WEIGHING DEATH: IS DEATH PENALTY ELIGIBILITY "ESPECIALLY HEINOUS, CRUEL OR DEPRAVED"?

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The Supreme Court in Furman v. Georgia *tacitly authorized states to impose the death penalty so long as their authorizing statutes ensure that eligibility is not so expansive as to lead to arbitrary and capricious infliction of death. When the death penalty is arbitrarily or capriciously imposed, it is considered cruel and unusual punishment and, thus, violates the Eighth and Fourteenth Amendments of the U.S. Constitution. One method to ensure that eligibility is not overexpansive is to weigh aggravating factors against mitigating factors. Using aggravating factors in such fashion creates the risk of facial vagueness, and—thanks to ill-advised Supreme Court deference allowing state courts to narrow already overbroad terms—these defective aggravators have become popular and widely used. For example, Arizona courts continue to apply defective aggravators by extensively redefining the key terms of facially deficient aggravators. This Note argues that one such aggravator—the "especially heinous, cruel or depraved" aggravator—is facially vague, defective, overused, and must be discarded.*

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INTRODUCTION

In 1972, the U.S. Supreme Court in *Furman v. Georgia* invalidated every then-existing capital sentencing statute in the United States, which forced states to revisit death penalty eligibility and ensure it was not so expansive as to lead to the arbitrary and capricious infliction of capital punishment. [1] When the death penalty is arbitrarily or capriciously imposed, it is considered cruel and unusual punishment, violating the Eighth and Fourteenth Amendments of the U.S. Constitution. [2] In response to *Furman*, states enacted statutes that sufficiently narrowed the class of persons eligible for the death penalty. [3] These statutes

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1. 408 U.S. 238 (1972) (per curiam); *see also* Srikanth Srinivasan, Note, *Capital Sentencing Doctrine and the Weighing-Nonweighing Distinction*, 47 STAN. L. REV. 1347, 1347 (1995).

2. *Furman*, 408 U.S. at 239–40 (per curiam); *see also* Alexander J. Hendricks, *A Global Network for Treason: The Internet's Impermissible Broadening of the Class of Death-Eligible Defendants Under § 904 of the Uniform Code of Military Justice*, 24 CORNELL J.L. & PUB. POL'Y 353, 356–57 (2014) ("This unfettered discretion is what the Supreme Court in *Furman* explicitly deemed unconstitutional as an arbitrary and capricious exercise of the death penalty. The arbitrary and capricious nature of [10 U.S.C.] § 904's eligibility phase violates the Eighth Amendment and makes the statute constitutionally invalid.").

3. Gregg v. Georgia, 428 U.S. 153, 179–80 (1976); *see also* Omar Malone, *Capital Punishment Statutes and the Administration of Criminal Justice: (Un)equal*

narrowed the class of eligible persons by requiring sentencing bodies to weigh aggravating factors against mitigating factors.[4] If the aggravators are more significant, then the offender is eligible for death.[5]

One concern with these "narrowing statutes," however, is that certain aggravators are facially vague and do not provide enough guidance to the sentencing body. The Supreme Court has ruled that facially vague aggravators are constitutionally defective unless the state appellate court has further defined the facially vague aggravator.[6] Still, overexpansive aggravators persist.

Ultimately, the problem begins with state legislators, who are charged with carefully drafting statutes that meet the standards set forth in U.S. Supreme Court jurisprudence. Some legislatures attempt to meet these standards by drafting statutes with a weighing function. When this occurs, the Court has tasked itself with ensuring these aggravators provide sufficient guidance to avoid being labeled as facially vague, and thus constitutionally defective. Yet, in *Walton v. Arizona*, the Court added another layer to the analysis when it allowed state appellate courts to further define facially vague aggravators.[7] This solution, however, still fails to satisfy *Furman*'s objective—to prevent the arbitrary and capricious infliction of capital punishment.

Part I of this Note analyzes the U.S. Supreme Court concerns underlying the Court's death penalty eligibility decisions, beginning with *Furman*. It further discusses the foundation on which capital sentencing has been made available. Part II then addresses how facially vague aggravators have passed constitutional muster despite the standards established by the Court's early jurisprudence. Next, Part III addresses how weighing states have designed their capital sentencing statutes—i.e., with varying numbers of aggravators and mitigators, each with different levels of expansiveness. Part IV uses the Arizona Supreme Court's definition of "especially heinous, cruel or depraved" to show how appellate courts have further defined facially vague aggravators. In *Walton*, the U.S. Supreme Court was

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Protection Under the Law!, 15 T. MARSHALL L. REV. 87, 99 (1990) ("Thirty-seven states provide for the imposition of capital punishment for defendants convicted of first degree murder. All of these states require the sentencer, before imposing the death penalty, to find certain facts relating to the crime or to the defendant that elevate the offense above the norm of other first degree murders. In most states, these aggravating circumstances are spelled out in the capital sentencing statutes, and most of them are relatively specific and narrow.").

4. *Gregg*, 428 U.S. at 196–97; *see also* Stephen Hornbuckle, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 TEX. L. REV. 441, 441–42 (1994) ("[I]f a state requires that the jury weigh aggravating factors against mitigating factors, then the Court has mandated some sort of reweighing if the death sentence is to comport with the prohibition on cruel and unusual punishment contained in the Eighth Amendment as interpreted by *Furman v. Georgia*, which refuses to enforce death penalty schemes that do not limit arbitrary discretion on the part of the jury and produce capricious results.").

5. *Gregg*, 428 U.S. at 196–97; *see also* Stephen P. Garvey, *Death-Innocence and the Law of Habeas Corpus*, 56 ALB. L. REV. 225, 252 (1992) ("[I]n other states, death-eligible status attaches only after the jury finds that aggravators outweigh mitigators.").

6. Walton v. Arizona, 497 U.S. 639 (1990).

7. *Id.*

ultimately persuaded that Arizona's definition provided sufficient guidance to the sentencing body. However, Arizona's definitions of the key terms failed to sufficiently narrow its effect, allowing lower courts to find heinousness, cruelty, or depravity in nearly any murder. Lastly, Part V discusses possible solutions—other than outright repeal—that the U.S. Supreme Court could adopt to provide some relief from facially vague aggravators. These solutions are imperfect as the aggravator is still too expansive to sufficiently narrow the class of persons eligible for the death penalty. In effect, these solutions treat the injury as opposed to trying to prevent it entirely. Therefore, the "especially heinous, cruel or depraved" aggravator should be struck down and removed from capital sentencing statutes.

I. THE FOUNDATION AND FORMAT OF MODERN DEATH PENALTY ELIGIBILITY

> *The proposed additional language in the legislation broadens the scope of those eligible for the death penalty to the point where the constitutionality of Arizona's death penalty statute likely would be challenged and potentially declared to be unconstitutional.*[8]

In 2014, then-Arizona Governor Jan Brewer vetoed House Bill 2313, which would have made a defendant eligible for the death penalty if there was a "substantial likelihood that the defendant would commit criminal acts of violence that constitute a continuing threat to society."[9] Governor Brewer stated that Arizona's death penalty statute had thus far passed constitutional muster because it "sufficiently narrow[ed] the class of individuals eligible for the death penalty."[10] The Governor was concerned that Arizona's death penalty statute had become increasingly overexpansive and that any addition to the current scheme might result in a failure to sufficiently narrow the class of persons eligible for the death penalty, rendering the whole scheme unconstitutional.[11]

Courts generally use one of two methods to narrow the class of persons eligible for the death penalty: weighing[12] and nonweighing.[13] Weighing states

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8. Letter from Janice K. Brewer, Governor of Arizona, to Ken Bennett, Secretary of State of Arizona (Apr. 24, 2014), https://votesmart.org/static/vetotext/47814.pdf [hereinafter Brewer Letter].

9. *Id.*; H.B. 2313, 51st Leg., 2d Sess. (Ariz. 2014).

10. Brewer Letter, *supra* note 8.

11. *See id.*; Zant v. Stephens, 462 U.S. 862, 877 (1983).

12. Lowenfield v. Phelps, 484 U.S. 231, 245–46 (1988).

13. The nonweighing format is outside the scope of this Note. In short, a nonweighing function asks the legislature itself to narrow the definition of capital offenses. *Id.* at 245. Oftentimes, legislatures narrow the definition of capital offenses by adopting categories of crime that are punishable by death. For example, in Texas the legislature has determined a person has committed capital murder when he or she knowingly "murder[s] a peace officer or fireman who is acting in lawful discharge of an official duty." TEX. PENAL CODE ANN. § 19.03(a)(1) (West 2011). Thus, a person who is convicted of killing a police officer affecting a traffic stop would be death-eligible without regard to any assessment by a judge or jury. *See, e.g.*, Ruiz v. State, No. AP-75968, 2011 WL 1168414, at *1 (Tex. Crim.

define capital offenses broadly and allow juries (or judges[14]) to weigh the presence of aggravating and mitigating circumstances to determine whether a defendant is eligible for the death penalty.[15] Specifically, weighing states create a list of "aggravators" that, if present, could make the perpetrator eligible for the death penalty.[16] Aggravators are then weighed against "mitigators," which might call for leniency.[17]

Aggravating and mitigating factors vary widely by state, ranging from extraordinarily broad circumstances to specific occurrences.[18] For example, one common aggravator is the presence of a violent felony on the defendant's criminal record.[19] A common mitigator is the defendant's age at the time he or she committed capital murder.[20] If the defendant was an adolescent, there is an argument that his or her maturity, impulsivity, intelligence, and judgment was not fully developed, which might call for leniency when determining if he or she is death-eligible.[21]

The weighing and nonweighing methods were developed in response to a number of U.S. Supreme Court capital-sentencing cases that demonstrated a need

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App. Mar. 2, 2011). For a more detailed example of this method of narrowing, see Jurek v. Texas, 428 U.S. 262, 268–69 (1976).

14. In *Ring v. Arizona*, the U.S. Supreme Court held that the Sixth Amendment does not permit a sentencing judge, sitting without a jury, to find an aggravating circumstance that makes a defendant death-eligible. 536 U.S. 584, 609 (2002).

15. *Lowenfield*, 484 U.S. at 246.

16. U.S. Supreme Court jurisprudence repeatedly insists that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). The Court has embraced this principle; as a result, murder is the only charge that can feasibly uphold a death sentence. *Id.* at 421; Coker v. Georgia, 433 U.S. 584, 592 (1977).

17. Mitigating circumstances are facts and instances that may indicate a defendant should not be sentenced to death. *See, e.g.*, DEL. CODE ANN. tit. 11, § 4209(d)(1) (2013).

18. *See infra* Part II.

19. *See, e.g.*, ALA. CODE § 13A-5-49(2) (2014); ARIZ. REV. STAT. ANN. § 13-751(F)(2) (2012); ARK. CODE ANN. § 5-4-604(3) (2014); DEL. CODE ANN. tit. 11, § 4209(e)(1)(i) (2013); FLA. STAT. § 921.141(5)(b) (2010); IND. CODE § 35-50-2-9(B)(13)(A) (2014); KAN. STAT. ANN. § 21-6624(a) (2013); MISS. CODE ANN. § 99-19-101(5)(b) (2013); NEB. REV. STAT. § 29-2523(1)(a) (2013); NEV. REV. STAT. § 200.033(2)(B) (2013); N.C. GEN. STAT. § 15A-2000(e)(3) (2012); OKLA. STAT. tit. 21, § 701.12(1) (2014); TENN. CODE ANN. § 39-13-204(i)(2) (2011).

20. *See, e.g.*, ARK. CODE ANN. § 5-4-605(4) (2001); FLA. STAT. § 921.141(6)(g) (2010); IND. CODE § 35-50-2-9(c)(7) (2014); KAN. STAT. ANN. § 21-6625(a)(7) (2013); MISS. CODE ANN. § 99-19-101(6)(g) (2013); MONT. CODE ANN. § 46-18-304(1)(g) (2013); NEB. REV. STAT. § 29-2523(2)(d) (2013); NEV. REV. STAT. § 200.035(6) (2013); N.H. REV. STAT. ANN. § 630:5(VI)(d); N.C. GEN. STAT. § 15A-2000(f)(7) (2012); OHIO REV. CODE ANN. § 2929.04(B)(4) (LexisNexis 2002); 42 PA. CONS. STAT. § 9711(e)(4) (2014); TENN. CODE ANN. § 39-13-204(j)(7) (2011); WYO. STAT. ANN. § 6-2-102(j)(vii) (2001).

21. *But see, e.g.*, State v. Laird, 920 P.2d 769, 775 (Ariz. 1996).

for reform—the foundation of which was *Furman v. Georgia*.[22] In *Furman*, the Court addressed a trio of cases in which a defendant had been sentenced to death.[23] In two cases, the death penalty was imposed for rape;[24] in the third, it was imposed for murder.[25] In a 5–4 per curiam decision, *Furman* held that the "arbitrary infliction" of the death penalty violated the Eighth Amendment's prohibition of cruel and unusual punishment.[26] *Furman* was so polarizing that every Justice on the Supreme Court issued a separate opinion to accompany the per curiam opinion.[27] *Furman* leveled to the ground an arbitrary and capricious death penalty system by invalidating every then-existing death penalty provision in the United States.[28]

The concurring justices did not rule that the death penalty was per se unconstitutional.[29] Until 1972, states utilized the death penalty with such infrequency that there was "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not."[30] Recognizing that the "basic theme of equal protection is implicit in 'cruel and unusual' punishments," the concurring justices sought to prevent states from imposing the death sentence in a wanton or freakish manner.[31] After *Furman*, a death penalty violates the Eighth Amendment's prohibition against cruel and unusual punishment when it is imposed under a statute that randomly, arbitrarily, or

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22. 408 U.S. 238 (1972) (per curiam).

23. *Id.* The Court granted certiorari to three separate cases on whether "the imposition and carrying out of the death penalty in [these cases] would constitute cruel and unusual punishment." *Id.* at 239.

24. In 1977, the Court held that the death penalty was a grossly disproportionate and excessive punishment for the rape of an adult woman, violating the Eighth Amendment. Coker v. Georgia, 433 U.S. 584, 592 (1977).

25. *Furman*, 408 U.S. at 239 (per curiam).

26. *Id.* at 239–40; *see id.* at 277 (Brennan, J., concurring).

27. One reason underlying the polarization of the Court in *Furman* was disagreement over whether the Court was the appropriate venue to determine evolving standards of decency. *Compare id.* at 403 (Burger, J., dissenting) ("[O]nly the legislature may determine that a sentence of death is appropriate . . . ."), *with id.* at 465 (Powell, J., dissenting) ("[I]mpatience with the slowness, and even the unresponsiveness, of legislatures is no justification for judicial intrusion upon their historic powers."), *and id.* at 465–66 (Rehnquist, J., dissenting) ("How can government by the elected representatives of the people co-exist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness from the popular will, to declare invalid laws duly enacted by the popular branches of government?").

28. Srinivasan, *supra* note 1, at 1347.

29. Decisions following *Furman* reinforced the idea that the Court did not intend to find the death penalty unconstitutional in all circumstances. *See* Gregg v. Georgia, 428 U.S. 153, 195 (1976) ("[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.").

30. *Id.* at 310–11, 313 (White, J., concurring).

31. *Id.* at 309–10 (Stewart, J., concurring) (explaining that when death sentences are imposed in a wanton or freakish manner, they are "cruel and unusual in the same way that being struck by lightning is cruel and unusual").

discriminatorily issues death sentences.[32] In response, states began enacting new capital sentencing statutes.[33]

To pass constitutional muster, capital sentencing statutes must sufficiently narrow the class of individuals eligible for the death penalty.[34] For example, in *Gregg v. Georgia*, the U.S. Supreme Court reviewed the constitutionality of Georgia's capital-sentencing procedures after a Georgia jury sentenced a hitchhiker, who shot and killed two men, to death.[35] Georgia's new procedures—implemented after the Court's decision in *Furman*—required a sentencing body to find beyond a reasonable doubt the presence of at least one statutorily enumerated aggravating circumstance before it could sentence a defendant to death.[36] The new procedures also added an additional safeguard by providing an automatic appeal of all death sentences to the Supreme Court of Georgia.[37] In light of the direction and guidance these procedures provided to the sentencing body, the Court held that Georgia's capital-sentencing procedures were constitutional, reasoning that they genuinely narrowed the class of persons eligible for the death penalty.[38] The Court ultimately held that in order to avoid constitutional flaw, a state must "genuinely narrow the class of persons eligible for the death penalty" when designing a capital sentencing scheme.[39]

Some weighing state-statutes have successfully addressed the Court's *Furman–Gregg* concerns by default simply because the Court is unable to declare the statute devoid of guidance. An illustrative example of such a statute is highlighted in *Proffitt v. Florida*.[40] In 1976, Florida adopted a new capital sentencing statute in the wake of *Furman*.[41] The changes required a post-conviction evidentiary hearing to determine the sentence; there, the jury was

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32. *Id.*

33. Srinivasan, *supra* note 1, at 1347.

34. Gregg v. Georgia, 428 U.S. 153, 189 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); *see also* Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

35. *Gregg*, 428 U.S. at 195. Fred Simmons and Bob Moore picked up the defendant and his travelling companion in Florida. *Id.* When the group stopped to rest in Georgia, the defendant fired his .25 caliber pistol at Simmons and Moore five times, killing each, before taking their valuables and driving away. *Id.*

36. *Id.* at 164–66. For example, aggravating circumstances exist when "the offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they (sic) involved the depravity of [the] mind of the defendant." *Id.* at 161.

37. *Id.* at 164–65, 196, 198 ("[The Supreme Court of Georgia] is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.").

38. *Id.* at 206–07.

39. Zant v. Stephens, 462 U.S. 862, 877 (1983).

40. 428 U.S. 242 (1976).

41. *Id.* at 247–48.

required to weigh any statutory aggravating and mitigating circumstances.[42] The statute also provided for an automatic review by the Florida Supreme Court for all cases imposing the death penalty.[43] In *Proffitt*, the U.S. Supreme Court held that Florida's sentencing statute, on its face, gave enough detail and specific guidance to assist the sentencing body in determining whether to impose death or life imprisonment.[44] Foreshadowing death penalty jurisprudence, the petitioner argued that the aggravating circumstances language was vague and overbroad.[45] But, at this point in the Court's capital sentencing jurisprudence, the Court could not conclude that "the provision, as so construed, provide[d] *inadequate* guidance."[46]

II. THE SUPREME COURT EMBRACES VAGUENESS

In 1983, in *Zant v. Stephens*, the Supreme Court once again addressed the *Furman–Gregg* vagueness concern.[47] In *Zant*, the defendant escaped from a Georgia prison and embarked upon a two-day crime spree.[48] While he and an accomplice were in the process of burglarizing a home, they were interrupted by an individual whom they subsequently beat, robbed, abducted, and shot twice in the head.[49] At trial, a Georgia jury sentenced the defendant to death.[50] On appeal, the U.S. Supreme Court addressed whether the death sentence should be vacated in light of the Supreme Court of Georgia's decision to invalidate an aggravator—found present in the defendant's case—on grounds of vagueness.[51] In upholding the death sentence, the U.S. Supreme Court opined on the matter of vague aggravators: "To avoid . . . constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[52]

In 1994, the U.S. Supreme Court's grapple with vagueness led it to announce an additional test intended to ensure that individual aggravators sufficiently narrowed the class of persons eligible for the death penalty.[53] Specifically, in *Tuilaepa v. California*, the Court held than an aggravating circumstance must meet two requirements in order to sufficiently narrow the class of persons eligible: First, "the circumstance may not apply to every defendant

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42. *Id.* at 248 & n.6.
43. *Id.* at 250.
44. *Id.* at 253.
45. *Id.* at 255. The petitioner specifically attacked the aggravator this Note argues should be struck down: "The capital felony was especially heinous, atrocious or cruel." *Id.* at 248 n.6, 255.
46. *Id.* at 255–56 (emphasis added).
47. 462 U.S. 862 (1983).
48. *Id.* at 864.
49. *Id.* at 864–65.
50. *Id.* at 866.
51. *Id.* at 864 (addressing whether a sentence to death must be vacated if one of three aggravating factors found by a jury is subsequently invalidated by a state supreme court decision).
52. *Id.* at 864, 877.
53. Tuilaepa v. California, 512 U.S. 967, 972 (1994).

convicted of murder; it must apply only to a subclass of defendants convicted of murder."[54] Second, "the aggravating circumstance may not be unconstitutionally vague."[55] While application of the first requirement is fairly straightforward, the second is much more difficult to define. At its core, an aggravating circumstance must offer guidance to the sentencing body.[56]

Before state appellate courts began scrutinizing the constitutional validity of aggravators, the Supreme Court tasked itself with this responsibility. For example, in *Godfrey v. Georgia*, the Court reviewed the constitutionality of an aggravating circumstance used to sentence a Georgia defendant to death.[57] After weeks of fighting with his wife and mother-in-law, the defendant went to his mother-in-law's trailer, peered into the window, spotted both women, and fired his shotgun at their heads, killing them instantly.[58] The State alleged there was an aggravating circumstance because the murder was "outrageously or wantonly vile, horrible, or inhumane."[59] The Court, however, held that Georgia's statute was unduly vague, noting that a "person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'"[60] Put differently, the Court concluded that the aggravator was vague because there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not."[61]

Eight years later, *Maynard v. Cartwright* echoed the same analysis.[62] In *Maynard*, a jury found the defendant, a disgruntled ex-employee, guilty of murder after he broke into the home of his former boss.[63] The defendant surprised his boss's wife in the hallway before shooting her twice in the legs with a shotgun.[64] He then proceeded into the living room, where he executed his boss.[65] The wife, who survived her initial injuries, dragged herself to a phone and called for help before the defendant found her and slit her throat.[66] Because the trial court concluded that the murder was "especially heinous, atrocious, or cruel"—an aggravating circumstance under Oklahoma law—the defendant was eligible for the

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54. *Id.*; *see also* Arave v. Creech, 507 U.S. 463, 474 (1993) ("If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm.").

55. *Tuilaepa*, 512 U.S. at 972; *see also Arave*, 507 U.S. at 463 ("[The court] must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer.").

56. *See* Gregg v. Georgia, 428 U.S. 153, 195 (1976).

57. Godfrey v. Georgia, 446 U.S. 420, 422–23 (1980).

58. *Id.* at 424–25.

59. *Id.* at 422.

60. *Id.* at 428–29.

61. *Id.* at 433.

62. 486 U.S. 356, 363–64 (1988).

63. *Id.* at 358.

64. *Id.*

65. *Id.*

66. *Id.*

death penalty.[67] But like in *Godfrey*, the U.S. Supreme Court ruled that the statute's language was too vague and invalidated the aggravator.[68]

In 1990, however, the Court's scrutiny of overexpansive aggravating circumstances regressed.[69] In *Walton v. Arizona*, a jury convicted the defendant of first-degree murder after he and his companions robbed and kidnapped an off-duty marine.[70] The three men then transported the marine into the desert and shot him in the head with his .22 caliber pistol.[71] Unbeknownst to the defendant, the gunshot did not immediately kill the marine.[72] Instead, the marine floundered in the desert and ultimately died of dehydration, starvation, and pneumonia.[73] A jury found that the murder was "especially heinous, cruel or depraved," which satisfied Arizona's aggravator and qualified the defendant as death-eligible.[74]

Ironically, Arizona's statutory language copies the statute in *Maynard* almost verbatim.[75] However, the U.S Supreme Court distinguished *Walton* from *Maynard* and *Godfrey* in two ways. First, the Court noted that the instructions given to the juries in *Maynard* and *Godfrey* were as vague as the relevant statutes.[76] In contrast, a trial judge—not a jury—was the final sentencer in *Walton*.[77] Second, the Court found that Arizona's appellate courts had already created a limited definition of the "especially heinous, cruel or depraved" aggravator in its own jurisprudence prior to the time of the defendant's sentencing.[78] Thus, the Court presumed that because the Arizona Supreme Court had narrowed the "especially heinous, cruel or depraved" aggravator, Arizona's trial judges were applying a stricter definition that provided "some" guidance to the sentencer.[79]

After decades of requiring specificity in state death penalty statutes, the post-*Walton* Court deferred to state appellate courts' definitions. During the *Maynard* and *Godfrey* era, the Court was the sole caretaker of the original *Furman* test—the death penalty may not be arbitrarily or capriciously administered.[80] Today, post-*Walton*, state appellate courts can distinguish and clarify their state's vague aggravators.[81] Instead of eliminating vague, overexpansive aggravators,

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67. *Id.* at 359.
68. *Id.* at 363–64.
69. *See* Walton v. Arizona, 497 U.S. 639 (1990).
70. *Id.* at 644.
71. *Id.*
72. *Id.*
73. *Id.* at 644–45.
74. *Id.* at 643; ARIZ. REV. STAT. ANN. § 13-751(F)(6) (2010 & Supp. 2015).
75. Arizona's statute reads: "The defendant committed the offense in an especially heinous, cruel or depraved manner." ARIZ. REV. STAT. ANN. § 13-751(F)(6).
76. *Walton*, 497 U.S. at 660.
77. *Id.* at 653–54.
78. *Id.* at 653; *see also infra* Part III.
79. *Walton*, 497 U.S. at 653–54.
80. Furman v. Georgia, 408 U.S. 238, 249 (1972) (Douglas, J., concurring).
81. *See Walton*, 497 U.S. at 653–54.

Walton provided a shortcut for their continued existence, which still fails to satisfy the *Furman* test.

The best clarification of the Court's stance on post-*Walton* aggravators came in 1993 with Justice O'Connor's step-by-step analysis in *Arave v. Creech*.[82] In the first step, courts must ask whether the aggravating circumstance is so vague as to not provide any guidance to the sentencing body.[83] If it is vague, the analysis should move to the second step, where courts must determine if the state's appellate courts have additional case law defining vague terms.[84] If case law exists, then courts must determine if those definitions provide some guidance to the sentencing body.[85] The inquiry does not stop there, but calls for an analysis of the state's capital-sentencing scheme to determine if it genuinely narrows the class of persons eligible.[86] For example, in *Arave*, the Court analyzed Idaho's aggravating circumstance statute, which read: "[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life."[87] Utilizing Justice O'Connor's step-by-step approach, the Court had to determine whether Idaho had defined any of the statute's terms. In that case, the Idaho appellate court had defined "utter disregard" as "the highest, the utmost, callous disregard for human life."[88] Though acknowledging the decision was a close one, Justice O'Connor held that the restated definition passed constitutional muster—i.e., the definition provided some guidance to the sentencing body.[89]

What is concerning about the Court's post-*Walton* method is that by giving state appellate courts the chance to define vague aggravators, it gives overbroad aggravators another chance to pass constitutional muster. It appears as if the Court is giving these aggravators every chance for survival, departing from its original strict analytical approach. Now, the Court defers to state appellate courts when analyzing potentially overexpansive aggravators. The disconnect between the original intent of the *Furman* test and courts that will create the definition results in a fractured analysis. These definitions may not narrow the class of persons eligible at all.[90] Although this concern will only arise in the context of facially vague aggravators, such as "especially heinous, cruel or depraved,"[91] these aggravators are more common than one might think.

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82. 507 U.S. 463 (1993).
83. *Id.* at 471.
84. *Id.*
85. *Id.*
86. *Id.* at 474 (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).
87. *Id.* at 465.
88. *Id.* at 468 (quoting State v. Osborn, 631 P.2d 187, 201 (Idaho 1981)).
89. *Id.* at 475.
90. *See* Walton v. Arizona, 497 U.S. 639, 694 (1990) (Blackmun, J., dissenting); *see also infra* Part III.
91. *Walton*, 497 U.S. at 643; Maynard v. Cartwright, 486 U.S. 356, 359 (1988).

III. WEIGHING STATES AND FACIALLY VAGUE AGGRAVATORS: ARE STATE LEGISLATURES FAILING TO SUFFICIENTLY NARROW THE CLASS OF ELIGIBLE PERSONS?

The "especially heinous, cruel or depraved" aggravator is facially vague. Pre-*Walton*, the U.S. Supreme Court would have overruled such an aggravator, but post-*Walton*, it has been given new life. This is concerning because the "especially heinous, cruel or depraved" aggravator is used in nearly every weighing state.

Currently, there are 32 states with statutes authorizing the use of the death penalty.[92] Of those, 19 are considered weighing states[93] and 13 are considered nonweighing states.[94] The factors weighing states employ vary in a number of aspects, including: number of aggravators; number of statutory mitigators; the presence of non-statutory mitigators; and types of aggravators.

Weighing states vary widely in the number of statutory aggravators they consider. Some states have a low number of aggravators, such as Montana, which has only 6; others have a high number of aggravators, like Delaware, which has 22.[95] Of the 32 states, 15 have 10 or more aggravators.[96] The presence of a large number of aggravators is not necessarily an indicator of increased application of the death penalty. For example, Kansas and Montana rank very low in executions per capita,[97] whereas Oklahoma—which has only eight aggravators in its capital sentencing statute[98]—ranks first in executions per capita,[99] and second in actual executions per death sentence.[100] Compared to Oklahoma, both Delaware and

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92. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Apr. 9, 2016).

93. Darian B. Taylor, *Capital Sentencing in Arizona: A Weighing State in Name Only*, 42 ARIZ. ATT'Y 20, 20 n.3 (2006). Since Taylor's article was published in 2006, six states have abolished the death penalty (Connecticut, Illinois, Maryland, New Jersey, New Mexico, and New York).

94. *Id.* at 20 n.5. It should be noted that the federal government's death penalty statute also falls into this latter category as a nonweighing state, as it delineates certain crimes that, upon conviction, may be punishable by death. *See, e.g.*, 18 U.S.C. § 794 (2012) (providing that the death penalty is available for defendants convicted of espionage).

95. *See* DEL. CODE ANN. tit. 11, § 4209(e)(1) (2015); MONT. CODE ANN. § 46-18-303(1)(A) (2015).

96. *See* Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1, 40 n.142 (2006) (providing a list of aggravators by state).

97. Kansas has not executed anyone since reinstating its death penalty in 1976, and Montana executes .030 people per 100,000. *State Execution Rates*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state-execution-rates?scid=8&did=477 (last visited Apr. 9, 2016) [hereinafter *State Execution Rates*].

98. OKLA. STAT. tit. 21, § 701.12 (2014).

99. Oklahoma executes .299 people per 10,000. *State Execution Rates*, *supra* note 97.

100. Oklahoma executes .305 inmates per death sentence. *Executions per Death Sentence*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-death-sentence (last visited Apr. 9, 2016) [hereinafter *Executions per Death Sentence*].

Pennsylvania have high numbers of aggravators; 22 and 18, respectively.[101] Delaware, with 22 aggravators, ranks second in executions per capita and first in actual executions per death sentence.[102] Pennsylvania, meanwhile, with 18 aggravators, has only executed three inmates since 1976.[103]

Weighing-state statutes also vary widely in the number of statutory mitigators that sentencers consider, and some do not have any mitigators at all.[104] However, this difference comes with a caveat. Even though a few states have zero statutory mitigators, each either leaves the definition of a mitigating factor open to include any other factors that call for leniency raised by the evidence,[105] or they simply describe the weighing function without reference to statutory mitigators.[106] This silence indicates the legislature's intent for the sentencing body to adopt the broadest view possible to determine what amount of leniency is appropriate.[107] This caveat is important because, although the number of statutory mitigators is consistently lower than the number of aggravators, the statute is actually more expansive.[108] Such breadth is desirable because it gives defense attorneys the ability to present anything that could call for leniency, reducing the chance a defendant will be sentenced to death. Ultimately, it helps ensure that those who do not deserve to receive the death penalty are given lengthy prison sentences instead. The spectrum of the number of statutory mitigators is quite negligible because the states that have statutory mitigators have between five and nine factors.[109]

Some states, like Mississippi[110] and Nebraska,[111] are true outliers because they limit their mitigating factors to only those articulated in their statutes. Most states include language that leaves mitigating circumstances open to any circumstance that would call for leniency.[112] For example, Florida's statute

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101. DEL CODE ANN. tit. 11, § 4209(e)(1) (2015); 42 PA. CONS. STAT. § 9711(d) (2014).

102. Delaware executes .167 people per 100,000 and .311 inmates per death sentence. *State Execution Rates*, *supra* note 97; *Executions per Death Sentence*, *supra* note 100.

103. Pennsylvania executes .002 people per 100,000 and .008 inmates per death sentence. *State Execution Rates*, *supra* note 97: *Executions per Death Sentence*, *supra* note 100.

104. *See, e.g.*, TENN. CODE ANN. § 39-13-204(j) (2011).

105. *E.g.*, *id.*

106. IDAHO CODE ANN. § 19-2515(7)(a)–(b) (2006) ("If the jury finds that a statutory aggravating circumstance exists and no mitigating circumstances exist which would make the imposition of the death penalty unjust, the defendant will be sentenced to death by the court."); *see also id.* § 19-2525(a).

107. *See, e.g.*, State v. Small, 690 P.2d 1336, 1338 (Idaho 1984).

108. *Contra* MISS. CODE ANN. § 99-19-101(5) (2013); NEB. REV. STAT. § 29-2523(2) (2013).

109. *Compare* N.H. REV. STAT. ANN. § 630:5(VI) (2014), *with* ARIZ. REV. STAT. ANN. § 13-751(G) (2010 & Supp. 2015).

110. MISS. CODE ANN. § 99-19-101(6) (2013).

111. NEB. REV. STAT. § 29-2523(2) (2013).

112. *See* ALA. CODE § 13A-5-52 (2014); ARIZ. REV. STAT. ANN. § 13-751(G) (2010 & Supp. 2015); ARK. CODE ANN. § 5-4-605 (2014); FLA. STAT. § 921.141(6)(h) (2010); IND. CODE § 35-50-2-9(c)(8) (2014); KAN. STAT. ANN. § 21-6625(a) (2013); MONT.

includes consideration of "[t]he existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty."[113] Further, both Mississippi and Nebraska have seven mitigators and fall directly in the middle of the spectrum.[114] Despite this limit on available mitigators, it is surprising that the number of factors does not appear to have an effect on the actual use of the death penalty. For example, Mississippi ranks 9 in executions per capita,[115] but 23 in actual executions per death sentence.[116] Meanwhile, Nebraska ranks 23 in executions per capita,[117] and 18 in actual executions per death sentence.[118]

Finally, when it comes to the type of aggravators weighing states employ, the array of language becomes extraordinarily similar. For example, 14 out of 19 weighing states have the aggravator addressed in *Godfrey*, *Maynard*, and *Walton*.[119] The pertinent language of the states that employ this aggravator is listed as follows:

> *Alabama*: "The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses."[120]
>
> *Arizona*: "The defendant committed the offense in an especially heinous, cruel or depraved manner."[121]
>
> *Arkansas*: "The capital murder was committed in an especially cruel or depraved manner."[122]
>
> *Delaware*: "The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of

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CODE ANN. § 46-18-304(2) (1995); NEV. REV. STAT. § 200.035(7); N.H. REV. STAT. ANN. § 630:5(VI)(i) (2014); N.C. GEN. STAT. § 15A-2000(f)(9) (2013); OHIO REV. CODE ANN. § 2929.04(B)(7) (LexisNexis 2014); 42 PA. CONS. STAT. § 9711(e)(8); TENN. CODE ANN. § 39-13-204(j)(9) (2011); WYO. STAT. ANN. § 6-2-102(j)(viii) (2001).

113. FLA. STAT. § 921.141(6)(h) (2010).

114. MISS. CODE ANN. § 99-19-101(6) (2013); NEB. REV. STAT. § 29-2523(2) (2013).

115. Mississippi executes .071 people per 100,000. *State Execution Rates*, *supra* note 97.

116. Mississippi executes .077 inmates per death sentence. *Executions per Death Sentence*, *supra* note 100.

117. Nebraska executes .016 people per 100,000. *State Execution Rates*, *supra* note 97.

118. Nebraska executes .107 inmates per death sentence. *Executions per Death Sentence*, *supra* note 100.

119. In *Godfrey v. Georgia*, the aggravator in question was "outrageously or wantonly vile, horrible or inhuman." 446 U.S. 420, 422 (1980). In *Walton* and *Maynard* the aggravator in question was "especially heinous, cruel or depraved." *Walton*, 497 U.S. at 643; *Maynard*, 486 U.S. at 359.

120. ALA. CODE § 13A-5-49(8) (2014).

121. ARIZ. REV. STAT. ANN. § 13-751(F)(6) (2010 & Supp. 2015).

122. ARK. CODE ANN. § 5-4-604(8)(A) (2001). Uniquely, the Arkansas statute goes on to statutorily define "cruel" and "depraved." *Id.* § 5-4-604(8)(B)–(C). These definitions are very similar to the Arizona appellate definitions. *See infra* Part III.

mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering the victim."[123]

Florida: "The capital felony was especially heinous, atrocious, or cruel."[124]

Idaho: "The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."[125]

Kansas: "The defendant committed the crime in an especially heinous, atrocious or cruel manner. A finding that the victim was aware of such victim's fate or had conscious pain and suffering as a result of the physical trauma that resulted in the victim's death is not necessary to find that the manner in which the defendant killed the victim was especially heinous, atrocious or cruel."[126]

Mississippi: "The capital offense was especially heinous, atrocious or cruel."[127]

Nebraska: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."[128]

New Hampshire: "The defendant committed the offense in an especially heinous, cruel or depraved manner in that it involved torture or serious physical abuse to the victim."[129]

North Carolina: "The capital felony was especially heinous, atrocious, or cruel."[130]

Oklahoma: "The murder was especially heinous, atrocious, or cruel."[131]

Tennessee: "The murder was especially heinous, atrocious, or cruel, in that it involved torture or serious physical abuse beyond that necessary to produce death."[132]

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123. DEL. CODE ANN. tit. 11, § 4209(e)(1)(l) (2013).

124. FLA. STAT. § 921.141(5)(h) (2010).

125. IDAHO CODE ANN. § 19-2515(9)(e) (2006).

126. KAN. STAT. ANN. § 21-6624(f) (2013). The Kansas statute also gives seven examples of conduct that would be considered heinous, atrocious, or cruel, though it does not limit the aggravator to those seven examples. *Id.* § 21-6624(f)(1)–(7); *see also, e.g.*, *id.* § 21-6624(f)(6) ("[D]esecration of the victims body in a manner indicating a particular depravity of mind, either during or following the killing . . . .").

127. MISS. CODE ANN. § 99-19-101(5)(i) (2013).

128. NEB. REV. STAT. § 29-2523(1)(d) (2013).

129. N.H. REV. STAT. ANN. § 630:5(VII)(h) (2014).

130. N.C. GEN. STAT. § 15A-2000(e)(9) (2012).

131. OKLA. STAT. tit. 21, § 701.12(4) (2014).

132. TENN. CODE ANN. § 39-13-204(i)(5) (2011).

> *Wyoming*: "The murder was especially atrocious or cruel, being unnecessarily torturous to the victim."[133]

The language "especially heinous, cruel or depraved" is extremely problematic, as it is obviously facially vague. This was confirmed in *Maynard* and *Godfrey*.[134] With the exception of Arkansas and Kansas, not a single state statute defines the meaning of its key terms.[135] Thus, pursuant to the rulings in *Walton*, all other states are subject to constitutional challenges unless their state's appellate courts have further defined these vague terms or have simply "give[n] meaningful guidance to the sentencer."[136] Though logically established as an effort to ensure only the worst of the worst offenders receive the death penalty, applying the "especially heinous, cruel or depraved" aggravator has become "the norm rather than the exception," covering nearly any homicide. By failing to narrow the class of persons eligible,[137] these vague aggravators ultimately become unconstitutional under *Furman*.

IV. THE ARIZONA SUPREME COURT'S DEFINITION OF "ESPECIALLY HEINOUS, CRUEL OR DEPRAVED"

Currently, Arizona Revised Statute Annotated Section 13-751(F)(6) ("(F)(6) Aggravator") reads, "The defendant committed the offense in an especially heinous, cruel or depraved manner."[138] The language is the same now as it was in 1990 when the (F)(6) Aggravator came under U.S. Supreme Court scrutiny in *Walton*.[139] Despite the fact that the aggravator in *Maynard*—ruled unconstitutional—and the aggravator in *Walton*—ruled constitutional—are the same, the *Walton* Court distinguished the two because it reasoned that Arizona's appellate courts had, on their own, narrowed the definition of the aggravator.[140] This resulted in constitutional permissibility. Through definitions and factors, Arizona's appellate courts attempt to narrow the "especially heinous, cruel or depraved" aggravator language. These efforts ultimately fail, however, as the aggravator can still be applied to nearly every murder.

A. Definitions

Initially, the Arizona Supreme Court turned to dictionary definitions of the terms in the (F)(6) Aggravator to narrow the statute.[141] In *State v. Knapp*, a jury convicted the defendant for murder after he covered his sleeping children in a

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133. WYO. STAT. ANN. § 6-2-102(h)(vii) (2001).

134. Maynard v. Cartwright, 486 U.S. 356, 359 (1988); Godfrey v. Georgia, 446 U.S. 420, 422 (1980).

135. *See* ARIZ. REV. STAT. ANN. § 13-751(F)(6) (2010 & Supp. 2015).

136. Walton v. Arizona, 497 U.S. 639, 655 (1990).

137. *Id.* at 698 (Blackmun, J., dissenting).

138. ARIZ. REV. STAT. ANN. § 13-751(F)(6) (2010 & Supp. 2015).

139. *Walton*, 497 U.S. at 643; ARIZ. REV. STAT. ANN. § 13-751(F)(6) (amending ARIZ. REV. STAT. ANN. § 13-703 (2007)).

140. *Walton*, 497 U.S. at 653.

141. State v. Knapp, 562 P.2d 704, 716 (Ariz. 1977).

flammable liquid accelerant, lit their room on fire, and returned to his bed.[142] The *Knapp* court stated that the Arizona legislature must have meant the especially heinous, cruel, or depraved aggravator to encompass first-degree murders that have "additional circumstances . . . apart from the usual or the norm."[143] Ultimately, the court relied upon statutory interpretation—the normal, dictionary definitions that would be clear to people of average understanding—in its analysis.[144] According to the dictionary, "heinous" means "hatefully or shockingly evil: grossly bad."[145] "Cruelty" means the willingness "to inflict pain, especially in a wanton, insensate, or vindictive manner."[146] Finally, "depravity" is present when one is "marked with debasement, corruption, perversion, or deterioration."[147] The *Knapp* court took these definitions directly from *Webster's Third New International Dictionary*.[148] *Knapp*'s impact on Arizona's "especially heinous, cruel or depraved" jurisprudence is foundational; the definition-based application has never been invalidated. Instead, it is used as a baseline for the Arizona Supreme Court's approach to death penalty cases.[149]

An issue immediately arising after *Knapp* is the ease with which one can argue that every first-degree murder will likely fit the dictionary definitions of heinous, cruel, and depraved. As stated by the *Godfrey* Court, "A person of ordinary sensibility could fairly characterize that every murder is 'outrageously or wantonly vile, horrible and inhuman.'"[150] *Knapp*'s dictionary definitions are no different. Any first-degree murder could be characterized as "shockingly evil" and "marked by debasement," and first-degree murder by nature includes an insensate infliction of pain.[151] In other words, dictionary definitions do very little, if anything at all, to help narrow the class of persons eligible for the death penalty. Moreover, definitions fail to ensure that only the worst offenders receive the death penalty.[152] Thus, with the bare use of dictionary definitions, the original concerns from *Godfrey* reemerge.

In 1997, the Arizona Supreme Court refined its interpretation of "cruelty."[153] In *State v. Trostle*, the defendant was convicted and sentenced to death after he and an accomplice executed a woman in the Tucson desert.[154] The two men initially planned to steal her vehicle but ultimately kidnapped her at gunpoint.[155] They took her to the desert, forced her to disrobe and kneel before

142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* (citing *Heinous*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY).
146. *Id.* (citing *Cruelty*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY).
147. *Id.* (citing *Depravity*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY).
148. *Id.*
149. *See, e.g.*, State v. Murdaugh, 97 P.3d 844, 856 (Ariz. 2004).
150. Godfrey v. Georgia, 446 U.S. 420, 428–29 (1980).
151. *Knapp*, 562 P.2d at 716.
152. *See, e.g.*, Emanuel Margolis, State v. Ross*: New Life for Connecticut's Death Penalty*, 68 CONN. B.J. 262, 278–82 (1994).
153. State v. Trostle, 951 P.2d 869 (Ariz. 1997).
154. *Id.* at 875.
155. *Id.*

them, and executed her with a shotgun.[156] Due to the amount of time that the victim spent with the two men, she was forced to question her fate and confront her own mortality, causing "extreme mental distress."[157] This ultimately led the court to expand the definition of cruelty to include circumstances where "the victim consciously experienced physical or mental pain prior to death."[158]

Notably, *Knapp* treated "heinous" and "depraved" as independent concepts rather than as a single concept.[159] In 1980, the Arizona Supreme Court expanded upon this trend and added to the definition of heinousness and depravity.[160] In *State v. Clark*, a jury convicted the defendant of murdering four people at the ranch where he worked.[161] Without apparent justification, he went into the room of an old wrangler and stabbed him to death before shooting a young wrangler using the victim's gun.[162] He then took the gun into the home of his employer and shot the employer and the employer's wife.[163] The defendant even kept a spent bullet from his crime as a souvenir.[164] He then slashed the tires of all the vehicles at the ranch, except the one he would later steal, and traveled to El Paso, Texas where police apprehended him.[165] In its decision, the court explained heinous and depraved as encompassing "the mental state and attitude of the perpetrator as reflected in his words and actions."[166] The defendant's words and actions indicated to the court that the defendant was "totally without regard for human life" and committed the crimes in an especially depraved manner.[167] Thus, the *Clark* court contextualizes the *Knapp* definitions, categorizing the terms "especially heinous, cruel or depraved." The attempt was made to define the terms beyond the bare dictionary definition, but it did little to combat vagueness and left the "factors" the court used completely untouched.[168]

B. Factors That Lead to a Finding of Heinousness or Depravity

Multifactor consideration provides a much broader approach to the "especially heinous, cruel or depraved" factor than definitions. *State v. Gretzler*—decided in 1983—armed Arizona's trial courts with various factors that, if present, satisfy a finding of heinousness or depravity.[169] This, in turn, satisfies the (F)(6) Aggravator.

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156. *Id.*
157. *Id.*; *see also* State v. Kiles, 857 P.2d 1212, 1225 (Ariz. 1993) ("Mental anguish includes a victim's uncertainty about her ultimate fate.").
158. *Trostle*, 951 P.2d at 883.
159. State v. Knapp, 562 P.2d 704, 716 (Ariz. 1977).
160. State v. Clark, 616 P.2d 888 (Ariz. 1980).
161. *Id.* at 890.
162. *Id.*
163. *Id.*
164. *Id.* at 897.
165. *Id.* at 890.
166. *Id.* at 896.
167. *Id.* at 897.
168. *See infra* Section IV.B.
169. 659 P.2d 1 (Ariz. 1983).

Gretzler would become instrumental in defining the "especially heinous, cruel or depraved" aggravator.[170] In *Gretzler*, the defendant and his accomplice robbed, kidnapped, raped, and murdered 17 people in Arizona and California.[171] Over the course of nearly one month, they hitchhiked across California and Arizona, stealing cars and money from unsuspecting victims; they murdered some and released others.[172] Their list of victims included a Tucson couple they held captive as they tried to change their appearance.[173] They tied up the husband and wife with heavy twine in a formation that would choke them if they straightened their own legs.[174] At one point, the wife was so terrified by the ordeal that the defendant and his accomplice had to give her Valium to calm her down.[175] Eventually, they killed the two, shooting the wife an extra time "to be completely satisfied that they had killed her."[176] The *Gretzler* court decided that all three elements (heinousness, cruelty, and depravity) need not be present in a murder to satisfy the aggravator because the statute is disjunctive, "so either all or one could constitute [the] aggravating circumstance."[177] In other words, if a murder were committed with depravity, it would satisfy the (F)(6) Aggravator; it need not also be committed with cruelty and heinousness to satisfy the aggravator. Thus, the Arizona Supreme Court determined that it is even easier for a murder to fit the (F)(6) Aggravator definition.

The court in *Gretzler* chose to address cruelty separate from heinousness and depravity. In doing so, it acknowledged that the *Knapp* definition is still the appropriate application of the aggravator.[178] Thus, the *Gretzler* court left cruelty largely unchanged, maintaining only that cruelty "involve[s] the infliction of pain on the victims," and adding that this infliction of pain not only includes physical pain, but also "mental distress" upon the victims prior to their death.[179]

In addressing heinousness and depravity, the *Gretzler* court acknowledged that it considered the killer's state of mind, holding that five specific factors lead to a finding of heinousness or depravity: (1) the apparent relishing of the murder by the killer; (2) the infliction of gratuitous violence on the victim; (3) the needless mutilation of the victim; (4) the senselessness of the crime; and (5) the helplessness of the victim.[180]

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170. *Id.*
171. *Id.* at 3–4.
172. *Id.* at 4.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 3–4.
177. *Id.* at 10.
178. *Id.*
179. *Id.*
180. *Id.* at 11–12. It should be noted that the *Gretzler* court indicated that at least a single factor is required, but is not necessarily sufficient to satisfy a finding of heinousness or depravity. In other words, "The mere existence of senselessness or helplessness of the victim, in isolation, need not always lead to a holding that the crime is heinous or depraved . . . ." *Id.* Further, "[w]here no circumstances, such as the specific factors discussed above,

1. Relishing the Murder

The first factor the *Gretzler* court contemplated is the killer's relishing of the murder.[181] Relishing generally refers to the killer's actions or words that evidence debasement or perversion.[182] In most cases, this requires that the killer say or do something, beyond the commission of the killing itself, to show that the killer savored in the killing.[183] For example, in *Clark*, after killing the four victims at the ranch, the defendant kept the spent bullet.[184] Similarly, in *State v. Bishop*, a jury convicted a defendant of first-degree murder after he assaulted a victim with a claw hammer.[185] After the assault, while knowing the victim was still alive, the defendant tied him up before throwing him down a mineshaft.[186] Then, as his body was still twitching at the bottom, the defendant proceeded to throw rocks at him.[187] While driving away, the defendant said, "Good-bye, Norman. I hope we never see you again."[188] The court in *Gretzler* found that both of these behaviors—the keeping of a "grisly" souvenir and the words and actions following a claw-hammer beating—qualified as relishing the murder.[189]

On the contrary, certain actions do not qualify as a relishing of the murder. For example, in *State v. Gulbrandson*, a jury convicted the defendant of first-degree murder after he murdered his ex-girlfriend by inflicting "at least 34 sharp-force injuries (stab wounds and slicing wounds), puncture wounds, and many blunt force injuries."[190] Though the trial court's special verdict asserted that the defendant's act of gambling immediately following the killing constituted relishing in the murder, the Arizona Supreme Court found no evidence that the defendant ever "bragged about the crime."[191] Similarly, in *State v. Graham*, a jury convicted the defendant after he killed a man in the course of a robbery.[192] The court found that although the defendant said the victim "squealed like a rabbit" when he was shot, the statement was probably due to the defendant's immaturity and peer pressure, rather than an effort to relish in or brag about the killing.[193]

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separate the crime from the 'norm' of first degree murders, we will reverse a finding that the crime was committed in an 'especially, heinous, cruel, or depraved manner.'" *Id.* at 12 (citations omitted). Yet, the remaining three *Gretzler* factors have, at times, been found sufficient proof of heinousness or depravity. *See, e.g.*, *infra* Sections IV.B.1–3.

181. *Gretzler*, 659 P.2d at 11.

182. State v. Walton, 769 P.2d 1017, 1033 (Ariz. 1989), *aff'd* 497 U.S. 639, 655 (1990).

183. State v. Roscoe, 910 P.2d 635, 651–52 (Ariz. 1996).

184. State v. Clark, 616 P.2d 888, 890, 897 (Ariz. 1980).

185. 622 P.2d 478, 481 (Ariz. 1980).

186. *Id.*

187. *Id.*

188. *Id.*

189. State v. Gretzler, 659 P.2d 1, 11 (Ariz. 1983).

190. 906 P.2d 579, 587 (Ariz. 1995).

191. *Id.* at 601.

192. 660 P.2d 460, 461 (Ariz. 1983).

193. *Id.* at 463. The defendant was 21 years old at the time of sentencing. *Id.* at 464.

2. Infliction of Gratuitous Violence

The *Gretzler* court's second factor in evaluating the existence of heinousness or depravity is where a killer inflicts gratuitous violence upon a victim.[194] The Arizona Supreme Court held that gratuitous violence is violence that is inflicted on the victim that is clearly beyond that necessary to cause death.[195] In other words, to uphold a finding of gratuitous violence, there must be violence beyond that "necessary to fulfill the criminal purpose."[196]

Violence beyond that necessary to effectuate a criminal end is present when the physical abuse is past the point sufficient to kill. In *State v. Ceja*, a jury convicted the defendant of murdering two people.[197] In both instances, he inflicted mortal wounds on the victims and then continued to shoot them in the head several times.[198] Further, the defendant continued to repeatedly kick one of the victims, already deceased, in the face.[199] The Arizona Supreme Court found that the defendant's continued violent conduct constituted abuse beyond the point necessary to kill.[200] Similarly, in *State v. Villafuerte*, the court held that "perverse gagging," such as forcing a cloth ball into the "nasal pharynx to assure suffocation," would satisfy depravity for reasons of gratuitous violence.[201]

On the other hand, there have been instances where a court has determined gratuitous violence was not present. In *State v. Styers*, for example, a jury convicted the defendant for shooting the child of the woman with whom he lived.[202] The State argued that because the defendant used hypervelocity bullets, he inflicted gratuitous violence upon the child.[203] The Arizona Supreme Court was not persuaded because there was no evidence that the defendant intended to inflict greater damage when he used such bullets.[204] Similarly, in *State v. Richmond*, the Arizona Supreme Court found that driving a car over a victim twice did not support a finding of gratuitous violence unless the evidence proved it was intentional.[205] In *Richmond*, the state did not prove that the driver of the car intentionally drove over the victim; it also failed to prove that the defendant was the driver of the car.[206] Thus, gratuitous violence was not present, and the state could not rely on this factor to prove heinousness or depravity.[207]

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194. *Gretzler*, 659 P.2d at 10–11.
195. State v. Reinhardt, 951 P.2d 454, 465 (Ariz. 1997).
196. State v. Soto-Fong, 928 P.2d 610, 625 (Ariz. 1996).
197. State v. Ceja, 612 P.2d 491, 492–93 (Ariz. 1980).
198. *Id.* at 493.
199. *Id.*
200. *Id.* at 496.
201. 690 P.2d 42, 45–46 (Ariz. 1984).
202. 865 P.2d 765, 771 (Ariz. 1993).
203. *Id.* at 776–77.
204. *Id.*
205. 886 P.2d 1329, 1335–36 (Ariz. 1994).
206. *Id.*
207. *Id.*

3. Needless Mutilation

Gretzler noted that needless mutilation of the victim is closely related to the previous two factors.[208] For example, in *State v. Vickers*, the defendant was a prisoner in the Arizona State Prison when he strangled his cellmate to death with a torn piece of cloth.[209] After the murder, the defendant continued to stab the victim and carved "Bonzai," the defendant's prison nickname, into the victim's chest.[210] The defendant later acknowledged that the sight of blood made him feel good.[211] Thus, the court had no difficulty concluding the defendant's actions were heinous, thereby satisfying the (F)(6) Aggravator.[212]

Similarly, in *State v. Smith*, the jury convicted the defendant for murdering two girls, aged 14 and 18 years old, by forcing dirt and soil into their mouths until it blocked their airways and asphyxiated them.[213] The defendant then stabbed both girls several times in and near their genitals.[214] One victim also sustained stab wounds to each breast, as well as a two-and-a-half inch sewing needle embedded in her left breast.[215] All stab wounds to the women's genitals or sexual organs were inflicted before death.[216] The *Gretzler* court referenced both *Vickers* and *Smith* to illustrate how needless mutilation of the victim could lead to a finding of heinousness or depravity in the killer's state of mind.[217]

On the other hand, there are several circumstances where the Arizona Supreme Court has found a lack of evidence to support needless mutilation of the victim. For example, in *State v. Schackart*, the defendant strangled his victim and stuffed a sock down the victim's throat, which caused her tooth to chip and her tongue to be torn from its base.[218] Yet, the Arizona Supreme Court found this to be insufficient evidence of mutilation.[219]

Additionally, the court has required finding a specific "purpose to mutilate the corpse."[220] In *State v. Medina*, the defendant killed his victim by running the victim over with his car three times.[221] Although the first pass killed

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208. State v. Gretzler, 659 P.2d 1, 11 (Ariz. 1983).

209. 633 P.2d 315, 318 (Ariz. 1981).

210. *Id.*

211. *Id.*

212. *See id.* at 324. The phrase "needless mutilation" is not found in *Vickers* because the needless mutilation factor was not established until *Gretzler* , which came two years after *Vickers*. *Gretzler* references *Vickers* as an example of circumstances where the needless mutilation factor will be satisfied. *Gretzler*, 659 P.2d at 11.

213. 638 P.2d 696, 697–98 (Ariz. 1981).

214. *Id.*

215. *Id.* at 698.

216. *Id.* at 697–98.

217. State v. Gretzler, 659 P.2d 1, 11 (Ariz. 1983).

218. State v. Schackart, 947 P.2d 315, 324 (Ariz. 1997); State v. Schackart, 858 P.2d 639, 641 (Ariz. 1993).

219. *Schackart*, 947 P.2d 329.

220. State v. Medina, 975 P.2d 94, 104 (Ariz. 1999) (quoting State v. Richmond, 886 P.2d 1329, 1336 (Ariz. 1994)).

221. *Id.* at 98–99.

the victim, there was insufficient evidence to prove that the defendant intended to mutilate the corpse with the additional two passes.[222] Thus, it did not qualify as needless mutilation and failed to satisfy a finding of heinousness or depravity.[223]

4. Senselessness

The fourth factor—senselessness of the crime—has been the most difficult factor for the Arizona Supreme Court to clearly define. At one time, academics thought the Arizona Supreme Court had rejected the notion that senselessness of the crime could be a factor because "all murders are senseless."[224] However, the court eventually clarified senselessness as being present when the murder is unnecessary to achieve the wrongdoer's ultimate criminal goal,[225] or when the murder served no rational purpose.[226]

For example, in *State v. Comer*, murder was unnecessary to achieve the ultimate criminal goal.[227] In *Comer*, the defendant went on a cross-country trip from Sacramento with only $500 along with his companion and her two children.[228] By the time they reached a campground in Arizona, they were out of money.[229] It was obvious that their criminal motivation was to obtain money and supplies.[230] Then, when the group came across a man camping in the desert, the defendant shot him in the head and stole the man's few supplies.[231] The *Comer* court found this to be senseless because the defendant did not have to kill anyone to effect his criminal purpose: to obtain money and supplies.[232] Further, the fact that the defendant did not actually get much from his victim did "not negate his original expectation" of money and supplies.[233]

The best example of a senseless crime is murder without a rational purpose.[234] In *State v. Wallace*, a jury convicted the defendant of murder for brutally beating his girlfriend and her two children to death.[235] The defendant later claimed he loved his girlfriend and her two children "more than he had loved anyone else" after living with them as a family for more than two years.[236] He was

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222. *Id.* at 104.
223. *Id.*
224. *Cf.* State v. Gilles, 691 P.2d 655, 661 (Ariz. 1984) (providing that while the phrase "all murders are senseless" comes from the Appellant's pro se brief, the court never expressly rejects this argument—rather, it states that "elimination of witnesses . . . also illustrates heinousness . . .").
225. State v. Comer, 799 P.2d 333, 349 (Ariz. 1990).
226. *See, e.g.*, State v. Wallace, 773 P.2d 983, 987 (Ariz. 1989).
227. 799 P.2d at 333.
228. *Id.* at 336.
229. *Id.*
230. *Id.* at 348.
231. *Id.* at 336–37.
232. *Id.* at 349.
233. *Id.*
234. State v. Wallace, 773 P.2d 983 (Ariz. 1989).
235. *Id.* at 983–84.
236. *Id.* at 987.

never able to indicate any reason or justification for the murders.[237] The *Wallace* court acknowledged that although it is conceivable that all murders may be considered senseless, these specific circumstances in question were "particularly disturbing" and senseless enough to support a finding of heinousness or depravity.[238]

Similarly, in *State v. Gillies*, the court found that sufficient senselessness was present to constitute a defendant's heinousness and depravity, but only when considered in the context of eliminating a potential witness.[239] In *Gillies*, the defendant found the victim when she inadvertently locked herself out of her car.[240] After helping her get into her car, the defendant and his friend stayed with her and she gave them a ride.[241] They then commandeered her car, took her to various locations, and raped her before finally pushing her off a cliff.[242] After determining that the fall did not kill her, they repeatedly beat her with rocks until she lost consciousness and then buried her beneath rocks large enough to require two men to uncover her.[243] *Gillies* stands as an exception to the general rule because the court found sufficient senselessness without a finding of: (1) the murder being unnecessary for the completion of the defendant's criminal purpose; or (2) the murder being without rational purpose.[244] Yet, the court now finds sufficient senselessness to constitute heinousness and depravity where a killing is for the purpose of eliminating a witness.[245]

5. Helplessness

The fifth factor the *Gretzler* court considered was the helplessness of the victim.[246] The Arizona Supreme Court has found that a victim is helpless "when disabled and unable to resist the murder."[247] Yet, the court has not relied on this definition with any rigor because helplessness can still be found even if there is evidence of a lengthy struggle.[248] For example, in *State v. Gulbrandson*, the defendant went gambling before murdering his ex-girlfriend.[249] The victim was found with numerous injuries, including 34 knife wounds, in her blood-soaked bedroom, and was bound at the wrists and ankles by an electrical cord.[250] At trial, the state offered evidence indicating there was a "protracted struggle" between the

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237. *Id.*
238. *Id.*
239. 691 P.2d 655, 671 (Ariz. 1984).
240. State v. Gillies, 662 P.2d 1007, 1012 (Ariz. 1983).
241. *Id.*
242. *Id.*
243. *Id.*
244. *See* State v. Comer, 799 P.2d 333 (Ariz. 1990); State v. Wallace, 773 P.2d 983 (Ariz. 1989); State v. Gillies, 662 P.2d 1007 (Ariz. 1984).
245. *Gillies*, 662 P.2d at 1013.
246. State v. Gretzler, 659 P.2d 1, 11 (Ariz. 1983).
247. State v. Lopez, 857 P.2d 1261, 1266 (Ariz. 1993).
248. State v. Gulbrandson, 906 P.2d 579, 602 (Ariz. 1995).
249. *Id.* at 586–87.
250. *Id.*

defendant and victim.[251] However, because the police found the victim bound, the court decided that she was ultimately rendered helpless despite the prior struggle.[252] Thus, the court held that the facts sufficiently supported helplessness, which led to a finding that the defendant acted with heinousness and depravity.[253]

The court has also upheld a finding of helplessness when a defendant inflicts wounds that render the victim helpless. For example, in *State v. Summerlin*, a jury convicted the defendant of murder after raping and battering a woman.[254] At trial, the coroner testified that there were far more blows to the victim's head than were necessary to kill her.[255] In fact, there were so many that it was "obvious" from the condition of the body that she was "incapable of defending herself."[256] Therefore, the court found sufficient evidence to support a finding of helplessness.[257]

Disparity in age and size has also supported a finding of helplessness. For example, in *State v. Styers*, the court found that the killing of a four-year-old child by the child's de facto babysitter satisfied helplessness.[258] Similarly, in *State v. Lopez*, the court found the victim's slight physical frame enough to render her helpless because she was a 59-year-old, 124-pound woman who was attacked by a healthy, 24-year-old man.[259]

Unlike the first three *Gretzler* factors,[260] neither the senselessness of the crime nor the victim's helplessness alone is enough to find a defendant acted with heinousness or depravity.[261] Of course, in all instances in which a court has used the *Gretzler* factors, the court looked to see when circumstances are beyond the pale. Thus, it is conceivable that a situation may arise where helplessness *can* sustain a ruling of heinousness or a depraved state of mind.[262]

6. Other Factors

As broad and widely applicable as the *Gretzler* factors are, the list is still not exclusive.[263] In *Gretzler*, the Arizona Supreme Court did reference the plain

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251. *Id.* at 601.
252. *Id.* at 601–02.
253. *Id.* at 601–02, 604.
254. 675 P.2d 686, 689–90 (Ariz. 1983).
255. *Id.* at 696.
256. *Id.*
257. *Id.*
258. 865 P.2d 765, 776 (Ariz. 1993).
259. 857 P.2d 1261, 1266 (Ariz. 1993).
260. *See infra* Sections IV.B.1–3.
261. State v. Gretzler, 659 P.2d 1, 11–12 (Ariz. 1983).
262. *Id.* at 12. For some clarity on this distinction, see *supra* note 180 and accompanying text.
263. *See* State v. Milke, 865 P.2d 779, 787 (Ariz. 1993). In 2013, the Ninth Circuit Court of Appeals set aside Milke's conviction due to police misconduct and retrial was barred on double jeopardy grounds. Milke v. Ryan, 711 F.3d 998, 1019 (9th Cir. 2013). Needless to say, Milke's case will not be used by the Arizona Supreme Court to examine

meaning of cruel, heinous, and depraved first stated in the *Knapp* decision.[264] Thus, there is room for the court to further expand the application of the heinous and depraved. For example, in *State v. Milke*, the defendant, the mother of the four-year-old victim, conspired with her roommate to kill the defendant's child after she took out a $5,000 life insurance policy on the child.[265] In addition to finding numerous *Gretzler* factors, the Arizona Supreme Court alluded to the possibility that a "special relationship" between the defendant and the victim could be a factor separating *Milke* from the rest of the heinous and depraved cases.[266] The court wrote that a mother conspiring to kill her four-year-old child is the "ultimate perversion of the parent/child relationship" because it is so hatefully and shockingly evil.[267] Therefore, the court "without reservation" found the relationship supported a finding of heinousness or depravity of the state of mind of the defendant.[268]

Ultimately, the Arizona Supreme Court's definitions of cruelty, heinousness, or depravity have given lower courts the ability to find cruelty, heinousness, or depravity in nearly any murder, and have failed to demonstrate how the definitions and factors sufficiently narrow the "especially heinous, cruel or depraved" aggravator. For example, a killer's behavior is heinous if the killer says something that indicates that he is pleased with the outcome of the murder.[269] Yet, this would not be the case if that utterance is attributable to immaturity or peer pressure.[270] Of course, a court is unlikely to define how it found that a statement indicating the defendant relished in the murder was attributable to the killer's immaturity or peer pressure.

Further, the crime is heinous if the killer engaged in "perverse gagging."[271] Yet stuffing a sock down the victim's throat is not.[272] Killing after tying the victim up after a long struggle is heinous[273]—as is killing after the victim is wounded.[274] Thus, an underlying and inescapable concern that persists is that the "especially heinous, cruel or depraved" aggravator has been applicable to nearly every first-degree murder case.

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the possibility of a special-relationship factor. *Id.* at 1018–19; Milke v. Mroz, 339 P.3d 659, 659 (Ariz. Ct. App. 2014).

264. *Gretzler*, 659 P.2d at 10.

265. *Milke*, 865 P.2d at 781. Milke is the severed co-defendant of the *Styers* case. *Id.* The record indicates that the defendant in *Styers* is the roommate and co-conspirator of the defendant in *Milke*. *Id.*

266. *Id.*

267. *Id.* at 787.

268. *Id.*

269. *See* State v. Bishop, 622 P.2d 478, 481 (Ariz. 1980).

270. *See* State v. Graham, 660 P.2d 460, 463 (Ariz. 1983).

271. *See* State v. Villafuerte, 690 P.2d 42, 50 (Ariz. 1984).

272. *See* State v. Schackart, 947 P.2d 315, 324 (Ariz. 1997); State v. Schackart, 858 P.2d 639, 641 (Ariz. 1993).

273. *See* State v. Gulbrandson, 906 P.2d 579, 601 (Ariz. 1995).

274. *See* State v. Summerlin, 675 P.2d 686, 696 (Ariz. 1983).

Hopefully, a final hypothetical will demonstrate this point: If a murderer were to approach a victim, not speak a word, and then shoot the victim in the head, the victim would undoubtedly confront his own mortality and a court could find the murder "cruel."[275] Yet, if a second murderer were to approach a victim from behind, not speak a word, and, unbeknownst to the victim, shoot the victim in the back of the head, then a court could find the murder "heinous."[276] In this hypothetical, both murderers could end up on death row.

VI. SAVING THE "ESPECIALLY HEINOUS, CRUEL OR DEPRAVED" AGGRAVATOR

The original vagueness concerns that the U.S. Supreme Court expressed in *Furman* persist 35 years later, when former Arizona Governor Jan Brewer vetoed a proposed additional aggravator for Arizona's death penalty statute.[277] Yet, Governor Brewer's concerns about overexpanding Arizona's death penalty statute are too late. Arizona's statute continues to insufficiently narrow the class of persons eligible for the death penalty due to the presence of the "especially heinous, cruel or depraved" aggravator—an aggravator that the Court should definitively strike down.

In striking down the "especially heinous, cruel or depraved" aggravator, the death penalty would continue to be an available punishment for the worst offenders. Yet, it would be restricted and would not allow exploitation of the overly expansive nature of the "especially heinous, cruel or depraved" aggravator. For example, Indiana, Montana, Nevada, Ohio, and Pennsylvania all have capital sentencing statutes that do not include the "especially heinous, cruel or depraved" aggravator.[278] Not only do they have these statutes, but they have also *used* them to inflict the death penalty.[279] Thus, it is highly unlikely that complete repeal of the "especially heinous, cruel or depraved" aggravator would be the end of the death penalty.

Despite the concern shown by Governor Brewer in striking down aggravators to avoid overexpansiveness, states will likely show some reluctance in the outright removal of the "especially heinous, cruel or depraved" aggravator. Some alternatives will help alleviate the overuse of the aggravator if states are unwilling to repeal the aggravator—but these alternatives will ultimately fall flat. For one, states could introduce hybrid-narrowing by implementing a nonweighing analysis that occurs before weighing occurs. This solution is not original—both

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275. *See* State v. Trostle, 951 P.2d 869, 883 (Ariz. 1997); State v. Kiles, 857 P.2d 1212, 1215 (Ariz. 1993) ("Mental anguish includes a victim's uncertainty about her ultimate fate.").

276. *See* State v. Comer, 799 P.2d 333, 349 (Ariz. 1990).

277. Brewer Letter, *supra* note 8.

278. IND. CODE § 35-50-2-9 (2015); MONT. CODE. ANN. § 46-18-303 (2013); NEV. REV. STAT. § 200.033 (2013); OHIO REV. CODE ANN. § 2929.04 (LexisNexis 2014); 42 PA. CONS. STAT. § 9711 (2014).

279. Ohio, in particular, has executed 20 inmates from 2010–2014. *Executions by State and Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/node/5741#OH (last visited Apr. 9, 2016).

Colorado and Utah utilize such an analysis.[280] In Utah, for example, a defendant must first be convicted of a "capital felony" before being put through a weighing-analysis-type aggravation hearing.[281] "Capital felony" has its own definition and includes homicides committed by someone who is already incarcerated in jail or prison, and homicides committed where two or more victims were killed, so long as notice of the intent to seek the death penalty accompanies the charges.[282]

Another solution would be to implement a limiting function at the charging level by, for instance, having prosecuting agencies assemble a panel of reviewers to ultimately determine whether any aggravators—particularly the "especially heinous, cruel or depraved" aggravator—are being stretched beyond what *Furman* originally requires. Or, alternatively, weighing states like Arizona could add mandatory proportionality review by the state's supreme court. Georgia, for example, has a mandated proportionality review of all death sentences by the Supreme Court of Georgia in order to ensure a sentence is not excessive in comparison to the sentence imposed in similar cases.[283] But even this has come under controversy because concerns over arbitrariness persist.[284] Perhaps any solution, short of outright repeal, will work only if it is implemented in conjunction with other solutions, which would encourage state legislatures to throw spaghetti at the wall and see what sticks. The gravity of the problem, however, is obvious—we are dealing with lives, and peddling death. Every solution that fails to stick may result in the continued imposition of arbitrary death sentences.

In order for Arizona, as well as other weighing states that continue to use the "especially heinous, cruel or depraved" aggravator, to regain control over the applicability of its capital sentencing statute, it must repeal the "especially heinous, cruel or depraved" aggravating factor. Other options leave too much room for unpredictability in an area that has too much at stake. The death penalty must be imposed following *Furman* standards; otherwise, it is in violation of the U.S. Constitution. Repeal of the "especially heinous, cruel or depraved" aggravator is the only way weighing-states's statutes will prevent the arbitrary and capricious imposition of the death penalty.

CONCLUSION

Early Supreme Court jurisprudence clearly stated that if the states were to reserve the death sentence as possible punishment, they must be mindful in crafting legislation that ensures that the death penalty is not arbitrarily or capriciously imposed—otherwise, such legislation would violate the Constitution. Initially, the Court was the caretaker of this test, but over time, the Court ceded this power back to the states. In doing so, the Court fractured the once-consistent

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280. See COLO. REV. STAT. § 18-1.3-1201 (2014); UTAH CODE ANN. § 76-3-207 (LexisNexis 2010).

281. UTAH CODE ANN. § 76-3-207 (LexisNexis 2010).

282. UTAH CODE ANN. § 76-5-202(1)(a), (1)(b), (3)(a) (LexisNexis 2010).

283. GA. CODE ANN. § 17-10-35.

284. Clark Calhoun, Note, *Reviewing The Georgia Supreme Court's Efforts at Proportionality Review*, 39 GA. L. REV. 631, 671 (2005).

caretaking of the test. As a result, facially vague aggravators have survived in situations where state appellate courts perform some defining of terms that render sentencing statutes facially vague.

An example of one of these facially vague survivors is the "especially heinous, cruel or depraved" aggravator that was once struck down, but has been given new life. Not only is this aggravator facially vague, but it is also used in nearly every state that purports to use aggravators as a method of narrowing the class of persons eligible for the death penalty. Arizona is one of these states that has the "especially heinous, cruel or depraved" aggravator and whose appellate courts have attempted to define the key terms and narrow the class of persons eligible.

However, the Arizona Supreme Court's definitions of cruelty, heinousness, and depravity have resulted in lower courts' ability to find cruelty, heinousness, or depravity in nearly any murder, and have failed to demonstrate how the definitions and factors sufficiently narrow the "especially heinous, cruel or depraved" aggravator. Thus, despite the supposed safeguards, the "especially heinous, cruel or depraved" aggravator is still too expansive to sufficiently narrow the class of persons eligible for the death penalty. Although there may be some structural changes that could help to fix this issue, those changes would likely prove ineffective. Therefore, this aggravator should be struck down and removed from capital sentencing statutes.