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The Impact of Information Overload on the Capital Jury's Ability to Assess Aggravating and Mitigating Factors

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THE IMPACT OF INFORMATION OVERLOAD ON THE CAPITAL JURY'S ABILITY TO ASSESS AGGRAVATING AND MITIGATING FACTORS

Katie Morgan* and Michael J. Zydney Mannheimer**

ABSTRACT

Since 1976, the U.S. Supreme Court has required that death penalty regimes meet two requirements. First, in order to minimize arbitrariness in the imposition of the death penalty, states must reserve capital punishment to a narrow class of offenders, those most deserving of death. States have done so by requiring that the prosecution prove at least one aggravating factor, i.e., some circumstance that separates the capital defendant on trial from those ineligible to be executed. Second, states must allow for individualization in sentencing by permitting the defendant to introduce mitigating evidence in order to persuade the jury that he is undeserving of death. The outcome has been that the penalty phase of the typical capital trial results in a flood of information from both prosecution and defense, much of it having little to do with the crime itself, through which the jury must wade.

Whatever else may be said about our current death penalty jurisprudence, this flood of aggravating and mitigating evidence implicates the potential for information overload on the part of the capital jury. The concept of information overload—essentially, that too much information presented to a decision maker can result in sub-optimal decision making—has been widely explored in the marketing area. A few scholars have written on the potential impact of this phenomenon on consumer law and securities regulation. But until now, none has written on the potential impact of information overload on the capital jury. The sheer amount of information presented at the penalty phase of a capital trial likely exceeds many jurors' capacities to process that information. In addition, the novelty, complexity, ambiguity, and intensity of the decision to be made virtually assure that a significant number of capital jurors experience information overload. Jurors under such a constraint face two

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choices. First, they may “satisfice,” or reach a decision that is sub-optimal simply to end the decision-making process. Second, they may “opt out,” or abdicate their decision-making responsibilities to the other jurors. Neither result is acceptable in the capital context.

In order to ease the potential effects of information overload, death penalty jurisdictions, with the approval of the Supreme Court, should reduce the amount of information presented at the penalty phase of capital trials. One logical way of doing this is to limit aggravating and mitigating circumstances at the penalty-selection stage to those that reflect on the individual culpability of the offender for the crime of conviction. This would mean doing away with victim impact evidence, evidence of future dangerousness, and all other non-culpability related aggravating evidence. This limitation would also require a loosening of the current strictures the Supreme Court currently places on the states’ ability to limit the defendant’s presentation of mitigating evidence. States should be permitted to limit the defendant’s introduction of mitigating evidence to that which reflects on his culpability for the crime, broadly conceived, and the states should exercise that authority.

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Anyone who has bought toothpaste in recent years may have experienced information overload. There was a time when one simply had to choose a brand. Nowadays, as one wades down the toothpaste aisle, one is faced with various new medicinal qualities of the once bland dentifrice—tartar controlling, teeth whitening, breath freshening, baking powder containing—in every possible combination and permutation. One suspects, and empirical research suggests, that many consumers leave the toothpaste aisle having made a sub-optimal purchase. But the consumer will have a chance to correct her mistake, perhaps after consulting with her dentist, and make a better-informed choice the next time. And even if she does not, the stakes are, after all, pretty low.

Now imagine deciding whether a fellow human being will live or die. A different kind of information overload may be at work here. Instead of an inordinately large number of choices, the decision maker is faced with only two—life or death—but to make the choice, she typically must wade through an inordinately large amount of information. Again, the result may be sub-optimal, or even arbitrary. But this time, there is no second chance. And the stakes are as high as they get.

Since 1976, the U.S. Supreme Court has read the Eighth Amendment of the U.S. Constitution as demanding that arbitrariness be minimized when the state seeks to impose the penalty of death.¹ Much has been written on the arguable failure of that endeavor. Without passing judgment on other objections to our modern system of capital punishment, this Article suggests an additional potential defect of that system

¹ Godfrey v. Georgia, 446 U.S. 420, 428 (1980); Gregg v. Georgia, 428 U.S. 153, 189 (1976) (indicating “that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action”); Furman v. Georgia, 408 U.S. 238, 305–06 (1972) (Brennan, J., concurring) (noting that the death penalty is different in nature than any other punishment in our criminal justice system and that because of the finality of a death sentence, there exists an extraordinary need for reliability in the conclusion that death is the appropriate punishment in a specific case).

that has allowed arbitrariness to seep back into the system: the problem of information overload. Specifically, this Article argues that because the typical capital jury must process virtually an unlimited amount of evidence relating to aggravating and mitigating factors, current death penalty jurisprudence might, paradoxically, enhance, rather than reduce, arbitrariness. This might occur because overwhelmed capital jurors experience information overload, and consequently disengage from the decision-making process and choose a result simply to end deliberations.

Part I of this Article reviews the Supreme Court's capital punishment jurisprudence and its attempt both to limit arbitrariness and enhance individualized capital sentencing. This Part also discusses the role of aggravating and mitigating factors in furthering those goals. Part II discusses information overload, a concept studied extensively in the marketing arena, but whose application to litigation has gone virtually undeveloped. Part III examines how aggravating and mitigating evidence arguably cause the capital jury to suffer from information overload and ultimately choose a capricious result. Finally, Part IV discusses various changes in the law, at both a constitutional and sub-constitutional level, which, if implemented, could lessen the degree of arbitrariness in capital cases by reducing the possibility that the capital jury will experience information overload. Specifically, we argue, it may well be bad policy to allow limitless aggravating evidence in the penalty-selection phase, and states should therefore eliminate evidence of future dangerousness, victim impact evidence, and other non-culpability related aggravating factors. In addition, because mitigating factors also contribute significantly to the information overload potentially experienced by the capital juror, we argue that the Supreme Court should re-think its current jurisprudence, which permits the capital defendant to introduce almost unlimited amounts of mitigating evidence. To reduce the amount of mitigating evidence that the defendant presents to the capital jury, the Supreme Court should allow states to limit mitigating evidence to that which relates to the defendant's culpability for the crime itself, broadly defined.

I. OUR MODERN CAPITAL PUNISHMENT REGIME: MINIMIZING ARBITRARINESS WHILE ENHANCING INDIVIDUALIZED SENTENCING

The Supreme Court has required, as a matter of federal constitutional law, that capital punishment regimes embody two distinct precepts. First, they must minimize arbitrariness in the imposition of capital punishment.² Second, they must provide for individualized sentencing of the capital defendant.³ At the heart of this system in the overwhelming majority of death penalty states is the capital jury and its consideration of aggravating and mitigating circumstances. The Court's goal has been "to develop a reasoned, consistent, and nonarbitrary system of inflicting the punishment of death."⁴

² See, e.g., *Godfrey*, 446 U.S. at 428; *Gregg*, 428 U.S. at 189.

³ See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

⁴ Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's*

A. Minimizing Arbitrariness in Death Penalty Cases Through the Use of Aggravating Circumstances

In 1972, the Supreme Court initiated a temporary moratorium with the “cornerstone decision”⁵ in death penalty jurisprudence, *Furman v. Georgia*.⁶ *Furman* indicated that, although capital punishment is an acceptable method for punishing violent criminals who commit murder,⁷ because Georgia’s capital sentencing regime provided the jury with “unrestrained discretion to decide whether to impose the death penalty,”⁸ it resulted in cruel and unusual punishment, thus violating the Eighth Amendment of the U.S. Constitution.⁹ As a result, the Supreme Court “effectively rendered then-existing death penalty laws functionally invalid,” thus imposing a temporary capital punishment moratorium.¹⁰

Because, however, *Furman* did not eliminate the death penalty per se,¹¹ following *Furman*, thirty-eight states altered their capital punishment statutes in an attempt to satisfy *Furman*’s ambition to avoid arbitrary and capricious application of the death penalty.¹² Subsequently, in the case of *Gregg v. Georgia*,¹³ the Supreme Court

Arbitrary and Mandatory Capital Punishment Scheme, 6 WM. & MARY BILL RTS. J. 345, 346 (1998).

⁵ James H.S. Levine, *Creole and Unusual Punishment—A Tenth Anniversary Examination of Louisiana’s Capital Rape Statute*, 51 VILL. L. REV. 417, 427–28 (2006).

⁶ 408 U.S. 238 (1972); see also Kirchmeier, *supra* note 4, at 352 (“In effect, the Court’s decision prevented the execution of all of the prisoners on death rows in the United States at the time.”) (citing FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 37 (1989)).

⁷ *Furman*, 408 U.S. at 306–07 (Stewart, J., concurring) (indicating that capital punishment is appropriate in limited cases); see also Carrie L. Flores, Comment, *The “Tie” Goes to the State in Kansas v. Marsh: A Small Victory for Proponents of the Death Penalty*, 42 VAL. U. L. REV. 675, 675 (2008).

⁸ Flores, *supra* note 7, at 679 n.23 (citing *Furman*, 408 U.S. 238).

⁹ U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

¹⁰ Rachel Ruttenberg, Note, *Equation of Death: Mitigating Factors Plus Aggravating Factors Equals Equipose!*, 28 WHITTIER L. REV. 1351, 1361 (2007).

¹¹ Kirchmeier, *supra* note 4, at 352.

¹² Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 147–48 (1988); see also Rob Warden, *Illinois Death Penalty Reform: How it Happened, What it Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 386 (2005) (indicating that, in response to *Furman*, thirty-eight state legislatures passed new capital sentencing laws with revised procedures that more appropriately address the problems discussed in *Furman*); Ruttenberg, *supra* note 10 (“[S]tate legislatures were sent into a ‘drafting frenzy’ and ‘over three-quarters of the states and the federal government have reenacted statutes allowing for capital sentencing for certain crimes,’ to bring their statutes in compliance with the demands of the Court.” (citations omitted)).

¹³ 428 U.S. 153 (1976).

determined that *Furman* did *not* require legislatures to fully eliminate the jury's discretion, but instead required that such discretion be "directed and limited."¹⁴ In other words, capital punishment schemes must provide the jury with guided, in contrast to unbridled, discretion during the trial's penalty phase.¹⁵

In particular, the Supreme Court placed its seal of approval upon several specific features that were present in states' updated death penalty regimes.¹⁶ First, the Supreme Court noted that, because the trial is bifurcated into a guilt phase and penalty phase,¹⁷ the jury has the ability, in the penalty phase, to focus solely upon the issue of death and its implications.¹⁸ Second, the Court noted the safeguard provided by automatic proportionality review by the highest state court in many death penalty schemes.¹⁹ Third, the Supreme Court noted that the updated capital punishment schemes permitted the capital jury to apply morals and mercy to the defendant by considering relevant mitigating circumstances.²⁰ Perhaps most significantly, however, the updated death penalty schemes channeled the jury's discretion by requiring the jury to find beyond a reasonable doubt at least one statutory aggravating factor beyond the mere fact of a murder in order to impose the death penalty.²¹

Aggravating factors serve two purposes. First, the presence of an aggravating factor renders the defendant eligible to be sentenced to death. Second, aggravating factors are then compared by the jury to any mitigating factors in selecting the defendant's sentence. Recent years have seen an increased amount of aggravating evidence at both the eligibility and selection stages.

¹⁴ *Id.* at 189.

¹⁵ *Id.* at 193 ("It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.").

¹⁶ *Id.* at 189–207.

¹⁷ See BLACK'S LAW DICTIONARY 1543 (8th ed. 2004) (defining a "bifurcated trial" as "[a] trial that is divided into two stages, such as for guilt and punishment or for liability and damages").

¹⁸ *Gregg*, 428 U.S. at 191–92 ("When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*."); see also Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 126 (2004) ("In a bifurcated trial, the sentencer was also able to put aside the question of guilt and focus freshly on evidence relevant to the appropriateness of death as punishment.").

¹⁹ *Gregg*, 428 U.S. at 198.

²⁰ *Id.* at 197 (upholding the portion of Georgia's death penalty statute that noted that "[t]he jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court").

²¹ *Id.* at 206 (noting that the jury "must find and identify at least one statutory aggravating factor before it may impose a penalty of death" and that "[i]n this way the jury's discretion is channeled").

1. Aggravating Factors as Eligibility Factors

An aggravating factor increases the enormity of the crime, thus singling it out for special, harsher treatment.²² In order to pass constitutional muster, “[a] capital sentencing scheme must . . . provide a ‘meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.’”²³ That is to say, the scheme “must channel the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’”²⁴ Thus, before imposing a death sentence, the capital jury must first find the existence of at least one statutory aggravating factor.²⁵ This initial step, which is often called the “eligibility phase,”²⁶ essentially determines whether the defendant is “death-eligible.”²⁷ In other words, aggravating factors narrow the class of death-eligible defendants, so as to prevent the death penalty from applying to every first-degree murder defendant,²⁸ thus determining which sub-classes of such defendants are eligible for the death penalty.²⁹ When used for this purpose, aggravating factors are sometimes referred to as “eligibility factors.”³⁰

“This narrowing requirement is usually met when the trier of fact finds at least one statutorily defined eligibility factor at either the guilt or penalty phase.”³¹ The narrowing function is satisfied at the guilt phase when the very definition of capital murder, as defined by the legislature, includes an aggravating factor.³² The narrowing

²² *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

²³ *Godfrey v. Georgia*, 446 U.S. 420, 427–28 (1980) (alteration in original) (quoting *Furman v. Georgia*, 408 U.S. 236, 313 (1972) (White, J., concurring)).

²⁴ *Id.* at 428 (citations omitted).

²⁵ *Gregg*, 428 U.S. at 206 (declaring that the jury “must find and identify at least one statutory aggravating factor before it may impose a penalty of death”).

²⁶ *Tuilaepa v. California*, 512 U.S. 967, 971 (1994) (distinguishing between the “eligibility” phase of the capital sentencing process and the “selection” phase).

²⁷ Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1544 (1998).

²⁸ *Id.* at 1545.

²⁹ Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, CHAMPION, Jan.–Feb. 1999, <http://www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/bee3ff4450880bb485256704006793eb?OpenDocument&Highlight=0,Stetler>.

³⁰ *See, e.g., Brown v. Sanders*, 546 U.S. 212, 217–18 (2006).

³¹ *Id.* at 216; *see also* 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, 7 (2006) (“Depending on a state’s statutory scheme, these eligibility factors may apply at sentencing as ‘aggravating factors’ or at the guilt phase as part of the definition of capital murder.”).

³² *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (“Here, the ‘narrowing function’ was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that ‘the offender has a specific intent to kill or to inflict great bodily harm upon more than one person.’”); *Jurek v. Texas*, 428 U.S. 262, 270–71 (1976)

function is satisfied at the sentencing phase when, after the capital jury has found the defendant guilty of murder, the jury subsequently determines that the prosecution has proven at least one statutory aggravating factor beyond a reasonable doubt.³³ If the prosecutor is unable to convince the capital jury beyond a reasonable doubt of the existence of at least one aggravating factor, then the defendant automatically becomes ineligible to receive the death penalty.³⁴ Because this is the prosecutor's first hurdle in obtaining a death penalty decision, the prosecutor has an incentive to establish multiple aggravating factors, thus increasing the amount of evidence being contemplated and analyzed by the capital jury.

2. Aggravating Factors as Selection Factors

Aggravating factors also serve a second purpose. Once the capital jury finds, either at the guilt phase or at the sentencing phase, that at least one aggravating factor has been proven beyond a reasonable doubt, and the defendant is therefore death eligible, the jury then considers the aggravating factor or factors, along with any mitigating factors, to determine whether the defendant will actually be sentenced to death.³⁵ This is known as the "selection phase."³⁶

Jurisdictions differ in two main respects regarding how the jury approaches aggravating factors at the selection stage. First, states differ in terms of whether and to what extent the jury is instructed to weigh or balance the aggravating and mitigating evidence.³⁷ Second, while some states permit the jury to consider aggravating factors not enumerated by statute, others do not.³⁸

a. Weighing vs. Non-Weighing States

Some states, sometimes known as "weighing" states, employ a structured, categorical approach to aggravating and mitigating circumstances.³⁹ In these states, after the capital jury finds the existence of one or more statutory aggravating circumstances,⁴⁰ the capital jury weighs the aggravating factors against any available mitigating evidence

("While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose." (citations omitted)).

³³ Kirchmeier, *supra* note 31, at 7–8 (noting that the narrowing function can occur at the sentencing portion of the trial via aggravating circumstances).

³⁴ *Id.* at 7.

³⁵ See *Tuilaepa v. California*, 512 U.S. 967, 971–72 (1977).

³⁶ *Id.* at 972.

³⁷ See *infra* Part I.A.2.a.

³⁸ See *infra* Part I.A.2.b.

³⁹ See *Zant v. Stephens*, 462 U.S. 862, 890 (1983).

⁴⁰ *Stringer v. Black*, 503 U.S. 222, 229 (1992).

to ultimately reach a punishment decision.⁴¹ The process “is meant to be a careful, thoughtful evaluation and assessment of all of the evidence presented.”⁴² The jury might be instructed that it may,⁴³ or even must,⁴⁴ return a verdict of death if aggravators outweigh mitigators.

In contrast, states that have been called “non-weighting” states do not utilize the same type of categorical structure.⁴⁵ Although the jury is still required to declare the defendant death eligible by finding the existence of at least one statutory aggravating factor, it is not specifically directed on how to choose between a life and death verdict.⁴⁶ Rather, “the decision is more open-ended, and the sentencer has complete discretion to decide between life and death.”⁴⁷

b. Statutory and Non-Statutory Aggravating Factors

The other primary difference among jurisdictions concerns whether the jury may consider non-statutory aggravating factors. In some states, the jury may consider at the selection stage only those aggravating factors enumerated by statute.⁴⁸ In most states,⁴⁹ however, the capital jury is permitted to consider in aggravation “facts other than or in addition to” the proven statutory aggravating factor(s) when determining whether to impose the death penalty.⁵⁰ The Supreme Court has approved the use of non-statutory aggravating factors.⁵¹ One scholar observed that the Court has, in effect, granted to the prosecutor in pursuing a capital sentence the same right it has granted to the defense in defending against it: “[T]he penalty trial is to be a free market in

⁴¹ *Id.*; see also *Brown v. Sanders*, 546 U.S. 212, 216–17 (2006); William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1063 (1995) (“[B]alancing’ statutes . . . list both aggravating and mitigating factors and ask jurors to weigh one against the other when making their punishment decision.”).

⁴² LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW § 11.01 (2d ed. 2008).

⁴³ See, e.g., MO. ANN. STAT. § 565.030(4) (West 2009) (indicating that defendant may be sentenced to life even if aggravators outweigh mitigators).

⁴⁴ See, e.g., *Boyd v. California*, 494 U.S. 370, 377 (1990) (rejecting petitioner’s argument that the “jury must have freedom to decline to impose the death penalty” under those circumstances).

⁴⁵ See *Brown*, 546 U.S. at 217; *Stringer*, 503 U.S. at 229–30.

⁴⁶ *Stringer*, 503 U.S. at 229–30.

⁴⁷ CARTER ET AL., *supra* note 42.

⁴⁸ See, e.g., FLA. STAT. ANN. § 921.141(5) (West 2006) (“Aggravating circumstances shall be limited to the following . . .”).

⁴⁹ See CARTER ET AL., *supra* note 42, § 11.04 (“Most jurisdictions allow the introduction and consideration of non-statutory aggravating evidence.”).

⁵⁰ Darian B. Taylor, *Capital Sentencing in Arizona: A “Weighing State” In Name Only*, 71 ARIZ. ATTY. 20, 20–21 (2006), available at <http://www.myazbar.org/AZAttorney/index.cfm?issue=71>.

⁵¹ See *Barclay v. Florida*, 463 U.S. 939 (1983) (plurality opinion).

information.”⁵² In essence, the Supreme Court will allow the prosecution to introduce any information that may potentially result in an aggravating factor, “without the constraint of legal categories.”⁵³ Accordingly, in most jurisdictions the number of aggravating factors, and therefore the amount of aggravating evidence, that the prosecutor can present to the jury at the selection stage is virtually limitless.

3. Two Common Types of Aggravating Evidence

Cataloguing all the different types of aggravating evidence, statutory and non-statutory, would be a monumental task. However, two types are of special note. Evidence of future dangerousness has dominated the death penalty decision and opened the door to virtually all evidence of a defendant’s bad character. Victim impact evidence is a common type of aggravating evidence that, unlike most aggravating and mitigating evidence, focuses not on the crime or the offender, but on the victim.

a. Evidence of Future Dangerousness

Evidence of future dangerousness has come to dominate the selection stage. Three states—Texas, Virginia, and Oregon—“expressly predicate death sentences on the future dangerousness of the defendant.”⁵⁴ Research has shown that in these states, “the fate of capital defendants ‘is determined almost entirely by juries’ deliberations on, and emotional responses to,’ the future dangerousness inquiry.”⁵⁵ These three states account for about forty-seven percent of all executions in the United States since 1976.⁵⁶ Of the other death penalty jurisdictions, about half expressly include future dangerousness as a statutory aggravating factor.⁵⁷ Most of the rest allow the jury to consider future dangerousness, either pursuant to more broadly worded statutory provisions⁵⁸ or as a non-statutory aggravating factor.⁵⁹

⁵² Bowers, *supra* note 41, at 1066.

⁵³ *Id.*

⁵⁴ Russell D. Covey, *Exorcizing Wechsler’s Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189, 216 (2004).

⁵⁵ *Id.* at 217 (quoting Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1252 nn.8–9 (2000)).

⁵⁶ See Death Penalty Information Center, *Executions in the United States, 1608–1976*, By State, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=1110> (last visited Apr. 20, 2009) (indicating 435 executions in Texas since 1976, 103 in Virginia, and two in Oregon); Death Penalty Information Center, *Executions by Year*, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=146> (last visited Apr. 20, 2009) (indicating 1156 executions in the U.S. since 1976).

⁵⁷ See Covey, *supra* note 54, at 216.

⁵⁸ See, e.g., *State v. Arguelles*, 63 P.3d 731, 758–59 (Utah 2003) (allowing consideration of “probability of future violence by [the] defendant” pursuant to statutory factor referring to “any other facts in aggravation . . . of the penalty” (citing UTAH CODE ANN. § 76-3-207(2)(a)(iv) (West 2009))).

⁵⁹ See, e.g., *United States v. Allen*, 247 F.3d 741, 788 (8th Cir. 2001) (considering future

The Supreme Court has concluded that an inference of future dangerousness may come from virtually anything the capital defendant has said or done. Thus, prosecutors have asked juries to find that the defendant poses a future danger based on his "criminal record, juvenile criminal record, past aggressive conduct, unproved prior bad acts, requests for psychiatric treatment, bad reputation, prison behavior, prison escapes, probation violations, alleged propensity to commit murder, lack of remorse, and general moral character,"⁶⁰ and even based on such innocuous acts as "'kick[ing] the bars of his [prison] cell following his arrest.'" ⁶¹ As a result, "the state's ability to present character evidence collateral to the circumstances of the crime for which the defendant is being sentenced is virtually unlimited."⁶² Moreover, in at least some jurisdictions, future dangerousness can be proved by expert testimony.⁶³ Not surprisingly, research has shown that discussion of a defendant's future dangerousness is "second only to the crime itself" in terms of the attention given during deliberations at the penalty phase.⁶⁴

b. Victim Impact Evidence

Another especially common, and controversial, form of aggravating evidence is victim impact evidence.⁶⁵ "Victim impact evidence is a form of evidence that describes the effect of the crime on the victim and, more specifically, on the victim's family."⁶⁶ The Supreme Court initially held in *Booth v. Maryland* that the use of victim impact evidence violated the Eighth Amendment, on the ground that such

dangerousness as a non-statutory aggravating factor).

⁶⁰ Covey, *supra* note 54, at 218 (footnotes and internal quotation marks omitted).

⁶¹ *Id.* at 219 (quoting *Skipper v. South Carolina*, 476 U.S. 1, 9–10 (1986) (Powell, J., concurring)).

⁶² *Id.* at 219.

⁶³ See *id.* at 220–21 (explaining the effectiveness of expert testimony as to future dangerousness as a "prosecutorial tool").

⁶⁴ John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 404 (2001).

⁶⁵ RICHARD C. DIETER, DEATH PENALTY INFO. CTR., BLIND JUSTICE: JURIES DECIDING LIFE AND DEATH WITH ONLY HALF THE TRUTH 20–21 (Oct. 2005), <http://www.deathpenaltyinfo.org/BlindJusticeReport.pdf> ("In almost every state, as the jurors are beginning to grapple with the difficult life-and-death question before them, the prosecution presents a series of witnesses who are relatives of the deceased victim.").

⁶⁶ Jason Elliot Nard, Comment, *Pennsylvania's Capital Statute: Does the Introduction of Victim Impact Evidence—Into the Evaluation of Mitigating and Aggravating Circumstances—At the Sentencing Hearing of a Murder Trial Introduce Unjust Prejudice into the Imposition of the Death Penalty?*, 42 DUQ. L. REV. 825, 827 (2004); see also *Booth v. Maryland*, 482 U.S. 496, 499 (1987) ("Although the [victim impact evidence] is compiled by the [Division of Parole and Probation], the information is supplied by the victim or the victim's family. The [victim impact evidence] may be read to the jury during the sentencing phase, or the family members may be called to testify as to the information." (citation omitted)).

evidence served “no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant.”⁶⁷ The Supreme Court subsequently performed a one-hundred-and-eighty-degree turn, reversing its previous decision in *Booth*, holding in *Payne v. Tennessee* that the use of victim impact evidence does not violate the Constitution.⁶⁸ As with evidence of future dangerousness, most death penalty jurisdictions specifically authorize by statute the introduction of victim impact evidence at the selection stage.⁶⁹ Others allow such evidence under more broadly worded statutory provisions.⁷⁰

The victim witnesses typically include the victim’s relatives, who express the loss suffered by the victim’s family and friends as a result of the victim’s death.⁷¹ However, in the vast majority of jurisdictions that allow victim impact evidence, prosecutors are permitted to introduce testimony from those beyond the confines of the victim’s family.⁷² Moreover, regardless of who testifies, courts have allowed juries to consider evidence regarding the impact of the killing on those far beyond the victim’s family and close friends. For example, in one case, the victim’s neighbor testified about the impact of the killing on listeners of a local radio call-in show,⁷³ and in another, the sentencer heard evidence concerning the loss to the local community resulting from the victim’s death.⁷⁴ Courts have also allowed victim impact evidence to take the form of “videotape presentations depicting a victim’s life prior to the murder, often narrated by a member of the family.”⁷⁵

4. The Growth in Aggravating Factors: The California Example

Because the Supreme Court permits each individual state to develop and implement its own capital sentencing scheme, aggravating factors vary significantly from

⁶⁷ *Booth*, 482 U.S. at 508–09.

⁶⁸ 501 U.S. 808, 825–27 (1991).

⁶⁹ CARTER ET AL., *supra* note 42, § 11.03.

⁷⁰ See, e.g., *People v. Edwards*, 819 P.2d 436, 467 (Cal. 1991) (holding victim impact evidence admissible pursuant to CAL. PENAL CODE § 190.3(a), which allows jury consideration in the selection stage of “[t]he circumstances of the crime”).

⁷¹ DIETER, *supra* note 65, at 20.

⁷² See CARTER ET AL., *supra* note 42, § 11.03 (“[T]he tendency of the courts has been to expand the universe of witnesses who may testify.”).

⁷³ *McClain v. State*, 477 S.E.2d 814, 824 (Ga. 1996).

⁷⁴ *Moore v. State*, 701 So. 2d 545, 551 (Fla. 1997).

⁷⁵ CARTER ET AL., *supra* note 42, § 11.03 (citing *Hicks v. State*, 940 S.W.2d 855, 857 (Ark. 1997); *Whittlesey v. State*, 665 A.2d 223, 251 (Md. 1995)). Recently, a defendant in one such case fell one vote short of obtaining review by the U.S. Supreme Court of the question whether such a videotaped presentation goes beyond what is permissible pursuant to *Payne v. Tennessee*, 501 U.S. 808, 825–27 (1991). See *Kelly v. California*, 129 S. Ct. 564 (2008) (Stevens, J., respecting denial of certiorari); *Kelly v. California*, 129 S. Ct. 567 (2008) (Breyer, J., dissenting from denial of certiorari). The full twenty-minute video shown to the jury in the case can be downloaded from http://www.supremecourtus.gov/opinions/video/kelly_v_california.html.

state to state.⁷⁶ States differ, for example, in the number of statutory aggravating factors contained in their capital punishment statutes. The aggravating factors that legislatures deem applicable range from facts surrounding the murder itself,⁷⁷ to the motivation for the murder,⁷⁸ to the status of the defendant or the victim.⁷⁹ Some states' statutory aggravating factor schemes include fewer than ten statutory aggravating circumstances,⁸⁰ while, in contrast, other states have more than twenty statutory aggravating factors.⁸¹ In recent years, many states have continued to expand the coverage of their capital punishment statutes with additional aggravating factors.⁸²

California, for example, has implemented one of the most expansive statutory aggravating factor schemes currently in existence.⁸³ It includes twenty-four⁸⁴ statutory aggravating circumstances, labeled "special circumstances," which the capital jury may consider when making its punishment decision.⁸⁵ Nine of these

⁷⁶ Ruttenberg, *supra* note 10, at 1360 ("States exhibit differing views on the death penalty and the means by which they impose such a sentence on a capital defendant."). See Kirchmeier, *supra* note 4, and Kirchmeier, *supra* note 31, for a comprehensive review of statutory aggravating factors among all states permitting capital punishment.

⁷⁷ See, e.g., ALA. CODE § 13 A-5-49(8) (2008) ("The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses."); MONT. CODE ANN. § 46-18-303(1)(a)(iv) (2007) ("[B]y an offender lying in wait or ambush."); UTAH CODE ANN. § 76-5-202(1)(p) (West 2007) ("[T]he homicide was committed by means of the administration of a poison or of any lethal substance or of any substance administered in a lethal amount, dosage, or quantity.").

⁷⁸ ARK. CODE ANN. § 5-4-604(6) (West 2007) ("The capital murder was committed for pecuniary gain."); N.C. GEN. STAT. ANN. § 15A-2000(e)(4) (West 2007) ("The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.").

⁷⁹ IDAHO CODE ANN. § 19-2515(9)(i) (2008) ("The defendant, by his conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society."); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(11) (2008) ("The offender was engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance . . .").

⁸⁰ See, e.g., KY. REV. STAT. ANN. § 532.025(2)(a) (West 2006) (listing eight statutory aggravating factors); CONN. GEN. STAT. ANN. § 53a-46a(i) (West 2008) (same).

⁸¹ See, e.g., DEL. CODE ANN. tit. 11, § 4209(e)(1) (2008) (listing twenty-two statutory aggravating factors); 720 ILL. COMP. STAT. ANN. 5/9-1(b) (West 2008) (listing twenty-one statutory aggravating factors).

⁸² Kirchmeier, *supra* note 31, at 12–14, 25 (noting that "more than twenty different state legislatures expanded their death penalties by adding factors that make one eligible for the death penalty" from 1996 to 2006).

⁸³ CAL. PENAL CODE § 190.2(a) (West 2008).

⁸⁴ *Id.* Although the statute lists only twenty-two aggravating circumstances, two of these, relating to the killing of peace officers and federal agents, each encompass two separate circumstances, depending upon whether the victim was killed because of his status or, rather, the defendant merely knew or should have known of the status. See *infra* notes 88–91.

⁸⁵ CAL. PENAL CODE § 190.2(a); see also Shiva Shirazi Davoudian, *California Homicide Law: The Basics*, 36 LOY. L.A. L. REV. 1375, 1391 (2003).

special circumstances relate solely to the facts of the killing itself, such as how it was carried out or how many people were killed by the defendant.⁸⁶ Another ten relate to the motivation behind the killing, either by itself⁸⁷ or in conjunction with the status of the victim.⁸⁸ Three relate solely to the status of the victim,⁸⁹ while one relates solely to the status of the defendant⁹⁰ and another relates to his status in conjunction with a motivation for the killing.⁹¹ Moreover, in selecting the appropriate sentence, capital juries in California are further directed to consider such non-crime-related factors as whether the defendant has previously been convicted of a felony⁹² and whether he previously has used or threatened the use of force or violence in connection with previous criminal activity.⁹³ Finally, California allows the capital jury to consider non-statutory aggravating factors, beyond the proven statutory aggravating

⁸⁶ CAL. PENAL CODE § 190.2(a)(3) (a defendant “convicted of more than one offense of murder in the first or second degree” in a single proceeding); *id.* § 190.2(a)(4), (6) (“murder . . . committed by means of a destructive device, bomb, or explosive,” either concealed or intended for delivery via mail); *id.* § 190.2(a)(14) (“murder . . . especially heinous, atrocious, or cruel”); *id.* § 190.2(a)(15) (“The defendant intentionally killed the victim by means of lying in wait.”); *id.* § 190.2(a)(17) (murder, whether intentional or not, committed during commission or attempted commission of an enumerated felony, or during immediate flight therefrom); *id.* § 190.2(a)(18) (“The murder was intentional and involved the infliction of torture.”); *id.* § 190.2(a)(19) (“The defendant intentionally killed the victim by the administration of poison.”); *id.* § 190.2(a)(21) (stating that intentional murder “perpetrated by means of discharging a firearm from a motor vehicle”).

⁸⁷ *Id.* § 190.2(a)(1) (intentional murder “carried out for financial gain”); *id.* § 190.2(a)(5) (“The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody.”); *id.* § 190.2(a)(16) (“The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin.”). We include this last category as a “motive” special circumstance rather than as “victim status” special circumstance for the simple reason that *every* victim will have a “race, color, religion [or lack thereof], nationality, or country of origin,” and the special circumstance applies only when the victim is killed *because of* that status.

⁸⁸ *Id.* § 190.2(a)(7)–(8) (victim was either a “peace officer,” “former peace officer,” or “federal law enforcement officer or agent” who was “intentionally killed in retaliation for the performance of his or her official duties”); *id.* § 190.2(a)(10) (witness elimination or retaliation); *id.* § 190.2(a)(11)–(13), (20) (prosecutor, judge, or other elected or appointed federal or state official, or juror, killed “in retaliation for, or to prevent the performance of, the victim’s official duties”).

⁸⁹ *Id.* § 190.2(a)(7)–(9) (victim was either “peace officer,” “federal law enforcement officer or agent,” or “firefighter” killed intentionally while engaged in official duties, and defendant was at least negligent as to victim’s status).

⁹⁰ *Id.* § 190.2(a)(2) (“The defendant was convicted previously of murder in the first or second degree.”).

⁹¹ *Id.* § 190.2(a)(22) (“The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang . . . and the murder was carried out to further the activities of the criminal street gang.”).

⁹² *Id.* § 190.3(c).

⁹³ *Id.* § 190.3(b).

factor(s), in its weighing decision.⁹⁴ These include future dangerousness⁹⁵ and victim impact evidence.⁹⁶

The current plethora of aggravating factors in some jurisdictions provide prosecutors with additional ammunition, thus increasing the probability that the prosecutor will present multiple aggravating factors to the capital jury to ensure that the capital jury finds at least one aggravating factor beyond a reasonable doubt.⁹⁷ In turn, unless there is a substantial overlap in the relevant aggravating factors, the amount of evidence prosecutors can introduce increases concomitantly. In other words, providing even more aggravating factors from which the prosecutor can choose results in the prosecutor presenting more aggravating evidence to the capital jury. Thus, the capital jury is bombarded with even more information to process and analyze.

B. Enhancing Individuation in Death Penalty Cases Through the Use of Mitigating Factors

The second element to the capital jury's death penalty decision involves consideration of mitigating circumstances. Mitigating circumstances are factors that the defendant "proffers as a basis for a sentence less than death."⁹⁸ In contrast to aggravating factors, which are utilized in both the eligibility and the selection phases, mitigating factors are utilized exclusively in the latter.⁹⁹ Death penalty statutes typically enumerate potentially applicable mitigating factors.¹⁰⁰ Many of these schemes borrow the Model Penal Code's eight mitigating factors that the judge must allow the jury to consider, so long as each factor is supported by the evidence.¹⁰¹ Two of these relate

⁹⁴ Taylor, *supra* note 50, at 20, 22 n.5.

⁹⁵ See *People v. Michaels*, 49 P.3d 1032, 1065–66 (Cal. 2002) (allowing prosecutorial statements on future dangerousness when supported by evidence admitted pursuant to CAL. PENAL CODE § 190.3).

⁹⁶ See *People v. Zamudio*, 181 P.3d 105, 134–35 (Cal. 2008), *cert. denied*, 129 S. Ct. 564 (2008). Technically, introduction of victim impact evidence in California is authorized pursuant to CAL. PENAL CODE § 190.3(a), which allows jury consideration in the selection stage of "[t]he circumstances of the crime." Reading this provision as an open-ended invitation to consider the characteristics of the victim, however, is akin to allowing non-statutory aggravating evidence.

⁹⁷ Kirchmeier, *supra* note 31, at 4.

⁹⁸ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); see also *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990); *Mills v. Maryland*, 486 U.S. 367, 374–75 (1988); *Hitchcock v. Dugger*, 481 U.S. 393, 398–99 (1987).

⁹⁹ Stetler, *supra* note 29. Aggravating factors are used both in the eligibility phase and in the selection phase because aggravating factors must be considered along with the mitigating factors in determining the ultimate punishment. See *id.*

¹⁰⁰ Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909, 941 (2005).

¹⁰¹ MODEL PENAL CODE § 210.6(4) (1980).

to the status of the defendant: his lack of a "significant history of prior criminal activity" and his youth.¹⁰² The other six relate to the facts and circumstances of the crime: that "[t]he victim was a participant in the defendant's homicidal conduct or consented to the homicidal act," that the defendant's "participation in the homicidal act was relatively minor," and that the defendant was acting "under the influence of extreme mental or emotional disturbance," a belief in the "moral justification or extenuation for his conduct," duress, or a mental impairment.¹⁰³

However, as a matter of constitutional law, potentially applicable mitigating factors extend far beyond these few. The Supreme Court has declared that the Eighth Amendment mandates that states permit the jury to hear and consider virtually all mitigating evidence.¹⁰⁴ It is irrelevant if the presented mitigating evidence is wholly divorced from the criminal act; in order for the jury to accomplish an individualized determination, the defendant is permitted to showcase all relevant mitigating evidence.¹⁰⁵

The Supreme Court laid the foundation for capital punishment's individualized sentencing requirement in *Furman*¹⁰⁶ and *Gregg*.¹⁰⁷ However, the Supreme Court began to focus its attention upon mitigating evidence in *Gregg*'s companion case, *Woodson v. North Carolina*.¹⁰⁸ The Court there declared unconstitutional a statute that made the death penalty mandatory upon commission of a capital offense, without consideration of any individual characteristics of the defendant.¹⁰⁹ The Court wrote:

While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.¹¹⁰

¹⁰² *Id.* § 210.6(4)(a), (h).

¹⁰³ *Id.* § 210.6(4)(b)–(g).

¹⁰⁴ *Walton v. Arizona*, 497 U.S. 639, 651–52 (1990).

¹⁰⁵ *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998).

¹⁰⁶ *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972). In a separate opinion, Justice White concluded that the death penalty, without legislative guidelines, violated the Eighth Amendment because it afforded "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not." *Id.* at 313 (White, J., concurring).

¹⁰⁷ *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (finding Georgia's capital punishment statute did not violate the Constitution because, among other things, the statute permitted the capital jury to consider mitigating evidence, thus channeling the jury's discretion).

¹⁰⁸ 428 U.S. 280 (1976).

¹⁰⁹ *Id.* at 304.

¹¹⁰ *Id.* (citations omitted).

The Supreme Court fully circled the wagons around the constitutional basis of mitigating evidence in *Lockett v. Ohio*.¹¹¹ In particular, the Supreme Court reasoned that, given the death penalty's finality and irreversibility, individualized analysis and consideration is crucial.¹¹² The Supreme Court ultimately held, as a constitutional mandate, that the sentencer must be allowed to consider all facets of the defendant's circumstances and case as mitigating evidence, and capital sentencing schemes that "prevent[] the sentencer . . . from giving independent mitigating weight to aspects of the defendant's character . . . proffered in mitigation" are unconstitutional per se.¹¹³ In essence, the *Lockett* decision declared that the capital jury's task of analyzing and considering mitigating evidence involves "a unique moral decision different in kind from the factfinding of the guilt determination,"¹¹⁴ involving the "highly-charged moral and emotional issue of whether the defendant, notwithstanding his crimes, is a person who should continue to live."¹¹⁵

In addition, mitigating evidence is not limited to factors concerning the defendant's character or circumstances prior to the crime.¹¹⁶ Evidence, such as "good behavior" while in jail awaiting trial or post-crime redemption must be considered by the capital jury, even though it does not directly relate to the defendant's culpability for the committed crime because it is clear that such evidence "would be 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'"¹¹⁷ Moreover, the Supreme Court essentially demands that defense counsel, after conducting the necessary investigation, provide at least *some* mitigating evidence from which the jury could conclude that the defendant deserves life over death.¹¹⁸ The Supreme Court has overturned death sentences where defense counsel failed to investigate and present mitigating evidence for the defendant, reasoning that, "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance."¹¹⁹

The defense counsel's investigation may produce multiple mitigating factors in many shapes and forms.¹²⁰ Mitigating factors that are often presented by the defendant include childhood abuse, substance abuse or addiction, a caring family, the absence of a criminal record, the defendant's age, the defendant and his family's mental history,

¹¹¹ 438 U.S. 586, 604 (1978).

¹¹² *Id.*

¹¹³ *Id.* at 604–05.

¹¹⁴ Bowers, *supra* note 41, at 1065.

¹¹⁵ Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 334–35 (1983).

¹¹⁶ See Skipper v. South Carolina, 476 U.S. 1, 4 (1986).

¹¹⁷ *Id.* at 4–5 (quoting *Lockett*, 438 U.S. at 604).

¹¹⁸ See Wiggins v. Smith, 539 U.S. 510, 513 (2003).

¹¹⁹ *Id.* at 537.

¹²⁰ See Garvey, *supra* note 27, at 1559–60 (showing results of a survey asking jurors what mitigating and aggravating factors would make them vote for life or for death).

whether the defendant had a background of extreme poverty, defendant's remorse, and whether defendant was ever institutionalized and received the necessary help.¹²¹

The Supreme Court has refined its mitigating factor jurisprudence by allowing the states a modicum of flexibility in structuring what juries may do with the mitigating evidence they hear. First, although a court cannot prevent the defendant from presenting all relevant mitigating information, each individual state retains the power to "structure" how a capital jury receives the mitigating evidence.¹²² For example, a state may require that the jury consider some mitigating evidence, such as youthfulness, only as it bears on particular issues made relevant by the death penalty statute itself, such as future dangerousness.¹²³ Moreover, the Supreme Court has declared that a capital sentencing statute that requires the defendant to bear the burden of establishing all mitigating circumstances by a preponderance of the evidence does not violate the Constitution.¹²⁴ On the other hand, a state may not require that the jury find mitigating factors unanimously or beyond a reasonable doubt for individual jurors to consider them.¹²⁵ Thus, although states retain some power to define the structure of the consideration of mitigating factors, they work within the narrow parameters of the Eighth Amendment.¹²⁶

C. The Unique Function of the Capital Jury

Following *Furman*, the Supreme Court moved towards an Aristotelian

need to rely on the practical judgment of persons to explore the moral "contours" of the crooked way general legal rules fit particular circumstances[:]. Aristotle drew a distinction between legal justice, defined by general rules, and moral equity, defined as the discretionary judgment it takes to "rectify" the inevitable shortcomings of general legal rules. His distinction seems implicit in the Court's emphasis on the need to leave the sentencing judge or jury with the obligation and the authority to consider any mitigat-

¹²¹ Vivian Berger, "Black Box Decisions" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham, 41 CASE W. RES. L. REV. 1067, 1082 (1991); Garvey, *supra* note 27, at 1559–60.

¹²² See *Johnson v. Texas*, 509 U.S. 350, 362 (1993) ("States are free to structure and shape consideration of mitigating evidence . . .").

¹²³ *Id.*

¹²⁴ *Walton v. Arizona*, 497 U.S. 639, 650 (1990). The Eighth and Fourteenth Amendments are not violated by putting the burden on the defendant, to establish by a preponderance of the evidence, the existence of mitigating circumstances that are "sufficiently substantial to call for leniency." *Id.*

¹²⁵ DIETER, *supra* note 65, at 23.

¹²⁶ Garvey, *supra* note 27, at 1561.

ing factor and to withhold imposing a death sentence even as a pure act of mercy or leniency.¹²⁷

Moreover, as noted by Justice Stevens, the death penalty “is the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules, but rather is ultimately understood only as an expression of the community’s outrage—its sense that an individual has lost his moral entitlement to live.”¹²⁸ The states generally have delegated to the jury the task of deciding whether the defendant lives or dies, requiring, during the penalty phase, that the jury compare the aggravating and mitigating factors.¹²⁹

The Supreme Court has held that the Constitution does not require jury sentencing in capital cases.¹³⁰ Nevertheless, in the overwhelming majority of death penalty jurisdictions, the jury performs the sentencing task. The jury is clothed with this distinctive role because it is thought, in determining whether the defendant deserves life or death, that capital jurors represent the “conscience of the community.”¹³¹ Therefore, the capital jury takes on a unique function within the capital punishment context, transforming from a creature merely following the letter of the law, to individuals applying notions of morality, mercy, and emotion, to ultimately determine the defendant’s final punishment.¹³²

Because each capital juror relies heavily on morals, ethics, and mercy while contemplating, and ultimately determining, whether to impose death, it is inevitable that each juror will infuse very personal considerations into the ultimate punishment decision. This in and of itself contributes to the impact the capital trial has on the jury. The capital jury’s task requires each juror to undergo intense personal deliberation, and is thus filled with uneasiness and apprehension.¹³³ Because mercy, morality, and emotion play such intricate roles in the capital jury’s punishment decision, the impact of aggravating and mitigating factors upon the capital jury is increasingly intense. Capital jurors must not only absorb the mere facts of the case, but they must also perform their task in an unfamiliar setting while applying novel, and often ambiguous, legal concepts:

¹²⁷ Abramson, *supra* note 18, at 120–21 (citing ARISTOTLE, NICOMACHEAN ETHICS 141 (Martin Ostwald trans., Prentice Hall 1962); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Caldwell v. Mississippi*, 472 U.S. 320 (1985)).

¹²⁸ *Spaziano v. Florida*, 468 U.S. 447, 468–69 (1984) (Stevens, J., concurring in part and dissenting in part).

¹²⁹ Bowers, *supra* note 41, at 1066.

¹³⁰ See *Spaziano*, 468 U.S. at 460–65; see also *Ring v. Arizona*, 536 U.S. 584, 612–13 (2002) (Scalia, J., concurring).

¹³¹ DIETER, *supra* note 65, at 22.

¹³² See *Spaziano*, 468 U.S. at 468–69 (Stevens, J., concurring in part and dissenting in part).

¹³³ Bowers, *supra* note 41, at 1071.

The dislocation from the routines of everyday life, the unfamiliarity of the sentencing task, the public exposure to which it subjects the jury, the unsettling experience of learning about a frightening crime in minute and graphic detail, the impact of finding another human being guilty of such a crime, and then the necessity of switching "frames" of understanding from one phase of the trial to the other, the incommensurable nature of the two types of evidence that must be "weighed" in the penalty phase, the inherent subjectivity and moral relativity of the penalty decision, and the burden of choosing between life and death can all create ambiguity . . . [and] can leave the jury with uncertainties and anxiety about what they are supposed to do.¹³⁴

Ultimately, the combination of all the requirements discussed above, situational imperfections and inner, emotional factors result in the capital jury having to not only reconcile death and life, but to also analyze and process quantities of information above and beyond that of a typical jury.

II. INFORMATION OVERLOAD

Despite the Supreme Court's attempt to reduce arbitrary death penalty results, critics have argued that arbitrariness continues to plague the capital punishment system. One scholar has argued that the excessive numbers of aggravating factors in many jurisdictions render those death penalty regimes virtually indistinguishable from the pre-*Furman* schemes that subjected every murderer to death and vested full discretion in the jury, thus permitting arbitrariness to continuously infect the death penalty system.¹³⁵ Moreover, Justices Blackmun¹³⁶ and Scalia¹³⁷ have taken the position that the *Furman* line of cases, mandating that capital punishment schemes channel the capital jury's discretion and narrow the class of eligible defendants,¹³⁸ is inherently inconsistent with the *Woodson/Lockett* line of cases, requiring that capital punishment schemes utilize individualized sentencing.¹³⁹ Both have argued that the

¹³⁴ Lorelei Sontag, *Deciding Death: A Legal and Empirical Analysis of Penalty Phase Jury Instructions and Capital Decision-Making* 80 (June 1990) (unpublished Ph.D. dissertation, University of California, Santa Cruz) (printed by UMI Dissertation Services).

¹³⁵ See Kirchmeier, *supra* note 31, at 4.

¹³⁶ See *Callins v. Collins*, 510 U.S. 1141, 1151–52 (1994) (Blackmun, J., dissenting from denial of cert.) (describing the incompatible commands of death penalty jurisprudence).

¹³⁷ See *Walton v. Arizona*, 497 U.S. 639, 664 (1990) (Scalia, J., concurring in part and concurring in the judgment) (stating he would no longer apply the principle of *Woodson* and *Lockett* that a sentencer may not be prohibited from considering any mitigating factor).

¹³⁸ Kirchmeier, *supra* note 4, at 346; see also *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

¹³⁹ *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978); *Woodson v. North Carolina*, 428 U.S.

inconsistency between the *Furman* and *Woodson/Lockett* lines of cases have effectively diluted the Court's endeavor to eradicate arbitrariness.¹⁴⁰ Without taking a position on these criticisms, we now explore the marketing- and business-based doctrine of information overload, which suggests an additional way in which arbitrariness infuses the death penalty.

A. What Is Information Overload?

Because Americans thrive on the freedom and the potential value of choice, the notion that more choice is better has become standard in American society. Conventional theory posits "that more choices are preferable to fewer choices."¹⁴¹ Most social scientists agree that, because people are rational human beings, additional options and choices enhance our society.¹⁴² People value information.¹⁴³ They "want information because it is empowering. Information enables those who have it to make informed decisions . . ."¹⁴⁴ Thus, information is categorically considered valuable.¹⁴⁵ The classic hypothesis presumes that decision-making quality and information quantity form a linear function; as information quantity increases, so does decision quality.¹⁴⁶

Despite this seemingly compelling conclusion, persuasive evidence to the contrary has been developed. "Psychologists, economists, policy-makers, sociologists, philosophers and ordinary people" are becoming increasingly concerned that Americans have too much information.¹⁴⁷ They have asserted that the value of information, like the value of most things we think are generally good, is contingent, not essential, and depends on circumstances and conditions other than the conceptual properties of information.¹⁴⁸ We do ourselves no favor, they argue, when we equate liberty too directly with choice, as if we necessarily increase freedom by increasing the number

280, 304 (1976).

¹⁴⁰ Kirchmeier, *supra* note 4, at 346–49.

¹⁴¹ Natalie Ram, *Tiered Consent and the Tyranny of Choice*, 48 JURIMETRICS 253, 269 (2008).

¹⁴² BARRY SCHWARTZ, *THE PARADOX OF CHOICE* 19 (2004).

¹⁴³ See Kenneth Einar Himma, *The Concept of Information Overload: A Preliminary Step in Understanding the Nature of a Harmful Information-Related Condition*, 9 ETHICS & INFO. TECH. 259, 260 (2007) (explaining various views on the value of information); see also Francis Heylighen, *Complexity and Information Overload in Society: Why Increasing Efficiency Leads to Decreasing Control* 11 (Apr. 12, 2002) (unpublished draft paper), available at <http://pespmc1.vub.ac.be/Papers/Info-Overload.pdf> ("During most of history, information was a scarce resource that was of the greatest value to the small elite that had access to it.").

¹⁴⁴ Troy A. Paredes, *Blinded By the Light: Information Overload and Its Consequences For Securities Regulation*, 81 WASH. U. L.Q. 417, 431 (2003).

¹⁴⁵ See Himma, *supra* note 143, at 260.

¹⁴⁶ See Paredes, *supra* note 144, at 440.

¹⁴⁷ Himma, *supra* note 143, at 260.

¹⁴⁸ *Id.*

of options available.¹⁴⁹ Accordingly, researchers have arrived at the nuanced proposition that although “*some* choice is good [it] doesn’t necessarily mean that *more* choice is better.”¹⁵⁰

This conclusion is grounded in the central insight that “bounded rationality” confines people’s decision-making abilities.¹⁵¹ The bounded rationality theory suggests that “people can only process a finite amount of information during any particular period of time.”¹⁵² Thus, although choice is an essential part of American society, abundant choice is self-defeating, resulting in uninspired decision-making, decreased satisfaction, and remorse when choices are made.¹⁵³ Americans’ desire to receive abundant information, in order to enhance our decision-making ability, has ultimately resulted in poor decision making and subsequently poorer decisions.¹⁵⁴ This phenomenon is commonly known as information overload.

The phrase “information overload” describes the situation where an individual receives too much information, thus becoming overwhelmed and confused.¹⁵⁵ Information overload takes on distinct, yet similar, definitions, depending upon the context in which it is being analyzed. The notion of information overload has been developed primarily within the marketing and business context,¹⁵⁶ in studying such areas as accounting,¹⁵⁷ management,¹⁵⁸ and, particularly, consumer research.¹⁵⁹ The classic,

¹⁴⁹ See *id.* at 270.

¹⁵⁰ SCHWARTZ, *supra* note 142, at 3. Not all researchers have agreed with this proposition. See, e.g., David M. Grether et al., *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 301 (1986) (“[T]he information overload idea—that too much information causes disfunction—is a myth.”). Because a response to this minority view would not be complete without exploring how information overload might affect capital jurors, we postpone such a response until Part III.A *infra*.

¹⁵¹ Paredes, *supra* note 144, at 440–41.

¹⁵² *Id.*

¹⁵³ Ram, *supra* note 141, at 269.

¹⁵⁴ See generally *id.* (discussing the pitfalls of abundant choice, including arbitrary selection and regret).

¹⁵⁵ Kathleen M. Sutcliffe & Karl E. Weick, *Information Overload Revisited*, in HANDBOOK OF ORGANIZATIONAL DECISION MAKING 56 (W. Starbuck & G. Hodgkinson eds., 2008).

¹⁵⁶ See Martin J. Eppler & Jeanne Mengis, *The Concept of Information Overload: A Review of Literature from Organization Science, Accounting, Marketing, MIS, and Related Disciplines*, 20 INFO. SOC’Y 325, 326 (2004) (examining the theoretical basis of information overload discourse in these disciplines).

¹⁵⁷ See, e.g., Allen G. Schick et al., *Information Overload: A Temporal Approach*, 15 ACCT., ORGS. & SOC’Y 199, 199–220 (1990) (“Given that accountants are major providers of information to decision makers, information overload has become an important accounting concern.”).

¹⁵⁸ See, e.g., Mary-Liz Grisé & R. Brent Gallupe, *Information Overload: Addressing the Productivity Paradox in Face-to-Face Electronic Meetings*, 16 J. MGMT. INFO. SYSTEMS 157, 157–85 (1999) (examining how to lead more effective meetings in the face of information overload).

¹⁵⁹ See, e.g., Jacob Jacoby, *Perspectives on Information Overload*, 10 J. CONSUMER RES.

general concept of information overload “compares the individual’s information-processing capacity (i.e., the quantity of information one can integrate into the decision-making process within a specific time period) with the information-processing requirements (i.e., the amount of information one has to integrate in order to complete a task).”¹⁶⁰ Over the past decade, the term “information overload” has morphed into idioms such as “information glut,” “data smog,”¹⁶¹ and information fatigue.¹⁶² Now, “[w]hat was once a term grounded in cognitive psychology has evolved into a rich metaphor used outside the world of academia.”¹⁶³

Herbert Simon, the “godfather” of information overload, developed a working model of information overload.¹⁶⁴ Simon used an inverted U-curve model, shown in Figure 1, to represent the point at which the decision maker supposedly experiences information overload.¹⁶⁵ As the inverted U-curve suggests, the information overload point occurs “where the amount of information actually integrated into the decision begins to decline.”¹⁶⁶ Beyond this point, decision quality decreases and the decision maker begins to remove him- or herself from the decision-making process.¹⁶⁷

432, 432–36 (1984); Kevin Lane Keller & Richard Staelin, *Effects of Quality and Quantity of Information on Decision Effectiveness*, 14 J. CONSUMER RES. 200, 200–13 (1987); Naresh K. Malhotra, *Reflections on the Information Overload Paradigm in Consumer Decision Making*, 10 J. CONSUMER RES. 436, 436–40 (1984).

¹⁶⁰ Eppler & Mengis, *supra* note 156, at 326. Eppler notes that this basic information overload definition can also be elucidated using the following *modus operandi*: “information processing requirements > information processing capacities.” *Id.*; see also Gary L. Hunter, *Information Overload: Guidance for Identifying When Information Becomes Detrimental to Sales Force Performance*, 24 J. PERS. SELLING & SALES MGMT. 91, 91 (2004) (defining information overload as “a state induced by a level of information exceeding the ability of an individual to assimilate or process during a given unit of time”); David Glen Mick et al., *Choose, Choose, Choose, Choose, Choose, Choose, Choose: Emerging and Prospective Research on the Deleterious Effects of Living in Consumer Hyperchoice*, 52 J. BUS. ETHICS 207, 208 (2004) (defining information overload as the “multiplicative function of the amount of product attributes and alternative information available for a single decision”); Charles A. O’Reilly, III, *Individuals and Information Overload in Organizations: Is More Necessarily Better?*, 23 ACAD. MGMT. J. 684, 684 (1980) (declaring that information overload occurs when information processing capabilities and the information loads encountered are mismatched); Cheri Speier et al., *The Influence of Task Interruption on Individual Decision Making: An Information Overload Perspective*, 30 DECISION SCI. 337, 338 (1999) (defining information overload as a state induced “when the amount of input to a system exceeds its processing capacity”).

¹⁶¹ Speier et al., *supra* note 160, at 337.

¹⁶² See generally RICHARD SAUL WURMAN, *INFORMATION ANXIETY* 2 (2001) (examining the effects of the explosion of non-information that does not actually inform).

¹⁶³ Speier, *supra* note 160, at 337.

¹⁶⁴ Eppler & Mengis, *supra* note 156, at 326 (noting that the “inverted U-curve represents the first important definition of information overload”).

¹⁶⁵ *Id.* at 328 (displaying a chart of various definitions of “information overload”).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

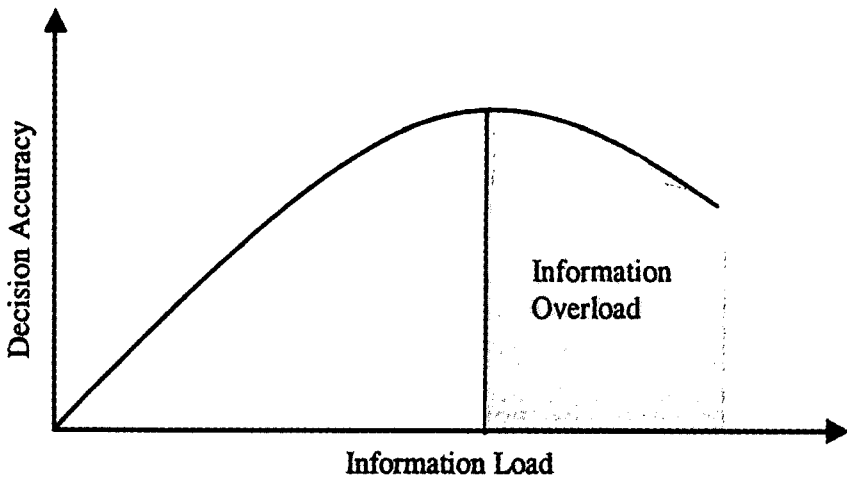


Figure 1: Information Overload as the Inverted U-curve

Recently, researchers and scholars have begun to define information overload based upon subjective factors and causes. For example, one researcher stated that “[i]nformation overload occurs when the decision maker estimates he or she has to handle more information than he or she can efficiently use,”¹⁶⁸ and another noted that information overload develops when the “[a]mount of reading matter ingested exceeds the amount of energy available for digestion, the surplus accumulates and is converted by stress and over-stimulation into the unhealthy state known as IOA (Information Overload Anxiety).”¹⁶⁹ These researchers clearly premise the information overload syndrome occurring not only upon external influences (i.e., large quantities of information), but also due to internal influences (i.e., personal skills, reasoning abilities, etc.).¹⁷⁰

Two different strands of information overload have surfaced.¹⁷¹ The first strand holds that “decision makers experience information overload when presented with an overwhelming number of options that must be considered simultaneously.”¹⁷² This strand represents the typical marketing situation where a person attempts to choose one particular item from a multitude of choices¹⁷³—for example, the toothpaste purchaser discussed in the Introduction to this Article.

The second strand holds that “decision makers experience information overload when presented with an overwhelmingly complex decision, even when only a few

¹⁶⁸ *Id.*

¹⁶⁹ WURMAN, *supra* note 162, at 209 (quoting Lance Shaw, *TECH. REV.* (Jul.–Aug. 1979)).

¹⁷⁰ *See id.*

¹⁷¹ Ram, *supra* note 141, at 270.

¹⁷² *Id.*

¹⁷³ *Id.*

options are available, because of the many details or attributes of each option that need to be considered.”¹⁷⁴ This strand represents the situation in which a person has to engage in making an exceedingly complex decision and, although only a few choices must be simultaneously considered, the person experiences information overload because each choice has a multitude of details or subparts.¹⁷⁵ This second type of information overload might occur when a person contemplates buying a house. The purchaser may only have two houses which she is considering, but each house requires analysis of its innumerable characteristics: cost, aesthetics, durability, size, age, location, yard size, layout, inspection results, disclosures, distance to work, neighborhood safety, county assessment, school quality, convenience to shopping, distance from main thoroughfare, and many, many others. Layer on top of these multifarious factors the difficulty that arises when two or more people—say a married couple with teenaged children—attempt to make the decision together. Although the choice might be only between house A and house B, each option’s subparts and corresponding details might cause the decision makers to become overwhelmed and confused, thus resulting in decision-making anxiety and information overload.¹⁷⁶

Research on information overload has focused primarily upon the first axis. Moreover, most of this research has remained confined to the business and marketing contexts.¹⁷⁷ However, there is little reason to think that the causes and consequences of information overload are not more generalizable.

B. Causes of Information Overload

The precise cause of information overload is unknown. However, scholars and researchers have unearthed various factors which, taken in conjunction, contribute to information overload. The relevant factors include limitations in cognitive capabilities, time constraints, and other factors related to the particular information and the task at hand.

1. Limited Cognitive Capabilities

Research indicates that “the human mind is not of limitless capacity and that the information available for decision making can only be of some finite magnitude before the mind is simply overwhelmed.”¹⁷⁸ Herbert Simon is credited with being the first to recognize that “people have limited cognitive abilities to store, process, and interpret information.”¹⁷⁹ Simon coined the term “bounded rationality,” claiming

¹⁷⁴ *Id.*

¹⁷⁵ *See id.*

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ *Id.*

¹⁷⁹ Paredes, *supra* note 144, at 435.

that “[c]ognitive capabilities are scarce resources that have to be allocated; because of limited cognitive capabilities, people cannot attend to all the information made available to them and cannot evaluate all their choices perfectly.”¹⁸⁰ Because humans suffer from limited cognitive capabilities, we are unable to consider every aspect of every decision. If we attempted to do so, the decision-making process would morph into a complex, distressing, and time-consuming experience.¹⁸¹ The inverted U-curve, displayed above at Figure 1, graphically portrays Simon’s information overload concept, noting the point where information transforms from beneficial to harmful, subsequently lowering decision quality.¹⁸²

2. Time Constraints

The impact of time on information overload first became evident when researchers and scholars began incorporating time into the very definition of information overload.¹⁸³ For example, one researcher claimed that information overload occurred when “the demands on an entity for information processing time exceed its supply of time.”¹⁸⁴ Time pressure causes the decision maker to relinquish partial control over his or her ability to retain and process information, resulting in feelings of anxiety and stress which ultimately contribute, on some level, to information overload and decreased decision-making ability.¹⁸⁵ Also, time constraints may cause a person who is currently bombarded with a large quantity of information to ignore essential and relevant details, or, in the alternative, fail to fully consider the details when additional information is presented.¹⁸⁶

In addition, distractions and interruptions have a direct proportionate impact on time pressure, thus potentially increasing information overload.¹⁸⁷ Scholars agree that distractions and interruptions can contribute to information overload because of the restrictions they put on time:

[D]istractions lead to the buildup of queues which can lead directly to overload, or can lead indirectly to overload by decreasing the amount of time to work on something and increasing time

¹⁸⁰ *Id.*; see also Herbert A. Simon, *Rationality as Process and as Product of Thought*, 68 AM. ECON. REV. 1, 9–14 (1978); Herbert A. Simon, *Theories of Decision-Making in Economics and Behavioral Science*, 49 AM. ECON. REV. 253, 272–73 (1959).

¹⁸¹ Paredes, *supra* note 144, at 435.

¹⁸² Eppler & Mengis, *supra* note 156, at 326.

¹⁸³ *Id.* at 326–27.

¹⁸⁴ Schick et al., *supra* note 157, at 215.

¹⁸⁵ Minhi Hahn et al., *The Effects of Time Pressure and Information Load on Decision Quality*, 9 PSYCHOL. & MARKETING 365, 366 (1992).

¹⁸⁶ *Id.* at 377.

¹⁸⁷ Sutcliffe & Weick, *supra* note 155, at 60.

pressure. Interruptions break the flow of work and often bring it to a halt. As interruptions take time away from present activity, they fuel feelings of time pressure. Interruptions also increase information processing demands by forcing decision makers to shift attention to the interruption, to contemporaneously attend to competing inputs, or to focus or narrow attention on one task at the expense of others.¹⁸⁸

In other words, every time a person is interrupted or distracted, the person's concentration breaks and suffers, thus increasing the probability that the person is going to experience information overload.¹⁸⁹

3. Additional Idiosyncratic Factors

Although cognitive limitations and time constraints contribute significantly to information overload, characteristics idiosyncratic to each decision-making procedure can exacerbate the problem. First, "the characteristics of [the] information, (i.e., the qualitative dimension) are [also] seen as major overload elements."¹⁹⁰ Characteristics such as ambiguity, novelty, difficulty, and intensity all contribute to the uncertainty level associated with the information, thus inducing information overload.¹⁹¹ Researchers Simpson and Prusak note that merely improving information quality, "(e.g., conciseness, consistency, comprehensibility, etc.) . . . can improve the information-processing capacity of the individual, as he or she is able to use high-quality information more quickly and better than ill-structured, unclear information."¹⁹²

In addition to the characteristics of the information itself, research indicates that the makeup of the individual decision maker, and thus that person's personality traits, are important factors affecting information overload.¹⁹³ Particularly, features such as personal abilities, experience level, and motivation may affect a person's processing and cognitive abilities.¹⁹⁴ For example, "[a] person who is highly involved" in the decision-making process "is more motivated to keep up with the pace of input, in the sense of more completely and intelligently processing the information, than is a less-involved person."¹⁹⁵ Therefore, a highly motivated person is less likely to experience information overload than a less-motivated person.¹⁹⁶

¹⁸⁸ *Id.*

¹⁸⁹ Eppler & Mengis, *supra* note 156, at 331.

¹⁹⁰ *Id.* at 327.

¹⁹¹ *Id.* at 331.

¹⁹² *Id.* (citing C.W. Simpson & L. Prusak, *Troubles with Information Overload—Moving From Quantity to Quality in Information Provision*, 15 INT'L J. INFO. MGMT. 413 (1995)).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Hahn et al., *supra* note 185, at 367–68.

¹⁹⁶ *See id.*

Finally, researchers believe that the nature of the specific task at hand can affect information overload.¹⁹⁷ Specifically, the less often the task is utilized and the more complex the task is, the more likely is information overload.¹⁹⁸ A complex, unfamiliar task invites sensations such as "stress, confusion, pressure, anxiety, and low motivation," which cumulatively contribute significantly to the onset of information overload.¹⁹⁹

C. Consequences of Information Overload

Just as with any syndrome, people respond in a variety of ways when experiencing information overload. When information overload attacks an individual, the person "has difficulties in identifying the relevant information, becomes highly selective and ignores a large amount of information, has difficulties in identifying the relationship between details and the overall perspective, needs more time to reach a decision, and finally does not reach a decision of adequate accuracy."²⁰⁰ Moreover, information overload often diverts the decision maker's attention away from relevant issues and blinds them to more important matters.²⁰¹ He or she is then likely to take one of two courses of action, both resulting in hurriedly made decisions and decreased decision quality. First, the decision maker may "satisfice."²⁰² Alternatively, he or she may "opt out."²⁰³

1. Satisficing

Decision makers often employ the technique of satisficing "when the information environment becomes very rich or the decision task becomes very complex relative to [a person's] available time or expertise."²⁰⁴ Specifically, the decision maker, whether consciously or subconsciously, chooses to simply pick an option to end the decision making process instead of choosing the best option.²⁰⁵ Therefore, the decision maker opts to satisfice rather than optimize.²⁰⁶ "To optimize is to choose the best from the

¹⁹⁷ Eppler & Mengis, *supra* note 156, at 330–31.

¹⁹⁸ *Id.* at 331.

¹⁹⁹ *Id.* at 328.

²⁰⁰ *Id.* at 331–33 (citations omitted).

²⁰¹ Sutcliffe & Weick, *supra* note 155, at 59.

²⁰² Grether et al., *supra* note 150, at 279.

²⁰³ See Ram, *supra* note 141, at 272.

²⁰⁴ Grether et al., *supra* note 150, at 279; see also Paredes, *supra* note 144, at 436 ("Simon concludes that people 'satisfice' rather than 'optimize,' especially when faced with complex choices.").

²⁰⁵ Grether et al., *supra* note 150, at 279.

²⁰⁶ *Id.*; see also Malhotra, *supra* note 159, at 438 ("While consumers may employ heuristics to limit the intake of information, these heuristics may often involve a tradeoff between simplifying and optimizing. . . . Hence, in the context of decision making, it is entirely possible for a [person] to adopt a choice heuristic that may limit cognitive strain but that may not lead

full set of . . . choices; to satisfice is to do as well as one can, given the circumstances.”²⁰⁷ Moreover, “[t]o satisfice rather than optimize is to *fail* to choose the most preferred—the ‘best’—from among a set of choices.”²⁰⁸

When a decision maker decides to satisfice, he or she often sets an “aspiration level,” or a level that satisfies the decision maker.²⁰⁹ Typically, the “aspiration level” is not the equivalent to the best decision that the decision maker could make.²¹⁰ Rather, the decision maker strives merely to meet the aspiration level, and whether a better decision is available becomes irrelevant:

In simpler terms, one can think of satisficing as doing the best as one can under the circumstances. This is not to say that individuals prefer to satisfice and not optimize. Rather, individuals satisfice because they do not have the cognitive capabilities to optimize.

At bottom, satisficing is a coping device for making complex choices under uncertainty. Decision makers trade off optimizing the outcome for simplifying the decision process.²¹¹

Moreover, because decision makers who satisfice attempt to simplify the decision-making process, they often discard or ignore available, relevant information and, instead, focus “on a manageable subset of characteristics—in other words, they essentialize.”²¹² As a result, satisficing often results in a lower quality decision.²¹³

2. Opting Out

In addition to satisficing, information overload can also push decision makers to “‘check out’ of the decision-making process altogether.”²¹⁴ Studies indicate two ways in which decision makers suffering from information overload attempt to break free from the decision-making process.²¹⁵ In situations “where the number of available choices is so great as to be ‘truly daunting,’ rather than trying to choose, ‘people

to the ‘best’ or even to a satisfactory choice.”); Paredes, *supra* note 144, at 436 (“Decision makers trade off optimizing the outcome for simplifying the decision process.”).

²⁰⁷ Grether et al., *supra* note 150, at 279.

²⁰⁸ *Id.* at 287 (emphasis added).

²⁰⁹ Paredes, *supra* note 144, at 436.

²¹⁰ *See id.*

²¹¹ *Id.*

²¹² Ram, *supra* note 141, at 270.

²¹³ *Id.*

²¹⁴ *Id.* at 272.

²¹⁵ *Id.*

may disengage, *choosing almost arbitrarily* to complete the process.”²¹⁶ In contrast, in situations where the decision maker must make multiple complex, intrinsic decisions virtually simultaneously, or within close proximity of one another, the decision maker experiences “psychological[] fatigu[e],” and thus subsequent decisions are likely to embrace more arbitrary and illogical factors.²¹⁷ As a result, because coupled decision making “is strenuous and fatiguing,” and subsequently leads to declining will, decision makers simply choose to “opt out” of the decision-making process.²¹⁸

III. THE POTENTIAL EFFECT OF INFORMATION OVERLOAD ON THE CAPITAL JURY

The Supreme Court’s capital punishment jurisprudence has, overall, done a commendable job of ensuring that capital jurors have access to all relevant information necessary to make the life-or-death decision. Nonetheless, negligible attention has been paid to how jurors actually use this information to reach their ultimate decision, or to whether jurors are actually receiving too much information.

A. Do Capital Jurors Experience Information Overload?

The logical starting point is to ask whether, in fact, capital jurors actually suffer from information overload during capital trials. A minority of scholars assert that the problem of information overload is non-existent. This position has been set forth most strenuously by David M. Grether, Alan Schwartz, and Louis L. Wilde (hereinafter GSW), who, in a 1986 article on consumer law, boldly wrote that “the information overload idea—that too much information causes disfunction—is a myth.”²¹⁹ They concluded that “the information overload idea should be dropped from legal discourse.”²²⁰

On one level, GSW can be read as claiming that information overload never occurs because “when the information environment becomes very rich or the decision task becomes very complex” the decision maker will employ a number of simplifying strategies in order to optimize their decision within those constraints.²²¹ Yet, as Troy Paredes pointed out, constrained optimization is simply another term for satisficing,²²² a term GSW themselves use.²²³ As Paredes wrote:

²¹⁶ *Id.* (quoting Barry Schwartz et al., *Maximizing Versus Satisficing: Happiness Is a Matter of Choice*, 83 J. PERSONALITY & SOC. PSYCHOL. 1178, 1179 (2002)).

²¹⁷ *Id.*

²¹⁸ *Id.* at 274.

²¹⁹ Grether et al., *supra* note 150, at 301.

²²⁰ *Id.*

²²¹ *Id.* at 279.

²²² Paredes, *supra* note 144, at 436 n.87 (“Satisficing can alternatively be thought of as optimizing subject to constraints.”).

²²³ Grether et al., *supra* note 150, at 301 (“[W]hen choice sets become large or choice tasks complex relative to consumers’ time or skill, consumers satisfice rather than optimize.”).

Information overload never suggests that people are not acting rationally when they adopt simpler decision strategies to cope with complex tasks. The relevant question is not whether individuals do the best they can given the information load facing them. One hopes that they do. Rather, the key question is whether the task environment can be manipulated in a way that alleviates the relevant constraints and improves decision quality.²²⁴

GSW's more cogent critique is based on their empirical conclusion that test subjects who satisfice because of an inability to process large amounts of information make decisions that are close to ideal.²²⁵ They acknowledge that such "task choice complexity" satisficing, "could in theory create serious problems for consumers."²²⁶ However, they conclude that "the best inference from the evidence is that consumers do not experience serious problems as a result of the *amount* of information that markets and the state now generate."²²⁷ That is to say, when decision makers engage in this form of satisficing, "the gap between satisficing and optimizing" is small enough for regulators to ignore.²²⁸

Yet, as Melvin Eisenberg pointed out, GSW's own research does not bear out this conclusion.²²⁹ First, the experiments upon which they rely "suggest that there is a precipitous decline in the ability of consumers to select their preferred product when more than a very few alternatives or salient attributes are involved."²³⁰ For example, in one experiment involving subjects choosing the ideal house based on a number of alternatives with varying attributes, subjects chose correctly 83% of the time when faced with five alternatives and five attributes per alternative, 58% of the time when faced with ten alternatives and five attributes per alternative, and 50% of the time when faced with ten alternatives and ten attributes per alternative.²³¹ In another experiment designed to test subjects' ability to segregate salient from non-salient attributes, and then to choose the alternative that was best based on the salient attribute(s), subjects chose correctly 73% of the time when there were two alternatives with two salient (and no non-salient) attributes, 63% of the time when there were three alternatives with two salient (and no non-salient) attributes, and 58% of the time when there were five alternatives and five attributes, only one of which was salient.²³² And GSW acknowledge that "when the choice task became quite complex—four alternatives

²²⁴ Paredes, *supra* note 144, at 443.

²²⁵ Grether et al., *supra* note 150, at 294.

²²⁶ *Id.* at 301.

²²⁷ *Id.* at 294.

²²⁸ *Id.* at 279.

²²⁹ See Melvin A. Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305 (1986).

²³⁰ *Id.* at 308–09.

²³¹ Grether et al., *supra* note 150, at 295.

²³² *Id.* at 297.

and four salient attributes—subjects essentially chose randomly.”²³³ Eisenberg is thus correct when he observes that the results regarding decision making involving even a modicum of complexity “provide scant support”²³⁴ for GSW’s bold claim that “task choice complexity” satisficing should cause us no concern.²³⁵

GSW try to excuse the poor performance of test subjects in making moderately complex decisions by noting that consumers making such decisions will “use simplifying strategies” largely unavailable to the test subjects because of the nature of the experiments.²³⁶ They point specifically to a screening process apparently used by some test subjects in whittling down the number of alternatives based on a few product attributes, where the subjects then compared all remaining products based on all attributes.²³⁷ As Eisenberg points out, such “simplifying strategies” are not always available even in real-life situations.²³⁸ In particular, it is difficult to imagine how capital jurors might use a similar simplifying strategy without running afoul of the Supreme Court’s admonition that the capital sentencer must consider all mitigating evidence.²³⁹

It might be argued that jurors in the penalty phase of a capital case are fundamentally unlike the test subjects in the experiments described by GSW. For one thing, jurors know their decision will have profound consequences. For another, they have taken an oath to dutifully find the facts and apply their judgment. Both characteristics should make the jurors’ decisions closer to the ideal than those of the GSW test subjects. Indeed, the Supreme Court has used this very reasoning in rejecting empirical data derived from mock jurors.²⁴⁰

But by the same token, we ought to demand a greater correlation between the actual and the ideal decisions in that context. GSW tout the 63% and 73% correct rate for test subjects when faced with two salient attributes and two or three alternatives, respectively, concluding that “the subjects did well, despite considerable variation in the amount of information supplied.”²⁴¹ We leave it to other researchers in the field as to whether a 37% error rate in the face of moderately complex information means that the subjects did “well” when emulating consumers making a product choice. But if capital jurors are prone to error rates even half as great because they receive too much information, then 18 to 19% of verdicts in capital penalty-phase trials are

²³³ *Id.*

²³⁴ Eisenberg, *supra* note 229, at 309.

²³⁵ Grether et al., *supra* note 150, at 301.

²³⁶ *Id.* at 299.

²³⁷ *Id.* at 295–96.

²³⁸ Eisenberg, *supra* note 229, at 310.

²³⁹ See *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982) (plurality opinion) (holding that sentencer may not “refuse to consider, as a matter of law, any relevant mitigating evidence”).

²⁴⁰ See, e.g., *Lockhart v. McCree*, 476 U.S. 162, 171 (1986) (rejecting three studies on responses of randomly selected non-jurors that did not simulate the jury deliberation process).

²⁴¹ See Grether et al., *supra* note 150, at 299.

incorrect in the sense that the verdict, be it for life or for death, would be different but for the inordinate amount of information fed to the jury. GSW concede that “[w]hen considerably less than all subjects solve the experimental task, there is a ‘glass is half empty or half full’ problem in interpreting the results.”²⁴² However acceptable this view is when consumers are choosing among toothpastes, it should have no place when jurors are choosing between life and death.

We do not, and perhaps cannot, know whether and to what extent capital jurors experience information overload. Because of the sanctity and secrecy of jury deliberations, it is difficult to accurately reconstruct what occurs during jury deliberations and, consequently, whether capital jurors actually suffer from information overload. Moreover, “there is always the risk that the studies and experiments relied on may be incorrect, and there is a dangerous tendency to take a relatively narrow study or experiment that is highly qualified in its findings and draw much larger conclusions and implications that the data may not sustain.”²⁴³ Perhaps most importantly, the experiments on the overload issue test subjects in contexts in which there is, objectively speaking, an optimal choice. The same can hardly be said of capital jurors who are exercising their moral judgment as to whether a fellow human should live or die. This is not to say that information overload cannot plague capital jurors. It is only to say that it would be extraordinarily difficult, if not impossible, to determine whether that is the case.

Yet most scholars who have looked at the issue agree that information overload is a genuine phenomenon.²⁴⁴ The most vocal critics of the notion of information overload have failed to show that it does not significantly affect decision making. “At the very least,” there is the possibility, and risk, of information “overload, even if we do not yet know its precise magnitude”²⁴⁵ on capital jurors. In light of current research, a re-examination of the use and over-use of aggravating and mitigating factors should begin to take a prominent place in our discussions of capital punishment.

B. How Unlimited Aggravating and Mitigating Factors Might Contribute to Information Overload

Consideration by capital jurors of aggravating and mitigating factors potentially contribute significantly to their experiencing information overload. Death penalty cases are saturated with too much information, primarily as a result of the use of aggravating and mitigating factors.²⁴⁶ Moreover, “[w]hen everything counts, as it does under *Lockett*, nothing is dispositive, and subjectivity (although not pure irrationality)

²⁴² *Id.*

²⁴³ Paredes, *supra* note 144, at 450.

²⁴⁴ *See id.* at 446–47.

²⁴⁵ *Id.* at 451.

²⁴⁶ *See* Bowers, *supra* note 41, at 1066 (noting “that *Zant* ‘essentially grant[ed] the states a *Lockett* right: the penalty trial is to be a free market in information” (alteration in original)).

holds sway.”²⁴⁷ Therefore, capital jurors are constantly battling with the facts and evidence presented by both sides in an attempt to process this information so that they may make an informed, accurate, and proportionate punishment decision.

By allowing the state to present virtually unlimited aggravating evidence,²⁴⁸ and requiring the state to permit the defendant to present virtually unlimited mitigating evidence,²⁴⁹ the Supreme Court has essentially endorsed the notion that more information is better. In essence, the Supreme Court wants the capital jury to make its decision based upon all the relevant information. As a result, attorneys flood capital jurors for days, if not weeks, with huge quantities of information. One study found that the average length of a capital trial in North Carolina was approximately 14.6 days—including 4.3 days just for the penalty phase—compared to the average 3.8 days of a non-capital trial.²⁵⁰ The capital juror must not only listen to, retain, and process all the aggravating and mitigating evidence, he or she must also do so in an emotionally charged, stressful, and unfamiliar situation. These factors combine to set the stage for capital juror information overload.

Although two strands of information overload have emerged,²⁵¹ it is primarily the second strand that is applicable to the capital punishment context. The second axis of information overload posits that “decision makers experience information overload when presented with an overwhelmingly complex decision, even when only a few options are available, because of the many details or attributes of each option that need to be considered.”²⁵² In a capital trial, the juror is not faced with an inordinate number of options. Instead, the jury is faced with two options—life or death. Clearly, this is nonetheless a complex and difficult decision. Each choice, life or death, implicates a multitude of details which must be considered, including the relevant aggravating and mitigating evidence, as well as notions of mercy and compassion. It is the combination of these factors, mixed with the overall complexity of the jury’s decision, that could result in capital jurors experiencing information overload.

It is essential to remember that capital trials are “bifurcated—meaning that the guilt phase and sentencing phase are tried separately.”²⁵³ Nonetheless, the same jurors hear evidence and make a decision as to both the defendant’s guilt or innocence and his punishment.²⁵⁴ Therefore, before the sentencing phase even begins, the jurors have

²⁴⁷ Berger, *supra* note 121, at 1082 (internal citation omitted).

²⁴⁸ See *supra* Part I.A.

²⁴⁹ See *supra* Part I.B.

²⁵⁰ PHILIP J. COOK & DONNA B. SLAWSON, THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA 61 (1993); see also Justin Brooks & Jeanne Huey Erickson, *The Dire Wolf Collects His Due While the Boys Sit by the Fire: Why Michigan Cannot Afford to Buy into the Death Penalty*, 13 T.M. COOLEY L. REV. 877, 891 (1996).

²⁵¹ See *supra* notes 171–76 and accompanying text.

²⁵² Ram, *supra* note 141, at 270.

²⁵³ Susan D. Rozelle, *The Principled Executioner: Capital Juries’ Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 793 (2006).

²⁵⁴ See *id.* at 793–94.

already been exposed to many hours of voir dire questions, evidence, and instructions from the trial judge.²⁵⁵ If the typical capital guilt phase lasts 10.3 days, as in North Carolina, then capital jurors must listen to, process, and retain roughly seventy-two hours of information.²⁵⁶ Thus, upon entering the sentencing phase, each juror's processing capacity has already been heavily tapped.

Once the sentencing phase begins, the strain on each juror's processing capacity continues due to his or her exposure to abundant aggravating and mitigating evidence. Again, to find a defendant to be death-eligible, the jury must find the existence of at least one aggravating factor.²⁵⁷ However, once it does so, the capital jury can consider all the proved aggravating factors during the selection stage.²⁵⁸ Therefore, it is to the prosecutor's benefit to attempt to prove multiple aggravating factors. Moreover, in most states, after proving at least one *statutory* aggravating factor, the prosecutor typically is permitted to prove *non-statutory* aggravating factors.²⁵⁹ In addition, the prosecutor is permitted to present victim impact evidence, which basically entails parading multiple witnesses who were related to the victim in front of the jury and permitting each witness to explain the loss and impact of the victim's death on the victim's family.²⁶⁰ Finally, the prosecutor is likely to introduce whatever evidence she can, however tangential to the crime, of the defendant's bad character, in order to show that he will pose a continuing danger in the future if he is not executed.

The defendant's mitigating evidence contributes to the amount of information that the jury must analyze and process. As is true of the aggravating evidence, the amount of mitigating evidence presented in a capital trial varies from case to case. Nonetheless, the defendant is permitted to present virtually all relevant mitigating evidence,²⁶¹ and, because compelling mitigating evidence can often sway the jury towards life, the defendant is likely to err on the side of more rather than less information.²⁶²

²⁵⁵ See, e.g., COOK & SLAWSON, *supra* note 250, at 61 (finding that the average length of a capital trial in North Carolina is 14.6 days, including both the guilt and sentencing phases).

²⁵⁶ This assumes a seven-hour work day and includes the jury's own deliberations, which might yield important new data as jurors share their thoughts (one hopes) for the first time. This figure concededly overestimates the data by also including voir dire and breaks other than lunch breaks. While little new data may be accumulated during these periods, such delays themselves may exacerbate the effects of information overload. See *infra* text accompanying note 279.

²⁵⁷ See *supra* Part I.A.1; see also Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 TEX. L. REV. 441, 447 (1994).

²⁵⁸ Hornbuckle, *supra* note 257, at 448–49 (explaining that, in weighing states, the jury is “explicitly instructed” to weigh the proven statutory aggravating factors against the proven mitigating factors).

²⁵⁹ See *supra* notes 48–53 and accompanying text.

²⁶⁰ See DIETER, *supra* note 65, at 20–21.

²⁶¹ See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

²⁶² See *Lockett*, 438 U.S. at 604; *Woodson*, 428 U.S. at 304.

Also, the function of the capital jury indicates that it will apply mercy, ethics, and morals to its sentencing decision.²⁶³ Each capital juror is going to infuse his or her ultimate punishment decision with personal feelings, morals, and emotions. These factors, in and of themselves, contribute to the amount of information each juror must process, analyze, balance, and weigh. Every emotion, every moral insight, and every personal feeling must be taken into consideration.

If each juror's processing capacity is already tapped into before the juror reaches the sentencing phase, it is reasonable to assume that, upon hearing and analyzing all the presented aggravating and mitigating evidence, and completing the required balancing, each juror's processing capacity has been strained, reaching or exceeding its maximum. The end result is that the pure quantity of information presented to the capital jury, in and of itself, is likely to cause each juror to suffer from information overload.

Moreover, other factors besides the mere quantity of information affect the jury and might lead to information overload. As previously noted, time constraints can affect the decision-making process and contribute to information overload.²⁶⁴ In theory, capital jurors are given as much or as little time as needed to reach their punishment decision.²⁶⁵ In actuality, time constraints during deliberations can come from two sources. First, fellow jurors who make up their minds early can pressure on-the-fence jurors to make up their minds quickly and to agree with the early deciders. Second, the trial judge can pressure, although not coerce,²⁶⁶ the jury into reaching a verdict in order to end the trial expeditiously.

During the trial itself, time constraints are not likely to contribute to information overload. After all, during the trial, time is directly proportional to information quantity: the more information is given to the jurors, the more time they have to observe and process it. However, the effect of constant interruptions, and resulting time implications, may contribute to information overload. Interruptions contribute to information overload because interruptions force jurors to shift their attention from the ultimate issue to the interruption, and thus increase feelings of uncertainty and decreased concentration.²⁶⁷ In capital trials, as in all trials, interruptions may take the form of discussions at the bench, recesses to obtain witnesses and evidence, and

²⁶³ See *Spaziano v. Florida*, 468 U.S. 447, 468–70 (1983) (Stevens, J., concurring in part and dissenting in part) (noting that the jury is best suited to “express the conscience of the community” (citation omitted)).

²⁶⁴ See *supra* notes 183–89 and accompanying text.

²⁶⁵ See, e.g., W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 203 (2006) (“[T]he length of time a court allows for jury deliberations is a decision within the sound discretion of the trial court.”).

²⁶⁶ See *Allen v. United States*, 164 U.S. 492, 501–02 (1896) (finding no error in jury instructions noting the jury's duty to decide the case and instructing dissenting jurors to weigh their position against the majority).

²⁶⁷ See Sutcliffe & Weick, *supra* note 155, at 60.

breaks for the judge to fulfill other duties and obligations. Moreover, deliberations are frequently interrupted as jurors ask for testimony and instructions to be re-read. Because jurors are often reluctant participants in the first place, and because of the sheer length of the trial, including both the guilt and penalty phases, interruptions likely fuel feelings of anxiety, thus pushing jurors to ignore information in order to make a premature decision to quickly end the deliberation process.

In addition, the characteristics of the evidence may increase the probability of juror information overload. Information characteristics such as “ambiguity, novelty, complexity, and intensity” often contribute to information overload.²⁶⁸ Each of these characteristics applies to information presented at a capital trial. First, as in any trial, evidence can be ambiguous, with each side urging its respective interpretation. Jurors also may not understand why the prosecutor or defendant is presenting certain evidence, thus causing jurors to view the information as ambiguous. Additionally, both novelty and intensity of the information are obviously significant factors in a typical capital trial. The typical capital juror, one would hope, is unlikely to be familiar with either the horrid details surrounding the types of killings that are death-eligible or the intimate details of the life and background of the typical capital murderer, often including childhood abuse and deprivation, mental illness and brain injury, and drug and alcohol abuse. Moreover, because information relating to such issues as future dangerousness, on the one hand, and the effect of childhood abuse, on the other, are typically the province of experts—by definition, “beyond the ken of the average juror”²⁶⁹—the difficulty of the jurors in understanding the information they are given may be enhanced.

Beyond the characteristics of the information, as previously noted, the complexity and novelty of the task itself may also exacerbate the effects of information overload.²⁷⁰ The capital jury makes its decision in a stressful, unfamiliar setting.²⁷¹ It is unlikely that a juror currently sitting on a capital jury has ever previously been on a capital jury, or perhaps any jury for that matter, and therefore the entire capital trial process will be alien, novel, and intimidating. Moreover, the overall life and death decision is complex and intense.²⁷² Not only is it difficult for a capital juror to make the decision whether another human being deserves to live or die,²⁷³ the task is also complex because jurors struggle to “understand the abstruse legal framework that the courts have constructed around the death penalty.”²⁷⁴ In particular, the jurors are

²⁶⁸ Eppler & Mengis, *supra* note 156, at 331.

²⁶⁹ United States v. Castillo, 924 F.2d 1227, 1232 (2d Cir. 1991), *cert. denied*, 513 U.S. 829 (1994).

²⁷⁰ See Eppler & Mengis, *supra* note 156, at 331.

²⁷¹ See Sontag, *supra* note 134, at 80.

²⁷² DIETER, *supra* note 65, at 22 (“[Jurors] have a difficult time determining who should live and die because it is an inherently inscrutable process.”).

²⁷³ See *id.* at 24 (describing the emotional impact on jurors).

²⁷⁴ *Id.* at 22.

often asked to weigh incommensurables: the utilitarian-based idea that very dangerous offenders must be permanently incapacitated by death, added to the harm-based retributivist²⁷⁵ values reflected by victim impact evidence, balanced against the intent-based retributivist notion of diminished culpability often underlying the mitigating evidence. One might as well ask the jury to add the mass of an object to its color and divide by its shape.²⁷⁶ To make matters worse, because different values are being compared, the same evidence—evidence of mental illness, for example—might have aggravating and mitigating significance for the jury at the same time, “as incoherent as that mental calculation may be.”²⁷⁷ Empirical research demonstrates the difficulty jurors have in comparing aggravating and mitigating factors.²⁷⁸ “Under conditions of uncertainty and complexity,” jurors, like all other rationally bounded decision makers, “are unable to devise either a fully specified solution to the problem at hand or to assess fully the probable outcomes of their action.”²⁷⁹ Therefore, the task’s complexity and the juror’s unfamiliarity with the trial process also may contribute to information overload.

Information overload theory tells us that, ultimately, overloaded jurors will—instead of attempting to process and weigh the aggravating and mitigating evidence as instructed by the court—choose to disengage from the process or arbitrarily make a life or death decision.²⁸⁰ That is, the impact of information overload on the capital jury may cause each affected juror to satisfice or opt out. Each juror may set an “aspiration level,” meaning the juror, consciously or subconsciously, decides that once the prosecutor proves a certain number of aggravating factors,²⁸¹ or the defendant

²⁷⁵ See, e.g., Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 735–36 (1988) (distinguishing “harm-based” from “intent-based” retributivism).

²⁷⁶ See Covey, *supra* note 54, at 259 (“[T]he weighing paradigm is fundamentally incoherent, because aggravators and mitigators are simply not comparable.”); Scott W. Howe, *Furman’s Mythical Mandate*, 40 U. MICH. J.L. REFORM 435, 476–77 (2007) (noting that jurors are typically “not told how to weigh any particular factor or what overriding question should determine their decision”); Franklin E. Zimring & Gordon Hawkins, *A Punishment in Search of a Crime: Standards for Capital Punishment in the Law of Criminal Homicide*, 46 MD. L. REV. 115, 120 (1986) (criticizing the Model Penal Code approach for requiring a jury to weigh “the incommensurable”); cf. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 394 (“[A] moral formula cannot . . . achieve [its] goal, so long as we cannot translate differing and competing values into a ‘universal currency’ for comparative measurement.” (quoting BERNARD WILLIAMS, *MORAL LUCK* 77 (1981))).

²⁷⁷ Covey, *supra* note 54, at 254.

²⁷⁸ Richard L. Wiener, *Death Penalty Research in Nebraska: How Do Judges and Juries Reach Penalty Decisions?*, 81 NEB. L. REV. 757, 768–69 (2002) (reviewing several studies concerning juror comprehension of mitigating circumstances).

²⁷⁹ Stephen M. Bainbridge, *Why a Board? Group Decisionmaking In Corporate Governance*, 55 VAND. L. REV. 1, 21 (2002).

²⁸⁰ See *supra* Part II.C.

²⁸¹ See Covey, *supra* note 54, at 262 (“[R]esearch suggests that sentencing decisions often turn on little more than the number of statutory aggravating factors established: The more

presents a certain amount of mitigating evidence, the juror will arbitrarily pick death or life.²⁸² In other words, once the standard the capital juror sets for him- or herself is met, the juror selects a pre-determined choice.

If a juror were to satisfice in this manner, the juror would ignore or disregard other relevant information.²⁸³ Instead, the juror would select which information he or she desires to process and become blind to all additional information. The juror might engage in this process subconsciously,²⁸⁴ because it is the only method in which the juror can process the inordinate amount of information that has plagued his or her processing capabilities. Because this hypothetical capital juror is satisficing, instead of optimizing, he or she is picking the best choice under the circumstances and not the overall best choice.

The other option for the information-overloaded capital juror, "opting out," is unusually easy to do in this context. On a twelve-person jury, it is all too easy for one or more overloaded jurors to "pass the buck" to their fellow jurors by declining to come to independent decisions based on the evidence and simply voting with the majority in order to end the decision-making process. And because every person has different cognitive capacities, information overload affects everyone slightly differently,²⁸⁵ allowing those jurors who choose to opt out to "hide behind" those who choose to satisfice and those who have not experienced information overload at all.

Obviously, neither consequence of information overload is acceptable in the context of jury deliberations in the penalty phase of a capital case. Satisficing is unacceptable because, if any decision-making context warranted the optimal result, it would be in the capital punishment arena. It is no overstatement to say that the Supreme Court's entire project in this area over the past three decades has been founded on the minimization of arbitrariness and caprice in the decision of who lives and who dies. Turning a blind eye to a system that inevitably causes some jurors to make that decision by ignoring some highly relevant information while exaggerating the importance of trifles would make a mockery of the Supreme Court's death penalty project.

Opting out is unacceptable for all the same reasons, but also because capital trials proceed on the assumption that a jury consists of twelve fully engaged people and not, say, eight fully engaged people and four people who have checked out of the

aggravators found, the more likely the defendant will receive a death sentence"); Wiener, *supra* note 278, at 769 (discussing this phenomenon among Nebraska judges).

²⁸² See Paredes, *supra* note 144, at 436 (noting that the aspiration level does not equal the best available decision).

²⁸³ Eppler & Mengis, *supra* note 156, at 333 (explaining that when a person satisfices, he or she has trouble identifying relevant information and tends to ignore significant amounts of information).

²⁸⁴ See Grether et al., *supra* note 150, at 279 (indicating that when a decision maker satisfices, he or she, whether consciously or subconsciously, ultimately makes the required decision arbitrarily because of information overload).

²⁸⁵ See *supra* text accompanying notes 193–96.

decision-making process. Federal²⁸⁶ and state constitutional²⁸⁷ and statutory²⁸⁸ provisions typically require that verdicts in criminal cases, and particularly verdicts of life or death, be made unanimously by twelve jurors. It would violate the spirit, if not the letter, of such provisions if even a single juror's concurrence with a verdict was the product, not of actual assent, but of a complete failure to consider all the evidence.

In sum, if capital jurors do suffer from information overload, they are ultimately sentencing defendants to death, not based upon the belief that defendants are unworthy to live, as determined by a comparison of aggravating and mitigating evidence, but because the capital jury is unable to adequately make this crucial decision and therefore relies upon coping strategies such as satisficing and opting out. Under the Supreme Court's jurisprudence, with its focus on minimizing arbitrariness, this result is simply unacceptable.

IV. EASING THE POTENTIAL EFFECTS OF INFORMATION OVERLOAD ON THE CAPITAL JURY

Because it is likely that capital jurors suffer from information overload, the possibility exists that jurors are disengaging from the decision-making process and arbitrarily choosing a life or death sentence, not based solely on the relevant evidence, but merely to end the decision-making process. Thus, the end result is a more arbitrary and capricious capital punishment system. By attempting to restrain the jury's discretion and create individualized capital sentencing through the use of virtually unlimited mitigating and aggravating factors, the Supreme Court may have, ironically, created a system overflowing with arbitrariness. Because of the likely impact of information overload on the capital juror, it is essential to reduce the amount of information presented to the capital jury in order to ensure that each capital juror is both focusing upon the most relevant information and making the life or death decision by analyzing and balancing all relevant factors. Therefore, it is bad policy to

²⁸⁶ See *Patton v. United States*, 281 U.S. 276, 288 (1930) (requiring twelve-person jury under the Sixth Amendment); *Thompson v. Utah*, 170 U.S. 343, 349 (1898) (same); cf. *Springville v. Thomas*, 166 U.S. 707 (1897) (requiring unanimous verdict in civil cases under the Seventh Amendment). It remains an open question whether these decisions survive *Williams v. Florida*, 399 U.S. 78 (1970), which held that the twelve-person jury requirement does not apply to the states, and *Apodaca v. Oregon*, 406 U.S. 404 (1972), which held the same regarding the unanimity requirement. See George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 170–71 (2001).

²⁸⁷ See, e.g., TEX. CONST. art. V, § 13 (requiring twelve-person jury in criminal cases); *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005) (requiring jury unanimity in criminal cases).

²⁸⁸ See, e.g., TEX. CODE CRIM. PROC. ANN. art. 36.29(a) (Vernon 2008) (requiring unanimous twelve-person jury in criminal cases).

allow the prosecution to present virtually unlimited aggravating evidence, and it is unsound constitutional law to permit the defense to present virtually unlimited mitigating evidence.

A. Cabining Aggravating Factors

Although aggravating circumstances assist in ensuring that the death penalty is not imposed in an “arbitrary or capricious manner,”²⁸⁹ it is nonetheless bad policy to allow limitless aggravating factors because they also can contribute significantly to the capital jurors experiencing information overload. Because, as previously noted, information overload may cause jurors to ignore relevant information and disengage from the decision-making process,²⁹⁰ it is essential to restrict the information presented to the capital jury. Therefore, legislatures should confine the prosecution, at the selection stage, to only those aggravating factors, statutory or non-statutory, that bear strictly on the defendant’s culpability for the present crime. This entails eschewing any reliance on future dangerousness and eliminating victim impact evidence.

1. Focusing Aggravating Factors on the Defendant’s Culpability for the Crime

One logical way of reducing the amount of aggravating evidence introduced at the penalty phase of a capital trial is to “direct the fact-finder to focus on culpability.”²⁹¹ Rather than posing a wide-ranging “inquest into the defendant’s past conduct and present disposition,”²⁹² the sentencing hearing should be a narrowly circumscribed inquiry into the defendant’s blameworthiness for the crime of conviction. That is to say, the question is neither, “Does *this* defendant deserve to die for *any* crime?”—an inquiry foreclosed by *Furman*²⁹³—nor, “Does *any* defendant deserve to die for *this* crime?”—an inquiry foreclosed by *Woodson*²⁹⁴—but rather, “Does *this* defendant deserve to die for *this* crime?”²⁹⁵ As Carol and Jordan Steiker cogently observed:

²⁸⁹ *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

²⁹⁰ See Eppler & Mengis, *supra* note 156, at 331–34.

²⁹¹ Covey, *supra* note 54, at 246 (noting retributive theory’s impact on capital sentencing).

²⁹² *Id.* at 247.

²⁹³ *Furman v. Georgia*, 408 U.S. 238 (1972) (noting the need for reliability in determining that the death penalty is appropriate in a specific case); see *Gregg*, 428 U.S. at 206 (requiring that defendant have committed an aggravated form of crime before being sentenced to death).

²⁹⁴ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (holding a mandatory death penalty unconstitutional).

²⁹⁵ See Covey, *supra* note 54, at 247 (arguing that whether death is deserved “should not turn on ‘the nature of the offender’s character’ but rather ‘the narrower issue of whether the offender, at the time of the offense, possessed and had a fair chance’ to exercise his or her ‘free choice’” (quoting Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 674–75 (1987))).

[A]n aversion to mandatory sentencing tells us only that we cannot consider the offense alone, apart from the offender, in imposing a sentence of death. . . . [But] it certainly does not necessarily entail [the] opposite; a consensus against mandatory sentencing does not lead us inexorably to unconstrained consideration of all individualizing circumstances.²⁹⁶

In addition, as Russell Covey has pointed out, the Supreme Court's modern death penalty jurisprudence has given us an Eighth Amendment that acts as a retributivist-based constraint on the death penalty.²⁹⁷ More particularly, this constraint homes in on the "moral quality of the choice" made by the defendant in committing his crime.²⁹⁸ Pursuant to such a scheme, only aggravating evidence that ties the defendant's enhanced culpability to the particulars of the crime committed leads to a finding that death is warranted. Evidence about the defendant's bad character in general, on the one hand, or the general harm inflicted by the killing, on the other, does not.

On such a theory, of the twenty-four "special circumstances" that render a defendant eligible for the death penalty in California, only some should be considered relevant at the selection stage. That the defendant committed a murder in a certain way—for example, by torture²⁹⁹—or for a certain reason—for example, for financial gain³⁰⁰—certainly bears on the defendant's culpability for the crime. On the other hand, that a defendant merely "reasonably should have known"—i.e., was negligent—that the victim was a peace officer,³⁰¹ while it arguably is relevant to death eligibility, hardly seems to appreciably enhance the defendant's culpability for the crime so as to become relevant in the selection stage. The same is true of the fact that the defendant has killed before.³⁰² while it logically and appreciably delimits the class of death-eligible defendants, and so is an appropriate eligibility factor, it has nothing

²⁹⁶ Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 844–45 (1992) (reviewing BEVERLY LOWRY, *CROSSED OVER: A MURDER, A MEMOIR* (1992)). Steiker & Steiker limit their culpability-based approach to mitigating circumstances, on the ground that "most aggravating circumstances serve a proportionality function rather than an individualizing function." *Id.* at 854. While this is true of aggravating factors when they act as *eligibility* factors, it is not true of aggravating factors when they take on their role as *selection* factors. See *supra* Part I.A.1–2 (discussing the difference between eligibility and selection factors). To the extent that aggravating factors are considered at the selection stage, we disagree with the Steikers "that individualized sentencing will occur primarily through sentencer consideration of mitigating evidence." Steiker & Steiker, *supra*, at 855.

²⁹⁷ See Covey, *supra* note 54, at 227–41.

²⁹⁸ *Id.* at 233.

²⁹⁹ See CAL. PENAL CODE § 190.2(a)(18) (West 2008).

³⁰⁰ See *id.* § 190.2(a)(1).

³⁰¹ See *id.* § 190.2(a)(7).

³⁰² See *id.* § 190.2(a)(2) (applying when defendant was previously convicted of first or second degree murder).

to do with whether the defendant deserves death for this crime.³⁰³ Accordingly, a culpability-focused selection stage would reduce the amount of aggravating evidence, as to both statutory and non-statutory factors, considered by the jury.

2. Eliminating Evidence of Future Dangerousness

The biggest impact of such a culpability-focused selection stage would be the elimination of evidence of future dangerousness. After all, asking how dangerous a defendant is is a quite different question from asking how culpable he is. Eliminating future dangerousness as a factor would eliminate much evidence of “prior bad acts, bad reputation, post-conviction prison misbehavior, and other evidence introduced with the principal objective of proving bad character”³⁰⁴—precisely the type of evidence that can accumulate and overwhelm a capital jury. Indeed, research has shown that “juror concerns about the defendant’s future dangerousness routinely eclipse issues concerning the defendant’s culpability.”³⁰⁵

Moreover, eliminating evidence of future dangerousness would not only reduce the sheer amount of information the jury is given to consider, but it would also have the beneficial side effect of simplifying the jury’s task along a different dimension. When a jury is asked to predict whether another person poses a future danger, it is asked to perform a role beyond that which jurors are usually given—and one that is certainly foreign to the average individual. By stark contrast, “the inquiry into culpability falls squarely within traditional notions of jury competence.”³⁰⁶ Further, the task of passing judgment is one with which even individuals who have never served on a jury are familiar, albeit in far less formal and consequential settings.³⁰⁷ In addition, and as a result, no longer would juries be subjected to expert testimony about future dangerousness.³⁰⁸ Thus might the penalty selection task, though weighty, become perhaps less novel, ameliorating the effects of information overload.

3. Eliminating Victim Impact Evidence

Although, as the Supreme Court acknowledged in *Payne*, it is important that the victim’s voice be heard during the sentencing proceeding, the emotional impact caused by the victim witnesses may cause the capital juror to become overwhelmed, thus blurring the relevant evidence and prohibiting the capital juror from focusing

³⁰³ See Covey, *supra* note 54, at 249 (noting that “prior criminal convictions . . . should not receive special consideration” since they represent transactions that already have been “paid for” by the defendant).

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 253.

³⁰⁶ *Id.* at 257.

³⁰⁷ See *id.* (“These judgments necessarily are bound up with conventional notions of responsibility, based on life experience . . .”).

³⁰⁸ See *id.* at 258.

on other aggravating and mitigating evidence.³⁰⁹ Although this evidence serves a legitimate purpose, the evidence is tangential to whether *this* defendant deserves to live or die for his crime.³¹⁰ Because of its resulting information overload impact on the capital jury, it is a logical category of evidence to be eliminated.

The capital defendant very often does not have firsthand knowledge concerning the personality of the victim or the nature of the relationship between the victim and his or her family or community.³¹¹ Nor does the defendant typically select the victim or choose to kill based on the potential impact of the killing on these relationships.³¹² By permitting the jury to consider, and occasionally base its death sentence largely upon, victim impact evidence "instead of on evidence relevant to . . . the crime, [victim impact evidence] diverts the jury's focus to irrelevant information independent of the decision to kill."³¹³ In addition, victim impact evidence is more likely to cause jurors to permit pity or anger to infuse the death penalty decision, obscuring the relevant facts with these emotions, and contributing to the already abundant amount of information each capital juror must process and manage.³¹⁴ As previously noted, capital jurors are bombarded with huge quantities of information and, because of bounded rationality, are likely unable to process all presented evidence.³¹⁵ Due to the sheer amount of information presented to the capital jury, it is essential for capital jurors to focus, not upon emotions, but upon the relevant and necessary facts.

It is true that victim impact evidence serves some legitimate purpose.³¹⁶ As the Supreme Court has noted, such evidence allows the state to counterbalance the defendant's mitigating evidence.³¹⁷ However, this will become less necessary if, as we propose, the Supreme Court restores to the states some meaningful power—and if the states exercise that power—to restrict the type and amount of mitigating evidence introduced by the capital defendant.³¹⁸ Moreover, the state is entirely capable of reiterating during the penalty phase what is often the most damning aggravating evidence of all: the evidence presented by the state during the guilt phase, including descriptions of the crime, and photographs of the crime scene and

³⁰⁹ DIETER, *supra* note 65, at 21.

³¹⁰ *Payne v. Tennessee*, 501 U.S. 808, 845–46 (1991) (Marshall, J., dissenting).

³¹¹ *See id.* at 845 ("[O]rdinarily . . . the defendant [i]s unaware of the personal circumstances of his victim . . .").

³¹² *Nard*, *supra* note 66, at 841 (citing *Booth v. Maryland*, 482 U.S. 496, 504 (1987)).

³¹³ *Id.*

³¹⁴ *Id.* at 841–42.

³¹⁵ *Paredes*, *supra* note 144, at 434–36.

³¹⁶ *Payne*, 501 U.S. at 825.

³¹⁷ *Booth*, 482 U.S. at 517 (White, J., dissenting) ("[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." (citations omitted)).

³¹⁸ *See infra* Part IV.B.

the victim.³¹⁹ Finally, the prosecution is able to present evidence supporting the multitude of available aggravating factors, most of which relate more directly to the defendant's culpability for the crime. Consequently, victim impact evidence is fundamentally low in value while, at the same time, the cost of presenting it may be very high. The purpose behind victim impact evidence is not sufficiently strong to justify its continued use given the potential information overload effect it has on the capital jury. It is a logical category of aggravating evidence that state legislatures should eliminate.

B. Limiting Mitigating Evidence

Just as it is bad policy to allow virtually unlimited aggravating evidence, it is also unsound constitutional law to permit virtually unlimited mitigating evidence. The Supreme Court's mandate for individualized assessment³²⁰ was, of course, developed with the best of intentions. But because allowing unlimited amounts of mitigating evidence may well cause capital jurors to suffer from information overload and thus make an arbitrary and unsupported life or death decision, at least some capital defendants might be harmed rather than helped under current law. Granted, some capital defendants may be helped by information overload, specifically those whose juries, because of information overload, sentence them to live where a non-overloaded jury would reach a verdict of death. But the goal of the Supreme Court's project has always been the minimization of arbitrariness in the system overall, rather than sparing as many capital defendants as possible.³²¹ A system in which capital defendants are arbitrarily spared is as bad as one in which capital defendants are arbitrarily executed.³²²

Instead of imposing a free-for-all mitigating evidence standard, the Supreme Court should revise its capital punishment jurisprudence to allow specific limitations upon the defendant's ability to present mitigating evidence. The logical way to do so is to

³¹⁹ See generally DIETER, *supra* note 65, at 24 (including the statement of one capital juror who explained that "[d]uring the six weeks of the [capital] trial, I became very angry at the prosecution, because in trying to recreate the horror, they bombarded us with the most gruesome and painful photographs. The prosecutors were careful to point out where the brain matter had splattered on the ground . . .").

³²⁰ See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

³²¹ *Lockett*, 438 U.S. at 603–04.

³²² See Steiker & Steiker, *supra* note 296, at 863 ("[P]re-Furman capital sentencing schemes were objectionable not simply because they resulted in *overinclusive* application of the death penalty, but also because they led to *underinclusion*."). It should be noted that not everyone agrees with this proposition. See, e.g., David McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?*, 24 FLA. ST. U. L. REV. 545, 567–73 (1997) (arguing that arbitrarily sparing capital defendants presents constitutional difficulty only if done with invidious motives).

use the same culpability-focused approach discussed above with regard to aggravating evidence.³²³ In the mitigation context, this constraint would limit mitigating evidence to that which “suggests any impairment of a defendant’s capacity to control his or her criminal behavior, or to appreciate its wrongfulness or likely consequences.”³²⁴ By this, we do not mean to limit mitigating factors to those that resemble excuse or justification defenses to the crime itself,³²⁵ exemplified by the Model Penal Code.³²⁶ Rather, we more broadly conceive of reduced culpability for the crime to include mitigating evidence that demonstrates factors beyond the defendant’s control that may have, as Paul Litton put it, “interfered with a minimally decent moral education in comparison to others who were provided that safeguard.”³²⁷

Much mitigating evidence, such as evidence of mental illness and childhood abuse, is introduced to show the defendant’s reduced culpability for the crime at issue according to this nuanced definition. Yet much of it is not. Mitigating evidence can also be introduced to show a defendant’s general good character, which in turn may demonstrate his potential for future contributions to society, and concomitant lack of dangerousness, as well as his “general desert” of a sentence less than death.³²⁸ Yet, as Steiker and Steiker point out, the general societal consensus that has emerged around the use of mitigating factors points to their consideration, not as a matter of the defendant’s general culpability, but with regard to his culpability for the crime at issue.³²⁹ Moreover, as Covey demonstrates, only a scheme that limits “the defendant’s constitutional right to proffer mitigating evidence that is relevant to . . . the extent to which her conduct was ‘freely chosen’”³³⁰ is consistent with the Supreme Court’s interpretation of the Eighth Amendment as a retributivist-based limitation on the death penalty.³³¹ On this interpretation, “what is pertinent to the issue of culpability is the

³²³ See *supra* Part IV.A; see also Steiker & Steiker, *supra* note 296, at 840 (“[T]he individualization requirement mandates consideration only of evidence regarding individual culpability.”).

³²⁴ Steiker & Steiker, *supra* note 296, at 846.

³²⁵ See generally Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21 (1997) (criticizing those who conflate the concept of culpability for guilt-phase purposes with culpability for purposes of punishment).

³²⁶ See *supra* text accompanying notes 101–03 (describing mitigating factors set forth in Model Penal Code).

³²⁷ Paul Litton, *The “Abuse Excuse” in Capital Sentencing Trials: Is it Relevant to Responsibility, Punishment, or Neither?*, 42 AM. CRIM. L. REV. 1027, 1033 (2005).

³²⁸ Steiker & Steiker, *supra* note 296, at 847–48; see also Garvey, *supra* note 27, at 1561 (“For the most part, mitigating evidence falls into three broad categories: reduced culpability, general good character, and lack of future dangerousness.”).

³²⁹ Steiker & Steiker, *supra* note 296, at 848–57 (reviewing state statutory schemes and Model Penal Code). *But see* Howe, *supra* note 276, at 468 (asserting that “there are no grounds to claim a societal consensus” around such a culpability-based view).

³³⁰ Covey, *supra* note 54, at 250.

³³¹ *Id.* at 227–41.

moral quality of the choice, not the moral character of the offender.”³³² Finally, since, as we propose, future dangerousness ought to be irrelevant as an aggravating factor at the selection stage, the irrelevance of lack of future dangerousness as a mitigating factor follows as night follows day.

Mitigating evidence can also be introduced to prompt the jury to feel sympathy for, and extend mercy to, the defendant. Current law seems to allow the defendant to introduce mitigating evidence merely to evoke a merciful response from the jury.³³³ Yet, just as dangerousness is a different question from enhanced culpability, an extension of mercy is not necessarily a recognition of reduced culpability.³³⁴ A jury might be merciful to one fully culpable for a grave crime and who therefore deserves death.³³⁵ Indeed, paradoxically, the only offenders capable of being afforded mercy are those who justice dictates should die; all others can rely on justice and have no need for mercy.³³⁶ Thus, evidence designed to evoke a merciful response “is no more relevant to a meaningful evaluation of the defendant’s culpability than is evidence of his dangerous character.”³³⁷

It may be that the same evidence introduced to demonstrate a defendant’s general good character, predict his lack of future dangerousness, or evoke a merciful response also demonstrates reduced culpability for the crime in question. Yet guiding the jury to consider the evidence for the limited purpose of its effect on the culpability of the defendant, rather than those other, broader purposes,³³⁸ seems to be a step in the direction of ameliorating the effects of information overload. In addition, in the run of cases, the sheer amount of mitigating evidence likely will be reduced if these other roles are eliminated.

Such a step would also be in line with cases in which the Supreme Court has held that a state may structure the jury’s consideration of mitigating evidence by permitting it to give effect to mitigating evidence for one purpose but not necessarily for all purposes.³³⁹ For example, in *Johnson v. Texas*, the Court held that jurors could constitutionally be instructed to consider the defendant’s youth only as it related to the

³³² *Id.* at 233.

³³³ *See id.* at 264 n.359 (“Admissible mitigating facts or circumstances have never been limited to those which reduce the defendant’s culpability, but instead extend to any facts or circumstances that evoke in the sentencer a willingness to be merciful.” (citing *California v. Brown*, 479 U.S. 538, 562–63 (1987) (Blackmun, J., dissenting))).

³³⁴ *Id.* at 265 (distinguishing “mercy” from “mitigation”).

³³⁵ *See id.* at 264 (“When, based on evidence that elicits sympathy for the defendant or shows his or her ‘good’ character, a less severe sentence is imposed on a defendant than others who commit comparably grave crimes, that sentence is the product of mercy.”).

³³⁶ *See* Jeffrie Murphy, *Mercy and Legal Justice*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 162, 167 (1988) (“If mercy requires a tempering of justice, then there is a sense in which mercy may require a departure from justice.”).

³³⁷ Covey, *supra* note 54, at 250.

³³⁸ *See supra* note 330 and accompanying text.

³³⁹ *See* Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1190–96 (1991).

question of his future dangerousness.³⁴⁰ And, more directly on point, in *Saffle v. Parks*, the Court held that a jury could be constitutionally instructed not to consider sympathy for the defendant.³⁴¹ In other cases, the Court has impliedly warned against reading its case law as rendering "constitutionally relevant any and all traits or experiences that distinguish one individual from another."³⁴² For example, as Steiker and Steiker note, the Court in one case seemed "distinctly underwhelmed by the significance of [the defendant's] receipt of a prize for his dance choreography while in prison,"³⁴³ and has suggested that such trifles as the defendant's impeccable personal hygiene should fare little better as a mitigating factor.³⁴⁴ Individual Justices have been even more blunt.³⁴⁵ Thus, avoiding the problem of information overload in the way in which we have suggested would not necessarily come at the cost of dramatically altering current law.

It may also be that capital jurors will inevitably allow merciful tendencies to play a part in their decision making.³⁴⁶ Yet that is a far cry from allowing in evidence whose only purpose could be to evoke a merciful response or failing to instruct a jury to consider mitigating evidence only as it bears on the defendant's culpability. Though mercy might be an inevitable instinct, we need not abet it when to do so would be unjust.³⁴⁷

CONCLUSION

The Supreme Court has genuinely attempted to create a capital punishment system void of arbitrariness. However, because the capital jury must process virtually an unlimited amount of aggravating and mitigating evidence, current death penalty

³⁴⁰ 509 U.S. 350, 369 (1993).

³⁴¹ 494 U.S. 484, 490 (1990).

³⁴² Steiker & Steiker, *supra* note 296, at 843.

³⁴³ *Id.* at 844 (discussing *Boyde v. California*, 494 U.S. 370, 382 n.5 (1990)); *accord* Jenny E. Carroll, Note, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEX. L. REV. 1413, 1446 (1997).

³⁴⁴ Steiker & Steiker, *supra* note 296, at 844 (discussing *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986)); *accord* Carroll, *supra* note 343, at 1446.

³⁴⁵ See, e.g., *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (noting the relevance of a defendant's background to the extent that the crime was arguably "attributable to" something in that background); *Skipper*, 476 U.S. at 12 (Powell, J., concurring in the judgment) (suggesting that the *Lockett* principle be limited to mitigating "evidence that lessens the defendant's culpability for the crime for which he was convicted").

³⁴⁶ See Covey, *supra* note 54, at 266 ("[W]e probably must permit mercy to play a limited role—if only because there probably is no other choice—despite the necessary capriciousness it injects into the process.").

³⁴⁷ See Murphy, *supra* note 336, at 167–68 ("What business does [a sentencer] have . . . ignoring his [own] obligations to justice while he pursues some private, idiosyncratic, and not publicly accountable virtue of love or compassion?").

jurisprudence may have ironically created a system plagued by arbitrariness, due in part to the fact that the capital jury may suffer from information overload. Information overload may well cause capital jurors to disengage from the decision-making process, and thus employ coping techniques such as satisficing and opting out, resulting in an arbitrary death or life decision to merely end the decision-making process. In light of the Court's "death is different" jurisprudence, neither coping strategy is acceptable within the death penalty scheme. Therefore, in order to reduce the risk that the capital jury will experience information overload, and thus reduce arbitrariness in capital punishment decisions, death penalty jurisdictions should restrain the amount of information presented to the capital jury by eliminating both victim impact evidence and evidence of future dangerousness, and by using a culpability-centered approach to the use of both aggravating and mitigating evidence. The Supreme Court, for its part, should loosen the constraints on the states with respect to the types and amounts of mitigating evidence a defendant is permitted to introduce, as well as to the ways in which the jury can give effect to such evidence. Arbitrariness in the administration of the death penalty is simply unacceptable, but until the Supreme Court and state legislatures focus on the potential information overload impact on the capital jury, it is all but inevitable.