

# ValpoScholar

## Valparaiso University Law Review

Volume 12  
Number 3 Spring 1978

pp.433-465

Spring 1978

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#### Recommended Citation

Jack A. Hiller, *Language, Law, Sports, and Culture: The Transferability or Non-Transferability of Words, Lifestyles, and Attitudes Through Law*, 12 Val. U. L. Rev. 433 (1978).

Available at: <https://scholar.valpo.edu/vulr/vol12/iss3/1>

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## Valparaiso University Law Review

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### LANGUAGE, LAW, SPORTS AND CULTURE: THE TRANSFERABILITY OR NON- TRANSFERABILITY OF WORDS, LIFESTYLES, AND ATTITUDES THROUGH LAW\*

JACK A. HILLER\*\*

I would like to acknowledge at the outset that I am mining a lode very close to that in which Bob Seidman has staked out his claim under his title, "The Law of the Nontransferability of Law."<sup>1</sup> I am pleased that he is here so that he can call me to account if I extract ore to which he has prior rights. He also will have an opportunity to assay my diggings to assure that no fool's gold contaminates the true ore.

Dropping my metaphor, I would also like to make clear that for the most part I am here developing a hypothesis, not attempting to establish a scientific fact. I intend here to set out some thoughts on law, language, sports and culture which I believe suggest certain

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\* The following article was a paper delivered at the Fifth Annual Symposium on Law and Development, "Law, Language and Development," at the University of Windsor Faculty of Law, March 23-25, 1978. It is reproduced here (with slightly updated footnotes) with the permission of the Symposium organizers, who retain all rights and who will separately publish it with the Symposium Proceedings.

\*\* Professor of Law, Valparaiso University School of Law; sometimes Professor of Law, Faculty of Law, University College, Dar es Salaam (as it was then known) and Faculty of Law, University of Nairobi. I wish to thank several people for their assistance: George H. Wright, who virtually co-authored this paper; Paul Brietzke and Jim Hostetler, who provided many valuable ideas; and Elmer Hess, Jim Walsh and Sylvester Awuye who, as usual, served above and beyond the call of duty in running down elusive sources. The faults that remain after all of this help are all my responsibility.

1. Why the same set of rules produces one result, say, in England and another in Africa is an example of his "Law of the Non-transferability of Law": A rule that induces one sort of activity in a particular social, political, and economic milieu will not induce the same activity in another social, political, and economic milieu, save fortuitously. The most recent formulation of his ideas on the subject is in his forthcoming book, R. B. SEIDMAN, STATE, LAW AND DEVELOPMENT, Ch. 2 (1978).

truths, but I am well aware that to prove them to anyone's satisfaction—even my own—will require far more research than I have yet brought to bear on the subject.<sup>2</sup> What I intend to suggest is that while any developing country can probably adopt and adapt any law or body of laws from another culture, if necessary, and can even translate such laws or rules into its indigenous language, such laws or body of laws carry with them so much imperceptible and incommensurable cultural “baggage” that the receiving country will inevitably experience far more internal cultural change than it either realized, intended or would have intended.

Obviously, development contemplates change. Development laws must do more than articulate or restate the customs of the people. If they did not, no change would occur. But we must be conscious of how much we are changing or trying to change in development. As we develop new goals, targets, institutions, techniques, instruments, principles, etc., we must be aware that in making such changes we are even changing a people's *attitude* toward law and their view of what law *is*. It is the latter sort of change that has had too little attention and which often occurs accidentally. As we press ahead with “development,” we seem too seldom concerned with the heart and core of the culture we are affecting. We do not bother to become familiar with existing cultural patterns or to search for clues<sup>3</sup> to the culture to ascertain its scope and character. We seem

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2. The ideas with which I deal in this paper have long interested me and have developed in an almost instinctive way. In researching for the paper, I have learned that others have come to similar conclusions from another direction—the sociology of sport. See, e.g., R. H. BOYLE, *SPORT: MIRROR OF AMERICAN LIFE passim*, (1963); D.Q. VOIGHT, *AMERICA THROUGH BASEBALL*, especially Part 3, *Baseball—Mirror of American Life* (1976), and M. ROBERTS, *FANS! HOW WE GO CRAZY OVER SPORTS* (1976).

3. It took resistance and riots in the late 1920's by the Ibos to persuade the British administration that anthropological research was necessary in order to determine the nature of native institutions. E.F. FRAZIER, *RACE AND CULTURE CONTACTS IN THE MODERN WORLD* 195 (1957). The technique of indirect rule required the revival of native culture which, in turn, required that Europeans study native cultures. *Id.* at 197ff. See also Margaret Mead's discussion of the importance of sociological research in our time:

Once a steamroller of any conquering state, either our enemies' or our own, has rolled over the cultures of the world eliminating clues which it has taken a thousand years to develop, we will be as helpless as those Americans who attempted to develop good painters by hanging Old Masters on the walls. We must work with the living stuff; we must know what the Chinese mothers say to their babies and how they hold them, to develop their special virtues; and what the Russian mothers say to their babies and how they hold them, to develop theirs. We must understand

to assume that since development presumes change we must accept whatever change comes with our chosen means of achieving specific goals, unconcerned with, and unaware of the consequences on the total pattern of culture. Whatever change we bring about must be congruent or consistent with the general attitude and goals or cultural core of the people or our efforts will be frustrated or will work cultural destruction of a significant order. Therefore, it is important that those recommending and inducing change be conscious of the nature and extent of the change being induced. Further, in order to bring about the desired changes, the message of development must be communicated in a way that will be acceptable to the people—not alien to them—and will cause them to respond with the desired activity.<sup>4</sup>

In China, the leaders quite clearly realized that the sort of incremental change that was occurring in most of the developing world was inadequate and too slow. Being sensitive to the effect of culture on change, they made a great cultural revolution to ensure continuation of their socialist revolution. In this they have been sensitive to all aspects of Chinese culture and their interconnectedness. In most other developing countries, development is piecemeal by comparison, and it is to that sort of situation that I direct my comments.

### *The Language Problem*

In 1965, A.B. Weston, then dean of the first and only faculty of law in East Africa, wrote an article entitled "Law in Swahili—

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what gives the Englishman his serene belief that he cannot lose, just as we must understand what gives the American his dedication to success. From the living stuff that these cultures are made of, from the way in which they fight and make love, discipline their children, organize a meeting, administer a town, or lose a battle, we may get the clues we need.

M. MEAD, AND KEEP YOUR POWDER DRY 259-260 (1942). For a similar call to anthropologists, see B. MALINOWSKI, *THE DYNAMICS OF CULTURE CHANGE* 1ff (1945).

4. On the subject of communication of law, see R. B. Seidman, *The Communication of Law and the Process of Development*, 1972 WIS. L. REV. 686, and Ch. 7 in his forthcoming book *supra* note 1. Future references in this paper will be to the Wisconsin Law Review article. See also O. K. Mutungi, *The Communication of Law under Conditions of Development: The Kenya Case*, 9 E.A.L.J. 11 (1973). A further note might be added on the subject. In the mid-1960's President Nyerere, dissatisfied with the then-used media of communication of development messages, carried out an extensive program, personally traveling, on foot, hundreds of miles through remote areas of Tanzania to inform the people and to exhort them to cooperate. This practice, tied to traditional ways, had been invoked in the 1930's at least in Tanzania's Iringa District by district officers making bi-yearly trips (also on foot) through rural areas in

Problems in Developing the National Language," an article which could have been entitled "An Article in Defense of a Language."<sup>5</sup> Dean Weston ably demonstrated the richness and adaptability of Swahili and its suitability as a medium for legal discourse and its appropriateness as Tanzania's national language. Swahili replaced English as the national language of Tanzania and has become the medium in which the laws are debated, written and applied. An attempt was made in Kenya in the mid-1970's to achieve the same end.<sup>6</sup> This attempt failed for various reasons, among them being the fact that Swahili is not a *lingua franca* in Kenya as it is in Tanzania.<sup>7</sup> Another was the reality that many members of Parliament and most members of the existing judicial superstructure (judges and other

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attempts to bring communications from the district commissioner to the people. On the latter, see R. B. Seidman *supra*, at 706.

5. 1 E.A.L.J. 60 (1965).

6. The events were most interesting. They began with President Kenyatta announcing to a KANU meeting that Swahili (Kiswahili) was now to be the national language and therefore the language of parliamentary debates, Bills, Acts, etc. However, without a constitutional amendment this was a legal impossibility. This led to a flurry of activity in and out of Parliament to legitimate the announcement. The (Kenya) Standard headline on July 5, 1974 was "Kiswahili is Kenya's Language." The Constitution was promptly (and retroactively) amended. The Constitution of Kenya (Amendment) (No. 2) Act, 1974, Act. No. 10 of 1974 (enacted July 12th but retroactive to July 5th). The result was not entirely satisfactory with members of Parliament, some whose Kiswahili was, to say the least, rusty. Various attempts were made to reach a compromise with the result that on February 14, 1975 the Constitution was once again amended, repealing the former amending Act. The result was that while proceedings in the National Assembly were to be conducted in Kiswahili,

(2) Every Bill (including the memorandum accompanying a Bill), every act of Parliament whenever enacted, all other actual or proposed legislation under the authority of an Act of Parliament, all financial resolutions and documents relating thereto, and every actual or proposed amendment of any of the foregoing, shall be written in English.

(3) In all proceedings of the National Assembly which involve the discussion of any of the following matters, that is to say, a Bill (including the memorandum accompanying a Bill), any Act of Parliament, any other legislation whether actual or proposed, any financial resolution or document relating thereto, or any actual or proposed amendment thereof, the wording of every such matter shall, as occasion requires, be quoted in English.

The Constitution of Kenya (Amendment) Act, 1975, Act No. 1 of 1975 (enacted February 10, 1975 retroactive to July 5, 1974).

The laws are still published in English. Some say that one of the factors that forced the compromise was the submission of a finance bill for debate—a bill whose treatment exclusively in Kiswahili was beyond the skills of many members of Parliament.

7. See O. K. Mutungi, *supra* note 4.

personnel) speak fluent English, not Swahili of a fluency adequate to the task.<sup>8</sup>

Even if we agree that Swahili, for example, is a perfectly adequate language for the debate, promulgation, invocation and application of a country's laws within the scope of its cultural patterns—and linguists say that most if not all languages are of sufficient complexity, sophistication and adaptability for such purposes<sup>9</sup>—that is not the main issue in law, language and development today. Two more important problems are: (1) What is the consequence of the reception of a foreign law in a foreign language into a developing country with a different culture, and (2) Is it possible to translate the foreign law into the receiving country's national language (so as to achieve better communication) without causing unexpected damage to the receiving culture?

O.K. Mutungi said that "it may not be an outrageous demand on the national budget to require an accurate translation of the statutes in each of the major languages [of Kenya]."<sup>10</sup> This would be in the interest of better communication. However, he acknowledges that it would be better to "think Swahili and develop it as an original and spontaneous language" rather than to "write Swahili with the English model as one's guide."<sup>11</sup> He further observed, "Translation from one language to another is hardly ever accurate."<sup>12</sup> And English to Swahili (or vernacular) is no exception to the problem. Often, a translation is either inaccurate or the force of the original message is lost in the process."<sup>13</sup>

8. See *infra* note 93 and related text for possible other reasons.

9. See M. Joos, *Linguistics and Legal Education*, in L. E. ALLAN & M. E. CALDWALL, *COMMUNICATION SCIENCES AND LAW: REFLECTIONS FROM THE JURIMETRICS CONFERENCE* 383 (1965); G. STEINER, *AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION* (1957).

10. O. K. Mutungi, *supra* note 4, at 25. During the colonial period consideration was given to the need to translate at least some of the laws into the East African vernacular languages but nothing was done. See J. Read, *The Search for Justice*, in H. F. MORRIS & J. S. READ, *INDIRECT RULE AND THE SEARCH FOR JUSTICE* 318-320 (1972).

11. *Id.* at 25. See also A. B. Weston, *supra* note 5, at 64, 70.

12. Citing G. Hyden, *Language and Administration*, in *DEVELOPMENT ADMINISTRATION—THE KENYA EXPERIENCE* 112 (1970), and F. WAISMANN, *THE PRINCIPLES OF LINGUISTIC PHILOSOPHY* 248 (1968). On specific problems of translating English into Swahili, see A. B. Weston, *supra* note 5, *passim* and R. B. Seidman, *supra* note 4, at 704 (citing Weston). For examples regarding the Tiv, see P. BOHANNAN, *JUSTICE AND JUDGMENT AMONG THE TIV* 117-120 (1957).

13. O. K. Mutungi, *supra* note 4, at 24. See also F. Abebe and S. Z. Fisher, *Language and Law in Ethiopia*, in *PROCEEDINGS OF THE CONFERENCE ON LEGAL EDUCATION IN AFRICA* appendix 3-10 (Addis Ababa: Centre for African Legal Development) (J.

The problem is more complex than this. There is an Italian proverb, "Traduttori, traditori." The English translation, "Translators, traitors," verifies the proverb by failing to communicate in English its subtlety in Italian, the exchange of one vowel sound for another. (As Robert Frost once said, "Poetry is what is lost in translation."<sup>14</sup>) On a rather superficial level the proverb's meaning comes through in translation, but the *cultural significance*, and part of that, the "fun," is lost and cannot really be *translated* into English. The Italians are fond of playing with words by switching vowels or aligning words with merely vowel differences and their language lends itself especially to such plays on words.<sup>15</sup> Therefore, there is a special *cultural* aspect lost in *transplanting* the proverb into English.

The legal counterpart of this point may be shown by two oft-used illustrations. During the colonial period there was imported apparently without question into many of the colonies<sup>16</sup> language from a British statute which made it a crime for any person "being armed . . . and having his face blackened . . . [to] appear in any forest . . . or in any high road" under a wide variety of stated circumstances not necessarily criminal in themselves—a statute designed, ostensibly, to deal with poachers and similar wrongdoers, but arming and/or blackening one's face was enough to constitute a capital crime in Britain.<sup>17</sup> The obvious cultural significance would be lost in translation and makes the language rather absurd in many of its new settings.

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Vanderlinden ed. 1968); A. Mustafa, *Some Thoughts About Legal Education in the Sudan*. *Id.* at appendix 34-35.

14. This is quoted from memory from one of the many Frost interviews, though the source cannot be recalled.

15. Take, for example, the following assortment of words which can be created by using the full range of vowels in substitution:

*passo* - "crazy"  
*pezzo* - "piece"  
*pizzo* - "lace"  
*pozzo* - "well" (n.)  
*puzzo* - "I smell"

I am indebted to my wife, Jessie, for this illustration.

16. For example, the NIGERIAN CRIMINAL CODE, Cap. 42, Sec. 417 (e) makes it a felony for a person to have "his face blackened . . . with intent to commit a felony." See also, KENYA PENAL CODE, Cap. 63, Sec. 308 (3) (a); and UGANDA PENAL CODE, Cap. 106, Sec. 285 (1) (e).

17. 9 George I c. 22 (emphasis added). The statute, enacted in 1723, became known as "The Waltham Black Act" or simply as "The Black Act." For a fascinating discussion of the Act, see E. P. THOMPSON, *WHIGS AND HUNTERS. THE ORIGIN OF THE BLACK ACT* (1975). The Act is reproduced in full in Appendix I of the book.

The other illustration is found in Zanzibar, in the case of *Abdulrahmin bin Mohamed v. R.*<sup>18</sup> and the cases cited therein. In *Mohamed*, the question arose whether the defendant's wife by native custom was a competent witness against him in a criminal prosecution. Under the English common law rule, which was the received law of Zanzibar, the husband or wife of the person charged was not a competent witness for the prosecution. Sir Ronald Sinclair, for the Court of Appeal for East Africa said:

The marriage [though monogamous] appears to have all the elements of 'wife purchase' . . . . There was no religious ceremony or, indeed, any ceremony at all. The [defendant] merely paid Shs. 200/- for her. . . . Either party could buy his or her release at any time. It may well be a valid marriage in Zanzibar but . . . we do not think the wife of such a marriage is within the purview of the general view that the husband or wife of the person charged is not a competent witness for the prosecution.<sup>19</sup>

In short, she was not tantamount to an English "wife."

What becomes obvious from these examples is that translation—no matter how accurate—is not an adequate solution to the problems of transferability of law, and the reason lies in the facts that both law and languages are carriers of culture and that each culture has its own integrity and internal consistency. These are the reasons not only why an imported law or institution will not work in the importing country the way it did in the exporting country,<sup>20</sup> but also, more importantly, why the importation of foreign elements into a culture will "skew" the receiving culture in profound ways. For a better understanding of this, we must consider the notion of cultural patterns.

#### *National Cultures and National Types*

Sociologists tell us that culture is integrated into patterns.<sup>21</sup> The "whole" of a culture is not merely the sum of its parts but the

18. (1963) E.A. 188.

19. *Id.* at 192-93.

20. Bob Seidman stresses, for example, why we cannot assume that every properly socialized person will know the law if that law is a product of a foreign system. On *ignorantia juris* generally, see R. B. Seidman, *supra* note 4, at 689. He says, by way of illustration, "However well the system for the promulgation of laws may work in England, it may not, and does not, work adequately in Africa." *Id.* at 697.

21. R. BENEDICT, PATTERNS OF CULTURE (1934). (References herein will be to the Sentry Edition, 1959).



result of a unique arrangement, interrelation and synergistic interaction of its parts into an *articulated* whole.<sup>22</sup> Between two such wholes, that is between two cultures, there is a discontinuity in kind,<sup>23</sup> and these cultural wholes are incommensurable.<sup>24</sup> These patterned wholes result not merely by chance; but, even if we were to assume that they arise by chance, they are the result of selection. Every distinct culture is a consequence of selection (mostly unconscious) from among the many possible interests provided either by the human age-cycle or by the environment or by man's various activities. Selection of one set or assortment necessitates rejection of others.<sup>25</sup> Infusion of elements of a foreign culture, which will be discussed below, naturally upsets the "pattern"<sup>26</sup> and generates unknown and unperceived "ripple" effects upon the culture, that social glue which binds men together and shapes their lives. The Canadians, for example, are buffeted by the diffusions of British and American culture.<sup>27</sup>

Taking their lead from the uniqueness of cultural patterns, a large number of psychologists, sociologists, anthropologists and linguists have developed a body of literature analyzing and describing "national characters" or "national types"<sup>28</sup> based upon the tendency of people to bear characteristics of their culture. I hasten to point out that there is clear distinction between this concept and the discredited notion of *racial* types.<sup>29</sup>

22. *Id.* at 46-48.

23. *Id.* at 52.

24. *Id.* at 22, 223.

25. *Id.* at 24.

26. "(M)aterial culture, technique, economic organization, and belief are so intimately related, that changes in one react upon all of the others." R. W. FIRTH, *ECONOMICS OF THE NEW ZEALAND MAORI* 490 (2d ed. 1959), quoted in B. F. Hoselitz, *Advanced and Underdeveloped Countries: A Study in Development Contrasts*, in W. B. HAMILTON, *THE TRANSFER OF INSTITUTIONS* 28 (1964). We would add "law" to his list.

27. For a discussion of the diffusion of political culture from Britain and the U.S. into Canada see A. Brady, *Canada and the Model of Westminster*, in W. B. HAMILTON, *THE TRANSFER OF INSTITUTIONS* 59 (1964). See also note 64 *infra*.

28. Following is a small sampling:

General: R. BENEDICT, *supra* note 21; M. Farber, *The Problem of National Character*, in H. BRAND, *THE STUDY OF PERSONALITY* 388 (1954); R. LYNN, *PERSONALITY AND NATIONAL CHARACTER* (1971). Americans: R. H. BOYLE, *supra* note 2; G. GORER, *THE AMERICAN PEOPLE: A STUDY OF NATIONAL CHARACTER* (1948); M. MEAD, *supra* note 3 (also discussing Germans, Russians and Japanese). English, French and Spanish: S. DE MADARIAGA, *ENGLISHMEN, FRENCHMEN, SPANIARDS* (2d ed. 1969). Japanese: R. BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD* (1946). See also note 80 *infra*.

29. See R. BENEDICT, *supra* note 21, at 14-16 and M. MEAD, *supra* note 3, at 18-26, 120.

Our perception of national types is often reflected in our humor (admittedly often biased and unscientific). Two illustrations should suffice. The American satirist, Finley Peter Dunne, through his alter ego, "Mr. Dooley," himself a model of a national type or subtype,<sup>30</sup> in one of his pithy dicta said, "I wisht I was a German an' believed in machinery."<sup>31</sup> For the other illustration we look to the list of the titles of books produced by various countries as the result of a mythical UNESCO request for studies on the elephant: *The Elephant and the British Empire* (England); *The Love Life of the Elephant* (France); *The Elephant: Does it Exist?* (U.S.S.R.); *The Elephant: How to Make it Bigger and Better* (U.S.A.); and *A Short Introduction Into the Study of the Elephant in Three Volumes* (Germany). But we can find better evidence than humor.

The clues to or indicators of national character are many. They arise from that rich mix of elements in a culture which bear the mark of the culture and place that mark on the culture's product. Margaret Mead observed:

[T]he language one speaks, the religion one professes, the code of ethics by which one judges and is judged, one's taste for wine or beer or vodka, or one's preference for paprika or snail or French-fried dragon flies can all be referred to the culture within which one is brought up. . . . The way in which people behave is all of a piece, their virtues and their sins, the way they slap the baby, *handle their court cases*, and bury their dead. . . . We are our culture.<sup>32</sup>

President Nyerere, in his constant emphasis on *African* socialism, treats it to a certain extent as a system consistent with the national characteristics of the Tanzanians.<sup>33</sup> A content analysis of his writings would surely provide other illustrations of Tanzanian national characteristics.

30. Mr. Dooley was a mythical Irish immigrant, barkeeper, "back of the yards" in Chicago at the turn of the last century.

31. F. P. DUNNE, *MISTER DOOLEY ON IVRYTHING AND IVRYBODY* 153 (1963).

32. M. MEAD, *supra* note 3, at 19-20 (emphasis added).

33. In a speech given at University College, Dar es Salaam (as it was then known) in late 1966, discussing Tanzania's motto, "Socialism and Self-Reliance," he said, in a humorous vien, "Our American friends do nct understand what we mean by socialism, but they do understand what we mean by self-reliance." We might wonder whether the word "socialism" has lost its meaning when we hear the presidents of three such diverse countries as Kenya, Tanzania and Uganda claiming it as an inherent national characteristic.

As I have said, the indicators and elements of national character are many.<sup>34</sup> So, also, are the vehicles through which national character or types can be perceived. Two of special relevance to this Conference are art and language. Briefly, it may be observed that Kenneth Clark, in his many writings on art, quite clearly asserts that national character is reflected in artistic expression. Comparing "one of the most famous of German portraits," Dürer's *Oswald Krell*, with Raphael's portrait of a cardinal in the Prado, he said of the former: "Oswald Krell is on the verge of hysteria. Those staring eyes, that look of self-conscious introspection, that uneasiness . . .—how German it is; and what a nuisance it has been for the rest of the world."<sup>35</sup> I am not concerned with the truth or falsity of this particular characterization but use it only to indicate that such sorts of analyses are made and can be useful even though particular judgments may be erroneous.

And now for the role of language. Salvador de Madariaga, a linguistic scholar from Oxford University, in his book, *Englishmen, Frenchman, Spaniards*,<sup>36</sup> set forth a thesis that the choices of words and constructions put on them by persons from each of these three countries established three national types, i.e., that the English were "men of action," the French, "men of thought" and the Spaniards, "men of passion." Language, he maintained, was a product of an entire culture, shaped it, was shaped by it and reflected it. I think that each of us instinctively knows this from his experiences that learning a foreign language allows one to "get inside" the culture whose language he has learned. It is the awareness of the importance of a national language to the development of national

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34. "Traditional Anglo-Saxon intolerance is a local and temporal culture-trait like any other. Even people as nearly of the same blood and culture as the Spanish have not had it. . . ." R. BENEDICT, *supra* note 21, at 11.

35. K. CLARK, CIVILIZATION 141-42 (1969). He went on to say, "[H]owever, in the 1490's these destructive national characteristics had not shown themselves." National character may change over time. See also Clark's analysis of the attempts of a variety of artists—Donatello, Perugino, Dürer, Raphael, Michelangelo and others—to render a nude drawing of Apollo in the classical Greek form. In each case, no matter how valiant the effort, the artist was unable to transcend his time and culture. In each case the result was distinctly un-Greek. K. CLARK, THE NUDE: A STUDY IN IDEAL FORM 56-59 (1956). For an example of the significance of national or cultural types in the field of music see B. GAVOTY, CHOPIN 69 (M. Sokolinsky trans. 1977): "It is in Poland, in Russia, in France, and in Italy that (Chopin) finds and will always find artists attuned to his particular nature, at once lyrical and restrained, voluble and reticent, forever allusive—which always baffles Teutonic sentimentality."

36. S. DE MADARIAGA, *supra* note 28. The first edition was published in 1931. Unfortunately, even the second edition of this delightful book is out of print.

culture and national identity even more, I think, than the need for a vehicle of communication which has lead the Tanzanians to adopt Swahili as a national language<sup>37</sup> and has brought about the above-mentioned events in Kenya.

Law, too, is a product of culture. Even though citizens of two countries speak the same language, they may use the same words in different ways. We recall George Bernard Shaw's comment that the U.S. and Britain are "two countries separated by a common language." An example of this phenomenon in relation to law has been pointed out by André Donner in his book, *The Role of the Lawyer in the European Communities*,<sup>38</sup> Scottish lawyers are often disagreeably surprised by judgments in the House of Lords (the majority of whose members are English) on appeals from Scottish judges. The surprise is occasioned by the fact that the English lords may quite understandably place a common law interpretation on language which might have a very different meaning in Scottish law. Similarly, though two different countries apply common law principles and use the same language, each will add its own cultural "gloss" to the language; but even though it adds its own gloss, the receiving country will not know how much of the exporting country's cultural gloss is carried in and around the words.

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37. Above all, the identity of the Tanzanians is reflected in the mastery of socio-economic problems, which Nyerere has handled with remarkable ideological flexibility. Unfortunately, his leadership has not been supported, promulgated, or embellished by a variety of spontaneous groups, such as those mobilised by the black consciousness movement. This situation caused him to comment bitterly that he was undertaking the dubious task of building "socialism without socialists."

Nevertheless, it must be acknowledged that the Tanzanians have come a long way since 1961 in discovering their national identity, as evidenced in the creation of a national language, as well as a collective consciousness of their own history. The difficulties of cultural emancipation are manifold when internationally-discussed ideas—mainly socialist, in this case—are constantly being imported, while foreign-made consumer goods, including those produced in neighbouring Kenya with its rapid rate of industrial development, offer continual incitements. In an interdependent world linked by technology and communications, cultural emancipation, especially in the so-called 'periphery' of the Third World, runs into difficulties, even when internal obstacles as faced in Senegal and South Africa no longer exist, or are abolished.

G. Grohs, *Difficulties of Cultural Emancipation in Africa*, 14 J. MOD. AFRICAN STUDIES 65, 77-78 (footnotes omitted).

38. A. M. DONNER, *THE ROLE OF THE LAWYER IN THE EUROPEAN COMMUNITIES* 31-33 (1968).

However, the problem with which I am most concerned is more subtle, complicated and serious than this. I think it can best be described by examining somewhat similar elements, law and sports, in two somewhat similar cultures, those of England and the United States. It takes us a bit afield of our consideration of law and language, but I believe that the subjects are related.

### *Law and Sports*<sup>39</sup>

In the area of culture, broadly defined, it is possible to show that the way citizens of a country react to games and sports reflects the way that they react to law.<sup>40</sup> This, we may consider as a reflection or indicator of national types. While the rules of games and law are different parts of a given culture's pattern, the hypothesis that I am suggesting is that there is sufficient similarity between them that if we can identify an attitude toward one it will reflect an attitude toward the other. Once we have done that, we may be able to make some comparisons or contrasts between two cultures and also perceive some problems regarding transferability of law.

### *The British*

If one watches the British long enough and carefully enough, he will notice a more than coincidental connection between their respect for law and their cultural preoccupation with sports—with "playing the game according to the rules."<sup>41</sup> Often, in the same

39. See note 2 *supra*. My comparison of rules of games or sport and rules of law is for reasons somewhat different from those of H. L. A. Hart in his famous inaugural lecture, *Definition and Theory in Jurisprudence*, 70 L.Q.R. 37 (1954), and Johan Huizinga in his analysis of law as play in Ch. 4 of his *HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE* (1950), fascinatingly built upon, by Art Leff, since the oral presentation of this paper, in his *Law and*, 87 YALE L.J. 989 (1978). Both of these sources shed considerable light on law as an element in culture. Also somewhat different from my point, but clearly related, is South Africa's application of its apartheid policy to sports. Racism permeates its culture. The ways in which cultural approaches to sport can be analyzed seem limitless. For another interesting insight, compare E. HERRIGEL, *ZEN IN THE ART OF ARCHERY* (1953) with R. Ascham, *Toxophilus*, in *THE RENAISSANCE IN ENGLAND* (1954) (a 1545 militarist approach to archery).

40. "If you examine the literature of jurisprudence you will find that legal institutions are studied for the most part in more or less complete abstraction from the rest of the social system of which they are a part. . . . The system of laws of a particular country can only be fully understood if it is studied in relation to the social structure, and inversely the understanding of the social structure requires, amongst other things, a systematic study of the legal institutions." A. R. RADCLIFFE-BROWN, *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 531-534, quoted in D. RIESMAN, *INDIVIDUALISM RECONSIDERED* 440, n. 3 (1954).

41. One is reminded of Mr. Justice Holmes' answering a parting admonition from Judge Learned Hand, "Do justice," with the retort: "That is not my job. My job

breath courts refer to "justice and fair play" or they say something such as that a party has "let down the side."<sup>42</sup> Margaret Mead wrote:

To the educated man, who has read thoroughly in English literature, fair play means certain definite things. It means "obeying the rules," and the "rules" are thought of as a device for keeping people from bullying or taking an unfair advantage of the other person. One's character is defined by the way in which the rules are embodied in one's behavior—and "That's not cricket" may be applied to making love to the wife of a man who is in a weaker position than oneself.<sup>43</sup>

She went on to say that the standard of behavior referred to here was

curiously incomprehensible to the German. During the last war [World War I], articles used to appear in German papers exploring this curious Anglo-Saxon notion called "fair play," reproduced without translation—for there was no translation.<sup>44</sup>

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is to play the game according to the rules." L. HAND, *THE SPIRIT OF LIBERTY* 306 (1960). Holmes' response was, I suggest, not typically American; he was too committed to the common law for that. For a similar British attitude, see the judgment of Lord Radcliffe in *Bolton v. Stone* (1951) A.C. 850, at 868-869 (a cricket case).

42. This would be an interesting research project in content analysis. The author cannot cite specific cases to illustrate this point; the examples are cited from memory. A minor insight into the British love of cricket and the tension that arises when cricket runs afoul of the law and the two are reconciled may be seen in *Miller v. Jackson* (1977) 3 W.L.R. 20. See also, Note, 93 L.Q.R. 481 (1977).

43. M. MEAD, *supra* note 3, at 142-43. She goes on to say, "Our games' traditions, although altered and transformed, are Anglo-Saxon in form; and fair play does mean for us, as for the English, a standard of behavior between the weak and the strong." If this was true when she wrote it in 1942, it is certainly not true in the sports world today. Robert Boyle reports:

Branch Rickey, a strict sabbatarian who refused to attend ball games on Sundays, defined his ideal player as one who "will break both your legs if you happen to be standing in his path to second base." A major league manager tells his team, "Cheat a little bit, especially at first and second when you're going to tag up after a fly ball." American sport has nothing comparable to the English maxim "That's not cricket." Instead, all too many honor Leo Durocher's wisecrack, "Nice guys finish last."

R. H. BOYLE, *supra* note 2, at 56-57.

44. M. MEAD, *supra* note 3, at 143-44.

She also said, "And if you keep to the rules and hit hard, you always win. That is the English conviction."<sup>45</sup>

A testimony to the importance of sports in British society is the remark attributed to the First Duke of Wellington: "The battle of Waterloo was won on the playing fields of Eton." To what extent "hitting hard" and teamwork ("keeping the rules"?) were more important in his mind than "fair play" one cannot tell. The important point is that Britain's leaders (including most of its barristers and, hence, judges) received their early training in public school where there has always been a heavy emphasis on sport, teamwork, the rules, fair play, etc.<sup>45a</sup> The fact that judges bring such attitudes to

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45. *Id.* at 152. She added, and here I disagree somewhat with her, "But the American is a little different. His gaze has been concentrated, not on the rules, but upon his strength in the face of variable and unpredictable circumstances." My own view, which some will call cynical, is that the "gaze" is on the thing which matters most—winning, at almost any cost; but, of course, there is an emphasis on strength—more appropriately, power—too. David Riesman said that,

whereas the American game (of football) was developed in and for a student group, the English game was played before quite large crowds who, from a class standpoint, were less homogeneous than the players themselves, though they were as well informed as the latter in the "law" of the game. Rugby football was seldom played by the proletariat (in the early days); it was simply enjoyed as a spectacle.

Held by the critical fascination the British upper strata had for the lower strata, the audience was often hardly more interested in the result of the game than in judging the players as "gentlemen in action." "The players," Mr. Benney (a British sociologist) writes, "had to demonstrate that they were sportsmen, that they could 'take it'; and above all they had to inculcate the (politically important) ideology that legality was more important than power." The audience was, then, analogous to the skilled English jury at law, ready to be impressed by obedience to traditional legal ritual and form, and intolerant of "bad form" in their "betters." . . . The apparent legalism of many American arguments over the rules would strike British observers as simply a verbal power-play.

D. Riesman and R. Denney, *Football in America: A Study in Cultural Diffusion*, in D. RIESMAN *supra* note 40, at 242, 249. They went on to say that while they did not necessarily believe that the American game of football developed as it did out of cultural compulsion, some of its aspects were "not unwelcome to Americans" and "fitted in with other aspects of their industrial folkways." *Id.* at 250. They also observed: "In contrast with the British, the Americans demonstrated a high degree of interest in winning games and winning one's way to high production goals." *Id.* at 252. With this compare Peter Ustinov's observation from his British school days: "[C]hildren in British schools are taught to lose gracefully, often at the expense of winning. The real encounter is won in the dressing room after the event, in which the extraordinary grace of the loser makes the victory seem hollow and even vaguely indecent to the winner." P. USTINOV, DEAR ME 61 (1977).

45a. On the subject of recruitment for the Colonial Service Lord Lugard wrote: The District Officer comes of the class which has made and maintained

the bench cannot fail to affect the administration and development of the law.<sup>46</sup>

Looking at the British attitude about law and sports from another point of view, I have always been fascinated by the *Laws of Rugby Football* as a model of British legislation and a model of the common law. Indeed, I have found it a useful text in a course in jurisprudence. A look at three subparagraphs of the *Laws* will suggest why.

LAW 10. *Functions of Referee*

(1) The Referee is sole timekeeper and judge of fact, and shall keep the score.

(2) He is sole judge of Law, subject to a right of appeal to this Union or other body having jurisdiction over the match.

(3) He is not entitled to contract out of the Laws of the Game by agreeing with both teams to vary or not to recognise any Law.<sup>47</sup>

the British Empire. That Britain has never lacked a superabundance of such men is in part due to the national character, in part perhaps to our law of primogeniture, which compels the younger son to carve out his career. His assets are usually a public school, and probably a university, education, neither of which have hitherto furnished him with an appreciable amount of positive knowledge especially adapted to his work. But they have produced an English gentleman with an almost passionate conception of fair play, of protection for the weak, and of 'playing the game.' They have taught him personal initiative and resource, and how to command and obey. There is no danger of such men falling prey to the subtle moral deterioration which the exercise of power over inferior races produces in men of a different type, and which finds its expression in cruelty.

SIR FREDERICK LUGARD, *DUAL MANDATE IN BRITISH TROPICAL AFRICA* 131-132 (3rd ed. 1926).

46. I hasten to point out that differences in attitudes toward sport exist between the professional and working classes in England, between the public school products and the others. Judges, products of the public school—the acme of their socialization, view sport in terms of their cricket and rugby, of playing (even though playing roughly in rugby) by the rules. The so-called working class, on the other hand, idolizes football, an unashamedly professionalized and commercial venture, where success comes from bending the rules and through player and spectator violence. When these people, especially in recent years, come into contact with the law, they do not see adjudicators as playing by noble rules; in divorce and magistrate's courts and administrative (employment welfare) tribunals the canon is getting the case through as quickly and as cheaply as possible. The conflict in legal attitudes is symbolized by the recent attacks of the Labour Party and the legal establishment on each other. I am indebted to Paul Brietzke for valuable insights on this point. For other discussions of the role of class in sport, see the sources cited at note 111 *infra*.

47. Quoted from *THE LAWS OF THE GAME OF RUGBY FOOTBALL* as framed by the International Rugby Football Board as applicable in 1967, the only set available to me.



The use of definitions, structures of rules, allocation of powers, limitations of jurisdiction, even legal fictions,<sup>48</sup> etc. could cause one to wonder which came first, the rules of British games or the common law. To be sure, all games have rules, but only the British could have put them in this form. Indeed, perhaps the common law and British games have a common origin—trial by ordeal, trial by combat, jousting, deeply ritualized warfare, etc.<sup>49</sup>

*The Americans*<sup>50</sup>

The place of sports in American culture is best illustrated in the opening paragraph of Dr. Arnold Beisser's book, *Madness in Sport: Psychosocial Observations on Sports*:

In World War II the attacking Japanese troops thought they knew what Americans hold most dear. They made their Banzai attacks not only with weapons but with shouted invectives meant to demoralize. One of those cries was, "To hell with Babe Ruth!" So far as I know they did not defame the religions of America, vilify our economic system, or condemn motherhood. Instead, they selected a sports hero as representative of what Americans held in highest esteem.<sup>51</sup>

Japanese intelligence officers had done their research into American culture reasonably well except for the assessment they made of the use to which the information could be put. Also, they seem to have discounted the American sense of humor. Their astuteness in selecting baseball is confirmed by many factors. One is that the American language has been shaped by the language of baseball.<sup>52</sup> Another is the fact that while other sports have been recognized as

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48. The development of the game of rugby football in England depended, even, on the use of "legal fictions." See D. RIESMAN & R. DENNEY *supra* note 45, at 242, 246.

49. See generally A. Strick, *Trial by Battle*, in THE CENTER MAGAZINE at 51, May/June 1978.

50. See generally J. A. MICHENER, SPORTS IN AMERICA (1976).

51. A. R. BEISSER, THE MADNESS IN SPORTS: PSYCHOSOCIAL OBSERVATIONS ON SPORTS 1 (1967).

52. See J. O. Herbold II, *To Understand America (and Americans)* Verbatim Vol. IV, No. 1, p. 4: "To understand America you must first understand baseball." See also L. A. Zurcher, Jr. and A. Meadow, *infra* note 80. Jacques Barzun put it similarly: "He who would know the heart and mind of America had better learn baseball." Quoted in D. Q. VOIGHT, *supra* note 2, at 3 and M. NOVAK, *infra* note 55 at 63. As to the connection between English sports and the English language (and temperament) see E. NEWMAN, STRICTLY SPEAKING 157-70, especially 165-66 (1974).

"businesses," subject to the antitrust laws,<sup>53</sup> the United States Supreme Court has struggled heroically to hold—in spite of the obvious absurdity of distinctions used—that baseball, the truly American game, is not a business subject to the antitrust laws.<sup>54</sup>

Research into the American attitude regarding sport can be carried out in at least two ways or on two levels. If one reads the sports literature on what, for the lack of a better expression, I call the theoretical level, one would conclude that the attitude in the United States is the same as that in Britain.<sup>55</sup> However, if one reads sport sociologists or, especially, what the participants write and one watches how players and fans actually act, one gets a different view.

I would like to digress for a moment to point out that I see a parallel between this situation and that in American law. The Legal Realist movement, which began in America, was an American phenomenon (which has since been exported), largely a consequence of American pragmatism. The Realists were critical of rules or perspectives alone; they were preoccupied with operations—with *how things actually worked*.<sup>56</sup> Both Legal Realism and the sports literature to which I will refer are consistent with a peculiarly

53. *International Boxing Club of N.Y. v. United States*, 358 U.S. 242, 79 S. Ct. 245 (1959) (boxing); *Radovich v. National Football League*, 352 U.S. 445, 77 S. Ct. 390 (1957) (football).

54. *Federal Base Ball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 42 S. Ct. 465; *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 74 S. Ct. 78 (1953); *Kowalski v. Chandler*, 346 U.S. 356, 74 S. Ct. 78 (1953); *Flood v. Kuhn*, 407 U.S. 248, 92 S. Ct. 2099 (1972). Consider the following informal judicial opinion: "I . . . remember . . . two rather humorous incidents that happened during our Eisenhower visits (annual courtesy call on the President). The first occurred after the Court had held that baseball was exempt from the antitrust laws, and later that football was not exempt from the antitrust laws. Felix Frankfurter and I had trouble restraining ourselves when Ike asked Earl Warren what the difference in antitrust law was between baseball and football. Of course, there was no difference. . . ." W. O. DOUGLAS, JR., *GO EAST YOUNG MAN: THE EARLY YEARS* 328 (1974).

55. See, e.g., P. WEISS, *SPORT: A PHILOSOPHICAL INQUIRY* 138, 140, 142 (1969), and M. Novack's rhapsodic, erudite, exaggerated and naive *THE JOY OF SPORTS* (1976). See also note 43 *supra*.

56. For example, recall Mr. Justice Holmes' statement which sets the tone: "The prophesies of what the courts will do in fact, and nothing more pretentious, are what I mean by law." O. W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). Of somewhat similar purport is his famous statement: "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intentions of public policy avowed or unconscious, even the prejudices which judges share with their fellow man, have a good deal more to do than the syllogism in determining the rules by which men should be governed." O. W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

American expression: "Tell it like it is." (Even what we have done with the English grammar in that expression is American.)

The classic statement of the American realist view of sports is to be found in Leo Durocher's book, *Nice Guys Finish Last*.<sup>57</sup> In a chapter entitled "I Come to Kill You", he said:

"How you play the game" is for college boys. When you're playing for money, winning is the only thing that matters.

. . .

I believe in rules. (Sure I do. If there weren't any rules, how could you break them?) I also believe I have a right to test the rules by seeing how far they can be bent. If a man is sliding into second base and the ball goes into center field, what's the matter with falling on him accidentally so that he can't get up and go to third? If you get away with it, fine. If you don't, what have you lost? I don't call that cheating; I call that heads-up baseball. Win any way you can as long as you can get away with it. . . . We used to do everything in the old days to try to win, but so did the other clubs. Everybody was looking for an edge. If they got away with it, I'd admire them.<sup>58</sup>

"Winning is the only thing that matters . . . test the rules by seeing how far they can be bent. . . . Win any way you can as long as you can get away with it." Winning is the "name of the game." "Winning isn't everything," said Vince Lombardi, coach of the Green Bay Packers, "It's the only thing."<sup>59</sup> These themes dominate the

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57. L. DUROCHER, *NICE GUYS FINISH LAST* 11, 12 (1975). See note 43 *supra*.

58. L. DUROCHER, *supra* note 57 at 11, 12.

59. Quoted in J. A. MICHENER, *supra* note 50, at 519-620. On pages 520 and following he reproduces many similar quotations and discusses the stress on winning and the role of violence. For a similar analysis of the importance of winning and for an attribution of the quoted statement to Jim Tatum, former head football coach at Maryland, see R. H. BOYLE, *supra* note 2, at 63. Consider the following:

In less than a generation, the prevailing ethos in America has shifted from "It's not whether you win or lose, its how you play the game," to "Winning isn't everything. It's the only thing." The current public glorification of winning at all costs came to the fore during a war we did not win. Sermons by top corporate executives on hot competition as the American way were being directed at the younger generation during a period when many of these same executives were making every effort to get around the federal regulations against price fixing and illegal cooperation among corporate "competitors." The use of sports terminology by our national administration became commonplace just before the nation learned how misleading and disastrous "game plans" and "enemy lists" can be.

G. B. Leonard, *Winning Isn't Everything. It's Nothing*, in A. YIANNAKIS, T. D. MCINTYRE, M. J. MELNICK & D. P. HART, *SPORT SOCIOLOGY: CONTEMPORARY THEMES* 84 (1976).

literature.<sup>60</sup> Further illustrations may be found in the Appendix to this paper.

Beyond this body of literature, one must rely upon observations of the culture in operation.<sup>61</sup> From the American language one gets clear clues. "Kill the umpire" is one of the most familiar sounds in baseball.<sup>62</sup> In the United States, reference to someone as a "winner"<sup>63</sup> or a "loser" has special significance. "Break his legs" or "Get

60. In fairness to the American sports world, it should be pointed out, as Erich Segal has, that the preoccupation with winning at all costs could be found as far back as ancient Greece. "The single aim in all Greek athletics was—as the etymology (from *athlon*, "prize") suggests—to win. There were no awards for second place; in fact, losing was a disgrace." E. Segal, *It is Not Strength, but Art, Obtains the Prize*, 56 THE YALE REVIEW 605, 606 (1967). He also said, "The ancient Greeks were far less hypocritical about athletics than the modern classicists. They never preached fair play, had no notion of good sportsmanship, and their unabashed aim was to win. . . . History has shown idealism and sport to be irreconcilable opposites." E. Segal, *Games People Don't Play*, 60 THE YALE REVIEW 605 (1971). This suggests a certain incongruity in the motto of Baron Pierre de Coubertin, who restaged the Olympics in 1896: "It is *not* the winning but the taking part."

61. I am aware of the perils of trying to assess one's own culture. It has been suggested that a fish is unaware of the water, but a fish taken out of taken out of the water and then returned has a pretty fair idea of what the water is like.

62. In 1888 the poem, *Casey at the Bat*, memorialized it: "'Kill him, kill the umpire,' shouted someone in the stand." Dr. Arnold Beisser, a psychiatrist who is a student of sports, said, "The old fan yelled, 'Kill the umpire.' The new fan tries to do it." Quoted in R. Fimrite, *Take Me Out to the Brawl Game*, in SPORT SOCIOLOGY: CONTEMPORARY THEMES, *supra* note 59, at 204. See also "'Kill the Umpire' Mentality: A Problem That Won't Die," N. Y. Times, Jan. 17, 1976, at 13, cols. 5-7, 15, cols. 6-8.

63. "Americans demand a winner. Frank Merriwell and fair play are passe. 'How can you be proud of a losing team?' asked the late Jim Tatum, the football coach. Another coach, Woody Hayes of Ohio State, has said, 'Anyone who tells me, "Don't worry that you lost, you played a good game anyway," I just hate.'" R. H. BOYLE, *supra* note 2, at 56. *Winning* (and "Winning big") is so important in the United States that many sports whose games originally could end in tied scores have been changed so that there must be a winner. Most sports in the United States *require* a winner even in regular season games. For example: badminton, baseball, basketball, boxing, dog racing, football, golf, handball, horse racing, ping pong, racketball, squash and tennis. A fair number of the popular British sports allow ties in regular season (non-tournament) play. For example: cricket, curling, field hockey, hurling, rugby, and soccer. Recently the North American Soccer League (NASL) in an attempt to attract greater United States following, changed some of its soccer rules. The International Federation of Football Associations (FIFA), the world body of soccer, threatened to suspend NASL membership unless these rules were changed to conform with the worldwide standards set down by the FIFA. One NASL rule unacceptable to FIFA is the league's refusal to allow ties at the end of regulation play. See N.Y. Times, Apr. 27, 1978, at 69, cols. 1-4. Consider what this attitude in the United States about *winning* does, for example, to the attempts at settling lawsuits. Contrast with this American attitude (a zero-sum conclusion) that involved in playing the ancient Chinese table game of strategy, *wei-ch'i* (commonly known in the West under its Japanese

the (other team's) star player"<sup>64</sup> is a dominant attitude in American athletics. It is no coincidence that Pele, the great soccer star, suffered no significant injury until he played in the United States. Overt, intentional violence—more than mere aggression<sup>65</sup>—has become part of the game.<sup>66</sup> Many players are recruited not because of their skill in traditional techniques of play, but, because of their

name, go). In wei-ch'i victory and defeat are relative phenomena and victory is incomplete; as contrasted with the typical Western game or sport, in regard to *operational strategy* wei-ch'i is a non-zero sum game. See S. A. BOORMAN, *THE PROTRACTED GAME: A WEI-CH'I INTERPRETATION OF MAOIST REVOLUTIONARY STRATEGY*, Ch. 1 (1969). This book is an excellent illustration of the importance of a cultural attitude toward games as transferred to the realm of war (e.g., the Vietnam War). I am grateful to my colleague, Bruce Berner, for calling this book to my attention.

64. In a study of the culture of young Canadian hockey players done under a grant from the Canada Council, Edmund W. Vaz observed:

At the Midget level teaching concentrates on the technical aspects of "playing the man" and the subtler methods of "hitting" the opposing player and "taking him out." It is perhaps no exaggeration to say that the implicit objective is to put the opposing star player out of action without doing him serious injury. Illegal tactics and "tricks" of the game are both encouraged and taught; rough play and physically aggressive performance are strongly encouraged, and sometimes players are taught the techniques of fighting. Minimal consideration is given the formal normative rules of the game, and the conceptions of sportsmanship and fair play are forgotten. . . . Under such conditions playing the game according to the "spirit and letter of the law" seems meaningless. . . . Gradually the team is molded into a tough fighting unit prepared for violence whose primary objective is to win hockey games.

E. W. Vaz, *The Culture of Young Hockey Players: Some Initial Observations*, in *SPORT SOCIOLOGY: CONTEMPORARY THEMES*, *supra* note 59 at 211, 213 (footnotes omitted). One wonders how much American sports have influenced Canadian attitudes.

65. Margaret Mead, who characterizes the American pattern of aggression as a response to the depression (surely it can be traced further back than that), says that this pattern can readily be studied in the playground. M. MEAD, *supra* note 3, at 139, 141-43.

66. See J. A. MICHENER, *supra* note 50, at 520. The Occupational Safety and Health Administration estimates that an American football player—whether high school, college or professional—is 200 times more likely to be injured than a coal miner. R. C. Yeager, *The Savage State of Sports*, *THE PHYSICIAN AND SPORTSMEDICINE*, Vol. 5, No. 5, May 1977, at 94, 96. It should be noted that in spite of his concern for "playing the game according to the rules" (see note 41 *supra*), Mr. Justice Holmes seemed to believe that a little injury never hurt anybody: "Out of heroism grows faith in the worth of heroism. The proof comes later and even may never come. Therefore, I rejoice at every dangerous sport which I see pursued. The students at Heidelberg, with their sword-slashed faces, inspire me with sincere respect. I gaze with delight upon our polo players. If once in a while in our rough riding a neck is broken, I regard it, not as a waste, but as a price well paid for the breeding of a race fit for headship and command." O. W. HOLMES, JR., *The Soldier's Faith. An Address, May 30, 1895*, in *THE HOLMES READER* 101, 105 (2d ed. J. Marke ed. 1964).

having a special ability to intimidate opposing players, they can serve as "enforcers."<sup>67</sup> The enforcers are glorified by the fans. And the nature of the game has changed. Persons who have played soccer in Europe and then play here—under the same written rules—say that in the United States it is a "different game."<sup>68</sup>

Only recently, as a result of an especially egregious incident in a basketball game last December have sports officials seriously enforced the "rules"<sup>69</sup> in an effort to contain the violence. Time does not allow an examination here of the forces which support violence or its being generally tolerated or encouraged in American sport. One would need to consider many factors including the commercialism of sport;<sup>70</sup> corporate ownership of teams; and the influence of fans, i.e., their demand for violence<sup>71</sup>—facts, incidentally, which clearly have induced more violence in ice hockey to fatten the "gate" and television receipts—a problem now reaching Canada.<sup>72</sup> It is safe to say, however, that whatever factors have determined the climate in professional sport unquestionably reflect back into the society<sup>73</sup> and filter down to college, high school and grade school.

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In the United States as contrasted with, say, a number of Latin American countries, violence, until recently, has been participated in by the fans vicariously; ours is a largely vicarious society. In Latin American countries scores of fans (as well as players and officials) have been killed by fan violence. As a result and a precaution in those countries, the playing fields are more and more protected by deep moats, barbed-wire fences and armed guards. The fear in the United States is that increased player violence will induce more fan violence, leading even to assassinations. See "Violence in Sports: Fan anxiety, anger grow dangerously," Chicago Tribune, March 5, 1978, Sec. 3, at 1, cols. 3-6, and 10, cols. 1-4.

67. N.Y. Times, Dec. 13, 1977, at 59, cols. 4-6; TIME, Dec. 26, 1976, at 70.

68. See D. Riesman and R. Denney, *supra* note 45.

69. See note 67 *supra*.

70. The impact of commercialism on sport is wide and varied. If, for example, one watches in the stadium a game which is televised, he will notice that the timing of the game (breaks in play, etc) is skewed to allow for commercials beamed to the television audience.

71. Vince Lombardi is quoted as saying, "This (football) is a violent sport. That's why fans love it." J. A. MICHENER, *supra* note 50, at 520.

72. Whether the problem has reached Canada through cultural infusion or not is unclear. It is very similar to the problem in the U.S. "When the evidence strongly indicates that there is a conscious effort to sell the violence in hockey to enrich a small group of show-business entrepreneurs at the expense of a great sport (not to mention the corruption of an entire generation's concept of sport), then one's concern grows to outrage." Testimony of Gary Leech, Investigation and Inquiry into Violence in Amateur Hockey, Report by Commissioner William R. McMurtry, Q.C., to Ministry of Community and Social Services 24 (1974). For a description of the corruptive influences of the media on American sports see J. A. MICHENER, *supra* note 50, Ch. 10.

73. "Sport permeates any number of levels of contemporary society and it touches upon and deeply influences such disparate elements as status, race relations,

athletics (perverting the educational process),<sup>74</sup> partly by example and partly because young athletes strive to learn to "play the game" in a way which will guarantee success in the "big time."<sup>75</sup>

There are those who would say that what has been discussed above is not truly characteristic of American culture. They would say that "Little League" and similar institutions are designed to teach children the "proper values" needed to succeed in life. Such an attitude proves too much. The opinion of many who have participated in such programs is that all of the worst in American sport may be found there too. James Michener, in his *Sports in America*, confirms this.<sup>76</sup> If the American attitude toward law is similar to that toward sport, as I suggest it is, then perhaps involvement at an early age in sports *does* acculturate people to "get along" in later life.<sup>77</sup> But how? What does this mean for law and lawyers?

Thorsten Veblen, in his *Theory of the Leisure Class*,<sup>78</sup> drawing his data "from everyday life, by direct observation" said that "the lawyer is exclusively occupied with the details of predatory fraud, either in achieving or checkmating chicane, and success in the profession is therefore accepted as marking a large endowment of that barbarian astuteness which has always commanded men's respect and fear."<sup>79</sup> Achieving chicane was certainly one goal of the lawyers, from the President down, in the Watergate conspiracy, and in the last few years leaders of the American legal profession have engaged in a flurry of activity calculated to underscore the importance of "playing the game according to the rules" of ethics rather than engaging in chicanery. It seems apparent that they justifiably feel

business life, automotive designs, clothing styles, the concept of the hero, language, and ethical values. For better or for worse, it gives form and substance to much in American life. . . ." R. H. BOYLE, *supra* note 2, at 3-4.

74. J. A. MICHENER, *supra* note 50, at 193.

75. *Id. passim*. See also SPORT SOCIOLOGY: CONTEMPORARY THEMES, *supra* note 59 *passim*.

76. J. A. MICHENER, *supra* note 50, at 123-54. At pages 26-31 he discusses sport as a character builder in the United States.

77. "In sport the citizen of the technical society finds the same spirit, criteria, morality, actions, and objectives—in short, all the technical laws and customs—which he encounters in office or factory." J. ELLUL, THE TECHNOLOGICAL SOCIETY 384 (1964). "[S]port is a social institution which has primary functions in disseminating and reinforcing the values regulating behavior and goal attainment and determining acceptable solutions to problems in the secular life." H. EDWARDS, *Sport and American Society*, in SPORT SOCIOLOGY: CONTEMPORARY THEMES, *supra* note 59, at 21.

78. T. VEBLEN, THE THEORY OF THE LEISURE CLASS viii (Modern Library ed., 1899).

79. *Id.* at 231.

that the public suspects them of the latter. They are suspected of chicanery because that is what a large segment of the population feel that lawyers are *for*.

I am unaware of any scientific legal study which would support<sup>80</sup> (or contradict) my opinion, based, as were Veblen's, on direct observation of everyday life,<sup>81</sup> that it is a characteristically (though not necessarily uniquely)<sup>82</sup> American belief *at the unofficial level*,<sup>83</sup> that, to borrow Durocher's language, one has a "right to test the rules by seeing how far they can be bent" (witness law reform by test-case litigation), that one may "win any way (one) can as long as (he) can get away with it," that "nice guys finish last." I trust that before I conclude it will be clear that the ultimate point that I wish to make does not depend on the accuracy of this particular conclusion about the "American character," though I think I am right and I ask my audience to accept my conclusion for the moment.

*The Infusion of Culture Through the Transfer of Cultural Elements*

According to historian Arnold Toynbee, future historians will say that,

the great event of the twentieth century was the impact of Western civilization upon all other living societies of

80. However, the literature on the sociology of sport certainly suggests that my theory is correct. Dr. Arnold Beisser said: "Sports and the rest of society are mirrors of one another. The sports fan reflects society's dissatisfactions—a disillusionment, for example, with materialism." Quoted in R. Fimrite, *supra* note 62, at 202, 205. See also G. Lüschen, *The Interdependence of Sport and Culture*, in THE CROSS-CULTURAL ANALYSES OF SPORT AND GAMES 85 (G. Luschen ed.); L. A. Zurcher, Jr. and A. Meadow, *On Bullfights and Baseball: An Example of Interaction of Social Institutions*, *Id.* at 109.

81. Large numbers of students and colleagues whom I have asked have responded almost uniformly in support of my theory. These people do not share what they understand to be the public's opinion; however, they feel that it exists and that it poses great problems for the lawyer.

82. "In 'Europe's Lighter Side,' in the New York Herald-Tribune, July 20, 1954, at 21, Art Buchwald reported that many Europeans had been puzzled by promising business deals that, after being discussed with them by vacationing Americans, had never been closed. He states: 'The only way we've been able to appease the Europeans is to explain that the Americans weren't being malicious. They were just trying to deduct their trip from their income tax. After it's explained, the European is always mollified. If there's one thing a European understands, it's tax evasion.'" From B. I. BITTKER AND L. M. STONE, FEDERAL INCOME ESTATE AND GIFT TAXATION 257-58 (4th ed. 1972).

83. There is some fascinating research on the practice of American businessmen to conduct business without reliance on legal rules of contract because the rules frustrate their goals. See, e.g., S. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AMER. SOCIOLOGICAL REV. 55 (1963).



the world of that day. They will say of this impact that it was so powerful and persuasive that it turned the lives of all its victims upside down and inside out—affecting the behavior, outlook, feelings, and beliefs of individual men, women, and children in an intimate way, touching chords in human souls that are not touched by mere external material forces—however ponderous and terrifying.<sup>84</sup>

One reading these words might at first think that such changes are the result of voluntary or at least conscious importation on a wholesale basis. Not so. Much of the change has resulted unintentionally and unknowingly on the part of the “victims.”

To be sure, some of the *received* cultural elements are changed through the influence of the receiving culture. In the case of law, reception statutes provided for that.<sup>85</sup> In *Nyali Ld. v. Attorney-General*,<sup>86</sup> Lord Denning, in his usual felicitous language, said,

The next proviso [to Order in Council 1902 as amended] provides, however, that the common law is to apply “subject to such qualifications as local circumstances render necessary.” This wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to people of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far-off lands the people must have a law which they

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84. A. TOYNBEE, CIVILIZATION ON TRIAL 214 (1948), quoted in E. F. FRAZIER, *supra* note 3, at 6. See Frazier’s excellent treatment of the subject. See also R. BENEDICT, *supra* note 21, at 5ff.

85. See, e.g., LAWS OF KENYA, REV. 1968, Cap. 8, s. 3 (1); LAWS OF TANZANIA, REV. 1965, Cap. 453, s. 2; LAWS OF UGANDA, REV. 1964, Cap. 34, s. 2. However, in the past, little attention was paid by courts to these statutes. For a proposal that courts should take these statutes seriously and for suggestions as to how they should proceed, see J. A. Hiller, *The Law-Creative Role of Appellate Courts in Developing Countries: An Emphasis on East Africa*, 24 I.C.L.Q. 205 (1975).

86. (1956) 1 Q.B. 1, (1955) 1 All. E.R. 646.

understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task which calls for all their wisdom.<sup>87</sup>

In spite of the assertions by some that reception can be accomplished absent the specter of cultural imperialism,<sup>88</sup> the reality is that the received law and legal institutions<sup>89</sup> are not changed by but change the receiving culture. Naturally, since development contemplates change, this will and must happen, but it happens even more pervasively<sup>90</sup> and often with more serious consequences<sup>91</sup> than many people realize.

The effects of infusion of Western culture in the most pervasive ways cut deeper and wider as they are carried on the cultural vehicle of law. In earlier days it was possible to say that contacts between Europeans and non-Europeans brought about infusion of European culture by producing a type of acculturation limited to certain areas and to certain classes of the indigenous population, not affecting the deeper layers of the personalities of native peoples or changing their fundamental values and outlooks on life.<sup>92</sup> Those who *were* affected, who adopted European languages, values, habits, behavior, sentiments, etc. became what Frazier has called "marginal men," i.e., cultural hybrids.<sup>93</sup> It was these people

87. (1956) 1 Q.B. at 16-17.

88. T. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?*, 1972 WIS. L. REV. 767. He points out that serious attempts are made by exporters and importers of elements of legal culture to avoid the possibility of harmful effects, and he feels that the results are successful.

89. "[I]nstitutions may be considered as clusters of social actions with a special, relatively well-defined objective, and for this reason each institution becomes an expression of the cultural meanings and understanding attributed to each set of actions. Hence the process of transfer of institutions may be considered, in the most general way, as a process of acculturation or cultural diffusion. . . ." B. F. Hoselitz, *supra* note 26, at 27-28.

90. "Every culture must be considered as a whole. The transformation of a given element through the effect of technique produces shocks in all areas." J. ELLUL, *supra* note 77, at 122.

91. For example, adoption of European styles of dress and habitation by Melanesians and Hawaiians had serious effects on health. E. F. FRAZIER, *supra* note 3, at 71ff.

92. *Id.* at 35.

93. *Id.* at 35, 311ff. Considering the typical bifurcation of developing societies (the modernizing enclave on the one hand and the rural hinterland on the other), there is a process of the same sort still in effect. But as lines of communication develop and become more effective, the hinterland culture will give way.

who became the leaders of nationalistic movements<sup>94</sup> and later national leaders. It is many of these who have a vested interest in the infusion of the received culture because of their exclusive skills in European languages,<sup>95</sup> technology, art,<sup>96</sup> law, etc. These are people who called and call the tune for development. They shape the legal culture and the culture in general. I do not intend here to condemn this class of people, these change agents, but merely to point out how especially difficult is their task of limiting and directing the sorts of changes which they bring about in their societies. One aspect of the difficulty, as I have suggested, is the subtlety and strength of interrelationships between cultural elements.

Some national leaders are becoming more aware of this problem. The Tanzanian shift to Swahili,<sup>97</sup> the desire of Kenyans to find a national language other than English, the efforts of the Sudanese to bring their law more closely into line with their Arabic language and culture,<sup>98</sup> the attempts of both Tanzania and Chile to transform their legal systems from liberal capitalist to socialist in style and content, and the almost universal movements toward revival of traditional cultures in developing nations reflect this awareness.

One small but interesting illustration of the attempt to reconcile Tanzanian tradition and the received common law is President Nyerere's handling of a problem of widespread cattle theft in 1966. During a tour of northern Tanzania, he came into an area which was troubled with numerous thefts of cattle, and he was asked by the

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94. Frazier said, "A French scholar and traveler expressed the fear that instruction in the French language was creating a group of declasses who, alienated from the natives and not assimilated by the French administration, would become the leaders of discontent and revolt." *Id.* at 313, citing JACQUES WEULERSSE, *NOIRS ET BLANCS* 16 (1931).

95. See O. K. Mutungi, *supra* note 4, at 25; A. B. Weston, *supra* note 5, at 61.

96. For an example of the rather arrogant attitude of a Western-trained East African artist/Minister of Culture toward traditional art, see S. Ntiro, *The Future of East African Art*, in *EAST AFRICA'S CULTURAL HERITAGE*, 55 at 69, (Nairobi: East African Institute of Social and Cultural Affairs, 1966), quoted in J. A. Hiller, *The Makonde and Their Sculpture*, *THE CRESSET*, October 1971 at 10.

97. See A. B. Weston, *supra* note 5.

98. Zaki Mustafa, sometimes law professor and dean, sometimes Attorney-General of the Sudan, in "Law Reform in the Sudan," a speech delivered on June 12, 1974 at the Workshop on The Use of Social Science Methodology in Legal Research, University of Nairobi, Faculty of Law, discussed the various attempts to bring the law into line with the people's Arabic culture. He said that one of the goals in codification in the Sudan was "to produce a core code," even though it contained common law elements, "so as to allow the courts to develop a Sudanese jurisprudence."

people to deal with the problem. He ordered that all suspected cattle thieves be rounded up and detained. Many were arrested, sternly reprimanded, placed in custody and held there for some time. This was done merely upon his executive order without the delay that might be occasioned by prior investigation and trials and without the escaping of thieves and loss of cattle which would result from the delay. At a later date the investigations were made and the guilt or innocence of the detained persons determined. Those whose innocence was established were released and compensated by the government for their detention. In explaining his actions, President Nyerere said that, while he had the highest respect for the presumption of innocence inherent in the received common law, at times such as this he must use the traditional authority of the tribal chief.<sup>99</sup>

A word of caution is in order. Cultural adaptation of an existing body of received law cannot be accomplished without careful planning. Tanzania's recent hasty attempts to bring its legal system into line with community expectations consistent with the political culture seem, according to Rudy James' account,<sup>100</sup> to be made in the interest of expediency but at a serious cost of legality. The opposite was said to be the case in Chile.<sup>101</sup> The recent hasty attempt to establish Swahili as Kenya's national language, though well intentioned, caused dissonance within certain areas of the society.<sup>102</sup> A much more wholistic approach must be used in such efforts than has yet been done.<sup>103</sup> A coordinated study of all aspects of the culture should be made, employing the talents of a great variety of experts: lawyers, political scientists, party officials, linguists,<sup>104</sup> artists, sociologists, etc.<sup>105</sup>

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99. I have discussed this elsewhere. See J. A. Hiller, *Teaching Jurisprudence in East Africa*, 10 FOREIGN EXCHANGE BULLETIN 3, 4 (1969).

100. See R. W. James, *Implementing the Arusha Declaration—The Role of the Legal System*, 3 AFRICAN REVIEW 179 (1973).

101. J. Viera-Gallo, *The Legal System and Socialism*, 1972 WIS. L. REV. 754. He points out that while the legal system must suit the needs and requirements of the society, the rule of law will be respected and the law observed as Chile transforms its liberal capitalist legal system into one suitable for the country's needs.

102. Cf. O. K. Mutungi, *supra* note 4, at 25.

103. See J. A. Hiller, *supra* note 85 *passim*. There this problem is dealt with at length with the principal focus on the courts as the instruments of change. The concepts and techniques discussed can be applied to other institutions as well.

104. See A. B. Weston, *supra* note 5.

105. Cf. L. L. Kato, *Methodology of Law Reform*, in EAST AFRICAN LAW AND SOCIAL CHANGE 279 (G.F.A. Sawyerr ed. 1967). He stressed that wide scale reform must be preceded by extensive research to determine what reform is needed and what is possible.

## CONCLUSION

Working with one element of culture such as sport, one which we might at first think has much less than language to offer development lawyers, we learn how intimately one component of a culture pattern is related to another. We see that national character is reflected in many things: language, an attitude toward sports, an attitude toward law, etc. We become more aware that we cannot merely transplant and adapt a whole foreign legal system<sup>106</sup> or even parts of it baggage free. Most of the literature on the non-transferability of law has warned us of many of the dangers. What I have tried to demonstrate with my hypothesis on law and sports is that this baggage is more subtle, invisible and firmly attached than many may suspect. The unquestioned transplantation of too many elements from one cultural pattern to another may transfer into the receiving culture not only legal and non-legal institutions alien to it (which, perhaps, can be dealt with by adaptation), but also—and more seriously—wholly different *attitudes*<sup>107</sup> about what law is, how it works<sup>108</sup> and what claims it has on people's obedience. Further-

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106. The law is rooted in the culture, and it responds, within cultural limits, to the specific demands of a given society in a given time and place. It is, at bottom, a historically determined process by which certain social problems are perceived, formulated, and resolved. Substitution of one legal system for another is neither possible nor desirable. . . . [T]here is something out there in the civil law world that is important and different. It is more than a set of different legal rules. It is not summed up in stereotypes about civil law codes and common law judicial decisions. It is subtler than that, and more pervasive. It has historical, political, social—in a word, cultural—dimensions. Anyone, lawyer or non-lawyer, who wants to understand Western Europe and Latin America (or, for that matter, the civil law nations of the Middle East, Asia and Africa) must become familiar with the civil law tradition.

J. H. MERRYMAN, *THE CIVIL LAW TRADITION* 157-59 (1969). For a recommendation that East African legal systems be restructured on the model of the civil law systems presently operating in Eastern European Socialist countries, see G. Eorsi, *Some Problems of Making the Law*, 3 E.A.L.J. 272 (1967). See also J. Viera-Gallo, *supra* note 101.

107. The man on the street in the United States sees himself and the government as adversaries. See R. BENEDICT, *supra* note 21, at 252-53. As a result, Americans have developed (through private enterprise) many media of communication about law (law journals, loose-leaf services, Bar conferences, newspapers, computer services, etc.) so that they will not have to rely on government sources alone. The Africans, on the other hand, seem to accept the fact that the most effective and reliable source of communication is government itself. This, no doubt, has cultural roots in traditional methods of communication and patterns of trust and authority. See generally, R. B. Seidman, *supra* note 4 and O. K. Mutungi, *supra* note 4.

108. Americans, for example, expect change. M. MEAD, *supra* note 3, at 43. Surely those in traditional societies have had a different attitude. What might this

more, traditions die hard and the receiving society by importing (intentionally or unintentionally) new attitudes about law may find it difficult to replace unwanted traditions and attitudes. A good example is "instant justice" in East Africa—the tendency of citizens to take the law into their own hands and punish in the street a criminal whom they have caught in the act.

Attitudes about law are often difficult to change but may change unexpectedly as other aspects of the cultural pattern are intentionally altered, and vice-versa. Most lawmaking in developing countries largely fails to take into account the "ripple effects" or unwanted consequences which have been mentioned here. Thought should be given to the creation of law reform commissions and other institutions specializing in techniques capable of predicting change and of processing feedback so as to avoid and counteract unwanted change.<sup>109</sup> It is this problem which deserves more attention from the lawyers, the social scientists and others unless a mass world culture—Marshall McLuhan's global village—is an inevitable reality.

### POSTSCRIPT

My audience may feel that I have oversimplified or that I have taken liberties with the subject matter. If I have, it has been intentional. I am aware of the consensus and conflict theories of cultural change;<sup>110</sup> that is, there are those who say that a society's culture is a unitary product of consensus and others who say that there is no single national culture, that a society's character is the result or consequence of many conflicting attitudes, styles, preferences, etc. I tend to the former theory insofar as it suggests an identifiable national culture but at the same time recognize that all societies below the national level are culturally pluralistic, the outcome of conflicting forces only some of which may be immediately visible because characteristic of dominant elites. Canada and the United States are clear examples. Indeed, many developing countries are striking examples because original cultural "wholes" (e.g., the Masai

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mean with regard to their attitudes, for example, toward the finality of judicial decisions or judicial lawmaking in general?

109. Cf. J. A. Hiller, *supra* note 85, at 240-54 and J. Hiller, *The Law-Creative Role of Appellate Courts in the Commonwealth*, 27 I.C.L.Q. 85 (1978).

110. For a general treatment of the subject see H. M. HODGES, JR., CONFLICT AND CONSENSUS: AN INTRODUCTION TO SOCIOLOGY, especially pages 34 and 93 (1971). On page 93 he points out, and rightly so, that national character may change through time. See also B. MALINOWSKI, *supra* note 3 *passim*.

in East Africa, various tribes in West Africa) were split by the colonizers who then forced many separate cultures or segments of cultural wholes together into unnatural national, political units constantly interacting.

I am aware that not *every* American shares the attitudes which I have herein described as American. Nor do *all* Englishmen have the view of "fair play" which I describe as English. There are differences along various lines not the least important of which is class.<sup>111</sup> But I still suggest that there is a tendency toward national characteristics in virtually all countries, and developing countries (even those which may be said not to have a national character) especially are *seeking* national identities or cultural "cores" in order to find the appropriate "cement" to hold their many subcultures together.<sup>112</sup> Lessons which we learn by studying national "types" or national cultures apply *mutatis mutandis* to situations involving sub-cultural pressures and influences.

#### APPENDIX

Following are two extracts included by Professor Lon Fuller of Harvard in the materials presented to his students in Jurisprudence.

##### "WHEN IS A RULE OF FOOTBALL A RULE?"

An Extract from a series of articles by Frank Leahy, "Farewell to Notre Dame," reprinted from the Boston Herald for March 24, 1954.

'But now that I'm through coaching for good . . . I feel at last free to answer some criticisms leveled at our school and at me these last 16 months, criticisms unfair and ridiculous. First, the feigned injuries. A feigned injury by one of our players at the end of each half of the Iowa game last fall stopped the clock and gave us the extra seconds needed to score our touchdowns in a 14-14 tie. The clamor that arose from certain sections of the press suggested we had not been playing the game in the full spirit of "The Rover Boys."

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111. See note 46 *supra*; E. W. Vaz, *supra* note 64, at 211-13; and R. H. BOYLE, *supra* note 2, Chs. 4-6.

112. For a number of interesting studies of various attempts at national cohesion, see A. F. ELDRIDGE, *LEGISLATURES IN PLURAL SOCIETIES: THE SEARCH FOR COHESION IN NATIONAL DEVELOPMENT* (1977).

'Feigned injuries have been part of football since Walter Camp invented the first down more than 70 years ago. Consider only a couple of fairly recent examples I witnessed. At Dallas, in 1949, we skinned by Southern Methodist, 27-20. Near the end the Mustangs feigned injuries to gain time, play after play. In fact, their fans began booing us for dirty playing. Check this with Matty Bell, S.M.U. athletic director and then the head coach. With two seconds to go in our 27-21 victory over Oklahoma at Notre Dame in 1952, one of their players lay sprawled. This stopped the clock and gave them a chance to get off one more pass. It didn't click. But it might have.

'Earlier that year against Pittsburgh, a feigned injury near the end of the first half gave us time to throw a touchdown pass. Nobody said anything about it. We lost the game, 22-19. There may be a connection.

'"Be sure," Rock used to tell us, "that the man who fakes the injury has the most capable replacement." Other coaches have told their players the same thing. Just ask any coach or player you know, at the college, high school, or even grade school level.

'Yet, you probably never heard about a feigned injury until our Iowa game, and I'll tell you why. Usually, the extra seconds gained avail a team little or nothing. Against Iowa, we used the extra seconds to score two touchdowns, a tribute to Notre Dame's typical determination and poise. It seems to me that the feigned-injury controversy was caused not by what was done, but by who did it and how successfully.

'If this is not so, why, tell me, did the National Collegiate Athletic Association rules committee wait all these years until two months ago to announce publicly that the feigned injury "is dishonest, unsportsmanlike and contrary to the rules."

'There never has been any rule against the feigned injury and there still isn't. A rule is not a rule unless an official can enforce it. No official can tell for sure whether a player is feigning an injury. Feigned injuries can be stopped only by a rule that removes any benefit from them. Such a rule would require that the clock be kept going, despite any injury, the last two minutes of each half.



The NCAA rules committee has failed to take any such action.'

#### HOW A BASEBALL CATCHER CAN HELP HIS TEAM BY FOOLING THE UMPIRE

(The following passage is taken from George ("Specs") Torporcer, "Baseball—From Back Yard to Big League," 1954, pp. 55-57, where it did *not* carry the title assigned to it above.)

Now, let someone take a position as a batter at the plate. You can stand quite close behind the plate and still be safe from getting hit from the swinging bat. Try it. Note that the batter has to stride forward as he swings, so his bat never actually comes back close to you. Figure out for yourself exactly how close you can stand, the closer the better. . . .

Why is it so important to stand close? There are many reasons.

Suppose your pitcher throws a curve ball low and it dives into the dirt. Because you're close up you can catch it either before it hits the ground, or you can take it on a short pick-up (not difficult). If you are further back, the same pitch will take a longer bound and, because of the curve's spin, will probably twist away, off the end of your mitt. The short pick-up (just as the ball rises after hitting the ground) is easy to make because there is no twist on the ball at this point, and you can smother the ball in your mitt.

For another thing, when you stand close, your mitt is nearer to the strike zone. Curve balls on the outside or breaking down below the knees are easier to handle and you can make them appear as strikes. While umpires are supposed to call balls and strikes according to where the ball passes over the plate, they are only human and will not be able to see everything. If you catch the ball too low or too far outside, you lessen the chance of having the umpire call the pitch a strike. . . .

Unless there are base runners moving and you have to throw, you should always "ride with the pitch." This is a motion of drawing your hands in toward you as you catch the ball. If the pitch is over the plate or close to it,

draw your hands toward your waist in a funneling motion. This not only lessens the impact of the ball and saves your hand from being pounded, but it will gain strikes on doubtful pitches. Umpires are more likely to call a pitch strike if it's drawn in by you, than if it's pushed away. Don't fight the ball by pushing or jerking it sideways. Just a smooth funneling is easiest and best, more efficient in every way.

