

# Guido Calabresi & Heather K. Gerken Final Cut v2 121223

[MUSIC PLAYING]

This is Inside Yale Law School, the podcast series designed to give you a peek inside 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. This is one in a series of special episodes to commemorate Yale Law School's Bicentennial, including speaking with all of the living deans.

Excellence by itself can be terrible. Without humanity and love can be awful. Humanity and love is wonderful. But if there are people who do that and are not very able, they don't get much done. Here, we have people who have the greatest ability. We have to try to make them understand that love, humanity, and caring for the other is what makes their excellence worthwhile.

I am so pleased to have Judge Guido Calabresi here today. Guido, thank you so much for coming.

Thank you. It's wonderful to be here.

So when I got here, Guido, Yale was the place to be, but it wasn't always that way. There was a long time that Yale was just a fledgling school struggling to survive. Can you walk us a little bit through the shift in the school's history and its status?

Well, I think, for a long time, the Yale Law School was primarily, a New Haven school, then it became a New York School, then a national school, and then an international school. And as it did, it changed in the number and success of its alumni.

But the one thing that had remained the same from the very beginning, from before there was a law school, from when, in 1801, a professor of law was named in the college was the idea that law should be taught to make citizens and leaders and not just lawyers. And that's what happened more and more. And as the school became broader and more national, this point of view came to win out.

So I want to talk a little bit about what you did to make this school what it is. So one of the things that I always say about you, Guido, is that you helped hire one of the greatest generation of scholars ever to walk these halls. I wonder if you might talk a little bit about how you managed to get so many luminaries here. And get them to engage with one another and make each other better.

OK. First, I should say that whatever I did in hiring was not as great as what Eugene Rostow did when he hired 13 or 14 of the top people at a time when, for certain reasons, Harvard was becoming boring, and he got all the bright young people. The Bickels. The Wellingtons. The Goldsteins. The Lipsons. Any-- Charles Black and so on.

What I did was to find that the law school was not able to hire during the end of Wellington's administration because we were not paying enough. We were paying around 16th among the top 20 schools that allowed us to retain people, with difficulty, but it wasn't easy to get people. And so I said, I want to get the best in every field. And I'm going to say that I will pay them whatever their school will pay them.

Not more because I don't want to buy anybody, but whatever, to come to a place where they can do something that is a paradigm breaking.

This, people said, "But you're going to cause people to raise salaries." And I said no. Because when they know that I will match them, whatever they do, they won't raise theirs, which would give them local trouble because it won't do them any good. And with that, I was able to say, look across the board at who is the top person in commercial law, the top person in legal history, and we will go after them and bring them here. And show them why this is a place where they can do the work they had always hoped they could do.

I could name names, but work that Bob Ellickson had done at Stanford was good, but wasn't as good as what he did when he came here. And that's what we did, again and again.

I think, that's one of things I've loved most about this place, Guido, is the workshop culture. So many people, I think, don't know that we have a clear culture that everyone reads the paper. So we don't even have a presentation. We just start right in with the questions. And it is this joint enterprise.

And that's the thing. That we are small enough or think of ourselves as being small enough so that in the workshop, people talk at you and with you not only in your field, but from other fields. There are places that have an advantage-- and I think, Harvard does-- in moving the frontier of a field out a little bit because they talk with each other in the field. And that's important. But you won't get totally new views. But if you have a workshop in which somebody like Ackerman says something and somebody like Schwartz from a totally different view says baloney or a worse language than that, that will cause Ackerman to rethink the thing from a totally different point of view and come up with things which are genuinely new. And that's what we have a comparative advantage in. And that's what we've been able to do. And in hiring, once you say that to people, those who have the capacity to do that light up because they know that that's what they're in the business to do.

Well, Guido, I remember, two things apropos of what you said. The first was when you were recruiting me. You walked me down the hallway. And you said, "Behind every one of these doors is an idea."

Yes.

And you said, "It's not enough to be the best in your field. You have to have an idea that's going to change the field." And that, to me, perfectly captured the ambition of the place.

And this can have problems with youngsters because they're apt to ask if they come in immediately, what is my idea? And of course, we don't have that idea yet. That comes later. And there are some-- the Markovits. Others like that-- whom we hire immediately because they are strong enough to be able to do

that. Others, we have to have to go to other schools and start learning a bit, and then we see. And that makes hiring more difficult in some way, but it is always to try to get the people who can do this.

So let me talk a little bit about something else that you did to change this place. We're accustomed to being in the most beautiful building imaginable. The students all call it Hogwarts. And yet, this building was pretty rundown when you started your deanship. Could you talk a little bit about the big bet you made?

Yeah. The building was a disaster. It was so bad that people seriously, in terms both of students and of faculty, of not wanting to come. The University had offered to take it over-- well, it was their keep. Traditionally, it was something they were supposed to maintain-- and build us some new building somewhere out in the sticks. I didn't want that because the law school had to be at the center of all university thought.

I mean, if you really are going to do something new, you want the philosophers. You want the political theorists. You want even people in totally different fields to be able to come. So I didn't want. And then, I thought, this building was magnificent.

Now there, the problem was that to fix this building would cost an enormous amount of money. And technically, this was the University's responsibility. The whole relationship financially was bizarre. Our budgets, so far as it was, had \$40,000 in it for maintenance of a building, which was the income and a million dollars in 1929, '30 when the building was built. That was never changed.

I was willing to take a chance on getting the money to redo the building completely. I had reason to think that this might work. And I thought that if I did, that would be, one, something that was necessary because we were at the bottom of the University list for redoing buildings. And by the way, at that time-- not now-- they were not redoing buildings well. They were doing it on the cheap.

Instead, I knew that in university buildings, like government buildings, if you do things, paying more, you save money because maintenance is always the thing that is hard. So I was willing to bet that I could get the money to redo the building. And by offering that to the University, I was, also, able to get the law school to be financially independent in different ways.

Now, I knew that the building could be redone because a cousin of Anne's, who was a great lawyer and a graduate, had told me, "Look at how horrible your floor is. Here are the people we use in Minneapolis. Let me show you what we can do." And he showed me do this in a small thing that this could be done.

The question of whether we could get the money was two things. One, I had noticed that even without doing anything, the alumni fund had risen because as we had gone from being New Haven, New York, International, our graduates were richer. And I'd also noticed that this had happened long enough so that some were now at the age where they were likely to be dying and leaving things. So that even if I didn't do anything, there would be significant bequests that would start coming in just demographically.

The other thing I was sure that if we managed to save at the law school was financially independent, we would get money from people who loved their college, and didn't want to give to Yale, but loved the law school and wanted to do that. And they knew that. And if I could say to them this just goes for the law school, this would happen. Both things happened. And then, some lock with particular people. But I thought that it was a bet that had the odds with it and was willing to do it.

Then the question was, what do we do? And here was this building that is magnificent and had things which were almost disappearing. Work in wood. The stained glass windows. The people were still there. The ceiling of the library.

And I remembered something that Whitney Griswold said, "When you're doing something of this sort, do the luxuries first. You will always find money for the necessities. If you do the necessities first, you'll run out."

So I did the opposite of what was sensible. And we got back people who had been in the original woodworking companies and in the windows. And we did that, and it succeeded. So at the building now, it's a joy.

So Guido, as I'm thinking about the big bets you make as dean, so for me, it was-- for me, it was the leadership program and the Hurst Horizon Scholarship program and US News. I remember a third big bet that you made. Not just the faculty, not just the building, but COPE. And I wonder if you could talk about the origins of our Loan Forgiveness Program.

Now, COPE originally had been part of Harry Wellington's idea because Harry Wellington, though he was tired at the end of his deanship and was not able to get money from the University to do things, had done a great deal in beginning to rehire people. And he had, with me, this idea that a need was not a snapshot, but was a moving picture. And that there were people who would come to the law school, who didn't have much money, but then would earn a great deal of money.

And so didn't really need more than loans, while there were others who might be wealthier, but wanted to do things that wouldn't earn money. And so, he and I talked about it and decided that what we wanted to do was have a thing in which loans would be converted to scholarship retroactively, depending on how much money the people then earned when they graduated. Because if they didn't earn much money, we thought it would be because most wanted to do things which were public interest.

At that point, I had something that I still care a lot, but I didn't want to define the public interest. I wanted the law school to be neutral in that. And that if we had the best students-- which we did have-- whatever they thought was in the public interest would be enough. So that rather than asking whether they worked at this public interest thing or that or this right wing or left wing thing, if somebody earned less money, that for a graduate of a law school was reason enough.

Oh, yeah, there might be somebody who was goofing off, but it's trivial. Most of them would be doing because they thought it was something that mattered. And that's how we set it up.

The University at first, voted it down. That is, it's the only time I threatened to resign. This was when I just begun as dean. I was in Canada. And the provost had told me this would go through. The corporation said no because some people in the medical school were afraid of it. And so I said I resign.

He said, what? And I said don't worry. You've got a few months. Because either, you can't carry out what you promised me, or you weren't true in promising me. He said, I'll look to it. And so they went with it.

Now, it's a wonderful program and idea. What you have done, though, has seen something which we had not seen. And that there are people who come from sufficiently low income that they cannot believe that they will earn enough to pay back the loans, even though many of them will. But they can't believe it. And those people are people that if we want really to reach out to everybody, must be reached to. So that

what has been done in terms of giving people below a certain level total payout is what fulfilled the dream that I originally had.

Happy to carry out a little bit of your dream, Guido. I wonder if you could talk a little bit just about deaning generally because it can be a lonely job. I think that you once joked to me that you can't be dean for 10 years because you lose 10% of your friends every year. And that at some point, you run out. Although, I know that's not the case. But I wonder if you might give advice to future deans about how they should think about this job?

First thing, let me say that I now have been a judge for 30 years. And I was dean for almost 10. It seemed, to me, as if a time I was dean was an eternity, which I loved. And for 30 years have gone by like nothing because it is so incredibly intense. And it's intense because as a dean, you are, in a way, the great butler.

You are the admirable Crichton. You are Jeeves. You are the person who has to work for the Lord and Lady of the manor, which is the faculty, the students, to some extent, and to some extent, the University, who are wonderful, but are incompetent at doing most of the things, for good reason, because they have other things to do. So what you have to do as dean is give the sense that you are there to find out what they really want, and then to save them for trouble and time so that they have time to do what they want. You want to make dramatic appointments, great. You decide who they are. Don't worry about the money. I'll find it.

You want to do this. I will be there to do that.

Now, that does, also, as if you read the novels about Crichton or Jeeves, allows you to put in and to suggest in talking with people, what your own agenda is. So that my own agenda of strengthening the clinical program was certainly part of what I did. But you always do it with a sense of "I'm listening to you." The other thing is, the dean is the only person whom a faculty member who has problems can go to. And the dean is the person they can go to. And so you have to be with them. And if you do that right, also with students, somebody whom people can come to and feel comfortable with.

And that gives a sense of an institution that is loving. And it's essential because it is, of course, part of what is Yale. Yale Law School is the place that is intellectually most challenging. We're all arguing about everything, but doing it in a loving, kind of a way.

And that requires then something else. And that is something that in those days, could be done much more difficult this day of having an administrative staff that in those days could be small, but who understood, unlike most deputies, associates, deans and so on, that their job and pleasure is not in saying no, but in being really good lawyers. So that when people come-- students or faculty-- wanting to do something which can't be done, for any number of good reasons, instead of saying, "Sorry, you can't do it," you're a good lawyer.

And what does a good lawyer do? Say, you want to do this? You can't do it that way, but you can do something that you want even more. And here's why, because I'm a good lawyer and will show you how to do it.

And that's what my associate deans were hired to do. And did. And that, also, gave the faculty the sense that they could come. So you do make enemies, but surprisingly, just as you have found, fewer than you might think.

You just captured what I always think of as your phrase, which is "excellence and humanity." That the law school is excellent in every way, but it is a humane community. And I feel like you embodied that from the moment you started teaching.

When I taught my last torts class, the students gave something to me which said that. And that has been a broken record of mine. Excellence by itself can be terrible. Without humanity and love, it can be awful. Humanity and love is wonderful. But if there are people who do that and are not very able, they don't get much done.

Here, we have people who have the greatest ability. We have to try to make them understand that love, humanity, and caring for the other is what makes their excellence worthwhile.

You taught torts for 60 years. And I remember being at your last torts class. And it was the only time, Guido, I have ever lied to you because I think, I told you-- it was the middle of COVID, of course, and so we were all teaching on Zoom. And I told you that I wanted to come to your class just to mark the occasion. And what I didn't tell you is I invited several hundred other people. And for those who are listening to this podcast, you have to imagine the moment the students are all on Zoom. You can see their faces. We all jumped in, but we made sure our screens were darkened so Guido did not know we were there until he gave his always famous last speech about law. And then, we all turned on our screens. There were staff from years past. There were faculty. Alumni. Justice Sotomayor was there. All to acknowledge and mark this extraordinary moment. It was one of the most beautiful things I remember.

What a blessing it was. Let me just say this, none of that would be possible without my wife, who-- going back to being dean, I didn't want to be dean. Giamatti arranged things because he was leaving. And so he wanted powerful people to be deans. Before he'd always wanted weak deans, but then he was leaving. And he arranged it so that it would be difficult for me to say no.

I still would have, but Anne said, "Do it. You might find that you had some skills you didn't know you had." And with her help, it turned out that, I did. I had-- I'd always been a teacher. And I've always been a scholar. It turned out that because the things of teaching and scholarship in a faculty like ours was what made it possible for me to reach out to the faculty and to the students. Then made it a successful deanship, as well.

Well, it was a remarkable deanship. And you were and are such a beloved figure. So whenever I am on the road-- whenever I am on the road talking to an alum, they always ask how you were doing. That's the first question out of almost every alum's mouth when I see them. So I wonder if we might talk a little bit about what you're working on now. Because Guido, I know, you never rest. So if you could talk a little bit about it?

I'm still teaching a seminar on constitutional litigation because I can't do without students. And I'm judging two thirds time, so I'm teaching one third and judging two thirds time. And the judging is very important because of the 13 active judges on my court, five were named by Trump. Six were named by Biden. That

means, there are only two judges that have been there for more than three or four years. And all these new judges have to learn what it means to be a judge.

And the only way you can teach judges is by sitting with them. And so all of us oldsters, we all know that these new judges have to learn that you've been a public defender for 17 years, and now, you're a judge. You've been a prosecutor for 26 years, and now, you're a judge. You don't lose that. And so, I do a lot of that.

But I'm also taking time to write. And I'm writing an article, which, I hope, will be really something that is new. I'm calling it "The Missing Buttress in the Cathedral." And it deals with the issue of how we deal with fundamental rights, with what people think of as fundamental rights, that are not specifically protected in the Constitution.

The only ones that are specifically protected in the Constitution are speech and religion and in a very different and very important way, property. And what I'm saying is this has been the thing that we have missed.

And it won't be one that gives ultimate answers. But I think, it asks questions that when people read what I've done, in that, will say, OK, this is what we want to talk about. So I may be right, I may be wrong, But I still think, I have ideas that may be new paradigms.

Well, I think, the legend, Guido, is that everyone here has at least one brilliant idea, but you've had, I think, you've once said, at least two. [LAUGHING] And now working on three. But you, also-- we just celebrated the completion of your biography, which is remarkable.

Well--

It took years. That was a very strange thing. Bob Post had a friend, who is a historian and a lawyer, and said, "Why don't you try to do a different kind of oral history with Guido?" and. We began just talking and talked every Monday for almost 10 years. And he would ask questions, and I would talk.

And strangely, my memory is extraordinary. And so I remember, any number of things. Like all memories, some things are not quite accurate. And then, he would do research and say, here Guido is right. Here, it's slightly wrong. And so on. And so it became a very different book than most memorial, memories, or things of that sort.

I talk. And then, he says, here's what is behind it. And it begins with me and Italy and anti-fascism, and how that shaped me because we all are shaped by what we have lived. As judges, we can overcome ideology because we look and can't control it, but we can't overcome and shouldn't overcome what we bring-- we can work with it, but what we bring.

And then coming to America, who helped and who did not. What America was like at that time. Why we stayed, thinking that America was more egalitarian than Italy. And in some ways, it is, and in some ways, it's not, but we try.

As I was doing it, each Monday, I would go and say, oh, dear, this is terrible. And then he would get me talking, and then do research and show me where I had it right and where I didn't. And it became something quite lovely. Two volumes. Very long.

Guido, I wonder, if I could close by asking for your favorite quotation? So you may not remember this, but you shared this with me, as did an alum, before I even became dean. And the very first letter I wrote to

the alumni quoted Grant Gilmore. And he wrote in the Yale Law Journal-- I think, this is what you said about it-- "Grant Gilmore once said that the golden age of the Yale Law School always seemed to lie in its immediate past, in the time of those who had just gone, while another golden age could be achieved in its immediate future if only a few things were done, if only a few things worked out." And you use that phrase all the time. I wonder if you could talk about it?

That, when I heard Gilmore saying it-- well, barking because he always would-- hit home and has remained my favorite quote about the law school. He went on to say, "How much better that is than a school that always thinks that this is its golden moment, and then looks back at the past and says, but we weren't that good." The only way you can be the kind of law school that we have wanted to be from Ezra Stiles to the present is if we don't think we are quite there.

And look at what people have done-- those who taught us. Those we argued with-- did in the past and say, "Can we do it again?" And I remember Grant Gilmore and a whole group of teachers that I thought were magnificent saying, you know, the people who taught me were so wonderful were not quite up to him.

Well, that is why, I think, the school has a restless gene. And that's what has always made us who we are. So Guido, I want to just close by thanking you. When anyone ever talks about the greatest deans, if not the greatest dean, at Yale Law School, you were always named. And I will say that in the beautiful office where I now sit, which is where you once sat, your name is carved in the stained glass window behind me. And every morning when the sun comes in, your name runs across my desk and reminds me of why this job matters. So thank you so much for everything that you've done for this place.

Thank you.

[MUSIC PLAYING]