Journal of Criminal Law and Criminology

Volume 81
Issue 4 *Winter*

Article 1

Winter 1991

Foreword--Evidence, Inference, Rules, and Judgment in Consitutional Adjudication: The Intriguing Case of Walton v. Arizona

Ronald J. Allen
Northwestern University School of Law

0091-4169/91/8104-0727
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 81, No. 4

SUPREME COURT REVIEW

FOREWORD—EVIDENCE, INFERENCE, RULES, AND JUDGMENT IN CONSTITUTIONAL ADJUDICATION: THE INTRIGUING CASE OF *WALTON V. ARIZONA*

RONALD J. ALLEN*

O senseless preoccupation of mortals,
How imperfect those syllogisms are
With which you beat your wings down to the ground!
Some were in pursuit of aphorisms, some
The Law; and some were following the priesthood.
This sought rule by force and that by sophistry.
Some were in the civil service, some went stealing;
Some tired themselves, entangled in the
Pleasures of the flesh; some gave themselves to ease—
While I, no longer tied to all these things,
*Was being gloriously received up in Heaven with Beatrice at my side.***

I.

Different intellectual tasks may call for different intellectual tools, an obvious but often overlooked fact. The point is obvious because we observe it constantly in life. The intellectual task of the theoretical physicist is not that of the diagnosing physician, that of the historian is not that of the chemist, and that of the judge is not that of the legislator. The point is often overlooked because different disciplines tend to have a dominant methodology that is taken as characterizing the discipline, with the resultant obfuscation of the nature of nonstandard tasks within the discipline. In the law

* Professor of Law, Northwestern University. As always, I am indebted to my colleagues for assistance, in this case Kenneth Abbott, Robert Burns, Jim Haddad, Linda Hirshman, Gary Lawson, and Larry Marshall.

** DANTE, THE DIVINE COMEDY 356 (Pocket Books ed., L. Biancolli trans. 1968).

schools, for example, there is still much talk of training students "to think like a lawyer," as though there were a single way in which lawyers think, and there is an analogous discussion about the nature of legal reasoning, as though there were such a methodology consistently applied across the various intellectual tasks generated by the legal system. But if different tasks do call for different tools, it would be remarkable if that fact were not reflected in any complex discipline such as the law. While the dominant methodology, whatever it is, may work quite well for the most part (and if it did not, it would not likely dominate), nonstandard situations may arise that call for nonstandard treatment.

What is probably true of the law generally is certainly true of appellate decision making particularly. Most appellate decisions employ a deductive, rule-based methodology. The nature of the disputed issue is carefully specified, the relevant sources of authority are identified, and the answer is ostensibly deduced from those sources through conventional, logical, syllogistic reasoning. This process is defensible in its own right in many instances, and defensible as a means of expressing a conclusion reached in other ways in other instances. It is defensible in its own right when the problem under consideration lends itself to such a methodology. It is defensible as a means of expressing a conclusion reached in some other way when doing so yields important information to others in the planning of their affairs.

These two justifications for the deductive methodology sweep widely over the scope of authority of appellate courts. Much of the grist of that mill is composed of questions having recognized sources that yield their deductive answers. Much appellate decision making clusters around the interpretation of language, and most theories of interpretation, statutory and constitutional, are of this sort. If the theory of interpretation is literalism, there must be sources for the meaning of words and combinations of words that can be applied deductively to the task at hand. If the theory of interpretation is intentional, some identifiable person's state of mind at some identifiable time controls, and controls deductively.[1] And if

[1] I mean neither to endorse any of these views nor to assert that they are coherent. If they are incoherent, they are so for reasons that I will develop in this article in the context of a narrowly defined set of problems. The essence of those reasons is that the deductive form hides a problem of inference or judgment. Although I do not wish to make the larger argument, there is substantial evidence of its validity. Often when the Court purports to be applying a constitutional phrase "literally," the Court comes across as naive, if not downright silly. An example is Coy v. Iowa, 487 U.S. 1012 (1988). The question in *Coy* was whether the state's practice of placing a screen between complaining witnesses and the defendant in child sex abuse cases violated the confrontation

the task is to specify clear rules in order to permit individuals to conform their conduct to the rules, then a highly deductive process with its specification of the sources of authority and their significance is a useful way to communicate the content of those rules regardless how they were in fact constructed.[2]

Some questions that appellate courts are asked to resolve are not obviously amenable to a deductive, rule based approach either because such an approach does not yield helpful answers or because those answers cannot be extended to other cases. The primary factor determining if either of these possibilities is present is the dynamic nature of the process generating the question under consideration.[3] If the process is static, the deductive approach works quite well. In a static system, the scope of inquiry is limited to the relatively fixed parameters of the system, thus permitting the careful specification of those parameters, and how they interrelate—arithmetic, for example. With fixed parameters, any particular answer to a given question is more likely projectable to other questions not presently being asked, as there is less risk of the intrusion of foreign elements into the equation.

---

clause. The Court struck this down as violating "the irreducible literal meaning of the clause: 'a right to *meet face-to-face* all those who appear and give evidence *at trial*.'" *Id.* at 1021 (quoting California v. Green, 399 U.S. 149, 175 (1970) (Harlan, J., concurring) (emphasis added by Court). Whatever else justifies the outcome in *Coy*, "the irreducible literal meaning" does not cut the mustard. The literal words of the clause are: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. There is no mention here of a right to be confronted at trial. For all one can tell from the "irreducible literal meaning," a pre-trial confrontation would be acceptable. Indeed, this "irreducible literal meaning" is supported by the use of the word "with." The clause says "confronted with;" it does not say "confronted by," as the majority's "irreducible literal meaning" would require.

The Court's meaning is quite curious for another reason. It requires face-to-face confrontations. Does that mean that a person who has had his face blown off, a war casualty for example, but who could still communicate through other means than speech, could never be a witness in a criminal case? How could a person without a face confront the accused "face-to-face"? Perhaps the Court might conclude in such a case that the "irreducible literal meaning" is head-to-head confrontations, or communicative ability to communicative ability confrontations, but rather obviously the "irreducible literal meaning" is becoming increasingly metaphorical. The better question might be why an opinion might be written that purports to rely on "irreducible literal meaning" but that in fact involves interpretation.

[2] There are complexities here. The syllogism as the primary tool of the judge has been attacked on various grounds by such luminaries as Oliver Wendell Holmes, Roscoe Pound, and John Dewey. For a discussion, see Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924). These critics may be right in general; my thesis is that they are right in spades when applied to the particular subject matter I discuss in this article.

[3] Another important factor is the nature of the review process. Dialogues can occur between trial and appellate courts, but not between courts, at least appellate courts, and jurors.

None of this holds if the process generating the appellate question is dynamic. A dynamic process is too complex to be efficiently captured by simplifying generalizations and is constantly in a state of flux—weather patterns, for example. Thus, its parameters at best can be captured as of a precise moment and at worst only approximated. The relationship of a particular state of the process to the preceding and subsequent states is not obvious, and often a matter of pure conjecture. How, then, an answer to any particular question can be projected to other questions emanating from a dynamic process is quite problematic. "If/then" reasoning is not helpful where the "if" is rarely replicated.

Perhaps the normal work product of the Supreme Court is amenable to a deductive methodology, more like arithmetic than weather forecasting. It consists in large measure of statutory or constitutional interpretation in the context of problems that may have comprehensible, even if controversial, solutions that can be extended by deduction to other situations. This may be so, for example, in many of the structural questions of government that the Court faces, and equally so in many of its statutory interpretations. But there is one area in which it is definitely not so, in which the relevant questions are more like weather forecasting than arithmetic, and that is the category of cases in which the inferential process of some other decision maker is integrally related to the question to be decided.[4] A number of the Supreme Court's decisions in the criminal area are of this sort, yet the opinions of the Court, as is true of appellate courts generally, reflect only sporadic awareness of the possible need to employ nonstandard approaches to this set of cases. The tendency is to decide them as though they called for no different tools than a standard case of constitutional or statutory construction.[5] If this thesis is correct, Supreme Court cases involving the inferential process should be both awkward and unstable: awkward because infelicitous tools have been used and unstable because succeeding cases demonstrate the awkwardness of previous decisions.

---

[4] This may be related to, and possibly the defining characteristic of, one version of Dworkin's "weak discretion." *See* Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967). For an interesting discussion of discretion and the rules of evidence, see Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937 (1990).

[5] This tendency is perfectly understandable. The world of the appellate jurist is for the most part an artificial one. In Friedrich A. Hayek's useful terminology, it consists of a "made" rather than a "spontaneous" or "grown" order. Inference and judgment, though, involve spontaneous orders, and thus resist easy generalization or simplistic description. F. HAYEK, LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER 35-54 (1973).

In this Foreword, I attempt to support the proposition that cases involving the inferential process are systematically decided in an awkward fashion that leads to instability. I develop this point in the context of the Court's opinions regulating the death sentencing process. I then turn briefly to three lines of cases involving the inferential process that possess analogous attributes to illustrate further the decisional awkwardness and instability that emanate from putting static tools to dynamic tasks. Finally, I consider some alternative approaches.

II.

The Supreme Court's death penalty jurisprudence is an oft told tale that need not long delay us. In essence, it is a tale of an apparently inconsistent set of decisions concerning the role of discretion in sentencing murderers to death.[6] In the standard version of this story, the Supreme Court called a halt to executions because unguided discretion was resulting in capricious applications of the death sentence,[7] subsequently reinstituted capital sentencing based on statutes guiding the exercise of discretion,[8] and most recently has, in the view of one of its members, Justice Scalia, come full circle to only approving death sentences if the decision maker has virtually unfettered discretion to grant mercy, thus constitutionalizing the very problem of capriciousness that led to constitutional rulings in opposition to capital punishment. The case prompting Justice Scalia's rather scathing assessment is *Walton v. Arizona*.[9] The *Walton* decision, and Justice Scalia's concurrence, is a paradigm of the issue I wish to discuss, and so I turn to it first.

Walton is a fairly standard death penalty case, to-wit, a horrible, brutal murder. Walton and two co-defendants were prowling for a victim to rob, the plan being to steal the victim's car in addition to any valuables they might find, leave the victim tied up in the desert, and flee Arizona in the stolen automobile. The defendants discovered their victim, Thomas Powell, a young Marine, in the parking lot of a bar, and put their plan into action. They robbed him at gun point, forced him into his car, and drove into the desert. Some distance outside the city, Walton forced Powell out of the car, marched

---

6 Another component, but one not related to the task at hand, concerns the permissibility of sentencing to death for any offense other than murder.

7 Furman v. Georgia, 408 U.S. 238 (1972).

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

9 110 S. Ct. 3047 (1990).

him into the desert, and shot him in the head.[10] Upon returning to his companions, Walton described what he had done, and commented that he had "never seen a man pee in his pants before."[11] The shot did not kill Powell, however. It blinded him and knocked him out. He apparently regained consciousness, wandered blindly in the desert, and ultimately died of dehydration, pneumonia and starvation a day or so before he was found.[12]

Walton was convicted by a jury of first degree murder and sentenced to death by the trial judge following a separate sentencing hearing conducted without a jury. Roughly following the jurisprudence apparently mandated by the Supreme Court, Arizona law states that the sentencing judge "shall impose a sentence of death if the court finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency."[13] In this case, two aggravating circumstances were found—the murder was committed in an especially heinous, cruel or depraved manner, and it was committed for pecuniary gain. The judge then considered all the mitigating circumstances advanced by the defendant, but concluded that there were "no mitigating circumstances sufficiently substantial to call for leniency."[14] Following Arizona law, the judge sentenced Walton to death.

After working its way through the lower courts, Walton's case reached the Supreme Court where four issues were raised, three of which can be disposed of briefly. First, Walton claimed that a jury must find the necessary facts underlying the sentencing decision, a claim the Court rejected out of hand. According to the Court, the aggravating and mitigating factors merely limit sentencing options; they are not constitutionally compelled elements. Accordingly, they need not be found by juries.[15] Second, Walton claimed that the "especially heinous, cruel or depraved manner" aggravating circum-

---

10 I do not pause over the various allegations made by the defendants concerning who did what. The case was decided on these facts.

11 *Walton*, 110 S. Ct. at 3052.

12 *Id.*

13 ARIZ. REV. STAT. ANN. § 13-703(E) (1989).

14 *Walton*, 110 S. Ct. at 3053.

15 All "elements" limit sentencing options, and as Justice Blackmun points out, the aggravating factors could not be eliminated without eliminating the death penalty. *Id.* at 3072 (Brennan, J., concurring). The Court's treatment of aggravating factors adds another curious chapter to the increasingly curious saga of the Court's treatment of essential elements of crimes and the constitutional implications of the requirement of proof beyond reasonable doubt. For a discussion, see Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321 (1980).

stance was unconstitutionally broad, a claim rejected by the majority after canvassing the narrowing interpretations given to the phrase by the Arizona Supreme Court.[16] Third, Walton claimed that the "shall impose" language was unconstitutional, a claim properly rejected as it merely informs a sentencer of the implications of the process. The point of the death penalty jurisprudence is to fashion a process that leads to a moment at which a decision is taken whether mercy should be exercised, a decision to be reached by comparative analysis of the aggravating and mitigating features of the case. The "shall impose" language merely informs a sentencer of its obligations if mercy is not in order.

The remaining claim brings us to the heart of the problem. Relying on the implications of *Mills v. Maryland*,[17] Walton claimed that the statute's requirement that the defendant establish mitigating circumstances by a preponderance of the evidence was unconstitutional.[18] In *Mills*, the relevant statute required unanimity to accept, but not reject, a mitigating circumstance. Because of the obvious problem this poses,[19] the state courts had interpreted the statute to require unanimity in both directions, and, lacking unanimity, the imposition of a life sentence. The *Mills* Court reversed because of ambiguity in the jury instructions, but did so in such a way as to give, however ambiguously, credence to Walton's claim. Nonetheless, the *Walton* Court rejected the claim. Relying on the distinction first advanced in dissent by Justice Scalia in *McKoy v. North Carolina* between the admissibility and processing of evidence,[20] a plurality of the Court, but as we shall see without Justice Scalia's participation,

16 As the dissents point out, the narrowing interpretations were not very narrow, and this part of the majority's opinion may herald further reductions in Supreme Court involvement in death cases.

17 486 U.S. 367 (1988).

18 After the briefs were filed in *Mills*, McKoy v. North Carolina, 110 S. Ct. 1227 (1990), was decided, which might also have lent support to the defendant's argument. In *McKoy*, the jury was required to: (1) make unanimous findings beyond reasonable doubt of aggravating circumstances; (2) make unanimous findings beyond reasonable doubt of mitigating circumstances; (3) determine if it found beyond reasonable doubt that the mitigating circumstances "found by you" are insufficient to outweigh the aggravating circumstances "found by you;" and (4) if the answer to (3) is yes, determine whether "you unanimously find beyond reasonable doubt that the aggravating circumstance or circumstances 'found by you' are sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances 'found by you.'" *Id.* at 1230. The Court reversed because "each juror must be allowed to consider all mitigating evidence in deciding" whether to sentence to death. *Id.* at 1233.

19 Because of the lack of unanimity on any particular element, each member of the jury might believe mercy is in order, although for a reason agreed upon by less than the entire group, and thus a death penalty would nonetheless be imposed.

20 110 S. Ct. 1227, 1241 (1990) (Scalia, J., dissenting).

concluded that the Constitution forbids excluding from consideration "any particular type of mitigating evidence," but does not forbid a state "from specifying how mitigating circumstances are to be proved."[21] *Mills* and *McKoy* only preclude a requirement of unanimity; they do not preclude requiring an individual juror to be convinced by a preponderance of the evidence of the existence of a mitigating circumstance.

The central argument of the majority is untenable as it stands, but not, as I shall discuss, for the reasons advanced by the dissenters. The majority's argument has two difficulties. The first is that the distinction between admission and processing is not as distinct as the argument requires. The point of admitting evidence is so that it may be considered; processing of evidence is how it is considered. Rather obviously, how something is considered determines in part whether it is considered. As the conditions of processing become more rigorous, the distinction between processing and admissibility collapses. Accordingly, the plurality's argument must proceed further to explain why any particular constraint on processing is acceptable. The only argument given by the plurality is a remarkable *non sequitur*. The plurality analogized to the affirmative defense cases such as *Martin v. Ohio*.[22] But if those cases supply the answer, the answer given in *Mills* and *McKoy* must be wrong. The affirmative defense cases permit states to require unanimous findings on affirmative defenses, which is precisely the analogy rejected in *Mills* and *McKoy*. Mitigating factors are either like affirmative defenses or they are not. The plurality cannot have it both ways.

The second problem with the plurality's opinion stems immediately from a misguided faith in the conventional preponderance of the evidence rule. Presumably the overarching desideratum in capital cases is to have the sentencer engage with whatever mitigating factors are present. A preponderance of the evidence rule is an extremely crude tool to accomplish that purpose. Suppose that a defendant advances three grounds for mitigation, each of which is established to a 0.25 probability, and thus not to be considered under Arizona's rule. The probability that at least one of these factors is true, assuming they are independent, is $1\text{-}0.75^3=0.58$.[23] As

[21] Walton v. Arizona, 110 S. Ct. 3047, 3055 (1990).

[22] 480 U.S. 228 (1987).

[23] The probability that each single factor is not present is $1-0.25=0.75$. Under the assumption that the three factors are independent, the probability that none are present is $0.75 \times 0.75 \times 0.75=0.42$. Thus, the probability that at least one is present is $1-0.42=0.58$. If the factors are not independent, the effect is lessened but still present. For more on this general problem, see Allen, *A Reconceptualization of Civil Trials*, 66 B.U.L. REV. 401 (1986).

more mitigating factors are advanced, or as they are proved to a higher probability, this point is exacerbated. For example, if three independent mitigating factors are each proved to a probability of 0.4, the probability that at least one of them is true is 0.78, yet the sentencer must decide as though there were no ground for mitigation. The plurality does not explain, and indeed it could not rationally defend, how a 0.78 probability that one of three mitigating factors is present differs from a 0.78 probability that a particular mitigating factor is present. If the point is to advance some notion of rationality, as the precursors to *Walton* suggest, then an obviously wrong conclusion has been reached. Whether for this reason or some other, the plurality's peremptory treatment of the defendant's claim makes no mention of rationality. But it makes no other persuasive argument, either, relying solely on references to unilluminating authority and on the non sequitur noted previously.

These are not the objections raised by the dissenters. Justices Brennan[24] and Blackmun[25] emphasize the cases requiring death to be imposed "fairly *and* with reasonable consistency or not at all," but rather obviously consistency will not be advanced by increasing discretionary sentencing, except for the tautology that all such sentences will be discretionary.[26] Justice Brennan's point, though, is not the tautological one. It is instead an emphasis on similar treatment of similar individuals, but that simply highlights the error that he makes. Discretionary sentencing forces the decision away from objective standards that permit judgments of similarity, and thus judgments of consistency and reliability, to be made and directs it toward the unique matrix of background and experience possessed by the individual decision maker. To determine consistency and reliability requires the articulation of categories, whereas individuated decision making forgoes categories. This does not mean that individuated decision making is inconsistent or unreliable; it means that those concepts are not applicable just to the extent that the concern is to judge the uniqueness of some person or event by

---

24 *Walton*, 110 S. Ct. at 3068-70 (Brennan, J., dissenting).

25 *Id.* at 3071 (Blackmun, J., dissenting). *See also id.* at 3076 (Blackmun, J., dissenting) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)):

> In noncapital cases, of course, the States are given broad latitude to sacrifice precision for predictability by imposing determinate sentences and restricting the defendant's ability to present evidence in mitigation or excuse. . . . This Court, however, repeatedly has recognized that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.'

26 *Cf.* Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980); Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U. CAL. DAVIS L. REV. 1037 (1985).

reference to the unique background of a decision maker. It is also just this point of tension between individuated decision making and categorical reasoning that makes Justice Stevens' dissent difficult to appraise, and that serves as the starting point for an appraisal of Justice Scalia's opinion. First, Justice Stevens' dissent.

Justice Stevens' argument in essence is that by restricting the scope of capital punishment, the risk of arbitrariness is sufficiently reduced to permit individuated decisions with the remaining class.[27] According to Stevens, the decision in *Furman* was:

> a function of the size of the class of convicted persons who are eligible for the death penalty. When *Furman* was decided, Georgia included virtually all defendants convicted of forcible rape, armed robbery, kidnapping and first-degree murder in that class. As the opinions in *Furman* observed, in that large class of cases race and other irrelevant factors unquestionably played an unacceptable role in determining which defendants would die and which would live. However, the size of the class may be narrowed to reduce sufficiently the risk of arbitrariness, even if a jury is then given complete discretion to show mercy when evaluating the individual characteristics of the few individuals who have been found death eligible.[28]

Justice Stevens then defended this assertion by pointing to the implications of the Baldus study that was the focus of *McClesky v. Kemp*,[29] the lesson being "that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender."[30]

Note first the curious structure of this argument. It asserts that there is a knowable hierarchy of heinousness of offenses, and the most heinous (however "most heinous" is understood) deserve the death penalty while the others do not. The primary thrust of the argument, then, is for categorical rather than discretionary sentencing. If there is a knowable category of cases that deserve the death sentence, it is precisely those cases in which death should be imposed, and doing so would eliminate all concerns of arbitrariness. In general, Justice Stevens' argument, like the plurality's and the other dissenters', is a *non sequitur*. It is a defense of categorical sentencing put to the defense of discretionary sentencing.

There is one respect in which Justice Stevens' opinion is correct. He can be understood as asserting that as the size of the death eligible group is reduced, the risk of the absolute number of cases

---

27 *Walton*, 110 S. Ct. at 3086 (Stevens, J., dissenting).

28 *Id.* (Stevens, J., dissenting).

29 481 U.S. 279 (1987).

30 *Walton*, 110 S. Ct. at 3090 (Stevens, J., dissenting).

involving jury arbitrariness in imposing death is decreased, where "arbitrariness" means an inappropriate sentence is imposed.[31] While this is true, it does not equate with either reduced arbitrariness in the system as a whole or with a reduced proportion of arbitrary decisions by juries. Such matters could only be assessed in light of knowledge of the proper decisions that should be made throughout the system. For example, reducing the size of the death eligible class will almost surely reduce the number of arbitrary death sentences imposed, but it will just as surely increase the number of arbitrary life sentences imposed (again, whatever "arbitrary" might mean). Similarly, the effect on proportions will be determined by the proportions in the excluded and included classes, and by how the jury decides the cases. These are matters that require knowledge; *a priori* reasoning such as Justice Stevens' focusing simply on the size of the relative classes is unenlightening. Accordingly, the persuasive aspect of Justice Stevens' opinion reduces to defending the present practices for the reason that the absolute number of arbitrary death sentences will be reduced, but it is not obvious why that matters so much. Suppose, for example, that pre-*Furman*, there were 1,000 death penalties, 100 of which "deserved" a life sentence instead, and post-*Furman* there were 100 death sentences, 10 of which deserved a life sentence instead. Shifting from pre- to post-*Furman* does not change the proportion of arbitrary death sentences to nonarbitrary ones, and results in 90 "correct" life sentences at the expense of 810 "incorrect" life sentences. In a system in which errors cannot be extirpated, distinguishing between these two scenarios is not simple, a task Justice Stevens did not even attempt.

Each of the opinions considered so far suffers from an analogous limitation. Each purports to treat a dynamic question—the nature of inference—with the standard deductive tools of appellate decision making. I suggest this in large measure is what makes the plurality's opinion appear so wooden and unpersuasive, and the dissenters' opinions so illogical. If the relevant universe cannot be carved up usefully into discrete categories, deductive methodologies are problematic.[32] Had Justice Scalia attacked these opinions on

[31] It is also possible that this is just an awkward summary of his point in *Furman* to the effect that the limiting criteria distilled the remaining class. Since I do not know what he meant beyond what he said, I will assume he meant what he said in both cases.

[32] As Judge Easterbrook of the Seventh Circuit recently commented, "Trying to force a continuous world into two categories is . . . impossible." United States v. Chaidez, 919 F.2d 1193, 1197 (7th Cir. 1990). Robin West recently attributed the analytical approach of the justices to their liberalism. West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 40, 85-93 (1990). My concern, by contrast, is not its cause but its effect.

this ground, the substance of his opinion might have added more to the intellectual content of the judicial dialogue than his harsh rhetoric subtracted, but he took a different tack. Rather than being the antidote for the intellectual errors of his colleagues, his opinion is virtually the paradigm case of those errors.

Justice Scalia concurs in the result,[33] but announces that the Court's death penalty jurisprudence is so screwy that he no longer will be bound by selected parts of it, in particular the holdings of *Woodson v. North Carolina*[34] and *Lockett v. Ohio*.[35] His opening assertion of the illogic of his colleagues not only sets the tone for the remainder of his opinion but also demonstrates clearly the nature and limits of his methodology: "The ultimate choice in capital sentencing . . . is a unitary one—the choice between death and imprisonment. One cannot have discretion whether to select the one yet lack discretion to select the other."[36] The obvious explanation of this remarkable passage is that it rests upon the proposition that the only manner in which an issue may be analyzed is syllogistically with binary choices. A person is to live or die; a decision maker either has or lacks discretion. Every decision making process, maybe every process in Justice Scalia's view, must be governed by a single principle entailing binary choices, no matter how complex or segmented that process may be. In essence, Justice Scalia has conflated the effect of a decision with the process leading to it.

Exposing the implicit justification of Justice Scalia's view refutes it. There is no logical or other authoritative principle forbidding the use of differing intellectual tools depending upon the task. Indeed, Justice Scalia's apparent insistence to the contrary verges on the incoherent. Suppose we decide that fact finders do not have discretion to reach a result, by which we mean they are obligated to apply the decision rule of uncertainty that we supply them. If they find X by a preponderance of the evidence, then Y is to be the verdict. Does this apparent denial of discretion in one context require that they exercise no discretion in any context? Does it mean, for example, that the fact finders do not have discretion to disregard evidence because they believe it lacks probative value even though admitted by the trial judge? To echo Justice Scalia, how can it be that they have and do not have discretion? Take another example. Does the denial of discretion in the decision rule mean that the fact

---

[33] *Walton*, 110 S. Ct. at 3061 (Scalia, J., concurring).

[34] 428 U.S. 280 (1976).

[35] 438 U.S. 586 (1978).

[36] *Walton*, 110 S. Ct. at 3058-59 (Scalia, J., concurring).

finders have no discretion to structure the deliberative process? How can it be that they have and do not have discretion?

The real question is how could it be otherwise. Different parts of a process can be, and in some instances must be, structured in different ways. It is perfectly sensible to say that certain facts condition eligibility to some benefit or disability and that, after the minimum requirements are met, discretion is to be exercised, a point instantiated constantly in everyday life. For example, to be admitted to many colleges, an applicant's index comprising a mix of grade point and test scores must reach a certain score, but a discretionary judgment is made to admit particular applicants in the remaining pool. Conditioning eligibility to a death sentence on specified criteria, and permitting the exercise of judgment—which is all "discretion" means in this context[37]—as to whether to impose the death sentence are perfectly analogous. Only if the quite conventional practice of decision making exemplified by college admissions is "illogical" would Justice Scalia be right, and he makes no argument that that is so.

Justice Scalia's opinion as it stands contains either an egregious error or an equally egregious omission, and I suggest one possible explanation is that he is blinded by the seductive power of deduction. Several passages in his opinion confirm this hypothesis. He says, for example, that "[t]his second doctrine [of mercy]—counterdoctrine would be a better word—has completely exploded whatever coherence the notion of 'guided discretion' once had."[38] This overlooks that the two doctrines may be designed to do different things. He asserts as proof of the illogic of his colleagues that "[o]ur cases proudly announce that the Constitution effectively prohibits the States from excluding from the sentencing decision *any* aspect of a defendant's character or record, or *any* circumstance surrounding the crime: [for example] that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood,"[39] his point being that these both cannot be mitigating. But situated in real human beings, they could be, not in and of themselves, of course, but connected to other aspects of defendants' lives. Only if categories have to be carved out in advance would Justice Scalia be right, but he has not explained why that is required.

Consider two final assertions that bring Justice Scalia directly

---

37 *See generally Symposium: Discretion in Law Enforcement*, 47 LAW & CONTEMP. PROBS. 1-312 (1984).

38 *Walton*, 110 S. Ct. at 3061 (Scalia, J., concurring).

39 *Id.* at 3062 (Scalia, J., concurring).

back to the errors of his colleagues, even though he attempts to enlighten us about rather than exemplify them:

> The . . . requirement [of mitigation] destroys whatever rationality and predictability the . . . requirement [of aggravation] was designed to achieve. . . . The issue is whether, in the process of the individualized sentencing determination, the society may specify which factors are relevant, and which are not—whether it may insist upon a rational scheme in which all sentencers making the individualized determinations apply the same standard. . . . It is impossible to understand why [the Constitution demands categories for aggravation and none for mitigation, and thus] it becomes impossible to claim that the Constitution requires consistency and rationality among sentencing determinations to be preserved by strictly limiting the reasons for which each sentencer can say 'yes.'[40]

Justice Scalia's superficially appealing call for rationality and standards is a call for decision by rule. Fact X either is or is not mitigating, just like a decision maker must or must not have discretion. There is, in Justice Scalia's cosmology, no judgment to exercise, only facts to be found and rules to be applied.

Suppose, however, that mitigation is not designed to achieve rationality and predictability; suppose instead it is designed to implement judgment. In that case, Justice Scalia's argument comes tumbling down, and the Court's scheme may be rescued. Judgment cannot be captured in rules; if it could be, judgment would not be required. Thus, the real question that cases like *Walton* pose is whether a justification other than one resting primarily on "predictability," "reliability," or "accuracy" can be constructed for the Court's bifurcated approach to capital sentencing, and I think it can. Doing so requires approaching the issue of capital sentencing free from the assumption that all legal questions require decision making by *a priori* rules, and examining instead the conditions under which *a priori* rules further a desirable goal at an acceptable cost.

Rough judgments of the relative culpability of acts, by which I mean to include the contemporaneous state of mind of the actor, have long been integral to the criminal law. These judgments at their roughest level separate misdemeanors from felonies, and at a more refined level, various degrees of an offense. That these judgments reflect more widely held views in the society at large is confirmed by our intuitions (robbing a bank seems different from stealing a package of gum; negligent acts resulting in harm or death seem different from purposeful or knowledgeable acts with similar outcomes); by the persistence of the categories over time in a demo-

---

40 *Id.* at 3063-64 (Scalia, J., concurring).

cratic society; and by their history, which demonstrates that a significant factor in separating crimes into degrees was nullifying juries that refused to convict on facts within the existing prohibitions but which morally called for different treatment.[41] Justice Stevens' inverted pyramid metaphor may be amended somewhat to capture this point. It is not the reduction in the absolute size of the death eligible class that accomplishes the result he attributes to the reduction. Rather, it is that the method of selection takes proportionally more cases out of the mix where death would be inappropriate. If it is not illogical to use deliberation or premeditation to distinguish first degree murder from second degree murder, and the fact that most legislatures have done so indicates that the distinction captures a widespread intuition, why is it illogical to use "especially heinous or cruel" to distinguish capital murder from first degree murder? Moreover, why would we not think that this distinction most likely captures another intuition? The answer is obvious: it is not illogical at all to make the distinction, and it probably does capture a widely held intuition.

This argument would not insulate any particular capital sentencing scheme from constitutional review; it merely specifies more carefully the justification for aggravating circumstances. Aggravating circumstances do not serve simply to reduce the size of the death eligible class, as Justice Stevens suggests, nor do they serve simply as an undifferentiated brake on discretion, as Justice Scalia suggests.[42] Rather, they eliminate from the death eligible group the cases for which death would be inappropriate. Or at least that is what they should do. Thus, the proper vocabulary to criticize them with is precisely the vocabulary of rationality. Do the aggravating circumstances capture reasonably well understandable moral judgments? Are they so idiosyncratic as to cast doubt on whether they reflect widely held moral intuitions? Are they seriously overinclusive, so that the risk of an inappropriate death sentence is not reduced? Is the pyramid that Justice Stevens talks of properly or misshapenly constructed? These are the questions to ask. But these are standard, categorical questions that are well within the normal competence of appellate courts. Thus, attention must turn to how the mitigation function differs, for if it does not, Justice Scalia's complaint of illogic is correct.

The difference emerges from the intersection of the perhaps

41 For a good discussion on this subject, see T. GREEN, VERDICT ACCORDING TO CONSCIENCE (1985).

42 *Walton*, 110 S. Ct. at 3063 (Scalia, J., concurring).

counterintuitive recognition that the set of death eligible defendants is relatively homogeneous and the common fact that differentiation within a fairly homogeneous set requires the exercise of judgment. If it is the case that the group of death eligible defendants deserve to die in some constitutionally acceptable sense, then that set is fairly homogeneous. That does not mean, however, that no distinctions among its member may be made. It merely means that distinctions cannot be made by categorical rule. If they could, the group would not be homogeneous. But if distinctions can be made, but not by rule, then they can only be made by judgment. They can only be made, in other words, if the decision maker is free from rules and allowed to consider whatever is advanced. The role of mitigation is best understood as implementing just such a scheme. It is designed to permit fine, not gross, distinctions among death eligible individuals to be made. The counterintuitive nature of this point stems, I think, from the fact that the fine distinction yields a gross difference—literally the difference between life and death. But merely because the consequences are great does not entail that the justifications for the distinction are obvious or rough. Refer again to the example of college admissions. Many people are rejected who are virtually indistinguishable in certain respects from those who are admitted. The process looks arbitrary if viewed from the perspective of justifying the parameters of the two categories, but it looks considerably less so if viewed from the perspective of implementing judgment.

This answers Justice Scalia's complaint. Mitigation is not designed to implement reliability or predictability, and the defenders of mitigation should forgo that vocabulary. It is designed to permit judgment to be exercised. Judge or juror is to consider whatever is advanced by the defendant to see if in the context of the defendant's life story, as seen through the lens of the decision maker's life story, there is an understandable and suitably powerful, even though subtle, reason to extend mercy. Neither the defendant's life story nor the intellectual resources brought to its evaluation by the decision maker will be capable of capture in rules, however. That is not the nature of this task.

Clarifying the nature of mitigation has a number of subsidiary benefits. It demonstrates further why Justice Scalia's ridiculing of the apparently inconsistent mitigating factors is at best beside the point. Any particular fact is of very little consequence standing alone. The web of facts is what matters. A person from a poor and educationally deprived background who has transcended it and begun to make a success of life, but who kills to advance economic

opportunities, may have no claim on our sympathies. A person from a rich and spoiled background may also be from one of little parental involvement in rearing, and may suffer from recurring bouts of depression and drug use, and thus his acts may be thought less responsible than that of our upwardly mobile, albeit deprived, killer.

Clarifying the nature of mitigation also clarifies the structure of mitigation, which in turn is a needed corrective for one of the wooden aspects of the debate occurring in the Court. That debate proceeds as though the relevant "facts" were just what Justice Scalia ridicules—such matters as a deprived or spoiled background—but this misses a crucial point. Those are not themselves "facts" in the sense of legally significant conclusions; rather, those "facts" are evidence of the legally significant conclusion, which is whether to grant mercy or not. If they were the legally operative "facts," Justice Scalia's scathing attack on his colleagues would have some merit. For then these "facts" would begin to look very much like other operative legal facts, such as intent in the definition of homicide. Here Justice Scalia would be right if he said "intent either is or is not an element of homicide." But he would be wrong, or at least seriously misleading, if he said, "X's testimony about Y's behavior either does or does not establish intent." X's testimony must be analyzed or, in the Court's terminology, processed. However, it makes no sense to say that, because the conclusion that rests on X's testimony must be established beyond reasonable doubt, one must believe X beyond a reasonable doubt or disregard the evidence, for intent can be established in lots of ways involving an infinite variety of combinations and permutations of evidence.[43] To so require would seem odd because it confuses the admission of evidence, which is tested by a simple standard of tolerant reasonableness,[44] with the inference to be drawn from that evidence, which is some legally operative fact and to which a definite decision rule, such as preponderance of the evidence or beyond reasonable doubt, is applied.[45] The legally operative fact in death hearings is whether to mitigate—whether the defendant's life story provides an adequate excuse to escape execution. Such a matter as the deprived nature of the defendant's background is evidence from which that conclusion

[43] For an argument to the contrary, see Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289 (1989).

[44] R. ALLEN & R. KUHNS, AN ANALYTICAL APPROACH TO EVIDENCE 101-06 (1989).

[45] A similar point, but put to a quite different purpose, is made by Justice Blackmun in his concurrence in McKoy v. North Carolina, 110 S. Ct. 1227, 1237 (1990).

may be inferred, but it will be inferred in light of all the evidence presented on the issue.[46]

If evidence of intent is analogous to evidence that mercy is in order, and an inference of intent is analogous to a conclusion that mercy should be extended, then it makes little sense to talk of burdens of proof with respect to the evidence of mitigation. This again is an analytical error of all the participants to this debate on the Court. By contrast, it makes perfect sense to ask whether the sentencer has been convinced of the justification for mercy by some standard of proof, and precisely that amount of "consistency" can be imported into the process. The justification for mercy, though, will emerge from all the evidence adduced and will not be a function of any discrete "fact" like a deprived or spoiled background.

Of course, different sentencers will see the issue in different ways, which I suspect is the lurking unspoken problem. The evidence presented at a sentencing hearing will not bear its implications on its face; it will have to be interpreted by the sentencer.[47] Because of differing life experiences, one juror may find a defendant's background mitigating whereas another may find it aggravating. This is not proof of "randomness" in decision making, as Justice Scalia would have it.[48] Again, it is simply the consequence of judgment, of human decision making encompassing too many variables to be reduced to rules.

Whether to incorporate judgment into capital sentencing may be controversial, but I hope that I have shown that it is not controversial for the reasons advanced in the debate on the Court. If it is controversial, it is for other reasons integral to the comparison of a rules approach to one entailing judgment. Rules convey the appearance of certitude, that very appearance that has seduced Justice Scalia.[49] Judgment entails forgoing certitude and placing faith in a

---

46 Perhaps this is what Justice Blackmun was getting at when he said: "Application of the preponderance standard in this context is especially problematic in light of the fact that the 'existence' of a mitigating factor frequently is not a factual issue to which a 'yes' or 'no' answer can be given." *Walton*, 110 S. Ct. at 3072 (Blackmun, J., dissenting).

47 *See* Allen, *On the Significance of Batting Averages and Strikeout Totals: A Clarification of the "Naked Statistical Evidence" Debate, the Meaning of "Evidence," and the Requirement of Proof Beyond Reasonable Doubt*, 65 TUL. L. REV. (1991) (forthcoming).

48 *Walton*, 110 S. Ct. at 3064 (Scalia, J., concurring).

49 Interestingly, it has not seduced him entirely. In Lewis v. Jeffers, 110 S. Ct. 3092 (1990), the primary issue was whether Arizona had properly narrowed the "heinousness" aggravating circumstance, and, relying on *Walton*, the Court held that it had. *Jeffers*, 110 S. Ct. at 3100-01. The interesting part of the opinion is the standard of review of the application of the aggravating circumstances requirement. The Court concluded that Jackson v. Virginia's "any rational fact finder" standard is the proper one. *Id.* at 3102 (quoting *Jackson*, 443 U.S. 307, 319 (1979)). If any rational fact finder could infer

particular decision maker. For political or social reasons, the appearance even without the reality of certitude may be preferable to a virtually unconstrained process of judgment. The appearance of certitude may belie the reality,[50] however, which becomes an argument for judgment if the appearance of unconstrained decision making can be tolerated.

There is a deeper question here, which is when can or should the appearance of unconstrained decision making be tolerated?[51] There is no simple answer to this question. Certain conditions can be specified, however. When the primary concern is to impose order on chaos, rules are in order. Perhaps the present state of international law is a good example, where the primary concern is with the construction of a stable order that conveys in a general sense rights and obligations. Where forgoing rules will not likely lead to regrettable chaos, judgment may be preferable for its individuating consequences. Permitting individuated decisions on mitigation is a good example. Such judgments will not undermine the criminal justice process, since the only thing being decided is whether to sentence someone to jail instead of death. Moreover, there seems to be a consensus on the intuition that moral judgments must be made because of the enormous consequences to the defendant, and they can only be made free from the constraints of rules. There is thus

---

from the evidence produced at trial the presence of a legitimate version of the "especially cruel or heinous" aggravating circumstance, the defendant's rights are not violated. The effect is essentially to curtail federal review, and to reduce considerably the probability of uniform national treatment. Curiously, Justice Scalia does not dissent on this. Perhaps it is just an example of his opinion in *Walton*, but then he should not have joined the opinion. This will lead to increased unpredictability in results, which supposedly was the cause of his fulminations in *Walton*. From my perspective, this is an example of the Court deferring to the reasoning process of someone else—in this case the state courts—and it is an example of the solution that should be applied to mitigating circumstances.

Lewis suggests another possible explanation of the death cases. A certain wing of the Court wishes to get out of the death business entirely by leaving most decisions to the states, and another wing wants to restrict the scope of the death penalty as much as they can. I note but do not discuss further this possibility. There is no way to know if the justices are playing rhetorical games, and holding them to task for the implications of what they actually say may create disincentives for such behavior, if it is occurring, and useful for other reasons if it is not.

50 *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 112 (1981) ("The rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.").

51 More precisely, when should it be encouraged? This is more precise because all human decision making involves judgment of one sort or another. Even in a decision making context bound by rules, judgment will be exercised as to whether the conditions of the rule have been met. The crucial distinction for my purposes is between discretion in finding particular facts, and discretion in determining the implications of whatever facts are found.

little to be lost and something to be gained from forgoing rules here.[52]

There is another difference between rules and judgment, one that I suspect plays a regrettably powerful role in this area: the application of rules can be reviewed on appeal, whereas exercise of judgment cannot. One would thus predict an overreliance on rules by appellate courts in an attempt to maintain their authority on appeal. In the death penalty context, this is one possible explanation for all the "rules" talk about reliability, even by those who logically should be talking in a completely different vocabulary. Rules are crucial to maintaining appellate authority, and not surprisingly appellate courts become habituated to rules talk. The Supreme Court may be particularly strongly addicted to it because its peculiar role primarily involves providing rules of national significance, a role that has little room for individuated justice. This more general thesis is borne out by a number of other lines of decision in the Supreme Court, which like the death penalty cases, also involve the conflict between rules and judgment. Consider the following three examples:

A. THE "MERE SYMPATHY" INSTRUCTION

In *California v. Brown*,[53] the Court reviewed a jury instruction which said that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" during the penalty phase of a capital case.[54] The Court's analysis of the instruction typifies its awkward treatment in cases involving some other decision maker's inferential process. The Court approved this instruction because it concluded that a juror would

> interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase. . . . [A] reasonable juror would . . . understand the instruction . . . as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase.[55]

The Court's argument is persuasive with respect to certain aspects of the instruction. Some of its forbidden categories are morally objectionable or otherwise inappropriate. The admonition to avoid conjecture and not be swayed by public feeling and opinion

---

[52] This is not to say that rules could not be imposed. It is only to explain what I observe.

[53] 479 U.S. 538 (1987).

[54] *Id.* at 539.

[55] *Id.* at 542.

can be understood as directing the jury's attention to the facts at hand. I doubt it to be controversial that the jury should not decide on the assumption that the defendant had a poor and deprived background if the evidence shows a rich and spoiled one instead, and the jury knows better than the unattending public what the facts are. The elimination of prejudice is another comprehensible component of this instruction that merely reminds the jury of the national commitment not to judge individuals on immutable characteristics. But what could it possibly mean to avoid "sentiment" or "sympathy" that is not rooted in the record? Putting aside the *Witherspoon*[56] issue, in what else could such responses be rooted? The reason that a juror would feel "sentiment" or "sympathy" for a defendant is only because of a defendant.[57] Apart from a general antipathy to the death penalty, which is the *Witherspoon* problem, there is no other source for such feelings. The rule that the Court adopts, approving jury instructions limiting sentimental and sympathetic responses to those generated by the evidence in the record, creates a false dichotomy, in which lies the peculiar awkwardness of this opinion.

In a partial confirmation of my thesis, the Court proceeds to argue that "by limiting the jury's sentencing considerations to record evidence, the State also ensures the availability of meaningful judicial review, another safeguard that improves the reliability of the sentencing process."[58] This is false, although revealing. The sources of sentiment or sympathy will be the interaction of the unique background and experience of the decision maker and whatever happens at trial. To be sure, a reviewing court can appraise for itself what the record contains, but doing so will not increase reliability in the sense of increasing confidence that death is more consistent with public mores. Doing so merely transfers

---

56 Witherspoon v. Illinois, 391 U.S. 510 (1968).

57 I put aside the inverse case of sympathy adverse to the defendant, from feelings for the victim's family, for instance. I would, however, make an analogous argument here. With one caveat, the prosecution should be, and typically is, allowed to respond with evidence inconsistent with the defendant's proffers of mitigating factors. Indeed, I would go further and allow the prosecution to situate the victim, even if the defendant had not been shown to be aware of the victim's family or profession or whatever. The social harm from murderous acts is a relevant factor in making the kinds of moral judgments jurors are called upon to make, and criminal defendants typically face strict liability aspects of elements, even if they are not explicitly denominated as such. The caveat is that the state should be constrained in presenting evidence that effectively cannot be rebutted even if false. For example, suppose the state produced evidence that the victim had a wonderful marriage, and suppose further that nothing could be further from the truth. The defendant could hardly be expected to rebut the inference with evidence, say, that the victim was a cruel and unattentive husband. This is the best explanation for the otherwise curious case of Booth v. Maryland, 482 U.S. 496 (1987).

58 *Brown*, 479 U.S. at 543.

power from one locus to another, from lay decision makers to judges or from trial judges to appellate judges. This may increase predictability in a different sense, however. In fact, if appellate judges rather than juries decide when death should be imposed based on a cold record, increased predictability should result for two reasons. With fewer people involved in the process, fewer unique people will be involved, thus increasing predictability. In addition, the "record" is never a full story of what actually happened at trial, and thus the appellate judges will be deciding on a relatively impoverished evidentiary base. As the complexity of the evidentiary base diminishes, predictability should increase. But that merely reiterates the central question of the nature of capital sentencing. The increase in predictability is regrettable just to the extent one wishes to invoke conventional reasoning to examine the life experiences of the defendant. If, by contrast, the point is to reduce the input of conventional reasoners or to maintain appellate authority, and the Court's explicit recognition of this latter point is the revealing aspect of the opinion, enhancing the role of appellate judges is justifiable.

Brown confirms my general thesis in another way. The other opinions of the Court are as unpersuasive as the majority's, indicating the difficulty these cases pose for the justices. Justice O'Connor sees the issue to be "whether an instruction designed to satisfy the principle that capital sentencing decisions must not be made on mere whim, but instead on clear and objective standards, violates the principle that the sentencing body is to consider any relevant mitigating evidence."[59] She concludes that it does not:

> In my view, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.[60]

The belief to which Justice O'Connor refers explains why evidence is relevant, but the question is what is sufficient. To say that the sentence "should reflect a reasoned *moral* response" begs the question even as it emphasizes "moral." Virtually any "mere sympathy" that is not irrational relates to a moral ground. The mere fact of the horrible plight of a defendant facing a possible death sentence gen-

---

[59] *Id.* at 544 (O'Connor, J., concurring).

[60] *Id.* at 545 (O'Connor, J., concurring).

erates a sense of sympathy, which at a minimum facilitates the construction of a moral argument in favor of leniency. Indeed, one would wonder about the humanity of a sentencer who felt to the contrary. To be sure, a juror could be required to determine whether some category, a deprived background for instance, is present, and thus implement Justice O'Connor's sense of morality, but to implement his or her own sense of morality requires being free from the syllogistic approach Justice O'Connor is here promoting.[61]

The question begging continues in Justice O'Connor's opinion:

> Because the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence, I agree with the Court that an instruction informing the jury that they 'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling' does not by itself violate [the Constitution].[62]

What distinguishes an "emotional response to the mitigating evidence" from a "reasoned" one is not articulated, and not surprisingly for it could not be satisfactorily articulated. One example will suffice: compassion is an emotion but inseparable from morality. Perhaps "emotion" can be kept out of certain kinds of decision making, but it is integral to, if not quite at the heart of, the decision to grant mercy. The essence of that question is precisely whether something in the defendant's background triggers a sympathetic response in the sentencer.

Justice Brennan, in his dissent, comes close to getting it right: "In forbidding the sentencer to take sympathy into account, this language on its face precludes precisely the response that a defendant's evidence of character and background is designed to elicit . . . ."[63] But, he makes two errors. He accepts the Court's erroneous argument that there is such a thing as "mere sympathy" that may be extirpated from capital sentencing hearings,[64] and he reiterates the common but regrettable theme that there is a relationship between reliability and individualized sentencing.[65]

---

61 For an extended discussion, see A. JONSEN & S. TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING (1988). Even if emotions could be separated from "a reasoned moral response," because moral reasoning is situated not abstract, there is no reason to think that appellate judges are more adroit in this form of reasoning than lay individuals, and the judges are certainly less representative of the community at large.

62 *Brown*, 479 U.S. at 545 Justice (O'Connor, J., concurring).

63 *Id.* at 548 (Brennan, J., dissenting).

64 *Id.* at 548-50 (Brennan, J., dissenting).

65 *Id.* at 561 (Brennan, J., dissenting).

Only Justice Blackmun gets it right, and his opinion is deserving of quotation:

> While the sentencer's decision to accord life to a defendant at times might be a rational or moral one, it also may arise from the defendant's appeal to the sentencer's sympathy or mercy, human qualities that are undeniably emotional in nature . . . .
>
> . . . .
>
> . . . The sentencer's ability to respond with mercy towards a defendant has always struck me as a particularly valuable aspect of the capital sentencing procedure. . . In my view, we adhere so strongly to our belief that sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual because, recognizing that the capital sentencing decision must be made in the context of "contemporary values," *Gregg v. Georgia*, 428 U.S. at 181 (opinion of Stewart, Powell, and Stevens, JJ.), we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value.[66]

Exactly so.

Justice Blackmun's willingness to defer to the natural reasoning power of lay jurors has not carried the day, however. In *Saffle v. Parks*,[67] the Court extended *Brown* in deciding whether an instruction telling the jury "to avoid any influence of sympathy" violates the eighth amendment.[68] According to the Court, in now familiar language: "There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision, and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision."[69] The crucial extension quickly comes: "[W]hether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant."[70] *Brown*, however, does not require that a juror be allowed to give sway to his or her sentiments; rather, *Brown* stands for the proposition that a jury may be admonished to "ignore emotional responses that are not rooted in the aggravating and mitigating evidence,"[71] and that a state may "prohibi[t] juries from basing their sentencing decisions on factors not presented at trial."[72] Here, the defendant is relying on

---

66 *Id.* at 561-63 (Blackmun, J., dissenting).

67 110 S. Ct. 1257 (1990).

68 And if so, whether it is a "new rule" for purposes of habeas corpus. This is an aspect of the opinion I address, but only in passing.

69 *Saffle*, 110 S. Ct. at 1261.

70 *Id.* at 1262.

71 *Id.* at 1263.

72 *Id.*

> a negative inference: because we concluded in *Brown* that it was permissible under the Constitution to prevent the jury from considering emotions not based upon the evidence, it follows that the Constitution requires that the jury be allowed to consider and give effect to emotions that are based upon mitigating evidence.[73]

The Court doubts this, but then says that it would have been a new rule anyway, thus habeas corpus is not available.

There are two issues here: the first is whether there is a distinction between a "reasoned moral response" and an "emotional one;" the second is whether the response of whatever sort must be rooted in the evidence. *Brown* is being read as simply approving an instruction requiring an emotional response to be rooted in the evidence. Neither distinction can be made. Emotions and "reasoned moral responses" are inseparable, and what is "in the record" is a function of how the jury analyzes the problem. This is another example of the mistake of thinking that evidence comes stamped with its implications and may be analyzed deductively.[74] As Justice Brennan in dissent accurately points out,

> the majority's language is strangely reminiscent of the argument trumpeted by the dissent in *Penry v. Lynaugh* where Justice Scalia, writing for four Members of the Court, argued that 'the instructions had to render all mitigating circumstances relevant to the jury's verdict, but the precise manner of their relevance—the precise *effect* of their consideration—could be channeled by law.'[75]

I will not reiterate my complaints about this form of reasoning. One does wonder, though, why jurors are necessary or useful if evidence does indeed come stamped with its implications in the way Justice Scalia believes.

B. THE OBSCENITY CASES

Another example of the Supreme Court responding with rules where deference is in order is its treatment of jury instructions in obscenity cases such as *Pope v. Illinois*.[76] The question in *Pope* was whether the jury should be instructed to employ community standards in deciding the third prong of the *Miller v. California*[77] test of obscenity, which requires the trier of fact to determine whether the litigated work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The Court announced that "[t]he proper

---

73 *Id.*

74 *See* Allen, *supra* note 47.

75 *Saffle*, 110 S. Ct. at 1269 (quoting Penry v. Lynaugh, 109 S. Ct. 2934, 2966 (1989) (Scalia, J., dissenting in part)).

76 481 U.S. 497 (1987).

77 413 U.S. 15 (1973).

inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."[78]

If the central idea here is to obtain community judgment, the Court's test is quite remarkable. As the dissent accurately points out, the Court seems to be asking a juror to find that "ordinary" members of the community are not "reasonable,"[79] for otherwise this holding makes no sense at all. But what would it mean for the ordinary member of some community not to be reasonable, and even if that were a coherent question, how could some other indistinguishable member of the community make such a judgment? The obscenity cases are highly similar to the death penalty cases.[80] In both, there are forces pulling in opposite directions. On the one hand lies the apparent necessity of deferring to some external (to the formal legal system) reasoner and on the other a seeming inability or reluctance to do so. If the explanation is inability, it stems from a conceptual failure; if it is reluctance, it is a matter of protecting judicial authority from lay encroachment. In either case, the solution would be the same. If "obscenity" is a fact with a concrete reality existing apart from community consensus, then its attributes need to be defined for and provided to the "fact finder," whomever that turns out to be. If "obscenity" is a value of a community, then the only question is what is the relevant community, and once defined its members must be permitted to reason conventionally about the subject.[81]

---

78 *Pope*, 481 U.S. at 500-01.

79 *Id.* at 511 (Stevens, J., dissenting).

80 *See also*, Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617 (1989).

81 On occasion the Court indicates an awareness of the basic thesis of this article. One example is its recent revolt against the multitudinous articulations of the proper standard by which to judge ambiguous jury verdicts, the existence of which, by the way, is evidence for my thesis. In Boyde v. California, 110 S. Ct. 1190 (1990), the jury was given 11 factors "to take into account and be guided by," and then told to sentence to death if aggravating factors outweighed mitigating ones, and life if the contrary. One of the issues was whether the instruction would be construed as limiting the jury's consideration of mitigating evidence. After reviewing the many different standards for testing jury instructions (*e.g.*, "would have," "could have" or is there a "reasonable possibility" or "substantial possibility" that a juror misunderstood the instruction or misapplied it), the Court concluded that it could not distinguish the various meanings supposedly contained within the various articulations. The Court was understandably puzzled, for example, how a juror "could have" but "would not have" misunderstood an instruction. It seems as though if the juror could have, he or she would have. If the juror could have, but did not, he or she must have acted for a reason which, had it been ignored, would have made the behavior unreasonable. The Court replaced the various articulations with a test focusing on "whether there is a reasonable likelihood that the jury has ap-

C. THE RELIABILITY OF OUT OF COURT STATEMENTS

For my last example, I wish to compare briefly two cases from last term, *Idaho v. Wright*[82] and *Alabama v. White*.[83] As previously mentioned, part of the difficulty with a syllogistic approach to matters requiring inference or judgment is the tendency to behave as though evidence comes stamped with its implications upon it, somewhat like the USDA stamps that indicate the quality of beef. This tendency is perfectly understandable. If evidence cannot be objectively evaluated, if it does not come with its implications evident on the surface, then the primary choice that a reviewing court has is to defer or not to defer. Analysis of the sort normally involved in appellate decision making will be of no avail. These two cases, both singly but particularly counterposed, make this point well.

Wright was a case of alleged child abuse. The mother of two daughters was accused of having molested them. The children were 5 1/2 and 2 1/2 years old at the time of the alleged abuse, and 6 and 3 years old at the time of trial. The older daughter was able to testify to the events, but the younger daughter was not. There was confirming physical evidence. Shortly after the allegations surfaced, the younger daughter was examined by a "pediatrician with extensive experience in child abuse cases."[84] During the examination, the daughter made statements that inculpated her mother. Those statements were admitted at trial pursuant to Idaho's residual exception to the hearsay rule, and the question was whether admission violated the confrontation clause. The Court held that it did.

The Court's opinion is curious for a number of reasons centering on confrontation clause jurisprudence, for example its resurrection of *Ohio v. Roberts*[85] as the paradigm for analysis of the relationship between hearsay and the confrontation clause, but it is curious for another reason as well. The Court held that hearsay statements that are not within well rooted exceptions to the hearsay rule must possess particularized guarantees of trustworthiness to be admitted without violating the confrontation clause. The State did not dispute this general proposition; rather, it argued that the proper test of reliability is the totality of the circumstances. The Court agreed, sort of: "We agree that 'particularized guarantees of trustworthiness' must be shown from the totality of the circum-

plied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 1198.

82 110 S. Ct. 3139 (1990).

83 110 S. Ct. 2412 (1990).

84 *Wright*, 110 S. Ct. at 3143.

85 448 U.S. 56 (1980).

stances, but we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief."[86] Because the concern is "whether the child declarant was particularly likely to be telling the truth when the statement was made, . . . hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."[87]

The Court's approach would be fine if evidence came labeled with its inferential implications, but it does not. No statement at trial is, or is not, "inherently trustworthy." Trustworthiness is a function of the relationship between any proposition advanced at trial, all the other propositions advanced, and the appraisal of that interrelated set by the decision maker. In making a determination of trustworthiness, the decision maker certainly will attend to its assessment of the internal coherence of testimony and the apparent credibility of the source, and perhaps this is what the Court means by "inherently trustworthy." Nonetheless, the determination of trustworthiness will not be limited to the internal coherence of the statement, and the credibility of the source will not be determined simply as a function of immediately appraising the witness. One important determinant of reliability is the manner in which any particular testimony meshes with other testimony, as well as with what the decision maker believes to be reasonable. These are not matters that can be limited to the circumstances surrounding the making of the statement.

The weakness of the Court's analysis is evident in the fact that of the four examples given of "factors that we think properly relate to whether hearsay statements made by a child witness in child sexual abuse cases are reliable,"[88] two of them cannot be reconciled with the test the Court articulates. Lack of motive and the "use of terminology unexpected of a child of similar age"[89] have no evidentiary implications without extending consideration beyond the circumstances surrounding the statement itself. A person's motives are obviously a function of a complex background, and whether a child employs too complex diction is a function of the child's development. To be sure, these are factors that will be operating at the time the statement is given, but this simply reiterates that the question is the reliability of the statement. It disconfirms that the relia-

86 *Wright*, 110 S. Ct. at 3148.
87 *Id.* at 3150.
88 *Id.*
89 *Id.*

bility analysis can be artificially limited to the "inherent" characteristics of a statement itself.

Examine the question from the flip side of the coin. Suppose a child witness who appears to remember the relevant events and employs proper syntax and diction, who constantly repeats her accusations and who appears calm at the time of testimony (to pick up the other two categories to which the Court refers). But suppose further that subsequent evidence shows the child to be an inveterate liar with a long line of incidents at school where it has been conclusively established that she lied. Or, assume that other evidence establishes a consistent tendency to fantasize in a direction quite consistent with the child's testimony. Such matters clearly are relevant to determining the reliability of the testimony, and just as clearly are not "inherent" in the testimony. The point, of course, is that if extraneous matters are relevant to show the lack of trustworthiness of the source, they are relevant to show trustworthiness as well.

Perhaps the point that the Court was trying to make is that the inquiry should be whether the witness is a truth teller rather than whether the witness is telling the truth. In other words, perhaps the Court was attempting to restrict the tendency to collapse this case into a harmless error rule in order to avoid the bootstrapping effect: if other evidence sufficiently establishes guilt, then this testimony is corroborated, and thus its admission is at worst harmless and at best justified. The problem is that corroboration does not just bootstrap; it confirms. One gains greater trust in any particular source as its propositions become more coherent with the propositions from other sources. Remarkably, the Court recognized this in the second case I wish to consider, *Alabama v. White*.[90]

In *White*, the issue was the propriety of a *Terry* stop. The police received an anonymous tip that White would be carrying cocaine. The police corroborated certain aspects of the tip, stopped her car, searched the car with her consent, found marijuana and arrested her. At the station house, cocaine was found in her possession. The only question before the Court was whether the police had sufficient grounds to suspect criminality was afoot so that a *Terry* stop was permissible. The Court concluded that they did, reversing the lower court's conclusion to the contrary. My primary interest in the case is in just two sentences. The majority recognized that

> The Court's opinion in *Gates* gave credit to the proposition that because an informant is shown to be right about some things, he is prob-

[90] 110 S. Ct. 2412 (1990).

> ably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity. Thus, it is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations made by the caller.[91]

The point, I take it, is obvious. If "independent corroboration imparts some degree of reliability to the other allegations made by the caller" in *White*, it is hard, indeed impossible, to see why independent corroboration does not impart some degree of reliability to the child witness in *Wright*.[92] This again supports my primary thesis that the cases that involve the inferential process of some other decision maker are peculiarly troublesome for the Court,[93] and they virtually always are awkward and unstable.[94]

III.

In the canto from which the epigraph of this article is taken, Dante continues:

> Take what I said before with this distinction,
> And in that fashion it can stand with what you
> Believe of the first father and our Delight.

---

[91] *Id.* at 2417 (citing Illinois v. Gates, 462 U.S. 213, 244 (1983)).

[92] Just how much corroboration is imparted is a different matter, and it is another matter that cannot be reduced to rules. Consider the famous (to collegiate math students, at any rate) question: If a coin is flipped 10 times, and each time turns up heads, what is the probability of a head on the eleventh flip? The answer is supposed to be "0.5," and the question is supposed to instruct on independent conditions. The answer is clearly not 0.5, because, were this done in the real world, one would begin to believe the coin to be weighted (after all, the chances of getting ten straight heads is less than one in a thousand with a fair coin; I think the chances of a weighted coin are greater than that). Just how much one would, or more precisely "should," begin to believe that is impossible to say.

[93] Professor LaFave has promoted the view that fourth amendment law should tend to generate standardized procedures applicable across a wide range of conduct and to avoid rules that require the police to make individuated decisions of the propriety of a search on a case by case basis. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127. Although there are some similarities between our arguments, they are fundamentally different. His concern is with the ability of the police to understand and apply complex rules provided by the courts. My point is that in certain instances the rules provided by the courts do not adequately capture the reality to which they are directed.

[94] The *Walton* issue and the three examples that I have briefly discussed do not comprise the range of my point. The regulation of the inferential process of some other decision maker than the Court extends over a wide area. Other examples are the *In re* Winship, 397 U.S. 358 (1970), problems (for example, in Carella v. California, 491 U.S. 263 (1989), the Court struck down a presumption of intent to steal based on failure to return car within 20 days; *see also* Michael H. V. Gerald D., 491 U.S. 110 (1989), upholding California's irrebutible presumption of paternity), the victim impact statements involved in Booth v. Maryland, 482 U.S. 496 (1987), and Bruton v. United States, 391 U.S. 123 (1968) questions, among others.

> And may this always be lead to your feet,
> To make you move slowly, like a tired man,
> To the *Yes* and *No* which you cannot see.
> For he is among the lowest fools
> Who affirms or denies without distinction,
> Doing one or the other in all cases.
> Thus it happens that hasty judgments
> In many instances incline to falseness,
> And then one's fondness for them binds the mind.[95]

Some tasks are amenable to deductive methodologies, and some are not. When a deductive approach is applied to a problem that resists that methodology, the result is often affirmation or denial without distinction leading to hasty judgments that incline to falseness. But a problem immediately arises. What is a court faced with problems such as those discussed in this article supposed to do when its primary decision tools do not work? The answer is to use different techniques, in particular deference, analogy, and decision by reference to reliability rather than accuracy.[96]

It may be the case that the most appropriate legal rule for some particular setting involves deference to some other decision maker than the highest court in a hierarchical legal system. If community judgment is at the core of obscenity law, then conventional reasoners from the community should make that judgment. Reviewing their judgment on appeal cannot further the postulated value. If probable cause determinations are best made in an ad hoc manner by someone on or close to the scene, again appellate review cannot easily improve on such a judgment.[97] Similarly, some questions involve matters so complex that no coherent strategy other than deference can work. The best example here is the nature

---

95 DANTE, THE DIVINE COMEDY 368 (Pocket Books ed., L. Biancolli trans. 1968).

96 Note that "balancing" is not in the list. The Court's balancing jurisprudence comprises a description of its own reasoning process, not someone else's. Thus, the coherence and efficacy of balancing jurisprudence are tangential to my concerns. If the Court does find it so hard to encapsulate its own reasoning within syllogistic approaches, as the recurrence to balancing techniques suggests, it should come as no surprise that its efforts to encapsulate the reasoning process of other individuals in an analogous fashion is typically a failure.

97 *See, e.g.*, United States v. Malin, 908 F.2d 163, 169 (7th Cir. 1990) (Easterbrook, J., concurring), where Judge Easterbrook describes the Supreme Court's treatment of "probable cause as a fact-bound judgment call . . . ." He continues:

> Multifactor tests do no comprise separable 'questions of law.' Rules of law influence the application of the factors, and appellate courts may ensure that district judges understand and apply these rules. But whenever the court must determine 'reasonableness' or climb the tiers of a multifactor approach, the result is a gestalt, not a legal conclusion. Little is gained, and much can be lost, by having three judges redo the work of one.

Id. at 169-70.

of the inference of reliability central to *Wright* and *White* or the judgment that mitigation is in order in *Walton*. The inference of reliability and the determination of the appropriateness or morality of a death sentence involve a natural reasoning process. Any effort to cabin such a process by rules will likely lead to unnecessary and counterproductive artificiality.

If an appellate court simply cannot keep its metaphorical hands off a problem of judgment or inference, its next best option is to encourage decision by analogy. Many problems that defy being cabined by rules may be cabined somewhat by explicitly approaching a decision analogically. No rules governing the decision to mitigate can usefully be given, but paradigm examples of cases of mitigation and no mitigation could be provided as guides for decision. An analogous procedure is presently followed in many obscenity trials, which often have a comparative element in them. So proceeding is not costless, however, the primary cost being the risk of the example becoming the rule.

Last, the courts can give up reliance on the notion of accuracy and focus instead on reliability. For the reasons previously discussed, appellate decision making is likely to be more reliable in the sense that it is more predictable than jury or trial judge decision making. But, "reliability" does not mean "accuracy," nor does it mean "more likely to capture community mores." It just means consistency. Consistency may be an important value. Any particular jury, or trial judge, may get some decision "right," but nonetheless that decision might look quite wrong to an outside observer. One role of appellate judges is to rub off the rough edges of individualized decision making by jurors and trial judges to maintain the appearance of just decision making.[98] Here, though, appearance is in explicit conflict with reality. There is no reason to believe that the appellate judges reason better about many of the issues of the type discussed in this article than do trial judges or

---

[98] Recently, for reasons analogous to those that I have advanced, Judge Posner expressed disquietude over the rigid set of rules purportedly applicable to judge probable cause determinations. United States v. McKinney, 919 F.2d 405, 423 (7th Cir. 1990):

> What is needed at this juncture in the evolving law of appellate review is not a multiplicity of rigid rules stated in empty jargon, or even three rigid rules that hack crudely at a complex reality, but the sensitive application of the clear-error standard, understood as such, across the board. This is a cleaner as well as a more honest approach than attempting the legerdemain of deriving from the words 'great deference' a warrant for a nondeferential rule of appellate review to be squeezed between de novo review and clear-error review.

I mention this here rather than in my discussion of deference because the point of a clear error rule would be to advance reliability in the sense that I have articulated it in the text.

jurors. Thus, the justification cannot be to improve the quality of decision making; it can only be to improve its appearance. Perhaps that is a good enough reason to proceed; perhaps it is not. That, though, is the real question.