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Mark D. Janis

Indiana University Maurer School of Law, mdjanis@indiana.edu

Hillary A. Sale

University of Iowa College of Law

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Symposium in Memory of David H. Vernon: An Introduction

Hillary A. Sale*
Mark D. Janis**

We are honored to introduce this special issue of the *Journal of Corporation Law*. Both of us had the opportunity to work with and learn from David Vernon. As a colleague, he was by turns funny and curmudgeonly. And, we loved him for both. As a teacher, he was respected and loved. As a scholar, he was interesting and diverse. This issue of the *Journal* pays tribute to all of those attributes.

One of the nicest things about organizing this edition of the *Journal* was the alacrity with which those who were asked responded. Some of them we had not met. For example, Bob Hillman taught at Iowa before either of us arrived. In fact, he left here twenty years ago. Yet, when asked whether he might like to contribute an article to an edition of the *Journal* dedicated to David, he promptly said yes. His article, *Contract Lore*, tells us why. He opens by describing David as tremendously available, helpful, and generous. David was all of those things.

The articles in this edition also pay tribute to David's diversity as a scholar. During the years we worked with him, we were constantly amazed by the number and variety of subjects he had taught. Contracts, of course, was a given, but David also taught Conflicts, Remedies, and even, Debtor Creditor law. So, when we asked people to write pieces, we stressed that the point was to honor David, and that nearly any commercial nexus would both allow for an appropriate JCL "fit" and appropriately honor David. The authors have succeeded in doing both.

Professor Hillman refers to David as a legend and uses that as a segue to the substance of his article—some traditional principles that people who talk about contract law invoke in their discussions about that law. Those beliefs, he argues, are simply that. They are not tethered to the positive law or pragmatic reality, but are largely "contract lore."

For example, Professor Hillman looks at the stated purpose of expectancy damages—to "put the plaintiff in the position he would be in if the contract had been performed." Despite this "definition," he argues, injured parties are not allowed to recover damages necessary to give them what they would have received if there had been no breach, including prejudgment interest, attorney's fees, and unforeseeable consequential damages. This contrast between the stated principle and the reality, Professor Hillman argues, is a form of contract lore.

In addition to the lore of expectancy damages, Professor Hillman points out that contracts scholars and lawyers pay homage to the principle that the motivations of the

* Professor of Law, University of Iowa College of Law

** Blair and Joan V. White Intellectual Property Law Scholar and Professor of Law, University of Iowa College of Law

breaching party are irrelevant to the damage award. Paying the actual loss is the goal, not the punishment. Yet, Professor Hillman points out that the exceptions to this stated rule all but swallow it. For example, the determination of whether a material breach exists can depend on the willfulness of the breaching party's actions. Thus, although not a direct part of the damages calculation, bad actions clearly play a role in the availability of damages. Professor Hillman offers other examples on this topic as well, noting that he finds curious the stress that scholars and others place on the discussion of the irrelevancy of willfulness, when judges obviously pay attention to and incorporate evidence of willfulness into their opinions and, ultimately, the law. Professor Hillman also explores the contrast between the way that contracts people emphasize intent and its importance, with the actual doctrine that emphasizes the objective manifestations of intent.

Professor Hillman then turns to a discussion of the value of contract lore, concluding that although it has a role to play in discussions of contract law, overreliance on it may well produce less accurate statements about the law than is efficacious. Instead, Professor Hillman encourages contracts people to grapple more with the reality of contract law and, in so doing, perhaps move the law forward to newer and better levels. Professor Hillman succeeds in raising some interesting questions and exploring some classic contract law issues. We are certain that David would enjoy this piece as well as a good fight with Professor Hillman about why people employ the lore and its objective value.

Professor Hovenkamp, a colleague at the time of David's death, notes wryly that his submission, *Bargaining in Coasian Markets: Servitudes and Alternative Land Use Controls*, is not the type of piece David himself would have offered. However, like the other submissions, Professor Hovenkamp's piece has a nexus to contract law, albeit one that, perhaps, only property law scholars could love. Professor Hovenkamp discusses private contractual arrangements for land use control—better known as real covenants and equitable servitudes. Analyzing private bargaining in Coasian markets for land use, Professor Hovenkamp considers probable outcomes and compares them to the probable outcomes of corresponding “public” bargaining processes over land use controls—namely, zoning regulations.

Professor Hovenkamp shows that, in theory, many multiplayer Coasian markets may be inherently unstable. Any decisive coalition of market participants could be defeated by some alternative coalition of market participants. In the absence of transaction costs, such markets might never reach equilibrium; the warring coalitions could cause an endless cycle of negotiation and renegotiation.

In practice, however, many multiplayer Coasian markets—including many private land use arrangements—are stable in spite of theoretical predictions. Professor Hovenkamp asserts that this stability is attributable to contractual obligations. If members of the decisive coalition are contractually obligated to keep their initial bargain (as in the case of homeowners who are bound by restrictive covenants in their subdivisions), the opportunity for endless bargain cycling is obviated, but in that case the situation becomes excessively stable—so stable, in fact, that the members will be unable to move to clearly Pareto superior outcomes.

Professor Hovenkamp concludes by comparing these outcomes to the outcomes of a legislative bargaining process in determining zoning regulations. He concludes that although private bargaining yields a comparatively efficient set of initial land use

controls for undeveloped land, zoning regulations may be more efficient for subsequent changes to land use controls on developed land. Thus, he suggests that an optimal arrangement for subdivision land use controls would be to give the private developer authority to develop the initial set of land use controls, but to allow greater public control (e.g., in the form of judicial intervention) in subsequent changes to developed land.

Professor Drahozal's contribution to this issue, *Nonmutual Agreements To Arbitrate*, is different in two respects. Although he is now a law professor himself, he knew David as a student. He first encountered David in a sample class taught for the College of Law orientation. That experience is sufficient for Professor Drahozal to know what those of us who worked with David on a daily basis know—that the College of Law is not, and will not be, the same without him.

The article Professor Drahozal submitted provides further diversity. He has taken on the topic of mutuality in contract law, noting that the much touted symmetry of contract law is, at least in some respects, illusory. Rather than finding nonmutuality to be a problem, Professor Drahozal thinks that it has merit, particularly in the context of nonmutual agreements to arbitrate. Professor Drahozal rejects the reasoning of courts that have deployed the doctrine of unconscionability to rule such clauses unenforceable in consumer and employment contracts. Instead, he argues that, for example, consumers who buy products subject to such clauses may benefit from lower costs and, thereby, might be harmed by judicial interference. Further, he argues that if the business response to the invalidation of nonmutual clauses is to incorporate mutual ones instead, consumers are likely to be harmed further. Businesses will focus on controlling the arbitration process in a manner such that they benefit, rather than the consumer, thus, perhaps, resulting in fewer consumer gains in the end. If there is anything that our colleague, David, understood well, it was bargaining and power. No doubt he would enjoy Professor Drahozal's exploration of those issues.

Professor Margaret Brinig, one of David's more recent Iowa colleagues, contributes a piece that considers connections between contract law and family law: "*Money Can't Buy Me Love*": *A Contrast Between Damages in Family Law and Contract*. Specifically, Professor Brinig asks whether damages rules from contract law might provide useful analogies for developing or explaining family law rules on dividing couples' assets after divorce. When Professor Brinig notes that she and David "grappled" over the answer, we know precisely what she means. David was a preeminent intellectual grappler. Whether the question involved substantive law, law school administration, or the long-term prospects for the legal academy, David attacked it with great zest, mustered powerful arguments—and then moved on to the next contest.

Professor Brinig's contribution comprises two distinct parts. The first part is a chapter from a contracts hornbook on which she and David were working at the time of David's passing. In this part, Professor Brinig (and David) lay out four goals of contract enforcement and damages rules, according to a law and economics vision: (1) encouraging profitable contracts; (2) encouraging the efficient amount of writing (i.e., the efficient amount of negotiation over express terms); (3) encouraging performance of efficient contracts; and (4) accounting for other goals of contracts (e.g., limiting claims of consequential losses to that which the breaching party could reasonably foresee when entering into the contract). The first part concludes with an illustration of the problem of asymmetric contracts (i.e., contracts in which one party must perform well before the

other), and an analysis of possible approaches to calculating damages for breach of such a contract.

In the second part of her article, Professor Brinig reflects on the connections between commercial contracts principles and family law. She argues that family law goals do not “match up” with the four goals of commercial contract enforcement. Family law, says Professor Brinig, does not contemplate repeat contracting: it is based on the idea that parties will make one marriage contract and “stick with it” and that love is unconditional rather than being “the subject of continued renegotiation.” Family law does not encourage efficient investments—or, at least, traditional arguments about investment incentives seem harder to swallow in the context of family relationships. Professor Brinig concludes by spinning out a family law analog to the asymmetric contracting problem and showing why familiar commercial contract approaches to the problem do not map well onto the family law analog. Concerning this conclusion, Professor Brinig suggests that David would have disagreed—robustly. Unfortunately, we will have to imagine the rebuttal commentary that he would have written.

Professor Brooke Overby of Tulane is also a former Iowa Law student, now turned professor. In her article, *Contract, in the Age of Sustainable Consumption*, Professor Overby identifies the current period of development as the “Age of Sustainable Consumption.” She takes this reference from one aspect of the globalization debate manifested in the *United Nations Guidelines for Consumer Protection*. The *Guidelines* originally addressed consumer reforms in developing countries, but more recently have begun to address sustainable consumption issues in both developing and developed countries. Professor Overby argues that this shift has increased the importance of understanding the intersection between the international principles embodied in the *Guidelines* and domestic principles embodied in American contract law, particularly in American contract fairness doctrines.

After explaining the *1985 Guidelines* and the *1999 Revised Guidelines* that incorporated notions of sustainable consumption, Professor Overby contrasts the *Guidelines* with American notions of contract fairness. Whereas the *Guidelines* attempt to enunciate broadly applicable statements of fairness and to establish highly effective consumer protection standards, American law relies principally upon case-by-case adjudication, a process that tends to reach only the most egregious offenses. U.S. Courts, sounding themes of individual choice and antipaternalism, often refuse to find contract terms unconscionable even in the face of evidence of questionable practices that mislead consumers.

Professor Overby illustrates the contrast by examining the law on predatory contracting practices targeted at elderly consumers. That inquiry yields mixed results on the effectiveness of current doctrine. According to Professor Overby, “[i]n terms of fairness, adequacy of redress, and sensitivity to context,” some of these cases come up “woefully short” when measured against international principles embodied in the *Guidelines*.

Professor Overby urges domestic contracts scholars and policymakers to pay attention to the conflicts between domestic and international contract principles and to avoid “avoidance”—i.e., initiate measures to deal with those conflicts rather than shielding domestic policy from them. She sketches out two broad approaches, dominance (U.S. principles dominate the international policy agenda) and engagement (domestic

policy reform efforts account for international norms), arguing that engagement is the preferable approach. In any event, Professor Overby concludes, the shift towards thinking globally about contracts signifies a new era in the development of contract law.

In a fitting reminder of the purposes of this Symposium, Professor Overby closes by expressing sadness for the passing era, while offering hope that fresh and interesting challenges await us in the era ahead. The Iowa College of Law is not the same without David. Those of us remaining continue to mourn him and all that we lost with him—humor, compassion, and wisdom. The articles in this issue pay tribute to him, and so do we.