THE CASE OF "INTENT": SHOULD THE ELEMENTS OF MURDER BE EXPANDED IN VIRGINIA?

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INTRODUCTION

The word "murderer" connotes in human beings an intensity of feeling that ranks near the top of the human emotional spectrum. Although the "murderer" is to be abhorred, his status is to be protected. That is, the term "murderer" embraces such magnitude of horror that the label must be saved only for those who truly deserve it. Therefore, the state legislature has established strict rules concerning the designation "first degree murderer." Among the rules is one that demands that the slayer possess not only the express "intent to kill," but also a "willful, premeditated, and deliberate" mindset. My inquiry here examines whether that rule of first degree murder in Virginia can be replaced with either an "intention to cause serious bodily injury" or a "reckless disregard for human life."

DISCUSSION

HISTORY

As common law murder evolved, a debate raged, and remains, as to what constitutes first degree and second degree murder.[1] Each state has instituted its own

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[1] *See generally* R. PERKINS, PERKINS ON CRIMINAL LAW 86-96 (1969). Perkins discusses the origins of the degrees of murder, which were embodied in a 1794 Pennsylvania statute that came to be known as the "Pennsylvania Pattern." Today this doctrine is no longer embodied in an existing authoritative statute but survives in modern case law in Commonwealth v. Drum, 58 Pa. 9 (1868).

ATTEMPTED SECOND DEGREE MURDER--Does It Exist?

Generally when one speaks of attempted murder, the list of essential elements includes only those used in first degree murder offenses. Additionally, it is essential that in order to have a valid attempt charge that the crime was not accomplished. Thus it would seem that a charge of attempted second degree murder would be rendered an impossibility. (The malice in second degree murder is generally imputed from the unlawful killing.) However, this assumption may be too hasty.

The presumption may be that all unlawful killings are second degree murder, but the Commonwealth still has the burden of proving malice if the defendant shifts the burden back to the Commonwealth. Thus, in second degree murder cases the prosecution must either elevate the killing to first degree murder through a showing of willful intent to kill or it must battle the defendant's contention that there was no malice to constitute second degree murder by showing that the defendant's actions were either with reckless indifference to the value of human life, Commonwealth v. Malone, 354 Pa. 180, 47 A.2d 445 (1956), or that the defendant intended serious bodily injury which was "life threatening." Cruce v. State, 87 Fla. 406, 100 So. 264 (1924). Thus malice, it would seem, can be proven in second degree murder cases, even without a death. Therefore, the elements of attempted second degree murder would be:

1. Either an intent by the defendant to cause serious bodily harm that is life-threatening or a reckless indifference to human life demonstrated by the defendant's actions. (No "intent to kill" element is necessary in second degree murder cases in Virginia.)

views concerning the requirements for each degree of murder.[2] For example, in most states a presumption of second degree murder arises from the death of an individual when caused by a criminal agent.[3] The unlawful act causing the death imputes the necessary malice.[4] However, this view of murder is not accepted by all states.[5] Another difference is in the "intent" requirement. Most states require an "intention to kill" only for first degree murder;[6] however, a minority of states require a specific "intent to kill" for second degree murder as well.[7]

Not surprisingly, conflicts exist over the restrictiveness of the first degree murder statutes. Many jurists believe that the "intent to kill" and the "premeditated and deliberate killing" requirements are too narrow. These jurists are of the opinion that the intent or malice requirement of first degree murder can be fulfilled by an intention

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2. Actions that would set into motion the process of events leading up to the fulfillment of the crime.
3. No one need be injured by the attempt. (There is no *corpus delicti* element.)

Because malice can be fulfilled for second degree murder without a killing, the door is left open for a valid charge and conviction of attempted second degree murder.

However, the difficulty in using this theory lies in the use of recklessness; for by definition recklessness lacks the specific intent which is required by all crimes of attempt. That leaves attempted second degree murder limited to only those defendants exercising an "intent to cause serious injury".

It should be noted that the theory of attempted second degree murder has never been used in the state of Virginia.

An Example of Attempted Second Degree Murder:

A man is walking down the street. He carries a gun on his person for protection. Another man coming from the opposite direction bumps into the armed man and calls him a name. The armed man, who is provoked, but not to a level justifying voluntary manslaughter, draws his weapon and fires at the other man. The intent of the armed man is to seriously injure the other by shooting him in the chest. There is no specific intent to kill. However, the recklessness of the act itself raises a presumption of second degree murder malice. The shot fired at the passerby misses him and lodges in a tree. Because there is both malice and a specific intent to injure, the charge of attempted second degree murder is warranted.

[2] R. PERKINS, *supra* note 1, at 88-9.

[3] Pugh v. Commonwealth, 223 Va. 663, 292 S.E.2d 339 (1982).

[4] Pannill v. Commonwealth, 185 Va. 244, 38 S.E.2d 457 (1946).

[5] State v. Rowley, 216 Iowa 140, 248 N.W. 340 (1933). The court held that the State need prove more than a death by an unlawful act to raise a presumption of murder.

[6] New York does not even require an "intent to kill" as an essential element of murder. *See* People v. Jernatowski, 238 N.Y. 188, 144 N.E. 497 (1924).

[7] *See, e.g.*, State v. Hill, 242 Kan. 68, 744 P.2d 1228 (1987); People v. Koerber, 244 N.Y. 147, 155 N.E. 79 (1926).

on the part of the accused to do "great bodily harm" to the victim[8] or by a "reckless disregard for human life" demonstrated by the accused.[9] The influence these jurists have on courts' interpretations of the differing state murder statutes is great. Today the New York and federal courts, two of the largest systems in the country, lead the way in expanding the intent requirement of first degree murder to include "reckless disregard for human life,"[10] while Louisiana and Indiana have led the charge toward the inclusion of the intent to do "serious bodily injury."[11]

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[8] An example of this judicial thought may be found in People v. Murphy, 1 Cal.2d 37, 32 P.2d 635 (1934), where the court extended the torture element of first degree murder to wife beating.

[9] *Jernatowski*, 238 N.Y. at 188, 144 N.E. at 497.

[10] United States v. Shaw, 701 F.2d 367 (1983).

The court in *Shaw* held that "the malice required for conviction of first degree or second degree murder does not require [a] subjective intent to kill, but may be established by evidence of conduct which is reckless and wanton and gross deviation from [a] reasonable standard of care, of such nature that [the] jury is warranted in inferring that [the] defendant was aware of [the] serious risk of death or serious bodily harm." *Shaw*, 701 F.2d at 392 (quoting United States v. Black Elk, 597 F.2d 49, 51 (8th Cir. 1978)).

Although the federal courts have stated that there still must be premeditation, that requirement is presumed fulfilled from successfully showing that the defendant's act constituted gross recklessness. In *Shaw*, the defendant negligently shot at a car while hunting deer at night (spotlighting). Although there was no specific intent to kill or even premeditation proven, the defendant was convicted of first degree murder on the grounds that his act was grossly reckless. *Shaw*, 701 F.2d at 367.

See also Deputy v. State, 500 A.2d 581, 596 (Del. 1985), where the court held in regard to felony-murder that "a person possessing a reckless state of mind can only be convicted of first degree murder if he recklessly kills while committing a felony." Although this limits the reckless intent doctrine to certain instances of murder, it does show a trend away from the stricter rule of "willful, premeditated, and deliberate." For one of the most famous cases on this subject, *see* People v. Jernatowski, 238 N.Y. 188, 144 N.E. 497 (1924).

[11] State v. Brooks, 499 So.2d 741 (La. App. 1986).

In *Brooks* the defendant contended that a specific intent to do serious bodily injury could not replace the intent to kill element of first degree murder. The court disagreed holding that "in proving first or second degree murder, either the specific intent to kill or the specific intent to inflict great bodily harm can be proven". *Brooks*, 499 So.2d at 744. However, the court did sustain the defendant's argument on the grounds that attempted first degree murder, of which the defendant was charged, required an intent to kill, not an intent to do harm.

See also State v. Martin, 213 N.J.Super. 414, 517 A.2d 513 (1986). In *Martin*, where the defendant killed a woman by knowingly setting a building on fire when he knew people were inside of it, the court held that "a murder conviction based on "purposeful" or "knowing" conduct can result from conduct which is practically certain to cause serious bodily injury when death is a result of the injury caused". *Id.* at 418, 517 A.2d at 517.

See also Robinson v. State, 453 N.E.2d 280 (Ind. 1983). In *Robinson*, the defendant kicked his child to death for bed wetting. The court in upholding the first degree murder conviction held that "there must be evidence that the defendant had a conscious objective to kill the victim or was aware that his conduct would result in [the] death of [the] victim". *Id.* at 280 (quoting Burkhalter v. State, 397 N.E.2d 596 (Ind. 1979)). An

Although Michie's Jurisprudence attempts to read the intent to do "serious bodily injury" into Va. Code Ann. 18.2-32,[12] it does so in an unacceptable manner. Michie's contention is that the statute is satisfied because an intent to do "serious bodily injury" is equivalent to "lying in wait" for the victim, thus implying the intent-to-kill element.[13] To support its deviation from the wording of the statute, Michie erroneously cites *Commonwealth v. Jones*,[14] which does not even address the issue of "serious bodily injury." In fact, *Jones* is a landmark "lying in wait" case, and in it, the court states explicitly that an "intent-to-kill" element is still necessary in order to prove first degree murder and cannot be overlooked simply by proving that the accused was "lying in wait." The party must necessarily be "lying in wait" to kill.[15] Therefore, the popular

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intent to kill is not necessary, only a presumed awareness by the reasonable man standard that the intent to harm would in fact occasion death. *See* Honesty v. Commonwealth, 81 Va. 283 (1886) for similar language.

For a listing of other cases affirming the trend toward inclusion of the "intent to do serious bodily injury" as a replacement for the "intent to kill" elements of first degree murder, *see also* State v. Gerrel, 499 So.2d 381 (La. App. 1986); State v. Flowers, 509 So.2d 588 (La. App. 1987); Burse v. State, 515 N.E.2d 1383 (Ind. 1987); Ortiz v. State, 651 S.W.2d 764 (Tex. Cr. App. 1983); and Smith v. State, 486 N.E.2d 465 (Ind. 1985).

[12] VA. CODE ANN. Sec. 18.2-32 (1988).

The full text of the statute reads:

First and second degree murder defined; punishment.--

Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary or abduction, except as provided in Section 18.2-31, is murder of the first degree, punishable as a Class 2 felony.

All murder other than capital murder and murder in the first degree is murder of the second degree and is punishable as a Class 3 felony.

[13] 9B MICHIE'S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA, HOMICIDE Sec. 19 (1952 & Supp. 1984).

[14] Commonwealth v. Jones, 28 Va. 598 (1829).

In *Jones*, the defendant and the deceased were socializing at a grocery in Lynchburg, Virginia in the spring of 1829. A prostitute, whom each man had known, entered the establishment and began insulting the deceased. The deceased there upon struck the prostitute and she appealed to the sympathies of the defendant to protect her. This incident incited a two-day war of words and deeds between the two men which culminated in the defendant's purchasing a gun and shooting the deceased. The rule of law that this case demonstrates is "intent". The court, in upholding the defendant's conviction of first degree murder, continually showed how the defendant had planned and deliberated over the killing. *Id.* at 598.

[15] *Id.*

argument imputing intent to do "serious bodily injury" to those "lying in wait" is very weak.

However, Michie's conclusion is invalid only in its analysis. The conclusion is correct! The intent to do "serious bodily injury" does replace the "intent to kill" and "premeditated and deliberate killing" requirements in first degree murder in Virginia. The reasoning of the Virginia Supreme Court is not that it is incorporated into the "lying in wait" element, but that it raises a presumption of deliberation. The court limits the application of the intent to do "serious bodily injury" to circumstances where a reasonable man would have known that the harm intended would "probably occasion the victim's death."[16] This expansion of first degree murder was first instituted in *Honesty v. Commonwealth*[17] and was reaffirmed in *Hall v. Commonwealth.*[18] The full rule of law reads: "[a]nd if there be a reasonable doubt whether he had willed, deliberated, and premeditated to kill the deceased, or *to do him some serious bodily injury, which would probably occasion his death, the jury ought not to find him guilty of murder in the first degree.*"[19]

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[16] Honesty v. Commonwealth, 81 Va. 283 (1886).

[17] *Id.* at 283.

A complete narrative of *Honesty* follows:

On November 14, 1884 there was a celebration in an unspecified Virginia city. The defendant was out in the street with an associate "hallooing and dancing". *Honesty*, 81 Va. at 302. The defendant had in his possession a large stick and threatened aloud that " if any son of a bitch of a democrat as much as rubs against me, I will give him hell." *Id.* at 302. Later that same evening the deceased and a friend proceeded toward the friend's home. They stopped along the way in order to enter an alley to "answer a call of nature". *Id.* at 303. There, they heard the defendant and his compatriot arguing. When the deceased requested the defendant to end the heated argument, the defendant began harassing, cursing, and pushing the deceased. When the deceased attempted to leave the alleyway, the defendant struck him in the head with a brick, thereby causing his immediate death.

The court held that the defendant's conviction of first degree murder should be sustained on the grounds that the use of the brick as a deadly weapon raised the presumption that the defendant deliberately caused the deceased's death. This the court reasoned was because a reasonable man would know that a blow, such as the one the defendant gave the deceased, would "probably occasion death". *Id.* at 294.

[18] Hall v. Commonwealth, 89 Va. 171, 15 S.E. 517 (1892).

In following *Honesty*, the court in *Hall* stated that a serious wound caused by a deadly weapon raised a *prima facie* presumption of an intent to do "serious bodily injury" and would substitute for the "willful, premeditated, and deliberate" element of first degree murder. *Hall*, 89 Va. at 178, 15 S.E. at This finding was affirmed by the court in Mealy v. Commonwealth, 135 Va. 585, 115 S.E. 563 (1923). *See also* Wade v. Commonwealth, 202 Va. 177, 116 S.E.2d 99 (1960), where the court refers to proof of intent to do "serious bodily injury" as an alternative to the "willful, premeditated, and deliberate" element of first degree murder.

[19] *Honesty*, 81 Va. at 294 (emphasis added).

The case law in Virginia is not as clear when the charge is first degree murder as the result of "reckless behavior."[20] No major cases in Virginia address reckless

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A Logical Expansion of the Law?

The logic behind the expansion of the first degree murder elements to include the intent to do "serious bodily injury" is based in part upon the court's view of premeditation as seen in *Honesty*. The array of cases that cite *Honesty* as controlling refer to the case's alternative interpretation of premeditated and deliberate murder. *See* Hall v. Commonwealth, 89 Va. 171, 15 S.E. 517 (1892), Mealy v. Commonwealth, 135 Va. 585, 115 S.E. 563 (1923), and Carson v. Commonwealth, 188 Va. 398, 49 S.E.2d 704 (1948). In *Hall*, the use of a firearm in and of itself was sufficient to justify *Honesty*'s alternative murder element. *Hall*, 89 Va. at 178, 15 S.E. at 519. The logic behind the expansion is embodied in the latter part of *Honesty*'s definition of the crime of first degree murder. which may be summarized as: "If a reasonable man knows his actions could result in death, than he should be held responsible for the natural consequences of those acts."

The argument for the expansion of first degree murder is in fact the same argument used by the Michigan Supreme Court in People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980), where the court struck down the felony-murder doctrine. The argument is that the law must punish not in accordance with mere presence, but with culpability. One must be made responsible for culpable intent and the actions that follow from that intent. Although a defendant can always attempt to reduce first degree murder to second degree murder by stating that he "didn't mean to kill," the state must logically be entitled to a presumption of intent if a reasonable man would know that his actions would probably occasion the death of the other party. One may not be allowed to ignore the consequences of ones act by mere denial after the fact. Intent is to be proven by the totality of the circumstances, Beck v. Commonwealth, 2 Va. App. 170, 342 S.E.2d 642 (1986), not by the *per se* testimony of the accused. To allow such an erroneous standard would make criminal intent obsolete.

[20] How Negligence Fits into the Spectrum of Legal Liability

If the proposition that gross recklessness can give rise to first degree murder is true, than it is also a truism that negligence (the failure to exercise due care) is a wrong whose spectrum extends from the civil court proceeding to the highest realms of the criminal court system. A diagramming of that negligence spectrum follows:

Civil Court Proceeding	/	**Criminal Court Proceeding**		
No Negligence	Negligence	Involuntary Manslaughter	Second Degree Murder	First Degree Murder
Absence of Malice			**Malicious Intent**	

behavior as a replacement for the "intent to kill" element of first degree murder.[21] Even Michie's is silent on the subject. Instead, persuasive law such as the landmark New York case *People v. Jernatowski*, which states that acts that show "reckless disregard for human life" can fulfill the requirement of intent for first degree murder,[22] must be cited as authority in order to make a case for this doctrine in the Virginia courts.

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[21] The Logic Behind Recklessness
(In its context as a substitute for first degree intent)

The viability of using reckless conduct as a substitute for the "intent to kill" and the *modus operandi* (premeditation) in a first degree murder case is not as unusual as it would first appear. The reasoning of a court effectuating the substitution may be grounded in common sense. If the actions of the defendant are truly outrageous enough to elevate the crime to first degree murder, than perhaps the "intent" and motive do, in fact, exist and, hence, may be implied for purposes of proving murder.

It would seem logical that at some point on the negligence-recklessness spectrum, a reasonable man knows he is committing a dangerous act and understands its foreseeable consequences. At such a level the defendant, whether he had actually contemplated his intention, would be implicitly intending the outcome of his actions.

The only true defense a defendant could raise, after the Commonwealth had elevated the recklessness to the first degree level and, thereby satisfied its burden of proof, would be the irresistible impulse insanity defense. (That is the affirmative defense where although the defendant knows of the consequences of his actions, he is nevertheless unable to stop his behavior. An impulse compels him to act against his will.)

Allowing an individual's outrageous acts either to slide by the judicial scales of criminal prosecution or to avoid higher levels of criminal punishment by pleading a lack of "intent," in all likelihood gives rise to intelligent killers with outrageous and uniquely planned premeditated murders.

However, the scenario just contemplated can be avoided if the Commonwealth is allowed to raise a presumption of "intent" by proving a stipulated level of outrageousness. The burden is then shifted onto each defendant to prove a lack of "criminal intent." This presumption, according to some jurists, would lead to a fairer system of adjudicating crimes involving death.

On the other hand, the difficulty with this type of system lies in the fact that it raises first degree murder to a strict liability or quasi-*res ipsa loquitur* standard. Those types of classes of proof in a civil system may be acceptable, but under the guise of criminal justice they are unconstitutional in their disregard for due process.

Therefore, the premise onto which extreme gross recklessness as a substitute for first degree murder may be based is fatally flawed. Unless due process can be satisfied, reckless conduct in and of itself can never raise a presumption of first degree murder no matter what level of recklessness is proved by the Commonwealth. In the opinion of this author, the New York Murder Statutes as they are presently interpreted by New York Courts through decisions like *Jernatowski* are constitutionally unsound.

[22] 238 N.Y. 188, 144 N.E. 497 (1924). In *Jernatowski*, a railroad strike occurred in Buffalo, New York. The deceased's husband was a foreman with the railroad. He did not participate in the strike and elected to cross the picket line. Late one evening one of the strikers fired two gunshots into the foreman's house in an attempt to scare the foreman. The defendant at the time of the shooting knew that the house was occupied and had even been told moments before the incident by the deceased to "get away from there." The result of the defendant's act was the death of the foreman's wife, as one of the gun shots hit and killed her instantly.

The court held that the defendant's act justified a conviction for first degree murder because the defendant did "an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual." *Id.* at 190, 144 N.E. at 497.

Thus "if A finds B asleep on straw, and lights the straw, meaning to do B serious bodily injury, but not to kill him, and B is burned to death, it is murder" (in the context of first degree murder).[23] The intent to do "serious bodily injury" replaces the "intent to kill" element under Virginia's first degree murder statute. However, the argument over "reckless disregard for human life" is still an open question in Virginia.

[23] *Honesty*, 81 Va. at 295.

APPENDIX:

PROPOSED JURY INSTRUCTIONS FOR FIRST DEGREE MURDER IN VIRGINIA

It is my contention that the Virginia Model Jury Instructions should be amended to reflect an intent to do "serious bodily injury" as a viable substitute element for the crime of first degree murder. The corrected version should read:

> The defendant is charged with the crime of first degree murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:
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> (1) That the defendant killed (Name of Person); and
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> (2) That the killing was malicious; and
>
> (3) That the killing was willful, deliberate, and premeditated or that the intention of the defendant was to cause (Name of Person) serious bodily injury, which would probably occasion his death.[24]

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[24] *See generally* 1 MICHIE'S JURISPRUDENCE, VIRGINIA MODEL JURY INSTRUCTIONS, CRIMINAL 485 (1985 & Supp. 1987).

The unedited current version of the Virginia Model Jury Instructions includes all of the proposed new instructions minus the wording "or that the intention of the defendant was to cause (Name of Person) serious bodily injury, which would probably occasion his death." The new wording comes from the jury instructions given by the court in *Honesty*, 81 Va. at 294.