

Is Terrorism a Crime or an Aggravating Factor in Sentencing?

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Abstract

Common law systems, in criminal cases, distinguish between the guilt/innocence proceedings and the sentencing stage. This is not the case in civil law systems where criminal trial consists of a single phase, combining the inquiry into guilt with sentencing. Under common law practice many facts relevant for sentencing are considered irrelevant at the stage of finding guilt for the commission of the crime. Aggravating elements, therefore, address a fundamental distinction of substantive criminal law between guilt and dangerousness: guilt is a determination of responsibility for a prior wrongdoing; dangerousness is a speculative future determination. The intensification of terrorist activity in the past few years has made terrorism one of today's most pressing problems. But is terrorism a crime or an aggravating factor in sentencing? In this article, the author challenges conventional wisdom regarding the meaning of 'terrorist crimes', by providing a conceptual understanding of 'terrorism', as well as articulating a theory of guilt. Terrorists seldom express 'guilt'. The word 'terrorism' describes, instead, an overriding motivation, a way of acting, rather than the objective circumstances of acting. Terrorism is nothing but common crimes although committed with an overriding motivation of imposing extreme fear on the nation as such. The author presents the conceptual grounds of the phenomenon of terrorism as it has evolved through history, before enquiring into the meaning of 'terrorist crimes': the overriding motivation associated with the concept of terrorism constitutes the degree of cognate dangerousness of terrorist crimes.

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1. Prologue on the Common Law

Before launching into a detailed discussion of the question at stake — terrorist crimes — I shall first clarify the perplexing grounds on which this article stands.

Common law systems (jury and non-jury based), in criminal cases, distinguish between the guilt/innocence proceedings and the sentencing stage; there is a clear separation between fact-finding on guilt and innocence and the sentencing phase of trial. However, this is not the case for European legal systems, e.g. Germany and France, where criminal trial consists of one phase, combining enquiry into guilt with sentencing.

The common law practice has significant advantages for the defence because many facts relevant for sentencing — notably, the fact of prior convictions and other criteria of dangerousness — are considered irrelevant at the stage of finding guilt for the commission of the crime.¹ Within the sentencing proceedings, it is permissible for both the prosecution and the defence to bring before the court evidence of prior convictions, testimony on the personal circumstances of the offender, on his character, and even the expression of regret by the offender himself (biased evidence). This kind of evidence cannot be brought before the court within the guilt/innocence proceeding, since it is a promise of the due process of law (or the right to fair trial) that a person is innocent until proven guilty. That is, during the guilt/innocence phase, the court (the trial judge; or the jury in jury-based systems) may not, in general, be exposed to evidence bearing of prior history, war record, family morality, or anything else that is extrinsic to the proof of the crime itself. The relevant evidence is limited to the wrongdoing committed by the offender; the state of mind upon which the wrongdoing was committed and the attribution of the wrongdoing to the offender himself (elements bearing on guilt). Also, it is important to keep in mind that the burden of proof in the guilt phase is proof beyond a reasonable doubt, in the sentencing phase, the burden is lower. Since common law jurisprudence does not make these distinctions in the burden of persuasion, these subtleties might be lost on a civil law audience. They are of critical important to lawyers in the common law tradition.

In contrast to the strict division between the guilt and sentencing phases of the common law trial, civilian judges interrogate the defendant about his person, name, residence, occupation, marital status and prior criminal record. The assumption underlying civilian criminal trials is that professional judges can handle this kind of provocative material without losing their impartiality. They believe — without much evidence, I might add — that judges can enquire about a defendant's criminal record and then proceed as though the defendant were presumed innocent until proven guilty.² This is obviously

1 G.P. Fletcher and S. Sheppard, *American Law in a Global Context: The Basics* (Oxford: Oxford University Press, 2005), at 531 and 543.

2 *Ibid.*, at 544.

incriminating material that could prejudice the entire trial. Unlike common law trial, which begins totally anew, unaffected by the evidence collected prior to trial, the civilian partial investigator turns over the entire file (the dossier) to the judge for examination prior to trial, and therefore, it is difficult for civilian judges to pretend that the entire process of proving guilt beyond a reasonable doubt starts again from scratch.³

Henceforth, I argue for the common law distinction between the two phases of criminal trial, acknowledging the important role that this distinction plays in understanding the theory of criminal law. To elaborate on the problem, I shall consider a touchstone case that illustrates the importance of the discussed common law distinction. However, this shall already be noted: though the following American case speaks of a jury trial based system, for systems in which a trial judge directs both the guilt/innocence and sentencing proceedings, e.g. in Israel, the trial judge may not be exposed to sentence-related material except within the sentencing stage. In contrast, but in the same manner, in jurisdictions based on the jury system (e.g. America where it is the jury that rules on guilt/innocence and the trial judge imposes a proportionate punishment) potentially provocative evidence may not be brought before the jury, who rules on the guilt/innocence question, but only before the trial judge within the sentencing proceedings.

On 22 December 1994, Charles Apprendi, an American citizen, fired into the home of an African-American family that had recently moved into a previously all-white neighbourhood.⁴ Admitting that he was the shooter, Apprendi was charged under New Jersey law, and pleaded guilty. The prosecution filed a motion to enhance the sentence, by virtue of the state's hate crime statute — though none of the counts referred to the hate crime law — which provides for an enhanced sentence if a trial judge finds, by the preponderance of the evidence, that the defendant committed the crime with a purpose to intimidate a person or a group because of, *inter alia*, race. The trial court found, by the preponderance of the evidence, that the shooting was racially motivated and sentenced Apprendi to a 12-year term on the firearms count. On appeal, the US Supreme Court reversed, addressing *inter alia* the question: Is the 'aggravating element' an element of the offence that must be proved within the guilt/innocence proceedings? Or is it a 'sentencing factor', which ought to be left for decision within the sentencing proceedings? Answering this question, the Court concluded that 'other than the fact of prior conviction, any fact that increases the penalties for a crime beyond the prescribed statutory maximum, must be submitted to the jury, and proved beyond a reasonable doubt.'⁵

This formula turns out to be much more difficult to apply than meets the eye. The Justices agree that evidence bearing on prior convictions need not be submitted to the jury even though it 'increases the penalties for a crime'.

3 *Ibid.*, at 546.

4 *Apprendi v. New Jersey*, 530 U.S. 466, 468–470 (2000).

5 *Apprendi*, 530 U.S. 466, at 490 (2000).

It is obvious that some deeper theory is required to explain what should go to the jury and what should not. Criticizing the Court's understanding of the question at stake in another place,⁶ I argue that aggravating elements address a foundational distinction of substantive criminal law between guilt and dangerousness. Referring to dangerousness I mean recidivism, severity of the crime and so on. I suggest that guilt and dangerousness differ in several ways. Guilt bears upon determination in the past. Dangerousness addresses the future. Guilt is a determination of responsibility for a prior wrongdoing, an action that has been accomplished (*ex post*). Dangerousness is a speculative future determination, which bears upon 'something that might reoccur' (*ex ante*). Finally, while guilt is a notion of fair condemnation, dangerousness is a concept based primarily on social protection.

However, the question remains: why should the court decide the issue of liability (the guilty determination) within one separate phase of the trial, leaving the determination upon the issue of dangerousness to the sentencing proceedings? The general prohibition against retroactive criminal legislation (*ex post facto* laws) provides some guidance to answering the question. The principle is also expressed in the Latin maxim *nullum crimen, nulla poena sine lege* (there is no crime, no punishment, without prior legislative warning).⁷ The basic principle is that individuals have a right to know what the 'law' is at the time that they are said to violate it. But how much of the 'law' is included in this principle? Individuals do not have a right to know that which could make utilitarian differences in their choosing to engage in the action or not. Rather, they have a right to know that which could make a moral difference in their choosing to engage in the action or not. Thus, it is that individuals have a right to know that which bears retrospectively on their choosing to engage in the action or not, but not that which bears prospectively on the ultimate calculation of their choice. The distinction between retrospective and prospective correlates with that between guilt and dangerousness. In the context of our discussion, the question remains, which facts are those that the court must decide within the guilt/innocence proceedings? These are the facts that bear on the guilt determination, namely what I have already called 'elements constitutive of guilt'. On the contrary, other facts, e.g. those that imply the dangerousness of the accused by means of his prior convictions are to be adjudicated within the sentencing phase of the trial.

I shall now centralize the discussion around the knotty problem that I purport to answer in this essay. The discussion I have launched bears upon one of the most fundamental problems in the aftermath of 9/11, when Western legal systems were caught by surprise and panic, thus showing incompetence towards the rising enigma of terrorist crimes. As we shall see, the distinctions

6 M. Saif-Alden Wattad, 'The Meaning of Guilt: Rethinking *Apprendi*' [Forthcoming, 33 *New England Journal on Criminal & Civil Confinement* (2007)].

7 G.P. Fletcher, *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998), at 12.

