

SEVENTEENTH ANNUAL BRIGHAM-KANNER PRIZE:
DINNER PRESENTATION AND
AWARD RECIPIENT SPEECH

AWARD RECIPIENT

Henry E. Smith, *Fessenden Professor of Law and Director of the Project on the Foundations of Private Law, Harvard Law School*

INTRODUCTION

Lynda L. Butler, *Chancellor Professor of Law and Director, Property Rights Project, William & Mary Law School*

BUTLER. Each year, the Brigham-Kanner Prize is awarded to someone who has made significant contributions to our understanding of property. Prior recipients have included the nation's leading property scholars, a Supreme Court justice, a leading practitioner, and a Peruvian economist. This year's recipient, Henry Smith, is one of the deepest thinkers we have recognized. By that, I am referring to Henry's ability to innovate, introducing new methods and ideas about property that have led to the emergence of a theory of property focusing on its architecture.

Whether it is his work on the relevance of an old doctrine, his explanation of the interface between contracts and property, his insights into a well-managed semi-commons, or his work on two strategies for delineating the nature and scope of property rights, Henry continues to push the boundaries of property theory in ways that reveal its complexity. Very few scholars can take a seemingly obsolete doctrine, like *numerus clausus*, and give it modern relevance. Very few can bring property from what critics predicted was its demise, its disintegration, to its re-emergence as a powerful system. His analysis is complex. Reading his work is not a leisurely walk in the park. But, the lessons learned are so invigorating that the careful reader will inevitably have an "aha" moment. Henry's numerous publications include books on property, on patent, on the economics of property law, and on linguistics. He has also published many articles in the top journals, including Yale, Harvard, Columbia, Michigan, Chicago, William and Mary, and the Brigham-Kanner Property Rights Journal. A member of the American Law Institute, Henry is the Reporter for the Fourth Restatement of Property—a monumental task.

Professor Smith received his AB in German studies from Harvard, an AM in German and a PhD in linguistics from Stanford, and a JD from Yale.

After clerking for Judge Winter on the Second Circuit, Henry joined the Northwestern Law School faculty in 1997. He returned to Yale as a faculty member in 2002 before joining the faculty at Harvard in 2009, where he now directs the Project on the Foundations of Private Law and is the Fessenden Professor of Law.

Both academics and practitioners have praised Henry's contributions. When Justice Kagan was the dean of Harvard Law School, she praised Henry as "one of the nation's leading lights in the crucial fields of property and intellectual property" and as producing scholarship that is "as original as it is rigorous, as brilliantly interdisciplinary as it is deeply rooted in the law." Bob Ellickson described Henry as "universally admire[d]" and a leading property theorist, and Joe Waldo, whose commitment to property rights led to the creation of this Conference, described Henry as "a remarkable scholar" and praised his leadership of the Fourth Restatement. Joe especially appreciated Henry's recognition of the importance of practitioners to the restatement project.

Henry, we are deeply honored that you are here virtually to receive the Brigham-Kanner Prize. Now I am going to do a virtual presentation of the prize to you. This is what I've been worried about the entire day because the Crystal is very beautiful but very heavy.

Congratulations!

SMITH. Thank you so much, Lynda. That was such a kind and gracious introduction.

I have to say that not only am I virtually honored and humbled to receive this award. I am *actually* honored and humbled to receive this award.

It's really a surreal experience because this is a conference I've attended many, many times. I consider it the sort of high point of the property year.

And I've always enjoyed this Conference very much and have always profited from it greatly. Your leadership of the Conference has been incredible. You've stimulated people to really do their best work.

My thanks first of all to Joe Waldo and Andy Brigham for making this work and Conference possible. As I said, the Conference is really

a boon to the whole field, and really the high point of the year for people in the field of property. It's one, as was mentioned, that brings together the whole property community, academics and practitioners and judges, which is incredibly valuable for obvious reasons, but also ones that I'll talk about in a moment. I'm also very grateful to my former neighbor Dean Ben Spencer, as well. William & Mary Law School is incredibly lucky to have you as its leader, and I really appreciate the William & Mary Law School and Ali Trivette for handling everything so well here.

If there's any group I'd be thrilled to join and thrilled to be joining, it's this group of property prize winners. I looked over the list again today and I really didn't have to do it. I think I could have actually recited them from memory because they are really a super group, and it's really hard to believe that I'm joining them, not just at a conference but actually joining their ranks.

Among others, that group includes people with whom I have a deep friendship and value as colleagues: Frank Michelman and Joe Singer; two of my friends and mentors, Bob Ellickson and Carol Rose, who taught at Yale when I was a student; and my longtime friend and collaborator Tom Merrill. (I'll have more to say about that in a minute.)

So, I'm definitely surprised to be a part of their revered company, but I'm surprised for other reasons as well, because I did not know always that I would be a property person. I did not think of myself as a property person when I went to law school, while I was in law school, or even after I was in law school.

But I would say maybe it was a little bit of revisionist history. I always was a property person and let me explain how that works.

I came to law school having earned a PhD in linguistics. I'll say more about what the connection is later, but it really wasn't apparent at the time. I did not set out to do law and linguistics. I wanted to take law on its own terms and see how things went, and when I started teaching at Northwestern after my wonderful clerkship with Judge Winter, the law school tried to get me to teach property. I actually argued them out of it, which is a testament to how nice the people are at Northwestern because usually when, for curricular reasons, they ask a junior faculty member to teach a subject, that's not really a request. But I made some argument about how I was hired to teach commercial law and so I should start with contracts

and so forth. They actually bought the argument. Well, little did I know that they were right and I was wrong.

At the time I was trying to apply new institutional economics, in particular the property rights economics of economists like Yoram Barzel, to the question of how we give remedies under contract law. I think it's still a good idea but what happened was that during the course of gearing up for this, I ran across the puzzle of the medieval open field system, the system of scattered strips that would be thrown open for common grazing after harvests and in fallow periods. This was always treated as a puzzle because these long thin strips seem to be very inconvenient. The explanations, if that's what they can be called, ran from statements like you know people just didn't know better to a possible insurance arrangement. I had the idea that maybe this was a way of constraining strategic behavior in certain ways.

And then I thought, well, okay, that's kind of an interesting idea, maybe I'll write a little paper on that and then get back to business with contracts—take a little tangent and then get back to where I was. And I'm still on that tangent. So I never got back to business, and here I am. And I'm very glad of that.

So, basically, as Lynda mentioned, I came to property through contract. I was both writing and teaching on contracts and encountered property questions from time to time. I certainly thought back to Bob Ellickson's property class when I was doing it. It was really quite puzzling—the idea that property facilitates bargains and promotes human flourishing of people's projects, allowing them to conduct economic activity—all sorts of activities that are protected. The protected activities have their limits—based on anti-discrimination, public policy, excessive restraints on commerce, and so forth. So, there were a lot of similarities and I thought, well that's not surprising. After all, a lot of people said, "oh you know private law is private law and maybe all law is law, there really shouldn't be anything special about areas of law," and yeah, property did seem to be special in a variety of ways. In particular, even though in many (though not all) of its guises, property like contract was facilitative—property provided a platform for people to do their thing—property still was very different from contract in that a lot of property was mandatory. That is, property law tells you: OK, if you want to do this, then you

have to use this form. You can't make up your own form, and here's a menu of forms to use. That is not the way that the contract law works. This and various other aspects were kind of puzzling. One day I dropped by my next door neighbor at Northwestern, who was none other than Tom Merrill. And I have to say that it's hard to imagine a neighbor as fun as Tom. You could just drop in anytime and that was one way to spend the afternoon. It was very productive because when I mentioned these things that were puzzling me, he said well actually there's a name for that and it's called *numerus clausus*. So we started talking about why property is standardized, and why it serves its purposes the way it does and maybe there is something to the idea that property is in rem addressing the world at large. If I have a property right, I'm holding it with respect to everybody in many cases, and that's very different from contract. We would have these very productive conversations.

And, you know, over time, I realized that this is very relevant to a whole gamut of issues in property law, from mortgages to customary law, and so forth, where who the participants are, their social distance from the thing itself, and the people who are asserting the rights, are very important. One thing led to another, with one puzzle leading to another and then another. Property obviously is not formalized all the time. It's not a system of purely mandatory rules. Part of property is very context-specific. We have trust law, we have equity, and we used to have special chancery courts to deal with equity (as evidenced by the brass plaque and the marble tablet behind Andy noting that George Wythe was a judge of the Chancery Board). The element of equity in our legal system is still very important and I'd like to talk a little bit about that tomorrow, but the idea that property law has this complex and hybrid character where its doing many things at one time is very important.

So looking back I realized that I was actually always a property person. I was Bob's RA on his land use book and I was a director of the landlord tenant clinic, where I worked for the late Frank Dineen at Yale. I was trying to remember at what point I got the idea that I was a property person because I'm making this sound like one thing led to another, and that's basically what it was. I remember a workshop dinner at Yale. Bob and Carol were both there, and the paper was somewhat property related, and we started getting into this highly raucous and wide-ranging discussion about property.

I don't think I can even recall all the things that this conversation touched on, but I think it included water, infrastructure, and land records, and I don't know what else. I realized that, maybe to borrow a phrase, property is about life in all its fullness. And I think that's very important. At the same time, it's a very specific set of institutions, and these are important institutions that need our urgent attention precisely because they touch upon life in all of its fullness and all of its aspects. What could be more important!

So when Ricky Revesz asked me to be the reporter for the Fourth Restatement of Property, I certainly was somewhat hesitant. I'd always been kind of skeptical that this could work and I convinced myself partly because of what I just said, that property is important. It's an important institution that deserves attention for what it's doing in so many facets of life. And yet I thought that there's something that maybe past restatements did but we could do again and maybe even more completely. The first restatement was only actually a partial restatement, unlike the torts and contracts restatements. I thought there was maybe the possibility that we could do something that's both systematic on the one hand and flexible and empirically grounded and sensitive to the real world on the other. That's a very tall order, something no one person could possibly even begin to do—it requires all sorts of different kinds of creativity and expertise as inputs to a project like that. I've been very fortunate to work with many different people with many backgrounds on the team of associate reporters. They are an outstanding group and a total pleasure to work with. And many of the people are here today, including Molly Brady, Sara Bronin, Rick Brooks, Wilson Freyermuth, John Goldberg, Dan Kelly, Brian Lee, Tom Merrill, and Chris Newman. And in the spirit of this very prize, we've really benefited, all of us have benefited from the expertise and wisdom of practitioners, and included in those are people on the program and involved in this Conference, like Steve Weise and Joe Waldo.

And many of the academics here today are also advisors on the project. As I said, this kind of project requires many kinds of wisdom as an input, and I'm deeply grateful to them. Creativity in the service of making things work is something that is really hard to appreciate unless you actually try to do it.

As a result of the Restatement, I've been drawn into areas of property that I never thought I would do—more on the theme of one

thing after another. These areas include drone trespass and conversion of intangibles, trespass on the internet and things like that—cutting-edge issues. I realized when I teach first-year property, if you want to include cutting-edge issues in the property class, it's kind of hard to do.

I think it's valuable to do, but it's hard to do because they often come in at the point where very basic concepts enter the course, like possession and trespass and so forth. And I think that says something very deep about property, that it's precisely in those areas where the combination of important technological and social change may demand some attention in the law. And that connection to reality is actually why I went to law school in the first place. I love linguistics, but I thought it was time to get real.

Over time, I have seen how what I did in linguistics is more relevant than I thought at first. You know, all sorts of aspects from the ancient Indian grammarians who I studied in grad school, to the sociology of audiences in discourse analysis, all grew more real and more property related than I ever thought at first.

For me, then, this is an occasion to think about how all this actually fits together, at least in retrospect. And that brings me back to the beginning, which is how I got into academia in the first place through linguistics.

As Ben said, my family is here, my wife, Sun-Joo Shin, and our daughter Hannah, and I certainly thank them most of all for their support. I met Sun-Joo while we were working in a problem set group. We formed our little two-person subgroup for problem sets. And I remember thinking at the time, what a miracle it was to be working with the most amazing person in the world. And it's been like that ever since, so thank you.

BUTLER. Henry, that was a wonderful way to end your remarks.