

## WHEN SHOULD UNIVERSITY ADMINISTRATORS SPEAK?: PERSONAL REFLECTIONS

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When should campus administrators speak out about issues occurring on their campus, as well as in the country and the world? This is a question that every university president, chancellor, and dean faces repeatedly. It has come up frequently since Hamas's terrorist attacks in Israel on October 7, 2023, and in light of Israel's actions in Gaza. But the difficult issue did not begin with this latest war in the Middle East. I have faced it often in my sixteen years as dean. When should I send a message to the entire law school community? When should I write an op-ed addressing national or world issues?

As I thought about the focus of this symposium, which looked at both leadership and First Amendment issues, this is an obvious intersection. What does it mean to be a leader in terms of when and how to speak out? Campus administrators have free speech rights too. But when should they exercise them?

### *The events since October 7*

There is no easy answer and every path taken has been sharply criticized in the weeks since October 7, 2023, when Hamas launched a terrorist attack in Israel and then Israel retaliated in Gaza. Some college presidents have said they would express no views about what is happening in the Middle East, adhering to an approach urged by the Kalven Report at the University of Chicago over a half-century ago that university administrators should not take positions on political issues.<sup>1</sup> Indeed, some prominent university presidents have expressly invoked the Kalven Report in explaining that they

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<sup>1</sup> Editorial Board, *For Universities, the Less Said About Controversial Issues, the Better*, WASH. POST (Nov. 10, 2023, 10:13 AM), <https://www.washingtonpost.com/opinions/2023/11/10/campus-israel-gaza-free-speech/>.

would be silent.<sup>2</sup> But some campus administrators who have done this have been condemned for their silence.<sup>3</sup> Many see their silence as itself a message and are dissatisfied with the lack of moral leadership from campus administrators who choose to say nothing.

Some administrators issued carefully crafted messages that tried hard to be neutral as to what is happening in Israel and Gaza.<sup>4</sup> They expressed compassion for all who have lost loved ones and for those in danger.<sup>5</sup> This approach, too, has been attacked for its effort to be morally neutral. Those taking this approach have been criticized from both sides, with some lamenting its failure to condemn the terrorism by Hamas and those who issued strong statements celebrating it, and others criticizing its failure to denounce Israel's assault on Gaza.<sup>6</sup>

Administrators who have expressed such condemnation have been attacked too. Those who have called what Hamas did terrorism and denounced those who have defended it have been called racist and Islamophobic.<sup>7</sup> Those who have criticized Israel have been called antisemitic.<sup>8</sup>

There is no approach that will please everyone. No approach will find consensus on campuses, especially those like mine with a significant number of students and faculty members having strong feelings on all sides of this controversy. There is simply no middle ground between those who believe that what Hamas did was terrorism that violates the most norms of humanity

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<sup>2</sup>Michael T. Nietzel, *The Kalven Report and the Limits of University Neutrality*, FORBES (Dec. 26, 2023, 6:00 AM), <https://www.forbes.com/sites/michaelt Nietzel/2023/12/26/the-kalven-report-and-the-limits-of-university-neutrality/?sh=12dd168c3bf0>.

<sup>3</sup>Michael S. Roth & Jeffrey Sonnenfeld, *For University Leaders, Silence on the Israel-Hamas War is Not Golden*, TIME (Nov. 22, 2023, 3:26 PM), <https://time.com/6339107/university-leaders-voices-israel-hamas-war/>.

<sup>4</sup>Claudine Gay et al., *A Statement from Harvard University Leadership*, HARV. OFF. PRESIDENT (Oct. 9, 2024), <https://www.harvard.edu/president/news-gay/2023/war-in-the-middle-east/>.

<sup>5</sup>*Id.*

<sup>6</sup>Alysha Palumbo, *Harvard President Responds to Backlash over Israel War Response by University-Affiliated Groups*, NBC BOSTON (Oct. 20, 2023, 7:24 PM), <https://www.nbcboston.com/news/local/backlash-over-israel-war-response-by-harvard-affiliated-groups/3156151/>.

<sup>7</sup>Collin Binkley & The Associated Press, *Feds Investigate 7 Schools over Allegations of Antisemitism, Islamophobia—Including 3 Ivy League Colleges*, FORTUNE (Nov. 17, 2023, 10:43 AM), <https://fortune.com/2023/11/17/7-schools-colleges-investigated-antisemitism-islamophobia-columbia-cornell-penn/>.

<sup>8</sup>*Id.*

and those who believe that it was part of a resistance to oppression. There is no middle ground between those who denounce Israel's actions in Gaza as "genocide" and those who see it as self-defense. Dialogue is impossible between those who oppose the very existence of Israel and those who strongly believe in its necessity.

And this is deeply personal to many on our campuses. Many have loved ones and friends who have lost their lives or are in danger. The existence of Israel and the Palestinian cause is a crucial part of the identity of many of our students and faculty. Each side sees the speech of the other as motivated by antisemitism or Islamophobia. Of course, this is not true of every campus, but it certainly has been present at many universities, especially those like mine with a significant population of Palestinian, Muslim, and Jewish students.

I personally have experienced this over the past few months. On October 9, I sent a message to the Berkeley Law community. It simply said:

I have been horrified to watch the terrorist attack on Israel that has claimed so many lives and put so many in danger. I am heartbroken to see the carnage and to think of those taken as hostages. Many in our community have family, friends, and loved ones in the Middle East. I hope I speak for our entire community in wishing them safety and in hoping for peace. I express my deepest sympathy for those who have lost loved ones.

As dean, I, of course, am also concerned for what this will mean for our community. As I wrote last year, we obviously are not going to resolve the issues of the Middle East at Berkeley Law or on this campus. But what we can control is how we act and speak with one another. My plea is that we take care at this difficult time to treat each other with respect, kindness, and compassion. I hope as we choose to speak we keep in mind that some in our community have lost loved ones or feel great anxiety for their safety.<sup>9</sup>

A third paragraph described the mental resources we have available for students and the process for accommodations if needed.<sup>10</sup>

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<sup>9</sup>Erwin Chemerinsky, *Dean's Message: At This Very Difficult Time*, BERKELEY L. (Oct. 10, 2023), <https://www.law.berkeley.edu/article/deans-message-at-this-very-difficult-time/>.

<sup>10</sup>*Id.*

I regarded this as a mild message. But quickly the Law Students for Justice in Palestine at Berkeley Law posted on social media that my message was “reek[ing] with racism” and was “Islamophobic.”<sup>11</sup> Students objected that my message had referred to Hamas’s actions as terrorism and did not specifically address Israel’s actions in Gaza.<sup>12</sup> (It was sent on October 9 before significant military actions in Gaza had begun by Israel). I do not believe there is any message I could have written that would have pleased everyone. And I certainly do not back down from referring to what Hamas did as terrorism.

*The testimony of the university presidents*

At a congressional hearing on December 5, three prominent university presidents—from Harvard, MIT, and Penn—were asked about advocacy of genocide of Jews.<sup>13</sup> Each clearly condemned such speech as reprehensible.<sup>14</sup> When asked whether such speech would violate their student code of conduct, and be subject to punishment, President Liz Magill, from the University of Pennsylvania, said that it would depend on the context.<sup>15</sup>

She was clearly correct as to the law, but it was not the answer that the members of Congress or the public or the Penn trustees wanted to hear. Within a few days after the hearing, she lost her job.<sup>16</sup> She was trying to give a logical and nuanced answer to a question that was based on emotion and that was asking for an unqualified declaration that such speech would always be punished. As the president of a private university, she might have said that the First Amendment does not apply at all. But she did not take that route, rightly proclaiming that her university strives to comply with free speech principles.

As Professor Magill and the other presidents—Claudine Gay of Harvard University and Sally Kornbluth of the Massachusetts Institute of

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<sup>11</sup>Berkeley LSJP (@berkeleylawforpalestine), INSTAGRAM (October 11, 2023), [https://www.instagram.com/p/CyQ5vo9rkyX/?img\\_index=1](https://www.instagram.com/p/CyQ5vo9rkyX/?img_index=1).

<sup>12</sup>*Id.*

<sup>13</sup>*University Presidents Testify on College Campus Antisemitism, Part 2*, C-SPAN (Dec. 5, 2023), <https://www.c-span.org/video/?532147-101/university-presidents-testify-college-campus-antisemitism-part-2>.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>Scott L. Bok, *A Message to the Penn Community: Resignation of President Liz Magill*, U. PA. ALMANAC (Dec. 12, 2023), <https://almanac.upenn.edu/articles/a-message-to-the-penn-community-resignation-of-president-liz-magill>.

Technology—expressed,<sup>17</sup> there are certainly situations where advocacy of genocide violates the First Amendment. Speech is unprotected by the First Amendment if it constitutes incitement or a true threat or harassment.<sup>18</sup> For incitement, it must be speech that is likely to cause imminent illegal activity, and that is directed at causing imminent illegal activity.<sup>19</sup> For true threats, it must be speech that is reckless in that there was a conscious disregard of a substantial risk that the speech would be perceived as a threat of violence.<sup>20</sup>

As for harassment, the official standard promulgated by the Education Department is that campuses must respond when the speech “is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from the recipient’s educational program or activity.”<sup>21</sup> There is not a clear principle in the law for how to determine when speech is so severe or pervasive as to materially interfere with educational opportunities.

It is easy to imagine situations in which the advocacy of genocide can be punished as incitement or true threats or harassment. But there also are situations in which it is the expression of an idea, albeit a horrific one, that is protected by the First Amendment.

Why not simply say that any advocacy of genocide is so beyond the pale that there is not constitutional protection? There is danger in giving the government the power to say that an idea is so offensive that it never can be expressed. I have heard those who oppose abortion rights call abortion a form of genocide. Do we want to give campus officials, if they agree with that view, the power to silence advocacy of abortion rights? Some have called Israel’s action in Gaza genocide. Could a campus then punish students who defended Israel? I am fearful of ever giving the government, including campus administrators, the power to declare any idea as so unacceptable that it cannot be voiced at all.

What would I have said if I had been a witness at the congressional hearing? And I readily admit that I have the luxury of having had a long time

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<sup>17</sup> *University Presidents Testify on College Campus Antisemitism, Part 2*, *supra* note 13.

<sup>18</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1308 (Rachel E. Barkow et al. eds., 6th ed. 2020).

<sup>19</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>20</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003).

<sup>21</sup> Letter from Catherine E. Lhamon, Assistant Sec’y for Civ. Rts., U.S. Dep’t Educ. (Nov. 7, 2023), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-202311-discrimination-harassment-shared-ancestry.pdf>.

to think about this, as opposed to having to answer in the fourth hour of an intense hearing. I would have said that advocacy of genocide of Jews is repugnant, blatantly inconsistent with the values of my school, and must be immediately condemned by campus officials. I would have expressed that as a Jew, who had family members perish in the Holocaust, I am especially sensitive to such advocacy. But I also would have said that the First Amendment protects hate speech and allows all ideas and views to be expressed, including deeply offensive ones. Even advocacy of genocide is within the speech protected by the First Amendment. There, however, also is a point at which the advocacy is so pervasive that it becomes harassment or that it may be expressed in such a way that it is a true threat that is unprotected by the First Amendment.

Would I, too, have lost my job for saying this, even though I would be correctly stating the law? What are we to make of a moment when a college president can lose her job for doing just that?

*When to speak and what to say?*

I reject the view embraced by the Kalven Report that university leaders always should be silent. Silence is a message too. Failing to condemn the terrorist attack on Israel and to object to those who defend will be heard as a message in itself. Failing to express deep sympathy for the carnage in Gaza will be heard as a message, too.

Admittedly, it is difficult to know when to speak as a university administrator. One cannot respond to every event or in every instance where some demand a statement. But I believe that there are times when there is the obligation to speak out, such as most did after the death of George Floyd or after January 6. Those on campus want their leaders to voice their pain, express compassion, and hopefully offer some moral clarity.

The reality is that any message in a difficult time will offend some, but that is not a reason for silence. Calling Hamas's actions terrorism has been denounced as racist. But not calling it terrorism has been condemned as complicity. Equating what happened in Israel and in Gaza offends some; not doing so offends others. Almost anything said will upset some, but saying nothing upsets others.

Ultimately, my conclusion is that we remember that our most important role as university administrators is not to please everyone or even the greatest number on campus. There are times when it is essential that we stand up for what is right, even if it means that some in our communities will be very angry with us.

My answer then is that I speak out when my silence would be the wrong message. I speak out to remind my community of its underlying values, including its commitment to freedom of speech and that all ideas and views can be expressed on a college campus. I speak out because I realize that to pretend to be neutral in the face of injustice is wrong and the wrong message for my community.

I follow these basic principles:

(1) I speak out to express our policies about free speech. It is imperative that law schools—and that campuses more generally—have clear principles and policies about freedom of expression. Of course, the legal requirements are different at public as opposed to private schools because the First Amendment applies only to the former.<sup>22</sup>

I always stress that our goal is to be a place where all ideas and views can be expressed. The First Amendment does not allow us to exclude any viewpoint, and I believe that it is crucial that universities be places where all ideas can be voiced and discussed. At times, this may mean that there can be expression of views that we dislike or even find offensive. But I long have believed that the only way my speech can be free tomorrow is to support protection for speech that I dislike today. I also am hopeful that there is a benefit in hearing views different from our own, though it can be unsettling and even painful. As lawyers, we must be prepared to answer the opposing arguments and our thinking inevitably is sharpened by hearing other positions.

My law school has an “all-comers” policy, which means that every student group must allow any student to join, and all student-group-organized events must be open to all students.<sup>23</sup> This is important to being an environment where all can feel included and that they belong.

I emphasize that disruption of speakers and events will not be tolerated. There were unfortunate instances in the last couple of years at other law schools where students disrupted events so that speakers could not be heard. That is a violation of Berkeley Law’s policies and I make clear that such behavior will be a basis for student discipline. The First Amendment does not protect a right to use speech to silence others. The appropriate response to an

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<sup>22</sup>CHEMERINSKY, *supra* note 18, at 1531.

<sup>23</sup>Berkeley L. Student Servs., *Student Organization Handbook*, <https://www.law.berkeley.edu/wp-content/uploads/2023/09/Student-Org-Handbook-2023-2024.pptx-1.pdf> (last visited Feb. 18, 2024).

objectionable speaker is to engage in non-disruptive protests and to invite your own speakers.

I conclude by simply stating that just because there is a right to say something doesn't necessarily mean that it should be said. I hope that as we choose what to say, we always will be sensitive to the feelings and sensibilities of others. It is inevitable that sometimes there will be disagreements among us, even intense ones, but I hope we always will treat one another with tolerance, respect, and kindness.

I send a message about this at the beginning of each school year. I send follow-up messages where I deem appropriate. In Fall 2019, when Ann Coulter came to speak on the Berkeley campus, some going to hear her were assaulted. I sent a message to the community about why that was inappropriate and inconsistent with our values, although protesting against Coulter is obviously permissible so long it was not disruptive of the event.<sup>24</sup> I was strongly criticized by some students for sending this message. A flyer was posted on every bulletin board in the law school saying that I defended Ann Coulter but not our students. My message simply defended Coulter's right to speak on campus and criticized those who assaulted people going to hear her.<sup>25</sup>

(2) I speak out if an event in my law school necessitates a response. I have not done this often, but at times have found it essential. (I do not include in this context the message I send at the beginning of each semester welcoming people back to school. These are not controversial and do not do much except hopefully add some warmth to the community.)

During the COVID pandemic, especially the early days when we went entirely online, I regularly sent messages to the community to express our new policies and to offer support. Initially, I did a Zoom town hall meeting every day, then went to twice a week, then once a week, and then not at all when we returned to in-person instruction. There was a great deal of information to convey and rumors were flourishing in the absence of accurate information.

But I also sometimes have sent messages when difficult situations have arisen. Several years ago, a prominent Jewish professor from another

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<sup>24</sup>Erwin Chemerinsky, *Ann Coulter Says Hateful, Ugly Things. Our Free Speech Laws Protect Her, Too*, SACRAMENTO BEE (Dec. 9, 2019, 8:00 AM), <https://www.sacbee.com/opinion/california-forum/article238048744.html>.

<sup>25</sup>*Id.*



university spoke at the law school. Someone drew a swastika over a flyer on a bulletin board with his picture. I immediately sent a message to our entire community condemning that as inconsistent with our values.<sup>26</sup> I felt it essential to use the occasion to condemn the hate speech and remind the community of our values.

Another very different example: In Fall 2023, a professor at my law school wrote an op-ed in the *Wall Street Journal* encouraging employers to not hire our law students who he described as antisemitic.<sup>27</sup> To say the obvious, many students were understandably deeply upset by this. They demanded that I discipline or even fire him. I do not have the authority to do that, and it could not be done without violating the First Amendment. But I did feel the need to speak out. I sent a message to the community, which in part said:

Each year, I write to the community to express our commitment to freedom of speech, which includes the right of people to say things that others find offensive, even deeply offensive. My guess is that in the last week most of us have heard things that offended and upset us. Some in our community were upset yesterday when a professor published an op-ed that called on employers not to hire students who expressed particular views. To be clear, that professor was speaking for himself and not for the institution. The Law School is strongly committed to helping all of our students find employment. Our Career Development Office is unflagging in this effort to work with each student to obtain employment during and after law school.<sup>28</sup>

To have said nothing in response to his op-ed would have been the wrong message. Some criticized me for not going further in condemning him. I felt that my message expressed the crucial point: he does not speak for the law school, and we will help every student get a job as best we can.

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<sup>26</sup> See Erwin Chemerinsky, *Swastika Found Drawn on Flyer of Alan Dershowitz After His Berkeley Law Event*, BERKELEY L. (Oct. 16, 2017), <https://sites.law.berkeley.edu/inthenews/2017/10/16/swastika-found-drawn-on-flyer-of-alan-dershowitz-after-his-berkeley-law-event/>.

<sup>27</sup> Steven Davidoff Solomon, *Don't Hire My Anti-Semitic Law Students*, WALL ST. J. (Oct. 15, 2023, 4:30 PM), <https://www.wsj.com/articles/dont-hire-my-anti-semitic-law-students-protests-colleges-universities-jews-palestine-6ad86ad5>.

<sup>28</sup> Erwin Chemerinsky, *Dean's Message: Supporting Our Students*, BERKELEY L. (Oct. 17, 2023), <https://www.law.berkeley.edu/article/deans-message-supporting-our-students/>.

(3) I am most reluctant to speak out on national and world events in a message to the law school community. I can think of only a few instances in my sixteen years as a dean when I have done so. But there are times when silence is the wrong message and that is when I speak out. After the death of George Floyd in May 2020, I sent a message to our community.<sup>29</sup> After January 6, 2021, I did so.<sup>30</sup> And I did this after the Hamas attack on Israel on October 7.<sup>31</sup> In each instance, I tried to focus on what the events meant for our community, as well as tried to recognize the pain of many in our community, to express compassion for those who are suffering, and to convey our (hopefully) shared moral vision.

There are certainly risks in doing so. There is the danger that any message that I send might further divide my community. There is the fear that my message might alienate some of my students and faculty and perhaps alumni as well. That was not a fear for me at Berkeley in the messages sent after the death of George Floyd or after January 6, but I knew that any message I sent after October 7 risked angering some—and it did. But I worried that saying nothing would be worse.

(4) Besides messages to the community, I speak in other forums and express my views. I recognize, of course, that they may be read by those in my law school community as well. I know that there are deans who will not write op-eds or be on social media or sign briefs or petitions. Their view is that there is too great a risk of angering some in the community, including donors. I respect that view, but it is not mine. I write frequent op-eds on legal issues, including very controversial ones. I am a contributing writer to the opinion page of the *Los Angeles Times*, write an every-other-week column for the *Sacramento Bee*, and monthly columns for the *ABA Journal* and the *Daily Journal*, as well as op-eds for other newspapers such as the *New York Times*, the *Washington Post*, and the *San Francisco Chronicle*. I also continue to write books and law review articles that express my views. The title of my most recent books leaves no doubt as to their ideology: *Presumed*

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<sup>29</sup>Erwin Chemerinsky, *Message from Dean Chemerinsky: Our Community at a Very Difficult Time*, BERKELEY L. (May 31, 2020), <https://www.law.berkeley.edu/article/community-5-31-20/>.

<sup>30</sup>Erwin Chemerinsky, *Dean Chemerinsky “in Light of the Unprecedented Assault on Our Democracy and the Rule of Law.”*, BERKELEY L. (Jan. 7, 2021), <https://www.law.berkeley.edu/article/chemerinsky-1-7-21/>.

<sup>31</sup>Erwin Chemerinsky, *supra* note 28.

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*Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights* (2021) and *Worse than Nothing: The Dangerous Fallacy of Originalism* (2022). My newest book, forthcoming in 2024, is titled, *No Democracy Lasts Forever: How the Constitution Endangers the United States*. I know that some will be upset by what I write and thus understand deans who say that they will not say controversial things while holding their administrative positions.

Why have I made a different choice? I believe that law professors should help to educate people about the law and to inform public opinion. As a dean, I think it important that I lead by example. I cannot know what donors I have lost, but I can point to large gifts both at UC Irvine and at UC Berkeley that came from individuals who have read my op-eds over the years and then reached out to me to contribute. I can point to countless examples of conservative alumni who say they disagree with my views but are glad to see the dean of their law school being part of the public debate. Admittedly, I will never know of the gifts that weren't received because of alumni who dislike what I say.

I recognize, of course, that deans and university administrators are in different situations depending on their schools, and I am explaining my choices alone. I have been fortunate to have had chancellors and provosts at both universities where I have been a dean who were very supportive of my expressing my views. Unlike being dean in some state schools, there is not direct legislative oversight of my law school and there are not political tensions surrounding it. I easily can imagine having made different choices at other schools.

On the other hand, I am not now and never have been on any social media, such as X (formerly Twitter), Facebook, or Instagram. I think that may be a generational choice of having begun writing op-eds long before social media and feeling more comfortable with that. I have come to tremendously value having an editor, whether for an op-ed piece or a law review article or a book. There is no editor for what is posted over social media.

I am careful to write only within my areas of expertise, and so most of my op-eds are about the subjects I teach and write about: constitutional law, criminal procedure, and federal courts. I have written a great deal about free speech on campus, including co-authoring a book on the topic and many opinion pieces.

Of all the op-eds that I have written over the years, and I am sure it is in the thousands, the one that produced the most responses—by far—was in late

October 2023 and published in the *Los Angeles Times*.<sup>32</sup> It began, “I am a 70-year-old Jewish man, but never in my life have I seen or felt the antisemitism of the last few weeks.”<sup>33</sup> It described some of what I had experienced in my law school. Someone within the law school posted on Instagram a picture of me with the caption, “Erwin Chemerinsky has taken an indefinite sabbatical from Berkeley Law to join the I.D.F.”<sup>34</sup> Two weeks earlier, at a town hall, a student told me that what would make her feel safe in the law school would be “to get rid of the Zionists.”<sup>35</sup>

The op-ed explained that I was stunned when students across the country, including mine, immediately celebrated the Hamas terrorist attack in Israel on October 7.<sup>36</sup> Students for Justice in Palestine called the terror attack a “historic win” for the “Palestinian resistance.”<sup>37</sup> A Columbia professor called the Hamas massacre “awesome” and a “stunning victory.”<sup>38</sup> A Yale professor tweeted, “It’s been such an extraordinary day,” while calling Israel a “murderous, genocidal settler state.”<sup>39</sup> A Chicago art professor posted a note reading, “Israelis are pigs. Savages. Very very bad people. Irredeemable excrement . . . May they rot in hell.”<sup>40</sup> A UC Davis professor noted that “[Z]ionist journalists . . . have houses w[ith] addresses, kids in school,” and

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<sup>32</sup>Erwin Chemerinsky, *Opinion: Nothing Has Prepared Me for the Antisemitism I See on College Campuses Now*, L.A. TIMES (Oct. 29, 2023, 10:47 AM), <https://www.latimes.com/opinion/story/2023-10-29/antisemitism-college-campus-israel-hamas-palestine>.

<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>NAT’L STUDENTS FOR JUST. IN PALESTINE, DAY OF RESISTANCE TOOLKIT, <https://dw-wp-production.imgix.net/2023/10/DAY-OF-RESISTANCE-TOOLKIT.pdf> (last visited Feb. 18, 2024).

<sup>38</sup>Joseph Massad, *Just Another Battle or the Palestinian War of Liberation?*, ELEC. INTIFADA (Oct. 8, 2023), <https://electronicintifada.net/content/just-another-battle-or-palestinian-war-liberation/38661>.

<sup>39</sup>*Yale Students Call for Professor’s Resignation After Israel-Hamas War Social Media Posts*, NBC CONN. (Oct. 13, 2023, 7:05 PM), <https://www.nbcconnecticut.com/news/local/yale-students-call-for-professors-resignation-after-israel-hamas-war-social-media-posts/3123857/>.

<sup>40</sup>Jackson Walker, *Chicago Art Professor Under Fire for Calling Israelis ‘Irredeemable Excrement’ in Wake of Hamas Invasion*, NAT’L DESK (Oct. 18, 2023, 5:46 PM), <https://thenationaldesk.com/news/americas-news-now/chicago-art-professor-under-fire-for-calling-israelis-irredeemable-excrement-in-wake-of-hamas-invasion-school-institute-mika-tosca-israel-palestine-terrorism-terrorist-middle-east-conflict-chicago-illinois>.

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noted, “they can fear their bosses, but they should fear us more,” before adding emojis of a knife, an axe, and three drops of blood.<sup>41</sup>

I wrote in my op-ed:

There has been enough silence and enough tolerance of antisemitism on college campuses. I call on my fellow university administrators to speak out and denounce the celebrations of Hamas and the blatant antisemitism that is being voiced. Students have the right to say very offensive and even hateful things, but school administrators—deans, presidents and chancellors—have free speech rights too. They must exercise them and take a stand even if it will offend some and subject them to criticism.<sup>42</sup>

I expressed my view that calls for the total elimination of Israel are antisemitic. I wrote:

Of course, criticism of the Israeli government is not antisemitism, any more than criticizing the policies of the United States government is anti-American. I strongly oppose the policies of the Netanyahu government, favor full rights for Palestinians, and believe that there must be a two-state solution. But if you listen to what is being said on college campuses now, some of the loudest voices are not advocating for a change in Israeli policies, but are calling for an end to Israel. . . . An oft-repeated mantra among some is that Israel is a settler colonialist country and should be forced to give the land back to the Palestinians. I have no idea how it would be determined who is rightly entitled to what land, but I do know that calling for the total elimination of Israel is antisemitic.<sup>43</sup>

I received hundreds and hundreds of emails in response. As I mentioned, I am not on social media so saw none of those responses, though have been told they were large. Some responses I received, not surprisingly especially from Jewish students and faculty at my law school and across the country, were very supportive. Some were thoughtful, though often angry

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<sup>41</sup> Jason Bedrick (@JasonBedrick), X (Oct. 9, 2023, 11:06 AM), <https://twitter.com/JasonBedrick/status/1715036789730431299?s=20>.

<sup>42</sup> Erwin Chemerinsky, *supra* note 32.

<sup>43</sup> *Id.*

disagreements, including from students and alumni who criticized me for focusing on antisemitism and not equally on Islamophobia and for calling some student speech antisemitic. Many of these strongly disagreed with my deeming calls for the end of Israel to be antisemitic. Some of the messages were just hateful and ugly.

I agonized for days over whether to write this piece. In the end, I chose to do so because I felt at that moment it was not being said. I felt the need to call out the awfulness of the celebrations of Hamas and to ask administrators to denounce antisemitism. But I knew by doing so I would further alienate a group of my students and alumni who fervently disagree with the views I expressed. Like any dean, I have tried hard to avoid ever doing that. Ultimately, I relied on my guiding principle about when to speak out: what would be the message from my silence? I decided it would be worse, both within my community and externally.

(5) For messages to my community, I always remember that the more messages that I send, the fewer that will be read. I cannot and should not try to speak out about every awful event in the country and the world. I have resisted requests to send messages to the community after prominent, controversial Supreme Court cases, as I have never done so. For messages to the entire law school, I am always focused on what will be best for our community. I am sure I often err in assessing this, but it is my guiding principle on when to speak and what to say.

### *Conclusion*

I think that expectations are changing for when deans and university administrators should speak out. The approach of the Kalven Report in some ways is easiest because it provides a bright line rule: never do so about political, national, or international events. But I think that the events in the months after October 7, 2023 reflect that it is increasingly expected that campus administrators will speak out.

It is impossible to devise clear guidance as for when administrators should and should not speak. There is certainly no consensus among them. So much will depend on the event, the school, and the context. But in this essay, I have tried to explain how I as a dean approach this important topic.