

On Tax—Daniel Hemel of NYU School of Law

Len Teti: Welcome to On Tax—A Cravath Podcast. I'm Len Teti, a partner in the Tax Department of Cravath, Swaine & Moore, a premier U.S. law firm based in New York City.

On each episode of On Tax, I talk to professionals in the Cravath network about their life and work in the world of tax. We focus on the human side of tax law, highlighting the people, connections and stories that make the space such a fascinating and dynamic area of practice. I hope you enjoy this episode.

Today, our guest is Daniel Hemel. Daniel is a Professor of Law at New York University School of Law in New York City. Daniel, welcome to the podcast and thanks for being here.

Daniel Hemel: Thanks, I'm thrilled to be on with you.

Len: Glad to have you today. So, Daniel, I know that you've listened to many of our episodes before, so I guess you've given some thought to how far back we need to go in your life to figure out where you got put on a path to doing what you're doing now. How far back is that?

Daniel: I think we have to go back to when I was 5 years old.

Len: OK.

Daniel: My mother was a lawyer and she asked me what I wanted to be when I grew up and I went through a long list of possible jobs, including my father's job—equity research analyst—but lawyer was nowhere on the list. And she asked me why I didn't want to be a lawyer.

And she was a lawyer and many of her female friends were lawyers, but I told her, "That's silly, mom. Men can't be lawyers." And she then explained to me that actually I could be a lawyer and that was the first time that the thought was planted in my brain.

Then I went to college and thought that I actually wanted to be a journalist, not a lawyer. But when I was working for The Harvard Crimson, I was assigned to the law school beat and got to cover a Supreme Court case that involved Harvard Law School. And it was that moment that I knew that I wanted to be a lawyer, that I was much more interested in the legal arguments than in writing up the story.

Len: Interesting. So, did you go to law school straight through from Harvard College or did you take time off?

Daniel: I took two years sort of off. I had a scholarship to go study at Oxford, so I got a degree in international relations and then came back to the States.

Len: OK. And so, what was law school like? I mean, obviously, you were drawn to the law because of the legal arguments that you had read and maybe other reasons, but how did law school get you to the tax universe?

Daniel: I loved law school from the very first day. Constitutional Law with Heather Gerken and Tort Law with Guido Calabresi—I was at Yale Law School—convinced me that I wanted to be either a constitutional law professor or a tort law professor. And then it was in my 2L year that I took Tax with Yair Listokin, already knowing that I wanted to be a law professor, but not thinking that I wanted to be a tax professor—and he persuaded me.

On day one, he said two things that I continue to tell my students. First, he said: "This is the most practical area of law. You will use it after law school regardless of what you do. It's the one area for which that is true, or you're going to have to learn criminal law really, really, really well."

And then the second thing he said is: "This is where we hash out issues of distributive justice in the United States. It is not a legitimate argument in tort law to say, 'This person should pay more because they're rich.' But in tax, that's the whole point." So, if we called it the law of redistribution or the law of distributive justice, then it would be obvious to every student that they wanted to take tax because that's inherently interesting.

- Len:** That sounds like you're coming to the tax law from a public policy/social justice perspective rather than merely an intellectual perspective. Am I understanding you right or would you put it differently?
- Daniel:** I would put it differently in that I think of at least the distributive justice questions as intellectual questions. John Rawls was an intellectual and he was trying to figure out: What do we owe each other? And we hash that out through the tax system.
- But I definitely did come to tax law knowing that I wanted to be a tax law professor—an intellectual, not a practitioner. I was surprised, when I was a summer associate after 2L year, how much I actually liked the practice of tax law, and would've been happy in an alternate universe where I became a tax law practitioner. I think it's probably the job I would want second most in the world. It's just that the job that I would like most in the world is to be a tax law professor, and I got to do that.
- Len:** So, you knew even then that your goal in the tax world was an academic goal. You wanted to be a professor, you wanted to be teaching tax, studying it, researching it, and doing all the things you're doing now—you knew that from an early age in tax?
- Daniel:** Early in my tax life.
- Len:** Early in your tax life. OK, got it.
- So, I'm curious about your clerkships—we haven't had a lot of clerks on our podcast. Can you tell us a little bit about what those experiences were and what you remember taking away from your clerkships?
- Daniel:** Yes. I got to work for three fantastic judges: Judge Michael Boudin on the U.S. Court of Appeals for the First Circuit; I was the first clerk for Judge Sri Srinivasan after he was confirmed to the D.C. Circuit, for his first batch of four clerks; and then I clerked for Elena Kagan on the Supreme Court.
- My big takeaway from that was I learned something about how judges think and how different judges think. But they care about consequences in the real world. They are not just automatons who are running the facts of the case and the words of the statute through some sort of algorithm and spitting out an answer.
- And I feel like that's a skill that is helpful for even tax practitioners. Most of them will never appear before a judge and argue a case; hopefully, will advise clients in a way that makes sure that they don't appear before a judge to argue a case. But lingering overhead is: At the end of the day, what would a court say if it confronted this issue? And there's no better way to figure that out than really being inside the mind of a judge for a year.
- Len:** That makes sense to me. So, as you leave these clerkships and you think about what you want your tax academic profile to be, as you go on the market and you're looking for a teaching job, how are you marketing yourself?
- Daniel:** I had a very idiosyncratic path toward becoming a professor. I'd been in law school, been a law journal editor and had worked on several articles published by University of Chicago Law School professors, but they were publishing in the *Yale Law Journal*. So, I got to know several of them quite well through this experience.
- And one day, I was sitting in Judge Srinivasan's chambers, and I got a call from the Appointments Committee chair at University of Chicago, saying, "Hey, do you want to come out here for a job talk?" And I paused for a moment because I wasn't actually on the academic job market. I didn't have a job market paper. And then I realized, "Oh my gosh, I have an opportunity straight out of a clerkship to have my dream job, I should say yes." So, I did say yes. I went out there and I got the job.
- Len:** So, I've heard the phrase "job talk" before, but I think folks who are uninitiated to the way this works don't really know what that means. It might sound like kind of a regular interview. Why don't you tell the audience what job talk means in this context?
- Daniel:** A job talk is as dissimilar from a regular interview as one could imagine. You have a paper, 50- or 60-page paper, stand in front of an audience that is the faculty where you're trying to get a job, talk about the paper for about five or 10 minutes, but most of them have already read it. And then for the next 50 minutes or so, they pelt you with hard questions. And then after that, they decide whether they want to hire you or not.

Len: So, it's kind of like appellate litigation, right? You're trying to get up in front of the court and make your point, but then all these smart people are throwing slings and arrows at you.

Daniel: Exactly. It's appellate litigation with a very hot bench, which is not that dissimilar to the job of a law professor. When I'm teaching *Old Colony Trust* to law students, they're raising their hand and pelting me with hard questions, some of which I've never thought about before, even though now I've been teaching for eight years. And in that sense, I think the job talk actually is a pretty good one-hour microcosm of the life of a law professor.

Len: Well, I imagine that that all went great and that they hired you after that, and so that when you finished with all your clerkships, you were able to just fly to Chicago and start at the University of Chicago. It's a great place to start.

Daniel: Yeah. There's an expectation at the University of Chicago that everyone teaches a 1L class. Tax is offered to 1Ls at NYU. It is not offered to 1Ls at the University of Chicago. So, my 1L class was torts. And I had taken torts as a 1L.

I hadn't really thought about torts since really the beginning of my 2L year when I decided that I didn't want to be a tort law professor, I wanted to be a tax professor. So, I had to spend the summer before starting learning about tort law. And my thought was, "Well, as long as I'm a week ahead of the students, then I'm in good shape."

Len: How did that go?

Daniel: It went well. I think there's something really special about the first class that a professor teaches that's hard to replicate again. I still keep in touch with students from that course.

Len: I think, similarly, there's something special for students about the first semester of law school. And for me, torts was actually the first class I had in law school at nine o'clock on the Monday that we started classes. And I think, for some reason, I can remember everything about the classroom that day.

I can remember what the professor was wearing, I can remember the way I felt. And of course, I went to hundreds of law school classes after that, but there's no replicating that sense of newness. So, I understand what you're saying.

So, I know that you're now not at the University of Chicago, you're at NYU. But I'm curious—now, you said you've been doing this for eight years.

Are you doing now about what you thought you would be doing eight years in, in terms of the scholarly work you're doing and the thinking that you're doing about tax? And what is that? Or have you swerved? Have you changed your particular academic focus?

Daniel: I think I'm doing more or less what I imagined I would do when I was a 2L and decided that I wanted to be a tax law professor. I didn't know which particular issues I would want to work on yet. I knew that they would be more on the individual income tax side and the tax theory side than, say, tax treatment of a merger where practice experience would be much more important than that. But I didn't realize that I would have the opportunity to be back in New York, which is where I grew up, and I'm thrilled for that.

Len: So, tell our audience: What is your focus right now? I mean, aside from the regular tax classes that you're teaching, which I assume is most or all of them, what are you writing about? What are you thinking about? What are you speaking about when you go out on panels, and how are you finding that right now?

Daniel: Right now, I'm focused on two issues. One is really the very practical issue of cash transfers to low-income individuals. This is born out of a course that I'm currently teaching. I'm on the NYU faculty, but I'm visiting at Yale Law School this semester, and I'm teaching a course where the students are designing a cash transfer program that a nonprofit will then actually implement in New Haven.

So, there's a budget of at least \$100,000 for the program that the students will design. And they have to decide: Who is the target population? How frequently are they getting their cash transfers? What outcomes are we potentially interested in?

This is the first time where I've taught a course that is this practical, where at the end of the day, some number of low-income people in the New Haven area will actually get money. And I'd previously written a couple of articles about the idea of a universal basic income, both the philosophical foundations and then the practical challenges in implementing a UBI program. So, that's one.

The second subject that's occupying my time and attention right now is the question of credible commitment and capital taxation. So, we think that lower capital taxes incentivize investment and incentivize labor. But let's focus on the investment aspect for now.

Len: We're talking about, for example, the lower rate on capital gains—

Daniel: Yeah.

Len: —than ordinary income.

Daniel: Right.

Len: Yes.

Daniel: Or the fact that the government doesn't take all of our money in the future. There have been countries that have imposed big one-time wealth taxes. It's not capital tax policy today that we're concerned about when we're making investment decisions, it's capital tax policy in the future.

But how does the government today commit to capital tax policy in the future? And right now, in the United States, most of us think that low capital taxation—low by potential historical standards—will persist for some time, whether it's a 23.8% top capital gains rate or a 40.8% top capital gains rate. It's not going to be the government taking 90% of your wealth. But in 1946, Japan had a 90% wealth tax.

There have been times when we've just seized people's stuff. How is it that the United States has sustained this credible commitment to low capital taxation? And it's a question that has bedeviled economists for decades, and one where I think a more interdisciplinary perspective can help illuminate.

Len: I want to talk about the first of those, first—the New Haven project you've got going. First of all, where's the money coming from? Is it coming from the university or from private donors or something?

Daniel: No, this is outside fundraising for the first \$100,000, and then, hopefully, there'll be more. But it's hard to fundraise when we don't know what the target population is yet. Because I want the students to actually construct their own little welfare state and think about the issues on the transfer side of the tax and transfer system.

So, they haven't decided yet who the target population is. And it's really hard to go to a funder and say, "Hey, please give me money. I'm going to give it away to low-income people, but I can't tell you who."

Len: And it seems to me that the side you're focusing on is less the revenue-raising side, right, and more the spending side.

Daniel: Right, exactly.

Len: How do you distribute the revenue after you've raised it? What are you spending on and why?

Daniel: Exactly. I mean, that's a big part of our tax system. We do that through the earned income tax credit. We do that through the child tax credit.

So, what students are doing is sort of a form of tax and transfer policy, just not operated through the government. I'm urging them to think about: What are the programs that you could pursue that would potentially be scalable?

So, where could a demonstration actually lead a state government or maybe the federal government one day to pick up on your idea? There are also concrete tax issues that arise when you give money to people. Is it a gift? And will this affect people's EITC eligibility or their Medicaid eligibility? And those depend upon the design of the program.

Len: Fascinating. That's sort of a neat way to teach it. So, one of the questions I've asked a lot of our guests is: What do the best tax professionals do well?

I want to ask you, I think, a slightly different question, which is: When you've got a tax student who attracts your attention—"Wow, this person's really a good student"—what are the sorts of things that you are seeing? It can be intelligence, it can be other things, but what are the things that are making a really successful tax law student these days in your eyes?

Daniel: One thing that surprised me is it has very little to do with whether you were an economics major in college. There are fantastic students who I've had who were economics majors in college—you've got to be at least able to do, I'd say, eighth grade-level algebra, but beyond that, you don't need to know much math to be a tax lawyer.

Different students do it well in different ways. Some of them are just really close readers of texts. Maybe they were English majors in college, maybe they just love reading and parsing words, and they're able to see ambiguities in statutes that I thought were crystal clear. And that's really exciting when that happens in class.

And I always thought the provision could only be read one way and a student points out another way that it could be read. Some students who I've had at NYU are more policy focused. And for that, it's a mixture of being able to think creatively and also being able to think practically at the same time.

And then I'd say, the most important thing for a student who's thinking about going into tax is just: Are you interested in tax? Are you coming to office hours? Are you reading beyond what's required in the case book?

Is this really the subject that you want to devote the rest of your life to, or at least the rest of your life between 9 a.m. and 6 p.m. on weekdays—realizing that many Cravath tax associates are working well beyond that? And if you've got the intelligence to get into a top law school and a real passion for tax, then I think you can be a tax lawyer.

Len: The point you make about not having to be an economics major is unsurprising to me, but I understand it would be surprising to a lot of people. And I was surprised because I came to tax with no economics. I didn't even take economics in college, let alone major in it. No real exposure to summer jobs on Wall Street or in finance. I came to it from a very liberal arts/reading/conceptual background.

And even then, I came to it as a law student who thought he was just going to read constitutional law cases and be a litigator or something. So, I came to it very blank. But I think you're right, it's mostly a conceptual thing, and if you want to take it in a quantitative or numerical direction, you can. But to do what I'm doing every day, certainly nobody wants to hear that, right? There's tax accountants who can run all the numbers.

People want to know what you think about the way the law works, and therefore, what they ought to do. And they want to hear it clearly. They don't want to have all the technical stuff gumming it up. So, that's an interesting perspective.

I'm also curious about your experience with good students who aren't going to be tax lawyers, either because they discover it by getting exposed to tax and it's like, "Well, I don't think I want to do that," or because they just sort of know, "No, I want to be a transactional lawyer, but I want to have some exposure to tax."

I just taught internally this week a 90-minute class that's the basics of the federal income tax system, but for corporate lawyers, basically. And I think that people are really eager to learn about the basics and also better at understanding even more nuanced tax concepts than they themselves give themselves credit for. So, I wonder what your reaction to that is in the law school community.

Daniel: I think tax is an extraordinarily valuable course for students who know that they don't want to be tax lawyers, or discover in the course that they don't want to be tax lawyers, if they're going to go into transactional practice.

One thing that my tax professor said to me and said to my class at the time was: "If South Korea owned 35% of every U.S. business and, more, 35% of the consequences of every U.S. business transaction, and you want to be a transactional lawyer, you better learn Korean. But when the federal government gets 35% of business profits, you better learn tax even if you're not going to be a tax lawyer." That's a little less compelling but I think still somewhat compelling now that the corporate tax rate has moved from 35%, where it was when I was in law school, to 21% today.

Len: So, I mean, we talk about budding tax lawyers or budding transactional lawyers—I remember going and talking to professors about what it would be like to do tax the way I'm doing it and trying to get advice. I assume you've got students doing the same thing. What kind of guidance are you giving them on this kind of early career advice when they ask you this?

Daniel: I'm somewhat hamstrung in my ability to give early career advice because I was only a tax practitioner for the three weeks of my 12-week summer associate stint when I was in the Tax Department. So—and this is totally honest, and you can ask my students whether this is true—I tell them to listen to the On Tax podcast. So, thank you for the service that you've done to the tax community.

Len: We're changing lives here at On Tax.

Daniel: Well, you are making life a lot easier for tax professors who have not practiced tax themselves. I think if one listens to a bunch of the episodes, one gets a good idea of the various pathways that tax practice can take you and understanding that being a tax partner at a law firm is not the only place where you can go from being a tax associate—so, thanks.

Len: Well, thanks for spreading the word and I appreciate your noticing that. So, in the few minutes we have left, Daniel, we like to talk to our guests about what they do when they're not doing tax. So, you referenced working from 9 to 6 every day, and I know that even professors work nights and weekends sometimes.

I'm curious, however, what you do when you're not working. What are your hobbies? What do you like to do to fill your time outside of tax?

Daniel: I have a 5-year-old and a 3-year-old who fill most of my time—

Len: Say no more.

Daniel: —outside of tax. They are avid museum goers, and they have recently become big fans of the NYU Violets women's basketball team, which is currently ranked number one in Division III. And we love to go to games.

So, that's how I've been devoting my time some recent weekends. And I'm an avid long-distance runner. I try to run every day or along the Hudson Greenway, and I have run six marathons and hope to do more.

Len: You've run six marathons, so one or two didn't scare you off. You like it.

Daniel: I love it, but I just also love going out for a seven- or eight-mile run. It doesn't have to be competitive. I find that I get my best thinking done then.

Len: That makes sense to me. I've definitely gone through periods of my life where I do a lot of that, and it is clarifying. And sometimes you wish you had a notepad, but other times you just got to reconstruct what you were thinking when you get home.

Our guest today has been Daniel Hemel, a Professor of Law at NYU in New York City. He's a tax professor and been a great guest. Professor, thanks for joining us. Glad to have you.

Daniel: Thanks for having me on.

Len: That's all for this episode of On Tax—A Cravath Podcast. You can find us online at cravath.com/podcast. And don't forget to subscribe on Apple Podcasts or Spotify. If you enjoyed the show, please consider rating or reviewing us wherever you listen.

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