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Vicarious Aggravators

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VICARIOUS AGGRAVATORS

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Abstract

In *Gregg v. Georgia*, the Supreme Court held that the death penalty was constitutional so long as it provided a non-arbitrary statutory mechanism for determining who are the worst of the worst, and therefore, deserving of the death penalty. As a general matter, this process of narrowing the class of death eligible offenders is done through the codification of aggravating factors. If the jury finds beyond a reasonable doubt that one or more aggravating factors exists, then a defendant convicted of murder is eligible for the ultimate sentence. There is, however, a critical, unanswered, and under-theorized issue raised by the use of aggravating factors to serve this constitutionally mandated filtering function. Can death eligibility be predicated on vicarious aggravating factor liability—is there vicarious death penalty liability?

A pair of cases, collectively known as the Supreme Court's *Enmund/Tison* doctrine, recognize that there is no per se bar on the imposition of the death penalty for non-killing accomplices. But these cases considered only felony murder liability and did not address the question of whether a non-killer can be rendered death eligible on the basis of vicariously imposed aggravating factors. Presently, many state statutes allow aggravating factors to be proven vicariously (or are silent on the question); under such a rule, the existence or absence of one or more aggravating factors will often bear little relation to the defendant's individual culpability. Because a defendant can be made eligible for capital murder through his participation in the crime with others—he is liable for murder as an accomplice, under a theory of co-conspirator or Pinkerton liability, or felony murder—in many cases we can have little confidence that a statute's aggravating factors are serving their constitutional function of rationally determining who will live and who will die. This article is the first to identify this constitutional problem and to provide a framework for resolving it. After parsing a variety of capital sentencing statutes we propose a framework for determining the legislative intent behind an aggravating factor and for ensuring a sufficient level of culpability before a non-killing defendant may be sentenced to death.

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INTRODUCTION

The Eighth Amendment prohibits the imposition of a death sentence without heightened procedural protections designed to limit and guide the

sentencer's discretion.[1] Consequently, in every death-penalty jurisdiction in the United States,[2] the sentencer's discretion to impose the ultimate punishment is limited by a requirement that a jury determine whether certain eligibility factors are present before a death sentence can be imposed. As a general rule, this process of guiding jury discretion is achieved through the use of statutorily enumerated aggravating factors.[3] Aggravating factors, then, serve the constitutionally mandated goal of separating the worst of the worst (those eligible for death) from the merely very bad. Aggravating factors do this by creating categories of crimes and killers that are inherently worse—and therefore more deserving of society's condemnation—than others.

There is, however, a critical, unanswered, and under-theorized issue raised by the use of aggravating factors to serve this constitutionally

1. *See* Zant v. Stephens, 462 U.S. 862, 874 (1983) (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976)) ("A fair statement of the consensus expressed by the Court in *Furman* is 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.'"). There is a robust academic literature documenting and examining the requirement of guided discretion in the context of capital sentencing. *See, e.g.*, Justin F. Marceau, *Lifting the Haze of* Baze*: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 179 nn.88–89 (2009) (compiling academic and judicial support for the requirement, more generally, of heightened procedural protections in death penalty cases); Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1143 (1980); Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1148 (1991) ("The first commandment of 'guided discretion' requires that the sentencer's discretion be narrowly guided as to which circumstances subject a defendant to the imposition of the death penalty.").

2. Currently, thirty-six states and the federal government permit the imposition of a death sentence. *See Death Penalty Facts*, AMNESTY INT'L USA 1 (May 2012), http://www.amnestyusa.org/pdfs/DeathPenaltyFactsMay2012.pdf.

3. *See* ALA. CODE § 13A-5-49 (2012); ARIZ. REV. STAT. ANN. § 13-751(F) (2012); ARK. CODE ANN. § 5-4-604 (2012); CAL. PENAL CODE § 190.2(a) (West 2008); COLO. REV. STAT. § 18-1.3-1201(5) (2012); CONN. GEN. STAT. ANN. § 53a-46a(i) (West Supp. 2012); DEL. CODE ANN. tit. 11, § 4209(e) (2007); FLA. STAT. § 921.141(5) (2012); GA. CODE ANN. § 17-10-30(b) (2012); IDAHO CODE ANN. § 19-2515(9) (2012); 720 ILL. COMP. STAT. ANN. 5/9-1(b) (West Supp. 2012); IND. CODE ANN. § 35-50-2-9(b) (LexisNexis 2009); KAN. STAT. ANN. § 21-6624 (2011); KY. REV. STAT. ANN. § 532.025(2)(a) (West 2012); LA. CODE CRIM. PROC. ANN. art. 905.4(A) (Supp. 2012); MD. CODE ANN., CRIM. LAW § 2-303(g)(1) (LexisNexis Supp. 2012); MISS. CODE. ANN. § 99-19-101(5) (2012); MO. REV. STAT. § 565.032(2) (2012); MONT. CODE ANN. § 46-18-303 (2011); NEB. REV. STAT. § 29-2523(1) (2008); NEV. REV. STAT. ANN. § 200.033 (LexisNexis 2012); N.H. REV. STAT. ANN. § 630:5(VII) (2012); N.M. STAT. ANN. § 31-20A-5 (LexisNexis 2009); N.C. GEN. STAT. § 15A-2000(e) (2011); OHIO REV. CODE ANN. § 2929.04(A) (LexisNexis 2010); OKLA. STAT. tit. 21 § 701.12 (Supp. 2012); OR. REV. STAT. § 163.150(1)(b) (2011); 42 PA. CONS. STAT. ANN. § 9711(d) (West 2007); S.C. CODE ANN. § 16-3-20(C)(a) (2011); S.D. CODIFIED LAWS § 23A-27A-1 (2012); TENN. CODE ANN. § 39-13-204(i) (2012); TEX. PENAL CODE ANN. § 19.03 (West 2011); UTAH CODE ANN. § 76-5-202(1)–(2) (LexisNexis Supp. 2012); VA. CODE ANN. § 19.2-264.2 (2012); WASH. REV. CODE § 10.95.020 (2012); WYO. STAT. ANN. § 6-2-102(h) (2011).

mandated function. Because many state statutes allow aggravating factors to be proven vicariously[4] (or are silent on the question), it is possible that the existence or absence of one or more aggravating factors will bear little relation to the defendant's actual culpability. Where a defendant is made eligible for capital murder because of his participation in a crime with others—where he is liable for murder as an accomplice; under a theory of coconspirator, *Pinkerton* liability; or felony murder—we can have little confidence that a statute's aggravating factors are rationally determining who is most culpable, and therefore, who will live and who will die.

"Vicarious liability" has long been controversial in the criminal law generally.[5] A foundational concern goes to the propriety of holding one person criminally accountable for the actions of another.[6] In the death-penalty context, a further concern arises regarding the fact that non-killers, even those who never intended that a death occur, may constitutionally be put to death because of the actions of others.[7] We are concerned here, however, with a third level of attenuation between culpability and punishment—that is, we note the additional problems caused when a defendant can be made eligible for the death penalty based on characteristics that may have little or nothing to do with either his acts or his mental state. Stated another way, this Article illustrates the problems inherent in a three-tiered system of vicarious death-penalty eligibility: (1) imputing criminal liability to a defendant for acts of another (under vicarious liability theories); (2) establishing a non-killer's sufficient culpability for the death penalty (under the Supreme Court's *Enmund–Tison* doctrine[8]); and (3) imputing the existence of a death-qualifying

4. This Article uses the term vicarious liability in a slightly casual way. In reality, coconspirator liability and felony murder are theories of vicarious liability—the defendant is strictly liable for the actions of others because he has voluntarily associated himself with them. By contrast, accomplice or aiding-and-abetting liability is a theory of derivative liability—because the accomplice has encouraged the criminal misconduct, his liability derives from the principals. This Article uses the term vicarious liability throughout to refer to all situations where one defendant is made liable for the conduct of another.

5. *See, e.g.*, Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1360 n.30 (1998) (acknowledging the controversy that "swirls around" complicity and conspiracy liability for the unintended crimes of the principal); Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 110 n.107 (1985) ("Especially in cases of conspiracy, the result can be 'vicarious criminal responsibility as broad as, *or broader than*, the vicarious civil liability . . . .'"); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1482 n.26 (1996) (describing vicarious criminal liability as "controversial and unpopular").

6. *See, e.g.*, Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 433 (2008) (summarizing the "troubling features of derivative liability").

7. *See* Tison v. Arizona, 481 U.S. 137, 158 (1987); Enmund v. Florida, 458 U.S. 782, 797 (1982).

8. *See Tison*, 481 U.S. at 156–58; *Enmund*, 458 U.S. at 798, 801.

aggravating factor (as required by *Furman*[9]) under a theory of vicarious liability.

Previous scholarship and judicial decisions have generally been silent on the question of vicarious aggravating-factor liability.[10] Perhaps this is due to some prosecutors' reluctance to seek the death penalty when they can only prove an aggravating factor through a theory of vicarious liability. However, it is certainly not the case that prosecutors never seek sentences of death on the basis of vicarious-aggravator liability. Many cases in which the death penalty is sought against a non-killer will involve vicarious liability.[11] Indeed, the Supreme Court's most famous case analyzing the constitutionality of a death sentence imposed on a non-killer, *Tison v. Arizona*,[12] though decided on grounds other than vicarious liability, involved a death prosecution based in part on an aggravating factor whose vicarious applicationwas not challenged by defense counsel.[13] Moreover, even if the practice of seeking death on a theory of vicarious-aggravator liability was rare, this would not be a question of merely academic interest. The Eighth Amendment requires that a jurisdiction's capital sentencing

9. Zant v. Stephens, 462 U.S. 862, 874 (1983) (citing Furman v. Georgia, 408 U.S. 238 (1972)).

10. Our research has not revealed a single article that addresses the question of whether and to what extent death-eligibility factors may be imputed to non-killers through theories of vicarious or derivative liability. To date, scholarship in this field has focused on the potential constitutional defects of executing a non-killer convicted exclusively on a felony murder theory. *See, e.g.*, David McCord, *State Death Sentencing for Felony Murder Accomplices Under the* Enmund *and* Tison *Standards*, 32 ARIZ. ST. L.J. 843, 843–45 (2000) [hereinafter *State Death Sentence*]; Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1104–05 (1990); Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371, 1399–1400 (2011). While few felony murderers who did not actually do the killing are sentenced to death, many non-killers are convicted of murder under an accomplice or conspiracy theory and sentenced to death. Accordingly, the issues of death-eligibility in this Article present concerns that are both more common and less understood.

11. Not all cases in which the non-killer is sentenced to death will involve vicarious-aggravator liability. For example, an aggravating factor that applies whenever "the actor was under a sentence of life imprisonment or a sentence of death at the time of the commission of the homicide" would, apparently, apply directly to the non-killer defendant. UTAH CODE ANN. § 76-5-202(1)(p) (LexisNexis 2000) (repealed 2001). That is to say, a limited class of aggravating factors apply directly to the defendant, even though he is a non-killer, and do not require vicarious-aggravator liability. *See, e.g.*, COLO. REV. STAT. § 18-1.3-1201(5)(b) (2012) ("The defendant was previously convicted in this state of a [serious] felony").

12. 481 U.S. 137, 150–58 (1987).

13. *See infra* text accompanying notes 166–67 (noting that the prosecution used killing for financial gain and killing in a cruel and heinous way as aggravating factors); *see also Enmund*, 399 So. 2d at 1371–72 (noting that the trial judge relied on an aggravating factor specifying that "the capital felony was especially heinous, atrocious, or cruel"); Lockett v. Ohio, 438 U.S. 586, 589 (1978) (noting that the prosecution relied on an Ohio aggravating factor thatprovided "that the murder was 'committed for the purpose of escaping detection. . .'"). None of these aggravating factors applies by their plain terms directly to the non-killer defendant.

scheme impose meaningful *legislative limits* on the ability of a prosecutor to pursue the death penalty.[14] More specifically, if the only limit on the imposition of a death sentence is the benevolence, or arbitrariness, of the prosecutor, then that capital-sentencing system unconstitutionally fails to provide meaningful standards for imposing the death penalty.

A vicariously imposed aggravating factor has the effect of imputing heightened culpability to a less culpable defendant, and capital-sentencing systems that permit such liability raise serious Eighth Amendment concerns. The very purpose of aggravating factors—narrowing death-eligibility to the very worst of all killers—is undermined when an aggravating factor is vicariously applied to a defendant. This Article thus concludes that blanket vicarious liability for aggravating factors is not constitutionally permissible.

This Article proceeds in four parts. Part I provides an overview of the limitations imposed by the Eighth Amendment in death penalty litigation. Specifically, this Part introduces both the procedural aspects of the Eighth Amendment—the use of aggravating and mitigating factors—as well as the substantive limitations—primarily the requirement of proportionality—imposed by that Amendment.[15] Part II provides a general description of common aggravating factors across the fifty states and the federal system and provides a basic overview of how aggravating factors function in death penalty litigation more generally. Next, in Part III, this Article summarizes the law of vicarious liability, providing a taxonomy of the various theories under which one defendant can be held liable for the actions of another. Finally, Part IV considers how the theories of vicarious liability, if applied mechanically to common aggravating factors, would create Eighth Amendment concerns.

Ultimately, this Article concludes that the rote application of vicarious liability principles in the capital-sentencing context is constitutionally impermissible. Although the Eighth Amendment has not been read to preclude a non-killer from receiving a sentence of death, it does bar the imposition of the ultimate penalty when the defendant does not evince personal culpability sufficient to justify a finding of one or more of the statutorily enumerated aggravating factors. Specifically, this Article proposes a novel four-step procedure for assessing whether a non-killer can be made death-eligible under the Eighth Amendment.

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14. *Zant*, 462 U.S. at 877–78 & 877 n.15; Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman?, 72 N.Y.U. L. REV. 1283, 1290–91 (1997).

15. It might seem odd to divide the Eighth Amendment's dual limits on capital sentencing schemes into substantive and procedural limitations, but the Supreme Court has recognized such a distinction. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 606 (2002) (suggesting that aggravating factors are procedural limits); *id*. at 614 (Breyer, J., concurring) (agreeing); Penry v. Lynaugh, 492 U.S. 302, 329–30, 335–36 (1989) (suggesting that cases have, as a substantive matter, prohibited the imposition of the death penalty on certain classes of defendants on the grounds of proportionality).

I. THE EIGHT AMENDMENT AND THE DEATH PENALTY

A. *Procedural Limits: The Constitutional Function of Aggravating Factors*

The prominent role that aggravating factors play in the imposition of capital punishment today is largely a historical and constitutional accident. There is nothing in either the plain text of the Eighth Amendment[16] or its history[17] that suggests, much less compels, a system of guided discretion predicated on the use of statutorily enumerated aggravating factors.[18] Only through a slow process of procedural accretion did the American death penalty become almost inexplicably linked to the concept of aggravating factors. While a full history of the American death penalty is beyond the scope of this Article,[19] in order to appreciate the Eighth Amendment problems intrinsic to vicarious liability for aggravating factors, a brief overview of this history is necessary.

From colonial times all the way through 1971, the death penalty was deemed substantially beyond the purview of the Eighth Amendment, if not beyond the purview of the Constitution itself. The Fifth Amendment explicitly refers to the death penalty,[20] and for much of American history it was taken for granted that the states were free to impose the penalty in a method of their choosing. Moreover, the death penalty was the mandatory punishment at common law for all who were convicted of murder and of many other serious felonies.[21] This approach quickly received a "negative

16. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

17. *See, e.g.*, Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 349 (1998) [hereinafter *Aggravating and Mitigating Factors*] ("In 1791, when the Eighth Amendment was adopted, all of the states followed the common law practice of making death the mandatory sentence for certain offenses.").

18. The phrase "guided discretion" is used to indicate a capital-sentencing system in which the sentencer's ability to impose death is limited, or guided through a set of statutory procedures. *See* Gregg v. Georgia, 428 U.S. 153, 206–07 (1976) (affirming a death sentence based on a bifurcated trial and sentencing when the sentencer's discretion was guided through the use of enumerated factors); David Hesseltine, Comment, *The Evolution of the Capital Punishment Jurisprudence of the United States Supreme Court and the Impact of* Tuilaepa v. California *on That Evolution*, 32 SAN DIEGO L. REV. 593, 597 (1995) ("Under a guided discretion statute, aggravating factors perform a constitutionally essential function in that the sentencing authority is required to find at least one aggravating factor present in a case before the death penalty is even an option.").

19. Other scholars have admirably covered this topic. *See, e.g.*, WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982 (1984); James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1 (2007).

20. U.S. CONST. amend. V ("No person . . . shall be deprived of life . . . without due process of law.").

21. McGautha v. California, 402 U.S. 183, 198 (1971) ("The growth of the law continued in this country, where there was rebellion against the [common law] rule imposing a mandatory death

verdict" from the colonies; as early as 1794, Pennsylvania divided its murder statute into degrees, reserving the automatic death penalty for murders of the first degree.[22] Other states quickly followed suit; today, nearly every state uses degrees of murder as the first slice at determining which murderers should live and which should die.[23]

Yet this division of murder into degrees was merely a legislative choice, made out of concern that juries—faced with a difficult choice between acquittal and death—would choose not to convict factually guilty defendants. For most of the death penalty's history in this country, the United States Supreme Court largely stayed out of the states' decision making regarding questions of life and death. In particular, it was long accepted that there was no principled, statutory way of distinguishing between those deserving of death and those who were less culpable. Indeed, the hallmark of this era—from colonial times through the early 1970s—was the belief that it was the utmost in human hubris to imagine that life or death decisions could be reduced to a set of rules. Most famously, in 1971's *McGautha v. California* decision, the Supreme Court explained that "[t]o 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."[24] Or as Justice William Brennan lamented in his *McGautha* dissent, the capital sentencing framework in every jurisdiction during this era was "purposely constructed to allow the maximum possible variation from one case to the next."[25] Justice Brennan found it inconsistent with the constitutional mandate of fair procedures that there was nothing in the sentencing statutes that prevented a particular death sentence from "reflecting [a] merely random or arbitrary choice."[26]

Justice Brennan's call for a more rational and structured sentencing process would not go unheeded for long. The era of pure discretion, emphatically punctuated by *McGautha*, ended just one year later. In 1972,

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sentence on all convicted murderers.").

22. *See, e.g.*, Frank Brenner, *The Impulsive Murder and the Degree Device*, 22 FORDHAM L. REV. 274, 274 (1953) ("The first statute to divide the crime of murder into degrees, enacted in Pennsylvania in 1794, was soon followed by like legislation in thirty-seven states and the District of Columbia, so that today murder grading in the United States is a device [that] has about it the aura of inertia associated with a matter, for better or worse, long settled." (footnotes omitted)).

23. *See* Liebman, *supra* note 19, at 23, 27 (noting that mandatory death sentencing was subject to "history's negative verdict" on the practice); *Aggravating and Mitigating Factors*, *supra* note 17, at 350 (noting that the accepted history is that "Tennessee, during the 1837–38 legislative session, became the first state to give juries sentencing discretion in capital cases once they found a defendant guilty of murder" and other states and the federal government followed suit shortly thereafter).

24. 402 U.S. at 204.

25. *Id.* at 248 (Brennan, J., dissenting).

26. *Id*.

a fractured Court held in *Furman v. Georgia* that the era of unguided discretion in capital sentencing was over.[27] *Furman*'s practical impact was to strike down as unconstitutional the discretionary capital-sentencing systems that were the norm in every state that permitted executions.[28] As Professor James Liebman has explained:

> From *McGautha* forward, the Court had assumed there were only three types of capital sentencing—mandatory, legally guided, and discretionary. *McGautha* ruled out the first two sentencing options—mandatory given history's negative verdict and legally guided because it could not be humanly realized. Though *Furman* may have done nothing else, it clearly ruled out the remaining discretionary method.[29]

Furman, then, requires that death penalty decisions not be left to the arbitrary discretion of a jury. Instead, it requires meaningful procedural mechanisms for identifying the worst crimes and the worst offenders, reserving capital punishment only for the most deserving. Such a momentous shift has aptly been described as the modern "Big Bang" of capital punishment law.[30]

Contrary to the predictions of many lawyers and academics, however, *Furman* did not mark the end of the death penalty in the United States.[31] As the Court itself would later recognize:

> *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.[32]

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27. Although *Furman* was a plurality decision, there was a paragraph-long per curiam holding that concluded that the death sentences imposed "in these cases" violated the Eighth Amendment. Furman v. Georgia, 408 U.S. 238, 239–40 (1971); *see also* Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 9 (2007) ("Before *Furman* was decided in 1972, the Eighth Amendment's 'cruel and unusual punishments' clause was largely a dead letter in constitutional law.").

28. *See, e.g.*, John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1753 n.78 (2008) (describing *Furman* as "striking down all then-extant state death penalty laws").

29. *See* Liebman, *supra* note 19, at 27 (footnotes omitted).

30. Sundby, *supra* note 1, at 1152.

31. *See, e.g.*, Austin Sarat, *Recapturing the Spirit of* Furman*: The American Bar Association and the New Abolitionist Politics*, 61 LAW & CONTEMP. PROBS. 5, 5 (1998) (describing contemporaneous beliefs that *Furman* was heralding the death of capital punishment in the United States as "quite naïve as well as somewhat forlorn").

32. Gregg v. Georgia, 428 U.S. 153, 199 (1976).

Searching for a politically viable, constitutional alternative to the purely discretionary sentencing that preceded *Furman*, many states turned to the Model Penal Code's (MPC) provisions on capital punishment.[33] Just prior to the *Furman* decision, the American Law Institute published the MPC, which included provisions for a model capital-sentencing system that attempted to develop a more structured approach to determining whether death was the appropriate punishment in any given case. One scholar has summarized the rise of the MPC provisions as states attempted to guide the jury's discretion as required by the post-*Furman* Eighth Amendment:

> The new statutes fell into two basic categories. A number of states sought to eliminate sentencing discretion altogether by making the death penalty mandatory for certain offenses. Many other states adopted an alternative approach patterned in varying degrees on the death penalty provisions of the Model Penal Code.
>
> In a series of 1976 decisions, the Supreme Court struck down mandatory death penalty provisions but upheld the statutes based upon the Model Penal Code. As a result of these decisions, all death penalty regimes now effectively follow the basic structure of the Model Penal Code.[34]

In 1976, the Supreme Court upheld Georgia's new MPC-based statute in *Gregg v. Georgia*, while invalidating in *Woodson v. North Carolina* the mandatory death sentencing regime that North Carolina had put in place after *Furman*.[35] Later decisions made clear that a death penalty regime could not be mandatory even for a very narrow group of defendants. For example, in *Sumner v. Shuman*, the Court held that a statute imposing a mandatory death penalty when a prison inmate is convicted of murder while serving a life sentence without possibility of parole violates the

33. *See, e.g.*, MPC § 210.6 (Proposed Official Draft May 4, 1962) (repealed 2009) ("The Court, in exercising its discretion as to sentence, and the jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant, but it shall not impose or recommend sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency.").

34. Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007, 1015–16 (2001) (footnotes omitted).

35. Indeed, many constitutional scholars begin a discussion of the history of the death penalty with *Furman* and *Gregg*. *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 361–62 (1995). In reality, there were four decisions decided on the same day in 1976, three of which approved the less discretionary sentencing systems of states, and one that struck down mandatory death-penalty statutes as unconstitutional. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Eighth Amendment.[36] Likewise, in *Roberts v. Louisiana*, the Supreme Court invalidated a mandatory death penalty for the killing of a police officer in the scope of her duties.[37] The Court held that although in each case the state had created a very narrow class of aggravated murders that could fairly be called the worst of the worst, the state could not remove from the sentencer the opportunity to consider facts in mitigation of either the defendant or her crime.[38]

So just as *Furman* eliminated the purely discretionary death penalty, *Woodson* and its line of cases eliminated the mandatory death penalty. Of the three types of sentencing regimes identified above by Professor Liebman—mandatory, legally guided, and discretionary—now only the middle one remained. And the principal method for guiding sentencing discretion—the procedure suggested by the MPC, adopted by most states, and approved by the Court—was the creation of a list of factors that, if proven, indicate that the murder was so egregious as to make the defendant eligible for a sentence of death.[39] It is typically the function of statutorily enumerated aggravating factors, then, to distinguish the worst crimes and criminals from those that are somewhat less bad.[40] Or as the Court explained in *Zant v. Stephens*, it is the aggravating circumstances that "perform[] the function of narrowing the category of persons convicted of murder who are eligible for the death penalty."[41] Death penalty retentionists believed that aggravating factors could provide the sort of "clear and objective standards" necessary to save the death penalty from

36. 483 U.S. 66, 77–78 (1987).

37. 431 U.S. 633, 636–37 (1976) ("There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer.").

38. *Sumner*, 483 U.S. at 81 ("Past convictions of other criminal offenses can be considered as a valid aggravating factor in determining whether a defendant deserves to be sentenced to death for a later murder, but the inferences to be drawn concerning an inmate's character and moral culpability may vary depending on the nature of the past offense."); *Roberts*, 431 U.S. at 636 ("To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance.").

39. The MPC called for aggravating factors to be balanced against evidence in mitigation of the defendant's crime. *See supra* note 33. In invalidating mandatory death sentences in *Woodson* and its line of cases, the Supreme Court has made the consideration of mitigating factors a necessary part of American capital punishment. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976).

40. Aggravating factors simultaneously serve to guide the discretion of the sentencer and give effect to the Eighth Amendment mandate that legislatures devise sentencing schemes that meaningfully distinguish murderers so as to create a narrow class of death-eligible defendants. *See, e.g.*, 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, 6 (2006) ("A list of factors that make one eligible for the death penalty serves both (1) the role of giving guidance to juries and judges, and (2) the role of narrowing the group of murderers who are eligible for the death penalty.").

41. 462 U.S. 862, 875 (1983).

unconstitutionality.[42] To this day, the rule of *Gregg*—approving guided discretion based on statutorily enumerated aggravating factors—continues to be the principal means of determining who receives the death penalty. Aggravating factors thus function as the critical mechanism for ensuring that an otherwise death-eligible defendant[43] is sentenced only through procedures that prevent the arbitrary imposition of the death penalty.[44]

In sum, because of the development of the Court's procedural Eighth Amendment jurisprudence, the American death penalty is now inextricably linked to the use of aggravating factors.[45] Aggravating factors, presented to the jury during the sentencing phase of a criminal trial, are the procedural mechanism through which our justice system distinguishes the worst of the worst.[46] Sggravators function as a sort of rough proxy for the defendant's moral culpability.[47]

B. *Substantive Eighth Amendment Limits on the Imposition of the Death Penalty*

In addition to the myriad procedural rules that now govern the imposition of the death penalty,[48] the Supreme Court has also enunciated a

42. Gregg v. Georgia, 428 U.S. 153, 197–98 (1976); *cf.* Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (striking down an aggravator because it failed to provide a "meaningful basis for distinguishing" death-eligible defendants) (quoting *Gregg*, 428 U.S. at 188).

43. For an eloquent elaboration on death ineligibility, see Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 346–56 (2010).

44. For purposes of this Article, we accept the aggravator–mitigator system as the means by which states achieve the constitutional mandate to meaningfully guide the discretion of the sentencer. To be sure, there is a well-founded critique of *Gregg*'s system of Eighth Amendment guided discretion as utterly failing to impose predictability and avoid arbitrariness. *See, e.g.*, Joseph L. Hoffman, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1159 ("Maybe Justice [John Marshall] Harlan was right all along in *McGautha*. Perhaps the best we *can* do in the death penalty area is to turn this intensely moral decision over to twelve good people and let them sweat blood over it. Perhaps our attempts to create 'rationality' from within, by drafting lists of 'aggravators' and 'mitigators,' merely permit the jury to conclude that there is a legally 'correct' answer to the sentencing question." (footnotes omitted)); Chelsea Creo Sharon, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 224 (2011) (arguing "that death penalty statutes with a litany of aggravating factors [do not meaningfully guide the sentencer's discretion], rendering death eligible the vast majority of murderers, many of whom cannot be classified as the 'worst' offenders, and thus increasing the risk of arbitrary capital sentencing").

45. Zant v. Stephens, 462 U.S. 862, 878 (1983).

46. Ring v. Arizona, 536 U.S. 584, 589 (2002) (holding that aggravating factors must be presented to the jury and proven beyond a reasonable doubt).

47. For a lucid summary of the history of aggravating factors, see Kirchmeier, *supra* note 40, at 5–8 (citing *Godfrey v. Georgia* and explaining that "aggravating factors must give jurors clear standards for determining who receives the death penalty").

48. *See, e.g.*, Steiker & Steiker, *supra* note 35, at 372 (describing the post-*Gregg* process of judicial regulation in the realm of capital punishment).

substantive Eighth Amendment capital jurisprudence. Most significantly, the Court has held that the Eighth Amendment requires proportionality between the crime committed and the punishment imposed—that is, regardless of the procedures followed, the sentence imposed in a particular case cannot be disproportionate to the crime in fact committed.[49] Applying this proportionality requirement, over the last quarter-century the Supreme Court has rather systematically removed categories of crimes and criminals from the ranks of the death-eligible.[50] Specifically, the Supreme Court has held that death is inappropriately disproportionate for a crime committed by a minor (*Roper v. Simmons*),[51] for a crime committed by a mentally disabled individual (*Atkins v. Virginia*),[52] and for a defendant who is incompetent at the time of the execution (*Ford v. Wainwright*).[53] In each of these cases, the death penalty was deemed disproportionate—not to the offense committed, but to the *status* of the offender.[54]

In other contexts, the Court has held that the death penalty is disproportionate to the *crime committed*, rather than with regard to an individual's personal characteristics. For example, the death penalty was deemed disproportionate for the rape of an adult woman (*Coker v. Georgia*),[55] and then later for the rape of a child (*Kennedy v. Louisiana*).[56] As the Court has explained, "capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution."[57]

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49. Professor Ian Farrell has explained that proportionality "is one of the most fundamental ingredients of our sense of just punishment"; according to Farrell, "Of the Justices who have occupied seats on the Court over the last century, only Justices [Antonin] Scalia and [Clarence] Thomas have maintained that the Eighth Amendment does *not* contain any requirement that [the] punishment be proportionate to the offense committed." Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment*, 55 VILL. L. REV. 321, 321, 322–23 (2010).

50. S*ee* Kovarsky, *supra* note 43, at 350–56; *see also* John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 78–79 (identifying two categories of proportionality review—"qualitative proportionality" and "quantitative proportionality").

51. 543 U.S. 551, 575 (2005).

52. 536 U.S. 304, 321 (2002); *see* Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 514 (2004) (describing *Atkins* as having "refocused doctrinal attention on the rich, and largely unexplored, substantive core of the Eighth Amendment's prohibition of cruel and unusual punishments").

53. 477 U.S. 399, 401 (1986).

54. Charles S. Doskow, *The Juvenile Death Penalty: The Beat Goes On*, 24 J. JUV. L. 45, 55 (2003-2004) ("If the details of crimes of the defendants in *Penry*, *Stanford* and *Atkins* are reviewed, it is hard to conclude that their perpetrators do not deserve the maximum sanction the law has to offer. Capital punishment is not disproportionate to the offense by that standard. Only the defendant's status can render it disproportionate . . . .").

55. 433 U.S. 584, 592 (1977).

56. 554 U.S. 407, 421 (2008).

57. *Id.* at 420 (quoting Roper v. Simmons, 543 U.S. 551, 568 (2005)) (internal quotation

The Court's cases lead ineluctably to the conclusion that a sentence of death is unconstitutionally disproportionate for crimes short of murder—that is to say, the class of persons most deserving of death is a subset of those who are guilty of a murder.[58]

Notably, however, the Court has also made clear that under its proportionality doctrine, not all persons guilty of murder are for that reason eligible for the death penalty. Taking the doctrine one critical step further—beyond limits on the *status* of the defendant and limits on the *nature of the crime* for which he is convicted—the Court, in a pair of cases, has provided guidance as to whether and under what circumstances those convicted of murder *who did not themselves kill* may be put to death. These two cases, *Enmund v. Florida* and *Tison v. Arizona*, stand for the proposition that some—but only some—non-killers may constitutionally be put to death for their crimes. As this Article elaborates, the collision of this question—when may non-killers be put to death?—with the predominance of aggravating factors in modern death penalty jurisprudence provides a platform for understanding the constitutionality of vicarious aggravating-factor liability.

1. *Enmund v. Florida*[59]

While Earl Enmund waited for them nearby in a car, Samson and Janette Armstrong rang the doorbell of the victims' rural home with the intention of robbing them.[60] The robbery went awry, a gunfight ensued, and Samson Armstrong shot both victims.[61] The Armstrongs then returned to the car, the three drove off and were subsequently apprehended, and both Enmund and Samson Armstrong[62] were sentenced to death for their role in the robbery and killings.[63]

On appeal, Enmund argued that because he did not take a life, attempt to take a life, or intend to take a life, he could not be sentenced to death consistent with the Eighth Amendment.[64] The United States Supreme Court agreed.[65] Analogizing to its recent decision in *Coker* that the death

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marks omitted).

58. Actually, the Court limits the death penalty to those who kill or "attempt to kill." *Id.* at 421 ("[A] death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional . . . ."); *id.* at 435 (noting that the crime at issue caused the victim "prolonged physical and mental suffering" but still holding that the death penalty was disproportionate).

59. 458 U.S. 782 (1982).

60. *Id.* at 784.

61. *Id.*

62. Janette Armstrong was tried separately and sentenced to three life terms. *Id.* at n.1.

63. Enmund was convicted of both robbery and murder under a felony murder theory. *Id.* at 785.

64. *Id*. at 787.

65. *Id.* at 788.

sentence was disproportionate for the rape of an adult woman, the Court noted that Florida was in a distinct minority of states that permitted a death sentence to be imposed on felony murderers without any showing of additional participation in the felony or killing.[66] However, the Court noted that it could not be swayed entirely by the views of the several states and that its obligation was to reach its own conclusions regarding the appropriateness of death in these circumstances.[67] The Court summarized its conclusion on this point as follows:

> For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment.[68]

2. *Tison v. Arizona*[69]

Enmund was decided by a narrow 5–4 vote.[70] Only five years later, the Court reconsidered *Enmund* in *Tison v. Arizona*, deciding by a similar 5–4 that the death penalty could be imposed upon Ricky and Raymond Tison despite the fact that the Tisons, like Earl Enmund, neither killed, attempted to kill, nor intended to kill the victims in their case. The grisly facts of the Tisons' case were set forth by the Court in some detail. The two brothers broke their father and another convicted murderer out of prison by smuggling a small arsenal of deadly weapons into the jail in an ice chest.[71] In the ensuing escape, the senior Tison and the other escapee kidnapped and ultimately killed a family of four.[72] While opinions differed regarding the role the Tison brothers played in the killings, it seems clear that they

66. *Id.* at 789–91.

67. *Id.* at 797.

68. *Id.* at 801. It is worth noting that there is language in the *Enmund* decision that might fairly be read as permitting a sentence of death for a felony murder accomplice based on recklessness. *See State Death Sentence*, *supra* note 10, at 850–51 (parsing the language of *Enmund* and concluding that it was ambiguous as to whether death was reserved for those accomplices who intended for the victim to die); *id.* at 851–52 ("[T]he Court further muddled the opinion by failing to define the key concept of 'intent to kill.'").

69. 481 U.S. 137 (1987).

70. *Enmund*, 554 U.S. at 783.

71. *Tison*, 481 U.S. at 139.

72. *Id.* at 141.

neither killed themselves nor assisted in the killing itself.[73] The brothers were nonetheless tried separately; convicted of robbery, kidnapping, and murder (under a theory of felony murder); and sentenced to death.[74]

On appeal, the Supreme Court considered whether its decision five years earlier in *Enmund* foreclosed the imposition of the Tisons' death penalty.[75] The Court held that its *Enmund* decision stood simply for the proposition that the death penalty was impermissibly disproportionate punishment for the crime of felony murder simpliciter.[76] Earl Enmund was a minor participant in a robbery and had no proven *mens rea* with regard to the killing engaged in by his confederates.[77] By contrast, the Tison brothers were significant participants in both the jailbreak and the kidnapping;[78] they were also present at the killings (or at least very close by) and did nothing to stop them.[79] Perhaps most important for the Court, the brothers, unlike Enmund, had a culpable mental state with regard to death.[80] By breaking two convicted murderers out of prison, arming them, and assisting in their kidnapping of four innocent victims, both brothers demonstrated a level of mental culpability that the Court charitably described as recklessness; the brothers were aware of a grave risk that their conduct would cause death and proceeded with it nonetheless.[81] As the Court wrote:

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.[82]

3. Summary

Although at first blush inconsistent, *Enmund* and *Tison* both remain the law of the land today. While the language the Court used in *Enmund*—that the death penalty cannot be imposed on one who does not kill, attempt to kill, or intend to kill—would seem to preclude a death sentence for the Tison brothers, the latter case limited the former to its facts. It is true that

73. *Id.* at 138.
74. *Id.* at 141–43.
75. *Id.* at 145–46. It is worth noting that the killing in *Tison* occurred before the Court's decision in *Enmund*.
76. *Id*. at 147.
77. *Id*. at 147, 149.
78. *Id*. at 139.
79. *Id.* at 141.
80. *Id*. at 151.
81. *Id*. at 151–52.
82. *Id*. at 156.

those, like Earl Enmund, who do not have a culpable mental state with regard to death cannot be put to death. But it is also true that non-killers like the Tison brothers who are both significantly[83] involved in the events leading up to the killing and who have a culpable mental state with regard to death may be executed without running afoul of the Eighth Amendment's proportionality principle.

Some commentators have attempted to reconcile *Enmund* and *Tison* by emphasizing that *Enmund* was not present when the killing occurred.[84] To be sure, when a defendant is merely a "minor actor" and he is "not on the scene," the death penalty will oftentimes be indefensibly disproportionate. But the reason the Eighth Amendment is offended in such circumstances relates to individual culpability and not simply to the defendant's location at the time of the killing.[85] Specifically, in distinguishing the facts of *Tison* from those of *Enmund*, the Court emphasized the importance of *mens rea* in measuring the culpability of the individual.[86] And clearly, *mens rea* suffuses the criminal law. At least since the promulgation of the MPC—but really for hundreds of years before that in less explicit ways—*mens rea* has been the primary measure of individual culpability.[87] In Part III, below,

83. As to whether the distinction between minor and major participants makes any constitutional difference, Richard Rosen has explained that nearly "any participant" can be labeled a major participant. Rosen, *supra* note 10, at 1154 ("Major and minor just describe two indefinite areas on a continuum of participation . . . .").

84. *See, e.g.*, *State Death Sentence*, *supra* note 10, at 874–75 (reasoning that, at least in the felony murder context, "[u]nless the sentencer is *completely* convinced that the defendant was present at the scene of the murders, the defendant is death ineligible"); *id.* at 876 (concluding that Enmund's absence from the murder scene was the "card that trumped his status as a significant participant" and concluding that if Enmund had been present "the Court's analysis would probably have been different"). Presumably, if there was murder liability under a complicity theory other than felony murder, one that required culpability on the part of the defendant, then Professor David McCord would not insist on a rigid presence requirement as a prerequisite for satisfying the Eighth Amendment proportionality requirements.

85. *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 142 (1987) ("[F]actors such as major participation in the underlying felony or presence at the scene of the killing may illuminate the defendant's mental state regarding the killing . . . .").

86. Because *Tison* simply decided what it called the "intermediate case" where a defendant's "participation is major and whose mental state is one of reckless indifference to the value of human life," *Tison*, 481 U.S. at 152, it seems reasonable to conclude that a minor participant, like Enmund, who had an intent to kill would also be death-eligible. Thus, at least two classes of felony murder accomplices may be sentenced to death: (1) those who intended to kill, regardless of whether they played a minor role; and (2) those whose participation was major and whose *mens rea* was at least reckless. Of course, in many cases the only evidence of *mens rea* will be the extent of the defendant's participation in the felony, thus causing the two inquiries to blur into one. *See State Death Sentence*, *supra* note 10, at 882 ("[D]efendant's 'participation' in the felony will usually be the primary evidence of his mental state with respect to the killing.").

87. *See, e.g.*, Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 LAW & CONTEMP. PROBS. 109, 110–11 (2012) (recognizing that central to the MPC is the notion that "[m]ens rea must attach to every normatively significant element of the offense as a means to measure culpability").

we return to the question of *mens rea* and culpability, demonstrating that pure vicarious liability for aggravating factors fails to adequately take into account the individual culpability of a non-killer.

C. *Synthesizing the Substantive and Procedural Eighth Amendment Limitations*

As a procedural matter, *Furman* ushered in an era of Eighth Amendment oversight that requires the states to create legislative standards that separate out the worst of the worst. For the last thirty-five years, the states have been required to create a meaningful system of guiding the discretion of the capital sentencer. As a substantive matter, the death penalty is not available in those cases where a death sentence would be disproportionate to either the defendant or his crime.[88] Together, these rules impose significant limits on who can receive a death sentence.[89] A death sentence that would otherwise be proportionate for a non-killer—because he satisfies the *Tison–Enmund* requirements—is barred unless the prosecution can prove the presence of at least one aggravating factor.[90] An under-examined question in this regard is the role that vicarious liability

88. Commentators have recently argued that the death penalty for felony murder accomplices is always disproportionate. *See* Trigilio & Casadio, *supra* note 10, at 1371 (recognizing the resurgence of Court interest in categorical proportionality review under the Eighth Amendment); *id.* at 1400–01 (concluding that the evolving standards of decency have shifted such that only ten jurisdictions allow the death penalty in "adherence to *Tison*'s minimal requirements"). As the title of that article suggests, these commentators, at times, argue that the death penalty is disproportionate for all non-killers, at least if the non-killer did not intend to kill. However, arguing that those who "neither kill nor intend to kill should be 'categorically' exempted from" capital punishment proves too much. *Id.* at 1407 (footnote omitted). It is not the case that all death sentences for non-killers arise in the context of felony murder; there are plenty of death-eligible cases in which the defendant was an accomplice to a first-degree murder under a theory of gross, or extreme, recklessness. *See, e.g.*, COLO. REV. STAT. ANN. § 18-3-102 (West 2012) (first-degree murder). Indeed, Joseph Trigilio and Tracy Casadio are often more precise and recognize that their discussion is limited to "felony-murder accomplices who do not intend to kill." Trigilio & Casadio, *supra* note 10, at 1408. In other words, concluding that death is disproportionate for felony murder does not compel the conclusion that death is disproportionate for all accomplice non-killers. This Article accepts the constitutionality of the death penalty for non-killers in the abstract, but considers the procedural limits on such sentences.

89. Some courts seem to imply that the *Enmund–Tison* analysis resolves the question of vicarious-aggravator liability. For example, in *People v. Borrego*, 774 P.2d 854 (Colo. 1989), the Colorado Supreme Court explained: "Since complicity is a theory that necessitates holding one person legally accountable for the behavior of another, a defendant's constitutional rights are violated if the jury in a capital offense sentencing hearing is given a complicity instruction." *Id.* at 857 (citation omitted). Of course, even without a complicity instruction a non-killer could be charged under some aggravating factors. *See infra* Section IV.B.

90. *Cf.* Rosen, *supra* note 10, at 1165 ("Because a defendant does not fall into one of the rigid categories of defendants for whom the death penalty is proscribed does not mean either that the death sentence is proportionate or that the court has reviewed the defendant's case for disproportionality. It merely means that the death sentence imposed in the particular case is not disproportionate for the particular reason embodied in the particular rule.").

can play in the process of proving aggravators. That is, can vicarious liability both make the defendant guilty of a capital crime and simultaneously satisfy the aggravating factor requirement, making the defendant eligible for the death penalty? After examining several common aggravating factors, we turn to that very question.

II. COMMON EXAMPLES OF AGGRAVATING FACTORS

In light of the Court's explicit approval of the aggravating-factor model of guided discretion, not surprisingly, most states that have retained the death penalty have opted to use a capital system based on the use of aggravating factors. With only a few exceptions,[91] state sentencing systems recognize that a defendant convicted of murder is eligible for a sentence of death if, and only if, the state is able to prove beyond a reasonable doubt the existence of an aggravating factor. The sentencing procedures in Arizona are illustrative:

> At the aggravation phase, the trier of fact shall make a special finding on whether each alleged aggravating circumstance has been proven based on the evidence that was presented at the trial or at the aggravation phase. If the trier of fact is a jury, a unanimous verdict is required to find that the aggravating circumstance has been proven. . . . If the trier of fact unanimously finds no aggravating circumstances, the court shall then determine whether to impose a sentence of life or natural life on the defendant. . . . .
>
> The penalty phase shall be held immediately after the trier of fact finds at the aggravation phase that one or more of the aggravating circumstances . . . have been proven. . . .
>
> At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. In order for the trier of fact to make this determination, . . . the state may present any evidence that demonstrates that the defendant should not be shown leniency . . . .
>
> The trier of fact shall determine unanimously whether death is the appropriate sentence.[92]

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91. Most notably, Texas does not use a true aggravating-circumstance system. Instead, the Texas system, approved by the Supreme Court in *Jurek*, asks the jury to answer three questions and only if the answer to all three is yes is death permitted. Rosen, *supra* note 10, at 1123 n.53; *cf. id.* at 1123 (noting that states do not have to follow the aggravating-factor approach to narrowing and explaining that some "states have chosen instead to narrow the class of [death-eligible] defendants by providing restrictive definitions of [first-degree] or capital murder."). i

92. ARIZ. REV. STAT. ANN. § 13-752 (E)–(H) (2012).

Similarly, the Colorado capital statute provides that the jury shall not render a verdict of death unless it unanimously finds and specifies in writing that: "(A) At least one aggravating factor has been proved; and (B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved."[93]

Georgia's system is slightly different in that it provides the sentencing jury with more discretion as to the ultimate sentencing decision.[94] When the Georgia capital statute was challenged in 1983, the U.S. Supreme Court certified a question to the Georgia Supreme Court asking it to explain the role that aggravating factors play in the ultimate selection of a life or death sentence. Notably, the state Supreme Court responded that once at least one aggravating circumstance is proved beyond a reasonable doubt, the existence or nonexistence of one or more aggravating factors played no particular role in determining the sentence.[95] Instead, once an aggravating factor is found to exist, the narrowing required by *Furman* is complete and the Georgia statute leaves to the "unfettered discretion of the jury" the question of whether the defendant lives or dies.[96] Although this procedure struck many as an admission that the Georgia statute resembled a *McGautha*-Era, open-ended, discretionary statute, the United States Supreme Court held in *Zant* that the statute passed constitutional muster.

The common denominator in all of these systems, despite their significant differences, is the use of the aggravating factor as the means of narrowing the class of death-eligible defendants.[97] It is the aggravating-factor analysis that determines whether "the character of the individual and the circumstances of the crime" justify the imposition of a death sentence.[98] The remainder of this Part serves to introduce some of the most common aggravating factors—that is, to provide examples of the sort of statutorily enumerated facts that suffice for Eighth Amendment purposes to make one eligible for the ultimate punishment. There are two general types of aggravators: (1) facts relating to the nature of the murder, or the defendant's motivation for the murder; and (2) facts relating to either the

93. COLO. REV. STAT. ANN. § 18-1.3-1201(2)(b)(II)(A)–(B) (West 2012).

94. GA. CODE ANN. § 17-10-31 (West 2012).

95. Georgia, because of its approach to capital sentencing, is referred to as a non-weighing state. Non-weighing in this sense means that the sentence is not limited to merely weighing the aggravating factors against the mitigating factors; instead, the ultimate sentencing decision is more open-ended and less structured. *See, e.g.*, Justin Marceau & Sam Kamin, *The Facts About* Ring v. Arizona *and the Jury's Role in Capital Sentencing*, 13 U. PA. J. CONST. L. 529, 576 (2011) ("Georgia's statute, which was the subject of both the *Furman* and *Gregg* decisions, is a paradigmatic example of a non-weighing statute.").

96. *Id.* at 576–77 (discussing *Zant* and Georgia's capital-sentencing system).

97. *See State Death Sentence*, *supra* note 10, at 846 (recognizing that in order to give meaning to the requirement that death-eligibility be "limited to murders that can, by some rational criterion, be deemed 'worse' than most" states must enact procedural mechanisms for this purpose, and most have done so by "specifying 'aggravating circumstances'").

98. Zant v. Stephens, 462 U.S. 862, 878–79 (1983).

victim's or the defendant's status at the time of the murder.[99]

This Article does not attempt to generate a complete list of all aggravating factors across all capital-sentencing schemes; instead, this Article's hope is to provide a representative sample of some of the most common and frequently relied upon aggravating factors.[100]

A. *Aggravating Factors Relating to the Murder Itself*

1. Cruel and Heinous Killings

Many scholars have observed that one of the most ubiquitous aggravating factors is the statutory factor allowing a defendant to be deemed death-eligible if the crime was committed "in an especially heinous, cruel, or depraved manner."[101] An illustrative example of this sort

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99. Obviously there are a number of plausible ways to categorize the range of aggravating factors. One scholar has catalogued every aggravating factor in every state with capital punishment, and he has further subdivided the aggravating factors such that he concludes there are four categories. According to Professor Jeffrey L. Kirchmeier:

> First, there are factors that determine [death-eligibility] based upon specific facts surrounding the murder. Second, some factors focus on the defendant's motivation in committing the murder. Third, some factors focus on the defendant's status at the time of the murder. Fourth, some factors focus on the status of the victim.

Kirchmeier, *supra* note 40, at 17–18 (footnotes omitted).

100. For a comprehensive list of the aggravating factors used across all jurisdictions, see *Aggravating and Mitigating Factors*, *supra* note 17, at 400–30 (compiling a list of forty-five different aggravating circumstances that were in use throughout all capital sentencing systems as of 1998). It should be noted that in addition to the statutory aggravators, as required for death-eligibility, a number of jurisdictions—all non-weighing jurisdictions—allow the sentencer to assess non-statutory aggravating factors when determining the ultimate question of life or death. In other words, although non-statutory aggravators do not serve the narrowing function essential to this Article, they do play a role in all non-weighing jurisdictions in determining whether a defendant will live or die. *See, e.g.*, Donald M. Houser, *Reconciling* Ring v. Arizona *with the Current Structure of the Federal Capital Murder Trial: The Case for Trifurcation*, 64 WASH. & LEE L. REV. 349, 354–55 (2007) ("Unlike statutory aggravating factors, which must be established for the defendant to be eligible for the death penalty, [non-statutory] aggravating factors are neither sufficient nor necessary for the jury to sentence the defendant to death. Only if the jury has first found the existence of at least one intent factor and one statutory aggravating factor does a [non-statutory] aggravating factor become relevant to the jury's determination of whether to impose the death penalty." (footnotes omitted)); *see also* 18 U.S.C. § 3593(e) (2006) (requiring at least one statutory aggravating factor to be found before the defendant is deemed eligible for death, and permitting the jury to balance mitigation against statutory and non-statutory aggravating factors); U.S. v. McCullah, 76 F.3d 1087, 1106–07 (10th Cir. 1996) ("The Supreme Court has dealt with the issue of non-statutory aggravating factors in state capital punishment statutes and has held the use of non-statutory aggravating factors permissible."); Adam Thurschwell, *After* Ring, 15 FED. SENT'G. REP. 97, 101 (2002) ("In the technical parlance of the Supreme Court's capital jurisprudence, statutory aggravators serve to 'narrow' the class of convicted murderers to those 'eligible' for execution, while [non-statutory] aggravators enter in the sentencing calculus only at the 'selection' stage . . . .").

101. COLO. REV. STAT. § 18-1.3-1201(5)(j) (2012). Cruel-and-heinous aggravators, although

of statutory-eligibility factor is contained in California's capital-sentencing provisions, which isolate as eligible for death those defendants where the murders involved are "especially heinous, atrocious, or cruel, manifesting exceptional depravity."[102] Even the state of Virginia, which recognizes only two death-qualifying factors, regards a killing that was "outrageously or wantonly vile" as sufficing for death-eligibility.[103] Notably, there is a split in jurisdictions regarding the wording of this aggravating factor that has not attracted judicial or academic attention. Specifically, whereas statutes like California's dictates only that the murder was "especially heinous, atrocious, or cruel,"[104] other jurisdictions seem to specify that the defendant himself must have acted with the requisite cruelty. For instance, the Connecticut statute provides that "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner."[105] While these variations in language are more likely a product of chance or caprice than reasoned legislative judgments, as this Article will show, these subtle variations play a powerful role in the vicarious application of the atrocious, heinous, and cruel aggravator.

2. Pecuniary Gain

Another common aggravating factor pertaining to the crime relates to a pecuniary motive for the killing.[106] An example is Florida's capital-sentencing statute, which allows for death-eligibility if "[t]he capital felony was committed for pecuniary gain."[107] The Florida statute, then, is focused

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commonplace, are very controversial. On multiple occasions the Supreme Court has cautioned against overly vague and amorphous aggravators. *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 653 (1990); Maynard v. Cartwright, 486 U.S. 356, 363 (1988); Godfrey v. Georgia, 446 U.S. 420, 429 (1980). Nevertheless, imprecise aggravators of this form persist. *See, e.g.*, Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 944 (1986).

102. CAL. PENAL CODE § 190.2(a)(14) (West 2012). For a list of all the cruel and heinous aggravators used by states, see *Aggravating and Mitigating Factors*, *supra* note 17, at 400 n.348.

103. VA. CODE ANN. § 19.2-264.2 (2012).

104. CAL. PENAL CODE § 190.2(a)(14) (West 2012).

105. CONN. GEN. STAT. ANN. § 53a-46a(i)(4) (2012). For a statute that seems to combine both approaches to the aggravator, see DEL. CODE ANN. tit. 11, § 4209(e)(1)(l) (2012) ("The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering the victim."). This statute contains both language describing the crime—"*the murder* was outrageously or wantonly vile"—and describing the participation of the defendant: "*[T]he defendant used such means* on the victim prior to murdering the victim." *Id.* (emphasis added).

106. Professor Kirchmeier counted more than thirty-two states that use some version of this aggravating factor as of 1998. *Aggravating and Mitigating Factors*, *supra* note 17, at 410 n.367 (compiling all the state statutes).

107. FLA. STAT. § 921.141(5)(f) (2012). The Colorado statute is nearly identical, providing that the murder "was committed for pecuniary gain." COLO. REV. STAT.§ 18-1.3-1201(5)(h) (Lexis 2012).

on the motive of the killing alone, and not on who did the killing.[108] By contrast, statutes in other jurisdictions focus both on the motive for the killing *and* the fact that the defendant himself, acting as principal, committed the murder. For example, the federal death-penalty statute specifies that "[t]he defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value."[109] The interpretations of these statutes seem to be in agreement that the pecuniary-gain aggravator applies whenever the defendant commits the murder in order to obtain any property of value[110]—that is, the aggravator applies not just to murders for hire, but to murders done in order to obtain anything of pecuniary value.[111]

3. Felony Murder

Another common aggravating circumstance is that a death occurred during, or in flight, from certain enumerated felonies. As with other aggravating factors, there is variation among the jurisdictions with regard to the required participation of a particular individual. For instance, some states, such as Colorado, specify that the defendant himself must have "intentionally caused the death of a person" during the course of the felony in order for the aggravator to apply to him.[112] That is to say, Colorado's statute raises questions of both *mens rea* and of causation; not only must

108. *Id.*

109. *See, e.g.*, 18 U.S.C. § 3592(c)(8) (2006).

110. Seemingly every jurisdiction that has interpreted the pecuniary-gain aggravating factor has held that the possibility of a financial reward must have been the motive for the murder itself and that robbery must not have been a mere afterthought.

111. Courts in many jurisdictions have held, for example, that the aggravator applies where the defendant committed the murder in order to steal a car. *See* Schad v. Ryan, 671 F.3d 708, 725 (9th Cir. 2011) (holding that, under Arizona law, where there was evidence that Defendant used the victim's vehicle and credit cards within a day of the murder, the evidence "rationally supported the application of the [pecuniary-gain] aggravating factor"); Thessing v. State, 230 S.W.3d 526, 539 (Ark. 2006) (holding that the pecuniary-gain aggravator had been proven where Defendant stole the victim's car and other personal possessions after committing the murder; and the fact that the State failed to introduce evidence that Defendant's motive had been formed prior to the murder, or evidence regarding the value of the stolen items, was immaterial); Porter v. State, 429 So. 2d 293, 296 (Fla. 1983) (holding that, where the State proved that Defendant "took his victims' automobile, television, silverware, jewelry, and other items," the pecuniary-gain aggravator had been proven; and the fact that Defendant subsequently threw the stolen property away without profiting from it was immaterial).

112. COLO. REV. STAT. § 18-1.3-1201(5)(g) (2012) ("[I]n the course of or in furtherance of such or immediate flight therefrom, the defendant intentionally caused the death of a person other than one of the participants . . . ."); IND. CODE § 35-50-2-9(b)(1) (2007) ("The defendant committed the murder by intentionally killing the victim while committing or attempting to commit [a felony]."). The Colorado statute specifies a separate aggravator for the killing of a person during a kidnapping. COLO. REV. STAT. § 18-1.3-1201(5)(d) (2012) ("The defendant intentionally killed a person kidnapped or being held as a hostage by the defendant or by anyone associated with the defendant.").

the defendant have caused the death himself, he must have done so with a culpable mental state—in this case, purpose. By contrast, other jurisdictions recognize the existence of the aggravator whenever the "death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of," certain enumerated felonies.[113] In contrast to a Colorado defendant, a defendant in such a state is made death-eligible whenever a death occurs during the commission of a felony in which the defendant is involved; it need be shown neither that the defendant killed nor that he had any *mens rea* with regard to the death of the victim. Such legislative distinctions, even if likely inadvertent, must be given effect. Although all felony murder aggravators focus on deaths that occur in the course of a felony, they are very different in the sweep of their coverage.

4. Grave Risk of Death to Others

Another aggravating factor, and one that is often present, is that the murder of one person put others at risk of death or injury. Illustrative is the Utah Code, which provides that an aggravating factor exists whenever the "actor knowingly created a great risk of death to a person other than the victim . . . ."[114] Many public shootings or other acts of violence in crowded areas will satisfy this aggravator. But again, there is a question whether this aggravating factor can, as a matter of statutory construction, apply to a non-killer who is guilty of murder. Does the defendant satisfy this aggravating factor by creating a risk of death to others even if he does not actually kill the victim?

Consider an example. Imagine two co-felons, A and B, both of whom shoot at V and V's friends from a passing car. Assume that A strikes and kills V but that B misses all of the intended victims. A, obviously, is liable for premeditated murder and has satisfied the grave risk of death aggravator; he is thus clearly eligible for a sentence of death. But what about B, his co-felon? B is likely liable for the killing itself under either an aiding-and-abetting or coconspirator theory—B emboldened A's homicidal acts and intended to do so; there was an agreement between A and B inferable from their conduct and the killing of V was committed in furtherance of that agreement. Furthermore, B satisfies the *Enmund–Tison*

113. 18 U.S.C. § 3592(c)(1) (2006); *see also* ALA. CODE § 13A-5-49(4) (2012) ("The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping."); FLA. STAT. § 921.141(5)(d) (2012); MISS. CODE ANN. § 99-19-101(5)(d) (2012) ("The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of [a felony.]"); MONT. CODE ANN. § 46-18-303(2) (2011) ("The offense was aggravated kidnapping that resulted in the death of the victim or the death by direct action of the defendant of a person who rescued or attempted to rescue the victim.").

114. UTAH CODE ANN. § 76-5-202(1)(c) (West 2012).

prerequisites for the death penalty—he was present and actively participating in the felony, had major participation in it, and shared A's homicidal intent. The only barrier to the imposition of a death sentence upon B, therefore, is whether the grave risk of death to others aggravating factor is proven with regard to him. There are two ways to conceive of B's culpability with regard to this aggravator: First, B may satisfy the aggravating factor through his own conduct. That is, it may be sufficient to show that he created a grave risk of death himself and that the aggravating factor is thus satisfied even though he himself did not kill.[115] The other is to hold B liable for the factor vicariously; because he is guilty of the crime and because the principal killed while creating a grave risk of death to others, the factor is satisfied with regard to B as well. Whether either of these theories will satisfy the aggravating factor will depend on two things: the wording of the aggravating factor and the constitutionality of vicarious liability for aggravating factors.

B. *Aggravating Factors Relating to the Status of the Defendant or the Victim*

1. The Status of the Defendant

One of the most common aggravating factors based on the status of the defendant is the fact that the defendant has been convicted of a prior violent felony. Many jurisdictions have an aggravator that applies whenever the defendant has previously been convicted of a serious violent felony.[116] The federal death penalty in fact has three distinct prior-conviction aggravators: (1) "Previous conviction of violent felony involving firearm;"[117] (2) "[p]revious conviction of offense for which a sentence of death or life imprisonment was authorized;"[118] and (3) the "defendant has previously been convicted of 2 or more Federal or State offenses, punishable by a term of imprisonment of more than 1 year."[119] Relatedly, many jurisdictions treat the fact of one's incarceration at the

115. For example, under Colorado's statute, applying the aggravating factor to B would require a finding that B created a grave risk of death to others in *the commission of the offense*. COLO. REV. STAT. § 18-1.3-1201(5)(i) ("In *the commission of the offense*, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.") (emphasis added). Was the "commission of the offense" the shooting of the victim by A or, conceived more broadly, did the "commission of the offense" include B's firing into the passing vehicle with an intent to kill?

116. The Colorado statute specifies that any prior conviction for a "class 1 or 2 felony involving violence" suffices to make a defendant eligible for the death penalty. COLO. REV. STAT. § 18-1.3-1201(5)(b) (2012).

117. 18 U.S.C. § 3592(c)(2) (2006).

118. *Id.* at § 3592(c)(3).

119. *Id.* at § 3592(c)(4). Arizona's capital-sentencing statute also appears to recognize three classes of prior-conviction aggravating factors. ARIZ. REV. STAT. ANN. § 13-751(F)(1), (2), (8) (2012).

time of the murder as an aggravating factor—in those jurisdictions, anyone who commits a first-degree murder in a prison is death-eligible.[120] For both of the aggravating factors just listed, the plain statutory language generally emphasizes the fact that the defendant who is convicted of first-degree murder must have a qualifying prior conviction; there is no reference to or discussion of vicarious liability.[121] One could imagine a case, however, in which the actual killer does not personally satisfy any of the aggravating factors but his accomplice does. For example, if B encourages and assists A in shooting a random stranger, it is possible that no aggravating factors will apply to A. However, if B has a prior conviction or is currently incarcerated, it is plausible that B (the non-killer) is death-eligible and A (the killer) is not. Alternatively, if the aggravating factor applies vicariously, yet another odd result is conceivable. Imagine that B—who neither has a criminal record nor is incarcerated—helps A to commit a murder within a prison. If the "already serving a prison sentence" aggravator can be vicariously applied, then B is rendered death-eligible by virtue of A's current incarceration.[122]

2. The Status of the Victim

Most capital-sentencing statutes provide for one or more aggravating factors based on the *victim's* status—that is, some attendant circumstance relating to the status of the victim determines the severity of the crime. Common examples include killing a "peace officer," "firefighter," "judge," or "elected . . . official."[123] Alternatively, the defendant may face a sentence of death when he kills a particularly vulnerable victim, such as a youthful,[124] elderly,[125] pregnant,[126] or disabled victim.[127] Interestingly, there is once again a material distinction in the way these vulnerable-victim statutes are worded. A Wyoming aggravator relating to age, for example, provides that the aggravator exists if the "[t]he defendant knew or

120. Either by case law or statutory text, incarceration includes actual incarceration as well as parole. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-751(F)(7)(a) (defendant committed the offense while "[i]n the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail . . . [or] [o]n probation for a felony offense").

121. *Id.*

122. Similar reasoning could apply to aggravating factors that apply when the possession of the murder weapon is a felony. If A has a prior conviction and thus the possession of a gun is a felony, the question is whether B, as A's accomplice to murder, is vicariously liable for the felon-in-possession aggravator.

123. COLO. REV. STAT. § 18-1.3-1201(5)(c) (2012).

124. *See, e.g.*, N.J. STAT. ANN. § 2C:11-3b(4)(k) (West 2012) ("The victim was less than 14 years old.").

125. *See, e.g.*, WYO. STAT. ANN. § 6-2-102(h)(ix) (2012).

126. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 9711(d)(17) (2012).

127. *See, e.g.*, TENN. CODE ANN. § 39-13-204(i)(14) (2012).

reasonably should have known the victim was . . . older than sixty-five . . . years of age."[128] Obviously, the defendant must be guilty of first-degree murder in order to be death-eligible. If he is guilty of first-degree murder, then this vulnerable-victim aggravator appears to apply regardless of whether he was the actual killer. By contrast, a Colorado aggravating factor applies only if the "defendant intentionally killed a child who has not yet attained twelve years of age."[129] Under Colorado law, this factor requires not only that the defendant himself be the killer, but that he have some *mens rea* with regard to the victim's status. A defendant who kills intentionally but is unaware or even reckless with regard to the child's age cannot satisfy this statute in Colorado; similarly, a defendant who intends that a child die and helps another to kill a child may not be death-eligible because he is not himself the child's killer.

C. *Summary*

In this brief and admittedly inexhaustive survey of common aggravating factors, this Article's goal has been to demonstrate that from the non-killer's perspective much depends on the precise nature of the legislature's wording. By their terms, some of these factors can be applied only to killers, some can be applied to anyone guilty of a murder, and others are ambiguous. Similarly, some aggravating factors require *mens rea*, while others appear to countenance strict liability. This patchwork of statutes should not be overly surprising, given the multiplicity of death-penalty states and the fact that capital statutes—and particularly aggravating factors—are often quickly, haphazardly, and serially drafted. This variation in the wording and apparent meaning of aggravating factors does raise important questions, however, about whether there are constitutional limits on the capacity of a state legislature to apply these factors against non-killers. After examining the doctrines of vicarious liability in more detail, this Article will synthesize its various components—the Eighth Amendment's limits on the imposition of the death penalty, the use of aggravating factors to do this work, and the doctrines of vicarious liability—to suggest important limits on the vicarious application of aggravating factors.

III. DOCTRINES OF VICARIOUS LIABILITY

Setting aside for a moment the question of death-eligibility, criminal law recognizes several different theories of vicarious liability. That is, as a matter of substantive criminal law, there are various theories under which

128. WYO. STAT. ANN. § 6-2-102(h)(ix) (2012).

129. COLO. REV. STAT. § 18-1.3-1201(5)(m) (2012). If A holds the victim while B shoots him, is A (as an accomplice to murder) eligible for death based on the youthfulness aggravator? Should it matter that A didn't know it was a child but B did? Similar problems arise for aggravating factors relating to the victim's status as a government officer or a pregnant woman.

criminal culpability for murder—or any other crime—may be attributed to a defendant who did not commit the prohibited acts herself. Long controversial, these doctrines take on an added level of controversy when they lead to a conviction for capital murder.

A. *Accomplice Liability*

Perhaps the best known of the vicarious-liability doctrines is the concept of accomplice liability. Accomplice liability is an ancient idea: those who intentionally assist others in the commission of a crime are liable for that crime as accomplices.[130] The common law had various terms to describe those who were involved in the commission of an offense—principal, principal in the second degree, accomplice, accessory, accessory after the fact, and so on.[131] Modern criminal law, by contrast, has greatly simplified accomplice law. It holds liable both those who in fact commit crimes (principals) and those who aid and intend to aid the commission of the offense (accomplices).[132] The accomplice is generally deemed to be guilty of the principal's crime as if she had done it herself—that is, we say that she is guilty of the principal's crime as an accomplice.[133] While her diminished role in the commission of the offense may be considered at sentencing, as a general matter accomplices share the guilt of those they abet.[134] What is more, the common law requirement that the principal be convicted before an accomplice can be convicted of the offense has largely been abrogated;[135] in fact, there exist today situations in which an

130. *See, e.g.*, Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1353–54 (1998) ("From the earliest days of civilized society, aiding someone in the commission of a criminal act with the intent that a crime be committed has been deemed blameworthy and deserving of punishment.").

131. SANFORD H. KADISH, ET AL., CRIMINAL LAW AND ITS PROCESSES 589–90 (8th ed. 2007).

132. *See, e.g.*, MODEL PENAL CODE § 2.06 (Proposed Official Draft May 4, 1962).

133. *See, e.g.*, Dressler, *supra* note 6, at 433. It is not even necessary in many jurisdictions to identify who is the accomplice and who is the principal. *See, e.g.*, 15 Colo. Prac., Criminal Practice & Procedure § 18.43 ("The complicitor and the principal need not be charged as codefendants in a single proceeding, but if they are, it is not necessary to designate which is the principal and which is the complicitor. In fact, a person can be charged as a principal and be convicted as a complicitor, or vice versa.").

134. *Cf.* Joshua Dressler, 37 HASTINGS L.J. 91, 108-09 (1985) ("Neither modern nor ancient treatises adequately explain why accomplices are punished for crimes they did not perpetrate, or why their punishment may be as severe as that given to perpetrators. Although common moral intuition dictates that all willing participants in crime should be punished, it would require a leap of faith to derive from that intuition the thesis that all accomplices and perpetrators should be treated alike. Considering the importance of the concepts of personal liability and causation in criminal law, it is remarkable how little has been written on the theoretical basis of modern accomplice liability and punishment.")

135. *See, e.g.*, People v. Garcia, 52 P.3d 648, 655 (2002) ("If a shooter's conviction is required to impose vicarious liability on an aider and abettor, this restriction may unduly thwart the prosecution of defendants involved in gang-related shootings. For instance, if the actual shooter were also killed during an exchange of gunfire (therefore making a conviction impossible), the aider

accomplice can be convicted even if the principal has a defense that precludes her conviction entirely.[136]

Although the acceptance of accomplice liability is universal in the English-speaking world,[137] its theoretical underpinnings remain relatively unexamined.[138] Agency theory—the idea that the acts of an individual's agents are attributable back to the individual—only goes so far in explaining the doctrine. As Professor Joshua Dressler has noted, the principal is not truly the accomplice's agent.[139] For example, it is possible to be an accomplice of a principal who is unaware that he has received the accomplice's aid; by contrast, agency law requires that the agent accept the principal's direction.[140] Similarly, a harm-based approach cannot justify holding the accomplice liable for the crimes of the principal; accomplice liability does not rely on causation[141] and could not reasonably do so. That

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and abettor would escape liability . . . notwithstanding undisputed evidence that someone intentionally and personally discharged a firearm proximately causing death."); MODEL PENAL CODE § 2.06(7) (Proposed Official Draft May 4, 1962) ("An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted."); Lance R. Chism, Comment, *Criminal Law*—State v. Carson*: A Misguided Attempt to Retain the Natural and Probable Consequences Doctrine of Accomplice Liability Under the Current Tennessee Code*, 29 U. MEM. L. REV. 273, 275 (1998) ("The most significant limitation to convicting an accessory at common law was that the conviction of the principal was an 'absolute prerequisite.' . . . Today, almost all states . . . allow an accomplice to be convicted even if the principal has not been prosecuted or convicted, and also allow conviction of the accomplice if the principal has been acquitted or has been convicted of a different offense.").

136. *See, e.g.*, Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation*, 73 CALIF. L. REV. 323, 327–28 (1985) ("A difficult question is what the legal status of the actions of the principal must be for the accomplice to incur liability. The obvious suggestion that the principal must be liable is shown to be incorrect by cases where the principal has a defense based upon policies extrinsic to his guilt (such as diplomatic immunity or entrapment), or where the principal's behavior is excused. The guilt of the principal would suffice to ground the liability of the accomplice where the principal has a [policy-based] defense (extrinsic to his guilt) but will not suffice where the principal is excused.").

137. *See* Dressler, *supra* note 5, at 91–92 ("The law of accomplice liability is perhaps now so widely accepted that few scholars have examined the soundness of its theoretical foundations." (footnote omitted)).

138. Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 222 (2000) ("Since the advent of the [MPC], accomplice liability has received relatively scant attention."); Michael D. Heyman, *The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY J. CRIM. L. 388, 389 (2010) ("Accomplice accountability is one of the most difficult topics to deal with properly, either pedagogically or through scholarly analysis. When people are part of multi-crime enterprises, it seems counterintuitive both for someone to be liable for the conduct of another *and* for her not to be.").

139. *See, e.g.*, Dressler, *supra* note 5, at 110 ("Civil rules of agency, however, cannot explain precisely the doctrines of [criminal-law] accountability. Civil agency requires a party to consent to being subjected to the control of another, whereas criminal liability does not." (footnotes omitted)).

140. *Id.*

141. *State v. Tally*, 15 So. 722, 738 (1894) ("The assistance given, however, need not

is, short of a finding that an accomplice has compelled the principal to act—and duress is a very difficult case to make—it would be extremely difficult to demonstrate that the encouragement of the accomplice caused the principal to act.[142] Thus, an accomplice may be convicted for the principal's conduct even in those situations in which it is clear that the principal would have committed her crimes even without the aid and encouragement of the accomplice. The MPC has embodied this approach, holding a defendant liable not just for those crimes of the principal that she has aided and intended to aid, but also crimes that she intended to aid and *attempted* to aid.[143]

The justification for accomplice liability, then, must lie in the manifestly antisocial behavior of the accomplice. That is, it must be based on the theory that one who encourages others to commit crimes and intends that those crimes be committed has demonstrated the same danger to society that the principal has in doing those crimes herself. Of course, to say that the behavior of the accomplice is antisocial and deserving of society's condemnation is not the same as saying that that antisocial behavior is identical to that of the principal. Nonetheless, every American jurisdiction would treat the accomplice as guilty of the same offense as the principal; only by persuading the sentencer that the defendant–accomplice was materially less culpable does the criminal law allow the secondary actor to obtain a less severe sentence.[144]

B. *Coconspirator Liability*

At its core, a conspiracy is a relatively simple idea—the crime is committed when two or more people agree to commit a crime or crimes and then any one of them takes an overt act in furtherance of the agreement.[145] Conspiracy is a felony, punishable as such and often carrying

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contribute to the criminal result in the sense that but for it the result would not have ensued."); Dressler, *supra* note 137, at 99 ("Unlike the person who commits the crime, the accomplice need not be causally tied to the harm for which she is punished.").

142. *See, e.g.*, Kadish, *supra* note 136, at 327 ("Complicity emerges as a separate ground of liability because causation doctrine cannot in general satisfactorily deal with results that take the form of another's voluntary action."). A defendant who uses an innocent agent to commit a crime—one who has no *mens rea* regarding the offense—is culpable not as an accomplice but as a principal. For example, where a defendant gets a "mule" to carry drugs across a border completely without the mule's awareness, the defendant is liable for the smuggling as a principal and the innocent mule is not liable at all. *Id.* at 342 ("Since the acts of the primary party are excused and hence not fully volitional, they can be treated as caused by the actions of the secondary party.").

143. *See* MODEL PENAL CODE § 2.06(3)(a)(ii) (Proposed Official Draft May 4, 1962) ("A person is an accomplice of another person in the commission of the offense if: with the purpose of promoting or facilitating the commission of the offense, he . . . aids or agrees *or attempts to aid* such other person in planning or committing it . . . ." (emphasis added)).

144. *See, e.g.*, United States v. Ambrose, 740 F.2d 505, 508–09 (7th Cir. 1984).

145. In some cases, particularly for more serious crimes, the overt-act requirement may be done away with. *See, e.g.*, MODEL PENAL CODE § 5.03(5) ("No person may be convicted of

with it punishments that vary with the seriousness of the crime agreed to by the parties.[146] Thus, for instance, conspiracy to commit murder is a felony, perhaps less serious than commission of the murder itself, but more serious than, say, conspiracy to commit bank robbery.[147] Again, the MPC takes a relatively extreme position with regard to vicarious liability. Under the Code, conspiracy to commit a crime is itself a crime, and is generally punishable at the *same* grade of seriousness as the target offense itself. That is, under the Code, a conspiracy to commit a robbery is an offense of equal seriousness as the robbery itself.[148]

In addition, and perhaps more importantly, conspiracy is also a theory of vicarious liability. The members of a conspiracy are generally responsible for the crimes committed by other members of the conspiracy if they are committed in furtherance of the conspiracy and are reasonably foreseeable.[149] This is true regardless of whether the crimes committed were those agreed to as part of the conspiracy.[150] Thus, where several people plan a bank robbery and thereafter one of the people robs the bank and kills a guard in the process, the other people are liable for the substantive offense of conspiracy to commit bank robbery; bank robbery (under a coconspirator theory); and murder (under a coconspirator theory), assuming that the killing was reasonably foreseeable.

Thus, one can see that coconspirator liability is significantly broader than accomplice liability in those states that have adopted both theories of liability.[151] This broadening of liability occurs in two ways. First, a

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conspiracy to commit a crime, *other than a felony of the first or second degree*, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired." (emphasis added)).

146. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1003(D) (2012) ("Conspiracy to commit a class 1 felony is punishable by a sentence of life imprisonment without possibility of release on any basis until the service of twenty-five years, otherwise, conspiracy is an offense of the same class as the most serious offense which is the object of or result of the conspiracy."); CAL. PENAL CODE § 182 (West 2012) (setting forth the punishments for conspiracies to commit various categories of crimes).

147. *See supra* note 146.

148. *See, e.g.*, MODEL PENAL CODE § 5.05(1) (Proposed Official Draft May 4, 1962) ("Except as otherwise provided in this Section, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense that is attempted or solicited or is an object of the conspiracy. An attempt, solicitation or conspiracy to commit a [capital crime or a] felony of the first degree is a felony of the second degree." (brackets in original)).

149. *See, e.g.*, Pinkerton v. United States, 328 U.S. 640, 647–48 (1946).

150. United States v. Alvarez, 755 F.2d 830, 851 (11th Cir. 1985) ("We find the individual culpability of [the defendants] sufficient to support their murder convictions under *Pinkerton*, despite the fact that the murder was not within the originally intended scope of the conspiracy. In addition, based on the same evidence, we conclude that the relationship between the three appellants and the murder was not so attenuated as to run afoul of the potential due process limitations on the *Pinkerton* doctrine."). *But see* Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimension of* Pinkerton, 57 AM. U. L. REV. 585 (2008) (arguing that the two-part test associated with the *Pinkerton* decision was never designed by the Court to function as such).

151. Note that the MPC has rejected vicarious liability based on participation in a conspiracy;

coconspirator is liable for the crimes of another regardless whether she has actually facilitated the criminal acts of the principal. Imagine, for example, two car thieves, each of whom agrees with a third party to participate in a ring of auto thefts. The two thieves are aware of each other's existence and the fact that they are part of a larger agreement with common goals, but they do not meet or in any other way interact. Under an accomplice theory, the thieves could not be held liable for each other's crimes; it would be difficult to show either that they assisted one another or that they had the intent to do so. Under a theory of coconspirator liability, by contrast, guilt would be relatively easy to prove. Each has entered an agreement with others and has intended to do so. Because each is aware of the other's existence, the crimes that each commits are reasonably foreseeable to the other and are in furtherance of the conspiracy's goals.

Second, it should be seen that the coconspirator is liable even for crimes that were not countenanced by the conspiracy itself. Thus, in the conspiracy to commit bank robbery described above, the coconspirators would be liable for the unplanned, un-agreed-to killing of the security guard so long as that killing was both in furtherance of the conspiracy's goal (bank robbery) and reasonably foreseeable. Although none of the defendants could be charged with conspiracy to commit murder—because that is not what any of them agreed to—any conspirator could be charged with murder on a coconspirator theory. Unlike with accomplice liability, where the accomplice's guilt is determined by those crimes he both encouraged and intended to encourage, with coconspirator liability the relevant question is one of foreseeability. This is obviously a great expansion of the scope of accessorial liability.

This expanded accountability afforded by coconspirator liability appears to be grounded in the particular dangers associated with group criminality.[152] A defendant acting on his own can do only so much harm. When he combines with others for the same purpose, though, the dangers he poses can be multiplied many times over. Criminal agreements also have the effect of emboldening criminal action—the criminal who has agreed with others to commit crimes is more likely to actually commit those crimes than the criminal merely musing over possible criminal

in these situations, the Code would make a defendant liable only where his participation in a conspiracy makes him liable as an aider or abetter. *See* MODEL PENAL CODE § 2.06(3)(a)(ii) (Proposed Official Draft May 4, 1962).

152. *See, e.g.*, Neal Kumar Katyal, *Danger in Numbers: Why It Makes Sense to Have Harsh Punishments for Conspiracy*, LEGAL AFFAIRS, March/April 2003, at 44, 44 ("In a world full of crime committed by groups, from terrorists to bank robbers to drug gangs to mafia families, traditional conspiracy doctrine plays a vital role in making our society and communities safer. The doctrine deters some people from joining criminal enterprises in the first place. And when conspiracies are hatched, the law gives prosecutors leverage to 'flip' defendants and build cases out of their testimony.").

conduct.[153]

C. *The Natural and Probable Consequences Doctrine*

The apex of vicarious liability is a species of accomplice liability known as the natural and probable consequences (NPC) doctrine. Under the NPC doctrine, a defendant is liable not just for those crimes that she has aided and abetted but for all crimes that are the natural and probable consequences of the crimes in fact aided and abetted.[154] Here, foreseeability is the only restraint on the defendant's culpability. Once he has become an accomplice, a defendant is liable for any crime that follows predictably from the crime he aided and abetted. While courts have split on the wisdom of the NPC doctrine, those jurisdictions that have accepted it allow for criminal liability even in circumstances where there would not be coconspirator liability.

D. *The Felony Murder Rule*

Although not strictly a theory of vicarious liability, felony murder plays an important part in modern death-penalty jurisprudence.[155] The rule, in its simplest form, is that any death that occurs in the course of an enumerated felony is murder regardless of the defendant's individual culpability with regard to death.[156] Accordingly, the most direct effect of the felony murder

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153. What is more, the agency theory that seemed misplaced in the accomplice-liability context makes more theoretical sense here. By its very nature, a conspiracy is a bilateral (or multilateral) agreement. Each of the parties has joined into an agreement because they expect and hope that they will be benefitted thereby. It seems only fair in that context to hold the defendant responsible for the foreseeable consequences of the plan that he has made himself a part of.

154. *See, e.g.*, People v. Luparello, 231 Cal. Rptr. 832, 846 (1986).

155. The doctrine also has some outspoken and thoughtful defenders. *See, e.g.*, Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403 (2011) (examining the features of the felony murder doctrine that make it a palatable, even desirable, part of America's criminal law).

156. *See* GUYORA BINDER, FELONY MURDER (2012) 97–98:

> Contemporary commentators continue to instruct lawyers and law students that England bequeathed America a sweeping default principle of strict liability for all deaths caused in all felonies. According to Wayne LaFave's treatise, "[a]t one time the English common law felony-murder rule was that one who, in the commission or attempted commission of a felony, cause another's death, was guilty of murder, without regard to the dangerous nature of the felony involved or the likelihood that death might result from the defendant's manner of committing or attempting the felony." Similarly the American Law Institute's Model Penal Code commentary describes "the common-law felony-murder doctrine" as declaring "that one is guilty of murder if death results from conduct during the commission or attempted commission of any felony. . . . As thus conceived, the rule operated to impose liability for murder based on . . . strict liability." According to Joshua Dressler's textbook, "At common law, a person is guilty of murder if she kills another person during the commission or attempted commission of any felony. This . . . felony-murder rule applies whether a felon

rule is to permit a murder conviction for a principal who lacked the *mens rea* necessary for a murder conviction.[157] Considering again the robbery situation above as an example, imagine the bank guard is killed accidentally in the course of the principal's robbing of the bank. The death could be charged as murder, even if the principal was neither reckless nor even negligent in bringing about the guard's death. This much-criticized[158] prosecutorial shortcut thus makes it much easier to prove a murder case against the principal than if the government were required to show that the defendant was extremely reckless with regard to death.

But felony murder does more than simply make the principal responsible for a murder for which he might otherwise lack *mens rea*. Combined with other doctrines of vicarious liability, it makes the other participants in a felony equally guilty for an unintended killing committed by another. Thus, not only is the robber who accidentally killed in the course of his crime a murderer under a felony murder theory, but the accomplice who gave him the gun (and who is liable for the robbery under an accomplice theory) is now responsible for a crime he neither intended nor committed. Felony murder, then, is something like a vicarious liability theory on top of a vicarious liability theory. While the *Enmund* and *Tison* decisions ameliorate some of the worst consequences of this doctrine—by making those guilty of felony murder simpliciter ineligible for the death penalty—the fact remains that in many instances a non-killer who lacks a highly culpable *mens rea* with regard to death can be found guilty of

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> kills the victim intentionally, recklessly, negligently, or accidentally and unforeseeably." Arnold Loewy's *Criminal Law in a Nutshell* informs students that "[a]t early common law, felony murder was a simple proposition: any death resulting from an apparently non-dangerous felony would be murder." (footnotes omitted).

Note that Binder is skeptical of this reading:

> [N]one of these accounts identifies when this supposed common law rule of strict liability for all deaths resulting from felonies became the law in England. None identifies a single case in which it was applied in England before American independence. These accounts are hazy about early American law. None of them documents application of such a rule in colonial America, or in the early American republic. In short, there is something suspicious about our received account of the origins of American felony murder rules."

Id. at 98 (footnotes omitted).

157. There is a tension between the death penalty, which tends to require heightened procedures and culpability, and felony murder, which "in its starkest form, provides that any participant in a specified felony that results in death shall be punished as a murderer . . . ." *See* Rosen, *supra* note 10, at 1104–05.

158. *See, e.g.*, James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1441 (1994) (noting that the rule is inconsistent with basic requirements of culpability).

murder, and perhaps even capital murder.[159]

IV. PUTTING THE PIECES TOGETHER: PROPORTIONALITY AND VICARIOUS AGGRAVATORS

A. *Alternative Approaches to Vicarious-Aggravator Liability*

For current purposes, this Article takes certain Supreme Court doctrines as fact. For example, this Article presumes that the death penalty can be constitutionally imposed given a statutory scheme that genuinely narrows the pool of death-eligible murderers. Further, this Article presumes that a defendant can be criminally prosecuted for the conduct of another under a theory of accomplice or coconspirator liability. Finally, this Article takes as a given the Court's decisions in *Tison* and *Enmund*, which make some non-killers eligible for death. The specific question addressed here is whether a defendant who did not himself kill can be made eligible for death through vicarious aggravating-factor liability.[160] In other words, can an aggravating factor be imputed to a defendant based on the actions or status of his codefendant? This is a question the Supreme Court itself has not yet addressed and that has proven enigmatic for the few lower courts that have even obliquely addressed the subject.[161]

There are three conceivable approaches to vicarious-aggravator liability. First, a court could conclude that any imputation of aggravating factors from one defendant to another is strictly prohibited. This position is the equivalent of a holding that the Eighth Amendment requires each individual to have personal responsibility for any aggravating factor alleged against him. Alternatively, one could argue that any aggravating

159. The majority of states, as a statutory matter, prohibit the death penalty for felony murder accomplices unless the defendant intended to kill. *See* Trigilio & Casadio, *supra* note 10, at 1401.

160. Analogously, this Article is interested in whether a killer who is not otherwise guilty of capital murder can be sentenced to death based on vicarious liability for the aggravating factors of an accomplice. The question, more generally, is whether aggravating factors may ever be applied across defendants.

161. Colorado's state high court is emblematic. In the one opinion on the subject, the Colorado Supreme Court held that the United State Supreme Court's *Enmund* opinion forbade the giving of a complicity instruction at sentencing. *See* People v. Borrego, 774 P.2d 854, 857 (1989). Because *Enmund* stands for the proposition that the focus at sentencing should be on each individual's moral culpability, the Court reasoned, "[i]t is therefore impermissible under the eighth amendment to treat in the same manner two defendants facing a sentence of death so that the jury could attribute to one the culpability of the other. Since complicity is a theory that necessitates holding one person legally accountable for the behavior of another, a defendant's constitutional rights are violated if the jury in a [capital] sentencing hearing is given a complicity instruction." *Id.* (citations omitted). This is true so far as it goes, but it probably overstates the constitutional mandate. It is true that the focus at sentencing must be on the individual being sentenced *and* that a general complicity instruction at sentencing would invite the jury to impute the principal's death worthiness to the accomplice. By contrast, if the court explains to the jury under what circumstances a particular aggravating factor may be found with regard to a non-killing defendant, this Article submits that the Eighth Amendment is satisfied.

factor that is applicable under a doctrine of vicarious liability ought to apply vicariously to each defendant. In other words, if an aggravating factor is directly applicable to a principal, *and* other defendants are responsible for the principal's behavior under a theory of vicarious liability, then that aggravating factor should be imputed against each defendant. As explained more fully below, this Article submits that a third, middle-of-the-road position most closely approximates the Court's current Eighth Amendment jurisprudence. Before elaborating on this Article's theory of vicarious liability, it is worth considering what vicarious-aggravator liability would look like under the two extreme models that this Article rejects.

Consider first the view that there can be no vicarious-aggravator liability. Such a system would preclude death sentences for nearly all non-killers. One state supreme court has come close to embracing this position, explaining that "a defendant's constitutional rights are violated if the jury in a [capital] sentencing hearing is given a complicity instruction" as to an aggravating factor.[162] While this holding certainly demonstrates concern about vicarious aggravating-factor liability, it is probably overreading it to conclude that an aggravating factor can never apply to a non-killer. That is to say, some aggravating factors may apply based on the plain text of the statute, and a defendant who has personally satisfied the requirements of the aggravator may be death-eligible. For instance, vicarious-aggravator liability hardly seems necessary to apply certain victim-specific aggravators to a non-killer. For example, imagine an aggravating factor that makes a defendant death-eligible if the victim of a murder is under the age of twelve. An aggravating factor like this—which describes a fact about the world that is either true or false—would seem to apply equally to killers and non-killers alike.

A more extreme limitation on the death penalty would recognize the inapplicability of any aggravating factors to non-killers. That is to say, the most robust limitation on vicarious-aggravator liability would be an understanding that only the killer himself can be made death-eligible through the use of aggravating factors. Such a view, while laudably protective of the Eighth Amendment interest in limiting the death penalty to the very most culpable offenders, is necessarily in tension with the holdings of both *Enmund* and *Tison*, which recognized the possibility that a non-killer can be sentenced to death consistent with the Eighth Amendment.[163] In *Tison* , for example, two of the aggravating factors that rendered the defendant eligible for death—committing a killing for pecuniary gain, and killing in a cruel and heinous manner[164]—were not

162. *Id.*

163. *See infra* note 164 and accompanying text.

164. Tison v. Arizona, 481 U.S. 137, 141–42 (1987) (citing the applicable version of the Arizona capital-sentencing statute). In addition, although the death sentence in *Enmund* was struck

directly applicable to Tison because he was not the actual killer. In other words, the Court implicitly endorsed at least some level of vicarious aggravating-factor liability in *Tison*. Accordingly, a reading of the capital sentencing statutes that precludes *any* vicarious aggravator liability is necessarily a narrowing of the death penalty beyond what the Court itself has sanctioned.[165]

At the other extreme is the concept of a full applicability of aggravating factors to non-killers. Some examples of broad application of aggravating factors are entirely palatable. For example, an eligibility factor that asks the sentencer to consider the future dangerousness of the defendant would, it seems, be as logically applicable to a non-killer as to the killer himself. Insofar as future dangerousness is an individualized assessment of the future threat he poses to society, it is relevant to the appropriate punishment in a given case, and there is good reason to apply this aggravating factor to a non-killer. Just as with true accomplice liability, which requires culpability on the part of the principal, the critical question is whether the defendant *himself* poses the level of dangerousness that makes him eligible for death.

However, other examples of the absolute approach to aggravator liability test the strictures of the Eight Amendment. In particular, once aggravating factors are applied vicariously to non-killers, the fit between the aggravating factor and the individual culpability of a non-killer becomes attenuated. For example, under the absolute view, if one is a coconspirator, then he can fairly be charged with any of the aggravating factors that followed from the conspiratorial plan and that were reasonably foreseeable. For example, if an aggravating factor specifies that the defendant killed someone for pecuniary gain, the application of that factor to one who killed for profit meaningfully impacts his culpability. Application to a non-killing coconspirator would be significantly more problematic, though. On these facts, the pecuniary-gain aggravator would apply to the codefendant only through a theory of accomplice or coconspirator liability.[166] That is, although the text of the aggravator appears to countenance only application to those who kill, it could be argued that because a codefendant is responsible for the killing—as an accomplice or coconspirator—she is responsible for any relevant

down as disproportionate, the Court did not object to the State's application of four aggravating factors to Enmund even though he was not the actual killer. Enmund v. Florida, 458 U.S. 782, 785 ("[T]he capital felony was committed while Enmund was engaged in or was an accomplice in the commission of an armed robbery; the capital felony was committed for pecuniary gain; it was especially heinous, atrocious, or cruel; and Enmund was previously convicted of a felony involving the use or threat of violence." (citations omitted)).

165. *Tison*, 481 U.S. at 141–42.

166. The pecuniary-gain aggravating factor was applied to codefendant non-killers in both the *Enmund* and *Tison* cases. *Tison*, 481 U.S. at 142; *Enmund*, 458 U.S. at 785.

aggravators as well.[167]

While this argument has some rationale to it, its application is deeply problematic. For example, consider a non-killer codefendant who assists in the killing of a juror or witness without knowing that the person the principal intends to kill is a juror or witness. Under a broad theory of vicarious aggravating-factor liability, the non-killer would be guilty of murder and could be charged with the witness-or-juror-killing aggravator. Even more extreme, if the killer has a prior violent felony (and the accomplice does not), under a theory of vicarious aggravating-factor liability, the non-killer could be charged with the prior-violent-felony aggravator since that factor is true with regard to the principal. Holding an accomplice liable for the aggravating factors that are unrelated to and even unknown to the accomplice would seem to undermine the very purpose aggravating factors are designed to play in the capital sentencing process—designating an individual as the worst of the worst. If the factor that qualifies a defendant for death has no relation to the defendant's own culpability, then the constitutionally assigned purpose of aggravating factors is simply not being served. The automatic and unthinking application of an aggravating factor to an accomplice or coconspirator thus violates the narrowing requirements of the Eighth Amendment.

B. *The Eighth Amendment Solution to Vicarious-Aggravator Liability*

Because neither of these two extremes—no vicarious liability or total vicarious liability—reflects the Eighth Amendment mandate of individualized culpability assessments in capital sentencing, a novel alternative is needed. This Article proposes a straightforward, doctrinally grounded, four-part framework for resolving the question of vicarious-aggravator liability.

Borrowing from the Georgia Supreme Court's *Zant* metaphor, this Article submits that the proper sentencing procedure can be thought of as a pyramid where only those defendants at the top of the pyramid can be sentenced to death on the basis of vicarious-aggravator liability.[168] The pyramid consists of the following four tiers, each of which must be satisfied in order for a death sentence to be statutorily and constitutionally sound as to a non-killer: (1) the defendant must be guilty of first-degree

167. After all, the entire vicarious-liability framework is predicated on this fictional notion that the defendant herself did something that she in fact did not. *See* Dressler, *supra* note 6, at 433 ("[A]s an accomplice to murder she will be convicted of the offense of 'killing' another person when, in fact, she did not kill the victim; as an accomplice to a rape, she will be convicted of having sexual intercourse with one whom she did not (and perhaps could not) have had sexual relations; as an accomplice to burglary she will be convicted of breaking and entering a structure she may never have seen, much less broken or entered.").

168. This Article, of course, borrows the image of the pyramid from the Georgia Supreme Court's description of its capital-sentencing system. *See* Zant v. Stephens, 462 U.S. 862, 870–71 (1983).

murder; (2) the death penalty must be proportionate to the crime (and the defendant's status); (3) the plain language of the capital-sentencing statute must permit the application of the aggravating factor to a non-killer; and (4) the defendant must have been at least reckless as to the aggravating factor's existence. This Section elaborates on each of these four tiers in turn.

The starting point for an analysis of the death-eligibility of a non-killer is, of course, the question of murder liability. If the defendant is not guilty of first-degree murder, then he cannot be sentenced to death. As discussed previously, there are a variety of doctrines that allow a defendant to derive liability from the conduct of his cohorts, and thus first-degree murder liability for a non-killer is not only possible, but common. The defendant need not be the actual killer, or the one who committed the offense, but he must be guilty of first-degree murder under one of the doctrines of vicarious liability.

Second, even for a defendant guilty of first-degree murder, there can be no death sentence unless the substantive proportionality principle of the Eighth Amendment is satisfied. If the defendant is a juvenile, or he is mentally retarded, for example, then the death penalty is impermissible. Likewise, if the defendant is not a sufficiently major participant and he was not at least reckless as to the death of the victim, then a sentence of death is unconstitutionally disproportionate.

Third, and perhaps most critically, is the requirement that the plain text of the aggravating factor permit vicarious liability. At this stage courts should defer entirely to the legislative will; courts ought not to consider the wisdom and overbreadth of the application of the aggravator to a non-killer. In short, the question is purely one of legislative intent—that is, did the legislature intend for the aggravator in question to apply to a non-killer so as to render him eligible for the ultimate punishment. As is the case in other areas of law, the statutory text will not always be susceptible to a single, unequivocal meaning as to the extent of its vicarious applicability. Notably, this Article has identified at least four models of statutory language, the varying meanings of which determine whether vicarious-aggravator liability might be permitted as a matter of statutory construction.

In order to illustrate the four models of statutory language that are relevant to this question, it is useful to consider one of the aggravating factors that the prosecution relied on to seek the death penalty for Ricky and Raymond Tison. Recall that the Tisons were in the process of stealing a car to assist with a prison break when the eldest Tison shot and killed the family who was travelling in the car they sought to steal. Ricky Tison—who was part of the jailbreak and robbery but did not commit the murders—was convicted of felony murder, and the prosecution sought the death penalty against him based on, among other aggravators, the

pecuniary-gain aggravating factor.[169] Consider four variations on the pecuniary-gain aggravating factor and the implications of each for the vicarious application of that factor:

> (i) The defendant intentionally killed another person for pecuniary gain.
>
> (ii) The defendant committed the offense for pecuniary gain.[170]
>
> (iii) The defendant caused the death of another person for pecuniary gain.
>
> (iv) The murder was committed for pecuniary gain.

From (i) to (iv), the aggravators are, arguably, worded from least to most amenable to vicarious application. Whether actual aggravators are carefully crafted with such care or whether the varying wording is simply a matter of chance, the plain text of the statutes must be given effect. Accordingly, an aggravator like example (i) should almost certainly not be read to permit vicarious liability. Where the aggravator is written so as to apply only when the "defendant kills," it is a stretch to argue that this statute can be applied to a non-killer accomplice.[171] In other words, we ought to respect the legislature's decision to limit aggravating-factor culpability to individuals who actually kill.

Example (ii), by contrast, is less straightforward. On the one hand, the phrase "committed the offense" in this statute seems synonymous with "kill." Thus, there is a strong argument that this aggravator, like (i), should not be applied to a non-killer. On the other hand, the term "committed" might better be deemed equivalent to "is guilty of," in which case application to a non-killer is appropriate. That is to say, one might read aggravating factors that limit their reach to defendants who "committed the offense" as permitting vicarious liability a long as the defendant is guilty of the murder under a theory of vicarious liability.[172] While in our view this seems like a stretch, and although the issue has never been litigated in the

169. *Tison*, 481 U.S. at 142.

170. This is the text of the pecuniary-gain aggravator that was in effect at the time of the Tisons' prosecution. ARIZ. REV. STAT. ANN. § 13-454(E) (1973) ("The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.").

171. A typical example would be an aggravating factor that applies when "[t]he defendant intentionally killed a child . . . ." COLO. REV. STAT. § 18-1.3-1201(5)(m). It would seem a stretch to say that the accomplice or coconspirator, who is guilty of murdering the child, actually killed the child.

172. It is strange to understand an accomplice as having "committed" an offense insofar as the defining feature of vicarious liability is holding one criminally responsible for a crime he did not commit. Dressler, *supra* note 6, at 433.

Supreme Court, it is worth noting that the pecuniary-gain aggravating factor that the prosecution relied on in *Tison* was worded in precisely this manner. Specifically, the relevant statute provided that the aggravating factor was satisfied if the "defendant committed the offense . . . in expectation of the receipt of anything of pecuniary value."[173] Notwithstanding the statutory language appearing to limit liability to those who "committed the offense," the Supreme Court upheld the death sentence based in part on the presence of this aggravating factor. A sentence of death was thus affirmed even though the aggravating factor was applied vicariously in a manner that appears inconsistent with the plain text of the statute. In our view, this was inconsistent with the plain language of the aggravating factor and, hence, error.

Even more complicated is example (iii). That aggravating factor applies so long as the defendant *caused* death. Such statutes seem to evince the intent of the legislature to render eligible for death those defendants who did not actually kill or commit the offense but whose conduct foreseeably led to the death. But the difficult question with such a theory is what the State would have to prove in order to demonstrate that the defendant, as a non-killer, was the cause of a victim's death. Significantly, there is a body of case law recognizing when defendants are the cause of death in such circumstances.[174] Specifically, where the defendant creates a grave risk of death to others—that is, he manifests extreme malice to others—he may be treated as a cause in fact of the victim's death, even though he was not the actual killer.[175] Thus, when the aggravating factor specifies that there must be causation, then a defendant can plausibly be charged with an aggravating factor even if he did not himself commit the homicidal offense or kill the victim.

Finally, example (iv) is the most straightforward example of vicarious-aggravator applicability. In (iv), the aggravating factor is framed in terms of certain events, certain attendant circumstances external to any particular actor. For example, if the aggravating factor provides that the murder must have been committed for pecuniary gain, then as long as this circumstance exists the aggravator is satisfied with regard to all of those guilty of that killing. Similarly, if the aggravating factor specifies that the victim was under a certain age, or particularly vulnerable, or pregnant, then the aggravating factor can, as a statutory matter, logically be extended to any

173. ARIZ. REV. STAT. ANN. § 13-454(E) (1973). Notably, the Tisons were also rendered eligible for the death penalty under a cruel or heinous aggravating factor that applied only if the "defendant committed the offense in an especially heinous, cruel, or depraved manner." *Id.* Given that the Tison brothers did not kill anyone, had the parties litigated this issue, it seems that neither of these statutory aggravating factors would have applied to a defendant who was a non-killer—that is, a defendant who did not actually commit the offense.

174. *See, e.g.*, People v. Gilbert, 408 P.2d 365, 373–74 (Cal. 1965).

175. *See, e.g.*, *id.*

non-killer. There is nothing in the text of such aggravating factors that would preclude them from applying to a non-killer; indeed, the most reasonable reading of those statutes would suggest a legislative intent to apply the aggravator vicariously.[176]

Fourth, assuming the defendant is guilty of first-degree murder under a theory of vicarious liability, assuming the death penalty is not disproportionate under the Eighth Amendment, and assuming finally that the plain text of the statute permits an aggravating factor to be applied to a non-killer, then the final question in our analysis is whether there is a constitutional problem with the vicarious application of that aggravator.

In our view, the rote application of aggravating factors vicariously raises constitutional concerns unless there is a showing that the defendant has personal culpability with regard to that factor. Under a conspiracy, natural-and-probable-consequences, or felony murder theory of vicarious liability, a non-killer could be guilty of first-degree murder even if he was only negligent as to the resulting death.[177] Moreover, the statute defining the relevant aggravating factor may permit liability for a non-killer, and it may even do so without specifying any additional *mens rea*.[178] In our view, however, more is needed before a defendant can be rendered eligible for the death penalty. That is, even if the defendant can be guilty of murder based on a lower standard of *mens rea*, the Eighth Amendment requires that the defendant be at least reckless as to the aggravating factors relied upon to make him eligible for death.[179]

Considering the constitutionally mandated function of aggravating factors in ensuring that only the most culpable offenders are eligible for

176. One can imagine that if certain aggravating factors were worded so as to permit vicarious liability, the narrowing function that aggravating factors are designed to serve would be undermined. For example, if the conventional prior-conviction aggravator was phrased, "The killer had previously been convicted of a violent felony," then a non-killer would be treated as eligible for a capital sentence based on a circumstance that had nothing to do with his own culpability.

177. These doctrines are sometimes described as theories of strict liability; however, given that the death under each doctrine must be reasonably foreseeable, it seems more apt to equate them with a culpability of criminal negligence.

178. Some aggravating factors specify a *mens rea*. For example, the aggravator might specify that during "the commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim . . . ." COLO. REV. STAT. § 18-1.3-1201(5)(i) (2012).

179. Commentators have noted that as to the question of felony murder liability, the *Enmund–Tison* limitation functions such that death is only available for those who were at least reckless as to the resulting death; this is a very feeble limitation. *See* Rosen, *supra* note 10, at 1158 (concluding that reckless indifference to life is present in nearly every felony murder). However, with respect to the sort of attendant circumstances present in many aggravating-factor statutes—such as age, cruelty, etc.—the requirement of recklessness will likely prove to be a more meaningful constitutional limitation. Whereas the "*Tison* standard rationally can be held to apply to every felony murder accomplice," *id.* at 1162, the same is not true for a recklessness requirement as to every material element specified in an aggravating factor.

death sentences,[180] individual culpability for each aggravating factor is required. Specifically, where the aggravating factor does not itself specify a *mens rea*, the defendant can only be charged with the aggravator when the prosecution can prove to the jury that he was at least reckless as to the material elements of the aggravating factor. Accordingly, even if the aggravating factor specifies only that the victim was pregnant, or that the victim was an elected official, the non-killer cannot be held strictly liable for the aggravating factor. Even if strict aggravator liability may not be unconstitutional as applied to the actual killer, strict *vicarious* liability is simply too wide a net of death-eligibility when applied to the non-killer.[181]

Thus, if A provides the murder weapon and other assistance to B, but has no idea that B's intended victim is a minor, the narrowing function of the aggravating factors would be undermined if the minor-victim aggravator were imputed to A. On the other hand, because the Court has previously sanctioned the use of recklessness as the measure of culpability required to make death a proportionate punishment,[182] we submit that the same level of culpability should suffice to satisfy the individual culpability requirements served by aggravating factors.[183] Thus, B may still be found liable of murder under an aiding-and-abetting theory. And he may still satisfy the Eighth Amendment's proportionality requirement if he was reckless with regard to the death of B's victim. But he cannot be put to death unless it is also shown that he was also reckless with regard to the age of the victim. That is, unless he was aware of a risk that B planned to kill a minor and aided him despite this risk, he is not eligible for the penalty of death.

In sum, vicarious-aggravator liability is constitutionally permissible, but strict vicarious-aggravator liability is not. In order to determine whether a non-killer may be sentenced to death, four distinct determinations should be made. While the first two requirements—first-degree-murder guilt and proportionality limits—are well-settled, our contribution is to emphasize the latter two conditions. Specifically, it is important to realize that not all aggravating factors are drafted in a way that permits, as a matter of statutory interpretation, vicarious liability. Moreover, even those aggravating factors that are textually amenable to vicarious liability would fail to satisfy the narrowing function ascribed to aggravating factors in *Gregg* if they were understood to impose strict vicarious liability.

180. *See generally* Furman v. Georgia, 408 U.S. 238 (1972) (asserting that the death penalty is often applied arbitrarily).

181. Previous scholarship has recognized that the Court "conscripted the reckless indifference doctrine" into the Eighth Amendment inquiry for accomplice liability. *See State Death Sentence*, *supra* note 10, at 880–81 (internal quotation marks omitted) (criticizing the use of recklessness as insufficient as a narrowing device).

182. *See* Tison v. Arizona, 481 U.S. 137, 158 (1987).

183. *See also* MODEL PENAL CODE § 2.02(3) (Proposed Official Draft May 4, 1962).

Accordingly, we propose a theory of vicarious-aggravator liability that permits a defendant to be charged with an aggravating factor only if the non-killer defendant is at least reckless as to the aggravating factor's material elements.

Obviously, if the aggravating factor specifies a higher level of culpability—intention or knowledge—then that is the *mens rea* that must be satisfied. When the aggravating factor is silent with regard to *mens rea*, however, the Eighth Amendment's twin concerns of proportionality and narrowing are adequately safeguarded by requiring a culpability of at least recklessness.

CONCLUSION

A person may be convicted of murder even though he was not the actual killer; indeed, the doctrines of vicarious liability may permit such convictions even when the accomplice's culpability is comparatively small. Moreover, the Supreme Court has not ruled out—and has in fact endorsed—the possibility of some non-killers being sentenced to death. However, as a procedural matter, the death-eligibility determination must still be based on criteria that genuinely narrow the class of death-eligible defendants. That is to say, even if the death penalty is not per se unconstitutional as applied to non-killers, it is clear that the ultimate punishment is only available if one or more of the aggravating factors applies to the non-killer. This Article considers this collision between vicarious liability and the narrowing function that aggravating factors are constitutionally mandated to provide.

The Eighth Amendment's *proportionality* doctrine limits the death penalty to defendants who had a culpability of at least recklessness as to the death of the victim. So too do the Eighth Amendment's *narrowing* and *proportionality* doctrines require that a defendant be at least reckless as to the material elements of an aggravating factor in order to be eligible for a sentence of death. In order for the Eighth Amendment requirement that capital-sentencing systems sort out the worst of the worst to have any practical application, it must require not just the codification of aggravating factors, but also procedural rules for ensuring that non-killers are sufficiently culpable so as to justify the ultimate punishment. We can convict the defendant based on the bad luck that his coconspirator killed someone, and we can make him constitutionally death-eligible because he was reckless and deeply involved in the felony. But it is simply too much to take the third step of saying this defendant is the worst of the worst because his codefendant alone had culpability as to an aggravating factor. Stated more directly, it defies any sense of proportionality and narrowing to conclude that, based on the fact of involvement alone, regardless of the statutory text, and regardless of individual culpability, a defendant is guilty of not just murder, but capital murder.