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A STUDENT PUBLICATION OF THE MARSHALL-WYTHE SCHOOL OF LAW COLLEGE OF WILLIAM AND MARY

Editor's Brief

Four articles in this issue represent development of diverse areas of Virginia law. Our first article focuses on an aspect of the national concern over the AIDS virus. However, the five articles do more than convey information about the topics they contain. They are samples of the caliber of writing that the students of the College of William and Mary's Marshall-Wythe School of Law produce every semester.

The disease of AIDS has spawned much discussion in legal circles concerning societal treatment of its victims. Mr. Sotelo assesses federal laws regarding the handicapped and their applicability to AIDS sufferers in our first article.

Contrasted with the emotionally charged topic of AIDS is the subject of liquidated damages provisions in construction contracts. Ms. Soraghan's work discusses the validity of such provisions when both the contractor and the contractor's customer are responsible for a delay in the completion of a project.

Mr. Gray's piece invites legislative or judicial reform of Virginia's libel law as its affects public school teachers and the press in small towns. He argues that the protection of the teachers afforded by the current state of the defamation case law comes at the expense of threatening the viability of small town publishers, who thrive on coverage of such figures.

In an increasingly crowded society, determination of land use rights are critical. Mr. Lady discusses competing lines of precedent in deciding whether and at what stage land use rights vest in their holders.

Should a person who kills another human being during the comission of a felony be chargeable with murder or manslaughter? Mr. Thomas' article thoroughly reviews the confusion of the Virginia courts in dealing with this difficult legal question, and offers suggested jury instructions when the situation arises.

I wish to make a special note of thanks to Mr. Thomas the Managing Editor, for all his hard work in making this issue one of our best to date.

We here at *The Colonial Lawyer: A Journal of Virginia Law and Public Policy* hope that you, the scholar and the practitioner, find the following articles of Volume 17 Number 2 insightful and stimulating, and we welcome any comments you might have for this or future issues.

Felicia L. Silber
Senior Editor

ABOUT THE AUTHORS

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Patricia Cahill Soraghan, *Enforcement of Liquidated Damages Provisions in Construction Contracts in Cases of Mutual Delay by Owners and Contractors in the Construction Industry,* is a second-year student at Marshall-Wythe. Ms. Soraghan received her B.A. degree in English from The College of William and Mary in 1985. Her article springs from research done for the York County, Virginia, County Attorney's Office.

Thomas Paul Sotelo, *AIDS: Handicap or Not?,* is a second-year student at Marshall-Wythe. Mr. Sotelo received his B.A. degree in Government and Politics from George Mason University in Fairfax, Virginia in 1987. Mr. Sotelo wishes to thank his family for all their support and encouragement.

David Lindsey Thomas, *Virginia's Felony-Murder Doctrine: From Haskell to King and the Problems In-Between,* is a second-year student at Marshall-Wythe. Mr. Thomas received his B.S. degree in Finance from Brigham Young University in 1986. He became interested in the felony-murder doctrine while working as a law clerk for William Person, Commonwealth Attorney of Williamsburg and James City County. He wishes to thank Mr. Person for his assistance with the preparation of this article.

AIDS: HANDICAP OR NOT ?

INTRODUCTION

Acquired Immune Deficiency Syndrome (AIDS) is a problem of economic, ethical, legal, medical, political, and social dimensions. One issue that cuts across the legal and social dimensions of AIDS is the possibility of discrimination in the workplace. The thesis of this paper is that persons who have contracted AIDS or ARC (AIDS-related complex) or who are infected with the virus (HTLV-III [human T cell lymphotropic virus type III] or HIV [Human Immunodeficiency Syndrome]) or who are perceived as carriers of AIDS are "individual[s] with [a] handicap(s)"[1] and thus protected by anti-discrimination statutes.

Part I will describe the significance of the AIDS problem and the nature of the syndrome. Part II will analyze whether persons with AIDS, ARC, HTLV-III, or who are perceived as having AIDS, are individuals with a handicap within the meaning of the Rehabilitation Act of 1973 (the Act). Part III reviews case law dealing with the issue of whether AIDS can be classified as a handicap. Part IV discusses the reason for classifying such persons as handicapped.

PART I

"The United States Public Health Service has called Acquired Immune Deficiency Syndrome (AIDS) the nation's number one health priority."[2] The extent of the AIDS problem is apparent when one considers both the number of persons who have contracted AIDS and the number of persons who are estimated to be infected with the virus. By May of 1988, the Center for Disease Control (CDC) had received a total of 62,000 reports of AIDS cases.[3] The total is

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[1]. 29 U.S.C. Sec. 706(8)(b) (Supp. IV 1986). The Rehabilitation Act of 1973 utilized the phrase "handicapped individual" and was amended in 1986 to "individual with handicaps":

> The term "handicapped individual is changed to "individual with handicaps." This change was suggested by persons representing individuals with disabilities who testified before the Subcommittee that by retaining the adjective "handicapped" before the noun "person" the legislation might be inadvertently adding to the stereotype that persons with handicaps are less worthy.

H.R. 571, 99th Cong., 2d Sess. Sec. 5, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3471, 3487.

[2]. Note, *The Constitutional Right of AIDS Carriers*, 99 Harv. L. Rev. 1274 (1986) (citing to U.S. PUBLIC HEALTH SERVICE, FACTS ABOUT AIDS I (1984)).

[3]. Washington Post, June 3, 1988, at A1 & A14. In Virginia, 784 cases of AIDS have been reported, while it is estimated that between 23,000 to 78,000 persons are infected with HTLV-III. 6 Port Folio Magazine 10 (August 16, 1988).

expected to continue to increase in the future.[4] Approximately 1.5 million Americans are infected with the virus that has the potential of causing AIDS or ARC.[5]

HTLV-III is the virus that may or may not cause AIDS. A person infected with the virus may remain asymptomatic, develop ARC, or progress to a case of AIDS.[6] AIDS is the possible severe result of HTLV-III infection. "AIDS is a syndrome"[7] that attacks and breaks down the immune system of a person and makes him susceptible to infection.[8] The suppressing of the immune system makes the body susceptible to "opportunistic" diseases.[9] *Pneumocystis carinii* pneumonia[10] and Karposi's sarcoma[11] are two examples of opportunistic diseases associated with AIDS.

The symptoms of AIDS are physical and mental. Physical effects range from weight loss to consistently swollen glands, coughing or shortness of breath to skin rashes and spots.[12] AIDS also decreases the ability of the mind to remember

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[4]. Washington Post, June 3, 1988, at A1 & A14. "According to the most recent PHS estimates, that figure [62,000] will grow nearly five times to 300,000 by the end of 1992." *Id.*

[5]. *Id.*

> The Public Health Service (PHS) estimates that up to 1.5 million Americans are now infected with the AIDS virus. Many of them do not know they are infected. And federal officials now believe that infected people could all eventually become ill if no effective treatment is developed. *Id.*

[6]. V. Gong, *AIDS: Facts and Issues*, 10-12 (V. Gong and N. Rudnick, eds. 1986).

[7]. W. Banta, *AIDS in the Workplace*, 1-2 (1988). AIDS opens people up to disease and infection that results in death. AIDS does not directly cause the fatality. *Id.*

[8]. P. Douglas & L. Pinsky, *The Essential AIDS Fact Book*, 13 (1987). The Center for Disease Control defines AIDS as:

> absence of all known underlying causes of cellular immunodeficiency (other than HTLV-III/LAV infection) and absence of all other causes of reduced resistance reported to be associated with at least one of those opportunistic diseases.
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> W. Dornette, *AIDS and the Law*, 264 app. B (1987).

[9]. P. Douglas & L. Pinsky, *The Essential AIDS Fact Book*, 15 (1987).

[10]. V. Gong, *supra* note 6, at 65-67.

[11]. *Id.* at 80-85.

[12]. *Id.* at 49-53.

or recall information (dementia).[13] The almost certain result of AIDS is death.[14] ARC (AIDS-related complex) is a less severe, usually non-fatal possible result of HTLV-III infection.[15] ARC may or may not progress into AIDS.

AIDS is an acquired syndrome. The weight of data lies against being infected via casual contact with a person infected with the virus, ARC, or AIDS.[16] HTLV-III cannot be transmitted through contact such as handshakes, hugging, sharing of food and beverages with a person who is either infected with the virus, ARC, or AIDS.[17] The reason for this is that the virus is fragile.[18] For example, the human skin acts as a barrier to the virus and prevents it from entering the bloodstream.[19] The virus must enter the bloodstream of a person to represent a danger of infection.

Transmission occurs in a number of ways. The first is the transfer of bodily fluids (semen, vaginal, cervical secretions) during sexual contact.[20] The transmission can occur during vaginal, rectum, or oral-genital sex and to a

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[13]. Picot, *Living in the Shadows of AIDS*, 6 Port Folio Magazine 9 (August 16, 1988).

[14]. Washington Post, *supra* note 4, at A1 & A4.

> Because no one has ever been cured of AIDS, a 99 percent AIDS rate [based on a study of homosexual men] means that virtually all would die unless a treatment is developed. 'The picture gets worse as we see more data,' said Dr. William W. Darrow, a researcher at the federal Center for Disease Control (CDC). 'We have to assume this model would hold up for all other infected groups as well.' *Id.*

[15]. V. Gong, *supra* note 6, at 13.

[16]. Douglas & Pinsky, *supra* note 9, at 19. "Every major scientific study has concluded that AIDS *cannot* be transmitted by casual contact." *Id.*

[17]. *See generally* P. Douglas & L. Pinsky, *The Essential AIDS Fact Book*, 19-21 (1987), R. Liebmann-Smith, *The Question of AIDS*, 42-57 (1985).

[18]. Douglas & Pinsky, *supra* note 9, at 20.

[19]. *Id.* at 18.

[20]. R. Liebmann-Smith, *The Question of AIDS*, 42-46 (1985).

> Epidemiological studies showed that a person could contract AIDS from sexual contact with a single infective individual, that one could be exposed to such an individual and *not* contract the disease, and that some people could apparently infect others without themselves being clinically ill. *Id.* at 45.

greater degree if there exist abrasions to the lining of the vagina, rectum or areas of the mouth.[21] Transmission may also occur with the sharing of unsterilized needles associated with intravenous-drug use,[22] the transfusion of infected blood and blood products,[23] and perinatal.[24]

PART II

The Act[25] will be used as a reference point to determine whether those afflicted with the virus, ARC, or AIDS, or perceived to be infected with AIDS are individuals with a handicap. Section 504 of the Act provides that any program that receives federal funding may not discriminate against an otherwise qualified individual with a handicap based upon the existence of the handicap.[26] The congressional purpose behind section 504 was to prevent individuals with handicaps from being discriminated against in all phases of life.[27]

The Act distinguishes between three categories of persons for purposes of determining whether a person has a handicap: 1) those individuals with either "a physical or mental impairment which substantially limits one or more of such person's major life activities,"[28] 2) those persons who have "a record of such an impairment,"[29] or 3) those persons "regarded as having such an impairment."[30]

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[21]. Douglas & Pinsky, *supra* note 9, at 18-19.

[22]. Liebmann-Smith, *supra* note 20, at 46-50.

[23]. *Supra* note 9 at 19.

[24]. *Id.*

[25]. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended 29 U.S.C. Sec. 701-796 (Supp. IV 1986)).

[26]. 29 U.S.C. Sec. 794 (Supp. IV 1986).

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....*Id.*

[27]. S. Rep. No. 1297, 93rd Cong., 2d Sess. Sec. 4, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6373, 6388.

> Section 504 was enacted to prevent discrimination against all handicapped individuals,...,in relation to Federal assistance in employment,..., or any other Federally-aided programs. *Id.*

[28]. 29 U.S.C. Sec. 706(8)(B)(i) (Supp. IV 1986).

[29]. 29 U.S.C. Sec. 706(8)(B)(ii) (Supp. IV 1986).

Regulations promulgated define a physical or mental impairment as either a physiological disorder[31] or any mental or psychological disorder.[32] "Major life activities" encompass the daily tasks of living such as working.[33] A person who "has a record of impairment" has either a history of impairment and recovery or has been misclassified as having an impairment.[34] A person "regarded as having such an impairment" is either a person with a handicap that does not substantially limit major life activities, except for a person's attitude toward him[35], or a person who does not possess an impairment but is treated as possessing the impairment.[36]

An "otherwise qualified handicapped" person is one who with reasonable accommodation by an employer or none at all can perform the tasks of a job.[37] Assessment as to whether reasonable accommodation can be achieved takes in such factors as undue hardship to the employer, the size of the business or

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[30]. 29 U.S.C. Sec. 706(8)(B)(iii) (Supp. IV 1986).

[31]. 45 C.F.R. Sec. 1232.3(h)(2)(i)(A) (1987). A physical or mental impairment means:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs, cardiovascular, reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine;....*Id.*

[32]. 45 C.F.R. Sec. 1232.3(h)(2)(i)(B) (1987). A physical or mental impairment can also mean:

> (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *Id.*

[33]. 45 C.F.R. Sec. 1232.3(h)(2)(ii) (1987).

> 'Major life activities' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *Id.*

[34]. 45 C.F.R. Sec. 1232.3(h)(2)(iii) (1987).

[35]. 45 C.F.R. Sec. 1232.3 (h)(2)(iv)(A) & (B) (1987).

[36]. 45 C.F.R. Sec. 1232.3(h)(2)(iv)(C) (1987).

[37]. 45 C.F.R. Sec. 1232.3(i) (1987).

program, facilities, budgetary constraints, type of business or program, and the nature and cost of accommodation.[38]

In determining whether the handicap status of the Act applies to persons encompassed within the AIDS issue, three groups of persons must be differentiated: those individuals with AIDS, those individuals that exhibit symptoms of ARC, and those individuals that are either carriers of the virus but asymptomatic, members of high risk groups (ie. homosexuals), family members of AIDS or ARC victims, or those persons perceived as having AIDS. Persons with AIDS are individuals with a handicap substantially limiting major life activities. AIDS victims suffer both physical and mental impairment. The regulations defined physical impairment as any physiological condition that impacts upon certain body systems.[39] AIDS impacts upon both the hemic and lymphatic systems of the immune system.[40] HTLV-III attacks the immune system (breaking down the function of the hemic and lymphatic systems) and opens the body up to opportunistic diseases and infection.

While the regulations promulgated do not speak explicitly of the immune system, one author has concluded that the statutory definition of physical impairment should not be read narrowly and is not an all inclusive list of physical impairments.[41] Dementia is also an example of a physical impairment affecting

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[38]. 45 C.F.R. Sec. 1232.10 (1987).

[39]. *Supra* notes 31, 32.

[40]. *See generally* Note, *AIDS and Employment Discrimination: Should AIDS be considered a handicap?*, 33 Wayne L. Rev. 1106 (1987); Note, *Does it qualify as a "Handicap" under the Rehabilitation Act of 1973?*, 61 Notre Dame L. Rev. 583 (1986).

[41]. Note, *Does it qualify as a "Handicap" under the Rehabilitation Act of 1973?*, 61 Notre Dame L. Rev. 583-84 (1986). The declared congressional purpose behind the Rehabilitation Act suggests that Congress's concern was on providing equal opportunity for employability to persons with handicaps:

> The purpose of this chapter is to develop and implement,..., and the guarantee of equal opportunity,...,for individuals with handicaps in order to maximize their employability, independence, and integration into the workplace and the community.

29 U.S.C. Sec. 701 (Supp. IV 1986). The purpose reflects the intention to integrate those with handicaps into society. Such a goal supports the view that the statute should be broadly interpreted and applied.

AIDS victims.[42] AIDS victims meet the first criteria of physical or mental impairment.

The second criteria, that the impairment must be one that "substantial[ly] limits", is harder to clarify because the regulations do not directly speak to this issue.[43] The plain language of the regulations show that "substantial limits" modifies "major life activities." Because AIDS is a crippling disease and in most cases causes death, a person with AIDS lacks control over his body's response to the virus and thus the physical impairment is a substantial limit to a major life activity (fighting illness).[44]

Additionally, AIDS is a substantial limit in the sense that a stigma is attached to persons with AIDS. The stigma results in isolation and non-participation in society.[45] One author has suggested that "substantial limits" refers to employability and the proper question is to what extent does the impairment affect employability.[46] Regardless of the manner in which "substantial limits" is construed, it is clear that one must assess the impact of the physical impairment upon one or more major life activities.

"Major life activities" as suggested by the regulations encompass the ability to live day to day.[47] AIDS makes the victim non-resistant to infection and in need of constant medical treatment. The victim is unable to care for himself in a normal fashion. Maintenance of good health is one example of a major life

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[42]. Picot, *supra* note 13, at 9.

> AIDS is a disease of loss, loss of control of one's body, one's mind, one's life. As the disease progresses, AIDS victims suffer not only physical but mental deterioration. HIV rides into the brain inside the white blood cells which it infects. In ways which are still not clear, the presence of the virus damages the nerve cells of the cerebral cortex, a center of intellectual function in human beings. AIDS patients suffer at first subtle and later more profound decreases in their intellectual abilities, suffering loss of memory and other mental functions. *Id.*

[43]. Note absence from C.F.R. Sec. 1232.3 (1987).

[44]. Note, *Does it qualify as a "Handicap" under the Rehabilitation Act of 1973?*; 61 Notre Dame L. Rev. 584, 584-6 (1986).

[45]. Note, *AIDS and Employment Discrimination: Should AIDS be considered a handicap?*, 33 Wayne L. Rev. 1106-07 (1987).

[46]. *Id.*

[47]. *Supra* note 33.

activity.[48] The progression of the disease can decrease the ability of the AIDS victim to work from either a physical or mental aspect.[49] Work is a major life activity as defined in the regulations.[50] The stigma that AIDS victims encounter also limits their meaningful participation in society (major life activity) in relation to their family, friends, employers, and co-workers.[51]

AIDS victims are individuals with a handicap within the meaning of the Act. Determination as to whether or not AIDS is an otherwise qualified handicap for purposes of working must be decided on a case by case basis. Persons who have ARC or are members of groups who are perceived to have AIDS (virus carriers, ARC persons, homosexuals, family and friends of AIDS or ARC victims, etc.) are handicapped in two ways. First, the Act's definition of a person with a handicap indicates that one who "has a record of such an impairment" (history of illness or misclassification) is a handicapped person within the Act.[52] Regardless of whether the person has the impairment, the person is treated by others as having the impairment and thus as an individual with a handicap.[53]

Secondly, persons who are treated as having AIDS but do not are protected by the third definition of an individual with a handicap. The Act provides that those persons "regarded as having such an impairment" are individuals with a handicap for purposes of the Act.[54] This protection encompasses those members

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48. *Supra* note 44, at 585-86.

49. *Supra* notes 13 and 45.

50. *Supra* note 33.

51. *Supra* note 44.

52. *Supra* note 34.

53. *Supra* note 45, at 1107.

54. 45 C.F.R. Sec. 1232.3(h)(2)(iv) (1987). The legislative history to the Rehabilitation Act Amendments indicates that the definition of a person with a handicap includes:

> those persons who are discriminated against on the basis of handicap whether or not they are in fact handicapped,.... This subsection includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause (A) in the new definition. Members of both these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

S. Rep. No. 1297, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. &

of high risk groups (ie. homosexuals), those persons who test positive for antibodies of AIDS, carriers of the virus, persons with ARC, family and friends of AIDS victims.[55]

PART III

Recent decisions of courts in the United States support the position that victims of AIDS, ARC, or carriers of the virus, or persons perceived as being infected with AIDS, should be handicapped within the meaning of the Act.[56] In *Thomas v. Atascadero Unified School District*, the district court held that a child who was infected with the AIDS virus and showing signs of ARC was an individual with a handicap and otherwise qualified to attend school for purposes of application of the Act.[57] The boy, Ryan Thomas, is a child infected with HTLV-III and was eligible at the time of the case to attend kindergarten class at a public school that received federal financial assistance.[58] The boy suffered from pulmonary and middle ear problems and chronic lymphadenopathy.[59] These symptoms indicate a person with ARC.[60]

The court concluded based upon the medical problems that the boy suffers from substantial impairment of his major life activities.[61] The court focused on the transmission of the AIDS virus and held that the disease is not transmitted through casual contact with a person infected.[62] Therefore, the risk of transmission is not present in the school context and the school district cannot

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Admin. News 6373, 6389-90.

55. *Supra* notes 44, 45.

56. This paper presents only three of the cases that address the question and does not intend to cover or speak for all such cases.

57. 662 F.Supp. 376 (C.D.Cal. 1987).

58. *Id.* at 379.

59. *Id.*

60. V.Gong, *supra* note 6, at 50-53.

61. 662 F.Supp. at 379-380.

62. *Id.* at 380.

> The best available medical evidence shows that the AIDS virus is not spread in the air by infected droplets as are the common cold, influenza and tuberculosis. The virus is fragile and is killed by most household disinfectants. The virus is transmitted from one person to another only by infected blood, semen, or vaginal fluids (and, possibly, mother's milk). Transmission by either semen or blood accounts for virtually all reported cases. *Id.*

use as the basis of its decision to exclude the boy the mere fact that he has the AIDS virus and symptoms of ARC.[63]

The court in *Thomas* relied upon a decision from New York in finding section 504 of the Act applicable to the facts. *In the Matter of District 27 Community School Board v. City of New York*, a seven-year old child was diagnosed as having AIDS and a review panel cleared his attendance at school.[64] The review panel concluded that the child should remain in school because he had remained healthy and had attended school in the previous years.[65] Two local community school boards brought an action seeking an injunction prohibiting the child from attending school.[66] While the case was at trial, the health commissioner placed the child's case before a second review panel. The panel unanimously concluded that the child did not meet the CDC's definition of a person with AIDS.[67] The child was classified as being infected with the virus and evidencing some immune suppression.[68]

The court, recognizing that the issues originally before it were now moot, proceeded to rule on those issues given the importance and likely recurrence of such issues and because it was in the public's best interest.[69] Because HTLV-III attacks and destroys lymphocytes, the court held that children with AIDS suffer from a physical impairment.[70] The decision further suggests that a person who is regarded as having an impairment but in reality does not possess the impairment is protected by the Act.[71] The court then addressed the misdiagnosis of the boy and ruled that the Act would apply because the boy's history and misclassification of having AIDS unjustifiably served as the basis of the exclusion order.[72] The school boards feared the risk of transmission of the disease to non-infected

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63. *Id.* at 382.

64. 130 Misc.2d 398, 502 N.Y.S.2d 325 (1986).

65. *Id.* at 401, 502 N.Y.S.2d at 328.

66. *Id.*

67. *Id.* at 402, 502 N.Y.S.2d at 329.

68. *Id.*

69. *Id.* at 402-403, 502 N.Y.S.2d at 329-30.

70. *Id.* at 414-15, 502 N.Y.S.2d at 336.

71. *Id.* at 414, 502 N.Y.S.2d at 336. The court also addressed the equal protection problem on two levels: 1) excluding those with AIDS but not those with ARC or carriers of the virus, and 2) excluding those known infected and not excluding those who are infected but not known. *Id.* at 414-17, 502 N.Y.S.2d at 337-8.

72. *Id.* at 415, 502 N.Y.S.2d at 336-37.

individuals. The court in recognizing the fear indicated that all of the witnesses for both the school boards and the City of New York concluded that the disease cannot be spread through casual contact with a person infected.[73]

In *School Board of Nassau County, Florida v. Arline*, the United States Supreme Court was faced with whether a person who had a contagious disease (tuberculosis) was an individual with a handicap and thus protected by the Act.[74] The Court stated that section 504 was enacted to combat discrimination against the handicapped.[75] The amendments to the definition of a handicapped person indicate that Congress intended for the Act to apply to persons who were perceived as having a handicap when they in fact did not.[76] This lends support to the position that those perceived as having AIDS or being infected are handicapped within the Act.

Arline was a teacher who had experienced recurring episodes of acute tuberculosis and was released from employment at the end of the 1978-79 school year because of her potential contagiousness.[77] She suffered from tuberculosis twice in 1978.[78] The Court held that Arline suffered from a record of impairment which substantially limited her major life activities.[79] Arline's tuberculosis affected her respiratory system, thereby creating a physiological disorder which met the criteria of a physical impairment.[80] Hospitalization to care for the respiratory impairment was a substantial limitation of her major life activities.[81] The Court held that the effect of tuberculosis upon Arline could not be separated from the risk of contagiousness to others because both proceeded from the same condition.[82]

Section 504 was designed to encompass both the person with the impairment and his impact on other persons affected by the impairment.[83] Arline was a

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73. *Id.* at 403-408, 502 N.Y.S.2d at 330-332.

74. 107 S.Ct. 1123 (1987).

75. *Id.* at 1126-27.

76. *Id.*

77. *Id.* at 1125.

78. *Id.*

79. *Id.* at 1127.

80. *Id.*

81. *Id.*

82. *Id.* at 1128-29.

83. *Id.* at 1128.

person with a record of physical impairment and thus an individual with a handicap within the meaning of section 504. The fear of contagion on its own as the basis of the discriminatory action is still not justified in the light of the Act.[84] The Court left to the district court the determination of whether Arline was otherwise qualified to be a teacher within the meaning of section 504.[85] From these cases, the courts will construe victims on the AIDS spectrum as having a handicap within meaning of the Act.

PART IV

Why consider whether the Act applies to persons with AIDS, ARC, or who are carriers of the virus, or who are perceived as being infected with AIDS? Victims of the AIDS epidemic are human beings. Just as discrimination on the basis of age, sex, religion, or ethnicity is not to be tolerated so then discrimination based upon a handicap should not be tolerated.[86] Persons are justifiably excluded when a substantial risk to others exists and reasonable accommodation cannot be made to prevent exposure of others to the infected person.

In the case of AIDS, casual contact in the workplace does not meet the substantial risk criteria. The nature of the disease and transmission modes argue against being infected via casual contact. Experts overwhelmingly conclude that the AIDS virus cannot be transmitted through casual contact. Additionally, AIDS and ARC victims suffer a physical impairment while those with AIDS, ARC, or the virus or those perceived as having AIDS suffer stigma from people. Misunderstanding and fear of the unknown are the impetus behind the discriminatory motives and attitudes. Without an awareness of the disease and its

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[84]. *Id.* at 1129.

> Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of Sec. 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. *Id.*

[85]. *Id.* at 1130-31.

[86]. Washington Post, June 3, 1988, at A1 & A14.

> Watkins [Chairman of the Presidential Commission of the Human Immunodeficiency Virus Epidemic] emphasized that he regards civil rights protection as essential to curbing the spread of AIDS because "it is the most significant obstacle to progress," a statement he said was expressed by dozens of witnesses who recounted their own experiences of those AIDS patients with whom they worked. *Id.*

modes of transmission, society will isolate and deny AIDS victims the chance for meaningful participation in society.

CONCLUSION

One avenue of protection for persons with AIDS, ARC, HTLV-III or who are perceived as having AIDS is the Rehabilitation Act of 1973. Section 504 prevents discrimination against otherwise qualified handicapped persons in programs receiving federal financial assistance. Statutory analysis and case law suggests that those persons are handicapped within the meaning of the statute. This is just one avenue of protection against discrimination in the workplace. Without avenues of protection for individuals with AIDS, ARC, or the virus or protection for those perceived to have AIDS, discriminatory attitudes fueled by misinformation, myths, and fear will deny those persons employment opportunities and meaningful participation in society.

ENFORCEMENT OF LIQUIDATED DAMAGES PROVISIONS IN CONSTRUCTION CONTRACTS IN CASES OF MUTUAL DELAY BY OWNERS AND CONTRACTORS IN THE CONSTRUCTION INDUSTRY

Gyms, Inc., a hypothetical Virginia construction company, contracts with a local government to build a public gymnasium. Pursuant to the contract, Gyms is to construct the facility and to install all wall mats, basketball hoops, gym bars, game clocks and other necessary equipment. Gyms also assumes responsibility for landscaping of the facility, paving of an auxiliary parking lot, and other jobs related to construction of the facility, but which are not absolutely necessary for its opening. The parties execute a 150-page contract which, along with its other provisions, states that time is of the essence and provides for liquidated damages to be assessed for each day completion is delayed beyond a specified date. Work is commenced by Gyms upon receipt of an order to proceed, and four months later, on the specified completion date, the finished facility is turned over to the government owner. A typical situation? Not at all.

Even a hypothetical owner and contractor are likely to be subjected to delays caused by inclement weather, unavailability of supplies, scheduling difficulties, and a number of other potential complications. When the owner is solely responsible for the delay, the contractor will usually seek an extension for completion. It may also recover financial losses resulting from any unreasonable delay on the part of the owner in court.[1] If the delay is instead caused by the contractor or its agents, the government will assess liquidated damages for each day's delay.

Yet in this hypothetical, as is often the case in reality, both parties have contributed to the delay in completion. The government's delay is in providing the game clocks, which can be installed in one day but must be in place for the facility to host basketball games. Gyms, while waiting for the clocks, proceeds with the paving and landscaping for 60 days past the completion date, at which time the clocks arrive and are installed.

Should the government be allowed to enforce its contractual remedy for damages due to the delay in completion of landscaping and paving, or should the time provision of the contract be nullified? If the time provision of the contract is negated, should Gyms be allowed a reasonable amount of time to complete its work on the clocks following the government's delay, leaving the government to prove actual damages for any recovery it seeks? More specifically, this article will discuss whether the local government can recover anything when both parties are at fault and when the delay of a contractor such as Gyms, though sizeable

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[1]. Atlantic Coast Line R. v. A. M. Walkup Co., Inc., 132 Va. 386, 390, 112 S.E. 663, 664 (1922).

when compared with the government's, did not prevent the facility from opening and thus caused no actual damages.

CONSTRUCTION CONTRACTS AND LIQUIDATED DAMAGES

In construction contracts, a provision granting liquidated damages for each day's delay is an appropriate means of inducing performance or of providing compensation when either party fails to perform.[2] Parties may properly contract for such a provision when actual damages at the time of the agreement are uncertain and difficult to measure. The courts will enforce the provision unless damages at the time of breach are susceptible of definite measurement (as in breach of an agreement to pay money) or when the stipulated amount would be grossly in excess of actual damages. As in any type of contract, the focus is on the intent of the parties as evidenced by the entire contract, and by the circumstances under which the contract was made.[3] As long as the amount designated as liquidated damages is a reasonable expression of the parties' intent at the time of the contract, the fact that no actual damages are ultimately suffered by the contractee is irrelevant.[4]

Construction contracts such as that between the hypothetical parties above are precisely the types of contracts where liquidated damages provisions are best used. Given the number and variety of duties assigned to the contractor, potential actual damages are incapable of being precisely ascertained at the time the contract is made. The liquidated damages provision, by setting a fixed rate of compensation, serves as an estimate of damages which would be sustained by the owner regardless of the nature of a delay, rather than as a means of compensating for the breach of a particular component of the contract.

Viewed in this light, a provision allowing the withholding of an amount which is not disproportionate to the probable (rather than actual) loss due to a contractor's delay will not be construed as an invalid penalty and is enforceable as liquidated damages.[5] Where, however, the contractor's delay is not the sole delay, an amount that would ordinarily be considered an appropriate measure of damages may be deemed unacceptable.

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[2]. Robinson v. United States, 261 U.S. 486, 488 (1923).

[3]. Taylor v. Sanders, 233 Va. 73, 75, 353 S.E.2d 745, 746-47 (1987). Although this is a real estate case, the real estate and construction industries are similar in this respect.

[4]. *See* Robinson v. United States, 261 U.S. at 488.

[5]. Taylor v. Sanders, 233 Va. at 76, 353 S.E.2d at 747.

MAJORITY VIEW: THE ROLE OF NONAPPORTIONMENT

There are two lines of opinion on the issue of whether a liquidated damages provision may be enforced when both the owner and the contractor contribute to a delay in construction. Under the majority view, an owner who has caused a substantial delay in the beginning or progress of work without agreeing to an extension is prohibited from claiming liquidated damages, even if the contractor is also responsible for the delay.[6]

In *United States v. United Engineering & Contracting Co.*[7], a contractor who had accepted a reduced payment under protest was able to recover liquidated damages withheld by the government after showing that much of the delay in its construction of a building had been caused by delays in the completion of surrounding buildings by other contractors hired by the government. The court refused to apportion the owner's and contractor's delay and held that since the government had prevented performance of the contract within the stipulated time, even though the work was also delayed through the fault of the contractor, liquidated damages were waived, and the government could recover only proven actual damages.[8]

The following language of the court's opinion states the oft-quoted "rule of nonapportionment" now applied by many states and lower federal courts:

> We think the better rule is that when the contractor has agreed to do a piece of work within a given time and the parties have stipulated a fixed sum as liquidated damages not wholly disproportionate to the loss for each day's delay, in order to enforce such payment the other party must not prevent the performance of the contract within the stipulated time, and that where such is the case, and thereafter the work is completed though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived.[9]

In adopting this rule, the court was influenced by the fact that supplemental agreements between the government and United Engineering during the course of construction made no reference to liquidated damages.[10] Some lower courts have interpreted the rule more broadly on the theory that the parties' mutual delays place the date of completion beyond the term of the contract. Because courts must be able to fix the day from which a liquidated damages clause is to apply, it

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6. Annotation, *Liability of Building or Construction Contractor for Liquidated Damages for Breach of Time Limit Where Work is Delayed by Contractee or Third Person*, 152 A.L.R. 1349, 1359-60 (1944).

7. 234 U.S. 236 (1914).

8. *Id.* at 242.

9. *Id.*

10. *Id.*

is claimed, apportionment cannot be made where no definite date for completion remains.[11] In any event, the owner is again relegated to proving actual damages.

THE MINORITY VIEW: APPORTIONMENT ALLOWED

Where a contract contains an explicit time extension provision, most courts will assume that the parties intended an apportionment of responsibility for delay to be made, and will allow the owner to recover a liquidated sum for the period of delay attributable to the contractor.[12] Under the minority view, apportionment is permitted even where no contractual provision for time extensions has been made. A delay caused by the owner does not necessarily discharge the forfeiture clause but only entitles the contractor to a credit against his period of default (in a sense, an automatic extension).[13]

The primary authority for the rule permitting apportionment is *Robinson v. United States.*[14] In *Robinson*, the contractor, relying on *United Engineering*, argued that because the government had caused some of the delay in construction, the liquidated damages provision was unenforceable. The court, however, distinguished *United Engineering*, in stating that, but for the government's action in that case, the contractor's work would have been completed within the contract period.[15] Because the contractor in *Robinson* had agreed to pay at a specified rate for each day's delay not caused by the government, the court found that a clear intent was shown for the contractor to pay for some days' delay, even if relieved from paying for other delays because of the government's action. As a result, the government did recover liquidated damages for the days of delay attributable to the contractor.[16]

APPORTIONMENT/NONAPPORTIONMENT IN THE FOURTH CIRCUIT

In the Fourth Circuit, case law both supports and limits the rule of nonapportionment. Because the circuit's mutual delay decisions were all made prior to *United Engineering* and *Robinson*, it is unclear how these later cases may have affected the state of the law in Virginia. In *Jefferson Hotel Co. v.*

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[11]. *Annotation, supra* note 6, at 1364-65.

[12]. Cushman, Ficken & Sneed, *Delays and Disruptions*, in CONSTRUCTION LITIGATION 123 (R. Cushman ed. 1981).

[13]. Annotation, *supra* note 6, at 1369.

[14]. 261 U.S. 486 (1923).

[15]. *Id.* at 489.

[16]. *Id.* at 488.

Brumbaugh,[17] the court did not require a general contractor to pay a contract penalty of $150 per day of delay because independent contractors hired by the owner had contributed to the delay. Though the hotel company urged that its contractors had only been responsible for a few days' delay, the court refused to apportion their delay with that of the general contractor. The court held that the general contractor, as a builder, was entitled to work in an undisturbed, systematic manner and that the court could not know, months later, what conditions had contributed to the overall delay, so it would not attempt to apportion the delay.[18]

In *Caldwell & Drake v. Schmulbach*,[19] a case decided shortly after *Jefferson Hotel*, the court, relying on that decision, refused to apportion the delay between an owner and contractor, even though the parties' contract expressly provided for apportionment. The causes of delay in construction of a building included difficulty of access to the construction site, which was hemmed in by surrounding buildings, necessity of protecting the buildings adjoining the site, and most notably, a set of architectural plans which provided for a building larger than the lot on which it was to be constructed. According to the court, these circumstances demonstrated clearly the impossibility of a court's attempting to determine and apportion the cause of delay between an owner and contractor when both were in default. Consequently, no private contract by its terms could change the law prohibiting apportionment or could compel a court to do so.[20]

Jefferson Hotel and *Caldwell & Drake* appear to indicate a general adherence to the rule of nonapportionment in the fourth circuit. Indeed, both cases are currently referenced as authority supporting that rule.[21] The decision in *Caldwell & Drake*, however, was modified on appeal in *Schmulbach v. Caldwell*,[22] where, rather than focusing on the difficulties a court might have in apportioning mutual delay, the court emphasized the parties' agreement that the contractor would pay $50 per day in liquidated damages for delays not caused by inclement weather or the owner. The court distinguished *Jefferson Hotel*, where the payment for each day's delay was designated in the contract as a penalty, stating that, where parties had provided for a stipulated sum as liquidated damages, courts should

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17. 168 F. 867 (4th Cir. 1909).

18. *Id.* at 874-75.

19. 175 F. 429 (C.C.N.D. W.Va. 1909).

20. *Id.* at 434.

21. *See* 17A C.J.S. *Contracts* Sec. 502(4)(a) (1963).

22. 196 F. 16, 28 (4th Cir. 1912).

give effect to their intent by not holding the amount to be a penalty or refusing to enforce the contract provision.[23]

In further attempting to distinguish *Jefferson Hotel*, the court pointed out that whereas the court in *Jefferson Hotel* had found it impossible to separate mutual delays, here the parties had provided for a means of apportionment in the contract. Regarding this issue, the court said:

> [W]e are not aware of any principle of law, which prevents or relieves the court from apportioning the delays when, **either by competent and satisfactory evidence, or by a contractual standard fixed by the parties**, they can do so with reasonable certainty.[24] (emphasis added).

Because the owner could show the number of days for which he was entitled to liquidated damages and could point to a contract requiring the defaulting party to share the number of days for which he was entitled to be credited, nonapportionment was inapplicable.[25]

The contractual language in *Schmulbach* (providing the contractor with a credit for days "when the weather forbids work" and "for each and every day he is delayed by the owner")[26] makes that agreement closely analogous to contracts explicitly providing for time extensions, which do not come under the rule of nonapportionment. However, based on the court's reference to consideration of *evidence* establishing responsibility for delay (as opposed to the parties' contractual standard), it would seem that whenever the impossibility of apportioning delay is not at issue (either because the parties have provided a means of apportionment, as in *Schmulbach*, or because the delays attributable to each party are easily separated, as in the Gyms hypothetical), it would not be inherently unfair for a court to apply a forfeiture clause, stipulated in advance by the parties, to the contractor's portion of the delay.[27]

Coal & Iron Ry. v. Reherd[28] indicates still another circumstance under which a Fourth Circuit court may be willing to allow apportionment. In *Reherd*, though the parties' contract did not expressly provide for a time extension where the owner's actions interfered with timely completion, the court found that because the contract conferred on the owner the authority to require additional work by

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[23]. *Id.* at 25-26.

[24]. *Id.* at 27.

[25]. *Id.*

[26]. *Id.* at 18.

[27]. *Id.* at 27.

[28]. 204 F. 859 (4th Cir. 1913).

the contractor, the parties' consent to a reasonable extension of time for completing the extra work could be implied.[29]

Under the implied extension rationale, fault for any delay beyond the reasonable period necessary to complete the extra work was attributed to the contractor. The court held that though the owner had increased the work, which would necessarily require more time, when a reasonable time had elapsed for the contractor to complete the increased work, it would be liable in liquidated damages for delays beyond that reasonable limit of time.[30] Thus, relying on its interpretation of the parties' agreement and intent, the court allowed enforcement of the forfeiture clause, even though specific provision for time extensions had not been made and the owner's actions had contributed to the delay.

COMPETING POLICIES

Though the more recent decision of *Robinson v. United States* can be read as limiting the instances in which a court refuses to apportion damages to situations such as that in *United States v. United Engineering & Contracting Co.* (where the contractor would have completed construction as scheduled had the owner's agents not caused an intervening delay), many courts continue to adhere to a general rule of nonapportionment. The policies that support the rule involved arise from unique aspects of the construction industry. Delay in one part of construction usually disturbs the whole, the length of an interruption does not necessarily correspond to the resulting delay, and complicated evidence makes it difficult to separate the delays attributable to each party.[31] The certainty, apparent evenhanded treatment of owner and contractor, and ease of application of the nonapportionment rule make it attractive from an administrative point of view.[32]

Nevertheless, the practical effect of a refusal to apportion delay, granting the contractor an extension of time for completion but denying him any monetary recovery for the delay, while at the same time precluding the owner from collecting liquidated damages for late completion, may result in injustice to both parties.[33] If the government in the Gyms hypothetical had failed to inspect the building for two months, which in turn prevented the contractor from proceeding with additional phases in the construction process, Gyms, though perhaps grateful for an exemption from paying liquidated damages for any delay on its part, might

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[29]. *Id.* at 880.

[30]. *Id.* at 881.

[31]. Annotation, *supra* note 6, at 1376-77.

[32]. Phillips, Stetson, Bramble, *Construction Disputes and Time*, in ISSUES IN CONSTRUCTION LAW 49, 65 (1988).

[33]. *Id.*

find that exemption wholly disproportionate to its losses over the two-month waiting period.

A better solution would be to grant Gyms an implied extension and to allow it to present a claim for "extra work" as in *Coal & Iron Ry. v. Reherd.* On the other hand, if, as in the original hypothetical, Gyms were responsible for two months' delay in performing one part of the contract (the landscaping and paving), while the government defaulted with respect to a part of the contract which in no way affected Gyms' ability to landscape and pave, which required only one half day's work, and which, had Gyms not also been in default, would probably have been excused altogether,[34] it would be unfair to allow Gyms to capitalize on the government's inability to obtain clocks by refusing to uphold the forfeiture clause.

In addition to the equitable considerations supporting apportionment, there are practical reasons for allowing the parties' contractual provisions for damages to stand. First, improvements in methods of scheduling analysis and the detail of critical path management have made allocation of responsibility for delay less difficult than it may have been when the rule against apport
ionment was being developed.[35] An increased faith in the ability of triers of fact to sort out complicated evidence also weighs in favor of allocation.

Finally, there is the liquidated damages provision itself. In the Gyms hypothetical, the parties, at the time the contract was made, agreed to a liquidated sum as a measure of potential actual damages which could not otherwise be ascertained. Though the rationale behind the refusal of many courts to enforce liquidated damages provisions in cases of mutual delay may be that such provisions act as a penalty,[36] the fact remains that if a claim is for measured or liquidated damages expressly agreed upon by the parties to be compensation for potential actual damages, the principles involved regarding the enforcement of penalties do not apply.[37]

It would be inconsistent for a court to rule that an owner who has contributed to construction delay is allowed to recover actual damages, only to ignore the owner's (and contractor's) provision for those damages. Today, when construction contracts cover hundreds of facets of a given project, are thoroughly negotiated by both sides, and are deliberately designed to protect both owner and

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[34]. Reid v. Field, 83 Va. 26, 1 S.E. 395 (1887). A contractee is entitled to accept less than full performance, and the government would have done so in the interests of avoiding unnecessary expense.

[35]. Phillips, Stetson, Bramble, *supra* note 32, at 66.

[36]. Annotation, *supra* note 6, at 1378.

[37]. Schmulbach v. Caldwell, 196 F. 16, 25-26 (4th Cir. 1912).

contractor from unpredictable events, there is no reason to sacrifice the parties' freedom to address problems of mutual delay in the interests of judicial economy and adherence to an archaic rule of law.

RICHMOND NEWSPAPERS V. LIPSCOMB: TIGHTENING THE GRIP ON VIRGINIA PUBLISHERS

The United States Supreme Court recently declined to hear an appeal of a 1987 Virginia Supreme Court case which held that a public school teacher is not a public official for the purpose of invoking the New York Times malice rule[1] in defamation cases. In *Richmond Newspapers, Inc. v. Lipscomb*, the Virginia court said the public has no independent interest in Lipscomb's qualifications and performance "beyond its general interest in the qualifications and performance of all government employees," and therefore she was not a public official but rather a private person.[2]

The court noted the lack of any federal case on the question, and a split in the state court holdings. Federal constitutional law determines who is a public official. State courts must determine public official status in accordance with "the purpose of a national constitutional protection," and therefore state law tests are not determinative on the question.[3]

This article analyzes the court's finding in *Lipscomb* that a public school teacher is not a public official. It also compares *Lipscomb* with other federal and state court decisions on the public official question. The article illustrates that this part of the *Lipscomb* decision missed the key components of the test for public official status, such as the breadth of the leading definition of a public official, the impact of public education on government, and the access a teacher has to media remedies.

FACTS OF LIPSCOMB

Lipscomb centered around a newspaper article written for the *Richmond Times-Dispatch* by Charles Cox. In a front-page article published a few weeks before the start of school in the fall of 1981, Cox questioned the qualifications of

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[1]. A suit for defamation provides an avenue of legal redress for invasions of an individual's interest in reputation and good name. To recover damages a plaintiff must prove the defamatory comments injured his reputation and impaired his standing among his peers. Thus an essential consideration in any defamation action is the status of the plaintiff. Whether a court deems a person to be a private individual or a public figure is of paramount importance in such actions because public figures alleging defamation must prove the defendant published the defamatory comments with actual malice or reckless disregard for the truth. Private individuals carry no such onerous burden. Note, Waldbaum v. Fairchild Publications, Inc.: Giving Objectivity to the Definition of Public Figures, 30 Cath.U.L.Rev. 307, 308 (1981).

[2]. 234 Va. 277, 287, 362 S.E.2d 32, 37 (1987) (quoting Rosenblatt v. Baer, 383 U.S. 75, 86 (1966)), *cert. denied*, 108 S.Ct. 1997 (1988).

[3]. Rosenblatt v. Baer, 383 U.S. 75, 84 (1966). The case held that a supervisor of a ski resort who was employed by and directly responsible to county commissioners was a public official for purposes of federal constitutional protection purposes.

Vernelle Lipscomb, a teacher at Thomas Jefferson High School in Richmond. The article included quotes from Lipscomb's colleagues, students and parents of students criticizing Lipscomb's teaching abilities, particularly when dealing with bright or honors program students. Cox was alerted to the problem by a parent of one of Lipscomb's students. The parent had previously approached the school administration and attempted to have Lipscomb removed. When this failed the parent contacted Cox and told him about the situation. At the time, no open conflict existed at the high school, but numerous complaints were on record regarding Lipscomb. The front-page article provided very little refutation of the negative statements. Lipscomb and other school officials had been contacted for comment, but the school board attorney advised them against discussing the details of the complaint against the teacher. Conflicting lines of testimony were presented at the ensuing defamation trial with regard to Lipscomb's qualifications.[4]

Prior to *Lipscomb*, the Supreme Court of Virginia had held that a university professor does not occupy a position of such persuasive power and influence that he could be deemed a public figure for all purposes.[5] In *Lipscomb*, the court broadened the scope of the state's defamation remedy by ruling that a teacher is not a public official, leaving designation as a "limited purpose" or "vortex" public figure[6] the only way in which an educator could qualify for *New York Times* actual malice.[7]

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[4]. Lipscomb, 234 Va. at 283. Lipscomb sued the newspaper, the publisher and the reporter, and was awarded $1,000,000 in compensatory damages and $45,000 in punitive damages by a jury. The trial judge sustained the jury's award of $45,000 in punitive damages but required a remittitur of $900,000 of the compensatory damages. *Id.*

[5]. Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981). Moore took out an advertisement in a local newspaper that accused Fleming of being a racist. Moore was a realtor and his actions were in reference to some property development that Fleming had invested in. The court said the words probably did not have an effect on Fleming in his profession as a teacher, and thus were not defamatory *per se*.

[6]. A limited purpose or "vortex" public figure is far more common than the "general purpose" public figure. The designation is comprised of those individuals who voluntarily inject themselves into a particular public controversy and thereby assume a role of special prominence in the affairs of society and therefore invite attention and comment. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

[7]. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The *Times* published an advertisement that was challenged as maliciously defamatory of a city commissioner in Montgomery, Alabama. The Alabama Supreme Court held that the statements in the advertisement were libelous *per se*, false, and not privileged, and that the evidence showed malice on the part of the newspaper. The U.S. Supreme Court held that there was a qualified privilege for honest misstatements of fact, defeasible only upon a showing of actual malice.

The court disposed of the public official question summarily, relying on the *Gertz*[8] arguments to conclude that a public school teacher is not a public official. The court, citing *Gertz*, reasoned that a teacher does not have access to channels of effective communication and hence does not have an opportunity to counteract potentially false or defamatory statements, thus making a teacher more like a private citizen than a public official and more in need of government protection.[9] The court cited the Virginia Code,[10] which prohibits disclosing student names and records, as one barrier to effective communication.

Following the reasoning of *Gertz*, one part of the test for a public official is whether, in view of his employment position, an official ran "the risk of closer public scrutiny" than might otherwise be the case.[11] The court acknowledged this was true for a public school teacher, but felt this point did not outweigh the other factors in the final decision. Particularly influential to the court's decision was Lipscomb's lack of access to channels of effective communication and the lack of a controversy at the time the newspaper article was published.

The court found that the criticism of Lipscomb came as a result of her performance as a teacher, not as temporary head of Jefferson High School's English department. She did not attempt to influence or control any public affair or school policy. The court focused on the question of whether her position as a schoolteacher was one that would invite public scrutiny and public discussion.[12] Finally, the *Times-Dispatch* article was one that created a controversy rather than reported on one that already existed. The employee's position was not inviting

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[8]. Gertz concerned a libelous article appearing in a magazine called American Opinion, a monthly publication of the John Birch Society. The article in question discussed whether the prosecution of a policeman in Chicago was part of a communist campaign to discredit local law enforcement agencies. The magazine alleged that Gertz was the chief architect of the "frame-up" of the police officer and linked him to Communist activity. Gertz was working for the plaintiff in a related civil suit. The Supreme Court held he was neither a public official nor a public figure. The court rejected the defendant's "de facto" public official argument and decided the question based on the attorney's lack of access to effective reply in the media. The court also based its decision on Gertz' failure to thrust himself into the vortex of any public issue or to seek the limelight in any meaningful way.

[9]. Lipscomb, 234 Va. at 285, 362 S.E.2d at 36 (quoting Gertz, 418 U.S. at 418).

[10]. Va. Code Sec. 22.1-287(A) provides in pertinent part:

"No teacher, principal or employee of any public school nor any school board member shall permit access to any written records concerning any particular pupil enrolled in the school in any class to any person except under judicial process...."

[11]. Gertz, 418 U.S. at 344.

[12]. Rosenblatt, 383 U.S. at 87 n.13.

public scrutiny and discussion, but rather because discussion was occasioned by the particular charges against Lipscomb, public official designation was inappropriate.[13]

BACKGROUND DECISIONS

In *New York Times Co. v. Sullivan*,[14] the United States Supreme Court introduced the concept of the public official whose privacy interest would have to partially yield to the public interest to further free and open debate on issues of general public concern. Under the *Times* standard, public criticism of a public official's public conduct is constitutionally protected from defamation liability absent clear and convincing proof[15] that the defendant acted with "actual malice."[16]

In *New York Times*, the Supreme Court intentionally left the boundaries of what constitutes a "public official" an open question.[17] Two years later the Court again addressed the question in *Rosenblatt v. Baer*.[18] The Court established that persons in either of the following two situations could fit the public official definition, thus triggering the *New York Times* malice standard:

> (1) "...at the very least...those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." or
> (2) "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees...."[19]

The Rosenblatt decision determined that the focus must be on the nature of the public employee's function and the public's particular concern with the employee's work. The case, however, did not provide a clear demarcation between public officials and mere public employees. The Court again left unclear to which government employees the public official designation extended.

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[13]. Lipscomb, 234 Va. at 287, 362 S.E.2d at 37 (citing Gertz, 383 U.S. at 87 n.13).

[14]. 376 U.S. 254 (1964).

[15]. *Id.* at 285-86.

[16]. *Id.* at 279-80.

[17]. The Court had no occasion "to determine how far down into the lower ranks of government employees the 'public official' designation would extend..." *Id.* at 283 n.23.

[18]. 383 U.S. 75 (1966).

[19]. *Id.* at 85, 86.

In 1967, the Supreme Court said that public figures would also be subject to the *New York Times* malice rule.[20] Like the public official, the public figure "...commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to 'expose through discussion the falsehoods and fallacies'"[21] voiced against him or her. A public figure designation could be achieved through the status of one's position in society, or by "thrusting ...[oneself] into the 'vortex' of an important public controversy...."[22]

The expansion of First Amendment protection under the public official and public figure doctrines reached its peak in 1971 with *Rosenbloom v. Metromedia, Inc.*[23] A plurality[24] of the Supreme Court said that regardless of whether the plaintiff was a public or private citizen, his involvement in a matter of public or general concern was sufficient to trigger the *New York Times* knowing and reckless falsity standard for defamation. Two years later in *Gertz*, the Supreme Court began to withdraw some of these First Amendment freedoms by narrowing the working definition of a public official. Rather than focusing solely on the question of whether the matter exposed to media attention was a valid public concern as *New York Times* and *Rosenblatt* did, the *Gertz* decision said that public official decisions had to balance this First Amendment concern against the privacy interests of the individual, and the individual's ability to respond to false or misleading statements made about them. In the opinion of the Court, "[t]he 'public or general interest' test for determining the applicability of the *New York* Times standard to private defamation actions inadequately serves both of the competing values at stake."[25]

The law as it stands today allows room for both the *Gertz* and *Rosenblatt* rationales. While in *Hutchinson v. Proxmire*[26] the U.S. Supreme Court reiterated its movement away from the pure "responsibility or control over government

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[20]. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[21]. *Id.* at 155 (quoting Whitney v. California, 274 U.S. 357, 377 (Brandeis, J., dissenting)).

[22] *Id.*

[23]. 403 U.S. 29 (1971)

[24]. Justice Brennan wrote the plurality opinion joined by Burger and Blackmun. Justices Black and White each wrote a separate concurrence. Justice Harlan wrote a dissenting opinion, as did Justice Marshall which was joined by Justice Stewart. Justice Douglas did not take part in the decision.

[25]. Gertz, 418 U.S. at 346.

[26]. 443 U.S. 111 (1979).

affairs"[27] test, in Virginia, "the *Rosenblatt* characterization of a *New York Times* public official has not been modified and in our view fits well into the framework of competing values created by libel litigation."[28]

VIRGINIA

In *Lipscomb*, the Supreme Court of Virginia focused primarily on the self-help doctrine: the idea that society will allow more potentially damaging discussion about public officials in part because of their enhanced ability to contradict lies or correct errors by their greater access to the media. The conclusion that Lipscomb did not have access to the media is contrary to the facts of the case. If Lipscomb's professional conduct as a schoolteacher was noteworthy enough to be published on the front page of the *Richmond Times-Dispatch*, the teacher had viable access to that medium. The court in *Lipscomb* is primarily concerned that the avenue for expression be a two-way street, yet the underlying facts show that this was the case. Because the institution of public education is being scrutinized, media interest is assured. For instance, had Lipscomb made a statement that her students were exceptionally belligerent, or made any other reference to her job which indicated that things were out of the ordinary, that would have been "news" also, and would have merited coverage in the newspaper.

The Virginia Supreme Court also reasoned that Lipscomb was barred from effectively replying to criticism because of a statute in the Virginia Code.[29] The court assumes that if Lipscomb were to defend her teaching reputation, she would need to disclose official records of students in her class, an act forbidden under the Code. There are three problems with this reasoning. First, equally effective options existed for Lipscomb to defend herself. At the trial there were students, teachers and school administrators who testified in contradiction of the complaints about Lipscomb,[30] so certainly there were reliable people available whom Lipscomb could have referred Cox to in order to contradict the defamatory statements Cox had recorded.

Secondly, the Virginia court misapplied the test for a public official. They focused on the individual circumstances of Lipscomb's case, and not the position of school teachers in general. When deciding whether a person is a public figure it is appropriate to delve into the particular circumstances surrounding the alleged defamatory statements. However, when deciding whether a person is a public official, the court should look at the employment position in a generic sense, and

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[27]. Rosenblatt, 383 U.S. 75 at 85-86.

[28]. Arctic Co., Ltd., v. Loudoun Times Mirror, 624 F.2d 518, 521 (4th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

[29]. See *supra*, note 10.

[30]. Lipscomb, 234 Va. at 283, 362 S.E.2d at 35.

not add in factors such as Lipscomb's ability to respond to specific charges.A person seeking government office "runs the risk of closer public scrutiny."[31] It is self evident that a person whose job entails trying to influence scores of young men and women on a daily basis is going to be scrutinized by those persons, their families and their peers.

Perhaps the strongest refutation of this "inhibited access" theory adopted by the Virginia Supreme Court in *Lipscomb* comes from an earlier Virginia case, *Landmark Communications, Inc. v. Virginia*, in which the U.S. Supreme Court, on appeal from the Virginia Supreme Court, said the fact that judges traditionally do not respond to media reports and public commentary did not give them any greater immunity from criticism than other persons or institutions.[32]

The Supreme Court of Virginia mentions the fact that Lipscomb was not an elected official. This should not have had any bearing on the outcome of the question.[33] The general public's right to vote for the official is dispositive of neither of the two criteria from *Rosenblatt*, apparent importance in government and heightened interest in job performance.[34] Appointed officials ranging from the executive cabinet to police officers[35] fit comfortably in the *Rosenblatt* definition of a public official. This is an example of the court's application of public figure reasoning to a public official question.

The determinative question in the public figure analysis is whether the person makes a conscious effort to seek out the limelight. A person campaigning for[36]

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[31]. Gertz, 418 U.S. at 344.

[32]. 435 U.S. 829, 838-9 (1978). Landmark focused on a Virginia statute which enacted criminal sanctions against any person publishing information about proceedings before a state judicial review commission hearing complaints about judges' disabilities or misconduct. The U.S. Supreme Court said that in general the operation of the judiciary, and in specific the conduct of judges, is a matter of utmost public concern. This analysis leads to a similar conclusion that complaints about a teacher's qualifications necessarily are a matter of public concern and protected speech because they have a direct bearing on the operation of public education.

[33]. "There has been no showing that Lipscomb, who was not an elected official...." Lipscomb, 234 Va. at 286, 362 S.E.2d at 37.

[34]. 383 U.S. at 85-86.

[35]. *See* True v. Ladner, 513 A.2d 257 (Me. 1986); Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984). Both of these courts rejected the public school teacher as a public official in part by distinguishing the position from a police officer. Both states have held a police officer to be a public official.

[36]. For an example of the New York Times malice rule applied to the higher strata of elected officialdom, *see* Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) (candidate for democratic nomination for U.S. Senate), and at the lower end of the spectrum, Ocala Star Banner Co. v. Damron, 401 U.S. 295 (1971) (candidate for

or holding an elected office would obviously be striving to stay in the public eye. A public official does not necessarily have the same motivations. The court errs by asking *how* Lipscomb obtained her position of authority.

The proper controlling question is whether the public acknowledges the job the official holds to be authoritative or influential. Under *Gertz*, public funding is relevant in deciding whether a government employee is a public official. *Lipscomb* did not mention the fact that the public school teacher was on the public payroll. While the question of whether an official receives public funds is not dispositive,[37] there is merit to the view that a threshold question to show public official status should be whether the position comes under the ambit of a government institution.[38]

ANALYSIS BY OTHER COURTS

As the Supreme Court of Virginia noted, there is a decided split in the state court holdings on this question. Other state courts have looked at the question in greater detail than did the Virginia court. Generally the courts that extend the public official doctrine to public school teachers rely on *Rosenblatt* (public debate should take precedence over privacy interest), while courts holding a teacher is not a public official emphasize the *Gertz* premise that privacy of the individual is superior. In the two decades since *Rosenblatt*, several cases have limited the scope of the public official doctrine, however.[39]

The Supreme Court of Virginia did not value a teacher's impact on society as highly as the state cases coming to an opposite conclusion on the public official question. There is substantial sociological data affirming the impact of the schoolteacher on the citizenry.[40] In *Gallman v. Carnes*,[41] the Arkansas Supreme

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county tax assessor).

[37]. Hutchinson v. Proxmire, 443 U.S. 111 (1979).

[38]. Johnston v. Corinthian City Television Corp., 583 P.2d 1101 (Okla. 1978).

[39]. *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. at 119 n.8. The Supreme Court "has not provided precise boundaries for the category of 'public official'; it cannot be thought to include all public employees, however."; *and* Dun & Bradstreet v. Greenmoss Builders, Inc. 472 U.S. 749 (1985).

[40]. Brennan noted the Court's repeated reference to public schools as "the Nation's most important institution in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." Brennan said the teacher plays a critical role in developing students' attitude toward government and understanding of the role of citizens in our society, and serves as a role model for students. *See, e.g.*, Note, Aliens' Right to Teach: Political Socialization and Public Schools, 85 YALE L. J. 90, 99-104 (1975). "With the family and the peer group, the school is recognized as a crucial agent of political socialization. A teacher's role in the process of political and cultural learning becomes critical because a teacher is quite often the first nonfamilial spokesman of society that a child regularly encounters, and functions

Court said newspaper articles could question the qualifications of a law school professor because education is a matter of general or public concern. The Arkansas holding is in direct conflict with *Lipscomb*. There is little to distinguish the case from *Lipscomb* other than the fact that the courts came to opposite conclusions.

In drawing the distinction that a teacher has very limited authority[42] the courts again emphasize the "control" aspect of the definition and overlook the "substantial responsibility" part of the definition. A review of the language used by the courts that espouse this reasoning reveals an underlying premise that to meet the definition of public official a government employee must have the ability to assert direct, tangible control over the citizenry.[43] This is simply not the case. A public official may be one who appears to have substantial responsibility for the conduct of government as well as private affairs.[44]

DECISIONS CONTRARY TO LIPSCOMB

State courts have mentioned a number of factors in holding a teacher to be a public official. In *Gallman*, the Arkansas Supreme Court held that a faculty dispute at a public institution was a matter of general public concern.[45] Other

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in the classroom as a model for acceptable behavior and social attitudes." *Id.* at 102-3 and "The public school teacher as an authority figure...is much more like a political authority...The teacher, like the policeman, president, or mayor, is part of an institutional pattern, a constitutional order." *Id.* at 103 n.52 (quoting R. Dawson and K. Prewitt, POLITICAL SOCIALIZATION (1969) at 158).

41. 497 S.W.2d 47 (Ark. 1973). The Supreme Court of Arkansas held that a law school professor was a public official for purposes of a news article that questioned his teaching abilities. The court said that a faculty dispute over the teacher's qualifications was properly an issue for public comment and therefore privileged. *Id.* at 50 (quoting Clark v. McBane, 299 Mo. 77, 252 S.W.428 (1923)). The court quoted Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), which extended the "constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." *Id.*

42. True v. Ladner, 513 A.2d at 264.

43. *See, e.g.*, True v. Ladner, 513 A.2d 257 (Me. 1986) *and* Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984).

44. Rosenblatt v. Baer, 383 U.S. at 85-86.

45. 497 S.W.2d at 50. Interestingly, the Arkansas court noted that the Supreme Court of Virginia had recently upheld a summary judgment in recognizing that a faculty dispute at a state college constituted a subject of public and general concern. The Virginia case involved a faculty dispute at Virginia Western Community College. The Virginia court based its "public official" decision on the fact that there was open dispute between faculty and administrators, rather than the general question of whether the position of college professor fit the public official definition, and the case is therefore not applicable to the present question.

relevant factors for some courts included the closeness of the teaching position to the electoral process,[46] and whether the position was publicly funded.[47] Another court has found that even a voluntary teaching position can qualify for public official status.[48] The most prevalent rationale used by courts when holding a teacher to be a public official is to emphasize the social and political responsibilities incumbent upon the position in the community.[49]

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[46]. In Sewell v. Brookbank, 119 Ariz. 422, 581 P.2d 267 (1978), the Arizona Supreme Court held that a teacher must show actual malice under New York Times and Curtis Publishing Co. v. Butts. The court was persuaded by an Illinois case, Basarich v. Rodeghero, 24 Ill.App.3d 889, 321 N.E.2d 739 (1974), later overruled in its state of origin by McCutcheon v. Moran, 99 Ill. App.3d 421, 54 Ill.Dec. 913, 425 N.E.2d 1130 (1981).
Basarich found it relevant that public school teachers were hired by the school board, an elected body, and were paid with public funds. Also, the court said the teaching occupation is a highly responsible position in the community and thus fit the Rosenblatt criteria for public official status.

[47]. Sewell v. Brookbank, 119 Ariz. 422, 581 P.2d 267 (1978).

[48]. Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla.1978) involved a grade school physical education teacher and wrestling coach. The fact that Johnston was not paid for his work as a coach was not relevant, according to the Supreme Court of Oklahoma, because Johnston was still working within the public school system, an obvious governmental function.

[49]. Scott v. News-Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986). The court borrowed language from the U.S. Supreme Court in saying that the public school teacher performs a task "that goes to the heart of representative government." Sugarman v. Dougall, 413 U.S. 634, 647 (1973). The court also advanced the argument that as an authority figure for children, the teacher has a significant impact on the community. *See also* Johnston v. Corinthian City Television Corp., 583 P.2d 1101 (Okla. 1978). The court said it could "think of no higher community involvement touching more families and carrying more public interest than the public school system" *and* Lorain Journal Co. v. Milkovich, 474 U.S. 953 (1985) (Brennan, dissenting). Brennan quoted from the newspaper column under question to accent his case for the importance of high school employees:

> "When a person takes on a job in a school, whether it be as a coach, administrator or even maintenance worker,it is well to remember that his primary job is that of educator.
>
> "There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way--many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions." *Id.* at 955-56.

STATES IN ACCORD WITH LIPSCOMB

Other courts have argued on policy grounds that making a teacher a public official would stifle creativity[50] and have said a teacher's control is too remote to be authoritative.[51] Other courts have focused on the size of the audience served by the newspaper;[52] asked whether the institution was a uniquely government affair;[53] whether the position had any administrative or supervisory duties;[54] whether it required any intrusion into the intimate details of daily lives;[55] or whether the employees would reasonably be aware that they were forfeiting some privacy rights.[56] Still other courts have asked whether the position is a highly visible one.[57]

The policy-based argument in other states holding teachers to be private citizen diverges greatly from the *Lipscomb* reasoning. Implicit in the policy argument "is the concept of a freedom of the governed to question the governor, of those who are influenced by the operation of government to criticize those

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[50]. In Franklin v. Benevolent and Protective Order of Elks, Lodge 1108, 97 Cal.App.3d 915, 159 Cal.Rptr. 131 (1979), the California Supreme Court said that a rule making teachers public officials, and therefore remediless for all defamation excepting where actual malice is present, would stifle the teacher's expression and intellect and lead to less effective teaching.

[51]. *Id.* The California court said that while a public school teacher invites public scrutiny and discussion, the policy behind the concept is to "allow the governed to question the governors," and the teacher's governing or control in the classroom is too remote and philosophical to qualify on those grounds. *See* also McCutcheon v. Moran, 99 Ill.App.3d 421, 54 Ill. Dec. 913, 425 N.E.2d 1130 (1981); Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984).

[52]. Johnson v. Board of Junior Colleges, 31 Ill.App.3d 270, 276 n.1, 334 N.E.2d 442 n.1 (1975). The court held that the public figure status of a college professor was due to his actions during the controversy, and that the teacher was a public figure only for purposes of media that specifically served the school audience, in this case the college newspaper. In a later case the court further narrowed the circumstances where a teacher could be a public figure. McCutcheon v. Moran, 99 Ill.App.3d 421, 54 Ill.Dec. 913, 425 N.E.2d 1130 (1981).

[53]. True v. Ladner, 513 A.2d 257 (Me. 1986). The state supreme court analysis consisted of distinguishing the public school teacher from a police detective, a position they had recently held to come under the public official doctrine. The court said that a detective is a public official because he is involved in law enforcement, and the duties of a law enforcement official are a uniquely government affair.

[54]. *Id.*

[55]. *Id.*

[56]. *Id.*

[57]. Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984).

who control the conduct of government."[58] The use of the word "control" in this argument is much stronger than the language of *Rosenblatt*, where the Supreme Court said there need be apparent control *or* substantial responsibility for the conduct of government affairs.[59]

The school teacher fits much better into the second category, substantial responsibility. Education is a government affair, perhaps the most important government affair at the state and local level, and the school teacher is the direct link between the government and the populace in this function. As the primary medium of the government message, the teacher certainly carries substantial responsibilities. Further, the private citizen decisions such as *Lipscomb* do not articulate the reasons why a teacher's control is "too remote or philosophical."

The policy argument says that there would be a chilling effect on teacher effectiveness if they were subject to this defamation exception. However, the courts do not attempt to balance this evil against the countervailing harm of a chill on the media. The public official doctrine was developed originally as a shield for the media. When a court ignores this factor it loses sight of the original intent of the doctrine.

BRENNAN'S INTERPRETATION OF THE PUBLIC OFFICIAL DOCTRINE

Justice Brennan wrote a dissent from a certiorari denial on the public official question in *Lorain Journal Co. v. Milkovich*.[60] Brennan, the author of the *Rosenblatt* decision, advocates a return to the standards set out in that case.[61] He gave a more expansive interpretation of the public official doctrine than the state courts and recognized that small newspapers would be singled out to bear the burden of a decision favoring teachers as private citizens.[62]

Brennan, joined by Justice Marshall, said that a narrow reading of the doctrine would unnecessarily deprive publishers of the "breathing space"[63] allowed for public expression and thus lead to a chilling effect on reports about borderline private individuals. The justices were most concerned about the effect on reporting by local papers, who rely heavily on coverage of these borderline

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58. Franklin v. Benevolent and Protective Order of Elks, Lodge 1108, 97 Cal.App.3d at 924, 159 Cal. Rptr. at 136.

59. Rosenblatt v. Baer, 383 U.S. at 85.

60. 474 U.S. 953 (1985).

61. *See also* Elder, Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria -- A Proposal for Revivification: Two Decades after New York Times v. Sullivan. 33 Buffalo L. Rev. 579 (1984).

62. *Id.*

63. *Id.* (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

public officials. Small, non-daily newspapers have the fewest resources and are more easily influenced by threats of a lawsuit and potential libel damage awards.[64]

CONCLUSION

An examination of the state court decisions reveals no clear trend in either direction on whether a public school teacher is a public official. The decision in *New York Times v. Sullivan* was announced a quarter century ago, yet courts continue to come up with contradictory results when assessing whether a teacher is a public official.

One problem is that many courts confuse public official and public figure theories and interchange the definitions and criteria of the two concepts. There were several other issues in the *Lipscomb* case,[65] the key issue being whether Cox acted negligently in gathering information for publication, and the public figure issue was given only threshold analysis. The court did little more than reiterate the minimal defamation protections under *Gertz*.

Classifying a public school teacher as a private citizen causes much more of a chill on small newspapers than large ones. Small town newspapers devote much more coverage to schools and teachers than larger papers, and limitations in terms of capital, copy editing expertise and legal advice amount to a much greater chill on their ability to publish than on the ability of larger, daily newspapers.

With little funding, it is easy for a small newspaper to be intimidated by the fear of a long, drawn-out lawsuit. Small newspapers traditionally employ persons with limited or no formal journalism training to write and edit articles. Cox, the author of the article in *Lipscomb*, received his college degree in economics, not journalism.[66] Because of this lack of expertise in the editing process, the news editor of a small paper is going to be more reluctant to assign a story that has

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[64]. In Lipscomb the jury awarded the plaintiff $1,000,000 in compensatory damages and $45,000 in punitive damages. *Supra* n.5.

[65]. In addition to the public official question, the court cited two main issues, and three collateral issues:

(1) If Lipscomb was not a public official, was negligent publication by Cox and the newspaper subsumed in the jury's finding of a publication with reckless disregard for the truth; and, if so, was the evidence in this case sufficient to support a finding of negligent publication?

(2) Was the evidence in this case sufficiently clear and convincing to support the jury's finding of publication by Cox with a reckless disregard for the truth, which Lipscomb must establish to recover punitive damages?

Collateral issues were the admissibility of an expert's opinion on the standard of care, the obligation of a trial court to segregate potentially defamatory evidence from nondefamatory evidence in its instruction to the jury, and the size of the jury's verdict. 234 Va. at 281, 362 S.E.2d at 34.

[66]. 234 Va. at 297 n.6, 362 S.E.2d at 43 n.6.

libel potential, and, when those stories are covered, the paper will err on the side of less coverage to avoid the risk of a defamation suit.

The third effective chill on small papers deals with their comparative lack of legal assistance. While large papers can afford to have in-house counsel to prevent a libelous article from being published, or at least to mitigate the damage once a mistake has been made, small papers usually can only afford to retain an attorney to deal with problems after they have risen to the level of an impending lawsuit. In *Lipscomb*, the Virginia Supreme Court could have avoided this problem by exercising its power to give defamation defendants protection beyond the minimal federal requirements extended in *Gertz*.[67]

Coverage of borderline public officials, including schoolteachers, is the mainstay of rural, non-daily publications which do not have the resources or economic incentive to cover national events and figures. The market for coverage of larger events and people is adequately served by the metropolitan and national newspapers. People buy rural and non-daily newspapers to keep themselves informed on local matters such as religious organization activities, business and club functions, educational matters, and crime reports. The court does not fully realize the chill it has cast on small newspapers with the *Lipscomb* decision. Small papers do not have the resources to challenge this action. Any challenge in court must come from a larger metropolitan newspaper with the resources to take a court battle to Virginia's high court. Until then, local press in Virginia will be restrained from coverage of many of the events which make their publications viable.

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[67]. The Virginia Constitution contains an "abuse" clause where "any citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right..." Va. Const., Art. I, Sec. 12. While some state courts have relied on similar "abuse" provisions to follow the minimal protections of Gertz, *see, e.g.*, Troman v. Wood, 62 Ill.2d 184 (1975); McCall v. Courier-Journal & Louisville Times, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982). Other state courts have not felt themselves bound by similar clauses, *see*, Diversified Management v. Denver Post, Inc. 653 P.2d 1103 (Colo. 1983); Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind.App. 671 (1974), *cert. denied*, 424 U.S. 913 (1976).

VESTED RIGHTS IN LAND USE: MUNICIPALITIES V. DEVELOPERS

INTRODUCTION

Zoning is an area of the law which involves two opposing interests. Walter F. Witt, Jr., a partner in the law firm of Hunton & Williams, aptly summarized this opposition, saying, "The public interest in land use regulations, which is subject to frequent changes because of shifting demands, is set against the interest of landowners and developers which depends on determining with certainty permissible land uses."[1] Nowhere is this conflict more apparent than in the issue of whether rights can vest in uses given by municipal zoning ordinances.

A vested right is defined in Black's Law Dictionary (5th Ed.) as:

> Rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or cancelled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law. . . . Such interests as cannot be interfered with by retrospective laws; interests which it is proper for the state to recognize and protect and of which the individual cannot be deprived arbitrarily without injustice.

Vested rights, with respect to zoning, have evolved from the 14th Amendment's Due Process clause in the United States Constitution, which prohibits the illegal "taking" of an individual's property without just compensation.[2]

Such rights are normally held protective of only the existing uses made by the landowner. There is no right, generally, to the continued existence of a zoning ordinance and to any prospective uses which are allowed thereunder.

> "[I]t is clear . . . that an amendatory zoning regulation cannot be applied so as to require destruction, removal, or abatement of pre-existing structures or uses. It is equally clear, however, that a landowner who merely hopes or plans to develop his property in a certain way at some time in the future has no protection against zoning changes prohibiting such development."[3]

The question is therefore where to draw the line between pre-existing uses and a "mere hope" of development.

THE LAW IN GENERAL

As mentioned above, there is no right to the continued existence of a given zoning ordinance. The rule in a majority of states allows for such ordinances to

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1. "Vested Rights in Land Uses", *Planning in Virginia*, January, 1988.

2. 4 Rathkopf, *The Law of Zoning and Planning*, Sec.50-03(1).

3. 49 ALR3d 13 Sec. 2(a).

have retrospective effect on properties upon which there is no existing use.[4] Further, a landowner acquires no vested rights to continue or complete construction, or to initiate or continue a use, unless, prior to the effective date of the legislation, he has relied on a validly issued building permit, in good faith, by substantially changing expenditures or obligations. There are two major exceptions to this rule.

According to the "Washington Rule," the right to develop the property vests at the time the permits are applied for in good faith. The ordinance in effect at that time is controlling, rather than any ordinance adopted subsequently.[5] This is the most liberal rule, as it allows the point of vesting to be controlled totally by the developer, without regard to his loss if the subsequent ordinances were held applicable.

The other exception, known as the "Illinois Rule," allows for vesting to occur at the time an application is made in good faith, as long as the landowner's position with regard to the land has substantially changed, either through expenditure or obligation.[6] This rule falls somewhere between the majority and Washington rules, in that it allows for vesting to occur at the earlier period in time (i.e., when the application is made), but requires the landowner to show the harmful affects from applying the subsequent ordinance.

Many scholars and academics who have written on this subject have made a distinction between equitable estoppel and vested rights. Equitable estoppel focuses on the equities of the situation while upholding the municipality's right to rezone retrospectively. The vested rights issue focuses on the property interest of a landowner and the consequential lack of governmental police power to take such property away.[7] Equitable estoppel is normally used in states which follow the majority rule, in order to give relief from the harshness of that rule, while vested rights analysis is used in the states that follow one of the exceptions.

Whether in the form of equitable estoppel or one of the exceptions to the majority rule, the theoretical foundation is the same: fundamental fairness. The Supreme Court of Illinois recognized this and named the injustice resulting from upholding such a retrospectively-applied amended ordinance as their reasoning for the so-called "Illinois Rule."

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4. *See* 4 Rathkopf Sec. 50.03(3); 49 ALR3d 13 Sec. 2(a); 50 ALR3d 596 Sec. 2(a); *American Law of Zoning* (3rd Ed.) Sec. 606.

5. *See* 1988 *Zoning and Planning Law Handbook*, Clark Boardman Company, Ltd., New York, New York, 1988, quoting *Valley View v. Redmond*, 107 Wash.2d 621 (1986), and *West Main Associates v. City of Bellevue*, 106 Wash.2d (1986).

6. 4 Rathkopf Sec. 50.03(2).

7. *See* Witt, *supra* note 1, at 15.

> "Where an individual or corporation expends substantial sums relying on the then existing zoning and zoning ordinance and proceeds to seek a permit in compliance with them, it would be a grave injustice to allow municipal officials to hold up action on issuance of a building permit until an amendatory ordinance could be passed, changing the standards to be met so that a permit formerly lawful would now not be issued due to an abrupt change in the law."[8]

Most courts, in analyzing this fairness, do so by looking at the "good faith" of the parties involved. In order to find good faith on the applicant's part, courts look to many of the following factors:[9]

- purchase of the property in question for the specific use indicated in the application for the building permit.
- relative usefulness of the subject property for other purposes.
- duration or stability of the zoning classification existing when the permit application was filed.
- openness in dealings with municipal officials, including inquiry into the current zoning status of the applicant's property and into the existence of any proposals to change the zoning, and free and full disclosure of the applicant's plans.
- receipt of assurances from municipal officials as to the legality of the proposed construction or as to the issuance of the requested permit.
- payment of filing fees or other costs in applying for a building permit.
- expenses and obligations incident to preparation for construction, such as payment of architectural or engineering fees, performance of preliminary site work not requiring a building permit, entering contracts for construction, supplies, and other building obligations, and similar matters.

Similarly, in an effort to determine just resolutions, courts will also look at factors which relate to the municipality's good faith, such as:[10]

- Inordinate or unexplained delay in processing the subject application, or its flat refusal to issue the requested permit at a time when its issuance was lawful.
- Affirmative efforts to mislead the applicant or lull him into believing that his permit would be issued as a matter of course.
- The fact that the rezoning process was initiated solely because of the applicant's proposed construction, and was aimed at thwarting his plans.

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8. Cos. Corp. v. City of Evanston, 27 Ill.2d 570 (1963).

9. 50 ALR3d 596 Sec. 2(b).

10. *Id.*

Imposition of frivolous, technical, or previously unenforced requirements with respect to the permit application or the applicant's plans and specifications.

In applying rules that also require the landowner to show a substantial change in position, there has been wide variance as to what constitutes fulfillment of that requirement. One theory requires the change in position to be measured in dollars and for that amount to be considered substantial when measured relative to the total development costs. This position has obtained momentum in many of the states applying the majority and Illinois rules.[11]

THE LAW IN VIRGINIA

Currently, the law in Virginia with respect to vested rights is unclear. Section 15.1-492 (Vested rights not impaired; nonconforming uses) of the Virginia Code provides relief to landowners who wish to continue an existing use allowed for under an old ordinance but prohibited under a subsequent one. Of course, this type of relief is in line with most states and does not help in determining the issue at hand. The case law gives far more guidance but leaves undecided the specific issue of whether and when a prospective use, as allowed for under the existing ordinance, can become vested in a landowner, who has not yet actually begun using the property.

The Supreme Court of Virginia has generally settled zoning issues with the underlying premise that a balance between the individual landowner and the society at large must be maintained so as to provide predictability in the law.

> The zoning statutes of Virginia, and those enacted by her political subdivisions, are designed to strike a delicate balance between private property rights and public interest. One who owns land always faces a possibility of its being rezoned. However, our policy, which holds that permissible land use should be reasonably predictable, assures a landowner that such use will not be changed suddenly, arbitrarily or capriciously, but only after a period of investigation and community planning, and only where circumstances substantially affecting the public interest have changed. As we said in *Fairfax County v. Snell Corp.*, 214 Va. 655, 659 (1974): 'Such stability and predictability in the law serve the interest of both the landowner and the public.'[12]

Given this general proposition, there are two cases, decided in 1972, which have universally been viewed as landmark cases in Virginia for this area of the law: *Fairfax County v. Medical Structures*[13] and *Fairfax County v. Cities Service*.[14] The cases are, for the most part, factually identical. They involve

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[11]. *See* Witt, *supra* note 1, at 16.

[12]. Cole v. City Council of Waynesboro, 218 Va. 827, 834 (1977).

[13]. 213 Va. 355 (1972).

[14]. 213 Va. 359 (1972).

property for which special use permits had been obtained prior to the complainant's purchase of the property. The landowner then filed site plans with the appropriate Fairfax County authorities. Subsequent to the filing of these applications but prior to their approval, the County Board of Supervisors amended the pertinent zoning ordinances, so as to void the special use permits upon which the site plans were based. In *Medical Structures*, the court said:

> [T]hat where, as here, a special use permit has been granted under a zoning classification, a bona fide site plan has thereafter been filed and diligently pursued, and substantial expense has been incurred in good faith before a change in zoning, the permittee then has a vested right to the land use described in the use permit and he cannot be deprived of such use by subsequent legislation.[15]

The Board of Supervisors in *Medical Structures* relied heavily upon *McClung v. County of Henrico*.[16] McClung was issued a valid building permit based on a normal zoning classification and the zoning ordinance was subsequently amended so as to prevent the use allowed for in the permit, if construction was not begun in ninety days. The subsequent ordinance was allowed to control in that case even though McClung had cleared and graded the land, set up building stakes, hauled building stone to the site and contracted to have the foundation dug and poured. The court, after a detailed analysis of the definition of construction, denied that McClung's activity constituted a construction start.

The court distinguished *McClung* in the latter two cases by saying that although the landowner had acquired a vested right in the use given by the permit, as was the case in *Medical Structures*, such rights expired when McClung failed to start construction within ninety days as was required by the zoning ordinance. Even though the court claimed there were factual differences and did not specifically overrule *McClung*, *McClung* is clearly not in line with the court's reasoning in either *Medical Structures* or *Cities Service*. Practically speaking, it has lost any precedential power it might have had outside of its factual setting.

In *Cities Service*, decided immediately after *Medical Services*, the Court quoted its decisions from *Medical Services* and found that the developer had acquired a vested right in the site plan application based on the use allowed to him by the special use permit.[17]

The line of reasoning used by the court in *Medical Structures* and *Cities Service* is generally thought to put Virginia among those states which follow the "Illinois Rule." Those in opposition to this reading of those cases, however, make the point that special use permits are far different from normal zoning

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[15]. Fairfax County v. Medical Structures, 213 Va. at 358.

[16]. 200 Va. 870 (1959).

[17]. Fairfax County v. Cities Service, 213 Va. 359, 362 (1972).

classifications. Whereas special use permits offer the municipality an opportunity for site specific analysis and give the landowner an objective governmental act upon which to rely, normal zoning classifications give neither. That argument normally concludes by calling for building permit approval to be the point in time at which vesting occurs with regard to such classifications.

Even if this line of reasoning were followed, building permit approval would have to be replaced by site plan approval. If not fully accepting the Illinois rule, the court, in *Medical Structures*, clearly found, at least with regard to urban development, that the site plan had replaced the building permit as an appropriate point in time to mark both the landowner's and government's intent with respect to the property. "Under current planning practice in many urban localities, the site plan has virtually replaced the building permit as the most vital document in the development process."[18]

In addition to *Medical Structures* and *Cities Service, Planning Commission v. Berman*[19] has also been upheld as a key Virginia Supreme Court precedent in this area and furthers the premise that Virginia is following the Illinois Rule. In that case, the landowner applied for site plan approval for a restaurant in an area which was zoned to allow for such a use and which, in fact, had several free-standing restaurants already. The landowner applied for site plan approval after having amended the preliminary plan, per the Planning Staff's recommendations. The site plan was denied by the Planning Commission, at which time the landowner filed for a writ of mandamus. Subsequent to all of these events, the City Council amended its zoning ordinance to prohibit the proposed use.

The trial court awarded the writ, but on appeal to the state supreme court, the City claimed the amended ordinance should have been the law applied by the trial court. The Virginia Supreme Court disagreed and upheld the trial court's ruling, after finding that the ordinance was precipitated by the site plan application of the landowner. In doing so, the court said:

> The trial court has found on credible evidence that at the time their petition was filed, appellees had complied with all provisions of the ordinances of Falls Church and the usual procedures and requirements, or were ready, willing and able to comply. Under such circumstances, approval of the site plan and the issuance of a permit were no longer discretionary but ministerial and mandatory.[20]

This case seems to indicate that the site specific analysis associated with special use permits and site plan approval is not a factor which should be

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[18]. Fairfax County v. Medical Structures, 213 Va. 355, 357 (1972).

[19]. 211 Va. 774 (1971).

[20]. *Id.* at 776-7.

considered by the courts of Virginia in their analysis of this issue. It is also an indication that normal zoning classifications are a sufficient governmental act upon which landowners should be able to rely in making their development plans.

The specific issues of whether a landowner has a vested right in a by-right use[21] allowed for under the zoning classification of his land and outlined in his site plan application and, at what point in time such a right vests, have not been decided by the Court. Two recent cases in Alexandria involve exactly these issues. The facts of each case are virtually identical.

The first case (*FADCO*) was decided against the landowner and remains on appeal before the Virginia Supreme Court.[22] In this case, the developer filed a site plan for construction of a 150-foot office building, which height was allowed under the existing ordinance. Subsequent to the application, the ordinance was amended so as to prohibit heights over 50 feet, with heights of 77 feet allowed for by special use permit. The amended ordinance gave its restrictions retroactive effect to all site plan applications not yet approved. The Planning Commission denied FADCO's application based on the amended ordinance and the City Council affirmed their decision. FADCO sought a declaratory judgment and the city filed a motion for summary judgment. In awarding summary judgment, the circuit court said that, absent a special use permit or another form of governmental approval specific to the applicant's property, the applicant had no vested interest in the site plan application for a proposed use.

The second case was in federal district court but was settled before the court made its decision.[23] In *Potomac Greens*, the developer filed a site plan for a use allowed under the existing ordinance. At the public hearing before the Planning Commission, it was determined that the height of the building applied for exceeded the heights permitted by the existing ordinance and, by agreement, consideration of the site plan was deferred. A revised site plan, with a lower height, was then submitted for the Commission's next public hearing. Prior to the developer's first application, the City Council had initiated the process of amending its ordinance, to prevent the use applied for by the developer without a special use permit. The ordinance became effective between the time the revised site plan was filed and heard by the Planning Commission at its next hearing.

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[21]. Under a given zoning ordinance, a landowner is allowed some uses automatically or "by right", and some uses under a special use permit, if such a permit is approved by the municipality.

[22]. First Ameriland Development and Construction Company (FADCO) v. City of Alexandria, At Law No. 1132d (1987).

[23]. Potomac Greens v. City of Alexandria, Civil Action 831A (E.D. Alex. 1987).

The case was never decided. The memoranda for both sides, however, typify the pro and con arguments of this issue. The developer argued that laws are generally not applied retroactively and that that rule applies in Virginia to "substantive" as well as "vested" rights. As precedent, he cited *Shiflet v. Eller*[24] and *Potomac Hospital Corp. v. Dillon.*[25] Further, he claimed that the decisions in *Medical Structures* and *Cities Service* were distinguished as involving special use permits. Additionally, citing *Sullivan v. Town of Salem*[26] and *Bain v. Boykin,*[27] he made the argument that a case should be determined by the law as it exists at the time of decision by the court. He also argued that laws are routinely given retroactive effect where the legislative branch enacting such a statute has indicated that such was their intent.

In furthering this reasoning, the city makes its most compelling argument by citing *Chesterfield Civic Association v. Board of Zoning Appeals,*[28] a case decided by the Supreme Court of Virginia two years after the court's landmark decisions in *Medical Structures* and *Cities Service.* In *Chesterfield*, the developer applied to the Board of Zoning Appeals (BZA) for a special use permit, which the BZA was allowed to grant under the existing ordinance. Subsequent to the landowner's applications but prior to the BZA's decision, the County Board of Supervisors amended the ordinance withdrawing the power of the BZA to grant special use permits, reserving it to themselves. The amended ordinance was silent as to the retroactivity of the law. The BZA awarded the special use permit and the complainant civic association then filed a writ of certiorari to have the decision overturned. The court overruled the BZA's grant of the special use permit by upholding the retroactive effect of the amended ordinance. The city used this case to press the point that local governments have the unquestioned authority to amend their own zoning ordinances and to apply such an amended ordinance to any pending applications.

While this is admirable advocacy, it is probably not a fair reading of that case. The court, in *Chesterfield*, primarily based its decision on the fact that the authority to grant special use permits ultimately resides in the Board of Supervisors or a like governing body. Further, the court said that that body is able to delegate that authority and, as in *Chesterfield*, to withdraw any such authority so delegated. Since the authority was withdrawn from the BZA before

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[24]. 228 Va. 115 (1984).

[25]. 229 Va. 355, cert. denied, 474 U.S. 971 (1985).

[26]. 805 F.2d 81 (2d Cir. 1986).

[27]. 180 Va. 259 (1942).

[28]. 215 Va. 399 (1974).

they acted upon the application, the application approved subsequently was held to have been invalidly approved and as such, was void.

In a more recent case in Alexandria, this line of reasoning was used by the city to defend itself against another claim involving a retroactive zoning ordinance. *Dominions Lands v. The City of Alexandria.*[29] In that case, the developer submitted a site plan for a development which met the existing height limitations of 50 feet. The planning staff recommended approval. The site plan was scheduled for review by the Planning Commission on September 1, 1987, and the developer claimed it was in conformance with the existing ordinance and that they were "ready, willing and able to comply" with the planning staff's recommendations. The Planning Commission deferred the review until October 6, 1987 and then recommended an amendment to the city ordinance which would have limited the height of development in the area to 30 feet, with 50 feet allowed for by special use permit.

The city council then failed to approve the ordinance before the October 6th review and the Planning Commission was thus forced to recommend approval. These actions may have been prompted by an action in mandamus which was filed by the developer when it heard of the proposed ordinance. The city council subsequently approved the amended ordinance on October 13, 1987. The adjacent property owners appealed the approval of the site plan by the Planning Commission, additionally claiming that the amended ordinance should be applied to the case on appeal. The developer filed for a declaratory judgment and when the matter came before the council, they deferred it until the issue could be settled in Court.

Primarily relying on *Planning Commission v. Berman*[30] and *Shiflet v. Eller*,[31] the developer maintained that site plan approval was a ministerial function, that they were "ready, willing and able" to proceed with construction under the existing zoning and that statutes are presumably prospective and should not be given retroactive effect.

The City argued two points. First, it argued that the case was not ripe, because the use required by Dominion Lands could still be applied for and that it had not been to date. Secondly, citing *Chesterfield Civic Association v. Board of Zoning Appeals*,[32] the city argued that final authority for approval of site plans rested with the city council and so many preliminary administrative approvals

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[29]. At Chancery No. 18106 (1987).

[30]. 211 Va. 774 (1971).

[31]. 228 Va. 115 (1984).

[32]. 215 Va. 399 (1974).

could not be relied on by the developer. Therefore, the city council should be able to apply the law as it exists when they make their final review of a site plan.

The circuit court, however, found in favor of the developer. First, it held that having a by-right use changed to a use available only by permit was injury enough to warrant adjudication. Secondly, the court, citing *Medical Structures*, said that the preliminary site plan had virtually replaced the building permit and that once its approval was given, the building permit was normally given as a matter of course. Therefore, the ordinance passed subsequent to Planning Commission approval of such a site plan should not be given retroactive effect, especially because there was no indication by the council, in approving the ordinance, that they intended to give it such an effect.

CONCLUSION

The case note briefs of the lower court opinions above signify both the complexity of this issue and its unsettled state in the Commonwealth. The issue will hopefully be decided by the holding of the Virginia Supreme Court in the *FADCO* litigation. The following is an attempt to prognosticate the outcome of that case and thus, give a fair reading of the court's precedent in this area.

The two most important cases remain *Medical Structures* and *Cities Service*. These are the *only* cases in which the court specifically recognizes the "vested rights" of a property owner to a use of his property allowed for by local ordinance, while deciding a zoning issue. Although both cases involve uses allowed the landowner by previously awarded special use permits, the opinions of the cases focus on the substantial change in position of the landowner in reliance upon a use so given and not upon the legislative act conferring those rights originally.

First, the Court included the argument of *Medical Structures* in its opinion, that "once a diligently pursued site plan is filed in reliance upon existing zoning or the issuance of a special use permit, fairness dictates that a vested right is acquired in the land use."[33] The court then followed this statement of the respondent with its finding that the site plan has replaced the building permit as the most important document for development, saying, "The filing of such a plan creates a monument to the developer's intention, and when the plan is approved, the building permit, except in rare situations, will be issued."[34]
Immediately following that case, the Court decided *Cities Service*, which they found "factually similar," and said, "[a]ccordingly, we hold that Cities Service's

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[33]. Fairfax County v. Medical Structures, 213 Va. 355, 357 (1972).

[34]. *Id.* at 358.

right to the land use described in the use permit vested upon the filing of the site plan...."[35]

Attempts are often made to distinguish these cases as involving special use permits, as stated above. Normally, this is done by quoting the respondent's argument as outlining the issue to be reliance on the existing zoning *and/or* the special use permit, and then stating how the court specifically refused to decide the broader issue and only decided as to the use given by a special use permit. This is then interpreted as an affirmative act by the court to hold that site plans based on normal zoning classifications do not carry the same vested rights as do plans based on special use permits.

A fairer interpretation, given the dicta in both cases concerning the substantial expense which both developers had incurred in preparation of their site plans, would be that the court simply chose not to settle issues not directly before it. Continuing the reasoning of the court in these cases to its logical conclusion concerning the issue of this memorandum, it would simply not make sense to protect the substantial expense incurred by the landowner prior to a site plan's submission with regard to use given by a special use permit and not grant the same protection to a developer whose plan is predicated upon a by-right use given by a normal zoning classification. Both are legislative acts of the governing body regulating a landowner's property which are subject to change, and, barring such a change, should be grounds upon which a landowner can rely in making plans for the use of his property.

In addition to these case precedents, the court's holding in *Berman* also bolsters the argument that rights should vest at the time a site plan is filed, even when it is based upon normal zoning classifications. In that case, the court's decision found site plan approval by the governing body of a municipality to be "ministerial and mandatory" rather than "discretionary" where the landowner was "ready, willing, and able to comply" with the applicable ordinances or usual procedures and requirements of that locality.[36] Further, the most recent case involving land use issues, *Cole v. City Council of Waynesboro*,[37] upheld land use predictability as being of paramount importance. The court said that land use designations should not be suddenly changed but altered only after careful consideration "and only where circumstances substantially affecting the public interest have changed."[38]

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[35]. Fairfax County v. Cities Service, 213 Va. 359, 362 (1972).

[36]. 211 Va. 774, 776-7 (1971).

[37]. 218 Va. 827 (1977).

[38]. *Id.* at 834.

Clearly, these cases taken in concert place Virginia more in line with the Illinois rule than with either the majority or Washington Rules, as quoted earlier. The rule in Virginia, therefore, would seem to be, that a landowner acquires a vested right in the use applied for in a site plan, at the time in which such a plan is filed in good faith, if such a use is a designated by-right use under the existing zoning classification of the land for which the site plan is filed, or the use is founded upon a previously-issued special use permit.

The only case which may fall outside of this analysis of the Virginia Supreme Court precedent in this area is *Chesterfield Civic Association v. Board of Zoning Appeals.*[39] In that case, the court held that the ultimate police power to make zoning decisions lies with the legislative body of a municipality, as granted by the General Assembly, and that, therefore, such power may be reserved to that body so as to void any applications before lower administrative agencies, or decisions subsequent to such a reservation. The argument could be made for extending this holding to include the further premise that any site plan application before the Planning Commission can be held invalid at the governing body's pleasure, as the Commission's power of approval is delegated to it by the local governing body, and therefore, it cannot be relied on by the developer in making his plans.

This argument was attempted by the city in the *Dominion Lands* case but was rejected by the circuit court of Alexandria. That reading of *Chesterfield* would be in direct conflict with the decisions in *Medical Structures, Cities Service* and *Berman.* There is no precedent for the notion that only the governing body's approval is enough of a governmental act upon which the landowner can state reliance, because only that body has constitutionally delegated police power. Even conceding this case as precedent, a municipality would presumably have to completely withdraw a Planning Commission's power to itself before any pending applications would lose their associated vested rights, as was the case in *Chesterfield.* Local city councils and/or Boards of Supervisors are unlikely to take this drastic step in order to thwart one developer's plans. Further, any repeated use of this mechanism would surely be held as an "arbitrary and capricious" act and therefore illegal as against the "Due Process" clause of the 14th Amendment of the U.S. Constitution.

STATUTORY RELIEF

Even if the above rule is an effective reading of the existing Virginia Common Law in this area, problems remain. The two most obvious are those of (1) what constitutes a "filing" and (2), at what time an ordinance becomes "existing"; or, phrased differently, when is an application made in good faith.

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[39]. 215 Va. 399 (1974).

Although, the prospective supreme court holding in the *FADCO* litigation could conceivably settle these disputes, it is unlikely, given that court's propensity for failing to settle issues not strictly within the facts of the case before it. A more appropriate remedy for this issue, in any event, is legislation by the General Assembly of Virginia.

Walter F. Witt, Jr., in his article "Vested Rights in Land Uses,"[40] gives a solid proposal for such legislation which adequately balances the individual landowner's rights and the interests of the public at large, as well as complying with the pertinent precedents of the Virginia Supreme Court. He proposes three legislative steps.

(1) Legislation which provides for rights in land uses which have become vested by way of existing zoning ordinances and a landowner's reliance upon them.

(2) Legislation which prescribes points in time at which such rights become vested. He maintains that three such points exist:
   - When an application is made for subdivision of a residential property.
   - When an application for site plan approval is made with relation to a multi-family, commercial, or an industrial project.
   - When an application for a building permit is made. He maintains that such legislation should, likewise, require accompanying land use or building plans so as to satisfy the substantial expenditure requirement as a matter of course.

(3) Legislation which defines time limits for such vested rights, so as to invalidate such a right, as acquired above, if the project is not begun within a designated time period.

While, as a whole, these proposals are a good foundation upon which legislation could be based, there are some factors which are not considered and should be.

With respect to the second step, a specific body should be designated as the agency to whom an application must be made for rights to vested. The most appropriate and equitable body would probably change according to the type of application, but should be spelled out nonetheless. Likewise, the type of application to be made should be specifically outlined for each situation (i.e., preliminary versus final site plan).

Additionally, a caveat should be included which defines existing law as a law which has actually been passed by the local governing body, thereby relieving the developer from considering any proposed legislation. Actual adoption by the

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[40]. Witt, *supra* note 1.

governing body is not only a clear point in time upon which to base the legislation, but also prevents proposed statutes from obtaining prospective effect and thus delaying a developer's plans based on laws which may never be passed.

VIRGINIA'S FELONY - MURDER DOCTRINE: FROM *HASKELL* TO *KING* AND THE PROBLEMS IN-BETWEEN

INTRODUCTION

English common law extended the punishment for murder to cases where a murder occurs during the commission of a felony. The common law classified this as secondary to the murder, but today it has been codified into what is known as the felony-murder doctrine.[1] The doctrine allows an accomplice to a felony to be convicted of murder if one of the principals of the felony kills someone while perpetrating the felony. What follows is an analysis of the elements of the felony-murder doctrine, and of some of the problems that the Virginia court system has faced in defining these elements.

DISCUSSION

Elements of the Underlying Felony (Felony Requirements)

In order to apply the doctrine, the principals in the first and second degree must be in the process of committing a felony, one element of which is an actus reus (voluntary act) by each party. The key act by the accomplice is a voluntary action of aiding and abetting, keeping watch or lookout, encouraging, or inciting the "principal in the first degree" while the felony is either being planned[2] or is in progress.[3]

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[1]. People v. Goldvarg, 346 Ill. 398, 178 N.E. 892 (1931). *See also* Wooden v. Commonwealth, 222 Va. 758, 284 S.E.2d 811 (1981).

Brief History of Felony-Murder

The felony-murder rule developed as a natural part of common law murder. Its consequences were of no real concern when the rule was originally applied because the punishment for all felonies was death. The underlying felony had the same punishment as the killing that took place as a corollary to the felony. It is only in modern times when the punishment for felonies changed to include penalties other than death that the felony-murder rule came under attack for its harshness.

The contention by many jurists, who oppose the doctrine, is either that felony-murder is unnecessary because it is subsumed under statutory murder or that felony-murder is unfair because it punishes without proving culpability. For these reasons, many states have either abolished felony-murder (Kentucky, Hawaii and Michigan) or have restrained its use (Arkansas, Delaware and New Hampshire). *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980).

However, the state of Virginia has codified felony-murder in two statutes that give it wide applicability to criminal proceedings in the state. Va. Code Ann. Secs. 18.32-33 (1988).

[2]. Horton v. Commonwealth, 99 Va. 848, 38 S.E. 184 (1901).

[3]. Moerhing v. Commonwealth, 223 Va. 564, 290 S.E.2d 891 (1982). See also Ramsey v. Commonwealth, 2 Va. App. 265, 343 S.E.2d 465 (1986); Brown v. Commonwealth, 180 Va. 733, 107 S.E. 809 (1921); Jones v. Commonwealth, 208 Va.

The second element of a felony is *mens rea* (intent to commit a felony).[4] The accomplice must act with purpose, and must consciously engage in felonious conduct. Shared criminal intent with "principal in the first degree".[5] This element can be fulfilled by inference if *actus reus* is met. However, if this type of purposeful conduct is lacking, one may use the "willful blindness" rule set forth in *United States v. Jewell*.[6]

In that case, the defendant was paid one hundred dollars to drive a car across the United States/Mexican border. The defendant did not know that one hundred and ten pounds of marijuana was in the trunk of the car. The defendant contended that he was not an accomplice because he lacked the criminal intent necessary for the illegal transportation of the drugs. The court held that he should have inquired further from the "principal in the first degree" as to why he was being paid to drive across the border. The court termed the defendant's conduct "willful blindness" and ruled that intent may be proven by a showing that the accomplice should have been aware that the conduct he was participating in was probably felonious.[7] A reasonable man standard, similar to that used to demonstrate negligence, should be used to prove "willful blindness".[8]

370, 157 S.E.2d 907 (1967); and Va. Code Sec. 18.2-18 (1982 and Supp. 1986, 1987).

The full text of the Virginia statute Sec. 18.2-18 reads:

How principals in second degree and accessories before the fact punished.--
In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree; provided, however, that except in the case of a killing for hire under the provisions of Section 18.2-31 (b) an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree.

4. Horton v. Commonwealth, 99 Va. 848, 38 S.E. 184 (1901).

5. Hall v. Commonwealth, 225 Va 533, 303 S.E.2d 903 (1983). *See also* Augustine v. Commonwealth, 226 Va. 120, 306 S.E.2d 886 (1983).

6. United States v. Jewell, 532 F.2d 697 (9th Cir. 1976).

7. *Id.*

8. *Id.* The language used by the court in *Jewell* is consistent with a negligence standard of reasonable care.

Actus Reus (First Element of Felony-Murder)

Aside from the felonious act, felony-murder requires a necessary sequence of events leading up to the murder.[9] The intent to commit the felony must precede the intent to kill. If not, the murder is independent of the felony and the accomplice is not liable under a felony-murder theory.[10] Thus, a felon (principal in the first degree) cannot kill his victim and then decide to rob him.

The murder must occur during the felony as defined by the *actus reus*. Generally, this question is answered in part by the satisfaction of the proximate cause requirement. The determination of the length of time encompassed by the felony is critical to the application of the doctrine.[11] In *Haskell*, the defendant helped to rob a sailor in the city of Norfolk by offering the sailor a ride and then stopping at a predetermined location for his counterparts to rob him. After the robbery had ended, the sailor would not allow the felons to escape. Finally, one co-felon shot the sailor in the chest to ensure their escape.

The court in Haskell overruled *Mason v. Commonwealth*, where felony-murder was not applied to an escaping felon.[12] The court in *Haskell* ruled that "the felony-murder doctrine applies where the initial felony and homicide were parts of one continuous transaction and were closely related in point of time, place, and causal connection, as where the killing was done in flight from the scene of the crime to prevent detection or promote escape."[13] The court in *Haskell*, citing *People v. Salas*, stated "... robbery is not terminated until the robber has won his way to a place of temporary safety".[14]

The classic fact scenario is *People v. Gladman.* The felons were termed to still be in the process of committing the felony even though they were in a parking lot a half mile from the murder-robbery site. The court held that the felons, who were fleeing a delicatessen, were in the process of robbing the store

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9. This section refers not to the existence of the underlying felony, but to additional elements that must co-exist with the underlying felony to establish felony-murder *actus reus.*

10. LaFave and Scott, *Criminal Law*, 637 (2d ed. 1986).

11. Haskell v. Commonwealth, 218 Va. 1033, 243 S.E.2d 477 (1978).

12. Mason v. Commonwealth, 200 Va. 253, 105 S.E.2d 149 (1958).

13. Haskell v. Commonwealth, 218 Va. at 1041, 243 S.E.2d at 482.

14. *Id.*, citing People v. Salas, 7 Cal.3d 812, 500 P.2d 7, 103 Cal. Rptr. 431, 58 A.L.R.3d 832 (1972), cert. denied, 410 U.S. 939 (1973).

until they had traveled to a safe and secure place, and until their "booty", if there was any, was safe.[15]

Stipulated Felonies (Part of the Felony-Murder *Actus Reus*)

There are two classes of felonies to which the felony-murder doctrine applies, and varying punishments that accompany these two classes. The first class is statutory and is listed in the Va. Code Ann. Sec. 18.2-32.[16] This class includes arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary, and abduction. The accomplice to any of these felonies is charged with first degree murder if a killing occurs. The punishment is that for a Class 2 felony.[17] The second class of felony is stipulated in the Va. Code Ann. Sec. 18.2-33.[18] If an accidental murder occurs as a result of any other felony not listed in Sec. 18.2-32, the felony-murder doctrine can apply.[19] However, the

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[15]. People v. Gladman, 41 N.Y.2d 123, 359 N.E.2d 420 (1976).

[16]. Va. Code Ann. Sec. 18.2-32 (1982 and Supp. 1986, 1987).

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.

[17]. *See* Wooden v. Commonwealth, 222 Va. 758, 284 S.E.2d 811 (1981).

[18]. Va. Code Ann. Sec. 18.2-33 (1982 and Supp. 1986, 87).

The full text of the statute reads:

Felony homicide defined; punishment.--
The killing of one accidentally, contrary to the intention of the parties, while in the prosecution of some felonious act other than those specified in Sections 18.2-31 and 18.2-32, is murder of the second degree and is punishable as a Class 3 felony.

[19]. In *Aaron*, the Michigan Supreme Court contended that the inherent unfairness in the felony-murder doctrine stems from holding felons guilty of accidental deaths that should be categorized as manslaughter, not murder, because there is no malice. *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980).
However, in the actual usage of the doctrine this flaw is corrected through the use of proximate cause "foreseeability" and "furtherance of the felony" rules. If a death is foreseeable then there is an inherent danger in the underlying felony. This danger connotes reckless behavior and malice by a felon who

accomplice can only be convicted of second degree murder and is punished for a Class 3 felony.[20]

In addition to these two accepted classes, a new class is developing beyond the felonies in the statutory listing of the Va. Code Ann. Sec. 18.2-32. Under *Heacock v. Commonwealth* any "inherently dangerous" felony that can cause death or serious injury regardless of whether the death is accidental can be used to apply the doctrine.[21] In that case, a drug dealer distributed cocaine to some friends at a party. One friend went into convulsions and died after ingesting the coke. The court in *Heacock* deemed the killing nonaccidental, but applied the felony-murder doctrine, although drug possession is not one of the felonies listed under the Va. Code Ann. Sec. 18.2-32.

The court held that the felony was in the possession and ingestion of the coke and that the defendant aided and abetted the perpetrator by distributing the cocaine to him in the first place. The court further stated that cocaine is "inherently dangerous" to human life and its ingestion is not accidental. Thus the court concluded that "inherently dangerous felonies" are a new category of felony-murder punishable as a second degree murder offense. The defendant contended that felony-murder could not apply because the victim was a co-felon. However, the court ruled that a co-felon can be a victim for purposes of felony-murder.[22]

Although the court applied Va. Code Ann. Sec. 18.2-33 as to the punishment of the offense (second degree murder), the court, like other courts, seemed to be hinting that an "inherently dangerous felony" could constitute first degree murder.[23] The judicial trend in the future of Virginia seems to be toward

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proceeds without regard to the danger. Additionally, the "furtherance of the felony" rule shows that the killing was not accidental, but contributed to the success of the underlying felony. The unfairness must not be in the killing and the nonuse of manslaughter, but in holding the accomplice liable for the murder when he had no intent to commit it. For a discussion of transferred malice *see* footnotes 41 and 50.

[20]. *See* Whiteford v. Commonwealth, 27 Va. 721 (1828).

[21]. Heacock v. Commonwealth, 228 Va. 397, 323 S.E.2d 90 (1984).

[22]. *Id.*

[23]. The Virginia Supreme Court used language more consistent with Va. Code Ann. Sec. 18.2-32 than with Va. Code Ann. Sec. 18.2-33. However, it found the murder to be second, not first, degree as Va. Code Ann. Sec. 18.2-32 specifies. *Id.*

expanding Va. Code Ann. Sec. 18.2-32 to include "inherently dangerous felonies", but with the advent of a more restrictive Virginia Court of Appeals which now hears all criminal appeals, this expansion seems unlikely. Thus, four years after the supreme court's opinion in *Heacock* there are still no Virginia cases that expressly hold that Va. Code Ann. Sec. 18.2-32 should be expanded.[24]

Virginia's Accomplice Doctrine (Validating Felony-Murder)

According to *Briley v. Commonwealth*, a "principal in the second degree" is as culpable as the "principal in the first degree" if the accomplice has met the *actus reus* and the *mens rea* requirements of the felony. Hence, the felony-murder

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[24]. *Felony-Murder and the Death Penalty*

Although an accomplice cannot usually be convicted even under Va. Code Ann. Sec. 18.32 of capital murder, the United States Supreme Court made an exception in its recent decision in *Tison v. Arizona*, 107 S.Ct. 1676 (1987), reh'n denied, 107 S.Ct. 3201 (1987). In that case two brothers broke their father out of prison. While escaping, their car broke down in the desert. To obtain another vehicle, the father stopped a car on the highway and killed the family in the car. The brothers did not participate in the killing, but sat idly by while their father brutally killed the family. The Supreme Court held that the initial felony was the escape ant that the killing occurred while the escape was still in progress. The felony-murder rule was therefore applicable to the killing. Although this would normally result in the brothers' conviction for first degree murder, the fact that the brothers showed reckless indifference to human life by watching their father kill the family without attempting to stop him warranted the death penalty for both brothers. Thus the death penalty can apply to special cases of felony-murder.

Does this explanation of felony-murder and the death penalty demonstrate the continued reasoning as set out by the common law in regard to felony-murder and deterrence? Francis B. Sayre, *Cases on Criminal Law*, 527-531 (1930), quoting *Regina v. Serne and another*, 16 Cox C.C. 311 (1887) and *People v. Washington*, 62 Cal.2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965). The answer to this is embodied in the difference in the degree of culpability between an accomplice who has no knowledge of the approaching murder until after the fact and an accomplice who is a witness to the entire incident and has the opportunity to stop the murder. The difficulty is in how foreseeable the murder must be to the accomplice at the scene of the crime. Surely if the principal pulls out a gun and shoots the storekeeper spontaneously, the accomplice has no time to stop the murder. The court determines the reasonableness of the opportunity. As to the degree of culpability and its application to the common law policy behind felony-murder, it seems that as the culpable conduct of the accomplice rises, so does the ability that the accomplice possesses to deter the murder. Under the robbery scenario, the ability to deter the principal is less than in *Tison* where the two brothers just stood by and watched. Since the common law policy of deterrence is at the heart of the doctrine, it is only logical that the punishment should increase with the need to deter. Seen in this light, one may better understand how the United States Supreme Court in the majority opinion written by Sandra Day O'Connor reached its conclusion in *Tison*.

doctrine holds the accomplice liable for the murder committed by the "principal in the first degree."[25]

Corpus Delicti (Second Element of Felony-Murder)

The second general requirement that must be satisfied is that someone must be killed.[26] However, death does not need to occur during the actual felony, but must be a proximate result of injuries received during the commission of the felony.[27] If a body is not found, this requirement may still be satisfied by showing circumstantial evidence of the death.[28]

Proximate Cause (Third Element of Felony-Murder)

The third requirement is that the felony must be the proximate cause of the murder.[29] This requirement is composed of a two-pronged test. First, the murder must satisfy the traditional "but for" prong. "But for" the commission of this particular felony by the principals in the first and second degree, the murder would not have taken place.[30] Generally, if one proves the felony and the corpus delicti, one also passes the "but for" prong.[31]

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[25]. Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980).

[26]. Smith v. Commonwealth, 62 Va. 809 (1871). *See also* Va. Code Ann. Sec. 18.2-32.

[27]. State v. Shortridge, 54 N.D. 779, 211 N.W. 336 (1926).

[28]. Epperly v. Commonwealth, 224 Va. 214, 294 S.E.2d 882 (1982).

[29]. Wooden v. Commonwealth, 222 Va. 758, 284 S.E.2d. 811 (1981). *See also* Va. Code Ann. Sec. 18.2-32.

[30]. *See* Doane v. Commonwealth, 218 Va. 500, 237 S.E.2d 797 (1977).

[31]. *The "Year and a Day" Rule Re-Explored*

The "but for" analysis includes the traditional "year and a day" rule. Although the rule is still used in murder cases today, the rule is treated as a rebuttable presumption, not as a concrete stipulation. The rule evolved due to the absence of medical practices that could adequately determine the causes of death. Thus, the rule supplied the State with a means of ascertaining proximate cause. If the defendant's act was over a year from the victim's death, than proximate cause could not be established and the defendant would be set free. In today's world of high tech medicine, the determination of cause is much easier than when the traditional rule was established. For example, in a case of poisoning, where the traditional rule would fail to establish proximate cause if the

The second prong of the test is much more stringent than the initial "but for" prong. Because the murder is classified under the "but for" prong as dependent on the felony, the second prong narrows this link by adding the requirement of foreseeability to the picture. The murder must not only be dependent, but it must also be foreseeable.[32] In *Haskell*, the foreseeability issue is satisfied by Va. Code Ann. Sec. 18.2-32, as a murder in connection with any of the listed felonies is foreseeable *per se*.[33]

According to *People v. Kessler*, this second prong is deemed the "accomplice theory".[34] In *Commonwealth v. Redline* this "Accomplice Theory" was refined from mere nexus or foreseeability to furtherance of the felony.[35] A co-felon or accomplice is only liable for the actions of the "principal in the first degree" if the murder was in the furtherance of the felony; that is, the murder must be the natural and probable consequence of the felony.[36] *Haskell* reemphasizes this prong by defining "furtherance" in the Virginia court system as "closely related in point of time, place, and causal connection".[37]

Thus in a case where felons are robbing a store and the store manager fights back, the use by one felon of deadly force to kill the manager is foreseeable.[38] Additionally, the felon furthered the success of the robbery by killing one who

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poison had been administered over a long period of time, medical science today can trace the cause of death directly to the poison and establish proximate cause. As a result, medical science has availed the State a method in which the traditional rule can be rebutted.
See generally, Rollin M. Perkins, *Perkins on Criminal Law*, 690-96 (2d ed. 1969).

[32]. *Id.*

[33]. Haskell v. Commonwealth, 218 Va. 1033, 243 S.E.2d 477 (1978).

[34]. People v. Kessler, 315 N.E.2d 29 (Ill. 1974).

[35]. Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958). *See also* Wooden v. Commonwealth, 222 Va. 758, 284 S.E.2d 811 (1981).

[36]. *Id.*

[37]. Haskell v. Commonwealth, 218 Va. at 1041, 243 S.E.2d at 483.

[38]. It is within contemplation that people may be hurt in a robbery, as stipulated in Va. Code Ann.18.2-32. The legislative intent was to deem certain crimes dangerous by their very nature and thus limit judicial mercy by stipulating the punishment as a class 2 felony (first degree murder). Va. Code Ann. 18.2-32 (1982 and Supp. 1986, 1987).

had the potential to apprehend him. In this situation the second prong would be satisfied because a tighter link between the robbery and the murder would be established.

The harder case is an accidental murder. For example, suppose an embezzler steals from his employer. While escaping from the premises with the money, he inadvertently pushes an innocent bystander into the street where the bystander is killed by an oncoming car, or kills someone while operating the getaway car. Is the death of the bystander a foreseeable consequence of his felony? Perhaps the better question is whether this killing furthers the felonies just committed so as to be causally connected to them. Ultimately, the satisfaction of the second prong is not as automatic as it may seem.[39]

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[39]. *See* King v. Commonwealth, 6 Va. App. 351 (1988), as an example of the difficulty in determining "furtherance" and proximate cause.

Note: *Confusion over Proximate Cause (The Evolution of Proximate Cause in the Virginia Court System)*

There is confusion among *Doane, Haskell, Heacock, King* (an Appeals Court case), *Wooden*, which cites *Redline*, as to how they fit into the overall picture of proximate cause. "In *Doane v. Commonwealth* we reserved the question whether the application of the rule requires a showing of causal relationship or whether a showing of mere *nexus* will suffice. We do not decide that question here because it is foreclosed by the evidence which we consider conclusive." *Heacock v. Commonwealth*, 228 Va. 397, 404, 323 S.E.2d 90, 94 (1984) (citing *Doane v. Commonwealth*, 218 Va. 500, 237 S.E.2d 797 (1977)). The Virginia Appeals Court used this quote in *Heacock* to decide for itself that proximate cause was not mere *nexus*, but causal connection. *King v. Commonwealth*, 6 Va. App. 351 (1988). Thus, in the court's opinion it decided an issue that the Virginia Supreme Court would not. However, the Virginia Supreme Court in *Heacock* (1984) overlooked its decision in *Haskell* (1978), which occurred a year after *Doane* (1977). *Heacock v. Commonwealth*, 228 Va. at 397, 323 S.E.2d at 90.

In *Haskell* the court defined its position on proximate cause not as "mere *nexus*", but as causal connection. The "felony-murder statute applies where the killing is so closely related to the felony in time, place and causal connection as to make it a part of the same criminal enterprise." *Haskell v. Commonwealth*, 218 Va. at 1044, 243 S.E.2d at 483. The *Wooden* case in 1981 adds to the confusion by citing proximate cause through the *Redline* definition, but made no attempt to define what "furtherance of the felony" as stipulated in *Redline* meant as applied to Virginia law. *Wooden v. Commonwealth*, 222 Va. 758, 284 S.E.2d 811 (1981). Thus, in order to clear the confusion, one must continue to rely upon *Haskell* in truly understanding what "furtherance" or proximate cause in regards to felony-murder connotes in Virginia. *Haskell v. Commonwealth*, 218 Va. at 1944, 243 S.E.2d at 483. The key is in the causal relationship between the felony and the murder. Therefore, the grand conclusion of the Virginia Court of Appeals in *King* had already been decided by the Virginia Supreme Court ten years earlier in *Haskell.*

Malice Aforethought (Fourth Element of Felony-Murder)

The last requirement of the felony-murder doctrine is *mens rea.*[40] The intention to commit the actual murder, as well as to commit the felony, is required. According to *Wooden*, all of the requirements of common law murder must be satisfied by the accomplice (principal in the second degree) in order to apply the felony-murder doctrine.[41] The *actus reus* is satisfied by the accomplices' participation in the initial felony, the *corpus delicti* and proximate cause requirements are satisfied as described in the previous two sections and the *mens rea* requirement is satisfied by the application of a rule stipulated in *Heacock.*[42]

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[40]. *Discussion of Mens Rea*

There are generally four levels of intent: purpose (specific intent), knowing (general intent), reckless (unjustifiable risk or gross negligence), and negligence (lack of reasonable care).

The *mens rea* or intent required by felony-murder shifts in accordance with the underlying felony. This is due to the implied malice inherent in the doctrine. Thus, robbery which connotes a specific intent carries over to the murder. This is a logical progression of intent, as Va. Code Ann. Sec. 18.32 would apply the felony-murder rule to the charge of first degree murder. First degree murder, like robbery, is a specific intent crime. Larceny is also a specific intent crime, but does not come under the Va. Code Ann. Sec. 18.32 in its application of the felony-murder rule. The defendant in a larceny case is convicted under the Va. Code Ann. Sec. 18.33 felony-murder rule of second degree murder, yet the larceny defendant had the same type of intent as the robber in the first scenario. Can it then be presumed that Felony-Murder is a specific intent crime applying to Va. Code Ann. Sec.Sec. 18.32 and 18.33 equally? The answer is no. An example is found in nonfeasance crimes, as when a truck driver fails to comply with a safety regulation that is required under federal law. The crime is not a specific intent crime, but one of general intent. The intent distinction is due to a circumstance in which the driver may be aware of the way a chemical is being transported without being aware of the regulations that govern that transportation. The result is termed "strict liability". If someone is killed due to the lack of compliance with the safety regulation, the driver could be found guilty of second degree murder under the Va. Code Ann. Sec. 18.33 felony-murder rule because the failure to meet the safety regulations is a felony. Thus, a general intent crime can impute the malice necessary to establish second degree murder. This proposition defeats any notion of logical order between the underlying felony and the murder as it would pertain to Va. Code Ann. Sec. 18.33 *mens rea.*

Therefore, one may conclude that all specific and general intent underlying felonies apply to Va. Code Ann. Sec. 18.33, while only specific intent crimes pertain to Va. Code Ann. Sec. 18.32. All crimes stipulated under the latter statute are specific intent crimes.

Recklessness and negligence have no application to the rule.

[41]. Wooden v. Commonwealth, 222 Va. 758, 284 S.E.2d 811 (1981).

[42]. Heacock v. Commonwealth, 228 Va. 397, 323 S.E.2d 90 (1984).

According to the *Heacock* rule, the act of committing a felony gives rise to imputed (implied and constructive) malice.[43] This malice satisfies the intent requirement for *mens rea* or "malice aforethought".[44] Malice is imputed because the felons who committed the murder had the original *mens rea* necessary to commit the original felony. Hence the felony *mens rea* is transferred to the murder and satisfies by judicial interpretation the malice requirement. Therefore, as a matter of law, if the accomplice meets the intent requirement for committing the felony, he also meets the intent requirement for the murder. As a result, the accomplice may be liable for the murder of an innocent victim by the principal felon through transference.

However, there are certain exceptions to the *Heacock* rule that tend to limit its application in regard to the imputation of malice in the felony-murder doctrine. There is no transference where the victim is killed by anyone other than one of the felons.[45] To do otherwise would impute malice where none had existed previously. The malice of the "principal in the first degree" is imputed to his accomplice in the felony only. This distinction is very important as a policeman or victim who shoots a co-felon cannot be used as a "principal in the first degree" to convict one of the other co-felons for the murder of a confederate.[46]

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[43]. *Id.*

[44]. *See* Commonwealth v. Gibson, 4 Va. 70 (1817).

[45]. *Where does Felony-Murder malice originate?*

There have been many theories as to how the malice is actually transferred. Some jurists have argued that the malice comes from the "principal in the first degree", *Wooden v. Commonwealth*, 222 Va. at 758, 284 S.E.2d at 811. Others have specified that it is the inherent nature of the original felony that gives rise to the malice, *Heacock v. Commonwealth*, 228 Va. at 397, 323 S.E.2d at 90. However, the best reasoning behind the imputation of malice comes from the common law. Francis B. Sayre, *Cases on Criminal Law*, 527-531 (1930), quoting the common law from *Regina v. Serne and another*, 16 Cox C.C. 311 (1887) and *People v. Washington*, 62 Cal.2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

Because the common law purpose is to punish accomplices who could have prevented the murder by not participating in the original crime, the *mens rea* for the initial felony passes to the murder regardless of the nature of the underlying felony and regardless of the intent of the "principal in the first degree". For this reason it is entirely possible for a robber to accidentally kill a victim without malice. If the robber dropped his weapon, thereby setting off the trigger and killing a bystander, his malice would be constructively transferred to the accomplice. For a discussion of the problems that come with the court's view of malice in *Wooden* and *Heacock* see footnote 50.

[46]. Wooden v. Commonwealth, 222 Va. at 758, 284 S.E.2d at 811.

An example of this scenario is found in *Wooden.* In that case, the felons broke into the victim's apartment at night and waited for him to return in order to rob him. When the victim arrived, he shot and killed one of the felons. The court held that the other felon, the defendant in the case, was not liable for the death of his co-felon as the victim's shooting was done without malice and was classified as a justifiable homicide.[47] The same rule applies to police officers who kill co-felons in a shootout.[48]

In *Heacock*, it was further held that a felon who aids and abets another felon (principal) in committing a felony and the principal felon dies either accidentally or due to the dangerous nature of the felony, malice is imputed to the accomplice felon.[49]

King v. Commonwealth (A Problem Case)

King v. Commonwealth raised questions about the scope of "furtherance" and the meaning of "inherently dangerous".[50] The defendant and victim were in the business of transporting and distributing illegal drugs for a drug smuggling operation. While flying over North Carolina and Virginia the victim, who was piloting the plane without a license, flew low in order to evade detection by law enforcement agencies. While flying at this dangerous altitude, the pilot lost

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[47]. *Id.*

[48]. *See* Redline v. Commonwealth, 391 Pa. 486, 137 A.2d 472 (1958) (a policeman shot a felon and malice was not imputed.)

[49]. Heacock v. Commonwealth, 228 Va. 397, 323 S.E.2d 90 (1984).

Malicious Suicide?

The logic behind the imputed malice theory seems to break down in *Heacock.* The malice not only is imputed from the principal, but from the nature of the felony. The disturbing question presented is whether in a felony other than murder there can be imputed malice as a matter of law. Larceny, for example, has no malice element, yet under the required Felony-Murder conditions the court could deem its existence. Even if this notion of malice from the felony were rejected, the court would still be left to decide whether one can have malice towards oneself. For the principal's malice to be imputed to the accomplice, the malice is transferred from the principal's intent to the accomplice's. Thus the principal must direct his malice toward himself to transfer it to another. If this be true, than it begs the question, "Can suicide be malicious?" The answers to any of the questions that present themselves when a discussion of the imputed malice in *Heacock* is commenced will continue to be controversial and disturbing until the court explains how the malice element of Felony-Murder in this case is truly satisfied.

[50]. King v. Commonwealth, 6 Va. App. 351 (1988).

control of the plane and crashed into a mountainside. The other felon, the defendant in the case, who acted as navigator, was the only one who survived the crash. He was convicted under the felony-murder doctrine.[51]

The court in *King* incorrectly held that the act of distributing drugs was not "inherently dangerous", even though the Virginia Supreme Court held in *Heacock* that marijuana is of the class of drugs that is "inherently dangerous".[52] The court in *King* distinguished that case from *Heacock* in that *Heacock* involved cocaine, but here marijuana, a less harmful drug, was involved.[53] However, according to the supreme court's reasoning in *Heacock* concerning drugs that can kill, both cocaine and marijuana are "inherently dangerous".

The best argument against using marijuana under the felony-murder doctrine that the court in *King* should have mentioned is not that it is not "inherently dangerous", but that in most states possession below a certain amount is a misdemeanor and not a felony. Distribution, as stated in *Heacock*, makes the dealer an accomplice to the felony of possession. Thus, if the possession is not a felony, the first requirement of felony-murder is not met and there is no transference of malice to the accomplice.

The key to this case was not the blunder by the Court of Appeals in incorrectly defining "inherently dangerous", but in its misinterpretation of proximate cause. According to *Haskell* and *Wooden* the murder must "further" the felony in a causal connection.[54] However, that connection does not need to be as restricted as the court in *King* believed. The court in *King* found no

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[51]. *Id.*

[52]. "Inherently dangerous" refers to drugs that have the propensity to kill and to be addictive. *See generally, Heacock v. Commonwealth*, 228 Va. at 404, 323 S.E.2d at 97. Unfortunately, in many states mere possession of various classes of "inherently dangerous" drugs is not a felony. An example of this classification in Virginia is marijuana. Va. Code Ann. Sec. 18.2-248 and Sec. 18.2-249 (1982 and Supp. 1986, 1987).

[53]. However, just as cocaine can kill, so marijuana can kill also. Although marijuana is cumulative in nature and not prone to an overdose as is cocaine, according to Helen Jones, a noted drug expert, marijuana can kill brain cells and cause cancer and heart disease. Jones, *On Marijuana Reconsidered*, Addictive Behavior: Drug and Alcohol Abuse, 109-113 (1985). *See also* R. Petersen, *Marijuana Overview*, Addictive Behavior: Drug and Alcohol Abuse 116-126 (1985). Additionally, marijuana is addictive like cocaine. "One of the most widely accepted misconceptions about marijuana is that a user will not develop physical or psychological dependence. Neither is true." *Id.* at 112.

[54]. Haskell v. Commonwealth, 218 Va. 1033, 1044, 243 S.E.2d 477, 483 (1978).

connection between the fog that caused the accident and the drug trade,[55] but failed to consider the reason why the plane was in the air or why it was flying low in mountainous terrain, which an experienced pilot, such as the defendant, would not do.[56] The court contended that the cause of the crash was the fog. The principal cause of the crash was in fact the low flying, not the fog, done to hide from law enforcement authorities so as not to be caught transporting a controlled substance.[57] The ring leader of the smuggling organization admitted that his employees were flying ridiculously low for ascertaining their location.[58] There was a "causal connection" between the crash and the felony.

The victim was furthering the felony by flying low to avoid detection. The defendant was aiding and abetting the victim by navigating the plane. Hence, proximate cause is easily established and the faulty reasoning of the court in *King*, which restricted "furtherance" and felony-murder, should be disregarded in favor of the Virginia Supreme Court's more expansive ruling in *Haskell* which gives the felony-murder doctrine a more expansive reading.

Possible Defenses to the Felony-Murder Doctrine

In order to fully understand the scope of the felony-murder doctrine, one must not only be acquainted with the elements necessitating the doctrine, but also with the defenses that may be used by the defendant. There are eight defenses to felony-murder that may be employed by the defendant at trial. Seven of these defenses are categorized as affirmative defenses and acknowledge that the prosecution has made out a *prima facie* case against the defendant for the crime charged. The burden rests with the defendant to prove his affirmative defenses.

1. Prosecution's Failure To Meet Its Burden

This is the most common of all the defenses that can be used and is the only nonaffirmative defense that can be employed by the defendant. Failure by the prosecution to prove beyond a reasonable doubt any of the aforementioned elements to felony-murder will constitute a valid defense. The major factor

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[55]. King v. Commonwealth, 6 Va. App. 351 (1988).

[56]. The defendant contended that he flew low to avoid bad weather and to locate himself. Any logical inquiry into the facts would render this argument incredible. The better choice that an experienced pilot, like the defendant, would make would be to fly above the fog and radio the nearest airport for assistance.

[57]. *Id.* at 10-11.

[58]. *See* Appellee Brief at 10, King v. Commonwealth, 6 Va. App. 351 (1988) (No. 0998-86-3).

facilitating the successful use of this defense by the defendant is disproving the underlying felony. In all cases, the dismissal of the underlying felony amounts to a dismissal of felony-murder.

2. Withdrawal

The accomplice can contend that he had withdrawn from the felony and that the causal connection between the accomplice and the felony had been broken before the murder took place.[59] The accomplice cannot just use verbal language to withdraw but must be physically remove himself. The strongest case for the withdrawal defense is when the accomplice calls the police to stop the "principal in the first degree" from completing the felony.[60]

3. The New York Defense

This defense is presently unrecognized in Virginia, but is a persuasive theory that has been made part of the criminal code in New York. The requirements for this defense are as follows:

1. "Principal in the second degree" did not directly aid the "principal in the first degree" in the commission of the homicide.
2. "Principal in the second degree" was not armed.
3. "Principal in the second degree" did not think the "principal in the first degree" was armed.
4. "Principal in the second degree" had no reasonable grounds to believe that the co-felon intended to engage in conduct likely to result in death or serious physical injury.[61]

Although this is a minority view, it is a well-liked theory that may have success in the future in Virginia.[62]

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[59]. State v. Thomas, 140 N.J. Super. 429, 356 A.2d 433 (1976).

[60]. *Id.* at 433.

[61]. N.Y. Penal Law Sec. 125.25(3) (1987).

[62]. LaFave and Scott, *supra*, at 10.

4. Self Defense

The defendant may attempt to show that the "principal in the first degree" acted out of necessity in fear for his own life in killing the victim.[63] The difficulty in sustaining the argument lies in the standard of the self defense doctrine. The standard states, in part, "a man shall not in any case justify the killing of another by a pretense of necessity, unless he were without fault in bringing that necessity upon himself."[64] In a case of felony-murder, the killing is only necessary because of the felon's culpable conduct. Hence, self defense is never a viable affirmative defense to felony-murder.

5. Intoxication

The defendant claims that he was intoxicated and did not possess the required intent to kill the victim or to commit the felony. The use of intoxication to negate an intent to kill is a generally accepted defense to premeditation in first degree murder. However, in felony-murder the malice is imputed so as to avoid an analysis of the specific intent to kill. Only the intent to commit the underlying felony must be proven. Thus the use of intoxication to void *mens rea* is valid only in regard to the underlying felony.

Voluntary intoxication has consistently been held not to be a bar to the question of intent,[65] but if shown acts only to mitigate premeditation in first degree murder.[66] Therefore, if an accomplice becomes voluntarily intoxicated before the felony in order to get up his nerve to participate in the crime, he may not use his lack of sobriety as an excuse. Only involuntary intoxication is a valid defense to felony-murder. Involuntary intoxication as it pertains to forming the prerequisite intent is not a presumption, but goes to the weight of the evidence in demonstrating whether the defendant was intoxicated enough so that his ability to form the necessary intent was impaired.[67]

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[63]. Clark v. Commonwealth, 90 Va. 360, 18 S.E. 440 (1893).

[64]. Bausell v. Commonwealth, 165 Va. 669, 181 S.E. 453 (1935).

[65]. Gill v. Commonwealth, 141 Va. 445, 126 S.E. 51 (1925).

[66]. Jackson v. Virginia, 443 U.S. 307, 312, 313, reh'n denied, 444 U.S. 890 (1979).

[67]. *See generally* Giarrantano v. Commonwealth, 220 Va. 1064, 266 S.E.2d 94 (1980) (mere intoxication is not a *per se* defense to "intent").

6. Insanity Defense

In order to use this defense, the accomplice must be so out of touch with reality that he cannot comprehend the character and consequences of his actions. The defendant is classified as partially insane if he has periods of lucidity where he can understand his actions. Partial insanity cannot be used as a defense.[68]

7. Coercion

The defendant could contend under this defense that the "principal in the first degree" forced him to be a party to the felony, thus negating the defendant's volition. The defendant must establish a sufficient amount of evidence to substantiate his claim. Past actions of the "principal" in dealing with the defendant supply the key evidence in this regard.[69]

8. Cruel and Unusual Punishment (Eighth Amendment)

The criminal justice system's belief in fairness demands that the punishment be commensurate with the offense. Murder is the most serious of charges and provokes the most extreme retribution, which in some jurisdictions includes death.[70] Thus, the burden on the commonwealth to prove murder is a strong one, beyond a reasonable doubt. Through the "accomplice theory" as articulated in *Briley*, the accomplice is treated as a principal to the felony in which he participated.[71] It is unfair to extend felony-murder by the accomplice theory to a situation where an accomplice consciously participated in one felony, but is charged in the commission of another felony. The accomplice in that case is of course not as culpable as the "principal in the first degree". Even in murder cases where there is no underlying felony, the accomplice is convicted of a lesser offense, generally second degree murder. In felony-murder the need to prove culpability is deleted by Va. Code Ann. Sec. 18.32, which specifies a punishment

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[68]. Dejarnette v. Commonwealth, 75 Va. 867, 876-7 (1881).

[69]. In order to determine a "reasonable reliance" by the defendant on the fact that the principal would injure or kill him unless he helped commit the felony, a prior history that shows a trend of abuse must be established by extrinsic evidence. Any prior court proceedings showing abuse of the defendant by the principal can be used toward the weight of the evidence demonstrating coercion.

[70]. *See generally* Va. Code Ann. Sec. 18.31 (1988).

[71]. Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980).

of first degree murder.[72] Perhaps Chief Justice Traynor put it best when he stated that the felony-murder rule "erodes the relation between criminal liability and moral culpability."[73]

Additionally, there are problems in the transference of malice to the accomplice. It is awkward to convict an accomplice with a general intent to commit murder[74] of a specific intent offense such as first degree murder.[75] Malice and premeditation are imputed.[76] The result is a first degree murder conviction under felony-murder that meets none of the elements of murder.

The question of excessive punishment is strong under these circumstances, especially if the policy behind the punishment is general deterrence.[77] Is general deterrence a sufficiently strong policy to impose first degree murder on an accomplice who may not have satisfied all of the elements of murder? The

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[72]. Va. Code Ann. Sec. 18.32 (1988) (stipulation of certain underlying felonies as raising the level of murder participated in by an accomplice to first degree murder).

[73]. J. Cook and P. Marcus, *Criminal Law* 505 (2d ed. 1988) quoting People v. Washington, 62 Cal.2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

[74]. Va. Code Ann. Sec.18.32 imputes a presumption of knowledge for certain felonies, as mentioned above.

[75]. J. Cook and P. Marcus, *supra* note 73.

[76]. For a more complete discussion of malice and Felony-Murder *see supra* 40 and 49.

[77]. *See generally*, Francis Sayre, *Cases on Criminal Law*, 527, 527-31 (1930), quoting Regina v. Serne and another, 16 Cox C.C. 311 (1887). *Serne* discusses felony-murder in terms of the common law and implies the reasoning behind the harsh doctrine to be twofold: first, people intend the consequences of their actions and second, the law must discourage dangerous felonies. *See also* Washington, 62 Cal.2d at 777, 402 P.2d at 130, 44 Cal. Rptr. at 442.

Is the Felony-Murder Doctrine Fair?

There is a heated debate between jurists as to the fairness of the Felony-Murder rule. The opponents of the rule contend that an accomplice should not be forced into rescuing a crime victim. The general rule, whether in tort law or criminal law, is that there is no duty to rescue. Therefore the policy of promoting the rescue of victims either before or during the commission of the felony by deterring the accomplice is defective.

However, the rescuer doctrine does have some notable exceptions. One such exception is if the rescuer caused the conditions that warrant rescue. *See* Parrish v. Atlantic Coast Line R. Co., 221 N.C. 292, 20 S.E.2d 299 (1942) and Hardy v. Brooks, 103 Ga. App. 124, 118 S.E.2d 492 (1961). Because the accomplice's own actions in engaging in the underlying felony caused the condition, it is only fair that the accomplice be held liable to remedy it.

question may only be answered by individual legislatures that have the responsibility of weighing the pros and cons of such a contradiction. However, a court can impose its will on a case by case basis, and the defendant's attorney, using an Eighth Amendment argument, must exploit that role of the judiciary to overturn a first-degree felony-murder conviction.[78]

CONCLUSION

The felony-murder doctrine allows an accomplice to a felony to be convicted of first or second degree murder when a murder he did not commit occurs while the felony is in progress. In order to apply this doctrine, a number of elements must be met. When using this legal theory to convict an accomplice, jury instructions must contain each of the following requirements:

1. *Actus Reus* (committing the initial felony)
   a. The accomplice must be aiding and abetting, keeping watch or lookout, encouraging or inciting the "principal in the first degree" to commit the initial felony.
   b. The accomplice must act with purpose or knowingly while aiding and abetting the "principal in the first degree" to commit the initial felony.
   c. The murder must take place while the initial felony is in progress.
   d. The intent to commit the felony by the "principal in the first degree" must antedate the intent to commit the murder.
2. *Corpus Delicti* (crime committed by a criminal agent)
   a. There must be evidence to suggest beyond reasonable doubt that a human being has been killed.
3. Proximate Cause
   a. "But for" this particular felony, the murder would not have occurred, must be answered in the affirmative.
   b. The murder must be foreseeable.
   c. The murder must "further" the purpose of the felony by being closely related in point of time, place, and causal connection.
4. *Mens Rea* (intent)
   a. As long as the accomplice *acted* with *intent* to commit a felony (requirements 1.a. and 1.b. are satisfied), there is "implied malice" to commit the murder and *mens rea* is satisfied. However, this imputed malice does not apply where the "principal in the first degree" is the victim (non-felon) or a law enforcement official.

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[78]. Although lack of Due Process is an additional constitutional defense that could be used to combat first degree Felony-Murder, it is nevertheless a defense that would fail because the Felony-Murder doctrine was codified and in common usage in most jurisdictions in the early nineteenth century.

As long as these elements are included in the jury instructions, the felony-murder rule may apply. The distinction in charges and penalties to the accomplice is based entirely on the type of felony. Any of the specifically listed felonies under Va. Code Ann. Sec. 18.2-32 carries a charge of first degree murder and is punishable as a Class 2 felony, while any non-listed felony coupled with accidental death or a non-listed "inherently dangerous felony" carries a charge of second degree murder and is punishable as a Class 3 felony.

In conclusion, it may be noted that this doctrine is not as well developed in Virginia as it is in many other states. As the quantity of case law expands, so will the applicability and requirements of the doctrine. Virginia is now beginning to use felony-murder more liberally as a viable theory in criminal law.

This trend began in the mid-1970s with the approval of the Virginia Supreme Court. However, with the new Virginia Court of Appeals, the use of the doctrine has been restricted. *King* may indicate that the court of appeals is trying to follow in the footsteps of the Michigan Supreme Court by abolishing felony-murder. The difference is that Michigan's felony-murder rule was never codified, as opposed to Virginia's. The legislative protection of felony-murder will keep the doctrine available to prosecutors in the future with the hope that judicial deference a goal of the law, deterring crime, will override the protection of criminals at the expense of the community. The doctrine may seem harsh to the criminal, but so are the effects on a family who loses their father to a robber's bullet.

Appendix: Recommended Virginia Jury Instructions

First Degree Felony Homicide

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 that crime:

1. That (Name of Victim) was killed by (Name of "Principal in the First Degree") who was a party to the (Name of Felony).

2. That (Name of the Defendant) was a "principle in the second degree" to the (Name of Felony).

3. That the felony committed was either arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary or abduction.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at:

1. Imprisonment for life; or

2. A specific term of imprisonment, but not less than twenty (20) years.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty of felony homicide.[79]

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[79]. *See Generally*, MICHIE'S JURISPRUDENCE, VIRGINIA MODEL JURY INSTRUCTIONS, CRIMINAL VOL. I 503 (1985 & Supp. 1987).

First Degree Felony-Murder is not addressed specifically in the Virginia Model Jury Instructions, but is instead mentioned as an afterthought in the instructions for First Degree Murder. The difficulty with the Virginia Model Jury Instruction's definition of First Degree Felony-Murder revolves around the inference that only the principal can be prosecuted for First Degree Murder. That assumption is incorrect. The purpose of the doctrine is to punish accomplices who participate in dangerous felonies equally with the "Principal in the First Degree". By punishing accomplices commensurate with the principal, the State hopes to deter dangerous crimes by encouraging accomplices to withdraw from assisting principal actors in the commission of dangerous felonies. *See Generally People v. Washington* 62 Cal.2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

Second Degree Felony Homicide

The defendant is charged with the crime of felony homicide. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

1. That (Name of Victim) was killed by (Name of "Principal in the First Degree") who was a party to the (Name of Felony).

2. That (Name of the Defendant) was a "principle in the second degree" to the (Name of Felony).

3. That the killing in the (Name of Felony) was accidental and contrary to the intentions of the defendant.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at a specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty of felony homicide.[80]

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[80]. *Id.*

For a basic guide on how Second Degree Felony-Murder instructions should be structured, the Virginia Model Jury Instructions are a good starting point. However, the instructions specifically detailing Second Degree Felony-Murder are incomplete and should not be used without further expansion.