Psychiatric Testimony and the Insanity Defense

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The Supreme Court's 2006 decision in Clark v Arizona\(^1\) was one of the most unexpected defeats the American Psychiatric Association (APA) has had since it began regularly submitting amicus briefs to the Court 35 years ago. Justice Souter, who wrote for the majority, ruled that Arizona's vanishingly narrow insanity defense was not unconstitutional and, more troubling to forensic psychiatrists, he decided that on the issues of intent or premeditation (the mental elements of the crime), Arizona could prohibit expert psychiatric testimony on the grounds that it was unreliable and confusing to jurors.

Leading forensic practitioners read the opinion as hostile to the insanity defense, dismissive of psychiatric expertise in the courtroom, and "skeptical about the evidence of mental disorders."\(^2,3\) And let it be said that legal scholars agreed with the forensic psychiatrists and thought that Justice Souter's decision was wrongly decided and poorly reasoned.\(^4\) Paul Appelbaum, now chair of the committee that prepared the APA briefs and an expert on law and psychiatry, worried that the legacy of the Clark opinion might be "to exert unfortunate influences involving mental health issues far removed from criminal law."

Justice Souter's decision was certainly a kick in the stomach to the drafters of this amicus brief, which was submitted to the Court on behalf of the APA, together with the American Academy of Psychiatry and Law and the American Psychological Association. A great deal of careful thought and collaborative effort had gone into an impressive brief in which forensic psychiatrists and psychologists had been able to work out a professional consensus with their lawyers on the difficult legal, constitutional, and scientific issues.

Justice Souter rejected all of the carefully crafted arguments; therefore, a certain amount of disappointment and disgruntlement was to be expected. However, I think it would be a mistake to conclude that Justice Souter is somehow biased against psychiatry, or that this disappointing decision constituted a major setback for psychiatry.

This was the first time in the history of the Supreme Court that the Justices have dealt directly with both the insanity defense and the admissibility of psychiatric testimony on criminal intent. Both issues are complicated, but they are basic to the understanding of the role of modern psychiatry in determining criminal responsibility and deserve the attention of every psychiatrist. In what follows, I shall try to present the Clark case in a historical context, explain in somewhat oversimplified terms the complex legal issues surrounding it, and suggest what I believe Justice Souter was attempting to accomplish by his decision.

Biased ruling?

There have been numerous other cases in the Supreme Court during the years of Justice Souter's tenure that to a significant extent turned on our psychiatric diagnoses and scientific expertise. In almost all these cases, Souter joined the justices who took positions closest to those supported by the APA. For example, he joined Justice Stephens' majority in striking down capital punishment for persons with mental retardation in Atkins v Virginia.\(^5\) In reaching this result, Justice Stephens cited the APA's assurances about the reliability and validity of the DSM diagnosis of mental retardation and the objectivity of qualified mental health professionals who make the diagnosis. Justice Souter also joined a controversial majority opinion by Justice Kennedy that cited a variety of psychiatric and psychological scientific evidence about adolescent development to prohibit capital punishment for...
16- and 17-year-old offenders. And most important to psychiatric clinicians, he joined the majority in the landmark \textit{Jaffee v Redmond} case that supported psychotherapist-patient privilege. This record does not suggest Justice Souter is biased against psychiatry.

If Justice Souter is not biased, then what accounts for the \textit{Clark} decision? There can be no definitive answer, but it does appear that Souter's opinion started out tracking the brief submitted to the Supreme Court by the Solicitor General of the United States, who intervened in the case and strongly supported the state of Arizona. The Solicitor General is appointed by the President. His support of the state of Arizona probably had more to do with the conservative constitutional emphasis of the new "federalism" (the old states' rights) than it had to do with hostility toward psychiatry.

Seen from this "federalist" perspective, Justice Souter's decision in the \textit{Clark} case protects the traditional lawmakering authority of the legislature of Arizona. And that conservative legal tradition gives the states wide leeway in formulating their criminal law and test of insanity. Take a step back from our professional psychiatric point of view and look at Justice Souter's decision through a wide lens; what one sees is that the Supreme Court cautiously and conservatively left the law pretty much where they found it. The Constitution sets no specific standard for the insanity defense. Arizona is not required to change its laws and neither is any other state. But, on the issue of psychiatric testimony, Justice Souter did unfortunately reject the Solicitor General's approach, which reached the same result without criticizing the expertise of psychiatry.

\textbf{Background}

Before discussing those more complicated legal issues about criminal intent in \textit{Clark v Arizona}, the psychiatric aspects of the case need to be explained. Clinicians will recognize Eric Clark's story as another American tragedy that testifies to the inadequacies of the current mental health system and the lack of proactive psychiatric services. Clark was 17 years old and had adolescent-onset schizophrenia. His symptoms were typical of classic Capgras syndrome; he was delusionally convinced that the people around him, including his parents, were being replaced by aliens who were dangerous to him. He believed that aliens had taken over the police force in his hometown of Flagstaff. His parents realized that something was wrong, but they were unable to obtain treatment for him even in the presence of this flagrant psychotic ideation. Only when he became violent and shot a Flagstaff policeman (apparently believing that he was killing an alien) did he obtain the inpatient care he needed. After 2 years of treatment for "paranoid schizophrenia," he was declared competent to stand trial and the state of Arizona then prosecuted him for the capital offense of killing a police officer.

His lawyer waived a jury trial and made the case to the judge both that Clark lacked the intent (\textit{mens rea}, in legal jargon)--the specific intent to knowingly kill a policeman as required by the statute—and that he also was not guilty by reason of insanity. Although in Clark's case both arguments are clinically plausible, the judge found neither legally convincing under Arizona law.

Arizona law excludes expert psychiatric testimony that might demonstrate the defendant lacked \textit{mens rea}, and the state has a very narrow insanity defense. The trial judge did listen to a great deal of expert testimony about the nature of Clark's mental disorder, but he concluded that under Arizona's law, psychiatric expertise could not be considered by a court in determining whether Clark intended to kill an alien rather than a policeman. The judge considered this psychiatric testimony in relation to the plea of not guilty by reason of insanity, and the experts on both sides agreed that the young man had been psychotic at the time of the killing. The judge nonetheless concluded that Clark, under the test of insanity set by the Arizona legislature "that the person did not know the criminal act was wrong," was not legally insane. He sentenced the young man to life in prison. It may be worth pointing out that judges in Arizona have to stand for reelection, that the insanity defense is not popular with voters, and that the dead policeman was a young husband and father who was killed in the line of duty.

The laws in Arizona demonstrate the antipathy toward the insanity defense and the biases against psychiatry that forensic psychiatrists were attributing to Justice Souter. The legislative history of Arizona's narrowing insanity defense and the restrictions against psychiatric testimony make that clear. But the question posed to Justice Souter and the Supreme Court was: Are Arizona's restrictions
and limitations in these matters unconstitutional and should they be overturned? By a 5 to 4 majority, they decided the answer was no.

The APA's joint amicus brief opposing the Clark decision was based on the idea that Arizona's very narrow insanity defense might be constitutional, but taken together with its prohibition against relevant psychiatric testimony on intent, they make a double whammy that deprives the defendant of a constitutionally protected interest. Perhaps the most convincing part of the argument was that under the US Constitution, the prosecution has to prove beyond a reasonable doubt every element of a crime, including mens rea.

Therefore, if Arizona law excludes relevant psychiatric testimony that might indicate that Clark lacked the intent, then the state has improperly relieved the prosecution of its traditional constitutional burden in criminal trials. This is the line that Justice Kennedy followed in his dissent in Clark. But this is a complicated issue, the type you might find on a law school examination, and there is still more complexity to it (which I am sparing the readers of this article). However, anyone who goes online to read the oral arguments before the Supreme Court and the comments and questions raised by the Justices might conclude that they were ill-prepared for any law school examination and that some confusion about the difficult questions reigned even in the minds of those participating in this exalted forum.

Justice Souter did have a clear idea, and he tenaciously pursued it during the oral argument. His idea was that states could certainly prohibit "diminished capacity" defenses. In my opinion his certitude was ill-founded. Diminished capacity defenses became notorious in the second half of the 20th century. The idea of these defenses was championed by the preeminent forensic psychiatrist of that period, Bernard Diamond, who took advantage of changes in the admissibility of evidence. Diamond's expert opinions were allowed as evidence, and he would provide just the type of psychiatric testimony to California courts that the state of Arizona refused to consider. He would testify that the defendant, because of his or her mental condition, lacked the necessary intent for the crime specified by the statute. Most of his testimony involved psychoanalytical explanations that he presented convincingly and eloquently. He was quite successful in getting charges reduced and therefore lesser sentences for defendants who had committed horrific crimes.

Diamond may have had predecessors, but it seemed that he was the first to exploit a loophole in the law that gave forensic psychiatrists a role in determining criminal responsibility that was far more important than testimony limited to the insanity defense. Expert psychiatric testimony, if it was admissible as evidence, was relevant in ways that the criminal courts had never confronted before. Diamond's diminished capacity defenses fascinated law professors and judges who were intrigued by psychoanalysis at the time.

The academic and liberal practitioners who drafted the Model Penal Code declared, "evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind that is an element of the crime." A number of courts concluded this was a constitutional requirement. But the elected legislators and the citizenry were outraged when the media focused public attention on these practices. The infamous "Twinkie" defense (in which Diamond did not testify) and subsequent verdict set off a night-long riot in San Francisco. The defendant, who had killed the mayor and the first openly gay city supervisor, offered psychiatric testimony not that he was insane but that he lacked the "premeditation" requirement necessary for murder under the California statute. A jury of his peers believed his psychiatrists and reduced his crime to voluntary manslaughter.

Although misinterpreted in the media as the "Twinkies made him do it," the psychiatric testimony that convinced the jury was that the defendant was depressed and that his uncharacteristic binge of junk food eating and recent weight gain were symptoms of his depression. The defendant committed suicide after serving his lesser sentence, which suggests that the psychiatric diagnosis might have been correct. Whether the diagnosis was clinically correct or not, under any conventional commonsense account of the killings, the defendant had planned, premeditated, and intended the crimes. The people of California and their legislators felt betrayed by the verdict and wanted to
eliminate diminished capacity defenses.

This is what Justice Souter was suggesting Arizona should be able to do during the oral arguments in \textit{Clark}. However, given the basic conception of criminal law that there is a mental element to the crime often specified in the language of the statute and that the prosecution has to prove this mental element (intent, premeditation, etc) beyond a reasonable doubt, diminished capacity is not that easy to eradicate. After the Twinkie verdict, California voters took this matter up and attempted to eliminate diminished capacity by adopting Proposition 8. The proposition excluded testimony on capacity, but lawyers went on trying to proffer expert psychiatric evidence to prove that their clients lacked the "actual" mental state required by the statute.

Eventually, California's legislature tried to narrow Dr Diamond's loophole by rewriting the criminal statutes to eliminate the grounds for these psychiatric defenses. From this perspective, when Arizona legislators made the killing of a police officer a capital offense, they unwittingly included language that could be understood as requiring defendants such as Clark to know or believe he was killing a police officer and not an alien. To prohibit such diminished capacity defenses, the Arizona legislature simply passed a law that excludes expert psychiatric testimony as evidence on the mental element of the crime, and the Arizona courts upheld that law, as did Justice Souter.

It is my contention that after the attempted assassination of President Reagan and John Hinckley's successful insanity defense, the US Congress attempted to do just what California and Arizona tried to do—eradicate diminished capacity. I testified at congressional hearings at the time and followed the legislative process.\textsuperscript{12} Federal legislators made it clear that these matters had for too many years been left in the hands of judges and academics; it was time for them to speak as the voice of the people. The Insanity Defense Reform Act of 1984 that was subsequently passed narrowed the Federal Insanity Defense and states that other than in presenting the insanity defense, "mental disease or defect does not... constitute a defense."\textsuperscript{13} But it has not been easy to put Dr Diamond's genie back in the bottle. Lower federal courts and the Justice Department have interpreted the 1984 act as not prohibiting expert testimony in diminished capacity defenses. And constitutional scholars have continued to argue that excluding relevant and probative expert psychiatric testimony that might be the only relevant evidence that can show the defendant lacked the necessary intent does violate the Constitution.\textsuperscript{13}

It was these constitutional arguments that were made by the APA and other amici and that Justice Souter rejected. To do so, he accepted the Arizona legislature's judgment that psychiatric expertise is often misleading and confusing to jurors and not based on a solid scientific foundation. Therefore, under Arizona's laws of evidence it can be excluded from the courtroom. If Justice Souter's opinion ratified those biases, I do not think he shares them. He was, I believe, attempting the difficult constitutional task of stuffing Dr Diamond's genie of diminished capacity back into the bottle. First, he interpreted Arizona's Law of Evidence not as barring all psychiatric expertise, but rather as channeling it all into the defendant's insanity defense. Second, he indicated that testimony about intent was allowed, including testimony from a psychiatrist, but only if the psychiatrist, like any other witness, was reporting a conversation or an observation made at the time of the crime. What the psychiatrist cannot do is provide his or her professional opinion about the defendant's state of mind or diagnosis for the Court's consideration on intent.

For those who are concerned about the future implications of the \textit{Clark} decision, it is worth reemphasizing that it made very little new law. Furthermore, Justice Kennedy, who is increasingly the bellwether of the Court in divisive cases, took a position much like that of the APA. And in the long run, it often happens that US law finds more wisdom and better precedents in the minority opinions of our Supreme Court than in the opinions of the majority.

\textbf{References:}

\textbf{1.} Clark v Arizona, 126 SCt 2709 (2006).


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