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Waiver in Indiana-A Conflict with the Goals of the Juvenile Justice System

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Waiver in Indiana—A Conflict with the Goals of the Juvenile Justice System

The doctrine of parens patriae has long been accepted as the basis for our juvenile justice system.[1] Indiana has not been unique in its adoption of this doctrine since throughout the history of the juvenile justice system the doctrine of parens patriae has been predominant. Under this philosophy the juvenile court was created to help the child, not to punish him; rehabilitation not retribution was the key according to the early "child savers" although much done in the name of rehabilitation included increased governmental control over the lives of children.[2] The central figure in this plan was the judge, who was seen as a kindly, patient man, truly concerned with children,[3] and who was to play an important role in the reform of the child. As a fatherly figure[4] the judge was thought to command respect and be capable of showing the child what he had done wrong, while still treating him with compassion.[5]

While the goal of the juvenile court was to reform the child it was recognized that not all children could be rehabilitated. So the juvenile courts relinquished control over certain offenders and allowed them to be waived for trial in the criminal court. Thus waiver became the exception to the doctrine of parens patriae.

Although the rationale behind the waiver policy i.e. if treatment doesn't work punishment will, has been attacked as being incompatible with the philosophy of the juvenile justice system,[6] there are other arguments in favor of waiver which are not inconsistent with the parens patriae notion. By waiving those juveniles who are considered beyond rehabilitation or who have committed particularly heinous offenses, the juvenile justice system is able to separate other juveniles who are incarcerated from the hardened delinquent.

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[1]IND. CODE § 31-5-7-1- (1976) The purpose of this act is to secure for each child within its provisions such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interests of the state; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents.

[2]Platt, *The Rise of the Child-Saving Movement: A Study in Social Policy and Correctional Reform*, 381 ANNALS 21 (1969).

[3]Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

[4]Chapter 237, Section 1, Indiana General Law 1903. Early Indiana law even required the judge to be a parent and not less than 40 years of age.

[5]The task demanded the sympathetic and friendly methods of a tribunal that could mix law with social work: of a judge who would not merely measure the lawbreaker's debt to society and require that he pay it, but who would preside over a program of treatment aimed at supplying the offender with the ability to live in conformity with the law. *See* Note, *Juvenile Delinquents: The Police, State Courts and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

[6]Sargent and Gordon, *Waiver of Jurisdiction: An Evaluation of the Process in the Juvenile Court*, 9 CRIME & DELINQUENCY 121, 124 (1963).

In the case of repeat offenders who have committed serious offenses such as murder or assault with a deadly weapon there is also a legitimate fear of unleashing such persons on society in a few years, since the juvenile court can only incarcerate them until their twenty-first birthday.

But while the alternative of waiver to adult court and a criminal conviction may protect the public, it is not without its costs. Laws governing waiver must be carefully drafted in order to remain compatible with the parens patriae doctrine. To the extent that only those children who are beyond the help of the juvenile court are waived to adult criminal court, the doctrine of parens patriae and waiver are compatible. However when waiver laws are overly broad they conflict with the underlying philosophy of the juvenile justice system.

The problem thus facing the juvenile court is under what circumstances the court should relinquish its protective jurisdiction over the child and allow him to be tried in the adult criminal court. It has been suggested that as judges became disillusioned with their failure to reform delinquent children by friendly counselling, stern warnings, probation or detention in training schools, they decided punishment was the only effective means of dealing with juvenile crime.[7]

The response to the problem often has been to specify by statute when waiver is permissable.[8] But even a well drafted waiver statute can work at odds with the juvenile justice system if it is not properly followed. The courts must carefully weigh the factors the legislature had determined should govern waiver. Yet other factors not expressed by the court will often influence its decision to waive jurisdiction. Certain offenses such as murder, rape or assault may arouse the public opinion against the defendant.[9] The child's age at the time of the offense may play an important part in the waiver decision, it is usually the older teenager charged with a serious offense who is waived,[10] even though in many states the child is subject to waiver at the age of fourteen[11] or fifteen.[12] The popular cries of "law and order" and "crime in the

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[7]Parker, *Juvenile Delinquency—Transfer of Juvenile Cases to Adult Courts—Factors to Be Considered Under the Juvenile Delinquents Act,* 48 CANADIAN BAR REV. 336 (1970).

[8]D.C. CODE § 6-2307, COLO. REV. STAT. § 19-1-104 (Cumm. Supp. 1975). IND. CODE § 31-5-7-14 (1976). (On February 16, 1978 the Indiana General Assembly passed House Bill 1028 which will become effective on October 1, 1979. This bill will be the new Indiana Juvenile Code. However the interim period will be used to study the problems under the present law and proposed changes. This note will deal with criticisms of the present Indiana waiver law, IND. CODE 31-5-7-14 (1976) and will present alternatives).

[9]Peuler, *Juveniles Tried As Adults: Waiver of Juvenile Court Jurisdiction,* 3 J. CONTEMP. L. 349, 357-58 (1977).

[10]Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited,* 43 IND. L.J. 583, 592 (1968).

[11](a) Whenever a child fourteen years of age or older is charged with an offense which would amount to a crime if committed by an adult, the judge, upon motion by the prosecuting attorney and after full investigation and hearing may waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult, if the court finds

streets" may also have influenced the judges and helped to increase the incidence of waiver.

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that there is probable cause to believe that the offense has specific prosecutive merit, that the child is beyond rehabilitation under the regular statutory juvenile system, that it is in the best interest of public welfare and security he stand trial as an adult and that the offense is either:

(1) heinous or of an aggravated character (greater weight being given to offenses against the person than to offenses against property); or

(2) part of a repetitive pattern of offenses, even though less serious in nature

(b) Whenever a child sixteen years of age or older is charged with any of the following offenses which would amount to a crime if committed by an adult: second degree murder, voluntary manslaughter, kidnapping, rape, malicious mayhem, commission of a felony while armed, inflicting injury in the commission of a felony, robbery, first degree burglary, aggravated assault and battery, or assault and battery with intent to commit any of the felonies enumerated in this subsection, the juvenile court upon motion by the prosecuting attorney shall after full investigation and hearing, waive jurisidiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of the offense if committed by an adult unless the court finds that either:

(1) there is probable cause to believe the offense does not have specific prosecutive merit; or

(2) it would be in the best interest of the child and of public welfare and public security for the juvenile to remain with the regular statutory juvenile system.

IND. CODE § 31-5-7-14 (1976).

[12](a) If a child fifteen years of age or older is charged with an offense which would amount to a crime if committed by an adult, the judge, upon motion by the prosecuting attorney and after full investigation and hearing may waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult, if the court finds that the offense has specific prosecutive merit and either;

(1) it is heinous or of an aggravated character, greater weight being given to offenses against the person than to offenses against property

(2) even though less serious, if the offense is part of a repetitive pattern of juvenile offenses which would lead to a determination that the juvenile may be beyond rehabilitation under regular statutory juvenile procedure

(3) it is in the best interest of the public welfare or for the protection of the public security generally that the juvenile be required to stand trial as an adult offender

(b) If a child sixteen years of age or older is charged with any of the following offenses which would amount to a crime if committed by an adult: second degree murder, voluntary manslaughter, kidnapping, rape, malicious mayhem, armed robbery, robbery, first degree burglary, aggravated assault and battery with intent to commit any of the felonies enumerated in this subsection, the juvenile court upon motion of the prosecuting attorney shall after full investigation waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of the offense if committed by an adult unless the court finds that:

(1) the offense if not heinous or of an aggravated character, greater weight being given to offenses against the person than to offenses against property

(2) the offense is not part of a repetitive pattern of juvenile offenses which would lead to a determination that the juvenile may be beyond rehabilitation under the regular statutory juvenile procedures

(3) it would be in the best interest of the child and of public welfare and public security for the juvenile to remain with the regular statutory juvenile system.

IND. CODE § 31-5-7-14 (1976).

No matter what factors play a part in the waiver decision, the outcome may be severe. Juveniles tried as adults often encounter drastic consequences.[13] "[T]he decision to relinquish jurisdiction moved the juvenile from the rehabilitative philosophy of the juvenile court to the regular criminal processes, where the notions of retribution and deterrence play an important role."[14]

This note will trace the development of waiver in Indiana through case law and legislative attempts to define waiver. Criticisms of the present law and possible alternatives will be explored.

THE COURTS' RESPONSE TO WAIVER

Since the decision to waive jurisdiction is of such critical importance, the juvenile court and the legislature must choose carefully which factors to consider. "The criteria should reflect not only the interests of the community, but also fairness to the troubled youth and consideration for his needs."[15] The Supreme Court recognized the need to balance the child's welfare with the best interests of the state in *Kent v. United States.*[16]

When faced with the issue of which procedural rules must be enforced during a juvenile court waiver hearing in order to insure that constitutional rights of due process and fairness were not denied the juvenile, the Supreme Court declared: "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness."[17] The Court was concerned that the child would recieve the worst of both worlds since he was given neither the protections accorded to adults nor the "solicitous care and regenerative treatment" intended for children.[18] The Court strengthed the District of Columbia statute[19] which required a pre-waiver hearing by insisting upon a complete investigation of the facts of the alleged offense to determine whether the

[13]An example is *Tilton v. Commonwealth,* where the seventeen-year-old defendant after being certified to stand trial in adult criminal court was convicted of murder and sentenced to death. The most severe sentence available to the juvenile court was four years in the State Boys' School. Tilton v. Commonwealth, 196 Va. 774, 85 S.E.2d 368 (1955).

[14]Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal,* 114 U. PA. L. REV. 1171, 1172 (1966).

[15]Peuler, *supra* note 9, at 358.

[16]383 U.S. 541 (1966).

[17]*Id.* at 555.

[18]*Id.* at 556.

[19]*Id.* at 544.

The District of Columbia Code involved in this case was not as specific in listing which children would be subject to waiver. However the general scope and intent of the D.C. waiver law very similar to present Indiana law:

If a child 16 years or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this sub-chapter in conducting and disposing of cases.

D.C. CODE § 11-914 (1961).

parens patriae plan would be more desirable and appropriate in the case.[20] However the Court did not go so far as to require that all the constitutional guarantees of adults be applied in the juvenile courts. Since the juvenile court has certain built-in rights and immunities[21] the Court felt that only those rights which are necessary to insure due process and fairness must be granted in the juvenile court. The Court also recognized that since waiver denies a child these protections he is entitled to counsel,[22] access to the social records and probation reports which are to be considered by the court,[23] and, most importantly, to a statement of reasons for the decision to waive.[24]

The Supreme Court in *Kent* made it clear that waiver orders merely stating that the judge had, after a full investigation, decided to waive the juvenile, would no longer be acceptable. The Court did not, however, offer any guidelines as to what would constitute a full investigation or what reasons given by the juvenile court judge to support the waiver decision would be acceptable. A list of suggested determinative factors for waiver was prepared by the juvenile judge for the District of Columbia and was included in an appendix to the Court's opinion.[25] However the Court gave no indication of its views as to the propriety of these criteria. These criteria were later adopted in whole or in part in court opinions in many jurisdictions, including Indiana.[26] Since the only specific guidelines as to which factors should be considered in

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[20]383 U.S. 541, 553 (1966).

[21]Those rights which the court in *Kent* felt were already part of the juvenile justice system were (1) the juvenile offender was shielded from publicity, (2) he was rarely detained with adults, (3) he could only be detained until he reached the age of twenty-one, (4) the juvenile court was admonished to give preferance to retaining a child in the custody of his parents, and (5) a juvenile court conviction carried no stigma such as loss of civil rights and disqualification from public employment. *Id.* at 556.

[22]The court cited the earlier case of Black v. United States, 355 F.2d 104, 106. "The need for counsel is even greater in the adjudication of waiver since it contemplates the imposition of criminal sanctions." *Id.* at 553.

[23]The court cited the earlier case of Watkins v. United States, 343 F.2d 278, 282)1964) and accepted the appellate court's view. "The child's attorney must be advised of the information upon which the Juvenile Court relied in order to assist effectively in the determination of the waiver question, by insisting upon the statutory command that waiver can be ordered only after 'full investigation', and by guarding against action of the Juvenile Court beyond its discretionary authority." *Id.* at 559.

[24]383 U.S. at 558 (1966).

[25]383 U.S. at 566 (1966).

[26]The Indiana Supreme Court adoted these criteria in Summers v. State, 248 Ind. 551, 230 N.E.2d 320 (1967) and Atkins v. State, 259 Ind. 596, 290 N.E.2d 441 (1972). Those factors which were to be considered by the juvenile court judge in making his determination whether to waive the offense were: (1) the seriousness of the alleged offense, (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner. . . , (3) whether the alleged offense was against persons or property. . ., (4) the prosecutive merit of the complaint. . . , (5) the desirability of trial and disposition of the entire offense in one court where the juvenile's associates in the alleged offense are adults. . ., (6) the sophistication and maturity of the juvenile. . . , (7) the record and previous history of the juvenile. . . , (8) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile. 383 U.S. 566-67 (1966).

the waiver were not even part of the Court's decision there remained uncertainties as to what form a juvenile waiver hearing should take. All that was clear was the intention of the Supreme Court to comport with the doctrine of parens patriae by making criminal trial in adult court the excepton rather than the rule for juvenile offenders.[27]

After the broadly stated doctrine in *Kent* that a hearing "must measure up to the essentials of due process and fair treatment"[28] the Indiana Supreme Court translated that doctrine into rules governing waiver in Indiana in *Summers v. State*.[29] The Indiana Supreme Court held as in *Kent* that the juvenile court had to accompany its waiver order with a list of the reasons why the waiver was granted in order to permit a reivew of the waiver decision.[30] These guidelines, however, were not exclusive, according to the court, thus leaving a large amount of discretion in the hands of the juvenile court judge.[31] At first glance, the *Summers* decision seemed to be an echoing of the *Kent* decision with the same guidelines as set forth in the appendix in the *Kent* case.[32] However the *Summers* case went beyond *Kent* in several important respects.

The court in *Summers* held that the prosecutor could petition for waiver when he believed the case had "prosecutive merit."[33] This added procedure, not authorized by the Juvenile Court Act of 1945, allows a great amount of discretion on the part of the prosecutor. No longer did the juvenile court judge exercise the sole power to decide which juveniles would be considered for waiver.[34]

Five years after *Summers* the Indiana Supreme Court was again called upon to review the propriety of a juvenile waiver. In *Atkins v. State*[35] the court reaffirmed the holding in *Summers* that the waiver order must clearly state the reasons for the waiver. The court also noted that there is a presump-

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[27]Peuler, *supra* note 9 at 351.

[28]Schornhorst, *supra* note 10, at 591.

[29]248 Ind. 551, 230 N.E.2d 320 (1967).

[30] [I]t is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. . . . the statement while not necessarily including a conventional finding of facts, should be sufficient to demonstrate unequivocally that the strict statutory requirement of a full investigation and hearing has been met and that a conscientious determination of the question of waiver has been made. We require that the reasons for the order of waiver ahould be stated with sufficient specificity to permit a meaningful review.

Id. at 559-60, 230 N.E.2d at 325.

[31]248 Ind. at 560, 230 N.E.2d at 325 (1967).

[32]According to *Summers* a juvenile case may be waived if: (1) the offense has specific prosecutive merit in the opinion of the prosecuting attorney; (2) if the offense is heinous or of an aggravated character (greater weight being given to offenses against person than to offenses against property); (3) if the offense is part of a repetitive pattern of juvenile offenses which would lead to a determination that said juvenile may be beyond rehabilitation; (4) or if it is in the best interest of public welfare for protection of the public security. *Id.* at 561, 230 N.E.2d at 325.

[33]*Id.* at 561-2, 230 N.E.2d at 326 (1967).

[34]See note 54 *infra* & text accompanying; note 64 *infra* & text accompanying.

[35]259 Ind. 596, 290 N.E.2d 441 (1972).

tion in favor of dealing with the juvenile offender within the juvenile system and that waiver should be used only as a last resort.[36]

One of the most important features of the *Atkins* case was an attempt to clarify prosecutive merit. To meet the requirement of prosecutive merit the prosecutor, according to the court in *Atkins,* has to show more than a willingness to prosecute. There must also be reason to believe that the case should be prosecuted in adult court.[37]

The *Atkins* decision was followed by a long line of cases which further defined the juvenile's rights at the waiver hearing.[38] These were further attempts to clarify the factors which the juvenile court judge could consider in making his decision, the movement being towards less prosecutorial discretion and more concern with the effects of waiver on the child. In *Clemons v. State*[39] the appellate court construed the 1945 waiver law as to require the juvenile court to necessarily consider the nature of the offense, whether it is part of a repetitive pattern of juvenile offenses, whether the child is beyond rehabilitation under the juvenile justice system, and whether waiver is necessary to protect the public security.[40]

The presumption in favor of dealing with delinquents within the juvenile system led to an additional restriction on waiver. The juvenile court was required to show that its resources had been exhausted before the juvenile could be certified to the adult court.[41] The appellate court in *State v. Seay*[42] rejected the argument that since the sanction of commitment to the Boys School was not available due to the age of the defendant he should be tried in adult court.[43] Since other sanctions are available the juvenile court must specify the reasons for the conclusion that these alternative dispositions are without merit.[44] But the court in *Seay* did not go so far as to reqire that the juvenile court specifically refer to each and every conceivable disposition and give reasons why that particular method was not chosen.[45]

As the trend of the Indiana courts seemed to limit waivers, defense counsel also began to raise the argument that the 1945 Indiana waiver law

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[36]*Id.* at 598, 290 N.E.2d at 442 (1972).

[37]*Id.* at 599, 290 N.E.2d at 443 (1972).

[38]Garst v. State, ____ Ind. App. ____ , 361 N.E.2d 934 (1977); Swinehart v. State, ____ Ind. App. ____ , 349 N.E.2d 224 (1976); Imel v. State, ____ Ind. App. ____ , 342 N.E.2d 897 (1976); Cartwright v. State, ____ Ind. App. ____ , 344 N.E.2d 83 (1976); Duvall v. State, ____ Ind. App. ____ , 353 N.E.2d 478 (1976); Seay v. State, ____ Ind. App. ____ , 377 N.E.2d 489 (1975); State v. Jump, ____ Ind. App. ____ , 309 N.E.2d 148 (1974); Ingram v. State, ____ Ind. App. ____ , 310 N.E.2d 903 (1974).

[39]____ Ind. App. ____ , 317 N.E.2d 859, 863 (1974).

[40]*Id.*

[41]Seay v. State, ____ Ind. App. ____ , 337 N.E.2d at 499 (1975).

[42]*Id.*

[43]____ Ind. App. ____ , 337 N.E.2d at 495 (1975).

[44]____ Ind. App. ____ , 337 N.E.2d at 495-96 (1975). The other sanctions available include probation, referral to a youth services bureau, commitment to a state hospital, or commitment to a community run drug treatment program.

[45]Cartwright v. State, ____ Ind. App. ____ , 344 N.E.2d 83 (1976).

was unconstitutional. However the law was upheld against claims that it was void for vagueness and in violation of equal protection or due process.[46] In the same decision, the court of appeals strengthened the presumption in favor of juvenile jurisdiction by placing the burden upon the state to establish by a preponderance of the evidence that juvenile jurisdiction should be waived.[47]

Despite the fact that the 1975 amendment took effect on July 29, 1975, the Indiana courts still had before them several cases dealing with the waiver statute as it appeared prior to the amendment.[48] The appellate court in *Duvall v. State*[49] held that the waiver hearing was required even if noone concerned wanted the hearing.[50] Neither the defendant, his parents, nor his attorney could waive the hearing and request that the case be tried in adult criminal court. Failure to hold the hearing would result in reversal of the criminal court conviction, and not merely a remand for proper waiver proceedings. The court stated: "(a)lthough the exclusive jurisdiction of the juvenile court inures to the benefit of the juvenile, it is nevertheless the court's jurisdiction."[51] Thus, a "stipulation" or consent to waive juvenile jurisdiction does not relieve the juvenile court from its duty to independently and conscientiously determine the appropriateness of waiver.[52] It seems more likely, however, that the court was most concerned with the possibility of the juvenile not understanding the consequences of his consent to waiver rather than being concerned with usurpation of the juvenile court's jurisdiction. Finally, the court declared that evidentiary support for a waiver order may not be obtained from what transpired in the criminal court nor by the presentence investigaton report if the case was first erroneously tried in the criminal court and then remanded to the juvenile court for a waiver hearing.[53]

The appellate court in *Swinheart v. State*[54] felt compelled to comment on the 1975 amendment even though the case before it was governed by the earlier law becaue the defendant raised the objection that the 1975 amendment had been applied to him rather than the law as it existed at the time the alleged crime was committed. The court dismissed this claim by noting

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[46]Imel v. State, ____ Ind. App. ____ , 342 N.E.2d 897 (1976). Another recent case, which was still required to be decided under the 1945 Indiana waiver law rather than the amended waiver law, said the waiver law also did not violate the defendant's protection against double jeopardy. Murphy v. State, ____ Ind. App. ____ , 364 N.E.2d 770 (1977).

[47]____ Ind. App. ____ , 342 N.E.2d at 902 (1976).

[48]Garst v. State, ____ Ind. App. ____ , 361 N.E.2d 934 (1977). Imel v. State, ____ Ind. App. ____ , 342 N.E.2d 897 (1976). Cartwright v. State, ____ Ind. App. ____ , 344 N.E.2d 83 (1976). Duvall v. State, ____ Ind. App. ____ , 353 N.E.2d 478 (1976). Swinehart v. State, ____ Ind. App. ____, 349 N.E.2d 224 (1976).

[49]____ Ind. App. ____ , 353 N.E.2d 478 (1976).

[50]*Id.* at 480-1 Galanti, *Survey of Recent Developments, Juveniles,* 10 IND. L. REV. 189 (1976).

[51]353 N.E.2d 478, 481.

[52]____ Ind. App. ____ , 353 N.E.2d 478, 481 (1976).

[53]See Harden v. State, 260 Ind. 501, 296 N.E.2d 784 (1973).

[54]____ Ind. App. ____ , 349 N.E.2d 224 (1976).

that "the case law applicable at the time of the alleged theft was identical to the statute which Swinehart claims was retroactively applied."[55] The court of appeals went on to express its concern that while the rationale behind the new waiver law was to codify the language in *Atkins* and *Summers*[56] waiver in those cases remained discretionary while under the new law waiver for sixteen year olds accused of serious felonies is virtually assured.[57] The criteria in *Summers, Atkins,* and the cases which followed required the juvenile court to consider several factors such as the nature of the offense, the best interests of the child, the possibility of rehabilitating the child, the maturity of the child, and the public welfare. It was not sufficient to find and base the waiver decision upon just one of these factors.[58]

THE LEGISLATURE'S RESPONSE TO WAIVER—THE 1975 AND 1976 AMENDMENTS

A major change under the 1975 and 1976 amendments was an abandonment of the presumption in favor of dealing with juveniles within the juvenile system. Some criticism was raised that the legislature may have been overreacting in a punitive way to children alleged to have committed violent acts.[59]

Under the 1976 amendment it is only necessary for the prosecutor to show that the child is beyond rehabilitation, and that it is in the best interests of the public welfare that the juvenile be tried as an adult, and *either* that the crime was heinous or part of a repetitive pattern of juvenile offenses.[60]

If the discretionary waiver provision of the present waiver law[61] seems to make it difficult for the juvenile court to retain jurisdiction over a juvenile, the mandatory waiver provisions[62] for certain "serious offenses" make it nearly impossible for the court to do so. The juvenile court must find that the offense does not have prosecutive merit or that it would be in the best interest of public welfare and public security for the juvenile to remain within the juvenile system.[63]

The legislature added commission of a felony while armed and infliction of injury in the commission of a felony to the list of offenses for which waiver is mandatory in the 1976 law. If the legislature intends to fulfill the stated

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[55]___ Ind. App. ___ , 349 N.E.2d 224, 226 (1976).

[56]Another recently decided case, Murphy v. State, 364 N.E.2d 770, 771 (1977) reached the same conclusion, that the 1945 waiver law was amended to bring it in to compliance with *Summers*.

[57]Fox, *Survey—Domestic Relations Waiver of Juveniles to Adult Criminal Court,* 9 IND. L. REV. 197, 234 (1975).

[58]___ Ind. App. ___ , N.E.2d at 935 (1977).

[59]See Hopson, *Public Law 296, Confused Step in the Wrong Direction,* ANNUAL SURVEY OF IND. LAW 1974-75, at 227.

[60]IND. CODE § 31-5-7-14(a) (1976).

[61]*Id.*

[62]IND. CODE § 31-5-7-14(b) (1976).

[63]See Hopson, *supra* note 59, at 227.

purpose of the juvenile justice system[64] it should not remove any juvenile from the reach of the juvenile court. The legislature seems to have ignored its stated goal of providing the child with the kind of care and discipline he would have received at home when it enacted the 1976 amendment to the waiver law.

The major criticism of the present approach is that it puts certain classes of offenses in the criminal court upon the prosecutor's motion with the option to transfer to juvenile court.[65] However transfer to juvenile court will seldom if ever occur. If the experience in California with discretionary transfer to the juvenile court is indicative[66] a large increase in the number of juveniles tried in adult courts can be expected, a result which seems to be exactly the intent of the legislature. While on the one hand moving juveniles into the adult court system gives them additional procedural protections not available in the juvenile system,[67] the wide discretion in the disposition of the child after conviction which the juvenile courts enjoy will be lost.

If the goal of the legislature in adopting a waiver allocation by statute was to restrict discretion they have clearly adopted the wrong method. Allocation by statute tends merely to place the discretion in the hands of the prosecutor rather than the juvenile court judge. Such "prosecutorial discretion is without adequate procedural check."[68] The prosecutor is not required to hold a hearing before he decides whether to file a waiver petition. And since the prosecutor's main function is to enforce the law his view of whether a juvenile may respond to treatment is colored.[69] The proseutor's decision as to which offense to charge a juvenile with and thereby seek waiver may be distorted if the offense has aroused public opinion; "well publicized cases usually result in pressure on the juvenile authorities to permit prosecution in the adult criminal courts".[70] Furthermore, failure to obtain a conviction for the crime

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[64]IND. CODE § 31-5-7-14 (1976).

[65]This approach concerned the court of appeals in *State v. Jump* when they rejected the state's argument and held that it was not erroneous to retain jurisdiction in the juvenile court when the offense was serious. In fact the court said, "[t]o adopt it [the state's argument] would be to require all juveniles to be waived to the criminal court for trial upon serious charges without regard to the purpose of the juvenile law concerning treatment and rehabilitation as expressed in *Atkins*." ___ Ind. App. ___ , 309 N.E.2d at 149 (1974).

[66]Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 U. PA. L. REV. 1171, 1181 (1966). The California Statute referred to is § 604 which requires that any proceeding in any court against a child under the age of 18 shall be suspended and a certification of such action sent to the juvenile court along with a copy of the pleadings filed against the child. The juvenile court must then decide whether to consider the case in juvenile court or order the proceedings to be continued in the original court.

[67]The right of jury trial is not available in the juvenile courts. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[68]Whitebread and Baly, *Transfer Between Courts: Proposals of the Juvenile Justice Standards Project*, 63 VA. L. REV. 221, 240.

[69]*Id.* at 240-41.

[70]*Juvenile Deliquents: The Police, State Courts and Individualized Justice*, 79 HARV. L. REV. 775, 793 (1966).

charged does not end the criminal court's jurisdiction and send the case back to the juvenile court; the criminal court retains jurisdiction over lesser included offenses, even if that offense would not have placed the child in the criminal court in the first place.

When read in conjunction with the 1975 amendment of Indiana Code 31-5-7-3-(b)(1) the present waiver law has an even more profound effect. Under Indiana Code 31-5-7-23 "no *child* shall be detained in any prison, jail or lockup . . ." However, with the 1975 amendment to Indiana Code 31-5-7-3(b)(1), a child tried for murder is now excluded from the definition of a child, so it is possible for a ten year old child accused of murder to be tried under the new waiver law in adult court and upon conviction to be imprisoned with adults.[71]

The present law does not even require a showing of probable cause that an offense has been committed by the child before the waiver hearing. And, parallel to the situation where no conviction is obtained, once waived to the adult court the child remains in the criminal court's jurisdiction even if he is found guilty of a lesser included offense that would not have required has waiver in the first place. Thus under the present law a child could be charged with first degree murder which would place him automatically in the criminal court's jurisdiction. The child, if then found guilty of invouluntary manslaughter, would remain in the criminal court's jurisdiction, subject to the punishment that court decides to impose. Yet the crime of involuntary manslaughter is not among the many crimes listed under the mandatory waiver provision of the present law.

There are, however, a few aspects of the new law which still restrict waiver. First, the juvenile court judge could refuse to file a petition against the child and instead handle the case informally so that the prosecutor could never request a waiver order. Even if a petiton is filed against the child and the prosecutor requests waiver the decision by the juvenile court to retain jurisdiction is not reviewable; the state may not appeal the decision.[72] Another restriction on waiver is that even if the judge wants to waive the case, only the prosecutor can initiate the waiver proceeding; thus, unless the prosecutor files a motion for waiver, the juvenile court must retain jurisdiction.[73]

Another consideration is whether the Indiana law in fact operates as harshly against juveniles as it might. This of course will depend to a large part on the prosecutors' office in each county and their policy regarding waiver.[74]

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[71]Fox, *supra* note 57, at 234.

[72]State *ex rel.* Hunter v. Juvenile Ct., ____ Ind. App. ____ , 309 N.E.2d 148 (1974).

[73]See Hopson, *supra* note 59, at 234.

[74]In Monroe County at least, some of the fears expressed by critics of stautory allocation of waiver have not materialized. Waiver to adult court is still the exception rather than the rule so that the claim that the new law would mean virtually all juveniles would be handled in adult criminal court is unfounded. In Monroe County about ten per cent of all juveniles have been

There is no guarantee that counties will not seek waiver in every juvenile case that they can nor is there any guarantee that present forbearance will continue. The potential for abandoning the parens patriae philosophy of the juvenile justice system in favor of waiver and the retributive principle of the adult court remains. The Indiana legislature should reconsider whether it wants to replace the philosophy in favor of rehabilitating the juvenile rather than punishing him. If the legislature decides to adopt a punishment model, and there are those who feel that that is the only way to handle the problem of juvenile crime, it should not do so while publicly claiming to be trying to provide care and treatment for the child. The present waiver law neither serves as a punishment model nor does it allow the juvenile court to retain jurisdiction over all those children who could be rehabilitated.[75]

CRITICISMS AND ALTERNATIVE PROPOSALS

There are alternatives available other than a complete reconsideration of our entire juvenile code, which may be necessary, but which is likely to take several years to complete. Legislation and the ABA's Transfer Standards Project provide examples.

If a juvenile commits a crime in New Jersey he has a hearing which is very similar to a trial, in that counsel is present and all rules of evidence are followed. If the juvenile is found guilty he is sentenced to the same term as an adult, but the juvenile has a right to be freed whenever he is sufficiently rehabilitated to assume a normal role in society.[76] While this no transfer plan would seem preferable to our arbitrary statutory allocation which carves out certain offenses for automatic waiver with no consideration given to the individual youth, this method is also subject to criticism. "While a true no transfer system might promote apparent equality of treatment among those of the same age it would also help to insure that the treatment received by all was equally bad. Any equality would be equality of disadvantage."[77] Under a no transfer system if the maximum age for juvenile court jurisdiction is set low the youths are hurt because they are denied treatment rather than

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waived to adult court. This figure has not increased significantly since the new law went into effect. It is now however the policy of the Monroe County Prosecutor's office to seek more waivers due to the number of repeat offenders and the public outcry for law and order. The prosecutors do not seek waiver for every case under the mandatory waiver section because they still consider other factors such as the maturity and sophistication of the child, his previous record, and the interest of the child and the public welfare. Waiver is not determined solely by the nature of the offense. Seldom does the Monroe County prosecutor's office ask for the maximum penalty against a juvenile offender, particularly if it is a first offense. Also the concern about the limited number of dispositions available to the adult criminal court is not as great since many convictions result in probation just as they would in the juvenile court. Yet, children stll can be sent to prison from Monroe County once they have been convicted of a crime in the adult criminal court. And it has been suggested that juveniles sent to prison tend only to learn to be efficient criminals. Interview with Robert Beck, Deputy Prosecutor, Monroe County, (Sept. 15, 1977).

[75]See note 64 *supra* & text accompanying.

[76]N.J. REV. STAT. 6:9-1(b) (1952).

[77]Whitebread and Baly, *supra* note 68 at 239.

punishment at an early age. But if the age criterion for juvenile court jurisdiction is set too high the juvenile court is forced to treat people incapable of benefitting from its treatment.

Another plan which is preferable to that enacted by our legislature wa suggested by the ABA's Transfer Standards Project.[78] The main purpose of these proposals was to insure that "only extraordinary juveniles in extraordinary factual situations [are] transferred to the criminal court."[79] The plan attempts to limit the incidence of waiver by requiring: 1) probable cause to believe the juvenile committed an offense, that, if committed by an adult would be punishable by death or by imprisonment for more than twenty years *and* 2) clear and convincing evidence that the juvenile is not amenable to juvenile court treatment.

Although it is doubtful that our legislature would adopt one of these alternative plans, that does not mean the legislature cannot or should not revise the present law.

While it is beneficial to have specific standards regarding waiver set out, as in the new Indiana law, it seems the legislature has taken the wrong approach—the presumption should still be in favor of juvenile jurisdiction if the parens patriae philosophy of the juvenile court is to continue. Waiver and the parens patriae doctrine are only compatible when waiver laws do not exclude those children who can be helped from the juvenile court and when the juvenile court does not try to retain jurisdiction over children who are hopelessly beyond the court's reach. Indiana's present law has not yet reached the balance necessary between the two doctrines.

The legislature should amend our present waiver law to require a showing of probable cause that the child has committed the offense charged and should require a child to be returned to the juvenile court for disposition if the child is found guilty in the criminal court of a lesser included offense that is not one of the crimes included in the mandatory waiver section. This would limit the prosecutor's discretion in filing exaggerated charges in order to bring the child within the jurisdiction of the criminal court and would afford the juvenile court a greater opportunity to deal with those children who the legislature and the juvenile court have determined are not beyond the reach of the juvenile court.

The discretionary waiver provision allows the child to be sent to the adult criminal court when it can be shown that the offense has specific prosecutive merit and one of the other specified factors is present. However it is not at all clear what is meant by specific prosecutive merit. In almost every instance a prosecutor can show that a case should be prosecuted for one reason or another. If the legislature intended to adopt the earlier court interpretation

[78]Institute of Judicial Administrators and the ABA Joint Commission of Juvenile Justice Standards, Transfer Between Courts (Proposed Draft 1976). For an excellent discussion of this project, see Whitebread and Baly, *supra* note 59.

[79]Whitebread and Baly, *supra* note 68, at 222.

of prosecutive merit it could have done so in a much clearer manner by making the court's definition of the term "prosecutive merit" a part of the statute. This vague term tends only to increase the prosecutor's already broad discretion.

Indiana's present waiver law requires the waiver of those children who have committed violent crimes against people.[80] However the present waiver law also requires mandatory waiver for such crimes as malicious mayhem, robbery, and first degree burglary.[81] While these are serious crimes against property, they are not the kind of crimes which indicate that the child is beyond the help of the juvenlie court. In order for our waiver law to be compatible with the long accepted parens patriae philosophy of the juvenile court system it must be amended to allow more certainty that those children we decide must be waived to the adult court are truly beyond the rehabilitative care of the juvenile court.

CONCLUSION

While the parens patriae doctrine has long been the theory behind our treatment model in the juvenile justice system, it has also been recognized that not all children can be rehabilitated. Thus waiver to adult court became the accepted method of handling these children and became a valid exception to the parens patriae plan. The legislature provided waiver laws with few if any guidelines as to who could be waived and what procedural requirements must be met. And so the courts in Indiana, as in many other jurisdictions, set minimum requirements in order to insure that waiver remained the exception so that the legislature's stated purpose to secure the custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents, was fulfilled. In an attempt to incorporate the case law within its waiver law, the Indiana legislature amended the waiver law in 1975 and 1976. However the effect of these amendments was to broaden rather than limit the grounds for waiver and to make waiver mandatory when a child has been charged with certain offenses regardless of the child's potential for rehabilitation. The result is a serious inconsistency between the stated goals of the juvenile justice system in Indiana and the present waiver law. This inconsistency needs to be rectified either by adopting a new philosophy for our juvenile system or by an amendment to the present waiver law so that it no longer conflicts with the present doctrine, parens patriae.

JACQUELINE SIMMONS

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[80]IND. CODE § 31-5-7-14(b) (1976).
[81]*Id.*