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INDISSOLUBLE PARTNERSHIPS

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"THERE CAN BE NO SUCH THING AS AN *INDISSOLUBLE* PARTNERSHIP."[1]

Since the development of the Uniform Partnership Act [UPA],[2] one of the more settled features of American partnership law is that any partner has the absolute power to dissolve a general partnership. This very considerable power may be effectuated through a mere expression of will to dissolve[3] and is exercisable regardless of cause or any agreement that may attempt to restrict the power.[4] The only requirement to dissolve a general partnership[5] is a single partner's clear communication of this intention to other partners.

Partnership law generally encourages the development of agreements regulating the relationship among partners.[6] This policy is evidenced by the numerous provisions of the UPA that are applicable only in the absence of an agreement among the partners.[7] Indeed, UPA provisions that supersede contrary

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1. Skinner v. Dayton, 19 Johns. 513, 538 (N.Y. 1822) (emphasis in original).

2. UNIF. PARTNERSHIP ACT (1914) (all references will be to the 1914 text) (49 states have adopted the UPA).

3. *See* UNIF. PARTNERSHIP ACT § 31(1)(b), (2). Ideally, the expression of will is clear and unequivocal, although a number of courts have inferred the expression from the course of conduct of a particular partner. *See, e.g*, Straus v. Straus, 254 Minn. 234, 243, 94 N.W.2d 679, 685-86 (1959) (filing a suit for dissolution may itself be a sufficient expression of will to constitute an act of dissolution in contravention of the partnership agreement); Cracco v. Cracco, 25 A D.2d 660, 660, 268 N.Y.S.2d 97, 98 (1966) ("The actions of defendants. . .in refusing to continue to pay plaintiff, who had become disabled. . .his share in the proceeds of the partnership and in refusing to account to plaintiff as provided in the partnership agreement manifested an unequivocal election by defendants to dissolve the partnership at will."); Timmerman v. Timmerman, 272 Or 613, 625, 538 P.2d 1254, 1260 (1975) (cessation of participation in partnership activities dissolved partnership at will).

In addition to dissolution by the express will of a single partner, which is the subject of this article, dissolution may be accomplished through a judicial decree, the termination of an agreed term or undertaking, the unanimous agreement of partners, the expulsion of a partner, an event that makes it unlawful to carry on the business of the partnership, the death of a partner, or the bankruptcy of the partnership or any partner. *See* UNIF. PARTNERSHIP ACT §§ 31-32.

Some jurisdictions provide special rules for mining partnerships. *See generally* A. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 27 (1968); H. REUSCHLEIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 263 (1979); Kiesling, *Mining Partnerships*, 12 BAYLOR L. REV. 103 (1960); Jones, *Mining Partnerships in Texas*, 12 TEX. L. REV. 410 (1934); McKay, *Joint Ventures and Mining Partnerships*, 7 KAN. L. REV. 22 (1958). These rules may affect the dissolvability of mining partnerships. *See* H. REUSCHLEIN & W. GREGORY, *supra*, § 263, at 432. The special considerations involved in mining ventures are beyond the scope of this article.

4. If the dissolution is in contravention of an existing partnership agreement, it may be "wrongful." Under such circumstances, the dissolution, although effective, may lead to the imposition of certain economic sanctions against the dissolving partner. *See infra* notes 11-14 and accompanying text.

5. The dissolvability of limited partnerships is not treated in this article.

6. One commentator has used the term "suppletory" to describe the approach of the UPA to the regulation of partnership affairs. M. EISENBERG, THE STRUCTURE OF THE CORPORATION 9 (1976). The great deference shown agreements by the UPA has influenced some recent reforms of the law of corporations designed to permit shareholders in close corporations to reach agreements as if they were partners. *See infra* note 181.

7. *See, e.g.*, UNIF. PARTNERSHIP ACT § 8 (Partnership Property); *id.* § 9 (Partner Agent of Partnership as to Partnership Business); *id.* § 18 (Rules Determining Rights and Duties of Partners); *id.* § 27 (Assignment of Partner's Interest); *id.* § 37 (Right to Wind Up); *id.* § 38 (Rights of

agreements are exceptions rather than the rule. The potential conflict between the dual policies of free dissolvability[8] and freedom of contract materializes when an individual partner dissolves a partnership prematurely and breaches an agreement previously accepted by that partner.[9] Under such circumstances, the policy of free dissolvability prevails and the agreement largely is subordinated to the desires and interests of the partner choosing dissolution.[10]

Dissolution in contravention of an agreement, however, is not without costs for the dissolving partner. Such costs arise because the right to dissolve is not coextensive with the power to so act.[11] The significance of the "right versus power" distinction is seen in the economic consequences of a premature, and therefore wrongful, dissolution. Although effective, a wrongful dissolution subjects the breaching partner both to liability in damages[12] and to the imposition of secondary sanctions. These sanctions include an inability to compel a liquidation of partnership assets,[13] and a discounted, or even deferred, account settlement.[14]

With the possible exception of the loss of the liquidation right,[15] the economic sanctions imposed on a partner causing a wrongful dissolution often are not significant.[16] Even in those circumstances in which the "cost" of a premature

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Partners to Application of Partnership Property); *id.* § 40 (Rules for Distribution); *id.* § 42 (Rights of Retiring or Estate of Deceased Partner When the Business is Continued); *id.* § 43 (Accrual of Actions).

8. In this article, the phrase "free dissolvability" is used to describe the power of a partner to dissolve a partnership even though that action is in contravention of the partnership agreement. "Dissolution" is a term of art under the UPA and means a "change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." UNIF. PARTNERSHIP ACT § 29.

9. In this article, the phrase "fixed term partnership" encompasses partnerships formed pursuant to agreements that either establish fixed terms or define specific undertakings. This usage is consistent with that of the UPA. *See Id.* § 31.

10. For a discussion of the pitfalls of normal partnership dissolutions, see Hillman, *Misconduct as a Basis for Excluding or Expelling a Partner: Effecting Commercial Divorce and Securing Custody of the Business*, 78 Nw. U.L. REV. 527, 531-36 (1983).

11. *See, e.g.*, Williams v. Hildebrand, 220 Ark. 202, 204-05, 247 S.W.2d 356, 358 (1952); Straus v. Straus, 254 Minn. 234, 244, 94 N.W.2d 679, 686 (1959); Napoli v. Domnitch, 18 A.D.2d 707, 708, 236 N.Y.S.2d 549, 551-52 (1962), *aff'd*, 14 N.Y.2d 508, 147 N.E.2d 623, 248 N.Y.S.2d 228 (1964); Campbell v. Miller, 274 N.C. 143, 150-51, 161 S.E.2d 546, 551 (1968); *see also* McCollum v. McCollum, 67 S.W.2d 1055, 1056 (Tex. Civ. App. 1934) (pre-UPA case indicating, "[t]he right to dissolve may not exist but the power to dissolve always exists."). *But see* Williams v. Terebinski, 24 Ohio Misc. 53, 57, 261 N.E.2d 920, 923 (1970) (concluding, incorrectly, that notice of dissolution by defendant partner "was no more than an expression on the part of [defendant] of his desire to have the partnership dissolved, which required under the circumstances plaintiff's consent to such dissolution.").

12. UNIF. PARTNERSHIP ACT § 38(2)(c).

13. *Id.* § 38(1), (2)(b).

14. The UPA permits the partners who have not caused a wrongful dissolution to elect to continue the partnership for the agreed term. If they so elect, they may either settle the account of the dissolving partner or defer payment and secure the former partner's account by a bond. In settling the account, the value of partnership goodwill is disregarded. *See id.* § 38(2).

15. For a discussion of the importance of the liquidation right, see Hillman, *supra* note 10, at 531-34.

16. *See infra* notes 126-34 and accompanying text. Sanctions also may be established by agreement. *See infra* notes 157-78 and accompanying text.

dissolution is high, the position of the disgruntled partner may be vastly superior to that of the dissatisfied minority shareholder, the partner's counterpart in a close corporation.[17] A partner, unlike a shareholder, is permitted the luxury of engaging in a cost-benefit analysis to determine whether the costs, if any, resulting from the act of dissolution will outweigh the benefits to be derived from such an action. A minority shareholder in a closely held corporation does not have such a choice.[18]

The position of the UPA on free dissolvability of fixed term partnerships is grounded firmly in the law of agency.[19] The authority of an agent to act on behalf of a principal is based upon that principal's assent. Revocation of assent by the principal terminates the authority of the agent. Since the authority of partners to act for each other is based upon these seemingly straightforward principles of agency, it follows that the withdrawal of assent by one partner must revoke the authority of others. Under this theory, the agency model dictates the free dissolvability of partnerships.

Although the application of agency precepts to partnership dissolutions may appear logical, the principle of free dissolvability of partnerships is not without the potential for controversy. Before the development of the UPA, American authorities split on the dissolvability of a fixed term partnership by the unilateral action of a single partner.[20] The widespread adoption of the UPA has settled the matter in virtually every American jurisdiction.[21] However, one adopting state, Arkansas, subsequently rejected this aspect of the UPA and now precludes a partner from causing a dissolution "in contravention or violation of the agreement between the partners."[22] Louisiana, which has not adopted the UPA, does not permit dissolution, without cause, of a fixed term partnership through a

17. For a discussion of the relative stability of partnerships and close corporations, 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. 1 (1982).

18. Most statutes permit a voluntary corporate dissolution upon the vote of a certain percentage of shareholders. *See, e.g.*, CAL. CORP. CODE § 1900 (West 1977) (50 percent); DEL. CODE ANN. tit. 8, § 275 (1975) (majority); N.Y. BUS. CORP. LAW § 1001 (McKinney 1963) (two-thirds). If the necessary share support is not forthcoming, a shareholder must seek an involuntary dissolution. Traditionally, the grounds for such dissolution are narrowly defined, although there has been some recent movement toward expanding these grounds. *See infra* notes 182-90 and accompanying text

19. *See infra* notes 40-55 and accompanying text.

20. *See infra* notes 32-37 and accompanying text.

21. *See supra* note 2.

22. Arkansas adopted the UPA in 1941. *See* 1941 Ark. Acts 263. In so doing, it accepted the UPA's provisions permitting dissolution by express will in contravention of a partnership agreement. However, the Arkansas law was amended in 1961 to preclude such dissolutions. *See* 1961 Ark. Acts 421. The amendment affected sections 29 and 31 of the UPA. *See* ARK. STAT. ANN. § 65-129 (1980) (defining dissolution in a manner consistent with UPA § 29 but adding, "provided that this change in the relation of the partners shall not effect a dissolution of the partnership in contravention or violation of the agreement between the partners"); *id.* § 65-131 (1980) (omitting as a cause of dissolution an expression of a partner's will to dissolve when that expression is in contravention of the partnership agreement); *see also* Osborne v. Workman, 273 Ark. 538, 621 S.W.2d 478 (1981) (holding a partner does not have the power to dissolve a partnership when the agreement permits dissolution only by mutual consent or operation of law).

unilateral expression of will.[23] English,[24] French[25] and German laws follow a similar rule.[26] In fact, American partnership law stands alone in permitting free dissolvability of fixed term partnerships.[27]

Although the issue seems settled in the United States, a recent decision demonstrates some judicial squeamishness with the principle of free dissolvability. In *Infusaid Corp. v. Intermedics Infusaid, Inc.*,[28] the First Circuit Court of Appeals suggested that, at least under certain circumstances, a court may enjoin the dissolution of a partnership and decree specific performance of the partnership agreement. *Infusaid* presents the occasion for a reexamination in this article of the UPA's principle of free dissolvability of fixed term partnerships.

Part I of the article examines the development of, and rationale for, the

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23. *See* LA. CIV. CODE ANN. art. 2821 (West 1985) ("If a partnership has been constituted for a term, a partner may withdraw without consent of his partners prior to the expiration of the term provided he has just cause arising out of the failure of another partner to perform an obligation.").

24. Subject to any agreement between the partners, a partnership is dissolved—

(a) If entered into for a fixed term, by the expiration of that term:

(b) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking:

(c) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

English Partnership Act, 1890, 53 Vict., § 32. *See generally* Moss v. Elphick, 1 K.B. 846 (1910) (agreement providing for termination by mutual agreement only creates a fixed term partnership for the joint lives of the partners and is not terminable upon notice by one of the partners); E. SCAMMEL & R. BANKS, LINDLEY ON THE LAW OF PARTNERSHIP 612-14 (1979); Milman, *Partnerships (3): Problems with Dissolution*, 4 THE COMPANY LAW. 10 (1984); Milman, *Partnerships (2): Domestic Enforcement of Rights*, 4 THE COMPANY LAW. 246 (1983).

25. Article 1844-7(5) of the French Civil Code provides several methods of terminating a partnership, including "anticipatory dissolution pronounced by the tribunal upon demand of one of the members for valid reasons, especially in the event of nonperformance of his obligations by one of the members, or of discord among the members paralyzing the operation of the company." *See* H. DEVRIES, N. GALSTON & R. LOENING, MATERIALS ON THE FRENCH LEGAL SYSTEM 103 (3d ed. 1979).

26. The German Commercial Code provides several methods of dissolving a commercial partnership, including "by notice of termination and by judicial decision." THE GERMAN COMMERCIAL CODE § 131 (S. Goren & I. Forrester trans. 1979). Section 132 permits dissolution by notice if the partnership was formed for an indefinite period. *Id.* § 132. Section 133 governs dissolution by decree:

> (1) On the petition of a partner the dissolution of the partnership may be ordered without notice by judicial decision before the expiration of the time fixed for its duration, or when the partnership is formed for an indefinite duration, if there is an important reason therefore.
>
> (2) Such a reason obtains, in particular, if another partner wilfully or through gross negligence violates a substantial obligation incumbent upon him pursuant to the partnership agreement, or when the performance of such an obligation becomes impossible.
>
> (3) An agreement contrary to these provisions, by which the right of the partners to demand the dissolution of the partnership is excluded or limited, is void.

Id. § 133.

27. This has been described as a "peculiarity" of American partnership law. XIII INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW I-47.

28. 739 F.2d 661 (1st Cir. 1984).

rule of free dissolvability of partnerships. The analysis challenges the widely held belief that free dissolvability is a necessary consequence of the law of agency. Part II considers the problem of free dissolvability in light of criteria largely ignored by the UPA, including efficiency, morality and fairness. This portion of the discussion also offers an evaluation of the *Infusaid* decision. Part III addresses the planning problems facing partners who desire to achieve a measure of stability and demonstrates the limited options that may be employed to achieve this effect. Part IV draws from the law of corporations and evaluates the degree to which the dissolvability of partnerships and close corporations should be governed by similar principles. Finally, Part V offers some suggestions for the reform of the UPA's treatment of premature dissolutions.

The analysis will center on three potentially conflicting objectives of participants in small business enterprises.[29] First, many partners perceive the need for stability, or relative permanence of membership, in their ventures. Typically, the greatest degree of consensus concerning this goal occurs at the beginning of a partnership. After the hard lessons of business experience have been learned, the benefits of stability, or continuation of the business by the initial cast of participants, may be open to debate. Stability interests, of course, are advanced when the premature dissolution of a partnership is rendered difficult, or even impossible.

Second, liquidity interests are common to both shareholders and partners who become dissatisfied with some aspects of their investments and prefer to deploy their energies and resources elsewhere. Liquidity interests are most clearly advanced when a policy of free dissolvability is combined with a method for the withdrawing partner to secure a prompt and fair account settlement. Naturally, stability and liquidity interests may conflict, as often becomes apparent with the passage of time.

Finally, some participants have, for want of a better term, risk-aversion objectives. Often, these interests are of a defensive character and reflect concern over the adverse effects of actions by other partners. Because partners are jointly liable for debts of their partnerships, risk-aversion interests may dictate the choice of alternative forms of business organization, such as corporations or limited partnerships. Normally, *risk* is associated with a defensive fear of liability and decline in net worth. A somewhat broader approach to risk, however, is employed in this article. Control over the actions and identity of an agent may be important as a method of increasing income through the realization of gains. For purposes of this analysis, therefore, risk-aversion goals include general concerns over effects of the acts of an agent on the principal's wealth.[30] Frequently, risk-aversion objectives are at best vaguely defined in the early period of a partnership. Only later do actual and potential risks become clear.

29. Obviously, partners commonly have objectives other than those here listed. Free dissolvability, however, most clearly affects the interests of stability, liquidity, and risk-aversion.

30. Perhaps "control objectives" would be preferable terminology.

I. The Uniform Partnership Act and Free Dissolvability: Of Agents, Principals, and Revocable Powers

A. *The Pre-UPA Debate*

Prior to the development of the UPA, the ability of a single partner to dissolve a fixed term partnership through a mere expression of will was open to question. In the view of some, the need to provide individual partners with a method of terminating unsatisfactory business relationships should be balanced against the understandable expectations of other partners that agreements concerning duration would be enforced.[31] According to Justice Story, the interests of the latter group were paramount because in many cases the remaining partners were left with no adequate remedy upon dissolution.[32] He noted the issue

31. Cases indicating that a fixed term partnership could not be dissolved by the express will of a single partner include: Ferrero v. Buhlmeyer, 34 How. Pr. 33, 40 (1867) ("I have been unable . . . to perceive any good reason why parties should not be allowed to enter a partnership for a certain specified period of time; on the contrary, the present large and extended commercial interests would seem to require the formation of such contracts. Nor do I perceive any good reason why, having entered into such a contract, a party thereto should, before the expiration of the time, be allowed to put an end to it by his own mere will and caprice, any more than he can be allowed in such manner to put an end to any other contract."); Pearpoint & Lord v. Graham, 4 Wash. C.C. 232, 234 (1818) (indicating in dictum, "now it is perfectly clear, that one partner can not, by withdrawing himself from the association before the period stipulated between the partners for its continuance, either dissolve the partnership, or extricate himself from the responsibilities of a partner."); Cole v. Moxley, 12 W. Va. 730, 747 (1878) ("A partnership for a limited period, cannot be dissolved at the mere pleasure of one of the partners, but may be dissolved for reasonable cause."); *see also* Hannaman v. Karrick, 9 Utah 236, 33 P. 1039 (1893), *aff'd on other grounds*, 168 U.S. 328 (1897). In holding that a partner could not expel another partner and thereby gain control of a profitable business, the Utah Supreme Court observed:

> Where the partnership is merely at will, the right of one partner to terminate it must be conceded; but where by agreement it is to continue for a time stipulated the party seeking a dissolution before the expiration of the time ought in justice at least be required to act in good faith, and at a reasonable time, and in a reasonable manner. . .. There seems to be no good reason why a person should be allowed to commit a breach of his contract in such case, while in all other cases of flagrant violation, not within the partnership, he would be compelled to specifically perform if it was within his power to do so.

9 Utah at 241, 33 P. at 1041. In affirming on other grounds, the United States Supreme Court expresed reservations over this aspect of the state court's opinion. 168 U.S. at 336. *See infra* notes 36-37 and accompanying text.

32.
> Whenever a stipulation is positively made that the partnership shall endure for a fixed period, or for a particular adventure or voyage, it would seem to be at once inequitable and injurious to permit any partner at his mere pleasure to violate his engagement and thereby jeopardize, if not sacrifice, the whole objects of the partnership; for the success of the whole undertaking may depend upon the due accomplishment of the adventure or voyage. . .. It is no answer to say, that such a violation of the engagement may entitle the injured partners to a compensation in damages; for, independently of the delay and uncertainty attendant upon any such mode of redress, it is obvious, that the remedy may be, nay, must be, in many cases utterly inadequate and unsatisfactory.

J. Story, Commentaries on the Law of Partnership § 275, at 439-40 (1859). He added: "If there by any real and just ground for the abandonment of the partnership, a Court of Equity is competent to administer suitable redress." *Id.* at 440.

"would not seem, *upon principle*, to admit of any real doubt or difficulty" and that a contrary position is "exceedingly artificial, if not indefensible."[33]

Regardless of the clarity of the principle articulated by Justice Story, American decisions prior to the development of the UPA split on the dissolvability of a fixed term partnership through the expression of the will of a single partner.[34] Indeed, a number of courts, probably the majority, held that a single partner could dissolve a partnership even if that act violated an agreement among the partners.[35] This view was well stated by the Supreme Court in a pre-UPA case, *Karrick v. Hannaman*,[36] which stressed the need for mutual consent among partners in order for the partnership to function efficiently.[37] *Karrick*, decided shortly before the development of the UPA, provided strong support for the proponents of free dissolvability of partnerships.

B. *The Issue Settled*

Although *Karrick* provided substantial support for the free dissolvability proponents, the decision recognized that the issue was one on which "there has been some difference of opinion."[38] In an attempt to settle the matter, the drafters of the UPA eventually accepted the position advanced in *Karrick* and concluded that a dissolution in contravention of a partnership agreement, although perhaps wrongful, is nevertheless effective.[39] In support of this position, the Official Comment to section 31 states, in part:

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33. *Id.* at 440.

34. For cases supportive of Story's position, see *supra* note 31.

35. *See, e.g.*, Karrick v. Hannaman, 168 U.S. 328 (1897) (discussed *infra* notes 36-38 and accompanying text); Lapenta v. Lettieri, 72 Conn. 377, 383, 44 A. 730, 732 (1899) ("Whoever acts as another's agent must base his authority on the other's assent. Such assent, if given, may be retracted at any time, as regards future transactions. This doctrine in the law of agency rests on reasons which apply fully to the partnership relation."); Skinner v. Dayton, 19 Johns. 513, 538 (N.Y. 1822) ("There can be no such thing as an *indissoluble* partnership.") (emphasis in original); Solomon v. Kirkwood, 55 Mich. 256, 259, 21 N.W. 336, 337 (1884) (describing the right of a partner to dissolve as "indefeasible"); Slemmer's Appeal, 58 Pa. 168 (1868).

36. 168 U.S. 328 (1897).

37. *Id.* at 334.

> Every partnership creates a personal relation between the partners, rests upon their mutual consent, and exists between them only. . .. No partnership can efficiently or beneficially carry on its business without the mutual confidence and cooperation of all the partners. Even when, by the partnership articles, they have covenanted with each other that the partnership shall continue for a certain period, the partnership may be dissolved at any time, at the will of any partner, so far as to put an end to the partnership relation and to the authority of each partner to act for all; but rendering the partner who breaks his covenant liable to an action at law for damages, as in other cases of breaches of contract.

Id. The Court added:

> We are not prepared, therefore, to assent to the opinion of the court below that a partnership for a definite term cannot be dissolved by one partner at his own will, and without the consent of his copartner, within that time. . .. But it is unnecessary to express an opinion on this point, because, however it might be decided, it would not affect the conclusion in favor of the plaintiff in the present case.

Id. at 336.

38. *Id.* at 336.

39. *See* UNIF. PARTNERSHIP ACT §§ 31, 38.

> The relation of partners is one of agency. The agency is such a personal one that equity cannot enforce it even where the agreement provides that the partnership shall continue for a definite time. The power of any partner to terminate the relation, even though in doing so he breaks a contract, should, it is submitted, be recognized.[40]

The Official Comment, like much of the case law addressing this issue, utilizes the imprecise concept, "personal," without specifically evaluating why a personal relationship must be freely dissolvable. A closer examination of the rationale reflected by the Official Comment reveals two distinct justifications supporting free dissolvability of all partnerships. First, partnerships tend to be small business ventures characterized by close or intimate working relationships among their co-owners. Dissolution must be the option of any partner, for a court is powerless to compel the restoration and maintenance of such a close, "personal," business relationship against the will of any of the partners. Second, partnerships are mutual agencies. Given the power of a single partner to act on behalf of the group and thereby render all other members of the partnership jointly liable, each partner must have the power to put an end to the relationship. An evaluation of the premise underlying free dissolvability requires separate considerations of these two justifications.

1. The "Close" Working Relationship Among Partners

Unquestionably, the typical partnership is a small business venture with relatively few owners.[41] Because working relationships are close, the partners must trust each other.[42] Courts are reluctant to mandate the maintenance of such trust relationships, and permitting any partner to dissolve a venture prematurely may seem desirable if the dissolving partner is willing to suffer the economic consequences.

This argument for free dissolvability is consistent with the general reluctance of courts to specifically enforce contracts either requiring personal services or presenting problems of supervision that may undermine the efficacy of such decrees.[43] However, a personal service dimension is not dispositive of the issue of whether free dissolvability should be a principle applied uniformly to all partnerships. Not every partnership is characterized by intimate working relationships. Many partners assume passive positions within their ventures. If a particular partnership does not depend upon cordial working relationships, why should that partnership be dissolvable at the will of any of its partners? Further, if free dissolvability is a necessary consequence of the intimacy of partnerships, why are courts often reluctant to grant decrees of dissolution under section 32

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40. The Comment adds: "The rights of the parties upon a dissolution in contravention of the agreement are safeguarded by section 38(2)." *See supra* notes 11-14 and accompanying text.

41. *See* Hillman, *Power Shared and Power Denied: A Look at Participatory Rights in the Management of General Partnerships*, 1984 U. ILL. L. REV. 865, 865-66.

42. *See, e.g.*, Ferrick v. Barry, 320 Mass. 217, 222, 68 N.E.2d 690, 694-95 (1946).

43. *See infra* notes 148-56 and accompanying text.

of the UPA unless the friction between partners is "productive of serious and permanent injury to the success and prosperity of the partnership?"[44]

A comparison of partnerships with their corporate counterparts is instructive.[45] Close corporations, like most partnerships, have relatively few owners, many or most of whom are active in their businesses.[46] Shareholders in close corporations enjoy, or suffer, working relationships similar in their character of "intimacy" to those of partners in comparably sized ventures.[47] Shareholders, however, are not permitted to dissolve[48] their enterprises at will.[49] If closeness of working relationships was the sole criterion for developing standards for dissolution, then both partnerships and close corporations should operate under an identical standard. As the following discussion demonstrates, however, the principal justification for the free dissolvability of partnerships lies not in the assumed "intimacy" of working relationships, but rather in the mutual agency character of partnerships.

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44. Under the UPA, a court is authorized to decree dissolution of a partnership for any one of a number of reasons. These include:

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(b) A partner becomes in any other way incapable of performing his part of the partnership contract,

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(e) The business of the partnership can only be carried on at a loss,

(f) Other circumstances [which] render a dissolution equitable.

UNIF. PARTNERSHIP ACT § 32.

Courts reluctant to decree dissolution absent a showing of serious business harm presumably feel that a business may be continued even though the relationships among its owners are less than cordial. Indeed, some partnerships prosper even in the face of serious disputes among their partners. *See, e.g.*, Potter v. Brown, 328 Pa. 554, 195 A. 901 (1938). *See generally* Hillman, *supra* note 10, at 545-47.

45. See *infra* notes 181-91 and accompanying text for a more fully developed comparison

46. For discussions of various definitions of close corporations, see F. O'NEAL, CLOSE CORPORATIONS: LAW AND PRACTICE § 1.02 (2d ed. 1971); Hillman, *supra* note 17, at 63-65.

47. *See, e.g.*, Helms v. Duckworth, 249 F.2d 482, 486 (D.C. Cir. 1957) (describing a close corporation as an "intimate" business venture and comparing it to a partnership); Donahue v. Rodd Elec. Co., 367 Mass. 578, 592-93, 328 N.E.2d 505, 515 (1975) (referring to the "trust and confidence which are essential" to close corporations and partnerships); Hetherington & Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 2-3 (1977) (partnerships and close corporations are "founded by individuals who have a virtually complete identity of interests and strong feelings of trust and confidence for one another"); *see also infra* notes 181-87 and accompanying text.

48. When applied to corporations, the meaning of "dissolution" may vary from jurisdiction to jurisdiction. *See generally* A. CONARD, CORPORATIONS IN PERSPECTIVE 234-35 (1976).

49. *See infra* notes 182-87 and accompanying text.

2. The Mutual Agency Character of a Partnership

a. The Traditional Analysis Reflected in the UPA: From the Perspective of the "Principal"

A second justification for regarding the relations among partners as "personal" is the mutual agency character of a partnership. Each partner has the capacity to act as an agent of the partnership and render other partners jointly liable for acts taken within the scope of the partner's authority.[50] Partners are thus more dependent than shareholders on the sound judgment and goodwill of each other. In this sense, the relationship of partners is intensely "personal."

The mutual agency character of a partnership provides a distinction, too often overstated, between partnerships and close corporations. The "risk" of a shareholder, unlike that of a partner, is limited to the amount that individual has invested in a particular enterprise.[51] The risk of the partner for the acts of other partners, on the other hand, is potentially unlimited. As a result, the UPA elects to give any partner an expeditious method of terminating agency powers even if that termination conflicts with an existing agreement establishing a duration for the partnership.

As an alternative to dissolution by express will, dissolution may be accomplished by means of a judicial decree. This method of altering the legal relationship of partners, however, is neither certain in its outcome nor immediate in its effect. Grounds must be established before a decree of dissolution may

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50. The UPA provides:

> (1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner . . . for apparently carrying on in the usual way the business of the partnership . . . binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.
>
> (2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.
>
> (3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:
>
> (a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership,
>
> (b) Dispose of the good-will of the business,
>
> (c) Do any other act which would make it impossible to carry on the ordinary business of the partnership,
>
> (d) Confess a judgment,
>
> (e) Submit a partnership claim or liability to arbitration or reference.
>
> (4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction.

UNIF. PARTNERSHIP ACT; *see also* UNIF. PARTNERSHIP ACT. § 4 (providing as a rule of construction that the law of agency shall apply under the UPA); *id.* § 15 (setting forth the nature of a partner's joint or joint and several liability). *See generally* A. BROMBERG, *supra* note 3, §§ 48-50; D. FESSLER ALTERNATIVES TO INCORPORATION FOR PERSONS IN QUEST OF PROFIT 18-85 (1980); Hillman, *supra* note 41, at 878-87.

51. The distinction, however, may be more theoretical than real. *See infra* notes 189-90 and accompanying text.

be secured,[52] and a review of litigation on this subject shows that a number of courts are reluctant to dissolve prosperous partnerships absent a showing of imminent business harm.[53] Further, even if the partner desiring dissolution is confident a decree may be obtained, a substantial delay may occur between the filing of the petition and the issuance of the decree. During this period, the partner seeking dissolution remains at risk for the actions of his or her partners.[54]

By permitting prompt and unreviewable dissolution of a partnership, the UPA advances risk-aversion objectives at the expense of previously bargained for stability.[55] Interestingly, the provisions of the Act regarding wrongful dissolution completely subordinate the liquidity interests of the dissolving partner, at least in situations where the non-breaching partners choose to continue the business and defer the settlement of accounts. This subordination of liquidity interests when the business is continued may enhance otherwise discounted stability objectives of the continuing partners. If the business is not continued, on the other hand, stability interests are disregarded.

Accordingly, the choice of free dissolvability reflects an assumption underlying the UPA that the risk-aversion interests of each partner are of paramount importance. Such a conclusion, however, is neither an inevitable consequence of the law of agency nor necessarily desirable as a matter of policy. As the following discussion demonstrates, this aspect of the UPA bears reconsideration.

b. An Alternative Analysis Not Reflected in the UPA: From the Perspective of the "Agent"

Admittedly, an individual's status as an agent is revocable at the will of the principal, and even a contract purporting to make an agency irrevocable for a specified period cannot be specifically enforced. Under the classic model

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52. *See* UNIF. PARTNERSHIP ACT § 32.

53. *See* Hillman, *supra* note 10, at 539-52.

54. Generally, the date of dissolution is the same as that of the decree accomplishing the dissolution. *See, e.g*, Zeibak v. Nasser, 12 Cal. 2d 1, 14-17, 82 P.2d 375, 382-83 (1938) (drawing a distinction between the date of the misconduct requiring a decree of dissolution and the date dissolution is actually ordered, and upholding an order decreeing dissolution as of the latter date); Ben-Dashan v. Plitt, 58 A.D.2d 244, 248, 396 N.Y.S.2d 542, 546 (1977) (observing in dicta that dissolution normally occurs on date of decree). A court, however, may decree dissolution as of an earlier date. *See, e.g.*, Vangel v. Vangel, 116 Cal. App. 2d 615, 626, 254 P.2d 919, 926 (1953) (In upholding an order decreeing dissolution as of the date the introduction of evidence was completed, the court commented: "In some cases where the breach is serious and unequivocal . the misconduct really dissolves the partnership, the court decree merely giving legal effect thereto. . .. [But in other cases the misconduct] simply provides grounds for an application to a court of equity for such relief."); Straus v. Straus, 254 Minn. 234, 242-43, 94 N.W.2d 679, 685 (1959) (the filing of a petition for dissolution may have the effect of automatically dissolving a partnership); *Ben-Dashan*, 58 A.D.2d at 248, 396 N.Y.S.2d at 546 (noting that dissolution generally occurs as of the date of the decree but finding in this case that the effective date was the time of mutual consent).

55. In one sense, the partner faced with a premature dissolution is in a better position than an agent whose authority has been terminated prematurely. The partner, unlike the agent, is at least permitted to continue to possess partnership property for the agreed term. *See* UNIF. PARTNERSHIP ACT § 38(2); *infra* notes 68-69 and accompanying text.

of agency, the relationship between the parties is hierarchical, and the agent acts, as a fiduciary, exclusively for the benefit of the principal.[56]

Taken this far, agency principles advancing risk-aversion considerations[57] support the position of the UPA on free dissolvability of partnerships. The analysis, however, ignores a special type of agency that is irrevocable. Referred to at common law as an "agency coupled with an interest"[58] and by the *Restatement (Second) of Agency* as a "power given as a security,"[59] this type of relationship represents an agency in name alone.[60] Partly because of the rigid terminology underlying the rule,[61] the nature of an interest that will render an agency "irrevocable" has plagued courts and commentators and need not be addressed in this article.[62] For present purposes, it is sufficient to observe that when an agent possesses, for want of a better term, a proprietary interest[63] in the subject of the agency, the relationship between "principal" and "agent" is not hierarchical in character. In such a case, the principal is denied the power to revoke the power of the agent to act.[64]

To a limited extent, the provisions of the UPA regarding wrongful dissolution equate partnerships with irrevocable agencies. The analogy, however, is only partially carried forward by the Act.[65] As was noted above, one of the

56. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 1(1) (1957) ("Agency is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.") [hereinafter cited as RESTATEMENT (SECOND) OF AGENCY]; *id.* § 13 ("An agent is a fiduciary with respect to matters within the scope fo his agency.").

57. Again, use of the term "risk-aversion" may be somewhat misleading. *See supra* note 30 and accompanying text.

58. *See, e.g.*, Gaussen v. Morton, 10 Barn. & Cress 731, 734 (K.B. 1830) (Lord Tenterden).

59. RESTATEMENT (SECOND) OF AGENCY § 139 (1957).

60. *Id.* § 14H (1957); *see also* H. REUSCHLEIN & W. GREGORY, *supra* note 3, § 47, at 97-98.

61. In an understatement, one court observed:

> It is most difficult to frame an all-embracing definition of a power coupled with an interest. . .. Many of the authorities approach the subject as though it were a thesis, and treat it in such an academic way as to be confusing. Much is said concerning what is not a power coupled with an interest, with little attempt at exactness concerning what actually constitutes the same.

Lane Mortgage Co. v. Crenshaw, 93 Cal. App. 411, 427, 269 P. 672, 679 (1928).

Professor Steffen commented: "The constructive thing to do, were it not too late, would be to reword the rule, and substitute *equity* for *interest*, thus, 'a power coupled with an *equity*' may not be revoked. This would at once preserve the essence of the rule, and end the uncertainty." R. STEFFEN, AGENCY-PARTNERSHIP IN A NUTSHELL 44 (1977); *see also* E. LATTY, INTRODUCTION TO BUSINESS ASSOCIATIONS 481 (1951) ("Focusing attention upon whether or not there was an 'interest' coupled with the agency runs the risk that powers that *ought* to be revocable . . . may be held by a court (having its eye solely on the traditional formula) to be irrevocable, and vice versa.").

62. *See generally* E. LATTY, *supra* note 61; H. REUSCHLEIN & W. GREGORY, *supra* note 3, § 98; Seavey, *Termination by Death of Proprietary Powers of Attorney*, 31 YALE L.J. 283 (1922). The landmark case, often criticized, is Hunt v. Rousmanier, 21 U.S. (8 Wheat.) 174 (1823).

63. *See infra* note 84 and accompanying text.

64. Such a relationship permits the "agent" to advance his or her own interests and should not be viewed as one of agency. *See supra* note 60 and accompanying text.

65. Any analogy between partnerships and agencies will be imperfect because each partner is both principal and agent. This undermines the application of traditional agency principles based upon relationships hierarchical in character.

consequences of a premature dissolution is that remaining partners have the right, under specified conditions, to possess partnership property for the agreed term.[66] In this sense, a partner opposing dissolution is in the same position as the agent holding an irrevocable power.[67] The positions of the agent and the partner differ markedly, however, on the issue of continuing capacity to bind the "principal." The power to bind terminates with the dissolution of the partnership,[68] while the agent's authority continues notwithstanding the desire of the "principal" to effect a termination.[69]

Apart from the continuation rights accorded non-breaching partners, the free dissolvability posture of the UPA assumes that partnerships are the equivalent of revocable agencies.[70] This assumption, however, is based upon faulty prem-

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To some extent, the "entity versus aggregate" issue is relevant to this problem. For a number of years, scholars debated the issue of whether partnerships should be treated as entities or aggregates of individual partners. A good review of this debate concerning legal personality may be found in Jensen, *Is a Partnership Under the Uniform Act an Aggregate or an Entity?*, 16 VAND. L. REV. 377 (1963). For additional discussions, see Crane, *The Uniform Partnership Act· A Criticism*, 28 HARV. L. REV 762 (1915); Lewis, *The Uniform Partnership Act — A Reply to Mr. Crane's Criticism*, 29 HARV. L REV. 158 & 291 (1916); Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617, 638-41 (1915). The UPA does not explicitly adopt either theory but instead reflects both in its various provisions. For example, in one section the UPA suggests an aggregate approach by defining a partnership as "an association of two or more persons to carry on as co-owners a business for profit." UNIF. PARTNERSHIP ACT § 6(1). *See, e.g.*, Scott v. United States, 354 F.2d 292 (Ct. Cl. 1965). In another section, the UPA establishes a relationship apparently unknown at common law by making partners agents of their partnerships. UNIF. PARTNERSHIP ACT § 9. *But cf.* NEB. REV. STAT. § 67-304 (1981) (providing the Act "shall be interpreted and construed in harmony with the entity theory of partnership; *Provided*, in all matters of interpretation and construction of [the Act] which do not involve the entity theory of partnership, [the Act] shall be so interpreted and construed as to make uniform the law of those states which have enacted or hereafter may enact it.") (emphasis in original).

If the partnership is viewed for this purpose as a legal entity, the application of traditional agency principles to the issue of revocability of the partnership would be somewhat clearer. The partnership would represent the principal, while the partners would constitute the agents. This result is consistent with the language of section 9 of the UPA. However, the principal focus of section 9 is directed to transactions between the partnership, through its members, and third parties. The UPA does not dictate application of the entity approach to all matters affecting the relations of partners inter se. Indeed, the ability of a single partner to compel a dissolution of the relationship suggests an aggregate rather than entity approach to partnerships. This gives rise to the concept of the partner as both principal and agent that complicates the analogy to other agencies.

66. *See supra* note 13 and accompanying text; *infra* notes 128-30.

67. *See* A. BROMBERG, *supra* note 3, § 75, at 427 ("As to the partnership property it might be considered that there is a power coupled with an interest, given to secure the performance of the contract.").

68. A dissolution, however, does not terminate a partnership, and liabilities may be incurred during the winding up of partnership affairs. *See* UNIF. PARTNERSHIP ACT § 30. If the business is continued following a wrongful dissolution, practical problems may arise in indemnifying the dissolving partner against partnership liabilities. *See* Hillman, *supra* note 10, at 578-81.

69. Limited application of irrevocable agency principles to partnerships did not bother one commentator. *See* A. BROMBERG, *supra* note 3, § 75, at 427.

70. However, partners, unlike agents, are permitted to possess partnership property for the agreed term following a dissolution in contravention of their partnership agreement. *See* UNIF. PARTNERSHIP ACT § 38(2)(b).

ises. The nature of the typical partner's interest[71] differs from that of the ordinary agent operating under a revocable power. Generally, an agent has no interest other than an expectation of compensation for services rendered on behalf of the principal.[72] The agent as principal is a contradiction in terms under agency law.[73] Partners, on the other hand, are co-principals and co-owners who have substantial interests in their business ventures.

The risk of a partner is ordinarily greater than that of an agent. Partners are jointly and severally liable for most of the obligations arising from their ventures.[74] At least in cases in which the principal is disclosed, an agent who contracts on behalf of a principal is not a party to the contract and suffers no liability for a breach.[75] The agent's liability in tort is also limited, for although an agent is responsible for his or her own tortious conduct, the liability does not extend to such conduct by other agents of the principal.[76] Consequently, the same agency principles that provide a basis for evaluating partners' liabilities to third parties need not necessarily control issues affecting the relations of partners to each other.[77]

The position of a partner also differs from that of an agent operating under an irrevocable power. Fiduciary principles restrict the extent to which one partner may pursue interests without regard to the effect of this action on other partners.[78] Typically, agents operate under similar, or perhaps even more strin-

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71. *See* UNIF. PARTNERSHIP ACT § 24 ("The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management."); *id.* § 25 (defining the nature of a partner's right in specific partnership property); *id.* § 26 ("A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.").

72. Invariably, courts find that a mere expectation of compensation is not a sufficient interest to render an agency irrevocable. *See, e.g.*, Taylor v. Burns, 203 U.S. 120 (1906); Kirchof v. Friedman, 10 Ariz. App. 220, 457 P.2d 760 (1969); Peacock v. American Agronomics Corp., 422 So. 2d 55 (Fla. 2d D.C.A. 1982); Maddox v. District Supply Inc., 222 Md. 31, 158 A.2d 650 (1960); Chain v. Pye, 429 S.W.2d 630 (Tex. Civ. App. 1968).

73. *See supra* note 56 and accompanying text.

74. *See supra* note 50.

75. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 320 (1957). *See generally* H. REUSCHLEIN & W. GREGORY, *supra* note 3, §§ 118-23.

76. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY, § 343 (1957) ("an agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal"); *id.* § 350 ("An agent is subject to liability if, by his acts, he creates an unreasonable risk of harm to the interests of others protected against negligent invasion."). *See generally* H. REUSCHLEIN & W. GREGORY, *supra* note 3, §§ 124-32.

77. *But see* Lapenta v. Lettieri, 72 Conn. 377, 378, 44 A. 730, 732 (1890) (pre-UPA case: "Each partner is the general agent of the firm, and the firm is the agent of each partner, with power to bind him to a personal liability in favor of partnership creditors. Whoever acts as another's agent must base his authority on the other's assent. Such assent, if given, may be retracted at any time, as regards future transactions. This doctrine in the law of agency rests on reasons which fully apply to the partnership relation."); A. BROMBERG, *supra* note 3, § 75, at 427 ("As to the power to continue to create personal obligations of the withdrawing partner, there seems to be no reason, under agency principles, why it should not be capable of revocation, though in breach of contract.").

78. *See infra* note 212.

gent, fiduciary standards.[79] However, when an agency is coupled with an interest, the agent is in a position superior to that of the partner; the very purpose of a power rendering an agency irrevocable is to permit the agent to act for his or her own interests rather than those of the principal.[80] Thus, an agent holding an irrevocable power is not really an agent at all.[81]

Classifying partnerships as either normal agency relationships or irrevocable agencies is both simplistic and misleading.[82] A more sensible approach acknowledges that partnerships fall somewhere between these two extremes and evaluates the issue by determining which type of agency the partnership most closely approximates. Viewed in this light, the interests of a partner in a fixed term partnership bear a stronger resemblance to those of an agent with irrevocable powers than those of a more typical agent. Support for this conclusion may be drawn from the Reporter's Comment to section 138 of the *Restatement (Second) of Agency*. After observing that an agent's interest in compensation is an ordinary incident of agency, the Comment adds: "On the other hand, an agent has an interest in the subject matter, as where he engages in a joint enterprise in which another supplies the subject matter, a power given him by the other to protect such interest is a power given as security."[83] Professor Seavey later elaborated on this principle:

> First, the distinction between agency powers and proprietary powers. The theory is simple but there are many cases close to the line. In a few cases, the courts have made obvious errors, having permitted the fact that the agent expended money in reliance upon the continuance of his powers, to blind them to the fact that there was a fiduciary relationship with a primary obligation to subserve the interests of the principal. *But of course it is possible that even an agency agreement shall be intended by the parties to give to the agent an indefeasible interest in the property itself, making him a co-owner, so that thereafter he is working for his own interest and for that of the principal. . . .*
>
> If the agency relationship is found, of course, it is terminable at will, although there was an agreement that it should not be terminated, or although the agent advanced money, or although it was expressed not to be revocable. . . .
>
> Where there is a proprietary power, i.e., where the power was given as security, or on a contract not of agency, for the benefit of the power holder or of a third person, it is not revocable by the will of the power giver. . . .[84]

79. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY, § 13, comment a (1957); *id.* § 387, comment a. Both agents and partners are subject to fiduciary standards.

80. *See, e.g.*, *id.* § 14H, comment a; *id.* § 387, comment a.

81. *See supra* note 60 and accompanying text.

82. *See supra* note 65.

83. RESTATEMENT (SECOND) OF AGENCY, § 138, comment b (1957).

84. W. SEAVEY, STUDIES IN AGENCY 123 (1949) (emphasis added). Consider in this regard the comments of Professor Mechem, who included in his description of cases of irrevocability the following:

1. There are cases in which the agent has acquired some interest of his own in the execution

Professor Seavey, of course, was not comparing partners with agents holding irrevocable powers; nevertheless, his emphasis on proprietary powers is both useful and relevant to partnerships. Even though a partner's interest may fall somewhat short of that of the agent holding an irrevocable power, it exceeds that of the typical agent whose interest is limited to compensation. The closer resemblance of partnerships to irrevocable agencies calls into question the use of agency principles as a basis for free dissolvability of fixed term partnerships.

The conclusion that all partners must have the power to dissolve their ventures, accordingly, is not an inevitable consequence of the law of agency. The policy of the UPA permitting free dissolvability of fixed term partnerships represents a questionable concession to rigid, and arguably antiquated, principles governing termination of the authority of an agent.[85] The drafters of the UPA could have recognized the special character of partnerships and declined to apply agency principles, at least with respect to the dissolvability of partnerships. Alternatively, the drafters could have borrowed from principles of agency and concluded that a partnership may bear a sufficient similarity to an agency coupled with an interest to render it irrevocable in the face of an agreement establishing a term.[86] In reflecting neither of these alternatives, the UPA overemphasizes risk-aversion interests at the expense of other considerations important to individuals conducting a business as partners.

II. Beyond the UPA: Of Fairness, Efficiency and Morality

Consistent with the clear treatment of the issue in the UPA, a number of cases have held that a court can neither enjoin dissolution of a partnership nor direct specific performance of a partnership agreement.[87] The "wrongful" character of a dissolution in contravention of a partnership agreement controls the consequences of the act of dissolution, not the act's effectiveness as a means of dramatically altering the legal relationships between the partners.[88] The decision to breach a partnership agreement and prematurely dissolve the venture, in short, lies within the discretion of the partner contemplating dissolution.

One argument supporting free dissolvability of partnerships focuses on the

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> of the authority, in addition to his mere interest in the contract of employment with its resulting gains. . . . 2. There may be cases in which the agent has been induced to assume a responsibility, or incur a liability, in reliance upon the continuance of the authority, under such circumstances that, if the authority be withdrawn, the agent will be exposed to personal loss or injury . . . .

F. Mechem, A Treatise on the Law of Agency § 569, at 406 (2d ed. 1914).

85. Evaluating the standards of revocability for existing agencies is beyond the scope of this article. The question arises, however, whether the revocability issue under agency law should be treated primarily as a problem of remedies.

86. The rather restrictive approach of agency law to the question of revocability has been relaxed in some jurisdictions when the agency is in the form of a shareholder proxy. *See, e.g.*, Cal. Corp. Code § 705 (West Supp. 1985) (providing that some proxies are irrevocable when issued in connection with agreements among shareholders in close corporations). *See generally* H. Henn & J. Alexander, Laws of Corporations and Other Business Enterprises 520-22 (1983).

87. *See supra* note 11.

88. *See supra* notes 11-14 and accompanying text.

numerous problems underlying the remedy of specific performance of partnership agreements. The existing approach of the UPA is supportable to the degree that monetary damages are sufficient to provide adequate compensation to partners faced with a premature dissolution, and to the degree that specific performance is a remedy the law should discourage. Viewed in this light, the problem may be no different than that of designing an appropriate remedy for the breach of any type of contract.

This broader problem of contract law has been the subject of extended scholarly commentary and debate. At issue is the correctness of the rather clear preference of courts to favor damages over equitable relief as a remedy for breach of contract. Regardless of any shortcomings of prevailing judicial approaches, changes in long-established attitudes disfavoring equitable relief have been slow. As one commentator has observed, "the very notion of contracts is tied to remedies, and the law of contracts, unlike tort, has traditionally been sparing, if not niggardly, with them."[89]

A recent decision of the First Circuit Court of Appeals demonstrates both dissatisfaction with an absolute rule of free dissolvability and an inclination to view the partnership law question as merely one aspect of the larger remedies issue. In *Infusaid Corp. v. Intermedics Infusaid, Inc.*,[90] two corporations, Infusaid and Intermedics,[91] established a joint venture to develop and sell drug infusion devices.[92] The agreement was for a fixed term[93] and assigned management responsibility to Infusaid. The agreement further provided that if, at any time, Infusaid was in material default under the agreement, Intermedics could assume

89. Linzer, *On the Amorality of Contract Remedies — Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 111 (1981).

90. 739 F.2d 661 (1st Cir. 1984).

91. Shortened names are adopted for clarity. Participants in the litigation included Metal Bellows Corporation and its subsidiary Infusaid Corporation, on one side, and Intermedics, Inc. and its subsidiary, Intermedics Infusaid, Inc., on the other. Naming the joint venture Infusaid Company further confused corporate identities.

92. For most purposes, including wrongful dissolutions, joint ventures are treated as the equivalent of partnerships. *See* A. BROMBERG, *supra* note 3, § 35, at 192; D. FESSLER, *supra* note 50, at 191-97. The court expressed some reservations over such a conclusion, particularly when the joint venturers are corporations. 739 F.2d at 662-63; *see also* Eastern Electrical v. Taylor Woodrow Blitman Constr. Corp., 11 Mass. App. Ct. 192, 198, 414 N.E.2d 1023, 1027 (1981) ("We are of the opinion that the [UPA] . . . should not be interpreted as having direct statutory and *mandatory* application to at least joint ventures which include corporate participants . . .. Accordingly, we treat the [UPA] as having relevance to joint ventures with corporate participants only by way of analogy and only when the use of the analogy in particular circumstances will achieve a just result."). Nevertheless, the court chose to apply the UPA because it perceived that result to be consistent with the intention of the parties at the inception of their venture. 739 F.2d at 663.

93. The First Circuit did not indicate the term of the venture, although the opinion is obviously based upon the assumption that the venture was for a fixed term rather than terminable at will. In the brief of the appellees, a reference is made to dissolution provisions in the joint venture agreement providing that the venture would continue until the year 2030, unless one party acquired the entire venture or the parties agreed to an earlier termination. Brief for Appellees, at 35-36, *Infusaid Corp.*, 739 F.2d at 661.

control of the venture until the default was removed or cured.[94] The parties had a "falling out," and Infusaid "ousted" Intermedics from the venture.[95] Infusaid, seeking to make permanent the ouster, then sought a judicial decree of dissolution under section 32 of the UPA.

The district court denied Infusaid's request for a decree of dissolution[96] and found Infusaid's ouster of Intermedics to be an incurable material default under the joint venture agreement.[97] The court ordered that the venture be managed by Intermedics pursuant to the agreement's provisions providing for a transfer of control upon Infusaid's material default[98] and broadly enjoined actions by Infusaid that would undermine effective management by Intermedics.[99] This order was especially injurious to Infusaid, for the finding that the material default by Infusaid was incurable rendered it impossible for Infusaid to take corrective action to regain management control over the venture. In effect, if not in words, the district court's order was equivalent to an order for specific

94. The agreement provided that management was in the hands of a committee of five directors. Under normal conditions, Infusaid was to appoint three of the directors, while Intermedics could designate two. The agreement further provided, however, that if Infusaid was in material default, Intermedics could designate a majority of the members of the management committee until the default was cured. 739 F.2d at 664.

95. Infusaid claimed Intermedics had breached its fiduciary obligations and the joint venture agreement by misappropriating intellectual property of Infusaid and developing a competitive product outside of the venture. Infusaid also claimed that Intermedics breached its fiduciary obligations to the venture by failing to provide additional financing. The lower court, however, found that Intermedics met its obligations under the agreement and had neither misappropriated an asset of Infusaid nor engaged in competition with the venture. *Id.* at 664-65.

96. *Id.* at 665.

97. The material default consisted of the ouster of Intermedics by Infusaid. *Id.*

98. *Id.*

99. The permanent injunction provided:

> 1. The management Committee of the joint venture, made up of three members appointed by the defendants and two members appointed by the plaintiffs, shall conduct the business of the joint venture, with full disclosure to the defendants of all information they request concerning the joint venture.
> 2. The plaintiffs . . . shall not interfere with the defendant's full and free access to all business and technical information concerning the joint venture.
> 3. The plaintiffs . . . shall make available to the defendants all technical information concerning the joint venture.
> 4. The plaintiffs . . . shall not permit the alteration, removal or destruction of any data, records, equipment or other assets relating to the work of the joint venture.
> 5. The plaintiffs . . . shall not take any action that would adversely affect the value of the defendants' option to purchase the joint venture.
> 6. The plaintiffs . . . shall not take any action that would interfere with the continued loyalty and employment of any employee or independent contractor of the joint venture. . ..
> 7. None of the plaintiffs or defendants shall sell, convey, transfer or assign . . . any interest in the joint venture to any third party. . ..
> 8. The plaintiffs shall not sell, convey, transfer or assign to any third party . . . any right to produce, sell or distribute any product of the joint venture without the express prior written consent of the three members of the Management Committee of the joint venture.

Order and Judgment of the District Court, at 6.

performance,[100] permanently altered the nature of the venture, and precluded Infusaid from responding to the alteration by declaring the venture dissolved. The lower court's order was tantamount to a permanent injunction against a dissolution.[101]

On appeal, Infusaid unsuccessfully argued that the refusal of the lower court to grant dissolution under section 32 of the UPA was reversible error. As an alternative ground for reversal, Infusaid argued that its exclusion of Intermedics was, in essence, a dissolution of the venture through an expression of will.[102] The First Circuit agreed that the partnership had been dissolved and added that there is a "strong presumption against specific performance of a joint venture or partnership agreement."[103] The court went on to suggest in dicta, however, that in some cases specific performance of a partnership or joint venture agreement may be an appropriate remedy:

> Where all parties to the agreement are corporations and there has been a dissolution per se of the relationship, however, and legal remedies have explicitly been found inadequate, a court may order specific performance of the agreement *if* the relationship is found to be without a significant personal service component. That is, if the joint venture or partnership can be maintained as an ongoing, profit-making concern without obliging any officer or director of the corporation that per se dissolved the relationship to continue in such a partnership against his will, . . . then specific performance may be rendered, again assuming the inadequacy of a legal remedy. By specific performance in this context we mean that the district court may order the corporate co-venturers to continue the business together *according to the terms of the joint venture agreement*.[104]

The court of appeals then remanded with an instruction that if the lower court could not make findings necessary to sustain its remedy of specific performance, then that portion of its order should be reversed.[105]

The qualification of the principle of free dissolvability suggested by the First Circuit is inconsistent with section 31 of the UPA,[106] which expressly contem-

100. The court of appeals treated the lower court's remedy as one of specific performance. 739 F.2d at 669 n.3.

101. "At this point, then, we must question the propriety of the district court's permanent injunction . . . against a dissolution per se that had already taken place." *Id.* at 668. While this interpretation is consistent with the breadth of the injunction granted by the district court, the lower court did not specifically reference in its order an injunction against a dissolution.

102. *Id.* at 667.

103. *Id.* at 669.

104. *Id.* (emphasis in original).

105. The subsequent history of this case reveals a treatment of the issue more in line with the free dissolvability position of the UPA. On remand, the district court awarded control of the venture's assets to Intermedics. It also required Intermedics to post a bond securing the payment of Infusaid's interest, discounted to reflect its loss of goodwill. This is consistent with the UPA's treatment of wrongful dissolutions. *See* UNIF. PARTNERSHIP ACT § 38(2). The First Circuit affirmed. Infusaid Corp. v. Intermedics Infusaid, Inc., 756 F.2d 1 (1st Cir. 1985).

106. UNIF. PARTNERSHIP ACT § 31 provides:

Dissolution is caused:

plates dissolution in contravention of a partnership agreement. As a matter of statutory interpretation, therefore, this aspect of the opinion is unsound. Even the First Circuit recognized, correctly, the "wealth of precedent" to the contrary and the lack of authorities supporting the exception it developed.[107] Regrettably, the court provided little analysis in support of its position. Indeed, its defense of the exception seems to rest largely on the assumption that it is of limited applicability.

Because of the lack of analysis supporting the dicta on specific performance, the *Infusaid* opinion could be dismissed as aberrational.[108] The decision bears closer examination, however, because it evidences a desire to circumvent the seemingly absolute rule of the UPA. By implicitly treating the issue as a matter of remedies, the First Circuit laid the foundation for a court with a more expansive approach towards equitable remedies to undermine significantly the principle of free dissolvability of partnerships.

The importance of the *Infusaid* opinion becomes clear with an examination of the circumstances under which specific performance might be available. Under the court's analysis, the enforcement of an agreement concerning a partnership term is dependent upon three principal conditions: first, the partners or joint venturers must be incorporated; second, existing legal remedies must be inadequate; and third, the venture must be without a significant personal

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(1) Without violation of the agreement between the partners,

(a) By the termination of the definite term or particular undertaking specified in the agreement;

(b) By the express will of any partner when no definite term or particular undertaking is specified;

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking;

(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under section 32.

107. 739 F.2d at 668.

108. The court presumably assumed its general equitable powers may be utilized to overcome the effects of the UPA's free dissolvability rule. There is some support for this approach in a pre-UPA decision: "There may be cases in which equity would enjoin a dissolution for a time, when the circumstances were such as to make it specially injurious." Solomon v. Kirkwood, 55 Mich. 256, 259-60, 21 N.W. 336, 337-38 (1884). The *Solomon* court, however, chose not to exercise such powers, noting that "[t]here can be no such thing as an indissoluble partnership." In light of the development of the UPA's position of free dissolvability, the use of equitable powers to accomplish a contrary result is questionable. *Cf.* McCollum v. McCollum, 67 S.W.2d 1055, 1056-57 (Tex. Civ. App. 1934) (pre-UPA decision noting "there can be no such thing as an indissoluble partnership," and adding that a partner "would, under no circumstances, be permitted to compel the maintaining of a partnership by mandatory injunction.").

services element. Although *Infusaid* assumed that these conditions represent a "strong presumption against" specific performance, other courts might question the strength of that presumption.

A. *The Relevance of Corporate Status*

Traditionally, corporations were without power to enter into partnerships. The reason for this rule was that the authority of partners to bind each other was incompatible with the requirement that management of a corporation was vested exclusively in its board of directors. One technical but effective method around the restriction on corporate powers was to structure the jointly owned business as a joint venture rather than a partnership.[109]

Today, most jurisdictions permit corporations to enter into partnerships.[110] This issue, strangely, is still alive in Massachusetts,[111] the laws of which, the *Infusaid* court apparently assumed, controlled the dispute.[112] The relationship between power of corporations to enter partnerships and the issue of free dissolvability, however, is not apparent. Indeed, if there is any question concerning a corporation's power to participate in a partnership, a court should be less

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109. *See supra* note 92.

110. *See* UNIF. PARTNERSHIP ACT § 2 (providing " 'Person' includes individuals, partnerships, corporations, and other associations"); *id.* § 6 (defining a partnership as "an association of two or more persons to carry on as co-owners a business for profit"). The issue is frequently addressed in corporation codes, the more modern of which authorize corporate participation in partnerships. *See, e.g.*, CAL. CORP. CODE § 207(h) (West Supp. 1985); DEL. CODE ANN. tit. 8, § 122 (1975); MODEL BUSINESS CORP. ACT § 3.02(9) (1984). *See generally* A. BROMBERG, *supra* note 3, § 9 D. FESSLER, *supra* note 50, at 191-92. Professor Fessler has observed, "in many jurisdictions the public policy prohibition on corporate partners is in full force." *Id.* at 192.

111. In adopting the UPA, Massachusetts accepted the Act's definition of a partnership as "an association of two or more persons to carry on as co-owners a business for profit." *See* UNIF. PARTNERSHIP ACT § 6(1); MASS. GEN. LAWS ANN. ch. 108A, § 6 (West 1958). However, Massachusetts law departs from the UPA in not defining "person" to include "individuals, partnerships, corporations, and other associations." *See* UNIF. PARTNERSHIP ACT § 2; MASS. GEN. LAWS ANN. ch. 108A, § 2 (West 1958). Nevertheless, Massachusetts legislation of general applicability provides that the term "person" shall, "unless a contrary intention clearly appears . . . include corporations, societies, associations, and partnerships." *Id.* ch. 4, § 7 (West 1976). Further, the Massachusetts Business Corporation Law provides, "to the extent authorized by its articles of organization, a corporation may be a partner in any business enterprise which said corporation would have power to conduct by itself." *Id.* ch. 156B, § 9A (West 1970); *see also* MASS. ADMIN. CODE tit. 950, § 104.04 (1979). Therefore, the statement in *Infusaid* that the power of corporations to enter partnerships is an "uncertain" issue is peculiar. *See also* Eastern Electrical Co. v. Taylor Woodrow Blitman Contr. Corp., 11 Mass. App. Ct. 192, 198, 414 N.E.2d 1023, 1026-27 (1981). Recent cases involving incorporated partners have not even addressed this question. *See, e.g.*, JRY Corp. v. LeRoux, 18 Mass. App. Ct. 153, 464 N.E.2d 82 (1984); Lazzaro v. Holladay, 15 Mass. App. Ct. 108, 443 N.E.2d 1347 (1983).

112. The court did not explain its reason for looking to Massachusetts law on this issue. The partners were incorporated under the laws of Delaware and Texas. Other Massachusetts cases have held that the validity of a corporate act is determined by the governing documents of the corporation and the law of the state of incorporation. *See, e.g.*, Wasserman v. National Gypsum Co., 335 Mass. 240, 139 N.E.2d 410 (1957); Edwards v. Fields, 57 Mass. App. Dec. 22 (1975), *aff'd* 371 Mass. 895, 351 N.E.2d 768 (1976).

inclined to enjoin dissolution of a partnership or joint venture comprised only of incorporated participants than one comprised exclusively of natural persons.

The incorporated status of partners is better treated as relevant to the personal service limitation on specific performance.[113] To the degree that the personal services component is not present, it makes little difference whether or not the partners are incorporated. As an independent limitation on equitable relief, therefore, the incorporated partner restriction articulated in *Infusaid* is of little importance.

B. *The Adequacy of Legal Remedies Debate*

Infusaid expressly conditioned the availability of specific performance of a partnership agreement upon proof that existing legal remedies are inadequate. This represents a traditional approach to specific performance reflected in so many cases involving breaches of contracts. In the more particular context of partnerships, the issue becomes: To what extent are the existing remedies of partnership law adequate to protect the interests of the non-breaching partner?

A partnership agreement, let us assume, is a contract.[114] The remedies provided by law upon breach define the true meaning of a contract. Although the point is somewhat controversial, most commentators seem to agree that the principal objective of contract remedies is to protect the expectations of the non-breaching party.[115] This normally means placing that party in as good a position as he or she would have enjoyed if the contract had been performed.[116]

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113. *See infra* notes 149-56 and accompanying text; *cf.* Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 297 (1979) ("requiring a sizable corporation that renders services to perform for a given promisee does not violate the corporation's associational interests or the associational interests of its employees").

There is some indication in the *Infusaid* opinion that the incorporated status of the venturers is also relevant to the personal services limitation on specific performance. *See* 739 F.2d at 669.

114. *See infra* notes 192-200 and accompanying text.

115. *See, e.g.*, Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1127 (1984); Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147 (1970); Schwartz, *supra* note 113, at 271.

116. The Restatement (Second) of Contracts provides:

> Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee:
>
> (a) his 'expectation interest,' which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,
>
> (b) his 'reliance interest,' which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or
>
> (c) his 'restitution interest,' which is his interest in having restored to him any benefit that he has conferred on the other party.

RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981). The Comment to this section indicates that ordinarily a court will protect the promisee's expectation interests. *See id.* § 344, comment a; *see also id.* § 347 (providing that normally an injured party has the right to damages based on expectation interests as measured by the loss in value to him of the other party's nonperformance); *id.* § 349 (providing for damages based on reliance interests as an alternative for the injured party when profits are uncertain); *id.* § 371 (outlining the measure of restitution interests).

Some commentators, and probably even more contracting parties, believe contracts represent moral commitments and are enforceable without regard to resulting inefficiences. Others argue that a party to a contract does not have an absolute right to the enforcement of its terms. Those inclined towards this view often look to the words of Justice Holmes for support:

> Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. . . . The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else . . . . If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.[117]

The Holmes analysis largely reflects the premises underlying existing remedies for a breach of contract.[118] A contemporary extension of this approach is found in the so-called theory of efficient breach.[119] Under this theory, providing the promisee with compensatory damages[120] and permitting the promisor to seek

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117. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

118. "Our system, then, is not directed at *compulsion* of *promisors* to *prevent* breach; rather, it is aimed at *relief* to *promisees* to *redress* breach . . .. [T]his at least adds to the celebrated freedom to make contracts, a considerable freedom to break them as well." Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147 (1970) (emphasis in original); *see also* Fuller & Perdue, *The Reliance Interest in Contract Damages* (pt. 1), 46 YALE L.J. 52, 79 (1936) (courts never "knowingly put the plaintiff in a better position than he would have occupied had the contract been fully performed").

119. One of the early, and perhaps first, uses of the term is found in Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977). Professor Macneil observed the concept was first suggested in Birmingham, *Breach of Contract, Damages Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273 (1970). *See* Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 947 n.2 (1982).

> The modern law of contract damages is based on the premise that a contractual obligation is not necessarily an obligation to perform, but rather an obligation to choose between performance and compensatory damages. Once a contemplated exchange has been negotiated, the breaching party is merely required to provide 'just compensation' equal to the value of the performance. . .. As long as the compensation adequately mirrors the value of performance, this damage rule is 'efficient.' It induces a result superior to performance, since one party receives the same benefits as performance while the other is able to do even better.

For an argument that specific performance advances efficiency objectives and should be as routinely available as the damages remedy, see Schwartz, *supra* note 113, at 271. For an argument that efficiency considerations mitigate against expanded availability of specific performance, see Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978). *See infra* note 139.

120. Posner offers the following justification for breach:

> [A] breach [is] in a sense involuntary. It was committed only to avert a larger loss. The breaching party would have been happier had there been no occasion to commit a breach. But in some cases a party would be tempted to breach the contract simply because his profit from breach would exceed his expected profit from completion of the contract, and if damages are limited to loss of expected profit, there will be an incentive to commit a breach. There should be.

other avenues of wealth maximation result in societal benefits through efficient allocation of limited resources.[121]

Some of these contemporary views can be seen in the UPA,[122] which establishes the power of a partner to dissolve a partnership prematurely if that partner is prepared to accept the economic consequences of such an action. Certain aspects of the wrongful dissolution provisions of the UPA, however, may result in the overcompensation of the non-breaching partner. Assuming that "promisors who breach increase society's welfare if their benefit exceeds the losses of their promisees,"[123] the secondary sanctions applied against the wrongfully dissolving partner — loss of the economic value of partnership goodwill and loss of the right to possess partnership property for the agreed term[124] — may cause that partner to continue to participate in a venture even when damages would adequately compensate the non-breaching partner.

If efficient utilization of resources is a goal to be advanced, and if the breaching partner can utilize the resources of the partnership more productively than the non-breaching partner, the breaching partner arguably should be awarded the assets of the partnership following dissolution. In addition, the breaching partner should only be required to give the non-breaching partner the value of his or her interest and any damages for proven lost profits. By promoting the liquidity interests of breaching partners, efficiency gains may result from the more productive use of assets controlled by partnerships. Viewed in this light, the secondary sanctions of the UPA appear punitive and inefficient rather than compensatory in character.[125]

Conversely, the approach of the UPA to wrongful dissolution may undercompensate some non-breaching partners. Adequate compensation presupposes placing the non-breaching partner in an economic position equivalent to that resulting had the premature dissolution not occurred. In simple contract cases involving fungible goods, this objective of economic equivalency is achievable. Partners, however, are not fungible goods. They resemble neither potatoes nor widgets. Admittedly, damages resulting from a premature dissolution are sometimes readily proven and, when combined with the secondary sanctions, adequate to protect the interests of the non-dissolving partner. Adequate compensation for non-breaching partners, however, may be a difficult goal to

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R. POSNER, ECONOMIC ANALYSIS OF THE LAW 89-90 (2d ed. 1977); *see also* Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247, 247-48 (1979) ("For the good of society, its resources should be efficiently allocated at every point in time. . .. Even if a party is bound by a contract to allocate his resources in a particular way, the good of society requires that he break the contract and reallocate his resources whenever this makes him better off without making someone else worse off.").

121. This article will not attempt a general efficiency analysis of partnership dissolutions. *See infra* note 139.

122. *See* UNIF. PARTNERSHIP ACT § 38(2).

123. Linzer, *supra* note 89, at 114 (highlighting some of the deficiencies of the efficiency theory).

124. *See* UNIF. PARTNERSHIP ACT § 38(2)(b)-(c).

125. This, of course, does not preclude bargaining concerning dissolution of the partnership. Recognition that such negotiations do and should take place is an important part of the efficient breach theory.

achieve. Decisions discussing the scope of damages arising from a premature dissolution are sparse. Although courts generally agree that damages are recoverable for profits lost as a result of a wrongful dissolution, the degree to which the principle is applied is open to question.[126] Interestingly the problem of accurately assessing damages prompts many courts to grant specific performance of contracts other than partnership agreements involving unique, as opposed to fungible, goods.[127]

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126. In spite of extensive litigation on the subject of partnership dissolutions, there are relatively few cases dealing with damages for premature dissolutions. This may be attributable to the high cost of litigating damages and the difficulty of proof in these types of cases. One of the more complete discussions of damages arising from a wrongful dissolution is found in Gherman v. Colburn, 72 Cal. App. 3d 544, 561-65, 140 Cal. Rptr. 330, 341-43 (1977). In *Gherman*, the court quoted with approval language in a pre-UPA decision of the United States Supreme Court suggesting damages may include profits prevented by a wrongful dissolution. *Id.* at 561-62, 140 Cal. Rptr. at 341. Proof of such damages, however, may be problematic. *See, e.g.*, Friedman v. Golden Arrow Films, Inc., 442 F.2d 1099 (2d Cir. 1971) (in an action for breach of the financing provisions of a joint venture agreement, the appellate court found a lower court's award of damages for loss of expected profits "not presently sustainable"); Williams v. Hildebrand, 220 Ark. 202, 205, 247 S.W.2d 356, 358 (1952) ("The evidence must afford a sufficient basis for estimating the anticipated profits with reasonable certainty. . .. Also, there must be deducted whatever amounts the [non-breaching partner] may fairly be expected to earn in other suitable employment, the [dissolving partner] having the burden of proof on this issue."); A. BROMBERG, *supra* note 3, § 75, at 428 n.78 ("The measure of damages is complicated . . .. If the other partners exercise their right to continue the business, they apparently give up any claim for destruction of the business, although they may still be able to recover for injury to it. . .. If they exercise their further right to keep all the partnership property, by securing to the dissolving partner the amount due him, they can hardly claim injury resulting from the withdrawal of partnership assets or funds, and thus they further reduce the damages they may recover."). *Compare* James v. Herbert, 149 Cal. App. 2d 741, 749, 309 P.2d 91, 96 (1957) ("Where without fault on his part, one party to a contract who is willing to perform is prevented from doing so by the other party, the primary measure of his damages is the amount of his loss, which may consist of his reasonable outlay or expenditure toward performance *and the anticipated profits which he would have derived from performance. . . Damages consisting of the loss of anticipated profits need not be established with certainty.*") (emphasis added) *with* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.3, at 153-57 (1973) (discussing the traditional problems of recovery for lost profits and observing, "[t]he certainty rule is very often applied to bar claims for lost profits. Perhaps it is applied to bar such claims more often than in any other case."). Several cases have indicated lost profits are recoverable but have provided little or no guidance concerning damage computation. *See, e.g.*, Karrick v. Hannaman, 168 U.S. 328, 337 (1897) (pre-UPA); Pemberton v. Ladue Realty & Constr. Co., 237 Mo. App. 971, 982, 180 S.W.2d 766, 771 (1944) (pre-UPA); Farwell v. Wilcox, 73 Okla. 230, 231-32, 175 P. 936, 937 (1918) (pre-UPA).

As to the effect of disregarding goodwill in account valuation, in many cases the value of goodwill is minimal or rests in the skills or reputation of the dissolving partner. For a discussion of the use of dissolution as a means of "misappropriating" the goodwill of a business, see Hillman, *supra* note 17, at 27-33. For a brief discussion of the use of liquidated damages clauses in partnership agreements, see *infra* note 171.

127. *See generally* A. CORBIN, CORBIN ON CONTRACTS §§ 1136-1142 (1964) (discussing the adequacy of specific performance as a remedy for a variety of contractual problems); Kronman, *supra* note 119, at 351. Professor Kronman observes:

> Whenever a court calculates money damages, there is some risk that it will undercompensate the injured party. But the magnitude of the risk is inversely related to the completeness and reliability of the information on which the court bases its award. At one extreme, where there is a well-developed market generating evidence of substitutability,

The UPA provides a limited version of specific performance by granting a non-breaching partner the right to possess partnership property for the agreed term and defer the dissolving partner's account settlement.[128] These provisions advance the risk-aversion interests of the dissolving partner but disregard this same partner's liquidity interests. If the non-breaching partner is in a position to carry on the business, the continuation right, when combined with adequate damages and a deferred account settlement, also advances the non-breaching partner's stability interests. Theoretically, the continuation right also gives the non-breaching partner the economic equivalent of the benefit of the original bargain. Given the difficulty of establishing prospective damages, however, this ideal state is seldom achieved.

Continuation of the business is sometimes impractical, particularly when the withdrawing partner's contributions are unique and therefore cannot be replaced. For example, if the dissolving partner has brought to the venture skills, technical expertise, research capacities, or a reputation important to the success of the partnership,[129] the possibility of continuing the business alone or with a substitute partner may be remote.[130] If damages are limited because they are incapable of proof, the remedies of the UPA can hardly be viewed as compensatory. Risk-aversion interests are thus advanced, while liquidity and stability considerations largely are subordinated.

As an alternative to continuation, the non-breaching partner faced with a premature dissolution may elect to wind up the affairs of the business and liquidate its assets.[131] However, if no market exists for the assets the liquidation

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> this risk is minimal. At the other extreme, where there is no market or at most a few isolated transactions, this risk is substantial. There is a point between these two extremes at which the risk becomes unacceptably large. . .. This is the point separating those contracts that are specifically enforceable from those that are not — the point to which the uniqueness test obliquely refers.

Id. at 363.

128. *See* UNIF. PARTNERSHIP ACT § 38(2)(b)-(c). The continuation right is conditioned on (1) unanimous agreement among non-breaching partners to continue the venture; (2) settlement of the dissolving partner's account or securing the payment of this amount by bond; and (3) indemnification of the dissolving partner against certain partnership liabilities. *Id.* For a discussion of these conditions and other problems in continuing a partnership following its dissolution, see Hillman, *supra* note 10, at 552-58.

129. *Cf.* Page v. Page, 55 Cal. 2d 192, 359 P.2d 41, 10 Cal. Rptr. 643 (1961) (dissolving partner more involved in management than the other partner). This will often be the case when the non-breaching partner has provided the financing while the dissolving partner operated the business.

130. Professor Latty observed:

> [O]ne partner may suffer "irreparable" loss, not readily compensable by the damages he may recover from the other partner for breach of the contract to continue a partnership, if the contract-breaking partner is allowed to pull out and take his talent and share of the firm property away with him.

E. LATTY, INTRODUCTION TO BUSINESS ASSOCIATIONS 471 (1951).

Although the non-breaching partner may preclude the dissolving partner from pulling out his share of the firm property, there is little the non-breaching partner can do to compel the dissolving partner to leave his talent in the venture. For a discussion of convenants not to compete, see *infra* notes 172-79 and accompanying text.

131. *See* UNIF. PARTNERSHIP ACT § 38(2)(a).

option may prove unsatisfactory.[132] The distress sale character of many liquidations of closely held businesses is well documented.[133] Indeed, the UPA does not preclude a partner who has wrongfully caused a premature dissolution from acquiring the assets of the partnership and continuing the business without the non-breaching partner.[134] This gives rise to the so-called squeeze out, partnership style. Such a tactic advances both the risk-aversion and liquidity interests of the breaching partner. This may result in a more efficient use of resources by freeing a portion of capital otherwise trapped in a business. However, the non-breaching and now excluded partner may be left in a position inferior to that resulting from full performance of the partnership agreement.

Wholly apart from the question of efficiency is the issue of, for want of a better term, morality.[135] Professor Linzer argues:

> "[M]orality" stands for the idea that it is both fair and appropriate to hold people to promises they freely made. This view is inspired both by a desire to protect the promisee's reasonable expectations and by a sense that personal liberty requires that people be able to bind themselves in a manner that will be enforced by the courts. Notions of liberty of contract have changed over the years, and courts will not enforce promises that are induced unfairly or that contain unfair terms. Assuming a fair bargain, however defined, the law ought to hold parties to their agreement.[136]

In part, the "moral" approach to remedies is justified by perceived deficiencies in analyses of economic efficiency. Professor Linzer observes that much of the scholarship in law and economics "has been devoted to measuring values for which there is no conventional market."[137] While an efficiency analysis may provide satisfactory results in the commercial setting, in other contexts the "economist can only speculate about what is important to the parties, and is likely to ignore or denigrate those values that only the parties can accurately

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132. This problem is discussed in Hillman, *supra* note 10, at 532-33.

133. *See, e.g.*, A. BROMBERG, *supra* note 3, § 83A, at 474.

134. Utilizing dissolution as a method of "appropriating" the interest of a partner at an unfair price may violate fiduciary standards applicable to partners. *See, e g.*, Page v. Page, 55 Cal. 2d 192, 197-98, 359 P.2d 41, 45, 10 Cal. Rptr. 643, 647 (1961) (dictum warning that use of dissolution as a method of appropriating the "new prosperity" of a partnership without adequate compensation is a breach of fiduciary duty); Shawn v. England, 570 P.2d 628, 633 (Okla. Ct. App. 1977) ("If a partner decides to dissolve a partnership and appropriate the business to himself, he must first fully compensate his co-partner for his share of the gain to be realized from the fulfillment of a prospective business undertaking the consummation of which is imminent.").

Appropriation cases, however, are rare, and fiduciary principles may represent a theoretical rather than real check on the use of dissolution as a technique for squeezing out unwanted partners when competition for the assets is nonexistent. *Cf.* Nicholes v. Hunt, 273 Or. 255, 541 P.2d 820 (1975); Cude v. Counch, 588 S.W.2d 554, 555-57 (Tenn. 1979). Similar techniques are applied in corporate settings. *See* F. O'NEAL & R. THOMPSON, OPPRESSION OF MINORITY SHAREHOLDERS § 5.21 (1985).

135. The term commonly is used to describe contracts as reflecting moral obligations to perform. As so employed, the term probably is unobjectionable. However, the implication that contrary views represent amoral, or even immoral, approaches to contracts is unfortunate.

136. Linzer, *supra* note 89, at 112-13.

137. *Id.* at 116.

assess."[138] The difficulties in applying an efficiency analysis are demonstrated by the existence of opposing views on the efficiency of the remedy of specific performance.[139]

In conclusions if not in premises, the theories of efficiency and morality may yield similar results. In his defense of specific performance as an efficient remedy, Professor Schwartz observed:

> [Another] reason why courts should permit promisees to elect routinely the remedy of specific performance is that promisees possess better information than courts as to both the adequacy of damages and the difficulties of coercing performance. Promisees know better than courts whether the damages a court is likely to award would be adequate because promisees are more familiar with the costs that breach imposes on them. In addition, promisees generally know more about their promisors than do courts; thus they are in a better position to predict whether specific performance decrees would induce their promisors to render satisfactory performance.[140]

Whether viewed from the perspective of efficiency or that of morality, the problem in the contexts of partnerships is the same — the services a partner brings to a venture may be unique, and damages may be difficult to ascertain and prove prospectively. Furthermore, the remedies of the UPA applicable to premature dissolutions often do not protect the reasonable expectations of the non-breaching partner. By focusing on the risk-aversion interests of the dissatisfied partner, the UPA renders the partnership a flawed and unstable form of business organization.

Differences over theory notwithstanding, a trend has developed towards an expanded use of specific performance to redress contract breaches. For example, section 359 of the *Restatement (Second) of Contracts* reflects a traditional and restricted view of specific performance,[141] the Comment to this section suggests a more flexible approach:

> Adequacy is to some extent relative, and the modern approach is to compare remedies to determine which is more effective in serving the ends of justice. Such a comparison will often lead to the granting of equitable relief. *Doubts should be resolved in favor of the granting of specific performance or injunction.*[142]

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138. *Id.*

139. *See supra* note 119. The purpose of this discussion is not to add yet another efficiency analysis but rather to outline the scope of the debate. *Cf.* Macneil, *supra* note 119, at 954 n.28 ("It thus seems likely that the intellectual outpouring on this subject applies only to a relative handful of actual situations. If so, should the legal system burden itself with the kinds of high-cost analyses, producing very high transaction costs, both to parties and society generally, required by microeconomic analysis of this kind? Or would it not be far better to ignore all the sophistication in favor of historical or more intuitive solutions?").

140. Schwartz, *supra* note 113, at 277.

141. "Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party." RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981).

142. *Id.* § 359, comment a (emphasis added). For a discussion of the background of both section 359 and comment a, see Linzer, *supra* note 89, at 120-26.

A number of decisions reflect this "modern" and flexible approach to remedies.[143] For example, some courts recently have decreed specific performance, notwithstanding the apparent adequacy of damages, in cases involving teacher reinstatement,[144] construction contracts,[145] and loans.[146] Professor Linzer has observed that these cases display a tendency to consider "the *full* cost to promisees of nonperformance and the *real* value to them of the bargain that they made. In addition, there is often a hint of the view that people should be held to their promises, and that the only effective way to do this is to grant specific performance."[147]

This trend towards specific enforcement of contracts has obvious relevance to partnership dissolutions. In its observation that there exists "a strong presumption against" the availability of the remedy, the First Circuit in *Infusaid* quite clearly reflected the traditional approach outlined in the *Restatement (Second) of Contracts*. Other courts, however, might choose the more flexible approach outlined in the Comment and, after balancing equities, resolve doubts in favor of specific performance. Although the UPA does not support such an approach, the problem of insuring that the expectations of the non-breaching partner are not frustrated because of a premature dissolution requires that partnership law not preclude specific performance merely because the contract is in the form of a partnership agreement.

C. *The Case of Personal Services*

The *Infusaid* observation that specific performance is inappropriate unless "the relationship is found to be without a significant personal services component"[148] reflects the traditional reluctance of courts to specifically enforce personal service contracts.[149] This limitation is most commonly justified by concerns over involuntary servitude, the impracticability of judicial supervision, and the impossibility of compelling cooperation between antagonistic parties.[150] The personal services limitation represents the most sensible restriction on relief in the form of specific performance.[151]

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143. These cases are collected and evaluated in Linzer, *supra* note 89, at 126-30. Other commentators have observed this trend. *See, e.g.*, Van Hecke, *Changing Emphasis in Specific Performance*, 40 N.C.L. REV. 1 (1961).

144. *See, e.g.*, AAUP v. Bloomfield College, 136 N.J. Super. 442, 448, 346 A.2d 615, 618 (App. Div. 1975) ("In view of the uncertainty in measuring damages because of the indefinite duration of the contract and the importance of the status of plaintiffs in the milieu of the college teaching profession, it is evident that the remedy of damages at law would not be complete or adequate.").

145. *See, e.g.*, Metropolitan St. Louis Sewer Dist. v. Zykan, 495 S.W.2d 643 (Mo. 1973). *See generally* D. DOBBS, *supra* note 126, § 12.22.

146. *See, e.g.*, Cuna Mut. Ins Soc'y v. Dominguez, 9 Ariz. App. 172, 450 P.2d 413 (1969); Vandeventer v. Dale Constr. Co., 271 Or. 691, 534 P.2d 183 (1975).

147. Linzer, *supra* note 89, at 130 (emphasis in original).

148. 739 F.2d at 669.

149. *See generally* D. DOBBS, *supra* note 126, § 2.5, at 63; Van Hecke, *supra* note 143, at 16-20.

150. *See* D. DOBBS, *supra* note 126, § 2.5, at 63; Van Hecke, *supra* note 143, at 16.

151. *Cf.* Schwartz, *supra* note 113, at 296-98 (concluding that efficiency considerations justify

Application of the personal service limitation to partnerships requires a case-by-case analysis. Some partners, for example, are indistinguishable from employees, and in such ventures the personal nature of the services may prove an effective bar against specific performance.[152] Other partners provide little or no personal services, and if the reasoning of *Infusaid* is accepted, specific performance may prove to be a significant remedy to redress breaches of agreements covering such ventures.[153]

The difficult cases lie between these two extremes. The expectation that partners in a particular venture are expected to provide "services" does not necessarily foreclose, without further consideration, the remedy of specific performance. A minority of courts, for example, has granted specific performance of building and construction contracts.[154] Such cases generally have not involved partnerships, but they nevertheless have relevance to partnerships formed to develop real estate.[155] The character of "services," in short, must be evaluated in light of legitimate reasons for denying the remedy of specific performance. Particularly when the compulsion of personal services is not a major issue, the remedy of specific performance as a means of curing breach of a partnership agreement may prove appropriate.[156]

III. What Can Partners Do? The Planning Perspective

Although the UPA renders all partnerships freely dissolvable, stability is sometimes an important objective of business partners.[157] Given the apparent

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a more liberal use of specific performance but adding that liberty considerations mitigate against the remedy in some situations in which it is now available).

152. *See generally* D. Dobbs, *supra* note 126, §§ 12.25-.26; Van Hecke, *supra* note 143, at 14-20. For a case holding the employer did not have the power to terminate an employment contract, see Jones v. Williams, 139 Mo. 1, 39 S.W. 486 (1897) (employee was also a stockholder in employer corporation).

153. This article assumes, perhaps unjustifiably, the validity of judicial supervision, personal liberty, and the impossibility of compelling cooperation as supportable restrictions on the availability of specific performance. Particularly with respect to the latter two restrictions, further analysis should be undertaken. For example, "personal liberty" is a general concept that should be refined (but not necessarily limited) to have meaning in the contexts of both contract and partnership laws. Further, if specific performance is more widely available, it is possible that otherwise antagonistic parties would have an incentive to cooperate.

154. *See supra* note 145.

155. Because of tax advantages, many real estate ventures are operated as partnerships.

156. Specific performance of partnership agreements would create special problems when the character of contributions of partners within a venture vary substantially. Assume, for example, a fixed term partnership consists of two individuals, *A* and *B*. *A*'s contribution consists of capital and his good reputation; he does not perform services for the venture. *B* breaches the agreement prior to the expiration of its term. The remedy of specific performance is doubtful because the subject of the decree is personal services. But what if the breach is by *A* instead of *B*? In this case, personal services are not an issue. *B*, assuming for the sake of this example the inadequacy of damages, may compel completion of the agreed term. In such event, only one partner, *B*, has the power to dissolve prematurely, a result made possible by the demise of the mutuality of remedy doctrine but perhaps not contemplated by the two partners at the inception of their relationship.

157. The lack of stability in the partnership form of organization often prompts individuals to incorporate their ventures.

conflict between the free dissolution posture of the UPA and the desire of some partners to stabilize their relationships, the question becomes: What can partners do, short of incorporation, to eliminate or minimize the risk of premature dissolution?[158]

Some measure of stability may be provided through effective business planning. Unlike corporations, partnerships are stabilized, to the degree possible, largely through contract rather than statute.[159] This requires individuals forming a partnership to recognize the fragile nature of their form of business association.[160] Facilitating sensible planning is the high degree of cooperation that normally exists at the inception of a partnership.[161] Too frequently, however, partnerships are established informally and without any measurable degree of planning;[162] in such cases, the opportunity to address major issues is more theoretical than real.[163]

Probably the most important method of achieving some degree of stability is the establishment of a fixed partnership term.[164] This will not render a partnership indissolvable, but, in many cases, it will increase the "costs" assigned to a partner desiring a premature, wrongful dissolution. However, when those "costs" become acceptable to a dissatisfied partner, that partner effectively enjoys the option, and often the incentive,[165] to dissolve the partnership in violation of the partnership agreement. Accordingly, more than a simple agreement concerning the term of the partnership may be necessary to provide meaningful disincentives to dissolution.

Sometimes, partnership agreements establish a fixed term and include a provision rendering ineffective attempts to dissolve before the expiration of the term. While this is clear evidence of the intent of the partners, it nevertheless is meaningless in light of the distinction drawn under partnership law between

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158. The inquiry is directed to planning alternatives that should be considered at the inception of a partnership. During the life of a partnership, one thing partners may do to avoid premature dissolution is attempt to accommodate the desires of the least satisfied partner. The degree to which the law should, as it now does, encourage such action is open to question. *See infra* notes 187-90 and accompanying text.

159. *See* Hillman, *supra* note 17, at 61-87.

160. *See, e.g.*, M. VOLZ & A. BERGER, THE DRAFTING OF PARTNERSHIP AGREEMENTS 13-16 (1976) (discussing the importance of a well-drafted partnership agreement).

161. *Cf.* Worcester, *The Drafting of Partnership Agreements*, 63 HARV. L. REV. 985, 986 (1950) ("Since a partnership is an extremely intimate relationship, perhaps the greatest potential problem is the risk of future disagreement among those who start out with the highest mutual regard.")

162. No formalities are required to create a partnership, and the ease with which the relationship can be established often undermines any deliberative business planning. For a further discussion of this point, see Hillman, *supra* note 17, at 16-19.

163. In the absence of a clear written or oral agreement, courts may infer terms. For a discussion of the implication of partnership terms, see *id.* at 16-33.

164. Defining the undertaking rather than the term may also provide a measure of stability.

165. An incentive to dissolve might arise, for example, when a partner does not wish to share opportunities with other partners. Most courts would agree that a dissolution for the purpose of misappropriating partnership opportunities is a breach of fiduciary duties. Enforcement of fiduciary responsibilities, however, may prove problematic. *See supra* note 134. If the partner is not permitted to dissolve the partnership, fiduciary responsibilities continue, and the position of the other partners may be improved. *See infra* notes 211-213 and accompanying text.

the power and the right to dissolve. It is both ironic and unfortunate that the same statute which subordinates most of its norms to contrary agreements among the partners also precludes any attempt by partners to waive by agreement their powers of dissolution.[166]

Even a clearer expression of intent may prove ineffective. Suppose, for example, a partnership agreement establishes a term, provides that no partner has the power to dissolve prior to the expiration of that term, and adds that if any partner attempts to dissolve or otherwise withdraw, the partnership agreement may be specifically enforced against that partner. Two obstacles face the non-breaching partner seeking to enforce such an agreement. First, the UPA does not permit a waiver of the power of dissolution. Second, even though contracting parties freely agree to a provision giving the non-breaching party the right to secure specific enforcement of the agreement, most courts do not view such provisions as binding.[167] This type of an agreement, if properly drafted, may render specific performance of the non-partnership contract more likely, but it cannot insure the availability of the remedy in the event of a breach.[168]

Enforceability problems should not deter partners otherwise desiring the remedy of specific performance from including appropriate provisions in their agreement. A specific enforcement clause can only increase the possibility that equitable relief will be available, particularly if a court follows the *Infusaid* lead and treats partnership dissolution as a problem of remedies rather than a question of partnership law. Further, a well drafted clause tailored to the peculiar circum-

166. Arbitration clauses, which are commonly used in partnership agreements, do not restrict the power of a partner to dissolve. *See* Wolf v. Baltimore, 250 Pa. Super. 230, 378 A.2d 911 (1977).

167. Although an agreement attempting to give the non-breaching party the right to compel specific performance will be given some weight, a court will nevertheless treat the remedy as a matter of judicial discretion. The leading case is Stokes v. Moore, 262 Ala. 59, 77 So. 2d 331 (1955). Although *Stokes* involved an employment contract rather than a partnership agreement, the court's comments are nevertheless relevant to partners:

> We do not wish to express the view that an agreement for the issuance of an injunction, if and when a stipulated set of facts arises in the future, is binding on the court to that extent. Such an agreement would serve to oust the inherent jurisdiction of the court to determine whether an injunction is appropriate when applied for and to require its issuance even though to do so would be contrary to the opinion of the court.

Id. at 61, 77 So. 2d at 334. *See generally* D. DOBBS, *supra* note 126, § 12.5, at 825 (indicating there is 'no clear answer" to the issue of whether a party may contractually agree to specific performance or an injunction against breach); Kronman, *supra* note 119, at 369-76 (discussing the relationship between specific performance and freedom of contract); Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495, 520-23 (1962) (explaining why specific performance clauses are a rarity).

168. Speaking generally of contractual provisions for specific performance, Professor Kronman has observed:

> A contractual provision accompanied by a lengthy description of those aspects of the transaction that makes specific performance desirable is likely to carry more weight than a provision unadorned by supporting explanation. But in no event will the contract provision prevent a court from independently determining the appropriateness of injunctive relief.

Kronman, *supra* note 119, at 371; *see also* Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article II*, 73 YALE L.J. 199, 252 (1963).

stances of the partnership and including a statement indicating why specific performance is appropriate will focus the partners' attention at an early stage on their expectations for the duration of the venture. Used in this fashion, the agreement serves both to spell out the rights and responsibilities of the parties, and to educate the partners by providing them with the occasion to evaluate carefully their mutual expectations.

Partners may also attempt by agreement to alter the consequences of dissolution. For example, a partnership agreement may provide for a continuation of the business following a dissolution and the deferred payout, often on an installment basis, of the dissolving partner's interest. Such an understanding, which is generally referred to as a continuation agreement, strikes a balance between stability and liquidity interests. Continuation agreements, however, are most appropriately utilized in anticipation of either the death of a partner[169] or the dissolution of a partnership which is terminable at will.[170] Used more broadly as a response to the premature and wrongful dissolution of a fixed term partnership, such agreements normally leave the continuing partner in a position inferior to that resulting from imposition of the wrongful dissolution sanctions of the UPA.[171]

More meaningful stability provisions are found in the covenants not to compete often included in partnership agreements.[172] These devices are particularly common in partnerships among professionals,[173] although they also appear in

169. *See generally* Bromberg, *Partnership Dissolution — Causes, Consequences, and Cures*, 43 TEX. L. REV. 631, 653-59 (1965); Fuller, *Partnership Agreements for Continuation of an Enterprise After the Death of a Partner*, 52 YALE L.J. 202 (1940); Note, *Partnership Continuation Agreements*, 72 HARV. L. REV. 1302 (1959).

170. Because the dissolution of such a partnership is not "in contravention of the partnership agreement," UNIF. PARTNERSHIP ACT § 38(1), it will not activate the wrongful dissolution sanctions of the UPA. *See generally* Hillman, *supra* note 10, at 537-39.

171. This is because the continuation agreement will probably modify the deferred payout provisions of the UPA and provide greater liquidity than the statute would accord. An alternative is to provide for liquidated damages in the event of a premature dissolution. *See, e.g.*, Beck, *Formalizing the Farm Partnership*, 54 NEB. L. REV. 558, 564 (1975) (advising partners they may wish to provide an "exacting measure of damages in the formalized partnership agreement"); *see also* Goetz & Scott, *supra* note 119 (arguing that in most circumstances efficiency would be maximized by the enforcement of the agreed allocations of risks reflected in a liquidated damages clause).

The enforceability of liquidated damages clauses relating to partnership dissolutions is beyond the scope of this article. Note, however, that the task of developing a reasonable forecast of damages from a premature partnership dissolution often will prove difficult, if not impossible. The complexity increases in proportion to the number of partners, to the degree contributions by partners vary, and as the length of the partnership term increases.

172. *See, e.g.*, D. FESSLER, *supra* note 50, at 117 ("[I]t is the willingness of courts to tolerate definite non-competition clauses in partnership agreements that more than any single factor, stabilizes the relationship."). Enforcement of a non-competition clause may complement the right of the partner not causing the wrongful dissolution to continue the business and settle the account of the breaching partner without regard to the value of that partner's interest in goodwill. *See supra* note 14.

173. *See, e.g.*, Gibson v. Angros, 491 P.2d 87 (Colo. App. 1971) (medical partnership); Akey v. Murphy, 238 So. 2d 94 (Fla. 1970) (medical partnership); Foti v. Cook, 220 Va. 800, 263 S.E.2d 430 (1980) (accounting firm).

other contexts.[174] Typically, such covenants provide that, in the event of a premature dissolution, the dissolving partner[175] is precluded from engaging in activities, in a defined area, which will compete with those of the partnership. The clauses, which are used in both fixed term and terminable at will partnerships, often restrict activities following the withdrawal from a partnership for any reason.[176] Breach of a covenant not to compete may give the protected partner the option of either seeking damages or pursuing injunctive relief.[177] Such clauses, which occasionally are accompanied by liquidated damages provisions,[178] may present, if enforceable,[179] significant disincentives to dissolution. For this reason, noncompetition covenants, together with agreements establishing

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174. *See, e.g.*, Habif v. Maslia, 214 Ga. 654, 106 S.E.2d 905 (1959) (partnership sold and serviced automobile motors); Brower v. Johnson, 56 Wash. 2d 321, 352 P.2d 814 (1960) (amusement park partnership).

175. Covenants not to compete are sometimes drafted to apply only to certain partners within the venture. *See, e.g.*, Henshaw v. Kroenecke, 656 S.W.2d 416, 417 (Tex. 1983); Willman v. Beheler, 499 S.W.2d 770, 773 (Mo. 1973); *but cf.* Rash v. Toccoa Clinic Medical Ass'n, 253 Ga. 331, 320 S.E.2d 168 (1984) (distinguishing restrictive convenants in employment agreements from those in partnership agreements and justifying the latter because the restrictions are mutual).

176. A consideration of the content and enforceability of convenants not to compete will not be undertaken in this article. For a discussion of the issue, see W. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 1633-1644 (W. Jaeger 3d ed. 1972). It is noteworthy, however, that many jurisdictions generally limiting or prohibiting enforcement of contracts restricting trade, professional or business activities nevertheless provide favorable treatment for certain of such agreements drafted in anticipation of partnership dissolutions. *See id.* § 1644. This is sometimes provided by statute. *See, e.g.*, ALA. CODE § 8-1-1 (1984); CAL. BUS. & PROF. CODE § 16602 (West 1964); FLA. STAT. § 542.33 (1983); N.D. CENT. CODE § 9-08-06 (1975); OKLA. STAT. ANN. tit. 15, § 219 (West 1966).

Under common law standards, enforceability of covenants not to compete often depends upon the reasonableness of the restriction. Factors considered include the nature of the business, the manner in which it has been conducted, the time limit of the restriction, and the territorial scope of the restriction. Overly broad restrictions may prove unenforceable. *See, e.g.*, Creter v. Creter, 52 N.J. Super. 197, 145 A.2d 149 (1958) (restraint of competition anywhere in the state is too broad); *cf.* Foti v. Cook, 220 Va. 800, 806, 263 S.E.2d 430, 434 (1980) (In upholding a noncompetition clause providing for the payment of a percentage of fees collected from former clients of the partnership, the court noted: "Important to our decision here is the fact that the partnership agreement does not prohibit [the former partner] from practicing his profession in Roanoke or elsewhere. . .").

177. *See, e.g.*, Rash v. Toccoa Clinic Medical Assocs., 253 Ga. 322, 320 S.E.2d 170 (1984); *cf.* Bauer v. Sawyer, 8 Ill. 2d 351, 358, 134 N.E.2d 329, 333 (1956) ("[E]ven if the provision in question is construed as one for liquidated damages the right to an injunction is not barred."). *But cf.* Thompson v. Allain, 377 S.W.2d 465, 467 (Mo. Ct. App. 1964) (suggesting that courts in equity enforce non-competition clauses because "there is no adequate remedy at law, and . . . the object of the contract can be attained only by the parties conforming expressly and exactly to its terms").

178. *See, e.g.*, Henshaw v. Kroenecke, 656 S.W.2d 416 (Tex. 1983) (agreement for partnership terminable at will provided for liquidated damages, but not injunctive relief, against specified partner in an amount equal to 12 times the average monthly billing to each client with whom the partner conducts business following the termination); Foti v. Cook, 220 Va. 800, 263 S.E.2d 430 (1980) (covenant restricted performance of services for clients of firm and provided that if such services were performed, the former partner would pay the partnership a percentage of the fee collected). *But cf.* Thompson v. Allain, 377 S.W.2d 465, 467 (Mo. Ct. App. 1964) (quoted *supra* note 177).

179. *See supra* note 176.

a term, constitute the principal contractual means of providing some stability to partnerships.

IV. An Alternative Perspective: Lessons from the Law of Corporations

The lore of partnership law emphasizes the contract as a basis for regulating the legal relationships among partners. The UPA is replete with provisions permitting partners to arrange their affairs in a fashion at variance with the otherwise applicable provisions of the Act.[180] Because the partnership agreement cannot effectively restrict the power of any partner to dissolve the venture, however, the freedom to alter statutory norms by contract is limited. The issue thus becomes: Should the right to alter statutory norms be extended to include restrictions on the power to dissolve when all partners so agree?

A useful point of comparison is provided by the incorporated counterpart of the partnership — the close corporation. Admittedly, using corporate law as a model for the reform of partnership law is unusual, for many recent reforms of the law applicable to close corporations have utilized the UPA as a sensible set of legal norms for the management of small, intimate business ventures.[181] Nevertheless, the intensive scrutiny given problems of close corporations in recent years justifies a comparative evaluation of the laws affecting dissolution of these two very similar types of business organizations.

No jurisdiction provides for free dissolvability of a close corporation by the unilateral declaration of a single, minority shareholder.[182] Most jurisdictions divide corporate dissolutions into two categories: voluntary and involuntary. Voluntary dissolutions occur when the holders of a requisite percentage of shares, typically a majority, vote to dissolve their corporations.[183] Involuntary dissolutions are occasioned by considerations of equity or necessity, such as deadlock, severe dissension, fraud, or oppression of minority shareholders.[184] A number of cases[185] and commentators[186] have suggested that these traditional grounds

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180. *See supra* note 7 and accompanying text.

181. *See, e.g.*, Israels, *The Close Corporation and the Law*, 33 CORNELL L.Q. 488, 488 (1948) ("[T]he participants [in a close corporation] consider themselves 'partners' and seek to conduct the corporate affairs to a greater or lesser extent in the manner of a partnership "); *id.* at 491 (the "objective of the participants in a close corporation is to equate the scheme of governance of their enterprise to that of a partnership").

182. In some states, however, free dissolvability may be approximated through provisions in the articles of incorporation authorizing dissolution on the demand of a single shareholder. *See, e.g.*, DEL. CODE ANN. tit. 8, § 355 (1983); N.Y. BUS. CORP. LAW § 1002 (McKinney 1963).

183. *See supra* note 18.

184. *See generally* Hillman, *supra* note 17, at 38-55.

185. *See, e.g.*, Capitol Toyota, Inc. v. Gervin, 381 So. 2d 1038 (Miss. 1980); Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983); Exadaktilos v. Cinnaminson Realty Co., 167 N.J. Super. 141, 400 A.2d 554 (Ct. Law. Div. 1979), *aff'd* N.J. Super. 559, 414 A.2d 994 (Ct. App. Div. 1980); *In re* Taines, 111 Misc. 2d 559, 444 N.Y.S.2d 540 (Sup. Ct. 1981); Topper v. Park Sheraton Pharmacy, Inc., 107 Misc. 2d 25, 433 N.Y.S.2d 359 (Sup. Ct. 1980).

186. *See, e.g.*, Afterman, *Statutory Protection for Oppressed Minority Shareholders: A Model for Reform*, 55 VA. L. REV. 1043 (1969); Hillman, *supra* note 17, at 49-55, 75-87; O'Neal, *Close Corporations Existing Legislation and Recommended Reform*, 33 BUS. LAW. 873, 885-88 (1978).

of relief for disgruntled minority shareholders are too narrow and that minority shareholders should be permitted to compel dissolution of their ventures under circumstances in which their reasonable expectations have been frustrated.[187] Indeed, some commentators have gone even farther and argued a close corporation should, like a partnership, be freely dissolvable at the will of any of its owners.[188]

Free dissolvability is not a widely accepted principle of corporate law. Even the less revolutionary concept of dissolution based upon a frustration of expectations represents a minority, although perhaps growing, approach to corporate dissolutions. What, then, is it about the close corporation that justifies an approach restricting the ability of a minority participant to compel a dissolution? Is this aspect of corporate law in need of further reform? Should dissolution of partnerships resemble more closely that of corporation? Or should a unified, middle ground be sought, with a relaxation of grounds for corporate dissolution and a tightening of the circumstances under which fixed term partnerships can be dissolved in breach of contract at the instance of a single participant?[189]

Some may attempt to dismiss the analogy with a close corporation because of the supposed uniqueness of partnerships. The argument might be that partners, unlike shareholders, suffer a greater risk because of their potential unlimited liability for the acts of others within their ventures. Because of this risk, or so the argument might go, partners must have a means of dissolving their ventures immediately. Such an argument, however, ignores the precarious positions of many shareholders in close corporations. Often, the shareholder in a close corporation has invested a substantial amount of capital and labor. This is subject to loss and therefore at risk. If the amount invested is a large percentage of the shareholder's net worth, as frequently is the case in close corporations, it is difficult to draw a distinction between the risk of the shareholder and that of the partner. Further, shareholders often personally guarantee the

187. At least one modern dissolution statute recognizes the importance of expectations. *See* MINN. STAT. ANN. § 302A.751, subd. 3a (West 1985) ("In determining whether to order equitable relief, dissolution, or a buy-out, the court shall take into consideration the duty which all shareholders in a closely-held corporation owe one another to act in an honest, fair, and reasonable manner in the operation of the corporation and the reasonable expectations of the shareholders as they exist at the inception and develop during the course of the shareholders' relationship with the corporation and with each other."); *see generally* Olson, *Statutory Changes Improve Position of Minority Shareholders in Closely-Held Corporations*, THE HENNEPIN LAW. (Sept.-Oct. 1983). *Cf.* CAL. CORP. CODE § 1800(b)(5) (West 1977) (permitting involuntary dissolution if "liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder or shareholders"); N.C. GEN. STAT. § 55-125(a)(4) (1982) (permitting involuntary dissolution if "liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder").

188. *See* Hetherington & Dooley, *supra* note 47. Under this approach, the shareholders desiring to avoid corporate dissolution could do so by purchasing the interest of the dissatisfied shareholder. This theory is evaluated in Hillman, *supra* note 17, at 69-75.

189. For an argument in favor of a unified structural, tax, and securities framework for small businesses, see Haynsworth, *The Need for a Unified Small Business Legal Structure*, 33 BUS. LAW. 849 (1978); *see also* Kessler, *With Limited Liability for All: Why Not a Partnership Corporation?*, 36 FORDHAM L. REV. 235 (1967).

debts of their corporation. To the extent of such guarantees, the interests and risks of the shareholder approximate those of the partner.

One argument in favor of extending the principle of free dissolvability to close corporations is that the ability of any owner to force a dissolution would prompt controlling shareholders to accommodate the needs of minority participants. Admittedly, this would redress quite effectively some of the grosser abuses inflicted on minority shareholders in close corporations. However, such a reform of corporate law would go too far. By focusing on the liquidity interests of minority shareholders, free dissolvability ignores the stability interests of shareholders, both minority and controlling, satisfied with the management of their enterprises.

A more appropriate method of reforming corporate law is to relax, but not eliminate, the traditional standards for involuntary dissolution of a close corporation. Expectations, not culpability, should be the relevant target of inquiry in most cases in which minority participants desire dissolution. To the extent that a minority shareholder had reasonable expectations at the inception of a venture, those expectations were understood by other participants in the enterprise, and the prospect that the expectations will be realized is remote, dissolution or a mandatory buy-out of the participant's interest may represent a sensible compromise between liquidity and stability interests in the close corporation setting.[190]

Much of the same analysis can be applied to partnerships. A partnership does not need to be a flawed and inherently unstable relationship when all of the partners agree to provide a measure of permanence to the venture. They should be able to do this by establishing a fixed term or specifying a particular undertaking. The preoccupation of the UPA with risk-aversion considerations is unnecessary when partners bargain to subordinate those concerns to considerations of stability. In such cases, premature dissolution should still be possible — not by a unilateral expression by one partner, but rather upon the occurrence of another of the events of dissolution specified in section 31 of the UPA.

Accordingly, neither the UPA nor corporate law serves as an appropriate model for the reform of standards generally applicable to the dissolution of closely held business ventures.[191] Each body of law should more closely approximate the other, with a middle ground established to facilitate the development of a unified, but not necessarily singular, legal structure for the dissolution of both partnerships and close corporations. Along this line, the following section offers some suggestions for the reform of partnership law.

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190. This approach is developed more fully in Hillman, *supra* note 17, at 69-87

191. Arguably, the standards of dissolution should be even more relaxed for close corporations than partnerships. Corporations normally have an unlimited life, and shareholders typically do not bargain on the issue of a term. When a venture is established for a defined term, as is the case with fixed term partnerships, a dissatisfied participant need only await the expiration of the term. The disgruntled shareholder does not enjoy a similar privilege.

V. Reforming Partnership Law Concerning Dissolutions: Addressing the Excesses of Free Dissolvability

A. *Defining the Role of the Agreement*

One of the more attractive features of partnership law is the flexibility it gives partners to tailor the legal structure of their ventures to the needs of the participants.[192] Ideally, partners exercise this flexibility through bargaining, the result of which is a contract.[193] However, a contract, at least in the form of a written agreement, cannot address all potential disputes among partners. Indeed, to use a written agreement as a detailed statement of principles of business governance would generate unacceptable transaction costs and, in most cases, prove unsuccessful.

This problem inherent in bargaining at the inception of a venture results from the complex nature of business governance. The relationship among partners is infinitely more complicated than that of parties to more typical and limited contracts.[194] For this reason, the partnership agreement is, at best, an unusual type of contract,[195] and bargaining necessarily is limited. Of course, this leaves a gap between the generality of the formal partnership agreement, which is the product of the bargaining, and the many potential controversies arising in day-to-day management. To a large extent, the gap is filled adequately

192. This feature of partnership law has had an important influence on the reform of the law applicable to close corporations. *See, e.g.*, 1 F. O'Neal, Close Corporations: Law and Practice § 1.14(a)-(b) (2d ed. 1971); Israels, *supra* note 181, at 491: Manne, *Our Two Corporation Systems: Law and Economics*, 53 Va. L. Rev. 259, 284 (1967).

193. *See supra* notes 6-7 and accompanying text.

194. This is clearest in the case of a short term contract for the sale of goods. The relationship among parties to some long term contracts, however, may create conflict between the needs for planning and flexibility. This gives rise to the relational model of contracts:

> In many exchange transactions, some aspects of the projection are complete and some are not. In a twenty year contract for the supply of coal, the subject, pricing formula, method of delivery, and duration may be spelled out. The relationship is relatively impersonal, tangible exchange is important, and a competitive market for coal may exist. On the other hand, the length of the contract puts strains on any effort to achieve complete initial protection. Despite careful negotiations and detailed planning, the initial agreement will probably fail to keep pace with change. At the same time, the transaction, because of high exit costs and specialized reliance, may be removed from the market. When these features are understood, the relational dimensions of the transaction come into sharper focus. . .. Both parties should understand at the outset that the long-term viability of the contract will depend upon continuing cooperation in performance and subsequent planning.

Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 Nw. U.L. Rev. 369, 401 (1981). *See generally* Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 Minn. L. Rev. 521 (1985); Macneil, *Values in Contract: Internal and External*, 78 Nw. U.L. Rev. 340 (1983); Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 Nw. U.L. Rev. 854 (1978); [hereinafter cited as *Adjustment*]; Macneil, *The Many Futures of Contracts*, 47 S. Cal. L. Rev. 691 (1974).

195. Commentators on the law of contracts have observed that this problem also arises in some long-term commercial contracts, which may be relational rather than discrete "to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations." Goetz & Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089, 1091 (1981). *See also* note 194, *supra*.

by statutory norms of business governance, such as the principle that differences concerning matters in the ordinary course of business are to be resolved by majority vote.[196] Such norms supply the standard of good faith applicable to the conduct of partners.[197]

Although they suffer some limitations, partnership agreements do serve an important function as constitutional documents for the governance of a partnership.[198] As such, they should address the broad issues affecting the partners, including identity of the partners, division of profits and losses, centralization of management, allocation of responsibilities, processes for decisionmaking, the consequences of the death of a partner, and, importantly, the duration of the venture. These issues, and not the minutiae of business governance, should occupy the attention of the partners as they attempt to develop a consensus on the structuring of their ventures.[199]

Unfortunately, many partnerships are formed on the basis of implied or half-articulated understandings. Too often, written agreements offer little improvement. Some lawyers approach the preparation of partnership agreements in a mechanical fashion and seek only slight refinements of supposedly well tested boilerplate clauses. In these cases, the partners are expected to adapt to the forms. While this approach may lower certain costs, it does not result in the type of constitutional document and statement of consensus that a partnership agreement should represent.[200] Focusing on important issues requiring a true consensus rather than the details of business governance would permit partners to streamline the negotiating process and result in more meaningful and understandable partnership agreements.

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196. UNIF. PARTNERSHIP ACT § 18(h).

197. *See infra* note 212; *see also* A. BROMBERG, *supra* note 3, § 68, at 389-90 ("The main elements of [the fiduciary duty] are well recognized: utmost good faith, fairness, loyalty."). *See generally* Note, *Fiduciary Duties of Partners*, 48 IOWA L. REV. 902 (1963). For an excellent general discussion of the nature of fiduciary relations and the rules that govern them, see Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795 (1983).

198. *Cf. Adjustment, supra* note 194, at 894 ("I feel some temptation to think of the written parts of contractual relations, especially very formal parts, such as collective bargaining agreements and corporate charters and bylaws, as constitutions establishing legislative and administrative process for the relation. . . . [But] if that concept or terminology is used to resurrect 'constitutions' long decayed and made obsolete, . . . we are, as a matter of principle, back to a relationally dysfunctional neoclassicism."); Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 5 (noting the unique, constitutional quality of a collective bargaining agreement and adding that the task of the arbitrator is "not to bend the dispute to the agreement, but to bend the agreement to the unfolding needs of industrial life").

199. This is not to say that partnership agreements should not deal specifically with more detailed matters affecting management. In some cases, the benefits of such specificity outweigh the transaction costs.

200. *Cf.* Fessler, *The Fate of Closely Held Business Associations: The Debatable Wisdom of Incorporation*, 13 U.C.D. L. REV. 473, 483 n.22 (1980) ("Perhaps it is appropriate that the lack of considered reasoning that is often behind the decision to incorporate can now be matched by an absence of particularized drafting in the crucial process of incorporation.").

B. *The Agreement as to Term: A Role for Indissoluble Partnerships*

What effect, then, is to be given an agreement concerning life of a partnership? The issue of duration is easily understood by those negotiating a partnership agreement. Admittedly, partners may have difficulty identifying the types of future disputes that may lead one or more partners to become dissatisfied. Most partners, however, understand that serious differences may arise and are in a position to evaluate their relative interests in stability, risk-aversion, and liquidity. The duration question is a fundamental matter on which the law should facilitate bargaining.

Because an agreement concerning duration is normally reached as a method of stabilizing a partnership, it should be given just that effect. If permitted to bargain effectively on this issue, partners most concerned with the adverse consequences of an early dissolution could pay the price for, and enjoy the benefits of, stability.[201] Partnership law can facilitate this objective by denying a partner the unilateral power to dissolve a partnership by express will prior to the expiration of the term previously accepted by that partner. An agreement concerning duration, in short, should effectively deny a partner the power to unilaterally cause a premature dissolution through an expression of will.[202] If cause exists, the dissatisfied partner may seek a decree of dissolution.

One objection to such a reform of the UPA might be that free dissolvability encourages the accommodation of the desires of the least satisfied partner. A similar argument has been offered to support the free dissolvability of close corporations.[203] The problem with this argument lies in its premise. If it is assumed that the cause of dissatisfaction in a business venture invariably is oppressive, arbitrary, or similarly culpable conduct by those in control, then free dissolvability is an important, and expeditious, method of protecting a minority participant from abuse. The reasons for dissatisfaction, however, are varied and may be unrelated to actions by others within the venture. To permit a dissolution regardless of the effect on the remaining participants represents an unwarranted preoccupation with the interests of a single, disgruntled participant.

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201. Several possibilities may be addressed in bargaining. First, partners can establish a venture terminable at the will of any of its members. Second, they can establish a fixed term partnership utilizing the premature dissolution provisions of the UPA. In the latter case, each partner would retain the power but not the right to dissolve the partnership. Alternatively, the power of each partner to cause a premature dissolution could be retained but different economic consequences than those provided by the UPA could be assigned. Partners should also be permitted to pursue a stabilizing alternative not presently available by making the partnership more closely approximate a corporation, at least for the agreed term. Further, partners may wish to vary the dissolvability of the venture depending upon the partner desiring to withdraw.

202. This would mean a partnership would continue absent some event of dissolution other than an expression of will. It may still necessitate relief in the form of specific performance with respect to certain of the obligations of partners, however. Other methods of causing a premature dissolution, such as a judicial decree upon a showing of cause, death or bankruptcy of a partner, or the express will of all partners would remain applicable. *See infra* notes 214-17 and accompanying text. The balance of the discussion will assume that the dissatisfied partner's ability to effect a premature dissolution is limited to a judicial decree.

203. *See supra* notes 182-90 and accompanying text.

A second possible objection to reforming the principle of free dissolvability concerns the increased costs of judicial administration of partnership dissolutions. This objection would be most potent if the principle of free dissolvability produced negligible litigation costs. Experience has shown, however, this is not the case. Current law shifts the focus of litigation from the question of the power of a partner to dissolve to the issue of the consequences of the dissolution. This is evident in the considerable number of cases addressing the wrongfulness of dissolutions.[204] The very uncertainty concerning the consequences of dissolution through an expression of will causes many partners to forego self-help and seek decrees of dissolution.[205] Indeed, the implementing mechanism of free dissolvability, dissolution through an expression of will, is best regarded as a very risky course of action. If the proposed reform of the UPA increases litigation costs, and this is by no means certain, the increase in costs would not likely be so substantial as to override other valid reasons for permitting partners to stabilize their relationships.

A third, and more persuasive, objection may be offered. Requiring a judicial decree to effect a premature dissolution may increase the risk of the dissatisfied partner. The ability to terminate risk promptly is probably the principal justification for the current law supporting free dissolvability.[206] By denying the dissatisfied partner the power to dissolve unilaterally, the partner may remain at risk for the actions of others during the full term of the partnership. Even if that partner has sufficient grounds to secure a decree of dissolution, a substantial period of time may elapse between the decision to dissolve and the date that objective is accomplished. During this period, the partner is at risk.

The ability to terminate risk, however, is not the sole objective worthy of protection by partnership law. When the partner seeking to terminate risk has previously agreed to a term for the partnership, then the risk-aversion interests of the one partner must be balanced against the legitimate objectives of the other partners. If the reported litigation on partnership dissolution demonstrated a recurring pattern of partners instigating dissolution to protect themselves from the risky decisions of their fellow-venturers, then risk-aversion interests should be treated as of paramount importance. Such, however, is not the case. Dissolution disputes rarely involve risk-avoidance concerns. More commonly, dissolution is sought because of the failure of a partner to perform obligations[207]

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204. *See generally* Hillman, *supra* note 10, at 536-52.

205. *See, e.g.*, Cooper v. Issacs, 448 F.2d 1202, 1206 (D.C. Cir. 1971) ("[T]he provisions of the Act regarding dissolution by decree of court were clearly designed to allow partners to extricate themselves from business relationships which they felt had become intolerable without exposing themselves to liability in the process. . . ."); A. BROMBERG, *supra* note 3, § 78, at 437 ("Judicial dissolution is particularly suited to facts which may amount to impossibility of performance or total breach of the partnership agreement, but which are so disputed or equivocal that automatic dissolution by operation of law, or self-help by partners would be reckless."). *See generally* Hillman, *supra* note 10, at 539-44.

206. *See supra* notes 51-55 and accompanying text.

207. The UPA authorizes a decree of dissolution when a "partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership

or continuing friction among the participants.[208] This suggests that risk aversion concerns, although worthy of consideration, should not be exaggerated.

An additional objection to requiring a judicial decree might be that a court is powerless to force an individual to remain a partner. This, however, confuses the issue of status with the problem of remedies. If dissolution is precluded, specific performance should be available as a remedy to redress many, but not all, defaults in performance by a partner. Undoubtedly a court will not compel an individual to perform services on behalf of another, and an abandonment of a partnership, evidenced by a withdrawal of services, normally cannot be enjoined. However, services are distinct from status as a partner, and limitations on the availability of the remedy of specific performance do not require the free dissolvability of partnerships. Not all partners provide services, and not all who abandon partnerships need to be relieved of the status and continuing responsibilities of a "partner."

An example may serve to illustrate both the advantages and, in certain cases, the limitations of the proposed reform. Assume a partnership consists of three individuals, *A*, *B*, and *C*. The *A-B-C* partnership agreement provides for a term of ten years. The agreement also contemplates varying contributions by the partners; *A* and *B* are to perform services, while *C's* principal contributions are financial and reputational in character. The partners agree to share income and losses equally. One year passes, and *C* desires to effect a premature dissolution. *C*'s reasons are not sufficient to warrant a judicial decree of dissolution.

Under existing law, *A* and *B* must be content with the imposition of wrongful dissolution sanctions against *C*. Admittedly, this will permit *A* and *B* to defer account settlement and continue the business for nine years. However, this remedy will not necessarily restore *A* and *B* to the position they would have been in without a dissolution. For example, losses for the next nine years are shared by two rather than three individuals. Risk is thus shifted from *C* to *A* and *B*. In addition, the required indemnification of the dissolving partner from post-dissolution liabilities means that *C*'s credit no longer backs the partnership. Particularly if they cannot find a substitute partner for *C*, *A* and *B* may be harmed in a fashion that a court cannot, or will not, compensate through an award of damages based upon speculation concerning the future.

The problem becomes more complex when the partner desiring dissolution is a significant service-provider. Assume, for example, it is *B* rather than *C* who desires to dissolve the partnership. Under existing law, *A* and *C* are powerless to prevent the dissolution, and *B* is free to pursue other opportunities.[209] The proposed reform would prevent *B* from unilaterally effecting a dissolution through an expression of will. The reform would not, however, provide a basis

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with him." UNIF. PARTNERSHIP ACT § 32(1)(d); *see, e.g.*, Ferrick v. Berry, 320 Mass. 217, 68 N.E.2d 690 (1946) (finding domineering conduct by one partner an alteration of the agreed relationship between the partners).

208. *See, e.g.*, Potter v. Brown, 328 Pa. 554, 195 A. 901 (1938) (refusing to decree dissolution because the business was prosperous notwithstanding the friction among partners).

209. *See infra* note 212.

for compelling *B* to continue to perform services. This problem would be treated, as it should, under the law of remedies.[210]

Assuming *A* and *C* cannot compel *B* to perform services, it nevertheless may be in *B*'s interest to continue active participation when the partnership cannot be dissolved unilaterally. For example, inability to effect a dissolution means *B* continues to share losses, but not necessarily income.[211] Further, if the *A-B-C* partnership continues, *B* remains subject to fiduciary standards and may therefore be required to share opportunities relating to the partnership business with *A* and *C*.[212] If this is the case, *B* may "voluntarily" elect to continue active participation in the partnership. If *B* chooses to abandon the partnership, it often will be in the interests of *A* and *C* to treat the abandonment as a basis for a decree of dissolution and seek imposition of sanctions against *B* for a wrongful dissolution.[213] In some cases involving abandonment, however, *A* and *C* may prefer to maintain the *A-B-C* partnership. If this is their choice, it should be given effect.

The principal advantage of the proposed reform is enhanced stability for fixed term partnerships. In some cases, however, a partner may have valid reasons for desiring a premature dissolution. Judicial review may serve quite effectively to evaluate the existence of cause to dissolve prior to the expiration of the partnership term.

C. *Dissolution for Cause*

Dissolution by judicial decree should remain a method of accomplishing a premature dissolution of a fixed term partnership. Section 32 of the UPA lists

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210. *See supra* notes 149-55 and accompanying text.

211. Absent an agreement to the contrary, partners are not entitled to remuneration for services. *See* UNIF. PARTNERSHIP ACT § 18(f). This is because the partner's compensation is in the form of distribution of profits. *See, e.g.*, Condon v. Moran, 11 N.J. Super. 221, 224, 78 A.2d 295, 297 (App. Div. 1951). In addition, absent a contrary agreement, partners are not required to perform services. *See* Hillman, *supra* note 41, at 875-78. However, the example discussed in the text suggests an agreement to perform services. Breach of an express or implied agreement to render services may result in an adjustment of partnership income allocations. *Cf.* Miller v. Hale, 96 Mo. App 427, 430, 70 S.W. 258, 259 (1902) (pre-UPA decision noting a partner "may abandon the contract, and thereby forfeit his right to an equal share of the proceeds of the business").

212. *See* UNIF. PARTNERSHIP ACT § 21(1) ("Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property."). Fiduciary principles restrict the ability of a partner individually to take advantage of business opportunities. *See, e.g.*, Homestake Mining Co. v. Mid-Continent Exploration Co., 282 F.2d 787 (10th Cir. 1960); Stark v. Reingold, 18 N.J. 251, 113 A.2d 679 (1955); Fouchek v. Janicek, 190 Or. 251, 255 P.2d 783 (1950). Dissolution, on the other hand, may enhance the ability of a partner to take advantage of partnership opportunities. Although fiduciary principles may restrict in theory the ability of a partner to dissolve in order to misappropriate partnership opportunities, in practice the effectiveness of this restriction is open to question. *See supra* note 165; *supra* notes 131-34 and accompanying text.

213. *A* and *C* could enjoy the benefit of the sanctions and perhaps add a substitute partner. In addition, the dissolution may permit the enforcement of a non-competition clause, the validity of which, in some jurisdictions, may depend upon dissolution of the partnership. *See generally* note 176.

a number of grounds supporting a decree of dissolution,[214] one of which — "circumstances [that] render a dissolution equitable"[215] — could not be stated with greater breadth. In practice, courts are reluctant to decree partnership dissolution in the absence of misconduct by those in control or severe friction that demonstrably harms business prospects.[216] Although consideration of cause as a standard for judicial dissolution is beyond the scope of this article, greater flexibility on the subject of cause may be in order, and the very type of expectations-based analysis suggested for use in connection with corporate dissolution may also prove appropriate when applied to partnerships.[217]

D. *Summing Up*

An agreement establishing the duration of a partnership should have the effect of denying any single partner the power to dissolve the partnership prior to the expiration of that term. This result may be accomplished by amending section 31 of the UPA to eliminate as a cause for dissolution the expression of will in contravention of an existing agreement. Such a reform would permit meaningful bargaining on the issue of duration and would be consistent with the general approach of the UPA in permitting partners to establish by agreement, norms for the governance of their businesses.

If partners choose not to accept a term, a terminable at will partnership would result. Even if a term is established, an early dissolution could result from other causes unrelated to the advancement of the interests of a single partner.

VI. Conclusion

The partnership is an unstable and therefore flawed form of business organization. Reflecting a questionable application of agency principles by the drafters of the UPA, free dissolvability undermines important stability interests of partners in business ventures. Accordingly, this article has suggested a reform of the UPA to deprive a partner of the power unilaterally to dissolve a partnership prior to the expiration of its term or completion of its undertaking. Under this reform, some fixed term partnerships would indeed be "indissoluble." If partners prefer free dissolvability over stability, they need only establish a terminable at will partnership.

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214. *See supra* note 44.
215. Unif. Partnership Act § 32(f).
216. *See generally* Hillman, *supra* note 10, at 544-52.
217. *See supra* note 190 and accompanying text.