



HOW A LEGAL ETHICIST FOUND HER CALLING IN BLOCKCHAIN LAW

DAVID HECHLER

*Think about how many stories involving life-changing events we've heard that involved notes or drawings on cocktail napkins. Here's one you haven't heard. **Michele Neitz** was a law professor whose focus was on ethics—specifically, those related to the legal profession. There was no connection to technology until she attended a multigenerational family dinner in 2017. Her brother, a “serial entrepreneur,” announced he was starting a company that involved the blockchain. “The WHAT?” was his family’s reaction. He tried to explain, then grabbed a cocktail napkin and began drawing the Bitcoin protocol. One by one family members left, shaking their heads and muttering “I don’t get it.” Only the law prof remained. That was her start.*

Neitz was one of the first and is still one of the very few law professors who teach in this area. And she still teaches ethics. At the University of San Francisco School of Law, where she's a visiting professor, she is founder and academic director of the [Center for Law, Tech and Social Good](#). The next big idea she'd like to help launch is a specialized federal Tech Court to handle these complicated, technical cases that most judges aren't prepared for.

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David Hechler: What was it that got you interested in cryptocurrency and the blockchain?

Michele Neitz: I've been a law professor since 2006, and my focus was on ethics related to the legal profession. And as my brother drew the Bitcoin network on a napkin, and I'm looking at this decentralized technology, I'm thinking, "Who will you arrest if there's a problem? And where are the ethics involved in a decentralized technology?" So it sparked my interest as a lawyer and as an ethicist. If we truly are going to have technologies that are decentralized, the legal system is not prepared for this. So I dove in to learn everything I could. And in late 2017 and early 2018, there wasn't enough law there for me to propose a two-unit course to my academic dean. So instead I decided to do research on this new technology. I published an article, and that got the attention of the governor's office. I was appointed to the California Blockchain Working Group.

Hechler: Were you fascinated by this area, or did you see an opportunity and a need?

Neitz: My initial instinct and interest really came around regulation. Then, when I got into the Blockchain Working Group, it was a wonderful experience with a lot of interesting folks from all sides: government, industry, academia. I was the only academic. We wrote a report, and we each got assigned a different chapter. I was assigned the chapter on voting and civic engagement—and on ethics. I started to feel that there was an ability of this technology to be used for social good. To help vulnerable populations and to make some of the friction that we have in our financial system go away for people who are being disadvantaged. All I hear about when I look at the congressional hearings is "crypto scam, crypto scam." But there's so much more to blockchain than crypto. We talked about things in the California Blockchain Working Group like: Let's put our archives on a blockchain. Filecoin is a blockchain that enables the easy facilitation of storage of data. So we could actually put our state archives on the blockchain. We can control who has access to it. You still can pay to be able to obtain documents, but it could be done without the friction of mailing in a check, waiting for them to make a copy, sending it back to you. Also, I live in a state that is very susceptible to natural disasters. And this idea that you could store information in a distributed way that would protect that information from any sort of tampering, but also from wildfires burning down the warehouses that hold the documents, became very attractive to me. So that was what led me to start an academic center.

Hechler: Do you think law schools are opening up to this subject? Even if few law professors specialize, are schools offering courses that relate to blockchain, cryptocurrency, etc.?

Neitz: I'll start by telling you why they should, and then I'll tell you what the status is. The reason that law schools should be offering these courses is because of the jobs. There are so many jobs in this industry for attorneys. It's become a pretty litigious situation for a lot of blockchain projects, and including some sort of position or funding for legal counsel is very important. And this is especially true in the United States, where regulation has been somewhat murky. And so compliance is a huge part of the crypto space right now. That's why I believe in offering this class. I have seen students get jobs right away because there are so few attorneys who understand blockchain and blockchain law. Are law schools actually offering this? The short answer is no. So this is a real advantage for the University of San Francisco School of Law, because we are training attorneys who understand. Berkeley, Stanford, those schools are aware of this, and they are on top of this. But you're not seeing a lot of blockchain-related courses. I think the reason is Sam Bankman-Fried.

Hechler: How has Sam Bankman-Fried changed the complexion?

Neitz: I used to joke with my students that I wish we could take a field trip to go and visit with Sam Bankman-Fried and talk to him.

Hechler: What about his parents? They're law professors—

Neitz: That's right, at Stanford. So how did Sam Bankman-Fried change the landscape? While Sam Bankman-Fried was wooing congressional members and government officials, he was also saying to them, 'Well, I have to be incorporated in the Bahamas because there's just not the capability here in the U.S. for me to be able to do what I need to do.' It's very reminiscent of **Enron**. When the Enron board told financial regulators, "You know, it's a black box." Basically told them, "You're not smart enough to understand what we're doing." And the regulators said, "OK, maybe we're not. We're just going to let you do it." I mean, it's the same playbook of corporate fraud that Sam Bankman-Fried pulled. "Blockchain is really complicated. You don't really understand our exchange. You can't really pass laws here. So we're going to go offshore." And regulators and congressional folks said, "OK. He seems like a nice kid. And he's donating money to our campaigns. And we believe him." Here's the problem. Same problem with Enron. The case is a straight-up corporate fraud case. We didn't need new laws to prosecute Sam Bankman-Fried. He was just in an industry that has a reputation for being very difficult, and frankly, in real life, has a very high learning curve.

So what did he do for the landscape? He made "blockchain" and "crypto" dirty words. There have always been scams in crypto. It was the first thing that I noticed about the Bitcoin protocol. Who do you arrest? It's a big problem in this space, and the industry is well aware of it. What Sam Bankman-Fried did was take the possibility of balanced regulation and legislation off the table because people became concerned that anything to do with crypto and blockchain is a lightning rod, and we shouldn't touch it. And so consequently, the effect of Sam Bankman-Fried on this space is that the regulatory pendulum has swung in both directions too far. He eliminated our ability to be able to get balanced regulation. And so in my mind, he is in large part responsible for the Biden administration's regulation by enforcement (as the industry calls it), and trying to be proactive, and going after harms to retail investors. And now the Trump administration's approach is just eliminating, not totally eliminating, but—"deregulating" is the word I should use—in this space. Our pendulum keeps swinging when what we really need is balanced regulation that will promote innovation in the U.S. and protect investors and consumers.

Hechler: Would you say, because of the reasons you just outlined, that in the public's mind, when they hear terms like blockchain and crypto, they're thinking about ransomware and Bitcoin? And when they have a little more information, they're thinking about memecoins and NFTs, and the danger of scams? And that's what they associate with all of this?

Neitz: If I were just a member of the public, and all I did was read the basic headlines around blockchain and crypto, I might not even know the difference between blockchain and crypto, right? I was asked at a conference years ago: "How will we know when blockchain has reached mass adoption?" My answer was, "When people stop asking how my Bitcoin class is going and start asking how my blockchain class is going." Because the whole point of my work is trying to show that there are so many other use cases beyond crypto.

SO WHAT DID HE DO FOR THE LANDSCAPE? HE MADE "BLOCKCHAIN" AND "CRYPTO" DIRTY WORDS.

Hechler: *How many years do you think it'll be before that happens?*

Neitz: I think we're going to have to see some really important projects come to fruition. So for example, your readers may not know that the California DMV is putting car titles on a blockchain using NFTs, so I'll be able to sell my car just using my phone and not having to fill out paperwork at the DMV. So much of blockchain happens on the back end that folks may not even realize that blockchain is being used. The crypto scams are real. I've been concerned about them for years. I think the regulatory pendulum swinging is actually enabling some of these scams to happen. We're not going to see the end of these scams until we're able to regulate them properly.

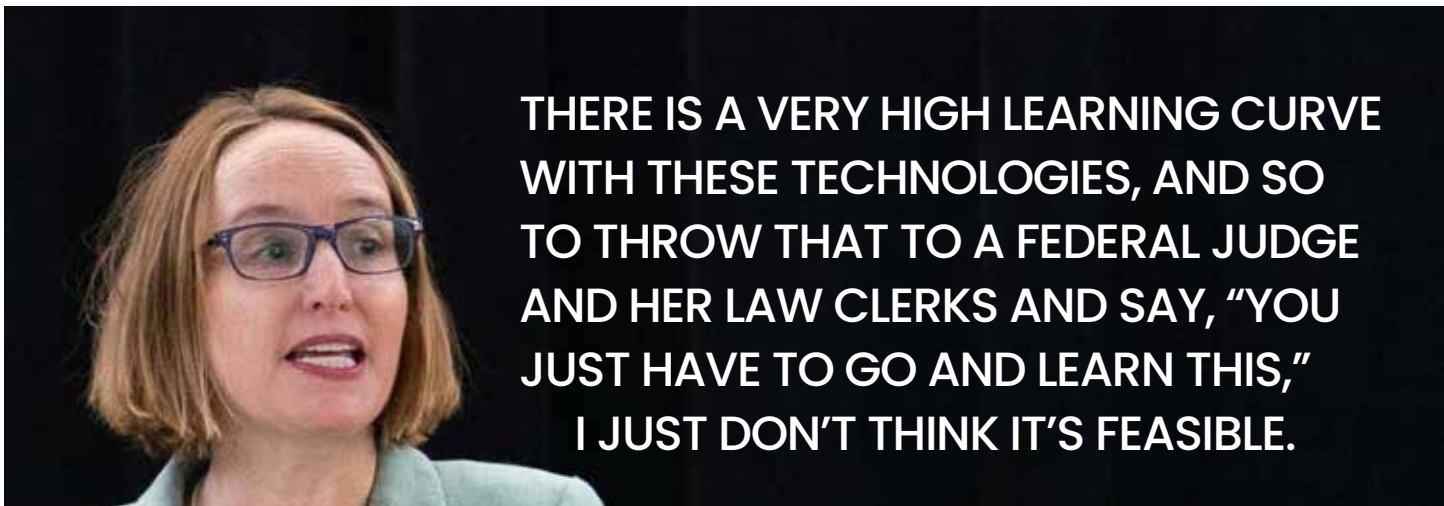
Hechler: *Let's talk about regulation. It seemed that the SEC under the previous administration, with Gary Gensler as the chair, was trying to figure out a way to bring some practical regulations into play, and not making quick progress. So Gensler is gone. Paul Atkins is the new chair, just confirmed a couple weeks ago, and he's not of that mind, nor is the president. So how much progress did Gensler ever make? And where are we now?*

Neitz: Gensler is a very controversial figure in this space. When he was appointed, people thought, "Well, he's taught blockchain at MIT, so he understands the technology. This could be very good." His approach at the SEC was a bit hampered by the fact that there is no federal legislation. And so he was able to guide the SEC to do regulation in the way that he wanted, because there was no federal guidance coming out of the out of the legislature. His approach became very focused on consumer protection—rightly so—but the way he did it was viewed by the industry as what they called "regulation by enforcement." And so while you could argue that Gary Gensler's approach was very focused on consumer protection, it was also, frankly, terrifying for companies that felt that if they cooperated with the SEC, they would end up on the chopping block and be hauled into court. And so when Gary Gensler would say, "Just come in and register," attorneys in the industry would have to tell their clients, "Don't do it, because if you raise your hand, it'll get chopped off." In my mind, that is not an effective regulatory scheme. I will never argue that there should not be regulation. I'm an attorney. I believe in laws. But I do think making folks afraid to go in and cooperate with a government agency because they're concerned about the legal ramifications is very problematic, and really sparked an anti-SEC sentiment in the industry.

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Hechler: *Let's talk about Trump and his sons and their company, World Liberty Financial and it's new stablecoin, USD1. Some people are talking about [conflicts of interest](#) and the Wild West, and politicians getting mixed up in crypto investments. Is there a problem with this?*

Neitz: Trump and Melania and their children have become involved by creating what we call memecoins. And so the Melania coin, the Liberty Financial stuff, the conflicts of interest inherent in this do appear problematic. I'm an ethicist, so I will point out the conflict of interest that could happen here. But ethicists are not usually the ones who are quoted in newspapers. So instead, I will tell you what the industry thinks about this. And they're very concerned, because to the extent that these high profile memecoins do commit a [rug pull](#) or defraud investors, that's really bad for the industry. I hope we do not see another Sam Bankman-Fried situation, where folks are using this new technology to defraud investors and consumers. That is what the industry is most concerned about. The conflicts are clearly there. I mean, I think anybody involved with the projects would note the conflicts of interest that exist.



Hechler: Another issue that's garnered attention is that the Justice Department disbanded its National Cryptocurrency Enforcement Unit. This happened in April. The administration's announcement said they think it's important for the public to be protected, but this isn't the way. And they don't want people in the industry being targeted just because they're in the industry. Comments?

Neitz: So there has been significant controversy around this. The Trump administration is saying we're still going after individuals who harm retail investors. We're just not going to go after the decentralized technologies like mixers, like tornado cash, for example, wallet providers, exchanges. If you are someone on the consumer protection side of this, the question is, why not? Why are you only going after the individuals? Why are you not going after the decentralized technologies that can enable this to happen. And the concern is about more than investor protection. You know, [tornado cash](#) was sanctioned in part because of the use of tornado cash to launder money with national security implications. And so removing the unit that provided some sort of oversight into what those mixers and wallets are doing could compromise market integrity as well as national security. Because I'm a law professor, I'll argue both sides. The other side of this is that it's really individuals that are doing the harm more than the decentralized technologies. What concerns me the most, from a social good approach, is that we don't know what this will do. There's the volatility, which is sort of baked in at this point, but there's also the unintended consequence problem here. I don't know what the consequences of disbanding that unit will be. They may be very minor. They also could be a huge national security risk that I just don't know about because I don't work for the government. In my mind, this is going to be true for all deregulation. I really think we need a more balanced approach than what we're seeing right now.

Hechler: You wrote an article called "Why Power Is Passing to Courts to Make U.S. Crypto Policy." It ran before last year's presidential election. Can you tell us what it said and how things have changed since it was published? And then, how all of this led to your proposal that we need specialized federal courts created to handle the challenging tech cases that require greater expertise than most judges possess?

Neitz: Sure, and I developed the arguments in that [shorter article](#) into a longer [law review article](#). There are a number of trends that are converging. One of them is the lack of clear federal regulation. Even if the stablecoin passes, that's just one area of the crypto and blockchain space. So we do not have clear federal legislation. We have the end of the Chevron Doctrine, which was clearly overturned in the [Loper Bright Enterprises](#) case by the Supreme Court. And we have an industry that keeps developing very quickly. And it's not just blockchain, it's also AI. It's also quantum computing. So I don't think that the federal government is currently prepared to deal with the legal issues that are coming. And I'm especially concerned about the lack of federal legislation when it comes to things like AI, where, depending on who holds the White House, our government policy just keeps swinging.

Quantum computing is going to pose a risk that I do not think the government is ready for. And so where we're seeing a lot of legislation is in the states. The states are the laboratories of democracy, where this is changing.

But what I'm most interested in is how these questions that are coming up, these legal questions, are going to be resolved. And I don't think they're going to be resolved by the executive branch. Or if they are, it's a temporary resolution. I don't think they're being resolved by the legislative branch. And so I think that leaves the judicial branch. Now that the executive agencies do not have the power that they used to have under the Chevron Doctrine, Federal Courts will be the ones that are deciding these cases. We see it already. We see it with AI, for example, with *The New York Times v. OpenAI* copyright case. You know, we have never had a case like that before, because we've never had large language models that were so prolific before. So this is going to be decided in the courts. I think it is not feasible to ask federal judges with their current packed dockets in a time of major judicial vacancies, I don't think it's possible to ask these federal judges to be able to learn blockchain technology enough to decide this case, or learn the intricacies of quantum computing to be able to decide a case. And that is why I think specialized courts in the federal judiciary related to technology, what I'm calling Tech Courts, are one solution that would enable courts to be able to deal with the issues that we're seeing.

Hechler: *Are there models that seem similar?*

Neitz: Sure. We have a tax court, right? We have specialized courts to deal with patent cases. This is not a unique phenomenon. The reason we have those is because tax was deemed really complicated and patent cases—I've worked on them as a law clerk in the Southern District of California—patent cases are really complicated. They take up a huge amount of time for the law clerks and the federal judges, especially if they don't have the scientific background that would be required to decide those cases easily. Technology is about to be the same thing. We're not just talking about railroads and telephones anymore. There is a very high learning curve with these technologies, and so to throw that to a federal judge and her law clerks and say, "You just have to go and learn this," I just don't think it's feasible. And I think that the rulings will be inconsistent as a result. If we could establish it now, before these very complicated cases are arising related to emerging technologies, I think that will provide the relief that the courts would need. And frankly, it would provide a lot of benefits to the American development of these technologies.

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