Ann Alstott and HKG EDIT v3 071522

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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.

You probably walk into tax class thinking, oh god, this is going to be the driest thing ever. It's going to involve math and debits and credits and things like that. So year after year, I get to explode those low expectations, and I get to show them that tax is this amazing field where a lot of domestic public policy and international public policy really resides. By the last day, they [? believe ?] [? you say ?] if you care about equality, you had better care about the tax code, because in the United States, that's where we deal with a lot of inequality, or fail to deal with inequality.

So I'm incredibly delighted to welcome Ann Alstott, the Jacquin D. Bierman Professor of Law at Yale Law School. And it's really nice to have you here.

I'm delighted to be here. Thanks, Heather.

So you are one of our resident polymaths, and your work is incredibly wide-ranging. So I thought I'd start maybe not with the early work, but with what you've been doing most recently, because it kind of gives a window into the kinds of things that you do as a lawyer and a scholar. So could you talk a little bit about the work you've been doing on transgender issues?

Yeah. So it's no news to anybody that we're in an age of incredible misinformation, and misinformation about science, in particular. So whether it's climate change, whether it's abortion, we could go on and on and name the venues where people are spreading misinformation about science. I got involved recently about an issue that I care a lot about that has to do with transgender rights, and in particular the access of transgender people to standard medical care.

Just in 2021, and with more virulence in 2022, there's been a wave of anti-transgender legislation across the country. Some of this has to do with participation in sports, but increasingly, there are a number of legal initiatives-- sometimes they're legislation, sometimes they take other forms, but legal initiatives that seek to deny access to standard medical care. The initiatives that I've been involved in fighting-- so I'm against this-- I think these initiatives-- so let me just first say what they are.

The initiatives-- let's take Alabama as an example. So in 2022, the Alabama legislature enacted and Governor Kay Ivey signed a bill that criminalizes the provision of standard treatments to transgender youth. And so what that means is that a doctor that provides standard medical care-- we call it gender-affirming medical care-- to a transgender youth-- and in Alabama, that's anybody under the age of 19-- a doctor that provides that care can be sent to jail for 10 years. Anybody who advises that person to seek that care, anybody who assists that person to seek that care can be put in jail. So that is SB-184, the Alabama legislation that did that.

And what was really remarkable to me as a lawyer was that the Alabama legislation incorporated scientific misinformation right in the legislation. So as lawyers, we know that legislation often includes legislative findings. And these are supposed to be findings of fact, and they're supposed to be good faith findings of fact. But in the Alabama bill, which is now the law, the findings of fact read literally like they've been pulled from a misinformation website.

And so this really enrages me. It enrages me because these bills are wrong. It enrages me because these bills are clearly a violation of the federal constitution. The federal constitution has in it various protections against discrimination on the basis of sex.

And as you and I know, as lawyers, there was a case called Bostock in 2020 that held that those sex discrimination protections that are built into our constitution include protections for gender identity. So the state is not supposed to use its power to disadvantage you, to deny you medical care, to deny you housing, deny you insurance just because of your gender identity. That's just not allowed anymore. Nevertheless, we are seeing these states-- Alabama, Arizona, Arkansas and Texas, and now Florida have all, in different ways, enacted these discriminatory bans.

So all of that is background. My specific role has been in working with some wonderful scientists at the Yale School of Medicine, the Yale Child Study Center to put together really a team. We almost act like a strike force to attack, in turn, this misinformation, because when the laws, when the attorney general's opinion, when most recently the Florida Medicaid authorities repeat this misinformation and use it as the basis for law, they are really, in my view, attacking the integrity of the law. They're not only mischaracterizing, misstating science, but they're attacking the integrity of the law. So we've put together this group. And our goal is to use their scientific expertise and my legal expertise together to be effective opponents of this kind of initiative.

Can you talk a little bit more about the interdisciplinary conversation going on? Because often, I find when I work with people from different fields is that they aren't as surefooted on some issues of law and policy in the way that we are. On the other hand, they bring a different kind of expertise that you need to translate into a language that people would understand even if they didn't have that background. So could you just talk a little bit, what's it been like doing that partnership?

That's been really-- that's one of the things that's so much fun. It's such a privilege every day to work with people who are super smart, super dedicated. They do amazing things that I couldn't do. And to kind of just learn how their minds work and learn that they see the world differently because of their training, right? We see the world in a certain way. Ever since we entered law school, our minds have been shaped to ask certain questions about the world, to frame ideas in certain ways. They were trained differently.

So I've been doing this since about-- in the medical sphere, I've always done this kind of work with economists in the public policy work that I do, but I've been working with physicians, psychologists, psychiatrists since about 2017. I've been working with various people at the Yale Child Study Center, which is the part of Yale that deals with child mental health. And as you say, there's always this interesting, and sometimes really hard, process of translation. Sometimes at the most basic level, they use terms that I don't know what they are. I can still remember the day when we were having a conversation about epigenetics and parenting, and I'm like, there's genetics in there somewhere. So I just had to put up my hand. I had to say, I don't know what that means.

At the same time, I will tell them things. I will say, oh, we just got a TRO in the trial court, but of course they'll appeal it, and it's only a state court. And they're like, um, there was court in there somewhere, right? And so all the things. So sometimes, it's at that level. Other times, though, it's really a kind of-- you really see the disciplinary grooves that are woven in our minds, right?

So the scientists are absolutely trained to always see nuance, always see the question that isn't answered, to always work on that margin of what's the next thing we need to know, and do we really know it, and be really self-critical about what we know and what we don't. That sort of thing, as you and I

know, can be disaster in a courtroom, right? It can be disaster in a courtroom. And so you always want to-- and the reason it can be a disaster, I should say, is not because it's true, but because it can-- if you're overly humble about what you don't know, or if you focus only on what you don't know, you can miss the bigger picture, which is what you do know.

And so particularly in the work I'm doing now, it's really, really important to say the truth, which is that there is a set of medical procedures that include something called puberty blockers, something called hormones, and then for adults, not for minors, gender-affirming surgery. And these things have been used for decades successfully. They've shown to have tremendous benefits when they're needed and used for transgender people. We just know that. We have deep, deep science that shows that all of this is deeply effective.

So I think you have some students working on this project with you. And I wonder what it's been like for them. I mean, first, it just must be so fulfilling to be able to protect the right of their peers, perhaps themselves, as they're under attack across the country. But what has it been like for the students?

I will first say, for me, it's been wonderful working with them. I've had three research assistants, and they really gave their all. We were working so hard in March, April, and into May, you know, like 40 hours a week, and they just did it. And as the research assistants, they don't always have the most glamorous tasks, but they're important tasks, like getting the citations correct, like-- we actually had to do a deep dive. This was amazing. We had to do a deep dive.

There was this mysterious source that was being cited by the Texas attorney general. And it sounded like a scientific group, but nobody had ever heard of it. And it turned out it was absolutely a political group that was masquerading as a scientific group that was cherry-picking the science and then putting it up on this website that had kind of a veneer of science. It had the words evidence-based medicine. That's a buzzword that is all in vogue.

And so the research assistants actually had the job of really digging into that site and saying who are the people that are running this site, what do we know about them, and what is the substance of what's on the site? Is that legitimate? Is it high-quality? Is it low-quality? And they were able to document beautifully just what a shoddy piece of work this was. And so as part of our report, we were able to reveal that this seemingly-- it bills itself as an international society of scientists and clinicians-- in fact appears to be something like 14 people who have an ax to grind and are cherry-picking and selectively misusing, and often misstating, science.

It's always a little startling when people take on an academic veneer because we know how much work goes into attaining that level of expertise and knowledge. When [? Mike ?] [? Clinic ?] litigated the Prop 8 case, it turned out that one of the so-called experts on homosexuality and its effects on parenting, just this incredible sort of person who would just say things that you just couldn't believe that he would say, it turns out his degree was in something like Victorian furniture or something completely different. But he held himself out as expert just because he had the degree attached to his name. And just a little digging revealed the truth of it.

Yeah. Yeah, we find that over and over again. Again, just to take this website, for example, if you take this particular website, they have 14 people. Very few of them are actually experts in relevant subject matters. Very few of them have published in relevant subject matters. So one of them was an evolutionary biologist with no academic appointment anywhere. One of them was a sociologist whose academic work

actually had nothing to do with transgender people. And then there were various doctors who, as you say, had the degree, but don't treat transgender patients and have never done research in relevant science. So we're enormously proud of the work that you're doing, Ann, and just for the work itself, but it's also been getting quite a bit of traction already, even though it's quite early. Could you just talk a little bit about what's happened so far?

So we have gotten some real traction and some real coverage. So we wrote a report that is on the Yale Law School website. We got a good amount of press coverage, especially in the places where these bills have become law or where they're seriously about to become law. So in Alabama, in Texas, we got quite a lot of coverage. We got some national coverage, as well. And we have been able to be helpful in litigation.

So our report came out in May. Just as our report was coming out, there were briefs being filed in the case that is challenging the Alabama law. And our report was cited in the plaintiffs'-- the plaintiffs were challenging the Alabama law-- our report was cited in the plaintiffs' reply brief. So we feel like we've been able to be helpful to journalists, to litigators. And what we're doing in Florida right now is Florida has issued a proposed regulation that would deny gender-affirming care under Medicaid, the Medicaid program, to transgender people of all ages.

So they've actually gone beyond the youth care bans. They are saying the state of Florida will not cover any gender-affirming medical treatment, standard medical treatment for people of any age. And they're not going to stop at Medicaid. They also wrote to the Florida Medical Board and are asking the Florida Medical Board essentially to rule that gender-affirming care for people of any age is not valid medical practice. So we are in the process of drafting, submitting on a short time frame comments on the proposed regulation. So we are just trying to get in there when we can and have an effective voice.

So the reason I wanted to start here is because it just seems to me, if there's a throughline through your work, it is thinking about those in the greatest need and how the system works for them. I wonder if I could now just back way up and talk about your early days. How did you become a professor? Why tax? How did you invent yourself, in essence? Because I think our students, in particular, think it's always just a linear process, and it rarely is. And so I wonder if you could just share a little of that story.

Yeah, no, not linear at all. I've always been interested in public policy, but when I graduated from law school, I thought, I'm just going to be a lawyer. I'm going to be out there in the world, making a difference in some way, or at least being right there in the hurly burly of business. Then I went from my law firm job-- so I had a law firm job right out of school-- I went from that to a government job. And it was there that I really reconnected with public policy.

And the interdisciplinary or cross-disciplinary element of my work really was fed in my Treasury Department job because the way the particular office that I worked in-- it was called the Office of Tax Policy-- every lawyer had a set of substantive assignments. So one of the things I worked on was the EITC, the earned income tax credit, which is a program for low-income working families. It was just very small at that time. It was just about to get very big and to become a major part of American welfare policy. And I was assigned to work side by side with a wonderful economist. She taught me so much. But again, it was that early theme of, as much as she taught me-- and she knew 80-- like, if you put together our total knowledge, she had 80% of the total knowledge and I had 20, but I had the 20. And I learned from her, and we both learned from each other. And so I've always been interested in public policy. And this

will sound odd to somebody, I think, who doesn't the law, but tax in law is actually a place where there's an enormous amount of public policy.

The American tax law has in it quite a lot-- and I was about to say the majority, I don't know how you'd measure that, but quite a lot of social welfare policy through the EITC, the child tax credit. The tax code makes climate policy. The tax code makes family policy. We think of the tax code as solely about economic policy, but there's a lot of social policy there. So that's why I sit in tax, in some sense. But a lot of tax people have these broad-ranging interests.

Well, it is pretty astonishing, I will say, because tax is such an intricate discipline and it requires such deep knowledge of things that might seem dry to some people, but at the very least, it requires a different part of your brain than the kind of work that involves policy and normative analysis and so on. So it's really hard to find people who pair them both. I mean, I think Yale does a really good job of that. I'm always astonished by how many are here. But it's still really a tough challenge.

Well, it is interesting. Part of it, I think, is that Yale has always-- and this is one of the reasons I really wanted to come here, and why I came back after teaching at another school--

We've never heard of that school.

No, a school that you would never have heard of. And it's that I think our self-perception and our discipline as members of the Yale Law faculty is to not be narrow. Right? This is not a faculty where I could sit and say, well, I am a tax person. I only know about tax. I respect you because about you know about con law, but we couldn't really have a conversation. That would really be violative of our norms, for me to be that narrow. So one of the things I've always valued about being on the Yale faculty is that there is this idea that you should be willing and able to take on big issues.

And if they're outside your field, well then that's probably because you're too narrow. You are conceiving of-- so we kind of live what we-- this is going to sound like a commercial, but we kind of live what we say to our students, which is that law is a broad discipline that prepares you broadly to do a lot of different things in the world. And I think you see that. Just to take my tax colleagues-- we could take lots of other people-- so if you were to look at the tax professors, you would see a group of people with really broad reach.

Yeah. And it's exactly right about the norms of the place. I remember when I first got here, there was a legal theory workshop, which has all these remarkable people-- Stephen Greenblatt, the Shakespeare scholar. Habermas came once.

And it was a psychologist who wanted to violate our norm by giving a presentation instead of letting us just read her paper and ask questions, which is because everyone reads. And we just kept saying, that's not our norm, that's not our norm. But she was really clear. She said she was just worried that a bunch of law professors wouldn't be able to engage with the paper.

We went ahead and did it the way we normally do it. At the end of the session, she just turned and she said, wow, I just am amazed by how many law professors are so deeply engaged with psychology. And of course, no one in that room was in that sense [LAUGHTER] deeply engaged with psychology. But we read the paper and we engage with it. That's the norm.

Yeah, and that is a kind of training. It's a kind of meta training to be able to say, what do I know. What do I not know? How can my tools be used to evaluate this work? When do I need to consult people from other disciplines? And how can we come together to produce a shared product that involves truth?

Well, one of the things I love about your work is your ability to frame a question in a way that is both sophisticated but also lets you see something new and yet is comprehensible to-- if I sent it to my mom and dad, they would understand it. And one of my favorite versions of that is The Public Option book, which you wrote with Ganesh. I wonder if you could just talk a little bit about the core insight and how you take a set of arguments and show people something that they really hadn't seen before?

So you're talking about, of course, the 2019 book called The Public Option, which I wrote with Ganesh Sitaraman, who is truly a polymath. It's a policy book that-- so the core insight is this. The core insight is that there are different ways that the government can act. The government can exclusively provide a good national defense.

We could question that one in a minute. But we think of the government, anyway. National defense is something the government does. It's not really something that other people do.

We can also think of purely private goods and services. For the most part, groceries are like that. If you and I want groceries today, we're going to go to a private store and shop. But there are a lot of public policies that operate in a middle space that we call the "public option." And the public option is when the government provides some good or some service or access to something that's really important, but it does so alongside the private market.

So the example that's on the cover of our book, just because it's so colorful and looks so nice is swimming pools, right? So there are public swimming pools in the United States. Depending on where you live, if it's a hot day like it will be tomorrow and you want to go swimming, you might go to a public swimming pool. But that's not the only way you can go swimming. You can have a swimming pool in your own backyard if you want.

So that's the idea of the public option is that there's something good and important, in this case, recreation. Public parks, the same way, right? You want to go take a nice walk, you can go to a public park. Or if you have the money and live in the right kind of place, you can have an extensive backyard and have your own private park. So that's kind of the core insight.

And so the book came about because Ganesh and I were just sitting down. And we both are interested in a lot of different fields of public policy. And Ganesh suggested that there might be this thing called a public option.

And as we talked, we just got more and more excited about it. Because I said, well, child care is like that, right? There are public preschools in some states that you can send your kids to. But even in those states, you can also choose a private preschool.

And he said, well, banking could be like that. Right now we have mostly a private banking system, although it's backed up by a lot of government funding. But there have been fascinating and really, I think, praiseworthy proposals for what's called "postal banking," which is a form of public banking. We used to have it in the United States.

But the idea of postal banking is that if you want a bank account, a checking account with a debit card, right now you have to go to a private bank. And private banks often charge a lot of money for that, particularly to people with lower incomes, younger people. If you can't meet the minimum balance requirements, it might be prohibitively costly. If you're the kind of person that's got $100, $200 in your checking account at any given time, you might pay $50 or $75 a month to even have a checking account, which is outrageous. Go back in history or fast forward to a time maybe when we adopt postal banking, you could go to any post office in the United States and get a free, basic checking account.

So the book The Public Option just goes through a whole bunch of different kinds of public options. We talk about retirement. We talk about childcare. We talk about banking. We talk about a whole bunch of different elements of public policy.

Internet-- internet is a key public good. A key-- well, whether it's a public good, we can talk about that. But certainly access to the internet is a key element of modern life. And yet the cost of internet access, largely because we have terrible monopoly structures, is prohibitive. More and more communities are providing a public option internet.

What I loved about the book, since it was in 20-- it was-- after we'd spent all this time debating Obamacare and the public option as if it were something novel, and then in comes the book to show this is so far from novel and that actually there's a framework for thinking about questions like this-- but it was written before COVID. And I wonder-- as COVID sort of laid bare economic inequality in a way that I don't think anyone, even those who resisted the idea could miss it-- I wonder if it's changed your thinking in any way? Or if you just sort of see it as playing out a different set of patterns, the same kind of patterns that you'd acknowledged before and found before but just in a different setting?

That's a really fascinating question. I think if anything, the economic pressures of COVID and the restructuring of COVID have just put more pressure on the need for public options. I think that COVID also has revealed some of the structures that we talked about.

One of the reasons you might use a public option is if the private market is not working well. One of the reasons the private market doesn't work well is if you have monopolies or oligopolies or other reasons why the idealized competitive market isn't working. I think COVID has just laid bare how faulty our supposedly competitive markets are, as we confront shortages in basic goods and services. It's quite clear that there are actors with market power. And a public option is-- it's not always the best way or the only way. But a public option is certainly one way to ensure access to important goods.

Other ways that COVID has had an impact-- think about the point we were just discussing, the access to broadband internet. For just literally [LAUGHTER] several million people in the United States, if you did not have access to broadband internet in the last few years, you might as well be cut off from society. Even for people who were essential workers, even for people who couldn't work remotely, a lot of things had to be done remotely.

Can I-- I would be remiss if I didn't talk about teaching with you. So I mean, you were one of the greatest teachers of this generation. I don't know how many times you've won the Teaching Award and been asked to give commencement addresses. But as Dean now and I get the list of classes, I see how many students are joyfully taking tacks, which I don't think is always true. [LAUGHTER]

But also that you-- you teach extra courses for them. You teach them numeracy courses and financial literacy courses. And they love you. I just wonder if you might just say a word about that half of your life?

Well, you're very kind. I just really enjoy teaching. I think I'm a big ham, which is why I enjoy large course teaching, because you're up in the front. Lots of people are looking at you. You're waving your arms. You're attempting to be funny. So I'm just a big ham. And they're patient enough to put up with it.

I actually think that I benefit from something we talked about earlier, which is if you either weren't a lawyer or maybe if you were a lawyer but you didn't go here, you probably walk into tax class thinking, oh God, it's going to be the driest thing ever. It's going to involve math and debits and credits and things like that. So I think the students really walking in not expecting much.

And so year after year-- and they're a new group every year, right? And so year after year I get to explode those low expectations. And I get to show them that tax is this amazing field where a lot of domestic public policy and international public policy really resides, right?

And so on the first day you can say to them-- and I think they're skeptical on the first day. But by the last day they believe you say, if you care about equality, you had better care about the tax code. Because in the United States, that's where we deal with a lot of inequality or fail to deal with inequality. If you care about children and education and child care, you had better be able to speak tax, because that is the lingua franca of public policy. If you want to work in Washington, you're going to know that the tax policy has a lot of sway.

So again, they're a little doubtful. But as we go along and as we show them what an impact tax has-- you know, we live in this tremendously capitalist society. And even by the standards of the Western world, our society is heavily capitalist. Most of the good things that you want in life have to be bought with money. So that makes tax, which is really, if you think about it, tax is just the regulation of money. Who has money? Who doesn't have money? Whose efforts will pay off in savings and housing and other things like that? Whose efforts will be burdened when they try and save, try and get childcare for their kids? That's what tax is about.

So it fundamentally is about inequality. It's about racial inequality and the racial wealth gap. One of the things we do in my class is we make use of work by scholars like Dorothy Brown at Georgetown to really show how-- the tax law is formally race neutral. You will not find the word "race" in the tax code, except when a couple of places maybe where there's a data collection or something, although we don't even collect data on race. It's facially race neutral, as we would say as lawyers.

But in fact, if you look at the rules of the tax code, they privilege essentially a white upper middle class position. They make it easier to save money if you already have money. They make it easier to buy and keep a house if you already have a lot of savings. They make it easier for you to have a secure retirement if you already have a good paying job.

And conversely, they make it very hard to have all of those things if you are starting out maybe in a lower paying job or if, like many Black Americans, you don't inherit as much from your own parents as white Americans on average do. So that's just fascinating. And I think the students can and should, as they do, connect with those real world problems.

Well, one of the things I also think from my conversations with students is that you manage to be a powerful presence and a human being at the same time, which is hard just for almost anyone. But particularly for women, I think it's really a challenge. So I want to maybe ask you a question about the relationship between you as a powerful presence and you as a human being, because a lot of your work as I said, is about caring for others and particularly children and family members. I know this goes back to your own personal experience. I wonder if you'd be willing to share a little bit about the connection between you as a human being and you as Ann Alstott, the great professor.

Sure. It's so funny, because I do think that-- especially when you're a young person, as many of our students are and you see these older people, you kind of imagine that they just came fully fledged from the head of Zeus and they have always been old and crusty and whatever.

But no, so yeah, a lot of my work really ties back to a formative experience. I mean, I was interested in all these things before. But I had a particular formative experience when I was in my late 20s and my early

30s. And it really led me to see how the law makes people vulnerable and how the law can either relieve vulnerability or it can create vulnerability.
So I'll just tell you the story. It's bare bones. When I was in my late 20s, my mother, who had had a substance use disorder and mental health problems for much of her adult life, really just fell off a cliff metaphorically. She lost her job. Her mental health problems became so severe that she could not care for herself. She could not be left alone at all, left alone, because she might wander off. She literally was having delusions, seeing people that weren't in the room and that sort of thing.
So there I was. I think I was 28 years old. I had just started teaching at Columbia. And here's my mother in just acute distress. And my sister and I-- my sister is younger than I am. So she was actually in the military at the time. Here we have all of a sudden this person who's in acute distress. How on Earth are we going to take care of her?
And a couple of things happen. We were just petrified, because I had a full time job. My sister was in the military. She was literally stationed in Antarctica. But we had our mom.
And a couple of things happened. We were lucky enough that my mother's own mother was able to take her in. If we hadn't had that, I don't know-- I would not be sitting here, because I would not have a career. So my mother's own mother took her in.
But the other thing that happened was that the government program SSDI, which is Social Security Disability Insurance, stepped in and gave my mother a decent monthly income and gave her access to the Medicare program, even though she wasn't retirement age. She was only in her early 50s.
And that was just so powerful for me, because it was an example of-- I grew up in Indiana, very conservative place, where "the government" quote unquote, has a bad reputation. And although I wasn't a conservative person particularly, there was just something about this personal experience of the government really working-- my mother had worked, she had paid into the Social Security program -- and when we were able to demonstrate her disabilities, it was amazing.
She had this income for the rest of her life. It wasn't-- she wasn't going to live like a princess on this income. But it absolutely made the difference between her having a place to live and being able to pay her bills and her being on the street, you know? And so I don't want to overstate the degree to which this program-- it doesn't work for everybody, right? And so that's one of the things that I look at in my work.
So that was a key part of my experience was both feeling at a human level this intense vulnerability. How am I supposed to hold a job and look after a person 24/7? But also seeing the ways in which public programs can really help.
Well, it's fitting I think that you began this answer by referencing who comes out of the head of Zeus, which of course, is Athena, [LAUGHTER] who is both a warrior and a scholar. And it's a remarkable combination to have both of those things inside of you. And it just makes a huge difference in the world, Ann.
So we're so proud of all the things that you've been doing. And it's just been lovely to be able to have this conversation. So thank you very much.
Well, I've never been compared to Athena before. But thank you very much.