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In re Gault and the Colorado Children's Code

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NOTE

IN RE GAULT AND THE COLORADO CHILDREN'S CODE

A MAJOR statutory revision of the juvenile court system of Colorado went into effect this summer. This legislation, known as the Colorado Children's Code,[1] applies the principles of due process to juvenile proceedings.

Only a few months earlier the United States Supreme Court had handed down its decision in the case of *In re Gault*.[2] That decision applied the Constitutional safeguards of due process to juvenile proceedings which may lead to incarceration in a state institution.

Gault will undoubtedly have an enormous effect on the juvenile courts of most states. In Colorado, however, the legislature anticipated the direction that juvenile law was pursuing and enacted the Code.

This note will examine the Code in depth and in so doing will point out the areas in which it has embodied the principles of due process as enunciated in *Gault*. In order to do this, it will be necessary to first look at the decision itself.

I. THE *Gault* DECISION

The facts in *Gault* are recited at length in the decision.[3] Briefly, they concern a fifteen year old boy, Gerald Gault, who was accused of having made a lewd telephone call to a neighbor. Gerald was taken into custody without his parents' knowledge. His parents had no formal notice of the charges against their son. In a very informal juvenile court proceeding Gerald was adjudicated a delinquent and committed to the State Industrial School for the period of his minority, unless released sooner. A writ of habeas corpus was dismissed by the Superior Court and dismissal was affirmed by the Arizona Supreme Court.[4] The United States Supreme Court received the case on appeal from this latter decision of the Arizona court.

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[1] Ch. 443, §§ 1, 2, [1967] Colo. Laws 993 [hereinafter referred to as the Code].

[2] 387 U.S. 1 (1967). 7-2 decision. The majority opinion was written by Mr. Justice Fortas. Justice Harlan dissented in part and Justice Stewart dissented.

[3] *Id.* at 4.

[4] Application of Gault, 99 Ariz. 181, 407 P.2d 760 (1965).

The United States Supreme Court limited its decision to the specific issues raised by the case: namely, a juvenile's right to notice of the charges against him, to counsel, to confrontation and cross-examination of the witnesses, to the privilege against self-incrimination, to have a transcript made of the proceedings, and to appellate review.[5] The application of the decision was limited to juvenile delinquency proceedings that might result in the child's being committed to a state institution.[6]

Extensive reference was made in the decision to the history of the juvenile court system. Nothing in the decision was intended to disturb the commendable practices of that system. For example the practice of processing juveniles separately from adults is not affected.[7] Notice was taken of the fact that from the inception of the juvenile court system, wide differences between the procedural rights of adults and of juveniles have been tolerated.[8] These differences were adopted in the hopes that treatment and rehabilitation of the juvenile would be easier in an informal atmosphere. In practice, however, that hope has never materialized. The Court noted that the failure to observe the requirements of due process had resulted in cases of unfairness to individuals and the denial of fundamental rights.[9] It stated that the primary and indispensable foundation of individual freedom is due process of law.[10] Its feelings are adequately summed up by the statement of the author of the majority opinion, Mr. Justice Fortas: "Juvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[11] Thus the application of due process requirements to juvenile proceedings that had been initiated in *Kent v. United States*[12] was continued.

The Court began by declaring that notice which would be constitutionally adequate in an adult civil or criminal proceeding[13] is required in delinquency hearings.[14] It stated specifically that the notice must be in writing, must contain the specific charge or factual allegations to be considered at the hearing, and must be given at

[5] 387 U.S. at 10. (The last two issues were not ruled upon.)

[6] *Id.* at 13.

[7] *Id.* at 23.

[8] *Id.* at 14.

[9] *Id.* at 19.

[10] *Id.* at 20.

[11] *Id.* at 18.

[12] 383 U.S. 541 (1966).

[13] Generally, the notice must recite the specific charge, be reasonably calculated to apprise interested parties of the pendency of the action, and afford them an opportunity to present their objections. *See* Armstrong v. Manzo, 380 U.S. 545 (1965); *In re* Oliver, 333 U.S. 257 (1948).

[14] 387 U.S. at 33.

the earliest practicable time,[15] in any case, sufficiently in advance of the hearing to permit adequate preparation of the case.[16] Even though Mrs. Gault actually knew of the nature of the charges against her son, the majority felt her knowledge did not excuse the lack of adequate notice and was not a waiver of the requirement of notice.[17] It was pointed out that one of the purposes of notice is to clarify the issues to be considered, and as the facts showed even the juvenile court judge was unclear about the precise issues of the case.[18]

Attention was turned next to the issue of right to counsel. The application of right to counsel which had earlier been applied in the adult area,[19] and then continued into juvenile waiver proceedings,[20] was with this case applied to those juvenile proceedings that carry the prospect of incarceration.[21] The Court notes that "the Due Process Clause of the Fourteenth Amendment requires that . . . the child and his parent must be notified of the child's right to be represented by counsel . . ."[22] and that the child has the right to have counsel appointed if unable to afford it.[23]

The Supreme Court had already ruled that the rights of confrontation[24] and cross-examination[25] are available to adults in state prosecutions under the Due Process Clause. *Gault* extended these rights into juvenile proceedings which may result in imprisonment and declared that absent a valid confession a delinquency determination and commitment to a state institution could not be sustained "in the absence of sworn testimony subjected to the opportunity for cross-examination . . . ."[26]

The Fifth Amendment privilege against self-incrimination has been interpreted by numerous court decisions to require that an accused adult be advised of his right to remain silent and that he make an intelligent waiver of that right before his incriminating statements may be used in court.[27] It has also been decided that the privilege applies in any adult proceedings, civil or criminal,[28] and

[15] *Id.*
[16] *Id.*
[17] *Id.* at 34 n.54.
[18] *Id.*
[19] Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).
[20] Kent v. United States, 383 U.S. 541 (1966).
[21] 387 U.S. at 36.
[22] *Id.* at 41.
[23] *Id.*
[24] Pointer v. Texas, 380 U.S. 400 (1965).
[25] Douglas v. Alabama, 380 U.S. 415 (1965).
[26] 387 U.S. at 57.
[27] *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).
[28] Malloy v. Hogan, 378 U.S. 1 (1964); Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

that "it protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used."[29] *Gault* requires that this same constitutional privilege against self-incrimination also be applicable to juveniles.[30]

Since *Gault* was reversed on the above grounds, the Court felt that it need not rule on the question of the necessity to provide a transcript of proceedings or the right to an appellate review of a delinquency determination.[31]

As can be readily seen, *Gault* applies far reaching Constitutional requirements to those juvenile proceedings which might result in incarceration.

Henceforth, a juvenile must be adequately notified of the charges against him and informed of his right to counsel, either self-retained or court appointed. Furthermore, an accused juvenile has the right to confront witnesses and to cross-examine their testimony, and he may avail himself of the privilege against self-incrimination.

This note will next examine the Colorado Children's Code and, where appropriate, will point out the areas in which the Code has embodied the requirements established by *Gault*.

II. THE COLORADO CHILDREN'S CODE

A. *The Intake Process*

1. Jurisdiction of the Court

Under the newly enacted Colorado Children's Code the juvenile court has a wide range of jurisdiction.[32] However, only two areas of jurisdiction are relevant to the present discussion. These are the code classifications of "delinquent child," and "child in need of supervision." A delinquent child is defined as a child between the ages of ten and eighteen who has violated any federal or state law except traffic or game and fish laws; any municipal ordinance, except traffic, which may be punished by a jail sentence; or any lawful order of the juvenile court.[33] The definition, however, does

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[29] Murphy v. Waterfront Commission, 378 U.S. 52, 94 (1964) (concurring opinion).

[30] 387 U.S. at 55.

[31] *Id.* at 58.

[32] Code § 22-1-4.

[33] *Id.* § 22-1-3(3), 22-1-3(17)(a). The exclusive nature of this jurisdiction may be subject to attack under the Colorado Constitutional Provision giving original jurisdiction to the district court in criminal matters. *See* COLO. CONST. art. 6, §9. *See also* Garcia v. District Court, 157 Colo. 432, 403 P.2d 215 (1965). A decision would seem to rest on whether the conduct of the juvenile delinquent can be characterized as criminal. At the time of this writing an appeal on this issue to the Colorado Supreme Court is imminent.

not apply to crimes of violence punishable by death or life imprisonment where the defendant is sixteen years of age or older.[34] At the same time, the definition does include any child under sixteen who has committed a traffic offense, "if his case is transferred from the county court to the juvenile court."[35]

It should be noted at the outset that the upper age limit of eighteen has been scaled down to sixteen in the case of capital offenses. This provision no doubt reflects a compromise between the juvenile court's goal of serving the welfare of the child,[36] and the goals of retribution and deterrence served by traditional penology. The Code at least reflects a legislative judgment that every child sixteen years of age or older who has committed a crime punishable by death or life imprisonment is incapable of benefitting from juvenile court services to the point where he ceases to be a menace to society. The validity of such a universal judgment is certainly open to doubt.

As stated above, the juvenile court has no jurisdiction of traffic offenses committed by a child sixteen or over, and only conditional jurisdiction if the child is under sixteen. This provision might indicate the belief that most traffic offenses do not involve moral turpitude, and the desire to conserve juvenile court resources for offenses that do involve moral guilt or contain evidence of future criminal conduct. If the foregoing is correct, it is perhaps regrettable that jurisdiction was not conferred on the juvenile court in at least some traffic cases. Illegal drag racing, hit and run, and drunken driving are offenses which often involve a high degree of moral turpitude, and the juvenile offender might be expected to benefit from juvenile court facilities. This section of the Code is quite confusing in that there are no directions as to the basis on which transfer of a child under sixteen to the juvenile court may be made. The Code also states that the juvenile court may refuse to accept jurisdiction in such a case.[37] Again no hints as to the criteria to be used are given. It would seem that here particularly the juvenile court should be given exclusive jurisdiction. The very fact that a child under sixteen is driving a car indicates a need for the services of the juvenile court.[38]

The second area of juvenile court jurisdiction to be discussed is that classified as "child in need of supervision." This term in-

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[34] *Id.* § 22-1-3(17)(b).

[35] *Id.* § 21-1-3(17)(c).

[36] *Id.* § 22-1-2(1)(b).

[37] *Id.* § 22-1-4(b)(ii).

[38] *See generally* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 24 (1967).

cludes those children who are habitually truant from school;[39] who have run away from home; who are beyond the control of their parents, guardians, or legal custodians;[40] or whose behavior is such as to endanger their own or others' welfare.[41] Such children have traditionally been within the jurisdiction of juvenile courts, and have previously been labelled as delinquent.[42] The change in nomenclature made by the Code is apparently an attempt to avoid the stigma of the term "delinquent" in those cases where a child has committed no real crime.

Hopefully, though, this clause will not be used as a vehicle for the imposition of a judge's personal morals. It could be interpreted as allowing a judge to dictate the length of a child's hair or the nature of his dress. If so, abuses could result.

2. Pre-Adjudication Procedure

The Code deals at some length with formal pre-adjudication procedure. A child may be taken into temporary custody by a law enforcement officer or juvenile court probation counselor when (a) in the presence of the officer he has violated a federal, state, or municipal law, other than traffic or game and fish law;[43] (b) there are reasonable grounds to believe that the child has committed an act which would be a felony if committed by an adult;[44] (c) the child is seriously endangered in his surroundings, or seriously endangers others, and immediate removal appears to be necessary for his protection or the protection of others;[45] or (d) there are reasonable grounds to believe he has run away from his legal custodian.[46]

The probation counselor may also commit a child to temporary custody if the child has violated the conditions of probation.[47] The Code further states that such temporary custody is not an arrest and does not constitute a police record. It is at least questionable whether such detention is actually an arrest by constitutional standards.[48] The drafters of the Code seem to recognize this by the incorporation of the "reasonable grounds" requirement. The section of the

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[39] Code § 22-1-3(18)(b).

[40] *Id.* § 22-1-3(18)(c).

[41] *Id.* § 22-1-3(18)(d).

[42] *See, e.g.,* COLO. REV. STAT. ANN. § 22-8-1(2)(1963).

[43] Code § 22-2-1(1)(b). This requirement is, of course, a departure from the general Colorado arrest statute. COLO. REV. STAT. ANN. 39-2-20 (1963). However it is in conformity with the arrest procedure followed in most jurisdictions. PROSSER, TORTS § 26, at 136 (3d ed. 1964).

[44] *Id.* § 22-2-1(1)(c).

[45] *Id.* § 22-2-1(1)(d).

[46] *Id.* § 22-2-1(1)(e).

[47] *Id.* § 22-2-1(2)(a), (b), (c).

[48] *See, e.g.,* United States v. Mitchell, 179 F. Supp. 636 (D.D.C. 1959) (holding that defendant was arrested when asked to accompany officer to a nearby call box).

Code stating that it is not an arrest, therefore, would seem to be aimed at avoiding the stigma which attaches to an arrest, rather than the avoidance of any constitutional requirements.

Assuming a child has been taken into custody under one or more of these provisions, the Code provides rather definite procedures concerning his further detention and release. The officer must notify the child's parents or guardian "without unnecessary delay."[49] He must inform the parent or guardian that if the child is placed in detention, he has the right to a prompt hearing to determine further detention.[50] However, the child must be released to the care of his parents or other responsible adult "unless his immediate welfare or the protection of the community requires that he be detained."[51] This determination is made by the police.[52]

As stated earlier, *Gault* requires certain steps to be taken to protect the privilege against self-incrimination.[53] The Code requires that no statement or admission shall be taken from the child for use as evidence unless the child and his parents or guardian are fully advised that the child has the right to remain silent and that any statements given by him may be used in evidence.[54] This fully conforms with the *Gault* requirement.

It should also be noted that *Gault* requires notice of the right to the presence of an attorney, either retained or court appointed.[55] The Code meets this requirement[56] and further provides that such notice of right to counsel be given at later stages of the proceedings as well.

Added insurance against improper questioning is set out by another Code section which prevents the detention of a child by law enforcement officers for a period longer than is necessary to obtain name, age, residence and other "necessary information" and to contact the parents or legal custodian.[57]

If the child is not released, he must be taken to a place of detention or shelter designated by the juvenile court.[58] The proper law enforcement official must then file a report with the court stating why the child was not released.[59]

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[49] Code § 22-2-2(1).
[50] *Id.*
[51] *Id.* § 22-2-2(2).
[52] *Id.* § 22-2-2(4).
[53] 387 U.S. at 55.
[54] Code § 22-2-2(3)(c).
[55] 387 U.S. at 36.
[56] Code § 22-2-2(3)(c).
[57] *Id.* § 22-2-2(3)(a).
[58] *Id.* § 22-2-2(3)(b).
[59] *Id.* § 22-2-2(4).

When the child arrives at the detention facility, he is no longer in the "temporary custody" of the police and the person in charge of the facility must notify the parent or guardian and the court accordingly.[60] He must also notify the parents or guardian of their right to a prompt hearing to determine further detention.[61] No child may be held in detention for more than forty-eight hours unless either a petition has been filed or the court orders further detention following a hearing.[62] The Code is silent as to what type of hearing is required in this instance. The Code provides that nothing therein shall be construed to deny the right to bail.[63]

A child may come to the attention of the juvenile court in an additional manner. If the court is informed by any person that a child is or appears to be within the court's jurisdiction, the court shall have an investigation made to determine whether the interests of the public or of the child require further action.[64] On the basis of that investigation, three choices are open to the court. The court may decide no further action is necessary,[65] authorize a petition to be filed,[66] or make an informal adjustment without a petition.[67] The first two alternatives are standard practice within the juvenile system.[68] However, the third alternative is an innovation, and would appear to be quite useful in the juvenile context. The court may make such an informal adjustment under the following conditions:

> The child, his parents, guardian, or other legal custodian were informed of their constitutional and legal rights including being represented by counsel at every stage of the proceedings;[69]
>
> The facts are admitted and establish prima facie jurisdiction, except that such admission shall not be used in evidence if a petition is filed; and[70]
>
> Written consent is obtained from the parents, guardian, or other legal custodian, and also from the child, if of sufficient age and understanding.[71]

These provisions are designed to keep the informal adjustment within acceptable limits. That is, the court may not make such an

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[60] *Id.* § 22-2-3(2).

[61] *Id.*

[62] *Id.* § 22-2-3(3).

[63] *Id.* § 22-2-3(7).

[64] *Id.* § 22-3-1(1).

[65] *Id.* § 22-3-1(2)(b).

[66] *Id.* § 22-3-1(2)(c).

[67] *Id.* § 22-3-1(2)(d).

[68] *See generally* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 14 (1967).

[69] Code § 22-3-1(2)(d)(ii).

[70] *Id.* § 22-3-1(2)(d)(iii).

[71] *Id.* § 22-3-1(2)(d)(iv).

adjustment without prima facie jurisdiction and without consent of the parties. In this way informal adjustment will not become arbitrary and oppressive in its operation. One potential tool of coercion does remain: the threat to file a petition if efforts at informal adjustment prove unsuccessful. It can only be hoped that the juvenile court will not use this threat as a means of gaining acceptance of what should be a voluntary agreement.

In the event that a petition is filed, the court is required to issue a summons which recites the substance of the petition, sets forth the rights of the child, and contains a notice of the right to have an attorney present at the hearing.[72] The summons must be served at least two days prior to the hearing.[73] One of the requirements of *Gault* was for an adequate and timely notice.[74] This summons provision would appear to satisfy that requirement. However, some question may arise as to whether two days allows adequate time to prepare. If not, a legislative extension of this time might be necessary to approach more closely the requirements of *Gault*.

B. *Adjudication*

When a petition is filed the next step is normally the adjudicatory hearing. However, if the petition alleges an offense which would be a felony if committed by an adult, and the child is sixteen years of age or older, the additional adjudicative process of a transfer hearing might become necessary.[75] The purpose of such a hearing is to determine whether the child should be tried as an adult in the district court. When such a petition comes before the court, several alternatives are possible: (1) the court may proceed as in any juvenile adjudication and hold no transfer hearing;[76] or (2) the court may continue the case for further investigation and transfer hearing if it determines that further investigation is in the interests of the child, his parents, guardian, or legal custodian[77] or that the child has not been represented by counsel and requests to be so represented at the transfer hearing.[78] The court may hold the transfer hearing immediately if it finds that no additional information is necessary to such a hearing,[79] and that the child and his parents, guardian or legal custodian have retained counsel or waived their right to counsel.[80]

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[72] *Id.* § 22-3-3(1).
[73] *Id.* § 22-3-3(7).
[74] 387 U.S. at 31.
[75] Code § 22-3-6(4).
[76] *Id.* § 22-3-6(4)(b).
[77] *Id.* § 22-3-6(4)(c)(ii).
[78] *Id.* § 22-3-6(4)(c)(iii).
[79] *Id.* § 22-3-6(4)(d)(ii).
[80] *Id.* § 22-3-6(4)(d)(iii).

If a transfer hearing is held, the court must consider only two issues, whether it would be contrary to the best interest of the *child* or of the public to retain jurisdiction.[81] Written reports and other material relating to the child may be considered, and those who prepare the reports are made subject to cross-examination.[82] The hearing is to be conducted according to the rules applicable to the normal adjudicatory hearing.[83] In order to retain jurisdiction the court must find that such retention is in the best interest of the child *and* of the public.[84]

The transfer provision may be viewed as a procedure whereby the juvenile court may divest itself of jurisdiction in any case where it feels that its unique services have no application to the circumstances of a particular case; where, for example, the child has become so hardened that punishment and deterrence, as opposed to individualized treatment and rehabilitation, seems the only answer.

However, the soundness of any transfer provision is nevertheless open to serious question.[85] After all, the sixteen year old burglar is still a juvenile and should be amenable to the same treatment as his counterpart who has committed a less serious offense. The Code, however, evidences a legislative judgment that this is not always the case, and that at least a court determination is required on the issue.

If the court retains jurisdiction, either because it decided transfer is not warranted or because no transfer hearing was held, it then proceeds to an adjudication of the guilt or innocence of the child. At this adjudication the child has the right to a jury of not more than six[86] and, in conformity to *Gault,* the right to be represented by counsel.[87] The court may appoint counsel without request where it is deemed necessary.[88] If a jury is not requested the case may be heard before a referee.[89] The referee acts in the same capacity as a judge. However, the parties have the right to a hearing before the judge instead of the referee[90] and they must be informed of

[81] *Id.* § 22-3-8(1).

[82] *Id.* § 22-3-8(3).

[83] *Id.* § 22-3-8(2).

[84] *Id.* § 22-3-8(5). It is beyond the scope of this note to inquire into all of the various social and penal theories which might be included under "interest of the child" *and* "interest of the public." However, it should be recognized that these concepts are broad enough to justify a decision on virtually any set of facts.

[85] Rubin & Shaffer, *Constitutional Protections For the Juvenile,* 44 DEN. L.J. 66, 82 (1967).

[86] Code § 22-1-6(4)(a)(i).

[87] *Id.* § 22-1-6(1)(a).

[88] *Id.* § 22-1-6(1)(c) (". . . necessary to protect the interest of the child or of other parties.").

[89] *Id.* § 22-1-10(1).

[90] *Id.* § 22-1-10(3).

this right by the referee.[91] After the hearing the referee must submit his findings and recommendations to the court, inform the parties of these findings and recommendations and notify them of their right to request a rehearing before the court.[92]

Whether the hearing is held before a judge, a judge and jury, or a referee, the Code prescribes certain rules. The rules of evidence provided by the Colorado Rules of Civil Procedure are applicable.[93] This, of course, insures confrontation, cross-examination of witnesses, and the right to present evidence. These same requirements regarding sworn testimony and cross-examination were laid down in *Gault*[94] and have been met by the Code. Compulsory process is also provided.[95]

Admission to the hearing is limited to those persons who have a direct interest in the case or the workings of the court or those individuals whom the parents or guardian wish to be present.[96] This section does not deny a public trial, since anyone whom the parents wish to be present, including the press, can attend. Quite obviously it evidences a legislative judgment that the desirability of avoiding unfavorable publicity to the child must, in the juvenile context, override the general public interest in the functioning of the court. It may, however, be argued that the provision is superfluous since another section of the Code states that no pictures, names, or addresses shall be published or given any publicity except by order of the court.[97]

The Code also provides that a verbatim record is to be made in any hearing,[98] an issue which the court refused to discuss in *Gault*. This is no doubt designed to facilitate possible appeals which may be taken from any order, decree or judgment of the juvenile court directly to the Colorado Supreme Court.[99] The burden of proof is the same as in the regular criminal courts, *i.e.*, beyond a reasonable doubt.[100] Upon a request by the court, the county attorney or district attorney represents the state at any hearing, including, of course, the adjudicatory and transfer hearings.[101] This would seem absolutely essential in any case where a defense attorney is present so as to prevent the judge from being forced into the

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[91] *Id.*
[92] *Id.* § 22-1-10(4).
[93] *Id.* § 22-1-7(1).
[94] 387 U.S. at 42.
[95] Code § 22-3-3(4).
[96] *Id.* § 22-1-7(1).
[97] *Id.* § 22-1-7(5)(a).
[98] *Id.* § 22-1-7(2).
[99] *Id.* § 22-1-12.
[100] *Id.* § 22-3-6(1).
[101] *Id.* § 12-1-6(3).

role of prosecutor. If the court finds that the allegations of the petition are not sustained beyond a reasonable doubt it must dismiss the petition and release the child from any detention or restriction.[102] A petition for a new hearing may be made on any of the grounds enumerated in rule 59 of the Colorado Rules of Civil Procedure.[103]

C. *Disposition*

If the allegations of the petition are supported beyond a reasonable doubt, the court must then consider the disposition to be made.[104] In making this determination the court may consider social studies or reports made by the probation department or other agencies designated by the court.[105] Parties making such reports are subject to cross-examination on the report,[106] and the court must inform the parties of this right.[107] The court may also have the child examined by a physician, psychiatrist or psychologist.[108] There is nothing in the Code which specifically gives the child the right to present evidence concerning proper disposition. However, the Code does state that the court shall hear evidence and that such evidence is not limited to the reports mentioned above.[109] This provision could be considered broad enough to allow such presentation, particularly since the Code recognizes an adversary element in the provision for cross-examination. It is regrettable that the legislature did not set forth this right more specifically if it in fact exists.

The court has broad authority in the formulation of what it considers a proper disposition. The disposition may embody what the Code terms an "order of protection." The order may be directed to the parent, guardian, or any other person who is a party to the proceeding. The Code states:

> (2) (a) The order of protection may require any such person:
> (b) To stay away from a child or his residence;
> (c) To permit a parent to visit a child at stated periods;
> (d) To abstain from offensive conduct against a child, his parent or parents, guardian, or any other person to whom legal custody of a child has been given;
> (e) To give proper attention to the care of the home;
> (f) (i) To cooperate in good faith with an agency:

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[102] *Id.* § 22-3-6(5).

[103] *Id.* § 22-3-17(1). Those grounds are (1) any irregularity which prevented a fair trial, (2) misconduct of the jury, (3) accident or surprise, (4) newly discovered evidence which could not, with diligence, have been discovered before trial, (5) insufficiency of the evidence, (6) error in law.

[104] *Id.* § 22-3-9(1).

[105] *Id.*

[106] *Id.* § 22-1-8(2).

[107] *Id.* § 22-1-8(3).

[108] *Id.* § 22-3-9(2).

[109] *Id.* § 22-3-9(1).

(ii) Which has been given legal custody of a child,

(iii) Which is providing protective supervision of a child by court order, or

(iv) To which the child has been referred by the court;

(g) To refrain from acts of commission or omission that tend to make a home an improper place for a child; or

(h) To perform any legal obligation of support.[110]

Many of these provisions have more obvious application to other areas of juvenile court jurisdiction, such as neglected children. However, a selective use of these provisions may also serve to reduce the causes of a particular child's delinquency. If the child has been adjudicated to be "in need of supervision" the court may choose from any one or more of the following alternatives in addition to those already stated:

(b) The court may place the child on probation or under protective supervision in the legal custody of one or both parents or guardian under such conditions as the court may impose;

(c) The court may place the child in the legal custody of a relative or other suitable person under such conditions as the court may impose, which may include placing the child on probation or under protective supervision.

(d) (i) The court may require as a condition of probation that the child report for assignment to a supervised work program or place such child in a child care or detention facility which shall provide a supervised work program, if:

(ii) The child is not deprived of the schooling which is appropriate to his age, needs, and specific rehabilitative goals;

(iii) The supervised work program is of a constructive nature designed to promote rehabilitation, is appropriate to the age level and physical ability of the child, and is combined with counseling from a probation counselor or other guidance personnel;

(iv) The supervised work program assignment is made for a period of time consistent with the child's best interest, but not exceeding ninety days.

(e) The court may place legal custody in the county department of public welfare or a child placement agency for placement in a foster home or child care facility, or it may place the child in a child care center.

(f) The court may order that the child be examined or treated by a physician, surgeon, psychiatrist, or psychologist, or that he receive other special care, and may place the child in a hospital or other suitable facility for such purposes.

(g) The court may require the child to pay for any damage done to persons or property, upon such conditions as the court deems best, when such payment can be enforced without serious hardship or injustice to the child.

(h) (i) The court may commit the child to the department of institutions for placement in the Colorado youth center, any other group care facility, or other disposition as may be determined by the department, as provided by law.

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[110] *Id.* § 22-3-10.

> (ii) No child committed to the department of institutions under the provisions of this section shall be placed initially in the Lookout Mountain school for boys, the Mount View girls' school, or any other training school as defined in section 22-1-3 (25), but may be transferred to one of these facilities by the department only as provided in section 22-8-4 (2).[111]

The provisions for work programs, and indeed the whole section, are obviously designed to avoid punitive elements as much as possible. The programs aim at rehabilitation. This seems particularly desirable since the "child in need of supervision" has done nothing which could be considered a crime within the normal usage of that word.

The provision regarding disposition of delinquent children is identical except that the restriction as to placement in Lookout Mountain boys' school and Mount View girls' school is removed, and a fine up to $50 may be imposed.[112] Again, the basic aim seems to be rehabilitation.[113] The apparent goal is to serve the needs of the child. The specific offense committed is only evidence of that need. This goal is further evidenced by another section of the Code which provides that no civil disability shall result from any adjudication made, nor shall such adjudication be admissible in any other court.[114]

D. *Post-Disposition*

Many, if not most, juvenile offenders are released on probation. The Code, as might be expected, provides rules regarding the probation process. Terms and conditions of probation must be given to the child in written form and shall be fully explained to him.[115] The juvenile court must review these terms and conditions and the progress of each probationary child at least once every six months.[116] The court may release the child from probation at any time, but he must be released if he has fulfilled the requirements for two years.[117] The jurisdiction of the court is then terminated.[118] The court is given the power to modify the terms and conditions of probation at any time without a hearing.[119] Grounds for the use of this power

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[111] *Id.* § 22-3-12(1).

[112] *Id.* § 22-3-13.

[113] However, as the Supreme Court in *Gault* pointed out, expectation may not always conform to result. In fact these "training schools" are often nothing more than glorified penal institutions which have the same detrimental effect on a child as they were created to remedy.

[114] *Id.* § 22-1-9.

[115] *Id.* § 22-3-18(1).

[116] *Id.* § 22-3-18(2)(a).

[117] *Id.* § 22-3-18(2)(b).

[118] *Id.*

[119] *Id.*

are not set forth. Hopefully this power will be used only to reflect changed or improved circumstances, and not as a tool of punishment for unproved subsequent offenses.

If the child has allegedly violated the terms of his probation, a hearing must be held. The hearing must be conducted in the same manner as the regular adjudicatory hearing.[120] If the court finds that probation has in fact been violated, it may take any measures which were open to it at the time of the original disposition.[121] These provisions give important protections to the alleged violator, and could be considered as a model for the comparatively backward adult probation system.[122]

Terms of incarceration or "commitment" differ between the "delinquent" and the "child in need of supervision." But within each group no differentiation is made as to the type of offense committed. A "child in need of supervision" is committed for an indeterminate period not to exceed two years.[123] However the court may renew the commitment for an additional two years or less upon petition of the department of institutions.[124] Although the petition must set forth the reasons for the request,[125] no hearing is given. On the other hand, an adjudicated delinquent may be committed for an indeterminate period not to exceed two years with possible parole supervision not to exceed an additional two years.[126] It is difficult to understand the reasoning underlying these provisions. Why should the "child in need of supervision," who has committed no crime, face a potentially longer confinement than the delinquent? This can perhaps be explained by the difference in the institutions to which the two types of offenders are committed.[127] It is submitted, however, that this difference in treatment is unfair on its face, and that a legislative revision should be seriously considered.

Any adjudicated delinquent who has been committed to the department of institutions must be considered for parole within one year after the commitment.[128] In considering parole, the parole board is to consider "the best interests of the child and the public."[129] This, of course, vests virtually total discretion in the parole board.

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[120] *Id.* § 22-3-18(3)(d)(i).

[121] *Id.* § 22-3-18(3)(d)(ii). However, the upper age limit for child care facilities is set at 18. Code § 22-8-6. It is unclear what happens to a child who is over 18 and has violated probation.

[122] *See, e.g.,* Note, *Legal Aspects of Probation Revocation,* 59 COLUM. L. REV. 3 (1959) for an appraisal of the shortcomings of the adult system.

[123] Code § 22-3-14(3)(a).

[124] *Id.*

[125] *Id.*

[126] *Id.* 22-3-14(3)(b).

[127] *Id.* § 22-3-14(2)(a).

[128] *Id.* § 22-9-2(1).

[129] *Id.*

Parole, as stated above, is for a maximum of two years, with a review required within one year.[130] The board has the authority to release the child from parole at any time.[131] Hearings on alleged parole violations are held before a hearing panel of the parole board after notice to the parties of the alleged violation.[132] No mention is made regarding the right to presence of an attorney or of the burden of proof required to sustain the allegations. There is also no provision for court review, although a rehearing may be held before the parole board.[133] It is regrettable that the Code, which is progressive in so many areas, chooses to follow the standard practice of vesting almost total discretion in the parole board with regard to grant of parole, terms and conditions, and revocation.[134] The parole process involves issues of liberty just as surely as the original adjudication, and procedural fairness and court review would play a major part in a truly enlightened system.

Any person who has been adjudicated a delinquent or a child in need of supervision may petition the court for expungement of his record two years after the termination of juvenile court jurisdiction or two years after his release from parole.[135] Such expungement shall be granted if the person has not been adjudicated a delinquent since the prior termination of jurisdiction or parole, if no such proceeding is pending, and if the court is satisfied that satisfactory rehabilitation has occurred.[136] If expungement is granted the records are sealed and the offense is "deemed never to have occurred."[137] Therefore in answer to any inquiry, the individual can honestly reply that he has never been adjudicated a delinquent. This is a farsighted attempt to avoid the stigma of a youth indiscretion where a sincere rehabilitation has occurred. As such, it should be welcomed by those concerned with the welfare of the juvenile.[138]

CONCLUSION

The Colorado Children's Code embodies the letter as well as the spirit of the recent United States Supreme Court case of *In re*

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[130] *Id.* § 22-9-2(2)(a).

[131] *Id.* § 22-9-2(2)(b).

[132] *Id.* § 22-9-6(4).

[133] *Id.* § 22-9-6(7).

[134] *See, e.g.*, O'Conner v. State Bd. of Parole, 270 App. Div. 93, 58 N.Y.S.2d 726 (1945).

[135] Code § 22-1-11(2)(a).

[136] *Id.* § 22-1-11(2)(c).

[137] *Id.* § 22-1-11(2)(d).

[138] *See generally* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 39 (1967).

Gault.[139] That spirit is adequately summed up by the following statements of the author of the majority opinion, Justice Fortas: "Under our Constitution, the condition of being a boy does not justify a kangaroo court";[140] and, "[d]ue process of law is the primary and indispensable foundation of individual freedom."[141]

The Code embodies the principles and requirements of due process as set forth in *Gault,* and, in addition, provides safeguards in areas in which the Court did not render a decision — notably in the areas of standard of proof, transcript of proceedings, and appellate review. The Code is the product of a farsighted legislative effort and could easily become a model for similar legislation in other states.

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[139] 387 U.S. 1 (1967).
[140] *Id.* at 28.
[141] *Id.* at 20.