This Code is Rated "R" - Second-Class Citizenship Under Indiana's New Juvenile Code

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This Code is Rated “R” — Second-Class Citizenship Under Indiana’s New Juvenile Code

J. RICHARD KIEFER*

Over a decade ago the United States Supreme Court held that the Bill of Rights is not for adults only. But not all of the constitutional rights applicable to adult criminal proceedings have been mandated for children charged with delinquent acts that would be crimes if committed by adults. This rationing of rights as if they were a commodity to be purchased at the corner grocery has relegated our most cherished national asset, children, to second-class citizenship. The new Indiana Juvenile Code which becomes effective on October 1, 1979 is a substantial improvement over the 1945 Act that it replaces, both in terms of procedures and juvenile rights. The dawning of the age of full equality of rights for juveniles still remains out of reach, somewhere over the horizon.

As is true with statutes generally, the new Indiana Juvenile Code is the product of compromise inherent in the legislative process. With other competing interests at stake, it is not surprising that the Code falls short of elevating juveniles to full citizenship by depriving them of the full panoply of rights accorded to their adult counterparts. If the Code were a movie, critiques would rate it “R” — Restricted, for certain rights are still for adults only! There are, indeed, numerous advantages to children being handled in juvenile courts with a treatment, care and confidentiality approach; however, as with other rights extended to juveniles, it need not be assumed that due process and juvenile justice are incompatible.

PHILOSOPHY

The purposes and policies upon which the new Juvenile Code is predicated reflect both a compromise by the drafters and a recognition of the competing interests and diverse goals of the system. Despite the inclusion in the Code of protection of the public1 as a goal, there are significant policy statements which can form the basis for innovative legal arguments by defense counsel.

The Legislature has continued a policy, although in slightly different language, of providing juveniles with “care, treatment, rehabilitation or protection.”2 This policy formed the basis of Indiana’s first juvenile

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2 Id. § 31-6-1-1(3).
Neither punishment nor vindictiveness are expressed as purposes or policies of the state. To this extent, the stated purposes are inconsistent with the disposition section which permits, for the first time in Indiana, jailing juveniles as a disposition.  

For the first time since the creation of the first juvenile court in Indiana in 1903, the prosecutor has a statutory role in representing the interests of the state in delinquency cases that would constitute crimes if the acts were committed by adults. While such a legislative mandate will have only marginal effect on counties where the prosecutor has handled such cases for several years, it will significantly alter the nature of the proceedings in those counties where the prosecutor has historically viewed the juvenile court as the domain of social workers.

The involvement of the prosecutor in the juvenile court system will likely result in a greatly enhanced role for defense counsel. Parents who previously believed defense attorneys were unnecessary when their child was summoned to court may feel differently when the prosecutor

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3. Acts of 1903 provided:
   This act shall be liberally construed, to the end that its purpose may be carried out, to wit: That the care, custody and discipline of the child may approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done, the child is to be placed in an approved family home and become a member of the family, by legal adoption or otherwise.

4. Acts of 1945 provided:
   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.
   The principle is hereby recognized that children under the jurisdiction of the court are subject to the discipline and entitled to the protection of the state, which may intervene to safeguard them from neglect or injury and to enforce the legal obligations due to them and from them.

5. IND. CODE § 31-6-4-16(g)(5) (Cum. Supp. 1979), permits confinement for a maximum of 10 days in a detention center or county jail. It should be noted that the provision for credit for time served awaiting trial which passed the Legislature in 1978 was deleted in the 1979 General Assembly. Defense counsel should note subsection (j) of this section which requires the court to accompany its dispositional decree with findings of fact on the record concerning the “needs of the child for care, treatment, or rehabilitation ... and it shall specify its reasons for the disposition.” If there is no factual basis for concluding that incarceration would provide the child with needed care, treatment or rehabilitation, defense counsel should challenge any attempt to use jail or detention as a disposition.

6. The prosecutor is the only person with statutory authority to request from the court authorization to file a petition alleging an act of delinquency that would be a crime if committed by an adult. IND. CODE § 31-6-4-7(d) (Cum. Supp. 1979). The person who requests such authorization shall “represent the interests of the state in all subsequent proceedings on the petition.” Id. § 31-6-4-9(a). Note that either the prosecutor or the attorney for the county welfare department may request authorization to file a petition alleging that the child has committed a “status offense” (curfew, truancy, runaway or ungovernable). Id.
becomes the adversary. It remains to be seen whether prosecutors will handle truancy, curfew, ungovernable and runaway cases. The new Code vests in the prosecutor discretion to handle such cases, which may have the effect of eliminating such cases from juvenile court jurisdiction.

For the defense attorney, there may be an added advantage of prosecutorial participation in the juvenile system. Defense attorneys are accustomed to plea-bargaining and arguing legal merits of their cases with prosecutors. In many respects, the new Code creates a mini-criminal court in which defense attorneys should feel at home. However, defense attorneys who fail to recognize the opportunities to develop a treatment plan for their client, or to seek informal adjustment with the probation officer before the case reaches the prosecutor, may do a substantial disservice to the child they represent.

JURISDICTION

The jurisdiction of the juvenile court has changed little in the last three quarters of a century, and will be only slightly affected by the new Juvenile Code. One significant change, however, is that juveniles who are charged with murder must be proceeded against, at least initially, in the juvenile court. Historically, the definition of “delinquency” excluded first degree murder, so that juveniles so charged could be indicted or informations could be filed against them without the formalities of waiver from the juvenile court. However, second degree murder was defined as an act of “delinquency.”

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8Id.
9Id. § 31-6-4-1(a)(1).
10The 1945 Code defined “delinquent child” to include, inter alia, persons under the full age of 18 who commit an act which, if committed by an adult, “would be a crime not punishable by death or life imprisonment.” Act of March 10, 1945, ch. 356, § 4(2), 1945 Ind. Acts 1724 (repealed 1975).
11In 1975, the General Assembly modified the Juvenile Code, but the result was the same, except for an error corrected a year later. In An Act to Amend IC 1971, 31-5 Concerning Juveniles and Repeals IC 1971, 31-5-4-1; IC 1971, 31-5-4-7; and IC 1971, 31-5-7-4, Pub. L. No. 296, § 3, 1975 Ind. Acts 1644 (repealed 1979) [hereinafter 1975 Ind. Acts, Pub. L. No. 296], the word “child” was defined to exclude persons under 18 years of age who are charged with first degree murder. The legislature failed to write the definition of “delinquent child” to be consistent with the definition of “child.” Instead, § 4 defined “delinquent child” as a person under the age of 18 who “commits an act which, if committed by an adult, would be a crime, except: (1) murder . . . .” The result was that both first and second degree murder were excluded from the definition of “delinquent child” although the definition of “child” continued to vest in the juvenile court jurisdiction over children who commit second degree murder.

The error made in 1975 was corrected in An Act to Amend IC 31-5-7 and 31-1-92 Concerning Juveniles, Pub. L. No. 129, 1976 Ind. Acts 621 (repealed 1979). Section 1 returned the definition of “child” to simply be any person under 18 years of age. The definition of “delinquent child” was also amended by § 2 to include, inter alia, a child who: “(a) Commits an act which, if committed by an adult, would be a crime, except: (1) first degree murder or a lesser included offense in a case in which the offender was charged with first degree murder . . . .”
12Id.
The Penal Code which became effective on October 1, 1977, eliminated the distinction between first and second degree murder and created a single offense of murder. The drafters of the Juvenile Code were thus left with a dilemma: either all juveniles charged with murder would be handled in criminal court, regardless of age and circumstances, or all such juveniles would be handled within juvenile court jurisdiction. The compromise reached in the Juvenile Justice Division [hereinafter referred to as the "Division"] and adopted by the Legislature was to include murder in the definition of "delinquency," but also provide for a relatively easy waiver of jurisdiction of such offenses to criminal court if the child is ten years of age or older.

The inclusion of murder in the definition of delinquency, despite the waiver provision, is a significant victory for the defense attorneys and their clients. There are some children who may technically commit murder, but the surrounding circumstances may be sufficiently mitigating to render care, treatment and rehabilitation in the juvenile justice system a more appropriate disposition than incarceration in an adult penal facility. Furthermore, the waiver of jurisdiction to criminal courts has been the source of several reversals in Indiana appellate courts where trial courts failed to comply with statutory procedures. Defense counsel must be prepared to challenge the juvenile court's jurisdiction or its waiver of the cause when the court neglects to adhere strictly to the numerous technical requirements of the new Juvenile Code.

DELINQUENCY DEFINED

The so-called laundry list of eighteen acts that were included in the definition of delinquency in the 1945 Act were whittled down to just five in 1975. No serious attempt was made to revert to the outdated list, which included such abhorrent behavior as begging, patronizing a bar, loitering, playing around railroad yards or tracks, using obscene language, associating with thieves, committing indecent or immoral conduct, and endangering one's own or someone else's morals. While such conduct may be undesirable, it is not criminal in nature and the Legislature in 1975 believed that not every problem a child has while

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12Id. § 31-6-2-4(c).
151975 Ind. Acts, Pub. L. No. 296, § 4. In 1976 Ind. Acts, Pub. L. No. 129, § 2 the Legislature added as an act of delinquency the commission of "an offense under IC 7.1-5-7." This refers to the underage drinking law. Otherwise, the elimination of the laundry list of offenses has remained unchanged until the adoption of the new Code.
growing up is the proper subject of coercive intervention of the juvenile court.

Unfortunately, this recognition of historic mistake did not carry over to the Division or Legislature in the new Code. Despite attempts by the author to limit the definition of delinquency to acts that would be a crime if committed by an adult, the Division and Legislature voted overwhelmingly to retain jurisdiction over juveniles who are habitually truant, run away from home, habitually disobey their parents and violate the curfew laws. The court could have retained jurisdiction over such behavior under the category of “children in need of services” (CHINS) and, in fact, an earlier draft of the Code, approved by the Division, made that change.

Aside from the policy considerations, defining “delinquent act” to include such behavior as habitual disobedience of the reasonable and lawful commands of one’s parent, guardian or custodian is bad law. Although courts are reluctant to hold delinquency statutes unconstitutional, such vague and broad terms as “ungovernable” have been extensively criticized.

Similarly, both policy and legal arguments support repeal of curfew laws for juveniles. Proponents of such laws argue that nearly fifty percent of our crimes are committed by juveniles and that curfew laws keep them at home at times when criminal offenses are frequently committed. Yet those same advocates refuse to suggest a curfew for adults, who, their statistics reveal, commit the other fifty percent of the crimes. Additionally, there are so many exceptions to the curfew law that the validity of any crime prevention arguments is called into serious question. Moreover, no empirical data linking curfew violations with criminal-type behavior was presented to either the Division or the Legislature.

At least part of the curfew statute enacted in the new Code violates the Indiana Constitution. The House Judiciary Committee amended the Code in 1978 despite advice from the Division that the amendment is unconstitutional. The Division recommended to the 1979 General Assembly deletion of the amendment, but was unsuccessful. The amendment in question is section 31-6-4-2(d) which allows local communities to ad-

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vance the curfew time by not more than one hour from the times provided by the act. The effect of the amendment is to permit local or special laws which are in direct contravention of article IV, sections 22 and 23 of the Indiana Constitution.24 Furthermore, the law creates a hiatus where juveniles in one county can be legally on the streets in a neighboring county but violate curfew by returning home in their own county.

The inclusion of status offenses in the definition of "delinquent act" does have one significant advantage. Under the new Code, all juveniles charged with acts of delinquency are entitled to the same constitutional rights that traditionally extended to juveniles charged with acts that would be crimes if committed by adults. Thus, under the new Code, all juveniles charged with committing a delinquent act are entitled to representation by counsel,26 to remain silent,27 to confront28 and cross-examine29 witnesses, to obtain witnesses or tangible evidence by compulsory process,30 to introduce witnesses and evidence on their own behalf,31 to proof beyond a reasonable doubt32 and to speedy trial.33 The significance to status offenders of these statutory rights is heightened by the fact that In re Gault34 and other landmark decisions have been limited to acts of delinquency that would be crimes if committed by adults, leav-

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2 In City of Indianapolis v. Sablica, 284 Ind. 271, 342 N.E.2d 853 (1976), the Indiana Supreme Court held an Indianapolis ordinance unconstitutional because it was an attempt to create a "local or special law" where there was a general state law enacted by the Legislature which had general application throughout the state. Previously, in Medias v. City of Indianapolis, 216 Ind. 155, 23 N.E.2d 590 (1939), the court had held that where the ordinance does not contravene a statute but merely supplements it, the Indiana Constitution was not violated. In Sablica, the court expressly overruled Medias to that extent and held that even a supplemental ordinance fails to pass constitutional muster. Thus, the curfew statute which grants to local communities the power to create local and special laws which will impose penalties for violations thereof must be deemed an unconstitutional attempt by the Legislature to authorize cities and counties to violate the Indiana Constitution.

24 IND. CODE §§ 31-6-3-1(b)(1), 31-6-7-2 (Cum. Supp. 1979).
25 Id. § 31-6-3-1(b)(2).
26 Id. § 31-6-3-1(b)(3).
27 Id. § 31-6-3-1(a)(1).
28 Id. § 31-6-3-1(a)(2).
29 Id. § 31-6-3-1(a)(3).
30 Id. § 31-6-7-13(a). It should be noted, however, that for status offenders there is a dual burden of proof. To determine that the child committed the delinquent "act," as defined by § 31-6-4-1(a), the standard is proof beyond a reasonable doubt; but a determination that the juvenile is a delinquent "child," as defined by § 31-6-4-1(b), the standard is a preponderance of the evidence. Id. § 31-6-4-1.
31 Id. § 31-6-7-6.
32 In re Gault, 387 U.S. 1 (1967), was specifically limited to cases in which the juvenile is charged with an offense that would be a crime if committed by an adult and may be committed to a state institution. Id. at 13. Kent v. United States, 383 U.S. 541 (1966), concerned the waiver of a juvenile charged with rape and is of questionable support for the rights of status offenders. The third in the trilogy of landmark decisions, In re Winship, 397 U.S. 358 (1970), was also limited to the single, narrow question whether proof beyond a reasonable doubt is applicable to a juvenile charged with an act which would constitute a crime if committed by an adult. Id. at 359.
ing unanswered whether such rights apply to all juveniles charged with acts of delinquency where there is a possibility of incarceration after adjudication. It should be noted that the Indiana Supreme Court has specifically held that status offenders are not entitled to proof beyond a reasonable doubt, and the new Code thus changes Indiana law.

**JUVENILE RIGHTS**

The new Juvenile Code has three key provisions relating to the rights of those charged with delinquency. First, the Code creates many statutory rights, some of which merely recite constitutional rights, and others which fill a void in the panoply of due process. Second, the Code mandates that juveniles be advised of their rights throughout the system, not only by the judge, but also by the probation officer. Finally, a waiver of rights section specifies the exclusive procedure for a juvenile to waive constitutional and statutory rights.

**Rights**

The principal rights section of the Code is section 31-6-3-1 which states:

(a) Except when the child may be excluded from a hearing under IC 31-6-7-10, the child is entitled:

1. to cross-examine witnesses;
2. to obtain witnesses or tangible evidence by compulsory process; and
3. to introduce evidence on his own behalf.

(b) A child charged with a delinquent act is also entitled to:

1. be represented by counsel under IC 31-6-7-2;
2. refrain from testifying against himself; and
3. confront witnesses.

All but two of the above rights have been held to be constitutionally required in proceedings involving acts of delinquency which would be crimes if committed by adults and in which there is a possibility of commitment to a state institution. The rights to compulsory process and to introduce evidence have not been presented to the Supreme Court for review, but such rights are clearly implicit in the concept of due process as articulated in *Gault* and its progeny.

The right to counsel is more fully enunciated in section 31-6-7-2(a):

If a child alleged to be a delinquent child does not have an attorney who may represent him without a conflict of interest,

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36 *In re Gault*, 387 U.S. 1 (1967). *Gault* held that in such proceedings, the child is entitled to the assistance of counsel, id. at 41; to cross-examination and confrontation, id. at 57; and to the privilege against self-incrimination, id. at 55. See Bridges v. State, 260 Ind. 651, 299 N.E.2d 616 (1973); Lewis v. State, 259 Ind. 431, 288 N.E.2d 138 (1972).
37 387 U.S. 1 (1967).
and if he has not lawfully waived his right to counsel under section 3 of this chapter, the juvenile court shall appoint counsel for him at the detention hearing, or at the initial hearing, whichever occurs first, or at any earlier time. The court may appoint counsel to represent any child in any other proceeding.

This section is not only a firm statement of the right to counsel, it is also a warning to the defense bar to be mindful of potential conflicts of interest. Parents who pay the legal fee for their child's defense often anticipate the attorney will treat them, not the child, as the client. Parents who have had difficulties in rearing the child may seek an adjudication of the court authority over the child and may resent defense counsel's efforts to exonerate their child; they may, perhaps unintentionally, interfere with the child's right to counsel. The Code underscores the fact that this right belongs to the child, not the parent. Judges who have reason to believe that defense counsel retained by the child's parents has a conflict of interest are obligated by the statute to appoint counsel for the child.

It is critically important that defense counsel begin his representation of the child early in the proceedings. If the child is detained after his arrest, a detention hearing must be held within forty-eight hours, excluding Saturdays, Sundays and legal holidays. The court must appoint counsel for the child at that hearing if the child has neither obtained an attorney nor waived his right to counsel.

While the court is required under the new Code to conduct a detention hearing within forty-eight hours of the child's apprehension, the criteria for further detention are of dubious constitutional validity. It is here, more than any place else in the Code, that juveniles are relegated to the ranks of second-class citizens.

In adult criminal proceedings, the Indiana Supreme Court has consistently held that "the object of bail very definitely is not to effect punishment in advance of conviction." Indeed, the United States Supreme Court has written that the "right to freedom by bail pending trial is an adjunct to that revered Anglo-Saxon aphorism which holds an accused to be innocent until his guilt is proven beyond a reasonable doubt." Factors to be considered in setting reasonable bail for adults are the nature of the offense and penalty attaching, the likelihood of the accused appearing at trial, and the financial position of the accused. The factors are relevant to the only recognized purpose of bail: to insure "the presence of the accused when required without the hardship of incarcera-
tion before guilt has been proved and while the presumption of innocence is to be given effect.\(^4\)

Pretrial detention of juveniles charged with acts of delinquency that would be crimes if committed by adults is thus constitutionally permissible only to assure the appearance of the juvenile at a subsequent hearing. But the new Code exceeds such limits. It permits judges to detain such juveniles if the court finds probable cause to believe that the "detention is essential to protect the child or the community."\(^4\) The Code not only emasculates the fundamental right of juveniles to the presumption of innocence,\(^4\) but it purports to legalize preventive detention for juveniles that has been prohibited for adults.

In \textit{McKeiver v. Pennsylvania}\(^6\) the Supreme Court refused to extend the right to trial by jury to juvenile delinquency proceedings because, \textit{inter alia}, the Court found that fundamental fairness did not require juries for accurate fact-finding.\(^7\) The Court noted, however, that it had previously found implicit in fundamental fairness the requirements of notice, counsel, confrontation, cross-examination and proof beyond a reasonable doubt. Equally inextricable from fundamental fairness are the rights to the presumption of innocence and liberty. There is no justification for abrogating these rights in juvenile delinquency proceedings. The pretrial detention section smacks of the "benevolent," unbridled discretion judges had before \textit{Gault} held that the Bill of Rights is not for adults only.

The Legislature should have provided that the rights to the presumption of innocence and liberty are also not for adults only. If there is no fear that the child will abscond from the jurisdiction of the court, there is no legitimate societal purpose in detaining the child until his alleged commission of the alleged delinquent act has been proven beyond any reasonable doubt. The only redeeming aspect of the detention provisions

\(^{4}\text{Hobbs v. Lindsey, 240 Ind. 74, 78, 162 N.E.2d 85, 88 (quoting United States ex rel. Rubenstein v. Mulcahy, 155 F.2d 1002, 1004 (2nd Cir. 1946) (1959)).}\)

\(^{5}\text{IND. CODE § 31-6-4-5(g)(2) (Cum. Supp. 1979).}\)

\(^{6}\text{See Estelle v. Williams, 425 U.S. 501 (1976), wherein Chief Justice Burger, speaking for the Court, stated:} \textit{\"The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. Long ago this Court stated: \"The principle that there is a presumption of innocence in favor of the accused is the undeniable law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.\" \textit{Id.} at 503, (quoting Coffin v. United States, 156 U.S. 432, 435 (1895)). For the applicability of the presumption of innocence to juvenile proceedings, \textit{Estelle} must be read in conjunction with \textit{In re} Winship, 397 U.S. 358 (1970), wherein the Court held the standard of proof beyond a reasonable doubt applicable to juvenile delinquency proceedings in which the child is charged with an offense that would be a crime if committed by an adult when an adjudication for such an offense could result in commitment to a state training school. The Court, in \textit{Winship}, warned against dilution on the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. \textit{Id.} at 364.}\)

\(^{7}\text{46403 U.S. 528 (1971).}\)

\(^{8}\text{\textit{Id.} at 643.}\)
of the Code is that juveniles who are detained are given a strict statutory right to speedy trial.

Indiana is perhaps the first state in the nation to adopt a speedy trial statute for juveniles charged with acts of delinquency. Section 31-6-7-6 requires, *inter alia*, that a petition must be filed within seven days after the child has been taken into custody and that either the fact-finding or waiver hearing must be commenced within twenty days thereafter, each period excluding Saturdays, Sundays, and legal holidays. Although there was no provision for speedy trial in the 1945 Juvenile Code which has governed Indiana’s delinquency proceedings for over thirty years, the state’s first juvenile court act, adopted 1903, and the first juvenile code, adopted in 1905, mandated that if the child were detained, he was entitled to speedy trial."}

One potential, serious flaw in the new speedy trial section is the provision that if jurisdiction over the juvenile is waived to the criminal court “the computation of time under Indiana Criminal Rule 4 commences on the date of the waiver order.” The Indiana Supreme Court has stated, in *dicta*, that speedy trial begins when the petition alleging delinquency is filed, not when the cause is subsequently waived to criminal court. If the Legislature can override a procedural ruling of the Indiana Supreme Court, the Code grants to the prosecutor significantly more time within which to move the case to trial.

The new Juvenile Code also requires the court to provide the child and his parents, guardian or custodian with notice of the nature of the allegations against the child, his constitutional and statutory rights, the possibility of waiver to a criminal court, and the dispositional alternatives available to the juvenile court if the child is adjudicated a delinquent child. Notice is constitutionally mandated by *Gault*. The Code

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"The Acts of 1903 provided, in pertinent part:

That if any such boy or girl against whom a complaint is made is unable to give bond and the magistrate does not release him or her on his or her own recognizance, then said boy or girl shall be entitled to an immediate hearing and trial in the juvenile court according to law.


"IND. CODE § 31-6-7-6(d) (Cum. Supp. 1979).

"State ex rel. Hunter v. Juvenile Court, 26 Ind. 624, 308 N.E.2d 696 (1974). The child in *Hunter* had been charged by information in the municipal court in Marion County with murder. When the grand jury determined that he was only 16, he was transferred to the juvenile court. The defense attorney filed a motion in opposition to the court acquiring jurisdiction, arguing that Indiana Criminal Rule 4 had already been violated. The court, relying on *State ex rel. Atkins v. Juvenile Court*, 252 Ind. 237, 247 N.E.2d 53 (1969), held that the municipal court had no jurisdiction over the child and thus the six-month period of time for trial did not start running until the delinquency petition was filed on January 4, 1974. *Hunter*, at 627, 308 N.E.2d at 696. The new Juvenile Code would change the speedy trial rule to provide that the period commences when the court orders waiver, which could be 20 days (excluding Saturdays, Sundays, and legal holidays) after the filing of a petition.

"IND. CODE § 31-6-4-13(e) (Cum. Supp. 1979).

"In re Gault, 387 U.S. 1, 33 (1967)."
does not specifically state that notice given at the initial hearing must be in writing, although such a requirement is clearly compelled by the section mandating issuance of summons to the child, his parent, guardian, custodian or guardian ad litem, which must be accompanied by a copy of the petition. Furthermore, the Indiana Supreme Court has held that the minimum requirement for notice in delinquency proceedings is that the child and his parent be notified in writing of the specific charge or factual allegation against the child and that such notice be given at the earliest practical time but, in any event, sufficiently in advance of the fact-finding or waiver hearing to permit preparation.

Any doubts about the applicability of double jeopardy to juvenile court proceedings were erased by the Supreme Court's decision in Breed v. Jones. The new Code does not enumerate double jeopardy as a right, but it was drafted so as to eliminate the factual situation which gave rise to Breed. The initial hearing section requires the court to determine whether the prosecutor seeks waiver before asking the child if he admits or denies the allegations in the petition. If waiver is sought, the court is prohibited from accepting an admission or denial by the child. Thus, defense counsel may not pre-empt waiver by a quick admission, thereby invoking jeopardy.

After the petition alleging delinquency has been filed, juveniles have historically had an unfettered right to change of venue from the judge without cause. At the stroke of midnight on September 30, 1979, that right will disappear. The Code mandates that a change of venue from the judge "may be granted only for good cause shown by affidavit filed at least twenty-four (24) hours before the fact-finding hearing." Adults in either civil or criminal trials have an automatic right to a change of judge without stating any reason whatsoever. The restriction of such a right in delinquency proceedings, where the child faces the threat of deprivation of liberty until age twenty-one is unjustifiable, illogical and an unwarranted demotion of children to second-class citizenship.

The right to a change of judge in delinquency cases was recognized in 1957 in State ex rel. Fritz v. Delaware Circuit Court and the following year in State ex rel. Duffy v. Lake Juvenile Court to have a statutory basis. A unanimous Supreme Court held "that when any matter of a statutory nature not triable by a jury is pending, the judge before whom the cause is pending shall grant a change of venue." A delinquency pro-

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ceeding was held to be an "adversary proceeding of a statutory nature not triable by a jury," thereby entitling juveniles to the right. In 1968 the Supreme Court reaffirmed an alleged delinquent's right to a change of judge without cause, but based its decision on the rules of civil procedure rather than statutes.6

Neither the Juvenile Justice Division nor the Legislature were told that the right to a change of venue from the judge without cause had created any problems for courts or the administration of juvenile justice. Nor were any philosophical arguments postulated by opponents of the rule. On the contrary, no logical or rational basis for changing the law was even suggested. The legislative committees that considered the Juvenile Code did not debate the change of venue section; they simply approved the recommendations of the Division. In so doing, juvenile rights were dealt a serious and unnecessary blow.

After an adjudication of delinquency, a juvenile has a qualified statutory right under section 31-6-4-16 to a disposition that:

1. least interferes with family autonomy;
2. is least disruptive of family life;
3. imposes the least restraint on the freedom of the child and his parent, guardian or custodian, and
4. provides a reasonable opportunity for participation by the child's parent, guardian, or custodian.

The "right" is qualified by the words: "[w]hen consistent with the safety of the community and the welfare of the child ..." This section is ripe for litigation by defense attorneys who carefully make a record at the disposition hearing.

If the juvenile has been released pending disposition and if no misconduct has occurred during such period, it would be difficult for a court to find that commitment to the Indiana Boys' School or Indiana Girls' School, or placement at a "private" facility, is necessary for the safety of the community.

One of the most important additions to the juvenile law incorporated in the new Juvenile Code is the following requirement:

The juvenile court shall accompany its dispositional decree with findings of fact on the record concerning the needs of the child for care, treatment, or rehabilitation and for participation by the parent, guardian, or custodian; and it shall specify its reasons for the disposition.64

Defense counsel must enter the disposition hearing with the same preparation as he would the fact-finding hearing. Probation officers whose predisposition reports65 are damaging to counsel's proposed

6Id. at 407, 151 N.E.2d at 295.
6IND. CODE § 31-6-4-16(j) (Cum. Supp. 1979)(emphasis added).
6The predisposition report is required. Id. § 31-6-4-15. Defense counsel's attention is
disposition should be subpoenaed if necessary and called as witnesses to justify their conclusions and recommendations; with equal vigor, counsel should call witnesses to support alternatives to the recommendations of the caseworker. All too often, defense attorneys assume their job is completed after the trial. Such a conclusion is totally inappropriate in the juvenile court where the focus is not only on whether the child committed the act, but, if he did, on what rehabilitative steps are necessary to prevent such conduct in the future. Counsel is not only fulfilling a constitutional role, he is helping shape the life of a child. Such responsibility should not be taken lightly.

There was no attempt either in the Division or the General Assembly to grant juveniles a statutory right to jury trial or bail. As noted earlier, the United States Supreme Court has held that jury trials are not constitutionally required in the juvenile court, but has not yet considered the question of bail.

Advisement of Rights

Implicit in the concept of constitutional rights of an accused is that the accused be advised of his rights. There has not, however, been uniformity throughout Indiana on when and by whom children should be apprised of their rights. The new Juvenile Code eliminates any confusion in the area and mandates advising of rights at various stages of the proceedings.

Probation officers have historically been viewed as social workers — not police officers — and thus they were exempt from any duty to advise juveniles of their rights, such as the right to remain silent. Furthermore, communication between juveniles and their probation officers enjoyed a qualified statutory privilege. This privilege was eroded substantially by the Indiana Supreme Court's ruling in 1978 that when ordered to do so by

directed to subsection (d) which sets forth the identical least restrictive alternative language of the disposition section. Also, subsection (f) mandates that the predisposition report "be made available within a reasonable time before the dispositional hearing . . . to any attorney . . . representing the child . . ." Id. § 31-6-4-15(f). The Indiana Supreme Court has held that notice of the fact-finding hearing given only one day before trial was inadequate. State ex rel. McClintock v. Hamilton Circuit Court, 249 Ind. 333, 232 N.E.2d 356 (1968). Counsel should argue that receiving the predisposition report only a day before the disposition hearing is also inadequate if it contains information which requires refutation by evidence which cannot be presented at a hearing held the following day. Such untimely notice of the probation officer's recommendations would deprive the defense attorney of sufficient opportunity to subpoena witnesses on behalf of the child.


"For a compendium of state and federal cases dealing with the applicability of bail to juvenile delinquency proceedings, see P. PIERSMA, LAW AND TACTICS IN JUVENILE CASES 195-99 (3d ed. 1977).

"IND. CODE § 33-12-2-22(c) (1976).
a court, a probation officer must testify about private communications with an alleged delinquent.\textsuperscript{69}

On the heels of the court’s decision, the Legislature enacted section 31-6-4-7(c) which, \textit{inter alia}, requires probation officers to advise juveniles and their parents, guardians or custodians, at the preliminary inquiry, of certain rights, including the child’s rights to remain silent and to counsel. The new law fails to specify a remedy for failure to comply with its provisions. Defense counsel should argue that any non-volunteered inculpatory statements of juveniles made to their probation officers should be excluded from evidence unless the child was properly advised by the probation officer of the rights specified in the act. Even if the child was first advised of his rights, any statement of the child should be suppressed unless there was a valid waiver of rights in compliance with section 31-6-7-3, which applies the law of police custodial confessions to preliminary inquiries by probation officers.

The juvenile court judge is also mandated by the new Code to advise juveniles of specified rights at the detention hearing,\textsuperscript{70} the initial hearing\textsuperscript{71} and the disposition hearing.\textsuperscript{72}

When law enforcement agencies take fingerprints or photographs of a juvenile, they have a duty under the new Code to give written notice to the juvenile and his parent, guardian or custodian of the child’s right to have such records destroyed under specified conditions.\textsuperscript{73}

No prior juvenile statute in Indiana has required that juveniles be advised of their rights. The new Juvenile Code follows the example of the criminal code’s guilty plea statute\textsuperscript{74} which lists the rights of which a defendant must be advised before he may enter a valid guilty plea. The new Code sections will thus help judges comply with the law by specifying their duties. The Code also creates a fertile ground for defense counsel to challenge juvenile court “admissions” or inculpatory statements of their clients when the strict, mandatory requirements of the law have not been fully satisfied.

\textit{Waiver of Rights}

The statutory law in Indiana has heretofore been silent on the requirements for a valid waiver by a juvenile of his statutory or constitutional rights. The new Juvenile Code represents a break with tradition. In an attempt both to codify case law and to modify it, the new Code includes a separate section setting forth the exclusive method by which juveniles are permitted to waive their rights.\textsuperscript{75}

\begin{footnotes}
\item \textsuperscript{69}Massey v. State, \textit{\_\_\_\_\_\_\_\_\_\_\_\_\_}, 371 N.E.2d 703 (1978).
\item \textsuperscript{70}\textit{IND. CODE} \textsection 31-6-4-5(f) (Cum. Supp. 1979).
\item \textsuperscript{71}\textit{Id.} \textsection 31-6-4-13(e).
\item \textsuperscript{72}\textit{Id.} \textsection 31-6-4-16(f).
\item \textsuperscript{73}\textit{Id.} \textsection 31-6-8-1.5(e).
\item \textsuperscript{74}\textit{Id.} \textsection 35-4.1-1-3.
\item \textsuperscript{75}\textit{Id.} \textsection 31-6-7-3.
\end{footnotes}
An exhaustive analysis of the Indiana cases dealing with the waiver of juvenile rights is beyond the scope of this article; however, a brief summary of the leading decisions is essential to provide a framework in which to examine the new statutory scheme. Although Indiana case law pertaining to waiver of juvenile rights has developed largely independent of the Supreme Court's ruling in Gault, that decision represents a logical starting point because it was in that opinion that the Court first held that the privilege against self-incrimination applied to juvenile proceedings, as well as adult criminal proceedings. The Court noted that "special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique — but not in principle — depending upon the age of the child and the presence and competence of parents." These "special problems" relating to waiver have caused Indiana courts numerous difficulties in determining whether a waiver by an accused juvenile of his constitutional rights has been knowingly, voluntarily and intelligently made.

The Indiana Supreme Court's first opportunity to apply the Gault decision came in 1969 in McClintock v. State which was a delinquency proceeding in which a fourteen year-old girl gave incriminating statements to the police after having signed a standard waiver of rights form. The court reversed the judgment, holding that a fourteen year-old girl cannot be presumed to be capable of waiving her rights where she has had no opportunity to consult with counsel, or with her parents.

In 1972 the Indiana Supreme Court issued its landmark decision in Lewis v. State which, for the first time in Indiana, established procedures to be followed in taking a juvenile's statement — and, thus, prerequisites for an effective waiver by a juvenile of constitutional rights. The defendant in Lewis was a seventeen year-old boy charged and convicted of first degree murder. He had been charged initially in the criminal court, there being no juvenile court jurisdiction over first degree murder at the time. At trial, Lewis' oral confession was admitted into evidence. He had signed a standard waiver of rights form, but was not given the opportunity to consult with his parents or an attorney prior to the oral statement. Before a written statement could be obtained, an attorney and Lewis' mother arrived and, thereafter, Lewis refused to sign any statement.

In reversing the conviction, the court stated that "[c]learly defined procedures should be established in areas which lend themselves to such standards in order to assure both efficient police procedure and protection of the important constitutional rights of the accused. Age is one area which lends itself to clearly defined standards."
A juvenile's statement, the court held, cannot be used against him at a subsequent trial or hearing, unless both he and his parents or guardian were informed of his (1) right to counsel, and (2) right to remain silent. Furthermore, the child must be given an opportunity to consult with his parents, guardian or attorney as to whether or not he wishes to waive those rights. After this procedure, a child may waive his rights if he wishes, provided of course that there are not elements of force, coercion or inducement present.

_Lewis_ has been the subject of extensive interpretation over the last seven years and has been substantially watered down despite continual lip service given it by the supreme court. To some extent, the new Juvenile Code attempts to further dilute _Lewis_; in at least one important circumstance, however, the new Code strengthens the rights of juveniles. It remains to be seen whether the Legislature can abolish by statute that which the Indiana Supreme Court has created as a constitutional safeguard. The constitutionality of the waiver of rights section awaits litigation.

The most significant dilution of _Lewis_ in the new Code is the provision that the juvenile can, under certain circumstances, waive his right to meaningful consultation with his parent, guardian, guardian ad litem or custodian. The Indiana Supreme Court has not permitted such a relinquishment of a procedural necessity mandated in its 1972 opinion. It should be noted parenthetically that the waiver of rights section of the Code was the focus of perhaps the most heated and controversial debates of any section considered by the Division. Numerous attempts by prosecutors on the Division to further weaken _Lewis_ resulted in a series of tie votes, with the chairman voting to retain in statutory form the requirements set forth in _Lewis_.

There is one significant, though perhaps accidental, strengthening of _Lewis_ and its progeny in the new Code's waiver of rights section. Since 1972, the court has held that the procedures dictated in _Lewis_ apply only to persons under the age of eighteen at the time of the confession, so that an eighteen year-old who committed an act of delinquency before he reached the magical age of adulthood but who confessed afterwards could not seek refuge in the _Lewis_ holding. The new Code requires an opposite result.

Under the new Code, a “child” is defined to include a person “eighteen (18), nineteen (19), or twenty (20) years of age who either is charged with a delinquent act committed before his eighteenth birthday or has been adjudicated a child in need of services before his eighteenth birthday.”

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Thus, included in the definition of "child" is the eighteen year-old who has been waived to criminal court and who then makes an incriminating statement to police. Since even murder must now be waived due to its inclusion in the definition of "delinquent act," any person who commits an act that would be a crime if committed by an adult prior to turning eighteen must be accorded the due process waiver of rights procedures enacted by the Legislature in the new Code.

CONCLUSION

The Juvenile Justice Division which drafted the new Code was comprised of conservatives and liberals, Republicans and Democrats, representatives of rural and urban communities, and professionals from each element of the juvenile justice system. As a result, the new Juvenile Code represents compromises reached through three years of research, deliberation, testimony and hard-fought debate. No member of the Division supports every provision in the final draft; but each member supported the Code as a package.

Balancing the protection of the public and the rights of juveniles is an arduous task. The new Code, despite a few sections to the contrary, achieves both goals. The Code is proof that parens patriae and due process are not incompatible. But, as with any significant legislation, its success will not be known until it is tested in the courtroom.

\textsuperscript{85}Id. § 31-6-4-1(a).