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## Continuity and Change: Partnership Formation Under the Common Law

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# CONTINUITY AND CHANGE: PARTNERSHIP FORMATION UNDER THE COMMON LAW

DEBORAH W. POST†

“Continuity and change are essential attributes of  
a legal system.”<sup>1</sup>

## TABLE OF CONTENTS

I. INTRODUCTION .....	988
II. THE COMMON-LAW APPROACH TO PARTNERSHIP FORMATION .....	991
A. <i>Symbols and Legal Theory—The Reconciliation of         Competing Values</i> .....	993
B. <i>The Emergence of Intent as a Test for Partnership</i> .....	998
C. <i>The Evolution of the Meaning of Intent in Partnership</i> .....	1002
1. <i>Formalism and Constructive Partnerships</i> .....	1007
2. <i>Empiricism and Expectation</i> .....	1014
3. <i>The Impact of Social Structure on Expectations</i> ....	1020
4. <i>Empiricism, Intent and the Indices of Partnership</i> ..	1028
D. <i>Community of Interest as a Test for Partnership—The         Emergence of the Idea of Entitlement</i> .....	1029
1. <i>Contribution, Combination and Entitlement</i> .....	1032
2. <i>Community of Interest, Control and Entitlement</i> ...	1038
3. <i>Community of Interest and Risk Sharing as             Entitlement</i> .....	1043
III. CONCLUSION .....	1056

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1. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 3 (1982). Calabresi was not the first to acknowledge this truism. The process of change in the law is often discussed in terms of legal evolution. See, e.g., Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COL. L. REV. 38 (1985).

This article presumes that there is a relationship between changes in the techno-economic environment, social structure, and ideology (the law). It is not presumed that the relationship is necessarily one of simple cause and effect. But see Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 WIS. L. REV. 1373 (1984), for a criticism of a “functionalist” explanation of legal evolution. What is usually neglected in most discussions of legal evolution is the importance of continuity. As Calabresi points out, “[a]brupt changes . . . can create deep ruptures in society, ruptures that slower, more organic change would avoid.” G. CALABRESI, *supra*, at 3.

(987)

## I. INTRODUCTION

Over the past few years, partnership law has begun to emerge from the shadow of corporation law. At one time, partnership was a topic that received scant attention in the law school curriculum and in academic scholarship.<sup>2</sup> Today there is renewed interest in partnerships and in the statute which determines most partnership issues, the Uniform Partnership Act.<sup>3</sup> At the Annual Meeting of the National Conference of Commissioners on Uniform State Laws in August 1986, the Commissioners approved the appointment of a committee to revise the Uniform Partnership Act (U.P.A.).<sup>4</sup> The decision to revise the U.P.A. was a result of a report entitled "Should the Uniform Partnership Act Be Revised?" which was prepared by the Subcommittee on Revision of the Uniform Partnership Act of the Committee on Partnerships

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2. In 14 casebooks published by five publishers, for use in the basic business course in law, 11 are entitled corporations or corporation law and 12 treat partnership superficially in 30 pages or less. Five of the six books with partnership in the title are books on agency and partnership, reflecting the historical placement of partnership in the curriculum. See Hillman, *The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relative Permanence of Partnerships and Close Corporations*, 67 MINN. L. REV. 15 n.13 (1982).

A change in the attitude toward partnership has been evidenced by: (a) the expansion of the partnership materials in some widely used textbooks, see, e.g., R. HAMILTON, *CORPORATIONS* (3d ed. 1986); (b) the reorganization of textbooks to more effectively communicate the fact that partnership is an alternative to incorporation, see, e.g., L. RIBSTEIN, *BUSINESS ORGANIZATIONS* (1984); and (c) the publication of new hornbooks and texts on partnership, see, e.g., M. EISENBERG, *AN INTRODUCTION TO AGENCY AND PARTNERSHIP* (1987); D. FESSLER, *ALTERNATIVES TO INCORPORATION FOR PERSONS IN QUEST OF PROFIT, Cases and Materials ON PARTNERSHIPS, LIMITED PARTNERSHIPS, JOINT VENTURES & RELATED AGENCY CONCEPTS* (2d ed. 1986); H. G. REUSCHLEIN & W. A. GREGORY, *AGENCY AND PARTNERSHIP* (1979). I have been advised that Professors Larry Ribstein and Alan Bromberg are revising the classic hornbook on partnership, A. BROMBERG, CRANE & BROMBERG *ON PARTNERSHIP* (1968), which is currently out of print.

3. *UNIFORM PARTNERSHIP ACT* (1969) [hereinafter U.P.A.]. This may be a response to the renewed popularity which partnerships or joint ventures have enjoyed. See *More Companies Make Alliances to Expand into Related Businesses*, Wall St. J., Nov. 8, 1985, at 1; *Technology*, Wall St. J., Mar. 2, 1984, at 29; see also *Corporate Odd Couples*, Bus. Wk., July 21, 1986, at 100. Another reason may be the utilization of partnership principles by legal scholars to discuss the problems of closely held corporations. See Blackmar, *Partnership Precedents in a Corporate-Setting Exit from the Close Corporation*, J. CORP. L. 237 (1982); Hillman, *supra* note 2.

4. The Report of the Executive Committee of the National Conference of Commissioners on Uniform State Laws was submitted to the membership for approval during the Annual Meeting August 1 - August 8, 1986 in Boston, Massachusetts. The Report adopted the recommendation of the Scope and Program Committee that a committee be appointed to draft the revisions to the Uniform Partnership Act. See Conversation with Mr. McCabe, legal counsel and Legislative Director of the National Conference of Commissioners on Uniform State Laws (Sept. 18, 1986).

and Unincorporated Associations of the American Bar Association.<sup>5</sup>

The recommendations of the ABA committee did not include suggestions for anything other than minor changes in the formation provisions of the U.P.A.<sup>6</sup> The commentary following these provisions does not explain this decision but the expository statement of underlying principles provides the necessary rationale.

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5. U.P.A. Revision Subcommittee of the ABA Partnership Committee, Corporation, Banking and Business Law Section, "Should the Uniform Partnership Act be Revised?" (April, 1986). The report was submitted to the Scope and Program Committee of the National Conference. H. Haynsworth, *Report on the Uniform Partnership Act Revisions Completed*, 6 BUS. LAW. UPDATE 5 (July/August 1986).

6. "Should the Uniform Partnership Act be Revised?," *supra* note 5, at 27-33. The formation provisions of the U.P.A. to which this article refers are sections 6 and 7. Section 6, a definition of partnership, is the primary focus of this article's criticism of the U.P.A.

§ 6. Partnership Defined

(1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this act, unless such association would have been a partnership in this state prior to the adoption of this act; but this act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

U.P.A. § 6. Section 7 of the U.P.A. sets out the "Rules for Determining the Existence of a Partnership." Section 7 eliminates the common-law distinction between intraparty and third party disputes:

§ 7. Rules for Determining the Existence of a Partnership

In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by section 16 persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) 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, but no such inference shall be drawn *if such profits were received in payment*

(a) As a debt by installments or otherwise,

(b) As wages of an employee or rent to a landlord,

(c) As an annuity to a widow or representative of a deceased partner,

(d) As interest on a loan, though the amount of payment vary with the profits of the business,

(e) As the consideration for the sale of good-will of a business or other property by installments or otherwise.

*Id.* § 7 (emphasis added).

No change in the language of the U.P.A. was suggested by the Committee "unless a compelling case for a change could be made."<sup>7</sup>

No one disputes the importance of continuity in the law. If a statute is being revised, a desire for continuity generally is a good reason for retaining the existing language of a statute. This is particularly true when there is a large body of case law interpreting the language of the statute. The application of the principle of continuity in the case of the U.P.A. partnership formation provisions, however, produces a result which is the exception to this general rule. A desire for continuity is a reason for revision rather than retention of the language of Sections 6 and 7 of the U.P.A. In most jurisdictions in which the U.P.A. has been adopted, the case law on partnership formation does not contain interpretations of these statutory provisions but refers back to the common-law tests for partnership.

The common law of partnership formation has amazing tenacity. Even before the U.P.A. was adopted, there were legislative attempts to define partnership.<sup>8</sup> Neither these earlier statutes nor the U.P.A. entirely displaced the common law.<sup>9</sup> Judicial fidelity to common law principles and tests for partnership should not be dismissed as examples of judicial incompetence.<sup>10</sup> The persistence of common-law doctrines suggests that the drafters of the U.P.A. overlooked or misjudged the significance of the language that appeared in case law. The Committee revising the U.P.A. now has the opportunity to cure that oversight.

In revising a statute, it is important to consider more than the potential ambiguities in language created by time or the inherent imprecision of language. The revisers must also be cognizant of

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7. "Should the Uniform Partnership Act be Revised?," *supra* note 5, at 6.

8. *See, e.g.*, CAL. CIV. CODE § 2935 (Deering 1901); GA. CIV. CODE § 3158 (1910); MONT. CIV. CODE § 3180 (1895); N.Y. CIV. CODE § 1283 (1865); N.Y. CONSOL. LAWS c. 39 § 2 (1897); N.D. CIV. LAW § 6386 (1913); OKLA. COMP. ST. § 8103 (1921); S. D. CIV. CODE § 4027 (1887). The U.P.A. was first adopted in 1915 in Pennsylvania and Wisconsin and is now the law in 49 states.

9. Examples of common law definitions can be found in *Stuart v. Overland Medical Center*, 510 S.W.2d 494, 497 (Mo. Ct. App. 1974); *Hanlon v. Melfi*, 102 Misc. 2d 170, 423 N.Y.S.2d 132, 134 (1979); *Gray v. West*, 608 S.W.2d 771 (Tex. Civ. App. 1980, writ ref'd n.r.e.). *See also* cases cited in A. BROMBERG, *supra* note 2, at n.31.

10. Bromberg noted the failure of the courts to cite the U.P.A. He attributed this failure to "inertia and ignorance" or "research reliance on legal encyclopedias." A. BROMBERG, *supra* note 2, at 34, 35. For a discussion of the criticism of the Texas bar and judiciary, see Hamilton, *Corporations and Partnerships*, 40 S.W.L.J. 219, 239 (1986).

the importance of symbols in the language of the law.<sup>11</sup> Symbols are signals to the judiciary, evoking ideas and values most relevant to the selection of the appropriate judicial response. In this way, symbols ensure continuity in the law by promoting consistency and adherence to traditional values. Symbols also facilitate change. Symbols reassure participants in the legal process of the rightness or justness of a change in the law and the consequent restructuring of social relationships that follow from such change. The decision is right in part because it can be justified in terms which are a part of the existing tradition.<sup>12</sup>

The common law of partnership utilized words and phrases which were evocative of both contract and property concepts and the values those concepts represent. A thorough examination of the common-law of partnership illustrates the significance of these symbols and should inform the choice of language in any proposed revision.

## II. THE COMMON-LAW APPROACH TO PARTNERSHIP FORMATION

The Uniform Partnership Act was an attempt to codify the

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11. The emotional persuasiveness of the language of a statute depends on the effective use of verbal symbols:

Words . . . come to symbolize both private and public meanings, both individual and social experience. . . . However varied the individual experience, the ideas, images, emotions it calls up are systematically, culturally interrelated to one another. They constitute in Geertz' phrasing "a model of and for reality."

M. DIMEN-SCHEIN, *THE ANTHROPOLOGICAL IMAGINATION* 148 (1977). Ideology, or the belief system that exists in each society, and symbols, the expression of these ideas or beliefs, are extremely powerful according to Dimen-Schein because they "bridge intrapsychic divides between feelings and thinking, emotions and reason, irrationality and rationality." *Id.* at 150, 151.

It has also been said that symbols "objectify experience in a concrete fashion and in so doing are able to get at our most fundamental feelings." Symbols "unify and express the core elements of our lives." M. C. HOWARD & P. C. McKIM, *CONTEMPORARY CULTURAL ANTHROPOLOGY* 334 (1983).

12. Judges, like chiefs, shamans, or oracles, their counterparts in small scale societies, fulfill their functions as law givers and law enforcers in rituals which make use of both verbal and non-verbal symbols. Could any lay person fail to be awed or intimidated by the black robes, the imposingly elevated bench, the barrier that separates initiates from the general public, the symbols of authority like the gavel and flags? Just as a shaman may utter ritual incantations containing images that evoke the values he wishes to validate or confirm in his decision, so a judge in any decision must demonstrate the legitimacy of that decision and validate his authority through the use of the proper verbal symbols. For a discussion of legal constructs as "magical tools" and legal masks as agents of social control, see Weyrauch, *Law as Mask—Legal Ritual and Relevance*, 66 CAL. L. REV. 699 (1978). See also Pyle, *Law, Ritual and Language*, 8 ALSA Forum 381 (1984); White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 UNIV. CHI. L. REV. 684 (1985).

common law that existed in the United States with respect to partnerships. However, there are significant differences between the definition of partnership contained in the statute and the common law definitions that were in use at the time of its adoption.<sup>13</sup> Partnership case law prior to the U.P.A. emphasized two things, the contractual aspect of partnership formation, which dictated an inquiry into the intent of the parties, and issues of entitlement which courts expressed in terms of a need for a "community of interest."<sup>14</sup>

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13. For examples of common law definitions, see cases and treatise cited *supra* note 9 and *infra* note 14. Early cases sometimes included a laundry list of definitions. See, e.g., *Winkelbach v. Honolulu Amusement Co.*, 20 Haw. 498, 501 (1911); *Potts v. Lux*, 161 Kan. 217, 166 P.2d 694 (1946); see also A. BROMBERG, *supra* note 2, at 33 n.7; N. LINDLEY, A TREATISE ON THE LAW OF PARTNERSHIP (5th ed. 1888) ("definitions of celebrity").

14. For a discussion of intent, see *infra* notes 34-99 and accompanying text. For a discussion of "community of interest," see *infra* notes 107-83 and accompanying text.

In most discussions of common-law partnerships, the existence of a contract was an *a priori* assumption. See, e.g., *Malvern Nat'l Bank v. Halliday*, 195 Iowa 734, 192 N.W. 843 (1923); *Thillman v. Benton*, 82 Md. 64, 33 A. 485 (1895); *Mackie v. Mott*, 146 Mo. 230, 47 S.W. 897, 903 (1898); *Beecher v. Bush*, 45 Mich. 188, 7 N.W. 785 (1881); *Sullivan v. Sullivan*, 122 Wis. 326, 99 N.W. 1022 (1904).

See generally S. WILLISTON, WILLISTON ON CONTRACTS § 307A, 440-49 (3d ed. 1959). Williston's definition of partnership recognizes its contractual nature. The definition states that "in general, a partnership requires two or more persons who have entered into a contract to carry on a business for profit as co-owners." *Id.* at 441; see also *Watson v. Hamilton*, 180 Ala. 3, 60 So. 63 (1912) (dismissed claim of wife's heirs because absent agreement to share in both profits and losses; no partnership); *Constanti v. Barovic*, 199 Wash. 117, 90 P.2d 724 (1939).

Another frequently cited authority was a treatise by Chancellor Kent which defined partnership as "a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." 3 J. KENT 23 (13th ed. 1884); see *Omaha & Grant Smelting & Ref. Co. v. Rucker*, 6 Colo. App. 334, 337, 40 P. 853, 854-55 (1895); *Flower v. Barnekoff*, 20 Or. 132, 143, 25 P. 370, 373 (1890). The treatise by Chief Justice Story is also quoted for this proposition in *Flower*. 20 Or. at 143, 25 P. at 373. Another treatise begins with a discussion of "contracts of partnership" including such topics as the nature of the contract, its duration, the capacity of the parties, the consideration required for formation and the applicability of the statute of frauds. LINDLEY, *supra* note 13.

An allusion to the contractual nature of a partnership often occurred in the context of a court's discussion of the proper "construction" or interpretation of a written agreement. See, e.g., *London Assurance Co. v. Drennan*, 116 U.S. 461 (1886); *Streeter & Riddell, Inc. v. Bacon*, 49 Cal. App. 327, 193 P. 285 (1920); *Florence v. Fox*, 193 Iowa 1174, 188 N.W. 966 (1922); *Thillman v. Benton*, 82 Md. 64, 33 A. 485 (1895); *C.E. Johnson & Co. v. Marsh*, 111 Vt. 266, 15 A.2d 577 (1940). However, courts also recognized oral agreements or contracts for partnership. See, e.g., *Bridgman v. Winsness*, 34 Utah 383, 98 P. 186 (1908); *Constanti v. Barovic*, 199 Wash. 117, 90 P.2d 724 (1939).

In contrast, section 6 of the U.P.A. omits any reference to contract.<sup>15</sup> The drafters also substituted “association . . . as coowners of a business,” a phrase which describes the result not the process by which a partnership is formed, for “community of interest” or the longer definitions which describe the process of contribution and combination that results in partnership.<sup>16</sup> Section 7 restates the common-law presumption of partnership if there is an agreement to share profits and lists alternative classifications for business relationships that were developed in early case law. Section 7 explicitly rejects the dichotomy that existed in the common law of partnership between intra-party and third party disputes.

A. *Symbols and Legal Theory—The Reconciliation of Competing Values*

Under the common law, partnership was considered a specialized area of contract law.<sup>17</sup> As a consequence, the ideas and doctrinal themes that appeared in contract law in the 19th and

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15. Intent as a test for partnership was a product of the common-law definitions of partnership as a species of contract. See *supra* note 14. Professor Bromberg, the venerable expert on partnership, has explained that association imports voluntariness, a word which in its turn implies intent. A. BROMBERG, *supra* note 2, at 38. Professor Bromberg does not cite to any case in which a court analyzed the language of the statute in this manner in an attempt to justify the continued use of intent as the test for partnership.

The decision by the drafters of the U.P.A. to avoid any reference to contract law was political. The drafters sought to eliminate the controversy which they thought might arise over implied in law (constructive) partnerships.

To say that the association must be created by contract, is not only unnecessary, but in view of the varied use of the word “contract” in our law, if the word is used, an explanation would have to be made as to whether the contract could be implied, and if so, whether it could be implied in law or only implied as a fact. By merely saying that it is an association these difficulties are avoided.

Commissioners’ Note, 7 U.L.A. 12.

Of course, there is no reason why courts cannot use the statutory definition of partnership to create implied partnerships. The persistence of the common-law test of intent may evidence a perceived need on the part of the judiciary to justify decisions symbolically in terms that refer to the assent of the parties.

Excising contract from the definition of partnership did not eliminate intent as a test for partnership. It did remove partnership from the mainstream of contract law and the jurisprudential debate over the purpose of contract and the role of the judiciary. The statute contains no clear signal to the judiciary that they need to be concerned with the consistency between two related areas of the law.

16. For the best example of the longer definitions, see the definition of partnership from Kent’s Commentaries quoted *supra* note 14. For a discussion of “community of interest” and the process of contribution and combination, see *infra* notes 109-50 and accompanying text.

17. See *supra* note 14.



early 20th centuries were echoed in partnership decisions.<sup>18</sup> The most important of these was the characterization of contract and partnership as areas of private law which was evidenced in both instances by a preoccupation with the intent of the parties.<sup>19</sup> In contract and in partnership, the ideology of the law maintained that individuals created commercial or business relationships by agreeing to undertake reciprocal rights, duties and obligations.<sup>20</sup>

18. The ideas which are present in contract and partnership are discussed at great length throughout this article. To summarize, early common law partnership cases reflect the same evolution of intent from Subjective to Empirical that occurred in contract law generally. For a discussion of this evolution, see *infra* notes 41-103 and accompanying text.

19. The predominant theme in contract in the 19th and early 20th centuries was the "privatization" of contract. Normative standards imposed by the common law were altered in the wake of the emergence and subsequent objectification of a "will" theory of contracts. The idea that individuals could by agreement abrogate or modify the law as between themselves was consistent with a political ideology of government by consent. The will theory of contracts was justified in ideological terms as a means by which courts could determine what the current "public sentiment" was with respect to certain legal rules. See generally P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); G. GILMORE, *THE DEATH OF CONTRACT* (1974); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977) (chapter entitled *The Triumph of Contract* describes emergence of will theory of contract in 18th and 19th centuries).

An example of the will theory in operation can be seen in *London Assurance Co. v. Drennen*, 116 U.S. 461 (1886). In *London*, the Supreme Court refused to find a partnership because the written agreement between the ostensible partners stated that the business would be conducted by a corporation. The process of incorporation was begun but not completed. Relying on the written contract rather than the conduct of the parties, the court stated emphatically: "Mere participation in profits would give no such interest contrary to the real intention of the parties. Persons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no partnership shall exist." *Id.* at 472.

20. "All legal rights and duties are aspects of social relationships. They are not essentially rights in things, though they may pertain to things. They are rights to act in certain ways in relation to the rights of other people." S. FALK-MOORE, *LAW AS PROCESS* 70 (1978) (citing HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1919)). With the creation of national markets and the restructuring of society that preceded or accompanied it, those social relationships which arose in the economic sector of American society, relationships which involved economic exchange, became impersonal. That is to say, they involved parties who were not otherwise related to kinship of residence. This change, the move from "status to contract," is equated with progress and with the freedom of individuals to make choices and exercise their free will. J. MURRAY, *CASES AND MATERIALS ON CONTRACTS* (3d ed. 1983).

For an interesting discussion of partnership and kinship under Roman and Medieval law, see J. PARSONS, *PRINCIPLES OF PARTNERSHIP* 4-7 (1889). See also *Winkelbach v. Honolulu Amusement Co., Ltd.*, 20 Haw. 498, 502 (1911) (Supreme Court of Hawaii stated that "[t]he contract of partnership is something more than an ordinary contract. It creates, in addition to the contractual relation, a status.").

"Courts, in essence, were developing a series of new doctrines designed to apply to large impersonal business dealings between commercially sophisticated insiders which, we have seen, were rapidly replacing the face-to-face transaction

The use of intent as a test for a legally enforceable undertaking was consistent with a belief system of an industrializing nation.<sup>21</sup> That belief system equated progress with individual initiative and individual decision-making with economic rationality.<sup>22</sup> The word "intent" was a symbol for the idea that courts

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as the dominant mode of trade." M. HORWITZ, *supra* note 19, at 200. The response by legal institutions unfettered by social mores that normally govern relationships was to leave the determination of reciprocal rights, duties and obligations to the parties. See also P.S. ATIYAH, *supra* note 19; Mensch, Book Review, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753 (1981) (reviewing P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979)).

21. "[T]hrough most of the nineteenth century the free market was the means of obtaining the desired goal of economic growth. . . . In this context, the primary objective of contract law was to support the market by enforcing promises and building a stable but rather general framework of operating principles within which the rational allocation of resources by private planners could proceed." E. MURPHY & R. SPEIDEL, *STUDIES IN CONTRACT LAW* 10 (3d ed. 1984) (citing W. HURST, *LAW AND ECONOMIC GROWTH* (1964)).

22. The late 19th century was a period of great technological and economic change. The ideas of progress and social evolution were equated with individual effort. P.S. ATIYAH, *supra* note 19; C. FRIED, *CONTRACT AS PROMISE* (1981). Rationality was considered a necessary prerequisite to such progress. In economic theory the influence of rationalism produced the paradigm of the "economic man." For discussion of "economic individualism" which was characteristic of the 19th century, see Metzger & Phillips, *Promissory Estoppel And the Evolution of Contract Law*, 18 AMER. BUS. L.J. 139, 144-53 (1980).

In law, the preoccupation with rationalism and individualism fostered a scientific approach to the law which emphasized systematic ordering and generalization in the form of legal principles and rules. See G. GILMORE, *THE AGES OF AMERICAN LAW* (1977). The Uniform Partnership Act was explained and justified by the drafters in terms of the necessity of a scientific approach to the law. See, e.g., Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617 (1915); Lewis, *The Desirability of Expressing the Law of Partnership in Statutory Form*, 60 U. PA. L. REV. 93, 98-99 (1911); see also G. GILMORE, *supra* note 19, at 9 (discussion of Justice Joseph Story's Report on Codification of the Common Law). Story's report also emphasized the "scientific precision and accuracy and clearness" which gave subjects like partnership, an area of the law he referred to specifically, "indisputable title to be treated as a fixed system of national jurisprudence." G. GILMORE, *supra* note 19, at 9.

Another treatise writer disagreed.

I am astounded by the statement . . . that the law of partnership is ripe for codification. They [Lindley and Pollack] intend by this statement to convey the meaning, that the principles of the relation, having been fully established, can be exposed in definitions and applied in formulas. How do they succeed in demonstrating the feasibility of the project? They stumble and halt on the very threshold. The definition of partnership breaks them all up.

J. PARSONS, *supra* note 20, at lxiii.

It is interesting to note that Lewis, the reporter for the committee that drafted the U.P.A., shared Parson's reservations.

[I]t is perhaps well to emphasize the fact that there is one matter connected with partnership which legislation cannot make certain. By no human ingenuity would a partnership law which does not abolish common law partnerships enable the person who reads it to tell in every supposable case whether there is or is not a partnership. . . . The un-

should protect personal autonomy, i.e., the ability of individuals to structure their relationships in a particular way. A companion belief was the idea that government should remain unintrusive. The reciprocal rights, duties and obligations of the parties were to be established by the agreement between them. The role of the courts was limited to the enforcement of the terms of that agreement.<sup>23</sup> In common-law partnership cases, the value placed on personal autonomy came to be symbolized by the word "intent".

Another value that found expression in partnership cases was personal responsibility. To say that American society valued personal responsibility in the partnership context is to say that an individual was required to act in a way which was consistent with the expectations of third parties, whether those third parties were creditors of co-participants in that enterprise.

Personal responsibility always is an issue when there is a failure to act by an individual who knows or should know that some circumstance has created an expectation in another that he will act, particularly when the failure to act will result in harm to the third party. Such expectations are now referred to as "socially oriented legitimate expectations."<sup>24</sup>

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certainty lies in the fundamental characteristic which distinguishes partnerships from every other business association . . . an infinite number of combinations of circumstances may result in the co-ownership of a business. Partnership is the residuum, including all forms of co-ownership except those business organizations organized under a specific statute.

Lewis, *The Uniform Partnership Act*, *supra* at 622.

23. The relationship between laissez faire politics, economics and legal doctrine has been discussed extensively. See P.S. ATIYAH, *supra* notes 19, 22; G. GILMORE, *supra* note 19, at 22; M. HORWITZ, *supra* note 19.

Formalism not only limited the courts to the terms of the contract, but also established rules regarding the acts which had to be performed by the parties in order to make their relationship one which had legal consequences. "[T]he result of contract is the creation of a *legal relationship* involving the rights and duties of persons." E. MURPHY & R. SPEIDEL, *supra* note 21, at 1. This idea continues to have power although it is inaccurate. The development of reliance theory has meant that even in the absence of "contract" there may still be legally enforceable rights and duties. See Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 835 (1983); Metzger & Phillips, *supra* note 22, at 139.

24. The term "socially oriented legitimate expectation" is used by Feinman in his discussion of contemporary contracts law. Feinman, *supra* note 23, at 835. The idea was described by Corbin in his definition of a legal relationship as:

certain specific facts of a kind such as have in the past caused organized society to give remedies against the duty bearer in favor of the right holder. . . . Legal relations are merely existing facts of life viewed in the light of a past uniformity of societal action, that enable us to predict similar action in the future with respect to two or more persons.

A. CORBIN, CORBIN ON CONTRACTS 4 (1952); see also L. FULLER, THE MORALITY OF

Those who describe expectations as "socially legitimate" assume the existence of a world view, including a model of social structure and social organization, shared by members of American society. The model describes the prescribed behavior between and among recognizable groups within society. Expectations also can be created by the words or conduct of individuals who chose to enter into relationships.

In partnership, the words which communicated the value placed on personal responsibility were "community of interest." This phrase described the nature of the relationship an individual had to have with a business enterprise before there could be a "socially legitimate expectation" that he or she had assumed the responsibility of a fiduciary toward other partners or the responsibility of an owner to the creditors of the enterprise.

It was also true that the ideology of the law equated fairness in a commercial context with notice to private individuals of the consequences their decisions.<sup>25</sup> Notice could take the form of legal rules that satisfied standards of certainty and clarity.<sup>26</sup>

The concern with notice and certainty was enhanced by a recognition of the consequences of partnership.<sup>27</sup> Partners had the right to participate in the management of the business; they were agents for the partnership and their actions bound the partnership and their fellow partners who were jointly liable for partner-

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LAW (1969). For a discussion of Empiricism and socially oriented legitimate expectation, see *infra* notes 77-82 and accompanying text. For a discussion of the world view, see *infra* note 103 and accompanying text.

25. See L. FULLER, *supra* note 24, in which he discusses the "internal morality of the law." In this article, I refer repeatedly to institutional norms and values. These are the standards of behavior to which participants in the institution are expected to conform and the values that inform the choices made by these participants. Fuller described these norms as affirmative in nature, imposing on legal institutions the obligation to "make the law known, make it coherent and clear." *Id.* at 42.

26. *Id.*

27. The discussion here refers to the consequences of partnership, the power and authority, rights and obligations of partners as described in the case law and treatises before the adoption of the U.P.A. See, e.g., *Meehan v. Valentine*, 145 U.S. 611 (1892) (upheld claim of creditor status of one who participated in profits, but not in business of partnership). The U.P.A. adopted the common law rules regarding the relationship of the parties. For example, sections 18(e) and 24 give each partner an equal say in the management of the business; section 15 makes each partner jointly liable for debts and obligations of the partnership and jointly and severally liable for the wrongful acts of any partner; section 18(a) states that each partner must contribute towards the losses of the partnership in the same proportion that he shares in the profits, and section 21 makes each partner accountable as a fiduciary to the partnership and his or her partners.

ship debts.<sup>28</sup> Each partner had an obligation, unless there was an agreement to the contrary, to share in the losses as well as in the profits of the enterprise.<sup>29</sup>

The attributes of partnership compelled courts to impose a fiduciary obligation on individuals who entered into that type of relationship.<sup>30</sup> The fiduciary standard of behavior minimized the risk and the vulnerability that inhered in a relationship based on trust and reflected the value placed on personal responsibility and honesty in interpersonal relationships of that nature. The imposition of such a fiduciary standard made the issue of notice critical. This preoccupation with notice and certainty was assuaged in part by an inquiry into the intent of the parties.

It is a basic premise of this article that many of the most fundamental values in American society conflict or compete with one another.<sup>31</sup> Conflict or competition is most apparent when values are invoked to support alternative choices in the creation or application of norms. The facts and circumstances of a particular dispute may be such that the vindication of one value will produce an outcome clearly inconsistent with the result dictated by the other value. Courts attempt to reconcile and accommodate competing values. Such an attempt at reconciliation or accommodation of the competing values of personal autonomy and personal responsibility is reflected in the use of "intent" and "community of interest" as tests for partnership.

### B. *The Emergence of Intent as a Test for Partnership*

In the 18th and early 19th century, the values of personal responsibility and personal autonomy were balanced in partnership law through the application of the "Net Profits Rule." Per-

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28. "Every member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way." N. LINDLEY, *supra* note 13, at 148. "The powers of the members of a partnership are equal, even although their shares are unequal." *Id.* at 351. "Equal rights of control do not preclude the possibility of delegation of authority to manage their business to one or more of the partners." *Id.* at 352. "A partner who enters into a contract on behalf of the firm is not liable on that contract except as one of the firm: in other words, the contract is not binding on him separately, but only on him and his co-partners jointly." *Id.* at 228. "For torts imputable to a firm all the partners are liable jointly and severally." *Id.* at 236.

29. *See id.* at 453.

30. This fiduciary obligation has been described as an obligation of "perfect fairness and good faith" and the standard of conduct equated with the "highest standard of honor." *Id.* at 353.

31. For a discussion of the competing values of personal responsibility and personal autonomy in the area of contract formation, see Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L. J. 997 (1985).

sonal responsibility was vindicated by the content of the rule. Anyone who provided money or property to a business in return for a share of the profits was treated as a partner and was liable to the creditors of the business.<sup>32</sup> Although this meant that partnerships could be created by operation of law, that is by judicial fiat, the Net Profits Rule lasted as long as it did because the application of the Rule left no room for discretion on the part of the judiciary. Personal autonomy was protected in the way that law of partnership formation operated. The Net Profits Rule provided certainty and presumably allowed the business community to plan more effectively since the legal consequences of an act could be predicted.<sup>33</sup> Nonetheless, the Net Profits Rule soon fell into disfavor.<sup>34</sup>

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32. See, e.g., *Rice v. Austin*, 17 Mass. 197 (1821); *Hackett v. Stanley*, 115 N.Y. 625, 22 N.E. 745 (1889); *Leggett v. Hyde*, 58 N.Y. 272 (1874); *Cothran v. Marmaduke & Brown*, 60 Tex. 370 (1883); see also *Eastman v. Clark*, 53 N.H. 276 (1872) (Judge Doe traced history of Net Profits Rule to two English cases, *Grace v. Smith*, 96 Eng. Rep. 587 (2. Black W. 998) (1775); *Waugh v. Carver*, 126 Eng. Rep. 525 (2H. BL. 235) (1793)). The doctrine as articulated in *Waugh v. Carver* and quoted in *Eastman v. Clark* states that:

he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle, that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts.

53 N.H. 276, 312 n.\* (1872).

To distinguish the constructive partnership from a "real" partnership, one treatise writer referred to it as quasi-partnership. See N. LINDLEY, *supra* note 13, at 7-9. Quasi-partnership was grouped with partnership by estoppel because both were aimed at protecting the interests of third parties. The Net Profits Rule had no application in disputes between alleged partners. For a discussion of the distinction courts drew between disputes interse and third party disputes, see *infra* notes 67-70 and accompanying text.

33. The emergence of a market economy made planning a critical part of economic exchange. Professor Atiyah has suggested that the idea of Rule of Law was critical to the development of the market economy in the eighteenth century because rules were thought to be impartial, abstract, certain and predictable. P.S. ATIYAH, *supra* note 19, at 402.

Of course, even in the eighteenth century, alternative solutions to the problem of predictability were offered. Professor Atiyah also notes that Lord Mansfield was concerned with making: "the law more serviceable to the commercial community. That meant that it must become more rationale, more intelligible, more predictable, and even more just according to the standards of the mercantile world." *Id.* at 122. Mansfield thought predictability could be achieved by giving effect to the reasonable intentions of the parties. The task for the judiciary was the articulation of general principles of law "more in accordance with commercial customs." *Id.* at 123.

34. The Net Profits Rule coexisted with other legal principles governing partnership formation. Among these was the basic tenet that partnership was a matter of contract. For the definitions of partnership and a discussion of partnership as contract, see *supra* note 14. Early partnership statutes required "consent by all the parties" for partnership. See, e.g., N.D. CIV. LAW § 6388 (1913).

An example of the rejection of the Net Profits Rule that exemplifies the reasons for its demise appears in *Fink v. Brown*,<sup>35</sup> an early Texas case. The plaintiff sought damages for personal injuries sustained on the premises of an ice plant. He argued that the existence of a provision in the lease for the plant which stipulated that the lessor would receive one half of the net profits from operations in addition to the base rent of \$10,000 per year was sufficient to establish a partnership between the lessor and the lessee.

The Texas court rejected the Net Profits test for partnership, citing the United States Supreme Court decision in *Meehan v. Valentine*,<sup>36</sup> and set out a different standard for a determination of partnership.

First. It is sufficient to constitute a partnership that the parties are to have a *community of interest* in the profits *as such*.

Second. In determining the question of whether a partnership exists, the actual relation consequent upon the engagement of the parties will be looked to; and as to

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While consent was required by some statutes and assent was considered indispensable in contract, the application of the Net Profits Rule meant that a partnership could be imposed on the parties without assent and in complete contravention of their actual intentions. The Net Profits Rule resulted in constructive partnerships, partnerships created by operation of law.

The court in *Eastman v. Clark*, 53 N.H. 276 (1872), noted that the Net Profits Rule never existed in unqualified form. In *Eastman*, the plaintiff sued all the individuals operating a stage line for the amount owed for feed sold to one of the participants in this business venture. The defendants had an agreement among themselves that they would each provide a coach, a driver, and two six-horse teams for the operation of a stage. A jury found that the parties agreed to share gross returns, each paying separately the costs of maintaining his stock. *Id.* at 277.

The issue before the court was whether an agreement to share gross profits should make one party to the agreement liable to trade creditors of the other. The court concluded that if the "Net Profits test" was the law, "logical consistency" would require the defendant be held liable as a partner since the rationale for the Net Profits Rule applied with even greater force in the case of gross profits. *Id.* at 290. The court reasoned that the only way to avoid the imposition of liability in the case was to reject the Net Profits Rule. *Id.* The Court concluded that the Rule was not a sound rule of law founded in reason. *Id.* at 288. The survey of precedents and scrutiny of the reasons for the Net Profits Rule were a necessary part of the court's assessment of the Net Profits Rule. *Id.* at 285; accord *Thillman v. Benton*, 82 Md. 64, 33 A. 485 (1895) (creditor receiving share of profits not partner); *Beecher v. Bush*, 45 Mich. 188, 7 N.W. 785 (1881) (lessor receiving share of profits not partner in operation of hotel). New York was the one jurisdiction in which courts continued to apply the Net Profits Rule after it was discredited in *Eastman*. See, e.g., *Leggett v. Hyde*, 58 N.Y. 272, 278, 279 (1874) (defense of Net Profits Rule).

35. 215 S.W. 846 (Tex. Comm'n App. 1919, judgment adopted).

36. 145 U.S. 611 (1892).

creditors, the court will ordinarily apply the doctrine that the party who shares the profits must also share the liabilities, *unless it appears that the parties intended and constituted a different relation*, in effect excluding that of partnership.<sup>37</sup>

In *Fink*, the court was confronted with a situation which represented the broadest application of the Net Profits Rule encompassing a relationship which the court and the alleged partners recognized as something other than partnership. The rejection of the Net Profits Rule was an acknowledgement of the limitation of the power of the law. The existence of this Rule of Law could not transform the way in which particular business transactions were perceived or defined by the community.<sup>38</sup> The application of the Rule produced results inconsistent with the expectations of the participants and the frequency with which a Net Profits Rule was disputed undermined the argument that individuals planned with reference to the law. Even though the Net Profits Rule arguably satisfied the requirements of certainty and clarity, it violated the sentiment that revered personal autonomy. In short, personal autonomy was not served but hindered through the application of the Rule.<sup>39</sup>

With the rejection of the Net Profits Rule, a new balance was

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37. *Fink*, 215 S.W. at 848 (emphasis added).

38. *Eastman v. Clark* contains a compilation of cases discussing the effect of a profit sharing term. Among the exceptions to the Net Profits Rule were profit sharing arrangements in leases with tenant farmers or saloon operators, and employment agreements with clerks, salesmen, and seamen. 53 N.H. 276, 338-39 (1872).

39. As Professor Atiyah points out, a rule thwarts predictability when it is inconsistent with emerging values. The change in values which Atiyah credits with the elimination of absurd and technical rules in English law was supported by a belief that: "men had the ability to plan their affairs in an orderly, rational way, and were therefore entitled to the assistance of the law in giving effect to reasonable intentions." P.S. ATIYAH, *supra* note 19, at 122.

That sentiment is certainly reflected in the lengthy quote in *Eastman v. Clark* from the testimony of Commissioner Fane before the select committee on partnership, printed by order of the House of Commons, July 8, 1851:

Nor, indeed, is it easy to see what right the law has thus to interfere with each man's discretion. Take a very common case. A person,—a successful lawyer, for instance,—who has some accumulations lying idle, hears of a project which has been started by some enterprising person, the rescue of a large tract of land, in Victoria county, from the sea. He approves the idea, has confidence in its promoters, and is content to risk a moderate sum,—1,000£., on the success of the enterprise, but no more. "No," says the law, "you shall not risk moderately; if you risk at all, you shall risk your last acre and last shilling." What right has the law thus to dictate, thus to control his discretion?

53 N.H. 276, 312 n.\* (1872).



struck between personal autonomy and personal responsibility. As evidenced by the language in *Fink*, intent was one means of avoiding the consequences of this rule of partnership formation. Although courts continued to treat an agreement to share profits as proof of partnership where a dispute involved third parties, the alleged partners could disprove partnership by indicating their intent to effect a different relationship.<sup>40</sup>

C. *The Evolution of the Meaning of Intent in Partnership*

In partnership law, as in contract law generally, intent has had different referents. Its earliest referent was a state of mind, the subjective intent of the individuals who were contracting or entering into a business engagement.<sup>41</sup> It was displaced, gradually, by an objective test of intent.<sup>42</sup> The objective test itself has undergone a metamorphosis over time. During the period when the Classical or Formal model of contracts was in its ascendancy,<sup>43</sup> an inquiry into objective intent was limited to an exami-

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40. See, e.g., *Meehan v. Valentine*, 145 U.S. 611 (1892); *Sullivan v. Sullivan*, 122 Wis. 326, 99 N.W. 1022 (1904). The Supreme Court in *Meehan* quoted extensively from the treatise on partnership by Chief Justice Story. Story observed, and the Supreme Court apparently concurred, that: "a participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third persons, in the absence of all other opposing circumstances." *Meehan*, 145 U.S. at 620 (citing J. STORY, PARTNERSHIPS § 38 (5th ed. 1859)). The meaning of "all other opposing circumstances" was provided in the explanation of the rule which should apply. "The true rule . . . would seem to be that the agreement and intention of the parties themselves should govern in all cases." *Id.* at 621.

41. For a discussion of the relationship between the "will" theory in contract and the subjective test of intent, see M. HORWITZ, *supra* note 19. See also G. GILMORE, *supra* note 19, at 22.

42. E.A. FARNSWORTH, CONTRACTS, § 3.6 (1982); G. GILMORE, *supra* note 19, at 22. Examples of the subjective test for intent can be found in *Watson v. Hamilton*, 180 Ala. 3, 60 So. 63 (1912); *Clemens v. Crane*, 234 Ill. 215, 84 N.E. 884 (1908); *Runnels v. Moffat*, 73 Mich. 188, 41 N.W. 224 (1889); *Tracy v. McManus*, 58 N.Y. 257 (1874).

43. Scholars refer variously to Classical contract doctrine, law, or theory; the Classical model or image of contract law, and to the Classical period in contract law. See generally G. GILMORE, *supra* note 19; Feinman, *supra* note 23. At times it is not clear whether it is an historical period or an ideology that is the subject of discussion. Variations in terminology notwithstanding, there is a shared understanding concerning the beliefs and values that constitute the ideology of Classicism, although some have even referred to the component ideas as "mythology." Mensch, *supra* note 20, at 753. Its origins in the American legal tradition have been traced to the works of Langdell, Holmes and Williston; it was based on the economic model of the free market and incorporated many assumptions that supported that model; it was the product of a liberal political philosophy for which "freedom of contract" was the byword and this political philosophy was implemented through the use of formalism as the predominant doctrinal or jurisprudential style. *Id.* at 755.

nation of the document or writing embodying the agreement between the parties.<sup>44</sup> Ultimately, however, objectivism led to Empiricism, an examination of the conduct of the parties and the realization that the conduct of the parties could and often did contradict the writing.<sup>45</sup> Under the Empirical test, no one factor or circumstance is determinative.

These three tests for intent, which have been denominated in this article as Subjective, Formal and Empirical, developed more or less in that order. The tests are not strictly chronological, however, and instances abound of the application of an "earlier" theory after the emergence of its successor.<sup>46</sup>

In early partnership cases discussing the intent of the parties, the courts were concerned with the actual, i.e., subjective intent of the parties. In *Clemens v. Crane*,<sup>47</sup> decided by the Supreme Court of Illinois in 1908, the estate of one Mr. Bode sought to avoid liability to the plaintiff, Mrs. Clemens, by arguing that the \$7,000 Mrs. Clemens had given Mr. Bode was a loan and that the interest rate on the loan was usurious. Shortly after her hus-

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44. Formalism was a:

rejection of the law-making power of the judge, rejection of the relevance of policy issues to legal questions, belief that the law was a deductive science of principles, and that the one 'true' answer to legal questions could be found by a strictly logical process. It involved also a belief in the objective reality of legal concepts. . . .

P. S. ATIYAH, *supra* note 19, at 660.

Formalism was expressed in the adoption of rules which limited the discretion of judges. Preeminent among these was the parol evidence rule which was designed to restrain judges from intruding into the area of "self-rule" enjoyed by private individuals. The parol evidence rule imprisoned judges within the four corners of the document or instrument memorializing the agreement between the parties and limited interpretation to the "plain meaning" of the words used in the writing. F. KESSLER, G. GILMORE & A. T. KRONMAN, *CONTRACTS* 822 (3d ed. 1986); S. WILLISTON, *CONTRACTS* §§ 600-647 (3d ed. 1961).

45. The role of the writing became evidentiary and not determinative of contractual rights and duties. Extrinsic evidence became the "interpretive framework" for accessing the "attitudes and expectations" of the parties. F. KESSLER, G. GILMORE & A. T. KRONMAN, *supra* note 44, at 824. The parol evidence rule assumed the "semblance of a ghostly fiction." Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 39 COL. L. REV. 56, 84 (1939). For discussion of the "Empirical attitude" of legal realism and the method of analysis Llewellyn labeled "situation sense", see Feinman, *supra* note 23, at 836, 837; Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 697-700 (1984). For a further discussion of Empiricism, see *infra* note 75.

46. It may be misleading to state that intent evolved from a Subjective to a Formal and then to an Empirical test if the term 'evolution' suggests that each form of the test completely displaced its predecessor. It is probably more accurate to say that each became dominant in its own time, a preferred but not exclusive approach. Taken together, the three represent strategies available to explain or justify a decision reached by a court on any particular set of facts.

47. *Clemens v. Crane*, 234 Ill. 215, 84 N.E. 884 (1908).

band's death, Mrs. Clemens had been convinced by Mr. Bode to sell the business she inherited and to invest the proceeds of the sale in Mr. Bode's business. The written contract stipulated that Mrs. Clemens was giving \$7,000 to Mr. Bode to use "in his business or outside of it as his judgment may elect" and that Mrs. Clemens would receive a net profit on her money of not less than 15% per year, part of which would be paid in monthly installments of \$75.

During the course of their business relationship, Mrs. Clemens and Mr. Bode exchanged several letters. Mrs. Clemens referred to her desire to have her money invested "in the business" and her intention that their relationship should be a partnership. Mr. Bode assured her that the documents he had prepared, which appeared to be loan agreements, were intended to protect her financially and to expedite the return of her original investment if he were to die.

Evidence was introduced which suggested that Mr. Bode used the \$7,000 he received from Mrs. Clemens to build his personal residence which included the offices of the business; that Mrs. Clemens knew of the use of the money and that the amounts paid to her were never calculated on the basis of the financial performance of the company. Mrs. Clemens never participated in the business in any way nor was she required under the agreement to share in any losses that might have been incurred.

The Illinois Supreme Court found there was a partnership, however, and supported its decision with a reference to the intent of the parties. The court eschewed any test for partnership which looked only at the contracts between the parties or their actions, what we might characterize as the public aspect of their relationship. Rather it examined at great length the private and informal communications between the parties, the letters of inquiry and explanation exchanged by the two. These letters can only be described as an expression of the internal, i.e., subjective, intentions of the parties.<sup>48</sup>

Today, an examination of the conduct of the parties in *Clemens* would lead inexorably to the conclusion that their relationship was not a partnership. Mrs. Clemens and Mr. Bode did nothing that looked at all like a partnership. Even if we were to consider Mr. Bode's letters as conduct, an objective test requires one to

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48. For an interesting example of an attempt to gauge the state of mind of the parties, see *Watson v. Hamilton*, 180 Ala. 3, 60 So. 63, (1912), discussed *infra* notes 95-98 and accompanying text.

assume that the perceptions of the person observing the conduct are those of a reasonable person.<sup>49</sup> While we may be willing to accept the fact that Mrs. Clemens thought she had a partnership, it is also clear that a reasonable person in her circumstances would not have shared her belief.

The objectification of intent in contract law is said to have begun in earnest with the publication in 1881 of Holmes' lectures on contract law.<sup>50</sup> Courts thereafter began to employ an approach to partnership formation and intent which was consistent with the Classical theory of contracts. They purportedly applied an objective test, one which looked at external manifestations of intent, but their exploration of the issue was restricted to the written instruments embodying the agreement between the parties.<sup>51</sup> *Fink* illustrates this early accommodation to objectification. Intent was adduced from a term in a written agreement which specified the way in which the partners classified the relationship.<sup>52</sup>

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49. A most concise statement of the objective standard was written by Professor Corbin: "the meaning that will determine legal effect is that which is arrived at by objective standards; one is bound, not by what he subjectively intends, but by what he leads others *reasonably to think* that he intends." Corbin, *supra* note 45, at 84 (emphasis added).

50. The objective approach introduced by Holmes was a standard for evaluating the legitimacy of a person's claim to a legally enforceable contract right. Whether acts or language created a legally enforceable agreement depended on the meaning a reasonable person would assign to them. *See, e.g.*, Corbin, *supra* note 45; E.A. FARNSWORTH, *supra* note 42, § 3.9; G. GILMORE, *supra* note 19.

51. *See, e.g.*, *Winkelbach v. Honolulu Amusement Co.*, 20 Haw. 498 (1911) (held running contest in return for one-third of proceeds not partnership relationship); *Florence v. Fox*, 193 Iowa 1174, 188 N.W. 966 (1922) (agreement between lesser and lessee to share produce of sorghum mill held not partnership); *Rosenblum v. Springfield Produce Brokerage Co.*, 243 Mass. 111, 137 N.E. 357 (1922) (absent intent, agreement to buy and sell onions held not partnership); *Thillman v. Benton*, 82 Md. 64, 33 A. 485 (1895) (held creditor receiving percent of profits not a partner); *Municipal Paving Co. v. Herring*, 50 Okla. 470, 150 P. 1067 (1915) (denied partnership absent any hint of its intention in contract); *Miles Co. of Seattle v. Gordon*, 8 Wash. 442, 36 P. 265 (1894) (partnership not created by payment of profits in return for rent).

52. *Fink*, 215 S.W. at 849. Statements to the effect that an agreement to share profits would not constitute a partnership if the parties indicated a contrary intent meant that if a contrary intent were clearly set out in writing, no partnership would result. *Id.*; *see also* *London Assurance Co. v. Drennan*, 116 U.S. 461, 469-71 (1886). In *London Assurance*, the court held that: "the parties, by that agreement . . . appeared, *ex industria*, to have excluded the possibility of Arndt's acquiring an interest in or any control of the insured property in advance of the formation of an incorporated company." 116 U.S. at 470-71. One is tempted to characterize *London Assurance* as an example of a formal test of intent. The Supreme Court found that there was no partnership because "looking at the whole agreement, the parties did not contemplate a partnership, and none was ever established between them." *Id.* at 469-70. However, in *London Assurance* there was a direct conflict between the operative effect of the terms of the agreement, the performance of which would have been sufficient to form a

As late as 1940 the Supreme Court of Vermont was still applying a Formal test for intent. In *Sheldon v. Little*,<sup>53</sup> the court held that the plaintiff could recover from the defendant in an action in assumpsit. The defendant sought a dismissal of the suit on the grounds that the proper action was an accounting, the remedy available if a partnership was found to exist.

Defendant consolidated his insurance agency with that of the plaintiff, turned over all of his records and other personal property for use in the consolidated business, managed the day to day operations of the business and prepared annual financial reports for seven years. These reports indicated that the business retained substantial amounts of undistributed income. Under the terms of the agreement, the defendant and plaintiff were to split the net profits of the business. The defendant had a right of first refusal if the plaintiff wished to sell the business or if the plaintiff died. The court held that there was no partnership noting that the agreement "provided that the said agencies, after being consolidated, should be run as the property of the plaintiff and under the name as theretofore of the Sheldon Agency;" and that since it had "no indication of the intention of the parties other than their written agreement, . . . their intention is to be ascertained by a construction of the writing."<sup>54</sup>

The facts presented by the court in its decision point out rather obviously the disingenuousness of this proposition. The court had before it the evidence of the way in which the business was conducted as well as the manner in which the accounts were settled during a seven-year period. The statement that it had no indication of intention other than the contract was really a rejection of an Empirical test for intent.

Under the common law, a written agreement stipulating that the relationship was not a partnership brought the competing val-

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partnership, and the intent of the parties to have a corporation rather than a partnership as expressed in the writing. This leads one to conclude, particularly in light of the language quoted *supra* note 19, that the Subjective test was being applied.

53. *Sheldon v. Little*, 111 Vt. 301, 15 A.2d 574 (1940); *cf.* *Coward v. Clanton*, 122 Cal. 451, 453-54, 55 P. 147, 148-49 (1898) (California Supreme Court dismissed argument that it could not compel accounting unless partnership existed). "If plaintiff has a cause of action of which the court has jurisdiction, and it is necessary to have an accounting to determine his rights, it will be done." *Coward*, 122 Cal. at 453-54, 55 P. at 148 (citing *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74 (1898)). An accounting is an equitable remedy in any case in which the dispute involved an agreement to share profits. D. DOBBS, REMEDIES 252 (1973).

54. *Sheldon v. Little*, 111 Vt. 301, 303-04, 15 A.2d 574, 575 (1940).

ues of personal autonomy and personal responsibility into direct conflict. The logic of Formalism and its ideological underpinnings required courts to defer to an express disavowal of partnership. However, as *Sheldon v. Little* illustrates, one obvious problem confronting courts that adopted a Formal test of intent was the reconciliation of provisions describing the mutual undertakings of the parties where those looked like the attributes of partnership with terms denying partnership or offering an alternative classification. If courts deferred to such expressions of intent, the value placed on personal autonomy was confirmed while the value placed on personal responsibility was put in question. Individuals would be able to deny the applicability of a societally sanctioned classificatory scheme. Once again, as in the case of the Net Profits Rule, socially legitimate expectations concerning the relationship could be disappointed. •

### 1. *Formalism and Constructive Partnerships*

The ideological content of Formalism and its preoccupation with individual liberty is reflected in *Canton Bridge v. City of Eaton Rapids*.<sup>55</sup> The Supreme Court of Michigan interpreted an agreement between the company and Mr. Wheaton in which Mr. Wheaton agreed to act as an agent for the company in obtaining construction contracts in return for one-half of the profits. It was not the agreement to share net profits alone that made the relationship between Wheaton and the company look like a partnership. Even the Net Profits Rule acknowledged the possibility that compensation of an employee or agent might be in the form of a commission stated as a percentage of profits.<sup>56</sup> A partnership was

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55. 107 Mich. 613, 65 N.W. 761 (1895). In *Canton Bridge*, the plaintiff company sued Eaton Rapids on a contract for the construction of a bridge. *Id.* at 616, 65 N.W. at 762. The contract was between R. D. Wheaton & Co. and the city. A great many inferences have to be drawn from the facts presented in order to reconstruct the actual course of events and the history of the case. The facts suggest that the city had already paid Wheaton on the contract. It seems though, that the company sought payment on the contract and introduced its contract with Wheaton as evidence of an agency relationship. *Id.* A verdict was entered for the defendant on the grounds that the agreement created a partnership between the plaintiff and Wheaton. *Id.* at 619, 65 N.W. at 763. The dissenting opinion of Judge Montgomery tells us that Wheaton was accustomed to making the collections on the contracts he negotiated for the company. *Id.* at 620, 65 N.W. at 763. Additionally, the company and Wheaton had negotiated a settlement of a dispute which included an assignment of the contract in question to Wheaton. *Id.* at 620, 65 N.W. at 764. The company subsequently rescinded that assignment. *Id.* at 619, 65 N.W. at 764. The dissent argued that there was a partnership and that Wheaton was a necessary party to the suit. *Id.* at 622, 65 N.W. at 763-64.

56. *Meehan*, 145 U.S. at 623-24. In *Meehan*, the Court stated that: "[i]n

implicated by the provision stipulating that Wheaton would be personally liable for one-half of the losses on any contract. Nonetheless, the court held that there was no partnership.<sup>57</sup>

The result in *Canton Bridge* may have been questionable, but the concerns articulated by the court were consistent with the emerging ideology of contract law.<sup>58</sup> The desire to limit the power of courts to protect individuals from surprise in the form of unexpected legal consequences for their personal choices is clearly stated in this decision.

In *Canton Bridge*, the court justified its decision by quoting from an earlier decision, *Beecher v. Bush*.<sup>59</sup> The *Beecher* court had warned against the implication of partnership, the creation of "constructive" partnerships which were a "trap for the unwary" particularly in those situations where there had been no injury to

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whatever form the rule is expressed, it is universally held that an agent or servant, whose compensation is measured by a certain proportion of the profits of the partnership business, is not thereby made a partner, in any sense." *Id.* Similarly, the court in *Eastman v. Clark* held that "[w]hen sharing profits is accepted as a test, it is almost universally with this qualification, that if the profits are received as compensation for services, or payment of any debt, sharing them is not a test." 53 N.H. 276, 338 (1872); accord *Parker v. Fergus*, 43 Ill. 437 (1867); *Rice v. Austin*, 17 Mass. 197 (1821); *Beasley v. Barry*, 33 Mont. 477, 84 P. 791 (1906); *Voorhees v. Jones*, 29 N.J.L. 270 (1861); *Leggett v. Hyde*, 58 N.Y. 272 (1874); *Cothran v. Marmaduke & Brown*, 60 Tex. 370 (1883).

57. *Canton Bridge*, 107 Mich. at 618-19, 65 N.W. at 763. Acknowledging the possibility of conflict between a denial of partnership in an agreement and the operative effect of the terms of that agreement, the court stated:

To determine whether persons are in fact partners, we must look at their intention, and this is deducible from their declaration as to their intention, . . . and, where the contract under which the business engagement is made contains the express or implied disavowal of an intention to assume the partnership relation, no partnership will be found to exist, *unless such declaration is so at variance and so inconsistent with their engagement as to be irreconcilable.*

*Canton Bridge*, 107 Mich. at 614, 65 N.W. at 761 (emphasis added). A less extreme statement of the rule of construction found in *Canton Bridge* appears in *Flower v. Barnekoff*, 20 Or. 132, 25 P. 370 (1890): "[T]he intention of the parties will be determined from the effect of the whole contract, regardless of the special expressions, (1 Bates on Part. § 117) the declaration of the parties, if not inconsistent with the other terms of the contract of course controlling." *Id.* at 144, 25 P. at 373.

The agreement to share losses raised the issue of partnership because the Net Profits Rule had been replaced by various tests including one which queried whether there was an agreement to share profits and losses. For a further discussion of risk-sharing as an element of partnership, see *infra* notes 141-83 and accompanying text. The *Canton Bridge* court concluded that an agreement to share losses was not inconsistent with an agency relationship.

58. For a discussion of the relationship of contract theory to the ideas that had intellectual currency in the 18th, 19th and early 20th centuries, see *supra* notes 19-24 and accompanying text.

59. *Beecher v. Bush*, 107 Mich. 188, 7 N.W. 785 (1881).

a third party.<sup>60</sup> Even though the rights of a third party clearly were an issue in *Canton Bridge*, the court then concluded: "We see no reason to force partnership relations and obligations upon parties who did not desire or intend to assume them, especially where the interests or rights of third parties are not to be affected."<sup>61</sup>

At the time the Michigan Supreme Court decided *Beecher v. Bush*, intent referred to the state of mind and personal desires of the individual. What troubled the *Beecher* court was the acknowledged power of the judiciary using the Net Profit Rule to create a partnership irrespective of the intent of the parties:

We have then a case in which the party it is sought to charge has not held himself out, or suffered himself to be held out as a partner either to the public at large or to the plaintiff, and has not intended to form that relation. He is not therefore a partner by estoppel or by intent; and if he is one at all, it must be by construction of law.<sup>62</sup>

With respect to the competing values we have identified in the area of partnership, the approach taken in *Canton Bridge* represents the absurd result of Formalism carried to its logical extreme. Because the contract referred to Mr. Wheaton as an agent, the court was forced to explain or justify its disregard of contract terms that indicated partnership. The *Canton Bridge* brand of Formalism severely limited those instances where courts would be able to find a partnership if the parties provided a different label for the relationship. The courts would be constrained to find a partnership only in those situations in which their ingenuity failed them. As long as courts were able to contemplate a circumstance under which an act, normally the act of a partner, might also be undertaken in an alternative business arrangement, partnership status could be denied.

A desire to protect the interests of third parties dealing with a business enterprise had previously led courts to construct the Net Profits Rule. The Rule clearly violated a fundamental belief that individuals should be able to contract privately with respect to the degree of their participation in a business and the amount of risk

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60. *Beecher*, 45 Mich. at 194, 7 N.W. at 786. Both *Beecher* and *Canton Bridge* adopted the phrase describing a constructive partnership as a "trap for the unwary" from a British case decided by Chief Justice Kent in *Post v. Kimberly*, 9 John. 470, 504.

61. *Canton Bridge*, 107 Mich. at 615, 65 N.W. at 762.

62. *Beecher*, 45 Mich. at 194, 7 N.W. at 786.



they are willing to assume. Both *Sheldon* and *Crane* were intraparty disputes, where the intent of the parties was a longstanding test for partnership. In *Fink* and *Beecher*, intent was applied as a test for a partnership in third party disputes. The introduction of a Subjective test and then a Formal test of intent in third party disputes swung the pendulum in the other direction, validating personal autonomy.

In spite of the apparent antipathy toward the judicial implication of partnership, the protection of third parties remained a matter of continuing concern for courts. The battle cry of *Canton Bridge* did not rally the judiciary to the banner of unqualified or unrestrained personal autonomy. Perhaps the long tradition of skepticism with respect to self-serving denials of partnerships was too deeply ingrained.<sup>63</sup> The use of intent as a test for partnership in both third party and intraparty disputes was confusing, however. Even in third-party disputes, an inquiry into intent meant that the will of the should be determinative in the case of a contract which was alleged to be a partnership. Courts rejected categorically the idea of constructive partnerships, yet the perceived need to protect third parties persisted. A means of resolving this

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63. For the language in the second part of the test for partnership set out in *Fink*, see *supra* note 37 and accompanying text. In partnership, Formalism has often been colored by a healthy skepticism concerning human nature and a recognition on the part of the courts that the label given a relationship by the parties might be chosen to avoid or promote certain legal consequences. See, e.g., *Meehan v. Valentine*, 145 U.S. 611 (1892); *Thillman v. Benton*, 33 A. 485, 82 Md. 64 (1895). Both cases quote from a British case, *Mollwo March & Co. v. Court of Wards*, 4 L.R.-P.C. 419 (1872):

If cases should occur where any persons, under the guise of such an arrangement,—that is, the guise of an arrangement as creditor and debtor,—are really trading as principals, . . . they must not hope by such devices to escape liability; for the law, in cases of this kind will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character.

*Id.* at 438 (cited in *Meehan*, 145 U.S. at 624; *Thillman*, 82 Md. at 76, 33 A. at 487); see also *Strohm v. Wilson*, 10 Haw. 302, 306 (1896) (held agreement to rent equipment with condition to make further purchases if successful, not partnership).

The ability of the parties to achieve that result, that is, the deference paid by courts to the self-classificatory process, often depends on policy considerations. Legislative allocation of benefits of burdens and risk of loss in the conduct of certain types of businesses may be based on the classification of the business relationship. For an example of such policy considerations regarding the applicability of usury laws, see *Clemens v. Crane*, discussed *supra* note 47 and accompanying text and *Napoleon Farmers' Elevator Co. of Napoleon v. Dunahey*, 47 N.D. 538, 182 N.W. 926 (1921). See also *People v. Curiale*, 171 Misc. 264, 12 N.Y.S.2d 464 (1939) (unsuccessful attempt to avoid minimum wage laws by calling employees partners).

dilemma ultimately was found in the adoption of an Empirical test of intent.

Long before Empiricism was named or described by contract theorists, however, the need to establish a balance between these competing values of personal autonomy and personal responsibility resulted in the application of an objective standard for partnership that referred to the conduct of the parties. Initially, the use of conduct and the reference to the circumstances of the parties was limited. Under the common law, conduct became relevant when the parties had neither specifically excluded the possibility of partnership nor provided an alternative classification. Courts would then seek to ascertain the intent of the parties from an examination of extrinsic evidence.<sup>64</sup> Also important in habituating courts to the practice of examining conduct was the recognition that a partnership could be established by an oral agreement. Where an oral agreement governed the relationship the most credible evidence concerned the acts rather than the statements of the parties.<sup>65</sup>

The power of the judiciary to create constructive partnerships was circumscribed but not eliminated by the adoption of intent as the principal test for partnership. The exercise of the power through the use of the formal test often was concealed in the discussion by courts of various definitions and attributes of partnership.<sup>66</sup>

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64. See, e.g., *Lee v. Cravens*, 9 Colo. App. 272, 288-89, 48 P. 159, 165 (1897).

[I]f we should concede for the present that an intention to form a partnership is not inconsistent with the language of the instrument, then, as that language is entirely consistent also with an opposite intention, we must go outside to find what the real intention was. Parol evidence is inadmissible to vary the terms of the contract, but, if they are equally susceptible of two different constructions, surrounding circumstances, and the acts and even declarations of the parties, may be considered, not to change the terms, but to find what meaning the contracting parties intended to convey by them, and discover which of the constructions the parties themselves placed upon the language used. . . .

*Id.*; see also *Chapman v. Hughes*, 104 Cal. 302, 37 P. 1048 (1894) ('syndicate' agreement for purchase and sale of property would have been partnership); *Thillman v. Benton*, 82 Md. 64, 33 A. 485 (1895) (denied partnership status where contract for "use of money" in return for share of profits which did not refer to status of relationship as partnership).

65. See, e.g., *Richardson v. Keely*, 58 Colo. 47, 142 P.2d 167 (1914); *Richards v. Grinnell*, 63 Iowa 44, 18 N.W. 668 (1884); *Mackie v. Mott*, 146 Mo. 230, 47 S.W. 897 (1898); *Flower v. Barnekoff*, 20 Or. 132, 25 P. 370 (1890); *Nicholson v. Kilbury*, 83 Wash. 196, 145 P. 189 (1915); *Bartelt v. Smith*, 145 Wis. 31, 129 N.W. 782 (1911).

66. See cases and definitions cited *supra* note 9, 13 and 14. For a discussion of indices of partnership, see *infra* note 106 and accompanying text.

Objecting in the guise of the formal test meant that the power to create constructive partnership was restrained by the rationale that supported it. Since the power was predicated on a need to protect third parties, courts continued to differentiate between intraparty and third party disputes. Precluded in a dispute inter se courts scrutinized agreements to determine whether there was the requisite intent and consent to a partnership.<sup>67</sup> Courts were less deferential to expressions of intent and more likely to examine the contract carefully for the characteristics of partnerships when the dispute involved an outsider.<sup>68</sup> Partnership status, in spite of any designation contained in the writing between or among the alleged partners, was an argument available to a third party even though the third party had not been able to meet the requirements of estoppel.<sup>69</sup> This dichotomy, criticized by commentators and rejected by the drafters of the U.P.A., is still alluded to by courts.<sup>70</sup>

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67. See, e.g., *Bushnell v. Consolidated Ice Mach. Co.*, 138 Ill. 67, 74-75, 27 N.E. 596 (1891); *Runnels v. Moffat*, 73 Mich. 188, 41 N.W. 224 (1889) (in intraparty dispute, matter settled and adjusted between parties); *Municipal Paving Co. v. Herring*, 50 Okla. 470, 150 P. 1067 (1915) (there can be no partnership by operation of law in dispute between corporations and individual).

68. For a discussion of *Canton Bridge*, 107 Mich. at 615, 65 N.W. at 761-62, see *supra* note 55 and accompanying text. See also *Stafford v. Sibley*, 106 Ala. 189, 17 So. 324 (1895); *Thillman v. Benton*, 82 Md. 64, 33 A. 485 (1895); *Troy Grain & Fuel Co. v. Rolston*, 227 S.W.2d 66 (Mo. 1950); *Pattison v. Blanchard*, 5 N.Y. 186 (1851). But see *Malvern Nat'l Bank v. Halliday*, 195 Iowa 734, 192 N.W. 843 (1923) (intent of parties to form partnership defeated claim of third party creditor). Also, an objective approach did not help third party creditors where agreement designated relationship as partnership, but court found none to exist. *Wade v. Hornaday*, 92 Kan. 293, 140 P. 870 (1914). For a discussion of indicies of partnership, see *infra* notes 106-07 and accompanying text.

69. See, e.g., *Rosenblum v. Springfield Produce Brokerage Co.*, 243 Mass. 111, 137 N.E. 357 (1922); *Hackett v. Stanley*, 115 N.Y. 625, 22 N.E. 745 (1889); *Bostwick v. Champion*, 11 Wend. 571 (N.Y. 1834); *Sheldon v. Little*, 111 Vt. 301, 15 A.2d 574 (1940); cf. *Omaha & Grant Smelting & Ref. Co. v. Rucker*, 6 Colo. App. 334, 40 P. 853 (1895).

70. *Beckerman v. Sands*, 364 F. Supp. 1197 (S.D.N.Y. 1973) (judicial gloss on U.P.A. requires finding of consent in dispute between parties); *Englestein v. Mackie*, 35 Ill. App. 2d 276, 182 N.E.2d 351 (1962); *Boyle v. Cleveland*, 303 Ill. App. 74, 24 N.E.2d 587 (1939); *Garner v. Garner*, 31 Md. App. 641, 358 A.2d 583 (1976) (no partnership between two brothers where partnership agreement never executed); *Wyatt v. Brown*, 39 Tenn. App. 28, 281 S.W.2d 64 (1955); *Holliday v. Taylor*, 249 S.W.2d 941 (Tex. Civ. App.—Waco no writ 1952).

Chief Justice Story, in his treatise on partnership, argued that there should be no difference in the analysis of partnership status in intraparty and third party disputes. Even without estoppel, if the courts found that the parties intended a partnership, a third party should recover. The converse was also true: if the parties did not intend a partnership, then a third party could not recover on a theory of partnership. J. STORY, *PARTNERSHIP* § 49 (5th ed. 1859); accord *Fink*, 215 S.W. at 848-49.

The distinction between third party and intraparty disputes can be found in

The even greater distance between the Subjective and the Empirical test of intent, in terms of the power to create constructive partnerships, is illustrated by *McAlpine v. Millan*,<sup>71</sup> an early Minnesota Supreme Court case involving a lumber company. Participants in this economic undertaking initiated the process of incorporation but never completed it. Nevertheless, they conducted business in the "corporate form,"<sup>72</sup> that is, they used the name McAlpine Lumber Company and each purported to act as an officer of the nonexistent corporation.

McAlpine sued for an accounting seeking to hold Millan liable as a fiduciary for self-dealing and mismanagement. McAlpine did not claim partnership. Instead, he sought to classify the relationship created by the written agreement as a trust with Millan as the trustee.

On the basis of similar facts, a contractual agreement to incorporate and the commencement of the process of incorporation, the United States Supreme Court held in *London Assurance Co. v. Drennan*<sup>73</sup> that there was no intent to form a partnership. In *McAlpine*, however, the Minnesota Supreme Court stated that the intent of the parties was to be derived from "all the circumstances of the case."<sup>74</sup> The significance of that statement is revealed in the facts that were discussed by the court. In addition to the

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cases that date from the mid-19th century and the until today. Compare *Chase v. Barrett*, 4 Paige 148, 160 (N.Y. Ch. 1833) ("It is certain, however, that such a partnership in relation to the rights of third parties, founded upon commercial policy, cannot be construed a contract of partnership between the trader and his servant, so as to give rights to either contrary to their own intentions.") with *Hodges v. Braun*, 654 S.W.2d 542, 544 (Tex. Civ. App.—Dallas, 1983) ("The appearance to protect innocent third parties relying on the appearance of partnership is wholly absent in a suit between alleged partners. We decline to hold in a suit between alleged partners seeking to establish a partnership that the parties are partners when both parties testify that they are not partners. Courts cannot make contracts for the parties.").

71. *McAlpine v. Millan*, 104 Minn. 289, 116 N.W. 583 (1908).

72. *Id.* at 290, 116 N.W. at 584.

73. 116 U.S. 461 (1886); see also *Negrini v. Plus Two Advertising Inc.*, 695 S.W.2d 624 (Tex. App. Houston [1st Dist.] 1985, writ ref'd n.r.e.) (no partnership because of lack of intent in case where defendants were to be issued shares in corporation); cf. *Freeman v. Huttig Sash & Door Co.*, 105 Tex. 560, 153 S.W. 122 (1913). For a discussion of constructive partnership, see H. REUSCHLEIN & W. GREGORY, *supra* note 2, at 426, 427. Under the Revised Model Business Corporation Act it is clear that the failure to incorporate should result in partnership-type liability with respect to third parties. However, the Official Comment also indicates that the limited liability afforded by the corporate form may be appropriate when investors are without knowledge of the failure to incorporate or in other extenuating circumstances. REVISED MODEL BUSINESS CORPORATION ACT ANN. § 2.04 (3d ed. 1985).

74. *McAlpine*, 104 Minn. at 292, 116 N.W. at 586.

terms of the contract itself which was quoted in large part, the court examined the conduct of the parties over the two year period the business was in operation. The facts which the court considered relevant included the extent to which McAlpine participated in the management and control of the business, executing contracts, hiring and firing employees, buying supplies, supervising operations, as well as the correspondence and communications he had with third parties which revealed his perception of his status. The Court concluded that McAlpine's conduct substantiated Millan's claim of partnership.

## 2. *Empiricism and Expectation*

The Formal and Empirical tests of intent provide contrasting views of the relationship between the law and individual expectations. The Formal view of the law is neutral as to standards of behavior but assumes that parties plan their relationships with reference to the law. The law determines their expectations concerning the enforceability of their private arrangements. Compliance with the formalities and the Rules of Law concerning contract formation was the only way to ensure that contractual obligations would be enforceable.

The Empirical approach reflects more accurately the complexity of the relationship between the law and individual and societal expectations. In partnership, the inability of the legal system to tolerate an obvious discrepancy between a Rule of Law and the expectations of the parties had already been demonstrated by the rejection of the Net Profits Rule. In contract law generally, Professor Karl Llewellyn and the legal realists made out a convincing case that the expectations of the business community concerning the enforceability of their contractual arrangements were inconsistent with a Formal approach to contract formation that obstructed such enforcement.<sup>75</sup> As a conse-

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75. Empiricism has been equated with the term "situation sense" used by Professor Karl Llewellyn in many of his articles on contract law and jurisprudence.

Empiricism existed before, during and after the Classical period of contract law. Llewellyn, as he himself recognized, merely described reality, the actual process used by judges. Its tenacity as a methodology derives from the fact that norms, the standards of behavior that are articulated by courts in particular disputes, are situationally defined and contextual in nature. There are as many sets of norms as there are sources of personal identity and opportunities for interaction.

What Llewellyn did was to change the "legal consciousness" of American society—legitimizing this contextualization, propagandizing for it, and incorporating it into a major piece of legislation, the Uniform Commercial Code. *See*

quence, Empiricism assumes that contractual obligations are enforceable if the parties act in a way which recognizes the existence of a relationship.

Unstated but important to an understanding of Empiricism is the underlying presumption that the perceptions, attitudes and beliefs of most judges are socially determined.<sup>76</sup> In tautological fashion, evidence of conduct supporting an inference on the part of the court that the parties had a relationship also establishes the legitimacy in societal terms of an expectation by the parties that the relationship will support legally enforceable rights, duties and obligations. The role of the courts is to enforce these socially legitimated expectations.<sup>77</sup>

Yet this reference to "socially legitimated expectations" is misleading. It creates the impression that the law has no role to play in determining expectations; that the generation of such standards is the province of other institutions within society, such as schools, religious institutions, professional and trade groups. In reality, Empiricism recognizes in its operation the complexity of the interaction between multiple sources of reglementation.<sup>78</sup>

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e.g., Klare, *Contracts Jurisprudence and the First-Year Casebook* (Book Review), 54 N.Y.U. L. REV. 876 (reviewing C.L. KNAPP (1979)).

Two important factors which influence both the standard that will be applied in a given situation and the determination of whether a sanction is appropriate are: (1) the relevant position the parties hold in the social structure (status); and (2) the degree of fault involved (state of mind and existence of mitigating circumstances). For a further discussion of Llewellyn and Empiricism, see Feinman, *supra* note 23; Feinman, *supra* note 45.

76. Empiricism is profounding troublesome if you cannot accept the basic premise that the values and beliefs of judges are the same as those held generally by society. See, e.g., Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950). It is also important to believe that judges have the ability to engage in dispassionate observation and self-conscious introspection. See generally B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1949).

77. Feinman, *supra* note 23.

78. See S. FALK-MOORE, *supra* note 20, at 13. "Reglementation" is a term that she uses to refer to the various rules, both formal and informal, that govern human behavior. The multiple sources of these rules include all forms of governmental regulation as well as the rules created and enforced within various social institutions like the family, civic, fraternal or sororital clubs, churches, synagogues or mosques, professional, trade, labor associations, educational institutions or corporations. An example of the interrelationship of these sources of reglementation might include the following: the relaxation of family norms which require a woman to remain in the home while she has young children, a change in the law governing equal employment opportunities for women, a change in admission policies to allow greater access for women to institutions of higher education, a change in hiring and promotion policies that result in admission of women to the ranks of middle management in corporate hierarchies and a change in the rules of religious institutions that results in the ordination of women ministers and rabbis and lobbying for women priests.

Even more importantly, it provides a mechanism for incorporating without disruption those changes in expectations that occur normally and quite regularly in every society. It also provides an appropriate mechanism when the opportunity arises to use the law to effect social change.<sup>79</sup>

The cases examining the intent of the parties in intraparty disputes all reveal a concern with the imposition by the court of reciprocal rights, duties, and obligations which were not expressly undertaken. Consistent with the Formal theory of contracts, the courts adhered to the principle that in contracting with one another, individuals should be free to determine the scope of their responsibilities.<sup>80</sup> The proper stance of the court was one of non-

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79. Empiricism as a methodology is embodied in the Uniform Commercial Code (U.C.C.). The U.C.C. has been described as dynamic and transactionally oriented. See Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of our New Commercial Code*, 11 VILL. L. REV. 213 (1966). The fact that Empiricism comprehends the ability of courts to use the law to create norms is aptly demonstrated in Llewellyn's own writing on jurisprudence and contract law. See, e.g., K. LLEWELLYN, *JURISPRUDENCE* (1962); Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L. J. 704 (1931); Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COL. L. REV. 431 (1930). Llewellyn refers to the "haziness" that exists in the extraordinary or unusual case, a haziness which facilitates (or justifies) the articulation of new norms by the judiciary. Uncertainty as to the appropriate norm may exist because the unusual case presents an innovative economic arrangement or it may exist because a competing view as to what is appropriate behavior has been presented to the court.

Those who are skeptical of the methodology of Empiricism reject it because they feel judges do not recognize it as an opportunity to "reflect policy in adjudication." Feinman, *supra* note 23, at 833. In fact, Empiricism does not prevent the social ordering that such policymaking represents. "Community" is a term which can expand or contract as the court wishes, referring at times to the local and parochial values and standards and at other times to a national standard or a newly emerging standard of behavior. Empiricism reflects what has been called the "dialectical relationship of norm and behavior." Roberts, *The Study of Dispute: An Anthropological Perspective* in *DISPUTES AND SETTLEMENTS* 1 (J. Bossy ed. 1983). Any change in the standard of behavior in a particular dispute has significance for the two groups represented by the disputants and presents the possibility of a change in the social structure. For a discussion of the cases involving landowners and tenant farmers, see *infra* notes 100-01 and accompanying text.

80. Although concessions have been made in contract to the notion that it is appropriate for the judiciary to exercise oversight with respect to the integrity of the bargaining process and perhaps even the substance of the bargain, contract is still viewed as an area of private ordering. See U.C.C. § 2-302 (judicial oversight of bargaining process); *Orange & Rockland Utilities, Inc. v. Ameranda Hess Corp.*, 397 N.Y.S.2d 814 (1977) (judicial oversight of substance of bargain); *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (1969) (contract is area of private ordering). The contracting parties, subject only to the most general constraints, determine the standard of behavior that will be exacted of them. See F. KESSLER, G. GILMORE & A. T. KRONMAN, *supra* note 44. For a case in which a court even went so far as to permit the parties to determine the content of the general standard of good faith imposed in contractual relationship, see *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129 (5th

intervention in the relationships the parties had created.

A narrow definition of expectation and an intolerance of socially derived or imposed norms necessitated the development of legal theories that made non-intervention possible. The Formal test of intent reinforced an institutional norm and a belief that courts had a limited role to play in determining what was right or wrong in a commercial setting. Since the law was unwilling to establish standards, individuals could not reasonably expect that any obligation was owed inter se other than those to which they specifically agreed. If a court found a partnership existed, a fiduciary standard of behavior external to the agreement had to be applied. Conformity with the ideal of judicial non-intervention means that courts had to find that no partnership existed.<sup>81</sup>

The vulnerability of Formalism is its inflexibility. It is unable to accommodate those situations in which expectations are not contractually determined is obviously wrong. Courts find it hard to ignore factors which complicate an inquiry into the expectation of the parties. Among these are the effect of time and continued interaction on expectations.<sup>82</sup> The conduct of the parties over

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Cir.), *cert. denied*, 444 U.S. 938 (1979). *But see* Mooney, *supra* note 79, at 247 (general discussion of baseline standards in U.C.C.).

81. A finding that there was no partnership sometimes could leave the plaintiff with no remedy. *See, e.g.*, *Detachable Bit Co. v. Timken Roller Bearing Co.*, 133 F.2d 632 (6th Cir. 1943) (at issue was successful exploitation of patent by defendant the benefits of which would have been shared if partnership with attendant fiduciary obligations existed); *Baldwin & Co. v. Patrick*, 39 Colo. 347, 91 P. 828 (1907). For a discussion of *Baldwin & Co.*, see *infra* notes 181-84 and accompanying text. Courts sometimes were able to provide a contractual remedy. *Coward v. Clanton*, 122 Cal. 451, 55 P. 147 (1898); *see also* *Nelson v. Abraham*, 29 Cal. 2d 745, 177 P.2d 931 (1947) (court applied contractual obligation of good faith approximating fiduciary standard); *Smith v. Bodine*, 74 N.Y. 30 (1878) (although not suit in equity for accounting because no partnership existed, accounting was proper remedy when defendant's answer raised issues regarding appropriate set offs to amount plaintiff alleged was owed). For a discussion of *Nelson*, see *infra* note 83.

82. There is some case law which suggests that courts were sometimes willing to entertain the argument that conduct after the establishment of a relationship could alter the effect of a written agreement, creating a partnership where there was none before. *See, e.g.*, *Van Da Linda v. Stevens*, 9 App. Div. 179, 41 N.Y.S. 126, 127 (1896) (court in *Van Da Linda* cited the New York partnership statute, but interpreted it in light of common-law test for intent). Similarly, in *Pierce v. Feno*, 184 N.Y.S. 851, 856 (1920), *aff'd*, 206 A.D. 649, 198 N.Y.S. 942 (1923), the court was convinced of the existence of a partnership because of the "course of dealing extending over a long period of time." In *Martin v. Peyton*, 246 N.Y. 213, 158 N.E. 77 (1927), probably the most famous case on partnership formation, Judge Andrews applied the Uniform Partnership Act which was adopted in New York in 1917 but his discussion of partnership law also drew upon the common law. Consider the following quote: "An existing contract may be modified by subsequent agreement, oral or written. A partnership may be created where there was none before." *Id.* at 218, 158 N.E. at 78. Generally,



time can create expectations that conflict with the express stipulations of the parties. It was precisely this issue, the alteration of expectations over time, that confronted the Supreme Court of California when it decided *Nelson v. Abraham*<sup>83</sup> in 1947.

Nelson brought an action for an accounting alleging that he and the defendant were copartners in the business of selling ice in San Francisco. Abraham testified that he and Nelson agreed that Nelson would receive one-third of the net profits of the business but that they also agreed that Nelson would not be a partner or have an interest in the business. The trial court found that there was no partnership.

The ice business in San Francisco began as an expansion of Abraham's ice business in Oakland. Nelson was an employee in Oakland who was asked to manage the new business. Abraham provided all the equipment and the necessary financing, but ice supplied by the Oakland plant was paid for by the San Francisco operation. Nelson actually ran the operations. Nelson continued to receive a salary which was treated as an expense of the operations. Unlike other employees, he did not receive overtime although he worked 12 to 16 hours a day. Nelson was authorized to sign on the business account for the San Francisco operations, he built up the routes and made the collections from customers and he and Abraham signed as partners on an application for a sales permit issued by the State Board of Equalization. Then one day, Abraham sold the business without any notice to Nelson.

Nelson sought one-third of the net profits from the sale. If he were an employee, his interest in net profits ended with the termination of the business as a going concern.<sup>84</sup> The defendant

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however, in partnership and in contract law there was little discussion of what is now referred to in contract scholarship as the "relational" aspect of long term contracts. See I. McNEIL, *THE NEW SOCIAL CONTRACT* (1980).

83. 29 Cal. 2d 745, 177 P.2d 931 (1947). Although California did not adopt the U.P.A. until 1929, it had a statute governing partnerships as early as 1898. CAL. CIV. CODE § 2395 (Deering 1901); see *Llewellyn v. Levi*, 157 Cal. 31, 106 P. 219 (1909) (fiduciary obligation of partnership requires highest good faith); *Coward v. Clanton*, 122 Cal. 451, 55 P. 147 (1898) (discussing definition of partnership contained in statute). The U.P.A., which had been added in 1929, was repealed and reenacted as part of the corporations code in 1949. CAL. CORP. CODE § 15001 (West 1987). It is interesting to note that the California courts did not hesitate to interpret their code in light of developments in the common law. In *Coward*, the court held that the Code did not use the Net Profits Rule as a test of partnership and rejected the rule citing *Eastman v. Clark*. *Coward*, 122 Cal. at 454, 55 P. at 148.

84. In contrast, on dissolution each partner is entitled to receive, after all of the debts of the partnership have been paid, the amount of his capital contribution and a proportionate amount of any surplus realized on the sale of the busi-

claimed, and could have proved, that there had been no profits from the operation of the business.

Acknowledging that a partnership or joint venture could be found as “a reasonable deduction from the acts and declarations of the parties,” the California Supreme Court then stated that such a designation of the relationship was not necessary.<sup>85</sup> The plaintiff could recover on the contract because of an implied covenant of good faith and fair dealing. Although Nelson did not need to prove a partnership to establish a fiduciary obligation, the court scrutinized the relationship between the conduct and expectations with respect to status:

[s]omething more than mere direction to perform a particular task in return for salary or wages was inherent in the agreement and in the minds of the parties. The establishment of the business entailed more than merely selling merchandise . . . . That the time and effort expended by the plaintiff in these respects were successful is evidenced by the eagerness of the competitors and the return to the defendant on the sale of the business. *The foregoing observations become pertinent in determining the nature of the relationship of the parties and in defining the correlative rights and duties flowing from a contract which gave to the plaintiff a share in the net profits from operation.*<sup>86</sup>

The Court held that the plaintiff was entitled to an accounting and doubt was cast on the propriety of including in the cost of the operations those amounts paid to the Oakland business for ice since those would give “an undue benefit to defendant”. Finally the court concluded:

*Considering the relationship which the defendant had assumed toward the plaintiff, and his subsequent conduct, the principles of equity might best be served by treating the San Francisco business, including the building of the routes and the sale, as an “operation.” To that end the defendant should not be permitted to say that he intended to profit from the plaintiff’s labor and at the same time deprive the plaintiff of the fruits of the agreement.*<sup>87</sup>

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ness. California courts hold that a fiduciary obligation extends to the dissolution of the partnership. *Richards v. Fraser*, 122 Cal. 456, 55 P. 246 (1898).

85. *Nelson*, 29 Cal. 2d at 749-50, 177 P.2d at 933.

86. *Id.* at 752, 177 P.2d at 935 (emphasis added).

87. *Id.* at 753, 177 P.2d at 935-36 (emphasis added) (citations omitted).

The conduct of the parties in *Nelson* was sufficient to create an expectation on the part of the plaintiff, a sense of entitlement with respect to any profits received from the operations or the sale of the business. His investment in time and energy merited a return as much as the investment of money and materials made by the defendant. Under the common law, conduct could alter existing relationships, creating a partnership where before there had been none. An Empirical test for intent achieves a result consistent with the common law approach while a Formal test for intent ties the court to the original agreement.

Constrained by the ideology of Formalism and the belief that the contract determined the proper classification of the relationship, the California Supreme Court sought a way to enforce Nelson's legitimate expectations. Without finding a partnership then, the court imposed a partnership remedy and a partnership standard of behavior, a fiduciary obligation disguised as an obligation of good faith and fair dealing.

### 3. *The Impact of Social Structure on Expectations*

If the socially legitimated expectations of the parties should be the measure of intent, it is incumbent on the judiciary to recognize the preconceptions that affect its perception of relationships.<sup>88</sup> Concepts of property, economic worth and social position often militate against a finding of partnership.

In *Nelson*, the court found that there was no partnership.<sup>89</sup> It

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88. Muriel Dimen-Schein uses the term "criteria of selection" to describe the way in which our social conditioning alters our perception of the world and human relationships. M. DIMEN-SCHEIN, *supra* note 11. These criteria of selection "structure the environment and relate our behavior to it" representing "specific though unarticulated theories, each implying a different vision of human nature and sociocultural possibilities." *Id.* at 58. Dimen-Schein suggests that the success of a particular scholarly or scientific theory depends on the extent to which the criteria of selection have been made explicit. *Id.*

The same can be said for legal decisions and doctrines. See generally M. BARKUN, *LAW WITHOUT SANCTIONS* (1968) (discussion of perceptual categories); J. NOONAN, *PERSONS AND MASKS OF THE LAW—CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* (1976) (effect of personal experience on judicial process); Atias and Lavoisier, *American Legal Culture and Traditional Scholarly Order*, 46 LA. L. REV. 1117, 1118 (1986) (discussion of legal culture as "possible epistemological obstacle"). Earlier scholars also described the sociological aspects of the judicial process. See also B. CARDOZO, *supra* note 76; Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935).

89. 29 Cal. 2d 745, 177 P.2d 931 (1947). The Supreme Court of California had before it a finding by the lower court that there was no partnership. *Id.* at 747, 177 P.2d at 932. This finding was supported by the testimony of the defendant. *Id.* According to Abraham, he and Nelson agreed that Nelson would get a share of the profits from the operation of the San Francisco ice plant but Nelson would have no interest in the business. *Id.*

did this ostensibly because of the agreement between the parties. The classification of the relationship was compelled as much by the force of precedent as by any private arrangement of the parties. Even when the Net Profits Rule governed partnership determination, an exception existed for situations where an employee received a share of the profits as remuneration for his services.<sup>90</sup> In Anglo-American society at least, an employee is not likely to have his status elevated by a court to that of an owner through dint of hard work. Whether it represents paternalism or class bias, the courts clearly feel that an employee should not be at risk for more than the value of his services.<sup>91</sup> The measure of ownership is the extent to which one has authority to make decisions and assumes the financial risk of the undertaking.<sup>92</sup>

Another group or class of common law cases which illustrate the perceptual blinders that direct the inquiry into intent and the expectations of the parties are those cases in which the ostensible partners were family members.<sup>93</sup> Children, brothers, sisters, and

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90. See, e.g., Annotation, *Partnership as Distinguished from Employment (Where the Rights of Parties Inter Se or Their Privies Are Concerned)*, 137 A.L.R. 6, 33 (1942). For a further discussion of exceptions to the Net Profits Rule, see *supra* note 38, and cases cited *supra* note 56.

91. *Voorhees v. Jones*, 29 N.J. L. 270 (1861). The *Voorhees* court stated: Why should a mere employee of a firm, who is bound to obey orders to transact all the business under the direction of his superiors, who has no control over the operations of the firm, who cannot limit its operations or direct its investments, be held liable to creditors, the contraction of whose debts he could not prevent if he had desired. *Id.* at 272; accord *Eastman v. Clark*, 53 N.H. 276, 278 (1872).

92. *Eastman v. Clark*, 53 N.H. 276, 278 (1872).

93. See, e.g., *Walker v. Mathews*, 58 Ill. 196 (1871) (evidence insufficient to support claim of partnership between two brothers but same evidence would support some "equitable claim" by surviving brother to land he had been farming); *Cole v. Cole*, 289 Mich. 202, 286 N.W. 212 (1939) (son alleges partnership with father and court finds testimony in case "from which perhaps it could be concluded that a partnership had been entered into" when considered in connection with the entire record in the case "merely reflect a father's thought for his son, and a natural parental encouragement"); *Falkner v. Falkner*, 24 Mich. App. 633, 180 N.W.2d 491 (1979) (stricter proof required in suit between relatives to establish partnership supported lower court determination that there was no partnership and that certain tangible and real property belonged to father); *Wirth v. Wirth*, 646 S.W.2d 394 (Mo. App. 1983) (reversed lower court finding of partnership between two brothers). But see *Reed v. Reed*, 6 Ky. L.R. 521 (1885) (conduct indicating that sons were partners in firm supported their claim of partnership in dispute with father); *Fletcher v. Fletcher*, 197 Mich. 68, 163 N.W. 488 (1917) (intent of father, evidenced by personal correspondence, to leave his business to all of his children, including his daughter, sufficient to defeat claim of partnership by sons).

Like most generalizations, this statement in the text is admittedly an oversimplification. The reference to kinship, for example, is too imprecise. Often in disputed partnership cases, the suit is between individuals who are related by marriage not by blood, affinal relatives. See, e.g., *Watson v. Hamilton*, 180 Ala.

especially wives had little hope of proving partnership even when they contributed substantial services to the enterprise if the family member who made the initial capital investment or started the business denied the existence of a partnership.<sup>94</sup>

3, 60 So. 63 (1912) (niece of decedent sues her husband for accounting); Crawford v. Cotter, 257 N.W. 356 (Iowa 1934) (wife of decedent sues his brothers and sisters for an accounting alleging family partnership); Chase v. Barrett, 4 Paige 148, (N.Y. Ch. 1833) (decedent's father sues his son's father-in-law alleging partnership between father-in-law and decedent); First Nat'l Bank of Eugene v. Williams, 142 Or. 648, 20 P.2d 222 (1933) (daughter-in-law who received nothing under terms of father-in-law's will unable to prove partnership between her husband and his father); Milosky v. Wilhelm, 286 A.2d 267 (Vt. 1971) (plaintiff sues claiming partnership with her sister and her brother-in-law); Nicholson v. Kilbury, 145 P. 189 (Wash. 1915) (suit by niece against her aunt's husband alleging partnership in hotel business). While from a theoretical standpoint it is essential to isolate each of the variables that impact on judicial decisions on partnership formation, it is impossible to prove a direct correlation between any one factor and the result in a particular case. In reality, variables such as kinship, which relate to the social structure of the community, never appear in isolation. For a discussion of the importance of contribution in family partnerships, see *infra* note 94.

94. Once again, the parallel development of partnership and contract law is apparent. In contract law, promises made by one family member to another were often unenforceable. Consideration was the legal doctrine that obstructed the enforcement of such promises. The requirement of consideration itself was predicated on the belief that the coercive power of the state should only be used when the parties evidenced their intent to be legally bound by meeting the requirements for a legally enforceable contract. Intent is the test used in family partnership cases and the burden of proof is stricter in such cases than it would be if the alleged partners were strangers. In *Foster v. Wilkinson*, an Oklahoma court made the following statement: "It will not construe arrangements entered into by members of a family for domestic or cooperative purposes as partnerships without clear proof that the parties intended to form such business relations." 96 Okla. 110, 112, 220 P. 325, 326 (1923); accord *Bailey v. Bailey*, 345 So. 2d 304 (Ala. Ct. App. 1977); *Cole v. Cole*, 289 Mich. 202, 286 N.W. 212, 213 (1939). Sometimes the heavier burden of proof is implicit in what appear to be rules of evidence. In *Walker v. Mathews*, an early Illinois court found that the evidence in support of a partnership between two brothers was not sufficient because it did not describe with any certainty the nature or extent of any interest in the business by the brother claiming partnership. 58 Ill. 196, 201 (1871); see also *Miller v. City Bank & Trust Co.*, 82 Mich. App. 120, 266 N.W.2d 687 (1978); *Wirth v. Wirth*, 646 S.W.2d 394 (Mo. App. 1983).

One should not be confused by tax cases which also use intent for family partnerships. The test for intent may be less rigorous in tax cases in which the coercive power of government is evident not only in the power to decide a case and enforce the judgement but also more directly in the suit itself which pits the I.R.S. against the individual in a dispute over the power to levy taxes. For discussion of tax treatment of family partnerships, see A. BROMBERG, *supra* note 2, at 177.

Of course, as in all partnership cases, one claiming partnership is in a better position if he or she invested money in the enterprise. For a discussion of risk sharing and entitlement, see *infra* notes 151-93 and accompanying text. See, e.g., *Dolan v. Dolan*, 140 A.745 (Conn. 1928) (husband sues to recover portion of bank accounts where initial deposit came from sale of his tobacco farm and subsequent deposits court concluded inferentially were from his salary during marriage); *Foster v. Wilkinson*, 96 Okla. 110, 220 P. 325 (1923) (sister prevails on

An example of the extent to which kinship ties may affect the interpretation by a court of the understanding of the parties and their expectations is *Watson v. Hamilton*.<sup>95</sup> In this early Alabama Supreme Court decision the court discussed at length the intent of Mr. Hamilton to form a partnership with his deceased wife.

An heir of the late Mrs. Hamilton sought an accounting with respect to Mrs. Hamilton's interest in the business. The plaintiff introduced evidence that the name of the business had been changed from N.O. Hamilton to N.O. and E.E. Hamilton, adding Mrs. Hamilton's initials to those of her husband. Mrs. Hamilton worked in the business and "gave it more attention than her husband" and she apparently told witnesses that she had an interest in the business.<sup>96</sup>

The court found that Mr. Hamilton could not have intended a partnership. Certainly Mr. Hamilton did not intend to have Mrs. Hamilton "shoulder the burdens when there was no need of her doing so and nothing for her to gain."<sup>97</sup> It was more likely, the court opined, that he changed the name of the business "for the purpose of pleasing her." His apparent acquiescence in her

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partnership claim where she provided initial money to start ranching operation); *Bridgman v. Winsness*, 34 Utah 383, 98 P. 186 (1908). In *Bridgman*, the transfer of property was challenged by the administrator of an estate on the ground that the heirs had no authority to sell the property. The court found that one of the heirs, the decedent's son, was a partner. 34 Utah at 391, 98 P. at 189. In addition to the active management of the company and the use of the name William Pender & Son, the son mortgaged his home and invested the funds in the business. *Id.* at 386, 98 P. at 187.

95. 180 Ala. 3, 60 So. 63 (1912). A cultural preference for patriarchy is apparent in the dominant position of men as fathers, husbands and elder brothers in partnership cases like *Watson* and even in cases like *Fletcher v. Fletcher*, 197 Mich. 68, 163 N.W. 488 (1917), where it was evidence of the father's subjective intent to leave part of his estate to his daughter which decided the case. The subordinate position of women in their roles as wives within the institution of marriage was first modified in partnership cases that found a partnership when a business was established or property acquired during a marriage with the personal wealth of the wife or her family. See, e.g., *Myrland v. Myrland*, 19 Ariz. App. 498, 508 P.2d 757 (1973) (husband was "special employee" because wife did not intend for him to be partner and because there was no community of interest or community of power in administration in business); *Peck v. Peck*, 16 Ill. 2d 268, 157 N.E.2d 249 (1959) (court distinguished cases in which partnership found to exist between husband and wife on facts which showed financial contribution by wives in those cases); *Prasse v. Prasse*, 77 S.W.2d 1001 (Mo. 1934). The recognition that the family is an economic unit has altered the treatment of partnership claims in divorce (or in other marriage like arrangements). See W.D. WEYRAUCH & S. KATZ, *AMERICAN FAMILY LAW IN TRANSITION* (1983) (discussions of marriage and partnership).

96. *Watson*, 60 So. at 64.

97. *Id.* at 64.

statements to third parties that she had an interest in the business was explained in the following manner:

Hamilton was selling a bill of goods at the time and probably did not hear her; but if he did, or if she had claimed the whole store, with him thrown in, he had been married to her many years, and evidently felt that discretion forbade a denial on his part of such a frequent and customary claim on the part of a wife.<sup>98</sup>

The general bias against partnership in cases involving wives was justified, as it was in cases involving employees, in terms of the need to protect this group from potential risk of loss.<sup>99</sup>

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98. *Id.* For a different result but an identical treatment of intent in a husband, see *Dolan v. Dolan*, 140 A. 745 (Conn. 1928). The court suggested that behavior is not an infallible test for intent when a husband must please an irascible wife. Mr. Dolan's acquiescence in the way a transaction was concluded, therefore, was not conclusive on the issue of partnership.

The title in this property was taken in her name; also it appears by mutual agreement, the husband's reason being "because the defendant would be better satisfied, and not quarrel with the plaintiff as long as it was in the name of the defendant," and the plaintiff said to the conveyancer, "Put it in her name and we will have peace in the family."

*Id.* at 747. For further discussion of partnership between husband and wives, see A. BROMBERG, *supra* note 2, at 47; W.D. WEYRAUCH & S. KATZ, *supra* note 95.

99. See *supra* note 97. For an interesting case in which the court ended up protecting a husband by denying his ex-wife's claim of partnership, see *Olson v. Olson*, 66 Ill. App. 2d 227, 213 N.E.2d 95 (1965) (absence of intent to form partnership meant that wife could not compel husband to contribute to payment of mortgage on farm). For a discussion of the need to protect certain individuals from risk of loss, see *supra* note 91 and accompanying text.

It is interesting to compare the cases involving husbands and wives with those in which courts were confronted with a meretricious relationship, usually involving a dispute between the legal wife and a subsequent companion of a decedent. Generally, partnership is an argument that is used to support a claim to a share of the estate by the person with whom the deceased was living at the time of his death. The claimant is generally at a disadvantage, not because of the law, but because she is in an untenable position from a moral standpoint. See, e.g., *Cline v. Cline*, 12 Ill. App. 2d 231, 139 N.E.2d 828 (1956).

The obvious injustice of depriving a long time companion in what was essentially an economic as well as a social arrangement of the wealth that was accumulated during the existence of the relationship moved one court to suggest that antiquated notions of morality have no place in the legal analysis by a court. See, e.g., *In re Estate of Thornton*, 81 Wash. 2d 72, 499 P.2d 864 (1972) (court held that plaintiff had been wrongfully non-suited since she had made out prima facie case of partnership). The court also criticized an earlier decision holding that a meretricious relationship could not give rise to community property rights in the following terms. "We have disclaimed, and continue to disclaim, any opinion or intended reflection on the moral status of a couple living in a meretricious relationship." *Id.* at 76, 499 P.2d at 867. On remand, however, the trial court found as a matter of fact that there was no partnership. Three years later the Supreme Court upheld this later decision as one that was not clearly against the weight of the evidence. *In re Estate of Thornton*, 14 Wash. App. 3971, 541 P.2d 1243 (1975).

Cases involving tenant farming, on the other hand, expressed skepticism concerning the responsibility of farmers and a desire to protect landowners.<sup>100</sup> In tenant farming arrangements, the landowner often agrees to pay one-half of the cost of seed, implements, and stock. The tenant farmer agrees to pay the other half of these expenses and to provide the labor, managing the farm and planting and harvesting the crops. The parties typically stipulate that the landowner will receive one-half of the proceeds on the sale of any stock or crops. Of this arrangement, the Supreme Court of Iowa said in *Florence v. Fox*:

If a partnership existed, it might be possible for the tenant, within the scope of the partnership, to purchase property and make the owner of the land responsible therefor in an amount largely in excess of the rent, and each might be responsible for the torts of the other committed within the scope of the agency. The courts hold quite generally that there are obvious reasons for holding that farm contracts or agricultural agreements by which the owner of land contracts with another that such land shall be occupied and cultivated by the latter . . .

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100. *Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777 (Iowa 1985); *Florence v. Fox*, 193 Iowa 1174, 188 N.W. 966 (1922). There are different ways of structuring farming agreements and the choices have different legal consequences although the distinctions are sometimes confused or blurred. For instance, tenant farming arrangements have been distinguished from sharecropping. The designation of a relationship as that of landlord/tenant rather than sharecropper provided a farmer with some legal protection. See, e.g., *Rowlands v. Voelching*, 115 Wis. 352, 91 N.W. 990 (1902) (distinguishing legal rights of tenant farmer from those of cropper in terms of property interest in products of farm). It has also been suggested that while a tenant farming arrangement could be a partnership, farming on shares never creates a partnership. When a person farms on shares, he is entitled to a share of the crops that are grown. This arrangement is not a partnership because there is no sharing of profits. See *Brown v. Jacquette*, 94 Pa. 113 (1880). But see *Reynolds Bros. v. Pool*, 84 N.C. 31 (1881) (court found a partnership where parties agreed to share profits from the cultivation and sale of cotton while citing as precedent an earlier case, *Lewis v. Wilkins*, Phil. Eq. 303, where products of farm were split "as profits"); see also *Baker Farmers Co. v. Harter*, 28 Ill. App. 3d 393, 328 N.E.2d 369 (1975) (court found that farming on shares creates landlord/tenant relationship and sharing of expenses meant that relationship could be classified as joint venture).

This distinction between the sharing of profits (which indicates that there is a business in which each party has an interest; that there has been contribution and combination necessary for partnership) and sharing of products is not limited to farming operations. For a contemporary case raising the same issue, see *State v. Houston Lighting & Power Co.*, 609 S.W.2d 263 (Tex. Civ. App. Corpus Christi 1980, writ ref'd n.r.e.). The product which was produced was electricity, not cotton, but the principle applied was the same. The court found that despite joint management of the project and shared expenses, there was no partnership because there was no sharing of profits. *Id.* at 265.



shall not be construed as creating a partnership between the parties. Such agreements are common in this country, and are usually informal in their character, often resting in parol. In the absence of stipulations or evidence clearly manifesting a contrary purpose, it will not be presumed that the parties to such an agreement intended to assume the important and intricate responsibility of partners, or to incur the inconveniences and dangers frequently incident to that relation.<sup>101</sup>

*Florence* is another example of the way in which social structure influences expectations. Courts determine intent with reference to community standards by applying a classificatory scheme based on status.

Each test of intent considered in this article, the Subjective, Formal and Empirical, represents a balancing of the values placed on individual autonomy and personal responsibility. In the application of the Subjective and Formal tests for intent the conflict between the two values often was made explicit. In the case of the Empirical test of intent, the balance is struck prior to application of the test. The conflict between personal autonomy and personal responsibility is minimized because the courts apply a classificatory scheme that has its derivation in ideas and beliefs that predominate in the community. That classificatory scheme has built into it consistent notions of personal responsibility.

This is not to say that the adoption of an Empirical test of intent totally eliminates the possibility of conflict between the competing values of personal autonomy and personal responsibility. The conflict arises in two kinds of cases, those which involve social change and those which involve an honest attempt by individuals to classify their relationship in a way which is inconsistent with community standards.

In the latter situation, the enforcement of socially legitimated expectations means that personal ideosyncracies will not be indulged. The desire of the parties to avoid partnership status or their belief that they were creating a different kind of relationship is irrelevant. Intent is determined by their behavior, not by their state of mind.

In the former, the court is usually confronted with economic, technological or social change in the larger society, harbingers of

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101. *Florence v. Fox*, 193 Iowa 1174, 1178-79, 188 N.W. 966, 967-68 (1922).

change in the law. When such changes occur, they are accompanied by changes in behavior in personal relationships. These emerging standards of behavior are presented to a court in support of arguments that the court create exceptions to established doctrines, that it reinterpret or abandon existing precedent, that it apply existing doctrine in a related area of the law. Such has been the case in partnership law.<sup>102</sup>

In both cases, intent is a means of legitimizing a result by justifying it in terms of the ostensible assent of the parties to a relationship which is being created by operation of law. With the adoption of an Empirical test that refers to the conduct of the parties, intent, the symbol for personal autonomy, was transformed by the application of community standards into a measure of the legitimate expectations of the parties. The continued use of intent as the test for partnership is essential because of the emotional content of the word and the association it has in the minds of members of American society with conceptions of personal autonomy. Its use creates the appearance of a reconciliation of the competing values of personal autonomy and personal responsibility. It reconciles a political reality, the exercise of judicial power, with a world view that prefers judicial restraint.<sup>103</sup>

The courts have available in an Empirical test for intent, if they chose to use it, a method of testing the validity of the assumptions that support a community based classificatory scheme. The Empirical test of intent examines the conduct of the individuals and the nature of their relationship in terms of the totality of the circumstances and characteristics associated with partnership. It is those characteristics, subsumed within the phrase "community of interest," that are now examined in greater detail.

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102. For a discussion of meretricious relationships, see *supra* note 99.

103. See generally M. DIMEN-SCHIEIN, *supra* note 11. The world view of members of any society is composed of the shared values and beliefs, the constituent parts of an image of reality, the ideal for members of that society. A world view includes values which reflect the personal qualities admired in or demanded of members of society and a perceived notion of the way in which individual and group relationships should be structured. The ideas or beliefs which have intellectual currency reveal the world view of a society. For a discussion of socially legitimate expectations and world view, see *supra* note 24 and accompanying text. One of my colleagues at the University of Houston, Peter Linzer, was emphatic in his denunciation of a use of intent, which he viewed as dishonest. I prefer to think of it as sleight of hand. Like other forms of magic, a very effective means of social control in other societies, the deception only works on those who believe. For a discussion of law and magic, see Weyrauch, *supra* note 12.

#### 4. *Empiricism, Intent and the Indices of Partnership*

An Empirical test of intent ultimately overwhelmed the Subjective and Formal tests for intent in contract as its credibility as a methodology was established by contract theorists.<sup>104</sup> If, as in the case of contract theory, the intellectual force behind objectification cannot be stayed in partnership law; if it is inevitable that courts move in the direction of an exploration of the interaction between the parties to determine the nature of their relationship, it is also important and necessary for the courts to reconcile this development with a value system that reveres personal autonomy and disdains judicial power.

Empiricism is objectivity unrestrained by Formalism. It is best described as a methodology. The belief in the efficacy of this methodology is a basic tenet of a jurisprudential philosophy.<sup>105</sup> In the case of a disputed partnership, Empiricism as a methodology requires a court to examine all facets of the relationship between the parties involved in a business enterprise. The relationship is then classified as a partnership if the facts in their entirety show behavior consistent with such a classification.

Under the common law, the problem confronting courts using an objective test for intent, whether Formal or Empirical, was the identification of the behavior uniquely characteristic of partners, behavior that previously had been referred to as the indices of partnership.<sup>106</sup> The next section of this article discusses the evolution of a second test for partnership which describes succinctly the nature of the relationship between partners. This test, "community of interest," directs courts to the facts which have relevance to the partnership determination.

In most jurisdictions, the relationship between the two tests was ambiguous. Early definitions of partnership such as those contained in *Fink* and *Meehan* exemplified the potential that existed for the assimilation of the two tests.<sup>107</sup> Intent to form a

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104. For a discussion of Empiricism, see *supra* note 75.

105. See generally Feinman, *supra* note 23; Mooney, *supra* note 79.

106. A more eloquent version of this statement was contained in *Beecher*: [w]hat . . . are the *indicia* of partnership in this case; the marks which force that construction upon the court irrespective of the intent of the parties; that in fact control their intent and give to the parties bringing suit rights which they were not aware of when they sold the supplies? 95 Mich. at 194, 7 N.W. at 786.

107. In *Fink*, the Texas Supreme Court stated that a partnership determination would be made with reference to the "actual relation consequent upon the engagement of the parties." 215 S.W. at 848. In *Meehan*, the Supreme Court described a partnership in the following manner: "The requisites of a

partnership could be found in the intent to do those things which brought the alleged partners within the definition of partnership.<sup>108</sup>

D. *Community of Interest as a Test for Partnership—The Emergence of the Idea of Entitlement*

With the rejection of the Net Profits Rule in the 19th century courts were struggling for a way to express the distinction they wanted to draw between an interest in profits that was proprietary and one that was a measure of compensation. There were various formulations describing a partnership interest as an interest in "profits as profits"<sup>109</sup> or stating that a partner had a "lien" on

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partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits." 145 U.S. at 618.

108. The assimilation of the two tests can be seen in some very early cases. In *Richardson v. Keely*, the Colorado Supreme Court stated: "The parties constituting the alleged partnership must be presumed to have intended the very things they did, in the conduct of the whole matter." 58 Colo. 47, 55, 142 P. 167, 170 (1914). Moreover, the court maintained that: "It is sometimes said that, in order to constitute a partnership, the parties must have intended to assume that relation towards each other. But by this it is meant to say, they must have intended to make such stipulation as in law constitute a partnership." *Id.* at 57-58, 145 P. at 171 (citing N. LINDLEY, A TREATISE ON THE LAW OF PARTNERSHIP (5th ed. 1888)).

The Minnesota Supreme Court made the relationship between the two tests even clearer:

[T]here is no arbitrary test by which to determine when a partnership exists. It depends upon the intention of the parties, and this intention must be ascertained from the evidence and all the circumstances of the case. If . . . the parties intended to combine their property, labor, and skill in an enterprise as principals for the purpose of enjoying the profits, it establishes a partnership.

*McAlpine v. Millen*, 104 Minn. 289, 292, 116 N.W. 583, 586 (1908); *see also* *Chapman v. Hughes*, 104 Cal. 302, 37 P. 1048 (1894) (denied partnership status to profits derived from property owned by individual independent of partnership); *Malvern Nat'l Bank v. Halliday*, 195 Iowa 734, 192 N.W. 843 (1923) (disallowing foreclosure of partnership assets used as collateral for partner's promissory note); *Nicholson v. Kilbury*, 83 Wash. 196, 145 P. 189 (1915) (partnership status not precluded because of titles to property); *Bartelt v. Smith*, 145 Wis. 31, 129 N.W. 782 (1911) (telephone lines constituted partnership property).

109. *Compare* *Campbell v. Sherman*, 8 N.Y.S. 630 (1890); *Reynolds Bros. v. Pool*, 84 N.C. 31 (1881) *with* *Meehan v. Valentine*, 145 U.S. 611, 619 (1892). Several courts have used adaptations of this language. *See, e.g.,* *Omaha & Grant Smelting & Ref. Co. v. Rucker*, 6 Colo. App. 334-40, 40 P. 853, 856 (1895); *Winkelbach v. Honolulu Amusement Co.*, 20 Haw. 498, 501 (1911); *Canton Bridge Co. v. City of Eaton Rapids*, 107 Mich. 613, 617, 65 N.W. 761, 762 (1895); *Elliott v. Murphy Timber Co.*, 117 Or. 387, 394, 244 P. 91, 93 (1926); *Sheldon v. Little*, 111 Vt. 301, 305, 15 A.2d 574, 576 (1940); *Sullivan v. Sullivan*, 122 Wis. 326, 99 N.W. 1022, 1025 (1904). The use of this same phrase by courts applying the Net Profits Rule demonstrates its inadequacy as a means of

partnership profits,<sup>110</sup> or that the interest was an interest in the profits before they were divided among the various partners.<sup>111</sup>

In their search for a simpler way of stating this distinction, courts subsequently adopted the language that appeared in several treatises on partnership. Restating the issue in recognizable terms, courts asked whether the alleged partner was a principal in the business.<sup>112</sup> This reformulation of the test for partnership changed the focus of the inquiry. No longer were courts examining the nature of the risk borne by the participant, but rather the nature of his or her relationship with the managers of the business. The facts which assumed importance were those which revealed the extent to which an alleged partner participated in the control of the business.<sup>113</sup>

The agency test for partnership proved to be as unsatisfac-

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determining partnership. *See, e.g.*, *Hackett v. Stanley*, 115 N.Y. 625, 631, 22 N.E. 745, 747 (1889); *Leggett v. Hyde*, 58 N.Y. 272, 277, 279 (1874).

110. *See Meehan v. Valentine*, 145 U.S. 611, 619 (1892); *Omaha & Grant Smelting & Ref. Co. v. Rucker*, 6 Colo. App. 334, 339, 40 P. 853, 855 (1895); *Rosenblum v. Springfield Produce Brokerage Co.*, 243 Mass. 111, 117-18, 137 N.E. 357, 360 (1922); *Champion v. Bostwick*, 18 Wend. 175, 185 (N.Y. 1837). Another interesting example of the distinctions that were drawn with respect to the manner in which profits could be shared appeared in an early Georgia statute, Civil Code Section 3158 (1910), which stated: "A joint interest in the partnership property or in the profits and losses of the business shall constitute a partnership as to third persons. A common interest in the profits alone shall not constitute a partnership as to third persons." GA. CODE ANN. § 14-8-21 (1982) (repealed 1985); *see also Municipal Paving Co. v. Herring*, 50 Okla. 470, 479, 150 P. 1067, 1070 (1915) (distinguishing between joint and common interests in profit).

111. *See Leggett v. Hyde*, 58 N.Y. 272 (1874) (interest in profits of business as profits constitutes partnership).

For a further discussion of profit sharing and ownership of profits, *see Omaha & Grant Smelting & Ref. Co. v. Rucker*, 6 Colo. App. 334, 40 P. 853 (1895); *Winkelbach v. Honolulu Amusement Co.*, 20 Haw. 498 (1911); *Barnes v. Collins*, 16 Haw. 340 (1904); *Florence v. Fox*, 193 Iowa 1174, 188 N.W. 966 (1922); *Thillman v. Benton*, 82 Md. 64, 33 A. 485 (1895); *Beecher v. Bush*, 45 Mich. 188, 7 N.W. 785 (1881); *Eastman v. Clark*, 53 N.H. 276 (1872); *Salter v. Ham*, 31 N.Y. 321 (1865); *Municipal Paving Co. v. Herring*, 50 Okla. 470, 150 P. 1067 (1915); *Flower v. Barnekoff*, 20 Or. 132, 25 P. 370 (1890); *Davis v. Gilmore*, 244 S.W.2d 671 (Tex. Civ. App. San Antonio 1951, writ ref'd n.r.e.).

112. *See, e.g.*, *Thillman v. Benton*, 82 Md. 64, 33 A. 485 (1895); *McAlpine v. Millen*, 104 Minn. 289, 116 N.W. 583 (1908); *Eastman v. Clark*, 53 N.H. 276 (1872); *Fink v. Brown*, 215 S.W. 846 (Tex. Ct. App. 1919).

113. What began as a requirement that there be a community of interest in profits "as profits" ultimately referred not to the way in which risk was shared but rather to how control was shared in partnership. *See, e.g.*, *Florence v. Fox*, 192 Iowa 1174, 1179, 188 N.W. 966, 968 (1922); *Campbell v. Sherman*, 8 N.Y.S. 630 (1890). In *Florence*, the court stated: "It has been held that the salient features of an ordinary partnership are a community of interest in profits and losses, a community of interest in the capital employed, and a community of power in administration." 192 Iowa at 1179, 188 N.W. at 968; *see also Quier v. Rickly*, 116 Colo. 5, 177 P.2d 549 (1947) (discussing community of interest in

tory as its progenitors. In the words of Justice Gray of the United States Supreme Court:

[T]he reference to agency as a test of partnership was unfortunate and inconclusive, inasmuch as agency results from partnership rather than partnership from agency. . . . Such a test seems to give a synonym, rather than a definition; another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn.<sup>114</sup>

What the Supreme Court substituted for an agency test was a definition of partnership contained in the Commentaries on the law of Partnership of Mr. Justice Story. This definition referred to the "community of interest" partners had in the property, business and the responsibilities of the partnership.<sup>115</sup>

The agency test for partnership and its replacement, the idea of a "community of interest," both sought a way of classifying the interests of the various categories of individuals who invest capital or labor in a business enterprise.<sup>116</sup> Partners were principals or owners and had a proprietary interest in a business, but how as a court to distinguish between a proprietary interest and the economic interdependence of exchange relationships?

An analysis of the common law partnership cases applying a community of interest test for partnership reveals three topics of concern in partnership determination: contribution and combination, control, and risk sharing. All three elements were associated with but not necessarily determinative of ownership.

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subject matter of partnership). For a further discussion of community of interest in capital stock of partnership, see *infra* note 125 and accompanying text.

Moreover, the court in *Meehan* held that "[t]he principle distinction between him [partner] and a mere agent is, that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership." 145 U.S. at 620 (quoting J. STORY, PARTNERSHIP § 1 (5th ed. 1859)).

114. *Meehan*, 145 U.S. at 622 (citations omitted).

115. For the definition of partnership in *Meehan*, see *supra* note 107.

116. In contemporary terms, the problems inherent in the application of property concepts to business enterprises are revealed in the discussion of the interests of "stakeholders" in the corporate context. The term reflects an emerging awareness that the individuals with the most at risk in the business may well be the employees, creditors and management rather than the shareholders, the owners in the traditional sense. While we ask the stakeholders to make additional investments to keep the enterprise afloat—pay cuts, restructuring debt, the belief persists that ownership creates entitlements superior to those of other stakeholders. See, e.g., Jensen, *Takeovers: Folklore and Science*, 62 HARV. BUS. REV. 109 (1984).

The attributes of ownership that indicate entitlement are also the consequences of partnership. The consequences of partnership are: (1) the agency relationship that exists between partners, (2) the right of each partner to participate in the management of the business, (3) the right to possess partnership property for partnership purposes, and (4) the obligation of each partner to share in the losses of the partnership business.<sup>117</sup> Under the common law, if an alleged partner exercised control by making management decisions or obligated himself to pay part of the losses of the business, a court could find a partnership. The absence of facts showing exercise of control and an obligation to share losses, or one or the other of these elements, could suggest that classification as a partnership was inappropriate. However, a court could find that the right to control and the obligation to share losses existed even in the absence of facts which showed either the exercise of the rights or the assumption of the responsibilities of partnership. Those rights and obligations existed by virtue of the determination of partnership by the court.

The struggle by courts to understand the relationship between entitlement as an owner of a business and contribution and combination, control and risk sharing and is reflected in the lengthy discussions of the significance of risk sharing and the confusion over the importance of an undertaking to share losses.<sup>118</sup> It is also reflected in the uneasiness the courts experienced with the use of control and risk sharing the consequences of partnership and the attributes of ownership, as a test for partnership.<sup>119</sup>

### 1. *Contribution, Combination and Entitlement*

In *Meehan*, the Supreme Court stated its definition of partnership, elaborating on the meaning of a community of interest.<sup>120</sup>

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117. See *Meehan*, 145 U.S. at 622 (discussing consequences of partnership determination).

118. For a discussion of risk sharing, see *infra* notes 151-93 and accompanying text.

119. For the Supreme Court's discussion of confusion between consequences and attributes, see *supra* note 114 and accompanying text. See, e.g., *Eastman v. Clark*, 53 N.H. 276, 299 (1872). Other early common-law cases discussing loss sharing as a consequence of partnership and recognizing the possibility of delegation of control are: *Omaha & Grant Smelting & Refining Co. v. Rucker*, 6 Colo. App. 334, 40 P. 853 (1895) (partnership consists of sharing of control and interest); *Beecher v. Bush*, 45 Mich. 188, 7 N.W. 785 (1881); *McAlpine v. Millen*, 104 Minn. 289, 116 N.W. 583 (1908) (partnership implies an agreement to share losses).

120. For discussion of the Supreme Court's elaboration, see *supra* notes 114-15 and accompanying text.

The explanation in *Meehan* identifies the prerequisites of partnership. The definition describes those acts which create an entitlement that imbues the participants with the status of owners. An individual had to make a contribution. This contribution had to be combined with that of others in a joint undertaking or business, and the benefits of that undertaking, the profits, had to be shared by the contributors.<sup>121</sup>

Courts seldom questioned the existence of contribution. It was acknowledged that one could contribute services, property, or money to a partnership.<sup>122</sup> Nor was it disputed that the agreement creating the relationship contemplated a division of the profits.<sup>123</sup> More often questions were raised as to whether the contributions had been combined in a joint undertaking and when that combination occurred.

For example, courts sometimes discussed the need for a "community of interest" in the capital stock of the partnership.<sup>124</sup> Although these courts spoke in terms of the need for joint ownership of property, the inquiry into whether there was a community of interest in the "capital stock" really concerned the extent to which property had been combined in the common enterprise.

Since a business does not need to own property to exploit

121. *Meehan*, 145 U.S. at 623; *see also* *Westcott v. Gilman*, 170 Cal. 562, 150 P. 777, 779 (1915).

122. *Id.*; *see also* *Robbins v. Laswell*, 27 Ill. 365 (1862); *Beecher v. Bush*, 45 Mich. 188, 7 N.W. 785 (1881); *Pattison v. Blanchard*, 5 N.Y. 186 (1851); *Bridgman v. Winsness*, 34 Utah 383, 98 P. 186 (1908); *Bartelt v. Smith*, 145 Wis. 31, 129 N.W. 782 (1911); *see generally* 3 J. KENT, COMMENTARIES ON AMERICAN LAW (13th ed. 1884). *But see* *Canton Bridge Co. v. City of Eaton Rapids*, 107 Mich. 613, 616, 65 N.W. 761, 762 (1895) (one providing services in venture was agent not partner). *See also* cases discussed *infra* notes 177 and 184 discussing the value placed on contributions of labor or business opportunities.

123. It is the agreement to share profits that generally precipitates an inquiry into the proper classification of the relationship. For a discussion of risk sharing as an element of partnership, *see infra* notes 151-93 and accompanying text.

124. *See, e.g.*, *Richardson v. Keely*, 58 Colo. 47, 142 P. 167 (1914); *cf.* *Canton Bridge Co. v. City of Eaton Rapids*, 107 Mich. 613, 65 N.W. 761 (1895); *Champion v. Bostwick*, 18 Wend. 175 (N.Y. 1837); *Flower v. Barnekoff*, 20 Or. 132, 25 P. 370 (1890). For a discussion of the relationship of 19th century property notions and partnership, *see, e.g.*, J. PARSONS, TREATISE ON PARTNERSHIP (1886).

Property, the only thing for which it exists, and in which it deals, is discarded as constituent of the relation. But the disputes which arise are in reference to the property of the firm, and they can not be adjusted unless title is located. . . . The instant the notion of firm property is brought forward, the material is furnished for an explanation of the relation in all its bearings.

*Id.* at LXIV, LXV, LXVI.



that property for financial gain,<sup>125</sup> the issue of ownership of property should be irrelevant to partnership. What is critical is the exercise of dominion or control over the property used in the business. The discussion of the absence of a community of interest in capital stock was often concerned with the inability of one or more of the alleged partners to exercise control over or use property needed in the operation of the business. The absence of control indicated an absence of contribution and combination.

The significance of combination as it related to control and entitlement is illustrated by early common law cases involving stage lines.<sup>126</sup> In the late 19th Century, the transportation of the public, mail and cargo was relegated to the private sector. Stage lines owned by individual entrepreneurs sprang up between small communities. As people began traveling longer distances, these stage operators apparently decided that it was more efficient or profitable to cooperate in providing passage over these long distances than it would be to expand their lines and compete with one another. In their contracts, the operators agreed that they would each continue to be personally responsible for the maintenance and care of their own animals and equipment and they would hire their own drivers. The cost of any tolls was deducted from the fares that were collected, and each operator received a share of the profits based on the ratio of the number of miles in his route to that of the entire route.<sup>127</sup>

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125. This is self-evident in certain kinds of business arrangements, for example, cases involving the lease of buildings or space used by a hotel or retail store or other business. See *Parker v. Fergus*, 43 Ill. 437 (1867) (lease of opera house); *Beecher v. Bush*, 45 Mich. 188, 7 N.W. 785 (1881) (lease of hotel); *Fink v. Brown*, 215 S.W. 846 (Tex. Ct. App. 1919); *Miles Co. of Seattle v. Gordon*, 36 P. 265 (Wash. 1894) (lease of building). It was rare that a court was willing to contemplate the possibility of a partnership in which a partner received compensation for the use of property he owned. See, e.g., *Parker v. Fergus*, 43 Ill. 437 (1867). But see *Robbins v. Laswell*, 27 Ill. 365 (1862). Other courts clearly had trouble when one party contributed the use of property or materials to the partnership but not the property itself. In *Canton Bridge* the court stated:

Under this contract the parties were to share the profits and losses, but the Canton Bridge Company was to furnish the material and labor, or advance the necessary funds to pay for the same. There is nothing to indicate that Wheaton was to own any share in these materials.

107 Mich. at 616, 65 N.W. at 762. But see *Champion v. Bostwick*, 18 Wend. 175 (N.Y. 1837). In *Champion*, the court held that: "It is not necessary to constitute a partnership that there should be any property constituting the capital stock which shall be jointly owned by the partners. But the capital may consist in the mere use of property owned by the individual partners separately." *Id.* at 182.

126. *Eastman v. Clark*, 53 N.H. 276 (1872); *Pattison v. Blanchard*, 5 N.Y. 186 (1851); *Champion v. Bostwick*, 18 Wend. 175 (N.Y. 1837).

127. *Eastman v. Clark*, 53 N.H. 276, 283 (1872); *Pattison v. Blanchard*, 5 N.Y. 186 (1851).

As far as the courts were concerned, the agreement that each operator would continue to be individually responsible for his own equipment also meant that none of the other operators had the authority to use that property without his consent. In a partnership, however, each partner has the right and the power to use or control partnership property for partnership purposes. Preservation of autonomy in management proved the absence of combination and resulted in the conclusion that there was no partnership.<sup>128</sup>

Combination, or the lack of it, was also the issue in determining whether a joint enterprise existed. In some instances individuals or firms in pursuit of their own economic interests benefitted from the cooperation of others whose expertise, skills, or resources complemented their own. There might be synergy in such cooperation, but there was no combination, no business in which each of the participants had a share.<sup>129</sup>

The best example of cooperation that did not result in the combination needed for partnership is found in a case involving the development of technology. In *Detachable Bit Co. v. Timken Roller Bearing Co.*,<sup>130</sup> the plaintiff, Detachable Bit Co. (DBC), was one of the earliest entries into the market for detachable drilling bits. In order to successfully exploit patents for two piece and three piece removable cutters that could be attached to the end of a drill rod, DBC needed financing. Timken, the defendant, a producer of specialized steel, was looking for an outlet for its steel. DBC also needed the expertise of the Timken metallurgists and engineers to develop its manufacturing processes. Timken lent DBC money and took convertible debentures which would have

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128. The court in *Champion v. Bostwick* correctly stated that there need not be any capital stock for there to be a partnership, but the court was wrong when it concluded that "[i]t is sufficient to constitute a partnership if the parties agree to have a joint interest in, and to share the profits and losses arising from the use of property or skill, *either separately or combined*." 18 Wend. 175, 183 (N.Y. 1837) (emphasis added). The language in *Champion* suggesting that combination was unnecessary is repudiated in *Pattison v. Blanchard*, 5 N.Y. 186 (1851). The court in *Pattison* distinguished *Champion* on the grounds that a partnership might exist for purposes of liability in tort when it would be inappropriate to find a partnership in the case of an intraparty dispute or in a suit by a third party creditor. *Pattison v. Blanchard*, 5 N.Y. 186, 190-91; see *Stroher v. Elting*, 97 N.Y. 102 (1884) (liability of owner of team and wagon for injury settled by pedestrian); see also *Eastman v. Clark*, 53 N.H. 276, 283 (1872).

129. See, e.g., *Beecher v. Bush*, 45 Mich. 188, 7 N.W. 785 (1881); *Parker v. Fergus*, 43 Ill. 437 (1867); see also *Coope v. Eyre*, 126 Eng. Rep. 24 (2 H.Bl. 37), discussed in *Eastman v. Clark*, 53 N.H. 276, 309, 310 (1872) (denied partnership to oil traders who agreed to sell their proportionate share of oil separately).

130. 133 F.2d 632 (6th Cir. 1943).

given its stock in DBC if it had chosen to exercise the conversion privilege. The potential for classification as a partnership arose not from the financial arrangements between the parties, but from the cooperation of the employees of DBC and Timken in the experimentation with the drill bit, the joint development of a manufacturing process and the exploration of a national market.<sup>131</sup>

Two years after the relationship between Timken and DBC ended, Timken entered the market as a competitor in the manufacturing of drill bits. When the successor in interest to DBC finally sued, it argued that Timken had a fiduciary obligation not to compete with DBC that grew out of the partnership in the development of the manufacturing process.<sup>132</sup>

The Court of Appeals for the Sixth Circuit concluded that there was no partnership. This conclusion was based in part on the fact that there was no joint property involved. Nor was there joint control over property used in a business which could be said to be a partnership business. It concluded:

Even though we consider the objective of their cooperative efforts as limited to development of manufacturing processes and to steel analyses there is still no joint undertaking. It is true that if their efforts had been crowned with success each corporation expected to profit—Timken in the sale of its steel, and Detachable in the sale of its bits. But such profits would be individual to each of the corporations involved and not joint.<sup>133</sup>

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131. *Id.* at 633-34.

132. *Id.* at 634-35.

133. *Id.* at 635. Compare *United Nuclear Corp. v. Energy Conversion*, 110 Ill. App. 3d 88, 441 N.E.2d 1163 (1982) (court reversed lower court's decision that agreement for development of technology did not establish joint venture). The case is interesting for a number of reasons. While the court used a four part test for a joint venture the test was used to determine the intent of the parties. One part of the test, reminiscent of the common law definitions of partnership, referred to the contribution of the parties. In contrast with *Timken*, this court indicated that an agreement to share profits and losses could be found in the joint ownership of the resulting technology. Sharing of losses could be established by the fact that if the project failed, the plaintiff would lose the money contributed to finance the research and the defendant would lose "the time and effort it expended." *Id.* at 110, 441 N.E.2d at 1178. The advent of the "information age" in the United States economy has been marked by the development of new technology by small concerns many of which lack the capital to finance their research. "Joint ventures" between large corporations and these small companies have been one of the solutions to this need for capital. See e.g. *Corporate Odd Balls*, *supra* note 3. *United Nuclear* and the popularity of this arrangement has implications for the future treatment of partnership formation.

In other words, the skill and expertise brought by each of these participants to the project never resulted in the creation of an identifiable business different or separate from the business interests each had prior to their cooperative undertaking. Each participant continued to own its own business, but neither had a proprietary interest in the business of the other or in anything new. The concept of entitlement was inapposite. There cannot be ownership if there is nothing to own.

In contrast to the cases which questioned whether a combination had taken place, *Dunham v. Rogers*,<sup>134</sup> an early Pennsylvania case, discussed the timing of the combination. *Dunham v. Rogers* concerned the relationship between a manufacturer of wooden handles and a county merchant who agreed to sell these handles. In a suit against the merchant by a supplier of lumber to the manufacturer, the court of common pleas held that the merchant was not liable for the expenses incurred by the manufacturer in producing the handles.

The business of the partnership was determined by focusing on the contributions of the parties and the timing of the combination. The court concluded that the relationship was created for the purpose of marketing a finished product. As owner of a business that marketed finished goods, the merchant would not be liable for the costs of producing those goods.<sup>135</sup> Entitlement, which confers both the benefits and the burdens of ownership, could only arise after combination. Timing was the crucial issue.

Contribution and combination require a processual analysis. In the relationship, the identifiable characteristics of the individual contributions are merged in something new, the product of this process of combination. In that process of combination, individuality is surrendered. The result is a relationship characterized by vulnerability and the potential for equality.

The cases discussing contribution and combination illustrate the complexity of the idea of entitlement. Interwoven throughout the discussion of contribution and combination are issues of control and risk sharing, the leitmotifs of partnership. The presence or absence of control could prove contribution and combination or the lack of it.<sup>136</sup> The process of contribution and combination

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134. 1 Pa. 255 (1845). This case is discussed in *Beecher v. Bush*, 45 Mich. 188, 190, 7 N.W. 785, 788 (1881).

135. *Dunham*, 1 Pa. at 262; see also *Westcott v. Gilman*, 170 Cal. 562, 150 P. 777 (1915) (defendant argued unsuccessfully that business of partnership was limited to shipping of fruit).

136. Under the U.P.A., the relationship between control and the process

could create or destroy entitlement and the attendant liability for risks associated with ownership.

## 2. *Community of Interest, Control and Entitlement*

As noted above, the earliest attempts to give content to community of interest as a test for partnership equated a right to receive profits with a principal's interest in the business. If one is a principal in a business and that business is conducted by others, then the managers must be the principal's agents. If they are his agents, ultimately he has the power to control or to direct their actions. The line of inquiry invariably, if rather indirectly, led to the issue of control.<sup>137</sup>

In most of the common law cases discussed in this section, the existence or absence of control was determined by reference to the instrument or agreement creating the relationship. Courts were concerned with a contractually created power to exercise control.<sup>138</sup> The legal consciousness, suffused at the time with ideas

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contribution and combination is less clear. In a discussion of control, or factors indicating control, it is sometimes possible to discern an interest in the process of partnership formation. For example, in *Martin v. Peyton*, Judge Andrews discussed various provisions of the written agreements in an effort to ascertain the intent of the parties. 246 N.Y. 213, 158 N.E. 77 (1927). The facts that he considered relevant included the stipulation that the securities were loaned to a partnership and were not "mingled with other securities" of the partnership; that the defendants, not the partnership, received dividends and retained the right to vote stock, that they could withdraw securities as these securities appreciated in value or substitute other securities for those that were initially loaned. *Id.* at 220-21, 158 N.E. at 79. This kind of control indicates that the securities were not contributed to the partnership because the defendants maintained a degree of control over the securities inconsistent with such contribution. *Id.* at 221, 158 N.E. at 79.

137. See *Beecher*, 45 Mich. 188, 7 N.W. 785. In *Beecher*, the court stated "[a]nd how could he be principal in a business over which he had absolutely no control?" *Id.* at 201, 7 N.W. at 789; accord *Lee v. Cravens*, 9 Colo. App. 272, 48 P. 159 (1897); see also *Sheldon v. Little*, 111 Vt. 301, 15 A.2d 574 (1940) (discussing connection between agency test and control).

138. See, e.g., *Salter v. Ham*, 31 N.Y. 321 (1865). In *Salter*, the court referring to the written agreement between the parties, said "[i]t did not impose upon the plaintiff the duties or clothe him with the powers of a partner." *Id.* at 328. Moreover, the court in *Beecher* posed the following questions:

[W]here in the mutual arrangement does it appear, that either of the parties clothed the other with an agency to act on his behalf in this business? . . . Could Beecher buy for the business a dollar's worth of provisions? Could he hire a porter or a waiter? Could he discharge one? Could he say the house shall be kept for fastidious guests exclusively and charges made in proportion to what they demand, or on the other hand that the tables shall be plain and cheap so as to attract a greater number? Could he persist in lighting with gas if Williams chose something different, or reject oil if Williams saw fit to use it? Was a servant in the house at his beck or disposal, or could he turn off a guest that Williams saw fit to receive, or receive one that Williams re-

of individualism, freedom of contract and judicial restraint, promoted this limited inquiry into control. This ideology of the law explains the attractiveness of a control test for partnership. According to the *Beecher* court:

There is something understandable by the common mind in this test; there is nothing artificial or arbitrary about it; it falls in with reason and enables every man to know when he makes his business arrangements whether he runs the risk of extraordinary liabilities contracted without his consent or approval.<sup>139</sup>

Despite the apparent enthusiasm for it, the limitations of a test that made the exercise of control the sole criterion of entitlement were obvious even to the courts that purported to apply it.<sup>140</sup> Courts could not rely totally on an examination of the role each participant had in the conduct of the business to determine partnership. Actual participation and control in a business can be expected only in an economic environment in which there is no accumulation of excess capital; no specialization of labor or talents. As will be discussed in the next section on risk, courts often concluded that individuals charged with the responsibility of managing a business did not have a proprietary interest in that business.<sup>141</sup> The opposite was recognized as being equally true.

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jected as unfit? In short, what one act might he do or authority exercise, which properly pertains to the business of keeping hotel, except merely the supervision of accounts, and this for the purpose of accounting only? And how could he be principal in a business over which he had absolutely no control?

45 Mich. at 200-01, 7 N.W. at 789; *see also* *Parker v. Fergus*, 43 Ill. 437 (1867); *Florence v. Fox*, 193 Iowa 1174, 188 N.W. 966 (1922); *Thillman v. Benton*, 82 Md. 64, 33 A. 485 (1895); *Rosenblum v. Springfield Produce Brokerage Co.*, 243 Mass. 111, 137 N.E. 357 (1922); *Municipal Paving Co. v. Herring*, 50 Okla. 470, 150 P. 1067 (1915). For discussion of the relevance of conduct, *see infra* note 150 and accompanying text.

139. *Beecher*, 45 Mich. at 196, 7 N.W. at 787.

140. *Id.* In *Beecher*, the court noted that there were instances in which "powers which might otherwise be supposed to exist are taken away or excluded by express stipulation." *Id.* at 201, 7 N.W. at 789. Similarly, in *Omaha & Grant Smelting & Refining Co. v. Rucker*, the court noted that the lack of participation in the control should not be given too much weight, particularly in a dispute between the parties. 6 Colo. App. 334, 338, 40 P. 853, 855 (1895). The court thus stated:

[A]s to them it may be, and frequently is, a question of contract, and it is competent for them to so contract that one member of the firm shall transact all the active business of the firm with third parties. Yet this would not affect the relation of partnership.

*Id.*; *see also* *Florence v. Fox*, 193 Iowa 1174, 188 N.W. 966 (1922); *McAlpine v. Millen*, 104 Minn. 289, 116 N.W. 583 (1908).

141. *See infra* notes 168-69, 178.

One who contributed money or the use of property and who had a proprietary interest might not be involved in the operation of the business.<sup>142</sup> The amount of control necessary to establish ownership varied with the type of business. Significantly less control was required to establish a proprietary interest in a business that involved speculation in real estate than would be required for a manufacturing or merchandising operation.

Complicating any analysis of the issue of control was the fact that debtors or lessors of real or personal property often demanded access to information normally shared among partners. Participation of this sort indicated either a proprietary interest and delegation of responsibility for day-to-day operations or investment oversight.<sup>143</sup>

In *Meehan* the Supreme Court accepted the characterization of the relationship contained in a written agreement and six promissory notes. These instruments designated the contributions as a loan rather than the purchase of an interest in the business. Although the alleged partner regularly received financial reports and payments calculated on the basis of a percentage interest in profits, and though he made regular trips to Baltimore where he visited the establishment and "talked business," the Court found he had not exercised control over the business inconsistent with his status as creditor.<sup>144</sup>

Although management of a business by itself was insufficient to prove a proprietary interest, the power to sell the business, whether exercised or not, was proof of an ownership interest. If the contract creating the relationship gave one participant in a business enterprise the power to sell the business, even when that

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142. In fact, it was the ordinariness of such an arrangement that prompted courts, often at the instigation of third party creditor plaintiffs, to ask whether a participant in a business who claimed creditor status was a "dormant" partner. *Beecher*, 45 Mich. 188, 7 N.W. 785; *Eastman v. Clark*, 53 N.H. 276 (1872).

143. Compare *Meehan*, 145 U.S. 611 (denied partnership status between creditor and debtor regardless of profit sharing); *Thillman v. Benton*, 82 Md. 64, 33 A. 485 (1895) (same) with *Robbins v. Laswell*, 27 Ill. 365 (1862) (upheld partnership based on profit sharing); *Causten v. Barnette*, 49 Wash. 659, 96 P. 225 (1908) (required accounting of stock of goods); *Bartelt v. Smith*, 145 Wis. 31, 129 N.W. 782 (1911) (upheld partnership between parties based on their conduct in operating telephone system).

144. *Meehan*, 145 U.S. at 625. Although, courts sought evidence of control in the terms of a written contract, skepticism impelled courts to entertain challenges to the way in which the parties labeled their relationship. It was necessary for courts to entertain arguments that conduct by the parties evidenced control commensurate with a partnership interest. *Id.* at 624. For a discussion courts seeking evidence of control in the written contract, see *supra* note 138. For a discussion of the courts' skepticism, see *supra* note 63.

power was restricted by an obligation to make the first offer to a co-participant, the former would be classified as an owner, the latter as an employee or agent.<sup>145</sup> On the other hand, if the contract was silent on the issue of the power to sell the business, any sale by one participant without the knowledge or participation of another participant could give the latter a right to an accounting and in some instances, damages for breach of fiduciary duty.<sup>146</sup>

While the common law often equated entitlement with control, there were instances where this assumption was challenged. Ownership could exist without the exercise of control or the existence of a contractually conferred right to control. One has only to compare *Beecher* with *Bengston v. Shain*,<sup>147</sup> a case decided by the Supreme Court of the State of Washington, to comprehend the magnitude of the difference.

Mr. Bengston claimed that he was a partner in a tavern. He began his relationship with the other owners as an employee and they claimed his status never changed. Bengston started out as a clerk and watchmaker in a pawnshop owned by a Mr. Shain. Two years later, a Mr. Pleski approached Shain with the idea of opening a tavern. Shain and Pleski agreed that each would contribute a portion of the purchase price and Shain was to contribute labor to equal the larger financial investment by Pleski. Shain, with Pleski's knowledge and agreement, asked Bengston to work in the tavern in the evenings. For his labor, Bengston was to receive a quarter share of the profits.

Bengston continued to work in the pawnshop during the day, from 10 A.M. to 4 P.M., while he worked in the tavern as bartender and manager from 6 P.M. until closing. He did not receive any remuneration for his services in the tavern. A few months later, when it became evident that the tavern was a tremendous success, Shain and Pleski told Bengston that they would take over the operation of the tavern and Bengston was to manage the pawnshop during the day. Finally, Bengston confronted Shain and was told that he had no interest in the tavern.

Applying an Empirical test of intent that looked at all the

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145. See, e.g., *Salter v. Ham*, 31 N.Y. 321 (1865); *Sheldon v. Little*, 111 Vt. 301, 15 A.2d 574 (1940); see also *Florence v. Fox*, 193 Iowa 1174, 188 N.W. 966 (1922) (absent terms in lease giving former tenant power to dispose of property on farm, proves that no partnership was intended).

146. *Nelson v. Abraham*, 29 Cal. 2d 745, 177 P.2d 931 (1947); *Flower v. Barnekoff*, 20 Or. 132, 25 P. 370 (1890); *Stipcich v. Marinovich*, 13 Wash. 2d 155, 124 P.2d 215 (1942).

147. 42 Wash. 2d 404, 255 P.2d 892 (1953).



"facts and circumstances and the actions of the parties," the court sought to ascertain whether there was a "community of interest in, or a joint ownership of, the business itself, accompanied by a joint right of control of its affairs."<sup>148</sup> The court admitted that if it were deciding on the basis of the conflicting testimony, it would find that Bengston was an employee. However, there were two actions taken by Shain and Pleski which indicated that the defendants recognized Bengston's status as a partner. A liquor license was issued to Pleski, Bengston and Shain, jointly, and the audit report prepared by the accountant for the business showed capital accounts for three partners, including Bengston. The court concluded that Bengston was a partner and as such he was entitled to a dissolution and an accounting. As to the issue of control, in response to an argument that must have been made by the defendants that Bengston did not participate in management decisions concerning the purchase or the operation of the business, the court concluded, "there was a community of interest in this business and, although Bengston did not assert it, he had, with his partners, a joint right of control of its affairs."<sup>149</sup>

*Bengston* is an important case because it illustrates several very important aspects of the common law of partnership. In *Bengston*, one can see that the issue of control in common law often represented a consideration of the existing social structure and the implications that structure had with respect to the classification of the relationship. It was not actual control but the court's analysis of who had the right to control that revealed the impact of status on partnership.

The methodology of Empiricism used by the court in *Bengston* led to an examination of the court's assessment of entitlement. The court was forced to acknowledge the possibility that the facts and circumstances of a particular relationship could destroy presumptions concerning the subordinate status of employees and the lesser value of labor. Normally, those presumptions would have interfered with the court's ability to contemplate a change in status from employee to owner.

*Bengston* also illustrates the direction in which the common law of partnership was moving. The community of interest test for partnership and the Empirical test of intent were merged. The court noted the conduct of Shain and Pleski recognized the

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148. *Id.* at 409, 255 P.2d at 895.

149. *Id.* at 411, 255 P.2d at 896.

status of Bengston as partner.<sup>150</sup> Since both defendants denied any intent to make Bengston a partner, what the court was referring to was the expectation of ownership created by such conduct. This is socially legitimated expectation. This expectation of ownership resulted in entitlement and it was unnecessary to prove the exercise of rights associated with ownership.

*Bengston* combined continuity with change. It referred to the intent of the parties and community of interest while it used an Empirical test. The court reconfirmed the premise first stated by the United States Supreme Court in *Meehan* that the power to control or manage a business is a consequence of partnership. This important distinction allowed the court the flexibility to consider sources of entitlement other than the exercise of those rights associated with ownership.

### 3. *Community of Interest and Risk Sharing as Entitlement*

In *Bengston* the defendants raised another issue which they claimed was relevant to the question of entitlement. They argued that Bengston had not assumed any obligation to share the losses of the enterprise. The court dismissed this argument by pointing out that "a contract to divide profits carries with it by implication the provision for the payment of losses."<sup>151</sup>

This straightforward and rule-like response by the court is misleading. It creates the impression that the third aspect of entitlement under the common law, risk sharing, was satisfied by the existence of an agreement to share profits. In fact, an agreement to share profits was the starting point of an inquiry into the way in which risk was shared and whether such risk sharing supported an inference of entitlement.

'Community of interest' in the earliest cases which employed the term was often combined with a reference to the profits of an enterprise.<sup>152</sup> The Net Profits Rule had been rejected as unacceptable because it treated all situations involving risk sharing in the commercial context as partnerships.<sup>153</sup> Although courts now

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150. *Id.* at 410-11, 255 P.2d at 896.

151. *Id.* at 409, 255 P.2d at 895 (citing *Dow v. Dempsey*, 21 Wash. 86, 57 P. 355 (1899)).

152. *Meehan*, 145 U.S. 611; *Omaha & Grant Smelting & Ref. Co. v. Rucker*, 6 Colo. App. 334, 40 P. 853 (1895); *Malvern Nat'l Bank v. Halliday*, 195 Iowa 734, 192 N.W. 843 (1923); *Pattison v. Blanchard*, 5 N.Y. 186 (1851); *Flower v. Barnekoff*, 20 Or. 132, 25 P. 370 (1890); *Sullivan v. Sullivan*, 122 Wis. 326, 99 N.W. 1022 (1904).

153. *See supra* note 59.

rejected the over-inclusiveness of the Net Profits Rule, the characteristic with which it was identified, risk sharing in a business enterprise, was still a prerequisite to any finding of partnership.<sup>154</sup>

Risk sharing necessarily implied that one had made a contribution or an investment in an enterprise. Yet not every contribution which resulted in a sharing of risk gave the contributor a proprietary interest in the enterprise. Instead, the element of risk sharing raised considerations of the relative value placed on money, property, labor and individual creativity and the sense of entitlement that properly flowed from the contribution of one or more of these to a business.

In 1890, two years before the Supreme Court decided *Meehan*, the Supreme Court of Oregon pointed out the limitations of a definition that spoke in terms of the community of interest of the parties. In *Flower v. Barnekoff*, the Oregon court noted:

Partnership and community of interest, independently considered, are not always the same thing, nor is a mere community of interest sufficient; but there must be an agreement to share the profits and loss, and such profits must be shared as the result of the adventure or enterprise, in which both are interested, and not simply as a measure of compensation.<sup>155</sup>

Courts in partnership disputes were asked to draw distinctions between partnership and alternative classifications: landlord/tenant; employer/employee; co-owners of property and creditor/debtor (within which one could include supplier/retailer or supplier/manufacturer). The Oregon court recognized the problems inherent in such a process of classification:

[W]hile cases arise on one side or the other of the line, approaching in their facts so near to each other that the difference between them may appear to be unsubstantial, yet the distinction itself is recognized, and the only difficulty is in the application of the principle on which it rests.<sup>156</sup>

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154. See *Winkelbach v. Honolulu Amusement Co.*, 20 Haw. 498 (1911). In *Winkelbach*, the court held that "[a]n agreement to share profits is an essential element of every true partnership." *Id.* at 503.

155. *Flower v. Barnekoff*, 20 Or. 132, 143, 25 P. 370, 373 (1890) (citations omitted); accord *Omaha & Grant Smelting & Ref. Co. v. Rucker*, 6 Colo. App. 334, 40 P. 853 (1895).

156. 20 Or. at 144, 25 P. at 374.

Some of the very early common law cases relied on the presumed skill of contract draftsmen and precision in the use of language to distinguish between contribution and a proprietary interest on the one hand and participation and a right to compensation on the other. This rather facile argument was one which had some persuasiveness for courts concerned with the intent of the parties. Using a literalistic approach to contract interpretation, a distinction was drawn between language which gave a person a right to a percentage of the profits and language which bestowed a right to receive an amount "equal to" a certain percentage of the profits. The former indicated partnership, the latter indicated compensation measured in terms of profits.<sup>157</sup>

The artificiality of that argument was criticized in *Beecher*:

[N]o case ought to turn upon the unimportant and mere verbal distinction between the statement in the papers that Beecher was to have a sum "equal to" one-third of the gross receipts and gross earnings, and a statement that he was to have one-third of these receipts and earnings. . . . We can conceive of cases where the difference in phraseology might be important, because it might give some insight into the real intent and purpose of the parties, and throw light upon the question whether that which was to be received, was to be received as partner or only by way of compensation for something supplied to the other, but the intent in this case is too manifest to be put aside by any mere ingenuity in the use of words.<sup>158</sup>

Having dispensed with the artificiality of a semantic analysis, courts applying a "community of interest" test explored several aspects of risk sharing. One aspect of risk sharing concerned the amount that was at risk, if money was contributed, and the inferences properly drawn from that fact; another concerned the manner in which the investment was made; still another the nature of the contribution; money, property, or labor.

The importance of the amount of investment, particularly with reference to the size of the capital contributions of other participants, is expressed in dicta in *Meehan*.<sup>159</sup> The Supreme Court

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157. *Omaha & Grant Smelting & Ref. Co. v. Rucker*, 6 Colo. App. 334, 40 P. 853 (1895); *Thillman v. Benton*, 82 Md. 64, 33 A. 485 (1895).

158. 45 Mich. at 195, 7 N.W. at 786 (citations omitted).

159. *Meehan*, 145 U.S. at 624.

distinguished prior cases in which a sharing of profits had resulted in partnerships by explaining that "the person held liable as a partner furnished the whole capital on which business was carried on by another, or else contributed part of the capital and took an active part in the management of the business."<sup>160</sup> This distinction noted by the Supreme Court describes the relationship between financial contribution and control; between money and entitlement. It illustrates the power of the idea that one who completely finances an economic undertaking is an owner.

In *Causten v. Barnette*,<sup>161</sup> another decision by the Supreme Court of Washington, the plaintiff sought and received an injunction prohibiting the defendants, including Barnette, from disposing of or transferring shares in a lumber company in Alaska. Causten argued that he had an interest as a partner in the stock of the lumber company and in the bank which owned the stock. He based his claim on a contract he had with Barnette. The contract entitled him to a one-third interest in the proceeds from the sale of general merchandise at a trading post Barnette established in Alaska and in any mining or other properties acquired by Barnette during the term of the contract.

On appeal, the Supreme Court found that Causten was entitled to an accounting with respect to the various business interests Barnette had acquired before and after the termination of the contract. It reasoned that Barnette would have been unable to proceed with his enterprise if Causten had not secured the necessary financing. Having assumed such a large risk, Causten was entitled to share in the success of the enterprise, including the unanticipated opportunities and profits which accrued from the serendipitous discovery of gold in the locality of the trading post. It was Barnette who organized the business and ventured off into the "wild, unsettled, and comparatively unknown region" that became Fairbanks, Alaska, but he could not have done it without Causten's financial assistance.<sup>162</sup>

The common sense approach of the court in *Causten* recommends it. The result in this case seems fair even today because it is well grounded in the shared values of American society, values which equate wealth with entitlement. However, there are common-law cases which appear to deny the validity of this generalization. A case in point is *Rosenblum v. Springfield Produce Brokerage*

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160. *Id.*

161. 49 Wash. 659, 96 P. 225 (1908).

162. *Id.* at 669, 96 P. at 228.

Co.<sup>163</sup> where the reasoning of the Supreme Judicial Court of Massachusetts provides a sharp contrast to *Causten*.

If the test for partnership was purely a matter of the size and exclusivity of a source of financing, Mr. Rosenblum's investment presented a much more compelling case for partnership than Mr. Causten's investment.<sup>164</sup> Mr. Rosenblum advanced over \$100,000 to the defendant for the purchase of onions. The Supreme Judicial court acknowledged that the contract provided for the sharing of profits and losses and that Mr. Rosenblum had provided all of the financing. The indispensable element of risk sharing was present.

Mr. Rosenblum did not want a partnership classification, however. If the court classified the relationship as a partnership, the contract with the corporate defendant would have been ultra vires and unenforceable. The defendant might not have had to perform or pay damages.<sup>165</sup> The court was placed in the position of having to justify a finding that Mr. Rosenblum did not have a proprietary interest in order to provide recovery consistent with ownership.

In its decision, the court referred back to the requirements of combination and control. It concluded that there was no joint enterprise since the defendant continued to buy and sell onions on its own account. Mr. Rosenblum never participated in the operation of the business. He was denominated a "silent partner" in the agreement.<sup>166</sup> Although the court found that Mr. Rosenblum was not an owner, the remedy they afforded him was an accounting, the same remedy that would have been given if there had been a partnership.<sup>167</sup>

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163. 243 Mass. 111, 137 N.E. 357 (1922).

164. Unlike Mr. Rosenblum, who advanced all the money required to operate the onion enterprise, Mr. Causten's liability was contingent. 49 Wash. at 662, 96 P. at 226. He cosigned notes of the defendant in the amount of \$6,000 and obtained his father-in-law's guarantee of these notes. *Id.* at 661, 96 P. at 225. The defendant in *Causten*, who was primarily liable on the notes, had already invested \$20,000 in obtaining supplies and a steamer to transport them to Alaska but ran into financial difficulties when the steamer proved unseaworthy. *Id.*

165. It is probably fair to assume that defendant sought to avoid liability by arguing that the contract was void. Whether the plaintiff could have used estoppel as a counter argument because the contract was fully executed cannot be assessed without researching the common law doctrine of ultra vires as applied in Massachusetts in 1922, an undertaking clearly beyond the scope of this article. See generally H. HENN & J. ALEXANDER, *LAW OF CORPORATIONS* § 184 (3d ed. 1983) (discussing ultra vires doctrine).

166. *Rosenblum*, 243 Mass. at 114, 137 N.E. at 359.

167. *Id.* at 120, 137 N.E. at 362. Plaintiff asked for a settlement of accounts

Under the common law, the greatest confusion with respect to risk sharing was precipitated by cases in which it was unclear whether one of the parties had assumed the financial responsibility associated in the minds of the judiciary with ownership. The disputes which raised the issue of financial responsibility under the common law were suits against alleged partners by creditors or suits to enforce an obligation to repay one of the participants in the business who claimed a right to contribution.<sup>168</sup>

The potential for unexpected liability once again raised the specter of an unrestrained judiciary trampling on personal autonomy by imposing obligations of which the individual had no notice. It was logical in these circumstances for courts to apply a community of interest test which referred to both profits and losses. Instead, courts used risk sharing indiscriminately, in cases involving third party claims and all intraparty disputes.<sup>169</sup> Focusing on this aspect of risk sharing, a number of courts in various jurisdictions intimated that an agreement or contractually based obligation to share losses or expenses was a prerequisite of partnership.<sup>170</sup> Over the course of time, this requirement was altered

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and court concluded that since relief at law would be inadequate, plaintiff could maintain a suit in equity for an accounting. *Id.*

168. See *Stafford v. Sibley*, 106 Ala. 189, 17 So. 324 (1895); *Hall & Ham v. Stone*, 11 Ga. App. 269, 75 S.E. 140 (1912); *Holmes v. Ray*, 13 Haw. 228 (1901); *Florence v. Fox*, 193 Iowa 1174, 188 N.W. 966 (1922); *Pattison v. Blanchard*, 5 N.Y. 186 (1851); *Flower v. Barnekoff*, 20 Or. 132, 25 P. 370 (1890); *Sullivan v. Sullivan*, 122 Wis. 326, 99 N.W. 1022 (1904).

169. See, e.g., *Meehan v. Valentine*, 145 U.S. 611 (1892) (suit by creditor of business); *Detachable Bit Co. v. Timken Roller Bearing Co.*, 133 F.2d 632 (6th Cir. 1943) (suit for accounting and damages for breach of fiduciary duty); *Watson v. Hamilton*, 180 Ala. 3, 60 So. 63 (1912) (suit by heir of alleged partner for accounting); *Stafford v. Sibley*, 106 Ala. 189, 17 So. 324 (1895) (intraparty dispute over remuneration for services as timber and log broker); *Baldwin & Co. v. Patrick*, 39 Colo. 347, 91 P. 828 (1907) (suit for accounting in cattle operation); *Omaha & Grant Smelting & Ref. Co. v. Rucker*, 6 Colo. App. 334, 40 P. 853 (1895) (suit by purchaser of ore to recover money paid); *Hall & Ham v. Stone*, 11 Ga. App. 269, 75 S.E. 140 (1912) (suit by farmer to recover value of cotton delivered to gin which subsequently was destroyed in fire); *Crawford v. Cotter*, 257 N.W. 356 (Iowa 1934) (suit for contribution by farmer who settled claim of farm worker injured in fall); *Malvern Nat'l Bank v. Halliday*, 195 Iowa 734, 192 N.W. 843 (1923) (suit by bank to foreclose on chattel mortgage); *Florence v. Fox*, 193 Iowa 1174, 188 N.W. 966 (1922) (suit by employee of sorghum mill to recover for injuries suffered on job); *Rosenblum v. Springfield Produce Brokerage Co.*, 243 Mass. 111, 137 N.E. 357 (1922) (suit for accounting); *Canton Bridge Co. v. City of Eaton Rapids*, 107 Mich. 613, 65 N.W. 761 (1895) (suit to recover money owed on contract in which defense was that money had already been paid to alleged partner); *Flower v. Barnekoff*, 20 Or. 132, 25 P. 370 (1890) (suit for accounting); *Miles Co. of Seattle v. Gordon*, 8 Wash. 442, 36 P. 265 (1894) (suit by third party creditor for materialman's lien).

170. See, e.g., *Stafford v. Sibley*, 106 Ala. 189, 17 So. 324 (1895); *Bussinger*

or modified in some jurisdictions,<sup>171</sup> contradicted in others,<sup>172</sup> with the end result being the obfuscation of the relevance of loss sharing to partnership.

As with the element of control, contribution and combination have played an important role in the analysis of risk sharing in partnership determinations. Issues of contribution and combination were first apparent in the distinction drawn by courts between the sharing of gross revenues and the sharing of net profits.<sup>173</sup> As demonstrated by the stage coach cases, where the materials and labor for the enterprise were provided by each participant and the costs of the materials or labor were paid by each participant out of revenues distributed, the risk was not shared. There were no common expenses or overhead other than tolls. Since each participant contracted separately for supplies and drivers, the operation could be profitable for one operator while another experienced a loss.<sup>174</sup>

The most critical fact for courts concerned with the question of whether risk sharing was proprietary or participatory was the nature of the contribution. This whole line of inquiry was fraught

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v. Ginnever, 213 S.W. 230 (Mo. 1948); *Johnson & Co. v. Marsh*, 111 Vt. 266, 15 A.2d 577 (1940).

171. It was at one time thought that an agreement to bear losses, as well as to share profits, was essential to the existence of the partnership relation . . . . But the modern conception of a partnership as a joint enterprise with a view to gain leaves the question of losses to be determined from the evidence, and in the absence of any contract to the contrary infers an agreement to share losses from an agreement to share profits.

*McAlpine*, 104 Minn. at 292, 116 N.W. at 586; *accord* *Richardson v. Keely*, 58 Colo. 47, 142 P. 167 (1914); *Robbins v. Laswell*, 27 Ill. 365 (1862); *Stipcich v. Marinovich*, 13 Wash. 2d 155, 124 P.2d 215 (1942).

172. The Supreme Court of Iowa developed two separate lines of authority under the common law with respect to partnership requirements. One line of cases held that an agreement to share losses can be implied. *Nelson v. Barnick*, 245 Iowa 982, 63 N.W.2d 911 (1954); *Malvern Nat'l Bank v. Halliday*, 195 Iowa 734, 192 N.W. 843 (1923); *Richards v. Grinnell*, 63 Iowa 44, 18 N.W. 668 (1884). The other line of authority holds that there must be an express agreement to share losses for partnership. *Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777 (Iowa 1985); *Crawford v. Cotter*, 257 N.W. 356 (Iowa 1934); *Florence v. Fox*, 193 Iowa 1174, 188 N.W. 966 (1922).

173. *Pattison v. Blanchard*, 5 N.Y. 186, 190-91 (1851); *see also* *Beecher v. Bush*, 45 Mich. 188, 7 N.W. 485 (1881) (sharing in gross receipts did not constitute partnership); *Eastman v. Clark*, 53 N.H. 276 (1872) (same).

174. *See, e.g., Eastman v. Clark*, 53 N.H. 276 (1872); *Pattison v. Blanchard*, 5 N.Y. 186 (1851). *But see* *Champion v. Bostwick*, 18 Wend. 175 (N.Y. 1837). In *Champion*, the court discussed the effect of an agreement to divide revenues according to the distance covered by a particular operator. Noting that the volume of passengers was bound to vary in direct relation to the proximity to urban centers, the court concluded that the low volume, potentially unprofitable lines were being subsidized by the high volume lines. *Id.* at 186.



with peril. There was tremendous confusion about the meaning of risk. An obligation to bear losses was sometimes equated with the payment of the overhead or expenses of the business enterprise.<sup>175</sup> In other jurisdictions courts would find there was no agreement to share losses in spite of an agreement to share expenses.<sup>176</sup> Although some courts recognized that the potential for loss is a structural part of the profit sharing arrangement, courts often failed to recognize or acknowledge the loss to one who contributed services or property or a business opportunity.<sup>177</sup> If there was not an agreement that the person contribut-

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175. *Collins v. Barnes*, 16 Haw. 340 (1904). This conclusion was problematic for courts confronted with agreements that provided for the payment of expenses out of revenues from the business. Some courts concluded that there was no allocation of responsibility for expenses, or consequently for losses, and thus no partnership. *Luling Oil & Gas Co. v. Humble Oil and Ref. Co.*, 144 Tex. 475, 191 S.W.2d 716 (1945) (court found that non-operating owner of net revenue interest in oil fields had no obligation to pay expenses); *Miles Co. of Seattle v. Gordon*, 8 Wash. 442, 36 P. 265 (1894) (court found no agreement to share losses although expenses of operation of sanitarium were to be paid out of revenues of business before profits were divided between lessor and lessee).

176. *Compare Florence v. Fox*, 193 Iowa 1174, 188 N.W. 966 (1922) (court found that agreement to split the expense of operating cane mill was not evidence of agreement to share losses) *with Anderson v. Walker*, 256 Iowa 1324, 131 N.W.2d 524 (1964) (court acknowledges agreement to share operating expenses for farm was indirect reference to sharing losses, but holds that this was not sufficiently clear or specific sharing of losses to support partnership). *Accord Olive v. Turner*, 120 F. Supp. 478, 483 n.14 (W.D. Okla. 1954).

177. The exception being some very early Kentucky cases. *Meadows v. Mocquot*, 110 Ky. 220, 61 S.W. 28 (1901); *Heran v. Hall*, 40 Ky. 159 (1840); *see also Stafford v. Sibley*, 106 Ala. 189, 17 So. 324 (1895) (distinguishing profit sharing as compensation when there are no profits from obligation to share losses). This treatment of money and labor as equivalents never received wide acceptance. *But see United Nuclear Corp. v. Energy Conversion*, 110 Ill. App. 3d 88, 441 N.E.2d 1163 (1982) (dicta) (court acknowledged that one might experience loss if form of time and expertise contributed to joint venture; more common treatment of services reflects conflicts between economic ideology and reality).

The common law held that one could contribute services for a partnership interest. In fact, unless they agree otherwise, partners cannot receive remuneration for services since each partner is expected to be involved in the business. A partner receives a share of the profits because of this participation. Nevertheless, the contribution of services is not a capital contribution in the same way that money or property, which also earns one a share of the profits, is capital. This is the position adopted by the U.P.A. in section 18 which imposes an obligation on partners to share losses, capital and otherwise, in the same proportion in which they share profits. U.P.A. § 18. This means that a person contributing services may end up owing money to the person who agreed to finance the operation. *See, e.g., Richert v. Handly*, 53 Wash. 2d 121, 330 P.2d 1079 (1958); *Richert v. Handly*, 50 Wash. 2d 356, 311 P.2d 417 (1957). For an interesting case in which it was clear that the jury could not decide how to treat the contribution of services, *see Taylor v. Lewis*, 553 S.W.2d 153 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.). The allocation of losses under the U.P.A. and the implications it has with respect to the value placed on labor is defended and explained by

ing his skills or expertise would be liable for losses, the courts in a number of jurisdictions confidently placed this relationship in the employer/employee, master/servant category.<sup>178</sup>

One of the assumptions implicit in this line of precedent would seem to be that labor is not capital in a sense that would ordinarily give one a proprietary interest in an enterprise. However, such decisions were justified by reasoning that was clearly paternalistic.<sup>179</sup> Concern for the protection of the laborer led courts to conclude that it would be inappropriate or unjust to hold him or her liable for a proportionate share of the losses.

The nature of the contribution also provoked an analysis of risk sharing in cases where a person contributed a business opportunity, a contract or option or knowledge and contacts.<sup>180</sup> If the individual lacked the financial wherewithal to exploit the opportunity and approached others for the money to pay the costs of acquisition or the expenses of operation, the result could be a denial of his property interest. For example, in *Baldwin & Co. v. Patrick*,<sup>181</sup> the plaintiff, Mr. Gause, had a contract to purchase cattle. In 1901, he approached the Baldwin Company and negotiated a contract with it. Under the terms of this contract Baldwin was to pay for, take delivery of, and sell the cattle, providing for their care in the interim between purchase and sale. On the sale of the cattle, Mr. Gause was to receive one-half of the net proceeds after the purchase price and the expense of maintenance and sale had been repaid to Baldwin. In 1907, one-third of the cattle remained unsold. A referee determined both the amount owed to Gause with respect to any cattle that had been sold and

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Bromberg. Bromberg, *Texas Partnership Law in the 20th Century—Why Texas Should Adopt the Uniform Partnership Act*, 12 S.W.L.J. 263, 290 (1958). The author suggests that unlike the participant contributing capital, one who contributes labor to a partnership will not experience a loss if the partnership is unsuccessful. *Id.* The argument seems to be that the person contributing services still has his services after the partnership is terminated. Actually, the person contributing services retains his or her ability to work and to earn money for those services in the future, but he or she cannot regain the value of the labor expended on the unsuccessful enterprise.

178. See *Stafford v. Sibley*, 106 Ala. 189, 17 So. 324 (1894); *Omaha & Grant Smelting & Ref. Co. v. Rucker*, 6 Colo. App. 334, 40 P. 853 (1895); *Miller v. City Bank & Trust Co.*, 82 Mich. App. 120, 266 N.W.2d 687 (1978); *Gill v. Ferris*, 82 Mo. 156 (1884).

179. See cases cited *supra* note 91.

180. See, e.g., *Detachable Bit Co. v. Timken Roller Bearing Co.*, 133 F.2d 632 (6th Cir. 1943); *Canton Bridge Co. v. City of Eaton Rapids*, 107 Mich. 613, 65 N.W. 761 (1895); *McAlpine v. Millen*, 104 Minn. 289, 116 N.W. 583 (1908); *Elliott v. Murphy Timber Co.*, 117 Or. 387, 244 P. 91 (1926).

181. 39 Colo. 347, 91 P. 828 (1907).

also calculated the market value for the remaining cattle, awarding Gause one-half of that amount. The lower court found that there was a partnership between Gause and Baldwin and the remedy was, in effect, an accounting and dissolution.

The Supreme Court of Colorado reversed and remanded the lower court's decision and on its own initiative discussed the issue of partnership. It concluded that there was no partnership between Gause and Baldwin because there was no "community of loss."<sup>182</sup> Quoting from an earlier decision, *Lee v. Cravens*, the court explained: "Where . . . an agreement between two or more persons, in relation to the prosecution of an enterprise, provides that one of their number shall incur no risk, and be chargeable with no loss, the agreement is not one of partnership."<sup>183</sup> The court continued, examining the relationship between Gause and Baldwin to determine if Gause was "at risk":

If the cattle had died after the purchase by the company, or the venture had proven a failure for any other reason, the whole loss would have fallen upon the company, and Gause would not have been answerable to the company for any part of the loss it may have suffered thereby.<sup>184</sup>

If the question of the significance of loss sharing was not complicated enough, courts succeeded in obscuring the issue even more by denying partnership status when there was an express agreement by the parties to share in the losses of a business.<sup>185</sup> These cases can be explained as a manipulation of theory to achieve an appropriate result, but they contribute to the overall impression of chaos experienced by one reviewing the common-law cases dealing with risk sharing.

One explanation for the confusion in the area of risk sharing is the fact that courts were using this element of partnership as a test in inappropriate contexts. As was noted in the beginning of the discussion of risk-sharing, an inquiry into the agreement of the parties with respect to losses made sense when the courts were concerned with unexpected liability. The ideology of law

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182. *Id.*, 91 P.2d at 829.

183. *Id.* at 348, 91 P.2d at 830.

184. *Id.*; see also *Hasslocher v. Heger*, 670 S.W.2d 689 (Tex. Civ. App.—San Antonio 1984, writ ref'd n.r.e.) (jeweler who knew of diamond for sale not partner of man who had money to buy it).

185. See, e.g., *Rosenblum v. Springfield Produce Brokerage Co.*, 243 Mass. 111, 137 N.E. 357 (1922) (accounting claim between parties to contract); *Canton Bridge Co. v. City of Eaton Rapids*, 107 Mich. 613, 65 N.W. 761 (1895) (contract denomination of relationship as agency controlling).

with its image of the proper role of the judiciary prompted caution in the implication of partnership in third party disputes. It demanded even greater restraint in intraparty disputes.<sup>186</sup> In their unabashed desire to avoid intervention in the disputes between and among individuals who had contractual relationships courts made this attribute of ownership, the assumption of the obligations of the business, determinative of the rights of the parties *inter se*, even when those disputes concerned the proper distribution of the profits of an enterprise rather than the assessment of liabilities.

Ultimately, the significance of risk sharing is better understood if it is viewed in non-legal terms. One could summarize the relationship between entitlement and contribution in the following way:

- (1) If a person had a business and sought capital from another in order to continue or to expand that business, the person investing capital generally was considered a lender rather than an owner unless he or she took an active part in the management of the business or the business was one that required little or no administration.<sup>187</sup>
- (2) If the owner of a business negotiated a profit shar-

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186. See, e.g., *Olive v. Turner*, 120 F. Supp. 478 (W.D. Okla. 1954); *Stafford v. Sibley*, 106 Ala. 189, 17 So. 324 (1895); *Westcott v. Gilman*, 170 Cal. 562, 150 P. 777 (1915); *Rosenblum v. Springfield Produce Brokerage Co.*, 243 Mass. 111, 137 N.E. 357 (1922); *Canton Bridge Co. v. City of Eaton Rapids*, 107 Mich. 613, 65 N.W. 761 (1895); *Beecher v. Bush*, 45 Mich. 188, 7 N.W. 785 (1881); *Pattison v. Blanchard*, 5 N.Y. 186 (1851); *Sheldon v. Little*, 111 Vt. 301, 15 A.2d 574 (1940). For a further discussion of the use of intent as means of protecting personal autonomy in intraparty disputes, see *supra* notes 34 & 80 and accompanying text.

187. For cases in which status as owner of related or predecessor business was important in refuting argument that plaintiff was agent or employee, see *Ryder v. Wilcox*, 103 Mass. 24 (1867) (contract indicated partnership because it 'embraced' operations of limited partnership in which plaintiff had been general partner); *Campbell v. Sherman*, 8 N.Y.S. 630 (1890) (claim of partnership upheld where business of publishing company was 'practically the successor' of another firm in which plaintiff's testator had been member). In each case, active management by one who contributed capital was apparent from facts which indicated that plaintiff's claims grew out of his exclusion from the business. See, e.g., *Meehan v. Valentine*, 145 U.S. 611 (1892) (stationer invests money in fruit, vegetable and oyster packing business of friend and is not partner); *Thillman v. Benton*, 82 Md. 64, 33 A. 485 (1895) (druggist invests \$2,000 in milk company for one year); *Salter v. Ham*, 31 N.Y. 321 (1865) (plaintiff loaned money to defendant to facilitate the business of manufacturing medicine); cf. *Clemens v. Crane*, 234 Ill. 215, 84 N.E. 884 (1908) (intent of parties revealed by private communications). For a discussion of cases applying Net Profits Rule, see *supra* note 32.

ing arrangement with an existing employee, no matter how critical the employee's skill or labor might have been to the success of the business, absent an express agreement to share losses or some investment of money by the employee it was unlikely that the employee's status would be transformed into that of an owner.<sup>188</sup>

(3) If two individuals agreed that they would begin a business and one would provide labor and the other capital, the two participants were co-owners.<sup>189</sup>

(4) If a person with an idea for a business and skills that could be profitably used in that business sought and obtained capital from an investor and that capital was used to begin the business, the person investing capital would be an owner.<sup>190</sup>

(5) If a person with an idea or business opportunity sought both financing and management from another, the person with the idea or business opportunity would not be an owner, unless he or she contributed capital or labor as well as the idea or opportunity.<sup>191</sup>

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188. See *Voorhees v. Jones*, 29 N.J.L. 270 (1861). In *Voorhees*, a third party creditor sued the members of a partnership that contracted to build a railroad. *Id.* at 273. One defendant argued that he was not a partner on the basis of the exception to the Net Profits Rule. *Id.* at 272. The court acknowledged the Rule and agreed that the original contract between the contractor and assignor of the defendant did not create a partnership. *Id.* at 273. Because defendant was approved by the contractor who then gave defendant further interest in the construction project in return for an undertaking by defendant to raise additional capital, a partnership was created. *Id.* at 274. Every generalization has its exceptions. Although circumstances have changed in recent years, young associates in professional partnerships like law and accounting firms expect that ultimately they will become partners.

189. *Richardson v. Keely*, 58 Colo. 47, 142 P. 167 (1914) (agreement by bank officers guaranteeing loan for purchase of smelter site in return for one-half profits created partnership); *Jubey v. Puni*, 6 Haw. 369 (1882) (working manager of sugarcane plantation was partner and not employee); *McAlpine v. Millen*, 104 Minn. 289, 116 N.W. 583 (1908); *Hackett v. Stanley*, 115 N.Y. 625, 22 N.E. 745 (1889) (partnership created when one party contributed ideas and services and other provided financing in form of loan and services); *Flower v. Barnekoff*, 20 Or. 132, 25 P. 370 (1890) (partnership created where one person contributed option and other services in platting and selling land); *Stipcich v. Marinovich*, 13 Wash. 2d 155, 124 P.2d 215 (1942) (purchased interest in restaurant established partnership); *Styers v. Stirrat & Goetz Inv. Co.*, 65 Wash. 676, 118 P. 896 (1911) (although denominated employment contract, fact that "employee" advanced funds for business made it partnership); *Bartelt v. Smith*, 145 Wis. 31, 129 N.W. 782 (1911) (both parties put in money and services); cf. *Stafford v. Sibley*, 106 Ala. 189, 17 So. 324 (1894) (plaintiff who contributed only labor and was not liable for losses was not deemed partner).

190. See *infra* note 191, *supra* notes 161-62 and accompanying text.

191. See, e.g., *McAlpine v. Millen*, 104 Minn. 289, 116 N.W. 583 (1908)

(6) If the owner of real or personal property allowed that property to be used in the operation of a business, he would be classified as an owner of the business or not almost at his discretion.<sup>192</sup>

(7) If an individual provided all the financing for a business, he would be an owner of that business unless classification as an owner would result in a forfeiture of his interest in the proceeds from the business.<sup>193</sup>

The assessment of entitlement is affected by the state of the business at the time the relationship is established. If the business is operational, the contribution of capital or labor is less likely to result in an ownership interest. If the business is being planned, the participants begin as equals and each is likely to have an ownership interest. By making these sorts of distinctions, courts could reflect the value placed on individual initiative. However, individual initiative is not enough to create entitlement

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(plaintiff who acquired rights to timber and license to operate timber business and actively participated in operation of business was partner rather than beneficiary of trust); *Elliott v. Murphy Timber Co.*, 117 Or. 387, 244 P. 91 (1926) (held promoter and manager of timber business partner rather than employee); *Flower v. Barnekoff*, 20 Or. 132, 25 P. 370 (1890) (option purchased by private funds of partner held to be partnership property); *cf. Municipal Paving Co. v. Herring*, 50 Okla. 470, 150 P. 1067 (1915).

192. *See, e.g.,* *Coward v. Clanton*, 122 Cal. 451, 55 P. 147 (1898) (no partnership in real estate speculation); *Hall & Ham v. Stone*, 11 Ga. App. 269, 75 S.E. 140 (1912) (landowner not partner with tenant operating cotton gin on his property); *Crawford v. Cotter*, 257 N.W. 356 (Iowa 1934) (landowner not partner with tenant farmer); *Malvern Nat'l Bank v. Halliday*, 195 Iowa 734, 192 N.W. 843 (1923) (sustained landowner's claim of partnership in farming operation thereby preventing foreclosure on chattel mortgage); *Florence v. Fox*, 193 Iowa 1174, 188 N.W. 966 (1922) (landowner not partner with tenant in operation of sorghum mill); *Beecher v. Bush*, 45 Mich. 188, 7 N.W. 785 (1881) (landlord not partner in hotel operated by tenant); *Johnson & Co. v. Marsh*, 111 Vt. 266, 15 A.2d 577 (1940) (landowner not partner with tenant farmer); *Miles Co. of Seattle v. Gordon*, 8 Wash. 442, 36 P. 265 (1894) (owner of building not partner with tenants running sanitarium); *cf. Olive v. Turner*, 120 F. Supp. 478 (W.D. Okla. 1954) (dismissed petition for accounting brought by landowners).

193. *See, e.g.,* *Stafford v. Sibley*, 106 Ala. 189, 17 So. 324 (1895) (held financing agreement not partnership); *Richardson v. Keely*, 58 Colo. 47, 142 P. 167 (1914) (bank officers who personally guaranteed note to provide financing for mining operation were partners); *Robbins v. Laswell*, 27 Ill. 365 (1862) (held plaintiff partner for providing money for livestock operation); *Rosenblum v. Springfield Produce Brokerage Co.*, 243 Mass. 111, 137 N.E. 357 (1922) (denied partnership between dealers in onions and third party); *Canton Bridge Co. v. City of Eaton Rapids*, 107 Mich. 613, 65 N.W. 761 (1895) (partnership denied in order to permit investment recovery by company); *Causten v. Barnette*, 49 Wash. 659, 96 P. 225 (1908) (held endorsement of notes in return for profit interest partnership); *see also* *Nicholson v. Kilbury*, 83 Wash. 196, 145 P. 189 (1915) (relying on *Bartelt v. Smith*, 145 Wis. 31, 129 N.W. 782 (1911) (held contribution of money and participation in business constituted partnership)).

if both skill and the money to launch the contemplated enterprise was lacking.

The economy of this nation is built on the creativity and ingenuity of individuals. Whether the individual is one who conceives of a new product or service or merely one who recognizes the opportunity for a profitable exchange, her ideas have value and without those ideas there would be no economic growth. Yet the value of these ideas is hard to quantify and courts in disputed cases are inclined to treat the individual who contributes the business opportunity in the same way that they treat the individual who contributes labor. The idea or business opportunity is not capital in the same way that money is capital. Therefore, there is no risk which will support a claim of entitlement as an owner.

### III. CONCLUSION

This article describes the issues and concerns that provide continuity in partnership law. The question of partnership formation is always one of entitlement, even when a court is concerned with the obligations and responsibilities rather than the privileges of ownership. Considerations of the relative status and worth of the contributions of the alleged partners are implicit in many partnership cases although the facts may never be discussed in these terms. Courts are concerned with personal autonomy and the power of the judiciary to create relationships which have legal consequences in what is thought to be part of the realm of private ordering. Continuity can be found in the tests which address the issues of entitlement and autonomy, tests derived from the common law of partnership rather than from the Uniform Partnership Act.

Section 6 of the U.P.A. is inadequate because it perpetuates that aspect of common-law partnership doctrine which was most problematic and omits that part which provides a means of resolution. Property notions and conceptions of entitlement assume prominence in the U.P.A. but this use of property is not linked to contract law as it was in the common law. For want of a better analogy, one could say that when the drafters of the U.P.A. eliminated contract from the definition of partnership, they unhitched the cart from the horse. The cart, conceptions of ownership and a method of analysis mired in the traditions of the late 19th and early 20th centuries, was no longer tied to contract doctrine, an area of the law which was evolving to meet the needs of a chang-

ing economy.<sup>194</sup> In partnership law, the balance that normally exists in the law between continuity and change has been impaired.<sup>195</sup>

Section 6 of the U.P.A. does not include language describing the process of contribution and combination. It substitutes the phrase "association . . . as co-owners of a business for profit." There is a dynamic aspect to the word "association" which suggests movement, activity, choices being made, all of which are necessary for a processual analysis. The principle difficulty with the word 'association' is the fact that it is too broad. A variety of relationships within the economic sphere involve repeated occasions for interaction over extended periods of time. In fact, each of the alternative classifications listed in Section 7 of the U.P.A. could be called an association.<sup>196</sup>

The process of contribution and combination can be approximated more closely by the addition of the words 'as co-owners'. Courts tend to focus on the idea of ownership, much as they did in early common law cases employing an agency test for partnership. Ownership is a status which is conferred during the process of partnership formation. Courts which use risk-sharing and control as the two tests for partnership are deciding ownership by referring to the description of the rights and duties that inhere in that status. The description of the status does nothing to enlighten us as to how the status is created.

Then too the usefulness of the statute has been undermined by the continued use of common-law doctrines and definitions; its efficacy placed in question by the perpetuation of the distinction between intraparty and third party disputes and the stipulation that an agreement to share losses is a prerequisite to partnership,

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194. Recent articles on property law and the issue of entitlement have advanced theories which challenge accepted notions of ownership. See, e.g., Linzer, *The Decline of Assent: At Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 373 (1986); Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

195. See G. CALABRESI, *supra* note 1. Calabresi discussed the problem of statutory obsolescence, a term used to describe statutes which are inconsistent with changed circumstances or "a new social or legal topography." *Id.* at 6; see also Hurst, Book Review, 67 MINN. L. REV. 536 (1982) (reviewing G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982)). Hurst concludes that obsolescence means "lack of fit with policy in analogous areas of legal concern." *Id.* at 538. Since Section 6 of the U.P.A. ignores the contractual nature of partnership, the treatment of partnership formation is inconsistent with the modern approach to contract formation which has a bias in favor of enforceable contracts.

196. For the text of sections 6 and 7 of the U.P.A., see *supra* note 6.



both of which conflict with the language of the statute.<sup>197</sup> The conflict created by the competing values of personal responsibility and personal autonomy has fostered a false distinction between joint ventures and partnerships and greater reliance on a formalistic multi-part test for joint ventures.<sup>198</sup>

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197. For a discussion of intraparty and third party distinction, see *supra* note 70 and accompanying text. Although section 18 of the U.P.A. imposes an obligation to share losses on partners, which would indicate that the parties need not address the issue, Bromberg has noted that "some courts have said it must be present to find a partnership in disputed cases." A. BROMBERG, *supra* note 2, at 72 n.34. He cites cases in Iowa, *Anderson v. Walker*, 256 Iowa 1324, 131 N.W.2d 524 (1964); Missouri, *Jones v. Taylor*, 401 S.W.2d 183 (Mo. App. 1966); Oregon, *Hayes v. Kellinger*, 235 Or. 465, 385 P.2d 747 (1963); and New York, *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 175 N.Y.S.2d 1, 151 N.E.2d 17, *appeal dismissed*, 358 U.S. 39 (1958). A. BROMBERG, *supra* note 2, at 72 n.34. For a recent acknowledgement of the inconsistency between the rule and the statute in a survey of Texas law, see Hamilton, *Corporations and Partnerships*, 38 S.W.L.J. 235, 259 (1984).

A review of case law in this area shows that a requirement of an express agreement to share losses persists in Alabama, *Bailey v. Bailey*, 345 So. 2d 304 (Ala. App. 1977); Iowa, *Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777 (Iowa 1985); Georgia, *Hayes v. Irwin*, 541 F. Supp. 397 (D. Ga. 1982), *aff'd without opinion*, 729 F.2d 1466 (11th Cir.), *cert. denied*, 469 U.S. 857 (1984) and perhaps in Colorado and Oklahoma, although a more accurate statement of the law in these two jurisdictions might be that an express agreement by the parties to exclude one party from any risk precludes the possibility of partnership. *Johnson v. Chilcott*, 599 F. Supp. 224 (D. Colo. 1984); *Crest Constr. Co. v. Ins. Co. of N. Am.*, 417 F. Supp. 564 (W.D. Okla. 1976).

In addition, there are a number of jurisdictions which have held that there must be facts which will support an implied agreement to share losses indicating that the court cannot imply such an agreement as a matter of law. *Stuart v. Overland Medical Center*, 510 S.W.2d 494 (Mo. Ct. App. 1974); *Gergen v. Bartzat*, 46 Or. App. 347, 611 P.2d 352 (1980); *Bassett v. Baker*, 530 P.2d 1 (Utah 1974); *Mislosky v. Wilhelm*, 130 Vt. 63, 286 A.2d 267 (1971).

At a minimum, an argument that the absence of an agreement to share losses is evidence of a lack of partnership appears to be gaining credence. *Compare* *Arrow Petroleum Co. v. Ames*, 128 Ind. App. 10, 142 N.E.2d 479 (1957) with *Endsley v. Game-Show Placements, Ltd.*, 401 N.E.2d 768 (Ind. Ct. App. 1980). In the former the court felt that a discussion of the absence of such an agreement was immaterial since an agreement to share losses is a legal consequence of partnership. 128 Ind. App. at 18, 142 N.E.2d at 483-84. In the latter, the court found that an agreement to share losses (or the absence of it) was relevant to the partnership determination. 401 N.E.2d at 770.

To add to the confusion, there is no consistency within the jurisdictions. For a discussion of courts which hold that an agreement to share losses is necessary and others which state that it is not, see *supra* note 172. For a discussion of the confusion within jurisdictions which is exacerbated by the use of a line of precedent which treats joint ventures differently from partnerships, see *infra* note 198. The test for joint venture in some cases appears to require an express agreement to share losses. See, e.g., *Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285 (Tex. 1978); *P & M. Cattle Co. v. Holler*, 559 P.2d 1019 (Wyo. 1977); cf. *United Nuclear Corp. v. Energy Conversion*, 110 Ill. App. 3d 88, 441 N.E.2d 1163 (1982).

198. Although most jurisdictions acknowledge that joint ventures are special or limited purpose partnerships to which partnership law otherwise applies,

Of course, the language of section 6 can be interpreted so that the use of community of interest and intent as tests for partnership is consistent with the statute. The argument has already been made that the concern with voluntariness implicit in the word 'association' explains the use of intent as a test for partnership.<sup>199</sup> Similarly, courts could explain that 'co-ownership' is determined by examining whether there is a community of interest between the parties. A better solution, however, would be to include the operative terms in the statute itself. The failure to do so in the first instance has contributed to the confusion that exists in the field of partnership law today.

Legal doctrine should be responsive to social structure and ideology and generally that means that community standards should be applied.<sup>200</sup> It is equally important to keep in mind the strong emotional commitment to certain values, particularly the idea of personal autonomy. By using a word with the emotional content that supports the value placed on individual liberty, courts can legitimize the enforcement of societal norms. At common law, intent symbolized both the ideological conflict precipitated by the potential use of coercive power by a legal institution and the resolution of that conflict. The resolution lay in the con-

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courts do not use sections 6 and 7 of the U.P.A. to determine whether there is a partnership. Instead, the courts use a formal, rule-like approach which lists three or four requirements for a joint venture. Some of the elements may vary, but at a minimum there must be an agreement to share profits, an agreement to share losses and joint control. *See, e.g.*, *Parks v. Riverside Ins. Co.*, 308 F.2d 175 (10th Cir. 1962); *Precision Testing Laboratories, Ltd. v. Kenyon Corp. of Am.*, 644 F. Supp. 1327 (S.D.N.Y. 1986); *Dang v. F & S Land Dev. Corp.*, 62 Haw. 583, 585 n.8, 618 P.2d 276, 280 n.8 (1980) (U.P.A. amended in 1972 to include joint ventures as partnerships); *Baker Farmer Co. v. Harter*, 28 Ill. App. 3d 393, 328 N.E.2d 369 (1975); *Rehnberg v. Minnesota Homes, Inc.*, 236 Minn. 230, 52 N.W. 454 (1952); *Wilkins v. Heebner*, 331 Pa. Super. 491, 480 A.2d 1141 (1984); *P & M Cattle Co. v. Holler*, 559 P.2d 1019 (Wyo. 1977); *see also Betenson v. Call Auto and Equip. Sales, Inc.*, 645 P.2d 684, 686 n.1 (Utah 1982) (list of jurisdictions which apply multi-part test for joint ventures); *see generally Hamilton, Corporations and Partnerships*, 40 S.W.L.J. 219, 239 (1986) (criticizing Texas judiciary for their indiscriminate use of joint venture analysis); *Jaeger, Partnership or Joint Venture*, 37 NOTRE DAME LAW 138 (1961) (pointing out distinctions between two forms of business organization).

199. For a discussion of an analysis of the partnership statute, *see supra* note 15.

200. For a discussion on the harm that can be caused by abrupt deviations from social norms, *see G. CALABRESI, supra* note 1. The relationship between law and social structure was described by Gilmore in the following way. "Law, by its nature, reflects what is—not what except to the extent dictated by cultural lag, what was and never what will be." G. GILMORE, *supra* note 19, at 18. For a discussion of the conditions under which the courts change the law to accommodate economic and social change, *see supra* notes 77-78 and 102 and accompanying text.

firmation of personal autonomy and the enforcement of the parties' reasonable expectations.

The use of the term 'community of interest' is important not because it resolves any dispute with respect to partnership but because it symbolizes a complex set of ideas concerning the joint ownership of a business. It directs courts to look for facts which demonstrate an identity of interest among the participants. It is not economic interdependence that is decisive, although a preliminary finding of risk-sharing is necessary. Conduct indicating control and risk sharing are important but only to the extent they reveal circumstances which support an expectation of ownership and a corresponding sense of entitlement.

Empiricism, a modern contract doctrine, provides the nexus between intent and community of interest. It also provides a means of adjusting partnership results to comport with changes in the economy and the social structure of American society. If those charged with responsibility for revising the U.P.A. do not wish to change the language of the statute, much of the current confusion could be reduced by the use of commentary which refers to the common law tests for partnership and explains their relationship to the language of the statute. This would provide an ideological framework, an expression of the direction in which the drafters would like the law to move and a methodology that refers the court back to community standards.<sup>201</sup>

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201. The statute in the area of commercial law which best illustrates these requirements is the sales article of the Uniform Commercial Code. Article 2 of the U.C.C. is replete with examples of Empiricism. *See, e.g.*, U.C.C. §§ 1-205, 2-203, 2-209, 2-306 and comment 2 to 2-615. All of these sections refer to a standard of commercial reasonableness. *See also id.* §§ 1-204, 2-206, 2-306 (incorporating "reasonableness" into gap-filling provisions of statute).

The U.C.C. also identifies the ideological framework of the drafters. The policy of the U.C.C., which is clearly expressed in the Commentary that follows each section of the statute, is to support and enforce commercial relationships, to reintroduce morality into economic transactions and to avoid an all or nothing result by encouraging compromise and negotiation. *See, e.g.*, § 2-615 comments 6 & 7.