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.

that I have drawn between the constitutive elements of guilt and sentencing have a bearing on understanding the nature of terrorism.

2. Introduction to Terrorism

The intensification of terrorist activity in the past few years, as well as the declared war on terror following the attacks of 9/11 on the Twin Towers, has made terrorism one of today's most pressing problems.[8] Though the word 'terrorism' now appears in every book, journal and newspaper in the world, the nations of the world are so divisively split on the meaning of terrorism[9] that it is impossible to pinpoint an area of harmony or consensus.[10] However, terrorism is not a notion born out of the recent attacks of 9/11; rather it is rooted in history as a conceptual phenomenon of imposing extreme fear. It has not been until the recent decade that 'terrorism' is increasingly used as a legal term, and therefore, the existence of a definition is of the utmost importance. On the one hand, not only does defining 'terrorism' shape a state's understanding of the problem and helps to distinguish lawful from unlawful responses, but also, on the other hand, it contributes to the constitutional premises upon which terrorists are charged for committing terrorist crimes, namely crimes associated with the intention to impose fear on the nation as such.

'Terrorism' is a concept that might be understood only within a particular context. However, in coming to define 'terrorism', a theory must be drawn regardless of the event, and not in light of a particular event.[11] The trouble is that all definitions provided by international scholars are articulated in light of what we see as terrorism nowadays. These definitions might not fit acts of terrorism that were exercised throughout history, and not even acts of terrorism that might be exercised in the future. 'Terrorism' ought to be defined according to certain conceptual understanding of the phenomenon itself.

8 R. Young, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation', 29 *Boston College International and Comparative Law Review* (2006) 23, at 24.

9 'Proceedings of the International Conference on the Repression of Terrorism', League of Nations Doc. C.94M.47, at 49 1938 V (1938); Convention for the Prevention and Punishment of Terrorism, 16 November 1937, League of Nations Doc. C.546M.383 (1937); and The Anti-Terrorism Resolution 1373 (2001) of the Security Council, available online at http://www.un.org/News/Press/docs/2001/sc7158.doc.htm (visited 3 August 2006). See also the contributions of G.P. Fletcher, T. Weigend, A. Cassese and M. Hmoud in this issue.

10 *Tel-Oren v. Libya Arab Republic*, 470 U.S. 1003 (1985); M.C. Bassiouni, *International Terrorism: Multilateral Conventions (1937–2001)* (Ardsley, NY: Translational Publishers, 2001), 15.

11 M. Saif-Alden Wattad, 'Resurrecting "Romantics at War": International Self-Defense in the Shadow of the Law of War — Where are the Borders?' (Forthcoming, 13 *ILSA Journal of International & Comparative Law* (2006).

Getting a grip on the issue of the meaning of guilt[12] has brought me to understand that the concept of guilt contributes to our understanding of various legal phenomena. The problem is that there are some phenomena that evade an exact classification. George Fletcher once challenged me as to whether terrorism is a crime or an aggravating factor in sentencing. As I understand *Apprendi* and the cases that have followed,[13] this is the same as enquiring whether the factors of 'terrorism' should be addressed by the common law jury or whether it should be reserved for the judge to decide without following the ordinary rules of evidence. Addressing this question requires deep understanding of the theory of criminal law. In fact, the answer to this question determines the factors that the prosecution must prove beyond a reasonable doubt as a matter of finding the accused guilty. However, to begin talking about the meaning of guilt in terrorist crimes without first standing on its roots and defining what the term means might be putting the cart before the horse.

Interestingly, terrorists seldom express any guilt about their action. Evidence for their sense of guiltlessness is found in the committing of their crimes in public (terrorism in private is an oxymoron) and the general acceptance of their families and communities of their conduct. They are typically treated not as criminals but as heroes. In cases of guiltlessness, imposing criminal responsibility becomes problematic.

In this article, I challenge the conventional wisdom regarding the meaning of 'terrorist crimes', by providing a conceptual understanding of 'terrorism', as well as articulating a theory of guilt. My argument is that the word 'terrorism' describes an overriding motivation, a way of acting, rather than the objective circumstances of acting. Terrorism is nothing but common crimes — murder, or arson, or the malicious destruction of property — but with an overriding motivation of imposing extreme fear on the nation as such. Thus, I will first present the conceptual grounds of the phenomenon of terrorism as it has evolved through history; then I will inquire into the meaning of 'terrorist crimes'. In the last two paragraphs, I will articulate a theory of criminal guilt, and I will argue that the overriding motivation — of imposing extreme fear on the nation as such — associated with the concept of terrorism, constitutes the degree of cognate dangerousness of terrorist crimes. As is well known, the basic difference between tort law and criminal law is that while the former has a private dimension the latter has a public one. The question then becomes, does the public danger in crime make the offender guiltier or more dangerous? It is my view that it makes the offender more dangerous, as Immanuel Kant puts this: '...because they [public crimes] endanger the commonwealth and not just an individual person'.[14]

12 Wattad, *supra* note 6.

13 *Blakely v. Washington*, 542 U.S. 296 (2004); *Booker v. United States*, 125 S. Ct. 738 (2005).

14 I. Kant, *The Metaphysics of Morals*, trans. by M. Gregor (Cambridge: Cambridge University Press, 1991), at 140.

3. The Conceptual Grounds of 'Terrorism'

> . . . I will send my terror ahead of you and throw into confusion every nation you encounter. I will make all your enemies turn their backs and run. I will send the hornet ahead of you to drive the Hivites, Canaanites and Hittites out of your way.[15]

Terrorism is not a new phenomenon; it has been among us for centuries, but it has never had the same features. Terrorism has its roots in early recorded history as a group of people attempt to scare other people with religious motives, e.g. (i) the Zealots: Jewish men who attacked Roman and Greek authorities in front of large groups of spectators, to send a message to the ruling body that they were not wanted there; (ii) the Sicari, who were also Jews, but they mostly murdered other Jews, who had fallen from their religious faith and (iii) the Assassins, a group of fanatical Muslims who murdered others who deviated from strict Muslim law. In the 19th century, a new notion of terrorism was developed by an Italian revolutionary, Carlo Pisacane, who argued that terrorism could deliver a message to an audience and draw attention to and support for a cause, e.g. (i) the Klu Klux Klan, whose members formed to try to dissuade re-constructionists after the Civil War; and (ii) the Young Bosnians, whose members were responsible for the assassination of Archduke Ferdinand in 1914, leading directly to the outbreak of World War One. However, it was not until the 1960s that terrorism as we know it today came into prominence with, e.g. the Provisional Irish Republican Army, Al Qaida or Hamas.

The history of terrorism, as it has evolved conceptually as a phenomenon, shows no single common form of terrorism, but rather provides a spectrum of various ways of exercising terrorism, with different motives, e.g. religious, political, etc. Yet, all forms of terror have shared one core component, that of imposing fear on a large specific group of people as such and not on individuals. This has also been true for modern terrorism. The attacks of 9/11 (and similarly the bombings in London and in Madrid) provide the perfect example of 19 hijackers imposing extreme fear on the American nation as such. It was Al Qaida's motive to impose fear on the Western world as such. For Al Qaida, the target of the attack was not a set of individuals but rather the 'infidel' nations of the West.

The word 'terror' entered western European lexicons through French in the fourteenth century, and was first used in English in 1528. The French Revolution provided the first political connotations to the word 'terrorism', in reference to the Reign of Terror initiated by the revolutionary government. The word 'terror' owes its etymology to Middle English: from Anglo-French *terrour*, from Latin *terror*, from *terrEre*, which means 'to frighten;' akin to Greek *trein*, which means 'to be afraid', and *tremein*, which means 'to tremble'. In addition, the word 'terror' has deep roots in the Bible, which describes

15 The Bible, Exodus, 23: 26–28.

a spectrum of degrees of extreme fear, translated from Hebrew into English as 'terror', e.g. *Chetat*,[16] and *Ematah Ubachad*.[17] The Bible describes, explicitly, the kind of fear that terrorism broadcasts:

> You will live in constant suspense, filled with dread both night and day, never sure of your life. In the morning you will say, 'If only it were evening!' and in the evening, 'If only it were morning!' — because of the terror that will fill your hearts and the sights that your eyes will see . . .[18]

4. Understanding 'Terrorism' from Within

> BESIDES the imperfection that is naturally in language, and the obscurity and confusion that is so hard to be avoided in the use of words, there are several *wilful* faults and neglects which men are guilty of in this way of communication, whereby they render these signs less clear and distinct in their signification than naturally they need to be.[19]

An enquiry into the conceptual implications of terror throughout history leaves no doubt as to its core meaning as a conclusive phenomenon of imposing extreme fear and dread on a group or a class of people. Terrorism has never been limited exclusively to either religious or political motives, nor has the word 'terror' been conclusively invoked as a legal term.

However, this is not how scholars of international law have been treating the concept of 'terrorism'. For them, not only has the word 'terrorism' become conclusively a legal term, but they have also departed from the original conceptual meaning. Fletcher tried to account for our shared understanding of the term by highlighting six features, most of which are present in the standard cases of terrorism:[20] (i) the victims must be civilians or innocent persons; (ii) terrorists are private actors against states; (iii) terrorists have political motives, believing that terrorism forces civilians to coerce their governments to change their policy; (iv) terrorists act as organized groups; (v) terrorism must have a theatrical aspect and (vi) terrorists feel guiltless. Thus, the more components scholars add to the basic meaning of 'terror', the closer they get to what we see today as terrorism.

To a great extent, it is the attacks of 9/11 and the suicide bombings in other countries that capture scholars' minds in defining 'terrorism'. The FBI defines terrorism as the unlawful use of force against person or property to intimidate or coerce a government, the civilian population or any segment thereof, in the

16 *Ibid.*, Genesis, 35: 4–6.
17 *Ibid.*, Exodus, 15: 15–17; Leviticus, 26: 15–17; Deuteronomy, 2:25.
18 *Ibid.*, Deuteronomy, 28: 66–68.
19 J. Locke, *An Essay Concerning Human Understanding*, ed. by A.C. Fraser, vol. II (New York: Dover Publication, New York, 1959), at 122.
20 See the contribution of G.P. Fletcher in the present issue.

furtherance or social objectives. In a similar way, the United States Criminal Code pays much attention to various arguable purposes of international terrorism, providing that 'international terrorism' is:[21]

> (1) . . . activities that —
> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State.
> (B) appear to be intended —
> (i) to intimidate or coerce a civilian population;
> (ii) to influence the policy of a government by intimidation or coercion; or
> (iii) to affect the conduct of a government by assassination or kidnapping; and
> (C) occur primarily outside the territorial jurisdiction of the United States . . ..

This kind of definition has more a political inspiration than a theoretical one. It can be of some help in order to recognize that terrorism is that which the UN Security Council described as constituting 'one of the most serious threats to international peace and security in the twenty-first century'.[22] Yet, this kind of definition can be of no help for legal purposes. The political motives that stand behind the contemporary definitions of 'terrorism', are exactly what make these definitions the more controversial, as captured by the aphorism: 'One man's terrorist is another man's freedom fighter.' Approaching the question of defining terrorism, it is notable that, like scholars, almost every English dictionary[23] treats 'terrorism' as an 'act', rather than a state of mind. I could find few dictionaries that limit their definitions solely to the conceptual meaning of 'terror', without adding political components to it.[24]

It is true that for political purposes we have strong intuition about what is, and what is not, terrorism. But with this intuition we cannot challenge questions related to prosecuting terrorists for their crimes. The problem lies in developing a definition of terrorism that distinguishes acts we want to criminally condemn from those we do not.[25] Rather than defining and prohibiting terrorism, international and domestic instruments frequently prohibit particular acts recognized as falling under the banner of terrorism. A domestic penal code that criminalizes terrorism must provide a precise definition of terrorism in order to avoid vagueness, as criminal law is required to be sufficiently knowable.[26] The requirement that the laws be sufficiently knowable

21 18 U.S. Code § 2331(1).

22 SC Res. 1377, Annex, UN Doc. S/RES/1377 (12 November 2001).

23 *Black's Law Dictionary* (8th edn., 2004), 1512–1513; *Oxford Advanced Learner's Dictionary* (5th edn., 1995), 1233.

24 *Bouvier's Law Dictionary and Concise Encyclopedia*, vol. III (3rd revision, 1914), 3262: 'Terror: The state of mind which arises from an event or phenomenon that may serve as a prognostic of some catastrophe; a fright from apparent danger'; *The Oxford English Dictionary*, vol. XI (Oxford: The Clarendon Press, 1933), 216: 'Terror: The state of being terrified or greatly frightened . . .'

25 A. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002).

26 *Kokkinakis v. Greece*, 17 ECHR 397, 423 (1994).