Vanderbilt Law Review

Volume 18
Issue 2 *Issue 2 - March 1965*

Article 14

3-1965

Legislation

Law Review Staff

LEGISLATION

College Disciplinary Proceedings

It is a matter of common knowledge that college age Americans are being encouraged to continue their formal education, at least through the baccalaureate level, with an intensity never before observed. These young people are assured that their prospects for future success are directly related to their level of achievement in the classroom. This emphasis on extended schooling is obviously well placed for many students, and their interest in being allowed to pursue and complete a program of study is a vital one. Institutions of higher learning have a correlative vital interest as they meet and cope with burgeoning enrollments—the maintenance of order and discipline among their students, including the power to expel and to administer other appropriate punishment. Actually, of course, neither the individual student's interest in completing his education nor the individual college's interest in maintaining reasonable discipline are phenomena originating in the current emphasis on higher learning. But the sheer size of present and predicted enrollments, brought on both by population increase and by the apparent prerequisite of college training to financial and cultural fulfillment, may make the reconciliation of these sometimes opposing interests more significant to society as a whole than ever before.

The Problem

It can probably be safely assumed that the vast majority of incidents of college or university discipline are settled completely within the administrative machinery of the school concerned. This should continue to be true. But it has been by no means uncommon for students to seek the aid of the courts in their efforts to have adverse decisions by school authorities reversed. Generally, courts have been understandably reluctant to intervene in matters which possess, in the view of the judges, so much of the appearance of parent-child relationships.[1] There has developed, however, a significant body of case law in which courts have wrestled with this problem, and the decisions have evolved some reasonably discernible rules.

The most prominent question raised by a student's resort to court for review of his dismissal from school is whether the school authori-

1. John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913).

ties have violated some right which the court is obligated to protect.[2] The inquiry into this matter has traditionally proceeded upon a determination of whether the authorities involved abused their discretion, or, stated another way, whether they treated the student unfairly.[3] The general rule appears to be that students are entitled to some type of hearing before being dismissed, at least insofar as tax-supported schools are concerned. Concededly, however, this statement must be based in large measure on dicta,[4] or on inference,[5] because most of the decisions have turned on the adequacy of the hearing rather than on the precise question of whether the student was entitled to a hearing at all. In most cases, the hearings have been held to be adequate.[6] Two cases in recent years, one decided by the Fifth Circuit[7] and the other by a federal district court in Tennessee,[8] have squarely held that the students involved were

2. The term "right" is used here as it applies to an evaluation of how a student should be treated in connection with the exercise by college authorities of their disciplinary powers, and not in the context of whether attendance at a college is a "right" or a privilege. The more recent and better reasoned decisions have disregarded the latter concept as the proper basis for extending or withholding the court's aid in reviewing school discipline. See Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930, 15 VAND. L. REV. 1005 (1962). The court stated that "the State eannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process." *Id.* at 156. See also Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961), in which the court stated: "Whether the interest involved be described as a right or a privilege, the fact remains that it is an intcrest of almost incalculable value, especially to those students who bave already enrolled in the institution and begun the pursuit of their college training." *Id.* at 178.

3. Robinson v. University of Miami, 100 So.2d 442 (Fla. Dist. Ct. App. 1958); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942); Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924); John B. Stetson Univ. v. Hunt, *supra* note 1; Koblitz v. Western Reserve Univ., 21 Ohio C. C. R. 144, 11 Ohio C.C. Dec. 515 (1901).

4. Due v. Florida A & M Univ., 233 F. Supp. 396, 401 (N.D. Fla. 1963) (dictum); People *ex rel.* Bluett v. Board of Trustees, 10 Ill. App. 2d 207, 211, 134 N.E.2d 635, 637 (1956) (quoting Smith v. Board of Educ., 182 Ill. App. 342, 346 (1913)); State *ex rel.* Sherman v. Hyman, *supra* note 3, at 827.

5. *In re* Carter, 262 N.C. 360, 137 S.E.2d 150 (1964); Tanton v. McKenney, *supra* note 3; State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 263 Pac. 433, *cert. denied*, 277 U.S. 591 (1928).

6. Due v. Florida A & M Univ., *supra* note 4; People *ex rel.* Bluett v. Board of Trustees, *supra* note 4; State *ex rel.* Sherman v. Hyman, *supra* note 3; Tanton v. McKenney, *supra* note 3; State *ex rel.* Ingersoll v. Clapp, *supra* note 5. *But see In re* Carter, *supra* note 5, in whieh the trial court, basing its jurisdiction of the case on N. C. GEN. STAT. §§ 143-315 (1964), which provides for judicial review of administrative decisions by state agencies, apparently found that there had been an adequate hearing but ordered a new hearing by the college on the ground that new evidence which had been introduced for the first time during the court's review would compel the college to reverse its dismissal of the student. The case reached the higher court on a procedural question and the finding and order of the lower court were allowed to stand.

7. Dixon v. Alabama State Bd. of Educ., *supra* note 2.

8. Knight v. State Bd. of Educ., *supra* note 2.

entitled to a hearing before being expelled from state colleges, and the holdings were grounded on the due process requirement of the fourteenth amendment of the United States Constitution.[9] At least one earlier case expressly denied that the due process clause was applicable to student discipline.[10] The question whether a private college must offer the accused student an opportunity to be heard has been even more troublesome to the courts, but several cases have indicated that some hearing is required.[11] There are, however, cases which take a strong position to the contrary, emphasizing the contractual basis of the relationship between students and private schools. These courts base their holdings upon a finding that the private college reserved a power of summary dismissal in its catalog, or in some other part of the contract of enrollment.[12] The courts have frequently stated, in cases dealing with private schools[13] as well as those involving state schools,[14] that the college authorities mnst not act arbitrarily or in abuse of their discretion, but the presumption against such behavior appears to be deeply rooted.

9. U.S. CONST. amend. XIV, § 1.

10. State *ex rel.* Sherman v. Hyman, *supra* note 3.

11. "Hearing" in the context of private school discipline probably includes even less formal procedures than it does as applied to the state school cases. In Robinson v. University of Miami, *supra* note 3, a student was required to withdraw from a teacher training course after having been accorded some type of interview with school officials concerning the matter, but without having been told the precise reason for their action. The court upheld the dismissal and pointed to the "hearing," but also stated its approval of the "rule" that private schools may reserve a power to dismiss students for any reason without divulging their reasons for doing so. In John B. Stetson Univ. v. Hunt, *supra* note 1, it appeared that the student had been interviewed by school officials prior to being dismissed for misconduct, and the court upheld the dismissal, stating that the school was not obligated to prefer charges and prove them at a "trial" before dismissing a student. In State *ex rel.* Arbour v. Board of Managers of Presbyterian Hosp., 131 La. 163, 59 So. 108 (1912), the court said by way of dictum that if the dismissed student nurse had not waived the right, she was entitled to notice and a public hearing. In Baltimore Univ. v. Colton, 98 Md. 623, 57 Atl. 14 (1904), the court held that the expelled student was entitled to a hearing. In Koblitz v. Western Reserve Univ., 21 Ohio C. C. R. 144, 157, 11 Ohio C.C. Dec. 515, 523 (1901), the court laid down the following rule: "[The private school] should give the student . . . every fair opportunity of showing his innocence. They should be careful in receiving evidence against hun; they should weigh it; determine whether it comes from a source freighted with prejudice; determine the likelihood, by all surrounding circumstances, as to who is right, and then act npon it as jurors, with calmness, consideration and fair minds . . . ."

12. Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957); Anthony v. Syracuse Univ., 244 App. Div. 487, 231 N.Y.S. 435 (1928); Baker v. Bryn Mawr College, 278 Pa. 121, 122 Atl. 220 (1923).

13. Robinson v. University of Miami, *supra* note 3; Frank v. Marquette Univ., 209 Wis. 372, 245 N.W. 125 (1932); John B. Stetson Univ. v. Hunt, *supra* note 1; Koblitz v. Western Reserve Univ., *supra* note 3.

14. *In re* Carter, *supra* note 5; Dixon v. Alabama State Bd. of Educ., *supra* note 2; State *ex rel.* Sherman v. Hyman, *supra* note 3; Tanton v. McKenney, *supra* note 3; State *ex rel.* Ingersoll v. Clapp, *supra* note 5.

Beyond the generally phrased requirement of fairness, the courts have been prone to uphold almost any form of hearing, and the student who has been expelled from college for alleged misconduct after having been accorded an opportunity to tell his side of the story to school officials may well find the courts unwilling to look further into the quality of the hearing given him. The judges universally agree that college authorities are not obligated to hold full judicial hearings, or to observe strict rules of procedure and evidence.[15] The wisdom of this position cannot be seriously challenged, but it is submitted that a student accused of a violation of regulations for which expulsion or extended suspension is a possible penalty should be accorded a procedure more formal than an interview in which he is simply permitted to deny that of which he is accused.[16] The case of *Dixon v. Alabama State Board of Education* upholds this proposition as it relates to the facts involved, and the court there engaged in a forthright analysis of the procedure to be followed prior to dismissal of students from state colleges for alleged misconduct.[17]

An even more difficult problem is presented to the courts when a

15. Dixon v. Alabama State Bd. of Educ., *supra* note 2; People ex rel. Bluett v. Board of Trustees, *supra* note 4; State *ex rel.* Sherman v. Hyman, *supra* note 3; John B. Stetson Univ. v. Hunt, *supra* note 1; Barker v. Bryn Mawr College, *supra* note 12.

16. See Seavey, *Dismissal of Students: Due Process*, 70 HARV. L. REV. 1406 (1957).

17. Dixon v. Alabama State Bd. of Educ., *supra* note 2, at 158-59. "For the guidance of the parties in the event of further proceedings, we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. They should, we think, comply with the following standards. The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled."

student challenges not the adequacy of the hearing held prior to his dismissal, but the power of the school to enforce the regulation which he is charged with violating. The authorities of a private school may apparently enforce virtually any regulation which they deem wise; the enrolling student is held to have consented to the regulation as a term of his contract.[18] There is judicial language to the effect that disciplinary action taken under a regulation that contravenes "common right" or is "palpably unreasonable" will not be upheld by the courts, but again the presumption is in favor of the reasonableness of the regulation.[19] Much the same rule applies with reference to state schools, but the courts have indicated a greater willingness to review the reasonableness of the regulations enforced by these institutions.[20] Nevertheless, there have been no reported cases in recent years in which regulations were actually held to be unreasonable. The polestar of judicial analysis in this area is the broad discretion that school authorities possess in maintaining order and decorum within their institutions, and the courts are reluctant indeed to find an abuse of that discretion.[21]

It is apparent then that the individual student's chances of persuading a court to interfere with school officials on his behalf are uncertain at best, at least where the officials can show that they went through some form of hearing prior to dismissing the student. Moreover, a realistic forecast seems to indicate that additional years of case development will be required to shape a significantly improved judicial attitude. In this atmosphere it would seem that the social importance of higher learning, the necessity for reserving to the

18. Carr v. St. John's Univ., 17 App. Div. 2d 632, 231 N.Y.S.2d 410 (1962). In this case students at a Catholic university were expelled for participating in a civil wedding ceremony. The court upheld the action which was taken pursuant to a regulation, reserving to the university the right to dismiss students on any grounds judged advisable by the university. John B. Stetson Univ. v. Hunt, *supra* note 1, and Gott v. Berea College, *supra* note 1, discuss the broad discretion which private schools have in formulating regulations.

19. John B. Stetson Univ. v. Hunt, *supra* note 1, at 517, 102 So. at 640. The court gave no specific examples of regulations which would be struck down.

20. In Knight v. State Bd. of Educ., *supra* note 2, the court reached its holding that a hearing was required at least partly on the ground that to hold otherwise would give an unreasonable effect to a school regulation which called for prompt dismissal of students who were convicted in a court of law of charges involving personal misconduct trending to reflect on the institution. The court held that the college authorities could not have known from the reports of the students' arrests which they received whether their conduct came within this category, and that a hearing was required to determine this fact. The court reasoned that it would be unreasonable to interpret the regulation as requiring summary dismissal based on no more knowledge as to the nature of the charges against the students than was then available. John B. Stetson Univ. v. Hunt, *supra* note 1, at 516, 102 So. at 640 (dictum).

21. Carr v. St. John's Univ., *supra* note 18; John B. Stetson v. Hunt, *supra* note 1; Gott v. Berea College, *supra* note 1.

institutions proper disciplinary powers, and the desirability of increased stability in this area of the law, all indicate that carefully drafted state legislation, designed to deal at least with tax supported schools, may serve a useful purpose.

EXISTING LEGISLATION

In those jurisdictions which presently have statutes requiring some form of hearing in connection with school discipline, the primary emphasis seems to be on the public schools, presumably through high school level.[22] The procedure which appears to be most often followed is for the local school board to hold a hearing, either prior to a student's expulsion[23] or afterward upon appeal by the student or his parents.[24] The requirements respecting the adequacy of the hearing typically include some statement in writing setting down the charges against the student, and giving notice of the pending hearing.[25] It is significant that some of these statutes expressly provide that the decision of the school board,[26] or of the commissioner of education,[27] shall be final, and that no further appeal will be allowed in the courts. In one jurisdiction, however, the statute provides that the town may be held liable in tort for wrongful exclusion of a child from the public schools.[28]

Some of the statutes lack specific grounds for expulsion, mentioning only such general grounds as "conduct inimical to the best interests of the school,"[29] "disobedience," or "misconduct."[30] Thus the broad discretion of school authorities which is held in such high esteem by the courts in the college and university cases is protected in the public school discipline statutes.

EXPLANATION OF PROPOSED LEGISLATION

Since the most pronounced confusion concerning the right to hearing, and the kind of hearing, exists in the realm of college discipline,

22. CAL. EDUC. CODE § 10601; CONN. GEN. STAT. REV. § 10-234 (1958); MASS. ANN. LAWS ch. 76, §§ 16, 17 (1954); PA. STAT. ANN. tit. 24, § 13-1318 (1962). *But see* N.Y. EDUC. LAW § 310, which is framed in much broader language and is apparently applicable to institutions of higher learning.

23. CONN. GEN. STAT. REV. § 10-234 (1958); MASS. ANN. LAWS ch. 76, § 17 (1954); PA. STAT. ANN. tit. 24, § 13-1318 (1962).

24. CAL. EDUC. CODE § 10601; N.Y. EDUC. LAW § 310.

25. CONN. GEN. STAT. REV. § 10-234 (1958); MASS. ANN. LAWS ch. 76, § 16 (1954).

26. CAL. EDUC. CODE § 10601.

27. N.Y. EDUC. LAW § 310.

28. MASS. ANN. LAWS ch. 76, § 16 (1954).

29. CONN. GEN. STAT. REV. § 10-234 (1958).

30. PA. STAT. ANN. tit. 24, § 13-1318 (1962).

it appears that there is a distinct place for legislation atuned primarily to the institutions of higher learning. The first step in properly sorting out the roles and powers of state school officials and the courts would seem to be a more precise statement, in legislative language, of the policy of the state with regard to the limits to be imposed on the schools in the sphere of regulations of conduct. It is significant that in the two most recent cases in which the courts have required hearings to be held, the student conduct complained of was not simple rowdyism, but was participation in racial demonstrations incidental to efforts to break down segregation barriers.[31] It is immediately apparent that conflicts in views between school officials and students as to the propriety of such demonstrations are inevitable. But, while excesses in any form on the part of the students may establish legitimate grounds for censure and even expulsion, the issue of who is right is not as clear-cut in a racial demonstration as it might be in, say, a panty raid on campus. In other words, college students who are adults or almost adults may be entitled to debate the power of the school officials to inhibit their participation in activities of which the officials disapprove. On the other hand, the matter of the propriety of student conduct obviously cannot be left entirely in the hands of the students themselves, and there are unquestionably many areas of behavior the control of which is the proper province of college authorities. A timely expression of the policy of the state would be to the effect that state college and university authorities have the power to formulate and enforce rules of student conduct which are appropriate and necessary to the maintenance of order and propriety, considering the accepted norms of social behavior in the community; but that no rules may be imposed which place restrictions on student conduct which are not reasonably necessary in furthering the school's educational goals, or which unduly restrict the freedom of students to express themselves on matters of genuine social and moral significance. Such broad language would of course require interpretation in relation to specific fact situations, but in every instance the college would conduct the initial proceedings as to the propriety of its rules within its own administrative structure. Only when the college had rendered its decision, finally and adversely, would the student be entitled to seek review in the courts.

Having established the substantive standard for college regulations

31. Dixon v. Alabama State Bd. of Educ., *supra* note 2; Knight v. State Bd. of Educ., *supra* note 2. *But see* Due v. Florida A & M Univ., *supra* note 4, where the court upheld a dismissal from school which grew out of a criminal contempt conviction brought about by the student's participation in racial demonstrations. The court held that there had been an adequate hearing by the college.

of student conduct, the statute should then outline the minimum procedural standard for enforcement of the rules. Generally, a college or university should be required to grant a reasonable hearing to students accused of violations for which expulsion or prolonged suspension is a possible penalty. This requirement would apply only to cases of alleged misconduct and not to cases of failure to meet academic standards, because the latter are peculiarly within the professional competence of the educator. The degree of notoriety of the misconduct, the seriousness of the act or acts complained of, including whether a violation of city ordinance, or state, or federal law is involved, the manner in which the misconduct was brought to the attention of the school, and whether the student has admitted or denied the violation, would be factors to be considered in determining what type of hearing is in order. In a case in which a student has been found guilty of a felony in a court of law, only a very cursory hearing to confirm the identity of the offender, if any, would be required. On the other hand, in the typical case in which a student is accused by a fellow student or by a teacher of cheating on an examination, or of some other breach of the college honor code, a more formal hearing, including a statement of the charges against the accused, the names of at least the primary witnesses against him, and an opportunity to produce wituesses in his own behalf would seem to be minimal requirements. The statute should therefore distinguish between those cases in which the guilt of the student must be established by a reasonable process of fact-finding within the college administration (including whatever student court or council may be organized for the purpose of hearing such matters),[32] and those cases in which his guilt has already been established, either by his own admission or by a court of law.

A student who has suffered an adverse decision by college authorities would, under the suggested statute, be allowed to petition a court of general jurisdiction for review. The statute should provide that no petition for review will be received by a court unless the student shall have suffered an adverse decision by the highest authority within the administration of the school empowered to make such decisions.[33] Furthermore, punishment short of expulsion or pro-

32. Many colleges and universities have rather elaborate honor codes and procedures for their enforcement. The student council is frequently an integral part of the disciplinary system, and the proposed statute envisions no alteration in this regard. On the propriety of the administration of discipline by student groups, see *In re* Carter, *supra* note 5.

33. See note 32 *supra*. The obvious purpose of such a provision would be to prevent students from bringing their cases into the courts prematurely. The procedures normally followed by the particular school would determine when a decision had reached the highest level of consideration and had become final.

tracted suspension should not normally be reviewable in the courts. It is suggested that suspension for one or more terms[34] should enable the student to proceed under the statute. Of course, if cases arose in which the college administration deliberately sought to evade the working of the statute by refusing to render a "final" decision, while at the same time keeping the student from attending classes, the court could intervene upon proper petition by the student and order the school to conclude its processes. Since a disciplinary proceeding before college authorities or before a student council can be assumed to produce some degree of intimidation or anxiety in the mind of the accused, the statute should require the school to permit him to be accompanied by legal counsel or by a lay adviser if he so chooses. There should be, however, a proviso that the normal rules of procedure of the disciplinary body will at all times prevail.

The primary inquiry of the reviewing court would be directed to the adequacy of the hearing afforded by the college authorities and the propriety of the regulation; and only in those cases in which the adverse decision of the college is unsupported by a proper hearing, or is based on a regulation beyond the power of the school to enforce, would the court reverse the decision of the college with an order for a new hearing or revocation or modification of the regulation at issue. Only in cases in which the college disciplinary authorities manifestly acted in bad faith would the court take the case from them and decide the question of the student's guilt on its merits. In any case in which the court saw fit to order another hearing at the college level, it could include such instructions for the guidance of the hearing authorities as it saw fit, short of ordering a specific conclusion. Any tendency toward harassment of school officials by disgruntled students with frivolous claims could be discouraged by a provision that the petitioner will be held liable for full costs, including attorneys' fees, in the event that judgment is given for the school and the court further finds that the student did not have reasonable cause for bringing the action. Flexibility in the administration of the statute could probably best be achieved by viewing proceedings instituted thereunder as equitable in nature. The typical remedy would therefore be injunction.

It cannot be denied that the procedure outlined herein would probably lead to an increase in the number of college discipline cases brought before the courts. This probability, standing alone, should not be a serious deterrent to its adoption, particularly in view of the fact that the statute would tend to discourage all frivolous appeals. College authorities do not characteristically act arbitrarily or in bad

34. Terms would normally be either quarters or semesters.

faith when dealing with their students, and this suggested legislation does not assume that they do. But, with the tremendous increase in enrollments in institutions of higher learning, with the corresponding increase in the inability of college authorities to know students individually, and with the transcendent importance which the typical student must be assumed to place upon his opportunity to complete his college program,[35] arbitrariness or bad faith should no longer be the prerequisites to judicial review of college discipline. As the court in *Dixon* has held, due process requires that students be accorded a reasonable hearing and given the benefit of objective ascertainment of guilt prior to being subjected to the extreme penalties of expulsion or prolonged suspension.

PROPOSED MODEL STATUTE

I. The administrative officers[36] of colleges and universities which receive their principal support from the legislature of this state[37] shall have the power to make and enforce all regulations pertaining to student conduct which are appropriate and necessary to the maintenance of order, discipline, and propriety at such colleges and universities, considering the normal standards of behavior within the local community; provided, however, that no regulation may be enforced which exceeds the reasonable interest of the school in furthering its educational goals, or which unduly restricts the freedom of students to express themselves on matters of genuine social and moral significance.

35. See Dixon v. Alabama State Bd. of Educ., *supra* note 2, at 157, "It is most unlikely that a public college would accept a student expelled from another public college of the same state. Indeed, expulsion may well prejudice the student in completing his education at any other institution."

36. It is acknowledged that the regulatory power may be vested in a board of education, a board of trustees, or in other agencies. "Administrative officers" is used generically for the purposes of the model statute.

37. This clause is not intended to contain an exclusive definition of the "state" college. The language is primarily descriptive, and is thougbt to be adequate to differentiate between the tax-supported institution and the "private" school, at least for the purposes of the model statute. A consideration of the statute's coverage inevitably raises questions as to how far the state can or should go in controlling the enforcement of regulations in so-called private institutions. See notes 11, 12, 13, and 18 *supra*. It has not been the purpose here to give searching treatment to this question, but this much should be said. The tendency of the courts to refrain from reviewing the disciplinary decisions of private schools on the ground that the private college-student relationship rests entirely in contract probably oversimplifies the problem. This is particularly so in cases where the "private" school is actually receiving some governmental financial aid, because in such cases there may well be sufficient "state action" involved to bring the institution within the scope of the due process requirements of the fourteenth amendment to the United States Constitution. Moreover, the fact that even "private" colleges and universities are performing what is basically a public function in the education of the nation's youth would seem to render them subject to reasonable requirements of procedural due process when they cause a student to be expelled for misconduct. See in this connection Guillory v. Adm'rs of Tulane Univ., 203 F. Supp. 855 (E.D. La. 1962), *rev'd. on rehearing*, 212 F. Supp. 674 (E.D. La. 1962); Johnson, *The Constitutional Rights of College Students*, 42 TEXAS L. REV. 344-49 (1964).

II. When any student at any college or university described in Part I has been accused of violating a regulation of such college or university, for which violation he may be punished by expulsion or suspension for as long as one school term,[38] he shall be entitled to the protection hereinafter provided:

A. In cases in which the guilt of the student has been established by his own voluntary admission or by conviction in a court of justice in the county where the college or university is located, of an offense which clearly amounts to a violation of the regulations of the college or university, the student may be subjected to suspension or expulsion, or lesser punishment, in the discretion of the disciplinary body,[39] upon the delivery to the student of notice in writing of the action to be taken. In such case, the student need not be accorded a hearing unless it is necessary to establish his identity as the convicted offender or to confirm the voluntary nature of his admission of guilt.

B. In cases in which the guilt of the student has not been established under the provisions of the preceding paragraph: (1) He shall be entitled to a hearing before the disciplinary body of the college or university. (2) He shall be further entitled to receive a statement in writing, at least two days prior to the hearing, setting forth the charges against him with sufficient clarity to enable him to present a reasonable defense thereto. (3) He shall be further entitled to know the names of the witnesses who are directly responsible for having reported the alleged violation to the disciplinary body, or if there be no such witnesses, to be fully informed of the manner in which the alleged violation came to their attention. (4) He shall be further entitled to present his defense to the disciplinary body while the members are assembled for hearing, including the presentation by him of a reasonable number of witnesses in his own behalf. (5) He shall be further entitled, if he so chooses, to be accompanied and represented by legal connsel or by a lay adviser; provided, however, that in all hearings before the disciplinary body; the normal rules of procedure of said body shall be observed. (6) He shall be further entitled to expeditious handling of his case and prompt decision after the hearing, consistent with the requirements of mature and careful reflection by the disciplinary body upon the charges and the defenses raised thereto. (7) He shall be further entitled to an explicit explanation in writing of the basis for any decision rendered against him.

III. A. Any student of any college or university described in Part I who has been expelled or suspended for as long as one school term on the ground that he is guilty of misconduct in violation of the regulations of the college or university, may, if the expulsion or suspension be ordered pursuant to a final decision by the highest disciplinary officer or body of the college or university that is empowered to make such decisions,[40] petition any court of general equity jurisdic-

38. See note 34 *supra.*
39. See note 32 *supra.*
40. See note 33 *supra.*

tion in the county where the college or university is located for review of the decision; provided, however, that such petitions must contain allegations that the decision of which he seeks review was rendered contrary to the provisions of Part I or of Part II of this Act, or of both, or that the action taken against him by the college or university was taken arbitrarily or in bad faith.[41]

B. Upon receipt by a proper court of a petition duly submitted pursuant to the provisions of the preceding paragraph, said court shall examine the facts and shall make a determination as to the merits of the allegations contained in the petition. Upon a finding that the allegations are without merit, the court shall dismiss the petition. Upon a finding that the allegations are meritorious, the court shall order a new hearing, or a revocation, or a modification of the regulations in issue, or, upon a finding of arbitrary conduct or bad faith by any party before the court, shall render whatever judgment is required by principles of equity.

C. Any student who seeks review of any decision of any college or university in a court of this state shall be fully responsible for all costs incurred by the college or university in defending the action, including all attorneys' fees, in any case in which judgment shall ultimately be in favor of the respondent college or university and the court shall find that the student did not have reasonable grounds for bringing the suit.

Enforcement of Foreign Non-Final Alimony Decrees

At the end of a divorce proceeding friction between the parties is common. Consequently the husband often tries to avoid paying alimony or support by leaving the state where his family resides. This not only imposes hardships on the abandoned family but creates a problem in which society has a paramount interest, both morally and practically, for if the husband does not support the family the state must do so.[1] Even if the missing spouse can be found, the wife faces very difficult legal obstacles to the enforcement of her alimony decree. The purpose of this brief discussion is to examine the interstate problems involved in enforcing decrees for alimony or support, to point out the developments and advances, and to propose a uniform solution.

41. This provision provides a desirable restriction upon the scope of review. Under most circumstances, the court will be required to look only to the sufficiency of the hearing, but the student is also protected against the possibility of there being improper regulations or other unfair action by the school.

1. In 1949 the total bill for aid to dependents where the father was absent and not supporting was $205,000,000. BROCKELBANK, INTERSTATE ENFORCEMENT OF FAMILY SUPPORT at v (1960).

THE PROBLEM

While the Constitution of the United States calls for the courts of the several states to give "Full Faith and Credit . . . to the public Acts, Records, and judicial Proceedings of every other State,"[2] the long established procedure for enforcing money judgments of sister states is to bring a new action in *F-2* based upon the *F-1* judgment.[3] Even though the *F-1* judgment is conclusive upon the merits[4] and subject to very limited grounds of attack, this method is at best expensive and lengthy. At worst it is likely to result in a warning to the judgment debtor by which he may dispose of his assets and deprive the judgment creditor of his effective remedy.[5] Undesirable as this procedure is for the enforcement of foreign money judgments in general, it is little better than none at all for enforcing alimony decrees in particular.[6] It is the practice in most American jurisdictions for the court to reserve the power to modify alimony and support orders upon the showing of good cause by either party.[7] This power generally extends not ouly to the payment of future installments but to amounts which may have accrued and remain unpaid. Decrees subject to this power are normally termed non-final orders.[8] In 1909 the Supreme Court ruled that decrees for the payment of alimony in future installments are protected by full faith and credit only as to those payments which are overdue and not subject to the discretion of the rendering court.[9] The rationale is that *F-1* money judgments are enforcible in *F-2* only by an action of debt upon the *F-1* judgment, but, since an action of debt is upon a sum due and certain, as long as the amount due under the decree is modifiable it may not be the subject of a new action in *F-2*.[10] The result is that

2. U. S. CONST. art. IV, § 1.

3. As has become customary in articles dealing with the conflict of law, the court rendering the decree will be designated hereafter as *F-1* and the state where enforcement is sought as *F-2*.

4. McElmoyle v. Cohen, 38 U.S. (13 Pet.) 169 (1839).

5. Paulsen, *Enforcing the Money Judgment of a Sister State*, 42 IOWA L. REV. 202 (1957).

6. The term foreign money judgments is used here only as it applies to the enforcement of sister state judgments and not to the enforcement of foreign judgments in the strict international sense.

7. This is normally done by statute but may be expressly reserved in the decree. MADDEN, PERSONS AND DOMESTIC RELATIONS, §§ 97-98, at 328 (1931).

8. The only final alimony or support orders are those which call for a lump sum payment. Since there is no difficulty involved in enforcing such decrees, this article is not concerned with them and when alimony or support is mentioned it is the non-final category which is intended.

9. Sistare v. Sistare, 218 U.S. 1 (1910).

10. Page, *Full Faith and Credit: The Discarded Constitutional Provision*, 1948 WIS. L. REV. 265; Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law*, 33 MICH. L. REV. 1129 (1935).

even a non-modifiable decree is enforcible only as to overdue amounts. If accrued installments are modifiable, then the wife must reduce the amount to judgment in *F-1* and then bring an action in *F-2* based upon this final judgment.[11] But of what good is this to a wife who needs the money to maintain herself and her family. Very few alimony awards are sufficient to bear the expense of two legal actions and leave anything for the wife. For example, a relatively recent case involved an alimony decree of only nine dollars per week.[12] Add to this the fact that the same procedure must be followed every time she wishes to collect unpaid installments and it is easy to see why a wife would be unable to pursue her remedy. This creates an anomalous situation—the law imposes a duty of support upon a husband and then renders it ineffectual by procedural niceties!

PROPOSED SOLUTIONS

Several different possibilities for alleviating the harshness of the existing method have been proposed and some have been utilized. For example, one state has chosen to allow accrued but modifiable installments to be the basis of a new action, reasoning that such a decree is entitled to full faith and credit until an application for modification is made.[13] This does not, however, eliminate the necessity of bringing a new suit every time installments become due. A very few courts have gone so far as to turn the *F-1* judgment into a local judgment by issuing a local continuing order.[14] Such an order takes all the terms of the *F-1* judgment and makes them effective in *F-2*. The advantages of this are obvious for not only is the decree enforced as to both past due and future installments, but the special local equitable remedies for the enforcement of alimony decrees, which are lost if enforcement is only by an action of debt, are also available.[15]

There have been two legislative proposals by the Conference of Commissioners on Uniform State Laws which would be significant advances in the enforcement of alimony decrees. The Uniform Enforcement of Foreign Judgements Act was drafted to eliminate the

11. An excellent discussion of all the possibilities is set out in Jacobs, *The Enforcement of Foreign Decrees for Alimony,* 6 LAW & CONTEMP. PROB. 250 (1939).

12. Worthley v. Worthley, 44 Cal. 2d 465, 283 P.2d 19 (1955).

13. Holten v. Holten, 153 Minn. 346, 190 N.W. 542 (1922).

14. Worthley v. Worthley, *supra* note 12; Sackler v. Sackler, 47 So. 2d 292 (Fla. 1950); Cousineau v. Cousineau, 155 Ore. 184, 63 P.2d 897 (1936); McKeel v. McKeel, 185 Va. 108, 37 S.E.2d 746 (1946). These cases were decided on the basis of comity and not full faith and credit. One court has held that full faith and credit required the enforcement of alimony decrees. Fanchier v. Gamill, 148 Miss. 723, 114 So. 813 (1927).

15. Scoles, *Enforcement of Foreign "Non-Final" Alimony And Support Orders,* 53 COLUM. L. REV. 817 (1953).

necessity of bringing an action in *F-2*.[16] It provides a registration and summary judgment procedure whereby the *F-1* judgment upon registration becomes an *F-2* judgment and is entitled to be enforced in the same manner as *F-2* judgments. If non-final alimony decrees could be registered under this act the result would be the same as has been accomplished by issuing a local continuing order. Unfortunately the act provides for the registration of only those judgments which are entitled to full faith and credit and under the *Sistare*[17] rule non-final alimony decrees are not.[18] A second uniform act expressly calls for the registration of foreign support orders. The Uniform Reciprocal Enforcement of Support Act says that foreign support orders may be registered in a state where enforcement is sought and will be the basis of a duty to support.[19] The enforcing state will not only enforce the decree for future payments but will also hear pleas for modification. Presently fourteen states have adopted this act in its amended form which includes the registration provisions, yet the act has seemingly not been used to enforce alimony or support order. No state appellate court has yet been called on to construe the section.[20] The act thus remains an unused reservoir of possibilities.

Even if an ideal uniform act were proposed which cured all the defects in the enforcement of foreign alimony judgments, it would remain subject to the fundamental disability of all other uniform acts, that is, it must be adopted by the states. In view of the approach taken by the states in the past, it seems unwarranted optimism to suspect that such an act would be widely adopted. The best solution is a federal statute calling for enforcement by registration of all foreign money judgments. Such statutes are now in effect in England,[21] Australia[22] and even govern the method of enforcement among federal courts in the United States.[23] That Congress has the constitutional power to provide for such a uniform system of registration is manifest.[24] Part of the full faith and credit clause provides that "Congress may by general law prescribe the manner in which such

16. See Leflar, *The New Uniform Foreign Judgments Act,* 24 N.Y.U.L. REV. 336 (1949).

17. *Supra* note 9.

18. *Supra* note 16, at 349.

19. BROCKELBANK, *op. cit. supra* note 1, at 94 (1960).

20. *Id.* at 69-77. An examination of the digests revealed no cases involving the use of this section of the act.

21. Administration of Justice Act, 1920, 10 & 11 Geo. 5, c. 81, pt. II.

22. Service and Execution of Process Act, 1901-1934 (2 Commonwealth Acts 1415) (1901-1935).

23. 23 U.S.C. § 1963 (1958).

24. Cook, *The Powers of Congress Under the Full Faith and Credit Clause,* 28 YALE L.J. 421 (1919); Yntema, *supra* note 10.

Acts, Records and Proceedings shall be proved and the effect thereof."[25] So far the only exercise of this authority as applied to judgments was in 1790[26] in an act which has been interpreted and followed as giving the conclusive effect to foreign judgments that they enjoy today, but not expanding the common law method of enforcement by bringing a new action.[27]

Conceding that Congress has the authority to provide for a system of registration, are there any constitutional or practical barriers to the inclusion of alimony decrees among those money judgments which may be registered? In *Barber v. Barber*, Mr. Justice Jackson speaking in support of the enforcement of alimony decrees said:

> Neither the full faith and credit clause of the Constitution nor the Act of Congress implementing it says anything about final judgments. . . . Both require that full faith and credit be given to "judicial proceedings" without limitation as to finality. Upon recognition of the broad meaning of that term much may some day depend.[28]

Certainly alimony and support decrees are judicial proceedings and are entitled under full faith and credit to the same treatment as other money judgments. The principle reason that money judgments are required to be final is that enforcement has traditionally been by the common law action of debt in *F-2*. If the method is changed and enforcement is no longer by an action of debt then what little basis there may be for requiring "finality" disappears.[29] The only concern for finality should be on the merits of the case. As long as the rights of the parties have been finally adjudicated and the decision has become final by the exhaustion of rights of appeal, there should be no insurmountable obstacles to enforcement by registration. Alimony decrees are as final under the circumstances as they can possibly be. Retaining the power to modify the decree is a unique and desirable way of keeping the interests of the party in harmony. Such flexibility should not be defeated unnecessarily.

Somewhat more complex than "finality" is the practical matter of the "effect" of judgments in sister states. In the event there is a conflict of law between *F-1* and *F-2* regarding enforcement of judgment procedures, just which law should *F-2* be required to apply?

25. U.S. CONST. art. IV, § 1.

26. The act was re-enacted in 1948 in its present form which is no different from the 1790 act as far as enforcement of judgments is concerned. 28 U.S.C. § 1738 (1958).

27. McElmoyle v. Cohen, 38 U.S. (13 Pet.) 169 (1839).

28. 323 U.S. 77, 87 (1944) (concurring opinion).

29. Obviously courts could not be required to enforce judgments where it was impossible to determine the amount due, but that is far from the case with alimony decrees where there is always a readily ascertainable sum due.

This question is obviously basic to the whole problem of enforcing foreign money judgments but has even more significance for non-final alimony decrees. Almost universally the answer has been that *F-2* need only treat *F-1* judgments in the same fashion as similar *F-2* judgments would be treated. This is the result in the English[30] and Australian[31] registration statutes and the same recommendation is made in the Uniform Enforcement of Foreign Judgments Act,[32] the statute suggested by Professor Cook[33] and the statute governing registration among federal courts.[34] It is submitted that this is a rational solution and is consonant with the proper purposes of full faith and credit—to put *F-1* judgments on equal footing with judgments of *F-2*. The purpose is to eliminate discrimination and this is achieved by making the *F-1* judgment, in effect, a judgment of *F-2*. An appropriate analogy is the privileges and immunities clause, which says that "the citizens of each state shall be entitled to the privileges and immunities of the citizens of the several states."[35] To say that *F-2* must apply the law of *F-1* would create a source of confusion and would do much to destroy the advantages gained by a registration system. At this point it should be noted that a literal reading of the 1790 act seems to reach the opposite conclusion. That statute provides that judgments "shall have such faith and credit given to them in every court within the United States as they have by law and usage in the courts of the State from which they are taken."[36] However, as shown previously, the Supreme Court said that this act provided merely for the conclusive effect of judgments and did not include enforcement procedures.[37] This interpretation has gone unchallenged and Congress has shown an acceptance of it by providing that registered federal judgments shall have the effect and be enforced in the manner of judgments of the registering state.[38] A federal statute providing for the registration of state judgments should have similar provisions. In the case of alimony or support orders this would mean that in *F-2* only those equitable remedies and grounds for modification available for *F-2* decrees would necessarily be available for *F-1* judgments. Perhaps some inequities will result from this and one party or the other will gain an advantage when *F-2* law is

30. Administration of Justice Act, 1920, 10 & 11 Geo. 5, c. 81, pt. II.
31. Service and Execution of Process Act, 1901-1934 (2 Commonwealth Acts 1415) (1901-1935).
32. UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT § 7 (1948).
33. Cook, *supra* note 24, at 427.
34. 28 U.S.C. § 1963 (1958).
35. U.S. CONST. art. IV § 2.
36. 28 U.S.C. 1738 (1958).
37. McElmoyle v. Cohen, 38 U.S. (13 Pet.) 169 (1839).
38. 28 U.S.C. § 1963 (1958).

different, but the similarity in the state laws concerning alimony is so great that any occasional advantage will be slight.

Dealing finally with modification it should be remembered that this statute sets out only what full faith and credit *requires F-2* to do with *F-1* judgments. It in no way affects what *F-1 may* do with a decree of her making. Thus *F-1* may choose to modify the decree upon grounds available either in *F-1* or *F-2*. Furthermore, while *F-2* is required to apply the grounds of modification available to its own decrees there is no prohibition against the use of other grounds if the court feels that an injustice is being done. Any modification of the decree by either court, after notice and opportunity for hearing, would then be entitled to full faith and credit just as any other judgment.

Since the enforcement of foreign alimony or support orders is only a part of a broader problem, the legislative proposal here submitted provides first for a procedure for enforcing all foreign money judgments. It then deals with the procedural problems which might arise with alimony or support decrees.

PROPOSED STATUTE

(A) A judgment in an action for the recovery of money or property entered in the court of any state which has become final upon appeal or expiration of time for appeal or other condition precedent for finality may be registered in any other state by filing a certified copy of the judgment in a court of same or similar jurisdiction as that of the originating court and if there is no such court then in a court of general civil jurisdiction of the state where registered. A judgment so registered shall have the same effect as a judgment of a state court of the state where registered and may be enforced in like manner from the moment of registration even though there be a period for the interposing of available defenses hereinafter set out.

(B) A notice summons clearly designating the foreign judgment and reciting the fact of registration, the court in which it is registered, and the time allowed for pleading, shall be sent by the clerk of the registering court via registered mail with return receipt, to the last known address of the judgmeut debtor. The clerk shall enter on the record the fact that the notice summons has been sent in the manner here stated and shall similarly make an entry on the return of the receipt.

(C) Any defense, which under the law of the state where registered may be asserted by the defendant in an action on the foreign judgment, may be presented by appropriate pleadings within sixty (60) days and the issues raised thereby shall be tried and determined as in other civil actions.

(D) The amount due on the judgment in the state of origin shall be increased by the cost of registration according to a schedule prescribed by the registering state.

(E) Judgment within the meaning of this statute shall include any decree or order for alimony or support which is enforceable in the state of rendition, even though modifiable in that state.[39]

(1) Petition for the registration of an alimony or support order shall set forth the amount remaining unpaid and a list of any other states in which the order is registered.

(2) Upon registration of a certified copy of any modification whether by the court which rendered the original decree or by a court where the decree is registered and after due notice to the judgment debtor of time for pleading and opportunity to be heard as set out above, the modification will be given the same effect as the original decree.

(3) At any time during the time allowed for pleading or subsequent thereto, the registering court may upon petition entertain pleas for modifications and may modify the decree by decreasing or enlarging or otherwise modifying the amount to be paid under the decree.[40]

Legal Aid for Indigent Criminal Defendants

It is the nature of man to seek justice, and the basic purpose of any good legal system is to provide it. One of the characteristics that has ennobled this nation and made it great is our insistence upon making justice equal and accessible for all.[1]

I. The Problem

The base point in evaluating the methods presently employed by the states in providing legal assistance to indigent criminal defendants is that due process requires that the indigent have competent counsel for his defense. The question today is no longer whether the states shall address themselves to the defense of the indigent; that decision has been made.[2] The Supreme Court, in *Gideon v. Wainwright*,[3]

39. This part of the statute is substantially the same as one published in 17 Vand. L. Rev. 652, 657 (1964), which is modeled on the federal statute, 28 U.S.C. § 1963 (1958).

40. The ideas embodied here were partially taken from the Uniform Reciprocal Enforcement of Support Act § 34 (1958).

1. Letter from Chief Justice of the United States, Earl Warren, to Orison S. Marden, President, National Legal Aid Association, October 10, 1956, reprinted in 15 The Legal Aid Brief Case 27 (1956).

2. It was not until 1938 that the Supreme Court in Johnson v. Zerbst, 30 U.S. 458 (1938), interpreted the sixth amendment to mean that a defendant in a federal court is entitled not only to be represented by his retained counsel, but that he is entitled to have counsel assigned, if he is unable to obtain representation. As recently as 1942 the Court, in Betts v. Brady, 316 U.S. 455 (1942), held that due process does not require a state to furnish counsel to a defendant in every criminal case, but only

recognized as essential to a fair trial the right of an indigent in a criminal trial to have the assistance of counsel. Mere recognition of this right, however, is illusory, unless accompanied by effective methods to assure its fulfillment. It is necessary to adopt means which comply with the qualitative requirements demanded by equal justice. There is little need to expound: if the indigent is to receive the same justice as the affluent, he must have as competent legal assistance as the malefactor of means. The problem is how to provide competent counsel for all indigent criminal defendants.

While solution to this problem would have been difficult at any stage in the country's development, it is particularly difficult today. The explosive expansion of the nation's population, industrial development, urbanization and the complexity and fluidity of economic and social institutions have created exceptional problems in the administration of criminal justice. There has been an enormous increase in criminal offenses with a correlative increase in the need for counsel. It is estimated that over two million people are charged with a major criminal offense each year. One million of those arrested need free legal assistance.[4] While progress has been made toward providing the needed assistance,[5] the fact remains that each year thousands of indigent criminal defendants receive only cursory representation by court appointed counsel, who are neither compensated for their services, nor reimbursed for expenses. Privately supported defender associations exist in relatively few communities and provide only limited coverage.[6] Only seventy-eight public defender offices are in existence, and of this number sixty-three are located in three states.[7] How can the demand for legal representation be effectively satisfied? Can adequate representation be provided indigent defendants by the traditional assigned counsel system? Or is it necessary

---

when the facts are such that to proceed without counsel would be fundamentally unfair. Since 1948, the Court has extended its interpretation of the right of representation in a state court. See, *e.g.*, Hudson v. North Carolina, 363 U.S. 697 (1960); Cash v. Culver, 358 U.S. 633 (1959); Gibbs v. Burke, 337 U.S. 773 (1949); Wade v. Mayo, 334 U.S. 672 (1948). The most recent decision is the now famous Gideon v. Wainwright, 372 U.S. 335 (1963), discussed in the text. For the complete historic development of the right to the Assistance of Counsel see BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955); Becker & Heidelbough, *The Right to Counsel in Criminal Cases*, 28 NOTRE DAME LAW. 351 (1953).

3. *Supra* note 2; 16 VAND. L. REV. 1228 (1963).

4. Pollock, *Equal Justice in Practice*, 45 MINN. L. REV. 737, 738-39 (1961).

5. For the growth of systems to afford representation to indigent defendants see, A SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, EQUAL JUSTICE FOR THE ACCUSED 43-47 (1959) [hereinafter cited as EQUAL JUSTICE]. See also BROWNELL, LEGAL AID IN THE UNITED STATES (1951).

6. *Supra* note 4, at 738.

7. California, Connecticut, and Illinois.

to increase reliance on innovations such as the private legal aid society and the public defender? Or is it time to institute newly devised methods?

II. Possible Solutions

Though the problem is apparent, the selection and implementation of the system most appropriately designed to provide effective representation to indigent criminal defendants requires more than casual reflection. Even the most informed authorities disagree. There are those who advocate the privately supported defender system, or, in the alternative, the assigned counsel system, if counsel is compensated, but feel that the public defender system is ill-conceived.[8] At the opposite extreme, there are those who feel the public defender system is the ultimate solution of the problem.[9] The following discussion evaluates the variety of methods presently employed in providing legal assistance to the poor. It begins with the private methods, moves to the public method, and concludes with the mixed public-private method. In evaluating these methods, it is necessary to establish a standard by which to measure the effectiveness of the system. Any system that is adopted must provide capable, experienced, and loyal representation for every indigent faced with a criminal prosecution; representation at an early stage in the proceedings and on appeal; and representation aided by adequate investigatory opportunities.[10]

A. Assigned Counsel

The method most frequently employed is the assigned counsel system, characterized by a case by case approach with the presiding judge appointing counsel to serve without compensation. Typically, younger attorneys who are willing and able to devote time to assigned cases are appointed.[11] In some jurisdictions there is a systematic technique of assignment under which counsel is assigned in alphabetical rotation.[12] The assigned counsel system was developed at a time when America was characterized by a homogeneous population living in rural areas. Communities were smaller, more stable, more conducive to personal relationships, and often the defendant was

8. Dimmock, *The Public Defender: A Step Towards a Police State?* 42 A.B.A.J. 219 (1956).

9. Celler, *New Hopes for Federal Public Defender Legislation*, 19 Legal Aid Brief Case 28 (1961); Cuff, *Public Defender System: The Los Angeles Story*, 45 Minn. L. Rev. 715 (1961); David, *Institutional or Private Counsel: A Judge's View of the Public Defender System*, 45 Minn. L. Rev. 753 (1961).

10. Equal Justice 26.

11. *Id.* at 48. See also Fellman, The Defendant's Rights 125 (1958).

12. Equal Justice 49.

known by the appointed counsel. With the courthouse the center of community attraction, the ambitious attorney was eager to accept assignment so as to demonstrate his skill. The office of the prosecutor was not specialized and, against the general practitioner, turned prosecuting attorney for the trial, the assigned counsel could compete on equal terms. The greatest factor contributing to the early success of the assigned counsel system was the relative infrequency of criminal prosecution, thus precluding the assigned attorney from assuming a burden of frequent or extended appearances.[13] However, inherent in the assigned counsel system is an inability to provide the scope of representation required in our complex metropolitan communities.[14] Another serious defect is the inability of the system to afford representation that is uniformly competent, experienced, zealous, and loyal.[15] The assumption that all lawyers are qualified to practice criminal law is erroneous.[16] While it may be true that criminal law concepts are familiar to most attorneys, there is a premium on detailed knowledge of applicable statutes, procedures, police techniques, and the workings of criminal labs.[17] Many lawyers in modern practice have little or no interest in criminal law and consequently are inadequately qualified to represent persons charged with crime. The reputable, experienced lawyer is seldom able to devote full time and energy to the assigned defendant.[18] It is not a solution to depend upon young attorneys whose time is less in demand, for, regardless of the zeal of a young lawyer, he is seldom a match for the experienced district attorney.[19] Though theoretically the assigned counsel system is able to come into operation at an early stage of the proceedings, in practice the appointment may not be made until the defendant is arraigned.[20] Thus the advantage of timeliness is lost. Further, as a practical matter, the representation assigned ends at the conclusion of the proceedings in the trial court,[21] though this factor, as well, is not an inherent weakness. With the burden of the defense on a practicing counsel, seldom does the defense acquire the completeness derived from utilization of all investigatory facilities.[22] This is particularly true when there are no provisions for

13. BROWNELL, *op. cit. supra* note 5, at 136.
14. EQUAL JUSTICE 63.
15. *Id.* at 64.
16. *Id.* at 65.
17. David, *supra* note 9, at 756, 736.
18. Even the call of professional responsibility cannot obscure the fact that a lawyer's stock and trade is time. It is unfair to place the burden of care for the poor on any group who earn their living by their work.
19. BROWNELL, *op. cit. supra* note 5, at 143, and Cuff, *supra* note 9, at 723.
20. EQUAL JUSTICE 67.
21. *Ibid.*
22. *Id.* at 66.

reimbursement of expenses, or when the counsel is a youthful attorney unable to expend personal money. Though the assigned counsel system in theory calls upon the best tradition of the legal profession and at times provides distinguished and effective services, in most areas the system now needs to be replaced by a means capable of supplying the demands of a complex society. It is recommended that in communities exceeding fifty thousand population, consideration be given to the adoption of other means to protect the indigent defendant. In those areas where the system can effectively be retained, it is suggested that compensation for the service of the assigned counsel and reimbursement for expenses incurred would improve the quality and effectiveness of the system.[23]

B. Voluntary Defender

A voluntary defender system has as its basis a private, non-governmental organization characterized by a centralized, professional approach to the representation of the indigent defendant. Unlike the *ad hoc* method of the assigned counsel system, the voluntary defender system creates a law office to which the court assigns representation of indigent defendants. The system employs a trained, salaried staff, but may also rely on the assistance of private law offices or local law students.[24] The office is privately controlled and financially supported by independent efforts to secure charitable contributions. In practice, a voluntary defender system with sufficient personnel and funds can provide the breadth of representation required to meet the qualitative standard of equal justice.[25] Also, contingent upon sufficient funds, there is no reason why the system cannot establish the required investigatory facilities necessary to present a complete defense.[26] The centralized office approach affords a continuity of qualified representation with the experience of the veteran defenders passed to the younger staff members.[27] However, while it is true that the system has highly qualified specialists at the top of the

23. It is suggested that the federal Criminal Justice Act, 18 U.S.C.A. § 3006a (Supp. 1964), might serve as a guide. The act provides for compensation at the rate of $15 per hour for time expended in court, and $10 per hour for time reasonably expended out of court, and for reimbursement of reasonable expenses incurred. This is limited to a maximum of $500 for a felony, and $300 for a misdemeanor.

24. EQUAL JUSTICE 50-51. Boston makes significant use of law students. The Harvard Voluntary Defenders Committee composed of 26 second and third year students performs practically all initial jail interviews and the bulk of investigatory work. In Philadelphia each month one of the large firms supplies the full time services of one of its junior attorneys. Law students from the local law schools perform interviewing and investigating tasks.

25. *Id.* at 68-70. See also Pollock, *supra* note 4, at 745.

26. EQUAL JUSTICE 70-71.

27. *Id.* at 70.

organization, all too often the brunt of the work is assumed by young attorneys who are beginning their careers and seek only a temporary position.[28] As previously noted, a new lawyer is often unable to meet an experienced prosecutor on equal terms. However, since the system uses an established organization, it is capable of initiating representation at an early stage and equally capable of continuing the proceedings to an appropriate conclusion. The most crippling defect of the system is its dependency on voluntary contributions.[29] The uncertainty and inadequacy of revenue is a practical limitation on the operation of the system, but if the necessary pecuniary support is forthcoming, the voluntary defender system can adequately meet the demands of equal justice.

C. Public Defender

The public defender, like the prosecutor, is a government official employed to fulfill the state's obligation of equal protection before the law regardless of economic status. The public defender's office is staffed by various means: civil service, appointment, or election.[30] This results in stability and continuity and frequently with career service developments. The system is financed by public monies: in some instances by budgetary appropriations and in others by fixed fee retainer.[31] Advocates of the public defender concept urge "that the presumption of innocence requires the state to defend as well as prosecute . . . ."[32] They urge that the accused should not be dependent upon charity for an adequate defense, but "should be represented by a sworn public official who has the duty, as well as the power and standing, fully to protect the interest of the accused."[33] The initial charge against the public defender system was that it was a step toward a police state by socialization of the bar.[34] Such a conception of the public defender is ill-conceived unless socialism includes every governmental office established to discharge a community responsibility. Implicit in the misconception is the failure to realize that the system grew out of a need to protect the individual

28. Cuff, *supra* note 9, at 725.
29. EQUAL JUSTICE 69-70.
30. *Id.* at 52. In two counties in California the public defenders are selected on the basis of competitive civil service examination. The public defenders in Connecticut are appointed by the judge of the superior court. Election by popular vote occurs in Omaha and San Francisco.
31. *Id.* at 51. Most public defenders submit a yearly budget request to a local governing body. In Connecticut, funds for all public defenders are originally appropriated by the Connecticut Legislature to the Judicial Department of the State which then provides for payments to the individual defender.
32. Cuff, *supra* note 9, at 721.
33. *Id.* at 726.
34. *Supra* note 8.

against the state. In practice, while the public defender system has continued to spread in use, the bar has retained its independence.[35] The most common criticism today arises from the fear of potential political direction of the system. In communities controlled by a powerful political organization appointments and even elections may result in the public defender office serving a function not intended when inaugurated. In addition to this argument, the system's opponents assert that even in the absence of political domination, the system will not protect the rights of the publicly unpopular defendant,[36] *e.g.*, cop-beater, rapist, embezzler of tax funds, etc. These criticisms do not strike at an inherent weakness in the system. There is no reason why a public defender should not be as conscientious and devoted a public servant as the prosecutor whom he opposes or the judge before whom he appears, both of whom are public officials. There are advantages in having an independent defense counsel, but experience has shown that in most jurisdictions the public defender system has the reputation of providing representation equal to that afforded by the most qualified private attorneys.[37] As a safeguard against the potential intrusion of political influence, a technique of appointment may be utilized to prevent subjecting the public defender to outside coercive pressures. Suggested are civil service examinations or appointment with tenure.[38] As for the qualitative standards of the system, no inherent structural inability appears to prevent the system from providing the scope of representation demanded by equal justice.[39] Subject to previously mentioned objections, the system as designed can afford representation which is competent, experienced, and enthusiastic. This, combined with the system's ability to conduct a complete defense because of its full investigatory facilities, allows the defender to confront the prosecution on equal terms.[40] Further, like the voluntary defender system, the public defender, because of its continuity, is in a position to afford representation at an appropriately early stage of the proceedings and continue to the end of the judicial process. Though the public defender system is not a panacea for representation of the criminal defendant, it does presently offer

35. EQUAL JUSTICE 45.

36. BROWNELL, *op. cit. supra* note 5, at 146. See also Pollock, *supra* note 4, at 748, where he suggests that real test of evaluation of any system is whether the system will protect the rights of an unpopular official, as the public defender, to fully protect the rights of a cop-beater, etc.

37. "In most of the jurisdictions examined by this committee, the public defender system has the reputation of giving representation of a quality equal to that of the more qualified private atorneys who practice in the criminal courts." EQUAL JUSTICE 73.

38. *Id.* at 92-93.

39. *Id.* at 72.

40. *Id.* at 73-74.

considerable promise toward assuring all criminal defendants effective legal representation.

D. Mixed Public and Private System

It is proposed that a new and presently little utilized system, the mixed public and private system, provides the best solution to the problem. A combination of the two most lauded systems, the public defender system and the voluntary defender system, the mixed system draws from the strengths of the two, while avoiding the most frequently cited weaknesses. The mixed system is calculated to maintain the high qualitative standards of representation recognized in the two systems. This system employs an independent, privately controlled and staffed legal aid organization that receives direct appropriation of public funds to be combined with those of charitable contributions.[41] This offsets the crippling restriction of deficient operating capital that impairs the effectiveness of the voluntary defender system. Equally significant is the obviation of the most common and potent objection to the public defender system, potential political domination. Although critics of the public defender system may attack the mixed system as well with their argument of governmental usurpation of a private endeavor, this argument is less potent, because the mixed system is administered privately by lawyers operating independently of government direction or supervision. There may remain, however, an objection to government subsidy. To rebut this argument it should be emphasized that government aid to private activities for public purpose is today a frequent combination.[42] Private and state universities receive federal research grants and construction loans that are essential in expanding facilities and which result in public benefit. Industry has received financial aid in order to stimulate production and increase employment.

This system is most highly developed in England, though legal aid in criminal cases is left outside the statutory scheme. The English Legal Aid and Advice Acts[43] are based upon three principles that concern the individual, the government, and the attorney.[44] As to the individual, "The Scheme provided under the Legal Aid and Advice Acts aims to make available to the public those services of solicitor and counsel which a reasonable man would provide for himself had he sufficient means to do so."[45] Second, though a person

41. *Id.* at 52.
42. CHEATHAM, A LAWYER WHEN NEEDED 50-51 (1963).
43. The basic statute is Legal Aid and Advice, 1949 12, 13 & 14 Geo. 6, c. 51.
44. CHEATHAM, *op. cit. supra* note 42, at 45.
45. MATTHEWS, AN OUTLINE OF THE LEGAL AID AND ADVICE SCHEMES AND OF THE PROVISIONS FOR LEGAL AID IN CRIMINAL CASES IN ENGLAND AND WALES I (memo),

who receives legal assistance is required, if his financial condition warrants, to make a contribution to the legal aid fund, the major part of the fund comes from the government.[46] At the crux of the plan, the third principle establishes control of the scheme in the organized legal profession, with the work being done by lawyers in private practice.[47] As a corollary, in each case the relation between the individual and the attorney is direct and without interposition of a governmental official.[48] The Law Society, an organization of solicitors, is primarily responsible for administering the system. The Society establishes panels of lawyers for the different classes of professional work.[49] It is noted that in large measure the success of the system has been due to the enthusiastic response and support of the individual practitioner. Though a lawyer is not required to submit his name for inclusion in the panel, practically every lawyer in the country has done so.[50]

In the United States, the mixed public-private system is little utilized. In New York, an enabling statute[51] permits any county having a population in excess of two hundred thousand to appropriate funds toward the maintenance of a private legal aid society. Rochester and Buffalo have established the mixed system, and New York City, taking advantage of the statute, has made contributions to its Legal Aid Society.[52] However, a recent innovation in Philadelphia indicates greater reliance on the mixed system. The Philadelphia Defender Association, once committed to the principle of support solely from private sources, concluded that private financing could not be depended upon to maintain its program. To eliminate the deficiency in its present operating budget and in order to facilitate expanded

prepared for the International Legal Aid Association Directory. In an early address to the Law Society, the plan was outlined by Sir Thomas Lund, who was instrumental in the preparation of the plan. Lund, *The Legal Aid and Advice Scheme,* 4 THE RECORD 77 (N.Y. City B.A. 1949). The entire spectrum of legal aid was described for the American Bar Association by the Lord Chief Justice of England. Parker, *The Development of Legal Aid in England* since 1949, 48 A.B.A.J. 1029 (1962). Among American commentaries are Smith, *The English Legal Assistance Plan: Its Significance for American Legal Institutions,* 35 A.B.A.J. 453 (1949); Thompson, *Developments in the British Legal Aid Experiment,* 53 COLUM. L. REV. 789 (1953).

46. CHEATHAM, *op. cit. supra* note 42, at 45.

47. *Ibid.*

48. *Ibid.*

49. *Id.* at 45-46.

50. Matthews, *Lawyer Referral—The English Equivalent,* The Lawyer Referral Bulletin, A.B.A. Committee on Lawyer Referral Service No. 1, at 2-3 (1963 issue).

51. N.Y. COUNTY LAW § 224(10). This statute provides: "The board of supervisors of any county having a population of over two hundred thousand may appropriate such sums of money as it may deem proper toward the maintenance of a private legal aid bureau or society organized and operating for the aid or relief of needy persons residing within the county."

52. *Ibid.*

responsibilities, the Association solicited the aid of governmental appropriations.[53] Surely, the legal aid agencies of other communities upon matching the vastness of their responsibilities with the limitations of their private financial supply will soon reach the same conclusion as the Philadelphia Defender Association.

III. CONCLUSION

Though it is suggested that the mixed public-private system affords the best method of providing representation to indigent criminal defendants, it is unrealistic to propose a model state statute that utilizes this system alone. The variables of population, projected numbers of criminal defendants, and the condition and attitudes within the local bar association, the legal aid society, and the community are factors which cannot be anticipated or resolved by the endorsement of a single system. It is more realistic and practical to propose that a state statute permit a choice among a diversity of methods. This is the technique employed by Congress in the Criminal Justice Act.[54] This approach allows the individual jurisdictions to evaluate their particular situation, and to select the system which meets their needs. Implicit in this solution is the embodiment of the initially expressed dominant consideration: providing *in fact* effective counsel. The implementation of a particular system is not the desired goal, but only the means to the goal: providing competent counsel to all indigent criminal defendants.

53. *Supra* note 4, at 751 n.32.

54. 18 U.S.C.A. § 3006 (Supp. 1964). The Criminal Justice Act provides alternatives among which a choice is to be made by the federal district court. The alternatives are representation by assigned attorneys, representation by attorneys furnished by the bar association or legal aid society, or representation containing a combination of the two. Though the federal policy seems clear, the act is the culmination of a quarter-century of conflicting opinion, with the ultimate omission of a fourth and fifth choice that would have included a federal defender or reliance on the state defender system. Since 1937 the American Bar Association, the Department of Justice, and the Judicial Conference of the United States have endorsed legislation to provide counsel for the indigent in the federal courts. On numerous occasions bills were introduced into the House of Representatives which were the subject of hearings before the House Judiciary Committee, but none of which was ever reported out of the Committee. In April, 1961, Attorney General Robert F. Kennedy appointed a special committee of judges, lawyers, and legal scholars, under the chairmanship of Professor Francis A. Allen of the University of Michigan Law School, to investigate and evaluate the federal needs in this regard. Out of the collective judgment of this group, there emerged a plan that was endorsed by the Attorney General and proposed to the Congress by President John F. Kennedy. Both the legislation proposed by the committee, H.R. 4816 and S. 1057 as it passed the Senate included the alternative options of a federal defender office and utilization of the local public defender. The Conference Committee adopted the Senate version of the bill; but amended it by deleting the use of these methods; and suggested that the Department of Justice revive its recent study in order to re-examine the need for such system. See also H.R. REP. No. 864, 88th Cong., 1st Sess. (1963); S. REP. No. 346, 88th Cong., 1st Sess. (1963); CONF. REP. No. 1709, 88th Cong., 1st Sess. (1964).

Prenatal Injuries and Wrongful Death

A recent development in the law of torts is the increasing recognition that injuries negligently inflicted upon an unborn child afford a basis for an action for damages. This development has created a need for legislative amendment of the wrongful death acts[1] defining the rights of the personal representative of an unborn child when prenatal injuries result in the death of a fetus, either by abortion[2] or stillbirth.

The Problem

Before 1946,[3] nearly all the decisions denied recovery to a child who was born deformed as a result of injuries sustained *en ventre sa mere*.[4] However, this rule has been rapidly overturned and a child is now generally permitted to recover for prenatal injuries;[5] the older rule denying a right of recovery remains in only three jurisdictions.[6] Paralleling this recognition of the child's right to recover for prenatal injuries, the decisions now generally allow a cause of action by the child's personal representative under the wrongful death acts when the prenatal injuries cause death following birth.[7] However, when the

1. The origin and effect of the wrongful death acts has been summarized as follows: "By . . . eommon-law rule, neither the members of the family of the injured person nor his personal representative had any cause of action for the loss occasioned by his death. This . . . has been changed, in all the states, by statutes, which are modeled upon Lord Campbell's Aet adopted in England in 1846, and are known as Death Aets." McCormick, Damages § 93 (1935). See Tiffany, Death by Wrongful Act § 24 (2d ed. 1913), for the differences in wording of the various state statutes. The variations in the statutes are minor and of little significance to the topic discussed in this note.

2. "Medically, the term 'abortion' applies to any termination of pregnancy prior to viability of the fetus, regardless of cause." 1 Gray, Attorney's Handbook of Medicine § 58.01(1) (3d ed. Supp. 1964).

3. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946), was the first decision to permit a child a recovery for prenatal injuries.

4. Prosser, Torts § 56 (3d ed. 1964); Restatement, Torts § 869 (1939). The first reported English or American case on the subject was Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884), in which Judge (later Justice) Holmes wrote the opinion denying a child's right to seek recovery. Judge Holmes' reasons have "generally provided the basis in precedent and logic for all subsequent cases which reached a similar conclusion." Del Tufo, *Recovery for Pre-Natal Torts: Actions for Wrongful Death*, 15 Rutgers L. Rev. 61, 64 (1960).

5. Prosser, Torts § 56 (3d ed. 1964). The counter-arguments to the decision reached in Dietrich v. Northampton, *supra* note 4, which are generally given in support of the modern trend are treated compreliensively in Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

6. Dean Prosser characterizes the continued existence of the older rule in Alabama, Rhode Island and Texas as resting merely upon "decisions not yet overruled." Prosser, Torts § 56 (3d ed. 1964).

7. See Amman v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); Keyes v. Construction Service, Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950).

same type of injuries result in the death of the fetus before birth, there is sharp conflict concerning the right of the personal representative to maintain an action under the wrongful death acts.[8] The decisions which have considered the question do not indicate a trend,[9] and, apparently, the result that a particular jurisdiction will reach can not be predicted. The courts which have most forcefully advocated the legal correctness and social justice of allowing the child a right of action to recover when negligently inflicted prenatal injuries cause deformity are frequently the most adamant in denying the personal representative a recovery for wrongful death when the injuries are sufficiently severe to cause the death of the fetus.[10] In addition to the uncertain status of the case law, a further consideration suggests that legislative action is needed to clarify this area. The right of action for wrongful death was granted by legislative fiat, and at a time when prenatal injuries afforded no basis for a cause of action.[11] Therefore, it is suggested, there could have been no legislative intention that the rights created by the death acts should accrue upon the wrongful death of a fetus, and that extension or modification of the statutory right to include the wrongful death of a fetus should originate with the legislature.[12] A legislature con-

8. PROSSER, TORTS § 56 (3d ed. 1964).

9. The fifteen jurisdictions which have directly considered the question are approximately equally divided: *Allowing a recovery*: (7) Gorke v. LeClerc, 23 Conn. Sup. 256, 181 A.2d 448 (1962); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Valence v. Louisiana Power & Light Co., 50 So.2d 847 (La. App. 1951); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959). *Recovery denied*: (8) Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Keyes v. Construction Service, Inc., *supra* note 7; Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Graf v. Taggert, 140 A.2d 204 (N.J. 1964); *In re* Logan's Estate, 4 Misc. 2d 283, 156 N.Y.S.2d 49 (1956); Howell v. Rushing, 261 P.2d 217 (Okl. 1953); West v. McCoy, 233 S.C. 369, 105 S.E.2d 88 (1958); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).

10. The Supreme Court of Massachusetts, for example, recognized the child's right to recover for injuries causing deformity, thus overruling Dietrich v. Northampton, *supra* note 4, saying: "Natural justice demands recognition of a legal right of a child to begin life unimpaired by physical or mental defects resulting from the injury caused by the negligence of another." Keyes v. Construction Service, Inc., *supra* note 7, at 635, 165 N.E.2d at 914. However, the court remanded with orders that the plaintiff be permitted to amend to show whether the child had lived a short time before death or had been born dead, for "liability attaches on fulfillment of an implied condition that the child be born alive." *Id.* at 636, 165 N.E.2d at 915. *Compare* Smith v. Brennan, *supra* note 5 (broadly approving the child's right to recover), *with* Graf v. Taggert, *supra* note 11 (an opinion by the same judge reaching the opposite conclusion in a prenatal death case.)

11. The first case in which recovery for prenatal injuries was allowed was decided in 1946. See note 3, *supra*. Prior to 1946, each of the states had enacted wrongful death legislation. MCCORMICK, DAMAGES § 106 (1935).

12. The following language of the Tennessee Supreme Court is characteristic of this

sidering a statutory amendment would probably find three facets to the problem requiring resolution:

1. Whether a right of action under the wrongful death act should accrue upon the wrongful death of a fetus.

2. Whether, if such a right be granted, it should arise ouly when the injury causing the wrongful death was inflicted after the child had attained viability.[13]

3. What should be the measure of the damages recoverable in such an action.

THE RIGHT OF RECOVERY

The proponents of a right of action under the death acts for the death of a fetus from negligently inflicted prenatal injuries have reasoned: (1) that such a result is a logical corollary to allowing the child a right of recovery for prenatal injuries when it survives; and (2) that allowing a right of recovery is consistent with the philosophy and purpose of the wrongful death statutes. To permit the child a right of action for prenatal injuries, it is suggested, is to regard the child *in esse* at the time of the injury, and therefore, a juridical "person" to whom a duty of care is owed within the meaning and protection of the wrongful death acts.[14] The purpose of the death acts is expressed in the preamble to Lord Campbell's Act,[15] the English statute after which the American death acts are patterned, as follows:

> Whereas, no action at law is now maintainable against a person who, by his wrongful act, neglect or default, may have caused the death of another

viewpoint: "Where a right of action is dependent upon the provisions of a statute, as in the case at bar, we are not privileged to create such a right under the guise of a liberal interpretation of it. Judicial legislation has long been regarded by the legal profession as unwise, if not dangerous business. It is generally an ill-starred adventure by wilful men." Hogan v. McDaniel, *supra* note 9, at 239, 319 S.W.2d at 223. See also Hale v. Manion, *supra* note 9, at 147, 368 P.2d at 3 (dissent); Stidam v. Ashmore, *supra* note 9, at 435, 167 N.E.2d at 109 (dissent).

13. "Viability implies that the fetus is capable of maintaining life outside the uterus. . . . Inasmuch as there are no reported survivals of a fetus born prior to the 22nd week of pregnancy and weighing under 500 gms. (2½ lbs.), the criteria of both . . . [Length] of pregnancy and birth weight have been suggested as definitive of expectancy of survival." 1 GRAY, ATTORNEY'S HANDBOOK OF MEDICINE § 58.01(1) (3d ed. Supp. 1964).

14. In Stidam v. Ashmore, *supra* note 9, the court reviewed prior decisions in which the child had been allowed a recovery for non-fatal prenatal injuries and concluded: "[O]nce we have accepted the basic proposition that the decedent was a person at the time of the injury, the substantive rights necessarily resulting from that fact may surely be enforced, whatever may be the practical difficulties involved." *Id.* at 435, 167 N.E.2d at 108. See also, Gorke v. LeClerc, *supra* note 9; Amman v. Faidy, *supra* note 9; Poliquin v. MacDonald, *supra* note 9.

15. 1846, 9 & 10 Vict., c. 93.

> person, and it is often expedient . . . that the wrongdoer in such case should be answerable in damages for the injury so caused by him.[16]

That recovery for prenatal injuries should be denied and the wrongdoer exculpated solely because the injuries negligently inflicted were sufficiently severe to produce the death of the unborn child is described as an "absurd" result.[17]

The opponents of a right of recovery have generally posed three contentions in support of their conclusion: (1) The mother's right of recovery for general damages for the miscarriage makes the need for a right of action for the death of the unborn child more apparent than real[18] and presents the danger of double recovery;[19] (2) the difficulties of proof of causation would permit fraudulent claims and decisions based only on the grossest speculations;[20] (3) the policy considerations which militate in favor of a right of action to compensate a living child for prenatal injuries which may have rendered permanent impairment to his life do not support a cause of action in behalf of the parents when the injury results in death to the fetus.[21] It is submitted that these arguments are not reasons for denying the right of recovery, but, rather, point only to a need for the most careful judicial administration of the cause of action if granted. The mother who has sustained an injury which results in miscarriage has been allowed recovery for mental and physical pain

16. TIFFANY, DEATH BY WRONGFUL ACT § 20 (2d ed. 1913).

17. Stidam v. Ashmore, *supra* note 9, at 435, 167 N.E.2d at 108.

18. "Considering the highly speculative nature of the pecuniary value of an unborn child, even if viable, it is apparent that practically everything that could be recovered in an action of an unborn child can now be recovered by the mother in connection with her own claim for general damages." Norman v. Murphy, *supra* note 9, at 98, 268 P.2d at 180. See also *In re* Logan, *supra* note 9, at 285, 156 N.Y.S.2d at 51.

19. PROSSER, TORTS § 56 (3d ed. 1964).

20. "Claim is frequently made that the sole cause of abortion, miscarriage, or premature labor has been an injury. Unless this was obviously of very major degree, it is but rarely competent. . . . Honest women who do abort without known cause very logically blame a recently remembered incident of unusual character and may feel that they should be recompensed." 1 GRAY, ATTORNEY'S HANDBOOK OF MEDICINE § 58.11 (3d ed. 1964). The inability of the jury to properly evaluate such claims is frequently emphasized: "Can it be maintained that immediately after conception, whether the infant later is born alive or not, the infant *in utero* is a legal person? At least in our system of law, where the jury plays such a large role in the determination of fact, we must return a negative answer to such a broad question, largely because the difficulty of proving the causal connection between the wrongful act and the injury is too great, and too remote." Albertsworth, *Recognition of New Interests in the Law of Torts*, 10 CALIF. L. REV. 461, 469 (1921). See also *In re* Logan's Estate, *supra note* 9, at 285, 156 N.Y.S.2d at 51; Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 359, 78 S.W.2d 944, 949 (1935) ("a rule of right may well be founded upon the inherent and inevitable difficulty of impossibility of proof.")

21. *In re* Logan's Estate, *supra* note 9; West v. McCoy, *supra* note 9; 2 HARPER AND JAMES, TORTS § 18.3 (1956).

resulting from the miscarriage per se,[22] the fear of miscarriage,[23] and mental suffering caused by the fear and apprehension that she will give birth to a deformed child.[24] Also, the father has a cause of action for loss of consortium.[25] However, neither the mother nor the father is allowed a recovery for the loss of the child.[26] The danger that a jury will erroneously award damages for the wrongful death of the child in the mother's or father's action emphasizes the need for carefully instructing the jury concerning the elements of damages recoverable in each of the actions. Also, the possibility of overlapping recoveries is made less likely by the fact that the various causes of action arising from the wrongful death of an unborn child will generally be consolidated for trial.[27] The problems of proof, though difficult, are not unlike problems of medical proof frequently encountered in the law of torts.[28] In *Valence v. Louisiana Power & Light Co.*,[29] the Court of Appeals of Louisiana recognized a right of recovery for the wrongful death of a fetus, but reversed a verdict for the plaintiff after carefully evaluating the medical proofs on the issue of causation.[30] This decision indicates the need for and the ability of the courts to administer the right of action so as to eliminate claims founded upon fraudulent or insufficient proof of causation. That public policy should favor the child who lives to face life in a deformed condition more than the parents of a fetus which has been killed is at least debatable. In any wrongful death case it might be contended that the injured party is better off dead than alive to endure suffering and disability. However, this contention wholly fails to consider that in either case the defendant's conduct is equally

22. 25 C.J.S. *Damages* § 65 (1941). See, *e.g.*, Morris v. St. Paul R.R., 105 Minn. 276, 117 N.W. 500 (1906); Wallace v. Portland Ry., Light & Power Co., 88 Or. 219, 170 Pac. 283 (1918).

23. 25 C.J.S. *Damages* § 70 (1941).

24. See Davis v. Murray, 9 Ga. App. 120, 113 S.E. 827 (1922).

25. "The husband's action is for the consequences affecting his estate, and for depriving him of the aid, society, and companionship of his wife, which, except for the wrong, he might reasonably expect to enjoy." Bntler v. Manhattan Ry., 143 N.Y. 417, 420, 38 N.E. 454, 455 (1894).

26. 25 C.J.S. *Damages* § 65 (1941). "The loss of the child may be shown as affecting the extent of her [the mother's] personal injury and a recovery by her, or on her behalf for her pain and suffering therefrom or for the impairment of her health." Stafford v. Roadway Transit Co., 70 F. Supp. 555, 570 (W.D. Pa. 1947).

27. 1 C.J.S. *Actions* § 111 (1936).

28. "Such difficulty of proof is not special to this particular kind of action; and it is beside the point, anyhow, in determining whether such action is maintainable." Mitchell v. Couch, *supra* note 9, at 906. A comprehensive listing and discussion of the factors an attorney should consider during the investigation of a claim for abortion, miscarriage or premature labor is to be found at 1 GRAY, ATTORNEY'S HANDBOOK OF MEDICINE § 58.11 (3d ed. 1964).

29. *Supra* note 9.

30. *Id.* at 850-54.

tortious, and that the unborn child has an interest in being born alive, as well as in living a full and complete life after birth.[31] Also, the death act proposes to compensate the next of kin for the pecuniary value of the life lost.[32] The recognition of a right of recovery for the wrongful death of an unborn child furthers the purpose of the wrongful death statutes. The arguments opposed to the right of recovery serve to emphasize the need for careful judicial administration[33] to prevent abuses of the right granted.

THE VIABILITY[34] ISSUE

The decisions permitting recovery for the wrongful death of an unborn child have all involved viable fetuses. Although the right of the personal representative to maintain an action for the wrongful death of a non-viable fetus has been directly presented in only one case,[35] the decisions allowing a right of recovery have frequently stated the issue and holding to include only "a viable, unborn child."[36] In a number of cases in which a child sought recovery for prenatal injuries sustained prior to viability, the viability issue has generally been resolved favorably to the child.[37] The authorities favoring the position that viability should be a condition precedent to any right of action contend that, as a non-viable fetus is unable to exist apart

31. Del Tufo, *Recovery for Prenatal Torts; Actions for Wrongful Death*, 15 RUTGERS L. REV. 61, 77 (1960).

32. MCCORMICK, DAMAGES § 93 (1935).

33. In Smith v. Brennan, *supra* note 5, the court observed: "The trial courts retain sufficient control, through the rules of evidence and the requirements as to the sufficiency of evidence, to safeguard against the danger that juries will find facts without legally adequate proof." *Id.* at 366, 157 A.2d at 503-04.

34. *Supra* note 13.

35. In Mace v. Jung, 210 F. Supp. 706 (D. Alaska 1962), recovery was denied the administratrix of a non-viable unborn child. Whether a right of recovery would have been allowed had the child been viable is not clear. The court recoguized a liberal trend in several decisions which had disregarded the viability requirement in cases brought by a child to recover for prenatal injuries, and concluded without giving any reasons that the situations in those cases were "clearly distinguishable from an action for wrongful death." *Id.* at 708.

36. See Rainey v. Horn, 221 Miss. 269, 72 So.2d 434 (1954); Stidam v. Ashmore, *supra* note 9; Durrett v. Owens, 371 S.W.2d 433 (Tenn. 1963). Were the unborn child not viable at the time the injuries were negligently inflicted, it is possible some courts which have allowed recovery would have reached the opposite conclusion on the ground that the child was not a "person" at the time of the injury within the meaning of the death acts. See note 38 *infra*.

37. "Most of the cases allowing recovery [by a child for prenatal injuries] have involved a fetus which was then viable. . . . Many of . . . [the courts] have said, by way of dictum, that recovery must be limited to such cases . . . ." PROSSER, TORTS § 56 (3d ed. 1964). However, the modern trend and the majority rule where a child who sustained pre-viability injuries is actually before the court is to allow recovery. *Ibid.* See, *e.g.*, Smith v. Brennan, *supra* note 5; Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960), for decisions characteristic of this modern trend.

from the mother, it is not a separate legal "person" to whom a duty of care is owed,[38] and that to extend the right of recovery to include prenatal injuries incurred prior to the time of viability creates difficult problems of proof of causation[39] which encourage decisions based chiefly upon speculation.[40] A majority of the courts and legal writers who have directly considered the issue of viability have rejected the requirement in the light of modern medical learning and, moreover, as an arbitrary limitation on recovery which itself presents difficult problems of proof. The unborn child is now generally regarded by medical authority as biologically separate from the mother from the moment of conception,[41] and, it is argued, legal separability should begin with biological separability.[42] The requisite proof of causation[43] is the same as that now required of the mother in her action for miscarriage. Moreover, the requirement that the fetus be viable at the time of injury may itself defeat honest claims in close cases wherein the plaintiff has proven a causal connection between the negligence of the defendant and the prenatal death, but is unable to establish the exact moment of viability.[44] Therefore, the requirement

38. See Albertsworth, *supra* note 20, at 470. This reasoning has been followed in many of the decisions which have allowed a recovery for the wrongful death of a fetus. See, *e.g.*, Mitchell v. Couch, *supra* note 9; Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Poliquin v. MacDonald, *supra* note 9; Stidam v. Ashmore, *supra* note 9. The following statement is typical: "We are also of the opinion that a fetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person and if such child dies in the womb as a result of another's negligence, an action for recovery may he maintained in its behalf." Poliquin v. MacDonald, *supra* note 9, at 107, 135 A.2d at 251.

39. Diagnosis of the cause of an abortion becomes more difficult as we go back to the beginning of pregnancy. "[T]he further the pregnancy has advanced, the easier it is to diagnose an abortion. In the first few weeks of pregnancy the ovum has not yet dilated the uterus and changed the sexual organs to the extent to which the growth of the ovum changes the genital organs bye and bye." HERZOG, MEDICAL JURISPRUDENCE § 948 (1931). See also, 1 GRAY, ATTORNEY'S HANDBOOK OF MEDICINE 58.11(3) (3d ed. Supp. 1964).

40. Reed, *Pre-Natal Injuries; Development of the Right of Recovery,* 10 DEFENSE L.J. 29, 46-48 (1961).

41. "Medical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body." Smith v. Brennan, *supra* note 5, at 362, 157 A.2d at 502, quoting 1 BECK, MEDICAL JURISPRUDENCE 277 (11th ed. 1860). That the child cannot live apart from his mother has been held not to affect his separability: "That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions exist, of course, that have that result at every stage of its life, post-natal as well as pre-natal." Kelly v. Gregory, 282 App. Div. 542, 544, 125 N.Y.S.2d 696, 697 (1953).

42. *Ibid.*

43. "[W]ith the advance of modern science and with the safegnards of requiring adequate proof of the injury, there appears to be no sound reason to deny . . . an opportunity to prove his case." Muse & Spinella, *Right of Infant to Recover for Pre-Natal Injury,* 36 VA. L. REV. 611, 623 (1950).

44. "In the first place, age is not the sole measure of viability, and there is nò rcal

of a viable fetus can produce problems of proof equally as great as those which it purportedly obviates. It is submitted that there is neither a legal, nor medical basis, nor any practical justification for the requirement that the fetus shall have attained viability at the time the injury causing death was inflicted.[45]

THE MEASURE OF DAMAGES RECOVERABLE[46]

The measure of the damages recoverable by the personal representative in an action for the wrongful death of his decedent is the pecuniary value of the life of the decedent to the parties for whose benefit the action is brought.[47] When the action is for the wrongful death of a child, the jury normally considers evidence concerning the deceased's age, sex, personal characteristics, and the general health of the deceased and the financial station of the family.[48]

way of determining in a borderline case whether or not a fetus was viable at the time of the injury, unless it was immediately born." Smith v. Brennan, *supra* note 5, at 367, 157 A.2d at 504. In Magnolia Coca-Cola Bottling Co. v. Jordan, *supra* note 20, the difficulty of proving viability was given as one reason for denying recovery altogether.

45. See notes 40 & 41 *supra.*

46. The measure of damages which is universally applied in wrongful death cases is generally regarded as grossly inaccurate and speculative, and this is considered to be especially true when the decedent is a minor child. See notes 48, 49 & 51 *infra.* The uncertainty of the measure of damages has caused about one-third of the states to impose a maximum limit on the amount of damages recoverable in an action for wrongful death. MCCORMICK, DAMAGES § 104 (1935). Perhaps the dangers of excessive judgments due to speculation would be ameliorated were such a maximum limitation on damages universally applied in wrongful death cases, and the ceiling on damages recoverable set even lower when the action is for the wrongful death of a minor child. (In some states such limitations are prohibited by constitutional provision, see note 50 *infra.*) Dean Prosser has suggested that the entire philosophy of the damages recoverable for wrongful death should be reconsidered. PROSSER, TORTS § 121 (3d ed. 1964). The general subject of the measure of damages recoverable for wrongful death is beyond the scope of this note. The following discussion is intended to demonstrate merely that the problems attendant to the measure of damages recoverable for wrongful death afford no apparent basis for either denying or limiting the damages recoverable for the wrongful death of a fetus as compared with the recovery allowed for the wrongful death of a minor child.

47. Lord Campbell's Act, 1846, 9 & 10 Vict., c. 93, did not limit the damages recoverable to pecuniary loss. However, the English courts soon created such a limitation: "There may be a calculation of the pecuniary loss sustained by the different members of the family from the death of one of them: but, if the jury were to proceed to estimate the respective degrees of mental anguish of a widow and twelve children from the death of the father of the family, a serious danger might arise of damages being given to the ruin of defendants." Blake v. Midland Ry., 118 Eng. Rep. 35, 42, 18 Q.B. 93, 111 (1852). The American statutes have either expressly so limited the damages recoverable or such has been held to be implicit in the fact that the American statutes were patterned after Lord Campbell's Act upon which this limitation was superimposed by judicial decision. MCCORMICK, DAMAGES § 93 (1935).

48. MCCORMICK, DAMAGES § 101 (1935). See Lane v. Hatfield, 173 Ore. 79, 143 P.2d 230 (1943), in which the Supreme Court of Oregon upheld a judgment of

However, in cases where the child's death was prenatal, some authorities have considered the evidence from which to infer pecuniary loss so uniformly speculative as to command either denying the right of recovery altogether,[49] or limiting the amount of damages recoverable[50] It is submitted that the measure of damages now applied universally in wrongful death cases is inherently a determination involving considerable conjecture, and that this standard applied in prenatal death cases will produce results no more speculative than those in cases involving minor children. The measure of damages has been described as "vague, uncertain, and speculative if not conjectural"[51] even when applied to determine the pecuniary value of an adult life. Moreover, where the deceased was a young child, it has been suggested that damages honestly calculated under the pecuniary-value standard could never be anything but a minus quality, since "any realistic view of the prospects must mean that the cost of rearing the child[52] will far exceed any conceivable pecuniary benefit that might ever be optimistically expected of him."[53] The judgments awarded for the wrongful deaths of children are generally regarded as explainable only on the basis that juries are awarding damages on the basis of sentimentality rather than on the basis of pecuniary loss.[54] Therefore, inexactitude and even speculation in the measure of the damages recoverable is a common characteristic of wrongful death cases, especially where the deceased was a young child. The only evidence available concerning the characteristics of the deceased in a case brought for the death of a young child which may be unavailable when death is prenatal, is the sex of the child and depending on the age of the child, indications of personal capabilities.

$5,000 for the wrongful death of a seven-year-old girl, saying: "To the extent that a seven year old girl's life could do so, decedent's life, as shown by the testimony, supports the conclusion that decedent was active, alert and gave promise of a successful and commendable fruition." *Id.* at 90, 143 P.2d at 234.

49. See, *e.g.*, Graft v. Taggert, *supra* note 9; 2 HARPER & JAMES, TORTS § 18.3 (1956).

50. See Anderson, *A Model State Wrongful Death Act*, 1 HARV. J. LEG. 28 (1964), in which a limit of $1,000 beyond actual medical expenses is recommended as a maximum amount of recovery because "of the highly speculative nature of the injury." *Id.* at 42-43. However, some states prohibit by constitutional provision the statutory limitation of damages. *Id.* at 44.

51. Lane v. Hatfield, *supra* note 43, at 89, 143 P.2d at 234.

52. "In 1946 Dublin and Lotka, The Money Value of a Man, 55, Table 14, estimated the cost of raising a child to the age of eighteen would be $16,337 for a family with an income of $5,000 to $10,000. On the basis of the change in price levels as reflected in Pres. Econ. Rep. 1959, 184 Table d-38, the 1959 equivalent of this would be $34,483." PROSSER, TORTS § 121 (3d ed. 1964).

53. *Ibid.* This is peculiarly true in those jurisdictions which allow recovery only for the pecuniary beuefit the parents would receive during the child's minority. See, *e.g.*, Hudnut v. Schmidt, 324 Ill. App. 548, 58 N.E.2d 929 (1944).

54. PROSSER, TORTS § 121 (3d ed. 1964); MCCORMICK, DAMAGES § 101 (1935).

However, can it be said beyond conjecture that a boy will make a more substantial pecuniary contribution to a family than a girl, or vice versa? Also, while the child's abilities may determine his capacity to contribute to his parents, it can hardly be said beyond conjecture that his abilities determine the actual pecuniary contributions he will make.[55] Assuming that the pecuniary value of the life of the decedent is strictly adhered to in measuring the damages recoverable, it is suggested that the needs presented by the geographical and financial station of the family is the most important factor indicating the contributions a child would have been called upon to make, and evidence of this is present whether the death is the prenatal death of a fetus, or that of a minor child.

PROPOSED STATUTORY AMENDMENT

Thus, it is suggested that the legislatures of the several states amend their wrongful death statutes to include the following concept.[56]

> The mother, or father if the mother does not survive, may maintain an action to recover damages against any person who by a wrongful act, neglect or default causes the death of an unborn child, and such action may be maintained whether the child was viable or non-viable at the time of the said wrongful act, neglect, or default.

Truth in Lending

THE PROBLEM

In the Spring of 1961, President John F. Kennedy, in his consumer protection message to the Congress[1] strongly urged the passage of

55. Considering the tendency for capable children to continue their education through college and even further, the more capable the child the more substantial may be the financial burden on the parents.

56. Although the various death acts are similar in their origin and effect, there are variations in the language employed. See, note 1 *supra*. Therefore, the wording of a statutory amendment to effect the proposed change would be varied to conform with the language of the particular wrongful death act.

1. This was the historic speech of March 15, 1962, in which President Kennedy set out the bill of rights of the consumer and strongly urged passage of consumer-protective legislation, particularly the previously proposed Truth in Lending Bill of Senator Paul Douglas. *Hearings on S. 750 Before a Subcommittee of the Senate Committee on Banking and Currency*, 87th Cong., 1st & 2d Sess., pt. 1, at 4 (1963) [hereinafer cited as 1963 *Hearings*]. This position was reaffirmed by President Lyndon B. Johnson in a similar message to Congress February 5, 1964. H.R. Doc. No. 220, 88th Cong., 2d Sess. (1964).

legislation which would deal with major problems of consumer economics. In this address he apprised the lawmakers that:

> Excessive and untimely use of credit arising out of ignorance of its true cost is harmful both to the stability of the economy and to the welfare of the public. Legislation should therefore be enacted requiring lenders and vendors to disclose to borrowers in advance the actual amounts and rates which they will be paying for credit. Such legislation, similar in this sense to the truth-in-securities laws of 1933-34, would not control prices or charges. But it would require full disclosure to installment buyers and other prospective credit users, and thus permit consumers to make informed decisions before signing on the dotted line.[2]

The apparent need for federal legislation stems from the magnitude of outstanding consumer credit—today exceeding 230 billion dollars. The consuming public not only pays in excess of 15 billion dollars per annum in interest payments, but also has mortgaged more than 60 per cent of current income.[3] Additionally, the current bankruptcy rate is more than twice that of the depression years and, significantly, almost 90 per cent are individual bankruptcies, most of which were caused by overuse of personal credit.[4] Much of the overuse is due to uninformed buying and the ineptitude of the consumer at calculating how much the "easy payment" plans are actually costing him in terms of interest. Interest is an area of almost total bewilderment to the average consumer[5] because of the varied methods of interest calculation employed by the retail and finance industries.[6] The problem can be aptly illustrated by a comparison of two of the most commonly used methods, the add-on and the discount procedures: Suppose *X* wants to borrow 100 dollars and in shopping around for credit he finds that both the bank and the finance company are advertising cash loans at 6 per cent interest per annum. Seemingly, it is im-

2. *Ibid.*
3. *Supra* note 1, at 5.
4. *Ibid.*
5. The confusion accompanying interest calculations is aptly illustrated in testimony by William McChesney Martin, Chairman of the Federal Reserve Board, former Under-Secretary of the Treasury and former President of the New York Stock Exchange. This widely experienced financier admitted that even a man of his background is confused by the current interest rate practices. *Hearings on S. 1740 Before a Subcommittee of the Senate Committee on Banking and Currency*, 87th Cong., 1st & 2d Sess., pt. 1, at 275 (1961 [hereinafter cited as 1961 *Hearings*].
6. In addition to the add-on and discount methods, other common practices include no quotation of interest charges, quotation of a monthly rate, the plus-fee system, etc. The result is that misleading practices arise such as (a) department stores statement of 1½% monthly which is actually 18% per annum, (b) small loan companies 3% per month which totals 36% per annum, (c) bank 4½% installment auto loans which are really 9% per annum, (d) 5% installment home improvements loans (advertised as less than the 6% first mortgage) which are actually 10% per annum, (e) the newest fad of weekly interest for teenage purchases which runs as high as 80% per annum.

material which credit institution X chooses since they both advertise the same rate but, suppose the loan company computes interest by the add-on method while the bank employs the discount method:

> Add-on method: Under this system X would be charged $6.00 interest which would be added to the principal thus requiring repayment of $106.00 at $8.83 per month. *X would receive $100.00.*
> Discount method: This method would discount the $6.00 interest charge from the principal and X would pay back $100.00 at $8.33 per month. *X would receive $94.00.*

Thus under both methods X has paid $6.00 interest but under the discount method he received the use of only $94.00 while under the add-on procedure he has $100.00. Therefore, he has paid a lower *rate* of interest for the money under the add-on method because he gets the use of more money for the same *amount* of interest. However, there is a further complicating factor in that neither of these methods illustrates a true annual interest of 6 per cent. Actually, under the add-on method, the true annual interest would be close to 12 per cent and the discount rate would be even higher, since repayment has to begin immediately and X does not have the use of the principle for the entire year. By the end of the sixth month, he has repaid over half of the principal to the lender, whereas under 6 per cent true annual interest, X would have the use of the principal for the entire year. Thus when the public, faced with the myriad variations of statement of interest under the add-on and discount methods, additionally has to cope with the declining balance method[7] it is apparent that the consumer seeking to shop wisely for credit is lost in a maze of mathematical computations.

PROPOSED SOLUTIONS

To cope with this problem, Senator Paul Douglas introduced the Truth in Lending Bill,[8] the express purpose of which is to require the disclosure of the two indispensable elements of a credit trans-

7. The declining balance method is typified by the revolving charge account in which interest is added to the balance each month so as the balance declines the amount of interest declines correspondingly.

8. This bill was originally introduced in the Senate January 7, 1960, as S. 2755 and was referred to the Subcommittee on Production & Stability which held hearings and reported to the full Committee on Banking & Currency. August 27, 1961, it was reintroduced as S. 1740, further hearings were held, and 1,804 pages of hearing material were published. The bill was not reported to the full Committee. February 7, 1963, the bill was reintroduced as S. 750 and another 2,376 pages of hearing material were compiled. Subcommittee hearings were beld in four locations outside Washington and the bill was sent to full committee only to be returned to subcommittee for further consideration.

action: the total dollar amount and the interest rate *stated in terms of true annual interest.* The object of the legislation is to provide the consumer a simple basis of comparison, regardless of the method of computation employed. Specifically, the bill would require any creditor to furnish in advance a written statement setting forth: (1) the cash price of goods or services to be purchased; (2) the amount, if any, to be credited as down payment and for trade-in; (3) the difference between (1) and (2) or the amount of the purchase price to be financed; (4) the charges, individually itemized, which are paid or are to be paid by the consumer of credit in comection with the transaction; (5) total amount to be financed; (6) the finance charge (which includes "interest, fees, service charges, discounts, and such other charges incident to the extension of credit") expressed in terms of dollars and cents; (7) percentage that the finance charge bears to the total amount to be financed *expressed as a simple annual rate* on the outstanding unpaid balance of the obligation.[9] The aim of the bill is much like that of the Securities Exchange Act[10] in that it does not seek to control prices of credit but only to require full disclosure. The penalty provision calls for civil[11] as well as criminal sanctions, but the original provision compelling strict accurateness of the statement of interest was removed by amendment. Under the present bill there is neither penalty nor civil recovery for erroneous computation, but a willful violation can bring a maximum 5,000 dollar fine and one year imprisonment. Constitutionality of the legislation rests on the commerce clause,[12] including the necessity of the promotion of economic stabilization as a legitimate national purpose.[13]

Objections

Strong objections have been raised to the federal legislation premised primarily on these arguments: (1) The bill imposes an impossible burden on the businessman because of the complexities of computing simple annual interest on each transaction; (2) instead of bringing about full disclosure the bill would actually precipitate misrepresentation and deceit; and (3) this is an area of legislation

9. *Supra* note 1, at 17.

10. 48 Stat. 74 (1933), as amended, 15 U.S.C. § 77 (1958).

11. The creditor would be liable for non-disclosure to the borrower or buyer in the amount of $100, or an amount equal to twice the finance charge, whichever is greater, not to exceed $2,000.

12. U.S. Const. art. I. § 8, cl.3.

13. Of some significance on the question of constitutionality is the fact that two present United States Supreme Court Justices, Byron R. White and Arthur J. Goldberg supported the bill when they were in the executive branch of government. Deputy Attorney General White stated that if a substantial bearing on interstate commerce could be shown the bill would, in his opinion, be upheld. 1961 *Hearings* 13.

which should be left to the states.[14] It is particularly with reference to the widely used revolving charge account that the opponents of the bill reason that the small businessman would be burdened by the complexities of the computations and the large businesses would be hampered due to their great volume of credit transactions. However subcommittee hearings revealed that slide computers are available to the small businessman which will enable him, with relative ease, to make accurate computation of true annual interest.[15] Regarding the complaint of the large businesses, a witness[16] who, as Vice President of Sears Roebuck & Co., originated the Sears Revolving Charge Account system which served as the model for the entire industry, not ouly testified that the bill was entirely workable under the revolving charge system but also urged its adoption on the grounds that:

> (1) It will arm consumers with the basic price information necessary for rational decisions among alternatives; (2) it will invigorate competition in the consumer credit market and reward the more efficient credit supplier; (3) by rendering consumer charges more cyclically sensitive it will contribute to the overall stability of our economy, and (4) lastly, it will, like the Securities Exchange Act, eliminate the possibility of deception and near fraud from a major sector of our economy.[17]

Finally, with regard to the first objection, it is readily admitted by both proponents and opponents of the bill that interest calculation is complex either under the present system with the complexities on the general public or under the new proposed system with the complexities shifted to the business world. However, it is submitted that where Congress has found a need for legislation, the burden should be placed where it can best be carried and it is obviously easier to educate the already widely experienced retail and finance

---

14. The issue of whether this area of legislation should be dealt with exclusively by the states is a topic which would require full separate treatment. Thus it is beyond the scope of this article which is limited to considcration of the federal bill on its own merits.

A major obstacle in getting any substantial action other than in subcommittee is the fact that Senator A. Willis Robertson, Chairman of the Committee on Banking and Currency, opposes the bill on the grounds that this is a matter to be left to the states. In a "question" to the Subcommittee he stated: "In my judgment the states can handle this field . . . and the lists of legislation enacted in 1955 through 1960 . . . and during the calendar year 1961 indicate that the states are, in fact, being very active in this field." 1961 *Hearings* 993. For charts shcwing the action that has been taken by states in this area see 38 NOTRE DAME LAW. 614 (1963), and 1961 *Hearings* 1377 a, b, c & d.

15. 1963 *Hearings* 8, 9, and examination of witnesses throughout the testimony.

16. Mr. Edward Gudeman, who is presently Under-Secretary in the Department of Commerce also stated the support of the department for the legislation.

17. 1963 *Hearings* pt. 2, at 23.

industries in the intricacies of interest calculation than it would be to educate the general public.

The merits of the bill are next attacked on the ground that its effect, if enacted, would be that interest charges would simply be hidden in the price of merchandise, thus defrauding rather than informing the public.[18] However, it is submitted that in the majority of cases[19] this objection would be effectively met and overcome; first by the competitive forces of the market in that a merchant who hid his interest rates in higher prices would find that his sales would drop accordingly. Secondly, this objection does not apply to the finance industry since compliance with the bill would forego hiding the cost of a loan.

Recommendations

We submit that the administration of the bill could be greatly improved by providing that the Federal Trade Commission rather than the Federal Reserve Board be the administering agency. The Federal Trade Commission is already regulating misleading trade practices, and the objects of the Commission are the same as the objects of this legislation,[20] whereas the Federal Reserve Board is not a retail trade regulatory agency.[21] The major responsibility of the Federal Reserve Board is influencing the reserves of the banking system in the interest of economic stability and growth. Regulation of disclosure of finance charges under the bill would differ from administration of general monetary policy. Therefore the experienced personnel of Federal Trade Commission would be much better suited to the task of administration.

Conclusions

In conclusion, it is submitted that in light of the magnitude of the consumer debt, the mortgage of current income, the increase in the

18. *Id.* at 8, 9.

19. Admittedly if the merchant was in a position of monopsony, the particular consumer would not be protected; however, it is submitted that this is the exceptional case. This bill is designed to aid the vast majority of the consuming public and the poor credit risk would obtain residual benefits therefrom.

20. In Ford Motor Co. v. FTC, 120 F.2d 175 (6th Cir.), *cert. denied*, 314 U.S. 668 (1941), the Commission prohibited the use of the term "6%" in connection with finance plans resulting in payments in excess of 6 per cent per annum. On this and many other occasions the Federal Trade Commission, acting under section 5 of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended 15 U.S.C. § 45 (1958), has proceeded against persons misrepresenting credit charges.

21. William McChesney Martin, Jr., Chairman of the Board of Governors of the Federal Reserve System, testified to the subcommittee: "While we are in full sympathy with the 'truth in lending' objective of the bill we also believe . . . that administration of such legislation would not constitute an appropriate activity for the Federal Reserve System." 1961 *Hearings* 276.

bankruptcy rate due to uninformed buying, the abuses in the credit field,[22] and the desirability for national economic stabilization there is a real need for legislation and that this bill with only a change in the administering agency is the best answer to that need that has been promulgated to date.

22. Hillel Blaek, in his book, *Buy Now, Pay Later,* deals extensively with the abuses in the credit industry but, unfortunately, through the use of loaded language, Mr. Black makes it appear that the entire finance industry is in the loan shark category. Some very good research went into the writing of the book and if the excessive emotional language can be overlooked, the book may be of some use to the consumer for general informational purposes. BLACK, BUY NOW, PAY LATER (1961).