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Should Usury Statutes Be Used to Solve The Instalment Sales "Problem"?

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SHOULD USURY STATUTES BE USED TO SOLVE THE INSTALMENT SALES "PROBLEM"?

The question of whether public policy requires the application of usury statutes to instalment sales contracts has arisen once again in the aftermath of a series of Nebraska decisions in which the court so applied Nebraska's usury statute.[1]

The purpose of this comment is to discuss the public policy considerations behind such reasoning and to determine whether such decisions should be followed.[2] Its aim is to assist the reader in understanding the instalment sales "problem," and to discuss the possible solutions together with the difficulties presented by the solutions.

In the United States "usury" has two distinct definitions: the legal and the non-legal. The legal is "the reserving and taking or contracting to reserve and take . . . a greater sum for the use of money than the lawful interest rate."[3] Its non-legal meaning is "an exorbitant amount or rate of interest."[4] An analysis of the two meanings reveals that their difference lies in their emphasis. The legal approach stresses a passing of a statutory limit. The layman's stress is the surpassing of the limit of reasonableness. In essence, though both meanings refer to the same term, they define two essentially different concepts—moral usury and legal usury.

By use of a hypothetical case, the viewpoints of the "majority" and the "minority" jurisdictions on this issue will be set forth.

Buyer, interested in purchasing a refrigerator, asks Retailer the price. Upon being informed that its cash price is $600, Buyer expresses a willingness to purchase the product and he tells Retailer that he would like to finance it over a twelve month period. Retailer, after consulting a chart furnished by Finance, tells Buyer that the time-price will be $53 a month for twelve months. Buyer agrees and signs a contract containing the following information: cash price ($600); time-price ($636); time differential ($36); payment period (12 mos.); monthly payments ($53). Several days later, Retailer discounts the contract to Finance, a company which normally buys "commercial paper" (usually called "chattel paper" in these cases). Several

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[1] For a report of the Nebraska situation see Wall St. Journal, Oct. 23, 1963, p. 1, col. 4 (eastern ed.), and "Caveat Venditor," Time Magazine, Nov. 8, 1963, p. 76. For a review of the previous Nebraska situation see Comment, An Analysis of Nebraska Finance Law, 40 Neb. L. Rev. 433 (1961).

[2] This article is not concerned with whether or not instalment sales are now subject to the prohibition of usury statutes, but rather, as a matter of public policy, whether they should be. For articles dealing with the latter problem see: Note, Usury in Credit Sales, 71 Harv. L. Rev. 1143 (1958); criticized in Raffel, Conditional Sales Contracts and Usury Laws, 76 Banking L.J. 829 (1959); Comment, Finance Charges or Time-Price Differential in Installment Sales—Usury?, 24 Mo. L. Rev. 225 (1959); Symposium—Instalment Selling, 2 Law and Contemp. Prob. 139 (1935); Warren, Regulation of Finance Charges in Retail Instalment Sales, 68 Yale L.J. 839 (1959); Symposium—Developments in Consumer Credit Law, 55 Nw. U.L. Rev. 301 (1960). For an article on the English view, see Note, Hire-Purchase or Moneylending?, 25 Modern L. Rev. 590 (1962).

[3] Black, Law Dictionary 1714 (4th ed. 1951).

[4] American College Dictionary 1338 (1954).

months pass, and Buyer has not made any monthly payments. Finance brings an action for the payments. Buyer answers that the contract is usurious as the maximum rate of interest permitted by statute is nine per cent and the contract in question bears a twelve per cent effective rate of interest (i.e., true interest) and is therefore unlawful.

The holding of the court depends upon the jurisdiction. A court adhering to the "majority" view would HOLD: (1) usury applies only to a loan of money or a forebearance of a debt; (2) an instalment sale does not involve a loan of money or forebearance of a debt; (3) a finance company can enforce a contract although the credit price exceeds the cash price by more than the lawful interest rate.[5]

However, a "minority" jurisdiction would HOLD: (1) the time differential, the difference between the time-price and the cash price, is a charge for the forebearance to collect the full cash price and is therefore interest; (2) interest, even in an instalment sales contract as the time differential, must not exceed the lawful rate; (3) a finance company is barred from enforcing a time sales contract which was usurious at its inception.[6]

In attempting to reconcile the divergent views and to solve the problems presented by the hypothetical case, several subsidiary questions should be considered: (1) What is the public policy supporting the adoption of laws regulating the rate or amount of interest that may be charged for the loan or use of money (usury statutes)? (2) Historically, what has been the rationale of usury statutes, and what has been the effect of such laws? (3) Should a distinction be made between loans for business use and those for consumer or individual needs? (4) Is the differential between the cash price of a commodity or service and the time or credit price to be considered in the same category as "interest for the use of money" and thus be subject to regulation?

For a proper analysis of the issues presented, the history of usury must be considered. Usury has had a long and erratic career. What follows will be the events that have had the greatest impact on our present day law and judicial theory.

Interest[7] was prohibited by the major cultures and religions of antiquity.[8] Both Athens[9] and Rome[10] had no official pronouncement against in-

[5] E.g., Commercial Credit Co. v. Tarwater, 215 Ala. 123, 110 So. 39 (1926); General Motors Acceptance Corp. v. Weinrich, 218 Mo. App. 68, 262 S.W. 425 (1924); Nazarian v. Lincoln Fin. Corp., 77 R.I. 497, 78 A.2d 7 (1951).

[6] Elder v. Doerr, — Neb. —, 122 N.W.2d 528 (1963); G.M.A.C. v. Mackrill, — Neb. —, 122 N.W.2d 743 (1963); Stanton v. Mattson, — Neb. —, 123 N.W.2d 844 (1963); Lloyd v. Gutgsell, — Neb. —, 124 N.W.2d 198 (1963).

[7] The term "usury" as used in ancient times was synonymous with interest.

[8] Interest was prohibited by Hindu and Chinese law, and by the Koran. Durnham v. Gould, 16 N.Y. (Johns.) 367 (1819). This decision by Chancellor Kent contains an excellent discussion of the historical aspects of usury. Likewise, Mosaic law prohibited the taking of interest on a loan of money. Exodus XVIII, 25; Leviticus XXV, 35-37; Deuteronomy XXIII, 19-20; Psalms XV, 5.

[9] In Athens at 400 B.C. usage recognized interest rates on personal loans between 10 and 33%. Loans for commercial and maritime purposes had a higher rate. Neifeld, Personal Finance Business 19 (1933).

[10] Rome also had a "usage rate" for personal loans. Montesquieu reports that in

terest; it was regulated by usage. Later, due to the popular unrest of the debtor class, the Twelve Tables reduced interest on personal loans to one percent,[11] and eventually Rome outlawed interest altogether.[12] The effect of this law was to encourage the lending of money at exorbitant rates, as the taking of *any* interest was an illegal activity.[13] To put an end to this widespread usury, the emperors were forced to legalize the charging of interest. Rome's experience with usury ran the gamut from no controls on interest to no interest.[14] Neither extreme was successful.[15]

With the advent of Christianity, the problem of usury was still unsolved. Some conclusions, though, can be drawn; (1) loans to an individual in need had to be either interest free or at a low rate; (2) loans for commercial purposes could bear a high rate of interest; and (3) Aristotle's theory[16] of the barrenness of money was to be the foundation of scholastic opposition to interest.

The Christian attitude towards interest did not differ radically from the position of the older religions—the charging of interest was wrong.[17] The rationale behind the Church's stand was based on a variety of theories. One was a revival of the Aristotelian doctrine with a slight twist: "Money is barren because it has no value at all and can serve only as a medium of exchange."[18] Another theory was that payment for the use of money is payment for time which, while being common property, belongs only to

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Cicero's day the "usage rate" was 34%. Montesquieu, The Spirit of the Laws ch. 22 § 21 (1748).

[11] But see ibid.: "Tacitus says that the law of the Twelve Tables fixed the interest at 1%. It is evident he was mistaken . . . [since] a law like this could not be the work of the Decemvirs."

[12] This was due to the fact that the extortion by creditors and the resistance of debtors was constantly disturbing the public peace. Durnham v. Gould, supra note 8. Now, "when a man wanted to borrow he found an obstacle in the very law made in his favor." Montesquieu, op. cit. supra note 10, ch. 22 § 22.

[13] Especially at election time: "[the] best way to . . . [prevent corruption of suffrage] was to discourage the lending upon interest . . . for usury always increased at time of elections because they [candidates] stood in need to bribe the voters." Ibid.

[14] Prompting Montesquieu's often quoted statements: "Law[s] excessively good are the source of excessive evil." And, "mankind are [sic] governed not by extremes but by principles of moderation." Id. at ch. 22, §§ 21, 22.

[15] In addition to giving us a warning of the dangers of extremism in legislation, Rome gave us another legacy—the loan bank, the nearest modern counterpart being the Hebrew Free Loan Society. Neifeld, op. cit. supra note 9, at 15.

[16] As money cannot breed money, as plants and animals can, interest charges are contrary to the laws of nature. Consumer Credit and Its Uses 5 (Hardy ed. 1938).

[17] Five events are significant in the development of the Christian viewpoint: 305 A.D.—Council of Elvira—interest taking is prohibited by clerics; 345 A.D.—Council of Carthage—interest taking by laymen is reprehensible; 789 A.D.—Council of Aix—taking interest is punishable by the bishops; 1179 A.D.—Third Lateran Council—those guilty of usury would be excommunicated; 1311 A.D.—Council of Vienna—civil law permitting usury is void as it would be contrary to Church Canon Law. Robinson and Nugent, Regulation of Small Loan Business 23 (Russell Sage Foundation 1935). For a chart of the "Attitude of Ecclesiastical Authorities towards Interest and Usury" from 1300 B.C. to 1873 A.D. see Neifeld, op. cit. supra note 9, at 23-25.

[18] Neifeld, op. cit. supra note 9, at 329.

God.[19] Others objected to the fact that money earned interest on Sunday and thought it similar to "plowing on Sunday."[20]

By 1311, loans with interest were absolutely forbidden by the Catholic Church with two results: (1) the needy borrower had no one to go to for money except the illegal lender who charged exorbitant rates; and (2) money lending for commercial purposes was now developing in the hands of non-Christians.[21] To remedy the first situation, charitable loan associations were established which were operated interest free. As a result of their failure to charge interest, most of these associations were short-lived. The first lending institutions of this type to achieve permanence were organized by the Franciscans in Italy in 1462—Monti di Pieta.[22] Later, to survive, they had to charge interest.[23] Due to ecclesiastical opposition, they had a slow growth in France after flourishing in Italy.[24]

The development of commerce had the same effect upon the theory of usury in Medieval Europe as previously had taken place in Rome. Rome attempted to abolish usury but the development of trade made loans with interest a necessary part of life. A further impetus leading to the legalizing of interest in Rome was the adverse effect the abolition of interest had on the needy borrower. So too in Italy, the revival and development of commerce made the doctrine of usury, then prevalent, outmoded.[25] Thus, the rebirth of commerce aided in the development of commercial loans and fostered the birth and growth of banking institutions.[26] Unlike Rome, the relaxation of restraints on the levying of interest was applicable *only* to commercial loans. It is important to note that during this period the only

19 Hardy, op. cit. supra note 16, at 6.

20 Sir Francis Bacon for example. Id. at 7. Though Chancellor Kent's quotation from Bacon v. Gould, supra note 8, demonstrates that Bacon realized that the two extremes had to be rectified so that the "tooth of usury" would be ground without extinguishing capital investment for the advancement of trade.

21 Another result of the Church's stand was the development of the term for years, a nonfreehold estate. "The term for years was used in the thirteenth century principally as a moneylending device designed to evade the Church's prohibition of usury." Moynihan, Intro. to Real Property 63 (1962).

22 Also called Montes Pietates. Though established by the Franciscans, they were run by the municipalities. The borrower pledged personal property and he was charged no interest.

23 This caused a furor, particularly by the Dominicans. Robinson and Nugent, op. cit. supra note 17, at 23-24. This dispute was solved by the Lateran Council of 1515, which decreed that Monti di Pietà which charged interest were not sinful but meritorious and they were allowed to exact a small interest charge. Neifeld, op. cit. supra note 9, at 25.

24 The worth of such organizations was finally recognized and they were reopened by Royal Decree in 1777. This was the foundation of the State Pawnshops of France after which the Provident Loan Society of New York, a semi-philanthropic organization, was modeled. Hardy, op. cit. supra note 16, at 18.

25 "The North Italians, who were the first great Christian merchants, were also the first great Christian moneylenders . . . whom kings and princes looked to for financial aid." Id. at 7.

26 Bank of Venice (1157), Bank Barcelona (1401), Casa di San Georgio (Genoa—1408), Banco di Rialto (Venice—1587), Banco di Sant' Ambrogio (Milan—1593). Neifeld, op. cit. supra note 9, at 15. See also the chart, "Important Dates in History of Banking," Id. at 17.

institution which attempted to meet the needs of the deserving small borrower was the charitable Monti di Pieta.

The English view of usury, up to the reign of Henry VIII, was similar to the view held in Continental Europe and the penalties for usurious loans were severe.[27] In 1545, the right to lend money up to ten per cent was recognized by statute.[28] This was a radical and significant departure from history, as no government since Rome had passed a law permitting interest charges on a personal loan.

Now, England, as Rome before it, in search of a solution for the interest problem, ran the gamut from no interest laws (1555)[29] to laws regulating the interest rates (1571),[30] and back again to no interest regulations by statute (1854).[31] The philosophical implications of interest cannot be divorced from the commercial. Hence, the development of the English theory of usury after 1854 cannot be fully understood unless the philosophical considerations of the subject are borne in mind. Throughout history, interest was not only a social problem but also an ethical and moral one. The Aristotelian theory still has its influence today. Hilaire Belloc expresses it as:

> Men had everywhere begun to think as though money were part of the nature of things as though money had, indeed, merely *as* money, *a right to breed.*[32]

The Belloc quotation, as representative of one school of modern thought, echoes the theory, expressed centuries ago by Aristotle, that the charging of interest violates natural law due to money's barrenness.

At this point in England there were no statutory limitations on the interest rate. England found that this was no solution to the problem, but rather created a greater social evil. In seeking a solution to this problem, England slowly came upon the realization of the distinction between moral and legal usury.[33] After 1854, Chancery Courts were petitioned by debtors for aid against oppressive contracts. It was in equity that moral usury was

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27 The usurer was liable to the penalties of the Church and after his death his chattels were forfeited to the king and his lands escheated to the lord of the fee. Gray v. Bennett, 44 Mass. (3 Met.) 522, 527 (1842).

28 37 Hen. VIII ch. 9. The language of the statute demonstrates a recognition of the fact that the total prohibition of interest encouraged usury. This marked the passing in England of the clerical influence on the state's attitude towards the recognition of loans with interest. Neifeld, Personal Finance Comes of Age 8 (1939).

29 5 & 6 Edw. VI ch. 20 [1555].

30 13 Eliz. ch. 8. [1571].

31 17 & 18 Vict. ch. 90 [1854]. Yet, it should be noted that this development had a profound effect on the status of interest. Prior to 1545, the absence of usury statutes meant that interest could not be charged; whereas, after 1854, the absence of usury statutes meant that interest could be charged.

32 Belloc, Crisis of Civilization 148 (1937) (Emphasis in original).

33 "Moral usury" may be defined as: "The taking of interest upon a loan of money alone . . . whether the money be invested soundly or not, whether it represents productive energy or not." Id. at 143. See also Neifeld, op. cit. supra note 9, at 331. The taking of profit on an unproductive loan is moral usury because it "destroys the debtor by putting him under the tribute to pay, though he has no source of income produced by the sum he borrowed." Belloc, op. cit. supra note 32, at 147.

first used as a "yardstick" by the courts in their decisions.[34] The legislative body finally recognized the distinction in 1900 and made moral usury a legislative mandate in the English Money-Lenders Act.[35] The Act provided that if the court found that the interest rate was excessive, the court could remake the contract and the debtor was relieved from paying the sum in excess of the sum judicially determined to be fair.[36]

Germany, too, at this point in history, came upon the recognition of moral usury. There, if the profit, from a loan of money seemed out of proportion to the services rendered, the loan transaction was null and void. This approach seems more desirable than the English for two reasons. First of all, the usurer forfeits his loan which has a deterrent effect on the exacting of usury. Also, German courts are not burdened with remaking the contract.[37]

The approach to usury in America at the time that the colonies were established reflected the trend then prevalent in England. It was an historical "accident" that the six per cent interest rate was adopted in England in 1660[38] and was consequently followed in most of the colonies (though some did experiment with other rates). But, when the English further developed their views on usury, there were no longer legal ties with the American colonies. Thus, our approach to usury was peculiar to America. This was unfortunate, for the states seem to have forgotten the historical implications related to usury. They have experimented with the fixing of different rates of interest, apparently holding to the theory that mathematics is the answer to a moral and social problem.[39]

With mathematics as their guide, the legislators ignored the needs of the small borrower and unrealisticly clung to the colonial six per cent maximum rate of interest. Consequently, since small personal loans were unprofitable at such a low rate, the rapid growth of the banking industry in America made no provision for the credit needs of the small borrower[40]—

[34] Neifeld, op. cit. supra note 9, at 332.

[35] 63 & 64 Vict. ch. 51.

[36] This act was amended in 1927 to the effect that any interest rate above 48% is presumed to be excessive (i.e., moral usury), and the burden of proving the contrary is on the creditor. 17 & 18 Geo. V ch. 21 [1927]. In France, moral usury is presumed when "an effective rate exceeding by more than half the average customary rate in the same conditions by good faith lenders for credit transactions carrying the same risks as the loan involved" is reached. Symposium—Developments in the Consumer Credit Law, supra note 2, at 304.

[37] Both approaches, however, recognize the fact that a speculative commercial loan may bear a high rate of interest. Belloc also agrees that a productive loan (one that is to be used to produce more money) can bear a high rate of interest—1000% or even higher. He goes even further, though, and holds the opinion that a personal loan, which is a non-productive one, cannot bear interest. Belloc, op. cit. supra note 32, at 145.

[38] It should be noted that by 1660, 7 out of the 13 original colonies were then in existence. England's rate was still in a state of flux: 1624-8%; 1660-6%; 1714-5%.

[39] "The American legislator has never been able to divorce himself from the conception of a mathematical limit that effortlessly separates the good from the bad. Like the Dantean inferno, he would have his usury statute—even when modified to meet modern conditions—herald to the world the exact numerical line that marked the complete abandonment of social desirability." Neifeld, op. cit. supra note 9, at 334.

[40] Ibid.

needs which did not arise out of business transactions, but which arose out of illness, unemployment, and the like. The enactment of small loan acts, which permitted a higher rate of interest on small loans than previously provided for before by statute, was an attempt to meet the needs of the small borrower.

This development was a significant breakthrough as it was the first time a distinction was made in America between the lending of small and large loans. Up to this point, the laws failed to take into consideration the high proportionate expense and risk involved in non-commercial small loans.[41]

The credit needs of the small borrower became an ever-increasing social problem. This need was attempted to be met by the encouragement of philanthropic[42] and semi-philanthropic organizations. The Morris Plan was also developed to help the small borrower obtain loans by permitting the creditor to avoid the low interest rates which made such loans financially unprofitable. Credit unions were also established to aid the small borrower.[43] The worth of such organizations is manifested by their present day growth.

It must now be apparent to the reader that the age-old problem, the same problem which faced Rome, now confronted America. The usury laws which historically were passed to protect the debtor had the adverse effect. Interest was regulated at a rate that made the loan business unprofitable, an obstacle to the debtor arising out of the very laws made for his benefit. It is important to bear in mind the policy behind usury statutes. Such statutes were designed to protect the borrower from unscrupulous persons seeking to take advantage of his needy condition.

The basis for these laws was really moral usury. Since the needy borrower had lost his bargaining power, the state had to restore it to him. Thus, these statutes afforded him protection not provided by contract law. They were not an attempt to discourage loans, nor were they an attempt to discourage profit. They were merely a legislative attempt to provide the needy debtor protection at a time when he could not protect himself. Consequently, the first step toward a realistic approach to usury was the recognition that corporations could not use usury as a defense.[44] A corporation borrowed money to produce more. The corporation never faced the situation where a lack of money meant death or hunger. The lack of money may have meant financial death, but that was not considered a moral problem. Usury statutes were enacted to prevent a moral evil. It can also be stated as a truism that where interest rates are too low, licensed money-

[41] Hubachek, Annotations on Small Loan Laws 1 (Russell Sage Foundation 1938).

[42] One of the first such organizations in America was the Franklin Loan Fund established by Benjamin Franklin in a codicil to his will. The fund did not grow as he had anticipated and the courts were called upon to vary the terms of the trust. Robinson and Nugent, op. cit. supra note 17, at 77.

[43] A credit union is a cooperative association, the members of which pool their savings and from the pool make loans to themselves. E. A. Filene, a Boston merchant, spent a great deal of money in their promotion and was the impetus behind credit union legislation in the various states, Hardy, op. cit. supra note 16, at 37.

[44] Neifeld, op. cit. supra note 9, at 279.

lenders will withdraw, leaving the needy borrower in the hands of loan sharks. Too low a rate will not attract capital. The legislators must guard against unwillingly creating such a condition in their attempts to aid the debtor.

At the time in America when the legislatures' awareness of the problems connected with usury statutes was increasing, instalment sales began to be used in retail sales. Isaac Singer in 1856, in order to increase the sales of his sewing machine, was the first to offer retail instalment contracts on a mass scale.[45] The theory behind instalment sales is that it enables the consumer-borrower to enjoy an income (through purchasing power) before earning it.[46] The buyer pays for an article while he uses it, rather than paying for it in advance. Thus, instalment sales and usury statutes developed together in America. It was only natural, then, that there should be a conflict between the two. If the difference between the cash price and time-sale price (i.e., the "time differential") could be judicially determined to be interest, and this time differential were higher than the lawful interest rate, it would be a usurious contract. The courts did not adopt this view for a variety of reasons. The prevailing view was that usury applied only to a "loan or forebearance of a debt" and was not applicable to an instalment sales contract.[47] If we consider the historical problems created by usury and the reason for usury statutes, the reluctance of the courts to apply usury to instalment sales is well founded.

The purchaser, unlike the needy debtor who requires money to meet an emergency and because of this cannot bargain, generally can refrain from buying.[48] If the time price is oppressive or exorbitant, the usual purchaser is not compelled to buy. On the other hand, the needy borrower is in no position to shop around. Usury statutes must protect the needy borrower, but must they protect the purchaser in his voluntary act of buying? It is easy to see, that if usury statutes are to be applied to instalment sales, the rationale or public policy motives behind such a step differs from the application of usury to a hire of money.

The problem this article has attempted to define is: "Should usury be applied to instalment sales? If so, how?" An attempt to answer these questions can only be made after we have answered another question: "What

[45] Though not used widely till 1856, the use of instalment sales was an old idea. Crassus, a contemporary of Julius Caesar, is reported to have made a fortune building houses outside of Rome and selling them on the instalment plan. Hardy, op. cit. supra note 16, at 58. The first to use instalment sales in the United States was Cowperwaite and Sons, furniture dealers in New York in 1807. Federal Reserve System Board of Governors, Consumer Instalment Credit pt. II, vol. 1, at 173 (1957). This report consists of four parts: Part I. Consumer Instalment Credit, Growth and Import (2 vols.); Part II. Conference on Regulation (2 vols.); Part III. Views on Regulation; Part IV. Financing New Car Purchases (hereinafter cited as Federal Reserve System).

[46] Hardy, op. cit. supra note 16, at 3.

[47] First considered by the Supreme Court in Hogg v. Ruffner, 66 U.S. (1 Black) 115 (1861). For a compilation of cases supporting this view see Annot. 48 A.L.R. 1142 (1927), supplemented in 57 A.L.R. 880 (1939) and 143 A.L.R. 238 (1943).

[48] E.g., General Motors Acceptance Corp. v. Weinrich, supra note 5; Nazarian v. Lincoln Fin. Corp., supra note 5.

evil (or evils) do instalment sales present that must be prevented?" Only when we know what we are trying to prevent can we effectively legislate.

Applying usury statutes to time sales would only prevent unlawful interest. If this is the evil that time sales present, then such a course may be wise. But, if time sales present other evils, applying usury statutes may be a "cure worse than the disease." Before we legislate, what is our aim? Several possible evils of time sales appear to be present: (1) Credit sales themselves; (2) Large consumer debt; (3) Possibility of fraud; (4) Excessive time differential.

If time sales are in themselves an evil that must be prevented, then the abolition of credit sales would be the answer. That is, all consumer goods would be cash and carry, and the retailers would be out of the credit business. The net result of this would be a lowering of the retail price as the stores would not have to make provision in their cash price for bad debts, and their bookkeeping departments' expenses could be considerably reduced.[49] But this is a somewhat "Utopian" approach. The consumer himself wants charge accounts. The consumer feels that if he charges his purchase he can more readily return the goods charged than if he had paid cash. The retailers, too, would object to this since: (1) credit customers are less likely to shop around for loss leaders and other bargains; (2) cash customers bunch their purchases at pay day causing peak-loads while credit customers buy evenly; and (3) credit customers' names and addresses are known and can be reached by retailers by mail advertising.[50] The greatest objection retail merchants would have to strictly cash sales, however, would be that they would not have the personal contact with their cash customers that they now enjoy with their credit customers. Yet, if credit sales in themselves are the evil contrary to public policy, strictly cash sales may be the answer.

In considering the abolition of credit sales, the legislatures would have to carefully consider the advantages which time-buying possesses as opposed to its evils. A great advantage is that it permits low-income couples to have a greater opportunity to marry earlier, raise families while they are young and to enjoy many of the benefits which the upper-income couples do.[51]

On the other hand, the evil may not be credit sales entirely, but only the volume to which they have grown. In 1960, there was a $56 billion consumer debt of which instalment sales constituted eighty per cent.[52] If this is the problem, the solution would be to regulate instalment sales. Great legal, social, political and economic problems are presented, however, whenever the government attempts to regulate our economy. If our public policy is to prevent people from becoming greatly in debt, controlling interest is not the answer. Our increased consumer debt is the result of several factors:

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[49] It may also have the effect of raising the cost of hiring money (interest) as loan companies would then have to provide for "bad debts" previously carried by credit retailers.

[50] Hardy, op. cit. supra note 16, at 57.

[51] Black, Buy Now Pay Later 212 (1961).

[52] Id. at 111.

(1) decay of the thrift pattern; (2) respectability of debt; and (3) general collapse of inhibitions against borrowing.[53] To meet this problem, the solution may be a revival of "Regulation W" which controlled consumer credit during wartime.[54] This was accomplished by specifying the minimum down payment allowed and the maximum periods for repayment. Both sellers of consumer goods and lenders of money were subject to the regulation.[55] This was considered, right after the Korean War, as a possible instrument of central banking policy in peacetime. But the permanent status of the regulation of consumer credit was not favorably received.[56] The greatest objection to such a solution is that it will not work.[57]

If we assume that the state *cannot* protect the consumer from falling into debt, and *should not*, it would seem that full disclosure to prevent fraud is all that the state can do. To appreciate the problem of the consumer, it must be remembered that there are many ways of computing the amount due to the creditor even though the principal and the rate of interest are the same.[58] To prevent this confusion, it has been suggested that the effective rate of interest (i.e., the true annual rate) should be disclosed.[59] The primary concern of the government should be full disclosure so that the consumer will not be deceived. The principle of full disclosure is not new and is the basis for the regulation of the public offering of securities pursuant to the Securities Act of 1933.[60] If we are so strict in requiring full disclosure in the buying of securities, an area where, for the most part, we are dealing with sophisticated investors, why a lesser standard for the consumer?

Two serious objections arise to this proposal. The first is that it may be of no assistance to the consumer. In most states, the retailer in an instalment sales contract is already required to disclose the time-differential

53 Hardy, op. cit. supra note 16, at 129.

54 For a synopsis of reasons for and against government controls see Federal Reserve System, op. cit. supra note 45, at pt. III, 5, 6.

55 The cash lenders had to determine the purposes for which the proceeds of the loan were to be used.

56 Federal Reserve System, op. cit. supra note 45, at pt. II, vol. 1, XVII-XIX.

57 "Consumer credit controls will not force consumers to save. Actually, consumer credit channels the use of consumer income from frivolous spending to expenditures for desirable goods. The consumer has something to show for his spending. Through credit the consumer does save. Result of consumer credit control would be for government to tell consumers how they can spend their money. This is a fundamental departure from the philosophy of free consumer choice." Id. at 165.

58 For charts showing the different methods of computation possible and the different amounts due because of this see, Neifeld, op. cit. supra note 28, at 171-175.

59 Model Retail Instalment Sales Act, 3 B.C. Ind. & Com. L. Rev. 443, 444 (1962) recommends that this be followed and contains a formula for its computation. This view is also supported in Black, op. cit. supra note 51, at 89, 219. For a view that some legislation in this field has been defective see Willier, Protection Instalment Buyers Didn't Get, 2 B.C. Ind. & Com. L. Rev. 287 (1962).

60 "Full disclosure" for the benefit of the consumer is also the basis of the Automobile Information Disclosure Act which requires that the manufacturer affix a label to the windshield of the car containing: make, model, serial number, assembly point, name and address of retail dealer, method and place of delivery, suggested retail price of auto and accessories and transportation charges. Symposium—Developments in the Consumer Credit Law, supra note 2, at 403.

(time price minus cash price). It does not seem that expressing the time-differential in percentages will be of much assistance. Conceivably, it will just confuse the consumer by the addition of more numbers to the contract.[61] If the consumer knows he is paying X number of dollars over the cash price by buying it on time, would it help to inform the consumer that the X number of dollars represents Y percentage of the time-price or Z percentage of annual interest? The second objection is an administrative one. In many situations, it is almost impossible at the inception of the instalment contract to determine what the simple interest will be.[62] In any event, it should be remembered that the only evil full disclosure will help to prevent is fraud.

The final possible "evil" of instalment sales is excessive time-differential. That is, the consumer is paying too much for the privilege of buying goods on time. The problem presented is: "Does public policy require that the consumer be protected from paying too much for goods on time?" Those who felt that public policy required such a move, enacted legislation in the nature of usury laws expressly placing a limit upon the amount of finance or similar charges that may be made—Instalment Sales Acts.[63] The purpose of such legislation was twofold: (1) to restrict the amount of the time-differential, and (2) to require that all pertinent information be included in the contract so that the buyer would really have a choice between the cash and time price.

In light of the Nebraska decisions and the limited amount of authority supporting this view, the question limits itself to: "In view of the historical need for usury statutes and the philosophical implications related to usury, should the courts now adopt the view that public policy requires the application of usuary statutes to instalment sales contracts?"

The first objection to such a move is that if public policy requires that it be done (taking into consideration the previous discussion), it should be left to the legislature to do it. The courts should be reluctant to outlaw long established usage. The result of the courts' invalidating all existing instalment sales contracts would be financial havoc.[64] But, in spite of this,

[61] This conclusion can be drawn from the results of a survey reported in Black, op. cit. supra note 51, at 135. The author, a critic of the "buy now, pay later" craze, relates that the interviewer found that the interviewed consumers knew that they were paying more for time sales than the cash price. Yet, the interviewed consumers did not know how much more in percentages. Some did not even know what the term "true interest" meant. In spite of this, the author still advocates "full disclosure" and apparently feels that this will solve most, if not all, of the instalment sales evils. One would assume that he is also going to educate the average time-consumer so that his "full disclosure" position will have some meaning.

[62] Testimony to this effect was given before the Senate Banking Committee, holding hearings in Boston under the chairmanship of Sen. Paul Douglas (D.-Ill.), on his "Truth-in-Lending" bill (S. 750). Boston Record-American Nov. 23, 1963, p. 7, col. 1 ("payoff final" ed.).

[63] The first such law was passed in Indiana in 1935, followed by Wisconsin (1935), Massachusetts (1937), and Maine (1939). A Survey of State Retail Instalment Sales Legislation, 44 Cornell L.Q. 38 (1958). See also Comment, Retail Installment Sales—History and Development of Regulation, 45 Marq. L. Rev. 555 (1962).

[64] Assuming that the 1960 figures are still applicable (see text accompanying note

if the court feels that the public policy considerations are so great that such a move must be followed, the result of such a move could be disastrous for the consumer and to the economy. The retailer will cease selling goods by instalment sales contracts (assuming the usury statute would not allow a profitable interest rate) and the consumer who is unable to pay cash will be unable to buy. Thus, while attempting to protect the unwary consumer, the courts could be leaving the consumer to the mercy of the illegal lenders.

The second objection to such a course is that the rationale behind usury statutes does not apply to conditional sales. It is somewhat unrealistic to hold that moral usury considerations apply when the "loan" concerns consumer goods (and, for the most part, luxury items: automobiles, televisions, etc.). The concept that the needy borrower is in no position to bargain does not apply. Especially since the consumer is generally free to buy the items on time or not. In essence, if the government is going to regulate the time-differential rates via a mathematical formula, it really is engaging in price control. This control could easily be avoided if retailers sold only on credit, for there would be no time-differential to regulate, and by definition "time-differential" is the difference between the cash and time price. If the purchaser paid cash, he would receive credits towards additional purchases or perhaps extra green stamps. It could also result in the formation of two types of stores—cash and credit.

These alternatives are mentioned to show that the application of usury to instalment sales is no permanent answer to the problem. It would only create many more problems. As the study of the history of usury points out, this is a moral and ethical, as well as an economic, problem; it cannot be solved through mathematical manipulations.

Where, then, does the solution lie? The most effective regulator is competition and not additional legislation. Governments should concentrate on seeing to it that there is true competition and should enforce aggressively the laws that prohibit collusion among competitors in fixing prices and other methods of restraining trade.[65]

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52 supra), the courts would be invalidating 80% of $56 billion. It was for this reason that the court in Hare v. General Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952), used the device of "prospective over-ruling" via a "caveat." However, this method still does not justify court interference in a legislative area.

65 "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal." Sherman Antitrust Act of 1890, 29 Stat. 209 (1890), 15 U.S.C. § 1 (1958).