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Taylor Lopa

THE "ESPECIALLY HEINOUS" AGGRAVATOR: SHARPSHOOTER BONUSES DO NOT BELONG IN CAPITAL SENTENCING LAW

TAYLOR LOPA[†]

INTRODUCTION

In capital cases, the jury is often left with the onerous decision about whether to impose the death penalty. To help jurors make sentencing decisions, judges will instruct them on how to apply the law. As one juror summarized, "[The judge told us] that we were to make our decision on the basis of his instructions and the law, not what we felt, not what we thought ought to be."[1] Because of jury instructions like this, jurors know that they must base sentencing decisions on the law rather than their personal beliefs. But what happens when the law itself leaves jurors to make decisions about who lives or dies based on the sentencers' subjective beliefs?

Fortunately, states that allow capital punishment have statutes outlining circumstances that sentencers must find present before they can choose to sentence the defendant to death.[2] Usually, these statutes specify aggravating circumstances that, according to the legislature, set capital murder apart from normal first-degree murder cases.[3] One type of aggravating circumstance, however, asks the jury to take part in that determination. Specifically, this aggravating circumstance allows jurors to impose the death penalty if they determine "[t]he murder was especially heinous, atrocious, or cruel."[4] This aggravating factor is controversial because, unlike

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[†] Senior Staff Member, *St. John's Law Review*, J.D., 2022, St. John's University School of Law; B.A., 2019, University of Delaware.

[1] Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L. J. 1183, 1214 (1995) (alteration in original).

[2] *See, e.g.*, OKLA. STAT. tit. 21, § 701.10 (2013).

[3] § 701.12.

[4] § 701.12(4).

most, the especially heinous, atrocious, or cruel ("HAC") aggravator does not measurably narrow the class of people eligible for capital punishment. Because the HAC aggravator is vague and essentially asks ordinary people to determine whether an unjustified killing is "particularly bad," a juror could find that any murder meets this standard.[5]

While the aggravating circumstance is designed to cover only the most deserving defendants, the standard erroneously assumes that average jurors know how to distinguish capital murders from all others.[6] In reality, unbridled sentencing discretion invites jurors to base life and death decisions on their subjective judgments.[7] Thus, limitless jury discretion has historically led to the "arbitrary and capricious" infliction of the death penalty, which constitutes cruel and unusual punishment under the Eighth Amendment.[8] To provide objective standards that guide the jury's decision about whether the crime justifies the death sentence, state courts have adopted limiting constructions of their states' HAC aggravators.[9] Despite this judicial intervention, HAC aggravators still fail to sufficiently limit jury discretion.[10] Oklahoma's aggravator is no exception.[11]

This Note argues that HAC aggravators, like Oklahoma's, are unconstitutionally overbroad and vague. Part I of this Note discusses Supreme Court precedent regarding capital sentencing and the HAC aggravating circumstance. Part II addresses the implications of this Supreme Court precedent, including how it applies to Oklahoma's HAC aggravator. Oklahoma case law confirms what common sense would suggest about the state's court-made limiting construction: The construction hardly and arbitrarily limits the application of the HAC factor, which continues to apply in an unprincipled, overly broad manner. Part III argues that, as the Oklahoma courts' limiting construction

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[5] Maynard v. Cartwright, 486 U.S. 356, 363–64 (1988).

[6] Michael Welner et al., *The Depravity Standard I: An Introduction*, 55 J. CRIM. JUST. 1, 3 (2018).

[7] Godfrey v. Georgia, 446 U.S. 420, 428–29 (1980).

[8] Gregg v. Georgia, 428 U.S. 153, 188 (1976); U.S. CONST. amend. VIII.

[9] Chad Flanders, *Is Having Too Many Aggravating Factors the Same as Having None at All?: A Comment on the Hidalgo Cert. Petition*, 51 U.C. DAVIS L. REV. 49, 55 (2017).

[10] Welner et al., *supra* note 6, at 5.

[11] Romano v. Gibson, 239 F.3d 1156, 1176 (10th Cir. 2001); Wayne L. Shelley, Influences and Effects of Subjective Post-Furman Death-Penalty Aggravators on Oklahoma Death Penalty Cases 93 (2014) (Ph.D. dissertation, Capella University) (on file with author).

currently applies, the state's HAC aggravator wholly fails to target "especially heinous" murders. To meet constitutional standards, these aggravators must cue jurors into specific circumstances that elevate a murder above those that fit the "typical" profile. As the political branch entrusted with the responsibility to craft criminal statutes that law enforcement and sentencers can fairly apply to individual defendants, the legislature—not the judiciary—is the appropriate body to reform the HAC aggravator.

I. BACKGROUND: THE SUPREME COURT'S ROLE IN STATE CAPITAL SENTENCING LAW

States did not always have safeguards to ensure jurors reserved the death penalty for only the "truly deserving" defendants.[12] Without adequate jury guidance, whether a defendant lives or dies often hinges on the mental state of the specific jury members rather than the circumstances surrounding the defendant's conduct.[13] For example, jurors might inject improper prejudices into their evaluations or base their decision on irrelevant or arbitrary factors.[14] In 1972, the Supreme Court, concerned about these risks, tasked states with the responsibility to regulate juries' capital sentencing decisions.[15]

A. In 1972, the Supreme Court mandated statutory standards in capital cases, which led states to create the HAC aggravator.

In *Furman v. Georgia*, the Supreme Court recognized that unfettered jury discretion leads to the "arbitrary" and "capricious" infliction of the death penalty.[16] Though there was no majority opinion, five justices held that the imposition of the death penalty in the cases at issue violated the Eighth Amendment prohibition against cruel and unusual punishment.[17] Two justices would have found the death penalty

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[12] *See* McGautha v. California, 402 U.S. 183, 204 (1971) ("To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.").

[13] Furman v. Georgia, 408 U.S. 238, 314 (1972) (White, J. concurring).

[14] *Id.* at 310 (Stewart, J., concurring); *id.* at 313 (White, J. concurring).

[15] *Id.* at 239–40 (per curiam).

[16] *Id.* at 295 (Brennan, J., concurring).

[17] *Id.* at 239–40.

unconstitutional per se.[18] Contrarily, three justices argued that capital punishment is unconstitutional only in the absence of rational and discernible standards that distinguish murders that qualify for the death penalty from those that do not.[19]

Post-*Furman*, states had to pass legislation to guide jury sentencing if they wanted to preserve capital punishment.[20] One approach[21] states took was to enact statutes that require juries to find at least one of a list of aggravating factors present before they may subject a defendant to the death penalty.[22] Four years later, the Supreme Court upheld this sentencing scheme.[23] In *Gregg v. Georgia*, the Supreme Court held that "a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance" can prevent the arbitrary and capricious imposition of the death penalty.[24]

Additionally, the Court in *Gregg*, for the first time, analyzed whether an HAC aggravator provided the necessary level of juror guidance.[25] This gap-filling aggravating circumstance allows the jury to impose the death penalty if it finds the nature and surrounding circumstances of a murder were somehow more troubling than those of a "typical" murder.[26] In Georgia, this aggravator allowed capital sentencing if the jury found the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."[27] While the majority conceded that "any murder [arguably] involves depravity of mind or an aggravated battery," it refused to find the aggravator overly vague and broad

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[18] *Id.* at 286 (Brennan, J., concurring); *id.* at 358–59 (Marshall, J., concurring).

[19] *Id.* at 256 (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 314 (White, J., concurring).

[20] Richard A. Rosen, *The Especially Heinous Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 947 (1986).

[21] The other approach states took was to completely remove the jury's discretion if the murder satisfied certain circumstances. *Id.* at 947. Under these circumstances, the death penalty would be mandatory. *Id.* The Supreme Court struck down this sentencing scheme in 1976. *Id.*

[22] *Id.* at 948. Generally, these aggravators are bright-line circumstances, like "[t]he victim of the murder was a peace officer," or "[t]he defendant was previously convicted of a [violent] felony" against the victim. *E.g.*, OKLA. STAT. tit. 21, § 701.12.

[23] Gregg v. Georgia, 428 U.S. 153, 192 (1976).

[24] *Id.* at 195.

[25] *Id.* at 200-01.

[26] *See id.* at 198; Welner et al., *supra* note 6, at 1.

[27] *Gregg*, 428 U.S. at 201 (quoting GA. CODE ANN. § 26-3102(b)(7) (1975) (recodified as GA. CODE ANN. § 17-10-30(b)(7) (2017))).

because the Georgia Supreme Court could construe the aggravator narrowly.[28]

In rejecting a statutory construction that allows the jury to impose the death penalty in any first-degree murder case, *Gregg* supported Justice White's proposition in *Furman* that there must be a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[29] Nevertheless, this decision permitted states' highest courts to adopt saving constructions, which narrowly interpret statutory aggravators that do not sufficiently limit jury discretion.[30]

B. In line with its precedent requiring capital sentencing standards, in 1980, the Court began to strike down overly vague and broad HAC aggravators.

Four years after *Gregg*, the Supreme Court again considered Georgia's especially heinous aggravator in *Godfrey v. Georgia*.[31] This time, the Court struck down the aggravator, finding it to be overly broad and vague.[32] Thus, the Court enforced the *Furman* principle that states must restrain juries' discretion to prevent the arbitrary and capricious infliction of the death penalty.[33] In his plurality opinion, Justice Stewart noted that states have a responsibility to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' "[34] Since rational jurors could reasonably believe that virtually every murder is "outrageously or wantonly vile, horrible and inhuman," the Georgia statute was too ambiguous to pass constitutional muster.[35] However, the Court reiterated *Gregg*'s suggestion that state courts could adopt a narrowing construction of vague statutory language.[36] Indeed,

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[28] *Id.*

[29] Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

[30] *Gregg*, 428 U.S. at 201.

[31] 446 U.S. 420 (1980).

[32] *Id.* at 422, 433.

[33] *Id.* at 428 ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.").

[34] *Id.* (quoting *Gregg*, 428 U.S. 153, 198 (1976); Proffitt v. Florida, 428 U.S. 242, 253 (1976); Woodson v. North Carolina, 428 U.S. 280, 303 (1976)).

[35] *Id.* at 428–29 (quoting GA. CODE ANN. § 26-3102(b)(7) (1975) (recodified as GA. CODE ANN. § 17-10-30(b)(7) (2017))).

[36] *Id.* at 432.

the Court would have upheld Godfrey's conviction if, in that case, the Georgia Supreme Court applied the more stringent criteria that it had applied to other cases.[37] Therefore, *Godfrey* effectively obligated state courts to extract discernable meanings from HAC aggravators to cure their potentially limitless application in first-degree murder cases.

In *Maynard v. Cartwright* (1988), because Oklahoma had a similarly ambiguous aggravator but failed to limit its application, the Supreme Court applied *Godfrey* to the state's "especially heinous, atrocious, or cruel" circumstance.[38] Like in *Godfrey*, the Court held that Oklahoma applied an unconstitutionally vague construction because, although the Oklahoma Court of Criminal Appeals ("OCCA") had established an adequate limiting construction, it had not required the state to apply it until after Maynard's conviction.[39] Here, the Court signaled that the aggravator would meet constitutional requirements if the OCCA continued to restrict the HAC aggravating circumstance to murders that included "torture or serious physical abuse."[40]

Although the Court did not discuss them, in Maynard's case, the judge provided the jury with capital sentencing instructions,[41] which the Oklahoma courts uniformly use today.[42] The state defined heinous as "extremely wicked or shockingly evil," atrocious as "outrageously wicked and vile," and cruel as "pitiless," or "designed to inflict a high degree of pain," with "utter indifference to, or [even] enjoyment of, the suffering of others."[43] Tacitly, in suggesting a court-made narrowing construction, the Court concluded that the definitional sentencing instructions Oklahoma courts used in Maynard's case were insufficient to cure the aggravator's lack of guidance.[44]

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[37] *See* William S. Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from Its Death Penalty Standards*, 12 FLA. ST. U. L. REV. 737, 753 (1985).

[38] 486 U.S. 356, 363–64 (1988) (quoting OKLA. STAT. tit. 21, § 701.12(4) (2011)).

[39] *Id.* at 364–65; *see* Stouffer v. State, 742 P.2d 562, 563 (Okla. Crim. App. 1987). In *Proffitt v. Florida*, the Supreme Court had held that the Florida Supreme Court's limiting construction, which contained a torture requirement, was not unconstitutionally vague. 428 U.S. at 255–56. After *Maynard*, the OCCA adopted that limiting construction. Hatch v. Oklahoma, 58 F.3d 1447, 1468 (10th Cir. 1995).

[40] *Maynard*, 486 U.S. at 365.

[41] Cartwright v. Maynard, 822 F.2d 1477, 1489 (10th Cir. 1987).

[42] DeRosa v. State, 89 P.3d 1124, 1156 (Okla. Crim. App. 2004).

[43] *Cartwright*, 822 F.2d at 1488–89.

[44] *Maynard*, 486 U.S. at 363–65. While this decision did not specifically analyze Oklahoma's jury instructions, the Court noted that *Godfrey*'s sentencing instructions gave the jury "no guidance" about what the terms meant shortly before affirming the

These instructions were no better than the HAC aggravator alone because they merely defined vague terms through additional vague terms.[45] Still, the Court was careful to note that there could be other constitutionally acceptable limiting constructions that the Oklahoma courts could apply to the HAC aggravator.[46] Essentially, this case further encouraged state appellate courts to take an active role in refining HAC aggravators that fail to clarify which manners of killing are "especially heinous."[47]

Taking this cue, the Oklahoma courts returned to the "torture . . . or serious physical abuse" limiting construction following the Court's decision in *Maynard*.[48] Therefore, the jury could find the especially heinous factor present only if it found evidence of torture or serious physical abuse preceding the victim's death.[49] Specifically, the courts limit murders containing torture or serious physical abuse to those where the defendant inflicts "great physical anguish" or "extreme mental cruelty."[50] As a second step, the judge provides the jury with instructions to define each term in the HAC aggravator.[51] With this guidance, the jury could then consider the surrounding circumstances to determine whether the murder was "especially heinous."

II. THE CONSTITUTIONALITY OF OKLAHOMA'S HAC

On its face, the current Oklahoma standard seems to limit jury discretion since most people can conceptualize extreme pain, whether physical or emotional. However, the OCCA has defined "great physical anguish" and "extreme mental cruelty" much more broadly than the plain language would suggest. The great physical anguish standard is satisfied if the victim experienced

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lower court's decision that *Godrey* controlled. *Id.* at 363–64. The lower court had previously addressed this issue specifically and held that the definitions were not an adequate limiting construction because they closely resembled the language rejected in *Godfrey*. *Cartwright*, 822 F.2d at 1489.

[45] *Cartwright*, 822 F.2d at 1489; *see Maynard*, 486 U.S. at 363–64. Notably, because the HAC aggravator is written in the disjunctive, the lower court rejected the state's argument that the definition of "cruel" was sufficiently clear. *Cartwright*, 822 F.2d at 1489–90.

[46] *Maynard*, 486 U.S. at 365.

[47] *Id.* at 364–65.

[48] Hatch v. Oklahoma, 58 F.3d 1447, 1468 (10th Cir. 1995).

[49] Nuckols v. State, 805 P.2d 672, 674 (Okla. Crim. App. 1991).

[50] Medlock v. Ward, 200 F.3d 1314, 1324 (10th Cir. 2000) (Lucero, J., concurring) (quoting Cheney v. State, 909 P.2d 74, 80 (Okla. Crim. App. 1995)).

[51] *Nuckols*, 805 P.2d at 674.

"conscious physical suffering" before death.[52] And the mental cruelty standard is met if the torture caused the victim greater mental anguish than the underlying killing would necessarily cause.[53] In practice, this narrowing construction limits the death penalty to cases where the murder victim experiences some pain before losing consciousness.[54] Thus, any murder satisfies the HAC aggravator unless the defendant strikes the victim with an instantaneously fatal blow.

Unlike Oklahoma's pre-*Maynard* aggravator, the limiting construction is easy to articulate. However, yet again, nearly any murder is subject to the death penalty under Oklahoma's especially heinous circumstance.[55] Moreover, when the aggravator does exclude murders from capital punishment, it often does so arbitrarily.[56] Indeed, many murders fall outside of the aggravator's scope only by chance, independent of the defendant's intent, conduct, or level of culpability.[57] Thus, two defendants who engage in the same conduct—like shooting and killing a victim—may have different outcomes depending on whether the bullet happens to hit a vital part of the victim's body.[58] This "sharpshooter bonus" is not only illogical, but also precisely presents the constitutional issues in capital sentencing that *Furman*, *Godfrey*, and *Maynard* sought to prevent.[59]

A. Supreme Court precedent outlines discernable standards to help states provide jurors with adequate guidance in capital sentencing.

The *Furman* line of cases asserts two main principles governing standards for capital sentencing. First, in capital

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[52] Battenfield v. Oklahoma, 816 P.2d 555, 565 (Okla. Crim. App. 1991).

[53] *Berget v. State,* 824 P.2d 364, 373 (Okla. Crim. App. 1991). Note that the mental and physical suffering prongs operate in the disjunctive, meaning only one must be present for a finding of torture. *Medlock*, 200 F.3d at 1324 (quoting *Cheney*, 909 P.2d at 80). Consequently, the courts rarely focus primarily on the mental suffering element since conscious physical suffering is present in almost any murder. *See infra* Part II and accompanying footnotes.

[54] Pavatt v. Carpenter, 928 F.3d 906, 936 (10th Cir. 2019) (Hartz, J. dissenting). Here, the OCCA agreed with the State that the torture prong is satisfied where the victim does not die instantaneously. *See* Brief of Members of the Oklahoma Death Penalty Review Commission as Amici Curiae in Support of Petitioner at 9, Pavatt v. Sharp, 140 S. Ct. 958 (2020) (No. 19-697).

[55] *Pavatt*, 928 F.3d at 936.

[56] *Id.*

[57] Shelley, *supra* note 11, at 93; *see* Welner et al., *supra* note 6, at 3.

[58] *Pavatt*, 928 F.3d at 936.

[59] *Id.*

cases, states have to guide sentencers through objective measures because unfettered jury discretion leads to the inconsistent and unpredictable application of the death penalty.[60] Arbitrary outcomes are troubling because retribution should reflect society's judgment about what conduct warrants that punishment rather than the jury's individual biases or subjective beliefs.[61] Second, and relatedly, those objective standards must provide a rational basis for distinguishing murders that are subject to the death penalty from other first-degree murders.[62] Otherwise, sentencing decisions will not reflect the state's assessment about which murders society considers particularly deserving of punishment.[63] Because of these recognized principles, overbroad or excessively vague death penalty statutes are unconstitutional under the Eighth Amendment.[64]

1. HAC aggravators defined only in abstract terms render an aggravator ineffective.

The Supreme Court has repeatedly suggested that the main issue with the HAC aggravator is that it defines aggravating circumstances through nothing more than a series of adjectives.[65] Since descriptive words are indefinite and relative, their meanings are open to a juror's subjective beliefs and interpretations.[66] This is especially problematic with the HAC aggravator since it essentially asks jurors to determine if they believe a given murder is especially repulsive and immoral compared to others. But since society considers murder one of the worst acts a person can commit against another, many jurors will likely consider any murder heinous, atrocious, and cruel.[67]

Often, in death penalty cases, all the jury has to decide is whether a particular murder was sufficiently *more* heinous, atrocious, or cruel than the average murder. However, since

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[60] Zant v. Stephens, 462 U.S. 862, 877–79 (1983).

[61] *Id.*; Gregg v. Georgia, 428 U.S. 153, 184, 197–98 (1976).

[62] *Zant*, 462 U.S. at 878–79.

[63] *Id.*

[64] *Id.*

[65] *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (discussing the "outrageously or wantonly vile, horrible and inhuman" aggravator and concluding, "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence.").

[66] Rosen, *supra* note 20, at 968.

[67] *See* Coker v. Georgia, 433 U.S. 584, 594, 598 (1977). This is based on public opinion and the Court's own judgment (setting murder apart from crimes, including rape, where the defendant "does not take human life"). *Id.* at 594, 598.

"especially" modifies terms that establish no standard, that qualifier does not limit the aggravator's application to any definable degree.[68] As the majority in *Maynard* noted, "To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.' "[69] The same is true of the definitions provided in the jury instructions, which failed to sufficiently limit the HAC aggravator since those terms, like those they define, are synonymous with "unusually bad."[70]

Because *Maynard* did not find these adjective-based definitions sufficient to cure the HAC aggravator's vagueness, the Court implicitly confirmed that descriptive words alone do not adequately guide the jury.[71] Rather, HAC aggravators must indicate the circumstances under which a jury can find a killing especially heinous.[72] Here, the Court seemed to accept the torture limiting construction because, on its face, "torture or serious physical abuse" provides a clear, objective prerequisite for jurors to conclude that a murder is especially heinous.[73] Thus, *Maynard* initially solved the issue that abstract verbiage presented in the application of legislative guidance for capital sentencing.[74] However, the Oklahoma courts have weakened the torture prerequisite into a pseudo-standard, meaning that the courts will find the torture element met in "almost every murder."[75] Because the aggravator serves no narrowing function, jury determinations are based wholly on the jurors' subjective judgments rather than their honest application of the HAC aggravator to the individual case.

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[68] Maynard v. Cartwright, 486 U.S. 356, 363–64 (1988).

[69] *Id.* at 364 (citing Godfrey v. Georgia, 446 U.S. 420, 428–29 (1988)).

[70] *See id.* at 363 (citing Godfrey v. Georgia, 446 U.S. 420, 428–29 (1988)).

[71] *See Maynard*, 486 U.S. at 365.

[72] Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1987).

[73] *See Maynard*, 486 U.S. at 364–65.

[74] Romano v. Gibson, 239 F.3d 1156, 1176 (10th Cir. 2001); Pavatt v. Carpenter, 928 F.3d 906, 936–37 (10th Cir. 2019) (Hartz, J., dissenting).

[75] *Romano*, 239 F.3d at 1176 (noting that the OCCA has blended the torture and conscious suffering concepts).

2. Because they must objectively narrow the class of people eligible for the death penalty, HAC aggravators cannot apply to the "typical" murder.

Sweeping standards are unconstitutional because, to meaningfully guide sentencing decisions, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty."[76] Though the *Atkins* decision did not deal with HAC aggravators, it highlighted the central problem with overbroad aggravators.[77] There, the Supreme Court interpreted *Godfrey* as holding that "the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State."[78] This principle illustrates that Oklahoma's limiting construction ignores the fundamental purpose of the HAC aggravator and capital sentencing aggravators generally. As the name suggests, aggravators authorize the death penalty if the defendant's background or conduct justifies more severe punishment than others who commit murder.[79] Necessarily, the average murder cannot satisfy this standard. That only "especially heinous" murders qualify for capital sentencing shows that the legislature understands that the death penalty cannot apply to "ordinary" murders.[80] Rather, the plain language of the HAC aggravator seems to mirror *Atkins*'s judgment that "only the most deserving of execution" should be put to death.[81]

Ironically, precisely because of their language, HAC aggravators are susceptible to the gratuitous infliction of the death penalty. Unlike others, the HAC aggravator does not spell out a circumstance that the legislature determined condemnable enough to warrant the highest punishment under the law.[82] Rather, the aggravating circumstance is whatever circumstances surrounding the murder the jurors find to constitute an "especially . . . aggravating circumstance"[83] Inherently, HAC aggravators are redundant because they merely echo the purpose of an aggravating factor. Thus, without additional guiding language, the HAC aggravator is an empty phrase and, therefore,

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[76] Zant v. Stephens, 462 U.S. 862, 877 (1983).

[77] Atkins v. Virginia, 536 U.S. 304, 319 (2002).

[78] *Id*.

[79] JOHN E. DOUGLAS ET AL., CRIME CLASSIFICATION MANUAL: A STANDARD SYSTEM FOR INVESTIGATING AND CLASSIFYING VIOLENT CRIME 98–99 (3d ed. 2013).

[80] OKLA. STAT. tit. 21, § 701.12(4) (2011).

[81] *Atkins*, 536 U.S. at 319.

[82] Rosen, *supra* note 20, at 941–43.

[83] *Id.* at 945.

a "catch-all" for any murder a juror might think is deserving of the death penalty.[84]

Even with Oklahoma's current limiting construction, the state's HAC aggravator still, in reality, operates as a catch-all. The Oklahoma courts instruct jurors that they can find the defendant tortured the victim as long as they find the victim consciously suffered before death.[85] Since the vast majority of cases satisfy that prong, the jury will almost always consider whether the murder was especially heinous, atrocious, or cruel. And since the latter half of the HAC jury instructions have not changed, Oklahoma's HAC aggravator applies almost exactly as it did pre-*Maynard*.[86] Despite the *Furman* line of cases holdings that overbroad aggravators are unconstitutional, the courts continue to hold that Oklahoma's aggravator meets constitutional standards.[87]

Interestingly, the Oklahoma courts take for granted that its HAC aggravator satisfies the Eighth Amendment because the OCCA has established a detailed test as a prerequisite to its application.[88] Generally, the court rejects vagueness challenges to the state's HAC aggravator under two bases. First, the OCCA concludes that the aggravator must give sufficient guidance because, as the Supreme Court suggested, the state uses a "torture or serious physical abuse" limiting construction.[89] The court implicitly treats the subsequent "clarifications" of these two terms as consistent with their plain meaning and, therefore, will assume that the lower court's application of the aggravator "was not contrary to or an unreasonable application" of *Maynard*.[90] Second, the court engages in a convoluted, yet uncritical, test to extract facts that support a finding of "torture" and ultimately determine that the jury could find the murder was especially heinous.[91] In short, the OCCA changed the definition of "torture" into "conscious physical suffering" and applies this diluted

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[84] Pavatt v. Carpenter, 928 F.3d 906, 936 (2019) (Hartz, J., dissenting).

[85] 2 OKLA. UNIF. JURY INST. CRIM. § 4-73 (OKLA. CRIM. APP. CT. 2005).

[86] *Id.*

[87] *See, e.g.*, Mitchell v. Sharp, 798 F. App'x 183, 192–93 (10th Cir. 2019).

[88] *Id.*

[89] *Id.* (quoting Mitchell v. State, 235 P.3d 640, 664 (Okla. Crim. App. 2010)) (rejecting that the HAC aggravator is vague simply because courts have approved the limiting construction, but ignoring that the current jury instructions, which the OCCA promulgated in *DeRosa*, require only conscious physical suffering to satisfy the torture prong).

[90] *Id.* at 191–92.

[91] *See, e.g.*, Pavatt v. Carpenter, 928 F.3d 906, 920–22 (10th Cir. 2019).

standard to particular cases, but simultaneously insists that the narrowing construction is constitutional because it incorporates a torture requirement.

Granted, at first, it seemed like the OCCA added to the torture prong to clarify the standard for the jury.[92] Yet, because the OCCA placed a largely empty prerequisite in front of the especially heinous aggravator, the court eventually crafted a jury instruction that might as well have repealed the torture requirement altogether.[93] Today, Oklahoma's jury instructions implicitly provide the jury with nearly limitless discretion. That the courts chose to make this instruction in a roundabout way makes the standard no less sweeping.

3. HAC factors must create principled standards, which rationally distinguish qualifying and non-qualifying types of murders.

Justice Stewart's concurring opinion in *Furman* aptly articulates why the risk of the arbitrary and capricious infliction of the death penalty is cruel and unusual: two people who committed the same crime, under the same circumstances, might suffer entirely different fates.[94] He submitted, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."[95] Indeed, to mitigate the possibility of the random infliction of the death penalty, the Supreme Court has required a principled distinction between circumstances that warrant capital sentencing from those that do not.[96] In other words, an articulable distinction between types of murders is insufficient if that distinction does not cure the tendency for random applications of the death penalty. Additionally, these distinctions must also be rational, meaning that the aggravating circumstances objectively relate to a judgment about the defendant's level of culpability.[97]

Unprincipled aggravators are often overbroad, like Oklahoma's HAC aggravator, but even clear standards, like the

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[92] Maynard v. Cartwright, 486 U.S. 356, 365 (1988).
[93] DeRosa v. State, 89 P.3d 1124, 1156 (Okla. Crim. App. 2004).
[94] *See* Furman v. Georgia, 408 U.S. 238, 309–10 (1972).
[95] *Id.*
[96] *Maynard*, 486 U.S. at 363.
[97] Zant v. Stephens, 462 U.S. 862, 876–77 (1983).

torture prerequisite, are unconstitutionally vague if they make unhelpful distinctions.[98] For example, in *Maynard*, the majority explained that vagueness challenges under the Eighth Amendment "characteristically assert that the challenged provision fails . . . to inform juries what they must find to impose the death penalty."[99] If the Eighth Amendment only required instructions that adequately inform the jury of what it must find, then Oklahoma's aggravator might be constitutional.[100] However, the Supreme Court has clarified that definable, unprincipled standards are still vague because "open-ended discretion" welcomes "a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman*."[101]

Unfortunately, the current standard in Oklahoma does not reasonably separate murders that satisfy the aggravator from those that do not. In fact, Oklahoma appellate courts frequently focus on largely arbitrary considerations.[102] These include whether the victim lost consciousness immediately, whether the victim survived for a few seconds or a few minutes, and whether the victim happened to see the attacker administer the deadly blow.[103] Often, those factors are matters of chance and unrelated to the defendant's intended conduct beyond inflicting a fatal wound to the victim.[104] For instance, it is hard to understand why whether a victim happened to notice the shooter's presence should determine whether the defendant committed torture.[105]

Worse, since almost any murder meets the requirements of the court-made limiting construction, and the second prong has not changed, jurors can still impart their subjective standards on the HAC aggravator.[106] Exactly like before *Maynard*, the heinous, atrocious, and cruel prong asks jurors to determine if the circumstances surrounding a murder are distasteful enough

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[98] *Id.* (stating legislative guidance that fails to narrow and reasonably distinguish those who are deserving of the death penalty from those who are not is unconstitutionally vague).

[99] *Maynard*, 486 U.S. at 361–62.

[100] *See id.*

[101] *Id.*; *Zant*, 462 U.S. at 876–77 (quoting Gregg v. Georgia, 428 U.S. 153, 195 n.46 (1976)).

[102] Shelley, *supra* note 11, at 93.

[103] *See, e.g.*, Pavatt v. Carpenter, 928 F.3d 906, 919 (10th Cir. 2019).

[104] Shelley, *supra* note 11, at 93; DOUGLAS ET AL., *supra* note 79, at 97.

[105] *See Pavatt*, 928 F.3d at 919 (highlighting that the victim clutched a trash bag before he died because it indicated that the victim saw the plaintiff pointing a gun before he pulled the trigger).

[106] *Id.* at 936 (Hartz, J. dissenting).

to warrant the defendant's death. As the *Cartwright* court noted, "When the sentencer is free to rely upon any particular event that it believes makes a murder 'especially heinous, atrocious, or cruel,' the meaning that the sentencer attached to this provision 'can only be the subject of sheer speculation.' "[107] Regrettably, it seems that the courts have forgotten why the state must demark aggravating circumstances: to limit the application of the death penalty to defendants whose conduct meets objective, aggravating criteria.[108]

Oklahoma's aggravator, with its narrowing construction, establishes the lowest bar for a jury to find the HAC aggravator present. Yet, the jury instructions wholly fail to indicate when the jury *should* sentence a defendant to death. Indeed, the current jury instructions grant jurors with almost limitless discretion once they determine that the victim consciously suffered before death.[109] Instead, the instructions should require jurors to compare an individual murder to the "larger universe of comparable crimes."[110] Because they do not, the reviewing court often cannot "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[111] That Oklahoma cannot rationalize the state's sentencing decisions indicates that they are based on subjective, or otherwise arbitrary considerations, rather than jurors' faithful application of the law.

B. A review of Oklahoma case law demonstrates how, under the HAC aggravator, state courts have sanctioned arbitrary jury determinations.

Unsurprisingly, a comparison of the cases where the Oklahoma courts upheld jury determinations that a murder was especially heinous yields a hopelessly conflicting image.[112] Since the sentencer can consider any circumstance it finds relevant, it is impossible to discern any standard for finding the HAC

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[107] Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1987) (quoting Godfrey v. Georgia, 446 U.S. 420, 429 (1980)).

[108] *See* Gregg v. Georgia, 428 U.S. 153, 197–98 (1976).

[109] 2 OKLA. UNIF. JURY INST. CRIM. § 4-73 (OKLA. CRIM. APP. CT. 2005).

[110] Welner et al., *supra* note 6, at 9.

[111] Zant v. Stephens, 462 U.S. 862, 877 (1983).

[112] Rosen, *supra* note 20, at 986 (comparing eleven states' court decisions regarding their HAC aggravators, including Oklahoma's); Pavatt v. Carpenter, 928 F.3d 906, 936 (10th Cir. 2019).

aggravator present other than whether "the reviewing courts have been able to find *something* disturbing in each case."[113]

The dissent in *Cartwright* referenced this tendency, noting that courts with similar aggravating circumstances have often relied on contradictory factors between cases.[114] For example, the Oklahoma courts could reasonably articulate their standard for evaluating the defendant's motive as follows: "If the defendant killed for no reason, the murder is especially heinous, as is a murder committed for a reason the appellate court does not like."[115] Indeed, the OCCA has upheld findings that a murder was especially heinous where the defendant killed the victim "to drive his car,"[116] for "talking shit,"[117] and "to wrest control of his life insurance" for himself and the victim's wife.[118] So the HAC aggravating factor, along with its definitions, invites juries to rely on aggravating factors in an inconsistent manner and the reviewing courts to simply divine which factors jurors might have found especially heinous.[119]

In an equally unprincipled manner, the torture limiting construction to the HAC aggravator directs the jury almost exclusively toward the victim's pain rather than the defendant's conduct in the victim's final moments.[120] Frequently, this translates to an in-depth analysis of the length of time that a victim remained conscious or survived.[121] Recently, the OCCA upheld a finding that a murder was especially heinous in a case where the medical examiner testified that the victim would have lost consciousness before he died and could not say whether the victim survived for less than one minute or for up to six minutes.[122] This testimony suggests that the victim could have lost consciousness immediately and then died only seconds later. Therefore, the court effectively held it was reasonable to conclude that the defendant tortured the victim even though the expert

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[113] Rosen, *supra* note 20, at 989.

[114] Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1987) (quoting Richard A. Rosen, *The Especially Heinous Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 989 (1986)).

[115] *Id.*

[116] Berget v. State, 824 P.2d 364, 374 (Okla. Crim. App. 1991).

[117] Robinson v. State, 900 P.2d 389, 402 (Okla. Crim. App. 1995).

[118] Pavatt v. Carpenter, 928 F.3d 906, 919 (10th Cir. 2019).

[119] *See id.* at 919–21; *Cartwright*, 822 F.2d at 1491.

[120] Shelley, *supra* note 11, at 93; DOUGLAS ET AL., *supra* note 79, at 97.

[121] *See, e.g.*, *Pavatt*, 928 F.3d at 919–21.

[122] *Id.* at 920–21.

did not know whether the victim experienced any pain before death.[123]

If there was any doubt that Oklahoma's current conception of the HAC aggravator might violate the Eighth Amendment, the court previously found the aggravator was not present in a similar case.[124] In *Brown v. State*, because the medical examiner testified that the victim would have died within minutes of receiving the fatal wounds, the court was not satisfied that the defendant tortured the victim.[125] Interestingly, in *Brown*, the defendant shot his wife seven times,[126] whereas in *Pavatt*, the defendant shot his lover's husband twice,[127] and both died minutes after sustaining their injuries. What makes the latter case more pitiless is subject to "sheer speculation."[128]

These cases show that Oklahoma's limiting construction fails to narrow the number of murders that qualify for the death penalty or provide a principled distinction between murders that are and are not eligible for this punishment.[129] Further, the courts have applied the limiting construction in cases where the circumstances barely meet Oklahoma's extremely low bar for a finding of torture.[130] Inexplicably, the jury can find that torture or serious physical abuse accompanied a murder even without concrete evidence that the victim genuinely suffered before death. Once the jurors make that finding, they can rely on any circumstance they deem relevant to determining whether the murder was especially heinous, cruel, or atrocious. If even the criminal courts cannot make principled decisions, how can we expect jurors—who have less exposure to serious criminal cases—to do so?[131] Jurors play an important role as the defendant's peers, but they need the law to establish principled

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[123] Granted, the standard of review required the court to view the facts in the light most favorable to the prosecution. *Id.* at 920 (holding that a jury could find the victim might have survived up to six minutes). Still, when the overbreadth of the HAC aggravator combines with great deference to jury determinations, the aggravator becomes truly meaningless.

[124] Brown v. State, 753 P.2d 908, 913 (Okla. Crim. App. 1988).

[125] *Id.*

[126] *Id.* at 910.

[127] *Pavatt*, 928 F.3d at 919.

[128] *See* Godfrey v. Georgia, 446 U.S. 420, 429 (1980) (discussing the jury's interpretation of the "outrageously wanton" standard).

[129] *See* Zant v. Stephens, 462 U.S. 862, 877 (1983).

[130] *See, e.g.*, *Pavatt*, 928 F.3d at 920–21.

[131] Proffitt v. Florida, 428 U.S. 242, 252 (1976) ("[A] trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.").

distinctions to guide them in capital sentencing decisions.[132] Unfortunately, as the dissent in *Pavatt* observed, "Oklahoma has veered off the course forced on it by *Cartwright*, coming full circle and no longer limiting this clearly vague aggravating circumstance in a manner that minimizes 'the risk of wholly arbitrary and capricious action.' "[133]

III. LEGISLATURES MUST REFINE HAC AGGRAVATORS TO SENSIBLY DISTINGUISH MURDERS THAT DO AND DO NOT JUSTIFY THE DEATH SENTENCE

The OCCA has strayed from *Maynard*'s mandate because courts are susceptible to creating unworkable standards that fail to reflect the community's judgments on retribution.[134] Whereas the legislature would have to debate how to refine the HAC aggravator, the OCCA simply adopted the torture prerequisite in one decision.[135] Moreover, courts can create piecemeal rule additions and alterations on a case-by-case basis, which is exactly what the OCCA did in weakening the torture standard over time.[136] Here, the court created an irrational standard because it hastily applied a stopgap to save Oklahoma's HAC aggravator and attempted to backtrack into a more broadly applicable standard.[137] Now, the courts should obligate state lawmakers to perform their legislative responsibility to craft an adequate HAC aggravator.

A. Critics are incorrect to point to the failure of court-made limiting constructions as conclusive proof that states cannot create constitutional HAC aggravators.

It is not surprising that the OCCA chose to unravel its bright-line limiting construction of the HAC aggravator over time. The Court adopted the torture narrowing construction because the Supreme Court signaled such an interpretation would allow Oklahoma to preserve jury discretion in capital

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[132] DOUGLAS ET AL., *supra* note 79, at 98.

[133] *Pavatt*, 928 F.3d at 936–37 (Hartz, J., dissenting).

[134] Gregg v. Georgia, 428 U.S. 153, 175 (1976) ("Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." (quoting Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring))).

[135] Hatch v. Oklahoma, 58 F.3d 1447, 1468 (10th Cir. 1995).

[136] *See* DeRosa v. State, 89 P.3d 1124, 1156 (Okla. Crim. App. 2004).

[137] *See Pavatt*, 928 F.3d at 936–37 (Hartz, J., dissenting) (noting the torture limiting construction was "forced on" the OCCA and that the standard has since come "full circle").

sentencing.[138] Yet, the state did not seem to want to limit the aggravator to just torture killings. Granted, the torture requirement undercuts the purpose of the HAC aggravator, since it is a gap-filling factor. Specifically, the aggravator allows jurors to make holistic, individualized determinations about whether a specific murder justifies special retribution because of exceptional circumstances that the legislature did not foresee.[139] But, ironically, the OCCA also undermined the purpose of the HAC aggravator when it allowed the factor to apply to any person guilty of murder.[140]

If Oklahoma wants to give jurors more discretion than a torture requirement might, the state should craft a standard that balances the value of the sentencer's particularized consideration and the risk of unfettered jury discretion. Instead, the court rashly adopted a single-factor HAC aggravator, was unsatisfied with the limits of the saving construction, and then incrementally "refined" it into a meaningless, sweeping standard. To address the unconstitutional overbreadth of the HAC aggravator, the legislature must craft a standard that comports with the plain language and purpose of the *especially* heinous aggravator.[141]

Because Oklahoma is just one of many states that unreasonably defines and applies its HAC aggravator, some scholars have argued that HAC aggravators are per se unconstitutional.[142] Generally, people who oppose the HAC aggravating circumstance argue that the legislatures—or courts—could never craft a standard narrow enough to adequately mitigate the risk of arbitrary enforcement of capital punishment.[143] Consequently, legislatures should simply enumerate every circumstance that qualifies a murder for capital

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[138] Maynard v. Cartwright, 486 U.S. 356, 365 (1988).

[139] *See* Welner et al., *supra* note 6, at 3 (arguing that HAC aggravators are limited in their ability to judge "the worst of the worst" crimes because statutory language covers only a subset of factors and characteristics relevant to murder investigations).

[140] *Id.*

[141] Zant v. Stephens, 462 U.S. 862, 875 (1983) ("[T]he aggravating circumstance merely performs the function of narrowing the category of persons convicted of murder who are eligible for the death penalty.").

[142] JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 420 (2002).

[143] *See* Rosen, *supra* note 20, at 989–92.

punishment.[144] Because people cannot help but base sentencing decisions on their subjective judgments, the HAC aggravator can never work as the legislature intended.[145] These critics recognize that juries exist to weigh the evidence and apply the law to individual cases.[146] However, they argue that, because "death is different," the law can trust sentencers to apply only strictly defined aggravators in capital sentencing decisions.[147] This position is difficult to square with this country's reverence for the right of criminal defendants' to their peers' individualized assessment of the cases and determination of guilt.

The Sixth Amendment right to a jury trial reflects our nation's democratic belief that the accused's peers are best suited to determine whether the defendant's conduct warrants punishment.[148] In many states, the legislature has included an especially heinous aggravator to reflect that same principle.[149] Apparently, the legislature believes that the trier of fact is in the best position to judge the severity of a defendant's conduct when it does not fit one of the specified aggravators.[150] This decision is logical since the death penalty is reserved for crimes that society considers truly debased,[151] and juries are generally a microcosm of the community.[152] Furthermore, as a matter of constitutional law, it seems appropriate for the legislature to allow individualized sentencing decisions.[153] However, the legislature's judgment must be balanced against the right of the accused against arbitrary and capricious sentencing.[154] Consequently, the

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[144] *Id.* (rejecting the HAC aggravator and suggesting a torture aggravating circumstance).

[145] *Id. See* Simone Unwalla, *Death is Different. Death Sentencing is Not*., 14 PA. J. PHIL., POL., & ECON. 41, 45 (2019).

[146] Unwalla, *supra* note 145, at 45.

[147] *See id.* at 45–46; Rosen, *supra* note 20, at 989–92.

[148] U.S. CONST. amend. VI; Ring v. Arizona, 536 U.S. 584, 615–16 (2002) (Breyer, J., concurring).

[149] *See* Unwalla, *supra* note 145, at 45.

[150] Welner et al., *supra* note 6, at 3 (noting legislative guidance should reflect that "murder is a very diverse crime with a range of motives, techniques, actions, intervening influences, victims and their characteristics, and the reactions of a perpetrator to one's homicidal actions").

[151] Coker v. Georgia, 433 U.S. 584, 594 (1977).

[152] *Ring*, 536 U.S. at 615-16 (2002).

[153] *See* Gregg v. Georgia, 428 U.S. 153, 175 (1976); Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

[154] *See* Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L., 117, 158 (2004) (arguing that the representative nature of the jury lends "legitimacy" to capital sentencing, but "not necessarily justice").

legislature must ensure that HAC aggravators function as intended: to reach only especially morally bankrupt defendants.

While critics are right to point out that there is a fundamental flaw with HAC aggravators as states currently define and apply them,[155] they are likely incorrect that the flaw is fatal. Juries can make principled determinations given sufficient direction. The issue with the HAC aggravator is that, naturally, most people have no way of knowing how to compare murders without meaningful guidance.[156] To remedy this, legislatures can likely craft standards that subtly cue jurors into what differentiates the common from the truly anomalous murder motives and perpetrator profiles.[157] This guidance would simultaneously prevent the HAC aggravator from acting as a standardless catch-all and allow individualized determinations about the defendant's fate.

B. States can craft standards that cue jurors into the circumstances that cause society to judge certain murders more harshly than others.

To strike the proper balance for jury discretion, HAC aggravators should have a few basic characteristics. First, the legislature should generally reserve descriptive words as a tool to modify more concrete words. As long as the concrete words objectively measure a quality or condition, the qualifying descriptive words will enhance the standard's meaning. Second, the statute should define any word that may be open to a juror's subjective interpretation. Third, legislatures should consider adding a mens rea element where the jury could otherwise construe the language to cover the average murder.[158] Fourth, the statute should contain ample action words. Last, concrete words should cue jurors into qualities, traits, motivations, or mental states that are generally lacking in a typical murder case.[159] HAC aggravators that follow this formula might better facilitate individualized jury determinations about the

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[155] Rosen, *supra* note 20, at 992.

[156] Welner et al., *supra* note 6, at 3, 9.

[157] *Id.* at 3. ("There are numerous aspects of intent, actions, victim choice, and attitudes about one's offense that distinguish a crime.").

[158] For example, a "torture" standard requiring that the defendant actually intended to cause the victim some level of pain might help jurors in Oklahoma separate classes of murder. *See, e.g.*, 18 U.S.C. § 2340.

[159] Welner et al., *supra* note 6, at 3, 9.

defendant's fate while providing principled guidance to help juries compare the circumstances of the specific case to other murders.

A few states have crafted especially heinous aggravating statutes that follow some of these drafting principles and could serve as prototypes to create more workable models in states like Oklahoma. For example, New York's "especially cruel and wanton" standard, while moot, would provide much more guidance than Oklahoma's HAC aggravator.[160] Here, the statute required not only that "the defendant acted in an especially cruel and wanton manner,"[161] but also that the defendant did so "pursuant to a course of conduct intended to inflict and inflicting torture upon the victim prior to the victim's death."[162] Unlike Oklahoma's definition of torture, New York defines torture as "the intentional and depraved infliction of extreme physical pain."[163]

While "extreme physical pain" is analogous to "great physical anguish," two things set New York's torture standard apart. First, there is no prerequisite—like conscious physical suffering—to undercut this definition; rather, the definition of "depraved" clarifies and further narrows the application of the HAC aggravator.[164] "Depraved" means the defendant enjoyed inflicting the extreme physical pain.[165] Thus, this depravity standard separates sadistic defendants from defendants who intended to hurt the victim but did so with a different, perhaps less perverted, conscious object.[166] Here, since it is probably

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[160] N.Y. PENAL LAW § 125.27(1)(a)(x) (McKinney 2019). New York's death penalty statute was invalidated by the New York Court of Appeals in 2004. N.Y. CRIM. PROC. LAW § 400.27(10) (McKinney 2020), *invalidated by* People v. LaValle, 3 N.Y.3d 88 (2004).

[161] N.Y. PENAL LAW § 125.27(1)(a)(x). Notably, the conduct must be "cruel" *and* "wanton," whereas courts have interpreted HAC aggravators in the disjunctive. *Id.*

[162] *Id.*

[163] *Id.* This aggravator is arguably redundant because the defendant must "intend[ ]" to inflict torture, and "torture" is also defined as an "intentional" act. *Id.* Yet, this redundancy serves a useful function because it highlights to the jury that they must focus on the defendant's mental state. *Id.*

[164] *Id.*

[165] *Id.* (" '[D]epraved' means the defendant relished the infliction of extreme physical pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain . . . .").

[166] For example, a defendant who uses a kitchen knife during a heated argument and stabs a victim to death likely intends to cause great pain. Yet, the enraged

rational to impart greater culpability on murderers who take pleasure in seeing their victims suffer, or even kill for sport, New York's "depraved" standard provides a principled distinction between murders. Second, the "intentional" and "depraved" requirements focus the definition of torture on the defendant's conduct.[167] Thus, this prong is less likely to turn on chance factors, like the sharpshooter bonus.

Colorado briefly employed an "especially heinous, cruel, or depraved" standard[168] that resembles aspects of New York's and Oklahoma's aggravating circumstances, but arguably better balances specificity and flexibility.[169] Actually, Colorado and Oklahoma's definitions of "cruel" are similar.[170] The main difference between the two standards is that the Colorado definition requires "physical or psychological torture."[171] Under its plain meaning, "conscious physical suffering" does not satisfy this standard, which should prevent Oklahoma's misguided focus on whether the victim died instantaneously.[172] While an explicitly intent-based torture standard—like New York's—might provide clearer guidance, this torture standard could provide a stronger framework for Oklahoma than its current HAC aggravator.

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defendant does not necessarily enjoy inflicting that pain if the defendant's sole motive in executing the killing was rage.

[167] *See* § 125.27(1)(a)(x).

[168] *See* People v. Rodriguez 794 P.2d 965, 983 n.14 (Colo. 1990) (en banc). The legislature reverted this aggravating circumstance to a pure "especially heinous, cruel, or depraved" aggravator after the Supreme Court of Colorado declared it unconstitutional for unrelated reasons. People v. Young, 814 P.2d 834, 846 (Colo. 1991) (en banc). *Compare* COLO. REV. STAT. ANN. § 16-11-103 (West 1990) (repealed 2002), *with* COLO. REV. STAT. § 18-1.3-1201 (5)(j). Then, in 2020, Colorado voted to abolish the death penalty. COLO. REV. STAT. § 18-1.3-1201(1)(b).

[169] People v. Rodriguez 794 P.2d 965, 983 n.14 (Colo. 1990) (en banc) (citing COLO. REV. STAT. ANN. § 16-11-103 (West 1990) (repealed 2002)).

[170] *See supra* note 45 and accompanying text (suggesting Oklahoma's definition of "cruel" might be adequate if the HAC aggravator did not apply in the disjunctive).

[171] *Rodriguez*, 794 P.2d at 983 n.14 (citing COLO. REV. STAT. ANN. § 16-11-103 (West 1990) (repealed 2002)). Granted, the instruction goes on to state "torture" includes "the pitiless infliction of pain or suffering," which could unduly weaken the standard. *Id.* Still, unlike Oklahoma's limiting construction, the definitions do not instruct the jury that non-instantaneous death is enough. *Id.*

[172] *Id.*; Battenfield v. State, 816 P.2d 555, 565 (Okla. Crim. App. 1991). Because the Oklahoma courts use their explanation of the word "torture" as a blanket authorization to find the HAC aggravating circumstance whenever that minimum bar is met, their instructions water down the standard. *Id.* If Oklahoma wants to clarify what does not qualify as torture, the definition could begin with: "Torture does not refer to the physical suffering the defendant inflicted to accomplish the killing . . . ."

Colorado's definition of "depraved" is even more effective because it spells out motives for murder that society judges especially harshly. For example, "depraved" means either "senseless or committed without purpose or meaning," or committed for an atypical reason.[173] Explicitly, the aggravator excludes murders that are "the product of greed, envy, revenge, or another of those emotions ordinarily associated with murder . . . ."[174] Moreover, "depraved" murders are those that "served no purpose for the defendant beyond his pleasure of killing."[175] This standard is flexible since it allows jurors to evaluate the defendant's conduct, but it also focuses the jurors on which specific circumstances they must find to impose the death penalty under the "depraved" option. Thus, this standard strikes the balance *Maynard* mandated.

Lastly, the definition of "heinous" wisely requires the jury to evaluate the "method of killing" and the victim's vulnerabilities.[176] Specifically, jurors can only find a murder especially heinous if they agree the method of killing was "particularly shocking or brutal" or if the victim was "unable to physically defend himself because of physical or mental disability or because he is too old or too young."[177] Therefore, this prong also focuses the jury on factors that are rationally related to the defendant's culpability rather than allowing the jury to rely on any circumstance it finds particularly shocking.

These are just two examples of statutes that direct juries to the factors surrounding a crime that bear on society's judgment about the defendant's level of depravity. Unlike Oklahoma's current standard, which singled out the victim's perspective in defining heinousness, these aggravating circumstances attempt to reach the defendant's motivation and underlying character. Here, the legislature has assessed what makes one murder more deserving of punishment than another and has put forward flexible, but rational, distinctions. In turn, jurors would have the discretion to decide whether the defendant's conduct met one of the required criteria. Indeed, when jurors make informed

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[173] *Rodriguez*, 794 P.2d at 983 n.14 (citing COLO. REV. STAT. ANN. § 16-11-103 (West 1990) (repealed 2002)).

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

determinations about whether the defendant's conduct was especially heinous, *Furman*'s mandate is satisfied.

CONCLUSION

For too long, states have ignored the fundamental flaws with HAC aggravators as they currently apply. Rather than allowing the legislature to do its job—to strike a balance between flexibility and precision in criminal statutes—the courts have ill-advisedly adopted clumsy narrowing constructions. Seemingly, after Oklahoma adopted the torture limiting construction, the courts realized they erred in substituting the legislature's attempt to cover the worst crimes with a standard that reaches only one subclass of especially heinous murders. To backtrack, the OCCA ironically broadened its limiting construction. In doing so, the state has shielded its eyes from the mandates of *Furman* and its progeny.

Without legislative reform, HAC aggravators will not achieve their chief duties of adequately channeling jury discretion and allowing individualized determinations about whether a murder is particularly deserving of the death penalty. As the state's representative body, legislatures can use their experience and commonsense principles to craft aggravators that allow jurors to rationally scrutinize the circumstances surrounding a murder that reflect the collective conscience. In fact, as Supreme Court precedent makes clear, the Eight Amendment obligates the legislature to do just that.[178]

[178] Maynard v. Cartwright, 486 U.S. 356, 363–64 (1988).