

THE ETHICAL CONSUMER: A REJECTER OF POSITIVE LAW ARBITRAGE

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INTRODUCTION

Ralph had been a socially conscious person while in college. He had written letters to Congresspersons demanding strong pollution control and worker protection laws, including a higher federal minimum wage, affirmative action laws, and the rights of a worker to bargain collectively. He believed that all of these would contribute to a more just, socially inclusive society. Also, Ralph heeded his economics professors' teachings and tried to maximize his utility when spending his money.

The time arrived for Ralph to enter the workforce. After scoring satisfactorily on an aptitude exam, he was hired by the Chrysler automobile corporation. When after a short time a slot opened up in a Chrysler supervisors' training program, Ralph applied and was selected. Ralph aggressively pushed Chrysler to hire women and minorities, to comply with environmental laws, and to adopt and enforce employee protections such as those envisioned by the Occupational Safety and Health Act.

Upon receiving his first paycheck, Ralph decided to purchase a new car. He considered a Chrysler product but decided on a Korean-made Hyundai because it was \$2000 cheaper and of comparable quality to Chrysler vehicles. When he drove the Hyundai to work, several coworkers asked Ralph why he had bought a foreign car. He responded, "Quality and price. I don't have money to burn, and this car was cheaper and about equal in reliability." A coworker noted that Korea does not have minimum wage laws,¹ environmental laws,² or employee rights

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¹ See DEP'T ST., COUNTRY REP. ON HUM. RTS. PRAC. 677 (1993). "The [Korean] Government implemented a minimum wage law in 1988. The minimum wage level is reviewed annually. In 1993 it was about \$10 per day (8,041 won). Companies with fewer than 10 employees are exempt from this law." *Id.*

The hourly compensation costs for production workers in manufacturing for Korea was \$5.87 in 1993 (the most recent year reported in dollar terms) compared to \$16.79 for comparable U.S. workers for the same year. DEP'T OF LAB., BUREAU OF LAB. STAT. RPT. 873, Table 1 (May 1994). See also DEP'T OF LAB., BULL. 2340, HANDBOOK OF

such as affirmative action programs,³ as meaningful or as rigor-

LAB. STAT. 572 (August 1989). The hourly wage figures given include total payments to the worker (wages for time worked, vacation pay, holiday pay, and pay for other leave; bonuses and the like; and pay in kind) before any payroll deductions. Also included are employer payments for insurance programs and contractual private benefit plans. "In addition, for some countries, compensation is adjusted for other taxes on payrolls or employment (or reduced to reflect subsidies) that are regarded as labor costs. For consistency, compensation is measured per hour worked for every country." *Id.* The author has confirmed with Mr. Arthur Neef, Office of Productivity and Technology, Bureau of Labor Statistics, U.S. Department of Labor, that it applies also to the \$5.87 and \$16.79 figure for 1993.

² See David E. Sanger, *Chemical Leak in Korea Brings Forth a New Era*, N.Y. TIMES, April 16, 1991, at D1. The author points out that South Korea started a program of "supercharged industrialization" in a valley formed by the Naktong River. *Id.* at D5.

But a recent chemical spill that some critics link to South Korea's "industrialize at all cost" policies is now causing the area and the nation much anguish.

.....
 For years, South Korea has been notoriously lax about what is dumped into the air and water, and while few officials will acknowledge it openly, the absence of expensive environmental regulations has made investment in industry here attractive.

Id. at D5, D7.

³ *But see* Republic of Korea Constitution, reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD Vol. IX (Albert P. Blaustein & Gisbert H. Flanz eds., 1994). The Korean Constitution, ch. II, art. 32(1), (3), and (4), provides:

(1) All citizens shall have the right to work. The State shall endeavor to promote the employment of workers and to guarantee optimum wages through social and economic means and shall enforce a minimum wage system as prescribed by law.

.....
 (3) Standards of working conditions shall be determined by law in such a way as to guarantee human dignity.

(4) Special protection shall be accorded to working women and they shall not be subjected to unjust discrimination in terms of employment, wages and working conditions.

Id. One could assert that these paragraphs provide the functional equivalent of Title VII of the Civil Rights Act of 1964 (equal employment opportunity) and, perhaps, even affirmative action in the U.S. since, arguably, declaring "all citizens have the right to work" combined with guaranteeing "human dignity" should enable minorities to obtain work. Further, the wording should serve to protect minorities from unjust discrimination in pursuit of that work.

However, discussions about affirmative action based on ethnicity in Korea are academic, since Korea is ethnically homogeneous. Of the total Korean population, 99% is Korean and about 50,000 Chinese are the only significant minority. John Andrews, *THE ECONOMIST: POCKET ASIA* 173, 177 (1993). Thus, unlike the ethnically diverse United States, which has about 12% blacks (the term used by the STATISTICAL ABSTRACT OF THE UNITED STATES), about 8.8% Hispanics, about 2.8% Asian and Pacific Islanders, and about .8% American Indian, Eskimo, and Aleut, Korea has little need for equal employment opportunity laws based on race or national origin (two of the Title VII categories). However, there is opportunity for religious and sex discrimination given the religious diversity (Buddhists 37%, Christians 30%, Confucians 17%, and Chundo Kyo 4%) and the fact that the population is almost equally divided along gender lines. *Id.* at 177.

ously enforced as Ralph had urged Chrysler to follow.

Ralph replied, "So what? I have a limited income and have to make that money stretch as far as possible by buying the lowest priced goods in the market. That doesn't only apply to cars, but to food, clothing, and all else."

While the persons identified in the previous scenario are apocryphal,⁴ the story illustrates what could be a very real phenomenon:

There is evidence that employment rights based on gender are poorly enforced in Korea. See DEP'T ST., COUNTRY REP. ON HUM. RTS. PRAC. 673 (1993).

Korea's conservative Confucian tradition has left women subordinate to men socially, economically, and legally. Most married women do not work outside the home. In large companies women are often expected to resign upon marriage or no later than the birth of their first child. Judicial decisions in cases involving women petitioners or defendants are often heavily influenced by the Korean Confucian ethos, which does not accord women equal status with men. There has been a gradual improvement, however, in social mores and values affecting women. Women have full access to education, become government officials, and hold elected office.

The National Assembly enacted an Equal Employment Opportunity (EEO) law in 1988 and, in early 1991, the Government issued "Guidelines to Eliminate Sexual Discrimination in Employment." So far, however, the law and guidelines have had only limited effect. There are very few women who work as company executives, officials in government ministries, or lawyers.

While women account for just over 40 percent of the economically active population, the average female worker's wage remained a little over half that of the average male worker, and starting wages for female university graduates were 40 percent lower than those of their male counterparts.

Id. Discrimination based on national origin is also prevalent in Korea. *Id.* at 674.

Citizenship in Korea is based on blood, not location of birth, and Koreans must show as proof their family genealogy. Thus, Korea-born Chinese residents cannot obtain Korean citizenship or become public servants and are unlikely to be hired by major corporations. Due to legal as well as social discrimination, many Chinese residents in Korea have emigrated to other countries since the 1970's, with the number of Chinese residents decreasing from 40,000 to 18,000 over the past several years. Amerasian children are usually able to obtain Korean citizenship. No formal discrimination exists. Informal discrimination, however, is prevalent. Although a few Amerasians have achieved fame in sports or entertainment, an Amerasian is unlikely to become prominent in academia, business or government.

Id. Korea has no national protections regarding accessibility for the disabled. "The Government has not enacted legislation or otherwise mandated accessibility for the disabled." *Id.*

⁴ *But see* Peter McGrath and Howard Fineman, *A New Voting Bloc*, NEWSWEEK, Dec. 31, 1984, at 30.

It is by now almost a cliché that Yuppie ideology juxtaposes economic conservatism with liberalism on social issues like abortion and homosexual rights. With their newfound stake in the economy, Yuppies cringe at government regulation of markets; many embrace the entrepreneurial

The Unethical Consumer. This is someone who demands positive laws providing significant benefits to workers and addressing perceived social evils, but who, when called upon by his or her purchasing patterns, refuses to bear the associated social overhead. Sovereigns responding to worker and public calls for socially responsible laws are referred to here as "strict sovereigns." Costs of being socially responsible are the result of laws—called positive laws by nineteenth-century English legal philosopher John Austin because they were "posited" or placed on the populous by the sovereign.

The last thirty years have witnessed a renaissance of social responsibility in many strict sovereigns. For example, one strict sovereign, the United States, has passed a wide range of positive laws⁵ designed to address perceived social wrongs. When workers and members of society express a desire for various worker and environmental protection laws, they exhibit social awareness. It is appropriate for workers in their role as workers or as members of society to demand and obtain positive laws sensitive to their interests. However, such workers and members of society have an ethical duty to businesses and other productive elements of the society in which they live: To support the cultural values as well as those bearing compliance burdens which positive laws have imposed on producers. Consumers who are conscious and observant of this reciprocal duty are Ethical Consumers. The purpose of the Ethical Consumer construct is to support both the producers bearing the costs of social responsibility imposed by positive law as well as the

creed of no riches without risk. But they welcome government intervention in such areas as environmental management, or discrimination against minorities. At bottom, one issue animates them: quality of life, others' as well as their own. "There is a tension between social activism and me-too self-concern," says Pat Caddell. "What this generation wants is a synthesis of that, politically."

Id.

⁵ See, e.g., Toxic Substances Control Act, 15 U.S.C. §§ 2601 to 2671 (1988); Marine Mammal Protection Act, 16 U.S.C. §§ 1361 to 1407 (1988); Marine Sanctuaries Act, 16 U.S.C. §§ 1431 to 1445 (1988); Endangered Species Act, 16 U.S.C. §§ 1531 to 1544 (1988); Fair Labor Standards Act, 29 U.S.C.A. § 206 (a) (1) (West Supp. 1993) (amendments of 1989 raising federal minimum wage to \$4.25 per hour); Clean Water Act, 33 U.S.C. §§ 1251 to 1387 (1988); Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (1988); National Environmental Policy Act, 42 U.S.C. § 4321 to 4370a (1988); Noise Control Act, 42 U.S.C. §§ 4901 to 4918 (1988); Clean Air Act, 42 U.S.C. §§ 7401 to 7642 (1988); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 to 6992k (1988); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 to 9675 (1988); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988); Nuclear Waste Policy Act, 42 U.S.C. §§ 10101 to 10270 (1988); Americans with Disabilities Act, 42 U.S.C. §§ 12101 to 12213 (1988).

cultural values of socially conscious nations who, via their positive laws, have given substance to their citizens' ethical concerns. The Ethical Consumer recognizes that giving the imprimatur of positive law to their ethics has economic and social costs borne by those subject to such positive laws.

The ethical duty of consumers is founded upon natural law principles, including the requirement that each of us be fair in our dealings and take consistent positions on a matter. Further, those who demand positive law but who do not bear its costs are denying an ethical reality: for every right, there is an associated duty. Those consumers who are ignorant and nonobservant of the ethical linkage between demanding socially conscious positive laws and supporting those subject to such laws are unethical. Efforts to justify unethical behavior by resorting to utilitarian notions points out a conflict between utilitarianism and humanitarian-based legal positivism that advanced industrial nations now confront. Consumers as individuals must reject positive law arbitrage if the positive law structures erected by major industrial democracies in response to citizen/consumer demands are to survive.

The problem of one sovereign's—called the lax sovereign—positive law intrusion into the territory of another sovereign—called the strict sovereign—occurs subtly by the mere purchase by a consumer from a strict sovereign of goods made in the lax sovereign. This Article examines John Austin's positive law and some positive law differentials that exist today which encourage consumers to purchase foreign goods made under sovereigns having less sensitive laws than those that these very consumers have demanded.

Possible solutions to the positive law arbitrage are examined. The preferred solution is the Ethical Consumer. The characteristics of the Ethical Consumer are examined as well as possible utilitarian conflicts. The Ethical Consumer does not only purchase U.S. products but can be ethical if she purchases the products of any sovereign provided that it has substantially equivalent positive laws to those which the consumer has demanded of her sovereign. Finally, an examination is made to determine if the Ethical Consumer violates Ricardian principles of comparative advantage or conflicts with John Austin's legal positivism.

Throughout this Article, the "U.S." is used as an example of a strict positive law sovereign whose positive laws the ethical consumer seeks to protect. However, the idea of Ethical Consumers is generalizable to consumers everywhere who, by their purchasing

decisions, wish to reinforce and protect any sovereign which they believe is passing and enforcing ethical positive laws or positive laws from which the Ethical Consumer has either demanded or received substantial economic benefits, or with which he or she philosophically agrees.

I. JOHN AUSTIN'S POSITIVE LAW

Positive law refers to laws imposed by the sovereign on political inferiors with sanctions imposed if these laws are broken, and which laws are habitually obeyed by the political inferiors.⁶ John Austin expounded at length about positive law in his monumental work, *The Province of Jurisprudence Determined*, based on lectures delivered in London in 1829 to, among others, John Stuart Mill. A version of several of these lectures was first published in 1832 thanks to the efforts of his wife, Sarah. During Austin's life, his book was unsuccessful, having scant reviews in scholarly journals.⁷ Although Austin enjoyed the company of some of the most illustrious thinkers of his, or any, era—Jeremy Bentham and both James Mill and his son, John Stuart Mill, being among them—Austin, according to his wife, lived “a life of unbroken disappointment and failure.”⁸ Following his death, however, the genius of his work was

⁶ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 11 (Isaiah Berlin et al. eds., Weidenfeld and Nicolson 1954) (1832).

⁷ See *id.* at viii. “Through the efforts of Sarah Austin an expanded version of the first part of the lectures was published in the autumn of 1832, under the title of *The Province of Jurisprudence Determined*, but no notice was taken of it outside Austin's circle of friends and it was never reviewed in any learned journal.” *Id.*

But see Wilfrid E. Rumble, *Nineteenth-Century Perceptions of John Austin: Utilitarianism and the Reviews of The Province of Jurisprudence Determined*, 3 *UTILITAS* 199 (1991).

Although scholars have tended to pay relatively little attention to them, the reviews illuminate both the book and its reception. Of course, what is true in this respect of some of the reviews is definitely not true of all of them. Their length, quality, and insights vary tremendously. Nonetheless, at their best the reviews are of great value for understanding the *PJD* [*Province of Jurisprudence Determined*] and how it was received. They clearly demonstrate, for example, the inaccuracy of a not uncommon opinion fostered by Sarah Austin. The nub of it is the view that her husband was, during his lifetime, a prophet without honour in his own country. While it is impossible to determine the accuracy of a statement in the *Law Magazine and Review* that “everyone is praising his [Austin's] book”, almost all of the other six reviews of the first edition of it were laudatory. They establish without question that the merits of the *PJD* were *not* appreciated “only at a later period, and by slow degrees”. In fact, they were recognized immediately by almost all of the numerous reviews of the first edition of the book.

Id. at 200 (footnotes omitted).

⁸ Austin, *supra* note 6, at xvi.

recognized. As Professor H.L.A. Hart has pointed out, Austin's book is now credited with being the basis of the study of jurisprudence in England.⁹

Austin's view of positive law was rigid. Matters often termed "law," but which failed to meet his definitional criteria, were rejected as positive law. For example, he did not accept international law as positive law¹⁰ since he saw no sovereign or political superior having universal authority, a requisite under his positive law definition. He referred to international "law" as "opinion."

II. THE EXTRATERRITORIAL REACH OF EACH SOVEREIGN'S POSITIVE LAWS

In the international sphere, there are multiple sovereigns and corresponding multiple sets of positive law. More importantly, the potential exists for differentials among these sets of laws from sovereign to sovereign, as well as the enforcement of the positive laws. It has traditionally been held that each nation has authority to pass laws governing matters within its territory and also has the right to govern its nationals who are beyond its borders.¹¹ Further, the U.S. may regulate conduct outside of its territory that has or is intended to have a substantial effect within its territory.¹² However, the U.S. may not regulate conduct outside of its borders by non-U.S. nationals where there is no substantial impact within it. In certain instances, U.S. positive law can have extra-territorial effect. For example, the U.S. may regulate activities of its nationals beyond U.S. borders if U.S. laws do not conflict with a foreign sovereign's laws.¹³ Also, the U.S. has authority to regulate foreign activity which has, or is intended to have, a substantial effect within U.S. borders¹⁴ unless such exercise of jurisdiction would be unreasonable.¹⁵ Thus, the U.S. may not set traffic laws in Korea, nor can Korea set the minimum wage laws for the U.S. In actuality, however, when U.S. consumers purchase Korean-made, labor-intensive products such as clothing instead of comparable U.S. products, Ko-

⁹ *Id.*

¹⁰ *Id.* at 11-12. Austin referred to international law as "*mere opinion*, that is, by the opinions or sentiments held or felt by an indeterminate body of men in regard to human conduct." *Id.*

¹¹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at § 403(1).

rea is, in substance, setting the minimum wage law for the U.S. with respect to that clothing. Korea, by the shipment of its products into the U.S., is extending its sovereignty into the U.S., giving Korean positive law an extra-jurisdictional reach into the other nation's sovereign territory. Lax sovereigns frequently have facially comparable positive laws on the books¹⁶ but either do not enforce them as vigorously or have much lower substantive requirements than the strict sovereign.¹⁷

A. *The Purchase of a Car is a Cultural Act*

The Ethical Consumers take a broad view of what a product is when they exercise their consumer sovereignty. A car is not just a car. It is the embodiment of the culture in which it is made—including that nation's positive laws and their enforcement. Thus, one car is made by strict sovereign workers who collect Social Security when they retire at levels so they can afford decent diets, do not have to live in houses without indoor plumbing, live in cardboard boxes heated by exhaust from ventilating ducts, or drink contaminated water. One car bears the minimum wages which enable the workers while they are working to live a decent, although far from luxurious, lifestyle. The car made by the strict sovereign contains a cultural element based on positive laws which says that its manufacturers should not work their employees beyond certain hour requirements and, if they do, these employees should be paid time and one-half or more.¹⁸ The strict sovereign car, by virtue of the positive law, says that if an employee is injured, contracts disease, or dies on the job, they or their survivors should be able to collect amounts which will help restore them to health, remedy their illness, or provide for their survivors. The strict sovereign car is made under positive laws which command its manufacturers to conform to environmental requirements on pain of incarceration, fines, or both.¹⁹ The strict sovereign shirt is made in a country which allows its workers to choose their own names without being

¹⁶ See *supra* note 3.

¹⁷ See *supra* note 2.

¹⁸ See *U.S. and Supermarket Chain Resolve Child-Labor Dispute*, N.Y. TIMES, August 4, 1993, at A13.

¹⁹ See, e.g., *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123, 1124 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980) (Corporate defendant, Frezzo Brothers, Inc., was fined \$50,000 and the individual defendants, Guido and James Frezzo, received jail sentences of 30 days each and fines aggregating \$50,000 for discharging hay and horse manure into a stream without a NPDES permit even though the U.S. had not first sought a civil resolution of the matter, nor had the EPA promulgated any effluent standards applicable to compost manufacturing businesses.)

penalized by denial of citizenship if they select a name reflective of another culture, such as "Mohammed Ali."²⁰ Other cultures often reject such human concerns as unjustified cultural incursions into the "good order" of the homogeneity of the labor force,²¹ which they view as having a strong influence on the productive process.

III. STRENGTH OF THE SYNAPSE BETWEEN POSITIVE LAW AND ECONOMIC COST

One apparent problem with the Ethical Consumer construct must be addressed early on: Proving that the cost of employee and environmental protections effected by the strict sovereign's positive laws directly increase the costs of particular goods compared to comparable goods produced in lax sovereigns. It is certainly possible to establish that environmental²² and employee protections²³

²⁰ See James Sterngold, *Japan Ends Fingerprinting of Many Non-Japanese*, N.Y. TIMES, May 21, 1992, at A11. The author reported that the Japanese Parliament had passed a bill eliminating the practice of fingerprinting permanent foreign residents. *Id.* The practice had been regarded by many non-Japanese as a humiliating symbol of discrimination by the government. *Id.*

While the news was welcomed by many foreigners, especially the Korean residents who will be the principal beneficiaries, many insisted the bill leaves in place an extensive system of unfair controls on non-Japanese residents.

For instance, foreign residents can still be arrested if they are found without their alien registration cards, or face criminal prosecution if they fail to report changes of address or jobs to the Government within two weeks. Permanent foreign residents, many of whose families have been in Japan for generations, also complained that they would still be denied the right to work for the Government or vote.

.....
About 602,000 Koreans and Taiwanese residents, many of whose families were brought here forcibly when their homelands were occupied by Japan, will no longer have to submit to routine fingerprinting in order to work, study and live in Japan. . . .

.....
Koreans have long faced the most persistent discrimination. Even those who seek Japanese citizenship, which means adopting Japanese names, find they are denied jobs with major corporations and are frequently unable to marry Japanese. . . .

Mr. Sohn of the Korean association said his group was still struggling to gain the right of Koreans here to vote, work in Government jobs and learn about their heritage in public schools, a course that is not currently taught.

Id.

²¹ See *infra* note 66.

²² See COUNC. ON ENVTL. QUAL., ANN. REP. ON ENVTL. QUAL. 222 (1992). The costs of pollution control and abatement expenditures for years 1972-89 for the business (as opposed to personal) portion of the private sector ranged from \$31.50 billion in 1972 to \$47.10 billion in 1989 (annual increases amounted to approximately \$1 bil-

add to the cost of business in the strict sovereign in a macro sense. But proving that such social responsibility costs alone account for higher prices of particular goods is difficult if not impossible due to the vagaries of cost accounting. This admission does not, however, invalidate the Ethical Consumer construct, because it is an ethical, not legal, notion.²⁴ As such, strict proof of causal linkage regarding positive law's cost impact on particular products that would be required if consumers were legally mandated to purchase goods bearing laws they demanded or substantially benefit from is not required in an ethical context. This follows because of ethics' classical relation to positive law: ethics are what we "ought" to do

lion). This did not include private sector research and development, which ranged from \$1.12 billion in 1975 (1972 was \$1.26 billion) to \$1.74 billion in 1989. *Id.*

See also Peter Hong and Dori Yang, *Tree-Huggers vs. Jobs: It's Not That Simple*, *Bus. Wk.*, Oct. 19, 1992, at 108.

Harvard University economist Dale W. Jorgenson estimates that the economy in 2000 will be 2.59% smaller than it would have been if environmental laws enacted between 1970 and 1990 weren't passed. He says that producers have diverted resources to such things as retrofitting plants and redesigning production processes. The economy would have grown faster if management had made more productive capital expenditures. . . .

Critics of such reasoning say conventional economic analysis doesn't consider environmental amenities such as clean air or water as assets—or their destruction as a debit—when calculating national wealth. Were these included, the economic impact of environmental protection would be far less. Most economists also can't pinpoint the number of jobs lost as a result of the costs imposed by environmental laws. Often the regulations are scapegoats for companies that lay off workers for other reasons.

. . . .
Many economists still insist that environmental protection is a net minus. "In the short term, you might create jobs through regulation, but the regulations become costs to someone else," says Paul R. Portney, an economist at Resources for the Future Inc., a Washington, D.C., centrist think tank.

Id.

²³ See, e.g., Bruce D. Fisher, *Controlling Government Regulation: Cost-Benefit Analysis Before And After The Cotton-Dust Case*, 36 *ADMIN. L. REV.* 179 (1984). The cotton industry estimated that the cotton-dust regulation promulgated in 1978 by the Department of Labor would impose compliance costs of \$656.5 million on the U.S. cotton industry. *Id.* at 195.

²⁴ The distinction between law and morality (ethics) is a fundamental aspect of positive law theory. See H.L.A. Hart, *Positivism And The Separation Of Law And Morals*, 71 *HARV. L. REV.* 593 (1958).

The nonpejorative name "Legal Positivism," like most terms which are used as missiles in intellectual battles, has come to stand for a baffling multitude of different sins. One of them is the sin, real or alleged, of insisting, as Austin and Bentham did, on the separation of law as it is and law as it ought to be.

Id. at 595.

but which we, as individuals, are left to determine for ourselves; positive law is the "is"; that is, what we must do.²⁵ We ought to back up producers who bear the costs of our mandated social responsibility because we know—not in a cost accounting sense but in a macro sense—that a strict sovereign's positive laws mandating social responsibility on manufacturers there make its goods more costly than those made in lax sovereigns. We are not, however, commanded to patronize strict sovereign made goods, nor should we be.

IV. ECONOMIC CONSIDERATIONS ARE NOT THE ONLY REASON FOR BEING AN ETHICAL CONSUMER

While positive laws imposing employee and environmental protections can and do cost enormous sums of money and thereby impose competitive disadvantages on strict sovereign producers, recognizing the economic costs of such positive laws is not the only reason for being an ethical consumer. Implicit in each good shipped from one sovereign to another are positive laws which relate to cultural values such as inclusiveness. An example would be positive laws relating to workforce gender and racial composition. Such laws arguably have little or no bearing on the economic costs of the related goods sold,²⁶ but they reflect a cultural value that allows women to work in jobs traditionally reserved by men. Few would deny that women can make a car,²⁷ shirt, or other product as well and as efficiently as a man, and most would acknowledge that one's ethnic or racial group should not impair one's ability to make goods.

Yet different sovereigns have either vastly different equal employment laws or facially similar laws which are enforced differently for cultural reasons. When consumers purchase goods from lax sovereigns whose laws deny inclusiveness in lieu of goods made under strict sovereigns whose positive laws advance inclusiveness,

²⁵ *Id.*

²⁶ *But see* Tamar Lewin, *Woman Gets \$7 Million in Airline Discrimination Suit*, N.Y. TIMES, Jan. 25, 1992, at A27.

²⁷ *See* Sara Rimer, *A Test for Women Who Build Cars*, N.Y. TIMES, Oct. 12, 1992, at D1.

The women of Willow Run have done it all—welding raw metal in the body shop (the hell hole, it is called), loading 70-pound seats, fighting the deadening monotony of the never-ending line, just like the men. But the women, many of them, were often the ones who went home and cooked dinner for their families.

Id. According to the article, Willow Run had 640 women and 3360 men among its hourly workers. "With the union behind them, the women have earned the same high wages and benefits as the men." *Id.*

those consumers have economically vetoed the strict sovereign's cultural value of inclusiveness. Although the inclusiveness causes lax sovereign goods to be less costly, those goods may have other values which the consumer is implicitly, and perhaps unwittingly, trading away through the purchase.²⁸ Thus, a sovereign can be lax with respect to cultural values such as inclusiveness and strict with respect to product quality or wages.²⁹

V. POSITIVE LAW DIFFERENTIALS

There is evidence that wage differentials exist³⁰ among different sovereigns; this is often based on positive law differences. For example, the U.S. has a \$4.25 per hour minimum wage,³¹ while Hong Kong has no minimum hourly wage or overtime requirement for males aged 18 or older.³² Hong Kong does, however, have the Trade Boards Ordinance, a 1948 statute that provides a mechanism for setting minimum wages; unfortunately, it has thus far not been used.³³ Thus, there is no minimum wage set by positive law for men, women, or children in Hong Kong. According to the most recent official U.S. government comparative labor statistics, the 1993 average hourly wages paid in manufacturing were \$4.31 in Hong Kong compared to \$16.79 in the U.S.³⁴ There is no restriction on the hours of work in general in Hong Kong for males, although there are limits on those of women and children.³⁵ Whether the U.S./Hong Kong hourly wage differentials exist because of positive law depends in part upon minimum wage law requirements of the different countries and the positive law concerning collective bargaining (since wages above legal mini-

²⁸ For example, there is a perception that Japanese autos are better in quality than those made in the U.S. See, e.g., David Sanger, *U.S.-Japan Auto Parts Rift Grows*, N.Y. TIMES, Jan. 28, 1992, at D1, D5. "Even today, after improvements, there is a big gap between American and Japanese parts," the quality-control manager of the Toyota factory that turns out Lexus luxury cars said during a plant tour two weeks ago." *Id.* at D5.

²⁹ See *infra* note 66.

³⁰ See *supra* note 1.

³¹ 29 U.S.C.A. § 206 (a)(1) (West Supp. 1994).

³² 6 INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS 114 (1992).

³³ *Id.*

³⁴ See generally DEP'T OF LAB., BUREAU OF LAB. STAT. RPT. 873 (May 1994).

³⁵ 6 INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS 100 (1992). Women and young persons' hours are governed by the Employment Ordinance, which sets eight hours per day, six days per week (or 48 hours per week) as the standard working hours for women. Women are allowed two hours extra per day overtime, with a maximum of 200 overtime hours per year. Also, women may not work over 12 hours per day, which includes overtime, meal time, and rest time. *Id.*

mums are often the result of employee leverage effected by unions).

In Mexico, the minimum wage per hour as declared by article 123 of the Mexican constitution "should be 'sufficient, when taking into account the conditions of each region, to satisfy the normal needs of the worker's life, his education and his honest pleasures, considering him as head of the family.'"³⁶ The 1993 minimum wage was \$4.60 (14.27 pesos) per day.³⁷ According to 1993 figures from the U.S. Bureau of Labor Statistics, the average hourly wages earned in Mexican manufacturing were \$2.65 per hour.³⁸ It is submitted that even taking into account the different cost of living

³⁶ Constitution of Mexico, art. 123 (A)(VI), reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD Vol. XII (Albert P. Blaustein & Gisbert H. Flanz eds., 1994).

The minimum wage to be received by the worker shall be general or according to occupation. The former shall govern in the geographic areas that shall be determined; the latter shall be applicable to specified branches of the economical activity or to special occupations, trades, or labor.

The general minimum wage must be sufficient to satisfy the normal material, social, and cultural needs of the head of a family and to provide for the mandatory education of his children. The minimum occupation wage shall be fixed by also taking into consideration the conditions of different economic activities.

The minimum wages are to be fixed by a national commission composed of representatives of workers, employers, and the government, which could be aided by special consultative commissions considered indispensable for the best performance of their functions.

Id.

³⁷ DEP'T ST., COUNTRY REP. ON HUM. RTS. PRAC. 502 (1993).

The 1993 minimum wage was \$4.60 (14.27 new pesos) per day for most advanced areas (Mexico City, Acapulco, Baja California, and certain municipalities of Chihuahua, state of Mexico, Sonora, Tamaulipas, and Veracruz). It was slightly less, \$4.28 (NP 13.26) per day, for intermediate areas (Guadalajara and some municipalities of Jalisco, Monterrey and some municipalities of Nuevo Leon, and additional municipalities of Sonora, Tamaulipas and Veracruz). It was \$3.90 (NP 12.05) per day in the rest of the country. There were special, higher minimum wages for 88 specialized occupations, including various construction trades. The announced 1994 minimum daily wage, to be implemented January 1, 1994, is \$5.00 (NP 15.27) for the most advanced areas, \$4.58 (NP 14.19) for the intermediate areas, and \$4.16 (NP 12.89) in the poorer parts of the country. The higher rates for 88 specialized occupations remain in effect. All these rates reflect a 7-percent increase from 1993 (5 percent for expected inflation and 2 percent representing the average increase in productivity over the past 3 years).

Social security data indicate that less than 16 percent of Mexico's workers earn the minimum wage.

Id.

³⁸ See DEP'T OF LAB., BUREAU OF LAB. STAT. RPT. 873 (May 1994).

between Mexico and the U.S., \$2.65 per hour is insufficient for Mexican workers to achieve the lifestyle envisioned by the salubrious minimum wage language in the Mexican Constitution.

Unlike the United States Constitution, the Korean Constitution addresses wage levels by noting that "[t]he State shall endeavor to promote the employment of workers and to guarantee optimum wages through social and economic means and shall enforce a minimum wage system as prescribed by law."³⁹ In 1993, the minimum wage was about \$10 per day.⁴⁰ The hourly compensation cost for production workers in Korea in 1993 was \$5.87.⁴¹

Thus, with respect to a significant element of manufacturing production costs—hourly labor rates—there is a difference in the U.S., Mexican, and Korean manufacturing hourly wages and presumably the positive laws related thereto. There are other examples of positive law (and enforcement) differentials between and among sovereigns including civil rights laws protective of minority and women's rights,⁴² employee protection rights in general, and environmental laws.⁴³

VI. POSITIVE LAW ARBITRAGE IS OCCURRING

Foreign trade imbalances suggest positive law arbitrage is occurring. This follows because consumers in strict sovereigns may not want to pay for the relatively expensive or lower-quality goods which result from elaborate positive laws reflective of social responsibility concerns. Foreign trade balances historically fluctuate between and among nations.⁴⁴ Differing and legitimate reasons for

³⁹ Republic of Korea Constitution, ch.II, art. 32(1), reprinted in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* Vol. IX (Albert P. Blaustein & Gisbert H. Flanz eds., 1994).

⁴⁰ DEP'T ST., COUNTRY REP. ON HUM. RTS. PRAC. 677 (1993).

The government implemented a minimum wage law in 1988. The minimum wage level is reviewed annually. In 1993 it was about \$10 per day (8,041 won). Companies with fewer than 10 employees are exempt from this law, and some still pay below minimum wages. Due to Korea's tight labor market, however, most firms pay wages well above the minimum wage in order to attract and retain workers.

Id.

⁴¹ See *supra* note 1.

⁴² See, e.g., DEP'T ST., COUNTRY REP. ON HUM. RTS. PRAC. 656-58, 673-75, 892-93 (1993).

⁴³ See *supra* note 2.

⁴⁴ See DEP'T COM., STAT. ABSTR. 796 (1993). The U.S. international transactions from 1960 to 1992 showed that the United States trade balance on goods, services, and income ranged from \$25.2 billion surplus in 1975 to a \$140.4 billion deficit in 1987. The balance on the current account for the same years ranged from \$18.1 billion surplus in 1975 to \$163.5 billion deficit in 1987. *Id.*

foreign trade include the desire for unique foreign products not available domestically, as well as the allure of foreign products for which domestic counterparts exist. However, when the basis for the desire is differentials based on product costs⁴⁵ resulting from social overhead imposed by strict sovereigns, positive law arbitrage can occur.

One identifiable segment of the U.S. population is the managerial and professional class.⁴⁶ Managers and professionals as a group have the highest incidence of purchase⁴⁷ of a major category of consumer goods which contributes to the U.S. balance of payments deficit: autos.⁴⁸ Thus, managers and professionals—when young, Yuppies⁴⁹—are the most likely group to purchase foreign cars; in so doing, they engage in positive law arbitrage with respect to the laws implicit in those vehicles. What makes this fact particularly paradoxical is that this occupational grouping is recognized as likely to demand positive laws imposing environmental and employee protection overhead.⁵⁰

⁴⁵ Certainly, lower-quality goods produced in the strict sovereign would be a cost of goods purchased.

⁴⁶ See 1992 STUDY OF MEDIA & MARKETS: AUTOMOBILES, CYCLES, TRUCKS & VANS 70 (Simmons Market Res. Bureau 1992). The professional/managerial category is one of four occupational groupings recognized by this marketing study.

⁴⁷ *Id.* Of four vocational groupings in this study (professional/managerial, technical/clerical/sales, precision/craft, and other), the professional/managerial category had the highest incidence of purchase of import/foreign cars bought new. The index for professional/managerial was 191, technical/clerical/sales 123, precision/craft 78, and other employed 71. In this study, "an index of 120 indicates that the group defined by the stub is 20% more likely to be in the group defined by the heading than is the total universe." *Id.* at iii. Thus, persons in the professional/managerial were 91% more likely to be in the group of those purchasing new foreign cars.

It is important to note that adverse trade balance is being used here only as evidence that positive law arbitrage is occurring, and not that alleviating adverse trade balances is the objective of the Ethical Consumer construct.

⁴⁸ See DEP'T COM., STAT. ABSTR. 794 (1993). In 1992, the U.S. exported \$46.686 billion in automotive vehicles and parts, but it imported \$91.238 billion in automotive vehicles and parts, leaving an annual deficit of over \$44 billion in this category.

⁴⁹ See Peter McGrath and Howard Fineman, *A New Voting Bloc*, NEWSWEEK, Dec. 31, 1984, at 30.

⁵⁰ *Id.*

It is by now almost a cliché that Yuppie ideology juxtaposes economic conservatism with liberalism on social issues like abortion and homosexual rights. With their newfound stake in the economy, Yuppies cringe at government regulation of markets; many embrace the entrepreneurial creed of no riches without risk. But they welcome government intervention in such areas as environmental management, or discrimination against minorities. At bottom, one issue animates them: quality of life, others' as well as their own. "There is a tension between social activism and me-too self-concern," says Pat Caddell. "What this generation wants is a synthesis of that, politically."

VII. POSITIVE LAW ARBITRAGE IS UNETHICAL BECAUSE IT VIOLATES NATURAL LAW

Positive law arbitrage is the practice whereby consumers in the strict sovereign demand and get positive laws addressing social concerns which they deem important, which often directly benefit them, and which are embedded in goods made in the strict sovereign. This same group, however, refuses to pay for such social overhead when they purchase apparently comparable, but cheaper, lax-sovereign-made goods not containing such positive law overhead. In effect, strict sovereign consumers who practice positive law arbitrage are taking inconsistent positions with respect to their nation's positive law. On the one hand, they are stimulating positive law differentials among nations; on the other hand, they are adjusting their spending patterns to capitalize on cost differentials resulting from these differences.

Natural law refers to the ethic of justice, fairness, or right.⁵¹ Although denominated "law," it is not positive law at all, but rather is a sense derived from God-given or rational sources. Although there are many refinements to natural law thought,⁵² it relates to positive law by serving as a standard against which positive law can be judged. Natural law is frequently cited as the "ought" and posi-

Id.

⁵¹ See 5 THE ENCYCLOPEDIA OF PHILOSOPHY 450-51 (1967).

Phrases like *ius naturale*, *diritto naturale*, *droit naturel*, *Naturrecht*, and "natural law" have been used over the centuries to designate a remarkably persistent doctrine concerning the moral basis of law. . . .

. . . .
NATURAL LAW AS A LEGAL CODE. First, it seems an intrinsic part of the doctrine (as the word "law" in its title is there to suggest) that the criterion by reference to which positive laws are to be judged should itself possess some of the characteristics of a legal code. In particular, it should exhibit some complexity or be capable of formulation as a comparatively extended set of rules or precepts, against which existing codes can then be matched item by item. . . .

. . . .
THE INTERPRETATION OF "NATURE." Second, the ideal or ethical law, which is contrasted with positive law and provides the norm in terms of which it is evaluated, is regarded by natural-law theorists (and this is what the word "natural" is there to indicate) as grounded in something wider or more general or more enduring than the mere practical needs of men, whether these be expressed in custom or in convention and agreement. It is grounded in "nature," and the various interpretations that have been placed on this word have generated the principal transformations through which natural-law theory has passed.

Regarding natural law in general, see D.J. O'CONNOR, AQUINAS AND NATURAL LAW (1967).

⁵² See 5 THE ENCYCLOPEDIA OF PHILOSOPHY 450-52 (1967).

tive law as the "is," meaning that natural law is what should be done and positive law is what exists as the rule established by the sovereign.

One recognized aspect of natural law is the law of noncontradiction.⁵³ The philosopher Immanuel Kant observed that people should act in a way that they want the law to be—his "categorical imperative." By extension, people should take consistent positions with respect to matters, and individuals failing to do so violate natural law.⁵⁴ For consumers in strict sovereigns with environmental and employee protection laws to demand positive laws prescribing minimum wages at \$4.25 and costly environmental protections⁵⁵ and then to purchase products made in a lax sovereign results in their taking inconsistent positions. They are on the one hand saying, "We need environmental and employee protections but lesser or no such protections are sufficient for Korean workers."⁵⁶ Are Korean workers less worthy of environmental protections than U.S. workers? Consumers who engage in such inconsistent positions are unethical because they violate natural law.

Positive law arbitrage is perverse since it undermines the very positive laws which consumers have demanded while simultaneously advancing the perceived evil that such positive laws were designed to prevent. Arbitrageurs take advantage of differentials by buying where things are cheap and selling where the same things are dear. By demanding positive laws which address perceived social problems, consumer-citizens exhibit a sense of social responsibility and awareness. When convincing the sovereign to enact positive laws which impose stringent sanctions protective of employee and environmental concerns, the consumer-citizens turn abstract ethics into social commands, the very embodiment of John Austin's positive law.⁵⁷

Citizens apparently lose their social awareness when they enter the consumer market and purchase shirts, autos, and food. They suddenly become the embodiment of the economic person, imbued with an economic sensitivity demanding that they maximize the purchasing power of each dollar. They become utilitarians try-

⁵³ *Id.* at 452.

⁵⁴ See generally LON FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

⁵⁵ See *supra* note 22.

⁵⁶ See *supra* note 2.

⁵⁷ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 26 (Isaiah Berlin et al. eds., Weidenfeld and Nicolson 1954) (1832). "Taken with the largest signification which can be given to the term properly, laws are a species of commands." *Id.*

ing to promote the greatest good for themselves irrespective of externalities or social costs their purchases may entail. Citizens in the strict sovereign inveigh against the dehumanizing effects of substandard wages and extended working hours.⁵⁸ Responding to their sensibilities, a strict sovereign amends its Fair Labor Standards Act by raising the minimum hourly wage.⁵⁹ Forgetting this, the consumer in the store simply compares the quality, price, and service offered by strict sovereign shirts vis-a-vis the shirts made in Hong Kong. The consumer finds the shirts comparable except that the Hong Kong shirt is cheaper, so she purchases it,⁶⁰ which explodes the constitutional premise for the Fair Labor Standards Act: "[S]uch 'detrimental' labor conditions would endanger national health and efficiency and consequently would interfere with the free movement of goods in interstate commerce."⁶¹ Rather than interfering with the free movement of goods, the substandard working conditions between and among international sovereigns is accelerating the movement of goods in international commerce.

VIII. POSSIBILITIES IN DEALING WITH UNETHICAL CONSUMERS PRACTICING POSITIVE LAW ARBITRAGE

The ethical question is, "What should be done about consumers who play the positive law arbitrage game?" There appear to be at least three answers. First, the jurisdiction having high-cost positive laws (the strict jurisdiction) could erect barriers to entry into its sovereign territory or impose duties on foreign goods to equalize the positive law differentials to protect against foreign-made goods which have competitive advantages based on positive law differentials. From the standpoint of positive law, a sovereign can and should protect its own laws. By erecting barriers to foreign-made goods, it is doing just that.

A problem with this solution is that it flies in the face of the utilitarian ethic. Accepted economic principles hold that adher-

⁵⁸ See *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1980). "The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.'" *Id.*

⁵⁹ See, e.g., 29 U.S.C.A. § 206 (West Supp. 1993).

⁶⁰ See John Andrews, *THE ECONOMIST: POCKET ASIA 70* (1993). The principal export from Hong Kong was clothing, with \$9.3 billion reportedly exported in the most recent year. The major country to which Hong Kong shipped 27.1% of its exports was China, followed by the U.S. with 22.7% of the total.

⁶¹ *Barrentine*, 450 U.S. at 739.

ence to free markets results in the most efficient way of extracting maximum consumer satisfaction from scarce resources.⁶² Thus, things like tariffs and quotas which would impede free movement of goods and services across borders disturbs the market's ability to maximize consumer satisfaction. Implicit in the free market advocates' position is equilibrium, one of the tenets of the free market and one that is based on the elimination of differentials. Further, the free market is animated by self-interest, one of the most basic of human motives. Thus, consumers in a store contemplating the purchase of a shirt intuitively look at three factors when deciding how to cast their dollar votes: quality, price, and service. They are intensely micro, or self-concerned, when they spend their incomes. They tend to ignore broad, macro implications of their purchases.

A second way to deal with consumer positive law arbitrageurs is to let them continue to do so. The result will be the acceleration of the evils at which the protective labor and environmental laws were targeted. This follows since the strict positive law producers' market will erode given the disadvantageous cost position in which they have been placed by the public, which is socially conscious when imposing positive law burdens on its producers but socially insensitive when backing producers subject to such laws. As producers in the strict sovereign continue to respond to ever more demanding social legislation, they will continue to lose market share to foreign producers having less demanding positive laws and cheaper products. This analysis is predicated on the continuation of unethical consumer practices in the market place: positive law arbitrage. That is, it is assumed that consumers will continue to demand social legislation protecting them in the workplace and protecting the environment while simultaneously purchasing cheaper foreign products not subject to such cost-imposing positive laws.

The third and recommended manner of responding to unethical consumers is for them to become ethical. They can do this by patterning their consumer purchases after their social consciences which have resulted in stricter positive laws. Thus, a U.S. consumer who believes in a fair day's wage for a fair day's work and supports the Fair Labor Standards Act and even supports strengthening it would purchase either U.S.-made goods and services incorporating this law OR purchase foreign-made goods made under circumstances which provide the foreign workers with comparable benefits. Similarly, a consumer who believes in protecting society from

⁶² See *The Economics of Free Trade*, THE ECONOMIST, Sep. 22, 1990, at 14-16.

environmental degradation would purchase U.S.-made goods manufactured under clean air, water, and toxic waste laws OR foreign-made goods which provide foreign workers with comparable protections. Thus, the Ethical Consumer can purchase products emanating from any sovereign provided that they are made under positive laws which coincide with the Ethical Consumer's positive law demands or laws from which the Ethical Consumer has derived significant personal benefits.

VIII. EXAMPLES OF PURCHASES BY CONSUMERS ATTEMPTING TO BE ETHICAL

Let us take the case of Mary Smith, an African-American woman whose position in a municipal government affairs office was significantly the result of affirmative action. Mary therefore believes strongly in employee protection laws such as wage, hour, and equal employment opportunity laws. Mary is contemplating the purchase of a Japanese, German, or a U.S.-made auto. If wages and hours were paramount, she would purchase the German or Japanese auto given the relatively high manufacturing wages there.⁶³ Although not the direct result of positive law, minimum wages are arguably reflective of collective bargaining in both Japan⁶⁴ and Germany,⁶⁵ where a greater percentage of the workforce is unionized than in the United States. If Mary were more concerned about supporting a sovereign which promotes women's rights, cultural diversity, and equal employment opportunity, she would shun Japanese products, since Japanese positive laws related to these concerns are weak⁶⁶ and enforced poorly relative to those in the

⁶³ See DEP'T OF LAB., BUREAU OF LAB. STAT. RPT. 873 Table 1 (May 1994). The hourly compensation costs in U.S. dollars for production workers in manufacturing in 1993 was \$16.79 in the U.S., \$19.20 in Japan, and \$25.56 in Germany (formerly West Germany). *Id.*

⁶⁴ See DEP'T ST., COUNTRY REP. ON HUM. RTS. PRAC. 652 (1993). "Approximately 25 percent of the active work force belongs to unions." *Id.*

⁶⁵ *Id.* at 896. "Thirty-nine percent of the total eligible labor force belongs to unions." *Id.* See also DEP'T COM., STAT. ABSTR. 436 (1993). In 1992, 15.8% of employed wage and salary workers were union members in the U.S. In 1983, the percentage of union members in the U.S. was 20.1% of employed wage and salary workers.

⁶⁶ See DEP'T ST., COUNTRY REP. ON HUM. RTS. PRAC. 656 (1993).

Although discrimination by private employers against women is prohibited by the Constitution, it persists. Legislation over the past 30 years has been enacted to accord women the same legal status as men. The Equal Employment Opportunity Law of 1986 was aimed at eliminating sex discrimination in such areas as recruitment, pay, and working hours. Yet the law does not expressly forbid discrimination; it merely states that "employers should endeavor" to avoid it. Under this law and other regulations, the Ministry of Labor attempts to encourage

corporate compliance with its objectives by positive inducements, including subsidies; it does not enforce compliance through fines or other punitive measures.

Significant disparities in pay and access to managerial positions persist. Women comprise over 40 percent of the employed population. A 1989 Ministry of Labor report noted that the average wage of women workers is about half that of men. . . .

Public awareness of discrimination against women and sexual harassment in the workplace has increased. An increasing number of government entities are establishing hotlines and designating ombudsmen to handle complaints of discrimination and sexual harassment. Nevertheless, sexual discrimination and stereotyping in the workplace continue to be major problems for women.

. . . .
. . . The ethnocentric nature of Japanese society, reinforced by a high degree of cultural and ethnic homogeneity and a history of isolation from other cultures, has impeded the integration of minority groups. This primarily affects Burakumin, Koreans, and alien workers against whom social, economic, and legal discrimination is widespread.

The Burakumin (descendants of feudal era "outcasts" who practiced "unclean" professions such as butchering and undertaking) are frequently victims of entrenched social discrimination. Their access to private housing, employment, and marriage opportunities have been greatly restricted. . . . The Government has extended basic legislation to provide funding for Burakumin programs until 1997, but the Burakumin continue to lobby for a new law that will expand current programs. . . .

Despite improvements in Japan's legal system, Korean permanent residents (most of whom were born, raised, and educated in Japan and who are estimated to number approximately 2 million) are still subject to various forms of deeply entrenched social discrimination. . . .

The legal obligations to carry an alien registration card and to be fingerprinted have been leading concerns among permanent resident aliens in Japan. This is particularly so for second- and third-generation Korean residents, who constitute 82 percent of all such aliens. In response to continued appeals from the Republic of Korea, the Government in 1993 halted the fingerprinting of permanent foreign residents. Instead, the Government has established a family registry system that uses the resident's picture and signature and contains information on parents and spouses living in Japan, a system similar to that used for Japanese nationals. The new law leaves intact the requirement that all foreign residents must carry alien registration certificates at all times.

Some immigrants reportedly face police harassment and discrimination in obtaining housing, jobs, and health care. . . .

. . . .
According to law, aliens with 5 years of continuous residence are eligible for naturalization and the simultaneous acquisition of citizenship rights, including the right to vote. In fact, however, most eligible aliens do not apply for citizenship, in part due to fears that their cultural identity would thereby be denied. De facto obstacles to naturalization include broad discretion on the part of adjudicating officers and great emphasis on Japanese language ability.

Id. The relative lag between Japan and the United States with respect to recognizing sexual harassment is reflected in the fact that the U.S. is almost a generation ahead of

United States.⁶⁷ German positive laws respecting women's rights in former West Germany are moderate to strong,⁶⁸ although enforcement of civil rights laws for national, ethnic, and religious minorities are suspect.⁶⁹ Given the fact that civil rights laws of a strict sovereign played a significant role in her obtaining her position,

Japan in terms of legal development in this area. Sexual harassment was recognized in the United States district court level in the 1970's. See, e.g., *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 950 (D.N.J. 1978) (plaintiff prevailed on New Jersey state claim of tortious interference with contract due to sexual harassment causing a hostile work environment). The U.S. Supreme Court recognized this wrong under Title VII of the Civil Rights Act of 1964 in *Meritor Savings Bank v. Vinson*. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). By contrast, sexual harassment was first recognized at the district court level in Japan only in 1992. See Steven R. Weisman, *Landmark Harassment Case in Japan*, N.Y. TIMES, Apr. 17, 1992, at A3. "In a decision that marked the first successful legal action against sexual harassment in Japan, a district court ruled today that a company and one of its male employees had violated a woman's rights because of crude remarks that drove her to quit her job." *Id.*

⁶⁷ See Tamar Lewin, *Partnership in Firm Awarded to Victim of Sex Bias*, N.Y. TIMES, May 16, 1990, at A1.

⁶⁸ See DEP'T ST., COUNTRY REP. ON HUM. RTS. PRAC. 892-93 (1993).

Women generally enjoy full and equal protection under the law, including property and inheritance rights. Young women experience difficulties in gaining access to training in some traditionally male fields, but recent court rulings and government pilot programs helped break down some of these attitudinal and institutional barriers. Women's rights groups are active in combatting pay inequities, sexual harassment, and violence against women.

Salaries for women in the private sector tend to be lower than salaries for men in similar jobs. The Government, through its Labor Ministry, acknowledged the existence of unequal, sex-differentiated pay scales in the private sector as a violation of the constitutional prohibition against discrimination on the basis of sex. Several decisions by the National Labor Court in recent years were in favor of women who initiated litigation to redress pay inequities.

The issue of equal pay for equal work is addressed also in the private sector in collective bargaining between unions and firms.

....
 . . . In recent years, the Federal Ministry for Women and Youth commissioned a number of studies to investigate such topics as violence against women and sexual harassment. One study concluded that most women are unsure of their legal options in cases of sexual harassment and often fail to come forward because of the taboo nature of the topic. The study recommended that legal counseling for victims of sexual harassment should be widely publicized and more readily available.

Id.

⁶⁹ *Id.* at 893.

Incidents reflecting intolerance of foreign, religious, and ethnic minorities occurred in both western and eastern Germany. Foreigners, particularly Romanians, Gypsies, Turks, Poles, and non-Europeans, continued to be harassed or attacked mainly by right-wing extremists during 1993. Incidents of antiforeigner violence in the first 9 months of 1993 increased by 36 percent over 1992. The 1.9 million people of Turkish origin in Germany comprise the largest ethnic minority. They have

she should consider the purchase of a vehicle from a strict sovereign with respect to civil rights laws. Although civil rights is a contentious issue in the United States,⁷⁰ the U.S. is a culturally pluralistic environment⁷¹ where such laws are elaborate and usually vigorously enforced.⁷² There is some evidence that black consumers in the U.S. do not engage in positive law arbitrage to the extent of whites with respect to automobiles; thus, if Mary patterned her auto purchase after them, she would probably buy a car made by a domestic manufacturer.⁷³

Nations other than the U.S. have positive laws which are facially identical or similar respecting equal employment opportu-

been among the primary victims of right-wing violence and other acts directed against foreigners.

.....
 Noncitizen residents of Germany are prohibited from holding most civil service jobs, which include teaching and police posts. Their rights to own property are also limited and they are subject to restrictive quotas in universities. Turkish organizations complain that such restrictions limit their members' economic opportunities and ability to integrate into German society.

.....
 . . . A total of 482 anti-Jewish incidents were recorded during the first 10 months of 1993, including 5 cases of assault. Jewish monuments were vandalized and at least 45 Jewish cemeteries were desecrated.

Id.

⁷⁰ See Neil A. Lewis, *Civil Rights Nominee's Words Make Her a Target*, N.Y. TIMES, May 14, 1993, at B8; Tamar Lewin, *Furor on Exhibit at Law School Splits Feminists*, N.Y. TIMES, Nov. 13, 1992, at B16.

⁷¹ See *supra* note 3.

⁷² See, e.g., Linda Greenhouse, *Court, 9-0, Makes Sex Harassment Easier to Prove*, N.Y. TIMES, Nov. 10, 1993, at A1; Tamar Lewin, *Partnership in Firm Awarded to Victim of Sex Bias*, N.Y. TIMES, May 16, 1990, at A1; Alison Mitchell, *U.S. Finds Retaliation Against White Woman Who Charged Bias*, N.Y. TIMES, Jun. 19, 1992, at B1; *Woman Wins a Bias Suit Against Texaco*, N.Y. TIMES, Sep. 28, 1991, at 25.

But see Eric Schmitt, *Military Falters On Prosecution In Sex Scandal*, N.Y. TIMES, Aug. 21, 1993, at A1.

⁷³ This follows because blacks purchase new foreign cars in far lesser percentages than their proportion to the population would suggest. See 1992 STUDY OF MEDIA & MARKETS: AUTOMOBILES, CYCLES, TRUCKS & VANS 70 (Simmons Market Res. Bureau 1992). Blacks had an index of 60 with respect to the purchase of foreign cars bought new, meaning that they were 40% less likely to be in the group defined by the heading than is the total universe. However, the study also points out that blacks purchase new domestic cars at an even lesser index of 45, meaning that they are 55% less likely to be in the group defined by the heading (purchasers of new, domestic cars) than is the total universe. *Id.* at 64. All of this suggests that blacks may purchase new cars—domestic and foreign—less than whites because of their lower economic situation rather than because they comport more with the Ethical Consumer construct.

Even if Mary purchases a domestic-made auto, the question of domestic content arises. Thus arises the question of what country's content resides in a Kentucky-assembled Toyota or a Marysville, Ohio assembled Honda compared, for example, with a Detroit-made Jeep or a Kentucky-made Ford. Fallsows, *infra* note 77.

nity positive laws. For example, Korea, Japan, Germany, and Mexico all have prohibitions against employment discrimination based on sex, race, and religion.⁷⁴ Yet, there is evidence that enforcement of such laws is weak or non-existent, either because of cultural bias against those positive laws⁷⁵ or simply because there is no ethnic diversity in some nations.⁷⁶

A second example shows the difficulty in being an ethical consumer given the advent of multi-cultural products.⁷⁷ Suppose Bill

⁷⁴ In some nations, such as Germany, unlike the United States, protections against sex discrimination are given constitutional stature. See DEP'T ST., COUNTRY REP. ON HUM. RTS. PRAC. 893 (1993).

⁷⁵ See Stephen Kinzer, *U.S. Diplomat's Speech on Extremism in Germany Stirs Storm*, N.Y. TIMES, April 19, 1994, at A6.

An unusually frank speech by a senior American diplomat about right-wing extremism in Germany has stirred a tempest here.

The diplomat, Douglas H. Jones, who heads the American diplomatic mission in Berlin, told an audience last week that many foreigners believe that Germany "lacks the will to confront its extremism problem pragmatically."

"It is not reassuring, for example, that more progress is not being made toward guaranteed civil rights for foreigners in Germany," he said.

....

... Mr. Jones, a 21-year-member of the Foreign Service who has served in his present post for five years, had previously announced that he would retire this year. He delivered his speech to a human rights group in Oranienburg, near Berlin.

....

... At one point, Mr. Jones noted that Chancellor Helmut Kohl was among many German politicians who often say Germany "is not an immigration country."

"If I were a skinhead, I would take a certain amount of comfort in hearing that Germany was not a country of immigration," Mr. Jones said. "That would signal to me that the nearly seven million foreigners who live here legally do not belong here, and that I am justified in wanting them out. And to be honest with you, this sentiment is by no means limited to skinheads."

Mr. Jones also criticized German citizenship laws, which place paramount importance on German ancestry rather than on place of birth or residence.

"How can those minorities remain anything but conspicuous, underprivileged targets of anger and frustration if they have no chance to become assimilated on an equal basis with Germans if they so choose, or to have their own cultural distinctiveness protected from attack if they do not?" he asked. "If Germany is not a racist society, why is its nationality law, which was written in 1913, predicated upon race? Public attitudes toward minority communities in Germany are ambivalent at best."

Id. See also *supra* notes 64 and 67.

⁷⁶ See *supra* note 3.

⁷⁷ But see James Fallows, *A Plea for Truth-in-Bashing*, N.Y. TIMES, February 10, 1992, at A17.

Foster, a white, male U.S. professor purchases a Nissan pickup, a U.S.-assembled product from a Japanese company. Suppose further that Professor Foster lectures his students at length on protecting endangered species and tropical rain forests, and advancing laws inclusive of women and minorities in the workplace. Japan arguably is stricter with respect to collective bargaining law, less strict on civil rights laws, and less strict on environmental law.⁷⁸

Reasonable people can disagree about whether a "buy American" campaign makes sense. But we could do without several fatuous arguments:

1. *You can't tell where this stuff comes from anyway.* Even the hard-headed Mike Royko has fallen for this. In a recent column, he said that he'd bought an American car and a friend had bought Japanese—but that the Japanese car was made in America and was probably more American than the real thing. Hah! The joke was on the buy-American crowd.

In principle, corporations might eventually lose all ties to their parent nations. This is nearly the case with American computer makers. None of the major components of Apple, Compaq, Dell, or other "American" computers are produced in the U.S., except for the microprocessing chip itself.

But "American" cars are overwhelmingly made in America. Because Chrysler buys many engines from Mitsubishi, the North American content of its cars is less than Ford's or G.M.'s. Because Honda builds engines in Ohio, its North American content is higher than Toyota's or Nissan's. But the Big Three are all much more "American" than any Japanese brand. The average North American content for Chrysler vehicles is more than 85 percent. According to Canadian officials inspecting "made in Ohio" Hondas, it remains an open question whether the cars are even 50 percent North American.

This doesn't prove that Americans should reject cars from Japanese "transplants," or even that they should care where their cars come from. But we should stop pretending that the origin is an unsolvable enigma.

Id.

⁷⁸ See Letter to the Editor, *Japanese Apples Owe Their Gloss to Dyes*, N.Y. TIMES, Sep. 8, 1993, at A18.

As a longtime resident of Japan, I can attest that Japanese apples are indeed "glossy red and blemish-free," but I also practically fear for my life when eating them. Japanese farmers use more agricultural chemicals than any other industrialized country to squeeze the highest possible yields from Japan's limited arable land. The glossy redness is unnatural, the product of dyes.

Id. See also Andrew Pollack, *Japan and Ecology: Room to Improve*, N.Y. TIMES, Jul. 31, 1992, at A8.

Recently, in a development that caused great embarrassment here, a court in Malaysia ordered the shutdown of a factory owned partly by one of Japan's largest chemical companies, Mitsubishi Kasai, because the plant's radioactive wastes were endangering local residents.

Moreover, conservationists say, while Japan has developed impressive technology for cutting emissions and reducing energy use, it has not shown a deep commitment to preserving the natural environment or curbing its appetite for development.

Japan is the world's largest importer of wood from tropical forests,

Thus, the higher U.S. nondomestic content of the Nissan would be the ethically correct purchase with respect to reinforcing collective bargaining, whereas the higher domestic content would be the ethically correct purchase with respect to reinforcing civil rights laws and environmental laws. There is considerable evidence that members of the professional/managerial class such as Professor Foster engage in positive law arbitrage to a greater extent than any other class of automobile purchaser,⁷⁹ even though such individuals as a class tend to support the causes that lead to employee and environmentally protective positive laws.⁸⁰

Let us return to Ralph, the Chrysler worker who bought a Hyundai at the start of this Article. He believes in positive laws protecting employees, but undermines such laws by purchasing from a lax sovereign producer with respect to workplace diversity, particularly in the context of female employment.⁸¹ While Korea does have a constitutional provision barring racial discrimination, it is inconsequential because the Republic of Korea is racially homogeneous.⁸² Ralph also believes in environmental protection laws, and Korea is notorious in its nonenforcement of such laws.⁸³ By purchasing the Hyundai, Ralph has economically vetoed such positive laws applicable to a strict-sovereign auto producer, which Korean auto manufacturers escape. Because of this, Ralph is an unethical consumer.

X. KNOWLEDGE BARRIERS TO BECOMING ETHICAL CONSUMERS

One might speculate that even highly motivated consumers sensitive to possible cost differentials based on positive law/enforcement differences between the U.S. and other nations find it difficult to learn of those differentials and the extent to which such positive law differentials translate into higher consumer prices.

has resisted a ban on whaling and has been embroiled in controversies in the last few years over its use of drift-net fishing and imports of ivory. At home, it has built dams on virtually all its rivers, threatened coral reefs with overdevelopment and plastered its countryside with golf courses.

Id.; David E. Sanger, *Defiant Japan to Promote Eating Whale Meat*, N.Y. TIMES, Jan. 30, 1993, at 6. "The Japanese Government and the nation's fishing industry, in their latest and most defiant challenge to the near-total ban on whale hunting, said today that they would begin separate campaigns to encourage Japanese to eat more whale meat, stressing nutritional value and medicinal benefits." *Id.*

⁷⁹ See *supra* note 46 and 47.

⁸⁰ McGrath and Fineman, *supra* note 49.

⁸¹ See DEP'T ST., COUNTRY REP. ON HUM. RTS. PRAC. 673 (1993).

⁸² See *supra* note 3.

⁸³ See *supra* note 2.

One possible way is to read consumer product labels, which, in the U.S., must denote country of origin.⁸⁴ With respect to one commonly purchased item constituting a major portion of many U.S. consumers' disposable income, assistance in determining nation of origin will soon be forthcoming. Starting October 1, 1994, new passenger cars and other light vehicles offered for sale in the U.S. must be labeled with information about their domestic and foreign content.⁸⁵ Another source of information regarding comparative civil rights laws is available annually from the U.S. Department of State.⁸⁶ Even if a consumer is not precisely certain of the economic impact a particular positive law might have on a product's price, the Ethical Consumer would err on the side of strict sovereign positive law preservation by purchasing a strict sovereign-made product when confronting a lax sovereign alternative.

Another factor which could result in more Ethical Consumers is greater consciousness-raising efforts by the academic community. It is difficult for U.S. consumers to ferret out foreign positive laws on employer/employee and environmental protections. Academics can help consumers by researching such issues and publishing this research not only in academic journals but those addressed to more popular audiences.⁸⁷

A further source of knowledge about foreign/domestic positive law differentials comes from strict sovereign producers and environmental groups.⁸⁸ Recent ads from producers often thought to be foreign reveal remarkable facts about domestic presence and presumable compliance with strict sovereign positive laws with respect to that presence.⁸⁹

⁸⁴ 19 U.S.C. § 1304 (Supp. 1993).

⁸⁵ American Automobile Labeling Act, Pub. L. No. 102-388, § 210, 106 Stat. 1556 (1992).

⁸⁶ See, e.g., DEP'T ST., COUNTRY REP. ON HUM. RTS. PRAC. 673 (1993).

⁸⁷ See 5 U.S.C. § 609(2) (1982). In a similar vein, this act encourages, but does not require, that federal agencies publish proposed rules having a substantial impact on small entities (small hospitals, municipal governments, and small businesses) in journals likely to be read by persons in those entities, in addition to the *Federal Register*.

⁸⁸ See generally ROSALYN WILL ET AL., SHOPPING FOR A BETTER WORLD: A QUICK AND EASY GUIDE TO SOCIALLY RESPONSIBLE SUPERMARKET SHOPPING (1988). This publication rates products based on the following categories of social responsibility: charitable giving; women's advancement; minority advancement; defense contracts; animal testing; social disclosure; community outreach; nuclear power; South Africa; and environment.

⁸⁹ See Michael Janofsky, *The Media Business: Advertising*, N.Y. TIMES, July 21, 1993, at D24.

Clouded by lopsided trade balances, a troubled economy and issues of protectionism, a sales pitch is not necessarily what it seems. For example, a current ad for Toyota appearing in news magazines shows a spiffy

XI. BEING AN ETHICAL CONSUMER IS NOT PROTECTIONIST

Economist David Ricardo introduced the construct of comparative advantage in the early nineteenth century as a way to maximize total worldwide wealth through each nation's specializing in what it makes relatively more efficiently.⁹⁰ Specifically, Ricardo noted that if two countries each make the same two products, such as wine and wool, the world would be better off from the standpoint of using scarce resources efficiently if the countries specialize in making what each is best at. That is, if they are in a two-product economy and one country is relatively more efficient at making wool than wine, it should make wool exclusively and let the other nation make wine. This follows even though the first nation is, in

new four-door Camry in profile below big red and black letters that say, "economy car," which it may well be, at a base price of \$14,000.

But less than a sales pitch for Toyota the car, the ad is selling Toyota the company—Toyota, the American company, at a time when large segments of the population have grown sensitive to the origin of the products they purchase. Not to be minimized as a motivation to buy, those kinds of sentiments are why a variety of companies pluck the chords of nationalism in their ad campaigns, like Wal-Mart's "Sam's American Choice" or DuPont's use of "Made in the U.S.A."

Never mind that some products, or parts of some, like a Toyota Camry, might be made elsewhere. Patriotism is often the last refuge of the salesman for its power to sway an undecided buyer or a buyer for whom nationalism might be the tie-breaking factor.

The Toyota ad, which was created by the Oasis International Group in New York, makes the point that Toyota, as a Japanese company with an American presence since 1957, now employs 15,000 people in the United States through a \$5 billion investment, and invests another \$4 billion through the purchase of parts used to make the cars.

...
A companion ad shows the same picture of the Camry amid copy that says, "We buy the best parts in the world, no matter which state they're from." Surrounding the picture are the names of 44 parts and the American states in which they are made.

In both ads, the implicit message is that although this is a Japanese-brand car, it is American made, and that's good for the United States economy.

"These are not intended to be political ads," Tim Andree, group manager of external affairs for Toyota of New York, said. "It's for educational purposes about a global company with a Japanese name. The point we want to make is that Toyota's presence in America is positive. . . ."

At least six Japanese auto makers manufacture cars in the United States. They include Honda, Nissan, Mazda, Mitsubishi and Subaru, as well as Toyota. Their plants employing [*sic*] a total of more than 35,000 Americans, according to figures compiled [*sic*] by the Japan Automobile Manufacturers Association in Washington.

Id.

⁹⁰ See *The Economics of Free Trade*, THE ECONOMIST, Sep. 22, 1990, at 14-16.

an absolute sense, more efficient at making both wool and wine. The gist of comparative advantage is specialization, which can yield a greater economic pie for everyone.

Ricardo's analysis was based on differentials resulting entirely from labor⁹¹—product price differences reflective of positive law differences in social overhead were apparently taken into account in currency exchange differences if at all. What is being suggested here under the Ethical Consumer construct is that social overhead such as employee protections and environmental laws should ethically be considered by consumers in making their purchases. The fact that some producers are held to a higher standard of social responsibility via positive law requirements should not be held against them under the rubric of comparative advantage and, in fact, should be recognized by consumers.

Ricardo wrote in an era prior to the rise of the modern welfare state, where many muniments of civilized society—Social Security, welfare laws, to say nothing of worker and environmental protection laws—were minimal if not nonexistent. Further, nuances of foreign trade introduced by currency fluctuations, to say nothing of positive law differentials, were probably not contemplated by Ricardo in his analysis. However, to the extent that Ricardo's heirs would factor positive law differentials into trade analysis and recognize it as a legitimate basis for trade differentials, it would seem that this might be appropriate for producers, but not the Ethical Consumers, to consider.

Why should taking account of cost differentials imposed by positive law differentials be appropriate for producers but not consumers? One initially might admit that both producers and consumers who are ethical should base their production/purchase patterns strictly on land, labor, and capital decisions and not inject positive laws into their analysis. However, given the impact that positive laws of each sovereign have on labor, land, and capital costs, it would seem unrealistic to deny the existence of positive law in engaging in any such analysis. Certainly, zoning and environmental laws affect land values just as labor laws affect the cost of the labor factor. Nonetheless, the focus of this analysis is the consumer, and economies are largely consumer driven. The gist of the Ethical Consumer is consumer sovereignty and the awareness that each consumer should have that the product he or she is purchas-

⁹¹ See Alan Deardorff, *Testing Trade Theories and Predicting Trade Flows*, in 1 HANDBOOK OF INTERNATIONAL ECONOMICS 467, 475 (Ronald W. Jones and Peter B. Kenen eds., 1984).

ing is more than just the shirt on the shelf: It is also the conditions under which that shirt is manufactured including the positive laws relating to employee and environmental protection.

As powerful a construct as comparative advantage might be, it is here suggested that Ricardo did not by comparative advantage intend to negate consumer sovereignty. If consumers through heightened ethical sensitivity to factors surrounding a product's manufacture choose to take account of matters beyond a product's apparent quality, price, and service, that is the consumer's prerogative. That is the free market in operation.

XII. HOW WOULD JOHN AUSTIN REACT TO THE ETHICAL CONSUMER PARADIGM?

It is tempting to consider how John Austin, the expounder of legal positivism, would react to the Ethical Consumer construct suggested here. Specifically, would he pattern his personal income expenditures after his positive law demands? This question pits utilitarianism against legal positivism since it asks whether fidelity to the positive laws one has demanded and/or substantially benefitted from should prevail over economic "laws"—maximizing the purchasing power of one's income.

Ironically, John Austin was both a legal positivist and a utilitarian. Three chapters of his opus magnum on legal positivism, *The Province of Jurisprudence Determined*, were devoted to utilitarianism. Although there are refinements to utilitarianism, Austin clearly adhered to the fundamental utilitarian notion of maximizing happiness.⁹² Further, he believed that there was a convergence of positive law and utilitarianism when positive law was valid.⁹³ Clearly, in so believing, he failed to recognize the potential conflict between maximizing utility, which opts for free trade, and legal positivism, which is undercut by the positive laws implicit in the goods being traded.

Scholars have long recognized that John Austin believed in

⁹² See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 42 (Isaiah Berlin et al. eds., Weidenfeld and Nicolson 1954) (1832).

⁹³ *Id.* at 43. Austin believed that utility—the greatest happiness for all his sentient creatures—had a theological source. Thus, Austin concluded:

Admit these premises, and the following conclusion is inevitable:—The whole of our conduct should be guided by the principle of utility, in so far as the conduct to be pursued has not been determined by Revelation. For, to conform to the principle or maxim with which a law coincides, is equivalent to obeying that law.

Id.

free trade.⁹⁴ However, Austin's allegiance to legal positivism is also beyond question. Some have asserted that he believed more strongly in utilitarianism than anything else.⁹⁵ However, the Ethical Consumer construct suggested here does not sanction sovereigns' inhibitions on free trade, but, rather, leaves decisions on consumer purchases and utility maximization with individual consumers. Thus, the Ethical Consumer construct is compatible with utilitarian notions of free trade. It merely broadens the definition of "product" to include the circumstances under which the product is made. The Ethical Consumer is also compatible with Austin's legal positivism, because this construct recognizes the concepts of free trade by not barring it through sovereign mandates while simultaneously preserving legal sovereignty and the positive laws which are its manifestation.

Austin also was an analytical positivist—a person who examined relationships among positive law concepts. Austin and other analytical positivists recognized correlatives, such as the fact that for every right there is a related duty.⁹⁶ Extrapolating from this, one could surmise that Austin would recognize a similar correlative for persons—who by their political demands derive positive law rights—as having a duty to support those producers upon whom positive law duties have been imposed. There are at least two conceptual hurdles in attempting to apply a right/duty analysis in the case of workers and their employers. Part of the problem arises from confusing upon whom rights and duties exist. In the case of correlatives as refined by others,⁹⁷ there are *two* pairs of rights and duties with respect to a worker and his receipt of wages.

⁹⁴ See WILFRID E. RUMBLE, *THE THOUGHT OF JOHN AUSTIN: JURISPRUDENCE, COLONIAL REFORM, AND THE BRITISH CONSTITUTION* 7, 47, 49 (1985).

⁹⁵ *Id.* at 218.

⁹⁶ More particularly, Austin believed that there are several parties to every right. There is the party bearing the right, a party burdened by the duty, and a government making the law at issue.

⁹⁷ See Arthur L. Corbin, *Legal Analysis and Terminology*, 29 *YALE L.J.* 163 (1919).

Having isolated these definite concepts and chosen these specific terms with which to express them—all being found in the actual decisions and usage of the courts—Professor Wesley N. Hohfeld then arranged them in the following pairs of opposites and correlatives: [Correlatives: right/duty] Each pair of correlatives must always exist together; when some person (A) has one of the pair, another person (B) necessarily has the other. One of the terms expresses the relation of A to B; the other expresses the relation of B to A.

Examples: . . . (c) A has a right that B shall not strike him, and B has a duty not to strike.

Id. at 165-67 (footnotes omitted).

The first correlatives are the worker's duty to work and the employer's right to the worker's labor. The second correlatives are the worker's right to wages and the employer's duty to pay them. Such analysis of correlatives as developed by Corbin and Hohfeld suggests that the recipient of the minimum wage has no *legal* duty to patronize the person paying that wage, as the Ethical Consumer construct seems to suggest. However, Austin's correlatives were legal, not ethical. Thus, legal correlative analysis may be inappropriate in an ethical context.⁹⁸ This could result in Austin's supporting the Ethical Consumer, if the Ethical Consumer's duties do not spring from positive law but from moral considerations. This follows because ethical correlatives could differ from legal correlatives. As such, ethical correlatives in the case of the Ethical Consumer might be cast in terms of the producer's duty to obey positive laws and the consumer's right to demand such laws as one pair, and the consumer's duty to patronize producers subject to the laws demanded and the producer's right to have one's goods and services so patronized as the other pair. Accepting this analysis, ethical correlatives that an analytical positivist would reject in a legal context might be tolerated. If this were so, Austin might approve, or at least not reject, the Ethical Consumer construct on analytical positivist grounds.

It is unlikely that Austin ever considered the free trade versus positive law clash in the sharp relief with which contemporary events present it. In the U.S. today, positive laws governing employee relations and environmental concerns are a creation of the past two or three generations—a relatively recent phenomenon. Mandates such as Title VII, CERCLA, the Clean Air Act, and Clean Water Act were not part of John Austin's legal landscape. Thus, the magnitude and scope of the positive law/utilitarian clash today is unprecedented.

What free trade actually presents is not a mere clash between utilitarianism and legal positivism, but a clash of two sovereigns' positive laws (or lack thereof). For example, if a lax sovereign such

⁹⁸ In fact, one of the hallmarks of legal positivism is the separation of law and morality (ethics). See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 595 (1958).

The nonpejorative name "Legal Positivism," like most terms which are used as missiles in intellectual battles, has come to stand for a baffling multitude of different sins. One of them is the sin, real or alleged, of insisting, as Austin and Bentham did, on the separation of law as it is, and law as it ought to be.

Id.

as Hong Kong has no wage and hour laws, and a strict sovereign such as the U.S. has such laws, the importation of goods made in Hong Kong into the U.S. and their purchase by U.S. consumers represents an economic veto of U.S. positive laws relating to wages and hours. Austin apparently never recognized the consumers' power to preserve sovereignty. Nonetheless, utility and sovereignty are not necessarily contradictory. Utility can be maximized by positive laws which promote societal happiness. The fact that a democratically elected legislature has seen fit to pass positive laws benefitting major—if not all—segments of society suggests such positive laws satisfy a utilitarian test. Austin placed paramount ethical value in untrammelled investigation and inquiry as a way to ascertain the objective of theologically based utilitarianism: The greatest happiness for the greatest number.⁹⁹ The Ethical Consumer aims to correct our inability to see the connection between positive laws and their cost implications in a world of international trade where lax-sovereign-made goods may well lack positive-law costs implicit in strict sovereign goods. Such recognition itself promotes utility and would thus win favor with John Austin given the greater sensitivity consumers would have regarding the implications of their purchases. Although Austin may not have seen the precise conflicts implicit in utilitarian-based free trade and utilitarian-based positive law, he did recognize the ongoing nature of ethical inquiry, which approaches, but never quite achieves, an ethical ideal.¹⁰⁰

Beyond this realization, John Austin was a rule utilitarian.¹⁰¹

⁹⁹ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 80 (Isaiah Berlin et al. eds., Weidenfeld and Nicolson 1954) (1832).

For, *first*, positive law and morality, fashioned on the principle of utility, are gotten by observation and induction from the tendencies of human actions: from what can be known or conjectured, by means of observation and induction, of their uniform or customary effects on the general happiness or good. . . . As the experience of mankind enlarges, as they observe more extensively and accurately and reason more closely and precisely, they may gradually mend the defects of their legal and moral rules, and may gradually clear their rules from the errors and nonsense of their predecessors.

Id.

¹⁰⁰ *Id.* "But, though they may constantly approach, they certainly will never attain to a faultless system of ethics: to a system perfectly in unison with the dictates of general utility, and, therefore, perfectly in unison with the benevolent wishes of the Deity." *Id.*

¹⁰¹ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 39 (Isaiah Berlin et al. eds., Weidenfeld and Nicolson 1954) (1832).

See also WILFRID E. RUMBLE, *THE THOUGHT OF JOHN AUSTIN: JURISPRUDENCE, COLONIAL REFORM, AND THE BRITISH CONSTITUTION* 67 (1985).

As such, he attempted to maximize happiness within the confines of the sovereign's commands. If rule utilitarians recognize that imports implicitly bear the costs of positive laws incident to the imported goods manufacture, and that as such a purchase of a good from a lax sovereign in lieu of a good made in a strict sovereign is an economic veto of a strict sovereign's laws implicit in the domestically made good, Austin would be an Ethical Consumer since doing so supports the positive laws consumers demanded of their own sovereign. On the other hand, a consumer can purchase foreign-made goods and still be ethical, provided that such goods are made under positive laws of rigor commensurate with those the Ethical Consumer demanded in his/her own sovereign.

CONCLUSION

John Austin gave a provocative statement of positive law almost 170 years ago when he declared that law is a command of the sovereign directed to political inferiors who habitually obey and which imposes sanctions if they disobey. Sensitive voters in strict sovereigns have demanded that legislators provide positive laws protective of interests such as employees' wages, working conditions, health and welfare, pregnancy rights, retirement benefits, and environmental matters. Strict sovereigns have responded to such demands by enacting elaborate positive laws with voluminous regulations to implement those statutes. Many such positive laws have placed manufacturers in strict sovereigns at a competitive disadvantage vis-a-vis their competitors in lax sovereigns, in large part due to costs imposed by positive laws mandating social responsibility.

It is not always possible to determine whether it is less demanding positive law which has provided lax positive law nations

The main alternatives which he examines are reducible to act- and rule-utilitarianism, though Austin does not use these labels. Act-utilitarianism entails the direct application of "considerations of utility to *this* act in *this* situation". Rule-utilitarianism means that the decision to act in a particular way must be deducible from a rule. . . . The major difference between the two forms of utilitarianism is thus the place of rules in ethical decisions. The act utilitarian claims that the conformity of an action to a rule is not required for the justification of the action. The rule or restricted utilitarian believes that such conformity is a necessary condition of ethically justifiable behavior.

Throughout most of his first chapter on ethics Austin explains, *and justifies*, rule-utilitarianism of a sort similar to Paley's. Austin not only argued that human conduct is guided by rules, but that it *ought to be*. *Id.* (footnotes omitted).

with cost advantages over competitors from strict positive law nations or economic differentials based on cultural factors other than positive law. Given this uncertainty coupled with longstanding, rational, albeit partially empirically proven assertions of comparative advantage,¹⁰² it would be imprudent to erect positive law barriers to prevent goods made in lax sovereigns from entering strict sovereigns such as the U.S. Rather, the demand side of free trade should be addressed by imposing on consumers an ethical duty to take strict sovereign/lax sovereign positive law differentials into account in their major consumer purchases in the following manner: The ethical consumer who expects there to be a substantial minimum hourly wage to give strict sovereign workers a wage enabling them to live with a modicum of dignity will purchase products made under positive laws which mandate a minimum wage compatible with their demands. Similarly, ethical consumers will buy

¹⁰² See Alan Deardorff, *Testing Trade Theories and Predicting Trade Flows*, in 1 HANDBOOK OF INTERNATIONAL ECONOMICS 467, 468-69 (Ronald W. Jones and Peter B. Kenen eds., 1984).

Empirical implementation and testing of the major theories of international trade began in the early 1950s with MacDougall's (1951, 1952) application of the Ricardian model of comparative labor costs and Leontief's (1954) applications of the Heckscher-Ohlin model of factor proportions. I say "application" rather than "test" of the models because both were acknowledged then and since as being either misdirected or incomplete as tests of the models.

....

Throughout this period the major obstacle to the testing of trade theories has been the difficulty of constructing tests that all would agree were theoretically sound. The intuitive content of most trade theories is quite simple and straightforward. But empirical tests of the theories are often faulted on the grounds that they test propositions that do not derive rigorously from the theories. The reason is not usually that the empirical models are sloppy. Rather, the problem seems to lie in the theories themselves, which are seldom stated in forms that are compatible with the real world complexities that empirical research cannot escape.

....

These problems and others like them provide the theme of this survey of the literature on testing trade theories. Considerable progress has been made, especially in the last few years, with refinements of the theories to improve their empirical relevance. But it remains true nonetheless that no unambiguously correct and conclusive test of any trade theory has been formulated and applied. Instead there have been piecemeal improvements in the empirical applications of trade theories. Together these have given us a body of evidence that, though it proves little, is highly suggestive and has fostered a consensus as to what the economic factors are that contribute most to the understanding of international trade.

Id.

products made under environmental laws and other protective employee labor laws if they demanded or have substantially benefitted from such laws.

The question arises why consumers should purchase products made under laws philosophically compatible to those they have demanded to be ethical. The answer is one of cost, culture, and natural law. Employee and environmental laws are a type of social overhead that the positive law imposes. These positive laws also reflect cultural values that may not exist in products manufactured in lax sovereigns, even if such laws impose no or only marginal costs. If consumers demand and get positive law protections which impose costly burdens on products made in a strict sovereign, it comports with both natural law precepts of fundamental fairness and justice that consumers should support producers upon whom consumers have imposed such standards by purchasing their products. Similarly, Kant's categorical imperative directs us to act as we would want the law to be, which also supports the purchase of goods incorporating the cultural values which consumers have forced on producers in strict sovereigns via the positive laws. Back up those upon whom we have forced legal duties. To do otherwise is perverse and unethical.

What prevents this suggested ethical consumer from being a protectionist? The Ethical Consumer's conduct is not the result of the sovereign's command but, rather, stems from the free will of ethically enlightened consumers who are taking full account of all of a product's manufacturing background in their buying decisions, much in the same way any consumer rejects a red sweater in favor of one that is blue. The Ethical Consumer is an aspect of the free market recognized by economists of most political hues: Consumer sovereignty.

The Ethical Consumer finds support in John Austin's belief in unstifled inquiry and observation as a means of more closely approximating the utilitarian ideal of promoting the greatest happiness for the greatest number by enhancing consumer-citizen understanding of the implications of their purchases and the positive law.¹⁰³ Much as did Dorothea in *Middlemarch*,¹⁰⁴ the Ethical

¹⁰³ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 81 (Isaiah Berlin et al. eds., Weidenfeld and Nicolson 1954) (1832).

¹⁰⁴ GEORGE ELIOT, *MIDDLEMARCH* 613 (Houghton Mifflin Co. 1956) (1871-72).

Her full nature . . . spent itself in channels which had no great name on the earth. But the effect of her being on those around her was incalculably diffusive: for the growing good of the world is partly dependent on unhistoric acts; and that things are not so ill with you and me as they

Consumer in many small ways does good deeds that go unnoticed in the larger scheme of things. Yet, the Ethical Consumer understands that his or her role in international trade while singularly insignificant is cumulatively important by supporting the sovereigns whose positive laws have contributed to the civility of our individual lives.

might have been, is half owing to the number who have lived faithfully a hidden life, and rest in unvisited tombs.

Id.