

# THE PSYCHOPATH'S DOUBLE-EDGED SWORD: HOW MEDIA STIGMA INFLUENCES AGGRAVATING AND MITIGATING CIRCUMSTANCES IN CAPITAL SENTENCING

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## ABSTRACT

Television dramas have historically portrayed psychopaths as the quintessential villain who is violent, lacks emotion, and is “evil.” These portrayals perpetuate the stigma surrounding psychopaths and reinforce the belief that death is the appropriate punishment for such criminals, implicating sentencing concerns in the judicial system. The 21<sup>st</sup> century’s “Golden Age” of television adds to the confusion as antihero protagonists have become popular in recent crime dramas. This Note seeks to examine how several recent television series serve to stigmatize psychopaths, which ultimately confuses potential jurors and contributes to improperly weighing mitigating evidence as aggravating instead. The U.S. Supreme Court has required that juries be provided some semblance of guidance to weigh evidence in capital sentencing. In *Penry v. Lynaugh*, the Court struck down a statute that removed jury discretion from consideration of aggravating and mitigating factors. In dictum, the Court noted that evidence of mental illness is a double-edged sword, but that it was unconstitutional to bar the jury from considering the potentially

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mitigating nature of such evidence. This Note suggests that recent trends in the depiction of psychopaths in popular media has constructively foreclosed the consideration of psychopathic evidence as potentially mitigating. Several remedies are suggested to reduce this confusion, which include simplifying jury instructions, detailed guidance on the consideration of mitigating evidence, or simply abstaining from introducing such evidence at all. A more holistic and preventative remedy would include framing media narratives to provide more context and background into the disorder rather than simply sensationalizing and emphasizing the stigmatic attributes.

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## I. INTRODUCTION

The word ‘psychopath’ has traditionally been associated with evil individuals who are dangerous, untreatable, and violent. These stigmas promote internal beliefs that such individuals should not be seen as suffering from an illness, but as individuals fully capable of voluntary actions. Thus, psychopaths, who are predominantly characterized by interpersonal and affective deficits, are viewed as the quintessential villain who manipulates, cheats, and destroys.<sup>1</sup> The media has exacerbated

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<sup>1</sup> Dustin A. Pardini & Rolf Loeber, *Interpersonal and Affective Features of Psychopathy in Children and Adolescents: Advancing a Developmental Perspective Introduction to Special Section*, 36 J. CLINICAL CHILD AND ADOLESCENT PSYCHOL. 269 (2007).

these stigmas by selectively reporting on and presenting television shows involving crimes of serial killers, bizarre homicides, and sex offenders.<sup>2</sup>

The media has traditionally been influential in shaping the public's views and opinions. Historically, the portrayal of the mentally ill, whether through print<sup>3</sup> or television,<sup>4</sup> has been that of a violent and unstable individual. These views influence legislation through lobbying, voting, and general public sentiment with the media operating as a political structure.<sup>5</sup> As a result, mental health legislations have correspondingly shifted with political ideologies.<sup>6</sup> A prime example of the media influence in California is illustrated in *People v. White*.<sup>7</sup> There, the defendant successfully mitigated a murder charge to manslaughter based on the evidence of severe depression.<sup>8</sup> The news reports exacerbated the public sentiment by reporting the defendant's statement during the trial that the depression fueled the defendant to consume larger amounts of sugar, furthering the depression.<sup>9</sup> The media coined the term "Twinkie Defense," implying that White, the defendant, had successfully blamed his actions on sugar overconsumption.<sup>10</sup> The public outcry was immediate, resulting in legislative reform and amendment to California's constitution to remove any possibility of a diminished capacity defense.<sup>11</sup>

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<sup>2</sup> Angela D. Stevens, *Psychopathy in the Media: A Content Analysis* (Jan. 2008) (unpublished M.A. thesis, Carleton University) (on file with Department of Psychology, Carleton University).

<sup>3</sup> See generally Ruth Allen & Raymond G. Nairn, *Media Depictions of Mental Illness: An Analysis of the Use of Dangerousness*, 31 AUSTRALIA AND NEW ZEALAND J. PSYCHIATRY 375, 378 (1997) (finding that media, including newspapers, focuses on sensationalized stories and presents them in a common way that resonates with readers' existing stereotypes of dangerousness and mental illness).

<sup>4</sup> Nancy Signorielli, *The Stigma of Mental Illness on Television*, 33 J. OF BROADCASTING & ELECTRONIC MEDIA 325 (1989).

<sup>5</sup> Is Diana Owen a student? See Diana Owen, *Review*, 61 J. OF POL. 227 (Feb. 1999) (reviewing GOVERNING WITH THE NEW: THE NEWS MEDIA AS A POLITICAL INSTITUTION, TIMOTHY E. COOK (1998) and POLITICS AND THE PRESS: THE NEWS MEDIA AND THEIR INFLUENCES, PIPPA NORRIS (1997)).

<sup>6</sup> See Elaine M. Hernandez & Christopher Uggen, *Institution, Politics, and Mental Health Parity*, SOC'Y AND MENTAL HEALTH, 154, 167 (2012).

<sup>7</sup> *People v. White*, 172 Cal. Rptr. 612 (1981).

<sup>8</sup> *Id.* at 615.

<sup>9</sup> Carol Pogash, *Myth of the 'Twinkie Defense'/The Verdict in the Dan White Case Wasn't Based on his Ingestion of Junk Food*, S.F.GATE (Nov. 23, 2003), <http://www.sfgate.com/health/article/Myth-of-the-Twinkie-defense-The-verdict-in-2511152.php>.

<sup>10</sup> *Id.*

<sup>11</sup> CAL. PENAL CODE § 25. The code section was passed in 1982, the year after the decision in *White*.

Potential jurors are not immune to the effects of the media and the judicial process overall does not exist in a vacuum. Crime dramas engage the viewers both “emotionally and intellectually.”<sup>12</sup> Visual media, in particular, depicts the mentally ill as being violent and dangerous, which may prompt the viewers to hold negative attitudes, even when disclaimers explicitly indicate the inaccuracy of the programs.<sup>13</sup> Especially graphic or vivid images may prompt the viewers’ previous schemas of the mentally ill from their past experience and serve to reinforce these generalizations.<sup>14</sup> Researchers have also found that increased viewing of crime dramas and police reality shows is positively correlated with greater support for capital punishment.<sup>15</sup>

More recently, there has been an increase in the number of crime dramas relating to psychopathic personality disorder.<sup>16</sup> As mental health groups advocate for de-stigmatization of mental illness, television networks are creating new characters that exhibit moral deficiencies in their personalities, rather than an illness that affects their daily functioning. From *Hannibal* to *American Psycho*, networks have portrayed villains to be intelligent, ruthless, violent, and dangerous. While the stigmas persist, the connection to mental illness has been weakened by manifesting the symptoms through personality. This creates the belief that these individuals, both in fiction and in reality, are untreatable and dangerous.

At the same time, criminal dramas have also focused on the psychopathic traits of protagonists. During the “golden age of television,”<sup>17</sup> these shows focused on the “fragmentation, desperation and violence of tragic, atomized figures.”<sup>18</sup> This shift from a morally good

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<sup>12</sup> Otto F. Wahl and J. Yonatan Lefkowitz, *Impact of a Television Film on Attitudes Toward Mental Illness*, 17 AM. J. COMMUNITY PSYCHOL. 521, 525 (1989).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 526.

<sup>15</sup> R. Lance Holbert et al., *Fear, Authority, and Justice: Crime-Related TV Viewing and Endorsements of Capital Punishment and Gun Ownership*, 81 JOURNALISM AND MASS COMMUNICATION Q., 343, 355 (2004).

<sup>16</sup> Michael E. Keesler, *Pop-Culture Psychopathy: How Media and Literature Exposure Relate to Lay Psychopathy Understanding* (May 2013) (unpublished Ph.D. dissertation, Drexel University) (on file with Drexel University) (discussing various misconceptions that individuals possess regarding psychopaths as both protagonists and antagonists and their possible ramifications in a jury in which twelve individuals have varying notions of what it means to be a psychopath).

<sup>17</sup> Ann Larabee, *Editorial: The New Television Anti-Hero*, 46 J. POPULAR CULTURE, 1131, 1131(2013).

<sup>18</sup> *Id.*

guy to an ambiguous protagonist represents a shift in American culture, leaning towards “authentic realism” that is predicated upon the failings of society.<sup>19</sup> The “antihero” movement represents recognition of the latent ambiguities inherent within a society of morally ambiguous choices. These protagonists are portrayed with attributes traditionally associated with psychopathic stigma, which include violence and dangerousness to account for such ambiguity. The overall effect has contributed to blurring the line between psychopathy, mental illness, and ordinary behaviors. This Note will incorporate some aspects of the framing theory to partially explain how the media presents information, which involves selective highlights of certain features and ideas. This approach to presenting information reinforces pre-existing stereotypes and promotes negative attitudes towards the mentally ill.

Psychopathic stigma presents problems within the criminal justice system. As the disorder is characterized as a moral illness,<sup>20</sup> issues of sanity and capacity are inapplicable during a trial. Psychopaths can differentiate between right and wrong, but their ability to act in accordance with such limits is questionable. This dispute becomes salient during the sentencing phase of criminal trials, in which mental health evidence is “double-edged” in nature. That is, while the evidence may diminish blameworthiness, this comes at a risk of exposing future dangerousness. Media perceptions may prompt potential jurors to have a biased or distorted view on what psychopathy is and its applicability as either an aggravating or mitigating factor. Such misperceptions of violence and “evil”<sup>21</sup> may prompt such jurors to support greater punishment.<sup>22</sup> In one study, when the prosecutor labeled a defendant as a psychopath, jurors perceived that individual to be more dangerous, even when mitigating evidence was presented to the contrary.<sup>23</sup> The literature suggests that the

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<sup>19</sup> See *id.* at 1132.

<sup>20</sup> See A.L. Glenn et al., *The Neural Correlates of Moral Decision-Making in Psychopathy*, 14 MOLECULAR PSYCHIATRY 5, 6 (2009).

<sup>21</sup> David T. Lykken, *Psychopathic Personality*, in HANDBOOK OF PSYCHOPATHY 3, 11 (Christopher J. Patrick eds., 2005).

<sup>22</sup> John F. Edens et al., *The Impact of Mental Health Evidence on Support for Capital Punishment: Are Defendants Labeled Psychopathic Considered More Deserving of Death?*, 23 BEHAV. SCI. & LAW 603, 618 (2005) (finding that jurors supported capital punishment for individuals described with psychopathic traits more so than for those described without such traits).

<sup>23</sup> John F. Edens et al., *Effects of Psychopathy and Violence Risk Testimony on Mock Juror Perceptions of Dangerousness in a Capital Murder Trial*, 10 PSYCHOL., CRIME & LAW, 393, 403 (Dec. 2004) (finding that even if both defense and prosecution agree to a conclusion that defendant was low risk, the dangerousness perception still persisted in jurors' minds).

public's negative perception of psychopaths works against mitigation and may, in fact, lead to additional penalties.<sup>24</sup> At best, public perception may be ambivalent, prompted in part by the recent increase of antihero programs.

This Note seeks to analyze how the media's portrayal of psychopaths in three recent and popular television series have reinforced stigmas, thus influencing potential jurors to conflate such factors as aggravating, rather than mitigating. This Note does not consider whether such circumstances should or should not be aggravating or mitigating, but instead will assume a theoretically mitigating purpose, in the cases of extreme psychopathy. The first section of this Note will provide a general overview of the disorder. This is followed by an examination of recent portrayals of psychopaths in recent television dramas, such as, *Breaking Bad*, *Dexter*, and *Mr. Robot*. The central portion of my argument focuses on the application to the sentencing phase in a trial. The media's perpetuation of these stigmas influences judges and juries to favor harsher sentences overall. However, the test on whether jury instructions should be provided depends on whether the jury is *statutorily* foreclosed from considering the mitigating aspect of the evidence. Many states and the federal system<sup>25</sup> utilize a balancing test, which defers to both sides in presenting aggravating or mitigating circumstances, thereby bypassing the test requirements. In the case of personality disorders, especially psychopathy, the stigma created by the media has constructively foreclosed the possibility of fair consideration. As such, this Note proposes that, while an outright jury instruction may be denied, a more general court instruction should be requested to remediate the effects of the inherent stigma. This includes providing examples of mitigating and aggravating factors, assigning clear standards to weigh such factors, and providing simpler instructions to improve comprehensibility. Alternatively, it is recommended that a defense counsel should abstain from presenting such evidence, *even in light of the mitigating nature*, as the prejudice seems to outweigh any benefit. Should such evidence be presented, it would be ideal to frame the evidence within a neurological context to limit such prejudice. Such changes would serve the guidance principle enunciated by the Supreme Court and ensure that juries do not "arbitrarily or capriciously" impose the death penalty, and that an

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<sup>24</sup> See Lisa G. Aspinwall et al., *The Double-Edged Sword: Does Biomechanism Increase or Decrease Judges' Sentencing of Psychopaths?*, 337 *SCI.* 846, 847 (2012).

<sup>25</sup> 18 U.S.C. §3592 (balancing test ruled unconstitutional by the 2nd and 10th circuit district courts).

informed decision is made.

## II. WHAT IS A PSYCHOPATH?

There is some controversy surrounding psychopathy and how it differs from sociopathy and Anti-social Personality Disorder (“ASPD”).<sup>26</sup> Sociopaths are “criminals by definition,” who are molded by their adverse environment, while psychopaths possess a stable set of traits characterized by neurological deficits in the autonomic nervous system.<sup>27</sup> On the whole, personality disorders are characterized by longstanding maladaptive behaviors or cognition.<sup>28</sup> ASPD is a diagnostic label for all of these characterizations within the Diagnostic and Statistical Manual (“DSM”), which is a consulting diagnostic resource for mental health professionals. The DSM does not categorize psychopathy or sociopathy as a separate personality disorder, but combines it under the umbrella of ASPD.<sup>29</sup> However, there are notable deficits in psychopathy that are not necessary for a diagnosis of ASPD. Some research has suggested that while many psychopaths embody ASPD symptoms, many of those diagnosed with ASPD do not exhibit psychopathic symptoms. In other words, most psychopaths have ASPD, but many individuals with ASPD are not psychopaths.<sup>30</sup> For the purposes of this Note, psychopathy will be considered as a long-standing disorder with stable traits rooted in neurological deficits.

Significant differences between psychopathy and other personality disorders lie in the affective and behavior deficits in the former. Hervey Cleckley’s *The Mask of Sanity* describes certain individuals in society as being able to present a normal facade, yet internalize destructive and maladaptive behaviors.<sup>31</sup> These symptoms are articulated as superficial charm, manipulative personality, emotional shallowness, and pathological lying by Robert Hare in his Psychopathy Checklist (“PCL”), which is a

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<sup>26</sup> See Anthony Walsh & Hwei-Hsia Wu, *Differentiating Antisocial Personality Disorder, Psychopathy, and Sociopathy: Evolutionary, Genetic, Neurological, and Sociological Considerations*, 21 CRIM. JUST. STUD. 135 (June 13, 2008).

<sup>27</sup> *Id.*

<sup>28</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 629 (4th ed. 1994).

<sup>29</sup> *Id.* at 647.

<sup>30</sup> See Robert D. Hare & Craig S. Neumann, *Psychopathy: Assessment and Forensic Implications*, 54 CAN. J. PSYCHIATRY 791, 796 (2009).

<sup>31</sup> Hervey M. Cleckley, *THE MASK OF SANITY* 10-11 (5th ed. 1976).

widely used assessment tool for psychopathy.<sup>32</sup> Most of the other symptoms are shared with ASPD, which include poor planning, delinquent lifestyle, and lack of remorse.<sup>33</sup> Under the Psychopathy Checklist, it is possible for an individual to score high on certain attributes, while also avoiding certain traits of ASPD. Thus, a diagnosis of psychopathy does not necessarily entail ASPD, implying that there are psychopaths who do not commit crimes. In his book, Cleckley describes the different disguises that psychopaths may take through a series of vignettes.<sup>34</sup> Cleckley delineates the different gradations of psychopathy, emphasizing that just like the “catatonic schizophrenic, with his obvious psychosis, to the impressively intelligent paranoid patient who outwardly is much more normal,” psychopaths can have varying levels of “superficial material success.”<sup>35</sup> However, these individuals are unable to find any satisfaction in “ordinary activity” and suffer from a complete lack of emotions.<sup>36</sup>

While treatment options are limited, there has been research suggesting that milieu therapy is effective in treating early signs of psychopathy within children by molding “attitudes, self-esteem, moral values, and behavior” in a collective, nurturing environment.<sup>37</sup> The general consensus is that identifying early symptoms and intervening with intense treatment, which includes staff supervision and rehabilitation, may lead to lower recidivism rates compared with untreated psychopaths.<sup>38</sup> Recent research has also suggested a biological basis for psychopathy, in which there is a deficit in the autonomic nervous system, particularly the amygdala section of the brain.<sup>39</sup> This area controls learning, conditioning, and expressing fear and emotion,<sup>40</sup> suggesting that psychopathic symptoms may be based on biological factors rather than

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<sup>32</sup> Robert D. Hare et al., *The Revised Psychopathy Checklist: Reliability and Factor Structure*, 2 J. CONSULTING AND CLINICAL PSYCHOL. 338 (1990).

<sup>33</sup> *Id.*

<sup>34</sup> Cleckley, *supra* note 31, at 193.

<sup>35</sup> *Id.* at 191-92.

<sup>36</sup> *Id.* at 191.

<sup>37</sup> WILLIAM M. MCCORD, *THE PSYCHOPATH AND MILIEU THERAPY A LONGITUDINAL STUDY* 263 (1982).

<sup>38</sup> Michael Caldwell et al., *Treatment Response of Adolescent Offenders with Psychopathy Features: A 2-Year Follow-Up*, 33 CRIM. JUST. AND BEHAV., 571, 590 (2006).

<sup>39</sup> R.J.R. Blair, *The Amygdala and Ventromedial Prefrontal Cortex: Functional Contributions and Dysfunction in Psychopathy*, 363 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y B 2557, 2562 (2008).

<sup>40</sup> *Id.*

environmental factors or free will.

The symptoms exhibited by psychopaths have led the media, especially in crime dramas, to focus on characters exhibiting these symptoms as they push the borderlines of morality. These individuals seem to be the ideal villains, possessing traits and committing acts that seem ethically and socially wrong. There is no remorse, no emotion, and a strong inclination to be dangerous and violent. The next section will examine some television characters that exhibit these key traits.

### III. PSYCHOPATHS IN TELEVISION

#### A. BREAKING BAD

The first television analysis looks at *Breaking Bad*, which is about a high school chemistry teacher, Walter White, who manufactures methamphetamine to provide financial security for his family after being diagnosed with a terminal illness. I will be analyzing Gustavo Fring, one of the antagonists, and Walter himself. Fring is introduced as a large-scale methamphetamine distributor, who conducts his affairs methodically and meticulously. On the exterior, he is a businessman, restaurant owner, and active philanthropist. In actuality, he “hide[s] in plain sight” by actively participating in the community while managing a large-scale drug empire.<sup>41</sup> He embodies Cleckley’s vision of a psychopath, someone who presents a normal façade, while concealing the mental defects underneath. The show portrays him to be extremely intelligent and soft-spoken, while also being volatile and violent.

Fring’s unstable and unpredictable nature is emphasized throughout the series. He is seen as someone who is one step ahead of law enforcement. If he feels slighted, he exhibits strong animosity to those who wronged him and exacts revenge. When the police discover Fring’s fingerprints at a crime scene and question him, he preemptively produces an alibi.<sup>42</sup> He presents himself transparently, with nothing to hide, by waiving his rights to an attorney and talking candidly about his relationship with the crime victim.<sup>43</sup> When he is asked about his lack of citizenry records from his home country, this catches him off guard, but he remains poised and blames the bureaucracy.<sup>44</sup> After he leaves, the

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<sup>41</sup> *Breaking Bad: I See You* (AMC Network May 9, 2010).

<sup>42</sup> *Breaking Bad: Hermanos* (AMC Network Sept. 4, 2011).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

camera pans to his trembling hands and a close-up of a subtle scowl on his face while he is in the elevator.<sup>45</sup> The build-up and post-interview scene depict a gentle façade, hiding a monstrous individual who plans to seek revenge on the carelessness of his henchman, who placed him on law enforcement's watch list.

Fring's extremely violent nature is subtly masked within the character. This dichotomy of evil within good is magnified for the viewer as it suggests how even outwardly peaceful individuals may resort to violence if need be. In one particular scene, Fring uses a box cutter to kill his own henchman (the one mentioned above who carelessly left his prints at a crime scene) in front of Walter.<sup>46</sup> The dramatic build up to this scene presents him as a cold, heartless individual as he removes his business suit, puts on a hazardous material bodysuit, kills, and then proceeds to clean up. Symbolically, this wardrobe change represents Fring's "killer" side coming out, while the gentle businessman façade disappears with the clothing. He remains silent from the time he changes clothes, through the kill, and then changing back into his suit. Upon approaching the door to leave, he gazes apathetically at Walter and tells Walter to get back to work. Presumably, the killing was also done to convey Fring's intolerance of Walter's behaviors, which up to this point, was in trying to escape and draw attention to the drug labs.

The protagonist, Walter, undergoes a series of evolutions as his character develops and also ultimately exhibits traditional psychopathic traits. He first embodies traditional protagonist features such as determination and affability, causing the viewer to identify with the underpaid, highly intelligent high-school teacher. As he enters the drug trade, he begins a series of transformations that eventually create the antihero. When Walter is first involved with a drug sale gone wrong, he ends up locking the drug dealer in the basement.<sup>47</sup> He then confronts a dilemma, forcing him to choose between freeing the drug dealer and risking his and his family's lives or murdering him.<sup>48</sup> After he chooses to murder the drug dealer, Walter undergoes a physical transformation, partially caused by cancer chemotherapy, in which he shaves off his hair, puts on a hat, and gives himself the moniker "Heisenberg" symbolizing a different persona.<sup>49</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Breaking Bad: Box Cutter* (AMC Network July 17, 2011).

<sup>47</sup> *Breaking Bad: And the Bag's in the River* (AMC Network Feb. 10, 2008).

<sup>48</sup> *Id.*

<sup>49</sup> *Breaking Bad: Crazy Handful of Nothin'* (AMC Network Mar. 2, 2008).

His next significant change occurs when he meets Fring to create a mass distribution network for his drugs. Here, the viewer begins to see Walter's full immersion into the methamphetamine business. During an argument with his wife, he declares that he is not in danger, but rather "I am the danger,"<sup>50</sup> confirming his transformation into a feared drug lord. As he further immerses himself into the business, he gets involved with several gangs and participated in murders. After his family leaves him because of the constant danger, Walter again engages in a physical transformation by re-growing his hair.<sup>51</sup> He ultimately ends up dying while exacting revenge upon a gang that previously murdered his brother-in-law.<sup>52</sup> While most of Walter's killings were somewhat defensible (e.g. killing other drug dealers, killing to protect others, etc.), he has also killed others to advance his goals. For example, he killed his partner's girlfriend by omission when he let her asphyxiate on her drug-induced vomit as she slept.<sup>53</sup> The girlfriend had previously tried to blackmail Walter, and he felt she was a distraction to his business.<sup>54</sup>

#### B. DEXTER

*Dexter* centers on a vigilante serial killer who kills criminals to satiate his own impulse to kill. For this Note, I will focus on the primary antagonist in Season 4, Arthur Mitchell, and Dexter, the central character. Mitchell is depicted as a serial killer with a specific style, targeting victims who resemble his childhood family members. The bizarre nature of the murders highlights the traits of unpredictability and violence as he targets and brutally kills strangers. Mitchell is a "wolf in sheep's clothing."<sup>55</sup> On the outside, he is a giving, generous individual who tutors students and is a deacon at his church. On the inside, he is a deeply disturbed individual who abuses his family and tries to "preserve his innocence" by murdering strangers who fit a certain profile.

Mitchell is portrayed as an unpredictable and moody individual through his interactions with his family. In one scene, he argues with his son, who then drives off and damages Mitchell's car.<sup>56</sup> Once he returns,

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<sup>50</sup> *Breaking Bad: Cornered* (AMC Network Aug. 21, 2011).

<sup>51</sup> *Breaking Bad: Granite Slate* (AMC Network Sept. 22, 2013).

<sup>52</sup> *Breaking Bad: Felina* (AMC Network Sept. 29, 2013).

<sup>53</sup> *Breaking Bad: Phoenix* (AMC Network May 24, 2009).

<sup>54</sup> *Id.*

<sup>55</sup> *Dexter: If I had a Hammer* (Showtime Network Nov. 1, 2009).

<sup>56</sup> *Dexter: Hungry Man* (Showtime Network Nov. 22, 2009).

Mitchell seems annoyed, but appears to let the matter go; however, he later proceeds to break his son's finger.<sup>57</sup> In the same episode, Mitchell's family is gathered around for Thanksgiving dinner to say thanks.<sup>58</sup> Once he notices that none of his family members are thankful for him, his mood immediately sours and goes from sarcastically pleasant to noticeably angry.<sup>59</sup> As his wife tries to change topics, he calmly tells her to "shut up, cunt."<sup>60</sup> The scene progresses as Mitchell strangles his son for destroying an urn, containing his sister's ashes.<sup>61</sup> The rapid mood shift suggests to viewers that Mitchell is volatile, dangerous, and capable of destruction at any time.

Here too, Mitchell personifies the stigma of the violent psychopath. His criminal history shows that he has killed for over three decades, in cycles of four years, targeting the same type of victims. The first victim is buried alive, the second has her femoral artery sliced, the third is forced to commit suicide through threats, and the last is bludgeoned.<sup>62</sup> The details of how the victims die focus on the extremely violent and bizarre nature of the acts. Viewers see how he chooses and stalks the victims, who are seemingly random individuals that just happen to fit his desired profile (e.g. 10-year-old child, mother of two, etc.).

Interestingly, there are various scenes that seem to suggest that Mitchell may have more than a psychopathic personality disorder. The bizarre nature and reenactment of his childhood through his killings suggests some possible psychosis. After kidnapping a 10-year-old boy, he refers to the boy as "Arthur," in reference to his own childhood<sup>63</sup> and calls his daughter "Vera,"<sup>64</sup> in light of his deceased sister. He also shows reluctance and fear in killing a wounded deer that he accidentally collides into, even though he shows no hesitation killing humans.<sup>65</sup>

Dexter's background is similarly complex, with much of his psychopathic tendencies explained by environmental circumstances. As a child, he witnessed his mother murdered in a shipping container and was trapped in the container for two days. Eventually, a police officer

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Dexter: Lost Boys* (Showtime Network Nov. 26, 2009).

<sup>63</sup> *Breaking Bad: Granite Slate*, supra note 51.

<sup>64</sup> *Breaking Bad: Cornered*, supra note 50.

<sup>65</sup> *Dexter: Slack Tide* (Showtime Network Nov. 8, 2009).

adopted Dexter and taught him to channel his violence, which he calls a “dark passenger,”<sup>66</sup> through a series of rules known as “Harry’s Code.”<sup>67</sup> Dexter occasionally deviates from the code and at times, accepts who he is as a psychopathic serial killer, with his addiction satiated only by murder.<sup>68</sup>

Violence is one of the primary traits portrayed by the protagonist, albeit in a morally justifiable manner. Dexter’s victims are criminals that have managed to escape from law enforcement after committing horrible violent acts. However, the criminals themselves are murdered in an equally torturous manner, usually tied down with significant plastic wrap to restrain movement. For example, Dexter murdered his mother’s killer in the same way his mother died by using a chainsaw.<sup>69</sup> Dexter eventually captures Mitchell and bludgeons him to death, symbolizing the last victim of Mitchell’s killing cycle.<sup>70</sup> The show frames the killings in a way that appears justified. For instance, Dexter conducts his own investigations to ensure that his victims are actually criminals.<sup>71</sup> In one episode, after he kills an innocent photographer on the mistaken belief that he was a murderer (the assistant was the murderer), the show subtly downplays this mistaken murder by depicting the photographer’s art as brutalizing and abusing women.<sup>72</sup> The show also emphasizes the intelligence of Dexter, who is able to kill methodically, hide all the evidence, and yet also works for a police agency.

### C. MR. ROBOT

Outside of the violent and evil, corporate psychopaths have also been popular villains. *Mr. Robot* portrays such a character through corporate executive, Tyrell Wellick. The show generally focuses on a group of hackers seeking to topple a corporation that has controlled society through debt. Wellick exhibits the classic psychopathic symptoms of narcissism, manipulation, and superficial charm. While generally accurate, the show still perpetuates similar stigmas that

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<sup>66</sup> *Dexter: An Inconvenient Lie* (Showtime Network Oct. 14, 2007).

<sup>67</sup> *Dexter: What’s Eating Dexter Morgan?* (Showtime Network July 14, 2013).

<sup>68</sup> *Dexter: Morning Comes* (Showtime Network Nov. 18, 2007).

<sup>69</sup> *Id.*

<sup>70</sup> *Dexter: The Getaway* (Showtime Network Dec. 13, 2009).

<sup>71</sup> *Dexter: Slack Tide*, supra note 65 (he breaks into a photography studio and checks for blood stains of victims).

<sup>72</sup> *Id.*

psychopathic individuals are ruthless and violent.

Wellick is first introduced as an executive of the corporation, and his storyline develops after a position opens up within the company for a Chief Technology Officer (“CTO”).<sup>73</sup> The show portrays him as a merciless individual, willing to do anything to secure the position. After the CEO informs him that the Board has found an outside CTO candidate, Wellick becomes visibly upset and pays a homeless man to let out his anger by brutally assaulting the man.<sup>74</sup> Similar to the build-up of the box cutter scene in *Breaking Bad*, Wellick is seen removing his suit, putting on gloves, and assuming a different identity prior to assaulting the man.<sup>75</sup> Later in the same episode, Wellick engages the CEO’s assistant in homosexual sex to gain access to the assistant’s cell phone for confidential data about the CTO candidate.<sup>76</sup> During this scene, Wellick checks his pulse (as he is on enhancement drugs) and, in response to the assistant’s remarks that he is an odd individual, he responds, “I’m just a businessman.”<sup>77</sup> This scene demonstrates the manipulative and emotionally shallow aspect of the character, illustrating his willingness to push all boundaries by any means to achieve his goals.

After the corporation chooses the other candidate as CTO, Wellick tries to befriend him to find out his weakness. In a rooftop scene with the CTO’s wife, Wellick tries to seduce her in order to manipulate her husband.<sup>78</sup> Unable to contain his frustrations and temper, he instead ends up strangling her to death in a fit of rage.<sup>79</sup> This scene, along with the earlier assaults on the homeless man, depict the character as violent and dangerous. When the police try to question him at work about the CTO’s wife’s death, he declines to answer and requests they make an appointment.<sup>80</sup> When they later question him in his home, his pregnant wife forces herself into labor to stop him from making any statements,<sup>81</sup> indicating the manipulative nature of the couple. *Mr. Robot* portrays a psychopath as being capable of murder even within a corporate setting. The show characterizes Wellick as a resourceful individual and capable of

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<sup>73</sup> *Mr. Robot: d3bug.mkv* (USA Network July 8, 2015).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Mr. Robot: v1ew-s0urce.flv* (USA Network Aug. 5, 2015).

<sup>79</sup> *Id.*

<sup>80</sup> *Mr. Robot: wh1ter0se.m4v* (USA Network Aug. 12, 2015).

<sup>81</sup> *Id.*

avoiding the police when necessary. During the season finale, Wellick is missing, and there is a presumption that the protagonist killed him during a blackout hallucination.<sup>82</sup> Similar to the first two antagonists, Wellick manages to evade law enforcement by hiding behind his resources. While this show is less violent than the previous two, it still portrays a psychopath as committing murder and assault.

The protagonist, Elliot, is depicted as a socially anxious character with episodes of mania and substance abuse. The prototypical attributes of a psychopath lie in Elliot's alter ego, a delusion of his deceased father whom he calls "Mr. Robot."<sup>83</sup> While Elliot is generally depicted as timid, Mr. Robot is the leader of the hacking group and is keen on world anarchy by destroying its economy. He shows a general lack of remorse, impulsivity, and violent tendencies by "throwing around Elliot" (portrayed through Elliot yelling and attacking himself).<sup>84</sup> A particular example of Mr. Robot's brash nature is shown when he tries to destroy a data center by blowing up a gas plant next door with no regard for the safety of human life.<sup>85</sup> He also throws Elliot off of a cliff for previously betraying his trust<sup>86</sup> and also threatens his fellow hackers with violence if they abandon their common goal.<sup>87</sup> Ultimately, viewers see a dissociative personality disorder within the protagonist, with the alter ego manifesting psychopathic attributes. The show detracts from this by portraying a comparatively worse antagonist: the corporation itself, which is shown to have financially enslaved the population. The addition of an actual mental illness, via the delusions and anxiety, may serve to garner viewer sympathy with the protagonist. Even though Mr. Robot is capable of violence and his erratic behavior may be dangerous, the viewer feels that the protagonist will ultimately do what needs to be done.

#### IV. APPLICATION

The television shows above construct the psychopath in subtle methods in which the disorder is portrayed as fundamentally different from other types of mental illnesses. While generally accurate, there is nonetheless a lack of context for the disorder, as background information

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<sup>82</sup> *Mr. Robot: zer0-daY.avi* (USA Network Sept. 2, 2015).

<sup>83</sup> *Mr. Robot: m1rr0r1ng.qt* (USA Network Aug. 19, 2015).

<sup>84</sup> *Mr. Robot: zer0-daY.avi*, *supra* note 82.

<sup>85</sup> *Mr. Robot: ones-and-zer0es.mpeg* (USA Network July 1, 2015).

<sup>86</sup> *Id.* (although the scene is ultimately revealed to be Elliot throwing himself off the cliff).

<sup>87</sup> *Mr. Robot: v1ew-s0urce*, *supra* note 78.

on the antagonists is scant.<sup>88</sup> Fring's background in *Breaking Bad* is largely absent, because the only information provided is that he is from Chile and had experienced the death of a person who was a close friend and business partner. There is no mention of family or how and why he entered the methamphetamine business. Wellick in *Mr. Robot* is equally enigmatic, and the show does not explain why he goes to such great lengths to reach his ends. While Mitchell had a bad childhood, little else is known as to why he reverts back, given the abusive nature. In contrast to the asocial portrayal of the other mentally ill,<sup>89</sup> these shows illustrate that the psychopathic antagonists have an ability to blend in, which is accurate with the general characteristics of the disorder. The protagonists also exhibit traits traditionally associated with psychopathy. For example, all of them are vulnerable at times while also possessing attributes of "dangerousness-aggressiveness" through their violent outbursts, homicidal acts and antisocial behaviors.<sup>90</sup>

Both antagonists in *Breaking Bad* and *Mr. Robot* did not show any symptomatology of additional mental illnesses, despite contrary research in the field.<sup>91</sup> Mitchell did show some signs of psychosis and possible regression symptoms by trying to relive his childhood. However, this in itself is stigmatic because regression is often exhibited through subtle personality changes and not a full-blown episode of behaving and acting like a child again.<sup>92</sup> Comorbidity is prevalent in psychopathy as Werner et al.'s study indicated a positive correlation between psychopathy and increased incidents of substance abuse, anxiety, and mood disorders.<sup>93</sup> A possible link resulting in such correlations may be rooted in the behavioral

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<sup>88</sup> Wilson et al., *Mental Illness Depictions in Prime-Time Drama: Identifying the Discursive Resources*, 33 AUST. N.Z. J. PSYCHIATRY 232, 235 (1999) (finding that dramas depict the mentally ill to have erratic behaviors without being predictable).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 234-35.

<sup>91</sup> Randall T. Salekin et al., *Psychopathy and Comorbidity in a Young Offender Sample: Taking a Closer Look at Psychopathy's Potential Importance over Disruptive Behavior Disorders*, 113 J. ABNORMAL PSYCHOL. 416, 424 (2004); Jeanette Taylor and Alan R. Lang, *Psychopathy and Substance Use Disorders*, in HANDBOOK OF PSYCHOPATHY 495 (Christopher J. Patrick eds., 2005).

<sup>92</sup> Michael Nash, *What, if Anything, is Regressed About Hypnotic Age Regression? A Review of the Empirical Literature*, 102 PSYCHOL. BULL. 42, 49-50 (1987) (reviewing numerous studies to find no actual regression through hypnosis). This topic is controversial, but it would seem that even if one were to assume this is possible, it is likely that regressive behaviors are projected rather than a full episode back into childhood as depicted by Mitchell.

<sup>93</sup> Kimberly B. Werner et al., *Epidemiology, Comorbidity, and Behavioral Genetics of Antisocial Personality Disorder and Psychopathy*, 45 PSYCHIATRIC ANNALS 195, 197-98 (2015).

and emotional impairments.<sup>94</sup> On the protagonist side, only *Mr. Robot*'s Elliot displayed any overt signs of additional mental illness through his social anxiety, substance abuse, and delusions. The other two programs showed a predominantly normal man with a terminal disease (*Breaking Bad*) or a psychopath shaped by the tragic death of his mother (*Dexter*). Both protagonists were portrayed as highly intelligent individuals, who can avoid detection and adapt on a moment's notice.

As mentioned earlier, a common element in these television shows is the death and killings of the psychopaths. Except for *Mr. Robot* (in which the antagonist simply goes missing), the show presents an evil and dangerous villain, and suggests that death is the only appropriate penalty. They evade police with ease and take actions with little to no concern about the consequences. Even one of the protagonists, Walter, dies at the end, suggesting a fitting end for a life filled with destruction. It has been found that in capital sentencing cases, prosecutors use the term "psychopath" to label the defendant as "bad" more frequently than defendants use it as mitigating evidence.<sup>95</sup> The label is used to focus attention on the lack of remorse and future dangerousness, factors that weigh heavily on the imposition of death. DeMatteo and Edens hypothesized that psychopathic evidence may be less prejudicial by referencing "neutral" points of comparison, such as by comparing psychopaths to "fake fruit" rather than to a serial killer like Ted Bundy.<sup>96</sup> By establishing a neutral point of context to describe psychopaths, instead of reinforcing traditional notions of what psychopaths are, courts may begin to remove prejudices surrounding the "psychopath" label.

Psychopathic symptoms were also portrayed through the character's actions as traits, whereas other mental illness symptoms were separated from the acts. This creates a sense that hallucinations and external symptoms may be treated, but character traits do not change because they are inherent in an individual. In *Mr. Robot*, Wellick is not seen as an individual with mental illness. Rather, when Elliot tries to hack him, he reacts as a person without mental illness.<sup>97</sup> Elliot himself, however, has social anxiety and hallucinations, which are shown in acts or

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<sup>94</sup> *Id.* at 198.

<sup>95</sup> David DeMatteo & John F. Edens, *The Role and Relevance of the Psychopathy Checklist-Revised in Court: A Case Law Survey of U.S. Courts (1991-2004)*, 12 PSYCHOL., PUB. POL'Y, AND L 214, 232-33 (2006).

<sup>96</sup> *Id.* at 232.

<sup>97</sup> *Mr. Robot: ones-and-zeros.mpeg*, *supra* note 85.

scenes as being separated from his normal behavior.<sup>98</sup> Wellick's traits, on the other hand, are manifested through his actions. For example, when we see him attack a homeless person or engage in sexual acts to further his ends, we focus on the act and not the underlying symptomatology. Instead of seeing "poor behavioural controls" or being "manipulative"<sup>99</sup> as symptoms of an underlying disorder, the acts are built into the character. Such actions seem to be voluntary and made with a conscious choice, so the underlying deficits are not evident to the viewer. The psychopath antagonist commits these acts as means to an end, whereas for the protagonists, the symptoms are constructed separately.

The stigmas portrayed suggest a conflation between correlation and causation with regards to psychopathy, violence, and dangerousness. While psychopathic traits are positively correlated with violence, this is not to say that such traits are the cause of the violence. Research has demonstrated that psychopathy is associated with poor levels of self-control and inhibition, which usually result in high recidivism rates.<sup>100</sup> Nonetheless, this difference "could not be attributable solely to past criminal behavior."<sup>101</sup> Thus, it remains unclear whether the traits cause the violence, or whether more violence leads to exacerbation of such traits. Furthermore, Edens et al.'s meta-study on the PCL-R's ability to predict future dangerousness indicates that when controlled for age, the actual data is scant in regards to the actual recidivism rates of released psychopaths.<sup>102</sup> More importantly, studies that indicate higher recidivism rates measured an individual's psychopathy level at the time of *release* from prison, not when the crime was committed.<sup>103</sup> That is, the claim that someone with a high psychopathy score when the crime was committed would have an equal or higher score when released is unsupported.<sup>104</sup> In essence, this weakens the link between psychopathy,

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<sup>98</sup> For example, the protagonist engages in vivid hallucinations and his symptomology is explicitly mentioned as a product of his mental illness. He also frequently sees a psychologist for therapy.

<sup>99</sup> Hare et al., *supra* note 32, at 793.

<sup>100</sup> Grant T. Harris et al., *Psychopathy and Violent Recidivism*, 15 LAW AND HUM. BEHAV. 625, 635 (1991).

<sup>101</sup> *Id.* at 634.

<sup>102</sup> John F. Edens et al., *Psychopathy and the Death Penalty: Can the Psychopathy Checklist-Revised Identify Offenders Who Represent "A Continuing Threat to Society"?*, 29 J. OF PSYCHIATRY & L., 433, 441-45 (2001).

<sup>103</sup> *Id.* at 444-45.

<sup>104</sup> *Id.* (finding that scores generally decrease with age and studies failed to account for this group of individuals).

violence, and recidivism rates.

Traditionally, criminal dramas drew a clear line as to for whom the viewer should be rooting. Although the “good guys” have traditionally been protagonists of criminal dramas, there is a shift in public’s perception towards making the antihero the protagonist. The creators of these shows blur the lines between the “good guy” and “bad guy,” while offering just enough cues to suggest with whom viewers should align. Recent research has suggested that viewers enjoy these shows by developing a specific schema to the antihero narrative.<sup>105</sup> In other words, viewers have developed a cognitive construction of themes and archetypes around similar narratives, thus expecting that, even though the antihero engages in immoral behaviors, their ultimate goal is to “overcome some enemy.”<sup>106</sup> A common element of this “Golden Age”<sup>107</sup> focuses on largely open-ended narratives with characters that have internal conflicts, driven by the natural troubles of society.<sup>108</sup> As television moved away from the constrictions of commercial sponsors, networks began exploring unconventional ideas.<sup>109</sup> There was a type of forbidden appeal to be found in areas outside social norms, such as murder or promiscuity, especially when attributed to the “good guy.”<sup>110</sup> While the acts of such characters are viewed as immoral, these programs also display “socio-cultural stresses that undermine our status, value or identity.”<sup>111</sup> Because the viewers recognize inequality of access to the “American Dream,” they identify with the protagonists and give more latitude to those characters resorting to alternative means of success when the legitimate routes to success fail.<sup>112</sup> Simultaneously, the strains depicted in the shows—Walter’s lung cancer, Dexter’s inability to feel emotion, and Elliot’s social anxiety—create a set of “hyper-realistic” scenarios with which viewers can identify and engage.<sup>113</sup>

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<sup>105</sup> Daniel M. Shafer & Arthur A. Raney, *Exploring How We Enjoy Antihero Narratives*, 62 J. COMM. 1028, 1038 (2012).

<sup>106</sup> *Id.* at 1031.

<sup>107</sup> BRETT MARTIN, *DIFFICULT MEN: BEHIND THE SCENES OF A CREATIVE REVOLUTION: FROM THE SOPRANOS AND THE WIRE TO MAD MEN AND BREAKING BAD* 14 (2013).

<sup>108</sup> *Id.* at 84.

<sup>109</sup> *Id.* at 85.

<sup>110</sup> *Id.* at 88.

<sup>111</sup> Meron Wondemaghen, *Walter White: The Psychopath to Whom We Can All Relate?*, *THE METHODS OF BREAKING BAD: ESSAYS ON NARRATIVE, CHARACTER AND ETHICS* 122, 129 (Jacob Blevins & Dafydd Wood, eds., 2015).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 128.

The protagonists of the shows demonstrate similar psychopathic stigmas, notwithstanding their morally ambiguous characteristics. Both Walter and Dexter are shown to be individuals capable of violence should the need arise. Even Elliot, through his alter ego, has shown aggressive, impulsive, and violent traits. Compared to their antagonist counterparts, however, the difference lies in the justifications of such acts: the victim deserved it for being a criminal, or the act was morally justified because it was to save a friend or the characters themselves. Shafter and Raney studied this form of “moral disengagement,” and found that television programs employ certain cues so that the viewer assumes “that a greater good is being served.”<sup>114</sup> These cues are evident in the dramas cited above. For example, in *Breaking Bad*, Walter first appears as a regular teacher who is only trying to help his family’s finances. While he goes on to commit various acts of violence, much of this is in defense of or for the protection of a loved one. Similarly, while Dexter is a serial killer, he targets only criminal victims while abiding by a set of rules, suggesting a degree of predictability. Finally, in *Mr. Robot*, Elliot’s behavior aims to topple an evil corporation with the goal of re-structuring a debt-ingrained society. Shafter and Raney’s study reinforces the notion that previous enjoyment of antihero narratives contributes to a greater likelihood of enjoying future antihero narratives.<sup>115</sup> This is noteworthy as it may suggest a compound effect in which the antihero narrative achieves greater widespread acceptance and reception over time. The popularity of these shows seems to reflect this notion—*Dexter*, the oldest series of the three that premiered in 2006, garnered about 603,000 views at its inception,<sup>116</sup> while *Mr. Robot*, premiering in 2015, received about 1.75 million.<sup>117</sup>

## V. HOW MEDIA INFLUENCES POLICY

The relationship between media and public perception is a well-researched area and has generally shown to be significant. Researchers

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<sup>114</sup> Daniel M. Shafer & Arthur A. Raney, *Exploring How We Enjoy Antihero Narratives*, 62 J. COMM. 1028, 1038 (2012).

<sup>115</sup> *Id.* at 1043.

<sup>116</sup> Ed Robertson, *Programming Notes: Showtime Wants More ‘Dexter’*, MEDIA LIFE MAG. (Nov. 3, 2006), <http://www.medialifemagazine.com/programming-notes-showtime-wants-more-dexter/>.

<sup>117</sup> Screener, *Wednesday Cable Ratings: ‘Duck Dynasty’ Wins Night, ‘Suits’, ‘The Game’, ‘Mr. Robot’, ‘Baby Daddy’ & More*, TV BY THE NUMBERS (June 25, 2015), <http://tvbythenumbers.zap2it.com/2015/06/25/wednesday-cable-ratings-duck-dynasty-wins-night-suits-the-game-mr-robot-baby-daddy-more/422449/>.

in Scotland conducted a content analysis and found that two-thirds of the sample believed mentally ill individuals to be violent, with two-thirds of those individuals attributing such beliefs to the media.<sup>118</sup> The fictional media content portrayed mental illness through prevalent themes of “split personality” and “intensely manipulative character.”<sup>119</sup> More recently, researchers who conducted a content analysis of primetime television found that these shows portrayed the mentally ill as violent offenders “nine times higher than the rate in the real world.”<sup>120</sup> Significantly, fourteen-percent of the portrayals in the study were of personality disorders.<sup>121</sup> A survey conducted in the same study also showed that the more television participants watched, the more likely that the participants were to believe that living in an area with mental health services “endangers local residents.”<sup>122</sup> Thus, there seems to be a general consensus that media’s portrayal of the mentally ill has stigmatized them in the minds of the general population, either implicitly or explicitly.

Researchers have also looked at how media has responded to and interacted with public opinion in shaping crime policy.<sup>123</sup> Gary Cavender has suggested that the media immerses the public in a narrative; however, this narrative has shifted from siding with the innocent defendant during the 1960s through the 1970s, to siding with police and seeing suspects as guilty from the 1970s onwards.<sup>124</sup> With this shift, the media favored harsher sanctions and greater empathy for law enforcement “as the last line of defense against the criminal blight.”<sup>125</sup> Pfeiffer et al. found that, in Germany, the biggest factor of increased sentencing was the belief that

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<sup>118</sup> Greg Philo et al., *The Impact of the Mass Media on Public Images of Mental Illness: Media Content and Audience Belief*, 53 HEALTH EDUC. J. 271, 274 (1994).

<sup>119</sup> *Id.* at 274.

<sup>120</sup> Donald L. Diefenbach & Mark D. West, *Television and Attitudes Toward Mental Health Issues: Cultivation Analysis and the Third-Person Effect*, 35 J. OF COMMUNITY PSYCHOL. 181, 187 (2007).

<sup>121</sup> *Id.* at 186-87.

<sup>122</sup> *Id.* at 190.

<sup>123</sup> See generally Gray Cavender, *Media and Crime Policy: A Reconsideration of David Garland’s The Culture of Control*, 6 PUNISHMENT & SOC’Y 335, 337 (2004) (discussing “dramatic depictions of privilege quick crime” and media’s role in shaping the public’s perception of crime); Christian Pfeiffer et al., *Media Use and Its Impacts on Crime Perception, Sentencing Attitudes and Crime Policy*, 2 EUR. J. CRIMINOLOGY 259 (2005).

<sup>124</sup> See generally Cavender, *supra* note 123 at 344–345 (discussing the public’s perception of crime rate that is created by television broadcasts of factual and fictional crimes and the significance of this perception in development of crime policy).

<sup>125</sup> *Id.*

crime is rising.<sup>126</sup> Evidence demonstrates that these beliefs are correlated with higher amounts of television watching<sup>127</sup> and support a growing trend of legislation focused more on public opinion than on empirical evidence.<sup>128</sup> This creates a dichotomy in which actual crime rates are not as high as public sentiment believes; yet, legislation is being passed to reflect such unjustified fears.

These individualized and shared conceptions of the mentally ill merge together in a theory known as framing. Frames are used to “economize our information-processing burden by highlighting certain informational elements, and hidings others.”<sup>129</sup> The media uses frames to present information in a way that is understandable and conveys the intended message. Robert Entman has proposed that frames work to “define problems,” “diagnose causes,” make “moral judgments,” and “suggest remedies.”<sup>130</sup> It has been suggested that framing is composed of various elements, which include the use of metaphors, depictions, catchphrases, exemplars, and visual images.<sup>131</sup> The audience members reason through a frame by utilizing a consequential, causal, and moral analysis.<sup>132</sup>

The television shows discussed above incorporate frames that are reinforced by a traditional and often stereotypical understanding of psychopaths. In a simplified analysis, the viewer will identify the cause as the personality characteristics of the antagonist (“he’s just evil”), diagnose the problem (“there is no mental illness here, he’s just evil”), make a morality judgment that such behavior is inexcusable, and justify death as an appropriate remedy.<sup>133</sup> For example, calling the psychopath a “monster” is common in the narrative and serves to de-humanize the character. The term itself, “psychopath,” is embedded in American culture through the success of such films as “Psycho” and “American Psycho,” which have associated the term with violence. Such framing elements combine to create a type of generic template for the

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<sup>126</sup> See Christian Pfeiffer et al., *supra* note 123.

<sup>127</sup> *Id.* at 12-13.

<sup>128</sup> *Id.* at 16-17.

<sup>129</sup> Elain M. Sieff, *Media Frames of Mental Illnesses: The Potential Impact of Negative Frames*, 12 J. OF MENTAL HEALTH 259, 263 (2003).

<sup>130</sup> Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. OF COMM. 51, 52 (1993).

<sup>131</sup> Sieff, *supra* note 129, at 264.

<sup>132</sup> *Id.* at 265.

<sup>133</sup> See *id.* at 263.

psychopath—one that is highly volatile, capable of extreme violence, and inherently evil. In both *Breaking Bad* and *Dexter*, the psychopathic antagonists are even given monikers to describe their general demeanor and associated characteristics, namely “Chicken Man” and “Trinity Killer.” These nicknames serve as a way for viewers to distance themselves. The protagonists in these shows similarly have monikers, from Walter’s “Heisenberg” to Elliot’s “Mr. Robot”,<sup>134</sup> adding a layer of complexity into the framing element.

The media has conflated the psychopath with violent murderer. Statistics indicate that psychopaths exist in many fields including CEOs, lawyers, and stockbrokers.<sup>135</sup> The introduction of psychopathic antiheroes in various shows adds a layer of complexity in the public’s mind regarding culpability and justification. As such, potential jurors in capital sentencing are likely to engage in unbridled discretion due to highly technical jury instructions and convoluted trial process.

#### A. THE SENTENCING PHASE

Currently, psychopathy and many personality disorders are barred from qualifying as an insanity defense in California<sup>136</sup> or in states following the Model Penal Code.<sup>137</sup> The reason for this rationale lies in the judicial system’s skepticism in excusing culpable criminal behavior. In other words, the courts aim to avoid circular reasoning in excusing criminal behavior as a symptom of a mental disease in order to prevent an exception from swallowing the rule. Therefore, psychopathic evidence has typically been introduced during the sentencing phase, after the defendant has been found guilty. This is in line with courts’ reasoning that personality traits should not be allowed in as evidence in determining whether the individual acted in conformity with such traits.<sup>138</sup>

Once the trial enters the sentencing phase, the rules of evidence are more relaxed. This is partly due to the fact that the defendant has already been found liable for the incident<sup>139</sup> and to provide constitutional

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<sup>134</sup> Note also that Dexter’s nickname of the “Bay Harbor Butcher” never fully attached to him as he sought to avoid the moniker given to him by the press.

<sup>135</sup> KEVIN DUTTON, *THE WISDOM OF PSYCHOPATHS: WHAT SAINTS, SPIES, AND SERIAL KILLERS CAN TEACH US ABOUT SUCCESS* 104 (2012).

<sup>136</sup> Cal. Penal Code § 29.8.

<sup>137</sup> Model Penal Code § 4.01(2).

<sup>138</sup> Fed. R. Evid. 404.

<sup>139</sup> See *Williams v. NY*, 337 U.S. 241, 247 (1949).

protections, because the penalty imposed interferes with fundamental rights under the Due Process Clause.<sup>140</sup> This is especially salient in the death penalty, which is substantially different from other types of punishment.<sup>141</sup> Similar constitutional constraints explain why a judge may not himself find an aggravating factor for the imposition of the death penalty, without a jury.<sup>142</sup> During this phase, defense counsel is obligated to introduce any form of potentially mitigating evidence, subject to standards of reasonableness.<sup>143</sup> The Supreme Court has noted that individualized circumstances, while traditionally not required, have been considered in sentencing in most states up to the late 1970s.<sup>144</sup> The Court in *Lockett* then confirmed that individualized circumstances are mandated by the Eighth and Fourteenth Amendments in death penalty cases, effectively barring states from enacting statutes that automatically qualify a defendant for a death sentence, if the defendant meets certain elements.<sup>145</sup> This mandate was statutorily reflected when Congress enacted the United States Sentencing Commission, which, while designed to maintain consistency throughout sentences, also allowed for the “flexibility to permit individualized sentences when warranted by mitigating or aggravating factors.”<sup>146</sup>

Although a defense counsel is obligated to present mitigating evidence, substantial deference is given to their discretion.<sup>147</sup> There must still be an adequate investigation conducted in a reasonable manner so as to make a “fully informed decision with respect to sentencing strategy.”<sup>148</sup> Thus, a counsel has discretion to introduce evidence that may be construed as both mitigating and aggravating, so that the counsel can avoid a client’s ineffective assistance of counsel claim.<sup>149</sup>

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<sup>140</sup> *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

<sup>141</sup> *Strickland v. Washington*, 466 U.S. 668, 716 (1984) (Brennan, J., dissenting).

<sup>142</sup> *Ring v. Az.*, 536 U.S. 584, 609 (2002).

<sup>143</sup> *Id.* at 618-19.

<sup>144</sup> *Lockett v. Ohio*, 438 U.S. 586, 602 (1978) (quoting *Williams*, 337 U.S. at 247-48).

<sup>145</sup> *Id.* at 606.

<sup>146</sup> 28 U.S.C. § 991(b)(1)(B) (while many courts have found the statute to be unconstitutional for due process and separation of power concerns, courts have recognized the tension between correcting sentence disparities and a policy of individualized approaches).

<sup>147</sup> *Strickland*, 466 U.S. at 688-689.

<sup>148</sup> *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

<sup>149</sup> *Evans v. Sec’y, Dep’t of Corr.*, 703 F.3d 1316, 1328 (11th Cir. 2013).

## B. GUIDANCE

The Supreme Court in *Gregg v. Georgia* found that, while the death penalty is not unconstitutional, it is imperative that juries do not impose the sentence in an “arbitrary or capricious manner” and are provided with “adequate information and guidance” during the process.<sup>150</sup> The Court recognized the inherent problems in asking an inexperienced jury to sentence and found that these problems could be resolved by giving “guidance regarding the factors about the crime and the defendant that the State . . . deems particularly relevant to the sentencing decision.”<sup>151</sup> For example, having the jury “point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other*” would reduce risks of unfettered application of the death penalty.<sup>152</sup> This guidance standard appears broad and seems to be met so long as the sentencing authority is appraised of the relevant information about the penalty and is provided with some standards to guide its use.<sup>153</sup> Low standard notwithstanding, this initiated a myriad of cases that challenged trial court judicial instructions as insufficient.<sup>154</sup> The guiding principles were never fully articulated, but it has been suggested that the standard is fairly low, so long as there is some form of actual instruction.<sup>155</sup>

The guidance issue has arisen with regards to how juries actually analyze and balance out aggravating and mitigating circumstances. Previous law review articles have discussed the improper consideration in which jurors misapplied what ought to be considered mitigating factors as aggravating factors instead.<sup>156</sup> This confusion becomes prominent with evidence beyond the jury’s understanding, as well as jury instructions that

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<sup>150</sup> *Gregg*, 428 U.S. at 195.

<sup>151</sup> *Id.* at 192.

<sup>152</sup> *Id.* at 193.

<sup>153</sup> *Id.* at 206-07.

<sup>154</sup> *See, e.g.,* *Boyde v. Cal.*, 494 U.S. 370 (1990) (finding that California’s jury instructions, which advised that the death penalty should be imposed if aggravating circumstances outweighed the mitigating circumstances, was not applied in a way that prevented juries from considering such mitigating or aggravating evidence; *Graham v. Collins*, 506 U.S. 461 (1993) (finding that a denial of a requested instruction advising juries to consider the defendant’s youth, family history, and background as mitigating circumstances did not decrease accuracy in his sentence); *Tuilaepa v. Cal.*, 512 U.S. 967 (1994) (finding that California’s list and explanation of capital sentencing factors were phrased in understandable and conventional terms).

<sup>155</sup> Joshua N. Sondheimer, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L. J. 409, 417 (1990).

<sup>156</sup> *Id.* at 418-19; Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1565 (1998).

may encompass legal terminology. While labeling particular evidence as mitigating or aggravating alleviates the problem with the sentencing authority, the jury may still misinterpret mitigating evidence.<sup>157</sup> Stephen Garvey has suggested that jurors make judgments with a moral compass, incorporating mitigating evidence in terms of how it can serve to diminish responsibility for the act.<sup>158</sup> This may partially explain why jurors may view evidence that is intended to be mitigating (such as drug or alcohol use) and, instead, use it as aggravating. A study conducted by Mona Lynch and Craig Haney has found that three out of ten jurors improperly considered substance abuse mitigating evidence to be aggravating instead.<sup>159</sup> The participants in the study were found to conflate mitigating evidence as aggravating evidence much more often than the reverse.<sup>160</sup> Even when jurors were allowed to deliberate, this effect was not reduced, and overall comprehension of the instructions did not improve from individual levels.<sup>161</sup> Although the study focused on race-based sentencing, its implications for juror confusion and misapplication of weighing factors hold relevance in the mental health context as well.

The general public does not have much contact with the mentally ill, and thus, it is impractical to expect the jury to properly weigh such evidence. This is particularly so in cases of personality disorders and psychopathy, which depend on symptoms of emotional and affective deficits, and have traditionally been found to be associated more with aggravating circumstances than with mitigating. Such evidence asks the jurors to incorporate moral judgments of responsibility and, when the evidence is presented without context, it may serve to aggravate rather than mitigate.<sup>162</sup> Psychopathic evidence represents a gray area within this area. While the Court has ruled that it is unconstitutional to impose

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<sup>157</sup> Sondheimer, *supra* note 155 at 432.

<sup>158</sup> Garvey, *supra* note 156 at 1538–1539.

<sup>159</sup> Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 L. AND HUM. BEHAV. 481, 486 (2009).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 492.

<sup>162</sup> Michelle E. Barnett et al., *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCI. LAW 751, 765 (2004) (While this study found that psychological evidence tends to mitigate, the evidence presented focused on traditionally Axis-I disorders found in DSM-IV. In contrast, substance abuse disorders, located on Axis-III, were actually found to be aggravating instead. “Contrary to what occurred with similar evidence provided in one of the vignettes, participants viewed drug and alcohol use and intoxication as aggravating circumstances...”).

the death penalty on the mentally retarded,<sup>163</sup> psychopathic or personality disorder evidence was never clearly addressed. Recent cases from the Florida Supreme Court have noted that mentioning psychopathy or a diagnosis of Antisocial Personality Disorder tends to elicit a negative response from juries, making it a valid defense strategy to exclude such evidence.<sup>164</sup> In addition, some federal courts have recognized psychopathic evidence as aggravating evidence, and it was found to be an error to exclude a defendant from rebutting such evidence.<sup>165</sup> It, therefore, seems that psychopathic evidence is aligned more with the general public's moral compass rather than an objective analysis of aggravation and mitigation. While the general consensus is that juries would have access to "both the views of the prosecutor's psychiatrists and the 'opposing views of the defendant's doctors,'" and would balance such evidence accordingly,<sup>166</sup> the reality seems skewed in favor of aggravation.

The general population is more persuaded to consider evidence as mitigating when exigent factors are perceived as beyond the defendant's control.<sup>167</sup> In an experiment to evaluate the persuasiveness of excuse defenses, Wendy Heath, et al. found that the most persuasive excuses were external variables, which are viewed as outside the defendant's control such as genetic disorders, post-traumatic stress disorder, and abuse, as these explanations tend to elicit shorter sentencing and lower degrees of responsibility.<sup>168</sup> This finding is consistent with attributional analysis, in which people gauge responsibility based on their perception of individuals' control over the issues that gave rise to the incident.<sup>169</sup> The controllability aspect was positively correlated with responsibility, anger, and retribution, while being negatively correlated with sympathy.<sup>170</sup> Therefore, whether a jury is likely to find evidence to be mitigating depends in part on people's perception about the defendant's control over

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<sup>163</sup> *Atkins v. VA.*, 536 U.S. 304, 321 (2002).

<sup>164</sup> *Looney v. State*, 941 So. 2d 1017, 1028-29 (2006).

<sup>165</sup> *United States v. Barnette*, 211 F.3d 803, 825-26 (2000), vacated and remanded, 390 F.3d 775 (4th Cir. 2004), affirmed, 644 F.3d 192 (4th Cir. 2011).

<sup>166</sup> *Ake v. Oklahoma*, 470 U.S. 68, 84 (1985).

<sup>167</sup> Wendy P. Heath et al., *Yes I Did It, But Don't Blame Me: Perceptions of Excuse Defenses*, 31 J. OF PSYCHIATRY & L. 187, 189 (2003).

<sup>168</sup> *Id.* at 211.

<sup>169</sup> Sandra Graham, Bernad Weiner & Gail Sahar Zucker, *An Attributional Analysis of Punishment Goals and Public Reactions to O.J. Simpson*, 23 PERSONALITY & SOC. PSYCHOL. BULL., 331, 341.

<sup>170</sup> *Id.*

the incident at issue.<sup>171</sup>

The television series above frame the psychopath to demonstrate the control factor through a heavy emphasis on certain traits. Each of the antagonists knew their opponents' weaknesses and exploited them to their advantage. For example, Fring convinced Walter that what he was doing was justified in the name of his family in order to push Walter to continue the methamphetamine production. This manipulative nature is based on a psychopath's superficial charm and glib. This is probably the most notable feature of psychopathy because many people see psychopaths as normal individuals, but yet they are deficient in emotional characteristics. This trait may be predominant in most psychopaths, but it ignores the fundamental affective and interpersonal deficits within them. While it remains unclear as to whether these antagonists do represent clinical psychopaths, the media distorts people's perception towards these psychopaths by emphasizing their manipulative and violent attributes. This contributes to a public view that psychopathy should be viewed more as an aggravating factor than a mitigating one, resulting in a bias during capital sentencing.

Another important factor in determining a juror's decision in favor of a death sentence is the perception of fear and danger.<sup>172</sup> Juries may be afraid that an offender might eventually be released, if the offender is imprisoned, and cause further damage to society.<sup>173</sup> As noted above, the media reinforces this perception by featuring various shows in which characters are killed, sending a subtle message that death is the only means to contain these individuals. These shows elicit fear in the viewer by graphically depicting the brutal or bizarre nature of the killings. The viewer links the psychopathic trait with the crime. For example, Fring kills in cold blood without saying a word; Mitchell kills some of his victims while he is naked and manipulates women into committing suicide. The graphic nature of these scenes may promote fear in viewers, rather than desensitizing them.<sup>174</sup>

There has also been significant literature on predicting the dangerousness of psychopaths. For example, John Monahan summarized the criticisms of having mental health experts predicting psychopath's

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<sup>171</sup> See *id.* at 332.

<sup>172</sup> Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. OF CRIM. LAW 585, 595 (2004).

<sup>173</sup> *Id.*

<sup>174</sup> W. James Potter & Stacy Smith, *The Context of Graphic Portrayals of Television Violence*, 44 J. BROADCASTING & ELECTRONIC MEDIA 301, 316 (2000).

danger: (1) that it is not empirically possible to predict, and (2) even if the prediction were accurate, it would violate civil liberties, and that (3) socially controlling activity via dangerousness prediction is outside the scope of mental health professionals.<sup>175</sup> The use of the PCL-R as a measuring tool to predict future dangerousness have little to no empirical support in sentencing cases since the possible benefits are likely outweighed by prejudicial impacts and imprecise methodologies,<sup>176</sup> due in part to the controversial nature of the disorder and imprecise expert testimony. Crime dramas exacerbate these effects by showing these villainous characters as a constant danger in their environment due to their volatility and unpredictability. Mitchell has killed for decades in multiple states, and Fring runs a massive drug empire, which is fraught with peril. Even the corporate psychopath in Wellick is shown to have extreme anger issues and capable of becoming violent at a moment's notice.

The increasing use of psychopathic evidence and the PCL-R<sup>177</sup> coupled with the rise in media psychopaths, has seemingly led to a greater likelihood of jurors improperly considering or confusing sentencing factors. Courts should be given the discretion to provide simpler instructions to better guide the jury through this complex process. Such intervention would limit a capricious application based on personal anecdotes, and sentencing would closely follow the principles enunciated in *Gregg*. Given the stigmatic nature of the term perpetuated by the media, the prejudicial effect is high, and defense counsel should avoid introducing the term in light of the ease with which the prosecutor can rebut and introduce even more aggravating factors. While courts should be wary of prosecutors attempting to prejudice the jury, the ultimate burden is on defense counsel to abstain from introducing such evidence or to provide an appropriate biological context of the mental illness to reduce blameworthiness.

### C. THE DOUBLE-EDGED SWORD

Both California state laws<sup>178</sup> and federal statutes<sup>179</sup> grant

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<sup>175</sup> MCCORD, *supra* note 37 at 281–82 (citing Monahan's concerns that prediction of dangerousness is not within the "helping role" of the psychologist or psychiatrist).

<sup>176</sup> Edens et al., *supra* note 23 at 406-07.

<sup>177</sup> DeMatteo, *supra* note 95 at 231.

<sup>178</sup> Cal. Rules of Court, rule 4.421, 4.423.

<sup>179</sup> 18 U.S.C. § 3553(b)(1) (while provisions of the statute have been found unconstitutional by

discretion to the court in balancing mitigating and aggravating factors when imposing sentences, subject to statutorily-prescribed limits. Mitigating circumstances include defendant's "mental or physical condition"<sup>180</sup> and aggravating factors include the "manner in which the crime was carried out," and whether defendant had taken "advantage of a position of trust or confidence to commit the offense."<sup>181</sup> California's Penal Code codifies the court's discretion in allowing mitigating and aggravating factors.<sup>182</sup> The same balancing test is applied in capital cases, but a jury, rather than a judge, typically decides whether death is appropriate. The controversy centers on the symptoms of psychopathy, which can constitute either aggravating or mitigating circumstances. On one hand, the behavioral and affective deficits have all been linked to neurological deficits, suggesting a biological and, therefore, less blameworthy causation for such behavior. On the other hand, these same behaviors are those that prosecutors focus on to argue future dangerousness, propensity for violence, and lack of remorse.

The Supreme Court has explicitly noted that evidence of mental disability would be a "two-edged sword," in that it may diminish blameworthiness at the expense of higher likelihood of future dangerousness.<sup>183</sup> The Court in *Penry* struck down a Texas statute that barred jurors from potentially considering the dual nature of mental health evidence, such as the defendant's inability to learn, as both mitigating and aggravating circumstances. The statutory questions forced the jury to answer in the affirmative when deciding whether the defendant would present a continued threat to society, since he was incapable of changing otherwise.<sup>184</sup> The *Penry* test was established to address whether death

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many courts, this is predominantly due to the mandatory sentencing guidelines, which unduly restrict a judge's discretion in imposing a sentence).

<sup>180</sup> Cal. Rules of Court, rule 4.423(b)(2).

<sup>181</sup> Cal. Rules of Court, rule 4.421(a)(8), (11).

<sup>182</sup> Cal. Penal Code § 1170 (a)(3); § 1170(b).

<sup>183</sup> *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989).

<sup>184</sup> *Id.* at 322-25. If all three special questions were answered in the affirmative, the death penalty may be imposed. The Court found all three interrogatory questions to have barred the jury from fully considering the evidence. The first question was whether defendant "deliberately" caused the death for which the Court found ambiguity that may have precluded a reasonable juror from giving full effect to the mitigating nature, even if the act was "deliberate." The second question dealt with future dangerousness and because the jury was effectively forced to answer "yes" due to the mental disorder, this too was unconstitutional without fully considering the mitigating nature of mental illness. Finally, the third question was on unreasonableness and here too, the Court found that while a juror may find less culpability due to the mental disorder, the juror was forced to answer in the affirmative.

penalty instructions foreclosed the possibility of a juror in considering potentially mitigating evidence, and if no jury instructions were given to clarify this possibility, whether the defendant's Eighth Amendment rights are violated. The test was slightly refined in *Johnson v. Texas*, when the Court mentioned that if there was no *reasonable likelihood* that a jury was foreclosed from considering the evidence as mitigating, then *Penry* would not apply.<sup>185</sup> In that case, the jury was provided with a supplemental instruction that they could consider mitigating evidence.<sup>186</sup> Additionally, the evidence in dispute in *Johnson* was the age of the defendant, which the court held can be freely considered by the jury.<sup>187</sup> In dictum, the Court also provided that jurors were allowed to actually consider age as an aggravating factor instead, so long as the mitigating evidence was "within the effective reach of the sentence."<sup>188</sup> Efforts to limit the test were struck down when the Court held that the evidence need not be "uniquely severe" as long as the standard to be applied was that of any mitigating evidence—whether it "might serve 'as a basis for a sentence less than death.'"<sup>189</sup> The test is one in which a juror is afforded the opportunity to consider the evidence as mitigating—not whether the evidence can be argued as "either aggravating or mitigating."<sup>190</sup>

The *Penry* analysis can be analyzed under two prongs: whether (1) the mitigating evidence was "constitutionally relevant" and (2) if such evidence was "beyond the 'effective reach' of the jurors."<sup>191</sup> In *Madden*, the Fifth Circuit found that the defendant's evidence of personality disorder, among other mitigating evidence, did not satisfy the first prong based upon the defense counsel's failure to link "personality avoidance disorder" to "substance abuse" with the act in question.<sup>192</sup> Thus, the court declined to consider the jury's ability to consider such evidence under the second prong.<sup>193</sup> Interestingly, the court does note that the psychologist that diagnosed Madden's personality disorder failed to

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<sup>185</sup> *Johnson v. Texas*, 509 U.S. 350, 368 (1993).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Tennard v. Dretke*, 442 F.3d 240, 248-49 (5th Cir. 2006).

<sup>190</sup> *People v. Smithey*, 20 Cal. 4th 936, 1006 (1999) (quoting *Tuilaepa v. Cal.*, 512 U.S. 967 (1994) in which the defendant's age could be argued by either prosecution or defense to be either aggravating or mitigating).

<sup>191</sup> *Madden v. Collins*, 18 F.3d 304, 308 (1994).

<sup>192</sup> *Id.* at 307.

<sup>193</sup> *Id.* at 308.

suggest that the disorder caused aggression or an inability to control impulses.<sup>194</sup>

Psychopathic evidence would be constitutionally relevant in the sentencing phase as a “clear nexus” would exist between the disorder and the act.<sup>195</sup> Thus, the controverted issue would depend on whether the jury was foreclosed upon considering the evidence as mitigating at all. The cases above focused on a Texas statute that explicitly asked a question that the jury had to answer in the affirmative to impose the death penalty. Thus, in the absence of statutorily defined rules, the second prong is inapplicable. In fact, federal statutes and many states do not have such special issues and defer to a balanced weighing of aggravating and mitigating factors.<sup>196</sup> In such cases, a *Penry*-like instruction should be given to provide some form of basic judicial guidance to the jury on the mitigating value of psychopathic evidence. The Court has never defined what it meant by “beyond the ‘effective reach’ of the jurors”—the *Penry* line of cases dealt with statutes that logically foreclosed a juror from considering mitigating evidence; as long as the juror was allowed to examine the evidence—this seems like a broad definition, but this is presumably constitutional. While there is a possibility that jurors may view psychopathic evidence as mitigating, the common sense and practical implications of a loaded term such as “psychopath” will create negative images, especially as presented by the media. As such, judicial instruction is beneficial at the beginning of the sentencing phase to provide jurors with the appropriate structural mindset.

In comparing the *Gregg* and *Penry* decisions, there appears to be a low standard in deciding when and whether additional guidance is needed in the context of mental illness. The courts have recognized the dual nature of mental illness, yet, they have declined to impose mandated jury instructions unless jurors are explicitly foreclosed from considering the mitigating nature of such evidence. However, the shift in television to

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<sup>194</sup> *Id.* at 307 (the court’s explicit mention of the psychologist’s failure to link the disorder as diminished ability to act may suggest that a psychologist that does mention this, which would be in the case of psychopathy, may satisfy the first prong).

<sup>195</sup> *Id.*

<sup>196</sup> *See, e.g.*, 18 U.S.C.S. § 3592; Cal. Penal Code § 190; Rev. Code Wash. § 10.95.030; Fla. Stat. Ann. § 921.141; A.R.S. § 13-751. Of note is that these balancing approaches function fundamentally like special issue questions. The only difference is that it asks the ultimate question of whether the aggravating factors outweigh the mitigating factors instead of several separate questions. Thus, the Supreme Court, in finding that the preclusion of mitigating evidence via the form of the special issue question was unconstitutional, was effectively ruling that being unable to fully consider a mitigating factor was unconstitutional.

portraying both antagonists and protagonists with stigmatic psychopathic traits may pose problems by affording excessive jury discretion in the imposition of the death penalty. In its current state, psychopathy is used and effective more often for the prosecution in arguing for the death penalty.<sup>197</sup> Studies of mock jurors have found that pre-existing attitudes of psychopaths predict attitudes towards imposing the death penalty.<sup>198</sup> It has been suggested that this is because jurors draw upon stereotypes and stigmas to facilitate and economize information, especially when called to perform something as complex as deciding on capital punishment.<sup>199</sup> Furthermore, when a juror has already decided in favor of the death penalty based on these prior perceptions, introduction of the psychopathy checklist may actually generate bias against the defendant.<sup>200</sup> The ambiguous nature of popular crime drama characters coupled with the double-edged nature of psychopathic evidence warrant additional guidance under *Gregg* as jurors are likely to be drawing upon stigmas and stereotypes in imposing the death penalty, constructively foreclosing them from considering the mitigating nature of the evidence.

#### VI. CURRENT TRENDS, PRECAUTIONS, AND SUGGESTED REMEDIES

A recent case provides an example of the volatility of psychopathic evidence in the sentencing phase. After Brian Dugan was found guilty of rape and murder, his defense attorney presented fMRI brain scans along with psychopathic assessment data as mitigating evidence.<sup>201</sup> Previous reports indicated that the jury would likely vote for life in prison due to a possible holdout; however, after a lengthy deliberation, the death penalty was imposed.<sup>202</sup> While the defense attorney opined that the evidence lead to prolonged deliberation, this does not mean such deliberation was helpful to the defendant. If there was a potential holdout, such evidence

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<sup>197</sup> See Edens et al., *supra* note 22 at 617-618.

<sup>198</sup> *Id.* at 618; John F. Edens et al., *Psychopathic Traits Predict Attitudes Toward a Juvenile Capital Murderer*, 21 BEHAV. SCI. & THE L. 807, 823 (2003).

<sup>199</sup> Edens et al., *supra* note 198 at 822-23.

<sup>200</sup> Edens et al., *supra* note 22 at 619 (since these jurors have already decided that the defendant is dangerous, introduction of the PCL-R would not establish that death is being imposed for being dangerous, but rather because the defendant "exhibit[s] psychopathic traits").

<sup>201</sup> Greg Miller, *fMRI Evidence Used in Murder Sentencing*, SCI. MAG., <http://news.sciencemag.org/2009/11/fmri-evidence-used-murder-sentencing> (Nov. 23, 2009 5:45 PM).

<sup>202</sup> *Id.*

could have ultimately been used as aggravating evidence instead. This was elaborated on by the prosecution's own expert witness, who stated that a brain scan done in the present day for a murder committed over 20 years ago was irrelevant.<sup>203</sup> Therefore, despite constant advancements in psychopathic research, prejudicial effects seem to persist.

To compound this effect, both antagonists and protagonists above, along with various other criminal dramas, embody the stereotypical psychopath, with emphasis on the violent and dangerous attributes.<sup>204</sup> The antagonists are generally portrayed as emotionless individuals without defined moral goals,<sup>205</sup> while perpetuating the dangerous and violent stigmas. The protagonists, while also portraying the stigmas, pursue goals that are more justified with Walter providing for his family, Dexter killing criminals deserving of death, and Elliot trying to take down an evil corporation. Such portrayal of the antagonists perpetuates the prejudice against "psychopaths." These protagonists add a layer of complexity as viewers side with these antiheroes, because they reflect realism depicted in a struggling society. It has been hypothesized that most members of our society actually possess psychopathic attributes, but simply utilize the traits for different end goals.<sup>206</sup> This phenomenon may partly explain why the common narratives in the shows are popular, but the overall research studying the link between such dramas and perception of crime has been scarce. It is contradictory to condemn certain acts of violence and then justify the same acts as achieving higher good, which seems to lend credence to the adage "the ends justify the means." It would seem beneficial then, for defense attorneys to present a narrative justification for their clients, while the prosecution seeks to restrict such evidence. In spite of these issues, there is a clear presumptive negative association with psychopathy from the outset. By depicting the protagonists with such psychopathic traits, this only adds complexity in jurors' minds, making them less of "passive decision makers that courts assume them to be."<sup>207</sup>

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<sup>203</sup> *Id.*

<sup>204</sup> Keesler, *supra* note 16 at 14.

<sup>205</sup> Breaking Bad's Fring may be an exception – It is revealed to viewers that Fring seeks revenge on the Mexican cartel for murdering his business partner at the beginning of his methamphetamine business. However, he chooses to carry out this plan in a drawn out and torturous manner, which distances the viewer. Similarly, Dexter's Mitchell and Mr. Robot's Wellick are engaged in either no goal at all (Mitchell killing to re-enact childhood) or a power-centric goal (Wellick striving to become Chief Technology Officer).

<sup>206</sup> Wondemaghen, *supra* note 111 at 122.

<sup>207</sup> Kevin M. O'Neil et al., *Exploring the Effects of Attitudes Toward the Death Penalty on Capital Sentencing Verdicts*, 10 PSYCHOL., PUB. POL'Y, & L. 443, 464 (2004).

This potentially confuses the public, which is immersed in a variety of literature emphasizing psychopathic traits, both demonizing and romanticizing it at the same time.<sup>208</sup> However, whether such traits are embodied by an antagonist or protagonist, the misperception remains and the stigma persists, leading the public to characterize them as aggravating evidence. Given how popular culture has framed the characters and the inherent symptomology of personality disorders, the psychopathic construct is more likely to be viewed as an extension of personality than of a mental illness. This would place psychopathy in common with substance abuse or alcohol use, viewed by jurors as aggravating evidence if provided without context,<sup>209</sup> than with child abuse or some other external mitigating circumstance.

A proposed remedy would incorporate a judicial role in guiding jurors during capital sentencing to reduce misinterpretation and confusion.<sup>210</sup> Judicial instructions would provide a structured framework at the outset and juries would focus on the instructions, rather than arbitrarily weighing the various aggravating and mitigating circumstances without defined parameters. Courts should carefully distinguish aggravating circumstances of an incident from prosecutors' suggestion of psychopathic traits as character evidence. Overall, judicial instructions that categorize mitigating and aggravating circumstances would restrict misapplication. Research has suggested that jurors' attitudes toward the death penalty are the primary determinant on whether the death penalty is imposed, even when accounting for the manipulation of aggravating and mitigating factors.<sup>211</sup> A proposed solution would be to limit the effect of these attitudes during deliberations, which would include stronger admonitions and guidance.<sup>212</sup> Such a judicial role would also include categorizing aggravating and mitigating factors, and assigning weight to different factors.<sup>213</sup> For example, defining the scope of mental illness and what it encompasses may broaden or constrain a juror's perception of what constitutes mitigating evidence. Such a standardized approach would disengage jurors from any personal identification with the

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<sup>208</sup> Keesler, *supra* note 16 at 39-40.

<sup>209</sup> See Heath et. al., *supra* note 167 at 211-12.

<sup>210</sup> Tracy Hughes & Shoshana Lazik, *Ambiguities in the Penalty Phase of Capital Proceedings: Statutory Patterns and Suggestions for California*, PUBLIC LAW RESEARCH INSTITUTE 18 (1994), <http://gov.uchastings.edu/public-law/docs/plri/deathp.pdf>.

<sup>211</sup> O'Neil et al., *supra* note 207 at 463.

<sup>212</sup> See *id.* at 464.

<sup>213</sup> Hughes & Lazik, *supra* note 210 at 16.

defendant, allowing for a more objective inquiry into the act itself, rather than the individual.<sup>214</sup>

Additionally, providing jury instructions, similar to a *Penry* instruction, would provide the necessary guidance to limit jury discretion. While jurors in many jurisdictions are not statutorily barred from considering the mitigating aspect of psychopathic evidence, the nature of the evidence lends itself to a high likelihood of misapplication and bias. The type of evidence likely to be presented is usually complex, technical, and prejudicial due to the controversial nature of the psychopathy.<sup>215</sup> Wiener et al. conducted an experiment consisting of different fact scenarios and sets of jury instructions, focusing on the comprehensibility of jury instructions. They found that jurors generally miscomprehend large portions of jury instructions, and those with lower comprehension were more likely to impose the death penalty.<sup>216</sup> Notably, the researchers also discovered that simpler jury instructions showed better comprehension.<sup>217</sup> Improved comprehension was particularly important for mitigating factors.<sup>218</sup> Therefore, it seems that simplifying the information through categorization and applying a set of standards would allow jurors to focus on the task at hand. A similar study by Patry and Penrod found more promising results, noting that a revised set of instructions along with case-specific mitigating factors improved jury comprehension.<sup>219</sup> The study also highlighted the importance of the dangerousness concept,<sup>220</sup> which is central to the most aggravating uses of psychopathic evidence and focuses on *institutional* dangerousness in capital cases rather than on *general* dangerousness. Jurors should be

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<sup>214</sup> Meghan S. Sanders & Mina Tsay-Vogel, *Beyond Heroes and Villains: Examining Explanatory Mechanisms Underlying Moral Disengagement*, 19 MASS COMM. & SOC'Y 230, 247 (2016) (finding that viewers' identification with the antihero may be a necessary component in determining whether moral disengagement, and thus character liking, occurs).

<sup>215</sup> The prejudicial nature would likely stem from a prosecution's gross oversimplification appeal to principles that psychopaths are naturally terrible people, drawn from a common sense of stereotype and stigma.

<sup>216</sup> Richard L. Wiener et al., *Comprehensibility of Approved Jury Instructions in Capital Murder Cases*, 80 J. APPLIED PSYCHOL. 455, 463-64 (1995).

<sup>217</sup> *Id.* at 464.

<sup>218</sup> *Id.* This legal issue focuses on jurors understanding that they are allowed to consider any aspects of the defendant's character or circumstance of the offense.

<sup>219</sup> Marc W. Patry & Steven D. Penrod, *Death Penalty Decisions: Instruction Comprehension, Attitudes, and Decision Mediators*, 13 J. FORENSIC PSYCHOL. PRACT. 204, 239 (Jan. 1 2013).

<sup>220</sup> *Id.* at 241 (finding that defendant's dangerousness plays a significant role in mediating the multiple various relationships governing sentencing attitudes of mock jurors).

guided through this subtle, but fundamental difference.<sup>221</sup> This stresses the importance of establishing clear instructions, ideally with concrete examples, to guide jurors in understanding their roles and appropriately weighing aggravating and mitigating factors.

Additionally, the optimal course for counsels defending psychopathic defendants may be to abstain from using the evidence of psychopathy. Studies have been scarce in demonstrating what, if any, link there is between mass media consumption and juror attitudes, but existing studies have indicated some negative stigma associated with psychopathy.<sup>222</sup> In its current stage, psychopathy is indisputably a loaded term, and even if it is not mentioned, its traits have been shown to trigger negative emotions.<sup>223</sup> Prejudice is a valid concern, even if the traits are considered in isolation through a standardized test such as the PCL-R.<sup>224</sup> The recent trend in popular culture media of creating antiheroes may only serve to cause confusion on whether psychopathic traits constitute a separate disorder at all.<sup>225</sup> Even though some literature identifies a neurological cause, many of the traits and symptoms are manifested through acts and emotional deficits, hardly evoking sympathy traditionally associated with mitigating factors. Up to this point, the Supreme Court has recognized such evidence to be double-edged in nature, and thus, a defense counsel would introduce such evidence at its own risk without proper judicial intervention. A prosecutor can easily turn psychopathic evidence against the defendant with effective cross-examination, simply by focusing on the core aspect of dangerousness. Yet, when psychopathy has been presented with the underlying genetic basis, judges are more likely to reduce sentence and are significantly more likely to view such evidence as mitigating.<sup>226</sup> The general trend of psychopathic research has also sharpened the other edge of the sword as the research led to a better understanding of the disorder and, thus, exposing jurors to the mitigating aspect. Ultimately however, a few years of research is unlikely to be sufficient to overturn decades of stigmatization.

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<sup>221</sup> Edens et al., *supra* note 102 at 441. Many jurors mistakenly believe that in weighing future dangerousness, they are considering whether defendant recidivates in the general public; however, in death penalty contexts, the alternative is usually life without the possibility of parole, and jurors would be considering whether the defendant would pose a danger to fellow inmates and/or prison guards.

<sup>222</sup> See Edens et al., *supra* note 22.

<sup>223</sup> *Id.* at 617.

<sup>224</sup> *Id.*

<sup>225</sup> Wondemaghen, *supra* note 111, at 122.

<sup>226</sup> See Aspinwall et al., *supra* note 24.

Crime dramatization in media currently focuses on the psychopathic villain as the antagonist, who usually has no other discernible mental illness, and a protagonist, who usually has some moralistic goal. A proposed solution in those scenarios would be framing psychopathy in order to reduce the stigmatic effects.<sup>227</sup> Framing the disorder and providing context would allow for greater depth and character development, while also allowing the public to view the disorder in the appropriate context. The television shows reviewed above provide no background information on the characters. While *Dexter* did indicate that Mitchell suffered an abusive childhood, his reaction of recreating his horrific past were sensationalized in response to such abuse. In contrast, many, if not all of the protagonists above had a morally justifiable purpose for their actions and some type of family to fall back on. Affording character development in appropriate context may limit issues of stigma so as to provide a holistic and more neutral comprehension of the individual.

## VII. CONCLUSION

The media has reinforced stigmas of psychopaths by portraying them as violent, dangerous, unpredictable, and untreatable individuals, creating a label that embodies these characteristics. While research into the origins and potential treatment of the disorder has grown in the last decade, “psychopathy” is still being used to describe the vilest of individuals and those who commit horrendous crimes without conscience. More often than not, crimes committed by psychopathic individuals elicit harsher punishments, such as the death penalty, than those committed by others.<sup>228</sup> Whether such a disorder should be generally accepted as a mitigating factor may rest on the public recognizing that psychopathic individuals may commit crimes involuntarily due to moral deficits rather than out of volition. It is this notion that hinges on the line between the “mad and the bad,” while also treading on the line between philosophy and psychology.

Additional judicial guidance may serve to enhance jury comprehension and constrain inappropriate deliberation. Recent research has suggested that presenting psychopathic evidence with its biological context, such as suggesting its genetic rather than behavioral origin, shifts the evidence from being mostly aggravating to mitigating, with judges

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<sup>227</sup> Michael D. Slater, Donna Rouner, & Marilee Long, *Television Dramas and Support for Controversial Public Policies: Effects and Mechanisms*, 56 J. COMM., 235, 249 (2006).

<sup>228</sup> Edens et al., *supra* note 22.

being more lenient.<sup>229</sup> Therefore, it is reasonable to suppose that providing such context could help jurors who are not well versed in the law and have difficulties in interpreting the value of psychopathic evidence. Judicial instructions, as part of a broader guidance scheme employed by courts, would be helpful in this regard to clarify and ensure information is not improperly considered, as mentioned in *Gregg*.

Another suggested solution for a defense counsel is to refrain from introducing the evidence of psychopathy. While courts have taken a very liberal approach in allowing attorneys to exercise their discretion in providing mitigating or aggravating factors, the description of the symptoms themselves may prove too prejudicial to the defendant and serve as an aggravating factor, even if no pejorative term is used.<sup>230</sup> This proposal may seem extreme, especially as it forgoes any type of psychiatric confinement and possible treatment, but any beneficial effects can easily be outweighed by uncertainties from future dangerousness that jurors rely upon. The biggest challenge may be recognizing the extent of the defendant's manifestation of the disorder that may trigger a judge or a juror to interpret the symptoms as mitigating, rather than aggravating circumstances. Only then should the defense counsel carefully consider introducing the psychopathic evidence.

Finally, the media should change the way that the mentally ill are being portrayed. The television shows analyzed above represent a fairly accurate portrayal of psychopathy, but some of them omit contextual background entirely. The shift towards an ambiguous protagonist allows for more complex characters to develop, but perpetuates stigmas of psychopathy. This simultaneous romanticizing and demonizing of psychopaths has served to analyze psychopathy as degrees of normality rather than as a discrete illness, potentially limiting valuable research in the area. As the line between a psychopath and someone who is voluntarily "evil" may be thin, it becomes important for the media to avoid stigmatizing psychopathy, so as to not conflate the disorder with free choice. Framing psychopathic disorders in this manner may provide context for the audience and gauge the behavior through the appropriate environment and cues.

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<sup>229</sup> Aspinwall et al., *supra* note 24.

<sup>230</sup> Edens et al., *supra* note 198 at 823 (finding that even without using the term 'psychopath,' mock jurors were negative, even after manipulating for possible ethnicity issues).