

On Tax—Andrew Hayashi of UVA 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 we're joined by Andrew Hayashi. Andrew is the Class of 1948 Professor of Scholarly Research in Law at the University of Virginia School of Law in Charlottesville. Professor Hayashi, welcome to the podcast and thanks for joining us.

Andrew Hayashi: Thank you for having me, Len. I'm looking forward to the conversation.

Len: Well, it's exciting to talk to you. You were not at UVA when I was a student there, but I'm excited to hear about what's been going on in the tax universe at UVA since then. Tell us, Andrew, about your background in the tax law.

Andrew: I've listened to your podcast and I know that some of the people that you've had on feel like they were destined to be tax lawyers. I think Alyson Lawrence said that.

Len: Right.

Andrew: That wasn't me. I came actually to law school after having started a PhD program in economics. I had thought I wanted to be an economics professor; I studied a little bit of philosophy, too, and then I came to a point where I was looking around and wanted to give myself a little bit more professional flexibility, for one thing. My wife is an academic and so I knew we'd be looking for jobs together. But I also would look across the Berkeley campus at the law school and what they were doing there, and was interested from an intellectual perspective in legal questions and legal scholarship. It's a natural place to apply economic analysis.

So I went to law school hoping to like tax. It's actually a place where my intellectual interests in philosophy and economics come together very naturally. I went there hoping to enjoy tax, and then it turns out that I did. Berkeley at the time did and still does have wonderful tax economists and tax law professors. When I took my first tax courses, it affirmed my priors and turned out to be just a really interesting area intellectually. But I also discovered, fortunately, that I really liked tax analysis, like doing tax law. Nobody's gonna hire you to just sort of philosophize about it. So, happily, I discovered I really just enjoy working with the statute and regulations and all of that.

Len: A lot of people get jobs as second-year law students going into their third year at firms over the summer—summer associate positions. Did you work in a firm that summer and did you do tax?

Andrew: Yeah, I did. Once I fell for tax as a practice area in law school, I was kinda all in. And then when I interviewed for my 2L summer positions, I was very upfront with every firm I talked to and said, "Look I understand often the tax groups are smaller in a lot of firms, and it can be tough to find work." I said, "This is what I really wanna do. Will I have a chance to try it out this summer?" And, happily, in a few places they said I could, and I ended up spending my 2L summer in New York, which is where I went after I graduated. So I practiced tax law in New York at really the best time to start out in practice: in the fall of 2008.

Len: It's good to know that you think the fall of 2008 was good for something.

Andrew: Yeah. Actually, in getting ready for this podcast, I was reflecting on the start of my career in tax law. And, of course, it was an incredibly stressful time. I hardly knew exactly how sort of scary a time it was. I was just trying to keep up. But in some ways it was a real blessing, though of course, the real regular deal flow had dried up. Things were totally different at the time, but it meant that the kind of work that we were doing was, hopefully, fingers crossed, once-in-a-lifetime kind of work. The kinds of legal questions I was being asked to research and to write about were unusual ones. Is the Federal Reserve an agency or instrumentality of the United States government or not?

These aren't questions that people had to ask before. I spent a lot of time researching the tax treatment of credit default swaps. If I had started at a practice during more normal times, I would have seen a regular deal flow. And then things did happily to get back to normal, but I think there was a real blessing in starting off in such an unusual environment. And it taught me the importance of being flexible, right? Everything is weird, but there's a lot to learn here.

Len: One of the things that I wanna talk to you about a little bit is about how you transitioned out of the law firm to an academic position. But first, it sounds like you actually found your way into the tax law from the sort of academic and intellectual perspective, as you said. And so then you came to a law firm, you were having this kind of practical experience. Can you talk about how the tasks you were given, the deals you worked on, and the other lawyers you worked with helped develop the sort of practical understanding of the tax law, separate from your formal legal training? And that might help us kind of understand your other transition after law practice.

Andrew: Yeah. I spent a lot of time in the first year helping write opinions. And that is something that I really loved. I think it's the thing that in some ways, when I tell our students now, will feel most familiar to them in that it's legal research and writing.

It's trying to interpret the various sources of authority in the tax context and come to a judgment about particular transaction or whatever it is. And I think that experience of just intense legal research and writing prepared me well to teach students afterwards, and particularly to help students become aware of the fact that the answer to tax questions is not always gonna be clear answers, sort of yes or no. But learning how to calibrate your judgment and figure out how certain are you about this position is something that I developed in sensitivity to in the first year, and I try to pass along.

Len: It is hard to teach people to be comfortable with the ambiguity of certain areas of the tax law and with the ambiguity of not having a clear answer. One of the challenges of practice, as you'll recall, is that clients need to know: What should I do? Clients don't necessarily need to know all the details, but they need to know, if they understood all the tax stuff the same way the professional tax lawyer did, where would they come out on this?

What would they do? And distilling legal principles or fuzzy, ambiguous, kind of legal authorities into a net-net, this is the step you should take or not take, is a real challenge. And I think more than anything, that's what law students need to learn to be comfortable with. Because it's one thing just around my desk to say like, "Well, we might win and we might lose," but the client actually needs some direction.

Andrew: Right. Right. And I think two other pieces of that are when it comes time to communicating what your advice is going to be. One, a couple other things I think I learned that I tried to pass along is the importance of clear communication. This is something that you've talked about on this podcast.

Len: Right.

Andrew: You can't speak just in code sections, right? There's a translation that needs to happen to make the sort of information and advice clear and operationalizable for the client. When I was interviewing actually for my summer 2L position at one firm, the tax partner asked me, "Define for me a Nash equilibrium." So this is this concept in game theory that—it's very important, associated with John Nash.

And I was like, why is he asking me this question? And of course, our job often is to translate technical concepts to clients in a way that is useful to them. So there was really an important point behind the question. So that's one thing I try and emphasize to students.

And the other is, rendering that sort of final advice, being sensitive to the client's business objectives. And I test our students on that. There's often this trade-off between achieving the best tax result from a purely tax perspective, and getting the client where they want to go taking the shortest path. And there's often a trade-off and you can't give good advice if you don't understand what that trade-off is.

Len: That's certainly true, and some of our other guests have made similar points. So it's definitely a common observation. The first point you made about being asked to explain something super complicated like the Nash equilibrium is something to pause on. I wanna alert law students out there that you may be asked to do something similar. I've certainly done this as an interviewer, where I'll ask somebody about their senior thesis from college, or to explain something to me about what they worked on last summer if they had a law job. Or even if they didn't, if they have work experience from after college, tell me about something you worked on.

And then I try and listen very carefully, because first of all, it's an awesome opportunity for a student who's being interviewed to be able to showcase not just their knowledge and their intellect, but this skill of communicating something on which you are an expert to a smart person who isn't. 'Cause that's what we do as lawyers. And if you can do that well in an interview kind of cold, it's a really good indication to the person on the other side of the desk who's interviewing you, that you will be able to do that with some practice and experience at a law firm. So that's a hot tip for people who are looking to get jobs. Prepare to be asked these questions, and even if you're not asked these questions, prepare to talk about something you know very well in a way that the person you're speaking to will understand.

Andrew: I was very fortunate that I had some great mentors in this respect. A lot of tax lawyers are teachers and they're teaching junior associates, mid-level associates and their clients. Maybe for that reason, you find a lot of tax lawyers, practitioners doing things like adjuncting and teaching in New York at places like NYU. There's a skillset that tax lawyers have to develop that just makes them great teachers.

Len: That's also true. And I think that would surprise a lot of people outside the tax profession, because I think they would expect that tax practitioners would be inaccessible and unable to communicate the wisdom they have about tax law, and it's actually quite the contrary. The best tax practitioners are people who can crisply and clearly explain what they're saying to people who don't have the same amount of expertise.

When you were in practice, did you have the opportunity to talk to others about the sort of academic side of the tax world? There are some practitioners who think about tax in that way and also, obviously, lots of law professors in New York. Did you have any exposure to that kind of thinking?

Andrew: I love being in practice, but one of the things that reassured me that I could make the transition to academia and not kind of lose touch with the practice side of things was attending a colloquium down at NYU, which is a phenomenal tax program and has a well-known seminar series.

And I went there and, of course, the faculty hosted, but I looked around the room and saw these real legends of the tax bar who were there. And I remember seeing Mike Schler in particular, who I had spoken with once before.

Len: Mike was for many years a partner in the Firm in the tax group. Go ahead.

Andrew: Right. And I knew from having spoken with him before that he knew a lot of folks in academia and in the government—of course, he probably knew everybody. And it reassured me that you could go into private practice and remain connected to the sort of more policy side of things, or you could go into academia and still be in conversation with practitioners as well. And so that was just a very reassuring thing for me to see.

Len: You're right. And a lot of practitioners, in their spare time, will work in a very academic way on the tax law. The New York State Bar Association has a Tax Section where it is very prominent in the field where practitioner partners at law firms across the city will participate in sessions. And they'll help write papers and analyze proposed regulations. And I know Mike was very involved in that.

And it's incredibly common for practitioners who are tax lawyers by day to be thinking about some of these kind of tax problems really from a policy perspective and using analytical reasoning and writing skills. And that's kind of a cross between being a tax lawyer and a tax professor.

Andrew: Yeah. I think, maybe that's the best area of the law for that. You can exercise different parts of your brain.

Len: So at what point in your associate career did you think about going to become a professor? Is that something that you expected at the beginning, or is it a sense that you began to get over the course of your time at your law firm?

Andrew: Well, I think—as you might guess, because of my path having come into it from an academic perspective to begin with—it was always in the back of my mind. I loved practicing tax law. Actually, listening to your podcast has made me a little nostalgic for parts of it, but to be honest, it's hard to beat the autonomy you have in academia to spend time on questions you're really interested in. And that's the luxury that I have now. When an interesting tax question captures my imagination, I can devote as much time to it as I want, more or less. So I kind of missed that. And I missed the teaching.

So it came to a point where I thought, well, my wife is coming to a natural end in her post-doc. She's a chemist. If I'm gonna make this change, it's gonna have to come pretty soon. So after I left the firm and spent two years as a research fellow at NYU, which gave me the time to do the kind of scholarship that you need to get an academic job. I know of people who've been able to make that transition and write and do that scholarship in their spare time as a Wall Street lawyer, but they're heroic. I have no idea how they do it. For most people, you need a little bit of a transition period.

Len: We talked to Mitchell Kane, who's a professor at NYU and was one of my professors in law school. And he made a similar point. He had spent four years practicing at Covington. And he said in order to get hired, he needed to spend some time doing a fellowship first to be able to devote the amount of attention and thinking and writing that you need to be able to get a job at a top law school. So it sounds like your path is fairly similar.

Andrew: Yeah. I found the same thing. Whether you're at Covington or Cravath, the job is very demanding, and it's hard to find the time, especially if you have a family, to spend doing research.

Len: So tell us about the process maybe during and after your fellowship of going onto the job market and interviewing at various schools. What did you learn about yourself and about your future and about the various law schools? How did that go?

Andrew: So the law hiring process is a very regimented, centralized process. You throw your hat in the ring by submitting your resume and some of your work to the central repository, and then all of the law schools go and download material and they page through a thousand or 2,000 portfolios to identify people that they're interested in. And then, over the course of a couple of days, there are sort of speed dating interviews. And if they go well, then schools will invite you back to spend a day or two to meet some of the faculty and give a presentation of your work. I think what I learned through that is the benefit of being able to communicate your work to a broader audience. So this is part of the same theme. But when you get up and talk about tax law to an entire law school faculty, I mean, there's a challenge there, right?

And you've got to make it interesting to people who study criminal law or constitutional law or whatever it is. And there often are points of connection, but it just takes a little bit of work. So I think that was something that I had to learn how to do when I was on the market. I had already had to do that a little bit. My training as an economist didn't prepare me entirely to get a job as a law professor. I practiced for a couple of years, but I still, in some ways, think a little bit like an economist. I had already had to do some of that translation just for law audiences and then this was sort of the next step in that process. So communication was something I had to really just continue to work on.

Len: And in that process, that's when you got hired by UVA, back then?

Andrew: As I mentioned, I was coordinating my job search with my wife, who's a chemist. But when the offer from UVA came, my advisor on the market pretty much said, "You've won the lottery and you should just take it and don't ask any questions." That's true for a couple of reasons, some of which I knew, some of which I didn't. UVA has such an incredible history in tax law with just legends of the bar: Ed Cohen and Mort Caplin, more recently, Michael Graetz.

And I interviewed with George Yin, who one of your guests I know had as her corporate tax professor. Just leading lights—people who devoted their lives to government service and to academia. It's so important. I knew I was grateful to have some of these folks as colleagues. But also, just the culture of UVA is really unusual. Collegiality isn't just a word, right? Anybody who's been here knows what it's like not just among the students, but among the faculty. It's a place where there's genuine diversity of political views, views on all sorts of things. And yet—or maybe because of that—there's a real sense of commitment to the mission of the school and to norms of collegiality intellectual engagement that is rare.

Len: I'll stop here and give my paean to the University of Virginia Law School, too. I think it is a remarkably intentional community. As you mentioned, the students themselves feel very close to each other in the way they live and work in the community for three years. They feel very close to the faculty members with whom they're living and working. But it's the faculty, I think, that over long periods of time—not individual three-year segments of time like a student experiences at school—but over a long period of time, it's the faculty and its connectivity, its community with each other that really helps give the place its intentional politeness, civility, friendliness, warmth, really.

And the other thing is Charlottesville. This is interesting that you were thinking about your job search in connection with your spouse's, but Charlottesville is a place where you actively choose to live.

I think the fact that it is kind of isolated in the way that it is relative to other top law schools' communities makes it a place that people self-select into. And I think those couple of things together are really what gives the law school its strong sense of community. I now know it very well as an alumnus, a relatively active alumnus, but meeting people like you and getting to know faculty members now even better than I did when I was a student there, just cements that strong feeling for me. And I'm glad that you recognized it at the time and are enjoying it so much.

Andrew: It was a little bit of a roll of the dice for us because we didn't go to school here.

Len: Right.

Andrew: But there's this strange thing that we did experience where UVA alums spend the rest of their lives trying to get back to Charlottesville. Sometimes it seems every one of them we've met in New York or in the Bay Area, where we were before, would gush about the place. And so it makes you wonder, it makes you curious, and it made us feel confident enough to move here, again, not knowing it intimately, but we're very grateful for it.

Sometimes I feel like I'm gushing, but the culture of the place, and I feel it's a wonderful thing to be able to come here and feel like you buy into the mission of what you're doing. So you're not just going to work for the paycheck or for your own personal sort of gain, but that all of the unseen work that is involved in being a professor you feel good about, because it's contributing to an institution that you think is really making the world a better place, I think. So that's maybe enough gushing, but it's all true.

Len: And now, tell me a little bit about the courses you've been teaching since you got to the law school. I imagine that you're spending a fair amount of your time counseling students about a professional career, likely a professional career at least starting in tax. And so I wonder how those conversations have gone and what advice you're giving students when they come to you with their questions.

Andrew: I've taught only tax courses since I've been here. I also run a small seminar on law and economics. But in terms of lecturing, I teach our introductory federal income tax course. I've taught a course on advanced topics in federal income tax, which has some flexibility in how it's taught. When I did it, it was focused on financial derivatives. And then I teach international tax, as well. The conversations you have with students depends a lot on which of those classes they're in, right?

So fed tax, people are coming for all kinds of reasons. The ones that are taking international tax have a very particular goal in mind usually. I really enjoy counseling students about the decision to go into tax law. I think it suited me perfectly, but I don't think it suits everybody perfectly. And I think it's important that students know that. One thing I highlight for them is that it is hard and you feel like you're drinking from a fire hose and the learning curve doesn't taper off very much for a long time. And then 2017 happens.

Len: And the law changes. Yeah.

Andrew: It all starts again. For somebody who loves to learn, it's just the greatest. But if you're the kind of person who's really uncomfortable not having your arms around everything and knowing every piece of things, having fully mastered every corner of your world, it will feel terrible. I think you'll just drown.

Len: It will really agitate you. I remember as an associate going into Steve Gordon's office. Steve was a guest on the podcast and was the Head of the Tax Department. I would say to him, and this has happened several times, "Oh, I just flubbed something." Or, "I just totally whiffed. I thought I knew the answer and then I realized there was a different case or a special rule."

And he'd laugh and then take out his legal pad and he'd start drawing this graph, which he has now drawn for me several times. And imagine just a graph where your sort of trajectory is straight up. And he'd say, "This is the amount that you're learning. This is the level of confidence you have about the tax law. This is how you're feeling about life."

And in about 18 months in, he just, the line goes straight down. Something's gonna happen and you're gonna hit this trough. You're gonna feel no confidence. You're gonna feel like you don't understand it. And then it starts going up again. And then some point six, 12, 18 months from then, it's gonna go down again. And he kept making it go down, but every time, the depths of the down line was not quite as low. It was a little higher.

Andrew: Yeah.

Len: And he'd keep drawing that graph and he'd say, "This is still happening to me." He says, "But if you just follow the troughs, if you just sort of understand that your low points are always kind of going up, that can give you some confidence that you're still kind of learning."

But if you can't live with the kind of rollercoaster ride of the feeling when, "Oh, I didn't even realize this," it's gonna be a really tough profession because you're never gonna feel like you've got a total grasp of it.

Andrew: I love that graph. I'm gonna draw my own version of that. I think it just sort of helps explain to the would-be, first-year tax associates what they're in for. Maybe this ties in, again, to how I ended up going from tax practice to academia and how the two are really not so far apart. Because the law is changing, because it's hard, there's a lot of teaching that goes on. Sometimes people say there's a quasi-academic feel to a tax department.

We would get together for tax lunches once a week, because some new case had come down or some new piece of guidance. It was new to everybody. Everybody understood that this thing was tricky and we worked it through together. One other thing I tell our students as they're thinking about practices, just the importance of finding a group like that. I wouldn't wanna kind of walk this path by myself—finding a place where the associates and the partners are open and are teaching each other and working together. That's helpful.

Len: You're right. That's important.

Can you tell us about your current academic interests and what you've been working on recently and some of your intellectual pursuits?

Andrew:

I finished an article, something I'd been looking forward to for a long time, which has to do with this really ugly corner of the Internal Revenue Code Section 382. So, the reason I'd be looking forward to writing this article is, as I mentioned, I started in the fall of 2008 in private practice. And as the world was collapsing, the IRS was issuing these notices that were playing with the rules around this code section, which was meant to discourage tax-motivated acquisitions. Again, as a junior lawyer, I hardly understood the significance of what was going on, but when I looked back and what had happened there, I wondered what was the effect of this guidance that the IRS had issued—which was designed to sort of consolidate the banking sector, but at what cost?

Section 382 was there for a reason. And so, transitioning to academia gave me the time to really drill down, use some of my economic tools to figure out what the long-term effects of some of that guidance was. So I wrote a paper looking at the effect of essentially suspending this code section on the efficiency of bank mergers that happened during this kind of brief three-month window in 2008, 2009. You get ideas in practice that sort of just sit there. You sit there and you mull them over and eventually they germinate and you have the time to investigate them, and that's what happened in that case.

And we found—might as well give you the punchline—that the notices themselves probably didn't increase the overall amount of bank M&A activity. There was already a lot going on for other reasons, but that some of the mergers that took place probably to exploit some of the tax benefits were less good matches in terms of the subsequent income growth of those banks. So, that was just fun for me to come full circle and finally get to write that piece.

Len:

382 for us is one of the gnarliest areas of the law. The rules are just incredibly intricate. There's nothing intuitive about it. You're right. The IRS is always putting out notices that are kind of tweaking the rules around the edges. And it's actually a good example of work that we do kind of in conjunction with Big Four accounting firms and our clients, because there's both elements of the law, but then there's just flat-out spreadsheet modeling Excel that you need to do to be able to understand how to be guided by the way the laws work. It's a common feature of our practice, especially after the TCJA, to have to work closely with accounting firms and clients, kind of model the right answer, but that's one of them. One of my early years as an associate, I had to build my own model for 382 with a partner who knew a lot about 382 and it was, like you said, drinking from a fire hose.

One of the developments that UVA in the tax world that I've noted with great interest as a tax practitioner alumnus over the last few years is the opening of the Virginia Center for Tax Law, and you've been named the first director. Can you tell us a little bit about what the center is and what its goals are over the short- and long-term?

Andrew:

So the center is really an umbrella for all of the tax-related activities that have been going on for a while at UVA and needed to sort of bring them under one canopy for organizational purposes. We have an annual conference; it's held in the fall for tax scholars. We have seminars. We give education programming for the students. And then also, on an ad hoc basis, other projects our faculty are involved in.

During the pandemic, there's a coalition of tax scholars here at UVA in another institution that were looking at state balance sheets and thinking about the effects of the recession on those, and got together to do some research and come up with some policy proposals about how states and municipalities could kind of weather the pandemic. And so that's something that the center has been involved in.

Another purpose of the center that I think is really important, and I know my colleagues also feel this, is to help continue to maintain connections between tax academia, private practitioners and folks in government service. Another thing that drew me to tax is just the amount of overlap there is between these three corners of the tax worlds in which you've got practitioners who will teach, academics who go into government, government folks who go into private practice, and everybody kind of bounces around. And there's expertise you develop in each of those corners.

And I think it's just essential for us to all be talking to each other. So another goal of the tax center is to continue those conversations between people within the UVA tax community, which is just an incredible one, the number of people we have in each of those three corners of the tax world. But also just more broadly tax policy, tax law, tax scholarship is only made better by everybody talking to each other from these different corners.

Len: Well, as I said, as an alumnus with a particular interest in the tax universe, I'm kind of thrilled to see the center develop and very excited to see where it goes. And, of course, to the extent that I can be helpful personally in any of these conversations, that would be fine and consistent with your observation that UVA people are always looking to go back to Charlottesville. I'll come back anytime to help out.

In the few minutes we have left, Andrew, I wonder if you would just tell us what you like to do in your spare time outside of tax. That's become a little bit of a tradition here on the podcast. And tell us how you spend some of your leisure time when you're not thinking about tax.

Andrew: Well, I have two young children, under the age of seven.

Len: OK, so you don't have any spare time.

Andrew: So I don't have any spare time. But I will say sports have always been a big part of my life and it's been a lot of fun to watch my two boys begin to take an interest. My oldest son started Little League.

Len: Great.

Andrew: It was so much fun trying to teach him some things and do a little bit of coaching in that role, and try and figure out what it's like to transition from being the kid to being a dad in that setting. So it's just been entertaining the kids and then helping them navigate the pandemic, which has been a challenge for everybody.

Len: Well, as I said, Charlottesville's a wonderful place to be outside, a wonderful place to raise a family, so at least you've got that going for you.

Andrew Hayashi is the Class of 1948 Professor of Scholarly Research in the Law at UVA and is the Director of the newly created Virginia Center for the Tax Law. Andrew, it's been a pleasure to have you. Thanks for joining the podcast.

Andrew: My pleasure. Thank you, Len.

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, Google Podcasts or Spotify.

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I'm your host, Len Teti—thanks for listening.