

Clark v. Arizona: Much (Confused) Ado About Nothing

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The background to *Clark v. Arizona* is fully described in Professor Peter Westen's companion article in this issue, of which I assume the reader is aware.¹ As Professor Westen correctly points out, and I will pursue no further, the Court could have said, but did not, something of significance concerning the constitutional stature of the various ways in which the states and the federal government regulate defensive claims of mental illness and the related concepts of diminished responsibility and capacity.² Professor Westen is also correct in pointing out that the Court could have said, but did not, something interesting—and as I discuss below enormously disrupting (by encouraging federal court review of state court inferential practices)—about constitutional limits on state evidentiary rules.³ Unlike Professor Westen, though, I think the Court actually did what it purported to do, which is to hold that the exclusion of evidence in this case on certain issues was not sufficiently unreasonable or ill justified to amount to a due process violation. The case, in short, is directly about lousy evidence, and indirectly about the level of constitutional scrutiny to be given to such exclusion. However, what should have been a direct and easy to write opinion upholding the exclusion of lousy evidence is instead tortured and peculiar, much ado about nothing very much really. Interestingly, many of the Court's opinions dealing with constitutional aspects of substantive criminal law generally and discrete evidentiary problems within that set are tortured and peculiar, which poses the question why this might be so.

I have a hypothesis. Both the substantive criminal law and the inferential process are sprawling and complex, and thus defy regulation by simple constitutional rules of the type the Court perceives itself as being in existence to provide. This is especially true of the inferential process. The drawing of inferences can be as complex as the experiential base of the person drawing the inference. No *a priori* set of rules will predict or guide such a process very well. Every case is unique, and what might be a reasonable inference in one case may not be in an only slightly different case. This sets up an enormous dilemma. Plainly, drawing correct inferences (getting to the

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¹ Peter Westen, *The Supreme Court's Bout with Insanity: Clark v. Arizona*, 4 OHIO ST. J. CRIM. L. 143 (2006).

² *Id.*

³ *Id.* at 151.

truth, in other words) is at the center of the pursuit of justice. If fact finders do not draw correct inferences, there is literally no point to the enforcement of rights and obligations, which are central to the pursuit of justice; rights and obligations can only be enforced if their necessary factual predicates are accurately found. But equally plainly, so, too, is the rule of law critical to the pursuit of justice—the commitment to deciding cases by rules laid down in advance. The aspirations of the commitment to the rule of law carry a hydraulic force leading toward the legal, rule-like, regulation of all significant legal fields, including the critical matter of drawing inferences. This has led legislatures and judges alike continually to try to cabin the inferential process in various rule-like ways, yet this is just what is very difficult if not impossible to do. The curious history of the Court in these areas may be a function of precisely this awkwardness of the relationship between its self-conception and the problems at hand.

To be fair, it is not just the Supreme Court that has struggled to cabin the inferential process. The Court's difficulties merely replicate the same problems evident in literally hundreds of years of common law and statutory efforts to regulate the inferential process. By far the most obvious example of this is one pertinent to the *Clark* case, and that is the area of presumptions. Presumptions are one method of controlling inference—in particular, but not exclusively jury inference. They are a part of a larger set of similar devices, which include inference instructions, allocations of burdens of pleading, production, and persuasion, judicial notice, and peremptory orders such as summary judgment and judgment as a matter of law. It has been known for quite some time that these devices are all functionally similar, and in particular that there is literally nothing unique that goes by the name “presumption.”⁴ All cases of presumptions are merely examples of something else—whether instructions on inferences or shifts of burdens of proof, or whatever. To be sure, this knowledge has been slow to permeate the judiciary, yet interestingly the Supreme Court's *Clark* opinion gets it right. But then it proceeds to get it wrong, as well.

The Court asserts that “Clark's argument . . . turns on the application of the presumption of innocence in criminal cases, the presumption of sanity, and the principle that a criminal defendant is entitled to present relevant and favorable evidence on an element of the offense charged against him.”⁵ Most scholars shudder in horror when a court announces that a case turns on presumptions, but remarkably the Court proceeds to get it right: “As applied to *mens rea* (and every other element), the force of the presumption of innocence is measured by the force of the showing needed to overcome it, which is proof beyond a reasonable doubt that a defendant's state of mind was in fact what the charge states.”⁶ And as to the second “presumption” the Court thought at issue, the presumption of sanity, “[t]he force of

⁴ Ronald J. Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843, 843 (1981); Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Analysis of Evidentiary Devices*, 94 HARV. L. REV. 321, 321–22 (1980) [hereinafter Allen, *Structuring*].

⁵ *Clark v. Arizona*, 126 S. Ct. 2709, 2729 (2006).

⁶ *Id.*

this presumption, like the presumption of innocence, is measured by the quantum of evidence necessary to overcome it [which] . . . varies across the many state and federal jurisdictions.”⁷

So far, so good—“presumption” in this context is just a synonym for “burden of persuasion.” The Constitution requires that elements be proven beyond reasonable doubt, but on nonessential facts (such as affirmative defenses), the state may allocate burdens of persuasion in different ways. Having noted that “presumptions” and “burden of proof practices” are synonymous, the next logical step would be to simply talk directly of the allocation of burdens of proof. There is no need to talk about “presumptions” any longer. The definition of the crime determines the elements, which must be proven beyond reasonable doubt, and all other matters are subject to whatever regulation the state chooses to impose. Since sanity is not a constitutionally necessary component of a state’s case, a state can allocate the burdens of pleading, production, and persuasion more or less how it likes. There is no need to talk about “the presumption of sanity”; there is only a need to consult the statutes or cases to see who has what burden of proof. This is true of all issues in the case. There was in *Clark*, no “presumption” of absence of self-defense, or necessity, or defense of superior orders, or whatever. If the defendant wants to raise those or other issues outside the formal definition of criminality, he would simply follow the procedural rules to raise and adduce evidence of them. Yet, the Court throughout its opinion after having recognized the superfluousness of “presumptions” continued to talk of the “presumptions” of innocence and sanity. This is quite peculiar, and totally unnecessary, indicative of confusion on the Court, and thus as I say evidence of much confused ado about nothing.

The evidence of confusion extends even further, and considerably deeper. As again Professor Westen correctly notes, the Court makes two arguments for the constitutionality of the statute. The first is that evidence of mental disease and incapacity may be relevant to intent (the Court refers to *mens rea* but earlier recognizes that the issue is intent; why, again, in light of that recognition the Court returns to using the highly ambiguous phrase is another mystery). The Court accurately points out that this poses a potential conflict if the state wishes to allocate the proof of insanity to the defendant and require that he prove it by clear and convincing evidence, as Arizona had done. The evidence of mental disease or lack of capacity obviously may bear on the existence of intent, and thus there may be a spillover effect. A defendant may adduce evidence of lack of capacity insufficient to find it by clear and convincing evidence but adequate to raise a reasonable doubt about intentionality.

Well, one might reasonably ask, SO WHAT? If evidence is relevant to more than one material proposition, it is only rational to allow the evidence whatever inferential value it has. But not so says the Court, in another passage needlessly invoking presumptions. In such a case “the presumption of sanity would then be only

⁷ *Id.* at 2730.

as strong as the evidence a factfinder would accept as enough to raise a reasonable doubt about *mens rea* for the crime charged; once reasonable doubt was found, acquittal would be required, and the standards established for the defense of insanity would go by the boards.”⁸ Moreover, as the Court points out in a passage that makes the effort to regulate the inferential process crystal clear:

In other words, if a jury were free to decide how much evidence of mental disease and incapacity was enough to counter evidence of *mens rea* to the point of creating a reasonable doubt, that would in functional terms be analogous to allowing jurors to decide upon some degree of diminished capacity to obey the law, a degree set by them, that would prevail as a stand-alone defense.⁹

This is either enormously confused or astonishing. Professor Westen thinks it is astonishing, for it seems to be saying that the burden of persuasion on intentionality may be shifted to the defendant in an example of what I referred to many years ago as a shift of the relative burden of persuasion.¹⁰ By limiting the use of evidence relevant to intentionality, the state has in essence required the defendant to show lack of intentionality by clear and convincing evidence if the explanation rests on mental disease or capacity. Astonishing about this is that, to paraphrase the Court, to ensure that “the standards established for the defense of insanity would [not] go by the boards,” the Court is permitting the constitutional standards for proof of elements “to go by the boards.”¹¹ The Court is simply wrong that a jury finding of no intent, given mental illness evidence, creates a defense of diminished capacity. Rather, it would simply be a conclusion on this evidence that intent was not proven beyond reasonable doubt. If intent is a necessary element of a criminal offense, what difference does it make what the explanation for lack of intent may be?

Standing alone, these passages do have the remarkable implications that Professor Westen admirably develops. However, they do not stand alone. Indeed, as noted above, even these passages hint that something else might be going in the form of jury control devices, and that these fact finders so glorified in constitutional myth

⁸ *Id.* at 2732–33.

⁹ *Id.* at 2733.

¹⁰ Allen, *Structuring*, *supra* note 4, at 330–38.

¹¹ Interestingly, this might make sense as an application of Justice Ginsburg’s defense of the result in *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (Ginsburg, J., concurring), for it could be understood as permitting a definition of crime to be intent unless there was no intent because of mental disease or lack of capacity, just as in *Egelhoff* there was no intent because of intoxication. This, in my opinion, would be even more astonishing for reasons I have previously laid out in detail, and would seriously undercut Professor Westen’s earlier argument that *Egelhoff* is purely about intoxication. The Court, however, denies that *Clark* is an application of *Egelhoff*, and there would be no point to its evidentiary taxonomy if it were. For discussions of *Egelhoff*, see Ronald J. Allen, *Foreword: Montana v. Egelhoff—Reflections of the Limits of Legislative Imagination on Judicial Authority*, 87 J. CRIM. L. & CRIMINOLOGY 633 (1997); Peter Westen, *Egelhoff Again*, 36 AM. CRIM. L. REV. 1203 (1999).

cannot be left alone to do their job, for otherwise justice will be determined by whether facts are found by “a degree set by them.” Of course, more confusion, this is false in at least one sense. The jury will be applying whatever rules of burdens of proof are given it. It is true that jurors will decide for themselves what inferences are acceptable, given the evidence and the burdens of proof, but one wonders what the Court could possibly think is wrong with that? That is why we have jurors—to find the facts based on the evidence—and as noted above every case will be unique. In all cases, jurors find to “a degree set by them” whether evidence is sufficient to meet the burdens of persuasion as allocated by the law. So, too, do judges when sitting as fact finders, and so too do judges reviewing factual records on appeal. It is literally impossible to remove the idiosyncratic experiences of humans from the inferential task. The *Clark* case is no different, and the Court’s failure to see this is yet more evidence of substantial confusion.

The strongest evidence of confusion is still to come, but ironically it also demonstrates that all this confusion is much ado about nothing. Immediately following the passage cited above that worries about jury fact finding, the Court notes:

A State’s insistence on preserving its chosen standard of legal insanity cannot be the sole reason for [upholding the statute], for it fails to answer an objection the dissent makes [I]f the same evidence that affirmatively shows he was not guilty by reason of insanity . . . also shows it was at least doubtful that he could form *mens rea*, then he should not be found guilty in the first place; it thus violates due process when the State impedes him from using mental-disease and capacity evidence directly to rebut the prosecution’s evidence that he did form *mens rea*.¹²

Exactly. And therefore all the discussion about preserving the state’s allocation of the burden of persuasion in insanity with its implicit discussion of the relative burden of persuasion is entirely beside the point.¹³ It is not even a “reason,” let alone the “sole reason,” why the Arizona statute is constitutional. The Court’s discussion is an interesting academic discourse on the relevance of evidence to more than a single material proposition, but the unavoidable implication of the discussion is that, without more, the Arizona statute is unconstitutional. What is not beside the point, as the Court proceeds to ask, is:

Are there, then, characteristics of mental-disease and capacity evidence giving rise to risks that may reasonably be hedged by channeling the consideration of such evidence to the insanity issue on which, in States like Arizona, a defendant has the burden of persuasion? We think there are: in

¹² *Clark*, 126 S. Ct. at 2733–34.

¹³ Professor Westen thinks to the contrary that what I am about to discuss is beside the point. I think the more natural reading of this opinion is mine, but that is like saying my reading of Alice in Wonderland is better than his. One is hard pressed to define the selection criteria.

the controversial character of some categories of mental disease, in the potential of mental-disease evidence to mislead, and in the danger of according greater certainty to capacity evidence than experts claim for it.¹⁴

In short, mental health professionals often talk gibberish, and the evidence they provide is often lousy, both being true enough so that the state's limitation of the use of this type of evidence entirely is permissible under the due process clause.

In reaching this conclusion, the Court was at pains to distinguish between observational testimony, of, say, bizarre behavior that indicated a defendant was so crazy he could not possibly intend to kill, and mental disease and capacity evidence from purported mental health experts,¹⁵ and to emphasize that its analysis only applied to the non-observational testimony of the experts. The only point of this taxonomy is to support the Court's analysis of this as a lousy evidence case. If a state can convict someone in a catatonic state of murder, what possible difference could it make if there is relevant observational evidence of lack of intentionality?

For all these reasons, unlike Professor Westen, I think this is a much confused opinion that ultimately concludes that reasonably lousy evidence may be excluded on certain issues without raising constitutional problems.¹⁶ Moreover, I think all the confusion comes from the Court trying to over think its way through the morass of the inferential process. What the Court should have said is simply that this is a case about lousy evidence. There may be some due process limit on the exclusion or cabining of evidence, since after all the due process clause is concerned with accurate fact finding, but this case gets nowhere close to the line. Actually, I think that is what the Court did say, surrounded as it is with a lot of irrelevant nonsense.

And it is a good thing the Court did not say anything else. Suppose the Court had attempted to articulate the standard for judging lousy evidence under the due process clause. No matter what the articulation, it would have the potential to turn every "prejudice exceeds probative value" ruling into a constitutional question. Like the Court's previous forays into the inferential process, there lies a looming disaster

¹⁴ 126 S. Ct. at 2734.

¹⁵ *Id.* at 2724–25.

¹⁶ Of course the exclusion on certain issues may raise other problems of the kind that concern Professor Westen. His central logical point is that evidence of lack of intent is evidence of lack of intent, no matter what its source. If on the basis of expert testimony, a judge concludes that there is significant evidence of mental disease or lack of capacity such that the defendant could not harbor intentional states of mind, how could the same judge find beyond reasonable doubt that the defendant intended to kill? I agree it is a logical puzzle, but it is also a ubiquitous one in our law that often admits evidence on one issue but forbids its use on another. Indeed, there is an entire federal rule of evidence devoted to the matter. FED. R. EVID. 105. In any event, the tension Professor Westen notes dissipates considerably if not entirely on the "lousy evidence" hypothesis. The dilemma will not arise if the expert testimony is limited to mental illness questions because, by hypothesis, it is lousy, and thus no one will be rationally influenced very much by it. However, were it not lousy evidence, then Professor Westen's contradiction becomes more probable. As I read *Clark*, so, too, then would a serious constitutional issue be raised about the right to present reliable evidence.

waiting to happen. Just as the Court had the good sense to get out of the business of trying to define the contours of criminality, gave up patrolling inferential guides judges give to juries, and largely eliminated federal oversight of sufficiency of the evidence in state criminal cases,¹⁷ the federal courts are not in a position to oversee the inferential practices of criminal trials. Each of these areas deals with highly complex issues that are analogous, at least on this variable, to the inferential process. In all these areas, virtually every case is unique and thus resistant to regulation from rules. This is certainly true of the inferential process. This is not to say that there can be no regulation of the process, constitutional or otherwise. Legislatures, of course, may do what they like, and once in a while the judges may reasonably conclude that a case or two is so aberrational as to be a problem, but for the most part this is an area that will defy legal regulation. Inferential practice is a reflection of the unique characteristics of each person engaging in it and not reducible to sets of necessary and sufficient conditions for the most part. There is, thus, no hope for any sort of principled analysis of inferential practice applicable to real trials. There can be simply the substitution of one idiosyncratic judgment for another. The last thing the Court would want to do, I should think, is to encourage such efforts under the banner of constitutional law, thus constitutionalizing every evidentiary ruling.

¹⁷ See Ronald J. Allen, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195 (2005).

