

Professor John Witt and Dean Heather K. Gerken

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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.

And what legal history allows me to do is study lots of different things. I mean, I can be a contracts lawyer, or a torts lawyer, or a law of war international law person, or a public health person, or a civil rights person in the course of a single week as I move through different fields of the law. And legal history as a field licenses me to do that.

Welcome, everybody. Today, I have with me John Fabian Witt, the Allen H. Duffy Class of 1960 Professor of Law at Yale Law School. John, thank you for being here.

Thank you for having me. I'm excited.

So we have a lot to talk about. I want to start, if it's all right, with one of your specialties, which is torts and regulation where you've done a tremendous amount of scholarly work. And you've also been extremely innovative on the pedagogy front, so I wonder if you could just talk a little bit about the work you've been doing.

Well, I guess there's two pieces to it. There's the scholarship, and there's the teaching. And actually right now I'm pretty excited about the teaching and the way we've restyled and reorganized the torts course, so to torts and regulation, or as I like to call it, T-REG. And what I found was that over time the torts course had become a collection of 19th century railroad cases.

Which you wrote a book about.

Well, it's true. I love the 19th century railroad because I would happily have gone on with that forever, but it turns out the 21st century student wasn't quite as excited about the 19th century railroad cases, and even those cases don't translate to the 21st century because of the regulatory overlay for railroads. And so more and more of the exciting cutting edge torts stuff is, it's either got a civil procedure dimension, or it's got a regulatory dimension, a preemption dimension in particular.

So the project of the new course is to use torts principles to highlight the way in which the administrative state works, the interaction between tort and the common law on the one hand and the regulatory state on the other. In a way, it's what Guido did for the common law, for the age of statutes just finally 30 years later becoming a course. So it really is in his image with all sorts of new bells and whistles.

So one of the things I know that you've written about and talked about and teach about is the distinctive nature of torts in the US system because of the way it's embedded in a broader institutional framework. I wonder if you could just say a few words about that.

It turns out that-- and the comparative lawyers are going to get upset with me for in a minute-- but you know, tort doctrine is basically the same all over the world. There's lots of distinctions, but the doctrine is pretty-- it has lots of uniformity. But the US tort system is radically different than other tort systems. As a share of GDP, the amount of money flowing through the American tort system is much bigger than any other country on the order of double and 10 times.

So what explains that? It turns out it's the institutions, and it's the way in which the plaintiff's bar and the jury and the liability insurance industry have produced a kind of privatized social policy system. And that's

where my work has focused, and I want to communicate a little bit of that to the students, in part because if they were to practice in this area, if they were to become aggregate litigation mavens, that's the world they're going to be in.

And there's some phrase I think that you use, something like, the new Palsgraf is arbitration. Is that what-- That's interesting. I like that idea. I mean, it might be the new Palsgraf is settlement. I mean, settlement has been the thing. I like to point out to the students that we don't have any idea how big the tort system is really because you don't have to file a single piece of paper in the public record to bring and resolve a tort claim. You just need to send a letter to the other side that says, hey, we were thinking about filing a lawsuit, but why don't we split the cash we were going to spend on filing that lawsuit between us and cut out the middleman and make a deal?

So the way in which tort has become contract-- lots of ways in which contract becomes tort, too, famously-- but the way in which tort has become contract through settlement is a huge part of the story. And so some of the course is the institutions and the sociology, and some of the course is game theory, trying to figure out what we can tell from the few pieces we can see of tort law, what we can tell about the way in which parties will be gaming out settlement in the private sector invisible to us.

So I know you have this entire set of teaching materials, which you've made available to everyone, which is fantastic. You also, I think, added Title VII, a week on Title VII to torts, which is a little unexpected, I think, for the traditionalists. I'm curious if you could just talk about that.

Yeah, so the two things, I would say, the two statutory pieces that I brought into the course and into the casebook, which as you say, is a Creative Commons casebook available to anybody, is Title VII and preemption, and they played slightly different roles. I mean, preemption is the centerpiece of the way in which the federal courts end up interacting with tort law, but I also wanted to persuade the students that tort principles were animating or deforming-- one way or the other, you decide-- some of the statutory systems that are most important to the country right now and of great interest to the students.

So we actually have a series of modules in the casebook that come up every couple of weeks throughout the course in which we watch tort principles go into Title VII and either screw up the doctrine or animate it in ways that are useful. So whether it's the reasonable person in harassment cases, or whether it's interesting damages questions, or proof questions, or causation questions, there are all sorts of ways in which the law of discrimination is animated by basic background tort common law principles.

So I want to talk about scholarship because we're so glad to have you back in the law school full time. We're, of course, delighted that the university wanted you to be the head of a college, but we're really glad to have you back. So first, what was it like being head of the college? And isn't it so much better to be a scholar at Yale Law School?

Oh, that's great. Well, I'm really glad I did that job. It was a wild experience like no other that the academy has to offer. I learned a lot. I met amazing students. Heather, it turns out not everyone at the University is a lawyer. It was kind of extraordinary. I had no idea, but it turns out there are poets, there are physicists, and--

Oh, we have those inside the law school.

But that's true, too. That's true, too. And so I really had a great time. It is true that it made it hard to do the biggest projects that I want to do. So after five years, I was happy to transition back to the law school and glad that you all were willing to have me back. But it was really, you know, the undergraduates are amazing at Yale College. It was a real pleasure to work with them.

So you're finishing up a leave, which, of course, we all know in the academy is the worst phrase that you could ever use. But I know you've been working on a book on the Garland Fund, and I wonder if you could just-- I think not everyone knows what the Garland Fund is and who the players were and what they were doing. I was wondering if you could just kind of give the arc of the book.

Yeah, I'm kind of in the, I would say, the last quarter, the final minutes of my work on the Garland Fund. And this is an organization, it was a philanthropic foundation in the 1920s into the 1930s that was started by an idealistic, sometimes confused, honestly, heir of a Wall Street fortune, who decided he didn't want the money that was coming to him. And Roger Baldwin, who had just founded the ACLU, and Upton Sinclair, author of *The Jungle*, got together, went to this young man named Garland, and said, Charles, why don't you take the money but give it to us, and we'll do good things with it?

And he was happy to do that. So then Baldwin for the next decade and a half runs this foundation kind of parallel to the ACLU, which he's running at the same time, but less known. And that foundation is well known to legal historians because they finance what becomes *Brown against Board of Education*. At the end of the 1920s after a decade of experimentation, they finance the litigation blueprint for *Brown*, but for that whole decade, they've been working on dozens and dozens of other things.

They were experimenting with labor education and labor mobilization, and class politics and inequality were actually their principal focus through the decade. So the puzzle that I'm trying to make sense of is, what does it mean that these different forms of social mobilization were happening at the same time, class and race, together there at the end of the 1920s? And it's been a vast project. It has me in labor archives and civil rights archives. It's taken me far too long, but I think it's starting to come together, and it's really been an exciting project.

One of the things about doing it over time is that our times are changing. I know the craft of history is a careful one, but I just wonder, as you take a step back and look at what was happening then, has your view on this changed as we've had these just absolutely crazy four years or six years or eight years of time when those two questions are also circling around one another?

I think of my education at Yale Law School in the 1990s. You know, *Brown against Board of Education* was a success story. There were really important critiques by people like Derrick Bell, but the confidence with which liberal law school-- and I mean liberal and the broadest sense, not the kind of narrow political sense of the late 20th and early 21st century-- but a law school interested in liberal cultural values would celebrate *Brown against Board of Education*.

And for sure, over the last seven, eight years, the limits of that transformation, to the extent it was a transformation at all, are increasingly salient. So I think it's at the heart of this project to figure out what it was about the project that the Garland Fund initiates in the late '20s helped produce the successes such as they were and the tragedies such as they were of the kind of civil rights transformation the United States engaged in in the middle of the century.

So can you say a little bit more about what you mean by that?

Well, what the Garland Fund hits on at the end of its-- its last big thing is a litigation campaign for school equalization, but what they mean by school equalization is an open ended question. What *Brown against Board of Education* delivers is something like a formal ban on segregation, de jure segregation in American schools. But remember, the Garland Fund had been focused on inequality. The Garland Fund for most of its time, 90% of its resources over the course of its life as a philanthropic foundation went into inequality and labor causes.

So the idea that they would end up with a project that is now critiqued widely among legal academics as having been overly formal and overly preoccupied with formal distinctions rather than substantive inequalities is really quite striking. And so one of the things I'm trying to do is reverse engineer the process by which this group of radicals produced in the American legal system a transformation, if that's the right word, that is so widely critiqued as having been insufficiently radical.

It's interesting that you're also working on this project because we've had a burgeoning group of scholars working on what was called law and political economy, for the people who are outside of law schools. I wonder, as you think about the economic inequality piece alone, the other work that they were doing, does that look different now from this vantage point?

For sure. I mean, I think what happens for the Fund is, there are a group of liberals and lefties in the '20s organized around labor, and they conclude by the end of the '20s that if they can't organize across race lines, they're not going to be able to organize a labor project. They need cross-race mobilization. Every time they launch a strike in a textile mill in the North, there are strike breakers from the Great Migration, or the mill owner is just going to move South where the unions are weaker. And so what the project of school equalization started as was an extension of the labor education project that they were engaged in throughout the decade.

The idea was that labor education for African-Americans in the South could be a way of beginning that cross-race mobilization and cross-race organizing. And that's an LPE idea. The law and political economy people are trying to figure out in totally brilliant ways-- I think it's such a great new initiative, new-ish initiative here and now elsewhere-- they're trying to figure out how to reorganize the economy in the United States, the law and the economy in the United States in a world in which there are divisions of class and also divisions of race. So I think in some ways these people in the '20s I'm focused on, Baldwin and his gang, were part of that.

So you weren't just writing one book. You were writing two. I mean, during the epidemic, you wrote about epidemics, and I wonder if you could just talk about that book. It's not hard to imagine what originated it, but I wonder what it was like to experience a pandemic and then writing about pandemics.

That book, *American Contagions*, came right out of my teaching. I mean, honestly, the thing that I've liked best about being here is working with students. Opportunities to work with students in the classroom and outside are just super exciting. And in my legal history course in the spring of 2020, we were puttering along like everybody else, doing what we usually do. And then all of a sudden when the epidemic hit, I felt obliged to add an epidemics unit.

I mean, the law of epidemics, as we now know, is a vast subject, and in the world before antibiotics, I mean, the law of epidemics was a central feature-- the jurisprudence of hygiene, as it was called, was a central feature of the American legal system. So I did a Zoom lecture, which some students helped me produce slides for. We tried to make it a multimedia production for the course.

Yale Press got wind of the lecture and asked me to write a fast book, and there I was around the dining room table with my two boys doing virtual school, so I was like, sure. And so that's what I did over the course of the next eight weeks. If the Garland Fund book has been a 10-year book, that was the 8-week book.

That was a pretty damn good book for eight weeks.

Well, there's a lot of space between the words, if you look carefully. Yeah, and it was a revelation. I mean, the way in which American law has had to deal with epidemics, going back as long as there was law, was

really totally fascinating. And the building of a regulatory state around the collective problem of epidemics and contagion was a fascinating story.

Oh, I totally agree with you, also, about the joy of teaching and writing with students. So there's actually a beautiful piece which features you in the Yale Alumni Magazine this coming season, which is about coauthoring and just how great it is because we sort of welcome students into our intellectual project. So maybe we could talk a little bit about the coauthoring that you've been doing. I mean, that piece is a beautiful piece about the work you've been doing. I wonder if you might say a little bit more.

Well, a couple years ago, five, six years ago, it dawned on me that students could be force multipliers. I mean, the constraints on time are just brutal, and having such talented students around means that maybe I could share some ideas with them and just set them off. And sometimes that's meant supervising papers that students publish, and that's great, and sometimes it's meant coauthoring with students. And I've let RAs and students with homeworiking kind of set their path. Do you want to work on it together? Do you want to do it on your own with my supervision? It's just a whole bunch, half dozen now, coauthored papers with students over the last three, four, or five years. Just last night, I was finishing up edits on a piece coming out in Cardozo Law Review in the spring with a student who graduated last year, Morgan Savige, class of '23-- '22, I suppose. And yeah, it's been really great. It's been really great. It lets me produce more than I could otherwise. I think it's a good experience for the students, too. I hope so, anyway.

I mean, I love doing it. It's also just a way to launch another generation of academics, let them sort of experience how fun that is. So I've actually been working on-- Columbia's publishing a piece with a coauthor of mine. I'm embarrassed to say he wrote his half about five years ago, and I have been a laggard and just caught up with him on it.

So, John, can I just talk a little bit about the field of legal history? So it's one of our signal strengths. We just have an extraordinary group of legal historians, although as I always tell people, what's interesting about our legal historians is, they're all polymaths, and so they're wide ranging intellectually. They're able to speak in the cadence of lawyers and normative and theoretical work, and they're excellent at their craft. And that's actually a rare combination, and I wonder if you just talk a little bit about the group that you work with, and then just how you think about the field itself.

Well, I love my colleagues, and they are polymaths. I think honestly, in my case, Heather, it's less polymath, and it's more that I don't understand much of anything. And what legal history allows me to do is study lots of different things. I mean, I can be a contracts lawyer, or a torts lawyer, or a law of war international law person, or a public health person, or a civil rights person in the course of a single week as I move through different fields of the law. And legal history as a field licenses me to do that.

I hope nobody realizes what a kind of bankrupt license it is. I wrote about bankruptcy history, too. And what it does is, it lets me as if-- it's a little like the parable of the blindfolded scholar trying to make sense of the elephant. I mean, eventually if I stick with this long enough, maybe I'll have made my way around the elephant enough times to have some sense of the whole.

I have just two questions. So one, for people who aren't deeply steeped in the academy, they may not know how much of a chasm there is in a crude sense between historians and their reluctance to engage in normative analysis and lawyering, the lawyering impulse to find a lesson in everything. What's the payoff? What does it mean for today?

I remember once in a legal theory workshop, we had a really excellent historian working on the history of coverture, post-Civil War. And she looked around and said, well, there are a lot of lawyers in this room, so maybe I'll just admit it. I'm against coverture. You sort of want to say, well, great. But I wonder how you think about that sort of crude divide in keeping up with the dictates of your craft, but also doing the work of legal scholarship.

Yeah, it's true that there's a temptation to say, well, the history was x, therefore y today. And almost always that syllogism fails. I mean, it just doesn't follow from the fact that once things were this way, therefore they should be that way. And that creates a challenge for the person oriented around the past in the legal academy for sure.

But it also turns out, and I think students and my colleagues all over the law school now understand, that to operate without a sense of the past is in some sense to walk without having any idea where you're going. And Eric Foner at Columbia often describes the person who doesn't know history as like an amnesiac. It's hard to make change in the world from that kind of a position, so the historical work helps us make sense of where we've been and where we might go, like a blueprint for figuring out paths into the future.

Yes. Stephen Greenblatt, the Shakespeare scholar, was here. He was writing about Macbeth, but it really seemed more like a conversation about the Iraq War. And he said that, in some ways, writing about Macbeth helped him think about the Iraq War. Do you find that with your source materials as well? Well, you're never out of the present. That is, in some ways, we're always already presentists. It's unavoidable, and sophisticated historians know that, too. I think in the law school world, it's especially salient. Of course, the reasons I took up the law of war in a book about a decade ago was because of the things following the US invasions of Afghanistan and Iraq.

And of course, the reason I'm trying to work through the Garland Fund and its significance is that here we are again in a moment of deep class inequality and real race justice problems. And so the present is always salient in the work. That makes it exciting, makes it interesting, engages students. And being on the edge between history and law is-- that's the way I like to be.

Torts and regulations isn't the only place where you've been innovating on the pedagogy front. So you also built out a completely new course about the foundations of legal theory, and I wonder if you could just talk a little bit about it. We suspended it during COVID, but we're going to kick it back in now that we're back in person. And I wonder if you could just say what that course is.

So the Foundations of American Legal Thought has been a group project. There's maybe four or five of us who've gotten together and helped to produce a new course. Four of us taught it in the spring of '21, and so in some ways, we were doing it through COVID in one way or another. The idea is to take a course that has the classics of American legal thought, the things that you can't be a sophisticated American legal theorist without knowing, but also update the canon as well.

Canon war is famous in the academy, and so we had readings ranging from classics going back to Oliver Wendell Holmes and the realists on the one hand, to Kate Manne and philosophers and theorists of the 21st century, and all sorts of things in between. It was just a great experience, wonderful to work through the best ideas and argue about them with students. It's been a real pleasure.

I imagine, for some of those things, you haven't read them in a while because they're classics. You read them early on in your career. When you circle back and talk to this generation of students, do you see things that are different in them?

Yeah, for sure. Everything looks different. I mean, I think in particular, reading Catharine MacKinnon with a group of students in a post-MeToo moment, or a mid-MeToo moment, as it might be, I mean, that was a really interesting thing to engage, in part because it's now 35 years old, that work. I mean, it was both far seeing and still controversial and electric today. So whether it was Catharine MacKinnon or our colleague, Gerald Torres-- we both read Gerald Torres and had Gerald Torres as one of our--

Your Marshall McLuhan moment in the class.

Exactly. Or the early law and economic stuff. I mean, reading Coase and Posner and Calabresi after the financial crash of the 2008, 2009 moment that, I think, really left an impact on this generation of students' intellectual lives, it was just an awesome course. And I'm going to be teaching it again, I think, in the spring of '24, hopefully pulling a few colleagues in. I'm looking forward to that.

When do you find time to do your writing?

Leaves are good. Leaves are good. Summer is good. I think now, what am I? I'm like 20 years into this, and honestly I don't have a good-- honestly, I haven't really figured it out. I think if I had a practice, I would say that teaching semesters are semesters in which I do a lot of research. There's a lot of logistics. Just the archival work, I mean, I've got a whole email backlog right now of archives with whom I'm working to get documents. And so working with RAs and with archives during semesters of teaching, and then using the summers and then the occasional leave semester to try to get the writing done.

Rumor has it that baseball has something to do with it.

There is some baseball stuff, yeah.

What's the baseball angle?

Well, first of all, there's the Yankees and the Phillies, and they are obsessions. Some people think-- David Schleicher and Taisu Zhang tell me that I can't have both of those, but I do. I do, so I prove them wrong every day. But then most of all, it's my 13-year-old who's a baseball lover and player, and I mostly follow him all around the Northeast with James Forman and his son in tow, so yeah.

And do you actually write on occasion during the game?

It is true that I am known for bringing large canvas sacks full of books, setting myself up in kind of an elaborate armchair operation I have out in right field, and working my way through the game. The other parents are a little confused. They have no idea what I'm doing.

Have you ever gotten so deep into the work that suddenly a fly ball is out your way?

There have been moments of real danger. Yeah, that's why I'm now in right field. I was a little too close to home plate before. It got dangerous.

Well, John, thank you so much for joining this podcast. It's just been a wonderful conversation.

It's been a real pleasure talking.

So glad to have you here.

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