ARTICLES & ESSAYS
Defining Terms in the Intellectual Property Protection Debate: Are the North And South Arguing Past Each Other When We Say “Property?” Lockean, Confucian, and Islamic Comparison.......................................... Richard Vaughan
The Spanish Products Liability Act of 1994 ........................................ Michael Ansaldi
NAFTA’S Approval: A Story of Congress at Work “From International Relations to National Accountability”.......................................................... Alejandro Posadas
The Search for Justice - A Case for Reform to the Civil Justice System in Britain................................................................. Peter Watson

NOTES AND COMMENTS
Application of the United States Law of Countervailing Duties to Nonmarket Imports: Effects of the Recent Foreign Reforms....................................................... James A. Meszaros
United States Asylum Law: The Failure of the United States to Accommodate Women’s Gender-Based Asylum Claims.............................................. Nancy Ciampa
The Dichotomy of Executive Immunity-A Comparative Analysis Between the United States and Great Britain ...................................................... Leonard Wilder
The Criminalization of Hate Propaganda: A Clash of Ideals Between Canada and the United States.......................................................... Eric Wolfman

VOLUME 2 WINTER 1996 NUMBER 2
# TABLE OF CONTENTS

## ARTICLES

<table>
<thead>
<tr>
<th>Title</th>
<th>Author</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say “Property?” Lockean, Confucian, and Islamic Comparison</td>
<td>Richard Vaughan</td>
<td>307</td>
</tr>
<tr>
<td>The Spanish Products Liability Act of 1994</td>
<td>Michael Ansaldi</td>
<td>371</td>
</tr>
<tr>
<td>NAFTA’S Approval: A Story of Congress at Work “From International Relations to National Accountability”</td>
<td>Alejandro Posadas</td>
<td>433</td>
</tr>
</tbody>
</table>

## ESSAY

<table>
<thead>
<tr>
<th>Title</th>
<th>Author</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Search for Justice - A Case for Reform to the Civil Justice System in Britain</td>
<td>Peter Watson</td>
<td>453</td>
</tr>
</tbody>
</table>

## NOTES AND COMMENTS

<table>
<thead>
<tr>
<th>Title</th>
<th>Author</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Application of the United States Law of Countervailing Duties to Nonmarket Imports: Effects of the Recent Foreign Reforms</td>
<td>James A. Meszaros</td>
<td>463</td>
</tr>
<tr>
<td>United States Asylum Law: The Failure of the United States to Accommodate Women’s Gender-Based Asylum Claims</td>
<td>Nancy Ciampa</td>
<td>493</td>
</tr>
<tr>
<td>The Dichotomy of Executive Immunity-A Comparative Analysis Between the United States and Great Britain</td>
<td>Leonard Wilder</td>
<td>517</td>
</tr>
<tr>
<td>The Criminalization of Hate Propaganda: A Clash of Ideals Between Canada and the United States</td>
<td>Eric Wolfman</td>
<td>543</td>
</tr>
</tbody>
</table>
DEFINING TERMS IN THE INTELLECTUAL PROPERTY PROTECTION DEBATE: ARE THE NORTH AND SOUTH ARGUING PAST EACH OTHER WHEN WE SAY "PROPERTY"? A LOCKEAN, CONFUCIAN, AND ISLAMIC COMPARISON.

Richard E. Vaughan*

I. INTRODUCTION .............................................................. 308
II. PIRACY ..................................................................... 311
III. DIFFERENT CULTURES—DIFFERENT MEANINGS BETWEEN NORTH AND SOUTH? .............................................................. 319
IV. COMPARATIVE PHILOSOPHICAL FOUNDATIONS ...................... 321
V. THE SOUTH: COMPARATIVE PHILOSOPHICAL FOUNDATIONS ........................................................................ 334
VI. PROPERTY AND CONFUCIANISM ........................................ 336
VII. PROPERTY AND ISLAM .................................................... 350
VIII. THIRD WORLD PIRACY—NOT A CULTURAL EXCUSE ....................................................................................... 359
IX. THE ANSWER—PIRATE COUNTRIES’ TRUE MOTIVE IS PERCEIVED SELF-INTEREST ...................................................... 360
X. CONCLUSION ...................................................................... 366

"What we’ve got here . . . is failure . . . to communicate.”

* J.D. 1995 St. Thomas University; B.A., 1983 University of Rhode Island. The author would like to express his deep gratitude to both Professor Douglas Matthews, of the St. Thomas University School of Law, whose guidance and enthusiasm were crucial to the completion of this project, and to Miss Sebrina Wiggins, whose assistance in obtaining obscure texts and articles, as well as her patience in the proofreading of the various drafts of this article, was invaluable.

The author is an attorney concentrating in international commercial maritime law. He has studied German Civil law at the Free University of Berlin, Germany, European Community law at the American University of Paris, France, and German language and history at the University of Salzburg in Austria. Prior to entering the practice of law, he worked for the U.S. Dept. of State and served in the U.S. Marines in the Counterintelligence field.

1. COOL HAND LUKE (Warner Brothers 1967).
I. INTRODUCTION

The concept of intellectual property, or ideas protected by patents, copyrights, and trademarks, has been around since at least the 13th century. However, it is only in the last decade that "piracy," or the illegal copying and selling of copywritten or patented material, has become a contentious issue in trade negotiations between the nations of the Northern and Southern Hemispheres.

In surveying the literature from both perspectives, the possibility arises that each side might be using a word denoting a different meaning to either side. Each party’s comprehension of that word carried with it a context gathered from hundreds or thousands of years of history. Could it be that the objective meaning of the word is being lost in the translation? And if that is the case, then it means that the parties have very little hope of ever coming to a mutual understanding. That word was "property," and more specifically "intellectual property."

For example, there is a story of an American and a Japanese executive who were locked in what seemed to be an unending round of business negotiations. Thinking that he was finally making headway, the American asked the Japanese whether they were "thinking along parallel lines." The Japanese executive seemed to agree. Later, when the deal collapsed, the American turned to the Japanese and asked with some exasperation, "I thought you said we were thinking along parallel lines." The Japanese nodded, saying, "parallel lines never meet."

The purpose of this article is four-fold. First, this article will examine whether the word "property" means the same thing in Northern and Southern contexts. Second, to establish whether such a difference, if any, is causing a linguistic disconnect in the intellectual property piracy debate between the Advanced Industrialized Countries (AICs) and the

---

2. During the 1460’s, the Venetian senate awarded the first privilegi (limited monopolies) in copyright. A short time later, in 1474, that Senate passed the first modern-style patent law. Paul A. David, Intellectual Property Institutions and the Panda’s Thumb: Patent’s Copyrights and Trade Secrets in Economic Theory and History, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY 51 (National Resource Counsel) (Wallerstein et al. eds., 1993) [hereinafter GLOBAL DIMENSIONS].

3. In 1984, for the first time since before the first World War, the United States had a net negative balance of trade, and as intellectual property comprised a greater part of the Gross National Product, the issue became one of vital national interest. Foreign Investment: Foreign Holdings in United States Increase Eleven Percent, United States Direct Investment Abroad Up by Nine Percent, 3 Int’l Trade Rep. (BNA) 872 (July 2, 1986). See also John Burgess, Fighting Trespassing on ‘Intellectual Property’: United States Tries to Prevent Overseas Copying of Everything From Music to Microchips, WASH. POST, Dec. 6, 1987, at H1 (quoting Senator Patrick Leahy (D-Vt.). “Intellectual property issues have become central to congressional debate on trade policy.” Id.
Newly Industrialized Countries and the Lesser Developed Countries of the South.\(^4\) Third, if such a "cultural disconnect" exists, to determine whether it, or economic self-interest, is the true motive behind piracy.\(^5\) Finally, the conclusion will argue that the problem of intellectual property piracy is but a symptom of a larger crisis: that of North-South economic disparity. It will also be argued that the piracy problem, to be best understood and dealt with, must be looked at using a multi-disciplinary approach.

Initially, there will be an examination of the Anglo-American concept and definition of property. Using this as a basis of comparison, there will then be an examination of the definitions of property from cultural perspectives of some of the regions where intellectual property piracy is most widespread.\(^6\) Specifically, there will be a brief examination of property beliefs from the Confucian, Shinto, Buddhist and Islamic perspectives. There will also be an examination of whether there are

\(^4\) WILLY BRANDT, NORTH-SOUTH: A PROGRAM FOR SURVIVAL 31, 32 (1981). In a report, chaired by former West German leader Willy Brandt to the Independent Commission on International Development Issues, Brandt divided the North and South into two general camps: the North (the Advanced Industrialized Countries) is comprised primarily of North America, Western Europe, Australia, New Zealand, and Japan; and the South (the Newly Industrialized Countries and the Lesser Developed Countries) is comprised primarily of South and Central America, the Caribbean, Africa, the Levant, and the poorer, non-aligned nations. At the time of the Report's publication in 1980 there existed a third classification, the Second World, comprised primarily of the Communist Bloc Nations. \textit{Id.}

\(^5\) Each year the United States Trade Representative (USTR) solicits United States exporters for reports of their losses due to foreign government practices (e.g. failure to make or enforce intellectual property protection laws). The USTR then confirms the losses with its own investigation. If it finds that the foreign government, through design or neglect, is encouraging intellectual property piracy, the USTR will take further action. The vast majority of piracy takes place within Newly Industrialized Countries and Lesser Developed Countries. For instance, in 1994, Ambassador Micky Kantor, the USTR, identified 37 trading partners as posing the most significant problems regarding the protection of United States Intellectual Property rights. He also announced placement of six trading partners on the "priority watch list," or the list of those nations which allow or even encourage the unauthorized copying and sale of United States intellectual property such as the European Union, Japan, South Korea, Saudi Arabia, Thailand and Turkey. Also, he announced that nineteen other countries had been placed on the "watch list", the list of countries whose copying of United States intellectual property was not as egregious as that needed to be placed on the Priority Watch List: Australia, Chile, Colombia, Cyprus, El Salvador, Greece, Guatemala, Indonesia, Italy, Pakistan, Peru, Philippines, Poland, Spain, Taiwan, United Arab Emirates, and Venezuela. Four of them -- Egypt, El Salvador, Greece, and the United Arab Emirates would be subject to out-of-cycle reviews to determine whether the past problems or practices had been remedied. Ambassador Kantor also noted concerns with continuing or prospective problems in Brazil, Canada, Germany, Honduras, Israel, Panama, Paraguay, Russia and Singapore, which were not included on the Special 301 lists. \textit{Imports of Certain Plants, Nursery Stock, 11 Int'l Trade Rep. (BNA) 18 (May 4, 1994).}

cultural differences in meaning that could justify the belief that what we call piracy is simply the South's form of benign technology transfer.

Intellectual property piracy occurs in almost every country, regardless of economic or social grouping. However, only the Confucian and Islamic systems have been concentrated on for the following reasons: (1) some of the most egregious piracy of United States/Northern intellectual property comes from those nations with Confucian, Buddhist or Islamic cultural backgrounds;\(^7\) (2) other regions, such as South and Central America, share Roman Catholic roots with the West and thus, to an extent, do not pose a cultural defense against piracy on the same order as Islamic or Confucian regions;\(^8\) (3) Confucian, Buddhist and Islamic beliefs are still enigmatic to the average Westerner; (4) piracy within and among the AIC's can be attacked using the well-developed enforcement mechanism of the national court systems,\(^9\) an option foreclosed in the South where it is often the national government encouraging piracy; and, (5) while other countries with systems markedly different from that of the European West are also sources of intellectual piracy, such as India (Hindi), and the former Soviet Union and Communist Bloc (Marxist), they are beyond the scope of this paper. Within the short span of a few years, "Westerners" will comprise a mere 700 million out of a global population that may swell to 9 or 15 billion souls.\(^{10}\) Ignorance of the beliefs of such a vast number of people can only be a disadvantage to the Western intellectual property rightsholder.

7. Id.
II. PIRACY

How is it that the mere copying of Northern ideas has become an issue of such importance to the North, and to the United States in particular? The short answer is that intellectual property has surpassed all other categories of trade in importance to national economic well-being, both North and South.\textsuperscript{11} For instance, just after World War II intellectual property comprised less than ten percent of all United States exports. At that time, progress and a nation's strength were measured by the number of planes, trains and automobiles that its factories churned out. As the West, later joined by Japan, entered the information age, the proportion of intellectual property in United States exports surged. First, to twenty-five percent, later to thirty-seven percent, and currently, up to well over fifty percent.\textsuperscript{12} Labor intensive industry moved offshore to Third World countries to take advantage of cheaper labor.\textsuperscript{13} In a nutshell, intellectual property has become the modern "wealth of nations."\textsuperscript{14} This is especially true for the United States, which spent $25 billion in 1992 on basic

---

\textsuperscript{11} Richard P. Rozek, Protection of Intellectual Property Rights: Research and Development Decisions and Economic Growth, in INTELLECTUAL PROPERTY RIGHTS IN SCIENCE, TECHNOLOGY, AND ECONOMIC PERFORMANCE 31, 40 (F. Rushing & C. Ganz Brown eds., 1990) (citing Edwin Mansfield, Intellectual Property, Technology and Economic Growth, in INTELLECTUAL PROPERTY RIGHTS IN SCIENCE, 17, 19 (asserting that forty percent of the growth in per capita GNP in the United States from 1929 to 1957 has been attributed to technological change)).

\textsuperscript{12} FRED WARSHOFSKY, THE PATENT WARS: THE BATTLE TO OWN THE WORLD'S TECHNOLOGY 7 (1994). Warshofsky maintains that in 1947 intellectual property comprised just under ten percent of all United States exports. "In 1986," he states, "the last year that the United States government compiled that statistic, the figure had grown to more than thirty-seven percent. Today, the best estimate is that intellectual property accounts for well over fifty percent of all American exports." (citing U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. (1951); U.S. DEP'T. OF COMMERCE, HIGHLIGHTS OF U.S. EXPORT AND IMPORT TRADE, Report FT990 (Dec. 1986)).

\textsuperscript{13} Rochelle L. Stanfield, Strains in the Family: America in the '90's, 23 NAT'L J. 2316 (1991).

\textsuperscript{14} WARSHOFSKY, supra note 12, at 3. See also Economic Outlook for 1993, Hearings Before the Joint Congressional Economic Committee (Statement of Senator Bennett), Fed. News Serv., Jan. 27, 1993, available in LEXIS, News Library, Arcnws file. Senator Bennett commented on how intellectual property has radically changed the nature of wealth creation in the developed world:

I find it significant that the richest man in the United States now is Bill Gates who owns no huge factories or ranches, no tremendous commercial enterprises that we would think of 50 to 60 years ago. It all comes out of his head. And the intellectual product has made him the richest man in the United States, not the physical product of a steel mill or an automobile factory. And I think that's a demonstration of the kind of structural differences that we have.

\textit{Id.}
technological research—ten times more than any other country. Ninety percent of knowledge in the sciences has been generated in the past thirty years, and is projected to double in the next fifteen years. With the accelerating pace of technology, product life-cycles are becoming shorter and shorter, giving the creators of intellectual property smaller "windows of opportunity." This allows them to recoup their increasingly expensive cost of research and development (R&D).  

A. THE NORTH AND THE SOUTH

Political observers have divided the world into the "North" and the "South," with economic classification corresponding roughly with geophysical positioning relative to the equator. Northern countries are generally characterized as wealthy, industrially, and technologically developed. These countries have stable, low, or even negative population growth rates, and well-educated, but older, populaces whose average life expectancy is about seventy years of age. Countries of the South, also known as the Third World, or Developing World, differs in almost every respect. Painting with a broad brush, these nations are usually characterized as being heavily laden with foreign debt; have little or no domestic industrial or technological base; and have young, burgeoning populations who have little or no education and suffer from widespread disease, hunger, and poverty.  

Even within the South itself, there are growth disparities. There are the Newly Industrialized Countries, such as the Asian "tiger" countries, which are industrially and technologically backward, but are enjoying explosive growth. Next, there are the Lesser Developed Countries, especially in Sub-Saharan Africa, many of whose economies have gone from bad to worse. Fourth and Fifth World nations are those "basket case" nations whose national governments have failed utterly. Rwanda, Somalia, the Sudan, and Lebanon are some recent examples of "basket case" nations.

B. Intellectual Property: Who is Making it—and Who is Taking it?

The Northern AICs account for ninety percent of the world's patents and carry out ninety percent of the world's trade in technology.

16. BRANDT, supra note 4, at 32.
In contrast, the poorer nations of the South produce little or none of their own technology, but account for over seventy-five percent of all piracy.

About a quarter-century ago, the stamp “made in Hong Kong,” was shorthand for a cheap and poorly-made product, usually a copy of something invented in the West. At worst, piracy was a mere nuisance to American and European producers of musical recordings, computer software, pharmaceuticals, books, designer fashions, high technology, and the like. However, copying is no longer just a nuisance. Western rightsholders are angry and are taking affirmative steps at protecting what

countries spent between sixteen and seventeen times more of their gross national product on research and development than did developing countries. UNCTAD, *Formulation of a Strategy for the Technological Transformation of Developing Countries*, UNCTAD Doc. TD/B/779 (1980) [hereinafter UNCTAD]. The report also stated that developing countries held only one percent of the world’s patents, and that those underdeveloped countries with patent systems issued 84% of their patents to foreigners. *Id.*


19. *Intellectual Property: China, Turkey, India, Brazil Faulted for Inaction on Intellectual Property*, Int’l Bus. & Fin. Daily (BNA), at D5 (Feb. 15, 1995) [hereinafter Intellectual Property]. Affected United States industries/rightsholders, such as the International Intellectual Property Association (IIPA) which represents motion picture, sound recording, computer software, and publishing industry associations, and the Pharmaceutical Research and Manufacturers of America (PhRMA), submitted their findings as to the most egregious copiers of United States intellectual property. They nominated Brazil, Greece, India, Korea, the Philippines, the Russian Federation, and Saudi Arabia. Russia and Brazil were recommended for listing on the “priority watch list.” PhRMA nominated Costa Rica, Guatemala, El Salvador, Nicaragua, Honduras, Panama, China, Egypt, Indonesia, Israel, Jordan, Korea, Thailand, and the United Arab Emirates to be named as priority watch list countries. The IIPA recommended that the following countries be placed on the USTR’s watch list: Bahrain, Bolivia, El Salvador, Guatemala, Israel, Italy, Japan, Nicaragua, Pakistan, Paraguay, Peru, Poland, Romania, Taiwan, Thailand, the United Arab Emirates, and Venezuela. While Japan posed increasing problems, particularly in failing to protect biotechnology, China remained top priority. While the list here is not exhaustive, the regions covered were primarily Central and South America, Russia and the Newly Independent States, the Middle East, the Far East, and Central Asia. *Id.*

20. Mahmood Saberi, *USA: US Lost $4 Billion Last Year Due to Piracy*, Saudi Gazette, MONEYCLIPS, Nov. 3, 1993 (quoting United States government sources stating that “more than 75 percent of the piracy is found in developing nations and the newly industrializing countries in Asia.”) Saberi further quoted Eric Smith, Executive Director of the Washington-based International Intellectual Property Alliance (IIPA) as stating that outside of Asia the IIPA’s biggest areas of concern were “in Eastern Europe, Russia and the Mid-east. ‘We are really concerned about the Gulf states.’” *Id.* See also Thomas Mesevage, *The Carrot and the Stick: Protecting United States Intellectual Property in Developing Countries*, 17 RUTGERS COMPUTER & TECH. L.J. 421 (1991). This article discusses why North-South piracy is so problematic. While piracy still occurs between the Northern producer nations, a substantial body of laws and practices provides a remedy to the patent-holder, whereas piracy committed within the newly industrialized and lesser developed countries, who have sometimes made it a part of their developmental policy not to afford intellectual property protection, oftentimes do not.
is theirs by right. They argue piracy is dangerous, causing them severe economic harm, and constitutes outright theft.

Piracy is "dangerous" because consumers will buy a product under the assumption that it is an original, and has been subjected to rigorous quality control and governmental testing. Pirated copies have killed or caused severe injuries. For example, pirated aircraft engine parts and automobile brake parts have failed suddenly under stress. Fake pharmaceuticals and chemicals, packaged just like the real thing, but crudely mixed in Third World countries, have caused death and paralysis.

Piracy is also causing nations that are net producers of intellectual property severe economic damage. For instance, in 1985, for the first time since before World War I, the United States had a net negative balance of trade. That trade deficit has swollen from $122 billion in 1985 to an estimated record high of $200 billion in 1995.

---

21. Stuart Auerbach, GATT's Global Stakes; Issues Are Complex, Crucial in Montreal, WASH. POST, Dec. 4, 1988, at H1 (writing that "the United States, the European Community and Japan have joined to seek stiff trade rules against piracy of products such as books, software and pharmaceuticals that are protected by patents or copyrights," despite remaining at loggerheads with regard to national agricultural subsidies).


23. The Federal Aviation Administration announced the grounding of 6,000 small aircraft due to "bogus" engine parts which had caused motors to fail in flight. The parts had been imported from Germany, but the authorities were attempting to find out who actually manufactured the "poorly fabricated" parts made with "inferior material." FAA Orders 6,000 Small Planes Be Grounded, SUN-SENTINEL, Mar. 18, 1995, at A3.


25. Gary M. Hoffman & George T. Marcou, Outposts-Law and Society; Who's Stealing America's Ideas?, WASH. POST, Nov. 5, 1989, at C3. While the copying of pharmaceuticals is comparatively easy, pirated goods are not made to the same quality standards nor required to pass safety standards associated with original Western-produced drugs and technology. Unauthorized imitations of amphetamines and tranquilizers have been blamed for deaths and paralysis, and a counterfeit fungicide led to the loss of 15% of the coffee crop in Kenya.

26. Ronald E. Yates, Far East Offers Friendly Ports for Product Pirates, CHIC. TRIB., Nov. 12, 1989, at B1. According to Yates, in 1989, America [was] suffering from a $130 billion trade deficit with most of the world. And more than 80 percent of that imbalance [was] with Asian trading partners where intellectual property pirates [were] pushing the United States trade picture deeper and deeper into the red. Id.

27. Foreign Investment: United States Net Debtor by $107.4 Billion at End of 1985, Commerce Department Reports, 3 Int'l Trade Rep. (BNA) 872 (July 2, 1986). However, the United States trade deficit started a few years earlier, skyrocketing along with the increasing popularity and ease of piracy: 1981 - $27.97 billion; 1982 - $36.45 billion; 1983 - $67.08 billion; 1984 - $112.51 billion; 1985 - $122.15; 1986 - $144.34 billion. INTERNATIONAL MONETARY FUND, 1987 INTERNATIONAL FINANCIAL STATISTICS 69. The 1994 deficit stood at
estimates of the Congressional Economic Leadership Institute, sixty percent of that deficit can be attributed to piracy. The cost to the United States has been the loss of tens of billions of dollars in sales and hundreds of thousands of jobs each year. A 1984 International Trade Commission report estimated United States losses in 1982 ranged between $43 billion and $61 billion and 131,000 lost jobs in five industrial sectors alone. The hemorrhage of United States jobs has continued to grow. In 1994, the United States Trade Representative (USTR), Ambassador Micky Kantor, told Congress "for every billion dollars of United States goods exported annually, 16,000 to 17,000 new domestic jobs are created." If these figures are correct and the corollary may be properly applied, this means that last year the United States lost 3,400,000 well-paying jobs due to its trade deficit. Applying the Congressional Economic Leadership Institutes’ estimates to the USTR’s assertion means that in 1995 the United States lost 2,040,000 jobs directly to piracy.

$151.1, while the 1995 trade deficit is predicted to rise to a record high of $200 billion. United States Trade Deficit: Trade Deficit to Rise to Record, Economic Analyst Predicts in Study, Int’l Trade Daily (BNA) at D6, (Apr. 26, 1995).


29. Then United States Trade Representative Clayton Yeutter told reporters that the United States Trade Commission had found that 431 United States companies suffered aggregate worldwide losses of more than $23.8 billion in 1986 due to inadequate intellectual property protection. In his 1988 United States International Trade Commission report, he stated that exports of intellectual property from the United States have doubled in the past decade and now represent more than a quarter of United States exports. Extrapolating these losses to the entire national economy, Yeutter placed the total losses between $43 billion and $61 billion. A 1984 ITC report on the effects of foreign product counterfeiting estimated that 131,000 United States jobs in five industrial sectors were lost in 1982 due solely to foreign product counterfeiting and similar practices. Major offenders targeted in the report were Brazil, China, India, Indonesia, Japan, Mexico, Korea, Taiwan, and Thailand. Critics assert these figures to be inflated, or at least, suspect. For instance, software whose market price in the United States was $400.00, but sold at the pirated price of $1.50 in Singapore, was considered to be a flat $400.00 loss. Critics charge that it would unrealistic to expect a sale to be made in a Third World country at that price. Whichever side is correct, it is still true that United States rightsholders are enduring significant losses to Third World piracy. Intellectual Property: United States Firms Lose Billions Annually to Foreign Piracy, ITC Intellectual Property Study Finds, 5 Int’l’l Trade Rep. (BNA) 290, (Mar. 2, 1988).

30. General Agreement on Tariffs and Trade: The Benefits of the Uruguay Trade Rounds, 103d Cong., 2d Sess. (1994) (statement of Mickey Kantor, Ambassador, United States Trade Representative.)

31. Id.
C. Piracy a Zero-Sum Equation

The concept of free trade is not figuring out new ways to slice the global economic pie, but to make it larger through the functioning of economies of scale and comparative advantage. However, some studies have shown piracy is a zero-sum game in that the Northern loss is directly tied to a pirating nations' gain. For example, in 1989 when the United States trade deficit was a "mere" $130 billion, more than eighty percent of that deficit was with Asian trading partners who simultaneously were the worst pirates of United States intellectual property. This comes as no surprise when it has been the declared national policy of many of the pirating nations to acquire Western technology and know-how.

Japan is one of the most successful examples. Its meteoric technological rise was not based on Japanese innovation, but on the copying of Western ideas. During the late 1970's, the United States spent $50 billion each year on research and development. One commentator, Teresa Watanabe, states the total price Japan had to pay for the Western technology it needed to transform itself from a nation of ricepaper and bamboo to transistors and skyscrapers was a bargain-basement $9 billion. This is not merely the product of terrific bargaining. Japan has carefully orchestrated its economy to keep out foreign imports while encouraging the copying of Western technology. Watanabe goes on to argue Japan

34. J. Davidson Frame, National Commitment to Intellectual Property Protection: An Empirical Investigation, 2 J.L. & TECH. 209, 215 (1987) (asserting that many of the worst infringers of Northern intellectual property are those countries demonstrating robust, if not explosive, economic growth benefits directly associated with their copying of Western know-how and technology). Frame states,

Given these traits, it becomes increasingly difficult to accept arguments by [Newly Industrialized Countries] that they are weak, helpless actors in the international system who need special protection. In the intellectual property arena, these countries are too big to be ignored. Their disregard for intellectual property protection has significant consequences.

Id.

36. Lawrence Chimerine & James Fallows, Japan Deserves a Tariff, N.Y. TIMES, June 9, 1995, at A15. Chimerine, chief economist at the Economic Strategy Institute (ESI), discusses how Japan keeps foreign goods out, pointed out that studies by the ESI and other research groups estimate that if Japan's markets behaved like those of other industrialized countries, Japan would import up to $200 billion more in goods each year than it does currently. Of that figure, almost $50 billion would have been imported from the United States. See also Intellectual Property:
did nothing different than what the United States did in copying European technology in its early years. However, Watanabe ignores the substantial change in the nature and importance intellectual property has taken on since that time. Meanwhile, Hong Kong, Taiwan, and Thailand have emulated Japan's strategy. Their technological and economic advances can also be traced to their piracy of Western technology.37

D. Pirates Continue to Enjoy Generalized System of Preferences Benefits

In an effort to assist the development of many of the world's poorer countries, the United States grants them preferential tariff treatment under its Generalized System of Preferences (GSP). GSP's help some nations more than others, and some of the same nations which benefit the most under the GSP also happen to be some of the worst offenders of piracy and unfair trade practices.38 Furthermore, the worst hit industries can trace much of their damage directly to those nations with which the United States has had significant trade deficits.39 Taken from a Southern perspective, piracy is a cheap and effective way of gaining new technology and driving economic growth. However, this ignores the likelihood that Western nations producing intellectual property will move to protect their vital interests,40 and it also ignores the long-range damage state-supported piracy causes to trade relations.41


40. American concerns are only heightened by the fact that its lead in technical innovation is slipping. John Eckhouse, CEOs See United States Losing its Edge in Technology, S. F. CHRON., Mar. 15, 1990, at C1.

41. Burgess, supra note 3, at H1. In Southern eyes, the ends of piracy justify its means. But the anger and ill-will that piracy causes is now becoming apparent. Burgess writes:

These days the United States is increasingly less willing to listen to arguments that the quest for development and a dignified standard of living legitimizes such behavior.
The production of intellectual property by the North and its abduction by the South has resulted in an acrimonious debate between the Hemispheres with the North accusing the South of outright theft and demanding improved protection of their intellectual property. Conversely, Southern nations recognize the absolute necessity of the transfer of technology from North to South in order to survive, much less to join the ranks of developed nations. Yet, the Southern nations are unable to pay the market price of the technology they need.42

When confronted, poorer nations of the South have offered by way of explanation that Northern intellectual property conventions are "culturally biased," favoring Western needs and encouraging development of technology unsuited to their particular situations.43 They have also justified the pirating of Northern intellectual property by arguing: (1) the North is imposing its own concepts of property on them;44 (2) intellectual property is really the common property, or heritage, of mankind;45 (3) the North is really attempting to prevent the South from obtaining technological know-how and thus keeping them from joining the ranks of the developed nations;46 and, (4) they are poor and must have Northern technology out of necessity.47

"That's really an indefensible way to run a society," declared [then-USTR Clayton] Yeutter. I don't see how any nation in the world can defend piracy as a means of keeping consumer costs down.

Id.

42. BLAKENEY, supra note 18, at 57-58, (attributing 87.5% of per capita growth of income in the United States in the first half of this century to technological progress and the remainder to the use of capital). Conversely, deprivation and poverty suffered by developing countries attributed "almost entirely" to their technological dependence upon the West. Id.


44. Peters, supra note 38, at 587.

45. HELENA STALSON, INTELLECTUAL PROPERTY RIGHTS AND UNITED STATES COMPETITIVENESS IN TRADE 48 (1987). Stalson writes, "[u]nder a vaguely defined principle that knowledge is the heritage of all mankind, they claim that protection denies them the ... social and industrial contributions of patented products because they are available only at prices they cannot afford and under conditions that violate their sovereignty." Id.

46. Ronald E. Yates, Winds Turn Against Product Pirates, CHI. TRIB., Nov. 13, 1989, at B1. Yates notes that despite the United States having success in forcing many of these pirate nations to enact and enforce intellectual property protection laws,

[T]here remains residual resentment and resistance over American efforts to wipe out Asia's notorious pirate dens. Many officials and businessmen in the region's newly industrializing economies continue to see the United States anti-piracy crusade as little more than an attempt to maintain America's technological and creative advantage while keeping them at a competitive disadvantage.
How valid are these Southern arguments? More specifically, are their arguments sincere when their concepts of property are different from those of the North? In the alternative, are they using so-called "cultural" defenses as a smoke screen to justify taking the ideas of the North without paying for them?

One commentator on the North-South intellectual property debate, Frank Emmert, framed the issue in this way: The question is "whether intellectual property is really a Western concept, foreign to the culture of many Newly Industrialized Countries and Lesser Developed Countries, which has simply been forced upon them by the [Advanced Industrial Countries] for egotistic economic motives." 48

III. DIFFERENT CULTURES—DIFFERENT MEANINGS BETWEEN NORTH AND SOUTH?

Black's Law Dictionary defines "property" as:

[O]wnership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from

---

47. ROBERT BENKO, PROTECTING INTELLECTUAL PROPERTY RIGHTS: ISSUES AND CONTROVERSIES 28 (1987).


Many producers in Europe and America complain that their patents, trademarks and other [intellectual property] rights are infringed in foreign markets, especially in the developing countries. . . Companies in rich countries often imply that all such disputes over intellectual property are a straightforward matter of piracy or theft . . . This debate goes on within the industrial countries; yet, in their dealings with the Third World, companies regard the conventions agreed at home as self-evidently correct for everywhere else. It is not at all obvious that the developing countries are obliged, either morally or for the sake of sound economics, to meet the rich countries' demands.

---
interfering with it . . . to denote everything which is the subject of ownership, corporeal or incorporeal; tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. 49

Holders of United States intellectual property rights (rightsholders) and American negotiators assume that this definition of property is universally understood. They also assume that it is widely understood that an idea, expressed in the form of an invention, a song, a story, or as computer code, may also be called "property" (i.e. "intellectual property"). Assuming arguendo, the human concept of ownership of a "thing" transcends all borders, United States negotiators have encountered markedly different mindsets when dealing with concepts of private ownership of things in relation to principles of "just" distribution. 50 Alan Greenspan noted this difference of societal values and economics, particularly with reference to the mindset often found in Communist nations, such as the People’s Republic of China, North Korea and Cuba, and former Communist nations, such as the former Soviet Union and the Newly Independent States of Eastern Europe, stating, "[m]uch of what we took for granted in our system and had grown to assume to be human nature was not nature at all, but culture." 51


50. POPE JOHN PAUL II, supra note 8, 33-34 (1991). "Western" concepts of just distribution vis-a-vis property rights are themselves not uniform. The Western concept of property right, as discussed in this paper, essentially follows the "Labor-Desert" theory propounded by the Greek Stoic Cicero, and echoed in Justian’s Institutes, English Common Law and Natural Law as defined by the Founders of America’s Constitution. Challenging the concept that property rights are a natural and absolute right, are those of the Roman Catholic Church, as embodied Pope John Paul II’s encyclical: the Centesimus Annus. The Pope argues that the need for profit should be subordinated to the needs of the common good. On that basis he argues that the AIC’s have a moral obligation to unilaterally transfer wealth to the poorer nations. Id.

51. Alan Greenspan, Thoughts About the Transitioning Market Economies of Eastern Europe and the Former Soviet Union, 6 DEPAUL BUS. L.J. 1 n.3 (1993) (citing Robert Wuthnow, The Moral Crisis in American Capitalism, HARV. BUS. REV., Mar. 1982, at 76 (discussing the interrelation between societal values and economics)).

The Free market system pervades the United States view of the world. Not only does the system connote the exchange of goods and services at prices determined by levels of supply and demand, but it also shapes basic values and conceptions and takes on moral meaning . . . Whether we acknowledge it consciously or not, the market influences our basic values, helps shape our suppositions about reality, and figures centrally in our tacit assumptions about daily life. We invest the market with moral importance and associate it with many of our most deeply held beliefs. In fact, the market system is so inextricably woven into our view of the world that any threat to the market endangers not only our standard of living but, more importantly, the very fabric of our society.
Simply stated, Western ideals are centered around the free market, individual "rights" and the concept that profits are the just reward for labor expended in creative endeavors. Other systems prevalent in the South, such as Confucianism, Buddhism, and Islam, are more communally oriented. Under these beliefs, wealth should be shared within society and distributed more or less equally.

IV. COMPARATIVE PHILOSOPHICAL FOUNDATIONS

A. Producing Nations: The North

Are property and intellectual property, as Emmert and Greenspan have mused, simply Western concepts? An examination of at least some of the cultures involved in the North-South intellectual property debate is a necessary first step in the questions' resolution. As noted above, the vast majority of innovation and trade takes place within and among the AICs. Although far from exclusive, a list representing what is meant by "AIC," includes the Group of Seven (G-7) industrialized Nations—Canada, France, Germany, Italy, Japan, United Kingdom, and the United States. With the exception of Japan, the AICs generally share common Greco-Roman philosophical backgrounds. Even Japan, which is principally Shinto-Buddhist-Confucianist, has been heavily influenced by Western Civil Code law since the 1860's and has been "Americanized" to a certain


52. The Group of Seven major industrialized nations are Canada, France, Germany, Italy, Japan, United Kingdom, and the United States. 12 Int'l Trade Rep. (BNA) 200 (Jan. 25, 1995); see also Robert W. Kastenmeier & David Beier, *International Trade and Intellectual Property: Promise, Risks, and Reality*, 22 VAND. J. TRANSNAT'L L. 285 (1989) (listing as developed countries, the United States, the European Community, Japan, Switzerland, the Nordic countries, Canada, Australia, New Zealand, Hong Kong, and some of the ASEAN nations).


55. 4 WORLDMARK ENCYCLOPEDIA OF THE NATIONS: ASIA & OCEANIA 206 (8th ed. 1995) (describing Japan as predominantly Shinto and Buddhist, or both because as the philosophies are not mutually exclusive and may be followed concurrently) [hereinafter WORLDMARK ENCYCLOPEDIA]. Underlying these philosophers is the Confucianist ethical system, originating in China, which has had a strong influence on Japanese society and has provided the underpinnings of some characteristically Japanese attitudes. For example, the respect for elders and authority figures ("filial piety"), subordination of the wants and needs of the individual, and the central importance of the welfare and dignity of the extended family ("clan").
degree since the end of World War II.\textsuperscript{56} However, Japan is still Confucianist and a resentment and resistance against further westernization is growing.\textsuperscript{57} It defies easy classification, and lumping it in with the West simply because of its full industrialization and geographic location would be a mistake. Japan will be covered in more detail below.

1. Property and the West—Historical Background

The definition of “property” in any society is shaped by its historical, cultural, legal, and religious backgrounds. The United States is no exception. America’s legal, religious, and property concepts have been shaped by a combination of its own experiences, the English common law,\textsuperscript{58} the Judeo-Christian faith,\textsuperscript{59} Roman Civil Law, and Natural Law.\textsuperscript{60} The Western concept of property, traced back to an early point of origin, will show that it is closely associated with the philosophy of natural law “rights” developed by the Greek Stoics and later by Roman philosophers and jurists.\textsuperscript{61} For example, the “Labor-Desert” theory, arguably the very embodiment of modern Western property belief, holds that man has an inherent right to property when he has added value to something previously owned by no one else.\textsuperscript{62} The Roman/natural law roots of this

\textsuperscript{56} See generally Harumi & Makoto Kojo, The Legal System of Japan, in 2 MODERN LEGAL SYSTEMS CYCLOPEDIA 2.70.10-13 (1989) (explaining how Japanese law was suddenly “westernized” during the 1860’s). The customary law of the Tokugawa period was discarded and replaced by the French, and then later, by the German Civil Code. The Meiji Constitution was adopted in 1889 and modeled after the Prussian Constitution. In 1946, the United States Occupation Forces drafted a new constitution for Japan. The Japanese cabinet adopted it in 1947 after making certain changes. The effect of the new constitution was to strip divinity and thus sovereignty from the Emperor. Also, Shinto was abolished as a State religion, the freedoms of speech and religion were guaranteed, and the use of military force as a means of settling international disputes was renounced. While Japan’s legal system may have been “Americanized,” their economic philosophy seemed to be guided more by Hegel and Friedrich List than by Locke. See generally JAMES FALLOWS, LOOKING AT THE SUN: THE RISE OF THE NEW EAST ASIAN ECONOMIC AND POLITICAL SYSTEM (1994).


\textsuperscript{58} See generally W. W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE (2d ed. 1965).

\textsuperscript{59} Genesis 15:7, 17:8, 34:10; Acts 2:45.


\textsuperscript{62} JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 133 (2d ed. 1988) (describing the Labor-Desert theory).
belief are shown in Roman works written almost 1,500 years ago.\textsuperscript{63} F.H. Lawson, an Oxford scholar of comparative law, excerpted translations from Justinian's \textit{Corpus Juris Civilis} (529-34 A.D).\textsuperscript{64}

The savage who hollows a tree, inserts a sharp stone into a wooden handle, or applies a string to an elastic branch, becomes in a state of nature the just proprietor of the canoe, the bow, or the hatchet. The materials were common to all; the new form, the produce of his time and simple industry, belongs solely to himself. \textit{His hungry brethren cannot, without a sense of their own injustice, extort from the hunter the game of the forest overtaken or slain by his personal strength and dexterity.} If his provident care preserves and multiplies the tame animals, whose nature is tractable to the arts of education, he acquires a perpetual title to the use and service of their numerous progeny, which derives its existence from him alone. If he incloses and cultivates a field for their sustenance and his own, a barren waste is converted into a fertile soil; the seed, the manure, the labour, create a new value; and the rewards of harvest are painfully earned by the fatigues of the revolving year.\textsuperscript{65}

This natural law property belief reflected an \textit{individual} right to property, rather than a \textit{collective} right to property, and expressly excludes those who do not contribute to the addition of value from sharing in the fruits of the labors. This is the essential difference between the Northern and Southern philosophies regarding property.

2. What Is "Natural Law?"

Websters defines natural law as "(a) rules of conduct supposedly inherent in the relations between human beings and discoverable by reason; law based upon man's innate moral sense: contrasted with statute

\textsuperscript{63} SHERMAN, \textit{supra} note 54, at 114. Codification of the work took place in the Eastern Roman Empire, Constantinople, between the years 529-34 A.D. Flavius Anicius Justinian's reign, from 527 to 567 A.D. was long and prosperous. Rome almost reached her old outward boundaries, which was lost earlier to Teutonic invaders. Since 391 A.D. Christianity had become the state religion and all heathen cults were forbidden. See HERMANN KINDER & WERNER HILGEMANN, \textit{THE ANCHOR ATLAS OF WORLD HISTORY} 103 (Ernest A. Menze trans., 1964).


\textsuperscript{65} \textit{Id.} at 32 (emphasis added); \textit{see generally} Justin Hughes, \textit{The Philosophy of Intellectual Property}, \textit{77 GEO. L.J.} 287 (1988).
law, common law; (b) a law of nature . . .; (c) laws of nature, collectively. . . .” Discussion of natural law dates back at least to Aristotle, who stated that the term natural refers “to those rules which can be known to be correct and binding in virtue of their own nature; rules that are ‘natural’ in this sense contrast with the arbitrary dictates which those in power may happen to lay down.” Commentators have grappled with the problem of describing precisely that concept of justice which was immutable and true for all periods and all civilizations. Simply, natural law and natural rights were deemed to be those that no king or Government could deny and still justly rule. English common law jurists, and later their American counterparts, would offer their own definitions.

William Blackstone, author of the Commentaries on the Laws of England (1765-69) and a great influence on early American law, asserted that the “absolute” rights of man are “the right of personal security, the right of personal liberty, and the right of private property.” Similarly Justice William Story spoke of the “fundamental right” to property. “We call those rights natural, which belong to all mankind and result from our very nature and condition. Those rights are a man’s right to his life, limbs, and liberty [and] to the produce of his personal labor.” Thus, the concept of the sanctity of private property was central to the Greco-Roman and, subsequently, the Anglo-American concept of natural law. The fact that “ideas” were embraced within the meaning of property would become enshrined in the United States Constitution and in the intellectual property protection laws of Northern countries.

66. WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 1197 (2d ed. 1983).
68. “Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes et omni tempore, una lex, et sempiterna et immortalis, continebit.” [There will be not different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times.] CICERO, 210 DE RE PUBLICA (C. Keyes trans., 1928).
69. 1 WILLIAM BLACKSTONE, COMMENTARIES 125.
70. Id.
72. U.S. CONST. amend. V.
3. Roman Natural Law Derived From The Greek Stoics

The demands of governing an Empire, rather than an ever-expanding city, forced Roman jurists to respond with a total revision of its laws. About 146 B.C., Rome defeated Carthage and Greece. While Rome may have been an enemy and conqueror of Greece, Roman jurists and philosophers greatly admired the Greek culture. The Romans embraced Greek Stoicism, particularly those aspects which urged self-denial, austerity and righteous simplicity; ius naturale, or "natural law," and ethics. From that point on, all enactments of Roman law would be weighed against the immutable truths and requirements of natural law. For example, the Roman Senate would look for guidance in the words of Cicero, the first Stoic, who said of natural law: "There is a true law, a right reason conformable to justice, diffused, through all hearts, unchangeable, eternal, which by its commands summons to duty, by its prohibitions deters from evil. Attempts to amend this law are impious, to modify it is wrong, to repeal it is impossible." An assertion of the overwhelming rectitude of natural law was not simple "Greco-Roman-Centrism." In this Golden Age of law-making, Rome had established trade with, or was engaged in warfare against, most all countries bordering on the Mediterranean. Its trade relations extended eastward into India and China, as far north as Germany, and southward into Africa. Roman jurists, praetors, collected laws common to all nations, incorporated them into the law of nations, ius gentium, and reasoned that the commonality stemmed from universal rational principles and universal truths hence "natural law."

4. Roman Property Law

In the early years of Rome, regulation of the exchange and ownership of property fell to the discretion of the Kings and unwritten

---

74. Rome (753 B.C.-1453 A.D.) existed initially as a city under Kings, and then as the Roman Republic. Rome became an Empire with the unification of Italy and Rome under Augustus (27 B.C.). SHERMAN, supra note 54, at 29, 43, 172.
75. KINDER & HILGEMANN, supra note 63, at 85; see also Richard Hyland, Pacta Sunt Servanda: A Meditation, 34 VA. J. INT'L L. 405 (1994).
76. SHERMAN, supra note 54, at 58.
77. Id. at 59.
78. CICERO, DE RE PUBLICA, iii, 23; DE LEGIBUS i, 6, ii, 4; quoted in SHERMAN, supra note 54, at 59.
79. SHERMAN, supra note 54, at 38-59.
80. Legend has it that Rome was founded in 753 B.C. by twins Romulus and Remus, who were raised by the she-wolf Aeneas. KINDER & HILGEMANN, supra note 63, at 73.
customary law. Finding this intolerable, the plebeians demanded a written set of laws. The Tribune Terentilius Arsa responded to their demands by dispatching a group of commissioners to Hellenic Greece and charging them with the mission of studying Greek law. Upon their return, ten magistrates, the *decemvirii* ("the ten men"), were appointed to reduce what they had learned to writing. The result was the laws of the "Twelve Tables," which were displayed in the Forum (450-449 B.C.). For the first time, Rome had a written law, some of which dealt specifically with the ownership and conveyance of property. Roman property law was borrowed from previous codes and was gradually updated.\(^8\) Much later, under Justinian, Roman law would be further refined and codified in such works as the *Institutes of Justinian*, the *Pandects*, and the *Corpus Juris Civilis*.\(^2\)

### 5. Influence of Roman Law on Western Systems

The *Institutes of Justinian* became the common source of the fundamental ideas of Anglo-American legal thought as well as Continental European jurisprudence.\(^3\) Many of the basic principles underlying the Anglo-American laws of admiralty, wills, contracts, easements, liens, mortgages, and adverse possession would all be handed down from Roman law.\(^4\) Roman law would survive the fall of Rome in 1453 A.D.\(^5\) and find its way into the legal systems of Europe, North and South America, the Middle East, and the Far East.\(^6\) For example, the legal doctrine or saying that "a man's home is his castle" was of Roman, rather than Angle-Saxon, origin.\(^7\) Blackstone, for instance, followed the structure and content of Justinian's *Institutes* in his *Commentaries*. For example, his section on "property," like that of the *Institutes*, did not entitle the section as "property," but as "things."\(^8\) "Things" were property rights, both corporeal and incorporeal, including patent rights.\(^9\)

---

81. SHERMAN, *supra* note 54, at 34. Sherman notes that Rome, Founded in 753 B.C., borrowed many of its legal concepts from Babylon by way of Egypt and Greece, and therefore "must not be treated lightly or with disdain."
82. SHERMAN, *supra* note 54, at 114-25.
83. *Id.* at 8-9.
84. *Id.* at 386-405.
85. KINDER & HILGEMANN, *supra* note 63, at 207.
89. DALZELL CHALMERS, STUDENT'S GUIDE TO ROMAN LAW 47 (1994).
Many of the nations of continental Europe either directly adopted the Roman Civil Code\(^9\) (Italy, 11th and 12th centuries;\(^9\) France, 16th century; and Germany, 19th century)\(^9\) or some variation of it.\(^9\) Even England, where the common law and the court systems were well entrenched, staunchly resisted what was considered to be “foreign” law\(^9\) would eventually engraft many of the natural law principles, including property concepts, into the common law. Thereafter, when the American colonies were founded, common law/natural law would follow.\(^9\)

6. Roman Law, Natural Law, The United States Constitution and Property

Natural law eluded the resistance of common law courts to the direct adoption of civil law through the interpretation and study of the classics.\(^9\) Thus, even though civil law was not adopted directly, many of its concepts found their way into the English common law indirectly under the aegis of natural law. For example, King John I was forced to sign the Magna Carta and thus obey the “ancient law,” (i.e. natural law) and to certify the right of the Barons to resist the abuses of the feudal privileges. The Magna Carta would become the “Bible of the Constitution.”\(^9\) The influence of natural law over English law would be seen again under the reign of Edward III, where confirmations of declarations were followed with the warning that any statute passed in violation of the Magna Carta was “soit tenuz p’nul” (null and void).\(^9\) Thus, natural law served as a check against unjust rule under the English system. Natural law, so intertwined with “common law,” became the basis of judicial review of acts of Parliament. Lord Coke, Chief Justice of the Common Pleas, recognized the judicial custodianship of the common law/natural law, in his dictum in Dr. Bonham’s Case:

And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an

---

90. WATSON, supra note 88, at 1.
91. THE ROMAN LAW READER, supra note 64, at 165.
92. Id. at 168.
93. FOREIGN LEGAL SYSTEMS, supra note 8, at 49.
94. SHERMAN, supra note 54, at 407.
95. Corwin, supra note 60.
96. Id. at 260.
97. KINDER & HILGEMANN, supra note 63, at 161.
98. Id.
Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge the Act to be void . . . .

The procedural protection of natural rights asserted by Coke was reinforced by the substantive protections asserted by John Locke. In his 1689 Second Treatise on Government, Locke espoused the natural rights of the individual of "life, liberty and estate," and provided the theoretical justification for the division of the powers of state into the legislative and executive branches. The ultimate check against tyranny would be the people's right of revolution. Locke also asserted that property in nature was given to man by God, but that man gained ownership of things by exerting labor and converting nature into something useful.

Natural law would be carried across the sea to young America, where the founding fathers used it as a basis for the Declaration of Independence, the United States Constitution and the Bill of Rights. Some familiar examples: "[w]e hold these truths to be self evident that all men are . . . endowed by their Creator with certain unalienable rights . . . life, liberty and the pursuit of happiness;" the rights of free speech, to own and bear arms, to be free from unreasonable search and seizure, as enshrined by the first, second and fourth Amendments to the United States Constitution; and "[r]esistance to tyrants is obedience to God," as expressed by Benjamin Franklin.

7. Constitutional Consecration of Private Property: Encouragement of Creativity

Up until the time that the inalienable right to property was enshrined in the United States Constitution, the concept of a property right that applied to all classes, and not just aristocrats, had only been recognized as a moral right through religious institutions, or at the sufferance of the reigning sovereign. One commentator, Henry Weaver,

99. Corwin, supra note 60, at 262 (citing 8 Rep. 113b, 118a, 77 Eng. Rep. 646 (1610)).
100. Locke formulated the labor theory in this treatise. To enjoy goods, an individual must exert labor upon them. This labor "adds value" to the goods. The value added by the individual bestows property rights upon the laborer. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 208-09 (Peter Laslett ed., student ed. 1988).
101. KINDER & HILGEMANN, supra note 63, at 269.
102. Corwin, supra note 60, at 262.
103. See generally LOCKE, supra note 100, at ch. V.
104. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
stated that because of the United States Constitution’s Fifth Amendment, for the first time in history, “the right to own property was to be given full legal recognition and was to be extended to the humblest citizen, without reference to class distinction, social position, or status of birth.”

With property finally being recognized as a fundamental right, the Founders also moved to provide protection for intellectual property. Their reason was “to promote the progress of science and the useful arts.” Article I, section 8, of the United States Constitution, also known as the “intellectual property clause,” provides: “The Congress shall have the power . . . to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

8. Property

Once enshrined in the Constitution, it remained for the legislature and the court system to define and enforce property rights. An early example of the high value the United States placed on property rights was the case of Wilkinson v. Leland. This 1829 Supreme Court case dealt with a Rhode Island statute which had the effect of taking something from one private individual and then giving it to another. The statute was struck down as an unconstitutional “taking.” Attorney for the Defendants in error, Daniel Webster, spoke:

105. U.S. CONST. amend. V. “No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation.” But what was “property”? The Founders provided guidance in the Fourth Amendment. “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.” U.S. CONST. amend. IV. Thus, property in writings were protected as well. It would have made little sense for the Constitution to protect “papers” but for the ideas committed to them.

106. HENRY G. WEAVER, THE MAINSPRING OF HUMAN PROGRESS (1947). As late as 1776, no one in the civilized world with the possible exception of a noble, could call even “so much as a pigeon” his own. Id. A distinction is thus drawn between a moral right and a legally enforceable right.

107. U.S. CONST. art. I, § 8. “The Congress shall have the power . . . to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” While protection would be granted American inventors, the United States in its early days, along with many of the Nations of Europe, had no qualms in “pirating” the inventions of the rest of the developed world. See generally Dru Brenner-Beck, Do As I Say, Not As I Did, 11 UCLA PAC. BASIN L.J. 84 (1984). It was only after the major producers, England and France, forced the issue onto pirating nations such as Holland, Belgium, and the early United States did the first international protocols, such as Berne and Paris Conventions, come about protecting intellectual property; much as the United States is now forcing the issue onto pirating Third World nations.


109. Corwin, supra note 60 (citing Wilkinson v. Leland, 27 U.S. (2 Pet.) 627 (1829)).
If at this period there is not a general restraint on Legislatures in favor of private rights, there is an end to private property. Though there may be no prohibition in the Constitution, the Legislature is restrained from acts subverting the great principles of republican liberty and of the social compact.\textsuperscript{110}

Also present, but speaking for the Court, was Justice Story. He stated:

[T]hat government can scarcely be deemed to be free where the rights of property are left solely upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred.\textsuperscript{111}

9. Latent "Psychological Baggage"

Whether they are conscious of it or not, Western rightsholders and negotiators carry with them this natural law mindset, that is, of what is "right" and "just."\textsuperscript{112} Possibly the individual Western negotiator sitting across the table from a Southern representative has never heard of Justinians "savage" who became owner of something by way of his labor, nor might he have heard of the "Labor-Desert" theory. But it is the rare Western businessman or Trade Representative who does not share the belief "this is mine because I made it" or more to the point, "taking something without paying for it is theft, pure and simple."\textsuperscript{113}

His Southern counterpart, however, raised in a Buddhist, Confucianist or Islamic society may very well have a very different concept of what is right and just. Whether the negotiating parties understand and sympathize with each other's cultural beliefs is one thing; but if they are unaware of each other's cultural meanings associated with property rights, it is something else. If that is the case, then the parties are confronted with a cultural-linguistic gap. If both parties are unaware of this gap, the possibility of meaningful communication, and agreement are very slim indeed. The resort to power politics is likely.

\textsuperscript{110} Wilkinson, 27 U.S. (2 Pet.) at 646.
\textsuperscript{111} Wilkinson, 27 U.S. (2 Pet.) at 646.
\textsuperscript{112} Wuthnow, \textit{supra} note 51, at 76.
\textsuperscript{113} Id.
10. Intellectual Property Same as Property?

Before segueing into an examination of Southern perspective, one last relevant question must be addressed. Is there any difference between property rights in a tangible "thing" and in intellectual property? If there is, the key difference would be an inventor's property rights are not absolute. Intellectual property rights, whether in the form of a patent, trademark or copyright, are limited monopolies granted by a government only for a certain period of time. Allowing the inventor to benefit from the profits of his creation by recouping his investment costs and to earn profits for his diligence encourages creativity and encourages the dissemination of new technology. To allow an inventor, or a buyer of a patent right, to keep his invention secret indefinitely would defeat the purpose of dissemination of new processes or technology. For this reason, patents, trademarks and copyrights will eventually pass into the public domain. For example, United States patents will expire after a term of seventeen years, but under the new World Trade Organization agreement, the term will be twenty years. The Western concept of property encompasses intellectual property rights, but its term has been limited for the policy reason mentioned above. Now, to the task of examining the concept of "property," intellectual or otherwise, from a Southern perspective.

B. Pirate Nations: The South

1. Being Specific—Identifying Pirates

Which countries in the Third World are pirating Western technology, what philosophies do they adhere to? Part of the answer is given to us each year in a statement released by the United States Trade Representative (USTR). The USTR uses the "Special 301" trade law to identify and then impose trade sanctions upon those countries which provide inadequate protection to United States intellectual property.

114. Mesevage, supra note 20, at 434.


117. J. H. Reichman, Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection, 22 VAND. J. TRANSNAT'L L. 747, 775 (1989) (asserting that intellectual property is a property right just like any other property right, or in a narrow sense, even a human right).

Affected United States industries, such as the International Intellectual Property Association (IIPA), which represents motion picture, sound recording, computer software, and publishing industry associations, and the Pharmaceutical Research and Manufacturers of America (PhRMA), submit their findings to the USTR to conduct trade negotiations with the named countries. If the USTR should find that the intellectual property rightsholders' grievances have merit, the United States may impose tariffs or countervailing duties on the infringing countries' imports.

Generally, the USTR's listing is incremental. "Special Mention," the lowest level, is for those countries that are still "on the radar screen" for concerns about their intellectual property protection regimes, but not to the level where the USTR is ready to impose trade sanctions. "Watch List" is for more serious infringement. "Priority Watch List," and ultimately, "Priority Foreign Country" for the most egregious offenders, who may also be subject to an "out-of-cycle review."120

2. United States Rightsholder's Accusations

On February 13, 1995, United States rightsholders (the IIPA and PhRMA) submitted their findings to the USTR as to the countries they alleged were guilty of intellectual property piracy and asked that, among others, Indonesia, Singapore, (mixed Buddhist-Christian-Islamic-Hindi) Turkey, (Islamic) and China (Confucianist-Marxist) be named as priority foreign countries.127 Altogether, the IIPA charged

119. Intellectual Property, supra note 19. Under Special 301, USTR identifies as priority foreign countries those nations that have the most serious problems in protecting United States' copyrights, patents, trademarks, trade secrets, and other intellectual property. The priority watch list is the second tier of intellectual property offenders, and the watch list is the third tier. A fourth tier, "Special Mention" has also been added. Id.

120. Id.

121. Id.

122. Id.

123. WORLDMARK ENCYCLOPEDIA, supra note 55, at 147.

124. Singapore, although ethnically 76% Chinese, has a diverse religious landscape: 28% Buddhist, 19% Christian, 18% nonreligious, 16% Islamic, 13% Daoist, 5% Hindi, and 1% "Other." FEDERAL RESERVE DIVISION LIBRARY OF CONGRESS, SINGAPORE: A COUNTRY STUDY xiii-xiv (Barbara L. LePoer ed., 1991).


126. Id. at 166.

forty-two countries, plus the former Republics of the Soviet Union, with causing billions of dollars in losses to copyright-dependent industries in 1994. Of those countries, the IIPA suggested that the USTR list twenty-four on the priority watch and watch lists. The IIPA representative stressed that China's trade practices made it a "top priority" and that Turkey, "of all the countries that have been cited on Special 301 lists since 1989, has done the least to address United States concerns."128 The IIPA and PhRMA recommended that Korea, (mixed Buddhist-Confucianist-Christian)129 China, and Thailand (Confucianist-Buddhist)130 be listed on the USTR's Priority Watch list, along with the Islamic nations of Egypt, Indonesia,131 Jordan, Saudi Arabia, and the United Arab Emirates.

For Watch List recommendations from the Buddhist/Confucianist countries the rightsholders named; Taiwan (mixed Buddhist-Taoist-Christian),132 Thailand, and Japan (mixed Shinto-Buddhist-Confucianist)133 Of the Islamic nations, the IIPA and PhRMA named Bahrain, Pakistan, the United Arab Emirates, and Malaysia.134 Fifteen other nations were nominated to be listed under the "Special Mention" list. Among those listed were Hong Kong, Singapore, and Vietnam (mixed Buddhist-Taoist-Christian-Animist-Marxist),135 Jordan, Kuwait, Lebanon, Oman, and Qatar (Islamic).

3. The United States Trade Representative's Responses

On April 29, 1995, Ambassador Kantor released his latest Priority Watch and Watch Lists. Citing "substantial progress" in foreign governmental responses to American pressure for increased intellectual property protection, the USTR declined to name any nation as a "Priority Foreign Country."136 Ambassador Kantor did, however, name eight

128. Id.
129. 1995 ALMANAC, supra note 125, at 217.
131. WORLDMARK ENCYCLOPEDIA, supra note 55, at 147. Indonesia is 87% Islamic, 10% Christian, 2% Hindu, 1% Confucianist/Buddhist, and 1% tribal religion.
132. 1995 ALMANAC, supra note 125, at 270.
133. WORLDMARK ENCYCLOPEDIA, supra note 55, at 206.
134. Islam is the official religion of Malaysia, even though only 53% of the population follows that theology. Other Malaysians follow such religions or philosophies as Hinduism, Confucianism, Buddhism, Christianity, or Animism. Id. at 302.
135. 1995 ALMANAC, supra note 125, at 290.
136. On April 29, 1995, the USTR released his latest Priority and Watch Lists, citing no country as a "Priority Foreign Country" due to "substantial progress" around the world in intellectual property protection, particularly in those countries that had earlier allowed unchecked
countries who "allow[ed] or even encourag[ed] the unauthorized copying and sale of United States intellectual property" to the Priority Watch List: Japan, Saudi Arabia, Turkey, Brazil, and Greece; these first five also being subject to out-of-cycle review.\textsuperscript{137} Three others were also named on the Priority Watch List: India, Korea and the European Union (the EU was named due to discriminatory public telecommunications policies, i.e. the television and movie local-content quotas which it has recently enacted).\textsuperscript{138}

Twenty-four other countries were named to the less egregious "Watch List:" Bahrain, Egypt, Indonesia, Pakistan, the United Arab Emirates, China, Singapore, the Philippines, Taiwan, Thailand, Argentina, Chile, Colombia, Costa Rica, El Salvador, Guatemala, Peru, Venezuela, Poland, Romania, the Russian Federation, Italy, Canada, and South Africa. Furthermore, Argentina, the UAE, Indonesia, and South Africa were listed as being subject to additional review.\textsuperscript{139}

V. \textbf{THE SOUTH: COMPARATIVE PHILOSOPHICAL FOUNDATIONS}

Turning South, most of Asia follows Confucian beliefs,\textsuperscript{140} while approximately another one-fifth to one-sixth of the world's population are adherents of Islam.\textsuperscript{141} Thus a sizable majority of the world's inhabitants come from a background very different than that of the Northern nations.

\textbf{A. Southern Viewpoints}

James Peters, a Western commentator, in his exploration of the root causes of intellectual property piracy in Singapore takes note of these different backgrounds:

\begin{flushright}
\textsuperscript{137} Id. \\
\textsuperscript{138} Id. \\
\textsuperscript{139} Id. \\
\textsuperscript{140} Frank Viviano, \textit{When Success is a Family Prize: Why the Children of Asian Immigrants Become Our Academic Superstars}, S.F. CHRON., Oct. 8, 1989, at 7/Z1. \\
\end{flushright}
Several legal theorists have challenged the effectiveness of imposing Western legal concepts on non-Western cultures. While concepts of property law are not universally accepted, the concept of intellectual property is even further removed from non-Western systems. Writers from developing countries have been quick to criticize the imposition of European law on Asian and African peoples. R. P. Anand, a well-known commentator, argued that "international law can win the respect of the new states only if it reflects the attitudes toward law and justice that correspond with the attitudes held by these countries in their own cultural backgrounds." 142

An example of cultural background that Mr. Anand speaks of comes from Mr. Kyung-Won Kim, the South Korean Ambassador to the United States during 1986. In this case, the background is Confucian. Ambassador Kim was referring to a recent round of talks between the United States and South Korea culminating in the forcing open of the Korean market to American goods and increased protection for United States intellectual property in Korea. Ambassador Kim stated: "[h]istorically, Koreans have not viewed intellectual discoveries or scientific inventions as the private property of their discoverers or inventors. New ideas or technologies were "goods" for everybody to share freely. Cultural esteem rather than material gain was the incentive for creativity." 143

Other countries in the Far East which have strong Confucian underpinnings reflect much the same opinion. Ronald Yates, columnist for the Chicago Tribune, in presenting the idea of intellectual property to entrepreneurs in such countries as South Korea, China, Taiwan, Hong Kong and Singapore, met with the same response. He said, "in the Confucian societies of Asia, imitation and reproduction of ideas, art and scholarship are considered a token of honor and respect. Americans, they insist, should be flattered." 144 Many seemed bewildered as to why Americans were so obsessed with those who copy technology, art and ideas. Said one Taiwanese patron of a "video parlor" where pirated American films were shown, "[i]t seems selfish to me . . . Don't

142. Peters, supra note 38, at 586 n.179.
143. Kyung-Won Kim, A High Cost to Developing Countries, N.Y. TIMES, Oct. 5, 1986, at 2. Apparently the Koreans viewed the talks to be an example of the American use of its overwhelming economic might to wring concessions from a smaller and weaker trading partner and greatly resented United States bullying.
American movie companies earn enough money already? Why are they so angry about people who are just trying to earn a living?" In the Islamic countries, where piracy of Western ideas has been rampant, the explanation given has been "[t]he prevailing Islamic approach to copyright has been that there should be no obstruction to the duplication of original material since the most widespread dissemination of knowledge is for the good of all." Under Islam, this concept of "for the good of all" or "wealth sharing" is required and is known as zakat (sweetening). Not to be confused with the voluntary and good-for-the-soul giving of alms to the poor sadaqah; zakat is a required 2.5% contribution by every Moslem to the state for distribution to the less fortunate, as every Believer is enjoined under the Shari'a (the Divine Law) to be his brothers' keeper. Such are the gists of the cultural arguments. While there are other arguments, such as those mentioned in the introductory section, they are beyond the scope of this paper.

VI. PROPERTY AND CONFUCIANISM

A. Intellectual Property Piracy and the Far East

Early in 1995, the United States and the People's Republic of China (PRC) arrived at the brink of a trade war. The United States was threatening to impose 100% import duties on more than $1 billion of Chinese imports. Ambassador Kantor cited as a major reason for the threatened sanctions, the one billion dollars the United States lost each year to Chinese intellectual property piracy. As evidence, the USTR pointed out the fact China had long known about, and allowed to operate, twenty-nine plants in its Southern provinces which produced seventy-five million pirated compact discs (CDs) each year. For its part, the Chinese government threatened countersanctions, refusing to be bullied by the United States. Eleven days of round-the-clock negotiations later, the PRC relented, promising to enact and enforce new laws to protect United States

---

145. Yates, supra note 26, at 1.
146. Simon Buckingham, In Search of Copyright Protection in the Kingdom, 11 MIDDLE E. EXECUTIVE REP. 5, May 1988, at 11.
148. KORAN II:270-273, VIII:73.
intellectual property. Commentators caution that we may have declared victory too soon.

A similar confrontation and agreement in 1991 yielded little in the way of concrete results. If nothing else, United States' losses to piracy in China soared. The United States' problems with intellectual property piracy do not begin and end with the PRC. Some of the worst offenders are our major trade partners in the "Tiger" countries of the Pacific Rim. For instance in 1994, the United States Trade Representative placed Japan, South Korea and Thailand on his "Priority Watch List," as being, among others, the primary offenders of United States' intellectual property rights.

B. Confucianism as a Cultural Defense

The Oriental reaction to the United States defending its intellectual property rights has ranged from bewilderment to rage. Writers familiar with the region pose as a defense the Confucian belief that ideas should be freely transmitted and are not "property" subject to ownership.

A good example of Asian reaction is when commentator William P. Alford lectured on intellectual property in January, 1991, at the National Taiwan University to an audience of officials, professors, lawyers, and other experts in, or interested in, intellectual property. Alford expressed his concerns about American policies asserting intellectual property rights. He also discussed the actions taken to defend them against piracy in Far Eastern countries. Alford described the reaction of his Taiwanese audience to be as "one of enormous anger. Terms like imperialism, traitor, and the like flew, not at me, but at the


151. Id.


156. Id.

157. Id.
American government and at Chinese citizens involved in representing foreign intellectual property holders.”

Is this “cultural defense” a valid one, or merely a smoke screen to justify the theft of billions of dollars each year of Northern intellectual property? To address this question, this section will first briefly examine what Confucianism is, against a historical backdrop, and then go on to examine property rights, and intellectual property rights, in China and other countries whose culture has been greatly influenced by Confucianism.

C. A Brief Exploration of Confucianism

Confucius is the latinized honorific Kung Fu-tsu (Master K’ung), referring to the philosopher K’ung Ch’iu. Confucius was born in the Lu nation-state and eventually wrote The Analects (Lyuin-yuu) in which he propounded a belief system that stressed it was man’s nature to be moral. Confucius’ concept of Heaven (T’ien) was not so much a God-figure (Ti-Tien) who had an identity and will, but rather, existed in a naturalistic sense. Tseng Tzu, a pupil of Confucius, summed up his master’s teachings: “[t]he Way of our Master is none other than conscientiousness (chung) and forgiveness or altruism (shu).” This was further extended by the concepts of “human-heartedness” (Jen), “righteousness” (yi) and “filial piety” (Hsiao). Confucius also professed the belief that society should be guided by the Rules of Propriety (li). The li was roughly analogous to the Western concept of natural law.

Unlike the Western concept of natural law, however, Confucianism embraced the “five cardinal relationships,” a hierarchical order where each accepted his place in society and strove to maintain peace and harmony. The five relationships were between ruler and subject; father and son; husband and wife; elder and younger brother; and older and younger friend. Zhongshu Dong elaborated on these relationships. “The Three Cardinal Guides: . . . Ruler guides subject,
father guides son, and husband rules wife." This hierarchy would remain central to Chinese thinking for the next 2,000 years and served to justify and embed authoritarianism from the family clan level up to the Emperor himself.

One attained one’s rank in life by way of destiny. Thus, one’s rank, or lack thereof, had been ordained, and was therefore natural and moral. Natural law, or the natural order of things was known as the Mandate of Heaven (T’ien Ming), and Ming itself translated as “fate,” “destiny,” or “mandate,” which is akin to fate, as in the Arabic expression “Imshallah” (“if Allah wills it so”). Indeed, the Emperor ruled under the Mandate of Heaven, that is to say, the Emperor ruled because he was virtuous and therefore, it was his destiny to rule. Conversely, should the Emperor become a tyrant, he goes against li; then he would lose heaven’s Mandate and his overthrow would be just. The Imperial intent, and the end result, was the stability of the empire, ensured by this hierarchical structure. In a circular fashion, authority was justified because it existed. And because it existed, it was good. To rebel against authority, whether against one’s parents or elders, a violation of filial piety, or against the Emperor, was to go against the natural order of things. Creation of disharmony could have severe, even fatal, consequences for the wrongdoer.

D. Integration and Coexistence with Taoism, (Zen) Buddhism and Shinto

Over time, other beliefs, such as the Tao (the “way”) and Buddhism would become incorporated into Chinese philosophy. The Tao propounded the passivity principles of wu-wei (the art of standing aside) as exemplified in the martial art of Tai-chi, also tsu-juan, or spontaneity, and hsiang sheng, or seeing the complimentary nature of supposed opposites, for example, good and evil, male and female, yin and yang. Taoism and Confucianism were viewed as complimentary doctrines; Taoism stressing solitude and freedom, while Confucianism stressed responsibility and ceremony. The gap was bridged by the Book of


166. Id. at 941 n.205. See also Dan Fenno Henderson, Promulgation of the Tokugawa Statutes in TRADITIONAL AND MODERN LEGAL INSTITUTIONS IN ASIA AND AFRICA 23 (David C. Buxbaum ed. 1967).

167. KIM, supra note 161, at 60.

Changes. It is said that the Chinese are socially Confucian, but individually Taoist. Later, another school of thought taking a different tack, one towards strict interpretation of Positive law (Fa) would become popular. Proponents of this school were known as the Legalists.

Buddhism would reach China, and thereafter the greater part of Asia, by way of India. Half a millennium before Christ, Gautama, the prince of the royal Sakya clan, properly known as "Sakya-muni:" or the "silent sage" (muni) of the Sakyas. Gautama Sakyamuni left his palace and family at the age of twenty-nine, and became a wandering mendicant in search for the Truth. After a period of intense meditation, he received Enlightenment and became Buddha. His ideology held that Man, as an ignorant child, is enveloped in the "flames" of his wants, needs and desires. Through meditation and spiritual learning via an endless cycle of rebirths (reincarnation), the fire is extinguished (Nirvana) and one becomes Buddha, one is Awake and no longer consumed by need. Once Buddhahood is achieved, the need for further learning through reincarnation is extinguished, and the Buddha moves on to a higher Plane of existence.

Buddha developed the "Four Noble Truths:" (1) suffering is universal (man is innately spiritually unhealthy); (2) suffering is caused by desire (trsna); (3) to eliminate desire is to eliminate suffering; and (4) the Path to Nirvana (end of rebirths) is by the "Eight-fold Path." This Eight-fold Path contained its own list, that of: Right View, Right Aspiration, Right Speech, Right Conduct, Right Means of Livelihood, Right Endeavor, Right Mindfulness, and Right Contemplation. Buddha's path is called the "middle way" because it avoids extremes. Buddha's teachings are based on love, compassion and service to others. One should worship the six cardinal directions, points of the compass plus zenith and nadir, and one's parents, one does this through obedience and performing ones' duty to them. Buddha also taught codes of conduct for husbands, wives, children, employers and kings, rejected violence in any

169. AL-FARUQI, supra note 147, at 222.
form and taught that crime could be eliminated by improving the economic condition of the people.  

King Ashoka made Buddhism the state religion of India in the third century B.C., but this gradually faded through splits into rival factions and hostile Brahmins. Around the birth of Christ, a major split gave rise to two major kinds of Buddhism: Hinayana (Little Vehicle) or Southern Buddhism, more individualistic and followed in Ceylon and Southern Asia; and Mahayana (Great Vehicle) which more closely followed the original teachings of Buddha. Mahayana was more social, polytheistic and followed in Himalayas, Tibet, Mongolia, China, Korea, and Japan.

Another form of Buddhism is Zen Buddhism. Followed in Japan, it relies on no God or Deities. It is indifferent to meditation. What, then, is Zen? When asked by their pupils what Zen was, ancient masters have answered in different ways. One master illustrated the concept by lifting one of his fingers. Another kicked a ball and third enlightened his pupil by slapping his face. Zen is said to be the taking of a different point of view at life (satori). It dwells in the concrete here and now. It is the opening of one's spiritual eye in order to look at the very reason of existence. It is the disciplining of one's own mind through insight into its proper nature. Westerners may be familiar with the expression, "the sound of a single hand clapping." This is an example of a koan, or "mind-snapping" problem given by masters to their pupils as basis of their meditations.

Shinto is yet another spiritual practice. "Spiritual practice" is so named because it has no spiritual founder (i.e. no Jesus, Mohammed, or Buddha). Shinto is a collective noun, embracing all faiths, and is the seeking of alignment and harmony with the Way or Spirit of Things (kami). Shinto has been a way of thinking and a way of life in Japan for more than two millennia. Shinto was originally the worship of spirits of nature, family and imperial ancestors. The Occupational Forces abolished Shinto as the state religion after World War II.
Shinto, Buddhism, Taoism and Confucianism can and do coexist with one another. Certainly in Japan, the beliefs run side-by-side: Confucianism deals with political organization, ethical precepts and a rational view of the universe.\textsuperscript{180} Buddhism is concerned with the relation of the individual soul to the limitless cosmos and the afterlife, whereas Shinto dwells on adapting to life in this world and the harmonious merging of man with his environment.

These belief systems exist in many variations throughout Asia and have become ingrained into the Oriental way of thinking, but Confucianism appears to be the common denominator among non-Islamic Asian countries.\textsuperscript{181} These religions or philosophies eschew the individual accumulation of wealth and avariciousness, stress in their stead the elimination of want of material things, and when thinking of property, to do so for the benefit of the family, clan, or society at large.

\textbf{E. Confucianism, Technology, and Profit}

Another aspect of the Confucianist belief was a low regard for profit, and thus personal, as opposed to communal, property.\textsuperscript{182} Confucius expressed his low regard for profit in his Analects: “The noble-minded man comprehends righteousness, the low-minded man comprehends profit.” These two tenets of belief stood out in stark contrast to the individualist, competitive, advantage seeking concepts characterizing Western civilization. These beliefs did not prevent technical innovation, but they did not encourage them either. The magnet, gunpowder, and paper were Oriental discoveries, yet it was the Westerners, after having the discoveries introduced by the likes of Marco Polo, that exploited them to their greater potential; which might have been early examples of piracy but there is no mention as to whether these discoveries were patented at the time. Indeed, Taoists believed too many devices would lead to laxity and corruption of character\textsuperscript{183} and the Ruling classes termed science and technology as “bizarre craft and cunning work” (qiji yinao).\textsuperscript{184} Moreover,


\textsuperscript{181} Yates, \textit{supra} note 26, at Bus. 1. Yates did a survey of the Far East and intellectual property piracy and stated that, “[o]thers say Americans and Europeans are ignoring fundamental differences in attitudes toward intellectual property in Asia that are rooted in ancient Confucianist beliefs. In the East, imitation is considered a sign of respect rather than a way to steal value.” \textit{Id}.

\textsuperscript{182} Ki\textit{m, \textit{supra} note 161, at 90.}

\textsuperscript{183} Wang, \textit{supra} note 165, at 29.

\textsuperscript{184} \textit{Id.} at 31.
the Imperial bureaucracy wielded Confucianism as a tool of control. It operated essentially as a state religion serving those in authority. It operated against mobility, independent thinking, and the dissemination of new knowledge. So it was for 2,000 years. While the Western nations were busy becoming unstable and seeking technological advances over one another, the Chinese dynasties were seeking to ensure all those in the Middle Kingdom were kept in their place. Currently, there has been a phenomenal rise in economic and technical development of the Pacific Rim nations over the past twenty years. It would be inaccurate to state that Confucianism and technology cannot coexist, or that Confucianism, in and of itself, has served to hold back technological development. 185

F. Property Under Confucianism

All property belonged to the Emperor, much as in the same sense all property in Western nations was subject to a claim of eminent domain by the ruling Sovereign. Aside from the Emperor’s claim, land and property were held by the father/patriarch to manage, but often he could only convey the land after consultation and acceptance by his sons, or sons, and wife, or wives. 186 There was no primogeniture system 187 and property was often held solely in the father’s name, with no interest held by sons, wives, or daughters while he lived. 188 Differences on claims to land were to be resolved by mediation within the Clan or family unit, or if between clans, by a neutral and learned man of unimpeachable character.

Litigation was strongly discouraged, as it brought disgrace upon both parties, since it indicated to all that the parties could not keep harmony amongst themselves. Moreover, it gave rise to the very real possibilities that it would lead to embarrassment and questioning of the patriarch’s authority. Criminal and civil cases were termed “important cases” and “trifling matters” respectively, with disputes over land and property considered to be trifling. 189 Thus, while there were property rights in ancient Confucian China, they did markedly differ from the

185. David J. Thorpe, Some Practical Points About Starting a Business in Singapore, 27 CREIGHTON L. REV. 1039 (1994). Thorpe discusses the meteoric development of authoritarian-governed Singapore and how a rise in the sophistication and education of the populace may require a loosening of the governments tight grip on the reigns of power.

186. Kim, supra note 161, at 103.

187. Wang, supra note 165, at 32.

188. Kim, supra note 161, at 104.

concept of individually held and owned property that arose in nations influenced by Roman law and the common law. Land and property were held jointly and for the benefit of the family unit.

G. Intellectual Property

Confucius wrote in his Analects, "I have transmitted what was taught to me without making up anything of my own. I have been faithful to and loved the Ancients." The concept that ideas belonged to the individual from whom they sprang, and that one should pay for their use was alien to the official Confucian belief, especially considering that system's emphasis on filiality and avoiding profit-seeking. However, just because Confucian beliefs taught seeking profit was wrong and ideas were not property, does not mean that the reality on the ground was a mirror-reflection of such a belief. There was property in ideas in ancient Chinese society; in practice, if not in written thought.

There is, for example, the story of the Taoist philosopher Lao Tse, who lived sometime around 602 B.C. Lao Tse was on his way West to India, or the "glorious Buddhist paradise of Sukhavati" when he was stopped by a Chinese border official. The border official would not let him leave the kingdom without an export license for his possessions. As a court librarian, Lao Tse explained, he carried nothing with him, save for his knowledge. The border official persisted. He would have to "leave his wisdom" in China before departing. In order to leave, Lao Tse spent the next three days writing the very succinct Tao te King, eventually a very influential work of the Taoist belief. Thus, in a round-about sort of way, we find the concept, even in ancient China, that ideas were considered property. And of property, it was said by Mencius, who was one of Confucius' most notable disciples, "taking things to which one has no right is contrary to justice." These examples illustrate a basic understanding of intellectual property akin to that found in the West.

Pure knowledge, set to paper, such as the Tao te King, might be considered analogous to something protected by the modern day copyright. Trademarks, after a fashion, also existed in ancient China. Manufacturers of sewing needles or silk would attempt to set their wares apart from


others by distinctive trademarks and would petition the government for protection against others who infringed.\textsuperscript{193}

But commerce and the dissemination of new ideas were not high on the list of priorities on the Imperial agenda. Maintaining the state monopoly on power, however, was at the top. Intellectual property protection existed more for that purpose than for the uses traditionally thought of in the West. For example, the Imperial Seal of the five-clawed dragon was strictly protected against use by others.\textsuperscript{194} The Empire also forbade the unauthorized reproduction and dissemination of scientific and astronomical writings, but this was more in the spirit of “state secrets,” with an eye toward keeping knowledge, and thus power, centrally controlled.\textsuperscript{195} Thus, a comparison to the contemporary patent would be inappropriate. Other writings, such as poetry, were protected in an effort to maintain quality and accuracy of reproduction.\textsuperscript{196}

Why should we have to resort to such a circuitous method of finding property in ideas in ancient China? A good reason is that a concept as avaricious as individual property rights might not serve the best interests of the Emperor or the Imperial bureaucracy, and thus would not get much press. If individuals could own property, that would challenge the Emperor’s otherwise exclusive claim to property in the kingdom. This would not do. The emphasis in Confucian China, once again, was maintenance of the status quo, meaning power and property, and on “saving face.” The Emperor and the bureaucracy used Confucianism because it was ideally suited to this end. As long as all property belonged to the Empire and its power could not be challenged under the Five Truths, the Emperor’s supremacy remained secure.

Therefore, what actually survived in officially sanctioned writings was highly idealistic, and reflected a striving for a perfect world, not reflective of reality.\textsuperscript{197} Under an ideology where sharing for the common good was the ideal, the accumulation of wealth in the hands of the few, in the form of opulent palaces, while the vast majority of the peasantry were

\begin{itemize}
\item \textsuperscript{193} Id. at 172 n.57.
\item \textsuperscript{194} Id.
\item \textsuperscript{195} Wang, supra note 165, at 48 n.36. Most of the illegal copying was done by the local officials, the ones who were originally charged with enforcing the Emperor’s decrees. China still has difficulty enforcing its laws, particularly in its far-flung outer provinces. See also Uli Schmetzer, Bottom Line Overrides Party Line in China: Economic Boom Takes Precedence Over Law, CHI. TRIB., Jan. 26, 1995, at News 8.
\item \textsuperscript{196} Wang, supra note 165, at 48 n.61.
\item \textsuperscript{197} Wang He, The Danger of Too Much Abstraction in Debate on Traditional Culture: Proceed from Reality in Studying the Role of Traditional Culture, Bur. Internal Affairs, Sep. 3, 1986, at China II; Part 3 The Far East FE/8354/BII/1.
\end{itemize}
dirt poor, made for an obvious, and embarrassing contradiction. It would be best for the powers that be if writings of such things were strictly controlled, lest free discussion of these disparities would give rise to dissatisfaction and instability.

Toward this end, the Emperor understood that whoever controlled the past could control the present. This required a state monopoly on historical writings. The Empire was careful to "control" the past in order to justify its actions. Chinese historians who engaged in unauthorized research were subject to castration and imprisonment. Others, reckless enough to refer to the past to criticize the present, were subject to the death penalty, along with all the members of their families. Such measures had a tendency to chill free speech. Nevertheless, piracy of official writings, such as poetry and scientific works, was widespread. Imperial attempts to suppress it were not very successful, even though backed by threats of severe beating and exile.

H. Case Study: Intellectual Property Piracy - Made in Japan

Fast forwarding to the 1990's, we find much of Asia is heavily influenced by the Confucian principles discussed above. Asia has also been the scene of a tremendous shift of technology and wealth from West to East. Of the countries in the Pacific, Japan has garnered the lion's share of this wealth. It has accomplished this while in the course of converting itself from a country devastated by allied bombing during World War II into an industrial giant. Japanese thinking is Confucian.

Clearly, the presence of Confucianist underpinnings have not interfered with its assimilation of technology or the accumulation of wealth. If Confucian principles have not interfered with Japan's phenomenal growth, have they in fact, contributed to it? The answer is yes. The Confucianist concept of freely copying the ideas of others has been key to its new-found prosperity.

The example of Japanese piracy that follows explains in a microcosm, how: (1) Western assumptions may not always be correct; (2) how Confucianism contributes to the mind-set that, what the West calls "piracy" is, in Asian eyes, merely a benign form of technology transfer;

198. Alford, supra note 190, at 103.
199. Id. at 106.
200. Alford, supra note 190, at 3-5.
201. Engardio, supra note 32, at 100.
and (3) how the strong desire for technical and economic advancement is a potent incentive for piracy of Western intellectual property.

The Western assumption is that the intellectual property debate is mostly North-South: but who defines "South?" In seeing Japan as a major technology-exporting center, Americans and Europeans might assume that Japan defines itself as a Northern nation. This assumption is challenged by Daniel Garner's observation that "[d]espite its position as a leading world economic power, Japan continues to see itself as a poor, developing country," often aligning itself with Third World nations in the intellectual property debate.203

I. The Kilby Patent

The case of the Kilby patent is prime example of this copying of Western technology. This was an almost thirty year battle for a patent application in Japan for the United States invented "IC chip." Jack St. Clair Kilby invented the integrated circuit (IC), the tiny device at the heart of computers, calculators and most every piece of electronics since the 1960's, while working for Texas Instruments in the late 1950's.204

As background, one should note the United States Patent Office will normally approve or disapprove an application for patent within eighteen months. In contrast, it takes the Japanese Patent Office (JPO) an average of five to seven years. Also, the JPO requires "full disclosure" of the technology submitted in the application. This creates a five to seven year window during which time other industries may copy, sell, and improve on the design or process submitted for patent protection. Shoji Tada, a JPO official, has admitted that the requirement was used to allow Japanese companies to copy American intellectual property and thus to "avoid the waste of time in coming up with the same ideas."205

Kilby submitted his application for patent of the IC chip to the JPO in 1960. Approval was thirty years in coming, during which time the Japanese semiconductor industry copied and sold many IC chip products, earning billions of dollars in profit from sales to America and to the rest of the world. To add insult to injury, the JPO's approval for Kilby's patent almost never came. Twelve major Japanese semiconductor producers filed oppositions to the United States' application and the JPO once asserted that

204. Warshofsky, supra note 12, at 112.
205. Lindgren & Yundell, supra note 155, at 1 n.3 (citing Sunday Present: The Intellectual Property War-Last Trap by the Americans (Japanese television broadcast, July 5, 1992)).
the patent had expired while it was still within the approval process. In the ensuing court battle, nineteen Japanese and Korean respondents were accused of importing products that infringed on ten United States' patents. Kilby eventually prevailed. Since that time, estimates of royalties from Japan from that patent alone have been estimated to be worth $800 million a year.\textsuperscript{206}

Since the Kilby episode, American corporations have responded with a more aggressive stance in filing patents and defending their intellectual property rights in Far Eastern courts. As to the Japanese response;\textsuperscript{207} Sony Corporation's chairman, Akio Morita, stated the reason for all the suits by American firms against Japanese Corporations was "the Americans are finally realizing just how good the Japanese products are, and they are becoming frightened . . . [and that] [t]he United States has been using intellectual property rights as a means, not necessarily to beat Japan, but to protect the United States' economy from the Japanese economy."\textsuperscript{208} To the average American, this would seem to be an example of unmitigated gall, however, Japanese media reflect a real breakdown in communication. The Tokyo Trigger published an article in 1992, Advanced, Developing Countries Battling Over Patents, which stated that "[t]he basic opinion of the United States was that anything . . . born out of the intelligent activities of human beings is to be protected. This was something that was impossible to understand for Japanese people, who are permitted to 'borrow upon others' cleverness in all matters."\textsuperscript{209} This mindset, asserts Robert Merges of the Boston University School of Law, is reflected in the differences in the American and Japanese patent systems. The Japanese patent laws severely limit what the inventor can claim as exclusively his. Instead it encourages "cooperative behavior" by permitting others to copy more than they would be able to under American patent law.\textsuperscript{210}

This example shows that, to a degree, there is a cultural disconnect as to what is acceptable business practice. What is one man's theft is

\begin{itemize}
  \item \textsuperscript{206} Id. at 7.
  \item \textsuperscript{207} Id. at 3 n.3.
  \item \textsuperscript{208} Id.
  \item \textsuperscript{209} Lindgren & Yundell, supra note 155, at 3 n.2.
  \item \textsuperscript{210} Robert P. Merges, Battle of Lateralisms: Intellectual Property and Trade, 8 B.U. INT'L L.J. 239, 242 (1990). The Japanese patent system has been said to limit the scope of exclusive rights which can be obtained, and thus encourages minimal claiming, licensing, and other "cooperative" behaviors. There is some truth to this claim. If correct, it marks a stark contrast with the more individualistic, pioneer-oriented United States system. To that extent, the patent systems reflect deep seated cultural differences.
\end{itemize}
Vaughan

another's benign transfer of technology. It also shows, in dollar terms, of what is at stake. But there is more to the equation than mere culture.

J. What Goes Around . . .

While culture may interfere with the communication process, self-interest has a capability of penetrating a cloud of cultural static. Japan and Taiwan, longtime leaders in piracy practices, are feeling the bite of illegal copying themselves and are now becoming true believers of intellectual property rights. First case in point, Yoshida Kogyo KK, maker of YKK zippers and the world's largest manufacturer of clothing fasteners, found Korean pirates were copying their distinctive "YKK" trademark. The Japanese rightsholders lost a protracted six-year court battle against the copiers. Since that time the Japanese Ministry of Finance has organized the "Customs Information Center," a watchdog unit to monitor illicit copying and trade practices and clearinghouse for information and legal advice; all in an effort to combat intellectual property piracy.211 Also, United States' pressure has led to reforms of the JPO, including the harmonization of Japanese patent laws to those of Europe and the United States, discouraging the practice of "cluster filing," whereby Japanese corporations "surround" and immobilize a United States invention by filing scores of minor changes to the original212 and by accepting patent applications in English.213

A second case in point concerns the Taiwanese Chung Hwa Book Company. Chung Hwa actually obtained a license to sell a ten volume set of a Chinese-language version of the Encyclopedia Britannica. Before Chung Hwa could issue its first set, the Tan Ching Book Company had a lower-priced pirate copy on the market. The ensuing court action had little apparent effect on the piraters.214 Now Taiwan has the Government Information Office, whose task is to crack down on video and motion picture pirates. Says its deputy director general, Liao Ching-kao, "respecting intellectual property is not only for the benefit of foreigners . . . respect for [intellectual property rights] benefits our own creations and businesses as well."215

Although the total figures of United States' losses to Asian piracy remain high, improvement in intellectual property protection in the Far

211. Yates, supra note 26, at Bus.1.
212. Warshofsky, supra note 12, at 28.
214. Hoffman & Marcou, supra note 25, at C03.
215. Id.
East has been dramatic.⁶ Yates’ survey of the region found that, overall, United States pressure has created a grudging, yet steady improvement in the enactment and enforcement of intellectual property laws by the governments of East Asian nations were piracy was rampant.

VII. PROPERTY AND ISLAM

A. A Brief Exploration of the Islamic Religion

Approximately one-fifth to one-sixth of the world’s population in countries ranging from the Middle East, Africa, West Asia to Indonesia, live under Islam.⁷ Many of these same nations have been placed on the USTR’s Priority Watch List and Watch Lists.⁸ Generally, the practices complained about range from a foreign national government’s failure to enact or enforce antipiracy laws; to actively requiring Northern patent holders to give up their intellectual property rights (“compulsory licensing” and the like);⁹ to actual threats of physical violence against International Federation of the Phonographic Industry (IFPI) personnel.¹⁰ Is there any correlation between the high occurrence of intellectual property piracy in those nations and the culture surrounding the Islamic belief system regarding property?

It may be helpful to first orient the reader by briefly exploring a history of the Middle East and the religion of Islam itself. Secondly, to examine the Islamic concept of “property.” Third, to inquire as to whether the Islamic concepts of property differ substantially from those of the Anglo-American concept. And finally, to examine whether there are aspects of Islamic beliefs that would preclude the protection of Northern intellectual property.

---

218. USTR Announcement on Foreign Government Procurement (Title VII) and Intellectual Property Protection (Special 301), Int’l Trade Rep. (BNA) 18, at d91 (May 3, 1995).
219. Compulsory licensing refers to requirements that the producer of a product allow a local manufacturer to produce that good. General Developments, Intellectual Property: China, Turkey, India, Brazil Faulted for Intellectual Property Inaction, Int’l Trade Rep. (BNA) 7, at d3 (Feb. 15, 1995).
B. Islam in a Nutshell

The United States expressly separates church and state and the nations of Europe likewise have secular legal systems. Islamic countries have generally not split the functions of church and state. Islam is at once a religion, a political system, and a philosophy used to organize a society in accordance to a divine purpose. It is not a state religion, per se, as the existence of the state is secondary. By and large the belief of Islam revolves around the individual, and the individual’s duty is to Allah and to his fellow man. The Western concept of state sovereignty conflicts with these duties, therefore, the concept of the state is different in Moslem countries. For instance, the State is just as much subject to Shari’a (literally “the path to water”), or the Divine Islamic law, as the most humble believer and it does not enjoy any special immunity.

C. Sources of Islamic Law

Islamic law is bifurcated into Shari’a and Non-Shari’a. Shari’a, or the Divine Islamic law, is further subdivided into codified and uncodified law. Much like Western systems of law, Islamic law follows a logical hierarchy. The first and most authoritative source of law is the written word of the Koran (the Islamic holy scriptures). Next, in order of authority is the Sunna, or the words, sayings (hadith) or actions of the prophet Mohammed. Third is ijma, or consensus on a point of law by those authorized to interpret the Koran or the hadith of the Sunna. Only when there is nothing directly on point in the foregoing sources of Islamic law, may qiyas, or strict analogical reasoning be resorted to. Qiyas is not resorted to lightly. A point of departure must first be established from the Koran, Sunna or Ijma, and the extended rule applied to the facts in a narrow fashion.

221. U.S. CONST. amend. I
222. 85 ORIGIN AND DEVELOPMENT OF ISLAMIC LAW (Majid Khadduri et al. eds., reprint 1984).
224. Id., at 60.
225. Hans Wehr, A DICTIONARY OF MODERN WRITTEN ARABIC 544-45 (4th ed. 1979). See also MODERN LEGAL SYSTEMS CYCLOPEDIA 100.5 (Kenneth R. Redden ed. 1984). Islamic law, as communicated by God through his prophet, Mohammed, was not a mere collection of metaphysical abstractions, but was transmitted in a context embodying a philosophy for organizing an entire society with a divine purpose. Id.
When all other sources of law fail to give a clear resolution to a problem that has not been dealt with before, Islamic judges and scholars attempt to resolve it in the manner Mohammed would have resolved it. This method is called “ijtihad” (“the struggle for understanding”). Sometime around the fifteenth century (or before) Islamic law was “frozen.” This “freezing” of independent reasoning is commonly known as “the closing of the gate of ijtihad.” Thus, the interpretation of Islamic law is essentially locked into the world view that existed between the tenth to fifteenth centuries A.D. Since that time, taqlid, or the “submissive acceptance of an earlier interpretation,” has been more the rule than the exception. To some observers, this inflexibility, and its effect on individual property rights, has been a root cause of “tyranny and stagnation” in Islamic societies. This important aspect will be revisited in greater detail below.

Whatever the school, there is almost universal agreement that interpretation of the Koran or Hadith (Tradition) is reserved to mujtahids, or those Muslim men whose intellect and integrity have been recognized as being worthy by the religious and legal scholars who have preceded them. A layman’s attempt to use the Koran or Tradition to advocate a position, therefore, has always been met by condemnation. The second source of Islamic law is non-Shari’a, or those aspects upon which the Koran and other sources of Sharia law are silent. As long as the nonshari’a does not conflict with Shari’a law, adoption of new law is permitted.

D. Variations within Islam

Islamic law is far from monolithic. Within the first 200 years after Islam came into existence, four major schools of interpretation developed: the Hanafi (also known as the Kufa or Iraqi school), the oldest of the schools, with the greatest number of adherents worldwide, who are located for the most part in Turkey, India, Afghanistan, and Pakistan; the Maliki,

227. In this last area, the schools are in disagreement as to whether such decision-making is open to laymen, or reserved only to judges and scholars, or even completely foreclosed. David A. Westbrook, Islamic International Law and Public International Law: Separate Expressions of World Order, 33 VA. J. INT’L L. 819 n.170 (1993).
229. Id.
231. Bethell, supra note 228, at 41.
232. Behdad, supra note 230, at 207.
233. Jamar, supra note 141, at 1082.
(or Medina) located mostly in North Africa and the Magreb; the Shafii, in South India, Southeast Asia, East Africa and along the Arabian coastline; and the Hanbali, the most traditional of the schools, whose followers are found primarily in Saudi Arabia.

E. Foreign Influences on Islam - A Historical Perspective

Like most bodies of law, Islam has been influenced by its contact with other belief systems such as Roman law. Indeed, one scholar goes so far as to assert "the best part of Islamic law is but a republication of Justinian Roman law, adapted for Moslems and clothed in an Arabic dress." Other contributors have been; Judeo-Christian traditions, the civil codes of Turkish, German, Swiss, and French origin, as well as the English common law. To one familiar with the history of Islamic nations, the concept of foreign influence is an old one. Islamic nations have been the both the invader and the invaded. Thus, Islam has spread its influence to other nations and has itself been influenced by them.

The Moors held Southern Spain for 400 years until driven out by "El Cid" and the Turks were fought back from the gates of Vienna

---

234. Bassiouni et al., supra note 223, at 69-70.

Many of [the Saudi Arabia's] substantive laws and procedural aspects are similar to, and were received from, other legal systems. It is in the differences of shari'a law, the law's religious origins, its role as protector of the Islamic faith and guide to daily social life, and its historical aversion to contemporary reinterpretation, and in Western lawyers' ignorance of these differences, that misunderstandings arise.

Id. at 2.

236. SHERMAN, supra note 54, at 178.
237. Saba Habachy, Property, Right and Contract in Muslim Law, 62 COLUM. L. REV. 450, 453 n.10 (1962); see also MOHAMMEDIANISM: AN HISTORICAL SURVEY 88, 89 (2d ed. 1953).

238. HAIM GERBER, STATE, SOCIETY AND LAW IN ISLAM: OTTOMAN LAW IN COMPARATIVE PERSPECTIVE 15 (1994).

239. Bassiouni et al., supra note 223, at 62. "[I]n Saudi Arabia the applicable commercial code was borrowed from the Turkish code, which in turn was borrowed from the German commercial code, unlike most of the other Turkish codes which were borrowed from the Swiss codes." Id.

240. Jamar, supra note 141, at 1095 n.93. "[T]he Egyptian Copyright Statute is modeled on French law and is consequently very different in its particulars, and in some of its basic forms of protection, from United States law." Id.

twice. In turn, Islamic nations have themselves been invaded. Alexander the Great and his legions would reach as far east as India. The Romans would burn Carthage and rule Northern Africa and Egypt for a time. Crusaders would storm eastwards from Europe in the eleventh century and hold sway over the region for some 200 years. Napoleon, before Waterloo, would march south and introduce his Code into Egypt, Tunisia, Algeria and Morocco. The Ottoman Turks would rule the Levant until the end of World War II, only to be succeeded by the English, the French, and the Italians. With the discovery of petroleum, United States oil companies introduced American influence on the economic and social direction of the Middle East. While Shari'a ruled the daily lives of those who lived under Islam, commerce, banking, and foreign relations were increasingly governed by laws adopted from Western systems. Independence from Colonialism and the Cold War introduced Marxism and Nationalism into the region, and with it, a resurgence in the fundamentals of Islamic beliefs.

Presently, the societies within Islamic countries are undergoing a fierce debate. Islamic societies are splitting into two major camps; those who support modernization, that is to say, harmonization of their own legal systems with those of the West (particularly in relation to international relations, banking, commerce, and human rights); and those who believe that Islamic fundamentalism is the proper course to take. To date, there is little prospect of agreement between those camps.

F. An Examination of the Islamic Concept of Property.

The average American has had little direct contact with the Middle East. Westerners have heard tales of hands cut off for thievery (the practice known as hadd) and public square decapitation for religious crimes. It would not be unfair to characterize the Western image of Islam, and therefore its justice system, as pagan. This outlook was immortalized by Justice Frankfurter's dissent in Terminiello v. Chicago. Justice

242. Tom Hundley, Muslims Find New Strength to Defend Ancient Values, DET. FREE PRESS, Feb. 1, 1987, at 1A.


244. Bernard Lewis, The Roots of Muslim Rage: Why So Many Muslims Deeply Resent the West, and Why Their Bitterness Will Not be Easily Mollified, ATLANTIC, Sept. 1990, at 47.

245. Jamar, supra note 141, at 1083.

246. The Bishop and the Imam Ask, Do We Really Have to Fight?, supra note 243, at 18.

247. Bassiouni et al., supra note 223, at 55.

248. Terminiello v. Chicago, 377 U.S. 1, 17 (1949) (Frankfurter, J. dissenting).
Frankfurter likened what he felt was an unbounded and unwarranted abuse of discretion by the United States Supreme Court to Islamic judges (kadis). “This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.” While the outer trappings of legal decision making may seem very different to Western eyes, there are striking similarities in basic legal principles, with property beliefs being no exception.

The common law concept of absolute ownership, such as fee simple absolute in land, is akin to that of mulk in Islamic law. A form of ownership in perpetuity for the benefit of charity or family, waqf, is similar to the common law concept of trust.249 Free and empty lands (mawat), to which title may be acquired by three years of occupation and improvement, are similar to lands granted settlers in the days of the westward expansion.250 To extend the analogy, such a title may also be lost to abandonment in both systems. Another form of property ownership is that of miri, or state-owned land, whose possession or usufruct (tasarruf) was given for a period of time.251 This is roughly similar to Federal lands for which license to exploit is often freely given. Land also may be leased, rented, mortgaged, and pass via succession. Thus, under religious doctrine at least, ownership of property reflects Western values and concepts in many ways. A comparative analysis of land ownership is not inapt to the question of intellectual property protection. Islamic countries classify property into moveable and immoveables, similar to that of civil code countries, rather than real and personal property.252 What is sought here is whether the differences in property concepts between Western and Islamic culture is so broad as to lead to a breakdown in communication.

In the developed nations, statutes and constitutions of secular governments define and protect property rights. Under Islam, the individual’s right to property is not only recognized, it is absolute and is


251. Id. at 8.

252. Id. at 27.
considered sacred. All property belongs to Allah but is given to Man in “inheritance.”

That property belongs to Allah and is held by the individual in trusteeship is not problematic; the owner’s title is good against all takers aside from Allah himself. Trespass is a sin against Allah and a violation of Shari’a. Foreigners are protected by this edict as well. The property right, once acquired, applies equally to Muslim and non-Muslim, Arab and foreigner alike. The Hanbali jurist Ibn Taimiya taught the protection of this right was the first duty of the state. Expropriation is only allowed in two instances. First, in the execution of judgment against a debtor and second, for the purposes of public utility. Even if property is taken to satisfy a debt, such as the religious requirement of alms (zakat), the state may only take what it is owed and no more. If seized in the name of public utility, just compensation must be paid the owner.

G. Recognition of Intellectual Property Under Islam

The Koran, at II:188, admonishes the faithful against the theft of another’s property. Thieves and converters, therefore, cannot obtain good title, but become trustees of the property and are liable for any damage or loss incurred on the true owner. Islamic law also recognizes the separability of physical property and ideas. It recognizes that those concepts, fixed in their expression are worthy of a property right. More

256. Habachy, supra note 237, at 451 n.1, citing 1 Santillana, Instituzioni Di Diritto Musulmano Malichita 356 (2d ed. 1938).
258. Id. at 455 n.19.
260. Jamar, supra note 141, at 1085, discussing the protectability of concepts under Islam: Islamic law did recognize that physical property on one hand and ideas on the other are conceptually separable, at least in the context of the hadd, the amputation of the hand of a thief, under certain limited circumstances, for things of certain minimum monetary value. For example, the Hedaya provided that one does not amputate the hand of a thief for stealing a book because the thief’s intention is not to steal the book as paper, but the ideas in the book, which was not tangible property. However, the same source notes that stealing a book of accounts is “appreciable” property, and not just the paper and materials which make up the book. It must be noted that this particular rule is not Quranic, does not come from the traditions, is not based on consensus, and is not from the qiyas type of reasoning. That is, this rule comes from a commentary on the law written by a prominent jurist. (footnotes omitted) (emphasis added).
to the point, forgery of original creations has been considered to be wrong under Islam, and indeed, to be a serious crime.\textsuperscript{261} Also congruent to the Western concept of the limited monopoly needed to effect intellectual property protection, is the existence of restrictive and self-regulating Islamic trade guilds.\textsuperscript{262} The concepts of intellectual property, limited monopoly, and a prohibition against forgery, all exist under the cultural history of Islam. Thus, the differences which exist between the Western and Islamic systems would seem to argue for greater, not less, understanding of Northern intellectual property.

\noindent \textbf{H. Zakat: The Difference within the Similarities}

As we have seen, Islamic law has many influences on it from Roman and other, more recent, Western legal systems. Ideally, Islam should present no barrier to a common North/South understanding of the word "property."\textsuperscript{263} The difference within these similarities lies with the Muslim distributive justice doctrine (\textit{maslaha} or "public interest").\textsuperscript{264} Islam, as far as property rights are concerned, seems to take the middle way between the communal property rights of Confucianism and the individual natural rights of the Labor-Desert theory. Mohammed lived during a period of great disparities and, in the Koran, he enjoins the Believer to share his wealth with the less fortunate.\textsuperscript{265} Maulana Shah Ahmad Noorani, a notable Pakistani religious scholar stated, "Mohammed was the leader of the first welfare state. . . . At the time of the Prophet,

\noindent \textit{Id.}

\textsuperscript{261} \textsc{Gerber}, \textit{supra} note 238, at 99. Gerber conducted what he termed to be "legal anthropology" by searching the records of legal cases (\textit{fetva}) of the Ottoman empire between the 16th and 19th centuries. His research uncovered the crime and punishment of "coin forgery" (i.e. the minting of "debased" currency). Coin forgery was committed in large part by the State itself. \textit{Id.}

\textsuperscript{262} \textit{Id.} at 118-19.

\textsuperscript{263} \textit{Survey: Islam and the West: The Next War, They Say, ECONOMIST}, Aug. 6, 1994, at 3.

\textit{[T]hese two civilizations have more in common with each other than either has with the Confucian world or the Hindu one . . . [while there are] disagreements . . . they sit alongside a large number of shared convictions. A Muslim and a westerner both believe, more clearly than most other people, in the idea of individual responsibility. They can exchange opinions about the nature of good and evil, or \textit{property rights}, or the preservation of the environment, in something like a spirit of brotherhood. (emphasis added).}

\textit{Id.}

\textsuperscript{264} \textsc{Jamar}, \textit{supra} note 141, at 1090.

\textsuperscript{265} \textsc{Koran II:} 270-73, VIII: 73; John L. Esposito, \textit{Muhammad, Prophet of God} in \textsc{The Ways of Religion: An Introduction to the Major Traditions} 373 (1993).
everyone was provided for—even the lowest beggar.” This concept of sharing for the good of all extends to “knowledge” as well, and may give rise to a belief, under the doctrines of economic and social justice, that Northern technology, particularly when it comes to medicines and educational materials, must be shared “for the good of all.”

I. Idealism Versus Reality: No Western-Style Property Rights Under an Islamic Kleptocracy

An analysis of Islamic religious tenets asserting individual property rights are sacred is fine, but does little to explain the crushing poverty which exists side-by-side with vast amounts of oil wealth in many Islamic countries, nor does it explain the many other crucial differences that make the Middle East seem so alien to the average Westerner. It would seem at first blush there are many common roots (such as Roman law) linking the West to Islam. However, just as in the preceding look at the disparity between the Confucian ideal and reality, there remains a gulf between concepts and practices under Islam. One commentator, Tom Bethell, asserts, in reality, property rights in Islamic nations are far less secure than those in the West. And it is this insecurity, according to Bethell, that is the single most important reason for the great disparity of material wealth between the two societies. Bethell sought, but could not find a reason under Islam why the on-the-ground concept of a property right should be so different from the Western ideal. Certainly, the Koran forbids *riba*, usually interpreted to mean “usury,” but in some schools, there is the outright prohibition against interest when lending money. The Koran also condemns hoarding, *maisair* (literally means getting something too easily, getting a profit without working for it); and requires the giving of *zakat*. But, as discussed above, the Koran praises industry and gives its express blessing to the concept of private property.

Bethell thinks a leading cause of the insecurity of private property in Islamic countries is the closing of the gate of *ijtihad* and the establishment of a kleptocracy. Much as in the case of the Confucian Orient, religion was used as a means of gaining unassailable authority. Where independent reasoning is foreclosed, those in power may not be
questioned and the believers' sole recourse is prayer and endurance. Thus, a civilization that once was preeminent in the sciences and international trade was frozen in time at its fifteenth century stage of development. Whether under the oppression of Ottoman Turks, the Caliph, or under the more recent tenets of Socialism, the national government, taqlid served the ends of those in power and gave license to seize private property with impunity. Bethell's analysis clarifies why intellectual property rights are given such short shrift in Islamic countries, in spite of the contrary teachings of the Koran. Property rights of Islamic countries' own citizens do not exist in the Western sense—why should it be that foreigners are given any better rights over property than their own countrymen?

Another commentator, William E. Schmidt, of the New York Times, conducted a more temporal investigation as to the attitudes of intellectual property pirates in Islamic countries. Polling merchants in the Cairo souk, he found a variety of reasons why they sold counterfeit Western goods. Some saw themselves as Robin Hood, taking from the rich to give to the poor. Others simply asserted that it was not illegal. Still others did not see piracy as a moral or ethical issue, but as a question of the market. They were simply offering goods to the community (umma) at a price they could afford, but were unaware of the long-term consequences.\(^{272}\)

**VIII. THIRD WORLD PIRACY—NOT A CULTURAL EXCUSE**

But are the doctrines like the Islamic zakat and the Confucian free alienability of ideas, the true motivating factors behind piracy from Confucian and Islamic countries? Based on the foregoing discussion they are not. We have seen that under both Confucianism and Islam, valuable information, even if not in a fixed form of expression, may be considered to be property.

While cultural differences do exist, they are not so extreme as to cause a linguistic or cultural breakdown in communication between the North and South when each says the word "property." However, there is a serious breakdown in communications, with fault being attributable to both sides, when it comes to the issue of perceived national self-interest.

---

IX. THE ANSWER—PIRATE COUNTRIES’ TRUE MOTIVE IS PERCEIVED SELF-INTEREST

Cultural arguments notwithstanding, Third World countries, the “have-nots” of the world, are pirating out of self-interest. Statements going to their state of mind reveal this to be their true motive. For example, Third World pirates scoff at patents, saying only the West will benefit if patents are enforced. They are also unabashed in giving their reasons; Vaivudhi Thanesvorakul, managing director of the Thai pharmaceuticals pirate company Biolab stated, “Thailand’s pharmaceutical industry isn’t yet mature enough for patents . . . . We haven’t had time to copy enough.” Sometimes it is Third World government officials themselves who advocate piracy. Senator Leahy once asked a government official about his government’s refusal to take action against widespread piracy in his country and his answer was direct, “[i]t makes money.” Other government officials claim helplessness. Only recently, Chinese government officials, attempting to shut down a factory for making pirated goods, were chased out of town by locals; “[i]f it makes money, it’s untouchable, no matter what the [Chinese Communist] Party orders.”

273. Eric Wolfhard, International Trade in Intellectual Property: The Emerging GATT Regime, 49 U. TORONTO FAC. L. REV. 106, 123 (1991). See generally 21 UN CHRONICLE 11, HEADS OF STATE OR GOVERNMENT: ADDRESSES AT THE OPENING OF THE THIRTY-NINTH GENERAL ASSEMBLY OF THE UNITED NATIONS (1984), available in LEXIS, News library, Arcnws file (Third World leaders calling for the unilateral transfer of technology from the West to the South as the “common heritage of mankind” and further, asserting that rich countries of the North were responsible for financially assisting poor Third World countries). See also Murray L. Weidenbaum, The Unveiling of an Increasingly Complex Global Marketplace, CHALLENGE, Jan. 1993, at 10 (quoting the United States GAO (General Accounting Office) as asserting [that the] “[d]eveloping countries” desire for economic development is perhaps the single most important reason for the persistence of inadequate protection, particularly for foreigners.”). Id.


276. What to Watch for on the US/Asia Front: Japan, Bus. ASIA, Jan. 8, 1990, available in LEXIS, Asiapc Library, Allasi File. The Japanese have remained intransigent in protecting their market from United States and European imports while enjoying a massive trade imbalance in their favor. Business Asia reports, “[i]n Japan, talks on supercomputers, satellites and wood products have yielded nothing thus far. Citing a litany of social and historical factors—including earthquakes—Japan says it simply can’t change its ways.” Id.

A. Southern Excuses—Pirate America

One of the counter-arguments leveled at the United States by nations pirating American intellectual property is the fact that in the early days of the United States, the government offered very little, if any, protection to foreign intellectual property in order for it to achieve advancement.278 This argument would have merit but for the considerable changes in the circumstances in the hundred-odd years that have passed since then, and in the nature and importance of intellectual property as well.

In the mid-nineteenth century, the concept of intellectual property was neither well developed nor as widely accepted as it is today.279 Intellectual property piracy, particularly in the field of copyright was more the rule than the exception.280 For instance, Holland and Belgium absolutely refused to protect foreign copyrights. The French, being primary targets of such piracy, failed to draw Holland into negotiations. Only by criminalizing piracy and other economic measures did France finally succeed in protecting its literary works.281 Young America, like many of its European compatriots, had no qualms in pirating the inventions and literature of the rest of the developed world.282 Eventually, the problems associated with piracy resulted in the negotiation of a series of international patent and copyright protection regimes, such as the Paris Convention283 in 1883, which dealt with patent and trademark protection, and the Berne Convention284 in 1886, which dealt with copyright protection.

Prior to this time, the United States was not so far from the norm in international intellectual property protection. Now, intellectual property protection has existed on the international scene for well over a century.

278. Watanabe, supra note 35, at 1.
279. Brenner-Beck, supra note 107, at 84 n.15.
280. Peter Burger, The Berne Convention: Its History and its Key Role in the Future, 3 J.L. & TECH. 1, 9 (1988). Burger explains as literacy increased, so did piracy of intellectual property, particularly of books. While the United States blatantly discriminated against foreign rightsholders, piracy at the time was more the rule than the exception throughout Europe. Id.
281. Id. at 8 n.49.
Moreover, the very nature and importance of intellectual property has changed dramatically. In the eighteenth and nineteenth centuries, to steal, and then use, someone else's intellectual property required some considerable effort: book printers had to actually typeset and print the books they pirated. Those copying cotton gins had to actually make cotton gins; in essence, pirating required almost the same effort as making the original during its production phase. The scope of piracy was also much narrower in the eighteenth and early nineteenth centuries. The buying and selling of books, a primary target of pirates of that era, was mostly domestic, and not exported to compete with the original product.\textsuperscript{285}

One hundred years hence, the situation has changed considerably. Costs of research and development have soared. Expense factors such as large-scale production, international distribution and marketing, have been added to the basic cost of every item. Add to this, the cost of piracy. On the other side of the equation, the ease of mass-copying of software, music and videos, as well as the ability to instantaneously transmit data around the globe via satellite, has made costs of piracy minuscule relative to profits realized.\textsuperscript{286} Northern exports cannot make entry into foreign markets where pirated copies of their wares are offered at a fraction of their normal price.\textsuperscript{287} Pirates will even import their illegally-copied wares and sell them in direct competition with legitimate goods in Northern markets.\textsuperscript{288} Also, intellectual property simply did not occupy the same state of importance to the national interest as it does now. Finally, the events surrounding the resolution of the international piracy dispute then mirror much of the discourse taking place now; with producers demanding increased protection, while the lesser-developed nations sought free alienability of ideas.\textsuperscript{289} Thus, if Third World nations use the argument that they are justified in taking property because at one time Northern nations

\textsuperscript{285} Burger, \textit{supra} note 280, at 7. Later, when international trade boomed and rightsholders felt the bite of piracy, holders of copyrights would seek greater protection for their works. \textit{Id}.


\textsuperscript{287} \textit{Indonesia Cracks Down on Pirated Computer Software}, \textit{L.A. Times}, Aug. 2, 1989, at B5 (describing how an American computer program that sells for $422.00 in the United States sells for the equivalent of $1.50 in Jakarta, Indonesia and with such odds as these, original goods have no chance of market entry).

\textsuperscript{288} Maggie Farley, \textit{Trade Tussle is Killing Toy Makers' Fun}, \textit{L.A. Times}, Jan. 19, 1995, at 4D (describing how product spies roam the corridors of toy conventions looking for hot products to copy. "They can ask for a sample, knock it off and have it on a boat to the States in a matter of weeks," said one United States Rightsholder).

\textsuperscript{289} Burger, \textit{supra} note 280, at 12.
were also guilty of piracy, the North may rebut by pointing out the earlier situation, was finally resolved by the imposition of protective laws.

B. Piracy Endangers International Trade Accords

By doggedly pursuing what they perceive to be their own national interest, and short-circuiting the multilateral dispute resolution process, piracy by Third World nations endangers the viability of international trade accords. By incorporating piracy into “national development” policies,\(^2\) using multilateral organizations, such as the World Intellectual Property Organization (WIPO)\(^2\) to block effective remedies for Rightsholders, and by using multilateral negotiations merely as delaying tactics to stave off economic sanctions while they continue to copy Western ideas.\(^2\) Third World nations have essentially forced the hand of Developed nations into using unilateral measures.

For instance, the United States’ use of Sections 301 and 337 have proven to be effective in achieving improved intellectual property regimes for Northern ideas in nations who initially failed to respond to multilateral and bilateral talks.\(^2\) Finding their access to free transfer of technology

---

290. Stefan Kirchanski, Protection of United States Patent Rights in Developing Countries: United States Efforts To Enforce Pharmaceutical Patents in Thailand, 16 LOY. L.A. INT’L & COMP. L.J. 569, 572 (1994). Kirchansky asserts that “these countries may fear drastic price increases that would result from paying royalties on patented pharmaceutical and agricultural technology as well as a loss of control over technology that is vital to national development.” Id.


292. Hoffman & Marcou, supra note 25, at C03.

293. See generally John F. Sweeney et al., Using U.S. Courts and International Treaties to Protect Against Infringement Abroad, and at Home, 393 PLI/Pat 9 (1994). Sweeney and coauthors state that developing countries which play host to a disproportionately high amount of counterfeiting activities do not have any strong motive to voluntarily pass or enforce laws to prevent such activities. Therefore, developed countries like the United States, as well as the European Community and several of its individual members, have endeavored to persuade the developing countries to take such measures. Since the developing countries require access to the developed countries as markets for their tangible products, the developed countries such as the United States have found that the threat of foreclosing or restricting trade access for the export products of the developing countries is the most persuasive tool available for compelling those countries to pass and enforce laws which will protect the intellectual property rights of the developed country’s nationals.
cut off, Developing Nations dependent upon piracy have raised a strident protest, alleging that United States' unilateral measures are violations of GATT. Nevertheless, the United States continues to use unilateral measures despite GATT panel findings that they violate the GATT doctrine against discriminatory treatment. Indeed, the United States considers trade sanctions, such as the imposition of countervailing tariffs and suspension of GSP benefits, to merely be "retaliation in kind" and well within their rights under GATT. Piracy, they allege, distorts markets and defeats the comparative advantage of nations.

This vituperative back-and-forth is ultimately destructive to all parties concerned. The GATT structure is jeopardized when the United States, its major proponent, is seen by others as having to ignore GATT Panel findings and to strike out on its own in order to protect its interests. Also, the very end that the pirating nations hope to achieve, that of economic and technological development, will be defeated if the developed nations find that they can only protect themselves by denying Third World nations' access to their markets, by refusing to export needed technology to them, and by refusing to invest in them. Yet, this is the very direction continued piracy is taking the world's nations.


295. Id. at 134. See also GATT: EC, Other Nations Said Set To Attack United States Over Trade Sanctions at GATT Meeting, 6 Int'l Trade Rep. (BNA) 171 (Feb. 8, 1989); GATT Council Finds That Section 337 Discriminates Against Foreign Companies, 39 Pat. Trademark & Copyright J. (BNA) No. 955, at 30 (Nov. 9, 1989).


297. Wolfhard, supra note 273, at 130.


C. Self-Destructive Nature of Piracy

The underlying premise of intellectual property piracy is that it is a fast and cheap method for a lesser developed or newly industrialized country to join the ranks of developed nations. Commentators have pointed to Japan's apparent success, through institutionalized piracy as a "model for emulation." These commentators ignore Northern, particularly American, bitterness engendered by these and other Japanese trade practices which have persevered despite long-standing United States protests. They also ignore the fact such practices may touch off trade wars and endanger the GATT, as well as other international business accords.

Aside from simply incurring anger from developed nations and drawing trade sanctions upon themselves, piracy is self-destructive to developing nations in other ways. For instance, for the individual Third World consumer, a pirated copy may not even be less expensive than the original. Piraters have copied originals, charged the same price and simply pocketed the profit. Nor, like their namesakes, do piraters have the best interests of the customers in mind. Copies can be dangerous to the user, such as using cheaper non-flame-retardant material for children's


302. Chimerine & Fallows, supra note 36, at A15. Chimerine, chief economist at the Economic Strategy Institute, discussing unfair Japanese trade practices. Even though Europeans also feel the bite of "managed trade" or Japanese markets closed to their products, they are less vociferous in their protests, as they themselves are highly protective of their own markets. Id.

303. Helene Cooper, Kodak Case Against Japan is Stronger than that of Auto Firms, Analysts Say, WALL ST. J., Jun. 9, 1995, at B4. Describing how Fuji camera films has systematically worked to smother United States Kodak's access to the Japanese market through monopolistic control by five tokuyakuten (exclusive distributorships); Chimerine & Fallows, supra note 36, at A15.

[If] Japanese markets were open to the same degree of the United States or even Europe, it would import $200 billion more in goods than it does now; at least $50 billion of which would come from the United States. Closed cartel-like business relationships, keiretsu, serve as hidden, non-tariff barriers to entry of United States goods.

Id.

304. Cooper, supra note 303, at B4. The United States has threatened Japan with $5.9 billion in punitive tariffs unless it opens its market to American automobiles and car parts.

305. Peters, supra note 38, at 589.
pajamas. Other pirate operations have been exposed as to be just another money-making proposition for the Mafia. 306

On a larger, macroeconomic scale, by not protecting intellectual property, Third World nations stunt the growth of domestic innovative industries since there is no incentive to create new knowledge or ideas. 307 This in turn has led to a "brain drain," where the best and brightest from the Third World feel compelled to leave their home countries for the more remunerative systems in developed nations. 308 Another destructive aspect is the downward spiral of quality, since competing copiers, after having forced original products out of the market, try to undercut one another. 309 Moreover, those producing intellectual property, such as pharmaceuticals or magnetically-reproducible media such as cassettes, computer software, and videotapes, will refuse to allow their products to be exported to those countries where they know their products will be given no protection by local intellectual property laws. 310 Piracy also has had a serious chilling effect on direct foreign investment and the startups of new production facilities. 311 Developed nation producers want to move production offshore. They look longingly to the sheer massive size of the potential consumer markets in developing nations, yet hold back as they have been burned by their earlier ventures in those markets. 312 In this sense, Third World Nations are the authors of their own misery.

X. CONCLUSION

The data would tend to show that the Southern nations are acting in their own perceived economic self-interest and in what they believe is an expedient, even necessary, course of action, rather than acting under a good-faith misunderstanding of the issue at hand. If the North is to

306. Williams, supra note 22, at 27.
308. Ronald Bailey, Brain Drain, FORBES, Nov. 27, 1989, at 261; Bob Johnstone, Diverting the Brain Drain, FAR E. ECON. REV., Jan. 28, 1988, at 70; but see ROBERT SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 156, 174 (1990) (describing a reverse "brain drain" back to South Korea after the enactment of new intellectual property protection laws there).
310. Id. at 94 (citing Gunda Schumann, Economic Development and Intellectual Property Protection in Southeast Asia, in INTELLECTUAL PROPERTY RIGHTS IN SCIENCE, TECHNOLOGY, AND ECONOMIC PERFORMANCE 173 (F. Rushing & C. Ganz Brown eds., 1990). Seventy-five percent of corporations in a 1987 survey stated lack of intellectual property protection was a strong disincentive to license technology to Developing Countries. Id.
311. Id. at 94.
312. Id. at 94.
staunch the hemorrhaging trade imbalances and lost jobs brought about by
the failure of the LDC/NICs to enforce IP measures in their own countries,
it must raise the stakes to make it the self-interest of those violator-nations
to suppress IP piracy.

The Northern nations which produce intellectual property are
steadily moving production offshore where LDC's find their competitive
advantage in providing the labor-intensive aspects of industry. The North
is becoming increasingly dependent upon the LDC's for raw materials,
fossil fuels, and production and must be able to retain its right in the
property in the creative arts and sciences. These are, in sum, our own
competitive advantage. A caution however; Smoot-Hawley-type trade
protectionism generally harms the economic well-being of all parties
concerned. It lowers political stability and enhances the likelihood of
hostilities between nations by foreclosing alternatives to armed conflict.

Most disturbing, however, is the entire backdrop against which the
North-South conflict is being played. The conflict, if it ever is to be
peacefully resolved, must be analyzed from a wider perspective, "a
world-view, a larger frame of reference."313 The South is poor and getting
poorer. Third World population pressures314 are taxing the environment
and seriously threaten the stability of Southern hemispheric
governments.315 First World Nations themselves are feeling the osmotic
pressure of Third World populations pushing into their own countries.316

314. Robert McNamara, The Population Problem, in EARTH AND US 50 (Mostafa Kamal Tolba & Asit K. Biswas eds. 1991). McNamara cites disturbing figures: forty-two countries have population growth rates over three percent per year, and twenty-four of these are in Africa, by far the poorest continent. Africa's population will have soared from 220 million in 1950 to a
projected 880 million by the end of the century. By contrast, the population of economically advanced nations grew by an average of 0.74% from 1970 to 1985. Id. See also Samuel Huntington, The Clash of Civilizations?, 72 FOREIGN AFFAIRS 22 (1993); Matthew Connelly & Paul Kennedy, Must it be the Rest Against the West? Immigration and Relations Between Western and Developing Nations, 274 THE ATLANTIC MONTHLY 61 (1994); Thomas Fraser Homer-Dixon, On the Threshold: Environmental Changes as Causes of Acute Conflict, J. INT'L SECURITY (1991); Ross Laver, Special Report: Looking for Trouble: Tad Homer-Dixon's Prophecies for a Crowded Planet Have Created a Stir in Washington, MACLEAN'S, Sept. 5, 1994, at 18, available in Westlaw, Magazine database.
Add to this mix, the arsenal-for-sale of the erstwhile Soviet Union, to include weapons of mass destruction,\textsuperscript{317} as well as the unemployed scientists who made them, the military officers who watched over them, and the idle hands of the largest terror-and-espionage services history has ever seen, that is, the KGB and GRU.\textsuperscript{318} Add to these, the rising Islamic fundamentalism in the Middle East, and to this, the stirring giant of China, who has shown itself a willing supplier of weapons refined with the new-found technology provided by Western education.\textsuperscript{319} Now pour in a widespread belief system based on anger and resentment against First World Nations that is often used by NIC/LDC elite for their own purposes,\textsuperscript{320} and the mix is volatile indeed.

In sum, the Developing Nations are justified in their own minds when they take AIC intellectual property, but not for the reason that they give—the disingenuous argument that intellectual property is the "common heritage" of mankind. Even a cursory study of the major cultures of the world show that each includes the very human understanding of the feeling that "this is mine." They take Western intellectual property out of necessity. It is in the long-term interest of the developed nations that they get Western technology, since it serves to lend stability to the South (as


\textsuperscript{320} Lewis, \textit{supra} note 244, at 47. \textit{See also} RICHARD H. SCHULTZ & ROY GODSON, \textit{DEZINFORMATSIA: ACTIVE MEASURES IN SOVIET STRATEGY} (1984) (describing how the world press, politicians and academics were manipulated by the Soviet secret services (KGB and the GRU) to spread inflammatory untruths). Some examples were that (1) AIDS was a CIA plot to destroy the Third World using biological warfare, (2) American were abducting Third World babies to use as organ donors for Western babies, and (3) the United States, by introducing neutron bombs and cruise missiles into Western Europe to counterbalance the overwhelming preponderance of tanks and their own introduction of mid-range SS-20's, was pushing the West into a nuclear war which would be fought exclusively on West European soil. \textit{Id.}
Thus the world). This was, after all, the underlying logic and intent of establishing the Bretton Woods institutions in the first place.

There is a quid pro quo however. It is imperative that the Southern Nations gain control over and drastically reduce their skyrocketing population rates. Economic and political stability will be impossible until this is done. It will not be enough simply to find new ways of feeding, housing, educating, and employing an ever-growing population with new technology. The introduction of AIC medicines and food aid into Third World countries has had the salutary effect of reducing infant and child deaths, however this was not sufficiently balanced by increased use of birth control. Now, the effects are being felt in the form of the desertification in Africa, and of the loss of the Amazonian Rain Forest, where a great proportion of the world’s oxygen is produced and from which global weather patterns are affected, and by the tides of overflowing Third World humanity pressing into Europe and America.

Nor is there any reason that First World Nations be expected to part with what has become their competitive advantage for free. The Third World is sitting upon a mineral, and in the case of the Amazonian Rain Forest—a biological wealth that the First World very much needs. What is needed is an exercise of good-faith and common-sense bargaining. However, given human nature, perhaps this is asking too much from either side. Third World hosts to joint extractive or manufacturing enterprise must discard the Marxist revanchist policies that they embraced during the “Wars of Liberation” in the fifties and sixties, and which serve now only to scare off reasonable investors and punish foolish ones. Instead, they should allow for repatriation of profits and not unduly interfere with management’s control over the daily business operations of the enterprise.

Joint venturers from developed nations, in their turn, should actually benefit the host country. Aside from just providing jobs, they must not drive such a hard bargain by whipsawing competing Third World countries, that in the “race to the bottom,” no benefits have accrued to the host country at the end of the tax holiday. Nor should production or extraction operations in a Third World nation be a free license to pollute. A balanced “win-win” approach is needed, whereby creative Northern intellectual property is protected, and the means and opportunity are given Lesser Developed Countries to achieve their own advancement.

In conclusion, the data shows that cultural barriers to communication do exist, but they are not insuperable. And, although power politics may be able to force a solution today, an agreed-to settlement that recognizes and deals with the barriers to meaningful communication would result in a more peaceful and enduring coexistence tomorrow.
THE SPANISH PRODUCTS LIABILITY ACT OF 1994

Michael Ansaldi*

I. INTRODUCTION ........................................................................................................ 372

II. PRODUCTS LIABILITY UNDER THE SPANISH CIVIL
    CODE OF 1889 ........................................................................................................ 376
    A. Contract-based Products Liability ................................................................. 378
    B. Products Liability in Tort ............................................................................... 381

III. GENERAL LAW FOR THE DEFENSE OF
     CONSUMERS AND USERS ............................................................................ 383

IV. THE EEC PRODUCTS LIABILITY DIRECTIVE ................................................. 390
    A. Background ...................................................................................................... 390
    B. Summary of Provisions .................................................................................. 392
    C. Implementation in Member States’ National Law ............................................. 395

V. THE SPANISH PRODUCTS LIABILITY ACT OF 1994 ........................................... 396
    A. Legislative History .......................................................................................... 396
    B. Summary of Key Provisions of SPLA ............................................................ 398

VI. THE SPLA COMPARED ....................................................................................... 402
    A. The SPLA and Post-Directive European
       Products Liability Law .................................................................................... 402
       1. The “Three” Options ................................................................................. 405
       2. Nonuniform Implementation ..................................................................... 407
       3. Subsistence of Background Law ................................................................. 409
    B. The SPLA and the GAC .................................................................................. 413
       1. Improvements in the Consumer’s
          Position Under the SPLA ........................................................................ 414
       2. Setbacks for Consumers Under the SPLA ................................................ 417
       3. Partial Continuance of the GAC ................................................................. 419
       4. Summary ...................................................................................................... 419

* Associate Professor of Law, Boston College. A.B., Columbia, 1975; B.A. (Honors),
express my thanks to my colleague Hugh Ault for the help he has given me in writing this article.
He bears no responsibility for any errors herein. I also wish to thank Raejean Battin, Karen
Bruntrager, and Frans Wethly for their most helpful research assistance. Copyright 1996, Michael
Ansaldi.
I. INTRODUCTION

The Spanish Constitution of 1978, a milestone in Spain's transition from the Franco era to the ranks of Western European democracies, has been described, in at least one respect, as "absolutely innovative on the panorama of European constitutions." It is "the first constitution worldwide to raise consumer protection to the status of a principle of general law." Chapters Three and Four of the Spanish Constitution provide in relevant part:

Art. 51.1: The public authorities shall guarantee the protection [defensa] of consumers and users, protecting the safety, health and legitimate economic interests of same by means of effective procedures.

Art. 51.2: The public authorities shall promote the informing and educating of consumers and users, foster their organizations and attend to them on matters which may relate to the foregoing, upon the terms established by law.

Art. 51.3: Within the framework laid down in the foregoing paragraphs, the law shall regulate domestic

---


2. Ignacio Díaz de Lezcano Sevillano, La Responsabilidad del Productor: Referencia a la Directiva Comunitaria y a las Leyes y Proyectos de Actuación, 43 ANUARIO DE DERECHO CIVIL 737, 742 (1990) (translation in the text by the Author, as are all other translations herein, except as otherwise noted).

3. Paloma Pemán Domecq, Products Liability in Spain, 15 COMP. L.Y.B. INT'L BUS. 137 (1993). Díaz de Lezcano Sevillano, while acknowledging that the Portuguese Constitution of two years earlier had also contained a specific reference to consumers, indicates that the concrete protections it afforded were rather more limited than those in the Spanish Constitution. Díaz, supra note 2 (quoting Portuguese Constitution of 1976). In its second revised form, promulgated in 1989, the Portuguese Constitution now contains a new Article 60 with more extensive guarantees than before. See Portugal, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, supra note 1, at 7, 51, 170.
commerce and the system [régimen] for authorizing commercial products.

Art. 53.3: A recognition, respect and protection of the principles recognized in [the above-cited provisions et al.] shall inform positive law, the practice of the courts and the actions of public authorities.4

Adopted against a backdrop of increased sensitivity in Western Europe to matters of consumer protection generally and the issue of products liability in particular,5 it should be noted these provisions are neither merely hortatory, nor self-executing. Rather, they affirmatively direct public authorities, positive law, and the courts to see to their further implementation.

Both before and after the 1978 Constitution, the Spanish legal system was naturally acquainted with the matter of liability from harmful products.6 Until the mid-1980's, matters of civil products liability were addressed within the statutory framework provided by rather general provisions of the Spanish Civil Code, and supplemented by judicial improvisation.7 This regime, however, was significantly altered in 1984 with the passage, in partial fulfillment of the constitutional mandate indicated above, of a wide-ranging consumer protection act, the “General Law for the Defense of Consumers and Users” (GAC).8 Chapter VIII of the GAC contained a complex set of provisions dealing with liability for harm arising from the consumption or use of goods, products and services.9

4. CONSTITUCION arts. 51.1-3 & 53.3 (Spain) [hereinafter C.E.]. Article 51 was inspired or influenced by the Resolution of the Council of the European Economic Community of April 14, 1975; a preliminary program for a consumer protection and information policy. Díaz, supra note 2, at 742; Ángel Rojo, La Responsabilidad Civil del Fabricante en el Derecho Español y en la Directiva 85/374/CEE, in 3 LIBER AMICORUM: COLECCIÓN DE ESTUDIOS JURÍDICOS EN HOMENAJE AL PROF. DR. D. JOSÉ PÉREZ MONTERO 1253, 1256 (1988); compare C.E. art. 51.1-2 with, e.g., 1975 O.J. (C 92) 2 (“Consumer interests may be summed up by a statement of five basic rights: (a) the right to protection of health and safety, (b) the right to protection of economic interests, (c) the right of redress, (d) the right to information and education, [and] (e) the right of representation (the right to be heard”).

5. See infra and text accompanying notes 90-97.

6. Rojo, supra note 4, at 1254.

7. For a discussion of the treatment of products liability matters arising before the effective date of the 1984 legislation alluded to in the text that follows, see infra, text accompanying notes 20-66.

8. For a discussion of the background of this law, see infra text accompanying notes 67 - 73. The acronym GAC, which one encounters in some English language discussions, presumably stands for the shorthand designation “General Act for Consumers.”

9. For a discussion of the operation of the much-criticized, but still pathbreaking chapter VIII of the GAC, see infra text accompanying notes 82-89.
Less than a year after this new consumer protection law was enacted, the Kingdom of Spain successfully concluded negotiations to join the European Economic Community, signing a Treaty of Accession on June 12, 1985.\textsuperscript{10} The very next month the Council of the European Communities, seeking to “approximate” Member States’ laws on liability for defective products, issued a long-awaited Products Liability Directive with instructions that Member States implement its provisions in their domestic law.\textsuperscript{11} This Directive clearly posed a problem for the not quite one year old GAC, because “Spanish lawmakers, in writing the [1984] Act, had the Directive project in mind but did not follow it.”\textsuperscript{12} Hence, Spanish lawmakers were faced with a need to revisit the matter of products liability in order to fulfill their obligations to the EEC, which included a requirement that the Directive be implemented in Spanish national law by July 30, 1988.\textsuperscript{13}

\textsuperscript{10} For Spain’s accession, see Jason S. Abrams, \textit{European Economic Community: Entry of Spain and Portugal—Instruments Concerning the Accession of the Kingdom of Spain and the Portuguese Republic to the European Communities}, 27 \textit{HARV. INT’L L.J.} 250 (1986). Under the 1992 Treaty on European Union, known as the Maastricht Agreement, the European Economic Community (EEC) was renamed the European Community (EC), and a new entity was created, the European Union . . . . [T]he European Union (EU) . . . comprises three legal persons, the EC, the ECSC [European Coal and Steel Community] and Euratom [European Atomic Energy Community] . . . . [I]n law there are still three Communities, though there is only one set of institutions . . . . [T]he European Union may be regarded as the legal and political concept which gives expression to the underlying unity.

T.C. Hartley, \textit{The Foundations of European Community Law} 8-9 (3d ed. 1994). Hence, the practice followed herein is to refer to the “European Economic Community” as such during the period for which that designation is technically accurate, and thereafter to refer either to the “European Community” or “European Union.”

\textsuperscript{11} Council Directive 85/374 of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 1985 O.J. (L 210) 29 [hereinafter Products Liability Directive]. Article 19 of the Directive provided that “Member States shall bring into force, not later than three years from the notification of this Directive, the laws, regulations and administrative provisions necessary to comply with this Directive.” Id. at 33. For a discussion of the background and substantive terms of this EEC legislation, see \textit{infra} text accompanying notes 90-118.


\textsuperscript{13} Article 19 of the Directive provided Member States had three years from the Directive’s notification date to implement its provisions. For the relevant language of Article 19, see Directive, \textit{supra} note 11. Member States were notified on July 30, 1985. \textit{Id}. at 33 n.1.
Like most other EEC Member States, Spain did not comply with the Directive’s mandate within the required time. Among the reasons cited for this delay were policy disagreements within the Spanish Government and general elections, the simple fact that Spain had previously opted to deal with products liability by statute, which distinguishes it from most other Member States whose national law questions of products liability were effectively left to more easily superseded case law. Finally, however, in 1994, the Spanish Parliament passed the “Law 22/1994 of July 6 on civil liability for damages caused by defective products (SPLA),” noting in the preamble that its object was “the adaptation of Spanish law to European Community Directive 85/374/EEC of July 25, 1985 concerning civil liability for damages caused by defective products.”

Part Two of this article describes the “original” state of Spanish product’s liability law under the most frequently invoked general provisions of the Civil Code and the cases decided thereunder. Part Three will consider the significant changes wrought to the Spanish legal regime by the passage of the GAC in 1984. An understanding of both these states of the law is needed for a complete understanding of current Spanish law, inasmuch as portions of the legal status quo ante survive into the present. Part Four moves from Spain to Europe, and sketches the background history and the key substantive provisions of the 1985 EEC Products Liability Directive. Returning to Spain, Part Five provides an analysis of the 1994 SPLA, the legislation to implement the EC Directive. Part Six concludes with a number of reflections and comparative observations.

14. See discussion infra text accompanying notes 119-126.
15. Mullerat & Cortes, supra note 12, at 361 (citing disagreement between Ministry of Justice and Ministry of Health and Consumption); Abrams, supra note 10, at 277; see also infra text accompanying notes 131-36.
16. Pemán Domecq, supra note 3, at 159; see also infra text accompanying note 130.
17. Rojo, supra note 4, at 1254. Rojo notes the partial exception of the Federal Republic of Germany’s treatment of Pharmaceutical Products through a 1976 statute. Id.
19. Id.
II. PRODUCTS LIABILITY UNDER THE SPANISH CIVIL CODE OF 1889

Commentators generally agree that the civil law of products liability in Spain has historically not been an especially highly developed area of the law. Case law has been sparse, largely owing to the standard practice of concurrent adjudication of both the criminal and civil liabilities to which the defective products may have given rise. Other factors that have been

20. In principle, the label "products liability" can certainly be extended to include such situations as claims for lost profits by one business against another, arising from some product malfunction. Apart from the occasional sideward glance, however, this Article will focus chiefly on what has come to be regarded as the core meaning of the term, as well as the sense in which it is used in both the Directive and the SPLA: physical injuries to natural persons, along with any concomitant material damage to their property and non-material damage (in the nature of emotional distress or pain and suffering) to other protected interests of natural persons. Also, occasionally the term used will be Product Liability. Nothing significant is meant by such alternation.

21. Casals, supra note 12 (identifying "main reason . . . why the law of torts in general, and the law of product liability in particular, have not expanded sufficiently in Spain"); Mullerat & Cortes, supra note 12, at 339 (describing product liability law as "not properly developed"); GERD BRÜGGERMANN, DIE PRODUKTHAFTUNG IM SPANISCHEN RECHT 59 (1988) (noting the "initially rather hesitant" treatment of product liability in Spanish literature and decisions); cf. Santiago Cavanillas Múgica, Práctica de la Responsabilidad Civil en la Defensa de Consumidores y Usuarios, 45 REVISTA GENERAL DE DERECHO 4463 (1989) (describing Spanish Consumer Law generally as "a novelty"); Rojo, supra note 4, at 1254 (describing product liability as "originally an imported topic" from European and American law). But cf. SANTIAGO CAVANILLAS MÚGICA, LA TRANSFORMACIÓN DE LA RESPONSABILIDAD CIVIL EN LA JURISPRUDENCIA 17 (1987) (opining that a line of Spanish strict-liability decisions was "the equal of any of those existing in European comparative law").

22. See Casals, supra note 12 (reporting that over the last 50 years the Spanish Supreme Court averaged about one product liability decision a year, but with a "substantial increase in the late 80s"); see also Mullerat & Cortes, supra note 12, at 350 ("Decisions on product liability have been very scarce. . . . in spite of the efforts of the courts, there has been no decisive case law for product liability in Spain as in some other countries like the United States of America or the German Federal Republic."); Rojo, supra note 4, at 1254 (calling Spanish Supreme Court decisions "scarce"); BRÜGGERMANN, supra note 21, at 61 (calling the number of Spanish product liability decisions "even today still exceedingly small, particularly as regards the typical form they take, where no immediate contractual relationship between manufacturer and end-purchaser exists"); id. at 62 (referring to Spanish cases developing product liability as "quite paltry, right up to the present day").

23. Díaz de Lezcano Sevillano notes that under the combined effect of certain provisions of the Civil and Criminal Codes, civil obligations arising from delicts or faults are to be governed by the provisions of the Criminal Code, which establishes that every person criminally liable is also civilly liable. Consequently, criminal courts are obligated to decide on matters of civil liability, unless the injured party expresses his wish either to waive such responsibility or reserve it for subsequent exercise before the civil courts.

Díaz, supra note 2, at 751-52; see generally JAIME SANTOS BRIZ, LA RESPONSABILIDAD CIVIL: DERECHO SUSTANTIVO Y DERECHO PENAL 903-27 (6th ed. 1991) (discussing civil and criminal product liability actions). Casals further describes this situation as follows:
identified as contributing to the relatively low volume of products liability actions on the civil side are: (1) Spain's long-standing "paternalistic" welfare system, which effectively relegates tort law to the status of a "junior partner" as a source of compensation for personal injuries; (2) the impermissibility of contingent-fee arrangements as a means of compensating plaintiffs' attorneys; (3) the inhospitality of Spanish law to class actions; (4) the absence of presumptively proplaintiff juries in civil actions; (5) the lack of a specialized products liability bar; and (6) the minimal attention given to tort law, in general, and to products liability, in particular, in Spanish legal education. Other commentators have noted: (1) the general caution of Spanish courts, especially courts of first instance, in allowing claims for which no unequivocal statutory basis exists; (2) difficulties of procedure and proof; and (3) "still too little 'social sensitivity' in the Spanish legal order [concerning the need] for manufacturers' products liability independent of contractual relations." The argument that products liability is assigned a lower value in predominantly agricultural Spain than in more highly industrialized countries may once have been truer than it is today.

In practice, where a criminal action is available, plaintiffs prefer to sue in the criminal jurisdiction. The reason is this jurisdiction is regularly more expeditious and cheaper; the public prosecutor has the duty to follow both actions in favor of the victim, and take all the steps necessary to investigate all the relevant facts. Furthermore, his activity is charged to the taxpayer and, in most cases, the victim doesn't even need to pay for a private prosecutor. And finally, if the offender is found guilty, the victim will not have to start a new process in order to recover damages; if, on the contrary, the offender is not found guilty, this decision does not preclude a civil action, and the victim can still claim for damages before the civil jurisdiction.

Casals, supra note 12; see also Mullerat & Cortes, supra note 12, at 350 (noting, inter alia, that more evidence may be available to prove criminal liability than civil). On the generally restricted discovery rights of civil litigants in Civil Law countries, see generally R. SCHLESINGER ET AL., COMPARATIVE LAW 426-28 (5th ed. 1988). Hence, because proven criminal liability for delict or fault necessarily includes civil liability, there would be no need for a court's opinion to focus on the particulars of civil liability as such. Conversely, should a court fail to find criminal liability (or should the public prosecutor have declined to bring the criminal suit in the first place), that might tend to indicate that the underlying facts on which the plaintiff would be relying in a civil action were somewhat weak, thus diminishing the likelihood of plaintiff's prevailing therein. Against the backdrop of two standard procedural rules which Spain shares with many if not most Civil Law jurisdictions—the assessment of the prevailing party's attorney's fees against the losing party, and the illegality of contingent fee arrangements as a means of paying one's own attorney's fees—the perception of a diminished chance of success would operate as a significant disincentive to the bringing of many cases that might otherwise have provided an opportunity for the elaboration of a purely "civil" product liability case law.

25. BRÜGEMANN, supra note 21, at 62 (citing Ángel Rojo y Fernández Rio).
26. Id. (citing several Spanish commentators).
27. Id. at 62-63 (quoting Rojo y Fernández Rio and citing Arrillaga).
28. Id. at 63 (citing Arrillaga).
For such civil actions as did arise, the Spanish Civil Code of 1889 supplied a number of somewhat broadly worded principles of contract and tort liability which were generally considered to govern their disposition. To the extent certain aspects of this earlier Spanish Products Liability law continue to survive, even now that the SPLA has gone into effect, it is still worthwhile to consider the operation of these sections of the Civil Code. The relevant contract principles will be discussed first.

A. Contract-based Products Liability

Because Spanish civil law embraces the principle of privity of contract, the contractual avenue of recovery for harms deriving from products is only available when a contract relationship exists between a products liability plaintiff and the defendant. What this has meant in practice is that contractual liability is generally asserted when a sales contract had previously been entered into between the injured party as purchaser and the manufacturer as seller of a defective product. However, nonmanufacturing retailers are also potential defendants under a contract theory.

There are two distinct forms in which a contract theory may be advanced: one cause of action arises under the general law of obligations, the other under the law of sales. Article 1101 of the Spanish Civil Code, located in Book Four, Title One entitled “On Obligations,” provides “those who, in the performance of their obligations, commit fraud, negligence or delay, and those who in any manner contravene the tenor of the aforesaid

[29. What an Anglo-American lawyer would call tort liability would probably be referred to by a Spanish lawyer as “extracontractual” or possibly “Aquilian” liability. See, e.g., Gabriel García Cantero, Exgesis Comparativa del Artículo 1.902 del Código Civil, in 1 CENTENARIO DEL CÓDIGO CIVIL 875 (1990). The term “Aquilian” derives from the Lex Aquilia, a Roman law “of fundamental importance in the law of delict,” probably dating back to the late third century B.C. See generally BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 16, 218-22 (1962). In the text, however, I shall employ the term tort, more familiar to Anglo-American readers.

30. This situation was not substantially different from those prevailing in other European countries. Prior to the mid-1980’s, several European states did not have any product liability legislation. This included the United Kingdom and Ireland whose common law jurisdictions did not include any concept for product liability. If a person was injured in the United Kingdom because of a defect in a product, they had to bring the claim either under the law of contract or the law of negligence. Dai Davis, Product Liability in the European Community: A Practical and Economic Perspective, 15 COMP. L.Y.B. INT’L BUS. 117 (1993).

31. “Contracts only produce an effect as between the parties who make them . . . .” Código Civil art. 1257 (Spain) [hereinafter C. Civ.]. This principle is usually referred to in Spanish law as the “relativity” of contracts (relatividad de los contratos).

32. The class of potential plaintiffs under a contract theory includes, but is not limited to, consumers.

33. Díaz, supra note 2, at 754.
In meeting the required proof of the defendant-seller's negligence, which would typically be at issue, the Article 1101 products liability plaintiff may benefit from a somewhat relaxed burden of proof.35

By contrast, article 1484, located in Book Four, Title Four, entitled “On Contracts of Purchase and Sale,” provides:

The seller shall be obligated to make indemnity for any hidden defects the item sold may have had, if they make it improper for its intended use or so diminish its use that the buyer, had he known them, would not have acquired it or would have paid less for it; but shall not be liable for manifest defects or those which were visible, nor for those which are not [manifest or visible] if the buyer is an expert who, by reason of office or profession, ought easily to have recognized them.36

Hence, under Spanish Sales law, sellers of goods are responsible for latent product defects, both known and unknown,37 with no requirement to show any kind of fault. However, because of a variety of disadvantages38

34. C. Civ. art. 1101.
35. BRÜGGEMANN, supra note 21, at 134.
36. C.Civ. art. 1484.
37. Sellers' liability for unknown latent defects is, however, subject to agreement otherwise. The seller is liable to the buyer for indemnifying hidden vices or defects in the thing sold, even though he is unaware of them. This provision shall not apply when there has been an agreement to the contrary, and the seller was unaware of the hidden vices or defects of what has been sold.
38. The lack of a need to prove fraud might, at first, seem to make the sales cause of action more attractive however relaxed the burden of proof under the “Obligations” theory. Furthermore, article 1485’s explicit imposition of liability for “unknown” defects would seem, prima facie, better suited to address questions of liability for harms resulting from so-called “development risks,” i.e., from product defects which the state of science and technology at the time the product was placed in circulation did not permit to be realized. See infra text accompanying note 42 (discussing development risks). Any seeming advantages, however, are more than offset by other aspects of sales theory. Under sales law, the general remedy available to a plaintiff-buyer of a product with a latent defect is merely a choice between rescission (with refund and expenses) and price reduction. C.Civ. art. 1486. It is only if the seller has failed to inform the buyer of those latent defects which are actually or constructively known to him that the seller becomes liable for damages, including those for personal injury. Id. arts. 1486-88; Mullerat & Cortes, supra note 12, at 343-44; Diaz, supra note 2, at 754-55. This formulation would mean that his responsibility for injuries from
associated with the Sales approach, products liability actions sounding in contract were generally more likely to have been brought under the general “obligations” theory.

The damages to which a successful products liability plaintiff under an obligations theory is entitled are defined as “not merely the value of the loss suffered, but also that of the gain which the [plaintiff] has failed to obtain . . . .”39 However, this generous measure of damages is subject to a very important caveat: to be compensable, the injuries sustained have to have been foreseeable at the time the obligation arose.40 Only in cases of the obligor’s fraud does the obligee become entitled to “all [damages] which are known to derive from breach of the obligation.”41 Hence, this requirement of foreseeability would exclude liability for injuries resulting from so-called “development risks,” i.e., defects that, because of the state of science or technology existing at the time of the contract, were necessarily unknown to the seller.42

As perhaps might be expected, because the law of obligations imposes liability only for injuries which were the “necessary consequence” of breach or “derive from” the breach,43 a defendant under a contract theory of development risks, unknowable ex hypothesi, would still remain minimal. The major disadvantage of the sales theory, however, lies in its exceptionally short statute of limitations: six months from delivery of the thing sold. C.CIV. art. 1490. Fortunately for plaintiffs, however, case law of the Tribunal Supremo has long permitted plaintiffs to elect the Obligations theory where both were applicable. BRÜGGEMANN, supra note 21, at 120-23 (discussing a 1911 case); Díaz, supra note 2, at 755. Furthermore, there is apparently no pro-plaintiff adjustment of the burden of proof in sales law. See BRÜGGEMANN, supra note 21, at 133-34. Additionally, the measure of damages is generally agreed to be a “reliance” measure, rather than obligation law’s “expectancy” measure, a factor certainly of significance to prospective business plaintiffs. Id. at 111-12, 129-30.

39. C.CIV. art. 1486. BRÜGGEMANN notes that this includes all quantifiable injuries as well as damages for accompanying non-material harms, such as loss of consortium. Only purely non-material injuries would appear to be excluded. BRÜGGEMANN, supra note 21, at 129; see also Mullerat & Cortes, supra note 12, at 344 (“Damages for personal injury are generally calculated on the basis of a particular amount per day the victim has not been able to work, in addition to any [pain and suffering] and physical damage or costs incurred (e.g., medical expenses, etc.)”).

40. “Apart from cases expressly mentioned by law, and those where the obligation so states, no one shall be liable for those occurrences which could not have been foreseen or which, being foreseen, were inevitable.” C.CIV. art. 1105. “The damages and injuries for which the good-faith obligor is liable are those foreseen or which could have been foreseen at the time the obligation arose and which are a necessary consequence of its breach.” Id. art. 1107, para. 1.

41. C.CIV. art. 1107, para. 2.

42. See BRÜGGEMANN, supra note 21, at 91. For definitions of “development risks,” see, e.g., SPLA art. 6.1(e), infra; Díaz; Sevillano, supra note 2, at 763; Anita Bernstein, L’Harmonie Dissonante: Strict Products Liability Attempted in the European Community, 31 VA. J. INT’L L. 673, 674 (1991). Bernstein notes that in American law, the concept of development risks will typically surface in the context of the “state of the art defense.” Id.

43. C.CIV. art. 1107
may defeat the claimed liability by showing the presence of such factors as victim negligence approaching or equaling 100%, negligence of a third party which breaks the causal chain between the defective product and injury, or force majeure or act of God. Spanish case law has also accepted principles of comparative negligence in reducing the size of awards.

Compared to the tort theory discussed below, the contract theory of products liability suffers from the perspective of injured consumers. For example, some obvious drawbacks are: availability to only a limited class of plaintiffs, i.e., those in privity of contract with the defendant; and availability only against one class of defendants, members of which will not always have the deepest pockets, i.e., nonmanufacturing retailers. On the other hand, the contract theory has the obvious advantage of a considerably longer statute of limitations than tort theory; fifteen years for the former versus one year for the latter. Because of this advantage, legal writers have attempted to develop lines of arguments under which the contract theory may be employed against remote sellers like the manufacturer.

B. Products Liability in Tort

For all products liability plaintiffs not in privity of contract with their defendants, the only generally accepted theory under which they might recover was, until 1984, tort theory. Article 1902, modeled after key provisions of the French Civil Code, provides, “He who, by action or omission, causes harm to another, with fault or negligence intervening, is obligated to redress the damage caused.” The tort liability, thereby, created

44. Cavanillas Múgica, supra note 21, at 4476.
45. Mullerat & Cortes, supra note 12, at 345.
46. C.Civ. art. 1105.
47. Cavanillas Múgica, supra note 21, at 4476.
48. As will be seen, it shares the exclusion of liability for development risks with tort theory. See infra text accompanying note 61.
49. C.Civ. art. 1964 (providing a 15-year limitations period for general personal actions not otherwise specified).
50. C.Civ. art. 1968. The one-year period, however, is extended to 15 years when the defendant’s actions also constitute a crime. Mullerat & Cortes, supra note 12, at 348.
51. See, e.g., Cavanillas Múgica, supra note 21, at 4479; Sevillano, supra note 2, at 757.
was not disclaimable.\textsuperscript{53} Article 1902, "among the most frequently cited in court decisions,"\textsuperscript{54} was described by one scholar as "the channel through which it is possible to provide a basis for redressing damages occasioned by defective products."\textsuperscript{55}

Like its French models, Article 1902 imports into the noncontractual liability analysis a requirement of fault. "For this liability to arise, what had to come together were fault in the conduct of the manufacturer and a victim who could prove it."\textsuperscript{56} However, despite the formidable task that proof of fault would appear to be, Spanish courts had in fact developed a practice of inverting the burden of proof, with the result that it really was up to the defendant to prove "that he had used all required diligence, according to the circumstances"\textsuperscript{57} or, in other words, his lack of fault. Hence, the presumption was subject to rebuttal.\textsuperscript{58} The plaintiff, in any event, continued to be responsible for demonstrating the causal relationship between the defendant's fault and his injury, for which no presumptions were available.\textsuperscript{59} While the code does not provide a measure of damages for infractions of Article 1902, the common opinion of courts and scholars is that Article 1902 "includes damages for both physical and nonmaterial injury."\textsuperscript{60} These damages are also subject to foreseeability requirements,\textsuperscript{61} the same as

\begin{itemize}
\item \textsuperscript{53} BRÜGGEMANN, \textit{supra} note 21, at 175.
\item \textsuperscript{54} García Cantero, \textit{supra} note 29, at 875.
\item \textsuperscript{55} Díaz, \textit{supra} note 2, at 756; cf. Casals, \textit{supra} note 12. If we analyze the main decisions of the 1990's, it can be ascertained without much difficulty that the general clause of Article 1902 CC and some of the devices created by jurisprudence, such as the reversal of the burden of proof, would in most cases be sufficient to protect the victims of defective products. \textit{Id.}
\item \textsuperscript{56} Díaz, \textit{supra} note 2, at 756.
\item \textsuperscript{57} SANTOS BRIZ, \textit{supra} note 23, at 948; Mullerat & Cortes, \textit{supra} note 12, at 348; BRÜGGEMANN, \textit{supra} note 21, at 164-73; see also Casals, \textit{supra} note 55.
\item \textsuperscript{58} Mullerat & Cortes, \textit{supra} note 12, at 348.
\item \textsuperscript{59} SANTOS BRIZ, \textit{supra} note 23, at 948.
\item \textsuperscript{60} BRÜGGEMANN, \textit{supra} note 21, at 160. Damages in tort cover all damages directly caused by the negligent act and those that may be deemed to have been caused by the act, but not those that are too remote. In particular, they include replacement of the product, damage effectively caused and an amount for compensation for damage to property and other prejudices [sic] and non-physical damage (pretium doloris) including pain and suffering, reputation, etc. They cover not only the damage (damnum emergens) but also lost profits (lucrum cessans) if there is sufficient evidence of the loss. In general, Spanish case law provides for a lump sum to be paid for all the heads of damage. Mullerat & Cortes, \textit{supra} note 12, at 347-48.
\item \textsuperscript{61} \textit{See supra} text accompanying notes 40-42: Mullerat & Cortes, \textit{supra} note 12, at 347.
\end{itemize}
required for the defenses and mitigations described above for contractual liability.\textsuperscript{62}

Despite the courts' alleviation of the products liability plaintiff's task by inverting the burden of proof,\textsuperscript{63} a number of commentators continued to feel that "great difficulties," including proof difficulties and other procedural and substantive complexities, continued to face product victims who sought compensation from the manufacturer. One feature to be highlighted here is, again, the rather short statute of limitations; one year from the date the victim discovered or ought to have discovered the injury.\textsuperscript{64} One scholar argued that one of the main impediments to a purely case law resolution of the products liability question, and the reason so many plaintiffs' claims still ran aground, was "the persistent primacy of the fault principle."\textsuperscript{65} Hence, such opinions concluded, "[the] system of protection for consumers deriving from these general rules was certainly insufficient."\textsuperscript{66}

III. GENERAL LAW FOR THE DEFENSE OF CONSUMERS AND USERS

The 1978 Spanish Constitution's explicit invocation of consumer rights,\textsuperscript{67} along with Western Europe's growing engagement with the topic,\textsuperscript{68} no doubt only served to bolster the widely shared sentiment among many lawyers that Spanish law's treatment of products liability was somewhat lacking. However, the true impetus for legal change may have been two widely reported mass torts that galvanized public opinion thereby forcing Spain's political leadership to respond. These tort incidents were the Los Alfaques campsite disaster in 1978 and the so-called "Toxic Oil Syndrome" of 1981.\textsuperscript{69} The latter, most especially, revealed "the inadequacy of the law

\textsuperscript{62} See supra text accompanying notes 43-47; cf. Pemán Domecq, supra note 3, at 139 (describing third-party negligence, acts of God (force majeure) and comparative negligence as standard features of a civil liability system).

\textsuperscript{63} This judicial strategem of inversion of the burden of proof has been described as one whereby "one slowly passes from a fault-based or subjective system to an objective system which dispenses with fault." Díaz, supra note 2, at 757.

\textsuperscript{64} C.Civ. art. 1968. But see Mullerat & Cortes, supra note 12, at 348.

\textsuperscript{65} Rojo, supra note 4, at 1254.

\textsuperscript{66} Díaz, supra note 2, at 758 (listing anti-plaintiff factors identified by Bercovitz-Caño). "A further motive for the passage of the GAC was surely the fact that the form taken by the dispositive [Civil Code] provisions on which a Products Liability claim could be grounded were still viewed as inadequate for the successful bringing of an effective claim for damages from defective products." Brüggemann, supra note 21, at 77 (omitting citations to Civil Code).

\textsuperscript{67} See supra text accompanying notes 1-4.

\textsuperscript{68} See infra text accompanying notes 90-99.

\textsuperscript{69} On July 11, 1978, an over-capacity tanker truck carrying more than 23,000 kilos of liquid propylene gas crashed into a campsite wall at Los Alfaques, near San Carlos de la Rapita along the Mediterranean and exploded, killing 215 campers, mostly French, German, Belgian, Dutch and
in force [and] moved the political parties . . . to prepare or, best of all, to put the finishing touches on, a piece of general legislation. In the electoral programs and campaigns of the period, consumer protection achieved the rank of a priority problem.\textsuperscript{70}

In September 1981, the center-right government of Prime Minister Adolfo Suárez sent the Cortes (the Spanish Parliament) a draft "Consumer Law," the effect of which was either to make no change at all in the legal status quo or, effectively contract the scope of protection afforded consumers by confining products liability to a contractual basis.\textsuperscript{71} The Spanish Socialist


Beginning in May of 1981, at least 402 people, chiefly from working class neighborhoods of Madrid, died and many more became seriously ill, generally believed to be a result of ingesting reprocessed industrial rapeseed oil marketed for cooking and consumption. The longest trial in Spanish history concluded in 1989 with a conviction of the businessmen who had imported the oil from France, tampered with it and sold it for home use. However, only two of the 37 defendants ever went to prison as a result, a verdict which outraged the public. Adela Gooch, \textit{Court 12 Opens Hearings on Oil Scandal, INDEPENDENT, Feb. 25, 1992, at 9}; Robert Hart, \textit{Hundreds Shut Out of Spanish Toxic Oil Hearings, REUTER LIBRARY REP., Feb. 24, 1992, available in LEXIS, Nexis Library, Reuters File}; Richard Lorant, \textit{Mass Poisoning in Spain Still Steeled in Mystery, L.A. TIMES, June 16, 1991, at A6}.

Among the authorities who see a clear link between one or both of these events and the heightened concern with product liability matters that led, \textit{inter alia}, to the passage of the GAC are Pernán Domecq, \textit{supra} note 3, at 137; Mullerat & Cortes, \textit{supra} note 12, at 369; Díaz, \textit{supra} note 2, at 759; Rojo, \textit{supra} note 4, at 1256; Francisco Javier Tirado Suárez, \textit{La Directiva Comunitaria de Responsabilidad Civil, Productos y Ordenamiento Español}, 43 REV. GENERAL DEL DERECHO 4967, 4973 (1987).


\textsuperscript{71} Rojo, \textit{supra} note 4, at 1258-59.
Workers' Party, the P.S.O.E., then the largest group in the parliamentary opposition, forwarded a response in its own draft, "Law for the Defense of Consumers and Users." From the consumer's perspective and in the opinion of at least one scholar, the P.S.O.E.'s draft was a distinct improvement over not just the Suárez government's bill which preceded it, but even over the later text of what would subsequently become the "General Law for the Defense of Consumers and Users."72

The GAC was passed in 1984 after the dissolution of the Cortes and the accession of the P.S.O.E. to power under Prime Minister Felipe González.73 The widely shared opinion of legal scholars is as a piece of legal craftsmanship, it was not just bad, but awful.74 Whatever its technical defects, however, there is no doubt the GAC made significant changes in Spanish products liability law.75

Articles 1 and 2 of the GAC, stating that its provisions were in furtherance of the Constitution's consumer protection provisions,76 began with a broad enumeration of the basic rights of consumers and users, and a

72. Rojo opines that this may have had something to do with the fact that the Ministry of Health and Consumption went to politicians other than those who had been most directly responsible for the area of consumer protection. Rojo, supra note 4, at 1259-61.


74. "The 1984 Act is a defective product itself; it is not only technically defective, but also incoherent." Casals, supra note 12. "Incomplete and technically deficient . . . reveals important shortcomings . . . incoherent and technically defective." Mullerat & Cortes, supra note 12, at 339, 352. "The unintelligibility of its articles 25 to 28 is so radical that, in my opinion, it cannot be overcome, not even by an interpretive effort well-meaningly bent on favoring consumers." Cavanillas Múgica, supra note 21, at 4464. A source of the highest legal uncertainty

[the result could not be worse. On the question of the manufacturer's civil liability the Law, without intending to, constitutes a front attack on legal certainty . . . . The system's lack of clarity and the imprecision of the terms employed has given rise to very different and contradictory interpretations of the rules in force, with grave injury to the public interest."

Rojo, supra note 4, at 1260. "[Article 28's strict liability régime] could not be called progressive but purely and simply irrational." Id. at 1272. "At many points [including the product liability regulations], the Act creates the impression that the wide sweep of the matters regulated was often at the expense of a precise working through of the details." BRÜGGEMANN, supra note 21, at 77; id. at 78 (noting "vehement" criticism in the literature).

75. See, e.g., Mullerat & Cortes, supra note 12, at 352; BRÜGGEMANN, supra note 21, at 85 (identifying GAC Article 28 as the law's "genuine innovation").

76. For the relevant constitutional text, see supra text accompanying note 4; see also BRÜGGEMANN, supra note 21, at 75 (describing GAC as rooted in Article 51.1-2 of the Spanish Constitution).
definition of the protected class under the act." The portions of the GAC
directly related to products liability appeared in chapter 8, Articles 25-31.

Article 25 sets out the general principle that consumers had a right to
compensation for harms caused to them by goods or services, except insofar
as the harm was their *culpa exclusiva* [own fault] or was caused by persons
for whom they were civilly liable. The principle is noncontroversial, and the
exception merely codified existing case law. But then chapter 8 of the GAC
confusingly went on to establish not one, but two separate regimes of
products liability. Articles 26 and 27 establish the "general" regime of
products liability, and Article 28 a "special" regime.

Much like Article 25, the "general" regime set up by Articles 26 and 27, in essence, also largely codifies existing law, adding a few specific rules for particular fact situations. While it is certainly possible to criticize them, as scholars have done, for faulty draftsmanship, the regime these

77. GAC Articles 1.1 & 2. Consumers and users are defined in Article 1.2. For a
translation, see *infra* text accompanying note 87. The difference between them is apparently that the
term "consumers" relates to goods, and "users" to services. Díaz de Lezcano Sevillano, *supra* note
2, at 773. This article, however, will hereafter generally follow standard American usage in
referring simply to consumers, rather than to consumers and users.

78. GAC art. 26 provides:
Actions or omissions of those who produce, import, supply or provide products or
services to consumers or users which cause damage or harm to same shall give rise to
liability in the former, unless it appears or can be shown that there has been
compliance with the demands and requirements established by regulation and with
other [types of] care and diligence demanded by the nature of the product, service or
activity.

*Id.*

79. GAC art. 27 provides:

a) the manufacturer, importer, seller or supplier of products or services to
consumers or users, shall be liable for the origin, quality and suitability of same, as per
their nature and purpose and the governing norms.

b) for products in bulk, the holder of same shall be liable, without prejudice to his
ability to identify and prove the liability of the prior holder or provider. 1. In general,
and without prejudice to more favorable results to consumers or users by virtue of
other provisions or conventional agreements, the following criteria shall govern on the
matter of liability

    c) for products packed, labeled and enclosed with an unbroken seal, the company
or company name appearing on the label, presentation or advertising shall be liable. It
may be released from such liability by proving its falsification or incorrect
manipulation by third parties, who shall be those responsible.

    d) If several persons shall have come together in producing the harm, they shall
be jointly and severally liable to the victims. Whoever pays the victim shall have a
right to seek contribution from the other liable parties, as per their participation in the
causation of the harm.

*Id.*
articles set up was essentially the "rebuttable presumption of fault" regime which Spanish courts had already created under Article 1902 of the Civil Code. Hence, it suffered from the same major defect as the latter: rebuttable presumptions can be rebutted.

Article 28, the "special" liability regime, was quite a different matter altogether:

28.1: Notwithstanding the foregoing, there shall be liability for damages originating in the correct use and consumption of goods and services when, by their very nature or by being so established by regulation, they necessarily include a guarantee of determinate levels of purity, efficacy or safety, under objective conditions of determination, and presuppose technical, professional or systematic quality controls until they reach the consumer or user in the proper condition.

28.2: In any event, considered to be subject to this liability regime are all food products, those of hygiene and cleanliness, cosmetics, pharmaceutical specialties and products, sanitary services, gas and electric service, household appliances and elevators, means of transportation and motor vehicles, and toys and products directed at children.

28.3: Without prejudice to what other statutory provisions may establish, the liabilities arising under this Article will have a limit of 500 million pesetas. This amount is to be periodically revised and updated by the Government, taking account of the variation in consumer price indices.

What Article 28, in fact, established was a seemingly parallel products liability regime qualitatively different from any preceding it. This regime was one of strict liability, since it did not provide that a defendant's fault was at all relevant to the plaintiff's case for recovery, either by way of proof or presumption.

The obvious scope questions, then, would seem to be presented: when does the "general," more traditional products liability regime of

80. BRÜGGEMANN, supra note 21, at 79-80. For criticism of the draftsmanship, see, e.g., Pemán Domecq, supra note 3, at 141-42; Rojo, supra note 4, at 1265-67; see generally supra note 74, (citing authorities).

81. See supra text accompanying notes 57-59.

82. GAC art. 28.1-3.
Articles 26 and 27 apply, and when does the "special," strict liability regime of Article 28 apply? The technical conclusion of most commentators who studied the matter was, in fact, that the exceptional regime of Article 28 basically swallowed up the general regime of Articles 26 and 27, because "it is difficult to find a product that, either by inclusion in the list or by being included within the definition, is subject to the general regime and not the special."83 Furthermore, the benefits of a strict liability theory were enhanced by the very limited number of defenses a liable party could assert.

Liable parties can only free themselves of the obligation to make indemnity if they prove the victim's fault (or the fault of persons for whom the victim is civilly liable). Only if the use or consumption has been 'incorrect' (art. 28.1 in connection with art. 25) is exoneration in order.84

These liable parties apparently included almost everyone in the production and distribution chain: the manufacturer, importer, seller, or supplier of the products to consumers, any one of whom could be sued at the consumer's election.85 Finally, as to damages available, there is no explicit limitation to those foreseeable. Hence, injuries from development risks were apparently also included within the scope of coverage.86

83. Rojo, supra note 4, at 1271. "Given its great breadth, the scope of this special strict liability system seems to be greater than that of the general liability system." Pemán Domecq, supra note 3, at 143. "The wide scope of this Article [28] means that what was intended to be a rule applicable only in exceptional cases, turns out to be the general rule . . . ." Mullerat & Cortes, supra note 12, at 355-56. "It [the Article 28 régime] is given such a broad substantive scope that in practice it operates with priority." María Elena Zabalo Escudero, La Ley Aplicable a la Responsabilidad por Daños Derivados de los Productos en el Derecho Internacional Privado Español, 43 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 75, 81 (1991). "Finding a product which does not fit into Article 28 of the GAC and which must follow the fault liability régime is rather difficult." Díaz, supra note 2, at 763-64. But cf. BRÜGGEMANN, supra note 21, at 86 (citing one's scholar's questioning of whether handicrafts and agricultural products in their natural state would fall under article 28).

84. Rojo, supra note 4, at 1272. Cf. BRÜGGEMANN, supra note 21, at 99 (citing opinion in the literature that under Article 28, principles of comparative negligence would also apply, thereby reducing a negligent plaintiff's recovery). Id. at 100-02 (noting some scholars' opinion that such defenses as "assumption of risk," "victim predisposition to the injury," and "fortuitous circumstances" would also be available under Article 28).

85. Rojo, supra note 4, at 1265; Díaz, supra note 2, at 761. Since article 28 itself contains no indication of liable persons, the authorities cited both argue that they must be the same as those enumerated in Article 27. But see BRÜGGEMANN, supra note 21, at 93-96 (citing with approval the line of scholarly opinions that would confine a liable party's liability to those product risks specifically arising within the latter's sphere of activity).

86. Id; see also Díaz, supra note 2, at 764; cf. Pemán Domecq, supra note 3, at 154 (opining that foreseeability requirements go along with negligence-based liability); Rojo, supra note 4, at 1270 (noting that lack of foreseeability is a defense under the general régime of Articles 26-27); BRÜGGEMANN, supra note 21, at 90-92 (noting split of opinion in the literature, but opining that the
Even though the de facto generalization of a regime of strict products liability may have come about more by sloppy draftsmanship than perhaps by conscious design, the substantive result would still appear to be a major advance for consumers. But that appearance is rather deceptive, because of the definition of "consumers and users" the protected class created by the GAC. These were defined as "natural or legal persons who acquire, utilize or enjoy, as destinatarios finales [end-recipients], personal or real property, products, services, activities or functions, whatever may be the nature, public or private, individual or collective, of those who produce, supply, furnish or extend them." Whereas, under the Civil Code it had been the limited class of persons in privity of contract with a products liability defendant who could benefit from the advantages of a contract theory over a tort theory, under the GAC, it was now only "end-recipients" or "end-users" who could benefit from the no-fault regime. Because membership in the two classes, "those in privity with the products liability defendant" and "end-users" of a product or service, would in the normal course of things, substantially overlap, it was roughly speaking, the same limited class which would benefit from the more advantageous theory of recovery.

All third parties and all bystanders, being neither "consumers" nor "users" for purposes of the GAC, would continue to be relegated to the Civil Code's presumed-fault tort regime under Article 1902.

Peseta cap in Article 28.3 is a "strong indication of intentional inclusion of liability for development risks").

87. GAC art. 1.2 (emphasis added).

88. While many, possibly most, products and services will be purchased by those who will eventually use them, the GAC would protect, for example, donees or thieves from the contract-purchaser, while depriving the latter of its benefits. It would also apparently not protect a private person who uses a product and subsequently re-sells it. Another peculiarity, much criticized, is the inclusion of "legal persons" within the definition of "consumers and users." The intention was, presumably, to include such presumptively not-for-profit organizations as churches and charities within the definition. But the language of the definition does not make this clear. Hence, one business suing another might well be, in certain circumstances, a "consumer" for purposes of this Act. See the discussion in Rojo, supra note 4, at 1262-64.

89. But cf. BRÜGGMANN, supra note 21, at 97 (noting the proposal of some scholars for a contra legem interpretation of Article 28 so as to include third parties on policy grounds).

There were other problems with the Article 28 régime as well. For one thing, there is much disagreement over how the 500 million peseta cap, apparently intended as a counterweight to the strict nature of the liability itself, was to be applied: per person, to all claims arising from the same defect, to all products made or supplied by a liable party, to each specific series of products, or per defect. DÍAZ, supra note 2, at 764; BRÜGGMANN, supra note 21, at 92; PEMÁN DOMÉCQ, supra note 3, at 144; BRÜGGMANN, supra note 21, at 98 (citing Bercoviz y Rodríguez Caño); Mullerat & Cortes, supra note 12, at 361; Rojo, supra note 4, at 1272. Would amounts paid out under a fault theory count towards the cap? Rojo, supra note 4, at 1272-73; cf. BRÜGGMANN, supra note 21, at 105 (implying that when limit was reached there might still be additional recovery under Civil Code's fault regime).
IV. THE EEC PRODUCTS LIABILITY DIRECTIVE

A. Background

In 1968, the Commission of the European Economic Community undertook preliminary studies for the drafting of a Directive to harmonize the products liability laws of the various member states. Subsequently, in October of 1972, European heads of state and government, meeting in Paris, called upon European community institutions “to strengthen and coordinate measures for consumer protection.” That same month, a “Convention on the Law Applicable to Products Liability” was adopted under the auspices of the Hague Conference on Private International Law.

On April 14, 1975, the European Council passed its resolution on a preliminary program for consumer protection and information policy. In September of the following year, the European Commission submitted to the Council of the European Communities its “proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the [m]ember [s]tates concerning liability for defective products.” This was followed, in January of 1977, by the Council of Europe’s adoption of the “European Convention on Products Liability in Regard to Personal Injury and Death.” In turn, the latter would serve as a significant source for the European Council’s July 25, 1985 “Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products.”

Another area of doubt was the limitations period for bringing an action: the standard 15 year period under the Civil Code Article 1964 for actions not otherwise specified, or the one year allowed by Civil Code Article 1968, or either, depending on whether a contractual relationship is present or the one year allowed by Civil Code. Article 1968. Pemán Domecq, supra note 3, at 145; Tirado Suárez, supra note 69, at 4976; cf. BRÜGGERMANN, supra note 21, at 102 (arguing for one year but noting that question would ultimately have to be answered by case law); Mullerat & Cortes, supra note 12, at 360; cf. Cavanillas Múgica, supra note 21, at 4479; Rojo, supra note 4, at 1277 (noting silence of Spanish law on limitation period for bringing the action). A discussion of the remaining articles of chapter VIII is not necessary for the present discussion.

90. Díaz, supra note 2, at 771. Two years later, a special commission of the Council of Europe took on the task of proposing harmonization measures in this area as well. Id.

91. 1975 O.J. (C 92) 1.


93. 1975 O.J. (C 92) 2

94. 1976 O.J. (C 241) 9 (later amended by 1979 O.J. (C 271) 3).


96. Pemán Domecq, supra note 3, at 148; Rojo, supra note 4, at 1255.

Writing about a year after the Directive’s adoption, Hans Claudius Taschner, staff member of the EEC Commission, described it as follows:

The Directive is the result of a compromise achieved with difficulty among the Member States, but also among the naturally very much opposed interests of industry and consumers. Member States’ laws are quite diverse [hétérogènes]. They range from traditional liability for fault with classic burden of proof . . . to de facto strict liability, unlimited as to amount and length of time, as progressively introduced by case law’s tilting of an irrefutable presumption of fault . . . passing through liability for fault with reversal of the burden of proof, with ever more rigorous conditions on making proof to the contrary . . .

As for the social partners, industry sought the maintenance of liability for fault or, in the event of strict liability, its overall and specific limitation to as weak a level as possible, exclusion of development risks, exclusion of property damage, and limitation of liability to a duration of five years; as for consumers, they considered that safeguarding their interests would necessarily come via strict liability unlimited as to amount and duration and extending to development risks, via liability for property damage with no threshold amount, and via reversing the making of proof to make it the producer’s burden as far as the causal nexus between defect and damage goes.

Given positions this far apart, it is hard to see how one could hold it against the Directive that it did not result in a rapprochement of national laws, but on the contrary in an accentuation of their diversity. The adoption of the Directive was only achieved at a price of temporarily maintaining a certain number of established rules. It remains no less the case that the keystone of the Directive, to wit the introduction of strict liability, which all alone justifies all the efforts and relegates all other question to the background, has been accepted without exception or reserve by all Member States. 98

---

From Taschner's description of the genesis of the Directive, one can get a fairly good sense of both its setting and its accomplishments: (1) a pre-existing diversity of national laws; (2) opposing interests; (3) attempted "harmonization" around the core idea of strict liability; and (4) incomplete harmonization achieved. A very brief summary of some of its more important terms follows.

B. Summary of Provisions

Strict Liability: Apart from its clear embrace of strict liability in the recitals, the operative provisions of the Directive which embody this principle are Articles 1 and 4, which together provide for a "producer's" liability for his product's defect, if the injured person can prove damage, defect and a causal relation between the two. What this formulation leaves


The adoption of the Directive has provisionally put an end to an important part of the debate in the E.E.C. regarding future European laws on the topic of liability for damages caused by defective products. The debate which has concluded, to my mind, brought with it neither winner nor loser. By that I understand that neither the consumer organizations who actively sought the Directive, nor organizations... representing industry which were against certain aspects of the proposed Directive and which for that reason were reticent, indeed against the Directive, completely carried the day.

Id.

100. See Bernstein, supra note 42, at 676 (arguing passim that the purported "harmonization," in the (minimalist) sense of "approximation," "an effort to unify, with minimal change of law," was not so much what the Commission was after as harmonization in the "meliorist" sense of law reform, "reconcil[ing] national laws with a Community ideal"). But she goes on to criticize the underlying idea behind the reform: "The Community has slighted its combination of assured compensation [through Member States’ social-welfare safety net] and well-developed principles of liability in favor of an alternative known chronically to fail as a source of compensation and to waste money." Id. at 689. She attributes this to the "sense of finitude" engendered by the rising costs of state health-care programs. "In the spirit of austerity that began in the mid-1980’s, many Europeans regard universal health care as a luxury of potentially infinite expense." Id.

101. See generally, e.g., Wolfgang Freiberr von Marschall, The Three Options of the EEC Directive on Products Liability and their Application in the Implementing Statutes of Member States, 1991 REVUE DE DROIT DES AFFAIRES INTERNATIONALES 707; cf. Bernstein, supra note 42, at 676 ("The increasing amount of leeway that the Commission now condones will assure divergent national laws in perpetuity.").

102. The English language text does not use the term "strict liability" but rather "liability without fault." The French equivalent is responsabilité objective. For the use of the responsabilité objective to mean strict liability, see, for example, Zabalo Escudero, supra note 83, at 80 n.23 (noting the 1973 Hague Convention’s use of French term as equivalent to American “strict liability”); see also Bernstein, supra note 42, at 680 ("The origins of the Directive suggest an appreciation for American-style forthright strict products liability...").
out, of course, is any need to show the producer's fault. Article 2 identifies "products" as most moveables, including those that have been incorporated into something else, and electricity, but excluding unprocessed agricultural products and game. A product is defective if it does not provide the safety a person is entitled to expect under the circumstances. Exculpatory clauses or limitations of this liability are not enforceable.

Protected Class: Under Article 4, prospective enforcers of this liability, i.e., products liability plaintiffs, are simply "injured persons" with no requirement of a contractual relationship with anyone. Third parties and bystanders have just as much protection under the Directive as parties to a contract. The only caveat is that the injured person's own fault, or the fault of someone legally in his charge, may, but need not, cut down or cut off his recovery. But the negligence of all other persons, if it is a coparticipant in causing the damage, in no way affects the injured person's right to recover against the producer.

Liable Parties: Article 1 identifies the "producer" as liable for the damage caused by product defects. As defined by Article 3, "producer" is an umbrella term, and includes: (1) manufacturers of finished products or component parts; (2) producers of raw materials; (3) "own branders," i.e., those holding themselves out as manufacturers or producers; (4) commercial importers into the EU; and (5) provisionally, any suppliers of the product. If, on the facts of a given case, there is more than one "producer," they are to be jointly and severally liable, with any national law rights regarding apportionment of the loss inter sese unaffected thereby.

Possible Defenses to Liability: Apart from the plaintiff's own fault or that of one legally in his charge, the more useful defenses available to producers are the "development risks" defense, unless national law opts to

103. Directive, supra note 11, art. 6.
104. Id. art. 12.
105. Id. art. 8.2.
106. Id. art. 8.1. The producer is free to exercise any rights under national law to seek contribution from such negligent person. Id.
107. An importer deemed a producer and held liable as such may have certain rights against the actual producer. Directive, supra note 11, art. 3.2.
108. Suppliers may discharge this provisional liability by giving the injured party, within a reasonable time, the identity of the actual producer or importer or of his own immediate supplier. Id. art. 3.3.
109. Id. art. 5.
110. Davis, supra note 30, at 126-27.
111. Directive, supra note 11, art. 7(e). The "development risks" defense was apparently added in response to pressure from the European Parliament. See, e.g., 1980 O.J. (C 147) 122-23 (parliamentary resolution endorsing development risks defense). The 1979 Amended Proposal did
eliminate it, as it may, and if one is a "producer" by virtue of having manufactured a component part, proof that the defect causing the damage is due to overall product design or to having followed the product manufacturer's instructions.

Scope of Allowable Damages: Under Article 9, the injured person is always entitled to damages for death or personal injuries. Apparently, this entitlement refers only to the material damages, because there is a reference back to national law for the possible availability of nonmaterial damage. There is no attempt to introduce uniformity into the calculation of those damages. The injured person is also always entitled to property damage for certain property, provided the damage is over an amount of 500 European Currency Units [ECU's]. The property damaged must be consumer property. If the property was either not ordinarily intended for personal use or consumption or not mainly so used by the injured party, which basically means capital goods, there is no recovery allowed. The Directive does not affect contract and tort rights which an injured person may have under national law.

The Directive allows a person to exercise their rights within three years of the date the injured person actually or constructively knew of the damage. In no event may they be exercised more than ten years from the date the individual damage-causing product was put into circulation. The total damages which a producer might be required to pay as a result of not contain any such defense. See 1979 O.J. (C 271) 3-11 (text of Amended Proposal); see also supra text accompanying note 42.

112. Directive, supra note 11, art. 15.1(b).
113. Id. art. 7(f).

The importance of making the correct choice [of forum] has been dramatically illustrated by a recent survey of damage awards in different Member States. Taking one example of a 40 year old male doctor who is married with two children and who suffers serious brain injury, if he brings his proceedings in Ireland he would be likely to receive something in the region of $2 million. If he brings his proceedings in Spain on the other hand he would be lucky to receive $250,000. As the authors of the report point out, until the Community introduces measures to iron out these disparities, forum shopping will remain prevalent, settlement will be difficult and the single market ideal of equal treatment in every Member State will be undermined.

Id.

116. Id. art. 10.
117. Id. art. 11.
identical items with the same defect may, but need not, be capped by national law at a minimum of seventy million ECU's.\textsuperscript{118}

C. Implementation in Member States' National Law

The only three member states able to implement the Directive as of July 30, 1988, were the United Kingdom, Italy, and Greece, with the latter two only doing so by decree.\textsuperscript{119} In fact, "in the [European] Commission's opinion, the only Member State which had correctly transposed the Products Liability Directive into its national law was Greece," since the Commission implemented infraction proceedings against both Italy and the United Kingdom.\textsuperscript{120} In addition, Spain, Belgium, Denmark, Ireland, France, Germany, Luxembourg, the Netherlands, and Portugal had not implemented the Directive on time.\textsuperscript{121} One commentator, writing in 1993, bluntly stated that "[t]he implementation record of most states in relation to this Directive is nothing short of scandalous. . . . [I]t is extraordinary that France and Spain have yet to implement the Directive."\textsuperscript{122} Another commentator a few years earlier noted, "The (interim) balance which one might have struck at the end of the period prescribed by Art. 19 of the EC Directive—the end of July 1988—was simultaneously skimpy and surprising."\textsuperscript{123}

In March of 1990, the European Parliament asked "[w]hat urgent action does the [European] Commission intend to take against the Spanish Government [for nonimplementation of the Directive]?"\textsuperscript{124} Shortly thereafter, the Commission provided a written answer in which it indicated

\textsuperscript{118} Id. art. 16.1.

\textsuperscript{119} Willibald Posch, \textit{Die Umsetzung der EG-Richtlinie "Produkthaftpflicht" in den Mitgliedstaaten und die beim "Autonomen Nachvollzug" durch Drittstaaten Auftretenden Probleme}, in SYMPOSIUM STARK: NEUERE ENTWICKLUNGEN IM HAFTPFLICHTRECHT 85 (Heinrich Hansell & Heinz Rey eds., 1991). This Article will not deal with the question of whether, given the failure to make timely implementation of the Directive in national law, the Directive's provisions therefore took "direct effect" therein. See Díaz de Lezcano Sevillano, supra note 2, at 790-92.


\textsuperscript{121} Bernstein, supra note 42, at 675 n.13. Subsequently, the European Union was enlarged, on January 1, 1995, with the accession of new members Austria, Finland, and Sweden.


\textsuperscript{124} EUR. PARL. DEB. (3-389) 199 (Apr. 4, 1990) (question no. 56 by Mr. Valverde Lopez, H-367/90).
that it had indeed begun "infringement proceedings" against nonimplementing member states, but went on to say:

However, the Commission took the view that Spain as a new Member State should be tacitly granted more time for full implementation. But this does not mean that the Commission could not now open infringement proceedings against Spain at any time that seems appropriate, which risks happening in the present case, as the Member State has not yet communicated to the Commission the necessary national measures for the implementation of the directive.  

Finally, as of August 3, 1995, "[a]ll EU member states, including the three new members, have now transposed this directive except for France."  

V. THE SPANISH PRODUCTS LIABILITY ACT OF 1994

A. Legislative History

"A directive is an EC law addressed to Member Nations of the Community. It is binding as to its result, but it leaves to each nation the choice of form and methods to implement it." Writing in 1988, one Spanish commentator identified three possible implementation options open to Spain:

125. Id. at 200; see also, e.g., EUR. PARL. DEB. (3-409) 214 (Oct. 9, 1991) (Commission's written answer to parliamentary question indicating that nonimplementation proceedings had been commenced against Ireland).

126. EU: Infringement Procedures Continue for Non-Transposition of Directives, AGENCE EUROPE, Aug. 3, 1995, available in LEXIS, Nexis Library, Reuter Textline File (list of the national legal provisions which EU Member States have communicated to the Commission in connection with the Directive is available in Westlaw, CELEX Library, NP file).

The Commission of the European Communities brought suit against France in the Court of Justice of the European Communities on November 21, 1991. In January 1993, the Court held that France's nonimplementation of the Directive constituted a failure to comply with its obligations thereunder and under the EEC treaty. Affaire C-293/91, Commission c. Republique Francaise, available in LEXIS, Eurocom Library, CJCE file (Jan. 13, 1993). In its filings with the Court, France admitted the facts complained of, but indicated that it was having problems integrating the Directive into existing French law, because the Directive's measures did not easily harmonize. Id.; see also Diaz de Lezcano Sevillano, supra note 2, at 789 (noting that French implementation of the Directive was faced with two problems: "coordination with the discipline of the Code Civil and coordination with special laws"). But see Rojo, supra note 4, at 1277 (noting that integration with the Civil Code was the method being employed by the Dutch). For a discussion of the difficulty of making changes in long-established civil codes, see generally SCHLESINGER ET AL., supra note 23, at 547-52.

[F]irst, modification of the Civil Code, by introducing into the part relative to tort liability norms corresponding to the manufacturer's liability. Second, modification of [the GAC], revising articles 25 and following of said general law and squeezing the Community rules within Chapter VIII. Third, finally, the drafting of a special law.¹²

That commentator recommended the third option, and that position seems to have prevailed relatively early in the process.¹²⁹ The process itself was punctuated, not to say delayed, by three national elections: in 1986, 1989, and 1993.¹³⁰

Two drafts were prepared in 1988, one by the Commercial Law section of the General Commission on Codification, in the Ministry of Justice, dated January 28, 1988,¹¹¹ and the other the work of the Ministry of Health and Consumption, apparently following the issuance of a Report commissioned by the National Institute on Consumption.¹²² The Ministry of Justice's bill, which basically followed the text of the Directive, included a repeal of Articles 25 through 29 of the GAC, opted to include agricultural products within the definition of "product," opted to put a global cap of ten billion pesetas on damages from identical products with the same defect, and allowed the "development risks" defense for products other than pharmaceutical products.¹³³ The Ministry of Health and Consumption's bill instead proposed merely amending the GAC to conform, where necessary, to the Directive. It would, for example, have allowed the GAC to continue to provide for recovery of property damage below the Directive's threshold of 500 ECU's. It also opted to include "agricultural products" within the definition of "product" and disallow the "development risks" defense for both medicines and food.¹³⁴

¹²8. Rojo, supra note 4, at 1277.
¹²9. Cf. Struyven, supra note 120, at 154 n.28 (noting in 1989 "the Directive will be implemented by means of a special law" and referring to early 1988 draft of same).
¹³¹. Mullerat & Cortes, supra note 12, at 361.
¹³². Pemán Domecq, supra note 3, at 158-59; Mullerat & Cortes, supra note 12, at 361.
¹³³. Pemán Domecq, supra note 3, at 158; Directive art. 15.1 (a) (option to include "primary agricultural products" and "game" within definition of "product"); id. art. 16.1 (option to cap global damages for identical products having same defect).
¹³4. Pemán Domecq, supra note 3, at 159. But see Casals, supra note 12 (stating that food products were excluded from the "development risks" defense only in 1993). The National Institute on Consumption's report, also proposing the amendment of the GAC, would apparently have also used the latter to supplement the Directive's ten year period after which consumers' rights were extinguished. It also accepted the global cap, and the exclusion of capital goods from coverage.
Another draft was prepared in early 1991. It excluded primary agricultural products, game and fish from the definition of "product," as long as they had not undergone any processing. It would have required for a supplier to discharge himself of his provisional liability as "producer" under Article 3.3, he would have to inform the injured person of the identity of the producer or his own immediate supplier within one month of receiving a request therefor. The Directive had merely specified "within a reasonable time." The bill permitted the "development risks" defense, a cap on global damages of 10.5 billion pesetas, and allowed the injured person's own contributory negligence affect his recovery.\(^{135}\)

Finally, in 1993, there was another bill from the Ministry of Justice. It declared Articles 25 through 28 of the GAC inapplicable to damages covered by the Directive. It apparently accepted the exclusion of game, fish and primary agricultural products from the definition of covered products, the global cap of 10.5 billion pesetas, and set the threshold amount for recoverable property damage at 75,000 pesetas.\(^{136}\) The 1993 Justice Ministry Bill appears to have served as the basis for the eventual 1994 Act.

B. Summary of Key Provisions of SPLA

The SPLA was promulgated on July 6, 1994 and published the next day in the Official State Bulletin.\(^{137}\) The Preamble to the Act states that its purpose is the adaptation of Spanish law to the Directive which it describes as, the opinion of many commentators to the contrary notwithstanding, "aim[ing] to achieve a substantially homogeneous legal regime within Community boundaries," and refers to the "format" decision of opting to draft a new law to take the place of the GAC.\(^{138}\) The details which the Preamble highlights are: (1) a regime of "strict but not absolute" liability and the limited defenses available to the manufacturer; (2) coverage of

\[^{135}\] Mullerat & Cortes, supra note 12, at 361-62. The authors do not make clear to what extent the "development risks" defense was to be permitted.

\[^{136}\] Pemán Domecq, supra note 3, at 159.

\[^{137}\] For the reference to the official publication, see supra note 18. An English translation of the SPLA appears in an Appendix infra. For a brief discussion in English, see Ramón Mullerat, New Product Liability Law in Spain, 22 INT’L BUS. LAW 418 (1994).

\[^{138}\] See infra Appendix. All other quoted language in this section is taken from the translation of the SPLA in the Appendix, unless the context indicates that it is taken from the Directive and/or a footnote further identifies the source.
physical injury and property damage over 65,000 pesetas; (3) designation of "those harmed by the defective product," or injured persons, as the protected class, whether or not they qualify as "consumers in the strict sense" (presumably that of the GAC); (4) the ten-year duration of the strict liability created, accompanied by the curious apologia that "it is a reasonable period of time if one takes into account the Bill's objective range of application, which is limited to movable goods and gas and electricity"; and (5) the exercise of the option to put a global cap on damages a manufacturer may have to pay for "personal" damages caused by identical articles having the same defect.

**Strict Liability:** Article 1 of the SPLA follows Article 1 of the Directive, making "manufacturers" and "importers" (Directive: "producers") liable for damages caused by the products they manufacture or import. Article 5 of the Act, tracking Article 4 of the Directive, states that the injured party who seeks to recover must prove "the defect, the damage and the causal relation between both." Adhering to the text of Article 2 of the Directive, SPLA Article 2 defines "product" as all moveables except primary agricultural products and game, plus gas and electricity. In other words, the option under Article 15.1 (a) to count primary agricultural products and game as "products" was not exercised. The addition of "gas" goes beyond the text of the Directive, but is arguably within its spirit.

Most of SPLA Article 3, "Statutory Definition of Defective Product," follows Article 5 of the Directive by defining a defective product as one "not offer[ing] the safety that might legitimately be expected" under the circumstances, and also by eliminating the argument that an item is defective because it subsequently appears in an improved version. However, accepting an amendment proposed by Izquierda Unida, the ex-Communist party in the Cortes, SPLA 3.2 departs from the text of the Directive by adopting verbatim a feature of the Italian Products Liability Decree, to the effect that "[i]n any event, a product is defective if it does not offer the safety normally offered by other examples in the same series." By sidestepping the possibly complicated task of having to show what degree of safety might "legitimately" be expected of a product, this provision facilitates plaintiff's proof.139 Article 14 of the Act reproduces the substance of Article 12 of the Directive, to the effect exculpatory clauses and clauses limiting liability are "inoperative."

**Protected Class:** As highlighted in the Preamble, the protected class under the SPLA is identified by Article 6 as "the injured person." Following the option provided by Article 8.2 of the Directive, SPLA article

139. Casals, supra note 12 (criticizing SPLA Article 3.2 for impeding the Directive's aim of developing "a unified concept of defect").
permits the contributory negligence of the injured person, or of one for whom the latter is civilly liable, to reduce or eliminate the manufacturer’s or importer’s liability. Like the Directive’s Article 8.1, the SPLA’s Article 8 makes the intervention of a third party, other than the one mentioned in the previous sentence, although a joint cause of the damage together with the product defect, ineffective to reduce the manufacturer’s or importer’s liability to the injured person. The manufacturer or importer, may, however, subsequently seek a proportionate contribution from the third person after having satisfied his obligation to indemnify the injured person.

Liable Parties: As mentioned above, whereas Article 1 of the Directive makes “producers” liable for the damage done by their defective products, the Act’s Article 1, still following the Directive’s substance, breaks up that umbrella term into its basic components, “manufacturers” and “importers,” probably for linguistic reasons. Counting as “manufacturers” are manufacturers of finished products, manufacturers of component parts and “own-branders,” as well as producers of raw materials. For “producer,” the Spanish text uses the same word, fabricante, that with the others is translated “manufacturer.” The “importers” who are liable under the act are commercial importers into the EU.

Under Article 4.3 of the SPLA, a supplier of the product is provisionally deemed a manufacturer unless he informs the injured person within three months of the identity of the unknown manufacturer or importer, or of his own immediate supplier. The Directive has a “within a reasonable time” requirement. However, an “additional provision” of the Act, appearing towards the end, further provides that any supplier who supplies a product knowing of the existence of the defect is liable as though he were the manufacturer or producer. But if he is held so liable, he has a claim against the manufacturer or importer. There is no parallel to this provision in the text of the Directive.

Article 7 of the Act, following Article 5 of the Directive, provides for joint and several liability of more than one liable person under the Act.

Possible Defenses to Liability: Besides the injured person’s own fault under SPLA Article 9, Article 6 of the Act, in keeping with Article 7 of the Directive, includes the two useful defenses of “development risks”—except as to “pharmaceutical products, foodstuffs or food products intended for human consumption” and the “sub-component” defense, where a component part is incorporated into a defectively designed product or the manufacturer or importer of the part has simply followed the product manufacturer’s instructions. The exception to the “development risks” defense is a partial exercise of the option provided by Article 15.1 of the Directive, which allowed reinstatement of liability for “development risks” in implementing legislation once the member state followed a notification
procedure. The Directive itself neither prohibits nor endorses such partial reinstatements of development risks liability.

With respect to the elimination of the "development risks" defense on "pharmaceutical products, foodstuffs, or food products," Professor Casals stated:

The practical consequences of the new provision go much further than the German Pharmaceutical Act [of] 1976. Thus, in comparison to the German Act, there is no distinction between prescription and over-the-counter drugs; liability refers both to physical injury and to property damage, and the concept of drug established by Spanish law is much wider.

The definition of "food" is found in the Spanish Food Code. The same Code defines the concept of "food product" (producto alimentario), which includes additives and other substances without any nutritional value used in food processes.

**Scope of Allowable Damages:** Paralleling article 9 of the Directive, SPLA Article 10.1 allows recovery of damages for death and bodily injury and for damages to noncapital, consumer goods—objectively so intended and subjectively, in the main, so used—over a threshold amount of 65,000 pesetas. Following the tenor of Article 13 of the Directive, Article 10.2 of the Act is a savings clause which preserves the right to be compensated for other damages and injuries, including pain and suffering, under the general civil law. Under the "third final provision" of the SPLA, this amount may be changed by the Government in accordance with periodic revisions by the Council of the European Union.

Article 12 of the SPLA sets a three-year statute of limitations on the bringing of an action, "from the date the injured person suffered the injury, from either the product defect or the damage that said defect occasioned him, provided the party liable for such injury is known." Presumably the quoted language is meant to indicate, in a roundabout sort of way, what Article 10.1 of the Directive stated: "The limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer." Article

---

140. None of the sources consulted indicated whether Spain followed the notification procedure outlined in Article 15.2 of the Directive with respect to this provision.


142. *Id.*

143. 1985 O.J. (L 210) 31.
12 of the Act goes on to insert a one-year limitation period on actions by a liable party seeking contribution from another.

As instructed by Article 11 of the Directive, Article 13 of the SPLA extinguishes all rights of injured persons "ten years from the date the specific product causing the injury was placed into circulation."

The Act's Article 11 places a global cap of 10.5 billion pesetas on damages stemming from deaths or personal injuries caused by identical products showing the same defect. This exercises Article 16.1's option with respect to the capping of damages. Under the "third final provision" of the SPLA, this amount too may be changed by the Government in accordance with periodic revisions by the Council of the European Union.144

Partial Repealer of GAC: The "first final provision" of the Act makes Articles 25 through 28 of the GAC inapplicable to civil liability for damages caused by "defective products" within the meaning of the Act. Further discussion and observations on the SPLA will be made in Part VI.

VI. THE SPLA COMPARED

A. The SPLA and Post-Directive European Products Liability Law

One explicitly stated rationale for the Directive was "because the existing divergences [in member states' laws] may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer."144 The antidote administered by the Directive was a self-described "approximation" of member states' laws.146 The very word chosen, "approximation," or "drawing closer," suggests that substantive 'equalization' of member states' laws, which perhaps alone could truly eliminate market distortions and differential protections, was not in sight, nor intended to be.

That having been said, two policy questions then surface: How close do member states' laws need to be brought in order to achieve significant diminution of market distortions; and should the desired degree of proximity ever properly be achieved at the cost of diminishing the protection

144. Quaere whether this language establishing the cap means that the damage to non-capital consumer property which accompanies a death or personal injury is uncapped. Furthermore, since neither the Act nor the Directive states that death or personal injury is a prerequisite to the recoverability of damages to noncapital consumer property, quaere whether consumer property damages occurring apart from death or personal injury are equally uncapped. One could argue that since the cap provisions only speak to "damage resulting from a death or personal injury," both kinds of property damage are uncapped. Whether this was intended, or is sensible policy, is another matter. The interpretive question is posed by the language of the Directive as well as of the implementing legislation.


146. Id.
afforded to consumers by member states whose antecedent products liability regime had progressed further, from a consumer perspective, than the Directive’s? The likely answers to these global questions would tend to point each in a different direction on the permissible contents of post-Directive national products liability laws. On the one hand, because of the concern with advancing consumer interests, evidenced by the text of the Directive and its pre-history, the latter should certainly not be construed so as to leave some European consumers effectively worse off than before. On this interpretation, the Directive would be taken only as establishing a minimum, a guaranteed “floor” of protection, below which the national law of any member state might not fall. Member states would be free to make their products liability laws more generous to consumers than the terms mandated by the Directive. On the other hand, it might be argued that because undesirable market distortions will only be removed the closer to parity, member states’ laws are brought, no more “divergences” should be tolerated other than those the Directive explicitly permits. Ideally, those divergences would eventually disappear. On this view, the Directive would be both minimum and maximum, floor and ceiling, for European consumer protection against defective products.

As a general matter, the precise quantum of legal approximation necessary for significant diminution of market distortions is probably not ascertainable ex ante. But even on the most restrictive reading of the Directive; i.e., one that would yield the maximum possible “approximation” of national laws, it is quite clear that the post-Directive products liability regime in Europe has still had to tolerate a significant amount of divergence. The latter emanates from a variety of sources:

147. The Preamble to the Directive states that “insofar as [existing contract and tort provisions of national law] also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive.” 1985 O.J. (L 210) 30. For the pre-history of the Directive, see supra text accompanying notes 90-101.

148. “The Directive only compels . . . a uniform minimum level of protection of the injured ‘consumer’ vis-à-vis that liable party who is a ‘manufacturer.’” Gerhard Hohloch, Produkthaftung in Europa, 2 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 408, 430 (1994).

149. Cf. Pemán Domecq, supra note 3, at 157 (opining that post-directive Spanish law might continue to allow for recovery of damages to defective goods themselves or to capital goods).

150. See, e.g., Rojo, supra note 4, at 1273. “What is involved is not a Directive of minimums, expandable at the will of every State. In it is contained a special closed system of civil liability . . . .” Id.

151. Hodges, supra note 122. [T]he much vaunted ‘level playing field’ has not been created in relation to product liability. Indeed, the [national divergences] could be said to reveal a playing field which not only undulates but is peppered with unpleasant pitfalls for the unwary. Depending on the viewpoint which is adopted, this is to the disadvantage of manufacturers, importers, distributors, retailers and consumers.
Some problems arise from the fact that the Directive contains a number of optional provisions, which lead to divergencies between the national laws of the Member States. Other problems arise from the inherent nature of legislating by directive, particularly that its terms do not have direct effect but need to be implemented into national legislation, which therefore allows for divergencies of implementation, whether intentional or accidental. Other problems arise from matters which are explicitly not dealt with in the Directive, such as relevant aspects of national law, practice, the legal systems and funding of litigation in Member States.\textsuperscript{152}

The three options explicitly provided for\textsuperscript{153} are: (1) whether to include “primary agricultural products”\textsuperscript{154} within the definition of “product;” (2) whether to permit the so-called “development risks” defense;\textsuperscript{155} and (3) whether to include a global cap of at least seventy million ECU’s on damages payable by a producer “for death or personal injury . . . caused by identical items with the same defect.”\textsuperscript{156} Besides perpetuating a “differing degree of protection of the consumer” to one extent or another,\textsuperscript{157} these

\footnotesize
\textsuperscript{152} Id. “It can be said that, far from harmonising laws within the EU, the implementation of the Directive has added a further layer of liability in the national law.” Casals, supra note 21. See also Struyven, supra note 120, at 151; Posch, supra note 119, at 113-14 (“The implementation of the EC-Directive does not in fact lead to standardization of law, but merely to a limited approximation that, due to highly relevant divergences in border-straddling products-liability cases, makes the private international law in this area not obsolete even among Common Market Member States.”); Kröger, supra note 99, at 300 (Member States’ options under the Directive “obviously do not favor harmonization”); cf. Hohloch, supra note 148, at 434-35 (opining that while what has been standardized predominates, Article 13 of the Directive “undoubtedly is also leading down the road to renewed diversification and separate development of [national] laws outside the core area [of standardization]”).

153. Actually, there are four options. On the canonical three options, see generally Hohloch, supra note 148, at 426, 431-32; Hodges, supra note 122; von Marschall, supra note 101, at 708 & 712; Rojo, supra note 4, at 1273; Struyven, supra note 120, at 148-50; and Kröger, supra note 99, at 300-02.

154. Primary agricultural products are defined by the Directive as “the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing.” Directive, supra note 11, art. 2. The Directive’s default position is to exclude them from the definition of “product.” Id. Article 15.1(a), however, allows Member States the option of including them within said definition.

155. See Brüggemann supra note 21, at 111-12.

156. Directive, supra note 11, art. 16.1.

157. See, e.g., Geddes, supra note 114, at 417 (noting the “still . . . very substantial differences in Member States’ laws governing personal injury awards arising out of product liability claims [left by] the Directive”).
options and other divergences may well pose a threat to the goal of eliminating market distortions.\textsuperscript{158} This result was probably preordained, given the character of the Directive as a compromise agreement.\textsuperscript{159}

1. The Three Options

\textit{Primary agricultural products:} As for "primary agricultural products," the SPLA does not choose to include them within its definition of "product."\textsuperscript{160} Earlier drafts of the law had, however, included them,\textsuperscript{161} which would tend to indicate this was a subject of some controversy. Such an exclusion was prospectively criticized by one Spanish commentator, who noted "European agriculture has nowadays largely become rather more of an industrial process. The exclusion of primary agricultural products and game is inspired more by political than legal reasons rooted in the support and protection [given] to the agricultural sector, traditionally well protected by Member States."\textsuperscript{162}

In this respect, Spain is among the majority of member states, inasmuch as only three states, Luxembourg and two new member states, Finland and Sweden, have opted to include primary agricultural products, although a draft French law would apparently also include them.\textsuperscript{163} Even so, one scholar has opined that the divergence of national laws on this point may in any event not be terribly significant, since processed foods are always subject to liability and any additional liability imposed by an expanded definition would not in practice extend to "spoilage [of fresh food products] \textit{en route} to the consumer." This is presumably because such spoilage would not be a "defect" whose absence the consumer is reasonably entitled to expect but the liability would only relate to the "narrowly construed . . . growth phase" of such products.\textsuperscript{164}

\begin{itemize}
  \item \textsuperscript{158} See Hodges \textit{supra} note 122. \textit{But cf.} Bernstein, \textit{supra} note 42, at 681-82 (wondering whether the legal changes implemented pursuant to the Directive will have any effect at all on decisions relating to the movement of goods, and if so, whether goods will be moved in a non-desired direction).
  \item \textsuperscript{159} \textit{Cf.} \textit{supra} text accompanying notes 98-101; von Marschall, \textit{supra} note 101, at 707 (describing the Directive as "a compromise which was achieved after long discussions and negotiations").
  \item \textsuperscript{160} SPLA art. 2.1.
  \item \textsuperscript{161} \textit{See supra} text accompanying notes 133-34.
  \item \textsuperscript{162} Díaz de Lezcano Sevillano, \textit{supra} note 2, at 777; \textit{see also} Rojo, \textit{supra} note 4, at 1281 (recommending inclusion of primary agricultural products in definition of "product"). The European food-processing industry was also in favor of the expanded definition, in light of Article 5 of the Directive's provision regarding joint and several liability of two or more parties liable for the same damage. Kröger, \textit{supra} note 99, at 302.
  \item \textsuperscript{163} These statistics are tabulated in Hodges, \textit{supra} note 122.
  \item \textsuperscript{164} Hohloch, \textit{supra} note 148, at 432.
\end{itemize}
Development Risks: Article 6.1 (e) of the SPLA makes a "development risks" defense generally available, but Article 6.3 later eliminates it with respect to "pharmaceutical products, foodstuffs or food products." Such a limited acceptance of the defense was apparently an agreed feature of the Spanish legislation from a rather early stage. But, by partly allowing and partly disallowing the "development risks" defense, Spain's position is an anomaly among EU member states. The great majority of the latter, and France in draft form, have opted to permit the defense; only Luxembourg and Finland have excluded it.

One commentator described the legal differences in member states' products liability laws on development risks as "more significant" than the differences over primary agricultural products. Recently, a Spanish scholar further opined that Spain's difference from other EU member states would be especially pronounced in the area of pharmaceutical products.

By contrast, another writer indicated a belief that cases involving development risks would be "extremely rare," and this is seconded by a commentator who observed "[t]he Directive's critics tend to overestimate the scope of development risk liability." Under the terms of the Directive, a report was due to be filed by the Commission in 1995 on the development risks defense, with a view to its possible complete elimination from the Directive.

Global Cap on Damages: Article 11 of the SPLA institutes a cap of 10.5 billion pesetas on "overall civil liability for death and personal injuries caused by identical products showing the same defect." Such a cap was a feature of the Ministry of Justice's draft as early as 1988, and the idea of a

165. See supra text accompanying notes 133-35. The elimination of the defense doubtlessly owes something to the "Toxic Oil Syndrome."

166. "To date, it seems that Spain has been the only country to answer [the development risks question] with a peculiar 'No, but . . . .'" Casals, supra note 12.

167. Hodges, supra note 122; Hohloch, supra note 148, at 432. Hohloch wrongly reports that the Swedish law has imposed development risk liability on manufacturers.

168. Hohloch, supra note 148, at 432.

169. See supra text accompanying note 141.

170. von Marschall, supra note 101, at 712.


172. Directive, supra note 11, art. 15.3.

173. See supra text accompanying note 133. It was apparently not a feature of the Ministry of Health and Consumption's bill of the same year, which, however, would presumably have retained the GAC's ambiguously applied 500-million cap. See supra text accompanying notes 89, 134.
cap was explicitly endorsed by at least one Spanish expert in the area.\textsuperscript{174} Here again, Spain is in the minority. Only three other member states, Germany, Greece, and Portugal, have also exercised this option, while the other eleven states, including France in draft, have not added such a provision. What these numbers may reflect is a general tradition of uncapped liability in European law\textsuperscript{175} and the surprisingly weak support of European industry for the idea of a cap.\textsuperscript{176} Under the terms of the Directive, the effects of the cap on consumer protection were likewise due for decennial review in 1995.\textsuperscript{177}

\textbf{Effect of Injured Party’s Fault:} Apart from the three widely discussed options indicated above, the Directive expressly provides for an additional option. Article 8.2 permits, but does not require, member states’ national laws to reduce or disallow a producer’s liability when “the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible.” SPLA Article 9 exercises this option.

\section*{2. Nonuniform Implementation}

\textit{Definition of “Product”:} While having chosen to exclude “primary agricultural products” from coverage, the SPLA went on to state that “gas and electricity are [also] considered products.”\textsuperscript{178} The Directive, however, had only specified that “‘[p]roduct’ includes electricity.”\textsuperscript{179} This addendum may be a reflection of the still rather widespread use of gas canisters, called \textit{bombonas}, to provide, for example, hot water in many Spanish households,

\begin{itemize}
\item \textsuperscript{174} Rojo, \textit{supra} note 4, at 1281.
\item \textsuperscript{175} Kröger, \textit{supra} note 99, at 301; cf. Díaz, \textit{supra} note 2, at 785 (noting “different traditions among the member states”).
\item \textsuperscript{176} Cited as reasons for this are the fact that “the proposed ceiling was so high that businesses scarcely saw any advantages it might hold for them” and the fear some businesses in fact felt that they might be “driven to insure themselves up to the ceiling even though their risks were in fact less significant.” Kröger, \textit{supra} note 99, at 301-02. The basic theory behind the Directive’s cap has also been criticized on policy grounds: The choice of any figure as a financial cap is, of course, entirely arbitrary.
\end{itemize}

The financial ceiling might be more justifiable if it were related mathematically to factors such as the number of a given type of products in circulation in a country and the size of the population of individual states. There is little justifiable correlation here between the widely fluctuating population sizes of different states.

Hodges, \textit{supra} note 122.

\begin{itemize}
\item \textsuperscript{177} Directive, \textit{supra} note 11, art. 16.2.
\item \textsuperscript{178} SPLA art. 2.2.
\item \textsuperscript{179} Directive, \textit{supra} note 11, art. 2.
\end{itemize}
as well as the fact that a number of leading decisions by the Tribunal Supremo on products liability had involved gas explosions. 180

Definition of 'Defect': The Directive's basic definition of a defective product is "not provid[ing] the safety which a person is entitled to expect." However, the SPLA superimposes another, more objective test: "In any event, a product is defective if it does not offer the safety normally offered by other examples in the same [product] series." 182 As indicated previously, this more objective test was apparently added to facilitate plaintiff's ability to meet the burden of proof, inasmuch as the Directive's general test of defectiveness is a rather more open-ended and, hence, less predictable inquiry. 183

Suppliers' Liability: Where a producer or importer could not be identified, the Directive made any supplier of the product provisionally liable just as though he were a producer, unless he informed the injured person "within a reasonable time" of the identity of the actual producer, importer, or of his own supplier. 184 The SPLA, instead, chooses to draw a bright line and specifies that the supplier has three months to provide such information. 185 In an earlier draft of the Spanish law, the period had been set at one month. 186 There is wide divergence here among the national laws of member states. 187

In another nonuniform provision, the SPLA additionally provides for the nonprovisional liability of suppliers who "suppl[y] [a] product knowing of the existence of the defect." 188 For all that, such scienter liability may be good policy, it has no basis in the text of the Directive.

180. See, e.g., Casals, supra note 12.
182. SPLA art. 3.2. The test was copied from the Italian Products Liability Decree.
183. See supra text preceding note 139.
184. Directive, supra note 11, art. 3.3.
185. SPLA art. 4.3.
186. See supra text preceding note 135.
187. By way of comparison, the Italian and Portuguese product liability laws also set a three month period and the German law sets a one month period, whereas the Greek, Danish, English and Austrian legislation followed the more open-ended "reasonable time" approach. By way of non-binding interpretive aid, the Austrian government's commentary on the relevant section of its law stated that normally a one to two week period is sufficient. Posch, supra note 119, at 97-98. Posch also notes an opinion to the effect that such more precise definitions of the available time period as that contained in the Spanish act contravene the Directive, going on to observe: "Here, precisely, is it particularly clearly shown how far from complete is the approximation of laws within the Common Market that the Directive aimed for." Id. at 96-97.
188. SPLA "Additional provision (one only). Supplier's liability."
3. Subsistence of Background Law

**Directive References to National Law:** The Directive explicitly states that national law continues to govern in the following five areas:

1. contribution or recourse rights among two or more jointly and severally liable persons;\(^{189}\)

2. contribution or recourse rights between a liable producer and a contributorily negligent intervening third-party;\(^{190}\)

3. recovery for nonmaterial damage such as pain and suffering;\(^{191}\)

4. tolling of the statute of limitations;\(^{192}\)

5. rights under rules of contract or tort [noncontractual liability and rights under any pre-existing “special liability systems”;\(^{193}\)

**Contribution and Recourse Rights:** Article 7 of the SPLA establishes joint and several liability for those persons, manufacturers, importers, or suppliers, the Act makes liable for the same injury. Article 8 further provides that a person found liable under the SPLA who has satisfied the obligation to pay compensation to the injured party may then bring a claim against a negligent third party for “the portion corresponding to his intervention in causing the injury.”\(^{194}\) In principle, it seems likely that such rights would not vary widely from one member state to another.

**Nonmaterial Damages:** In light of the SPLA’s repeal of Articles 25 through 28 of the GAC as to damages caused by defective products, the background Spanish law on compensation for nonmaterial damages, such as pain and suffering, will hence revert to the Civil Code’s contract and tort provisions discussed earlier. Both of them, as interpreted by the courts, generally permitted recovery for nonmaterial damages.\(^{195}\) But a reversion to the Civil Code to recover such damages will obviously entail the reinstatement of some sort of fault analysis in Spanish products liability

---

190. *Id.* art. 8.1.
191. *Id.* art. 9.
192. *Id.* art. 10.2.
193. *Id.* art. 13; *see also supra* note 134.
194. Additional provisions regarding joint and several liability and contribution rights can be found in Civil Code Articles 1137-48, 1195-1202.
195. *See supra* text accompanying notes 39 & 60.
Such divergences as may exist on a theoretical level among the various member states in their treatment of nonmaterial damages were assessed by one commentator as often being merely apparent differences which, to his mind, really had no discernible distorting effect on competition.197

**Tolling of the Three-Year Limitations Period:** The Directive dictates a three year limitations period for the bringing of an action, which begins to run “from the day on which the plaintiff became aware or should reasonably have become aware, of the damage, the defect, and the identity of the producer.”198 In an awkwardly worded provision,199 Article 12.1 of the SPLA provides that an action must be brought “within three years from the date the injured person suffered the injury, from either the product defect or the damage that said defect occasioned him, provided the party liable for such injury is known.” It goes on to provide “[t]he tolling of the limitation period is governed by provisions of the Civil Code.”200

From the rather opaque language used, it is hardly crystalline that the second part of the disjunctive phrase “three years from the date the injured person suffered the injury, from either the product defect or the damage that said defect occasioned him” is meant to cover subsequently discovered injuries. Presumably, the SPLA intends to cover such situations; for it not to do so would be extraordinarily regressive.201 However, in the unlikely event that Article 12.1 of the SPLA is found not to extend to such subsequently discovered injuries, however, it is clear that the referenced civil law provisions tolling the statute of limitations would not be adequate to bring them within the Act, whatever other lacunae they could be used to fill.202

---

196. See supra text accompanying notes 34, 56-59.
198. Directive, supra note 11, art. 10.1.
199. See supra text accompanying note 142.
201. Cf. C.Civ. art. 1968.2. The general statute of limitations for civil actions for fault or negligence under Civil Code article 1902 states that the same have to be brought within one year “from [the time] the aggrieved party discovered it.”
202. The general provisions on tolling are found in the Civil Code Articles 1973-1975. They do not deal with the problem of after-discovered injury. Where American legal theory uses the one umbrella term “tolling,” Spanish legal theory distinguishes between the “suspension” of a Statute of Limitations, which prevents its ever starting to run in the first place, and its “interruption” once it has started running. Hence, it is the text of SPLA Article 12.1 itself which needs to contain rules regarding the “suspension” of the three-year statute, since Article 12.2’s reference to civil law only relates to its “interruption.” For a general discussion of tolling of the statute of limitations in the context of the Civil Code Articles 1902, see SANTOS BRIZ, supra note 23, at 1045-68.
**Savings of Contract and Tort Rights:** In addition to the just mentioned possibility of contract or tort rights to recover nonmaterial damages, the following eight types of damages have also been identified as falling outside the scope of national legislation implementing the EEC’s Products Liability Directive:

1. Damage caused by products which were put into circulation before the implementing date of the legislation and which remain in circulation.
2. Damage [from development risks] . . .
3. Damage to the defective product itself.
4. Damage to commercial property.
5. Damage to personal property not in excess of 500 ECU.
6. Damage for which proceedings are not commenced within three years from the plaintiff’s date of actual or constructive knowledge of the damage, the defect and the identity of the producer.
7. Damage caused by a product which has been in circulation for more than ten years.
8. Pure economic loss not caused by death or personal injuries.203

As for defective products already in circulation when the new law went into effect, the SPLA’s single “transitional provision” provides that the Act is inapplicable. Liability for such products latter “shall be governed by the provisions in effect at said time.” For such situations, then, the GAC or the Civil Code will continue to provide the governing law.

With respect to the other items on the list, Article 15 of the SPLA provides that actions brought thereunder “have no effect on other rights the injured person may have as a result of the contractual or noncontractual [tort] liability of the manufacturer, importer or of any other person.” As a result, it would appear that most, if not all,204 of the listed damages may

---


204. Liability for development risks was excluded under both the contract/obligations and tort regimes. *See supra* text accompanying notes 42 & 61. However, there was a minimal development-risk liability under the Sales theory. *See supra* text accompanying note 38. Damages not sought within three years from the plaintiff’s date of actual or constructive knowledge of the damage, the defect and the identity of the producer would continue to be available only under a
continue to be sought under the Civil Code's contract and tort provisions. Of course, those damages may not be sought under the GAC since the SPLA repealed its products liability provisions. Once again, as with nonmaterial damages, this means that these damages are still recoverable, though only upon proof, or unrebutted presumption, of the defendant's fault. Hence, one Spanish scholar has indicated that he regards the continued vitality of the civil code regime as assured: "[I]n practice it is likely that future claims under the SPLA will be made with causes of action which would previously have been used, pleaded in the alternative."

Most of the member states, except France, have effectively preserved contract and tort rights. From a theoretical perspective, the Directive's permitted savings of such rights should not result in a wide degree of divergence among member states because most had previously followed some sort of mixed contract-tort approach to products liability questions in the time preceding the Directive. As a result, one scholar calls the practical consequences of such differences "small" and "tolerable."

Other Features of the Legal System: Far from inconsequential, at least as it relates to the "bottom line" of compensation, are differential practices of national court systems in measuring damages. Spanish courts have at times been cited for the conservatism of their products liability awards, as compared with other EU member states. On the other hand, Spain was identified by one commentator as belonging to a group of countries making legal aid available, "particularly where there is no assessment of the merits of a claim." The high level of availability of legal aid is a factor which may make it easier in Spain to bring products liability lawsuits.

contract/obligations theory, which has a 15-year statute of limitations, but not under a tort or a sales theory, which have limitations of one year and six months, respectively. See supra text accompanying notes 38, 49-50, 64.

205. See supra text following note 144.
206. Casals, supra note 12.
207. Hohloch's attempted differentiation of Great Britain and Italy in this respect seems open to question. See Hohloch, supra note 148, at 428, 429 n.93. Both the British and Italian laws have explicit savings clauses. See Consumer Protection Act [United Kingdom], § 2(6) (1987) and Decreto del Presidente Della Republica n. 224 del 24/05/88, Supplemento Ordinario Alla Gazzetta Ufficiale n. 56 del 23/06/88 [Italian Products Liability Decree 1987], § 15.1.
208. See, e.g., supra note 30; Hohloch, supra note 148, at 413.
210. See Geddes, supra note 114 (contrasting Spain and Ireland).
211. Hodges, supra note 122.
212. Another theoretically "anti-consumer" feature of the Spanish legal system, one which it shares with other Civil Law countries, is a lack of easy access to extensive documentation on discovery. See SCHLESINGER ET AL., supra note 23, at 426-28. "Ease of access to extensive
B. The SPLA and the GAC

Prior to the passage of the SPLA, many Spanish commentators agreed that a comparison of the GAC with the legal regime set up by the Directive would show consumer interests better protected by one over the other. Hence, they saw a simple replacement of the GAC with the Directive as a simultaneous improvement and worsening of consumer protection in Spain. But if this was so, why not, when implementing the Directive, adhere to the policy stated in the Directive’s Preamble and maintain the GAC “to the extent it implies a plus in protection?”

While the Spanish government was considering how best to implement the Directive, one option some were arguing for was in fact the maintenance in force of an amended GAC. This option, however, was ultimately rejected, and it is not hard to find compelling reasons to have rejected it. Quite apart from the savage criticism of the GAC’s draftsmanship and its very intelligibility, there may have been a feeling that the lavish pro-consumer regime instituted by Article 28 was beyond what was tolerable at that stage of development of Spanish society, having been perhaps something of an overreaction to the Toxic Oil Syndrome. Hence, one commentator argued, any attempt to have the best of both worlds, i.e., to keep the most attractive, pro-consumer, features of both, would lead to a relative weakening of Spanish industry vis-à-vis its European competitors. Ultimately, the SPLA did in fact repeal Articles 25 through 28 of the GAC as they related to “civil liability for damages caused by defective products [as defined by the SPLA].”

documentation on discovery” is cited by Hodges as one of a number of features which are generally regarded as “major risk factors” in product liability from a defendant’s perspective. Hodges, supra note 122 (singling out Denmark, Ireland and the United Kingdom (less Scotland) as presenting this risk factor). On the other hand, under the SPLA parsimonious discovery is less likely to prove a problem to injured Spanish consumers, inasmuch as the question of fault, whose access to such documents would be most relevant, should not surface except at the margins.

213. Pemán Domecq, supra note 3, at 155; Mullerat & Cortes, supra note 13, at 363; Rojo, supra note 4, at 1282.
215. Rojo, supra note 4, at 1280.
216. See supra text accompanying note 134; Diaz de Lezcano Sevillano, supra note 2, at 773 n.95 (citing opinion of Sequiera that GAC already provided and exceeded the level of protection required by the Directive); cf. Rojo, supra note 4, at 1279-80 (arguing that the substance of GAC Article 28 could be maintained under Article 13 of the Directive).
217. See supra text accompanying notes 74 & 89.
218. Rojo, supra note 4, at 1260-61, 1272.
219. Id. at 1282.
One Spanish commentator has recently described his own and a portion of the public's response to the SPLA as follows:

I thought the implementation of the EC Directive on Products Liability would be an important step towards more effective protection for consumers in Spain without burdening manufacturers with unreasonable costs. Today I doubt it. The editorial of last October's [1994] issue of Dinero y Derechos (Money and Rights), a magazine published by a Spanish consumer organisation, states that the new Spanish Products Liability Act (SPLA) "will end by creating more problems instead of offering solutions to the victim"; it adds that judges were already showing the right path to adapt Spanish law to the EC Directive, and questions whether this new Act will mean a backward step or not.220

What accounts for the pessimistic tone of these reactions? Underlying it must be a perception that the overall net position of Spanish consumers who are products liability plaintiffs is worse under the SPLA than it had been under the GAC. Is such a conclusion warranted by a comparison of the key features of the two Acts?221

1. Improvements in the Consumer's Position Under the SPLA

Under the GAC, it was only "destinatarios finales," end-recipients or end-users, who were defined as "consumers." Only "consumers," so defined, could benefit from the virtually absolute liability of the GAC Article 28 "special" regime. All others were relegated to the Civil Code's fault-based liability system with causes of action sounding either in contract or tort.222 Given the SPLA's preservation of contract and tort rights, those products liability plaintiffs whom the GAC had effectively confined to the Code theories of liability are clearly not harmed by the passage of the SPLA. They can now, in essence, choose between Civil Code and SPLA-based causes of action or, as Professor Casals predicted, argue them in the

220. Casals, supra note 12.

221. For the sake of discussion, the following analysis adopts an avowedly partisan, purely "pro-consumer" perspective as opposed to the more self-consciously "balanced" perspective of one interested in the overall equilibrium and well-being of Spanish society. It assumes, then, that increases in consumer rights and protections are social goods, without more, and vice versa. This is done, however, solely to throw certain aspects of the SPLA into high relief. It is in no sense an attempt to obviate a society's need to weigh consumers interests against others, to the possible detriment of the former.

222. See supra text accompanying notes 87-89.
alternative.\textsuperscript{223} As a class, then, they can only be benefited from the SPLA. It is only those plaintiffs who would previously have been eligible to sue under the GAC, "consumers" narrowly defined, who may now be adversely affected by its repeal. Alternatively, such plaintiffs may have been benefited by the SPLA, to the extent that the latter's provisions are more advantageous than the ones they replace.

\textit{Protected Class Broadened:} There is one obvious feature of the SPLA which may represent an improvement over the GAC for consumers. This relates to the scope of the protected class under each. Whereas under the GAC it was only "consumers" who could benefit from the virtually absolute liability of the GAC Article 28 "special" regime, the SPLA by contrast defines the protected class much more broadly as "injured persons."\textsuperscript{224} Consequently, the no-fault protection afforded by the latter Act extends well beyond the confines of the GAC's "consumers." All prospective products liability plaintiffs who would previously have been slotted into the category of nonconsumers have now been benefited by their admission to the SPLA's no-fault liability regime. Thus, to the extent that the Civil Code regime continued to prove problematic even after judicial establishment of a rebuttable presumption of defendants' fault,\textsuperscript{225} plaintiffs who are ineligible for "consumer" status under the GAC are clearly better off under the SPLA regime which largely dispenses with the fault inquiry. By the same token, to the extent that the GAC's absolute liability provided an even higher degree of protection to certain consumers than the SPLA's strict liability, those plaintiffs who could previously have sued under the GAC have clearly been harmed by being deprived of the latter. As a matter of policy, the legal treatment of end-using and non-end-using products liability plaintiffs no doubt ought to have been largely equalized. Whether that equalization ought to have come about by lowering the protection of the one and then raising the protection of the other to the same new level is another matter.

On a statistical level, if the subset of product liability plaintiffs who are not end-users is larger than the subset of plaintiffs who are, more people would be benefited by the improved position of the former than would be harmed by the worsened position of the latter. Hence, if this assumption is correct, one might well say that, in this respect, there is a net improvement in the position of Spanish consumers. On the other hand, if this statistical assumption is incorrect, and end-users in fact preponderate among products liability plaintiffs, then a greater number of Spanish consumers will have

\textsuperscript{223} See supra text accompanying note 206.
\textsuperscript{224} See supra text following note 139.
\textsuperscript{225} See supra text accompanying notes 63-66.
been harmed by the relative contraction of their legal rights as compared to the \textit{status quo ante} under the GAC.

Without statistical data, of course, it is impossible to give anything more than impressions about which of these assumptions is correct. To the author, however, it appears intuitive, though no more than intuitive, that "end-users" would constitute the great majority of products liability plaintiffs. If so, then this aspect of the repeal of the GAC is obviously a setback to the interests of more consumers than not. Nonetheless, it indubitably provides a clear-cut benefit to some consumers, even if they turn out to be numerically in the minority.

To this clear-cut benefit for those consumers previously disadvantaged under the GAC, we may now perhaps add two rather speculative benefits of the SPLA to the other consumers, those who would have been entitled to sue under the 1984 Act. The first benefit relates to the statute of limitations; the second to the cap on damages. These benefits must perforce be viewed as speculative, owing to the lack of clarity in the GAC itself.

\textit{Statute of Limitations Lengthened}: Article 12 of the SPLA provides for a three-year statute of limitations. Characteristic of its inartful drafting, the GAC was silent on the limitations period. If the latter's limitation period was in fact one year as some commentators argued,\textsuperscript{226} then those who would previously have been "consumer" plaintiffs under the GAC as well as those non-end users suing in tort,\textsuperscript{227} were clearly benefited by the SPLA'S increase of the limitations period to three years; even non-end-users suing in contract probably benefited thereby.\textsuperscript{228} On the other hand, if the GAC's limitations period was in fact fifteen years, as one commentator claimed,\textsuperscript{229} then those who previously would have been consumer plaintiffs under the GAC were obviously harmed by the SPLA's reduction of the time period for bringing an action. However, since the weight of opinion, however, appears to be with the one-year interpretation, one can venture a qualified judgment in this

\textsuperscript{226} See supra text accompanying note 89.
\textsuperscript{227} See supra text accompanying notes 50, 64.
\textsuperscript{228} Plaintiffs under a contract/obligations theory, which had a fifteen-year limitations period, would not necessarily lose out if SPLA Article 15, which saves contract rights, is read as giving a product-liability plaintiff the option of suing either under the SPLA or under the contract provisions of the Civil Code (assuming he meets the factual predicates for the latter status). See supra text accompanying note 49. Of course, if he chooses the latter route, that would come only at the cost of re-instating a fault analysis. Should this prove too high a price to pay, the SPLA's apparent option to sue in contract might well only rarely be exercised. In that case, those plaintiffs having the theoretical option to sue in contract might be viewed as having had a trade off made for them: a shorter limitations period in exchange for a lack of need to prove defendant's fault. In the calculus of net benefit or loss, those plaintiffs would probably still be better off under the SPLA.
\textsuperscript{229} See supra text accompanying note 89 (opinion of Pemán Domecq).
respect the SPLA’s three-year period represents an advance in consumer protection.

**Higher Cap on Damages:** Article 11 of the SPLA, exercising the option provided under Article 16 of the Directive, implemented an overall cap of 10.5 billion pesetas on liability “for death and personal injuries caused by identical products showing the same defect.” The GAC, for its part, had a cap of 500 million pesetas on liability arising under Article 28’s special regime, with no indication of how it was to be applied. If the GAC’s cap was (a) the same kind of cap as the SPLA’s, i.e., a cap on all claims arising from the same defect in the same product series; or (b) a cap on all claims stemming from the same product series, albeit from more than one defect; or (c) a cap on all no-fault damages payable by a given defendant, then the SPLA’s raising of the cap amount and/or making it a per defect cap, is a major legal improvement. If, on the other hand, the GAC’s 500 million pesetas is simply a per person cap—which seems to be the best-reasoned interpretation—then the SPLA’s 10.5 billion peseta cap is, at least on a theoretical level, a drawback for consumers. Once all claims totaled 10.5 billion pesetas, the SPLA’s cap would be reached and no-fault liability would be extinguished, whereas under the GAC there could have been an infinite series of claims each totaling less than 500 million pesetas. Where this difference could conceivably rise above the merely theoretical, of course, would be in the area of mass torts.

2. Setbacks for Consumers Under the SPLA

**Need to Prove Existence of Defect:** Article 5 of the SPLA requires that the injured person prove “the defect, the damage and the causal relation between both.” The defect that must be proven, according to Article 4, is a failure to provide either “the safety which might legitimately be expected” or “the safety normally offered by other examples in the same [product] series.” Article 28 of the GAC, by contrast, only required consumers to prove “correct use [or] consumption of goods” and the damages it caused, a formulation which totally dispensed with proof of product defect, as well as defendant’s fault. That the need to prove defectiveness was felt to be a setback for consumers is probably indicated by the Cortes’ adding to the

---

230. See supra text accompanying note 89.
231. See supra text accompanying note 89.
232. See supra text accompanying note 82. Pemán Domecq, however, notes that the product’s defectiveness is clearly implied by the fact that its correct use or consumption caused injury. Pemán Domecq, supra note 3, at 144.
Directive's definition of defectiveness a second, nonuniform way to prove it.\textsuperscript{233} Noninclusion of Agricultural Products: Article 2.1 of the SPLA excludes from its definition of a "product," which could potentially give rise to no-fault liability, "primary agricultural and livestock materials, and products of hunting and fishing which have not undergone an initial transformation."\textsuperscript{234} Under the prevailing interpretation of the GAC, by contrast, such products would most likely have been covered under the special regime of article 28.\textsuperscript{235} Less Generous Calculation of Damages: SPLA Article 10.1 excludes liability for damage caused to the defective product itself and to the plaintiff's nonconsumer capital goods.\textsuperscript{236} That same article also allows compensation for damage "consumer property" only to the extent it exceeds 65,000 pesetas. Under the GAC, virtually all types of damage were covered,\textsuperscript{237} including those excluded by the SPLA.

"Development Risks" Liability: With the exception of "pharmaceutical products, foodstuffs or food products intended for human consumption," Article 6 of the SPLA excludes liability for development risks. Article 28 of the GAC, however, was generally interpreted as creating liability for such risks.\textsuperscript{238} Contraction in Suppliers' Liability: Along with manufacturers and importers, the SPLA also provides for provisional liability of suppliers pending their timely identification of the manufacturer, importer or own supplier, and nonprovisional liability of suppliers who supply a defective product with scienter.\textsuperscript{239} Article 28 of the GAC, though it contained no list of liable parties, was interpreted to include as liable parties the manufacturer, importer, seller, or supplier of a product to a consumer.\textsuperscript{240} The portion of

\textsuperscript{233} See supra text accompanying notes 182-83.
\textsuperscript{234} See supra text accompanying notes 160, 2.
\textsuperscript{235} See supra text accompanying note 83. There is perhaps an argument to be made here to the effect that, since the SPLA technically only repealed Articles 25 to 28 of the GAC as they related to "civil liability for damages caused by defective products within the meaning of article 2 [of this Act]" (emphasis added), the GAC remains in force with respect to "products" not included in Article 2. Whether the argument would succeed, in the face of clear legislative intent to exclude primary agricultural products and the like, seems unlikely, but it is at least a possibility.
\textsuperscript{236} For the sense in which the term "capital goods" is used, see supra text preceding note 115. Damages to the defective product itself and to non-consumer property may, of course, still be sought under the appropriate Civil Code provisions. See supra text accompanying notes 202-05.
\textsuperscript{237} Pemán Domecq, supra note 3, at 148; Rojo, supra note 4, at 1276.
\textsuperscript{238} See supra text accompanying note 86.
\textsuperscript{239} See infra Appendix arts. 1, 4, "additional provision."
\textsuperscript{240} See supra text accompanying note 85.
the GAC's liability system which the SPLA thus eliminated, is a supplier's liability for unknown defects.

Statute of Repose: Article 13 of the SPLA provides that an injured person's rights are in any event extinguished ten years from the date the injury-causing product was put into circulation. There is no comparable provision under the GAC:

3. Partial Continuance of the GAC

The SPLA does not include liability for defective services. Article 28 of the GAC, by contrast, explicitly included "services" within the scope of the special system it set up. But inasmuch as the SPLA only repealed Articles 25 to 28 of the GAC as they related to "liability for damages caused by defective products," that portion of the GAC regime relating to liability for services still continues in legal effect.

4. Summary

Viewed at the micro level, the only relatively clear benefit to the seeming majority of Spanish products liability plaintiffs from the SPLA is an extended statute of limitations, though even that benefit is not free from doubt. In every other respect the new Act represents a contraction of protection for that group. On the other hand, another group of plaintiffs is clearly benefited by the newly conferred ability to invoke a theory of strict liability in seeking to recover for product injuries. While it is technically true, as many commentators predicted, the GAC is better in some areas and the SPLA in others, the GAC, for all its defects in craftsmanship, is the superior text from a consumer's perspective.

At the macro level, how important are these consumer setbacks in the governing statutory text? If the paternalistic Spanish welfare system continues to provide a safety net at the level it long has, most cases of product injury will probably go on never becoming "products liability cases" in the first place. Those that, even despite this safety net, might otherwise proceed to litigation, will mostly continue to be deterred by the persistent structural features of the Spanish legal system identified by Professor Casals. Presumably, it will still be only the most extreme situations that

241. In 1991, the European Commission proposed a directive which would have imposed Community-wide standards for the liability of service providers. 1991 O.J. (C 12) 8. This proposal was subsequently withdrawn. GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 1132 (1993), 225 (Supp. 1995).

242. Such an outcome was prospectively criticized by Rojo, more for its inelegance than anything else. Rojo, supra note 4, at 1278.

243. See supra text accompanying note 24.

244. See supra text accompanying note 24.
come before the Spanish civil courts. On the other hand, if the safety net is removed or its benefits significantly altered, which does not seem impossible,\textsuperscript{245} the lowering of protection represented by the SPLA may acquire somewhat greater practical significance in a universe in which more Spanish product victims become forced to seek effective compensation for their injuries through the civil law.

C. Spanish and United States Products Liability: Some Comparisons

Perhaps one reason for the Directive's rejection of the term "strict liability" is its unsavory association with the products liability regime of the United States, the experiences of European manufacturers with which had frequently been met with "incredulous astonishment" or "ascribed to the realm of fable."\textsuperscript{246} But now, in fact, the observation might be made that, with the implementation of the Products Liability Directive, the products liability laws of the member states have been brought into closer alignment with the law generally prevailing in the United States, in which strict products liability has been a key feature since the early 1960s.\textsuperscript{247} Spain, of course, has had a strong variant of strict products liability, in some aspects no doubt stronger than that in the United States, on the statute books since 1984. Although the SPLA weakens Spain's earlier form of strict liability, the new act is still an embodiment of that theory, and thus Spain's law in this area may still be said to be close to that in the United States, certainly closer than it would be if its only products liability laws were those of its Civil Code.

Such an observation, however, would obviously be open to the charge of formalism, a comparison of two varieties of "law in books," when what is really much more at issue is a comparison of "laws in action."

Comparison of laws should never be limited to juxtaposing legal norms or institutions viewed in isolation. Rather, it must display whatever rules are to be compared in their social context. Only the depiction of the socio-cultural background of a legal norm enables us to get an insight

\textsuperscript{245} See supra text accompanying note 100.

\textsuperscript{246} Peter Borer, \textit{Bringt uns die EG-Richtlinie "amerikanische Verhältnisse"?}, in \textit{US AND EEC PRODUCT LIABILITY: ISSUES AND TRENDS} 105, 124-25 (Roger Zäch ed., 1988) [hereinafter ZACHI\textsuperscript{ COLLECTION}]. Borer, writing about Germany, notes that, when the Directive project first began to be discussed, there was a fear that the United States doctrine of strict liability would necessarily entail the American experience with that liability. \textit{Id}. at 125.

\textsuperscript{247} \textit{Id}. at 124.
into a country’s or a culture’s multilayered process of making and applying laws. 248

As discussed above, one Spanish scholar has identified the unchanged features of the Spanish legal landscape that he believes will prevent Spain’s experience with strict liability from ever comparing to that in the United States. 249 Similarly, a German writer identifies the following features of the United States legal and social system as primarily responsible for the peculiarly American experience with the doctrine of strict products liability: much lower levels of social insurance and welfare schemes; the attorney system, particularly with respect to compensation by contingent fees; extensive pre-trial discovery; jury trials; lack of rules for shifting attorneys’ fees; and punitive damages. 250 He also notes the research done by another German writer, predicting that the effect of introducing American-style strict liability through the Directive would only be to increase risks, presumably of manufacturers, by ten to twenty percent. 251

Hence, it may well be that Spanish products liability law may never really be like American products liability law in any but the narrow sense of “formal rules.” That having been said, however, one might still venture a number of comparisons between the two systems at that admittedly formal level. These comparisons shall assume that § 402A of the Restatement (Second) of Torts, “a veritable Everest among a few other relatively tall peaks and hundreds of foothills,” 252 is generally representative of United States law in this area:

Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:

(a) the seller is engaged in the business of selling such a product, and

248. Id. at 125.
249. See supra text accompanying note 24.
250. ZACH COLLECTION, supra note 246, at 129-46.
251. Id. at 146-47.
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.\textsuperscript{253}

To this statement of the rule itself must be added the accompanying caveat:

The [American Law] Institute expresses no opinion as to whether the rules stated in this Section may not apply

(1) to harm to persons other than users or consumers;

(2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or

(3) to the seller of a component part of a product to be assembled.\textsuperscript{254}

\textit{Strict Liability:} The first obvious point of comparison is the plain exclusion of fault from the Restatement's inquiry, inasmuch as § 402A(2)(a) makes the seller's due care no defense to liability. All the plaintiff need show is a defective product in an unreasonably dangerous condition\textsuperscript{255} and the physical harm, to the consumer/user or his property, thereby caused. This is very much on a par with the SPLA's Article 5: "The injured person attempting to obtain redress for the damages will need to prove the defect, the damage and the causal relation between both."

Another feature of U.S. law, both as represented by the Second Restatement as well as by the most recent draft of the Restatement (Third) of Torts, is to omit any explicit consideration of product presentation and marketing in the context of determining whether a product is defective, an

\textsuperscript{253} RESTATEMENT (SECOND) OF TORTS § 402A (1977). This provision was first approved for inclusion in the Restatement in 1965. MICHAEL GREENFIELD, CONSUMER TRANSACTIONS 279 (2d ed., 1991).

\textsuperscript{254} RESTATEMENT (SECOND) OF TORTS § 402A caveat (1977).

\textsuperscript{255} It has been argued that "defective condition" and "unreasonably dangerous" are both aspects of one and the same inquiry. See, e.g., James R. Adams, \textit{Product Liability Law in the United States: An Overview, in PRODUCT LIABILITY: PREVENTION, PRACTICE AND PROCESS IN EUROPE AND THE UNITED STATES} 3, 5 (Rudolph Hulsenbek & Dennis Campbell eds., 1989).
omission strongly criticized by Professor Shapo. Article 3 of the SPLA, by contrast, makes “presentation” the first of the attendant circumstances to be considered in judging whether a product offers “the safety which might legitimately be expected.”

**Scope of Protected Class:** One striking feature is the former parallel between the Restatement’s grant of protection to the “user or consumer” and its agnosticism about all others, on the one hand, and the narrowly defined protected class under the GAC, consumers or users in the sense of “final recipients,” on the other. Comment o to the Restatement (Second) notes that “there may be no essential reason why such [other] plaintiffs should not be brought within the scope of the protection afforded,” but states that the limitation in the rule reflects the social pressure for a rule of strict liability coming from consumers.

**Liable Parties:** Another point of comparison is the Restatement’s imposition of liability on all “sellers” of the defective product, whether or not there is a contractual relationship between the seller and the consumer/user. Such a formulation encompasses the entire chain of distribution between the manufacturer and purchasing consumer/user, and the liability of each to the consumer is not provisional or subsidiary; though, naturally, one “link” in the chain may have recourse rights against another. The great breadth of this formulation may reflect the large geographic size of the United States, and the difficulties of obtaining long-arm jurisdiction or bringing a lawsuit in a distant forum. The situation under Spanish law is certainly comparable, but not precisely the same: manufacturers and importers are the normally liable parties, with “suppliers” only occasionally liable. While the United States law is more “pro-consumer” by providing more potential defendants, doubtless it makes better general sense to try, as the Spanish law does to some extent, to concentrate liability on the party, the manufacturer, who was best able to avoid the injury, with the liabilities of the importer and supplier being concessions to the practical difficulties occasionally involved in holding a manufacturer liable.

While Section 402A is also agnostic on the liability of manufacturers of component parts, it is nonetheless generally true that component

---

manufacturers, "after some initial hesitation," can now be held liable.259 Article 4.1b of the SPLA makes that liability explicit.

**Development Risks:** The text of the Restatement does not explicitly speak to the important question of liability for development risks, and comment k to § 402A speaks only to the conceptually related "unavoidably unsafe products," which deal, however, with known risks that cannot be eliminated.260 One leading American products liability scholar recently opined that it is impossible to predict how an American court would respond to a claimed "development risks" defense.261 Another writer described the law here as "both murky and unsettled," though noting a trend in favor of the state of the art defense.262 This is to be contrasted with the clarity of Spanish law on this issue: a "development risks defense" is permitted, except as to pharmaceutical products, foodstuffs or food products intended for human consumption.263 But if there is indeed a United States trend towards a state of the art defense, there may in fact be occurring a convergence of United States and Spanish law in this anti-consumer direction.

**Scope of Allowable Damages:** It is also worth noting that United States law, as represented by the Restatement, allows recovery for damage to the consumer's "property," without any requirement that it be "consumer property" in any narrow sense, and also allows recovery for such injuries "from the ground up," i.e., without any deductions. The SPLA contains both these "anti-consumer" features.

It should also be noted, though Section 402A does not speak to the issue, that a United States plaintiff may also recover noncompensatory punitive damages, a possibility that does not exist in Spain.264 On the other hand, however, an award of punitive damages in a United States proceeding is frequently a means of providing covertly what the Spanish legal system allows directly: recovery of the prevailing party's attorneys fees.

**Services:** One last issue, closely related if not directly on point, is liability for defective services. By its only partial repealer of the GAC,265 the SPLA preserved a clear statutory basis for the imposition of strict liability for defective services. No comparably broad statutory basis exists for imposing

259. Id.
261. Shapo, supra note 252, at 679.
262. Leebron, supra note 258, at 19, 23. For "state of the art" defense as the American label for the "development risks" defense, see Bernstein, supra note 42.
263. See supra text preceding note 140 and accompanying note 141.
264. Casals, supra note 12.
265. See supra text accompanying notes 240-41.
such liability on services in the United States; where liability for defective services in fact exists, it is essentially a creature of case law or narrowly targeted statutes, and in any event “the consumer recovers only upon proof of negligence”. 266

What Spanish commentators said when comparing the GAC with the Directive could be applied, with greater justification still, to this comparison of the formal rules of United States and Spanish products liability law: one is better protective of consumer interests in some areas, the other in others. But when these two bodies of rules are put into their institutional and social setting, then which of the two systems, taken as a functioning whole, better provides for the well-being of its consumers, let alone of the other competing interests at stake, is very much a separate question.

266. GREENFIELD, supra note 253, at 342-58.
JUAN CARLOS I
KING OF SPAIN

LAW 22/1994 of July 6, on civil liability for damages caused by defective products.

To all those who shall see and have knowledge hereof, KNOW YE: that the Cortes Generales have approved and that I grant my assent to the following law:

STATEMENT OF REASONS [PREAMBLE]

This law has as its object the adaptation of Spanish law to European Community Directive 85/374/EEC of July 25, 1985, concerning civil liability for damages caused by defective products. The fruit of a long and complex drafting process [proceso de elaboración], the Directive aims to achieve a substantially homogeneous legal regime within Community boundaries on a subject especially delicate by reason of the conflicting interests [involved].

Given that neither the scope of the protected class [ámbito subjetivo de tutela] nor the objective contemplated by the Directive coincide with those of General Law 26/1984 of July 19 for the Defense of Consumers and Users, it was opted to draft a special Bill.

Pursuant to the Directive, this law establishes a regime of strict [objectiva] though not absolute liability, allowing the manufacturer to absolve itself of liability under the circumstances enumerated.

Contemplated as compensable damages are personal injuries and property damage with, in the latter case, a threshold amount of 65,000 pesetas.

The persons protected are, in general, those injured by the defective product, independent of whether or not they hold the status of consumer in the strict sense.

267. This translation is by the Author. See also Product Liability in Spain—The Recent Legislation, LLOYDS PRODUCT LIABILITY INT'L, Dec. 31, 1994, available in LEXIS, World Library, TXTLNE File (translating the same legislation into English).
The manufacturer's objective liability lasts ten years from the time of placing in circulation of the defective product causing the damage. It is a reasonable period of time if one takes into account the bill's objective range of application, which is confined to movable goods and gas and electricity.

Finally, the law makes use of the option offered by the Directive of limiting a manufacturer's overall liability for personal injuries caused by identical articles having the same defect.

**ARTICLE 1. GENERAL [STATEMENT OF] PRINCIPLE**

Manufacturers and importers shall be liable, in conformity with the provisions of this law, for damages caused by defects in the products which they respectively manufacture or import.

**ARTICLE 2. STATUTORY DEFINITION OF PRODUCT**

1. For purposes of this law, "product" means any movable good, even when it is affixed to or incorporated into another movable good or real property, except for primary agricultural and livestock materials, and products of hunting and fishing which have not undergone an initial transformation.

2. Gas and electricity are considered products.

**ARTICLE 3. STATUTORY DEFINITION OF DEFECTIVE PRODUCT**

1. By "defective product" it is meant that one does not offer the safety which might legitimately be expected, keeping in mind all the circumstances and, in particular, its presentation, the foreseeable reasonable use of same and the time of its placing in circulation.

2. In any event, a product is defective if it does not offer the safety normally offered by other examples in the same [product] series.

3. A product is not to be considered defective by the mere fact that said product is subsequently placed in circulation in an improved form [de forma más perfeccionada].

**ARTICLE 4. STATUTORY DEFINITION OF MANUFACTURER AND IMPORTER**

1. For purposes of this law, "manufacturer" means:
   a) the [manufacturer] of a finished product.
   b) the [manufacturer] of any component part integrated into a finished product.
   c) one who produces a raw material.
   d) anyone who holds himself out to the public as a manufacturer, placing his name, company's name,
trademark or any other sign or distinguishing feature on the product or the packaging, wrapping or any other component of the [product's] protection or presentation.

2. For these same purposes, "importer" means one who, in the exercise of his entrepreneurial activity, introduces a product into the European Union for sale, rent, lease, or any other form of distribution.

3. If the product's manufacturer cannot be identified, anyone who provided or supplied the product shall be regarded as its manufacturer, unless within a three-month period the person shall have indicated to the person damaged or injured the identity of the manufacturer or of whomever provided or supplied to the individual the said product. The same rule is to be applied in cases of imported products if the product does not indicate the name of the importer, even though the manufacturer's name is indicated.

**ARTICLE 5. PROOF**

The injured person attempting to obtain redress for the damages caused will need to prove the defect, the damage, and the causal relation between both.

**ARTICLE 6. EXONERATING CAUSES**

1. The manufacturer or importer shall not be liable if they show:
   a) that they did not place the product in circulation.
   b) that, on the circumstances of the case, it may be presumed that the defect did not exist at the time the product was placed in circulation.
   c) that the product was not manufactured for sale or for any other remunerative type of distribution [cualquier otra forma de distribución con finalidad económica], nor manufactured, imported, provided or supplied in the context of any professional or entrepreneurial activity.
   d) that the defect was due to the fact that the product was made as mandated by existing rules [conforme a normas imperativas existentes].
   e) that the state of scientific and technical knowledge existing at the time of [the product's] placing in circulation did not allow the existence of the defect to be ascertained.

2. The manufacturer or importer of a component part of a finished product shall not be liable if either shows that the defect is ascribable to the design [concepción] of the product into which it was integrated, or to the instructions given by that product's manufacturer.
3. In the case of pharmaceutical products, foodstuffs or food products intended for human consumption, the persons liable hereunder may not invoke the exonerating clause contained in subparagraph e of paragraph 1 of this Article.

**ARTICLE 7. JOINT AND SEVERAL LIABILITY**

The persons [made] liable for the same injury by the application of this law shall be jointly and severally liable.

**ARTICLE 8. INTERVENTION OF THIRD PARTIES**

The manufacturer's or importer's liability shall not be reduced when the injury was jointly caused by a product defect and the intervention of a third party. Notwithstanding, the person liable hereunder who has satisfied [the obligation to pay] compensation may claim of the third party the portion corresponding to that person's intervention in causing the injury.

**ARTICLE 9. INJURED PERSON'S FAULT**

The manufacturer's or importer's liability may be reduced or eliminated based on the circumstances of a case if the injury caused was jointly due to a product defect and the fault of the injured person or [the fault] of one for whom the latter is civilly liable.

**ARTICLE 10. SCOPE OF PROTECTION**

1. The regime of civil liability envisaged hereunder encompasses cases of death and bodily injury, as well as damages caused to things distinct from the defective product itself, provided that the item damaged is found to have been objectively intended for private use or consumption and was principally used in such manner by the injured person. In the latter event, a threshold amount of 65,000 pesetas shall be deducted.

2. Other damages and injuries, including pain and suffering, shall be compensable in conformity with the general civil law.

3. The present law shall not apply to recovery of damages caused by nuclear accidents, provided such damages are covered by international conventions ratified by European Union Member States.

**ARTICLE 11. LIMITS ON TOTAL LIABILITY**

For the liability regime envisaged hereunder, the manufacturer's or importer's overall civil liability for death and personal injuries caused by identical products showing the same defect will be limited to the amount of 10,500,000,000 pesetas.
ARTICLE 12. LIMITATION PERIOD FOR ACTIONS

1. An action seeking redress of damages and injuries described herein must be brought three years from the date the injured person suffered the injury, from either the product defect or the damage that said defect occasioned the individual, provided the party liable for such injury is known. An action by one who has satisfied [the obligation to pay] compensation against all others liable for the injury must be brought one year from the date the compensation is paid.

2. The tolling of the limitation period is governed by provisions of the Civil Code.

ARTICLE 13. EXTINGUISHMENT OF LIABILITY

The injured person's rights recognized herein shall be extinguished upon the lapse of ten years from the date the specific product causing the injury was placed into circulation, if the corresponding judicial claim has not been commenced during that period.

ARTICLE 14. EXCULPATORY CLAUSES, OR CLAUSES LIMITING LIABILITY, INOPERATIVE

As against the injured person, exculpatory clauses or clauses limiting civil liability hereunder are inoperative.

ARTICLE 15. CONTRACTUAL OR NONCONTRACTUAL LIABILITY

The actions recognized hereunder have no effect on other rights the injured person may have as a result of the contractual or noncontractual liability of the manufacturer, importer, or of any other person.

ADDITIONAL PROVISION (ONE ONLY). SUPPLIER'S LIABILITY

The supplier of the defective product will be liable as though the individual were the manufacturer or importer if the individual supplied the product knowing of the existence of the defect. In that event, the supplier may bring an action claiming over against the manufacturer or importer.

TRANSITIONAL PROVISION (ONE ONLY). PRODUCTS IN CIRCULATION

This law shall not apply to the civil liability arising from injuries caused by products placed in circulation before its entry into effect. Said liability shall be governed by provisions in effect at said time.
FIRST FINAL PROVISION. CERTAIN PROVISIONS REPEALED

Articles 25 through 28 of General Law 26/1984 of July 19 for the Defense of Consumers and Users shall be inapplicable to civil liability for damages caused by defective products within the meaning of Article 2 hereof.

SECOND FINAL PROVISION. NEW TEXT OF ARTICLE 30 OF LAW 26/1984 OF JULY 19

Article 30 of General Law 26/1984 of July 19 for the Defense of Consumers and Users is amended to read as follows:

The Government, after having heard from interested parties and consumer and user groups, shall have the power to set up a mandatory insurance system for civil liability deriving from damages caused by defective products or services, and a guarantee fund covering, in whole or in part, damages consisting of death, poisoning or bodily injury.

THIRD FINAL PROVISION. MODIFICATION OF AMOUNTS

The Government is authorized to modify the amounts established hereunder, in conformity with the periodic revisions made by the Council of the European Union, under the terms established by community norms.

FOURTH FINAL PROVISION. EFFECTIVE DATE

This law shall go into effect the day after its publication in the "Official State Bulletin."

Wherefore,
I command all Spaniards, private citizens and [the public] authorities to observe and make observed this law.

Madrid, July 6, 1994

JUAN CARLOS R.
The President of the Government
FELIPE GONZALEZ MARQUEZ
NAFTA'S APPROVAL: A STORY OF CONGRESS AT WORK "FROM INTERNATIONAL RELATIONS TO NATIONAL ACCOUNTABILITY"

Alejandro Posadas*

I. INTRODUCTION .............................................................. 433
II. STATING THE ISSUE ....................................................... 434
   A. One Long Day ......................................................... 434
   B. The Debate ........................................................... 436
III. THE ROAD TO CONGRESS ............................................. 439
IV. THE HOUSE, THE COMMITTEES, AND THE DEALS ................. 441
V. THE VOTE .................................................................... 444
VI. CONCLUSION .................................................................. 445

I. INTRODUCTION

The North American Free Trade Agreement (NAFTA) entered into force on January 1, 1994. Since then, the new General Agreement on Tariffs and Trade (GATT) has been approved; control of the United States Congress has changed from Democrat to Republican; Mexico is going through a financial crisis; and apparently nothing dramatic, for better or for worse, has yet happened to the American economy.

In practice, the viability of NAFTA was resolved on November 17, 1993, when the United States House of Representatives voted to pass the bill of implementation and approval of the international accord. After weeks of intense political debate, the House approved the agreement by a vote of 234 to 200. The margin did not fully reflect the degree of uncertainty before the vote: such a wide margin was considered

* Alejandro Posadas is a fellow law lecturer at Duke University School of Law; J.D., UNAM, Mexico 1992; LL.M. Duke, 1995. He is a founding member of the Mexican International Law Students Association (AMEDI), of which he served as the first national President in 1991.

1. According to its Article 2203, the accord would enter into force "on an exchange of written notifications certifying the completion of necessary legal procedures," which were completed on December 30, 1992. North American Free Trade Agreement, 39 Free Trade L. Rep. (CCH) (Dec. 17, 1992).


unattainable just a week before.\(^4\) The Senate approved the agreement, three days later, by a comfortable margin.\(^5\)

This paper is a study of the United States Congress in action, using the passage of NAFTA as an example of the process. Chance did not dictate the choice of NAFTA as the basis of the study. NAFTA is the first serious effort to liberalize the exchange of goods and services, and to adopt transnational rules and principles on aspects ranging from investment and intellectual property to environment and labor, among countries that have unequal economic capacity, diverse legal systems, and different historical and cultural backgrounds. Moreover, Canada, the United States, and Mexico, these “distant neighbors,” share borders thousands of miles long.

NAFTA probably had one chance in Congress. This article questions how and why the controversial legislation was approved by the bicameral representative body. In doing so, it raises typical issues Congress faced in its decision-making process. The article focuses on the House of Representatives when the international trade agreement was on the verge of failing.

II. STATING THE ISSUE

A. One Long Day

If Representative Robert Dornan, a Republican from California ate a late dinner that night, we might never know. It was to be his fate to vote yes on bill HR 3450 that implemented NAFTA. Apparently, his wife did not share his position and would probably have gone against the bill if she had been voting instead of her husband. On the floor, someone even regretted the representative’s wife was unable to take his place.\(^6\)

This split of opinion was mirrored across the United States during the months preceding the approval. The polls reflected similar percentages of people in favor of NAFTA, against NAFTA, and undecided.\(^7\) The percentages were similar in the House of Representatives, and according to Representative Dornan, probably in his house as well. Other houses were


\(^5\) The final vote was 61 “ayes” and 38 “nays.” 139 CONG. REC. S16,712 (daily ed. Nov. 20, 1993).

\(^6\) “Mr. Chairman, no late dinner for me tonight. My wife is against NAFTA. But I have the vote. I rise in support of NAFTA.” 139 CONG. REC. H10,037 (daily ed. Nov. 17, 1993) (statement of Representative Dornan (R-CA)). Another member retorted, “Mr. Chairman, I made a suggestion to the gentleman from California that his wife take his place. . . .” Id. at H10,039 (statement of Representative Gerald Solomon, R-NY).

\(^7\) See Public Support for NAFTA chart infra p. 447.
also divided: Democratic representatives in the House and their own leadership.

On November 17, the House was to decide the future of an agreement mainly negotiated by a Republican President, but adopted and presented to Congress by a Democratic President. The agreement had been fiercely attacked by a strange coalition composed of organized labor, environmentalists, the radical right, the protectionist left, and some very specific powerful business groups, such as big sugar firms, citrus growers, and the flat-glass industry. This coalition was especially favored by the money and participation of former presidential candidate Ross Perot. On the other hand, NAFTA arrived in the House in the wake of a string of congressional approvals of trade liberalizing agreements stretching to the end of World War II. In addition, Presidents Carter, Ford, and Bush responded to Clinton's request for support. Corporate America and almost all of the state governors were also pro-NAFTA allies.

The media had a significant role in the process by covering the NAFTA debate extensively. The academic world also participated actively, producing a large body of literature on the subject, and organizing symposiums and conferences all over the nation. One of the high points of the public dialogue was the November 9, 1993, televised debate between Vice-President Al Gore and Ross Perot. Unlike the Free

---

8. NAFTA: The Showdown, ECONOMIST, Nov. 13, 1993, at 23 (discussing how torn between populism and sound economics, Congress prepares to vote on NAFTA); Viva NAFTA, ECONOMIST, Aug. 21, 1993, at 21 (choosing sides in treaty ratification).

9. According to I. M. Dextler from the University of Maryland, Congress has not rejected a trade liberalization proposal in the postwar era. David S. Cloud, Decisive Vote Brings Down Trade Walls with Mexico, 51 CONG. Q. WKLY. REP. 3014, 3175 (1993). See also Waking up to NAFTA, ECONOMIST, Sept. 18, 1993, at 28 (gathering support for treaty for fight in Congress).

10. Clinton invited the ex-Presidents to the September 14, 1993, signing of the NAFTA side agreements. Their presence was intended to signal NAFTA represented a bipartisan and national interest issue. Waking up to NAFTA, supra note 9, at 27.

11. See Businessmen for NAFTA, ECONOMIST, Oct. 16, 1993, at 27. In the last week of August, all but nine governors supported the adoption of NAFTA. Viva NAFTA, supra note 8, at 22.

12. On November 21, 1993, 91% of respondents to a poll conducted by Gallup had, at least to a small degree, followed the news about NAFTA; 24% responded they had followed it very closely; 44%, somewhat closely; and 23%, not too closely. Only nine percent responded that they had not followed the news at all or refused to answer. Westlaw Database, POLL, NAFTA (Nov. 19-21, 1993).


14. The debate was held during the CNN Larry King Show. Polls done before and after the debate showed support for NAFTA rose from 34% to 57%. David S. Cloud, As NAFTA
Trade Agreement with Canada, passed by Congress only five years earlier by a very comfortable margin, the NAFTA process aroused controversy.\textsuperscript{15} "Not since the Smoot-Hawley Tariff Act has trade legislation produced such bitter polarization of opinions."\textsuperscript{16} Each side predicted dire consequences if NAFTA did pass or if it did not pass. One long day in November, the House debated for more than eleven hours before voting on the bill. The debate had been framed months ago, but the result was unknown until that long day ended.\textsuperscript{17}

B. The Debate

The two most controversial issues in the NAFTA debate involved the environment and labor; their lobbyists were the most active NAFTA opponents. At the end, however, the fight was fought mainly by the AFL-CIO. Since the Bush presidency, some environmental groups, including the World Wide Fund for Nature, decided to support the agreement, reasoning that it would be easier to monitor abuses in Mexico with an agreement than without it. Other groups followed suit and supported the agreement.\textsuperscript{18}

The environmental opponents mainly contended that the lower enforcement levels in Mexico would attract American industry, adding

\textit{Countdown Begins, Wheeling Dealing Intensifies}, 51 CONG. Q. WKLY. REP. 3104, 3106 (1993). Another poll showed 52\% of respondents did not change their opinion after the debate, but 35\% were more likely to support the agreement, versus 12\% who were less likely to support it. Westlaw, \textit{supra} note 12.

15. The United States Senate passed S. 5090, implementing the Free Trade Agreement between Canada and the United States, on September 19, 1988, by a vote of 83 to 9. By a vote of 366 to 40, the House of Representatives passed it on August 9, 1988. Westlaw, Database CRABS.


17. The debate started at 11:11 a.m. and finished at 10:36 p.m. when the vote was recorded. 139 CONG. REC. H10,078 (daily ed. Nov. 17, 1993).

18. Environmentalists were easier to convince through the creation of domestic incentives and funds to promote infrastructure and environmental clean-up. The division, along with the fact that presently all environmental groups are experiencing a decline in membership and a rise in financial problems, weakened their fight against NAFTA. Organizations mentioned as backing the ratification of the agreement were the National Audubon Society, the World Wildlife Fund, the National Wildlife Foundation, the National Resources Defense Council, and the Environmental Defense Fund. The main environmental groups opposing NAFTA were the Sierra Club and the Friends of the Earth (some charters of the Auduborn Society and Greenpeace played a less relevant role). \textit{Land of the Free-For-All}, NEW STATESMAN & SOC'Y, Nov. 19, 1993, at 38; 139 CONG. REC. H9887, H9901 (daily ed. Nov. 17, 1993); \textit{see also} Viva NAFTA, \textit{supra} note 18.
incentives to damage the already deteriorating Mexican environment.\textsuperscript{19} They pushed for reprisals against Mexico, rather than cooperation. Framed in this manner, the environmental issue was closely related to the labor issue. Labor groups also feared that industries were attracted to Mexico by the low wages paid to local workers. The "giant sucking sound," was the phrase used by Ross Perot to describe the catastrophic phenomenon of companies and jobs moving to Mexico as though they were being sucked into a black hole. This metaphor represented the main force binding together this unusual coalition.

The Administration attacked the jobs issue with an equally forceful opposing argument. It promoted NAFTA as a job producing agreement. Thus, the ensuing battle of statistics with respect to prospective job losses or gains caused confusion, radically divided public opinion, and probably overemphasized the issue.\textsuperscript{20} As a result, relations between the White House and organized labor deteriorated, and the labor groups defined all those not with them as against them. Nevertheless, President Clinton trusted that despite this confrontation, unions were not likely to abandon the rest of his legislative agenda.\textsuperscript{21}

The academic world had a mostly positive view of NAFTA. Considering the acute difference between the American and the Mexican economies, the overall impact was expected to be minimal, but positive.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{19} Krugman, supra note 16, at 16 ("The question is whether factories emerging from NAFTA will do more damage than the factories in which Mexican workers would otherwise have been employed."); see also William A. Orme, Jr., The NAFTA Debate-Myths Versus Facts: The Whole Truth about the Half-Truths, FOREIGN AFF., Nov.-Dec. 1993, at 2, 8. There were two reasons to think NAFTA would be good for the environment: (a) the United States had made the environment a top priority; and (b) industry was relocated to the North of the country, rather than to the already unhealthy central valley of Mexico City. \textit{Id.}
\item \textsuperscript{20} See Public Perception Regarding Jobs and NAFTA chart infra p. 448 which provides an example of the differing results from one inquiry to another.
\item \textsuperscript{21} On November 7, 1993, President Clinton accused American labor unions of using "roughshod muscle-bound tactics" to intimidate legislators such as threatening to retire support for their re-election if they voted for NAFTA. \textit{NAFTA: The Showdown, supra} note 8; \textit{Viva NAFTA, supra} note 8; \textit{Cong. Q. Wkly. Rep.} 3014, 3017 (1993); \textit{Congress OKs North American Trade Pact, supra} note 4, at 173. Unions still contribute an average of one third of the campaign funds for Democratic congressmen. At the root of the NAFTA debate "was a battle about sovereign democratic lines . . . . [T]he lines were drawn between progressive coalitions anchored in labor, against the Fortune 500 represented by the White House." \textit{Land of the Free-For-All, supra} note 18, at 39.
\item \textsuperscript{22} The Mexican Gross National Product represents less than 4% of the United States GDP. Other numbers, used to further this argument, view Mexico as the new addition to the existing free trade agreement between Canada and the United States, but Mexico's economy is just five percent of those of Canada and the United States combined. NAFTA could hardly add much more than 0.1% to the real income of the United States. Regarding job losses, the overall figures were hardly above the 200,000 monthly average displacement rate of the United States
\end{itemize}
The liberalization and closer relationship between the two countries could help specific areas of concern, such as those regarding the Mexican environment, wages, democracy, and immigration. At least, the agreement would not make these issues worse. One interesting approach promoted enactment of NAFTA as a matter of foreign policy rather than of economics.\(^2\) A congressional member, advancing this trend, even compared the opportunity to approve NAFTA with the historic opportunity to purchase Louisiana or Alaska.\(^3\)

In the midst of the debate, many other topics were addressed, such as human rights, drug dealing in Mexico, United States' sovereignty, supranational bureaucracies, the uneven playing field in trade, immigration, and the deficit increase. Many specific examples of midsize companies threatened by the unfair competition, with Mexico, or highly benefited by the already opening Mexican market, were offered. The final debate was between two groups that, according to some analysts, possessed competing domestic agendas and irreconcilable world views.\(^25\) Nevertheless, the debate was to be resolved by a third group of undecided voters. Pushed by the Administration, this undecided group found itself trapped in a war of extremist assertions. Its decision required a leap of faith and personal sensitivity. Many of those who were undecided were

---

23. The accord was viewed as tying up the Mexican economic reform, and as an indubitable signal from the so-called “Latin American emerging markets” whose main partner, if market reforms continued, was to be found in the United States. In the post-cold war, multipolar, multi-level international society, the United States faced the strengthening of the European Union and the Pacific rim. It thus was sensible for the United States to take the first steps in securing Latin America as a market area. Furthermore, considering the United States efforts to push forward the world’s multilateral liberalization trend through GATT’s Uruguay Round, approval of NAFTA was a congruent example of its commitment. See Krugman, supra note 16; Orme, supra note 19, at 8; Abraham F. Lowenthal, Latin America: Ready for Partnership?, FOREIGN AFF., Nov.-Dec. 1993, at 74.


torn by the congressional dilemma, balancing local concerns with national interests.26

III. THE ROAD TO CONGRESS

In 1990, the government of Mexico approached the government of the United States with the idea of negotiating a free trade agreement. Since 1985, with its accession to the GATT system, Mexico began to liberalize and to open its economy. The process proved profitable to states such as Texas, which in turn encouraged then President George Bush to initiate talks.27 By 1991, opposition to the agreement was already organized as the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and several environmental groups focused on achieving the defeat of a congressional revival of the "fast-track authority." Nevertheless, Congress approved it in May 1991.28 In November 1992, Bill Clinton defeated President Bush in the presidential election. Although NAFTA negotiations were completed before the 1992 election,29 then candidate Clinton had endorsed the accord by promising to pursue supplemental agreements to address the deficiencies in the negotiated text in the areas of the environment, labor, and safeguards.30 Clinton was apparently trying to appease two major interest groups which supported his campaign: labor and environmentalists. The carefully negotiated side agreements, however, proved to be unappeasing.

On August 13, 1993, marking the completion of negotiation of the supplemental side agreements, House Majority Leader Gephardt announced he could not support the accord as it stood.31 Previously, Gephardt had suggested that Clinton should not support the Bush text because it contained no protections for the enforcement of Mexican workers rights, nor any mechanism that assured wages in Mexico rise

---

26. For a detailed analysis of the concept of two Congresses, see ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS (1994).
27. Cloud, supra note 9, at 3180.
29. President Bush initialed the pact on August 12 of that year. Initialing the pact was a formal requirement under the “fast-track authority.” With that act, Bush expressed his intent to sign the accord. Congress OKs North American Trade Pact, supra note 4, at 173.
31. Gephardt is a leader of the labor cause in the House. See Viva NAFTA, supra note 8, at 21.
along with productivity. On September 21, in a speech at the National Press Club, Gephardt confirmed that he would vote against the pact. With this news, the formerly unified Democrat leadership was divided on the passage of NAFTA. Aside from Representative Gephardt, the second highest ranked Democrat in the House, Majority Whip David Bonior, also opposed the pact. One month before, Bonior collected 100 commitments from Democrat Representatives to demand NAFTA be delayed until healthcare reform was passed. Despite widespread support, this action did not prosper. However, Representative Bonior continued to work hard for the defeat of the pact. In October, he announced he was only nine votes away from the 218 needed to kill the agreement. Thus, the leadership role of the pro-NAFTA Democrats fell to House Speaker Thomas S. Foley. The split in the leadership showed the vote was not going to be based on loyalty, but on conscience. Partisan affiliation, therefore, was not a reliable variable for predicting the result. President Clinton had not yet begun working strongly for NAFTA passage when his opponents, especially Ross Perot, took advantage of the White House Administration's slow start to try to capture the public conscience.

32. Congress OKs North American Trade Pact, supra note 4, at 177.

33. Representative Bonior is an interesting case of the representative-constituency relationship. Bonior represents a district in Michigan that encompasses the city of Macomb. His opposition to NAFTA was greeted enthusiastically there; even his last Republican challenger opposed the pact. A large part of his constituents still remember the 1981-82 recession, when the Big Three (Ford, Chrysler, and GM) reduced the Macomb workforce by half. Furthermore, the small and midsize business community believes the future lies in productivity associated with nearby markets. The community does not understand why the government would tempt the car industry to move to Mexico. Representative Bonior also has personal reasons to oppose the pact. Representative Bonior believes the pact to be an extension of the United States colonialist policy toward Latin America, furthered by a conspiracy of corporate and academic elitists. Representative Bonior has voted for higher taxes, higher spending, and lifting of the Cuban embargo. He voted against the Gulf War. Any of the items on that list would probably have been sufficient to eject any other member from Congress, but Representative Bonior's relation to his constituents is symbiotic. Representative Bonior worked for the Detroit car plants and shares Polish-American roots with a large part of his supporters. His Catholic sense of justice and his ability to outspend his opponents five to one have also been key elements contributing to his permanence in the House. Free Trade, the Vast Middle and David Bonior, ECONOMIST, Sept. 18, 1993, at 36.

34. Viva NAFTA, supra note 8, at 22.


36. Representative Bill Richardson functioned as the Democrats' Whip for passage of NAFTA, and together with Representative Matsui coordinated the party. The Flying Arkansan, ECONOMIST, Nov. 20, 1993, at 25; Cloud, supra note 9, at 3014.

37. President Clinton had been immersed in budget battles and, to avoid offending anti-NAFTA Democrats, he had been careful not to raise the issue throughout the negotiations on the side agreements. Marketing NAFTA, ECONOMIST, Aug. 21, 1993, at 14 (noting that the treaty faced a fight in Congress).
September 14, 1993, with the signing of the Environment and Labor Side Agreements, was the date chosen by the President to launch a campaign for approval of NAFTA. He designated lawyer William W. Daley as special advocate for the NAFTA cause. President Clinton delivered a speech that made George Bush comment, "[n]ow I know why I am outside looking in and he is inside looking out." Soon after, corporate America got on the road through an alliance of 2700 companies, including most of the Fortune 500, to lobby for the agreement. The alliance, under the name of USA NAFTA, chose Lee Iacocca as its champion. The business community prepared for a short, fierce fight.

On September 24, 1993, the United States Court of Appeals for the District of Columbia reversed a lower court decision that required NAFTA to be submitted to an environmental impact study, thus clearing the last obstacle to a congressional vote. Finally, on November 3, the President sent the implementing NAFTA bill to Congress.

IV. THE HOUSE, THE COMMITTEES, AND THE DEALS

According to a media specialist, "NAFTA is a tough challenge for the art of congressional arm twisting. Proponents are trying to sell a policy with global economic implications to lawmakers for whom all politics are local." Before the President sent the implementing bill to Congress, a peculiar practice had already occurred, the drafting of mock implementation bills. This practice was a response to the nature of the agreement. Negotiated under fast-track authority, the NAFTA bill could not be modified once submitted to Congress. Neither the bill of implementation, nor the text negotiated by the countries, which was included in the former, were subject to modification. The mock bills were

38. Daley, brother of the Mayor of Chicago, was named campaign coordinator for NAFTA, and was given the privileged "War Room" in the Old Executive Office Building next door to the White House. He was responsible for heading the White House lobbying efforts in Congress. Waking up to NAFTA, supra note 9, at 27.

39. Id. In his speech, President Clinton called on Americans to embrace change and to "create the jobs of tomorrow," rather than seeking to preserve "the economic structures of yesterday." Id. at 27.

40. USA NAFTA sponsored 60-second televised advertisements which began airing on October 10, 1993, tailored to combat Perot's anti-NAFTA propaganda. Businessmen for NAFTA, supra note 11, at 27.

41. The court of appeals held that the President's actions are not agency action, and therefore are not reviewable under the Administrative Procedure Act. Public Citizen v. United States Trade Representative, 5 F.3d 549, 553 (D.C. Cir. 1993).

42. CONG. Q. WKLY. REP., supra note 21, at 3014.
drafts prepared by congressional committees working on the implementing bill. The President had absolute discretion in deciding whether or not to consider the mock bills in preparing his own bill. Nevertheless, if he wanted a positive result he could not simply disregard them. The mock draft exercise was a first step in the Congress-White House negotiating and lobbying process.\(^4\)

Once in Congress, the bill went through committee consideration. Adhering to the rationale of the mock drafts, this consideration was pro-forma only.\(^4\) Before voting on NAFTA, Congress had conducted eighty-eight hearings beginning in June 1990, issued six reports beginning in September 1992, and conducted three NAFTA debates.\(^4\) Because of the thoroughness of the process, it would be difficult to imagine that a member casted an uninformed vote.

One of the most criticized aspects of the approval process were the deals the Administration made to win over undecided members. NAFTA contains additional side agreements other than the well-known agreements covering environmental and labor issues. These concessions presented an interesting international political compromise among Mexico, Canada, and the White House to fulfill some congressional members' expectations and conditions. Thus, the Administration extracted a commitment from Mexico not to export sugar indefinitely, and to begin negotiations after NAFTA's passage for the acceleration of the phasing out tariffs in for flat glass, wine, appliances, and bedding.\(^6\) In exchange, the White House agreed to reinstate tariffs for oranges and tomatoes in case they overflowed the American market, to finalize last minute deals protecting peanut growers and wine producers in California, and to extract concessions from

---

43. The House Ways and Means Committee and the Senate Finance Committee were responsible for conducting the mock or shadow markups of the NAFTA. For example, on September 30, the Ways and Means Trade Subcommittee approved a draft version of the bill. CONG. Q. WKLY. REP., Oct. 2, 1993, at 2620, 2621; see also Congress OKs North American Trade Pact, supra note 4, at 171.

44. In the House, the Ways and Means Committee approved NAFTA on November 9, 1993, by a vote of 29 to 12; the Energy and Commerce Committee sent it to the floor without recommendation; and the same day, the Banking Committee sent the bill to the floor accompanied with an unfavorable recommendation. Land of the Free-For-All, supra note 18.

45. Of the 88 hearings, 64 were conducted by House committees. The hearings ranged from issues such as environment, labor, and settlement of disputes to human rights, democracy, elections, and the peso devaluation in Mexico. Congress also conducted fourteen related hearings and issued seven related reports. Congressional Information Services, 93-P.L. 103-182.

46. The sugar deal was made to assure the support of Louisiana lawmakers. Sugar producers feared that Mexico would substitute corn sweeteners in products for its local markets and export its sugar surplus. Congress OKs North American Trade Pact, supra note 4, at 178.
Canada regarding American wheat farmers near the Canadian border.\footnote{47} Representative Clay Shaw Jr., a Republican from Florida, saw an opportunity to condition his vote on a promise from Mexico to extradite an alleged rapist.\footnote{48}

Even non-NAFTA countries were affected by the deals. For example, the White House reinstated the phasing out of textile tariffs from ten to fifteen years, which applied to the Philippines and other developing countries.\footnote{49} The Hispanic caucus, led by Representative Esteban E. Torres, a Democrat from California, pushed for the allocation of one billion dollars to public works projects for communities that would lose jobs to Mexico.\footnote{50} Other members of Congress worked out their own deals. For example, Representative Floyd H. Flake, a Democrat from New York, after announcing his support for NAFTA, received a call from President Clinton informing him of a Small Business Administration pilot program that had been allocated to his district in Queens, New York.\footnote{51}

Many of the deals were formalized through letters of understanding, but others were the product of unwritten political compromises.\footnote{52} Anti-NAFTA groups attacked this give-away procedure vociferously. Regardless of what position they took on the deals, the defenders of the deal-making process explained that the deals were substitutes for the amendment process which was foreclosed because of the fast-track rules for the adoption of NAFTA. The White House also was restricted as to the extent of the concessions which were granted. For example, the Administration rejected a tax cut on cigarettes sought by

\footnote{47} The Administration designed a mechanism for re-imposing tariffs on Mexico if the price of orange juice concentrate as tracked on the New York Commodities Exchange dropped down to a certain level. With the agreement on oranges and tomatoes, the Administration won the votes of the nine representatives from Florida. Cloud, \textit{supra} note 9, at 3179; \textit{Congress OKs North American Trade Pact, supra} note 4, at 178; \textit{The Flying Arkansan, supra} note 36, at 25.

\footnote{48} The accused was charged of having raped a five-year-old girl. Mexico's practice regarding extradition is not to extradite Mexican nationals but to judge them under its own laws. Clay wanted the accused to be judged in the United States, where the act was committed. \textit{Cong. Q. Wkly Rep.}, Oct. 2, 1993, at 2620; \textit{Cong. Q. Wkly Rep.}, Nov. 13, 1993, at 3106.

\footnote{49} This decision included 10 votes of House members from textile producing districts. Cloud, \textit{supra} note 9, at 3175.

\footnote{50} The North American Development Bank (NAD Bank) addressed this concern; only Representative Torres from the Hispanic caucus voted for NAFTA. Although the NAD Bank was not the only one to tackle this concern, some critics sarcastically adopted the phrase: "one bank, one vote." Cloud, \textit{supra} note 9, at 3175; David S. Cloud, \textit{Clinton Turns Up Volume on NAFTA Sales Pitch}, 51 \textit{Cong. Q. Wkly Rep.} 2863, 2863 (1993); \textit{The Great NAFTA Bazaar}, \textit{Economist}, Nov. 13, 1993, at 27.

\footnote{51} \textit{Congress OKs North American Trade Pact, supra} note 4, at 179.

\footnote{52} See 139 \textit{Cong. Rec.}, H9883 (letters of understanding).
representatives from North Carolina.\textsuperscript{53} Furthermore, the active participation of Mexico and Canada in lobbying the United States Congress evidenced a concerted effort to stay within the well marked boundaries of the political process.\textsuperscript{54}

V. THE VOTE

The process of gaining votes for passage of NAFTA resembled climbing a mountain, a race to the top against the clock.\textsuperscript{55} Somber, or deeply doubtful, remarks were not uncommon throughout the process. "Being for NAFTA right now is like being for a congressional pay raise," declared Representative Fred Upton, a Republican from Michigan, in early November 1993; Representative Dale E. Kildee, a Democrat from Michigan, pointed out the undecided "want to cast their vote quietly;" and Representative Richard A. Gephardt, the Democrat from Missouri, said he had never seen such intense pressure on members for a positive vote.\textsuperscript{56}

On November 9, 1993, Treasury Secretary Lloyd Bentsen, unofficially declared that the Administration was twenty-six members short of the required 218 votes to obtain House approval for NAFTA.\textsuperscript{57} More detailed analysis that week showed 175 members favoring the accord, fourteen were classified as "leaning" towards approval, and thirty-two were undecided.\textsuperscript{58} Many Republicans favored the agreement but were not willing to let the White House rely on them for support. Republican Minority Whip, Newt Gingrich, made it clear that a bipartisan effort was necessary to obtain congressional approval of NAFTA.\textsuperscript{59}

\textsuperscript{53} The tax on cigarettes was a powerful arm of the upcoming healthcare reform effort; the Administration was not willing to endanger it. Cloud, \textit{supra} note 9, at 3179.

\textsuperscript{54} During the November 17th House debate, a member affirmed according to a study conducted by the Center for Public Integrity, Mexico had spent at least 30 million dollars in lobbying the United States Congress (no confirmation of this data could be found by the author). \textit{See} 139 CONG. REC. H9900 (statement by Representative Benjamin A. Gilman, R-NY).

\textsuperscript{55} On August 21, 1993, it was estimated the vote in the Senate was in favor of NAFTA, but in the House the numbers showed only 120 of the 176 Republicans were in favor; only 1/3 of the Democrats were then in favor, 1/3 opposed it, and 1/3 were undecided. Large delegations, such as California and Florida, opposed the agreement. \textit{Viva NAFTA, supra} note 8, at 22.

\textsuperscript{56} Cloud, \textit{supra} note 14, at 3104.

\textsuperscript{57} This remark was made before the Gore-Perot debate on NAFTA. \textit{The Great NAFTA Bazaar, supra} note 50, at 27.

\textsuperscript{58} According to this analysis, of the 175 favoring the accord: 100 were Republicans and 75 were Democrats, 14 "leaning" members were Democrats, and 15 of the undecided were Republicans, the remaining 17 being Democrats. Cloud, \textit{supra} note 14, at 3107.

\textsuperscript{59} Representative Gingrich feared too much reliance on Republicans would push Democrats into taking a safe position not to risk any political capital. Some Republicans
Although the Republican Party did not control the House of Representatives, President Clinton owed more to the GOP members for his victory in obtaining approval for NAFTA than to members of his own party: 132 Republicans and 102 Democrats voted “aye.” Democratic members who received twenty percent or more of their total campaign contributions from labor Political Action Committees (PACs) generally, but not in all cases, voted against the agreement. From the thirty House members that identified themselves on November 12, 1993, as being undecided, twenty-one voted in favor of NAFTA.

Another element of the victory was the public support for NAFTA. Wisely, it was remarked that if President Clinton won the support of the voters, he was going to win in Congress. Through the final months preceding the vote, public opposition to NAFTA grew and resulted in a small approval margin. The relationship between the voters and the representatives was reflected in the House decision.

Finally, Ross Perot’s prediction of a second vote on NAFTA, by those congressional members who were elected in the 1994 general election, proved unfounded. Of the 234 members who voted for NAFTA, 184 were re-elected, nearly 80%. The surveys regarding this issue, the Republican agenda in the 1994 race, and the nature of mid-term elections, strengthens this assumption.

VI. CONCLUSION

Although NAFTA will achieve the complete liberalization of ninety percent of the actual trade in goods and services among the contracting parties, it is a gradual process planned to be completed, within twenty years. Considering the safeguard measures, the accord can be viewed as an instrument of industrial oriented policy which is close to President Clinton’s and other Democrats’ economic philosophy. As such,

complained they were being asked to take the risk for the President’s policy, while Democrats were running for cover. Cloud, supra note 9, at 3179.


61. It is difficult to find a defined pattern. For example, Representative Sangmeister (D-III), who received 40% of total campaign contributions from labor PACs, voted against NAFTA, but Representative Thomas C. Sawyer (D-OH), who received 41%, voted yes.


63. See Public Support for NAFTA chart infra p. 447 which provides figures on public support for NAFTA.

64. Ross Perot warned that in case NAFTA was passed by the Congress, it was still going to be subject to two other votes, the electoral responses of 1994 and 1996.

65. See Public Reaction to Congressmen if Voted for NAFTA chart infra p. 450.
it not only offers another explanation of why the President enthusiastically adopted it, but it also reflects the nature of determining winner and loser nations under the terms of NAFTA. This feature was exploited by many members to extract concessions for local producers that were not able to make their way into NAFTA at the negotiation table. Although highly criticized, this practice is influenced by the local accountability to which representatives are subjected. When decisions are made, and the affected agents are not able to advance their concerns, social frustration will result. Here, the political process was at work, and although it was not perfect in this case, it was able to advance all interests: the administration had NAFTA, many groups received concessions, and representatives strengthened ties to their constituents. The fight over NAFTA left no scars and has now been forgotten, leaving Congress free to address other issues.

On the other hand, many of the opponents of NAFTA had radically different views on the philosophy, principles, and commitments which underlie the agreement. Why did their efforts fail to defeat NAFTA? The answer to this question may lie in the economic situation of the country, and in the globalization trend. All of these factors influenced the positions of the voting public and the members of Congress who voted for NAFTA. In the end, after hearing so many arguments, pro and con, can it be denied public opinion guided the outcome? After all, Congress is a mirror image of the American people. The NAFTA approval process shows us politics at work and the influence of public concerns.

Finally, the capacity of the collegiate organization of Congress to assess decisions containing profound foreign policy implications should be questioned. Today, we see Senate Committees addressing the White House response to the Mexican financial crisis. How much of that response can trace its origin to the change that NAFTA represented in United States' foreign policy toward Mexico and the Latin American region? Whatever the answer to these questions may be, in the midst of the human conditions which result because of NAFTA, there will always be the temptation for nations to think that their decisions are better for their interests than the decisions reached through NAFTA, and whatever nation can benefit the most from the agreement will also be motivated into doing less to disturb its terms.
## Public Support for NAFTA

### September 19, 1993

**Do you favor or oppose NAFTA?**

<table>
<thead>
<tr>
<th>Response</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oppose not so strongly</td>
<td>15%</td>
</tr>
<tr>
<td>Favor strongly</td>
<td>16%</td>
</tr>
<tr>
<td>Favor not so strongly</td>
<td>17%</td>
</tr>
<tr>
<td>No answer</td>
<td>27%</td>
</tr>
<tr>
<td>Do not know</td>
<td>1%</td>
</tr>
<tr>
<td>Oppose strongly</td>
<td>24%</td>
</tr>
</tbody>
</table>

### October 26, 1993

**Do you favor or oppose NAFTA?**

<table>
<thead>
<tr>
<th>Response</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Opposition</td>
<td>33%</td>
</tr>
<tr>
<td>Not sure</td>
<td>4%</td>
</tr>
<tr>
<td>No opinion</td>
<td>34%</td>
</tr>
<tr>
<td>In favor</td>
<td>29%</td>
</tr>
</tbody>
</table>

### November 11, 1993

**Do you favor or oppose NAFTA?**

<table>
<thead>
<tr>
<th>Response</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Opposition</td>
<td>39%</td>
</tr>
<tr>
<td>Not sure</td>
<td>20%</td>
</tr>
<tr>
<td>In favor</td>
<td>41%</td>
</tr>
</tbody>
</table>

### December 14, 1993

**Do you think NAFTA is a step in the right/wrong direction?**

<table>
<thead>
<tr>
<th>Response</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Sure</td>
<td>14%</td>
</tr>
<tr>
<td>Right</td>
<td>53%</td>
</tr>
<tr>
<td>Wrong</td>
<td>33%</td>
</tr>
</tbody>
</table>

### October 25, 1994

**Do you think NAFTA is good/bad?**

<table>
<thead>
<tr>
<th>Response</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>No opinion</td>
<td>19%</td>
</tr>
<tr>
<td>Good</td>
<td>50%</td>
</tr>
<tr>
<td>Bad</td>
<td>31%</td>
</tr>
</tbody>
</table>
**Public Perception Regarding Jobs and NAFTA**

**October 26, 1993**

<table>
<thead>
<tr>
<th>Question</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you believe some jobs will be lost but more will be created?</td>
<td></td>
</tr>
<tr>
<td>Agree</td>
<td>42%</td>
</tr>
<tr>
<td>Not sure</td>
<td>13%</td>
</tr>
<tr>
<td>Disagree</td>
<td>45%</td>
</tr>
</tbody>
</table>

**November 9, 1993**

<table>
<thead>
<tr>
<th>Question</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you think NAFTA would result in more or fewer jobs?</td>
<td></td>
</tr>
<tr>
<td>More</td>
<td>50%</td>
</tr>
<tr>
<td>Same</td>
<td>3%</td>
</tr>
<tr>
<td>Fewer</td>
<td>38%</td>
</tr>
<tr>
<td>Don't know</td>
<td>9%</td>
</tr>
</tbody>
</table>

**November 11, 1993**

<table>
<thead>
<tr>
<th>Question</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you think NAFTA is good/bad for American workers?</td>
<td></td>
</tr>
<tr>
<td>Good</td>
<td>38%</td>
</tr>
<tr>
<td>Bad</td>
<td>51%</td>
</tr>
<tr>
<td>Not sure</td>
<td>11%</td>
</tr>
</tbody>
</table>

**November 11, 1993**

<table>
<thead>
<tr>
<th>Question</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you think NAFTA will cause anyone in your household to lose their job?</td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>77%</td>
</tr>
<tr>
<td>Yes</td>
<td>12%</td>
</tr>
<tr>
<td>Not sure</td>
<td>8%</td>
</tr>
<tr>
<td>No one works</td>
<td>3%</td>
</tr>
</tbody>
</table>

**November 16, 1993**

<table>
<thead>
<tr>
<th>Question</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you think NAFTA will create jobs because Mexico will buy more U.S. imports, or will cause the loss of jobs because low wages attract firms to Mexico?</td>
<td></td>
</tr>
<tr>
<td>Create</td>
<td>32%</td>
</tr>
<tr>
<td>No difference</td>
<td>5%</td>
</tr>
<tr>
<td>Loss</td>
<td>53%</td>
</tr>
<tr>
<td>Do not know</td>
<td>10%</td>
</tr>
</tbody>
</table>

**March 21, 1994**

<table>
<thead>
<tr>
<th>Question</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you think NAFTA will help/hurt the overall job situation?</td>
<td></td>
</tr>
<tr>
<td>Hurt a little</td>
<td>14%</td>
</tr>
<tr>
<td>Hurt a lot</td>
<td>18%</td>
</tr>
<tr>
<td>Help a little</td>
<td>32%</td>
</tr>
<tr>
<td>Help a lot</td>
<td>20%</td>
</tr>
<tr>
<td>Do not know</td>
<td>15%</td>
</tr>
<tr>
<td>No effect</td>
<td>1%</td>
</tr>
</tbody>
</table>
## Public Perception of NAFTA Issues

### November 11, 1993

**Do you think NAFTA will be mostly good or mostly bad for American consumers?**

<table>
<thead>
<tr>
<th>Opinion</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Good</td>
<td>52%</td>
</tr>
<tr>
<td>Bad</td>
<td>33%</td>
</tr>
<tr>
<td>Not Sure</td>
<td>15%</td>
</tr>
</tbody>
</table>

### November 15, 1993

**If NAFTA is passed, do you think immigration from Mexico into the U.S. would go up, go down, or stay about the same?***

<table>
<thead>
<tr>
<th>Option</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Go up</td>
<td>26%</td>
</tr>
<tr>
<td>Go down</td>
<td>18%</td>
</tr>
<tr>
<td>Stay about the same</td>
<td>50%</td>
</tr>
<tr>
<td>Not sure</td>
<td>6%</td>
</tr>
</tbody>
</table>

### November 11, 1993

**Do you think NAFTA will be mostly good or mostly bad for American corporations?**

<table>
<thead>
<tr>
<th>Opinion</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Good</td>
<td>69%</td>
</tr>
<tr>
<td>Bad</td>
<td>20%</td>
</tr>
<tr>
<td>Not sure</td>
<td>11%</td>
</tr>
</tbody>
</table>

### November 16, 1993

**Do you consider the vote in Congress on NAFTA a crucial test of America’s leadership role in the world?****

<table>
<thead>
<tr>
<th>Opinion</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>55%</td>
</tr>
<tr>
<td>No</td>
<td>37%</td>
</tr>
<tr>
<td>Do not know</td>
<td>7%</td>
</tr>
</tbody>
</table>

---

** Yankelovich  
*** Hart and Teeter  
**** Gallop
### Public Reaction to Congressmen if Voted for NAFTA

#### October 26, 1993
Which candidate for Congress in 1994 elections would you support:

<table>
<thead>
<tr>
<th>Option</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>A) Supported president Clinton’s economic program, health care program, and NAFTA;</td>
<td>52%</td>
</tr>
<tr>
<td>B) Opposed all of the latter</td>
<td>39%</td>
</tr>
<tr>
<td>Depends on candidate</td>
<td>4%</td>
</tr>
<tr>
<td>Not sure</td>
<td>5%</td>
</tr>
</tbody>
</table>

#### November 15, 1993
If your member of Congress votes against NAFTA, would this opposition make you more/less likely to vote for him in 1994?

<table>
<thead>
<tr>
<th>Option</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>No difference</td>
<td>60%</td>
</tr>
<tr>
<td>More likely</td>
<td>16%</td>
</tr>
<tr>
<td>Less likely</td>
<td>13%</td>
</tr>
<tr>
<td>Not sure about vote</td>
<td>4%</td>
</tr>
<tr>
<td>Not sure</td>
<td>8%</td>
</tr>
</tbody>
</table>

#### November 16, 1993
If your member of Congress votes in favor of NAFTA, will that make you more/less likely to vote for him in 1994?

<table>
<thead>
<tr>
<th>Option</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>No effect</td>
<td>60%</td>
</tr>
<tr>
<td>Less likely</td>
<td>21%</td>
</tr>
<tr>
<td>More likely</td>
<td>14%</td>
</tr>
<tr>
<td>Do not know</td>
<td>6%</td>
</tr>
</tbody>
</table>

#### October 10, 1994
If your candidate supported NAFTA, will that make you more/less likely to support him?

<table>
<thead>
<tr>
<th>Option</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>More likely</td>
<td>19%</td>
</tr>
<tr>
<td>Somewhat more likely</td>
<td>29%</td>
</tr>
<tr>
<td>Much less likely</td>
<td>18%</td>
</tr>
<tr>
<td>Somewhat less likely</td>
<td>19%</td>
</tr>
<tr>
<td>Not much difference</td>
<td>6%</td>
</tr>
<tr>
<td>Not sure</td>
<td>9%</td>
</tr>
</tbody>
</table>
## The President, Congress and NAFTA

### December 26, 1993

<table>
<thead>
<tr>
<th>How would you rate President Clinton's job in handling NAFTA?</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Excellent</td>
<td>20%</td>
</tr>
<tr>
<td>Good</td>
<td>40%</td>
</tr>
<tr>
<td>Fair</td>
<td>22%</td>
</tr>
<tr>
<td>Poor</td>
<td>13%</td>
</tr>
<tr>
<td>Not sure</td>
<td>14%</td>
</tr>
</tbody>
</table>

### December 26, 1993

<table>
<thead>
<tr>
<th>How would you rate Congress' job in handling NAFTA?</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Excellent</td>
<td>6%</td>
</tr>
<tr>
<td>Good</td>
<td>38%</td>
</tr>
<tr>
<td>Fair</td>
<td>36%</td>
</tr>
<tr>
<td>Poor</td>
<td>16%</td>
</tr>
<tr>
<td>Not sure</td>
<td>5%</td>
</tr>
</tbody>
</table>
THE SEARCH FOR JUSTICE - A CASE FOR REFORM TO THE CIVIL JUSTICE SYSTEM IN BRITAIN

Peter Watson*

I. THE BRITISH SYSTEM ................................................................. 453

II. THE UNITED STATES' SYSTEM ................................................. 457

III. THE WAY FORWARD ................................................................. 460

I. THE BRITISH SYSTEM

It can be said without fear of contradiction, that there is a need, both perceived and real, for reform of the British civil justice system. Although different, I draw no distinction between Scotland's and England's justice systems. However, to the extent that any distinction could be drawn, perhaps it would suggest that the case for reform is stronger in Scotland. The tension between the disenfranchisement of the middle classes from the British judicial system and the impossible demands placed upon a publicly funded Legal Aid system have, in part, been recognized through legislation in Scotland. Specifically, the laws of Scotland allow enhanced fees in cases where solicitors take instructions on a speculative basis, "no win - no fee," and there are proposals pending in England for similar reforms. To the extent that one measure of a civilized society is its system of law, we must be concerned when a system fails to provide access to justice for all and where all do not stand equal before the law.

There is also the problem of failing public confidence in a system which can, on the one hand, deliver what are perceived to be large verdicts in defamation and libel cases, and modest, inadequate compensation for those who have suffered devastating personal injury, or have seen their loved ones killed through the negligence of others, such as the recent thalidomide victims. I pause to reflect that parents who have suffered the tragic and immeasurable loss of their child might find such a death in Scotland valued at about £3000. It has been said that reform of the law is far too serious a matter to be left to the legal profession. Instead, I submit that the responsibility for correcting such matters must lie with us all. The law must reflect the society it serves. It must change and develop if it is to continue to be relevant rather than becoming a museum.

* Head of Litigation, Levy & McRae, Glasgow, Scotland; L.L.B., University of Edinburgh; B.A., University of Strathclyde.
relic preserving ideas of the past which have increasingly little relevance for today's needs. Therefore, we need to look at other legal systems. We need to experiment and find ways of delivering access to justice, and in a way which does not impose intolerable burdens on public expenditure.

In the areas of personal injury and wrongful death, there is a useful comparison to be made between the civil justice system in Britain and that in the United States which, to some extent, shares a common origin with the British system, although it has developed quite differently. If access to justice is as I suggest, a fundamental indicator of the relevance of any system of justice, then the system in Britain is in need of radical reform. Presently, only those who have been granted Legal Aid or who are very wealthy can afford the costs and the risks inherent in most litigation. Eligibility for Legal Aid has increasingly been restricted, and even those who are granted Legal Aid, subject to a contribution, often find the contribution so large in relation to their means as to make the sacrifice too great. Those who accept the offer of Legal Aid will find their freedom to instruct a solicitor restricted to those lawyers prepared to act for the fee rates paid by the Legal Board, which fall considerably short of those paid by privately instructing clients.

The law of supply and demand dictates that many of the best lawyers, whether solicitors or counsel, often prefer to act for the corporate or private client who pays "top dollar," while those who depend upon Legal Aid may be restricted to the less experienced or perhaps less able attorney. While this is a general comment subject to many exceptions, it is nonetheless true to say that the Legal Aid client is placed in a different position from those able to instruct privately. Lawyers who act for Legal Aid clients agree to provide their services at a hugely discounted rate. Many skilled and able solicitors and counsel agree to this, but many do not. It is perhaps an inevitable consequence of a system of publicly funded litigation that there will always be a need for cost control, and inevitably fees paid from the public purse will fall short of those available from the private client. I would argue not only must we achieve access to the courts for all, but the quality of representation should be determined by needs of the case rather than the wealth or poverty of the claimant. It is surely right that all should stand equal before the law and in that sense "David" is surely entitled to be equal with "Goliath."

It cannot be just that a Legal Aid litigant is advised by an inexperienced or less able lawyer working within budgetary constraints, often overloaded with cases, in an effort to compensate for an inadequate fee structure. Meanwhile, those he sues are represented by the most able in their field, fully prepared and able to apply the skill, time, and resources necessary to properly argue their client's cause. This
observation is not a criticism of solicitors and counsel who represent clients of Legal Aid, but a reflection of the uneven playing field often facing the Legal Aid litigant.

It is also clear that the present Legal Aid System is, by design, bound to fail. It is the classic dilemma of infinite demand and finite resources. Is it conceivable that we could have a system of publicly funded litigation which meets any and all demands placed upon it? Such a system would inevitably consume a disproportionate amount of public expenditure. Legitimate claimants should be able to bring their claims before the courts, and those responsible for acts of negligence or who cause injury and death, should not be able to hide behind the imperfections of a legal system which denies justice to victims.

Great Britain's Legal Aid System is also one which, by design, encourages inefficiency. Fee charging is either by the hour or by the act performed. It is said that this scheme leaves the system open to abuse. For example, unscrupulous lawyers may make up for poor rates by doing unnecessary work or allowing pointless litigation to proceed through the courts with the sole purpose of charging more fees.

In response to some of these problems, the legal profession has seen the introduction of new rules in Scotland which allow solicitors and clients to enter into special fee arrangements which in turn enable lawyers to recover enhanced fees of up to 100% if they are prepared to take on litigation speculatively; that is no win - no fee. Similar proposals are being considered in England. The new rules are subject to a number of qualifications and do not cover all the fees that a solicitor would normally charge a client. Lawyers are restricted to fees that might be recoverable from the losing party in the event of success. These fees are often much less than the actual fees and costs incurred, and there are a number of other restrictions and qualifications. These proposals remain wedded to the principle of paying lawyers on an hourly rate. It is not equivalent to the American contingency fee system with lawyers paid on a percentage of what is recovered in damages. Nonetheless, these proposals recognize a remarkable departure from one of the often voiced objections to the American system; namely, that a lawyer should not have an interest in the outcome of his client's case. It now appears that such an interest is not only permissible, but that it may in fact be a good thing to the extent that lawyers under these arrangements are unlikely to pursue pointless litigation.

It is unclear to what extent these proposals will address the problem of access to justice, or ensure that the choice of lawyer is governed by the needs of the case rather than the means of the client. Nor is it clear whether this new approach can or will generate sufficient
additional fees to compensate solicitors for the risk of taking a case on a speculative basis. Such speculative arrangements impose a considerable risk, particularly for solicitors in smaller practices. Resources and manpower in pursuing litigation can be considerable and the failure to recover a fee can cause considerable financial problems for the solicitor. In the American system, where lawyers are paid a percentage of damages recovered, usually between twenty-five to forty percent, depending on the type of case and the risk involved, the sums recovered are often sufficient to provide a "cushion" for cases which do not succeed. It is not clear whether the current proposals would achieve figures sufficient to compensate for the risk involved. There is also the difficulty that litigants in Britain, even in a speculatively funded action, continue to face perhaps the biggest disincentive to pursue their rights; namely, the "expenses rule" where the loser pays expenses. The very persons which the new proposals seek to help, those who cannot afford to instruct lawyers privately and who by definition are not wealthy, are asked to take the risk of paying expenses if they lose. Expenses can be huge and sufficient enough to overwhelm the resources of most middle income earners.

In England there is a proposal for litigants to buy insurance to cover expenses. It is not clear to what extent this system will work. No equivalent system is in place in Scotland and those wishing to pursue an action are at a considerable disadvantage. Corporate and wealthy individuals defending actions are at an advantage which often deters others pursuing litigation or, if raised, can see litigation prematurely settled at below value settlements. Every lawyer in practice in Britain is aware that the expenses rule is often used to bludgeon litigants into settlements which do not properly reflect compensation for the loss they have suffered, but reflect a compromise to avoid the expenses inherent in the judicial process.

In comparison with other systems, most notably the system in the United States, it is often said that the British system avoids the excesses of massive jury awards. One notable exception in Britain and often the subject of adverse comment, is the difference between the perceived huge awards sometimes made by juries in defamation and libel cases (primarily in England) for plaintiffs who suffered hurt feelings and the more modest awards for plaintiffs who suffered devastating personal injury. This exposes a number of problems and contradictions in the British system. The adjectives used to describe some United States' jury awards presupposes they exceed what is just and, by definition, what would have been awarded in a similar case in Britain.

The difference in result in many cases is, in my view, arrived at for one very important reason. For the most part, damage awards in Britain are decided by judges whilst in the United States by juries. If the
purpose of an award of damages is to compensate victims for their loss, past, present and future, and to compensate them for their pain and suffering, who is best able to assess damages? It is true that juries are composed of ordinary people who are not experts and who may, from time to time, make mistakes. Many who criticize the system in Britain say judges are conservative in their approach, and they take into account wider concerns which are sometimes irrelevant, such as the effect large awards may have on insurance premiums, all of which have little to do with compensating the individual concerned. What is clear is that the level of damages recoverable in Britain for personal injury and wrongful death cases fall considerably short of the damages generally recoverable in the United States. Many dealing with personal injury litigation believe that the proper course is to allow juries to determine personal injury matters, to have a greater faith in the jury system, and to allow the courts to correct those awards if it can be demonstrated that juries have behaved unreasonably. As will be seen, the effect of jury awards is wider than just the proper compensation of those affected by the negligence of others. Although jury trials are sometimes available in Britain, they are not commonplace, nor are they easy to obtain. Perhaps there is reason to extend the role of juries to personal injury cases on the basis that they are as qualified as judges to assess the proper compensation deserved in a case. The appreciation of pain and suffering, and the likely impact on an individual's life and his or her ability to earn a living, are not matters which judges are any more qualified to assess than is a member of the public applying his or her life experience. Some might argue that the experience of ordinary people in such an assessment is a great deal more relevant than that of judges. The perceived failure of our system to properly compensate those who have been the victim of personal injury has led lawyers, in cases where the opportunities exist, to take litigation to other countries in order to recover higher compensation.

II. THE UNITED STATES' SYSTEM

In contrast to the British system, the system in the United States has much more of a free market feel to it. There is no equivalent system of publicly funded litigation and there is no equivalent rule about expenses. Those who wish to litigate may sue whomever they want, without fear of expenses. However, first they must find a lawyer. Those who wish to pursue litigation have a choice between retaining attorneys on an hourly rate or engaging attorneys on a contingency basis. When an attorney is engaged on a contingency fee basis, the lawyer is largely responsible for the funding and associated costs of any litigation, before taking on a case
they must be convinced of the prospects of success. All costs and fees are contingent upon success. The effect is that American attorneys will screen cases to determine the prospects of success. Those wishing to pursue hopeless and pointless litigation will not readily be able to engage attorneys, and those who initiate claims will find that their attorneys constantly monitor the prospects of success. Another effect of the contingency fee system is that it allows those with claims to choose the attorney best suited to the case rather than seek out an attorney prepared to work at discounted fee rates with the obvious risk that the best lawyer for the job is not retained.

It would now appear acceptable and perhaps even appropriate for lawyers in Britain to have an interest in the outcome of litigation. This much is implicit in the most recent proposals for Scotland and England, but what can be said of the comparison between our system and that in the United States? There is, I would suggest, greater access to justice in the United States. Almost everyone with a claim is in a position to retain attorneys on a contingency fee basis. The system involves no public expenditure and therefore imposes no burden on the public purse. The system does deliver larger awards for personal injury and wrongful death cases. It is really a question of which system delivers best in the widest sense. Those against contingency fee systems argue that it has led to an explosion in litigation, log jammed the American court system, and negatively affected business. Another argument against the contingency fee system blames large jury awards for increased insurance premiums, driving the United States medical system to the point where many doctors cannot afford the insurance premiums. When examined, most of these observations are found to be largely anecdotal and have little basis in fact.

Litigation is certainly popular in the United States. However, there is little evidence that its popularity has been fueled by speculative litigation. Much of the litigation is raised by the government seeking to recover student loans and other debts, and viewed in another way the courts are being used for precisely the purpose they are designed. That purpose is to regulate disputes and to settle claims. Equally, there is little evidence to suggest that litigation harms the competitiveness of American firms or that there is any link between insurance costs and the performance of business. So far as the medical profession is concerned, it is important not to exaggerate what is happening in the United States. Most doctors do very well despite insurance premiums. The reality is that very few medical malpractice cases succeed. Fifty percent of those filed result in no awards at all and whilst insurance premiums for doctors doubled in the years 1976 to 1984, this did not equal the rise in average earnings for that period. In fact, as a percentage of earnings, premiums fell. There appears
to be little evidence to suggest that larger jury awards in the United States have imposed an unacceptable social cost by penalizing business or the medical profession in such a way that they are adversely affected. Indeed, *per contra*, it can be argued that in a country which does not have a national health service, or the extensive welfare system provided in Britain, such awards are necessary to properly reflect the costs of ongoing medical care, support, and loss of income for those injured through the fault of others. In Britain, where awards have been much smaller, the State, through the National Health Service and the system of State Benefits, has to some extent paid the bill for the ongoing effects of those suffering long term disability who have not been adequately compensated for the effects of their injuries. It can be argued that as pressure on public funds mount, affecting not only funding for the Legal Aid, but also the National Health Service and other State Benefits, the better way to compensate those affected by the negligence of others is to have the negligent party pay the full cost, relieving the state of responsibility for funding litigation or looking after the victim.

There is, of course, another consequence of American jury awards; what I call the "economic imperative." This describes the consequence of such awards on those who have to pay them, notably the insurance industry or large corporations. The manufacturers of defective products are, as a matter of economic necessity, more likely to react to large damage awards than to small awards. The prospect of facing multiple claims is such that corporations are likely to react to improve safety standards and correct defective products to avoid multiple large damage awards. If the death of a child were to result in an award of £3000 it will have little financial impact on a company or insurer. If the award were $3,000,000 the equation is of necessity different. The United States has seen many improvements in safety standards which are a result of large jury awards or the threat of them. Large verdicts are more effective than the periodic promotion of higher safety standards by government departments or other bureaucratic agencies. The "economic imperative" is a stimulus to improve standards. Perhaps it comes as no surprise that corporations react more quickly when faced with multimillion dollar law suits rather than the prospect of a modest fine imposed by a criminal court after a breach of a health and safety regulation.

In summary, the American system appears to offer many advantages. Contingency fees allow all, irrespective of their personal circumstances, to retain attorneys most appropriate to the case. Those attorneys are unlikely to accept litigation where there is no prospect of success since not only do they put their fees at risk, but in most cases they risk the cost of funding actions. Jury awards are large enough to make the
contingency fee system work to the extent that prospects of a share in damages are sufficient to compensate the lawyers for the risks taken. The effect of larger awards is measured partly as the “economic imperative” to improve standards and by imposing the true costs of the negligence on a guilty party rather than the state assuming responsibility for after care and other social support. This relieves the demand on the public purse while ensuring greater access to justice for those who need it.

The American contingency fee system has been the subject of much criticism by many in Britain and is now under attack in the United States. It is unfortunate that many in Britain who criticize have been silent as an increasing proportion of the British public have become disenfranchised from a legal system, which purports to serve them, often sees just claims not pursued or victims bullied into inadequate settlement. Those in the United States who see apparent advantages in the “expenses rule” should consider with care the effect such a rule will have on access to justice.

It has been said that the contingency fee system will encourage lawyers to take shortcuts and to be unethical. The logic of this argument is difficult to follow. It presumes that the system in Britain is free of such problems or that the unscrupulous and unethical are unable to find opportunities to abuse our system, but clearly this is not the case. Those administering the British Legal Aid System are aware of many abuses within that system where pointless litigation is pursued on an hourly basis with little or no prospect of delivering any success to the claimant. The system of hourly paid fees, whether legally aided or privately funded, is always open to abuse by the unethical and unscrupulous. I am aware of no evidence to suggest that the American system or American lawyers are any more likely to produce such abuses than Great Britain. The question of ethics and standards is one quite separate from how we organize access to justice.

III. THE WAY FORWARD

I do not seek to suggest that all in the British system is wrong nor that all in the American system is correct. I would suggest, however, that we can learn from looking at other systems and looking at our own critically. It is neither appropriate nor desirable to substitute one for the other and the better course undoubtedly would be to encourage development of our own system to meet the demands of the present day. For my part, I would argue for an experiment in the area of personal injury litigation. It should not be beyond the wit of government and the profession to devise a system allowing contingency fees for certain classes
of actions or within certain parts of the court structure. I would also argue that such a system will not work unless it permits greater access to juries. In principle, there is no reason why this should impose additional costs. The option of a jury trial could result in damages sufficient to meet any additional costs. Would it be unreasonable, for example, for those who elect a jury trial to agree to pay a percentage of the sums awarded as a cost? Again, I would suggest this would be payable only on success, reflecting the philosophy of contingency based litigation and ensuring that those who were of modest means were not disadvantaged in the pursuit of their claims.

I am the first to appreciate that these proposals are imperfect, but then again, so is the current system. We are in urgent need of reform. It is a reform which, to be successful, requires everyone to contribute to ensure that we end up with a system which meets the expectations and needs of the public that it seeks to serve.
APPLICATION OF THE UNITED STATES' LAW OF COUNTERVAILING DUTIES TO NONMARKET IMPORTS: EFFECTS OF THE RECENT FOREIGN REFORMS

James A. Meszaros*

I. INTRODUCTION .............................................................. 464
II. GENERAL UNITED STATES LAW OF COUNTERVAILING DUTIES ................................................ 465
III. SIGNIFICANT URUGUAY ROUND CHANGES TO UNITED STATES COUNTERVAILING DUTY OBLIGATIONS ................................................................ 466
IV. HISTORICAL DEVELOPMENT OF UNITED STATES' POLICY ON COUNTERVAILING DUTIES LAW AND NONMARKET ECONOMIES AWARDED ........................................ 467
   A. Imports of Carbon Steel Wire from Poland and Czechoslovakia .............................................. 467
   B. Georgetown Steel .................................................... 469
   C. Commerce's Current Challenge: Nonmarket Economies in Transition .................................... 470
V. ANTIDUMPING LAW AND REFORMING NONMARKET ECONOMIES ........................................ 472
   A. The Problem with Valuation .................................... 472
   B. The Bubbles Test: Imports of Lug Nuts and Fans From the People's Republic of China (PRC) .............. 474
   C. The Mini-Bubbles Test: Initiation of Countervailing Duties Investigation of the Lug Nut Imports .......................................................... 476
   D. The Market Oriented Industry Test: Redetermining the Dumping Investigations of the Lug Nut and Fan Imports .......................................................... 478
   E. The Challenges of Foreign Production Investigations .......................................................... 479

* The author is a candidate for Juris Doctor, 1996, at Boston College Law School. The author would like to thank Professor Cynthia Lichtenstein for her many helpful comments, and Paulo Mendes from the United States Department of Commerce for the invaluable information he provided.
The last several years have been marked by considerable economic reform in nonmarket countries. The changes which have occurred have undoubtedly impacted upon United States’ law and policy with respect to the United States’ treatment of those countries. The purpose of this paper is to examine the effects, or potential effects, this reform has had, or could have, on the United States’ law of countervailing duties with respect to nonmarket economies. In particular, this paper seeks to demonstrate, through case analyses, how these effects are, or likely will be, driven by those basic principles already established under the United States’ countervailing duty law. Part I is a general look at the United States’ trade law, highlighting some recent changes made to it by the Uruguay Round Agreement. Part II outlines how the United States Commerce Department (Commerce), which is responsible for administering this law, developed the United States’ policy on countervailing duty law and nonmarket economies. Part III is devoted to a discussion of important antidumping law developments which impact upon the application of countervailing duties to nonmarket economies in transition. Part IV examines what can already be said about the application of countervailing duty law to reforming nonmarkets given the fact this is still a very new area for Commerce. This paper will then conclude with some final thoughts on related foreign policy concerns.
II. GENERAL UNITED STATES' LAW OF COUNTERVAILING DUTIES

The purpose of United States' countervailing duty law is "to offset the unfair advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments." Before the Commerce Department can impose countervailing duties on any imports, it must make a two-part determination. First, the goods are being subsidized by the foreign government; and second, a United States' industry is materially injured, or is threatened with material injury, or the establishment of a United States' industry is slowed because of the subsidized imports. Upon making a positive finding for countervailing duties, the Commerce Department will publish a countervailing duty order covering the subsidized goods, or "subject merchandise" in the Federal Register pursuant to this order. The Commerce Department will then direct Customs to impose countervailing duties equal to the amount of the net subsidy.

The Commerce Department defines subsidies as direct and indirect government grants, whether in the form of direct cash payments, tax credits, or artificially low-interest loans, for the production or exportation of goods. In its statutory definition of subsidy, the Tariff Act of 1930 lists two types: export and domestic. The former kind are defined to include those examples which the General Agreement on Tariffs and Trade (GATT) Subsidies Code enumerates in its Illustrative List of Export Subsidies. That list includes various subsidies, credits, and preferential tax treatments contingent upon export.

In defining domestic subsidies, the Tariff Act holds that subsidies must be provided "to a specific enterprise or industry, or group of enterprises or industries." Thus, United States' trade law aims at countervailing, not foreign government programs designed to achieve

4. 19 U.S.C. § 1671(c). An estimated amount is used before Commerce makes a more definite assessment.
broad economic goals such as lower inflation or unemployment, but the
government aid which benefits a specific economic sector. The Tariff Act
states such aid includes provisions of capital, low-interest loans, debt
forgiveness, and cost assumptions.9

III. SIGNIFICANT URUGUAY ROUND CHANGES TO UNITED STATES
COUNTERVAILING DUTY OBLIGATIONS

Until recently, United States' trade law did not require Commerce
to conduct a material injury test for subsidized goods from all countries.
Under the Trade Agreements Act of 1979, the United States was obligated
to conduct such a test on imports only from those nations which: (1) were
signatories to the Tokyo Round Subsidies and Countervailing Measures
Code; (2) had assumed comparable obligations; (3) or were not signatories
to GATT but had bilateral trade agreements with the United States
requiring unconditional Most Favored Nation (MFN) treatment.10
Otherwise, countervailing duties could be imposed without an injury test.
This bifurcated system changed, however, with the Uruguay Round. All
signatories to that accord are afforded an injury test, and since all World
Trade Organization (WTO) members are parties to these agreements, an
injury test must now be applied by the United States in every
countervailing duty case involving a WTO member.11

Prior to the Uruguay Round, controversy frequently arose
regarding exactly what type of government-conferred benefits constitute
"subsidies" under GATT.12 At times it was unclear just when the United
States could hold such benefits as actionable, under the GATT law of
countervailing duties. The Uruguay Round Subsidies Agreement clarified
this area of GATT obligations when it defined a subsidy as a "financial
contribution" provided directly or indirectly by a government which
confers a benefit.13 The Agreement more completely developed this
definition of an actionable subsidy by establishing a classification of
subsidies. The classes include subsidies which are: (1) prohibited, or "red

Procurement After the Tokyo Round: Is it ‘GATT Legal’? 23 CORNELL INT’L L.J. 553, 568
(1990); see also JOHN H. JACKSON ET AL., INTERNATIONAL ECONOMIC RELATIONS 785 (1995).
12. JACKSON, supra note 10, at 783, 785.
13. GATT, supra note 7, art.1, §1.1.
light;" (2) permissible, but actionable if they cause adverse trade effects or "amber light;" and (3) nonactionable, or "green light."

Under this new Uruguay Round classification, the United States may continue to treat export subsidies as a violation of GATT obligations, but may also treat as prohibited any de facto export subsidies or subsidies contingent upon the manufacturer’s use of domestic materials for production. The United States may now also legally take countervailing action when it can demonstrate, by means proscribed under the “amber light” category, the use of subsidies by a nation has adversely affected United States’ trade interests through price or market share effects; whether they have caused “serious prejudice” to United States’ interests. In cases where serious prejudice is presumed, the burden is on the subsidizing nation to demonstrate harm was not caused to the importing nation. The new classification prohibits the United States from taking countervailing action in certain cases of governmental assistance for: industrial research, regional development, or the adaptation of existing plants or equipment to meet new environmental standards. A notification provision allows for other countries to judge the permissibility of subsidies before they are granted by a government.

IV. HISTORICAL DEVELOPMENT OF UNITED STATES’ POLICY ON COUNTERVAILING DUTIES LAW AND NONMARKET ECONOMIES AWARDED

A. Imports of Carbon Steel Wire from Poland and Czechoslovakia

The first three petitions for application of countervailing duties against nonmarket economies were filed in 1983. In September of that year, the American Textile Manufacturers Institute filed a petition alleging subsidization of textile and apparel imports from the People’s Republic of China. That petition was ultimately withdrawn on the day the Commerce

14. See also U.S. COMMERCE DEP’T, UNITED STATES-CHINA LEGAL SEMINAR—UNITED STATES ANTIDUMPING AND COUNTERVAILING LAWS: IMPLICATIONS FOR THE PEOPLE’S REPUBLIC OF CHINA 23 (1994) [hereinafter SEMINAR].

15. GATT, supra note 7, art. 3, § 3.1(a). The United States must, however, allow a three-year grace period from the Agreement’s entry into force before it may act on the latter two practices. SEMINAR, supra note 14, at 24.

16. GATT, supra note 7, art. 6; see also SEMINAR, supra note 14, at 24.

17. GATT, supra note 7, art. 6.


19. Id.
Department was scheduled to issue its preliminary determination. Later that year in November, a group of United States' producers of carbon steel wire rod filed a petition against imports of that product from Poland, and another petition against imports from Czechoslovakia. In March of 1984, United States' producers of potassium chloride (potash) filed petitions against imports of potash from the Soviet Union and East Germany.

In May 1984, the Commerce Department finally declared its stance on the applicability of countervailing duties to nonmarket economy countries. In its final determination on the cases of the carbon steel wire rod imports from Czechoslovakia and Poland, Commerce decided countervailing duty law could not be applied to nonmarket economies. The Department's rational in each case was that it was impossible to identify a countervailing subsidy in a nonmarket economy. Under the United States' law of countervailing duties, the Department recognized a subsidy as "any action that distorts or subverts the market process and results in a misallocation of resources." Yet, in nonmarket economies, there is no such market process to distort. Nonmarket economies rely on the central government rather than market forces to determine prices and resource allocation. As a result, anything which results in such markets is caused by the central planning, and not by subsidization. Thus, Commerce found it lacked the grounds to find a nonmarket government action to be a countervailing subsidy.

As a result of its conclusions, the Commerce Department denied the petitions for duties against the Polish and Czechoslovakian imports. One month later, the Commerce Department dismissed the petitions against the Soviet Union and East German imports and rescinded the initiations of the related countervailing duty investigations. The above determinations were appealed by the petitioners, and the Commerce Department's ruling was reversed by the United States Court of

---

20. *Id.*
21. *Id.* at 954.
23. *Id.* at 19,371.
24. *Id.*
25. *Id.*
26. *Id.* at 19,370.
International Trade in *Continental Steel Corp. v. United States.*[^28] The court held that the language of section 303 of the Tariff Act of 1930 did not make any distinctions concerning a country's economy, and that it did not matter whether a subsidy could be said to exist in a nonmarket economy under our legal definitions.[^29] Finally, the case was brought before the Court of Appeals for the Federal Circuit in *Georgetown Steel v. United States.*[^30] The court reversed the Court of International Trade and sustained the Commerce Department's position against the nonapplicability of countervailing duties against imports from nonmarket economies.[^31]

**B. Georgetown Steel**

The basis of the *Georgetown Steel* decision was the court's determination that the concepts of subsidization and its resultant misallocation of resources, indeed had no meaning outside the context of market-based economic systems since commercial activity in nonmarket economies is controlled according to central plans.[^32] The court was convinced by the Commerce Department's argument that subsidies cannot affect the allocations of resources when the state establishes such allocations pursuant to a central economic plan.[^33] The court found that, in such markets, government subsidies may aid producers in accomplishing their set economic goals, but the subsidies "do not create the kind of unfair competitive advantage over American firms against which the countervailing duty act was directed."[^34] Since such nonmarket economy subsidies do not help producers make sales in the United States which they otherwise may not have made, the court held countervailing duties to be inapplicable under United States' trade law.[^35]

It is interesting to note that in its reasoning, the *Georgetown Steel* court went back to the basic purpose of United States' countervailing duty law. The court went beyond the narrow analysis of the International Trade Court and sought out whether or not the benefit conferred by a nonmarket government actually gave its producers an unfair competitive advantage in foreign markets such as the United States. By showing that the nature of

[^29]: Id. at 551; see also 19 U.S.C.S. May 1995 JM Supp. § 1303 repealed.
[^30]: Georgetown Steel Corp. v. United States, 801 F.2d at 1308 (Fed. Cir. 1986).
[^31]: Id.
[^32]: Id. at 1315.
[^33]: Id. at 1316.
[^34]: Id. at 1315.
[^35]: Georgetown Steel Corp., 801 F.2d at 1315.
nonmarket economies precludes such an effect, the court made it clear why countervailing duty law cannot be applied to nonmarket economies to accomplish the law’s purpose.36 The Georgetown Steel court strengthened its position by pointing out that in a nonmarket economy the government owns everything. Thus, if the government were to give a true subsidy, it would effectively be giving itself a subsidy, which is impossible.37 The court also added its belief that Congress did not intend the countervailing duty laws to apply to nonmarket economies.38 The court stated, if Congress had intended the countervailing duty laws to apply to nonmarket economies, it would not have remained silent with regard to countervailing duties when it amended the antidumping laws in 1974 and 1979 to cover goods from nonmarket economies.39 Such silence led the court to believe Congress meant for the antidumping laws to be the sole defense for United States’ manufacturers against unfairly traded goods from nonmarket economies.40 Finally, the court declared that the Commerce Department was neither unreasonable nor abusive of its discretion in its determination that countervailing duty law was inapplicable to nonmarket economies.41

C. Commerce’s Current Challenge: Nonmarket Economies in Transition

In recent years, a number of the traditional nonmarket economies have undergone considerable political and economic reforms. Included in these reforms has been a shift from centrally planned to market oriented economies. During this period of transition, these countries have had neither pure centrally controlled economies, nor true market economies. As these countries continue their transitions, the Commerce Department’s challenge has become the determination of whether, or to what degree, countervailing duty law should apply to them.42 The Department’s task is to fairly and accurately determine whether certain government-subsidized imports from these countries are produced in an industry which operates under a free market system. A positive finding, in this regard, means that

37. Georgetown Steel Corp., 801 F.2d at 1316.
38. Id. at 1315.
39. Id. at 1317-18.
40. Id. at 1318.
41. Id.
42. Richardson & Nielsen, supra note 36, at 151.
our countervailing duty law ought to apply to these imports. While making these evaluations, the Commerce Department must also seek to balance competing United States’ foreign and domestic policy goals, namely the encouragement of further transitions to market economies and the protection of United States’ industries from subsidized imports.\footnote{Richardson & Nielsen, supra note 36, at 164.}

As already discussed, countervailing duty law has not been considered applicable to nonmarket economies since the \textit{Georgetown Steel} court concluded subsidies have no meaning outside the context of market-based economic systems.\footnote{Georgetown Steel Corp., 801 F.2d at 1308.} However, when a reforming nonmarket economy begins to exhibit elements of both market and nonmarket economies, it becomes more difficult to justify the inapplicability of this law. During this time of transition, prices and costs which were previously set by the state begin to be set by the emerging market forces of supply and demand.\footnote{Id. at 152.} Thus, it becomes inappropriate to hold countervailing duty law inapplicable under the assumption that subsidies to these transitional economy industries fail to either distort resource allocation, or to give these industries a competitive advantage in the United States’ marketplace. If a manufacturer in a certain foreign industry has suddenly been freed from central planning and is now basing its production decisions on market forces, government subsidies would influence this manufacturer to produce more or less different products.\footnote{Id. at 165.} Likewise, these subsidies would help the manufacturer make sales it would otherwise not have been able to realize. This is exactly the kind of unfair competitive advantage which our countervailing duty law was meant to prevent. Therefore, the Commerce Department would need to find some way to legally apply the countervailing duty law in these circumstances.\footnote{Id.}

Perhaps due to efforts by some foreign countries to honor their international obligations to restrict subsidies, or perhaps due to the inability of some countries to afford subsidization, the Commerce Department has yet been faced with a petition for countervailing action against imports from reforming nonmarket economies.\footnote{Telephone Interview with Paulo Mendes, Policy Analyst, United States Department of Commerce (Apr. 7, 1995) [herinafter Interview].} However, if a foreign government from a transitional economy nation in question began to recover from their current economic difficulties, and can afford subsidy programs once again, it is certainly possible such petitions may eventually
be brought to the Commerce Department. The Commerce Department may have to turn to existent United States' antidumping law for help in determining how to treat such imports. Currently, there exists no legislation or case law which specifically addresses the application of countervailing duties to reforming nonmarket economies.\(^4\)

Nevertheless, Congress and the courts have provided helpful direction in this area in the related realm of antidumping law. Congress' decision to amend the nonmarket economy provisions of the antidumping law would provide the legal basis for the Commerce Department to apply our countervailing duty law in the case of a reforming nonmarket economy.\(^5\) Thus, it is necessary to examine relevant antidumping law which the Commerce Department would consider.

V. ANTIDUMPING LAW AND REFORMING NONMARKET ECONOMIES

A. The Problem with Valuation

Antidumping law is aimed at offsetting the margin amount in price by which an imported good is being unfairly dumped on the United States' market.\(^5\) Thus, the Commerce Department obviously must determine this dumping margin as accurately as possible if it is to truly carry out the purpose of this law.\(^6\) In normal antidumping investigations, the Commerce Department compares an import's foreign market value to the United States' value to determine the margin amount by which the imported good is being dumped into the United States' market.\(^7\) If the import comes from a market economy country, the Commerce Department may base the foreign market value on prices in the exporting country, in another foreign country, or on a constructed value.\(^8\)

Valuation is not as simple when an import arrives from a nonmarket economy nation. In these cases, the Commerce Department cannot use the nonmarket economy prices since, from a United States' perspective, the prices are distorted by central planning and have nothing to do with market forces.\(^9\) Since the economic principles upon which nonmarket economy prices are based are incompatible with the supply and

---

49. *Id.*


51. *Id.* at 155.

52. *Id.* (quoting Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190 (Fed. Cir. 1990)).


demand principles upon which United States’ prices are established, use of the nonmarket economy prices in determining the dumping margin would not produce a meaningful result.  

Section 1316 of the Omnibus Trade and Competitiveness Act of 1988 provided the Commerce Department with a method for more accurately calculating the foreign market value of nonmarket economy imports. The statute directs the Commerce Department to determine foreign market values by totaling the amounts of the input factors used in the production of goods. The factors are computed by using their values in a “surrogate” market economy country where is economically comparable. Thus, the distortion of nonmarket economy prices is eliminated and the Commerce Department can make a meaningful calculation of the dumping margin.

Over the next several years following the Act of 1988, a number of nonmarket economy countries continued to make transitions to market economies. Prices in some industries within these countries began to be driven by market forces rather than by central planning. In these cases, the Commerce Department would better meet its goal of accurate dumping margin measurements by foregoing its use of surrogate market economy values, and simply using the nonmarket economy countries’ prices for the goods in question. In the Omnibus Trade and Competitiveness Act of 1988, Congress made the provision for the Commerce Department to use nonmarket economy prices in those cases where the prices of the imports in question are found to be sufficiently market driven. The Department’s problem was Congress gave no statutory guidance in determining when the exporting country’s prices were market oriented and sufficiently free from the value distortions caused by central planning. Consequently, the Commerce Department had to develop an approach for determining value distortions which would be consistent with the purpose of antidumping law and its nonmarket economy provisions.

56. Richardson & Nielsen, supra note 36, at 155-56.
61. Richardson & Nielsen, supra note 36, at 157.
63. Richardson & Nielsen, supra note 36, at 154-55.
64. Id. at 155.
B. The Bubbles Test: Imports of Lug Nuts and Fans From the People’s Republic of China (PRC)

The Department’s first test for determining whether or not certain nonmarket economy prices were distorted was the “bubbles of capitalism” test. This test was developed by the Commerce Department in 1991 from an investigation of certain imports of fans from the People’s Republic of China (PRC). This test was also used by the Commerce Department in another 1991 case involving lug nuts from the PRC. The PRC remains the only country against which the bubbles test has ever been used. Under the “bubbles test,” or the “100% test,” if the Commerce Department finds that 100% of the nonmarket economy prices of manufacturers’ costs were “market driven,” then it will consider those foreign producers as operating within a “bubble of capitalism.” In such cases, the Department uses the reported nonmarket economy input prices rather than surrogate market values in determining the foreign market values of the imports in question.

The following case analysis is used to illustrate how and why the Commerce Department applied the “bubbles test” to imports from China. In Oscillating Fans and Ceiling Fans from the People’s Republic of China; Preliminary Determinations of Sales Less than Fair Value, the Commerce Department first had to get information from each individual company on its sources of cost inputs, manufacturing processes, distribution channels, controls on external trade, profit retention, and the nature of its ownership. The Commerce Department then stated that it would decide whether each company was a “bubble of capitalism” on the basis of whether a company could demonstrate, de jure and de facto, that it was free from central economic controls. A finding for de jure absence of central control could be supported by, but does not require, evidence of: “(1) an absence of restrictive stipulations associated with an individual exporter’s business and export licenses; and (2) any legislative enactments

65. Id. at 157.
68. Interview, supra note 48.
69. Richardson & Nielsen, supra note 36, at 158.
70. Id.
[sic] devolving central control of export trading companies." De facto absence of central control could be supported by evidence that: "(1) each exporter sets its own export prices independently of the government and other exporters; and (2) . . . each exporter can keep the proceeds from its sales." The PRC manufacturers submitted evidence in order to support their market oriented status so their own prices or costs could be used in the Commerce Department’s dumping calculations. First, PRC industries involved in the case were privately owned and operated on market principles. Second, the overwhelming majority of their input materials were purchased from outside the PRC, or from other foreign investment projects in the southern part of China. Third, all of their output was sold outside the PRC. Finally, evidence was submitted to prove that the labor market in the southern part of the PRCs was subject to competitive forces.

The PRC manufacturers then attempted to convince the Commerce Department that their industry was market oriented as a whole by arguing that: their producers are generally foreign-owned; their government does not control prices, production, profits distribution, or the use of capital; materials used by their manufacturers generally come from outside the PRC; those materials which are purchased from within the PRC are generally done so at arm’s length; the government does not control prices for materials or involve itself with labor; companies in the industry deal freely with their employees; PRC companies pay a higher rate for electricity than those in Hong Kong; and the government does not impose foreign exchange controls on the companies. Therefore, the PRC manufacturers argued their own prices could be used because their industry was sufficiently free of state control under section 771(18) of the amended United States Tariff Act of 1930.

The Commerce Department’s written reaction to the above evidence seems to convey the frustration which must have influenced

73. 56 Fed. Reg. 25,664.
74. 56 Fed. Reg. 25,664.
75. 56 Fed. Reg. 25,664.
76. 56 Fed. Reg. at 25,666.
77. 56 Fed. Reg. at 25,666.
79. 56 Fed. Reg. at 25,667. That section lists the factors Commerce must take into account in evaluating whether an economy is a nonmarket one: currency convertibility, freely bargained wage rates, government ownership or control over production factors.
Commerce to decide on such a stringent, "all-or-nothing," rule such as the "bubbles test." Commerce stated:

These assertions, and our understanding of the circumstances under which these respondents produce and sell the subject merchandise, require us to consider how any industrial sector or any commercial entity in an NME can be said to be operating on market principles such that costs and prices are acceptable, reliable measures of fair market value.1

Commerce then indicated, since the legislative history of the Tariff Act provided no helpful guidance in determining the fair market value for producers from nonmarket economies in transition, Commerce would require a showing by the manufacturers that all of their costs and prices are market oriented.81 Absent such a showing, the manufacturers could not use their own prices in the dumping calculations of fair market value, and instead factors of production methodology would be used.82 In the case of the fan manufacturers, the Commerce Department's preliminary determination was not all of their manufacturing costs were market based, therefore, they could not be used in the calculations.83

C. The Mini-Bubbles Test: Initiation of Countervailing Duties Investigation of the Lug Nut Imports

Eventually, the Department must have realized an "all-or-nothing" test was not appropriate for evaluating the market orientations of reforming nonmarket economy producers. The reality is manufacturers in reforming nonmarket economies use some production materials which have market driven prices, and other materials which have centrally controlled prices. To allow the "100% test" to accommodate for this fact, the Department added a second "mini-bubbles" test.84 Under this test, it is not necessary for 100% of the manufacturer's costs to be market driven. If the manufacturers can demonstrate that at least some of their costs are market driven, then those nonmarket economy values will be used in the Department calculations; the surrogate market values are then used only for the remaining distorted prices.85 Under the "mini-bubbles test," a

82. 56 Fed. Reg. at 25,667.
84. Richardson & Nielsen, supra note 36, at 158.
85. Id. at 159.
nonmarket economy value was considered market driven if it were shown to be free of direct or overt central government influence. 86

The "mini-bubbles test" was applied by Commerce in the PRC lug nuts case, which concerned manufacturing costs. To determine whether the manufacturing costs paid by the lug nut manufacturer were free of distortion, Commerce examined the nature of the individual transactions which took place between the manufacturer and its suppliers. 87 The shortcoming of this test was Commerce failed to take into account any price distortion which resulted indirectly from the manufacturing of a product within a nonmarket economy.

The Commerce Department's published investigation of the PRC lug nut producers is used below in order to analyze the nature of an indirect distortion. 88 A study of this report helps explain why the "mini-bubbles test" was inadequate for properly determining whether a manufacturer's operations are truly market oriented. The petitioners in the report pointed out to the Commerce Department that manufacturers in the PRC lug nut industry were benefiting from upstream subsidies 89 which were being bestowed upon their steel and chemical suppliers. 90 In other words, subsidies being conferred by the PRC, upon steel and chemical producers, were significantly affecting the lug nut manufacturers' production costs. Lower costs for suppliers indirectly resulted in lower costs for the lug nut manufacturers, thus the latter were enjoying a competitive benefit from the upstream subsidies. Under section 701(e) of the Tariff Act, 91 the Commerce Department has the power to investigate such upstream subsidies if it has reasonable grounds for doing so. 92

The Department indicated the petitioners had demonstrated ample evidence of the existence of upstream subsidies. 93 However, it seemed the problem for the Commerce Department was the same one which was at the heart of the Georgetown Steel decision; the Department was simply incapable of identifying or quantifying those subsidies because they were

86. Id.
87. Id.
93. 57 Fed Reg. 878.
granted in the context of a nonmarket economy. As the court in *Georgetown Steel* held, subsidies in nonmarket economies simply have no meaning within our sense of the concept. As a result, the Department declined, in the lug nut case, to initiate a separate investigation of the upstream subsidies. This is why the Commerce Department failed to take into account the indirect price distortions surrounding the lug nut manufacturers' operations.

The Commerce Department realized this shortcoming and asked the Court of International Trade for a remand so it could reconsider the use of this test. During the remand, the Commerce Department developed another test which would take into account both the direct and indirect effects of central planning in the determination of whether a particular nonmarket economy industry is market oriented.

**D. The Market Oriented Industry Test: Redetermining the Dumping Investigations of the Lug Nut and Fan Imports**

The Commerce Department's new test was called the market oriented industry test. This test has three parts. To be considered market oriented, the foreign industry under investigation must: (1) have no government involvement in the setting of its prices or scheduled output; (2) "be characterized by private or collective ownership;" and (3) pay market driven prices for all its significant inputs and government determined prices for only an insignificant proportion of the total value of production. To determine if prices are market driven, the Commerce Department looks at the circumstances under which the inputs were purchased from the supplier and also looks at the supplier itself. If the supplier also provides input materials for centrally planned production, it is unlikely the Commerce Department will find that the suppliers prices are entirely market driven. Through this three part test, the Commerce

100. 57 Fed. Reg. 15,052.
Department seeks to ensure the foreign market value of the final goods be determined by market forces, and not by government influence.\textsuperscript{102}

While the lug nut and fan cases were on remand, the Commerce Department applied the market oriented test for the first time on the imports of Sulfanilic Acid from the People’s Republic of China.\textsuperscript{103} There the Commerce Department concluded that the Chinese producers did not produce enough documentary evidence to overcome the presumption that their input prices were not market driven.\textsuperscript{104} Consequently, the Commerce Department used surrogate country values to determine the foreign market value of the Chinese imports.\textsuperscript{105}

Shortly following the Sulfanilic Acid case, the Commerce Department applied the market oriented test to the remanded PRC lug nut and fan cases.\textsuperscript{106} Thus, in the lug nut case, the Commerce Department looked beyond the manufacturer’s individual transactions for its inputs.\textsuperscript{107} The Commerce Department found the Chinese government played a significant role in setting suppliers’ prices and outputs of steel, a major input for the lug-nut manufacturers.\textsuperscript{108} As a result, the Commerce Department concluded the prices the lug nut manufacturers paid for their steel inputs could not really be considered market driven.\textsuperscript{109} Thus, surrogate input prices would have to be used to determine the foreign market value of the lug nuts. The Commerce Department permitted the fan manufacturers in the other case, however, to use their own prices of significant inputs since those inputs came from outside the Chinese market.\textsuperscript{110}

\textbf{E. The Challenges of Foreign Production Investigations}

The above decisions on the proper classification of particular Chinese industries are obviously much easier to discuss in retrospect than they were for the Commerce Department to make. This writer gained an appreciation for the type of nuances with which the Commerce Department

\begin{itemize}
  \item \textsuperscript{102} Id. at 141.
  \item \textsuperscript{103} Preliminary Determination of Sales at Less Than Fair Value: Sulfanilic Acid From the People’s Republic of China, 57 Fed. Reg. 9409 (1992).
  \item \textsuperscript{104} 57 Fed. Reg. 9409.
  \item \textsuperscript{105} 57 Fed. Reg. 9409.
  \item \textsuperscript{107} Id. at 716.
  \item \textsuperscript{108} Id.
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} Id. at 716-17.
\end{itemize}
had to deal with by studying a particular public document memorandum which was sent by an import compliance specialist in the Commerce Department to his division director of antidumping investigations in January of 1994. The compliance specialist, Andrew McGilvray, had just participated in a meeting at the Beijing offices of the PRC's Ministry of Foreign Trade and Economic Cooperation on matters regarding an antidumping duty investigation of silicon imports from the PRC.

At the meeting, the Ministry's Treaty and Law Department Division Chief, Zhang Yuging, had to explain what he had meant when he informed the Commerce Department earlier that the Chinese government does not own or control producers of silicon because they were owned "by all the people."

Zhang explained China has a different ownership concept than other countries, and when companies in China are said to be owned by all the people, it does not mean the PRC's central government owns or controls the companies. What this really means, said Zhang, is that the company "belongs to the community," and cannot be taken over by any individual. Under this setup, the company's employees are responsible for the company's management. Zhang told the Commerce Department when a company is owned by all the people, the government cannot interfere in decision making, nor can it involve itself in the handling of profits, aside from assessing taxes. Likewise, such a company is responsible for financing its own losses or selling off its assets.

The memorandum also includes Zhang's explanation of a provincial government's role in the ownership and control of such community owned companies. Zhang explained provincial governments were authorized by the central government to license businesses, but that did not mean that these second level governments could legally dictate the decision making processes of the companies. When asked by the Commerce Department compliance specialist if the provincial governments were still permitted to influence companies to comply with any of the Commerce Department's import regulations, Zhang explained the

111. Memorandum to Gary Taverman, Director, Division I, Office of Antidumping Investigations, Investigation Public Document A-570-824 (Feb. 15, 1994) [hereinafter Memorandum to Taverman].
112. Id. at 3.
113. Id. Commerce was concerned that this meant that the state still had ownership control.
114. Id.
115. Id.
116. Memorandum to Taverman, supra note 11.
governments could not force compliance but could give incentives for it. In sum, the memorandum is valuable as an example of the attention the Commerce Department must give to the meanings which different countries attach to their economic terminology. Such attention is necessary if the Commerce Department is to properly evaluate the economic information it has on a country in order to make an accurate market oriented industry analysis. If the Commerce Department is to correctly apply or not apply countervailing duty law to countries in transition, it has to know which industries are in fact state controlled and which industries only sound as if they are because of the foreign terminology used to describe them.

F. A Market Oriented Manufacturer: Imports of Magnesium from the Russian Federation

While the Chinese cases involved market orientation analyses of whole industries, a recent final determination was issued by the Commerce Department in the spring of 1995 which involved a decision on whether a single manufacturer within a reforming nonmarket economy was sufficiently market oriented in its operations for antidumping pricing purposes. The purpose of the investigation was to decide whether the Russian magnesium sector from the Russian Federation was sufficiently market oriented to permit use of Russian producers’ own prices in the dumping determination. One of the two Russian manufacturers involved, SMW, requested the Department to conduct an individual market orientation examination of the company, rather than the usual examination of the entire industry within which the company operates. SMW wanted to demonstrate that government ownership and control were absent from its own individual operations. SMW was ultimately seeking to have the Commerce Department make an individualized dumping calculation for its own exports of alloy and pure magnesium, which was separate from other potential Russian exporters of magnesium.

The Commerce Department granted SMW’s request for the opportunity to demonstrate its own market independence, but asserted that to make such a positive showing, SMW would have to demonstrate the absence of both de jure and de facto governmental control over its export

118. 60 Fed. Reg. 16,443.
120. 60 Fed. Reg. 16,443.
operations.\textsuperscript{121} Evidence which the Commerce Department indicated SMW could use, but did not require in order to support a finding of de jure absence of central controls included: "(1) an absence of restrictive stipulations associated with [its] business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the government decentralizing control of companies."\textsuperscript{122} To determine whether governmental control over SMW was absent de facto, the Commerce Department stated it would weigh the following factors:

(1) whether [SMW's] export prices are set by or subject to the approval of [governmental] authority; (2) whether [SMW] has authority to negotiate and sign contracts and other agreements; (3) whether [SMW] has autonomy from the government in making decisions regarding the selection of management; and (4) whether [SMW] retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.\textsuperscript{123} Pursuant to its stated guidelines, the Commerce Department decided that central control of SMW was absent de jure on the basis of the following findings.\textsuperscript{124} First, the President of the Russian Federation had issued a decree in July of 1992 that joint stock companies, such as SMW, were out of the control of state authority.\textsuperscript{125} Second, a law had been passed in July of 1991 which mandated the privatization of former state held enterprises, such as SMW.\textsuperscript{126}

The Department was also satisfied with findings on SMW's de facto independence. The Commerce Department found that SMW set its own prices, had free access to its own export profits, could finance its own losses, and could purchase foreign currency or dispose of assets.\textsuperscript{127} In addition, the Commerce Department found that the Russian government did not interfere with SMW's disposition of its sales proceeds, and that the board of SMW was responsible for the appointment of its management.\textsuperscript{128}

\textsuperscript{121} 60 Fed. Reg. 16,444.
\textsuperscript{122} 60 Fed. Reg. 16,444.
\textsuperscript{123} 60 Fed. Reg. 16,444.
\textsuperscript{124} 60 Fed. Reg. 16,444.
\textsuperscript{125} 60 Fed. Reg. 16,444.
\textsuperscript{126} 60 Fed. Reg. 16,444.
\textsuperscript{127} 60 Fed. Reg. 16,444.
\textsuperscript{128} 60 Fed. Reg. 16,444.
This writer believes that the Russian magnesium case is significant in that it demonstrates the level of sensitivity with which the Commerce Department now deals in matters of market orientation determinations. “Sensitivity” refers to the degree to which the Department is willing to go beneath the nonmarket surface of an economy to find individual entities of capitalism. With final determinations on the Chinese fan and lug nut cases, we saw the Commerce Department go beyond the nonmarket exterior of the PRC’s economy in order to investigate the possible market oriented nature of a particular industry. With the Russian magnesium case, the Department went further by looking beyond the nature of a certain industry within the reforming Russian economy to examine the status of a particular company in that industry. Thus, to this writer, this methodology in “Magnesium from the Russian Federation” seemed as if it were a return to the type of analysis once used by the Commerce Department in the mini-bubbles test, as discussed previously. Recall that this test, used only in the preliminary determinations of the Chinese fan and lug-nut cases, involved a thorough investigation of certain individual manufacturers within a particular industry, for purposes of determining whether their own prices were market driven. In the Russian magnesium case, the Department was doing essentially the same thing. It is worth noting that the above de jure and de facto tests used in the Russian case for determining the absence of government control are substantially similar to the corresponding tests used in the preliminary determinations of the Chinese fan case, as discussed previously.

The Commerce Department’s willingness to look beyond whole industries and to focus instead on individual companies indicates that, as reforming nonmarkets move closer to capitalism, an industry wide investigation will not always yield a proper finding for whether countervailing duty law ought to apply to certain imports. Perhaps one of the marks of an economy in transition is that some companies within a particular industry move more quickly toward market orientation, while others take more time to free themselves from state control. By confining an investigation to a single producer, rather than the producer’s whole industry, the Department seems to be sensitive to the microcosmic levels on which capitalism sometimes apparently exists in transitional markets. This has particular import to this study on countervailing duties: The greater willingness the Department has to find capitalistic entities within reforming markets, and the more likely such markets are to find countervailing duty law applied to their imports.
VI. APPLICATION OF COUNTERVAILING DUTY LAW TO REFORMING NONMARKET ECONOMIES

A. Market Oriented Industry Analysis: Countervailing Duty Investigations of the Lug Nut and Fan Import Cases

The above developments in antidumping law are important to our discussion of countervailing duty law and reforming nonmarket economies. As previously noted, the Commerce Department faces the near future possibility of having to decide whether to apply countervailing duties to imports from nonmarket economy countries in transition. The current Commerce Department policy is that such duties are inapplicable to nonmarket economies. However, the Commerce Department might find that a foreign industry in question is a market oriented part of an otherwise nonmarket economy. In that case, the Department may be forced into making a determination as to whether countervailing duty law is inapplicable. The Department would not have any countervailing duty law to aid it in a decision such as this. It would, however, have the above antidumping laws and policies to turn to. Using the market oriented industry analysis, the Commerce Department may one day come to the conclusion that countervailing duty law is applicable to a particular industry within a nonmarket economy.

The Commerce Department has already used the market oriented test in two countervailing duty investigations which it recently conducted. In the cases involving the importation of fans and lug nuts from the People's Republic of China, the Commerce Department used this test to determine if countervailing duties were applicable on the basis that the industries in question were actually market oriented. In neither case did the Department find that the industry in question was really market oriented, so countervailing duty orders were not issued.

In these countervailing duty cases, the Commerce Department applied a system of evaluation which it had developed for the purposes of antidumping law. For example, in its preliminary determinations in the Ceiling Fans countervailing duty case, the Commerce Department first sought to determine whether the Chinese government was involved in


setting prices and production amounts in the fan industry. Then the Commerce Department tried to determine whether or not the industry was generally characterized by private and collective ownership by fan producers. Finally, the Commerce Department sought out whether the fan producers under investigation paid state set or market driven prices for their major inputs purchased within China. Here, as in the lug nuts antidumping case, the Department found that the government played a significant role in setting prices and outputs of suppliers of steel. Since steel represents a major portion of the fan manufacturers' input purchases, the Department decided that the fan industry cannot be considered a capitalistic industry within an otherwise nonmarket economy. Thus, countervailing duties could not be applied to the fan imports.

The Commerce Department decided that countervailing duties were inapplicable to the lug nut imports as well. Again, the final determination was based on finding the steel industry in China was heavily controlled by central planning. Thus, the industry could not be considered to be market oriented either.

B. Reforming Nonmarket Economy Manufacturers Absorbed by Capitalism: Imports of Steel from Germany

The previous cases involving Chinese imports demonstrated the Commerce Department would be making more decisions on the applicability of countervailing duty law to reforming nonmarket economy imports in the near future. As previously noted, such cases have yet to be brought before the Department. As a result, the Commerce Department has not taken an official stance on when countervailing duties could be applied to imports from reforming countries, such as those in Eastern Europe. One countervailing duty case, which did come before the Department and which is of interest to this study, involved subsidies to certain German manufacturers of carbon steel products. In this case, subsidies to the manufacturers were found to clearly exist, and the International Trade Code found a reasonable indication of material injury or threat of material injury to United States' manufacturers of like

products. Since Germany is a market oriented country, it would have seemed that the determination to apply countervailing duties would be routine.

The final determination in this case was not so routine, and this is interesting because of the German manufacturers' defense. The manufacturers argued that the United States' countervailing duty law was inapplicable to them because they were located in the former East Germany. The manufacturers asserted the Commerce Department exempts countervailing duty law companies located in countries still considered to have nonmarket economies. Under this policy, the manufacturers proceeded to argue countervailing duty law should likewise be inapplicable to producers located in a former nonmarket economy which is adapting to a market economy.

This was an unusual case because subsidized manufacturers in a market country were asking for an exemption from United States' countervailing duty law. The manufacturers were recently operating within a nonmarket economy. The manufacturers felt that the application of countervailing duty rules to their case would result in an unequal treatment of producers in the former East Germany and those in other former East Bloc countries. The manufacturers argued they should be treated equally with producers in reforming countries such as Poland and Romania where antidumping proceedings had initiated, but where no countervailing duty action has been taken. According to the German manufacturers, countervailing duty law was inapplicable in those countries because of their status as former nonmarket economies in transition.

A further argument for exemption from the United States' countervailing duty law by the German producers is the United States' obligation to MFN treatment under GATT. The producers pointed to the Department's recent decision not to apply countervailing duties to the oscillating and ceiling fan imports from China. They felt that, under the MFN status, Chinese imports were going to be exempted from countervailing duty law, then there ought to be an exemption as well for imports from the former East Germany, which was a former nonmarket economy in transition.

139. 58 Fed. Reg. 37,324.
140. 58 Fed. Reg. 37,315, 37,324.
With respect to this last argument, the German producers perhaps misunderstood the reasoning upon which the Commerce Department based its decision in oscillating and ceiling fans from the PRC. The Department did not decide to exempt the Chinese imports because they were from a nonmarket economy which was undergoing some reform. As demonstrated previously, The Commerce Department was more than willing to apply countervailing duties to the imports, regardless of the PRC’s political-economic status. What the Commerce Department was concerned with was the status of the individual Chinese industry in question. The Commerce Department ultimately decided against countervailing duties because it could not find sufficient evidence that the fan industry was really market oriented. Thus, the German producers could not claim the same exemption under the most favored nation principle because they were indeed operating in a recognized market economy.

With respect to the rest of the German producers’ argument, the Department sided with the claims of the petitioning American producers. The Commerce Department agreed with the Americans the imports under investigation ought to be looked at as imports from the Federal Republic of Germany (FRG), not from the former German Democratic Republic. Furthermore, the subsidy programs being examined were funded by the FRG. These simple facts appeared to have made the difference in this case. Because the FRG is a market economy, government subsidies have real economic meaning. Additionally, they can certainly be identified and quantified. Contrast this with subsidies given to producers in nonmarket economy countries. Nonmarket economy subsidies have no meaning in our capitalistic sense because they cause market distortions and result in sales which would not have otherwise been achieved. They cannot be identified anyway since prices are controlled by the state. This is the fundamental reason why the Commerce Department generally exempts nonmarket economy imports from countervailing duties. Thus, it is futile for producers such as the German manufacturers in this case, or their counsel, to attempt to introduce issues of political economic status, or MFN status, as grounds for exemption from countervailing duty law. In short, the Commerce Department will apply this law as long as it finds the subsidies in question have real economic meaning and can be identified, regardless of whether the foreign industry in question operates within a nonmarket economy or one in transition.

144. 58 Fed. Reg. 37,324.
145. 58 Fed. Reg. 37,324.
The petitioners were correct to assert the subsidies in question were exactly those which United States' countervailing duty law was designed to counteract. Thus, the petitioners were also correct in pointing out the Commerce Department would be violating the United States' obligations to GATT if it did not apply countervailing duties to these imports because the United States would be extending preferential treatment to Germany against the interests of other producers in market oriented economies.

In its final determination to impose countervailing duties on the carbon steel imports from Germany, the Department emphasized that United States' countervailing duty law does not prohibit a domestic industry from a countervailing duty petition against a reforming nonmarket industry, whether it has been absorbed into a market oriented economy, as with the GDR, or whether it is still in a transitional process. In each case, the basic test will be whether the industry under investigation is sufficiently market oriented for the law to apply. In addition, the Department noted that application of our countervailing duty law is consistent with our GATT obligations under Article 15 of the subsidies code allows a country to apply either a countervailing duty law or an antidumping law to imports from a country with a state controlled economy.

The final determination on the German carbon steel case is an important statement by the Commerce Department, if for no other reason than reasserting the major factors upon which it makes its countervailing duty decisions. The determinations on the Chinese imports were grounded on the market oriented industry test discussed earlier, and not on the fact that China was a nonmarket economy undergoing reform. Had prices within the Chinese fan industry been found to be sufficiently market driven, the result would have been different.

VII. TREATING REFORMING NONMARKET ECONOMIES AS MARKET ECONOMIES

A. Analyzing an Economy for Market Orientation: the Russian Magnesium Imports

The Commerce Department need not look at a country’s whole economy in order to make a market orientation determination for purposes

146. 58 Fed. Reg. 37,324.
147. 58 Fed. Reg. 37,324.
149. 58 Fed. Reg. 37,324.
of antidumping or countervailing duty law cases. As demonstrated in the cases concerning Chinese and Russian imports, the Department can restrict its investigations to a particular industry, or even a single producer. However, the very recent Russian magnesium case also demonstrated, as numerous reforming nonmarket economies move closer to market orientation, the Commerce Department may soon be using individual antidumping or countervailing duty cases to decide whether particular nonmarket economies ought to be reclassified. Though not mentioned in the earlier discussion of the Russian case, the two Russian producers involved actually first asked the Department to use their own prices on the basis that the Russian economy as a whole ought to be reclassified by the Commerce Department from its previous nonmarket status.\textsuperscript{150}

In Magnesium from the Russian Federation, the Russian manufacturers claimed that the current economic conditions, which were prevalent throughout Russia, warranted revocation of the country’s nonmarket economy status for purposes of antidumping law price determinations.\textsuperscript{151} The Commerce Department asserted that such a finding would center on an analysis of the Russian government’s role in the country’s general economic activity.\textsuperscript{152}

In determining whether to revoke the Russian Federation’s status as a nonmarket economy, the Commerce Department turned to the factors listed under section 771(18) of the amended Tariff Act of 1930.\textsuperscript{153} In particular, these criteria are: (1) the extent to which the currency of the foreign country is convertible into the currencies of other countries; (2) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management; (3) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country; (4) the extent of government ownership or control of the means of production; (5) the extent of government control over the allocation of resources and over the price

\textsuperscript{150} 60 Fed. Reg. 16,443.

\textsuperscript{151} 60 Fed. Reg. 16,443. Recall from the earlier discussion that nonmarket producers’ costs are presumed to be distorted unless the producers demonstrate otherwise under the market oriented industry test.

\textsuperscript{152} 60 Fed. Reg. 16,443.

\textsuperscript{153} 60 Fed. Reg. 16,443.
and output decisions of enterprises; and (6) other factors the Commerce Department considers appropriate."  

Pursuant to the above guidelines, the Department concluded that the Russian Federation still merited a nonmarket economy treatment for purposes of antidumping law. Though it was evident to the Commerce Department that Russia had made significant steps toward a market economy by freeing most prices, and privatizing most state held enterprises, the Commerce Department was not convinced that functioning markets had replaced state controls. Nor was the Commerce Department satisfied that prices and costs in Russia adequately reflected market considerations.

B. Foreign Policy Concerns for the Commerce Department to Consider

The Russian magnesium case demonstrates the significant authority vested in the Commerce Department for classifying individual foreign markets for purposes of applying countervailing duty law or making antidumping calculations. Under the trade statutes, the Commerce Department may at any time make a determination that a foreign country is or is not a nonmarket economy. As of the end of 1994, Poland is the only country which the Commerce Department has reclassified from a nonmarket to a market nation. As illustrated above, the Commerce Department’s decision to treat a nation as a market or nonmarket economy revolves around the application of a thorough statutory test. However, the decision to begin treating a nonmarket nation as a market country means the Commerce Department can begin applying countervailing duties to exports in appropriate situations. Thus, the making of this decision ought to perhaps also include a careful consideration of certain important foreign policy issues.

Chief among the policy issues to consider is the fact that the application of countervailing duties to the imports of reforming markets can substantially slow their transitions. Countervailing duties obviously impose a cost on a foreign producer sales within the United States. The lost sales have a heightened significance when the foreign producer is new

156. 60 Fed. Reg. 16,440, 16,443.
157. SEMINAR, supra note 14, at 10.
to the competition of the free market because it becomes more difficult for the producer to establish products in the United States. If the producer cannot successfully break into an important market such as the United States, its market share might never grow. It follows such producers might begin believing the move to a free market was not as good a change as it might have originally promised.

Countervailing duties are also viewed by many in Eastern Europe as an unfair United States' practice which threatens to undermine much of the political and economic reform going on in the area. Some are concerned that the negative feeling which it stirs among producers might only serve to strengthen the arguments of those who would prefer to see a return to full central planning. Others are convinced such duties are just another example of the "capricious and discriminatory policies of the West."

The United States has certainly demonstrated that it wants to develop trade with Eastern Europe, as evidenced in large part by our substantial funding of economic development in that region, as well as by numerous political announcements and promises. For instance, the United States clearly would like to see a continued development in the former East Germany in order to expand our trade interests in Germany. The more rapidly that area can develop, the more quickly United States' exporters can benefit from the large potential market there. However, the United States retards that expansion when it applies countervailing duties to those imports being purchased from manufacturers operating in the reforming region of Germany. Countervailing duties hurt exporters' profits, which hurts industry in general and slows development.

Does the Commerce Department really even have a choice in these matters? On the one hand, the Department probably joins United States' exporters in its desire for continued development in reforming areas. On the other hand, the Commerce Department has its duty to United States' manufacturers to apply the law of countervailing duties wherever it is applicable, regardless of policy concerns. United States' producers obviously view an unfairly subsidized import as an unfairly subsidized import, regardless of the import's country of origin. To United States' manufacturers, countervailing duty law exists to protect them from just such imports, from where ever those imports may arrive. Moreover, the Commerce Department must consider United States' MFN status

159. Egge, supra note 18, at 959.
160. Id. (quoting Stoltysinski, The United States Import Relief Laws and Trade with Centrally Planned Economies, 3 FLA. J. INT'L L. 59, 80-81 (1987)).
obligations under GATT. Exemption of countervailing duties for a certain country might be supported by foreign policy, but it is certainly not supported by the GATT.
UNITED STATES ASYLUM LAW: THE FAILURE OF THE UNITED STATES TO ACCOMMODATE WOMEN'S GENDER-BASED ASYLUM CLAIMS

Nancy C. Ciampa*

I. INTRODUCTION

"Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest tossed to me: I lift my lamp beside the golden door."

Those are the words of Emma Lazarus, inscribed on the Statue of Liberty. Unfortunately, the United States has continually interpreted those words to mean men, not women, particularly, women seeking asylum. Women make up a majority of the world's refugees,¹ yet their particular needs

* B.A., 1975, University of Maine; M.Ed., 1979, Boston University; Candidate for Juris Doctor, 1997, Nova Southeastern University, Shepard Broad Law Center. The author wishes to express appreciation to attorney Clark Trainer for introducing her to the subject of this article and to Immigration Judge Neale Foster for his support and encouragement.

¹ Third Circuit Recognizes Potential Asylum Claim Based on Gender, 71 Interpreter Releases 164 (Jan. 24, 1994); see also Nancy Kelly, Gender-Related Persecution: Assessing the Asylum Claims of Women, 26 Cornell Int'l L.J. 625, 625-26 n.1 (1993).
have been overlooked.²

While the Immigration and Naturalization Service (INS) recently issued new procedural guidelines, recognizing rape and other sexual persecution as a potential justification for asylum claims,³ they are intended to educate asylum officers and immigration judges on the procedural aspects of women's asylum claims and do not acknowledge gender-based persecution alone as a basis for asylum.⁴ A woman must still establish she is persecuted because of her political opinion in order to justify relief.⁵

Gender-based persecution is violence directed at women specifically because they are women.⁶ A woman may be persecuted because of her gender⁷ or a trait related to her gender.⁸ Such abuse includes: dowry related murders⁹ and bride burnings¹⁰ in India; rape;¹¹ forced sterilization in China¹² and Mexico;¹³ genital mutilation in the

---


3. See Ashley Dunn, Abused Women Can Win Political Asylum, MIAMI HERALD, May 28, 1995, at 9A (noting that the decision to adopt the guidelines was a result of the mass rape of women in Bosnia).

4. Id.

5. Id. A refugee may also establish persecution for asylum purposes on account of her race, religion, nationality, or membership in a particular social group. See 8 U.S.C. § 1101(a)(42) (1988).

6. Goldberg, supra note 2, at 5.

7. Id.

8. Id.


11. Rape by the military, or for military purposes, is a worldwide problem. It is used to punish actual or imputed opposing political views of the victim or her family, as well as to control local populations. It becomes persecution when the government either condones or fails to protect against such abuse. See M. Jane Kronenberger, Refugee Women: Establishing a Prima Facie Case Under the Refugee Convention, 15 ILSA J. INT'L L. 61, 66 (1992); see also Karen Bower, Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group, 7 GEO. IMMIGR. L.J. 173, 173 (1993).


Middle East, Africa,\textsuperscript{14} and Asia;\textsuperscript{15} and domestic abuse.\textsuperscript{16} Gender-based persecution can also take the form of repressive and discriminatory laws and practices meant to oppress and subordinate women. In Haiti, adultery results in a potential three month prison sentence for women while men are fined $6.50.\textsuperscript{17} In Islamic countries, women are required to veil their faces or face flogging and imprisonment by the religious police.\textsuperscript{18} In Muslim countries, women living alone face abuse for failing to have a male family member's protection. Each of these acts constitutes gender-based violence directed specifically at women. Such abuse rises to the level of persecution when the government is either unable, or unwilling, to prevent it.\textsuperscript{20}

The United States must recognize gender-based violence and should expand the definition of the "particular social group" classification for asylum claims to meet the needs of women facing such persecution. Courts must recognize the types of violence targeted specifically at women as well as a state's involvement in such action, and follow the decisions in

\begin{enumerate}
\item health survey showed that one out of twenty-five women who are sterilized did not agree to it. \textit{Id.}
\item \textquote{}An estimated seventy percent to ninety percent of Egyptians are circumcised just before puberty." \textit{Egypt Bans Circumcision of Females at State Hospitals, MIAMI HERALD, Dec. 30, 1995, at 13A.}
\begin{itemize}
\item Female genital mutilation includes clitoridotomy, clitoridectomy and infibulation. Clitoridectomy is the removal of the prepuce of the clitoris. Clitorectomy removes the clitoris and the surrounding tissue. An infibulation involves the excision of the clitoris, labia minora and most of the labia majora, followed by the sewing of the sides of the vulva, "leaving a hole the size of a match stick." \textit{Id.}
\end{itemize}
\item Celina Romany, \textit{Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law}, 6 HARV. HUM. RTS. J. 87, 115 (1993). In Brazil alone, over 400 women were murdered by their spouses or lovers between 1987 and 1989 in the state of Penambuco. The criminal justice system of Brazil recognizes a "defense of honor" and, during the same period above, seventy percent of all reported acts of violence were in private residences and most were committed by husbands or lovers. \textit{Id.}
\item \textit{Haiti's Victimized Women, MIAMI HERALD, Aug. 28, 1995, at 8A (a man can also claim extenuating circumstances for murdering his adulterous wife).}
\item Stevens, \textit{supra} note 15, at 195.
\item The United States requires state participation in the persecution either through action or inaction in order for an alien to qualify for asylum. \textit{See 8 U.S.C. § 1101(a)(42) (1982).}
\end{enumerate}
In re A and Z, 21 and In re M.K. 22 Part I reviews the historical background of refugee and asylum law. Part II discusses the history of United States asylum law and how it has been applied to female refugees. Part III looks at recommendations by the United Nations and changes being implemented in Canada and Germany to meet the needs of women seeking asylum under claims of gender-based persecution. Part IV examines the first known cases in the United States where an Immigration Judge granted asylum to two women, one claiming domestic abuse, and another claiming both domestic abuse and abuse as a result of female genital mutilation, finding both members of a “particular social group.”

II. HISTORICAL BACKGROUND OF REFUGEE AND ASYLUM LAWS

Asylum is the discretionary grant of haven to an individual who meets the definition of a refugee. The definition of refugee originated in 1946 by the Constitution of the International Refugee Organization, created for the protection and resettlement of displaced victims of World War II. 23 The definition of refugee was developed further by the Convention Relating to the Status of Refugees 24 which added “particular social group” as a category and was refined by the Protocol Relating to the Status of Refugees. 26 The Convention and the Protocol are independent provisions; the United States ratified the Protocol in November 1968, but never signed the Convention. 27 Parties to either the Convention, the Protocol, or both comply with their obligations under


25. Pamela Goldberg, Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence, 26 CORNELL INT’L L.J. 565, 590 (1993). The Swedish delegation added “particular social group” to the grounds for asylum, recognizing the potential failure of the other four categories to include “all the reasons for persecution an imaginative despot could conjure up.” Id. at 590 n.143.


27. Kronenberger, supra note 11, at 64 n.20.
these instruments by creating domestic refugee laws and policies. The Convention defines a refugee as any person who

[a]s a result of events occurring before 1 January 1951, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The Protocol adopted the Convention definition of refugee but removed the geographic and temporal restrictions and added victims of inhumane treatment world-wide.

This has become the dominant definition of refugee world-wide, with numerous countries implementing the same or a similar definition. France became a party to the Convention in 1952 and enacted the Office of Francais des Protection des Refugees et Apatrides, using the same definition. The 1971 Immigration Act of Great Britain refers to the Convention definition, while the 1982 Asylum Procedure Law of Germany states refugees will at a minimum enjoy the status recognized by the Convention. The Convention definition of refugee is applied by Canada, Switzerland, the Organization of African Unity, with similar definitions implemented by the 1954 Caracas Convention on Territorial Asylum and the United States.

28. Id.
29. Neal, supra note 24, at 228 n.131.
30. Bower, supra note 11, at 177.
31. Kronenberger, supra note 11, at 65 n.24 (citing the Office of Francais des Protection des Refugees et patrides, Loi. No. 52-893 of July 25, 1952, art. 2.).
32. Id. at 65.
33. Id.
34. Id.
III. **The Refugee Act of 1980 Established the Current Laws for Admitting Refugees into the United States.**

The United States asylum law is modeled after and governed by the Convention and the Protocol. It follows the United Nations Handbook as a persuasive guide when determining refugee status. The Immigration and Nationality Act (the Act), first enacted in 1952, did not mention the word refugee. In 1953, the Refugee Relief Act was passed by Congress to deal with World War II refugees, but the Act did not include refugees until 1957. It was not until 1965 that Congress, by amending the Act, made refugee a distinct category for admission into the United States, ending the selection of immigrants, mainly Europeans, based on national origin, race, or ancestry. Section 3 of the 1965 Act stated in part that refugees include those who have fled from any Communist or Communist-dominated country, or area, or from any country within the general area of the Middle East, and are unable or unwilling to return to such country because of persecution or fear of persecution on account of race, religion, or political opinion.

The Refugee Act of 1980 established the current laws for admitting refugees into the United States. Under the Act, asylum is granted to those who meet the definition of refugee as stated in 8 U.S.C. § 1101(a)(42) (1982). A refugee is defined as:

any person who is outside any country of such person's nationality, or in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on


41. *Id.*

42. *Id.* at 181-82 (citing Act of Oct. 3, 1965, §§ 3, 203(1)(7)).

43. *Id.* at 181-82.

account of race, religion, nationality, membership in a particular social group, or political opinion.\textsuperscript{45}

An individual may seek asylum either at designated locations outside of the United States,\textsuperscript{46} or at any time after arrival into the United States by presenting her claim to the INS for review by an asylum officer.\textsuperscript{47} If the claim is denied, the INS begins either exclusion or deportation proceedings\textsuperscript{48} against the individual. The alien may then file a new application for asylum with an immigration judge as a form of relief from either exclusion or deportation.\textsuperscript{49}

While persecution has no universally accepted definition,\textsuperscript{50} the Handbook and the Immigration and Naturalization Service Basic Law Manual (Manual) considers serious physical harm, loss of freedom, threat to life, discriminatory treatment which leads to consequences of a substantially prejudicial nature,\textsuperscript{51} and a combination of numerous harms, which standing alone may not constitute persecution, but in combination create a well-founded fear of persecution, as forms of persecution.\textsuperscript{52} The Manual also recognizes arbitrary interference with a person's privacy, family, home, or correspondence as forms of persecution. Furthermore, the Bureau of Immigration Appeals (BIA) has characterized persecution as harm or suffering inflicted upon a person to punish that individual for a


\textsuperscript{46} An individual seeking asylum outside the United States is known as an "asylee," while a person who applies for asylum either upon entry into, or once in, the United States is referred to as a "refugee."

\textsuperscript{47} 8 C.F.R. § 208.4(b) (1988).

\textsuperscript{48} An individual who is not accepted during inspection upon entry into the United States faces exclusion proceedings and is known as an applicant, while an alien either admitted or paroled into the United States is placed into deportation proceedings and is referred to as a respondent.

\textsuperscript{49} Administrative immigration judges, sitting in different regions of the country, are under the supervision of the Executive Office for Immigration Review (EOIR). EOIR and the INS are part of the Department of Justice but are independent of one another. Decisions of the immigration judge are appealable to the Bureau of Immigration Appeals (BIA) whose members are appointed by the Attorney General. Once all administrative remedies are exhausted, an alien may file for review with the Court of Appeals for the circuit in which the deportation hearing was heard. Appeals to the United States Supreme Court are possible, but rare.

\textsuperscript{50} Persecution was not defined by the Convention or the Protocol.

\textsuperscript{51} Discriminatory treatment such as the denial of the right to earn a living, practice one's religion, or have access to educational facilities are considered forms of persecution. \textit{See} Kelly, supra note 19, at 521.

\textsuperscript{52} Certain human rights are considered so basic and fundamental as to be nonderogable, and any violation is considered persecution. Included are genocide, slavery, torture, and arbitrary arrest and detention.
belief or characteristic associated with him.\textsuperscript{53}

United States asylum law is further defined by case law. \textit{INS v. Stevic}\textsuperscript{54} established that the burden is on the alien to prove there is a "clear probability" that one's life or freedom would be threatened upon return to a given country on account of race, religion, nationality, membership in a particular social group, or political opinion.\textsuperscript{55} The court in \textit{Cardoza-Fonseca v. INS}\textsuperscript{56} held the threat of persecution may come from the government or from groups the government is "unwilling or unable to control."\textsuperscript{57}

The "well-founded fear" of persecution was initially defined by \textit{In re Acosta},\textsuperscript{58} and \textit{In re Mogharrabi}.\textsuperscript{59} In order to establish a "well-founded fear" of persecution, an alien must show he possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; the persecutor is aware, or could become aware, that the alien possesses this belief or characteristic; the persecutor has the capability of punishing the alien; and the persecutor has the inclination to punish the alien.\textsuperscript{60} The term was further defined in \textit{Blanco-Comarribas v. INS},\textsuperscript{61} where the court held the fear of persecution must be both subjectively genuine and objectively reasonable.\textsuperscript{62}

Case law has also refined the definitions for each of the five enumerated categories, but this Comment will focus primarily on the categories of "particular social group" and "political opinion," which are the primary categories used by women seeking asylum for gender-based persecution. The Handbook defines political opinion broadly, stating that

\begin{itemize}
\item \textsuperscript{53} \textit{In re Acosta}, 19 I & N Dec. 211 (BIA 1985); \textit{see also} 8 C.F.R. § 208.13 (1992).
\item \textsuperscript{55} \textit{Id}.
\item \textsuperscript{56} \textit{Cardoza-Fonseca v. INS}, 767 F.2d 1448 (9th Cir. 1985).
\item \textsuperscript{57} \textit{Id}.
\item \textsuperscript{58} \textit{In re Acosta}, 19 I & N Dec. at 211.
\item \textsuperscript{59} \textit{In re Mogharrabi}, 19 I & N Dec. 439, 441 (BIA 1987).
\item \textsuperscript{60} \textit{Id.} at 446.
\item \textsuperscript{61} \textit{Blanco-Comarribas v. INS}, 830 F.2d 1039, 1042 (9th Cir. 1987).
\item \textsuperscript{62} \textit{In re Mogharrabi}, 19 I & N Dec. at 445; the BIA held the objective standard is met if a reasonable person in similar circumstances would fear persecution. A reasonable person may fear persecution even if the likelihood that it may occur is significantly less than a clear probability. \textit{Id}. Moreover, an alien's own testimony, without corroborative evidence, may be sufficient to establish a "well-founded fear" of persecution where testimony is believable, consistent and sufficiently detailed to provide a plausible and coherent account for the basis of fear. \textit{Id}. In \textit{In re Chen}, the court ruled asylum relief could be granted for humanitarian reasons, even if there was little likelihood of future persecution. \textit{In re Chen}, 21 I & N Dec. 3104 (BIA 1989).
\end{itemize}
a person can fear persecution because of a political opinion even if the opinion is not expressed. Further, action or inaction can constitute an expression of political opinion. Following this premise, in *INS v. Elias-Zacarias*, the Supreme Court held a petitioner must actually possess political opinions and the persecutor's motives must be based on those opinions. Imputed opinions are not to be considered, but a court may interpret resistance or noncompliance as a manifestation of opposition. The Supreme Court's decision goes against the holding of *Lazo-Majano v. INS*, where the Circuit Court of Appeals ruled a political opinion imputed to the petitioner is a valid basis for relief.

There are even greater conflicts concerning the category of a "particular social group." No United States court has yet defined the qualifications necessary to establish membership in a particular social group. *Ananeh-Firempong v. INS* was the first appellate case to consider what constitutes a particular social group. The court stated a particular social group is normally comprised of persons of similar backgrounds, habits, or social status, habits which are essentially beyond the individuals power to change.

While courts have generally agreed that members must share some common characteristic which is fundamental to their identity as a member of a particular social group that is both recognizable and discrete and serves to distinguish them in the eyes of a persecutor, there are conflicting decisions concerning whether the characteristic must be immutable. The BIA decision in *In re Acosta* established the social group must share a "common immutable characteristic" or that "the common characteristic that defines the group . . . must be one that the members of the group either cannot change or should not be required to change because it is fundamental to their identities or consciences." This

65. *Id.* at 482.
66. *Id.*
67. *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).
68. *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985).
69. *Id.*
70. *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986); see *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).
71. *In re Acosta*, 19 I & N Dec. at 211.
72. *Id.*
decision acknowledged sex as an immutable characteristic. However, in *Sanchez-Trujillo v. INS*, the Ninth Circuit held the phrase particular social group meant a collection of people who are affiliated with each other and have a common impulse or interest, and stated the existence of the associational relationship must be voluntary. To date, this conflict has not been resolved.

The different court interpretations of political opinion and membership in a particular social group have not borne well for women. There have been few federal court cases addressing women’s claims of asylum based on membership in a particular social group or political opinion, but in each case, relief was denied. In *Gomez v. INS*, the petitioner Carmen Gomez, a native and citizen of El Salvador, sought asylum alleging she had been raped by guerrilla forces at least five times between the ages of twelve and fourteen, and that each time, her life had been threatened and her home vandalized. She based her asylum claim on membership in a “particular social group of women who had been raped by the guerrillas” and claimed because of past persecution she had established a well-founded fear of persecution should she return to El Salvador. The court denied her request for relief, stating she had failed to demonstrate the guerrillas were inclined, or would seek, to harm her based on her membership in a “particular social group.” The court held the possession of such broadly based characteristics as youth or gender does not create a particular social group, and such characteristics by themselves do not distinguish members in the eyes of the persecutor. Had the court recognized women fleeing gender-based persecution as members of a particular social group, it is likely that Ms. Gomez would have been granted asylum.

In *Fatin v. INS*, the petitioner Parastoo Fatin applied for asylum under both the political opinion and particular social group categories, and was denied relief under each. Fatin, an Iranian citizen, entered the United

---

73. *Id.*
74. *Sanchez-Trujillo*, 801 F.2d at 1576.
75. *Id.*
76. BIA decisions are followed by immigration judges except in areas where the circuit court has ruled otherwise.
78. *Id.* at 662.
79. *Id.* at 664.
80. *Id.*
States in 1978 as a nonimmigrant student. In 1988 she applied for asylum, claiming she was a member of a “particular social group of educated, Western free-thinking individuals with a deeply rooted belief in feminism” and she would be persecuted if she did not wear the traditional Islamic veil. Fatin also requested asylum based on her political opinion, stating in high school she had participated in a political organization which supported the Shah.

The court dismissed her request based on political opinion, reasoning because of the length of time since she participated in political activities, she would not be singled out for persecution based on past action. While acknowledging Fatin had established a legitimate social group for asylum purposes, the court denied her request for relief, stating she failed to establish she would not wear a veil, making her subject to persecution. The court went on to say that just because a state has laws or traditions repugnant to the United States and our concepts of freedom, it does not subject them to persecution. “If persecution were defined that expansively, a significant percentage of the world’s population would qualify for asylum in this country.”

The reasoning and holding of Fatin were followed by the court in Safie v. INS. In Safie, the petitioner, an Iranian women, requested asylum as a member of a “particular social group of Iranian women who advocate women’s rights or oppose Iranian customs relating to dress and behavior,” as well as for her political opinion as a Shah supporter. Safie’s claim based on membership in a particular social group was denied because the court found her opposition was not of the “depth and intensity

---

82. Id. at 1235-37.
83. Id. The veil is known as the chador, and the Islamic practice requiring the veiling of women is known as the Hejab. See Neal, supra note 24, for a detailed discussion of Islamic traditions pertaining to women.
84. Fatin, 12 F.3d at 1240.
85. Id. Courts have since held that an alien need not prove that they would be “singled out” for persecution in order to establish a valid asylum claim.
86. Fatin, 12 F.3d at 1241. The social group was Iranian women who refuse to conform to the government’s gender-specific laws and social norms.
87. Id. Fatin stated that she would try not to wear the veil, not that she would not wear one. Nor did she testify that wearing the veil was so abhorrent to her deepest beliefs that it would amount to persecution.
88. Id. at 1240.
89. Id.
90. Safie v. INS, 25 F.3d 636 (8th Cir. 1994).
required." Her political opinion claim was denied because she failed to establish she had or would be singled out and persecuted for her opinion.

In each of these cases the court correctly held that persecution was not based on the petitioner's political opinion. Each petitioner was persecuted specifically because of their gender, and had the courts acknowledged women fleeing gender-based persecution as members of a particular social group it is likely each would have been granted asylum.

The United States needs to start implementing substantive immigration laws recognizing the unique circumstances of some women seeking asylum in order to alleviate the discrepancies among the courts and to end the discrimination against women. Such action would be in line with the recommendations of the United Nations and the changes being implemented in Europe and Canada.

IV. UNITED NATIONS RECOMMENDATIONS AND CHANGES IN CANADA AND GERMANY BEING IMPLEMENTED IN RECOGNITION OF THE PARTICULAR NEEDS OF WOMEN SEEKING ASYLUM

Since 1980, the United Nations has focused on the particular needs of women seeking asylum. Following its lead, Canada and many European countries have implemented changes to their respective asylum laws, addressing the special circumstances encompassed in women's asylum claims.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is the most prominent international document to recognize the right of women to be free from discrimination. Ratified by 112 countries, although not the United States, it specifically acknowledges all forms of discrimination against women. The CEDAW

91. Id. While Safie claimed to have been arrested for smoking and wearing Western clothes and make-up, the court found she did not show proof she had suffered severe consequences because of her nonconformance. Id. at 640. The amount of prior persecution needed to establish a valid asylum claim is determined on a case by case basis, because asylum is considered a personal issue.

92. Id.; see Gomez v. INS, 947 F.2d 660, 664 (2d. Cir. 1991).

93. See also Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987) (rape by terrorists based on uncle's political opinion does not constitute persecution on account of political opinion or membership in a particular social group); Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1986) (repeated sexual assault by a member of the Salvadoran army not based on imputed political opinion or membership in a particular social group).


95. Id. at 197 n.13.

96. Id. at 197 n.12.
prohibits discriminatory state action and demands that governments take action to end both state and private discriminatory practices on any level and in any form against women.\textsuperscript{97} It also considers gender-based violence a form of discrimination, and considers such action a violation of the Convention.\textsuperscript{98}

In 1985 the International Seminar on Refugee Women was held.\textsuperscript{99} Its purpose was to examine the situation of refugee women worldwide, and concluded states should acknowledge gender-based persecution and grant asylum to women who have suffered forms of oppression which violate human rights.\textsuperscript{100}

Later that year, the UNHCR issued its "Conclusions on Refugee Women," declaring that countries might recognize claims of gender-based persecution under the "particular social group" category for purposes of asylum claims.\textsuperscript{101} It urged states to recognize the social, economic and cultural oppression of women, and that they should interpret asylum laws liberally when granting asylum to women faced with such persecution.\textsuperscript{102} It stressed the special needs of women refugees concerning health, education, and employment, and urged states to consider women seeking asylum for having transgressed social mores in their country as members of a "particular social group."\textsuperscript{103}

\textsuperscript{97} Id. at 197 n.13.

For the purposes of the present Convention, the term discrimination against women shall mean any distinction, exclusion or restriction, made on the basis of sex which has the effect of, or purpose of, impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

\textsuperscript{98} Goldberg & Kelly, \textit{supra} note 9, at 198 n.15.

This definition of discrimination includes gender-based violence. That is violence which is directed against women because she is a woman or which affects women disproportionately. It includes acts which inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions mention violence.

\textsuperscript{99} Neal, \textit{supra} note 24, at 230.

\textsuperscript{100} Id. (citing Recommendations, in \textit{INTERNATIONAL SEMINAR ON REFUGEE WOMEN} 53 n.148 (Soesterberg, The Netherlands, May 22-24, 1985)).


\textsuperscript{102} Neal, \textit{supra} note 24, at 231 n.151.

\textsuperscript{103} Id. at 231 nn.153 & 154.
Another document addressing gender-based violence was the 1985 Nairobi Forward-Looking Strategies for the Advancement of Women which was initiated by the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women.\textsuperscript{104} It urged states to address the end of violence against women by providing assistance to its victims, increasing public awareness of the problem, and establishing policies and procedures to prevent the continuance of such abuse.\textsuperscript{105}

In 1991 the UNHCR issued guidelines which specifically recognize the unique circumstances of some women seeking asylum.\textsuperscript{106} These guidelines call for states to recognize women who fear severe discrimination or gender-based persecution as members of a particular social group for asylum determination.\textsuperscript{107} The 1991 UNHCR Guidelines also state a subgroup of women can be recognized based on their exposure or vulnerability to violence, including domestic violence, when their governments deny them protection from such persecution, particularly when their vulnerability is a result of their gender.\textsuperscript{108}

In 1993 the United Nations Declaration on the Elimination of Violence Against Women condemned acts of gender-based violence as a per se violation of human rights.\textsuperscript{109} Such violence includes physical, sexual, or psychological harm occurring in public or private life, specifically domestic battering and female genital mutilation.\textsuperscript{110}

Following the lead of the United Nations, Germany was one of the first countries to recognize women as a particular social group for asylum purposes. Several Iranian nationals applied for asylum in the Federal Republic of Germany in 1986, one claiming that as a woman she was

\begin{itemize}
\item \textsuperscript{105} Goldberg & Kelly, \textit{supra} note 9, at 199 n.207.
\item \textsuperscript{106} Goldberg, \textit{supra} note 2, at 3 (citing UNHCR, \textit{GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN} (Geneva, July 1991)).
\item \textsuperscript{107} Goldberg, \textit{supra} note 25, at 596 n.176.
\item \textsuperscript{108} Id. at 596 n.178. The Vienna Declaration and Programme of Action, June 1993, U.N. Dept. of Public Information DPI/1394-39399-Aug.1993-20M, which emerged as a result of the United Nations World Conference on Human Rights, also recognizes violence against women as a violation of human rights. Goldberg, \textit{supra} note 2, at 5.
\item \textsuperscript{109} In re M.K., A-72-374-558 (citing to Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104 (1993)).
\item \textsuperscript{110} Id.
\end{itemize}
subject to special persecution. While all of the applicants were granted asylum on the basis of their political activities, the German Federal Office held the woman was a member of a social group of Iranian women subject to persecution “specific to women.” The Office stated that “the ideology based power of men over women results in a general political repression of women in defiance of their individual liberties and human rights.”

Continuing its trend, in 1992 the German Federal Office granted asylum to a Romanian woman who had been abducted and sexually abused by a town mayor. The Office found persecution is political when associated with an immutable characteristic, and since gender is an immutable characteristic, any gender-based persecution is “political persecution.”

Canada has also changed its guidelines, acknowledging the increasing international support for the application of the particular social group category to women claiming asylum based on fear of persecution because of their gender. The Canadian guidelines, released by the Immigration and Refugee Board in March 1992, and enacted into law in 1993, state that women who are unable to obtain government protection from spousal abuse, who are subject to violence by public officials, or who fear persecution for violating discriminatory laws, traditions or customs, will be given special consideration for refugee status. These violations can include choosing a spouse rather than accepting an arranged marriage, wearing make-up, or wearing the clothing of her choice. The guidelines also recognize the unique persecution of women in the form of infanticide, bride burning, compulsory sterilization, and genital mutilation.

111. Bower, supra note 11, at 200 (referring to Seven Case Abstracts (IJRL/0222), 1 INT’L J. REFUGEE L. 566(1989)).
112. Id.
113. Id.
115. Id.
116. Goldberg, supra note 25, at 596.
117. Stevens, supra note 15, at 197.
119. Kelly, supra note 1, at 662.
120. Stevens, supra note 15, at 197.
Unlike the United States, Canada does not require that the social group be "internally cohesive" and states the size of the particular social group is irrelevant. The Canadian guidelines state that the only relevant consideration is whether the group "suffers or fears to suffer severe discrimination or harsh and inhuman treatment that is distinguished from the situation of the general population, or from other women." 

Canadian case law has dealt with several asylum claims of women seeking refuge from gender-based persecution and, unlike the United States, has granted these women asylum based on their membership in a particular social group. In August 1987, the Canadian Immigration and Refugee Board held that a woman living alone in a Muslim country which requires females to live under the protection of a male family member was subject to persecution and constituted a particular social group.

In *Mayers v. Minister of Employment and Immigration*, the Canadian Federal Court of Appeal reviewed the decision of an administrative panel which found a Trinidadian woman could be considered a refugee. While the court did not determine if the particular woman qualified for asylum, it held Trinidadian women subject to spousal abuse may constitute a particular social group when the government fails to intercede on their behalf, and that such abuse may constitute persecution.

Also in 1992, the Canadian Immigration and Refugee Board granted asylum to a woman from Zimbabwe who had been forced to marry at age fifteen, and had suffered continual abuse, including rape, at the hands of her husband. The court found that the applicant had proven "good grounds for fear of persecution" based on her membership in a "particular social group of Zimbabwean women and girls, forced to marry according to the customary laws of Kurzvarira and Lobola."

Canada has also granted asylum to women facing forced
sterilization in China. In *Chung v. M.E.I.*, the court held that women who bear more than one child and face forced sterilization are members of a particular social group. The court stated these women are a group of people who share different views from their government, have a similar basic characteristic in common, and are identified by the common purpose of reproduction so fundamental to their human dignity, that they should not be required to forsake it.

While there are recognizable problems when addressing gender-based persecution claims, particularly intimate abuse, these problems can be overcome, as demonstrated by Germany and Canada. Further, while concern for the respect warranted by other societies' traditions and cultures should definitely be a consideration, there are some situations when respect for human life and dignity outweigh diplomatic protocol. The main fear in the United States is expanding the definition of the particular social group to include women seeking asylum from gender-based persecution would open the flood-gates for asylum claims. This fear is unfounded. Even if a woman can establish membership in a

130. *Id.*
131. *Id.*
132. Many women are afraid to testify about intimate sexual abuse. Further, such abuse is often difficult to prove.
133. In *In re Oluloro*, the court found that after reviewing the evidence regarding female genital mutilation, although it attempted to respect the traditions and cultures of other societies, it considered the practice cruel and serving no known medical purpose. No. A72-147-491, (U.S. Immigr. Ct. Seattle, Wash. Mar. 23, 1994) (unpublished I.J. decision). “While it could possibly have had some purpose in ancient cultures, whatever the utility the practice might have ever had, it no longer exists.” *Id.*
134. Asylum advocates, as well as its detractors, have raised concerns about expanding the definition of refugee to recognized gender-based persecution. See Deborah Sontag, *Women Asking U.S. Asylum Expand Definition of Abuse*, N.Y. TIMES, Sept. 27, 1993, at C8. This fear is based on a belief that the number of asylum applicants will increase, adding to the current antiimmigrant movement and creating hardships for the refugees and immigrants currently residing in the United States, as well as leading to new restrictions in immigration policies. *Id.; see also* Kelly, *supra* note 19, at 627. Federal Courts have also indicated a fear of expanding the definition of particular social group. In *Sanchez-Trujillo v. INS*, concerning Salvadoran males fleeing to avoid persecution for failing to join the military, the court stated “this class of young working class urban males may be so broad and encompass so many variables that to recognize any person who might conceivably establish that he was a member of this class and is entitled to asylum . . . would render the meaning of refugee meaningless.” 801 F.2d 1571, 1577 (1986).
135. “Despite the propaganda about America being overwhelmed with immigrants, the rate of immigration is about one-third what it was at the beginning of the century . . . . [W]ithout immigration, America would not long have existed. Now, without immigration it cannot exist as a world power.” A.M. Rosenthal, *Are We 'America the Mingy?' Halting Immigration is Blind Folly*, MIAMI HERALD, Dec. 27, 1995, at 11A.
particular social group she must still demonstrate state involvement in the persecution, through action or inaction. She must also meet both the subjective and objective prongs of a well-founded fear of persecution, as well as establishing the only form of relief available to her is asylum. As demonstrated in Canada and Germany, expanding the definition of a particular social group to include women fleeing gender-based persecution has not opened the flood-gates.

V. TWO GROUND-BREAKING CASES

A. In re A and Z

In a potentially ground-breaking case, a United States immigration judge granted asylum to a Jordanian woman fleeing intimate abuse, finding her eligible for asylum under both the political opinion and particular social group categories, noting that the two categories may be interchangeable.136

The petitioner was a woman who fled Jordan in 1990 with her child, requesting asylum on the basis of spousal abuse. She presented evidence establishing ongoing abuse at the hands of her husband over a thirty year period of time. Testifying and presenting corroborating witnesses and documents, the petitioner proved that her husband had beaten her in front of others, even during pregnancy. One incident occurred when she attempted to obtain her high school diploma. Also, on several occasions he placed her under house arrest, refusing to let her step out of the house. She was also not permitted to work, or to have friends, or her own bank account. Her husband would not even give her gas money. Further, it was established that the petitioner’s husband beat her just to “keep her in line.”

In May 1990, the petitioner’s husband threatened her with a gun, firing it into a room where she and her child were located. It was then that she decided to leave. Under Jordanian policy, however, the petitioner could not travel without the consent of her husband. He refused to consent and obtained a detainment court order to prevent her from leaving. Her husband finally permitted her to come to the United States, where they owned a home, during the summer of 1990. The petitioner’s husband followed her to the United States where the abuse continued. When he finally realized that the petitioner would not return to Jordan with him, he stopped giving the petitioner and her child financial support.

The Immigration and Naturalization Service argued the case

concerned personal marital abuse, but the court disagreed.\textsuperscript{137} The petitioner presented evidence establishing not only that she could not receive protection from the Jordanian government, but that such abuse was traditionally accepted and it is a cultural norm not to seek police assistance for domestic abuse.\textsuperscript{138}

The court found that the petitioner was a member of a particular social "group of women who are challenging the traditions of the Jordanian government and society."\textsuperscript{139} It found that by fleeing her husband, thus challenging her husband’s power to abuse her, she also challenged the system of submission of women in Jordan by espousing her feminist beliefs.\textsuperscript{140} Citing Fatin v. INS,\textsuperscript{141} the court also held that feminism qualifies as a political opinion.\textsuperscript{142}

The court found the abuse suffered by the petitioner demonstrated that she was willing to suffer the consequences for asserting her beliefs.\textsuperscript{143} Furthermore, she showed she was unwilling to accept any further abuse because her Western feminist beliefs collided with traditional Jordanian values.\textsuperscript{144} The court concluded that the petitioner’s social group is basic to her political opinion and they are interchangeable.\textsuperscript{145} Based on the Department of State’s \textit{Country Reports on Human Rights Practices for 1992}, it found that there are few legal avenues for redress of intimate abuse in Jordan, and the actions of the petitioner’s husband are traditionally accepted.\textsuperscript{146} As such, the court concluded that although the persecution was done on a private level, the government was a collaborator by its inaction in preventing it.\textsuperscript{147} Based on the husband’s past actions and the government’s inaction, the court found a clear probability the petitioner would be subject to persecution if she returned to Jordan.\textsuperscript{148} In granting her request for relief from deportation, the court stated the petitioner was eligible for asylum under both the political opinion and

\begin{itemize}
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Id.}
\item \textsuperscript{139} \textit{Id.} at 29.
\item \textsuperscript{140} \textit{Id.} at 30.
\item \textsuperscript{141} Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993).
\item \textsuperscript{142} \textit{In re A and Z, No. A72-190-893, No. A72-793-219, at 30.}
\item \textsuperscript{143} \textit{Id.} at 31.
\item \textsuperscript{144} \textit{Id.}
\item \textsuperscript{145} \textit{Id.} at 29.
\item \textsuperscript{146} \textit{Id.} at 30.
\item \textsuperscript{147} \textit{In re A and Z, No. A72-190-893, No. A72-793-219, at 30.}
\item \textsuperscript{148} \textit{Id.}
\end{itemize}
particular social group categories.\textsuperscript{149}

\textbf{B. \textit{In re M.K.}}

In a more recent decision out of the same immigration court, a twenty-nine year old woman from Sierra Leone was granted asylum on three bases: persecution relating to her resistance to, but forcibly imposed, genital mutilation; persecution through spousal abuse as a result of her attempts to assert her feminine views; and persecution because of her political opinion.\textsuperscript{150}

The court noted that although it considered the issue of female genital mutilation a case of first impression concerning a claim for asylum, the same issue was addressed in the context of a suspension of deportation hearing by an immigration judge sitting in Seattle, Washington.\textsuperscript{151}

The respondent, M. K., entered the United States in August 1991 on a visitor's visa. She applied for asylum when the INS instituted deportation proceedings against her for remaining in the United States without authorization and she was found to be deportable.\textsuperscript{152}

M.K. is twenty-nine, married, and a native and citizen of Sierra Leone. She has a high school level education and is trained and employed as a nursing assistant. At the age of fifteen the respondent's mother began pressing her to submit to female genital mutilation.\textsuperscript{153} She continuously refused, at the risk of becoming an outcast, treated as a nonadult, or shunned,\textsuperscript{154} because three of her friends had died as a result of the practice and numerous others suffered pain because of the mutilation. At the age

\textsuperscript{149} \textit{Id.} at 29.

\textsuperscript{150} \textit{In re M.K.}, No. A72-374-558. The court's rationale concerning the third category of political opinion will not be discussed in this article.

\textsuperscript{151} \textit{Id.} at 2 (referring to \textit{Oluloro} and a suspension of deportation proceeding under Immigration & Nationality Act §244). In order to qualify for suspension of deportation, an applicant must have been present in the United States for seven years immediately preceding the application, be a person of good moral character, and that deportation would result in extreme hardship to the alien, her United States citizen or lawful permanent resident spouse, parent or child. Immigration & Nationality Act §244(a)(1). The burden of proof is on the alien to establish eligibility for suspension of deportation. \textit{Kimm v. Rosenberg}, 363 U.S. 405 (1960). In \textit{Oluloro}, the court granted the suspension on the basis of potential hardship to the respondent's two minor female children who would be subject to female genital mutilation if the respondent was deported to Nigeria. \textit{Oluloro} No. A72-147-491 at 17.

\textsuperscript{152} \textit{In re M.K.}, No. A72-374-558 at 2.

\textsuperscript{153} Female genital mutilation is a traditional practice in Sierra Leone (with the exception of the Creoles, who make up 20\% of the population) and approximately 80\% of the female population of that country undergo some form of this mutilation. \textit{Id.} at 5.

\textsuperscript{154} According to the testimony of Susan Rich, an expert on African family planning, in Bundo Society a social stigma attaches to the woman who refuses to undergo the mutilation. \textit{Id.} at 7.
of twenty-one the respondent ran away from home when her mother told her she would be forced to undergo the procedure, returning only when her mother promised her she would not be forced.

However, in January 1989, after the birth of her child, the respondent was abducted from her parents home, blind folded and bound, and taken against her will to a place in the jungle called the “Bundo Bash.” There her “initiation” into the Bundo Society was performed. She was stripped of her clothes and bound while an elder woman, using an unsterilized razor, cut away her clitoris and labia minor. She was not given anything to ease the pain. Six women sang to disguise the screams of the respondent and six other victims.

As a result of the “operation” the respondent bled for five hours and lost consciousness, but the group refused to take her to the hospital for fear the Bundo secret would be revealed. A woman doctor was called in to stop the bleeding. Following the mutilation the respondent received two weeks of instruction on a woman’s role in society and was forced by threat of death to take an oath of silence concerning the ritual and her mutilation.

The court accepted testimony that there is no legal recourse regarding female genital mutilation in Sierra Leone, reasoning it is a traditional practice and police would inform the Bundo Society should anyone reveal the “secret” by lodging a complaint. As a result, the court concluded the government was either unable or unwilling to stop the persecution, finding genital mutilation mandated for all non-Creole women in Sierra Leone.

Recognizing forced female genital mutilation as a form of persecution, the court held the respondent warranted asylum on the basis of either “persecution on account of political opinion” for her resistance to, and complaints about, female genital mutilation; or “persecution on

155. Expert testimony at the respondent’s hearing established that “initiation” into the Bundo Society, of which the respondent’s family were members and which all women are required to join, is to inculcate young women on their socially-imposed roles. In re M.K., No. A72-374-558 at 6. Female genital mutilation is part of the initiation and is performed by a Digba, a women elder, using a razor blade or broken glass to perform the surgery. Id. While the Digba is permitted to drink intoxicants, the victims are given nothing to relieve the pain. In re M.K., No. A72-374-558 at 6 (referring to the testimony of Susan Rich and Dr. Gary S. Eglinton, an Associate professor and Director of Maternal-Fetal Medicine in the Department of Obstetrics and Gynecology at Georgetown University School of Medicine).

156. The respondent’s long term health has also been affected. Id. She suffers from discomfort, a chronic rash, and has endured a miscarriage as a result of an infection caused by the mutilation. Id.

157. Id. at 8.

158. Id. at 13.

account of membership in the social group that consists of women who are forced to undergo female genital mutilation."\textsuperscript{160} The court also granted asylum based on the respondent's "past attempts to assert her individual autonomy, resulting in physical spousal abuse, and because of her fear of future harm, given the threat of her husband to kill her."\textsuperscript{161}

The respondent married her husband in 1985. Since 1988 he abused her both verbally and physically, beating her with his fists and feet approximately every two months because she was mouthy.\textsuperscript{162} On three occasions respondent complained to the police about the abuse and on each occasion was told the police could do nothing because it was a domestic matter.\textsuperscript{163} The respondent's husband beat her, even during her two pregnancies, so she refused to bear him any more children, further angering him. The beatings continued until 1990 when the respondent left him.\textsuperscript{164} At the time of the hearing the respondent was in the process of divorcing her husband. As a result, he has threatened to kill her because she refuses to bear him more children, refuses to relinquish custody of their two children, and is carrying out her threat to divorce him.\textsuperscript{165}

On the basis of this testimony, the court also granted the respondent asylum because of spousal abuse stating that such abuse could be "classified as either: 'persecution on account of political opinion' for her resistance to mandated female subservience and complaints about physical spousal abuse; or 'persecution on account of membership in the social group that consists of women who have been punished with physical spousal abuse for attempting to assert their individual autonomy.'"\textsuperscript{166}

These cases are significant for two reasons. \textit{In re A and Z} is believed to be the first decision by an immigration judge in which a woman was granted asylum based on intimate abuse because such abuse was found to constitute persecution. \textit{In re M.K.} is the first case to hold female genital mutilation is a form of persecution meriting asylum. Second, both cases identify women who have faced and are facing gender-

\begin{itemize}
  \item \textsuperscript{160}Id. at 14. "In addition, Respondent is eligible for asylum on humanitarian grounds because of the horror of being forced to undergo female genital mutilation." Id.
  \item \textsuperscript{161}Id.
  \item \textsuperscript{162}Id. at 9.
  \item \textsuperscript{163}Testimony by Susan Rich confirmed that in Sierra Leone men are considered head of the house and a wife's disrespect or disobedience justifies her punishment. \textit{In re M.K.}, No. A72-374-558, at 9. The court noted, referring to the report, State Department Sierra Leone Human Rights Practices 1994, that wife-beating is common and rarely results in court action because it is not recognized as a societal problem. Id. at 10.
  \item \textsuperscript{164}Id.
  \item \textsuperscript{165}Id.
  \item \textsuperscript{166}Id. at 15.
\end{itemize}
based persecution as members of a particular social group. These cases should be upheld. Furthermore, they should be followed and expanded upon.

The particular social group category was added as a ground for refugee status in recognition of the potential failure of the other categories to include all forms of persecution. Both the definition of refugee and the inclusion of the category for a particular social group indicate that it was meant to cover groups, such as women who face gender-based persecution, that are not covered by the other categories. Furthermore, the United States was a contracting party to the Protocol, and as a member should follow the UNHCR guidelines which call on states to recognize women fleeing gender-based persecution as members of a particular social group.

While the petitioners in both the In re A and Z and In re M.K. were able to establish persecution because of their political opinion as well as because they were members of a particular social group, other women are targeted for persecution specifically because of their gender. The United States needs to establish immigration policies recognizing that fact. The flood-gates will not open. Canada and Germany are proof that fear will not be realized.

VI. CONCLUSION

In an age where women's rights and equality are both recognized and demanded, the United States should amend its immigration policies to reflect the changes occurring world-wide. In a country that prides itself on equality, the discrimination against refugee women should be acknowledged and eliminated. The United States immigration laws and policies were not carved in stone, but the words of Emma Lazarus were. Those are the words that should be followed—and those words were meant to include women.

I. INTRODUCTION

Politicians get away with murder! This common statement tends to reflect how many feel about the privileged class of people who make and enforce the law. Nevertheless, the litigious nature of the United States has caught up with the current President of the United States, Bill Clinton. He is accused of several state and federal civil rights violations\(^1\) allegedly committed against Paula Corbin Jones, a former Arkansas state employee.\(^2\) President Clinton was given leave to argue the ruling in \textit{Nixon v. Jones v. Clinton}, 869 F. Supp. 690 (E.D. Ark. 1994).


Fitzgerald gives him absolute immunity from being sued while holding office, so that Jones' suit should be dismissed without prejudice until after he leaves office. The district court did not agree and held that the President is subject to discovery but the initial trial may be delayed until after he leaves office. On January 9, 1996, the United States Court of Appeals for the Eighth Circuit, with Judge Bowman writing for the majority, ruled in a two to one decision that the President is subject to the same rules which apply to every American citizen. The court held that since the actions alleged were not "official acts," Nixon v. Fitzgerald could not provide the President any type of immunity in this instance and the pretrial discovery could proceed. The Circuit Court based its opinion on a strict reading of Nixon v. Fitzgerald. The District Court based much of its decision on what it called the "English Legacy," and on Supreme Court decisions (mainly Fitzgerald) to conclude President Clinton does not have full immunity from suit.

The District Court's comparison of English law and history concerning the issue of immunity was used to aid the court in interpreting the intent of the Framers of the Constitution and was thus given more weight than it deserved. On the other hand, the circuit court never touched upon the "English Legacy."

This article will discuss and analyze the fundamental differences between executive immunity in the United States and the United Kingdom of Great Britain and Northern Ireland. The first part of this article will discuss the "American position." This section will analyze the historical development the courts have taken concerning the constitutionality of enjoining, subpoenaing, and suing the President of the United States for actions committed during his term and even before his term commenced. After discussing the American position, the second part of this article, titled, "The British Counterpart", will discuss the formation and role of the modern monarchy, and its retention of certain powers and privileges since the formation of Parliament. The section will also address the civil and criminal immunity the monarch always enjoys and how that immunity can, at times, protect members of the Crown in the course of their executive

6. Id.
7. Id. at *3.
8. Id. at *1.
duties. Finally, the conclusion will summarize the differences between the British monarch and the American President and allow the reader to determine if the discussed immunity is necessary in today's day and age.

II. THE AMERICAN POSITION

It is often stated the United States is the most litigious nation in the world. This belief is evident by the number of law suits filed and litigated in American courts each year. By 1990, the legal profession became a ninety-one billion dollar a year industry and employed nearly one million people. The profession has helped give the average person the ability to file suit against anyone, even against the President of the United States.

Until the final days of Richard Nixon's tenure in office, it was believed the President of the United States enjoyed complete immunity from suit. This belief changed over time. In a series of decisions, the President's omnipotent status has been eroded. Nevertheless, the courts have continuously had difficulty in balancing presidential immunity with the need of the judicial branch to administer justice. Several important court decisions have helped shed light on how far the judicial branch may go to exercise its jurisdiction over a president. The following cases indicate the President is subject to some legal process, and is not above the laws of the United States.

III. THE COURT'S SUBPOENA POWER OVER THE PRESIDENT

In United States v. Burr,11 the trial court subpoenaed President Thomas Jefferson. Aaron Burr wanted Jefferson to provide a letter which Burr intended to use as evidence to help defend a charge of treason. The government conceded Burr's right to serve the President with a subpoena to testify, but decided that a subpoena duces tecum cannot be served on the President because a request for documents could disclose confidential communications which only the President is entitled to read.13

With Chief Justice John Marshall presiding, the trial court recognized that


12. Aaron Burr (1756-1836) was the third Vice President of the United States (1801-1805) under Thomas Jefferson. Burr was accused of trying to raise an army against Spain and conspiring to divide the Union.

a subpoena *duces tecum* might jeopardize public safety, but held the President must hand over the letter. The court added that portions of the letter may be withheld in the interest of national security. More interesting, Marshall ruled the courts cannot proceed against the President as an ordinary individual. Marshall's decision was revisited when a federal district court ordered President James Monroe to submit to a subpoena and serve as a witness in a court-martial hearing. The Attorney General believed Monroe had a legal duty to cooperate with a subpoena. Claiming he could not leave his official duties, Monroe answered a series of interrogatories which the court sent by mail.

Perhaps the most significant case recognizing the courts' power to subpoena the President, thus legitimizing Marshall's decision was *United States v. Nixon.* President Nixon challenged a subpoena ordering him to turn over tape recordings of his discussions which were needed for a criminal trial. Nixon argued that the separation of powers doctrine precluded the court from exercising its jurisdiction over the executive branch. In a unanimous decision (without Justice Rehnquist's participation), the Supreme Court held the doctrine of separation of powers and confidentiality do not give the President an unqualified privilege of immunity from the judicial process. The Court noted that unless President Nixon could show the released communications would jeopardize military, diplomatic, or national security interests, his arguments could not prevail over the fair administration of criminal justice.

---

14. *Burr,* 25 F. Cas. at 34-35. Chief Justice Marshall wrote the following: "A subpoena *duces tecum*, then, may issue to any person to whom an ordinary subpoena may issue, directing him to bring any appear of which the party praying it has a right to avail himself as testimony." Id. at 34-35.

15. *Ray,* supra note 10, at 750; see Id. at 752 n.69 (explaining Burr's concession the "constitutional officer" has a right to withhold certain documents from the public); see also *Burr,* 25 F. Cas. at 35.


18. *Id.*

19. *Id.*


21. *Id.*

22. *Id.* at 706.

23. *Id.*

24. *Id.* at 713.
IV. THE COURTS’ INJUNCTION POWER OVER THE PRESIDENT

The Reconstruction Act of 1867 set the battleground for the Supreme Court to hear Mississippi v. Johnson. Mississippi attempted to enjoin President Andrew Johnson from enforcing the Reconstruction Act of 1867. The Supreme Court unanimously held a state cannot sue the President to block enforcement of a statute it believes is unconstitutional. Furthermore, the court stated that the separation of powers doctrine precludes the courts from exercising its jurisdiction over the executive branch and the Reconstruction Act was purely executive and political. Nevertheless, the decision in Mississippi v. Johnson did not necessarily preclude the courts from enjoining the President in his performance of ministerial duties or hearing a suit against the President for noninjunctive relief.

It was not until the 1950s when the Supreme Court heard arguments in Youngstown Sheet & Tube Co. v. Sawyer that Mississippi v. Johnson was revisited. President Harry Truman ordered his Commerce Secretary to seize the nation’s steel mills when management and labor were unable to resolve a wage dispute which threatened to close down the industry in the middle of the Korean War. In a hearing before the United States District Court, the government argued the precedent in Mississippi v. Johnson prohibited the court from exercising its jurisdiction over the President or his agents. The District Court ruled against the government but distinguished the current case from Johnson on the grounds that the

25. Reconstruction, which lasted from about 1865 to 1877, was the era following the American Civil War (1861-1864) in which the states of South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, Texas, Virginia, Arkansas, North Carolina, and Tennessee were reinstated into the Union.


27. Andrew Johnson was the seventeenth President of the United States who succeeded to the Presidency upon the assassination of Abraham Lincoln in 1865. A lifetime member of the Democratic party, Johnson was selected by Lincoln, a member of the Republican party, to give the ticket a non-partisan character. Johnson and the Republican-controlled Congress were constantly at odds with each other, especially where reconstruction was at issue. As a result, Andrew Johnson became the only President to be impeached. The opposition failed by one vote to gain his conviction; thus, Johnson was able to finish out his term in office, which ended in 1869.


29. Johnson, 71 U.S. at 475.

30. Id. at 499, 500.

31. Id. at 499.


33. Id. at 582.

34. Ray, supra note 10, at 760.
complaint named the Commerce Secretary and not President Truman. When the case reached the Supreme Court, council for the steel mills argued that Johnson did not pertain to presidential subordinates and thus an injunction would be permissible. The majority opinion did not address whether Youngstown was actually a suit against the President; but at the very least it established that one can challenge a presidential order if the named defendant is a presidential agent. In the end, the Supreme Court invalidated Truman's executive order stating the Constitution does not authorize the President, as Commander-in-Chief, to seize private property. Eventually, the ability to enjoin a presidential order by directly naming the President instead of a "named agent" became acceptable in the eyes of the Court, but it is nevertheless difficult to achieve. The same can be said for a writ of mandamus, though difficult to obtain, it is not legally impossible.

V. SUIT AGAINST THE PRESIDENT—NIXON V. FITZGERALD

In 1968, A. Ernest Fitzgerald, a management analyst with the Department of the Air Force, testified before a congressional subcommittee about cost overruns and technical difficulties concerning the development of the C-5A air-transport. When Richard Nixon assumed the presidency in 1969, Fitzgerald's position was eliminated. Fitzgerald believed his dismissal was politically motivated and challenged his termination before the Civil Service Commission. The Commission found Fitzgerald's termination was not in retaliation for his congressional

35. Id.
36. Id. at 761.
37. Id. at 763.
38. Youngstown, 343 U.S. at 588; see also Ray, supra note 10, at 761-63.
39. See National Ass'n of Internal Revenue Employees v. Nixon, 349 F. Supp. 18 (D.C. 1972) (holding that plaintiffs' failed to show that a preliminary injunction to require the President to adjust wages of federal employees was in the public interest); see also Dellums v. Bush, 752 F. Supp. 1141 (D.C. 1990) (holding that members of Congress were not entitled to a preliminary injunction directed to the President prohibiting him from initiating military action against Iraq because the issue was not ripe for consideration).
40. See San Francisco Redevelopment Agency v. Nixon, 329 F. Supp. 672 (N.D. Cal. 1971) (holding that no proposition has been found to suggest that a United States District Court may compel the head of the Executive Branch of government to take any action whatsoever). But see Hourigan v. Carter, 478 F. Supp. 16 (N.D. Ill. 1979) (holding that mandamus can only be used to compel ministerial and non-discretionary duties).
42. Id. at 5.
43. Id.
appearance, but that it did involve "personal factors unique to him." The Commission ordered him reinstated in another position equivalent to the one he held plus back pay; Fitzgerald was not satisfied with what he believed was an inadequate ruling. Fitzgerald filed suit against several Nixon White House staff members and eventually, in 1978, amended his complaint to include President Nixon. President Nixon’s motion for summary judgment (claiming presidential immunity) was denied, giving him the opportunity to make a collateral appeal which was dismissed summarily. The Supreme Court of the United States heard arguments, and eventually ruled that the President enjoys absolute immunity for official actions he commits while President. The Court developed its rationale using precedent and history. The ruling in Fitzgerald can be summed up as follows:

Applying the principles of our cases to claims of this kind, we hold that the petitioner, as a former President of the United States, is entitled to absolute immunity from damages predicated on his official acts. We consider the immunity a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.

The Court examined the powers and responsibilities of the President and held that the President’s powers are unique as compared to other executive officers because the President has the responsibility to execute the nation’s laws as well as shape United States foreign policy. Fitzgerald argued that the only immunity mentioned in the Constitution is reserved for

44. *Id.* at 6.
45. *Id.*
46. Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 6, Nixon v. Fitzgerald, (No. 79-1738), *cert. denied* (1980). Fitzgerald also filed suit against Bryce Harlow and Alexander Butterfield, two of Nixon’s top aides. The Supreme Court ruled in Harlow v. Fitzgerald, 457 U.S 800 (1982), that cabinet members and aides are only entitled to qualified immunity, which would be denied only if the official reasonably should have known that his or her act was a violation of law. See Aviva Orenstein, *Recent Development, Presidential Immunity From Civil Liability*, 68 CORNELL L. REV. 236, 240-42 (1983).
47. *Nixon*, 457 U.S. at 731.
48. *Id.* at 749.
49. *Id.*
50. *Id.* at 749-50; see also Harlow v. Fitzgerald, 457 U.S. 800 (1982) (holding that executive officials are usually entitled only to qualified immunity).
Congressman and presidential immunity must not have been considered. The Court did not agree and listed several reasons why Fitzgerald had to be wrong. First, because presidential immunity is not specifically mentioned in the Constitution does not mean it does not exist. The Court noted judges have immunity even though the Constitution does not specifically grant such a privilege. Second, the Court already has extended to certain executive branch officials (i.e., prosecutors) absolute immunity. Finally, there is historical evidence that the Framers assumed the President has immunity. Senator Ellsworth and Vice President John Adams, both delegates to the Constitutional Convention, believed the President was not subject to the Court’s jurisdiction. Alexander Hamilton, noted in the Federalist, that an executive who is not independent will equate to a weak government. Thomas Jefferson, the nation’s third President, wrote the following to the prosecutors in Aaron Burr’s trial:

The leading principle of our Constitution is the independence of the legislature, executive and judiciary. But would the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, help him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?

To summarize its position, the Court quoted Joseph Story, a nineteenth century commentator, who observed:

There are incidental powers belonging to the executive department which are necessarily implied from the nature of the functions which are confided to it. Among these must necessarily be included the power to perform them

---

51. *Nixon*, 457 U.S. at 750; see U.S. CONST. ART. I, § 6 (guaranteeing immunity in all cases, except treason, felony, and breach of the peace, from arrest during a congressional session).

52. *Nixon*, 457 U.S. at 750 n.31

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 751 n.31. For more historical commentary on immunity, see Memorandum (Attachment) in Support of President Clinton’s Motion to Dismiss on Grounds of Presidential Immunity at 1, Jones v. Fitzgerald (No. LR-C-94-290) (1994) [hereinafter President’s Attachment].

57. President’s Attachment, *supra* note 56, at 4-5.

without any obstruction whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office, and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.  

VI. RECENT DEVELOPMENTS

Paula Corbin Jones, a former Arkansas state employee, filed suit against President Clinton claiming that while governor of Arkansas, Clinton violated her equal protection and due process rights by making "noncoercive sexual advances." Jones claims that she rebuffed Governor Clinton's advances and as a result, her superiors treated her in a "hostile and rude manner" and she was denied merit pay raises. Jones voluntarily left her state job in 1993. She filed her complaint one day short of the three year statute of limitations, which incidentally was the year and a half point of Bill Clinton's presidential term. President Clinton moved to dismiss the complaint arguing the precedent of *Nixon v. Fitzgerald* gave the President absolute immunity from civil suit. The district court ruled that since the actions allegedly committed by the President occurred before his term of office commenced, the President, under the constitutional doctrine of separation of powers, is only entitled to "limited or temporary" immunity from immediate trial but discovery and deposition may proceed against the President. In January


60. Memorandum in Support of President Clinton's Motion to Dismiss on Grounds of Presidential Immunity at 15, *Jones v. Ferguson* (No. LR-C-94-290) (1994) [hereinafter President's Memorandum].

61. Id. at 16.

62. Id. at 17.

63. Id. at 63.

64. Id. at 18.

65. *Jones*, 869 F. Supp. at 697-99. Prior to this case, there have only been three Presidents sued for actions they allegedly committed before they assumed office. People *ex rel. Hurley v. Roosevelt*, 179 N.Y. 544 (1904). In *Hurley*, Theodore Roosevelt, was a member of the Board of Police for the New York City Police Department before he assumed the Presidency. A suit was filed against Roosevelt and the other members when a patrolman believed that he was unjustly dismissed. The suit was resolved in the Board's favor. The New York Court of Appeals, without opinion, affirmed the lower court's decision. In *Devault v. Truman*, 194 S.W.2d 29 (Mo. 1946), President Harry Truman was sued because of a decision he made as a state court judge in 1931. The dispute was resolved in Truman's favor with no mention of presidential immunity. In *Bailey v. Kennedy*, No. 757,200 (Cal. Super. Ct. 1962), President John Kennedy was sued when delegates to the prior Democratic Party Convention used a car they claimed was given to them by high ranking members.
of 1996, this decision was reversed in part by an appeals court, which ruled that Fitzgerald does not protect actions outside the outer perimeter of the President’s office and thus Bill Clinton, individually, is subject to trial for actions he allegedly committed before he became president. \(^6\) As such, the absolute immunity Fitzgerald provided the President has at least, for the time being, been strictly applied to provide immunity only for official actions committed while in office.

Before discussing Fitzgerald, the District Court spent a significant amount of time discussing the “English Legacy.” The Court believed that the question concerning immunity lies within English law. \(^6\) The Court noted English law, which is the cornerstone of American law, eventually stood for the proposition the king is under no man, but under God and the law. \(^6\) At the same time, the Court noted the Petition of Rights, \(^6\) signed by King Charles I, made it apparent the king’s prerogative was limited and he would be subject to the law. \(^7\) Examining the steady decline of the king’s divine right, the Court concluded that through the reception statutes which allowed, as of a certain date, English common law and acts of parliament to be received in new independent states, the rights of the President would by implication not exceed the rights of the weakened monarch in the early seventeenth century. \(^7\)

---

6. Jones v. Clinton, Nos. 95-1050, 95-1167 1996 WL 5658 at *6 (8th Cir. Ark.). President Clinton’s lawyers plan to appeal to the full appeals court whose decision will possibly be reviewed by the United States Supreme Court. See Mimi Hall, Court: Paula Jones’ Suit Can Go to Trial, USA TODAY, Jan. 10, 1996, at 4A.


68. Id. at 693.

69. The Petition of Rights was a further restraint on arbitrary government. The Petition condemned taxation without Parliament’s consent, imprisonment without showing cause, quartering of soldiers, and the misuse of martial law. By 1689, the Bill of Rights was passed by Parliament. See A.E. DICK HOWARD, MAGNA CARTA-TEXT AND COMMENTARY 26-27 (1964).

70. Id.

71. Jones, 869 F. Supp. at 693. The court stated the following:

The events of this period in English legal and political history were conclusive in determining the end of ‘the divine rights of Kings’ and subjecting the King to the law. This is historically important to us in that the founding fathers cast very little light (outside the impeachment provision) upon suits against the President, and this matter was never addressed by Congress in passing laws enacted pursuant to the Constitution.
The “English Legacy” helped the Court determine the extent of Presidential immunity. The lofty Seventeenth Century English statement that “the King ought to be under no man, but under God and the law”\(^7\) appears to coincide with the modern American proposition the President is not above the law.\(^7\) Though both statements are egalitarian, to some they may appear to be ludicrous and simply naive. Was the Monarch ever held to the law? As a result of the “down-sizing” of the Monarch’s divine right during the Seventeenth Century, the Court reached the conclusion that if the monarch is not above the law, neither is the President.\(^7\) Though it is true that the monarch’s divine right has been effectively abrogated, it can not be accurately stated the British Monarch is entirely under the law.

VII. THE BRITISH COUNTERPART\(^7\)

The United Kingdom of Great Britain and Northern Ireland is a nation immersed in stately tradition preceding the Constitution of the United States by hundreds of years. The formation of Great Britain’s legal system can be traced to the passage of the Magna Carta.\(^7\) The Magna

\[\text{"It must be assumed that the rights of the President do not rise above the rights of an English monarch in the early 17th Century." (emphasis added).}\]

Id. at 693-94 n.1. But see Nixon v. Fitzgerald, 457 U.S. 731, 748 (1982). The court stated the following:

Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. . . . This inquiry involves policies and principles that may be considered implicit in the nature of the President’s office in a system structured to achieve effective government under a constitutionally mandated separation of powers.

Id. The Supreme Court apparently wanted to de-emphasize the importance of English political tradition, a tradition which the Founding Fathers no doubt wanted to abandon. The Founding Fathers instead created a system of government that mandates that the three branches be separate in identity, but equal in power. The United Kingdom does not adhere to such a concept. This is evident, as explained later, by the fact the executive powers of the United Kingdom are exercised by the governing party in Parliament.

\(^7\) Statement was originally coined by Henry Bracton, a 13th Century legal scholar. Sir Edward Coke, who served as Queen Elizabeth’s attorney and was later Chief Justice of the King’s Bench, stated to King James I that “Bracton saith, Quod Rex non debet esse sub homine, sed sub deo et lege” [That the King ought not to be under any man, but under God and the law]. See Jones, 869 F. Supp. at 693 n.1 (quoting DAVID MELINKOFF, THE LANGUAGE OF THE LAW 203 (1963)).

\(^7\) See Fitzgerald, 457 U.S. at 758 n.41

\(^7\) Jones, 869 F. Supp. at 696.

\(^7\) Many Commonwealth nations have laws regarding immunity and for a discussion on these similarities and differences, see COLIN MCNARIN, GOVERNMENTAL AND INTERGOVERNMENTAL IMMUNITY IN AUSTRALIA AND CANADA 3 (1977).

\(^7\) BOYD C. BARRINGTON, THE MAGNA CHARTA AND OTHER GREAT CHARTERS OF ENGLAND 5 (1899).
Carta is one of the most significant documents ever introduced to the people of England,\textsuperscript{77} who had no rights except for what the king saw fit to give.\textsuperscript{78} The Magna Carta, which was approved by King John in 1215,\textsuperscript{79} guaranteed certain rights to the barons and eventually to all the people of England.\textsuperscript{80} On that fateful day, the principle was established that the king cannot override the law,\textsuperscript{81} thus the king’s tyrannical right to rule by arbitrary decisions ended.

By 1688, the English Parliament, which did not exist when the Magna Carta was signed in 1215, became the supreme law making body of England.\textsuperscript{82} Though Parliament’s ascendance overshadowed the powers of the monarch, there was an aspect of the monarch's divine right that has always remained, despite what others may believe. This “holdover” has given the Queen,\textsuperscript{83} and the Crown as a whole, unique privileges, which the United States President will never have.

\textbf{VIII. THE EXECUTIVE POWERS OF THE CROWN}

The American system of government is based upon the concept of separation of powers. The United States Constitution mandates that the

77. Representing eighty percent of the population of the United Kingdom, England is simply one country out of four that comprises the United Kingdom. Wales came under the rule of the English Crown in the thirteenth century and formally entered the union by 1536. Scotland, which shared the same king of England since 1603, formally joined the United Kingdom of Great Britain in 1707. Ruled by the English Crown since the twelfth century, Ireland formally joined the union in 1800. In 1922, the Irish Free State separated from the United Kingdom. The six counties of the North (Northern Ireland) remained a part of the United Kingdom. See Colin C. Turpin, British Government and the Constitution 218-39 (2d ed. 1990).

78. Barrington, supra note 76, at 5

79. King John (1167-1216) ruled England upon the death of his brother Richard in 1199. John, who was involved in a war with France, levied heavy taxes in order to support his military efforts. In 1214 John returned to England after being defeated by France. With widespread discontent by his barons (who renounced their allegiance to John), as well as by the Church of England, John agreed to accept the demands of his barons and had his seal affixed to the Magna Carta on June 19, 1215. See Howard, supra note 69, at 8-9.

80. Howard, supra note 69, at 8-10. The Magna Carta granted such important rights as tax relief from the king (chapter 12), the location of courts in certain jurisdictions (chapter 17), reasonable fines and punishments (chapter 20), compensation for taking private property (chapter 28), a free person will not be punished except by lawful judgment of his peers and by the law of the land (chapter 39), availability of justice (chapter 40), and freedom to leave and re-enter the kingdom (chapter 42).


82. Turpin, supra note 77, at 24. The Bill of Rights required the consent of Parliament before taxes were levied. See Howard, supra note 69, at 26.

83. The current Queen, Elizabeth II, has been Queen of the United Kingdom of Great Britain and Northern Ireland since the death of her father, King George VI, in 1952. The Queen, as well as past queens and kings, is also known as the Monarch or Sovereign.
executive, legislature, and the judiciary have mutually exclusive members, and at times, mutually exclusive responsibilities which prohibit one branch from encroaching upon the powers of another. In the United Kingdom, this concept is not as definite. The legislative body of Parliament makes the laws, the Crown, headed symbolically by the monarch and steered by specific members of Parliament, has the authority and power to enforce the laws. Specifically, the Crown consists of the Monarch, ministers, who are usually sitting members of Parliament, the Central Governmental Departments (civil service), and the armed forces. The Monarch is the incarnation of the Crown and could not be separated from that body. The Crown's powers include the prerogative powers of the Monarch, the executive powers exercised by her ministers, the civil service, and the armed forces.

The United Kingdom without a king or queen would be like the United States without a president; the nation would not function within its constitutional system of government. Though the current Queen is perceived as a symbolic figure of days long gone, her role in certain matters is constitutionally mandated. The Queen is given the prerogative power to dismiss her ministers, or the Prime Minister, if either were to lose the support of the government. Similarly, the Queen is also given the opportunity to appoint the Prime Minister, but such selection is governed by convention which mandates that she appoint the person who can command the confidence of the majority party in the House of Commons, usually the party leader. The Queen is the only person who

84. See David C. M. Yardley, Introduction to British Constitutional Law 38 (5th ed. 1978). In several Commonwealth nations, the term Crown is also used in the same manner. For purposes of this article, unless otherwise noted, the term Crown will be used to refer only to the executive branch in the United Kingdom.

85. Turpin, supra note 77, at 150-51.

86. Common law powers, not already delegated by Parliament, may only be exercised by the Sovereign. Such powers would include, among other things, the power to make treaties, recognize foreign governments, grant a royal pardon, etc. See Blackburn v. Attorney-General [1971] I WLR 1037 (CA).

87. A minister is a member of the Prime Minister's cabinet. The Prime Minister and cabinet ministers are collectively referred to as the "Crown's Ministers."

88. Turpin, supra note 77, at 150-51. Though the Queen is given such powers, in political reality and necessity, the Prime Minister would offer his resignation or call for a dissolution of Parliament.

89. Id. at 146. The queen cannot appoint anyone she wants to the office of Prime Minister, but in 1957 and 1963 she was given the rare opportunity to solely appoint a prime minister when the majority party did not have an apparent leader. Today this opportunity would be diminished by internal party rules which guide the Queen in her selection. Since 1957, Labor party rules prohibit a member of the Labor Party to sit as prime minister without first being elected party leader. See Peter Bromhead, Britain's Developing Constitution 27-29 (1974).
may dissolve Parliament, but such action may only be taken if the Prime Minister requests a dissolution. Nevertheless, it has been asserted by British Constitutional experts that the Queen may have the right to refuse a Prime Minister's request for dissolution. Though Governor-Generals in several commonwealth nations have refused Prime Ministerial requests for dissolution, the Sovereign in the United Kingdom has not refused one since the passage of the Reform Act of 1832.

The Queen has the power to dismiss her ministers, and it appears that convention would allow her to do so if she felt that it were necessary but in practice the Prime Minister is the one who actually dismisses a minister.

The Queen does not have the power to alter the law, but she does retain a prerogative power by Order of Council to legislate and regulate matters not already governed by statute. The Crown may extend its sovereignty and jurisdiction to areas of land or sea which it has not...

90. TURPIN, supra note 77, at 155. The Prime Minister would seek a dissolution of Parliament if he or she no longer commanded the confidence of their party.


92. TURPIN, supra note 77, at 155-56.

93. In commonwealth nations that recognize the Queen as their Sovereign, the Governor-General is the person, usually appointed by the Prime Minister, who wields the power of the Crown in the Queen's absence. See WILDING, supra note 81, at 272-73.

94. Turpin, supra note 77, at 155-56 (relying on Sir Peter Rawlinson, Dissolution in the United Kingdom, 58 THE PARLIAMENTARIAN 1, 2 (1977)).

95. Turpin, supra note 77, at 150-51. Since the passage of the Reform Act of 1832, no Sovereign has ever dismissed a Prime Minister in the United Kingdom. In 1975, the Governor-General of Australia, Sir John Kerr, acting in the name of the Queen, dismissed the Prime Minister and all ministers in the Labor government when they no longer could govern effectively. The Governor-General wrote the Prime Minister the following:

In accordance with section 64 of the Constitution I hereby determine you appointment as my Chief Advisor and Head of government. It follows that I also hereby determine the appointments of all the Ministers in your Government. You have previously told me that you would never resign an election...or a double dissolution and that the only way in which such an election could be obtained would be by my dismissal of you and your ministerial colleagues. You have persisted in your attitude and I have accordingly acted as indicated. I propose to send for the Leader of the Opposition and to commission him to form a new caretaker government until an election can be held.

Id. at 152.

96. Orders of Council are made by the Privy Council. Privy Council membership is partly governed by convention. Conventional council members include past and present Ministers, the Archbishops of Canterbury and York, the Speaker of the House of Commons, and any other distinguished person who the Queen may appoint. Membership is for life. The Council, which has several hundred members, meets in full upon the death or coronation of the Monarch. Smaller committees meet when they need to exercise the Monarch's Royal Prerogative. Membership in the council is for life. YARDLEY, supra note 84, at 43-44.

97. Turpin, supra note 77, at 382-83.
previously claimed or exercised sovereignty or jurisdictions. During the Falkland Island conflict in 1982, the government used the prerogative of the Crown to requisition ships in "any of the Channel Islands, any colony, any country outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of the Government of the United Kingdom." But perhaps the most important power the Queen retains is the right to refuse to assent to legislation passed by Parliament. However, this veto power has not been exercised by a monarch in over two hundred years.

The monarch, though no longer omnipotent, has enough power if used unwisely to halt the workings of the government and cause a constitutional crisis. The executive powers formally exercised by the sovereign alone are now in the hands of the ministers of the Crown, namely the Prime Minister.

The Prime Minister is usually a member of the House of Commons. As such, his discretion and powers are for the most part unlimited. The British Constitution gives the Prime Minister the power to request a dissolution of Parliament and call a general election. The Prime Minister, who is an elected member of Parliament, chairs the cabinet meetings, appoints ministers, and has the authority to intervene in virtually all matters of government and foreign relations. Whereas the President of the United States has the unfettered discretion to dominate the executive branch and matters of foreign policy, the Prime Minister, by Great Britain's formal lack of separation of powers, occupies a dual role which allows the office holder to dominate the executive as well as legislative functions of government. Though some may want to call the Prime Minister a "first among equals," in fact the Prime Minister could easily be considered a "constitutionally elected dictator."

As shown, the Queen has a considerable amount of constitutional power. Yet, unlike the President of the United States, the Queen can do
no wrong. This ancient maxim, which stems from the days when the monarch ruled by divine right, persists today, but now although the Queen can do no wrong, her ministers personally, as well as the government can.

The Crown Proceedings Act of 1947 played a significant role in allowing suits to be brought against the Crown. Prior to the Act, no proceedings for criminal or civil actions could be brought against the Crown. Thus, a servant of the Crown who committed an illegal action pursuant to duty, would bear the sole responsibility for that action because "the Crown can neither commit nor authorize nor be responsible for any wrongdoing . . . ." The 1947 Act allowed civil proceedings by and against the Crown or governmental agencies, whereas prior to the act, one used a petition of right to seek relief against the Crown. Presently, one may directly sue the Crown via an appropriate governmental department or agency by permitting actions to be brought against the Crown for torts committed by its servants or agents for any breach of its


109. For purposes of the immediate discussion, the pertinent parts of this act are as follows: Section one allows a subject to sue the Crown directly except for actions which the Crown remains privileged from legal action for damages, for the recovery of a liquidated sum, for specific performance, and for contracts dependent on money from Parliament. As such, no soldier may sue the Crown because the control of the armed forces are still under the prerogative power of the Crown. Section two permits actions to be brought against the Crown for torts committed by servants or agents for any breach of its duties. Section two did not remove the right to sue the actual tortfeasor. Section seventeen provides for the minister of the Civil Service to publish a list of authorized government departments so that civil proceedings against the Crown may be brought against the appropriate department or if no department exists, the Attorney General. Section forty of the act preserves the monarch's personal immunity from civil actions. See Home Office, [1993] 3 All E.R. 537, 554; Yardley, supra note 84, at 129-30.

110. Kier, supra note 106, at 528.

111. Id.

112. Id. at 528-29.

113. Id. at 529.

114. A petition of right is a method by which an aggrieved subject would petition the Crown for relief. This method was at one time the only way to obtain relief and a judgment against the Crown, which the Crown did not have to satisfy. The Crown Proceedings Act did away with this method. It should be noted that the Crown has traditionally been cooperative in taking responsibility for the actions of its servants and that the petition of right proceeding usually proceeded as ordinary actions between subjects. See Id.; see also Holdsworth, supra note 107, at 290.
duties that give rise to tortious liability. At the same time, this Act does not prevent a minister from being held personally liable for his own tortious actions. However, unlike the President of the United States, the Queen, or the reigning monarch, can never be held personally responsible in a civil court for torts committed by her.

IX. JUDICIAL REVIEW OF THE CROWN

As in the United States, the powers of government are subject to judicial control. In the United Kingdom, executives are generally immune from the control of the courts so long as their actions are within the parameters of the law. As such, decisions by a minister or other public authority are not subject to appeal, but a person may challenge the exercise of a minister’s powers by means of judicial review. The courts have the power to order a public authority to perform a duty, by a writ of mandamus, or to refrain from unlawful action, by a writ of prohibition. The courts also have the power to create an order which annuls a decision made contrary to law, by a writ of certiorari, to make a declaration of a party’s legal rights, or impose an injunction, which until recently was not available against the Crown or ministers acting on behalf of the Crown.

The right to enjoin a minister of the Crown and hold that minister or his department in contempt for violating an injunction was decided in the benchmark case of M. v. Home Office. M was a citizen of Zaire who arrived in the United Kingdom and claimed political asylum. After several months of review, his claim was rejected by the Secretary of State who made plans to deport M back to Zaire. M’s solicitors made application for leave to apply for judicial review. On the evening M was

117. YARDLEY, supra note 84, at 130; GRAY, supra note 105, at 307.
118. TURPIN, supra note 77, at 414.
119. LORD MACDERMOTT, PROTECTION FROM POWER UNDER ENGLISH LAW 81 (1986).
120. TURPIN, supra note 77 at 414.
121. Id. see also Home Office, [1993] 3 All E.R. at 558-60.
123. Id.
124. Id. at 542-43.
125. Id.
126. Id.
to be deported, the judge indicated he believed that there was an arguable point arising out of the application and that he wanted M to remain in the United Kingdom so M's application could be made to a nominated judge. The judge adjourned the Court session believing that pending a further hearing, M would not be removed from the United Kingdom. Due to miscommunication between M's solicitors, the Home Office, and the judge, M was deported against the wishes of the Court.

Proceedings were commenced on behalf of M against the Secretary of State for contempt in failing to comply with the judge's order. The counsel for the Home Office argued an injunction could not be used against ministers of the Crown in judicial review proceedings, and thus the order of contempt which the Court of Appeals upheld against the Home Secretary was in error. The House of Lords unanimously found the Home Office, and not the Home Secretary personally, in contempt because the office inadvertently violated the judge's order not to deport M. The House of Lords, speaking through Lord Woolf, held language in Section 31(a) of the Supreme Court Act of 1981 gives the courts the right to make coercive orders, such as injunctions, against ministers of the Crown in judicial review proceedings. Furthermore, under Rules of the Supreme

128. *Id.*
129. *Id.* at 546-47.
130. *Id.*
131. *Id.* at 541-42.

*Application for judicial review*—1) An application to the High Court for one or more of the following forms of relief, namely—\(a\) an order of mandamus, prohibition, or certiorari; \(b\) a declaration or injunction under subsection 2; or \(c\) an injunction under section 30 retraining a person not entitled to so from acting in an office to which that section applies, shall be made in accordance with rules of court by a procedure to known as an application for judicial review. 2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeing that relief, has been made and the High Court considers that, having regard to \(a\) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition, or certiorari; \(b\) the nature of the persons and bodies against whom relief may be granted by such orders; and \(c\) all the circumstances of the case, it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be. . . .

*Id.* But see Section 21(2) of the Crown Proceedings Act of 1947, reprinted in 13 HALBURY'S STATUES 20 (4th ed. 1991) which states the following:

The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order
Court Order 53, r 3(10), which was given statutory authority by Section 31 of the Supreme Court Act of 1981, the court can grant interim injunctions against ministers as well as make a finding of contempt against the minister or his government.\textsuperscript{134}

This decision directly conflicted with an earlier House of Lords decision rendered by Lord Bridge in \textit{Factortame Ltd. v. Secretary of State for Transport},\textsuperscript{135} which refused to accept the notion that Section 31 allows injunctions in judicial review proceedings to be made against the Crown or a minister of the Crown acting in their official capacity.\textsuperscript{136}

Lord Bridge's decision was based partly on the notion that Section 31 of the Supreme Court Act did not expressly extend the right for a judge to order an injunction against a minister of the Crown in judicial review proceedings.\textsuperscript{137} At the same time, his reasoning in \textit{Factortame} relied

\begin{quote}
would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.
\end{quote}

\textit{Id.}

\textsuperscript{134} \textit{Home Office}, [1993] 3 All E.R. at 563. R.S.C Ord. 53, r 3(10) states the following:

Where leave to apply for judicial review is granted, then (a) if the relief sought is an order of a prohibition or certiorari and the court so directs, the grant shall operate as a stay of the proceedings to which the application related until the determination of the application or until the court otherwise orders; (b) if any other relief is sought, the court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.

\textit{Id.}

\textsuperscript{135} \textit{Factortame Ltd. v. Secretary of State for Transport}, [1989] 2 All E.R. 692, 703-08. The European Economic Community attempted to conserve fish stock by means of national quotas. Not a member of the EEC at the time, Spain fared poorly under the quota system. Several Spanish fishing companies attempted to secure part of the British quota by buying pre-existing British fishing vessels or re-registering their vessels under the British flag. To prevent, this "quota-hopping," the Secretary of State for Transport promulgated regulations under which a fishing vessel could only qualify for entry on the new British register if its legal title was at least 75\% British owned. The applicants, who believed that the nationality requirements were unjust and against Community Law, applied for judicial review. The Divisional Court decided to obtain a preliminary ruling from the European Court of Justice (ECJ), but such a ruling would take several years. The Divisional Court granted interim relief ordering the regulations to be "disapplied." The House of Lords in \textit{Factortame}, held that the court did not have the power under English Law to make an interim order displacing an act of Parliament. Nevertheless, the House of Lords referred the matter back to the E.C.J.. Meanwhile, due to another proceeding challenging the regulations (see Case 246/89 Commission v. United Kingdom), the E.C.J. made an interim order that the Secretary's regulations concerning the nationality requirements must be suspended. Subsequently, the E.C.J. ruled in \textit{Factortame Ltd. v. Secretary of State for Transport} (No 2) Case c-213/89 [1991] 1 All E.R. 70 that a national court was obliged to set aside a national law if such a law was sole obstacle preventing it from granting relief under Community Law. See All E.R. Annual Review 1990, \textit{European Community Law} 104-05; TURPIN, supra note 77, at 346-47.

\textsuperscript{136} \textit{Home Office}, [1993] 3 All E.R. at 561.

\textit{Id.}
heavily upon a lower court decision in *Merricks v. Heathcoat-Amroy*, which seemed to suggest, contrary to the opinion of Lord Woolf, that a minister can not be under a personal liability and subject to injunctive relief for wrongs committed by a minister in his official capacity. Lord Bridge's decision was further influenced by the Law Commission's 1976 report which recommended that Section 21 of the Crown Proceedings Act of 1947 needed to be amended so courts may grant such injunctions against the Crown.

Lord Woolf respectfully doubted Lord Bridge's reasoning in *Factortame* and held the language of Section 31 of the Supreme Court Act of 1981 allowed courts to render injunctions against the Crown in judicial review proceedings and that RSC Ord 53, r 3(10) allowed the courts to grant interim injunctions against the Crown. In an important caveat, Lord Woolf stated an injunction still could not, pursuant to Section 21(2) of the Crown Proceedings Act of 1947, be handed down to the Crown or a minister of the Crown in civil suits.

Lord Woolf believed that just because judicial review was not introduced through primary legislation, it does not necessarily limit the scope of Section 31 of the 1981 Act. Perhaps to avoid delay, England and Wales decided that an amendment to the Rules of the Supreme Court should precede primary statutory legislation. Thus, the Law Commission's recommendation to amend Section 21 of the 1947 Act was effectively abandoned. At the same time, the need to amend Section 21 was not necessary because it dealt with civil proceedings, not judicial review proceedings. According to Lord Woolf, "order 53 undoubtedly

139. *Home Office*, [1993] 3 All E.R., at 557 (relying on *Merricks v. Heathcoat-Amory*, [1955] 2 All E.R. 453). The plaintiff in *Heathcoat* sought an injunction against the Minister of Agriculture, Fisheries, and Food both in his personal and official capacity. The minister argued that the court had no jurisdiction over him in his official capacity because the court was not allowed to grant an injunction against a minister. The minister also argued that if he acted personally, the court did not have jurisdiction over him because he was a member of Parliament and had parliamentary privilege. The court agreed with his argument. *Home Office*, [1993] 3 All E.R. at 557.
140. *Home Office*, [1993] 3 All E.R., at 561. The Law Commission's 1976 report preceded RSC (Rules of the Supreme Court) Ord. 53, which was the precursor to the Section 31 of the Supreme Court Act of 1981. The report suggested that the lack of jurisdiction by the courts should be addressed by amending Section 21 of the 1947 Act. The report was never implemented and instead the Rules of the Supreme Court were amended. *Id.*
141. *Id.* at 564. Lord Woolf noted that a declaration is still the appropriate remedy on an application for judicial review involving officers of the Crown. *Id.*
143. *Id.*
144. *Id.* at 563.
extended the circumstances in which a declaration could be granted against the appropriate representative of the Crown." \(^{145}\) This was confirmed by the passage of the Supreme Court Act of 1981. \(^{146}\) Lord Woolf noted that as a matter of construction, it would be difficult to treat Section 31 and order 53 as not applying to ministers. \(^{147}\) To support that proposition, Lord Woolf turned to the Northern Ireland Act of 1978, which was not discussed in \textit{Factortame}, which recognizes the limits of the 1947 Act, but gives the court the ability to bind the Crown in non-civil proceedings (i.e., judicial review). \(^{148}\) That Act gives the court a wide discretion to grant interim relief, which would seem to confirm that injunctions in judicial review proceedings may be granted against ministers in Northern Ireland. \(^{149}\) By implication, such remedies would likely be available in England and Wales. \(^{150}\) Lord Woolf further reasoned the Rules of the Supreme Court, order 53, r 3(10) have always been treated as giving the Court jurisdiction to grant interim injunctions \(^{151}\) which is linked to the power of the court to grant final injunctions. \(^{152}\) In sum, Lord Woolf wrote the following:

I am, therefore, of the opinion, that the language of s 31 being unqualified in its terms, there is no warrant restricting its application so that in respect of ministers and other officers of the Crown alone the remedy of an injunction, including an interim injunction, is not available. In my view, the history of prerogative proceedings against officers of the Crown supports such a conclusion. \(\ldots\) \(^{153}\)

Perhaps another reason the House of Lords ruled against the Home Office was the fact that since the judgment of \textit{Factortame} was rendered,
the European Court of Justice ruled in *Factortame* 2\textsuperscript{154} that a national court must set aside national legislative provisions if it was the sole obstacle in granting interim relief in a case concerning community law.\textsuperscript{155} It would appear ironic to have one remedy available for domestic law and another available for Community law. This is apparent by the statement made by Lord Woolf in *M v. Home Office*: "It would be most regrettable if an approach which is inconsistent with that which exists in community law should be allowed to persist if this is not strictly necessary."\textsuperscript{156}

Though the constitutional aspects of Lord Woolf's decision are tremendous, the practical effects are minimal because the Crown has always been cooperative with court rulings. In the beginning of his opinion, Lord Woolf stated, "[t]his was the first time that a minister of the Crown had been found to be in contempt by a court. . . ."\textsuperscript{157} At the same time, the above decision does not seem to directly affect the Queen since most of her executive duties are in the hands of her ministers.

X. OTHER IMPORTANT PRIVILEGES

In the United Kingdom, laws passed by Parliament do not personally apply to the Queen, or even the Crown as a whole, unless otherwise specifically mentioned by express words or by necessary implication. This means a statute would only bind the Crown if the intent of the statute would be frustrated without the Crown being bound to its provisions.\textsuperscript{158} In *Madras Electric Supply Co. v. Boarland*,\textsuperscript{159} the Privy Council considered the liability of the appellant to pay income tax and found it necessary to explain and uphold the Queen's, and the Crown's, right not to pay income tax.\textsuperscript{160} The qualified immunity from statute allows

\begin{itemize}
\item \textsuperscript{154} *Factortame Ltd.*, 2, Case C-213/89 [1991] 1 All E.R. 70; see also *Factortame Ltd.*, 2 All E.R. 692.
\item \textsuperscript{155} Id. at 102. See also TURPIN, supra note 77, at 346-47.
\item \textsuperscript{156} *Home Office*, [1993] 3 All E.R. at 564.
\item \textsuperscript{157} Id. at 541.
\item \textsuperscript{158} TURPIN, supra note 77, at 141 (relying on Province of Bombay v. Municipal Corp. of Bombay, [1947] AC 58 (PC)).
\item \textsuperscript{159} Madras Elec. Supply Co. v. Boarland, [1955] AC 667 (PC).
\item \textsuperscript{160} The decision of this case is now moot. In 1992, the Queen voluntarily agreed to pay income tax on her private holdings. See *Prince Charles Wants to Reduce Royalty*, USA TODAY, Oct. 31, 1994, at 2D. Prince Charles, the Queen's son and heir to the throne, has also agreed to pay tax (forty percent) on his main source of revenue, the Duchy of Cornwall. Charles was previously paying only twenty-five percent tax on the Duchy. See Edward Verity & Richard Kay, *Charles Slices Back His Tax*, DAILY MAIL, May 16, 1994, at 15. The above changes have fueled a movement in Canada for the Governor-General to pay income tax on his $97,375 salary. Since 1953, Governor-Generals in Canada have only paid tax on their private holdings. See Joan Bryden, *Reform Demands Tax Hike for Governor General*, CALGARY HERALD, Feb. 8, 1995, at A3.
\end{itemize}
the Queen, and the Crown, to escape the operation of certain laws, even criminal laws.\textsuperscript{161}

The criminal prosecution of a defendant is handled by various offices, notably the Crown Prosecution Service, and is tried in the Crown Court.\textsuperscript{162} At the same time, the maxim, "the Queen can do no wrong" creates a legal fiction which would seemingly prevent any member of the Crown from being tried in Crown courts. However, several courts in other Commonwealth jurisdictions have determined it is legally possible for the Crown to be prosecuted.\textsuperscript{163} As discussed above, the Crown may be held to the requirement of a statute if the statute specially applies to the Crown.\textsuperscript{164} In a benchmark ruling handed down by the Australia High Court, the Court ruled there is a strong presumption that the Crown is not bound by the criminal laws.\textsuperscript{165} The same conclusion was reached in the Canadian case \textit{Canadian Broadcasting Corp. v. Attorney General}.\textsuperscript{166} However, both cases suggest that a criminal statute may apply to the Crown if the statute specially pertains to the Crown.\textsuperscript{167} Nevertheless, it appears the only sanctions that may be handed down are monetary because the Crown cannot be imprisoned.\textsuperscript{168} It should be noted that ministers of the Crown are personally subject to all laws.\textsuperscript{169} However, whereas

\begin{itemize}
\item[161.] \textsc{Turpin}, supra note 77, at 144; see Peter W. Hogg, \textit{Liability of the Crown} 232-234 (1989).
\item[162.] See \textsc{Foreign & Commonwealth Office, Justice and the Law} 21-22 (May 1993).
\item[163.] Hogg, supra note 161, at 234.
\item[164.] See \textsc{Foreign & Commonwealth Office, supra} note 162, at 55, see also \textsc{Turpin, supra} note 87, at 146. Certain public health authorities that once enjoyed Crown immunity may be subject to criminal action for breach of public health legislation. See Hogg, supra note 161, at 234. Though the Crown may be bound by statute through necessary implication, it is very rare due to the narrow definition of "necessary implication" in \textit{Bombay} (see note 150 above) and the fact that most penal sanctions cannot be handed down to the Crown. See Hogg, supra note 161, at 234.
\item[165.] See \textsc{McNairn, supra} note 77, at 87-89 (relying on Cain v. Doyle, 72 C.L.R. 409 (1946)); See also \textsc{Foreign & Commonwealth Office, supra} note 162, at 55.
\item[166.] Canadian Broadcasting Corp. v. Attorney General, [1959] S.C.R. 188.
\item[167.] Hogg, supra note 161, at 234. In some cases it may be inferred that a statute binds the Crown through necessary implication. Very few statutes, however, bind the Crown in this manner because of the narrow definition of necessary implication in \textit{Bombay}, as well as the presence of penal sanctions in a statute that make it nearly certain that the Crown is not to be bound. Id.
\item[168.] Id. at 235.
\item[169.] Home Office, [1993] 3 All ER at 540
\end{itemize}

\textit{J}udges cannot enforce the law against the Crown as monarch because the Crown as monarch can do no wrong, but judges enforce the law against the Crown as executive and against the individuals who from time to time represent the Crown . . . . If the minister has personally broken the law, the litigant can sue the minister . . . . in his personal capacity. 

\textit{Id.}
ministers can personally be separated from the Crown and stand trial for their unlawful acts which exceeds the scope of their office, the Queen can not separate herself from the Crown because she is the personification of the Crown. Thus, it appears, using the above rationale the Queen may be subject to monetary criminal sanctions but she can never be imprisoned.\textsuperscript{170}

In the United States, statutes using the word "persons" are construed to exclude the government.\textsuperscript{171} Nevertheless, there is no definitive and fast rule on the subject, and the conventional interpretation of the word "person" may be disregarded if the scope and intent of the statute is meant to attach to the government.\textsuperscript{172} As such, the above rule appears to be no different than the rule of law in the United Kingdom, but there is one important difference in its application. No person in an individual capacity is free from the requirements of the law. If the President of the United States committed a crime, he would have to be impeached before the government could conduct a criminal proceeding.\textsuperscript{173} The structure of the British system would make the separation of monarch from Crown constitutionally impossible to separate. Thus, the reigning could theoretically break a law without incurring any serious legal consequence.\textsuperscript{174}

\textbf{XI. CONCLUSION}

As discussed above, the Queen,\textsuperscript{175} unlike the President of the United States, is personally immune from liability for all torts she commits. Furthermore, section 40(2)(f) of the Crown Proceedings Act of 1947 establishes "Crown Immunity," which appears to establish a

\textsuperscript{170} See HOGG, \textit{supra} note 161, at 233 ("But where a fine is an alternative penalty, or the only penalty, then the provision could apply to the Crown, just as it could apply to a corporation (which also can not be imprisoned").


\textsuperscript{172} United States v. Cooper Corp., 312 U.S. 600 (1941).

\textsuperscript{173} See President's Attachment, \textit{supra} note 57, at Section 10 (arguing that Vice President Spiro Agnew did not have to be impeached before being indicted, former Solicitor General and Appeals Court Judge Robert Bork cited the records of the Constitutional Convention which led to the formation of Article I, Section 3, Clause 7 of the United States Constitution which maintains that only the President must be impeached before the courts hand down an indictment). President Clinton perhaps used Bork's theory to show that if the President must be impeached before he is indicted, then there is no possibility that the President has to stand trial in a mere civil suit.

\textsuperscript{174} The Crown, if it broke the law, would be subject to the pressure of adverse public opinion, which could be more damaging than penal sanctions.

\textsuperscript{175} The rights the Queen enjoys are exclusive to her alone. Nevertheless, it could be argued that governor-generals and lieutenant-governors, who fulfill the functions of the Sovereign in Commonwealth nations, are beyond the reach of the courts for the duration of their term. See Gray, \textit{supra} note 106, at 308.
rebuttable presumption that the Queen (and members of the Crown) have personal immunity from the requirements of statute unless that statute specifically states otherwise, or if the intent of the statute would be frustrated if the Crown did not have to abide by it. At the same time, it appears that the Queen, and the Crown, enjoy immunity from most criminal proceedings, but unlike the Prime Minister and other members of the Crown, the Queen can never be imprisoned. The American President does not enjoy these three privileges.

Though the Queen's divine right to rule has been irreversibly weakened, it appears that she personally obeys the law, and perhaps exceeds the requirements of the law as a matter of grace, and not through the legal coercion the President is subjected too. Furthermore, unlike the President, who cannot serve more than two four-year terms, the British monarch rules for life. It is hard to reconcile the British position that the "king is under no man, but under God and the law" when the monarch enjoys such unique personal privileges. The same cannot be said about the President, who must, at times, submit to the jurisdiction of the courts for wrongful actions he commits outside the scope of his office. The difference in the immunity given to the President and the Queen is remarkable since the President holds the world's most powerful office. Thus, it can easily be reconciled why the President deserves the immunity that he is given, whereas the immunity afforded to the Queen appears only the result of tradition which conflicts with the tenets of a modern democratic society.

176. TURPIN, supra note 77, at 142. The Act states that it will not "affect any rules of evidence or any presumption relating to the extent to which the Crown is bound by any Act of Parliament." Id.
THE CRIMINALIZATION OF HATE PROPAGANDA: A CLASH OF IDEALS BETWEEN CANADA AND THE UNITED STATES

Eric Wolfman*

I. INTRODUCTION .............................................................. 543
II. THE COMPPELLING INTEREST IN CRIMINALIZING HATE SPEECH ............................................................ 544
III. THE HISTORY OF GROUP LIBEL AND DEFAMATION LAW .......................................................... 546
IV. THE INTERNATIONAL PROSPECTIVE ON HATE PROPAGANDA ............................................................ 549
   A. The United Nations .................................................. 549
   B. Criminalization of Hate Propaganda in Canada .......................................................... 553
V. HATE PROPAGANDA AND THE FIRST AMENDMENT IN THE UNITED STATES ..................................... 564
VI. CONCLUSION .................................................................. 575

I. INTRODUCTION

This paper will attempt to make the case that the criminalization of racist speech in the form of hate propaganda could survive a First Amendment challenge. Section I examines the elemental harms caused by hate propaganda and the compelling reasons why such speech should be criminalized.

Section II gives a brief overview of the history of group libel and defamation law. An examination of the history of group libel shows that the concept of punishing speech that defames and disrupts society has been well established since the formation of organized society.

Section III looks briefly at the response of the international community to the problems associated with hate propaganda. Part A examines the actions taken by the United Nations and the European

* J.D. Candidate Nova Southeastern University, May, 1996; Hons. B.A. University of Western Ontario. The Author would like to thank Nova Southeastern University Professors Pearl Goldman, Johnny C. Burris, John B. Anderson, Douglas L. Donoho, and Robert M. Jarvis, for their guidance and insight into all aspects of the law.
Community in their efforts to eliminate hate propaganda. Part B examines, in depth, the Canadian response to hate propaganda. Canada's free speech jurisprudence, along with its Charter of Rights and Freedoms, is similar to that of the United States. Canada's multicultural society is also comparable to the cultural make-up of American society. As a model for the criminalization of hate propaganda, the United States could look to the Canadian experience for guidance.

Part IV briefly examines the fundamental values of free speech associated with the First Amendment. It then goes on to examine First Amendment jurisprudence as pronounced by the decisions of the United States Supreme Court. By examining the holdings and dicta in the various cases dealing with First Amendment issues, an argument can be made for the constitutional criminalization of hate propaganda.

II. THE COMPELLING INTEREST IN CRIMINALIZING HATE SPEECH

Racially defamatory speech or hate propaganda, the precursor to racial hatred and discrimination, should not be classified as constitutionally protected speech. The value of such speech is so slight, it does not merit the respect of the First Amendment. It is in fact "rotten fruit in the marketplace of ideas."¹

Racist expression harms the very marketplace of ideas that the First Amendment is designed to foster.² Racist hate messages are rapidly increasing and are widely distributed in the United States through a variety of technologies and media.³ Race is a constant subtext of daily life in America. The negative effects of hate messages are real and immediate for its victims. "Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear, rapid pulse rate, difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."⁴ The blows of racist

---

³ See BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993. Congress considered the problem of hate crimes serious enough to pass the Hate Crime Statistics Act, 28 U.S.C. § 534 (1990), which required the Attorney General to collect and publish data about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity. Id.
messages have been labeled "spirit murder" in recognition of the psychic destruction victims experience.\(^5\) In recommending the need for criminal and administrative sanctions for willfully promoting hatred against an identifiable group, one must consider the tension between the First Amendment and the Fourteenth Amendment. In an argument as to the hierarchy of rights, ultimately, history has taught us that without equality, freedom of speech is an illusion.

The threat of hate groups like the Ku Klux Klan, the Neo-Nazi Skinheads, and the growing "White Aryan Resistance," goes beyond their repeated acts of illegal violence. Their presence, and the active dissemination of racist propaganda, means that citizens are denied personal security and liberty as they go about their daily lives. "Violence is a necessary and inevitable part of the structure of racism. It is the final solution, as fascists know, barely held at bay while the tactical weapons of segregation, disparagement, and hate propaganda do their work."\(^6\) The growth of the "Aryan Movement" and the "White Militias," coupled with their recruitment of the youth of America, are real threats to the very fabric of American society.

"The historical connection of all the tools of racism is a record against which to consider a legal response to racist speech."\(^7\) It is well known that notions of racial superiority are commonly associated with practical schemes for denying certain political or economic rights to members of the group under attack.\(^8\) "In the political [and] economic struggle, modern democracy operates through the interplay of group activities. [I]t is through participation in groups that persons contribute to the social welfare and develop their individual capacities."\(^9\)

Hate propaganda used to disparage identifiable groups are attacks on the pluralistic forces which make up a democratic society and, by inference, on the individual members of the group who associate or identify with their group affiliations.\(^10\) An attack on one group within a society is an attack on the whole society. What is needed in this situation is a series of public and institutional practices which can inculcate respect

6. Matsuta, supra note 4, at 2335.
7. Id.
9. David Riesman, Democracy and Defamation: Control of Group Libel, 42 COLUM. L. REV. 727, 731 (1942); see also Post, supra note 2 (discussing the effects of defamation).
10. Riesman, supra note 9, at 731.
for the principle of equality and demonstrate that equality has a community status superior to that of a pious slogan. The educational impact of the criminal law can be of great value. In order to advance the argument for proscribing the dissemination of hate propaganda, the legislature would have to prove, among other things, the particular and distinct harms caused by racist expression.

Richard Delgado, recognized the real harms caused by hate propaganda, and suggested a tort remedy for injury from racist words. Those who have suffered the emotional distress associated with the effects of hate propaganda should have a remedy at law. However, this remedy ignores the intrinsic harm caused to society as a whole by the dissemination of hate propaganda.

One contemporary theory for regulating racist speech is that there is an elemental wrongness associated with racist expression, regardless of the presence or absence of particular empirical consequences such as grievous, severe psychological injury. The toleration of fascist expression is inconsistent with respect to the principle of equality that is at the heart of the Fourteenth Amendment. If the Fourteenth Amendment is thought to enshrine an anti-discrimination principle, then any speech which supports racial prejudice or discrimination should be subject to regulation. Ultimately, hate propaganda, as a class of speech, communicates the message of racial inferiority.

The key to criminalizing hate propaganda is to show that this type of speech does not deserve the protection of the First Amendment.

Those who profess the view that free speech is an “absolute,” never offer convincing reasons why keeping one’s mouth shut, under pain of punishment, should always be considered a greater evil than any mischief which may result from publishing the words of hate. The danger and mischief which the dissemination of hate propaganda and racial superiority lead to are such that, as a class of speech, they deserve no more protection than that offered to obscenity.

III. THE HISTORY OF GROUP LIBEL AND DEFAMATION LAW

Since Roman times the state has had an interest in controlling the propagation of hate or libelous speech against individuals or groups.


12. Post, supra note 2, at 272.
Whoever insulted the magistrate of the Roman republic made themselves guilty of "laesio majestatis pipuli Romani." Later, the Emperor was protected under the law of "libelli famosi" against "viros illustres," and such libel was punished with deportation or by capital punishment. "During the Middle Ages, defamation was largely a matter for the ecclesiastical courts." The provision for peaceful means of redress for attacks on reputation seems to have originated with organized society. Early Germanic laws such as the "Lex Salica" and the "Norman Costumal" sought to prevent blood feuds which by their persistent violence tore societies apart.

Attempts to prevent the propagation of scurrilous statements about particular groups in the Anglo-American legal tradition are extremely old. The Star Chamber took over prosecutions of scurrilous statements in 1488, shortly after the development of the printing press and the corresponding capacity for wide publication to the masses. The Star Chamber's focus was on protecting the Christian Monarch as well as the protection of private rights. Further, the Star Chamber wanted to suppress dueling, and in order to accomplish this end, "it would punish defamatory libels on private citizens who had suffered insult."

"With the religious decline, as a result of the Renaissance and Reformation, temporal attitudes toward defamation replaced ecclesiastical ones." Except for political offenses, the civil courts usurped the field of defamation. In 1641, the Star Chamber was abolished and the Court of King's Bench took over the criminal jurisdiction of the realm. In libel actions, "the role of the jury was limited to . . . deciding whether the defendant had published the statement in question, while its defamatory character was a 'question of law' for the royally appointed judge."

The earliest instance where defamation or libel was made criminal occurred in 1275, when the offense of "De Scandalis Magnatum" was created. De Scandalis Magnatum prohibited "any false News or Tales,

13. Riesman, supra note 9, at 728.
14. Id. at 728 n.7.
15. Id. at 734.
18. Id.
20. Riesman, supra note 9, at 734.
22. Riesman, supra note 9, at 735.
whereby discord, or occasion of discord or slander may grow between the
King and his People, or the Great Men of the Realm."²³ The aim of the
statute was to prevent false statements which could threaten the security of
the state in a society dominated by extremely powerful landowners.²⁴ De
Scandalis Magnatum was part of a system of remedies for defamation
available to all subjects.²⁵ Queen Elizabeth I punished defamation with the
loss of an ear for spoken words and the loss of a hand for written words.²⁶
De Scandalis Magnatum, however, was rarely employed, and was
abolished in England in 1888.²⁷

The first known attempt to prosecute group libel was made in
London in 1700, in the case of King v. Alme & Nott.²⁸ The defendants
were indicted for a libel entitled, "List of Adventures in the Ladies
Invention, being a Lottery."²⁹ The persons against whom the libel was
directed could not be determined. The King's Bench ruled that the
original indictment had been insufficient since the persons libeled were
unknown.³⁰

The leading case of King v. Osborne, decided in 1732, has
traditionally been regarded as establishing the doctrine that group libel is
an indictable
offense.³¹ In Osborne, a paper was published charging that
Portuguese Jews had burned to death a Jewish woman and her bastard
child whose father was a Christian, and that such instances were frequent.³²
As a result, when mobs attacked and beat Jews in various parts of the city,
the peace was actually breached. The court ruled:

Though an information for criminal libel might be
improper, such defamatory accusations necessarily tend to
raise tumults and disorders among the people, and inflame
them with an universal spirit of barbarity against a whole
body of men, as if guilty of crimes scarce practicable and

²³. 3 Edw. 1, ch. 34 (1275); see Sir William Holdsworth, A HISTORY OF ENGLISH LAW,
Vol. III (5th ed. 1942); Zundel, 95 D.L.R.4th, at 217 (outlining a history of English libel law).
²⁵. Vechten Veeder, supra note 16.
²⁷. Id. at 39.
³⁰. Id.
³¹. Id. at 268; King v. Osborne, 94 Eng. Rep. 406 (1732).
totally incredible, and deserves to be punished as misdemeanors."

"The use of hate propaganda against racial and religious groups not only hurts the groups as collectivities [sic], and the individual members of such groups, but adversely affects the stability and welfare of the community itself." The act of defaming a specific and identifiable group has been given various labels over time: "group libel," "group defamation," "racial defamation," "racist speech," and "hate propaganda." The term hate propaganda is most appropriate. The Supreme Court of Canada has defined the term "hate propaganda" to denote "expression intended or likely to create or circulate extreme feelings of opprobrium and enmity against a racial or religious group."

Group defamation in the form of hate propaganda is not the basic cause of prejudice and intergroup tensions. Whether the hate-monger will have any success in influencing other individuals depends to a large degree on the potential responsiveness of the audience. History has taught that the more often the message is repeated, the more likely it is to gain acceptance and be acted upon. The case for or against racists' freedom of speech depends on the utility of interference versus the utility of noninterference. This in turn depends, at least in part, on the nature of the society in which one lives and the particular situation with which one is confronted. The international community, in recognizing this concept, historically and presently has endeavored, through the United Nations, to overcome the problem with a number of conventions and resolutions.

IV. THE INTERNATIONAL PROSPECTIVE ON HATE PROPAGANDA

A. The United Nations

International legal norms within the international community concerning hate speech began to crystallize shortly after the Second World War. The memory of Nazi Germany's use of hate propaganda and the Holocaust spurred the international community to eliminate racial discrimination. Most nations have adopted legislation proscribing racial
defamation and incitement of racial hatred.\textsuperscript{38} If the harm of racist hate messages is significant, and the truth value marginal, the doctrinal space for regulation of such speech is \textit{a fortiori}. An emerging international standard seizes this possibility. The international community has chosen to address the issue by outlawing racist hate propaganda.\textsuperscript{39}

The Charter of the United Nations, in its first article, lists among the aims of the organization, "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, religion or language."\textsuperscript{40} In 1948, the General Assembly adopted the Universal Declaration of Human Rights drafted by the Commission on Human Rights without dissent.\textsuperscript{41} The Declaration is wide ranging in scope. After listing a comprehensive catalogue of personal freedoms, the Declaration makes the specification that all are entitled to those freedoms without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.\textsuperscript{42}

The United Nations, following its founding principles, passed the International Convention of the Elimination of All Forms of Racial Discrimination which was signed by the United States on September 28, 1966.\textsuperscript{43} However, it has yet to be ratified by the United States. One hundred countries have ratified the Racial Discrimination Convention.\textsuperscript{44} Article 4 of the Racial Discrimination Convention provides:

\begin{quote}
State parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of such discrimination and to this
\end{quote}

\textsuperscript{38} See generally Jones, supra note 1; Matsuta, supra note 4; Smolla, supra note 37 (providing an in-depth history of the United Nations' response to hate propaganda).

\textsuperscript{39} Smolla, supra note 37, at 191.

\textsuperscript{40} U.N. CHARTER \textit{art. 1, para. 3.}


\textsuperscript{42} Id.


\textsuperscript{44} See Jones, supra note 1.
end, with due regard to rights expressly set forth in Article 5 of this Convention, inter alia:

(a) Shall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organization or activities as an offense punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Under this treaty, states are required to criminalize racial hate messages. Recognizing the conflict in the values between the concepts of free speech and prohibiting dissemination of ideas of racial superiority or hatred, the treaty recognizes the rights of freedom of speech, association, and conscience.

The Preamble to the Racial Discrimination Convention states explicitly that “any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination.” The community of nations has thus made a commitment, with the support of the United States, to the elimination of racism. The United Nations has recognized that racist hate propaganda is illegitimate and properly subject to control under the international law of human rights. The procedures for signature and ratification allow reluctant states to reject antipropaganda laws that would interfere with the right of free speech by specific reservation of the article.

The response of the international community to the threat posed by hate propaganda is evidenced by the passage of specific criminal

45. Racial Discrimination Convention, supra note 43.
46. Id. at art. 4, 5; see also Jones, supra note 1; Matsuta, supra note 4 (outlining the history of the “hate propaganda” treaty).
47. Racial Discrimination Convention, supra note 43.
legislation. The United Kingdom under the Race Relations Act, has criminalized incitement to discrimination and incitement to racial hatred.\textsuperscript{48} The Race Relations Act specifically prohibits racial defamation. The requisite \textit{mens rea} to complete the offense is the intention to "stir up hatred" by the publishing of an utterance, or the utterance of words that are racially defamatory.\textsuperscript{49} The \textit{actus reus} consists of oral or written words that are likely to stir up hatred against a particular segment of the community on the basis of colour, race, ethnic or national origins.\textsuperscript{50}

Sweden also prohibits the defamation of a race:

If a person publicly or otherwise in a statement or other communication which is spread among the public threatens or expresses contempt for a group of a certain race, skin colour, national creed, he shall be sentenced for agitation against ethnic group to imprisonment for at most two years, or if the crime is petty, to a fine.\textsuperscript{51}

Other European nations have committed to antipropaganda measures. Germany and Denmark have prohibited the dissemination of hate propaganda. Under the European Convention for the Protection of Human Rights and Fundamental Freedoms, "all European Community states are required to eliminate hate propaganda."\textsuperscript{52}

\begin{flushright}
48. Race Relations Act of 1965, ch. 73, 6(1) (amended 1976 & 1986). Section 6(1) of the Act provides:
A person shall be guilty of an offense under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race or ethnic or national origin if:
(a) he publishes or distributes written matter which is threatening, abusive or insulting;
or,
(b) he uses in any public place or at any public meeting words which are threatening, abusive, or insulting, being matter or words likely to stir up hatred against that section on grounds of colour, race or ethnic or national origins.
\textit{Id.}

49. \textit{Id.}

50. \textit{Id.}


\end{flushright}
B. Criminalization of Hate Propaganda in Canada

In order to prove the assertion that the application of criminal sanctions against the propagation of hate propaganda would not impair free speech rights to the point of undermining a fundamental concept of ordered liberty, it is necessary to examine a jurisprudence comparable to the United States. Canada's free speech jurisprudence allows for criminal sanction for the dissemination of hate propaganda. By comparing the rationale used in Canada, a jurisdiction with similar free speech jurisprudence to that of the United States, it may be possible to extrapolate a rule of law that would allow for the criminalization of hate speech in the United States.

In 1982, Canada passed the Constitution Act, entrenching the Charter of Rights and Freedoms into the Constitution of Canada. The relevant sections of the Charter that effect this discussion are:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:
   (a) freedom of conscience and religion
   (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;
   (c) freedom of peaceful assembly; and
   (d) freedom of association.

15. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

27. This charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

The concept of freedom of speech has long been established in Canadian jurisprudence. "The freedom to express oneself openly and fully is of crucial importance in a free and democratic society and has been recognized by Canadian courts prior to the enactment of the Canadian Charter of Rights and Freedoms."\textsuperscript{55} Freedom of expression has been noted by the Canadian Supreme Court as an essential value of Canadian parliamentary democracy "well before the advent of the Canadian Bill of Rights," which was passed by Parliament in 1960.\textsuperscript{56} Freedom of speech has been protected by the Canadian judiciary to the extent possible before the specific freedom was entrenched in the Charter.\textsuperscript{57}

Canada has a history of attempts to prosecute libel as a crime. However, the Criminal Code provisions "did not focus specifically upon expression propagated with the intent of causing hatred against racial, ethnic or religious groups."\textsuperscript{58} Canadian "common law has long seen defamation as a tortious action, but only where a litigant could show that his reputation has been damaged by offending statements directed toward himself as an individual."\textsuperscript{59}

In 1966, in response to the increase of racist sentiment in Canada, and mindful of its commitments to the United Nations, the Canadian government appointed a special committee to study problems associated with the spread of hate propaganda in Canada. The opening paragraph of the report reflects the tone of the special committee.

This report is a study in the power of words to maim, and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of

\begin{itemize}
\item \textsuperscript{54} Canadian Charter of Rights and Freedoms, (U.K.) 1982 c.11 (effective Apr. 17, 1982).
\item \textsuperscript{55} Regina v. Keegstra, 61 C.C.C.3d 1, 21 (Can. 1992).
\item \textsuperscript{56} Id.; see also Canadian Human Rights Comm’n v. Taylor, 75 D.L.R.4th 577 (Can. 1992); Regina v. Zundal, 95 D.L.R.4th 202 (Can. 1992) (giving a history of free speech issues in Canada).
\item \textsuperscript{57} Keegstra, 61 C.C.C.3d at 22.
\item \textsuperscript{58} Id. at 19.
\item \textsuperscript{59} Id.
\end{itemize}
injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate.60

In light of the special committee report, the Canadian government realized a need to prevent the dissemination of hate propaganda without unduly infringing freedom of expression. With this concept in mind, the Canadian government passed amendments to the Canadian Criminal Code which covered the advocation of genocide, public incitement of hatred likely to lead to a breach of peace, and the willful promotion of hatred.61 Section 319(2) of the Criminal Code of Canada provides that “everyone who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of an offense.”62 Subsection (3) allows for a number of defenses, in particular 3(a), which provides that “the accused shall not be convicted if he establishes that the statements communicated were true.”63

In Regina v. Keegstra, the Canadian Supreme Court announced their base line rationale for constitutional decision making associated with challenges to the regulation of hate propaganda.64 Keegstra, a secondary school teacher was charged with the offense of willfully promoting hatred against an identifiable group contrary to section 319(2) of the Canadian Criminal Code. The charges arose out of his anti-Semitic teachings in the classroom in Eckville, Alberta. The evidence established that he had systematically denigrated Jews and Judaism in his classes. He described Jews by such epithets as “subversive, sadistic, money loving, power hungry, and child killers as well as teaching that Jewish people seek to destroy Christianity, and are responsible for depressions, anarchy, chaos, wars, and revolution.”65 He advised his students they must accept his views as true unless they were able to contradict them, and expected his

60. Id. at 20.
62. Canadian Criminal Code, R.S.C. 1985 § 319(2)[hereinafter Hate Propaganda Statute].
63. Id. The reverse onus provision providing for the accused to prove the truth of the statement as an affirmative defense was also upheld by the Supreme Court. Keegstra, 61 C.C.C.3d at 72. Paragraph 3(b) and (d) refer to good faith expression of arguments on a religious subject, statements relevant to any subject of public interest for the public benefit and where the accused in good faith intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred. This language in the statute takes care of concerns about “slippery slope,” “overbreadth” and “underbreadth” arguments.
64. Keegstra, 61 C.C.C.3d 1.
65. Id. at 12.
students to recite these notions in essays and examinations if they were to receive good grades.\textsuperscript{66}

The values of free speech to Canadian society announced in \textit{Keegstra} are similar to those values expressed in the United States and protected by the First Amendment. "Freedom of expression was entrenched in the Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, \ldots however unpopular, distasteful or contrary to the mainstream."\textsuperscript{67} "Such protection is \ldots fundamental because in a free, pluralistic and democratic society [Canadians] prize [the] diversity of ideas and opinions for their inherent value both to the community and to the individual."\textsuperscript{68}

In upholding the constitutionality of the hate propaganda regulation, the Court engaged in a two-part analysis similar to the analysis used by the United States Supreme Court when it decides First Amendment challenges to governmental regulations. The Court first examined the regulation to determine whether it infringed the Charter guarantee of freedom of expression. It then determined if the regulation could be saved by Section 1 of the Charter.

In answering the first question, the Court asked "does the coverage of Section 2(b) \textsuperscript{69} of the Charter extend to the public and willful promotion of hatred against an identifiable group?" The Court found that the reach of the free speech clause was wide, and that expression deserves protection if it serves individual and societal values in a free and democratic society.\textsuperscript{70}

In this "application analysis," the Court asked whether the Charter guarantee of freedom of expression applied to the Hate Propaganda Statute. The Court examined whether the regulation was "content/viewpoint based" or "content neutral" in regard to its effect and on its face. In this sense, the inquiry is similar between the two jurisdictions. The Court stated "if the activity that is to be regulated conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee." The term "expression as used in \ldots the Charter embraces all content of expression, irrespective of the particular meaning or message sought to be conveyed."\textsuperscript{72} In other words, is the purpose of the statute in question a

\textsuperscript{66} Id.
\textsuperscript{67} Id. at 23.
\textsuperscript{68} Id.
\textsuperscript{69} \textit{Keegstra}, 61 C.C.C.3d at 21.
\textsuperscript{70} Id. at 22.
\textsuperscript{71} Id. at 24.
\textsuperscript{72} Id.
regulation of speech or does it regulate conduct? The United States Supreme Court uses a similar analysis in determining whether the purpose of a governmental regulation reaches expression or only conduct.\(^{73}\)

In determining that the purpose of the regulation was to restrict the content of the expression, the Court stated:

> The guarantee of freedom of expression will necessarily be infringed by government action having such a purpose. If, however, it is the effect of the action, rather than the purpose, that restricts an activity, \[section\] 2(b) [of the Charter] is not brought into play unless it can be demonstrated by the party alleging an infringement that the activity supports rather than undermines the principles and values upon which freedom of expression is based.\(^{74}\)

It appears that if the Court had found the purpose of the regulation was to restrict conduct solely, and that free expression was only incidentally affected, the free speech section of the Charter would not be applicable, and the challenge to the statute would have failed. This analysis is similar to American courts when it refers to over-inclusiveness and the chilling effects of regulations on the freedom of expression.\(^{75}\)

Based on the express language of the statute and its direct effect on expression, the Court found that Parliament's purpose behind the Hate Propaganda Statute was to prohibit those communications which are intended to promote hatred against identifiable groups. The purpose of the government was to regulate expression, and that purpose was based on the content of the communication. Therefore, the Court determined the hate speech statute did in fact infringe on the free speech section of the Charter.\(^{76}\)

In dicta, the Court examined the nature of hate propaganda, and rejected any notion that hate propaganda was analogous to a direct threat

---

73. *See generally* United States v. O'Brien, 391 U.S. 367 (1968) (upholding draft card burning regulation as a restraint on conduct); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (banning school children from wearing arm bands struck down as regulation of expression); Texas v. Johnson, 491 U.S. 397 (1989) (striking down state flag burning statute as a restraint on expression); United States v. Eichman, 496 U.S. 310 (1990) (striking down federal flag burning statute as a restraint on expression). In each case the Supreme Court's threshold question was whether the regulation was directed at conduct or the expressive intent in the conduct.


of violence.” In Canada, as in the United States, violence as a form of expression receives no protection. The Court declined to exclude the protection of the guarantee of freedom of expression to hate propaganda via this line of reasoning.78

The Court declared all activities conveying or attempting to convey meaning are considered expression for the purpose of the Charter.79 “The content of expression is irrelevant in determining the scope of the Charter provision.”80 The Hate Propaganda Statute prohibits the communication of meaning which is repugnant, but the repugnance stems from the content of the message as opposed to its form. In the view of the Court, hate propaganda is categorized as expression, bringing it within the coverage of the free expression clause of the Charter.

Since the Court determined that the Hate Propaganda Statute did come within the ambit of the free expression clause, the second part of the analysis was to determine whether the statute could be saved by Section 1 of the Charter. Section 1 of the Charter states: “the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”81 This section of the Charter allows for a limit on a right or freedom if the government can establish that the impugned state action has an objective of “pressing” and “substantial” concern in a free and democratic society. “Only such an objective is of sufficient stature to warrant overriding a constitutionally protected right or freedom.”82 In order to justify a limit on a right or freedom in a free and democratic society, the government must establish that the impugned state action has an objective of pressing and substantial concern, and that the regulation is within “proportion” between the demonstrated objective and the impugned measure.83 In effect, Section 1 of the Charter entrenches a level of scrutiny that falls between the strict scrutiny standard and the intermediate scrutiny standard used in United States’ courts.

United States’ courts have developed differing “levels of scrutiny” in deciding governmental actions and constitutional questions. “The general rule is legislation is presumed to be valid and will be sustained if

77. Id. at 26.
78. Id.
79. Id.
80. Id.
82. Keegstra, 61 C.C.C.3d at 28.
83. Id.
the classification drawn by the statute is rationally related to a legitimate state interest." 84 This level of scrutiny has been labeled "rational basis scrutiny" or "weak scrutiny." However, when legislation is based on discrimination or when state laws impinge on personal rights protected by the Constitution, "[such] laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." 85 To satisfy strict scrutiny, the state must show that the statute furthers "a compelling state interest by the least restrictive means available." 86

United States' courts use intermediate scrutiny in analyzing the constitutionality in such instances as gender based discrimination or commercial speech restrictions. 87 In Craig v. Boren, the Court introduced intermediate scrutiny when it stated "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 88 Therefore, depending on the effect of the state action under question, the United States' courts will use a different type of scrutiny in examining the constitutional validity of the state action.

Values and principles essential to a free and democratic society guided the Canadian Supreme Court in determining whether the government had a pressing and substantial interest in restricting hate propaganda. Those principles embody "... respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society." 89

The principles the Court relied on in determining a pressing and substantial governmental interest in terms of freedom of expression, widened the scope in which the Canadian government may infringe upon fundamental freedoms as opposed to the United States' model. Courts in

---

84. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985). Justice White analyzed the three levels of scrutiny courts use in determining constitutional questions. Id. The dissent of Justice Marshall in which he outlines the use and need for intermediate scrutiny is most enlightening. Id. at 455 (Marshall J., dissenting).
85. Id. at 440.
88. Boren, 429 U.S. at 197.
89. Keegstra, 61 C.C.C.3d at 29.
the United States restrict content-based infringements upon freedom of expression to situations where the government has a compelling interest. The Canadian Court concluded Parliament’s purpose in enacting the legislation was to prevent the harm caused by hate-promoting expression. The Court came to this conclusion based on its examination of the information before Parliament.

In comparison to American jurisprudence, the Court required the Crown, as prosecutor, to prove it in fact, Section 1 of the Charter applied to the regulation in question. However, the Court also examined Parliament’s motives for passing the legislation. Therefore, the Court must find that it was reasonable to believe, in light of the information before Parliament, that the regulation was necessary to achieve the government’s substantial and pressing interest. Again, the Canadian Court applied a hybrid analysis used by American courts. The Court used a heightened level of factual analysis, which requires the Crown to “prove it in fact” that the government has a pressing and substantial interest in overriding the fundamental freedom. In addition, it examined whether it was reasonable to believe that Parliament had a substantial and pressing concern based on the information before the legislature.

In determining Parliament’s pressing and substantial concern in enacting the Hate Propaganda Statute, the Court also addressed other Charter provisions and international agreements to which Canada is a party. The Court gave special attention to Canada’s obligations under the many International Conventions dealing with the regulation of hate propaganda, especially those embodied in the United Nations Convention on the Elimination of All Forms of Racial Discrimination. In light of those commitments the Court stated “the prohibition of hate-promoting expression is considered to be not only compatible with a signatory nation’s guarantee of human rights, but is as well an obligatory aspect of this guarantee.”

In Keegstra, the Court examined other sections of the Charter, specifically Sections 15 and 27. These sections represent a strong

90. See generally Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (outlining three levels of factual analysis that United States’ courts use in analyzing the necessary levels of proof the government must meet in determining the elements of each constitutional “scrutiny” test).

91. Keegstra, 61 C.C.C.3d at 39, 43.

92. Id. at 39; See also International Convention on Civil and Political Rights, 1966, 999 U.N.T.S. 171.

93. Keegstra, 61 C.C.C.3d at 42.

94. Id. at 43; Canadian Charter of Rights and Freedoms, supra note 53.
commitment to the values of equality and multiculturalism, and underline the great importance of Parliament's objective in prohibiting hate propaganda. Section 15 of the Charter can be equated with the Fourteenth Amendment of the United States Constitution. "The purpose of Section 15 is to ensure equality in the formulation and application of the law."95

The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving concern, respect, and consideration. The Court reasoned that government sponsored hatred on group grounds would violate Section 15 of the Charter. "Parliament promotes equality and moves against inequality when it prohibits the willful public promotion of group hatred on these grounds. It follows government action against group hate, because it promotes social equality as guaranteed by the Charter, deserves special constitutional consideration under Section 15."96 After finding the measure in question was of a pressing and substantial concern, the second part of the test involved assessing the "proportionality" between the governmental objective and the impugned measure. It is interesting to note the United States Supreme Court used a proportional standard in In re R.M.J., finding the state may regulate commercial speech if it shows it has "a substantial interest and the interference with speech [is] in proportion to the interest served."97

In determining the proportionality of the measure the Canadian Supreme Court applied a three-part test first established in Regina v. Oakes.98 First, the government must prove the measure, adopted is "carefully designed to achieve the objective in question; [the measure] must not be arbitrary, unfair, or based on irrational considerations."99 In other words, the measure cannot raise to the level of a pretext. Second, even if there is a pressing and substantial governmental interest, "the means . . . should impair 'as little as possible' the right or freedom in question . . . ."100 This test can be equated to the concept of overbreadth and vagueness as employed by American courts. Third, "there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'"101 The inquiry into the

95. Keegstra, 61 C.C.C.3d at 43.
96. Id. at 44.
100. Id.
101. Id.
proportionality of the measure can be compared with the "most narrowly tailored" standard in the United States under a strict scrutiny standard. In *Keegstra*, the Court found the means used by Parliament to further the objective of prohibiting hate propaganda were proportional to its ends.

Although guaranteed, the freedoms known throughout Canadian society are limited by Section 1 of the Charter. The underlying values of Canada's free and democratic society guarantee both the rights in the Charter and, in appropriate circumstances, justify limitations upon those rights. Therefore, the Court recognized in the case of hate propaganda, even though it infringed upon the guarantee of freedom of expression, the government had a substantial and pressing interest in criminalizing this type of expression. The Court held the statute was not irrational and was connected to the stated substantial governmental interest. The Court also found the Hate Propaganda Statute was "narrowly tailored" or in "proportion" to the substantial governmental interest.

In order for Section 1 of the Charter to "save" a particular regulation, the Crown must prove its case in fact. Canadian courts will also examine the basis for the legislature's motive in passing regulations which infringe on Charter rights. Therefore, in sustaining a regulation which infringes on a Charter right or freedom, the objective of the limitation must be of sufficient importance to warrant overriding a constitutionally protected right or freedom.

To prevent trivial justification, such objectives must relate to concerns which are pressing and substantial in a free and democratic society. The imposition must meet the qualifications of rational connection, minimum impairment, and a proportionality of purpose and effects. The measures must be carefully designed to achieve the objective in question and must not be arbitrary, unfair, or based on irrational considerations. The means should impair as little as possible on the right in question, and there must be a proportionality between the effects of the limiting measure and the objective. The more severe the damaging effects of the measure, the more important the objective must be.102

In addressing the overbreadth and vagueness concerns of the proportionality test, the Court, in a detailed analysis, concluded that the trier of fact, with proper instruction from the judge, could make the necessary inferences to meet these concerns.103 The Court also found the terms of the offense possessed definitional limits which acted as safeguards

102. *See generally* Regina v. Ladouceur, O.A.C. LEXIS 179 at *1 (Ont. 1987) *available in* LEXIS, Canada library, Ont file (using the same analysis in relation to arbitrary police detention and unconstitutional search and seizures, as decided by the Ontario Appellate Court).

to Parliament’s objective. “Hatred is not a word of casual connotation. To promote hatred is to instill detestation, enmity, ill-will, and malevolence in another.”

In Regina v. Andrews, a companion case heard at the same time as Keegstra, the Court upheld the Hate Propaganda Statute as it impacted on the distribution of literature. The accused, a member of a white supremacist organization known as “the Nationalist Party of Canada,” was convicted of distributing anti-Semitic literature. The Court did not give any special significance to the so-called political status claimed by the accused.

In Canadian Human Rights Commission v. Taylor, the Court upheld a contempt order against an accused for instituting a telephone message service where members of the public could dial a telephone number and listen to a prerecorded message which “exposed persons identifiable on the basis of race and religion to hatred or contempt.” Under the Canadian Human Rights Act, it is a “discriminatory practice for a person to use the telephone to communicate repeatedly any matter likely to expose persons to hatred or contempt by reason of the fact that those persons are identifiable on the basis of a prohibited ground of discrimination.” Using the same reasoning as in Keegstra, the Taylor Court upheld the trial court's finding that the “Western Guard” failed to comply with the Human Rights Commission’s cease and desist order.

The Supreme Court, however, drew the line when it came to the prohibition of publishing false news in Regina v. Zundel. Zundel was charged with “willfully publishing a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest.” Zundel published and distributed a pamphlet which questioned

104. Regina v. Andrews, 77 D.L.R.4th 128, 137 (Can. 1990). This case was a companion appeal heard along with the Keegstra case. Id. at 130.
105. Id.
106. Id. at 132.
Pursuant to a search warrant, eighty-nine materials were seized from the home of the appellants. Included in these materials were copies of the Nationalist Reporter, letters written by subscribers, subscription lists and mimeographed sticker cards containing such messages as “Nigger go home,” “Hoax on the Holocaust,” “Israel stinks” and “Hitler was right Communism is Jewish.”

Id.

the occurrence of the Holocaust. The Court held that in this case the statute could not pass the proportionality test as announced in *Keegstra*.

The Court found the statute vague and overbroad in its scope and difficult to determine the meaning of "a statement" as worded in the Code. The Court also could not determine whether the statement was false, with sufficient accuracy to make falsity a fair criteria for denial of constitutional protection. The chilling effect of the statute on legitimate expression "outweighs its minimal benefit given the alternative means of prosecution of speech detrimental to racial tolerance [available to Parliament]."

It can be seen from the examination of the Canadian experience and those of the international community that it is possible and reasonable for a free and democratic society to criminalize hate propaganda. The fundamental concept of ordered liberty associated with the rights to self-expression are neither diminished nor chilled. In light of the multicultural nature of society, it has been recognized by the international community that the need to protect the fundamental rights of equality require a minimal infringement on the right of free speech.

V. HATE PROPAGANDA AND THE FIRST AMENDMENT IN THE UNITED STATES

It is interesting to note in each of the above cited Canadian cases that the Canadian Supreme Court examined American First Amendment jurisprudence in relation to hate speech. The Canadian Supreme Court, in comparing Canadian constitutional history to that of the United States, examined the relevant American case law and the academic literature and concluded that "... the precedents are somewhat mixed, but the relaxation of the prohibition against content-based regulation of expression in certain areas indicates that American courts are not loath to permit the suppression of ideas in some circumstances." The international reaction to hate speech may seem broad, but every western democracy draws a distinction in their laws between hate propaganda and other speech. The United States stands alone in the degree to which it has decided legally to tolerate racist rhetoric.

113. *Id.* at 257, 258, 272.
114. *Id.*
115. *Id.* at 275.
117. See Kent Greenwald, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L.J. 287, 303 (1990). There are group libel statutes in the criminal codes of five states. See CONN. GEN. STAT. § 53-57 (1960); ILL. ANN. STAT. ch. 38 para.27-1 (Smith-Hurd 1961);
In order to make the case for criminalizing the dissemination of hate propaganda in the United States it is necessary to touch upon the fundamental values associated with the First Amendment. Thomas Emerson has grouped the values sought by society in protecting the right to freedom of expression into four broad categories.\textsuperscript{118} The first value is one of "individual self-fulfillment."\textsuperscript{119} The right to freedom of expression is justified because it allows for individuals to attain and realize their true potential as human beings. Second, free expression is necessary as a means of attaining the truth.\textsuperscript{120} In theory, rational judgment is arrived at by considering all the facts and arguments which can be put forth in any proposition.\textsuperscript{121} Third, freedom of speech allows an individual to participate as members of society in social and political decision making.\textsuperscript{122} The right of all individuals to freely communicate with others is regarded as an essential principle of a democratically organized society.\textsuperscript{123} Finally, freedom of expression maintains the balance between stability and change in society.\textsuperscript{124} Open discussion is a method of achieving an adaptable and more stable community, and maintains the balance between differences of opinion and general consensus.\textsuperscript{125}

Hate propaganda has no place in relation to the fundamental values that Emerson expounds. Disseminators of hate propaganda do not attain, nor do they realize their true potential as human beings. In fact, those people who promote hate propaganda inhibit their victims from attaining their true potential as human beings. Hate propaganda has no bearing on the attainment of truth. It often dissuades individuals from participating as full members of society. It creates instability and discord in society. As far as promoting change in society, the true goal of hate propaganda is to roll back the gains minorities have made over the past forty years.

Prevailing First Amendment dogma maintains that speech may not be penalized merely because its content is racist. Conventional American free speech jurisprudence holds racist speech qualifies for the very highest

\begin{itemize}
  \item \textsuperscript{118} Thomas Emerson, Toward a General Theory of the First Amendment, 72 \textit{Yale L.J.} 877 (1963).
  \item \textsuperscript{119} \textit{Id.} at 879.
  \item \textsuperscript{120} \textit{Id.} at 880.
  \item \textsuperscript{121} \textit{Id.} at 882.
  \item \textsuperscript{122} \textit{Id.} at 883.
  \item \textsuperscript{123} Emerson, \textit{supra} note 118, at 884.
  \item \textsuperscript{124} \textit{Id.} at 886.
  \item \textsuperscript{125} \textit{Id.} at 887.
\end{itemize}
levels of First Amendment protection, perhaps even absolute protection, because it is thought of as "opinion" or "viewpoint." Even if racist speech communicates little in the way of intellectual argument, the prevailing dogma refuses to continence any distinction between the cognitive and the emotive elements of speech, and the communicative thought and feeling are equally protected.

Membership in groups which advocate racist positions may not be made illegal, and advocacy of ideas such as racial or religious genocide may not be outlawed. Only if such speech is on the very verge of ripening into immediate violence may the speech be penalized. If hate violence comes from the reactions of others to the hate-filled speech, American orthodoxy is that the hecklers must be arrested, not the speakers. However, considering the global response to hate propaganda, a reevaluation of hate propaganda in relation to the ideals of the First and the Fourteenth Amendments may lead to a conclusion contrary to the prevailing First Amendment dogma.

Racial equality and tolerance are not just good ideas but the law of the land, the declared public policy of the United States. Thomas Hobbs stated, "that the actions of men proceed from their opinions", and racist opinions lead to an atmosphere of race-hate, an insensitivity that fosters acts of palpable violence and discrimination. " Even John Stuart Mill permits the state to intrude on individual liberty when its exercise will injure another."

In the context of First Amendment jurisprudence the Supreme Court has created a dichotomy of approaches to constitutional decision making. American courts must decide whether speech or conduct is involved. Does the speech communicate thought or emotion? Does the regulation affect the statement of facts or opinions? Is the regulation content-based or content-neutral? Is the government property a forum or a nonforum? Is the speech political or nonpolitical, commercial or noncommercial, for children or adults? In Gertz v. Robert Welch Inc., the Supreme Court stated "under the First Amendment there is no such thing as a false idea." But Justice Powell also stated in the next sentence "there is no constitutional value in false statements of fact, [n]either the

126. Smolla, supra note 37, at 172.
129. Smolla, supra note 37, at 174.
130. Id.
131. Id. at 175.
intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”

In striking down Louisiana’s criminal defamation statute, the Court stated in Garrison v. Louisiana the use of calculated falsehood would put a different cast on the constitutional question. Justice Brennan, as did Justice Powell in Gertz, cited Chaplinsky v. New Hampshire asserting:

[calculated falsehood falls into that class of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.]

Clearly, any regulation which criminalized hate propaganda would be one that was content based, and when challenged, as it surely would be, would be subject to strict scrutiny. The key to advancing the argument for applying criminal sanctions against those who promote hate propaganda is to place such propaganda in the unprotected speech category. In effect, if hate speech can be put into the same category as pure falsehood, or analogized as an obscenity then it could be constitutionally criminalized. Hate propaganda is a calculated falsehood of such slight social value that it does not deserve constitutional protection.

In Chaplinsky, the Supreme Court established the “fighting words doctrine.” Since then, the Court has followed a course of categorizing different levels of speech and providing different tests as to the level of protection afforded each category. A review of relevant case law as developed by the Supreme Court’s decisions on issues affecting the First Amendment will illustrate a possible rationale for constitutionally criminalizing hate propaganda.

In 1949, the Court in Terminiello v. City of Chicago overturned a disorderly conduct conviction which resulted when Terminiello’s oratory caused a riot. Terminiello was found guilty of disorderly conduct arising out of an address he delivered to over eight hundred persons in an auditorium. Over a thousand people had gathered outside the auditorium

133. Id. at 340.
136. Id.
to protest the meeting. Terminiello, in his speech, condemned the conduct of the crowd outside and vigorously criticized various political and racial groups whose activities he denounced as "inimical to the nation's welfare." The facts show that between the two groups a riot almost ensued. Justice Jackson in his vigorous dissent, and after a lengthy recitation of the facts found that the resulting violence was a riot.

The Court took exception to the charge of the jury, in which breach of the peace was defined as, "speech that stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." The Court declared the very function of free speech under the American system of government is to invite dispute. Because the ordinance, as construed by the trial court, permitted the conviction of Terminiello if his speech stirred people to anger or invited public dispute, the conviction could not stand. The Court reasoned the statute was applied more broadly than the "fighting word doctrine" first announced in Chaplinsky. Realizing the implications of the Court's holding, Justice Jackson, admonished the Court "to take heed lest we walk into a well from looking at the stars."

Two years later however, in Feiner v. New York the Court upheld New York State's disorderly conduct statute under similar circumstances as Terminiello. Feiner was arrested because the content of his speech was creating the possibility of a riot on a street corner in Syracuse, New York. Feiner, using a loud speaker, was making derogatory remarks concerning President Truman, the American Legion, and other local political officials. He was also, "endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights." The New York statute was very similar to that of the City of Chicago's statute.

138. Id. at 2.
139. Id.
140. Id. at 7 (Jackson, J., dissenting).
141. Id. at 4.
143. Id. at 6.
144. Id.
145. Id. at 14 (Jackson, J., dissenting).
147. Id. at 317.
148. Id.
149. Id. at 319 n.1 (providing the wording of the New York State statute under question).
The Court in upholding Feiner’s conviction did not cite to *Terminiello*. The Court declared “[a] state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.” However, “when the speaker passes the bounds of argument or persuasion and undertakes incitement to riot the police are not powerless to prevent a breach of the peace.” The Court’s finding in *Feiner* is almost in complete opposition to *Terminiello*. The Court determined the deliberate defiance by the petitioner to the police by not stopping his speech convinced the Court they could not reverse this “conviction in the name of free speech.” The only constant in the Supreme Court’s approach to First Amendment adjudication is its “pendulum” approach in determining the constitutionality of regulations that concern freedom of expression.

Group libel as a category of speech has seldom been tested by the Supreme Court. In *Beauharnais v. Illinois* the Court upheld an Illinois group libel statute. Illinois’ statute made it a crime to, “exhibit in any public place any publication which portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion to contempt, derision, or obloquy.” Beauharnais distributed a leaflet that called for, “a halt to further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro.”

The Court stated:

[t]here are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, libelous, and the insulting or fighting words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

150. Id. at 320.
152. Id.
155. ILL. REV. STAT. ch. 38 para. 471 (1949).
156. *Beauharnais*, 343 U.S. at 256.
157. Id. at 255-56.
The Court rejected the argument that prohibiting libel of a creed or of a racial group, "is but a step from prohibiting libel of a political party." The Court answered, "even though a power may be abused it is not a reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law." Justice Frankfurter equated such libelous utterances as being in the same class as obscene speech.

The dissents in Beauharnais are as significant as Justice Frankfurter's majority opinion. Justice Reed assumed the power of the state to pass group libel laws, but dissented on the ground that the statute in question was too vague. Justice Jackson agreed group libel laws fall within the power of the states, but that in this case the defendant had no opportunity to prove a defense, such as fair comment, truth, or privilege. Justice Douglas suggested that defamatory conduct directed at a race or group in the United States could be made an indictable offense, since like picketing, it would be free speech plus. However, he would have required either a conspiracy or a clear and present danger to support an indictment. Based on Beauharnais it appears that the criminalization of hate speech could be found constitutional.

It is important to note that the Supreme Court has never overruled Beauharnais. In fact, the Court has continued to cite to it favorably, particularly in obscenity cases. Commentators assert that New York Times Co. v. Sullivan, overruled the Court's finding in Beauharnais. The Court in Sullivan held that the Constitution limits state power in civil actions brought by a public official for criticism of his official conduct. Damages would be awarded only for a false statement "made with actual malice." The statements had to be made with knowledge that they were

158. Id.
159. Id. at 263.
160. Id. at 266.
161. Beauharnais, 343 U.S. at 283 (Reed, J., dissenting).
162. Id. at 294 (Jackson, J., dissenting).
163. Id. at 302 (Douglas, J., dissenting).
166. Lasson, supra note 153, at 35.
168. Id. at 279, 280.
false or with reckless disregard for the truth of the matter. However, *Sullivan* was expressly limited to actions brought by public officials against critics of their official conduct. The Court stated that no category of speech falls completely outside of the First Amendment, but the Court was simply ensuring that a state could not remove speech from judicial scrutiny merely by putting a label on it.

The Court in *Garrison v. Louisiana* expanded the scope of the *Sullivan* standard by invalidating Louisiana's criminal libel statute. In reversing Garrison's criminal conviction, the Court still expressed some limits to the scope afforded free speech by First Amendment protection. The Court stated:

> [t]hat speech used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government, and with the orderly manner in which economic, social, or political change is to be effected.

The Court cited the same language it used in *Chaplinsky*. The Court also reiterated in *Sullivan*, that both a knowingly false statement, and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection. It is difficult to imagine any circumstance which an opinion or message expressed in hate propaganda could possibly be construed as anything but falsehood made with a reckless disregard for the truth.

Cases that lend support to the contention that the criminalization of hate propaganda would be constitutional are those concerning obscenity. It can be argued not only that hate propaganda rises to the same level of obscenity but also, it is in fact, an obscenity. However, in examining the obscenity cases, what the Court says in its opinions does not necessarily reflect the law which emerges.

In addressing the level of protection afforded obscenity under the First Amendment, the Court in *Roth v. United States* stated, "[i]n the light of this history, it is apparent that the unconditional phrasing of the

169. *Id.*
170. *Id.* at 269.
172. *Id.* at 75.
173. *Id.*
174. *Id.*
First Amendment was not intended to protect every utterance."\textsuperscript{176} Roth had been convicted of mailing material that was obscene, lewd, lascivious, or a filthy publication, contrary to a federal statute.\textsuperscript{177} In upholding Roth’s conviction, the Court cited \textit{Beauharnais} with approval. It concluded that since obscenity is not protected, constitutional guarantees were not violated in this case merely because it was not proved the obscene material would perceptibly create a clear and present danger of antisocial conduct, or induce its recipients to such conduct.\textsuperscript{178}

In \textit{Roth}, the Court conducted an extensive review of the historical treatment by the states of obscenity. It also acknowledged the international community’s treatment of obscenity. The Court concluded that obscenity is not within the area of constitutional protection,\textsuperscript{179} finding:

\begin{quote}
[a]ll ideas having even the slightest redeeming social importance \ldots have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interest. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, \textit{reflected in the international agreement of over 50 nations}, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956 \ldots \textsuperscript{180}
\end{quote}

Thus, the Court is not reluctant to survey international law as well as state law when it looks for legal guidance. In light of the present day treatment of hate propaganda by the international community, any examination of the law of the international community by the Court would show hate propaganda is not worthy of constitutional protection.

If it can be proven that hate propaganda has no redeeming social importance, and that it encroaches upon the limited area of a more important interest, then clearly hate propaganda also would not merit First Amendment protection. If, as the Court held, obscenity is afforded no constitutional protection, the discussion would have ended. However, in an attempt to avoid the “slippery slope” of having its holding spread to

\begin{footnotes}
\item[176] \textit{Id.} at 48.
\item[177] \textit{See} 18 U.S.C. § 1461 (1956).
\item[178] \textit{Roth}, 354 U.S. at 483.
\item[179] \textit{Id.} at 481.
\item[180] \textit{Id.} at 484, 485 (emphasis added).
\end{footnotes}
legitimate material worthy of First Amendment protection, the Court went on to announce a test for determining what constitutes obscenity. By announcing a standard for judging obscenity the Court in effect, gave obscenity a modicum of First Amendment protection.

In 1973, the Court modified its test for obscenity regulation in the case of *Miller v. California.* The major effect of the decision was to tighten the definitional elements of what constitutes obscenity and how the lower courts were to apply those standards. The test announced in *Miller* required the states to ensure that their legislation be narrowly drawn and very specific as to what constituted obscene material. However, the Court was consistent in maintaining obscene material is unprotected by the First Amendment. What this means to those who would draft regulations concerning hate propaganda is that the definitional elements of the regulation would have to be very specific and narrowly construed.

The Supreme Court has been willing to abridge constitutional protections when governments attempt to legislate for the welfare of children. The Court "[has] sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." If it could be proven in fact that hate propaganda bears heavily and pervasively on the welfare of children then it would be permissible to consider messages of hate without First Amendment protection. In *New York v. Ferber,* the Court held that when it came to children and obscenity, the standard used for adults was not satisfactory. The Court recognized and classified child pornography as a category of material outside the First Amendment's protection. The Court stated "[w]hen a definable class of material . . . bears so heavily and pervasively on the welfare of children . . . the balance of competing interest is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment." The Court was concerned with safeguarding the physical and psychological welfare of children, and considered such state interest compelling.


183. *Id.* at 764.

184. *Id.* at 756.

185. *Id.* at 763.

186. *Id.* at 764.

In upholding New York's child pornography statute, the Court stated, "it is the content of an utterance that determines whether it is a protected epithet or an unprotected 'fighting comment.'" The Court reiterated its holding in *Beauharnais* that libelous publication is not protected by the Constitution and further stated: "[I]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interest . . . at stake . . . ." The dicta used by the Court leads one to believe, if it can be proven in fact the physical, emotional, and psychological welfare of children can be and is irreparably harmed by exposure to hate propaganda, it could be classified as speech not protected by the First Amendment.

The Court in *Ginsberg v. New York*, sustained a law protecting children from exposure to nonobscene literature. In *FCC v. Pacifica Foundation*, the Court held the Government's interest in the well-being of its youth justified special treatment of indecent broadcasting received by adults as well as children.

The Court has not limited the abridgment of fundamental rights solely when obscenity affects the welfare of children. In *New Jersey v. T.L.O.*, the Court, in balancing the school's legitimate need to maintain an environment in which learning can take place with that of the school child's legitimate expectations of privacy, required some easing of the restrictions to which searches by public authorities are ordinarily subject. The Court has also allowed school authorities to suppress student newspapers, and the content of speech in the school setting.

The dissemination of hate propaganda through commercial telephone services, on-line computer services, and printed material is pervasive in American society. Hate propaganda reaches both the adult and juvenile population of the United States equally. The psychological harm caused by exposure to messages of hate is both palpable and invidious. By being exposed, and having access to hate propaganda the youth of America are being sent a message that such ideas are tolerable

188. Id. at 763.
189. Id.
and acceptable. By criminalizing hate propaganda, and eventually eliminating its wide spread dissemination, it may be possible to reduce the levels of hate, distrust, and bigotry, which are pervasive in American society. If as the Court has stated, the physical and psychological welfare of children is a compelling state interest, then the criminalization of hate propaganda is certainly justified.

The most serious objection raised to the constitutionality of criminalizing hate propaganda is it would be a content based regulation. It puts the state in the censorship business, with no means of assuring the censor's hand will stop at hate speech and not pass into areas of legitimate expression. The "slippery slope" argument arises most often when legislatures or the Supreme Court do not carefully define the language they use in their pronouncements.194

Slippery slopes can best be countered by drafting legislation which narrowly define exactly what constitutes hate propaganda. The Canadian experience shows this is possible. The language of the Supreme Court in past cases dealing with the First Amendment has shown that freedom of expression is not an absolute. Regulations criminalizing hate propaganda, if narrowly tailored and specific, can survive strict scrutiny. The government can prove it in fact, that the harms associated with the dissemination of hate propaganda are real, and the interest in eradicating such hate speech is compelling.

VI. CONCLUSION

In light of the "New World Order" that is dawning, it is only fitting the United States should join the international community in recognizing the real harms created by hate propaganda. The best means of accomplishing this is for Congress to ratify the International Convention of the Elimination of All Forms of Racial Discrimination, without reservations.

Any regulation which criminalizes the dissemination of hate propaganda would be based on the content of the speech. Therefore, to sustain a constitutional challenge such regulation must pass a strict scrutiny test. The government would have to prove it in fact, the harms associated with hate propaganda, rise to a level of a compelling state interest. Ample evidence is available for any state to prove the inherent and real harm caused by the dissemination of hate propaganda. The state can also show the elimination of these harms is a compelling governmental interest based on American history and the international response to hate propaganda.

The regulation would have to be narrowly tailored, such that there could be no chance of finding it overinclusive, nor underinclusive. The definitional terms as to what constitutes hate propaganda would have to be very precise. Drafting such legislation is not impossible. The Canadian and British statutes provide an excellent model. The regulation would have to provide a provision for defenses. It should also express when a breach of the statute does or does not occur. This would avoid a challenge as to the vagueness or overbreadthness of the regulation.

Regulations that would criminalize hate propaganda pose no threat to the fundamental values of free expression which are protected by the First Amendment. Fundamental concepts of ordered liberty, would be enhanced rather than being diminished. The values associated with the modern application of the Fourteenth Amendment would be greatly enhanced and would give those individuals who are the target of hate propaganda a realization that American society is truly egalitarian. It is time American society lived up to the immortal words of the Declaration of Independence that truly all "people" are created equal.