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Obscene Literature

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In 1959 the United States Supreme Court in *Smith v. California*[1] held a city and county ordinance unconstitutional for failure to require scienter on the part of a defendant. That ordinance, like many other ordinances and state statutes, subjected a bookseller to criminal prosecution for the sale of obscene literature regardless of whether he knew that it was obscene. The Court reasoned that such an ordinance would result in a bookseller's refusal to sell many publications which would not be legally suppressible but which the seller suspected of being obscene, perhaps without having read them.[2] This self-censorship would constitute a restraint on freedom of speech and press in violation of the first and fourteenth amendments.

The *Smith* decision poses two major questions for statutory draftsmen. First, what degree of awareness on the part of a defendant is required to satisfy the scienter requirement prescribed by *Smith*? Must the bookseller have read the book and be consciously aware that it is obscene as a matter of law, or is it enough that he has read it and merely ought to be aware that its contents are obscene as a matter of fact? Is it even necessary that a bookseller read the book, if other circumstances indicate that he should know that the book may be obscene? Second, what quantum and type of proof is required in order to establish the presence of this necessary degree of awareness on the part of a defendant? If it is necessary to prove by direct evidence that a bookseller knew that he was selling legally obscene material, convictions will be difficult, if not impossible to obtain.[3] On

1. 361 U.S. 147 (1959).
2. *Id.* at 153.
3. In order to prove guilty knowledge it is usually necessary only to show that the defendant knew the nature of the act which he did, regardless of whether he knew it was unlawful. Under this theory, to find guilty knowledge on the part of a bookseller selling an obscene book, the bookseller must have read the book in order to be aware of the nature of the book he was selling. Booksellers, however, seldom read books which they offer for sale, making proof of this guilty knowledge in many cases virtually impossible. Moreover, it should be pointed out that whatever degree of awareness may be required or whatever methods may be prescribed for carrying the burden of proof, a resort to circumstantial evidence will always be necessary to establish the presence of the required state of mind, unless the defendant confesses to his state of mind. For a discussion of other problems involved in finding scienter in obscenity cases, see Wilson, *California's New Obscenity Statute: The Meaning of "Obscene" and the Problem of Scienter*, 36 So. CALIF. L. REV. 513, 542 (1963).

the other hand, acceptance by the courts of a quantum of proof of awareness less than a showing of actual knowledge of obscenity may tend to influence booksellers to become censors, and this may create constitutional restrictions on freedom of speech and press. There is also the problem of whether the finding of the requisite degree of awareness should always be a question of fact for the jury's determination, or whether certain presumptions of awareness should be used based on the finding of particular basic facts and circumstances. The Supreme Court, having recognized these problems, has left the task of providing definite answers to the state courts and legislatures.[4]

Two approaches to the scienter question appear in the existing state obscenity statutes. California's recently adopted law[5] exemplifies the stricter degree-of-awareness, or scienter requirement. This statute punishes a defendant who has "knowingly" committed the prohibited act, and defines "knowingly" as with "knowledge that the matter is obscene."[6] Proving a subjective intent to sell a book which the seller knows to be obscene before he sells it would be a difficult task requiring a great deal of circumstantial evidence to allow even a reasonable inference of such intent. The Ohio statute as it has been interpreted sets up less strict degrees of awareness requirement and is representative of the burden of proof imposed on the prosecution by a majority of the states. This statute also uses the word "knowingly," but the courts find this element satisfied when a defendant has "knowledge of the contents" of the book which he sold.[7] Under this definition it is not necessary to prove that the defendant knew that the articles sold were legally obscene, but merely that he had knowledge of the articles and their contents before he sold them. Thus, two different degree-of-awareness requirements have evolved, one requiring proof that the defendant was aware that the articles were actually obscene and the other requiring proof that the defendant had knowledge of the contents of the articles sold.

As to the second question concerning the quantum and type of proof required to establish the presence of the necessary degree of awareness, most states have no statutory provision prescribing an answer. This would imply that the establishment of the existence of the requisite awareness is a fact question to be answered on the basis of

4. 361 U.S. at 154.
5. CAL. PEN. CODE § 311(2).
6. CAL. PEN. CODE § 311(e).
7. OHIO REV. CODE ANN. § 2905.34 (1964). States which define scienter as factual knowledge of the contents include: Alabama, ALA. CODE tit. 14, § 374(4) (Supp. 1963); Illinois, ILL. REV. STAT. ch. 11, § 20 (1964); Kentucky, KY. REV. STAT. § 436.100(2) (1962); Washington, WASH. REV. CODE § 9.68.010 (1961); Wisconsin, WIS. STAT. § 944.21 (1958).

all available circumstantial evidence.[8] A few states have created evidentiary presumptions to facilitate the establishment of the required proof. The Florida statute,[9] for example, makes it a crime "knowingly" to sell any obscene literature, and prescribes two methods of proving knowledge: by showing that the defendant had "actual knowledge of the contents" or by showing the presence of "facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character."[10] A defendant's knowledge of the contents, under the first Florida alternative, must normally be established by circumstantial evidence sufficient to allow the trier of fact to draw a reasonable inference therefrom. Under the second Florida alternative, however, the trier of fact may presume a defendant's "knowledge of the contents" from the existence of certain facts and circumstances. Utah's statute[11] provides that any person having books in his possession for resale "shall have the duty to make a reasonable investigation of the contents thereof and shall be presumed to have knowledge of the contents thereof which such investigation would disclose."[12] This statutory presumption considerably lightens the prosecutor's burden of proof; in fact it almost presumes a bookseller's knowledge of the contents of any obscene book, since the statute apparently assumes that a reasonable investigation would disclose whether or not a book is legally obscene. The relevant Oregon statute[13] provides that,

> In any prosecution for a violation of this section, it shall be relevant on the issue of knowledge to prove advertising, publicity, promotion, method of handling or labeling of the matter, including any statement on the cover or back of any book or magazine,[14]

The effect of this statute is to significantly decrease the amount of circumstantial evidence necessary to establish the requisite awareness.

As previously stated, the doctrine of the *Smith* case raises a serious question concerning the constitutionality of the methods of proof and statutory presumptions which are available to prosecutors in carrying their burdens of proof. In criminal law, scienter is normally considered

8. People v. Harris, 192 Cal. App. 2d 887, 13 Cal. Rptr. 642 (1961); State v. Onorato, 199 A.2d 715 (Conn. Ct. App. 1963); State v. Cercone, 196 A.2d 439 (Conn. Ct. App. 1963); People v. Richmond County News, Inc., 205 N.Y.S.2d 94, *aff'd*, 9 N.Y.2d 578, 216 N.Y.S.2d 369 (1960); People v. Schenkman, 20 Misc. 2d 1093, 195 N.Y.S.2d 570, *aff'd*, 207 N.Y.S.2d 389, *rev'd on other grounds*, 9 N.Y.2d 342, 214 N.Y.S.2d 363 (1961).

9. FLA. STAT. § 847.011 (1964).

10. FLA. STAT. § 847.011(5) (1964).

11. UTAH CODE ANN. § 76-39-5(3) (1963).

12. UTAH CODE ANN. § 76-39-6 (1963).

13. ORE. REV. STAT. § 167.151(1) (1963).

14. ORE. REV. STAT. § 167.151(4) (1963).

to be a person's awareness of the nature of his actions, whether or not he is also aware that those actions are a violation of the law. An individual is presumed to know the law and, if he commits an act without knowing that it is unlawful, he will not be permitted to rely on his ignorance of the law to excuse him from criminal liability.[15] The fairness of presuming knowledge of the law in obscenity cases, however, is glaringly open to criticism. Since obscenity is not clearly defined, even one fully aware of the law can never be sure whether the sale of a particular book violates the law.[16] A clear definition of obscenity is impossible to formulate, since the same actions or words can be arranged to convey many different meanings, some suppressible and others not. Thus, if the proof of awareness necessary to support an obscenity conviction is simply that a defendant have knowledge of the contents of a book which he sells, it is apparent that a bookseller may be convicted because of his awareness of the contents of a book even though he does not know that it is legally obscene. Realizing this, a bookseller will refuse to sell a book which he has read and thought to be suspicious, rather than subject himself to a possible conviction resulting from a presumption that he knows the law. Thus, if scienter is defined as awareness of the contents of a book and not as knowledge that it is legally obscene, there will be the same encouragement of self-censorship in doubtful cases which *Smith* held unconstitutional. Moreover, this self-censorship is increased by the use of the various statutory presumptions. If a bookseller knows that under certain circumstances he can be presumed to have knowledge of the contents *as well as* being presumed to know that these contents are legally obscene, he will be inclined to exercise further self-censorship. What we are then confronted with is actually a double presumption. The first is the familiar doctrine that an individual is presumed to know the law and that his ignorance of it will not excuse him from criminal responsibility if he commits the prohibited act.[17] Injustice arises in that under this presumption a bookseller is supposed to recognize obscenity upon sight, when in fact, except perhaps in the case of hard core pornography, no one knows what is legally obscene until it is so declared. When one superimposes on this the second type of presumption as have the states of Florida, Utah and Oregon, a bookseller can be presumed to have

15. Lambert v. California, 355 U.S. 225, 228 (1957).

16. The Supreme Court in Roth v. United States, 354 U.S. 476 (1957), set up as the test for obscenity "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. Under such a test it is obvious that no one can be sure whether particular material is obscene until some court litigates it.

17. *Supra* note 16.

knowledge of the contents from the existence of other key facts, in addition to being presumed to know that the contents are obscene.[18] Thus, when statutory presumptions are used to facilitate proof of awareness of the contents of a book, the likelihood of self-censorship and resulting violations of freedom of speech and press is compounded.

Suppose that the prosecution is required to prove that a defendant is aware that the contents of a book which he sells are legally obscene before the traditional knowledge of the law presumption operates. Although this literally abolishes any presumption that an individual knows the law, it appears to be the only standard of awareness which can prevent self-censorship. If a bookseller is unaware that a book is legally obscene, under this burden of proof, he need have no fear of prosecution if he sells the book, and no longer feels the necessity for self-censorship. This creates an obvious problem for the states. How can a prosecutor possibly prove actual awareness of legal obscenity when no one knows what is obscene until it is so declared by a court? The use of presumptions would only recreate the problem of self-censorship. But many believe that the impossibility of precisely defining obscenity should not preclude the state from exercising its legitimate interest in suppressing material which clearly has no redeeming social importance.[19] The logic of the *Smith* decision, however, seems to point to the impossibility of such a conclusion.[20] The

18. *See* notes 10-15 *supra.*

19. It is difficult to define clearly the state's interest in obscenity regulation. It is usually based on the premise that the government should prevent free dissemination of obscene material, the only purpose of which is to appeal to the sexually immature. The theory is that such material corrupts the minds of the sexually immature resulting in an evil which the government must prevent. Many believe that this situation does not justify regulation. It is doubtful, even if all obscene literature could be controlled, that there would ever cease to be corrupted minds. Justices Black and Douglas in their dissent in Roth v. United States, *supra* note 16, argued against any censorship unless "the particular publication has an impact on actions that the government can control." *Id.* at 511. Nevertheless, a majority of voters in many areas believe that obscene literature should not be permitted free dissemination.

20. One of the arguments made in *Roth* was that obscenity statutes do not provide "reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due process." 354 U.S. at 491. In *Roth* the Supreme Court refused to accept this argument citing United States v. Petrillo, 332 U.S. 1 (1947). "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambigious to define a criminal offense. . . ." *Id.* at 7. It appears, however, that the thrust of the reasoning behind the *Smith* case should cast some doubt on the status of these statements as current law. Even though the reasoning of the *Smith* decision, when brought to its logical conclusion, leads to this result, it should be pointed out that *Smith* also contains dicta indicating that the state's right to regulate is not defeated by the fact that, due to vagueness, a certain degree of self-censorship is bound to result. But the degree of self-censorship induced by the particular type city ordinance in Los Angeles was clearly not within the permissible

ultimate solution to the problem must lie in obtaining a prior adjudication of obscenity by utilizing a declaratory judgment proceeding. Where a particular book is adjudicated obscene and notice of the proceeding is given to booksellers, a presumption of legal obscenity in a subsequent prosecution for the sale of the same book would not be unreasonable nor would its effect be unconstitutional. Only that which actually is adjudicated legally obscene would be suppressed, and booksellers would feel free to sell any other material no matter how suspicious it may be.[21]

Only in cases of hard core pornography does there seem to be any justification for eliminating the requirement of a prior adjudication of obscenity. Presumably hard core pornography includes that material so vile that any person recognizes it to be obscene upon sight. But even this definition of hard core pornography does not preclude differences of opinion in specific cases. If hard core pornography is made an exception to the prior adjudication requirement, it would be all too easy for prosecutors to avoid prior adjudication in a specific case by merely stating that the material involved is hard core pornography. The only conceivable solution is to leave the determination in all cases to a court composed of men competent to make such a decision.

PROPOSED STATUTE

(1) Whoever knowingly imports, prints, advertises, sells, has in his possession for sale, or publishes, exhibits, or transfers commercially any lewd, obcene or indecent written materials shall be fined not more than $500 or imprisoned not more than one year or both.

(2) Proof that a defendant "knowingly" committed any act referred to in section (1) may only be made by showing that the particular material involved had been adjudicated obscene in a prior proceeding and notice of this proceeding had been given in accordance with sections (3) and (4).

(3) Whenever there is reasonable grounds to believe that any material which is being used in the manner stated in section (1) is lewd, obscene or indecent, the public prosecutor may file a compaint in the proper court, directed against such material by name. Upon filing of the complaint the court shall make a summary examination of such

bounds. This inconsistency of the *Smith* decision is characteristic of any argument which attempts to support limited censorship on one hand and free speech on the other. *Smith* seems to say that the states cannot enact a statute which creates self-censorship since this is a restriction on constitutional free speech and press. But at the same time they say that the states can continue to practice censorship as long as they do not induce *too much* self-censorship. Then the only guideline left for the states is that the degree of self-censorship induced in *Smith* was not permissible.

21. For examples of obscenity statutes authorizing declaratory judgment proceedings, see FLA. STAT. § 847.011(7) (Supp. 1964); MASS. GEN. LAWS ch. 272, § 28C (Supp. 1964); WIS. STAT. § 269.565 (Supp. 1965).

material. If it is the opinion of the court that there is reasonable cause to believe that such material is obscene, it shall issue an order, directed against said material by name, to show cause why said material should not be judicially determined to be obscene. This order shall be addressed to all persons interested in the material including the publisher, producer, and one or more distributors of said material and shall be returnable within 30 days. This order shall also be published in a newspaper of general circulation for five successive days. Thirty days after issuance of this order, the court shall proceed to adjudicate the issue of whether the particular material is lewd, obscene or indecent.

(4) The name of such material as is adjudicated lewd, obscene or indecent in accordance with section (3) shall be placed on a list and a copy of said list shall be published every three months in a newspaper of general circulation for five successive days.[22]

Protection of the Surviving Spouse's Rights Under Elective Share Statutes

Statutes protecting a surviving spouse's rights in her husband's property, and imposing restraints on voluntary disinheritance by the husband, are as old as the Code of Hammurabi.[1] At common law, a widow was protected against complete disinheritance by the right of dower, which consisted of a life estate in one-third of the lands and tenements of which her husband was seised at any time during coverture and which could have descended to the issue of the marriage.[2] A widow's right to such an estate arose by operation of law, independent of any rights that she might have acquired by testamentary provision.[3] During the marriage, a wife had a protected expectancy in this estate called "inchoate dower" which could be defeated only in certain defined and limited ways.[4] Thus, at a time when wealth was concentrated largely in real property, inchoate dower effectively prevented a husband from decimating his estate

22. *Ibid.*

1. HARPER, CODE OF HAMMURABI §§ 168-72 (1904); Urch, *The Law Code of Hammurabi,* 15 A.B.A.J. 437 (1929). See Cahn, *Restraints on Disinheritance,* 85 U. PA. L. REV. 139 (1936).

2. 1 AMERICAN LAW OF PROPERTY § 5.1, at 616 (Casner ed. 1952) [hereinafter cited as LAW OF PROPERTY]; 3 VERNIER, AMERICAN FAMILY LAWS § 188, at 345 (1935) [hereinafter cited as VERNIER].

3. *Supra* note 2.

4. 1 LAW OF PROPERTY § 5.31; 1 WALSH, LAW OF REAL PROPERTY § 101 (1947). . . § 101 (1947).

through gifts and other inter vivos transactions and thereby disinheriting his wife.

Early in the nineteenth century, however, state legislatures began to recognize two important facts about common law dower: (1) that because of the change in our economy from an agricultural to an industrial era, with wealth concentrated in personalty, dower has ceased to provide significant protection against disinheritance of married women, and (2) that inchoate dower causes burdensome restraints on free alienation of real property.[5] Consequently, most states today have abolished dower altogether.[6] Even in states which have retained it, this right has been greatly modified; some states have raised the wife's interest to one-half;[7] some have increased her estate from a life estate to one in fee;[8] and some have limited dower rights to property of which the husband dies seised.[9] In addition to statutory abolishment or modification of dower, most states have enacted elective share (sometimes called "forced share") statutes, which typically allow a widow to take a stated fraction of the personal property in her husband's probate estate in lieu of her testamentary provision.[10] A widow's statutory elective share in her husband's estate is usually the same as, though not to be confused with, the share provided for her under statutes dealing with intestate succession.[11] Since elective share statutes have been passed almost exclusively in states which have either abolished or sharply restricted dower rights, it is apparent that they were enacted for the principal purpose of protecting married women against total disinheritance, which, protection was formerly provided by common law dower.[12]

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5. See generally 1 LAW OF PROPERTY § 5.5, at 631; 3 VERNIER, § 189, 351-54 (1935); 1 WALSH, *op. cit. supra* note 4, 110.

6. See note 5 *supra.*

7. See, *e.g.*, ALA. CODE tit. 34,§ 41 (1959); KY. REV. STAT. ANN. § 392.020 (1963).

8. See, *e.g.*, KY. REV. STAT. ANN. § 396.020 (1963).

9. See, *e.g.*, GA. CODE ANN. § 31-101 (1952); N.H. REV. STAT. ANN. § 560.3 (1955); TENN. CODE ANN. § 31-601 (1955).

10. For typical statutes abolishing dower and substituting an elective share for the surviving spouse, see IND. ANN. STAT. §§ 6-211, 6-301 (1953); ME. REV. STAT. ANN. ch. 111, §§ 1051, 1056 (1964); MINN. STAT. ANN. §§ 525.15-.16 (1947), § 519.09 (Supp. 1964); MISS. CODE ANN. §§ 453, 668 (1942); OKLA. STAT. ANN. tit. 32, § 9(4), tit. 84, § 44 (1952); PA. STAT. ANN. tit. 12, § 6, tit. 20, § 1.5 (1950); WYO. STAT. ANN. §§ 2-37, -47 (1957).

For statutes retaining dower and, in addition, giving the surviving spouse the right to an elective share, see ALA. CODE tit. 34, § 41, tit. 61, § 18 (1959); GA. CODE ANN. §§ 31-101, -108 (1952); N.H. REV. STAT. ANN. § 560:10 (1955); TENN. CODE ANN. § 31-605 (1955). See also 1 LAW OF PROPERTY § 5.42, at 735; 3 VERNIER, § 189, at 354-55 (1935); Cahn, *supra* note 1, at 141.

11. See, *e.g.*, ALA. CODE tit. 61, § 18 (1959); TENN. CODE ANN. § 31-605 (1955). See also SIMES, MODEL PROBATE CODE § 32(a) (1946).

12. Spies, *Rights of the Surviving Spouse,* 46 VA. L. REV. 157, 178 (1960). See note 10 *supra* and accompanying text.

State legislatures have been criticized for their failure to abolish inchoate dower completely and effectively,[13] and one writer has remarked that "no field is more deserving of complete renovation."[14] The constant pressure to make land more freely alienable by abolishing dower has indeed had its effect,[15] but this emphasis upon free alienability has pushed aside much concern with the central purpose of elective share statutes—protecting the married woman from complete disinheritance by her husband. Present day elective share statutes typically provide the married woman with but a small part of the protection for her expectancy which she enjoyed under inchoate dower at common law.[16] Most statutes merely guarantee that a married woman shall be entitled to a stated fractional share of her husband's probate estate.[17] Hence, a husband may quite often defeat his wife's statutory share in his personal property, and, if dower has been abolished, in his real property as well, by transferring his property in such a way as to assure that it will not be brought within his probate estate. He may of course accomplish this while retaining for himself beneficial enjoyment in such property during his lifetime. Some of the more common devices used by wealthy husbands to decimate their estates are revocable trusts;[18] trusts with life estate reserved; life insurance, with power reserved to change the beneficiary;[19] life insurance trusts; [20] jointly owned property and bank accounts;[21] and outright gifts made by the husband in contemplation of death.

The need to formulate an elective share statute that will protect the wife from substantial disinheritance while not unreasonably fettering alienability of her husband's property during coverture has been met effectively by very few legislatures.[22] The burden of protecting the wife's expectancy in her husband's property has fallen largely on the judiciary. In construing elective share statutes, courts have generally started with the proposition that inter vivos transfers

13. See, *e.g.*, 1 LAW OF PROPERTY § 5.5, at 633; 3 VERNIER, § 188, at 346-47 (1935); Comment, 8 ALA. L. REV. 317 (1956); Spies, *supra* note 12 at 159.

14. 3 VERNIER, § 188, at 347.

15. The great majority of states today have either abolished or sharply restricted dower. See note 10 *supra* and the statutes cited therein.

16. Cahn, *supra* note 1; Spies, *supra* note 12.

17. See note 10 *supra* and the statutes cited therein.

18. Goldman, *Rights of the Spouse and the Creditor in Inter Vivos Trusts*, 17 U. CINC. L. REV. 1 (1948).

19. Vance, *The Reneficiary's Interest in a Life Insurance Policy*, 31 YALE L.J. 343 (1922).

20. Note, 42 VA. L. REV. 256 (1956).

21. Effland, *Estate Planning: Co-Ownership*, 1958 WIS. L. REV. 507; Comment, 1957 U. ILL. L.F. 655.

22. See note 13 *supra*.

defeating a wife's elective share in her husband's property are not necessarily in violation of the elective share statute.[23] One court-made exception to this rule is that any transfer made with the intent of defeating a spouse's statutory share is invalid.[24] This view, called the "intent" or "fraud" test, has been incorporated into some elective share statutes.[25] The New York Court of Appeals, in *Newman v. Dore*,[26] rejected the "intent" test as too uncertain and formulated what has since been deemed the majority rule—that only those transfers by the husband which the court deems to be "illusory" or "testamentary" will be subject to the surviving spouse's elective share. To implement this rule, the New York court set out what has been called the "control" test. Under this test, when the husband reserves substantial power over the property transferred, the transfer is deemed "illusory" and subject to the surviving spouse's elective share.[27] This test has been used successfully in some states to protect a widow's interest in revocable trusts set up by the husband for the benefit of third parties, but courts have generally refused to extend the protection provided by the "control" test to other types of inter vivos transfers.[28]

The Model Probate Code, while calling for outright abandonment of dower,[29] gives the surviving spouse an elective share in her husband's estate, including real and personal property, equal to the amount that would pass to her under the section dealing with intestate succession.[30] The Code proposes to protect this interest, or expectancy, by applying a variation of the "intent" test, which would allow the surviving spouse to recover her share out of "any gifts made . . . in fraud of her marital rights,"[31] such fraud being presumed when gifts are made by the deceased spouse within two years prior to his death.[32] A fourth method for protecting the elective share rights of a surviving spouse recently proposed is to impose a "statutory trust" of one-third of all real and personal property owned by each

23. See, *e.g.*, Cheatham v. Sheppard, 198 Ga. 254, 31 S.E.2d 457 (1944); Holmes v. Mimes, 1 Ill. 2d 274, 115 N.E.2d 290 (1953); *In re* Golewitz' Estate, 206 Misc. 218, 132 N.Y.S.2d 297 (1954); Richards v. Richards, 30 Tenn. (11 Humph.) 429 (1850).

24. Probably the leading case for this view is Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 150 S.W.2d 611 (1939).

25. See TENN. CODE ANN. § 31-612 (1955). See also SIMES, *op. cit. supra* note 11, § 33(a).

26. 275 N.Y. 371, 9 N.E.2d 966 (1937).

27. *Ibid.*

28. Smith, *The Present Status of Illusory Trusts—The Doctrine of Newman v. Dore Brought Down to Date*, 44 MICH. L. REV. 151 (1955).

29. SIMES, *op. cit. supra* note 11, § 32.

30. *Ibid.*

31. *Id.* § 33(a).

32. *Id.* § 33(b).

spouse in favor of the other spouse.[33] Under this proposal a wife would have a non-assignable, equitable interest in one-third of her husband's property, subject to divestment in case of divorce or failure to survive her husband. Conveyance of property by the husband to a bona fide purchaser for value would cut off this interest, but it would attach automatically to the consideration received by the husband. If, however, the transfer were not for value, the transferee would take subject to the surviving spouse's equitable interest.[34]

It is submitted that the first aim of an effective, workable elective share statute should be to abolish completely common law dower and curtesy, and in their stead to create in the surviving spouse a fractional, fee simple elective share in all the real and personal property owned by the deceased spouse at the time of his death. Experience has demonstrated that anything less than complete abrogation of dower leads to confusion and uncertainty in conveyancing.[35] It should be noted that the proposed fractional share differs from common law dower in several ways: it extends to personalty as well as to realty; it is operative as to the husband as well as to the wife; it is a free interest rather than a life estate; it is elective, that is, taken in lieu of any testamentary disposition; it attaches only to property in which the deceased spouse had an interest at the time of his death. As to these points, the proposals closely follow the Model Probate Code.[36]

This discussion is focused, however, on protection of the surviving spouse's statutory share, and on this point it is submitted that the Model Code's provision—that gifts "in fraud of . . . marital rights"[37] are subject to the elective share—would not provide adequate protection. Although this provision could be made effective by broad judicial construction, it suffers from the same defect as the "intent" test[38] in that it is based on the state of mind of the deceased spouse at the time the transfer was made, and consequently, its application would be uncertain as well as easy to avoid. The "control" test[39] formulated by the New York court, though more objective than the "intent" test, is equally uncertain in that neither the degree nor kind of reserved control necessary to invalidate the deceased spouse's inter vivos transfers is specified. Finally, it is submitted that the "statutory trust" proposal[40] would inhibit the free alienability of

33. Spies, *supra* note 12, at 183.
34. *Ibid.*
35. See note 13 *supra.*
36. See note 29 *supra.*
37. Merz v. Tower Grove Bank & Trust Co., *supra* note 24.
38. See note 24 *supra* and accompanying text.
39. See note 27 *supra* and accompanying text.
40. See note 33 *supra* and accompanying text.

property in the same manner as did inchoate dower, a result most elective share statutes were designed to eliminate. Under such a proposal, not only would the power of married persons to make absolute gifts of property, real or personal, be curtailed, but any transaction made by a spouse would later be subject to possible invalidation on the ground that inadequate consideration was received. To avoid the uncertainties inherent in the "intent" and "control" tests as they formerly have been applied, while not placing undue restrictions on the free alienation of married persons' property, it is submitted that a model elective share statute should subject only certain, specifically-named types of inter vivos transfers made by the deceased spouse to the surviving spouse's fractional share. For this purpose, it is further submitted that the federal estate tax sections in the Internal Revenue Code which define the extent of property in a decedent's gross estate[41] should be used as guidelines for defining the types of transfers which would be brought within the decedent's probate estate for purposes of determining the surviving spouse's elective share.[42] Thus, the husband would be able to make absolute, unconditional gifts free from his wife's expectancy under statute with the exception of gifts made in contemplation of death.[43] If, however, he should retain any interest or beneficial enjoyment that would bring the transferred property within his gross estate for estate tax purposes,[44] such property would be subject to the widow's statutory elective share. The main effect of such a provision would be to prevent the inequitable situation in which the husband, by means of the inter vivos transactions mentioned earlier,[45] retains a substantial interest in the transferred property until his death, being assured all the while that such property will not pass through his probate estate, and thus will be insulated from his wife's statutory elective share. To avoid this loophole in elective share statutes, the writer submits that, having abolished dower and curtesy, and having established an elective share of the probate estate similar to that provided in the Model Probate Code,[46] state legislatures should redefine probate estate, solely for the purposes of determining the surviving spouse's elective share, by incorporating the following provision into elective share statutes:

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41. INT. REV. CODE OF 1954, §§ 2031-44.

42. This idea has been briefly mentioned in Atkinson, *Catching Up With Changing Influences On the Inheritance Process*, 93 TRUSTS & ESTATES 244 (1954); Goldman, *supra* note 18.

43. See INT. REV. CODE of 1954, § 2035.

44. *E.g.*, transfers with retained life estate, *id.*, § 2036; transfers taking effect at death, *id.*, § 2037; revocable transfers, *id.*, § 2038; joint interests, *id.*, § 2040.

45. See notes 18-21 *supra* and accompanying text.

46. See note 29 *supra*.

DEFINITION: PROBATE ESTATE.

In determining the fractional share which a surviving spouse may elect to take under this statue, the term "probate estate" shall include all property in the deceased spouse's "gross estate," as defined in the Estate Tax section of the United States Internal Revenue Code of 1954. In the event that the preceding provision increases the surviving spouse's elective share, the amount by which such increased share exceeds the fractional share of the ordinary probate estate, without the preceding provision, shall be applied only to the property brought into the probate estate solely by virtue of the preceding provision.[47] All such property shall be declared by the probate court as held in trust for the benefit of the surviving spouse, to the extent of the fractional share, and a decree ordering division and tarnsfer of such property shall be given, at the election of the surviving spouse.

The Right to Bail and the Pre-"Trial" Detention of Juveniles Accused of "Crime"

I. INTRODUCTION

Recent years have brought an increasing percentage of our population into the juvenile age category.[1] Yet, the number of crimes committed by juveniles has increased almost three times as fast as the

47. This sentence would prevent a wife from taking *all* of the property in her husband's ordinary probate estate by virtue of the enlargement of the estate in the preceding sentence. If a wife is to take advantage of this enlargement of the estate, and thus the enlargement of her fractional share, the larger share must come only out of all the property brought into the probate estate by the preceding sentence.

1. For the purposes of this article the juvenile age category includes persons of the ages ten to eighteen years. This is based upon a survey of the Juvenile Court Acts of the several states and the District of Columbia which provide as follows:

ALA. CODE tit. 13, § 350 (1959) (16); ALASKA STAT. § 47.10.010 (1962) (18); ARIZ. REV. STAT. ANN. § 8-201 (1956) (18); ARK. STAT. ANN. § 45-204 (1964) (18); CAL. WELFARE & INST'NS CODE § 504; COLO. REV. STAT. ANN. § 22-8-1 (1953) (18 or 16 plus capital offense); CONN. GEN. STAT. REV. § 17-53 (Supp. 1963) (16); DEL. CODE ANN. § 1101 (1955) (18 unless felony); D.C. CODE ANN. § 11-1551 (Supp. IV, 1965) (18); FLA. STAT. ANN. § 39.01 (1961) (17); GA. CODE ANN. § 24-2408 (1959) (17); HAWAII REV. LAWS § 333-1 (1955) (over 12 and under 18); IDAHO CODE ANN. § 16-1802 (Supp. 1963) (18); ILL. ANN. STAT. ch. 23, § 2001 (Smith-Hurd 1964) (female under 18 and male under 17); IND. ANN. STAT. § 9-3203 (1956) (18); IOWA CODE § 232.1 (1949) (18 unless capital offense); KAN. GEN. STAT. ANN. § 38-802 (Supp. 1959) (female under 18 and male under 16); KY. REV. STAT. ANN. § 208.010 (1962) (21); LA. REV. STAT. ANN. § 13.1569 (Supp. 1963) (17); ME. REV. STAT. ANN. ch. 152-A, § 2 (Supp. 1963) (17); MD. ANN. CODE art. 26, § 52 (1957) (18); MASS. GEN. LAWS ANN. ch. 119, § 52 (Supp. 1964) (over 7 and under 17); MICH. STAT. ANN. § 27.3178 (1962) (19); MINN. STAT. § 260.111 (Supp. 1964)

juvenile population.[2] While the rights of adults accused of crime have been receiving renewed attention and the public eye has been directed to the problem of bail and pre-trial detention of adults,[3] surprisingly little consideration has been given to the same problem with respect to juveniles. The purpose of this paper is to examine the bail and pre-trial detention problems facing the juvenile accused of "criminal"[4] conduct.

(18 subject to permissible reference if over 14); MISS. CODE ANN. § 7185-02 (1952) (over 10 and under 18); MO. ANN. STAT. § 211.031 (1959) (17); MONT. REV. CODES ANN. § 10-603 (1947) (21); NEB. REV. STAT. § 43-201 (Supp. 1963) (18); NEV. REV. STAT. § 62.020 (1957) (18); N.H. REV. STAT. ANN. § 169.1 (1964) (18); N.J. STAT. ANN. § 2A:4-14 (1952) (18); N.M. STAT. ANN. § 13-8-20 (Supp. 1963) (18); N.Y. JUDICIARY—FAMILY COURT ACT § 712 (over 7 and under 16); N.C. GEN. STAT. § 110-21 (1960) (16); N.D. CENT. CODE § 27-1-07 (1960) (18); OHIO REV. CODE ANN. § 2151.01 (Baldwin 1964) (18); OKLA. STAT. ANN. tit. 20, § 772 (1962) (18); ORE. REV. STAT. § 419.476 (1953) (18); PA. STAT. ANN. tit. 11, § 243 (1939) (18); R.I. GEN. LAWS ANN. § 14-1-3 (1956) (18); S.C. CODE ANN. § 15-1171 (1962) (17); S.D. CODE § 43.0301 (1939) (18); TENN. CODE ANN. § 37-242 (Supp. 1964) (18); TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3 (1964) (female over 10 and under 18 and male over 10 and under 17); UTAH CODE ANN. § 55-10-6 (1963) (18); VT. STAT. ANN. tit. 33, § 602 (1959) (16); VA. CODE ANN. § 16.1-158 (1960) (18); WASH. REV. CODE ANN. § 13.04.010 (1962) (18); W. VA. CODE ANN. § 4904 (1961) (18); WIS. STAT. ANN. § 48.02 (1957) (18); WYO. STAT. ANN. § 14-98 (1957) (18).

2. U.S. CHILDREN'S BUREAU, STATISTICAL SERIES No. 73 (1963).

3. See, *e.g.*, WALD & FREED, BAIL IN THE UNITED STATES: 1964 (1964), and the projects enumerated therein.

4. "Criminal" is used here to indicate conduct which if exhibited by an adult would be the basis for criminal prosecution. However, most of the juvenile court acts provide that such conduct on the part of the juvenile shall not constitute a crime:

ALA. CODE tit. 13, § 378 (1958); ALASKA STAT. § 47.10.080 (1962); ARIZ. REV. STAT. ANN. § 8-228 (1956); ARK. STAT. ANN. § 45-205 (1964); CAL. WELFARE & INST'NS CODE § 503; COLO. REV. STAT. ANN. § 22-843 (1953); CONN. GEN. STAT. REV. § 17-53 (Supp. 1963); DEL. CODE ANN. § 1176 (1955); FLA. STAT. ANN. § 39.10 (1961); GA. CODE ANN. § 24-2418 (1959); HAWAII REV. LAWS § 333-1 (1955); IDAHO CODE ANN. § 16-1814 (Supp. 1963); ILL. ANN. STAT. ch. 23, § 2001 (Smith-Hurd 1964); IND. ANN. STAT. § 9-3222 (1956); KAN. GEN. STAT. ANN. § 38-801 (Supp. 1959); KY. REV. STAT. ANN. § 208.200 (1962); LA. REV. STAT. ANN. § 13.1580 (1950); ME. REV. STAT. ANN. ch. 152-A, § 2 (Supp. 1963); MD. ANN. CODE art. 26, § 54 (Supp. 1964); MASS. GEN. LAWS ANN. ch. 119, § 53 (1957); MICH. STAT. ANN. § 27.3178 (1962); MINN. STAT. § 260.211 (Supp. 1964); MISS. CODE ANN. § 7185-08 (1952); MO. ANN. STAT. § 211.271 (1959); MONT. REV. CODES ANN. § 10-601 (1947); NEB. REV. STAT. § 43-206.03 (Supp. 1963); NEV. REV. STAT. § 62.200 (1957); N.H. REV. STAT. ANN. § 169.26 (1964); N.J. STAT. ANN. § 2A:4-39 (1952); N.M. STAT. ANN. § 13-8-65 (Supp. 1963); N.Y. JUDICIARY—FAMILY COURT ACT. § 781; N.C. GEN. STAT. § 110-24 (1960); N.D. CENT. CODE § 27-16-21 (1960); OHIO REV. CODE ANN. § 2151.35 (Baldwin 1964); OKLA. STAT. ANN. tit. 20, § 822 (1962); ORE. REV. STAT. § 419.543 (1953; PA. STAT. ANN. tit. 11, § 262 (1939); R.I. GEN. LAWS ANN. § 14-1-40 (1956); S.C. CODE ANN. § 15-1202 (1962); S.D. CODE § 43.0327 (1939); TENN. CODE ANN. § 37-267 (Supp. 1964); TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13 (1964); UTAH CODE ANN. § 55-10-33 (1963); VT. STAT. ANN. tit. 33, § 671 (1959); VA. CODE ANN. § 16.1-179 (1960); WASH. REV. CODE ANN. § 13.04.240 (1962); W. VA. CODE ANN. § 4904 (1961); WIS. STAT. ANN. § 48.38 (1957); WYO. STAT. ANN. § 14-109 (1957).

II. THE JUVENILE'S RIGHT TO BAIL PRIOR TO THE JUVENILE COURT ACTS

The United States Constitution does not expressly grant a right to bail; the Eighth Amendment provides merely that excessive bail shall not be required.[5] However, from the adoption of the Judiciary Act of 1789[6] through the present Federal Rules of Criminal Procedure[7] the federal courts have held that in all but capital cases[8] a person accused of a crime has an absolute right to be admitted to bail.[9] Substantially the same right is guaranteed by the constitutions or statutes of all but seven states.[10]

Until the passage of the juvenile court laws the same right presumably extended to a juvenile accused of a crime; for until the special jurisdiction of the juvenile court was established, the juvenile was legally responsible—subject to certain presumptions based on his age—for his criminal conduct and could be subjected to the same punishments inflicted upon adults convicted of the same offense.[11] Certainly, under those circumstances the juvenile was to be afforded the same procedural safeguards as the adult.

III. THE JUVENILE'S RIGHT TO BAIL UNDER THE JUVENILE COURT ACTS

The various juvenile court acts passed in most of the fifty states[12] have given exclusive original jurisdiction[13] over the juvenile[14] accused

5. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

6. 1 Stat. 73, 91 (1789).

7. FED. R. CRIM. P. 46.

8. In capital cases the right to bail has been held to be discretionary.

9. Stack v. Boyle, 342 U.S. 1, 4 (1951).

10. WALD & FREED, *op. cit. supra* note 3, at 2 n.8.

11. For an excellant summary of the common law and the present law in England on this point, see RUSSELL, CRIME 98-101 (12th ed. 1964).

12. All of the fifty states and the District of Columbia have statutory provisions placing jurisdiction over juveniles accused of crime in one specialized court or in a special term of the county or district court. However, not all states have provisions as comprehensive as those suggested by the National Probation Association, National Council of Juvenile Court Judges, and the U.S. Children's Bureau. See STANDARD JUVENILE COURT ACT.

13. However, most of the acts provide that if a juvenile is over a certain age (usually 16) and has committed an offense of a certain degree of seriousness (usually that which, if committed by an adult, would be a felony) the juvenile court judge may in his discretion transfer the juvenile to the county court for prosecution as an adult. See, *e.g.*, STANDARD JUVENILE COURT ACT § 13. Cases involving violations of state and local motor vehicle laws are another common exception to the juvenile court's exclusive original jurisdiction. Most juvenile court acts provide that in this latter class of case the juvenile may be prosecuted in the city or county courts in the same manner as an adult.

14. See note 1 *supra*.

of violating the law[15] to the juvenile court.[16] These acts have treated the subject of bail with everything from affirmative approval through complete neglect to express disapproval. Nine states have expressly provided that the rules as to bail in criminal actions shall apply to juvenile court proceedings.[17] Three states have provisions which seem to imply that there is a right to bail.[18] On the other hand, three states have expressly provided that the rules as to bail in criminal actions shall not apply,[19] while eight others reach the same result by innuendo.[20] The remaining twenty-seven states and the District of Columbia have no provisions expressly dealing with the question.[21]

15. See note 4 *supra* and accompanying text.

16. ALA. CODE tit. 13, § 351 (1959); ALASKA STAT. § 47.10.010 (1962); ARIZ. REV. STAT. ANN. § 8-202 (1956); ARK. STAT. ANN. § 45-206 (1964); CAL. WELFARE & INST'NS CODE § 5; COLO. REV. STAT. ANN. § 22-8-7 (1953); CONN. GEN. STAT. REV. § 17-53 (1958); DEL. CODE ANN. tit. 10, § 1151 (Supp. 1962); D.C. CODE ANN. § 11-1551 (Supp. IV, 1965); FLA. STAT. ANN. § 39.02 (Supp. 1963); GA. CODE ANN. § 24-2408 (1959); HAWAII REV. LAWS § 333-2 (1955); IDAHO CODE ANN. § 16-1803 (Supp. 1963); ILL. ANN. STAT. ch., 23, § 2002 (Smith-Hurd 1958); IND. ANN. STAT. § 9-3103 (1956); KAN. GEN. STAT. ANN. § 38-806 (Supp. 1959); KY. REV. STAT. ANN. § 208-020 (1962); LA. REV. STAT. ANN. § 13.1563 (1950); ME. REV. STAT. ANN. ch. 152-A, § 3 (Supp. 1963); MD. ANN. CODE art. 26, § 53 (Supp. 1964); MASS. GEN. LAWS ANN. ch. 119, §§ 61, 74 (Supp. 1964); MICH. STAT. ANN. § 27.3178 (1962); MINN. STAT. § 260.111 (Supp. 1964); MISS. CODE ANN. § 7185-03 (1952); MO. ANN. STAT. § 211.031 (1959); MONT. REV. CODES ANN. § 10-603 (1947); NEB. REV. STAT. § 43-202 (Supp. 1963); NEV. REV. STAT. § 62.040 (1957); N.H. REV. STAT. ANN. § 169.29 (1964); N.J. STAT. ANN. § 2A:4-14 (Supp. 1964); N.M. STAT. ANN. § 13-8-26 (Supp. 1963); N.Y. JUDICIARY—FAMILY COURT ACT § 713; N.C. GEN. STAT. § 110-21 (1960); N.D. CENT. CODE § 27-16-08 (1960); OHIO REV. CODE ANN. § 2151.23 (Baldwin 1964); OKLA. STAT. ANN. tit. 20, § 773 (1962); ORE. REV. STAT. § 419.476 (1953); PA. STAT. ANN. tit. 11, § 244 (Supp. 1964); R.I. GEN. LAWS ANN. § 14-1-5 (1956); S.C. CODE ANN. § 15-1171 (1962); S.D. CODE § 43.0302 (1939); TENN. CODE ANN. § 37-243 (Supp. 1964); TEX. REV. CIV. STAT. ANN. art. 2338-1, § 5 (1964); UTAH CODE ANN. § 55-10-3 (1953); VT. STAT. ANN. tit. 33, § 601 (1959); VA. CODE ANN. § 16.1-158 (1960); WASH. REV. CODE ANN. § 13.04.030 (1962); W. VA. CODE ANN. § 4904 (1961); WIS. STAT. ANN. § 48.12 (1957); WYO. STAT. ANN. § 14-100 (1957). *Contra,* State v. Reed, 207 Iowa 557, 218 N.W. 609 (1928); IOWA CODE § 232.1 (1964).

17. ALA. CODE tit. 13, § 368 (1959); ARK. STAT. ANN. § 45-227 (1964); COLO. REV. STAT. ANN. § 22-8-6 (1953); GA. CODE ANN. § 24-2415 (1935); MASS. GEN. LAWS ANN. ch. 119, § 67 (1957); MICH. STAT. ANN. § 27.3178 (1962); N.C. GEN. STAT. § 110-27 (1960); S.D. CODE § 43.0309 (1939); W. VA. CODE ANN. § 4904 (1961).

18. ILL. ANN. STAT. ch. 23, § 2022 (Smith-Hurd 1958); IOWA CODE § 232.17 (1949); WASH. REV. CODE ANN. § 13.04.115 (1962).

19. KY. REV. STAT. ANN. § 208.110 (1962); N.Y. JUDICIARY LAW § 724; ORE. REV. STAT. § 419.583 (1953).

20. CONN. GEN. STAT. REV. § 17-63 (1958); ME. REV. STAT. ANN. ch. 152-A, § 14 (Supp. 1963); MINN. STAT. § 260.171 (1959); MISS. CODE ANN. § 7185-06 (1952) (See also Annot., 160 A.L.R. 287); N.H. REV. STAT. ANN. 169.21(a) (1964); S.C. CODE ANN. § 15-1185 (1962); TENN. CODE ANN. § 37-251 (Supp. 1964); VA. CODE ANN. § 16.197 (1960).

21. Alaska, Arizona, California, Delaware, Florida, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maryland, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, Vermont,

In those jurisdictions where no statutory provision expressly grants or denies a right to bail,[22] there are few cases dealing with the issue[23] and those which have been decided are in conflict. The courts which have held that the juvenile court acts abrogate the right to bail as it existed under the common law,[24] have done so on two grounds. First, since the proceedings are denominated civil rather than criminal and the disposition is intended as a treatment rather than punishment, the common law rule applicable to criminal proceedings no longer applies, and in civil proceedings the question of bail is wholly within the discretion of the trail judge. Second, an absolute right to bail is inconsistent with the purpose of the juvenile court acts, which is to provide care and guidance for those juveniles in need both before and after their hearings. The cases adopting the opposite view[25] rely on two major arguments. First, the purpose of the juvenile court acts is to provide additional benefits for the juvenile and not to remove those rights which he had previously possessed. Second, while the aim of juvenile court detention is, theoretically, to provide care and treatment, in practice this is not the case and cannot be used to justify the intrusion upon the rights of the juvenile and his family.

IV. THE PROBLEM ON THE THEORETICAL LEVEL AND ITS UNDERLYING ASSUMPTIONS

On purely theoretical grounds, there should clearly be no absolute right to bail in juvenile court proceedings.[26] An absolute right to bail is inconsistent with the basic policy of the juvenile court acts

Wisconsin, Wyoming. The District of Columbia is also silent on this point.

22. See note 21 *supra*.

23. There are several factors responsible for the lack of cases litigating this point. The most important are the limited right of appeal and the limited access to counsel in the juvenile courts. While the statutory provisions in most states would seem to contradict this observation, in practice those provisions have not received their due. Furthermore, since the individuals who more commonly find themselves confronted with an unjust detention are usually of meager financial means, a contest on this point is usually out of the question.

24. *In re* Magnuson, 110 Cal. App. 2d 73, 242 P.2d 362 (1952); A. N. E. v. State, 156 So. 2d 525 (Dist. Ct. App. Fla. 1963); State v. Fullmer, 76 Ohio App. 335, 62 N.E.2d 268 (1945); *Ex parte* Espinosa v. Price, 144 Tex. 121, 158 S.W.2d 576 (1945).

25. Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960); State v. Franklin, 202 La. 439, 12 So. 2d 211 (1943).

26. This is the position taken by the Standard Juvenile Court Act. STANDARD JUVENILE COURT ACT § 17(6). See also Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 552 (1957). The present article will proceed on the basic assumption that the idea of a juvenile court is a good one and can be implemented to further the basic policy of the juvenile court acts. However, passing reference should be made to the developments in England, Scotland and Wales. In those countries, this basic assumption is a major issue; a recent study in Scotland has recommended that the idea of juvenile court be abandoned. 1964 BRIT. J. CRIM. L. 604. While some of the comments which follow may be said to raise problems

which provide a juvenile coming within their purview the care, guidance, and control most conducive to his welfare and the best interests of the state.[27] Certainly, there are many cases in which release would not be in the best interests of the state and may even be potentially detrimental to the welfare of the child.[28] However, underlying this argument and the policy of the juvenile court acts is the assumption that it will be in the better interests of the juvenile to detain him. Whether this assumption is valid depends in turn upon the adequacy of the detention facilities available and the efficacy of their use and operation.

The juvenile court acts contemplate that the judge making the determination as to whether the juvenile should be detained or released would have a choice between releasing the child or providing him with care which would closely approximate that which he should receive at home.[29] Most of the acts contain elaborate provisions for the establishment of specialized detention centers.[30] Usually provision is made for alternative procedures when specialized centers are not available.[31] In addition, protective provisions are common; these include prohibitions against the use of jails, lockups or prisons,[32]

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which undermine this basic assumption, it is submitted that those problems may be solved within the framework of the juvenile court system.

27. STANDARD JUVENILE COURT ACT § 1. Most of the states have adopted provisions which are substantially the same as § 1 of the standard act.

28. Paulsen, in his article makes the point with this example: "See, for example, *In re* Tillotson, 255 La. 573, 73 So. 2d 466 (1954), which tells of a young girl who had sexual relations with a man in 'her mother's bed at her home in New Orleans, with her mother's apparent consent and approval,' and Application of Jones, 206 Misc. 557, 134 N.Y.S.2d 90 (1954), which tells of a fifteen year old who had been abused by her stepfather." Paulsen, *supra* note 26, at 552 n.21.

29. See note 27 *supra* and accompanying text.

30. See, *e.g.*, ALASKA STAT. §§ 47.10.170-.10.260 (1957); CAL. WELFARE & INST'NS CODE §§ 850-70; ILL. ANN. STAT. ch. 23, §§ 2161-77 (Smith-Hurd 1964); KAN. GEN. STAT. ANN. §§ 28-707, 38-523 to -27 (Supp. 1961); MO. ANN. STAT. §§ 211.151, 211.331, 211.341 (1959); N.Y. COUNTY LAW § 218-a; OHIO REV. CODE ANN. § 2151.34-3415 (Baldwin 1964); UTAH CODE ANN. §§ 55-10-49 to -49.6 (1963); VA. CODE ANN. § 16.1-198 to -202.9 (1960); WASH. REV. CODE ANN. § 13.04.135 (1962).

31. See, *e.g.*, COLO. REV. STAT. ANN. §§ 22-12-1 (1953); FLA. STAT. ANN. § 416.02 (1960); IND. ANN. STAT. § 9-3222 (1956); MASS. GEN. LAWS ANN. ch. 119, § 68 (1957); MISS. CODE ANN. § 7185-06 (1952); NEB. REV. STAT. § 43-206.02 (Supp. 1963); OKLA. STAT. ANN. tit. 20, § 812 (1962). Such alternative procedures include the use of foster homes, private institutions and placement agencies. In some cases the court is authorized to place the child in the custody of a respectable citizen.

32. ALA. CODE tit. 13, § 379 (1959) (unless absolutely necessary and no other arrangements can be made); ALASKA STAT. § 47.10.130 (1959) (unless over 18 or separated from adults); ARK. STAT. ANN. § 45-225 (1964) (unless female over 18 or male over 17 or detention home not available); CAL. WELFARE & INST'NS CODE § 507 (unless over 18 or no other adequate facilities available); COLO. REV. STAT. ANN. § 22-8-6 (1953); CONN. GEN. STAT. REV. § 17-63 (1958); DEL. CODE ANN. § 1174 (1955); D.C. CODE ANN. § 16-2313 (Supp. IV, 1964) (unless he is a menace to other children); FLA. STAT. ANN. § 39.03 (1961) (unless the judge determines that it is necessary); GA. CODE ANN. § 24-2416 (1935) (unless judge orders or detention

periodic inspection of facilities designated for detention use,[33] and maximum time limits on the length of detention prior to the formal filing of a petition.[34]

It is also intended that the judge making the determination[35] will

home not available); HAWAII REV. LAWS § 333-13 (1955) (unless over 19 or accused of a felony); ILL. ANN. STAT. ch. 23, § 2022 (Smith-Hurd 1958); IND. ANN. STAT. § 9-3222 (1956) (unless over 18); IOWA CODE § 232.17 (1949) KAN. GEN. STAT. ANN. § 38-823 (Supp. 1959) (unless by order of court and charge of delinquency); KY. REV. STAT. ANN. § 208.120 (1962) (unless over 16 or by order of court); LA. REV. STAT. ANN. § 13.1577 (1951) (unless over 15 and separated from adults); ME. REV. STAT. ANN. ch. 152-A, § 14 (Supp. 1963) (unless by court order and in the best interests of the community or juvenile); MD. ANN. CODE art. 26, § 58 (Supp. 1963) (unless separated from adults); MASS. GEN. LAWS ANN. ch. 119, §§ 66-67 (Supp. 1964) (unless over 17 or over 14 and no detention facilities are available); MICH. STAT. ANN. § 27.3178 (598.16) (Supp. 1964) (unless 15 and a menace to other children in detention facilities); MINN. STAT. § 260.175 (Supp. 1964) (unless other facilities are not available or his habits constitute a menace to other children in detention facilities); MISS. CODE ANN. § 7185-06 (1952) (unless a menace to other children in detention facilities); MO. ANN. STAT. § 211.151 (1959) (unless a menace to other children in detention facilities); MONT. REV. CODES ANN. § 10-626 (1947) (unless over 18, or over 16 and accused of felony, or a menace to other children in detention facilities); NEV. REV. STAT. § 62.170 (1957) (unless over 18 or no other facilities available); N.H. REV. STAT. ANN. § 169.7 (1964) (unless a menace to other children in detention facilities); N.J. STAT. ANN. § 2A:4-33 (1952) (unless over 18 or over 16 and no other place is available); N.M. STAT. ANN. § 13-8-44 (1953); N.C. GEN. STAT. § 110-30 (1960); OKLA. STAT. ANN. tit. 20, § 811 (1962) (unless 16 and accused of a felony); ORE. REV. STAT. § 419.575 (1953) (unless 16 and a menace to other children in detention facilities or 14 and no other facilities are available); PA. STAT. ANN. tit. 11, § 249 (Supp. 1964) (unless over 16); R.I. GEN. LAWS ANN. § 14-1-23 (1956); S.D. CODE § 43.0309 (Supp. 1960) (unless over 15); TEX. REV. CIV. STAT. ANN. art. 2338-1, § 17 (1964) (unless female over 18 or male over 17); VT. STAT. ANN. tit. 33, § 620 (1959) (unless over 16 or charged with crime punishable by death); VA. CODE ANN. § 16.1-196 (1960) (unless over 18 or over 14 with consent of the court); WASH. REV. CODE ANN. § 13.04.115 (1962) (unless over 16); W. VA. CODE ANN. § 4904 (1961) (unless over 16); WIS. STAT. ANN. § 48.30 (1957) (unless a menace to other children in detention facilities); WYO. STAT. ANN. § 14-102 (1957) (unless over 13).

33. See, *e.g.*, ALASKA STAT. § 47.10.240 (1957); CAL. WELFARE & INST'NS CODE § 509; FLA. STAT. ANN. § 416.08 (Supp. 1964); ILL. ANN. STAT. ch. 23, § 2029 (Smith-Hurd 1964); N.J. STAT. ANN. § 26:1A-18,19 (1964). Along the same lines, many states require that private agencies who handle the detention of juveniles he licensed. See, *e.g.*, ARIZ. REV. STAT. ANN. § 8-506 (1956); COLO. REV. STAT. ANN. §§ 22-12-2, 22-12-3, 22-12-4 (1953); CONN. GEN. STAT. REV. §§ 17-48 to 17-50 (Supp. 1963); IOWA CODE § 232.37 (1946).

34. See, *e.g.*, ALASKA STAT. § 47.10.140 (1962) (48 hours); FLA. STAT. ANN. § 39.03 (1961) (48 hours); GA. CODE ANN. § 24-2416 (1935) (24 hours); IDAHO CODE ANN. § 1811 (Supp. 1963) (24 hours); KY. REV. STAT. ANN. § 208.110 (1963) (24 hours); LA. REV. STAT. ANN. § 13.1577 (1951) (24 hours); MINN. STAT. § 260.171 (Supp. 1964) (48 hours); NEB. REV. STAT. § 43-205 (Supp. 1963) (48 hours); N.M. STAT. ANN. § 3-8-43 (Supp. 1963) (48 hours); N.Y. JUDICIARY LAW § 729 (72 hours or the next day court is in session whichever is sooner); ORE. REV. STAT. § 419.577 (1953) (24 hours); R.I. GEN. LAWS ANN. § 14-1-25 (1956) (24 hours); TENN. CODE ANN. § 37-251 (Supp. 1964) (48 hours); WASH. REV. CODE ANN. § 13.04.053 (Supp. 1964) (72 hours); WYO. STAT. ANN. § 14-104 (1957) (72 hours).

35. The typical provisions relating to the assumption of custody of a juvenile

do so on the basis of the needs of the juvenile. The typical provision recites that the child should be released unless the circumstances are such that his welfare requires that immediate custody be assumed.[36]

pending the disposition of his case are, of necessity, quite complex. Yet, the overall plan is directed toward an early release of the juvenile to his parents or an immediate determination of whether he requires temporary detention by the juvenile court. Generally, the juvenile may be taken into custody in two ways: by arrest (a term which must be used advisedly since most juvenile court acts expressly provide that the process shall not be deemed an arrest) or by summons. In the latter case, there is no problem since the child is being summoned by the court and will be brought there before any further steps are taken. The problems arise in the case of an arrest. In the latter case, most states have elaborate provisions to ensure that the child will either be released immediately upon written promise of his parent to bring him before the juvenile court at the time set for his hearing or if not so released, brought immediately before the juvenile court for a determination of whether he requires temporary detention. See, *e.g.*, CONN. GEN. STAT. REV. § 17-65 (1958); FLA. STAT. ANN. § 39.03 (1961); HAWAII REV. LAWS § 333-14 (1955); ILL. ANN. STAT. ch. 23, § 2021 (Smith-Hurd 1964); KY. REV. STAT. ANN. § 208.110 (1962); MICH. STAT. ANN. § 27.3178 (598.14) (1962); NEB. REV. STAT. § 43-205.02 (Supp. 1963); N.Y. JUDICIARY—FAMILY COURT ACT § 724; OHIO REV. CODE ANN. § 2151.25 (Baldwin 1964); PA. STAT. ANN. tit. 11, § 248 (Supp. 1964); S.D. CODE § 43.0318 (Supp. 1960); UTAH CODE ANN. § 55-10-22 (1963). However, some states alter the procedure by permitting the arresting officer to detain the juvenile so long as notice is sent immediately to the juvenile court giving the reasons for not releasing. See, *e.g.*, ALASKA STAT. § 47.10.140 (1962); IND. ANN. STAT. § 9-3212 (1956); MINN. STAT. § 260.171 (1959); N.H. REV. STAT. ANN. § 169.6 (1964); N.J. STAT. ANN. § 2A:4-32 (1952); OKLA. STAT. ANN. tit. 20, § 811 (1962); WASH. REV. CODE ANN. § 13.04-.053 (Supp. 1964). In some states the burden of making the determination has been taken out of the hands of the juvenile court entirely and placed in the hands of the probation officer. See, *e.g.*, ARIZ. REV. STAT. ANN. § 8-221 (1956); CAL. WELFARE & INST'NS CODE § 627; GA. CODE ANN. § 24-2417 (1959); N.M. STAT. ANN. § 13-8-42 (Supp. 1963); VA. CODE ANN. § 16.1-197 (1960). In others, the responsibility for making the determination appears to rest on the arresting officer—subject to certain time limits. See, *e.g.*, IDAHO CODE ANN. § 16-1811 (Supp. 1963) (detention for not more than 24 hours before court appearance); MO. ANN. STAT. § 211.141 (1959) (24 hours); ORE. REV. STAT. § 419.577 (1953).

36. See, *e.g.*, ALASKA STAT. § 47.10.030 (1962); IND. ANN. STAT. § 93-209 (1956); LA. REV. STAT. ANN. § 13.1575 (1951); MINN. STAT. § 260.135 (Supp. 1964); MO. ANN. STAT. § 211.101 (1959); N.H. REV. STAT. ANN. § 169.14 (1964); N.M. STAT. ANN. § 13-8-34 (Supp. 1963); N.C. GEN. STAT. § 110-27 (1960); OHIO REV. CODE ANN. § 2151.28 (1964); OKLA. STAT. ANN. tit. 20, § 802 (1962); TEX. REV. CIV. STAT. ANN. art. 2338-1, § 8 (1964); UTAH CODE ANN. § 55-10-15 (1963); WYO. STAT. ANN. § 14-105 (1957). On the other hand, several other states seem to shift the emphasis a bit by authorizing detention when it is deemed necessary for the welfare of the child *or the community*. See, *e.g.*, NEV. REV. STAT. § 62.140 (1957); ORE. REV. STAT. § 419.486 (1953); VT. STAT. ANN. tit. 33, § 606 (1959). Another alternative ground for assumption of custody pending the disposition of the case is reasonable ground for believing the juvenile would not appear at his hearing or would flee from the jurisdiction of the court. See, *e.g.*, MISS. CODE ANN. § 7185-06 (1952); MONT. REV. CODES ANN. § 10-608 (1947); NEB. REV. STAT. § 43-205.03 (Supp. 1963); NEV. REV. STAT. § 62.140 (1957); N.Y. JUDICIARY—FAMILY COURT ACT § 739 (McKinney 1963); S.C. CODE ANN. § 15-1182 (1962). At least two states provide that custody may be assumed for any good reason. ME. REV. STAT. ANN. ch. 152-A, § 14 (Supp. 1963) (in discretion of the court); VA. CODE ANN. § 16.1-166 (1960) ("other good reason"). One state has attempted to spell out with particularity those instances in which custody may be assumed; Michigan limits detention pending the

Contemplated by these provisions is an informed determination by the juvenile court judge based upon such considerations as the juvenile's mental and physical condition, his background and environment at home—the intended emphasis being on the condition of the child and the circumstances he will face if released.[37]

V. THE PROBLEM ON THE PRACTICAL LEVEL— THE UNDERLYING ASSUMPTIONS REVISITED

Admitting the paper perfection of the various code provisions relating to detention procedures and facilities does not resolve the issue. The more important question is their practical operation; the application of the theory has uncovered many problems. Although the juvenile court acts contemplate a determination by the juvenile

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hearings to those juveniles (1) whose home conditions are such that detention is immediately necessary, (2) who are likely to run away, (3) whose offenses are so serious that their release is likely to endanger the public, or (4) who are in need of observation, study or treatment by qualified experts. MICH. STAT. ANN. § 27.3178 (598.15) (1962).

37. This can be seen more clearly by examining the comments to the standard act and the recommendations of its authors. The comments to the Standard Juvenile Court Act would limit detention to three classes of juveniles: (1) those who are almost certain to run away before the disposition of their case, (2) those who are almost certain to commit an offense dangerous to themselves or the community, and (3) those who must be held for transfer to another jurisdiction. STANDARD JUVENILE COURT ACT § 17. However, these criteria presuppose two different types of custodial care: (1) detention, which is defined as temporary care in physically restrictive facilities, and (2) shelter, which is defined as temporary care in physically unrestricted facilities. As will be seen below, most states do not have adequate facilities of even the first type, and facilities of the second type are virtually nonexistent. FREED & WALD, *op. cit. supra* note 3, at 108-09. This is not to say that the criteria suggested are not good, but merely to indicate that perhaps detention should be provided in many of the circumstances in which the Standard Juvenile Court Act would provide shelter or some other unrestricted custody. Such circumstances are: (1) physical danger or strained relationship between the juvenile and his parents, (2) other need of protection, or (3) need of clinical or psychological study and treatment. The Advisory Council of Judges of the N.P.P.A. would limit detention to juveniles: (1) who are likely to run away, (2) whose problems are so serious or family relationship so strained that release would cause further trouble, (3) who are in need of protection, (4) who have a history of serious offenses which indicate that their release would be a serious threat to the community, (5) who are parole violators, or (6) who are in need of psychological study or care. N.P.P.A., GUIDES FOR JUVENILE COURT JUDGES 46-47 (1957). The National Council on Crime and Delinquency adopts the same criteria as the Standard Juvenile Court Act, adding admonitions against the use of detention as a substitute for specialized care or treatment. N.C.C.D., STANDARDS AND GUIDES FOR THE DETENTION OF CHILDREN AND YOUTH 15-17 (2d ed. 1961). It is apparent from the foregoing that the emphasis is on the needs of the juvenile. Those differences of opinion which do exist are merely over the form which the custody is to take. This is not to say, however, that the interests of the community are to be forgotten entirely. As the above authorities indicate, there are situations in which the interests of the community will require that the court assume temporary custody. Yet, this will occur only in the exceptional case.

court judge based upon a consideration of the conditions facing the child at home, the likelihood of his appearance at the hearing, and his individual needs for treatment and supervision,[38] in many instances no such considered determination is or can be made. Among the factors responsible are crowded juvenile court dockets, inadequately staffed receiving centers, and poorly trained juvenile court personnel.[39] Moreover, the problem does not end with the initial determination. Assuming that an informed determination could be made, what choices are available to the juvenile court judge with respect to the order he can give? The truth of the matter is that he has little, if any, choice in most juvenile court jurisdictions. While some localities have had remarkable success in establishing specialized detention facilities,[40] the natonal picture is very discouraging. In 1960 the National Council of Crime and Delinquency published a report on detention practices in the United States.[41] This report indicated that most states have fewer than six detention homes and many have none at all.[42] Furthermore, the alternative procedures,[43] which were to relieve the problems posed by a shortage of specialized centers, have seen only limited development.[44] Even the protective provisions of the acts prohibiting jail detention[45] have broken down, for most of these prohibitory sections are qualified with exceptions provided for those cases in

38. See note 37 *supra.*

39. We have already seen the criteria for determining whether a juvenile should or should not be detained are generally agreed upon. See note 37 *supra.* However, without an evaluation of each juvenile in terms of these criteria, the mere fact that they are agreed upon is of little significance. It is not hard to believe that in most of the large metropolitan areas crowded court schedules make it impossible for the judge to make such an evaluation. See, *e.g.*, Statement of the Honorable Samuel S. Liebowitz, *Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess. 36-40 (1959). Yet, a recent California study indicates that even in smaller counties almost 50% of the juvenile cases are disposed of in less than 10 minutes. 2 REPORT OF THE GOVERNOR'S SPECIAL COMM. ON JUVENILE JUSTICE 16 (1960). The Statement of the Honorable Irving Ben Cooper, *supra* at 6, is indicative of the exasperation which is felt by many judges faced with this difficult task and armed with too little time and information to execute it: "No judge is God. We are human beings clothed with certain authority, and we look at this fellow, who looks contrite. He may be a mental derelict. He may be in need of treatment. We look at another youth and he is angry and he is snarling and he is defiant; and all he may need is an arm around his shoulder."

40. See, *e.g.*, N.C.C.D., DETENTION PRACTICE *passim* (1960).

41. *Ibid.*

42. *Id.* at 166.

43. See note 31 *supra.*

44. Foster homes, for example, have seen significant use only in Georgia and Buffalo, New York. WALD & FREED, *op. cit. supra* note 3, at 108 n.52. Probably the major reasons for the failure of the juvenile court to use foster homes in most areas are lack of funds to adequately subsidize these homes and the natural reluctance of persons, agencies or institutions to assume the responsibility for a "juvenile delinquent."

45. See note 32 *supra* and accompanying text.

which there are no other facilities available.[46] Finally, the judge faced with the limited choice between jail detention and release is often forced to determine arbitrarily which juveniles will be released and which will be detained.[47] The result is that the juvenile court procedure has often failed before it has even begun.[48]

VI. ALTERNATIVE SOLUTIONS AND RECOMMENDATIONS

In view of this discouraging picture of the juvenile court detention procedures in action, the position of those who still argue for an absolute right to bail is not hard to understand. Clearly, the justifications for assumption of custody which are argued on the theoretical level have no basis in fact. Furthermore, such an assumption of custody involves the derogation of not only the right of the juvenile to live at home but also the right of the parent to provide for his care, custody and control. "It is no accomplishment for the courts to interfere in the lives of people and then because of lack of staff and facilities proceed to substitute court neglect for the neglect of parents and communities."[49]

While the proponents of an absolute right to bail may rightly derive support from the problems facing the juvenile courts, their solution is not the only one available. Nor is it the most desirable. In the first place, there is no assurance that establishing a right to bail would solve more problems than it would create. One need only

46. Even those provisions for separating the juvenile from adults if jail detention is required are given only token respect. Such separate facilities often turn out to be "a bunk on top of a block of cells within hearing if not sight of adult criminals or woefully inadequate rooms in a police station." WALD & FREED, *op. cit. supra* note 3, at 105. The result is that every year over 75,000 juveniles are confined in jails most of which are unfit for adult offenders. N.C.C.D., DETENTION PRACTICE 166 (1960).

47. Statement of the Honorable Nathaniel Kaplan, *supra* note 39, at 66.

48. It has failed in two respects: First, it has failed by unnecessarily detaining juveniles not in need of detention. It is not uncommon for 50% of the juveniles who are referred to juvenile court to be detained. WALD & FREED, *op. cit. supra* note 3, at 97. Yet, this is five times that which the N.C.C.D. considers necessary. STANDARDS AND GUIDES FOR THE DETENTION OF CHILDREN AND YOUTH 16 (2d ed. 1961). "In view of the disgraceful condition of detention facilities in most areas, such unnecessary detention is more than a failure; it opens a Pandora's box of plaguing problems. Second, the juvenile court procedure has failed by releasing juveniles who are in need of detention, care or treatment. These are the individuals for whom the juvenile court was established. Yet, until they are identified, their needs must go unsatisfied. For example, it has been estimated that from twenty to twenty-five per cent of the juveniles brought before juvenile courts are in need of psychiatric care; yet in most instances these juveniles are either released or placed in a jail to await their hearing." Statement of W. C. Turnbladh, Director of the N.P.P.A., *supra* note 39, at 81.

49. Statement of the Honorable Irving Ben Cooper, *supra* note 39, at 9, quoting Mayor Wagner of New York City.

look at the operation of the bail system in adult criminal proceedings to find serious cause to doubt its potential as a solution to the problems facing the juvenile court. Our jails are still over-crowded by those too poor to exercise their right to bail; appearance at trial by those inclined to flee has not been assured by the monetary inducement provided by bail; and even the guardian angel of the bail system, the bondsman, has become the subject of frequent critical comment.[50] Furthermore, the establishment of a right to bail would be an unnecessary compromise with the philosophy of the juvenile court acts[51] when there are other alternatives available. Of course, the obvious alternative is the establishment of adequate detention facilities. Yet, this suggestion is almost naive, for it assumes a solution to the basic problem facing the juvenile court system today—lack of funds.[52] Moreover, there is substantial evidence that if the present facilities were used more wisely, their expansion in many areas might be unnecessary.[53]

The detention problem can be met most effectively at its source with a screening procedure which would provide the juvenile court with more meaningful control over the number and type of juveniles

50. For a discussion of the bail system and its critics see WALD & FREED, *op. cit. supra* note 3, at 9-21.

51. See notes 26-28 *supra* and accompanying text. Those who suggest establishment of a right to bail would do well to consider whether the benefits to be derived from such a move would be worth the cost, *i.e.*, an exchange of the basic policy of the juvenile court acts, which is to provide detention only for those in need of detention, for a policy which would provide detention only for those in need of money.

52. Lack of funds cannot be traced to any one major cause. One might say in the first instance that the majority of the voting public are not interested in the problems facing the juvenile court. However, the truth of the matter is that most people are just not aware that those problems exist. If the latter is true, suppose the politician were able to muster enough interest to support a drive for appropriations. For all his work he would find his hands tied by the present provisions of most juvenile court acts which place the burden of financing the juvenile court program on the counties. See, *e.g.*, ALA. CODE tit. 14, § 387(171) (Supp. 1963); CAL. WELFARE & INST'NS CODE § 850; FLA. STAT. ANN. § 416.01 (1960); IOWA CODE § 232.36 (Supp. 1964); KY. REV. STAT. ANN. § 208.130 (1962); MINN. STAT. § 260.101 (Supp. 1964); N.Y. COUNTY LAW § 218-a; S.D. CODE § 43.0309 (1939); WIS. STAT. ANN. § 48.31 (1957). Yet, it has been estimated that in the United States there are 2,500 counties the resources of which are too small to adequately carry the burden of financing a juvenile court program. N.P.P.A., *supra* note 37, at 43-44. Some states have attempted to solve this problem by providing for regional facilities maintained by groups of contingent counties. See, *e.g.*, FLA. STAT. ANN. § 416.05 (1960); ILL. ANN. STAT. ch. 23, § 2168 (Smith-Hurd Supp. 1964); ORE. REV. STAT. § 419.612 (1963). However, this solution has been criticized for being politically naive, N.P.P.A., *supra*, at 44, and so far experience has proven that such regional detention facilities cannot be relied on to solve the financing problems. N.C.C.D., *supra* note 40, at 167-69. Some of these problems could be met by the states if they were to assume responsibility for detention. See N.C.C.D., STANDARDS, *supra* note 37, at 149-50. But as yet, only a few states have undertaken this task. *Ibid.* Furthermore, even state sponsorship involves some potentially difficult problems. See *ibid.* for discussion.

53. N.C.C.D., STANDARDS, *supra* note 37, at 13.

admitted to the detention facilities. By gathering data relating to the juvenile's mental and physical condition, his background and environment at home and presenting this information to the judge, the informed determination contemplated by the juvenile court acts could be made a reality. An improvement at this stage of the juvenile court proceedings could bring about several desirable results. First, it would relieve some of the congestion in the presently available detention facilities.[54] In addition, it would tend to minimize the unnecessary intrusions upon the family life of the juvenile.[55] Finally, it would provide greater assurance that those in need of detention or treatment would receive it.[56] The problem here is not lack of criteria for such admission control;[57] rather, the problem is finding someone to apply the criteria. The judge alone is unable to perform this function, since he does not have the time to assemble the necessary information.[58] Alternative solutions at this point have ranged from the creation of an entirely separate juvenile court to relieve the pressure on the existing court system to provisions for more judges or facilities to assist them. Of course, all of these suggestions meet with the familiar problem of obtaining the funds necessary for their implementation. The suggestion that an entirely separate juvenile court be established seems more than likely to suffer defeat at the appropriation stage. To a large extent, the same problem confronts those who suggest that more judges be provided. Not only do the salary demands of highly trained personnel present a problem, but in the first instance there is a shortage of persons with adequate training.

The most workable and politically feasible solution lies in the proposal to provide screening centers to assist the present juvenile court judges in making their determinations. Facilities for such centers might vary in size from a suite of two rooms to an entire building depending upon the demands of the particular jurisdiction. However, they should encompass comfortable waiting and private consultation areas apart and distinct from detention, jail or prison facilities. Personnel needs will vary, but at the minimum would

54. Under the new Family Court Act in New York City the admission control service was a substantial factor in reducing the daily detention census almost 40% in the first eight months of its operation. WALD & FREED, BAIL IN THE UNITED STATES: 1964 100 (1964). In view of the usually high rate of detention, see note 48 *supra*, and the estimated rate which should he the case if detention criteria were correctly applied, *ibid.*, it would seem that most areas would benefit as has New York City from the establishment of an admission control service.

55. See note 48 *supra*.

56. *Ibid.*

57. See note 37 *supra* and accompanying text.

58. See note 39 *supra* and accompanying text.

call for someone to supervise those juveniles waiting to be screened and another to do the screening. The screening procedure is primarily one of gathering information. The use of forms designed by judges, psychologists and sociologists to provide information necessary for an intelligent disposition of the juvenile case will facilitate this procedure and eliminate the need for highly trained personnel at this level.[59] The necessary information[60] may be obtained by a combination of interviews, telephone contacts and other investigatory techniques in much the same manner as the investigation involving the release of adults on recognizance is handled.[61] After this investigation is completed, the findings would be summarized on the prepared forms and sent with the juvenile to the juvenile court judge. Armed with the findings of such a center, the present juvenile court judges could make more effective determinations and probably in less time than is presently required.

Certainly, such a center would cost money, but it appears to offer one of the most economical solutions. Furthermore, there is evidence that such a proposal could work. In the closely related area of release of adults on recognizance, several experiments have shown the practicability and efficacy of such information gathering procedures.[62] When the problem being faced has as little political appeal as that under discussion here, a proposal with the lowest cost and the highest promise of success is the proposal most likely to meet with legislative approval.

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59. To some extent the use of highly trained personnel at this level would waste talent, since before their training can be brought to bear effectively on any given case, a certain minimum amount of information must be assembled. Assembling this information does not require training, but it does require time—time which judges, psychologists and social workers cannot afford to spend. The fundamental principle of screening centers is that this time-consuming function can effectively be delegated to less highly trained personnel, leaving the judges, psychologists and social workers free to make their decisions on the basis of the information gathered by the screening centers.

60. See note 37 *supra* and accompanying text.

61. See WALD & FREED, *op. cit. supra* note 54.

62. We are interested in these experiments merely as they show that such information gathering services can operate economically to provide the judge with the information he needs to make an intelligent determination of whether or not to detain. Those experiments have shown both economy of operation and ease of integration into pre-existing judicial procedures. See WALD & FREED, *op. cit. supra* note 54, at 57-70; Note, 38 N.Y.U.L. REV. 67 (1963).