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

Michael J.Z. Mannheimer
Katie Morgan

Available at: https://works.bepress.com/michael_mannheimer/2/
The Impact of Information Overload on the Capital Jury’s Ability to Assess Aggravating and Mitigating Factors

Michael J. Zydney Mannheimer* and Katie Morgan**

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 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 allow the defendant to introduce only that

* Associate Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. J.D. 1994 Columbia Law School.

** J.D. expected 2008, Salmon P. Chase College of Law, Northern Kentucky University.
mitigating evidence that reflects on his culpability for the crime, broadly conceived, and the States should exercise that authority.

I. OUR MODERN CAPITAL PUNISHMENT REGIME: MINIMIZING ARBITRARINESS WHILE ENHANCING INDIVIDUALIZED SENTENCING ............... 5
A. Minimizing Arbitrariness in Death Penalty Cases Through the Use of Aggravating Circumstances .................................................................................................................. 5
   1. Aggravating Factors as Eligibility Factors .............................................................. 8
   2. Aggravating Factors as Selection Factors .................................................................. 10
      a. Weighing vs. Non-Weighing States ...................................................................... 11
      b. Statutory and Non-Statutory Aggravating Factors ............................................... 12
   3. Two Common Types of Aggravating Evidence ....................................................... 13
      a. Future Dangerousness ......................................................................................... 13
      b. Victim Impact Evidence ..................................................................................... 15
   4. The Growth in Aggravating Factors: The California Example .............................. 17
B. Enhancing Individuation in Death Penalty Cases Through the Use of Mitigating Factors 20
C. The Unique Function of the Capital Jury ................................................................. 24

II. INFORMATION OVERLOAD .............................................................................. 26
A. What Is Information Overload? ................................................................................ 27
B. Causes of Information Overload .............................................................................. 33
   1. Limited Cognitive Capabilities ............................................................................. 34
   2. Time Constraints .................................................................................................... 35
   3. Additional Idiosyncratic Factors .......................................................................... 36
C. Consequences of Information Overload .................................................................. 37
   1. Satisficing .............................................................................................................. 38
   2. Opting Out ........................................................................................................... 39

III. THE POTENTIAL EFFECT OF INFORMATION OVERLOAD ON THE CAPITAL JURY ......................................................... 40
A. Do Capital Jurors Experience Information Overload? .............................................. 40
B. How Unlimited Aggravating and Mitigating Factors Might Contribute to “Information Overload” ..................................................................................................................... 45

IV. EASING THE POTENTIAL EFFECTS OF INFORMATION OVERLOAD ON THE CAPITAL JURY ........................................... 56
A. Cabining Aggravating Factors ............................................................................... 56
   1. Focusing Aggravating Factors on the Defendant’s Culpability for the Crime ....... 57
   2. Eliminating Evidence of Future Dangerousness ..................................................... 59
   3. Eliminating Victim Impact Evidence ..................................................................... 60
B. Limiting Mitigating Evidence ................................................................................... 62

CONCLUSION ........................................................................................................... 68
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 as demanding that arbitrariness be minimized when the State seeks to impose the penalty of death. 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 that has allowed arbitrariness to seep back into the system: the problem of

---

1Godfrey 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, 306 (1972) (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).
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 area, but whose application to criminal law 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. Second, they must provide for individualized sentencing of the capital defendant. 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.”

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” in death penalty jurisprudence, Furman v. Georgia. Furman indicated that, although capital punishment is an acceptable method for punishing violent criminals who commit murder, because Georgia’s capital sentencing regime provided the jury with “unrestrained

---


4 408 U.S. 238, 238 (1972). See also Kirchmeier, supra note 2, 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)).

5 Furman, 408 U.S. at 306 (Stewart, J., concurring) (indicating that capital punishment is appropriate in limited cases). See also Carrie L. Flores, 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).
discretion to decide whether to impose the death penalty,” it resulted in cruel and unusual punishment, thus violating the Eighth Amendment of the United States Constitution. As a result, the Supreme Court “effectively rendered then-existing death penalty laws functionally invalid,” thus imposing a temporary capital punishment moratorium.

Because, however, Furman did not eliminate the death penalty per se, following Furman, approximately thirty-five States altered their capital punishment statutes in an attempt to satisfy Furman’s ambition to avoid arbitrary and capricious application of the death penalty. Subsequently, in the case of Gregg v. Georgia, the Supreme Court determined that Furman did not require legislatures to fully eliminate the jury’s discretion, but instead required that it be

---

6 Flores, supra note 5, at 679 n.23.

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


9 See id.

10 Kirchmeier, supra note 2, at 352.

11 Stephen J. Markman & Paul G. Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 STAN. L. REV. 121, 146 (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 8, at 1361 (“[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).

12 See, e.g., Gregg, 428 U.S. at 168-69 (holding that “punishment of death does not invariably violate the Constitution” and declaring Georgia’s revised capital punishment statute constitutional); Jurek v. Texas, 428 U.S. 262, 276 (1976) (declaring Texas’s revised capital punishment scheme constitutional because it (1) required the jury to find at least one statutory aggravating factor, (2) permitted the capital jury or sentencing judge to consider mitigating factors relating to the individual defendant, and (3) provided for prompt judicial review of a death sentence by a court with statewide jurisdiction). But see, e.g., Roberts v. Louisiana, 428 U.S. 325, 331 (1976) (striking down Louisiana’s mandatory capital sentencing statute because it failed to give the jury an opportunity to consider mitigating evidence); Woodson v. North Carolina, 428 U.S. 280 (1976) (declaring North Carolina’s updated death penalty punishment statute unconstitutional because automatically applies the death penalty to all defendants convicted of first degree murder and therefore fails to provide the jury with an opportunity to consider mitigating evidence) (emphasis added).
“directed and limited.” In other words, capital punishment schemes must provide the jury with guided, in contrast to unbridled, discretion during the trial’s penalty phase.

In particular, the Supreme Court stamped its seal of approval upon several particular features that were present in States’ updated death penalty regimes. First, the Supreme Court noted that, because the trial is bifurcated into a guilt phase and penalty phase, the jury has the ability, in the penalty phase, to focus solely upon the issue of death and its implications. Second, the Court noted the safeguard provided by automatic proportionality review by the highest state court in most death penalty schemes. 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. Perhaps most significantly, however, the updated death penalty schemes channeled the jury’s discretion by requiring the jury

---

13 Id. at 189.
14 Id. at 193 (“It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.”).
15 Id. at 153.
16 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”).
17 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 Abramason,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.”).
18 Gregg, 428 U.S. at 198.
19 Id. at 197 (upholding the portion of Georgia’s death penalty statute which noted that “the jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court”).
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.\(^\text{20}\)

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.

1. **Aggravating Factors as Eligibility Factors**

An aggravating factor increases the enormity of the crime, thus singling it out for special, harsher treatment.\(^\text{21}\) 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.’”\(^\text{22}\) 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.’”\(^\text{23}\) Thus, before imposing a death sentence, the capital jury must first find the existence of at least one statutory aggravating factor.\(^\text{24}\) This initial step which is often called the “eligibility phase,”\(^\text{25}\)

\(^{20}\) *Gregg*, 428 U.S. at 206 (noting that “[the jury] must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way, the jury’s discretion is channeled”).


\(^{22}\) *Godfrey*, 446 U.S. at 427-28 (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)).

\(^{23}\) *Id.* at 428 (citations omitted).

\(^{24}\) *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”).

\(^{25}\) *Tuilaepa v. California*, 512 U.S. 967, 971 (1977) (distinguishing between the “eligibility phase” of capital sentencing process and the “selection phase”).
essentially determines whether the defendant is “death eligible.” 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, thus determining which sub-classes of such defendants are eligible for the death penalty. When used for this purpose, aggravating factors are sometimes referred to as “eligibility factors.”

“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.” The narrowing function is satisfied at the guilt phase when the mere definition of capital murder, as defined by the legislature, includes an aggravating factor. The narrowing function is satisfied at the


27 Id.

28 Id.


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) [hereinafter Kirchmeier, Another Decade] (“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, 245 (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.’ The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.”); Jurek, 428 U.S. at 270-71 (“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 . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and 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.\textsuperscript{33} If the prosecutor is unable to convince the capital jury of the existence of at least one aggravating factor beyond a reasonable doubt, then the defendant automatically becomes ineligible to receive the death penalty.\textsuperscript{34} Because this is the prosecutor’s first hurdle in obtaining a death penalty decision, the prosecutor often attempts to establish multiple aggravating factors,\textsuperscript{35} 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.\textsuperscript{36} This is known as the “selection phase.”

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

\footnotesize{\textsuperscript{33} Kirchmeier, Another Decade, supra note 31, at 7-8 (noting that the narrowing function can occur at the sentencing portion of the trial via aggravating circumstances).}

\footnotesize{\textsuperscript{34} Id.}

\footnotesize{\textsuperscript{35} Id. at 4 (“These long lists of aggravating factors give prosecutors and courts broad discretion in imposing the death penalty . . . .”)}

\footnotesize{\textsuperscript{36} See Tuilaepa v. California, 512 U.S. 967, 971 (1977).}
is instructed to weigh or balance the aggravating and mitigating evidence. Second, while some States permit the jury to consider aggravating factors not enumerated by statute, others do not.

a. Weighing vs. Non-Weighing States

Some States, sometimes known as “weighing” States, employ a structured, categorical approach to aggravating and mitigating circumstance. In these States, after the capital jury finds the existence of one or more statutory aggravating circumstances, the capital jury weighs the aggravating factors, against any available mitigating evidence to ultimately reach a punishment decision. The process “is meant to be a careful, thoughtful evaluation and assessment of all of the evidence presented.” The jury might be instructed that it may, or even must, return a verdict of death if aggravators outweigh mitigators.

In contrast, States that have been called “non-weighing” States do not utilize the same type of categorical structure. 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

37 See Zant, 462 U.S. at 890.
39 Id. See also Brown, 546 U.S. at 217; 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.”).
40 LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW 115 (2d ed. 2008).
41 See, e.g., N.M. Stat. Ann. s. 31-20A-2(b) (indicating that defendant may be sentenced to life even if aggravators outweigh mitigators).
43 See Stringer, 503 U.S. at 229-30; Brown, 546 U.S. at 217.
directed how to choose between a life and death verdict. Rather, “the decision is more open-ended, and the sentencer has complete discretion to decide between life and death.”

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 in the statute. In most, 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. The Supreme Court has given its stamp of approval to the use of non-statutory aggravating factors. 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: “the penalty trial is to be a free market of information.” In essence, the Supreme Court will allow the prosecution to introduce any information that may potentially result in an aggravating factor, “without the constraints of legal categories.” 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.

44 CARTER ET AL., supra note 40, at 115.

45 See, e.g., Fla. STAT. ANN. s. 921-141(5) (“[A]ggravating circumstances shall be limited to the following . . . .”).

46 See CARTER ET AL., supra note 40, at 130 (“Most jurisdictions allow the introduction and consideration of non-statutory aggravating evidence.”).


49 Bowers, supra note 39, at 1066.

50 Id.
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 the victim.

a. Future Dangerousness

the jury to consider future dangerousness, either pursuant to more broadly worded statutory provisions\textsuperscript{55} or as a non-statutory aggravating factor.\textsuperscript{56}

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 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,”\textsuperscript{57} and even based on such innocuous acts as “kicking the bars of his prison cell following his arrest.”\textsuperscript{58} 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.”\textsuperscript{59} Moreover, in at least some jurisdictions, future dangerousness can be proved by expert testimony.\textsuperscript{60} 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.\textsuperscript{61}

\textsuperscript{55} See, e.g., State v. Arguelles, 63 P.3d 731, 758-59 (Utah 2003).

\textsuperscript{56} See, e.g., United States v. Allen, 274 F.3d 741, 788 (8th Cir. 2001).

\textsuperscript{57} Covey, \textit{supra} note 51, at 218 (footnotes and internal quotation marks omitted).

\textsuperscript{58} Id. at 218-19 (quoting Skipper v. South Carolina, 476 U.S. 1, 9-10 (1986) (Powell, J., concurring)).

\textsuperscript{59} Id. at 218.

\textsuperscript{60} See \textit{id. at} 220-21.

b. Victim Impact Evidence

Another especially common, and controversial, form of aggravating evidence is victim impact evidence. 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. 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 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.” The Supreme Court subsequently performed a one hundred and eighty degree turn, reversing its previous decision in *Booth*, and held in *Payne v. Tennessee* that the use of victim impact evidence does not violate the Constitution. As with evidence of future dangerousness, most death penalty jurisdictions specifically authorize by statute the introduction of victim

---

62 Richard C. Dieter, Death Penalty Info. Ctr., Blind Justice: Juries Deciding Life and Death with Only Half the Truth 20-31 (Oct. 2005), available at 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.”).

63 Jason Elliot Nard, 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.”) (citations omitted).

64 *Booth*, 482 U.S. at 508-09.


66 *Id.* at 825-27.
impact evidence at the selection stage. 67 Others allow such evidence under more broadly worded statutory provisions. 68

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. 69 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. 70 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, 71 and in another, the sentencer heard evidence concerning the loss to the local community resulting from the victim’s death. 72 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.” 73

67 CARTER ET AL., supra note 40, at 126.

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

69 DIETER, supra note 62, at 20-21.

70 See CARTER ET AL., supra note 40, at 127 (“[T]he tendency of the courts has been to expand the universe of witnesses who may testify.”).


72 See Moore v. State, 701 So.2d 545, 551 (Fla. 1997).

73 CARTER ET AL., supra note 40, at 127 (citing Hicks v. State, 940 S.W.2d 855, 857 (Ark. 1997), and Whittlesey v. State, 665 A.2d 223, 251 (Md. 1995)).
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 State to State.74 States differ, for example, in the number of statutory aggravating factors contained in their capital punishment statutes. The aggravating factors legislatures deem applicable range from facts surrounding the murder itself,75 to the motivation for the murder,76 to the status of the defendant or the victim.77 Some States’ statutory aggravating factor schemes include fewer than ten statutory aggravating circumstances,78 while, in contrast, other States have more than twenty statutory aggravating factors.79 In recent years, many States have continued to expand the coverage of their capital punishment statutes with additional aggravating factors.80

74 Ruttenberg, supra note 8, 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 e.g. Kirchmeier, supra note 2, and Kirchmeier, Another Decade, supra note 31, for a comprehensive review of statutory aggravating factors among all states permitting capital punishment.

75 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(4) (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.”).

76 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.”).

77 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 . . . .”)

78 See, e.g., KY. REV. STAT. ANN. § 532.025(2)(a) (West 2006) (listing eight statutory aggravating factors); OHIO REV. CODE ANN. § 2929.04(A) (West 2008) (listing ten statutory aggravating factors); CONN. GEN. STAT. ANN. § 53a-46a(i) (West 2008) (listing eight statutory aggravating factors).


80 Kirchmeier, Another Decade, supra note 31, at 12-14, 25 (noting that “more than twenty different states expanded their death penalties by addition factors that make one eligible for the death penalty” over the past ten years).
California, for example, has implemented one of the most expansive statutory aggravating factor schemes currently in existence.\textsuperscript{81} It includes twenty-four\textsuperscript{82} statutory aggravating circumstances, labeled “special circumstances,” which the capital jury may consider when making its punishment decision.\textsuperscript{83} Nine of these 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.\textsuperscript{84} Another ten relate to the motivation behind the killing, either by itself\textsuperscript{85} or in conjunction with the status of the victim.\textsuperscript{86} Three relate solely to the status of the victim,\textsuperscript{87} while

\textsuperscript{81} \textit{E.g.}, \textsc{Cal. Penal Code} § 190.2(a) (West 2008).

\textsuperscript{82} 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. \textit{See infra} notes 86, 87.


\textsuperscript{84} \textsc{Cal. Penal Code} § 190.2(a)(3) (defendant “convicted of more than one offense of murder in the first or second degree” in a single proceeding); § 190.2(a)(4), (6) (“murder . . . committed by means of a destructive device, bomb, or explosive,” either concealed or intended for delivery via mail); § 190.2(a)(14) (“murder . . . especially heinous, atrocious, or cruel”); § 190.2(a)(15) (“The defendant intentionally killed the victim by means of lying in wait.”); § 190.2(a)(17) (murder, whether intentional or not, committed during commission or attempted commission of an enumerated felony, or during immediate flight there from); § 190.2(a)(18) (“The murder was intentional and involved the infliction of torture.”); § 190.2(a)(19) (“The defendant intentionally killed the victim by the administration of poison.”); § 190.2(a)(21) (intentional murder “perpetrated by means of discharging a firearm from a motor vehicle”).

\textsuperscript{85} \textsc{Cal. Penal Code} § 190.2(a)(1) (intentional murder “carried out for financial gain”); § 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”); § 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.

\textsuperscript{86} \textsc{Cal. Penal Code} § 190.2(a)(7), (8) (victim was either “peace officer,” “former peace officer,” or “federal law enforcement officer or agent” “intentionally killed in retaliation for the performance of his or her official duties”); § 190.2(a)(10) (witness elimination or retaliation); § 190.2(a)(11), (12), (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”);

\textsuperscript{87} \textsc{Cal. Penal Code} § 190.2(a)(7), (8), (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 ).
one relates solely to the status of the defendant\textsuperscript{88} and another relates to his status in conjunction with a motivation for the killing.\textsuperscript{89} Moreover, California allows the capital jury to consider non-statutory aggravating factors, beyond the proven statutory aggravating factor(s), in its weighing decision.\textsuperscript{90} These include future dangerousness\textsuperscript{91} and victim impact evidence.\textsuperscript{92}

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 the capital jury finds at least one aggravating factor beyond a reasonable doubt.\textsuperscript{93} 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 ever more information to process and analyze.

\begin{footnotes}
\footnotetext[88]{CAL. PENAL CODE § 190.2(a)(2) (“The defendant was convicted previously of murder in the first or second degree.”).}

\footnotetext[89]{CAL. PENAL CODE § 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.”).}

\footnotetext[90]{Taylor, supra note 47, at 21 n.5.}

\footnotetext[91]{See People v. Michaels, 49 P.3d 1032, 1065-66 (Cal. 2002).}

\footnotetext[92]{See People v. Zamudio, 181 P.3d 105, 134-35 (Cal. 2008). Technically, introduction of victim impact evidence in California is authorized pursuant to CAL. PEN. CODE s. 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.}

\footnotetext[93]{Kirchmeier, Another Decade, supra note 31, at 4.}
\end{footnotes}
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 which the defendant “proffers as a basis for a sentence less than death.”94 In contrast to aggravating factors, which are utilized in both the eligibility and the selection phases, mitigating factors are utilized exclusively in the latter.95 Death penalty statutes typically enumerate potentially applicable mitigating factors. 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.96 Two of these relate to the status of the defendant: his lack of a “significant history of prior criminal activity” and his youth.97 The other six relate to the facts and circumstances of the crime: that “[t]he victim was a participant in the defendant's criminal conduct or consented to the criminal act,” that the defendant’s “participation in the capital offense 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, “not sufficient to constitute a defense to the crime.”98

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

---


95 National Association of Criminal Defense Lawyers, supra note 29. Aggravating factors are used both in the eligibility phase as well as in the selection phase because aggravating factors must be considered along with the mitigating factors in determining the ultimate punishment. See id.

96 AMERICAN LAW INSTITUTE, MODEL PENAL CODE s. 210.6(4) (1980).

97 Id. s. 210.6(4)(a), (h).

98 Id. s. 210.6(4)(b), (c), (d), (e), (f), (g).
mandates that States permit the jury to hear and consider virtually all mitigating evidence.\textsuperscript{99} 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.\textsuperscript{100}

The Supreme Court laid the foundation for capital punishment’s individualized sentencing requirement in \textit{Furman}\textsuperscript{101} and \textit{Gregg}.\textsuperscript{102} However, the Supreme Court began to focus its attention upon mitigating evidence in \textit{Gregg}’s companion case, \textit{Woodson v. North Carolina}.\textsuperscript{103} 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. 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.\textsuperscript{104}


\textsuperscript{100} Buchanan v. Angelone, 522 U.S. 269, 276 (1998).

\textsuperscript{101} 408 U.S. 238 (1976). 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.” \textit{Id}. at 313 (White, J., concurring).

\textsuperscript{102} 428 U.S. at 206 (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).

\textsuperscript{103} 428 U.S. 280 (1976).

\textsuperscript{104} \textit{Id}. at 304 (citations omitted).
The Supreme Court fully circled the wagons around the constitutional basis of mitigating evidence in *Lockett v. Ohio*. In particular, the Supreme Court reasoned that, given the death penalty’s finality and irreversibility, individualized analysis and consideration is crucial. 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 weight to aspects of the defendant’s character . . . proffered in mitigation” are unconstitutional per se. 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,” involving the “highly-charged moral and emotional issue of whether the defendant, notwithstanding his crimes, is a person who should continue to live.”

In addition, mitigating evidence is not limited to factors concerning the defendant’s character or circumstances prior to the crime. 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

---

106 *Id.*
107 *Id.* at 604-05.
sentence less than death.”

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. The Supreme Court has overturned death sentences where defense counsel failed to investigate and present mitigating evidence for the defendant, reasoning that, “had 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.”

The defense counsel’s investigation may produce multiple mitigating factors in many shapes and forms. Mitigating factors that are often presented by the defendant include child abuse, substance abuse or addiction, caring family, absence of a criminal record, the defendant’s age, the defendant’s and his family’s mental history, whether the defendant had a background of extreme poverty, defendant’s remorse, and whether defendant was ever institutionalized and received the necessary help.

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 it hears. 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. 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

111 Id. at 4-5.


113 Id.

114 Garvey, *supra* note 26, at 1559-60.

penalty statute itself, such as future dangerousness.\textsuperscript{116} 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.\textsuperscript{117} 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.\textsuperscript{118} 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.\textsuperscript{119}

C. The Unique Function of the Capital Jury

Following \textit{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:”\textsuperscript{120}

\begin{quote}
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 mitigating factor and to withhold imposing a death sentence even as a pure act of mercy or leniency.\textsuperscript{121}
\end{quote}

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

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{117} Walton, 497 U.S. at 650 (“The Eight 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.”).
\end{flushright}

\begin{flushright}
\textsuperscript{118} DIETER, supra note 62, at 23.
\end{flushright}

\begin{flushright}
\textsuperscript{119} Garvey, supra note 26, at 1560.
\end{flushright}

\begin{flushright}
\textsuperscript{120} Abramason, supra note 17, at 120.
\end{flushright}

\begin{flushright}
\textsuperscript{121} Id. at 120-21 (citing ARISTOTLE, NICOMACHEAN ETHICS 141 (1962)).
\end{flushright}
understood only as an expression of the community’s outrage – its sense that an individual has lost his moral entitlement to live.”  

The courts 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.

The Supreme Court has held that the Constitution does not require jury sentencing in capital cases. 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.” 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.

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

123 Bowers, supra note 39, at 1066.
125 DIETER, supra note 62, at 22.
126 Spaziano, 468 U.S. at 468-69 (Stevens, J., concurring in part and dissenting in part).
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 it must also perform its task in an unfamiliar setting while applying novel, and often ambiguous, legal concepts:

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 and 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.128

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 excessive numbers of aggravating factors in many jurisdictions are 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

127 Bowers, supra note 39, at 1071.

penalty system. Moreover, Justices Blackmun and Scalia 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, is inherently inconsistent with the Woodson/Lockett line of cases, requiring that capital punishment schemes utilize individualized sentencing, thus permitting the defendant to introduce virtually unlimited mitigating evidence. Both have argued that the inconsistency between the Furman and Woodson/Lockett lines of cases have effectively diluted the Court’s endeavor to eradicate arbitrariness. 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. Most social scientists agree that, because people are rational human beings, additional options and choices enhance our society. People

129 Kirchmeier, Another Decade, supra note 31, at 4.
132 Kirchmeier, supra note 2, at 346. See also Godfrey, 446 U.S. at 428.
133 Woodson, 428 U.S. at 304; Lockett, 438 U.S. at 604-05.
134 Kirchmeier, supra note 2, at 346-49.
value information. “[P]eople want information because it is empowering. Information enables those who have it to make informed decisions . . . .” Thus, information is categorically considered valuable.

The classic hypothesis presumes that decision making quality and information quantity form a linear function; as information quantity increases, so does decision quality proportionally. 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. 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. 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 of options available. Accordingly, researchers have arrived

---

137 Kenneth Einar Himma, A Preliminary Step in Understanding the Nature of a Harmful Information-Related Condition: An Analysis of the Concept of Information Overload, 9 ETHICS AND INFO. TECH. 259, 259 (1997). See also Francis Heylighen, Complexity and Information Overload in Society: Why Increasing Efficiency Leads to Decreasing Control 11 (April 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.”).

138 Id.

139 Himma, supra note 137, at 259.


141 Himma, supra note 137, at 260.

142 Id.

143 Id.
at the nuanced proposition that although “some choice is good [it] doesn’t necessarily mean that more choice is better.”

This conclusion is grounded in the central insight that “bounded rationality” confines people’s decision making abilities. The bounded rationality theory suggests that “people can only process a finite amount of information during any particular period of time.” 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. 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. 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. 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, in studying such areas as accounting, management, and, particularly,

---

144 SCHWARTZ, supra note 136, 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.

145 Paredes, supra note 140, at 24-25.

146 Id.

147 Ram, supra note 135, at 20.


The classic, 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) within the information-processing requirements (i.e. the amount of information one has to integrate in order to complete a task).” Over the past decade, the term "information overload" has morphed into idioms such as "information glut," "data smog," and “information fatigue.” “What was once a term grounded in cognitive psychology has evolved into a rich metaphor used outside the world of academia.”

---


153 Eppler, supra note 149, 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. PERSONAL 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 . . . .”); David Glen Mick et al., Choose, Choose, Choose, Choose, Choose, Choose, Choose: Emerging and Prospective Research on the Deliberative Effects of Living in Consumer Hyperchoice, 52 J. OF BUS. ETHICS 207, 208 (2004) (defining information overload as the “multiplicative function of the amount of product attributes and alternative information for a single decision.”); Charles A. O’Reilly, Individuals and Information Overload in Organizations: Is More Necessarily Better?, 23 ACAD. OF MGMT J. 684, 684 (1980) (declaring that information overload occurs “when information processing capabilities and the information overloads encountered are mismatched.”); Cheri Speier et al., The Influence of Task Interruption on Individual Decisionmaking: An Information Overload Perspective, 30 DECISION SCIENCES 337, 337-59 (1999).(defining information overload as “a state induced when the amount of input to a system exceeds its processing capacity.”);

154 Cheri Speier et al., supra note 153.

155 Id.


157 Speier, supra note 153.
Herbert Simon, the “godfather” of information overload, developed a working model of information overload.\textsuperscript{158} Simon used an inverted u-curve model, shown in Figure 1, to represent the precise point where the decision maker supposedly experiences information overload.\textsuperscript{159} As the inverted u-curve suggests, the information overload point occurs “where the amount of information actually integrated into the decision begins to decline.”\textsuperscript{160} Beyond this point, decision quality decreases and the decision maker begins to remove him or herself from the decision making process.\textsuperscript{161}

\textbf{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

\textsuperscript{158}Eppler, \textit{supra} note 149, at 326 (noting that the “inverted u-curve represents the first important definition of information overload”).

\textsuperscript{159}Id. at 328.

\textsuperscript{160}Id.

\textsuperscript{161}See id.
she can efficiently use,” and another noted that information overload develops when the “amount of reading matter ingested exceeds amount of energy available for digestion; the surplus accumulates and is converted by stress and over stimulation into the unhealthy state known as information overload anxiety.” 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.).

Two different strands of information overload have surfaced. The first strand holds that “decision-makers experience information overload when presented with an overwhelming number of options that must be considered simultaneously.” This strand represents the typical marketing situation where a person attempts to choose one particular item from a multitude of choices – 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 options are available, due to the many details or attributes of each option that need to be considered.” 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

\[\text{Id.}\]

\[\text{Wurman, supra note 156, at 2.}\]

\[\text{See id.}\]

\[\text{Ram, supra note 135, at 21.}\]

\[\text{Id.}\]

\[\text{Id.}\]

\[\text{Id.}\]

\[\text{Id.}\]
subparts. This second type of information overload might occur when a person contemplates buying a house. The purchaser may only have two houses which he or 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 maker to become overwhelmed and confused, thus resulting in decision making anxiety and information overload.  

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. 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.

---

169 See id.
170 See id.
171 Ram, supra note 135, at 21.
1. Limited Cognitive Capabilities

Research indicates that “the human brain 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.”\textsuperscript{172} Herbert Simon is credited with being the first to recognize that “people have limited cognitive abilities to store, process, and interpret information.”\textsuperscript{173} Simon coined the term “bounded rationality,” claiming that “cognitive capabilities are scare 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.”\textsuperscript{174} Because humans suffer from limited cognitive capabilities, we are unable to consider every aspect of every decision because, if we did so, the decision making process would morph into a complex, distressing, and time consuming experience.\textsuperscript{175} 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 affecting, and lowering, decision quality.\textsuperscript{176}

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} Paredes, \textit{supra} note 140, at 16.


\textsuperscript{175} Paredes, \textit{supra} note 140, at 16.

\textsuperscript{176} Eppler, \textit{supra} note 149, at 326.
2. Time Constraints

The impact of time on information overload first became evident when researchers and scholars begin incorporating time into the very definition of information overload.\textsuperscript{177} For example, one researcher claimed that information overload occurred when “the demands on an entity for information processing time exceed its supply of time.”\textsuperscript{178} 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.\textsuperscript{179} 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.\textsuperscript{180}

In addition, distractions and interruptions have a direct proportionate impact on time pressure, thus potentially increasing information overload.\textsuperscript{181} Scholars agree that distractions and interruptions can contribute to information overload because of the restrictions they put on time:\textsuperscript{182}

\begin{quote}
[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 pressure. Interruptions break the flow of work and often bring it to a halt. As interruptions can take away from present activity, they
\end{quote}

\textsuperscript{177} Id.
\textsuperscript{180} Id. at 377.
\textsuperscript{181} SUTCLIFFE & WEICK, \textit{supra} note 148, at 5.
\textsuperscript{182} Id.
fuel feelings of time pressure. Interruptions can 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 another.\footnote{Id.}

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.\footnote{Eppler, supra note 149, at 331.}

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.”\footnote{Id. at 327, 331.} Characteristics such as ambiguity, novelty, difficulty, and intensity all contribute to the uncertainty level associated with the information, thus inducing information overload.\footnote{Id. at 331.} 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.”\footnote{Id.}

In addition to the characteristics of the information itself, research indicates that the make up of the individual decision maker, and thus that person’s personality traits, are important
factors affecting information overload. Particularly, features such as personal abilities, experience level, and motivation may affect a person’s processing and cognitive abilities. 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.” Therefore, a highly motivated person is less likely to experience information overload than a less motivated person.

Finally, researchers believe that the nature of the specific task at hand can affect information overload. Specifically, the less often the task is utilized and the more complex the task is, the more likely is information overload. 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.

C. Consequences of Information Overload

Just as with any disease or 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 large amount [sic] 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

---

188 Id.
189 Id.
190 Han, et al., supra note 179, at 367-68.
191 See id.
192 Eppler, supra note 149, at 331.
193 Id.
194 Id. at 328.
decision of adequate accuracy.”

Moreover, information overload often diverts the decision maker’s attention away from relevant issues and blinds them to more important matters. 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.” Alternatively, he or she may “opt out.”

1. Satisficing

Decision makers often employ the technique of satisficing “[w]hen the information environment becomes very rich or the decision task becomes very complex relative to a person’s available time or expertise.” 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. Therefore, the decision maker opts to satisfice rather than optimize. “To optimize is to choose the best from the full set of . . . choices; to satisfice is to do as well as one can, given the circumstances. To satisfice rather than optimize is to fail to choose the most preferred – the ‘best’ – from among a set of choices.”

195 Id. at 333 (citations omitted).

196 SUTCLIFFE & WEICK, supra note 148, at 4.

197 Grether et al., supra note 144, at 279. See also Paredes, supra note 140, at 17 (“Simon concludes that people “satisfice” rather than “optimize,” especially when faced with complex choices.”).

198 Grether et al., supra note 144, at 279.

199 Id. See also Paredes, supra note 140, at 17 (“Decision makers tradeoff optimizing the outcome for simplifying the decision process.”); Malhotra, Reflections, supra note 152, 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 to for a [person] to adopt a choice heuristic that may limit cognitive strain but that may not lead to the ‘best’ or even to a satisfactory choice.”).

200 Grether et al., supra note 144, at 279.
When a decision maker decides to satisfice, he or she often sets an “aspiration level,” or a level that satisfies the decision maker. Typically, the “aspiration level” is not the equivalent to the best decision that decision maker could make. 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 satifice and not optimize. Rather, individuals satisfy because they do not have the cognitive capabilities to optimize. At bottom, satisficing is a coping device for making complex decisions under uncertainty. Decision makers tradeoff optimizing the outcome for simplifying the decision process.

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.” As a result, satisficing often results in a lower quality decision.

2. Opting Out

In addition to satisficing, information overload can also push decision makers to “check out” of the decision-making process altogether. Studies indicate two ways in which decision makers suffering from information overload attempt to break free from the decision making process:

201 Paredes, supra note 140, at 17.
202 See id.
203 Id.
204 Id.
205 Ram, supra note 135, at 23.
206 Id.
207 Id. at 24.
process.\textsuperscript{208} In situations “where the number of available choices is so great as to be ‘truly daunting,’ rather than trying to choose, ‘people may disengage, \textit{choosing almost arbitrarily} to complete the process.’”\textsuperscript{209} 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[] fatigue,” and thus subsequent decisions are likely to embrace more arbitrary and illogical factors.\textsuperscript{210} 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.\textsuperscript{211}

\section*{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 whether jurors are actually receiving too much information.

\begin{enumerate}
\item[A.] \textbf{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

\begin{itemize}
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} \textit{Id.}
\item \textsuperscript{210} \textit{Id.}
\item \textsuperscript{211} Ram, \textit{supra} note 135, at 26.
\end{itemize}
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.” They concluded that “the information overload idea should be dropped from legal discourse.”

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. Yet, as Troy Paredes pointed out, “constrained optimization” is simply another term for satisficing, a term GSW themselves use. As Paredes wrote:

> 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.

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. They acknowledge that that such “task choice complexity” satisficing, “could

---

212 Grether et al., supra note 144, at 301.

213 Id.

214 Id. at 294.

215 Paredes, supra note 140, at 436 n.87 (“Satisficing can alternatively be thought of as optimizing subject to constraints.”).

216 Grether et al., supra note 144, at 301 (“[W]hen choice sets become large or choice tasks complex relative to consumers’ time or skill, consumers satisfice rather than optimize.”).

217 Paredes, supra note 140, at 443.

218 Grether et al., supra note 144, at 301.
in theory create serious problems for consumers.” 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.” 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.

Yet, as Melvin Eisenberg pointed out, GSW’s own research does not bear out this conclusion. 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.” 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. 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

---

219 Id.

220 Id. at 294.


222 Grether et al., supra note 144, at 295.
attributes, only one of which was salient. And GSW acknowledge that “when the choice task became quite complex – four alternatives and four salient attributes – subjects essentially chose randomly.” Eisenberg is thus correct when he observes that the results regarding decision making involving even a modicum of complexity “provide scant support” for GSW’s bold claim that “task choice complexity” satisficing should cause us no concern.

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. 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. As Eisenberg points out, such “simplifying strategies” are not always available even in real-life situations. 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.

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

223 *Id.* at 297.

224 *Id.*

225 Eisenberg, *supra* note 221, at 309.

226 Grether et al., *supra* note 144, at 299.

227 *Id.* at 296.

228 Eisenberg, *supra* note 221, at 310.

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.230

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.”231 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 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 half empty or half full’ problem in interpreting the results.”232 However acceptable this view is when consumers are choosing among toothpastes and toasters, 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.233 “In addition, 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.”234 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.235 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”236 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”

Aggravating and mitigating factors potentially contribute significantly to capital jurors’
experiencing information overload. Death penalty cases are saturated with too much

233 Paredes, supra note 140, at 17.
234 Id.
235 Id.
236 Id.
information, primarily as a result of the use of aggravating and mitigating factors. Moreover, “when everything counts, as it does under Lockett, nothing is dispositive, and subjectivity (although not pure irrationality) holds sway.” Therefore, capital jurors are constantly battling with the facts and evidence presented by both sides, in an attempt to process this information in order to make an informed, accurate, and proportionate punishment decision.

By allowing the State to present virtually unlimited aggravating evidence, and requiring the State to permit the defendant to present virtually unlimited mitigating evidence, 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. 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.

---

237 Bowers, supra note 39, at 1066 (noting that “Zant essentially granted the states a Lockett right: the penalty trial is to be a free market of information”).

238 Berger, supra note 115, at 1082.

239 See supra notes 2 to 93 and accompanying text.

240 See supra notes 94 and 119 and accompanying text.

Although two strands of information overload have emerged, it is primarily the second strand of information overload 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, due to the many details or attributes of each option that needed to be considered.”

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, however, 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.

Because of the vast amount of information presented during the capital, it is likely that capital jurors suffer from information overload. It is essential to remember that capital trials are “bifurcated – meaning that the guilt phase and sentencing phase are tried separately.” Nonetheless, the same jurors hear evidence and make a decision as to both the defendant’s guilt or innocence and his punishment. Therefore, before the sentencing phase even begins, the jurors have already been exposed to many hours of voir dire questions, evidence, and instructions from the trial judge. If the typical capital guilt phase lasts 10.3 days, as in North Carolina,

---

242 See supra notes 165 to 171 and accompanying text.
243 Ram, supra note 135, at 21.
245 Id. at 793-94.
246 See, e.g., COOK, supra note 241, at 97-98 (explaining that the average length of a capital trial in North Carolina is 14.6 days, including both the guilt and sentencing phases).
then capital jurors must listen to, process, and retain roughly 72 hours of information.\textsuperscript{247} 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.\textsuperscript{248} However, once it does so, the capital jury can consider all the proved aggravating factors during the selection stage.\textsuperscript{249} Therefore, it is to the prosecutor’s benefit to attempt to prove multiple aggravating factors. Moreover, in most States, after proving at least one \textit{statutory} aggravating factor, the prosecutor typically is permitted to prove \textit{non-statutory} aggravating factors. 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.\textsuperscript{250} 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.

\textsuperscript{247}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 256.

\textsuperscript{248}\textit{Stringer}, 503 U.S. at 229.

\textsuperscript{249}Stephen Hornbuckle, \textit{Capital Sentencing Procedure: A Lethal Oddity In The Supreme Court’s Case Law}, 73 TEX. L. REV. 441, 448-49 (1994) (explaining that, in weighing states, the jury is “explicitly instructed” to weigh the proven statutory aggravating factors against the proven mitigating factors).

\textsuperscript{250}DIETER, supra note 62, at 20-21.
In addition, 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 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.

Also, the function of the capital jury indicates that the capital jury applies mercy, ethics, and morals to its sentencing decision. 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. In theory, capital jurors are given as

---

251 Woodson, 428 U.S. at 304; Lockett, 438 U.S. at 604.

252 See generally Woodson, 428 U.S. at 304; Lockett, 438 U.S. at 604.

253 See Spaziano, 468 U.S. at 468-69 (Stevens, J., concurring in part and dissenting in part).
much or as little time as needed to reach its punishment decision.\textsuperscript{254} 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,\textsuperscript{255} 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 its 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.\textsuperscript{256} In capital trials, as in all trials, interruptions may take the form of discussions at the bench, recesses to obtain witnesses and evidence, and breaks for the judge to fulfill other official 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 shear 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.

\textsuperscript{254} W. Wendell Hall, \textit{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.”).

\textsuperscript{255} See Allen v. United States, 164 U.S. 492, 501-02 (1896).

\textsuperscript{256} SUTCLIFFE \& WEICK, \textit{supra} note 148, at 5.
In addition, the characteristics of the evidence may increase the probability of juror information overload. Information characteristics such as ambiguity, novelty, difficulty, and intensity often contribute to information overload. 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 – 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. The capital jury makes its decision in a stressful, unfamiliar setting. 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.

257 Eppler, supra note 149, at 331.

258 United States v. Castillo, 924 F.2d 1227, 1232 (2d Cir. 1991).

259 Id.

260 Sontag, supra note 128, at 80.
Moreover, the overall life and death decision is complex and intense.\textsuperscript{261} Not only is it difficult for a capital juror to make the decision whether another human being deserves to live or die,\textsuperscript{262} the task is also complex because jurors struggle to “understand the abstruse legal framework that the courts have constructed around the death penalty.”\textsuperscript{263} In particular, the jurors are often asked to weigh incommensurables: the utilitarian-based idea that very dangerous offenders must be permanently incapacitated by death, added to the harm-based retributivist\textsuperscript{264} 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.\textsuperscript{265} 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.”\textsuperscript{266} Empirical research demonstrates the difficulty

\begin{flushleft}  
\hspace{1cm} \textsuperscript{261} \textsc{Dieter, supra} note 62, at 22 (“[Jurors] have a difficult time determining who should live and die because it is an inherently inscrutable process.”).
\end{flushleft}

\begin{flushleft}  
\hspace{1cm} \textsuperscript{262} \textit{Id.} at 24.
\end{flushleft}

\begin{flushleft}  
\hspace{1cm} \textsuperscript{263} \textit{Id.} at 22.
\end{flushleft}

\begin{flushleft}  
\hspace{1cm} \textsuperscript{264} See, e.g., \textsc{Andrew Ashworth, Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law}, 19 \textsc{Rutgers L.J.} 725, 735-36 (1988) (distinguishing “harm-based” from “intent-based” retributivism).
\end{flushleft}

\begin{flushleft}  
\hspace{1cm} \textsuperscript{265} See \textsc{Covey, supra} note 51, at 259 (“[T]he weighing paradigm is fundamentally incoherent, because aggravators and mitigators are simply not comparable.”); \textsc{Scott W. Howe, Furman’s Mythical Mandate}, 40 \textsc{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”); \textsc{Franklin E. Zimring & Gordon Hawkins, A Punishment in Search of a Crime: Standards for Capital Punishment in the Law of Criminal Homicide}, 46 \textsc{Md. L. Rev.} 115, 120 (1986) (criticizing Model Penal Code approach for requiring jury to weigh “the incommensurable”). \textsc{Cf. Robert Weisberg, Deregulating Death}, 1983 \textsc{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 \textsc{Williams, Moral Luck} 77 (1981)).
\end{flushleft}

\begin{flushleft}  
\hspace{1cm} \textsuperscript{266} \textsc{Covey, supra} note 51, at 254.
\end{flushleft}
jurors have in comparing aggravating and mitigating factors. “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.” 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. 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, or the defendant presents a certain amount of mitigating evidence, the juror will arbitrarily pick death or life. 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. Instead, the juror would select which information he or she desires to

---


269 See Covey, supra note 51, at 262 (“[R]esearch suggests that sentencing decisions often turn on little more than the number of aggravating factors established: The more aggravators found, the more likely the defendant will receive a death sentence . . . .”); Wiener, supra note 267, at 769 (discussing this phenomenon among Nebraska judges).

270 See generally Paredes, supra note 140, at 17 (noting that the aspiration level does not equal the best available decision).

271 Eppler, supra note 149, at 333 (explaining that when a person satisfices, he or she has trouble identify relevant information and tends to ignore significant amounts of information).
process and become blind to all additional information. The juror might engage in this process subconsciously, 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 arbitrarily 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 juror 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, 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 or best 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

272 See Grether et al., supra note 144, at 279 (indicating that, when a decision maker satisfies, he or she, whether consciously or subconsciously, ultimately makes the required decision arbitrarily because of information overload).

273 See supra text accompanying notes 188 to 191.
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 decision making process. Federal\(^ {274} \) and state\(^ {275} \) constitutional and statutory\(^ {276} \) 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 the evidence at all.

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 was unable to adequately make this crucial decision and therefore relied 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.


\(^ {276} \) See, e.g., TEX. CODE CRIM. PROC. ANN. art. 36.29(a) (requiring unanimous twelve-person jury in criminal cases).
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 limit and 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 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,” it is nonetheless bad policy to allow limitless aggravating factors because they also can contribute significantly to the capital juror experiencing information overload. Because, as previously noted, information overload may cause jurors to ignore relevant information and disengage from the decision making process, it

277 Gregg, 428 U.S. at 195.

278 See Eppler, supra note 149, at 331.
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.”\(^{279}\) Rather than posing a wide-ranging “inquest into the defendant’s past conduct and present disposition,”\(^ {280}\) 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*\(^ {281}\) – nor, “Does any defendant deserve to die for this crime?” – an inquiry foreclosed by *Woodson*\(^ {282}\) – but rather “Does this defendant deserve to die for this crime?”\(^ {283}\) As Carol and Jordan Steiker cogently observed:

> [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 entail [the] opposite; a consensus against mandatory sentencing does not lead us

\(^{279}\) Covey, *supra* note 51, at 246.

\(^{280}\) Id. at 247.


\(^{283}\) *See* Covey, *supra* note 51, 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)).
inexorably to unconstrained consideration of all individualizing circumstances.\(^{284}\)

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.\(^{285}\) More particularly, this constraint homes in on the “moral quality of the choice” made by the defendant in committing his crime.\(^{286}\) 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 torture\(^{287}\) – or for a certain reason – for example, for financial gain\(^{288}\) – certainly bears on the defendant’s culpability for the crime. On the other hand, that a defendant merely “should have

\(^{284}\) 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) (book review). 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* text accompanying notes 21 to 50 (discussing 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.

\(^{285}\) Covey, *supra* note 51, at 227-41.

\(^{286}\) *Id.* at 233.

\(^{287}\) *See* CAL. PENAL CODE § 190.2(a)(18).

\(^{288}\) *See* CAL. PENAL CODE § 190.2(a)(1).
known” – *i.e.*, was negligent – that the victim was a peace officer,\(^{289}\) 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:\(^{290}\) while it logically and appreciably delimits the class of death eligible defendants, and so is an appropriate eligibility factor, it has nothing to do with whether the defendant deserves death for this crime.\(^{291}\) 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 than 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”\(^{292}\) – 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.”\(^{293}\)

---

\(^{289}\) See Cal. Penal Code § 190.2(a)(7).

\(^{290}\) See Cal. Penal Code § 190.2(a)(2).

\(^{291}\) See Covey, *supra* note 51, at 249 (“[P]rior criminal convictions . . . should not receive special consideration . . .”).

\(^{292}\) Covey, *supra* note 51, at 249.

\(^{293}\) *Id.* at 253.
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.” 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. In addition, and as a result, no longer would juries be subjected to expert testimony about future dangerousness. 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 is 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 on the already introduced aggravating and mitigating evidence. Although this evidence serves a legitimate purpose, the evidence is tangential to whether *this* defendant deserves to live or die for his crime. Because of its

---

294 *Id.* at 257.

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

296 *Id.* at 258.


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 of the nature of the relationship between the victim and his or her family or community. Nor does the defendant typically select the victim or choose to kill based on the potential impact of the killing on these relationships. By permitting the jury to consider, and occasionally base its death sentence largely upon, victim impact evidence “instead of on the evidence relevant to . . . the crime, [victim impact evidence] diverts the jury’s focus to irrelevant information independent of the decision to kill.” 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. 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. 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. As the Supreme Court has noted, such evidence allows the state to counterbalance the defendant’s mitigating

299 See Payne, 501 U.S. at 845. ("[O]rdinarily . . . the defendant [i]s unaware of the personal circumstances of his victim . . . .").

300 Nard, supra note 63, at 842.

301 Id. (emphasis added).

302 Id.

303 Paredes, supra note 140, at 16.

304 Payne, 501 U.S. at 825.
evidence.\textsuperscript{305} However, this will become less necessary if, as we propose,\textsuperscript{306} 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. 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 the victim.\textsuperscript{307} 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. Subsequently, 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 assessment\textsuperscript{308} was, of course, developed with the best of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{305} 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).
\item \textsuperscript{306} See infra Part IV.B.
\item \textsuperscript{307} See generally DIETER, supra note 62, at 24 (including the statement 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 . . . ”).
\end{itemize}
\end{footnotesize}
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 that 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. A system in which capital defendants are arbitrarily spared is as bad as one in which capital defendants are arbitrarily executed.\footnote{309}

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 use the same culpability-focused approach discussed above with regard to aggravating evidence.\footnote{310} 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.”\footnote{311} By this, we do not mean to limit mitigating factors to

\footnote{308}Woodson, 428 U.S. at 304; Lockett, 438 U.S. at 604.

\footnote{309}See Steiker & Steiker, supra note 284, 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).

\footnote{310}See supra Part IV.A; see also Steiker & Steiker, supra note 284, at 840 (“[T]he individualization requirement mandates consideration only of evidence regarding individual culpability.”).

\footnote{311}Steiker & Steiker, supra note 284, at 846.
those that resemble excuse or justification defenses to the crime itself,\textsuperscript{312} exemplified by the Model Penal Code.\textsuperscript{313} 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.”\textsuperscript{314}

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.\textsuperscript{315} 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.\textsuperscript{316} 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

\textsuperscript{312} 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).

\textsuperscript{313} See supra text accompanying notes 96 to 98 (describing mitigating factors set forth in Model Penal Code).


\textsuperscript{315} Steiker & Steiker, supra note 284, at 847-48; see also Garvey, supra note 26, at 1561 (“For the most part, mitigating evidence falls into three broad categories: reduced culpability, general good character, and lack of future dangerousness.”).

\textsuperscript{316} Steiker & Steiker, supra note 284, at 848-57 (reviewing state statutory schemes and Model Penal Code). But see Howe, supra note 265, at 468 (asserting that “there are no grounds to claim a societal consensus” around such a culpability-based view).
conduct was `freely chosen'” is consistent with the Supreme Court’s interpretation of the Eighth Amendment as a retributivist-based limitation on the death penalty.\(^{318}\) On this interpretation, “what is pertinent to the issue of culpability is the moral quality of the choice, not the moral character of the offender.”\(^{319}\) 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.\(^{320}\) Yet, just as dangerousness is a different question from enhanced culpability, an extension of mercy is not necessarily a recognition of reduced culpability.\(^{321}\) A jury might be merciful to one fully culpable for a grave crime and who therefore deserves death.\(^{322}\) 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.\(^{323}\) Thus, evidence designed to evoke a merciful

\(^{317}\) Covey, supra note 51, at 250.

\(^{318}\) Id. at 227-41.

\(^{319}\) Id. at 233.

\(^{320}\) 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.”).

\(^{321}\) Id. at 265 (distinguishing “mercy” from “mitigation”).

\(^{322}\) 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.”).

\(^{323}\) 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 requires a departure from justice.”).
response “is no more relevant to a meaningful evaluation of the defendant’s culpability than is evidence of his dangerous character.”

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,325 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 them to give effect to mitigating evidence for one purpose but not necessarily for all purposes.326 For example, in Texas v. Johnson,327 the Court held that jurors could constitutionally be instructed to consider the defendant’s youth only as it related to the question of his future dangerousness. And, more directly on point, in Saffle v. Parks,328 the Court held that a jury could be constitutionally instructed not to consider sympathy for the defendant. In other cases, the Court has impliedly warned against reading its case law as rendering “constitutionally relevant any and

324 Covey, supra note 51, at 250.

325 See id. (calling for “a presumptive clarification of the principle of individual consideration to protect only the defendant’s constitutional right to proffer mitigating evidence that is relevant to his or her culpability, that is, the extent to which her conduct was ‘freely chosen.’”).


all traits or experiences that distinguish one individual from another.”

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,” and has suggested that such trifles as the defendant’s impeccable personal hygiene should fare little better as a mitigating factor. Individual Justices have been even more blunt. 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. 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.

329 Steiker & Steiker, supra note 284, at 843.

330 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).

331 Steiker & Steiker, supra note 284, at 844 (discussing Skipper v. South Carolina, 476 U.S. 1, 7 n.2 (1986)); accord Carroll, supra note 330, at 1446.

332 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 v. South Carolina, 476 U.S. 1, 12 (1986) (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”).

333 See Covey, supra note 51, 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.”).

334 See Murphy, supra note 323, 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?”).
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 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 upon the potential information overload impact on the capital jury, it is all but inevitable.