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Survey of Recent Developments in Indiana Law

The Board of Editors of the *Indiana Law Review* is pleased to publish its fifth annual Survey of Recent Developments in Indiana Law. This survey covers the period from June 1, 1976, through May 31, 1977. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal case and statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

I. Foreword: Indiana's New and Revised Criminal Code

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Indiana's Bicentennial Criminal Code[1] finally became effective on October 1, 1977, just three months after the date that it was originally to have become effective.[2] Although it is a completely new code, it is also a thoroughly revised code because of the manner in which it was enacted. The code was originally enacted during the 1976 session of the General Assembly, but its effective date was delayed until July 1, 1977, to permit further study of the code's provisions.[3] A Criminal Code Interim Study Commission was then established to review the code and to make recommendations for

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[1]The Criminal Code was originally enacted in 1976 during the celebration of the nation's bicentennial. *See* Pub. L. No. 148, 1976 Ind. Acts 718; Kerr, *Foreword: Indiana's Bicentennial Criminal Code, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 1 (1976) [hereinafter cited as Kerr, *Indiana's Bicentennial Criminal Code*]. The term "Criminal Code" is used with reference to this codification of criminal statutes although it is recognized that this is only one section of the entire "Indiana Code" and that criminal statutes do appear in other parts of the general code.

[2]*See* Pub. L. No. 340, § 151, 1977 Ind. Acts 1533, 1611.

[3]*See* Pub. L. No. 148, § 28, 1976 Ind. Acts 718, 817.

changes by the General Assembly.[4] This Commission's extensive study resulted in a thorough revision of the entire code by the 1977 General Assembly, so thorough, in fact, that virtually the entire code was reprinted and reenacted in an amended version.[5] Pursuant to the Commission's recommendation, the effective date was also delayed from July 1, 1977, to October 1, 1977, to facilitate distribution of the code and further preparation for implementing its adoption and use.[6]

As finally enacted, the new and revised code generally reflects the changes recommended by the Interim Study Commission. Other proposed changes were submitted to the General Assembly, including a proposal to repeal the entire code,[7] but only a limited number were approved. Three of the proposals that were approved, however, do have major significance with reference to the sentencing provisions. One provision gives the trial judge authority to impose concurrent or consecutive sentences in his discretion, with only limited exceptions.[8] This substantially changes Indiana's prior law, which generally provided for concurrent sentencing,[9] and makes Indiana's sentencing procedures similar to those followed by the federal courts.[10] Another provision authorizes the trial judge to consider the fact that a victim was sixty-five years of age or over, or was mentally or physically infirm in determining an appropriate sentence.[11] A third provision makes a convicted person liable for costs separate and apart from any sentence imposed and prohibits the suspension of costs by a court.[12]

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[4]The Commission was established by an Executive Order of the Governor on April 2, 1976.

[5]Pub. L. No. 340, 1977 Ind. Acts 1533. The only sections not reprinted and reenacted were the provisions concerning the classification and registration of drugs and controlled substances. IND. CODE §§ 35-48-2-1 to -13, 35-48-3-1 to -9 (Supp. 1977); Pub. L. No. 148, § 7, 1976 Ind. Acts 718, 762-83. [Citations herein to IND. CODE are to the 1976 official edition of the Indiana Code. Citations to "Supp. 1977" are to the 1977 official edition supplement to the official 1976 Indiana Code.] The Commission submitted five proposed statutes: Ind. S. 84, 93, 199, 200, & 1267, 100th Gen. Assem., 1st Sess. (1977). All were enacted except Ind. S. 1267, 100th Gen. Assem., 1st Sess. (1977), which was enacted in part only.

[6]Pub. L. No. 340, § 151, 1977 Ind. Acts 1533, 1611.

[7]Ind. H.R. 1516, 100th Gen. Assem., 1st Sess. (1977).

[8]IND. CODE § 35-50-1-2 (Supp. 1977).

[9]*See* Kerr, *Indiana's Bicentennial Criminal Code*, *supra* note 1, at 32.

[10]*See, e.g.*, United States v. Wenger, 457 F.2d 1082, 1083-84 (2nd Cir.), *cert. denied*, 409 U.S. 843 (1972); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 527, at 419-20 (1969).

[11]IND. CODE § 35-4.1-4-7 (Supp. 1977). This provision was placed in the Criminal Procedure Code instead of in the sentencing provisions of the Criminal Code.

[12]*Id.* § 35-50-1-3.

The major changes that are included in the new and revised code may be divided into four general categories. These include changes in style, revisions in the sections concerning defenses, changes in the definitions of various offenses, and changes in the sentencing provisions. In addition, certain provisions have been added to the code by the reenactment of statutes that were repealed and omitted from the code in 1976 and by the transfer of provisions into the code from other sections of the general Indiana statutes.

A. Changes in Style

One of the most extensive changes in the code is simply a matter of style: the naming of an offense within the provision defining the offense. In the original 1978 code, the names of the offenses were included as titles but were not included within the definitions of the various offenses.[13] In the revised version, the names of the offenses are inserted at the end of the various definitions.[14] Although this change appears to be minor, it did necessitate a revision of a substantial number of the sections in the code. The titles of four offenses were also changed by the addition of the word "criminal" in order to designate the offenses as "criminal confinement,"[15] "criminal deviate conduct,"[16] "criminal mischief,"[17] "criminal recklessness,"[18] and "criminal trespass."[19]

Numerous changes were also made throughout the code, either to improve the language or grammar employed in a particular provision,[20] or to improve the organization or structure of a provision.[21] Finally, two provisions in the code were transferred to other parts of the code without having any effect on the substance of the provisions. Robbery was classified as an offense against property in the original 1976 code,[22] but it is now classified as an offense against the

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[13]*See, e.g.*, Pub. L. No. 148, § 2, 1976 Ind. Acts 718, 730 (murder).

[14]*See, e.g.*, IND. CODE § 35-42-1-1 (Supp. 1977) (murder).

[15]*Id.* § 35-42-3-3.

[16]*Id.* § 35-42-4-2.

[17]*Id.* § 35-43-1-2.

[18]*Id.* § 35-42-2-2.

[19]*Id.* § 35-43-2-2.

[20]*See id.* § 35-41-2-1 (voluntary conduct); *id.* § 35-41-4-1 (standard of proof); *id.* § 35-41-5-2 (conspiracy); *id.* § 35-41-5-3 (multiple convictions); *id.* § 35-44-3-8 (obstructing a fireman); *id.* § 35-45-3-2 (littering).

[21]*See id.* § 35-41-3-8 (duress); *id.* § 35-41-4-4 (prosecution barred for different offense); *id.* § 35-44-3-6 (failure to appear); *id.* § 35-46-1-1 (definition of dependent).

[22]Pub. L. No. 148, § 3, 1976 Ind. Acts 718, 737.

person.[23] Likewise, the definition of sexual intercourse, which was originally included within the section defining rape,[24] is now included within the general definitions section at the beginning of the code.[25]

B. Revised Defenses

Ten specific defenses were grouped together in one chapter of the code as originally enacted in 1976. Although the codification of these defenses was one of the major improvements included in the 1976 code, many of the defenses were substantially revised by the 1977 General Assembly. Of the ten defenses, only four were not changed in some way, including: legal authority,[26] intoxication,[27] mistake of fact,[28] and duress.[29] One of the other defenses, the avoidance of greater harm,[30] proved to be so controversial that it was finally repealed and eliminated as a defense.[31] The remaining five defenses were revised to a substantial extent.

1. Defense of Person or Property.—In the code as originally enacted, a person was authorized to use "deadly force" in defense of himself or another person,[32] or in defense of property other than a dwelling,[33] but he was authorized to use only "force that creates a substantial risk of serious bodily injury" in defense of his dwelling.[34] Although the terms may have been essentially the same, the 1977 General Assembly amended the latter provision and substituted the term "deadly force" in order to resolve any question about the type of force authorized.[35] The term "deadly force" was then redefined to mean any force "that creates a substantial risk of serious bodily injury."[36] Thus, the same degree of force is now clearly authorized for the defense of both person and property, including a person's dwelling.

2. Use of Force Relating to an Arrest.—When the code was originally enacted, a provision was included concerning the authority of private citizens and law enforcement officers to use force in making arrests. The section authorized private citizens to use force

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[23]IND. CODE § 35-42-5-1 (Supp. 1977).
[24]Pub. L. No. 148, § 2, 1976 Ind. Acts 733.
[25]IND. CODE § 35-41-1-2 (Supp. 1977).
[26]*Id.* § 35-41-3-1.
[27]*Id.* § 35-41-3-5.
[28]*Id.* § 35-41-3-7.
[29]*Id.* § 35-41-3-8.
[30]Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 724.
[31]Pub. L. No. 340, § 148, 1977 Ind. Acts 1533, 1610.
[32]Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 723.
[33]*Id.*
[34]*Id.*
[35]IND. CODE § 35-41-3-2(b) (Supp. 1977).
[36]*Id.* § 35-41-1-2.

to make arrests for felonies based simply on probable cause,[37] and the 1977 General Assembly amended this to provide that a private citizen may use force to make an arrest only if a felony in fact has been committed and there is probable cause to believe that the other person committed the felony.[38] This amendment thus reinstates the previous law concerning arrests for felonies by private citizens.[39] The original section also authorized a law enforcement officer to use force "that creates a substantial risk of serious bodily injury" in making an arrest and thereby cast doubt on the authority of an officer to use "deadly force," as discussed above with reference to defense of person and property.[40] This language was also amended by the 1977 General Assembly, which substituted the term "deadly force" in order to clarify the ambiguity.[41] Finally, the original section also provided that a person could resist an arrest "only if the arrest is clearly unlawful."[42] This provision was completely eliminated from the revised code, apparently because of the difficulty in determining when an arrest is or is not "clearly unlawful."[43]

3. Insanity.—One of the most controversial provisions in the original 1976 code was the section concerning the defense of insanity. The section simply provided that a person would have a defense if he "lacked culpability as a result of mental disease or defect."[44] Since this could be interpreted as adopting the *Durham* rule concerning insanity,[45] the section was amended by the 1977 General Assembly to provide that a person is not responsible "if, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."[46] The section thus now codifies the prior Indiana law concerning insanity as a defense.[47]

4. Entrapment.—The defense of entrapment was codified in statutory form for the first time in Indiana in the 1976 version of the code,[48] and the codification promptly had an effect on the law of the state even though the code was not effective at the time. As

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[37]Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 723-24.
[38]IND. CODE § 35-41-3-3(a) (Supp. 1977).
[39]*See* Doering v. State, 49 Ind. 56 (1874); Teagarden v. Graham, 31 Ind. 422 (1869).
[40]Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 724.
[41]IND. CODE § 35-41-3-3(b) (Supp. 1977).
[42]Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 724.
[43]*See* IND. CODE § 35-41-3-3 (Supp. 1977).
[44]Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 725.
[45]Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954).
[46]IND. CODE § 35-41-3-6 (Supp. 1977).
[47]*See* Hill v. State, 252 Ind. 601, 614, 251 N.E.2d 429, 436 (1969).
[48]Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 725.

enacted, the code made no reference to Indiana's special rule requiring an officer to have some basis for suspecting a person of illegal activity before "baiting" a trap.[49] After the code was enacted, the Indiana Supreme Court eliminated this special rule and referred to the new code as indicating legislative support for this change in the law.[50] The supreme court's interpretation was apparently accepted by the 1977 General Assembly, which thereafter made no effort to add the special requirement to this section of the code. The General Assembly did, however, act to limit the defense of entrapment even further by providing that the defense exists only when an offense is produced by a "law enforcement officer, or his agent."[51] This amendment thus narrowed the definition of entrapment since the 1976 code referred to an offense produced by a "public servant."[52]

5. Abandonment.—In the 1976 version of the code, abandonment was recognized as a defense with reference to aiding and abetting, attempt, and conspiracy, but the defense did not apply to conspiracy unless the person also voluntarily prevented the commission of the crime being planned by the conspirators.[53] After reviewing all three offenses, the 1977 General Assembly decided to apply the same rules to each and provided that abandonment would be a defense (for each offense) only if the person voluntarily abandoned his efforts and voluntarily prevented the commission of the intended crime.[54]

C. Definitions of Offenses

Numerous changes were made throughout the code with reference to the penalties for various offenses; these will be discussed hereafter in connection with the sentencing provisions. Changes in the definitions of offenses, however, were limited primarily to six offenses, including: attempts, homicide, kidnapping, robbery, burglary, and theft.

1. Attempts.—When the Indiana Criminal Law Study Commission submitted its original proposals to the General Assembly, it recommended that there be a general offense of attempt and that a person should be guilty of an attempt if he committed an act or failed to do an act that would constitute "a substantial step toward the

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[49]*See* Locklayer v. State, 317 N.E.2d 868 (Ind. Ct. App. 1974). *See also* Kerr, *Criminal Law and Procedure, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 160, 186-87 (1975).

[50]Hardin v. State, 358 N.E.2d 134, 136 (Ind. 1976).

[51]IND. CODE § 35-41-3-9 (Supp. 1977).

[52]Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 725.

[53]*Id.* at 726.

[54]IND. CODE § 35-41-3-10 (Supp. 1977).

commission of the crime."[55] This recommendation was accepted in part by the 1976 General Assembly, which ultimately provided that a person would be guilty of an attempt after committing a substantial step toward the commission of a crime "and the crime would have been consummated but for the intervention of, or discovery by, another person . . . ."[56] Because this additional language would have severely limited the extent or scope of the offense of attempt, the 1977 General Assembly eliminated the language and reverted to the original recommendation of the Study Commission.[57] The offense, as finally enacted, thus gives no guidance concerning the definition of a "substantial step" and leaves this to the courts for interpretation.

2. Homicide.—(a) Murder.—The definition of the offense of murder was almost completely rewritten and restructured in the new and revised code. Under the code as originally enacted in 1976, murder was divided into two classifications. The knowing or intentional killing of another human being and the killing of another human being during the commission or attempted commission of certain felonies were classified as Class A felonies.[58] In addition, nine specified types of aggravated killings were designated as capital felonies,[59] and the death penalty was made mandatory for such offenses.[60] Major changes were made in both of these classifications, primarily because of the new requirements for capital offenses that were established by the United States Supreme Court in a series of cases decided after the 1976 Indiana Code was enacted.[61]

Because of the special difficulties involved in defining the offense of murder, the 1977 General Assembly accepted a recommendation to classify murder as a separate offense, *sui generis*.[62] As a result, the code now includes five felony classifications, including murder and Class A through Class D felonies. In addition, the former offense of capital murder was eliminated and the imposition of the death penalty was made a part of the sentencing process.[63] The definition of murder is otherwise essentially the same as that included in the original 1976 code, except that child molesting is now

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[55]INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA PENAL CODE: PROPOSED FINAL DRAFT 68 (1974) [hereinafter cited as PENAL CODE: PROPOSED FINAL DRAFT].

[56]Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 729.

[57]IND. CODE § 35-41-5-1 (Supp. 1977).

[58]Pub. L. No. 148, § 2, 1976 Ind. Acts 718, 730.

[59]*Id.*

[60]*Id.* § 8, at 790.

[61]*See* Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Gregg v. Georgia, 428 U.S. 152 (1976).

[62]IND. CODE § 35-42-1-1 (Supp. 1977).

[63]*Id.* §§ 35-42-1-1, 35-50-2-3, 35-50-2-9.

included in the list of felonies under the felony-murder provision.[64] As originally enacted, the felony-murder provisions included the offense of rape but not child molesting. Since the code also redefined rape to exclude statutory rape[65] and defined child molesting to include statutory rape,[66] the effect was to eliminate statutory rape from the list of offenses included under the offense of felony-murder. The amendment thus restores statutory rape to the list but also adds other offenses as well since child molesting is defined to include fondling or touching a child and deviate sexual conduct.

Under the code as originally enacted in 1976, murder was punishable as a Class A felony for a determinate period of from twenty to fifty years in prison.[67] This was changed by the 1977 General Assembly so that murder, as a separate classification, is now punishable by imprisonment for a determinate period of thirty to sixty years.[68] The standard penalty is to be forty years, with the possibility of twenty years being added for aggravating circumstances or ten years being subtracted for mitigating circumstances. In addition, the state is authorized to seek the death penalty if certain specified aggravating circumstances are shown to exist.[69] The circumstances must be proved beyond a reasonable doubt at a hearing on the sentence, which is to be held separately from the trial on the issue of guilt or innocence.

By adopting these provisions, the General Assembly has, in effect, required a bifurcated or two-stage trial similar to the one required by the Indiana Supreme Court for habitual offender cases.[70] The same jury or judge that determines the guilt of the defendant is to decide the issue concerning the existence of the aggravating circumstances. When a jury is involved and decides that an aggravating circumstance in fact exists, the jury is to make a recommendation to the court concerning the death penalty. Regardless of the recommendation, it is advisory only, and the judge is not bound to follow the recommendation. As enacted, the provision thus allows the judge to impose the death penalty even after a jury has recommended otherwise.[71] Furthermore, if the jury cannot agree on a recommendation, the jury is to be discharged, and the judge is authorized to make the decision concerning the sentence. A final

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[64]*Id.* § 35-42-1-1.
[65]Pub. L. No. 148, § 2, 1976 Ind. Acts 718, 733.
[66]*Id.* at 734-35.
[67]*Id.* § 8, at 790.
[68]IND. CODE § 35-50-2-3 (Supp. 1977).
[69]*Id.* § 35-50-2-9.
[70]*See* Lawrence v. State, 259 Ind. 306, 286 N.E.2d 830 (1972).
[71]IND. CODE § 35-50-2-9(d) (Supp. 1977).

safeguard is added by the specific requirement that the death penalty is to be reviewed by the Indiana Supreme Court under procedures to be adopted by the court.[72]

The section lists nine aggravating circumstances that may be proved to invoke the death penalty, but there are actually more than nine circumstances since seven offenses are listed under the felony-murder circumstances and four different types of officials are listed under the circumstance concerning the type of victim involved. Seven of the nine listed circumstances are taken from the list of offenses originally designated in the code as capital murder, but the other two circumstances are new provisions added by the General Assembly. The first aggravating circumstance restates the list of offenses included in the felony-murder definition[73] and then provides that the death penalty may be imposed if the killing with reference to these offenses was in fact intentional. This is a new provision that was not included in the original code with reference to capital murder.[74] The other additional aggravating circumstance—the eighth listed circumstance—is certain to be controversial. Under this circumstance, the death penalty may be imposed if the defendant has committed another murder at any time, even if he has not been convicted of the other murder.[75] This provision would thus cover unrelated murders at any time and at any place, even in another state or jurisdiction, as well as multiple murders committed at one time or in some pattern or scheme. If the defendant has not been convicted of such an offense, the trial court would apparently be required to try the defendant for the offense in the sentencing hearing before a sentence recommendation could be made. Presumably there would be no issue concerning jurisdiction since this would be a sentencing proceeding, but the hearing could well pose double jeopardy issues if the defendant is later brought to trial for the other offense or offenses.

(b) Manslaughter.—The definitions of voluntary and involuntary manslaughter were changed almost as drastically as the definition of the offense of murder in the new and revised code. As originally enacted in 1976, the offense of voluntary manslaughter included a number of changes from the previous law and posed several difficult

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[72]*Id.* § 35-50-2-9(h). In French v. State, 362 N.E.2d 834, 838 (Ind. 1977), the supreme court stated that it could not review and revise sentences of death until the legislative branch first established standards for applying the death penalty and procedures by which evidence relevant to the standards could be made a part of the court record.

[73]*Compare* IND. CODE § 35-50-2-9(b)(1) (Supp. 1977) *with id.* § 35-42-1-1.

[74]*See* Pub. L. No. 148, § 2, 1976 Ind. Acts 718, 730-31.

[75]IND. CODE § 35-50-2-9(b)(8) (Supp. 1977).

questions of interpretation.[76] Because of these difficulties, the 1977 General Assembly amended the definition and essentially reenacted the definition of voluntary manslaughter that existed before the code was adopted in 1976.[77] This appears to have resolved most of the questions concerning this offense except for the question concerning the burden of proof. The General Assembly repealed the provision that the state "is not required to prove intense passion resulting from grave and sudden provocation" but retained the provision that sudden heat is a mitigating factor that would reduce murder to voluntary manslaughter.[78] By this action, the General Assembly simply left the question open for resolution by the courts. No guidance is given concerning the party that is to prove the mitigating factor of sudden heat. Thus, it may still be logical to conclude that the state must prove the existence of sudden heat as an element of the offense if voluntary manslaughter is charged initially, and that the defendant has the burden at least of going forward with evidence of sudden heat if murder is the basic charge.[79]

The new definition of involuntary manslaughter, however, poses almost as many issues as the definition originally enacted in 1976. The gist of the offense under Indiana law prior to 1976 was the involuntary or unintentional killing of a human being during the commission of an unlawful act.[80] As enacted in the 1976 code, involuntary manslaughter was divided into two separate offenses. Involuntary manslaughter was defined simply as the killing of a human being while committing an offense.[81] The other offense, reckless homicide, was defined as the reckless killing of another human being.[82] The new definitions apparently expanded the former offense of involuntary manslaughter to include both intentional and unintentional killings during the commission of any offense, but the definitions still presented two difficult issues. The first issue is whether the related offense is independent of or a lesser included offense of involuntary manslaughter. For example, if a victim is killed during

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[76]*See* Kerr, *Indiana's Bicentennial Criminal Code*, *supra* note 1, at 14-15.

[77]*Compare* IND. CODE § 35-42-1-3 (Supp. 1977) *with id.* § 35-13-4-2 (1976) (repealed, effective Oct. 1, 1977). Some provisions of the Indiana Criminal Code in existence prior to 1976 were repealed effective October 1, 1977, by Pub. L. No. 148, §§ 24-28, 1976 Ind. Acts 718, 815-17, and Pub. L. No. 340, § 150, 1977 Ind. Acts 1533, 1611.

[78]IND. CODE § 35-42-1-3(b) (Supp. 1977).

[79]*See* Patterson v. New York, 429 U.S. 813 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). A similar burden of going forward has been placed on the defendant with reference to the defense of insanity, Young v. State, 258 Ind. 246, 280 N.E.2d 595 (1972), and self-defense, Woods v. State, 319 N.E.2d 688, 693 (Ind. Ct. App. 1974).

[80]IND. CODE § 35-13-4-2 (1976) (repealed, effective Oct. 1, 1977).

[81]Pub. L. No. 148, § 2, 1976 Ind. Acts 718, 731.

[82]*Id.*

the course of a rape, is the rape a lesser included offense of involuntary manslaughter? If so, would the proportionality provision of the Indiana Constitution[83] prevent the legislature from prescribing a greater penalty for rape than for involuntary manslaughter?[84] The second issue is whether the term "offense" includes any and all misdemeanors and felonies or whether it is limited, such as to acts that are dangerous to life or are mala in se.

In an effort to resolve both of these issues, the 1977 General Assembly amended the definition of involuntary manslaughter in the new code and inserted a specific list of offenses that could give rise to a charge of involuntary manslaughter.[85] The first issue was then resolved by limiting the related offenses to Class C felonies or to offenses of a less serious classification. Since involuntary manslaughter is a Class C felony, except when a vehicle is involved, there is thus no issue concerning proportionality even if the related offense is considered to be a lesser included offense of involuntary manslaughter. The other issue was resolved by limiting the offense to those that inherently pose a risk of serious bodily injury, except for the offense of battery, which was the only offense specifically included by name. Although these amendments do appear to resolve the two issues, there does seem to be an inconsistency in the provisions that would subject a person to a prosecution for involuntary manslaughter because of a death resulting from a fist fight, but would otherwise limit involuntary manslaughter to offenses inherently posing a risk of serious bodily injury. In addition, the courts undoubtedly will have difficulty in deciding what offenses are inherently dangerous or pose a risk of serious bodily injury.[86]

3. Kidnapping and Confinement.—Despite the controversial nature of the definitions of kidnapping and confinement included in the 1976 code,[87] the 1977 General Assembly made only one basic change in these provisions. Under the original code, kidnapping was defined only as the removing of a person from one place to another under certain specified aggravating circumstances.[88] Confinement was defined to include all other forms of removal from one place to

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[83]IND. CONST. art. 1, § 16.

[84]*See* Kerr, *Criminal Law and Procedure, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 137, 167-68 (1974).

[85]IND. CODE § 35-42-1-4 (Supp. 1977).

[86]This approach to defining involuntary manslaughter has been criticized because it focuses on the general nature of the offense—whether the offense is generally dangerous—instead of the defendant's conduct—whether the defendant's conduct in the particular situation was dangerous under the circumstances. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 602 (1972).

[87]*See* Kerr, *Indiana's Bicentennial Criminal Code*, *supra* note 1, at 18-19.

[88]Pub. L. No. 148, § 2, 1976 Ind. Acts 718, 732-33.

another as well as all forms of unlawful confinement without the person's consent.[89] The General Assembly decided to define kidnapping to include not only the removal of a person under the specified aggravating circumstances but also the confining of a person under the same circumstances.[90] Confinement was then left to cover all other forms of both removal and confinement. The kidnapping and confinement provisions concerning removal of a person were also amended to include the use of fraud or enticement in bringing about the removal.[91]

4. Robbery.—Robbery was defined originally in the 1976 code as the knowing or intentional taking of property from the presence of another person by force or threats of force.[92] This was not substantially different from the prior definition of robbery, which was the taking "from the person of another any article of value by violence or by putting in fear."[93] The words "knowingly or intentionally" were added, the words "from the presence of another person" were substituted for the words "from the person of another," and "putting in fear" was eliminated as an element of the offense.[94]

As revised by the 1977 General Assembly, the final definition resembles the earlier definition even more closely. The General Assembly combined both versions, in part, by including a taking "from another person or from the presence of another person."[95] Likewise, the legislature reinserted the element of putting a person in fear but expanded the definition of robbery to include a taking by the use of force against "any person" or by "putting any person in fear."[96] Each of the three possible penalties for robbery was also raised by one classification and the offense of robbery was transferred from the article concerning offenses against property to the article defining offenses against persons, as discussed above.

5. Burglary.—The offense of burglary was drastically revised by the 1976 code and was defined simply as the entering of the building of another with an intent to commit a felony therein.[97] The penalty was to be imprisonment for two to four years, or two to eight years if a deadly weapon was used, and six to twenty years if bodily injury was inflicted.[98] After reconsidering this offense, the

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[89]*Id.*

[90]IND. CODE § 35-42-3-2 (Supp. 1977).

[91]*Id.*

[92]Pub. L. No. 148, § 3, 1976 Ind. Acts 718, 737.

[93]IND. CODE § 35-13-4-6 (1976) (repealed, effective Oct. 1, 1977).

[94]*Id.* § 35-42-5-1 (Supp. 1977).

[95]*Id.*

[96]*Id.*

[97]Pub. L. No. 148, § 3, 1976 Ind. Acts 718, 736.

[98]*Id.*

1977 General Assembly restored the element of breaking to the definition, raised each of the penalties by one level of classification, and restored the distinction between dwellings and other buildings by making the penalty higher for entries into dwellings than for entries into other buildings.[99] As finally enacted, the definition of burglary is not substantially different from the defintion that existed prior to the 1976 code, although the new definition makes no reference to an "other place of human habitation" and omits the special provision that makes a person guilty of burglary if he enters a dwelling with intent to inflict even a minor injury upon a person therein.[100]

Although the General Assembly did revert to the earlier definition of burglary, it made another major change in the law by its action, possibly through inadvertence. As originally enacted in 1976, the offense of burglary replaced the offense of entering to commit a felony[101] as recommended by the Criminal Law Study Commission.[102] By reinserting the element of "breaking" in the definition of burglary, the legislature eliminated the offense of entering to commit a felony. The offense of criminal trespass was amended to include an entry of a dwelling without consent,[103] but this is only a misdemeanor and does not fully replace the prior offense of entering to commit a felony.

6. Theft.—In 1963, the Indiana General Assembly enacted a new statute entitled the "Offenses Against Property Act,"[104] which was intended to consolidate a number of offenses related to theft. When the Indiana Criminal Law Study Commission submitted its proposals to the General Assembly, it recommended that this statute be simplified even further. Under its version, a person would commit theft "when he knowingly exerts unauthorized control over property of the owner with the intent to deprive the owner of the property."[105] The Commission's proposal also included a series of permissible inferences and definitions related to the offense.

When the code was enacted in 1976, the General Assembly accepted these recommendations in part but altered them substantially by following the former statute's cumbersome style of defining theft.[106] After further review by the Criminal Code Interim Study

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[99]IND. CODE § 35-43-2-1 (Supp. 1977).

[100]*See id.* § 35-13-4-4 (1976) (repealed, effective Oct. 1, 1977).

[101]*Id.* § 35-13-4-5 (1976) (repealed, effective Oct. 1, 1977).

[102]PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 55, at 94-95.

[103]IND. CODE § 35-43-2-2 (Supp. 1977).

[104]*Id.* §§ 35-17-5-1 to -14 (1976) (repealed, effective Oct. 1, 1977).

[105]PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 55, at 96.

[106]Pub. L. No. 148, § 3, 1976 Ind. Acts 718, 737-40.

Commission, the 1977 General Assembly finally agreed to enact the simplified version in the new and revised code.[107] The final version is essentially the same as that originally recommended by the Study Commission although the inferences and definitions have been revised to some extent.

7. Other Offenses.—(a) Perjury.—Perjury is now defined in the new and revised code as the making of a "false, material statement under oath or affirmation, knowing the statement to be false or not believing it to be true."[108] In the 1976 code, the definition was the same except for the additional requirement that the statement be made "before a person authorized by law to administer oath . . . ."[109] By eliminating this requirement, the General Assembly apparently extended perjury to cover false statements made under a voluntary oath, including a written statement signed and attested under oath.

(b) Resisting Arrest.—As discussed above with reference to the use of force as a defense,[110] the original code included a provision that a person could resist an arrest "only if the arrest is clearly unlawful."[111] This was contrary to the earlier law concerning resisting an arrest,[112] and the General Assembly eliminated the section from the new and revised code.[113] The earlier law is now codified in the provision concerning "resisting law enforcement," which provides that a person is guilty of resisting law enforcement if he resists an officer who is "lawfully engaged in the execution of his duties as an officer."[114]

(c) Contributing to Delinquency.—When the 1976 code was enacted, it appeared to make a major change in the law concerning contributing to the delinquency of a minor. The code provided that the offense would be committed when a person eighteen years of age or older "causes" a person under the age of eighteen to commit an act of delinquency.[115] Under the law prior to the 1976 code, it was sufficient if the offender "caused" or "encouraged" the minor to commit an act of delinquency.[116] This was interpreted to mean that

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[107]IND. CODE §§ 35-43-4-1 to -5 (Supp. 1977).

[108]*Id.* § 35-44-2-1.

[109]Pub. L. No. 148, § 4, 1976 Ind. Acts 718, 747.

[110]*See* notes 37-43 *supra* and accompanying text.

[111]Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 724.

[112]IND. CODE § 35-21-4-1 (1976) (repealed, effective Oct. 1, 1977). Although the word "lawful" was not included in this statute, the Indiana Supreme Court interpreted the statute as authorizing resistance to an unlawful arrest in Heichelbech v. State, 258 Ind. 334, 337, 281 N.E.2d 102, 104 (1972). *See also* Birtsas v. State, 156 Ind. App. 587, 591, 297 N.E.2d 864, 867 (1973).

[113]*See* IND. CODE § 35-41-3-3 (Supp. 1977).

[114]*Id.* § 35-44-3-3.

[115]Pub. L. No. 148, § 6, 1976 Ind. Acts 718, 758.

[116]IND. CODE § 35-14-1-1 (1976) (repealed, effective Oct. 1, 1977).

the person who encouraged a minor to commit an unlawful act would be guilty of contributing even though the minor did not thereafter commit the act that was encouraged.[117]

In view of this apparent change in the definition of delinquency, the 1977 General Assembly amended the provision to include any person who "aids, induces, or causes" a minor to commit an act of delinquency.[118] The word "encourage" was not reinserted, however, and the words "aids, induces, or causes" may well be interpreted to require that the juvenile actually commit the unlawful act before contributing to delinquency has occurred. If the words are interpreted in this manner, the encouraging of an act of delinquency may be an offense under the general attempt statute, but it would have to be decided that the encouragement involved a substantial step towards commission of the intended offense.

D. Sentencing

1. Consecutive Sentences.—The most significant change in the sentencing provisions, as noted above, was made with reference to consecutive and concurrent sentences.[119] Indiana has generally followed a system of imposing concurrent sentences when a person has been convicted of two or more offenses, subject to certain specified exceptions.[120] As finally enacted, the new and revised code authorizes the trial court to impose concurrent or consecutive sentences in its discretion, except that consecutive sentences are required for offenses committed after a defendant has been arrested and is subject to court action for another offense.[121]

2. Determinate Sentencing.—One of the major changes included in the 1976 code was the provision for determinate sentencing based on a classification of offenses. This system was continued in the new and revised code with only minor modifications. The penalty provision for Class A felonies was amended to conform to the pattern for the other penalties and now provides for a term of thirty years, which may be increased by twenty years or decreased by ten years.[122] In addition, the maximum penalty for Class A infractions was increased to ten thousand dollars[123] and two additional classes of

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[117]Montgomery v. State, 115 Ind. App. 189, 57 N.E.2d 943 (1944).
[118]IND. CODE § 35-46-1-8 (Supp. 1977).
[119]*See* text accompanying notes 8-10 *supra.*
[120]*See* Kerr, *Indiana's Bicentennial Criminal Code, supra* note 1, at 32 n.169.
[121]IND. CODE § 35-50-1-2 (Supp. 1977).
[122]*Id.* § 35-50-2-4.
[123]*Id.* § 35-50-4-2.

infractions were created with maximum penalties of one thousand dollars[124] and five hundred dollars.[125]

3. Increased Penalties.—When the code was originally enacted in 1976, it provided for a reduction in the maximum penalties for a number of offenses. Because of the controversial nature of these reductions, the 1977 General Assembly finally increased the penalties for ten of the offenses in the new and revised code.[126] In addition, the penalty for murder was increased because of the reclassification of murder from a Class A felony to a separate classification of its own.[127]

4. Habitual Offenders.—Under the law as it existed before the 1976 code was enacted, a person who had been convicted of three felonies was subject to imprisonment for life as a habitual offender.[128] The Criminal Law Study Commission recommended that the prior law be retained but in a somewhat modified form, including a reduction of the term of imprisonment from life to a maximum period of thirty years.[129] Instead of following the Commission's recommendations, however, the General Assembly initially decided to provide enhanced penalties for any person convicted of a third felony. Enhanced penalty provisions were thus enacted with reference to each felony classification,[130] and the provisions concerning habitual offenders were omitted from the 1976 code. This approach, however, raised serious procedural questions concerning the imposition of enhanced penalties. In particular, the possibility existed that the two-stage trial required for the trial of habitual offenders[131] would also be required for the trial of a person subject to an enhanced penalty.[132] These questions were finally resolved by the 1977 General Assembly, which repealed the enhanced penalty provisions and enacted a habitual offender provision, including a provision for a two-stage trial essentially as recommended originally by the Study Commission.[133]

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[124]*Id.* § 35-50-4-3.

[125]*Id.* § 35-50-4-4.

[126]The ten offenses are as follows: kidnapping (aggravated confinement), IND. CODE § 35-42-3-2 (Supp. 1977); rape, *id.* § 35-42-4-1; criminal deviate conduct, *id.* § 35-42-4-2; child molesting, *id.* § 35-42-4-3; robbery, *id.* § 35-42-5-1; arson, *id.* § 35-43-1-1; burglary, *id.* § 35-43-2-1; assisting a criminal, *id.* § 35-44-3-2; professional gambling, *id.* § 35-45-5-3; and dealing in controlled substances, *id.* §§ 35-48-4-2 to -4.

[127]*Id.* § 35-50-2-3.

[128]*Id.* §§ 35-8-8-1 to -2 (1976) (repealed, effective Oct. 1, 1977).

[129]PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 55, at 185-87.

[130]Pub. L. No. 148, § 8, 1976 Ind. Acts 718, 790.

[131]Lawrence v. State, 259 Ind. 306, 286 N.E.2d 830 (1972).

[132]*See* United States v. Tucker, 404 U.S. 443 (1972); Lewis v. State, 337 N.E.2d 516 (Ind. Ct. App. 1975).

[133]IND. CODE § 35-50-2-8 (Supp. 1977).

E. Additional Provisions

1. Reenactments.—When the new code was originally enacted in 1976, many statutes were repealed or eliminated from the state's criminal law. Many of these were eliminated because they were unnecessary, obsolete, or invalid,[134] but others were repealed inadvertently or for other reasons. As a result, the 1977 General Assembly was asked to reenact a number of these provisions, including the statutes concerning "ghost employees,"[135] piracy of recordings and films,[136] theft of trade secrets,[137] and interference with jury service.[138]

2. Transfer of Provisions.—One of the primary objectives of the Indiana Criminal Law Study Commission was to revise and recodify essentially all of Indiana's criminal statutes into one "code" or volume of statutes.[139] Despite this objective, the Commission itself omitted certain criminal provisions from its proposed code, including the statutes concerning obscenity,[140] and recognized that certain types of offenses such as administrative regulatory offenses and traffic violations should not be included in the criminal code.[141] In addition, the General Assembly eliminated certain other provisions from the proposed code, including the provisions concerning abortion[142] and deadly weapons,[143] and retained the previously existing statutes concerning these offenses.[144] The new and revised Criminal Code, as enacted, is therefore not a complete codification of the state's criminal statutes. This fact may suggest that it is inappropriate even to use the term "Criminal Code" for this collection of criminal statutes. It may be argued that there is only one "Indiana Code," that it includes all of the Indiana statutes arranged by various subjects, and that it would be confusing to refer to each of the individual sub-collections as "codes." Nevertheless, the General Assembly has approved and even mandated the use of the term with reference to certain subjects such as the Election Code,[145] the

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[134]*See* Kerr, *Indiana's Bicentennial Criminal Code*, *supra* note 1, at 36.

[135]*Compare* IND. CODE § 35-22-8-1 (1976) (repealed, effective Oct. 1, 1977) *with id.* § 35-44-2-4 (Supp. 1977).

[136]*Compare* IND. CODE § 35-17-7-1 (1976) (repealed, effective Oct. 1, 1977) *with id.* §§ 35-43-4-1(b)(8), 35-43-4-5(c) (Supp. 1977).

[137]*Compare* IND. CODE § 35-17-3-1 (1976) (repealed, effective Oct. 1, 1977) *with id.* §§ 35-41-1-2, 35-43-4-2 (Supp. 1977).

[138]*Compare* IND. CODE § 35-1-97-2 (1976) (repealed, effective Oct. 1, 1977) *with id.* § 35-44-3-10 (Supp. 1977).

[139]PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 55, at viii.

[140]IND. CODE §§ 35-30-10.1-1, 35-30-10.5-1, 35-30-11.1-1 (1976).

[141]PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 55, at viii.

[142]*Id.* §§ 35-15.1-1-1 to -4.

[143]*Id.* §§ 35-17.1-1-1 to -15.

[144]*See* IND. CODE §§ 35-1-58.5-1 to -8, 35-23-1-1 to -5 (1976).

[145]IND. CODE § 3-1-1-1 (1976).

Military Code,[146] the Public Health Code,[147] the Uniform Consumer Credit Code,[148] the Uniform Commercial Code,[149] and the Probate Code.[150]

Prior to the recodification of the Indiana statutes in the Indiana Code of 1971, the term "Criminal Code" was used on the spines of the two volumes of Indiana Statutes Annotated,[151] which covered criminal law and procedure, and it is probable that the use of the term will continue in the future. Such usage will probably cause some difficulties, however. For example, the term was used for both the substantive and procedural volumes of Indiana Statutes Annotated, as noted above. On the other hand, the Indiana Criminal Law Study Commission recommended eliminating the use of the term completely and suggested using two separate terms instead, "Code of Criminal Procedure"[152] and "Penal Code."[153] The term "Criminal Code" has been used in this discussion specifically with reference to the codifications of the criminal statutes as enacted by the General Assembly in 1976 and 1977. The term "Penal Code" has not been used because it suggests that there is some clear distinction between substantive and procedural provisions in the criminal law, and yet, the codifications enacted in 1976 and 1977 include some provisions that clearly appear to be procedural as well as others that are at least arguably procedural.

Assuming that the term "Criminal Code" does continue in popular usage, it is necessary to recognize that all of the state's criminal laws are not collected together in one volume or codification but are still scattered throughout the general statutes of the state. A major portion of the statutes are collected in the new and revised code, however, and hopefully the others will be added in the future as the process of codification continues. The 1977 General Assembly moved in this direction by repealing a number of statutes and reenacting them as parts of the Criminal Code as recommended by the Criminal Code Interim Study Commission. These included statutes concerning unlawful use of a police radio,[154] flag desecra-

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[146]*Id.* § 10-2-1-1.

[147]*Id.* § 16-1-1-1.

[148]*Id.* § 24-4.5-1-101.

[149]*Id.* § 26-1-1-101.

[150]*Id.* § 29-1-1-1. The term is also used with reference to the Trust Code, *id.* §§ 30-4-1-1, 2-5-11-1; the Civil Code, *id.* § 2-5-8-1; and the Juvenile Code, *id.* § 2-5-8-4(7).

[151]IND. STAT. ANN., Vol. 4, Parts 1 & 2 (Burns, 1956 Repl. Vol.).

[152]INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT (1972).

[153]PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 55.

[154]*Compare* IND. CODE § 35-44-3-12 (Supp. 1977) *with id.* § 35-21-1-1 (1976) (repealed, effective Oct. 1, 1977).

tion,[155] unlawful disclosure of telegraph messages or telephone conversations,[156] cruelty to animals,[157] and discrimination in jury selection.[158]

At the same time, the General Assembly did not reverse its earlier decision to leave the abortion statutes and deadly weapons statutes out of the new codification. It did, however, enact a statute to resolve a problem that was caused by the decision to retain the previously existing statutes concerning deadly weapons. The Criminal Law Study Commission had originally recommended that the new code contain a general article concerning deadly weapons, including a provision concerning the unlawful possession of a deadly weapon.[159] The 1976 General Assembly declined to enact this general article, thereby retaining the previously existing statutes concerning deadly weapons, but the statute concerning unlawful possession of a deadly weapon was inadvertently repealed.[160] Instead of incorporating this offense into the new and revised code, the 1977 General Assembly amended the statutes concerning deadly weapons and reenacted the offense of unlawful possession as part of those statutes.[161]

F. Conclusion

After seven years of study, drafting, and legislative debate, Indiana finally has a new and revised criminal code. This new code reflects many changes in form and style, including the reorganization of the state's criminal statutes into a coordinated system, and the elimination of unnecessary, unconstitutional, or obsolete statutes. These changes and revisions were necessary and should have been made previously on a continuing basis, but they will probably have little, if any, impact on the state's criminal justice system. On the other hand, the code does contain a number of other fundamental changes that will undoubtedly have a major impact on the

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[155]*Compare* IND. CODE § 35-45-1-4 (Supp. 1977) *with id.* § 35-27-7-1 (1976) (repealed, effective Oct. 1, 1977).

[156]*Compare* IND. CODE § 35-45-2-4 (Supp. 1977) *with id.* § 35-1-108-1 (1976) (repealed, effective Oct. 1, 1977).

[157]*Compare* IND. CODE § 35-46-3-2 (Supp. 1977) *with id.* § 35-1-107-1 to -7 (1976) (repealed, effective Oct. 1, 1977).

[158]*Compare* IND. CODE § 35-46-2-2 (Supp. 1977) *with id.* § 35-15-2-3 (1976) (not repealed).

[159]*Compare* IND. CODE § 35-46-2-2 (Supp. 1977) *with id.* § 35-15-2-3 (1976) (not repealed).

[160]PENAL CODE, PROPOSED FINAL DRAFT, *supra* note 55, at 144.

[161]IND. CODE § 35-1-79-1 to -5 (1976) (repealed by Pub. L. No. 148, § 24, 1976 Ind. Acts 815).

[162]IND. CODE § 35-23-12-1 to -2 (Supp. 1977).

system. These include the classification of offenses according to the seriousness of each offense, the elimination of indeterminate sentences, the elimination of juries from the sentencing process, the adoption of presumptive sentencing, the emphasis on mandatory confinement and the inability to suspend confinement for various offenses and second felony convictions, the authorization of discretionary consecutive sentences, and the provision for an automatic parole for a limited period of time. All of these changes relate primarily to the sentencing process, but the code does contain other changes that are just as important, including: the provision for a general attempt offense, the revised homicide provisions, the new definitions of theft and arson, and the culpability provisions.

Most of the changes in the sentencing process were enacted in 1976 and were not substantially altered by the 1977 amendments; the provision concerning consecutive sentences is the primary exception. The other changes, however, were introduced in the 1976 version of the code but underwent substantial revisions before appearing in their final form in the 1977 amendments. Further revisions may be required from time to time as the code is implemented, but the new and revised code should provide a sound and workable framework for the state's criminal statutes for the foreseeable future.

II. Administrative Law

*Gregory J. Utken**

A. Administrative Rule Making

The federal government has long had a comprehensive system for the promulgation and publication of federal administrative rules and regulations. This system is comprised of the Federal Register and the Code of Federal Regulations. Indiana has now established a parallel promulgation and publication procedure for the state's administrative rules and regulations.[1] Prior to this time, Indiana only had a skeletal procedure for administrative rule making.[2] Recent legislation elaborated upon this procedure.

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[1] IND. CODE §§ 4-22-2-2 to -12 (Supp. 1977) (amending IND. CODE §§ 4-22-2-1 to -11 (1976)).

[2] *Id.* §§ 4-22-2-1 to -11 (1976) (amended 1977).