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The Style of a Law Firm: Eight Gentlemen from Virginia

By Anne Hobson Freeman*

*Reviewed by John P. Austin***

In *The Style of a Law Firm: Eight Gentlemen from Virginia*, Anne Hobson Freeman describes the evolution of the Richmond, Virginia, law firm, Hunton & Williams, through penetrating sketches of the eight lawyers whose names appeared in the firm name during the firm's first seventy-five years. Brave woman is she to take on this task, bearing in mind that her husband is a senior partner in the law firm. Those of us who, for our sins, have been condemned to read law firm histories know that, with rare exception, they are dull as day-old dishwater. Somebody at the Hunton firm had the common sense to pick a trained professional writer to write the firm history and the extraordinary good sense to pick Freeman to do the job. Being close to the subject matter of the book has its dangers—does Freeman let all the rats out of the closet? Probably not, but this reviewer can make an educated guess that she accurately describes the tensions and joys of practice in the Hunton firm, together with its style (or core values).

There is no doubt about it: readers of this book are in for a treat. Of course, Freeman was lucky in the subject matter with which she was given to work. As a rather arrogant cub commencing practice with a Wall Street law firm in 1939, this reviewer would have been astonished to learn that men of the caliber described in this book would, given the opportunity to go to New York, choose to live and practice in Richmond, Virginia. Even today, this reviewer, not greatly hampered with facts about Richmond, Virginia, and long since a non-New Yorker, finds it very unusual that fate brought this very talented group of eight lawyers to the firm. The author describes with warmth Justice Powell's and George Gibson's decisions to join the firm. Today Hunton & Williams is a national law firm, and its ability to attract top-flight personnel comes as a surprise to no one.

As if Freeman's sketches were not enough, the book also contains "brief personal vignettes" of five of the eight partners by Justice Lewis Powell. In describing them collectively, Justice Powell makes this superb statement:

*Chapel Hill: Algonquin Books of Chapel Hill, 1989, 290 pp. (\$24.95).

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They had a perception of the practice of law that I admired. Law was one of the ancient professions. The primary purpose of practicing was not to make money. Indeed, the partnership agreement George Gibson and I drafted in the mid-1950s expressly recognized that lawyers have professional responsibilities. Partners and associates alike were encouraged to engage in pro bono activities and to take part in community affairs. Of course the firm also emphasized duty to render quality service to clients, whether rich or poor. I was proud to be a lawyer and to be a member of what is now known as Hunton & Williams. Lawyers share with judges the privilege and responsibility of preserving the rule of law in our country. This includes the liberties and rights guaranteed by our Constitution. I know of no other calling with a greater opportunity to serve the public good.

The book also contains a very readable Forward by W. Taylor Reveley III, the firm's managing partner. Reveley has some sensible advice regarding basics that none of us should overlook. This reviewer particularly liked the following remark: "Reasons for success are legion. But those institutions that prevail usually take strength from their past."

During the course of developing her eight sketches, Freeman gives us some interesting descriptions of Virginia during the years 1901 to 1976 and, in so doing, a considerable amount of Virginia history from that period. The book opens with a haunting description of Richmond attempting to recover from the Civil War and Reconstruction. Readers should have no doubt about it: a Southerner wrote this book. We revisit that famous "what if" that might have caused the North to let her erring sisters go: if Virginia had voted to secede when the cotton states did, Maryland and other border states might have quickly followed suit, leaving the North without a capital and the will to fight. But Freeman also adds this nugget: "The next three months General Hunton [partner Hunton's father] spent in prison at Fort Warren. The change of climate and particularly the change in diet from Confederate officers' rations to U.S. Army prison fare 'acted very beneficially' upon his constitution. For the first time in four years, his health improved substantially and he gained weight."

The origin of the firm tells one some planning was done when two young lawyers, Eppa Hunton, Jr., and Edmund Randolph Williams, asked an older and better-known lawyer, Beverley Bland Munford, to join them so that they "could do first-class work, as good . . . as any work in the country."

The Hunton partners were not always on the side of the angels, but they consistently showed up on significant occasions—such as major railroad reorganizations in the early years and the school desegregation cases in the later years.

Readers will agree that every law firm needs a partner like Edmund Randolph Williams. Men like Williams provide the glue that holds a bunch of feisty, temperamental lawyers securely in harness. Freeman highlights this point in her description of Williams keeping the peace by his unselfish "give

ups” of partnership points. People like Williams are not only respected but loved. And despite the predictable wear and tear on all firm personnel, there is a need for a Henry Watkins Anderson to put fire into a law firm and to attract clients. The reader gets an authentic feel for Gibson working for Anderson and Gay, and for others who worked for George Gibson. The reader sees people as they actually talked and behaved, as in Gibson’s description of his recruitment interview:

The first preparation for the interview with ‘the Colonel,’ as he was called, was to go through a grilling by Thomas Benjamin Gay. And after I’d been grilled sufficiently and was deemed in trim, I was ushered into the august presence. The interview, while august, was very brief because Mr. Anderson looked at me and said, ‘Gibson, can you look up law?’ It’s the dreariest, most servile task that any lawyer can perform. It’s not done now; machines do it. I said, ‘I think so, sir. I can certainly try.’

And his reply was: ‘Well, that is a good thing, for to put me to that task would be like putting a thoroughbred to the plow.’

Predictably, Anderson (like this reviewer’s senior partners) had nothing but contempt for billing by the hour “like a plumber or a bricklayer.”

On the whole, Freeman keeps her cool in descriptions of attitudes and events as to which she may have very different personal views. However, in describing the style of the firm, she refers to “Sufficiently Democratic,” the phrase George Gibson applied to the form of government he and Lewis Powell had devised. Freeman goes on to say: “But it was a limited democracy, particularly when it came to the division of the firm’s profits.” Perhaps here she writes with the realism of the wife of a then-junior partner in the firm who was overworked and underpaid.

Freeman notes the rapid changes in law practice after World War II, caused by expanding federal law and regulations and the surge in litigation. Because of this demand for more lawyers, law firms grew rapidly and, as they grew, their practice and style changed. For some, law practice today has become more a business than a profession, as illustrated in the *American Lawyer’s* intense preoccupation with profits, partners’ shares, and who’s making the money and who’s losing it—to the exclusion of matters of more professional interest.

Freeman has told us much about Hunton & Williams, but a number of fascinating questions remain unanswered. How could an up-and-coming law firm like that get by in 1950 with but one associate? At what point in the firm’s history did a perceived need for planning take over? Who pushed the need for planning in the firm (e.g., planning for space, personnel, desired type of practice, financial budgets, questions about women and minorities, partnership admittance policy, and pro bono policy)?

Having in mind Justice Powell’s statement regarding the practice of law, it is an unfortunate fact that we can all think of fine law firms which have upheld the best traditions of the law but which have fallen by the wayside through inability to meet the winds of change. Perhaps this reviewer should close by

challenging Freeman to supplement her fine book with Volume II, describing how the modern firm she knows so well has met and is meeting the difficult task of maintaining a high degree of professionalism in its practice and solving the planning issues so crucial to the firm's survival.

Contract Enforcement: Specific Performance and Injunctions

By Edward I. Yorio*

Reviewed by Douglas Laycock**

Contract Enforcement is an important and useful book. The subtitle is a better indication of its scope: this is a treatise on specific performance of contracts and closely related topics. The last such treatise was Pomeroy's, first published in 1879 and half-heartedly updated into the first half of this century.¹ *Contract Enforcement* is also much more current, and much more helpful, than the treatment of specific performance in the treatises by Williston² and Corbin.³

In addition to specific performance and injunctions in aid of specific performance, Professor Yorio considers selected issues of contract damages. These include what he calls monetary adjustments—damages or offsets awarded along with a specific performance decree—and a few rules of contract damages that he finds directly relevant to the choice between damages and specific performance. He promises general treatment of monetary remedies for breach of contract, including both damages and restitution, in a second volume.

The first nine chapters are organized doctrinally around general principles of equitable relief. The next nine chapters are organized around particular kinds of contracts—real estate, sales, construction, employment, and so on. Then come two chapters on contracting into and out of specific performance, one on jury trial, and one on choice of remedy in diversity cases. The book concludes with Yorio's argument against the routine availability of specific performance, based on his earlier article,⁴ and, finally, with a survey of specific performance in civil law systems, emphasizing French and German law.

He organizes all the sprawling doctrine that has grown up around specific performance, generally says something useful about each point, and collects a couple of cases on each point. There are some five hundred cases in his Table of

*Boston: Little, Brown & Co., 1989, 640 pp. (\$90).

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1. J. Pomeroy, *A Treatise on the Specific Performance of Contracts as It Is Enforced by Courts of Equitable Jurisdiction in the United States of America* (1897).

2. S. Williston & W. Jaeger, *A Treatise on the Law of Contracts* (3d ed. 1968).

3. A. Corbin, *Corbin on Contracts* (2d ed. 1964).

4. Yorio, *In Defense of Money Damages for Breach of Contract*, 82 *Colum. L. Rev.* 1365 (1982)

Cases. He offers more breadth than depth; he elaborates his analysis only occasionally. But his brief discussions emphasize what is central to each point. He offers conceptual clarification as well as a detailed practical reference.

Yorio is a traditionalist. He defends the traditional rules of equity, including the irreparable injury rule, the equitable defenses, and the emphasis on equitable discretion. A common theme is that specific performance tends to be an all-or-nothing remedy. If the remedy is granted, the contract is performed in full; if the remedy is denied, plaintiff gets nothing. He argues that damages are more flexible: courts can award the plaintiff's full expectancy, or they can award nothing. But they can also compromise by awarding plaintiff's reliance damages, or they can use doctrines of certainty, foreseeability, mitigation, and the like to produce a compromise figure. Some scholars criticize the tendency of contract damages to undercompensate,⁵ but Yorio sees this tendency as a virtue.

The conventional wisdom is that equity is the home of flexibility and discretion, and that law is rigid and rule-bound. Yorio's argument turns that upside down. He is certainly right that contract damages give courts room to compromise—to award more than nothing but less than the expectancy. Of course, courts can do the same thing with specific performance decrees, subjecting the decree to conditions, granting performance of only part of the contract, or tacking monetary adjustments on to the decree. But he may be right that it is easier for a judge or jury to hide a compromise in a deliberate undercalculation of damages than for a judge openly to compromise and justify a limited specific performance decree.

I am especially intrigued by Yorio's treatment of what he called the adequacy doctrine and what I call the irreparable injury rule—the rule that equitable remedies will be granted only when legal remedies are inadequate. I have just completed an eight-year study of that rule,⁶ collecting some fifteen hundred cases in all areas of the law, not just contract. Yorio and I describe the same trees, but we see a very different forest.

Yorio says some very traditional things about the rule. “[T]he adequacy doctrine remains the linchpin of the rules governing specific performance in American law.” “As a consequence of the adequacy test, specific performance and injunctions are exceptional remedies for breach of contract in American law.” And so on. He criticizes the Restatement (Second) of Contracts for being too generous with specific performance. But his summary of the rule is decidedly nontraditional: “For specific performance to be proper . . . the marginal benefit to the promisee must be sufficiently great that it outweighs the marginal costs imposed on the promisor and on the legal system.” This formulation would seem to require that judges balance costs and benefits on a case-by-case basis, picking the best remedy in every case. But if they are picking the best remedy in every case, nothing is left of the adequacy rule. The essence of the adequacy rule is a presumption that legal remedies are adequate and equitable

5. Schwartz, *The Case for Specific Performance*, 89 Yale L.J. 271 (1979).

6. D. Laycock, *The Death of the Irreparable Injury Rule* (forthcoming from Oxford Univ. Press 1990); Laycock, *The Death of the Irreparable Injury Rule*, 103 Harv. L. Rev. 687 (1990).

remedies are exceptional. Picking the best remedy in every case eliminates any presumption. Picking the best remedy in every case is exactly what Professor Fiss proposed when he urged abolition of the adequacy rule.⁷

My own forthcoming book shows that Yorio's more specific formulation is exactly right—courts balance costs and benefits and pick the best remedy in each case.⁸ I found only a handful of cases in which the adequacy rule actually explained the result, and the results in these cases were uniformly unappealing. Yorio and I agree that courts balance costs and benefits case by case. His label for that is that the adequacy rule is the linchpin; my label is that the rule is dead.

If we disagree only about labels, that is an academic matter of no real significance. But I think the disagreement matters. If courts are really balancing costs and benefits case by case, then it is positively misleading except where the plaintiff proves the inadequacy of legal remedies. The clarification that adequacy means only comparative advantage never catches up to the misleading black letter rule. Thus, the rhetoric of adequacy and irreparable injury is a powerful source of confusion, leading to much wasted effort by lawyers, to a significant number of silly opinions, and to a few bad results.

If courts are really engaged in a general balancing of costs and benefits, they should say so explicitly. Then lawyers could explicitly address that balance in their presentation of evidence and in their briefs. Lawyers should address that balance anyway, for it explains judicial results much better than any plausible version of the adequacy rule. We could clarify the law immensely by dropping all talk of adequacy and irreparable injury at the stage of permanent relief and discussing directly the costs and benefits of each possible remedy.

Balancing costs and benefits might be consistent with a preference for damage remedies if specific performance always imposed extra costs. But there is no reason to believe that is true. Damage remedies always impose the extra costs of trying the damage issue; specific performance is often simpler. Sometimes specific performance is dramatically simpler. Consider *Pennzoil v. Texaco*,⁹ where the damage judgment nearly destroyed Texaco. Specific performance of Pennzoil's contract to acquire part of Getty would have been vastly simpler for everybody, including the court, and vastly cheaper for Texaco.

Nor do we need a presumption against specific performance in order to make possible the compromise damage calculations that Yorio so admires. When there is a reason to award less than the full expectancy in a particular case, the court can state that reason as a ground for preferring damages. Plaintiff should not get specific performance in a case where he could not get his expectancy. If the court cannot state the reason, a slogan like the adequacy rule should not be allowed to substitute for a reason.

7. Fiss, *The Civil Rights Injunction* (1978).

8. See Laycock, *The Death of the Irreparable Injury Rule*, *supra* note 6.

9. 729 S.W.2d 768 (Tex. App. 1987), *writ denied n.r.e., cert dismissed*, 108 S. Ct. 1305 (1988).

It was the great commercial lawyer Karl Llewellyn who said that “Covert tools are never reliable tools.”¹⁰ The adequacy doctrine is a covert tool, and we should replace it with overt tools. Yorio is not misled by the covert tool; he described the cases accurately, and his book is a reliable reference source. But he revels in the courts’ covert description of what they are doing; he does not see the need for overt statements in plain English of the real basis for decision. On that, I think he is wrong.

10. Llewellyn, *Book Review*, 52 *Harv. L. Rev.* 700, 703 (1939).

Bromberg and Ribstein on Partnership

By Alan R. Bromberg and Larry E. Ribstein*

Reviewed by Steve Thel**

Partnership law has been pressed recently to accommodate a growing variety of business practices as well as changing conceptions of the role of law in regulating the affairs of business organizations. In response to this pressure, the National Conference of Commissioners on Uniform State Laws has revised the Uniform Limited Partnership Law twice and has undertaken to revise the Uniform Partnership Act.¹ These developments have received relatively little attention from the academic community. Commentators who might have been expected to address them have generally been preoccupied with corporate law issues, and partnership law no longer receives the in-depth study it once did.

Fortunately, Alan Bromberg and Larry Ribstein have undertaken a thorough reexamination of partnership law in their new treatise, *Bromberg and Ribstein on Partnership*. This work succeeds Professor Bromberg's single volume on partnership law,² which in turn succeeded Professor Judson Crane's hornbook.³ The organization of the predecessors has been preserved here, and some material is brought forward with very little change.⁴ Nonetheless, *Bromberg and Ribstein* is essentially a new book, and it is likely to prove valuable and influential.

The two volumes that have already been released focus on general partnerships. Future volumes will address limited partnerships and other organizational forms that are usually considered alternatives to incorporation. *Bromberg and Ribstein* follows the same course through general partnership law that a

*Boston: Little, Brown & Co., 1988, 2 vols. (looseleaf \$160). A supplement will be available in November 1990 (\$45).

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1. See Revised Uniform Partnership Act (Discussion Draft 1989), reprinted in 1 A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership* 39 (Supp. 1989) [hereinafter Discussion Draft]; UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations, *Should the Uniform Partnership Act Be Revised?*, 43 Bus. Law. 121 (1987); Weidner, *A Perspective to Reconsider Partnership Law*, 16 Fla. St. U.L. Rev. 1 (1988).

2. A. Bromberg, Crane and Bromberg on Partnership (1968).

3. J. Crane, *Handbook on the Law of Partnership* (2d ed. 1952).

4. For example, it appears that no one has had any occasion recently to consider the effect on a partnership of war between its members' nations. Compare A. Bromberg & L. Ribstein, *supra* note 1, § 2.04(g), with A. Bromberg, *supra* note 2, § 11.

firm follows through partnership, starting with formation, moving to business operations, and concluding with dissolution and winding up. The text is well-written and the discussion is generally comprehensive and well-informed by tax considerations, although users will still need to refer to other sources for exhaustive treatment of partnership taxation questions. The publisher has also gone to great lengths to make it possible to use one volume at a time. The loose-leaf volumes will be easy to update, and each volume contains a complete set of supplementary materials, including the important uniform statutes and a discussion draft of the proposed Revised Uniform Partnership Act, as well as indexes and tables for the whole work.

The treatise's few weaknesses as a practical tool stem from its being released as a serial. As it stands now, *Bromberg & Ribstein* does not purport to be complete. A chapter on the enforcement of partnership rights and obligations has not been released yet, and, as mentioned above, the authors are still working on the volumes on limited partnerships and related matters. The available volumes are sufficient for many purposes, but they cannot yet provide definitive guidance on some general partnership questions. Occasional references to material that is not available are annoying, but they are inevitable inasmuch as some central issues of general partnership cannot be treated in isolation. These flaws, such as they are, are temporary. Thus, for example, the completed treatise will presumably be much more useful in choosing the form in which to operate a business, a problem the treatise's predecessor called one of the most important in business law.⁵

Bromberg & Ribstein makes the law of general partnership readily accessible, and for this alone it will earn the gratitude of practitioners and students alike. The treatise does more than collect and describe the law, though; it also provides a penetrating analysis of what general partnership law ought to be. With the revision of the Uniform Partnership Act underway, this reexamination could hardly be more timely. Professors Bromberg and Ribstein are both important scholars of partnership law,⁶ and their treatise has already informed discussion within the committee that is revising the Uniform Partnership Act. It is likely to be even more influential as a broader public becomes involved in the revision process.⁷

5. A. Bromberg, *supra* note 2, at 124.

6. The UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations of the ABA Section of Business Law acknowledged the separate contributions of both authors when it recommended a complete revision of the Uniform Partnership Act. UPA Revision Committee, *supra* note 1, at 122 n.6. Professor Ribstein played a central role in drafting the partnership statute Georgia enacted in 1984, which has in turn greatly influenced the Discussion Draft of the Revised Uniform Partnership Act that has been prepared for the National Conference of Commissioners on Uniform State Laws. See Discussion Draft, *supra* note 1, at 43; Ribstein, *An Analysis of Georgia's New Partnership Law*, 36 Mercer L. Rev. 443 (1985); Weidner, *supra* note 1, at 2. Professor Ribstein is an official advisor to the committee that prepared the Discussion Draft.

7. For the somewhat different views of the Reporter for the revision project, Professor Donald Weidner, see Weidner, *supra* note 1.

Bromberg & Ribstein treats general partnership as fundamentally a contractual relationship.⁸ Partnership law is seen as a form contract that serves by default to govern the relationships of partners among themselves and with outsiders when parties fail to agree on governing rules.⁹ The wisdom of particular legal rules is thus largely a function of their costs and benefits within a contractual relationship.

Partners have considerable freedom to organize themselves as they see fit, and partners can adopt or reject most partnership law rules. Legally sophisticated parties presumably know this, and they may well be said to agree to be governed by generally applicable legal rules when they do not provide otherwise by formal agreement.¹⁰ Partnership law can reduce the amount of resources that sophisticated people have to devote to preparing partnership agreements by incorporating the rules that they would choose themselves.

In most cases in which it applies, however, partnership law is imposed without the consent of the parties. Partnerships are often formed without much thought being given to the matter of governing law, and most partnership disputes probably involve contingencies that partners did not contemplate—let alone address—when they went into business. Indeed, statutory partnership law is most likely to govern unanticipated problems, for small partnerships are much more numerous than large ones, and small partnerships are less likely to anticipate partnership law and draft around it. Partnership law can still be usefully analyzed as a standard contract in this context, and the authors argue that statutory partnership law should focus on the needs and expectations of informal partnerships operating small businesses.¹¹

The treatise judges the rules provided by partnership law, especially those provided by the UPA, against the terms of a sort of ideal contract. This contractual analysis of legal rules can be quite complicated, as in the case of the relationship between a partnership and third parties.¹² A simpler case is that of two people who agree that one will supply the money necessary for a business venture and the other will supply the necessary labor, with the profits of the venture to be divided equally. If the venture fails and all the money is consumed in the process, should the capital partner be able to recover part of his lost

8. See 1 A. Bromberg & L. Ribstein, *supra* note 1, § 1.01(d), at 1:11.

9. *Id.* at 1:12; see also Discussion Draft, *supra* note 1, at 44 (the “RUPA should be, in effect, a ‘default statute’ and focus on those situations where the parties have not addressed their partnership relationship, or a part of that relationship, in a partnership agreement”).

10. The authors recognize that, since a partnership is an association that the parties expect to last for a long time, it is an atypical contract at most. 1 A. Bromberg & L. Ribstein, *supra* note 1, at 1:11 (citing MacNeil, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law*, 72 Nw. U.L. Rev. 854 (1978)).

11. 1 A. Bromberg & L. Ribstein, *supra* note 1, at 1:12–13. Similarly, the committee that prepared the Discussion Draft of the Revised UPA “determined that the primary focus of the statute should be the small partnership, including the inadvertent partnership, since larger partnerships generally have a partnership agreement addressing, and often modifying, many of the provisions of the partnership statute.” Discussion Draft, *supra* note 1, at 44.

12. 1 A. Bromberg & L. Ribstein, *supra* note 1, ch. 4.

money from the laboring partner? The UPA seems to require the laboring partner to reimburse the capital partner for half of his lost money when the enterprise is liquidated.¹³ Yet it seems likely that many people who enter into informal partnerships expect to leave losses where they fall.¹⁴ Maybe partnership law should be changed to reflect the conventional understanding that partners need not contribute to capital losses.¹⁵

The contractual model offers valuable insights into partnership law and illuminates the interests involved, sometimes with startling clarity. Nevertheless, the model cannot make the hard choices that it identifies. Contractual analysis does not always yield a single, simple rule for recurring partnership problems. The partnership of capital and labor discussed above is a good example. Real people bargaining over the matter might make a variety of arrangements. It is, as *Bromberg & Ribstein* finds, "a close question whether the sharing of capital losses is an appropriate part of the U.P.A. standard form."¹⁶

Professors Bromberg and Ribstein do not claim to have a simple formula for creating the best possible partnership law rules, and the fact that their method cannot be applied mechanically is hardly a fault. There is, however, a troubling possibility that the language they use to explain their recommendations may be misunderstood.

Lawyers usually think of contracts as actual arrangements of consenting parties. Yet partners seldom actually consent to be governed by partnership law, at least not partners in small businesses.¹⁷ Business associates often become partners by force of law, without even knowing what they have accomplished. Even when people enter into partnerships intentionally, their relationships often have very little in common with the discrete, clearly defined transactions suggested by the word contract. Rarely if ever do those involved in partnerships expressly agree to be bound by generally applicable principles of partnership law, and it is usually hard to say in any meaningful sense that they have agreed even implicitly.¹⁸

13. Uniform Partnership Act § 18 (1914). *Cf. id.* 40; *Richert v. Handley*, 53 Wash. 2d 121, 330 P.2d 1079 (1958).

14. 2 A. Bromberg & L. Ribstein, *supra* note 1, § 6.02, at 6:15--18.

15. *Id.*; *cf. Kovacic v. Reed*, 49 Cal. 2d 166, 315 P.2d 314 (1975).

16. 2 A. Bromberg & L. Ribstein, *supra* note 1, § 6.02, at 6:16; *see also* Discussion Draft, *supra* note 1, at 90 (the Commissioners should consider the rule). Recognizing as they do that the loss-sharing problem is likely to arrive in several essentially different situations, 2 A. Bromberg & L. Ribstein, *supra* note 1, § 6.02, at 6:16--18, the authors might be expected to propose a more textured rule; however, they seem to feel that a single default rule should govern the sharing of capital losses. A set of clear and simple default rules may reduce litigation costs and be easier for the public to understand, but perhaps the arrangements that partnerships would make cannot be stated in simple rules. If so, then whatever simple rule is adopted will buy the benefits of simplicity at the price of the expectations of some partnerships.

17. *See* 1 A. Bromberg & L. Ribstein, *supra* note 1, § 1.01 at 1:4, 1:6; *id.* § 2.08(e); *id.* § 2.14(d); *cf. id.* § 2.05(d).

18. The contractual conception of the corporation is widely held, but critics question whether it accurately reflects the real world. *See* Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 Colum. L. Rev. 1403 (1985); Clark, *Agency Costs versus Fiduciary Duties*,

The authors recognize that in many cases it is artificial to say that partners have adopted a contract that incorporates the terms of general partnership law. They do not suggest that lawmakers trying to construct rules of general application need to identify a particular contract that actual parties have entered. Their position is that default rules provided by statute should match the terms of the contract that typical parties might or ought to enter. In other words, the contract at issue is an artificial construction.

Considerations of efficiency may justify using the terms of an ideal contract for default rules regardless of whether anyone has actually agreed to be governed by them.¹⁹ However, such rules may obtain efficiency at the price of destroying the actual expectations of those who act in ignorance of the law. This may be an appropriate tradeoff. The law does not always protect expectations, and perhaps the expectations of those who do not bother to learn the law should be sacrificed in the interest of efficiency.²⁰

If lawmakers want to adopt rules that sacrifice expectations, whether with a view to furthering efficiency or otherwise, they should recognize what they are doing. Expectations are real, and they should not be disregarded lightly.²¹ Efficiency arguments based on ideal contracts are not the same as expectation arguments based on consensual arrangements. As partnership law is reconsidered, lawmakers should remember that the cost of efficient rules of general application may be occasional unfairness in real cases.

in *Principals and Agents: The Structure of Business* 55 (J. Pratt & R. Zeckhauser eds. 1985). See generally *Contractual Freedom in Corporate Law*, 89 Colum. L. Rev. 1395 (1989). If the contractual model fails to reflect the actual situation of those interested in corporations, it is even less apposite for partnerships. At least corporate security holders know they are participating in a firm governed by corporate law, and the price investors pay for securities may reflect the costs and benefits of their participation, at least if the securities are publicly traded. See Ribstein, *Takeover Defenses and the Corporate Contract*, 78 Geo. L.J. 71, 77 (1989).

19. The authors generally use efficiency arguments to justify the default rules they propose, although at one point they suggest that partnership law rules apply because of consent. 1 A. Bromberg & L. Ribstein, *supra* note 1, § 1.01, at 1:11 (partners typically opt “to be governed by a set of fiduciary rules that serves to fill in the gaps in their agreement”). See also *id.* at 1:12 (“the U.P.A. is a kind of ‘standard form contract’ that may be accepted or rejected by the parties”).

20. There may not be much of a sacrifice anyway. See Discussion Draft, *supra* note 1, at 91 (quoting A. Bromberg, *supra* note 2) (“As a practical matter the obligation to contribute anything beyond the working partner’s original investment, if any, is probably in most cases a nominal one. The partner who contributes little or no capital is generally without resources wherewith to share losses. He may be execution proof.”).

21. The authors recognize the moral force of expectation, and indeed underscore it when they suggest that parties should generally be free to reject statutory partnership law. See 2 A. Bromberg & L. Ribstein, *supra* note 1, at 6:3–6, 6:68–69, 6:89–92 (partnership alteration of standard fiduciary duties).

Guidelines for Manuscripts Submitted to *The Business Lawyer*

1. Deadlines for the submission of manuscripts intended for publication in the November, February, May, and August issues are June 1, September 1, December 1, and March 1, respectively. Manuscripts should be submitted to Larry P. Scriggins, Piper & Marbury, 36 S. Charles Street, Baltimore, Maryland 21201.
2. Authors should submit three copies of each manuscript, double-spaced, with footnotes also double-spaced and placed at the end of the article. Wherever possible authors should also submit the document on a diskette in WordPerfect format (IBM or MacIntosh versions).
3. In preparing both text and footnotes, authors should consult and follow the style presented in *A Uniform System of Citation* (14th ed.) (the Blue Book). For questions of literary style not covered by the Blue Book, *The Elements of Style* (3d ed.), by William Strunk, Jr., and E. B. White, should be consulted.
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5. Quoted material of 50 words or more should be indented without enclosing quotation marks and should be double-spaced.
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