

FOURTEENTH ANNUAL BRIGHAM-KANNER PRIZE
PRESENTATION DINNER
AWARD RECIPIENT SPEECH

AWARD RECIPIENT

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INTRODUCTION

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BUTLER. Each year, the Brigham-Kanner Prize is awarded to someone who has made significant contributions to our understanding of property and its role in our society, to someone who has thought deeply about property's relationship to the human condition. Prior recipients have included some of our nation's leading property scholars, a Supreme Court Justice, a very accomplished practitioner, and a Peruvian economist.

This year's recipient, David Callies, is one of the most prolific scholars we have recognized. He began his scholarly career as a graduate student with a prophetic thesis on positive planning law in England, while he was getting his degree—his LL.M. degree—from the University of Nottingham in England. He then burst onto the American scene with the publication of *The Quiet Revolution in Land Use Control*,¹ written with Fred Bosselman, for the U.S. Council on Environmental Quality. I remember noticing that publication when I first started teaching. He has subsequently revisited that text for a number of reasons.

Before he entered the legal academy, David practiced law in cold Chicago. The Chicago winters must have convinced David to move to paradise and join the law faculty at the University of Hawai'i; and in Hawai'i, he met his wife.

Scholars and practitioners noticed David's early work and were looking forward to more. David has not disappointed them.

His some twenty books have included casebooks on property and on land use, and a variety of books on eminent domain topics. He

1. See FRED P. BOSSELMAN & DAVID L. CALLIES, COUNCIL ON ENVTL. QUALITY, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971) [hereinafter *THE QUIET REVOLUTION*].

has also written more than ninety articles. Two hallmarks of his scholarship are its accessibility—both to practitioners and to professors—and the timely relevance of the topics that he writes about. These qualities, as well as his commitment to advancing society’s understanding of property, have already been recognized by a number of prestigious professional organizations. They include the American Law Institute and the American College of Real Estate Lawyers, among other organizations.

David, one of the best barometers of the wisdom of a decision is the reaction of your peers. I can tell you that I have received countless messages—from the right, the left, and the in-between—applauding our choice of you as the next Brigham-Kanner recipient. We are deeply honored that you are here to receive the prize. Please come forward.

CALLIES. President Reveley, Dean Douglas, Dean Soifer, colleagues, co-conspirators, and friends:

When one starts like this, there’s a danger of a very, very long after-dinner speech. I should point out that the average class session in Hawai’i is one hour and fifteen minutes. Unless I am mistaken, Professor Butler can’t quite get to me in time, and as opposed to the Academy Awards, there’s no music that will signal that my time is up and it’s time to leave. But I will definitely attempt to be brief.

Thank you very much for this singular honor. It was, as my wife Laurie will tell you, most unexpected and most appreciated. I thank William & Mary and the committee that was kind enough to bestow this honor on me.

I have a couple of points I would like to make. Judging from the talks that I’ve heard before and, in particular, the one that I was privileged to witness that Mike Berger gave just a few years ago—I should talk a little bit about how I got here; about property and property law; and about what we owe as property lawyers in the current economy, the current state of the nation, and the current state of law schools today. After I make these three points, of course I would expect a spontaneous explosion of wild applause. In part because my remarks will hopefully be brief. So the sooner you clap, the quicker I will leave and that will get everyone home at an appropriate time.

(Audience claps.)

I should have seen that coming, shouldn't I? A good trial lawyer would have, which tells you a little about what I don't do.

It's a truism to say that one owes a great deal to one's parents, and I'm not going to dwell on it. I certainly do owe a lot to my parents. Among other things, I would not be here except for them, and that's an unarguable proposition. But there are people both here and absent that really affected my going into law and the way I treat it.

I am indebted to my economics professor Fred Silander at DePauw University who encouraged all of us to think in terms of a combination of what is now called behavioral economics and traditional economics: that every action and every decision has a consequence, and you can choose to accept it or you can choose not to accept it. Whether you accept it or not, it doesn't affect the fact that you have made a choice, and there are consequences. My family has suffered from my tendency, for decades, to convert everything to that economic equation, and I thank them for their patience. That often makes me less than easy to live with on a day-to-day basis. Thank you to my family, for that.

Austin Fleming is a name that may be familiar to some of the older practitioners in the area of wills and trusts. He wrote largely in the field of trusts and estates. He was extremely good at what he did. For upward of fifty years, he was general counsel at Northern Trust Company in Chicago. He was a very blunt-spoken individual, and he and his daughter were neighbors of mine. After he visited his daughter at Stanford—where he did some work while he was visiting her—he wrote a scathing letter to Stanford, something to the effect of: You call yourself a law school. Here are the treatises you don't have in your library. Very truly yours, Austin Fleming. He persuaded me (and my parents, who paid the bills) to go to DePauw University not Stanford and to Michigan not Harvard or Yale. He perceived, very well, that for a Midwestern, second-generation American lad, those schools would probably chew me up alive. I owe a great debt to Austin Fleming for seeing that, perceiving it, guiding me toward the law, and guiding me in those two areas. It was extremely helpful, and I would not be here today without Austin's guidance.

When I was at law school, Paul Carrington was an iconoclastic, maverick attorney, who disappointed his father hugely by going into the teaching of law rather than the practicing of law. I was his

research assistant, and he showed up regularly in either a red vest or a yellow vest under a grey suit. He was an interesting person, articulate in his beliefs, and I owe him a great deal as well.

I also owe a great deal to a Professor from Japan named Tsuyoshi Kotaka. For ten years Kotaka and I undertook a study in Asia having to do with takings and, in particular, eminent domain. Professor Kotaka tried to teach me and gave me a great deal to think about, not only in regard to respecting folks no matter where they're from and what their culture is but also, a samurai down to his toes, when to keep quiet and when to listen. A lesson that I unfortunately never learned, as you can see tonight. But that was not because Professor Kotaka did not try.

Then there are those, here in this room, that have been extremely helpful to me.

To Jim Ely, who exemplified how to be an enthusiastic and gracious gentleman in areas having to do with practice and property: I thank you for that, Jim, and for my time in Vanderbilt when you were so gracious.

To Gideon Kanner and Mike Berger, who taught me the limits of advocacy: there aren't any. You dig in. You fight. You stay professional.

I will try to sprinkle some of these remarks with an anecdote or two. And I must, must, absolutely must, relate this one that has to do with Gideon. I met Gideon for the first time in about 1973. The sequel to *The Quiet Revolution and Land Use Control*² came out, called the *Taking Issue*³ (a little bit more about that later). I was tasked with bearding the lion in his den—going and seeing Gideon Kanner after having just written, having co-authored something that stood for the opposite of virtually everything that Gideon has spent his life doing. And Gideon made that quite clear at the time. He said, you have no idea what you've done. You have no idea what you have affected. What were you thinking? By the way, it's about noon, do you want to grab some lunch?

I learned a lot from that experience. I learned that one could make statements to take a strong point and do it apparently with a great

2. See generally THE QUIET REVOLUTION, *supra* note 1.

3. See FRED P. BOSSELMAN, DAVID L. CALLIES & JOHN BANTA, COUNCIL ON ENVTL. QUALITY, THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL (1973).

deal of feeling. But it was for effect (I learned that lesson very quickly). I also learned never to drive with Gideon again. He is the only person that I know today who, when he changes lanes, doesn't go forward. We went directly into the next lane without any forward motion at all. I don't think that Le Mans drivers could do that as well, Gideon, and it certainly did make me less interested in lunch by the time we got there.

There are folks like my colleagues from Hawai'i that I wish to thank.

The first is Dean Aviam Soifer, who kindly enough came down, but not all the way from Hawai'i this time. He is on what apparently administrators and deans do. You can't give them a sabbatical because they're not teaching (he teaches, but it doesn't count that way). So he's on administrative leave and has come in from New York. I want to thank Dean Soifer, who pretty much lets me do what I want and occasionally listens to my suggestions about running the law school—which I have no interest in doing.

Thank you to Ron Brown, my colleague for almost forty years at the William S. Richardson School of Law, who came all the way from Hawai'i.

My thanks continues to former students (and now colleagues) like Rob Thomas, who, you all know, has done many wonderful things so far in pushing the limits of property law that we all hold dear; and speaking, writing, and holding and co-chairing conferences.

And it extends to Justice Sabrina McKenna. At that time she was a second year law student at the University of Hawai'i and what we call a Hapa Haole—half Japanese, half Caucasian, and fluent in both languages. After eighteen years in Japan, she came to the University of Hawai'i, played varsity basketball, and then came to the Law School. She won me over forever when she came up to me in the pouring rain after graduation. Everything was dripping wet, and—which took guts as a first-year student—she put her arms around me, gave me a hug, and said, it's okay, Professor Callies, tomorrow will be sunny. Those are the kinds of things that one remembers later on.

I also wish to thank David Breemer, whom I think many of you know from the Pacific Legal Foundation and who was probably one

of the two brightest research assistants that I've ever had. He walked into my office seeking a job as a research assistant with a baseball cap reversed on his head, flip-flops, board shorts, and a tank top. And he said, hey dude, I understand you're looking for someone to work. Some of you who know David might be reminded of that. He's certainly been doing wonderful things for the Pacific Legal Foundation ever since.

I also wouldn't be here today without my late father-in-law, Norvin Garrett, who was a Duke and Citadel graduate and served on Nimitz's staff in World War II. He taught me, a northern Yankee from the Midwest, about the gracious side of the South, and about what it meant to grow up and work in the South as he had done for eighty years. I owe him a great deal for the time that he spent with me. I still remember sitting on the banks of the Chowan River in his gazebo, drinking more bourbon than is good for me, and listening to him speak.

And of course, I wish to thank my family. I am ever so lucky, fortunate, to have as my life's partner someone who lets me do pretty much whatever I want to do—or at least that's what she makes me think. I suspect there are things that are controlling me that I have no knowledge of and probably never will. To my dear wife Laurie. And my thanks for the huge surprise today from my stepson, Lindsey, who came all the way from Los Angeles (well, not actually Los Angeles but El Segundo), who came to surprise me, and that was awfully, awfully nice of you, Lindsey. I just kept sitting, sneakily eating granola, when Lindsey walked in. I couldn't believe that he was here. Thank you for that.

This brings me to the end of where I think I have come from, and how I got to where I am today.

Now I want to turn to property and property law. To paraphrase Winston Churchill, I think, property rights can be messy, until one considers the alternative: a regulatory state (which is what we are in, an administrative-regulatory state). I learned today not to follow the folks who spoke before me. It is really hard, and all my best anecdotes have already been taken. So this will be shorter as a result, because of the comments that you've already heard. But to paraphrase Jim Ely who writes so eloquently, it is a property right that

is so very fundamental and important, and affects every other right.⁴ We defend property rights—sometimes it is daunting, often thankless, and always time-consuming.

It is not enough.

We need to share property rights. We need to broaden their appeal. Not only because it's the right thing to do but also because it's the practical thing to do. Such rights are more and more available to fewer and fewer—not only the poor but also the young middle class—who are increasingly divorced from such rights, who prefer or are forced into foregoing them, or who find them out of reach. Those with access to these rights are increasingly outnumbered: a perilous thing in what is left of our democracy.

We need to change that. The poor, the oppressed, the disadvantaged—whatever class and race—must be provided with a stake or the means to achieve it, less we breed generations with no stake and no appreciation of property and all the benefits it accrues. The holding sector, we must increase. We must attack discrimination when we see it. We must attempt to provide funds in the way of cheap loans or something of that sort and provide a stepping-stone—which the popular press is beginning to pick up on. Shelter is sometimes nothing more than a ten-by-ten house on a mini-lot, which in many of our jurisdictions is forbidden. We have old case law that finds these kinds of shelter fundamentally unsafe, but they are no longer deemed unsafe but a necessary part of what we need to provide. And so with the bully pulpit that I have up here, I charge us all, as property rights attorneys, property rights practitioners, and property rights scholars, to do more to broaden the access to property rights to those that don't have it at this time.

Lastly, I want to talk about the practice of law, again taking advantage of the bully pulpit that I have. I neither liked nor enjoyed law school. And I sometimes wonder about my students who say they do both; I wonder if they have a screw loose. Law school is many things, but enjoyable and fun? I don't think so. It is superb for teaching analytical skills that are useful not only in the practice and the teaching of law but in the world generally: digging out relevant facts,

4. JAMES W. ELY, *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (3d ed. 2008).

problem solving, developing alternative solutions and scenarios, and predicting outcomes.

And so, I want to make suggestions to what I see as my two sets of colleagues here.

For my younger colleagues, I have three suggestions gleaned from fifty years in learning about law and property. One, keep an open mind. Back off, look at all sides (top, bottom, and above), and listen (a lesson that I have still not learned). Two, visit the site. After all, property is always site related in some fashion. Things are rarely what you're told. Something new, something wrong, something different—there is always something to be learned from a visit. Three (which I expect will strike some as a little bit different, maybe anathema), as you go through with your open mind and visit the site, drain passion and emotion. Reason clinically. If your intent is to change the world, whether through property or something else, set it aside on a case-by-case basis. Again, something that I learned from my advocate colleagues, Berger and Kanner: there is a place for emotion. If it's in court, it should be something used, not felt, to make a point. Give me an emotionally addicted opponent, and I will guarantee you I will win every time.

Finally, for my contemporary, older colleagues, those on the other side of twenty nine, I have this advice: forget about your legacy. It won't survive long anyway. Rather, recall those who lent you a helping hand along the way. Befriend not only a young colleague but also a young adversary.

Many years ago, I was sent to argue a motion before a federal judge in Chicago, and I lost miserably. I was figuratively torn limb from limb. The judge was a former law partner of Mayor Richard Daley in Chicago. The advocate on the other side was his right-hand man, Tom Keane. At the time, the Democratic Party in Chicago ran the city because the mayor held three positions, or at least controlled them. He was not only the mayor of Chicago but chairman of the Cook County Democratic Organization, appointed the assessor, and appointed the corporation counsel—and therefore had a ball park with all the balls, all the bats, all the bases.

Keane took me aside, took me to lunch, and told me how things worked in the city. He told me:

You can do it “this” way if you like. You can stick with just the law. I won’t really care one way or the other; you’re far too young for me to bother respecting you. But if you want to succeed, and you want the power, you need to take it from us, the Irish. We took it from the Germans. The Germans, and others tried to take it from us. That’s the way it works.

So, put in a good word. Recommend to a learned society or a professional organization not only your young colleagues but your young opponents. It will go a long way in making a difference.

Thank you very much.