

VII
ANNUAL DINNER REMARKS

By Geoffrey R. Stone
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*The Annual Dinner
of The American Law Institute
was held in the Ritz-Carlton Ballroom,
Washington, DC,
on Tuesday evening, May 17, 2016.
President Roberta Cooper Ramo presided.*

President Ramo: I always remember when I was in practice after a while, in San Antonio, actually, I got a very valuable piece of advice about what to do when somebody was talking on the phone and you really had to go, and they just wouldn't stop.

And a lawyer, a Texas lawyer I am a Texas lawyer, too gave me the best advice. He said, "Well, you should listen politely for a while, and then if you really need to hang up, hang up while you're talking." (*Laughter*) Those Texas lawyers, they know what to do.

So I'm a New Mexico lawyer. I'm just a country lawyer they brought to the big city, and who knows what you end up with. My name is Roberta Ramo. I am thrilled to have everybody here.

We've had a quite remarkable two days, for sure. One of the new members asked me if it was always true that we had a number of Supreme Court Justices, and they all walked around and shook hands with everybody. (*Laughter*)

So when you have the new President, I'm sure that will happen with all of them. I've only been able to get a few of them to do it.

This is a wonderful evening, and we've had a very long and productive and important two days, although at one point I thought, if I were a woman who drank, hmm. (*Laughter*)

But I want to introduce we have so many distinguished people here. But we have two justices from high courts from around the world that I just want to recognize, and if they would stand up, we're so delighted to have you.

We have Justice Gageler from the High Court of Australia and Justice Bart Katureebe, the Chief Justice of Uganda. And if you would stand up, we would love to welcome you both.

(*Guests stood.*) (*Applause*)

President Ramo: And that said, have a wonderful dinner, and we'll speak again shortly.

(Dinner was enjoyed by the group.)

President Ramo: Shh, shh. So we've learned a lot of important lessons. We have a United States Supreme Court Justice walking around saying hello to everybody, and the Dean of Duke Law School just taught me a lesson he learned from Oprah, which was just go "shh" in the microphone, and everybody would be quiet.

I learned another lesson from Oprah. Many, many, many years ago, I was on a board with her, and as a result, they did a wonderful set piece about domestic violence and invited me to come on the show and talk a little bit about it. And this was in the days when there were sort of cassettes being recorded when you were on television.

And I don't know, three or four or five months went by, and somebody at my firm had done this videotape, and it wandered around the firm. And finally, this young male associate walked in one morning, and he said, "Gosh, Roberta," he said, "I finally got the tape, and I saw you on the Oprah show."

And he said, "You looked so fabulous. What did they do to you?" *(Laughter)*

And I said, "You are so fired." *(Laughter)*

I think a lot about what this incredibly legally diverse audience and our wonderful friends and guests would want to hear at dinner after a long day, and the truth is this is a very curious and intellectual group. And I was trying to think about what the issues of the day were that we didn't get really enough time to talk about in the context of our work, and I started worrying about speech in a lot of ways and about what was going on in universities. And I immediately thought of exactly the right person, and that's Professor Geoffrey Stone from the University of Chicago Law School.

You have Geoff's bio, but there are some things that I wanted to say about him and about why, in particular, I wanted us to hear from him today. His proposers into The American Law Institute were Bernie Meltzer and Dan Meltzer. Not bad. I'm surprised that Bernie Meltzer had time to propose you, because he spent so much of his

time writing letters for me when I kept trying to find jobs, and no one would hire me. (*Laughter*) So I'm glad he managed to make a little time for you, Geoff.

Geoff is a well-known scholar, a constitutional scholar. He is, and again, it's a small family, as we've discovered, the Edward Levi Distinguished Service Professor at the University of Chicago. He was law clerk to Justice Brennan. He has served as the dean of my law school not once, but twice.

It wasn't because he didn't do it well the first time, and they gave him another chance. It was quite the reverse. He was the Harry Kalven Distinguished Professor of Law at the University of Chicago earlier.

I guess I should tell you, Geoff, and this is okay. Harry Kalven taught my class torts. For any of you that knew him, he was the most enthusiastic teacher ever. He loved torts, but he loved the Chicago Cubs more. And when he died an untimely, early death, our class made a vow that if the Cubs ever won the World Series, we would donate a million dollars to the law school. (*Laughter*) (*Applause*)

After 30 years, we officially dissolved our promises. (*Laughter*) Because not that we didn't want to come up with the money, but we were kind of thinking maybe we were the curse causing the problem. So that was it.

Geoff has a new book that he's been working on that's coming out next spring titled *Sex and the Constitution* [forthcoming 2017]. He's written many books, many articles. But what I most personally appreciate about him is that in addition to his what most of us might think of as his serious academic work, he writes in the most courageous, clear, and compelling way about many of the issues of our time, where constitutional law and especially our civil rights are colliding with the mores of the society.

And as important as it is to have those scholarly articles, when I see him write about difficult things in the *Chicago Tribune* and the *The Huffington Post*, I often send him an e-mail that says, "Thank you,

Geoff.” Because it’s so important for the great intellects of our time to speak not just in academic circles, but to the general public.

And so let me introduce somebody that I thank very regularly, Professor Geoffrey Stone. (*Applause*)

Professor Geoffrey R. Stone: Thank you, Roberta.

I am very honored to have the opportunity to speak with you this evening. The leadership of ALI at the moment and the future leadership are people I most deeply admire. They’re good friends—Roberta obviously, David Levi, Ricky Revesz. The institution is in very, very good hands, and I am truly delighted to be here.

Roberta asked me if it was okay if I began while they were still serving dessert, and I said to her it was fine as long as you understood that if you make any sound, I will call on you. (*Laughter*) So keep that in mind.

So let me begin at the beginning. Academic freedom is *not* a law of nature. It is not something to be taken for granted. It is, rather, a hard-bought acquisition in a lengthy struggle for academic integrity.

Indeed, until well into the 19th century, real freedom of thought was neither practiced nor even professed in American universities. To the contrary, any real freedom of inquiry or expression in American colleges in this era was smothered by the prevailing doctrine of “doctrinal moralism,” which assumed that the worth of any idea must be judged by what the institution’s leaders thought its moral value to be. Thus, through the first half of the 19th century, American higher education squelched any notion of free discussion or of intellectual curiosity. To cite just one example, as the nation moved toward Civil War, any professor or student in the North who defended slavery, or any professor or student in the South who challenged slavery, could readily be dismissed, disciplined, or expelled.

Between 1870 and 1900, though, there was a genuine revolution in American higher education. With the battle over Darwinism, new academic goals came to be embraced. For the first time, to criticize, as well as to preserve, traditional moral values and understandings

became an accepted function of higher education. By 1892, William Rainey Harper, the first president of the University of Chicago, could boldly assert: “When for any reason the administration of a university attempts to dislodge a professor because of his political or religious sentiments, at that moment the institution has ceased to be a university.”

But despite such sentiments, the battle for academic freedom has been a contentious and a continuing one. In the closing years of the 19th century, for example, businessmen who had accumulated vast industrial wealth began to support universities on an unprecedented scale. But that support was not without strings, and during this era professors who offended wealthy trustees or donors by criticizing the ethics of their business practices were dismissed from such leading universities as Cornell and Stanford.

Then, during World War I, when patriotic zealots persecuted and even prosecuted those who questioned the wisdom or the morality of the war, universities collapsed almost completely in the defense of academic freedom. Students and professors were systematically expelled or fired at such institutions as Columbia and the University of Virginia merely for “encouraging a spirit of indifference towards the war.”

Similar issues, of course, arose again, with a vengeance, during the age of McCarthy. In the late 1940s and 1950s, most universities excluded those even suspected of entertaining Communist sympathies from university life. Yale President Charles Seymour went so far as to boast that “there will be no witch hunts at Yale, because there will be no witches.” (*Laughter*) “We will neither admit nor hire anyone with Communist sympathies.”

We now face a similar set of challenges. We live today in an era of political correctness in which students themselves demand censorship, and colleges and universities, afraid to offend their students, too often surrender academic freedom to charges of offense.

To give just a few examples, several colleges and universities, including Brown, Johns Hopkins, and Williams, have withdrawn speaker invitations because of student objections to the views of the invited speakers, Northwestern University recently subjected a professor to a sustained sexual-harassment investigation for publishing an essay in *The Chronicle of Higher Education* criticizing Northwestern's sexual-harassment investigations, Colorado College suspended a student for making a joke that mocked feminism, William & Mary, DePaul University, and the University of Colorado all disciplined students for criticizing their affirmative-action programs, and the University of Kansas disciplined a professor for condemning the National Rifle Association.

At Wesleyan University, after the school newspaper published a student op-ed criticizing the Black Lives Matter movement, other students demanded that the University defund the school paper, at Amherst College, students demanded that the administration remove posters stating that "All Lives Matter," at Emory University, students demanded that the university punish other students who had chalked "Trump in 2016" on the university's sidewalks because, in their words, a university is "supposed to be a safe place and this made us feel unsafe." With good reason. (*Laughter*) And at Harvard, African American students demanded that a professor be taken to the woodshed for stating in class that he would be "lynched" if he gave a closed-book examination.

The latter is an example of so-called micro-aggressions—words or phrases that may make students uncomfortable or may make them feel "unsafe." Saying "off the reservation" has been deemed a micro-aggression to Native Americans, saying "America is a melting pot" has been deemed a micro-aggression to new immigrants, and saying "As a woman, I know what you must go through as a racial minority" has been deemed a micro-aggression to racial minorities. Such micro-aggressions, whether used by faculty or students, have been deemed punishable by colleges and universities across the nation. A recent survey revealed that 72 percent of current college students support disciplinary action against any student or faculty member who express-

es views they deem to be “racist, sexist, homophobic, or otherwise offensive.”

Another recent invention is the so-called “trigger warning.” A trigger warning is a requirement that before professors assign readings or hold classes that cover subjects that might make some students feel uncomfortable, they must warn students in advance that the readings or the class will deal with such sensitive topics as rape, affirmative action, abortion, murder, slavery, the Holocaust, religion, homosexuality, or immigration. The idea is that students who would be upset can then avoid having to deal with such emotionally fraught material by not doing the reading or not attending class.

So, where did all this come from? It was not too long ago when college students were demanding the right to freedom of speech. Now, they demand the right to be free from speech that they find to be offensive, upsetting, or emotionally disturbing. The current phenomenon is based on the assumption that students should not be made to feel uncomfortable or unsafe.

One often-expressed theory is that this has happened because students of this generation, unlike their predecessors, are weak, fragile, and emotionally unstable. The explanation is that this generation of young adults has been raised by so-called “helicopter parents,” who have protected, rewarded, and celebrated them in every way from the time they were infants. They have, therefore, never learned to deal with challenge, defeat, uncertainty, anxiety, stress, insult, or fear.

On this view, this generation of college students is, in fact, emotionally incapable of dealing with this challenge. But if this is so, then the proper role of a university is not to protect and pamper them, but to prepare them for the challenges of the real world. The goal should not be to shield our students from discomfort, insult, and insecurity, but to enable them to be effective citizens of the world. On this view, if their parents have, indeed, failed them in this way, then their colleges and universities should save them from themselves.

Now there is, however, another possibility. It is that students, or at least some students, have always felt this way, but until now they were too intimidated or too shy or too deferential to speak up. On this view of the matter, this generation of college students deserves credit, because instead of remaining silent and oppressed, they have the courage to demand respect, equality, and safety.

My own view, for what it's worth, is that there is an element of truth in both of these perspectives, but I'm inclined to think that the former view explains more of the current reality than the latter.

Faced with these ongoing challenges to academic freedom at American universities, University of Chicago President Robert Zimmer charged a faculty committee last year with the task of drafting a formal statement for the University of Chicago on Freedom of Expression. The goal of that committee, which I chaired, was to stake out the University of Chicago's position on these questions. The Committee consisted of seven very distinguished faculty members from across the institution. And after broad consultation, both inside and outside the university, we produced a brief, three-page Report. At the risk of being self-indulgent, I want to read you some excerpts from that Report.

Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. Of course, the ideas of different members of the University community will often and quite naturally conflict. But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.

Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas,

however offensive or disagreeable those ideas may be to some members of our community.

The freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, wherever they wish. The University may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the core functioning of the University. But these are narrow exceptions to the general principle of freedom of expression, and it is vitally important that these exceptions never be used in a manner that is inconsistent with the University's commitment to a completely free and open discussion of ideas.

In a word, the University's fundamental commitment is to the principle that robust debate and deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose. Indeed, fostering the ability of members of the University community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University's educational mission.

As a corollary to the University's commitment to protect and promote free expression, members of the University community must also act in conformity with the principle of free expression. Although members of the University are free to criticize and contest the views expressed on campus,

and to criticize and contest speakers who are invited to express their views on campus, they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe. To this end, the University has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it. As University of Chicago President William Rainey Harper observed 125 years ago, without a vibrant commitment to free and open inquiry, a university ceases to be a university.

Now when we wrote this Report, we were thinking only of the University of Chicago, and indeed, I spared you the first five or so paragraphs, which dealt with the history of our University with respect to issues of free speech. To our surprise, the Report has had a national and even international impact. Indeed, I'm pleased to say that the Report has since been adopted by a broad range of other universities, including, for example, such diverse institutions as Princeton, Purdue, Johns Hopkins, American University, the University of Wisconsin, and Louisiana State University, among others. What they've figured out is they could simply lop off the paragraphs about the University of Chicago. (*Laughter*) And they had this really nice statement that they chose to adopt.

Okay. So now that I've finished congratulating myself, let me elaborate just a bit. So why should a university take the position that members of the university community must be free to advance any and all ideas, however offensive, obnoxious, and wrongheaded they might seem? For lawyers, the reasons are familiar.

For one thing, we have learned from bitter experience that even the ideas that we hold to be most certain might in fact turn out to be wrong. As confident as we might be in our own wisdom, experience teaches that certainty is different from truth. And again, as lawyers, we see this all the time.

Second, history teaches that the suppression of speech invites the suppression of speech. If today I am permitted to silence those whose

views that I find distasteful, I have then opened the door to allow others down the road to silence me. The neutral principle of no suppression of ideas protects us all, and particularly for the minority groups, who are most avid about censoring speech today, the long run would bode ill for them if they were to succeed.

Third, a central precept of free expression is, of course, the concern with chilling effect. That problem is especially acute today because of the effects of social media. It used to be the case that students and faculty members were generally willing to take controversial positions because the risks to them were relatively modest. After all, one could say something provocative or even offensive, and the statement soon disappeared from view. But in a world of social media, where every comment that one makes can be circulated to the world and can be called up by prospective employers or graduate schools or neighbors with the mere click of a button, the potential costs of speaking courageously—of taking controversial positions, of taking risks—are greater than ever before. Indeed, according to a recent survey, 65 percent of all college students now say that it is unsafe for them to express unpopular views, and this clearly has an effect on faculty as well. In this setting, it is especially important for universities to stand up for free expression.

So, how should this work in practice? Should students be allowed to express whatever views they want—however offensive they might be to others? Yes. Absolutely. Should those who disagree and who are offended by the views and speech of others be allowed to condemn that speech and those speakers in the most vehement terms? Yes. Absolutely. Should those who are offended and who disagree be allowed to demand that the university punish those who have offended them? Yes. Absolutely. Should the university punish those whose speech annoys, offends, and insults others? Absolutely not. That is the core meaning. (*Applause*) That is the core meaning of academic freedom.

But what then should a university do? Well, a university should educate its students about the importance of civility and mutual

respect. These are core values for students, for professors, for citizens, and even for lawyers. But these are values that should be reinforced by education and by example, not by censorship. In addition, a university should encourage disagreement, argument, and debate. It should instill in its students and faculty the importance of winning the day by facts, by ideas, and by persuasion, rather than by force, disruption, obstruction, or censorship.

The bottom line is this: For a university to fulfill its most fundamental mission, it must be a SAFE SPACE for even the most loathsome, odious, offensive, disloyal, arguments. Students should be encouraged to be tough, fearless, rigorous, and effective advocates and critics.

At the same time, though, a university has to recognize that, in our society being as flawed as it is, the costs of free speech will often fall most heavily on those groups and individuals who feel the most marginalized, unwelcomed, and disrespected.

All of us feel that way sometimes, of course, but in our often unjust society, the individuals who most often bear the brunt of free speech—or at least of certain types of free speech—tend to be racial minorities; religious minorities; women; gays, lesbians, and transsexuals; immigrants; and so on. Universities must be sensitive to this reality. Even if they cannot “solve” this problem by censorship, this does not mean that they can’t take other steps to address the special challenges faced by groups and individuals who are most often made to feel unwelcome and undervalued by others.

Universities should take this challenge seriously. They should support students who feel vulnerable, marginalized, silenced, and demeaned. They should help those students learn how to speak up, how to respond effectively, how to challenge those whose attitudes, whose words, and whose beliefs offend, appall, and outrage them. This is a core responsibility of universities, for the world is not a safe space, and it is our job to enable our graduates to win the battles they will need to fight in the years and decades to come. This is not a challenge that universities can or should ignore.

Now having said all of this, I don't mean to suggest that there aren't hard cases. As you all well know, as simple as it may be to state a principle, it is always much more difficult to apply that principle to concrete situations. So, being a law professor, let me leave you with just a couple of hypotheticals for you to mull over on your own.

First, suppose a sociology professor gives a talk on campus condemning homosexuality as immoral and diseased and calling on "normal" students to steer clear of fags, perverts, and sexual degenerates? What, if anything, should the Chair of the Sociology Department do in that situation?

Second, suppose a student hangs a Confederate flag, a swastika, an image of an aborted fetus, or a "vote for Trump" sign on the door to his dorm room. (*Laughter*) What, if anything, should the Resident Head do?

Or third, suppose the dean of a university's law school goes on Fox News and says "Abortion is murder. We should fire any woman faculty member and expel any woman student who has had an abortion." The president of the university is then inundated with complaints from alumni saying, in effect, "I will never give another nickel to your damn school as long as she remains dean of the law school." What, if anything, should the president of the university do in that situation?

As these hypotheticals suggest, there are, in fact, interesting and difficult cases. But we should not let the existence of marginal cases obscure the clarity of our core commitment to academic freedom. That commitment is now seriously and dangerously under attack, and it threatens not only our universities, but also our democracy. It will be interesting to see whether our universities have the courage, the integrity, and the fortitude to be true universities. It remains to be seen.

Thank you. (*Applause*)

President Ramo: Well, Geoff, thank you. That was an enormously important address for all of us to hear. Now the professor has

agreed that he would take a few questions from the students. (*Laughter*) So if you would like to ask a question, raise your hand, and then let's get a microphone. There is a professor from NYU—I can't remember his name.

Director Revesz: Geoff, that was a wonderful talk. We're very grateful. We were discussing at our table that it would be great to get your answers to the three hypotheticals that you gave at the end. (*Laughter*)

Professor Stone: Fair enough. So the first one is about the hypothetical sociology professor who makes the homophobic statements. What I would say is that that professor is within his rights to make that statement. There are, of course, people historically who have held this view, and Justices of the Supreme Court have acknowledged that people have held this view throughout history. Although I might find that view reprehensible, the professor is within his rights to make that argument and to let people respond to it.

The second hypothetical is the dorm-room situation. A residence hall is distinctive, because it's a kind of captive audience for the students who live there. Every time they move out into the hallway, they will see these potentially troubling or offensive messages. In such circumstance, I think the university can make neutral time, place, and manner regulations to deal with the concern. It can have a rule providing that no signs, no flags, can be displayed on dorm-room doors. But it should not be allowed to make distinctions among those messages. It should not be able to pick-and-choose which messages are permitted and which are forbidden, because there is no principled way for a university to do that.

The third hypothetical is about the dean. I actually faced this issue myself when I first became Dean of the University of Chicago Law School back in 1987. Robert Bork, one of our alums, had been nominated to the Supreme Court. The press was very interested in what I, as dean of his law school, thought about Robert Bork. I figured out very quickly that I should keep my mouth shut, because whatever views I had, it was not appropriate for me to say things that I knew

would alienate alumni and would lead them to say, "I'll never give another nickel to that damn school as long as that Stone is dean."

And so I think there are positions that individuals hold within universities where they have a responsibility, not as professors, but as deans, as department chairs, as heads of development, etc., to fulfill those responsibilities in a way that doesn't damage the institution. I would therefore say that the dean of a law school has to exercise judgment in that respect and can be dismissed from the position if she makes herself ineffective as the dean.

President Ramo: So, Geoff, before I let somebody else ask a question, what I don't know is what obligations, especially for under-graduates, a university has, not just to respond to these things, but what do you do to try to teach students? You talked about civility, integrity. These are things we talk about all the time in the ALI.

But what is the teaching role of the university, and how do you make that happen so that somebody who comes to you leaves at least understanding? Because our country won't work if the kind of rhetoric that we're hearing now, in political life, becomes the everyday rhetoric of political life or anything else. So what do you do?

Professor Stone: Colleges and universities up to now have been relatively passive about this. That is, the culture of most colleges and universities does, in fact, exemplify a degree of civility and mutual respect and tries to illustrate and exemplify those values in its teaching, its intellectual discourse, and in its interactions with students. But I think now we need to be more self conscious about all this. In light of current issues and controversies, I think we now have to think harder about all this. For example, we might now add into the orientation process for new students more explicit discussions of the obligations of civility, mutual respect, and the need to tolerate even free speech we despise. We should also be more self conscious about empowering students to respond effectively to the expression of views that they oppose.

President Ramo: Thank you. Questions? Let's see, right over there, right in the middle next to Stephanie, if that's helpful for the microphone.

Unidentified Speaker: I don't know that I need a microphone.
(*Laughter*)

President Ramo: Well, you don't need a ladder, that's for sure.

Unidentified Speaker: There's one coming. So one of the questions I have is about the issue of freedom of speech. And one of the questions that I would ask you to address to many people who are from marginalized communities is that it appears that the idea of the principle of the protection of freedom of speech oftentimes works on the concept of the normalization of bias against marginalized groups.

So it seems, sometimes, that the balance is always to allow for individuals to speak who may be critical of the history of, or the perspective of, marginalized individuals. And so how do you address the fact that oftentimes what's often being used to protect free speech are speakers who are actually talking about marginalized minorities or our gay communities or transgender communities, and oftentimes you don't have that same invocation of that protection for individuals who are speaking from a different perspective.

And I think, as someone from a minority community, that's often what I hear from minority students about how this principle is often used to protect people who are saying incredibly offensive things about minority groups.

Professor Stone: Well, the principle does protect people who say offensive things about anything, including, of course, minority groups. And as I recognized toward the tail end of my talk, I think there is a problem about lack of equality of opportunity, lack of equality of voice. It is important to remember, though, that in colleges and universities in the United States, which are fundamentally dominated by liberal views, this problem is much less serious than it is in the real world. Nonetheless, we do need to make sure that those individuals who feel vulnerable and who feel marginalized are prepared not only

to cope effectively with the environment of a university, but also with the much more hostile environment of the real world. I think the best way to do that is to teach our students how to respond to ugliness when they confront it.

This is not a nice way of putting the point, but our goal should not be to encourage our students to think that whenever they confront sexism, homophobia, racism, religious hostility, and the like that the proper response for them is “go running to mommy” for protection. The plain and simple fact is that there is no “mommy” in the real world, and the university does not do its job if it fails to prepare our graduates to go out into the ugliness of the real world and deal with it effectively. That’s the critical part of what we have to do. (*Applause*)

President Ramo: Let’s take one last question, or we have two people. Hold on. All right. So we’re going to take quickly all the way in the back. I’m sorry. I can’t see who you are.

We’re going to take someone at that table. I’m sorry. I can’t see who you are. Yes, you.

And then we’re going to take Justice Liu over here. Okay. And that will be it. Go ahead.

Ms. Theresa Amato (DC): Thank you. Thank you. I’m a native Chicagoan and now of Washington, D.C.

Professor Stone, if we move from hypothetical to reality of recent news, President Drew Faust of Harvard University just announced a policy about not putting Harvard’s imprimatur on students who belong to single-sex clubs. Would you like to comment on that?

Professor Stone: Well, first of all, it’s not a free-speech issue, as such. I’m puzzled a bit by it. As I understand it, these single-sex clubs are outside the university. They are independent organizations. A university should be cautious about disadvantaging students for doing things that are not actually part of the university itself. Having said that, though, I haven’t thought about this carefully enough. I don’t know exactly what rationale Drew Faust has for this policy. So I don’t feel comfortable commenting on this issue beyond saying that I would

be cautious about interfering with what students do outside the domain of the university itself.

President Ramo: Right in the middle, yes. (*Applause*) No, I'm sorry.

Unidentified Speaker: As one of your former students, it's great to have a chance to ask you a question. (*Laughter*) I'd like you to address the Title—as you know, Title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.] requires universities to provide an environment that's free of harassment. And this is, of course, of particular concern to minority groups and religious groups. And if you could address what's going on in the college campuses and where free speech crosses a line to harassment.

I'm particularly thinking of things like outsiders coming onto the campus and yelling “Intifada, Intifada,” which is calling for the murder of Jews. Actually saying, “Zionists out of CUNY,” “Jews to the gas.” This has been going on at quite a few universities, and I would hope you could address that. Thank you.

Professor Stone: So what do *you* think about that? (*Laughter*) (*Applause*)

Unidentified Speaker: I think it's harassment and that the university does have a responsibility to deal with it appropriately, including disciplining students that call for the murder of another group.

Professor Stone: One has to be careful about “call for the murder of another group.” What's rhetoric, what's real, right? As the Supreme Court said [in *Cohen v. California*, 403 U.S. 15, 25-26 (1971)], “Fuck the Draft” is protected because it's a powerful way of conveying the depth of one's convictions and one's emotions. And I think one has to be careful about treating hyperbole as something other than hyperbole. So, I am reluctant to punish people for saying things that shouldn't be taken seriously. They may be offensive, and I certainly understand that. They may even be hateful. But they shouldn't be taken as seriously as some people might want to take such

statements, unless they are clearly and unequivocally intended and understood as genuine threats.

President Ramo: Thank you. Last question. Goodwin.

Justice Goodwin Liu (CA): So the campus-speech issue has been with us for many years, a couple of decades at least. And although there are hard cases, there is a sort of principled position because it's a university, because of academic freedom, and you lay out the very cogent case for your position.

I'm wondering, you have also had an experience on the review group for the surveillance apparatus of the United States. And I wonder if you could tell us a little bit about your experience with that and the balancing of free speech and association and associated values of privacy versus what I think presents some even harder cases with respect to countervailing values of national security.

Professor Stone: What Goodwin is referring to is that after the Edward Snowden disclosures, President Obama appointed a five-member Review Group, including myself, to make recommendations to the President and to the Congress about the various NSA [National Security Agency] surveillance programs and how they might be reformed or modified to improve them.

What did I learn from that experience? One thing that surprised me had to do with the NSA itself. I came into this process very skeptical about the NSA. As a long-time civil libertarian, I approached this assignment with the preconception that the NSA had run amok and that these programs were both unnecessary and unwarranted.

I came away with a very different perspective. I came away with the sense that the NSA, in fact, is a careful and thoughtful organization that did not exercise any authority that had not been given to it explicitly by Congress, by the executive branch, and by the Foreign Intelligence Surveillance Court. In the end, I came away with the understanding that the biggest problem was that, although these programs were well motivated and, in varying degrees, useful in protecting the nation, what was lacking was a careful sense of how to

construct them in a way that preserved their value in terms of protecting the national security, while at the same time making sure that they didn't *unnecessarily* intrude on legitimate privacy and civil-liberties interests. Most of our recommendations, several of which were enacted into law in the USA FREEDOM Act [of 2015, Pub. L. No. 114-23, 129 Stat. 268], were designed to address those concerns by refining and tightening both the processes and the oversight mechanisms.

I would also say that I came away from that experience with much more respect for the individuals who live and work in the intelligence community than I would have expected. I came to understand a story that Jim Baker told after 9/11, which I had read and was intrigued by when I read it, but came to understand much better once I entered that strange world of foreign intelligence.

Baker said that keeping the nation safe after 9/11 was a bit like being a goalie in a soccer game in which, if the other team scored a goal, 3000 people would die. In this game, the other players were invisible, the ball was invisible, and the only way you could prevent a goal was by watching every single piece of grass and figuring out from the movements of the grass where the ball was and where the opposing players were. Once I found myself inside that world, I discovered how apt that analogy actually was. So, in the end, I came away from the experience with a sense that a lot of work can be done to make the programs better, but that, at their core, these programs and, even more important, these public officials were safeguarding our nation and our people in a most fundamental manner.

President Ramo: Thank you, Geoff.

Professor Stone: My pleasure. Thank you. (*Applause*)

President Ramo: Let me just say to those of us who are lucky enough to be in this room and hear such thoughtful thoughts about the most difficult issues of our times and hear important questions and know that our own culture is one of inquiry and civility and trying to find out what the facts are and balancing interests of many different

sides, that I hope when we leave this room, each of us understands that our responsibility is to teach everyone around us about these issues, as we have teachable moments.

Because there aren't enough of us brave enough to stop the car in our carpools and the talk around dinner tables and sometimes in our places where we work to say, "Let's talk this through. Do you really want to go down that road?" At least so that we have the conversation.

I don't think it's just universities that have the obligation to do that, Geoff. I think those of us who are lucky enough to be in the position we are all in need to do that as well.

Now having said that, we start tomorrow morning at 9:00 a.m. with Sentencing. (*Laughter*) An easy topic. And I expect you all to be there right on time and well prepared with the questions that Bennett would ask.

Thank you. (*Applause*)