Human Rights: The Emerging Norm of Corporate Responsibility

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The conduct of many multinational corporations suggests that corporate social responsibility means more than profit maximization. These companies are refraining from corrupt practices, are adopting minimum standards for treatment of workers, and are providing certain drugs at below-market prices. The changes in behavior reflect both the corporations' growing acceptance of responsibility toward more than shareholders, and their respect for the power of the collective, even when composed of individually vulnerable persons. Further, whatever the motive for these changes, the actual behavior has social influence.

Meantime, human-rights norms are now evolving toward an increased recognition of the collective as well. Included among the civil and political rights, and the economic, social, and cultural rights, are rights that are most effective when used by a group. The solidarity rights, including the right to development, are a natural culmination of that trend. These norms emerge from the larger society that extends beyond the developed world, and certainly far beyond the corporations' commercial environment. A democratic process of admittedly varying formality and effectiveness creates and legitimates these norms.

The feedback between (1) corporations' conduct in support of the collective and (2) the human-rights norms' move toward the collective, reinforce each other. Thus, the multinationals' behavior becomes more predictably compatible with human-rights norms, while these norms further support the corporations' move toward conduct consistent with human rights. The behavior and the norms, together, reflect a developing notion of corporate social responsibility that concerns the well-being of all those affected by the multinationals, and not only the shareholders.
The story is simple. In the past, the leaders of the commercial and corporate arena have defined the normative aspects of corporate social responsibility and have sought to control it as a positive matter. [FN1] This cannot be appropriate. These leaders have arrogated the power to themselves although the corporation owes its existence to a much larger community: to society as a whole. Ironically, moreover, the practical reality today is that some multinational corporations' actual behavior is becoming more respectful of nonshareholder rights than the classic corporate social responsibility norm requires. As a matter of conduct, multinationals recognize the rights of persons other than shareholders, [FN2] and a growing appreciation of the power of groups influences this evolving behavior. [FN3] Both Nike and Wal-Mart, for example, have adopted codes of conduct that articulate concern for the rights of developing-country workers. [FN4] What is the source of this different understanding of corporate social responsibility? It is a general change in perception, which increasingly conforms to norms of the East and South, [FN5] and which is reflected in the evolving human-rights norms.

Interestingly, as the human-rights norms are becoming worldwide as opposed to purely West/North-dominated, they are becoming more collective in nature. Collective both in the sense that some individual rights have a collective impact and in the sense that some of the most recently articulated rights belong to a group, not merely to an individual. [FN6] The emphasis on groups is a recognition that the more vulnerable are significant at least as a collective; the behavior of U.S.-based multinationals reflects this same understanding.

As multinationals' behavior becomes consistent with the emerging human-rights norms, the behavior reinforces the norms and vice versa. Further, because the human-rights norms emerge through a kind of unstructured, loose process akin to democracy, these norms--and the behavior consistent with them--acquire the type of legitimacy afforded to democratically approved conclusions. As corporate behavior begins to recognize the rights of a collective whose individuals are relatively powerless, the increasingly collective human-rights norms accord a reflected legitimacy to that behavior. [FN7]

This convergence of actual behavior and human-rights norms describes the new corporate social responsibility--a concept that is descriptive and normative, and is based on the will of a community far broader than the narrow commercial-corporate arena in which corporations have traditionally been thought to operate. [FN8] Further, as individuals as well as states gain rights under human-rights jurisprudence, this expression of corporate social responsibility increasingly becomes enforceable. [FN9]

II. Evolution of United States Multinationals' Behavior in the Global Environment: The Normative Articulation (Corporate Social Responsibility) and the Descriptive Outcome

Statements about appropriate behavior, and behavior itself, are two manifestations of a norm. Statements and behavior also influence each other. [FN10] Thus, to understand corporate social responsibility, we must review both the verbal expressions about appropriate behavior and corporations' actual behavior.

A. A Recent History of the Normative Articulation: Corporate Social Responsibility

Almost three decades ago, Milton Friedman asserted in simple, blunt terms that the role of the corporation is to maximize shareholder profits. The value underlying the implication is equally straightforward: managers who opt for goals other than shareholder profit maximization may hurt the economy, and are arrogating to themselves taxing powers granted only to the government. [FN11]

Later theorists, including, in particular, neoclassical law and economics scholars, relied on the concept of efficiency to justify their support of shareholder profit maximization. The socially
responsible corporation acts in an "efficient" manner. [FN12] This articulation masks the existence of an underlying value, such as wealth maximization. Early responses to this neoclassical school challenged the implication that efficiency is value neutral. For example, if the value underlying efficiency is egalitarian, then the "efficient" act may be redistributional rather than profit-maximizing. [FN13]

Taking a different tack, within the last ten years the progressives have argued that social responsibility requires the corporation to consider all relevant stakeholders. In addition to shareholders, the stakeholders have typically included others who had made an investment in the corporation. Employees who have invested human capital are the classic example of a nonshareholder stakeholder. The progressives' perspective was bolstered by states' adoption of so-called "constituency statutes," which expressly permit the board of directors to consider constituents other than shareholders. [FN14]

If the statutes had mandated, rather than merely permitted, consideration of nonshareholder stakeholders, the progressives would in all likelihood have succeeded in broadening the articulation of corporate social responsibility. [FN15] As it was however, challenges to the shareholder profit maximization model have continued. The team production model is a recent attempt to raise the issue of shareholder primacy from a different perspective: what role do shareholders have anyway? [FN16] Another approach allows the corporation to maximize its shareholders' profit, but asks that it do so using a long-term perspective. This change in time horizon encourages the corporation to maximize labor's productivity by treating workers relatively well. [FN17]

Each of these perspectives, from the focus on the value underlying efficiency to the discussion of stakeholders and shareholders, focuses insistently on the corporation. In fact, however, the multinationals' actual behavior both reflects and demands a broader, society-wide point of departure.

B. Multinationals' Actual Behavior Today Diverges from Shareholder Profit Maximization

As a descriptive matter, the actual behavior of even highly visible corporations has already moved beyond the Friedman/neoclassical model. To appreciate the present, to understand that current standards are part of a progression, and generally to accept that standards are not immutable, it is useful to recognize that the corporation in the United States has already seen the public perception of its purpose evolve from purely public to increasingly private over the past two hundred years. [FN18] The question, then, is to identify what form this private purpose takes: does a review of corporate conduct reveal shareholder profit maximization, or some other standard?

Recently, prominent multinationals formed under the laws of U.S. states have behaved in ways that are consistent with responsibility to more than their shareholders. While this is not the only possible interpretation of multinational conduct, the corporations have demonstrated attention to the plight of workers through adoption of codes of conduct, the concern for payee-country residents through the anticorruption movement, and the recognition of obligations to actual and potential customers of, in particular, certain pharmaceuticals. [FN19] The motivation of the multinationals-whether their management is irrelevant when considering the impact of the multinationals' action. Initially, the significant question is how those who witness the multinationals' performance interpret that behavior. In other words, it is appearance that matters. [FN20]

First, reviewing the treatment of developing-country workers: since the beginning of the 1990s, U.S.-based multinationals have adopted codes of conduct that purport to regulate their suppliers' labor practices with respect to those workers. [FN21] Although these codes are often honored in the breach, [FN22] and although the multinationals' managers may in fact have other motivations, [FN23] to the extent that the multinationals do insist on improved conditions, their behavior does display a concern for the workers' condition. [FN24] Indeed, there is some evidence of improvement in the working conditions of workers after the multinationals have received media attention. [FN25]

Second, consider anticorruption. The developed countries engineered adoption of the Organization for Economic Cooperation and Development's (OECD) recent antibribery convention (OECD Convention); [FN26] at least to some degree, U.S.-based multinationals supported that
effort. This looks like an other-regarding move by the multinationals: although corruption subjects the bribe-receiving country's population to economic distortions, the ability to pay bribes can be advantageous to developed-country multinationals. The multinationals appear to be protecting the populations that would suffer from the distortions. To be sure, there is also evidence that the multinationals voiced support for the OECD Convention principally in order to reduce their own expenses by eliminating upward competition among suppliers of bribes. Nevertheless, to the extent that multinationals have moderated their bribe payments since adoption of the OECD Convention, the multinationals' conduct is optically consistent with a desire to benefit host-country residents, even at the multinationals' own expense. The anticorruption efforts ostensibly do continue, although it is too early to have proof of the OECD Convention's success in reducing bribe payment.

Finally, we turn to the pharmaceutical manufacturers' expression of concern for actual and potential customers in the developing world. In 2001, the developed-country pharmaceutical companies, supported by home country governments, fought off demands that they drastically reduce the price of anti-HIV/AIDS drugs sold to South Africa. The specific point of pressure was a South African law that encouraged use of generic drugs in that country. The concern of the multinationals was not limited to loss of revenue from South Africa: they were also worried that drugs produced in South Africa would be imported as gray-market goods in the developed world, thereby cutting into the multinationals' highly profitable markets there. The pharmaceutical manufacturers' recalcitrance continued in the face of a worldwide pandemic that had already cost over sixteen million lives, and that had infected another thirty-three million people. Eventually, however, embarrassed by negative publicity worldwide, the pharmaceutical companies agreed to lower the price for sale of the antiviral and related drugs to South Africa, and to withdraw their suit triggered by the South African law permitting manufacture of generics. The pharmaceutical companies succumbed to pressure from many sources outside the narrow commercial world, running the gamut from consumer groups to the United Nations (U.N.), and the companies' ultimate behavior is consistent with a concern for the currently and potentially infected.

These examples illustrate that certain highly visible multinationals may well not be ignoring all other players in favor of their shareholders. Instead, the multinationals are behaving more generously-not less so-to nonshareholders than would be expected under a strict shareholder-profit model of corporate social responsibility. The riposte is that in each of their situations, the multinationals' management is still seeking to maximize shareholder profits, and is merely incorporating changed circumstances into its strategy. By treating developing-country workers better, the multinationals are responding to consumers in developed-country markets, and hence are protecting revenues; by ceasing to pay bribes, they are reducing their costs and thus increasing their profits; by reducing the price of anti-HIV/AIDS drugs sold to the developing world, the multinationals are protecting their reputations, and therefore their profits, in the developed world.

Consider this, however. Initially, the multinationals ignored developing-country workers, they paid bribes, and they charged the same high price for HIV/AIDS drugs worldwide. Then, at least as regards working conditions and anti-HIV/AIDS drugs, the multinationals changed their behavior when confronted by collective outrage emanating from a community far broader than the corporate world. This community pressure is new, and it did force the multinationals' management to take into account constituencies beyond the shareholders.

### III. Evolution of the Human-Rights Norms: From the Individual to the Increasingly Collective

Optically, the conduct of these multinationals has gotten ahead of traditional concepts of corporate social responsibility. A review of human-rights norms sourced in a community that extends beyond the commercial-corporate and beyond the West/North sets up a comparison of corporate behavior to current influences, rather than merely to traditional assumptions.

#### A. A Brief History of the Three Generations' Move Toward Collective Rights

Human rights are frequently categorized by "generations" representing the evolution of these norms. These are only rough categories, and many rights do fit into more than one
The concept of generations nevertheless highlights the evolution of the group's, of the collective's status in the context of human rights. Starting with the first so-called "generation" of human rights, and without going back before the eighteenth century, it is fair to suggest that these civil and political rights focus on protecting individuals against abuse by governments. They are memorialized in the *International Convention on Civil and Political Rights (ICCPR)* and are principally negative: the state is, generally, asked to abstain from an exercise of power that compromises an individual's autonomy. Included in the first generation are the right to free expression and the right to associate, which clearly are negative, but also the right to vote—a right that, by its nature, requires affirmative governmental intervention. Thus, although first-generation rights are primarily negative, they are not wholly so: as the United States illustrated during the presidential election of 2000, the state that fails to act affirmatively does not ensure its citizens' right to vote. However useful the negative-positive dichotomy may be in describing an overall evolution, the distinction may be without a difference in other arenas.

Among the three illustrations of corporate behavior, the first, relating to the treatment of overseas workers who are employees of a U.S.-based multinational's suppliers, is most clearly within the first generation: the rights of workers directly implicate freedom of expression and association. To the extent that political corruption effectively disenfranchises citizens by creating an occult method of participating in government as a way of bypassing normal voting procedures, anticorruption efforts, also, fit under first-generation rights. The anti-HIV/AIDS drug example implicates first-generation rights, too, including the rights to life, bodily integrity, and human dignity. In each of these categories of rights, the individual is definitely the focus of protection, but, because the first generation of human rights really is about balancing the power of the state against the collective of the vulnerable, some first-generation rights have distinctly collective aspects. The right to association emphasizes that directly, but freedom of expression's protection of the press and the right to vote similarly create a space in which the vulnerable can, by exercising their individual rights, mass against the state. These first-generation rights do belong to the individual, but they gain their impact through group cohesion. This traditional type of collectivity empowers the right holder as the holder joins with others. In this way, the collective nature of first-generation rights becomes effective when the right holders act as though they were unionized, whether or not they do so consciously. Second-generation rights-economic, social, and cultural rights-were championed principally by socialist regimes starting at the beginning of the twentieth century. In general, these rights are considered to be affirmative: the state must act, rather than merely refrain from acting, in order to provide individuals with, for example, education, health care, or decent working conditions. The United Nations Charter speaks of social and economic rights, and the West has to a significant degree overcome its initial skepticism of these rights. At least from the perspective of the liberal democracies, second-generation rights represent a twentieth-century evolution of the human-rights universe. By the end of the twentieth century, three-quarters of the nations had ratified the International Convention on Economic, Social and Cultural Rights (ICESCR), the treaty that most broadly concerns second-generation rights. With the notable exception of the United States, most Western countries have ratified the ICESCR, including almost all the European nations. The first illustration, relating to workers, implicates second-generation rights: the ICESCR expressly covers the issue of workers' rights, in particular conditions of work. This focus reflects the same kind of collectivism implicated in the rights to free association and free expression: although the right is individual, the right holder derives power when other exploited workers exercise their individual rights simultaneously. The third illustration, too, the one describing the major pharmaceutical companies' slow embrace of an obligation to provide anti-HIV/AIDS drugs at low cost to the developing world, concerns the application of a second-generation right—the right to health care. This right emphasizes the similar plight of all actually and potentially infected persons; the effectiveness of the actual and potential victims' individual right depends on collective action, as the illustration graphically underscores. Although these victims suffer from the denial of HIV/AIDS drugs because they are ill or at risk,
they are not being targeted just because they belong to a group of actual or potential victims. The right to health care thus represents the traditional type of collectivism. The logical extension of this balancing of state or other concentrated power against the vulnerable population is the group of human rights called "solidarity" or "collective" rights; these are the third-generation rights. While the existence of these third-generation rights remains controversial, they are said to include a right to development, a right to a clean environment, rights of indigenous peoples, and even the right to peace and perhaps an emerging right to *1446 democracy. [FN62] A right that is collective may also belong to the individual. This kind of collectivity is different from the type we saw in the context of first- and second-generation rights because third-generation rights belong to the group or collectivity, not just to the individual. [FN63] The second and third illustrations, concerning anticorruption activity and the availability of HIV/AIDS drugs, implicate the right to development. Corruption's economic distortions are incompatible with development, [FN64] and the HIV scourge has erased decades of development in the entire sub-Saharan region. [FN65] This right to development is both negative and affirmative: the state must avoid impeding development, and it must also take affirmative steps to support development.

The move to third-generation rights, and thus, to increasingly collective rights, reflects the West/North's evolving acceptance of norms from the developing world. [FN66] It also reflects a natural progression in the West/North, from the first-generation rights through the more socialist second- generation rights, and finally to the collective rights. The inclusion of third-generation rights confirms that the human-rights regime no longer considers individualism to be the sole perspective, but, instead, recognizes the power and significance of the group. In the next Part, I will analyze the influence of the evolving human-rights regime on corporate social responsibility. At the threshold, however, lies the following question: are these changes in the human-rights regime legitimate, such that any influence they do exert on corporate behavior is defensible?

B. The Legitimacy of the Human-Rights Norms' Evolution: Emergence as Democracy

The evolution of human rights represents a change in norms. Whether the result is legitimate is a separate question. There are, of course, philosophic arguments in support of human rights, but I am instead proposing certain democratic principles as the legitimating force for human-rights norms. As a first step, democratic principles suggest that, because human rights belong to all persons, individually or as members of groups, all persons are affected and should weigh in the decision. Shareholders and prominent capitalists should not be the sole voices heard.

1. Democracy Legitimates, Subject to the Tyrannies of Majority and Minority

Nobel laureate Amartya Sen has famously stated that no famine ever occurred in a functioning democracy. [FN67] He points out that famines are inconsistent with democracies because the leaders must consider *1448 the future if they expect to stay in office. [FN68] This should be reason enough to espouse democracy when seeking society's definition of corporate social responsibility: inherent in the process is the leaders' incentive to consider the consequences to, and thus the reactions of, those whom they lead. First, however, we must face fundamental delegitimizing aspects of the democratic form, and in particular, the risk of tyranny by either the majority or the minority. Corporate lawyers are familiar with these problems in the context of corporate governance. Whenever the minority acquires power, for example, if it has a veto, it can exercise that power just as abusively as any majority wields its own controlling position. The purpose of fiduciary duty is, at least in part, to control abusive majorities and minorities. [FN69] In the more classical, political context, democracy creates the risk of tyranny by both the majority and the interest group, each of which I will briefly consider in turn. [FN70] James Madison saw the majority as dangerous and complained that democracy creates a risk for the "weaker party, or an obnoxious individual." [FN71] Proposals to temper the majority's power have included Lani Guinier's effort to provide minority voters at least some voice by appropriating the corporate cumulative voting mechanism. [FN72] Other suggestions have focused on education and, in particular, on educating the citizenry to "share in ruling." Madison proposed a representative government to defang the majority. [FN73]

*1449 At the opposite end of the spectrum, the tyranny of the minority lurks. Interest groups
can benefit from the larger group's--the majority's--collective action problems. [FN74] Indeed, smaller groups can have disproportionate power, especially if the group's members are finely focused. [FN75] There is an argument, of course, that vote weighted by interest is as legitimate as, for example, the vote granted per capita. For instance, a racial minority that is at risk from a diffuse majority's efforts to pass discriminatory legislation may be able to block passage if the members of the minority vote as a cohesive interest group. [FN76] To the extent that we applaud this result, we are not necessarily approving the distortion of the democratic process; rather, we are arriving at the independent, normative conclusion that to block discriminatory legislation is the preferable outcome. [FN77] Thus, we seek a democratic system that will allow the minority voice to be heard, but without encouraging full capitulation to an interest group. What is needed is not just democracy, but a form of liberal, representative democracy, complete with checks and balances against tyranny by either the majority or the minority. [FN78]

2. Informal Democracy

We have seen that the human rights' three generations have evolved. Each generation has gained acceptance over time. For civil and political rights, the ICCPR is the culminating treaty, and for economic and social rights, it is the ICESCR. [FN79] For solidarity rights, *1450 we do not yet know the codification's full contours, but treaties of specific application, such as the International Labor Organization Convention No. 169 [FN80] on indigenous and tribal peoples and the Banjul Charter, [FN81] have begun the process. The pre-codification part of the effort resembles emergence, an informal, spontaneous decision-making structure, roughly analogous to democracy. [FN82] The second part, the codification, more directly-but imperfectly-conforms to the classic understanding of representative government. Emergence is complex behavior that has a discernable pattern, but is created wholly from local rules of behavior. [FN83] If behavior is adaptive, the self-organizing system becomes smarter, that is, better able to accomplish the goal. [FN84] In this kind of bubbling up of structure, the action on the local level determines by feedback whether it is enhancing the community. In pure emergence, the feedback is not conscious: large cities grew in Europe during the Middle Ages because crop rotation increased productivity, and more food permitted greater population density, which in turn created more fertilizer, and subsequently, more food--and so forth. [FN85] By the time the behavior has emerged, it by definition has massive influence and, in this way, is majoritarian. [FN86] Once the majority has spoken, the minority may be overwhelmed. [FN87] Depending on the circumstances, emergence can also raise a concern about a minority's usurpation of majority prerogatives: not all emergence is pure, because sometimes a minority force guides the process. [FN88] The development of civil and political rights in the United States, for example, included conscious efforts by norm entrepreneurs to shape the developing social culture. The Federalist Papers are a prime exhibit of efforts to exert influence over an emerging public understanding about civil and political rights. [FN89] This type of feedback is more similar to "applied emergence" in which a person who controls the feedback structure and who values tolerance, can ensure that extreme views will not survive the otherwise self-organizing system. [FN90] Development of the second-generation rights appears to be on this pattern, with a West/North minority initially resisting acceptance. [FN91] *1452 Third-generation human rights similarly are subject to a risk of interest-group pressure, that is, to tyranny by the minority. The particular configuration of a right to development may be supported by an unrepresentative collection of activists. [FN92] Or, just as likely, that right is supported at least at an inchoate level by a large proportion of the Third World's population, but the articulation of the right meets determined opposition from multinationals who prefer the status quo. [FN93] Worldwide public opinion was marshaled in the South African HIV/AIDS drug debate as the engine for change, while the multinational pharmaceutical companies, supported by their home-nations, sought to attenuate efforts to impose a reduction in prices for the HIV/AIDS drugs. [FN94] The balance between majority and minority is imperfect and hard to predict.

3. Formal Democracy

The codification process may provide a corrective to the risks of tyranny by the majority or the minority. A body such as the United Nations General Assembly, and other codification systems, can institutionalize a representative form of approval and thus begin to address both majority excess and interest-group pressures.
We know that the first generation of human rights simmered for at least two centuries before they were codified in the ICCPR. The progress from the second generation’s first emergence [FN95] to its, at least *1453* partial, codification in the ICESCR was more rapid, being effected in less than a century. [FN96] Third-generation rights are currently being codified selectively. As these rights move toward codification, the process offers some protection against minority excess, as the three illustrations help us understand.

The treaties most directly relevant to reducing the abuse of workers, cleaning up political corruption, and providing anti-HIV/AIDS drugs are, respectively, the ICCPR, the OECD Convention, and the ICESCR. [FN97] The first and third were initially adopted by the United Nations General Assembly and thus, indirectly, include decisions of the various state-members. To the extent that these states are liberal democracies, the people are indirectly represented through their own states, and then through the General Assembly. Unfortunately, forty-five percent of the world’s population still lives under non-democratic governments, which places the majority at risk of tyranny by the minority. And half of the democracies do not offer constitutional protections, which places the minority at risk of abuse by the majority. [FN98] For its part, the OECD Convention, engineered by disproportionately wealthy countries, [FN99] is arguably even less democratic in origin than the U.N. treaties. The OECD Convention is the decision of a representative democracy in the sense that most of the nation-members of the OECD are democracies; however, it codifies a norm imposed on the world by an unrepresentative group of nations, being primarily the developed countries in which the great multinationals are based. These efforts to codify human rights are at best very imperfect democracies, with inadequate protection against the twin tyrannies of majority and minority.

There are some further correctives against these twin tyrannies. International organizations, for example, are offering fora for discussion. The International Labor Organization provides a forum for workers through its tripartite structure that includes not only *1454* government representatives and employers, but also workers. [FN100] The international financial institutions are spearheading demands for clean government, and their processes are making increasing use of nongovernmental organizations as proxies for persons who are affected by these institutions’ decisions, but who otherwise would be under- or unrepresented. [FN101] The U.N. and its agencies are now involved in discussions concerning the pricing of anti-HIV/AIDS drugs; they, too, are reaching out to constituent groups. [FN102] These organizations are not providing the worldwide town meeting, nor even a true representative democracy, but they do offer one more context for consultations between the majorities and minorities, however defined on any specific issue.

This clearly is not a perfect system. However, both the informal and the formal process have democratic undertones and, together, have the potential to address at least some of the risks of abuse. Thus, as *1455* human-rights norms are evolving toward a more collective conception they carry with them not only whatever legitimacy traditional philosophical perspectives can offer, but also the legitimacy that an admittedly flawed form of democracy provides. This is a democracy that is broader than the West/North, and far broader than the corporate-commercial arena.

IV. Feedback Between Multinationals’ Behavior and Evolving Human-Rights Norms

The actual behavior of prominent multinationals is moving toward the human-rights norms. We see this both in the specific behavior described in the three illustrations, and in the general trend toward recognition of collectives. The similarity of behavior and norms reflects an existing norm of corporate social responsibility, one that has evolved in the greater community, not just among the commercial-corporate arena’s opinion makers.

A. Both Corporate Behavior and Human-Rights Norms Are Increasingly Recognizing the Significance of the Vulnerable as a Collective

This multinational conduct is consistent with an acknowledgment that workers in developing countries have a right to working conditions that exceed certain, stated minimum standards. Multinationals support their governments’ efforts to criminalize occult payoffs to developing countries’ political officials. Multinationals have agreed to provide developing countries with HIV/AIDS drugs at a fraction of the price in the developed world. [FN103] This behavior is a
"norm" in the technical, sociological sense even if the multinationals behave in this way only because of different motives. [FN104] Thus, the behavior is a "norm" even if the multinationals seek only to increase profits by eliminating the cost of bribery, or to placate developed-country consumers outraged by cold calculation in the face of sweatshops and the modern plague. [FN105]

The multinationals' behavior, whatever the motive, casts its own social influence on society at large. When the behavior conforms to the three generations of human-rights norms, it reinforces those norms *1456 among all members of the community, including, for example, developed-country consumers. Consider how this plays out concerning political corruption: even if bribery were culturally acceptable both in the payor's and payee's country, [FN106] the very fact that the behavior becomes nonpayment of bribes creates a sociological "norm" with social influence. If the influence takes hold, both the residents of the payee's country and the consumers in the payor's markets will insist that multinationals cease contributing to political corruption. In the case of labor conditions and HIV/AIDS drugs, consumers and workers already are on the multinationals' radar screens influencing behavior. [FN107] Thus, a feedback loop evolves that, in its turn, reinforces human-rights norms, which then encourages the multinationals to respect the human rights of workers and of HIV/AIDS victims. [FN108] The loop continues.

This complicated feedback between multinationals' behavior and human-rights norms applies not just to specific rights, such as the right to reasonable work conditions, to education, or to vote. It also applies to the larger trends, including the movement toward an appreciation of the collective. The beginnings of that recognition exist already for labor and health care, but with respect to political corruption, the multinationals are still in the process of acquiring a conscious recognition that residents of the payee's country have, collectively, a right to development remains a work in progress. [FN109] Nevertheless, that multinational behavior becomes consistent with a recognition of the collective right to development, that conduct does support third-generation rights, too. These new norms confirm the West/North's *1457 increasing acknowledgment of the collective-not just of the individual. The behavior, whatever the motive, reflects an implicitly democratic acceptance that the collective "other" has a relevant voice.

This combination of the evolving behavior and the evolving human-rights norms describes corporate social responsibility: how corporations behave tags up to the larger community's normative expression. Because the rights are positive as well as negative, the norm calls for affirmative, corrective action, not merely the avoidance of a directly exploitative act. Increasingly, this norm of corporate social responsibility is undergirded by legal enforceability. [FN110]

B. Human-Rights Norms Are Real: Enforceability

The human-rights duties are both negative and affirmative; thus, the multinationals subject to the concomitant duties must both avoid certain actions and affirmatively take others. To the extent that corporate social responsibility is reflected in the actual behavior of multinationals, enforceability is not necessary, but it does serve as a framework to support the norm. [FN111] When multinationals do not conform to the norm, however, enforceability obviously has direct application. There are two separate issues to consider in this connection: are human-rights norms enforceable at all in the United States? Even if the answer is affirmative, are they enforceable against a private, nonstate party, such as a multinational corporation? [FN112]

The most straightforward source of enforceable human-rights law is through treaties. There, the United States scene is bleak: first-generation rights are not enforceable under the ICCPR because the treaty is not self-executing in the United States; [FN113] second-generation *1458 rights are not enforceable under the ICESCR because the United States has never ratified it; [FN114] third-generation rights are not enforceable even in jurisdictions traditionally more hospitable than the United States to human-rights adjudication. [FN115] The alternate ground for enforceability is that at least first-generation rights are part of customary law. [FN116] By the same analysis, second-generation rights, too, may be customary because very few nations other than the United States have failed to sign the ICESCR. Third-generation rights remain problematic. Nevertheless, recent regional conventions, and even the illustrations of the pro-development aspects of the fight against corruption and of the fight to reduce the price of HIV/AIDS drugs, indicate an increasing recognition of third-generation rights. [FN117]

Assuming, then, that at least certain human rights are enforceable, are they enforceable against
a multinational? Although historically only states could be actors in international public law, recent cases in the United States have allowed causes of action against individuals for violation of human-rights law. [FN118] To avoid dismissal, however, these cases must concern egregious, human-rights violations as to which there is worldwide consensus. To date, torture or genocide suffice; claims for fraud or breach of fiduciary duty do not. [FN119] *1459 Directors of U.S. corporations may, today, have less risk of legal liability in the U.S. courts for violating the human rights of a developing-country worker than they have for violating the duty of care or loyalty to a shareholder, but the trend is toward increased liability. Worldwide consensus emerges as the evolution of behavior and norms continues to emphasize the collective aspects of first- and second-generation rights, and the collective nature of third-generation rights. The larger community is both the source of the evolving norm and its beneficiary. This form of corporate social responsibility, already in evidence as a behavior and as human-rights norms, recognizes obligations to the collective, based on the will of the larger community. Consequently, the multinationals are faced with duties that are increasingly likely to be the subject of legal enforcement.

V. Conclusion
In the past, the leaders of the commercial-corporate domain determined what is corporate social responsibility, and the definition included, famously, profit maximization for shareholders. Globalization of trade and the sheer size of modern multinationals have expanded the reach of such corporations from their base in the developed world, into the recesses of the developing world's labor markets and homes. In consequence, it is no longer these leaders who, alone, determine the multinationals' conduct, because home-market consumers and complex pressures from the developing world combine to influence the multinationals' behavior.

Multinationals' conduct is moving beyond the traditional concept of corporate social responsibility, which narrowly focuses on shareholder primacy. Prodded from beyond the traditional commercial-corporate realm, many multinationals have adopted codes of conduct that, at least to some degree, regulate the treatment of developing-country workers, and support pro-development actions relating to corruption and healthcare. By their actual behavior, the multinationals evidence their appreciation of the power of vulnerable individuals when acting collectively.

At the same time, evolving human-rights norms, including for development, reflect an awareness, born both of the developed world's traditions and of those of the developing world, that people who are *1460 individually vulnerable have collective significance. The emergence of these norms is a kind of unstructured, democratic process and, therefore, benefits from the legitimacy imparted by a system akin to democratic voting. That system is further bolstered by the more formal, international codification process.

Meantime, the feedback loop kicks in. As the actual behavior of multinationals becomes increasingly consistent with the evolving human-rights norms, the behavior both reinforces the norms, and is reinforced by them. The human-rights norms, supported by and supporting actual corporate behavior, redefine corporate social responsibility—and they do so in accordance with the most broadly held perception of the appropriate corporate role.

Benefiting from this broader input into the definition, neither the multinationals' behavior nor human-rights norms have adopted shareholder profit maximization as the core value for corporate social responsibility. Instead, the emerging understanding of corporate social responsibility recognizes the interests of persons beyond the corporation's shareholders, beyond traditional stakeholders, and certainly beyond the West and North. And the trend is toward enforceability of this new definition of corporate social responsibility based on human-rights norms.

[FN1]. See infra Part II.A.

[FN2]. See infra Part II.B.

[FN3]. See infra Part IV.A.


[FN5]. See infra note 66 and accompanying text.

[FN6]. See infra Part III.A.

[FN7]. See infra Parts II.B, III.B.

[FN8]. See infra Part III.B.

[FN9]. See infra Part IV.B.

[FN10]. John C. Turner, Social Influence 16 (1991) (asserting that "social interaction" creates social norms); see also id. at 4-5 (noting that compliance with norms can be willing, i.e., driven by a desire to conform, or unwilling, i.e., coerced).

[FN11]. See Milton Friedman, A Friedman Doctrine-The Social Responsibility of Business Is to Increase Its Profits, N.Y. Times, Sept. 13, 1970, (Magazine), at 32 (stating that efficiency considerations prohibit corporate management from spending corporate funds for general social purposes); id. at 122 (stating that the manager who spends corporate money other than to maximize shareholder profit is taxing the corporation; and in any event, the manager is not in a position to know what action to take, for example, to reduce inflation); id. at 126 ("[T]here is one and only one social responsibility of business-to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game.").

[FN12]. Richard A. Posner, Economic Analysis of Law §4.11, at 460 (5th ed. 1998) (asserting that profit maximization is the only viable purpose); see also id. §1.2, at 13-15 (discussing efficiency and noting that the Kaldor-Hicks definition of efficiency is more realistic than the Paredo measure); Chris William Sanchirico, Deconstructing the New Efficiency Rationale, 86 Cornell L. Rev. 1003, 1005 (2001) (asserting that law and economics's dominant principle is efficiency). The law and economics scholars are important because they have been the dominant voice. See, e.g., Donald C. Langevoort, Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited, 140 U. Pa. L. Rev. 851, 916 (1992) (stating that the law and economics school is dominant); David Millon, New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law, 86 Va. L. Rev. 1001, 1003 (2000) (same).

[FN13]. See Sanchirico, supra note 12, at 1006 n.3, 1069-70 (arguing for the importance of equity, of "equality of economic well-being," to the definition of efficiency); see also Richard S. Markovits, Duncan's Do Nots: Cost- Benefit Analysis and the Determination of Legal Entitlements, 36 Stan. L. Rev. 1169, 1176-77, 1194 (1984) (suggesting either utilitarianism or egalitarianism as the values in connection with the efficiency analysis).

[FN14]. See, e.g., Lawrence E. Mitchell, Groundwork of the Metaphysics of Corporate Law, 50

[FN15]. See O'Connor, supra note 14, at 951 (noting that all but one of the stakeholder statutes is permissive); see also Millon, supra note 12, at 1008-09 (acknowledging that the progressives have not been able to shake the law and economics school's dominance). This appears to be a declaration against interest; Professor Millon's credentials as a progressive are impeccable. See David Millon, Communitarianism in Corporate Law: Foundations and Law Reform Strategies, in Progressive Corporate Law 1 (Lawrence E. Mitchell ed., 1995).


[FN17]. See Lawrence E. Mitchell, Corporate Irresponsibility: America's Newest Export 116 (2001) (asserting that managers' very short time horizons contribute to their willingness to "skimp" on employees' well-being).

[FN18]. The vast majority of corporations formed before 1800, including during the colonial period, were "essentially utilities .... almost 80 percent were for highways and local public services." Gregory A. Mark, The Court and the Corporation: Jurisprudence, Localism, and Federalism, 1997 Sup. Ct. Rev. 403, 413. However, as state laws allowed freer incorporation rather than requiring a special state grant, the corporation's purpose became less public in nature. Gregory A. Mark, Comment, The Personification of the Business Corporation in American Law, 54 U. Chi. L. Rev. 1441, 1448 (1987). The discussion of private versus public purposes has continued over the past one hundred years.

[FN19]. See infra notes 20-30 and accompanying text.

[FN20]. See Turner, supra note 10, at 3, 40-42, 44 (defining "norms" and discussing internalized norms).


[FN22]. See, e.g., Group Links Pentagon, Firms to Child Labor, Wash. Post, Dec. 22, 2000, at A9 [hereinafter Group Links Pentagon] (reporting accusations that Nike, Sharper Image, and Kohl's sell goods produced overseas under abusive working conditions and the companies' assertions that the conditions are appropriate to the region). Nike has a formal code of conduct. See Code of Conduct, supra note 4, at 165. Neither Kohl's nor Sharper Image publishes a code of conduct on their Web site. However, Kohl's appears to have one. See Group Links Pentagon, supra, at A9
(reporting that a spokeswoman for Kohl's says that PricewaterhouseCoopers reported violations of the "code" at an overseas factory). It is unclear whether Sharper Image has a formal code, but it assertedly investigates conditions. Id. (reporting that according to a Sharper Image spokeswoman, it conducts investigations of factories in China); see also Stephanie Strom, A Sweetheart Becomes Suspect: Looking Behind Those Kathie Lee Labels, N.Y. Times, June 27, 1996, at D1 (reporting that in 1996 Wal-Mart was again responsible for marketing clothes manufactured by children, this time by thirteen- and fourteen-year-old Hondurans). Thus, absent a concerted effort marshaled by an international agency such as the International Labour Organization (ILO), it is unlikely that the multinationals' behavior will predictably and consistently work to improve labor conditions. See generally Dickerson, supra note 21, at 614.

[FN23]. The multinationals' managers may be motivated to comply with the perceived desire of developed-country consumers. See generally Dickerson, supra note 21.

[FN24]. An international consensus can remain one even if honored in the breach. See Filártiga v. Peña-Irala, 630 F.2d 876, 884 n.15 (2d Cir. 1980) (holding that international customary law remains even if breached). In any event, the multinationals' behavior has improved. See, e.g., Group Links Pentagon, supra note 22, at A9 (quoting a Nike spokesperson claiming that wages paid "far surpass regional or national minimum wages"); see also Jaime Sneider, Editorial, Good Propaganda, Bad Economics, N.Y. Times, May 16, 2000, at A23 (reporting that Nike wages in Vietnam are "more than twice the country's average annual income"). The watchdogs are unconvinced of the adequacy of improvements. See, e.g., Group Links Pentagon, supra note 22, at A9. If, however, the managers are unskilled or unlucky enough that a motivation for improving these conditions is visibly other than to help workers, then the behavior does not create social influence in favor of improving conditions. See generally Dickerson, supra note 21 (discussing other pressures, including in particular developed-country consumers, and thus other motivations for improving conditions).

[FN25]. Nike claims that, having been battered by the media, it has improved its own performance, including the effectiveness of its monitoring. See Maureen Minehan, Nike Offers Lessons on Corporate Responsibility, 5 No. 24 HR Policies & Practices Update 1 (Nov. 24, 2001); see also William H. Meyer & Boyka Stefanova, Human Rights, the UN Global Compact, and Global Governance, 34 Cornell Int'l L.J. 501, 502-03 (2001) (discussing the "spotlight effect" and its favorable impact on multinationals). But see Meyer & Stefanova, supra, at 513 n.35 (noting that Nike's insistence on self-monitoring allows critics to doubt Nike's claims of improvement in working conditions).


[FN27]. Mickey Kantor, who then was the United States Trade Representative, asserted that the FCPA cost U.S. business $45 billion in 1994 alone. His estimates came from the Central Intelligence Agency. Paul Lewis, Corruption Is Now Under Global Attack, Commercial Appeal, Nov. 29, 1996, at 5B.

Corruption may give rise in some circumstances to the "efficient" result. See, e.g., Rose-Ackerman, supra, at 24-25 (asserting that anticorruption is not dogmatic as corruption may be efficient, depending on the circumstances). However, it is only a second-best solution. See Susan Rose-Ackerman, Corruption and Democracy, 90 Am. Soc'y Int'l L. Proc. 83, 84 (1996).


[FN31]. It is still too early to determine to what extent multinationals have in fact moderated bribe-payment: the first systematic review of performance under the OECD Convention will be the 2002 Transparency International Bribe Payers' Index. See id. at 202.


[FN33]. See id. (reporting that two months before they eventually capitulated, the pharmaceutical companies did finally lose support from the United States).

[FN34]. See, e.g., World Trade Organization (WTO), Experts: Affordable Medicines for Poor Countries Are Feasible, at http://www.wto.org/english/news_e/pres01_e/pr220_e.htm (Apr. 11, 2001) (acknowledging that in order to allow pharmaceutical companies' to recover costs while causing medicines to be available at lower prices in developing countries, the system must avoid imports of cheap drugs into "rich country markets").

[FN35]. See, e.g., World Health Organization (WHO), AIDS Not Losing Momentum--HIV Has Infected 50 Million, Killed 16 Million, Since Epidemic Began, at http://www.who.int/inf-pr-1999/en/pr99-66.html (Nov. 23, 1999). In South Africa, the average level of HIV infection is just over ten percent, but there are areas of the country with an infection rate as high as thirty-six percent. Rachel L. Swarns, South Africa's AIDS Vortex Engulfs a Rural Community, N.Y. Times, Nov. 25, 2001, at A1 (reporting on the level of HIV infection in a community within Zululand).

[FN36]. See Swarns, supra note 32 (reporting that the multinationals dropped their lawsuit). See generally Claire Moore Dickerson, Culture and Transborder Effects: Northern Individualism Meets Third-Generation Human Rights, 54 Rutgers. L. Rev. 52(b) (forthcoming 2002).

[FN37]. For evidence of the U.N. involvement in the health crisis, see WHO, supra note 35. For other pressure points, see generally Ben Barber, Global Groups seek AIDS Drugs for Poor Patients; Drug Firms Back Off From Patents, Wash. Times (D.C.), Mar. 19, 2001, at A13, available at 2001 WL 4149188 (reporting that consumer groups were planning to participate, together with AIDS advocacy groups and major drug companies, in the April 2001 joint meeting of the WHO and WTO in Norway); see also Joint Communiqué from Secretary-General and Seven Leading Research-Based Pharmaceutical Companies on Access to HIV/AIDS Care and Treatment, SG/SM/7982, AIDS/34, at http://www.un.org/News/Press/docs/2001/sgsm7982.doc.htm (Oct. 4, 2001) (reflecting discussion leading to reduction of prices and increase in general health-care assistance).


[FN43]. See Sohn, supra note 40, at 24 (discussing rights included in the first generation).

[FN44]. Berlin's positive freedom is different in that it describes the individual as master of self, without creating any state-based obligations. See Berlin, supra note 42, at 131-32.

[FN45]. See U.S. Comm'n on Civil Rights, Executive Summary: Voting Irregularities in Florida During the 2000 Presidential Election, at http://www.usccr.gov/pubs/vote2000/report/exesum.htm (last visited Feb. 22, 2002) (stating that 14.4% of "Florida's black voters cast ballots that were rejected," as compared with 1.6% of "nonblack Florida voters," and that the responsibility falls on an "overall lack of leadership" on the part of the state's political leaders). The Commission describes itself as "independent, bipartisan, fact-finding agency of the executive branch." U.S. Comm'n on Civil Rights, About the Commission, at http://usccr.gov (last visited Aug. 4, 2002). However, others view it as partisan. See, e.g., Katharine Q. Seelye, U.S. Rights Commission Blocks Seating of Bush Nominee, N.Y. Times, Dec. 8, 2001, at A10 (reporting that Democrats on the Commission "outmaneuvered" the White House); see also Sleight of Hand at the Polls, Business Wk. Online, Nov. 27, 2000, at http://www.businessweek.com/2000/00_48/b3709015.htm (last visited July 2, 2002) (arguing that government did not do enough to prevent manipulation of the absentee ballots). On the other hand, there also were allegations of affirmative governmental interference, including improper targeting of minorities by Florida's state police. Id.


See, e.g., Susan Rose-Ackerman, Corruption and Government: Causes, Consequences, and Reform 22 (1999) (stating that bribery of a government official impedes the development of "effective mechanisms that translate popular demands into law"); see also ICCPR, supra note 41, art. 25 (granting the right to vote). It is not directly enforceable in the United States because the ICCPR is not self-executing in the United States. See, e.g., Igartua De La Rosa v. United States, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (holding that right to vote is not protected by ICCPR because convention is not self-executing); Christian A. Levesque, Comment, The International Covenant on Civil and Political Rights: A Primer Raising a Defense Against the Juvenile Death Penalty in Federal Courts, 50 Am. U. L. Rev. 755, 778 n.137 (2001) (same); supra note 47 and accompanying text.

See, e.g., Sohn, supra note 40, at 23-24 (discussing first- generation rights); see also ICCPR, supra note 41, arts. 6-10.

Nevertheless, traditionally only the nation-state has had the power to enforce human rights. See, e.g., Kathryn L. Boyd, Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level, 1999 B.Y.U. L. Rev. 1139, 1147-53 (describing efforts in the last two decades of the twentieth century of private plaintiffs bringing suit in U.S. courts); see also Beth Stephens, Taking Pride in International Human Rights Litigation, 2 Chi. J. Int'l L. 485 (2001) (discussing private causes of action).


It is hard to know exactly what "collectivity" means in the context of rights. Professor Sohn has described "collective rights" as those "exercised jointly by individuals grouped into larger communities, including peoples and nations," perhaps as distinguished from rights belonging to individuals who belong to a family, trade union, or a state. Sohn, supra note 40, at 48.

See Lauren, supra note 39, at 292 (remarking that the socialist and Marxist revolutions of the nineteenth and early-twentieth centuries prompted discussion of the second generation of rights); Hernández-Truyol, supra note 38, at 26 (discussing the second generation and early-twentieth-century Socialist revolutions); Sohn, supra note 40, at 33 (stating that the second generation launched with Russian Revolution); see also Philip Alston, U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy, 84 Am. J. Int'l L. 365, 369 (1990) (arguing that the United States in particular has had the most difficulty with articles 11 through 14, relating to the "rights to food, clothing and housing, the right of access to physical and mental health care, and the right to education").


U.N. Charter art. 55; see also The Universal Declaration of Human Rights, G.A. Res.

[FN56]. See supra note 54 and accompanying text (describing the ICESCR).

[FN57]. See Hom & Yamamoto, supra note 54, at 1789 n.194.

[FN58]. See Alston, supra note 53, at 372 (reporting that as of March 1989, of the twenty-two nations in the Western European and Others grouping, only Ireland, Malta, and Turkey had not ratified the ICESCR). In December 1989, Ireland adopted the ICESCR. United Nations, supra note 47. Other than the United States, all the G-7 members including Russia, have adopted the ICESCR. Id. By August 21, 2002, Ireland and Malta have adopted the ICESR. Turkey and the United States have signed but not ratified the treaty (the United States signed in 1977, Turkey in 2000). Office of the High Comm'r for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, at http://www.unhchr.ch/pdf/report.pdf (Aug. 21, 2002).

[FN59]. See ICESCR, supra note 41, art. 7 (conditions of work).

[FN60]. See id. art. 12 (health care).

[FN61]. See Dickerson, supra note 36 (discussing the risk of contagion, including across borders).


[FN64]. That, certainly, is the World Bank's stated view, as reported by a senior legal adviser of the Bank. See Sabine Schlemmer-Schulte, The Impact of Civil Society on the World Bank, the International Monetary Fund and the World Trade Organization: The Case of the World Bank, 7 ILSA J. Int'l & Comp. L. 399, 420-21 (2001) (stating that the World Bank's president has linked the negative effects of corruption on development for over five years).


[FN67]. Amartya Sen, Development as Freedom 16 (1999); see also id. at 43 (reporting that while China has had numerous famines, India has had none since its independence in 1947).

[FN68]. Id. at 49-50 (arguing that governments can easily prevent famines, and democratically selected leaders have the incentive to do so).


[FN70]. For a general over view of "illiberal democracies," i.e., democracies that neither protect the minority from the tyranny of the majority, nor the majority from the tyranny of an elected minority, see Fareed Zakaria, The Rise of Illiberal Democracy, For. Aff., Nov./Dec. 1997, at 22, available at 1997 WL 9287610.


[FN73]. The Federalist No. 10, at 62 (referring to citizens who have "wisdom ... patriotism and love of justice"). But see id. at 63-64 (calling for a republic large enough so that factions do not control, but small enough so that the representatives retain a sense of the local, and preferring a federal form in order to insulate further the greater number from localized factions). Of course, for Madison the representatives have a heavy responsibility: rather than merely repeating the constituents' views, the representatives identify public interest and then communicate that information back to the constituents. See, e.g., Herbert Hovenkamp, Arrow's Theorem: Ordinalism and Republican Government, 75 Iowa L. Rev. 949, 955 (1990).


[FN75]. Olson, supra note 74, at 127 (emphasizing the power of small, intense groups); see also Elhauge, supra note 74, at 50 (discussing small- interest groups).

[FN76]. See Elhauge, supra note 74, at 50 (discussing a smaller group blocking discriminatory legislation); see also Bruce A. Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713, 723-31 (1985) (discussing smaller groups' ability to overcome the free-rider problem); see also Daniel J.H. Greenwood, Beyond the Counter-Majoritarian Difficulty: Judicial Decision- Making in a Polyonomic World, 53 Rutgers L. Rev. 781, 811 (2001) (discussing methods of limiting majoritarian excess).

[FN77]. See Elhauge, supra note 74, at 50 (discussing the role of the underlying normative view).
There is a delightful circularity here, too. Democracy legitimates the human-rights norm as democracy becomes a human-rights norm. See generally Franck, Emerging Right, supra note 62 (analyzing democracy as an entitlement).

The Universal Declaration of Human Rights, a nontreaty precursor to the ICCPR and ICESCR, contains both first- and second-generation rights. See, e.g., Hernández-Truyol, supra note 38, at 18, 20 (noting that the Declaration includes both civil and political rights, and economic, social, and cultural rights, and that the economic, social, and cultural rights were codified in the ICESCR).


African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [hereinafter Banjul Charter]. Its article 20 expresses a right of self-determination, article 22 grants a right to development, article 23 grants a right to peace, and article 24 combines the rights to a clean environment and to development by providing that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development."

For purposes of this discussion, I consider conventions to "codify" whether they are restating existing customary law or making new law. Thus, pretreaty norm-formation may not have risen to the level of customary law.


Id. at 112-13. The feedback loop needs connectedness because the evaluation has to return. See id. at 134. However, decentralized systems, such as the Internet, connect without organizing; structure is necessary, too. Id. at 117-20. Cities provide both the density for connectedness and the clusters of tradespeople, who act as structures, for two-way connection. See id. at 107-08.


It may be that, at least in some circumstances, the actions of the group in power are self-limiting: neither the majority nor the minority exercises its full power. Given that a norm
expands exponentially, see supra note 86 and accompanying text, the viral analogy suggests that
the group with power will strive not to kill the "host." See, e.g., Richard Preston, The Hot Zone
84, 97, 99 (1994) (noting that the outbreak can die out on its own if the virus kills its host before
it can infect another host).

[FN88]. When an entrepreneur applies the principles of emergence, an organization like
Amazon.com collects information about what I, as a purchaser, might like based on my prior
purchases, and those purchases of thousands of others. See Johnson, supra note 83, at 206-07
(discussing applied emergence); see also infra note 90 and accompanying text (same).

[FN89]. See, e.g., Jacob E. Cooke, Introduction in The Federalist, at xi (Jacob E. Cooke ed.,
1961) (conjecturing that Hamilton started writing the essays and contacting collaborators
because he "concluded that if [the Constitution] were to be adopted, convincing proof of its
merits would have to be placed before the citizens of New York"). There were at least more-or-
less spontaneous uprisings opposing civil and political rights. See, e.g., Lauren, supra note 39, at
21 (describing an English mob hanging Thomas Paine in effigy in 1792).

[FN90]. Johnson, supra note 83, at 161 (discussing setting up a chat room by rewarding
moderators who promote diverse views, instead of merely popular ones). Of course, this is easier
to accomplish when a single person is setting up the rules for the chat room. In other words,
although emergence occurs on its own, it can be shaped by successful norm entrepreneurs. This
is what Johnson calls "applied emergence." Id. at 207; see also supra note 83 and accompanying
text (discussing emergence).

[FN91]. They first emerged in revolutionary Russia. See supra note 53 and accompanying text
(discussing Socialism, Marxism, and the Russian revolution as a launching point in the
development of second-generation rights, and initial Western reluctance); see also James Gray
Pope, The First Amendment, The Thirteenth Amendment, and the Right to Organize in the
Twenty-First Century, 51 Rutgers L. Rev. 941, 944 (1999) (noting that significant labor militancy
preceded every major reform in U.S. labor law and referring specifically to reforms in 1898 and
1935); Lauren, supra note 39, at 112-13 (describing the relationship between worldwide misery
during the Depression and the emergence of calls for economic and social rights). The Universal
Declaration of Human Rights was split into the ICCPR and ICESCR at the time of drawing up the
conventions because the West/North rejected second-generation rights as more than precatory.
Hernández-Truyol, supra note 38, at 20.

[FN92]. Among scholars, Karel Vasak is an early proponent. See Vasak, supra note 62, at 837-
53. He is considered the "author of the phrase 'third generation of human rights.'" Sohn, supra
note 40, at 61.

[FN93]. See Sohn, supra note 40, at 56-58 (quoting Vasak as asserting that third-generation
rights can be realized only by a conjunction of efforts of all relevant actors: the individual, the
state, the public and private entities, and the international community).


[FN95]. See, e.g., Jack Donnelly, In Search of the Unicorn: The Jurisprudence and Politics of the
Right to Development, 15 Cal. W. Int'l L.J. 473, 474 (1985) (explaining that the right to
development was unknown in 1970, never discussed in the U.N. before 1975, first mentioned by
the Commission on Human Rights in 1977, and by 1980 had been discussed even by the United
Nations General Assembly). Seven years later the General Assembly had adopted Declaration on
the Right to Development. See supra note 63 and accompanying text. More classic examples of
partial codification include the ILO Convention No. 169, supra note 80 (rights of indigenous
peoples).

[FN96]. See supra Part III.A (providing a brief history of the generations).
[FN97]. See supra Part II.B (providing three illustrations).

[FN98]. See Zakaria, supra note 70 (noting that in 1997, 118 of the 193 extant countries, representing 54.8% of the world's population, had democratically elected governments, and half of those governments were illiberal).

[FN99]. See, e.g., Cassel, supra note 26, at 1970 (referring to the twenty-six--now twenty-eight--OECD members as "affluent"); Stephan, supra note 26, at 1343 (asserting that the United States' economic and strategic power are unparalleled).

[FN100]. The ILO has a tripartite organization, including representatives of employees. ILO Constitution, supra note 47, art. 3, §5 ("The Members [the States] undertake to nominate non-Government delegates and advisers chosen in agreement with the industrial organizations, if such organizations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries."). Who will represent the employees is important, because representation by a union leader is often not available in developing countries. See, e.g., Frances Lee Ansley, Rethinking Law in Globalization Labor Markets, 1 U. Pa. J. Lab. & Emp. L. 369, 371 (1998) (asserting that in the developing world, workers tend not to be "seasoned and organized").


[FN103]. See supra Part II.B (providing the three illustrations).

[FN104]. See Turner, supra note 10, at 4-5 (discussing different reasons for compliance).

[FN105]. Or even if the multinationals are ostensibly supporting the right to development only as a means of weakening the civil and political rights by arguing that the former trumps the latter. See Orford, supra note 63, at 136. See generally Turner, supra note 10, at 40-42, 144 (discussing internalized norms).

[FN107]. See generally Dickerson, supra note 21 (influence of developed- world consumers on multinationals); Del Jones, Unions Call for Fair Trade, Practices WTO Should Protect Rights of Workers, USA Today, Dec. 1, 1999, at 3B, available at 1999 WL 6860091 (reporting that workers see the multinationals as using the WTO to “drive a wedge” between workers from the developed and developing world); see supra note 36 and accompanying text (discussing pressures of, inter alia, consumers on the major pharmaceutical manufacturers).


[FN109]. See supra Part III.B (describing the three illustrations in the context of the evolving human-rights generations reflecting a move toward a more collective perspective).


[FN111]. See, e.g., Ariela Gross, Beyond Black and White: Cultural Approaches to Race and Slavery, 101 Colum. L. Rev. 640, 686-87 (2001) (emphasizing the difference between (1)treating law and norms as though they are on parallel tracks but affect each other and (2)recognizing that they are on an infinite feedback loop); see also Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021, 2025 (1996) (asserting the influence of law on norms); supra note 110 and accompanying text (discussing law and norms).


[FN113]. Although the United States has ratified the ICCPR, the United States claims that it is not self-executing. See supra note 47 and accompanying text. Of course certain violations of human rights are independently prohibited in the United States. Bribery of foreign officials, for example, is illegal under the FCPA.

[FN114]. See supra note 54 and accompanying text (noting that the United States has not ratified the ICESCR).

[FN115]. See Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 Yale L.J. 273, 276-79 & n.13 (1997) (arguing that Europe is more hospitable than the United States to private actions asserting violations of first-generation rights, but is not hospitable to the second- or third-generation rights). Specific conventions do, however, provide for third-generation rights. See, e.g., supra Part III.B.2 (discussing the ILO Convention No. 169 and the Banjul Charter).

[FN116]. Customary international law is federal law. The Paquete Habana, 175 U.S. 677, 700 (1900); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).
See supra Part II.B for the illustrations; supra Part III.B.2 for discussion of the Banjul Charter, a regional convention.


Filártiga, 630 F.2d at 878 (allowing a cause of action for torture); Karadzic, 70 F.3d at 236 (allowing a cause of action for genocide); Hamid v. Price Waterhouse, 51 F.3d 1411, 1418 (9th Cir. 1995) (disallowing, because it is not against the "law of nations," a cause of action for fraud and breach of fiduciary duty); see also Stephens, supra note 50, at 487-88.

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