

1975

Revision of Virginia's Criminal Code

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REVISION OF VIRGINIA'S CRIMINAL CODE

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I. INTRODUCTION*

On October 1, 1975 the criminal justice system of the Commonwealth of Virginia began to operate under revised codes of criminal law and procedure. Enacted during the last legislative session, Titles 18.2 and 19.2 contain an impressive array of new laws with which judges, lawyers, and law enforcement officers should quickly become familiar. In many instances, these new laws go far beyond recodification of existing laws. Several represent substantive changes which are quite controversial and remain hotly debated since the close of the legislative session.

To redirect our thinking in terms of the new statutory provisions will require a determined effort on the part of every practitioner of the criminal law. Continuing legal education programs throughout the state will surely assist in smoothing the transition, as did programs on the new laws at bar association meetings earlier this year.

For Virginia lawyers who might not have followed the proposed changes as they were being debated and enacted, and who might not have studied Titles 18.2 and 19.2, a number of the key changes brought about by the 1975 revision are outlined here. While the treatment of Titles 18.2 and 19.2 is not intended to be exhaustive, practitioners will greatly benefit from the careful highlighting done in the following material.

II. 1975 REVISION OF TITLE 18.1

Although the 1975 revision of Title 18.1 of the Virginia Code was primarily a recodification of existing Virginia law, substantive changes were made in five major areas: (1) classification of offenses and designation of punishment; (2) capital punishment; (3) rape; (4) abortion; and (5) gambling. In addition, new laws dealing with criminal solicitation, felony homicide, and drunken driving were enacted.¹ Certain sections of Title 18.1 were deleted, while other sections of the Code were transferred into Title 18.2 in an attempt to combine all criminal provisions in one title.² The following discussion will deal only with major substantive changes in Title 18.2 and

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1. See VA. CODE COMM'N REPORT, REVISION OF TITLE 18.1 OF THE CODE OF VIRGINIA 13-19 (H. Del. Doc. No. 10, 1973) [hereinafter cited as CODE COMM'N REPORT] for a complete listing of comparative section numbers from Title 18.1 to 18.2; sections deleted, added, and those sections brought into Title 18.2 from other parts of the Code.

2. *Id.* at 1.

will examine potential problems raised by the revised Code.

A. CLASSIFICATION OF OFFENSES AND DESIGNATION OF PUNISHMENT

Title 18.2 has categorized criminal offenses within six classes of felonies³ and four classes of misdemeanors⁴ with specific punishments designated for each class.⁵ As a result, the needless repetition of punishment for each separate offense is avoided, as is the problem raised by the sometimes extreme divergence heretofore existing between minimum and maximum penalties for each offense. The consolidation of punishments within classes also diminishes the discretionary sentencing power of the judge and jury.⁶

Unlike the first two misdemeanor classes, there is no provision for punishment by imprisonment contained in classes three and four.⁷ The lack of such provision relieves the state from the responsibility of appointing counsel for indigent defendants charged with class three or four misde-

3. Va. Acts of Assembly 1975, ch. 14, at 19 (§ 18.2-9 (1)).

4. *Id.* (§ 18.2-9 (2)).

5. *Id.* at 19-20.

§ 18.2-10. Punishment for conviction of felony. —The authorized punishments for conviction of a felony are:

(a) for class 1 felonies, death.

(b) for class 2 felonies, imprisonment for life or for any term not less than twenty years.

(c) for class 3 felonies, a term of imprisonment of not less than five years nor more than twenty years.

(d) for class 4 felonies, a term of imprisonment of not less than two years nor more than ten years.

(e) for class 5 felonies, a term of imprisonment of not less than one year nor more than ten years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both.

(f) for class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both.

§ 18.2-11. Punishment for conviction of misdemeanor.—The authorized punishments for conviction of a misdemeanor are:

(a) for class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both.

(b) for class 2 misdemeanors, confinement in jail for not more than six months and a fine of not more than five hundred dollars, either or both.

(c) for class 3 misdemeanors, a fine of not more than five hundred dollars.

(d) for class 4 misdemeanors, a fine of not more than one hundred dollars.

6. This broad discretionary sentencing power was the basis for striking down the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972). The Code Commission recognized the possible application of the *Furman* rationale to other sentencing provisions. See CODE COMM'N REPORT, *supra* note 1, at 2. For a complete discussion of the classification system see 9 U. RICH. L. REV. 415 (1975).

7. Va. Acts of Assembly 1975, ch. 14, at 20 (§ 18.2-11(c),(d)).

means as required by the doctrine of *Argersinger v. Hamlin*,⁸ a potential source of savings for the state treasury. Under the former Code, a judge had to appoint counsel if, *before* hearing any evidence, he anticipated that a prison sentence might be warranted. If he did not so appoint, he was then precluded from imposing a jail term on the defendant no matter how aggravated the offense might later appear as the evidence developed.⁹ This anomaly, suggested in Justice Powell's concurrence in *Argersinger*,¹⁰ is eliminated in Title 18.2 by the lack of provision for jail time for class three and four misdemeanants.

B. CAPITAL PUNISHMENT

The Code Commission Report¹¹ notes that the United States Supreme Court decision in *Furman v. Georgia*¹² necessitated a revision of Virginia law concerning capital offenses. The former Code, in Title 18.1, allowed discretionary imposition of the death penalty for at least ten offenses. Title 18.2 eliminates such discretion and mandates death in three instances—killing a kidnap victim, killing for hire, and killing by a prison inmate.¹³

It appears that even this revised form may again be affected by the Supreme Court's interpretation of several amendments to the Constitution. The landmark decision of *Furman v. Georgia*¹⁴ raised almost as many questions as it answered. Two justices of the five man majority, Justices Brennan and Marshall, found the death penalty unconstitutional *per se*; Justices Stewart, Douglas, and White held that the death penalty as applied in *Furman* constituted cruel and unusual punishment in violation of the eighth amendment because of the discretion allowed the judge and jury in imposing the death penalty.¹⁵ This lack of unity in the Court's position ensured that the issue would again be before them and left the states uncertain about their interim capital offense laws.

In *Fowler v. North Carolina*,¹⁶ the capital punishment case currently before the Supreme Court, Solicitor General Robert Bork, appearing for

8. 407 U.S. 25 (1972). According to *Argersinger*, the state must appoint counsel for indigents charged with an offense punishable by imprisonment.

9. *Id.* at 53.

10. *Id.* at 25.

11. CODE COMM'N REPORT, *supra* note 1, at 2-3.

12. 408 U.S. 238 (1972).

13. Va. Acts of Assembly 1975, ch. 14, at 22 (§ 18.2-31).

14. 408 U.S. 238 (1972).

15. For a more detailed discussion of capital punishment in general and *Furman v. Georgia* in particular, see 9 U. RICH. L. REV. 415 (1975); *Capital Punishment Statutes After Furman*, 35 OHIO ST. L.J. 651 (1974); Note, *Capital Punishment in Virginia*, 58 VA. L. REV. 97 (1972).

16. 285 N.C. 90, 203 S.E.2d 803, *cert. granted*, 95 S.Ct. 223 (1974).

the United States as *amicus curiae*, has asked the Court for a clarification of the *Furman* rule to the effect that the death penalty is per se constitutional.¹⁷ In oral argument, Stanford Law Professor Anthony Amsterdam argued on behalf of Fowler that peace time imposition of the death penalty on a civilian is cruel and unusual punishment per se, and that the infrequent imposition of the death penalty suggests general rejection by American society.¹⁸ He further argued that the North Carolina death penalty procedure allows the exercise of uncontrolled discretion considered fatal by three Justices in *Furman*.¹⁹ However, the discretionary practices noted by Amsterdam—prosecutorial discretion (as evidenced by plea bargaining); non-reviewable gubernatorial power to grant executive clemency; and vaguely drawn distinctions between capital and non-capital offenses²⁰—are all so deeply ingrained in the American criminal justice system that their elimination would be extremely difficult.

Deputy Attorney General Jean A. Benoy of North Carolina argued that there was no indication that the discretion exercised by prosecutors and the governor had been abused. Further, the fact that thirty-one states have enacted death penalty statutes since *Furman* indicates that society has *not* rejected capital punishment.²¹ Benoy noted that the death penalty was specifically contemplated by the framers in the fifth and fourteenth amendments;²² if it is in fact obsolete, the proper remedy is constitutional amendment rather than judicial pronouncement.²³

Reacting to the complexity of the issues raised by *Fowler*, the Court has scheduled the case for reargument in the October, 1975 term.²⁴ In determining the effect a decision for Fowler would have on the new Virginia capital punishment statute, it may be significant that the statute is more narrowly drawn than both the former Virginia statute and that under consideration in *Fowler*.²⁵ But if Amsterdam's reasoning is ultimately accepted by the Court, and the discretion inherent in the criminal process cannot otherwise be eliminated, the death penalty will be declared unconstitutional per se. This result seems unlikely given the ideological posture of the present Supreme Court, the fact that only two Justices on the *Furman* Court found the death penalty unconstitutional per se, and the presence of the same Justices to decide *Fowler*.

17. 43 U.S.L.W. 1166 (U.S., Apr. 29, 1975).

18. *Id.*

19. See note 15 and accompanying text *supra*.

20. 43 U.S.L.W. 1166 (U.S., Apr. 29, 1975).

21. *Id.*

22. U.S. CONST., amends. V, XIV.

23. 43 U.S.L.W. 1166 (U.S., Apr. 29, 1975).

24. 43 U.S.L.W. 3674 (U.S., June 23, 1975).

25. Compare Va. Acts of Assembly 1975, ch. 14, at 22 with VA. CODE ANN. § 18.1-21 (Cum. Supp. 1975) and N.C. GEN. STAT. § 14-17 (Cum. Supp. 1974).

C. NEW OFFENSES ADDED

1. *Criminal Solicitation*

The Virginia General Assembly filled a substantive void in the statutory criminal law by enacting a criminal solicitation statute²⁶ making it a class six felony to "command, entreat or otherwise attempt to persuade another person to commit a felony."²⁷ It is submitted this law raises at least two significant problems: first, there is no apparent requirement that the actor actually intend that the subject of his "persuasion" perpetrate the felony and second, the statute makes no distinction for purposes of punishment between degrees of seriousness of the felony solicited.

Other states which have criminal solicitation statutes,²⁸ and the Model Penal Code,²⁹ have included the requirement that the solicitor have *actual intent* that the person solicited commit a felony. Indeed, some states also require that specific conduct which would constitute a crime be solicited.³⁰

It is equally anomalous that the statute makes no distinction based on the seriousness of the offense solicited. Other jurisdictions have designated degrees of criminal solicitation³¹ under the obvious rationale that one who solicits another to destroy public records³² should not be given the same sentence as one who solicits another to commit murder.

26. Va. Acts of Assembly 1975, ch. 14, at 21 (§ 18.2-29). In *Wiseman v. Commonwealth*, 143 Va. 631, 637-39, 130 S.E. 249, 250-52 (1925), common law solicitation was defined as "inciting to crime" and distinguished from an attempt to commit a crime by the presence of an overt act. If there is an overt act in the commission of a crime, it is an attempt and not solicitation.

27. Va. Acts of Assembly 1975, ch. 14, at 21 (§ 18.2-29). Until the recent enactment of Virginia's criminal solicitation statute, acts of this nature were treated as inchoate offenses, e.g., conspiracy. For a general commentary on inchoate crimes in Virginia, see *Reforming the Law of Inchoate Crimes*, 59 VA. L. REV. 1234 (1973). The statutory format advocated in this article was not adopted by the General Assembly. See also, Sobel, *Anticipatory Offenses in the New Penal Law: Criminal Solicitation, Conspiracy, Attempt, and Facilitation*, 32 BROOKLYN L. REV. 257 (1966); 4 MEMPHIS ST. U.L. REV. 138 (1973); *Attempt, Solicitation, and Conspiracy under the Proposed California Criminal Code*, 19 U.C.L.A.L. REV. 603 (1972).

28. CAL. PENAL LAW § 653(f) (West Cum. Supp. 1975); COLO. REV. ST. ANN. § 18-2-301 (1973); DEL. CODE ANN. tit. 11, §§ 501-13 (1974 Rev.); ILL. STAT. ANN., ch. 38, § 8-1 (a) (1972); N.Y. PENAL LAW § 100.00 *et seq.* (McKinney 1975); N.H. REV. STAT. ANN. § 629:2 (1974); TENN. CODE ANN. § 39-115 (Cum. Supp. 1974); TEX. CODE ANN. tit. 4, § 15.03 (1974); WISC. STAT. ANN. § 939.30 (1958).

29. MODEL PENAL CODE § 5.02(1) (Proposed Official Draft, 1962).

30. See, e.g., ORE. REV. STAT. § 161.435 (1974); PA. STAT. ANN. tit. 18, 902 (1973); TEX. CODE ANN. tit. 4, § 15.03 (1974); MODEL PENAL CODE § 5.02 (1) (Proposed Official Draft, 1962).

31. N.Y. PENAL LAW § 100.00 *et seq.* (McKinney 1975); WISC. STAT. ANN. § 939.30 (1958).

32. Va. Acts of Assembly 1975, ch. 14, at 32 (§ 18.2-107).

2. *Felony Homicide*

The 1975 Virginia General Assembly also enacted a felony homicide statute³³ which, to a great extent, simply codifies the common law felony/murder rule.³⁴ The felony/murder rule was primarily developed as a procedural tool to aid in the establishment of the requisite *mens rea* where a person intends to commit a felony, and during its commission or attempted commission there is an otherwise accidental homicide. Under the felony/murder rule, the killing is considered murder rather than manslaughter because of the felonious intent "transferred" from the underlying felony.³⁵

Virginia has no case law developing the felony/murder concept because such conduct constituted a violation of section 18.1-21, the homicide statute encompassing homicide committed in attempting or perpetrating a felony.³⁶ Therefore those cases involving a killing during the perpetration of a felony were decided by statutory interpretation rather than application of the common law rule.³⁷

To fall within the ambit of section 18.2-33, an accidental killing must have occurred while in the prosecution of *some felonious act* other than those enumerated in the first degree homicide statute.³⁸ Thus, by its plain language, there is no requirement that the underlying felonious act be one inherently dangerous to human life. This element has wisely been supplied both by statute,³⁹ and case law⁴⁰ in other jurisdictions. Furthermore, the

33. *Id.* at 22 (§ 18.2-33).

34. *See, e.g.*, R. PERKINS, CRIMINAL LAW 37 (2d ed. 1969); *cf.* Ritz, *Felony Murder, Transferred Intent, and the Palsgraf Doctrine in the Criminal Law*, 16 WASH. & LEE L. REV. 169 (1959); Note, *A Survey of Felony Murder*, 28 TEMPLE L.Q. 453 (1955).

35. *See* note 34 *supra*.

36. VA. CODE ANN. § 18.1-21 (Cum. Supp. 1975).

37. *See, e.g.*, Durham v. Commonwealth, 214 Va. 166, 198 S.E.2d 603 (1973) (attempted robbery); Williams v. Commonwealth, 214 Va. 338, 200 S.E.2d 579 (1973) (robbery); Wooden v. Commonwealth, 208 Va. 629, 159 S.E.2d 623 (1968) (robbery); Timmons v. Commonwealth, 204 Va. 205, 129 S.E.2d 697 (1963) (rape).

38. Va. Acts of Assembly 1975, ch. 14, at 22 (§ 18.2-33) (emphasis added).

39. ILL. STAT. ANN. ch. 38, § 9-1(a)(3) (Cum. Supp. 1975-76); N.Y. PENAL LAW § 125.25.3 (McKinney 1967). *But see* MODEL PENAL CODE § 210.2 (1)(b) (Proposed Official Draft, 1962) which substitutes a rebuttable presumption of implied malice for the felony/murder rule.

40. Most jurisdictions have merged into the felony/murder rule a requirement that the underlying felony attempted or perpetrated must be one inherently or foreseeably dangerous, under the circumstances, to human life. *See, e.g.*, State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); Jenkins v. State, 230 A.2d 262 (Del. Sup. 1967); People v. Golson, 32 Ill. 2d 398, 207 N.E.2d 68, *cert. denied*, 384 U.S. 1023 (1965).

Felonies which have been found inherently dangerous to human life, and thus within the ambit of the felony/murder doctrine are: People v. Calzada, 13 Cal. App. 3d 603, 91 Cal. Rptr. 912 (1970) (driving under the influence of drugs); People v. Cline, 270 Cal. App. 2d 328, 75

statute does not require demonstration of a causal connection between the killing and the underlying felony. Thus, a person who kills a darting child while driving his car with due care and within the speed limit to mail a forged check may then be convicted of second degree murder under the felony homicide statute. This result could be avoided by including in the statute the requirement of a causal connection between the felony and the killing. Other jurisdictions have established the causation requirement by judicial pronouncement.⁴¹

It is submitted that Virginia would achieve needed savings in court time and expense by amending the felony homicide statute to require that the underlying felonious act be both inherently dangerous to human life and causally related to the homicide.⁴²

3. *Driving While Intoxicated*

The new "drunk driving" statute,⁴³ passed as emergency legislation and

Cal. Rptr. 459 (1969) (furnishing restricted drugs); *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965) (robbery); *State v. Doss*, 279 N.C. 413, 183 S.E.2d 671 (1971) (sodomy by threatening with knife and gun); *State v. Lee*, 277 N.C. 205, 176 S.E.2d 765 (1970) (escape by convict); *State v. Lewis*, 133 W. Va. 584, 57 S.E.2d 513 (1950) (unlawful abortion).

Those felonies held not inherently dangerous include: *People v. Satchell*, 6 Cal. 3d 28, 489 P.2d 1361, 98 Cal. Rptr. 33 (1971) (possession of concealed weapon by an ex-convict); *People v. Phillips*, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966) (grand theft); *People v. Paulic*, 227 Mich. 562, 199 N.W. 373 (1924) (violation of liquor law).

41. *State v. Moffitt*, 199 Kan. 514, 431 P.2d 879 (1967); *State v. Thompson*, 28 N.C. 202, 185 S.E.2d 666 (1972) (chain of causation); *Buel v. People*, 78 N.Y. 492, 497 (1879) ("but for" test of causation).

42. Cf. R. PERKINS, *CRIMINAL LAW* 44 (2d ed. 1969).

43. VA. CODE ANN. § 18.2-271.1 (Cum. Supp. 1975) provides:

Probation, education and rehabilitation of person charged with driving while intoxicated, etc. — (a) Upon the trial of any person for a violation of § 18.2-266, or any ordinance of a county, city or town similar to the provisions thereof, and upon motion of the defendant, the court may order probation to the defendant, on condition that he be assigned to a driver education program, and, in the discretion of the court, to an alcohol treatment or rehabilitation program, or both such programs. Such trial may be continued for a period up to one year and during such time of continuance the court may:

(1) Require the defendant to cooperate in any investigation conducted by any probation officer assigned to the case or such other person working in a driver education program, and

(2) Require the defendant moving for probation under the provisions of this section to pay a fee not to exceed one hundred fifty dollars, which amount shall be forwarded by the clerk to be deposited with the State Treasurer. Fees shall be kept in a separate fund in the State treasury for expenditure by the Highway Safety Division, for the maintenance of the provisions set out in this section, for which such funds as may come

in force since March 24, 1975, provides an innovative program of conditional probation, treatment, and rehabilitation of the drunk driver, granted at the discretion of the court.⁴⁴ It delegates to the Virginia Highway Safety Division authority to establish procedures and standards necessary to implement this program.⁴⁵

Conspicuously absent on the face of the statute is any provision for suspension or revocation of the probationer's operating license during his rehabilitation period. It would therefore seem that one convicted of "drunk driving" may be allowed lawful access to the highways during his treat-

to the State are hereby appropriated.

(b) If the court finds that the defendant is not eligible for probation or violates any of the provisions of probation, the court shall dispose of the case as if no probation had been ordered. If the court finds that the defendant has complied with its probation order, such compliance may be accepted by the court in lieu of a conviction under § 18.2-266 or the requirements specified in § 18.2-271, upon payment of all fines and costs, if any, as required by law.

(c) The State Treasurer or any city or county is authorized to accept any gifts or bequests of money or property, and any grant, loan, service, payment or property from any source, including the federal government, for the purpose of driver alcohol education. Any such gifts, bequests, grants, loans or payments shall be deposited in the separate fund provided in (a) (2) hereof.

(d) The Highway Safety Division, or any county, city, town, or cities or any combination thereof may establish driver alcohol education programs and alcohol treatment and rehabilitation programs in connection with highway safety. The Highway Safety Division is authorized to establish standards and criteria for the implementation of such programs. It may establish criteria for the modalities of administration of such programs, as well as public information, accounting procedures and allocation of funds. Funds paid to the State hereunder shall be utilized by the Division to offset the costs of State and local probation, rehabilitation, administration, driver education and public information. The Highway Safety Division shall establish standards of evaluation for the programs set out herein, and shall submit an annual report as to its actions taken at the close of each calendar year to the Governor and the General Assembly.

(e) Nothing in this section shall be construed to prevent the exercise by a court of its authority to make any lawful disposition of a charge of a violation of § 18.2-266 or a similar offense under any county, city or town ordinance.

44. This statute authorizes a program modeled after the federally sponsored Fairfax Alcohol Safety Action Project (ASAP) now in operation in Fairfax County, Virginia, and implemented through the Fairfax General District Court. *See* VA. HIGHWAY SAFETY DIVISION, D.W.I. ARREST—A BRIEF GUIDE TO ASAP AND THE COURTS (1975).

45. According to Mr. Walter Douglas, Assistant Director of the Virginia Highway Safety Division, there are now seven operational ASAP centers. Guidelines for implementing these ASAP programs are presently being formulated. The procedure begins with a sixty to ninety day planning grant of ten to twenty thousand dollars, through which the state and local authorities cooperate in planning and implementing local ASAP treatment programs. Interview with Mr. Walter Douglas, Virginia Highway Safety Division, in Richmond, Virginia, June 20, 1975.

ment period. However, subsection (e) of the statute,⁴⁶ which preserves the authority of the trial court to make "any lawful disposition" of the case before it, is being interpreted by local courts to permit judges to suspend or revoke licenses during the probation period.⁴⁷

The wording of the statute in subsection (a), "upon the trial of any person,"⁴⁸ raises a potential problem as well. The courts have disagreed on the proper construction of this phrase⁴⁹ which purports to specify the authorized procedure for implementing the probation program. In the Fairfax Alcohol Safety Action Project (ASAP), prior to the enactment of section 18.2-271.1, the defendant's motion for acceptance into the ASAP probation program was made during the pre-trial procedures.⁵⁰ This practice served to eliminate the time and expense of actually going to trial before a defendant could be assigned to the ASAP program.

The statute's provision that successful completion of probation may be accepted by the court in lieu of a conviction creates an equally perplexing problem, since the courts have generally required a guilty plea and conviction before assigning the defendant to the ASAP program.⁵¹

Virginia's ASAP program is breaking new ground in state treatment programs for drinking drivers.⁵² The need for flexibility in approach to the

46. VA. CODE ANN. § 18.2-271.1(e) (Cum. Supp. 1975).

47. Telephone interview with Mr. Barent Landstreet, Project Manager of Fairfax ASAP, June 20, 1975 [hereinafter cited as Landstreet Interview].

This interpretation may represent a judicial attempt to remedy a legislative oversight rather than a result dictated by sound statutory construction. Subsection (e) was probably intended to assure that judges were not compelled to prescribe rehabilitation where another disposition, such as acquittal or outright license revocation *without* rehabilitation, was deemed warranted. It is submitted the legislature could have avoided this strained interpretation by explicitly providing in subsection (e) that courts could dispose of the charge of a violation of § 18.2-266 (drunk driving) by invoking § 18.2-271.1 (rehabilitation *in addition to* any *other* lawful disposition, i.e., license revocation).

48. VA. CODE ANN. § 18.2-271.1(a) (Cum. Supp. 1975).

49. According to Mr. Landstreet, different courts have developed various interpretations of this language. In the Fairfax program only after a guilty plea or a finding of guilt by the court, can probation under section 18.2-271.1 be granted on a pre-sentence basis. Some courts have chosen to deal with this program by ordering probation, after a plea of guilty or a finding of guilt, at the sentencing. Arlington, Virginia, has chosen to continue to implement this program during the pre-trial procedures. Other courts have implemented section 18.2-271.1 by agreeing to suspend the defendant's jail term if he chooses to participate in the ASAP program. Landstreet Interview, *supra* note 47.

50. *Id.*

51. VA. CODE ANN. § 18.2-271.1(b) (Cum. Supp. 1975); Landstreet Interview, *supra* note 47.

52. New York and California have statutes dealing with driver training and rehabilitation generally, but these statutes do not deal specifically with the problem of drinking drivers.

problem of drunk drivers has long been recognized,⁵³ and this law is a useful tool in achieving this flexibility. However, perhaps because of the speed with which it was passed, the statute is rather poorly drafted. It is submitted that the General Assembly should amend this statute to clearly reflect its intent, rather than leaving clarification to the courts.

D. RAPE

1. *Forcible Rape*

The Code Commission's proffered revision of the state rape laws included a division of forcible rape into two categories: (1) rape accompanied by serious bodily injury or by the use of a deadly weapon or by a threat to use such a weapon with a display thereof; and (2) rape absent the concomitants specified in the first category.⁵⁴ The General Assembly accepted this categorization in its package passage of Title 18.2,⁵⁵ but reduced the punishments for these crimes from those which the Commission had suggested.⁵⁶ However, later in the same session, the legislature passed amendatory legislation to be incorporated into Title 18.2 which superseded the earlier passed rape sections.⁵⁷ Under the new sections, there is no classification of forcible rape into separate crimes with different punishments.⁵⁸

See CAL. VEHICLE CODE § 13368 (West Cum. Supp. 1975); N.Y. VEHICLE & TRAFFIC LAW §§ 520-23 (McKinney 1975).

53. See, e.g., Beresford, *Group Therapy for Chronic Violators*, 7 TRIAL 42 (March/April, 1971); Little, *Administration of Justice in Drunk Driving Cases*, 58 A.B.A.J. 950 (1972); Zylman, *The Alcohol Safety Counter Measures Program: A Panacea or Pandora's Box*, 19 TRAFFIC DIG. & REV. 16 (1971).

54. CODE COMM'N REPORT, *supra* note 1, at 13, 32 (§ 18.2-61).

55. Va. Acts of Assembly 1975, ch. 14, at 25 (§§ 18.2-61 to -62). The General Assembly modified the Commission's suggested punishments, *infra* note 56, by prescribing the aggravated rape of the first category as a class 2 felony, and the lesser form of rape under the second category as a class 3 felony. This modification in punishment became nugatory upon the subsequent abrogation of the division of rape into two categories. See notes 57, 58 and accompanying text *infra*.

56. The rationale behind the Commission's recommendation of a division of forcible rape into two categories is explained by its apparent desire to retain capital punishment for the offense. Believing the death penalty to be the appropriate punishment for forcible rape in certain instances, the Commission suggested its retention as the sole punishment for the aggravated form of rape under the first category, while the lesser form of rape under the second category would be punishable as a class 2 felony. See note 54 and accompanying text *supra*; CODE COMM'N REPORT, *supra* note 1, at 3, 32 (§ 18.2-61).

57. Va. Acts of Assembly 1975, ch. 606, at 1265-67 (§§ 18.2-61 to -67).

58. *Id.* at 1265 (§ 18.2-61). This amending of legislation passed earlier in the same session shows that the legislators' apparent plan was to pass Title 18.2 as a package early in the session, with undesirable provisions to be dealt with during the balance of the legislative period.

Title 18.1 allowed discretionary imposition of the death penalty for forcible rape,⁵⁹ an unconstitutional provision under *Furman v. Georgia*.⁶⁰ The legislature could have constitutionally retained capital punishment in Title 18.2 by prescribing it as the sole penalty for the offense,⁶¹ but instead it chose to allow the court or jury, in its discretion, to impose a punishment ranging from a term of not less than five years to life imprisonment.⁶²

Under Title 18.2, a female under thirteen legally does not have the capacity to consent to an act of sexual intercourse.⁶³ Therefore, the carnal knowledge of a female under this age is considered an act of forcible rape, even though actual consent be present.⁶⁴ The use of force is constructively deemed present in such an instance.⁶⁵ Because it is classified as forcible rape, the defendant in such a case faces the same range of punishment as does one who carnally knows a female against her will and by force.⁶⁶ The parallel provision under Title 18.1 applied to females under the age of sixteen.⁶⁷ The legislature apparently felt that this age was outdated, prompting the three year reduction noted above.

2. Statutory Rape

The General Assembly set the age of fifteen as the age of lawful female consent to sexual intercourse.⁶⁸ The carnal knowledge of a female under

59. VA. CODE ANN. § 18.1-44 (Cum. Supp. 1975).

60. 408 U.S. 238 (1972). The Code Commission noted that there was "little question" of the unconstitutionality of the state death penalty provision for rape under Title 18.1. CODE COMM'N REPORT, *supra* note 1, at 3. See also II B *supra*.

61. While the Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238 (1972), is susceptible of divergent interpretations, the Virginia Supreme Court has ruled that the decision does not render constitutionally infirm a non-discretionary, mandatory death penalty. *Jefferson v. Commonwealth*, 214 Va. 747, 749, 204 S.E.2d 258, 260 (1974). See also II B *supra*. The Code Commission had recommended the death penalty as the sole punishment for the aggravated form of rape which it proposed, but the General Assembly rejected this suggested retention of capital punishment. See notes 54-56 and accompanying text *supra*; note 62 and accompanying text *infra*.

62. Va. Acts of Assembly 1975, ch. 606, at 1265 (§ 18.2-61).

63. *Id.*

64. *Id.*

65. For cases holding that a female's actual consent and the absence of actual force are immaterial when she is under the legal age of consent, see VA. CODE ANN. § 18.1-44 (Repl. Vol. 1960).

66. Va. Acts of Assembly 1975, ch. 606, at 1265 (§ 18.2-61). The Code Commission had recommended that the carnal knowledge of a female under the age of seven, although it be nonforcible and with actual consent, be punishable solely by death as a class 1 felony. CODE COMM'N REPORT, *supra* note 1, at 32 (§ 18.2-61).

67. VA. CODE ANN. § 18.1-44 (Cum. Supp. 1975).

68. Va. Acts of Assembly 1975, ch. 606, at 1265 (§ 18.2-63). The General Assembly followed

fifteen but at least thirteen years of age, although it be an act of consensual sexual intercourse, is punishable as a class 4 felony.⁶⁹ However, if the accused is a minor and the consenting female is three years or more his junior, the act is punishable as a class 6 felony; if the consenting female be less than three years the junior of the accused minor, the act is punishable as violative of the fornication statute.⁷⁰ Consensual sexual intercourse with a female under thirteen is not considered statutory rape, but is punishable as an instance of forcible rape.⁷¹

Under Title 18.1, the possible punishment for the carnal knowledge of a female patient or pupil of certain institutions ranged from imprisonment for not less than five years to death.⁷² The statute made no exception for cases in which the accused could not have known that the female was such a patient or pupil. Under Title 18.2, the state must show that the accused knew or had good reason to believe that the female was such a patient or pupil, or that she was on furlough with convalescent status.⁷³ Upon proof thereof, the act is punishable as a class 3 felony.⁷⁴

the recommendation of the Code Commission, which stated that "due to the increase in knowledge in sex matters by females under the age of sixteen, the age of sixteen as the age of lawful consent to sexual intercourse is out of date, and the Commission's proposals in this respect fix the age at fifteen." CODE COMM'N REPORT, *supra* note 1, at 3. The designated age under Title 18.1 was sixteen. VA. CODE ANN. § 18.1-44 (Cum. Supp. 1975).

69. Va. Acts of Assembly 1975, ch. 606, at 1265 (§ 18.2-63).

70. *Id.* at 1265-66 (§ 18.2-63). For a comparison with the statutory rape provision submitted by the Code Commission, prescribing different ages and penalties, see CODE COMM'N REPORT, *supra* note 1, at 32-33 (§ 18.2-63). Under Title 18.1, statutory rape applied when the consenting female was between the ages of fourteen and sixteen, with punishment ranging from one to twenty years in prison. No qualifications existed for defendants who were minors. VA. CODE ANN. § 18.1-44 (Cum. Supp. 1975).

Fornication, occurring when a nonmarried person voluntarily has sexual intercourse with any other person, is punishable under Title 18.2 as a class 4 misdemeanor. Va. Acts of Assembly 1975, ch. 14, at 76 (§ 18.2-344).

71. See notes 63-65 and accompanying text *supra*.

72. VA. CODE ANN. § 18.1-44 (Cum. Supp. 1975). These institutions include those for mentally deranged females, as well as for those who are deaf, dumb, blind, feeble-minded, or epileptics. *Id.*

73. Va. Acts of Assembly 1975, ch. 606, at 1266 (§ 18.2-64). The Code Commission noted that "the practice of furlough of females, who, to all appearances and manifestations, are in complete control of their volition, places an unwarranted liability on an accused who has no reason to believe that the female is an inmate of such an institution." CODE COMM'N REPORT, *supra* note 1, at 3.

74. Va. Acts of Assembly 1975, ch. 606, at 1266 (§ 18.2-64). This punishment is a substantial reduction from that designated under Title 18.1, *supra* note 71 and accompanying text. The General Assembly passed the new provision dealing with institutionalized females in the same form as the one submitted by the Code Commission. CODE COMM'N REPORT, *supra* note 1, at 33 (§ 18.2-64).

The only other consequential change in the rape laws deals with the deposition of a prosecutrix. Under Title 18.1, the judge alone had the discretion to order the taking of the prosecutrix' deposition to be read subsequently in court in lieu of oral testimony.⁷⁵ Title 18.2 retains this section, but with the added condition that the consent of the accused, obtained in open court, be a prerequisite to the taking of the deposition.⁷⁶

E. ABORTION

1. General

The abortion article passed by the General Assembly under Title 18.2⁷⁷ is tailored to meet the constitutional dictates handed down by the Supreme Court in *Roe v. Wade*⁷⁸ and its companion case.⁷⁹ A woman, upon her request, may obtain an abortion during the first trimester of her pregnancy if performed by a physician licensed to practice medicine and surgery by the Virginia State Board of Medicine.⁸⁰ Such an abortion likewise is lawful during the second trimester of pregnancy, if performed in a hospital licensed by the State Department of Health and Mental Retardation.⁸¹ This statutory location requirement is valid since the Court in *Roe* asserted that a state may regulate abortion procedures in ways reasonably related

75. VA. CODE ANN. § 18.1-47 (Repl. Vol. 1960).

76. Va. Acts of Assembly 1975, ch. 606, at 1266-67 (§ 18.2-67). The General Assembly apparently felt that the prosecutrix' physical appearance on the witness stand is of such importance that the consent of the accused be obtained before the witness' deposition be taken to be read in court in lieu of oral testimony.

77. Va. Acts of Assembly 1975, ch. 14, at 26 (§§ 18.2-71 to -76.2).

78. 410 U.S. 113 (1973). The Court struck down as violative of the due process clause of the fourteenth amendment a Texas criminal abortion statute proscribing abortion without reference to gestation periods, unless used as a life saving procedure. *Id.* For a discussion of the 1973 Supreme Court abortion cases and their background, see 8 U. RICH. L. REV. 75 (1973).

79. *Doe v. Bolton*, 410 U.S. 179 (1973). The Court struck down various abortion procedural requirements in a Georgia statute as violative of the fourteenth amendment. *Id.* at 191-201. See note 84 *infra* for a brief discussion of the case.

80. Va. Acts of Assembly 1975, ch. 14, at 26 (§ 18.2-72). Under *Roe v. Wade*, 410 U.S. 113, 165 (1973), a state may stipulate that the physician currently be licensed by the state.

Under Title 18.1, abortions were obtainable when the pregnancy resulted from incest or forcible rape, as well as when the child was likely to be born with an irremediable and incapacitating defect. VA. CODE ANN. § 18.1-62.1 (Cum. Supp. 1975). Under the new legislation, where abortion is freely obtainable during certain gestation periods, it became unnecessary to specify these instances. See notes 77-78 and accompanying text *supra*. However, under Title 18.1 they had been the only circumstances under which an abortion could be performed other than when necessary to save the woman's life or to prevent the substantial impairment of her health. VA. CODE ANN. §§ 18.1-62.1, -62.3 (Cum. Supp. 1975). This was patently unconstitutional under *Roe*, thus necessitating a revision of the abortion law.

81. Va. Acts of Assembly 1975, ch. 14, at 26-27 (§ 18.2-73).

to maternal health during this period of gestation.⁸² Abortion is proscribed subsequent to the second trimester, except where the continuation of pregnancy is likely to result in death or serious and irremediable injury to the woman.⁸³ This diagnosis requires the concurrence of two consulting physicians in addition to the woman's physician.⁸⁴ However, a less stringent emergency provision allows abortion whenever necessary to save the life of the woman.⁸⁵ Under this "catchall," the treating physician need not be licensed specifically by the Virginia State Board of Medicine, and there is neither the requirement of a two-doctor concurrence in the diagnosis nor a mandatory location at which the abortion must be performed.⁸⁶

2. Other Provisions

A "conscience clause" of questionable constitutionality allows any medical facility to deny admittance to a patient for the purpose of an abortion, and allows any individual to abstain from participating in an abortion procedure for any reason.⁸⁷ The woman's express written consent is re-

82. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

83. Va. Acts of Assembly 1975, ch. 14, at 27 (§ 18.2-74).

84. *Id.* In *Doe v. Bolton*, 410 U.S. 179, 198-200 (1973), the Court invalidated the procedural requirement in a Georgia abortion statute stipulating a two-doctor concurrence in the female's physician's diagnosis that an abortion was necessary to prevent substantial impairment to the health of the woman.

The decision would appear to render constitutionally infirm the two-doctor concurrence clause under the new Virginia statute. However, the Georgia statute lacked references to the several trimesters of the pregnancy, and it is thus possible to interpret *Doe* as invalidating a two-doctor concurrence clause only when such a provision is not confined to a trimester of pregnancy other than the first one, when the state may regulate abortion procedures in a manner reasonably related to maternal health. *Roe v. Wade*, 410 U.S. 114, 164 (1973). Under this rather tortuous interpretation, the Virginia two-doctor concurrence clause, confined to a period other than the first trimester, is constitutional.

The Court in *Doe* also invalidated a residency requirement imposed on the woman before she could obtain an abortion, as well as a provision requiring a hospital staff abortion committee's prior approval of the procedure. 410 U.S. at 200. Under Title 18.1, Virginia had both such requirements. VA. CODE ANN. § 18.1-62.1 (Cum. Supp. 1975).

85. Va. Acts of Assembly 1975, ch. 14, at 27 (§ 18.2-74.1).

86. *Id.*

87. *Id.* (§ 18.2-75). See *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir.), *cert. denied*, 419 U.S. 891 (1974), where the Eighth Circuit invalidated a municipal hospital's resolution banning the use of its facilities for non-therapeutic abortions. Citing the Supreme Court abortion decisions, *supra* notes 78, 79 and accompanying text, the court stated: "It would be a nonsequitur to say that the abortion decision and its effectuation is an election to be made by the physician and his patient without interference by the state and then allow the state, through its public hospitals, to effectively bar the physician from using state facilities to perform the operation." 495 F.2d at 1346. The court found no "compelling circumstances" to justify the hospital's resolution. *Id.*

quired prior to an abortion.⁸⁸ The encouragement or promotion of illegal abortions is banned.⁸⁹

Apparently apprehensive of judicial invalidation of one or more of the abortion sections, the legislature included in the article a severability clause stating that any such invalidation should be confined as narrowly as possible without impairing the remainder of the abortion article.⁹⁰

F. GAMBLING

Although the gambling statutes under Title 18.2⁹¹ represent a complete revision of the previous law,⁹² the emphasis lies in the updating of format rather than the alteration of substance.⁹³ Two sections of Title 18.1, believed to be either unnecessary or inappropriate, have been deleted,⁹⁴ while in other instances several sections under the old law have been joined to form single sections.⁹⁵

The most noteworthy modification is found in the section defining illegal gambling, gambling devices, and operators.⁹⁶ Under Title 18.1, provisions

88. Va. Acts of Assembly 1975, ch. 14, at 27 (§ 18.2-76). Under Title 18.1, the written consent of the husband was required in addition to that of the woman when the abortion was to be performed because of likelihood that the child would be born with an irremediable and incapacitating defect. VA. CODE ANN. § 18.1-62(e) (Cum. Supp. 1975). Because the decision is based on the woman's right of privacy, *Roe v. Wade*, 410 U.S. 113 (1973), can be read to invalidate any provision calling for the husband's consent as an infringement of this right.

89. Va. Acts of Assembly 1975, ch. 14, at 27 (§ 18.2-76). The Supreme Court recently invalidated a Virginia statute which had been used in 1971 to convict a defendant newspaper editor for having published an advertisement stating that abortions were legal in New York for non-residents of that city. *Bigelow v. Virginia*, 43 U.S.L.W. 4734 (U.S. June 16, 1975). The statute was held violative of the first amendment guarantee of free speech. *Id.* at 4737-39. The statute had imposed a blanket restriction on advertisements encouraging the procurement of an abortion. VA. CODE ANN. § 18.1-63 (Repl. Vol. 1960). The legislature amended the section in 1972 to ban the encouragement or promotion of only those abortions *prohibited* in Virginia. VA. CODE ANN. § 18.1-63 (Cum. Supp. 1975). This section exists under Title 18.2 in substantially identical form. Va. Acts of Assembly 1975, ch. 14, at 27 (§ 18.2-76.1).

90. Va. Acts of Assembly 1975, ch. 14, at 27 (§ 18.2-76.2).

91. *Id.* at 72-76 (§§ 18.2-325 to -340).

92. VA. CODE ANN. §§ 18.1-314 to -343 (Repl. Vol. 1960); *id.* §§ 18.1-316, -318.1, -319, -329, -330, -331, -340, -341 (Cum. Supp. 1975).

93. See CODE COMM'N REPORT, *supra* note 1, at 4.

94. One of these deleted sections construed as remedial the laws against gaming, while the other had stipulated an attorney's fee of \$10.00 to be taxed in cases of gambling convictions. VA. CODE ANN. §§ 18.1-314, -315 (Repl. Vol. 1960). See CODE COMM'N REPORT, *supra* note 1, at 5.

95. See CODE COMM'N REPORT, *supra* note 1, at 100-04, which lists after each of the recommended new sections, subsequently passed in substantially the same form by the General Assembly, the sections of Title 18.1 upon which the new legislation is based.

96. Va. Acts of Assembly 1975, ch. 14, at 72 (§ 18.2-325).

concerning a variety of specifically named gambling devices and machines were dealt with in separate sections, thus rendering difficult their analysis.⁹⁷ The definitions of these gambling instrumentalities were unduly cumbersome.⁹⁸ Furthermore, the legislature at different times was forced to amend the old sections to deal with exigencies previously uncovered.⁹⁹ The new legislation does not attempt to define specific devices such as "slot machines" or "punch boards." Instead, several sections from Title 18.1 were combined and rewritten into a single section which forms a comprehensive definition of gambling devices.¹⁰⁰ This is intended to eliminate special legislation to cover future forms of gambling.¹⁰¹

III. 1975 REVISION OF TITLE 19.1

The revision of the criminal procedure provisions of the Virginia Code sought to accomplish two main objectives: (1) a redraft of certain prior sections to conform with already existing Rules of the Supreme Court of Virginia and recent decisions of the United States Supreme Court; and (2) an alteration of the wording in some sections and the sequence in which they appear to promote clarity and conciseness.¹ The following discussion will consider only the more significant changes. Although the purpose of this discussion is primarily to document changes, certain sections which permit conflicting interpretations or adopt controversial policies will be given more extensive coverage.

A. CONSERVATORS OF THE PEACE AND SPECIAL POLICEMEN

Chapter 2² of the revised Code of criminal procedure concerns the duties, powers and procedures for conservators of the peace and special policemen. This subject area had been previously covered in Title 19.1³ but its manner of presentation made it difficult to interpret and apply.

97. See note 92 *supra*.

98. For example, see the definition of a slot machine under Title 18.1. VA. CODE ANN. § 18.1-331 (Cum. Supp. 1975).

99. See, e.g., VA. CODE ANN. §§ 18.1-316, -318.1, -319, -329 to -331, -340, -341 (Cum. Supp. 1975).

100. Va. Acts of Assembly 1975, ch. 14, at 72 (§ 18.2-325).

101. *Id.* See CODE COMM'N REPORT, *supra* note 1, at 4.

1. VA. CODE COMM'N REPORT, REVISION OF TITLE 19.1 OF THE CODE OF VIRGINIA 4 (H. Del. Doc. No. 20, 1974) [hereinafter cited as CODE COMM'N REPORT].

2. Va. Acts of Assembly 1975, ch. 495, at 849-51 (§§ 19.2-19 to -25). Chapter 1 (§§ 19.2-1 to 11), which is mentioned in passing only, outlines the General Provisions for the title. Section 19.2-6 is new and provides that when an appointive power is given to the judge of a circuit court, that power will be vested in the circuit's chief judge. *Id.* at 848 (§ 19.2-6).

3. VA. CODE ANN. §§ 19.1-20 to -32 (Repl. Vol. 1960), as amended, (Cum. Supp. 1975).

The revision of the subject is divided into three articles in an effort to provide a more simplified and logical approach. Article 1⁴ deals with the appointment of conservators of the peace and special policemen; Article 2⁵ describes the powers and procedures under which they are required to function; and Article 3⁶ provides an appeal procedure for those individuals from whom a recognizance is required⁷ or who have been committed to jail for failure to give security for such recognizance. Furthermore, several important changes were made in the contents of these articles.

1. *Appointment*

All judges throughout the state and all magistrates within their geographical jurisdiction are automatically deemed conservators of the peace.⁸ Those who must be appointed to the position of conservator of the peace are referred to as special conservators if appointed by the circuit court.⁹

The provisions for these special conservators have been changed. In Title 19.1, the legislature had attempted to list all the places in which a special conservator of the peace could be appointed.¹⁰ Appointment depended on whether the particular place involved was enumerated rather than on the need for such an official. The 1975 revision does not attempt such a task but rather authorizes their appointment upon application of the owner, proprietor or custodian of any place, when there is a showing of a necessity for the security of property or the peace.¹¹ The special conservators of the peace, within the area and time specified in their order of appointment, have all the powers and duties of any other conservator of the peace.¹²

The new provisions also make it clear that the appointment of an employee as a special conservator of the peace does not relieve the employer and principal from liability for wrongs this employee commits while acting in the scope of his employment.¹³ The special conservator is authorized to

4. Va. Acts of Assembly 1975, ch. 495, at 849-50 (§§ 19.2-12 to -17).

5. *Id.* at 850 (§§ 19.2-18 to -23).

6. *Id.* at 850-51 (§§ 19.2-24,-25).

7. Article 2 of Chapter 2, Title 19.2 adopts procedures requiring persons to give a recognizance to keep the peace under certain circumstances. *Id.* at 850 (§§ 19.2-19 to -22). For a discussion of recognizances in Virginia and the difference between a recognizance and a bail bond see 2B MICHE's JURISPRUDENCE *Bail and Recognizance* § 3 (Repl. Vol. 1970).

8. Va. Acts of Assembly 1975, ch. 495, at 849 (§ 19.2-12). Others who are automatically conservators of the peace are designated in *id.* (§ 19.2-14).

9. *Id.* (§ 19.2-13).

10. VA. CODE ANN. § 19.1-28 (Cum. Supp. 1975) listed such areas as universities, great gatherings of people, hospitals, penal institutions, etc.

11. Va. Acts of Assembly 1975, ch. 495, at 849 (§ 19.2-13).

12. *Id.* For a discussion of a conservator's duties and powers see III A 2 *infra*.

13. *Id.*

act pursuant to statutory provisions and in this sense becomes an agent of the state. However, since the employer has requested that his employee have such status, the former remains vicariously liable.¹⁴

2. Powers and Procedures

Conservators of the peace have the power to arrest without a warrant in two instances.¹⁵ First, a conservator has the power to arrest any person who threatens to kill or injure another or threatens to commit acts of violence or injury against another's person or property.¹⁶ Conservators of the peace are also authorized to make warrantless arrests of any person who commits a crime in their presence or who they have probable cause to believe has committed a felony.¹⁷ However, the exercise of his power to arrest without a warrant imposes upon the conservator of the peace a duty to follow procedural paths set out elsewhere in Title 19.2.¹⁸

In short, these procedural rules require that the conservator, upon arresting an individual for threatening violence or injury, immediately take the arrestee before a magistrate or judge.¹⁹ Similarly, if the arrest is made upon a crime being committed in the conservator's presence, the Code directs him to take the arrestee before "an officer authorized to issue criminal warrants."²⁰ In each case an impartial judicial officer makes the decision whether to restrain the arrestee's freedom or release him.

These procedures represent a significant departure from the previous Code. Formerly, a conservator of the peace could arrest without a warrant upon a complaint that a person had threatened an offense against the

14. The new provision follows the majority of Virginia case law. See 1A MICHIE'S JURISPRUDENCE AGENCY § 9 (Repl. Vol. 1967). See also *Clinchfield Coal Corp. v. Redd*, 123 Va. 420, 96 S.E. 836 (1918).

15. Va. Acts of Assembly 1975, ch. 495, at 850 (§ 19.2-18).

16. *Id.* (§ 19.2-19). The arrestee must be taken before a magistrate who determines whether the arrestee has threatened to injure another person or his property. If he finds such a threat was made, the magistrate may require the individual, under section 19.2-19, to give a recognizance to keep the peace. For a general discussion of recognizances to keep the peace see 3 MICHIE'S JURISPRUDENCE *Breach of Peace* § 6 (1949). For a criticism of peace bonds or recognizances see Note, *Peace and Behavior Bonds—Summary Punishment for Uncommitted Offenses*, 52 VA. L. REV. 914 (1966).

17. Va. Acts of Assembly 1975, ch. 495, at 865 (§ 19.2-81). Section 19.2-81 also authorizes warrantless arrests where an individual is charged with a crime in another jurisdiction and the officer is in receipt of a telegram, radio message, computer printout, etc. that provides the individual's name or a description of the person wanted, the crime alleged, and an allegation that such person is likely to flee the jurisdiction of the Commonwealth. *Id.*

18. *Id.* at 850 (§ 19.2-18).

19. *Id.* at 850 (§ 19.2-22).

20. *Id.* at 865 (§ 19.2-82).

person or property of another. However, the conservator also had the power to issue warrants and hold a hearing to determine whether a recognizance was required.²¹

The 1975 revision makes it clear that only a detached magistrate or judge shall issue warrants and conduct the required hearings. This revision was advocated by the Virginia Code Commission²² and necessitated by the United States Supreme Court's interpretation of the fourth amendment, requiring that warrants be issued by an independent judicial officer disengaged from the activities of law enforcement.²³ Under Title 19.2, police and judicial powers are in separate hands.

Title 19.1 had also given conservators of the peace the authority to require from "persons not of good fame" security for their good behavior.²⁴ This behavior recognizance could be required from persons on a mere showing of bad reputation as contrasted with the requirement in Title 19.2 of an actual threat against another's person or property.²⁵ Such a behavior bond based solely on the question of one's reputation has been severely criticized.²⁶ The 1975 revision accordingly has denied even magistrates and judges the power to require such a recognizance.

B. SEARCH WARRANTS

Chapter 5²⁷ of Title 19.2 is a revision of the prior law dealing with search warrants.²⁸ The revision states generally that a judge or other judicial officer can issue a search warrant on the basis of a complaint or oath, supported by an affidavit, if he is satisfied there is probable cause for the

21. VA. CODE ANN. § 19.1-21 (Repl. Vol. 1960).

22. See CODE COMM'N REPORT, *supra* note 1, at 5.

23. The principle that warrants must be issued by a "neutral and detached" magistrate is well established. See *Shadwick v. City of Tampa*, 407 U.S. 345 (1972) (the rule that a warrant be issued by a neutral and detached magistrate requires severance and disengagement from activities of law enforcement); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (warrants required to be issued by neutral and detached magistrates instead of being judged by officer engaged in the often competitive business of ferreting out crime).

24. VA. CODE ANN. § 19.1-20 (Cum. Supp. 1975).

25. See Va. Acts of Assembly 1975, ch. 495, at 850 (§ 19.2-19).

26. For a discussion and criticism of statutes requiring a bond for bad reputation, see Note, *Peace and Behavior Bonds—Summary Punishment for Uncommitted Offenses*, 52 VA. L. REV. 914 (1966).

27. Chapter 3 of Title 19.2 deals with magistrates and the operation of the magistrate system. Chapter 4 deals with the subject of special magistrates. These sections contain only minor changes from the provisions previously contained in Title 19.1. See Va. Acts of Assembly 1975, ch. 495, at 851-55 (§§ 19.2-26 to -51).

28. Search warrants were previously covered in VA. CODE ANN. §§ 19.1-83 to -89 (Repl. Vol. 1960), as amended (Cum. Supp. 1975).

issuance of a warrant.²⁹ Search warrants can be issued for the search of specified places, things and persons and the police may seize items within several general categories, i.e., weapons or other objects used in the commission of crimes, contraband, fruits of crimes, and items constituting evidence of a crime.³⁰

There is no attempt to list with great specificity all the types of items for which a search warrant can be authorized. Title 19.1 had attempted to provide such a listing,³¹ but it was wholly incomplete and contained no provisions for the seizure of "mere evidence."³² The generic listings of Title 19.2 include all the specific types of evidence and should eliminate the necessity for continued revision of the Code section.³³

There has also been a change in the statutory requirements for the affidavit supporting the issuance of a search warrant. Under Title 19.2, there is an additional requirement that the affidavit must state that the objects to be seized constitute evidence of the commission of the offense named in the affidavit.³⁴

The portions of the revision governing the issuance of a general warrant or a search warrant *not* supported by an affidavit, the contents of the search warrant and to whom it is directed, the execution of the warrant, and disposition of any property seized are essentially the same as provisions in Title 19.1.³⁵ This means that the revision also fails to contain any statutory provisions concerning "no knock entry" in executing a search warrant. It appears that the legislature intends to allow the courts to slowly

29. Va. Acts of Assembly 1975, ch. 495, at 855 (§ 19.2-52).

30. *Id.* (§ 19.2-53).

31. See VA. CODE ANN. § 19.1-84 (Cum. Supp. 1975) which listed items such as spurious coins, obscene books, lottery tickets, firecrackers, etc. Needless to say, to have a complete, specific listing of items authorized to be seized would be a lengthy and difficult task.

32. In *Warden v. Hayden*, 387 U.S. 294 (1967), the United States Supreme Court declined to uphold any distinctions between the lawful seizure of "mere evidence" and the fruits or instrumentalities of crime.

33. The revision's categorization of items is fashioned after the language of VA. SUP. CT. R. 3A:27(a), (c). It is interesting to note that although Title 19.2 and Rule 3A:27 state any books, papers, or records can be seized without limitation, the Virginia Supreme Court has previously ruled that no search warrant can be issued for the search and seizure of evidential papers, holding this seizure is a violation of fifth amendment rights. See *Rees v. Commonwealth*, 203 Va. 850, 127 S.E.2d 406 (1962).

34. Compare Va. Acts of Assembly 1975, ch. 495, at 855-56 (§ 19.2-54) with VA. CODE ANN. § 19.1-85 (Cum. Supp. 1975). This additional phrase conforms to the language already contained in VA. SUP. CT. R. 3A:27(b). See also *Moore v. Commonwealth*, 211 Va. 569, 179 S.E.2d 458 (1971) (the omission of the offense rendered the affidavit defective).

35. Compare Va. Acts of Assembly 1975, ch. 495, at 856 (§§ 19.2-55 to -58) with VA. CODE ANN. §§ 19.1-86 to -89 (Repl. Vol. 1960), as amended, (Cum. Supp. 1975).

carve out guidelines in this controversial area.³⁶

The 1975 revision retains the section stating the general rule that a warrant is required for a valid search; however, one instance is now designated when a warrantless search can be conducted.³⁷ The area of warrantless searches has not previously received statutory coverage in Virginia, except for a provision allowing officers empowered to enforce game laws to enter for the purposes of police inspection.³⁸ Section 19.2-59 provides that an officer or other person, incident to a lawful arrest, may search without a warrant, the person arrested, the open portion of a vehicle he is occupying or any area easily within his grasping distance for evidence relating to the offense for which he is being arrested and for weapons. This exception to the warrant requirement is clearly well grounded under *Chimel v. California*.³⁹

However, the authorization of only one type of warrantless search raises the question of whether the legislature intended to exclude other significant exceptions such as: searches incident to full custodial arrest,⁴⁰ war-

36. The Virginia Supreme Court has discussed "no knock entry" in several recent decisions. The initial Virginia decision in this area, *Johnson v. Commonwealth*, 213 Va. 102, 189 S.E.2d 678 (1972), upheld a "no knock entry" where the police had reason to believe that illegal drugs could easily be destroyed or disposed of. For a discussion of the court's rationale in *Johnson*, see *Criminal Procedure, Survey of Developments in Virginia Law 1972-1973*, 59 VA. L. REV. 1478, 1486 (1973); 7 U. RICH. L. REV. 565 (1973). The Virginia Supreme Court recently upheld a "no knock entry" in *Carratt v. Commonwealth*, 215 Va. 55, 205 S.E.2d 653 (1974).

37. Compare VA. CODE ANN. § 19.1-88 (Repl. Vol. 1960) with Va. Acts of Assembly 1975, ch. 495, at 856-57 (§ 19.2-59).

38. VA. CODE ANN. § 19.1-88 (Repl. Vol. 1960).

39. 395 U.S. 752 (1969). In *Chimel*, the United States Supreme Court approved searches incident to arrest of the person and the area within his grasp for weapons and easily destructible evidence:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. *Id.* at 762-63.

40. See *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973). The Supreme Court, in *Robinson*, recognized a full search of the arrestee's person incident to a lawful custodial arrest as a reasonable warrantless search.

rantless searches of automobiles,⁴¹ and other exigent circumstances justifying warrantless searches,⁴² inventory searches,⁴³ and seizures under the plain view doctrine.⁴⁴ No legislative history is available for the decision to designate only one type of warrantless search, but it is reasonable to assume that other types of warrantless searches will continue to be upheld on a case by case basis.

C. ARREST

Several noteworthy revisions were made in the laws on arrest in Chapter 7⁴⁵ in order to conform to other Code provisions, to existing rules of court and to recent court decisions. The adoption of the magistrate system in Virginia necessitated a change in the list of persons authorized to issue process of arrest under Title 19.2.⁴⁶ This change seems to be only a formality, yet it represents a long overdue increase in the emphasis placed on uniformity within the Code.

Chapter 7 contains several revisions which adopt the language already contained in the Virginia Supreme Court Rules. There are now provisions for a more detailed description of exactly what an arrest warrant shall recite and require. The warrant is required to be directed to an appropriate officer or officers, to name the accused or set forth a description by which he can be identified, to describe the offense charged with reasonable certainty, to be signed by the issuing officer and to command the accused be

41. Searches of automobiles have been a well recognized exception to the warrant requirement. The United States Supreme Court has determined, if police have probable cause to search an automobile, they can conduct a warrantless search where the mobility of the vehicle makes securing a warrant impractical. *Carroll v. United States*, 267 U.S. 132, 153 (1925). Also, the Supreme Court has held that if police have probable reason to search an auto when it is stopped, they may then conduct a later search after the car has been taken into custody and moved to a different location. *Chambers v. Maroney*, 399 U.S. 42, 52 (1970).

In *Fox v. Commonwealth*, 213 Va. 97, 189 S.E.2d 367 (1972) and *Vass v. Commonwealth*, 214 Va. 740, 204 S.E.2d 280 (1974), the Virginia Supreme Court recently upheld warrantless searches of automobiles.

42. Police in "hot pursuit" of criminals have not been required to secure warrants before conducting searches for criminals or weapons. *Warden v. Hayden*, 387 U.S. 294 (1967).

43. For a discussion of two recent Virginia decisions involving inventory searches and warrantless administrative searches, see *Criminal Law—Survey of Developments in Virginia Law: 1971-1972*, 58 VA. L. REV. 1206, 1208-15 (1972).

44. The inadvertent discovery of items in "plain view" has been upheld by the United States Supreme Court. See *Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1971). See also *Lugar v. Commonwealth*, 214 Va. 609, 202 S.E.2d 894 (1974).

45. Chapter 6 deals with the interception of wire or oral communications and contains essentially the same provisions as appeared in the previous Code.

46. Compare Va. Acts of Assembly 1975, ch. 495, at 863 (§ 19.2-71) with VA. CODE ANN. § 19.1-90 (Repl. Vol. 1960).

arrested and brought before a court of appropriate jurisdiction.⁴⁷

The revised sections also provide more guidance concerning the execution and return of a warrant or summons. Now an officer may execute within his jurisdiction a warrant issued anywhere in the state, and the warrant shall be executed by the arrest of the accused.⁴⁸ If an individual is arrested in a jurisdiction other than that in which the charge is to be tried, the arresting officer shall bring the individual before a judicial officer authorized to grant bail in the jurisdiction in which the arrest was made. The judicial officer may then transfer the individual to the proper jurisdiction or admit him to bail.⁴⁹

As for the general duties of any officer making an arrest with a warrant, Title 19.2 continues to require the arresting officer to bring the accused before a judicial officer having authority to grant bail.⁵⁰ However, the Code now allows the judicial officer to either commit the accused to jail, admit him to bail, or proceed to trial if the charge is a misdemeanor, the state and accused consent, and the judicial officer is a judge of a court not of record having jurisdiction in the matter.⁵¹

Finally, the 1975 revision updates previous Code provisions by authorizing police officers to arrest *without a warrant* individuals who commit any crime in their presence or individuals whom the officer has probable cause to believe have committed a felony not in his presence.⁵² This change finally recognizes the longstanding positions of both the United States and Virginia Supreme Courts.⁵³ Such legislative action will allow the courts to interpret, on a case by case basis, these well-known

47. Compare Va. Acts of Assembly 1975, ch. 495, at 863 (§ 19.2-72) with VA. CODE ANN. § 19.1-91 (Repl. Vol. 1960). See VA. SUP. CT. R. 3A:4(c)(1).

48. Va. Acts of Assembly 1975, ch. 495, at 864 (§ 19.2-76).

49. *Id.*

50. *Id.*

51. Compare Va. Acts of Assembly 1975, ch. 495, at 865 (§19.2-80) with VA. CODE ANN. § 19.1-98 (Repl. Vol. 1960). See VA. SUP. CT. R. 3A:5(a)(1). Note the retention of the term "court not of record."

52. Compare Va. Acts of Assembly 1975, ch. 495, at 865 (§ 19.2-81) with VA. CODE ANN. § 19.1-100 (Cum. Supp. 1975).

53. The Supreme Court of the United States has upheld warrantless arrests of suspected felons even when it appeared there was sufficient time before the arrest to obtain a warrant. See, e.g., *Trupiano v. United States*, 334 U.S. 699 (1948). The Virginia Supreme Court has also followed this reasoning. See *Crowder v. Commonwealth*, 213 Va. 151, 191 S.E.2d 239 (1972).

For a discussion of the common law rule concerning the warrantless arrest of suspected felons see generally 5 AM. JUR. 2d *Arrest* § 24 (1962). See also Y. KAMISAR, W. LAFAYE, J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 283-86 (4th ed. 1974). For a general discussion and collection of cases concerning warrantless arrests for misdemeanors see 5 AM. JUR. 2d *Arrest* §§ 26 to 33 (1962).

rules of arrest. It will relieve them of the task of laboriously framing the rules themselves.

D. BAIL AND RECOGNIZANCES

Section 19.2-120 in Chapter 9⁵⁴ of the revision directs that an accused who is held pending trial shall be admitted to bail unless there is probable cause to believe he will not appear at trial or unless his liberty constitutes an unreasonable danger to the public.⁵⁵ This section is a new Code provision although it repeats language presently contained in the Virginia Supreme Court Rules.⁵⁶ By authorizing a denial of bail to arrestees in non-capital cases, the Virginia General Assembly has accepted the extremely controversial principle of preventive detention. The principle of preventive detention, particularly the concept that an individual can be denied bail solely on the determination that he is "dangerous," has evoked extensive debate not only on its constitutionality but its efficacy.⁵⁷

The alarming point concerning the adoption of such a policy, is not the fact that strong arguments have been made against it. Rather, it is the fact that with little or no debate and discussion, the legislature has instituted a system which rejects the traditional concepts of right to bail, the presumption of innocence,⁵⁸ and bail's purpose of insuring the accused's pres-

54. Chapter 8 contains the Uniform Criminal Extradition Act and contains no significant changes from the previous Code.

55. Va. Acts of Assembly 1975, ch. 495, at 870 (§ 19.2-120).

56. See VA. SUP. CT. R. 3A:29.

57. For a general discussion of the arguments for and against preventive detention, see Note, *Preventive Detention and the Proposed Amendments to the Bail Reform Act of 1966*, 11 WM. & MARY L. REV. 525 (1969). See also Ervin, *The Legislative Role in Bail Reform*, 35 GEO. WASH. L. REV. 429 (1967); Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959 (1965).

Professor Tribe of Harvard University argues rigorously against preventive detention. He logically points out that a person who is detained prior to trial on the grounds that he is dangerous, was probably just as dangerous before he was charged. Also, if he were to be acquitted, again, he would be free but remain as dangerous as he was before trial. Thus, the only logical justification for refusing bail for such a dangerous person, Tribes argues, is the fact that he has been charged with a crime. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970).

Former Attorney General John Mitchell has argued in favor of the constitutionality of preventive detention. See Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969).

58. In *Stack v. Boyle*, 342 U.S. 1 (1951) the United States Supreme Court noted that since 1789 federal law has unequivocally held that a person arrested for a non-capital offense shall be admitted to bail. Mr. Chief Justice Vinson, speaking for the Court stated:

This traditional right of freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.

ence at trial.⁵⁹ It is also noteworthy that the 1975 revision does not have any statutory standards to be utilized in determining whether an individual is "dangerous" or a "danger to the public." It appears that the judicial officer will define these terms for himself.

Another new provision in the law of bail is section 19.2-121.⁶⁰ This section directs that, if an accused is admitted to bail, the official granting the bail should consider in determining the terms (1) the nature and circumstances of the offense (2) the weight of the evidence (3) the financial ability to pay bail and (4) the character of the accused. These factors are to be weighed to determine an amount, reasonably calculated to insure the accused's presence for trial.⁶¹ Basing the test on the likelihood of the accused's appearance seems rather unusual in light of other portions of the revision.

First, section 19.2-123 states that any person accused of a non-capital offense will be considered for release on his written promise to appear or upon execution of an unsecured appearance bond. The judicial officer is directed to consider eight factors in determining whether to allow the individual such a pre-trial release. It is not clear why these factors, used in determining if a person should be released on his own recognizance, should not be exactly the same factors utilized to determine the amount of bail required.⁶²

Secondly, it is difficult to determine why one Code provision requires setting bail to insure the accused's presence, while the other provides for preventive detention. Section 19.2-120 states a judge should not grant bail at all if there is probable cause to believe an accused will not appear for trial. Thus, it seems illogical that the revision requires determination of bail in order to insure an accused's presence at trial, when under section

tion. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning. *Id.* at 4.

59. The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. . . . [T]he deposit of a sum of money serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment. *Id.* at 4-5.

60. Va. Acts of Assembly 1975, ch. 495, at 870-71 (§ 19.2-121).

61. *Id.*

62. *Id.* (§19.2-123). The factors listed in section 19.2-123 are:

- (a) nature and circumstances of the offense charged
- (b) family ties
- (c) employment
- (d) financial resources
- (e) length of residence in the community
- (f) record of convictions
- (g) any record of failures to appear at court in the past.

19.2-120 the judge would have denied bail in the first place if there were probable cause to believe the accused would flee. Moreover, having determined under section 19.2-120 that a person may be admitted to bail, since there is no probable cause to believe he will not appear at trial, should not the accused be assured a release on his own recognizance under 19.2-123?⁶³

Finally, although section 19.2-120 indicates bail may be denied altogether due to an accused's danger to the public, section 19.2-121 gives no indication that a person's dangerous nature should be considered in determining the amount of bail set.⁶⁴ It seems reasonable that if a person's dangerous character could be a basis for denying him bail altogether, it should be considered in determining the amount of bail.

The problems with bail and recognizance under Title 19.2 can be traced to one major source. In 1973, the General Assembly had reformed the Virginia bail system to broaden the methods available to judicial officers to secure the accused's presence at trial.⁶⁵ The Code provisions adopted at that time were nearly identical to federal procedure provisions enacted in the Bail Reform Act,⁶⁶ and these Code provisions remain in Title 19.2. However, the Bail Reform Act of 1966 contemplates a right to bail in non-capital cases; there are no preventive detention provisions. With the adoption of a preventive detention statute in 1975 and the retention of Code sections similar to those in the federal system, the 1975 revision raises obvious problems of interpretation which should be remedied by the legislature rather than the courts.

Thus, in addition to the problems already mentioned, the legislature has carelessly retained a section authorizing a denial of bail in *capital cases* where the judicial officer has determined the accused is likely to flee or present a danger to the community.⁶⁷ This section (19.2-126) is similar to the language in the Bail Reform Act of 1966, and is relevant only in a system where there is a difference between right to bail in capital and non-capital cases. Since under section 19.2-120, any arrestee can be denied bail, it follows that section 19.2-126 is a superfluous provision in the revised Code.

63. *Id.*

64. *Id.* (§ 19.2-121). See note 61 *supra* and accompanying text.

65. See VA. CODE ANN. §§ 19.1-109.1 to -109.9 (Cum. Supp. 1975).

66. 18 U.S.C. §§ 3146-52 (1970). For a discussion of the 1973 bail reform in Virginia, see *Criminal Procedure—Survey of Developments in Virginia Law: 1972-1973*, 59 VA. L. REV. 1478 (1973).

67. Va. Acts of Assembly 1975, ch. 495, at 871-72 (§19.2-126).

E. CHANGES IN GRAND JURY PROVISIONS

Among the most important changes regarding criminal procedure in Virginia is the extensive revision of Chapter 13 relating to grand juries.⁶⁸ According to the Report of the Virginia Code Commission:

[S]ubstantial changes have been made in the revision, particularly with respect to the special grand jury

The fundamental distinction between regular grand juries and special grand juries has been retained—but the function, authority and power of, and procedure before, the special grand jury, have been spelled out in detail.⁶⁹

Unlike Chapter 13 of Title 19.1, the format of the revised chapter emphasizes the distinction between the two types of grand juries by dividing the chapter into three articles: General, Regular Grand Juries, and Special Grand Juries. In this manner, the recent legislation regarding grand juries not only brings new rules of procedure into the Code, but organizes all the rules into a more manageable form.

1. *General Changes*

Article 1 begins by specifying the two-fold functions of the grand jury.⁷⁰ The function of considering bills of indictment to determine whether there is probable cause to return such indictment as “a true bill” is reserved solely for a regular grand jury.⁷¹ The second function, which may be exercised by either a regular or a special grand jury, is to investigate and report on conditions which tend to promote criminal activity in the community or which indicate misfeasance of governmental authority by governmental agencies or their officials.⁷²

68. Va. Acts of Assembly 1975, ch. 495, at 885 *et seq.* (§§ 19.2-191 to -215). For a history of the grand jury in Virginia see Whyte, *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461 (1959), and for a survey of the laws relating to grand jury see Comment, *The Grand Jury in Virginia*, 22 WASH. & LEE L. REV. 325 (1965).

69. CODE COMM'N REPORT, *supra* note 1, at 4, 5.

70. Va. Acts of Assembly 1975, ch. 495, at 885 (§ 19.2-191).

71. *Id.* (§ 19.2-191(1)). In general, it is the duty of the grand jury to “inquire of and present all felonies, misdemeanors and violations of penal laws committed within the jurisdiction of the respective courts wherein it is sworn” *Id.* at 887 (§ 19.2-200). The function of the grand jury is merely accusatory; it does not hear the whole case. The state presents its indictment, and the grand jury has only to say whether the accusation is well made and properly to be tried. In so doing, the grand jury is recognized as a necessary protection to the citizen against unfounded accusations and unjust prosecution. See *Ex Parte Bain*, 121 U.S. 1 (1887).

72. Va. Acts of Assembly 1975, ch. 495, at 885 (§ 19.2-191(2)). “It has long been the practice in Virginia to impanel special grand juries . . . to investigate unlawful conditions which have become prevalent in the community” *Benson v. Commonwealth*, 190 Va. 744, 748, 58 S.E.2d 312, 313 (1950). The 1975 revision provides statutory authorization for this practice.

Another new section in Article 1 provides that all proceedings during sessions of the grand jury shall be kept secret by its members, with the exception of the testimony of a witness who is later prosecuted for perjury based on such testimony.⁷³ In this respect the revision apparently differs from the common law rule which allowed disclosure of evidence in the court's discretion.⁷⁴

2. *Regular Grand Jury Changes*

Although the 1975 revisions are concerned primarily with special grand juries, there are some changes regarding the number and terms of regular grand juries.⁷⁵ Whereas Title 19.1 merely allowed a regular grand jury to be convened at one term of the circuit court in each year, the new section requires such a grand jury at each term of the circuit court, unless the court finds it unnecessary or impractical to impanel a grand jury and enters an order to that effect.⁷⁶ Provision is also made for more than one regular grand jury in a particular term.⁷⁷

Additionally, the court must instruct the regular grand jury to decide whether it desires to be impaneled as a special grand jury.⁷⁸ If the jury or

73. Va. Acts of Assembly 1975, ch. 495, at 885 (§ 19.2-192).

The nature and virility of the grand jury, as a common law institution, could be seriously weakened if the privileged privacy and security of its hearings were readily or freely withdrawn. Persons would be deterred, through fear of subsequent publicity or possible reprisals, to reveal to the grand jury their knowledge of crime committed or facts helpful in its detection. *In re Disclosure of Evidence*, 184 F. Supp. 38, 40 (E.D. Va. 1960).

A further reason for secrecy is to protect citizens against unfounded accusations and unjust prosecution. *See* note 71 *supra*.

74. According to the common law rule:

[T]he secrecy is not inviolable. Quite soundly, the same doctrine relaxes the injunction whenever the public interest would be better served by delivering up the grand jury evidence. Resolution of the conflict has immemorially been entrusted to the court of the grand jury. *In re Disclosure of Evidence*, 184 F. Supp. 38, 40 (E.D. Va. 1960).

Accord, Va. Sup. Ct. R. 3A:6(c).

75. Va. Acts of Assembly 1975, ch. 495, at 885-86 (§ 19.2-193). Provisions relating to selection, qualification, and deficiency in number of jurors, and those concerning the foreman of the grand jury and the oaths of jurors and witnesses remain unchanged, as do procedural provisions relating to regular grand juries. *Id.* at 886-87 (§§ 19.2-194 to -205).

76. *Id.* at 885-86 (§ 19.2-193).

77. *Id.*

78. *Id.* at 887 (§ 19.2-199). The heading of this section indicates a possibly unintended omission regarding charging the grand jury in the presence of persons summoned as petit jurors. The new section is partially based on VA. CODE ANN. § 19.1-154 (Repl. Vol. 1960), which provides that no petit juror

shall be present in the court room when said grand jury is charged; and the charging of said grand jury in violation of this provision shall constitute reversible error in any

any member thereof expresses the desire to investigate conditions promoting criminal activity or indicating governmental misfeasance,⁷⁹ "then the court shall impanel so many of the jury as answer in the affirmative, plus any additional members as may be necessary to complete the panel, as a special grand jury."⁸⁰

3. *Special Grand Jury Changes*

Article 3 of Chapter 13, which concerns special grand juries, has virtually all new provisions.⁸¹ A special grand jury may be impaneled only for the purpose of investigating conditions promoting criminal activity or indicating governmental misfeasance.⁸² The composition of special grand juries has been expanded to consist of not less than seven nor more than eleven members from a list prepared by the court.⁸³ Otherwise, qualifications are the same as for regular grand jury members.⁸⁴

criminal case tried by a . . . [petit jury].

This language does not appear in the body of the revised section although it is introduced in the heading.

79. See Va. Acts of Assembly 1975, ch. 495, at 885 (§ 19.2-191(1)).

80. *Id.* at 887 (§ 19.2-200).

81. *Id.* at 887-88 (§§ 19.2-204 to -215).

Only in recent years have special grand juries been impaneled more than infrequently, and their exact function and authority under the Code had remained unclear. However, recent investigations by special grand juries in both Portsmouth and Richmond, which went far beyond the traditional roles of the grand jury, illustrated the need for more explicit guidelines on which a judge could base his instructions to such juries. It was in response to this need that the new special grand jury provisions have been implemented. Telephone Interview with Judge M. Ray Doubles, (ret.) in Richmond, June 13, 1975 [hereinafter cited as Doubles Interview].

82. Va. Acts of Assembly 1975, ch. 495, at 887 (§ 19.2-206). This provision preempts the common law rule that a special grand jury is qualified to perform any business that may properly come before it, and generally has the same powers as a regular grand jury. See *Robertson v. Commonwealth*, 1 Va. Dec. 851, 852, 20 S.E. 362, 363 (1894); *Lyles v. Commonwealth*, 88 Va. 396, 13 S.E. 802 (1891).

83. Va. Acts of Assembly 1975, ch. 495, at 887-88 (§ 19.2-207). Selection of special grand jury members from a list prepared by the court was provided for in Title 19.1, and this practice has been uniformly sustained by the Virginia Supreme Court. *Benson v. Commonwealth*, 190 Va. 744, 748, 58 S.E.2d 312, 313 (1950).

The rationale for increasing the number of jurors on special grand juries and widening the range between the minimum and maximum number was to give added flexibility to the special grand jury which must consider a wide variety of unique cases. Doubles Interview, *supra* note 81. The number of jurors on a regular grand jury remains the same as in the former provision which did not differentiate regular and special grand juries in regard to number. Compare VA. CODE ANN. § 19.1-150 (Cum. Supp. 1975) with Va. Acts of Assembly 1975, ch. 495, at 886 (§ 19.2-195).

84. Va. Acts of Assembly 1975, ch. 495, at 887 (§ 19.2-207). For qualifications of regular grand jury members, see *id.* at 886 (§ 19.2-194).

In order to perform its function the special grand jury has been granted the power to subpoena persons to appear and testify, and to produce specified records, papers, and documents.⁸⁵ After interviews with the members of the Richmond and Portsmouth special grand juries, the Code Commission discovered that they had been severely handicapped without such powers. Vesting the special grand jury with subpoena power would help achieve the revision's goal of granting "mechanical independence" from the court.⁸⁶

Before a witness testifies, he must be warned by the foreman regarding his fifth amendment privilege against self incrimination, that he may have counsel present during his appearance to testify, and that he may later be called upon to testify in a case growing out of the investigation and report of the special grand jury.⁸⁷ A review of investigations by special grand juries indicated that witnesses were giving conflicting testimony in cases growing out of the investigations. This last warning is designed to eliminate the temptation of giving inaccurate testimony by making the witness aware that he may later be called upon to testify again under oath in open court.⁸⁸

The new legislation embodies several other measures to expedite the work of the special grand jury while preserving its independence. The new rule relating to the presence of the attorney for the Commonwealth distinguishes the investigatory and the deliberative stages of special grand jury sessions. In the former stage he may be present only when requested or when the special grand jury was impaneled upon his motion.⁸⁹ Except when his legal advice is requested, the attorney for the Commonwealth may not be present after the investigatory stage while the jury is "discussing, evaluating, or considering the testimony of a witness, or deliberating in order to reach a decision or prepare its report."⁹⁰

Formerly, the Commonwealth's attorney often went before the grand jury. If, in his opinion, the public interest would be promoted thereby, or if called upon by the foreman, the Commonwealth's attorney would appear to advise and assist the grand jury in the discharge of their official duties.⁹¹ This practice was preempted by a statute which practically terminated the Commonwealth's attorney's appearances.⁹² The present statute incorpo-

85. *Id.* at 888 (§ 19.2-208).

86. Doubles Interview, *supra* note 81.

87. Va. Acts of Assembly 1975, ch. 495, at 888 (§ 19.2-208); *cf.* United States v. Scully, 225 F.2d 113 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955).

88. Doubles Interview, *supra* note 81.

89. Va. Acts of Assembly 1975, ch. 495, at 888 (§ 19.2-210).

90. *Id.*

91. *See, e.g.*, Lawrence v. Commonwealth, 86 Va. 573, 10 S.E. 840 (1890).

92. VA. CODE ANN. § 19.1-156 (Repl. Vol. 1960). The statute provided:

rates this older language while anticipating new circumstances under which the Commonwealth's attorney may be present. The purpose of the statute is to give the grand jury the benefit of his professional advice and at the same time "to preserve privacy of deliberation and independence of action by the grand jurors, free from outside control or influence."⁹³

Article 3 also allows the court to designate special counsel and other appropriate personnel to assist the special grand jury in its work.⁹⁴ A court reporter may be present to record all testimony, but he is to be excluded from deliberations.⁹⁵ The transcripts are for the exclusive use of the grand jury and are to be sealed, dated, and delivered to the court when they are no longer needed.⁹⁶ The court is directed to keep safely these materials for three years and after such time has elapsed to destroy them unless within that time a witness before the special grand jury is prosecuted for perjury.⁹⁷ In that event the materials shall be accessible to prosecution and defense and admissible at the trial.⁹⁸

A final section delineating the powers and functions of the special grand jury provides that, in contrast to a regular grand jury, a special grand jury does not file a presentment, or indictment, but rather a "report" including its recommendations.⁹⁹ Thereafter it is discharged¹⁰⁰ and any bill of indictment which follows from the report is prepared by the Commonwealth's

No attorney for the Commonwealth shall go before any grand jury during their deliberations except when duly sworn as a witness, but he may advise the foreman of the grand jury or any member or members thereof in relation to the discharge of their duties.

93. *Draper v. Commonwealth*, 132 Va. 648, 657, 111 S.E. 471, 473 (1922).

94. Va. Acts of Assembly 1975, ch. 495, at 888 (§ 19.2-211). Compare VA. SUP. CT. R. 3A:6(b), promulgated in 1973, stating that only the grand jurors, the witness under examination, and if directed by the court, an interpreter may be present during the hearing of evidence and that only the grand jurors may be present during their deliberations and voting. Since in the past judges have followed this rule implicitly, the Code Commission asked the legislature to give statutory consent to solicitation of outside aid in order to facilitate the special grand jury's investigation. The type of personnel and instances contemplated include an accountant in embezzlement cases or a detective in drug abuse cases. *Doubles Interview*, *supra* note 81.

95. Va. Acts of Assembly 1975, ch. 495, at 888 (§ 19.2-212).

96. *Id.*

97. *Id.* A difference of opinion among the members of the Code Commission regarding the use and disposition of these transcripts produced this compromise between immediate destruction to insure the secrecy of the proceedings and preservation of the materials for use in perjury prosecutions as a deterrent to giving inaccurate testimony. *Doubles Interview*, *supra* note 81.

98. Va. Acts of Assembly 1975, ch. 495, at 888 (§ 19.2-212).

99. *Id.* (§ 19.2-213).

100. *Id.*

attorney for presentation to a regular grand jury.¹⁰¹

F. TIME LIMITATIONS ON THE PROSECUTIONS OF FELONIES

The 1975 revision concerning time limitations on felony prosecutions was designed "both to clarify the 1974 version and to cover situations not covered in [that] statute."¹⁰² While the pre-1974 statute's use of a terms-of-court formula¹⁰³ had been upheld as a reasonable legislative interpretation of what constitutes a "speedy trial,"¹⁰⁴ it was held that the procedural application of the statute may result in the deprivation of an individual's sixth amendment rights.¹⁰⁵

Under the new statute, a person held continuously in custody after a district court has found probable cause that he has committed a felony is forever discharged from prosecution if no trial is commenced within five months.¹⁰⁶ If the person is not held in custody but has been recognized for his appearance, he is discharged after nine months without trial.¹⁰⁷ If there is no preliminary hearing or if it is waived, the five or nine month periods commence at the date of indictment or presentment against the accused.¹⁰⁸ However, if the accused is not under arrest at the time the indictment or presentment is found against him, the five and nine month periods com-

101. *Id.* (§ 19.2-214).

102. CODE COMM'N REPORT, *supra* note 1, at 6. Compare VA. CODE ANN. § 19.1-191 (Cum. Supp. 1975) and Va. Acts of Assembly 1975, ch. 495, at 893 (§ 19.2-243).

103. The statute prior to the 1974 amendment provided for perpetual discharge of the accused from felony prosecution "if there be three regular terms of the circuit or four of the corporation or hustings court in which the case is pending after he is so held without trial . . ." VA. CODE ANN. § 19.1-191 (Repl. Vol. 1960). The object of the statute was to secure a speedy trial to the accused and to guard against protracted imprisonment or harassment by criminal prosecution. *Mealy v. Commonwealth*, 193 Va. 216, 68 S.E.2d 507 (1952).

104. *Flanary v. Commonwealth*, 184 Va. 204, 35 S.E.2d 135 (1945). See also *Barker v. Wingo*, 407 U.S. 514 (1972), where the Supreme Court rejected a set time limit rule in favor of a balancing test involving four factors to determine if the accused had been denied a speedy trial: 1) length of the delay, 2) reason for the delay, 3) defendant's assertion or failure to assert his right, and 4) possible prejudice to the defendant from delay. However, the opinion adds that "[t]he States, of course, are free to prescribe a reasonable period consistent with constitutional standards . . ." *Id.* at 523. The American Bar Association has recommended a set time limit of six months. American Bar Association Project on Standards for Criminal Justice, *Speedy Trial* 14-16 (Approved Draft 1968).

105. *Nail v. Slayton*, 353 F. Supp. 1013 (W.D. Va. 1972). The application of the terms-of-court formula resulted in a lack of uniformity and in some instances in detention without trial for as long as a year or more. A rural circuit may have fewer than the requisite terms in a year while an urban circuit might have as many as ten. *Doubles Interview*, *supra* note 81.

106. Va. Acts of Assembly 1975, ch. 495, at 893 (§ 19.2-243).

107. *Id.* The 1974 amendment required a nine month period without trial whether the accused was in custody or not. VA. CODE ANN. § 19.1-191 (Cum. Supp. 1975).

108. Va. Acts of Assembly 1975, ch. 495, at 893 (§ 19.2-243).

mence upon his arrest.¹⁰⁹ Finally, the time periods provided for do not include delay attributable to certain causes.¹¹⁰

G. OTHER CHANGES IN TITLE 19.1

The 1975 revision includes changes dealing with presentments, indictments, and informations which constitute the subject matter of Chapter 14.¹¹¹ The chapter begins with a codification of the common law definitions of indictment, presentment and information. Accordingly, if the grand jury presents of their own knowledge, it is a presentment only. If they act on the knowledge of others, it is an indictment.¹¹² An information is an accusation in the nature of an indictment from which it differs only in its being presented by a competent public officer on his oath of office, instead of a grand jury on their oath.¹¹³

Elsewhere in the chapter are provisions that in perjury indictments, for giving conflicting testimony under oath on separate occasions, it is unnecessary to allege which statement made by the accused was false.¹¹⁴ Furthermore, the section on amendment of indictments no longer distinguishes amendment procedure for felony and misdemeanor offenses.¹¹⁵ It allows amendment for defects in form or variances in proof at any time before the trier of fact determines guilt or innocence.¹¹⁶

Another significant section in the 1975 revision concerns process on indictment or presentment for misdemeanors.¹¹⁷ The revised section termi-

109. *Id.*

110. *Id.* In general terms these subsections include delay caused by insanity of the accused, sickness or accident, separate trial of a person jointly indicted, continuance, escape, failure to appear according to his recognizance, and inability of the jury to agree in their verdict.

111. *Id.* at 889-91 (§§ 19.2-216 to -230).

112. See *United States v. Mundel*, 10 Va. (6 Call.) 245 (1795).

113. See *Chahoon v. Commonwealth*, 61 Va. (20 Gratt.) 733 (1871).

114. Va. Acts of Assembly 1975, ch. 495, at 890 (§ 19.2-222). The substantive offense is set out in *id.* ch. 15, at 175 (§ 18.2-435).

115. *Id.* ch. 495 at 891 (§ 19.2-231). At common law an indictment could not "be changed or altered in the slightest degree by any power after it [had] been returned into court and the grand jury [had been] discharged." *Bradshaw v. Commonwealth*, 57 Va. (16 Gratt.) 507, 512, 86 Am. Dec. 722, 724 (1860).

Title 19.1 allowed amendment of indictments for misdemeanors at any time before judgment was entered as long as the offense charged was not changed. VA. CODE ANN. § 19.1-175 (Repl. Vol. 1960). Procedure for amendment of felony indictments depended on whether or not the defendant had pleaded. Before pleading, the state could amend as long as it did not change the character of the offense charged. *Id.* § 19.1-176. After pleading, however, only the court could amend and only for defects in form or to conform to variances between allegations and evidence, as long as the nature of the offense was not changed. *Id.* § 19.1-177.

116. Va. Acts of Assembly 1975, ch. 495, at 891 (§ 19.2-231).

117. *Id.* at 892 (§ 19.2-237).

nates the practice of implying a guilty plea if defendant did not appear to defend certain misdemeanor charges.¹¹⁸ The more modern view seems to be that implying such a plea violates the accused's right to be confronted by witnesses against him.¹¹⁹ Under Title 19.2,¹²⁰ a motion to withdraw a plea of guilty or nolo contendere may be made only before sentencing or suspension of sentence, except that within 21 days the court may set aside a conviction and permit the defendant to withdraw his plea in order to correct manifest injustice.¹²¹ Furthermore, there is a prohibition against unreasonable delay between a finding of guilty and sentencing, or suspension thereof.¹²² In the interim the accused may be jailed or bail may be continued or altered.¹²³ Before pronouncing sentence a court must inquire whether the accused wishes to make a statement or give any reason why judgment should not be pronounced against him.¹²⁴

Finally, the revised Code provides that after a finding of guilty, the court may direct a probation officer to make a presentence investigation and report.¹²⁵ The accused may demand the same after pleading guilty and being convicted of a felony punishable by death or confinement for more than 10 years.¹²⁶ The same section outlines the required contents of the probation officer's report and by whom it should be filed. The report must be presented by the probation officer in open court in the presence of the accused, who shall be advised of its contents. The accused may cross-examine the probation officer regarding the report and present additional facts bearing upon a proper sentence.¹²⁷

118. The prior statute distinguished offenses in Chapter 7 of Title 18.1 from other misdemeanors. The change reflects the theory that there should be no presumption of a confession from the mere fact of the accused's absence and that the state should still have the burden of proving guilt. *Doubles Interview, supra* note 81.

119. *But see* *Shiflett v. Commonwealth*, 90 Va. 386, 18 S.E. 838 (1894).

120. Va. Acts of Assembly 1975, ch. 495, at 900-02 (§§ 19.2-295 to -310).

121. *Id.* at 900 (§ 19.2-296). Although this provision and following ones are new to the Code, they have been standard procedure in Virginia courts and have been lifted almost word-for-word from VA. SUP. CT. R. 3A:25.

122. Va. Acts of Assembly 1975, ch. 495, at 900 (§ 19.2-298).

123. *Id.*

124. *Id.*

125. *Id.* at 900-01 (§ 19.2-299).

126. *Id.*

127. *Id.*

