Stanfordâ??s Misguided Response to Judge Kyle Duncan Protest

Description

When Trump-appointed Judge Kyle Duncan of the Fifth Circuit of Appeals came to Stanford Law School at the request of the Federalist Society on March 9, 2023, he was confronted by students in protest of his career as a private lawyer and as a judge targeting the rights and dignity of the LGBTQ+ community. An orchestrated firestorm ensued, predictably and disingenuously claiming that conservative voices were being silenced and demanding that the students be punished. Unfortunately, the law school and the university mishandled the matter. My letter to Law School Dean Jenny S. Martinez and Stanford President Marc Tessier-Lavigne is reproduced below.

April 14, 2023

Jenny S. Martinez

Richard E. Lang Professor of Law

& Dean of Stanford Law School

Marc Tessier-Lavigne

President and Bing Presidential Professor

Stanford University

Re: Advancing Free Speech and Inclusion at Stanford Law School

Dear Dean Martinez and President Tessier-Lavigne,

I write in response to your recent letters regarding Judge Kyle Duncanâ??s appearance at Stanford Law School. I appreciate the difficulties you face in responding to this volatile and contentious situation that has been deliberately inflamed for political and ideological purposes. However, I cannot help but feel that your responses have done a disservice to the mission and values of the university and the law school, and I hope that you will take further action that will ameliorate the harm that has been caused.

Your joint letter of March 11, 2023 to Judge Duncan apologizes for the â??disruptionâ?• of his speech, and states that â??what happened was inconsistent with our policies on free speechâ?¦â?• The letter concludes that â??Freedom of speech is a bedrock principle for the law school, the university, and a democratic society, and we can and must do better to ensure that it continues even in polarized times.â?• Dean Martinezâ??s follow-up letter of March 22, 2023 to the SLS Community similarly focuses, not exclusively but predominantly, on the speakerâ??s freedom of speech.

These statements are noncontroversial, but incomplete. The overwhelming impression given by both letters is that Stanford prioritizes the freedoms of Judge Duncan over the freedoms of others, including those of the students. The letter to Judge Duncan is a one-sided apology that makes him the victim and those who disagreed with him the perpetrators, without any acknowledgment of his own role in the incident or the competing rights held by those who opposed him. And the letter to the SLS Community is unfortunately condescending in tone and substance, with a one-sided justification for condemning the students for what they perceived (reasonably in my opinion, as discussed below) as the exercise of their own rights.

What both letters lack, in short, is a recognition of the difficult balancing that is necessarily involved when objectionable speakers are invited on campus. This is all the more surprising because Stanford has already taken great pains to address this complicated issue in a way that is clear, appropriate, and in conformance with both the law and the universityâ??s mission. I refer here to Stanfordâ??s official policies as reflected in the Policy on Campus Disruptions, the Fundamental Standard, the Office of Community Standardsâ?? guidance statement on Freedom of Speech and the Fundamental Standard, and the statement on Advancing Free Speech and Inclusion by President Tessier-Lavigne and Provost Persis Drell. Taken together, these policies provide just the nuanced and balanced approach to this ongoing issue that should have guided, but did not, the response of the law school and the university.

The Tessier-Lavigne/Drell statement is particularly valuable as a guide. The fundamental premise of that statement is that in addressing hate speech, offensive and hurtful speech, and provocative outside speakers on campus, the challenge is how to balance two competing but equally important interests: â??both our unwavering commitment to the free expression of ideas and our equally steadfast goal of an inclusive community.â?•[1] The statement emphasizes that, contrary to those who wish to reduce the issues to free speech fundamentalism, â??[t]hese issues are difficult, and we too have struggled with them.â?• The statement then provides a number of considerations to help navigate this difficult terrain. These considerations include not only â??a commitment to freedom of inquiry and the free expression of ideas,â?• but also the â??fostering of an inclusive campus culture in

which all community members feel they belong.â?•

Importantly, the statement recognizes that while objectionable speech is to be permitted as part of the universityâ??s mission, this does not end the universityâ??s obligations to those who may be harmed by such speech. The university should model and encourage â??respectful expressionâ?• by speakers; and should do more to â??acknowledge and support those who are negatively impacted by speech.â?• In addition, if a â??controversial speaker comes to campus,â?• members of the campus community may â??attend the event and try to question the speaker, they may simply stay away from the event, they may criticize the decision to invite the speaker; or they may protest the speech without disrupting it.â?• Finally, â??if the speaker espouses views that are at odds with the fundamental values of the university, the university will not hesitate to speak out against those ideas, even as we allow them to be voiced.â?•

I believe that these standards dictate a very different response to this event than that given in the two letters referenced above.

First, it is not at all clear that any students, let alone all the students, violated the policy on campus disruptions. To begin with, the policy is vague and unclear in that it does not adequately define the line between what is permissible (â??Stanford firmly supports the rights of all members of the University community to express their views or to protest against actions and opinions with which they disagreeâ?•) and what is impermissible (failing to â??maintain on the campus an atmosphere conducive to scholarly pursuits, to preserve the dignity and seriousness of University ceremonies and public exercises, and to respect the rights of all individualsâ?•). It is a violation of the policy to â??[p]revent or disrupt the effective carrying out of a University function or approved activity,â?• with examples given of â??preventing members of a class from hearing a lecture or taking an examination, or preventing the instructor from giving a lecture, by means of shouts, interruptions, or chantsâ?¦â?• This appears to proscribe the so-called â??hecklerâ??s veto.â?• However, the key word here is not â??hecklerâ?• but â??vetoâ?•: heckling is not itself generally considered an impermissible disruption, provided that it does not prevent the speaker from speaking. In sum, there is no clear guidance given as to exactly what conduct constitutes impermissible â??disruption,â?• but the most reasonable interpretation is that the conduct must have the effect of not just momentarily impeding, but actually precluding, the speech in question. As the Tessier-Lavigne/Drell statement puts it, â??So long as the speaker is allowed to proceed and be heard,â?• protesting the speech is â??consistent with the requirements of free speech: a peaceful protest is an exercise of free speech, not a renunciation of it.â?•[2]

I waited to assess the facts until an audio recording became available that appears to record nearly all of the incident. Having now listened to the recording,[3] I do not believe that it is reasonable to conclude that a violation occurred. The first ten minutes were undoubtedly unruly, and it could be argued that Judge Duncan was impeded in his ability to speak without interruption during that time. However, a university administrator was in the room and there is no indication that this university representative found a violation of the policy. Moreover, she then spoke of the right of the Judge to speak and the need to listen to him within the bounds of school policy. Regardless of whether the university in hindsight disagrees with its representativeâ??s approach and remarks, the students were certainly entitled to rely on her actual or apparent authority to implicitly condone their conduct as within the boundaries of acceptable counter-speech.

After the administrator concluded her remarks many of the students peacefully left the room, as they are entitled to do under university policy. The speaker then resumed his speech and was not precluded from any statements he wished to make. Much of what he said was greeted with noises and some comments from some of the attendees, but at no time was he ever shouted down or otherwise prevented from speaking. On the contrary, the speaker deliberately engaged with his audience, responding to them and inviting, even demanding, that they answer questions he directed at them. The speaker then abruptly ended his speech, immediately after a student asked

everyone to quietly listen to what he had to say. That decision was his and his alone and cannot be attributed to the students, except that he was clearly offended and rattled by their presence. He then opened the floor for questions and answers. The questions were in all cases pointed, respectful and clearly communicated. The speaker belittled the questions and those who asked them, refused to answer most of them, asked questions in return, and generally created an atmosphere of agitated debate in which he was the prime antagonist. He then abruptly ended the question-and-answer portion of the talk, made some disparaging comments, and left the room.

In sum, based on this recording, the speaker was not precluded from speaking, nor did any students otherwise â??prevent or disrupt the effective carrying out of a University function or approved activity.â•

Second, most if not all of the studentsâ?? conduct was consistent with their own rights of freedom of expression and the core commitment of the university to the free expression of ideas even when such ideas are uncomfortable. A fair review of the audio recording and the limited video recordings demonstrate that Judge Duncan was affronted because he found the content of the studentsâ?? speech hostile and disturbing. But as Dean Martinezâ??s letter emphasizes, quoting the 1967 Kalven Report, a â??university faithful to its mission will provide enduring challenges to social values, policies, practices, and institutions. By design and by effect, it is the institution which creates discontent with the existing social arrangements and proposes new ones. In brief, a good university, like Socrates, will be upsetting.â• There is no doubt that this sitting federal court judge, a representative of currently prevailing ideas and institutions, found challenges to his ideas and actions to be upsetting. But that is precisely the role law students and other members of the university community are supposed to play. Again, from the Kalven Report: â??The instrument of dissent and criticism is the individual faculty member or the individual student. The university is the home and sponsor of critics; it is not itself the criticâ?¦A university, if it is to be true to its faith in intellectual inquiry, must embrace, be hospitable to, and encourage the widest diversity of views within its own community.â• Here, the students were engaged in expressing their views, an activity which is just as much to be protected as the invited speakerâ??s own expressions. In fact, they were doing just what the Tessier-Lavigne/Drell statement recommended as options when faced with provocative outside speakers: attending the event and asking questions of the speaker, criticizing the decision to invite the speaker, and protesting the speech without disrupting it.[4] As Dean Martinez notes, â??robust protection for the rights of association and speech has been critical to the advance of social movements for historically marginalized groups.â• Here, the LGBTQ+ community and its supporters, a historically marginalized group if there ever was one, was equally as deserving, and more in need, of the protection of its rights as was this speaker.

Third, the law school and the university have not given appropriate consideration to the studentsâ?? interest in belonging to a safe and inclusive community. While this interest is rightfully given prominent consideration in the Tessier-Lavigne/Drell statement and other policy statements, it is not mentioned at all in your joint letter to Judge Duncan, and is minimized in Dean Martinezâ??s letter which rather defensively asserts that valuing â??our LGBTQ+ students, faculty and staffâ• is â??*not* inconsistent with principles of academic freedomâ• (emphasis in original), before going on to â??set expectationsâ• about what the school administration will not do in support of diversity, equity, and inclusion. The list that follows bears little relationship to the types of objections that these students were raising to this particular speaker, nor does it appear to be consistent with the principles set forth in the Tessier-Lavigne/Drell statement and other Stanford policies that go much further to protect the legitimate interests of all students to be part of a community that is safe and welcoming to them whatever their status.

The invited speaker, Judge Kyle Duncan, is not simply someone who holds political views that are â??conservativeâ• or otherwise unpopular among some students. According to numerous qualified observers, Judge Duncan has dedicated his entire professional career to enacting and enforcing legislation that is hostile to the equal rights of those within the LGBTQ+ community. In opposing his nomination to the Fifth Circuit Court of Appeals, thirty-nine national, state, and local advocacy organizations representing the interests of LGBT people

and those living with HIV wrote that â??Mr. Duncanâ??s career has been dedicated to advancing positions that seek to marginalize, and often vilify, groups that do not conform to his ultraconservative social views. In recent years, Mr. Duncan has achieved national notoriety for his niche practice opposing LGBT equality at every turnâ?¦. As made clear through his personal writing, Mr. Duncan is driven by a deeply held view that same-sex marriage â??imperils civic peaceâ?? and he has gone to great lengths to thwart efforts to achieve legal equality for same-sex couplesâ?¦ Mr. Duncan has also tried aggressively to defeat equal basic equal opportunity protections for transgender peopleâ?¦ Mr. Duncanâ??s relentless pursuit of litigation targeting the rights of vulnerable groups and promoting dogmatic and exclusionary views couched in the language of religion renders him patently unqualified for a lifetime appointment to a federal court of appeals.â?•[5] Judge Duncanâ??s record since confirmation has demonstrated a continuation of his animus against the LGBTQ+ community.

Stanford has a formal process for addressing â??Protected Identity Harm (PIH) Incidentsâ?• which are â??incidents where a community member experiences harm because of who they are and how they show up in the world.â?•[6] A PIH incident is defined as â??conduct or an incident that adversely and unfairly targets an individual or group on the basis ofâ?• a â??protected identity.â?•[7] Sexual orientation and gender identity are explicitly identified in Stanfordâ??s policy as â??protected identities.â?• In addition, Stanford has identified â??increasingly oppressive legislature [sic] targeting the LGBTQ+ communityâ?• as an example of â??inequity and injustice [that] are evident across multiple dimensions of U.S. systems.â?•[8] Given these acknowledgments, Stanford cannot deny that Judge Duncan is a speaker whose presence and words on campus are likely to cause â??distress, hurt, confusion, frustration, and angerâ?• to those who are the targets of his campaign against this marginalized and vulnerable population. Thus, it is not sufficient to simply say that Judge Duncan and his sponsors have a right to hear his speech. Stanford has committed to do more. As the policy on Freedom of Speech and the Fundamental Standard states, â??Just because speech is protected does not mean that it is ethical, consistent with our values as an inclusive and supportive community, or that the university has no recourse in addressing it.â?• The Tessier-Lavigne/Drell statement concurs: â??we believe there is more the university can do to acknowledge and support those who are negatively impacted by speech. Some members of our community can be deeply wounded and even frightened by certain types of speech. We worry about the experiences of vulnerable populations within our community â?? those who seek an environment where their identities are welcomed, not challenged by hate or ignorance. We cannot dismiss their concerns, and we certainly donâ??t want them to remain silent. Instead we must continually find ways of providing meaningful support.â?•

Neither the law school nor the university has appeared to fulfill these commitments. The two letters give little to no consideration to the legitimate and protected interests of these students whose identities have been under sustained attacked by this speaker, and those students who support an inclusive and supportive environment free of animus based on protected identities. Instead of offering support to these students, the letters rushed to place all the blame at their feet. This failure is all the more concerning given the acknowledgment in Dean Martinezâ??s letter that these students have been the targets of â??hate mail and appalling invectiveâ?• and â??vitriolic and threatening emails and social media postings.â?• Sadly, the response of the law school and university was no doubt a contributing factor in this double victimization.

I understand that it is not an easy matter for the university or the law school to stand up to the extraordinary pressure that is exerted by a perpetual outrage machine that is designed to intimidate institutions into submission.[9] It takes great courage to withstand this assault and abide by the more enduring values set forth in the Tessier-Lavigne/Drell statement. Nonetheless, I hope you will reconsider the actions you have taken to date and reaffirm those values through a more thorough review of the facts in the light of the balancing of interests elucidated in that statement and Stanfordâ??s other policies.

Sincerely,

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JD Stanford Law School 1988

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[1] This is consistent with the Office of Community Standardsâ?? statement of Freedom of Speech and the Fundamental Standard, which states: â??At its best, freedom of speech is transformative, elevating our caliber of discourse, giving voice to the marginalized, and inviting connection across difference. At its worst, freedom of speech can become divisive, causing very real hurt to members of our community and harm to the fabric of our campus. Our campus community is therefore called upon to balance the fundamental freedom of speech with the essential goal of fostering an inclusive campus culture.â?•

[2] The policy refers to both â??prevent[ing] or disrupt[ing],â?• but if disrupting is interpreted as something less than preventing, then there is no reasonable means for a student or administrator to determine what constitutes a violation. Moreover, this would open the door to viewpoint discrimination, whereby sustained cheers and applause would be approved but jeers and groans would be prohibited, even though they equally impede the flow of a speech.

[3] This recording is found at https://davidlat.substack.com/p/the-full-audio-recording-of-judge (last accessed April 14, 2023).

[4] It is not disputed that their rights of self-expression stop at impermissible â??disruption,â?• but as noted above, the recording establishes that this threshold was not reached and the studentsâ?? questions, which they were invited to ask, were pointed but entirely fair and appropriate. As the Tessier-Lavigne/Drell statement puts it: â??So long as the speaker is allowed to proceed and be heard, all of these [options] are consistent with the requirements of free speech: a peaceful protest is an exercise of free speech, not a renunciation of it.â?•

[5] Lambda Legal et al. to the Honorable Charles Grassley, January 17, 2018.

[6] Stanford Univ., â??Protected Identity Harm Reporting/About the Process,â?• https://protectedidentityharm.stanford.edu/about-process (last accessed April 14, 2023).

[7] Stanford Univ., â??Protected Identity Harm Reporting/Free Speech and Inclusion,â?• https://protectedidentityharm.stanford.edu/about-process/free-speech-inclusion (last accessed April 14, 2023).

[8] Stanford Univ., â??Stanford Against Hate,â?• https://studentaffairs.stanford.edu/about-vice-provost/student-affairs-initiatives/stanford-against-hate, (last accessed April 14, 2023).

[9] Judges James Ho and Elizabeth Branch have openly vowed that they â??will not hire any student who chooses to attend Stanford Law School in the future.â?• Regrettably, it does not appear that the law school or university has publicly objected to this attempt to further undermine Stanfordâ??s principles and punish its students.