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Rethinking Mens Rea for Extreme Atrocity or Cruelty

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by Alex G. Philipson

Viewpoint

Currently in Massachusetts, the only *mens rea* required for first-degree murder by extreme atrocity or cruelty is malice aforethought—the same *mens rea* required for second-degree murder. *See Commonwealth v. Cunneen*, 389 Mass. 216, 227 (1983). The mental state may be identical, but the punishment is very different: for first-degree murder, it is life imprisonment without parole; for second-degree, it is life with the possibility of parole after fifteen years. What distinguishes proof of the greater offense is evidence of extraordinary brutality or suffering. *Id*. at 227–228. But the Commonwealth need not prove the defendant intended, or was even aware of, this heightened savagery. *Id*.

Is it time to reconsider this law? At least two Justices of the Supreme Judicial Court (and one former Justice) think so. *See Commonwealth v. Berry*, 466 Mass. 763, 774–778 (2014) (Gants, J., concurring, joined by C.J. Ireland [now retired] and Duffly, J.). *See also Commonwealth v. Riley*, 467 Mass. 799, 828–829 (2014) (Duffly, J., concurring). They say it is unfair to allow a jury to find that a defendant acted with extreme atrocity or cruelty without proof that he intended, or was indifferent to, the victim's extraordinary pain. *Riley*, 467 Mass. at 828–829; *Berry*, 466 Mass. at 776–778. The point is well taken.

Consider a hypothetical case where a jury heard evidence that a defendant killed a victim by repeatedly striking him in the head with a tire iron. On the theory of extreme atrocity or cruelty, the jury would be instructed that they could find the defendant guilty if they found any one of seven factors—only one of which is subjective: the defendant's indifference to, or taking pleasure in, the victim's suffering. *See Cunneen*, 389 Mass. at 227. The other six factors are objective: the victim's consciousness and degree of suffering; the extent of physical injuries; the number of blows; the manner and force of blows; the instrument used; and the disproportion between the means needed to cause death and those used. *Id.* So, the jury could sidestep the question of the defendant's intent or awareness of the victim's suffering by focusing solely on one or more of the objective factors—e.g., that the instrument used (a tire iron) can cause grotesque injuries. To be sure, there is one circumstance when a jury is required to consider the subjective factor: when there is evidence suggesting the defendant was mentally impaired. *See Commonwealth v. Gould*, 380 Mass. 672, 685–686 (1980). But even then, the Commonwealth is still not required to disprove the defendant's impairment; evidence of impairment is simply a factor that the jury can weigh as they see fit.

In short, the trouble with *Cunneen* is that it separates the subjective factor from the objective ones. Luckily, these factors can be joined using principles from our existing law.

The case that established that malice is the only required *mens rea* for extreme atrocity or cruelty nonetheless acknowledged that another state of mind is also relevant. *See Commonwealth v. Gilbert*, 165 Mass. 45, 58–59 (1895). In one breath, the court declared that "[s]pecial knowledge of the character of the act," i.e., that the killing "was attended with extreme atrocity or cruelty," is not required. *Id*. at 58. But, in another breath, the court recognized that *some* knowledge of the crime's brutality must exist: "The circumstances [of the killing] would give [the defendant] reason to believe that he was causing pain to his victim; the indifference to such pain, as well as actual knowledge thereof and taking pleasure in it, constitute cruelty, and extreme cruelty is only a higher degree of cruelty." *Id*. at 59. The implication is that a defendant who knows his actions are cruel would also know they are extremely so. Yet, how can a jury make this conclusion unless they find that the defendant's actions were extreme (e.g., that the defendant inflicted multiple blows with a dangerous weapon), and that the defendant had at least "actual knowledge" of the extraordinary pain the victim would suffer? *Gilbert*, 165 Mass. at 59. And shouldn't the Commonwealth have to prove this *mens rea*, considering what is at stake: a sentence of life without parole? Put another way, when our most severe criminal punishment is on the line, is it fair to allow the jury to *presume* the defendant's actual knowledge of, indifference to, or pleasure in the victim's extreme suffering? These are the problems that *Gilbert* created and that *Cunneen* failed to solve.

So what is the answer? How about requiring the Commonwealth to prove *both* the first *Cunneen* factor and at least one of the others? That would bring together two essential components: an unusually brutal or painful manner of death (objective element), and the defendant's indifference to or taking pleasure in the victim's extraordinary suffering (subjective element). By analogy, our law already uses a similar hybrid of objective and subjective components for so-called "third-prong malice": an intent to do an act which, in circumstances known to the defendant (subjective part), a reasonable person would have known created a plain and strong likelihood of death (objective part). *See Commonwealth v. Stewart*, 460 Mass. 817, 826 & n.9 (2011). A similar hybrid could perhaps work for extreme atrocity or cruelty too.

Some time ago, two members of the Supreme Judicial Court worried that requiring the Commonwealth to prove the defendant knew about or intended the victim's extreme suffering would "blur the distinction" between two theories of first-degree murder: deliberate premeditation, and extreme atrocity or cruelty. *See Gould*, 380 Mass. at 693 (Quirico, J., concurring in part and dissenting in part, joined by Hennessey, C.J.). The Justices did not explain what they meant by "blur." It seems they were concerned that because deliberate premeditation is the only theory of first-degree murder that, besides malice, has a second *mens rea* (i.e., forming a plan to kill after a period of reflection, *Commonwealth v. Caine*, 366 Mass. 366, 374 [1974]), adding a second *mens rea* to extreme atrocity or cruelty (indifference to or pleasure in the victim's suffering) would—by giving that theory two *mens reas*—make that theory too similar to deliberate premeditation. The concern, however, is not compelling. The mental state for deliberate premeditation (forming a plan to kill after a period of reflection) is quite unlike indifference to or taking pleasure in a victim's extraordinary suffering. Thus, the purported concern with "blurring" should not stand in the way of improving our law.

The same two Justices also warned that adding a second *mens rea* would "rewrite [the] legislative definition" of extreme atrocity or cruelty. *See Gould*, 380 Mass. at 691. Perhaps so, considering that G. L. c. 265, § 1 does not provide this second *mens rea*. But neither does the statute define what acts objectively bespeak extreme atrocity or cruelty; the common law does that. *See Cunneen*, 389 Mass. at 227. Also, the Legislature has not amended G. L. c. 265, § 1 since the Supreme Judicial Court, more than three decades ago, allowed juries to at least consider evidence of a defendant's mental state (beyond malice) to determine whether the defendant acted with extreme atrocity or cruelty. *See Gould*, 380 Mass. at 684–686 & n.16. *Accord Commonwealth v. Rutkowski*, 459 Mass. 794, 798 (2011); *Commonwealth v. Urrea*, 443 Mass. 530, 535 (2005). *See also Cunneen*, 389 Mass. at 227–228. The Legislature's silence on *Cunneen* and *Gould* suggests it is comfortable with sensible judicial modifications of the law.

It may be some time before the right occasion arises to revisit the *mens rea* element of murder by extreme atrocity or cruelty. When that time comes, the Supreme Judicial Court would do well to take the opportunity to make the law more logical and fair.

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