Knowing Evil When We See It: An Attempt to Standardize Heinous, Atrocious, and Cruel

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KNOWING EVIL WHEN WE SEE IT: AN ATTEMPT TO STANDARDIZE HEINOUS, ATROCIOUS, AND CRUEL

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I. INTRODUCTION

In 1972, the United States Supreme Court made a ruling that required Florida to revise its death penalty statute in order to eliminate the possibility of arbitrary application and to bring it within constitutional limits.¹ In revising Florida's death penalty statute, the Florida Legislature devised a trifur-
Florida’s present sentencing scheme charges the judge to weigh the aggravating and mitigating circumstances present and to reach a determination on which sentence is appropriate, life imprisonment without parole, or death. One of the aggravating circumstances enumerated in Florida law is whether “[t]he capital felony was especially heinous, atrocious, or cruel.”

This article will examine and discuss the evolution of Florida’s current capital sentencing scheme. Particular focus will be given to the statutory aggravating circumstance of a crime being heinous, atrocious, or cruel, which, if present, may allow for a possible death sentence. This article will also address the lack of a clear, objective standard to guide both a judge and a jury in determining when a crime is, or is not, heinous, atrocious or cruel. It will also explore a combined scientific research initiative called the Depravity Scale and its efforts to resolve the absence of a meaningful, objective standard.

Part II of this article will trace the development of Florida’s capital sentencing scheme following the decision in Furman v. Georgia, and the ability of Florida’s capital sentencing statute, after Furman, to continually pass constitutional muster. Part III will examine and discuss various Florida capital cases, where death sentences have been both affirmed and vacated, to highlight the varying conceptions of what has been considered heinous, atrocious, and cruel in Florida courts.

Finally, Part IV will discuss the inception, ideology, and research of the Depravity Scale, a collaborative scientific effort that aims to provide judges and juries nationwide with an objective method of defining those crimes that are heinous, atrocious, and cruel.

II. FLORIDA: BEFORE AND AFTER FURMAN

When the decision in Furman v. Georgia was handed down, the statutes that were in effect in Florida automatically imposed a death sentence on any defendant convicted of a capital felony. The only defendants who were spared the punishment of death were those who received a recommendation

3. See id.
4. Id. § 921.141(5)(h).
5. Id.
6. 408 U.S. 238 (1972) (per curiam).
of mercy from the jury upon return of the verdict. In these “recommendation of mercy” cases, the defendant then received a mandatory sentence of life imprisonment. Thus, the fate of a defendant rested solely with the jury.

In 1972, the United States Supreme Court, in Furman, struck down the capital punishment statutes of Georgia and Texas. The Court declared the statutes unconstitutional because their arbitrary application violated the Eighth Amendment’s ban on cruel and unusual punishment. The majority reasoned that the statutes were applied absent any type of limitation or guidance. The core of the Furman decision required that the class of defendants eligible for the death penalty be narrowed, and that a state’s capital punishment statute not be administered in a capricious fashion. It also required that a state’s capital punishment statute achieve this purpose in a manner that is not arbitrary or discriminatory. To align itself with the Furman decision, the Florida Legislature passed a new death penalty statute which would come under attack a few years later in Proffitt v. Florida.

A. Proffitt v. Florida

Following the Furman decision, the United States Supreme Court heard cases regarding the revised capital sentencing statutes of five states, one of

8. Charles W. Ehrhardt & L. Harold Levinson, Florida’s Legislative Response to Furman: An Exercise in Futility?, 64 J. CRIM. L. & CRIMINOLOGY 10 (1973); Lafferty, supra note 7, at 468. Moreover, although defendants were automatically allowed appeal to the Supreme Court of Florida, the issue of sentencing was not permissible for review. Id.
10. See id.
11. See Furman, 408 U.S. at 238. There were three petitioners in the Furman case, each of whom received the death penalty. Id. at 239. One petitioner received the death penalty for murder, and the other two for rape. Id.
12. Lafferty, supra note 7, at 467–68.
13. Furman, 408 U.S. at 240. The five Justices included in the majority were Justices Douglas, Brennan, Stewart, White, and Marshall. Id. Each of the five Justices in the majority filed a concurring opinion. Id. Additionally, the dissenting Justices also each wrote a separate opinion. Id.
14. See generally id.
15. See Furman, 408 U.S. at 249 (Douglas, J., concurring).
16. Id. at 249. Addressing the discriminatory aspect of the statutes, Justice Douglas said “[w]hat the legislature may not do for all classes uniformly and systematically, a judge or jury may not do for a class that prejudice sets apart from the community.” Id.
which was Florida. In Proffitt, Florida became one of three states whose death penalty statute gained approval from the United States Supreme Court in the wake of Furman.

Florida’s current trifurcated capital punishment statute provides that after a conviction of a capital offense, a separate trial must be conducted to determine sentencing. During the sentencing trial, the jury is present and “the trial judge must permit the introduction of any relevant evidence regarding the nature of the crime and the defendant’s character.” The jury, after considering any aggravating and mitigating circumstances, must then provide an advisory sentencing opinion of either life imprisonment or death to the trial judge. In Florida, the jury’s advisory sentence is not required to be unanimous.

Following the receipt of the jury’s advisory sentence, the trial judge must then weigh both the “aggravating and mitigating circumstances,” if any, against each other and make the ultimate decision of whether to impose a sentence of life imprisonment or death. This final sentencing carried out by the judge, notwithstanding the jury’s advisory sentence, is known as the “jury override.” Under Tedder v. State, the judge is required to give great

18. Gary Scott Turner, Note, Ring v. Arizona: How Did This Happen, and Where Do We Go?, 27 NOVA L. REV. 501, 508 (2003). The other four states were North Carolina, Louisiana, Georgia, and Texas. Id.
19. Id.
20. FLA. STAT. § 921.141(1) (2008). Florida law provides that “[u]pon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment.” Id.
21. Lafferty, supra note 7, at 468.
22. Id.; see also FLA. STAT. § 921.141(2).
23. Bottoson v. Moore, 833 So. 2d 693, 716 (Fla. 2002) (per curiam) (Shaw, J., concuring). “In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.” Id.
24. FLA. STAT. § 921.141(3). The Supreme Court of Florida has said that:
   It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).
25. Id. at 15.
26. 322 So. 2d 908 (Fla. 1975) (per curiam). In Tedder, the defendant, Mack Reed Tedder, was convicted of first-degree murder. Id. at 909. At the sentencing hearing, the judge found three aggravating, and no mitigating, circumstances present. Id. at 910. One of the three aggravators found was “that the crime was especially heinous, atrocious, or cruel.” Id.
weight to the advisory opinion of the jury. However, if a jury does advise a sentence of life imprisonment and the trial judge imposes a death sentence, the judge is then required to provide, in writing, specific findings of fact relevant to the aggravating and mitigating circumstances. If a death sentence is imposed, under Florida law, it is automatically reviewed by the Supreme Court of Florida. Additionally, the Supreme Court of Florida will also conduct a “proportionality review,” even if the issue of proportionality is not raised on appeal.

In Proffitt, the defendant, Charles William Proffitt, was convicted of first-degree murder. Following his conviction, as required by Florida statute, a separate sentencing “hearing was held to determine whether [Proffitt] should be sentenced to death or to life imprisonment.” Under Florida’s newly enacted sentencing scheme, whether Proffitt was sentenced to life imprisonment or death hinged on whether the aggravating circumstances present outweighed the mitigating circumstances present. Following the sentencing hearing, the jury rendered its advisory opinion recommending that Proffitt receive the death penalty. Then, as provided for in the Florida statute, the judge independently weighed the aggravating and mitigating circumstances present. The judge found four aggravating circumstances, and no mitigating circumstances were present. The judge then sentenced Proffitt to death. On appeal to the Supreme Court of Florida, Proffitt’s sentence was affirmed.

27. Id. (holding “[a] jury recommendation under [Florida’s] trifurcated death penalty statute should be given great weight”). This is commonly referred to as the “Tedder standard.” Lafferty, supra note 7, at 470.

28. See FLA. STAT. § 921.141(3) (2007). An important ruling on the issue of jury over-ride presented itself in Tedder. See Tedder, 322 So. 2d at 909–11. Here, the Supreme Court of Florida held that in order for a death sentence to be upheld “following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.” Id. at 910.

29. FLA. STAT. § 921.141(4). The “sentence of death shall be subject to automatic review by the Supreme Court of Florida . . . within 2 years after the filing of a notice of appeal. Such review . . . shall have priority over all other cases.” Id.

30. England v. State, 940 So. 2d 389, 407 (Fla. 2006) (citing Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990) (per curiam)).


32. Id. at 245–46.

33. Id. at 246.

34. Id.

35. Id. at 246–27.

36. Proffitt, 428 U.S. at 246–47. One of four aggravating circumstances found by the judge was that “the murder was especially heinous, atrocious, and cruel.” Id. at 246.

37. Id.

38. Id. at 247.
The United States Supreme Court granted certiorari to determine whether Florida’s recently enacted sentencing scheme was in violation of Proffitt’s rights under the Eighth and Fourteenth Amendments.39 The Court upheld Florida’s statute as constitutional.40 The Court reasoned that sentencing determined by a judge and not a jury was an adequate measure to insure that the death penalty was not applied “in an arbitrary or capricious manner.”41 This was because “a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.”42 As another constitutional challenge, Proffitt argued that the aggravating circumstance of a crime being especially heinous, atrocious, or cruel was overly vague.43 The Court denied Proffitt’s argument, holding that this aggravating circumstance was sufficiently narrow, as defined by the Supreme Court of Florida.44

B. Walton v. Arizona

Another significant decision of the United States Supreme Court, regarding a capital sentencing statute similar to that of Florida’s, came in Walton v. Arizona.45 In Walton, the defendant, Jeffrey Walton, along with two others, robbed the victim, Thomas Powell, at gunpoint.46 Then, Walton and his two accomplices drove Powell out to the desert.47 Walton exited the vehicle with Powell, walked him out into the desert, forced him to lie on the ground, and with his foot on Powell’s neck, shot Powell in the head.48 Walton was tried and convicted of first-degree murder.49 Following the trial, and without the jury in attendance, the judge then conducted a separate hearing on the issue of sentencing.50 During sentencing, the judge found that

39. Id.
41. Id. at 252–53.
42. Id. at 252.
43. Id. at 255.
44. Id. at 255–56. This “definition,” provided by the Supreme Court of Florida, consisted of statements that “‘the Legislature intended something “especially” heinous, atrocious or cruel when it authorized the death penalty for first degree murder’” and that the aggravator of heinous, atrocious, or cruel only applied to “‘the conscienceless or pitiless crime which is unnecessarily torturous to the victim.’” Proffitt, 428 U.S. at 255 (quoting State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973)); see also Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).
46. Id. at 644.
47. Id.
48. Id.
49. Id. at 645.
50. Walton, 497 U.S. at 645.
there were two aggravating circumstances present. One of the two aggravating circumstances found was that the crime was "especially heinous, cruel or depraved." The judge, finding no mitigating circumstances, then imposed the death penalty as Walton's sentence. On appeal to the Supreme Court of Arizona, Walton's sentence of death was affirmed.

Following receiving his sentence of death, Walton was granted certiorari by the United States Supreme Court and argued that the aggravating circumstances being decided by a judge and not a jury directly violated his Sixth Amendment right to a trial by jury. In rejecting Walton's constitutional argument and upholding the Arizona statute, the United States Supreme Court relied heavily on its decisions in previous challenges to Florida's death penalty statute. The Court reiterated that "the Sixth Amendment does not require [a jury to make] specific findings authorizing the imposition of the sentence of death."

In its opinion, the Court reasoned that because aggravating circumstances are "not elements of the crime," but merely considerations for sentencing, Arizona's statute was not unconstitutional for allowing only the judge to decide the aggravating circumstances. The Court decided that these aggravating circumstances were considerations, rather than elements, because "the judge's findings did not result in a conviction or acquittal." Thus, the Arizona capital sentencing statute was upheld.

51. Id.
52. Id. This aggravating circumstance was partially attributable to the testimony given by a medical examiner "that Powell had been blinded and rendered unconscious by the shot but was not immediately killed. Instead, Powell regained consciousness, apparently floundered about in the desert, and ultimately died from dehydration, starvation, and pneumonia approximately a day before his body was found." See id. at 644-45.
53. Id. at 645.
54. Walton, 497 U.S. at 645. The Supreme Court of Arizona also upheld the finding of the "heinous, cruel, or depraved" aggravating factor. Id. at 646. It relied on its previous decisions stating that an aggravating circumstance is present when a victim experiences "mental anguish or physical abuse" before his or her death. Id. The Supreme Court of Arizona found as evidence of Thomas Powell's anguish the fact that he was walked out into the desert by Walton at gunpoint, and, as a result of his anguish, urinated on himself. Id. at 646 n.3.
55. Id. at 647.
56. See Walton, 497 U.S. at 647-48; see also Hildwin v. Florida, 490 U.S. 638, 640-41 (1989) (per curiam) (upholding Spaziano v. Florida, 468 U.S. 447 (1984), ruling that Florida's capital punishment statute was constitutional because under the Sixth Amendment, a jury is not required to make the findings necessary to impose the death sentence).
59. Id. at 515.
60. Walton, 497 U.S. at 649.
C. Ring v. Arizona

However, in 2002, the role that aggravating factors played in the imposition of the death penalty again came before the United States Supreme Court in *Ring v. Arizona*.61 In *Ring*, the defendant, Timothy Stuart Ring, was convicted of felony murder in the first degree.62 Following the trial, but prior to the sentencing hearing, testimony of one of the defendant’s accomplices to the crime was heard by the judge.63 Based on this testimony, the judge drew the conclusion that the defendant was the one, of all involved, who actually shot the victim.64 The judge then found two aggravating factors, one of which was that the crime was carried out “‘in an especially heinous, cruel or depraved manner.’”65 Under the jury’s verdict, Ring was only subject to a sentence of life imprisonment.66 However, the finding of the two aggravating factors by the judge provided for a sentence of death.67 Ring was sentenced to death, and his sentence was affirmed following his appeal to the Supreme Court of Arizona.68

On appeal to the United States Supreme Court, Ring challenged Arizona’s death penalty statute, arguing that allowing a judge, and not a jury, to make the finding of an aggravating factor was in violation of his rights under the Sixth Amendment.69 The Court agreed, and reversed Ring’s sentence of death.70 The Court reasoned that if a state could enhance a defendant’s sentence based on a finding of fact in order to satisfy the Sixth Amendment, that finding of fact must be made by a jury, and not a judge.71

On numerous occasions, the Supreme Court of Florida has been presented with claims that Florida’s death penalty statute is unconstitutional under the *Ring* decision.72 Two particularly noteworthy cases where the Su-

61. 536 U.S. 584 (2002).
62. Turner, supra note 18, at 519.
63. *Id.* at 519–20. The accomplice’s testimony implicated Ring as the one, of all involved, that shot the victim. *Id.* at 520.
64. *Id.*
65. *Id.* (quoting *Ring*, 536 U.S. at 594–95).
66. Turner, supra note 18, at 521.
67. *Id.*
69. *Id.* at 521.
70. Diamond, supra note 68, at 917–18.
71. *Id.* at 918.
72. See, e.g., Robinson v. State, 865 So. 2d 1259 (Fla. 2004) (per curiam); Smith v. State, 866 So. 2d 51 (Fla. 2004) (per curiam); Parker v. State, 873 So. 2d 270 (Fla. 2004) (per cu-
preme Court of Florida addressed this issue were *Bottoson v. Moore*\(^{73}\) and *King v. Moore*.\(^ {74}\) Both Bottoson and King, in different cases, were convicted of murder and received the death penalty.\(^ {75}\) Following their sentencing, both Bottoson and King received a stay of execution from the United States Supreme Court.\(^ {76}\) After each was granted a stay of execution, the Supreme Court of Florida decided *Ring*.\(^ {77}\) After the *Ring* decision was made, both Bottoson and King had their certiorari denied by the Court.\(^ {78}\)

In Florida, the jury is responsible for considering aggravating circumstances in rendering its advisory opinion and the judge is charged with determining which, if any, aggravating circumstances are present in imposing a sentence.\(^ {79}\) Only aggravating circumstances enumerated in the statute may be considered.\(^ {80}\) One aggravating circumstance under Florida law is whether

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73. 833 So. 2d 693 (Fla. 2002) (per curiam).
74. 831 So. 2d 143 (Fla. 2002) (per curiam).
75. *Bottoson*, 833 So. 2d at 694; *King*, 831 So. 2d at 144.
76. *Bottoson*, 833 So. 2d at 697 (Wells, J., concurring).
77. *Id.* at 695 (majority opinion).
78. *Id.* at 697 (Wells, J., concurring).
80. *Id.* § 921.141(5). Florida’s statutory aggravating circumstances are as follows:
“[t]he capital felony was especially heinous, atrocious, or cruel.” However, no standardized definition of what heinous, atrocious, or cruel actually

(a) The capital felony was committed by a person under sentence of imprisonment or placed on community control or on probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim’s official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal street gang member . . .

(o) The capital felony was committed by a person designated as a sexual predator . . or a person previously designated as a sexual predator who had the sexual predator designation removed.

Id. § 921.141(5)(a)–(o).

81. Id. § 921.141(5)(h).
means for sentencing purposes is currently in existence. 82 This creates a conundrum because Florida is one of thirty-nine states that allow for either the death penalty or a more severe sentencing when a crime is heinous, atrocious, or cruel. 83

Florida began implementing the use of aggravating circumstances to "narrow the class of persons eligible for the death penalty." 84 However, the United States Supreme Court also requires that these aggravating circumstances provide "clear and objective standards" that [afford] 'specific and detailed guidance.' 85

Evidence of the vagueness that surrounds determining if a crime is heinous, atrocious, or cruel can be found in the Supreme Court of Florida opinion, State v. Dixon. 86 Directly addressing the heinous, atrocious, and cruel factor, Justice Adkins, writing for the majority, said:

The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel capital felony constitutes an aggravated capital felony. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim. 87

Again, if a judge determines that the aggravating circumstances outweigh the mitigating circumstances, the judge can override the jury's advisory sen-

83. Id.
86. 283 So. 2d 1, 18 (Fla. 1973), superseded by statute, FLA. STAT. § 782.04(3), as recognized in State v. Dane, 533 So. 2d 265, 268–69 (Fla. 1988).
87. Id. at 9 (citation omitted).
The constitutionality of Florida’s statutory provision allowing the trial judge, and not the jury, to make the final sentencing determination was challenged in *Spaziano v. Florida*. In 1976, Spaziano was convicted of first degree murder. The majority vote of the jury was for a sentence of life imprisonment. Notwithstanding the jury’s recommendation of life imprisonment, the trial court judge found there were sufficient aggravating circumstances present to warrant a death sentence. Two aggravating factors were found, one of which was that the crime “was especially heinous and atrocious.” On appeal to the Supreme Court of Florida, Spaziano’s sentence of death was reversed due to an error in sentencing. On remand, the trial judge once again found the murder was heinous, atrocious, and cruel and, for the second time, sentenced Spaziano to death. Once again, Spaziano appealed to the Supreme Court of Florida, and this time, Spaziano’s sentence was affirmed.

On appeal to the United States Supreme Court, Spaziano argued that Florida’s override provision violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. The issue presented to the Court was, “whether, given a jury verdict of life,” a trial judge may override the jury and impose a sentence of death. The United States Supreme Court decided a judge could in fact

90. *Id.* at 451.
91. *Id.*
92. *Id.* at 451–52.
93. *Id.* at 452.
94. *Spaziano*, 468 U.S. at 452. The sentencing error was caused when the trial judge did not allow Spaziano an opportunity to respond after the judge received a presentence report containing confidential information, and relied on it. *See Spaziano v. State*, 393 So. 2d 1119, 1122 (Fla. 1981) (per curiam).
95. *Spaziano*, 468 U.S. at 453. For a similar scenario, see generally *Orme v. State*, 677 So. 2d 258 (Fla. 1996) (per curiam). In *Orme*, the defendant, Roderick Michael Orme, after freebasing cocaine, called the victim, a nurse he had known for some time, for assistance during a “bad high.” *Id.* at 260. Upon her arrival to the hotel where Orme was staying, Orme raped, beat, and strangled her. *Id.* Orme was ultimately convicted and sentenced to death. *Id.* at 261. The judge found that three aggravating factors were present. *Id.* One of the three aggravating factors found was that the crime was heinous, atrocious, and cruel. *Orme*, 677 So. 2d at 261.
96. *Spaziano*, 468 U.S. at 453; *see also* Spaziano v. State, 433 So. 2d 508, 511 (Fla. 1983) (holding as constitutional the Florida provision allowing a judge to override the advisory opinion of a jury).
98. *Id.* at 458. When *Spaziano* was decided, the only other states which allowed a jury override were Alabama and Indiana. Lafferty, *supra* note 7, at 472.
override a jury’s advisory opinion. The Court held that the Florida requirements in place allowing for a judge to override the advisory opinion of a jury for sentencing were not so broad or vague as to make them unconstitutional. Additionally, the Court rejected Spaziano’s Sixth Amendment argument, holding that the Sixth Amendment does not “guarantee a right to a jury determination” on the issue of punishment.

III. CASE STUDIES: RECONCILING HEINOUS, ATROCIOUS, AND CRUEL IN FLORIDA

Various Florida cases can be examined to show the varying conceptions of what has been considered heinous, atrocious, and cruel. This is of importance because, as stated by the Supreme Court of Florida, the heinous, atrocious, and cruel aggravator is one “of the most weighty in Florida’s sentencing calculus.” However, Florida currently has no method in place to precisely define these terms. The confusion that surrounds what crimes qualify as heinous, atrocious, or cruel was summed up succinctly by Judge Barkett when she stated that:

[M]any death-penalty states require consideration of whether a murder was committed in an “especially heinous, atrocious, or cruel” manner. But what does this mean? Must the perpetrator have intended to torture his victim? Must the victim have suffered even though suffering was not intended by the perpetrator? This factor has been applied so broadly that it has led to anomalous results.

100. Id. at 449. However, Justice Stevens opined that Florida’s capital sentencing statute was “unusual” because “[i]t consists of a determination of guilt or innocence by the jury, an advisory sentence by the jury, and an actual sentence imposed by the trial judge.” Id. at 470 (Stevens, J., concurring in part and dissenting in part).
101. Id. at 459.
103. See Welner, Response to Simon, supra note 82, at 417. The United States Supreme Court has said that “[a] State’s definitions of its aggravating circumstances—those circumstances that make a criminal defendant ‘eligible’ for the death penalty—therefore play a significant role in channeling the sentencer’s discretion.” Lewis v. Jeffers, 497 U.S. 764, 774 (1990).
The numerous cases below will attempt to illuminate the lack of uniformity in Florida courts in defining exactly what constitutes a crime being heinous, atrocious, and cruel.

A. **We Know Evil: Upholding the Presence of Heinous, Atrocious, and Cruel**

1. **Johnson v. State**

   In *Johnson v. State*, the defendant, Richard Allen Johnson, was convicted of murder and sentenced to death. In 2001, Johnson met his victim at a bar. Johnson and his victim then spent the night together, and the following day, the two had an argument. Johnson then killed his victim by strangling her both manually with his hands, and also with a ligature.

   In determination of his death sentence, one of the aggravating circumstances found by the judge was that the murder was carried out in a heinous, atrocious, or cruel manner. On appeal, the Supreme Court of Florida upheld the finding of the heinous, atrocious, or cruel aggravator and affirmed Johnson’s sentence.

2. **Butler v. State**

   Another example of a crime being deemed heinous, atrocious, or cruel is found in *Butler v. State*. Here, the defendant, Harry Butler, entered the home of his ex-girlfriend, Leslie Fleming, the victim. Butler and Fleming had a daughter together who was in the bedroom with Fleming at the time Butler entered the home. Butler then picked his daughter up and took her into a separate bedroom.

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105. 969 So. 2d 938 (Fla. 2007) (per curiam).
106. Id. at 943.
107. Id.
108. Id.
109. Id. at 944. Additionally, testimony was given at trial that Johnson stated it took longer to break the victim’s neck than he thought it would. *Johnson*, 969 So. 2d at 944.
110. Id. at 945.
111. Id. at 962.
112. 842 So. 2d 817, 833 (Fla. 2003) (per curiam).
113. Id. at 821.
114. Id.
115. Id.
After putting his daughter in another room, Butler then went back into the room where Fleming was. Butler then both stabbed Fleming multiple times and then strangled her. Butler was convicted of first-degree murder. The jury rendered an advisory sentence by a vote of eleven to one that Butler receive the death penalty. During the sentencing trial, the trial judge found only one aggravating circumstance present, that the murder was heinous, atrocious, or cruel. Several mitigating circumstances were also found. Butler was sentenced to death.

On appeal to the Supreme Court of Florida, Butler's death sentence, and the finding of the aggravator, was upheld. The court held that a sentence of death, even when the only aggravating circumstance found is that the murder is heinous, atrocious, or cruel, is not disproportionate, even if there are several mitigating circumstances present.

3. Coday v. State

Once again, in Coday v. State, the aggravator of heinous, atrocious, and cruel was found. In this case, the defendant, William Coday, was convicted for the murder of his former girlfriend, Gloria Gomez, and sentenced to death. Coday and Gomez had an on again, off again relationship. After breaking up, Coday lured Gomez to his apartment by lying and telling Gomez he had cancer. When Gomez arrived, Coday attempted to reconcile their relationship. When Gomez refused his advances, Coday "flew into a rage and punched" Gomez.

Coday then began to strike Gomez with a hammer. During the commission of the attack, Coday struck Gomez with a hammer a total of fifty-

116. Id.
117. Butler, 842 So. 2d at 821.
118. Id. at 820–21.
119. Id. at 822.
120. Id. at 833.
121. Id.
122. Butler, 842 So. 2d at 833.
123. Id. at 834.
124. Id. at 833.
125. 946 So. 2d 988 (Fla. 2006) (per curiam).
126. Id. at 1006.
127. Id. at 992.
128. Id.
129. Id.
130. Coday, 946 So. 2d at 992.
131. Id.
132. Id.
several times. Following the strikes of the hammer, Coday then stabbed Gomez with a knife eighty-seven times. Then, while Gomez was likely still conscious, Coday stabbed Gomez in the throat, and held the knife there until she died. At trial, expert medical testimony was presented that the victim was likely alive the entire time. Due to the nature of the attack, the trial court gave great weight to the aggravating circumstance of the crime being heinous, atrocious, or cruel.

On appeal to the Supreme Court of Florida, Coday argued that the finding of the heinous, atrocious, or cruel aggravator was improper because “he did not have an intentional design to torture or inflict pain.” The court rejected this argument, and upheld Coday’s conviction and vacated the sentence, affirming the finding of the heinous, atrocious, or cruel aggravator because Coday’s action represented “utter indifference to the suffering of” the victim.

B. Mistaking Evil: Some Crimes Do Not Rise to the Level of Heinous

1. Robertson v. State

Conversely, cases can be found where the aggravator of heinous, atrocious, and cruel was found, and death sentences imposed, only to have them later vacated on appeal to the Supreme Court of Florida. In Robertson v. State, the defendant, Lavarity Robertson, was convicted of two counts of

133. Id. at 1006.
134. Id.
135. Coday, 946 So. 2d at 1006.
136. Id. In addition to the medical testimony that the victim, Gloria Gomez, was likely still alive, Coday signed a written confession to the effect that “Gomez was alive until the fatal stab wound when he thrust the knife into her neck and held it there until she expired.” Id.
137. Id.
138. Id.
139. See Coday, 946 So. 2d at 1006. In upholding the finding of the heinous, atrocious, or cruel aggravator, the court said:

In this case, Coday brutally beat Gloria Gomez with two hammers a total of fifty-seven times. He then stabbed her eighty-seven times. The medical examiner testified that Gomez was alive for 143 of the 144 wounds, that she was conscious for all of her defensive wounds, and that she may have been conscious for 143 of the wounds. In Coday’s signed, written confession, he wrote that Gomez was alive until the fatal stab wound when he thrust the knife into her neck and held it there until she expired. The facts demonstrate at the very least an utter indifference to the suffering of Gloria Gomez.

Id.
140. See, e.g., Robertson v. State, 611 So. 2d 1228 (Fla. 1993) (per curiam); Bonifay v. State, 626 So. 2d 1310 (Fla. 1993) (per curiam); McKinney v. State, 579 So. 2d 80 (Fla. 1991).
141. 611 So. 2d at 1228.
murder and sentenced to death. In 1988, Robertson came upon a couple sitting in a parked car. Deciding to rob the couple, Robertson approached the driver’s side of the vehicle. After demanding money, he shot the first victim. The second victim then exited the vehicle screaming, and Robertson shot her as well.

On appeal, the Supreme Court of Florida reversed Robertson’s death sentence, finding the aggravator of heinous, atrocious, or cruel was not present because the murder was not committed with the intent of torturing the victim or “the desire to inflict a high degree of pain or with the enjoyment of” the victim’s suffering. The court went on to say that the heinous, atrocious, or cruel aggravator is only found in murders that include torture or murders where depravity, shown by the desire to cause a high degree of suffering, is present. Because the murders committed by Robertson were ordinary shootings, they were not outside the “norm” and as such, not heinous, atrocious, or cruel.

2. Bonifay v. State

In Bonifay v. State, the defendant, James Patrick Bonifay, killed a clerk who worked at a parts store where his cousin was previously fired from. Bonifay and an accomplice each shot the victim once. After shooting the victim, Bonifay and his accomplice then broke open cash boxes located in the store. In the midst of Bonifay and his accomplice emptying the cash boxes, the victim, who was still conscious, begged for his life. The victim also told Bonifay that he had a wife and children. Bonifay told the victim to “shut up” and then proceeded to fire two bullets into the vic-

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142. Id. at 1231–32.
143. Id. at 1230.
144. Id.
145. Id.
146. Robertson, 611 So. 2d at 1230.
147. Id. at 1233.
148. Id.
149. Id.
150. 626 So. 2d 1310 (Fla. 1993) (per curiam).
151. Id. at 1311. The apparent motive for the killing was the belief of Bonifay’s cousin that the clerk was the cause of him being released from his employment. Id. However, the record shows that the intended victim was not working on the night of the murder, and another clerk was killed. Id.
152. Id.
153. Bonifay, 626 So. 2d at 1311.
154. Id.
155. Id.
Bonifay was subsequently convicted of murder, and during the sentencing phase, the judge found four aggravators present, and sentenced Bonifay to death. One of the aggravators found was that the murder was heinous, atrocious, or cruel.

On appeal, the Supreme Court of Florida found that there was no evidence to support the aggravator of heinous, atrocious, or cruel. Although the victim begged for his life, the court held that there was no intent "to inflict a high degree of pain or to otherwise torture the victim." The court went on to explain that a victim begging for his or her life, or the presence of multiple gunshots, was not an adequate basis to find the aggravator of heinous, atrocious, or cruel, unless "Bonifay intended to cause the victim unnecessary and prolonged suffering." Following this finding, Bonifay's death sentence was vacated and his case remanded for a new sentencing process.

3. McKinney v. State

In McKinney v. State, the defendant, Boris McKinney, was convicted of murder and other charges. In 1987, McKinney robbed the victim and then drove him to an overpass where he then shot the victim. McKinney then brought the victim to an alley, where he eventually disposed of the body, and shot the victim two more times. Following the trial, the court found that there were three aggravators present. One of the three aggravators was that the murder was "unnecessarily heinous, atrocious, or cruel." At sentencing, McKinney received the death penalty.

156. Id.
157. Id. at 1311–12.
158. Bonifay, 626 So. 2d at 1312.
159. Id. at 1313.
160. Id.
161. Id. However, even if a victim is interrogated before being shot execution style, this still will not satisfy the requirement of being heinous, atrocious, or cruel. See Maharaj v. State, 597 So. 2d 786, 791 (Fla. 1992) (per curiam).
162. Bonifay, 626 So. 2d at 1311–12.
163. 579 So. 2d 80 (Fla. 1991).
164. Id. at 81. The other charges McKinney was convicted of included "unlawful display of a firearm during the commission of a felony, armed robbery, armed kidnapping, armed burglary of a conveyance, and grand theft of an automobile." Id. at 82.
165. Id. at 84.
166. Id.
167. McKinney, 579 So. 2d at 82.
168. Id.
169. Id.
On appeal to the Supreme Court of Florida, McKinney argued that the aggravator of heinous, atrocious, or cruel did not apply to his case. The Supreme Court of Florida agreed. The court held that the aggravator of heinous, atrocious, or cruel was not proven beyond a reasonable doubt. The court expressed that "[w]hile it is true that the victim was shot multiple times, a murder is not heinous, atrocious, or cruel without additional facts to raise the shooting to the shocking level required by this factor." Because there were no additional facts, aside from the victim being shot multiple times, the court held that the aggravator of heinous, atrocious, or cruel was not proven beyond a reasonable doubt. Thus, the Supreme Court of Florida subsequently vacated McKinney’s death sentence.

IV. THE DEPRAVITY SCALE: A SCIENTIFIC APPROACH TO DEFINING EVIL

The Depravity Scale is being developed by the Forensic Panel, which is "the only peer-reviewed forensic consultation practice [located] in the United States." In the United States, many states allow for harsher sentencing and in some cases the death penalty for crimes that are found to be "depraved," "heinous," or "evil." However, these terms are ambiguous, and as such, "these aggravating factors have offered judges and juries little in terms of guidance." As previously mentioned, in Florida, one of the enumerated aggravating factors of a crime is especially heinous, atrocious, or cruel.

170. Id. at 84.
171. Id.
172. McKinney, 579 So. 2d at 84.
173. Id.
174. Id.
175. Id. at 85.
177. Michael Welner, Symposium: Hidden Diagnosis and Misleading Testimony: How Courts Get Shortchanged, 24 PACE L. REV. 193, 193 (2003). Michael Welner is the Chairman of The Forensic Panel, a Clinical Associate Professor of Psychiatry at New York University School of Medicine and also serves as an Adjunct Professor of Law at Duquesne University School of Law. Id.
178. Welner, FAQ, supra note 176.
179. Barkett, supra note 104, at 927.
Although there is no statutory definition of what these terms mean, the Supreme Court of Florida has said:

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Again, no objective method exists that assesses whether a crime meets these criteria, or defines just what these words mean. By creating the Depravity Scale, the Forensic Panel seeks to undertake the task of scientifically guiding jurors and judges in determining whether a crime qualifies as heinous or depraved, in an effort to eliminate leaving these determinations up to subjective personal opinion. ‘In a system sensitive, at sentencing, to prejudice influenced by race, orientation, and socioeconomic factors, mingling the ‘what’ of a crime with other factors that had nothing to do with the perpetrator’s intent, actions, and attitudes undercuts an unbiased, equal justice.”

“Is it fair for one person to characterize anyone [as] evil without an objective standardized appraisal of his intent, actions, and attitudes?” Although many people can recognize certain crimes are worse than others, the Depravity Scale seeks out how to objectively and fairly determine the worst of the worst. “Standardized definitions must integrate the diversity of our social, psychological, and cultural influences on our perception of what distinguishes certain acts for additional accountability—for all criminal cases, not merely murder.” Without clear guidelines, it is not far-reaching to assume that both judges and juries can have their judgment colored by emotion when deciding whether a particular crime is heinous or depraved. This is why the Depravity Scale enlists input given by the public to allow the

182. Welner, Response to Simon, supra note 82, at 418–19.
183. Id. at 417–18.
184. Id. at 420.
185. Welner, FAQ, supra note 176.
186. Welner, Response to Simon, supra note 82, at 418.
public “to affect criminal sentencing standards.”\textsuperscript{188} An individual, regardless of his or her familiarity or experience in the legal or forensic science fields, can participate in Phases B and C of the Scale’s research initiative.\textsuperscript{189}

The Depravity Scale focuses on the “what” of the crime, and not the “who.”\textsuperscript{190} The founder of the Forensic Panel, Michael Welner, feels it necessary for jurors, when deciding whether the aggravating circumstance of heinousness or depravity is present, to be provided with an objective guide to shield them from deciding based on trial tactics and possible bias.\textsuperscript{191} The Depravity Scale seeks to distinguish between the worst of crimes in a standardized and consistent manner.\textsuperscript{192} It also aims to change the way the law enforcement community investigates crimes.\textsuperscript{193} The Depravity Scale is a chart comprised of objective categories of an offender’s traits and crime, such as intent, the act itself, and behavior.\textsuperscript{194} The goal of the Depravity Scale is to “yield a standardized instrument that focuses inexperienced juries on evidence.”\textsuperscript{195} This is necessary because in order to justify a harsher sentence, such as death, the fact pattern of a heinous, atrocious, or cruel crime must be distinguishable from a crime that is not.\textsuperscript{196}

A. \textit{Researching the Evil Side of Crime}

The research of the Depravity Scale is broken in to three separate phases: A, B, and C.\textsuperscript{197} The research that sparked the Depravity Scale began in 1998.\textsuperscript{198} In Phase A, the Depravity Scale’s founder, Michael Welner, studied over one-hundred appellate court decisions, randomly selected, “where jury

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\item\textsuperscript{188} Welner, FAQ, \textit{supra} note 176.
\item\textsuperscript{189} \textit{Id.}
\item\textsuperscript{190} \textit{Id.}
\item\textsuperscript{191} \textit{Id.}
\item\textsuperscript{192} Amanda Phillips, \textit{Psychology 101: The Mind of a Shooter}, 34 L. ENFORCE. TECH. 38, 45 (2007).
\item\textsuperscript{193} \textit{Id.} at 46.
\item\textsuperscript{194} Neely Tucker, \textit{Giving Evil the Eye; Juries Don’t Always Know Heinous Crimes When They See Them, but This Might Help}, \textit{WASH. POST}, July 23, 2007, at C1.
\item\textsuperscript{195} Welner, \textit{Response to Simon, supra} note 82, at 420.
\item\textsuperscript{196} Welner, FAQ, \textit{supra} note 176.
\item\textsuperscript{197} \textit{Id.}
\item\textsuperscript{198} \textit{Id.} The research conducted by the Depravity Scale is overseen by an advisory board. \textit{Id.} The advisory board consists of professionals and experts in fields such as psychology, criminology, forensic nursing, law, computer science, law enforcement, pathology, entomology, history, and engineering. \textit{Id.}
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findings of ‘heinous’ or ‘depraved’ were challenged and upheld.”  

Next, these features were organized and termed in accordance with psychiatric diagnostic constructs typically associated with exceptionally notorious behavior: specifically, antisocial personality, psychopathy, malignant narcissism, antisocial-by-proxy, sadism, and necrophilia. Fifteen items emerged from this exercise of ascertaining “depraved” intents, actions, and attitudes as had been signified by American courts, establishing content validity.

The Depravity Scale is currently in Phase B of its research effort which consists of releasing a survey to the public. Participants are given scenarios and asked to rate whether a crime is “‘especially,’ ‘somewhat,’ or ‘not’ depraved.” The participant is provided with twenty-six categories of crimes. The high percentage of people in agreement, approximately 25,000 people who have taken the survey, is surprising. Results of the survey show that ninety-nine percent of all those responding “agree that ‘actions that cause grotesque suffering,’ ‘intent to emotionally traumatize’ and ‘actions that prolong suffering,’ are depraved.” Furthermore, the research effort of the Depravity Scale recognizes that a number of variables may influence one’s opinion of what is heinous or depraved. To combat responses being too heavily influenced by a respondent’s demographics, the

199. Weiner, Response to Simon, supra note 82, at 419.
201. Id.
202. Id.
203. Id.
204. Id. Some of the categories include: emotionally traumatizing someone, maximizing damage and destruction, causing disfigurement, targeting victims who are vulnerable, reacting to a trivial irritant, prolonging the suffering of a victim and inflicting exceptional harm physically. Posting of Marie Price to Depravity Scale Blog, https://depravityscale.org/blog/?m=200612 (Dec. 20, 2006, 16:37 EST). Additionally, the crime scenarios are given range from non-violent, such as property crimes, to violent. Weiner, FAQ, supra note 176. This is so all criminal acts, not just murder alone, are included because “[s]tandardized definitions must distinguish certain acts for greater accountability.” Id.
205. Tucker, supra note 194. Those who completed the survey are representative of more than fifty countries, with the highest number of respondents being located within the United States. Id.
206. Id.
207. Weiner, Response to Simon, supra note 82, at 419.
Depravity Scale has implemented control factors in its conduction of research. 208 Following Phase B, Phase C shall “establish how the items on the final [scale] should be ‘weighted’ upon measuring the factors present in a given crime.” 209 Phase C evaluates the items under research to compare them to one another. 210 In order to partially determine an item’s “weight,” survey “[p]articipants are asked to rank the items from ‘least depraved’ . . . to ‘most depraved’ . . . when presented together in randomly ordered subgroups.” 211 Each survey participant is provided with a random set of unique questions, to determine “whether participants consistently regard certain items as more depraved than other items, regardless of presentation order or reference frame.” 212

V. CONCLUSION

Florida’s trifurcated capital sentencing scheme requires the jury to consider aggravating factors when rendering its advisory sentence of life imprisonment or death. 213 The sentencing scheme also charges the judge to weigh the aggravating and mitigating circumstances present in a crime in reaching a conclusion on which sentence is appropriate, life imprisonment without parole or death. 214 One of the fifteen enumerated aggravating circumstances in Florida is whether “[t]he capital felony was especially heinous, atrocious, or cruel.” 215 Although the Supreme Court of Florida has said “we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended,” 216 currently no objective method exists to define these “common knowledge” terms. 217

208. Id. The variables for which controls are in place include age, gender, ethnicity, history of victimization, state of residence, profession, attitude toward the death penalty, level of spirituality, education level, location, degree of religious tradition and others. Id. at tbl.1. No one has “distinguished the social, political, religious, and cultural influences on peoples’ perceptions of depravity. Therefore . . . to establish intents, actions, and attitudes [the] research must take into account all potentially confounding variables.” Welner, FAQ, supra note 176.

209. Id.

210. Id.

211. Id.

212. Id. Additionally, each participant is only able to partake in the surveys that comprise Phase B and Phase C one time each. Welner, FAQ, supra note 176.


214. Id. § 921.141(3).

215. Id. § 921.141(5)(h).


217. Welner, FAQ, supra note 176.
Because the presence of the heinous, atrocious, or cruel aggravator can mean life or death, judges and juries should have some standard of deciding objectively which crimes are the worst of the worst.\textsuperscript{218} To truly bring this aggravating circumstance into the category of "clear and objective" required by the United States Supreme Court,\textsuperscript{219} courts need some method of defining just what these terms are to mean.

This is exactly what the Depravity Scale seeks to do by scientifically guiding jurors and judges in determining whether a crime qualifies as heinous or depraved in an effort to eliminate leaving these determinations up to subjective personal opinion. "Without standardized direction, jury decisions on whether a crime is depraved are all too often contaminated by details about the 'who' of a crime . . . as opposed to focusing on 'what' the defendant actually did."\textsuperscript{220} The founder of the Forensic Panel, Michael Welner, M.D., feels it is necessary for jurors and judges, when deciding whether the aggravating circumstance of heinousness or depravity is present, be provided with an objective tool to make these decisions, so they are not influenced on trial tactics and possible bias.\textsuperscript{221} This is because "[s]tandardizing the already used terminology of 'heinous,' 'depraved,' and 'evil,' is a matter of fairness and justice."\textsuperscript{222}

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\item \textsuperscript{218} Id.
\item \textsuperscript{219} Lewis v. Jeffers, 497 U.S. 764, 774 (1990) (quoting Godfrey v. Georgia, 446 U.S. 420, 428 (1980)).
\item \textsuperscript{220} Welner, \textit{Response to Simon}, supra note 82, at 417.
\item \textsuperscript{221} Welner, FAQ, \textit{supra} note 176.
\item \textsuperscript{222} Welner, \textit{Response to Simon}, \textit{supra} note 82, at 418.
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