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## Annual Survey of Virginia Law: Criminal Law

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## CRIMINAL LAW

*Richard A. Williamson\**

### I. INTRODUCTION

Effective January 1, 1985, the Court of Appeals of Virginia was established.<sup>1</sup> The new intermediate appellate court possesses exclusive jurisdiction over appeals from any final judgment of conviction in a circuit court for a traffic violation or a crime, except where a sentence of death is imposed.<sup>2</sup> The operation of the court of appeals is likely to have a twofold effect on the criminal justice system. First, it should reduce the current backlog of cases in the supreme court; second, it should produce an increase in the number of reported criminal decisions, thereby facilitating an understanding of criminal law and procedure. For the first time, therefore, a review of criminal law developments in the commonwealth must include the work of an additional court.

Another significant recent development in criminal law is the continuing attention the legislature has given to laws dealing with the offense of driving under the influence of alcohol. While it is unlikely that the last chapter on this problem has been written, the 1986 session of the General Assembly produced another major revision in the manner in which "drunk driving" cases will be handled.

Finally, during the past few years both the General Assembly and the supreme court have considered the problems associated with allegations of interspousal rape. The supreme court, applying Virginia's general rape statute, recently decided two cases involving claims of marital rape. As a result of these decisions, Virginia joined other states in authorizing the prosecution of sexual offenses committed by one spouse against the other. In the 1986 session of the General Assembly, the legislature completely rewrote the law with respect to interspousal sexual offenses and created not only

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The views expressed herein are entirely those of the author.

1. 1983 Va. Acts 519-23.

2. VA. CODE ANN. § 17-116.05:1(A) (Cum. Supp. 1986).

separate statutory offenses, but also separate procedural and sentencing schemes for such offenses.

The discussion that follows will review and explain the major substantive criminal law developments from 1984 to 1986, including some of the major statutory revisions adopted during the 1985 and 1986 sessions of the General Assembly.

## II. HOMICIDE

### A. *Capital Murder*

The Virginia Supreme Court continues to hear and resolve a significant number of death penalty cases.<sup>3</sup> In *Tuggle v. Commonwealth*,<sup>4</sup> a case remanded by the United States Supreme Court<sup>5</sup> for reconsideration "in light of" the decision in *Ake v. Oklahoma*,<sup>6</sup> the Virginia Supreme Court upheld a death sentence even though it concluded that the trial court erred in denying the defendant's motion for an independent psychiatrist to rebut the psychiatric evidence of future dangerousness proffered by the commonwealth at the sentencing phase of the trial. The court held that when, as in this case, the jury finds that the commonwealth has proved both the "dangerousness" and the "vileness" predicates for the imposition of the death penalty and one of the predicates subsequently is invalidated on appeal, the remaining predicate is sufficient to support the verdict and no further proceeding is required.<sup>7</sup>

As previously noted, under the Virginia capital murder statute, the trier of fact is authorized to impose the death penalty upon finding either or both of two "aggravating circumstances." The

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3. See, e.g., *Wise v. Commonwealth*, 230 Va. 322, 337 S.E.2d 715 (1985); *Tuggle v. Commonwealth*, 230 Va. 99, 334 S.E.2d 838 (1985); *Boggs v. Commonwealth*, 229 Va. 501, 331 S.E.2d 407 (1985); *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985); *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815 (1985); *Edmonds v. Commonwealth*, 229 Va. 303, 329 S.E.2d 807 (1985).

4. 230 Va. 99, 334 S.E.2d 838 (1985).

5. *Tuggle v. Virginia*, 105 S. Ct. 2315 (1985).

6. 105 S. Ct. 1087 (1985). *Ake* held that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the state must provide the defendant access to psychiatric assistance on this issue if the defendant cannot otherwise afford his own psychiatrist. *Id.* at 1097. *Ake* also held that in a capital case, where the state relies on psychiatric evidence of the defendant's future dangerousness, the state must provide an indigent defendant with access to a defense psychiatrist. *Id.* at 1099.

7. *Tuggle*, 230 Va. at 110, 334 S.E.2d at 845 (citing *Zant v. Stephens*, 462 U.S. 862 (1983)).

trier of fact must find that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society" (the so-called "future dangerousness" predicate), or "that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim" (the so-called "vileness" predicate).<sup>8</sup>

The statute governing proof of future dangerousness is facially ambiguous. The Virginia Code (the "Code") provides that the trier of fact may impose a sentence of death upon finding that the defendant poses a continuing threat to society after considering his prior "criminal record of convictions,"<sup>9</sup> and yet the Code also authorizes the commonwealth to introduce "evidence of the prior history of the defendant" to establish future dangerousness.<sup>10</sup> The supreme court previously rejected a "vagueness" challenge to this statute and held that in determining the probability of a defendant's future criminal conduct it "is essential . . . that the jury have before it *all possible relevant information* about the individual."<sup>11</sup> Thus, the commonwealth may introduce not only the defendant's record of convictions, but also testimonial evidence relating to the commission of those crimes.<sup>12</sup> The court also has allowed the introduction of evidence of other criminal acts for which the defendant was not convicted.<sup>13</sup>

The "aggravated battery" element of the "vileness" predicate continues to cause problems. The supreme court has stated that to

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8. VA. CODE ANN. § 19.2-264.2 (Repl. Vol. 1983). The jury, of course, must still recommend the imposition of the death penalty. *Id.*

9. *Id.*

10. *Id.* § 19.2-264.4 (C).

11. *LeVasseur v. Commonwealth*, 225 Va. 564, 594, 304 S.E.2d 644, 660 (1983) (emphasis in original), *cert. denied*, 464 U.S. 1063 (1983); *Quintana v. Commonwealth*, 224 Va. 127, 147-48, 295 S.E.2d 643, 653-54 (1982); *Stamper v. Commonwealth*, 220 Va. 260, 275-77, 257 S.E.2d 808, 819 (1979), *cert. denied*, 445 U.S. 972 (1980).

12. *See, e.g., Coleman v. Commonwealth*, 226 Va. 31, 43-44, 307 S.E.2d 864, 870-71 (1983), *cert. denied*, 465 U.S. 1109 (1984); *Peterson v. Commonwealth*, 225 Va. 289, 298, 302 S.E.2d 520, 526, *cert. denied*, 464 U.S. 520 (1983); *Quintana v. Commonwealth*, 224 Va. 127, 147-48, 295 S.E.2d 643, 653-54 (1982); *Stamper v. Commonwealth*, 220 Va. 260, 275-77, 257 S.E.2d 808, 819 (1979), *cert. denied*, 445 U.S. 972 (1980).

13. *Watkins v. Commonwealth*, 229 Va. 469, 488, 331 S.E.2d 422, 436 (1985) (admission of evidence of another killing by the defendant for which he had yet to be tried); *Poyner*, 229 Va. at 418, 329 S.E.2d at 827 (admission of a confession in which the defendant admitted the killing of three other women for which he had yet to be tried); *Stockton v. Commonwealth*, 227 Va. 124, 147, 314 S.E.2d 371, 385, *cert. denied*, 469 U.S. 873 (1984) (admission of testimony that the defendant had killed another individual).

support a finding under the aggravated battery theory, the commonwealth must prove that the battery was "qualitatively and quantitatively . . . more culpable than the minimum necessary to accomplish an act of murder."<sup>14</sup> While an aggravated battery is not established by evidence that the victim died almost instantaneously from a single gunshot wound,<sup>15</sup> proof of the infliction of multiple wounds may meet the test for an aggravated battery if death was not instantaneous and the shots were separated by a lapse of time.<sup>16</sup> It is immaterial whether the victim remained conscious during the course of several assaults.<sup>17</sup> Both the aggravated battery and "torture" elements of the vileness predicate ordinarily connote conduct preceding the death of the victim.<sup>18</sup>

The third element of the vileness predicate, depravity of mind, can exist independently of the other two.<sup>19</sup> Conduct such as "mutilation, gross disfigurement or sexual assault committed upon a corpse or an unconscious body evinces 'depravity of mind.'"<sup>20</sup> Hence, an attempt to incinerate a corpse is sufficient to support a finding of depravity of mind.<sup>21</sup>

A trial court is not constitutionally required to define for the jury the statutory requirements for the imposition of the death penalty.<sup>22</sup> The definitions of the various predicates are appropriate as standards for appellate review<sup>23</sup> and are not necessarily required as part of the instructions to the jury, although the trial court does possess the authority to define the legal terminology in the statute for the jury.<sup>24</sup>

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14. *Wise*, 230 Va. at 335, 337 S.E.2d at 723; *Boggs*, 229 Va. at 521, 331 S.E.2d at 421; *Watkins*, 229 Va. at 489, 331 S.E.2d at 437; *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967 (1979).

15. *Watkins*, 229 Va. at 489, 331 S.E.2d at 437; *Peterson*, 225 Va. at 296, 302 S.E.2d at 525.

16. *Boggs*, 229 Va. at 521, 331 S.E.2d at 421; *Watkins*, 229 Va. at 489-90, 331 S.E.2d at 437.

17. *Boggs*, 229 Va. at 521, 331 S.E.2d at 421; *Jones v. Commonwealth*, 228 Va. 427, 447-48, 323 S.E.2d 554, 565 (1984).

18. *Jones*, 228 Va. at 448, 323 S.E.2d at 565.

19. *Id.*; *see also* *Bunch v. Commonwealth*, 225 Va. 423, 442, 304 S.E.2d 271, 282 (1983), *cert. denied*, 444 U.S. 1049 (1980).

20. *Jones*, 228 Va. at 448, 323 S.E.2d at 565.

21. *See id.*

22. *Tuggle*, 228 Va. at 515, 323 S.E.2d at 553; *Jones*, 228 Va. at 446, 323 S.E.2d at 564; *Bunch*, 225 Va. at 447, 304 S.E.2d at 285; *Coppola v. Commonwealth*, 220 Va. 243, 254, 257 S.E.2d 797, 805 (1979), *cert. denied*, 444 U.S. 1103 (1980).

23. *Jones*, 228 Va. at 446, 323 S.E.2d at 564.

24. *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*,

Although the United States Supreme Court has recently addressed the issue, the jury selection process in capital murder trials remains a source of controversy. The problem of selecting a "death qualified" jury has existed since the 1968 decision in *Witherspoon v. Illinois*.<sup>25</sup> The *Witherspoon* rule, as modified by more recent decisions, provides that a prospective juror may be excluded "for cause" because of his or her views on capital punishment, if "those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."<sup>26</sup> Defense objections to the exclusion of jurors "for cause" because of their opposition to the death penalty have been numerous.<sup>27</sup>

More recently, defendants have challenged "death qualified" juries on the ground that such juries violate their right to a jury representing a fair cross section of the community.<sup>28</sup> Defendants have argued that this violation constitutes a denial of their right to an impartial jury because such "death qualified" juries are more "guilt prone."<sup>29</sup> The United States Supreme Court recently rejected these contentions.<sup>30</sup>

The Virginia Supreme Court recently upheld the constitutionality of a statute which authorizes the use of a new jury for resentencing in the event a death sentence (but not a guilty verdict) is set aside on appeal.<sup>31</sup> The court also held that a jury verdict in a capital murder trial fixing punishment at life imprisonment must

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441 U.S. 967 (1979).

25. 391 U.S. 510 (1968). In *Witherspoon*, the Supreme Court held that it is permissible to exclude jurors "for cause" if they make it unmistakably clear that they will automatically vote against the death sentence regardless of the evidence and circumstances, or that their views on the death penalty will prevent them from making an "impartial decision" on the question of guilt. *Id.* at 522 n.21.

26. *Adams v. Texas*, 448 U.S. 38, 45 (1980); *see also* *Wainwright v. Witt*, 105 S. Ct. 844 (1985).

27. *See, e.g., Coppola*, 220 Va. at 248-50, 257 S.E.2d at 801-02; *Smith*, 219 Va. at 464, 248 S.E.2d at 141.

28. *LeVasseur*, 225 Va. at 576, 304 S.E.2d at 650; *Waye v. Commonwealth*, 219 Va. 683, 690-91, 251 S.E.2d 202, 207, *cert. denied*, 442 U.S. 924 (1979).

29. *Le Vasseur*, 225 Va. at 576, 304 S.E.2d at 650.

30. *Lockhart v. McCree*, 106 S. Ct. 1758 (1986). *Lockhart* held that a "death qualified" jury does not violate the fair cross section requirement nor does it violate the defendant's right to an impartial jury even assuming, *arguendo*, that scientific studies demonstrate that "death qualification" in fact produces juries somewhat more conviction prone than "non-death qualified" juries.

31. *Evans v. Commonwealth*, 228 Va. 468, 474-77, 323 S.E.2d 114, 118-20 (1984); *see* VA. CODE ANN. § 19.2-264.3 (Repl. Vol. 1983).

be by unanimous vote even though the statutory form of jury verdict does not so expressly provide.<sup>32</sup> Finally, the supreme court rejected a challenge that the statutory verdict form unconstitutionally lists aggravating factors without listing mitigating factors and fails to state a standard of proof for evidence in mitigation.<sup>33</sup> The United States Supreme Court held that the constitutional mandate that a jury's discretion be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty"<sup>34</sup> is not violated by this form of jury verdict.

In the 1985 session of the General Assembly, the legislature added another form of capital murder to the list of capital offenses:

[t]he willful, deliberate and premeditated killing of a child under the age of twelve years in the commission of abduction as defined in § 18.2-48 when such abduction was committed with the intent to extort money or a pecuniary benefit, or with the intent to defile the victim of such abduction.<sup>35</sup>

In *Harward v. Commonwealth*,<sup>36</sup> the supreme court held that Virginia Code section 18.2-31(e), murder during the commission of rape, only proscribes the murder of a rape victim and cannot be extended to include the murder of another; accordingly, the court reversed a conviction for capital murder where the defendant killed the husband of the rape victim prior to the sexual assault.<sup>37</sup>

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32. *Evans*, 228 Va. at 480-81, 323 S.E.2d at 121 (construing VA. CODE ANN. § 19.2-264.4(D) (Repl. Vol. 1983)). Subsection (D)(1) requires the jury to "unanimously fix [the defendant's] punishment at death" while subsection (D)(2) merely provides that the jury may "fix [the defendant's] punishment at imprisonment for life." VA. CODE ANN. § 19.2-264.4(D)(1)-(2) (Repl. Vol. 1983).

33. *Watkins*, 229 Va. at 490-91, 331 S.E.2d at 438. The court concluded that the statutory form of verdict actually benefits the accused since the aggravating factors are expressly limited while the mitigating factors are not so confined. *Id.* at 491, 331 S.E.2d at 438.

34. *Proffitt v. Florida*, 428 U.S. 242, 258 (1976).

35. VA. CODE ANN. § 18.2-31(h) (Cum. Supp. 1986).

36. 229 Va. 363, 330 S.E.2d 89 (1985).

37. *Id.* at 366-67, 330 S.E.2d at 91. VA. CODE ANN. § 18.2-31(e) (Cum. Supp. 1986) provides that the "willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape" shall constitute capital murder (emphasis added). The court found it significant that the provision refers to the killing of "a person" while other capital murder offenses, such as murder in the commission of robbery, refer to the killing of "any person." *Harward*, 229 Va. at 366, 330 S.E.2d at 91. The court also found it significant that the capital murder-rape provision refers to a killing "during the commission of or subsequent to" rape rather than a killing "in the commission" of the felony. *Id.* (emphasis added).

In *Watkins v. Commonwealth*,<sup>38</sup> the defendant argued that he could not be convicted of murder in the commission of robbery because he did not actually take the property that was alleged to have been stolen. The supreme court disagreed and held that the commonwealth "need only prove that the defendant actually committed the murder and was an accomplice in the robbery."<sup>39</sup>

### B. *Second-Degree Murder*

Despite increasing public awareness of the dangers associated with drug use and drunk driving, serious criminal prosecutions remain uncommon in such cases even when death results. The Virginia Supreme Court, however, recently sustained a second-degree murder conviction of an individual who provided cocaine to a willing user who ingested the drug and died as a result.<sup>40</sup> In another case, however, the supreme court held that driving under the influence of alcohol, standing alone and without more, no matter how appalling such conduct may be, is insufficient to support a conviction for second-degree murder.<sup>41</sup>

In *Heacock v. Commonwealth*,<sup>42</sup> the defendant provided cocaine for a "drug party."<sup>43</sup> One of the participants died of "acute intravenous cocaineism."<sup>44</sup> The evidence at trial did not establish how the fatal injection was accomplished, but there was testimony that the defendant was present when another participant injected the substance and that he participated in the preparation of the substance for its intravenous administration.<sup>45</sup> The defendant was charged with and convicted of second-degree felony-murder—" [t]he killing of one accidentally, contrary to the intention of the parties, while in the process of some felonious act other than [capital murder and specified other felonies]."<sup>46</sup> The underlying felony used to support the felony-murder charge was the distribu-

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38. 229 Va. 469, 331 S.E.2d 422 (1985), *cert. denied*, 106 S. Ct. 1503 (1986).

39. *Id.* at 485-86, 331 S.E.2d at 435; *see also* *Briley v. Commonwealth*, 221 Va. 563, 573, 273 S.E.2d 57, 63 (1980).

40. *Heacock v. Commonwealth*, 228 Va. 397, 323 S.E.2d 90 (1984).

41. *Essex v. Commonwealth*, 228 Va. 273, 322 S.E.2d 216 (1984).

42. 228 Va. 397, 323 S.E.2d 90 (1984).

43. *Id.* at 401, 323 S.E.2d at 93.

44. *Id.* at 402, 323 S.E.2d at 93.

45. *Id.* at 401-02, 323 S.E.2d at 92-93.

46. VA. CODE ANN. § 18.2-33 (Repl. Vol. 1982).



tion of cocaine, a Schedule II controlled substance.<sup>47</sup>

The defendant raised several objections to the application of the second-degree felony-murder statute in these circumstances: first, there was no evidence that he administered the fatal injection; second, death was not a "foreseeable consequence" of the criminal conduct alleged in the indictment; third, the felony-murder rule does not apply "unless the underlying felony is shown to be the proximate cause of death;" and finally, the felony-murder rule is inapplicable since the decedent "was a co-felon in the sense that she was present at a 'drug party.'"<sup>48</sup>

The court rejected all contentions. First, the court stated that it was immaterial whether the defendant actually injected the fatal dosage.<sup>49</sup> The evidence established that the defendant participated in the preparation of the drug for intravenous injection; as such, he was a principal in the second degree, equally culpable as if a principal in the first degree.<sup>50</sup> Second, the court held that nothing in the second-degree felony-murder statute limits its application to felonies "not foreseeably dangerous."<sup>51</sup> The court went on to hold, however, that even if the statute were so confined, the unlawful distribution of cocaine and its injection constitute conduct which the defendant knew or should have known was "inherently dangerous to human life."<sup>52</sup> Third, the court held that the "cause and effect" between the distribution of the cocaine and the decedent's death from its intravenous injection "were proximately interrelated."<sup>53</sup> Finally, the court held that while a "criminal participant in a felony may not be convicted of the felony-murder of a co-felon killed by the victim of the initial felony," such was not the case here because the decedent was not a co-felon killed by the victim of the drug distribution felony but was, instead, the "victim" of

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47. *Heacock*, 228 Va. at 403, 323 S.E.2d at 93.

48. *Id.* at 405, 323 S.E.2d at 95.

49. *Id.* at 403, 323 S.E.2d at 94.

50. *Id.*; see VA. CODE ANN. § 18.2-18 (Repl. Vol. 1982) ("every principal in the second degree . . . may be indicted, tried, convicted and punished in all respects as if a principal in the first degree"). A principal in the second degree is a person present, actually or constructively assisting in the commission of the crime. See, e.g., *Jones v. Commonwealth*, 208 Va. 370, 372, 157 S.E.2d 907, 909 (1967).

51. *Heacock*, 228 Va. at 404, 323 S.E.2d at 94.

52. *Id.* at 403-04, 323 S.E.2d at 94; see *supra* text accompanying note 47. The court noted that cocaine is classified as a "Schedule II controlled substance" under the Virginia Code because it "has high potential for abuse" which "may lead to severe psychic or physical dependence." *Heacock*, 228 Va. at 404, 323 S.E.2d at 94.

53. *Heacock*, 228 Va. at 404-05, 323 S.E.2d at 94.

that crime.<sup>54</sup>

The result in the *Heacock* case is consistent with the modern view of felony-murder. While some jurisdictions limit the application of felony-murder statutes to felonies that are "inherently dangerous,"<sup>55</sup> there is ample support for the position that the sale of certain drugs is a "dangerous felony," so that when the purchaser dies from an overdose, the seller who furnished the drug is guilty of felony-murder.<sup>56</sup> The *Heacock* decision, however, was not a simple seller-purchaser case; instead, the defendant, in addition to providing the drug, was present and apparently participated in its preparation for intravenous injection. It is thus unclear whether the reasoning and rationale of the decision would extend to cover a situation where the defendant was the mere provider of the drug and not present when the drug was consumed. The court's analysis in *Heacock* is confusing because, at one point, the court described the defendant as a principal in the second degree to the act of the injection of the fatal dose, suggesting that it was this conduct rather than the distribution of the drug which supported the conviction. The problem arises from the fact that he was charged with and convicted of distribution of cocaine. The underlying felonious act charged was not the injection of the fatal dosage.

In *Essex v. Commonwealth*,<sup>57</sup> the supreme court held that when a killing results from negligence, however gross or culpable, and is contrary to the defendant's intention, a second-degree murder conviction cannot be sustained; the fact and degree of intoxication,

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54. *Id.* at 405, 323 S.E.2d at 95. The court distinguished its decision in *Wooden v. Commonwealth*, 222 Va. 758, 284 S.E.2d 811 (1981), which held that a criminal participant in a felony may not be convicted of the felony-murder of a co-felon killed by the *victim* of the initial felony. There are two competing theories of felony-murder. The first, the so-called "agency" theory, holds that the crime does not extend to a killing that is attributable to the act of someone other than one of the felons, even though it was "caused" by the felony. The other, the so-called "proximate cause" theory, holds that the crime extends to include any death proximately resulting from the felony, including the death of one of the felons. The *Wooden* decision clearly rests on the "agency" theory of felony-murder.

55. *See, e.g.,* *People v. Phillips*, 64 Cal. 2d 574, —, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232 (1966) (holding that only felonies "'inherently dangerous to human life' can support the application of the felony murder rule").

56. *State v. Randolph*, 676 S.W.2d 943 (Tenn. 1984).

57. 228 Va. 273, 322 S.E.2d 216 (1984). *Essex* was convicted of one count of driving under the influence of alcohol and three counts of second-degree murder arising from an automobile collision. A blood test conducted about two and one-half hours after the accident established *Essex's* blood-alcohol level at 0.144 percent. *Id.* at 279, 322 S.E.2d at 219. For a discussion of the driving-under-the-influence aspects of this case, see *infra* text accompanying notes 94-97.

standing alone, "neither enhances nor impairs" proof of the required element of malice.<sup>58</sup>

As the *Essex* court emphasized, the element of malice is what distinguishes murder from manslaughter. Under Virginia law, malice can be either express or implied. "Express malice is evidenced when 'one person kills another with a sedate, deliberate mind, and formed design'. . . . Implied malice exists when any *purposeful, cruel act* is committed by one individual against another without any, or without great provocation . . . ."<sup>59</sup> In either case, however, the wrongful act must be done "wilfully or purposefully;"<sup>60</sup> that is, to sustain a conviction requiring proof of malice, "the defendant must be shown to have wilfully or purposefully, rather than negligently, embarked upon a course of wrongful conduct likely to cause death or great bodily harm."<sup>61</sup>

With this background, the court in *Essex* held that a defendant's degree of intoxication, however great, is irrelevant to the determination whether the killing was with malice; the issue, instead, is whether the act causing death was volitional or inadvertent.<sup>62</sup> In *Essex*, the court noted the absence of evidence on the issue "whether the defendant embarked upon his ill-fated course of conduct wilfully and with a malicious purpose."<sup>63</sup> The implication from this language is that while it is theoretically possible to convict the drunk driver of second-degree murder, the proof of malice must come from evidence other than the fact of the defendant's intoxication and its degree.

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58. *Essex*, 228 Va. at 282, 322 S.E.2d at 221.

59. *Id.* at 280, 322 S.E.2d at 220 (quoting *Pugh v. Commonwealth*, 223 Va. 663, 668, 292 S.E.2d 339, 341 (1982)) (emphasis added).

60. *Essex*, 228 Va. at 280-81, 322 S.E.2d at 220.

61. *Id.*

62. *Id.* at 282, 322 S.E.2d at 221.

63. *Id.* at 284, 322 S.E.2d at 222. Justice Poff dissented in part, arguing that there is a "species of reckless behavior so willful and wanton, so heedless of foreseeable consequences, and so indifferent to the value of human life that it supplies the element of malice which distinguishes murder of the second degree from manslaughter." *Id.* at 288, 322 S.E.2d at 224 (Poff, J., concurring in part and dissenting in part). Justice Poff went on to argue that "where the evidence is sufficient to show that the driver of a motor vehicle, whether drunk or sober, is guilty of criminal negligence which is the sole proximate cause of a homicide, such evidence raises a question of fact whether the offense is manslaughter or murder of the second degree." *Id.* at 289, 322 S.E.2d at 225.

## III. MARITAL RAPE AND RELATED OFFENSES

During the past three years, both the Virginia Supreme Court and the General Assembly have considered the unique problems arising from allegations of rape committed by one spouse against the other. Historically, courts have assumed that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."<sup>64</sup> Times change. As one court noted: "In the years since [the] formulation of [this] rule, attitudes towards the permanency of marriage have changed . . . . This rule . . . need not prevail . . . ."<sup>65</sup>

In the 1984 case of *Weishaupt v. Commonwealth*,<sup>66</sup> the supreme court reviewed the development of both the law of "marital rape" and the more general subject of the legal standing of women in this country and in England, and concluded that the clear trend in both countries was toward an "increasingly recognized role of the autonomy and independence of women" and a "break with the ancient rules that cast women in a subservient posture."<sup>67</sup> The court also concluded that under certain circumstances, a husband could be convicted of the rape of his wife under Virginia's general rape statute. The court held that a wife can unilaterally revoke her implied consent to marital sex (and thus open the possibility of a finding of rape) when: (1) she manifests "her intent to terminate the marital relationship by living separate and apart from her husband;" (2) she refrains "from voluntary sexual intercourse with her

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64. 1 M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 629 (1736).

65. *State v. Smith*, 85 N.J. 193, \_\_\_, 426 A.2d 38, 42 (1981).

66. 227 Va. 389, 315 S.E.2d 847 (1984).

67. *Id.* at 402, 315 S.E.2d at 854. The court noted that judicial decisions in four states had held that, under appropriate circumstances, a husband could be found guilty of raping his wife. *Id.* at 401, 315 S.E.2d at 853. The court also considered judicial decisions in Virginia regarding the "ever-increasing separateness and independence accorded women," *id.* at 400, 315 S.E.2d at 853, including *Stewart v. Commonwealth*, 219 Va. 887, 252 S.E.2d 329 (1979) (holding that a husband could be found guilty of grand larceny for stealing his wife's property); *Schilling v. Bedford County Memorial Hosp., Inc.*, 225 Va. 539, 303 S.E.2d 905 (1983) (declaring the "necessaries" doctrine unconstitutional); and *Knox v. Commonwealth*, 225 Va. 504, 304 S.E.2d 4 (1983) (holding that a husband could be found guilty of burglarizing his wife's separately maintained dwelling). Finally, the court recognized that under the Virginia no-fault divorce statute, VA. CODE ANN. § 20-91(9) (Cum. Supp. 1986), the legislature implicitly recognized the right of married women to withdraw an implied consent to marital sex because the statute requires the parties to live "separate and apart" without cohabitation in order to secure the divorce. *Weishaupt*, 227 Va. at 402-03, 315 S.E.2d at 854.

husband;" and (3) "in light of all the circumstances," conducts herself "in a manner that establishes a *de facto* end to the marriage."<sup>68</sup> The commonwealth, of course, would still have to prove that the act was accomplished against the will of the wife by force, threat or intimidation.<sup>69</sup>

The *Weishaupt* decision, in which the defendant was found guilty of rape, was followed the same year by *Kizer v. Commonwealth*,<sup>70</sup> where the supreme court overturned a marital rape conviction. The *Kizer* opinion noted that, under *Weishaupt*, the prosecution, in addition to proving the usual elements of rape, "must prove beyond a reasonable doubt that the wife unilaterally had revoked her implied consent to marital intercourse," a finding which "must be demonstrated by a manifest intent 'to terminate the marital relationship.'"<sup>71</sup> Reviewing the facts before it, the court concluded that the wife had not conducted herself "in a manner that establish[ed] a *de facto* end to the marriage."<sup>72</sup> The court stated that while "the wife subjectively considered the marriage fractured beyond repair" when the parties separated three weeks before the assault, "the subjective intent was [not] manifested objectively to the husband, in view of the wife's vacillating conduct, so that he perceived, or reasonably should have perceived, that the marriage actually was ended."<sup>73</sup>

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68. *Weishaupt*, 227 Va. at 405, 315 S.E.2d at 855. In *Weishaupt*, the defendant was found guilty of the attempted rape of his estranged wife. The parties had separated eleven months prior to the attack. Their contact was limited to telephone conversations concerning their infant child and chance public meetings. The wife had consulted a lawyer about a divorce. The defendant entered his wife's apartment and began fighting with another man who was in the apartment. The assault occurred after the other man left the apartment. *Id.* at 392-94, 315 S.E.2d at 848.

69. See VA. CODE ANN. § 18.2-61 (Cum. Supp. 1986).

70. 228 Va. 256, 321 S.E.2d 291 (1984).

71. *Id.* at 260-61, 321 S.E.2d at 293 (quoting *Weishaupt*, 227 Va. at 405, 315 S.E.2d at 855).

72. *Id.* at 261, 321 S.E.2d at 294.

73. 228 Va. at 261-62, 321 S.E.2d at 294. The court described the wife's conduct during the six month period preceding the assault as "equivocal, ambivalent, and ambiguous." *Id.* at 261, 321 S.E.2d at 294. The wife first left the marital abode approximately six months before the assault, but she described the trip as a "visit" to her parents' home in Texas and not a "separation" from her husband. She again left the marital abode approximately two months before the assault but returned several weeks later after the parties had "talked to each other." At that time, she told the husband she wanted "to make it work" but she did not "love" him. Shortly after she returned, the husband moved out "to avoid . . . arguing . . . in front of" their child. During this period, the husband filed a petition seeking custody of the parties' child and they decided to consult a lawyer "about getting a legal separation." On the way to the lawyer's office, the wife stated that she did not want to separate "right now." From the time the wife first left the marital abode approximately six months before

As *Kizer* made clear, under the general rape statute a conviction of one spouse for the rape of the other could be obtained only when the wife clearly manifested an intent to terminate the marital relationship. To do this, the wife was required to live separate and apart, to refrain from voluntary sexual intercourse, and in light of all the circumstances, to otherwise conduct herself in a manner that indicated that the marriage actually was over.<sup>74</sup> Any equivocal conduct on her part during the period preceding the putative sexual assault—conduct that could reasonably be interpreted as manifesting an intent to continue the marital relationship—would defeat a finding that she revoked implied consent to marital intercourse.

In 1986, the General Assembly passed legislation dealing specifically with the problems of sexual assault within the marital relationship.<sup>75</sup> Whether this legislation totally supersedes the *Weishaupt-Kizer* mode of analysis is unclear. There is now a new and discrete offense of marital rape. This offense is committed when a person “has sexual intercourse with his or her spouse and such act is accomplished against the spouse’s will by force, threat or intimidation of or against the spouse or another;” provided, however, that no person may be found guilty of marital rape “unless, at the time of the alleged offense, (i) the spouses were living separate and apart, or (ii) the defendant caused serious physical injury to the spouse by the use of force or violence.”<sup>76</sup> No prosecution under this provision is possible, however, “unless the spouse or someone on the spouse’s behalf reports the violations”<sup>77</sup> within ten days.

The new legislation departs from the *Weishaupt-Kizer* mode of analysis in several major respects. First, the focus is no longer on evidence of revocation of the implied consent to sexual intercourse or on evidence of a *de facto* end to the marriage. Second, without regard to factors other than the usual elements of rape, marital rape may be established by showing that the defendant caused serious physical injury to the victim-spouse.<sup>78</sup> Finally, the statute

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the assault until the date of the incident, the parties did not engage in sexual intercourse. *Id.* at 258-60, 321 S.E.2d at 292-93.

74. *Id.* at 261-62, 321 S.E.2d at 294.

75. VA. CODE ANN. §§ 18.2-61, -67.1, -67.2, -67.2:1, 19.2-218.1, -218.2 (Cum. Supp. 1986).

76. *Id.* § 18.2-61(B) (Cum. Supp. 1986) (emphasis added).

77. *Id.* The ten day limitation does not apply when the spouse is physically unable to make a report or is restrained or otherwise prevented from reporting the offense.

78. *Id.* § 18.2-61(B)(ii).

distinguishes interspousal rape from other forms of rape by the separate diversion, guilt-finding, and sentencing provisions<sup>79</sup> and the requirement that no prosecution for marital rape may occur unless the offense is reported within ten days.<sup>80</sup>

The General Assembly also created separate offenses of interspousal inanimate object sexual penetration,<sup>81</sup> interspousal forcible sodomy,<sup>82</sup> and a wholly new offense of interspousal sexual assault.<sup>83</sup> The elements and special procedural components of these offenses generally follow the statutory scheme for marital rape.<sup>84</sup>

79. Marital rape, like other forms of rape, is punishable by a term of confinement from five years to life. VA. CODE ANN. § 18.2-61(C) (Cum. Supp. 1986). The court is authorized to suspend all or a portion of a sentence if the defendant completes a program of counseling or therapy and, after the court considers "the views of the complaining witness," the court finds that such action "will promote maintenance of the family unit and will be in the best interests of the complaining witness." *Id.*

When a marital rape charge is filed upon a finding of probable cause at the preliminary hearing, the court "may" request that its court services unit, in consultation with appropriate mental health organizations, prepare a report analyzing the feasibility of providing counseling or therapy. Based upon this report, the court "may, . . . with the consent of the accused, the complaining witness and the attorney for the Commonwealth" authorize the accused to participate in a course of counseling or therapy. *Id.* § 19.2-218.1 (Cum. Supp. 1986). Upon successful completion of the program, the court "may," after considering the "views of the complaining witness, discharge the proceedings" if the court finds such action will "promote maintenance of the family unit and be in the best interest of the complaining witness." *Id.* If no preliminary hearing is held prior to indictment, the circuit court must refer the case to the juvenile and domestic relations district court for consideration of counseling and therapy. *Id.* § 19.2-218.2 (Cum. Supp. 1986). If the counseling and therapy program is ordered and completed, the circuit court "may" dismiss the charges with the consent of the Commonwealth's attorney and "if the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness." *Id.*

Finally, in any case tried by the court, the court, without entering a judgment of guilty and with the consent of the complaining witness and the Commonwealth's attorney, may defer further proceedings and place the defendant on probation pending completion of counseling, if not already provided. The court may also dismiss the proceedings "after consideration of the views of the complaining witness" and if "the court finds such action will promote maintenance of the family unit and be in the best interests of the complaining witness." *Id.* § 18.2-61(D) (Cum. Supp. 1986).

80. *Id.* § 18.2-61(B).

81. *Id.* § 18.2-67.2(B).

82. *Id.* § 18.2-67.1(B).

83. *Id.* § 18.2-67.2:1.

84. VA. CODE ANN. §§ 18.2-67.1, -67.2, -67.2:1 (Cum. Supp. 1986). The only truly new offense is the crime of marital sexual assault. This offense, punishable by confinement for up to twenty years, apparently attempts to bridge the gap between the general rape, sodomy, and inanimate object sexual penetration offenses and their interspousal counterparts. This offense is committed when one spouse "engages in sexual intercourse, cunnilingus, fellatio, analingus or anal intercourse" or inanimate object sexual penetration with his or her spouse and "such act is accomplished against the spouse's will by force or a present threat of force against the spouse or another person." *Id.* § 18.2-67.2:1(A) (Cum. Supp. 1985). There is no requirement that the parties were living separate and apart at the time, and no requirement

## IV. DRIVING UNDER THE INFLUENCE OF ALCOHOL

For the third time in the past four years, the General Assembly has significantly modified the offense of driving under the influence of alcohol. In 1984, the legislature first enacted the so-called "per se" offense—the offense of driving with a blood-alcohol concentration of 0.15 percent or more by weight by volume.<sup>85</sup> With the addition of the "per se" method of proof, the commonwealth could prove the offense of driving under the influence of alcohol in either of two ways: by establishing that the defendant drove with a blood-alcohol concentration of 0.15 percent or more by weight by volume as shown by a chemical test (breath or blood) administered in accordance with Virginia's implied consent law, or by proving that the defendant drove "while . . . under the influence of alcohol."<sup>86</sup> The latter method of proof is aided by a statutory presumption that the accused was under the influence of alcohol at the time, if the blood-alcohol level was 0.10 percent or more.<sup>87</sup> The government may, however, prove guilt by other evidence that the accused was "intoxicated" at the time of the offense.<sup>88</sup> In 1986, the General Assembly amended the so-called "per se" method of proof to make it unlawful to drive a motor vehicle with a blood-alcohol concentration of 0.10 percent or more by weight by volume as shown by a lawfully administered chemical test.<sup>89</sup>

While there are no reported cases on point, there is uncertainty regarding the proper method of charging and proving the offense of driving under the influence of alcohol. There is only one offense of driving under the influence of alcohol, but the offense may be

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that the defendant caused serious physical injury to the victim. It also is significant that marital sexual assault, unlike the other interspousal sexual offenses, is committed only when against the will of the victim "by force or a present threat of force against the spouse or another person." The other new interspousal sexual offenses require proof of "force, threat or intimidation of or against the spouse or another person." The marital sexual assault statute does, however, require reporting of the offense within ten days. The offense of marital sexual assault is specifically designated as a necessarily included offense of marital rape, sodomy, and inanimate object sexual penetration. *Id.* § 18.2-67.2:1(E) (Cum. Supp. 1986).

85. 1984 VA. ACTS 666.

86. VA. CODE ANN. § 18.2-266 (Cum. Supp. 1986).

87. *Id.* § 18.2-269.

88. See *Overbee v. Commonwealth*, 227 Va. 238, 315 S.E.2d 242 (1984); *Clemmer v. Commonwealth*, 208 Va. 661, 159 S.E.2d 664 (1968); *Coffey v. Commonwealth*, 202 Va. 185, 116 S.E.2d 257 (1960).

The language "under the influence of alcohol" means "intoxicated" as defined in VA. CODE ANN. § 4-2(14) (Cum. Supp. 1986). See *Gardner v. Commonwealth*, 195 Va. 945, 954, 81 S.E.2d 614, 619 (1965).

89. VA. CODE ANN. § 18.2-266 (Cum. Supp. 1986).



proved in two different ways: through proof consisting solely of the level of blood-alcohol as shown by chemical analysis (the "per se" method of proof), or through proof of intoxication by evidence of the defendant's condition at the time of the offense, aided by proof of the level of blood-alcohol as shown by chemical test and the statutory presumptions arising therefrom (the "intoxication" method of proof).<sup>90</sup> Some trial courts apparently require the commonwealth at the outset of trial to elect which method of proof it intends to rely upon; other courts, however, do not require election until after the evidence is presented.

The timing of the election may be important. While the admissibility of the chemical analysis of the defendant's blood-alcohol level is important even when the commonwealth is attempting to use the "intoxication" method of proof, it is essential to the proof of the "per se" branch of the offense. At the outset of trial, the admissibility of the chemical analysis will be uncertain. If the commonwealth is required to elect, and elects the "per se" method of proof, but is unable to secure the admission of the results of the chemical analysis, the case is lost. However, with the "intoxication" method of proof, the commonwealth may still prove intoxication by other means.

Two recent cases illustrate the problems that can arise, but also demonstrate that it is possible to secure a conviction under the "intoxication" branch of the offense without the admission of a chemical analysis.

In *Overbee v. Commonwealth*,<sup>91</sup> a case tried before the adoption of the "per se" method of proof, the Virginia Supreme Court ruled that the certificate of analysis of the results of a breath sample administered pursuant to the "implied consent" law was inadmissible because the commonwealth did not prove that the sample was obtained pursuant to an arrest which occurred within two hours of the alleged operation of the motor vehicle, as required by law.<sup>92</sup>

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90. See *supra* note 88.

91. 227 Va. 238, 315 S.E.2d 242 (1984).

92. VA. CODE ANN. § 18.2-268(b) (Cum. Supp. 1986) provides that any person who operates a motor vehicle on a public highway is deemed thereby to have consented to having a sample of his or her breath or blood taken and analyzed to determine alcoholic content. The "implied consent," however, is effective only if the driver is arrested for driving under the influence within two hours of the alleged offense. *Id.*; *Thomas v. Town of Marion*, 226 Va. 251, 253, 308 S.E.2d 120, 122 (1983).

In *Overbee*, the defendant was not in the automobile when the arresting officer first observed him. Instead, he was standing in front of the vehicle. The hood was up, the engine

Without the certificate of analysis, the commonwealth was unable to obtain the benefit of the presumption of intoxication and was therefore required to prove intoxication based upon other evidence of the defendant's condition at the time of the offense.<sup>93</sup>

In *Essex v. Commonwealth*,<sup>94</sup> another case tried before the adoption of the "per se" method of proof, the defendant, convicted of second-degree murder and driving under the influence of alcohol, refused to submit to a breath or blood-alcohol test as required by the "implied consent" law.<sup>95</sup> Nevertheless, at the hospital where the defendant was taken following the accident, a blood-alcohol test was performed approximately two and one-half hours after the accident. The results of the test were admitted into evidence, but not under the provision of the Code which provides that the results of tests performed under the implied consent law are self-authenticating. Instead, the commonwealth established a proper foundation for the admission of the test results, presumably by evidence that would support the introduction of the results of any scientific test.<sup>96</sup> The supreme court upheld the use of the test results but, because the blood test was not administered in accordance with the "implied consent law," the commonwealth was unable to gain the benefit of the presumption of intoxication.<sup>97</sup> *Essex* is significant because the court specifically held that the results of scientific tests otherwise admissible may be used to prove intoxication.

In both *Overbee* and *Essex*, the commonwealth was unable to

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was not running and the ignition key had been removed. 227 Va. at 240, 315 S.E.2d at 243. The result of the breath test administered, therefore, was inadmissible because there was no evidence to show the time of the defendant's operation of the vehicle. *Id.* at 243, 315 S.E.2d at 244.

93. *Id.* at 244-45, 315 S.E.2d at 245. The case was remanded for a new trial without the evidence of the results of the breath test. Other evidence of the defendant's intoxication was presented at the trial and for this reason, the court held that the evidence exclusive of the breath test was not insufficient as a matter of law to prove intoxication. *Id.*

94. 228 Va. 273, 322 S.E.2d 216 (1984). For a discussion of the second-degree murder aspects of this case, see *supra* text accompanying notes 57-63.

95. VA. CODE ANN. § 18.2-268 (Cum. Supp. 1986). The penalty for an "unreasonable" refusal to submit to the test is suspension of the defendant's driver's license for six months or one year in the event of a second or subsequent offense within one year. *Id.* § 18.2-268(n).

96. *Id.* § 18.2-268(e) provides that a certificate of analysis attesting to the results of the blood or breath test administered in compliance with the requirements of the statute is admissible as evidence of the facts stated therein and of the results of the analysis.

The Code also specifically provides, however, that nothing in the implied consent law limits the introduction of other relevant evidence of intoxication. *Id.* § 18.2-268(i).

97. *Essex*, 228 Va. at 286, 322 S.E.2d at 223.

utilize the results of a chemical test authorized by the "implied consent" law. Had such cases been brought under the "per se" branch of the offense, conviction would have been impossible. However, in both instances, proof of intoxication by other means was still feasible.

The General Assembly has also altered the procedure relating to the taking of a breath or blood sample under the "implied consent" law. Upon arrest, the accused may elect to have either (but not both) a blood or breath test taken, provided, however, that it is no defense to the prosecution if one of the two tests is unavailable.<sup>98</sup> This provision was inserted in 1985 and repealed an earlier version of the statute. The earlier statute allowed the arresting officer to elect which test would be administered and, in the event the arresting officer elected to administer the breath test, required that the officer inform the accused, in writing, of his right to have a blood test taken at his own expense.<sup>99</sup> Under the current law, if the accused elects a breath test, he is entitled upon request to observe the process of analysis and to see the blood-alcohol reading.<sup>100</sup>

## V. MISCELLANEOUS CRIMES AND DEFENSES

### A. *Duress*

As Justice Rehnquist recently observed, "[c]riminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind [and] an evil-doing hand.'"<sup>101</sup> Occasionally, courts must decide whether criminal liability should be imposed when coercive conditions or necessity are present, even though an evil-doing hand and an evil-meaning mind are also present.<sup>102</sup>

Historically, the law has recognized the defenses of duress and necessity. Duress will excuse criminal conduct where the actor

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98. VA. CODE ANN. § 18.2-268(b) (Cum. Supp. 1986).

99. The provision authorizing the arresting officer to make the election was added in 1984. 1984 VA. ACTS 1155-59. This provision was repealed the following year. 1985 VA. ACTS 1135-39 (codified at VA. CODE ANN. § 18.2-268(b) (Cum. Supp. 1986)).

100. VA. CODE ANN. § 18.2-268(b) (Cum. Supp. 1986). If the equipment automatically produces a written printout, the accused must be given the printout or a copy thereof. *Id.*

101. *United States v. Bailey*, 444 U.S. 394, 402 (1980) (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952)).

102. See, e.g., *United States v. Gordon*, 526 F.2d 406 (9th Cir. 1975) (rejecting a defense of duress to a charge of selling drugs where the defendant's friends were threatened with death if he did not sell the drugs); *State v. Warshow*, 138 Vt. 22, 410 A.2d 1000 (1979) (rejecting the defense of "necessity" to a charge of unlawful trespass arising out of demonstrations at a nuclear power plant site).

"was under an unlawful threat of imminent death or serious bodily injury" which caused the actor to commit the criminal acts.<sup>103</sup> The defense of necessity will excuse criminal conduct where "physical forces beyond the actor's control rendered [the] illegal conduct the lesser of two evils."<sup>104</sup> The distinction between the two defenses has been blurred in modern usages.<sup>105</sup>

The Court of Appeals of Virginia recently held that the evidence in support of the defense of duress was insufficient to negate criminal liability for unlawfully obtaining drugs by fraud, deceit, and misrepresentations. In *Pancoast v. Commonwealth*,<sup>106</sup> an intern at the Medical College of Virginia knowingly filled out and signed false prescriptions to enable her husband, an addict, to obtain controlled drugs. She claimed that she lacked the required felonious intent to commit the crimes because of the pressure from her husband to write the prescriptions. She alleged that her husband had threatened her with death, and that she did not leave him because she had no place to go and was afraid that he might do something violent to someone else.<sup>107</sup>

Two specific false prescriptions formed the basis for the charges. With respect to the first, the defendant testified that it was written after she arrived home feeling tired, having had no sleep for two days. She found her husband "frantic" because he had no drugs. She initially refused his request, but relented when he persisted.<sup>108</sup> On the second occasion, she testified that her husband insisted that she accompany him to the pharmacy "so that things look real."<sup>109</sup> She refused and he hit her. When they arrived at the pharmacy, she filled out the prescription while her husband walked up and down the aisles thirty feet from her. She testified that, because she was afraid of her husband, she did not tell the pharmacist about the false prescription.<sup>110</sup> A clinical psychologist de-

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103. *Bailey*, 444 U.S. at 409.

104. *Id.* at 410.

105. The Model Penal Code retains the defense of duress, MODEL PENAL CODE § 2.09 (1962), but also incorporates a more general statement on "justification." *Id.* § 3.02. The "justification" provision of the Model Penal Code establishes an affirmative defense whenever the actor engages in "[c]onduct that the actor believes to be necessary to avoid a harm or to himself or to another," provided *inter alia* that "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented." *Id.*

106. 2 Va. App. 28, 340 S.E.2d 833 (1986).

107. *Id.* at 31, 340 S.E.2d at 835.

108. *Id.* at 30-31, 340 S.E.2d at 834-35.

109. *Id.* at 31, 340 S.E.2d at 835.

110. *Id.* at 31, 340 S.E.2d at 835.

scribed the defendant as a "rescuer, a sitting duck for a master manipulator like her husband."<sup>111</sup> He also testified that the defendant may have reasonably feared serious bodily harm from her husband.<sup>112</sup>

The court of appeals rejected the claim of duress under these circumstances. The court stated that the defense of duress required proof that the acts "were the product of threats inducing a reasonable fear of immediate death or serious bodily injury," and that even if such threats were present, "[i]f the defendant failed to take advantage of a reasonable opportunity to escape, or of a reasonable opportunity to avoid doing the acts without being harmed, he may not rely on duress as a defense."<sup>113</sup> In this case, the court found no evidence of "threats of imminent death;" with respect to the second incident, the court stated that "[h]ad she so desired, she could have informed the pharmacist . . . that the prescription was fraudulent" and thus, have taken advantage "of an alternative to criminal conduct."<sup>114</sup>

### B. *Legal Duty of Care*

The scope and nature of the legal duty of care in the criminal law is both complex and controversial. In *Davis v. Commonwealth*,<sup>115</sup> the Virginia Supreme Court found that, under the circumstances of the case, a daughter had a contractually based duty of care for her mother and was guilty of criminal negligence in causing her mother's death.

A criminal law sanction traditionally is imposed only for positive acts; a failure to act is generally not culpable.<sup>116</sup> Historically, however, a failure to act (sometimes called a "negative act") may serve as the basis for a criminal sanction when there is a legal duty to undertake positive action. "[A] person failing to act when he has a duty to do so may be held to be criminally liable just as one who has acted improperly."<sup>117</sup> The legal duty of care may arise from a

111. *Id.* at 31-32, 340 S.E.2d at 835.

112. *Id.* The psychologist also described the husband as a "moderately severe passive personality . . . who is extremely adept at manipulating." *Id.*

113. *Id.* at 33, 340 S.E.2d at 836 (citing *United States v. Bailey*, 444 U.S. 394, 407-09 (1980)).

114. *Id.* at 33-34, 340 S.E.2d at 836.

115. 230 Va. 201, 335 S.E.2d 375 (1985).

116. R. PERKINS & R. BOYCE, *CRIMINAL LAW* 650 (3d ed. 1982).

117. *Id.* (quoting *United States v. FMC Corp.*, 572 F.2d 902, 906 (2d Cir. 1978)).

variety of sources. It may be imposed by statute, by common law tradition, or by contract. A mere "moral" obligation to act will not suffice.<sup>118</sup>

In *Davis*, the evidence established that the defendant accepted sole responsibility for her mother's care. It was her full-time occupation. In return for care, the defendant's mother allowed her to live in her home expense-free. The defendant shared her mother's social security income and acted as her food stamp representative. The defendant informed a number of people that she was responsible for the "total care" of her mother. Consequently, the court found that these facts were sufficient to give rise to an "implied contract" of care.<sup>119</sup>

Once the duty of care was established, the court had to decide whether the defendant was criminally negligent in failing to provide her mother with "heat, food, liquids, and other necessities."<sup>120</sup> Expert medical testimony established that the defendant's mother died from "pneumonia and freezing to death due to exposure to cold with a chronic state of starvation."<sup>121</sup> When a paramedic arrived at the residence, he found the decedent lying on a bed. There was no source of heat in the decedent's room. Only small amounts of food were found in the house. When the decedent was admitted to the hospital, her body temperature was eighty degrees. Doctors diagnosed her principal problems as low body temperature, severe malnutrition and bilateral pneumonia. She also was found to have a blood stream infection, a skull laceration, and multiple rib fractures. She died two days after admission to the hospital. Expert medical testimony also established that, at the time the decedent was admitted to the hospital, she had not received liquids for at least two days and had eaten "no food whatsoever" for at least thirty days.<sup>122</sup> Finally, a physician testified that the defendant had stated that her mother was senile and totally disabled, was not able to feed herself, was not able to care for her personal needs, and had to wear diapers.<sup>123</sup> Based upon these facts, the court concluded that there was sufficient evidence to support the trial

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118. See *Davis*, 230 Va. at 205, 335 S.E.2d at 378.

119. *Id.* at 203-05, 335 S.E.2d at 377-78.

120. *Id.* at 202, 335 S.E.2d at 376. The court noted that, when death results from a "malicious" omission to perform a legal duty, the offense is murder; when the omission is "criminally negligent," the offense is manslaughter. *Id.* at 205, 335 S.E.2d at 378.

121. *Id.* at 203, 335 S.E.2d at 376.

122. *Id.* at 202-03, 335 S.E.2d at 376-77.

123. *Id.* at 203, 335 S.E.2d at 377.

court's verdict of involuntary manslaughter; that is, the evidence was sufficient to establish that defendant's conduct was so gross and wanton as to show a callous and reckless disregard for her mother's life, and that her failure to provide her mother with heat, food, liquids, and other necessities was the proximate cause of her death.<sup>124</sup>

### C. *Diminished Capacity*

In *Stamper v. Commonwealth*,<sup>125</sup> the supreme court once again rejected an attempt to use the defense of "diminished capacity" for the purpose of establishing that the defendant was incapable of entertaining the requisite specific intent to commit the offense. The court stated that "[f]or the purposes of determining criminal responsibility a perpetrator is either legally insane or sane; there is no sliding scale."<sup>126</sup> The court also stated that "evidence of a defendant's mental state at the time of the offense is, in the absence of an insanity defense, irrelevant to the issue of guilt."<sup>127</sup>

### D. *Accommodation Defense*

In *Heacock v. Commonwealth*,<sup>128</sup> the supreme court imposed a significant limitation on the so-called "accommodation" defense to

124. *Id.* at 206-07, 335 S.E.2d at 379.

125. 228 Va. 707, 324 S.E.2d 682 (1985). In *Stamper*, the defendant was convicted of possession of marijuana with intent to distribute. He sought to introduce expert medical testimony to prove that he was a "manic depressive" and consequently "incapable of forming the intent to distribute" which is a requisite element of the offense. The trial court refused to allow the testimony because the defendant did not put forth an "insanity defense." *Id.* at 715-16, 324 S.E.2d at 687.

The so-called "diminished capacity" or "diminished responsibility" defense normally is used to refer to evidence that purports to negate the existence of the mental state required to prove the offense charged; that is, the defense attempts to prove that because of his mental state the defendant was incapable of entertaining a specific intent to commit the crime. The diminished capacity defense is recognized in some jurisdictions, especially when used to reduce the degree of homicide from murder to manslaughter. *See, e.g.,* *People v. Henderson*, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).

126. *Stamper*, 228 Va. at 717, 324 S.E.2d at 688.

127. *Id.* Arguably, *Stamper* is analytically inconsistent with the line of Virginia decisions which hold that a defendant's voluntary state of intoxication may be used to negate the element of premeditation so as to avoid a first-degree murder conviction. *See Hatcher v. Commonwealth*, 218 Va. 811, 814, 241 S.E.2d 756, 758 (1978). It is difficult to distinguish between voluntary intoxication, when used to negate evidence of a *mens rea* aspect of an offense, and a mental disorder when used for the same purpose.

128. 228 Va. 397, 323 S.E.2d 90 (1984). For a discussion of the homicide aspects of the case, see *supra* text accompanying notes 42-54.

a charge of possession of a controlled substance with the intent to distribute. In an earlier decision, the court noted that the accommodation defense was designed to apply when the distribution was made "not by a dealer in drugs, a pusher or one who was normally engaged in the drug traffic, but by an individual citizen who was motivated by a desire to accommodate a friend."<sup>129</sup> In *Heacock*, the evidence established that the defendant was the supplier of "high quality" cocaine for a "drug party." The drugs were provided free of charge. Other evidence suggested, however, that the defendant was a "dealer in drugs."<sup>130</sup> The court held that the defendant, as a dealer in drugs, could not assert the accommodation defense under the circumstances even though he distributed the drugs without charge. The court stated that a dealer "must cultivate and maintain a familiar clientele" and that a "drug party, catered gratis by a dealer, is a typical public-relations tool designed to promote good will, strengthen mutual confidence and interdependence, and enhance the dealer's business prospects."<sup>131</sup> Under the statute, the defense is not available if the distribution was made "with intent to profit thereby."<sup>132</sup> "Profit" includes "any consideration received or expected."<sup>133</sup> The court concluded that the defendant distributed the goods free of charge at the party "with the expectation of promoting profits from future sales."<sup>134</sup> *Heacock* is significant not just because the accommodation defense

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129. *Stillwell v. Commonwealth*, 219 Va. 214, 219, 247 S.E.2d 360, 364 (1978). The so-called "accommodation" defense to a charge of possession with intent to distribute a Schedule I or II substance is set forth in VA. CODE ANN. § 18.2-248(a) (Cum. Supp. 1986). The defense, if established, reduces the penalty for a first offense from five to forty years in prison to a class five felony, the maximum penalty for which is ten years imprisonment. VA. CODE ANN. § 18.2-10 (Repl. Vol. 1982).

130. The evidence used to support the finding that the defendant was a "dealer in drugs" included evidence that the drug supplied was "high quality cocaine," evidence of the large amount supplied for the party, evidence of his possession of drug paraphernalia, and evidence that, the day following the death of one of the participants at the party, he delivered additional cocaine to a third party. *Heacock*, 228 Va. at 406, 323 S.E.2d at 95.

131. *Id.* at 406-07, 323 S.E.2d at 96.

132. VA. CODE ANN. § 18.2-248(a) (Cum. Supp. 1986). In *King v. Commonwealth*, 219 Va. 171, 247 S.E.2d 368 (1978), the court stated that the term "profit" means "a commercial transaction in which there is a consideration involved. It does not necessarily mean that a seller of drugs has to sell his drugs to a buyer at a price in excess of the amount the seller paid for the drugs." *King*, 219 Va. at 174, 247 S.E.2d at 370.

The statute also provides that the accommodation defense is unavailable if the act is done with the intent "to induce the recipient or intended recipient . . . to use or become addicted to or dependent upon such controlled substance." VA. CODE ANN. § 18.2-248(a) (Cum. Supp. 1986).

133. *Heacock*, 228 Va. at 407, 323 S.E.2d at 96.

134. *Id.*



was denied even though the evidence established that the defendant provided drugs to others free of charge; *Heacock* suggests that any time a defendant seeks to raise the defense, the commonwealth may respond with evidence of "other crimes" which would prove that the defendant was a drug dealer, thereby negating the accommodation defense.<sup>135</sup> A defendant with a prior criminal record of drug distribution charges, therefore, must weigh the benefit to be gained by the accommodation defense, even if successful, against the damage done to his case by the introduction of the "other crimes" evidence.

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135. Traditionally, evidence of other criminal acts by the defendant is inadmissible to prove guilt of the offense charged. *Kirkpatrick v. Commonwealth*, 211 Va. 269, 272, 176 S.E.2d 802, 805 (1970). Such evidence is admissible, however, when relevant to an issue or element in the case. *Id.*