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Mark McQueen
West Virginia University College of Law

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I. Supreme Court's Authority to Alter Common Law

Addressing a legal issue of first impression in West Virginia the supreme court refused to allow criminal sanctions for the murder of an unborn child in *State ex rel. Atkinson v. Wilson*, thereby reaffirming the Legislature as the primary body defining crimes and their punishments.

Jeff Atkinson had sought to prohibit his murder trial on the ground that the circuit court was without jurisdiction to try him. The appellant had already been convicted of the murder of Teri Lynn Gooch, who was approximately thirty-seven weeks pregnant when murdered. Atkinson sought to prohibit his prosecution for the death of Teri Gooch's unborn child. The circuit court had acknowledged that the murder of an unborn child could not be prosecuted at common law, but nevertheless concluded that this common law rule should be modified in light of medical advances that enable reliable predictions as to the viability of unborn children. In reaching its decision, the circuit court relied heavily on *Baldwin v. Butcher*, where the West Virginia Supreme Court of Appeals recognized that a tort action for wrongful death could be brought on behalf of a viable unborn child.

In *Atkinson*, the supreme court reversed the lower court's decision, reasoning that the lower court was without jurisdiction. In the opinion, the supreme court stressed that the killing of an unborn child was not murder under common law principles and additionally pointed out that the West Virginia murder statute does not address the killing of an unborn child.

The critical issue addressed in *Atkinson* was whether the court could assume authority to alter the common law rule on the killing of an unborn child. While declining to exercise this type of authority, the court cited *Spencer v. Whyte*, where the court had refused to alter a probation statute so that a term of incarceration could be given as a part of probation, therein explaining: "We have traditionally recognized that the legislature has the primary right to define crimes and their punishments subject only to certain constitutional limitations." Professors LaFave and Scott have also concluded that there is scant authority for the position that courts can create new common law crimes.

At first blush, the *Atkinson* decision appears somewhat contradictory to the

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2 *Id.* at 808.
5 *Atkinson*, 332 S.E.2d at 809.
court’s previous decisions in *Morningstar v. Black & Decker Manufacturing Co.*³ where the court had altered the common law rule on product liability, and *Bradley v. Appalachian Power Co.*⁴ where the court had reexamined and altered the West Virginia rule on contributory negligence. However, these previous decisions altering common law rules addressed areas of tort law and the *Atkinson* court distinguished them as such, explaining: “... there exists a distinction between a court’s power to evolve common law principles in areas in which it has traditionally functioned, i.e., the tort law, and in those areas in which the legislature has primary or plenary power, i.e., the creation and definition of crimes and penalties.”¹¹ The court also summarily distinguished previous decisions altering common law rules in the criminal field,¹² reasoning that these decisions were procedural in nature and did not create a new class or category of crimes.

Although courts in South Carolina and Massachusetts have recently declared the killing of an unborn child to be a crime,¹³ the *Atkinson* court rejected these decisions as unpersuasive, concluding: “... neither our murder statute, 61-2-1, nor its attendant common law principles authorize the prosecution of an individual for the killing of an unborn child. This matter must be left to the good judgment of the legislature, which has the primary authority to create crimes.”¹⁴

It is interesting to note that legislatures in California, Florida, Illinois, Oklahoma, and Rhode Island have recently established criminal sanctions for the murder of an unborn child.¹⁵

II. Double Jeopardy


While refusing to issue a writ of habeas corpus in *State ex rel. Lehman v. Strickler*,¹⁶ the court determined that, when a defendant commits two separate aggravated robberies and in the course thereof kills one of the victims, he can be convicted of both aggravated robbery of one victim and felony murder of the other.

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¹¹ *Atkinson*, 332 S.E.2d at 810.
¹² *Id.* at 811 (citing *State v. Petry*, 273 S.E.2d 346 (W. Va. 1980) (concluding that aiders and abettors could be prosecuted as principals in the first degree); *State v. Burton*, 163 W. Va. 40, 254 S.E.2d 129 (1979) (concluding that venue is not an element of the substantive offense and may therefore be proved by a preponderance of the evidence)).
¹⁴ *Atkinson*, 332 S.E.2d at 812.
Lehman’s offenses were committed during a dispute between members of two rival motorcycle groups, the "Avengers" and the "Mofo Men." On the day of the killing, two members of the Mofo Men invited Lehman to a party to discuss the territorial rivalry between the two groups. Lehman eventually took the two victims’ "colors" (vests with gang patches) at gunpoint, then shot both men, killing one and seriously injuring the other. After trial, Lehman was convicted of aggravated robbery and malicious wounding of one victim and felony murder of the other.17

The supreme court upheld the convictions and rejected Lehman’s argument that separate punishments should be barred by double jeopardy principles, concluding that the forcible taking of the two victims’ gang vests constituted two separate robberies.18 Recognizing the well established rule that separate trials or punishments for both felony murder and the underlying felony would violate state and federal principles of double jeopardy,19 the court relied upon State v. Flint20 and State ex rel. Watson v. Ferguson,21 which establish that multiple homicides which do not result from a single volitive act can be separately tried and punished, even though they occurred within a very short period of time. Also relied upon was State v. Myers,22 where the court explained that "when a crime is committed against people rather than property, the general rule is that there are as many offenses as there are individuals involved."23 Support for the view that multiple trials and punishments are constitutionally permissible when several people are robbed at the same time and place can also be found in the United States Supreme Court decision of Hoag v. New Jersey,24 as well as case law from several other jurisdictions.25

In State v. Trail,26 the court entertained a claim that convictions and separate punishments for abduction and sexual assault based on the same transaction violate the double jeopardy clause. The charges stemmed from an incident in which the defendant, William Trail, came across two teenagers, hit the male teenager over the head with a log and raped the female teenager. The teenagers had been walking in a wooded area when they were joined by Trail. After helping the victims build
a fire, Trail struck the male and then repeatedly hit the female before leading her off through the woods and raping her.²⁷

Trail was indicted on the following counts: abduction of a female with intent to defile her,²⁸ malicious assault (on the male victim),²⁹ and first degree sexual assault.³⁰ At trial the jury found the defendant guilty on the abduction and assault charges and guilty of the lesser-included offense of second-degree sexual assault.³¹ The defendant was sentenced to three to ten years for abduction, two to ten years for malicious assault, and five to ten years for second degree sexual assault. The first two sentences were ordered to run consecutively and the third to be concurrent.³²

On appeal, the defendant claimed that his punishment for both abduction and sexual assault constitutes multiple punishments for the same offense in violation of the double jeopardy clause of the West Virginia Constitution.³³ The defendant asserted that the abduction and the sexual assault constituted the "same offense" for purposes of double jeopardy analysis because both convictions were based on the same transaction. Therefore, Trail reasoned, his punishment for both violated the multiple punishment bar.³⁴

The supreme court rejected the defendant’s argument and affirmed the conviction and sentences of the trial court. Quoting Blockburger v. United States,³⁵ the court held: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."³⁶ The test set forth in Blockburger had been previously adopted in West Virginia in State v. Zaccagnini.³⁷

In reaching their decision, the supreme court explained that abduction of a female with intent to defile³⁸ requires an asportation or taking away that is not an element of sexual assault. Also, sexual assault in the second degree³⁹ requires sexual intercourse or penetration that is not an element of abduction.⁴⁰ The court’s reasoning that the abduction was a separate offense from the sexual assault was strengthened by the fact that Trail’s asportation of the victim covered a distance

²⁷ Id. at 672.
³² Trail, 328 S.E.2d at 673.
³³ W. Va. Const. art. III, § 5. See also U.S. Const. amend. V.
³⁴ Trail, 328 S.E.2d at 673.
³⁶ Trail, 328 S.E.2d at 673.
⁴⁰ Trail, 328 S.E.2d at 673-74.
of approximately three miles prior to the sexual assault. Additional support for the court's decision in *Trail* can also be found in several other jurisdictions.

### III. **Lesser Included Offenses**


In *State v. Jones*, the court established that arson in the third degree is a lesser included offense of arson in the first degree. The court reached their decision by utilizing a two-part inquiry which was set forth in *State v. Neider*.

The defendant, Verlin G. Jones, was convicted in circuit court for arson in the first degree after starting a fire in the Pocahontas County Jail. He admitted at trial that he had started the fire, but asserted that his intention was to burn the personal property of a fellow inmate, which would be arson in the third degree. The prosecution claimed that Jones intended to burn the jail which would constitute arson in the first degree. The circuit court instructed the jury that they could return a verdict of guilty of arson in the first degree, guilty of arson in the fourth degree (attempt), or not guilty. The jury returned a guilty verdict of arson in the first degree.

The supreme court reversed the defendant's conviction. The court held that Jones was entitled to a jury instruction on arson in the third degree. In reaching its decision the court reaffirmed the two-part test used in *State v. Neider*, wherein the court held:

The question of whether a defendant is entitled to an instruction on a lesser included offense involves a two part inquiry. The first inquiry is a legal one having to do

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41 *Id.* at 674.
47 *W. Va. Code* § 61-3-3 (1984) provides:
Any person who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any personal property of any class or character, (such property being of the value of not less than fifty dollars and the property of another person), shall be guilty of arson in the third degree.
Any person who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, whether occupied, unoccupied or vacant, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself or another, shall be guilty of arson in the first degree.
50 *Id.* at 68.
with whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. . . .The second inquiry is a factual one which involves a determination by the trial court if there is evidence which would tend to prove such lesser included offense.52

Focusing on the legal question of the two part Neider inquiry, the court pointed out that the offenses of first, second, and third degree arson are set forth in separate statutes, and the degree of arson is determined by the property involved. Arson in the first degree involves "any dwelling house, whether occupied, unoccupied or vacant, or any kitchen, shop, stable, or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself or of another. . . ."53 Arson in the second degree involves "any building or structure of any class or character, whether the property of himself or of another, not included or prescribed in the preceding section. . . ."54 Arson in the third degree involves "any personal property of any class or character, (such property being of the value of not less than fifty dollars and the property of another person). . . ."55 Except for the penalties to be imposed and the distinctions as to type of property involved, the West Virginia arson statutes are identical. The various degrees each apply to "[a]ny person who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of. . . ." certain property. Also, the distinctions as to type of property referred to in the different degrees of arson are not significant to attempted arson.56 Under the attempt statute, any person who attempts to burn "any of the buildings or property" mentioned in the first, second, or third degree arson statutes, shall be guilty of arson in the fourth degree." Arson in the first, second, or third degree each require for their existence a willful and malicious setting of fire to or burning of property. Therefore, arson in the third degree is, by virtue of its legal elements, included in the offense of arson in the first degree.57

The evidence presented in the case was in direct conflict as to whether Jones had intended to burn only personal property, or had intended to burn the county jail, thereby satisfying the second factual inquiry of the Neider test, which requires evidentiary support for an instruction on the lesser offense. Accordingly, the court concluded that arson in the third degree is a lesser included offense of arson in the first degree.58 Recognizing that there was evidentiary support for arson in the third degree, the conviction of the trial court was reversed because the defendant was entitled to an instruction on arson in the third degree as a lesser included offense under the indictment.59

52 Neider, 295 S.E.2d at 904-05.
57 Jones, 329 S.E.2d at 71.
58 Id. at 71.
59 Id.
IV. SEXUAL ASSAULT


Interpreting the terms "forcible compulsion" and "serious bodily injury" as contemplated in our sexual assault statutes, the supreme court reversed the lower court's decision in State v. Hartshorn, where the defendant was convicted of first degree sexual assault. The reversal in this case was based on the lack of evidence demonstrating "earnest resistance" to forcible compulsion, as required for first degree sexual assault.

The defendant, thirty-four year old Fred Hartshorn, had been accused of sodomizing fifteen year old Tommy Cloninger against his will. Cloninger and the defendant were apparently well acquainted and had been mowing the lawn of a couple (the Thorpes) prior to the alleged assault. After they had finished cutting grass, the pair remained with the Thorpes until around midnight and, according to the boy, they drank wine and smoked marijuana. Thereafter, they accepted the Thorpes' invitation to spend the night and settled down next to one another with sleeping bags in the Thorpes' residence.

Tommy testified that, shortly after he had dozed off, Mr. Hartshorn unzipped his pants and began to fondle him until the boy persuaded him to stop. After again dozing off, Tommy claimed he was suddenly accosted by the appellant, who pulled his trousers down to his ankles, wrapped his legs around him, and sodomized him despite "pretty loud" protestations. Tommy admitted that he did not appeal for help from the Thorpes because they "were more his friends than mine." Tommy claimed he did not try to leave after the assault because he was intoxicated with wine and marijuana, and his house was over a mile away.

Throughout the proceedings, the defendant maintained his innocence and denied all of the charges. Hartshorn's denial was supported by the testimony of Mrs. Thorpe. Mrs. Thorpe stated that she and her husband would have heard any unusual activity from their doorless bedroom, located less than ten feet from where the

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60. W. VA. CODE § 61-8B-3 as it existed at the time of the offense in this case provided in part:
   (a) A person is guilty of sexual assault in the first degree when:
      (i) He engages in sexual intercourse with another person by forcible compulsion; and
      (ii) He inflicts serious bodily injury upon anyone, . . .

W. VA. CODE § 61-8B-4, the second degree sexual assault statute, provides in part:
(a) A person is guilty of sexual assault in the second degree when:
(i) He engages in sexual intercourse with another person by forcible compulsion. . . .

In 1984, the West Virginia Legislature revised the sexual assault statutes and removed the term "forcible compulsion" from the first degree sexual assault. Forcible compulsion is still present in the language of the second degree sexual assault statute.

62. Id. at 577.
63. Id. at 575.
64. Id.
assault allegedly took place. Moreover, the boy did not report the incident until one year and seven months after its alleged occurrence.

At trial, the investigating officer testified that Tommy's allegations were not supported by medical evidence, but were determined to be true through a polygraph examination. Defense counsel's objection to the testimony regarding the polygraph was sustained, but motions for mistrial and directed verdict were denied. The court, referring to the testimony concerning the polygraph test, reaffirmed State v. Frazier, holding that result from polygraph tests are not admissible evidence.

The trial court instructed the jury that it had the option of finding the defendant guilty of sexual assault in the first degree, sexual assault in the second degree, or sexual assault in the third degree. The jury was also instructed on sexual abuse in the event that it found the facts insufficient to warrant assault. After deliberation, the jury returned a guilty verdict of first degree sexual assault.

The supreme court reversed the conviction, explaining that first and second degree sexual assault require "earnest resistance" to forcible compulsion to an extent not supported by the evidence. West Virginia's first degree sexual assault statute, as it existed at the time of the alleged assault, required a finding of forceable compulsion. The court stressed the lack of evidence showing any threat, intimidation, or serious resistance, as contemplated by West Virginia Code section 61-8B-1(1)(a). Furthermore, the alleged victim was in fact a "voluntary social companion" of the appellant under West Virginia Code section 61-8B-3(a)(i)(iii). Also, Tommy was not incapable of consent under West Virginia Code section 61-8B-3(a)(2) and not under the age of eleven as contemplated by section 61-8B-9(a)(3).

In a side issue, the court addressed the State's attempt to show that Tommy's psychological injuries were in fact "serious bodily" injuries as contemplated in

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66 Id.
67 Id.
68 Id.
69 Id.
75 Harishorn, 332 S.E.2d at 576.
76 Id. at 577.
78 Id. at 576 (citing W. Va. Code § 61-8B-1(1)(a)).
79 Id. at 577 (citing W. Va. Code § 61-8B-3(a)(i)(iii)).
the first degree sexual assault statute. West Virginia Code section 61-8B-1(a) defines "serious bodily injury" as a "bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ." The court explained that the statutory definition of serious bodily injury was derived precisely from the definition recommended by the Model Penal Code. The drafters of the Code refused to recognize psychological injury as serious bodily injury resulting from assault offenses. Accordingly, the court refused to expand the statutory definition of serious bodily injury to include psychological harms, opting to allow the Legislature the opportunity to alter the existing definition if it so desires.

Although New Hampshire and New Mexico have statutorily declared that a "serious bodily injury" includes mental anguish and trauma, the few states which have adopted the recommendations of the Model Penal Code likewise do not recognize psychological injuries as a "serious bodily injury."

As a result of the 1984 legislative revision of West Virginia's sexual assault statutes, forcible compulsion is no longer an element of first degree sexual assault. In addition, victims who are voluntary social companions of the actor are no longer excluded under first degree sexual assault. Hartshorn was decided after the 1984 revisions, therefore the court's refusal to expand the statutory definition of "serious bodily injury," which does not include psychological harm, remains effective until changed by what the court considers legislative perogative.

Unlike first degree sexual assault, the revised second degree sexual assault statute has retained the element of forcible compulsion where the victim of the assault is not physically helpless. Hartshorn indicates that in order to prove forcible compulsion, the victim must at least show threat or intimidation or reasonable physical resistance and attempt to escape.

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*Hartshorn*, 332 S.E.2d at 577.
*"The definition of 'bodily injury'... excludes from liability under the assault offense, wrongs based solely upon insult or emotional trauma."* Model Penal Code § 211.1.
*Hartshorn*, 332 S.E.2d at 578.
*Hartshorn*, 332 S.E.2d at 577.