

2002

Conceptions of the Corporation and the Prospects of Sustainable Peace

Jeffrey Nesteruk

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Commercial Law Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Jeffrey Nesteruk, Conceptions of the Corporation and the Prospects of Sustainable Peace, 35 *Vanderbilt Law Review* 437 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol35/iss2/2>

This Symposium is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Conceptions of the Corporation and the Prospects of Sustainable Peace

Jeffrey Nesteruk*

ABSTRACT

This Article examines the role of corporate law in promoting sustainable peace. The Author argues that corporate legal theory can make a distinctive contribution to a more peaceful world by exposing some deeper roots of corporate law doctrines. Beginning with a brief overview of the corporation in legal discourse, the Article addresses the corporation as property, person, contract, and community. Next, the Article explores the significance of legal language, detailing the ways the law, through language, constructs and impacts the “character,” “culture,” and “community” of society. The Article then analyzes the dominance that the property and contract conceptions of the corporation demonstrate over the person and community notions of the corporate entity. Using a specific case as an illustration of how basic understandings of the corporate entity affect the sense of corporate responsibility for corporate harms, the Author focuses on how the contract and property notions overwhelm the community notion of the corporation. Finally, the Article concludes that the person and community notions of the corporation offer the better prospects for the goal of sustainable peace by enlarging the sense of corporate responsibility for harms associated with corporate undertakings.

TABLE OF CONTENTS

I.	CONCEPTIONS OF THE CORPORATION AND THE PROSPECTS FOR SUSTAINABLE PEACE	438
II.	OVERVIEW OF THE CORPORATION IN LEGAL DISCOURSE.....	440
III.	THE SIGNIFICANCE OF LEGAL LANGUAGE	444
IV.	PERSON/PROPERTY	446
V.	CONTRACT/COMMUNITY.....	448

* Professor of Business Law, Franklin & Marshall College. Copyright 2001. Jeffrey Nesteruk. All rights reserved.

VI.	<i>JOHN DOE I V. UNOCAL CORPORATION</i>	451
VII.	CONCLUSION.....	455

I. CONCEPTIONS OF THE CORPORATION AND THE PROSPECTS FOR SUSTAINABLE PEACE

The question of sustainable peace is, by and large, a new one for corporate law. While there is a rich literature exploring corporate social responsibility, the role of the corporation in promoting peace has not been the focus of scholarly inquiry. This does not mean, of course, that such an inquiry is an inappropriate one. Posing new questions is one of the central roles of legal theory. Even when the outcome of such inquiries is uncertain, asking novel questions can be fruitful, sometimes in unforeseen ways. For, as John Coffee wrote, "Better answers often await better questions."¹

In examining the role of corporate law in promoting sustainable peace, this Article develops the particular perspective of legal theory on the question. The aim is simply to expose some connections between the basic ways in which the law understands and talks about corporations and the goal of sustainable peace.

As an exercise in legal theory, this Article is fraught with both limits and possibilities. The limits are more immediately obvious. This Article does not call for a particular regime of new corporate law rules nor does it present a practical program for changing the status quo, though change is both necessary and desirable. Even when it is argued that certain basic conceptions of the corporation hold the greatest potential for enabling the corporation to contribute to sustainable peace, the larger claim that such conceptions of the corporation are more descriptively accurate or normatively justifiable than their rivals is not made.²

This Article takes such an approach to show how some of the central possibilities of developing legal theory in this regard lie elsewhere. Corporate legal theory can make a distinctive contribution to a more peaceful world by exposing some of the deeper roots of corporate law doctrines. The world of legal theory might seem far removed from the realm of armed conflict, but the ways in which legal norms are thought about and spoken about create the

1. John Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1146 (1984).

2. For the Author's views on this larger claim, see Jeffrey Nesteruk, *Persons, Property, and the Corporation: A Proposal for a New Paradigm*, 39 DEPAUL L. REV. 543 (1990).

basis for the harms inflicted. If the aim is to examine thoroughly the roots of discord in the world, one needs to explore the words through which humans acknowledge and interact with one another.

Given the powerful role of corporations in daily life, this is particularly important in the discourse on corporations. Underlying this Article is the view that the way that corporations are talked about matters. It matters because of the creative role language plays. In its creative role, language helps to construct the realities it describes. As philosopher Charles Taylor writes, "If we are partially constituted by our self-understanding . . . then language does not only serve to *depict* ourselves and our world, it also helps *constitute* our lives."³

Because the corporation is a distinctively legal institution, it matters especially how the law talks about corporations. From the standpoint of the law, the corporation is never simply an objective, external phenomenon. Rather, the character of the corporation is intimately intertwined with the law's choices. In an important sense, the corporation is whatever the law decides it should be.

This Article begins with a brief overview of the corporation in legal discourse. In this overview, the Author draws upon current corporate law scholarship, considering the notions of the corporation as (1) property, (2) person, (3) contract, and (4) community.

Following this overview, the Article explores the particular significance of legal language, detailing some of the central ways the law constructs greater society. The law plays this constructive role by constituting and transforming understandings of "character," "culture," and "community."

Examining the ways in which basic corporate conceptions contribute to understanding of these three central elements of the business environment brings into view how legal language can structure the sensibility and vision⁴ brought to corporate law problems. Each conception of the corporation presents it in a certain light, giving to the corporation a certain "character." Each character thus presented is in turn intertwined with a culture—"a set of ways of claiming meaning"⁵—that can justify a greater or lesser sense of community.

Against this backdrop, the Article closely examines the significance of allowing the property and contract conceptions of the corporation to dominate over the person and community notions of the corporate entity. Whereas the notion of property justifies a

3. CHARLES TAYLOR, HUMAN AGENCY AND LANGUAGE PHILOSOPHICAL PAPERS 9-10 (1985).

4. The phraseology here comes from James Boyd White.

5. JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW xi (1985).

corporate failure to act for the benefit of non-shareholder constituencies, the notion of person gives rise to a corporate obligation to act for the welfare of these constituencies. While viewing the corporation as contract brings to the fore the external, contingent nature of corporate relationships, seeing the corporation as community reveals a richer constitutive role for corporate relationships.

The Article focuses on a recent case, *John Doe I v. Unocal Corporation*,⁶ to illustrate how these understandings of the basic concepts of the corporation brought to the business environment can significantly affect the understanding of corporate responsibility for the harms involved with corporate ventures. The case highlights how two of these corporate conceptions—the notion of the corporation as property and the notion of the corporation as contract—work to diminish the sense of community in corporate undertakings. Under the sway of this diminished sense of community, the law at crucial junctures divorces corporate responsibility from corporate harm. In doing so, it lessens the prospects of a genuine corporate contribution to sustainable peace.

The Article concludes that, while the notions of the corporation as property and contract predominate in current corporate law scholarship, the concepts of the corporation as person and community offer better prospects to achieve the goal of sustainable peace. They do so because of the way they enlarge the sense of corporate responsibility for the harms associated with corporate undertakings. Because this greater sense of corporate responsibility works to eliminate or minimize such harms, it contributes to the corporation's ability to foster long-term cooperative relationships among all of its stakeholders. Thus, if corporations are to contribute to the creation of a more peaceful world, legal discourse can help by revitalizing one of its old notions, the corporation as person, and more fully embracing a new one, the corporation as community.

II. OVERVIEW OF THE CORPORATION IN LEGAL DISCOURSE

Legal discourse has a long history of grappling with the basic nature of the corporation. At the most immediate level, this grappling with the character of the corporation is understandable. For, in a practical way, the corporation can be many things to many people. To shareholders, it is the source of investment returns. For employees, the corporation is a provider of jobs. Communities look to

6. *John Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

corporations as dispensers of tax revenues. For top executives, the corporation is a source of personal power.

It is little wonder that legal theorists have struggled with words in attempting to formulate concepts of the corporation in the complex and nuanced language of the law. Even though there are periodic attempts to avoid these debates in corporate theory,⁷ the problem of the fundamental character of the corporation is a pervasive and reoccurring one. Like many philosophical questions, it resists definitive resolution.

The resistance to definitive resolution has its roots in two basic features of legal discourse about the nature of the corporation. First, the corporate entity presents for legal discourse the problem of descriptive accuracy.

The contemporary corporation presents a descriptive problem for the law because of a basic incongruity between the corporate entity and the legal system's underlying conceptual framework. At its core, the law is marked by a dichotomy of person and property.

Fundamental to our legal system is the distinction between 'persons' and 'property.' The distinction, roughly put, is one between that which 'acts' and that which is 'acted upon.' The essentially active nature of the person is evident from the law's conception of the person as the subject of rights and duties. Rights and duties, after all, imply an active subject, one who may exercise privileges and fulfill obligations. Similarly, the notion of property as an entity 'acted upon' or essentially passive is also readily apparent. Central to the law's definition of property is its susceptibility to ownership. The traditional notion of ownership entails control. As a controlled entity, property is acted upon by those who exercise control, *i.e.*, its owners.⁸

Within this conceptual framework of the legal system, the contemporary corporation appears as an anomaly.

The large, modern corporation does not fit neatly into this conceptual scheme. This is because the person/property dichotomy offers no conceptual framework for understanding property which has been artificially activated, that is, has become an actor. But this is precisely what occurs through the legal mechanism of incorporation. The corporation retains its status as property, is owned by the shareholders, and in theory is controlled by its owners. However, the corporation also has an independent legal existence which permits it to act in many significant ways, such as entering into contracts, suing those who have wronged it, and even exercising its free speech rights in political referenda.⁹

7. See, *e.g.*, David Millon, *The Ambiguous Significance of Corporate Personhood*, 1 STAN. AGORA: ONLINE J. LEGAL PERSP. 1, 2 (2001), at http://www.law.stanford.edu/agora/cgi-bin/article2_corp.cgi?library=millon.

8. Nesteruk, *supra* note 2, at 543.

9. *Id.* at 543-44.

Therefore, from the perspective of the legal system, the corporation has a deeply ambiguous character. It has both person-like aspects, such as the ability to exercise constitutional rights, and property-like aspects, such as its susceptibility to ownership. This has left ample room for the development of both characterizations. Thus, Peter French provides a sophisticated philosophic defense of corporate personhood, asserting "a theory that allows treatment of corporations as full fledged members of the moral community, of equal standing with the traditionally acknowledged residents: human beings."¹⁰ Milton Friedman, however, can also confidently take as his starting assumption the notion of corporations as property, declaring corporate charitable contributions to be a kind of theft from the shareholders.¹¹

Competing conceptions of the corporation also present a greater difficulty than the problem of descriptive accuracy. More fundamentally, competing conceptions of the corporation raise questions of normative premises. Warren J. Samuels makes this clear regarding the law's recognition of corporate personhood. "Judicial affirmation of the corporation as a person," he writes, "is epistemologically only superficially a positive, descriptive matter. Much more fundamentally, it is a linguistic means of establishing normative premises functional for subsequent legal reasoning and choice"¹²

The normative import of corporate descriptions is the more significant reason there is no easy resolution to the debate over the characterization of the corporation. Because descriptions of the corporation are rich with contestable normative claims, scholarly discussions in this area are often more about the role that the corporation should play in society than what the corporation is. This can be true even when the normative character of the argument is not explicitly acknowledged or subjected to further scrutiny.

Consider, for example, the conception of the corporation as contract that currently predominates in corporate law scholarship. A leading proponent of this conception of the corporation, Daniel Fischel, states his view succinctly: "A corporation . . . is nothing more than a legal fiction that serves as a nexus for a mass of contracts

10. PETER FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* 32 (1984).

11. Discussing corporate contributions to charitable activities, Milton Friedman writes, "The corporation is an instrument of the stockholders who own it. If the corporation makes a contribution, it prevents the individual stockholder from himself deciding how he should dispose of his funds." MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 135 (1962).

12. Warren J. Samuels, *The Idea of the Corporation as a Person: On the Normative Significance of Judicial Language*, in *CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY* (Warren J. Samuels & Arthur S. Miller eds., 1987).

which various individuals have voluntarily entered into for their mutual benefit."¹³ He uses his ostensible description of the corporate entity, however, to make a significant normative claim.

Viewing the corporation as contract, asserts Fischel, leaves little room for the social responsibility that fits so well with other corporate conceptions, such as French's notion of corporate personhood.

Those who argue that corporations have a social responsibility assume that corporations are capable of having social or moral obligations. This is a fundamental error Since it is a legal fiction, a corporation is incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations.¹⁴

In significant part because of such normative claims, the contractual view of the corporation has attracted a number of critics. Many legal scholars, critical of the nexus-of-contracts view of the corporation, draw on a different basic conception—the corporation as community. As David Millon describes the debate, communitarian legal scholars challenge the contractual view's advocacy of shareholder primacy, emphasizing "a 'multifiduciary' model, according to which management's duty is redefined to embrace non-shareholder as well as shareholder interests."¹⁵

The view of the corporation as a community has also been buttressed by significant development in its own right. Robert Solomon, for instance, has produced a well-developed philosophic treatment of the corporation as a community. "Corporations," he writes, "are real communities neither ideal nor idealized"¹⁶

In his development of the corporation's communal character, he emphasizes the normative import of being part of a community. "What it means to be part of a community is something more than cooperation, something more than having something ('a commons') in common. It is, among other things, to identify yourself and your interests in and with the community. It is, simply, to become a different person."¹⁷

Even with this brief look, one can see how the basic character of the debate over the nature of the corporation gives rise to its status as an issue that is ongoing. It is so because the corporation can be meaningfully described in different ways, and each description can

13. Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982).

14. *Id.*

15. David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1388 (1993).

16. Robert C. Solomon, *Corporate Roles, Personal Virtues: An Aristotelean Approach to Business Ethics*, 2 BUS. ETHICS Q. 317, 325 (1992).

17. Robert C. Solomon, *The Corporation as Community: A Reply to Ed Hartman*, 4 BUS. ETHICS Q. 271, 281 (1994).

function as a normative premise that is itself contestable. The discourse here is thus one of descriptive complexity thoroughly intertwined with the even greater contestability of substantive normative claims.

The present concern is not primarily with the theoretical dimensions of the debate, but rather exploring its practical import. Understanding the practical significance of this debate requires a thorough appreciation of its rhetorical dynamics—the subtle ways each conception persuades or dissuades, often without appearing to do so. The focus, therefore, is not on the elegance of any theoretical resolution to the debate, but its ongoing effects. More frequently than not, it is an underlying and unrecognized feature of even the most practical judgments of corporate law.

III. THE SIGNIFICANCE OF LEGAL LANGUAGE

In recent years, James Boyd White has had a tremendous influence on the understanding of legal language, examining its creative role. His work explores the richness of the dynamic observed in legal discourse about the corporation: the normative import of language's descriptive power.

[T]erms of what seem to be social 'description' are often used as powerful terms of 'value' in argument. Think of the force of such terms as 'university' or 'judge' or 'family' or 'teacher.' It does not make sense to call these terms either factual or normative for they are both in a kind of shifting mixture. Sometimes they are used with one emphasis, sometimes with another, but . . . they always retain both possibilities.¹⁸

Exposing this shifting mixture of description and normative claims, White reveals the often subtle power of the law's language. For him, the language of the law contains its greatest potency: "But I think the greatest power of law lies not in particular rules or decisions but in its language, in the coercive aspect of its rhetoric—in the way it structures sensibility and vision."¹⁹

For White, the essence of the law is "the art of making meaning in language with others."²⁰ He captures the law's making of meaning through a particular understanding of legal discourse. Legal language, as he sees it, is "rhetorical."²¹ In characterizing the law in this way, he brings to the fore its constitutive role:

18. JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 22 (1984).

19. JAMES BOYD WHITE, THE LEGAL IMAGINATION xiii (1985).

20. WHITE, *supra* note 5, at xii.

21. *Id.* at xi.

To characterize this activity as 'rhetorical', as I do, is to claim a somewhat richer meaning for that term than is common. By it I mean not merely the art of persuasion—of making the weaker case the stronger, as the Sophists were said to do—but that art by which culture and community and character are constituted and transformed.²²

In his view of law as constitutive rhetoric, White thus suggests three particular ways that the law helps to construct meaning in people's lives: it does so by constituting and transforming the elements of "culture," "community," and "character."²³ White gives to each of these elements a specific meaning. Culture, he explains, is "a set of resources for future speech and action, a set of ways of claiming meaning for experience."²⁴ He defines community as "a set of relations among actual human beings."²⁵ Character, for White, refers to the individual natures developed within the rhetoric of the law. "[B]oth 'we' and our 'wants,'" he asserts, "are constantly remade in the rhetorical process."²⁶

Legal language may play its constitutive role most directly within legal institutions and among those directly involved, such as lawyers and legislators, judges and juries, administrative officials and policymakers. The less direct influences of the legal system should not, however, be underestimated. From the police officer issuing a speeding ticket to the auditor reviewing business records, these actors and institutions affect people's understanding of the world in myriad ways.

Indeed, the broad influence of legal language is likely to be increasing. "At the very least," writes Mary Ann Glendon, "judges and legislators need to be more conscious of the radiating pedagogical effects of their activities in a law-saturated society. Lawmakers . . . have more responsibility today than ever before to consider how their words will be understood—not only within a professional community[,] . . . but by a wider public . . ."²⁷

Examining the ways corporate conceptions help to construct character, culture, and community reveals how legal language can structure the sensibility and vision brought to corporate law problems. Legal language accomplishes this by contributing to the understandings that inform the view of the business environment.

In brief, the aim of this Article is to bring into view a fundamental dynamic of the law's discourse regarding the

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 35.

27. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 104 (1991).

corporation. Each conception of the corporation presents it in a certain light, giving to the corporation a certain "character." Each character thus presented in turn is intertwined with a culture—"a set of ways of claiming meaning"—that serves as the basis for justifying a greater or lesser sense of community.

IV. PERSON/PROPERTY

The conception of the corporation as property presents the corporate entity in a distinctive light. At the core of this characterization of the corporation is the notion that it exists to serve the interests of stockholders rather than to promote the welfare of a broader group of stakeholders, such as employees, consumers, and local community members. Making sense of this corporate character requires a particular "set of ways of claiming meaning,"²⁸ a culture in White's sense of the term.

This section examines more closely the culture arising from the characterization of the corporation as property. If the corporation is cast as property, the shareholder becomes simply an owner, and an absentee owner at that, for he has ceded the day-to-day control of his property to others. With this proprietary characterization of the corporate entity, those who do run the corporation—the directors and officers—have a similarly circumscribed significance to their roles. They are understood as property managers.

As property managers, corporate directors and officers do not serve whatever broader set of values individuals who are shareholders may actually hold—for instance, the values they hold in their roles as parents or citizens. This larger and more varied significance of shareholder lives disappears within the set of meanings arising from this proprietary culture. Within this context, the individuals who are shareholders are recognized only within their economic role as absentee owners. As property managers, corporate directors and officers work simply to advance the presumptive interest of absentee owners in the financial return on their investment. Within this set of meanings, any action by corporate managers arising from broader social concerns acquires a particular significance. Any such action, as Milton Friedman suggests, is theft.²⁹

28. See WHITE, *supra* note 5, at xi.

29. Milton Friedman is clear regarding the harm he sees here. "Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible." FRIEDMAN, *supra* note 11, at 133.

Such a set of meanings provides the justification for a diminished sense of community. As noted earlier, White defines community as "a set of relations among actual human beings."³⁰ Because the actual human beings associated with the corporate enterprise here—the shareholders and corporate managers—have only the narrow significance of their roles, the relations of these individuals are strictly circumscribed. Community here has an economic and bilateral character. It consists only in the relations of those who seek a financial return, the shareholders, and those whose expertise provides it, the directors and officers. The possibility of a greater sense of community—one that allows a broader understanding of these individuals involved in the corporate enterprise or that attends more fully to the welfare of other stakeholders—is precluded.

Viewing the corporation as a person, however, brings a wholly different world into view. This is because corporate personhood grants to the corporate entity a markedly different character, that of an autonomous actor. The characterization of the corporation is in this way intertwined with its own distinctive culture.

Under the proprietary conception of the corporation, the corporation was a passive entity, an instrument for effectuating presumptive desires of shareholders. Seeing the corporation as an actor in its own right infuses the corporate environment with a new set of meanings.

Within this culture, the significance of shareholders shifts. With the corporate entity now understood as an actor, shareholders not only act upon the corporation, but the corporation also acts upon them. This means that shareholders are no longer simply owners, at least as that term has been traditionally understood, because at the core of traditional ownership is a degree of control that corporate agency calls into question. With the corporation as an independent actor, shareholders acquire a new and more complex context to their lives. They become members of a community that now includes another member, the corporate person.

Such a community has a more complex nature than was true under the proprietary conception of the corporation, because, as an autonomous actor, the corporation is no longer subject to a predefined set of relationships, but rather has a role in defining its relationships. In so doing, it can challenge as well as serve the shareholders. Indeed, it can sometimes serve them best by challenging them.

Moreover, as an actor in its own right, the corporation acquires a basic obligation to take account of how its actions affect others and to make decisions reflecting its status as a member of a community.

30. See WHITE, *supra* note 25, at xi.

Because of the broad and varied effect of corporate actions, corporate responsibility may thus entail duties of a social as well as of an economic nature, and include obligations to non-shareholder constituencies such as employees and consumers. It may even include obligations to such non-human entities as the environment.

Thus, the notions of the corporation as property and person help to construct the meanings of the corporate environment in two markedly different ways. Of particular note is the varying significance they attach to the corporation's failure to act.

Conceiving of the corporate entity as property places the corporation in the role of serving a single set of stakeholders—the shareholders—to the exclusion of all others. Because it creates this special relationship with the shareholders, the proprietary conception of the corporation limits the basic duty of corporate action to promoting the welfare of the owners of the firm. Absent special contractual obligations, the corporation bears no general duty for failure to act in ways that best promote the welfare of other constituencies.

The notion of the corporation as person gives a different significance to the failure to act. It does so because it defines the corporation's relationships—its community—in a different way than the proprietary conception of the corporation. As a person, the corporation is an actor in its own right, capable of defining its relationships. As an autonomous actor, it has the responsibility to consider the significant effects of its actions on a wide array of groups. Enmeshed in this broad set of relationships, the corporation's failure to act for any one of the affected groups potentially exposes the corporation to legal liability.

V. CONTRACT/COMMUNITY

The notion of the corporation as contract also illuminates the corporation in a particular way, giving it a distinctive character. As is true with the person and property conceptions, this notion of the corporation is intertwined with a distinctive set of meanings.

The culture connected with the nexus-of-contracts view of the corporation is an atomistic one. It is atomistic because of the way the self is understood within the basic institution of contract. Within this culture's set of meanings, individuals are separate, autonomous beings entering into relationships of an external, contingent character.

The separateness of individuals is embedded in the notion of contract because making sense of contracts requires an assumption of the autonomous nature of an individual's preferences. Seeing preferences as autonomous means that an individual's desires exist

independent of context. They thus transcend particular situations. Only on such an assumption does the institution of contract make sense, because if individual preferences varied situationally, why would individuals bind themselves to their own preferences as they existed at a particular place and time? Yet, this is precisely what occurs with the manifestation of mutual assent in a contract.

The autonomous nature of individual preferences also gives to relationships among such separate individuals an external, contingent nature. Individual relationships are external in that they do not change character. Individuals remain unchanged by relationships because preferences maintain themselves autonomously through varying contexts, including the alteration of relationships. Such an individual's relationships are also of a contingent nature. They are contingent because an autonomous being is not required to engage in them. The existence and scope of relationships will remain subject to discretion.

Within this set of meanings, a diminished form of community comes into view. This is so because culture allows individual preferences a distinctive significance. If desires are autonomous in the sense described, individual preferences can play a morally foundational role. In such a role, desires not only reflect what is, they also point to what should be. They have a normative character. "[G]ood is defined," writes Arthur Leff, "as that which is in fact desired."³¹

Desires acquire this distinctively normative significance through the mechanism of contract. Real or hypothetical contracts arising from individual preferences define the norms that inform this particular understanding of community. In a community structured by voluntary agreements, the only obligations are those that arise through mutual consent.

It is here that the limited nature of this community is made explicit. At the foundation of a community are the norms that constitute it and thus help to form the individuals that are its members. "What it means to be part of a community," Robert Solomon writes, ". . . is, among other things, to identify yourself and your interests in and with the community. It is, simply, to become a different person."³²

In this diminished sense of community, however, individuals are not changed by their participation in it. It exists merely to serve them as they already are. Because existing preferences expressed through contract define the norms for this community, community

31. Arthur Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451, 456 (1974).

32. Solomon, *supra* note 17, at 281.

here has a purely instrumental character. It plays no role in the development of its members.

In contrast to the culture with which the institution of contract is intertwined, the culture brought to the fore by the characterization of the corporation as a community provides a set of meanings that fosters the growth of individuals in and through their relationships. At the core of this culture is a different understanding of the self. Grasping this different understanding of self requires an appreciation of the particular sense in which corporations are communities. Corporations are communities because they can be, as Timothy Fort has written, mediating institutions.³³ They can serve as fora for developing and transforming individual preferences. As mediating institutions, they are settings in which people discover their social selves.

Making sense of this notion of corporate community requires a different understanding of the nature of individual preferences than that which arises from the institution of contract. Rather than being radically autonomous, an individual's preferences arise from character, and character is itself molded over time by the community in which the individual participates. On this assumption, individual preferences have a more complex nature than was true under the contractual conception of the corporation. Rather than being independent of context, they are rooted in the broader environment of the community in which an individual character evolves.

Under this view, the notions of virtue fostered by the good community define the appropriate norms for individuals within the community. Virtues are those traits of character that spawn admirable or praiseworthy behavior.³⁴ To focus on virtues is to focus on something more fundamental than interests—it is to focus on that which gives rise to an individual's interests. “[I]t can make little sense,” writes Edwin Hartman, “to say virtue is or is not in your interests because vice or virtue determines what your interests are.”³⁵ Simply put, a good person will desire different things than a corrupt one.

This culture thus offers the possibility of a greater sense of community, because the community now has a developmental role to play with its members. It serves as more than a forum for the effectuation of interests. Its role now includes the cultivation of

33. See TIMOTHY L. FORT, *ETHICS AND GOVERNANCE: BUSINESS AS MEDIATING INSTITUTION* (2001).

34. This understanding of virtues has its philosophical roots in Aristotle. See ARISTOTLE, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* (Richard McKeon ed., 1941).

35. Edwin M. Hartman, *The Commons and the Moral Organization*, 4 *BUS. ETHICS Q.* 253, 257 (1994).

virtues. In cultivating virtues, communities help individuals to become new persons. The focus is not simply on what individuals do, but the kind of people they are. The community attends to moral development as well as personal conduct.

Thus, the notions of the corporation as contract and community also help construct the meanings of the corporate environment in markedly different ways. They do so because of the significantly different roles relationships play within the respective cultures. The culture intertwined with the notion of the corporation as contract understands relationships as having an external, contingent nature. An individual remains unchanged by his relationships and, in each case, chooses whether and to what extent to enter into them. Viewing the corporation as community, however, brings into view a richer constitutive role for relationships. In significant ways, community helps to form character and foster development.

Of particular note here is the way these differing views of the significance of relationships assign different meanings to the responsibility of one actor for the actions of another. These two different meanings bear on the understanding of corporate responsibility for the actions of others.

Because the contractual view of corporations posits an atomistic world of contingent relationships, the corporation's responsibility for the conduct of other actors involved with the corporate enterprise depends heavily on its contractual arrangements with such actors. By choosing the nature and extent of such relationships, the corporation controls its responsibilities regarding the actions of others associated with its business activities.

The notion of the corporation as community, however, gives rise to a different perspective by emphasizing the constitutive nature of relationships. Under such a view, the corporation, by tailoring its relationships to diminish its own accountability, risks corrupting its own character. It thus does not necessarily escape responsibility by strategically structuring its relationships with the other actors involved with corporate undertakings. Indeed, this structuring may itself be irresponsible because of the way it diminishes the potentially positive influences corporate relationships can have over the character of other such actors.

VI. *JOHN DOE I V. UNOCAL CORPORATION*

Thus far, the exposition of the competing conceptions of the corporation has had primarily a theoretical focus. The aim has been to sketch out in a general way how each corporate conception gives the business environment a strikingly different set of meanings.

This section addresses *John Doe I v. Unocal Corporation*³⁶ to illustrate the difference such general understandings of the business environment can make. The focus is not on the case in its entirety or on its many technical aspects. Rather, *Unocal* is used to show how bringing a different sensibility and vision of the corporation to cases such as this can change one's understanding of them.

Unocal arose against the backdrop of Burma's political turmoil and violence. The court describes the context of the country's troubled history:

Burma's elected government was overthrown by a military government in 1958. In 1988, Burma's military government suppressed massive pro-democracy demonstrations by jailing and killing thousands of protesters and imposing martial law. At that time, a new military government took control naming itself the State Law and Order Restoration Council ("SLORC") and renaming the country Myanmar. In May 1990, SLORC held multiparty elections in which the National League for Democracy, the leading opposition party, won 80 percent of the parliamentary seats. After the elections, SLORC refused to relinquish power and jailed many political leaders.

The international community has closely scrutinized the SLORC's human rights record since it seized power in 1988. Foreign governments, international organizations, and human rights groups have criticized SLORC for committing such human rights abuses as torture, abuse of women, summary and arbitrary executions, forced labor, forced relocation, and arbitrary arrests and detentions.³⁷

During the 1990s, Unocal became involved with a Burmese state-owned company, Myanmar Oil and Gas Enterprise, in a complex business arrangement designed to exploit natural gas fields.³⁸ A key portion of the project involved the construction and operation of a gas pipeline through the Tenasserim region located in southern Burma.³⁹ Under the arrangement, Burma's military provided security for the construction and operation of the gas pipeline.⁴⁰

The plaintiffs in this case were Tenasserim villagers.⁴¹ They alleged that Burma's military made use of forced labor and forced relocations for the benefit of the pipeline project.⁴² According to deposition testimony, Burmese soldiers engaged in numerous acts of violence in performing their duties.⁴³ The court described the

36. *John Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

37. *Id.* at 1296 (footnote omitted).

38. *Id.* at 1297.

39. *Id.* at 1297-98.

40. *Id.*

41. *Id.* at 1298.

42. *Id.*

43. *Id.*

violence perpetrated against the villagers as “well documented” by deposition testimony.⁴⁴

According to the court, Unocal and the Burmese government had the shared goal of turning this venture into a profitable project.⁴⁵ The court also acknowledged that the Tenasserim villagers provided:

[E]vidence demonstrating that before joining the Project, Unocal knew that the military had a record of committing human rights abuses; that the Project hired the military to provide security for the Project, a military that forced villagers to work and entire villages to relocate for the benefit of the Project; that the military, while forcing villagers to work and relocate, committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing, and would continue to commit these tortious acts.⁴⁶

Nonetheless, the court granted Unocal’s motion for summary judgment on federal claims under the Alien Tort Claims Act, absolving Unocal of legal liability for the harms done by the military to the Tenasserim villagers.⁴⁷

In its ruling, the court’s crucial analysis focused on the nature of Unocal’s involvement with the harms inflicted on the plaintiffs. Unocal bore no corporate responsibility here because the court found that the character of involvement by the corporation did not merit the assignment of accountability. In the court’s own words, “Plaintiffs present no evidence that Unocal ‘participated in or influenced’ the military’s unlawful conduct”⁴⁸ Later, the court continued, “Plaintiffs present no evidence Unocal ‘controlled’ the . . . military’s decision to commit the alleged tortious acts.”⁴⁹

The court’s language here works to distance Unocal from the illegal acts by refusing to characterize Unocal’s involvement in the business venture as a form of participation in the brutality that occurred. Reasoning in this way significantly diminishes corporate responsibility for harms associated with corporate undertakings.

This morally unsettling result depends heavily on the particular conceptions of the corporation underlying the court’s reasoning. The earlier exposition of competing corporate conceptions reveals the corporate conceptions that serve as the basis for the court’s decision. It also suggests how bringing different conceptions of the corporation into view provides an alternative understanding of the case.

For example, consider the court’s stance that a private entity must exercise control over the governmental actor’s decision to

44. *Id.*

45. *Id.* at 1306.

46. *Id.*

47. *Id.* at 1312.

48. *Id.* at 1306-07.

49. *Id.* at 1307.

commit illegal acts in order for the private entity to be liable.⁵⁰ Because Unocal did not exercise control over the military's decision, Unocal is not liable.⁵¹

Such an analysis depends fundamentally on accepting the premise underlying the contractual conception of the corporation. This premise allows the business enterprise to disable itself, creating its own realms of inaction. This occurs under the nexus-of-contracts view because of the way this view takes as its premise the external, contingent nature of all relationships. By structuring its relationships so that it lacked control in domains where harms were likely to occur, Unocal created for itself an inability to act in such legally risky areas. By creating its own inability to act, it exempted itself from legal liability.

Viewing the corporation as a community would give rise to a markedly different analysis, because a communitarian conception of the corporation emphasizes the constitutive nature of relationships. Under such a view, the corporation, by structuring its relationships, changes itself. Some changes—such as disabling itself in a realm where significant harms are foreseeable—could be seen as a legally prosecutable exercise of control. This is not only because such a disabling calls into question the resulting character of the corporation, but also because such disabling negates the possibility of the corporation's relationships having a positive influence over the character of those engaged in harmful conduct.

Consider also the court's position that a private entity must participate in or influence the governmental actor's illegal conduct.⁵² Because Unocal did not engage in such affirmative action, it is not here legally liable.⁵³

This analysis stems from a proprietary conception of the corporation. Under this proprietary conception, corporate managers have an affirmative duty to advance the welfare of shareholders, but have no such duty regarding other corporate constituencies. Under this view, the simple failure to act to prevent or minimize harms to non-shareholder groups is not legally actionable. It cannot be viewed as participating in or influencing such harmful behavior because there is no fundamental underlying duty to act.

The notion of the corporation as person, however, changes this analysis. Under this notion, the corporation potentially has affirmative duties to those significantly affected by its actions. Defining the scope and focus of such duties may be difficult, but this

50. See *supra* note 49 and accompanying text.

51. *Id.*

52. See *supra* note 48 and accompanying text.

53. *Id.*

should not obscure how their existence fundamentally changes the character of analysis. Failure to act for the benefit of a constituency to which the corporation had a duty could be seen as participating in or influencing the harms that thus occur to that constituency.

What ultimately comes into view is the way the sense of corporate responsibility arising from the corporation as property or contract has its roots in the diminished understanding of community in the business environment. Recall how White defines community as "a set of relations among actual human beings."⁵⁴ The notion of the corporation as property devalues the corporation's relations with a wide array of human beings by justifying the corporation's lack of affirmative action for the welfare of non-shareholder constituencies. The notion of the corporation as contract diminishes these relations in an even more fundamental way. It does so by disabling the ability of the corporation to engage in such affirmative action. In the former case, the corporation may be able to take such action but is not required to do so. In the latter case, the corporation cannot be required to take such action because it no longer has the capacity to do so.

VII. CONCLUSION

If one wishes to develop the corporation's role as peacemaker, the crucial point is how the conceptions of community brought to the understanding of the business environment affect the sense of corporate responsibility that prevails there. As *Unocal* suggests, a diminished sense of corporate responsibility is part and parcel of the particular conception of the community that held sway in the case. It was a sense of community that separated *Unocal* from the consequences of its business activities. It separated *Unocal* from these consequences by limiting *Unocal*'s obligation to take affirmative action and construing its corporate relationships as merely external and contingent in nature.

The intertwined nature of community and corporate responsibility is crucial because it reveals how the way people think and speak about the corporation can affect the corporation's contribution to sustainable peace. The person and community notions of the corporation hold a greater potential for fostering a corporate contribution to a more peaceful world than the notions of property and contract, because of the kind of community they foster in the understanding of the business environment. Unlike the property and contract conceptions, it is a sense of community that

54. See WHITE, *supra* note 25 and accompanying text.

enlarges the sense of corporate responsibility for harms flowing from corporate undertakings. It is a sense of corporate responsibility that not only more readily acknowledges corporate accountability for such harms that occur, but also supports affirmative corporate action to eliminate or minimize such harms.

Thus, while the notions of the corporation as property and contract predominate in current corporate law scholarship, the conceptions of the corporation as person and community offer prospects for a more peaceful world that their rival conceptions do not. They do so because of the way in which they enhance the sense of corporate responsibility for harms flowing from corporate ventures, encouraging affirmative corporate action to eliminate or minimize such harms. The conception of the corporation as person encourages such affirmative action by promoting corporate attention to the corporation's broader constituencies. The conception of the corporation as community fosters this affirmative action by emphasizing the potential of corporate relationships to influence the character of both the corporation and those with whom it does business. In helping to reduce the harms flowing from corporate ventures, these conceptions of the corporation contribute to the corporation's ability to create long-term cooperative relationships among all its stakeholders.

If people wish the corporation to grapple successfully with the new challenge of creating a more peaceful world, they will need to think and speak of it in new ways. Here, legal theory has a helpful role to play.