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***Beyond “Unprecedented”: The Post-Pandemic Economy***

**Episode 1: “Essential—and Broke”**

[00:00:02] **Katharina Pistor:** We are all facing grave uncertainties.

[00:00:05] **Michael Graetz:** Even if the virus is controlled, the economic consequences are going to go on for a long time.

[00:00:12] **Pistor:** We don’t have the time to just take vitamins and wait a couple of decades.

[00:00:15] **Graetz:** Private law and public law need to work together to protect the interests of the American public.

[00:00:22] **[Media clips of journalists saying “unprecedented”]:** The coronavirus pandemic has tanked the global economy with unprecedented speed. The steepness of the decline here is unprecedented. This is a crisis that is unprecedented. It is unprecedented, and we just don’t know.

[00:00:35] **Eric Talley:** This is *Beyond “Unprecedented”: The Post-Pandemic Economy* from Columbia Law School and the Millstein Center for Global Markets and Corporate Ownership. I’m your host, Eric Talley, Sulzbacher Professor at Columbia Law School and co-director of the Millstein Center.

[00:00:53] **Talley:** Picture two images from the COVID-19 pandemic and ongoing economic crisis. The first, a mile-long line of cars idling at drive-through COVID testing centers and food pantries. Lines spawned days after the onset of the pandemic in March of this year. The second, a Caribbean sunset posted on social media on or about the same time by billionaire entertainment magnate David Geffen as he quarantined on his private 454-foot superyacht. Now, look, widening gaps in wealth and income are now familiar trends. But the pandemic has not only underscored this phenomenon. It, by most accounts, has accelerated it. If we are in a recovery, it is decidedly a K-shaped one rather than a V-shaped one, with the rich and the working class following much different paths.

[00:01:45] **Talley:** So how did we even get here? Where the well-to-do spring back to their feet, while everyday workers, many of whom are working essential jobs, remain devastated and on the sidelines. I’m excited to dive into these questions and more with our guests, Katharina Pistor and Michael Graetz.

[00:02:03] **Talley:** Katharina is the Edward B. Parker Professor of Comparative Law at Columbia Law School. Her most recent book, *The Code of Capital: How the Law Creates Wealth and Inequality*, was named one of the best books in 2019 by the *Financial Times*. Welcome, Katharina.

[00:02:19] **Katharina Pistor:** Thank you, Eric.

[00:02:20] **Talley:** Michael Graetz is the Columbia Alumni Professor of Tax Law. His recent scholarship is focused on U.S. legal history and problems around economic insecurity and inequality. He also has a recent book, *The Wolf at the Door: The Menace of Economic Insecurity and How to Fight It*, with Ian Shapiro. Welcome to you, Michael.

[00:02:37] **Michael Graetz:** Thank you, Eric.

[00:02:38] **Talley:** Seventy-five years ago, the United States was an emerging world power and its wealth and income distributions were not this lopsided. Do you think this was an inevitable result of what capitalism does, or did we somehow fall asleep at the wheel?

[00:02:52] **Graetz:** Well, I think it’s probably a little bit of both. You know, until the 1970s into the late ’60s after World War II, the U.S. essentially had all the money there was. And then globalization, as you know, accelerated, many jobs went elsewhere, and technology, then combined with globalization, created winner-take-all markets for lots of industries and created great economic insecurity for the American middle class and below. Before the pandemic, the Federal Reserve reported 44% of American families could not pay off a $400 emergency with cash or with a credit card they could pay off by the end of the month. And now those insecurities, because of the virus, have become much more than $400 a month. And a precarious work force has become even more precarious, as you say, except for people at the very top.

[00:04:03] **Talley:** You know as well as anyone that there is now a decades-long—at least a decade long—literature largely produced by economists that purports to demonstrate that the top 1% have increasingly grabbed a large piece of the economic pie. But you argue in your book that this focus on the top 1% misses the larger picture on at least two levels. Why do we miss something when we focus just on the 1%?

[00:04:30] **Graetz:** The problem with that focus is that the 99% is not an effective coalition for change. There is no agreement on hardly any issue among 99% of the American public. There are vast differences between the 90th percentile and the 20th percentile, not to mention, the people in the middle. And so the spotlight, which has been on the top 1%, we argue in the book, has really distracted us from taking a very hard look at the precarious situation faced by the middle class and the people below whose jobs are at risk, and as we’ve seen in the pandemic, when something happens—something awful happens—those jobs disappear. But even if the virus is controlled, the economic consequences are going to go on for a long time. Focusing on the 1% is not an answer to that problem.

[00:05:40] **Talley:** Katharina, let me get you in on this. Your book shares, in many ways, Michael’s critique of the focus on the 1%, but for you it’s as much about focusing too much on outcomes and not on structural institutional phenomenon, the legal and regulatory code, as it were, that gave rise to the ascendancy of the uber-rich and even the sort of rich. Give me a sense of what you mean by that. What do you mean when you talk about, you know, the code of capital and access to it?

[00:06:10] **Katharina Pistor:** Well, when I talk about the code of capital, I’m really saying that there are certain legal institutions, most importantly, institutions of the private law, property rights, collateral law, the common law trust, the corporation rules and bankruptcy, and contract law, as well. So really private law institutions that have been used for centuries to protect interests of some against the rest. When we think about really what these legal institutions have done is that they have given some stronger rights, others weaker rights; they have made some interests durable, others not. The state protects these interests against the world, against anybody. And so you’re basically socializing the cost of maintaining these protections. The super-rich, or even the richer in the upper echelons below the top one point or 1%, they owe their richness not only to skills, not only to what they’ve brought to it, not going to a thrift and, you know, the good Protestant ethic. They also owe their wealth, to a large extent, to a social resource. And that’s the law. Now, what implications does it have for those left behind? I think there are two strategies. One is to think about whether we can give them similar types of protection. And the second question is whether actually doing this through private law is sufficient for the masses of people, whether we need social or political state-led intervention. And we probably need a bit of both. But I just want to make sure that we understand that the insecurity of the majority is the flipside of the super-rich because they have generated their wealth to a large extent in financial assets. A lot of these assets are debt assets and there are debtors on the other side that are typically taking the short end of the stick.

[00:08:05] **Talley:** Interesting. One of the things that I was trying to think through as you were describing this is, you know, look, median income in the United States is currently just at around $65,000 a year. The median net worth in the U.S. is only a little bit larger, around $100,000 a year. You know, realistically, for someone who’s sitting at that median or possibly below, how helpful are some of these structures like trusts and limited liability companies? Is that something that is practically worthwhile for someone who’s sitting at the median?

[00:08:37] **Pistor:** Well, some of the features, yes. I think, you know, many people know that it’s better to set up a limited liability company than run a partnership in terms of protecting yourself from future downturns. For others, it’s clear that they help only the super-rich because it costs to hire a lawyer to set up certain fancy legal structures. And so it’s worth it only if you have a couple of million dollars on your hands already to do so, and for the others it’s just not accessible. Here’s where politics and legislation and intervention maybe comes in, and I think it should come in on both sides. To what extent do we want to allow some individuals to harness the powers of the stage to protect their wealth in a certain way? And then we respect these legal entities wherever they have been formed in the Cayman Islands or elsewhere. And the second question is, as the pandemic suggests, we are all basically facing grave uncertainties. To what extent can and should we insure people against similar downturns over which they have no control? And how do we do this best?

[00:09:38] **Graetz:** I want to comment on something that Katharina said earlier. I think that her point about the role of private law and asset accumulation is extremely important. But remember, the people in the middle and below don’t have assets. And the one instance where the federal government stepped in, both Republicans and Democrats over a long period of time to try and help the middle class develop wealth, was through homeownership, which turns out to be good politics and bad policy, as we’ve seen, because it doesn’t protect against a downturn. When we had the downturn in 2008 and 2009, people found out that it didn’t matter whether their landlords or their banks put them on the streets. And so I think you have to be careful about policies that are going to build wealth among people and not try and focus, as we did, on one particular asset.

[00:10:38] **Pistor:** Now, I want to say just one point in response to a failure of the housing policy. I agree that this was a massive failure. But I’m not sure that the failure as such was the attempt to try to give people housing as ownership or even rental in either way, but that we basically allowed the complete financialization of the housing policy. So I think it’s really not when Fannie Mae and Ginnie Mae started securitization, but when the private sector stepped in and used these assets as a huge money minting machine to enrich itself. It wasn’t anymore about giving money to homeowners to buy the house. It was really creating assets for investors. That’s the, you know, this is something we need to be careful about when we strategize policies, how they can be used and flipped into basically money-making, wealth-creating machines rather than pursue the public policies that we want to pursue.

[00:11:32] **Eric Talley** I want to get into some potential solutions with both of you in a second. But before we do that, I’d be interested in both your thoughts on whether these institutions, in addition to creating the possibilities for significant wealth creation, largely at the upper end of the economic spectrum, have also created avenues for the preservation of that almost dynastic wealth. Is there a sense in which that multigenerational element of wealth is stronger now than it used to be?

[00:12:01] **Pistor:** I think in the United States, certainly that is the case. That has a lot to do with the use of trusts and other entities. Before you get to the ultimate beneficial owner of any corporation, you have levels and levels of partnerships and trust and other structures. And that’s basically protecting these owners from oversight of how much wealth they really have. So I think that has certainly increased in the U.S. over time. There’s no doubt in my mind we have reached feudal type of levels of inequality. And I think the legal institutions play a huge role in creating that kind of inequality in wealth.

[00:12:35] **Graetz:** Those with wealth have managed to protect themselves through the political process. The average worker really has no collective voice in the legislative process. And businesses, as you know well, Eric, have been determined only to benefit their shareholders. It takes either regulation or subsidies or tax policy or some combination of social insurance mechanisms in order to make sure that things like dislocations and destruction of income, job loss because of health or disability, or unemployment are protected for the middle class.

[00:13:20] **Eric Talley** Well, I guess that gets me to maybe a small sense of ennui that I feel from listening to both of you. I think you both make compelling cases, both here and in your books, that would give me cause to feel somewhat depressed. I want to sort of push for us to also think about, well, what are some constructive solutions? And maybe we’ll get to some specific ones in a second. But first and more generally, you know, if we were to seriously think about solving these sorts of problems, what form would it take? Would it be more evolutionary than revolutionary? Would it be more of a silver bullet or just a years- and decades-long regimen of one-a-day vitamins to go about trying to figure out how to address some of these problems?

[00:14:08] **Pistor:** Yeah, I think we don’t have the time to just take vitamins and wait a couple of decades. At the same time, I just don’t really believe in revolutions. I also think that when we look at past revolutions, we actually see that very often after one has been done and accomplished, the old configurations reestablish themselves. So the point is not just to do a superficial revolution. I think the point is something that I call strategic incrementalism. We have to be very careful, both politically but also legally and strategically, to find the soft spots where we can change the system. So one of the things that I suggest, for example, in the book is we basically have to take away the punchbowl for the super-rich. We do not need to give them more subsidy. That also goes to the distribution during a crisis like COVID, right, so we are protecting asset prices. Not everybody has assets, as Michael said before, but so why do we put so much money behind these assets rather than thinking about those who need to build assets in the first place? So I don’t have a silver bullet, but I think we learned from the past from examining while certain policy interventions got derailed to protect ourselves against the future, and we have to be very clear to what extent, actually, the law that we currently have in place allows the production of wealth for those who already are protected, but leaves everybody basically hanging as orphans in the wind.

[00:15:30] **Eric Talley** You think that the, you know, decades-long emphasis on homeownership that ended up sort of going awry during the financial crisis, could that have been part of a larger package that might have gotten it right? So, for example, you know, one potential good attribute of encouraged homeownership is that it’s a type of forced savings on some level, as long as the investment isn’t overly leveraged up. But, by the same token, with economic downturns, at least as we saw in 2008 through 2013, those assets for middle-class folks weren’t protected by some of these institutions that would otherwise protect sort of the rich and uber-rich. Do you think a, you know, a policy instrument, like encouraging homeownership, when combined with possibly extending some of these legal relationships that partition and protect assets might be a step in the right direction? Or is that still going off, a little bit, 15 degrees sideways?

[00:16:36] **Pistor:** Yeah, I don’t think any society can actually afford homeownership for everybody. You know, I think that requires a huge subsidy. And it’s, of course, and that again, then triggers moral hazard problems to some extent. On the other hand, I think we also have to realize that to the extent that people in this country have built equity, they’ve built it mostly through housing. So I think there has to be some kind of mixture of saying, first of all, people need to have shelter and this can also be a rental property. But, you know, just keep in mind that rental property also has become financialised after 2008. You know, how many folks who had been investing in asset-backed securities, mortgage-backed securities have now switched to distressed housing. And we see, you know, renters being evicted on that as well. So no, no asset class is necessarily immune against the coding of capital because it’s just so attractive and has become so easy. The point is that people should have a secure shelter and then, depending on your income, you can afford different types of shelter. But I do agree that if we have a massive crisis, that we have to think about how to protect asset holders from a massive downturn that leads to eviction. Because I think the need to have shelter is an overriding policy objective. And whether it’s renters or homeowners I think is irrelevant on that front.

[00:17:54] **Graetz:** I think wealth building is a hugely challenging problem for the middle class and below. Since the 1990s, homeownership has no longer been a form of forced savings because as you know well, credit card companies essentially created home equity lines of credit where you could use your credit card to borrow against your home. And so the amount of leverage on homes was so high that when their values took a small hit or even a large hit, there was no equity to fall back on. You have to think about broader classes of assets, 401ks and other retirement assets have extended stock ownership down the income scale to the top half, but they stop at the midway point. People below the top half have not been able to acquire assets. And so we have to think about creating savings accounts—things like baby bonds that [U.S. Sen.] Cory Booker and others have suggested—as ways of creating financial wealth for the people below, below the top and below the middle even. But I don’t think housing is necessary. I think people need housing; Katharina and I agree on that. And they need good housing and they need to be protected, whether it’s from their lender or their landlord. But that’s a different matter than using housing as the basis for wealth creation. It’s just a myth in the United States that this is the way to do that. It was when our parents did it, but it’s not anymore.

[00:19:38] **Eric Talley** I am sympathetic to the idea of strategic incrementalism or however else you want to describe it. But it does very much depend on the pliability of the political system. And as both of you have commented, that one of the reasons that we got into the current situation we’re in is that politics has increasingly become dominated by folks who have ended up the beneficiaries of our current state of play. So how do you think about strategic incrementalism within an environment where politics have become so dominated by some of those very interests that are some of the biggest beneficiaries?

[00:20:20] **Pistor:** The beauty of a more incremental strategy is to really find the entry points where you can achieve something, whether it’s at the state level, at the municipal level, or sometimes at the federal level. And so you have to build coalitions around certain issues. But in some cases, you might also be able to push something at the state level. Just think about the competition for corporate law that we’ve had for decades and at some point got stuck in Delaware. But states could also, some individual states and they sometimes do, California on environmental policies and other issues, go ahead and actually push a particular agenda and become models for other states. That’s one of the beauty of things of the federal system that you could exploit instead of showcasing that certain things work. Sometimes, of course, it gets buried in politics. I am just thinking about health insurance in Massachusetts, which wasn’t really picked up then by the Republicans in Congress.

But I think there’s more room for experimentation and just pushing certain types of agendas in political circumstances where they become feasible, I think is critical. And another point, I think it goes to the lawyers, including private transactional lawyers, who I think should think very hard about how they employ their skills and also goes to courts and how they assess cases. Of course, we are bound by precedents, we’re bound by statutory law, but there’s also a lot of wiggle room still where we can sort of move the normative agenda slightly to get better outcomes. That’s slow; it’s very incremental. But I think if change happens in all these different levels, we are in a much better position than if we just only rely on D.C., which, of course, as we know, is a difficult place to change anything at this moment.

[00:21:53] **Talley:** What are your thoughts on that, Michael? Obviously, one of the biggest challenges for a nationalized form of unemployment insurance or assistance would be sort of these national politics. Are there places of entry at the local, state, regional, judicial level that are promising as well?

[00:22:10] **Graetz:** I think there are places, we’ve seen, for example, the Earned Income Tax Credit, which was a federal program that has been extremely important in making after-tax wages higher for people with children. And the states have been able to piggyback on that system. And there are state earned income tax credits that have lifted wages even further. We do need certain programs at the national level. And there, I think, one just has to look for opportunities. But the key in the political process is finding a coalition that will hold itself together for achieving some moral improvements, some improvement that people believe in. And then prohibiting or avoiding blocking coalitions that will undermine it. And that’s the challenge that we spend a lot of time in our book talking about for creating jobs, for making after-tax wages higher, for better child care, better health insurance, and helping people move from unemployment to reemployment, all of which we think are important. That’s not to deemphasize private law, because I think, as Katharina has said, private law and public law need to work together to protect the interests of the American public and address the kinds of genuine economic and securities that people are now facing.

[00:23:43] **Eric Talley** Katharina and Michael, thanks so much for joining us. These insights are super interesting and helpful and are almost certainly going to be part of a constructive way forward.

[00:23:53] **Pistor:** Thank you, Eric.

[00:23:55] **Graetz:** Thank you, Eric.

[00:23:58] **Eric Talley** My guests today were Katharina Pistor and Michael Graetz. Join me next time for another episode of *Beyond “Unprecedented.”* Make sure to subscribe wherever you get your podcasts. Thanks so much for listening.

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