



Case report

The Depravity Standard and individualized assessment: A case study modality for *Miller* resentencing cases

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ABSTRACT

In the wake of Supreme Court decisions *Miller v. Alabama* (2012), *Montgomery v. Louisiana* (2016), and *Jones v. Mississippi* (2020) that collectively abolished mandatory life sentencing for juveniles, individualized assessment of juvenile homicide offenders is paramount. Yet few actuarial tools exist to inform risk assessment. The Depravity Standard, a 25-item inventory designed to operationalize the heinous, cruel, and depraved features of the offense and its offender that bear on aggravating circumstances, is a notable exception. The current case study applies the Depravity Standard to the codefendants in the seminal *Miller* case, Evan Miller and Colby Smith, and reveals significant differential evidence of depravity in their intent and conduct within the same criminal episode. The Depravity Standard is a valid and reliable way to quantitatively and qualitatively substantiate evidence of aggravation (*Miller*) and mitigation (*Smith*) among adolescents who perpetrate homicide offenses even within the context of the same event. The case study demonstrates a methodology to inform individualized assessment that is required by the courts in *Miller* resentencing cases.

1. Introduction

The United States Supreme Court decision in *Miller v. Alabama*¹ abolished mandatory life imprisonment without parole sentencing for convicted homicide offenders under age 18 years. *Miller* allowed that courts could continue to sentence juvenile murders to life imprisonment without parole; however, such sentencing was to be discretionary. Discretionary sentencing would allow courts, in the words of Justice Kagan, to consider the possibility of “lessened culpability” and “capacity for change” as reasons for lesser sentences. As a result, sentencing courts were to consider the potential significance of an offender’s youth, development, social background, delinquent history, and attendant characteristics, such as incorrigibility, before imposing a penalty.

Four years later, the Supreme Court held in *Montgomery v. Louisiana*² that the *Miller* decision would apply retroactively. In the aftermath of the *Montgomery* decision, approximately two thousand defendants convicted of murder as juveniles have sought resentencing across the United States. These defendants are referred to as *Miller* resentencing cases.

More recently, the Supreme Court held in *Jones v. Mississippi*³ that neither *Miller* nor *Montgomery* require the sentencing court to make a separate factual finding of permanent incorrigibility before imposing a

sentence of life without parole. Instead the Court decided that a discretionary sentencing system is both constitutionally necessary and constitutionally sufficient. Thus, the sentencer does not have to provide an on-the-record explanation for an implicit finding of permanent incorrigibility, does not have to provide an on-the-record explanation that the defendant’s youth was considered, or does not have to provide an on-the-record explanation to be compliant with *Miller* and *Montgomery*.

In *Jones*, the Court repeatedly referred to the issue of individualized assessment as it relates to *Miller* and derivative decisions. In those decisions, the individualized assessment approach stood in stark contrast to the mandatory sentencing schemes it replaced. There are many variables pertaining to a juvenile murderer beyond the defendant’s age, some of which are mitigating, and some that are not. These features enable individualized assessment to parse murders in order to determine cases that warrant the most serious criminal punishment. Individualized assessment likewise enables consideration of a defendant’s intent, motivation, violence perpetration, and psychopathology when these features are distinctive and clinically remarkable.

Distinguishing those with greater culpability and lesser culpability has focused to date on the mitigating aspects of developmental adversity

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and potential. Many defendants in the under eighteen age range prove to have been psychologically immature and impetuous, and with a legacy of callow decision-making, contributing to recognizing them as less culpable. Others in the same age demographic choose to commit murder despite evidence of adequate impulse control, to have not acted under the lure of antisocial peers, or to be themselves leaders of others' criminal deviance, and to possess decision-making capabilities no different from an able adult.

Theoretical arguments that adolescent brains universally show developmental deficiencies in impulse control, decision-making, risk aversion, and judgment (e.g.,⁴⁻⁷ do not conform with clinical experience nor the responsibilities conferred on many under age eighteen. Moreover, broad theoretical pronouncements are incompatible with the individualized assessments sought by the *Miller* court that recognize the unique history and profile of each defendant. This legal reference point is consistent with forensic science practice, which as a standard, values individualized assessment as instrumental to valid conclusions about a given defendant.

Research on adolescent risk taking, teenage smoking and driving, and normative adolescent misconduct and delinquency does not inform choices to murder with any ecological validity.⁸ Likewise, neuroimaging studies have never been produced to demonstrate an adolescent criminogenic brain that evolves when a person reaches their early twenties. Biological differences between adolescents and adults do not link to choices those under eighteen to murder.

Even proponents of the viewpoint that juveniles are fundamentally different than adults in their decision-making and psychosocial traits acknowledge the flimsiness and weak ecological validity of research that putatively supports such a perspective. For example, Gardner and Steinberg⁹ admitted, "No laboratory task can adequately simulate real life. No matter how realistic the task, it is difficult to determine whether participants' performance in the laboratory is an accurate representation of their real-world behavior."

On the other hand, ecologically-valid research on life-course-persistent (LCP) antisocial behavior and incorrigibility has distinguished risk factors and populations for whom early violent crime is a prelude to continuing threat. Moffitt¹⁰ advised, "Over the first two decades of development, accumulating transactions between the individual and the environment incrementally construct a disordered personality with hallmark features of violent physical aggression and a broad repertoire of antisocial behaviors persisting to midlife. Antisocial behavior that is LCP infiltrates multiple adult life domains, including illegal activities, substance misuse, problems with employment, and victimization of intimate partners and children. This cumulative infiltration gradually diminishes the possibility of reform accounting for the persistence of LCP behavior."

Ultimately, *Miller* resentencing cases present the discretionary challenge to weigh the culpability of an individual murder defendant relative to mitigating features of the perpetrator and crime. Such is the case in the discretionary sentencing of convicted capital murder defendants, for whom the Supreme Court has more directly addressed the constitutionality of aggravating factors.¹¹

In legislation that defines aggravation, statutes employ diverse language to describe the most serious variants of crime, but consistently employ specific descriptors, such as "depraved," "heinous," or "vile" meant to capture the most grievous expressions of a particular crime (Welner et al., 2018). In Alabama, where the *Miller* crimes occurred, the statute distinguishes aggravating factors to include whether the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses.¹² Federal law uses similar language.¹

In forensic practice, assessments of aggravation and mitigation among criminal defendants have concentrated on a loose division that risk informs aggravating factors and background informs mitigating factors.^{13,14} To that end, a lack of risk is mitigating^{15,16} and a lack of psychosocial disadvantage is inherently aggravating to the fate a person who chose to commit capital murder.¹⁵⁻¹⁷ However, what also

fundamentally distinguishes one perpetrator from another, even among perpetrators within the same crime,¹⁸ is the crime itself and its intent, victim choice, actions, and the perpetrator's attitude toward the crime.¹⁹

What has been missing until recently is an objective measure that could provide granular analysis of the offense behavior of juvenile murderers to quantitatively inform what courts have asked for,^{20,21} specifically, an objective societal standard to distinguish the most heinous, cruel, and atrocious murders. The current case study uses the Depravity Standard, a validated and recently-published evidence-based instrument, to compare the offense qualities of Evan Miller and Colby Smith, the codefendants in the criminal event that culminated in the Supreme Court decision in *Miller v. Alabama*. With its emphasis on data richness and detail, the case study approach is perfectly suited to provide focused analysis of the defendants' intentions and actions during their homicide offense. Moreover, the case study methodology is isomorphic to the requirement for individualized assessment in recent Supreme Court decisions regarding sentencing of juvenile murderers.

2. The Depravity Standard

The Depravity Standard is a 25-item inventory designed to operationalize the heinous, atrocious, cruel, and depraved features of crimes that bear on aggravating circumstances in criminal sentencing.²²⁻²⁴ The items are clear, evidence-driven definitions that bear on the intent of the offender at the time of the crime, the nature of the relationship between the offender(s) and victim(s), motivational factors in crime perpetration, and the attitude of the perpetrator after the crime reflecting on what he has done. The Depravity Standard addresses substantive themes about the offender that occur preceding, during, and after the criminal event and address intent, victim choice, action, and attitude. The Depravity Standard contains 25 items shown in Table 1.

A validation study supported the Depravity Standard and its application to murder cases.²⁴ Among data from a random sample of 582 murder cases, the most frequent items were Item 16 Exceptional degree

Table 1
Depravity standard items.

1	Intent to emotionally traumatize the victim, maximizing terror, through humiliation, or intent to create an indelible emotional memory of the event. (Intent)
2	Intent to maximize damage or destruction, by numbers or amount if more than one person is victimized, or by degree if only one person is victimized. (Intent)
3	Intent to cause permanent physical disfigurement. (Intent)
4	Intent to carry out a crime for excitement of the criminal act. (Intent)
5	Targeting victims who are not merely vulnerable, but helpless. (Victim Choice)
6	Exploiting a necessarily trusting relationship to the victim. (Victim Choice)
7	Influencing depravity in others in order to destroy more. (Intent)
8	Crime reflects intent of progressively increasing depravity. (Intent)
9	Carrying out crime in order to terrorize others. (Intent)
10	Carrying out crime in order to gain social acceptance or attention, or to show off. (Intent)
11	Influencing criminality in others to avoid prosecution or penalty. (Intent)
12	Disregarding the known consequences to the victim. (Action)
13	Intentionally targeting victims based upon prejudice. (Victim Choice)
14	Prolonging the duration of a victim's physical suffering. (Action)
15	Unrelenting physical and emotional victimization; amount of victimization. (Action)
16	Exceptional degree of physical harm; amount of damage. (Action)
17	Unusual and extreme quality of suffering of the victim, including terror and helplessness. (Action)
18	Indulgence of actions, inconsistent with the social context. (Action)
19	Carrying out crime in unnecessarily close proximity to the victim. (Action)
20	Excessive response to trivial irritant; actions clearly disproportionate to the perceived provocation. (Action)
21	Pleasure in response to the actions and their impact. (Attitude)
22	Falsely implicating others, knowingly exposing them to wrongful penalty and the stress of prosecution. (Attitude)
23	Projecting responsibility onto the victim; feeling entitlement to carry out the action. (Attitude)
24	Disrespect for the victim after the fact. (Attitude)
25	Indifference to the actions and their impact. (Attitude)

of physical harm; amount of damage, Item 15 Unrelenting physical and emotional victimization; amount of victimization, Item 20 Excessive response to trivial irritant; actions clearly disproportionate to the perceived provocation, Item 12 Disregarding the known consequences to the victim, Item 17 Unusual and extreme quality of suffering of the victim, including terror and helplessness, Item 23 Projecting responsibility onto the victim; feeling entitlement to carry out the action, and Item 25 Indifference to the actions and their impact.

Among data from 148 murders from Arkansas, most of which were capital murder cases, these same items had high endorsement in addition to Item 6 Exploiting a necessarily trusting relationship to the victim. However, the ordering of the items in terms of prevalence was slightly different for the Arkansas cases. In descending order, the prevalence was Item 15, Item 17, Item 20, Item 12, Item 16, Item 25, Item 23, and Item 6.

Across both samples, several items were rarely endorsed including Item 4 Intent to carry out a crime for excitement of the criminal act, Item 3 Intent to cause permanent physical disfigurement, Item 13 Intentionally targeting victims based upon prejudice, and Item 10 Carrying out crime in order to gain social acceptance or attention, or to show off.

3. The crime and its aftermath

Cole Cannon, age 52, came to Evan Miller's trailer just before midnight on July 15, 2003, seeking food after he had accidentally burned his dinner. (In the *Miller* decision, the reason listed for Cannon's visit was to conduct a drug deal with Miller's mother). Cannon was intoxicated on alcohol, and as he visited with Miller's mother, the defendants, Miller, age 14, and his friend Colby Smith, age 16, went to Cannon's trailer to look for drugs. Finding none, they stole Cannon's baseball cards instead.

After Cannon finished eating, he returned to his trailer and the defendants went back to his trailer intending to potentially buy drugs from him and get Cannon further intoxicated so they could steal money from him. The defendants smoked marijuana and drank alcohol with the victim. Cannon lost consciousness due to his intoxication and the defendants stole his wallet and split the \$300 that Cannon had in his possession.

As they attempted to return the wallet, the victim awoke and reportedly grabbed Miller by the throat. Smith grabbed a baseball bat, reportedly to protect his friend, and hit Cannon once in the head, after which Miller climbed onto Cannon and repeatedly punched the victim in the face. Despite the victim's pleading with Miller to stop the assault, Miller retrieved the baseball bat and repeatedly assaulted the victim. After placing a sheet over Cannon's head, Miller stated "I am God, I've come to take your life" and hit the victim a final time. The defendants left the trailer, but soon thereafter returned to clean up blood and set fires to cover up their crime.

Several features of the crime were deemed to be aggravating factors under Alabama law. The offense conduct spanned multiple criminal offenses including robbery, theft, underage drinking, drug use, assault with a deadly weapon, arson, and murder. The defendants' intent reflected instrumentality and a desire to exploit the intoxicated state of the victim. In the moments after the assault, the offense conduct reflected instrumental albeit poorly executed forensic awareness. In the initial investigation, Miller was untruthful to police and denied even being in the victim's trailer at the time of the offense. Throughout his interview with police, Miller externalized blame (*Evan Miller v. State of Alabama*, 2010).

The defendant Colby Smith was immediately overcome with remorse after the perpetration of the crime. He placed a towel under the victim's head to stop the bleeding, and turned on a faucet in the kitchen sink and clogged the drain hoping that the water would extinguish the fires they had set. As the victim pleaded and asked why the defendants were doing this, Smith expressed that he felt guilt about the event. He reportedly returned alone about 10 min later in an effort to assist the victim, but

was unable to reenter the trailer due to the extensiveness of the smoke from the fires.

Approximately two weeks after the crime on July 31, 2003 and August 4, 2003, authorities transported Miller from juvenile detention to other facilities for mental health evaluations. During this travel, Miller asked a deputy if he could change his mind about his role in the crime since he had been untruthful in the original investigation. He now wanted to tell the "true story." Even two weeks after the crime, Miller intimated that he could not remember all of his actions pertaining to the offense, but "the more he thought about it," he acknowledged that assaulted the victim, and that he had set the fatal fire.

Miller reported that he deserved to serve time in a correctional facility for his criminal conduct. Miller was adjudicated guilty and sentenced to life imprisonment without the possibility of parole. Smith pleaded guilty and was sentenced to life imprisonment with the possibility of parole as early as September 1, 2025. Smith's original sentence has not been modified since it was imposed on October 27, 2006.

Pursuant to the ruling in *Miller*, Miller's case was referred for reconsideration of sentence. On April 27, 2021, Judge Mark Craig resented Miller to life imprisonment without parole during his *Miller* resentencing hearing. Irrespective of Miller's youth at the time of the offense or testimony of his history of being abused, Judge Craig opined that Miller was the primary aggressor in the murder and that Miller's conduct showed cunning and was not the outcome of "clumsy, rash thinking".²⁵ Moreover, Judge Craig reasoned that the circumstances of the crime reflected heinousness.

4. The Depravity Standard and evidence-driven, individualized assessment

The circumstances of the murder and Miller and Smith's conduct prior to, during, and after the murder illustrate the utility of the Depravity Standard as a means for individualized assessment. The Depravity Standard is a research-validated inventory that enables quantitative assessment of the degree of depravity of murder. The 25-item instrument draws from evidence of different aspects of exceptional intent, actions, victim choice, and the perpetrator's attitude about the offense.

Developed in order to provide an objective measure for establishing the worst of crimes, the Depravity Standard informs scoring of a particular offender's crime relative to hundreds of other murders from the original study sample. Large scale surveys of the general public inform weighting of items when a jury deems them to be present. Intended for use by judges and juries, the Depravity Standard does not involve expert testimony to determine if a given item is present. Triers of fact make the determination for each item in question.

Each of the Depravity Standard items has highly detailed definitions, including qualifying and disqualifying exemplars. This assists in application of the instrument to the universe of murder, even though murder is a heterogeneous crime. In validating research, the definitions developed for application to murder and attempted murder cases showed strong interrater reliability.

Protocols demand adequate evidence for informing the presence of particular items. If there is not enough information available to score certain items, they must be assessed as "Not Present." This methodology installs a burden of proof on prosecutors to demonstrate enough evidence to establish the presence of an item. The availability of a fine-pore definition is especially useful for ambiguous evidence. Although they were coparticipants in the same criminal event, Miller and Smith's behaviors are both qualitatively and, as assayed by the Depravity Standard, quantitatively distinct.

5. Depravity Standard items present

Both Miller and Smith struck Cannon with a baseball bat. Cannon did so first; Miller struck a second blow. Smith's use of the baseball bat to

assault the victim is disturbing in its imagery. However, he reportedly employed the bat as a utilitarian weapon to subdue Cannon when he was struggling with Miller. Therefore, while he inflicted serious injuries to Cannon, and sought to do so, there is no evidence that he struck the victim any more than needed to incapacitate him. Smith would not, therefore, qualify for any of the Depravity Standard intent items.

Miller, however, declared in Smith's presence, "I am God, I've come to take your life," before striking Cannon over the head with a bat.¹ The grandiosity of his declaration supports a conclusion that this use of the weapon was not utilitarian and that he was acting out of bravado.²

The original intention of the codefendants reflected instrumental desire to steal from the victim. Miller, however, relentlessly attacked Cannon with both bat and fist even after the victim stopped struggling and was begging for the attack to stop. The ferocity of his attack contrasted sharply with Smith's actions, and culminated in his declaration of coming "to take your life." The continuum of the attack reflects upon the murder as borne of a homicide motive of excitement. More information may be needed to resolve whether Item 4 is a better fit, or whether both Item 4 and Item 10 are present. As the definitions detail, hyping one's homicidality to another is reflective of Item 10, while hyping one's self with one's actions is reflective of Item 4.³

Miller alone also demonstrated Item 18 - Indulgence of actions, inconsistent with the social context. Cannon was no longer resisting, and the robbery was completed. In spite of this, Miller chose to batter and then, to kill Cannon with a lethal blow to the head from a baseball bat. This item is present when actions reflect unnecessary and gratuitous violence.⁴

Given the violence of the murder, and the arson that followed, Item 16, Exceptional degree of physical harm; amount of damage, is also a consideration. The arson, however, was perpetrated to conceal the homicide. If there was exceptional degree of physical harm, the autopsy would demonstrate a multiplicity of injuries that each could have been lethal.⁵ Item 16 would not be attributable to Smith, but may prove to be attributable to Miller on closer investigation.

6. Depravity Standard items not present

The perpetrators struck Cannon with a baseball bat, and Miller inflicted the lethal blow to his head. All that is demonstrated, however, is that Miller intended to kill him and struck him where such a blow

would be lethal. The blows could have been disfiguring, were Cannon to have survived; however, the only known intent was to kill, and therefore Item 3 – Intent to Disfigure, is not present.⁶

Both Miller and Smith targeted the victim for robbery after rendering him inebriated. This is not sufficient for Item 5 -Targeting victims who are not merely vulnerable, but helpless, because Cannon awoke and grabbed Miller by the throat. It was then that Smith grabbed the bat and began the attack that culminated in Cannon's death. Miller applied a death blow at a time that Cannon was no longer resisting and had stopped fighting. However, as Item 5 notes, "Should the perpetrator render an otherwise able target helpless in order to carry out a crime, Item 5 does not apply."⁷ Moreover, as Item 5 reflects intent, Miller did not intend to kill Cannon because he was intoxicated and beaten, but for other, aforementioned reasons including excitement and to show off, as well as anger for the victim's initial resistance. This is not consistent with Item 5.⁸

History that Miller and Smith went to Cannon's home and robbed him raises questions that they exploited a trusting relationship. However, for a neighbor, a trusting relationship is not presumed as it would be someone within the same family. The ability to access a home does not carry with it the presumption of trust.⁹

Beyond the original assault, Miller escalated the confrontation to intended homicide. Item 8, Crime reflects intent of progressively increasing depravity is not present, however. This item is scored when a series of criminal events occur over a more extended period of time, reflecting escalating depravity. Given that this was a singular event, Item 8 is not present.¹⁰

All that is known of Cannon's last minutes was his begging for his life. What, if any, were the derivative known consequences of his passing, is unclear. Cannon was a neighbor to Miller and well-acquainted, but that is not sufficient to establish Item 12, The key point to Item 12 is what the perpetrator was aware would happen because of a death, and consciously disregarded. The victim begging to be spared and explaining that he had siblings who could no longer care for themselves were he to be killed, for example, would demonstrate a known and disregarded consequence. Without more information, we do not know what, if anything, Miller disregarded as a derivative consequence of Cannon's demise.¹¹

In the same encounter, Smith assaulted the victim to prevent him

¹ From the Manual, "Definitions of Items – Murder" Item 10, Carrying out crime in order to gain social acceptance or attention, or to show off: "Attention-seeking may also be manifested through the flamboyance of the perpetrator in criminal acts."

² From the Manual, "Definitions of Items – Murder" Item 10, Carrying out crime in order to gain social acceptance or attention, or to show off: "The perpetrator must be playing to someone else for Item 10 to be present. Playing to oneself is not representative of Item 10, although when present, it may demonstrate the presence of an excitement motivation (Item 4)."

³ From the Manual, "Definitions of Items – Murder" Item 4 - Intent to carry out a crime for excitement of the criminal act: "Carrying out a crime for excitement or thrill speaks to the effect the perpetrator wants the crime to have on *him or herself*. This is different from Item 10, carrying out a crime to show off, which addresses the effect the perpetrator wishes to have on others. Bragging to the victim during the offense may be sufficient to establish Item 4, while bragging to others may alternatively *or additionally* reflect Item 10."

⁴ From the Manual, "Definitions of Items – Murder" Item 18, Indulgence of actions, inconsistent with the social context "Examples demonstrate how Item 18 is present when another crime supplements an original crime with an original motive that is unrelated to what can only be accounted for as the act of criminal indulgence. Item 18 refers to a multiplicity of crimes."

⁵ From the Manual, "Definitions of Items – Murder" Item 16, Exceptional degree of physical harm; amount of damage "Fractures of approximately four or more types of bones (as opposed to fractures involving closely related bones, such as ribs, the wrist, or four fingers), without corresponding injury to the perpetrator, reflect Item 16."

⁶ From the Manual, Intent to cause permanent physical disfigurement "Definitions of Items – Murder" Item 3, "If the victim dies as a result of his or her injuries, Item 3 applies only if the intent of the perpetrator was to cause permanent disfigurement, not death."

⁷ A clearly intoxicated victim who was aggressive, even if with impaired coordination or other physical signs of intoxication, does not fulfill criteria for Item 5."

⁸ From the Manual, "Definitions of Items – Murder" Item 5, Targeting victims who are not merely vulnerable, but helpless: "The important factor for Item 5 is that the victim was specifically targeted for one's helplessness. If a helpless or vulnerable person is targeted for a specific reason, such as revenge, etc., regardless of one's condition, then this item is not present."

⁹ From the Manual, "Definitions of Items – Murder" Item 6, Exploiting a necessarily trusting relationship to the victim "Item 6 only applies when the relationship is close, such that the closeness would fundamentally render the murder most unexpected."

¹⁰ From the Manual, "Definitions of Items – Murder" Item 8, Crime reflects intent of progressively increasing depravity: "The key element of Item 8 involves a long-term plan that includes the clear intent to offend again similarly, incorporating increasingly creative elements of depraved actions and items."

¹¹ From the Manual, "Definitions of Items – Murder" Item 12, Disregarding the known consequences to the victim "One example of Item 12 is an attack in which the victim pleads with his or her assailant about the impact the murder will have on other loved ones, to no avail ... When the perpetrator disregards a victim's plea of "don't kill me," for example, Item 12 is not met; no victim would wish to die, and so the perpetrator following through on homicide is no different from any other premeditated killer."

from harming Miller, yet Miller engaged in a prolonged attack with his fists and the multiple blows from a baseball bat, ultimately killing the victim as he intended. The disparity is what each of the perpetrators did demonstrates disproportionate violence by Miller. However, both were violent and the violence began when Cannon reacted to being robbed by grabbing Miller by the throat. Therefore, while the actions were disproportionate, the irritant was not trivial. Item 20 - Excessive response to trivial irritant is therefore not scored as present.¹²

7. Depravity Standard items inadequately informed

Five items of the Depravity Standard relate to the perpetrator's attitude about the crime. Only patchy evidence was gathered about Miller and Smith's response to the crime. Therefore, one cannot speak to the presence or absence of Item 21, Pleasure in response to the actions and their impact, and Item 25, Indifference to the actions and their impact. Moreover, there is no way to verify the defendants' account that the assault and then murder followed Cannon's grabbing Miller's throat. Yet no one is a living witness to that encounter other than Smith and Miller. Were the defendants to be falsely blaming Cannon for instigating events leading to his own demise, Item 23, Projecting responsibility onto the victim; feeling entitlement to carry out the action, would be present.¹³

The differential depravity in the codefendants' choices and conduct is itemized in Table 2. Both Smith and Miller were actively involved in the robbery. Both participated in an assault on Cannon. Both acted to conceal the crime after the fact. But evidence demonstrates that Miller's intent and actions reflect Item 4, Item 10, Item 18, and possibly Item 16. Scores associated with these Items are shown in Table 2.

The degree of depravity, relative to other murders, is the sum of weighted scores of each Item present. For Smith, who had no proven items present, his percentile would be 0.0.¹⁴ Miller has at least three Items present; Item 4 (weighted score 69.07), Item 10 (weighted score 56.98), and Item 18 (weighted score 63.14). Item 16 (weighted score 78.81) may also be demonstrated based on autopsy evidence. Miller's score on the Depravity Standard is therefore a floor of 189.18 (65-70th percentile) and a ceiling of 268 (near 80th percentile) if Item 16 is present, and higher still if Item 23 is present.

8. Discussion

Application of the Depravity Standard disciplines the justice system to gather adequate evidence to prove individual elements of a 25-item inventory with very precise definitions. When more than one defendant is involved, charges may be the same. However, a higher scrutiny of 25 aspects that distinguish a depraved murder reflect upon relative culpability. The availability of a measure to appraise each individual's unique role allows for greater fairness, and comports with the Supreme Court's objectives of an individualized approach to sentencing.

Greater scrutiny of the smaller components of depravity serves justice in other ways as well. When scrutiny goes beyond guilt or innocence, and the intent, actions, victim choice, and attitude are teased out,

¹² From the Manual, "Definitions of Items – Murder" Item 20, Excessive response to trivial irritant; actions clearly disproportionate to the perceived provocation: "Item 20 is not present in a homicidal attack that follows a less serious violent attack. Neither is it present when a significant crime results after progressive escalation of provocations, unless the direct antecedent to the crime was an obviously trivial irritant."

¹³ From the Manual, "Definitions of Items – Murder" Item 23, Targeting victims who are not merely vulnerable, but helpless: "Those who make false claims about the victim's provocation also meet criteria for Item 23. The perpetrator's account may speak to justification, however, if that account is false, then it demonstrates an attitude of self-justification, the essence of Item 23."

¹⁴ Were Item 23 to be present, Smith's score would register at 66.25, which would just over 30th percentile, still low relative to others convicted of murder.

Table 2
Depravity Standard (bolded items reflect evidence, or potential evidence).

Miller
1 Intent to emotionally traumatize the victim, maximizing terror, through humiliation, or intent to create an indelible emotional memory of the event.
2 Intent to maximize damage or destruction, by numbers or amount if more than one person is victimized, or by degree if only one person is victimized.
3 Intent to cause permanent physical disfigurement.
4 Intent to carry out a crime for excitement of the criminal act.
5 Targeting victims who are not merely vulnerable, but helpless.
6 Exploiting a necessarily trusting relationship to the victim.
7 Influencing depravity in others in order to destroy more.
8 Crime reflects intent of progressively increasing depravity.
9 Carrying out crime in order to terrorize others.
10 Carrying out crime in order to gain social acceptance or attention, or to show off.
11 Influencing criminality in others to avoid prosecution or penalty.
12 Disregarding the known consequences to the victim.
13 Intentionally targeting victims based upon prejudice.
14 Prolonging the duration of a victim's physical suffering.
15 Unrelenting physical and emotional victimization; amount of victimization.
16 Exceptional degree of physical harm; amount of damage.
17 Unusual and extreme quality of suffering of the victim, including terror and helplessness.
18 Indulgence of actions, inconsistent with the social context.
19 Carrying out crime in unnecessarily close proximity to the victim. 20: Excessive response to trivial irritant; actions clearly disproportionate to the perceived provocation.
21 Pleasure in response to the actions and their impact.
22 Falsely implicating others, knowingly exposing them to wrongful penalty and the stress of prosecution.
23 Projecting responsibility onto the victim; feeling entitlement to carry out the action.
24 Disrespect for the victim after the fact.
25 Indifference to the actions and their impact
Smith
1 Intent to emotionally traumatize the victim, maximizing terror, through humiliation, or intent to create an indelible emotional memory of the event.
2 Intent to maximize damage or destruction, by numbers or amount if more than one person is victimized, or by degree if only one person is victimized.
3 Intent to cause permanent physical disfigurement.
4 Intent to carry out a crime for excitement of the criminal act.
5 Targeting victims who are not merely vulnerable, but helpless.
6 Exploiting a necessarily trusting relationship to the victim.
7 Influencing depravity in others in order to destroy more.
8 Crime reflects intent of progressively increasing depravity.
9 Carrying out crime in order to terrorize others.
10 Carrying out crime in order to gain social acceptance or attention, or to show off.
11 Influencing criminality in others to avoid prosecution or penalty.
12 Disregarding the known consequences to the victim.
13 Intentionally targeting victims based upon prejudice.
14 Prolonging the duration of a victim's physical suffering.
15 Unrelenting physical and emotional victimization; amount of victimization.
16 Exceptional degree of physical harm; amount of damage.
17 Unusual and extreme quality of suffering of the victim, including terror and helplessness.
18 Indulgence of actions, inconsistent with the social context.
19 Carrying out crime in unnecessarily close proximity to the victim. 20: Excessive response to trivial irritant; actions clearly disproportionate to the perceived provocation.
21 Pleasure in response to the actions and their impact.
22 Falsely implicating others, knowingly exposing them to wrongful penalty and the stress of prosecution.
23 Projecting responsibility onto the victim; feeling entitlement to carry out the action.
24 Disrespect for the victim after the fact.
25 Indifference to the actions and their impact

the criminal justice system has greater confidence in whether individual defendants are best held accountable to the greatest degree possible – a life sentence without parole, whether a defendant's crime deserves a more lenient sentence, or whether a defendant may actually be overcharged as a capital murder defendant. The inventory prompts the investigative effort to keep asking questions, and keep asking the right questions to secure this understanding.

The distinction of "the right questions" derives from very detailed qualifiers and disqualifiers that are shaped through extensive validating

research.^{22–24} With precise direction as to what qualified and what does not qualify, the Depravity Standard item definitions safeguard the system from presumptive impressionism about its that are and are not present. It would be easy for a *Miller* jury to find, for example, that Item 5,^{15, 16} and 20¹⁷ are present.

The definitions, which were refined in order to filter out the most extreme of crimes, show otherwise. That is because these definitions were refined to filter out extreme examples not only of murder, but the items themselves. Wherein a loose definition of “vulnerable” would make Item 5 scorable in most murders, a most restrictive definition assures a trier of fact that when present, that offender has already distinguished himself from a cohort of murderers. This guidance is all the more important when one considers that a jury does not have to reflect upon a particular murder every day. Without guidance, every murder might be the most disturbing that the trier of fact has appraised. This contributes to unconscious bias in decision-making.

The Depravity Standard, as a guide, was refined from murders from diverse jurisdictions. As such, it is well-ahead of most justice research in its ecologically-valid adaptation. Moreover, weighing individual items has been developed from crowdsourcing that continues to this day. Survey-based research at www.depravitystandard.org continues to collect input from individual adults of jury-age that impacts the weighting of each item. This enables the Depravity Standard to recalibrate with the evolution of American societal attitudes and priorities, and to keep current. The discipline of established protocols based on societal standards assists a jury to follow the facts, stay in the facts, and to avoid decisions driven by emotion or bias.

The Depravity Standard has been validated for use in murder and attempted murder, other violent crimes, and non-violent crimes.^{19,22–24} Adaptation for use in sex-crimes is ongoing. Item definitions have been validated, with interrater reliability established, from actual cases within these silos. This strengthens the ecological validity of the measure.

The sampling of murder cases used to validate the Depravity

¹⁵ The essential feature of Item 5 is the perpetrator’s deliberate selection of a perceived helpless individual for victimization, regardless of the actual resistance exhibited by the victim. This includes the mentally retarded, infants, the demented, the physically handicapped, the unconscious, immobilized, comparatively frail, small statured, conspicuously meek, the seriously mentally ill, subordinate members of sects that enforce silence, and exceptional cases of domestic abuse. Individuals may be helpless because of a lack of sophistication of intellect or physical limitations. Much younger and older individuals are not per se helpless because of their age, but may be, due to physical infirmity. If the perpetrator perceived that the child was too physically unable to escape a situation, or too developmentally immature to call for help, then the perpetrator’s perception was that the child was helpless, regardless of age. To satisfy criteria for Item 5, that helplessness must influence the choice to target the victim, regardless of the outcome of the criminal plan.

¹⁶ The exploitation of a personal trust distinguishes this item. Item 6 only applies when the relationship is close, such that the closeness would fundamentally render the murder most unexpected. When the nature of the relationship makes murder most unexpected, evidence may demonstrate that the perpetrator exploited the perceived safety of that dynamic to perpetrate a crime.

¹⁷ The key ingredient of Item 20 is a response clearly out of proportion to its immediate provocation (i.e., gross overreaction), as the perpetrator perceives it. This item is subjective; it allows for the potential of a perpetrator’s psychotic perceptions of the provocation, and the reality that there may be no actual provocation. Item 20 must be considered based upon careful appraisal of the antecedents of the crime and the perpetrator’s perceptions of these antecedents. Item 20 is typically associated with a perpetrator of exceptional temper, and/or impulsivity. Yet verbal displays are not necessary to demonstrate a disproportionate reaction; it is the action itself that should be assessed, to ensure that the acts of quiet, or even silent, perpetrators are not precluded. If someone attacks a random, or known, victim with no provocation whatsoever, Item 20 qualifies for non-instrumental crimes.

Standard derives from murders committed by adults and younger people. This raises the fair criticism of whether the Depravity Standard – Murder would benefit *Miller* evaluations if it draws only from a comparison group of murder by adolescents alone. We disagree, because the very distinctions of adolescents compare them to adults to argue they are less culpable. Insofar as many adolescent murders are impetuous, the Depravity Standard has been refined to cull out crimes whose impulsivity demonstrates the very lack of depraved elements of intent. Future research may indeed demonstrate that age is associated with less depravity in murder when comparisons are made to adult murderers. However, the distinction of lesser culpability, that rules that a given adolescent not be treated as would an adult, does necessitate this comparison to the universe of murders and their perpetrators per se. Such understanding has been learned and published from hundreds of closed murder cases in earlier published studies of the Depravity Standard.

Its scoring system distinguishes the Depravity Standard as an inventory in which a perpetrator accumulates points that are measured against a percentile, in order to compare the depravity of one offender’s involvement against other murder offenders. Future research may incorporate qualities of the very same intent, actions, attitudes and victim choice enable percentiles adjusted for age.

Some Depravity Standard items specifically conjure immaturity. Item 13, Intentionally targeting victims based upon prejudice, would be scored in a hate crime murder. But should such prejudices be the byproduct of remediable ignorance, this element of depravity may be muted in a 17-year-old relative to its expression in a more experienced 22-year-old. The Depravity Standard is not meant to negate other evidence, but to coexist with evidence informing other aspects of an individualized assessment.

Courts in the aftermath of the Supreme Court decision in *Miller* now engage the directive to provide specific individualized assessment. Our case study shows that the Depravity Standard guides scrutiny of 25 components of a crime, from antecedents to aftermath. When evidence gathering is complete, and items that are present are identified and known, the court is then also in a better position to discern whether such items are the product of psychosocial immaturity or the portents of career criminality. As such, the Depravity Standard fulfills and advances the imperatives of *Miller* and its progeny.

Declaration of competing interest

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