

Inside Yale Law School, Season 2, Episode 4

Amy Kapczynski

[MUSIC PLAYING]

This is "Inside Yale Law School," the podcast series designed to give you a peek inside to the scholars, the thinkers, the teachers, and the game changers of Yale Law School. I'm Heather Gerken, the Dean, here to open a little window into the world of this remarkable place.

To me, it's really important that students learn the law. Right? You can't criticize something or try to change it, unless you know what it is. So we do do a lot of serious work learning the law, but we also are always asking questions about why is it this way? How did it come to be this way, and how could it be otherwise?

[MUSIC PLAYING]

I am thrilled to introduce Amy Kapczynski, Professor of Law and faculty co-director of the Yale Global Health Justice Partnership. Amy, thank you so much for being here.

Thank you.

So there's so much to cover with regard to your work. I wonder if I could just bring you back to the work you started as a 1L, because it's amazing to know that you spearheaded a campaign as a 1L that led Yale and Bristol Myers Squibb to change their policy on a set of drugs. I wonder if you could just fill out the story.

Sure. Yeah. So I have very deep connections to this place, and they do start as a student. So before I became a student, actually, I started working on access to AIDS medicines, and the issue was so long ago now. It was in the late 1990s when I started working on these issues.

The issue was that there were tens of millions of people around the world living with HIV/AIDS who had almost no access to treatments which were really transforming people's lives here. Because there are medicines you can take, if you have HIV, that make you-- you have a chronic disease, but you can survive, and those medicines cost, at the time, around \$10,000 to \$15,000 per person, per year, and it's a lifelong treatment. So it's quite-- it doesn't sound expensive, if you think about drug costs now, but it was really very, very prohibitive, if you were thinking about a country like South Africa, where one in five adults was HIV positive.

And what I learned from activists working on these issues was that the drugs weren't expensive because they were expensive to make. They were expensive because of patents. Patents are rights that the government gives you. I now teach intellectual property law, so this is a good plug for my class. Patents are rights that the government gives you that allow you to exclude others from making or using or selling your invention. And drug companies get patents, and they allow them to set monopoly prices.

And so what was happening around the world was that they were pricing-- in a country like South Africa, they were pricing the drugs at the price that only rich people could afford, if them. So there were probably just a few hundred people who could afford those medicines in South Africa, when so many needed them. Because they cost the same as they cost here, \$10,000 per person, per year.

And we learned that generic companies in India could make them for \$100 a year, and at that point, you could start to build programs. You could start to really build systems to get medicines to people. And so I, through these circles of activists, started working with Doctors Without Borders, and they had just gotten a Nobel Prize. And they were using that money to build a campaign for access to medicines, and they wanted the companies to lower their prices.

And they knew that this was possible, because they knew the drugs were inexpensive to make. But the companies were really refusing to do that, at the time. In fact, they were suing Nelson Mandela himself, as the lead party in a lawsuit about the-- a law that the South African government wanted to use to bring these Indian drugs into the country. And so they had taken a very hard line, and they were really refusing really significant price decreases.

And Doctors Without Borders knew that it was possible to-- they wanted to find a target, and that target was Yale University. Because Yale held the patents on some of these drugs, on one of these drugs in particular, a drug called D4T. And Yale had licensed it to Bristol Myers Squibb. And I knew, as a student, that there were many people who worked for the university, because they cared deeply about the public interest. And that people like the scientists who work here would not have been happy with this situation, and in fact, found the guy-- his name was William Prusoff-- who was the scientist who had developed this, drug and he ended up playing a really important role in this story. He came out publicly and said he wanted the companies to behave better, and he wanted Yale to give up its patent rights.

And so as a student, what I did was what a lot of student activists do. I ran around and I talked to a lot of people, organized other students, and the go between Doctors Without Borders and Yale to say, you can do this. It's not going to destroy the pharmaceutical industry. In fact, it's going to save many, many people's lives.

And to its credit, Yale first initially said no, but there was a lot of media attention and a lot of organizing. And a few weeks later, they renegotiated their deal with the drug company and allowed the drug to be made generically available, actually, in all of sub-Saharan Africa. So the price plummeted it was like 3% of the price the next day, and it also I think kind of played a role in the drug companies coming more to their senses and in building the activists' momentum to overcome these patent barriers.

And now, today, we have tens of millions of people on AIDS drugs, all around the world, and we built those programs. They're not perfect. There's still issues, but yeah, it was a very powerful lesson to me about the role of law and the role of organizing in change, even around things that can seem really tragic and intractable.

Now, so I see you feel like telling all the 1Ls who are listening to this that it's OK for them just to focus on being a 1L. It's setting an awfully high bar for your first year of law school, but I can just see how that shaped your career. Because you've devoted your life to issues related to global health and justice, and your scholarship has often been built on those issues. I wonder if, let's talk a little bit just about your scholarship, if you could walk me through.

My favorite one of your articles is on the Flu Network, and by that, it is not the Harry Potter Flu Network but a really interesting study of the way we develop flu vaccines. But I wonder if you could just give us an overview of the work that you've done on that front and its relationship to intellectual property. Although, I sometimes do tell people that your aim is to take the property out of intellectual property.

Yeah. So I do-- this work was exactly what got me into studying intellectual property. And I remember actually telling professors, including some of mine from college, that I was interested in this intellectual property stuff, and they looked at me like, you've lost your soul in law school. And I was like, no, no, no, this is really interesting stuff.

This is the lifeblood of the modern economy, if you think about it, and I came to learn this studying and working on these issues. If you think about it, when we had agricultural capitalism, what mattered most foundationally were things like land rights and what kind of workers' rights you had. In industrial age, you had the emergence of the corporation, and the law was really powerfully shaping the way the economy worked then.

But today, intellectual property, which covers artistic works but also trademarks and patents and so inventions and science, that really governs an enormous amount of how we shape the economy, what kinds of things are produced, who gets access to them, and what we can do online. And so it's a really vibrant area. It's hard law to teach, because it changes so fast. There's always Supreme Court cases on intellectual property law, every year.

But I became very interested in just understanding this from the inside, from a public interest perspective and wanting to understand what were just ways that this law could be organized, given how many interests there were that converged at the point of these issues. And so what my scholarship has been about for many years has been starting from these access to medicines issues, writing about ways that the law could help mediate the rights of private rights holders and accommodate the needs of the public. And so for example, one of my first articles was about how universities could change how they licensed their drugs to allow them, in fact, to be used all across the world in the global south, because there really isn't any market in most of the rest of the world. Particularly in places like sub-Saharan Africa, it's like 1% of the world's market. So you could just write a license in advance and figure out how to just carve off that market and not really undermine the incentives to innovate. And so getting inside of those arguments sometimes from a practical perspective was some of what I've done in my scholarship, and then often, also, trying to get really at the heart of the issue.

So intellectual property law really does help provide incentives to create things, and yet it has this high cost, which is that a lot of people can't get access to whatever is created. And so that's a really foundational dilemma, and so often, we talk about trying to get the balance right. But there's a way in which sometimes you can't really get the balance right. You really are going to undermine access. And so I've also been very interested in what the piece about the Flu Network is about is are there other ways to develop these critical goods that don't have the same trade-offs? There are other problems with, say, government-funded science. Certainly, it's not a simple enterprise but when the government funds science you can say-- and they typically do-- well, everybody can have access to this. At the end of the day, you have to share your data, for example.

And so I wanted to be sure to not only work on the access side and figure out what are exceptions to these rights? But also because all of us care about-- if you care about health, you want new drugs. You want new medicines and figure out, well, how can you develop them better? Can we get more innovation out of a system that actually is publicly funded?

And so the Flu Network piece that I wrote was about how the flu vaccines that you and I probably both take every year that everybody listening to this has probably good access to, certainly if you're in the US every year. The strains that go into that are actually gathered, analyzed, and then reproduced by a global public network that's founded by the World Health Organization, that collects labs from more than 100 countries, and that does this scientific enterprise that's really, really important and that couldn't really be done well in markets. And so part of that study was how does that work? How do we make open science work?

And part of what drove me to that, and some of the work that I'm doing now, is about how public science might go further than just this more basic research and go all the way into production. So California is about to make its own insulin. That's because there have been a lot of issues for people who are diabetic in this country getting access to their insulin, and they're trying to solve the problem by bringing manufacturing to the United States. So it intersects with a lot of issues that people may be thinking about with respect to industrial policy today. Now, I would put that in a broader frame of my work on law and political economy, which I'm happy to talk a little bit more about.

So the Flu Network is a good example of the way that your work is highly interdisciplinary, manages to be granular, but still keep an eye on the macro. And doesn't just depend on top-down legal solutions, but really understands how institutions work to make it. So it's one of things I love about your work. I feel like law and political economy is the bigger version, the more system-wide version of the work that you've been doing in the space of IP, and you're one of the founding parents of it.

For listeners who don't know what it is, I'll let Amy explain it in full. But I do want to say that I don't remember there being this much energy, intellectual energy among faculty and students around a project in decades. And so it's really exciting for it to be centered here with the work that you're doing, and I wonder if you could just talk about what the work itself is and then where the movement is.

Great. Sure. So yeah, that's exactly how I see it is that I had been doing work on some of these issues that only now would I call law and political economy work, and that was true for many of us. I think there's a little bit of a generational aspect to this, that there were many people who were starting to think about how does law shape the economy, and how might we reorganize law to make our economy more just? And also to think about the economy a little bit more expansively than I think we commonly do. So the economy exists in many places, not just the marketplace, but also here we are in open science thinking about how do we generate the resources that we need to thrive?

So what the law and political economy is, is really an attempt to intellectually make space for questions about how law shapes the economy, how politics shapes the economy, and push back against I think some of what when I was growing up, coming through college, coming through law school, we understood as the way you were supposed to think about markets. The market is the law of supply and

demand. It just is this thing. You have to follow these rules, and in fact, in law schools too, we were taught about efficiency and how you come into law school thinking we're going to talk all about justice.

And then it turned out that there were a lot of places where we didn't talk about justice, and those were commonly classes like contracts or torts. Where instead you talked about what was efficient, and that was treated as something neutral. And I think the law and political economy framework is trying to challenge some of the ways that we've thought about markets, and say, they're not natural. They're actually made in politics.

We're using insights from the legal realists, from critical legal studies, also from critical race theory, and feminist studies to think about how law actually constructs our political economy and how you could reconstruct it to be more just. And so part of what you're tapping into, the sense of excitement about this, is that it really is also expressing and has become a place where people can talk about what we feel are some of the most urgent debates of our time. So we're thinking, if you're thinking about climate change, or you're thinking about inequality and the occupy moment or the financial crisis, or you're thinking about racialized dispossession and housing, and how can we build housing for all? Those are all questions of political economy that you really need to be able to get into from more perspectives with more values in hand than I think many of us were taught to think about the economy with.

So it broadly is a scholarly movement. Although, there's a student network. There's more than 30 student groups around the country that have their own reading groups and speaker series. And we're all trying to rethink the political economy, and how does law structure it? And how can we rebuild it, so that we can work against things like climate change, concentration of corporate power, inequality, even things like the carceral state, which are shaped very deeply by political economy as well, I would say.

In the scholarly network, it's been astonishing how many of them have come through this place and how many I'm connected to you and a few other scholars here that have been inside this school. It just I sometimes say to people, this place, it's like you throw a tire into the water, a reef builds out around it. And it's been remarkable to see just putting this in the water and how a whole ecosystem has evolved around it. You're also, though, seeing it affect policy and move into and move into that piece of the world. And I wonder if you could just say a little bit more about not just the scholars who are doing this work but the folks who are fellow travelers, who are in the policy world, and connected to these projects.

Yeah, one way people who are interested in this might get a good flavor of what we're doing is we have a blog called "The Law and Political Economy" blog, and you will find advocates and activists and scholars all writing on it. And it's an accessible way in to also show you, well, if you're interested in housing-- So I can give you just a few examples off the top of my head.

So people who are interested in housing, go on the blog and read some of the work about tenants unions. So we're trying to think about how law structures political and economic power, and so taking examples from the Labor Union context and bringing them over to the Tenants Union context and saying, well, what if tenants could organize together, and the law facilitated that the way it facilitates labor organizing?

There's work, of course, on labor organizing as well.

Probably one of the most prominent examples, actually, one of the students that helped me make my first Law in Political Economy class was Lina Khan, who's now the chair of the FTC and who is taking these

ideas about the importance of how antitrust law was reinterpreted really without any warrant in the statute, I would say, and I think she and others have shown to prioritize low prices and really wipe away everything else. Wipe away the impact of mergers on workers. Wipe away its impact on the power of a corporation to govern, whether it's Amazon or others, the way the market works, or what we're allowed to do. So Lina is bringing many of these ideas into the FTC.

On my mind today, for a very, very sad reason, Ady Barkan, who was a graduate of ours and a wonderful advocate and activist, who just passed away from ALS, Ady was one of this whole generation that really grew these ideas from the ground up. So I think in the era of inflation, we're all really aware that what the Fed does affects workers. But when I came to law school, no one was talking about the Fed who cared about, what about low wage workers, and how do we think about their interests?

And Ady organized low-wage workers to go to the Fed. I remember him telling me how freaked out he thought people were at this meeting, somewhere in Colorado, when they showed up with a bunch of low-wage workers. And they said, hey, when you're setting interest rates, you have to take our interests into account. It's not just a technical matter, which is I think how we had been taught.

It's not just a technical-- that's for the economists and for the experts. It was it's a hugely important distributive question, how we set interest rates. So Ady was part of a group called the Center for Popular Democracy, and there's a bunch of new organizations that have lawyers, some of them [? ILS ?] lawyers, working on organizing in a different spirit, in a different way, trying to build power and work on economic justice questions. And we've actually worked now with some of those organizations to have a summer academy on law and organizing, where we're bringing students from different law schools, including ours but also many others, to work with organizers and learn a little bit about law and political economy theory. And try to figure out how do you build power for ordinary people, and how does it help to know about law to do that?

What I love about that too is that organizing has actually been part of this place for a long time, especially because of the work of our clinics, who often move from litigation to policy and back again. It's also been the work that you've been doing, and I realize this is going to be the most intimidating interview imaginable. Because people aren't going to imagine that you either sleep, or that there are at least two of you. But talk a little bit about the Global Health Justice Partnership that you do with Gregg Gonsalves and Allie Miller, because it's had an enormous impact, and again, straddles theory and practice in a way that is really interesting.

One of the things I like about teaching at Yale is that there are many faculty members who do both writing and practical work. And it's one of the reasons I became a law professor was the thought that there was something you could combine these two. And for me, they've always been really synergistic, so you heard that story.

So we have for many years run a practicum, we call it, which works with partners on global health issues and also local health issues. So we've worked on a really wide range of things like the accountability of the UN for cholera being spread in Haiti. That was one of our first projects we worked on. Actually, quarantine laws long before COVID, which were used improperly we thought in the context of Ebola, when there was a big, big scare about Ebola but not really very much Ebola at all in the United States.

So we've done a little bit of litigating but mostly more, I would say, partnerships, trying to help build organizational power, sometimes here with local harm reduction communities or sex work communities in New Haven who are facing health impacts from the way that law treats their communities or the way the policing works here in New Haven. And so we do a wide range of projects. We've worked-- a lot of the work that I've done there has been around drug pricing, in fact. So we took some of the lessons that we had learned internationally and tried to bring them into the United States as the I think the public awareness of the problem of drug pricing was really starting to peak.

There was a new drug for hepatitis C, which is a chronic disease, which affected five million Americans when we started this work. Some of them have been cured but certainly not all of them, because the drug cost \$100,000. This was a drug that was also needed very much in prisons, which do not have an unlimited budget, despite the constitutional right. Kids, you've got to go to law school to figure out why that one's true.

But we wanted to figure out ways to bring the prices of those drugs down, and so through the clinic, we developed a proposal about something called government patent use, which allows the government-- in fact, we discovered that the government has the right to use patents. And so do things like import generic drugs or negotiate lower prices, and those arguments did help, particularly in the state context, actually, get the prices of some of those drugs down. So we've really worked on a wide range of issues.

In COVID, we worked on community health workers and how to get community health workers to more places to provide the bottom-up services and to also build power among community health workers or people who really share experience with those that they're helping. And so we have some wonderful community health worker programs in New Haven. Students can work with them through our medical legal partnerships.

One of the things that it's been I think a touchstone for you is the ability to speak in many registers. You're writing theoretically ambitious law review articles as part of your academic portfolio. You're testifying in front of Congress. You're writing for popular outlets.

One of the things I was especially impressed by is that you also are in conversation with doctors across the country and have been able to speak with and on behalf of them and organize them. And I really saw that especially during COVID. I wonder if you could just talk a little bit about that work, which I know you often did with Gregg Gonsalves.

Yeah. So I feel like those of us who had worked on HIV could see, the moment that COVID hit, some of the things that were going to happen. And one of the things that we could see is that we were not well-prepared as a society to provide the kind of support that people were going to need in order to allow people to safely stay home and to allow people to do what they wanted to do. Which if you remember back to the very early days of COVID, before the profound political polarization, like there was an enormous sense of people really wanting to hold together. And that's something I've always seen in people in crises, and it's a real credit to I think what we're capable of.

But we didn't have the tools that we needed to allow people to stay home and allow people to-- we don't have paid sick leave in this country. We had hospitals that could have been sites where ICE would have come and causing people not to go to the hospital, if they were very sick. We had prisons that were

churning people in and out, and we know from years of work on HIV that prisons are incubators for disease, and that the whole community wasn't going to be safe, unless we did something about that. So one of the very first things we did was try to put together a experts letter, which we did. God, it was very early. I think it was before my children were even sent home from school, in March, 2020. We got very quickly hundreds and hundreds of experts signing on to this letter, saying we need to act now. This is very serious, and we need to start thinking about not just how do we quarantine people-- and we had had a travel ban at that time-- but how do you support people so that they can do the right thing? Because fundamentally, if you don't support people to do the right thing, you just mandate them, both people aren't going to always do it, and you're going to end up discrediting the government. And I think that, at the end of the day, one of the things I've seen and feel very deeply about COVID is that the lack of that caring infrastructure actually is part of the political polarization and the real anger that people had with public health in the long run. Because we didn't support people. We ended up telling them what to do more than we supported them to do the right thing, and I think that was a real problem. A lot of my work in that period became trying to figure out how to propose policies that would actually provide some of that support. So get hospitals to be allowed to say, we're not going to have ICE here, or get-- we did. We actually got-- the vaccines were free. A certain amount of health care was free. In a certain way, we almost created a sort of jury-rigged national health care system, just a little shadow of that, to be able to provide medicines and care for people. And so it showed some of what we could do. We canceled the rent for a bit. We canceled student loans. We did quite a lot. And unfortunately, I think we have not really taken from that some of the lessons that I would hope we would, which is that we need this long-term follow through now. Like paid sick leave shouldn't be controversial, once you appreciate the effects on everybody. But also we need more broadly the kinds of social support that I think will allow us to rebuild the solidarity that maybe people can think back to in those early moments.

I know you're doing all of that during COVID, helping save the pieces of the world that you could save, but you were also, amazingly enough, at that moment, caring for two kids, speaking of the lack of infrastructure at home, and also teaching our students. And you won the teaching award, the YLW-plus Teaching Award, during that period. And I remember vividly, Amy-- I don't know if you remember this-- we were all looking to our best teachers, at that moment, to help us think about how to make the Zoom environment plausible. We were all doing our best to keep connections with our students and to find a way to make the education as good as it could be. And you did a presentation for the faculty, and I remember it, because I think you showed us how to turn ourselves into banana.

I did. I did.

Just to keep the world going, and a few weeks after that, the famed cat video with the lawyer came on. And I remember thinking to myself, actually, Amy should have told us how to turn ourselves off from being a banana. But can you talk just a little bit about your teaching generally, not just during COVID but generally. Because you're a beloved teacher and a wonderful mentor.

I feel very privileged to be able to teach and to be able to teach students who are so enthusiastic and excited to be in the classroom. I think of teaching really at its best as a way of being able to be curious together about things. It can be hard sometimes to find that curiosity, because there's a lot of hard work to study law, and there's a lot to master. And I even myself sometimes get caught up in just trying to, all right, here's the statute, and there's 16 things you got to know about it.

But I think I would say what I love best about my classroom is that we often do really cultivate a sense of curiosity. Like this is weird. Why does it work this way, and how could it work otherwise? And to me, it's really important that students learn the law. Right? You can't criticize something or try to change it unless you know what it is.

So we do do a lot of serious work learning the law, but we also are always asking questions about why is it this way? How did it come to be this way, and how could it be otherwise? And I think that every law school should be doing that. Right? What are the real values that you have?

What did you walk into law school with? What did you want to do? Why did you come here, and how do you make the law do work for that community? Don't forget who you were.

There's some sense we're going to teach you to think a lawyer, and you're going to be a different person. Well, all your experiences will change you, but take the things you know and love, the things you care about, and use the law to try to make the world a better place. And so what I hope is some of that spirit comes through in the classroom and that we get to both do the hard work of learning a real skill that can be used, and we feel the commonality of doing it together and doing it in the service of something that really matters.

From your 1L year onward, you can just really see through line in all the work you're doing, even as you do things that are in very different parts of the world. So organizing on the ground, changing policy in Washington, pushing forward new intellectual movement, there's a clear through line. And I do again wonder whether people are going to think we're talking about more than one person. So I wonder if you might talk about something you do badly or talk a little bit least about how you maintain balance, given all that you're trying to do and how big the problems that you're addressing are.

Yeah. It's funny. I don't feel superhuman at all. I think I feel like I'm a wreck. I'm disorganized. I forget things.

I was just telling you, like my calendar turns off sometimes, and then I don't show up for meetings. And I've been trying, actually, I think many people my age, I've started a little bit of a meditation practice, trying to figure out, how do we keep calm in an age of social media and just overwhelming stimulus? But also trying to think about, how can you help press yourself to really be in service to others and do good things without needing to be perfect, without needing to be the only one who can solve a problem? And part of I think the way I think about that and what keeps me going is that a lot of the things I've been talking about, they really aren't just me, and I'm not just saying that.

There's a whole community. I learned what I learned as a student and how to work on these access issues from others. And we did them together, and we felt like we were a collective. We were a cohort. We cared for each other, and I think that that, in its best form-- one of the things I love about working on the law and political economy issues is that we've built a real community.

And if you really ask me, what's law and political economy, it's a network of people. It's a community. It's people who are trying to figure out how to ask questions across silos in different ways, so that you know. I have a question about banking, but I work on criminal defense. Who do I talk to?

We're trying to build that network, and so that's something I also say to my students, that their communities are going to really matter to them. It's something that I think many people would say, looking back on law school, it's your community that's going to matter most to you, and so build that and nurture that. And also try not to take yourself too seriously.

Because ultimately, when you do achieve things, it will be because of this community. And when you fail, you're not the only one who's ever failed. In fact, that's part of the human condition, and we need to learn to be a little bit more kind to each other and ourselves, because yes, we all do screw up.

Well, I'm delighted that you're a part of this community and extraordinarily proud of the work that you've done in the world. It's made a huge difference, and it's an astonishing legacy for any scholar, let alone a scholar who's done the many things that you've done. So thank you very much.

My pleasure.

[MUSIC PLAYING]