

Heckling a Federal Judge at Stanford Law School

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Larry Bernstein:

Welcome to What Happens Next. My name is Larry Bernstein. What Happens Next is a podcast which covers economics, finance, and politics.

Today's episode is Heckling a Federal Judge at Stanford Law School.

Our guests are Stanford Law Professors Michael McConnell and Rick Banks. Michael is the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School and a Senior Fellow at the Hoover Institution. He is also the author of the book *the President Who Would Not Be King: Executive Power under the Constitution*.

Rick is the Jackson Eli Reynolds Professor of Law at Stanford, and the author of the book *Is Marriage for White People? How the African American Marriage Decline Affects Everyone*. Rick is most famous co-hosting this podcast What Happens Next during the second half of 2020.

There is much to cover so buckle up.

Let me start by giving our listeners some background as to what happened recently at Stanford Law School. A group of conservative and libertarian Stanford students with the Federalist Society invited Federal Judge Kyle Duncan from the 5th US Circuit Court of Appeals to speak.

Judge Duncan was appointed to the Federal Appellate Court by President Trump. One of his opinions that particularly upset some of Stanford's progressive students related to a case where a transgender prisoner convicted of child porn crimes wanted to change her conviction records to match her new name and new pronouns. Judge Duncan denied that appeal because he said that Congress has said nothing to prohibit courts from referring to litigants according to their biological sex.

Michael, you were on this podcast, What Happens Next in September 2020 when we discussed free speech on campus. You said that conservative students were scared to express their opinions in class. Tell us what happened when Federal Judge Duncan made a presentation to the Stanford Federalist Society and was attacked by a mob of Stanford Law students. Tell us what happened?

Michael McConnell:

Judge Duncan was attacked, harassed, prevented from being able to speak and insulted with vile language. But, in addition to that, someone posted posters with pictures of the leadership group from the society and their names saying, "you should be ashamed." Many of them had to walk through an abusive crowd on the way in and on the way out, some of them report feeling quite threatened. A few of them were crying. It was very traumatic event for them.

Kyle Duncan is a Fifth Circuit Judge who was invited to speak on how Federal Appellate Courts relate to the Supreme Court. I had gotten a call from the judge the day before saying he had heard rumors that there is going to be a disruption. I went and talked to the Dean's Chief of staff and said, "have you heard of about any of these problems?"

And I was told that the administration was quote "on top of it." But, in fact, the administrator who seemed to be in charge was far from being interested in protecting the right of free speech, was egging them on.

From the very beginning when the judge came in, he was introduced by the head of the student group, who was himself heckled and interrupted. Judge kept trying to speak, kept getting heckled and interrupted, and he could not carry on. He said, "is there an administrator here."

Instead of helping, she basically took the podium and delivered what appeared to be pre-prepared remarks, six minutes long. Now, she did give lip service to freedom of speech. But this was during while praising the protestors. It is not the job of a law school administrator to praise or blame or criticize speakers invited by students. It's their job simply to maintain order. And that did not happen. I think that is the most troubling thing. You expect students to misbehave. I don't expect administrators to behave that way.

Larry Bernstein:

The Dean of Diversity of Equity Inclusion Tirien Steinbach presented her prepared remarks to the Stanford students. She repeatedly emphasized the following point: "is the juice worth the squeeze." And Judge Duncan asked her what she meant by that? Dean Steinbach explained in her WSJ Op-Ed that Is the Juice means "what we are doing" and worth the squeeze means "the intended and unintended consequences and costs." Dean Steinbach then said that "I will certainly continue to ask this question myself." Is free speech compatible with this conceptual framework?

Michael McConnell:

And she went on to say that she thought that the university's free speech policy might have to be reconsidered cause it has such evil consequences as to invite a federal judge to speak to students that had issued opinions that some students strongly disapprove of, which I would not have thought was very shocking.

Larry Bernstein:

Rick Banks what do you think of this incident?

Rick Banks:

I think we have lost our way institutionally as a law school, as a university, even lots of other universities have as well. It should be the case that we welcome lots of views on campus. We should not just tolerate it; we should embrace that. We should enter those conversations with open minds and the belief that our ideas might change over time. That we might find something persuasive in what a speaker has to say, even when we disagree. But too often we view people with different views as the enemy; someone to be conquered rather than someone we want to engage in dialogue with.

The second issue is that we should not let assertions of harm on the part of students or anyone else, frankly, determine the contours of debate. There can be subjective sense of harm but if we draw on legal principles from other areas, we also see rather quickly that there must be some objective standard there as well.

Michael McConnell:

I'm so glad Rick put it that way. Stanford's by no means alone in this kind of an incident. Sometimes what the administrator will do is they'll shush people and say, "this is a matter of freedom of speech, we cannot interfere." But what Rick is saying is that the teaching of the law school should be that this is a good thing that we welcome various points. We sharpen our minds by contrary points of view. It forces us to figure out, why do we believe what we believe? What is the best argument against what I'm hearing? Our job is not to shut people down. Our job is to persuade people.

Rick Banks:

The conversation at Stanford Law School and elsewhere is too often focused on toleration of alternative views rather than embracing those views.

Larry Bernstein:

Dean Martinez wrote an apology to Judge Duncan immediately after the student mob attacks. Dean Martinez received significant pushback from some of the law school students for writing an apology. Threats were made against her, and she published a 10-page essay articulating the

reasons for why the heckler's veto will not be tolerated at Stanford Law School. Michael, what did you make of Jenny Martinez's letter?

Michael McConnell:

In the face of protests, which go against the fundamental values of the university, it is so important for leaders like Jenny Martinez not just to stand up and stand firm, which is what she did, but also to explain why. I thought she made the especially important point that law school administrations do not take sides, which is something that I think universities are forgetting all over the place these days. That when universities and law schools become partisans, when they become advocates for one side or the other, it really poisons the atmosphere. It makes it exceedingly difficult for universities to be places of exchange of ideas.

Larry Bernstein:

Rick, here's my favorite paragraph from her essay quote. "Some students might feel that some point should not be up for argument, and therefore, that they should not bear the responsibility of arguing them or even hearing arguments about them. But however appealing that position might be in some other context, it is incompatible with the training that must be delivered in a law school. Law students are entering a profession, which their job is to make arguments on behalf of clients whose very lives may depend on their professional skill. Just as doctors in training must learn to face suffering and death and respond in their professional role, lawyers in training must learn to confront injustice or views they don't agree with and respond as attorneys." Rick, what do you think of that idea?

Rick Banks:

The sad part of this is that it needs to be stated. I agree that Jenny's letter was very well done. Those are principles that should be taken for granted at a law school. My only two quibbles with it were that it relied a bit too much for my taste on the language of rights and the First Amendment and constitutional law, and not enough on the language of values. And the core question of what type of community do we want to create, and what does it mean to be in a learning community?

I am a strong proponent of the principles and the ideas of diversity, equity, and inclusion. I think that is particularly important. But I also think it's a case that DEI can go badly wrong. Is there anyone on our campus who thinks that the role of the DEI person is to make the Christian pro-life conservative from the South feel comfortable? And the answer is no. So, there is a problem there.

It also needs to be the responsibility of not one person, but of everyone. I go back to the Judge Duncan scenario. I do not want to hold the DEI person responsible for anything that happened

there, frankly, because there were at least four other law school administrators, university administrators, the chief of staff for the Dean. There were a lot of other people in the room at the time who, frankly, who probably rank higher on an organizational chart than the DEI person. I think it is a mistake to hold the DEI person responsible when instead we need to look at the sort of the institutional sources of these problems.

Larry Bernstein:

Dean Steinbach is different from the other University Administrators in the room. She had prepared six-minute of opening remarks. As you know, I am a big fan of opening with six minutes of remarks, so I get that <laugh>. Obviously, she put a lot of thought into it. She wrote out a six-minute speech, she waited for her cue, and she stepped up to the podium. Dean Steinbach decided to take matters into her own hands, and I think that differentiates her from the others and thus deserves to be treated differently.

Rick Banks:

I am just speculating here, but I do not know that she did not discuss those remarks with those other administrators in advance. I do not know that she did not share drafts with those remarks and get the go ahead and say, “okay, we're on top of it.” I would be hesitant to do what institutions typically do and throw one person under the bus and act as though everyone else is innocent and that there is no institutional problem here. We just had a bad apple problem and then move on.

Larry Bernstein:

Michael.

Michael McConnell:

Well, I'm inclined to agree with that, although I think we may have had both a bad apple and a bad institution <laugh>.

Rick Banks:

That is true. But the bottom line then is that we should not fall into the trap of imagining that we can fix the problem simply by eliminating or censoring one person. We need to really think critically about what we're doing institutionally and what our values are.

Michael McConnell:

It's perfectly clear that this one administrator is not the source of the problem. Just as is perfectly clear that Stanford Law School is not the only locus of the problem. This is a national problem and an educational problem and a cultural problem. It is not easily solved.

Larry Bernstein:

What surprises me about both of your views is that your focus is on the failures of the administration and the faculty and not the students. You treat these students as children and therefore not responsible for their actions. I view Stanford Law students as young adults. Stanford Law is consistently ranked as one of the best law schools in the country. Stanford Law's admission policies are highly selective, and the student body represents our nation's best and brightest. Some of these young adults grossly misbehaved and embarrassed the institution.

When I went to college, the last thing that I would have considered were the views of the administration on any matter. I expected to be judged by my fellow students and faculty based on my behavior and my character. I think we should judge these young adults accordingly.

Michael McConnell:

Well, Larry, I think you're right. And I feel rightly rebuked for thinking in these terms. You're right that these are young adults. I think part of the problem with universities today is we've started treating them like children and there's too much administration, too. So I thank you for that Larry.

Larry Bernstein:

When I started at Salomon Brothers in 1987, one of the young associates in the investment bank was on the cover of Cigar Aficionado magazine wearing colorful suspenders and smoking a cigar. At the next firmwide Monday morning meeting, the CEO John Gutfreund announced that he fired the associate who was the same age of those Stanford Law Students because he disapproved of the image of that banker in public. If there were an opportunity to meet with the press, it needed to be cleared by the press office. I never heard of another press incident again over my 13-year career at Salomon despite a change in management and rolling over of staff. That was it. I think sometimes using an example makes the point. Actions have consequences.

Next topic is the video of the event. At Judge Duncan's presentation, he personally used his iPhone to video tape the event as well as other students who used their phones. The University tech team also professionally videotaped the event. In Jenny Martinez's 10-page letter, she said, "although the students are identifiable in cell phone videos, in photos circulating online, given that the license for use of this recording belongs to the university itself, pursuant to this standard speaker release, we believe that the university's relation to its students makes the blurring of faces appropriate." If individual students act inconsistent with the norms on campus, do you think universities should protect those students by blurring their faces?

Rick Banks:

I would say she did not go far enough, frankly. The video was inappropriate by all parties. That was bad behavior in the part of students. It was bad behavior in the part of the judge. They

should both be called to account for that. I would go farther and say that we should have a rule against the video recording of events that are not public events, because the goal of those video recordings is to call people out. And what we need instead is to call people in.

Larry Bernstein:

Rick, I want to push back about taping public events. First, Judge Duncan was under personal attack and wanted to have his own video proof of what happened. Instead of the he said, she said, we have proof of what was in fact said. Second, beginning with COVID we now have video of many events in and out of the university, some public others not. In this case, some students who opposed Judge Duncan's presence at the Stanford Law School demanded that the Judge be prevented from presenting on campus because it would be too hurtful and requested that he speak remotely on Zoom instead.

Rick Banks:

We should not have changed the format to Zoom simply because protesting students did not want him to be in person. That is just another way of ceding to heckler veto. Even if the event had originally been scheduled to be on Zoom, that does not mean it's a public event. None of us can speak freely if we think that our thoughts and ramblings and confused utterances might appear in the New York Times. That is what a classroom should be, a place where you try out ideas. And some of those ideas are going to be dumb ideas. But that's what you should do. And that cannot be public.

Michael McConnell:

I'm not sure that I agree with Rick about this. For one thing, this was not a classroom, this was a public event. Members of the public could have come if they wanted to. And the advantage of a recording is that provides the evidence of what really happened. I would have thought people were exaggerating. And there is a certain newsworthiness value hearing Tirien Steinbach deliver her address. And to see the mob atmosphere in that room. I probably agree with Rick about classrooms, but I am not sure I agree about public addresses.

Larry Bernstein:

Next topic is personal culpability for the hecklers. Going back to Dean Martinez's letter and I quote, "In this instance, the failure by administrators in the room to timely administer clear and specific warnings, and instead to send conflicting signals about whether what was happening was acceptable or not. And indeed, at one point, to seemingly endorse the disruptions that occurred up to that point by saying, 'I look out and I say, I'm glad this is going on here,' is part of what created the problem in the room and renders disciplinary sanction in these particular circumstances problematic." Rick, do you believe that if an administrator condones bad behavior that absolves students of disciplinary actions?

Rick Banks:

What the Dean said is exactly right. We have the law in the books, and then we have the law in practice. You cannot punish people because they violate the law in the books if they're acting consistent with their norms in practice.

Michael McConnell:

But we need to make it clear in the future that this will not happen again. And that similar behavior will meet with serious action.

Rick Banks:

Right. And to do that the faculty, the institution, need to really conform our own behavior to the law on the books. The reality is that we have not done that in the past.

Larry Bernstein:

What cracks me up is that the solution is always more training, more half-day workshops. And here is what Dean Martinez concludes in her 10-page letter. "Accordingly, as one first step, the law school will be holding a **mandatory half day session** in the spring quarter for all students on the topic of freedom of speech and the norms of the law profession. A faculty committee will plan this session and invite speakers representing a range of viewpoints. Needless to say, faculty and students are free to disagree with the material presented in these sessions, or with the arguments I have presented in this memorandum - There will be no orthodoxy on this topic either." Michael, what do you make of the mandatory half day sessions to resolve this problem of no free speech?

Michael McConnell:

That was not my favorite part of Jenny's letter. I am not sure why the victims of this event should be required to attend mandatory training sessions. And I am not sure what the variety of diversity of views on the question of the basic rules of allowing other people to speak. I'm not sure what that diversity is going to look like. So, I do not know.

I also do think that the encouragement of administrators is part of this. And I do think that there was an unwritten rule that students' kind of act up until they get a warning. It's a little bit like the British Riot Act, where the sheriff has to come out and read the Riot Act to the mob first, and then if they don't disperse, they're liable. I think that has been the written rule here at the law school. I do not really think it is a matter of educating.

Rick Banks:

While we are talking about how to treat misbehavior, I don't think it's received enough coverage in the news that the judge misbehaved in this context as well, frankly. There is a code of judicial

ethics that governs his behavior, both on the bench and off, and his entering the room and filming the scene as if he wanted to document it so he could then post it later, his calling the students idiots and other disparaging remarks that he made. All of that seems to me to violate the code of judicial ethics as well. So, while we are trying to hold people accountable, we should not lose sight of the fact that the judge was very much a part of the misbehavior that day.

Larry Bernstein:

One of the students allegedly said, “we're going to rape your daughter.” What would you expect a judge to say to something other than calling him an idiot?

Rick Banks:

I don't know if that remark was actually uttered.

Larry Bernstein:

Hey judge, you are scum. That quote is not in dispute.

Rick Banks:

The reality is that a judge will encounter litigants and defendants who behave in all sorts of inappropriate ways and sometimes say insulting things. And the role and job of the judge is above that fray. And to maintain a demeanor of respectability and be the embodiment of the rule of law and the impartiality and the judgment the wisdom, the restraint that expect the dispenser of the law to have. This judge seemed to really fall far short of that aspiration.

Michael McConnell:

I thought the low point of the insults was some of the students told him “You couldn't get into Stanford.” Combination of insult and privilege and smug self-superiority. That person really hit a low point.

Rick Banks:

I do not want to defend any of the student's behavior. I think the students' behavior was despicable. But I think the judge should not be let off the hook either, frankly.

Michael McConnell:

He could have comported himself much better, but I have to say, I do not know how you, Rick, or I or you, Larry, would respond if we were subjected to this kind of a barrage. It would be superhuman.

Larry Bernstein:

Next topic is the use of cameras and the ever-greater use of videotaping. Its ease of use is revolutionary. We demand that video cameras be placed in police cars and in police interactions. Whenever there is a hostile situation, everyone gets their phones out immediately. You mentioned good reasons for limitations on the use of video inside a school classroom to encourage debate, but I do not see why if a judge or a police officer enters a hostile situation, he shouldn't videotape it where later there's going to be questions about what was said and what was done.

Rick Banks:

The judge was in a position of great power. He does not have to enter that hostile situation. First, he could have easily gone to the room next door with Federal Marshals. They could have determined who gets to enter that room, and they could have held the event in the room next door, which was likely open at that time.

Larry Bernstein:

Rick, he was a guest at Stanford. A guest does not get to set the rules of engagement. He cannot go into a classroom where is not invited with a Federal Marshal and say that he gets to decide who can enter. The court is not in session.

Judge Duncan heard rumblings that there might be a problem. He called Michael to investigate the matter and Michael informed him that the Stanford Law School Administration were "On top of it." He was blindsided by a mob attack.

Rick Banks:

I'm not defending the students.

Larry Bernstein:

There were five law school deans in the audience, if the right thing to do is change the location for the event that was their job. Michael, do you agree that the Judge should have changed the venue?

Michael McConnell:

The protestors would agree to that as a victory. I do not know for sure, but my understanding is that he wasn't aware that the Federal Marshals were present, that he did not call for them, and that they did not manifest themselves. Nobody, so far as I know, knows how they got there.

Rick Banks:

I assumed that they would arrive with him and escort him. Huh. Okay.

The underlying problem is part of polarization in society and the refusal to embrace people who have views different from ours. And we do ourselves no favor when we inculcate those attitudes in our students. That's the failing of Stanford University. It's the failing of the law school. It's the failing of the faculty, frankly. But I also wonder whether Federal judges now are increasingly part of the same polarizing dynamic. One example, it used to be that politically conservative judges would hire liberal clerks.

We did not expect that there would always be an alignment in ideology between the student and the judge. Now, what I'm sensing in writing recommendation letters for students and seeing where they go and who they get interviews with, conservative judges are becoming much more likely to only hire and only interview conservative students. There are some judges for whom if you're not a member of the Federalist Society, you're not a candidate for an interview. I think that is a pernicious process as well. Michael, you probably know better than I.

Michael McConnell:

I clerked for two judges whose politics were the opposite of mine. I think it was a great experience for me. I hope it was a good experience for them as well. When I was hiring law clerks, I deliberately hired a mix so that we would be able to have a good discussion. But I would add, it isn't just that the conservative judges are hiring conservative clerks, liberal judges are just hiring liberal clerks.

There are several judges who do not do this, but Rick is right that it does seem to be an increasing practice for judges to hire clerks of a similar ideological orientation. I think it is bad for everybody. I really do not understand the philosophy behind this one. I would tell my clerks, do not tell me what you think, I think. I know what I think <laugh>, what I need you to tell me that might be wrong.

Larry Bernstein:

Conservative Federal Judge Ho announced that he would no longer hire clerks from Yale Law School because of the lack of free speech norms at that law school. I would not be surprised if because of this incident some judges decide not to hire clerks from Stanford Law School, regardless of the student's personal views. Should judges abandon hiring clerks from top law schools that engage in discriminatory speech practices?

Michael McConnell:

I'm totally opposed to this. The day after this Judge Duncan incident, I had a couple conservative students come up to me and say, "next thing you know, the conservative judges won't be hiring us as law clerks either." They feel like they are doubly brutalized. First, they are the victims of

this kind of behavior. And then people on the bench that might be their allies refuse to hire them. It is like the wrong people are being punished.

Larry Bernstein:

Michael, do you think that the combination of the Judge Duncan incident and Dean Martinez response will give confidence to Stanford Law Students and conservative students at other law schools to speak openly about their views in and out of the classroom?

Michael McConnell:

Well, students have been increasingly alarmed over the last several years. I thought in the last year that things were beginning to ease up a little bit. But they also should appreciate that each law school goes through these periods. Harvard went through this a few years ago and then it was Yale's turn. Now it is our turn. With Jenny taking a firm line as she had, maybe there will be a step back from the abyss and it will not completely surprise me if we have a few years of relative stability.

I certainly hope the conservative students don't avoid coming here, would be a terrible thing, would just make things worse. I would hate for this one incident to cause people go to other places.

Larry Bernstein:

I end each episode on a note of optimism. What are you optimistic about?

Michael McConnell:

Well, it's Easter Sunday this weekend. And so, all things will become new.

Larry Bernstein:

Rick what about you?

Rick Banks:

I am hopeful that we will learn to appreciate the ways in which we've allowed the extremes to dominate discussion and create an environment that's worse for us all. We all have a stake in quieting those voices allowing the silent majority to become more central.

I am optimistic about the energy and the insight that I see in young people. When I talk to them individually, they can express what they really believe rather than feel pressured by the norms of the crowd.

Larry Bernstein:

Thanks to professor Michael McConnell and Rick Banks for joining us today.

If you missed last week's show, check it out. Our guest was Steven Biddle who is a professor of international and public affairs at Columbia University. Stephen previously worked for General Petraeus in Iraq and General McChrystal in Afghanistan. Steven discussed the current state of the war in Ukraine, a likely counter-offensive in the spring, and speculated that the war would end in a stalemate. Steven also argued against Ukraine pushing the battlefield into mainland Russia.

I would now like to make a plug for next week's show. Our speaker will be Kevin Cook who wrote the book, *Waco Rising: David Koresh, the FBI, and the Birth of America's Modern Militias*. It is now 30 years since Janet Reno approved the FBI assault on the Branch Davidians compound in Waco, Texas, that resulted in the deaths of 78 individuals, including many women and children. The What Happens Next film critic Darren Schwartz, will join us again to discuss the new Netflix series, *Waco: American Apocalypse*.

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I would like to thank our audience for your continued engagement. Goodbye.