Restrictive Import Regulations on Pornography: Public Morality of Protectionism?

Illana Post

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Great Britain has long been committed to tight customs control of obscene materials and, anticipating the fall of trade barriers by 1993, is considering legislative initiatives to further curtail the importation of pornography. Although British officials claim that nothing in European Community (“EC”) treaties or legislation prevents such actions, Article 30 of the Treaty establishing the European Economic Community (“EEC Treaty” or “Treaty”) forbids any import prohibition effecting a quantitative restriction on other Member States. Because British law employs separate standards for domestic and imported pornography, Great Britain’s selective regulation arguably violates the EEC Treaty’s antidiscrimination provisions.

This Comment explores such selective and restrictive regulations on the movement of pornographic materials in the EC. Part I examines the rationales behind U.S and British laws restricting the sale and export of pornography. Part II contends that the proposed British restrictions violate Article 30 of the EEC Treaty, as Great Britain allows the domestic production and marketing of certain pornography, while restricting the importation of similar material. Part III analyzes several provisions of the EEC Treaty that may provide exceptions to Article 30 for Britain’s antipornography regulations: the public morality clause of Article 36; Article 234, which permits trade restrictive agreements concluded prior to Member State accession to the EC; and Article 115, which allows temporary

† B.A. 1990, Smith College; J.D. Candidate 1993, University of Chicago.
1 British efforts to bolster antipornography legislation are due, in part, to the controversy surrounding “After Twelve,” a new all-night satellite television channel that plans to broadcast sexually explicit adult entertainment to European audiences, including viewers in Great Britain. Fearing that Great Britain soon will be forced to abandon its traditionally restrictive approach to imported pornography, British officials are taking this opportunity to tighten existing laws. See Melinda Wittstock, TV Sex Channel to Face Decency Test, Times Newspapers Ltd (June 14, 1991), and Kim Fletcher, Alien Porn Loopholes. . ., The Daily Telegraph 11 (June 23, 1991).
2 Treaty Est the Eur Eco Comm, Art 30.
protective measures when authorized by the Commission. This Comment concludes that unless Great Britain applies parallel standards to domestic and imported pornography, any restriction on intra-Community trade impedes the free movement of goods and is necessarily prohibited by EC Treaty law.

I. INTERNATIONAL JUSTIFICATIONS FOR RESTRICTING PORNOGRAPHY

A modest comparison of international antipornography regulations reveals renewed debate over state regulatory issues due, in part, to a growing belief that grave harms result from the wide availability of obscene materials. Specifically, nations restricting trade in pornography seek to protect three interests. First, governments regulating pornography have a legitimate interest in protecting the public commercial environment by preventing the marketing of obscene materials. Second, transportation of obscene materials risks exposure to children (or unwilling adults), and such material may have an adverse influence on juveniles by fostering tendencies to abuse or humiliate women. Third, the growing feminist movement has contributed to the awareness that pornography "eroticizes hierarchy, [and] . . . sexualizes inequality . . ."

A. U.S. Justifications

In the U.S., regulation of pornography requires balancing First Amendment concerns against the state's interest in protecting the public, specifically minors and women. While the Supreme Court has denied obscene material First Amendment protection because it does not constitute "speech" within the meaning of the Constitution and, relatedly, because the resulting social harms outweigh any value the expression might contain, "obscenity" is no longer considered a synonym for "pornography" under U.S. law. Such

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6 The First Amendment provides in part that "Congress shall make no law . . . abridging the freedom of speech . . ." US Const, Amend I.
7 See Cass R. Sunstein, Pornography and the First Amendment, 4 Duke L J 589, 595 and 607 (1986), arguing that pornography is "low value" speech and, as such, is entitled to less government protection than other types of speech.
8 For example, Miller v California, 413 US 15 (1973) defined "obscenity" as patently offensive depictions of sexual conduct which, taken as a whole and absent serious literary, artistic, political or scientific value, appeal to the prurient interest. Id at 24. Some theorists,
differences in terminology have not only resulted in varying degrees of First Amendment protection but have also become manifest in divergent legislation. For example, federal antiobscenity legislation tends to be quite restrictive, prohibiting the importation or transportation of “any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character.” While violation of this statute may result in imprisonment for five years and a maximum fine of $5,000, even stricter local antipornography legislation focused on the harms incurred by pornography has been passed in Indianapolis. Similar legislation has also been proposed in Los Angeles and Minneapolis.

In addition to First Amendment concerns, empirical evidence suggesting a connection between juvenile access to pornography and rape has encouraged regulation of pornography in the U.S. However, have declined to extend the morality-based definitions of “obscenity” to “pornography,” favoring instead harm and power-based definitions of pornography suggested by feminist conceptions. Thus, Catherine MacKinnon and Andrea Dworkin define pornography as “the graphic sexually explicit subordination of women” who are displayed, either in pictures or in words, as enjoying and seeking physical pain, torture, and humiliation. See MacKinnon, 2 Yale L & Policy Rev at 322-24 (cited in note 5).

9 One exception to this restrictive trend exists in Oregon, where the State Supreme Court invalidated a law regulating obscene material in 1987. The court held that such laws violated the guarantee of free speech, press, and expression under Article I, §8 of the Oregon Constitution, and concluded that “[i]n this state any person can write, print, read, say, show or sell anything to a consenting adult even though that expression may be generally or universally considered ‘obscene.’ ” State v Henry, 302 Or 510, 525, 732 P2d 9, 18 (1987).


11 Id.

12 Atty Gen Final Rep at 392 (cited in note 3). Note, however, that American Booksellers Assoc., Inc. v Hudnut, 771 F2d 323 (7th Cir 1985), aff’d 475 U.S. 1001, 106 S Ct 1172 (1986) invalidated the Indianapolis ordinance. However, given that the Supreme Court affirmed Hudnut summarily, the Court’s decision has limited precedential value, and the future of the Indianapolis antipornography restrictions remains uncertain.

13 Atty Gen Final Rep at 392 (cited in note 3).

While extrapolation from laboratory studies to real life is often suspect, the mere suggestion of causal relationship has motivated legislators to further restrict "aggressive" pornography. Finally, the harm resulting from the portrayal of abusive and coercive treatment of women provides additional justification for U.S. regulation of the production and distribution of pornography. Some courts have recognized the American feminist perspective that pornography is injury.

In the words of Judge Easterbrook, pornography is an aspect of dominance. It does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view pornography is not an idea; pornography is the injury. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets.


Interestingly, this protection of human dignity forms the core of antipornography legislation in countries such as Belgium, Denmark, Sweden, and especially Germany. In fact, the supreme duty of the German government is the protection of human dignity, an obligation accomplished, in part, through the regulation of all speech tending to corrupt the youth or violate personal honor. Basic Law of the Federal Republic of Germany, Art 1; see also Basic Law, Art 5, covering, in part, independent categories of expression such as press and film. Based on this constitutional provision, German law justifies regulation of obscene material for the protection of the basic rights of other individuals. However, outside the scope of this human dignity exception, pornography is subject to little domestic regulation in Germany, as all speech expressing an "opinion" is beyond censorship. See Reimann, 21 Mich J L and Reform at 210 (cited in note 14).

American Booksellers Assoc., Inc. v Hudnut, 771 F2d at 328-29. Although Judge Easterbrook invalided the Indianapolis ordinance as unacceptable viewpoint-based discrimination, the Seventh Circuit's acknowledgement that significant harms are associated with the dissemination of pornography lends credence to the feminist argument for harm-based regulations. See also, Frank I. Michelman, Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation, 56 Tenn L Rev 291, 295 (1989). For other cases considering the effect of pornography on human dignity, see Morris v Municipal Ct, 32 Cal 3d 553, 568, 562 P2d 51, 60, 186 Cal Rptr 494, 503 (1982); Kingsley
B. British Justifications

British legislation concerning imported obscene material traditionally has been more restrictive than that of its neighbors. While the "pornography causes rape" view was adopted in Great Britain as well as in the U.S., conservative politicians and police authorities have more often controlled the importation of obscene material by making it illegal to "outrage the public decency."\(^\text{18}\)

The 1954 Obscene Publications Act represents the strongest British statement yet against the traffic of obscene material. The Act defines "obscene material" as that which "tend[s] to deprave and corrupt" its viewers\(^\text{20}\) and authorizes the seizure of materials held to be obscene within this definition and "kept for publication for gain."\(^\text{21}\) Recently, in *Gold Star Publications Ltd. v Commissioner of Metropolitan Police*,\(^\text{22}\) the House of Lords, sitting as an appellate court, interpreted such a possession of indecent articles as warranting a penal sanction and rejected the "abstract concept of obscenity" invoked in earlier cases.

Increased regulations on imported pornography may be a reaction by British officials to a divergence between Great Britain and the EC on what constitutes "obscene" material. Differing definitions can create problems, for example, for European satellite tele-

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\(^\text{19}\) Pornography is widely available in its most explicit forms in Denmark, Sweden, and Germany, and materials termed "soft-porn" are also easily obtained (though not legal) in France, Italy, and the United States. *KCWD/Kaleidoscope* 29 (Jan 20, 1992) (Lexis, Europe Library, Eurisp File).

\(^\text{20}\) The common law recognized several offenses forbidding the proscribed conduct as an outrage to public decency. Such offenses included obscene libel and prohibited the availability of such material as early as the late nineteenth century. For example, section 42 of the 1876 Customs Consolidation Act prohibits the importation into the customs territory of the United Kingdom of "indecent or obscene" articles and adds that such articles may be forfeited, destroyed, or otherwise disposed of at the Commissioners of Customs's discretion. Similarly, section 304 of the 1952 Customs and Excise Act makes it a criminal offense to be concerned in any way with the fraudulent evasion (or attempted evasion) of the import regulation. Rebecca M. M. Wallace, "Public Morality" - *The Terms of Article 36 of the EEC Treaty*, 25 J of Legal Society of Scotland 234 (1980).


\(^\text{22}\) Obscene Publications Act, § 3(3) (as amended, 1959).

\(^\text{23}\) Queen's Bench Div (Div Ct) (1980). *Gold Star* involved publishers whose warehouse contained a consignment of more than 150,000 "obscene" magazines to be marketed "in the United States, in Europe, in Africa, and elsewhere abroad." While Gold Star Publishers argued that the 1959 Obscene Publications Act should be interpreted as meaning "kept for publication in England and Wales for gain in England and Wales," the House of Lords upheld the seizure of goods despite considerable financial loss to the property owners. See also Comment, 130 New L J at 508-9 (cited in note 20).
vision channels seeking to air adult broadcasts throughout Europe. Despite EC conventions and directives regulating transfrontier broadcasting, broadcasts considered “artistic” by one Member State might be “obscene” to another.

The current controversy surrounding the satellite channel “After Twelve” exemplifies the intra-Community debate over obscenity definitions. Protests from the British Broadcasting Standards Council and the National Viewers’ and Listeners’ Association caused the Commission to withhold a broadcasting license from “After Twelve” until it met the requirements of the 1990 European Broadcasting Act and the Commission’s Programme Code. These rules, however, contain definitions that are far more restrictive than the EC regulations normally guiding satellite companies.

British domestic legislation already has been strengthened with regard to pornographic photographs, conditions for the licensing of sex shops, video censorship, and public displays of obscene material. However, anticipating a wave of new assaults on British import laws stemming from Gold Star and the “After Twelve” controversy, British Home Office Minister Mellor and Secretary of the Tory European Reform Group Taylor have joined forces to further bolster the 1959 Obscene Publications Act. Fearing developments at the frontiers will require Great Britain to abandon its traditionally restrictive controls on the importation of obscene material, British officials hope to preempt looser EC

23 See note 1.
25 For example, the Local Government Act of 1982 provides local authorities in England and Wales with the power to control “sex cinemas” and sex shops in their area. Under the Act, sex shops must be licensed or will be subject to a fine. See Case 121/85, Conegate Ltd. v Her Majesty’s Customs and Excise, 1986 ECR 1007, 1 CMLR 739.
26 Specifically, the Video Recordings Bill (1984) classifies video cassettes as either suitable for home-viewing or simply censored. Any person who supplies or offers to supply a video cassette which has not been classified by the British Board of Film Censors will be guilty of an offense punishable by a fine of up to £10,000. Editorial, Video Censorship, 134 New L J 245 (March 16, 1984).
27 Such legislative initiatives are serving as the model for new EC regulations banning “pornographic or sexually suggestive pictures, objects or written materials” from the workplace. Grice, Times Newspapers Ltd (June 30, 1991) (cited in note 24).
standards by suppressing imported print pornography and obscene broadcasts that outrage the public decency.

II. THE TERMS AND DEROGATION OF ARTICLE 30

This Comment challenges proposed British regulations on imported pornography as violating the Treaty of Rome. Limitations placed on goods imported into Great Britain, either directly from the Member State of origin or indirectly through other Member States, violate one of the fundamental principles governing the EEC Treaty—the free movement of goods.29

A. Article 30

In order to ensure the free movement of goods, EC law has developed a number of Treaty-based and policy-oriented tools.30 Of these, the Article 30 prohibition against trade discrimination provides the strongest argument against new British import restrictions.31

Article 30 provides that "[q]uantitative restrictions on imports, and all measures having equivalent effect shall . . . be prohibited between Member States."32 Given that the free movement of goods constitutes a fundamental freedom of the EC,33 the elimination of quantitative restrictions and of any regulation having equivalent effect is essential to the furtherance of a Common Market.34 Therefore, in evaluating trade restrictions, the initial question is whether the particular measure restricts intra-Community imports.35

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29 EEC, Arts 2, 30.
30 The main EEC Treaty provisions designed to abolish national measures that restrict Community trade include Articles 12 to 17 (prohibiting customs duties and any taxes having the same effect); Articles 30 to 36 (eliminating quantitative restrictions and any measures with equivalent effect); Articles 92 to 94 (preventing any State aid that affects intra-Community trade or distorts common market competition); and Articles 95 and 96 (forbidding fiscal discrimination).
32 EEC, Art 30.
33 EEC, Art 2.
34 It should be noted that although Article 4(a) of the European Coal and Steel Community Treaty and Article 93 of the European Atomic Energy Community Treaty prohibit quantitative restrictions on imports and exports of certain products, Article 232 of the EEC Treaty states that provisions of any one of these two treaties and of the EEC Treaty neither affect nor derogate provisions of the others. This Comment considers only the provisions of the EEC Treaty.
35 Although pornography that is broadcast rather than printed is considered a "service" as opposed to a "good," Case 155/73, State v Sacchi, 1974 ECR 409, 2 CMLR 177, the free movement of such material is nonetheless protected by Articles 59 to 66 of the EEC Treaty.
The European Court of Justice ("ECJ") first interpreted the scope of Article 30 in *Procurer du Roi v Dassonville*, finding any regulation capable of hindering, directly or indirectly, actually or potentially, intra-Community trade to be a "quantitative restriction." *Regina v Henn and Darby* then applied the *Dassonville* test directly to obscene material and determined that a prohibition on the import of pornographic material violates Article 30. The ECJ additionally established that Article 30 bans total prohibitions on imports as well as partial trade restrictions. Thus, any law of a Member State prohibiting importation of pornographic articles into that state constitutes a quantitative restriction on imports within the meaning of Article 30.

Recently, *Sheptonhurst Limited v Newham London Borough Council* noted that Member States do not violate Article 30 when marketing restrictions on imported goods are no more stringent than those placed on domestic products. *Sheptonhurst* implies that Article 30 is violated, however, when imported goods are subjected to stricter regulations than are similar domestic goods. Currently proposed antipornography regulations in Great Britain would obstruct the importation of goods that are freely marketed domestically. Such disparity in trade practices hinders intra-Community trade because domestic pornography is available on more favorable terms than its imported counterpart. Thus, the proposed British antipornography laws constitute a violation of Article 30.

See also, Case 7/68, *Commission v Italy*, 1968 ECR 423, 1 CMLR 1. Given that the goals of these Articles are extremely similar to those advanced by Article 30, this Comment assumes that any distinction made between "goods" and "services" for identifying Article 30 violations is irrelevant. Article 30 purposefully substitutes the term "imports" in its discussion of quantitative restrictions, implicitly protecting the free movement of imported goods and services generally.

36 Case 8/74, 1974 ECR 837, 2 CMLR 436.
37 1974 ECR at 852.
38 Case 34/79, 1979 ECR 3795, 1 CMLR 246. This Comment examines two aspects of the *Henn* decision: the first section of *Henn* concerns only the scope of Article 30, while the second section examines the extent to which Article 36 serves as an exception to Article 30. The second element is discussed in Part III of this Comment.
39 1979 ECR at 3804.
40 Case 350/89, Transcript (May 7, 1991). *Sheptonhurst* agreed with Case 23/89, *Quietlynn Limited and Another v Southend Borough Council*, (1990) 3 All ER 207 (Lexis, Europe Library, Alleur File), in which the Advocate General reasoned that "[r]egulating the sale of sex articles may . . . lead to a reduction in imports and thus justify application of Article 30." While *Quietlynn* found the particular law prohibiting the sale of sex articles in unlicensed sex shops did not violate Article 30, *Quietlynn*'s reaffirmation of the *Dassonville* formula as the appropriate "starting point" for such examinations justified application of Article 30 in *Sheptonhurst*. 
B. Derogations of Article 30

Despite the provisions of Article 30, disparities between a Member State's policies toward domestic and imported goods continue to arise whenever national and Community standards conflict. Mutual recognition and harmonization are not always effective, and the principles underlying Article 30 are not easily applied in all situations. Recognizing this fact, Rewe-Zentral v Bundesmonopolverwaltung fur Branntwein ("Cassis de Dijon"),41 carved out an initial set of exceptions to Article 30.

Under Cassis de Dijon, in the absence of any Community rules, Member States are entitled to regulate all matters relating to their own domestic production and marketing of goods. Therefore,

Obstacles to movement within the Community resulting from disparities between national laws relating to the marketing of [goods] . . . must be accepted in so far as . . . necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.42

Cassis de Dijon provides that Member States may occasionally impose measures necessary to protect the public interest. Such restrictions on the free movement of goods are tolerable only in the absence of applicable Community provisions, and must only be accepted in so far as the restrictions are necessary "for the purpose of safeguarding rights which constitute the specific subject matter of that property."43 This temporary "necessity test" articulated in Cassis de Dijon was modified by Gilli and Andres:44

[I]t is only where rules, which apply without discrimination to both domestic and imported products, may be justified as necessary in order to satisfy imperative re-

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41 Case 120/78, 1979 ECR 649, 3 CMLR 494.
42 1979 ECR at 662 (emphasis added).
43 The phrase "in particular," implies that the "mandatory requirements" listed are exemplary rather than exhaustive. Peter Oliver, Free Movement of Goods in the EEC, 87, 133-34 (Eur Law Centre Ltd, 2d ed 1988). For example, procedures inherent in customs practices are deemed to be an exception to Article 30, because formalities such as frontier controls do not infringe on the free movement of goods. See Case 159/78, Commission v Italy, 1975 ECR 3247, 3 CMLR 446.
45 Case 788/79, 1980 ECR 2071, 1 CMLR 146.
quirements . . . that they may constitute an exception to
the requirements arising under Article 30.\textsuperscript{46}

Given the exceptions to Article 30 articulated in Cassis de Dijon,
the question becomes whether British import regulations are saved
by any such carve-outs. Cassis de Dijon should be read narrowly:
unless covered by other Treaty provisions, most restrictions on im-
ports fall within the scope of Article 30 whether or not they actu-
ally discriminate against imports.\textsuperscript{46}

British proposals to strengthen import restrictions on pornog-
raphy violate Article 30 when they restrict goods that are freely
marketed domestically. Such Article 30 derogations are not justi-
fied by the exceptions articulated in Cassis de Dijon, primarily be-
cause bolstered import restrictions are not necessary to effectuate
fiscal supervision, ensure fair commercial policy, or protect public
health and welfare. Further, the proposed restrictions are targeted
specifically towards limiting imports and impeding intra-Commu-
nity trade, thereby contravening fundamental goals of the EEC
Treaty.

III. JUSTIFICATIONS FOR ARTICLE 30 DEROGATION

Although Article 30 appears to be couched in absolute terms
that prohibit any measure that restricts imports, violations of Arti-
cle 30 may be justified by several exceptions—in addition to those
mentioned in Cassis de Dijon—contained in the Treaty itself. How-
ever, having determined that any tightening of British import
restrictions will violate Article 30, this Comment argues that none
of the Treaty's exception clauses will justify such derogations.

A. Public Morality

Article 36 of the EEC Treaty gives every state the exclusive
right to protect its national interests, by providing that "[t]he pro-
visions of Article 30 . . . shall not preclude prohibitions or restric-
tions on imports, exports, or goods in transit justified on the
grounds of public morality, public policy or public security."\textsuperscript{47} Ar-
ticle 36 emphasizes that "[s]uch prohibitions or restrictions shall

\textsuperscript{46} 1980 ECR at 2078, 1 CMLR 146 at 154 (emphasis added).

\textsuperscript{46} For example, flour-milling quotas set at the production level have little or no effect
on wheat imports and are, therefore, unlikely to affect trade between Member States. Given
this low probability of trade infringement, the regulation does not constitute a quantitative
restriction on imports under Article 30. Oliver, Free Movement of Goods in the EEC at 136
(cited in note 42).

\textsuperscript{47} EEC, Art 36.
not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

Courts have interpreted Article 36 to grant each Member State the right to determine, in accordance with its own values and through its own means, the requirements of public morality in its own territory. While the ECJ decision in Regina v Henn and Darby suggested that restrictions on the importation of pornographic material may violate Article 30, the ECJ concluded that public morality concerns provided sufficient justification for the importation restrictions in question.

Noting that the authority to enact such a regulation is fully within the power reserved by Article 36, the Court added that, if public morality justified an import prohibition, enforcement of that prohibition, absent any lawful trade within the Member State, would not constitute a means of arbitrary discrimination. Maintaining that the overall purpose of the British legislation, despite variations existing in different territorial units, was “the prohibition or at least, the restraining, of the manufacture and marketing of publications or articles of an indecent or obscene character,” the ECJ in Henn concluded that the United Kingdom permitted no lawful trade of such goods.

The Court was, in fact, mistaken because lawful trade of indecent or obscene materials within the United Kingdom was possible. Indeed, most parts of the United Kingdom not only permitted trade of articles deemed "indecent," but also allowed trade of obscene articles justified “for the public good.” Put simply, erotica sold in licensed sex shops or indecent articles sold to persons over eighteen constituted a lawful and profitable trade in the United Kingdom when Henn was decided.

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48 The exceptions enumerated in Article 36 must be carefully distinguished from the mandatory requirements of Article 30. While Member States rely on Article 30 “in the absence of common rules” as an informal lapse of EC law, the public morality, public policy, and public security exceptions of Article 36 render Article 30 wholly inapplicable once the stated conditions have been met. EEC, Art 36.

49 Conversely, where Community Directives, in application of Articles 100 and 100(a), harmonize national measures so as to address Article 36 concerns, recourse to that Article will be more limited or even excluded.

50 Case 34/79, Regina v Henn and Darby, 1979 ECR at 3817.

51 Id at 3813. See also Comment, Ban on Importation of Pornographic Articles Not Contrary to EEC Treaty, 44 J Crim L 165, 166 (1980).

52 Case 34/79, Henn, 1979 ECR at 3814.

53 See Case 121/85, Conegate Ltd. v Her Majesty's Customs and Excise, 1986 ECR 1007, 1014, 1 CMLR 739 (opinion of Advocate General).
Henn also instructs, however, that a Member State may not rely on the Article 36 public morality exception when its legislation contains no prohibition on the domestic marketing of the same goods. Similarly, because no absolute ban on the manufacture or sale of pornographic articles existed, Conegate Ltd. v Her Majesty's Customs and Excise\(^*\) held that although the United Kingdom was entitled to set its own standards of public morality justifying restrictions on free movement of goods, any such prohibition must apply to domestic goods equally.\(^*\)

Conegate explained that neither partial restrictions on circulation nor territorial restrictions on the public display of obscene goods was sufficient to establish equivalent domestic prohibition. Given the disparity between standards controlling domestic and importation activities, the ECJ concluded that the import restriction was unjustified and thus not covered by Article 30.\(^*\)

The public morality exception permits only limited derogation from a fundamental principle of Community law. Moreover, the ECJ has allowed Article 36 public morality exceptions only when the restriction does not constitute a means of arbitrary discrimination against imports.\(^*\) This limitation may be based, in part, on a political representation rationale. Political safeguards work only when applied equally. If purported safeguards of public morality do, in fact, involve discrimination, then those who are burdened by such discrimination are denied adequate political representation before those enacting the safeguard in question.\(^*\)

Article I, Section 8, Clause 3 of the U.S. Constitution — the Commerce Clause — interpreted in light of a political representation theory may be analogous to Articles 30 through 34, which govern the movement of goods among Member States. The framers of the U.S. Constitution drafted the Commerce Clause in order to

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\(^*\) 1986 ECR 1007, 1 CMLR 739.
\(^*\) 1986 ECR at 1025.
\(^*\) Id at 1023.
\(^*\) For example, Article 36 does not justify advertising restrictions on alcoholic drinks when they affect imported products more than domestic products. See Case 152/78, Commission v France, 1980 ECR 2299, 2 CMLR 743 (although the Member State could have invoked the "public health" clause of Article 36 to justify the restriction, the looser requirements imposed on domestically produced drinks rendered the advertising restriction arbitrary). For cases urging a narrow interpretation of Article 36, see Case 10/89, SA CNL-Sural NV v HAG GF AG, 3 CMLR 571 (1990); Case 304/84, Ministere Public v Muller, 1986 ECR 1511, 2 CMLR 469 (1987); Case 222/82, Apple and Pear Dev Council v KJ Lewis Ltd., 1983 ECR 4083, 3 CMLR 733 (1984); and Case 144/81, Keurkoop BV v Nancy Kean Gifts, 1982 ECR 2853, 2 CMLR 47 (1983).

promote economic integration and interstate harmony,69 and the
Commerce Clause has since been the primary tool for the removal
of discriminatory, state-enacted barriers to free trade.60 Similarly,
since the Treaty establishing the Common Market expressly recog-
nizes the free movement of goods and seeks to eliminate all barri-
er to the movement of goods,61 the ECJ has invalidated national
laws hostile to the concept of a Common Market.62

The EEC Treaty recognizes that if all states created and im-
plemented trade regulations motivated by their self-interest, the
Member States would eventually suffer collective harm. Therefore,
the Treaty safeguards both economic integration and the free
movement of goods by employing tools that identify protectionist
measures. For example, Article 3 of the EEC Treaty makes the free
movement of goods its first priority, indicating that Member State
protectionism is inconsistent with the smooth functioning of a
common market. Pursuant to the goals of creating a customs
union,63 by abolishing customs duties and quantitative restrictions
between Member States, and prohibiting exclusive rights for state
monopolies of a commercial nature,64 the EC prevents Member
States from implementing protectionist restrictions on goods at the
expense of Community trade.

Therefore, Article 36 enables a Member State to safeguard the
public morality of its citizens through antipornography legislation
to the extent that any restrictive conditions imposed on Commu-

60 Indeed, Constitutional Convention debates indicated that commercial protectionism
between the states, rather than an overwhelming concern for personal rights, acted as the
primary catalyst for the Constitutional Convention. See Eule, 91 Yale L J at 430 (cited in
note 58). See also, Richard B. Collins, Economic Union as a Constitutional Value, 63 NYU
L Rev 43 (1988); Albert S. Abel, The Commerce Clause in the Constitutional Convention
and in the Contemporary Comment, 25 Minn L Rev 432 (1941).
61 Although worded affirmatively, U.S. courts have employed the Commerce Clause as a
basis for invalidating state laws which either overtly discriminate against interstate com-
merce, or unnecessarily interfere with the free movement of goods. See H. P. Hood & Sons v
DuMond, 336 US 525, 539 (1949) (emphasizing that the U.S. is a "federal free trade unit"
by virtue of the protection afforded by the Commerce Clause). See also, John Ely, Democ-
62 See Final Act of the Intergovernmental Conference on the Common Market, Title 1,
298 UNTS 18 (March 25, 1958); and EEC, Arts 30-34.
63 Under a political representation theory, judicial invalidation of discriminatory trade
measures is not merely appropriate, but indeed essential to any representational govern-
ment. "When regulation is of such a character that its burden falls principally on those
without the state, legislative action is not likely to be subjected to those political restraints
which are normally exerted on legislation where it affects adversely some interest within the
64 EEC, Art 9.
64 Id, Art 37.
nity imports do not exceed those applicable to its domestic products. Indeed, article 3 of Council Directive 70/50 requires all Community marketing restrictions to apply equally to imported and domestic goods.65

Nevertheless, Great Britain continues to apply different standards to domestic and imported pornography. Regarding published material, for example, Great Britain treats imported pornography according to a broadly drawn standard that prohibits anything deemed "indecent" or "obscene." Statutes such as the Obscene Publications Act, however, restrict only domestic material tending to "deprave or corrupt" an individual. Therefore, imported pornography continues to be stringently regulated while the domestic "soft-porn" industry thrives. Great Britain's proposed import regulations may serve a purpose consistent with the general intent to regulate offensive material, but the ECJ requires that such a purpose may not "take precedence over the requirement of the free movement of goods, which constitutes one of the fundamental rules of the Community."66

This subordination of state law to EC goals is fundamental to the "supranational" character of EC law. EC law differs from international public law in that it constitutes "a separate legal order whose provisions belong neither to international [public] law nor to the municipal law of the Member States,"67 an interpretation similar to the U.S. Supreme Court's careful safeguarding of the "supreme law of the land."68 By injecting a national, or a supranational, perspective into their analyses, both the Supreme Court and the ECJ balance competing interests in an effort to eradicate discrimination and remedy defects in the political process caused by protectionist regulations.

B. Article 234: Conventions Concluded Before Accession

Article 36 does not justify Great Britain's derogation of Article 30 if British antipornography restrictions discriminate against im-

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66 Case 120/78, Rewe-Zentral Ag v Bundesmonopolverwaltung Fur Branntwein, 1979 ECR 649, 3 CMLR 494.
68 Compare Gibbons v Ogden, 22 US (9 Wheat) 1 (1824) (interpreting the dormant commerce clause as rendering national regulation superior to regulation attempted by the sovereign states) and Case 6/84, Costa v Ente Nazionale per l’Energia Elettrica (ENEL), 1964 ECR 585, 1 CMLR 425 (holding that unilateral measures cannot take precedence over Community laws concerning conditions in which goods are marketed).
ported goods. By exceeding the terms of the public morality escape clause, Great Britain must consider other exceptions to Article 30, such as Article 234, which ensures that:

The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.69

National concerns about the regulation of pornographic material began prior to British accession to the European Community, and, indeed, many Member States concluded agreements among themselves and with third countries before the EEC Treaty came into force. Specifically, Great Britain signed the Geneva Convention for the Suppression of Traffic in Obscene Publications in 1923 and the Universal Postal Convention, renewed at Lausanne in 1974. Both agreements strictly limit the importation of material classed as indecent or obscene, and both were ratified prior to British accession to the EEC Treaty.70 In an effort to preserve its import restrictions, Great Britain could argue that current proposals to tighten import regulations simply constitute amendments to these prior agreements and are, therefore, safeguarded by Article 234.

Although Article 234 often serves as an escape clause for Article 30 violations based on agreements concluded prior to accession, Article 234 only applies to agreements between one or more Member States and one or more third (non-EC) countries; it excludes agreements concluded solely between Member States.71 The Court emphasized this limitation on Article 234 in Commission v Italy,72 rejecting Italy's claim that higher customs duties imposed by Italy on other Member States were justified by a 1956 GATT agreement. Italy supported its argument by citing Article 234, but the ECJ responded that "in matters governed by the EEC Treaty, that

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69 Article 234 of the EEC Treaty qualifies the first paragraph by adding:
To the extent that such agreements are not compatible with this Treaty, the Member . . . States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall . . . assist each other to this end and shall, where appropriate, adopt a common attitude.

70 For another relevant convention signed by Great Britain prior to accession, see the Customs Consolidation Act of 1876 (targeting the importation of pornographic articles from Holland).

71 See Oliver, Free Movement of Goods in the EEC at 292-93 (cited in note 42).

72 Case 10/61, 1962 ECR 1, 1 CMLR 187.
Treaty takes precedence over [all] agreements concluded between Member States before its entry into force.\textsuperscript{73}

Rooted in the supranational character of EC law, the rule articulated in \textit{Commission v Italy} must, nonetheless, be granted a degree of flexibility. Certainly occasions will arise when a Member State will execute an agreement with a third country that necessarily affects another Member State (for example, border controls, drug trafficking laws).\textsuperscript{74} Although such situations constitute the exception rather than the norm, incidental involvement of another Member State should not bar the application of Article 234.

The ECJ adopted this approach in \textit{Regina v Henn and Darby}, focusing on the compatibility of EC law with the Geneva Convention of 1923, which sought to suppress traffic in obscene publications. The ECJ had two options: either the 1923 Convention represented nothing more than a series of bilateral trade agreements superseded by the EEC Treaty, or, alternatively, the Geneva Convention could be fully enforced despite the EEC Treaty, but only by third countries.\textsuperscript{75} The ECJ chose the latter option, holding that if a Member State invokes the public morality exception, yet Article 36 is rendered unavailable, Article 234 may permit the Member State to fulfill obligations arising from prior conventions.\textsuperscript{76}

Perhaps due to the ambiguity of \textit{Henn} on this point, the ECJ reconsidered the issue in \textit{Conegate} and held that “an agreement concluded prior to the entry into force of the Treaty may not be relied upon in order to justify restrictions in trade between Member States.”\textsuperscript{77} Thus, \textit{Conegate} implies that, despite \textit{Henn}, Article 234 can virtually never be an exception to Article 30.\textsuperscript{78}

The ECJ has not taken another opportunity to firmly decide whether Article 234 covers recent amendments to agreements enacted prior to accession, since the prior treaty in \textit{Henn} covered the same ground set forth by Article 36 and the treaties involved in \textit{Conegate} were irrelevant to the Court’s ultimate decision.\textsuperscript{79}

\textsuperscript{73} 1962 ECR at 10.
\textsuperscript{74} Oliver offers these examples and concludes that “there is no reason why the result should be different where more than one Member State is bound by a prior treaty obligation.” Oliver, \textit{Free Movement of Goods in the EEC} at 293 (cited in note 42).
\textsuperscript{75} See Case 34/79, \textit{Regina v Henn and Darby}, 1979 ECR at 3833 (opinion of Advocate General). Note that the first option is in line with Case 10/61, \textit{Commission v Italy}, 1962 ECR 1, 1 CMLR 187.
\textsuperscript{76} Case 34/79, \textit{Henn}, 1979 ECR at 3818.
\textsuperscript{77} Case 121/85 \textit{Conegate Ltd. v Her Majesty’s Customs and Excise}, 1986 ECR at 1026.
\textsuperscript{78} Oliver, \textit{Free Movement of Goods in the EEC} at 294 (cited in note 42).
\textsuperscript{79} Specifically, the Geneva Convention of 1923 only applied to “publications,” and the Universal Postal Convention only applied to goods sent by post.
theless, the *Conegate* Court chose to examine the question when it could have avoided the issue on relevancy grounds, suggesting judicial interest in the scope of Article 234.

Given apparent judicial willingness to consider Article 234 cases, Great Britain could argue that non-EC states that are parties to agreements such as the Customs Consolidation Act should have the right to enforce the sections of the Act concerned with the import and export of obscene materials against those states-parties that have since joined the EC. Arguing that its antipornography restrictions merely constitute amendments to prior agreements, Great Britain could, thereby, conclude that any violation of Article 30 is justified under Article 234.

Faced with such an argument, the ECJ should respond by favoring *Henn*'s flexible interpretation of Article 234 over *Conegate*'s more restrictive approach. If British antipornography regulations reflected no disparity between domestic and importation policies, then Article 36 would apply. In the event that Article 36 is found inapplicable, a flexible approach to Article 234 might allow Great Britain to tighten import regulations pursuant to prior agreements.

Given the failure of the Article 36 public morality exception to justify the different standards Great Britain applies to domestic and imported pornography, the ECJ should follow *Commission v Italy* by deeming prior agreements between Member States superseded by EC law. Adherence to *Commission v Italy* should end, however, when such an approach impairs the rights of third countries. In such cases Community law should not interfere with prior negotiations. To hold otherwise would punish non-Member States simply because those countries are not members of the EC.

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80 In that situation, “in so far as a Member State avails itself of the reservation relating to the protection of public morality provided for in Article 36 of the Treaty, the provisions of Article 234 do not preclude that State from fulfilling the obligations arising from [the prior treaties].” *Case 34/79, Henn*, 1979 ECR at 3818.

81 It is not difficult to imagine a situation where a nation with a traditionally neutral foreign policy is wary of proposals for a mandatory common defense policy within the EC. Given the Commission's rejection of proposals for "affiliated members," (states that are Community members for trade purposes only), these nations may be reluctant to accede to the EC if such a commitment means being forced to relinquish a traditionally well-guarded neutral foreign policy. Should nations like Austria be denied enforcement of established treaties due to their decision to remain non-members? Policies recently developed in Maastricht suggest that certain Member States (currently Great Britain and Denmark) may be permitted to "opt out" of "the eventual framing of a common defense policy." Alan Riding, *Measured Steps Toward One Europe*, NY Times (Dec 12, 1991).
Unfortunately, the Court will probably follow its ultimate holding in *Conegate*, implicitly removing Article 234 from the class of possible exceptions to Article 30.\(^{82}\) One of the most recent examinations of Article 234 as an exception to Article 30, *Conegate* involved British importation of "inflatable dolls of a sexual nature."\(^{83}\) The timeliness of the decision, in addition to the nature of the goods involved, suggests that prior agreements will not justify trade restrictions between the Member States.

C. Article 115: Protective Measures Authorized by the Commission

In addition to the Article 36 public morality exception and the Article 234 prior agreements exception, Article 115 of the EEC Treaty offers an exception to Article 30. Although Article 115, initially appears to be the most compelling and appropriate exception to Article 30 to justify antipornography import restrictions, further examination reveals that Article 115 contains significant drawbacks rendering the exception, at most, a temporary and ineffective solution.

Article 115 provides for derogations from the principles of free trade where necessary to ensure Member State cooperation. These derogations take the form of protective measures as authorized by the Commission.\(^{84}\) Specifically, "Article 115 . . . gives to the Commission the power to authorize . . . [temporary] protective measures particularly in the form of derogation from the principle of free circulation within the Community . . . ."\(^{85}\)

Member States have invoked Article 115 to justify importation quotas where disparities between regulations of different Member States were due to purely domestic conditions. Examples of such Article 115 applications include Community decisions restricting

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\(^{82}\) Case 121/85, *Conegate Ltd. v Her Majesty's Customs and Excise*, 1986 ECR at 1025.

\(^{83}\) Id at 1008.

\(^{84}\) Article 115 provides in part:

In order to ensure that the execution of measures of commercial policy taken in accordance with this Treaty by any Member State is not obstructed by deflection of trade . . . the Commission shall recommend the methods for the requisite cooperation between Member States. Failing this, the Commission shall authorize Member States to take the necessary protective measures, the conditions and details of which it shall determine.

EEC, Art 115.

the free circulation of textiles, pottery, fruit, woven fabrics, tableware, clothing, and electronics. The ECJ has upheld these trade restrictions and has further allowed the introduction of licensing requirements and criminal penalties "in order to ensure the actual implementation of the [Commission's] authorization [for such restrictions]," giving Article 115 the teeth necessary to be an effective protective measure.

Article 115 is not, however, a broad catch-all intended for use by Member States as a last resort. In fact, Article 115 operates under five significant constraints that often go unnoticed: first, the ECJ interprets Article 115 quite strictly; second, Council Decisions have limited the use of Article 115 to those Member States demonstrating serious economic difficulty; third, Article 115 applies only to goods originating in third countries; fourth, Article 115 measures are only temporary in nature, requiring periodic renewal; and finally, the Article itself was assigned an inevitable expiration date.

In Tezi Textiel v Commission, the Court reasoned that Article 115 should be interpreted narrowly, not only because it constitutes an exception to the principles of Article 30, "which [are] fundamental to the operation of the common market," but also because it represents "an obstacle to the implementation of the common commercial policy." The ECJ further advised that:

[T]he Commission must show great prudence and moderation in exercising the powers which it has under Article 115 . . . as far as those products are concerned, the Com-

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94 The final constraint refers to the fact that, with the completion of the internal market, customs controls between Member States will be abolished after January 1, 1993. Case 206/87, Lefebvre Frere et Soeur SA; Douai v Commission, 1989 ECR 275.
95 Case 59/84, 1986 ECR 887, 3 CMLR 64.
96 1986 ECR at 928.
mission may, solely for serious reasons and for a limited period, after a full examination of the situation... and having regard to the general interests of the Community, authorize, pursuant to [Article 115], the protective measures which cause the least disruption of intra-Community trade.87

Moreover, the petitioning Member State must prove the requested measures are necessary in order to avoid significant economic harm. Thus, Member States must be willing to undergo the Commission’s scrutiny before protective measures in the form of an Article 30 derogation will be authorized.88

Given the difficulty of determining exactly when “differences between such measures [of national trade policy] lead to economic difficulties,”90 Article 115 should not be invoked indiscriminately. Indeed, the ECJ demands “a causal connection between the economic difficulties and the disparities between national commercial policy measures which... must be compatible with the Treaty.”100

Thus, Article 115 does not allow protective measures where the Member State applicant is not suffering—and is in no danger of suffering—grave economic difficulties as a result of the imports in question.101 This Comment argues that the economic difficulties perceived by British proponents of stricter import regulations on pornography do not pose a threat sufficiently serious to invoke Article 115.

Great Britain neither bears nor anticipates economic difficulties by virtue of the importation of pornography for three reasons: first, domestic production and marketing of pornography indicates an existing British market for the very items Great Britain seeks to exclude; second, proponents of tightened import restrictions have

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87 Id. See also, Case 242/84, Tesi Textiel v Ministry of Economic Affairs, 1986 ECR 933, 3 CMLR 64 (upheld Commission Decisions authorizing the Benelux countries to exclude from Community treatment an extensive group of textile products originating in Macao); Commission Communications under Art 115, 1983 OJ C102:3, 1983 OJ C340:2.
88 EEC, Art 115(1). See also, Commission Dec 80/47, art 3, 1980 OJ L16:14, amended by Corrigendum to Commission Dec, 1980 OJ L89:22, which provides in part: Where imports into a Member State of a product referred to in Article 1 [of the Decision] give rise to economic difficulties, the Member State in question may take protective measures after obtaining the prior authorization of the Commission which shall determine the conditions and details of such measures.
89 Oliver, Free Movement of Goods in the EEC at 269 (cited in note 42); see also, Case 62/70, Bock v EC Commission, 1971 ECR 897, 1972 CMLR 160.
failed to establish any convincing link between the availability of imported pornography and depreciation in domestic sales of pornography; and finally, even if such a correlation later arises, potential economic difficulties will not be soothed by protective regulations on imported material. Strengthened import restrictions will not decrease consumer demand for imported products, but rather will deflect domestic trade to an underground market.

While some of the pornography imported into Great Britain originates in non-EC countries such as the United States, much of the material is produced in Member States. Countries such as Denmark, Germany and Italy, therefore, will remain untouched by protective measures enacted under Article 115, as the escape clause cannot regulate goods originating in Member States. Further, Article 115 remedies are effective only pending harmonization by EC laws. Once Community legislation regarding intra-Community trade or trade with third countries of pornography is implemented, Article 115 can no longer be invoked, leaving Member States uncertain as to the validity of protective measures authorized by the Commission.

Finally, the fall of trade barriers anticipated by 1993 may obviate the need for Article 115 measures altogether. As disparities among national commercial policies are gradually eliminated, the need for specifically authorized restrictive measures will become remote, if not extinct. Overall, British application for Article 115 protective measures would result in a temporary solution of only limited efficacy.

**Conclusion**

Transnational antipornography legislation is often justified by the promotion of a free commercial environment, the protection of juveniles, and the role of pornography in subordinating women. Al-

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102 Community measures supplanting temporary import restrictions could easily be based on Article 113 governing the common commercial policy on Community-third country trade. Note also that the temporary nature of Article 115 protection could be alleviated with Community support measures such as voluntary restraint agreements. Following a 1989 study on possible ways to reconcile the inevitable phase out of Article 115 with the need to protect the values of Member States, commercial support measures were considered. Among those proposed were voluntary restraint agreements, negotiated between the EC and third countries, to limit imports in sensitive industries. Voluntary restraint agreements might allow the protective measure to continue after 1993, because once the Commission evaluates the needs of a Member State and permits protective measures under Article 115, the arrival of a preset deadline should not void the Commission's judgment. *Euroscope: Article 115* (Dec 12, 1991) (cited in note 98).

though Great Britain is considering tightened import restrictions in order to achieve similar goals, British application of different standards to domestic and imported pornography produces an effect equivalent to a quantitative restriction. Such import prohibitions violate Article 30 of the EEC Treaty.

The public morality clause in Article 36 does not provide a viable exception, as the restrictions on imported pornography implemented by Great Britain constitute impermissible arbitrary discrimination. Likewise, Article 234 fails to provide relief, as agreements between Great Britain and other states entered prior to EC accession do not justify such restrictions on trade between the Member States. The only means for Great Britain to strengthen antipornography regulations within Community law is to seek Article 115 authorization from the Commission to take protective measures against obscene materials, yet the lack of demonstrable economic harm will probably preclude such authorization. Even if the Commission decides to grant Great Britain permission pursuant to Article 115 to tighten import regulations, such measures will, at most, yield short-lived protection from goods originating only from third countries.

Existing escape clauses will fail to justify Article 30 derogations as long as Great Britain continues to apply different standards to domestic and imported pornography. If British attempts to tighten import regulations on pornography are to be implemented in a manner consistent with EC law, antipornography legislation directed at domestic products must conform to a similarly strict standard. Selective trade regulation violates fundamental Community values and is rightfully proscribed by EEC Treaty law.