

# ARTICLES

## TRUE CODES VERSUS VOLUNTARY CODES OF ETHICS IN INTERNATIONAL MARKETS: TOWARDS THE PRESERVATION OF COLLOQUY IN EMERGING GLOBAL COMMUNITIES

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### 1. INTRODUCTION

As businesses become increasingly international in scope the ethical challenges of commerce grow more complex.<sup>1</sup> Globalization of markets results in greater diversity among corporate stakeholders. This diversity takes a number of forms, including a more eclectic workforce, more heterogeneous suppliers, and more varied clusters of consumers.<sup>2</sup> A consequence of cultural diversification is increased exposure to a greater variety of values, norms, and beliefs. Within this context<sup>3</sup> ethical decisionmaking becomes more complicated and potentially more difficult.<sup>4</sup>

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<sup>1</sup> For a discussion of ethical and public policy challenges arising from the internationalization of business, see RAYMOND J. WALDMANN, *REGULATING INTERNATIONAL BUSINESS THROUGH CODES OF CONDUCT* 5-18 (1980).

<sup>2</sup> While this article focuses on the challenges of international business ethics, these issues are a subcategory within the broader class of international ethics. For a comprehensive general overview of international ethics, see TERRY NARDIN & DAVID R. MAPEL, *TRADITIONS OF INTERNATIONAL ETHICS* (1992).

<sup>3</sup> This is particularly true for the growing numbers of smaller firms that lack the specialized and highly trained personnel most capable of recognizing and analyzing complicated ethical problems. See Michael A. Mayo, *Ethical Problems Encountered by U.S. Small Businesses in International Marketing*, *J. SMALL BUS. MGMT.*, Jan. 1991, at 51, 57.

<sup>4</sup> For discussion of the effects of complexity on difficulty in decisionmaking, see generally PAUL C. NUTT, *MAKING TOUGH DECISIONS: TACTICS FOR IMPROVING MANAGERIAL DECISIONMAKING* (1989).

Because the norms that define the limits of acceptable behavior are often culturally derived, greater diversity is likely to result in greater conflict between cultural norms. On a spectrum ranging from cohesive cultures to mixed or heterogeneous cultures, norm consensus moves from high to low. With the internationalization of the marketplace in the 1990s businesses can expect to encounter greater cultural diversity and less concordance of values among stakeholders. As a result, ethical decisions likely will become more challenging.<sup>5</sup>

In addition to the challenges presented by cultural diversity,<sup>6</sup> the potential disparity of interests between nations at varying stages of development affects international business ethics.<sup>7</sup> For example, recent discussions concerning free trade including the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA) have raised ethical and public policy questions about the fair distribution of costs and benefits between developed and developing economies.<sup>8</sup> Given the powerful force of multinational corporations (MNCs) in shaping the substance of international agreements, these issues are of particular importance to corporations attuned to the ethical implications of their decisions and actions.<sup>9</sup> GATT and NAFTA will alter

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<sup>5</sup> See, e.g., David J. Fritzsche, *Emerging Ethical Issues in International Business*, SAM ADVANCED MGMT. J., Autumn 1990, at 42, 43-45 (identifying ethical issues likely to arise from the integration of economic markets).

<sup>6</sup> For a discussion of these challenges, see GERARD ELFSTROM, MORAL ISSUES AND MULTINATIONAL CORPORATIONS (1991).

<sup>7</sup> While discussions of MNCs in the Third World often affect a Marxist critical posture regarding ostensibly imperialist motives and behaviors, the discussion of ethics in this setting probably benefits from a balanced and realistic assessment of host-country attitudes. As Donaldson observes, "Third World representatives increasingly acknowledge the role multinationals play as a conduit of technological know-how to host cultures, and most have adopted a promultinational position . . ." Thomas Donaldson, *Can Multinationals Stage a Universal Morality Play?*, 29 BUS. & SOC. REV. 51, 52 (1992). Balancing this observation is the recognition that "[b]ecause they are powerful, the multinationals possess formidable moral responsibilities." *Id.*

<sup>8</sup> See, e.g., John Dobson, *TNCs and the Corruption of GATT: Free Trade Versus Fair Trade*, 12 J. BUS. ETHICS 573 (1993) [hereinafter Dobson, *TNCs*]; Ross A. McDonald, *An Open Letter to North American Business Ethicists*, 12 J. BUS. ETHICS 661 (1993).

<sup>9</sup> See John Dobson, *Ethics in the Transnational Corporation: The "Moral*

relations between First World and Third World nations,<sup>10</sup> and thus provide the potential for the development and exploitation of Third World countries.<sup>11</sup> MNCs conducting business in developing and newly-opened economies face considerations of fair dealing with historically disadvantaged economies as well as the challenge of increased complexity that arises from intercultural heterogeneity.<sup>12</sup>

The variety of perspectives that accompanies the globalization of business has two crucial effects. First, inbred or myopic philosophies are exposed to the challenging eye of different viewpoints, thus enhancing the likelihood that traditional assumptions will be questioned and dysfunctional practices will be scrutinized. Second, harmony and consensus likely will be disrupted, and conflicts among cultures may become a source of relational disruption and dissension.

These tendencies are the source of a debate concerning how

*Buck* Stops Where?, 11 J. BUS. ETHICS 21, 24 (1992) [hereinafter Dobson, *Ethics*] ("The most powerful interest group present for [the review of GATT] is . . . a consortium of the world's TNCs. It is not surprising, therefore, that GATT's primary agenda appears to be the facilitation of unencumbered development of the developing world by the developed world's TNCs.").

<sup>10</sup> The recent focus of government policy on international business relations in general, and such relations with developing nations specifically, suggests that corporate approaches to international ethics will be inextricably tied to related phenomena such as business-government relations, voluntary responsibility versus mandatory accountability, and the development of international public policy. For discussion of these related concerns, see Sita C. Amba-Rao, *Multinational Corporate Social Responsibility, Ethics, Interactions and Third World Governments: An Agenda for the 1990s*, 12 J. BUS. ETHICS 553 (1993).

<sup>11</sup> For an ethical analysis of Third World development, see David A. Crocker, *Toward Development Ethics*, 19 WORLD DEVELOPMENT 457 (1991); IRMA ADELMAN & CYNTHIA T. MORRIS, *ECONOMIC GROWTH AND SOCIAL EQUITY IN DEVELOPING COUNTRIES* (1973); David A. Crocker, *Insiders and Outsiders in International Development Ethics*, 5 ETHICS & INT'L AFFAIRS 411 (1991).

<sup>12</sup> Reference to this component of international business does not imply that this author intends to take a particular position. Proponents of free trade will argue that open markets redound to the benefit of all, whereas opponents of free trade will refer to the purported opportunities and realities of exploitation that arise when powerful companies from First World economies enter into transactions with less powerful companies from Third World economies. Instead, the purpose of this Article is to identify both the reality of more open trade in the 1990s, and the ethical and policy challenges that face MNCs as they assess various business opportunities and render decisions that may be criticized as exploitative.

to resolve ethical tensions that arise in international business. This Article addresses the literature and makes several recommendations regarding the regulation of international business ethics. Specifically, this Article suggests that (1) resolution of international business ethics dilemmas focuses too much on result and not enough on process and the benefits that can be derived from effective processes; (2) as a result, calls for increased international codification of business ethics, whether by international laws and treaties or by international professional<sup>13</sup> or industry codes, must be carefully circumscribed to avoid the establishment of consensus at the cost of colloquy; and (3) this circumscription can be effectively achieved by utilizing "voluntary codes,"<sup>14</sup> which serve as intermediate bridges between the organic development of community values and the official embodiment of such values in enforceable "true codes."<sup>15</sup>

Section Two discusses the nature of codes of ethics and explores the circumstances under which such codes can be dysfunctional, especially in international applications. Community, including community values, is defined as a function of process rather than as a substantive entity. This focus on legitimately derived and effective community development processes establishes the foundation for Section Three, which attempts to reconcile the interests of community

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<sup>13</sup> This Article primarily addresses questions of international business ethics rather than professional ethics. Most of the concepts, however, also may be applied to the professions. This Article's emphasis upon colloquy and discourse over rigid application of rules in complex international and cross-cultural contexts is apt as applied to the professions. As one commentator observed about the practice of international law, "[i]t is wrong to think that the way to regulate the conduct of lawyers is to create a single approach that applies to all lawyers in all contexts." Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 FORDHAM INT'L L.J. 53, 86 (1992-93).

<sup>14</sup> For further discussion of the term "voluntary code," see *infra* notes 109-14 and accompanying text.

<sup>15</sup> For the purposes of this Article, enforceability is the definitive quality of a "true code." For purposes of reference, the reader can assume that the terms "true code" and "code" are interchangeable. Any references to "voluntary codes" will be consistently so labelled.

Because the existence of a code is contingent upon enforceability, a code is a form of law which derives its quality of compulsion from some source of power. For a discussion of law as power, see Austin T. Turk, *Law as a Weapon in Social Conflict*, in *THE SOCIOLOGY OF LAW* 105, 107-113 (William M. Evan ed., 1980).

and expediency, recommending the use of voluntary codes to bridge the gap between the establishment of value consensus and ripeness for true codification.

## 2. THE DYNAMICS OF CODES VERSUS COLLOQUIA IN EMERGENT COMMUNITIES

This Section identifies the ways in which codes of ethics differ from ethics developed in a more informal, organic, and gradual manner through the process of facilitated discourse or colloquy.<sup>16</sup> This author suggests that codes of behavior are dysfunctional when adopted prior to adequate community development. The problem is particularly compelling in the context of the global marketplace, within which transactions and relationships frequently arise prior to an opportunity for the mutual examination of expectations and ideals.<sup>17</sup> As a

<sup>16</sup> Reference to colloquy as "organic" is intended to evoke the image of a naturally emerging ethics, as compared to a forced or compelled ethics. This emphasis is of course hardly new; rather, it reflects the historic emphasis in Western political philosophy on free and open discourse in a marketplace of ideas as the optimal forum for the development of rules and standards concerning the inevitably social nature of humankind. *See, e.g., JOHN STUART MILL, ON LIBERTY* 75-118 (Penguin Classics 1974) (1859).

<sup>17</sup> The development of community during the late twentieth century poses novel and unprecedented challenges. Our first impulse may be to argue that community has been a challenge since human beings began to live as social beings, i.e., since the inception of history. Upon closer examination, however, the present period is revealed to present unique problems in establishing community standards of morality.

Prior to the industrial revolution, the geographic sphere of social living was highly restricted, largely by limitations in transportation, communication, and technology in general. In other words, interactions were limited to relatively small numbers of intra- and inter-group combinations. Even during the industrial revolution, trade was far more limited than it is today, and collaborative arrangements, joint ventures, and contractual or licensing arrangements occurred with less frequency and over a less varied network of possible connections.

As advances in transportation, communication, and technology facilitate greater interactive possibilities, and as political economies move toward greater economic freedom, the potential for global relationships expands. Geography is thus rapidly approaching irrelevance, both in terms of alliance activity and sales/service transaction relationships. As geography approaches logistical irrelevance, culture remains entrenched and intransigent. Businesses in the emerging global market therefore must recognize that loyalties to cultural norms and values cannot necessarily evolve and converge to one global ideal as rapidly as technology permits the development of new relationships.

result, the encouragement of colloquy is crucial to the development of effective transnational business ethics.

This Section first examines the nature of ethical codes in terms of their definitive and incidental characteristics. The discussion focuses specifically on the goal of clarity as it is constrained and limited by cross-cultural contexts prior to unified community evolution. These constraints often lead to vague code provisions. As a result, many codes, especially those that precede the development of a community vision, are of little practical use. The discussion focuses on the difficulty of promulgating an international code without an adequately defined global community. A detailed example illustrates the difficulties attendant to the provision of specific ethical edicts in the absence of universal moral principles.

### 2.1. *The Definitive and Incidental Characteristics of Codes of Ethics.*

A code is a "collection, compendium or revision of laws,"<sup>18</sup> a "complete system of positive law, scientifically arranged, and promulgated by legislative authority."<sup>19</sup> Framers of a code strive to create an instrument that is binding, comprehensive, and authoritarian. These qualities are common to existing ethical and professional codes. Because codes are created by legislative authority, a fundamental and definitive quality of any code is that it is binding in nature. In contrast, the comprehensiveness of codes is an ideal rather than a definitive quality. A code can embody some instead of all rules of behavior. A code that is not binding on its constituency is not a true code; rather, it is a proposed set of ideal values. Because this Article examines the difference between legalistic compulsion and nonbinding discourse during the early evolutionary stages of global community, a literal definition of the term code is necessary for comparative purposes.

Transnational codes<sup>20</sup> with a moral dimension<sup>21</sup> may be

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<sup>18</sup> BLACK'S LAW DICTIONARY 323 (4th ed. 1968).

<sup>19</sup> *Id.*

<sup>20</sup> The corporate code of ethics began largely as an American phenomenon, and has only recently gained increased attention in other nations. See Bruce N. Kaye, *Codes of Ethics in Australian Business Corporations*, 11 J. BUS. ETHICS 857 (1992) (observing that corporate codes are a more recent phenomenon in Australia than in the United States).

private or public.<sup>22</sup> In either case, they are embodiments of law in the broadest sense, because they are enforceable by a source of control.<sup>23</sup> Private codes are imposed by privately owned entities, e.g., business corporations and professional firms. Because the power to grant rewards for compliance and to mete sanctions for disobedience is lodged in the bureaucratic structure of private entities, private codes are essentially legalistic.<sup>24</sup> Codes promulgated at the organizational level are typically top-down documents that form the basis of bureaucratic and administrative control.<sup>25</sup>

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<sup>21</sup> In this Article, codes containing a moral dimension differ from codes that contain exclusively policy dimensions. Codes in the latter category embody a choice among several possible policy decisions that cannot be distinguished from an ethical perspective, which must be made for purposes such as expedience, consistency, and order.

<sup>22</sup> A public code is enforceable by the power of the state, as opposed to a private code which is enforceable by a private entity such as an employer-corporation, a professional employer, or a professional accrediting body.

<sup>23</sup> Implicit in this statement is a liberal interpretation of the "legislative authority" that is the source of true codes. See *supra* note 15. Given this Article's purpose of distinguishing compulsory standards from organically developing standards, it is useful to define the authoritative sources of codes broadly, to include rules derived from both government and private loci of control.

<sup>24</sup> For critics who may suggest a distinction between governmentally legislated edicts and corporate standards that are technically derived from employment contracts, a number of explanatory comments may be helpful here. First, the contractual source of compliance with corporate rules does not necessarily distinguish corporate mandates from governmental mandates; to the contrary, the ultimate source of government authority in republican society is a form of contract, albeit typically labelled a social contract. Accordingly, government and corporate rules cannot be distinguished by labelling the latter as contractual. The most compelling basis for distinguishing the social contract that legitimizes governmental authority from the private contract that condones corporate authority is the relatively greater degree to which the former may be viewed as adhesive in nature, given the impracticability of declining to participate in society at large. Even this potential schism between public and private edict is becoming increasingly illusory, as corporations grow to resemble states in terms of the dimension of power, and to the extent that large employers have substantially greater bargaining power than employees.

<sup>25</sup> Even when corporations elicit substantial input from employees at all organizational levels in developing a code of ethics, the ultimate authority rests at the top of the hierarchy. Thus, even relatively emergent codes that reflect significant bottom-up contributions are ultimately instruments of legal compulsion. They are distinguishable from more autocratic codes of ethics only in that they are laws that are likely to have more democratic influences; be they autocratic or democratic, they are still laws.

Professional codes are not easily classified as either public or private. All professional codes can be considered at least "quasi-public" because of the potential influence they have upon the force of legal judgments in the course of litigation. Moreover, failure to comply with the dictates of influential accrediting associations can be tantamount to professional ostracism. To the extent that states adopt accrediting body standards as law, those standards become public codifications.

The American Medical Association's Principles of Medical Ethics and Current Opinions of the Judicial Council (AMA Principles),<sup>26</sup> for example, are not laws per se, and the maximum penalty for violation of the principles is expulsion from the AMA. Nonetheless, the AMA Principles' ethical precepts serve as persuasive evidence of the existence of threshold professional standards. Likewise, the American Bar Association's Code of Professional Responsibility serves two quasi-public legalistic functions: it provides evidence of professional standards of loyalty and care, and it becomes directly enforceable public law when a state adopts it or its variants as binding upon lawyers admitted to practice within that state.<sup>27</sup>

Members of a corporate community are bound coercively by private codes, much as citizens of a state are bound by public codes of law,<sup>28</sup> i.e., formalized laws of either sovereignties or alliances of sovereignties. International public codes of ethics are typically in the form of compacts or treaties. Examples of international public codes of ethics<sup>29</sup> are The Guidelines for Multinational Enterprises adopted by the European

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<sup>26</sup> AMERICAN MEDICAL ASSOCIATION, CURRENT OPINIONS OF THE JUDICIAL COUNCIL OF THE AMERICAN MEDICAL ASSOCIATION (1981) (supplement to the revised Principles of Medical Ethics adopted at the Annual Convention of the American Medical Association in 1980).

<sup>27</sup> See, e.g., TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT (1992).

<sup>28</sup> The binding nature of private codes can be viewed contractually—just as citizens in a republican state become bound under some variant of social contract, citizens of the corporation are bound by agreement to abide by the corporation's rules, regulations, and mandatory standards. For a more detailed explication, see *supra* note 24.

<sup>29</sup> For the purposes of this Article, a true code is defined as obligatory and enforceable. These examples fall within such a definition because they are either directly enforceable by the promulgating authority or indirectly enforceable upon adoption by sovereign governing bodies.



Organization for Economic Co-operation and Development ("OECD Guidelines"),<sup>30</sup> The International Labour Office Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy ("Tripartite Declaration"),<sup>31</sup> and the United Nations Code of Conduct on Transnational Corporations.<sup>32</sup>

## 2.2. *Difficulties Associated with Codification in International Contexts.*

Codification of values can be troublesome under any circumstances, but it raises particular difficulties in international and intercultural contexts. The remainder of this Section addresses the problems associated with codes under conditions of social, legal, and cultural heterogeneity.

### 2.2.1. *The Misguided Goal of Legal Clarity*

The term "legal clarity" implies that notice of compulsory expectations be unambiguous. The utility of legal clarity is limited by language and culture within international contexts. Thus, under conditions of great heterogeneity, analytical or "ethical" clarity is more valuable than a precise explication of mandatory expectations.

Clarity has value in the realm of ethics, but that value

<sup>30</sup> OECD, Declaration by the Governments of OECD Member Countries and Decisions of the OECD Council on Guidelines for Multinational Enterprise, adopted June 21, 1976; amended 1979, 1984. The OECD Guidelines are only partially true codes, as they contain both binding and voluntary provisions. For a discussion of the OECD Guidelines, see OECD DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES, 1991 REVIEW (OECD Publications, 1992).

<sup>31</sup> International Labour Office Governing Body §§ 185-214. The Tripartite Declaration is akin to a uniform code that is made enforceable when individual home countries adopt its provisions as law. Hans Gunter of the International Labor Office notes, "Governments are urged by the Declaration to ratify certain basic relevant ILO Conventions in the areas of freedom of association, collective bargaining and non-discrimination in employment, where they have not been ratified. . . ." Hans Gunter, *The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (History, contents, follow-up and relationship with relevant instruments of other organisations)*, ILO Working Paper # 18 at 5 (1992).

<sup>32</sup> UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, THE UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS, U.N. Doc. ST/CTC/SER.A/4 (1986).

differs from the value of clarity in law. Ethical clarity is the clarity of philosophers, an illumination of normative expectations through the vehicle of reason and the process of logical ordering. In this sense, ethical clarity refers to the ability to maintain the highest quality of conversation. The dialectic of an ethics is served by arguments that build on sound axioms, and that proceed in a reasonable and intellectually supportable progression.<sup>33</sup>

Clarity in law is achieved when the rules of the game are delineated in the most precise and certain terms.<sup>34</sup> The valid and valuable objective of legal clarity is due process—the promise that the rules will be binding on the players only if their application imparts a fundamentally fair imposition of authority. This quality of legal clarity is the opposite of ethical clarity. Whereas legal clarity is an attempt to fix expectations and understandings, ethical clarity is the effort to sustain rational discourse and encourage justified alteration in thinking.

International contexts, characterized by social and cultural diversity, are imbued with layers of ethical complexity above and beyond the complexity of ethics in more homogeneous

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<sup>33</sup> Contrast the potential anti-colloquial effects of codes. Kultgen describes the “moral inversion” that can result from the codification process:

Ethical persons reflect on actions that are clearly right or clearly wrong and generalize principles for difficult cases. They formulate codes that carry moral authority. Society recognizes the value of actions promoted by the code and rewards them. The actions come to be performed by morally insouciant individuals for the sake of the rewards. Others find that they can gain the rewards by only appearing to conform to the code or, more deviously, by insinuating self-serving provisions into the code itself.

John Kultgen, *The Ideological Use of Professional Codes*, BUS. & PROF. ETHICS J., Spring 1982, at 53, 64.

<sup>34</sup> As sociological functionalists have revealed, the law's goal of clarity is constrained by the inevitable qualities of interpretation. See, e.g., Talcott Parsons, *The Law and Social Control*, in THE SOCIOLOGY OF LAW 60, 62 (William M. Evan ed., 1980). Parsons explains:

[R]ules must be formulated in general terms. The general statement may not cover all of the circumstances of the particular situation in which I am placed. Or there may be two or more rules, the implications of which for my action are currently contradictory. Which one applies and in what degree and in what way? What specifically are my obligations in this particular situation or my rights under the law? This is the problem of interpretation.

*Id.*

settings.<sup>35</sup> This complexity begins with substantial variation in the significance placed on business ethics, and therefore on the likelihood that particular activities will even trigger the process of moral analysis. Vogel refers to the disparity in ethical engagement as the “ethics gap,”<sup>36</sup> the existence of which has been confirmed in comparative analyses between the United States and such countries as Australia<sup>37</sup> and Great Britain.<sup>38</sup>

Even when there is a parity between nations or cultures in regard to ethical engagement, complexity nonetheless results from the increased variance among values and norms in transactions and interactions between distinctive cultures.<sup>39</sup> This complexity is a compelling force for ethical relativists and nonrelativists alike.<sup>40</sup> For ethical relativists,<sup>41</sup> cross-

<sup>35</sup> For a detailed discussion of the margin of complexity conferred by culture and language in international relations, see Steven R. Salbu, *Parental Coordination and Conflict in International Joint Ventures: The Use of Contract to Address Legal, Linguistic, and Cultural Concerns*, 43 CASE W. RES. L. REV. 1221 (1993).

<sup>36</sup> David Vogel, *The Globalization of Business Ethics: Why America Remains Distinctive*, 35 CAL. MGMT. REV. 30, 35-36 (1992) (“By any available measure, the level of public, business, and academic interest in issues of business ethics in the United States far exceeds that in any other capitalist country.”).

<sup>37</sup> See Kaye, *supra* note 20, at 859-60.

<sup>38</sup> See Jack Mahoney, *An International Look at Business Ethics: Britain*, 9 J. BUS. ETHICS 545, 545 (1990) (“British business ethics is still only in its infancy.”); Thomas W. Whipple & Dominic F. Swords, *Business Ethics Judgments: A Cross-Cultural Comparison*, 11 J. BUS. ETHICS 671, 676 (1992) (finding “U.S. [questionnaire] respondents are significantly more critical than U.K.” respondents along several dimensions of ethical decisionmaking).

<sup>39</sup> For example, White and Rhodeback identified significant differences in the ways in which U.S. and Taiwanese subjects viewed the ethical characteristics of such problems as “misrepresentation, value/goal conflicts, manipulation, technical ineptness and misuse of data.” Louis P. White & Melanie J. Rhodeback, *Ethical Dilemmas in Organization Development: A Cross-Cultural Analysis*, 12 J. BUS. ETHICS 663, 668 (1992).

<sup>40</sup> While this paper addresses the differences between ethical relativism and absolutism only incidentally, the common utility of colloquy for both relativists and absolutists may shed light on the controversy between these two conflicting camps. Werhane has demonstrated that relativist and absolutist perspectives must ultimately clash in the application. See Patricia H. Werhane, *Ethical Relativism and Multinational Corporations*, in BUSINESS ETHICS: CORPORATE VALUES AND SOCIETY 145, 146 (Milton Snoeyenbos et al., eds., 1983). This observation is true, given the manner in which ethical relativism is usually defined, i.e., to suggest that value judgments “are context-bound, relevant only to the particular socio-cultural

cultural complexity is certainly daunting. Before divergent ethical systems may be reconciled, a discussion between proponents of such systems must reach a high level of refinement at which the cultural contexts of valuation can be explained and reasonably understood. Similarly, for nonrelativists, values believed to transcend national and cultural borders must be derived, evaluated, and periodically re-evaluated. Although the relativist is less troubled by the potential contingency of values than the nonrelativist, even the staunchest proponent of universal or absolute ethics must struggle with the identification of proof of values.

Both relativists and nonrelativists therefore rely on the utility of colloquy in the lengthy process of perfecting ethical systems. Because our ethical systems have not evolved to a

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context out of which they arose," so that "[t]here are no ethical principles which hold for everyone universally." *Id.* This traditional philosophers' conception of relativism is ultimately untenable, unless we are willing to consign virtually every activity, including such uncontroversial ones as rape and murder, to idiosyncratic cultural whim.

Nonetheless, a form of relativism not typically discussed by philosophers but routinely used by anthropologists is extremely important in the context of colloquy. The notion of "cultural relativism," suggests that the fair evaluation of foreign practices requires an adequate understanding of the cultural context. This variant of relativism does not imply that absolute judgments can never be made; rather, it warns against premature judgments grounded in ignorance. Implicit as well is a humbleness that admits that we are all bound in our epistemology by cultural prejudices, and that other cultures may be the source of enlightenment that requires significant immersion, as well as the crossing of difficult boundaries. This conception of cultural relativism would encourage conversation and colloquy, in order to improve the quality of understanding through the enlargement of perspective. Even in a world of absolute right and wrong, the challenges of knowing right from wrong dictate openness to multicultural conversation, including efforts to understand the values of another culture within that culture's own framework. Cultural relativism, as defined in this article, is not inconsistent with moral absolutism; to the contrary, both are well-served by resistance against ignorance and receptivity to the ideas of others.

<sup>41</sup> Ethical relativism refers to the ostensible "fallacy common to many writings on human rights, namely the presumption of universality. What typifies this way of thinking is the belief that human rights exist independent of culture, ideology, and value systems." ALISON DUNDES RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM 12 (1990).

Renteln suggests that nonrelativist or universalist positions are "a peculiar form of ethnocentrism insofar as Western ideas are presumed to be ubiquitous." *Id.* For a discussion distinguishing this ethical relativist position from a more moderate cultural relativist position, see *supra* note 40.

state of near perfection, analytical clarity in the discussion of ethics is more crucial than legal clarity or fixation of ethics, particularly at the periphery, where discord is most likely to exist. To encourage such discussion, rational discourse must be valued over legal clarity. Whereas open discussion among cultures propels the evolution of ethics, the closure of discourse through the premature fixation of legal clarity stunts that evolution.<sup>42</sup>

More specifically, discourse between initially alien cultures provides the best example of what have been identified as "convergence" and "divergence" tendencies in international settings. Ralston et al. suggest that the meeting of two cultures results in both convergence, in which "managers in industrialized nations will embrace the attitudes and behaviors common to managers in other industrialized nations despite cultural differences," and divergence, in which "individuals will retain diverse, culturally based values despite any economic and social similarities between their nations."<sup>43</sup> The conflicting tendencies towards convergence and divergence can be seen as a natural manifestation of both dynamism and moderation, the receptivity to change tempered by control over adaptive processes. Convergence represents openness to the possibility of the existence of better approaches than the received approach in one's own culture. Divergence reflects a defensive posture from which hard-earned principles are endowed with value, so that alteration and change are permitted only after a process of persuasion.<sup>44</sup>

Achievement of legal clarity through the early imposition of codes is not only counterproductive to the encouragement of

<sup>42</sup> The evolution of common intercultural values, as opposed to the revolutionary imposition of intercultural values by force of law, creates breathing room for rational discourse aimed at refining ethical clarity. Such clarity of analysis and evaluation is the precursor to good codification.

<sup>43</sup> David A. Ralston et al., *Differences in Managerial Values: A Study of U.S., Hong Kong and PRC Managers*, 24 J. INT'L BUS. STUDIES 249, 251 (1993).

<sup>44</sup> When cultures clash, the balancing forces of convergence and divergence permit the infusion of intelligence and wisdom in the development of global value systems. In comparison, the expedient, external imposition of codes, regulations, and laws is potentially inflexible, closed to the incorporation of new information and perspectives. The intransigence of promulgated rules can reflect entrenched ethnocentrism, and the application of power rather than the manifestation of reason.

analytical clarity through colloquy, it is also highly impracticable. The legal clarity of codes becomes less feasible as social, cultural, legal, and linguistic diversity increases.<sup>45</sup> Cohen et al. have identified a number of international and cultural constraints that may impose pragmatic limitations on the viability of international ethical codes.<sup>46</sup> They apply Hofstede's work-related values<sup>47</sup> as "moderating constraints" upon the effectiveness of professional codes of ethics in directing behaviors in international environments.<sup>48</sup> According to the authors, the four moderating constraints—power distance, uncertainty avoidance, individualism versus collectivism, and masculinity versus femininity—result in a lack of consensus regarding acceptable behavior and the diversity of interpretation.<sup>49</sup>

These four constraints dilute the viability of ethical codes, especially international codes. Each constraint is a source of potential derailment. Power distance refers to the "degree of inequality in power between a more powerful superior and less powerful subordinate, as perceived by the subordinate."<sup>50</sup> Power distance is a factor relevant to ethical code viability because differences in power distance are associated with varying acceptance levels of the authoritarian power that is inherent in legalistic codes.<sup>51</sup> Uncertainty avoidance is a measure of rule orientation, employment stability, and stress. As these three factors vary among cultures, patterns of obedience to formal codes vary as well.<sup>52</sup> The individualism-

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<sup>45</sup> Most broadly construed, the constraints that bind international ethical decision-making include public opinion, political systems, individual managerial decision-making, economic systems, and ethical beliefs, i.e., the entire panoply of political, economic, and social conditions surrounding and infusing the process. For explication of a model that incorporates these intercultural factors, see James Owens, *Business Ethics in the College Classroom*, 58 J. BUS. EDUC. 258 (1983).

<sup>46</sup> Jeffrey R. Cohen et al., *Cultural and Socioeconomic Constraints on International Codes of Ethics: Lessons from Accounting*, 11 J. BUS. ETHICS 687 (1992).

<sup>47</sup> GEERT HOFSTEDE, *CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES* (1980).

<sup>48</sup> See Cohen et al., *supra* note 46, at 688.

<sup>49</sup> See Cohen et al., *supra* note 46, at 690-92.

<sup>50</sup> See Cohen et al., *supra* note 46, at 690.

<sup>51</sup> See Cohen et al., *supra* note 46, at 690.

<sup>52</sup> See Cohen et al., *supra* note 46, at 691.

collectivism dichotomy describes cultural differences with relative emphasis on self versus community, including potentially highly conflicting moral evaluations of the good and evil associated with either orientation.<sup>53</sup> Finally, differences along the masculine-feminine continuum refer, respectively, to relative degrees of assertiveness and supportiveness.<sup>54</sup> A masculine culture may accept as aggressively competitive some practices that are viewed as unacceptably ruthless in a more feminine culture.

Cohen et al. suggest that Hofstede's moderating constraints are substantial sources of culture clash. Magnified across international boundaries, such constraints subvert even the best intended codes of ethics by reducing the likelihood that a code will be consistently interpreted across cultures.<sup>55</sup> Moreover, even when consistent interpretation occurs, acceptance of the code and willingness to abide by it will tend to be mitigated by a lack of moral consensus derived from the four sources of disparity.<sup>56</sup>

### *2.2.2. Codes Without Bite: The Consequences of Prematurely Choosing Global Over Regional Codification*

Because consensus regarding specific behaviors is difficult to reach under the cross-cultural conditions discussed in the previous subsection, international codes tend to be so general as to provide little practical or useful guidance. International codes often deteriorate into vague statements of uncontroversial principle, platitudes that are so broad and generic that it is easy to justify undesirable individual behaviors within the interstices of interpretation.

For example, the developing United Nations Code of Conduct on Transnational Corporations requires transnational corporations ("TNCs," the U.N. nomenclature equivalent to MNCs) to respect human rights and fundamental freedoms, contribute to the promotion of exports, help to train citizens in the host country, and act to protect the environment.<sup>57</sup> The

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<sup>53</sup> See Cohen et al., *supra* note 46, at 691.

<sup>54</sup> See Cohen et al., *supra* note 46, at 691.

<sup>55</sup> See Cohen et al., *supra* note 46, at 692.

<sup>56</sup> See Cohen et al., *supra* note 46, at 691.

<sup>57</sup> G.R. Bassiry, *Business Ethics and the United Nations: A Code of*

Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises are likewise vague,<sup>58</sup> stating for example that Enterprises should “favor close co-operation with the local community and business interests,” and “allow their component entities freedom to develop their activities and to exploit their competitive advantage in domestic and foreign markets, consistent with the need for specialisation and sound commercial practice.”<sup>59</sup>

These codes exemplify the low level of specificity contained in many international codes. The mandate to respect human rights, for example, does not suggest what those rights are. Moreover, U.S. constitutional controversy in areas such as race relations and women’s rights indicates that consensus at the margins is difficult to reach domestically, let alone internationally.<sup>60</sup> Once cultural differences in the conception of human rights are interposed in the interpretation of this edict, the principle of respect for human rights is so broad as to approach meaninglessness when applied by different decisionmakers.<sup>61</sup>

These observations suggest the existence of a point along a slippery slope at which there is intercultural value consensus adequate to sustain international codes that are explicit enough to be useful and practicable by virtue of a legitimacy

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*Conduct*, SAM ADVANCED MGMT. J., Autumn 1990, at 38, 39.

<sup>58</sup> The OECD Guidelines do have a few specific provisions that render some clear guidance, such as an edict against the payment of bribes, and the prohibition of the tendering of illegal political contributions. OECD Guidelines, *supra* note 30, at 93. Of course, the value of a prohibition of activities that are already illegal by definition is negligible.

<sup>59</sup> OECD Guidelines, *supra* note 30, at 93.

<sup>60</sup> Policies for the achievement of equal opportunity are controversial in general public discourse and in constitutional analysis. Issues like affirmative action, race and gender quotas, and small business set-asides have been subject to debate among both lawyers and laypersons in the 1990s.

<sup>61</sup> There is a legitimate reason that the terms of international codes tend to be general, vague, and of little help in rendering actual guidance for particularized decisionmaking. Without minimally well-developed community consensus, only codifications with a high degree of conceptual breadth and abstraction can receive enough support to be enacted. At the present juncture the world lacks adequate community to create meaningful global codes of ethics. It is likely that the pursuit of early codification will result in the creation of meaningless provisions, the only provisions for which there exists adequate support.



achieved by broad-based support. Presently, the global community has evolved to a point at which there are cross-cultural value clusters but relatively little worldwide consensus.<sup>62</sup> Truly international codes of ethics may be premature in the 1990s because the global community has not yet evolved beyond the intermediate stage of micro-geographic cluster communities. If regional clusters characterize the present growth stage of international community, then regional rather than global codification is probably the only form of compulsion that can presently be supported by social consensus and perceived legitimacy. Furthermore, once the evolutionary process has advanced sufficiently, such regional cluster codes can logically facilitate the eventual globalization of community values. The next step will be intercultural assimilation and accommodation between regional clusters that are presently only in the process of developing provisional community identities.<sup>63</sup>

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<sup>62</sup> Wines and Napier's model of cross-cultural ethics recognizes these micro-clusters in the form of "value strings" that link related but separate cultures through the sharing of moral values. See William A. Wines & Nancy K. Napier, *Toward an Understanding of Cross-Cultural Ethics: A Tentative Model*, 11 J. BUS. ETHICS 831, 835-37 (1992). The authors note, for example, that "there may be some moral values common to North American or European cultures and others more prevalent in East Asian cultures." *Id.* at 836.

<sup>63</sup> The viability of mandatory international codes is also likely to conflict with national rights of self-determination in a world still officially characterized by sovereignty. For a discussion of the right of self-determination, see JOHN RAWLS, *A THEORY OF JUSTICE* 378 (1971). For a brief discussion of the related issues of national autonomy, see BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS 79-100 (Peter G. Brown & Henry Shue eds., 1981). The United Nations has recognized an international right to self-determination, including a peoples' right to "freely determine their political status and freely pursue their economic, social and cultural development." International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3, 5. Taken seriously, the right to self-determination limits the utility of mandatory international codes by restricting application to those forums that voluntarily adopt the code. Furthermore, once a collection of sovereign states agrees to be bound by adopting a code, one critical logistical challenge is likely to remain: the translation of international morality into international law which depends upon viable centralized institutions of enforcement. For a discussion of the feasibility of maintaining international legal and moral order without such centralized institutions, see TERRY NARDIN, *LAW, MORALITY AND THE RELATIONS OF STATES* 115-148 (1983). Self-determination is a principle that recognizes the inherent difficulties associated with the attempted universalization of norms without prior persuasion. Even when the

### 2.2.3. *The Absence of Cultural Cohesion*

The feasibility of an international code is limited by the tension inherent in the modern concept of a global community. Beyond a relatively small number of ethical positions that are universally adopted and considered incontrovertibly valid, the norms of ethical behavior are dictated largely by community standards.<sup>64</sup> Potentially universal edicts will be akin to those identified by Donaldson as protecting "fundamental international rights"<sup>65</sup> such as laws or codes that prohibit torture.

Most daily ethical challenges faced by business and the professions are not so easily resolved. With regard to rules of behavior established around custom or a social cost-benefit analysis which do not arise from any clearly defined, universal principle, the development of effective, justifiable ethics depends upon processes that are sensitive to social and cultural differences. In such instances, the means must balance the needs and values of corporate, domestic, and relevant world cultures.<sup>66</sup> An example of the kind of ethical issue that cannot be resolved effectively by resort to universal principles is that of lawyer billing practices.<sup>67</sup> The American

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persuader is judged by the persuaded as ultimately having been correct, acknowledgement of autonomous rule requires that subjection to mandatory standards be imposed from within.

<sup>64</sup> Thus, while one commentator accurately has acknowledged the "internationalization of human rights," the sphere of human rights that effectively can be universalized to override traditional theories of national and cultural sovereignty is small. Jorge Carpizo, *The Current Tendencies of Human Rights*, 23 CAL. W. INT'L L.J. 373, 374-75 (1992).

<sup>65</sup> See THOMAS DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 76 (1989).

<sup>66</sup> In this regard, the President and Chief Executive Officer of the American Management Association has aptly warned: "In the global economy, if we are going to write rules of behavior, those rules must be framed in the context of world citizenry so that employees have the ability to adapt to local customs yet comply with the values that define the corporate character." David Fagiano, *Ethics in a Shrinking World*, MGMT. REV., Mar. 1993, at 2.

<sup>67</sup> Professional billing is only one of many examples of ethical questions that may reflect a degree of policy adoption, and is not entirely referable to easily universalized principles. This example was chosen because it has not received substantial attention in the academic literature. Other examples such as the payment of bribes, are also relevant and important, but have been covered in such detail by so many scholars that another examination

Bar Association (ABA) has recently issued a formal opinion regarding a practice known as "double billing," or the charging of more than one client for the same work or overlapping work.<sup>68</sup> The ABA opinion forbids double billing without client approval. The ABA approach is appealing because it preserves contractual freedom and simultaneously protects consumers by requiring both voluntary and informed consent. Nonetheless, the double billing dilemma provides an interesting example of the indeterminacy of ethical issues at the "ethical periphery" (i.e., the realm of ethics beyond basic, fundamental rights).<sup>69</sup>

At the periphery, ethical questions may be resolved more effectively by reference to established community norms and public policy than by reference to ostensibly fundamental or universal principles. In the case of lawyer billing, reasonable arguments can be made against and in favor of double billing, even in the limited institutional and cultural context of U.S. business and professional practices. In condemnation of the practice, double billing can be challenged as unfair because it provides multiple total compensation for a single unit of work. Thus the lawyer who triple bills for four hours of actual work, originally done for Client 1, receives compensation for twelve hours of work. The purported unfairness of this billing practice can also be viewed from the perspectives of Clients 2 and 3, each of whom paid for four hours of incremental work, when the actual output of labor was just the time necessary to convert the fruits of the first effort to suit the needs of each of the latter two clients.

In support of this practice, double billing can be seen as eminently fair because each client is purchasing a four-hour product that took four hours to create. Moreover, an edict

is unlikely to add new insight. For a review and bibliography of some of the vast literature on the ethics of bribery, see John Tsalikis & Osita Nwachukwu, *A Comparison of Nigerian to American Views of Bribery and Extortion in International Commerce*, 10 J. BUS. ETHICS 85, 85-86 (1991).

<sup>68</sup> Amy Stevens, *ABA Tackles Firms' Tendencies for Creative Clockwork in Billing*, WALL ST. J., Dec. 17, 1993, at B10.

<sup>69</sup> The realm of reasonably controvertible ethical positions is referred to as the "ethical periphery," or the "periphery" for short. At the periphery, both ethics and legal codes develop interactively: emergent community norms can become informal standards and formal, authoritarian codes infuse community expectations. Likewise, the formalization of codes legitimizes and reinforces the community values that provide the foundation of the law.

against double billing is fraught with logistical difficulties. If Client 1 pays for the four hours of initial labor, and Client 2 can be charged only for actual incremental labor required for conversion of use from Client 1 to Client 2, for example, one-half hour, then Client 1 has inadvertently subsidized the product of Client 2. This inequity can be resolved by any of a number of policies, such as simply permitting the attorney to charge each client four hours for a four-hour product, or by creating detailed rules for the latter client's contribution to the expenses originally incurred by the initial client.<sup>70</sup>

Even within the confines of the United States, the rules of fair billing in the legal profession are unlikely to be resolved by reference to deontological principles.<sup>71</sup> Policy questions are resolved by a debate which centers around a negotiated understanding and from which a set of community expectations are generated. Because specific issues associated with lawyer billing are not subject to incontrovertible principles or universal rules, the eventual choice of community expectations will be somewhat arbitrary. These expectations nonetheless will be compelling because they reflect the contractually derived rules that have been determined by consensus to define the realm of fair play. Once such rules are established and accepted, they develop their own moral authority as representatives of community expectations. In other words, while the policy chosen may not be inherently superior to the rejected alternatives, relations will adjust themselves around the received policy, thus infusing it with

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<sup>70</sup> These two examples are based on differing judgments regarding ownership of the product. The first approach implies that the lawyer owns a matrix that can be sold to any buyer at full cost. The latter approach implies that Client 1 purchased and owns a custom-designed product and should therefore have the right to royalties upon the resale of that product.

<sup>71</sup> One possible deontological principle that reasonably can support a number of policy alternatives is the broad principle of honesty, refined in business and professional practice in the form of disclosure requirements. In other words, any approach regarding the ultimate ownership of lawyers' work product can be justified as reasonable, provided that the parties know the rules of the game. This suggests that the ABA policy appears more capable of being universalized than a more random policy that is not supported by an ostensibly absolute deontological duty. Relativists may suggest, however, that the value of honesty is either not fundamentally capable of being universalized, or that a culture may embrace other preeminent values that supersede honesty in ways that are inaccessible under essentially Western conceptions of ethics.

legitimacy and meaning.<sup>72</sup>

If, for example, the U.S. legal and business communities accepted the edict against double billing, parties would incorporate this norm into their transactions for legal services. Client 1 may be willing to pay  $x$  under a system that prescribes double billing,  $x-y$  under a system that allows the lawyer to bill subsequent clients for the work, and  $x+z$  in a system that allows double billing but requires partial reimbursement of royalties to the client who originally commissioned the work. While arguments exist for and against each policy option, and while one is arguably more economically sound than another, acceptance of any clearly stated policy that is approved by the community allows a free market economy to adjust to the system through the pricing mechanism as demonstrated in this hypothetical.

Because policy questions frequently are not resolved by resort to universal principles, they lack inherent value, and should be most effective when infused with the artificial value derived from widespread community consensus. The case of double billing reveals that the creation of policy from norms of international communities produces special challenges. On the domestic front, the discourse from which community consensus develops can be begun with a relative degree of mutual foundational understanding. Within the United States there exists a relatively common understanding regarding the role of lawyers, the nature of the relationship between lawyer and client, and the commonly accepted procedures for the billing of services. In contrast, a fundamental understanding about

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<sup>72</sup> The implication is that by defining policy questions as those that do not address issues that can be resolved by reference to universal principles concerning fundamental rights, the process by which the policies are developed becomes more important than the policies that are ultimately chosen. When the questions at issue require a workable solution, there are either a number of equally useful solutions, or a number of solutions that vary in terms of net utility, any of which are at least satisfactory. In other words, policy that does not regard fundamental rights can be answered by any of several viable approaches. As the particular selection among these approaches becomes less compelling by virtue of their fungibility, the processes by which the selection occurs gains in relative stature. While the ultimate choice is unimportant, the community participation in the selection, and the degree to which the selection approaches universal approval, are crucial to both the ultimate degree of compliance and the level of satisfaction among the community regarding the legitimacy of the legal process.

these variables may not exist in regard to lawyer billing issues in international transactions. In other countries, lawyers may not work by the hour or they may be expected to provide services for standard fees, as a doctor in the United States will charge a certain fee for an appendectomy, or a dentist will charge a fixed amount for a porcelain crown. These two protocols logically imply divergent substantive conceptualizations of a lawyer's product. Billing by the hour suggests that a client agrees to pay only for the attorney's actual expenditure of time. Under this protocol, double billing is likely to be deceptive and unethical. Billing for the product suggests that the client agrees in advance that the end result is worth a certain price. The implication is that the profit of the lawyer is only the lawyer's concern: if the lawyer is highly inefficient, then the lawyer may actually suffer an economic loss. Conversely, any efficiencies that the lawyer realizes are the source of profit. Under this protocol, the lawyer's product is much like a consumer product. The buyer only knows that the product is worth \$n to him or her. Fluctuations in profit to the seller based on economies of scale or scope are viewed as purely the seller's business. Since the two protocols, billing by the hour and billing for the end product, reflect these significantly divergent foundational philosophies, the utility of either is likely to depend most crucially on the degree of community consensus surrounding the policy chosen.

The divergence of philosophies, traditions, and practices between the United States and other nations serves to complicate issues such as ethical billing in international contexts. As business markets become increasingly global, the markets for legal services to support international business also are likely to globalize. ABA billing standards may not answer the kinds of complex challenges that are likely to arise in these international transactions for legal services.

When a community embraces broadly condoned value systems, codification of the periphery<sup>73</sup> is most viable because

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<sup>73</sup> The periphery refers to the area denoted by Donaldson and Dunfee as "moral free space," in which the application of fundamental rights or universal principles of ethics is insufficient to resolve conflict. See Thomas Donaldson & Thomas W. Dunfee, *Integrative Social Contracts Theory: A Communitarian Conception of Economic Ethics*, 11 *ECON. & PHIL.* (forthcoming 1995).

formal laws in well-established communities are supported by belief patterns that more closely approach ubiquity. Conversely, when communities are relatively undeveloped, formal codes are vulnerable at both the theoretical and the pragmatic levels. At the theoretical level, dissident members of a loosely-configured community can challenge the legitimacy of its code because peripheral principles are not self-evident. Thus, broad community consensus is required if a code is to be justifiably binding. At the pragmatic level, dissidents will be more likely to disobey<sup>74</sup> or revolt against<sup>75</sup> codification at the periphery because they disagree with its underlying values and because the numbers of potential dissidents in such loosely-held communities will confer the power to disagree.<sup>76</sup>

The question of compliance is difficult because two possible sources of ethical error exist. First, in cases in which the

<sup>74</sup> Charles H. Taquey, *Free Trade: The Ethics of Nations*, 141 *DIOGENES* 112, 116 (1988) (recognizing the irrelevance of “[l]egalized morality” in the face of the “will to ignore it”).

<sup>75</sup> Development of the United Nations Code of Conduct on Transnational Corporations has been frustrated by geopolitical dissent that reflects the practical difficulties in the achievement of codification without a sufficiently unified community foundation. See *THE NEW CODE ENVIRONMENT*, UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS CURRENT STUDIES at 17, U.N. Doc. ST/CTC/SER.A/16, U.N. Sales No. E.90.II.A.7 (1990) (discussing the “political impasse” experienced in development of the United Nations Code).

<sup>76</sup> Even in cohesive and well-developed communities, ethics will shift in response to two kinds of change: internal change within an industry or profession, and social change in the broader community environment in which the industry or profession operates. These changes of ethical norms will cause changes to occur in codes as well. Jeanne F. Backof & Charles L. Martin, Jr., *Historical Perspectives: Development of the Codes of Ethics in the Legal, Medical and Accounting Professions*, 10 *J. BUS. ETHICS* 99, 108 (1991). Because the norms and the codes that reflect them are always in some state of flux, consensus can never be complete. Nonetheless, there is a difference between developmental discord associated with the process of ethical evolution within well-established communities, and the fundamental discord that exists when there is no established community or when codes of ethics are imposed upon divergent communities. In the former instance, the foundation of established values and behavioral patterns, while ever-changing, provides the foundation for acceptance of codification in the abstract. Changes in the code simply enhance its legitimacy. Conversely, in the latter instance, there is no foundation from which acceptance of the concept of a code in the abstract can be derived. Change in these instances does not comprise the creative process of evolution and perfection of a dynamic ideal, but rather comprises the destructive process of subversion of an illegitimate source of authority.

encoded virtues are desirable virtues (i.e., qualities that would survive over time as community values become increasingly congealed under rigorous debate and scrutiny)<sup>77</sup> a code may nonetheless become the focal point of protest or rebellion based on the perceived lack of democratic legitimacy, rather than on the substantive precepts themselves. Second, when the encoded virtues are not desirable virtues,<sup>78</sup> and they contain flaws that would be revealed during a process of discussion and scrutiny over a reasonable span of time,<sup>79</sup> such codes may be subject to mindless conformity on the part of those most temperamentally obedient to the force of law.<sup>80</sup> In these instances, individual analysis without the influence of codification may have yielded behavior superior to that

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<sup>77</sup> The idea of virtues being desirable in regard to peripheral questions is culturally constrained. Because this author argues that at the periphery choice is affected more by process than by substance, what is viewed as desirable is contingent upon its fit with the community as it eventually unfolds.

<sup>78</sup> Codification can consist of "bad" legislation. Max Weber has labelled this type of lawmaking "formally" or "substantively irrational." Max Weber, *Types of Lawmaking and Lawfinding*, in *THE SOCIOLOGY OF LAW* 368, 369 (William M. Evan ed., 1980) ("Both lawmaking and lawfinding may be either rational or irrational. They are 'formally irrational' when one applies in lawmaking or lawfinding means which cannot be controlled by the intellect, for instance when recourse is had to oracles or substitutes therefor. Lawmaking and lawfinding are 'substantively irrational' on the other hand to the extent that decision is influenced by concrete factors of the particular case as evaluated upon an ethical, emotional, or political basis rather than by general norms.").

While one may justifiably contest Weber's definition of irrational lawmaking, his emphasis on the intellect rather than such talismans as oracle correctly suggests that good law is a function of intelligent discourse and analysis rather than superstition or blind obedience to tradition. Any tendency to derive codes from facile consultation of the latter may potentially yield what I am labelling "Type Two" error.

<sup>79</sup> The two types of codification risks are built on admittedly contrary tendencies. The former risk is predicated on a tendency to disobey laws that are perceived to lack legitimacy. The latter risk presupposes a tendency to obey codes blindly, without regard to their perceived usefulness. The fact that the risks are premised upon contrary tendencies does not render them inconsistent. Rather, it suggests that each risk is fed by the predicted behaviors of different groups of people or actuated by diametric temperamental orientations or inconsistent behavior by individuals.

<sup>80</sup> Professionals are unlikely to violate professional codes, even when there is a conflict between personal and official precepts. See Robert Hauptman & Fred Hill, *Deride, Abide or Dissent: On the Ethics of Professional Conduct*, 10 J. BUS. ETHICS 37, 42 (1991).



encouraged by the inadequately scrutinized code.<sup>81</sup> Because codification precludes certain instances of superior individual analysis, the net quality of behavior can be expected to decline.<sup>82</sup>

Premature codification is also risky at another level. It increases the likelihood that self-serving rules and standards will be adopted in the guise of public protection.<sup>83</sup> Codes or standards purporting to further the public interest through increased "professionalization" may in fact have self-serving subtexts, masking opportunism and insulating corporations or firms from accountability or social responsibility.<sup>84</sup> One study suggests that at the corporate level, the dominant function of codes is protection of the firm.<sup>85</sup> The ability of authoritarian sources to adopt codes of veiled opportunism is magnified in international situations, where an incremental layer of complexity derived from cultural variation acts as a potential smoke screen. Unsophisticated critics who lack a finely tuned understanding of the cross-cultural questions at stake may be unable to discern the true motives and effects of the code.<sup>86</sup> These observations suggest that codification of

<sup>81</sup> Brief et al. have demonstrated that there is a tendency to discard personal values when decisionmakers are held accountable to an external standard regarding which they possess explicit knowledge. See Arthur P. Brief et al., *Resolving Ethical Dilemmas in Management: Experimental Investigations of Values, Accountability, and Choice*, 21 J. APPLIED SOC. PSYCHOL. 380, 392-93 (1991). This finding suggests that the risk of mindless conformity to authoritarian codes of ethics is significant.

<sup>82</sup> Of course, one can argue that such an error may be balanced by a countervailing preclusion of independent behaviors that are inferior to behaviors that conform to premature codification. This argument assumes a randomness that will be undermined by the tendency of rationality to favor superior independent judgments over inferior independent judgments, if good faith is held constant.

<sup>83</sup> The potential for the adoption of self-serving rules and regulations is great, given that neither corporate management nor shareholders are disinterested agents. For a discussion of the pressures that may cause these important stakeholders to adopt self-serving policies in the guise of ethics, see Dobson, *Ethics*, *supra* note 9, at 25-26.

<sup>84</sup> BURTON J. BLEDESTINE, *THE CULTURE OF PROFESSIONALISM* (1976); Lisa H. Newton, *Lawgiving for Professional Life: Reflections on the Place of the Professional Code*, BUS. & PROF. ETHICS J., Fall 1991, at 41, 45-51.

<sup>85</sup> Maurica Lefebvre & Jang B. Singh, *The Content and Focus of Canadian Corporate Codes of Ethics*, 11 J. BUS. ETHICS 799, 808 (1992).

<sup>86</sup> When codes artificially attempt to invent and impose transnational norms without the benefit of a well-developed underlying consensus of a

values has greater potential within highly cohesive, well-developed communities<sup>87</sup> than within culturally fragmented, developing communities.<sup>88</sup> Codification prior to the development of a traditional community structure becomes totalitarianism at the extremes because moral judgments are imposed absolutely without a source of democratic support.<sup>89</sup> Popular patronage requires a sufficiently developed community. While the exponential growth of technology has forced the world into the status of a single community, efforts to govern that community must account for its embryonic nature. The global community has been forced into premature proximity. As the Twentieth Century draws to a close, nations must coexist before mutual cultural assimilation can occur. It is likely that efforts to force assimilation by prematurely codifying ethical codes would be ineffective and dangerous. Laws without underlying values are meaningless to those who do not understand them, because their foundations are alien. Further, the application of laws without an understanding of

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true community, they are more susceptible to industrial or professional subversion. This is because the alien quality of extra-cultural values is poorly understood by those to whom it is applied, and this relatively low comprehension and perceived complexity will tend to encourage acceptance on faith. In the absence of clear, open, and rigorous colloquy, ulterior motives and effects pass more easily without notice.

<sup>87</sup> The emphasis on well-developed community as a requisite of compulsory ethical strictures incorporates a "social relatedness" model of business ethics, which emphasizes the inevitably organic relationship between ethical decisions and social structure. For a discussion of this model, see John H. Barnett, *The American Executive and Colombian Violence: Social Relatedness and Business Ethics*, 10 J. BUS. ETHICS 853, 858-59 (1991). An emphasis on such relations suggests that the legitimacy of the derivation of the rules may prove more important than the technical enforceability of rules.

<sup>88</sup> The history of British common law and its derivatives serves as a model of codification and stages of community development. Early law was exclusively common law, reflecting the need for emerging community standards to drive the gradual process of developing community consensus. Statutory laws have become increasingly prevalent as common law nations develop a more refined foundation of community standards upon which they can reasonably build.

<sup>89</sup> The U.S. Supreme Court recognizes a nexus between imposed ethics and the development of an ethical community. The Court discusses rights, for example, as reflecting "the basic values that underlie our society," and being "rooted in the traditions and conscience of our people." Daniel J. Morrissey, *Moral Truth and the Law: A New Look at an Old Link*, 47 SMU L. REV. 61, 65 (1993) (citations omitted).

their purpose is a potential source of international and intercultural resentment and hostility.<sup>90</sup>

Taken in toto, the observations in this section suggest that the world may be forced to accede to ethical ambiguity and conflict for the foreseeable future. These observations reflect a belief that this turmoil is unavoidable and that it is preferable to ethical coercion among nations and within emerging cultures. Ethical standards exist without authoritarian codes. The logistical problems associated with formulating and implementing international ethical codes direct us in either of two divergent policy directions. The sanctity of a code's ideals can be preserved and its proponents can seek means of reducing or eliminating its moderating constraints. Conversely, the moderating constraints, in tandem with other shortcomings of ethical codes in international contexts, support the conclusion that such codes are not presently the most appropriate or useful means of encouraging ethical behavior.

### 3. RECONCILING THE INTERESTS OF COMMUNITY AND EXPEDIENCY: THE PARADOX OF THE "VOLUNTARY CODE"

In the previous Section, the adoption of quick, mandatory solutions to ethical challenges prior to the development of community values was criticized based on the observation that the foundation of community serves two vital functions in the evolution of an ethical system: (1) the rigorous testing of values, and (2) the establishment of a support base upon which compliance with the values can be implemented effectively. Implicitly, the codification of some controversial ethical issues

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<sup>90</sup> William C. Frederick suggests that the existence of international codes of ethics may be evidence of developing global community standards. William C. Frederick, *The Moral Authority of Transnational Corporate Codes*, 10 J. BUS. ETHICS 165 (1991). Frederick argues that the normative prescriptions and proscriptions contained in these codes embody "a moral authority that transcends national boundaries and societal differences, thereby invoking or manifesting a universal or transcultural standard of corporate ethical behavior." *Id.* at 165. While this assertion may be true, it may also be false, embodying a potential tautology. The existence of codes does not prove the existence of underlying community values. Because codes are authoritarian and coercive in nature, they can and do exist without underlying constituency support, provided that the authority imposing the code has the power to do so. While a code may be evidence of consensus, it may also be a mere manifestation of the force of rule.

at the corporate, professional, national, and international levels presently is neither legitimate nor viable.

These dangers can be averted by delaying the mandatory enactment of controversial value systems while emphasizing the colloquial development of a foundational community consensus. The emphasis on colloquy suggests that the interests of speed and certainty, which are furthered by premature codification, will be outweighed by the interests of open discussion and persuasion during early stages of community development.

Of course, the stage of consensus sufficient to support the codification of values exists at some indeterminate location on a slippery slope.<sup>91</sup> The cultivation of community includes a phase of ambiguous consensus regarding many ethical issues.<sup>92</sup> At this stage, consensus grows such that codification gradually contains fewer problems of legitimacy and viability. There is no precise point at which enough community consensus exists to justify codification of values. Because the ambiguous stage provides no clear transition point for the change from idiosyncrasy to codification,<sup>93</sup> the vehicle of the voluntary code is a valuable hybrid that can be used to translate community development into sustainable law.

Pratt has identified the voluntary code as a mechanism for

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<sup>91</sup> This author does not suggest that broadly supported community standards are feasible with regard to all ethical questions. Rather, the author posits that codification of ethics is untenably coercive unless broad-based community support can be garnered, and that codification should be delayed until such support exists.

<sup>92</sup> At this point, acceptance of norms may not be as broad as it will eventually become through the process of evolution of values. Values at this stage are likely to be unclear, indistinct, or blurred. In other words, both the degree and the focus of consensus are not fully realized.

<sup>93</sup> A distinct point of ideal codification is difficult to locate because the process of developing a community (i.e., shifting from highly idiosyncratic, divergent value systems to cohesive, potentially codifiable value systems) includes the intermediate steps of colloquy and convergence. The entire chain, then, goes from idiosyncrasy to colloquy to convergence to codification. The insular nature of belief outside the realm of community begins to erode from the insights generated in the colloquial process, which entails the refinement of ideas and some individual concessions via persuasion. These concessions, when accumulated, drive the gradual convergence of previously separate ideologies. The greater the convergence, the more practicable and theoretically supportable will be any ultimate codification.

facilitating "mutual adjustment"<sup>94</sup> when cultural differences impede the development of policy in areas such as environmental protection.<sup>95</sup> He suggests that a voluntary code of conduct may be crucial in averting conflicts between MNCs and host countries.<sup>96</sup> Pratt does not examine the nature and prescribed utility of voluntary codes in any detail, but he suggests that such codes will serve a crucial function in transnational settings such as the facilitation of an "active dialogic communication."<sup>97</sup> This relationship between the voluntary code and the enhancement of dialogue suggests that we further explore the potential of such codes to bridge the ambiguous area between idiosyncrasy and consensus.

Voluntary codes are not mere theoretical constructs. A United Nations Report defines a code of conduct in a manner evocative of the qualities of a voluntary code, as "a consistent set of recommendations which are gradually evolved and which may be revised as experience or circumstances require."<sup>98</sup> The Report notes that while such codes are "not compulsory in character, they act as an instrument of moral persuasion, strengthened by the authority of international organizations and the support of public opinion."<sup>99</sup>

Perez-Lopez has catalogued and analyzed numerous existing and historical voluntary codes<sup>100</sup> concerning rights of employees which serve as exemplars of the concept: the Sullivan Principles,<sup>101</sup> the MacBride Principles,<sup>102</sup> the

<sup>94</sup> John Paluszek, Public Relations in The Coming Global Economy, in *VITAL SPEECHES OF THE DAY*, October 15, 1989, at 23.

<sup>95</sup> Cornelius B. Pratt, *Multinational Corporate Social Policy Process for Ethical Responsibility in Sub-Saharan Africa*, 10 *J. BUS. ETHICS* 527, 530-31 (1991).

<sup>96</sup> *Id.* at 530.

<sup>97</sup> *Id.*

<sup>98</sup> U.N. DEPT OF ECONOMICS AND SOCIAL AFFAIRS, *THE IMPACT OF MULTINATIONAL CORPORATIONS ON DEVELOPMENT AND ON INTERNATIONAL RELATIONS*, at 55, U.N. Doc. ST/ESA/6, U.N. Sales No. E.74.II.A.5 (1974).

<sup>99</sup> *Id.*

<sup>100</sup> Jorge F. Perez-Lopez, *Promoting International Respect For Worker Rights Through Business Codes of Conduct*, 17 *FORDHAM INT'L L.J.* 1 (1993).

<sup>101</sup> The Sullivan Principles, created as a means for achieving racial equality in South Africa, were developed and revised during the 1980s. For a discussion of the Sullivan Principles, see Leon H. Sullivan, *The Sullivan Principles and Change in South Africa*, in *BUSINESS IN THE CONTEMPORARY WORLD* 175 (Herbert L. Sawyer ed., 1988).

Slepek Principles,<sup>103</sup> the Miller Principles,<sup>104</sup> and the Maquiladora Standards of Conduct.<sup>105</sup> While these voluntary codes have created principled standards for unilateral choice rather than mandatory standards enforced by compulsion of law,<sup>106</sup> they have resulted in social change and fostered an international dialogue that has yielded reforms in the United States and beyond.<sup>107</sup>

Paradoxically, because compliance with voluntary codes is optional, voluntary codes are potentially more powerful than true codes. The ultimate power of voluntary codes is a result of their encouragement of rigorous debate which ultimately improves the quality of the code. Debate of mandatory law can be chilled by the perception that the process is inefficient. Because immediate compliance is not a strategic variable for any institution, time allocated to discourse can be justified only if the probability of legislative reform is feasible and cost effective.<sup>108</sup> This means that a greater number of potential

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<sup>102</sup> The MacBride Principles are intended to address the problem of anti-Catholic discrimination by U.S. companies doing business in Northern Ireland. See Lisette M. Currier, *Religion and Employment in Northern Ireland: U.S. Influence on Anti-Discrimination Legislation*, 12 COMP. LAB. L.J. 73 app. B. at 103-04 (1990).

<sup>103</sup> The Slepek Principles address human rights issues associated with activity in the former Soviet Union. For a discussion of the Slepek Principles, see Perez-Lopez, *supra* note 100, at 12-16.

<sup>104</sup> The Miller Principles, which address human rights in the People's Republic of China and Tibet, were originally contained in a bill presented to Congress. H.R. 1571, 102d Cong., 1st Sess. (1991).

<sup>105</sup> The Maquiladora Standards of Conduct were created by the Coalition for Justice in the Maquiladoras. The Standards address health, safety, employment, and environmental issues associated with U.S.-Mexican border manufacturing facilities. For a discussion of the Maquiladora Standards, see Perez-Lopez, *supra* note 100, at 19-23.

<sup>106</sup> Only one of these voluntary codes, the Sullivan Principles, eventually became mandatory. See Perez-Lopez, *supra* note 100, at 26-27. For codification related to the original Sullivan Principles, see Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1087 (1986) (codified at 22 U.S.C. §§ 5001-5116 (1988 & Supp. IV 1992) (Sections 5051-73 were subsequently omitted from the original Act by Executive Order No. 12,769, 56 Fed. Reg. 31,855 (1991), as authorized by Section 5061(a) of that Title.); Prohibiting Trade and Certain Other Transactions Involving South Africa, Exec. Order No. 12,532, 3 C.F.R. 387 (1986), *reprinted in* 50 U.S.C. § 1701 (1988).

<sup>107</sup> Perez-Lopez, *supra* note 100, at 43-44.

<sup>108</sup> The term "strategic variable" refers to a factor that confers upon the decision-maker a meaningful choice, i.e., one that can have a material effect.

change agents will be attracted to the debate of precatory norms than of mandatory norms, simply because the hurdle for achieving some return on the investment in the process is lower. Accordingly, more vigorous discussion will ensue.

Debate of voluntary codes is beneficial because compliance options exist. A discussion of voluntary codes has two potentially positive social effects. First, colloquy improves the likelihood that compliance will be undergirded by changes in social values, so that decisionmakers develop bona fide personal ownership of those values. This internalization will increase the likelihood that decisionmakers will abide by the spirit of the code, even when loopholes provide an escape from the letter of the code. Second, colloquy acts as a marketing tool, augmenting the constellation to which transactions of the terms of the voluntary code are applied.<sup>109</sup> Discussion thus translates into exposure, which may lead to the types of fanning effects observed by Perez-Lopez, as when Sullivan-like principles were adopted worldwide.<sup>110</sup>

Kline has identified a pragmatic advantage of the voluntary code—the “element of voluntary adherence” may be necessary to recruit initial support from otherwise skeptical stakeholders.<sup>111</sup> According to Kline, “[a]cceptance of the voluntary mode has been essential to secure participation in

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The suggested principles of a voluntary code concern a strategic variable—they grant the decision-maker the latitude to choose among alternatives, so that debate has an immediate benefit in terms of the quality of instant decisions. Conversely, true codes do not create a strategic variable for law-abiding decision-makers. Because they are compelled by force to adhere to the terms of the code, expenditure of time analyzing the quality of those terms yields no immediate return. Moreover, such expenditure yields no long-term return unless the decision-maker believes that code reform is a viable possibility.

<sup>109</sup> These transactions may or may not result in the sale of a voluntary code, i.e., in the internalization of its norms through individual purchase and ownership of its belief system. This is a benefit of using voluntary codes in developing communities. Personal investments in the marketed terms of such codes will be made individually, based on the perceived value of those terms. The terms will or will not germinate in the normative system of the emerging community, depending on the degree of aggregate individual adoption.

<sup>110</sup> See JOHN M. KLINE, *INTERNATIONAL CODES AND MULTINATIONAL BUSINESS: SETTING GUIDELINES FOR INTERNATIONAL BUSINESS OPERATIONS* 89-110 (1985).

<sup>111</sup> *Id.* at 46.

the [United Nations Conference on Trade and Development Code on Restrictive Business Practices] by most Western governments as well as the acquiescence of many corporations."<sup>112</sup> The transitional function of the voluntary code is valuable. It complements a healthy reluctance of stakeholders to adopt mandatory policies that have neither been fully discussed nor provisionally tested.

Raiborn and Payne's definition of a code of ethics requires the qualities of "clarity, comprehensiveness, and enforceability."<sup>113</sup> Based on that definition, the idea of a voluntary code is an oxymoron because a set of principles must be mandatory to be enforceable under Raiborn and Payne's definition. Thus, the discussion of voluntary codes must define such codes and explain how the hybridization of two inconsistent concepts, voluntariness and enforceability, can be reconciled. If a voluntary code of ethics is defined as a provisional set of precepts or principles which are not officially binding and which attempt to capture the developing cross-cultural confluence of norms and values in emerging communities, the ideas of voluntariness and enforceability are harmonized, thus creating a crossbreed mechanism for the development of consensus out of idiosyncrasy and controversy.

Under the preceding definition, the principles and precepts of a voluntary code are neither technically nor legally binding, and alteration and change are permitted, encouraged, and expected. Ultimately, compliance with a voluntary code occurs by election, not compulsion. A voluntary code is more suggestive and less coercive, more tentative and less certain than a true code. While both varieties of codes remain subject to amendment, change is more natural and acceptable in the case of the provisional than in the case of the established and determined.

This analysis does not suggest that U.S. law is entirely unadaptable or immalleable. In fact, law in the United States is remarkably fluid.<sup>114</sup> Instead, the analysis indicates the

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<sup>112</sup> *Id.*

<sup>113</sup> See Cecily A. Raiborn & Dinah Payne, *Corporate Codes of Conduct: A Collective Conscience and Continuum*, 9 J. BUS. ETHICS 879, 883 (1990).

<sup>114</sup> Legislative change occurs frequently, often accompanying shifts in political incumbency. Similarly, common law as bound by *stare decisis* is increasingly viewed by the courts as flexible, and subject to shifting



relative likelihood and ease of cultural norm shifts under voluntary versus mandatory codification. Both citizens and politicians tend to view the enactment of true codes as a finite process. The stages of that process in a republican democracy are roughly the stages of rational decisionmaking: defining the problem, identifying criteria for solving the problem, attributing weights to the criteria, generating alternatives, rating the alternatives based on the weighted criteria, and selecting the optimal solution.<sup>115</sup> The process has a beginning and an end. This finite quality implies that selection of a decision alternative is followed by a shift to new problems, so that we view the successful codification of ethical and other dilemmas as a termination. Although the decisions adopted in a true code are subject to modification, change is bounded by the force of inertia generated by the sense of completion that accrues at the end of a finite process. Once adopted, a true code can be seen as static unless levels of dissatisfaction reach a high threshold, thus driving legislative decisionmakers to adopt modification. The closure generated by successful codification thus creates a baseline of stasis. The substantive issues resolved in the process of codification are unlikely to be reexamined without a critical event capable of shifting social and political perception of the issue from the realm of the closed to the realm of the open.<sup>116</sup>

Contrast a true code with a voluntary code. While not legally binding, a voluntary code is evocative of the state of the art. As defined herein, a voluntary code is a provisional statement of the present status of the moral conversation. Whereas a true code is a snapshot of ostensibly fixed and determined moral reality, a voluntary code is a frame from a

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community standards. *See, e.g.,* *Edwards v. Clinton Valley Center*, 360 N.W. 2d 606 (Mich. Ct. App. 1984).

<sup>115</sup> For greater explication of this rational decision process, see generally MAX H. BAZERMAN, *JUDGMENT IN MANAGERIAL DECISION MAKING* at 3-4 (2d ed. 1990).

<sup>116</sup> True codification cannot avoid this all-or-nothing dualism. Codification is implicitly a statement that we have found a workable solution, and efforts at recodification will not be triggered unless lawmakers believe that the code is seriously flawed. Ironically, the force of the law can become tautological in this regard, to the extent that we equate legal and moral precepts. Positivist perspectives that suggest that the force of law is its own moral right may undermine the process of continual and ongoing examination and assessment.

moving picture. The voluntary code suggests both explicitly and implicitly that it represents an amalgamation of current thinking in a process that, while not necessarily infinite, has no imminent end. A discussion may culminate in eventual community enlightenment that converges upon a broad-based consensus in which a universal truth is revealed, or discussion may be eternal, because some issues cannot be solved by resort to a universal truth.

Either way, the critical point is that a voluntary code can be established to create an understanding that the moral process has no immediate terminus. In contrast to the finite quality of a true code, and its tendency to truncate the moral conversation, a voluntary code may evoke a continuous colloquy. Because no official disposition is desired or expected, the conversation continues in an ongoing, steady stream. From the viewpoint that identifies colloquy in the process of community development as the ultimate source of ethics,<sup>117</sup>

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<sup>117</sup> Legitimate and practicable ethical systems must be built upon a solid community foundation. Both the quality and the broad popular acceptance of value systems depend upon informed and intelligent discussion, which is the foundation of community consensus. Colloquially derived value systems both reflect and reinforce a defining characteristic of communities, namely interdependence. For a discussion of the emphasis upon interdependence in ethical systems that emphasize community, see JAMES O'TOOLE, *THE EXECUTIVE'S COMPASS: BUSINESS AND THE GOOD SOCIETY* 88-89 (1993).

Communities, whether ascribed locally, as has been the case historically, or globally, as is becoming more common in modern technological society, participate in an iterative system in which interdependence is both the source and the guiding characteristic of ethics. Interdependence inexorably raises questions of ethics because our mutual proximity, and thus our unavoidable interactions, pose challenges wherein the conflicting interests and values will inevitably clash. Because of this reality, the solution to ethical questions paradoxically mimics the problem itself. The difficulties associated with interdependence, or with simply living together, are best solved by extended conversation in which the disparate but proximate interests are represented, and in which the interests to be furthered reflect the unavoidable interrelatedness of the members of the relevant community. These sentiments evoke the spirit of de Tocqueville's notion of "enlightened self-interest," according to which communal cooperation is conceded in order to advance the individual interests of all who participate in the cooperative system. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Phillips Bradley ed., 1945) (1835).

If interdependence is the driving force behind the existence of ethical questions, the process for developing solutions, and the substance of the solutions themselves, it becomes difficult to ignore the overwhelming role of community in the evolution of any system of ethics. Community is a process rather than an entity, such that legitimate and useful ethical

systems should emphasize process over substance. From this standpoint, a community's moral dimension is defined as the gradual and ongoing creation of a common system or set of values.

Contrast this conception of ethics with one more commonly embraced by those seeking to apply ethics in business and professional contexts. The tempting desire for an immediate solution, with imminent and measurable increments in what may be described vaguely as "more ethical behavior," drives the search for simplistic ethical mechanisms. Kipnis describes this search as the application of an engineering model of applied ethics. See Kenneth Kipnis, *Ethics and the Professional Responsibility of Lawyers*, 10 J. BUS. ETHICS 569 (1991). Under this model, practitioners apply ethics by reference to the more theoretical work of philosophers, as engineers apply principles of physics. *Id.* at 570. As Kipnis observes, the analogy is flawed, in part because what are broadly considered proved principles among physicists become noncontroversial, whereas divergence always remains among fundamental schools of philosophical thought. *Id.*

Philosophy is inherently different from physics in that it is not subject to the same objective forms of proof characteristic of the scientific method. This difference is particularly important in the process of trying to convert theory to application in international and cross-cultural settings. As a general principle, philosophies cannot be converted formulaically into practices using the simple expedient of application. Uncontroverted and uncontroversial scientific principles can be translated into workable products and processes. In comparison, the challenging questions of applied ethics, those at the margins of disagreement, cannot be so translated because they are not subject to the rule of uncontroverted and uncontroversial principles. The disparity between physics and philosophy becomes exaggerated when questions of national sovereignty and cultural variation are added to the equation. Philosophy is much more inherently a cultural artifact than is physics, therefore applications of philosophy will be much more culturally dependent than applications of physics. Likewise, whereas the results of applied philosophy are largely intangible, the results of applied physics are engineered products. The evaluation of philosophical intangibles is likely to be more complex and controversial than the evaluation of technological applications.

Taken together, the reasoning in this subsection suggests that ethics at the margin can be conceived as equivalent to the development of community, at least in its valuative aspect. Moreover, this process cannot effectively be managed or engineered with formulaic facility, simply by applying a set of rules derived from an underlying source of theory, such as the literature of philosophy. This does not suggest that philosophy is not the ultimate source of ethics, but rather that the transitions from theoretical philosophy to applied ethics cannot be imposed in the legalistic embodiment of a code. International ethics are derived in a painfully slow, evolutionary process—the process of development of a global community.

Some critics may contend that the process is intolerably slow, and that codification of controversial, marginal areas of ethics is necessary to ensure the most humane conditions. In response to such challenge, a crucial point must be emphasized: the absence of codified ethics is not the absence of ethics. The conversation that results in attitudes that support behavioral decisions comprises the developing body of international ethics as divergent global cultures converge upon more shared understandings, in effect

the voluntary code may be more valuable than a true code.

Precepts or principles that are not legally binding nonetheless will be organically influential in the development of community standards. For example, consider the ethical challenges faced by MNCs doing business abroad with regard to employment discrimination. Suppose that the Acme Corporation does business in the country of Dystopia, where the subjugation of women into subservient roles is universally accepted as normal and desirable.<sup>118</sup> Should the company

developing a global community, and hence a global ethics. The idea that codification is necessary to avert unnecessary evil is presumptuous in its assumption that the source of binding authority is capable of making the most ethically sound decision at the margin, without the benefit of conversation. This is not to suggest that ethics are relative, but rather that potentially universal ethical precepts, upon which all parties may eventually agree after examining all sides of the issues openly and disinterestedly, may not be immediately accessible to the human race at this stage of our development. A source of authority that adopts governing principles at the margin, without adequate deference to the evolutionary process and the role of colloquy in that process, evinces a form of ethnocentrism that threatens both the quality of our developing ethical tenets and the likelihood that they will receive broad constituent support.

Notwithstanding the risks associated with premature codification and the concomitant end to colloquy, some commentators insist that authoritative answers are necessary. Davis and Welton, for example, suggest that individual discretion to evaluate good and bad is "unfortunate because situation ethics have no place in either business or government operations. A person needs to be able to separate ethical from unethical situations without having to create a set of standards for every situation." James R. Davis & Ralph E. Welton, *Professional Ethics: Business Students' Perceptions*, 10 J. BUS. ETHICS 451, 454 (1991).

The idea that ethics should and must be fixed by a source of authority, to such an extent that individuals need not analyze ethical situations as they arise, both degrades the concept of ethics and creates opportunities for mindless conformity to externally validated sources of control of varying moral value. Encouraging individuals to distinguish good from bad signals a richer conception of ethical processes than the fixed establishment of ethical institutions.

<sup>118</sup> While Dystopia is meant to be a fictitious nation, readers may be tempted to identify a potential inspiration. The temptation is understandable, given international discrepancies in racial and gender equality, both in attitudes and behaviors. Japan in particular has received poor marks for egalitarianism, in both journalistic and scholarly treatments. See Yoshimi, *Japan's Racial Myopia*, 14 JAPAN ECHO 47 (1987); see also Clayton Jones, *Japan Tries to Shed Image Left by Racist Comments*, CHRISTIAN SCIENCE MONITOR, Oct. 23, 1990, at 4; John Greenwald, *Prejudice and Black Sambo*, TIME, Aug. 15, 1988, at 25; Paul Lansing & Tamra Domeyer, *Japan's Attempt at Internationalization and its Lack of Sensitivity to Minority Issues*, 22 CAL. W. INT'L L.J. 135 (1991-92).

purchase goodwill in Dystopia by refusing to hire and promote women to positions of responsibility and authority, or should the company stand by its egalitarian beliefs, hiring and promoting on the basis of ability and merit? Are there other options? Should the government dictate appropriate practices for U.S. multinationals doing business in Dystopia?

While the country of Dystopia is mythical, the problems in the hypothetical are real. In 1991 the U.S. Supreme Court held that Title VII did not prohibit extraterritorial discrimination against U.S. citizens by U.S. MNEs operating outside of the United States.<sup>119</sup> As the holding was based on an interpretation of Congressional intent under Title VII,<sup>120</sup> Congress responded in the Civil Rights Act of 1991 by specifically prohibiting Title VII discrimination by U.S. MNEs against U.S. citizens abroad.<sup>121</sup> The Civil Rights Act of 1991 exempts MNEs from Title VII's antidiscrimination provisions, however, "if compliance . . . would cause [an] employer . . . to violate the law of the foreign country in which [the] workplace is located."<sup>122</sup>

Under a voluntary codification approach, respect for community development as an organic process is paramount. Accordingly, Congress should abstain from imposing extraterritorial rule of U.S. values when those values are controversial and in conflict with the values of the home territory. Legislative restraint in these instances is neither cowardly nor amoral. To the contrary, it liberates free discourse, the most powerful tool for effecting social change.<sup>123</sup> Specifically, egalitarian U.S. companies in the

<sup>119</sup> EEOC v. Arabian American Oil Co., 499 U.S. 244, 247 (1991).

<sup>120</sup> *Id.* at 248-256.

<sup>121</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, §109, 105 Stat. 1071, 1077-78 (1991).

<sup>122</sup> *Id.* § 109(b)(1)(B).

<sup>123</sup> Compelling arguments can and should be made against gender discrimination in any community. For example, Bellace observes that "[w]ith the internationalization of business, managers will increasingly seek international experience. Lack of such experience may limit one's career progress." Janice R. Bellace, *The International Dimension of Title VII*, 24 CORNELL INT'L L.J. 1, 23 (1991). Overseas discrimination thus affects even domestic career opportunities. Furthermore, as labor markets become more global, reductions in demand for women's services in some parts of the world are likely to have ripple effects in the remainder of the world under free market conditions of supply and demand.

hypothetical case can and should adopt some voluntary policy option that embodies their ethical beliefs, and that has persuasive force. Among these options, in increasing order of severity, are: (a) the engagement in discussions aimed at changing the attitudes of the host country, while adapting to that country's normative system; (b) the unilateral adoption of egalitarian policies, and the ongoing defense of those policies, notwithstanding market pressures that encourage discrimination; and (c) the refusal to participate in economic transactions with nonegalitarian nations, in the form of a boycott.

All three options are distinguished from U.S. legislation in that they are private, technically noncompulsory decisions. The options are only *technically* noncompulsory, because the force of open colloquy may exact such pressure in an open marketplace of ideas as to approach a *de facto* compulsion.<sup>124</sup> Such pressures, fueled by the media, were the ultimate source of expedited change in South African apartheid policies in the early 1980s and 1990s.<sup>125</sup>

In both Dystopia and South Africa, encouragement of colloquy in the process of developing an ethical community is the ideal mode of moral evolution. Each of the three unilateral voluntary options serves a vital and sustaining function in any viable process of ethical reform: the internalization of, rather than mere extrinsic imposition of, change. Each of the three opinions shares a belief in, and commitment to, open and honest persuasion in an ongoing conversation. Whether a company merely elects to talk, opts to talk while taking an ethical stand in its behavioral choices, or chooses to abstain from participating, three critical characteristics apply: (1) Each company must take responsibility for its own stance, and

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<sup>124</sup> For a discussion of the degree to which ideals of gender equality may be developing in the global community, see Don Mayer & Anita Cava, *Ethics and the Gender Equality Dilemma for U.S. Multinationals*, 12 J. BUS. ETHICS 701, 706-07 (1993).

<sup>125</sup> The case of South Africa does not provide a laboratory setting for observing the pure impact of unilateral private pressures on global ethics, because the U.S. government influenced individual corporate decisions throughout the process. Nonetheless, the economic pressures placed on South Africa to reform its policies of extreme discrimination under apartheid were driven largely by public protest and concomitant pressure on private industry and both public and private institutional investors.

cannot ignore the problem by simply hiding behind the edict of law. The problem of discrimination remains a critical community concern, and is not relegated to the arena of issues disposed by law. (2) Individual actors may disagree with the party line. While public pressures favoring unilateral sanctions are likely to remain and to be forceful, the open conversation, and the insights and understanding that result from that process, are not preempted by the dispositive force of authoritarian edict. (3) The decision to lodge ethical responsibility in the marketplace rather than in the laws will result in a process that, while more gradual, is likely to have a solid and lasting effect. Whereas premature legal edicts may force social change, often without accompanying changes in attitude, more gradual colloquial pressures provide the opportunity for real persuasion (i.e., for change to occur) because internal support for the discriminatory system has declined as beliefs have been altered.

This final observation returns to the basic precept of ethical colloquy: that externally imposed moral positions which lack internal cultural support will be less effective than changes which reflect a substantive alteration of the culture itself.<sup>126</sup> Social change by edict not only short-circuits the conversation, but also undermines the social and cultural foundations that most effectively translate policy into practice. There can be little doubt that laws prohibiting discrimination in the United States are undermined daily by insidious and carefully veiled discriminatory activity. Egalitarian policies would be more effective if they were supported by more widespread social consensus. Unfortunately, as the coercive forces of public policy have impaired open, honest debate, they have undermined discussion of the virtues of

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<sup>126</sup> The debate between legal positivists and legal realists exists in part because legislators fail to defer to individual self-determination prior to the development of social consensus. This failure leads to error, in which rules are legislated that later reveal themselves in the light of ongoing debate as bad. Restraint in deference to social colloquy would provide a legal reticence that averts both the rigidity of positivists and the free-handed interpretation of laws by realists. For discussion of positivist and realist perspectives on the interpretation of law, see Gregory C. Keating, *Fidelity to Pre-existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1, 16-21 (1993).

egalitarianism.<sup>127</sup> From a more theoretical perspective, Talcott Parsons' classic explication of social systems explains, among other things, the effects of informal normative dynamics on human interactions. Parsons observes that a number of system forces, or "modes of orientation," are translated into moral and other action.<sup>128</sup> Parsons' modes of orientation include various motives<sup>129</sup> and values,<sup>130</sup> which determine the ultimate character of actions. Varying patterns of motives and values may determine, for example, whether behavior is predominantly instrumental (i.e., geared toward the efficient achievement of goals) or moral (i.e., concerned with consummating good rather than bad behavior).<sup>131</sup>

Turner provides a succinct explanation of the interplay between modes of orientation and types of action. He emphasizes the potency of social systems of status, roles, and norms that result from informal and organic human intercourse:

[T]he organization of unit acts into social systems requires a parallel conceptualization of motives and values that become, respectively, the personality and cultural systems. The goal of action theory now becomes understanding how institutionalized patterns of interaction (the social system) are circumscribed by complexes of values, beliefs, norms, and other ideas (the cultural system) and by configurations of motives and

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<sup>127</sup> Open discussion regarding discrimination has been subverted by the official party line, which has become so unassailable that most mildly intelligent people know better than to produce for inspection retrogressive attitudes which, while deeply felt, have become unacceptable in civilized discourse. If we could open the conversation so that discriminatory attitudes were exposed, they would be easier to change. In concealment they simply fester and feed upon themselves. Those who hold racist and sexist beliefs are most likely to be persuaded by arguments that they perceive to be fair, honest, and open.

<sup>128</sup> TALCOTT PARSONS, *THE SOCIAL SYSTEM* 3-67 (1951).

<sup>129</sup> Motives fall into three categories: cognitive (i.e., informational), cathetic (i.e., emotional), and evaluative (i.e., seeking assessment). *Id.* at 7.

<sup>130</sup> Values fall into three categories: cognitive (determining value based on objective information), appreciative (determining value based on aesthetics), and moral (determining value in terms of right and wrong). *Id.* at 13.

<sup>131</sup> *Id.* at 49-50.



role-playing skills (the personality system).<sup>132</sup>

Parsons' organic functionalism can be translated for and applied to the question of voluntary transnational codes. While such provisional statements of emergent community expectations are not technically binding, they influence behavior. A voluntary code encompasses the transitional status of values, beliefs, and norms. While the voluntary code enhances characteristics of openness and mutability so as to promote a healthy and balanced evolution, the existence of voluntary codes at any given moment, albeit in evolving forms, helps mold behavior via informal social and institutional pressures. The voluntary code thereby has the potential to balance the goals of community moral development with the more pragmatic interests of viable social control, the latter of which reflects received values, which are imperfect but ever approaching perfection.

The process of developing and amending a voluntary code is conversational in nature. Voluntary codes are not created in vacuums, but rather by mutual adjustment and adaptation that respond to a decisionmaking dialogue. In this sense, the task of creating and maintaining a code formalizes the conversation and ensures its continuation.

Given this role, voluntary codes are more appropriate during the earlier, formative stages of community values, whereas true codes are more viable and more acceptable during later stages, once community values have congealed. This observation reconciles the importance of a bottom-up, democratic, dialogic development of ethics with the necessity for top-down, authoritarian implementation of true codes that have been legitimized by extensive community evolution.<sup>133</sup> In other words, while the pre-policy stage of moral consensus development should be considered provisional and therefore precatory, the post-policy stage is justifiably mandatory,<sup>134</sup>

<sup>132</sup> JONATHAN H. TURNER, *THE STRUCTURE OF SOCIOLOGICAL THEORY* 63 (4th ed. 1986).

<sup>133</sup> In response to the pragmatic need to enhance ethical behavior in business and the professions, commentators often recognize the need for top management to state their values and expectations clearly. See, e.g., Deon Nel et al., *Business Ethics: Defining the Twilight Zone*, 8 J. BUS. ETHICS 781 (1989).

<sup>134</sup> See *id.* at 781 ("The policies which an organization implements, with

provided that the policy is legitimate, i.e., built on the groundwork of an acceptable and adequate base of debate, followed by consensus within the community.

The danger attendant to premature true codification, and failure to use an intermediate voluntary codification stage to debate, evaluate, and refine a policy is bimodal, operating at both the individual and the community levels. Imagine that a code that is suboptimal, from a hypothetical, highly developed community standard, is prematurely promulgated as a true and binding code. At the individual level, those who conform to true code strictures in order to abide by the law will have suspended individual judgment in deference to an inferior policy; those who insist upon exercising free and independent thought will face a dilemma<sup>135</sup> associated with the exercise of civil disobedience.<sup>136</sup> At the community level, the aggregation of individual decisions—dysfunctional decisions to abide by bad law, and inefficient decisions to break bad law and thereby trigger the social expense of legal enforcement mechanisms—is harmful. Even more crucially, those who thoughtlessly conform to the premature true code remove themselves from the debate of the substantive issues associated with the code, mitigating the vigor of analysis and thereby impeding or even halting the gradual development of most optimal moral postulates as measured against extant community values. Depicted graphically, we can observe the transitional role of the voluntary code, as it reconciles the conflicting needs of freedom and control during the formative stage of community morality:

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regard to ethically contentious issues in business, should conceivably also be a reflection of the values of top management . . .”).

<sup>135</sup> This dilemma, of course, consists of the choice between abiding by a law one believes to be immoral, or disobeying the law because one believes it to be immoral.

<sup>136</sup> Steven R. Salbu, *Law and Conformity, Ethics and Conflict: The Trouble With Law-Based Conceptions of Ethics*, 68 IND. L.J. 101, 105 (1992).

Less Freedom  
More Control

**True Codes**——>Tendency to conform; tendency to terminate debate.

**Voluntary Codes**——>Moderated tendency to conform, combined with encouragement of debate.

**No Codes**————> Maximized freedom from coercion and mindless conformity, but without any source of guidance to structure shape of debate.

More Freedom  
Less Control

#### 4. CONCLUSION

As business becomes increasingly global, ethical challenges are becoming increasingly complex. This article analyzes this complexity and proposes a framework for the development and implementation of international business ethics. Specifically, it asserts the following propositions:

1. Ethical decision processes are directly linked to a number of important substantive characteristics of the ethical decisions themselves, including quality of the decision, degree of appropriateness of the decision in the context of the particular intercultural transaction or relationship involved, and viability of the effective implementation of the decision.

2. This emphasis on process can be translated into a number of supporting propositions regarding the adoption and use of codes of ethics. Specifically,

A. True codes, i.e., codes that are binding by force of either governmental or private authority, become increasingly effective as they reflect higher levels of development of intercultural community. Conversely, true codes are less effective during the earlier stages of development of intercultural community.

B. Prior to viable true codification, an emphasis on ethical decision processes suggests that colloquy should supplant premature codification. At this early stage, legal clarity is inappropriately restrictive, as the non-negotiable nature of clear and precise edicts undermines and short-circuits the continuing process of informal debate, from which legitimate intercultural values can be derived. Support for colloquy, rather than truncation of colloquy through the imposition of legalistic mechanisms, can effectively help achieve philosophical rather than legal clarity, i.e., force and clarity of reason in the development of norms and values, rather than force and clarity of language in enforcing extant values.

C. Premature true codification may be ineffective for a number of ancillary reasons as well. Without consensus achieved through debate and the refinement of ideas, true codes tend to be vague. As a result, many premature true codes are couched in only those bland terms and values that can be widely accepted even at the early stages of intercultural discourse. These relatively noncontroversial values tend to be so broad and so fundamental as to provide little practical guidance. Furthermore, premature codification can encourage rebellion against high quality codes that are perceived to lack legitimacy because fair processes have been subverted. Premature codification can also yield entrenchment of low-quality codes to the extent that the force of authority is effective.

3. Community, ethical or otherwise, is as much a process as it is a result. Emergent community values should therefore be viewed and fostered with an emphasis on effective community development processes. The interests of effective development of global community values must be balanced with countervailing interests of expediency in the development and implementation of global ethics. An effective bridge between the spheres of noncommunity and highly cohesive community is the voluntary code, a hybrid that encourages the systematic and concrete collection of proposed norms and values, without the rigidity and chilling effect upon debate that tend to accompany true codes. Voluntary codes can facilitate the process of mutual adjustment necessary to the achievement of confluence of separate normative systems as they meet in

global market relationships and transactions.

The globalization of historically insular world forces is occurring so rapidly in the wake of high technology as to create a period of value crisis. The need for assimilation and adjustment is greater than the time in which such processes ordinarily occur. The transition to an ethical global community will be facilitated by focusing on process rather than true codification.