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COMMENT

Toward a Balanced Equation: Advocating Consistency in the Sentencing of Serial Killers

Every normal person, in fact, is only normal on the average. His ego approximates to that of the psychotic in some part or other and to a greater or lesser extent.

— Sigmund Freud¹

I. Introduction

Robert Piest was a hardworking fifteen-year-old boy who held down a part-time job at a pharmacy in addition to maintaining a position on his high school honor roll.² He was also a gymnast and an amateur photographer.³ One evening at work, he overheard the pharmacy's building contractor discuss how much he paid his employees, a figure that sparked young Robert's interest.⁴ When Robert's mother came to pick him up after work, he asked her to wait while he spoke to the contractor about some extra work.⁵ His mother never saw him alive again.⁶

Rather than offer the young man a job in construction, the building contractor lured Robert into his car and suggested that Robert could more easily make money by selling his body for sex.⁷ The man then drove the boy to a suburban Chicago home where he subjected him to a night of torture.⁸ The contractor handcuffed Robert, tried to perform oral sodomy on him, forcibly raped him, and later strangled him with a rope.⁹ The next day, the

1. Sigmund Freud, *Analysis Terminable and Interminable*, in 23 THE STANDARD EDITION OF THE COMPLETE WORKS OF SIGMUND FREUD 216, 235 (James Strachey ed., 1937), available at <http://www.brainyquote.com/quotes/quotes/s/sigmundfre151783.html>.

2. HELEN MORRISON & HAROLD GOLDBERG, MY LIFE AMONG THE SERIAL KILLERS 79 (2004).

3. *Id.*

4. *Id.*

5. *People v. Gacy*, 468 N.E.2d 1171, 1176 (Ill. 1984), *superseded by statute on other grounds*, 730 ILL. COMP. STAT. 5/5-2-4 (1996), *as recognized in People v. Wilhoite*, 592 N.E.2d 48 (Ill. App. 1991).

6. *Id.*

7. MORRISON & GOLDBERG, *supra* note 2, at 80.

8. *Id.*

9. *Gacy*, 468 N.E.2d at 1190.

contractor dropped Robert Piest's body off a bridge into the Des Plaines River.¹⁰

Police later discovered that the contractor was John Wayne Gacy, who was eventually recognized as one of the most notorious serial killers of the twentieth century.¹¹ After police determined that Gacy was the contractor to whom Robert had spoken, they questioned Gacy, who spontaneously confessed to killing more than thirty boys and young men.¹² Gacy told police that he had buried most of his victims in the crawl space beneath his home and had dumped the bodies of a few of his victims, including Robert Piest, in the Des Plaines River.¹³ Although Gacy later recanted this confession, when officers searched the crawl space beneath Gacy's home, they recovered the decaying corpses of twenty-nine boys and young men.¹⁴ The police found four additional bodies in the river downstream from where Gacy admitted to dumping them, bringing the total to thirty-three victims.¹⁵

Although many of the corpses were too badly decomposed to determine the exact cause of death, most were found either with rope tied around their necks or with objects stuffed in their throats.¹⁶ While the bodies themselves could no longer verbally relate to authorities the abuses they had suffered, a few of Gacy's victims lived to tell horror stories of the torture they experienced at Gacy's hands.¹⁷ Common themes in these tales included incidents of bondage, rape, and suffocation.¹⁸

10. MORRISON & GOLDBERG, *supra* note 2, at 80.

11. *Id.*

12. *Gacy*, 468 N.E.2d at 1181.

13. *Id.* at 1176, 1190.

14. *Id.* at 1176, 1180-81.

15. *Id.* at 1176.

16. *Id.* at 1189-91.

17. *Id.* at 1191. After meeting Gacy at a bar, Jeffrey Rignall was chloroformed, bound, orally and anally sodomized, and then left, unconscious, next to a statue in a Chicago park. *Id.* Michel Ried had moved in with and was working for Gacy when Gacy inexplicably hit him with a hammer, stating "he did not know what had come over him, but that he felt like he wanted to kill Ried." *Id.*

18. *Id.* According to Robert Donnelly, a nineteen-year-old college student Gacy intimidated into entering his car by pretending to be a police officer, Gacy held Robert's head under water until he lost consciousness, waited until the victim regained consciousness, and then repeated the process multiple times. MORRISON & GOLDBERG, *supra* note 2, at 88. This water torture occurred after Gacy had brutally sodomized his victim and had played Russian Roulette with his victim by pointing a revolver with a single bullet at the victim's head and repeatedly pulling the trigger until the young man begged Gacy to kill him to end the torture. *Id.* Instead of killing the young man, Gacy inexplicably halted his activities, drove the young man to work, and released him. *Id.*

Although the living victims reported their harrowing experiences to authorities shortly after Gacy released them, the police did not actively pursue Gacy until the discovery of the thirty-three bodies.¹⁹ Because Gacy was a prominent and active member of his community, the community reacted to the news of his activities with stunned surprise.²⁰ Gacy had organized the Polish Day Parade in Chicago, held annual backyard barbecues with hundreds of guests, and dressed up as a clown to entertain children at local hospitals.²¹ Gacy even had his photograph taken with First Lady Rosalynn Carter when she visited Chicago.²² To put it succinctly, “Gacy wasn’t merely well liked. He was admired.”²³

An overwhelming media frenzy surrounded Gacy and his trial.²⁴ Beyond the Chicago community that was grappling with the incongruity of one of its prominent citizens committing such horrific crimes, Gacy had piqued the interest of the national and international communities:

[T]he story was told around the world by the news media . . . on a daily basis. In fact, with the advent of mogul Ted Turner’s Cable News Network, headlines and one-minute summaries about Gacy were beamed out to the world hourly. And the newspapers! They had field days as gory headlines boosted circulation.²⁵

The brutal nature of the torture Gacy inflicted and his bizarre manner of disposing of the corpses of his victims had intrigued the entire country.²⁶ Amidst society’s macabre fascination, however, definitive opinions existed about how Gacy should be punished.²⁷ Terry Sullivan, the man who prosecuted Gacy, summed up the general societal reaction to Gacy by calling him “a rat, mean, vile, base, and diabolical . . . the personification of evil.”²⁸ Accordingly, an Illinois jury sentenced Gacy to death on March 12, 1980, for the twelve murders he committed after 1976,²⁹ the year the U.S. Supreme

19. MORRISON & GOLDBERG, *supra* note 2, at 89-90.

20. *Id.* at 86.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 90.

25. *Id.* (second alteration in original).

26. *Id.*

27. HAROLD SCHECHTER, *THE SERIAL KILLER FILES* 356 (2003) (explaining that many viewed Gacy’s execution as “richly deserved”).

28. MORRISON & GOLDBERG, *supra* note 2, at 114 (alteration in original).

29. *People v. Gacy*, 468 N.E.2d 1171, 1176 (Ill. 1984), *superseded by statute on other grounds*, 730 ILL. COMP. STAT. 5/5-2-4 (1996), *as recognized in People v. Wilhoite*, 592 N.E.2d 48 (Ill. App. 1991); MORRISON & GOLDBERG, *supra* note 2, at 114-15.

Court held that the death penalty was not necessarily a cruel and unusual punishment violating the Eighth Amendment of the U.S. Constitution.³⁰ In response to Gacy's appeal, the Illinois Supreme Court determined that although the jury had not sufficiently considered evidence about Gacy's background, including information about his abusive father, the lower courts had not committed any reversible error.³¹ The court reasoned, "A disapproving father does not excuse 33 homosexually related murders and numerous other incidents of sexual torture and physical abuse. We decline to disturb the jury's determination."³² Consequently, Gacy was executed on May 9, 1994, after exhausting his appeals process.³³

Public interest in Gacy has not waned since his death. An MSN internet search for "John Wayne Gacy" yields 53,333 results.³⁴ A film with the self-explanatory title "Gacy,"³⁵ complete with a maniacal clown adorning the cover, occupies a position on the new release wall at Blockbuster Video. Authors have written an abundance of books either exclusively about Gacy

30. *See* *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion). The plurality first determined that the death penalty does not invariably violate the Eighth Amendment because of its history within American society and because the penological purposes of deterrence and retribution comport with basic concepts of human dignity. *Id.* at 182-83. The plurality then held that Georgia's capital sentencing scheme was constitutionally permissible because it required the jury to focus both "on the particularized nature of the crime and the particularized characteristics of the individual defendant" so that a jury could not "wantonly and freakishly impose the death sentence." *Id.* at 206-07. The scheme advocated attention to the "particularized nature" of the crime and the individual defendant by narrowing

the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed. In addition, the jury is authorized to consider any other appropriate aggravating or mitigating circumstances. . . . The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court, . . . but it must find a statutory aggravating circumstance before recommending a sentence of death.

Id. at 196-97 (citations and footnote omitted).

31. *Gacy*, 468 N.E.2d at 1215-16, 1219.

32. *Id.* at 1216.

33. MORRISON & GOLDBERG, *supra* note 2, at 121.

34. Internet search at <http://search.msn.com> (submit search for "John Wayne Gacy") (last visited Oct. 29, 2005).

35. *See* *GACY* (Peninsula Films 2002).

and his crimes or inclusively about Gacy and other notorious serial killers.³⁶ A market even exists for paintings Gacy completed while in prison.³⁷

The preceding brief history of the crimes and infamy of John Wayne Gacy is but a microcosm of society's duality regarding serial killers. The public exemplifies this duality both by its obvious fascination with Gacy's brutality and by its determination that he deserved to die.³⁸ Seemingly, once society feels it has rid itself of the potential danger from the individual, it can enthusiastically explore the life, crimes, and motivations of the serial murderer.³⁹ As the facts become more bizarre, the exploration becomes more exciting. If a serial murderer has a predilection for mutilation,⁴⁰ necrophilia,⁴¹ or cannibalism,⁴² the public desires even more information, including any macabre details.⁴³

Even though serial murderers fascinate society, society demonizes them as archetypal villains. Because most people believe serial killers are evil, one-dimensional creatures without redeeming or humanizing qualities, some members of society have concluded that the only acceptable means of protecting the public from these characters is to exterminate them.⁴⁴ Accordingly, the criminal justice systems of most individual states function to identify and classify serial killers.⁴⁵ Such classification expedites the procedure with which the state may impose a sentence of death.⁴⁶

The procedural system that determines the ultimate fates of these individuals, however, has a duty to consistently apply the protections granted

36. See, e.g., MORRISON & GOLDBERG, *supra* note 2; SCHECHTER, *supra* note 27, at 196-98; DONALD J. SEARS, TO KILL AGAIN: THE MOTIVATION AND DEVELOPMENT OF SERIAL MURDER 21-36 (1991).

37. MORRISON & GOLDBERG, *supra* note 2, at 118-19.

38. *People v. Gacy*, 468 N.E.2d 1171, 1216 (Ill. 1984), *superseded by statute on other grounds*, 730 ILL. COMP. STAT. 5/5-2-4 (1996), *as recognized in* *People v. Wilhoite*, 592 N.E.2d 48 (Ill. App. 1991).

39. See *infra* Part III.A.

40. Mutilation is a form of the word "mutilate . . . 2. To deprive (a person or animal) of an essential part, as a limb." WEBSTER'S CONCISE AMERICAN FAMILY DICTIONARY 346 (1997) [hereinafter WEBSTER'S].

41. Necrophilia is a form of the word "necrophile . . . one who is morbidly attracted to corpses." OXFORD ENGLISH DICTIONARY 283 (1989).

42. Cannibalism is a form of the word "cannibal . . . 1. a person who eats human flesh." WEBSTER'S, *supra* note 40, at 76.

43. See *infra* Part III.A.

44. See, e.g., SEARS, *supra* note 36, at 159 (explaining that one of society's alternatives regarding serial killers is to recognize them as monsters, seek them out, and destroy them).

45. See *infra* Part IV.A.

46. See *infra* Part IV.A.

to offenders whose circumstances indicate reduced responsibility.⁴⁷ This comment recognizes that even though serial murderers commit deplorable crimes and irreparably damage numerous victims and their families, they are also complex, often damaged human beings, and should not be sentenced solely on the basis of the crimes they commit. Exploring the backgrounds of these offenders reveals undeniable environmental, sociological, and biological commonalities.⁴⁸ Their commonalities indicate that serial murderers suffer from a powerful compulsion to commit murder, which should decrease — rather than increase — their legal responsibility for the crimes they commit.

This comment neither articulates a value judgment about whether capital punishment is inherently just, nor suggests that a serial murderer who possesses a combination of the commonalities typically attributable to serial murderers justifies an insanity defense, which enables the defendant to completely avoid legal responsibility. Indeed, research suggests that many serial murderers do not satisfy the legal definition of “insanity”⁴⁹ because they are capable of understanding the wrongfulness of their actions at the time their crimes are committed.⁵⁰ Accordingly, an argument that would facilitate a serial murderer’s insanity defense would have dire consequences because society certainly needs to be protected from individuals who have demonstrated a clear inability to control their impulses.

This comment focuses on the treatment of serial killers in states’ capital sentencing schemes. Many states statutorily facilitate the execution of serial killers by (1) structuring statutes to classify offenders who fall within certain parameters as serial killers and (2) using the classification as an aggravating factor that weighs in favor of death.⁵¹ This comment argues that rather than classifying serial killer status as a statutory aggravating factor, states should classify serial killer status as a statutory mitigating factor because in many jurisdictions the balance between aggravating and mitigating factors determines the difference between a sentence of life and a sentence of death. Part II of this comment explores the procedural aspects of a capital case, specifically examining the procedural application, historical development, and

47. *See infra* Part II.E.

48. JONATHAN H. PINCUS, *BASE INSTINCTS: WHAT MAKES KILLERS KILL?* 129 (2001) (“The triad of abuse, mental illness with paranoia, and neurologic deficit has been present in almost all the serial murderers I have examined.”).

49. Insanity is defined as “[a]ny mental disorder severe enough that it prevents a person from having legal capacity and excuses the person from criminal or civil responsibility. . . . Insanity is a legal, not a medical, standard.” BLACK’S LAW DICTIONARY 353 (2d pocket ed. 2001).

50. Sean Spence, *Bad or Mad*, *NEW SCIENTIST*, Mar. 20, 2004, at 38 (“Such people are not clinically mentally ill and they usually know when they are doing wrong.”).

51. *See infra* Part IV.A.

underlying policies regarding the doctrines of aggravation and mitigation. Part III explores the phenomenon of serial murder, including general public understanding and reaction, patterns of crime, and environmental and biological commonalities. Part IV synthesizes Parts II and III by exploring the criminal justice system's current treatment of individuals who commit serial murder and suggesting that the existing criminal justice system's treatment of these individuals is inconsistent with the policies underlying the doctrines of aggravation and mitigation. Not only does Part IV critique the current system, but the part also proposes a quantifiable means of classifying individuals as "serial killers" for mitigation purposes.

II. Procedural Considerations for Capital Cases

The hallmark of the U.S. Supreme Court's capital punishment jurisprudence in the past twenty-six years is that a state may not implement a capital punishment scheme permitting a sentence of death based upon consideration of only the crime itself.⁵² States must have additional safeguards in place for cases in which capital punishment is possible because the Court has recognized that death as a criminal penalty is qualitatively different from sentences where the most severe possible penalty is incarceration.⁵³ In capital cases, the Court requires the sentencer to consider the circumstances surrounding the crime, including consideration of the defendant as an individual, before imposing the death penalty.⁵⁴ Although policy considerations are the driving force behind the Court's death penalty jurisprudence, an in-depth examination of policy is postponed in this comment until after an articulation of the basic framework, including relevant terminology.

A. Individualized Consideration

To guide states and factfinders in determining whether the death penalty is appropriate, the U.S. Supreme Court has centered its death penalty jurisprudence on the doctrine of individualized consideration. On the same day the Court decided *Gregg v. Georgia*,⁵⁵ which held that the death penalty

52. See *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion) (discussing the need to have accurate information about both the details of the crime itself and the individual characteristics of the offender before a sentence of death may be imposed).

53. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995).

54. *Gregg*, 428 U.S. at 192 (stating that "the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision").

55. 428 U.S. 153 (plurality opinion).

was not per se cruel and unusual, the Court also decided *Woodson v. North Carolina*,⁵⁶ the genesis of the individualized consideration doctrine. In *Woodson*, the Court determined that states could not mandatorily impose the death penalty on the basis of a particular crime⁵⁷ alone, but that, additionally, the factfinder must have access to “particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.”⁵⁸ To facilitate this individualized consideration, states have developed a number of procedural conventions.

B. Bifurcation

First, although never explicitly mandated by the Supreme Court, due process seemingly requires bifurcated trials as a procedural convention to protect defendants in capital cases.⁵⁹ “Bifurcation” means that a single trier of fact decides the guilt of the defendant and the penalty imposed in separate proceedings.⁶⁰ The guilt phase requires the state to prove the elements of the underlying capital offense beyond a reasonable doubt, whereas the penalty phase exists solely to determine whether a sentence of death is appropriate considering the individual circumstances of the case.⁶¹

C. Consideration of Aggravating and Mitigating Circumstances

As an additional procedural convention facilitating individualized consideration, the finder of fact must consider both aggravating and mitigating circumstances during the sentencing phase of a capital case.⁶² Aggravating circumstances are defined as “fact[s] or situation[s] that increase the degree of liability or culpability for a criminal act . . . and that [are] considered by the court in imposing punishment ([especially] a death sentence).”⁶³ Statutory aggravating circumstances pushing a case into the realm of death penalty eligibility are known as “eligibility aggravating factors.”⁶⁴ For example, a state may determine that murder committed for pecuniary gain is an eligibility

56. 428 U.S. 280 (1976) (plurality opinion).

57. *Id.* at 301.

58. *Id.* at 303.

59. LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW § 7.01, at 51 (2004) (reporting that in 1976, the U.S. Supreme Court “acknowledged that the bifurcated procedure was one of the safeguards that helped ensure that the death penalty would not be imposed in a wholly arbitrary, capricious, or freakish manner”).

60. *Id.* § 7.01, at 52.

61. *Id.* § 7.01, at 51-52.

62. *Id.* § 13.01, at 157.

63. BLACK’S LAW DICTIONARY, *supra* note 49, at 99.

64. CARTER & KREITZBERG, *supra* note 59, § 9.01, at 95-96.

aggravating factor that permits the state to seek the death penalty for a particular offender.⁶⁵

In contrast to aggravating circumstances, mitigating circumstances are defined as “fact[s] or situation[s] that [do] not justify or excuse a wrongful act or offense but that [reduce] the degree of culpability and thus may reduce . . . the punishment (in a criminal case).”⁶⁶ Examples of mitigating circumstances include “the influence of drugs or alcohol,”⁶⁷ “the defendant is not a continuing threat to society,”⁶⁸ and “[a]t the time of the offense the defendant was too young to appreciate the consequences of the offense.”⁶⁹

Before the finder of fact considers the death penalty in a particular case, it must determine that the facts of the case present at least one eligibility aggravating factor.⁷⁰ A determination of whether such eligibility aggravating factors exist may be made during either the guilt or penalty phase.⁷¹ When the jury determines that eligibility aggravating factors exist during the guilt phase, such factors are generally included within the statutory language as an additional element the state must prove in the prosecution of a predesignated capital offense.⁷² Thus, the defendant will not be found guilty in the guilt phase without one of these factors, but upon a determination of guilt, death is automatically an available penalty.⁷³ Alternatively, a state’s scheme may require the determination of eligibility aggravating factors to be made in the penalty phase rather than in the guilt phase.⁷⁴ When the jury determines that eligibility aggravating factors exist during the penalty phase, the state must first meet its burden of proof regarding the elements of the underlying offense during the guilt phase.⁷⁵ If the jury determines that the defendant is guilty of the offense charged, it must then decide whether any eligibility aggravating factors are present during the penalty phase.⁷⁶

65. See, e.g., COLO. REV. STAT. § 18-1.3-1201(5)(h) (2004).

66. BLACK’S LAW DICTIONARY, *supra* note 49, at 100.

67. COLO. REV. STAT. § 18-1.3-1201(4)(i).

68. *Id.* § 18-1.3-1201(4)(k).

69. FLA. STAT. § 921.0016(4)(k) (2004).

70. *Lowenfield v. Phelps*, 484 U.S. 231, 244-46 (1988) (holding that the Louisiana sentencing scheme permitting the same aggravating circumstance to be used in both guilt and penalty phases was constitutionally permissible as long as the scheme required the finder of fact to find an aggravating circumstance that “genuinely narrow[ed] the class of death-eligible persons”).

71. *Steiker & Steiker*, *supra* note 53, at 372.

72. *CARTER & KREITZBERG*, *supra* note 59, § 9.03[C], at 101-02.

73. *Id.*

74. *Id.* § 9.02[A], at 98.

75. *Id.*

76. *Id.*

Once the factfinder determines, in either the guilt or penalty phase, that at least one eligibility aggravating factor exists, the focus of the case shifts from eligibility aggravating factors to the broader category of all aggravating and mitigating evidence.⁷⁷ If a case reaches this point, the factfinder ultimately determines whether the death penalty is appropriate.⁷⁸ Jurisdictions differ in their approaches to the factfinder's use of aggravating and mitigating evidence to reach a decision about whether death is appropriate.

D. Weighing Versus Nonweighing Jurisdictions

The manner in which a state's scheme requires factfinders to balance aggravating and mitigating factors may result in an additional procedural protection for capital defendants. U.S. Supreme Court jurisprudence articulating due process requirements for state capital punishment schemes can be a confusing maze.⁷⁹ There are, however, a few rules and standards that remain consistent. The Court has announced the following minimum standards that must be satisfied before a jury may impose the death penalty: (1) the state must follow a discernible method for narrowing the offenses that make a defendant eligible for the death penalty;⁸⁰ (2) the state must permit the defendant to present every piece of evidence that the factfinder could possibly consider a mitigating circumstance;⁸¹ and (3) the factfinder must predicate a sentence of death on the finding of at least one aggravating circumstance.⁸²

77. *Id.* § 9.02[B], at 99.

78. *Id.*

79. See Steiker & Steiker, *supra* note 53, at 358 (discussing how critics have described the Court's death penalty jurisprudence as an "overly complex, absurdly arcane, and minutely detailed body of constitutional law that . . . 'obstructs, delays, and defeats' the administration of capital punishment") (footnote omitted).

80. *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion) (holding that Georgia's method of comparing an individual sentenced to death with the sentences of "similarly situated defendants" guards against the capricious imposition of a death sentence at the unfettered whim of the finder of fact).

81. *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). The U.S. Supreme Court reversed the lower court's holding that the death penalty was appropriately imposed on a conspirator in an armed robbery plan that ultimately led to the fatal shooting of a pawn shop owner because the judge, when determining the appropriate sentence, only considered the three mitigating factors that Ohio's sentencing scheme permitted. *Id.* at 608-09. The Court concluded that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (footnote omitted).

82. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (holding that "the jury is required

Beyond these basic requirements, the Court has not provided guidelines about the weight the factfinder must give the mitigating evidence provided by the defendant.⁸³ Procedural due process is deemed satisfied if the defendant simply has the opportunity to present mitigating evidence.⁸⁴ Therefore, a state court could constitutionally impose the death sentence upon the finding of just one aggravating circumstance, provided that the defendant has the opportunity to present some form of mitigating evidence.⁸⁵ Because the U.S. Constitution affords only minimal procedural protection to defendants accused of capital offenses, some individual jurisdictions choose to adhere to the previously stated minimum due process requirements while other jurisdictions provide additional procedural protection to capital defendants.⁸⁶

An additional procedural protection adopted by many jurisdictions is a weighing,⁸⁷ rather than a nonweighing,⁸⁸ sentencing scheme. Nonweighing sentencing schemes are straightforward applications of the minimum due process requirements. If the factfinder determines that an aggravating circumstance exists and the court permits the defendant to present all possible mitigating evidence, the factfinder has complete discretion over whether to impose the death sentence or life imprisonment.⁸⁹ A “weighing sentencing determination,” on the other hand, requires the factfinder to consider all of the aggravating circumstances and weigh them against all of the mitigating circumstances.⁹⁰ In jurisdictions employing weighing sentencing schemes, the factfinder may impose the death penalty only upon a finding that the aggravating circumstances outweigh the mitigating circumstances.⁹¹ In some states that employ weighing sentencing schemes, however, the factfinder has

during the sentencing phase to find at least one aggravating circumstance before it may impose death”).

83. CARTER & KREITZBERG, *supra* note 59, § 12.01, at 138 (noting that “there is no standardized formula for the use of mitigation in the actual assessment of the individual’s circumstances”); *see also* Eddings v. Oklahoma, 455 U.S. 104, 122 (1982) (Burger, C.J., dissenting) (suggesting it is inappropriate for the Court to give guidance regarding the “weight” of mitigating evidence).

84. CARTER & KREITZBERG, *supra* note 59, § 12.01, at 137.

85. *Id.* § 7.03, at 55.

86. *Id.* § 13.02, at 159-62.

87. For states utilizing weighing sentencing schemes, *see id.* § 7.03, at 53 (including Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, and Utah).

88. *Id.* § 7.03, at 53. States utilizing nonweighing sentencing schemes include Georgia and North Carolina. *Id.*

89. *Id.* § 7.03, at 54.

90. *Id.* § 7.03, at 53.

91. *Id.*

discretion to recommend that the court impose a life sentence even where the aggravating circumstances outweigh the mitigating circumstances.⁹² In contrast, a factfinder in a weighing jurisdiction may never mandate capital punishment when mitigating circumstances outweigh aggravating circumstances.⁹³ As an additional procedural safeguard, the U.S. Supreme Court determined that when a state has implemented a weighing scheme, “it may not ignore the sentencer’s reliance on an improper factor in that structured decisionmaking process.”⁹⁴ Twenty-six of the thirty-eight states where capital punishment is permissible⁹⁵ have adopted weighing sentencing schemes. The protections afforded to a defendant by the weighing scheme requirements in these twenty-six jurisdictions are greater than the bare minimum required by the U.S. Constitution.

Because weighing schemes comprise a clear majority view in jurisdictions where capital punishment is permissible, such schemes are the target of the model proposed later in this comment.⁹⁶ The model would have minimal effectiveness in a jurisdiction with the more lenient and virtually unbridled sentencing procedures permitted in a nonweighing jurisdiction because the characterization of a particular factor as aggravating or mitigating would not be as significant when the factfinder is not obligated to decide to impose the death penalty pursuant to a quantitative weighing process. If the factfinder can only impose the death sentence when aggravating factors outweigh mitigating factors, whether “serial killer status” is classified as an aggravating or a mitigating factor truly becomes a matter of life and death.

92. *Id.*

93. *Clemons v. Mississippi*, 494 U.S. 738, 751-52 (1995) (per curiam) (holding an order affirming the trial court’s imposition of the death penalty must be vacated when it was unclear whether the appellate court actually reweighed the aggravating circumstances pursuant to the invalidation of one of the aggravating circumstances relied on by the trial court because, in order to impose the death penalty, the remaining aggravating circumstances must definitively outweigh any mitigating circumstances).

94. *Steiker & Steiker*, *supra* note 53, at 386.

95. *CARTER & KREITZBERG*, *supra* note 59, § 7.03, at 53 (including Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, and Utah). The thirty-eight states permitting capital punishment include Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Id.* § 1.01, at 2 n.7.

96. *See infra* Part IV.B.

E. Operation and Policies Underlying the Requirement of Individualized Consideration in Capital Cases

The procedural conventions articulated above facilitate the central doctrine of individualized consideration. Although the U.S. Supreme Court first introduced the doctrine of individualized consideration in *Woodson v. North Carolina*,⁹⁷ the Court further refined the doctrine two years later in *Lockett v. Ohio*.⁹⁸ The *Lockett* Court established the scope of the mitigating evidence a defendant may present to the factfinder, and created a broad protection for defendants by determining that

in all but the rarest kind of capital case, the [factfinder must] not be precluded from considering, *as a mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.⁹⁹

In addition to defining the doctrine of individualized consideration and determining the scope of the doctrine, the Court has also articulated a wealth of policy rationales in support of the doctrine.

The preeminent policy behind the doctrine of individualized consideration is that, because "death is qualitatively different from any other sentence,"¹⁰⁰ nonindividualized "death penalty statutes run afoul of the basic norms of equal treatment because they erroneously rely on the flawed belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'"¹⁰¹ Indeed, the Court has recognized that the fact of an individual's commission of a crime does not necessarily provide an adequate basis for determining that individual's degree of culpability because the uniqueness of humankind dictates that people are shaped by the totality of their circumstances.¹⁰²

Recognizing that death is qualitatively different from other possible sentences,¹⁰³ the Court requires that sentencing in a capital case be conducted with the highest degree of reliability possible because a death sentence is final

97. 428 U.S. 280 (1976) (plurality opinion).

98. 438 U.S. 586 (1978).

99. *Id.* at 604 (footnote omitted).

100. *Id.* (internal quotation marks and citation omitted).

101. Steiker & Steiker, *supra* note 53, at 369.

102. *Lockett*, 438 U.S. at 605 ("The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.").

103. *Id.* at 604.

and, once applied, cannot be altered.¹⁰⁴ In furtherance of this goal of accuracy, the Court mandates that the factfinder must possess the “fullest information possible”¹⁰⁵ to encourage it to base its sentencing decisions on reasoned, moral responses rather than unguided, emotional responses.¹⁰⁶

To facilitate reasoned, moral responses by factfinders, the Court requires that factfinders be provided a means of considering and giving effect to any existing factors that call for less severe punishment.¹⁰⁷ In *Penry v. Johnson*,¹⁰⁸ the Court highlighted the semantic distinction that the factfinder must not only *consider* but also *give effect* to relevant mitigating information.¹⁰⁹ This distinction is especially important in situations where the nature of the mitigating evidence is such that factfinders can only appreciate the full *effect* of certain mitigating circumstances in aggregation with other mitigating circumstances.¹¹⁰

The Court provided powerful examples of the importance of aggregating certain mitigating circumstances in the case of *Eddings v. Oklahoma*.¹¹¹ In *Eddings*, the defendant was only sixteen years old when he shot and killed an Oklahoma Highway Patrol officer.¹¹² Although Eddings provided evidence of childhood abuse and neglect, psychological and emotional disorders, and his readily apparent youth at the time of the offense, the state courts nonetheless affirmed the imposition of the death penalty.¹¹³ In articulating some of its reasons for remanding the case, the U.S. Supreme Court emphasized the heightened consideration by the factfinder that an aggregate of circumstances can merit:

Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. . . . In some

104. *Id.* at 605.

105. *Id.* at 603.

106. *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 328 (1989) (remanding a death penalty sentence because the jury was unable to give effect to evidence of the defendant’s mental retardation. According to the impermissible state scheme, once the case was death penalty eligible, a death sentence could be avoided only if one of three possible special issues merited a *negative* answer), *abrogated on other grounds* by *Atkins v. Virginia*, 536 U.S. 304 (2002).

107. *Lockett*, 438 U.S. at 605.

108. *(Penry II)*, 532 U.S. 782 (2001) (holding that the procedure on remand did not satisfy the Court’s instructions in *Penry I* because the instructions required the jurors either to give no effect to defendant’s mitigating evidence or to answer dishonestly with regard to special issues where the sentencing relied on answers to the identical three special issues utilized in *Penry I*).

109. *Id.* at 797.

110. *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982).

111. 455 U.S. 104.

112. *Id.* at 105-06.

113. *Id.* at 108-09.

cases, such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.¹¹⁴

Through its holding, the Court acknowledged that jurisdictions must sometimes assist factfinders in giving mitigating evidence the weight it deserves, particularly when the mitigating evidence achieves its full significance only when considered in conjunction with other mitigating evidence.

Jurisdictions work against the goal of assisting factfinders in giving effect to mitigating evidence either by deficiencies in sentencing schemes or by the absence of specialized jury instructions in a particular case.¹¹⁵ Although the Court has not articulated definitive rules by which states must structure their sentencing schemes and jury instructions, the Court's guiding principle regarding individualized consideration is that the mechanism used to assist jurors in giving effect to mitigating evidence be effective and logical.¹¹⁶

Through the individualized consideration doctrine, the Court attempts to underscore certain guiding principles including: (1) American criminal justice systems must always recognize that “death is qualitatively different” from all other possible sentences;¹¹⁷ (2) factfinders cannot be permitted to impose the death penalty upon consideration of the crime alone;¹¹⁸ and (3) states must make every effort to ensure that sentencing decisions in capital cases are based on the reasoned, moral responses of the factfinder rather than unguided, emotional responses.¹¹⁹ Indeed, the Court demonstrates a continuing interest in ensuring that factfinders fully consider mitigating evidence through the

114. *Id.* at 115 (citation omitted).

115. *See, e.g.,* *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion) (holding that a sentencing scheme mandating the death penalty for specified offenses restricted the factfinder's ability to consider and give effect to mitigating circumstances); *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302, 328 (1989) (indicating that the state court could remedy a deficiency in scheme by appropriate instructions enabling jurors to give effect to mitigating evidence), *abrogated on other grounds by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

116. *See* *Penry v. Johnson* (*Penry II*), 532 U.S. 782, 804 (2001) (opining that where the trial court informed jurors that they could give effect to defendant's mitigating evidence by answering untruthfully to one of the special circumstances, “the mechanism [the trial court] purported to create for the jurors to give effect to th[e] evidence was ineffective and illogical”).

117. *See, e.g.,* *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (quoting *Woodson*, 428 U.S. at 305).

118. *See, e.g.,* *Woodson*, 428 U.S. at 304.

119. *Penry I*, 492 U.S. at 328.

recent cases of *Wiggins v. Smith*¹²⁰ and *Williams v. Taylor*.¹²¹ In each case, the Court found violations of the defendant's Sixth Amendment rights to effective assistance of counsel where counsel failed to fully "investigate and present mitigating evidence . . . that . . . taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] moral culpability."¹²² The following section considers the reactions of American society to serial killers and how serial killers share certain distinguishing commonalities. Furthermore, a study of the current treatment of serial killers reveals that such treatment is at odds with the policies of individualized consideration discussed above.

III. The Phenomenon of Serial Murder

A. The Serial Killer as an Object of Macabre Fascination

Serial killers fascinate American society.¹²³ Society evinces this fascination in music, films, and literature.¹²⁴ Prolific rock bands have written songs pertaining to the genre including "Midnight Rambler" by the Rolling Stones and "Psycho-Killer" by Talking Heads.¹²⁵ Bands have incorporated serial killers' names into their own names, including Ed Gein's Car and Marilyn Manson.¹²⁶ Filmmakers have created a multitude of films in the serial killer genre, dating back to the beginning of the history of motion pictures.¹²⁷ The public also proves its serial killer fascination with the commercial success of thriller novels, such as Thomas Harris's *Red Dragon* and *The Silence of the Lambs* and James Patterson's *Kiss the Girls*.¹²⁸

The extent to which popular art and the media saturate society with fodder for its macabre fascination with serial killers results in dehumanizing the serial killer.¹²⁹ This dehumanization can rise to the level of creating an absolute lack

120. 539 U.S. 510 (2003).

121. 529 U.S. 362 (2000).

122. *Wiggins*, 539 U.S. at 538 (quoting *Williams*, 529 U.S. at 398 (citation omitted)); see also *Williams*, 529 U.S. at 398-99.

123. See SCHECHTER, *supra* note 27, at 1.

124. *Id.* at 369-402 (detailing examples of the "serial killer culture" in art, literature, films, music, tourist locations, and memorabilia).

125. *Id.* at 385.

126. *Id.* at 386.

127. *Id.* at 386-90 (detailing the history of films portraying serial killers, from a 1920s film about a pedophilic sex murderer to more recent commercial films such as *COPYCAT* (Warner Bros. 1995) and *THE CELL* (New Line Cinema 2000)).

128. *Id.* at 391.

129. See, e.g., *id.* at 3 (explaining that even early newspaper documentation of serial killers thrived on the sensationalism produced by referring to serial murderers as "murder fiends," "bloodthirsty monsters," or "devils in human shape").

of empathy by society for either the abuses perpetrated on individuals who later become serial killers or any other circumstances that arguably contributed to serial killers' development.¹³⁰

The absence of empathy and humanity creates a response in the collective mind of society, and by extension the minds of jurors, that the only adequate means of dealing with these creatures is to exterminate them because, as one prospective juror explained, the mention of the words "serial killer" conjures images of a "beyond hope situation."¹³¹

Although society's macabre fascination with the lives and crimes of serial killers is not likely to wane, the criminal justice system does not have to reflect the duality of society's titillation by, and fear of, these individuals. The most effective means of ensuring a "reasoned, moral response"¹³² to serial killers involves first understanding the common factors that contribute to their

130. An example of this phenomenon occurred early one morning in the Oklahoma Memorial Union on the campus of the University of Oklahoma during the preparation of this comment in mid-November 2004. A group of university students had gathered around a large-screen television in one of the common areas of the Union at approximately 2:00 a.m. on the morning in question. The focus of the students' attention was an HBO documentary about Aileen Wuornos, the female prostitute who was responsible for the murders of seven men in Florida in the late 1980s and early 1990s. *AILEEN: LIFE AND DEATH OF A SERIAL KILLER* (HBO/Cinemax Documentary Films 2003) [hereinafter *AILEEN*]. Wuornos' life was the subject-matter of the 2003 film *MONSTER* (Newmarket Films 2003) and the character for whose portrayal Charlize Theron won an Academy Award for Best Actress. See Oscar.com at http://www.oscars.org/76academyawards/winners/03_lead_actress.htm (last visited Oct. 29, 2005).

The documentary detailed the life of Wuornos, including information about her childhood, her crimes, her time in prison while appealing her death sentence, and, ultimately, her execution. *AILEEN*, *supra*. While examining Wuornos's childhood, the documentary revealed that Wuornos's maternal grandparents had raised her after Wuornos's mother abandoned her during infancy. *Id.* The documentary also aired the prevalent rumor that Wuornos was fathered by her maternal grandfather. *Id.* Discussions with Wuornos's childhood acquaintances revealed that after Wuornos gave birth to a child at age thirteen, she lived, for a time, outdoors in the snowy woods near her home. *Id.* These acquaintances also revealed that they had witnessed some of the physical abuses Wuornos's grandfather inflicted upon her. *Id.*

The audience of university students revealed that it did not recognize Wuornos's humanity by its reaction to the facts about her childhood and later portrayals of her life in prison as a deeply disturbed, paranoid individual. The students laughed. The more outrageous the facts presented, the louder they laughed. Probably the most uproarious laugh of the night occurred when the documentary revealed the final words uttered by Aileen before her execution: "I will be sailing away with The Rock. I will be back with Jesus Christ, like on Independence Day. On June 6, just like the movie, on the big mother ship. I'll be back. I'll be back." *Id.*

131. *State v. Timmendequas*, 737 A.2d 55, 151 n.18 (N.J. 1999) (Handler, J., dissenting).

132. *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302, 328 (1989), *abrogated on other grounds by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

behavior and then creating a common sense means of ensuring that factfinders give full effect to these factors.

B. Patterns of Crime

No universal formula exists to quantify serial killer status. The FBI qualifies a serial killer as an individual who commits “[t]hree or more separate events in three or more separate locations with an emotional cooling-off period between homicides.”¹³³ Another organization uses the following definition:

A series of two or more murders, committed as separate events, usually, but not always, by one offender acting alone. The crimes may occur over a period of time ranging from hours to years. Quite often the motive is psychological, and the offender’s behavior and the physical evidence observed at the crime scenes will reflect sadistic, sexual overtones.¹³⁴

Although the stereotypical image of the serial killer is one of an intelligent Caucasian male, twenty to thirty years of age, who targets predominantly young women or men in their late teens or early twenties, in reality, the profile is much more varied.¹³⁵ Indeed, serial murderers are found throughout the globe,¹³⁶ have representatives from various ethnicities and both genders,¹³⁷ and are not universally as intelligent as popular films and novels portray them.¹³⁸

Although male serial murderers predominantly commit the types of sexually sadistic murders involving ritual mutilation,¹³⁹ necrophilia,¹⁴⁰ or cannibalism,¹⁴¹ the serial killer phenomenon is not exclusive to the male gender.¹⁴² Society commonly misperceives that only males serially murder. Such a misperception results from the graphic and visceral nature of their crimes, usually evincing strong elements of sexual sadism, which attracts more

133. SCHECHTER, *supra* note 27, at 7 (quoting J.E. DOUGLAS ET AL., *CRIME CLASSIFICATION MANUAL* (1992)).

134. *Id.* at 9 (quoting the National Institutes of Justice).

135. *Id.* at 28-104.

136. MORRISON & GOLDBERG, *supra* note 2, at 234 (“In any event, serial murder is an international phenomenon.”).

137. *See* SCHECHTER, *supra* note 27, at 28-104 (indicating that both genders and all races, ages, sexual preferences, and occupations have representatives among the serial killer population).

138. James Alan Fox & Jack Levin, *Multiple Homicide: Patterns of Serial and Mass Murder*, 23 *CRIME & JUST.* 407, 413 (1998).

139. *See supra* note 40.

140. *See supra* note 41.

141. *See supra* note 42.

142. SCHECHTER, *supra* note 27, at 30-41.

attention from the media when compared to the generally less explosive facts surrounding the crimes of female serial killers.¹⁴³

Another public misperception of serial killers concerns the killers' level of intelligence. Society's belief that serial murderers are exceptionally cunning and intelligent is not necessarily accurate.¹⁴⁴ While the most notorious serial murderers — those who have the greatest number of victims — tend to possess higher than average intelligence, less intelligent serial murderers exist. The killers of below average intelligence, however, are probably not as notorious because they do not have the ability to sustain their activities over a long period of time without being captured by law enforcement.¹⁴⁵ By extension, some individuals who fit the serial killer profile are never classified as such because they are discovered after committing only one murder.¹⁴⁶

The stereotype that most serial killers are between twenty and thirty years old¹⁴⁷ likely exists because most captured serial killers are in the twenty-to-thirty-five age range,¹⁴⁸ and many serial murderers commit their first murder at some point during their twenties or early thirties.¹⁴⁹ A possible reason why captured serial killers are usually within this age range is that most discovered serial murderers are found before they have sufficiently refined their methodology to avoid detection.¹⁵⁰ While serial killers captured in their late twenties or early thirties are ostensibly intelligent enough to avoid detection long enough to accumulate a significant number of victims, their capture is ultimately the result of their own human error.¹⁵¹ Although authorities have discovered and apprehended older serial murderers,¹⁵² they are a rarity.

143. *Id.* Although Aileen Wuornos was described as the first female serial killer, this portrayal is far from accurate. *Id.* at 30. Wuornos was unique because her methodology was peculiar for a woman. *Id.* at 31. The methodology of murder preferred by women is often poison, but Wuornos killed with a gun, an overtly violent and bloody method that is usually preferred by men. *Id.* at 30-31.

144. Fox & Levin, *supra* note 138, at 413.

145. *Id.* at 425 (“Only those with sufficient cunning to kill and get away with it are able to avoid apprehension long enough to amass the victims necessary to be classified as a serial killer.”).

146. PINCUS, *supra* note 48, at 130 (“One big difference, therefore, between serial and nonserial killers is that the nonserial killer is caught before he can evolve into a serial murderer.”).

147. *See supra* note 135 and accompanying text.

148. SEARS, *supra* note 36, at 45.

149. *Id.*

150. PINCUS, *supra* note 48, at 130.

151. SCHECHTER, *supra* note 27, at 349-51 (detailing ten examples of how serial killers were detected).

152. MORRISON & GOLDBERG, *supra* note 2, at 63-66 (discussing the unusual case of elderly Albert Fish, serial child murderer and cannibal, who was apprehended in the 1920s);

Perhaps the seeming rarity of older serial murderers is a function of their refined ability to avoid detection until advancing age renders them physically incapable of continuation.

C. The Composite of a Serial Killer — Commonalities

Arguably, a major component of society's fascination with individuals who commit serial murder is a desire to understand the underlying reasons for the crimes. The discussion about why serial killers commit the crimes they commit centers on the classic "mad or bad" debate, which focuses on whether the serial killer is simply motivated by some intrinsic evil or is the product of nature and environment.¹⁵³ Researchers in the fields of sociology, psychology, psychiatry, and neurology have attempted to explain the behavior of serial killers in terms of environment, sociology, biology, or various combinations of these factors.¹⁵⁴

1. Environmental Factors

Certain environmental commonalities are pervasive among individuals who commit serial murder.¹⁵⁵ Once this fact is demonstrated, the relevant question becomes *how* these experiences shape the individual's future behavior. Research has overwhelmingly revealed that the vast majority of known serial killers, and indeed perpetrators of violent crime in general, suffered various degrees and combinations of physical, sexual, and psychological abuse as children.¹⁵⁶ John Wayne Gacy, for example, suffered physical and psychological abuse at the hands of his father.¹⁵⁷ In addition to regularly beating young John, Gacy's father constantly berated his son for being a "sissy" and subjected the young boy to the sight of his own mother's beatings.¹⁵⁸ As a child, Albert Fish, an elderly child-murderer of the 1920s,¹⁵⁹ was sent to an orphanage where he had a schoolteacher who would strip a

SCHECHTER, *supra* note 27, at 183-87 (providing a brief biography of Fish).

153. Ed Cameron, *Some Psychoanalytic Aspects of Serial Homicide*, 24 CARDOZO L. REV. 2267, 2271-72 (2003) ("It has long been debated whether or not serial killers are mad or insane. . . . This is the old 'mad or bad' debate.").

154. *See, e.g.*, PINCUS, *supra* note 48, at 29 (explaining how aggressive behavior is a result of neurological deficits (biology), paranoid thoughts (biology and sociology), and abuse (environment)); ADRIAN RAINE, *THE PSYCHOPATHOLOGY OF CRIME: CRIMINAL BEHAVIOR AS A CLINICAL DISORDER* 26 (1993); SEARS, *supra* note 36.

155. PINCUS, *supra* note 48, at 129.

156. *Id.* at 27 ("The most vicious criminals have also been, overwhelmingly, people who have been grotesquely abused as children . . .").

157. SEARS, *supra* note 36, at 22.

158. *Id.*

159. SCHECHTER, *supra* note 27, at 51.

child naked and flog him or her in front of other children.¹⁶⁰ Mary Bell, a young girl in Britain convicted of murdering smaller children, was forced into prostitution by her mother, who would hold Mary down while men raped her.¹⁶¹

A concrete example of how childhood abuse directly translates into the later crimes of serial killers is the history of a serial murderer who killed six women and cut off the feet of most of them.¹⁶² During his childhood, both his father and his mother beat him.¹⁶³ The beatings administered by his father were ritualistic in that he would position the boy

on his bed, on his stomach or kneeling, a rope or belt immobilizing his hands behind his back . . . [with his] pants down to his ankles, thereby also immobilizing his legs. . . . He was struck ten to twenty times on his buttocks, back, thighs, and the soles of his feet with the belt. These beatings lasted for several minutes and were delivered two to three times a week over a ten-year period when [the child] was five until he was fifteen. . . . [The father] “got into it — he enjoyed it.”¹⁶⁴

If these beatings were not sufficient to give the boy a particular interest in feet, further inappropriate contact with his mother solidified this interest. His mother, dressed only in a slip that made no effort to conceal her nipples, buttocks, and pubic hair, would often require the child to massage her feet.¹⁶⁵ While the boy did this, his mother would “moan and gasp softly.”¹⁶⁶ The childhood abuse substantially involving feet relates directly to the idiosyncratic ritual performed by the individual when he later committed his serial murders and cut off the feet of his victims.

Some commentators have argued that a history of childhood abuse is not universally present among individuals who commit serial murder.¹⁶⁷ Failure to allege abuse, however, as in the case of Ted Bundy,¹⁶⁸ does not necessarily

160. *Id.* at 185.

161. *Id.* at 48.

162. PINCUS, *supra* note 48, at 130.

163. *Id.* at 144-45.

164. *Id.*

165. *Id.* at 146-47.

166. *Id.* at 147.

167. *See, e.g.,* SEARS, *supra* note 36, at 83 (“This theory of learned aggression . . . fails to explain serial killers such as Berkowitz or Bundy, whose childhood experiences were not marked by their parents’ violence or aggressive behavior. Indeed there is no evidence at all of severe abuse. Although violent behavior learned in childhood seems to be an important part of what motivates many serial murderers, it cannot be the determinate factor.”).

168. *Id.*

mean abuse was absent. Many violent offenders fail to allege childhood abuse for a number of reasons. Abused children who later become violent often display an inexplicable loyalty to the abuser, especially when the abuser was a parent,¹⁶⁹ a suppression of memories,¹⁷⁰ or the belief that abusive punishments were “fair and not excessive.”¹⁷¹ As a result, later offenders’ reports of the extent of the abuses are “minimized and sanitized.”¹⁷² In addition to the violent offenders’ failures to report abuse, “family members may have strong motivations to hide the details of the killer’s social history, especially when it is full of the grossest sexual abuse and/or severe physical abuse.”¹⁷³

Assuming the existence of childhood environmental abnormalities, various disciplines theorize regarding *how* the abnormality shapes the later offender’s behavior. Some researchers have observed in serial killers the consistent presence of abnormalities in the mother-child relationship.¹⁷⁴ “Mother may be rejecting and punitive or, to the contrary, seductive, at times openly so, and over-protective and infantilizing her son.”¹⁷⁵ Freudian theorists posit the argument that, as a result of dysfunctional maternal relationships, sexual sadist serial murderers, most of whom are male, are products of incomplete Oedipal phases.¹⁷⁶ The absence of the father, the abandonment or other rejection by the mother, or the existence of inappropriate maternal intimacy results in the continuation of the maternal figure as the object of the child’s drive.¹⁷⁷ In such cases, “the drive, which is always sexual, is not relegated to a socially acceptable function.”¹⁷⁸ Accordingly, “[s]ince the prohibition of incest is never adequately instilled . . . *nothing* is prohibited.”¹⁷⁹ This absence of prohibition purports to explain the extreme behavior carried out by the sexual sadist.¹⁸⁰ Where barriers are either unknown or nonexistent, the child later experiences difficulty in developing socially appropriate boundaries.¹⁸¹

169. PINCUS, *supra* note 48, at 147-48.

170. *Id.* at 129 (“Many times the subject does not remember or denies the abuse.”).

171. *Id.* at 42.

172. *Id.* at 43.

173. *Id.* at 129.

174. Cameron, *supra* note 153, at 2279-81.

175. EUGENE REVITCH & LOUIS B. SCHLESINGER, *PSYCHOPATHOLOGY OF HOMICIDE* 174 (1981).

176. Cameron, *supra* note 153, at 2275-76.

177. *Id.*

178. *Id.* at 2279.

179. *Id.* at 2280 (emphasis added).

180. *Id.* at 2281. Examples of the extreme behavior of the sexual sadist serial killer include mutilation, cannibalism, and necrophilia. SCHECHTER, *supra* note 27, at 206.

181. Cameron, *supra* note 153, at 2279-80.

Theorists also postulate regarding how childhood experiences shape the serial killer from a sociological perspective.¹⁸² From this perspective, observing parental reactions to stressful stimuli shapes a child's ability to react to similar situations.¹⁸³ For example, "abusive parents, or those whose discipline is harsh or inconsistent, raise children who see violence as the only means of dealing with difficulties in life[;] . . . the serial killer understands only that aggressive behavior offers relief."¹⁸⁴

Consistent with the idea that serial killers share certain common characteristics, commentators have argued that the existence of a so-called "psychopathological triad" is an early indicator of individuals who are predisposed to serially murder.¹⁸⁵ The triad includes: (1) bed-wetting lasting into adolescence; (2) pyromania; and (3) precocious sadism, usually in the form of torturing small animals during childhood or early adolescence.¹⁸⁶ Although the triad does not address the "why" behind the serial murderer's actions, it adds to the weight of the evidence indicating that discernible factors exist supporting the proposition that individuals committing serial murder have common experiences and modes of development shaping their behavior later in life.¹⁸⁷

2. *Biological Factors*

In addition to sharing similar environmental circumstances, neurological studies support the theory that individuals who commit serial murder also share certain biological characteristics.¹⁸⁸ At the forefront of biological factors behind the phenomenon of serial murder is damage to the frontal and temporal lobes of the brain.¹⁸⁹ Neurologists believe these areas of the brain affect behavior, personality, and emotion,¹⁹⁰ and certain experts indicate that damage to these areas inhibits an individual's ability to exercise impulse control.¹⁹¹ Researchers posit that the anger and hostility demonstrated by individuals with injuries to these areas may be the result of a postconcussional syndrome that subjects the injured individual to "headaches, irritability, and sensitivity to noise."¹⁹²

182. SEARS, *supra* note 36, at 79-101.

183. *Id.* at 82.

184. *Id.*

185. *See, e.g.*, SCHECHTER, *supra* note 27, at 25.

186. *Id.*

187. PINCUS, *supra* note 48, at 129.

188. SEARS, *supra* note 36, at 103-18.

189. *Id.* at 104.

190. *Id.*

191. PINCUS, *supra* note 48, at 19.

192. RAINE, *supra* note 154, at 194-95.

Another biological explanation contributing to the behavior of many serial killers centers on damage to the cerebral cortex and the reticular activating system (the "RAS").¹⁹³ The cerebral cortex is the area of the brain that reacts to stimuli from the environment.¹⁹⁴ Neurological or chemical deficiencies may cause the RAS to block "otherwise stimulating activity from reaching the cerebral cortex."¹⁹⁵ Such blockage, in turn, impairs an individual's ability to receive stimulation from the everyday environment.¹⁹⁶ Accordingly, these studies indicate that a serial killer with a deficient RAS might be compelled to commit acts of increasing violence to receive stimulation.¹⁹⁷

Other biological and neurological studies focus on the serial killer's ability to commit brutal murders, often without compunction or remorse.¹⁹⁸ These studies center on the amygdala, the portion of the brain involved in the processing of emotional cues.¹⁹⁹ Individuals with damage to the amygdala are apparently unable to detect fear or sadness in others; "[w]hat they seem to lack is empathy."²⁰⁰

The preceding biological research indicates that brain damage and deficiencies impair impulse control, raise the threshold of activity necessary to achieve stimulation, and suppress empathetic responses to suffering in others.²⁰¹ Recognizing such facts, the appropriate inquiry becomes how these damages or deficiencies occur and why they are especially prevalent among individuals who commit serial murder. A possible answer to the question lies in the high correlation between individuals who commit serial murder and the severe head trauma resulting in brain damage that these individuals sustain at some point before the murders began.²⁰²

193. SEARS, *supra* note 36, at 107.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 59 (observing that the serial killer "is not completely devoid of all feelings; it is only the emotions associated with empathy for others that he lacks").

199. Spence, *supra* note 50, at 38.

200. *Id.*

201. See SEARS, *supra* note 36, at 59, 106-07.

202. See PINCUS, *supra* note 48, at 129 ("[T]hough brain damage is a frequent feature of serial killers, the damage seems less severe than in nonserial killings."); RAINE, *supra* note 154, at 193; SEARS, *supra* note 36, at 111-12. Raine's research provides an explanation for how the lessened degree of brain damage in serial as opposed to non-serial murderers operates to improve their effectiveness. See RAINE, *supra* note 154, at 98-99. Raine indicates that the prefrontal cortex operates more effectively in serial than nonserial murderers and "the presence of prefrontal activity in the multiple murderer would be consistent with the planned, careful execution of [serial] murders [as opposed] to the more impulsive acts of the one-time murderer." *Id.* at 149.

In a study of death row inmates, with participants not exclusively drawn from the serial killer population, all of the participants “had a history of severe head injury.”²⁰³ Leading neurologists who advocate criminal behavior as a clinical disorder carefully explain that even though neurologists have not definitively established a causal link between head injury and aggressive behavior, the empirical data certainly supports this conclusion.²⁰⁴ Specifically,

epidemiological data on head injuries for whites show that the highest rates of head injury occur in the 15-19 year age group or the 10-20 year age group, with rates at those ages being nearly twice the overall occurrence. This major elevation in the age curve occurs at an earlier age than the peak for violent offending, which tends to occur in the late teens and early twenties, as opposed to property offenses, which peak earlier. Again, these data do not prove a causal link, but they are at least consistent with a model that suggests that head injury precedes violence and crime.²⁰⁵

Other possible contributing causes of brain damage and deficiencies include genetic flaws and birth complications.²⁰⁶ Studies show significant correlation between the perinatal trauma incurred during delivery and violence and impulsive criminal offenses.²⁰⁷ Additionally, twin and adoption studies, though tenuous, provide promising data that genetic factors function in tandem with environmental factors to influence psychopathic crime.²⁰⁸ Although researchers emphasize that there is no “crime gene,”²⁰⁹ some theorize that genetic abnormalities operate on a synaptic level to create neurological and psychiatric illnesses.²¹⁰ An important and oft-observed effect of these illnesses is paranoia.²¹¹

Whether incurred through head trauma, genetic defects, or birth complications, a wealth of empirical data exists that reveals an overwhelming likelihood that a person participating in the sort of aggressive, antisocial behavior common to serial killers will also, upon inspection, possess brain function abnormalities consistent with those discussed above.²¹² Attempting to explain the degree of antisocial behavior exhibited by serial murderers as

203. RAINE, *supra* note 154, at 193.

204. *Id.*

205. *Id.* at 193-94 (citations omitted).

206. *See id.* at 76-78, 195-98.

207. *Id.* at 195-96.

208. *Id.* at 78-79.

209. PINCUS, *supra* note 48, at 56.

210. *Id.* at 122.

211. *Id.* at 57.

212. *Id.* at 84-85.

merely a function of biological aberrations, however, risks oversimplification because not all people who exhibit these sorts of abnormalities commit serial murder.²¹³

3. Synthesis of Biological and Environmental Factors

Environmental and biological factors may combine to form individuals with a strong predisposition toward the commission of compulsive and methodical²¹⁴ serial murder. Researchers consistently observe the following three factors when assessing the serial killer's physical examination and environmental history: (1) childhood abuse, (2) neurological defects, and (3) paranoid thoughts.²¹⁵ An explanation exists for the way environmental and biological factors work together to shape the serial murderer.²¹⁶ First, the childhood sexual, physical or psychological abuse creates perverse urges that the serial murderer carries within himself,²¹⁷ and because of such abuse, the threshold of what the serial murderer deems unimaginable or abhorrent is dramatically lowered; "the horror of their acts probably is an echo of the ghastliness of the murderers' own childhood experience."²¹⁸ Paranoia, which is indicative of mental illness, functions in tandem with other neurological deficiencies to inhibit the individual's impulse control and restrict the experience of emotion.²¹⁹ Succinctly stated, "[a]buse generates the violent urge. Neurologic and psychiatric diseases of the brain damage the capacity to check that urge."²²⁰

Even if this explanation does not definitively describe the motivation behind serial murder, it encompasses the commonalities researchers have observed in known serial murderers. Understanding how the commonalities combine to create the compulsive aggressive behavior of serial killers is certainly desirable, both to those who seek to treat these individuals and to those who must encounter these individuals in the criminal justice system. Unfortunately, definitive knowledge beyond theoretical conjecture may not be possible in the near future, but the observed commonalities exist almost universally in known serial killers.²²¹ The nearly universal prevalence of these common traits indicates that these individuals are not merely evil beings, but are instead

213. *See id.* at 27.

214. *Id.* at 155.

215. *Id.* at 129.

216. *Id.* at 155-56.

217. *Id.* at 155.

218. *Id.* at 156.

219. *See id.* at 19.

220. *Id.*

221. *Id.* at 129.

shaped by their individual circumstances. In light of these known commonalities, if society dismisses the idea that serial murders are intrinsically evil and seriously entertains the idea that serial killer classification is a clinical disorder, then the treatment of the serial killer within the criminal justice system needs to be reevaluated and reformed to better reflect the policies underlying the system.²²²

IV. Analysis and Integration

A. Present Treatment of Serial Killer Status as Aggravating Factor

In jurisdictions employing weighing sentencing schemes, the classification of the defendant's particular circumstances as an aggravating or a mitigating circumstance plays a substantial role in the issuance of a death sentence or a sentence of life in prison. In many weighing jurisdictions, the process dictates the result when the defendant is a serial killer.²²³ States utilize two methods to ensure that classification as a serial killer translates into a statutory aggravating factor. First, some states expressly address serial murderers in the language of their aggravating circumstance statutes.²²⁴ Second, courts have interpreted statutory language not explicitly referring to serial murderers in a

222. For a discussion of the policies underlying the U.S. Supreme Court's death penalty jurisprudence, see *supra* Part II.E.

223. See *infra* notes 224-26.

224. See, e.g., ALA. CODE § 13A-5-49(10) (LexisNexis Supp. 2004) ("The capital offense was one of a series of intentional killings committed by the defendant."); COLO. REV. STAT. ANN. § 18-1.3-1201(5)(p) (West 2005) ("The defendant intentionally killed more than one person in more than one criminal episode."); DEL. CODE ANN. tit. 11, § 4209(e)(1)(k) (2004) ("The defendant's course of conduct resulted in the deaths of 2 or more persons where the deaths are a probable consequence of the defendant's conduct."); FLA. STAT. ANN. § 921.0016(3)(c) (West 2001) ("The offenses before the court for sentencing arose out of separate episodes; the primary offense is scored at offense level 4 or higher; and the defendant has committed five or more offenses within a 180-day period that have resulted in convictions."); IDAHO CODE ANN. § 19-2515(9)(h) (2004) ("The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society."); NEV. REV. STAT. § 200.033(9) (2004) ("The murder was committed upon one or more persons at random and without apparent motive."); OHIO REV. CODE ANN. § 2929.04(A)(5) (LexisNexis 2003) ("Offender was [previously] convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender."); TENN. CODE ANN. § 39-13-204(i)(12) (2003) ("The defendant committed 'mass murder,' which is defined as the murder of three (3) or more persons whether committed during a single criminal episode or at different times within a forty-eight-month period."); UTAH CODE ANN. § 76-5-202(1)(b) (2004) ("[T]he homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed . . .").

manner practically equating statutory serial killer status with an aggravating circumstance.²²⁵ Whether by express language or court interpretation, the result is the same: classification as a serial killer is an aggravating circumstance.

At least six states using weighing sentencing schemes have enacted legislation expressly classifying the activity of serial killers as an aggravating circumstance.²²⁶ Tennessee was the first state to expressly classify serial killer status as an aggravating circumstance by adopting the following statutory language: “The defendant committed ‘mass murder,’ which is defined as the murder of three (3) or more persons whether committed during a single criminal episode or at different times within a forty-eight month period.”²²⁷ The language of a Delaware statute also evinces a straightforward intent to classify serial killer status as an aggravating circumstance: “The defendant’s course of conduct resulted in the deaths of 2 or more persons where the deaths are a probable consequence of the defendant’s conduct.”²²⁸ The plain language of these statutes explicitly refers to serial killers because the statutes both

225. *See infra* notes 236-38 and accompanying text. For statutes amenable to such interpretation, see, for example, CAL. PENAL CODE § 190.2(a)(2)-(3) (West 1999) (“The defendant was convicted previously of murder in the first or second degree. . . . The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree.”); CONN. GEN. STAT. ANN. § 53a-54b(3) (2003) (referring to “murder committed by one who has previously been convicted of intentional murder”); IND. CODE ANN. § 35-50-2-9(b)(7)-(8) (LexisNexis 2004) (“The defendant has been convicted of another murder. . . . The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.”); MISS. CODE ANN. § 99-19-101(5)(b) (West 1999) (“The defendant was previously convicted of another capital offense of or of a felony involving the use or threat of violence to the person.”); MO. ANN. STAT. § 565.032(2)(1) (West 1999) (“The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions.”); NEB. REV. STAT. § 29-2523(1)(a)&(f) (Supp. 2004) (“The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial prior history or serious assaultive or terrorizing criminal activity. . . . The offender knowingly created a great risk of death to at least several persons.”); N.J. STAT. ANN. § 2C:11-3(c)(4)(a) (West 2005) (“The defendant has been convicted, at any time, of another murder.”); 12 OKLA. STAT. § 701(1)-(2) (2001) (“The defendant was previously convicted of a felony involving the use or threat of violence to the person. . . . The defendant knowingly created a great risk of death to more than one person.”); 42 PA. CONS. STAT. ANN. § 9711(d)(11) (West Supp. 2005) (“The defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue.”); S.D. CODIFIED LAWS § 23A-27A-1(1) (2004) (“[T]he offense of murder was committed by a person who has a felony conviction for a crime of violence . . .”).

226. *See supra* note 224.

227. TENN. CODE ANN. § 39-13-204(i)(12) (2003).

228. DEL. CODE ANN. tit. 11, § 4209 (e)(1)(k) (2001).

require multiple offenses over a marked period of time.²²⁹ Additionally, the language of the Tennessee statute referring to committing murder at different times within a forty-eight month period applies to serial killers because it reflects the tendency of serial killers to commit their acts in separate episodes.²³⁰ Furthermore, the “course of conduct” language in the Delaware statute arguably refers to serial killers by recognizing the ritualistic aspect of the crimes committed by serial murderers.²³¹

Even if the plain language of these statutes does not clearly implicate serial killer status, the courts’ application of these statutes supports such a conclusion.²³² The Tennessee Supreme Court interpreted that the “within a period of forty-eight . . . months” language applied to “serial or mass murders perpetrated over an extended but definite period and committed in a similar fashion as part of a pattern.”²³³ Additionally, the Tennessee court recognized that the legislative history behind the statutory amendment incorporating the aforementioned aggravating circumstance into the sentencing scheme revealed a reaction to the crimes “committed by Wayne Williams in Atlanta, or by the ‘Son of Sam’ in New York.”²³⁴ Similarly, the Supreme Court of Delaware interpreted the “course of conduct” aggravating circumstance as particularly applicable to a defendant who had committed serial murder because “the record reflected, beyond a reasonable doubt, [that] he was a relentless serial murderer.”²³⁵

In contrast to the states that explicitly address serial killer status as a statutory aggravating circumstance, other states achieve the same result by applying statutes that, on their faces, do not specifically address serial killers.²³⁶ An example of such a statute is the following aggravating circumstance adopted by the legislature of New Jersey: “The defendant has

229. SCHECHTER, *supra* note 27, at 7 (The FBI’s definition of serial killers has three elements: “(1) Quantity. There have to be at least three murders. (2) Place. The murders have to occur at different locations. (3) Time. There has to be a ‘cooling-off period’ — an interval between the murders that can last anywhere from several hours to several years.”).

230. *See id.*

231. *Pennell v. State*, 604 A.2d 1368, 1375 (Del. 1992). Regarding the ritualistic nature of serial killers’ crimes, see *PINCUS*, *supra* note 48, at 29.

232. *See State v. Bobo*, 727 S.W.2d 945, 951-52 (Tenn. 1987) (holding that the mass murder aggravating circumstance was improperly applied to the defendant where the defendant had not been convicted of two other murders about which the state introduced evidence during the penalty phase of the third murder); *Pennell*, 604 A.2d at 1375 (finding no error in the trial court’s determination that the “course of conduct” aggravating factor existed where defendant had tortured, killed, and mutilated four women).

233. *Bobo*, 727 S.W.2d at 951-52.

234. *Id.* at 951.

235. *Pennell*, 604 A.2d at 1378.

236. *See supra* note 225.

been convicted, at any time, of another murder.”²³⁷ This statute could plainly apply to anyone previously convicted of a murder in any situation not exclusive to the serial murder paradigm. The Supreme Court of New Jersey, however, reasoned that the factfinder appropriately determined that this aggravating circumstance was present in the case of a defendant who had murdered at least three victims according to the serial murder paradigm because “[t]he legislative history of the 1985 amendment discloses that the Legislature specifically intended to permit the use of convictions on appeal to insure that serial killers do not evade the consideration of their multiple murder convictions as aggravating factors.”²³⁸

Of the twenty-three jurisdictions employing weighing sentencing schemes, at least nineteen equate serial killer status with a statutory aggravating factor either through the express language of the statute or by judicial application.²³⁹ Significantly, in these states, classification as a serial killer likely has an appreciable impact on whether aggravating factors outweigh mitigating factors for capital punishment sentencing purposes.²⁴⁰ Plainly stated, serial killer status in weighing jurisdictions is a matter of life and death.²⁴¹ If the behavior of serial killers is consistent with a disorder motivated by a compulsion,²⁴² however, then perhaps state legislatures should reevaluate these statutes.

B. Serial Killer Status as Mitigating Factor

1. Quantifiable Means of Determining Serial Killer Classification for Mitigation Purposes

Because of a potential negative reaction to a proposal that classifies serial killer status as a mitigating circumstance, a scheme permitting such a result should employ strict standards. Although a state has virtually unlimited discretion to determine whether the state or the defendant bears the burden of proving the existence of mitigating circumstances and to determine the applicable standard of proof,²⁴³ the following model seeks to approach these issues in a manner that respects the states’ established schemes while recognizing the unique context of serial murder.

The model is straightforward for states whose statutory language expressly targets serial killer status as an aggravating circumstance. First, these states

237. N.J. STAT. ANN. § 2C:11-3(c)(4)(a) (West 2005).

238. *State v. Biegenwald*, 542 A.2d 442, 445 (N.J. 1988).

239. *See supra* notes 224-25 and accompanying text.

240. *See supra* Part II.D.

241. *See supra* Part II.D.

242. *See supra* Part II.D.

243. *See supra* Part II.C.

must delete the serial murder aggravating circumstance from the statute.²⁴⁴ Second, such states must create a statutory mitigating circumstance recognizing the disorder. Third, the defendant must bear the burden of proving the existence of the mitigating disorder with clear and convincing evidence.²⁴⁵ This third requirement is appropriate because the Court has determined that “[i]t is not inconsistent with a defendant’s due process rights to require him to shoulder the burden of proof on issues raised in mitigation of punishment.”²⁴⁶ Additionally, some states require the clear and convincing standard of proof to establish mitigating factors.²⁴⁷

To prove the existence of the mitigating disorder, the defendant must offer proof of three elements: (1) childhood abuse; (2) neurological impairment demonstrated either by extrinsic evidence consistent with such impairment, including head trauma and birth complications, or by expert testimony, including qualitative neurological testing; and (3) paranoia demonstrated either by testimony of witnesses acquainted with the defendant before or during the timeframe of the murders, or by expert diagnosis of psychiatric disease consistent with paranoia.²⁴⁸

In states where the express language of the aggravating circumstance statute does not isolate serial murderers but the judicial application achieves such a result, the model is even less complicated. The state must simply create the statutory mitigating circumstance, and the defendant must prove the above three criteria with clear and convincing evidence.

244. The removal of the statutory aggravating circumstance is particularly appropriate where the circumstance specifically addresses serial killers, such as the statutes listed in note 224, *supra*, because if not removed, recognition of the serial killer disorder as a mitigating circumstance would be cancelled out by the continued existence of the serial killer aggravating circumstance.

245. This standard of proof requires “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.” BLACK’S LAW DICTIONARY 596 (8th ed. 1999).

246. *Naasz v. Dretke*, No. Civ.A.3:01-CV-1058-M, 2003 WL 22329017, at *3 (N.D. Tex. Oct. 6, 2003) (citing *Patterson v. New York*, 432 U.S. 197, 207-08 (1977)).

247. *See, e.g., Koleles v. State*, 660 P.2d 1199 (Alaska 1983) (requiring the criminal defendant to prove mitigating factors by clear and convincing evidence).

248. *See PINCUS, supra* note 48, at 29, 154-56. Because Pincus’s research indicates these three factors exist almost universally among serial killers, the mitigating circumstance should apply when the three factors are proven to exist when offered in the serial murder context.

2. *Synthesis of the Policy Reasons Behind the Mitigation Doctrine and Serial Killer Status as a Disorder*

The previously proposed model ensures the procedural protections espoused by the U.S. Supreme Court in *Woodson v. North Carolina*,²⁴⁹ *Lockett v. Ohio*,²⁵⁰ and those cases' individualized consideration progeny because the model provides a means of fulfilling the policy considerations underlying those cases. In contrast, schemes automatically classifying serial killer status as an aggravating circumstance impermissibly permit jurors to impose capital punishment predicated on the class of offense alone.²⁵¹ In *Lockett*, the U.S. Supreme Court definitively stated that the unique nature of death penalty cases requires that the factfinder possess "the fullest information possible" about the circumstances of each individual defendant.²⁵² The model proposed herein provides, as contemplated by the Court, an effective and logical mechanism to enable factfinders not only to consider the mitigating evidence with which they are presented, but also to give effect to that evidence as mandated by *Penry v. Johnson*.²⁵³

Further, the *Woodson* court highlighted the importance of guiding factfinders in imposing a sentence commensurate not only with the crime committed but also with the individual defendant's culpability.²⁵⁴ To make such a determination, the Court in *Penry v. Lynaugh* articulated that the criminal justice system should provide factfinders with tools to facilitate a reasoned, moral response rather than an unguided, emotional one.²⁵⁵ Undeniably, crimes committed by serial killers are often brutal, grotesque, and nauseatingly shocking.²⁵⁶ The extreme nature of the crimes committed, however, combined with pop culture and the media's tendency to dehumanize serial killers²⁵⁷ leads to the logical conclusion that jurors exposed to pop culture's portrayal of serial killers will most likely respond emotionally to the visceral nature of the crimes unless the criminal justice system provides them

249. *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

250. *Lockett v. Ohio*, 438 U.S. 586 (1978).

251. *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (plurality opinion).

252. *Lockett*, 438 U.S. at 603.

253. 532 U.S. 782, 797 (2001); *see also supra* note 108.

254. *Woodson*, 428 U.S. at 298 (noting that "individual culpability is not always measured by the category of crime committed").

255. *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 328 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

256. *See supra* Part III.B (discussing the often sexually sadistic nature of the crimes serial killers commit).

257. *See supra* Part III.A.

with a clear framework in which they must make a reasoned, moral response.²⁵⁸

The proposed model provides this logical framework because it permits the finder of fact to consider how mitigating evidence, including childhood abuse, neurological impairment, and paranoid thoughts, can achieve greater import when considered in the aggregate rather than individually. The Court's *Eddings* decision recognized the importance of considering mitigating factors in their totality, and not individually, in certain circumstances.²⁵⁹ In the case of serial killers, this type of wholistic consideration is particularly appropriate, especially considering that this combination of factors is known to be almost always present among those who commit serial murder.²⁶⁰ By facilitating and legitimizing consideration of mitigating circumstances in their entirety, states provide a more accurate and reliable method for factfinders to measure the individual serial killer's actual culpability for the offenses committed.²⁶¹ This accuracy and reliability is the paramount concern for sentencing in capital cases because "death is qualitatively different."²⁶²

Finally, and importantly, the proposed model does not dictate the sentence that the sentencer must impose.²⁶³ Instead, the proffered model only guides the sentencer to give appropriate weight to all of the evidence *Lockett* permits a defendant to present, which is any and all evidence that a finder of fact could consider mitigating.²⁶⁴ The Court has repeatedly articulated that imposing the death penalty is not per se cruel and unusual punishment.²⁶⁵ Accordingly, use of the proposed model leads the sentencer to one of three possible conclusions: (1) the evidence presented failed to establish that the statutory mitigating disorder was present, and the balance of evidence weighs in favor of imposing the death penalty; (2) the evidence presented sufficiently established the presence of the statutory mitigating disorder, but nonetheless, the balance of

258. See *State v. Timmendequas*, 737 A.2d 55, 151 n.18 (N.J. 1999) (Handler, J., dissenting) (reporting that a juror revealed that mention of the words "serial killer" made him think of a "beyond hope situation").

259. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

260. PINCUS, *supra* note 48, at 129.

261. See *Penry v. Johnson (Penry II)*, 532 U.S. 782, 797 (2001) (quoting *Johnson v. Texas*, 509 U.S. 350, 381 (1993) (O'Connor, J., dissenting) ("[A] sentencer [must] be allowed to give full consideration and full effect to mitigating circumstances.") (alteration in original)).

262. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

263. See *supra* Part IV.B.2.

264. *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949) (holding that the sentencer should be in "possession of the fullest information possible"))).

265. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion); *Woodson*, 428 U.S. at 285.

all the evidence weighs in favor of the death penalty; or (3) the mitigating circumstance was present, and its presence tips the balance toward a life sentence rather than death. Even though death is still a possible outcome under the proposed model, its imposition would occur in accordance with a process designed to provide a heightened level of rationality and morality.

C. Counterarguments and Rebuttal

Acceptance of the model proposed by this comment is only plausible upon an understanding of the nature and causes of the serial killer disorder. Additionally, the policies and practicalities underlying the criminal justice system in general, and capital punishment sentencing jurisprudence in particular, must be appreciated before the model is accepted. Without such an understanding, the idea of modifying sentencing schemes to consider serial killer status as a mitigating circumstance seems patently absurd because the modification would permit incongruous results. Simply stated, a person who has murdered two, three, fifteen, or even fifty human beings in a premeditated manner could receive a less severe sentence than a person who had murdered only one person, and the less severe sentence is possible precisely *because* the individual killed more than one person according to a pattern. Arguments against the proposition that sentencing schemes should consider serial killer status as a mitigating circumstance fail, however, in light of a true understanding of both the nature of the serial killer disorder and the criminal justice system.

The first justification for considering serial killer status as aggravating rather than mitigating recognizes the state interests of retribution and deterrence in applying the death penalty.²⁶⁶ The state interest in retribution appears especially heightened in the context of an offender who has killed more than one person under circumstances indicating that the victims were subjected to sexual sadism.²⁶⁷ The states' retributive interest is insufficient, however, because it impermissibly bases the sentence of death upon consideration of the crimes alone without giving consideration to the individual circumstances of the defendant.²⁶⁸ Further, requiring a convicted offender to spend life in prison without the possibility of parole does not frustrate the states' retributive interests.²⁶⁹ Lastly, states do not deter serial killers by imposing a sentence of capital punishment upon them. A person suffering from a compulsive disorder is not deterred by even his intelligent

266. *See Gregg*, 428 U.S. at 182-83.

267. *See supra* Part III.B.

268. *See Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (plurality opinion).

269. CARTER & KREITZBERG, *supra* note 59, § 2.02, at 13.

understanding of possible consequences because his problem is one of impulse control, not the result of a conscious cost-benefit analysis.²⁷⁰

A second argument supporting serial killer status as an aggravating factor is the proposition that current procedures imposing a death sentence on serial killers function to protect society from inalterably dangerous murderers.²⁷¹ Advocates of this position rely on the following three distinct rationales: (1) the offender will not serve the remainder of his life in prison;²⁷² (2) if the offender is released from prison, society will be in danger because serial killers are unamenable to treatment;²⁷³ and (3) even if serial killers remain in prison, other inmates are in danger.²⁷⁴ Each of these justifications contain fundamental errors.

The first concern is that some procedural loophole will eventually permit the release of the offender into free society where he will once again prey on innocent victims.²⁷⁵ This fear's existence is especially apparent in light of studies revealing the extent to which jurors and other lay persons misapprehend sentencing options providing for life in prison without the possibility of parole.²⁷⁶ The common misconception is that offenders under such a sentence may nonetheless manipulate the system and obtain release.²⁷⁷ States are only required to allow defendants to provide accurate information about the likelihood of parole eligibility when the aggravating factor of future dangerousness is at issue.²⁷⁸ States are thus apparently free to permit jurors to believe that parole eligibility is a possibility for a particular offender when, in fact, such a possibility might not exist.²⁷⁹ This misconception can be remedied by fully instructing jurors about the actual application of any sentence the jury might impose on an offender who is eligible for the death penalty and by informing jurors that a sentence of life in prison without the possibility of

270. PINCUS, *supra* note 48, at 17 (explaining that the triad of paranoid thoughts, childhood abuse, and neurological deficits also exists in other violent and sexual offenders and illustrating how a pedophile who understood that pedophiles are targeted by other inmates in prison did not modify his behavior in conformance with this understanding).

271. See Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 4 (1993) (explaining how prosecutors emphasize a defendant's future danger to society in a way that creates fear in jurors about the results if the offender escaped or obtained release).

272. *See id.*

273. *Id.*

274. See PINCUS, *supra* note 48, at 156.

275. See Eisenberg & Wells, *supra* note 271, at 4.

276. CARTER & KREITZBERG, *supra* note 59, § 13.05, at 169.

277. *Id.*

278. *Simmons v. South Carolina*, 512 U.S. 154, 164 (1994).

279. CARTER & KREITZBERG, *supra* note 59, §13.05, at 173.

parole equates to a natural death sentence. In other words, the individual will never be released from prison because he will never be eligible for parole consideration or early release.²⁸⁰

The second argument of society-protection advocates follows from the first. Advocates fear a serial killer who might somehow legally obtain release from prison will pose a risk to the public.²⁸¹ The prospect of a serial murderer's eventual release from prison is especially frightening in light of the argument that serial killers are inalterable recidivists who are unamenable to treatment.²⁸² For this reason precisely, prosecutors often recognize offenders' capacity for future dangerousness when seeking a sentence of death.²⁸³ Indeed, a strong argument exists that because of the unique manner in which environment and biology shapes serial killers, they cannot be completely cured.²⁸⁴ As the Court explained in *Penry v. Lynaugh*, however, espousing the argument that an individual's frailties render that person unamenable to treatment, and thus inalterably dangerous, operates as a "two-edged sword."²⁸⁵ To provide the factfinder with sufficient information to permit it to give full effect to the mitigating evidence, the serial killer defendant is also admitting the compulsive nature of his behavior, which will likely lead directly to a finding that the future dangerousness aggravating factor exists. Because of the high likelihood that a serial murderer will continue to be a danger if not contained,²⁸⁶ states must protect their citizens by ensuring that serial murderers spend the remainder of their lives in prison without the possibility of parole. This goal can be accomplished by mandating that if the factfinder determines that the statutory mitigating factor proposed by the model is found, the minimum possible sentence is life imprisonment without the possibility of parole. This approach ensures that the offender never obtains release from prison nor poses a risk to the public.

Third, society-protection advocates assert that even if incarcerating serial killers protects the free section of society, the prison population and prison

280. See Eisenberg & Wells, *supra* note 271, at 15.

281. *Id.* at 4.

282. See *State v. Timmendequas*, 737 A.2d 55, 151 n.18 (N.J. 1999) (Handler, J., dissenting) (discussing juror's opinion that serial killers are beyond hope).

283. See, e.g., *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302, 323 (1989) (requiring the jury to answer the special issue of "whether there is a probability that the defendant would commit criminal acts of violence that constitute a continuing threat to society"), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); Eisenberg & Wells, *supra* note 271, at 4.

284. See, e.g., SEARS, *supra* note 36, at 154 (explaining that many professionals question the value of attempting to rehabilitate serial killers with psychotherapy because any apparent progress is merely a function of the serial killer's manipulation of the therapist).

285. *Penry I*, 492 U.S. at 324.

286. *Id.*

employees are still at risk and deserve protection.²⁸⁷ The flaw in this argument is perhaps the flaw most easily identified and overcome. Research reveals that the structure of prison life serves to provide an effective control mechanism over the serial killer's compulsive tendencies.²⁸⁸ A possible explanation for this phenomenon is that incarceration prevents these individuals from murdering according to their idiosyncratic predilections because "[t]he need for the right time, place, and victim both stamps these acts as bizarre and protects fellow inmates from the serial killer's vulnerabilities to violent action."²⁸⁹ Accordingly, the portion of society associated with prisons is apparently effectively protected while the serial killer is incarcerated.

A final counterargument against the proposed model is that requiring the factfinder to consider the mitigating evidence in the aggregate imposes too much restraint on the discretion of the factfinder by dictating the *weight* the factfinder must give to the evidence.²⁹⁰ This argument fails because, rather than dictating the weight the factfinder must give to the evidence, the proposed model permits the factfinder to determine the weight the evidence receives based on "the fullest information possible," in accordance with the driving policy behind *Lockett*.²⁹¹ As *Eddings* recognized, sometimes the factfinder's ability to consider the fullest information possible requires external guidance to place the information in the appropriate context.²⁹² The context of mitigating evidence is particularly important with regard to serial killers because of the manner in which child abuse, neurological defect, and mental illness resulting in paranoid thoughts function to influence the compulsive behavior of the serial killer.²⁹³ States can provide the appropriate external guidance by adopting the proposed measures to ensure that jurors base their decisions on a sufficient understanding of the unique manner in which these three factors operate in the development of the serial killer.

V. Conclusion

The criminal justice system's current treatment of persons classified as serial killers with regard to the sentencing procedure in capital cases does not demonstrate consistency with policies underlying the constitutional

287. See PINCUS, *supra* note 48, at 156.

288. *Id.*

289. *Id.*

290. *Eddings v. Oklahoma*, 455 U.S. 104, 122 (1982) (Burger, C.J., dissenting) (explaining that the trial court considered all of the defendant's mitigating evidence but stating the U.S. Supreme Court should not dictate what weight that evidence must be given).

291. *Lockett v. Ohio*, 438 U.S. 586, 603 (1978).

292. *Eddings*, 455 U.S. at 115 (majority opinion).

293. See *supra* Part III.C.3.

requirement of individualized consideration. As demonstrated in the recent cases of *Wiggins v. Smith*²⁹⁴ and *Williams v. Taylor*,²⁹⁵ the U.S. Supreme Court is committed to ensuring that all capital defendants receive sentences based on full consideration of mitigating circumstances.²⁹⁶ Sentencing schemes automatically considering serial killer classification as an aggravating circumstance effectively make a constitutionally impermissible value judgment that the crimes committed, considered alone, are so heinous that they invariably merit the death penalty.²⁹⁷ These schemes only cursorily consider mitigating evidence, and in the case of serial murderers, mitigating evidence requires consideration at a higher level than is present under the existing schemes. The legal system must be prepared to recognize that certain factors, standing alone as mitigating circumstances, do not have the full mitigating weight they merit unless considered in light of their effect in the aggregate. Only then will factfinders perform their duties with the aid of a balanced equation. This balanced equation permits them to sentence serial killers according to a reasoned, moral response pursuant to an understanding that the totality of each individual's circumstances creates unique frailties that sometimes reveal reduced culpability for even the most despicable crimes.

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294. 539 U.S. 510 (2003).

295. 529 U.S. 362 (2000).

296. *See supra* notes 120-22 and accompanying text.

297. *See supra* Part II.E (discussing the individualized consideration doctrine and the constitutional requirement that the death penalty should not be imposed by considering the circumstances of the class of offense alone).