Stanford Law School

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Dear SLS Community,

As my message to you last week indicated, I had hoped to wait until after final exams concluded at the end of this week to offer any further comments on the disruption of Judge Kyle Duncan's speech at a student Federalist Society event on March 9, 2023, and the school's response to that disruption. However, continuing outside attention to these events, as well as the volume of hateful and even threatening messages directed at members of our community, have led me to conclude that a more immediate statement is necessary.

As we consider the role of respectful treatment of members of our community, I want to be clear that the hate mail and appalling invective that have been directed at some of our students and law school administrators in the wake of March 9 are of great concern to me. All actionable threats that come to our attention will be investigated and addressed as the law permits.

In the message below, I respond below to many of the questions I continue to receive about why I apologized to Judge Duncan, why I stand by that apology, and why the protest violated the university's policy on disruption. I articulate how I believe our commitment to diversity and inclusion means that we *must* protect the expression of all views. And, I outline some of the steps the school will be taking in the wake of this incident, including the adoption of clearer protocols for managing disruptions and educational programming on free speech and norms of the legal profession.

This message is unusually lengthy; because we are a law school and these issues are core to our educational mission, I explain some of my reasoning in quite a bit more detail than I would for a general audience. I also recognize that what I share below will not please everyone. While some of you may disagree with my views, I look forward to continuing the conversation about how we can create a learning environment that both respects freedom of speech and ensures that we support all of our diverse community members on their path to becoming lawyers.

I. Academic Freedom, Free Speech, and Protests on University Campuses: Protest is Allowed but Disruption is Not Allowed

My response is informed by basic principles. First, Stanford's Statement on Academic Freedom adopted by the faculty Senate in 1974 provides:

> Stanford University's central functions of teaching, learning, research, and scholarship depend upon an atmosphere in which freedom of inquiry, thought, expression, publication and peaceable assembly are given the fullest protection. Expression of the widest range of viewpoints should be encouraged, free from institutional orthodoxy and from internal or external coercion.

Second, while the First Amendment is designed to protect speech from government restriction, and therefore is not directly applicable to Stanford as a private institution, California's Leonard Law, Cal. Educ. Code § 94367, prohibits private colleges from making or enforcing rules subjecting students to discipline on the basis of speech that would be protected by the First Amendment or California Constitution if regulated by a public university. Some students have argued that the disruptive protest of the event was itself constitutionally protected speech. Of course, protests are in some instances protected by the First Amendment, but the First Amendment does not give protestors a "heckler's veto." As First Amendment scholar Dean Erwin Chemerinsky has written, "Freedom of speech does not protect a right to shout down others so they cannot be heard." Erwin Chemerinsky & Howard Gillman, *Free speech doesn't mean hecklers get to shut down campus debate*, WASH. POST (Mar. 24, 2022), https://www.washingtonpost.com/opinions/2022/03/24/free-speech-doesnt-mean-hecklers-get-shut-down-campus-debate/.

To the contrary, settled First Amendment law allows many governmental restrictions on heckling to preserve the countervailing interest in free speech. As the California Supreme Court stated in *In re Kay*, 464 P.2d 142, 149 (Cal. 1970), "the state retains a legitimate concern in ensuring that some individuals' unruly assertion of their rights of free expression does not imperil other citizens' rights of free association and discussion." Thus, even in public forums such as the public streets, sidewalks, and parks, where free speech rights have greatest latitude, it is well-settled that the First Amendment allows the imposition of reasonable content-neutral time, place, and manner restrictions. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 487-88 (1988).

And while the First Amendment bars regulation of speech on the ground that listeners might find its *content* disturbing, *see Terminiello v. Chicago* 337 U.S. 1, 3 (1949) (invalidating a law treating speech as a breach of the peace if it "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance"), the First Amendment permits the regulation of speech that "*substantially impairs the effective conduct of a meeting*." *In re Kay*, 464 P.2d at 150 (emphasis added). Thus, while the California Supreme Court in *In re Kay* protected protestors speaking out against an elected official at "a large, public

celebration held outdoors in a public park," the Court noted that "the nature of a meeting necessarily plays a major role," and that "customs and usages" are central to the analysis. *Id.*

For these reasons, modern First Amendment law does not treat every setting as a public forum where a speech free-for-all is allowed. To the contrary, First Amendment cases have long recognized that some settings are "limited public forums," where restrictions on speech are constitutional so long as they are viewpoint-neutral and reasonable in light of the forum's function and all the surrounding circumstances. *See Christian Legal Soc. Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez*, 561 U.S. 661, 679 (2010); *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 676-78, 688 (1998). As Justice Ginsburg cautioned in a prominent case, such speech restrictions may be especially reasonable "in the educational context," which requires "appropriate regard for school administrators' judgment" in preserving a university's mission and advancing academic values. *Christian Legal Soc.,* 561 U.S. at 685, 687. A university classroom setting for a guest speaker invited by a student organization is thus a setting where the First Amendment tolerates greater limitations on speech than it would in a traditional public forum.

The "nature of a meeting" in an indoor university classroom, under settled First Amendment law, does not countenance the same sort of "prolonged, raucous, boisterous demonstrations" that might be acceptable at an outdoor rally, *see In re Kay*, 464 P.2d at 150. Rather, different "customs and usages" apply in a setting like a planned lecture in a reserved room on campus. In such a setting, limiting audience participation to signs, questions during a planned Q&A, and a non-disruptive level of audience reaction is appropriate to the nature of the forum. Stanford's event disruption policy gives attendees a right to hold signs and to demonstrate disagreement in other ways as long as the methods used do not "prevent or disrupt the effective carrying out of a University function or approved activity, such as lectures, meetings, interviews, ceremonies. . . and public events."[1] Moreover, students are encouraged to hold alternative events where they can share their own views without disrupting the invited speaker. Stanford's policy is thus fully consistent with the First Amendment and long-settled California constitutional law.

Moreover, a university is not just a platform for speech but is itself a speaker with its own First Amendment rights and prerogatives to edit the message it conveys to its students and the world, including messages about the importance of free speech. *See Sweezy v. State of New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) ("'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what

[1] Stanford Univ., *Campus Disruptions*, https://studentservices.stanford.edu/more-resources/student-policies/student-rights-responsibilities/campus-disruptions, (last visited Mar. 17, 2023) (noting "the application of the Policy also takes situational factors into consideration" and "[t]hus, for example, conduct appropriate at a political rally might constitute a violation of the Policy on Campus Disruptions if it occurred within a classroom.").

may be taught, how it shall be taught, and who may be admitted to study.'"). A university's free speech and campus disruption policy is an important component of such academic freedom.

Some of the protestors at last week's event stayed within the bounds of permissible, non-disruptive counter-speech, while others crossed the line in sustained heckling that disrupted the event. Some students contend that the judge invited the heckling with offensive comments or engagement with protestors. These arguments misunderstand the nature of the disruption policy. The policy would not be meaningful to protect the carrying out of public events and the right of attendees to hear what is said if it applied only when a speaker said things protesters in an audience found agreeable. Nor does the fact that the speaker departs from their planned remarks and engages with the hecklers justify further heckling that disrupts the event. The Stanford disruption policy prohibits not just conduct that literally drowns out the speaker, but also that which "disrupt[s] the *effective* carrying out" of the event (emphasis added).

The President of the University and I have apologized to Judge Duncan for a very simple reason – to acknowledge that his speech was disrupted in ways that undermined his ability to deliver the remarks he wanted to give to audience members who wanted to hear them, as a result of the failure to ensure that the university's disruption policies were followed. That apology, and the policy it defends, is fully consistent with the First Amendment and the Leonard Law.

II. Academic Freedom, Free Speech, DEI, and the Role of University Administrators

The university's commitment to diversity, equity, and inclusion can and should be implemented in ways that are consistent with its commitment to academic freedom and free speech. *See* Marc Tessier-Lavigne and Persis Drell, *Advancing free speech and inclusion*, (Nov. 11, 2017), https://quadblog.stanford.edu/2017/11/07/advancing-free-speech-and-inclusion/. Indeed, for the reasons explained below, I believe that the commitment to diversity, equity, and inclusion actually means that we *must* protect free expression of all views.

The Federalist Society has the same rights of free association that other student organizations at the law school have. Students calling for the law school administration to restrict the organization or the speakers it can bring to campus are demanding action inconsistent not only with freedom of speech but with rights to freedom of association that civil rights lawyers fought hard in the twentieth century to secure. To do so would also be inconsistent with the Stanford Statement on Academic Freedom's requirement that "[e]xpression of the widest range of viewpoints should be encouraged, free from institutional orthodoxy and from internal or external coercion." Unless we recognize that student members of the Federalist Society and other conservatives have the same right to express their views free of coercion,

we cannot live up to this commitment nor can we claim that we are fostering an inclusive environment for all students.

Enforcement of university policies against disruption of speakers is necessary to ensure the expression of a wide range of viewpoints. It also follows from this that when a disruption occurs and the speaker asks for an administrator to help restore order, the administrator who responds should not insert themselves into debate with their own criticism of the speaker's views and the suggestion that the speaker reconsider whether what they plan to say is worth saying, for that imposes the kind of institutional orthodoxy and coercion that the policy on Academic Freedom precludes. For that reason, I stand by my statement in the apology letter that at the event on March 9, "staff members who should have enforced university policies failed to do so, and instead intervened in inappropriate ways that are not aligned with the university's commitment to free speech."

The 1967 Kalven Report of the University of Chicago is not formal policy at Stanford but helps explain why university administrators should avoid exercising their authority in ways that can chill speech. It states:

> A university has a great and unique role to play in fostering the development of social and political values in a society. The role is defined by the distinctive mission of the university and defined too by the distinctive characteristics of the university as a community. It is a role for the long term.
>
> The mission of the university is the discovery, improvement, and dissemination of knowledge. Its domain of inquiry and scrutiny includes all aspects and all values of society. A 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.
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> 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 critic. It is, to go back once again to the classic phrase, a community of scholars. To perform its mission in the society, a university must sustain an extraordinary environment of freedom of inquiry and maintain an independence from political fashions, passions, and pressures. 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.

It bears emphasizing that is *not* inconsistent with principles of academic freedom for the university administration to say that our LGBTQ+ students, faculty, and staff are valued members of our community of scholars. That goes to the basic norms of pluralism that

underpin our operation as a university, in the same structural way that the normative commitment to free speech underpins those operations. Indeed, as the Stanford Faculty Senate reaffirmed in a resolution adopted on November 11, 2016, the university has a commitment to an "open and inclusive community that embraces all members, irrespective of race, ethnicity, religion, gender, gender identity, sexual orientation, citizenship, abilities and political views." And so I say that firmly here as well, and defend the value and place of LGBTQ+ people in our community.

Moreover, there are many ways to support diversity, equity, and inclusion that are not inconsistent with a commitment to academic freedom. For example, as an educational institution dedicated to training future lawyers, we support diversity, equity, and inclusion by encouraging thoughtful and critical discourse about the law and legal system, by training students to offer substantive critiques of injustice that they encounter, by teaching future lawyers how to marshal evidence that supports their point of view and how to make arguments that convince others. We support diversity, equity, and inclusion when we encourage people in our community to reconsider their own assumptions and potential biases. We support diversity, equity, and inclusion when we encourage students to connect with and see one another as people. We support diversity, equity, and inclusion when we teach each and every one of our students how to be the best possible lawyer they can be, and take those skills of advocacy out into the world.

At the same time, I want to set expectations clearly going forward: our commitment to diversity, equity, and inclusion is not going to take the form of having the school administration announce institutional positions on a wide range of current social and political issues, make frequent institutional statements about current news events, or exclude or condemn speakers who hold views on social and political issues with whom some or even many in our community disagree. I believe that focus on these types of actions as the hallmark of an "inclusive" environment can lead to creating and enforcing an institutional orthodoxy that is not only at odds with our core commitment to academic freedom, but also that would create an echo chamber that ill prepares students to go out into and act as effective advocates in a society that disagrees about many important issues. Some students might feel that some points 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 in 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.

Law is a mediating device for difference. It therefore reflects all the heat of controversy, all the pain and suffering, and all the deeply felt moral urgency of our differences in position, power, and cherished principles. Knowing all of this, I believe we cannot function as a law school from the premise that appears to have animated the disruption of Judge Duncan's

remarks -- that speakers, texts, or ideas believed by some to be harmful inflict a new impermissible harm justifying a heckler's veto simply because they are present on this campus, raised in legally protected speech, and made an object of inquiry. Naming perceived harm, exploring it, and debating solutions with people who disagree about the nature and fact of the harm or the correct solutions are the very essence of legal work. Lively, candid, civil, and evidence-based discourse in disagreement is not just positive for our community, constituted as it is in difference, it is a professional duty. Observance of this duty matters most, not least, when we are convinced that others haven't.

Moreover, because of the special role of lawyers in our system of justice, lawyers are held to higher standards of professional conduct and interaction with one another than lay people. For example, the oath a lawyer takes upon becoming a member of the bar in California requires one to swear or affirm that they "will faithfully discharge the duties of an attorney and counselor at law to the best" of their "knowledge and ability" and "as an officer of the court," they "will strive to conduct" themselves "at all times with dignity, courtesy and integrity." This requirement is even more important, not less important, in the midst of heated controversy. And learning to channel the passion of one's principles into reasoned, persuasive argument is an essential part of learning to be an effective advocate.

There are fundamental issues to consider here beyond the issues of formal law and university policy. They have to do with choices for which all of us are responsible in building a community dedicated to learning and to preparation for the practice of law. With regard to the norms of this community, the cycle of degenerating discourse won't stop if we insist that people we disagree with must first behave the way we want them to. Nor will it stop if we try to shame each other into submission (shaming, the research shows, has precisely the opposite effect in communities constituted by difference). The cycle stops when we recognize our responsibility to treat each other with the dignity with which we expect to be met. It stops when we choose to replace condemnation with curiosity, invective with inquiry. I remain dedicated to cultivating these norms in our community.

There is temptation to a system in which people holding views perceived by some as harmful or offensive are not allowed to speak, to avoid giving legitimacy to their views or upsetting members of the community, but history teaches us that this is a temptation to be avoided. I can think of no circumstance in which giving those in authority the right to decide what is and is not acceptable content for speech has ended well. Indeed, the power to suppress speech is often very quickly directed towards suppressing the views of marginalized groups. We see this today, both around the United States and around the globe. And at key moments in history, robust protection for the rights of association and speech has been critical to the advance of social movements for historically marginalized groups. *See, e.g.*, *Gay Students Organization of University of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974). Thus, I believe that strong protection for freedom of speech is a bedrock principle that ultimately supports diversity, equity, and inclusion and that we must do everything in our power to ensure that it endures.

III. Next Steps

In closing, I will address some issues that have been the subject of many inquiries from inside and outside the university,[2] and then I will discuss what steps the law school is taking to ensure that these events are not repeated.

First, Associate Dean Tirien Steinbach is currently on leave. Generally speaking, the university does not comment publicly on pending personnel matters, and so I will not do so at this time. I do want to express concern over the hateful and threatening messages she has received as a result of viral online and media attention and reiterate that actionable threats that come to our attention will be investigated and addressed as the law permits. Finally, it should be obvious from what I have stated above that at future events, the **role of any administrators present will be to ensure that university rules on disruption of events will be followed**, **and all staff will receive additional training in that regard**.

Second, with respect to the students involved in the protest, several factors lead me to conclude that what is appropriate here is **mandatory educational programming** for our student body rather than referring specific students for disciplinary sanction (which at Stanford is administered by the central university's Office of Community Standards and involves a deliberate process including fact-finding and hearings). My analysis here is informed by California's Leonard Law, which as discussed above legally prohibits Stanford University from imposing disciplinary sanctions on students for activity protected by the First Amendment. Measures targeting constitutionally unprotected speech raise concerns when implemented in a way that may chill constitutionally protected speech. *See, e.g.*, *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (noting that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights."). As I have already explained at length above, the disruptive conduct of many students at the event was *not* protected by the

[2] A recording of the event was ordered in advance from the law school's audiovisual services department by the Federalist Society student organizers, who agreed to pay the standard fee for such a recording. It took several days after the event for the students to turn in a copy signed by Judge Duncan of the standard speaker release required by the school for all guest speakers being recorded. That has now been received and the recording is being released to the students who ordered it. Because of the public nature of the event, students in the room did not have a reasonable expectation of privacy and there are many cell phone recordings as well as an audio recording of the event already circulating. Given the vitriolic and threatening emails and social media postings that have been directed at students based on the viral spread of online stories about this event, however, we have determined that protection of those students from threats in the current environment suggests that blurring the faces of students in the audience who appear on camera in the video is appropriate for the release of the official video at this time (given the camera angle focused on the podium, most of the audience is not visible and the blurring occurs only at two short passages at minutes 21:00 and 28:45 in the recording). Although the students are identifiable in cell phone videos and photos circulating online, given that the license for use of this recording belongs to the University itself for "educational purposes" pursuant to the standard speaker release, we believe that the university's relation to its students makes the blurring of faces appropriate.

First Amendment. There were easily a hundred students in the room, however, and some individual students crossed the line into disruptive heckling while others engaged in constitutionally protected non-disruptive protest, such as holding signs or asking pointed questions. Even if we could come up with a fair process for identifying and distinguishing between the two categories of students consistent with First Amendment values, the particular circumstances of this event raise additional concerns. Given the sometimes uncertain boundary between permissible audience reactions and impermissible disruptions at an event, "a warning and a request that defendants curtail their conduct" before proceeding to sanction can in some circumstances be important in preventing a constitutionally impermissible chilling effect on speech. *In re Kay*, 464 P.2d at 152. Such an onsite warning might not be required in all cases, and students had been generally informed of the policy against disruptions (including by schoolwide email the morning of the event). In this instance, however, 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 had occurred up to that point by saying "I look out and 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.

Moreover, it is important to recall that the First Amendment bars regulation of speech on the ground that listeners might find its *content* disturbing, *see Terminiello*, 337 U.S. at 3. Under this standard, students could be sanctioned for interrupting the speaker with loud shouts, for example, but *not* for holding signs or asking questions (when called upon) that are offensive, vulgar, or provocative. Given this, focusing solely on punishing those who engaged in unprotected disruptions such as noisy shouting during the lecture would leave perversely unaddressed the students whose speech was perhaps constitutionally protected but well outside the norms of civil discourse that we hope to cultivate in a professional school. As a law school, it is within our educational mandate to address with students the norms of the legal profession with regard to, for example, offering substantive criticism of legal arguments and positions rather than vulgar personal insults, and the potential consequences for their professional reputations of such speech.

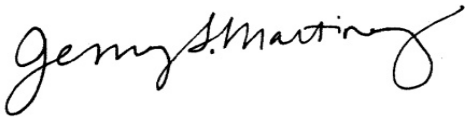
Accordingly, as one first step the law school will be holding a **mandatory half-day session** in spring quarter for all students on the topic of freedom of speech and the norms of the legal profession. A faculty committee will plan the session and invite speakers representing a range of viewpoints. 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. But I believe further discussion of these topics will both advance our educational mission and help us learn from the errors of the recent past. In addition, the faculty committee I have constituted will solicit feedback from the faculty, students, and members of the bar including our alumni, and it will make further recommendations on how to improve constructive and inclusive discourse at the law school. More details on this committee will follow.

In addition, **a more detailed and explicit policy with clear protocols for dealing with disruptions** would better protect the rights of speakers and also those who wish to exercise their right to protest within permissible bounds, and is something we will **seek to adopt and educate students and staff on going forward**. *Cf., e.g.,* UC Hastings [now UC College of the Law San Francisco] Event Policy: Student Organization Support Protocol; Permissible Forms of Protest (Adopted October 1, 2022), available at https://www.thefire.org/research-learn/uc-hastings-event-policy-adopted-october-1-2022. Doing so will bring greater clarity and certainty about future enforcement of the policy, including through disciplinary sanctions as appropriate.

I also recognize that the protest originally grew out of a desire by students to bring greater attention to discussion of LGBTQ+ rights in the current legal environment. I have spoken with faculty whose scholarship and teaching gives them relevant expertise, and who will work with students to plan events in spring quarter to substantively engage on this topic. Such programming, rather than disruptive protests, better advances students' education as lawyers and advocates.

I recognize that the course I have chosen will not please everyone, not least of which those who have demanded that I retract my apology to Judge Duncan and those who have demanded that students be immediately expelled. But this is the course I believe best furthers our obligations as legal educators, charged with training future lawyers and preparing them to participate in a profession that undergirds the very fabric of our democracy and the rule of law.

Sincerely,



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