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## The Private Use of Public Authority: Sovereignty and Associations in the Common Law

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**THE PRIVATE USE OF PUBLIC AUTHORITY: SOVEREIGNTY  
AND ASSOCIATIONS IN THE COMMON LAW**

**ARTHUR J. JACOBSON**

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**THE PRIVATE USE OF PUBLIC AUTHORITY: SOVEREIGNTY  
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ARTHUR J. JACOBSON\*

INTRODUCTION

This Article provides a unified account of the Anglo-American law of associations.<sup>1</sup> It includes agency, partnership, trust, joint stock company, corporation, and the fundamental and pervasive concept of fiduciary relations.<sup>2</sup> The law of associations, I contend, can properly be understood only as a distribution of sovereignty to private persons beyond the precincts of the state apparatus.<sup>3</sup> The significance of this contention is that relations we deem altogether private, such as agency, involve direct participation in sovereign power. Hence, theories of state and economy that divorce sovereignty from the daily business of private life are in error.<sup>4</sup>

A proper understanding of the law of associations, therefore, begins by rejecting the notion that the doctrine of sovereignty cannot be reconciled with a broad decentralization of power.<sup>5</sup> Sover-

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1. The Anglo-American literature on associations is sparse. It counts one treatise, H. SMITH, *THE LAW OF ASSOCIATIONS* (1914), and a handful of methodical articles. See, e.g., Dodd, *Dogma and Practice in the Law of Associations*, 42 *HARV. L. REV.* 977 (1929); Fuller, *Two Principles of Human Association*, in *VOLUNTARY ASSOCIATIONS* 3 (J. Pennock & J. Chapman eds. 1969).

2. The series does not include the family or voluntary association (club). Neither fits the definition of association as a shifting or distribution of legal responsibility among persons. See note 11 *infra*. As the common law contains no definitive canon of "associations," the term itself could easily be eliminated. The subject of the account, then, is a series of legal institutions, rather than an abstraction called "association."

3. Both "association" and "sovereignty" are defined in text accompanying notes 11 & 12 *infra*.

4. For a recent expression of such a theory, see R. HESSEN, *IN DEFENSE OF THE CORPORATION* (1979); Hessen, *A New Concept of Corporations: A Contractual and Private Property Model*, 30 *HASTINGS L.J.* 1327 (1979).

5. For a classic statement that sovereignty cannot be reconciled with decentralization, see H. LASKI, *THE FOUNDATIONS OF SOVEREIGNTY* 1, 26-29 (1921); Laski, *The Personality of Associations*, 29 *HARV. L. REV.* 404 (1916), reprinted in H. LASKI, *supra*, at 139, 169. See

eighty itself in our tradition has been the instrument of decentralization. Courts and legislatures have used the law of associations to distribute a portion of sovereignty to private persons. Yet neither courts nor legislatures have acknowledged that they distribute sovereignty or that the means of distribution is the law of associations. The doctrine of sovereignty, as we have it, does not easily yield either proposition.

Our traditions of legal and political thought reflect a discomfort with the private association of persons.<sup>6</sup> Hobbes, for example, saw corporations as "many lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a naturall man."<sup>7</sup> The doctrine of sovereignty, he knew, could be used to justify the pretensions of corporations as easily as it could justify the claim of the state to absolute power. In principle, however, sovereignty legitimizes but the single association of commonwealth, governed by one state apparatus. Inferior associations, such as corporations, exist only as articulations in the formal structure of the central apparatus. To tolerate corporations is to qualify rivals to the legitimacy of the commonwealth. The purpose of sovereignty, then, would fail: "For what is it to divide the Power of the Common-wealth, but to dissolve it; for Powers divided mutually destroy each other."<sup>8</sup>

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generally O. GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY* 62-69 (E. Barker ed. 1950). But cf. Adams, *Nature of Law: Methods and Aim of Legal Education*, in *CENTRALIZATION AND THE LAW: SCIENTIFIC LEGAL EDUCATION* 22-23 (1906). For an account of the origin of the link between sovereignty and centralization, see RIESENBERG, *INALIENABILITY OF SOVEREIGNTY IN MEDIEVAL POLITICAL THOUGHT* (1956).

6. The discomfort results from the hostility of a central political apparatus towards any combination of persons, more or less formal, more or less institutionalized, that threatens or could threaten the monopoly of the central apparatus on all forms of power. Roman law, for example, has in it surprisingly few mechanisms (notably agency and business corporations) for the association of persons without the consent and control of the central apparatus. See O. GIERKE, *ASSOCIATIONS AND LAW* 127 (G. Heiman ed. 1977); R. SOHM, *THE INSTITUTES* §§ 37-38, 88 (trans. J. Ledlie 1940). The achievement of Anglo-American law has been to provide a wealth of mechanisms for private association, while dampening the threat of these associations to the central apparatus both directly through administrative control of markets, etc., and indirectly through substantive doctrines in the law of associations. For example, the law of partnerships accords the partnership device only to persons whose collective aim is to profit by business activity. See notes 104-116 *infra* & accompanying text. The aims, indeed the existence, of a partnership are tempered and constrained by the stern discipline of the market. Hence the central apparatus could control associations conducted as partnerships by seemingly autonomous forces, unconnected to political dominion.

7. T. HOBBS, *LEVIATHAN* 257 (1909) (previously published in London 1651).

8. *Id.* at 251.

Even those, unlike Hobbes, who reject the doctrine of sovereignty, either ignore the association of persons, or attempt to assimilate it to a quite different fundamental doctrine, such as the law of contract.<sup>9</sup> In this view, an association is, like all legal relations, the sum of consensual arrangements among persons, forming spontaneously without the artifice of sovereignty. Yet a principle theme of this Article is that associations, from agency to corporation, cannot be understood simply as instances of contract. To reduce associations to contract, one must either transform the traditional doctrine of contract, or obliterate certain doctrines characteristic of the law of associations.<sup>10</sup> Both parties, the friends and the enemies of sovereignty, have confined associations to a vanishing point between dissolving altogether into the natural world of contract and disappearing into the grasping unity of the state apparatus. Only compromise and confusion has allowed the reality of associations to coexist with our main traditions of legal and political theory.

The first task, then, is to recall the theoretical traditions that have met the law of associations with scepticism and suspicion, and reconstruct these traditions to accommodate associations. Our legal theory has misconceived associations precisely because the battle line between the friends and enemies of sovereignty has been so strictly drawn. The enemies of sovereignty must surrender their notion that private relations can be constructed entirely from spontaneous agreements among persons, without reference to sovereignty. They must reconcile themselves to the proposition that private persons who enter into associations make use of a portion of sovereign power. So too, the friends of sovereignty must allow a portion of sovereignty to be distributed among private persons so that it can in fact be an instrument in the autonomous construction of private associations. Only once each side to the dispute over sovereignty sacrifices a point in its position, can associations take their place in legal theory.

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9. See, e.g., O. GIERKE, *supra* note 5, at 62, 70-79; 1 F. HAYEK, *LAW, LEGISLATION AND LIBERTY* 39-54, 91-93 (1973) [hereinafter cited as F. HAYEK I]; F. HAYEK, *THE CONSTITUTION OF LIBERTY* 148-61 (1960) [hereinafter cited as F. HAYEK II].

10. The doctrine of authority, for example, can be reduced to contract only by ignoring the fact authority empowers the recipient rather than binds him. Moreover, authority empowers the recipient to bind who would not be bound under the doctrines of contract. See text accompanying notes 75-80 *infra*. But see F. MAITLAND, *The Unincorporate Body* in 3 *THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND* 271-84 (H. Fisher ed. 1911).

The second task is to isolate a primitive element of associations that also serves as a rudimentary distribution of sovereignty. The primitive element, I contend, is the broad class of fiduciary relations. The fiduciary relation is at once the minimum, or kernel, of association, and a distribution of a portion of sovereignty to one of the participants in the relation. All other associations—agency, partnership, joint stock company, trust, and corporation—are built upon this primitive element as a series of modifications of fiduciary relations. Agency, for example, is a form of fiduciary relation in which the beneficiary, or principal, unlike the beneficiary of the primitive fiduciary relation, exercises control over the content of his fiduciary's activity. Actions of the fiduciary, the agent, unlike actions of the primitive fiduciary, constitute legally binding action of the beneficiary. Agency, therefore, is a form of fiduciary relation in which both participants share in the distribution of sovereignty. The final task, then, is to trace the construction of higher forms of association from the rudimentary distribution of sovereignty in fiduciary relations.

### I. DISTRIBUTING SOVEREIGNTY

The thesis of this Article has two sides. First, the state apparatus in our tradition distributes a portion of sovereignty to persons not formally subject to bureaucratic control. Second, this distribution generates a series of legal institutions—agency, partnership, and the like—found in the law of associations.

#### A. *Two Methods of Proof*

One might attempt to prove both propositions at once, defining "sovereignty" and "association" so that the latter, by dint of forced or contrived deductions, appears to be a distribution of the former. "Association," for example, may plausibly be defined as any relation exhibiting a shifting or distribution of legal responsibility controlled by the participants in the relation.<sup>11</sup> "Sover-

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11. Anglo-American law de-emphasizes the formal definition of "association," except as a technical word for "club." See note 13 *infra*. "Association" in our legal system, in contrast to those on the Continent, has never been the focus of political or systematic legal dispute. See, e.g., Barker, *Introduction to O. GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY LVII-LX* (E. Barker ed. 1950); J. BRISSAUD, *HISTORY OF FRENCH PRIVATE LAW* § 589 (3 Continental Legal History Series 1912); Heiman, *Introduction to O. GIERKE, ASSOCIATIONS AND LAW* 32-33 (G. Heiman ed. 1977); R. HUEBNER, *A HISTORY OF GERMANIC PRIVATE LAW* § 15 (4

eignty," according to the theory that defines it, is the source of binding commands, called law.<sup>12</sup> The deduction of "association" as a distribution of "sovereignty" might proceed as follows.

The sovereign commands persons. A command informs the persons which of their actions the sovereign considers legally significant, in that it attaches a binding consequence to the commission of such actions. A command thus compels the sovereign to complete two further tasks. First, it must attribute actions defined as legally significant to one person or another. Second, the sovereign must assign benefits and harms to persons according to the binding consequence of actions thus attributed. "Person" thus signifies one to whom action is attributed, and a unit of account to which the sovereign assigns legal benefits and harms. The person is, in sum, the bearer of legal responsibility. To be sovereign, following the course of this deduction, is to exercise control over legal responsibility. But a private person, exercising such control, possesses an attribute of sovereignty. Consequently, an association, in which the participants control assignment of legal responsibility, represents an exercise of sovereignty by persons outside the state apparatus.

A formally proper deduction, however, cannot provide sufficient proof of the thesis. For "sovereignty" and "association" have never played more than a specialized role in Anglo-American private law.<sup>13</sup> Courts and commentators have not resorted to either term in framing doctrines of agency, partnership, and other associations. "Sovereignty" has simply not been available to them for the construction of such doctrines, because theorists of sovereignty

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Continental Legal History Series 1918); Maitland, *Introduction to O. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE XVI-XXXII* (1913).

12. The theory is called legal positivism. See, e.g., J. AUSTIN, *LECTURES ON JURISPRUDENCE*, Lectures I, VI (R. Campbell ed. 1885); T. HOBBS, *supra* note 7, at 203-23. See text accompanying notes 20-22 *infra*. See generally A. D'ENTREVES, *THE NOTION OF THE STATE Part II* (1967).

13. See "Association" in *4A WORDS AND PHRASES* (perm. ed. 1969). "Association" unmodified means only a "confederacy or union for particular purposes, good or ill," *Allen v. Stevens*, 33 A.D. 485, 507, 54 N.Y.S. 8, 23 (1898), and has limited doctrinal significance. When modified, as in "business association," it is typically replaced by a particular technical term, such as "partnership," or "corporation." The "law of associations" commonly refers to the branch of law regarding clubs, fraternal organizations, and the like.

The word "sovereignty" occurs only in doctrines having directly to do with the state, such as sovereign immunity, eminent domain, personal and subject matter jurisdiction, state action, etc.

have until recently confined its exercise to persons overtly affiliated with the state apparatus. Furthermore, English lawyers, unlike their colleagues on the Continent, saw little need for a "theory" of associations to support the practical requirements of their commercial clients. Hence a unifying, argumentative definition of association, given its wealth of practical forms in Anglo-American law, has always seemed superfluous. Definitions of sovereignty and association cannot be grounded in private law doctrine. Any definition, or deduction from definition, smacks of the arbitrary.

The proof I offer follows quite another path. Rather than a deduction from definitions, I present the construction of a series of institutions from the elementary institution of fiduciary relations. The elementary institution provides a transition between private transactions and the exercise of sovereign power. The lineaments of fiduciary relations, I suggest, can be explained no other way.<sup>14</sup> Subsequent institutions in the series—agency, partnership, and the like—are built upon fiduciary relations to reflect a progressive absorption of public authority into the realm of private transactions.

Yet, even a constructive proof must reckon with the confinement of sovereignty within the state apparatus. One cannot recognize the appearance of sovereignty in fiduciary relations without first reconstructing sovereignty to play a role outside the state apparatus.

Modern theorists, I contend, have defined sovereignty as legislation, which they confine to the state apparatus.<sup>15</sup> Only in the past generation have two theorists, Hans Kelsen and H.L.A. Hart, sought to release a portion of sovereignty to private persons.<sup>16</sup> Their effort, in part, is an attempt to defend legislation from the charge that it is at best ineffective and at worst destructive of spontaneous social and economic arrangements existing alongside

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14. See Part II *infra*.

15. See, e.g., J. BENTHAM, *THE THEORY OF LEGISLATION* ch. 13 (E. Dumont ed.) (2d ed. R. Hildreth trans. 1874). See generally N. ROSENBLUM, *BENTHAM'S THEORY OF THE MODERN STATE* 9-26 (1978).

16. See H.L.A. HART, *THE CONCEPT OF LAW* 77-96 (1961); H. KELSEN, *PURE THEORY OF LAW* §§ 36-40 (1967). Cf. 2 M. WEBER, *ECONOMY AND SOCIETY* 730 (G. Roth & C. Wittich eds. 1968) (a translation of *Wirtschaft und Gesellschaft* (4th ed. Tübingen 1956), citing A. Voigt, *Wirtschaft und Recht*, 2 *ZEITSCHRIFT FÜR SOZIALWISSENSCHAFT* (1911); *Die Wirtschaftlichen Güter als Rechte*, 4 *Archiv für Rechts- und WIRTSCHAFTSPHILOSOPHIE* (1913). See also H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 5-8 (tent. ed. 1958); Jaffe, *Law Making by Private Groups*, 51 *HARV. L. REV.* 201 (1937), and the sources cited therein.



the superficial structure of sovereignty.<sup>17</sup> The state, the challengers urge, need only cure the occasional defects of spontaneous social order by settling disputes among private persons. Law, in their estimation, is contract, a reflection of spontaneous social order. Those who wish to preserve the theory of legislation, accordingly, have justified contract as a private form of legislation.<sup>18</sup>

But contract alone, I will show, does not constitute associations, understood as the shifting of legal responsibility among persons. Only by returning to the original view of sovereignty as enforcement, rather than legislation, is it possible to find in the doctrine of sovereignty a source of associations.<sup>19</sup>

17. See, e.g., F. HAYEK I, *supra* note 9, at 72-93.

18. See H.L.A. HART, *supra* note 16, at 94; H. KELSEN, *supra* note 16, at § 35(h).

19. John Locke, for example, considered sovereignty to be enforcement:

Man, being born, as has been proved, with a title to perfect freedom and uncontrolled enjoyment of all the rights and privileges of the law of nature equally with any other man or number of men in the world, has by nature a power not only to preserve his property—that is, his life, liberty, and estate—against the injuries and attempts of other men, but to judge of and punish the breaches of that law in others as he is persuaded the offense deserves, even with death itself in crimes where the heinousness of the fact in his opinion requires it. But because no political society can be, nor subsist, without having in itself the power to preserve the property and, in order thereunto, punish the offenses of all those of that society, there and there only is political society where every one of the members has quitted his natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it. And thus all private judgment of every particular member being excluded, the community comes to be umpire by settled standing rules, indifferent and the same to all parties, and by men having the authority from the community for the execution of those rules decides all the differences that may happen between any members of that society concerning any matter of right, and punishes those offenses which any member has committed against the society with such penalties as the law has established; whereby it is easy to discern who are, and who are not, in political society together.

J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 48-49 (1952) (previously published in London 1764 & 1690). Hobbes devotes the major part of his *LEVIATHAN* to the construction of a single person, the sovereign, from a multitude. The test for delimiting a single person, as for Locke, is the exercise of one judgment:

The only way to erect such a Common Power . . . is to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will: which is as much as to say, to appoint one Man, or Assembly of men, to beare their Person; and every one to owne, and acknowledge himselfe to be Author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted, in those things which concerne the Common Peace and Safetie; and therein to submit their Wills, every one to his Will, and their Judgments, to his Judgment. This is more than

## B. *Two Notions of Sovereignty*

"Sovereignty" is a term that completes a certain definition of law. Law, in the language of legal positivists, is a command of the sovereign.<sup>20</sup> But "sovereignty" is more mysterious than the term it defines. There would be little purpose in using it, were it not for the destructive effect of sovereignty in opposing two propositions: that law is revelation, and that law is nature discovered by reason.<sup>21</sup> Sovereignty is as invisible as God; it is as abstract as the law of nature. Yet it succeeds, when it is used, in removing both of them from the process of legislation. When the time comes, however, in which they must say something positive about sovereignty, positivists simply turn the definition of law around, using law to define sovereignty. Sovereignty, in this circle, is the source of commands, called law.<sup>22</sup>

The abstraction and circularity of the definition is to positivists the very essence, indeed the virtue, of their position on law. One breaks out of the circle of definition only by adopting a substantive criterion for recognizing law, such as revelation or reason. No society, however committed to the project, could forever agree on such a substantive criterion. Formal opposition would yield to informal opposition, as interpreters of the agreed upon criterion would inevitably produce competing and ungovernable claims to authenticity. These interpreters of the substantive criterion would require a forum in which their claims could be reconciled definitively. Whether the forum is a church, a council of the enlightened,

Consent, or Concord; it is a reall Unitie of them all, in one and the same Person.

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T. HOBBS, *supra* note 7, at 131. See also *id.* at 129-30; R. POLIN, *POLITIQUE ET PHILOSOPHIE CHEZ HOBBS* ch. 10 (1953). Both Locke and Hobbes have language concerning the supremacy of legislative power. One must distinguish, however, between the *nature* of sovereignty, which is enforcement, and the wholesale way in which enforcement can be conducted, which is legislation. Legislation is a supreme form of enforcement. See text accompanying notes 30-33 *infra*.

20. See note 11 *supra*.

21. See, e.g., J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 17 n.1, 21-22 (1948) (previously published in London 1823 & 1789).

22. Thus Austin finds the "superiority which is styled sovereignty" where "[t]he bulk of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior . . .," who is not in a similar habit of obedience. J. AUSTIN, *supra* note 12, at 220. Austin's definition of "sovereignty" depends on the fact of obedience, which, in turn, depends on the command of a determinate and common superior. Sovereignty is, therefore, the source of law that works.

or the ordinary bureaucratic executive, it would be one form or another of state apparatus. Positivists claim that the state apparatus rules, because substantive criteria do not, nor do the several interpretations of a single criterion. The state apparatus rules, however, only if it lacks competitors. Promulgation of commands by separate and distinct authorities, according to positivists, would lead to a clash of commands, with no recourse to mediation by an objective criterion. The sole criterion positivists impose on the circle of definition, therefore, is that sovereignty be unitary and located in the state apparatus. Law is defined, not by a substantive criterion, but by its unique and exclusive institutional source in the state apparatus.<sup>23</sup>

Refusing to recognize an objective criterion forces positivists to narrow the ambit of sovereignty one step further, *within* the activities of the state apparatus. For commands do not enforce themselves. The state apparatus must be prepared to enforce commands as well as issue them. Yet the enforcement of a command, even if it is carried out by the same official, can diverge or appear to diverge from its issuance. This potential divergence between issuance and enforcement, between legislation and execution, presents a choice for legal positivism. One or the other, issuance or enforcement, has to be primary.

If, as for positivists following Bentham, issuance is recognized as primary, enforcement must proceed as though it were self-evident and automatic, adding nothing to the direct terms of command.<sup>24</sup> Otherwise enforcement, which ought to be nothing but the realization of commands, usurps the place of issuance, and the sovereign is rent by a forbidden clash of legislative powers. Likewise, if enforcement is primary, as for the original positivists, such as Locke, then the separate office of issuance may, like courts, articulate only the most unimpeachable precedents and rules of justice.<sup>25</sup> In either instance, to choose one side of sovereignty is to limit, truncate, or suppress the other altogether.

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23. See text accompanying note 7 *supra*.

24. J. BENTHAM, *supra* note 15, at 153-56.

25. The obligations of the law of nature cease not in society but only in many cases are drawn closer and have by human laws known penalties annexed to them to enforce their observation. Thus the law of nature stands as an eternal rule to all men, legislators as well as others.

J. LOCKE, *supra* note 19, at 77. Cf. note 14 *supra*.

The choice between issuance and enforcement suggests several consequences, far exceeding the scope of this Article. A few, however, are crucial. In the original view of sovereignty as enforcement, law made by the office of issuance, or legislation, differs in form, but not in substance from law made by the office of enforcement, or common law; it is the refined discussion of fairness in transactions, modelled after the tradition of the Yearbooks. Legislation, like law, ought not to interfere with the individual welfare of participants in transactions. Relief from the distress of law, if any, should be had through the limited administration of equity, not through law. In the more modern view of sovereignty as legislation, quite the opposite holds. Individual welfare is the very substance of legislation.<sup>26</sup> If a form of transaction, created slowly over centuries by the courts, ceases to contribute to individual welfare, then the sovereign must do away with it, no matter how fair it seems. The test of transactions is substantive welfare, not fairness. Law itself provides relief from distress.

I intend to show that the foundation of associations, the fiduciary relation, expresses a concern for individual welfare embedded in the office of enforcement. The fiduciary relation stands as a challenge to the divided house of positivism: concern for welfare tied to the locus of enforcement, not to legislation.

The first consequence of the choice between issuance and enforcement leads to a second: distinct definitions of "person."<sup>27</sup> If sovereignty is legislation, "person" is first of all the bearer of individual welfare, a unit of account for benefits and harms. But the guiding rule of enforcement under a regime of legislation is that the sovereign assigns benefits and harms according to the binding

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26. See J. BENTHAM, *supra* note 15, at 1, 95.

27. For general discussions of legal personality, see W. BUCKLAND & A. MCNAIR, *ROMAN LAW AND COMMON LAW* 23-59 (2d ed. 1952); P. DUFF, *PERSONALITY IN ROMAN PRIVATE LAW* (1938); F. HALLIS, *CORPORATE PERSONALITY* (1930); A. NEKAM, *THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY* (1938); Brown, *The Personality of the Corporation and the State*, 21 *LAW Q. REV.* 365 (1905); Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655 (1926); Geldart, *Legal Personality*, 27 *LAW Q. REV.* 90 (1911); Machen, *Corporate Personality* (pts. 1, 2), 24 *HARV. L. REV.* 253, 347 (1911); F. MAITLAND, *Moral Personality and Legal Personality* in 3 *COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND* 304-20 (H. Fisher ed. 1911); Radin, *The Endless Problem of Corporate Personality*, 32 *COLUM. L. REV.* 643 (1932); Vinogradoff, *Juridical Persons*, 24 *COLUM. L. REV.* 594 (1924). See also 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 469-90 (3d ed. 1927); 9 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 45-71 (1926); 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 486-97 (S. Milsom ed. 1968) (2d ed. 1898).

consequence of attributed action. "Person" thus signifies as well one to whom action is attributed, obeying or disobeying the terms of legislation.<sup>28</sup> If, however, sovereignty is enforcement, "person" signifies more than one to whom action is attributed, more than a unit of account to which the sovereign assigns benefits and harms. The original positivists had a third term in the doctrine of persons that the more modern positivists saw fit to eliminate: "person" is one whose actions result from an exercise of judgment.

For modern positivists, persons have judgment, if at all, only to calculate the pleasurable or painful consequences of action. "Nature," wrote Bentham, "has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do."<sup>29</sup> But the judgment required to calculate pains and pleasures is a strictly individual sort of judgment. No rule of calculation, no judgment, is common to everyone, as no one can be told his pleasure.

Law as enforcement, in contrast, appeals precisely to universal judgment.<sup>30</sup> Persons may, it is true, calculate personal pains and pleasures. But the enforcing authority holds them to calculate as well the legal consequence of actions, even in the absence of a specific, legislated command. In return, the enforcing authority confines its creation of law to universal rules of judgment that any person could be expected to foresee. In a real sense the person aids in making law as he confronts the challenges of daily life, his individual judgment to be ratified or not by the universal judgment of the enforcing authority.<sup>31</sup> Legislation, quite the contrary, contemplates persons only as animals to control. It appeals not to their

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28. See J. BENTHAM, *supra* note 21, chs. 4, 7.

29. See *id.* at 1.

The *Expositor*, keeping within his sphere, has no concern with any other faculties of the mind than the *apprehension*, the *memory*, and the *judgment*: the latter, in virtue of those sentiments of pleasure or displeasure which he finds occasion to annex to the objects under his review, holds some intercourse with the *affections*.

J. BENTHAM, *A Fragment on Government*, in A BENTHAM READER 46 (M. Mack ed. 1969).

30. Hobbes' project in his *LEVIATHAN* is to show the conditions under which universal judgment is possible. See T. HOBBS, *supra* note 7, at 49-52 (especially the definitions of "judgment" and "conscience"); J. LOCKE, *supra* note 19, at 44-54. See note 19 *supra*.

31. For a recent formulation of the doctrine of universal judgment, see D'Amato, *The Limits of Legal Realism*, 87 YALE L.J. 468, 489-91, 497-505 (1978).

judgment, but to whatever induces their compliance.<sup>32</sup> Law as enforcement is less a command of the sovereign to persons than the judgment of persons *en masse* replacing the judgment of individual persons.<sup>33</sup>

The choice between definitions of person requires a further choice between definitions of association. Association has formally been defined as a shifting or distribution of legal responsibility among persons.<sup>34</sup> Legal responsibility, in turn, was regarded as modern positivists regard it, embracing the two sides of person as they see person: attribution of action, and assignment of benefits and harms. In the stance where sovereignty is enforcement, however, legal responsibility must also embrace judgment. Action, then, may be attributed only to persons whose exercise of judgment may be said to have caused the action; and binding consequence proceeds from action only when the enforcing power of the sovereign, judgment *en masse*, concurs in the decisions of individual judgment. When it is included, therefore, judgment, in the strong sense of legal calculation, becomes the centerpiece of the doctrine of persons, hence a crucial element of legal responsibility. If the stance of enforcement is valid, then a shift of judgment should accompany the distribution of legal responsibility that defines association. The presence or absence of a shift of judgment provides a crucial empirical test in the law of associations for the choice between sovereignty as enforcement and sovereignty as legislation. Yet, a shift of judgment from one person to another is the essential feature of the most rudimentary association, the fiduciary relation. Thus the presence of shifting judgment in fiduciary relations vindicates the claim of the original positivists, that sovereignty is enforcement, not legislation.

The final consequence of the choice between enforcement and

32. Compliance may flow from passions we find attractive, such as public spirit, or unattractive, such as fear. Legislation can function either through democratic or totalitarian forms.

33. I observe the *Diseases* of a Common-wealth, that proceed from the poyson of seditious doctrines; whereof one is, *That every private man is Judge of Good and Evill actions*. This is true in the condition of meer Nature, where there are no Civill Lawes; and also under Civill Government, in such cases as are not determined by the Law. But otherwise, it is manifest, that the measure of Good and Evill actions, is the Civill Law; and the Judge the Legislator, who is always Representative of the Commonwealth.

T. HOBBS, *supra* note 7, at 249. See J. LOCKE, *supra* note 19, § 87.

34. See text accompanying note 11 *supra*.

legislation is perhaps most significant, since it has raised a challenge in the past century to the very notion of sovereignty. If sovereignty is legislation, then what persons do has absolutely no significance in the state apparatus, other than the compliance of their actions with the terms of legislation. Persons may use the law, as if it were a facility, but they cannot directly make the law. The task of making law is a state monopoly. In the structure of public life, therefore, persons are inert entities.<sup>35</sup> Judgment, however, energizes persons. If sovereignty is enforcement, the ultimate criterion of law is judgment, not legislative or individual calculation. The sovereign makes law by reference to and with the aid of persons.<sup>36</sup> The enforcing power, like a common law court, looks to the pleadings of parties as the first step in its determination of judgment. Indeed, the participation of private persons in enforcement is in itself a distribution to or sharing of sovereignty with private persons. When sovereignty is legislation, no such distribution is possible.<sup>37</sup>

### C. *Anti-Positivism, Contract and Distributing Sovereignty Through Associations*

The insignificance of persons in the public life of modern positivism has struck many as a factor to be weighed against the doctrine of sovereignty.<sup>38</sup> These critics of modern positivism abhor a system in which the sole effective source of order is the state apparatus. Society, they reflect, is abundant with spontaneous arrangements among persons, formed without the state's aid and enabling authority. Persons are the source of energy and order in the economy and in cultural life. Sovereignty, when used, is but a pretext to suppress and control the energy of persons. The state apparatus, they argue, exists only to remedy occasional defects in the autonomous order of society. It is a committee of the private world, a

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35. See, e.g., J. BENTHAM, *The Constitutional Code* ("Means of Government"), in 9 THE WORKS OF JEREMY BENTHAM 95-96 (J. Bowring ed. 1843). To put government, that is, legislation, in the hands of an ordinary member of society is to invite partiality in a subject where attention to universal interest is required. Cf. J. BENTHAM, *A Fragment on Government*, in A BENTHAM READER 53-54 (M. Mack ed. 1969).

36. See, e.g., J. LOCKE, *supra* note 19, at §§ 95, 131, 135, 149.

37. Original positivists forbade the distribution of legislative power outside the state apparatus, even as they suppressed its role inside. See J. LOCKE, *supra* note 19, at § 141.

38. See, e.g., F. HAYEK I, *supra* note 9, at 91-93; F. HAYEK II, *supra* note 9, at 71-84.

negligible extension of other less visible means in society for curing the disorders of spontaneous order.<sup>39</sup>

Law, to these anti-positivists, is neither legislation nor enforcement. It is the ratification or restoration of spontaneous arrangements.<sup>40</sup> Law gives preemptory form to a content voluntarily supplied by those subject to law. It forces, or threatens to force, only what persons agree shall be forced. The principles of law, therefore, are coterminous with the principles of contract. Spontaneous order makes up the lack of an objective criterion, which had led to the doctrine of sovereignty in the first place. Contract avoids the necessity of sovereignty.<sup>41</sup>

Hans Kelsen and H.L.A. Hart reacted to the attack of anti-positivists by seeking to accommodate contract within the doctrine of sovereignty.<sup>42</sup> Both derive contract as a distribution of legislative, or rule-making power to private persons outside the state apparatus. Parties to a contract "legislate" the rule by which the sovereign commands them. The anti-positivists thus forced modern positivists, for the first time, to grant private persons a creative role in public life beyond the sterile role as electors they had been assigned in nineteenth century representative democracy.

Neither version of contract, as reflection of spontaneous order or as the distribution of rule-making power to private persons, adequately accounts for the reality of associations. Unless we distort the ordinary principles of contract beyond recognition, contract cannot accomplish the shifting of legal responsibility that marks an association. Even omitting the third term of person, which is

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39. The anti-positivist need not be politically conservative. A notion of autonomous social order appears, for example, in the work of K. Marx. See, e.g., S. AVINERI, *THE SOCIAL AND POLITICAL THOUGHT OF KARL MARX* 86-95 (1968).

40. See, e.g., F. HAYEK I, *supra* note 9, at 94-123.

41. To describe the constructions of Locke and Hobbes as "contract theory" is technically improper. Both account for political society through the legal device of agency, not contract: the sovereign is agent of the persons forming the commonwealth. See T. HOBBS, *supra* note 7, at 132; J. LOCKE, *supra* note 19, at § 89. *Contra* H. WARRENDER, *THE POLITICAL PHILOSOPHY OF HOBBS* (1957) (Warrender finds a pre-existing covenant in the state of nature.). Hobbes says: "This [the formation of the Commonwealth] is more than Consent . . ." T. HOBBS, *supra* note 7, at 131. We see the spectacle in original positivism, which modern positivists and anti-positivists have found difficult to abide, of an agent commanding his principal. Yet this grasps the truth of authority, hence government, more completely than less paradoxical formulations. See generally H. PITKIN, *THE CONCEPT OF REPRESENTATION* 1-37, 209-40 (1967).

42. See note 18 *supra*. The details of their attempts at accommodation, though important in the jurisprudence of the past generation, are beyond the scope of this Article.



judgment, contract neither shifts the attribution of action among persons, nor alters the binding consequence of action thus attributed. Contract leaves unchanged the legal responsibility of persons who are parties to the contract. The terms of contract, it is true, may accomplish a private redistribution of benefits and harms, but they do not change the unit of account according to which the benefits and harms are distributed. Thus, a contract may call for one party to make the other whole, when a stranger to the contract presses a claim against him. But the principles of contract cannot force the stranger, without his consent, to absolve from liability the person he would otherwise attempt to bind.<sup>43</sup> Binding consequence stays where the law puts it, even if the person bound is subsequently made whole by operation of terms of the contract. Also, action that is attributed to one person by law is not then attributed to another, simply because it is taken pursuant to a contract. The attribution of action is unaffected, even if the contract terms give all the benefits of the action to the other party. Contract fails to shift legal responsibility and thus cannot alone construct associations.

One must return to original positivism, to sovereignty as enforcement, to find an adequate account of shifting legal responsibility, hence associations.<sup>44</sup> So long as one fixes on legislation, as do anti-positivists and modern positivists, the unique reality of associations in our legal culture eludes one's grasp. The enmity between spontaneous order and legislation is an illusion, caused by insufficient attention to the struggle of the original positivists to keep legislation and spontaneous order in productive tension. If they are kept apart, the whole of the private world seems to be constructed on the principles of contract, which it is not. The separate principle of associations appears directly as one restores the productive tension of original positivism. To understand associations, one must draw together the power of the state to declare

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43. See RESTATEMENT OF CONTRACTS § 160(4) (1932).

44. When American Realists examined the uncertain fate of rules in enforcement, they asserted no more than Locke would against an ardent Benthamite. Some allowed their criticism of modern positivism to push them into the camp of anti-positivists. Others retained a faith in the social necessity of authority, reworking sovereignty to approximate the system of state and society in original positivism. Thus, they would consider legislation that works without the intervention of an enforcement authority to be self-enforcement by those who obey the legislation. See, e.g., H. HART & A. SACKS, *supra* note 16, at 132-33. Cf. note 19 *supra*.

rules and the energy of persons both to use rules and contribute to their construction.<sup>45</sup> One should not assume that declaring, using, and enforcing rules are separate, even when the institutional structure of the state apparatus seems to require it.<sup>46</sup> The case of associations compels that these fragments of sovereignty be joined.

When sovereignty is restored to enforcement,<sup>47</sup> persons play a role in public life more prominent than the one accorded them by Kelsen or Hart. As recipients of authority to enforce, persons do more than make contracts: they enter into associations. Consequently, the most rudimentary association, the fiduciary relation, is a primary distribution of complete enforcement power to private persons.

## II. FIDUCIARY RELATIONS: THE KERNEL OF ASSOCIATIONS

The claim is that the broad class of fiduciary relations insinuates public sovereignty into private life in the form of associations. Where it appears, the fiduciary relation marks a primary distribution of sovereignty to persons outside the state apparatus. It forms, as well, the most rudimentary instance of association. More complex associations are built upon the fiduciary relation by successive modifications of its elemental structure.

The structure of the fiduciary relation may be described as a shifting of judgment from one person to another. The shifting, not

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45. Cf. Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976). When sovereignty is considered enforcement, then contract appears, not as a delegation of rulemaking power to private persons, but the use of expectations of enforcement in private negotiations. A contract is the exchange of expectations, whose validity is established by the willingness of the state apparatus to ensure that its terms are fulfilled. The sovereign undertakes to enforce terms created by private persons coming to agreement. The content of enforcement is thus determined by persons outside the state apparatus. Nonetheless, the act of enforcement itself is jealously guarded by the sovereign. Private persons dictate the contents of enforcement, but they are neither given, nor do they take to themselves any portion of the enforcement mechanism itself. Using expectations of enforcement in private negotiations is not a complete distribution of enforcement. It neglects to plant the mechanism of enforcement alongside the power to determine its content. Associations make good this neglect.

46. The theoretical premise of this Article has been applied in the field of constitutional law by Professor Lawrence G. Sager. See Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

47. The legal and philosophic literature contains several recent proposals for distributing enforcement *in toto* to private persons. *Private Alternatives to the Judicial Process* (Proceedings of a Seminar Sponsored by the Liberty Fund and Administered by the Law and Economics Center of the U. of Miami School of Law), 8 J. LEGAL STUD. 231 (1979).

a policy of benevolence, creates concern for individual welfare in the fiduciary relation. The persons who enter a fiduciary relation, therefore, are essentially creatures of judgment. Fiduciary relations are an imposition of the authority that requires all legal action to be the product of judgment.

Furthermore, the structure of fiduciary relations impels one to view sovereignty as judgment *en masse*, or enforcement. The sovereign of legislation cannot take care, as it must in the fiduciary relation, that action be prosecuted only by persons capable of exercising judgment. The shifting of judgment forces the fiduciary to exercise judgment in the affairs of another, divorced from personal interest. His exercise of judgment apart from interest admits the fiduciary into the enforcement power of the sovereign.

Finally, the shifting of judgment brings with it an initial shifting of legal responsibility, hence an association of fiduciary with beneficiary.

#### A. *Fiduciary Relations as a Shifting of Judgment*

Anglo-American law has a plethora of relations whose character it calls "fiduciary."<sup>48</sup> The relation of trustee to trust beneficiary is only the most prominent.<sup>49</sup> Agent and principal,<sup>50</sup> director and corporation,<sup>51</sup> guardian and ward<sup>52</sup>—the catalogue of relations with

48. The fiduciary relation never occurs in a vacuum. It is always the character of another relation. See P. FINN, *FIDUCIARY OBLIGATIONS* 8-12 (1977). For general accounts of the American law of fiduciaries, see *RESTATEMENT OF RESTITUTION* §§ 190-201 (1937); 1 A. SCOTT, *THE LAW OF TRUSTS* § 2.5 (3d ed. 1967); Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 521 (1949). For other accounts, see P. FINN, *supra*; D. WATERS, *THE CONSTRUCTIVE TRUST* (1968); Sealy, *The Fiduciary Relationship*, 1962 CAMBRIDGE L.J. 69 (1962); Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 LAW Q. REV. 51 (1981); Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1 (1975). *But see* note 53 *infra*.

None of these accounts, especially Shepherd's review of the premises of fiduciary obligation extant in the literature, mentions the theory of fiduciary obligation presented in this Article: that it arises when one person voluntarily or involuntarily transfers to another person his power to exercise judgment.

49. See *RESTATEMENT (SECOND) OF TRUSTS* § 170, Comment a, subsection (1) (1959); 2 A. SCOTT, *THE LAW OF TRUSTS* § 170 (3d ed. 1967).

50. See *RESTATEMENT (SECOND) OF AGENCY* § 13 (1958); W. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* § 140 (1964). The English authorities are not explicit on the fiduciary character of agents though they in fact impose it. See R. POWELL, *THE LAW OF AGENCY* 246-48, 252 (1952) ("Any agent who consents to act for principal owes a duty of care to his principal . . .").

51. See *RESTATEMENT OF RESTITUTION* § 190, Comment a (1937); 2 H. OLECK, *MODERN CORPORATION LAW* § 959 (1959).

a fiduciary character is huge and various. Since the name "fiduciary" has been applied to such different relations, the fiduciary character either does not exist, or is so simple and indeterminate that it can be adapted to each empirical circumstance.<sup>53</sup>

Such accounts of the fiduciary relation as appear in standard texts are simple. "A fiduciary relationship," Professor Scott writes, "involves a duty on the part of the fiduciary to act for the benefit of the other party to the relation as to matters within the scope of the relation."<sup>54</sup> The texts speak, and in this they are joined by innumerable cases, as if one could comprehend the fiduciary relation entirely as one person acting for the benefit, or protecting the interest of another.<sup>55</sup> Indeed, the occasions upon which the law will find a fiduciary relation support the standard account. A principal authorizes an agent to do what he will not or can not do himself. The trustee manages a stock that the settlor of the trust does not wish the trust beneficiary to manage. In general, the fiduciary relation arises when one person loses or resigns<sup>56</sup> the capacity to pro-

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52. See RESTATEMENT OF RESTITUTION § 190, Comment a; 39 C.J.S. *Guardian & Ward* § 3 (1976).

53. See D. WATERS, *supra* note 48, at 241-64. It is Waters' contention that English law has confused the remedial origin of fiduciary obligations, which is equity, with their effect on substantive legal relations. The result has been a poverty of analytical thinking about fiduciary relations, leaving each case to be determined as fact without the aid of legal precedent. Pointing to the work of Seavey and Scott, Waters does not find an equivalent poverty in America. The remedy enters substantive law, as in the thesis of this Article.

54. 1 A. SCOTT, *THE LAW OF TRUSTS* § 39.

55. See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 170; G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 541 (2d rev. ed. 1978); P. FINN, *supra* note 48, at 9-10; Shepherd, *supra* note 48, at 75.

56. "Loses" and "resigns" mask or simplify an issue one confronts often in a systematic discussion of associations. In the narrow context of fiduciary relations the issue is whether fiduciary obligation is "imposed on" or "undertaken by" persons. The more general issue is whether associations must include elements, such as sovereignty, that cannot be understood adequately in terms of contract. Are all relations persons enter by consent just contract relations? The short answer is, no. Not every voluntary or consensual relation can be or is in fact reduced to contract. Marriage, for example, though it is voluntary, requires the overt intervention of public authority. Even formally contractual relations may contain non-contractual elements. The professional relation of physician to patient is created by contract, but generally governed by the tort of negligence. Many states do not allow contracting parties to limit liability for negligence in the performance of contracts, or, in some states, certain classes of contracts. Section 1-102(3) of the Uniform Commercial Code imposes the obligation of good faith, reasonableness, diligence and care on contracting parties, which they may not disclaim. Contract theorists, to be sure, have attempted to rework all private obligation as contract, express or implied. Tort, property, marriage, and association are, in this view, just branches of the law of contracts. Yet Anglo-American practice has never fully,

vide for his own benefit, to protect his own interest.<sup>57</sup> The texts, in their focus on benefit or interest, seem adequately to reflect legal doctrine.

Yet to pose the point at which the fiduciary relation attaches as a loss or resignation of protection of interest is to look at the matter entirely from the point of view of persons. Doctrine is loath to give "benefit" or "interest" a meaning beyond what each person would give it. Where an economist would say, "People pursue their interests," the lawyer would remark only that what persons do beyond the specific undertakings and constraints of law is their own business. For the purposes of doctrine it is a truism that people pursue their interests. Lawyers care only when persons perform certain legally significant actions. "Benefit," or "interest," means only that persons are free to do as they please, and has no assertive content.<sup>58</sup>

How can it be said, then, that a person has resigned the protection of his interest? Can it mean that the person has resigned the ability to do as he would please? But the ordinary person is forever in the position of not being able to do as he would please, and doctrine does not give the ordinary person the benefit of fiduciary obligations. The resignation of the protection of interest must mean something more than the perspective of persons gives it.

If the resignation is to have legal significance, it must effect actions or conditions with which the law concerns itself. A person's protection of his interest is significant in law only when the inter-

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or even mostly, bent to the view that contract is the proper form of all private obligation. When one enters a relation with a fiduciary character, one buys a package whose contents one cannot entirely control. Yet one has committed the voluntary act of buying the package. See text accompanying notes 9-10, 16, 38-43 *supra*; notes 75-76, 83-89, 90-91 *infra*. See P. FINN, *supra* note 48, at 9, 12-13; Shepherd, *supra* note 48, at 64-68, 75-79. Henceforth, the complex meaning contained in the phrase "loses or resigns" will be indicated by the single word "resigns."

57. The loss or resignation need not encompass the whole of the person. The precise extent of loss or resignation defines the reach of the fiduciary obligation. Thus a partner has a fiduciary obligation to his partners only with respect to the business of the partnership. Several fiduciary relations, such as ward and guardian, extend over the totality of the person of the beneficiary, even beyond what law otherwise includes in its definition of person, as in the occasion one cares for an incompetent or provides for the education of an infant.

58. Professor Finn, in the only comprehensive treatise our tradition possesses on fiduciary obligations, calls the freedom to pursue interest "independence," or "autonomy." P. FINN, *supra* note 48, at 13, 21-23.

est he defines or the manner in which he pursues it qualify as action entailing a binding consequence attributable to the person. Law is concerned with benefit or interest as the source of attributed action.

From the perspective of the legal system, then, resignation of the protection of one's interest signifies only resignation of the ability to adjust attributed action in terms of its binding consequence. If a person loses the ability to adjust his actions, then law will have lost the whole of its effectiveness as a system of control, and fully half its pretension to justice, since by correcting the wrong to the innocent suitor it creates a fresh wrong against the innocent sued. Law cannot tolerate actions taken, where the one to whom the action would be attributed is unable either to judge the binding consequence of the action or implement his judgment. Resignation of the protection of interest is, therefore, from the perspective of law and not the person, a resignation of judgment.

By itself, resignation of protection by one entails no assignment of protection to another. Though it may appear in a given instance that protection is assigned in the moment it is lost, the theory of benefit, or interests, does not compel it. Law may speak of solicitude for beneficiaries, if only to justify its interference in the private ordering of affairs, yet it neglects this solicitude when only the interest of a person is at stake. Fiduciary relations, however, require both steps: resignation of protection and its assignment.

If, for a second time, one adopts the perspective of the legal system instead of the perspective of single persons, then the impetus behind the assignment of resigned protection becomes clear. If the resignation is one of judgment, rendering the person unable either to assess the binding consequence of action or to take action in light of the assessment, the legal system faces an unpalatable choice: whether or not to leave the person without judgment responsible for actions that are not the product of his judgment. Our legal system thematically chooses not to hold a person without judgment responsible for his legally significant actions, for to do so would vitiate the purposes of judgment: to make law a system of control, and to appeal to the sense of justice. But if the legal system neglects to hold such a person responsible, it is in the anomalous position of allowing attributed action without a binding consequence. This too is intolerable. Consequently, the law deprives the

person without judgment of the capacity to act, and assigns the burden of acting on his behalf to another person. This other person, the fiduciary, is considered to possess the judgment lacking in the first. Action and forbearance are attributed to him, and he must suffer their binding consequence.

As confirmation of the hypothesis that judgment is the subject of fiduciary relations, one may observe that the obligation arising from a transfer of judgment may or may not entail a prohibition upon the beneficiary resuming his protection, or taking responsibility once again for the exercise of judgment. Certainly in agency, where the agent bears a fiduciary obligation towards his principal, there is no prohibition against the principal performing tasks assigned to his agent.<sup>59</sup> The trust beneficiary, however, generally may not assume the management of trust property, even for a moment.<sup>60</sup> Though the matter requires careful scrutiny, the distinction between instances where a beneficiary is and is not allowed to resume judgment may be based upon his ability to do so. If the beneficiary truly lacks judgment, so that he cannot be restored to it, then the law would not allow him to resume his own protection. But if he lacks judgment only because he has placed himself in a position where it is impossible to exercise it, as does the settlor of a revocable trust, then he could be restored to judgment when he takes himself out of that position.

The structure of the fiduciary relation, therefore, is shaped by the shifting of judgment from one person to another. Benevolence to the beneficiary is a result of the shifting of judgment. Fiduciary relations are imposed by the authority that requires all legal action to be the product of judgment.

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59. Unless the principal has contracted with his agent not to interfere. See RESTATEMENT (SECOND) OF AGENCY § 434; W. SEAVEY, *supra* note 50, at § 165.

60. Cf. G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 297 (2d ed. 1978). The trust case is quite complex, as befits an advanced form of association in which the fiduciary character is only one element. See Part V, section B *infra*. A trust, where trust beneficiary gets control over actions of the trustee, more nearly resembles an agency. In the classic family trust, which a settlor creates to care for an infant, the trust beneficiary can have no control over the trustee. In either case, the trust beneficiary would normally not directly manage the trust *res*, leaving that to the trustee. The complexity of the trust case derives from the fact that the settlor, not public authority, determines the precise relationship of trust beneficiary to trustee. Hence it is the settlor's judgment as to who will or can manage that controls in the first instance.

B. *Fiduciary Relations as a Distribution of Sovereignty*

The discussion of fiduciary obligation has from the beginning implicated sovereignty. The law shifts judgment, it is claimed, more to protect the interests of the legal system, holding responsible only those who can be responsible, than to enhance the welfare of the helpless beneficiary, even though law prefers to speak of the matter as benevolence. The facts, however, do not sustain this interpretation. The irruption of fiduciary obligations into private affairs protects the interest and stability of the legal system. Even so, the public law interpretation of fiduciary relations would hardly be convincing, unless it could demonstrate that the interests of the legal system contribute decisively to the structure of fiduciary relations. This demonstration reveals, in turn, the nature of sovereignty as enforcement and the participation of fiduciaries in enforcement.

When judgment shifts, it changes. The fiduciary's judgment serves the legal system first, and the beneficiary second. This transformation occurs for two reasons, of which the second is more important.

First, the fiduciary could hardly know what actions to take in order to protect the interest of his beneficiary simply by consulting his own conception of interest, and it would be useless to consult the beneficiary, since the premise of the relation is that the beneficiary has lost or resigned his power to be consulted. The law treats a person protecting his own interest as one who necessarily exercises judgment at once defining his interest and deciding the best way to protect it. It is essential to our concept of person that the interest protected be the person's own. Otherwise, judgment is unreliable. It is not simply that one person will not look out for another's interest (the assumption that he will not cannot in practice be maintained): even the most zealous protection of another's interest is foiled by the impossibility of one person defining interest for another person. To do so would violate the person of the other, which requires that he define his own interest. Fiduciary relations contemplate precisely what the person abhors: interest protected by another. For this reason alone, the interest protected by the fiduciary must not be the interest of the beneficiary, but rather an interest imputed to him by public authority. Only thus can the person of the beneficiary survive in the fiduciary relation, even if it survives only as a fiction.



The second reason why shifting judgment transmutes it follows immediately upon the first. The fiduciary protects an interest imputed to the beneficiary by public authority. He lies accountable to the public authority for protecting the imputed interest. He is not free to define and protect the interest of the other as he is free to define and protect his own. What may be witnessed in fiduciary relations is the creation of a second personality in the fiduciary: it is a public personality, for which he serves as incidental holder, rather than augmentation of his own private personality. The interest protected by the fiduciary, the judgment he exercises and executes, is thus the interest that belongs to his second, public personality. Both beneficiary and fiduciary lose the right of private judgment, of idiosyncratic benefit. The beneficiary must accept the judgment following upon imputed interest, and the fiduciary must prosecute it.

These simple considerations reveal that public authority intrudes in private affairs through the very structure of the fiduciary relation. The interest forming the subject of the relation is an interest belonging to neither participant, but is imputed by public authority, and the judgment to be exercised is a judgment foreign to both beneficiary and fiduciary, absent public authority. Yet, one may show more than that public authority intrudes into private affairs. By examining the content of the imputed interest, it is possible to demonstrate that the fiduciary is given and exercises a portion of sovereignty, construed as enforcement.

The fiduciary is burdened with two obligations, based on the imputed interest he must protect. The first is the obligation of loyalty, a prohibition against the fiduciary taking his own interest into account when he prosecutes the interest imputed by public authority. For example, the obligation of loyalty forbids the fiduciary to undertake any action that affects the distribution to him of benefits or harms.<sup>61</sup>

The second obligation is at once one that ought to infuse the fiduciary's action and a standard by which it is judged. The fiduciary is admonished to conduct the affairs of the beneficiary that are within his power as a reasonably prudent man would conduct his own affairs. The admonition speaks as if the fiduciary ought to put

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61. See generally RESTATEMENT (SECOND) OF TRUSTS § 170; 2 A. SCOTT, THE LAW OF TRUSTS § 170.

himself in the mind of a person of a certain temper conducting his affairs. Its language preserves the pretense that caring for another, which in reality is the task of the fiduciary, is the ordinary action of a single person prosecuting his own interest.

But the single person of the fiduciary relation may not prosecute his interest as he pleases: he must be reasonably prudent.<sup>62</sup> To be prudent is to treat oneself as another in one's charge. By elaborate circumlocution, preserving the pretense of single persons, fiduciary relations call upon one to exercise reasonable care for another. Even when it is admitted, however, that fiduciary relations require caring for another, the pretense of single persons may be and ordinarily is preserved. Those whose duty it is to maintain and develop the Anglo-American legal tradition show considerable reluctance in according significance to an attitude or temper, such as caring for another.<sup>63</sup> Their hope in any circumstance where an attitude or temper is at issue is to find an objective correlative by which the presence or absence of the temper might definitively be ascertained. Then temper itself would be eliminated from consideration, since it is replaced by a search for the objective correlative. Thus, for example, wanton disregard or recklessness is usually determined from an examination of the actual behavior of the one charged with that temper. The temper is inferred from actual behavior, and not examined in its own right. By charging a defendant with wanton disregard or recklessness one does not, in fact, accuse him of possessing a certain temper, but rather of having behaved in a way that common experience would attribute to that temper.<sup>64</sup>

Similarly, the hope of those responsible for its administration is that the temper of the fiduciary relation be reduced to objective correlatives that would, as a matter of law, eliminate temper from the relation. Caring for another, like other standards, could then be enforced by examining the actual behavior of the fiduciary, regardless of his temper in dealing with the beneficiary. If the fiduciary relation is reduced from a temper of one person towards an-

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62. See RESTATEMENT (SECOND) OF TRUSTS § 174; 2 A. SCOTT, *THE LAW OF TRUSTS* § 174.

63. See Arnold, *Accident, Mistake, and Rules of Liability in the Fourteenth Century Law of Torts*, 128 U. PENN. L. REV. 361, 374-78 (1979).

64. See O. HOLMES, JR., *THE COMMON LAW* 107-13 (1881). Cf. Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 644 (1917); Fuller, *Human Interaction in the Law*, 14 AM. J. JURIS. 1, 34 (1969).

other to the actual behavior of a single person, then law will have rid itself of the one relation that intensely threatens its preference for dealing with single persons.

The push to reduce the subjective temper of caring to objective standards, thus to preserve the preference for single persons, has succeeded in several varieties of fiduciary relation, where the legal and business contexts will bear it.<sup>65</sup> Nevertheless, the guardians of law have not been able to eradicate the subjective element in fiduciary relations, for two reasons.

First, many legal and business contexts in which fiduciary relations are found simply will not bear formulation through standards. The common law response to being unable to formulate standards, throwing the determination to a jury, only exacerbates the problem, since juries must be instructed and their verdicts controlled. Moreover, many fiduciary relations are regulated by proceedings in which juries are not used for fact-finding, such as equity. The fact-finding judge must reason his way through evidence without the benefit of objective standards. Second, even when objective standards have been formulated, the strong sense remains that the faithless fiduciary has committed a subjective violation, not simply that his behavior retrospectively constitutes a breach of objective standards. The faithless fiduciary has failed in a trust; he has breached a fiduciary obligation. The ordinary citizen, for the most part, accepts the preference of his legal guardians for thinking about wrongs as the breach of objective standards. Thus, the community today does not necessarily consider a breacher of contracts or perpetrator of negligence to be bad, but one who in retrospect has breached a standard and must pay for it. Even where attitude forms an element of a tort, such as assault, the stigma of evil temper may be erased by paying punitive damages.

Neither the ordinary citizen, nor his legal guardians, have entirely accomplished or accepted the reduction of the fiduciary temper of care to objective standards. A clear residuum of attitude or temper governs all consideration of fiduciary relations. The fiduciary relation is unique in its resistance to the blandishments of objectivity. It has resisted for two reasons.

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65. Cf. D. WATERS, *supra* note 48, at 258-64. See generally R. Niles, A Contemporary View of Liability for Breach of Trust (The Fifth Mortimer H. Hess Memorial Lecture delivered before the Association of the Bar of the City of New York 1974).

First, objective standards suffice, coupled with retrospective judgment and compensation, only because the legal system assumes the ability and desire of the wronged person to bring his injury to the attention of the authorities, who will correct it. If the wronged person is either unable or unwilling to do so, out of ignorance, fear, or other circumstances considered unacceptable in our legal system, then the assumption breaks down, and objective standards, coupled with retrospective compensation, cease adequately to perform the task of ensuring justice in private transactions. But our legal system finds fiduciary relations in precisely those circumstances where the wronged person would be either unable or unwilling to apprise the authorities. The temper of the person entrusted with a fiduciary obligation is then critical and irreducible, since protection of the beneficiary's interest is given to a person who is likely to be the only one either to know that the beneficiary has been wronged or to do something about it. If the attitude of the fiduciary is adverse to the interest of his beneficiary, the entire structure of shifting protection of interest must collapse, unaided by the salutary operation of objective standards and retrospective compensation.

The temper of care the law requires of a fiduciary may be compared to the duty of care ordinary persons owe, one to another, the breach of which constitutes an element of the tort of negligence. The care in negligence is hardly an attitude or temper. The duty of care tends to be owed not to a given individual, but to broad classes of persons in similar circumstances. Yet the temper of care that should possess a fiduciary is directed towards a particular person, who means more to the fiduciary than a nexus of circumstances. Furthermore, law has no interest in the attitude or temper of the one who owes the duty of care. It is simply an objective standard, a judgment of offending behavior after it has occurred, that awards compensation and renders justice retrospectively between tortfeasor and victim. Even more to the point, law does not punish a breach of the duty of care unless it results in injury. There is no "negligence in the air."<sup>66</sup> One is free to be negligent so long as one is willing to assume the risk of injury. Yet the law does take what care it can to ensure that the fiduciary acts in the preferred temper. It does, for example, as part of the duty of

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66. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928).

loyalty, forbid the fiduciary, as a general rule, from trading in the subject matter of the relation, so that his judgment, his temper of care, will not be clouded by self interest.<sup>67</sup>

The almost unique interest shown by law and common opinion in the temper of the fiduciary, in the prospect of misdeed rather than in the retrospective correction of it by compensation, calls to mind the condition of a public official. No one cares to know that the malfeasant official can one day be brought to account. Retrospective justice is not the coin in which government and administration commend themselves to legitimacy.<sup>68</sup> In the ideology of the Anglo-American system, trust and caring for the public business are the measures of qualification for office. The rationale of public life does not include resort to the protection of litigation as a sufficient or desirable method of controlling official behavior. Much greater stock is put in the careful selection of trustworthy personnel. Indeed, the temper of the official who conducts it is perhaps the most telling recommendation of legitimacy for a course of action.

The family resemblance of fiduciary relations to public office raises the second reason why the temper of care in fiduciary relations does not give way entirely to the formulation of objective standards and the rendering of retrospective compensation on the basis of those standards. The public authority relies on the fiduciary to exercise judgment on behalf of his beneficiary and to implement the judgment. Just as the public authority creates contract through its willingness to enforce promises,<sup>69</sup> it creates fiduciary relations by its decision to care for the interests of one who has lost or resigned the capacity for judgment in the prosecution of his affairs. The reason of state for this decision may, in fact, be the preference of the public authority that action be taken only by one who can be accountable for action. The private consequence of the decision is that the state undertakes responsibility for the welfare of certain of its citizens. The fiduciary plays a crucial role in the undertaking, for it is to him that the public authority delegates the initial responsibility of putting into operation, thus executing or enforcing, a decision of the state. He may no more be held to the

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67. Qualifications to this statement are set forth in 2 A. SCOTT, *THE LAW OF TRUSTS* §§ 170.10, 170.12.

68. See, e.g., J. LOCKE, *supra* note 19, at §§ 136, 161-64.

69. See note 45 *supra*.

test of objective standards than the ordinary public official, vast areas of whose activities must be judged prospectively according to the temper of selfless loyalty and competence, not retrospectively in a restricting attempt to construct objective standards. The public official and the fiduciary have in common that they must be free to exercise competence, lest either be rendered incapable of prosecuting the business entrusted to him. The fiduciary ought to be in no different position vis-a-vis public authority than a subordinate official: he is entrusted with a task by the enforcing authority, to whom he must eventually account in terms that go beyond objective standards.<sup>70</sup>

The fiduciary relation, then, is the private law structure that is formed when the sovereign as enforcer delegates the task of caring for the substantive welfare of certain persons to other persons who are in an especially favorable position to assume the delegation. It is a matter of efficiency. The state would not perform the task itself. In the first place, it is not equipped to do so. In the second, numerous and powerful voices in our tradition stand by the proposition that the state ought not to be involved in caring for the substantive welfare of its citizens.<sup>71</sup> If private persons can be enlisted to do the job, then the state will have accomplished its goal without offending a cherished self-image. The law can perform many tasks in the disguise of justice that would not be tolerated as naked policy. Fiduciary obligations present just such a task. And finally, who better than the direct source of threat to the welfare of a citizen may be enlisted to protect it?

### C. *Fiduciary Relations as Associations*

To conclude the discussion of fiduciary relations, it is well to consider the paucity of changes they engender in the subordinate elements of person: Attribution of action and binding consequence that flows from the attribution of action.

Here the multiplicity of fiduciary relations would seem to pose an acute problem. So far, one could account for differences among fiduciary relations by reference either to the thoroughness with which the beneficiary is deprived of judgment, or to the amenabil-

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70. Professor Finn sees the resemblance of fiduciary relation to office as a central, thematic character of fiduciary obligation. See P. FINN, *supra* note 48, at 3, 8-14.

71. See, e.g., 2 F. HAYEK, *LAW, LEGISLATION AND LIBERTY* (1976).

ity of the fiduciary's obligation to formulation in objective standards. These are differences of degree, not kind. But differences of kind appear in the subordinate elements of person. For example, in certain relations possessing a fiduciary character the beneficiary is not personally bound by actions of his fiduciary, beyond their effect on property of the beneficiary.<sup>72</sup> Yet in the relation between principal and agent, the principal, as beneficiary, is bound by the authorized actions of his agent, who is a fiduciary.<sup>73</sup> Agency, as a subset of fiduciary relations, marks a second stage in the construction of associations. Agency is a fiduciary relation altered by the addition of one or more qualities to the primitive fiduciary character. The difference in shifting of accounts between primitive fiduciary relation and agency may be characterized as a progress from simpler to more complex associations. Consequently, the set of primitive fiduciary relations displays a uniform shifting of accounts differing only from the shifting of accounts in higher forms of association, such as agency. The multiplicity of fiduciary relations in the shifting of accounts is thus only apparent.

Where the primitive fiduciary relation is found, the fiduciary has the right to take action affecting the property (and actions or fate) of the beneficiary. Contract also acknowledges this right, as, for example, in a contract for construction on land. However, the decision how to affect property in contract is a mutual decision, taken prior to initiation of the action. In fiduciary relations, the decision is taken by fiduciary alone (in concert with oversight by the public authority) after setting terms in the relation. Fiduciary relations thus depart from a settled presumption of our law, that one may not affect another's property without the explicit, prior, and specific permission of the other.<sup>74</sup> The parameters within which the fiduciary has a license to affect property of his beneficiary are determined by many factors, peculiar to the setting of each fiduciary relation. Among the most prominent is, for example, whether title to the property has been vested in the fiduciary or remains in the beneficiary.

Actions of the fiduciary do not personally bind the beneficiary, though they affect property of his subject to the relation. Thus ac-

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72. In the trust, for example. See RESTATEMENT (SECOND) OF TRUSTS § 274.

73. See note 78 *infra*.

74. See RESTATEMENT (SECOND) OF TORTS §§ 158, 217 (1965).

tions of the fiduciary are not attributed to the beneficiary, though taken at the instance of his protection. Yet, the fiduciary is bound as a private person by his actions as fiduciary. The fiduciary relation provides no insulation between the public personality created in the fiduciary and his private personality. This contrasts sharply with more advanced forms of association, in which insulation is provided between the private personality of the participant and the personality created by his participation. In the primitive fiduciary relation, the fiduciary can look to no one for the legal consequences of his actions as fiduciary. He cannot look to the public authority, which regulates him, and certainly not to the beneficiary, for whose benefit, but not in whose name, the fiduciary acts. The fiduciary is subjected to personal liability to fulfill the enforcement vision of person: that one who exercises judgment be responsible for its consequence.

The primitive fiduciary relation provides the scarcest beginning in the shifting of the elements of person. The fiduciary is licensed to affect property of the beneficiary in limited ways, but cannot, for example, affect transfer of title in the property, unless title has first been transferred to him, as in the trust. The fiduciary is bound by actions he takes to affect the property, as if they were taken to affect property of his own. The beneficiary must suffer the consequences of the fiduciary's actions, but only to the extent of property subject to the relation. He is not personally bound. The first step in the construction of associations out of sovereignty entails nothing more than one person acting to affect the interest of another, and being bound as if he were acting on his own account.

### III. AGENCY: THE ARROGATION OF AUTHORITY

Fiduciary relations are the material from which all associations are constructed. They provide the foundation for a sequence unique in our law, running from fiduciary relations to agency, partnership, joint stock companies, trusts, and corporations. So agency is constructed from the primitive fiduciary character by its fusion with a novel quality; partnership is similarly constructed from agency, and so on.<sup>75</sup>

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75. The temporal priority of elements in the sequence has no necessary bearing on its logical order. Agency precedes partnership in logic, but not necessarily in time. The sequence is the picture of a single moment, the middle part of the twentieth century, which



Fiduciary relations must be credited with two accomplishments. First, they are the vehicle by which a portion of sovereignty is distributed to private persons. Second, they constitute the most rudimentary association, licensing one person to affect the interest of another person, who is forbidden, because he is incapable, to affect them on his own.

Yet fiduciary relations leave much to be accomplished in constructing associations. They fail to treat the beneficiary as a person necessarily active in the relation. Nor do they impose themselves on strangers to the relation (except to nullify their dealings with the beneficiary, which could be premised on other grounds, such as infancy). They fail to shift either subordinate element in the person: attribution of action, or binding consequence. They have no attribute forming an interior of the association, such as association property, or methods of group decision. All these remain to be accomplished in higher forms of association.

These matters can be accomplished only when both participants in the rudimentary association take into their hands the portion of sovereignty distributed in primitive fiduciary relations to only one of them. Fiduciary obligation (if not the relation from which the obligation is said to arise) is thrust upon private persons to serve a purpose of the state apparatus.<sup>76</sup> In order for fiduciary relations to flower into forms of association exhibiting the omitted matters, private persons, beneficiaries in particular, must bend them to their own purposes. The private world must capture the fiduciary relation, transforming it into an economic facility. Agency, as a fiduciary relation in which both participants exercise a portion of sovereignty, is the vehicle of capture.<sup>77</sup>

Even as private persons arrogate a portion of sovereignty, however, public authority reasserts itself in fresh interventions, making possible the evolution of higher forms of association. The very highest association, accordingly, is the product of a series of mutual exploitations and cooperation between state and private

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possesses a broad and settled body of doctrine concerning the several associations. Yet the history of the doctrines of association, with the exception of fiduciary relations, has now run its course; so we are privileged to observe priority in the sequence of associations.

76. See note 56 *supra*.

77. Fiduciary relations, of course, may directly be used by private persons as an economic facility. Agency, however, presents the initial formal institutional recognition that private persons have a say in determining the content of fiduciary obligation.

persons.

Agency supplies three closely related attributes of association lacking in the fiduciary relation. First, it produces a shifting of binding consequence. Second, it requires activity from both persons in the relation. Third, it imposes itself on strangers to the relation. These three attributes are brought together in the doctrine of authority.

#### A. *Contribution of Agency to the Construction of Associations*

Agency is founded upon the primitive fiduciary relation, but surpasses it in the following respect: whereas actions of the mere fiduciary can never bind the beneficiary, the agent binds his principal if he has acted within his authority. The power to bind transforms the mere fiduciary into an agent, and the beneficiary into a principal. In general, an agent has power to bind his principal, either in contract or tort, by taking actions authorized by the principal that bind the agent apart from his relation to the principal.<sup>78</sup> Thus an agent who makes a contract for his principal would also be bound, unless he makes clear to the person wishing to bind him that he acts for another, not himself.<sup>79</sup> Whether he discloses the fact of his agency or not, the agent is bound by his torts.<sup>80</sup> Thus, agency produces a sharing, rather than a shifting, of binding consequence, both in contract and in tort.

The second attribute contributed by agency follows directly from the first. In order to be bound by the action of his agent, the principal must have authorized him to undertake it. He must do precisely what a beneficiary may not do: take action, if only the action of authorizing. But more than this, the principal retains power to act in place of his agent. Unlike the primitive fiduciary relation, agency does not force a principal to sacrifice any element of his personality to obtain the benefits of the relation.<sup>81</sup> Whereas

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78. For contract, see RESTATEMENT (SECOND) OF AGENCY § 140; R. POWELL, *supra* note 50, at 125; W. SEAVEY, *supra* note 50, at §§ 55-56. For tort, see RESTATEMENT (SECOND) OF AGENCY § 212; R. POWELL, *supra* note 50, at 156-58; W. SEAVEY, *supra* note 50, at § 91.

79. See RESTATEMENT (SECOND) OF AGENCY §§ 320-27; R. POWELL, *supra* note 50, at 204-06; W. SEAVEY, *supra* note 50, at § 123.

80. See RESTATEMENT (SECOND) OF AGENCY § 343; R. POWELL, *supra* note 50, at 225-26; W. SEAVEY, *supra* note 50, at § 129.

81. The principal has the "right to control" the conduct of his agent. See RESTATEMENT (SECOND) OF AGENCY § 14; R. POWELL, *supra* note 50, at 14; W. SEAVEY, *supra* note 50, at § 3E. If the principal exercises a high degree of control over his agent, particularly his physi-

the beneficiary of a fiduciary obligation is barred from acting precisely where it is incumbent upon the fiduciary to act, a principal is not barred, even though he remains beneficiary of the agent. Retention of personality by the principal, a beneficiary, is a paradox in fiduciary relations, where sacrifice of personality is a prerequisite. Yet, it is precisely on this paradox that agency takes its stand as a higher association. Moreover, correlating the shift of binding consequence with retention of the power to act accords with the thematic preference of enforcement, putting responsibility for action on one whose judgment may be said to have caused the action.

The third attribute also follows from the first. The power to bind makes the presence of the association legally significant to persons outside the association. The fiduciary relation, in contrast, has no significance to those who do not participate in it. The fiduciary relation creates an interest distinct from the interest of any single person. Yet, the distinct interest has no legal effect on the outside world. Indeed, it does not appear as such to the outside world; it is distinct only in contemplation of the participants. Thus, the beneficiary knows that the interest protected is not strictly his own interest, and the fiduciary knows that actions he takes in protecting it are not strictly his own actions, but the legal consequence of his duty to the beneficiary. The knowledge of beneficiary and fiduciary does not, however, inform persons outside the relation, and has no practical effect on them. From the perspective of outsiders, the line between the natural personality of the fiduciary and the personality he takes from the fiduciary relation is but weakly drawn. And the beneficiary is a beneficiary precisely because either brute fact or the law has rendered him incapable of protecting his interest and performing actions on his own. Therefore, outsiders need not be concerned with him.

### B. *The Presence of Authority*

Agency is the simplest instance in which an association affects the legal relations of non-participants. The effect takes place precisely because the principal retains his power to act at the same time his agent may perform binding actions on his behalf. If a person outside deals directly with the principal, then the agency rela-

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cal movements, then he is master, and the agent is a servant. See RESTATEMENT (SECOND) OF AGENCY § 220; R. POWELL, *supra* note 50, at 14-16; W. SEAVEY, *supra* note 50, at § 6A.

tion is beside the point. The principal appears in his natural personality. It is only when a person deals with an agent in order to bind the principal that he must be concerned with the agency relation between them. The third person wishes to bind the one by dealing with the other. If he dealt with the agent to bind only him and not the principal, then once again the agency relation would be beside the point. The agency relation serves the purpose of the principal wishing to be bound and the third person intending to bind.

The power of an agent to bind his principal by dealing with persons outside the relation is treated under the rubric "authority."<sup>82</sup> Actions of an agent bind the principal only because law recognizes the authority of the agent to do so. Neither outside person nor principal may look to each other for liability unless the person through whom they deal, the agent, has been given the authority of the principal. Beside fiduciary obligation and contract, agency presents authority, a third mode of relation between persons. Two points should be made about authority.

First, authority provides a focus for the three attributes of association contributed by agency. Giving authority is the action a principal must take in order to participate in the relation. It is the channel through which binding consequence flows from agent to principal. It is the element of the relation that makes it a reality to outside persons. All three novel attributes emanate from authority.

Second, authority resolves the paradox agency builds into the fiduciary relation. Authority is the substance of the fiduciary obligation when the beneficiary does what he may not do by retaining personality. In order to appreciate the role of authority in resolving the paradox of an active beneficiary, it is necessary to examine the special character of authority, distinguishing it, on the one hand, from the non-associational relation of contract and, on the other, from the primitive fiduciary relation.

The first and most striking character of authority is that in order for it to be effective its use need not be disclosed. Thus, the undisclosed principal may hold the outside person liable on a contract made with his agent (unless the contract excludes an undisclosed principal). Similarly, the outside person may hold the undis-

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82. See RESTATEMENT (SECOND) OF AGENCY §§ 32-48; R. POWELL, *supra* note 50, at 33-35; W. SEAVEY, *supra* note 50, at § 8B.

closed principal liable, should he discover him.<sup>83</sup> The authority in either case does not show itself in the negotiation between outside person and agent. For this reason, Seavey and others have concluded that authority is a principal that cannot be cabined by contract.<sup>84</sup> The contract doctrine of privity, after all, demands that liability attach only to one who is a party to the contract, either by overt participation in the act of agreement or by formal assignment according to its terms.<sup>85</sup>

The second distinguishing character of authority is that it does not of necessity bind the agent to take specified actions.<sup>86</sup> Of course, the agent may agree to take certain actions. But, in general, the agent is empowered, not compelled. Quite unlike contract, authority retains the character of fiduciary relations, in that it may, if the principal so desires, range over the entire ambit of his personality. Authority can command the exercise of judgment as well as the accomplishment of certain actions. Thus, "buy potatoes if the price falls below \$10 per bushel!" is a specific command to the agent to buy potatoes below a certain price. Yet, authority need not command the agent to do something so specific. "Buy potatoes if in your judgment the market will rise!" or "manage my investment in potatoes!" more nearly corresponds to what authority can accomplish.

The fact persons can enter into a contract to manage, for example, does not threaten this distinction. Certain contracts do appear to violate the contract prohibition against vagueness.<sup>87</sup> By entering upon a contract to manage, the party has not undertaken to perform this or that specific act; rather, he has taken on the status of a manager. Contract can admit one into a legal relation that is not strictly comprehensible in contract. Thus, agency relations

83. See RESTATEMENT (SECOND) OF AGENCY § 186; R. POWELL, *supra* note 50, at 126-33; W. SEAVEY, *supra* note 50, at §§ 62, 111-16.

84. Seavey, *The Rationale of Agency*, 29 YALE L.J. 859 (1920). See also R. POWELL, *supra* note 50, at 125; Lewis, *The Liability of the Undisclosed Principal in Contract*, 9 COLUM. L. REV. 116, 135 (1909). Seavey attacks those, such as Holmes, who maintain that rules of agency are a product of the fiction of identity between agent and principal, worked on by common sense and policy. Holmes' vision reduces agency to contract. See Holmes, *The History of Agency*, 4 HARV. L. REV. 345 (1891) and 5 HARV. L. REV. 1 (1891), reprinted in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY at 368 (1909).

85. See generally 1 A. CORBIN, CORBIN ON CONTRACTS § 124 (1963). But see 6 *id.* § 1285.

86. See RESTATEMENT (SECOND) OF AGENCY § 12; R. POWELL, *supra* note 50, at 245-46; W. SEAVEY, *supra* note 50, at § 8A. But see note 81 *supra*.

87. See generally 1 A. CORBIN, CORBIN ON CONTRACTS § 95.

may be formed by contract, but agency itself is not contract.<sup>88</sup>

Moreover, authority can be created by any manifestation of consent, of which contract is only one. As an empowerment, authority is conferred by donation. It need not be undertaken as a duty. The agent may accept the authority merely by using it, and in order for the authority to be effective he need receive nothing in return for its use.<sup>89</sup> He is a party to the contract between an outside person and principal only if he makes himself a party.

Authority distinguishes agency from fiduciary obligation precisely on the ground that it is created by consent. The fiduciary relation is a product of necessity, and consent has no bearing on whether the court institution or legal profession, generally public authority, imposes it on the dealings of two private parties. No person willingly and irredeemably puts himself at the mercy of another, but he will often ask another to strengthen him, to act on his behalf. In fiduciary relations the public authority intervenes in the dealings of private persons to create an interest and require certain actions. In agency, private persons take back into their own hands a portion of public authority. They take it back precisely as authority. Now *they* create the interest and require the actions, not the state. Thus the principal, the beneficiary, decides what the agent, the fiduciary, may do for him, and the agent, unless he has bound himself by contract, decides whether he will use the authority thus conferred. The fiduciary relation originates in weakness, and marks public authority coming to the aid of a private person. In agency the private person creates his own fiduciaries, even as he is in a position of strength. The fiduciary relation becomes an instrument of private power.

### C. *The Appearance of Process: Inherent Authority*

Resolving the paradox of agency through authority creates what appears to be an anomaly in the effort of constructing associations. The fiduciary relation produces a separate interest, imposed by the public authority upon natural persons. Even so, the separate interest of the fiduciary relation disappears in agency. One should not have expected a higher form of association, the agency relation, to abandon a key indicium of the created legal

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88. See note 84 *supra*.

89. See RESTATEMENT (SECOND) OF AGENCY §§ 15-16; W. SEAVEY, *supra* note 50, at § 18.

person, an interest apart from the interest of any natural person. This separate interest appears in the fiduciary relation as one ascribed to the beneficiary by public authority, only to disappear in agency in favor of a donation of authority by one natural person to the other participating in the relation.

It is not surprising, however, that the interest ascribed to the beneficiary disappears in agency. The separate interest produced in the fiduciary relation is clearly the interest of a natural person. It makes no difference that the content of the interest is defined, by default, in general terms. The standard of reasonable prudence is a standard fitting natural persons. But it is inappropriate for the conduct of affairs through advanced forms of association in a decentralized economy. Law cannot constrain them to the standard of reasonable prudence. Neither can they be allowed the absolute freedom of natural persons. The actions taken in association are the decision of no one person, but of several members of the association. If the association is not to dissolve into a multitude of single persons, then the decisions of its members must be constrained. Yet, it is a problem how constraint may be effected, since the public authority in Anglo-American law most often declines to determine whether a particular decision is proper.<sup>90</sup>

The solution in our law of associations is to regulate the *process* of making decisions in associations higher than the fiduciary relation, in which the *content* of decisions is constrained. This statement is necessarily abstract, for the precise nature of "process" differs from association to association. Thus "process" in agency is not the same as process in succeeding forms of association. Constraint becomes farther removed from content in the progress from agency to corporation.

Agency displays only the rudiments of process, and only since the first quarter of the twentieth century. It maintains an ambivalent position in the emergence of process. Agency has in it control of the content of decisions, for the principal donates a particular authority to his agent. But agency also controls process, which now appears for the first time.

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90. See generally R. HALE, *FREEDOM THROUGH LAW* (1952); 2 M. WEBER, *ECONOMY AND SOCIETY* 729-61 (G. Roth & C. Wittich eds. 1968). In American corporate law, the reluctance of courts to interfere in particular decisions of management is expressed in the so-called "business judgment rule." See, e.g., *Auerbach v. Bennett*, 47 N.Y.2d 619, 631; 419 N.Y.S.2d 920, 926; 393 N.E.2d 994, 1001 (1979).

Control of content appears first in the fiduciary relation as an assertion of power by public authority. Control passes into private hands in agency, the next higher form of association. One sees the same sequence in the control of process. It appears first in agency as an assertion of power by public authority, only to pass into private hands in partnership. Control of process first appears in the doctrine of inherent authority. This doctrine was recognized only late in the history of the law of agency, when Judge Hand formally distinguished it from apparent authority.<sup>91</sup> The doctrine had been used, but not named, as early as 1869 in *Butler v. Maples*.<sup>92</sup>

Apparent authority charges a principal with liability for an action of his unauthorized agent, when conduct by the principal causes a third person reasonably to believe that the agent possesses authority for the action.<sup>93</sup> Apparent authority is premised on the dual character of authority, that it creates a relation not only between agent and principal, but also between those two and the outside world. The principal creates apparent authority.

Yet in certain cases courts hold a principal liable for the unauthorized action of his agent even when the principal has done nothing to create the appearance of authority, indeed, when the agent has acted contrary to instructions. The fault of the principal in these cases lies in his absence of activity, in not "holding out to the world"<sup>94</sup> the instructions to his agent. Thus in certain cases the principal is held to a requirement that he make known his donation of authority not only to the agent, but also to the world. In these cases the agent is said to possess inherent authority, or inherent agency power.<sup>95</sup>

Inherent authority may in general be found when the principal places his agent in a position that in practice or custom owns the exercise of certain powers.<sup>96</sup> In such cases principal, not outside

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91. *Kidd v. Thomas A. Edison, Inc.*, 239 F. 405 (S.D.N.Y.), *aff'd*, 242 F. 923 (2d Cir. 1917).

92. 76 U.S. (9 Wall.) 766 (1869). See also W. SEAVEY, *supra* note 50, at § 8F.

93. See RESTATEMENT (SECOND) OF AGENCY § 27; W. SEAVEY, *supra* note 50, at § 8D. The English authorities recognize apparent authority, but classify it under "power," in which law enables an agent to act in excess of actually donated authority. See, e.g., R. POWELL, *supra* note 50, at 33-34.

94. See W. SEAVEY, *supra* note 50, at § 59B.

95. See RESTATEMENT (SECOND) OF AGENCY § 8A; W. SEAVEY, *supra* note 50, at § 8F. The English authorities give the name "usual authority" to inherent agency power. See, e.g., R. POWELL, *supra* note 50, at 38-42.

96. Certain authorities follow Holmes on this point, who otherwise disagree with him.



person, must assume the risk of the agent acting in a customary manner, even though he has been endowed with less than customary authority. If the principal wishes to limit this customary authority, he must successfully inform the world of the limitation. Inherent authority extends actual authority as far as the authority customarily possessed by one in the position of the agent. Thus, inherent authority accords binding validity to an action, when it is taken by one who occupies a certain position. It is a first step towards accomplishing process: an action receives binding validity not because it has in terms been authorized, but because it is taken by one who occupies a position.

To be sure, the process of inherent authority may not wholly be distinguished from content. The position in which the principal places his agent is entirely defined by the decisions taken by those who occupy the position. The position does not stand apart from its collection of decisions. Indeed, the collection of decisions defining the reach of inherent authority does not appear significantly different from the collection of decisions created in the ordinary grant of authority. Thus, "you may have my authority to purchase a gross of pencils," defines a collection of decisions, all within the power of the agent, regarding, for example, color and hardness of the lead, manufacturer and price, and so on. Similarly, "you have authority to manage my investment in potatoes," defines a collection of decisions such as a manager of investments would make. Both authorizations set a boundary of permissible decisions according to the criterion of practice or custom. It would seem impossible to distinguish one from the other.

Yet a distinction between ordinary and inherent authority marks the latter as a step towards process. To fulfill his authority to purchase pencils, the agent must make several subsidiary decisions. Each follows directly upon the general decision to purchase pencils and would not be required in the absence of a general decision. The subsidiary decisions have no autonomous significance. They are strictly moments in the entire decision underlying the pursuit of the authority.

Managing an investment presents a different case. One does not do it in the way one purchases a gross of pencils. Once he de-

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See note 84 *supra*. They ascribe the finding of inherent authority to pure decisions of policy. See, e.g., F. MECHEM, *OUTLINES OF THE LAW OF AGENCY* § 111 (P. Mechem ed. 1952).

cides on the matter, a person may hold purchasing a gross of pencils as a purpose, so that accomplishing it constitutes legal action. A person could never hold managing an investment as an immediate purpose. Therefore, accomplishing it cannot directly constitute legal action. Fiduciary obligation permits the sovereign to hold persons liable for duties that in contract would be impermissibly vague or indeterminate.

Managing an investment is better understood as a system of discrete purposes emanating from the collection of subsidiary decisions. None of the subsidiary decisions is taken with a thing so vague as management directly in view. Each subsidiary decision stops at its own horizon, and only after each has been taken according to its own necessities does management emerge as the system of purposes emanating from these subsidiary decisions. In contrast to the subsidiary decisions created by the authority to purchase pencils, management decisions have strictly an autonomous significance.

In this manner, the position from which inherent authority draws its power stands apart from the collection of subsidiary decisions. The position does not embrace some crucial or preeminent decision, but is the abstract system of purposes emanating from decisions found together in custom or practice. The validity of a decision not authorized in terms is thus tested by whether it fits into the system of purposes emanating from a collection of decisions, each of which can be justified in its own terms. The position supplies only a secondary justification, flowing not from the grant of authority, but from custom and practice. Justification on the grounds of position comes from without the agency relation as a system of purposes supplied by practice or custom, whereas justification in the case of ordinary authority must come from within the relation as a perfection of the principal's intentions. In this sense, testing the validity of an action by reference to a position, inherent authority shows the rudiments of process.

#### IV. PARTNERSHIP: THE STRUGGLE TOWARDS ENTITY

When private persons enter into contracts, they avail themselves of a facility provided by the state: the enforcement of expectations created by their exchange of promises.<sup>97</sup> The relation be-

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97. See note 45 *supra*.

tween private person and state is that of user and provider of a facility. It is not so simple in agency. At its root is the fiduciary relation, whose purpose concerns the state interest of entrusting action to persons with judgment. Fiduciary relations do not, in the first instance, constitute a facility. The state does not provide them so that private persons might avail themselves of their use, as they avail themselves of contract. Thus, when private persons turn fiduciary relations to their own use, as agency, they transform a doctrine of public intent into a facility, as if it were contract. Agency is an arrogation of public authority, where contract is only the exploitation of a facility provided by public authority. For this reason, it is easier to imagine that contract, more than agency, is the rational consequence of the natural isolation of single persons, as some anti-positivists suppose.<sup>98</sup> Agency is inexplicable without authority, which, in turn, depends upon the presence of a sovereign. But neither agency nor contract departs from the model of social life as single persons governing affairs under the thrall of sovereign power. The world of entities other than sovereign simply fails to appear in these doctrines. Agency, for example, speaks only of single persons. It provides for the shifting of accounts between them, but does not depart fundamentally from the scheme of single persons. The institutional element of agency, which is authority, comes close to a legal recognition of social reality apart from persons, but does not achieve it. Authority is the possession of a single person.

Were the construction of associations to stop at agency, the intersection between sovereignty and private affairs would be narrow. Agency accomplishes little in the construction of institutions and actions that constitute the entities of society. It simply puts the power of sovereignty behind one person acting in the name of another. If the construction of associations stopped at agency, then a large measure of the institutions and actions society takes for granted would be left to happen in the interstices of sovereignty, without its invaluable, energizing support.<sup>99</sup> Many elements of social behavior thrive in the interstices.<sup>100</sup> Nevertheless, if the sover-

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98. See, e.g., F. HAYEK I, *supra* note 9, at 101-10.

99. See text accompanying note 156 *infra*.

100. The state does not, for example, protect the interest of a bridal pair in the gift-giving of guests to their betrothal or the host of a dinner to reciprocating invitations. Yet wedding guests give gifts and dinner invitations are reciprocated. Even business affairs,

eign did not aid in their construction, one could no more imagine the existence of certain entities in society, than contract without the settled expectation that public authority will enforce the exchange of promises. Society would be left to accomplish a vast culture of relations in the silence of public authority.

If law is to recognize social reality, it must incorporate an element, such as authority, without reference to single persons. Authority, or its equivalent, must exist apart from the world of persons. Inherent authority is just such an element. Its source is a "position"; it is not the intention of a person. The state recognizes and protects in inherent authority the social notion of "position," carrying with it certain accepted portions of authority. Inherent authority is a step towards the recognition of social reality, its fusion into the dialogue of state and person that begins in the fiduciary relation.

Today the calculation of authority from a position, rather than intention, seems a prudent contribution to the ordering of private affairs. Yet, the doctrine of inherent authority was not formulated until 1917, nor used before 1870.<sup>101</sup> Agency functioned for centuries without it, even as the social conditions one associates with inherent authority, such as large-scale organization and a market economy of routine participants, were apparent both to the persons who used agency and to those who controlled its legal destiny. The legal profession either did not perceive, or perceived and rejected, inherent authority as a result of their animus toward thinking in terms other than person (or natural fairness) and state (or public policy). At least in the law of associations, they have resisted the premises and arguments that may be drawn from position and the structure of positions, we call "society."<sup>102</sup>

In agency, the struggle against the social idea of position is only incidental to the structure of the relation. Whether inherent authority is recognized or not does not affect agency principles. In

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which are commonly thought to depend on the harshness of sovereignty, show greater reliance on private sanctions, such as maintaining trade or ideal motives of self-regard, than the vendors of legal services allow themselves to admit. Cf. J. AUSTIN, *supra* note 12, at 86-87; Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963), reprinted in L. FRIEDMAN & S. MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* 145 (1969).

101. See text accompanying notes 91 & 92 *supra*.

102. See, e.g., Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383 (1924).

partnership, built in part upon agency, the struggle against a social idea of position provides the context of the relation. Partnership is the form of association devoted to a social idea of the merchants, called the "firm."<sup>103</sup> The "firm," as such, is a position in society created by the usage of merchants, not a legal construction. Partnership is thus the first association encountered that refers to something outside itself, the usage of merchants. With the single exception of inherent authority, all other constructions—contract, fiduciary relations, and agency—take the position that their legal reality is their social reality. They are the consequence of the simple application of a sovereign purpose to the doctrine of persons. Partnership starts from the novel premise that legal reality and social reality, partnership and firm, are in potential opposition. The law of partnership is a record of common law struggle against a social idea.

Section A describes the social idea of the firm, and the failure of common law to assimilate it to the doctrine of persons. Section B presents an episode in the history of partnership law, in which common law judges attempted to find a criterion to modify the doctrine of persons. Section C, finally, records the modern accommodation of partnership law to the social reality of the firm.

#### *A. Common Law Failure to Assimilate the Social Idea of the Firm to the Doctrine of Persons*

The guiding problem of partnership law is what to make of a social entity, such as the firm. The firm is a going concern.<sup>104</sup> It is a business whose owners take from it only profit, devoting the first part of returns from transactions to replenishing the business in order to sustain it. It is not a joint venture, a single transaction, whose viability over time is of no concern to the participants in the transaction.<sup>105</sup> The problem of partnership law, then, is how to recognize the fact the firm is a business for profit, a going concern.

Practitioners of common law have for the most part attempted

103. See C. COOKE, CORPORATION, TRUST AND COMPANY 40, 48 (1950); T. HADDEN, COMPANY LAWS AND CAPITALISM 10 (2d ed. 1977); 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 197-99 (1926). See also W. LINDLEY, A TREATISE ON THE LAW OF PARTNERSHIP 146-48 (10th ed. 1935).

104. See generally J. COMMONS, THE LEGAL FOUNDATIONS OF CAPITALISM 143-213 (1924). But see note 103 *supra*.

105. See generally A. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 35 (1968).

to assimilate the firm into their doctrine of persons. They have considered the firm as an aggregate of relations among natural persons. The firm, as such, was admitted to these relations only as it was impossible to construct them out of more elementary relations having nothing to do with the social idea of the firm.<sup>106</sup> The "common law theory of partnership," as commentators call it,<sup>107</sup> seeks to accord as little recognition as possible to the social reality of the firm, consistent with the overriding purpose of giving it legal foundation. Thus partnership is a mutual agency of partners, whose authority extends over the business conducted by the firm.<sup>108</sup> It is also a joint tenancy or tenancy in common in assets of the firm.<sup>109</sup> It is an agreement dividing the profits of the firm among partners.<sup>110</sup> It is, finally, all these elementary relations among single persons bound together by contract into the package called "partnership."<sup>111</sup>

Yet the program of constructing the firm out of known and elementary relations failed in certain instances to give adequate protection to its social reality. Thus partnership property, owned in common by partners, ought to be available to any of them for any purpose consistent with the use of the others. The doctrine of joint ownership does not by itself tolerate further restriction on use of the property.<sup>112</sup> Yet there was the practical necessity that partnership property be devoted only to the business of the firm, and law accommodated this result.<sup>113</sup> Consequently, joint ownership did not accurately describe the condition of partnership property, and was in due course dropped.<sup>114</sup>

In other instances, the failure was corrected by a tacit change in doctrine. Thus, the scope of authority with which one partner can bind the others is said to extend to the business of the part-

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106. See A. BROMBERG, *supra* note 105, at 18.

107. See *id.* at 19.

108. See *id.* at 272-73.

109. See *id.* at 228; H. TIFFANY, *THE LAW OF REAL PROPERTY* § 445 (3d ed. 1939); 2 *AMERICAN LAW OF PROPERTY* § 6.8, at 36 (1952).

110. See A. BROMBERG, *supra* note 105, at 66-69.

111. See *id.* at 31, 33-35, 38, 42-43.

112. See 2 *AMERICAN LAW OF PROPERTY* § 6.2, at 7-8 (1952).

113. See Lewis, *The Uniform Partnership Act*, 24 *YALE L.J.* 617, 630-34 (1915).

114. See Crane, *The Uniform Partnership Act*, 29 *HARV. L. REV.* 838, 847, 849-50 (1916); Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism* (pt. 1), 29 *HARV. L. REV.* 158, 162-63, 170-72 (1915); Burdick, *Partnership Realty*, 9 *COLUM. L. REV.* 199, 213 (1909).

nership.<sup>115</sup> By the beginning of the nineteenth century, courts took the business to include "any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member."<sup>116</sup> Authority thus springs from the "business of the kind carried on by the firm," not necessarily from an explicit statement of the partners. This is precisely the doctrine of inherent authority, appearing *sub silentio* in partnership law at least a century before it appeared in agency, and masquerading as the trivial application of agency principles to partnership.

The challenge faced by the common law theory has been to discover a criterion for judging whether to modify the aggregate of elementary relations, accommodating them to the social reality of the firm, or to displace them altogether. The contrariety and profusion of opinions, theories, attitudes, and rationales in partnership law, shifting within a single jurisdiction and from jurisdiction to jurisdiction, suggests that such a criterion should not be easy to find.

#### B. *Search for a Criterion to Modify the Doctrine of Persons: Cox v. Hickman*

Partnership actions made their way from courts merchant into common law courts in the course of the seventeenth century, as the former fell into disuse.<sup>117</sup> The merchant idea of the firm, as an entity in private life distinct from the persons who compose it, had then either to be accepted or rejected. The tenor of the law demanded rejection. Yet no one believed that the firm is merely an aggregate of persons. The social reality of the firm simply did not fit into the favorite categories of common law.

Common law courts protected their doctrines from the alien law merchant and merchant practice without rejecting them. Merchant ideas, such as the firm, were classified as custom, pecu-

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115. See A. BROMBERG, *supra* note 105, at 272-77; W. LINDLEY, *supra* note 103, at 173-77.

116. Partnership Act, 1890, 53 & 54 Vict. c.39, § 5 [hereinafter cited as Partnership Act]. Cf. A. BROMBERG, *supra* note 105, at 276-77; 3 J. KENT, COMMENTARIES ON AMERICAN LAW 46-47 (11th ed. 1867); W. LINDLEY, *supra* note 103, at 176.

117. See Burdick, *What is the Law Merchant?*, 2 COLUM. L. REV. 470, 478-80 (1902), reprinted in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 34, 43-44 (1909); Scrutton, *General Survey of the History of the Law Merchant*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 7, 13.

liar to a status group with special traditions. As custom, the law merchant and merchant practice were found as fact, never entering the system of doctrine.<sup>118</sup> Common law courts absorbed merchant ideas without digesting them. Thus, the legal profession avoided confronting the problem, whether the firm could be successfully assimilated to the doctrine of persons.<sup>119</sup>

Even once the ruse of custom was dropped, partnership escaped absolute rationalization. Lord Mansfield happened not to decide many partnership cases, so that he could not extend to partnership his efforts at building the commercial law from English, merchant, and continental sources.<sup>120</sup> As the American authority, Professor Burdick, wrote at the turn of the century:

A learned writer has said: "The law of partnership rests on a foundation composed of three materials: the Common Law, the law of Merchants, and the Roman law." It must be added that these different materials, like the iron and the clay in the image of Nebuchadnezzar's vision, do "not cleave to one another." Nor has English jurisprudence yet shown its ability to assimilate them.<sup>121</sup>

An episode in the history of partnership law, lasting from 1775 to 1860, provides a clue to the problem of assimilating the social idea of the firm to the legal construction of partnership. At the start of the period, DeGrey, C.J., stated as dictum in the case of *Grace v. Smith*<sup>122</sup> the rule that persons who share profits incur liabilities as if they were partners.<sup>123</sup> DeGrey based his dictum on an opinion by Lord Mansfield, *Bloxham v. Pell*,<sup>124</sup> in which the principle had been used without being identified; it was both used and stated twenty-three years later in *Waugh v. Carver*.<sup>125</sup>

118. See Burdick, *supra* note 117, at 480; Scrutton, *supra* note 117.

119. Blackstone discusses partnership only as an example of entities that must use equitable accounting, and one other similarly negligible instance. See 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 437 (Chitty ed. New York 1844).

120. See Crane, *The Uniform Partnership Act: A Criticism*, 28 HARV. L. REV. 762, 765 (1915).

121. F. BURDICK, THE LAW OF PARTNERSHIP 2 (1899).

122. 2 W. Black. 998, 96 Eng. Rep. 587 (K.B. 1774).

123. The only question is, what constitutes a secret partner? Every man who has a share of the profits of a trade, ought also to bear his share of the loss. And if anyone takes part of the profit, he takes a part of that fund on which the creditor of the trade relies for his payment.

*Id.* at 1000, 96 Eng. Rep. at 588.

124. 2 W. Black. at 1000, 96 Eng. Rep. at 588.

125. 2 H. Black. 235, 126 Eng. Rep. 525 (C.P. 1793).



One should be clear that DeGrey's principle is a doctrine of liability, not a theoretical statement about partnership. The spirit of the age was similar in this respect to the spirit of ours. They could impose liability in a case from immediate considerations of fairness or public policy, without serious regard for the suitability of the imposition in an entire system of doctrine. It may be fair or good policy that one whose sole connection with a firm is a share of profits be responsible for a share of losses. But liability for losses without participation in the business or possession of partnership property to prosecute the business hardly comports with the rest of partnership doctrine.

DeGrey's principle requires one to take the position of an outsider. From that position, it is fair and good policy to hold one who shares profits and nothing else responsible for the debts of the firm. Yet the principle neglects entirely the interior of the firm, that it is an association of persons conducting a business in common, whose liabilities flow from that pursuit. The mere sharer of profits only partly resembles a member of the firm: he takes his livelihood from it, but is not responsible for the decisions that produce his livelihood. He is not called on to exercise judgment. At the least, DeGrey's principle violates the thematic preference of our tradition, that only those capable of judicious action be responsible for its consequences. But more, it is an attempt to expunge from the law of partnership any reference to the social idea of the firm. DeGrey reduced the firm to a single attribute: the sharing of profits. Other attributes may attach, but are not the essence. One is a member of the firm to outsiders if one has a share of profits, even though one is not a member, in the business or practical sense of doing business in the firm. DeGrey's reduction solves the problem of assimilating the social idea of the firm to the legal construction of partnership. It eliminates the firm.

Lord Lindley's conclusion in his treatise on the English Partnership Act of 1890 that, "[o]ne feature peculiar to the English law of partnership . . . was the persistency with which the firm, as distinguished from the partners composing it, was ignored both at law and in equity," may be excessive.<sup>126</sup> It is true, nonetheless, that in the era of *Grace v. Smith* partnership law reached a pitch of animus toward the firm. Even as the principle was explicitly applied

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126. W. LINDLEY, *supra* note 103, at 4.

in that era, its harshness was limited. Thus, it was held that persons who share only gross returns are not liable as partners.<sup>127</sup> A distinction was drawn, as Lord Lindley notes, between a payment out of profits and a payment varying with them.<sup>128</sup> In *Ex Parte Hamper* Lord Eldon stated that a person would be liable as a partner only if he has a right to "a part of the profits as such," thus to an account.<sup>129</sup> This already entails a severe limitation on the operation of DeGrey's principle.

The era of *Grace v. Smith* came to an end in 1860, with the celebrated case of *Cox v. Hickman*.<sup>130</sup> Scheduled creditors of a deed of arrangement, who were to be paid their debts out of the profits of their debtor's business, were held not liable for debts contracted by the trustee carrying on the business pursuant to the deed. The Lords reasoned that sharing profits did not of itself establish the trustee as agent of the scheduled creditors. *Waugh v. Carver* was distinguished on the ground that profits in that case were to be shared to an indefinite extent, whereas profits in *Cox v. Hickman* were shared only to the limit of the scheduled debts. The principle of *Grace v. Smith* was in form preserved. Yet, as Lord Lindley points out, the distinction between limited and unlimited sharing of profits is one that cannot be maintained against outsiders under DeGrey's reasoning.<sup>131</sup> *Cox v. Hickman* redirected attention to the interior of the firm. One could no longer be held liable as a partner unless one was in fact a partner, or held oneself out as a partner, or was the agent of a partner.<sup>132</sup>

The episode of DeGrey's principle did not leave the systematic law of partnership unimproved. By searching for an essential attribute of partnership, DeGrey laid bare and clarified the legal significance of the firm. The fault in the doctrine of *Grace v. Smith* was

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127. *Benjamin v. Porteus*, 2 H. Black. 590, 126 Eng. Rep. 720 (C.P. 1796).

128. *Ex Parte Hamper*, 17 Ves. 403, 34 Eng. Rep. 156 (Ch. 1811). See W. LINDLEY, *supra* note 103, at 54.

129. *Ex Parte Hamper*, 17 Vest. at 411-12, 34 Eng. Rep. at 158-59.

130. 8 H.L.C. 268, 11 Eng. Rep. 431 (H.L. 1860).

131. See W. LINDLEY, *supra* note 103, at 57.

132. See *id.* at 57-59. The American Uniform Partnership Act singles out sharing profits for a presumption of partnership. Uniform Partnership Act § 7(4) [hereinafter cited as UPA]. Certain relations, such as debtor-creditor, wage earner-employer, and landlord-tenant, are protected, so that sharing profits, as rent for example, does not engage the presumption. The presumption can probably be dissipated by the presentation of sufficient evidence that no partnership exists, according to factors set forth in the statutory definition of partnership. See A. BROMBERG, *supra* note 105, at 76-80.

that it encouraged confining consideration of partnership to the essential attribute, without pursuing its consequences throughout the entire idea of the firm. *Grace v. Smith* thus provided a beginning for the acceptance and systematic understanding of the firm as such in partnership law, which prior to *Grace v. Smith* had been resistant to the firm and somewhat confused by it. Modern law demotes the essential attribute, sharing profits, to a presumption of partnership, a point from which the true investigation whether a partnership is present may begin.<sup>133</sup> Community of profits under modern law provides a criterion by which elements of the firm may be sifted for inclusion in the legal construction of partnership. It is not an end of analysis, but a beginning, animating the legal concept of the firm.

### C. *Partnership Law and the Ongoing Character of Business*

Profit indicates the potential for ongoing business activity.<sup>134</sup> It is the practical and theoretical measure that determines whether an enterprise ought to survive. The social reality of profit is the survival of an enterprise. Profit is its license to carry on.

Within thirty years of *Cox v. Hickman*, partnership law explicitly incorporated protection of the ongoing character of business. The English Partnership Act of 1890 defines partnership as "the relation which subsists between persons carrying on a business in common with a view of profit."<sup>135</sup> The old indicium, community of profits, takes second place to "carrying on a business in common." The American Uniform Partnership Act of 1916 has an identical formulation: "A partnership is an association of two or more persons to carry on as co-owners a business for profit."<sup>136</sup> Both statutes make partnership reflect the social reality of the firm, "carrying on a business in common."<sup>137</sup>

Before *Cox v. Hickman*, events having nothing to do with the business of a partnership could easily disrupt it. A partner was al-

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133. Partnership Act § 2(3) ("The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business . . ."). Section 7(4) of the Uniform Partnership Act is identical.

134. See text accompanying notes 104 & 105 *supra*.

135. Partnership Act § 1(1).

136. UPA § 6(1).

137. See A. BROMBERG, *supra* note 105, at 248, for the suggestion that the guiding purpose of the Uniform Partnership Act is protecting the ongoing character of business.

lowed to assign his share of partnership property to strangers. Unless the assignment breached an agreement of the partners, the only penalty was dissolution of the partnership.<sup>138</sup> The power of a partner to assign his interest in partnership property does not of itself go farther than his plenary power to dissolve the partnership, wind up its affairs, and distribute his portion of partnership property to whomever he pleases. The right of assignment surpasses the power of dissolution, however, in that it serves as the foundation for attachment of a partner's share of partnership property for debts of a partner unrelated to the business of the firm.<sup>139</sup> Attachment puts in the hands of a personal creditor of a partner, a stranger to the partnership and its business, the decision whether the property and affairs of the partnership remain intact. Considerations alien to the firm dictate its future. The right of attachment for personal debts of a partner derives sensibly from simpler doctrines, but reflects total neglect of the firm.

Such protection as the firm received under the old law was perplexing, variable, and indistinct.<sup>140</sup> It is captured in the term "partners' equities." The old law, as the new, recognized the right of partners to insist that partnership property be used only for business of the partnership.<sup>141</sup> If a stranger to the firm came into an interest in its property, he was subject to the same restraint on use as was the partner from whom he derived his interest.<sup>142</sup> Even so, protection of the firm was illusory, since the proper course of attachment was early established as seizure of the whole property by a sheriff, interrupting use of the property by the partnership.<sup>143</sup> The necessity of seizure has been cured only by modern legislation.<sup>144</sup>

In two doctrines crucial to the firm, assignment of partnership property and its attachment by strangers, the legislative compilations of partnership law in England and America, working at the

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138. See *id.* § 77.

139. See *id.* §§ 42-43.

140. See Lewis, *supra* note 114, at 162.

141. See A. BROMBERG, *supra* note 105, at § 40.

142. See *id.* § 43. The doctrine seems to have been established definitively in equity in *Skipp v. Harwood*, 2 Swanst. 586, 36 Eng. Rep. 739 (Ch. 1747), and later made its way into law.

143. See *Heydon v. Heydon*, 1 Salkeld 392, 91 Eng. Rep. 340 (K.B. 1693). See also Lewis, *supra* note 114, at 162 n.5.

144. See A. BROMBERG, *supra* note 105, at § 43.

turn of the century on the heritage of *Cox v. Hickman*, encoded the definitive recognition and protection of the firm.<sup>145</sup> The Uniform Partnership Act prohibits the assignment of a partner's right in specific partnership property, except in connection with the assignment of rights of all partners in the same property.<sup>146</sup> The English statute is not as explicit, but accomplishes the same result.<sup>147</sup> The Uniform Partnership Act also prohibits the attachment of or execution on a partner's right in specific partnership property, except on a claim against the partnership.<sup>148</sup> Similarly, the English statute provides that "a writ of execution shall not issue against any partnership property except on a judgment against the firm."<sup>149</sup>

Both compilations allow the assignment by a partner of the profit to which he is entitled, defined as his interest or share in the partnership.<sup>150</sup> Assignment of the interest or share in the partnership does not dissolve the partnership, nor does it remove the as-

145. It is interesting to note that the English Partnership Act gives explicit recognition to the firm, whereas recognition in the American Uniform Partnership Act is only implicit. Thus section 4(1) of the English statute gives the name "firm" to partners collectively carrying on a business, and couches many relations among partners and of partners to strangers in terms of relations to the firm. The draftsmen of the Uniform Partnership Act, first Ames and then Lewis, use the term "partnership" where Pollock, the draftsman of the English statute, uses "firm." The technical distinction is that the English statute defines partnership as a relation among persons; the Uniform Partnership Act defines it as an association of persons. See text accompanying notes 135 & 136 *supra*. The English Partnership Act thus requires a separate term for the collectivity of partners, whereas the collectivity of partners is incorporated in the American definition of partnership. The true ground of distinction probably lies elsewhere, in the relative absence of dispute in England about the nature of partnership, whether it is a person separate from the partners. Compare W. LINDLEY, *supra* note 103, at 146-48, with A. BROMBERG, *supra* note 105, at § 3. See also Crane, *supra* note 114, at 838; Crane, *supra* note 120, at 762; Lewis, *supra* note 114, at 158, 291; Lewis, *supra* note 113, at 617. See generally E. WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION (1929). The English were not betrayed, as the Americans, by debate whether a partnership is an artificial person, and could directly construct their legislation according to the principle that partnership is a set of legal relations reflecting the social reality of the firm.

146. UPA § 25(2)(b).

147. All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business . . . must be held and applied by the partners exclusively for the purposes of the partnership. . . .

Partnership Act, § 20(1).

148. UPA § 25(2)(c).

149. Partnership Act, § 23(1).

150. Partnership Act, § 31(1); UPA § 27.

signing partner from participation in the firm, or substitute the assignee in his place.<sup>151</sup> Thus a partner may assign values he has placed or produced in a firm to the extent that the assignment does not disturb the ongoing character of the firm. Furthermore, both compilations provide the charging order, a form of attachment of the interest or share in the partnership to satisfy the separate debt of a partner.<sup>152</sup> The charging order may lead to dissolution of the partnership, but does not cause the removal of a partner during its pendency.<sup>153</sup>

The result of legal development since *Cox v. Hickman* is recognition and protection of the firm as an ongoing enterprise. The firm is insulated from the private affairs of its partners. It must survive or fail subject only to the harsh discipline of profit. Yet the affairs of the firm are allowed to affect its partners without limitation. Partners are personally responsible for conducting the business of the firm, and must bear its consequences. This is in strict accord with the thematic preference of our tradition.<sup>154</sup>

Indeed, from the perspective of the construction of associations, the most telling contribution of the absorption of the firm into partnership is the recognition that partners do more than represent each other as agents possessing a limited and explicit grant of authority. They manage the business of the firm.<sup>155</sup> The source of a partner's authority to act is management of the firm, and not the mutual grant of authority from partner to partner. The notion of management acknowledges the presence in partnership of inherent authority, where the position from which the partner draws his authority is the firm.

## V. THE ARTIFICIAL PERSON

Both agency and fiduciary relations were constructed from a relation between sovereign, on the one hand, and natural persons, on the other. Law could capture their entire reality. The doctrines of agency and fiduciary obligation follow strictly upon the applica-

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151. *Id.*

152. Partnership Act, § 23(2); UPA § 28.

153. Partnership Act, § 33(2); UPA § 32(2).

154. *Cf. Lewis, supra* note 114, at 172; Wright, *Opposition of Law to Business Usages*, 26 COLUM. L. REV. 917, 927 (1926).

155. Section 24(3) of the UPA lists the right to participate in management as one of the three property rights of a partner.

tion of a sovereign purpose to the ancient doctrine of persons. In fiduciary relations it is to entrust judgment about action to persons who can be responsible for its consequences. In agency, the purpose is to accede to the strengthening of persons through their usurpation of the sovereign's concern for the propriety of action. Partnership was the first association encountered that could not be constructed from the simple application of a sovereign purpose to the doctrine of persons. The reality encompassed by partnership is not legal, but social, and thrives even in the absence of aid from the sovereign. Consequently, it has never been clear whether by recognizing the firm in law the sovereign has aided it, or merely assimilated it as a rival system of power.<sup>156</sup>

Aid or assimilation, much of the communication between sovereign and firm has been accomplished by the creation of novel relations among persons. One instance of aid, however, could only apparently be delivered in the manner of the others, as a relation among single persons. This is the right of a partner to participate in managing the firm. As it is phrased, it is a right owned by a single person. The singular phrasing of the right is usual.<sup>157</sup> Nevertheless, the right of a partner to participate in management dissolves, upon inspection, into the right of partners collectively to manage. The singular phrasing of the right cannot be sustained, especially in large firms. Common law offered two forms of association, trust and joint stock company, to accomodate certain needs of large firms within the scheme of natural persons. The defect of these forms is that they hewed to an individual, natural concept of legal responsibility, and failed to reflect responsibility in large firms. An adequate form of responsibility appears in the artificial person.

#### A. *Persons and the Management of Large Firms*

What can the statutes and textbooks mean when they say that a partner has the right to participate in managing the firm? When a partnership agreement contains a formal mechanism for management, an executive committee or voting by partners, the right to participate means that a partner cannot be excluded from the

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156. See Part IV, Section C *supra*.

157. See, e.g., A. BROMBERG, *supra* note 105, at § 48; W. LINDLEY, *supra* note 103, at 377-78; J. PARSONS, AN EXPOSITION OF THE PRINCIPLES OF PARTNERSHIP § 152 (1889).

mechanism without his consent.<sup>158</sup> However, partnerships do not need a formal mechanism. It is then difficult to recognize participation, since the partnership agreement has not defined it. Statutes, to be sure, may define participation, as voting for example, in the absence of agreement. Even if partners agree, however, or if a statute speaks in the absence of agreement, partners can be bound by the unapproved action of a partner within the ordinary course of business of a kind conducted by the firm, if the one who seeks to bind them does not know that the action is one required to be approved.<sup>159</sup> A partner, therefore, may be in a position to make a decision, acting alone, especially when no formal mechanism has been provided. Stripped to its fundamentals, the singular phrasing of the right to manage means that a partner has the power, on certain occasions, to act without the concurrence of his partners.

As is often the case with rights, the singular phrasing confronts reality. If a partner were continually to make unpopular decisions, his partners would dissolve the partnership. The singular phrasing labors in a world where its assertion could spell the end of the ongoing business. If, instead, one looks at the right to continue business, its phrasing must be altered. Because any partner can threaten a decision on his own, other partners must deal with him. The right of a partner to participate means only that he can force the others either to come to terms or dissolve the partnership. Even if a formal mechanism is present, the partners in the minority on a given issue must overall or to some extent be satisfied. Informal coming-to-terms is implicit even in a formal process of decision. The positive meaning of the right to participate is not singular, but collective, the constant coming-to-terms of partners.

Yet coming-to-terms is possible only when the firm is of such quality and size that differences among partners can be reconciled. If they cannot, either because the firm has grown beyond manageable size or because members jockey for preeminence in management, the ongoing nature of the enterprise is threatened by forces having nothing to do with its external economic success. The hazard of an informal procedure is tolerable only when daily reconciliation is probable or when few depend on continuing the enterprise.

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158. Cf. W. LINDLEY, *supra* note 103, at 392-95.

159. See text accompanying notes 115 & 116 *supra*.



Neither condition is met in large firms.<sup>160</sup>

Even if owners could come to terms, many in a large firm cannot be bothered to do so. Complex enterprises involve vast sums of capital which a small number of persons invest in a variety of businesses. Moreover, as the scale of enterprise expanded in England and America, certain possessors of landed wealth converted it into ownership of firms. Neither owner of capital, nor landed proprietor could be burdened with active participation in all the firms into which their wealth led them. A class of passive investors developed, eager to entrust to a handful of participants the active management of their firms.<sup>161</sup>

Both pressures, the scale of enterprise and the rise of a class of passive investors, led to the management of large firms by a minority of owners, by the end of the seventeenth century at the latest.<sup>162</sup> This was unavoidable reality. In larger firms, the collective right to manage could not be left to an informal mechanism. Certain tasks and decisions had definitively to be assigned to certain persons, whose number was far smaller than the number of owners. Moreover, some tasks and decisions arose only upon the determination of tasks and decisions of more general importance. The coterie of managers would be moved to arrange themselves into a hierarchy to reflect the hierarchy of tasks and decisions. This could not be accomplished through the informal mechanism of owners, since discipline cannot weather the threat of dissolution. The law had either to accommodate the constriction and specialization of management, or watch them proceed in silence.<sup>163</sup>

Accommodation of the needs of management could not proceed by the construction of relations among natural persons. Assimilation of large firms to that branch of the doctrine of persons was, for reasons set forth above, impossible. Yet two ways of proceeding, which seem to depart little from the scheme of natural

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160. Certain industries, such as investment banking, accounting, or law, can survive the presence of enormous firms, because transactions in these industries depend on personal trust and knowledge throughout the industry about the conditions of each transaction. Hence members are relatively powerless to initiate a transaction without the concurrence of their fellows.

161. See C. COOKE, *supra* note 103, at 40-42, 132.

162. See *id.* at 50.

163. See A. CHANDLER, JR., *THE VISIBLE HAND* 484-500 (1977); J. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970* 25-26 (1970).

persons,<sup>164</sup> were gradually developed by lawyers and the commercial class from the sixteenth to the eighteenth century. The first is the trust, and the second, the joint stock company.<sup>165</sup>

### B. *Trust and Joint Stock Company as Devices for Managing Large Firms*

The trust is an unusual association of persons. Settlement of the trust creates a fiduciary obligation running from trustee to beneficiary, but only over property put into the trust.<sup>166</sup> Unlike the mere fiduciary relation, however, deeds of settlement can specify the nature and purpose of benefits to be given the beneficiary.<sup>167</sup> The trust thus resembles an agency, which also specifies the nature and purpose of benefits conferred, but by a donation of authority, rather than by the transfer of legal title to property.<sup>168</sup>

Two characteristics of the trust are outstanding for passive investors and their coterie of managers. First, the beneficiary of the trust does not have legal title to trust property, and is precluded by law from acting on it.<sup>169</sup> This characteristic is clearly suited to the necessity of constricting management in large firms. Second, liability of the beneficiary is limited to benefit he can receive from trust property, and if he is settlor as well as beneficiary, to the trust property itself.<sup>170</sup> So if a passive investor puts himself in the legal position respecting his investment of a settlor who is also beneficiary, he is precluded from management, and absolved of liability beyond his investment.

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164. See F. MAITLAND, *supra* note 27, at 317; F. MAITLAND, *supra* note 10, at 321-404.

165. See generally, C. COOKE, *supra* note 103, chs. 3-6; A. DUBOIS, *THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT 1720-1800* (repr. New York 1971); 4 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW 408-80* (1924); 8 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW 206-22* (1926); A. KUHN, *A COMPARATIVE STUDY OF THE LAW OF CORPORATIONS* ch. 3 (No. 123 of the Columbia University Studies in the Social Sciences) (1912); W. SCOTT, *THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT STOCK COMPANIES TO 1720* (1912). But see Comment, *Operation of Business by Trustees*, 1967 DUKE L.J. 321 (1967).

166. See 1 A. SCOTT, *THE LAW OF TRUSTS* § 2.5.

167. See RESTATEMENT (SECOND) OF TRUSTS § 4; 1 A. SCOTT, *THE LAW OF TRUSTS* § 4.

168. Trust and agency share more than fundamental homology. It is probable that agency, as well as the trust, originated in the use. See 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 228 (S. Milsom ed. 1968) (2d ed. 1898).

169. See RESTATEMENT (SECOND) OF TRUSTS § 175, Comment a; *id.* § 277, Comment a. Cf. note 60 *supra*.

170. See RESTATEMENT (SECOND) OF TRUSTS § 274; 3 A. SCOTT, *THE LAW OF TRUSTS* § 274.

The trust device brought with it several practical and legal consequences that came in varying degrees to be considered desirable by business during the seventeenth and eighteenth centuries. First, the trust has, for all practical purposes, perpetual existence (up to the limit imposed by the Rule Against Perpetuities), for the deed of settlement can provide that a trustee removed by death, disability or design be replaced.<sup>171</sup> Second, the trust has continuity of existence, since its integrity as a legal entity does not depend on the identity of the beneficiaries.<sup>172</sup> Third, the beneficiaries are able to transfer their interests without permission of the trustee.<sup>173</sup> This contrasts with partnership, which dissolves upon the withdrawal of one of its partners, and requires the consent of all partners before a new partner may be added to the firm.<sup>174</sup> The transferability of beneficial interests has, in turn, two consequences. First, a dissatisfied investor need not dissolve the legal entity in order to take his money out of the enterprise; and second, he is able at any time to realize his investment simply by selling his beneficial interest. The investment of a passive investor in a trust is thus more liquid than the investment of a partner, and its removal less disruptive to the ongoing condition of the enterprise. Fourth, the trust can sue and be sued in the name of the trustees, a small number of persons.<sup>175</sup> Fifth, the trust can transfer property in the name of the trustees.<sup>176</sup>

Especially in the United States, it is not the constriction of management, but limitation on liability of investors that has captured the modern imagination about trusts.<sup>177</sup> However, the notion that limited liability is the most desirable benefit law can bestow on business is bad history, and worse understanding of the requirements of business.<sup>178</sup> When the trust was first used extensively, in

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171. See generally G. BOGERT, *supra* note 60, at § 304.

172. See RESTATEMENT (SECOND) OF TRUSTS § 36; 1 A. SCOTT, THE LAW OF TRUSTS § 36.

173. See RESTATEMENT (SECOND) OF TRUSTS § 132; 2 A. SCOTT, THE LAW OF TRUSTS § 132.

174. See A. BROMBERG, *supra* note 105, at §§ 5, 74; W. LINDLEY, *supra* note 103, at 435, 658-60. The latter requirement is known as "*delectus personae*."

175. See RESTATEMENT (SECOND) OF TRUSTS §§ 261, 280; 3 A. SCOTT, THE LAW OF TRUSTS § 261; 4 A. SCOTT, THE LAW OF TRUSTS § 280.

176. See RESTATEMENT (SECOND) OF TRUSTS § 190; 3 A. SCOTT, THE LAW OF TRUSTS § 190.

177. See, e.g., Powell, *Passing of the Corporation in Business*, 2 MINN. L. REV. 401 (1918).

178. See Handlin & Handlin, *Origins of the American Business Corporation*, 5 J.

the eighteenth century, no other legal form provided absolute limited liability. King's court had bestowed limited liability on members of chartered companies in 1440.<sup>179</sup> But in 1671, *Salmon v. Hamborough Company* held that a creditor of a company could force it to levy upon its shares (the "leviation").<sup>180</sup> Hence, in the classic era of capital development, English law made it difficult, not impossible, to pierce the formal protection of limited liability. Full protection was restored to companies only in the Limited Liability Act of 1855.<sup>181</sup> Even several American states, whose legal practitioners assumed that chartered companies had limited liability at common law, took it away for a time by statute in the early nineteenth century.<sup>182</sup> The trust simply had no competitors in offering limited liability to investors, and had investors desired it, one would have expected the trust to possess even greater popularity than it in fact enjoyed, suggesting that for the eighteenth century limited liability was not the issue it is today.

It would be wrong to suppose, however, that limited liability counted for nothing. A trustee could not effectively shield himself from liability for managing the property of the trust. Only recently has the law permitted a trustee to make contracts without assum-

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ECON. HIST. 1, 8-17 (1945). For contemporary discussions of the advantages and disadvantages of the several devices of association, see E. WARREN, *supra* note 145; Kessler & Yorio, *Choosing the Appropriate Form for the Small Business*, CORPORATION L. REV. 291, 299-304 (1978). Among the advantages, limitation on liability in the eighteenth century was of narrow legal importance. In contracts it could be achieved by negotiating for a limitation on damages. The presence of prior statutory or common law limitations would not, in practice, necessarily protect the passive investor, when, for example, the creditor of an enterprise demands the personal guarantee of its investors. Limitation on liability could have been crucial only for torts committed outside the aegis of contract. The narrow reach of tort liability in the seventeenth and eighteenth centuries casts in doubt the commercial significance of even the crucial case. See T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 459-60 (5th ed. 1956).

Business opposed the provision of limited liability as often as they supported it. See J. ANGELL & S. AMES, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE* 370-74 (1832); A. DUBOIS, *supra* note 165, at 94, 226; J. HURST, *supra* note 163, at 26-27. Their attitude, after all, could not wholly escape the lawyers' culture of responsibility. Investment could as easily be frightened off by the relaxation of responsibility as it would be encouraged. Dodd maintains that the ultimate significance of limited liability was to facilitate a market in shares. See E. DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860* 390 (1954).

179. Y.B. Pasch. 19 Hy. VI pl. 1 (p.64) (per Markham). See A. DuBois, *supra* note 165, at 98-104; 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 484 (1927).

180. 1 Ch. Cas. 204, 22 Eng. Rep. 763 (1671).

181. Limited Liability Act, 1855, 19 & 20 Vict., c.47.

182. See J. ANGELL & S. AMES, *supra* note 178, at 357-64.

ing personal responsibility, though common law did allow him to seek indemnity from trust property.<sup>183</sup> He was personally liable at common law for amounts greater than the fund at his disposal. The trustee of assets constituting an enormous firm could only be disquieted by the prospect of liability for its operations.<sup>184</sup>

The trust has a second defect. If a trust beneficiary is allowed any say in management, he becomes a partner of the trustees, and the trust is destroyed.<sup>185</sup> He may not even participate in selecting trustees, by election or otherwise, though as settlor he could initially have appointed them. His only remedy for dissatisfaction is to sell his beneficial interest. He exercises no reforming power over management. Trustees are accountable only in the judgment of equity for breach of trust, not in the judgment of trust beneficiaries as to the most effective management of their affairs. The price of limited liability is resignation by investors of the power to have any say in management. This accords with the thematic preference: common law would not tolerate the grant of limited liability to trust beneficiaries together with their retention of substantial control over trust affairs. Yet retention of control by passive investors is desirable. If the sole remedy of the passive investor is to sell out, management is beyond control, at least up to the value of the fund at their disposal. Decline in the value of the beneficial interest has at best indirect effect on the fortunes of management, unless they too possess beneficial interests. The owners must be able to turn management out for destroying the value of their interests. Within the value of the fund at their disposal, it is the control exercised by beneficial owners that inculcates responsibility in trustees.

The trust has a third defect. Though it accomplishes the constriction of management, it cannot definitively parcel out tasks and decisions among trustees, or arrange them into a hierarchy to mirror the hierarchy of tasks and decisions. The coterie of trust man-

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183. See RESTATEMENT (SECOND) OF TRUSTS §§ 224, 261; 3 A. SCOTT, LAW OF TRUSTS §§ 224, 261.

184. In all probability it was the unlimited liability of trustees that reduced the popularity of the trust in the eighteenth century, as much as the cause advanced by Holdsworth—the too rigid confinement of business policy in the deed of settlement. See 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 479-80 (1924).

185. See H. BALLANTINE, BALLANTINE ON CORPORATIONS 18-20 (rev. ed. 1946); E. WARREN, *supra* note 145, at 383-400. *But see* Magruder, *The Position of Shareholders in Business Trusts*, 23 COLUM. L. REV. 423 (1923).

agers behave much as if they form a partnership, playing with the higher stakes given them by passive investors.

These defects—the unlimited liability of managers, the entire loss of control by passive investors, and the incapacity of the trust to structure management—are corrected in the second way of assimilating enormous firms to the doctrine of persons: the joint stock company. Though there were a profusion of variations, it is a simple device.<sup>186</sup> Investors pool their assets, their stock. Title to the stock may be retained by the investors in joint tenancy, but more likely would be placed in a board of managers, in a single member of the board, or in a trustee. Investors would by contract divest themselves of the power to manage the stock. Together they would appoint a board of directors or certain officers as agents to manage the affairs of the stock. The mode of appointment was commonly election at specified times by holders of shares. Each investor would have a right to such portion of profits of the stock as declared by the managers and provided for in the contract forming the company. The rights and interests of an investor could be transferred, even though common law opposed the assignment of a chose in action (which the interest was<sup>187</sup>) and though the Bubble Act of 1720 forbade the transfer of shares in a joint stock company created by contract absent the overt exercise of royal or parliamentary power.<sup>188</sup> Because he was a principal of the managers, the owner of shares was jointly and severally liable for their wrongs, regardless of his proportional investment in the company.

While preserving its benefits, the joint stock device ameliorated the defects of the trust. By virtue of their power to elect management, the passive investors retained a form of control, and could force managers to be responsible within the value of the joint stock. Because passive investors occupied the legal position of principals, they could parcel out tasks to each of the managers, their agents. They could even create a hierarchy of agents. Finally, managers could enter into contracts using only the names of their principals, the owners, or look to the owners to indemnify them for torts committed in the proper exercise of authority, even to an amount beyond the value of the stock. A manager, in other words,

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186. See generally A. BROMBERG, *supra* note 105, at § 34; H. HENN, *HANDBOOK OF THE LAW OF CORPORATIONS* §§ 50-57 (2d ed. 1970); E. WARREN, *supra* note 145, at 327-682.

187. See A. DuBois, *supra* note 165, at 359.

188. Bubble Act, 1720, 5 George I c.28.

was given the limited liability accorded to an agent, who, after the trust beneficiary, is the second figure the common law gives a sort of limited liability.

Nevertheless, the joint stock device had two defects, one practical, the other theoretical. The practical defect was imposition of joint and several liability upon holders of stock, regardless of proportional investment. Trust and joint stock company put the organizers of business upon a choice, whether to subject managers to liability for the disproportionate transactions under their control, or to put the liability on passive investors without relation, as in partnerships, to their individual interests in the business. To be sure, as Henn points out, the liability of holders of stock was often only theoretical, since they were dispersed and hidden from view.<sup>189</sup> Even so, the common law compelled organizers to choose between managers and investors as the ultimate repositories of responsibility. In offering the choice, it was moved strictly by the thematic preference, that those who are capable of action be responsible for its consequences. The trust beneficiary has no say in managing its assets; hence, he is free of liability. The holder of stock has the limited say of choosing personnel for management; hence, he is subject to liability. Similarly, the manager of trust property is beholden only to his conscience operating under the loose standard of breach of trust; the manager of a joint stock is beholden to his holders of stock. The first is exposed to liability, the second is not.

The problem with this scheme is that the holder of stock exercises only mild control: he helps select personnel. He is barred from real participation in management, yet is subject to the harsh prospect of liability for actions he has not taken, nor in specific terms authorized. He merely calls upon the managers of the stock to manage, nothing more.

### C. *A New Form of Responsibility: the Artificial Person*

The Hobson's choice of liability in common law does not accurately reflect the realities of management and responsibility in large firms. By its insistence on the thematic preference, common law required holders of stock to assume liability for operating an enterprise they did not operate, and trustees to be responsible for

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189. See H. HENN, *supra* note 186, at 16-17, citing A. DuBois, *supra* note 165.

the fortunes of an enterprise from which they could expect no profit. The reality of the matter, as in partnership, was the economic survival of the firm. Common law was probably correct in supposing that no holder of stock, taken alone, would have sufficient stake in that survival, were his liability limited to his interest in the firm. Exposure to liability is the antidote to irresponsibility. The holders of stock *en masse*, however, through the device of election, would be no more irresponsible than the ordinary person. The interest possessed meets the interest required, even if liability is limited to stock in the firm. The penalty for imprudence is death of the firm as an ongoing enterprise, which is enough for the thematic purpose of responsibility.

Yet, common law was incapable of awarding limited liability to managers at the same time as passive investors. Its fear was that there would then be no one responsible. Common law neglected the reality of the firm as enterprise, that its internal mechanism of responsibility and accountability is sufficient to guarantee normally prudent action. The separation of management from investment created a new form of responsibility that common law found itself incapable of acknowledging.

The new form of responsibility differs little from the one found in political organization.<sup>190</sup> The control of investor over manager through election is weaker than the control of principal over agent, but stronger than the control of trust beneficiary over trustee using the remedy of breach of trust. It is a political species of control, which should have been sufficient, absent the thematic preference, to confine liability to stock of the ongoing firm.

The presence in large firms of a new species of control, hence responsibility, raises the theoretical difficulty of the joint stock device. A manager is not an agent, even one given broad and ill-defined authority. He derives authority from appointment or election to office, not, as in agency, from a direct manifestation of consent. His authority is the product of appointment or election, not the intentions of persons.<sup>191</sup> Yet our legal culture mistakenly considers election as a typical manifestation of consent, leading ineluctably

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190. See J. COLEMAN, *POWER AND THE STRUCTURE OF SOCIETY* 81-84, 102-04 (1974).

191. Modern corporation statutes separate the managers of joint stock acting as trustees, the board of directors, from managers acting as agents, the officers. Members of the board are elected in order to manage the joint stock over-all. Officers are appointed as agents by the board to implement its decisions.



to imposition of liability on holders of stock. Election, rather, is a process in which persons participate, merely filling a position or office made available to them by public authority. Holders of stock authorize officers as much as a principal authorizes his agent who exercises inherent authority, that is, in reality, not at all.

Appointment, or election, is thus the first step in the program of process, which, as has been shown, was completed only centuries after the introduction of joint stock companies in the doctrine of inherent authority.<sup>192</sup> Like inherent authority, election derives authority from position rather than from intention. Because private law was not prepared for it, lawyers did not at first recognize office as a form of inherent authority. Their view of office did not carry with it extensive ramifications in private law, such as limited liability. Stockholders were agents, not electors of offices. Only in the eighteenth century did lawyers acknowledge an overtly private form of inherent authority in the notion of managing a partnership.<sup>193</sup> The complete devolution of office into private law was left to our century, with an explicit doctrine of inherent authority.

When firms in the seventeenth and eighteenth centuries became the prevalent institution of English economic life, private law was prepared to account for the management of firms only as a regime of persons, using agency and trust. The latter, after all, require the delegation of fewer elements of sovereignty to private persons than does office. Corporations remained monopolistic instruments of public law, at least through the era of Blackstone. Lawyers and merchants, Cooke has shown, considered largely adventitious the connection of joint stock company to corporation, of private firm to creature of the state.<sup>194</sup> The failure of the Bubble Act of 1720 to suppress joint stock companies and destroy the trade in their shares was practical proof, if any was needed, that modern capitalistic forms could flourish absent the open support of sovereign power. They had its tacit support, instead, in the common law instruments of association reviewed in this Article.

Lawyers would depart from the scheme of natural persons only reluctantly.<sup>195</sup> They stood by the fiction that private life is the

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192. See Part III, section C *supra*.

193. See text accompanying notes 115, 116 & 155 *supra*.

194. See C. COOKE, *supra* note 103, at 18. See also Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369, 1373-74 (1956).

195. See Pollock, *Common Law, Has it Received the Fiction Theory of Corporations?*,

preserve of persons. An officer may be described, consistent with the scheme of persons, as a trustee without title to the property in his trust. He is an agent whose principal is no natural person.<sup>196</sup> Lawyers were forced, in the course of the eighteenth century, to the position that managers of a firm are agents of an invisible principal; the firm itself, an invisible or artificial principal or person.<sup>197</sup> To preserve the fiction of persons in private life, lawyers availed themselves of the medieval doctrine of artificial persons.<sup>198</sup>

But the state maintained the proposition that only the sovereign has authority to create an artificial person.<sup>199</sup> Even as they sought to preserve the rupture between state and economy brought on in the era of the Bubble Act, lawyers were led by both logic and experience to embrace the explicit intervention of sovereignty in autonomous economic affairs.

The disingenuous simplicity of the proposition that only a sovereign may create artificial persons should now be apparent. If it

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27 LAW Q. REV. 219 (1911).

196. Even today, these two ways of accounting for the position of those who manage firms, enormous or otherwise, are commonly found in the literature of corporations.

197. See C. COOKE, *supra* note 103, at 92. The roots of the artificial person can be traced in more primitive forms of association. Trusts take the first step away from the method of assimilating social reality to relations among natural persons. The world of natural persons is a world of owners managing property. No legal relation more primitive than the trust departs significantly from this model. In the fiduciary relation, management is perforce given over to another. In agency, it is voluntarily given over, and in partnership a group of persons pools property to manage it jointly. Trusts wrench the natural order of property owners. To the world the trustee appears as a property owner. Yet in reality, he merely serves as trustee. It is not *his* property that he manages, but the property of another, even though he has title to the property and assumes the risk of managing it. The textbooks say that the trust separates legal from beneficial ownership. This conceals the fact that in the trust the natural order of property owners no longer exists. The true "owner" of the property, the beneficial owner, does not own it in contemplation of law. The legal owner, the trustee, has no natural motive for carrying on prudent management, only the legal motive that he lies accountable for breach of trust. The property owner does not own property, and the legal owner has no natural motive for managing it. Trusts abrogate the world of natural persons as property owners, while in form preserving it. The joint stock company abrogates the form as well as the substance of the world of natural persons. For an opposing view, see Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts*, 9 COLUM. L. REV. 285, 289 (1909).

198. See 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 482-87 (3d ed. 1927); 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 486-97 (2d ed. 1898). *But see* Wang, *Corporate Entity Concept (or Fiction Theory) in the Year Book*, 58 LAW Q. REV. 498 (1942), 59 LAW Q. REV. 73 (1943).

199. See 9 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 45-46 (1926); Holdsworth, *English Corporation Law in the 16th & 17th Centuries*, 31 YALE L.J. 382-83 (1922).

means that only monarchs and parliaments may create them, and not courts, then it is wrong. For private persons, acting through *their* forum in the state apparatus, the courts, have created artificial persons in trusts and joint stock companies for over three hundred years. The proposition must, indeed, be construed to mean that only monarch and parliament may shield at once both participants in a firm, manager and passive investor, from personal liability.<sup>200</sup> The incapacity of courts proceeded not from any fundamental notion that legislature and executive possess more appropriate power, but rather from the courts' thematic preference that responsibility at all times be placed on one or another natural person. Judges were reluctant, without help from other branches of government, to develop a private law concept of political responsibility.

### CONCLUSION

The task of creating political responsibility in private law has been left to recent times. Political leaders, lawyers, businessmen, and scholars are actively debating whether public purposes should be accomplished directly by the state through regulation, or indirectly in the autonomous determinations of economic actors. The corollary of imposing social responsibility on economic actors is that courts ultimately may judge whether economic actors are fulfilling it. At stake is the method by which public purpose on an issue is created: by a clash of interests in legislation, or by the molecular process of decentralized decision. No one yet knows the shape of institutions that would sustain a socially responsible, decentralized economy.

Those who enter the debate, from whatever position, should be aware that common law has routinely been the vehicle through which the state apparatus distributes public authority to private economic actors. Imposition of social responsibility on such persons would be only the final step in a centuries-old process. Office, managing the business of a partnership, and inherent authority—these doctrines and institutions lend recognition to a quiet

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200. Even this statement is false. In the early nineteenth century Courts of Chancery upheld the limited liability of both owners and managers of insurance companies, whose enabling documents attempted to meld the advantages of the trust and joint stock device. See C. COOKE, *supra* note 103, at 87-88.

fact: every time persons act through an association—whether agency or partnership, company or trust—they exercise a portion of sovereignty. Only the kernel of associations, the fiduciary relation, does not yet reflect this distribution of sovereignty. Courts and legislators must reconstruct the fiduciary relation, as they have reconstructed higher forms of association, to impose public powers and obligations on persons in the relation. Thus reconstructed, the fiduciary relation would include notions of both social benefit and social responsibility.<sup>201</sup>

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201. The theorists of social responsibility have embarked on this project. For a review of social responsibility literature, see R. Ackerman, *Public Responsibility and the Businessman: A Review of the Literature*, in *TOP MANAGEMENT: BUSINESS STRATEGY AND PLANNING* (B. Taylor & K. Macmillan eds. 1973). For an introduction to theories of collective benefit, see K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (Cowles Foundation Monograph No. 12, 1951); M. OLSEN, JR., *THE LOGIC OF COLLECTIVE ACTION* (Schocken Paperbacks ed. 1968).

