

ACKNOWLEDGMENT

JUDGE GUIDO CALABRESI

First, I want to thank you: thank you all. What a joy and what an honor. A joy and an honor because it is N.Y.U., because it is the Annual Survey, because you have invited my beloved wife, my daughter, and my son-in-law; but also because of the things that you have said, and most especially because of who you are.

When I thought about who you are—all of the speakers—I noticed one thing: in addition to the magnificent law work you have all done—and that is central to what you do, what you have done—is your willingness to engage in conversations, in dialogue with others, to further the study, to further the development of the law, to make it better, to push the quest further. In a way, it is not surprising for academics to do that—that is what the academics today represented and that is what academics are supposed to do.

But what is stunning is the diversity of the conversations which each of the speakers has represented—whom they talk to, and so elegantly. I'm going to stop and interrupt myself right there. The Dean suggested that I might take a name, a position that required me to take another name. And I was thinking as you were talking about the possible names I might take: Ricky the First—no; Akhil the First—a little better; Vincenzo the First—sounds good; Kenji the First. I've decided that it was absolutely clear that if anything like that happened, the name I should take is: Judith the First.

So, back to conversations. Akhil, who talks with historians and even with the Framers; that is his conversation. Kenji, who talks with literature and the greatest works of literature and the poets; one never hears Kenji talk except in conversation with them. Ricky, who talks with environmentalists and administrators. Ken, who talks with economists and people who actually do insurance work—and that is a very hard group to talk to, and yet he talks to them and they listen. Vincenzo, who talks with lawmakers and expounders in cognate countries and in non-cognate countries, and in that conversation pushes the quest further.

But it is equally true of the judges who spoke tonight. For these are judges who understand that the role of judges is not only to decide cases and occasionally to make law, but that it is also to be part of an ongoing process of law development that comes about as a result of judges dialoguing and structural conversations with other law-developing institutions: with legislatures, executives, ad-

ministrative agencies; with courts of other sovereign states; with federal courts of all levels; and with the academy. Think about Judith for instance, and her decision on the New York death penalty, that great decision, which was a dialogue with the legislature, a conversation with the legislature.¹ Not to mention the development of certification, which is a dialogue between the federal courts and the state courts in which the federal courts ask and learn while sometimes even suggesting, “Here is what we might know from someplace else but it is up to you to tell us whether you want to accept it or not.” Think about Bob Katzmann, and his work in immigration. In talking about the development of that law and in creating that bar, not to mention his direct writings about getting in touch with Congress, with the legislature, when the decisions of the courts have to be in one direction but don’t make sense, and so he asks the legislature to cure that.

All this is crucially important to me because I am both an academic and a judge. And if there is anything that defines my work and my judicial philosophy, it is the centrality of dialogue. This has been, I hope, true of my scholarship, for example—and I hope not only—with economics. And here I emphasize dialogue, not subservience—not just applying economics to law, but a back and forth in which each discipline gains from what the other can tell. It is not economic analysis of law—it is law and economics talking to each other.

Let me give just two very quick examples from *The Cathedral*.² *The Cathedral* has a little model and it looks through that model at the world as it is, and it says: “Gee, there are things that aren’t in the world.” And then you realize, if you are dialoguing, it is because we were looking at the world entirely from the standpoint of appellate cases, and not looking at the world in the way it really was. So there, economics caused us to rethink the world in a way. But more recently, I’ve been thinking of *The Cathedral* in a different way. I’ve been thinking that most of us, myself included, when we started out with that, talked about the liability rule as if it was there to mimic the market—to do what the market should do if the market didn’t work. But if you look at the real world—the world of punitive damages, of juries that are willing to do more than give compensation, of juries that give less, of eminent domain (as in *Kelo*³), that sometimes ought to give more than market value compensation, or as in

1. *People v. Smith*, 468 N.E.2d 879 (N.Y. 1984).

2. Guido Calabresi & Alan Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

3. *Kelo v. City of New London*, 545 U.S. 469 (2005).

Italy where compensation is value in use, not market value—you see that in fact the real world says that the liability rule can mimic inalienability. All that comes from a conversation back and forth.

But I think it is equally important to my view of judging. Yes, we decide cases and that's the first thing we do; yes, occasionally we make law directly, but much more often, we make law through remands, suggestions, and comments to engage other lawmakers, law developers, institutions in the task; we become part of the process. This can be seen in certification, but it can also be seen in decisions that send cases back to the legislatures for second looks. It can be seen—whether directly or obliquely—in cases that turn on prudential rightness, and conversations of that sort. Decisions invoking the European—Italian, originally—notion of laws heading towards constitutional invalidity. It can be seen in concurring opinions in which we talk; indeed, even when I write a concurrence with my own majority opinion, because I want to decide the case, but I also want to write in ways that start talking beyond that. And of course, in decisions that speak to the academy and draw from academic thought. I don't mean that dialogue is the only—or even the primary—role of an American judge, but it is a crucial one. And it is one that an academic judge is especially suited to engage in. It is both modest and restrained in its immediate practical effects, but in a long-term sense it can be very assertive. Moreover, it's great fun. It's great fun to be doing that.

So there it is. I've given myself away. But in a sense, those you chose to speak about me already have because they were all dialoguers—they are all dialoguers. And that is why I rejoice and am so grateful for this evening.

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