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Predicate Offenses for First Degree Felony Murder in Virginia

Richard Brooks Holcomb

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Predicate Offenses for First Degree Felony Murder in Virginia

Richard Brooks Holcomb*

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The supreme excellency of a code of criminal laws consists in defining every act that is punishable with such certainty and accuracy, that no man shall be exposed to the danger of incurring a penalty without knowing it, and which shall not give to courts an incalculable latitude of construction, with respect to the conduct of mankind, and an unbounded discretion in punishment.¹

— Zepheniah Swift

Throughout Western history, obeying the law has depended on the interpretation of statutes²

— William N. Eskridge, Jr.

I. Introduction

The Virginia Code's indeterminant definition of first degree felony murder³ is in serious need of revision. The statute, § 18.2-32, provides:

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 or animate object sexual penetration, robbery, burglary or abduction, except as provided in § 18.2-31, is murder of the first degree, punishable as a Class 2 felony.⁴

The numerous amendments made over the years to the first degree murder statute, the capital murder statute, and related chapters and articles in the Code have combined to produce an unfortunate statutory tangle.⁵ Inconsistency

1. 2 ZEPHENIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 365 (1795).

2. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 1 (1994); see Lon L. Fuller, *The Case of the Speluncean Explorers in the Supreme Court of Newgarth*, 4300, 62 HARV. L. REV. 616, 634 (1949) (discussing potential implications of view that interpreting statutes may be compared to eating shoes, with best part being holes).

3. See VA. CODE ANN. § 18.2-32 (Michie 1996 & Supp. 1999) (defining first degree murder).

4. *Id.*

5. See *id.* (listing amendments to first degree murder statute as "Code 1950, § 18.1-21; 1960, c. 358; 1962, c. 42; 1975, cc. 14, 15; 1976, c. 503; 1977, cc. 478, 492; 1981, c. 397; 1993, cc. 463, 490"). Notable amendments to the felony murder portion of the Code's first degree murder statute include: the addition of abduction as a predicate offense in 1962, see 1962 Va. Acts ch. 42 (amending first degree murder statute to include abduction as predicate offense for felony murder); the elimination of rape as a predicate in 1976, see 1976 Va. Acts ch. 503 (eliminating rape predicate); the reinstatement of rape as a predicate in 1977, see 1977 Va. Acts ch. 478 (amending § 18.2-32 to include rape predicate); the addition of inanimate object sexual penetration as a predicate in 1981, see 1981 Va. Acts ch. 397 (adding object sexual pene-

within the text of § 18.2-32 and a series of incongruous intersections with other relevant portions of the Code combine to defeat traditional methods of statutory interpretation.⁶ Section 18.2-32's principal defect is the reference system for the predicate offenses; the ambiguities in the statute create interpretive problems that, under extreme readings, would allow Class 5 and Class 6 felonies and even misdemeanors to serve as predicate offenses for first degree felony murder.⁷ In its current form, Virginia's first degree felony murder statute fails essential standards of statutory drafting for failing to inform readers of the scope of first degree felony murder predicate offenses.⁸ This failure to inform the public of which crimes actually support a felony murder charge undermines doctrinal justifications, such as deterrence, for having a felony murder statute in the first instance.⁹ An ambiguous and contradictory reference system also creates the possibility of arbitrary and discriminatory enforcement.¹⁰ In extreme cases, minor offenses inappropriately prosecuted as predicates for first degree felony murder would result in highly inequitable results.¹¹

tration predicate to § 18.2-32); and the amendment of the object sexual penetration predicate to include animate objects in 1998, *see* 1998 Va. Acts ch. 281 (amending object sexual penetration predicate). Additional relevant amendments include: the addition of the offense of carjacking in 1993 under the Article titled Robbery, *see* 1993 Va. Acts ch. 500 (defining offense of carjacking); the expansion of the capital murder statute to include willful, deliberate and premeditated killings in commission of robbery or in commission of or subsequent to rape, *see* 1976 Va. Acts ch. 503 (amending § 18.2-31 to include subsections (d) and (e)); and the expansion of the capital murder statute to include an additional abduction subsection in 1985, *see* 1985 Va. Acts ch. 428 (amending to § 18.2-31 to include subsection (h)).

6. *See* VA. CODE ANN. § 18.2-32 (listing statutory amendments relevant to § 18.2-32 and felony murder predicates).

7. *See id.* §§ 18.2-10 & 18.2-11 (establishing penalty structures for felonies and misdemeanors). It is the position of this Note that Class 5 and 6 felonies, which are punishable, at the judge or jury's discretion, by terms of imprisonment less than a year, are questionable predicates for first degree felony murder. *Id.*; *see infra* note 62 and accompanying text (discussing felony murder rule and doctrinal limitation of rule to violent and inherently dangerous offenses); *infra* Parts III.B.3, III.C.3.b, III.D.3, III.E.3 (discussing penalty structures as indicia for proper predicates for first degree felony murder).

8. *See Perkins v. Commonwealth*, 12 Va. App. 7, 16, 402 S.E.2d 229, 234 (1991) (noting that penal statute is unconstitutionally vague in violation of Due Process Clause of Fourteenth Amendment if it fails to define offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement" (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983))).

9. *See infra* Part II (discussing felony murder doctrine).

10. *See Perkins*, 402 S.E.2d at 234 (noting unconstitutionally vague statute can encourage arbitrary and discriminatory enforcement).

11. *See infra* note 38 (discussing parental abduction in violation of custody decree as predicate for first degree felony murder as example of inappropriate application of § 18.2-32's abduction predicate, § 18.2-49.1).

A. Section 18.2-32 and the Predicate Offenses

Virginia divides first degree murder into three distinct categories: killings committed by specific means; willful, deliberate, and premeditated killings; and felony murder.¹² Section 18.2-32 describes felony murder by predicate offense: arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary, and abduction.¹³ However, § 18.2-32 does not reference these predicate offenses by their statutory section number in the Code.¹⁴

This treatment of the predicate offenses requires prosecutors and courts to make determinations about the appropriate statutory reference for each felony murder predicate.¹⁵ In several instances the references are clear.¹⁶ For example, the predicate offense of rape correlates directly with § 18.2-61, which is titled "Rape."¹⁷ Although there are other offenses within the Article titled "Criminal Sexual Assault," § 18.2-32 clearly refers to § 18.2-61 when it names rape as a predicate offense for first degree felony murder.¹⁸ The reference is clear for the predicate offense of forcible sodomy as well, codified at § 18.2-67.1 as "Forcible Sodomy." Inanimate or animate object sexual penetration, codified at § 18.2-67.2 as "Object Sexual Penetration," is also readily ascertainable.¹⁹

In many instances, however, the intended reference is not clear.²⁰ Currently Title 18.2, Chapter 4, Article 5, titled "Robbery," contains two offenses: §§ 18.2-58 and 18.2-58.1. Section 18.2-58, denominated "How punished," lists a variety of actions that establish the violence or intimidation element of robbery and sets the penalty for the offense.²¹ In 1993, the General Assembly

12. See *supra* note 4 and accompanying text (quoting VA. CODE ANN. § 18.2-32 (Michie 1996 & Supp. 1999), first degree murder statute).

13. See *supra* note 4 and accompanying text (listing predicates for felony murder).

14. See *supra* note 4 and accompanying text (listing predicates for felony murder).

15. See *infra* Part III.A.3 (discussing, in context of rape predicate, charging decisions implicated by felony murder doctrine).

16. See ROGER D. GROOT, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA 273 (4th ed. 1998) (stating "[t]here is no difficulty in identifying the three sexual offenses; the references are clearly to violations of §§ 18.2-61, 18.2-67.1, and 18.2-67.2"); see also *infra* Part III (examining sex offense predicates).

17. See VA. CODE ANN. § 18.2-61 (Michie 1996 & Supp. 1999) (defining offense of rape).

18. See *id.* tit. 18.2, ch. 4, art. 7 (listing statutory offenses under Article 7, entitled "Criminal Sexual Assault").

19. See *id.* §§ 18.2-67.1, 18.2-67.2 (defining sex offenses of forcible sodomy and object sexual penetration).

20. See GROOT, *supra* note 16, at 273 (noting ambiguity in felony murder portion of first degree murder statute).

21. See VA. CODE ANN. § 18.2-58 (defining punishment for robbery). In Virginia, the Code does not define robbery; it is a common-law crime. See *George v. Commonwealth*, 242

added § 18.2-58.1 to Article 5.²² This new section defines carjacking, in part by restating the violence or intimidation portion of the robbery statute.²³ As it now reads, § 18.2-32's listing of robbery as a predicate offense to first degree felony murder may be read simply as referring to § 18.2-58, titled "How punished," or to the whole of Article 5, titled "Robbery." If the latter interpretation is correct, carjacking becomes a predicate for first degree felony murder even though § 18.2-32 does not list it as a predicate offense.²⁴

Section 18.2-32's reference to arson is more problematic. Chapter 5 of Title 18.2, "Crimes Against Property," includes a series of burning crimes, none of which contain the common-law definition of arson.²⁵ Although § 18.2-77, "Burning or destroying dwelling house, etc." most closely approximates common-law arson, §§ 18.2-79 and 18.2-80 also deal specifically with the burning of structures.²⁶ Further confounding § 18.2-32's reference to arson is the title of the article that contains the burning offenses – "Arson and Related Crimes."²⁷ Because § 18.2-32 cannot refer to a specific statutory provision nor to a specific criminal offense titled arson, the reference might be to the whole of Article 1. In that event, the predicate offense of arson encompasses even the

Va. 264, 277, 411 S.E.2d 12, 20 (1991) ("Although the punishment for robbery is fixed by statute, Code § 18.2-58, the offense is not statutorily defined, and we must look to the common law for its definition.").

22. See 1993 Va. Acts ch. 500 (adding § 18.2-58.1 to criminal code).

23. See VA. CODE ANN. § 18.2-58.1 (Michie 1996 & Supp. 1999) (defining offense of carjacking). Section 18.2-58.1 reads, in pertinent part:

B. As used in this section, '*carjacking*' means the intentional seizure or seizure of control of a motor vehicle of another with intent to permanently or temporarily deprive another in possession or control of the vehicle of that possession or control by means of partial strangulation, or suffocation, or by striking or beating, or by other violence to the person, or by assault or otherwise putting a person in fear of serious bodily harm, or by the threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever.

Id.

24. See *infra* Part III.B.3 (discussing appropriateness of carjacking as felony murder predicate).

25. See VA. CODE ANN. § 18.2-77 (burning or destroying dwelling house, etc.); *id.* § 18.2-79 (burning or destroying meeting house, etc.); *id.* § 18.2-80 (burning or destroying any other building or structure); *id.* § 18.2-81 (burning or destroying personal property, standing grain, etc.); *id.* § 18.2-82 (burning building or structure while in such building or structure with intent to commit felony); *id.* § 18.2-86 (setting fire to woods, fences, grass, etc.); *id.* § 18.2-87 (setting woods, etc., on fire intentionally whereby another is damaged or jeopardized); *id.* § 18.2-88 (carelessly damaging property by fire).

26. See *id.* §§ 18.2-77, 18.2-79, 18.2-80 (defining burning offenses); *infra* Part III.C (examining arson predicate for felony murder).

27. See VA. CODE ANN. tit. 18.2, ch. 5, art. 1 (listing statutory offenses under Article 1, titled "Arson and Related Crimes").

negligent burning of brush and straw criminalized in § 18.2-88, a Class 4 misdemeanor.²⁸

Perhaps the most troubling of the predicate offense problems within § 18.2-32 is the reference to abduction. First, Title 18.2, Chapter 4, Title 18.2, denominated "Kidnapping and Related Offenses," contains at least three abduction statutes, any one of which might be the offense referenced in § 18.2-32.²⁹ Second, abduction is a statutory, not a common-law, offense.³⁰ Third, none of the statutory abduction offenses correlates with common-law kidnapping.³¹ The first statutory offense is the general abduction statute, § 18.2-47.³² It is a Class 5 felony and does not import harm to the victim.³³ Section 18.2-48, the aggravated abduction statute, is a Class 2 felony.³⁴ It includes an additional mental state, "the intent to extort money or for immoral purpose,"³⁵ and encompasses ransom kidnapping, some forms of hostage taking, and juvenile white slavery.³⁶ Another statutory offense within Title 18.2, Chapter 4, Article 3 covers parental abduction in child custody cases.³⁷ Violation of this section is

28. See *id.* § 18.2-88 (defining statutory offense titled "Carelessly Damaging Property by Fire").

29. See *id.* art. 3, §§ 18.2-47, 18.2-48, 18.2-49.1 (listing statutory offenses under Article 3, titled "Kidnapping and Related Offenses").

30. See *infra* notes 260-64 and accompanying text (discussing history of abduction offense).

31. See VA. CODE ANN. § 18.2-47 (Michie 1996 & Supp. 1999) (defining offense titled "Abduction and Kidnapping Defined; Punishment"); GROOT, *supra* note 16, at 1 (stating that while abduction and kidnapping are synonymous in Virginia, abduction offenses in Code are "entirely statutory and virtually divorced from their common law antecedents").

32. See VA. CODE ANN. § 18.2-47 (defining general abduction offense).

33. See *id.* (defining offense as Class 5 felony, but providing different classification if abductor is parent of victim); GROOT, *supra* note 16, at 274 (stating that § 18.2-47 "does not import harm to the victim"). Section 18.2-47 also includes a provision for parental abduction, which is chargeable as a Class 1 misdemeanor if the child is withheld from the custodial parent within the Commonwealth, and a Class 6 felony if the child is withheld outside of the Commonwealth. See VA. CODE ANN. § 18.2-47 (defining general abduction offense, including parental abduction provision); *infra* Part III.E.2.c (discussing parental abduction portion of general abduction statute).

34. See VA. CODE ANN. § 18.2-48 (defining aggravated abduction offense as Class 2 felony).

35. See *id.* (listing title as "Abduction with intent to extort money or for immoral purpose" and providing that "Abduction (i) with intent to extort money or pecuniary benefit, (ii) of any person with intent to defile such person, or (iii) of any child under sixteen years of age for the purpose of concubinage or prostitution, shall be a Class 2 felony").

36. See GROOT, *supra* note 16, at 274 (stating that § 18.2-48 covers "ransom kidnapping, some forms of hostage taking, and juvenile white slavery").

37. See VA. CODE ANN. § 18.2-49.1 (Michie 1996 & Supp. 1999) (defining parental form of abduction, titled "Violation of court order regarding custody and visitation").

a Class 6 felony if the child is withheld from the custodial parent outside the Commonwealth, but it is a misdemeanor offense under other circumstances.³⁸ The vagueness of § 18.2-32's reference to abduction as a predicate offense for first degree felony murder is particularly troubling when its scope arguably includes misdemeanor offenses.³⁹

B. The Cross-Reference to Section 18.2-31

Section 18.2-32's cross-reference to the capital murder statute, § 18.2-31, adds an additional layer of complexity to the task of identifying felony murder predicates.⁴⁰ Following a listing of the predicate offenses, the language of § 18.2-32 reads "except as provided in § 18.2-31."⁴¹ Facially, the exception could apply to all three clauses of § 18.2-32 – the specific means, the willful and deliberate, and the felony murder categories; to all the predicate offenses to felony murder; or only to the predicate offense immediately preceding the clause, abduction.

Although the statutory history supports this last and most narrow reading of the capital murder cross-reference as the original understanding of the General Assembly,⁴² subsequent amendments to the capital murder, the first degree felony murder, and the abduction statutes have introduced considerable ambiguity.⁴³ Grammatically, the implication of the "except as" clause in

38. See *id.* (stating that under § 18.2-49.1A, when "child is withheld outside of the Commonwealth [the violator] shall be guilty of a Class 6 felony," but that under § 18.2-49.1B, if person violates court order respecting custody, violator shall be guilty of Class 4 misdemeanor if first offense; that second conviction for same offense within twelve months of first conviction shall be Class 3 misdemeanor; and third conviction within twenty-four months of first conviction shall be Class 2 misdemeanor); GROOT, *supra* note 16, at 4 (stating that § 18.2-49.1B "contains the same elements as § 18.2-49.1A, except that the Commonwealth need not prove that the child was withheld outside of Virginia").

39. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.06B(3), at 481 (2d ed. 1995) (stating felony murder rule "reflects society's judgment that the commission of a felony resulting in death is more serious—and, therefore, deserves greater punishment—than the commission of a felony *not* resulting in death"); GROOT, *supra* note 16, at 273 ("Since the felony murder doctrine imputes malice from predicate crime, it should be one in which the danger to human life is inherently very probable.").

40. See *supra* note 4 and accompanying text (quoting first degree felony murder statute).

41. See *supra* note 4 and accompanying text (quoting first degree felony murder statute).

42. See *infra* Part III.E.3.a (discussing implication of cross-reference to capital murder statute within first degree murder statute). As originally written, the 1975 version of § 18.2-31 included only one form of capital felony murder – the premeditated killing of any person in the commission of abduction as defined in § 18.2-48, the Class 2 felony abduction statute. Necessarily, the "except as provided in § 18.2-31" could have referred only to abduction.

43. See *infra* Part III.E.3.a (discussing history of § 18.2-32's cross-reference to § 18.2-31).

§ 18.2-32 indicates that whatever offenses § 18.2-31 delineates within the capital murder category, those offenses are excepted from a larger pool of possibilities contained within the first degree murder statute.⁴⁴ However, multiple constructions of both the size of the pool and the scope of the exception are currently permissible in Virginia.⁴⁵

C. Implications of the Problem

Although complete clarity in statutory drafting may be unattainable, statutes that allow such a questionable latitude in construction are abhorrent to our judicial system's ideas of fairness and notice.⁴⁶ Also important is the underlying theoretical premise that justifies a felony murder statute in the first instance. The doctrine supposes that the predicate offense is of such a serious nature that its very undertaking is inherently dangerous to human life and that proof of the intent to commit the predicate offense abrogates the need for an additional showing of some malice in the killing.⁴⁷ At trial, the bad intent

44. For example, abduction is a predicate offense for both first degree and capital felony murder. See VA. CODE ANN. §§ 18.2-31(1), 18.2-32 (Michie 1996 & Supp. 1999) (listing abduction among predicate offenses for capital and first degree felony murder). Accordingly, when § 18.2-32 states "abduction, except as provided in § 18.2-31," one interpretation is that § 18.2-31, the capital statute, contains particularly egregious forms of abduction culled from the larger group of abductions the first degree statute, § 18.2-32, references. Thus, § 18.2-31(1) specifies the onerous forms of extortion, defilement, and drug offense abduction, and § 18.2-32 contains all other abductions. *Id.* This is the literal application of the "except as" language in § 18.2-32. However, this interpretation would include parental abductions in violation of custody orders, as well as other forms, as predicates for first degree felony murder, and is inconsistent with the historical treatment of abduction as a § 18.2-32 predicate offense and with the doctrinal requirement that the predicate offense be inherently dangerous. See § 18.2-49.1 (criminalizing abduction in violation of court order regarding custody and visitation); *infra* Part III.E (examining predicate offense of abduction); *infra* Part II (discussing felony murder doctrine). Parents in violation of a custody decree who experience the unintended, i.e. accidental, death of a child could be prosecuted for first degree felony murder. See *infra* Part III.E (examining predicate offense of abduction).

45. See *infra* Part III.E.3.a (discussing history of § 18.2-32's cross-reference to § 18.2-31).

46. See *Perkins v. Commonwealth*, 12 Va. App. 7, 16, 402 S.E.2d 229, 234 (1991) (noting penal statute is unconstitutionally vague in violation of Due Process Clause of Fourteenth Amendment if it fails to define offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement" (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983))).

47. See *Wooden v. Commonwealth*, 222 Va. 758, 762, 284 S.E.2d 811, 814 (1981) (explaining imputation of malice in felony murder doctrine); *Regina v. Serné*, 16 Cox Crim. Cas. 311 (Cent. Crim. Ct. Va. 1887) (stating "any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder"); 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW*

intrinsic in the commission of one of the predicate felonies provides the malice prerequisite to a finding that the homicide was murder.⁴⁸ However, if malice cannot properly be inferred from the predicate offense because it is neither egregious in its execution nor inherently dangerous in the abstract, the doctrinal justification is meritless.⁴⁹

This Note maps the ambiguities and inconsistencies in Virginia's current reference scheme for first degree felony murder. Part II reviews the felony murder rule and its doctrinal justifications as they developed at common law, and examines the doctrine as it exists in Virginia.⁵⁰ Part III examines the statutory offenses potentially cognizable as predicates for § 18.2-32 felony murder by assessing potential predicates: for their fealty to common-law antecedents; for their comportment with the felony murder rule's doctrinal requirement of inherent dangerousness; and for the seriousness of the offenses, using penalty structures as indicia of egregiousness.⁵¹ In so doing, Part III determines whether the potential predicates are appropriately within the scope of § 18.2-32 felony murder.⁵² In conclusion, Part IV recommends revisions to § 18.2-32's reference system for first degree felony murder.⁵³

§ 7.5, at 208 (1986) (noting requirement that felony attempted or committed by defendant be dangerous to human life limits scope of felony murder rule). In *Wooden*, the court stated:

"Malice inheres in the doing of a wrongful act without just cause or excuse, or as a result of ill will. . . ." Where a person maliciously engages in criminal activity, such as robbery, and homicide of the victim results, the malice inherent in the robbery provides the malice prerequisite to a finding that the homicide was murder.

Wooden, 284 S.E.2d at 814 (quoting *Dawkins v. Commonwealth*, 186 Va. 55, 61, 41 S.E.2d 500, 503 (1947)).

48. See *Hickman v. Commonwealth*, 11 Va. App. 369, 371, 398 S.E.2d 698, 699 (1990) (stating that where "person engages in felonious activity and homicide results, the malice inherent in the original felony provides the malice necessary to a finding that the homicide was murder").

49. See *Davis v. Commonwealth*, 12 Va. App. 408, 411, 404 S.E.2d 377, 378-79 (1991) (noting that in order to restrain felony murder from being rule of absolute liability, acts resulting from commission of homicide must be consequence of felony, not mere coincidence); *King v. Commonwealth*, 6 Va. App. 351, 355, 368 S.E.2d 704, 706 (1988) (stating that in order for unintended killing to fall within scope of felony murder rule, "the homicide must be criminal in nature and must contain the elements or attributes of criminal homicide cognizable at common law").

50. See *infra* Part II (discussing felony murder doctrine at common law and in Virginia).

51. See *infra* Part III (examining individual predicate offenses for first degree felony murder).

52. See *infra* Part III (examining individual predicate offenses for first degree felony murder).

53. See *infra* Part IV (recommending revisions to § 18.2-32's predicate offense reference system).

II. Felony Murder: The Doctrine

A. Felony Murder at Common Law

At common law, anyone who caused another's death in the course of committing or attempting to commit a felony was guilty of murder.⁵⁴ Over time, the number of felonies increased to include some relatively minor offenses.⁵⁵ Coordinately, the scope of the felony murder rule reached offenses that were not dangerous to life or limb.⁵⁶ English courts responded to this expansion in the scope of the felony murder rule by imposing one of two limitations. The first limitation required that the defendant's act be one of violence and that the felony charged criminalize violent conduct. The second required that the death be the natural and probable consequence of the defendant's conduct in committing the felony.⁵⁷

American courts have adopted several different limitations to alleviate the harshness of the rule.⁵⁸ Among the limitations are the requirements that the conduct of the defendant be the proximate cause of death or that the felony itself be dangerous to life.⁵⁹ Some states have limited the scope of the doctrine by requiring that the predicate offense must have been a felony at common law,⁶⁰ while others describe a general category of felonies to which the rule applies.⁶¹ Most state criminal codes, like the Virginia Code, limit predicate offenses to a list of specific felonies that are considered inherently dangerous.⁶²

54. See 2 LAFAYE & SCOTT, *supra* note 47, § 7.5, at 206-07 & n.4 (noting guilt was "without regard to the dangerous nature of the felony involved or to the likelihood that death might result from the defendant's manner of committing or attempting the felony," but that, since "[a]t the time the felony-murder rule developed, all felonies were punishable by death . . . it made little difference whether the felon was hanged for the felony or for the murder" (internal citations omitted)).

55. See *id.* § 7.5, at 207 (noting felonies multiplied to include many offenses "which involved no great danger to life or limb," giving examples of felonious sale of intoxicating liquors and filing false tax returns).

56. See *id.* (noting expansion of felonies to include those not dangerous to life or limb).

57. See *id.* (stating that English courts limited the doctrine either "(1) by requiring that the defendant's conduct in committing the felony involve an act of violence in carrying out a felony of violence, or (2) by requiring that the death be the natural and probable consequence of the defendant's conduct in committing the felony").

58. See *id.* § 7.5, at 207-08 (describing methods of limiting scope of felony murder rule).

59. See *id.* § 7.5, at 208 (describing methods of limiting scope of felony murder rule).

60. See *id.* (noting felonies at common law are rape, sodomy, robbery, burglary, arson, mayhem, and larceny).

61. See *id.* § 7.5, at 210-11 (stating that "these categories in one way or another relate to the dangerousness of the felony").

62. See *id.* § 7.5, at 211 & n.24 (noting that these specific felonies "involve a significant prospect of violence" (citing VA. CODE ANN. § 18.2-32 (1950))); see also ROLLIN M. PERKINS,

B. Felony Murder in Virginia

The Virginia Code does not define murder.⁶³ Virginia's courts espouse the traditional common-law formulation that a homicide is elevated to murder if committed with malice.⁶⁴ The malice may be express or implied.⁶⁵ In a felony murder prosecution, the intention to commit the predicate offense functions as the malice necessary to elevate a homicide to murder,⁶⁶ the killing itself need not be intentional.⁶⁷

In order for malice to be implied, the act causing death must result from an effort to further the felony; some act must be attributable to the felon that causes death.⁶⁸ This causation requirement is one of the major limitations Virginia places on the felony murder doctrine.⁶⁹ By way of statutory construc-

CRIMINAL LAW 43 (2d ed. 1969) (stating that if statute dealing with involuntary manslaughter includes under that offense "any involuntary killing 'in the perpetration of or attempt to perpetrate any unlawful act other than arson, rape, robbery, burglary, or mayhem,' this shows a limitation of the 'felony-murder rule' not only to a dangerous felony but to these particular five").

63. See *Wooden v. Commonwealth*, 222 Va. 758, 761, 284 S.E.2d 811, 813 (1981) ("Since murder is not elsewhere defined in the code, murder for purposes of the felony-murder statute is common-law murder coupled with the contemporaneous commission or attempted commission of one of the listed felonies.").

64. See *id.* at 814 (stating "[t]he test of murder is malice" (quoting *Jacobs v. Commonwealth*, 132 Va. 681, 686, 111 S.E. 90, 92 (1922))).

65. See GROOT, *supra* note 16, at 265 (noting "[t]he cases adopt the common law definition: 'Murder is the unlawful killing of any person with malice aforethought and malice is either express . . . or malice is implied. . . .'" (quoting *M'Whirt's Case*, 44 Va. (3 Gratt.) 594, 604-05 (1846)) (alteration in the original)).

66. See *Wooden*, 284 S.E.2d at 814 (stating "[w]here a person maliciously engages in criminal activity, such as robbery, and homicide of the victim results, the malice inherent in the robbery provides the malice prerequisite to a finding that the homicide was murder").

67. See *id.* (stating "[n]either premeditation nor an intent to kill is an element of felony-murder, but malice is" (citing *Robertson v. Commonwealth*, 1 Va. Dec. 851, 856, 20 S.E. 362, 364 (1894))).

68. See GROOT, *supra* note 16, at 273 (noting liability extends to one who was principal in either first or second degree to predicate felony, although not actual slayer).

69. See *Davis v. Commonwealth*, 12 Va. App. 408, 411, 404 S.E.2d 377, 378 (1991) (stating "to limit the potentially harsh results of the felony-murder doctrine, Virginia courts require the accidental death to be causally related to the commission of the felony"). However, not all killings committed in the course of the predicate offenses are murders; in Virginia, felons may not be convicted for the felony murder of co-felons killed by victims in the course of the commission of one of the predicate offenses. See *Wooden v. Commonwealth*, 222 Va. 758, 765, 284 S.E.2d 811, 816 (1981) (holding that criminal participant in felony may not be convicted of felony murder of co-felon killed by victim of initial felony). Rather than a doctrinal or statutory limitation, Virginia's rule that there is no felony murder liability when the killing is performed by one other than a criminal participant in the felony is a judge-made limitation on the felony murder doctrine. See GROOT, *supra* note 16, at 273 (noting limitation on doctrine). In *Wooden*, the court noted that other states recognize a similar limitation on the

tion, the predicate offenses themselves provide Virginia's other major limitation on the felony murder doctrine by bounding the universe of underlying crimes that may support a felony murder charge.⁷⁰ For this reason, appropriate implementation of the felony murder rule depends on an accurate interpretation of the scope of each predicate offense.⁷¹

III. Predicate Offenses in Section 18.2-32

A. The Sex Offenses

Section 18.2-32 lists three sex offenses that serve as predicates for felony murder: rape, forcible sodomy, and inanimate or animate object sexual penetration.⁷² Rape and sodomy were felonies at common law.⁷³ Object sexual penetration extends the predicate sex offense category to include penetration

felony murder rule. *Accord* *People v. Antick*, 539 P.2d 43 (Cal. 1975) (recognizing limitation on felony murder rule); *People v. Washington*, 402 P.2d 130 (Cal. 1965) (same); *Alvarez v. Dist. Ct.*, 525 P.2d 1131 (Colo. 1974) (same); *Weick v. State*, 420 A.2d 159 (Del. 1980) (same); *People v. Morris*, 274 N.E.2d 898 (Ill. 1971) (same); *Commonwealth v. Balliro*, 209 N.E.2d 308 (Mass. 1965) (same); *People v. Austin*, 120 N.W.3d 766 (Mich. 1963) (same); *Sheriff, Clark County v. Hicks*, 506 P.2d 766 (Nev. 1973) (same); *State v. Canola*, 374 A.2d 20 (N.J. 1977) (same); *Jackson v. State*, 589 P.2d 1052 (N.M. 1979) (same); *People v. Wood*, 167 N.E.2d 736 (N.Y. 1960) (same); *Commonwealth v. Redline*, 137 A.2d 472 (Pa. 1958) (same); *cf. In re Leon*, 410 A.2d 121 (R.I. 1980) (rejecting limitation on felony murder rule).

70. *See* VA. CODE ANN. § 18.2-32 (Michie 1996 & Supp. 1999) (listing predicate offenses for first degree felony murder). This limitation is true only of first degree felony murder, however. The predicate offense requirement of § 18.2-33, the second degree felony homicide statute, may be satisfied by any felonious act. *See id.* § 18.2-33 (reading "[t]he killing of one accidentally, contrary to the intention of the parties, while in the prosecution of some felonious act other than those specified in §§ 18.2-31 and 18.2-32, is murder of the second degree and is punishable as a Class 3 felony"); *Heacock v. Commonwealth*, 228 Va. 397, 403, 323 S.E.2d 90, 93 (1984) (noting that "commission of any felonious act . . . during the prosecution of which a death occurs supplies the malice which raises the incidental homicide to the level of second-degree murder" (emphasis added)). While the broad scope of § 18.2-33 is itself problematic, the clear intention of the Code's structure is to differentiate the predicate offenses in § 18.2-32 from the larger pool of possibilities in § 18.2-33. The separate listing and the difference in degree underscores the conclusion that the predicates in § 18.2-32 are deemed particularly egregious because of their inherently dangerous nature. *See supra* notes 58-62 and accompanying text (discussing doctrinal limitations on felony murder rule). For a discussion of the problems with the broadly worded second degree felony homicide statute, see LAFAVE & SCOTT, *supra* note 47, § 7.5, at 210-11 (noting problems with "all other forms" second degree felony homicide statutes).

71. *See* 2 LAFAVE & SCOTT, *supra* note 47, § 7.5, at 208-10 (discussing methods of limiting harshness of felony murder rule).

72. VA. CODE ANN. § 18.2-32; *supra* Part I.A (describing first degree felony murder portion of statute).

73. *See* 2 LAFAVE & SCOTT, *supra* note 47, § 7.5, at 208 (listing those potential predicate offenses for felony murder which were felonies at common law: rape, sodomy, robbery, burglary, arson, mayhem, and larceny).

by object or animal.⁷⁴ Because of the specificity of the titles of the offenses, both in § 18.2-32 and in their chapter in the Code, these three predicates are easily identifiable.⁷⁵

1. Rape: Section 18.2-61

Section 18.2-61 is titled "Rape."⁷⁶ Contained within Article 7, Criminal Sexual Assault, § 18.2-61 is the analog to common-law rape.⁷⁷ These two facts make § 18.2-61 the clear reference for § 18.2-32's rape predicate for first degree felony murder.

74. See *Bell v. Commonwealth*, 22 Va. App. 93, 98-99, 468 S.E.2d 114, 116-17 (1996) (noting statute makes it crime to sexually penetrate victim with "any object," including defendant's finger); GROOT, *supra* note 16, at 429 (stating that § 18.2-67.2 may be violated by forced sexual activity with animal).

75. See GROOT, *supra* note 16, at 273 (stating "[t]here is no difficulty in identifying the three sexual offenses").

76. See VA. CODE ANN. § 18.2-61 (Michie 1996 & Supp. 1999) (defining offense of rape). Section 18.2-61 reads, without its penalty provision:

A. If any person has sexual intercourse with a complaining witness who is not his or her spouse or causes a complaining witness, whether or not his or her spouse, to engage in sexual intercourse with any other person and such act is accomplished (i) against the complaining witness's will, by force, threat or intimidation of or against the complaining witness or another person, or (ii) through the use of the complaining witness's mental incapacity or physical helplessness, or (iii) with a child under age thirteen as the victim, he or she shall be guilty of rape.

B. If any person has sexual intercourse with his or her spouse and such act is accomplished against the spouse's will by force, threat or intimidation of or against the spouse or another, he or she shall be guilty of rape.

However, no person shall be found guilty under this subsection unless, at the time of the alleged offense, (i) the spouses were living separate and apart, or (ii) the defendant caused serious physical injury to the spouse by the use of force or violence.

Id.

77. See GROOT, *supra* note 16, at 425 (noting that extramarital, nonspousal form is analog to common-law rape: "It is committed when a perpetrator (male or female) has penile-vaginal intercourse with an unwilling person of the opposite gender who is not the spouse of the perpetrator."). Section 18.2-6.A also includes provisions for causing rape, when the actual intercourse must occur between non-spouses. See *id.* (noting that actual intercourse must occur between non-spouses). Section 18.2-61.B covers marital rape, with the requirement that the intercourse must be accomplished by force, threat or intimidation; however, if the spouses are not living separately, there must be evidence of serious physical injury. See *id.* at 427. The basic penalty for rape is five years to life. See VA. CODE ANN. § 18.2-61.C (stating "a violation of this section shall be punishable, in the discretion of the court or jury, by confinement in a state correctional facility for life or for any term not less than five years"). But see GROOT, *supra* note 16, at 427 (noting that, for violation of § 18.2-61.B's marital rape provision, §§ 18.2-61.C and 18.2-61.D permit suspension of sentence and probation without imposition of sentence upon certain conditions).

2. *Sodomy and Object Sexual Penetration: Sections 18.2-67.1 and 18.2-67.2*

Codified at § 18.2-67, forcible sodomy includes cunnilingus, fellatio, anallingus, and anal intercourse.⁷⁸ The Code denominates inanimate or animate object sexual penetration at § 18.2-67.2 as "Object sexual penetration."⁷⁹

78. See VA. CODE ANN. § 18.2-67.1 (defining offense of forcible sodomy). Section 18.2-67.1 reads, without the penalty provision:

A. An accused shall be guilty of forcible sodomy if he or she engages in cunnilingus, fellatio, anallingus, or anal intercourse with a complaining witness who is not his or her spouse, or causes a complaining witness, whether or not his spouse, to engage in such acts with any other person and

1. The complaining witness is less than thirteen years of age, or

2. The act is accomplished against the will of the complaining witness, by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness's mental incapacity or physical helplessness.

B. An accused shall be guilty of forcible sodomy if (i) he or she engages in cunnilingus, fellatio, anallingus, or anal intercourse with his or her spouse, and such act is accomplished against the will of the spouse, by force, threat or intimidation of or against the spouse or another person. However, no person shall be found guilty under this subsection unless, at the time of the alleged offense, (i) the spouses were living separate and apart, or (ii) the defendant caused serious physical injury to the spouse by the use of force or violence.

Id.

79. See *id.* § 18.2-67.2 (defining offense of object sexual penetration). Section 18.2-67.2 reads, without the penalty provision:

A. An accused shall be guilty of inanimate or animate object sexual penetration if he or she penetrates the labia majora or anus of a complaining witness who is not his or her spouse with any object, other than for a bona fide medical purpose, or causes such complaining witness to so penetrate his or her own body with an object or causes a complaining witness, whether or not his or her spouse, to engage in such acts with any other person or to penetrate, or to be penetrated, by, an animal, and

1. The complaining witness is less than thirteen years of age, or

2. The act is accomplished against the will of the complaining witness, by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness's mental incapacity or physical helplessness.

B. An accused shall be guilty of inanimate or animate object sexual penetration if (i) he or she penetrates the labia majora or anus of his or her spouse with any object other than for bona fide medical purpose, or causes such spouse to so penetrate his or her own body with an object and (ii) such act is accomplished against the spouse's will by force, threat or intimidation of or against the spouse or another person. However, no person shall be found guilty under this subsection unless, at the time of the alleged offense, (i) the spouses were living separate and apart, or (ii) the defendant caused serious physical injury to the spouse by the use of force or violence.

Id.

The structure of sections § 18.2-67.1 and § 18.2-67.2 parallels the structure of the rape statute; both include provisions for causing the offenses and for violation by spouses.⁸⁰ They are also punished by imprisonment for five years to life.⁸¹ Both statutes require penetration: forcible sodomy requires penile or lingual penetration;⁸² object sexual penetration requires penetration of either the labia majora or anus by either an animate or inanimate object.⁸³ Section 18.2-32's references to forcible sodomy and inanimate or animate object sexual penetration as predicate offenses for first degree felony murder clearly refer to §§ 18.2-67.1 and 18.2-67.2.⁸⁴

3. *Intransigent Interpretive and Doctrinal Issues*

The clarity of the references for the sexual offenses in § 18.2-32 does not eliminate a prosecutor's flexibility in charging for sex offenses that result in a killing, nor does it affect her ability to lessen the burden of proof through the use of the felony murder statute. For instance, a prosecutor might choose to charge a killing committed in the course of a sexual assault when no intercourse has occurred as either aggravated sexual battery and murder or attempted rape felony murder. A prosecutor that charges aggravated sexual battery and murder must prove two mental states, intent to commit the battery and malice. Conversely, a prosecutor that charges attempted rape and attempted rape felony murder need prove only an intent to have sexual intercourse.⁸⁵

This distinction exists in spite of the fact that the accused's course of conduct, whether charged as attempted rape or aggravated sexual battery, is

80. See GROOT, *supra* note 16, at 429 (noting that §§ 18.2-67.1 and 18.2-67.2 are constructed almost identically to rape statute, § 18.2-61).

81. See VA. CODE ANN. §§ 18.2-67.1, 18.2-67.2 (providing penalties for offenses of forcible sodomy and object sexual penetration). Both marital forcible sodomy and marital object sexual penetration permit suspension of sentence and probation without imposition of sentence under certain circumstances. *Id.*

82. See GROOT, *supra* note 16, at 429 (noting requirement of penetration (citing Dawson v. Commonwealth, 13 Va. App. 109, 113-14, 409 S.E.2d 466, 468 (1991) (holding victim's statement that accused "had oral sex with me" insufficient to prove penetration))).

83. See Bell v. Commonwealth, 22 Va. App. 93, 98-99, 468 S.E.2d 114, 116-17 (1996) (noting statute makes it crime to sexually penetrate victim with "any object," including defendant's finger); GROOT, *supra* note 16, at 429-30 (noting § 18.2-67.2 forbids penetration of labia majora or anus by animate or inanimate object, and that 'animate object' is likely to include body parts, e.g., fingers, as well as animals).

84. See GROOT, *supra* note 16, at 273 (stating "[t]here is no difficulty in identifying the three sexual offenses").

85. See *id.* at 430 ("To commit sexual battery the accused must have the purpose to molest, arouse or gratify.").

a crime against a person that is likely to cause death.⁸⁶ It seems counter-intuitive that a doctrine that allows a prosecutor to forego proof of a mental state because of the dangerousness of the underlying offense should simultaneously permit that prosecutor to choose from a smorgasbord of intents, with potentially varying levels of dangerousness.⁸⁷ Although careful statutory drafting is essential for appropriate application of the felony murder rule, even clear references for predicate offenses will allow doctrinal problems to persist in the application of the statute.⁸⁸

While the references for the sex offenses pose few statutory interpretation problems today, this was not always the case. Prior to 1998, § 18.2-32 referred only to inanimate object sexual penetration, while § 18.2-31, the capital murder statute, referred to object sexual penetration.⁸⁹ The implication was that all

86. See *Garland v. Commonwealth*, 8 Va. App. 189, 191-92, 379 S.E.2d 146, 147 (1989) (noting while aggravated sexual battery is markedly similar to attempted rape where victim is female and her genitalia are touched by perpetrator's penis, they are distinguishable by fact that aggravated sexual battery does not require intent to have sexual intercourse, but attempted rape does); *Glover v. Commonwealth*, 86 Va. 382, 385, 10 S.E. 420, 421 (1889) (intent to commit rape is essential element of an attempt to commit rape). It is notable that all of the predicate sex-offenses require penetration or attempted penetration. See VA. CODE ANN. §§ 18.2-61, 18.2-67.1, 18.2-67.2 (Michie 1996 & Supp. 1999) (defining offenses of rape, forcible sodomy, and object sexual penetration). This level of physical assault necessarily is inherently dangerous conduct likely to impart death or harm to the victim, and may alone justify the inclusion of the sex offenses as predicates for first degree felony murder. See *Regina v. Serné*, 16 Cox Crim. Cas. 311 (Cent. Crim. Ct. Va. 1887) (stating "any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder"); *supra* notes 58-62 and accompanying text (explicating doctrinal justification of felony murder rule).

87. A possible rationale for proceeding on the attempted rape count rests on the treatment the Code gives penetration or attempted penetration, and the implication for the dangerousness analysis. See *supra* note 74 and accompanying (discussing expansion of sex offense category to include penetration by object or animal).

88. See 2 LAFAVE & SCOTT, *supra* note 47, § 7.5, at 208-11 (discussing limitation of felony murder doctrine to certain felonies). Doctrinal problems with the predicate-offense felony murder form the Virginia statute takes are unavoidable, particularly at the margins. The problems tend to recapitulate inconsistencies that arise in application of the "inherently dangerous in the abstract" approach to felony murder: "if the purpose of the felony-murder doctrine is to hold felons accountable for unintended deaths caused by their dangerous conduct, then it would seem to make little difference whether the felony committed was dangerous by its very nature or merely dangerous as committed in the particular case." *Id.* at 210. Observing the dangerous conduct of the accused in the hypothetical above, it makes little sense to exclude aggravated sexual assault from the list of predicate offenses for felony murder. As with the inherently dangerous limitation, exclusion of the aggravated sexual assault offense is "more understandable . . . if viewed as an attempt . . . to limit . . . 'a highly artificial concept that deserves no extension beyond its required application.'" *Id.* at 210 & nn.18, 20 (quoting *People v. Phillips*, 414 P.2d 353, 360 (Cal. 1966)).

89. See 1998 Va. Acts ch. 281 (inserting "or animate" into text of felony murder statute).

violations of § 18.2-67.2 were predicates for § 18.2-31, while only inanimate object violations were considered predicate felonies within § 18.2-32.⁹⁰ The likely cause of the inconsistency was that § 18.2-32 was not amended after the General Assembly added animate object sexual penetration to § 18.2-67.2 in 1993. The 1998 amendment to § 18.2-32 eliminated the inconsistency by inserting the words "or animate," expanding the scope of the predicate offense to include all object sexual penetrations under § 18.2-67.2.⁹¹ Although the discrepancy in language between §§ 18.2-31, 18.2-32, and 18.2-67.2 no longer poses interpretive problems, this recent history illustrates the confusion introduced by the piecemeal amendment process, and demonstrates the effect this approach has had on the scope of the capital and first degree felony murder statutes in Virginia. This history also argues that the legislature might rectify current ambiguities by modifying the language of § 18.2-32 once again, perhaps to include direct citation to statutes following each predicate offense.⁹²

B. Robbery

Although one may easily decipher the statutory references for § 18.2-32's sex crime predicates by consulting the Code,⁹³ the statutory reference for robbery is not clear. A series of unfortunate problems complicate the Code's use of the word "robbery" to describe a predicate offense for first degree felony murder. First, robbery is a common-law crime in Virginia.⁹⁴ The statutory provision cited in the cases, § 18.2-58, recites a variety of actions that establish the violence or intimidation element for robbery and sets the penalty for the offense, but it does not define robbery.⁹⁵ Second, the Article

90. *Id.*

91. *See* VA. CODE ANN. § 18.2-32 (providing predicate offenses for first degree felony murder).

92. *See infra* Part IV (concluding that most expeditious method of eliminating ambiguities in first degree felony murder statute is to cite predicate offenses by statutory section in Code).

93. *See supra* Part IIIA (explaining clarity of § 18.2-32's references for predicate offenses of rape, sodomy, and object sexual penetration).

94. *See* *George v. Commonwealth*, 242 Va. 264, 277, 411 S.E.2d 12, 20 (1991) ("Although the punishment for robbery is fixed by statute, Code § 18.2-58, the offense is not statutorily defined, and we must look to the common law for its definition.").

95. *See* VA. CODE ANN. § 18.2-58 (Michie 1996 & Supp. 1999) (reading "[i]f any person commit robbery by partial strangulation, or suffocation, or by striking or beating, or by other violence to the person, or by assault or otherwise putting a person in fear of serious bodily harm, or by the threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever, he shall be guilty of a felony and shall be punished by confinement in a state correctional facility for life or any term not less than five years"); *George*, 411 S.E.2d at 20 ("Although the punishment for robbery is fixed by statute, Code § 18.2-58, the offense is not statutorily defined, and we must look to the common law for its definition."); *see also* GROOT, *supra* note 16, at 415

under which § 18.2-58 is included, Title 18.2, Chapter 4, Article 5, is itself titled "Robbery."⁹⁶ Third, in 1993 the General Assembly added an additional offense to Article 5: Section 18.2-58.1, titled "Carjacking."⁹⁷ As it now stands, one may read § 18.2-32's listing of robbery as a predicate offense simply as referring to common-law robbery or to the whole of Article 5, titled "Robbery," encompassing both common law robbery and carjacking.⁹⁸

1. Common-Law Robbery: Section 18.2-58

Like rape and forcible sodomy, robbery was a felony at common law.⁹⁹ Similarly, like rape and forcible sodomy, robbery poses an inherent danger to life.¹⁰⁰ By contrast, larceny, although a felony at common law, is not ordinarily a dangerous felony.¹⁰¹ The distinctions between robbery and its lesser-included offense, larceny, illustrate this important difference in dangerousness: in addition to the six elements of larceny, robbery requires that property be taken from the person or presence of the victim and that the taking be

("The common law definition most often used in the Virginia cases is 'the taking, with the intent to deprive the owner permanently, of personal property, from his person or in his presence, against his will, by violence or intimidation.'" (citations omitted)).

96. See VA. CODE ANN. tit. 18.2, ch. 4, art. 5 (Michie 1996 & Supp. 1999) (titled Code article "Robbery").

97. See *id.* § 18.2-58.1 (criminalizing carjacking).

98. See *Bell v. Commonwealth*, 21 Va. App. 693, 701, 467 S.E.2d 289, 293 (1996) (explaining passage of carjacking statute). In *Bell*, the court of appeals noted that the carjacking offense was enacted as an additional provision in Article 5. *Id.* The Court also noted that, when offered for passage by the General Assembly, the bill was captioned as "Aggravated robbery, motor vehicle piracy, carjacking penalty." *Id.* at 293 n.2. It also stated that "[w]hile not part of the code section, in the strictest sense, the caption may be considered in construing the statute, as it is 'valuable and indicative of legislative intent.'" *Id.* at 293 (citing *Krummert v. Commonwealth*, 186 Va. 581, 584, 43 S.E.2d 831, 832 (1947)). The *Bell* factors supporting the conclusion that § 18.2-58.1 is not unconstitutionally vague – that carjacking is a species of robbery and that the General Assembly purposefully enacted carjacking under the same Article as robbery – might substitute as arguments for a finding that carjacking is an appropriate predicate offense for first degree felony murder. However, the ambiguity in the § 18.2-32 reference to robbery remains.

99. See *supra* note 60 and accompanying text (discussing doctrinal developments limiting scope of felony murder doctrine to those offenses which were felonies at common law).

100. See GROOT, *supra* note 16, at 273 ("Since the felony murder doctrine imputes malice from the predicate crime, it should be one in which the danger to human life is inherently very probable."); 2 LAFAVE & SCOTT, *supra* note 47, § 7.5, at 208-09 (stating that common-law felonies, with exception of larceny and consensual sodomy, but especially robbery, arson and rape, involve danger to life).

101. See 2 LAFAVE & SCOTT, *supra* note 47, § 7.5, at 209 & n.13 (stating that, because larceny is not ordinarily dangerous felony, "if death should occur in an extraordinary, unforeseeable fashion, it ought not to be murder").

effectuated by means of force or intimidation.¹⁰² The danger involved in misappropriating property in a face-to-face confrontation by violence or threat of violence justifies robbery's greater punishment.¹⁰³ The danger inherent in the commission of robbery also satisfies the felony murder rule's doctrinal requirement that the predicate offense carry a serious threat to life.¹⁰⁴

2. Carjacking: Section 18.2-58.1

Section 18.2-58.1 defines and sets the punishment for carjacking.¹⁰⁵ Added in 1993, the carjacking statute is similar to the robbery statute in many

102. See GROOT, *supra* note 16, at 416 ("To make out robbery the Commonwealth must prove violence or intimidation and must prove that the violence or intimidation preceded or was contemporaneous with the taking."); 2 LAFAYE & SCOTT, *supra* note 47, § 8.11, at 438 (noting robbery consists of all six elements of larceny plus two additional requirements, and enumerating six elements of larceny as: "a (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with the intent to steal it" and additional two robbery elements as "(7) that the property be taken from the person or presence of the other and (8) that the taking be accomplished by means of force or putting in fear"); *supra* note 95 (quoting pertinent part of Code's robbery statute).

103. See GROOT, *supra* note 16, at 416-17 (noting forms of violence or intimidation specified in statute are very broad, and that violence or intimidation element distinguishes robbery and "larceny from the person"); 2 LAFAYE & SCOTT, *supra* note 47, § 8.11, at 437-38 & n.4 (noting that robbery involves misappropriation of property under circumstances involving danger to person as well as danger to property, and quoting Model Penal Code:

[Robbery] is one of the main sources of insecurity and concern of the population at large. There is a special element of terror in this kind of depredation. The ordinary citizen does not feel particularly threatened by surreptitious larceny, embezzlement or fraud. But there is understandable abhorrence of the robber who accosts on the streets and who menaces his victims with actual or threatened violence. . . . [t]he offender exhibits himself as seriously deviated from community norms, thus justifying more serious sanctions).

Id. (quoting MODEL PENAL CODE § 222.1 cmt. (1980)).

104. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 48-49 (Mark DeWolfe Howe, ed., Little Brown & Co. 1963) (stating general test of murder is degree of danger attending acts under known state of facts, and that "[i]f certain acts are regarded as peculiarly dangerous under certain circumstances, a legislator may make them punishable if done under these circumstances"); Note, *Reforming the Law of Homicide*, 59 VA. L. REV. 1270, 1275-76 (1973) ("It is apparent that the Virginia legislature has attempted to limit the scope of the [felony murder] rule to those felonies most likely to involve a serious threat to life."); *supra* Part II (explicating felony murder doctrine at common law and in Virginia).

105. See VA. CODE ANN. § 18.2-58.1 (Michie 1996 & Supp. 1999) (defining offense of carjacking). Section 18.2-58.1 reads, in pertinent part:

A. Any person who commits carjacking, as herein defined, shall be guilty of a felony punishable by imprisonment for life or a term not less than fifteen years.

B. As used in this section, 'carjacking' means the intentional seizure or seizure of control of a motor vehicle of another with intent to permanently or temporarily deprive another in possession or control of the vehicle of that possession or control

respects.¹⁰⁶ The statutory language in § 18.2-58.1 establishing the violence or intimidation element for carjacking mirrors the language in the robbery statute.¹⁰⁷ Also, like robbery, carjacking requires a taking of the personal property of another from that person.¹⁰⁸

3. Proper Predicates for Section 18.2-32 Robbery

The distinctions between carjacking and robbery center on the personal property and permanently deprive elements of the offense.¹⁰⁹ Obviously, in a carjacking, the accused must seize the victim's vehicle or seize control of that vehicle, as opposed to robbery's more general requirement that the taking involve any personal property.¹¹⁰ Additionally, a carjacker need not intend to deprive the owner of the vehicle permanently, but may intend only "temporarily [to] deprive another in possession or control" of the vehicle.¹¹¹

Several arguments support the conclusion that violation of § 18.2-58.1 should serve as a predicate offense for first degree felony murder.¹¹² First

by means of partial strangulation, or suffocation, or by striking or beating, or by other violence to the person, or by assault or otherwise putting a person in fear of serious bodily harm, or by threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever.

Id.

106. See *Bell v. Commonwealth*, 21 Va. App. 693, 701, 467 S.E.2d 289, 293 (1996) (stating that carjacking "is a species of robbery" and "[f]hough the elements of carjacking and robbery are not identical, the carjacking provision is nonetheless confined by the same limitations which apply to robbery"); GROOT, *supra* note 16, at 81 (noting that felony of carjacking "is closely akin to robbery").

107. Compare VA. CODE ANN. § 18.2-58 (containing robbery offense) with *id.* § 18.2-58.1 (using same statutory language for violence/intimidation element).

108. See *id.* § 18.2-58.1 (requiring intentional seizure or seizure of vehicle of another with intent to deprive); *Keyser v. Commonwealth*, 22 Va. App. 747, 750, 473 S.E.2d 93, 94 (1996) (noting accused must obtain actual control of the vehicle); GROOT, *supra* note 16, at 81 (stating that accused must intentionally seize vehicle or seize control of vehicle); 2 LAFAYETTE & SCOTT, *supra* note 47, § 8.11, at 438 (listing elements of common-law robbery). But see *supra* notes 106-07 and accompanying text (distinguishing nature of taking under § 18.2-58.1 from taking under § 18.2-58).

109. See GROOT, *supra* note 16, at 81 (stating that carjacking is more limited than robbery in its subject matter and more expansive in that accused need only intend temporarily to deprive).

110. See *Bell*, 467 S.E.2d at 292 (noting General Assembly enacted carjacking statute to protect persons in possession or control of their vehicles); GROOT, *supra* note 16, at 81 (noting stolen object must be motor vehicle).

111. See VA. CODE ANN. § 18.2-58.1 (Michie 1996 & Supp. 1999) (describing intent as "intent to permanently or temporarily" deprive (emphasis added)); GROOT, *supra* note 16, at 81 (noting accused need only intend temporarily to deprive).

112. See *supra* note 98 and accompanying text (noting factors in *Bell v. Commonwealth*,

among these is that because § 18.2-58.1 includes the same violence or intimidation element as § 18.2-58, carjacking is as inherently dangerous as robbery. Like robbery, a carjacking necessarily includes misappropriating property in a face-to-face confrontation by violence or threat of violence.¹¹³ Second, as the Virginia Court of Appeals noted, because the General Assembly enacted § 18.2-58.1 as an aggravated form of robbery, it makes little sense to exclude the aggravated form of an offense from the scope of first degree felony murder predicates when the general form of the offense qualifies.¹¹⁴ The penalty structures for the two offenses support this argument. The penalty for robbery is life or any term not less than five years, and for carjacking the penalty is life or any term not less than fifteen years.¹¹⁵ This comparison indicates the General Assembly considers carjacking to be at least as serious an offense as robbery.

Nonetheless, an argument in favor of including carjacking as a predicate offense in § 18.2-32 must explain how that section references carjacking when it lists only robbery as a predicate. For carjacking to be within the scope of the predicate offense named as "robbery" in § 18.2-32, that term cannot refer to § 18.2-58 alone.¹¹⁶ It must refer either to the whole of Article 5, or to some definable category of "robbery" offenses, such as those having the same or appropriately similar elements as common-law robbery.¹¹⁷

However, neither of these possibilities comports with the manner in which § 18.2-32 designates the predicates for sexual offenses.¹¹⁸ Those references are to precise sections of the Code rather than to larger subdivisions thereof.¹¹⁹ This precision in the reference to the sexual offenses is particularly notable in the case of object sexual penetration, which clearly refers to § 18.2-

21 Va. App. 693, 701, 467 S.E.2d 289, 293 (1996) that might apply to predicate offense argument).

113. See *supra* note 102 and accompanying text (explaining danger inherent in offense of robbery).

114. See *Bell*, 467 S.E.2d at 293 & n.2 (noting bill offered for passage by General Assembly was captioned "*Aggravated robbery, motor vehicle piracy, carjacking penalty*").

115. See VA. CODE ANN. §§ 18.2-58 & 18.2-58.1 (stating penalty for robbery as life or any term not less than five years, and penalty for carjacking as life or any term not less than fifteen years).

116. See *supra* note 98 and accompanying text (discussing possible scope of predicate offense of robbery).

117. See 2 LAFAYE & SCOTT, *supra* note 47, § 7.5, at 206-08 (discussing interface between common law and statutory limitations on scope of felony murder rule).

118. See *supra* Part III.A (explaining clarity of references to sexual predicate offenses for first degree felony murder in § 18.2-32).

119. See *supra* Part III.A (explaining clarity of references to sexual predicate offenses for first degree felony murder in § 18.2-32).

67.2,¹²⁰ and, like carjacking, is a statutorily-created offense.¹²¹ Neither of the two analyses explaining § 18.2-32's reference to robbery as encompassing carjacking are consistent with § 18.2-32's references to the sexual predicate offenses.

Although one may make a plausible argument for including carjacking under the rubric of robbery, that fact does not legitimate the ambiguity of § 18.2-32's use of the word "robbery." Arguably, the inherently dangerous nature of carjacking justifies its inclusion as a species of robbery, but the scope of the predicate offense should be apparent from the face of the statute.¹²² It should not require an inquiry into the doctrinal underpinnings of the felony murder rule to rationalize the result.¹²³ This ambiguity runs contrary to the basic purpose of statutory codification and erects analytical barriers to citizens without legal training.

C. Arson

Arson has been a predicate felony for first degree murder since at least 1849.¹²⁴ Nonetheless, the statutory reference remains unclear.¹²⁵ Like robbery, arson is not a statutory crime in Virginia.¹²⁶ The first Article within Chapter 5 of the Code, "Crimes against Property," is titled "Arson and Related Crimes."¹²⁷ The first offense in the Article, § 18.2-77, titled "Burning or destroying dwelling house, etc.," is the closest the Code comes to arson as it

120. See *supra* Part III.A (explaining clarity of references to sexual predicate offenses for first degree felony murder in § 18.2-32).

121. See *supra* Part III.A (explaining clarity of references to sexual predicate offenses for first degree felony murder in § 18.2-32).

122. See *Perkins v. Commonwealth*, 12 Va. App. 7, 16, 402 S.E.2d 229, 234 (1991) (noting penal statute is unconstitutionally vague if it fails to define offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement" (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983))).

123. See *id.* at 234 (noting requirement that law "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" (quoting *Coleman v. City of Richmond*, 5 Va. App. 459, 466, 364 S.E.2d 239, 243 (1988) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972))).

124. See VA. CODE ch. 191, § 1 (Ritchie 1849) (defining offense of homicide).

125. See GROOT, *supra* note 16, at 273 (noting difficulty in identifying reference for arson within Code).

126. See VA. CODE ANN. tit. 18.2, ch. 5, art. 1, (Michie 1996 & Supp. 1999) (titled article "Arson and Related Crimes," but containing no statutory offense called arson); GROOT, *supra* note 16, at 273 ("Virginia no longer has a specific crime called arson . . .").

127. See VA. CODE ANN. tit. 18.2, ch. 5, art. 1 (titled article "Arson and Related Crimes"); PERKINS, *supra* note 62, at 216 (defining common-law arson as malicious burning of dwelling of another).

was defined under the common law.¹²⁸ However, § 18.2-77 is much broader in scope than its common-law corollary.¹²⁹ Additionally, Chapter 5, Article 1 includes several other burning crimes.¹³⁰ Like robbery, the arson reference in § 18.2-32 is frustrated by these interpretive obstacles: the discontinuities between potential statutory references and the common-law offense; the absence of a direct statutory corollary in the Code; an ambiguous article heading that includes the name of the predicate offense; and the presence of multiple offenses within that Article.¹³¹

1. Common-Law Arson

Arson was a felony at common law.¹³² Like rape and robbery, common-law arson involves a significant prospect of harm to persons.¹³³ The common-law formulation requires that the ignited structure be a dwelling place, making arson an offense against a habitation, rather than merely an offense against property.¹³⁴ This factor focuses the offense of arson on burnings that carry an inherent threat to human life.¹³⁵

128. See GROOT, *supra* note 16, at 273 (stating § 18.2-77 is "closest analog to common law arson").

129. See *id.* at 21 (noting substantial differences between § 18.2-77 and common-law arson: "First, § 18.2-77 is violated by one who burns his own dwelling house or manufactured home. Second, the range of structures covered by § 18.2-77 is much broader than the common law dwelling. Third, § 18.2-77 includes two degrees of crime.").

130. See VA. CODE ANN. § 18.2-77 ("Burning or destroying dwelling house, etc."); *id.* § 18.2-79 ("Burning or destroying meeting house, etc."); *id.* § 18.2-80 ("Burning or destroying any other building or structure"); *id.* § 18.2-81 ("Burning or destroying personal property, standing grain, etc."); *id.* § 18.2-82 ("Burning building or structure while in such building or structure with intent to commit felony"); § 18.2-86 ("Setting fire to woods, fences, grass, etc."); § 18.2-87 ("Setting woods, etc., on fire intentionally whereby another is damaged or jeopardized"); § 18.2-88 ("Carelessly damaging property by fire").

131. See *supra* Part III.B (explaining particular problems with § 18.2-32's reference to robbery as predicate offense for first degree felony murder).

132. See PERKINS, *supra* note 62, at 217 (noting arson was common-law felony from earliest days, and at one time punishment was death by burning); see also notes 55-60 and accompanying text (discussing doctrinal developments limiting scope of felony murder doctrine to those offenses which were felonies at common law).

133. See 2 LAFAYE & SCOTT, *supra* note 47, § 7.5, at 211 (listing specific felonies that involve significant prospect of violence).

134. See GROOT, *supra* note 16, at 21 ("At common law a dwelling was a place of residence."); PERKINS, *supra* note 62, at 223 (stating that, like burglary, at common law, arson "was an offense against the habitation and not against property").

135. See PERKINS, *supra* note 62, at 218, 223 (noting restrictions on dwelling, including that it must be place of residence, it does not become one before first dweller has moved in, and definition extends to barn or stable if usually occupied at night by lodger, and also stating that "[f]ew types of harm of comparable gravity . . . are so likely to result from mischance . . . as the burning of a dwelling").

Other elements of arson also concern the dangerousness of the offense. Common-law arson requires that the dwelling burned be "of another."¹³⁶ One cannot be guilty of common-law arson for setting fire to one's own dwelling.¹³⁷ An attack on another's habitation, particularly if unsuspected, increases the risk of death or serious injury.¹³⁸ Additionally, common-law arson does not reach negligent burnings, but requires a higher level of mental state, punishing those who willfully increase the risk of harm to others.¹³⁹

2. Arson in the Code

a. Dwelling Places: Section 18.2-77

Section 18.2-77, titled "Burning or destroying dwelling house, etc.," is the closest burning offense Virginia has to common-law arson.¹⁴⁰ However,

136. See *id.* at 226 (noting that "the statement frequently encountered is that it must be the 'house of another,' but it is possession or occupancy and not title which determines whose house a building shall be said to be for such purposes" (citations omitted)).

137. See *id.* at 226-27 (explaining that arson does not include burning one's own dwelling, unless one does so with "the purpose of burning the dwelling of another, or under such circumstances that there is obviously great danger of such a result . . . [and] the fire is actually communicated to the other house").

138. See *id.* (stating that arson "is an offense which involves a disturbance of the 'security of the dwelling house' . . . [and that] [t]he human hazard created by the conflagration of a dwelling is not limited to the dweller and his household because members of the fire department may be expected to come, friends and neighbors may attempt to be of assistance, and some of these may go onto or into the building to fight the blaze").

139. See GROOT, *supra* note 16, at 23 (noting that common-law arson includes reckless as well as intentional burnings); PERKINS, *supra* note 62, at 217-19 (noting use of "voluntary" and "willful" to describe intent of actor, defining common-law arson as "the malicious burning of the dwelling of another," and stating that negligent burnings do not constitute common-law arson).

140. See VA. CODE ANN. § 18.2-77 (Michie 1996 & Supp. 1999) (defining burning offense). Section 18.2-77 reads, in pertinent part:

A. If any person maliciously (i) burns, or by use of any explosive device or substance destroys, in whole or in part, or causes to be burned or destroyed, or (ii) aids, counsels, or procures the burning or destruction of any dwelling house or manufactured home whether belonging to himself or another, or any occupied hotel, hospital, mental health facility, or other house in which persons usually dwell or lodge, any occupied railroad car, boat, vessel, or river craft in which persons usually dwell or lodge, or any occupied jail or prison, or any occupied church or occupied building owned or leased by a church that is immediately adjacent to a church, he shall be guilty of a felony, punishable by imprisonment for life or for any period not less than five years . . . [a]ny person who maliciously sets fire to anything, or aids, counsels or procures the setting fire to anything, by the burning whereof such occupied dwelling house, manufactured home, hotel, hospital, mental health facility or other house, or railroad car, boat, vessel, or river craft, jail or prison, church or building owned or leased by a church that is immediately adjacent to a church, is burned shall be guilty of a violation of this subsection.

§ 18.2-77 differs from common-law arson in many respects. First, § 18.2-77 extends the range of structures covered under common-law arson to include river craft, railroad cars, and manufactured houses.¹⁴¹ In doing so, though, § 18.2-77, like common-law arson, requires that those structures be residences.¹⁴²

Beyond broadening the range of structures, § 18.2-77 differs from common-law arson in that it allows the prosecution of one who burns her own dwelling.¹⁴³ Furthermore, § 18.2-77 separates the offense into two degrees, with punishment turning on whether the burned structure was occupied or unoccupied.¹⁴⁴ The statute also specifically proscribes setting fire to other things that in turn burn a dwelling place,¹⁴⁵ a result reached by judicial interpretation under the common law.¹⁴⁶

While § 18.2-77 differs in many respects from common-law arson, the statute criminalizes conduct that inherently is likely to cause death or serious injury.¹⁴⁷ Also, § 18.2-77 is the only burning offense in the Code that addresses attacks on habitations.¹⁴⁸ To the extent that § 18.2-77 broadens the

Id.; GROOT, *supra* note 16, at 21 ("Section 18.2-77 is the nearest Virginia analog to common law arson"); *see also* VA. CODE ANN. § 18.2-78 (distinguishing those structures not deemed dwelling house, but creating no separate offense).

141. *See* GROOT, *supra* note 16, at 21-22 (noting that range of structures § 18.2-77 covers is much broader than common-law dwelling).

142. *See id.* at 22 ("In sum, each of the places listed in § 18.2-77 must be resided in to be the subject matter of § 18.2-77 arson."); *supra* note 140 (listing pertinent elements of § 18.2-77).

143. *See* GROOT, *supra* note 16, at 21 (noting, as substantial difference from common-law arson, that "§ 18.2-77 is violated by one who burns his own dwelling house or manufactured home"); PERKINS, *supra* note 62, at 227 (noting human hazard involved in arson is such that many modern legislators have removed requirement that house burned be that of another, and that means of expansion of statute has most frequently been by "the insertion of some such phrase as 'the property of himself or of another'" (citing VA. CODE ANN. § 18.1-75 (Michie 1960), currently in force as VA. CODE ANN. § 18.2-77 (Michie 1996 & Supp. 1999))); *supra* note 140 (quoting portion of § 18.2-77 that states individual's burning of building is violation, "whether belonging to himself or another person . . .").

144. *See* VA. CODE ANN. § 18.2-77 (distinguishing penalty for violation of the statute as five years to life and fine of up to \$100,000 if structure is occupied, but punished as Class 4 felony if unoccupied); GROOT, *supra* note 16, at 21-23 (noting that offense includes two degrees of crime, and discussing difficulties attendant determination of whether structure is unoccupied).

145. *See* VA. CODE ANN. § 18.2-77 (including prohibition on "setting fire to anything" that burns dwelling place).

146. *See* PERKINS, *supra* note 62, at 221-22 (discussing variety of interpretations that bring indirect burning methods within subject matter of common-law arson).

147. *See* GROOT, *supra* note 16, at 273 (noting that burning or bombing habitation, as covered by § 18.2-77, contains inherent danger to human life).

148. *See id.* at 273 (noting that § 18.2-77 is only arson statute in Virginia Code dealing with habitations).

scope of arson, it only does so to reach similar conduct that involves the same hazard to human life.¹⁴⁹ For these reasons, § 18.2-77 is an appropriate predicate for felony murder.¹⁵⁰

b. The Meeting House: Public Buildings and Section 18.2-79

Section 18.2-79, titled "Burning or destroying meeting house, etc.," criminalizes the burning of public buildings not used for habitation.¹⁵¹ Those public buildings that might be used for habitation, such as hotels and jails, are within the scope of § 18.2-77,¹⁵² and are specifically excluded from § 18.2-79.¹⁵³ Like § 18.2-77, the Code separates § 18.2-79 into two grades,¹⁵⁴ with the grades determined by the presence or absence of a person in the building.¹⁵⁵ If the

149. See *id.* at 22 (noting phrase in § 18.2-77, "in which persons usually dwell or lodge" essentially restates common-law test for determining whether place ordinarily not residence became dwelling and thereby became subject matter of arson); PERKINS, *supra* note 62, at 225 (noting some statutory schemes "subordinate the common-law concept of arson and emphasize the element of human danger as by providing that it is 'aggravated arson' if it involves 'any structure, water craft, or movable, wherein it is foreseeable that human life may be endangered'" (citations omitted)).

150. See GROOT, *supra* note 16, at 273 (stating that violation of § 18.2-77 is proper predicate felony for § 18.2-32 felony murder).

151. See VA. CODE ANN. § 18.2-79 (Michie 1996 & Supp. 1999) (establishing burning offense). Section 18.2-79 reads:

If any person maliciously burns, or by the use of any explosive device or substance, maliciously destroys, in whole or in part, or causes to be burned or destroyed, or aids, counsels, or procures the burning or destroying, of any meeting house, courthouse, townhouse, college, academy, schoolhouse, or other building erected for public use except an asylum, hotel, jail, prison or church or building owned or leased by a church that is immediately adjacent to a church, or any banking house, warehouse, storehouse, manufactory, mill, or other house, whether the property of himself or of another person, not usually occupied by persons lodging therein at night, at a time when any person is therein, or if he maliciously sets fire to anything, or causes to be set on fire, or aids, counsels, or procures the setting on fire of anything, by the burning whereof any building mentioned in this section is burned, at a time when any person is therein, he shall be guilty of a Class 3 felony. If such offense is committed when no person is in such building mentioned in this section, the offender shall be guilty of a Class 4 felony.

Id.

152. See *supra* notes 141-46 and accompanying text (discussing differences between common-law arson dwelling and § 18.2-77 dwelling).

153. See *supra* note 151 (quoting § 18.2-79, including portion reading "except an asylum, hotel, jail or prison").

154. See *supra* note 151 (quoting § 18.2-79, including penalty provision); *supra* note 144 and accompanying text (explaining penalty provision for § 18.2-77).

155. See GROOT, *supra* note 16, at 24 (noting that like § 18.2-77, § 18.2-79 is graded, and that "severity depends upon the presence of a person in the building"); *supra* note 151 (quoting § 18.2-79, including penalty provision).

Commonwealth establishes that a person was in the building, the crime is a Class 3 felony; otherwise, § 18.2-79 is punishable as a Class 4 felony.¹⁵⁶ With respect to all other elements, §§ 18.2-77 and 18.2-79 are the same.¹⁵⁷

c. Other Structures: Sections 18.2-80 and 18.2-82

The Code contains two other statutes that address the burning of structures. Sections 18.2-80 and 18.2-82 cover structure burning offenses outside the scope of the more dangerous burnings delineated in §§ 18.2-77 and 18.2-79.¹⁵⁸ Section 18.2-80, titled "Burning or destroying any other building or structure,"¹⁵⁹ requires proof that the violator acted maliciously in burning or destroying;¹⁶⁰ it reaches all structures not covered by §§ 18.2-77 and 18.2-79.¹⁶¹ The structure need not be a building.¹⁶² Section 18.2-80 also covers burnings intended to defraud an insurance company.¹⁶³ Like § 18.2-79, the

156. See *supra* note 140 and accompanying text (quoting § 18.2-77); *supra* note 151 (quoting § 18.2-79, including penalty provision).

157. See GROOT, *supra* note 16, at 23 ("The acts, mental state, and results which will support a conviction under § 18.2-79 are exactly the same as those set out [for § 18.2-77].").

158. See VA. CODE ANN. § 18.2-82 (Michie 1996 & Supp. 1999) (stating that burning covered by section is that burning which is "not punishable under any other section of this chapter"); GROOT, *supra* note 16, at 23 (noting VA. CODE ANN. § 18.2-80 protects structure if it is not covered by §§ 18.2-77 or 18.2-79).

159. See VA. CODE ANN. § 18.2-80 (establishing burning offense). Section 18.2-80 reads:

If any person maliciously, or with intent to defraud an insurance company or other person, burn, or by the use of any explosive device or substance, maliciously destroy, in whole or in part, or cause to be burned or destroyed, or aid, counsel or procure the burning or destruction of any building, bridge, lock, dam or other structure, whether the property of himself or of another, at a time when any person is therein or thereon, the burning or destruction whereof is not punishable under any other section of this chapter, he shall be guilty of a Class 3 felony. If he commits such offense at a time when no person is in such building, or other structure, and such building, or other structure, with the property therein, be of value of \$200, or more, he shall be guilty of a Class 4 felony, and if it and the property therein be of less value, he shall be guilty of a Class 1 misdemeanor.

Id.

160. See *supra* note 159 (quoting VA. CODE ANN. § 18.2-80, including mental state requirement for burning offense).

161. See *supra* note 159 (stating subject matter of section as "the burning or destruction whereof is not punishable under any other section of this chapter"); GROOT, *supra* note 16, at 24 (noting structures protected by § 18.2-80 are those structures not covered by §§ 18.2-77 and 18.2-79).

162. See GROOT, *supra* note 16, at 24 (noting that structure need not be building: "[t]hus an outhouse excepted from § 18.2-77 by § 18.2-78 is within this section").

163. See *supra* note 159 (quoting VA. CODE ANN. § 18.2-80, including element stating "If any person maliciously, or with intent to defraud an insurance company or other person, burn . . .").

Code separates § 18.2-80 into grades according to whether or not a person was present in the structure.¹⁶⁴

Section 18.2-82, titled "Burning building or structure while in such building or structure with intent to commit felony" does not require proof that the burning was malicious.¹⁶⁵ It does require that the violator be in the structure unlawfully with the intent to commit a felony inside the building.¹⁶⁶ Also, in order to be actionable under § 18.2-82, a burning may not be punishable under any of the other burning statutes.¹⁶⁷ The only purpose for § 18.2-82 may be to criminalize the negligent or accidental burning of buildings by burglars.¹⁶⁸

d. Nonstructural Burnings:

Sections 18.2-81, 18.2-86, 18.2-87, and 18.2-88

(1) Property and Crops

There are four other burning offenses in the Code, none of which directly concern the burning of structures.¹⁶⁹ Section 18.2-81, titled "Burning or destroying personal property, standing grain, etc."¹⁷⁰ protects personal prop-

164. See GROOT, *supra* note 16, at 24 (noting § 18.2-80 is "internally graded by presence"); *supra* note 159 (quoting VA. CODE ANN. § 18.2-80, with division by grades).

165. See VA. CODE ANN. § 18.2-82 (Michie 1996 & Supp. 1999) (establishing burning offense). Section 18.2-82 reads:

If any person while in any building or other structure unlawfully, with intent to commit a felony therein, shall burn or cause to be burned, in whole or in part, such building or other structure, the burning of which is not punishable under any other section of this chapter, he shall be guilty of a Class 4 felony.

Id.

166. See *supra* note 165 (stating elements of § 18.2-82).

167. See *supra* note 165 (stating elements of § 18.2-82).

168. See GROOT, *supra* note 16, at 24 (stating § 18.2-82 "permits conviction of a burglar who accidentally or negligently [burns a building and]. . . this may be its only necessary application [because] . . . [t]he only burnings not punishable under another section are those which are not malicious").

169. See VA. CODE ANN. tit. 18.2, ch. 5, art. 1 (naming offenses within article titled "Arson and Related Crimes").

170. See *id.* § 18.2-8 (defining burning offense). Section 18.2-81 reads:

If any person maliciously, or with intent to defraud an insurance company or other person, set fire to or burn or destroy by any explosive device or substance, or cause to be burned, or destroyed by any explosive device or substance, or aid, counsel, or procure the burning or destroying by any explosive device or substance, of any personal property, standing grain or other crop, he shall, if the thing burnt or destroyed, be of the value of \$200 or more, be guilty of a Class 4 felony; and if the thing burnt or destroyed be of less value, he shall be guilty of a Class 1 misdemeanor.

Id.

erty and standing crops.¹⁷¹ The burning must be done either maliciously or with the intent to defraud an insurance company or other person.¹⁷² In this regard, it is a parallel statute to § 18.2-80, which has structural burnings as its subject matter.¹⁷³ However, unlike § 18.2-80, the Code does not grade § 18.2-81 by the physical presence of another person;¹⁷⁴ instead, because it deals explicitly with personal property and standing crops, § 18.2-81 is graded according to the value of "the thing burnt or destroyed."¹⁷⁵ Because § 18.2-81 emphasizes attacks on property, and not on habitations, it does not fit within the inherently dangerous rubric of arson and is therefore an improper predicate for first degree felony murder.¹⁷⁶

(2) *Setting the Woods on Fire*

Section 18.2-86, titled "Setting fire to woods, fences, grass, etc.,"¹⁷⁷ is a Class 6 felony.¹⁷⁸ Like the realty burning offenses,¹⁷⁹ the burning in § 18.2-86 must be done maliciously.¹⁸⁰ The burning itself may be of anything that can spread fire on land.¹⁸¹

Section 18.2-87 also prohibits burning anything that can spread fire on land.¹⁸² The fire must be set "intentionally."¹⁸³ The violator also must inten-

171. See *supra* note 170 (quoting VA. CODE ANN. § 18.2-81 (Michie 1996 & Supp. 1999), including subject matter of offense).

172. See *supra* note 170 (quoting VA. CODE ANN. § 18.2-81, including mental state requirement).

173. See *supra* note 161-63 and accompanying text (discussing subject matter of § 18.2-80).

174. See *supra* note 164 and accompanying text (discussing division of § 18.2-80 according to presence).

175. See *supra* note 170 (quoting VA. CODE ANN. § 18.2-81 (Michie 1996 & Supp. 1999), including grading of offense).

176. See *supra* notes 132-39 (discussing elements that establish inherent dangerousness of common-law arson).

177. See VA. CODE ANN. § 18.2-86 (Michie 1996 & Supp. 1999) (defining burning offense). Section 18.2-86 reads: "[i]f any person maliciously set fire to any wood, fence, grass, straw or other thing capable of spreading fire on land, he shall be guilty of a Class 6 felony." *Id.*

178. See *supra* note 177 (quoting VA. CODE ANN. § 18.2-86, including grade of offense).

179. See *supra* Parts III.C.2.a-c (discussing offenses within article involving burning of realty and mental states required by those statutes).

180. See *supra* note 177 (quoting VA. CODE ANN. § 18.2-86, including mental state requirement).

181. See *supra* note 177 (quoting VA. CODE ANN. § 18.2-86, including subject matter of offense).

182. See VA. CODE ANN. § 18.2-87 (defining burning offense). Section 18.2-87 reads:

Any person who intentionally sets or procures another to set fire to any woods, brush, leaves, grass, straw, or any other inflammable substance capable of spreading

tionally allow the fire to escape onto another's land.¹⁸⁴ Once there, the fire must damage or jeopardize property.¹⁸⁵

The last burning offense in Title 18.2, Chapter 5, Article 1, is § 18.2-88, titled "Carelessly damaging property by fire."¹⁸⁶ The burning may be of any substance capable of spreading fire¹⁸⁷ and must damage or jeopardize property of another.¹⁸⁸ As its name suggests, a negligent mental state is sufficient to convict under the statute.¹⁸⁹ Violation of § 18.2-88 is a Class 4 misdemeanor.¹⁹⁰ Both §§ 18.2-87 and 18.2-88 hold the violator liable for the cost incurred in fighting the fire.¹⁹¹

3. Proper Predicates for Section 18.2-32 Arson

Although Virginia has abandoned common-law arson in favor of a more elaborate statutory scheme,¹⁹² it does not follow that § 18.2-32's predicate of arson should embrace all the burning offenses in the Code.¹⁹³ Several of the

fire, and who intentionally allows the fire to escape to lands not his own, whereby the property of another is damaged or jeopardized, shall be guilty of a Class 1 misdemeanor, and shall be liable for the full amount of all expenses incurred in fighting the fire.

Id.

183. See *supra* note 182 (quoting VA. CODE ANN. § 18.2-87 (Michie 1996 & Supp. 1999), including mental state requirement).

184. See *supra* note 182 (quoting VA. CODE ANN. § 18.2-87, including act requirement).

185. See *supra* note 182 (quoting VA. CODE ANN. § 18.2-87, including act requirement).

186. See VA. CODE ANN. § 18.2-88 (defining burning offense). Section 18.2-88 reads:

If any person carelessly, negligently or intentionally set any woods or marshes on fire, or set fire to any stubble, brush, or straw, or any other substance capable of spreading fire on lands, whereby the property of another is damaged or jeopardized, he shall be guilty of a Class 4 misdemeanor, and shall be liable for the full amount of all expenses incurred in fighting the fire.

Id.

187. See *supra* note 186 (quoting VA. CODE ANN. § 18.2-88, including act requirement).

188. See GROOT, *supra* note 16, at 25 (emphasizing that fire need not escape to other land because fire need only jeopardize other lands); *supra* note 186 (quoting VA. CODE ANN. § 18.2-88, including act requirement).

189. See GROOT, *supra* note 16, at 25 (noting § 18.2-88 "is effectively a lesser included offense of § 18.2-87" and that it "is sufficient for conviction that the fire was set negligently or carelessly"); *supra* note 186 (quoting VA. CODE ANN. § 18.2-88 (Michie 1996 & Supp. 1999), including mental state requirement); see also *supra* note 188 (explaining elements of offense).

190. See *supra* note 186 (quoting § 18.2-88, including grading of offense).

191. See GROOT, *supra* note 16, at 25 (noting criminal sanctions under §§ 18.2-87 and 18.2-88 are relatively minor, but that civil sanction, recovery of firefighting expenses, is severe).

192. See *supra* Part III.C.2 (examining burning offense statutes in Virginia Code).

193. See *supra* notes 25-26 and accompanying text (naming range of burning offenses in Code).

offenses do not qualify as arson;¹⁹⁴ others are simply not acceptable predicates for first degree felony murder on their face.¹⁹⁵ Ultimately, the only appropriate predicate offense in the Code for § 18.2-32's arson reference is § 18.2-77.¹⁹⁶ Section 18.2-77 is the only burning offense that directly addresses common-law arson's protection of dwelling places, the element which makes the offense inherently dangerous.¹⁹⁷ The penalties for the offenses and the structure of the Code also point to this conclusion.¹⁹⁸

a. Dwelling Structures

The common law explicitly limits arson to dwelling places.¹⁹⁹ Some risk to human life attends the burning of any structure, but the increased risk of death or serious injury involved in the burning of a residence is particularly alarming.²⁰⁰ The historic common-law sanction for arson, death by burning, illustrates the social opprobrium attached to attacks on habitations.²⁰¹ The inherent dangerousness of such attacks justifies the inclusion of arson as a predicate offense for felony murder.²⁰² Virginia's arson predicate should

194. See *supra* note 176 and accompanying text (discussing inappropriateness of § 18.2-81 as predicate for first degree felony murder).

195. See *supra* note 189 and accompanying text (discussing mental state requirement for § 18.2-88); see also *Essex v. Commonwealth*, 228 Va. 273, 280-81, 322 S.E.2d 216, 220 (1984) (stating, in context of second degree felony murder, "defendant must be shown to have willfully or purposefully, rather than negligently, embarked upon a course of wrongful conduct likely to cause death or great bodily harm"). *Essex* explicates, in the second degree felony murder context, the proposition that negligent acts cannot serve as a basis to impute malice for felony murder purposes. *Id.*

196. See *supra* note 140 (quoting § 18.2-77, dwelling-place arson statute).

197. See *supra* notes 132-39 (discussing inherent dangerousness of common-law arson).

198. See *infra* Part III.C.3.b (examining penalty structures for burning offenses). That the arson reference in § 18.2-32 is to § 18.2-77 also is supported by the tendency of the General Assembly specifically to refer to lesser burning crimes when it includes them in the general category arson. See GROOT, *supra* note 16, at 273 & n.111 (noting this use in § 18.2-90 and stating that failure to include other burning crimes in § 18.2-32 "probably limits the term 'arson' to § 18.2-77").

199. See GROOT, *supra* note 16, at 21 ("At common law a dwelling was a place of residence."); PERKINS, *supra* note 62, at 223 (stating that, like burglary, at common law, arson "was an offense against the habitation and not against property").

200. See *infra* note 226 (discussing common-law treatment of attacks on habitations in context of burglary). The fact that people are more likely to be asleep or less watchful in their homes accounts for the added danger. There also may be an increased risk that fire will trap unsuspecting children.

201. See PERKINS, *supra* note 62, at 217 (noting that arson was common-law felony from earliest days, and that at one time punishment was death by burning).

202. See 2 LAFAYE & SCOTT, *supra* note 47, § 7.5, at 211 (listing specific felonies involving significant prospect of violence).

address an equivalent level of dangerousness and should include common-law arson's emphasis on dwellings.²⁰³

Only four sections in the Code deal with attacks on structures, and of these four, only § 18.2-77 explicitly addresses attacks on habitations.²⁰⁴ Following § 18.2-77, the subject matter of succeeding statutes tracks a widening ambit of concern, away from the home and into the world at large. Section 18.2-79 looks beyond dwelling structures, focusing instead on public buildings like schools and the work place.²⁰⁵ Section 18.2-82 covers the narrow case of the negligent burglar.²⁰⁶ Moving into the general is § 18.2-80, which covers "any other building or structure."²⁰⁷ Outside the perimeter drawn by these three building-related statutes, the Code addresses the nonstructural world in §§ 18.2-81, 18.2-86, 18.2-87, and 18.2-88, all of which concern the burning of land.²⁰⁸

b. Penalty Structure

As the subject matter of the burning offenses moves outward from habitations, the severity of their penalties decreases coordinately. Section 18.2-77, the dwelling house statute, is punishable, at its maximum, by life imprisonment and a fine of \$100,000.²⁰⁹ Section 18.2-79, the meeting house statute, is punishable, at its maximum, by twenty years and a fine of \$100,000.²¹⁰ Section 18.2-82 awards the negligent burglar a maximum term of ten years and the same \$100,000 fine.²¹¹

As for the nonstructural burning offenses, § 18.2-81 is punishable by a maximum of ten years imprisonment if the crops or property destroyed are

203. See *supra* Part III.C.1 (discussing common-law arson).

204. See VA. CODE ANN. § 18.2-77 (Michie 1996 & Supp. 1999) (establishing burning offense); *supra* notes 147-50 and accompanying text (noting that while § 18.2-77 is broader than common-law arson, its elements remain focused on inherent dangers attending attacks on dwellings).

205. See VA. CODE ANN. § 18.2-79 (establishing burning offense); *supra* notes 151-57 and accompanying text (discussing scope of meeting house burning offense).

206. See VA. CODE ANN. § 18.2-82 (establishing burning offense); *supra* note 168 and accompanying text (discussing purpose of § 18.2-82).

207. See VA. CODE ANN. § 18.2-80 (establishing burning offense); *supra* notes 158-64 and accompanying text (discussing general nature of § 18.2-80).

208. See VA. CODE ANN. §§ 18.2-81, 18.2-86, 18.2-87, & 18.2-88 (establishing various burning offenses for protection of property, crops, and land); *supra* notes 169-91 (discussing elements of statutes).

209. See VA. CODE ANN. § 18.2-77 (establishing penalty for burning dwelling place).

210. See *id.* § 18.2-10(c) (Michie 1996 & Supp. 1999) (establishing penalty for Class 3 felonies).

211. See *id.* § 18.2-10(d) (establishing punishment for Class 4 felonies).

valued above \$200.²¹² Section 18.2-86, a Class 6 felony, has a maximum term of five years.²¹³ The remaining two burning offenses, §§ 18.2-87 and 18.2-88 are both misdemeanors.²¹⁴ The maximum prison time for violation of the former is twelve months.²¹⁵ The latter is punishable by a fine of not more than \$250.²¹⁶ However, both carry a civil penalty: violators are liable for all expenses incurred in fighting the fire.²¹⁷

Virginia's elaborate statutory scheme establishes a hierarchy of offenses through its penalty structure. Like the common law, the Code deems attacks on dwelling houses as most serious, and this form of arson receives the most severe penalty.²¹⁸ It is clear from their status as misdemeanor offenses that §§ 18.2-87 and 18.2-88 are inappropriate predicates for felony murder.

c. Textual Structure

The name of Title 18.2, Chapter 5, Article 1 is "Arson and Related Crimes."²¹⁹ This designation implies that within Article 1 there is one offense in the category "arson" and more than one offense related to but not in the category "arson." It follows that at least two offenses must be "related crimes" and not "arson." This understanding argues against a wholesale inclusion of all burning offenses in Article 1 as predicates for § 18.2-32.

Comparisons with other portions of the Code support this analysis. Article 2 of Chapter 5 in Title 18.2 is titled "Burglary and Related Offenses."²²⁰ Section 18.2-89, the first and most serious offense in the article,²²¹ defines and grades the crime of burglary.²²² Necessarily, as § 18.2-89 is burglary, the

212. *See id.* (establishing punishment for Class 4 felonies). If the property destroyed is valued at less than \$200, burning is a Class 1 misdemeanor, has a maximum penalty of twelve months imprisonment and a fine of \$2,500. *See id.* § 18.2-11(a) (establishing penalty for Class 1 misdemeanors).

213. *See id.* § 18.2-10(f) (establishing punishment for Class 6 felonies).

214. *See id.* §§ 18.2-87, 18.2-88 (establishing grades for burning offenses).

215. *See id.* § 18.2-11(a) (establishing punishment for Class 1 misdemeanors).

216. *See id.* § 18.2-11(d) (establishing punishment for Class 4 misdemeanors).

217. *See id.* §§ 18.2-87 & 18.2-88 (establishing civil liability for violation of burning offenses); *supra* note 191 and accompanying text (discussing severity of civil liability for land-burning offenses).

218. *See supra* notes 209-17 and accompanying text (comparing penalties for burning offenses).

219. *See* VA. CODE ANN. tit. 18.2, ch. 5, art. 1 (Michie 1996 & Supp. 1999) (establishing offenses titled "Arson and Related Crimes").

220. *See* VA. CODE ANN. tit. 18.2, ch. 5, art. 2 (establishing offenses titled "Burglary and Related Offenses").

221. *See id.* (codifying § 18.2-89); GROOT, *supra* note 16, at 69-76 (examining burglary and related offenses section of Code).

222. *See* VA. CODE ANN. § 18.2-89 (defining and grading offense of burglary).

remaining crimes are the "related offenses" of the title. If the Code structures Article 1 of the same Chapter, "Arson and Related Crimes," in a parallel fashion, then the first and most serious offense, § 18.2-77, is "arson," and the remaining offenses are "related crimes."²²³ Therefore, when § 18.2-32 names arson as a predicate offense for first degree felony murder, the reference is to § 18.2-77, and not to any other burning offense.²²⁴

D. Burglary

1. Common-Law Burglary

Like rape, robbery, arson, and forcible sodomy, burglary was a felony at common law.²²⁵ The common law considered burglary a heinous offense because it was an attack, not on property, but on a person's right of habitation.²²⁶ The elements of common-law burglary are the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony.²²⁷ The dwelling house and structural elements imply that burglary poses an inherent danger to life.²²⁸

223. See *id.* tit. 18.2, chap. 5, art. 1 (establishing offenses titled "Arson and Related Crimes").

224. See GROOT, *supra* note 16, at 273 (noting § 18.2-77 is proper predicate felony because of danger to human life). However, §§ 18.2-79 and 18.2-80 do not carry the same inherent risk. *Id.*

225. See 2 LAFAVE & SCOTT, *supra* note 47, § 7.5, at 208 (noting that felonies at common law are rape, sodomy, robbery, burglary, arson, mayhem, and larceny); *supra* notes 60 & 62 and accompanying text (discussing doctrinal developments limiting scope of felony murder doctrine to those offenses that were felonies at common law).

226. See 2 LAFAVE & SCOTT, *supra* note 47, § 8.13, at 469 (stating theoretical basis of common-law burglary as "protection of man's right of habitation" and noting Blackstone's commentary that burglary was crime which burglarized could punish with death, and which, in civilized society, law would punish similarly); C. S. Parnell, Annotation, 43 A.L.R.2d 831, 834 (1955) (discussing burglary as attack on habitation). Parnell noted that:

It is evident that the offense of burglary at common law was considered one aimed at the security of the habitation rather than against property. . . . [I]t was the circumstance of midnight terror aimed toward a man or his family who were in rightful repose in the sanctuary of the home, that was punished. . . . [T]he jealousy with which the law guarded against any infringement of this ancient right of peaceful habitation is best illustrated by the severe penalties which at common law were assessed against a person convicted of burglary.

Id. at 834-35.

227. See 2 LAFAVE & SCOTT, *supra* note 47, § 8.13, at 464 (stating common-law definition of burglary (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 224 (1769); 3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 63 (1644); 2 E. EAST, PLEAS OF THE CROWN 484 (1803); 1 M. HALE, PLEAS OF THE CROWN 549 (1736))).

228. See GROOT, *supra* note 16, at 273 ("Since the felony murder doctrine imputes malice from the predicate crime, it should be one in which the danger to human life is inherently very probable."); 2 LAFAVE & SCOTT, *supra* note 47, § 7.5, at 208-09 (stating that common-law felonies, including burglary, involve danger to life).

2. Burglary in the Code

a. Statutory Burglary: Section 18.2-89

The Code denominates Title 18.2, Chapter 5, Article 2 as "Burglary and Related Offenses."²²⁹ The first offense in Article 2 is § 18.2-89, "Burglary; how punished."²³⁰ Section 18.2-89 is largely a restatement of the common-law offense of burglary.²³¹ Because violation of § 18.2-89 poses an inherently high risk to human life and because it clearly parallels the common-law offense of the same name, § 18.2-89 is an appropriate predicate for § 18.2-32 felony murder.²³²

b. Housebreaking or Storebreaking: Sections 18.2-90 and 18.2-91

The next section in the Code, § 18.2-90,²³³ while now titled "Entering dwelling house, etc., with intent to commit murder, rape, robbery, or arson,"

229. See VA. CODE ANN. tit. 18.2, ch. 5, art. 2 (Michie 1996 & Supp. 1999) (listing statutory offenses under heading "Burglary and Related Offenses").

230. See *id.* § 18.2-89 (establishing offense of burglary). Section 18.2-89 reads:

If any person break and enter the dwelling house of another in the nighttime with intent to commit a felony or larceny therein, he shall be guilty of burglary, punishable as a Class 3 felony; provided however, that if such person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony.

Id.

231. See GROOT, *supra* note 16, at 71 ("Section 18.2-89 is a restatement of the common law offense."); *supra* note 230 (stating elements of § 18.2-89); *supra* note 227 and accompanying text (noting elements of common-law burglary). One notable difference is the different grading for possession of a deadly weapon. See VA. CODE ANN. § 18.2-89 (grading offense of statutory burglary).

232. See GROOT, *supra* note 16, at 273 (noting § 18.2-89 is appropriate predicate for felony murder).

233. See VA. CODE ANN. § 18.2-90 (establishing housebreaking offense). Section 18.2-90 reads:

If any person in the nighttime enters without breaking or in the daytime breaks and enters or enters and conceals himself in a dwelling house or an adjoining, occupied outhouse or in the nighttime enters without breaking or at any time breaks and enters or enters and conceals himself in any office, shop, manufactured home, storehouse, warehouse, banking house, church as defined in § 18.2-127, or other house, or any ship, vessel or river craft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation, with intent to commit murder, rape, robbery or arson in violation of §§ 18.2-77, 18.2-79, or § 18.2-80, he shall be deemed guilty of statutory burglary, which offense shall be a Class 3 felony. However, if such person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony.

Id.

is often called "housebreaking" or "storebreaking" in the cases.²³⁴ These denominations also are applied to § 18.2-91, now titled "Entering dwelling house, etc., with intent to commit larceny, assault and battery or other felony."²³⁵ These two sections differ from burglary in many respects.²³⁶ First, the Code does not limit §§ 18.2-90 and 18.2-91 to nighttime acts.²³⁷ Second, entry may be made without breaking, but by entering and hiding.²³⁸ Third, §§ 18.2-90 and 18.2-91 extend to structures other than dwelling places, to include most enclosed structures, ships, railroad cars, and vehicles used as habitations.²³⁹

234. See *Willoughby v. Smyth*, 194 Va. 267, 270, 72 S.E.2d 636, 638 (1952) (noting Virginia courts have recognized "housebreaking" and "storebreaking" as descriptive term of statutory offenses now codified as § 18.2-90 and 18.2-91); see also PERKINS, *supra* note 62, at 213 (noting that legislatures have enacted statutes in order to expand area of societal interest protected by common-law burglary, and, to distinguish from common-law felony, often have labeled statutory offense "housebreaking").

235. See VA. CODE ANN. § 18.2-91 (Michie 1996 & Supp. 1999) (defining burglary offense). Section 18.2-91 reads:

If any person commits any of the acts mentioned in § 18.2-90 with intent to commit larceny, or any felony other than murder, rape or robbery, or arson in violation of §§ 18.2-77, 18.2-79, or 18.2-80, or if any person commits any of the acts mentioned in § 18.2-89 or § 18.2-90 with intent to commit assault and battery, he shall be guilty of statutory burglary, punishable by confinement in a state correctional facility for not less than one or more than twenty years or, in the discretion of the jury or the court trying the case without a jury, be confined in jail for a period not exceeding twelve months or fined not more than \$2,500, either or both. However, if the person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony.

Id.

236. See GROOT, *supra* note 16, at 71-72 (noting differences between § 18.2-89 burglary statute and §§ 18.2-90 and 18.2-91).

237. See *supra* note 233 (quoting VA. CODE ANN. § 18.2-90, including time of day requirements); *supra* note 235 (quoting VA. CODE ANN. § 18.2-91, including time of day requirements).

238. See *supra* note 233 (quoting VA. CODE ANN. § 18.2-90, including entry requirements); *supra* note 235 (quoting VA. CODE ANN. § 18.2-91, including entry requirements). Sections 18.2-90 and 18.2-91 allow conviction of daytime conduct if done by either (1) entering and hiding or (2) breaking and entering; only entry must be established for nighttime conduct. See GROOT, *supra* note 16, at 72 (explicating statutory language of §§ 18.2-90 and 18.2-91).

239. See GROOT, *supra* note 16, at 73 (noting that while burglary can be committed only against dwelling house, § 18.2-90 "can be committed against a dwelling house or adjoining outhouse, virtually any other enclosed structure, ship or boat, railroad car, or any motor vehicle used as a place of habitation"); *supra* note 233 (quoting VA. CODE ANN. § 18.2-90, including place requirements). Note that the expansive list of places § 18.2-90 covers includes the structures enumerated under § 18.2-79, the meeting house burning statute, as well as the non-structural habitations, such as motor vehicles, of § 18.2-77, the dwelling place statute. See *supra* notes 140 & 151 (quoting VA. CODE ANN. §§ 18.2-77 and 18.2-79); see also Dalton v.

3. Proper Predicates for Section 18.2-32 Burglary

The differing mental state elements of the Code's "Burglary and Related Offenses" offers an acceptable means of distinguishing between §§ 18.2-89, 18.2-90, and 18.2-91. Section 18.2-89 requires the intent to commit a felony or larceny.²⁴⁰ Section 18.2-90 limits its mental state element to the intent to commit murder, rape, robbery, or arson.²⁴¹ Similarly, § 18.2-91 limits its mental state element to the intent to commit larceny, assault and battery, or felonies other than murder, rape, robbery, or arson.²⁴²

Because § 18.2-90's mental state element requires the intent to commit inherently dangerous offenses, it is an appropriate predicate for felony murder.²⁴³ Although the Code does not limit § 18.2-90 to dwelling places, and it is therefore not strictly limited to attacks on habitations, breaking and entering a structure with the intent to commit an inherently dangerous felony warrants treating § 18.2-90 as § 18.2-89's equivalent for felony murder purposes.²⁴⁴ The human hazard violation § 18.2-90 creates is actually two-fold: the improper presence on the premises, whether effected by breaking or concealment, coupled with improper intent to commit a violent felony.²⁴⁵ Notably, the listed object crimes of § 18.2-90 that are not murder are themselves predicate offenses for felony murder.²⁴⁶

Commonwealth, 14 Va. App. 544, 549, 418 S.E.2d 563, 565-66 (1992) (stating fact that three sides of structure were composed of chain link fence does not exclude structure from classification as storehouse).

240. See *supra* note 233 (quoting VA. CODE ANN. § 18.2-90). Note that while common-law burglary required the intent to commit a felony, § 18.2-89 includes the intent to commit larceny. VA. CODE ANN. § 18.2-89. While a felony at common law, see PERKINS, *supra* note 62, at 234 (defining common-law larceny), the Code divides larceny by kind and degree, and the offense may not be a felony in some instances. See VA. CODE ANN. §§ 18.2-95 & 18.2-96 (dividing larceny into grand and petit larceny).

241. See *supra* note 233 (quoting VA. CODE ANN. § 18.2-90 (Michie 1996 & Supp. 1999), including intent requirement).

242. See *supra* note 235 (quoting VA. CODE ANN. § 18.2-91, including intent requirement).

243. See *supra* note 62 and accompanying text (discussing doctrinal requirements of felony murder rule in Virginia).

244. See GROOT, *supra* note 16, at 274 (stating that "[b]reaking/entering with . . . [intent to commit murder, rape, robbery, or arson] carries a sufficiently high inherent risk that a consequent death can properly be treated as felony murder").

245. See *id.* (stating that "[b]reaking/entering with . . . [intent to commit murder, rape, robbery, or arson] carries a sufficiently high inherent risk that a consequent death can properly be treated as felony murder"); *supra* notes 240-43 (discussing intent elements of §§ 18.2-89 and 18.2-90).

246. See *supra* text accompanying note 4 (quoting first degree felony murder portion of VA. CODE ANN. § 18.2-32). A possible exception to this near parallel between the predicate offenses for felony murder and the object crimes of § 18.2-90 is arson, which the General

Section 18.2-91 explicitly excepts the specific object crimes of § 18.2-90.²⁴⁷ In their place, § 18.2-91 names the intent to commit larceny, assault and battery, or felonies other than those named in § 18.2-90.²⁴⁸ The specific object crimes of § 18.2-91 do not carry the same level of inherent danger as those in § 18.2-90.²⁴⁹ Therefore, § 18.2-91 is an inappropriate predicate for § 18.2-32 burglary felony murder.²⁵⁰

E. Abduction

Abduction and kidnapping are synonymous in the Code.²⁵¹ However, none of the statutory abduction offenses in the Code correlate directly with common law kidnapping.²⁵² Title 18.2, Chapter 4, Article 3, denominated "Kidnapping and Related Offenses," contains at least three abduction statutes, any one of which might be the offense referenced in § 18.2-32.²⁵³ The cross-reference in § 18.2-32 to the capital murder statute, "abduction, except as

Assembly added to § 18.2-90 in 1997. *See supra* note 233 (quoting VA. CODE ANN. § 18.2-90, as amended). When the legislature enacted the 1997 amendment, § 18.2-90 incorporated §§ 18.2-77, 18.2-79, and 18.2-80 as specific object crimes for housebreaking. *Id.* On their own, §§ 18.2-79 and 18.2-80 do not pose the level of danger necessary to justify their inclusion as predicate offenses for § 18.2-32. *See supra* note 62 and accompanying text (discussing felony murder doctrine). However, when a perpetrator commits those offenses in the context of violating § 18.2-90, the danger of either §§ 18.2-79 or 18.2-80 is aggravated by the presence of the additional elements in § 18.2-90. In this context, the burning offense is committed or attempted inside a structure – after either breaking and entering or entering and concealment. The danger to human life created by the act is multiplied, and the doctrinal requirement that the predicate offense be inherently dangerous is met. *Id.*

247. *See supra* note 235 (quoting VA. CODE ANN. § 18.2-91 (Michie 1996 & Supp. 1999)).

248. *See supra* note 235 (quoting VA. CODE ANN. § 18.2-91, including intent requirement).

249. *See GROOT, supra* note 16, at 273 (stating "[s]ince the felony murder doctrine imputes malice from the predicate crime, it should be one in which the danger to human life is inherently very probable"); 2 LAFAYETTE & SCOTT, *supra* note 47, § 7.5, at 208-09 (stating common-law felonies, with exception of larceny and consensual sodomy, but especially robbery, arson and rape, involve danger to life).

250. *See GROOT, supra* note 16, at 274 & n.113 (stating that lesser intents of § 18.2-91 make it inappropriate to treat death consequent to violation of statute as felony murder but noting that violation resulting in death is still felony homicide).

251. *See* VA. CODE ANN. § 18.2-47 (stating that "[t]he terms 'abduction' and 'kidnapping' shall be synonymous in this Code").

252. *See Scott v. Commonwealth*, 228 Va. 519, 526, 323 S.E.2d 572, 576 (1984) (stating § 18.2-47 supersedes common law); GROOT, *supra* note 16, at 1 (stating abduction offenses in Code are "entirely statutory and virtually divorced from their common law antecedents").

253. *See* VA. CODE ANN. tit. 18.2, ch. 4, art. 3, §§ 18.2-47, 18.2-48, & 18.2-49.1 (Michie 1996 & Supp. 1999) (listing statutory offenses under Article 3, entitled "Kidnapping and Related Offenses").

provided in § 18.2-31," adds additional complexity to the determination of the appropriate abduction predicate.²⁵⁴

1. Common-Law Abduction and Kidnapping

The common law defined kidnapping as the forcible abduction or stealing away of man, woman, or child from their own country and sending into another.²⁵⁵ The offense of kidnapping is a form of aggravated false imprisonment – with the extreme asportation element of removal from one's native soil.²⁵⁶ Simple kidnapping does not require proof of a specific intent.²⁵⁷ Aggravated forms include kidnapping for ransom and child stealing.²⁵⁸ Although the common law considered kidnapping to be a misdemeanor, modern statutes make it a felony, and aggravated forms of kidnapping often are included in capital statutes.²⁵⁹

Abduction, on the other hand, is not a common-law offense.²⁶⁰ It has been a statutory crime, however, since 1487, and originally protected young ladies of means from immoderate suitors intent on the ladies' inheritances.²⁶¹ The original statute persists in widely differing forms, but usually includes elements such as taking, often by force or duress; unlawful purpose, including defilement; and deprivation of lawful custody.²⁶² No single factor informs modern abduction statutes beyond the establishment of forms of personal protection;²⁶³

254. See *supra* text accompanying note 4 (quoting VA. CODE ANN. § 18.2-32, including capital murder statute reference); *supra* notes 38-43 and accompanying text (discussing capital statute reference within § 18.2-32 and offering alternative interpretations to "except as provided in § 18.2-31" phrase); *infra* Part III.E.3.a (same).

255. See PERKINS, *supra* note 62, at 176 (stating common-law definition of kidnapping).

256. See *id.* at 176 & n.2, 177 (noting relation of kidnapping to false imprisonment, quoting East – "kidnapping is the 'most aggravated species of false imprisonment'" – and explaining that extreme asportation in form of transportation out of country is no longer essential under modern statutes).

257. See *id.* at 177 (defining simple kidnapping).

258. See *id.* at 180, 181 (describing kidnapping for ransom and child stealing, and noting that child stealing is sometimes considered form of abduction).

259. See *id.* at 180 (noting common-law classification of kidnapping as misdemeanor punishable by fine, imprisonment, and pillory, that modern statutes make kidnapping felony, and stating "the special form of 'kidnapping for ransom' is regarded as one of the gravest of crimes and is not infrequently made a capital offense").

260. See *id.* at 135 (explaining statutory origin of abduction).

261. See *id.* (noting that statute "provided in substance that if any person should take any woman . . . against her will, unlawfully, and such woman had substance in the form of lands or goods or was the heir apparent of her ancestor, such person should be guilty of felony").

262. See *id.* at 135-38 (describing modern statutory approaches to abduction).

263. See *id.* at 135 (noting lack of common factor in abduction statutes "other than that they are intended for certain types of personal protection").

approaches vary by jurisdiction.²⁶⁴ Certain forms of abduction, such as those prohibiting the deprivation of parental custody, overlap the field of kidnapping.²⁶⁵ As abduction means taking or drawing away, that term logically may include kidnapping.²⁶⁶

2. Abduction in the Code

a. Simple Abduction: Section 18.2-47

Abduction and kidnapping are synonymous in the Code.²⁶⁷ Title 18.2, Chapter 4, Article 3, "Kidnapping and Related Offenses," contains two major categories, simple and aggravated abduction, and five additional statutes addressed to lesser offenses.²⁶⁸ The first abduction statute in Article 3 is § 18.2-47, titled "Abduction and kidnapping defined; punishment."²⁶⁹ Often called simple abduction, the cases refer to § 18.2-47 as a lesser-included offense of the aggravated form codified at § 18.2-48.²⁷⁰ Detention without

264. *See id.* ("One jurisdiction may have only one or two provisions covering a small part of the total, another may have eight or ten sections with rather exhaustive coverage, while others occupy intermediate positions of varying degree.")

265. *See id.* at 135, 181 (noting identity between certain forms of abduction and child stealing kidnapping).

266. *See id.* at 136 (noting that word abduction was employed by Blackstone in his definition of kidnapping, and "could logically have included that field as well").

267. *See* VA. CODE ANN. § 18.2-47 (Michie 1996 & Supp. 1999) (stating that "[t]he terms 'abduction' and 'kidnapping' shall be synonymous in this Code"); *see also* PERKINS, *supra* note 62, at 181 (noting connections between forms of abduction and kidnapping, various statutory approaches to those offenses, and stating "[o]ne rather logical solution is a chapter on abduction and kidnapping").

268. *See* VA. CODE ANN. tit. 18.2, ch. 4, art. 3 (listing abduction offenses). Section 18.2-47 is the simple abduction statute. *See infra* note 269 (quoting simple abduction offense). Section 18.2-48 is the aggravated abduction statute. *See infra* note 277 (quoting aggravated abduction offense). The additional statutes are: VA. CODE ANN. § 18.2-48.1 (abduction by prisoners); VA. CODE ANN. § 18.2-49 (threatening, attempting or assisting in abduction); VA. CODE ANN. § 18.2-49 (parental abduction in violation of court order); VA. CODE ANN. § 18.2-50 (requiring disclosure of information and assistance to law enforcement by immediate family); VA. CODE ANN. § 18.2-50.2 (providing emergency control of telephone service in hostage situation).

269. *See* VA. CODE ANN. § 18.2-47 (defining abduction offense). Section 18.2-47 reads, in pertinent part:

Any person, who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes the person of another, with the intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of 'abduction' [T]he terms 'abduction' and 'kidnapping' shall be synonymous in this Code.

Id.

270. *See* *Hawks v. Commonwealth*, 228 Va. 244, 247, 321 S.E.2d 650, 652 (1984) (stating

asportation violates § 18.2-47.²⁷¹ The deprivation of liberty may be accomplished by deception and not force.²⁷² Unless the abduction fits into an explicit category, like parental abduction, violation of § 18.2-47 is punishable as a Class 5 felony.²⁷³

Parents violate § 18.2-47 by detaining, secreting or taking their own children in violation of a custody decree.²⁷⁴ A violation may occur if the abducting parent is without or has limited custodial or visitation rights and that parent withholds the child beyond the scope of the custody decree.²⁷⁵ If the child is withheld in Virginia, the abducting parent is guilty of a Class 1 misdemeanor; if the parent removes the child from the Commonwealth, the offense is a Class 6 felony.²⁷⁶

b. Aggravated Abduction: Section 18.2-48

The Code titles § 18.2-48 "Abduction with intent to extort money or for immoral purpose."²⁷⁷ Section 18.2-48 consists of the same elements as the lesser-included § 18.2-47 plus an additional mental state.²⁷⁸ To convict under § 18.2-48, the Commonwealth must prove that the abduction was committed to extort money or for pecuniary benefit, to defile the victim, or, if the victim is under sixteen, for the purpose of concubinage or prostitu-

that § 18.2-47 is "an offense lesser-included in the offense defined in § 18.2-48"); GROOT, *supra* note 16, at 1 (describing § 18.2-47 as simple abduction).

271. See *Brown v. Commonwealth*, 230 Va. 310, 314, 337 S.E.2d 711, 714 (1985) (concluding that § 18.2-47 may be violated by detention without asportation); GROOT, *supra* note 16, at 1-2 (noting that § 18.2-47 prohibition on seizure, detention, and secreting does not necessarily involve movement, and that abduction crime is complete when victim is deceptively detained).

272. See *supra* note 269 (quoting VA. CODE ANN. § 18.2-47, including force, intimidation or deception element).

273. See VA. CODE ANN. § 18.2-47 (Michie 1996 & Supp. 1999) (defining abduction offense and providing punishment for offense).

274. See *supra* note 269 (quoting VA. CODE ANN. § 18.2-47, including provision forbidding withholding from one "lawfully entitled to [a child's] charge").

275. See GROOT, *supra* note 16, at 3-4 (describing possible custodial violations of § 18.2-47, and noting that abducting parent must intend to withhold child from custodial parent).

276. See VA. CODE ANN. § 18.2-47 (defining simple abduction and providing penalty for offense). Note that if the child is withheld in the Commonwealth, an unintended death in the course of such an abduction could not serve as a predicate for felony homicide, whereas death after removal from the Commonwealth might. See *id.* § 18.2-33 (defining felony homicide).

277. See *id.* § 18.2-48 (defining aggravated abduction). Section 18.2-48 reads: "Abduction (i) with the intent to extort money, or pecuniary benefit, (ii) of any person with intent to defile such person, or (iii) of any child under sixteen years of age for the purpose of concubinage or prostitution, shall be a Class 2 felony." *Id.*

278. See GROOT, *supra* note 16, at 5 (noting that § 18.2-48 consists of simple abduction plus additional mental state).

tion.²⁷⁹ The Code punishes an abduction committed with any of these mental states as a Class 2 felony.²⁸⁰

The pecuniary benefit/extortion mental state clearly encompasses ransom kidnapping.²⁸¹ However, the courts have interpreted the statute to reach a wide variety of fact situations, including cases in which the object of the abduction is to collect or to cancel a debt or even to get a free ride.²⁸² Of course, an abduction committed in the course of a robbery qualifies as an abduction committed with the intent to extort money or pecuniary benefit.²⁸³

The victim of a defilement abduction may be either male or female.²⁸⁴ The intent to defile is a specific intent that the Commonwealth must establish.²⁸⁵ The Code does not define "defile."²⁸⁶ Although defilement is not so limited a concept, the reported cases all involve rape or sodomy.²⁸⁷ Similarly, the Code

279. See *supra* note 277 (quoting VA. CODE ANN. § 18.2-48 (Michie 1996 & Supp. 1999), including mental state element).

280. See *supra* note 277 (quoting VA. CODE ANN. § 18.2-48, including grade of offense).

281. See GROOT, *supra* note 16, at 5 ("Traditional ransom kidnapping is no doubt the primary evil against which this part of the statute is directed."); see also PERKINS, *supra* note 62, at 180 (stating "the special form of 'kidnapping for ransom' is regarded as one of the gravest of crimes and is not infrequently made a capital offense").

282. See *Turnbull v. Commonwealth*, 216 Va. 328, 332, 218 S.E.2d 541, 545 (1975) (finding abduction with intent to collect debt within pecuniary benefit element of aggravated abduction statute); *Krummert v. Commonwealth*, 186 Va. 581, 585, 43 S.E.2d 831, 833 (1947) (finding abduction with intent to obtain free ride within pecuniary benefit element of aggravated abduction); *Kent v. Commonwealth*, 165 Va. 840, 841-42, 183 S.E. 177, 177-78 (1936) (finding abduction with intent to obtain cancellation of debt within pecuniary benefit element of aggravated abduction statute); GROOT, *supra* note 16, at 5 (noting broad construction given mental state requirement of § 18.2-48).

283. See *Barnes v. Commonwealth*, 234 Va. 130, 137, 360 S.E.2d 196, 201 (1987) (holding robbery abduction within § 18.2-48); GROOT, *supra* note 16, at 5 (noting robbery abduction within § 18.2-48).

284. See GROOT, *supra* note 16, at 5 & n.32 (noting § 18.2-48 uses language "any person" for victim of defilement abduction).

285. See *id.* at 5 (noting specific intent element of § 18.2-48).

286. See *id.* at 5 & n.33 (noting that Code does not define defilement, but that model instructions substitute term "sexually molest" for "defile," and that substitution has been judicially approved (citing Va. Model Crim. Instr. No. 4.200, and *Fitzgerald v. Commonwealth*, 223 Va. 615, 633, 292 S.E.2d 798, 808 (1982))).

287. See *id.* at 5 (noting defilement in reported case, and arguing term "defile" should include rape, carnal knowledge, sodomy and object sexual penetration). Notably, with the exception of carnal knowledge, this definition of defilement lists the sex offense predicates in § 18.2-32. See *supra* note 4 and accompanying text (discussing felony murder statute and predicate offenses). Carnal knowledge, criminalized by §§ 18.2-63 and 18.2-64.1, is defined as sexual intercourse, cunnilingus, fellatio, annalingus, anal intercourse, and object sexual penetration, see VA. CODE ANN. §§ 18.2-63(ii), 18.2-64.1 (Michie 1996 & Supp. 1999) (defining carnal knowledge for purposes of sections), and remains within the ambit of the sex offenses in § 18.2-32. See *supra* Part III.A (discussing sex offenses of rape, forcible sodomy, and object sexual

does not define concubinage, and it presumably means holding the victim for repetitive sexual gratification of the abductor.²⁸⁸

c. Parental Abduction: Section 18.2-49.1

In addition to the parental abduction subdivision of § 18.2-47, the Code includes a separate statute for violations of court orders regarding custody and visitation.²⁸⁹ Section 18.2-49.1 criminalizes the knowing, wrongful, and intentional withholding of a child in violation of a custody or visitation decree.²⁹⁰ The violation of the court order must be "clear and significant."²⁹¹

3. Proper Predicates for Section 18.2-32 Abduction

a. History of the Cross-Reference to Section 18.2-31

The language of § 18.2-32 provides additional but inconclusive guidance for interpreting the scope of the abduction reference. Following a listing of the predicate offenses, the language of § 18.2-32 reads "except as provided in § 18.2-31."²⁹² Facially, the exception could apply to all three clauses of § 18.2-32 – the specific means, the willful and deliberate, and the felony murder categories; to all the predicate offenses to felony murder; or to only the predicate offense immediately preceding the clause, abduction.²⁹³

penetration); *supra* note 86 (discussing penetration in context of sex offenses and doctrinal requirement of inherent dangerousness).

288. See GROOT, *supra* note 16, at 6 (explaining concubinage as holding victim for repetitive sexual gratification of abductor).

289. See VA. CODE ANN. §§ 18.2-47 & 18.2-49.1 (Michie 1996 & Supp. 1999) (defining parental abduction offenses).

290. See *id.* § 18.2-49.1 (defining parental abduction offense). Section 18.2-49.1 reads:

A. Any person who knowingly, wrongfully and intentionally withholds a child from the child's custodial parent in a clear and significant violation of a court order respecting the custody or visitation of such child, provided such child is withheld outside of the Commonwealth, shall be guilty of a Class 6 felony.

B. Any person who knowingly, wrongfully and intentionally engages in conduct which constitutes a clear and significant violation of a court order respecting the custody or visitation of a child shall be guilty of a Class 4 misdemeanor upon conviction of a first offense. A second conviction for a violation of this section within twelve months of a first conviction shall be a Class 3 misdemeanor, and a third conviction occurring within twenty-four months of the first conviction shall be a Class 2 misdemeanor.

Id.

291. *Id.*; see GROOT, *supra* note 16, at 4 (noting that "clear and significant" language seems to permit proffer of defensive evidence negating element).

292. See *supra* note 4 and accompanying text (quoting VA. CODE ANN. § 18.2-32).

293. See *supra* note 4 and accompanying text (discussing structure of first degree murder statute); *supra* Part I.B (discussing § 18.2-31 cross-reference).

The statutory history supports this last reading.²⁹⁴ Prior to 1962, abduction was not a predicate offense for first degree felony murder.²⁹⁵ In 1962, the General Assembly added "abduction as defined in § 18.2-38" to the list of predicate felonies.²⁹⁶ Section 18.2-38 was virtually identical to present § 18.2-48, the aggravated abduction statute.²⁹⁷

In 1975, the General Assembly added § 18.2-31, the capital murder statute, to the Code.²⁹⁸ At the time of its enactment, § 18.2-31 included only one form of capital felony murder: "[i]n the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money, or a pecuniary benefit."²⁹⁹ Thus, while abductions to extort money or pecuniary benefit became capital felony murder predicates, the other forms of § 18.2-48, abduction with intent to defile or for purposes of prostitution, did not.³⁰⁰ At this time the General Assembly also amended the language of the first degree murder statute to read, as it does now, "abduction, except as provided in § 18.2-31."³⁰¹

These amendments firmly clarified the scope of the capital felony murder predicate of abduction, but they made the first degree felony murder predicate less clear. Two different readings now are possible. One interpretation could be that as abductions to extort money or for pecuniary benefit were elevated to capital felony murder predicates, the other forms of § 18.2-48 abduction not included in § 18.2-31, defilement and prostitution abduction, became the only

294. See *infra* notes 295-301 and accompanying text (examining statutory history). Alternative readings are possible. All of the felonies listed in § 18.2-32, with the exception of arson, also are referenced in § 18.2-31. See VA. CODE ANN. §§ 18.2-31, 18.2-32 (listing predicate offenses for capital and first degree felony murder). Arguably, the phrase "except as provided in § 18.2-31" could apply to all of the felonies in § 18.2-32. This reading would not resolve the question, however, of whether § 18.2-47 abductions are predicate felonies under § 18.2-32, and does not comport with the legislative history. See *infra* notes 295-301 and accompanying text (discussing amendments to §§ 18.2-31 and 18.2-32).

295. See 1962 Va. Acts ch. 42 (adding abduction as predicate offense for first degree felony murder).

296. *Id.*

297. See 1960 Va. Acts ch. 358 (amending § 18.2-38, aggravated abduction statute); *supra* note 277 (quoting VA. CODE ANN. § 18.2-48 (Michie 1996 & Supp. 1999), current aggravated abduction statute). At the time, the simple abduction statute was § 18.2-36, the equivalent to the current § 18.2-47. See 1960 Va. Acts ch. 358 (amending § 18.2-36, simple abduction statute); *supra* note 269 (quoting VA. CODE ANN. § 18.2-47, current simple abduction statute).

298. See 1975 Va. Acts chs. 14, 15 (enacting capital murder statute).

299. See *id.* (enacting capital murder statute). The General Assembly also moved the aggravated abduction statute from § 18.2-38 to its current place in the Code, § 18.2-48. See *id.* (denominating aggravated abduction statute as § 18.2-48).

300. See *supra* note 277 (quoting § 18.2-48, aggravated abduction statute); *supra* note 281 (discussing egregious nature of ransom kidnapping).

301. See 1975 Va. Acts chs. 14, 15 (enacting capital murder statute and amending first degree murder statute).

predicates for first degree felony murder.³⁰² This interpretation is consistent with the prior treatment of first degree felony murder predicates, and it draws on the language of the statute prior to the 1975 amendment, when the first degree murder statute explicitly limited the abduction predicate to § 18.2-38 aggravated abductions.³⁰³

A competing interpretation, based primarily on the statutory language of § 18.2-32, reaches dramatically different results. This interpretation reads "abduction, except as provided in § 18.2-31" to mean all abductions not named in § 18.2-31: that is, all other abduction offenses in the Code, to include § 18.2-48 forms not found in § 18.2-31, as well as § 18.2-47 simple abductions.³⁰⁴ At its most extreme, this literal reading of the statutory language includes even § 18.2-49.1 parental abductions.³⁰⁵ An inquiry into the penalty structures of the abduction offenses provides a basis for choosing between these two interpretations.

b. Penalty Structure

In 1997, the General Assembly split § 18.2-47 into subdivisions.³⁰⁶ Section 18.2-47A is the simple abduction provision and is a Class 5 felony.³⁰⁷ Section 18.2-47B defines two types of parental abductions, one of which is a Class 6 felony, the other a Class 1 misdemeanor.³⁰⁸ As a result, incorporation of § 18.2-47 into the predicate offense of abduction in § 18.2-32 necessarily includes potential misdemeanors.³⁰⁹ Even if restricted to the simple abduction

302. See VA. CODE ANN. §§ 18.2-31, 18.2-32 (establishing predicate offenses for capital and first degree felony murder). In 1985, the General Assembly amended § 18.2-31 to include willful, deliberate and premeditated killings of children under 12 in the commission of an abduction with the intent to defile the victim. See 1985 Va. Acts ch. 428 (amending capital murder statute to include subdivision (h)). In 1996, § 18.2-31 was amended to include abductions committed with the intent to defile the victim, regardless of age. See 1996 Va. Acts ch. 876, 959 (amending subdivisions (1) and (8) of capital murder statute). Thus, the only § 18.2-48 abduction not included as a capital murder predicate is prostitution abduction. See VA. CODE ANN. §§ 18.2-31, 18.2-48 (defining capital murder and aggravated abduction, respectively).

303. See *supra* notes 294-97 and accompanying text (discussing history of abduction predicate for first degree felony murder).

304. See *supra* notes 269, 277 (quoting simple and aggravated abduction statutes).

305. See *supra* note 290 (quoting parental abduction statute).

306. See 1997 Va. Acts ch. 747 (amending § 18.2-47 by splitting into subdivisions).

307. See VA. CODE ANN. § 18.2-47A (Michie 1996 & Supp. 1999) (establishing simple abduction offense); *supra* Part III.E.2.a (examining simple abduction statute).

308. See VA. CODE ANN. § 18.2-47B (establishing form of parental abduction); *supra* Part III.E.2.a (examining § 18.2-47 parental abduction).

309. This is a clearly undesirable consequence. Misdemeanors are inappropriate predicates for felony murder. The solution to the problem, should one deem simple abduction offenses to be appropriately within the scope of the § 18.2-32 abduction reference, is rather messy. The General Assembly might refer, in § 18.2-32, to only those forms of § 18.2-47 that fit, that is,

provision, § 18.2-47A, the abduction predicate would include offenses punishable at their maximum by imprisonment for ten years and at minimum by less than twelve months confinement.³¹⁰

By comparison, the Code categorizes § 18.2-48 as a Class 2 felony. At their maximum, Class 2 felonies are punishable by imprisonment for life and, at minimum, twenty years.³¹¹ This level of punishment reflects the aggravated nature of the offense, and is consistent with the levels of punishment indicated by other first degree felony murder predicates.³¹²

Because inclusion of §§ 18.2-47 and 18.2-49.1 within the scope of § 18.2-32's abduction reference produces the undesirable result of making misdemeanors predicate offenses for first degree felony murder, the reference should explicitly be limited to § 18.2-48 abductions not included in § 18.2-31. Arguably, the legislature intended this result when it amended §§ 18.2-31 and 18.2-32 in 1975.³¹³ Limiting the § 18.2-32 abduction predicate to § 18.2-48 abductions is consistent with the felony murder rule's doctrinal requirement that predicate offenses should be limited to the most serious felonies.³¹⁴ Limiting the § 18.2-32 abduction predicate to § 18.2-48 avoids the potential need to differentiate between §§ 18.2-47A and 18.2-47B abductions.³¹⁵ The penalty provision for § 18.2-48, unlike §§ 18.2-47 and 18.2-49.1, also is consistent with the penalty structures of the other clearly ascertainable predicates within § 18.2-32.³¹⁶

§ 18.2-47A abductions. Alternatively, the legislature could create two statutes out of the already subdivided § 18.2-47. However, this option might require a reassessment of the other parental abduction statute, § 18.2-49.1. *See supra* note 269 (quoting simple abduction statute); *supra* Part III.E.2.c (discussing § 18.2-49.1 parental abduction).

310. *See* VA. CODE ANN. § 18.2-10(e) (establishing punishment for conviction of Class 5 felony); *supra* notes 7-9 and accompanying text (discussing appropriateness of Class 5 and 6 felonies as predicates for first degree felony murder); *supra* note 62 and accompanying text (discussing felony murder doctrine and requirement of serious threat to life or inherent dangerousness).

311. *See* VA. CODE ANN. § 18.2-10(b) (establishing punishment for conviction of Class 2 felony).

312. *See id.* §§ 18.2-61, 18.2-67.1, 18.2-67.2 & 18.2-58 (stating maximum penalty for rape, forcible sodomy, object sexual penetration, and robbery, respectively, as life imprisonment).

313. *See supra* Part III.E.3.a. (discussing potential interpretations of "abduction, except as provided in § 18.2-31" language of § 18.2-32).

314. *See* GROOT, *supra* note 16, at 273 (stating that § 18.2-47 "does not import harm to the victim"); *supra* note 62 and accompanying text (discussing felony murder doctrine and requirement of serious threat to life or inherent dangerousness).

315. *See supra* note 309 (discussing possible solutions to reference problem caused by split in § 18.2-47).

316. *See supra* note 312 (noting maximum penalties for rape, forcible sodomy, object sexual penetration, and robbery statutes).

IV. Conclusion

The current reference system in § 18.2-32 for first degree felony murder contains too many ambiguities to properly serve its purpose.³¹⁷ The knotty statutory tangle consists of many strands: inconsistent relationships between statutory offenses and their Code headings,³¹⁸ a confusing cross-reference to the capital murder statute,³¹⁹ a combination of common-law and statutory predicate offenses,³²⁰ and legislative amendments to the felony murder statute, the capital murder statute, and the underlying predicate offense sections.³²¹ The solution, however, is relatively simple.

Denominating predicate offenses by their statutory section number within the text of § 18.2-32 would eliminate the undesirable ambiguity inherent in the Code's current reference system.³²² The statutory section of each predicate should be parenthetically placed after the offense as named in § 18.2-32.³²³ The Code utilizes this level of precision in other areas, notably in the capital felony murder abduction reference.³²⁴ Scrutiny of the felony murder doctrine

317. See *supra* Part I.C (explaining function of statutory felony murder).

318. See *supra* Part III.B (discussing discontinuities between Article heading and common-law offense of robbery).

319. See *supra* Part III.E.3.a (discussing § 18.2-32's cross-reference to § 18.2-31).

320. See *supra* Part III.B (discussing common-law offense of robbery).

321. See *supra* note 5 and accompanying text (discussing notable amendments to relevant Code provisions).

322. A model amendment to § 18.2-32, proposed by Professor Roger D. Groot, reads as follows:

§ 18.2-32. 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 (§ 18.2-77), rape (§ 18.2-61), forcible sodomy (§ 18.2-67.1), object sexual penetration (§ 18.2-67.2), common law robbery, burglary (§ 18.2-89) or abduction (§ 18.2-48), 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 by confinement in a state correctional facility for not less than nor more than forty years.

Memorandum from Professor Roger Groot, Washington and Lee School of Law, to Jim Walsh (October 22, 1997) (on file with author). Possible alterations to this model might include the addition of § 18.2-58.1 as a robbery predicate and § 18.2-90 as a burglary predicate. See *supra* Part III.B.3, III.D.3 (discussing proper predicates for § 18.2-32 robbery and burglary predicates).

323. See *supra* note 322 (providing model revision for felony murder statute).

324. See VA. CODE ANN. § 18.2-31(1) (Michie 1996 & Supp. 1999) (citing VA. CODE ANN. § 18.2-48 in capital felony murder abduction subsection); *id.* § 18.2-91 (citing VA. CODE ANN. §§ 18.2-89, 18.2-90 in burglary offense); see also *supra* notes 89-92 (discussing history of modifications to capital and felony murder statutes and effect on scope of predicate offense of object sexual penetration).

in Virginia³²⁵ and the range of potential predicates for the § 18.2-32 references³²⁶ reveals that the obvious candidates tend to be inherently dangerous offenses and are, for the most part, easily identified.³²⁷

The scope of the predicate offense, however, should be apparent from the face of the statute.³²⁸ It should not require an inquiry into the doctrinal underpinnings of the felony murder rule to rationalize the result.³²⁹ This ambiguity runs contrary to the basic purpose of statutory codification and erects analytical barriers to citizens without legal training. The possibility of starkly inequitable results also argues for the modification of § 18.2-32's reference system for predicate offenses for first degree felony murder.³³⁰ As it stands now, however, the Code does not determine the scope of first degree felony murder by statute; this determination is left to prosecutors and, ultimately, to the courts.

325. See *supra* Part II.B (examining felony murder doctrine in Virginia).

326. See *supra* Part III (examining potential predicates for first degree felony murder).

327. See *supra* note 62 and accompanying text (discussing felony murder rule's doctrinal requirement of inherent dangerousness). It is also important to note here that felony offenses that are not inherently dangerous, and that have not been included in the proposed revision to § 18.2-32, are still chargeable as § 18.2-33 felony homicides. See VA. CODE ANN. § 18.2-33 (defining offense of felony homicide). Policy disputes about the scope of predicate offenses under § 18.2-32 should be resolved with this factor in mind.

328. See *Perkins v. Commonwealth*, 12 Va. App. 7, 16, 402 S.E.2d 229, 234 (1991) (noting penal statute is unconstitutionally vague if it fails to define offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement" (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983))); see also *supra* note 46 and accompanying text (discussing codification of criminal law and requirement of notice).

329. See *Perkins*, 402 S.E.2d at 234 (noting requirement that law "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" (quoting *Coleman v. City of Richmond*, 5 Va. App. 459, 466, 364 S.E.2d 239 (1988) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)))).

330. See *supra* note 44 and accompanying text (discussing potential for first degree felony murder conviction predicated on parental abduction); *supra* Part III.C.3 (discussing existence of potential arson predicate offense with mental state element of negligence); *supra* Part III.D.3 (discussing inappropriateness of potential burglary predicate offense with insufficient mental state element); *supra* Part III.E.3.b (discussing classification of some abduction offenses as misdemeanors).

