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Vileness: Issues and Analysis

Douglas R. Banghart

I. Introduction

Under section 19.2-264.2 of the Virginia Code, the finder of fact may impose a sentence of death upon finding that, inter alia, "[the defendant's] conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." The plurality stated that "[a] capital sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." It further explained that a state which chooses to impose the death penalty "must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death."

In the years following Godfrey, the Court has continued to emphasize its "principal concern" that "the death penalty is not meted out arbitrarily or capriciously." It has stressed that "unbridled discretion" is unconstitu-

1. VA. CODE ANN. § 19.2-264.4 (Michie 1999) ("The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that [the defendant's]... conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.").
2. 446 U.S. 420 (1980).
4. Id. at 427-28.
tional,7 that states "must administer [the death] penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not,"8 and that "death penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion."9

This article proposes that the death penalty in Virginia is administered in a manner inconsistent with principles outlined in Godfrey and clarified in later decisions.10 Specifically, and although the Supreme Court of Virginia has concluded otherwise,11 it will be argued that even if the Virginia capital

9. California v. Brown, 479 U.S. 538, 541 (1987). The Court has stressed this concern in several cases. See Mills v. Maryland, 486 U.S. 367, 374 (1988) (remanding case for sentencing because unclear jury instructions might have precluded sentencers from considering mitigating factors and resulted in an arbitrary decision); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (holding that any mitigating factor must be given some weight in consideration of a death sentence because "a consistency produced by ignoring individual differences is a false consistency").
10. See supra notes 3-9.
11. The Supreme Court of Virginia has yet to provide a coherent explanation of why the Virginia vileness predicate is constitutional when Georgia's identical predicate was not. For example, in Watkins v. Commonwealth, 385 S.E.2d 50, 56-57 (Va. 1989), the court cited three cases (discussed below) in rejecting the petitioner's constitutional attack.

Smith v. Commonwealth, 248 S.E.2d 135 (Va. 1978), was the oldest of the three cases and cited as precedent by the other two. The court in Smith refused to declare the Virginia vileness predicate unconstitutional because the United States Supreme Court had, as of that time, declined the invitation to overturn Georgia's identical statute. Id. at 149. What the court in Watkins ignored, however, was the United States Supreme Court decision in Godfrey which accepted that invitation and overruled Smith.

In Turner v. Commonwealth, 273 S.E.2d 36 (Va. 1980), which was decided after Godfrey, the court cited three cases (in addition to Smith) in upholding the vileness predicate. Id. at 44. Two of these, Mason v. Commonwealth, 254 S.E.2d 116, 118-19 (Va. 1979) and Wayne v. Commonwealth, 251 S.E.2d 202, 211-12 (Va. 1979), were decided before Godfrey and have been overruled thereby. The third, Martin v. Commonwealth, 271 S.E.2d 123 (Va. 1980), was decided after Godfrey but does not attempt to distinguish it. Id. at 126.

In Briley v. Commonwealth, 273 S.E.2d 57, 67 (Va. 1980), which was decided after Godfrey, the court cited Martin, which, as was noted immediately above, does not attempt to distinguish Godfrey, and two pre-Godfrey cases (Smith and Clark v. Commonwealth, 257 S.E.2d 784, 790-91 (Va. 1979)). The court in Briley rejected the petitioner's assertion that vileness predicate was unconstitutionally vague on two grounds. First, without explaining why doing so would address a vagueness challenge, it distinguished the facts of Godfrey: "[The Briley murder was] carried out under ... terrifying conditions... in an inhuman, outrageous, wanton, horrible, [and] vile manner, and]... [the entire massacre was carried out in such a deliberate and premeditated manner, and with such precision and coolness, that it could only have been done by those possessed of depraved minds." Id. at 66-67. Second, the court distinguished Godfrey on the ground that in Briley the jury had heard the Smith limiting instructions, see infra notes 39, 68 and accompanying text, whereas the jury in Godfrey had heard no such instruction. As is explained infra at notes 39-48, 66-69 and accompanying text, because the Smith limiting instructions are, as a practical matter, meaningless, the juries in
murder statute is not facially unconstitutional, it is has not been limited in a manner which makes possible its Constitutional application. At least three arguments support this thesis. First, rather than limiting the jury's discretion by "clear and objective standards," the judiciary and legislature have permitted the acts which constitute "vileness" to slowly expand so as to encompass any capital murder. Second, although mandated by state law, the introduction of "victim impact evidence" to assist the jury in itsileness determination is illogical under any conceivable relevance standard. Finally, because the Commonwealth need not prove which acts constitute vileness or whether those acts are vile because they prove torture, depravity of mind, or aggravated battery, any possible guidance provided by those sub-elements is illusory.

II. The Vileness Predicate

In order to impose the death penalty under the vileness predicate, the Commonwealth must prove the existence of one of the following sub-elements: (1) that the defendant's conduct in committing the murder amounted to torture of his victim ("torture"); (2) that the defendant's conduct in committing the murder amounted to an aggravated battery of his victim ("aggravated battery"); or (3) that the defendant evidenced a depravity of mind in the commission of the murder ("depravity of mind"). This article sets forth the argument that because the legislature has failed to define these sub-elements, and the judicial gloss with which they have been painted is meaningless, virtually every capital murder involves an aggravated battery, and that those which do not inevitably evidence a depravity of mind. Because of this, conditioning the imposition of death on such findings is entirely nonsensical.

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12. See discussion infra Part II.
13. See discussion infra Part III.
14. For an explanation of why these factors are "sub-elements" and not merely "means," see discussion infra Part IV.
15. See discussion infra Part IV.
16. For an explanation of the Commonwealth's burden of proof as to this issue, see discussion infra Part IV.
18. See infra notes 68-83 and accompanying text.
19. See infra notes 20-83 and accompanying text.
A. Torture

In a state which constitutionally applies the death penalty, that is, one which "channel[s] the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death," it might be expected that the sub-element which has, over centuries of judicial construction, developed a simple and concrete definition would be that on which the prosecution relies most frequently to prove vileness. Although torture is such a sub-element, the Commonwealth rarely, if ever, relies on it.

Black's Law Dictionary defines "torture" as the infliction of "intense pain to body or mind for purposes of punishment . . . or for sadistic pleasure." In short, torture is a goal-directed infliction of severe or intense pain. Several theories might explain why this sub-element is not relied on by the Commonwealth. The first is entirely benign: As evidenced by the facts as described by appellate courts, few cases in Virginia involve circumstances in which the defendant tortures, within that term's legal definition, his victim. Given this, it may well be the case that the absence of prosecutions based upon the torture sub-element is due to the simple fact that no cases in Virginia involve torture.

A more problematic explanation, however, is conceivable. This explanation derives from the fact that, as is explained immediately below, the content of the appellate record of reported cases is indirectly controlled by the Commonwealth. As was noted above, the absence of factual circumstances indicating torture is evidenced by the appellate record of reported cases. The appellate record, in turn, is derived from the trial transcript. The trial transcript, of course, is a product of the line of questioning pursued by the Commonwealth's Attorney. The Commonwealth's Attorney's line of questioning is intended to elicit testimony which will prove that the defendant's crime involved one or more of the sub-elements on which the Commonwealth has decided to rely. Given this, even if all cases of "vile" capital murder involved torture, if Commonwealth's Attorney ignored that sub-element and instead focused his questioning on the depravity of mind and/or aggravated battery sub-elements, then it would be expected that most...
cases of capital murder, as evidenced by the appellate record, would not reflect the presence of goal-directed intentional infliction of physical pain.

If this explanation for the apparent lack of torture cases is accepted, an obvious question is presented: why might the Commonwealth choose to focus the presentation of its cases on the depravity of mind and aggravated battery sub-elements rather than the torture sub-element? One entirely prudent reason is that this sub-element, unlike the others, requires proof of purpose and, all things being equal, the Commonwealth would undoubtedly prefer to prove less than more. In any other legal context, this reason would represent nothing more than an efficient use of the state’s resources. A second reason the Commonwealth might chose to ignore the torture sub-element might be due to the fact that, as was noted above, torture has a clearly defined and narrow common law definition. As is explained infra, depravity of mind and aggravated battery do not. This means that while what may evidence a depraved mind or constitute an aggravated battery is open to reasonable debate, the common law has already drawn a line in the sand as to what constitutes torture. As the Supreme Court of Virginia noted in Smith v. Commonwealth, "any act of murder arguably involves a ‘depravity of mind’ and an ‘aggravated battery to the victim.’" Could it be the case that the torture sub-element has been ignored because the other two are so much more susceptible to expansion? Maybe.

It is probably safe to say that a Commonwealth’s Attorney, as a person of integrity, would not “roll the dice” with another’s life; given this, when a Commonwealth’s Attorney makes the decision to charge a defendant with capital murder, the Commonwealth’s Attorney almost surely believes that the evidence is such that the defendant deserves to die, regardless of whether he also believes he will be able to make each of the twelve jurors come to the same conclusion. Assuming this is the case, a rational Commonwealth’s Attorney would presumably prefer to be required to prove less rather than more. In other words, it is probably safe to say that the Commonwealth’s Attorney would prefer only to be required to prove that the defendant committed capital murder and not have the additional burden of proving that the capital murder evidenced vileness. This result would be achieved if the definition of capital murder necessarily included the defini-

24. See infra notes 32-34 and accompanying text.
25. See infra notes 35-40, 66-69 and accompanying text.
26. See supra notes 21-22 and accompanying text.
28. To take the most extreme example, the Commonwealth’s attorney might be privy to overwhelmingly inculpatory facts which, because of the exclusionary rules, privilege issues, or other legal reasons, would never be heard by the jury. Under such circumstances, even though the Commonwealth’s attorney might be certain that the defendant was guilty and his crime vile, he would likely question his ability to convince a jury to sentence the defendant to death.
tion of vileness. How then to get to such a result? Given a choice between attempting to widen the definitions of two already broad and ambiguous sub-elements or one clearly established narrow one, a cynic would argue the Commonwealth sought to widen the already nebulous sub-elements. As is explained infra, whether by accident or design, this is exactly what has happened in Virginia. Because the aggravated battery and depravity of mind concepts are so broad, a finding of capital murder almost necessarily entails a finding of vileness. Again, were this any other legal context, such foresight would be nothing more than farsighted and efficient legal practice on the part of the Commonwealth.

The capital context, however, is not the same as other contexts: “Death is different.” Again, in order to impose the sentence of the death the state must use a system which “channel[s] the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’” If every capital murder involves vileness, the jury is given no guidance in determining who should live and who should die. Without such guidance, the fact-finder’s discretion is not limited nor is the process for imposing death rationally reviewable by appellate courts.

B. Aggravated Battery to the Victim

After noting that the offense was unknown at common law (unlike torture), Black’s Law Dictionary defines an “aggravated battery” as the “[u]nlawful application of force to another characterized by unusual or serious consequences or attending circumstances such as a dangerous weapon.” Because the death of the victim has been the result of the

29. The Supreme Court of Virginia may be aware that the Commonwealth rarely relies on the torture sub-element. As is explained infra at notes 39, 68 and accompanying text, in Smith, 248 S.E.2d at 149, the Supreme Court of Virginia provided what it purported to be were (presumptively limiting) “constru[ctions]” of the vileness predicate. Id. Curiously, the Smith court failed even to mention the torture sub-element. In fairness and to the court’s credit, the omission might be attributable to the simple fact that torture has already been well defined at common law. See supra note 21 and accompanying text.

30. See infra notes 40-48 and accompanying text.
31. See infra notes 32-34 and accompanying text.
34. See discussion infra Part II B, II C.
35. See supra note 21 and accompanying text.
application of force, every intentional killing arguably involves an “aggra-
vated battery.” As is the case with the depravity of mind sub-element, 9 this
was exactly the problem the United States Supreme Court sought to address
in Godfrey when it held that a state which chooses to impose the penalty of
death must do so with a statutory scheme which “channel[s] the sentencer’s
discretion by ‘clear and objective standards’ that provide ‘specific and
detailed guidance,’ and that ‘make rationally reviewable the process for
imposing a sentence of death.’” 38

In upholding the statutory scheme struck down in Godfrey and purported-
dly providing the “specific guidance” thereby required, the Supreme Court
of Virginia in Smith “construe[ed] the words ‘aggravated battery’ to mean
a battery which, qualitatively and quantitatively, is more culpable than the
minimum necessary to accomplish an act of murder.” 39 What this “defini-
tion” was intended to encompass is anyone’s guess. In practice, aggravated
battery has come to mean “murder plus.” Specifically, the aggravated
battery sub-element requires the presence of some “bad act” beyond the
intentional killing. At first blush, this “murder plus” definition has a logic
to it; such a system is clearly fairer than one in which a mere intentional
killing is sufficient to uphold, but does not require, 40 the imposition of a
death sentence. In fact, were it the case that the universe of defendants was
divided into two classes, those who committed mere intentional killings and
those who committed intentional killings “plus,” the former receiving life
sentences and the latter receiving death, the system would operate perfectly.
Unfortunately, the universe of defendants is not divided into such classes.
Instead, almost all murders involve “murder plus.” Because the universe of
defendants is composed almost entirely of the “murder plus” class, a jury
instruction which in effect instructs the jury that it may only sentence the
defendant to death if it finds “murder plus” is no instruction at all. A jury
instruction which permitted the jury to impose the sentence of death only
if it found “the defendant is not a potato” would guide the jury’s decision to
precisely the same extent.

That almost every capital murder will involve “murder plus” is evi-
denced by the Supreme Court of Virginia’s rejection of the defendant’s

37. See infra notes 66-67 and accompanying text.
U.S. 242, 253 (1976) (Stewart, Powell, and Stevens, J.J., concurring); Woodson v. North
Carolina, 428 U.S. 280, 303 (1976) (Stewart, Powell, and Stevens, J.J., concurring)).
40. If every person found guilty was sentenced to death, no Constitutional problem
would, in the author’s judgment, result. The problem is not that the death sentence is
imposed at all, but that it is imposed arbitrarily. See Woodson, 428 U.S. at 285 (citing Gregg,
428 U.S. at 168-87).
claim in Hedrick v. Commonwealth\(^{41}\) that the jury’s conclusion that he had committed an aggravated battery was based on insufficient evidence.\(^{42}\) In Hedrick, the defendant robbed, raped, and then, at a distance of three to seven feet, shot his victim in the face with the shotgun, killing her instantly.\(^{43}\) Two things are clear about the defendant’s conduct. The first is not controversial: Hedrick committed capital murder. The second is: if Godfrey’s command that jury be given clear and specific guidance means anything, there was clearly insufficient evidence to support Hedricks’s death sentence under the vileness predicate.\(^{44}\)

As noted above, the Supreme Court of Virginia concluded that there was sufficient evidence to support the finding that the defendant committed an aggravated battery.\(^{45}\) It is important to remember that, as a technical matter, such a conclusion has a very specific legal meaning: specifically, that the battery is one “which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.”\(^{46}\) In other words, even if the circumstances of the case are otherwise awful, unless the defendant exerted more force than was necessary to kill his victim, the evidence is insufficient to support the finding that he committed an aggravated battery. In Hedrick, because the defendant killed his victim instantaneously, the battery presumably occurred while he was holding her down as he raped her or while he bound her arms to keep her from escaping.\(^{47}\) If this is the case, the question which, for purposes of satisfying Godfrey, must be answered is: how might a defendant rob, rape, and kill his victim without “battering” her? The answer might well be that he cannot. If so, every capital murder will involve an aggravated battery. Given this, the jury is forced to decide whether the defendant should live or die based on the “guidance” of a characteristic every capital murder will share. As was explained above, this is no “guidance” at all, and it is this unbridled discretion which causes the Constitutional problem.\(^{48}\)

How then might the jury’s discretion be limited? One answer might be to impose the death penalty on all defendants who are found guilty of capital murder under the rape predicate;\(^{49}\) another might be to only impose

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\(^{41}\) 513 S.E.2d 634 (Va. 1999).


\(^{43}\) Id.

\(^{44}\) See infra notes 45-48 and accompanying text.

\(^{45}\) See supra notes 41-42 and accompanying text.


\(^{47}\) See infra notes 55-56 and accompanying text. See also Peterson v. Commonwealth, 302 S.E.2d 520, 525 (Va. 1983) (“A death sentence based upon vileness is not supported by the evidence where the victim died almost instantaneously from a single gunshot wound.”) (citation omitted); see Godfrey, 446 U.S. at 433.

\(^{48}\) See supra notes 4-5 and accompanying text.

\(^{49}\) Doing so might be foreclosed by Roberts v. Louisiana, 431 U.S. 633 (1977). In that
life under such circumstances. But because we have chosen to legislate into operation a statutory scheme which does not mandate life or death upon a finding capital murder, but instead forces the jury to chose between those two alternatives once it has so found, the system must provide the jury some guidance in making that choice. As Hedrick demonstrates, such guidance is not found under the current statutory scheme.

Because, as explained above, almost every capital murder involves “murder plus,” a catalogue of what has been found to constitute an aggravated battery will not be presented here. Instead, presented below are a few of the unusual cases in which the Supreme Court of Virginia stretched logic to conclude the defendant’s acts constituted an aggravated battery.

1. Can a Corpse be Battered?

Perhaps the most startling aspect of the aggravated battery sub-element is that the battery need not occur while the defendant is alive. In Whitely v. Commonwealth, the defendant argued that because a battery requires the infliction of harm on “another,” and a corpse is no longer an “another,” he

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50. See supra notes 41-48 and accompanying text.
51. See infra notes 52-65 and accompanying text.
52. 286 S.E.2d 162 (Va. 1982). See also Stockton v. Commonwealth, 402 S.E.2d 196, 208 (Va. 1991) (holding that although aggravated battery “ordinarily connot[e] conduct preceding death of the victim,” corpse nevertheless may suffer aggravated battery) (citing Jones v. Commonwealth, 323 S.E.2d 554, 565 (Va. 1984)). Given that a corpse can be battered, it should not surprise the reader that a person need not be conscious to be battered. See Jones, 323 S.E.2d at 565-66; Bogg v. Commonwealth, 331 S.E.2d 407, 421 (Va. 1985) (“For purposes of the “vileness” determination, it is immaterial whether the decedent remained conscious during the course of several assaults.”).
could not have committed a battery. The court rejected this argument, negatively inferring that because the Supreme Court in Godfrey "was not required to decide, and did not decide, whether an aggravated battery must precede the victim's death in order to satisfy the vileness standard," it was compelled to conclude an aggravated battery could occur after the victim's death. The Supreme Court of Virginia was certainly correct in recognizing that Godfrey did not hold that the battery must occur during the life of the victim. This, however, was due to the simple fact that the question as to whether the victim had to be alive in order to be harmfully or offensively touched was not at issue. What the Supreme Court of Virginia ignored in Whitely, of course, is the fact that neither Godfrey nor any other United States Supreme Court decision stands for the proposition that a corpse may be harmfully or offensively touched.

2. Overkill?

Godfrey held that an aggravated battery is not proven where the evidence shows that the victim died almost instantaneously from a single gunshot wound. Presumably, this holding was based on the notion that where the defendant has made his victim's death a quick and painless one, his crime is less vile than one in which the defendant has unnecessarily prolonged death. But under this reasoning, the mere fact that a defendant fired several shots at point blank range in rapid succession at a victim's head, thus ensuring death, should make the crime even less vile than one in which a single gun-shot kills the victim. This is not the case in Virginia. Gray v. Commonwealth is instructive. In this case, the victim was the defendant's wife's ex-supervisor. Several days after having words with him regarding his wife's dismissal, the defendant abducted the victim. In

54. Id. (citing Godfrey, 446 U.S. at 433).
55. Godfrey, 446 U.S. at 433. See also Peterson v. Commonwealth, 302 S.E.2d 520, 525 (Va. 1983) ("A death sentence based upon vileness is not supported by the evidence where the victim died almost instantaneously from a single gunshot wound.") (citation omitted).
56. This argument is borne out by the Supreme Court of Virginia's conclusions as to the "psychological torture" component of the depravity of mind sub-element. See infra notes 70-75 and accompanying text.
57. Alternatively, Godfrey would be plainly distinguishable if the defendant was forced to fire more than one shot because his weapon was incapable of killing instantly or if the defendant intentionally directed his first shots at non-vital regions. In both circumstances the defendant's action would prolong the victim's death, not shorten it.
60. Id.
61. Id. at 172.
doing so, the defendant hit the victim with his "hand." This was the only physical contact the defendant had with the victim. After the defendant assured the victim he would not be harmed and commanded him to lie down, the victim "lay face down on the ground, [and the defendant] fired six pistol shots in rapid succession into [the victim's] head from a distance of 3 to 18 inches." The Supreme Court of Virginia concluded that the jury's finding of vileness was justified under the aggravated battery sub-element. In a later case, the court clarified that "in Gray... we held that aggravated battery was established by showing the victim received six gunshot wounds, any one of which would have proved fatal, in rapid succession." In no case has the court provided any possible explanation as to why the mere firing of more than one bullet makes a crime vile.

C. Depravity of Mind

Depravity of mind is perhaps the vaguest of the three vileness sub-elements. Although some murders are of course "worse" than others, it seems impossible to determine which murders do not exhibit a depravity of mind. As was the case with the aggravated battery sub-element, if it is so impossible, then it is necessarily the case that proof of intent would be the only prerequisite to a death sentence. Recognizing this fact, the Supreme Court of Virginia in Smith "defined" depravity of mind as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Again, what this means is anyone's guess. Although it is impossible to define what does not evidence depravity of mind, it is clear what does evidence depravity of mind:

62. Id. at 179.
63. Id. at 173.
64. Id. at 180.
66. Compare Gilbert v. Florida, 487 So. 2d 1185 (Fla. Dist. Ct. App. 1986) (seventy-five year-old defendant killed wife of fifty-one years who was suffering from osteoporosis and Alzheimer's disease after she told him "I'm so sick, I want to die, I'm so sick... Ros I want to die, I want to die.") with Fitzgerald v. Commonwealth, 292 S.E.2d 798, 801-02 (Va. 1982) (defendant raped victim, striking her several times with a machete, almost cutting off her thumb when she attempted to ward off his blows; forced victim to engage in oral sodomy with him until she said she could not continue because of blood in her mouth; and then, ignoring her pleading to "God, please just blow my brains out and get it over with," proceeded to mutilate her by stabbing and slashing her repeatedly, from head to feet, front, sides, and back, including both eyes, as well as genital and rectal areas, with the machete and with a knife that he removed from his wallet).
67. See supra notes 36-38 and accompanying text.
Because virtually every capital murder will involve an aggravated battery, and the tiny minority which do not will certainly demonstrate the defendant’s depravity of mind, a catalogue of the various factual circumstances which have given rise to a finding of depravity of mind will not be presented here. As was undertaken with the aggravated battery sub-element, presented below are a few of the unusual cases in which the Supreme Court of Virginia stretched the boundaries of which acts evidence a depravity of mind.

1. "Psychological Torture" as Proof of Depravity of Mind

Poyner v. Commonwealth\(^\text{70}\) is one of the few cases in which the defendant did not commit an aggravated battery during the course of his murders.\(^\text{71}\) Poyner killed a total of five women. The first four murders were conducted with the same modus operandi: Poyner would enter a place of business posing as a customer, wait for a clerk to offer him assistance, reveal a handgun, rob the store, and then execute the clerk with a single shot to the head. In the fifth murder, Poyner also raped his victim.\(^\text{72}\) The Commonwealth stipulated that the murders did not involve an aggravated battery,\(^\text{73}\) which presumably means that Poyner's fifth victim did not struggle when he raped her. Given these facts, and aside from the rape itself, Poyner likely did not commit an aggravated battery. Due to the absence of aggravated battery, the Commonwealth argued that the victims were subjected to "psychological torture" before they were killed, and the fact that Poyner subjected them to this "psychological torture" was evidence of his depravity of mind.\(^\text{74}\) The Supreme Court of Virginia agreed:

[The victim] had time to realize Poyner's deadly purpose and to peer down the barrel of a .38-caliber pistol in the hands of a person who had let her get a good look at his face. She had time to realize that since she could identify him she was a potential threat to him. After Baldwin had turned over the money, he made her turn away and expose her back to his gun. He did not shoot her immediately; he let her, indeed ordered her

\(^\text{69}\) See Bunch v. Commonwealth, 304 S.E.2d 271, 282 (Va. 1983) (noting that "depravity of mind can exist independently of the presence of torture or aggravated battery and may alone support a finding of vileness as a basis for a sentence of death").

\(^\text{70}\) 329 S.E.2d 815 (Va. 1985).


\(^\text{72}\) Id. at 831.

\(^\text{73}\) Id.

\(^\text{74}\) Id. at 831-32 (citing Burger v. Zant, 718 F.2d 979 (11th Cir. 1983) (holding that "torture" sub-element of Georgia statute may be satisfied by evidence of psychological torture)).
to walk away from him, toying with her, implying that she might be spared. Then he shot her in the head.\textsuperscript{75}

In expanding the depravity of mind sub-element to include the "psychological torture" concept, the Supreme Court of Virginia provided another textual hook with which a given capital murder may be construed as vile. As is argued immediately below,\textsuperscript{76} such a textual hook is apparently unnecessary to getting to the "vile" result; specifically, when faced with a total absence of aggravated battery, torture, or depravity of mind, all a court need do is recite the facts and conclude they are vile because they evidence a depraved mind.

2. Total Absence of Aggravated Battery or Torture

In a system which "channel[s] the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death,'"\textsuperscript{77} one might assume that the Supreme Court of Virginia would necessarily be required to use some sort of objective test in concluding that sufficient evidence supported a finding of vileness. This is not the case.

In \textit{Sheppard v. Commonwealth},\textsuperscript{78} the evidence tended to show that the defendant had executed and robbed his victims over an allegedly unpaid drug debt.\textsuperscript{79} Sheppard was convicted of capital murder. On appeal, he contested the sufficiency of the evidence in regard to the jury's finding of vileness, arguing that "the record is absolutely silent as [to] the existence of any physical or psychological torture. Aside from the shots that killed them, the [victims] suffered no wounds or mutilation. There were no other signs of physical or mental abuse. The record supports only the finding that they were killed almost instantly and within seconds of each other."\textsuperscript{80} The Supreme Court of Virginia rejected this argument, concluding that the evidence supported a finding of both aggravated battery and depravity of mind. The court found that, under clearly established (if erroneously reasoned) precedent,\textsuperscript{81} the evidence supported a finding of aggravated battery.

\textsuperscript{75} Id. at 832.
\textsuperscript{76} See infra notes 77-83 and accompanying text.
\textsuperscript{78} 464 S.E.2d 131 (Va. 1995).
\textsuperscript{80} Id. at 138-39.
\textsuperscript{81} See infra notes 55-65 and accompanying text.
because the defendant shot his victim more than once. Its analysis as to the depravity of mind sub-element was more troubling: "Executing two persons in their home and then stripping their bodies of jewelry and stealing their personal property manifestly demonstrates a depravity of mind." According to the Court's "standard," depravity of mind was found simply in the fact that a murder/robbery existed. Given this "standard" for depravity of mind, it is not clear what murder/robberies would not support a finding of vileness.

III. The (Ir?)relevancy of Victim Impact Statements

A. General Introduction

In Booth v. Maryland, the United States Supreme Court held that the use of victim impact statements describing the (1) personal characteristics of victims and the emotional impact of the crimes on victims' families and (2) family members' opinions and characterizations of the crimes and the defendant was unconstitutional. In Payne v. Tennessee, the Court overruled Booth to the extent that it prohibited the use of victim impact statements describing personal characteristics of victims and the emotional impact of the crimes on victims' families. Specifically, the Court held that the Eighth Amendment does not prohibit states from choosing to allow the admission of victim impact evidence at the sentencing phase of capital trials.

As a result of the Supreme Court's retraction, the legislatures of almost all of the states in which the death penalty is used enacted statutes or passed amendments permitting the introduction of victim impact evidence in capital cases. Although the Virginia General Assembly was part of this movement, it was beaten to the punch by the Supreme Court of Virginia. As is explained below, the court had already decided two cases which permitted the introduction of victim impact evidence.

82. Sheppard, 464 S.E.2d at 139.
83. Id. at 139.
84. 482 U.S. 496 (1987).
87. Payne v. Tennessee, 501 U.S. 808, 827 (1991) (holding that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar").
88. Id.
90. See infra notes 91-108 and accompanying text.
In *Weeks v. Commonwealth*, the jury convicted and sentenced petitioner to death for the killing of a law-enforcement officer who was performing an official duty. At sentencing, the court permitted the introduction of victim impact evidence in the form of testimony from the victim’s widow and coworkers regarding the murder’s effect on their lives. Although the record is not clear, the trial court presumably allowed the admission pursuant to the statutory provision which permits the admission of evidence relating to any matter the court deems relevant to the jury’s sentencing decision. The jury recommended death based on its finding of vileness predicate. On appeal, Weeks argued that the victim impact testimony was not relevant to the jury’s sentencing decision. The Supreme Court of Virginia rejected this contention citing *Payne*—which merely held that the Eighth Amendment does not *ipso facto* bar introduction of victim evidence—for the much broader proposition that “victim impact testimony is relevant to punishment in a capital murder prosecution in Virginia.” Later, with no citation to authority or analysis, the court ruled that “under Virginia’s modern, bifurcated capital procedure, victim impact evidence is probative, for example, of the depravity of mind component of the vileness predicate.” As is explained below, such evidence is not probative under any conceivable relevance standard.

In *Beck v. Commonwealth*, the Supreme Court of Virginia clarified its understanding of the role of victim impact evidence in sentencing. In *Beck*, the petitioner received three death sentences after pleading guilty to three charges of capital murder. At his sentencing, the judge, sitting without a jury because of the guilty plea, received testimony from the victim’s co-workers and friends. On appeal, Beck argued that the Supreme Court’s language in *Payne* stating that “[a] State may legitimately conclude that evidence about the victim and about the impact of the murder

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91. 450 S.E.2d 379 (Va. 1994).
93. *Id.* at 389. See also Flamm, supra note 89, at 327 (citing VA. CODE ANN. § 19.2-264.4 (Michie 1996) (governing capital sentencing proceedings)).
94. *Weeks*, 450 S.E.2d at 382.
95. *Id.* at 389.
96. *Id.* (citing *Payne*, 501 U.S. 808 (1991)).
97. *Id.* at 390.
98. See infra notes 112-44 and accompanying text.
101. *Id.* at 100. Although this ought to go without saying, the tragic but entirely foreseeable result in *Beck* is proof positive that it is the *most unusual case* in which pleading guilty to capital murder is even a strategy *option*, let alone the most effective form of capital defense representation.
102. *Id.* at 903.
on the victim's family is relevant to the . . . decision as to whether or not the death penalty shall be imposed" foreclosed the introduction of victim impact evidence from other sources.\(^\text{103}\) The Supreme Court of Virginia rejected this contention, concluding that, assuming such evidence was relevant, Payne limited only the nature, and not the source, of victim impact testimony.\(^\text{104}\) Thus, under the Beck formulation of the standard for the introduction of victim impact evidence, although such evidence can be gathered from a larger pool of sources than was explicitly permitted in either Payne or Weeks, such evidence may not be introduced if it is not relevant.\(^\text{105}\)

The Supreme Court of Virginia then turned to the question of whether the victim impact evidence was relevant.\(^\text{106}\) Reviewing under an abuse of discretion standard, emphasizing that the evidence was reviewed by the judge and not a jury, and noting that Beck had not raised a particularized objection to any piece of evidence, the Supreme Court of Virginia determined that "none of the declarants of the victim impact evidence received by the trial court was so far removed from the victims as to have nothing of value to impart to the court about the impact of these crimes" and that there was therefore insufficient evidence in the record to conclude that the trial court erred in admitting the testimony.\(^\text{107}\) The court engaged in no analysis whatsoever in support of this conclusion. Because the case for the irrelevancy of victim impact evidence to the jury's decision as to vileness is a strong one,\(^\text{108}\) it might have been possible under Beck to prevent the introduction of victim impact evidence where only vileness is at issue.

This possibility has been foreclosed, however, by the adoption of section 19.2-264.4 of the Virginia Code.\(^\text{109}\) This section requires, upon the Commonwealth's motion and the victim's consent, the court to permit the victims to testify before the jury.\(^\text{110}\) Because the legislature has determined

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103. Id. (quoting Payne, 501 U.S. at 827 (emphasis added)).
104. Id. at 904 (holding that "the admissibility of victim impact evidence during the sentencing phase of a capital murder trial is limited only by the relevance of such evidence to show the impact of the defendant's actions").
105. See Flamm, supra note 89, at 330 ("Thus, the Virginia Supreme Court's threshold for excluding victim impact evidence is the point at which the prejudicial effect eclipses the probative value; in contrast, the corresponding Payne threshold is the point at which the victim impact evidence renders the trial fundamentally unfair.").
106. Beck, 484 S.E.2d at 905-06.
107. Id. at 906.
108. See notes 99-144 and accompanying text.
109. VA CODE ANN. § 19.2-264.4 (Michie 1999). See also VA CONST. art. I, § 8-A (establishing rights of crime victims and noting that "[t]hese rights may include . . . right to address the circuit court at the time sentence is imposed").
110. § 19.2-264.4. "Victim" is defined in section 19.2-11.01 of the Virginia Code as the decedent victim's spouse, child, parent, or legal guardian. See VA CODE ANN. § 19.2-11.01(B) (Michie 1999). The victim may testify as to any or all of the following: (i) the identity of the victim, (ii) economic loss suffered by the victim as a result of the offense, (iii) the nature and
that public policy is best served by the use of victim impact testimony, its
use is of course less troubling than would be the case if such evidence was
admitted under the misguided and judicially legislated Weeks standard.
Nevertheless, section 19.2-264.4 is misguided for the same reason that Weeks
is. Quite simply, and as is explained below, victim impact evidence is not
relevant to the decision the jury must make regarding the vileness
predicate.\textsuperscript{111}

\textbf{B. Victim Impact Testimony is Not Relevant}

Allowing the jury to hear victim impact evidence in the sentencing
phase of cases in which vileness is at issue is doubly wrong in Virginia.
First, the Supreme Court’s decision in Payne, which implies that challenges
to the introduction of victim impact evidence are to be taken on a case-by-
case basis, is flawed in serious ways. A persuasive argument can be made for
the proposition that no state employs a statutory scheme in which victim
impact evidence is relevant.\textsuperscript{112} Second, even assuming the validity of Payne’s
conclusion that some states might have statutory schemes in which victim
impact evidence is relevant, Virginia is not such a state: as is explained
below, the jury in a Virginia capital case is charged by statute with the task
determined only whether the defendant’s conduct in committing the
murder constituted aggravated battery or torture or evidenced a depravity
of mind.\textsuperscript{113}

The Supreme Court in Payne permitted the introduction of victim
impact evidence because it concluded that such evidence is “another form
or method of informing the sentencing authority about the specific harm
caused by the crime in question.”\textsuperscript{114} According to the Court, this “specific
harm” includes the fact that “the victim is an individual whose death repre-
sents a unique loss to society and in particular to his family.”\textsuperscript{115} The ques-
tion left unanswered was how “specific harm” was relevant to the senten-
cer’s task.

In his dissent, Justice Stevens condemned the court for "abandon[ing]
ules of relevance that are older than the Nation itself and ventur[ing] into

extent of any physical or psychological injury suffered by the victim as a result of the offense,
(iv) any change in the victim’s personal welfare, lifestyle or familial relationships as a result
of the offense, (v) any request for psychological or medical services initiated by the victim or
the victim’s family as a result of the offense, and (vi) such other information as the court may
require related to the impact of the offense upon the victim. VA. CODE ANN. § 19.2-299.1
(Michie 1999).

\begin{itemize}
  \item \textsuperscript{111} See notes 99-144 and accompanying text.
  \item \textsuperscript{112} See infra notes 114-21 and accompanying text.
  \item \textsuperscript{113} See infra notes 124-44 and accompanying text.
  \item \textsuperscript{114} Payne, 501 U.S. at 825.
  \item \textsuperscript{115} Id. (quoting Booth v. Maryland, 482 U.S. at 517 (White, J., dissenting), overruled
    in part by Payne, 501 U.S. 808)).
\end{itemize}
uncharted seas of irrelevance." Stevens recognized that the majority opinion reasoned that because, under *Lockett v. Ohio*, the defendant has a right to introduce all mitigating evidence that may inform the jury about his character, fairness would require that the State be allowed to respond with similar evidence about the victim. As Stevens pointed out, the major flaw in this argument is the simple fact that it is the defendant, and not the victim, who is on trial. Because of this, the victim's character, "good or bad, cannot therefore constitute either an aggravating or a mitigating circumstance." Stevens argued that the use of victim impact evidence therefore caused two distinct Eighth Amendment problems. First, because the use of victim impact evidence forces the jury to evaluate the culpability of the defendant based on facts the defendant could not know at the time of his crime, it has no relevancy to the defendant's personal blameworthiness, which is the factor the jury is charged with evaluating. Second, because the quantity and quality of victim impact evidence sufficient to turn a verdict of life in prison into a verdict of death is not defined until after the crime has been committed, it cannot be applied consistently in different cases.

As Stevens pointed out, the Court's decision in *Payne* represented a serious departure from the traditional rules of relevance, because in all states it is the defendant who is on trial. Because of this, the argument can be made that victim impact evidence is not relevant to the jury's decision in any state. Nevertheless, it is clear that even if there are some states in which victim impact evidence is relevant to the jury's sentencing decision, Virginia is not one of them. As is explained *infra*, the "specific harm" manifested by victim impact evidence and caused by the defendant's conduct can not

116. *Id.* at 858-59 (Stevens, J., dissenting).


118. *Payne*, 501 U.S. at 859 (Stevens, J., dissenting) (citing *Id.* at 825-26 (majority opinion)).

119. *Id.*


121. *Id.* (citing Gregg v. Georgia, 428 U.S. 153, 189 (1976) ("Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); *Godfrey*, 446 U.S. at 433 (holding that death sentences must be imposed under system in which there is "principled way to distinguish [the case] in which the death penalty was imposed, from the many cases in which it was not").

122. See *infra* notes 124-44 and accompanying text.
aid the jury in performing the narrow evaluation the Virginia vileness statute requires of it.\textsuperscript{123}

The case for the irrelevancy of "specific harm" and victim impact evidence to the jury's task under the Virginia vileness predicate might best be made by first highlighting two statutory schemes in which such evidence is relevant. As was noted above, victim impact evidence may come before the jury during the jury's vileness determination pursuant to section 19.2-264.4 of the Virginia Code. Again, this article proposes that the introduction of evidence at this time is in error because it cannot assist the jury in making the determination required of it under statute.\textsuperscript{124} Victim impact evidence is also introduced a second time, however, and at this time it might well be of assistance to the sentencer's task: Specifically, after the jury returns a death sentence, the judge is required to "direct a probation officer of the court to thoroughly investigate the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just."\textsuperscript{125} If the judge finds the imposition of the death sentence to be "appropriate and just," he will adopt the jury's recommendation. The impact of the defendant's crime on the victims might well be one of the many "any and all other" factors relevant to his decision as to whether a death sentence is "appropriate and just." For this reason, that the introduction of victim impact evidence at this stage of the sentencing proceeding is mandated\textsuperscript{126} is not objectionable.

In certain circumstances, victim impact evidence might even be relevant to the jury's evaluation of aggravating factors.\textsuperscript{127} Under the federal statute, for example, the jury is required to consider the "[v]ulnerability of the victim," whether the victim was a "[h]igh public official,"\textsuperscript{128} as well as "any other aggravating factor for which notice has been given."\textsuperscript{129} Because these factors require information about the victim, the information contained in

\textsuperscript{123} See VA CODE ANN. § 19.2-264.2 (Michie 1999); see also VA CODE ANN. § 19.2-264.4 (Michie 1999) ("The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that [the defendant's] conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.").

\textsuperscript{124} See infra notes 127-44 and accompanying text.

\textsuperscript{125} VA. CODE ANN. § 19.2-264.5 (Michie 1999) (requiring post-sentence reports to contain Victim Impact Statements). Alternatively, if the judge finds "good cause" in the post-sentence report and the cases collected for comparative proportionality review, he may impose a life sentence. Id.; see infra Part III. B.

\textsuperscript{126} See supra notes 114-21 and accompanying text.

\textsuperscript{127} But see supra notes 114-21 and accompanying text.


victim impact statements might well help the jury in evaluating those factors.

By marked contrast, however, victim impact evidence cannot help the jury to evaluate any of the three vileness sub-elements. The case for the irrelevancy of victim impact evidence to the first two sub-elements is simple. Both aggravated battery and torture clearly relate to the physical conduct of the defendant in relation to the victim.\(^\text{131}\) Victim impact evidence, on the other hand, relates to the indirect impact of the victim’s death on the victim’s survivors. Because there is no logical link between the physical conduct used by the defendant in killing his victim and the emotional impact of the victim’s death on his survivors, victim impact testimony has no relevancy to either the aggravated battery or torture sub-elements.

As was explained above, depravity of mind is the most vague, ambiguous, and far-reaching of the three sub-elements. As a result, it should come as no surprise that demonstrating that victim impact evidence is irrelevant to depravity of mind is more complicated than is the case with the aggravated battery and torture sub-elements. In \textit{Smith v. Commonwealth}, the Supreme Court of Virginia “defined” depravity of mind as “a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.”\(^\text{132}\) Unlike the aggravated battery\(^\text{133}\) and torture\(^\text{134}\) sub-elements, depravity of mind refers to a

\begin{footnotesize}
\begin{enumerate}
  \item See, e.g., \textit{Harris v. State}, 230 S.E.2d 1, 10 (Ga. 1976) (“This aggravating circumstance involves both the effect on the victim, viz., torture, or an aggravated battery; and the offender, viz., depravity of mind. As to both parties the test is that the acts (the offense) were outrageously or wantonly vile, horrible or inhuman.”).
  \item The defendant's mental state clearly has no bearing on the aggravated battery sub-element. See \textit{Reid v. Commonwealth}, 506 S.E.2d 787, 792-93 (Va. 1999) (“We have never held that the vileness factor . . . includes a requirement that a defendant’s mental state embrace the intent to commit an outrageously or wantonly vile murder, and we decline to do so now. The number or nature of the batteries inflicted upon the victim is the essence of the test whether the defendant’s conduct [constitutes an aggravated battery.]”) (citing \textit{Boggs v. Commonwealth}, 331 S.E.2d 407, 421 (Va. 1985)).
  \item Although the definition of “torture” contains a state of mind component in that it requires a finding of “goal direction,” it is assumed in this article that the primary inquiry under the torture sub-element goes to the defendant’s actions in committing the murder. This is because, in the absence of other evidence, certain methods of killing will strongly suggest the “goal-directed” state of mind (for example, castrating and stabbing victim’s eyes out with ice pick), while others will suggest the absence of such a state of mind (for example, a single shot to the head). Even if the reader rejects this proposition and concludes torture goes to a substantive state of mind, the conclusion reached by the relevance analysis is nevertheless unaffected: if torture contains a substantive state of mind requirement, then victim impact evidence is not, as is argued \textit{supra} at note 131 and accompanying text, irrelevant to torture because it is similar to aggravated battery, but instead because it is similar to depravity of mind, to which victim impact is also clearly irrelevant. See \textit{infra} notes 135-44 and accompanying text.
\end{enumerate}
\end{footnotesize}
substantive mental state. In other words, the jury infers the defendant's state of mind from the way in which the defendant committed the murder, which may, or may not, have constituted aggravated battery or torture. Because the scope of the depravity of mind concept is not limited by the facts of the case, but instead allows the jury to extrapolate from those facts the defendant's mental state at the time of the murder, the depravity of mind scope is necessarily much broader than are those of the other two sub-elements. But victim impact evidence is no more relevant to it.

As was noted above, the Weeks court suggested that victim impact evidence might tend to prove depravity of mind but, aside from its citation to Payne, offered absolutely no precedential or analytical support for this assertion. If it were the case that the omission of precedent was due to the fact that the statutory predicate used to sentence Payne is similar to the depravity of mind sub-element, such an omission would be logically acceptable; in other words, there would be no reason to reinvent the wheel if the authority the court cited in Payne clearly supported its position.

Because the statutory predicate used to sentence Payne is not similar to Virginia's depravity of mind sub-element, the omission was not an efficient use of judicial resources, but was instead an abdication of the court's responsibility to cite appropriate authority. At Payne's sentencing hearing, the prosecution argued that the impact the murders had had on the victim's family members made Payne's offenses "especially cruel, heinous, and atrocious." The language of the prosecutor's phrase tracks the statutory predicate on which the prosecutor relied in making his case for death. Specifically, the predicate is established if the jury determines that the "murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." In other words, this predicate refers to the acts committed by the defendant, not his state of mind at the time of the murder. As such, it mirrors the aggravated battery and torture, but not the depravity of mind, sub-elements found in the capital statute.

Given this, under the "logic" of Payne, victim impact evidence would be relevant to the aggravated battery and torture sub-elements, not depravity

135. See Flamm, supra note 89, at 332-34.
136. Id.
137. Id.
138. See supra notes 96-97 and accompanying text.
139. See infra notes 140-44 and accompanying text.
140. Payne, 501 U.S. at 816.
141. See TENN. CODE ANN. § 39-13-204(i)(5) (1999) (stating that the heinous, atrocious, or cruel aggravator refers to murders involving "torture or serious physical abuse beyond that necessary to produce death").
142. Id.
of mind. But the Weeks court cited Payne for precisely the opposite proposition, that is, that victim impact evidence was relevant to the depravity of mind sub-element. Thus, even assuming the Payne court’s conclusion that there is a connection, however tenuous and undefined, between evidence of the way in which a crime was committed and the impact that crime had on the victims is correct, no such link exists between the defendant’s state of mind and the impact of the crime on the victims. This is because depravity of mind goes to the defendant’s substantive state of mind, while in the cases of aggravated battery and torture it is the defendant’s actions which are at issue. In other words, while Payne concludes, correctly or incorrectly, that victim impact evidence is relevant to the jury’s determination of how bad acts are, Payne does not suggest that it is possible to infer the defendant’s substantive state of mind from the “specific harm” his acts caused. Therefore, even assuming that victim impact is relevant to aggravated battery and torture cases, which it is not, it is certainly not relevant to depravity of mind cases, and Payne does not stand for the proposition that it is.

IV. Unanimity as to Vileness

Under existing Virginia law, the Commonwealth is not required to prove beyond a reasonable doubt which of the sub-elements make a murder vile. In other words, it is permissible for some jurors to believe that the crime is vile because it involved torture, others because it demonstrated the depravity of mind of the defendant, and still others because it was an aggravated battery of the victim. A similar result has plainly been rejected by the United States Supreme Court.

In Richardson v. United States, the Court held that in order to convict a defendant under 21 U.S.C. § 848, a jury must unanimously agree not only that the defendant committed some “continuing series of [drug] violations,” but also about which three specific “violations” constitute that “continuing series.” The court’s conclusion turned on its resolution of the issue of whether the “continuing series of violations” was but one element or, in the alternative, a series of elements.

Were it the former, the Court reasoned, the government would be required to prove no more than that the defendant committed some series of violations, but not any particular series of violations; under this theory, the “continuing series” would be a single element, and the individual viola-
tions but the means by which the defendant perpetrated the element.\textsuperscript{149} Because the government need only prove the elements of a statute, and not the means,\textsuperscript{150} the defendant could be convicted by a unanimous jury of committing "a series" of violations despite the fact that no two jurors agreed the defendant committed any given violation.\textsuperscript{151} The court emphatically rejected this interpretation. Instead, the Court held that each of the "violations" composing the series was an individual element which must be proven.\textsuperscript{152} In other words, the Court ruled that the three violations composing the series were the last three elements of 21 U.S.C. § 848, on which the government of course bore the burden of proof. Although the decision in 
\textit{Richardson} explicitly involved a matter of statutory construction, not constitutional law, the principles of statutory construction there discussed might well have effect in the Virginia capital context. Specifically, applying the 
\textit{Richardson} reasoning, the Commonwealth ought to be required to prove beyond a reasonable doubt which underlying sub-element(s) support(s) a finding of vileness.\textsuperscript{153}

As has been explained, the Virginia capital murder statute provides three possible "factors" (heretofore assumed to be "sub-elements") which a jury must find, alone or in any combination, in order to find vileness, thereby making a defendant eligible for a death sentence.\textsuperscript{154} Two possible interpretations of this statute are possible. This article argues that these three factors, which provide the evidence and proof of vileness, are separate elements requiring jury unanimity. The opposite position is that the three factors are but means by which the vileness element may be found and which therefore need not be proven beyond a reasonable doubt.

There are at least two reasons why the factors are sub-elements and not merely means. The first is a simple matter of statutory construction: when a criminal statute describes how a crime may be committed in the disjunctive, the words constituting that description are elements, not means. For example, robbery is defined at common law as "taking by force or threat of

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  \item \textsuperscript{149} \textit{Id. at} 1710.
  \item \textsuperscript{150} To take the Court's example, where the government seeks to prove the "force or the threat of force" element of robbery by evidence that the defendant wielded either a knife or a gun, so long as all twelve jurors unanimously determined that the Government had proved that the defendant had threatened force, it would matter not that some jurors concluded that the defendant used a knife to create the threat while others concluded he used a gun. Such a conflict would merely be a disagreement about the means by which the defendant performed the element, not about whether he did in fact actually perform the element. See \textit{id.}; \textit{McKoy v. North Carolina}, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring).
  \item \textsuperscript{151} \textit{Richardson}, 119 S.Ct at 1710 (citing Schad v. Arizona, 501 U.S. 624, 631-632 (1991) (plurality opinion); Andersen v. United States, 170 U.S. 481, 499-501 (1898)).
  \item \textsuperscript{152} \textit{Id. at} 1709.
  \item \textsuperscript{153} See \textit{infra} notes 154-58 and accompanying text.
  \item \textsuperscript{154} VA. CODE ANN. § 19.2-264.2 (Michie 1999).
\end{itemize}
force.” As the Supreme Court has explained, “force or threat of force” are clearly elements. This is because it is presumed that where the legislatures and courts have taken the time to describe specifically how a crime may be committed, it is those actions which constitute the crime, and those actions which must be proven beyond a reasonable doubt. In other words, courts and legislatures have determined that what matters in the robbery context is whether an act of force occurred or was threatened, not whether the defendant used a knife or a gun in so doing. Likewise, the Virginia General Assembly has determined that what is important in the vileness context is whether the defendant’s conduct constituted aggravated battery or torture or evidenced depravity of mind, not how those elements might have been accomplished. Given the heightened standard of reliability for capital cases and the fact that the legislature took the time to describe how vileness may occur, it should be assumed that such descriptions constitute elements and not means. As the Court in Richardson explained, this is because allowing a jury to gloss over the differences in behavior, thereby “permitting a jury to avoid discussion of the specific factual details . . ., will cover-up wide disagreement among the jurors about just what the defendant did, or did not, do.”

Second, as has been repeatedly emphasized in this article, a state which chooses to impose the death penalty “must channel the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’” By not requiring the jury be unanimous as to which sub-element makes his crime vile, Virginia fails on both counts. If it matters not whether some jurors believe the defendant committed an aggravated battery, others that he tortured his victim, and still others his crime evidenced a depravity of mind, the sentencer is clearly not being provided “specific and detailed guidance.” Likewise, if the jury need not decide which sub-element constitutes vileness, the reviewing courts cannot rationally review the sentencer’s decision because it cannot know the basis of that decision.

V. Conclusion

It has been argued in this article that the death penalty in Virginia is administered in a manner inconsistent with principles outlined in Godfrey

155. See supra note 150.
157. Richardson, 119 S.Ct at 1711.
and clarified in later decisions. Rather than limiting the jury’s discretion by “clear and objective standards,” the judiciary and legislature have permitted the acts which constitute “vileness” to slowly expand so as to encompass any capital murder.159 Moreover, although mandated by state law, the introduction of “victim impact evidence” to assist the jury in its vileness determination is illogical under accepted relevance principles.160 Finally, because the Commonwealth need not prove which acts constitute vileness or whether those acts are vile because they prove torture, depravity of mind, or aggravated battery, any possible guidance provided by those sub-elements is illusory.161

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159. See discussion infra Part II.
160. See discussion infra Part III.
161. See discussion infra Part IV.