Structuring jury decision making in criminal cases

R. ALLEN, STRUCTURING JURY DECISION MAKING IN CRIMINAL CASES: A UNIFIED CONSTITUTIONAL APPROACH TO
EVIDENTIARY DEVICES


[T]he superficially distinct evidentiary devices employed in criminal trials—affirmative defenses, placement of burdens of production and the concomitant possibility of a directed verdict on an issue, judicial comment on the evidence, and instructions on presumptions and inferences—are actually very similar. Their primary unifying trait is that they all modify the evidentiary relationship of the parties at trial by manipulating burdens of persuasion. Affirmative defenses and burdens of production manipulate the relative burden of persuasion explicitly, while the other devices do so implicitly.

Moreover, these devices cannot be distinguished on the basis of the magnitude of their effect on the burden of persuasion, for that effect unmistakably varies within each category. Comments on the evidence, or presumptive instructions, may be very influential with a jury, and thus have a great impact on the relative burden of persuasion, or may have little influence and little or no effect on the relative burden. Similarly, one affirmative defense may be much easier to establish than another, even though the formal burden of persuasion is the same in both cases. Moreover, instructions that comment on the evidence, either explicitly or implicitly, involve essentially the same problems of ensuring the accuracy of the comment. Both explicit judicial comment and presumptive instructions may enhance the likelihood of a correct outcome; but both may also do just the opposite, thereby unconstitutionally abridging the defendant's right to have the state prove its case against him beyond a reasonable doubt.

Finally, the deterrent impact on the defendant does not adequately distinguish any of these evidentiary devices. Compare, for example, shifts in burdens of “persuasion” and “production.” As a rule, it may be more damaging to a defendant to have to prove something by a preponderance of the evidence instead of to some lower degree. If, however, the defendant has access to little or no convincing evidence on an issue, he will not be able to meet either standard. Similarly, the prevailing view that shifts in burdens of persuasion are more damaging than instructions on inferences seems erroneous. A shift in the explicit burden of persuasion conceivably may have no impact upon the outcome. If, for example, after all the evidence is in, the jury would conclude that there is a sixty-five percent chance that the defendant committed a homicide in the heat of passion, then the result will be the same—mitigation to manslaughter—regardless of whether the state has to prove the absence of provocation beyond reasonable doubt or the defendant has to establish it by a preponderance of the evidence. By contrast, judicial comment on that evidence conceivably could cause the same jury to find that provocation has been disproven beyond reasonable doubt.

The actual effect in a particular case of any of the evidentiary devices discussed above is an empirical question that probably is not subject to very satisfactory empirical investigation, but the devices all share the function of allocating burdens of persuasion to the state and to the defendant. Consequently, they all raise essentially the same two issues, despite the diversity of their manifestations in the current case law. The first issue is the compatibility of the devices with In re Winship's imposition of the reasonable doubt standard as a constitutional mandate. The second is the effect of the devices on our conception of the right to a jury trial.

Because of the functional similarity of these devices, a unified analysis of their constitutionality can be developed....

Such a framework can be constructed by asking three fundamental questions. The first two questions respond specifically to Winship's requirement of proof beyond a reasonable doubt, and the last relates to both Winship and the right to a jury trial. First, we must determine whether the evidentiary device has a favorable or unfavorable effect on the defendant's case, since there is no danger of the state's burden being lowered and therefore no question of constitutionality if the effect is favorable. Second, if the effect is unfavorable, we must establish whether the device affects a fact that the state is constitutionally required to demonstrate as an element of criminality. This step is a necessary part of the analysis because imposing a constitutional standard of proof makes sense only if it is linked to a theory that indicates what facts constitutionally must be proved under the standard; otherwise, the standard could be circumvented by a state choosing to redefine the factual elements constituting a crime. The third step of this analysis, which applies if the fact affected is one that the state cannot constitutionally remove from its definition of the crime in question, is to ask whether the device amounts to an accurate judicial comment on the evidence. Manipulations of the burden of persuasion are permitted only if the device moves the jury toward a more rational, accurate result. This last inquiry guards against undermining the jury's fact-finding role, and ensures that the jury does not reach its conclusion on the basis of inaccurate commentary that would lower the state's burden of proof.

A. A FAVORABLE EFFECT

The first standard applicable to the evidentiary devices is obvious and requires no extended discussion. If a state employs an evidentiary device that is favorable to a defendant, it should not be struck down on constitutional grounds. “Favorable” in this context means only that the explicit burden of persuasion on the issue involved remains with the government at least to the level of beyond reasonable doubt, and that the comment, whether accurate or not, tends to dispose the jury more in favor of the defendant on that issue than the jury would have been without the comment. Under such circumstances, a defendant has no basis for complaint. The constitutionally required burden of persuasion has been maintained, and the jury's evaluation of the factual issue will be at least as fair as he has a right to expect.

B. THE CONSTITUTIONAL NECESSITY OF PROVING THE FACT IN ISSUE

In the second step of the analysis, the nature of a particular fact in issue is examined to determine whether it is one that the state is required by the Constitution to prove beyond a reasonable doubt. Because forcing a defendant to bear the burden of persuasion in proving facts that establish a defense is functionally the same as requiring the state to prove the absence of those facts, constitutional analysis must not depend upon whether a state legislature chose to label a factual issue a defense or an “element of the offense.” Without some substantive restriction on a legislature’s discretion to define crime, Winship may be eviscerated. Therefore, step two inquires whether the state has increased the defendant's relative burden of persuasion with respect to an issue that is critical to culpability....

Commentators who advocate the substantive due process test argue that “in evaluating the constitutionality of an affirmative defense, the ultimate question should be whether the issue is so critical to culpability that it would offend 'the deepest notions of what is fair and right and just'
to obtain a conviction where a reasonable doubt remains as to that issue." To say that a fact "so critical to culpability" has not been proven beyond reasonable doubt, however, is simply another way of saying that the conditions for imposing punishment have not been satisfied. To subject a person to substantial punishment when such a critical fact has not been proven beyond reasonable doubt would distort the relationship between what the defendant has been proven to have done and what the state does to him. Unmistakably, this "due process" test is yet another manifestation of the concern that a proper relationship between crime and punishment be maintained, and thus is simply a variation on the theme of maintaining proportionate punishment....

If the Constitution does not limit a state's ability simply to remove a particular element from the definition of criminality, there is no point in attempting to limit the state's power to shift the burden as to that element by creating an affirmative defense: nor, for that matter, is there any point in forbidding jury instructions that permit an element to be "presumed" on the basis of some other fact that lacks a rational relationship with that element.... [I]t seems to me that if a state limits its manipulation of burdens of persuasion to issues that need not be proved under the eighth amendment's proportionality standard or principles of substantive fairness imposed by due process, then whatever the state does should be acceptable. If, by contrast, the state manipulates a burden on an issue that constitutionally it must establish, then it must do so in a way that either favors the defendant or amounts to accurate judicial comment.

C. ACCURATE JUDICIAL COMMENT

Judicial comment on the evidence may be either accurate or inaccurate. Comment that is accurate enhances the jury's conception of reality, and permits the jury to deliberate in a more accurate and realistic factual matrix. Inaccurate comment also changes the factual matrix within which the jury operates, but it skews the decisionmaking process away from reality.... [I]naccurate judicial comment detrimental to the defendant, on an issue that constitutionally must be included in a state's definition of a crime, violates the mandate of In re Winship by effectively lowering the state's burden of proving guilt beyond a reasonable doubt. In fact, inaccurate comment on an issue is tantamount to creating an affirmative defense since the defendant is forced to show the existence of more than a reasonable doubt on the issue. Accurate comment, on the other hand, can prevent an erroneous verdict when the jury is unable to appreciate the implications of certain facts proven at trial. Certainly a state should be permitted to fill in gaps in the jury's knowledge. Since accurate judicial comment serves this important function without undercutting the reasonable doubt standard, it should be constitutionally permissible--as should its functional equivalents--so long as the comment does not violate the right to a jury trial. Accordingly, the impact of judicial comment on that right must be examined.

The effect of judicial comment on the right to a jury trial raises three questions that may generate constitutional problems: first, does the right to a jury trial limit the manner in which the jury may acquire information; second, how constrained may a jury be made to feel concerning the content of the comment; and third, what is the significance of ambiguity or incoherence in the comment?

1. THE MANNER OF PRESENTING INFORMATION TO THE JURY

The first difficulty results from the very nature of judicial comment. Judicial comment is, in essence, a method of presenting evidence to the jury. Legislative investigation(1)105 or judicial experience(2)106 may result in the conclusion that certain facts usually present themselves in a certain relationship, a relationship that may not be known by the jury. One method of communicating the substance of that relationship is by judicial comment, which is precisely the dynamic the Supreme Court was referring to when it commented that "a valid presumption may ... be created upon a view of relation broader than that a jury might take in a specific case."(3)107

There are alternatives to comment, however. The facts that the comment is based upon could be presented to the jury. Prosecutorial argument on the basis of those data and the other evidence in the case may often be sufficient. Nonetheless, there does not seem to be any constitutional basis for preferring these procedures to judicial comment. Since the Constitution does not dictate a specific method of introducing evidence, accurate judicial comment does not contravene any constitutional command.

2. JURY INDEPENDENCE FROM JUDICIAL COMMENT

Though judicial comment is a permissible method of presenting evidence, it still raises problems with respect to the right to an independent evaluation of the evidence by a jury, which is implicit in the constitutional right to a jury trial. To be permissible, judicial comment must not convey to the jury a sense that it is bound by the content of the comment. The comment must be in permissive language and make very clear that the jury is simply being presented with another matter for its consideration. Obviously, the jury may be influenced by the comment, but if the comment is accurate, it ought to be influential. It ought to be influential, however, only to its degree of accuracy as determined by the jury, which raises the third problem with judicial comment.

3. AMBIGUITY IN JUDICIAL COMMENT

The judge is quite likely to be viewed with some respect by the jurors, and there will surely be a strong inclination to accept what he says as true. Accordingly, he must be careful to make sure that his comment is clear and coherent. Thus, instructions that say only that a jury "may but need not" infer or presume one fact from another should be struck down on the ground that they lead to irrational jury decisionmaking in contravention of the right to a trial by jury. The judge should be required to elaborate on what the word "may" means--what is the basis for concluding that one fact implies another, how close does the relationship seem to be, what are the levels of confidence that the data possess? These questions, of course, prompted the development of the "rational relationship" test in the first place. This test was created in order to ensure that a reasonable connection exists between an "inferred fact" and one proved at trial so that an instruction on the inference would not skew the jury's deliberations away from reality. However, the rational relationship test is, at best, only a crude guarantor of jury rationality because the instructions on inferences and presumptions are usually so ambiguous that it is difficult to assess their impact on the jury's inferential process. The goal of the test would be accomplished better by requiring thorough, cautious comment in place of current instructions.

