

# Daniel Markovits and Heather Gerken EDIT v4

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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.

We have a profound interest in being custodians of our politics. Our lives go better if we take on the custodial role rather than only the partisan role.

I'm delighted to welcome Daniel Markovits, a Guido Calabresi professor of law and the director and founder of the Center for the Study of Private Law, here to the podcast today. So Daniel, I remember once when there was a book party for your wife Sarah and everyone else was giving toasts to Sarah, it was a warm and fuzzy moment. And you immediately said, let's talk about the work. So, let's talk about the work. When I, actually, first met you, you were writing about lawyering and democratic theory. Your work is incredibly wide ranging, it's actually hard to capture how many different topics you have covered just in the time that we've been colleagues. And so I wonder if you might, just for those who aren't familiar with the work, just talk a little bit about through line among the work-- or the through lines through your work.

Sure. First of all, actually, we first met when you were my boss at Jenner & Block.

That is true.

At Jenner & Block, so some things never change.

I don't think I ever thought you were going to end up at Jenner & Block, although, it was a delight to have you there.

We met playing video games at Dave and Buster's and shooting skeet, so that's how we actually first met many, many years ago. A through line in the work is a more serious matter. I think the thing that I'm interested in most, throughout all of these topics, is the way in which people who have competing interests but also divergent views about justice or fairness can, through institutions, structures, practices, often legal ones, find a way to establish some form of solidarity. And also how that can break down when certain kinds of economic life or legal regimes make that less possible or more possible. I think that's the theme-- that was the theme about the work on lawyering, the ways in which adversary lawyers actually are engaged in a cooperative project. That's some of the work that I do on distributive justice. In a way, the work I've done recently on economic inequality is about how certain relations of production make that impossible. So I think that's the thing that holds it all together.

Yeah, so let's talk about the book that is most directed to a popular audience before diving into the more scholarly work, which is the Meritocracy Trap. So it was a huge book, it generated a lot of conversation. I wonder if you could just say a few words now, reflecting back on it, about how you think about the project and whether it goes anywhere from here.

Yeah so the basic idea of that book is that we think of meritocracy as an unalloyed good, that it's a way of both allocating advantage fairly and giving everybody a chance to get ahead and also a way of producing an elite that, even as it serves its own interests, is also capable and promotes the general interest. And the idea of the book is that neither of those things is actually true. That, on the one hand, because people

are good at things that they've been trained at, and rich people buy more training for their kids than anybody else, meritocracy now actually blocks opportunity for most people.

On the other hand, it produces an elite that, because it believes it has earned its advantage, claims more than its fair share and it distorts our economy in ways that actually damage the prospects for everybody else. So those were the core ideas of the book. And I guess I feel like, when I published the book, it sort of started an argument. And when it was published and when I was first talking about it lots of people thought it was crazy. Now I think something like my view has become the conventional wisdom. I doubt that's because of the book, I think it's more because the book was identifying difficulties in our public life that have become totally apparent since it was published. But in that sense, I feel like it started an argument and the argument has moved in my direction.

And can you talk a little bit about what you think universities should do and what they ought to be? Because I know you have views on that are separate and apart from the ideas in this book and I wonder if you think about how to pull them together.

Yeah, I mean, first of all, you have to be really careful about universities because there's the elite sector and then there's everything else. So I was actually just on something with the guy who runs the California State College system-- the California Community College system. And he observed that all these universities are competing for the lowest admissions rates and he's competing for the highest admissions rate, he thinks it's a virtue of a university to have 100% acceptance rate, because the point is to educate people. So you should educate everybody who's willing to be educated. And so one segment of the university system is really trying not just to be inclusive in a demographic sense, but to be totally open to everybody and to figure out how to educate people on a budget, where everybody who wants to get the education should be able to get it.

That's not just community colleges, if you look at Arizona State University, Michael Crowe, who's the president there, basically has a model in which he wants to get at as many people admitted as possible and he wants to admit everybody whom he thinks can benefit from the education he gives. I think Arizona State, right now, has 135,000 enrolled students. So in that segment of the university sector, the task is to use limited resources to bring as many people in as possible and to figure out how to deliver a meaningful and productive education subject to those constraints. And then there's the elite sector, and a place like Yale is on the very far end of that. And there I think the problem is quite different, it's that we have too many resources and are directing them at too few students.

So my view there is that what universities are trying to do is somehow prayerfully to open up their admissions process so that it's no longer unfair, in the sense that the privilege no longer have as big of a leg up and universities are looking for people who come from less privileged backgrounds and trying to find a way to recruit them. That's obviously better than not doing that, but I don't think it solves the problem. The problem is that an elite university education is too resource-intensive and too socially and economically valuable. So what elite universities really should be doing is educating many more students and never completely moving towards the Arizona State or Cal State community college model, but moving in that direction. We should be educating two or three times as many students as we are because that would dilute the value of our degree and that would be a good thing for our society and also a good thing for our students for other reasons.

So can I just ask a question, why not 135,000 people? Because even if every Ivy League University multiplied itself by two or three times, it'd still be a drop in the bucket of inequality.

Yeah so I think there are two points here. One is it would be less of a drop in the bucket of inequality than people think. And the reason for that is that our economy and our cultural regime has become so unbelievably top heavy that in fact, if one can do something to dilute the advantage, both the income and the wealth but also the cultural advantage, of a very narrow elite, well that's actually doing quite a lot for inequality. If you could make the tenth of 1% or the half of 1% materially broader and less distinctively prosperous, you would eat away at most of the rise in the overall Gini in the United States. So just to be very clear, the Gini coefficient is a measure of overall inequality. If you look at the Gini coefficient in the bottom 70% of the distribution, it is no higher now than it was in 1970. So all of the inequalities in the top third and almost all of that inequality is in the top 5% or top 1%, so if you can do something for the top 1% or against the top 1%, you can actually make a big difference in inequality. So that's one reason. But the other reason is that elite universities do serve a purpose and to reject one extreme isn't to embrace the opposite extreme. And we need innovation and we need extremely, intensively educated people, and we need very, very high skilled people. It's just that we don't need them to be quite as privileged and raised in quite as hothouse an atmosphere as they are now. So for that reason, it's not the case that we should abandon all matters of distinction in education. And it is the case that we should find a way to deliver a very good education to students who are partly distinguished by having an unusual capacity to absorb that education and then produce more skill and knowledge with it. It's a balancing act. And what would you say to a more radical vision? So one response to yours would also be to say that universities are for the production and dissemination of knowledge and that, in fact, that is their best and highest purpose and the best and highest use of their resources. And so funding, for example, a generation of research on climate change or basic science is actually far more important for the good of the world than educating three times as many students as they do. Because there's obviously a trade-off if you're going to hire faculty to teach. Or maybe your model's not to hire faculty to teach and just let them become part of a research institute, but I think that might be the question. I think when university presidents talk about the contribution that universities make, they often focus on this piece of the puzzle. Yeah, I think there are two parts to this. The first is that the US, and to some degree the UK, are actually extremely unusual in the world in that they merge elite knowledge, production, scholarship, and research with the selection of an elite for the next generation. So that's much less true in Germany, it's much less true in Japan, it's even less true in France. And so this idea that you should merge research and teaching is a somewhat peculiar one. On the other hand, it's also the case that US and UK universities are some of the most successful in the world. So it's not that I'm totally confident that it's a mistake, I'm just observing that one model, which you've mentioned, is to separate research and teaching, especially elite research from elite teaching. Which may be part of the solution, to not separate entirely, at least pull them somewhat apart.

But the other part of this is that the extreme eliteness that we have now, particularly in the US university system, actually distorts research, also, in a variety of ways. Law is, in fact, a great example. US law schools, Yale Law School, are the greatest knowledge generators about law probably the world has ever seen. We produce the most interesting and innovative scholarship and our graduates produce the most dramatic legal innovations. But it's also the case that the American legal system is more or less a catastrophe. Its public legal system is falling apart under political pressures, it's criminal legal system can't produce reasonable, either substantive or procedural, justice, and its private legal system is unbelievably expensive and inefficient. And legal systems that are much less innovative, that produce much less

creativity, both among scholars and practitioners, actually produce a higher and more reliable quality of justice at a much lower cost. I think those two are connected because innovation often serves an interest other than the general good. It often serves the interest in private law of concentrations of capital. So lots of the legal innovations in private law surround the legal creation and then manipulation of financial markets and markets for corporate control, which are great for some people but don't actually produce a corporate sector that raises employment or raises GDP very quickly. Lots of the public sector innovations produce certain kinds of political outcomes for certain political groups, some of which I approve of, some of which I don't approve of, but which aren't collectively part of the good functioning of a political system. So innovation can be distorted itself by a concentration of privilege in the innovation sector.

So I completely hear that, I suspect that most universities would say that law schools are not actually what universities are. I mean, I think we're as close as you get, we're like a mini university, but nonetheless. When they talk about the kind of contribution a university makes to society, they are typically talking about advances in science, and most universities have a science department. And most universities have a group of scholars who are devoted to thinking about knowledge in the sector that they're in. And it's the question of, should they be teaching 3,500 students--

But even there, if we start looking-- let's take two other examples, economics departments. So economics departments were captured by a financialized model of markets. And for 50 years or so, from 1970 to 2020, I don't think have produced particularly valuable knowledge, although they produced an enormous amount of innovation. I think that's actually becoming part of the conventional wisdom about the last generation and a half of economists, including in economics departments. If you look at the humanities, the humanities are in a terrible state particularly in the United States right now. Partly, again, because they are responding to a series of cultural imperatives which are different from producing humanistic and artistic thought and production for the broader society. Now, it's not that I'm a big fan of socialist art, but it is the case that many of the ideas that come out of the humanities today are not particularly socially useful. If you look at the natural sciences, we produce massive innovations, many of which have a relatively low social product. And there's a defense of all of this if you believe in certain forms of knowledge for its own sake, which, as a professor, I do, but as a citizen, I don't. And it's not clear to me that universities should be structured in a way that is good for the professors.

So can we talk about your next book project because, I take it as very much about some of the forces that you were just describing that are shattering law and legal institutions. So can you talk a little bit about the toleration politics book?

Yeah so the toleration book begins from the following thought, that conventional liberal defenses of toleration and liberals in the history of ideas sense, not in the current left politics sense, are the main defenders of toleration. And they have two central ideas which begin with Socrates and then run all the way through Milton and Locke and Mill. And these are, on the one hand, that the mere expression of offensive or malign ideas is harmless, and on the other hand, that intolerance, efforts to suppress these ideas, quickly descend into the kinds of brutality that are obviously harmful. And so the model here is of the minority religion that expresses ideas that others, the majority, finds sinful or offensive. And that the majority response is to exterminate or expel the minority religion. And that model makes sense when arguments for toleration are addressed to a dominant hegemon in a moral monoculture. When you're

trying to tell Christians in Europe to tolerate Jews but when you're trying to tell Brahmins in India to tolerate James.

But it misfires badly in a multi culture and in a world in which almost everybody is insecure, and it misfires in the following way. First of all, the idea that offensive or malign expression is harmless in a world in which there is wide cultural demographic identity variety and everybody is vulnerable is just false. It actually is harmful to have to sit in a university and listen to a racist lecture if you're a student of color. It is harmful if you're a woman student to listen to somebody who's articulating ideas that women aren't good at abstract or rational thought. And on the other hand, the ways in which people who are moved to try to suppress that kind of offensive speech are now acting is not actually to exterminate those who are speaking it, but rather they're using intolerance as a shield to protect themselves.

So the traditional liberal argument for toleration first of all says something that is just false to the lived experience of the people it's directed to, namely, this isn't harming you, when everybody who's hearing it says, no it's harming me. And second of all is saying, you should accept that harm out of concern for the brutality that you may inflict on others who are wronging you when, in your judgment, which is not unreasonable, they are more powerful than you are. So that argument, the traditional argument, is almost perfectly structured to undermine the case for toleration under our circumstances. So that's sort of where the book sets out from. And then it tries to come up with another argument that might make better sense for our circumstances.

What does that look like?

So it looks a little bit like this. In any collective venture, people take on two roles. One is we are participants or partisans in the venture. We have interests, we have beliefs, we're arguing with one another, we're trying to promote our interests and vindicate our beliefs. That's the familiar one and that dominates most of our lives. But the other one is that we're also custodians for the venture. We're in charge of making the collective venture go well as a collective venture. An example of this that's most straightforward is the playing of a game. We try to win, we try to defeat the other side, we try to damage its interests. But at the same time, for the game to be a success for us, in fact, for us to be able to win it as a game, we also have to enforce the rules, respect the rules, act within the rules, and that's our custodial role. And obviously politics isn't a game, it's much more dangerous.

In some sense, games-- I think I'm going to say in this book if I can write it, they create the ultimate safe spaces, because we can fight each other, and the only risk is that we'll lose, nothing else bad can happen to us. And politics isn't a safe space. On the other hand, it's also true that we have a profound interest in being custodians of our politics. That our lives go better if we take on the custodial role rather than only the partisan role. So the argument of the book will be to build up the appeal of that custodial role. I think there's going to be an analogy, actually, to love as a way of thinking about the appeal of the custodial role both in individual relationships and collectively. I hope I can write this book. You've got to get the tone right and you've got to find a way to write it so that you're speaking respectfully to people who are very different from you while also saying what you mean to say, and I don't know that I'll be able to do that. It sounds like it's going to be a fantastic book when it does come, though, and we could all use it.

I mean, if it comes.

I mean, it's sort of amazing, Daniel, I'll just say-- I mean, I know I'm accustomed to our resident polymath here, but it is remarkable how wide ranging the work is. Can we talk a little bit about both your center and your clinic? So first the center, if you just say a few words about what you understand the purpose of the

center to be. And I mean, you've run some of the most remarkable conferences around, I mean, every time I see the guest list I think, I wish I weren't dean so I could just go hang out at the conference all day. But I wonder how you think about its purpose.

Yeah so the center is the Center for Study of Private Law. And if you think about law as being either law that governs the relationship between the state and individuals, that's public law. Or law that governs the relationships among individuals, that's private law. So private law quintessentially is contracts, property, torque. Most US American lawyers basically think private law, as a category, doesn't exist. They think almost everything is public law and that's a function of American legal realism and the idea that law is just a way in which the collective determines the balance of advantage and we always need to look to public norms. The irony for me is my politics very much embraces that set of views. But there is a deep intellectual tradition going back to Roman law which views private law as distinct and, in some ways, as conceptually anterior to public law. And in the US today, that's associated with a kind of libertarian right politics, but it hasn't always been and it doesn't have to be. Part of the purpose of the center is to provide a place where global scholars who think in that way can engage with US American legal thought.

So the center's role is principally an intellectual one and principally devoted to finding a way to produce cross theoretical or cross traditional intellectual engagements. And that's one of the reasons why, for example, a lot of these conferences we often have two speakers on at the same time and often the speakers are people who, before they come on, think they will have nothing to say to each other. Then what we hope to do is to structure the event and the conversation in such a way that they discover that they're talking about the same thing but just in very different ways. The clinic is partly-- this goes back to something you asked me about earlier, I wish I'd spent more time working as a lawyer, this is a way to do some of that inside the law school. We spent the first year really trying to think about how to structure what we're doing, what kinds of matters to take on, in what way to do it.

I think we are going to work towards some sort of more entrepreneurial things where we're trying to build a tool that consumers can use in e-commerce in order to read and understand the contracts that they face, in order to stop sophisticated sellers from manipulating consumers, either by including contract language consumers don't know about or by various kinds of dark patterns that push consumers to make choices that they wouldn't otherwise make. And so that's a project that will turn on computer science but antecedently requires legal analysis to know where best to deploy the computer science. Then we're also working on some more conventional litigation related matters concerning housing and rental agreements, concerning financial contracts and consumer debt.

There's a fellow who practiced for a few years, a graduate of this law school who works with me on it, the students break into teams based on their interests to work on one or the other of these projects over the course of a semester or a year. And the ultimate product depends on the nature of the project, it could be something as lawyerly and traditionally lawyerly as a brief. It could be some kind of legislative advocacy or it could be a Chrome plug-in that people can put on their browsers when they shop on the internet.

So who are your clients for the litigation piece of it?

So that's something we have to figure out. Our clients-- it depends. We are thinking of doing something in a consumer debt area where we might try to build a class and have a class action but of course that requires institutional capacity inside the clinic to manage it. That might require us to partner with an outside law firm. We might run an amicus practice in which the clients would be interested civil society groups. And I think one of the things that there's a lot of room to do now, particularly in the consumer

space-- because an interesting thing about consumer law, at this political moment, is that there are a series of both political groups and social and economic interest groups that traditionally code conservative or red that actually have a profound interest in certain forms of economic justice and certain instances of consumer empowerment and rights. And are probably, for that reason, in fact, I know are for that reason, under-served by the elite activist legal establishment which tends to code blue.

And so one thing we are also looking into is whether for some of these cases, it might make sense to have, as our clients, if we have an amicus practice, groups that fall into that category. And there's actually a lot of interesting work there. Lots of, for example, southern states that have long histories of extremely progressive consumer law now somewhat in desuetude but still fairly deep in the traditions of those states. And so those are places where we might get involved. I mean, Heather you know this, I'm finding my feet here and trying to figure out how to do this and how to do it well. So we're moving deliberately and cautiously and want to not make-- at least not make obvious mistakes. We're going to make a lot of mistakes, but I want to not make the ones that we should avoid.

Can I just ask you a little bit about what it's been like to parent over COVID?

Yeah it's been, from the privileged place that Sarah, my wife, and I have been in, it hasn't been that bad in multiple ways. First of all, obviously, my wife's also an academic so our jobs were never at risk. We could continue to do our jobs, so it's not just that our jobs were never at risk, but the part of our lives that involved our work was never taken away from us. Our children are older so that Zoom school was perfectly plausible. Actually, one other thing I've been doing over the past year is, together with somebody at Harvard's Ed school, I've sort of convened a bunch of people in education to talk about the pandemic and schooling and gather data on what's happened. And one of the things that's absolutely clear is that, for parents of small children, this has been just humanly, unbelievably difficult. In some sense, no matter how secure they otherwise are because it's transformed their days and their lives.

That's why every university is extending 10 year clocks by two years.

So there's that part of it. There's also the question about what you need to keep your job and to get ahead in your life prospects. But there's also just-- we've created a form of life and a set of ambitions which rightly or wrongly leaves many people feeling like when they have children full-time, all the time with their children, wasn't the regime that they expected, anticipated, constructed their own emotional lives for. And then all of a sudden, it happened. And that's just difficult, and even if everything else in your life is secure and going swimmingly, it's difficult. And if everything in your life is not secure and not going swimmingly, it's only more difficult.

Can we just maybe close a little bit talking about the next couple of years of American politics? Because I know that your work on economic inequality is very much tied to a sense of urgency about democratic crisis, which is a different question from what's going to happen in American politics in the next few years. But I do wonder how you must feel when you see, every day in the headlines things that are connected to your work and whether you want to talk about them at this moment or talk about them in the future, I'm very curious.

So I think there are going to be parts, if I can write this book on toleration, of this book that will be a little bit about that in the following sense. I think there are some genuinely malign forces in our society. I don't actually think that there are more of them or that they're stronger than they have been in other times in my life. There are lots of periods in recent American history in which there were major national political figures, for example, who took the view that racism and race-based discrimination wasn't just morally OK,

it was morally required. So the fact that there are open bigots in our public life now is terrible, but shouldn't be surprising. And isn't, in fact, in the sweep of the American experience, that unusual. I think it's important for us to remember that.

I think the real threat now is that, for complicated reasons, which we could talk about, the underlying security of our basic democratic practices is significantly at risk. I mean, you know more about this than I do, but in ways in which it hasn't been before. I think it's really important here to distinguish between voter suppression and unfairness in elections, which has always been part of America and which is a grievous injustice, but isn't the end of America, it's just part of America and it's a constant struggle to stop it. And the prospect that the person who is understood to have won the election will nevertheless not get power, which would be a different kind of problem. I feel like that's a risk now of a sort that we haven't faced in some time.

But if we can get through the next five years, I'm much more optimistic and one reason for that is this, maybe it's just a comparative point and maybe it's schadenfreude or something, I don't know, but schaden-optimism. If you compare our politics, say, to European politics, young people are mostly committed to democracy and the rule of law in this country and are not authoritarians or proto fascists. Whereas if you look at who supports, say, Le Pen in France, it's young people, significantly. So in Europe, there's a long term problem. Whereas here, I feel like if we can navigate the next five years, I think things may look less dire than people who have my left politics intuitively feel them to be at this moment.

Well thank you, Daniel, this was wonderful.

Thanks very much. Been a real pleasure to be here. Thanks for taking the time.

Happy to do it.