

# BDS AS A THREAT TO ACADEMIC FREEDOM AND CAMPUS FREE SPEECH IN THE UNITED STATES

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This article considers the impact that the anti-Israel Boycott, Divestment, and Sanctions (BDS) movement has had on academic freedom and freedom of expression in the American academy. Focusing on campaigns to boycott Israeli academic institutions; attempts at disrupting Israel-related speaking events; and actions that impede the ability of Jewish students to freely express their Zionist identities, the article examines the most significant ways that BDS-related activism undermines and threatens to erode well-established notions of academic freedom and free speech on a growing number of US college and university campuses. Legal avenues that are increasingly being pursued to address campus antisemitism, including the filing of complaints with the US Department of Education alleging discrimination under Title VI of the Civil Rights Act of 1964, are also analyzed. While most BDS-related advocacy is lawful, protected by the First Amendment and by institutional rules and norms regarding freedom of expression, the article underscores that protected speech can also be deeply hurtful and offensive to its intended targets and can weaken the diverse, inclusive, and intellectually robust environments that universities strive to create. The article concludes by highlighting the positive efforts being undertaken by a growing number of university leaders to address anti-Jewish intolerance and to improve the climate on campus for all students.

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## INTRODUCTION

This article focuses on the campus *Boycott, Divestment, and Sanctions* (BDS) movement, its guidelines for the academic and cultural boycott of Israel, and its impact on free speech and academic freedom on American university and college campuses. BDS-related activism presents unique challenges for administrators and faculty members who strive to create an inclusive and welcoming learning environment on campus while upholding principles of free speech, academic freedom and open inquiry. These bedrock principles of the academy are undermined by actions carried out in the name of BDS, including disruptions and shout downs of Israeli speakers, campaigns to boycott and shutter study abroad programs and other types of inter-university scholarly exchange, and efforts to prevent students from freely expressing their Jewish and Zionist identities and from participating fully in campus life.

On American public university campuses, the First Amendment to the US Constitution guarantees to students and faculty members the right to express themselves on a broad range of matters. At most private colleges and universities, institutional policies and rules generally afford similarly broad expressive rights. But while a great deal of anti-Israel expression on contemporary American campuses is legally or institutionally protected by the right to freedom of speech, that does not render the speech harmless. Protected speech can be deeply hurtful and offensive to its intended targets, undermining the diverse, inclusive and welcoming learning environments that universities seek to foster. This is as equally true of speech that is racist, sexist, or homophobic, for example, as it is of antisemitic speech. In such instances, university leaders may exercise their own free speech rights to condemn hateful speech. Moreover, while much anti-Israel and anti-Jewish speech is constitutionally protected, discriminatory speech that is so severe and persistent that it amounts to harassment under federal antidiscrimination law may lose its legal protections.

Part I of this article offers a brief overview of BDS and the campus anti-Israel movement in the US. Part II examines several of the most significant ways in which BDS activism today is undermining academic freedom, campus free expression, and open inquiry. This article first will focus on recent efforts by BDS-allied scholar-activists in the US to promote the boycott of Israeli academic institutions, including on their own university campuses. This article next will look at recent attempts, primarily by anti-

Zionist student groups, to heckle, disrupt, and even shout down invited guest speakers who are perceived to be supportive of Israel. Finally, this article will discuss a disturbing trend evident on a growing number of campuses, namely efforts to shun and exclude Jewish students from participating fully in campus student life activities on account of their professed Zionist beliefs or positive identification with Israel.

Part III discusses one avenue that is increasingly being pursued in an effort to remedy the growing intolerance toward Jewish and pro-Israel students—the filing of administrative complaints alleging violations of Title VI of the Civil Rights Act of 1964. The article addresses, in this context, former President Donald Trump’s Executive Order on Combating Antisemitism (EO 13899, December 2019) and considers its possible impact on the campus climate for Jewish and Zionist students. This article concludes, in Part IV, by highlighting two positive trends in terms of the health of the campus. First, universities increasingly are recognizing the value of adopting or strengthening mandatory antisemitism awareness training and educational programs for both their students and staff. Second, university leaders increasingly are exercising their own free speech rights not only to reject the adoption of BDS resolutions but also to call out and condemn BDS as an intolerant stance that is inimical to the academy’s mission and values.

## I. THE BDS MOVEMENT

The BDS movement campaigns for an academic, cultural, and economic boycott of Israel with the goal of effecting change in Israeli government policy through boycotting, divesting, and sanctioning Israeli institutions.<sup>2</sup> In terms of campus activism, BDS proponents maintain that boycott, and in particular the academic boycott of Israel, is an expression of nonviolence which is meant to address the injustice and inequalities that Palestinians face. Despite its claim to be a movement for social justice, however, the BDS movement does not advocate for coexistence, peace building, or even dialogue with Israeli academics or Israel’s American-

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2. See BDS MOVEMENT, <https://bdsmovement.net/> (last visited Feb. 13, 2021); see generally Ali Abunimah, *THE BATTLE FOR JUSTICE IN PALESTINE* (2014); see generally Omar Barghouti, *BDS: BOYCOTT, DIVESTMENT, SANCTIONS: THE GLOBAL STRUGGLE FOR PALESTINIAN RIGHTS* (2011); see also Tom Pessah, *BDS: A Diverse Movement in Support of Human Rights*, in *SOCIAL JUSTICE AND ISRAEL/PALESTINE: FOUNDATIONAL AND CONTEMPORARY DEBATES* 237–46 (Aaron J. Hahn Tapper & Mira Sucharov eds., 2019).

Jewish supporters on campus. BDS activists on campus typically compromise educational goals by turning the complex and intractable Israeli-Palestinian conflict into a caricature that singles out one side for blame and establishes a false binary of oppressor versus oppressed.<sup>3</sup> While many well-meaning students, faculty, and staff gravitate to BDS believing that it offers a means for advancing Palestinian rights and peace in the Middle East, the reality is that the movement brings a reactionary and fundamentally illiberal discourse to campus. In demonizing and delegitimizing Israel, BDS is widely regarded as adopting antisemitic tactics and methods while opposing the very existence of a Jewish state and denigrating the identity of Jews, the vast majority of whom self-define as Zionists.<sup>4</sup>

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3. Andrew Pessin & Doron S. Ben-Atar, *Introduction and Overview: The Silencing*, in *ANTI-ZIONISM ON CAMPUS: THE UNIVERSITY, FREE SPEECH, AND BDS* 1–40 (Andrew Pessin & Doron S. Ben-Atar eds., 2018).

4. In May 2019, the German Bundestag passed with a large majority a resolution denouncing BDS for its “pattern of argument” and tactics reminiscent of Nazi-era calls to boycott Jews. Katrin Bennhold, *German Parliament Deems B.D.S. Movement Anti-Semitic*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/world/europe/germany-bds-anti-semitic.html>. In the United States, some thirty states currently have laws, executive orders or resolutions that discourage or ban state funding for those affiliated with the BDS movement. Here, the key distinction is between advocacy of boycotts (speech) and participating in them (action). See *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/anti-bds-legislation> (last visited Mar. 14, 2021). In November 2020, the United States government formally designated the global anti-Israel boycott movement as antisemitic with US Secretary of State Mike Pompeo stating that it would withdraw support from organizations and entities engaging in hateful BDS conduct. See Lahav Harkov, *Pompeo: US to Recognize BDS Movement as Antisemitic*, JERUSALEM POST (Nov. 19, 2020), <https://www.jpost.com/breaking-news/pompeo-us-to-withdraw-funding-from-groups-with-ties-to-cancer-bds-649581>. In a recent poll commissioned by the American Jewish Committee, 80 percent of Jewish respondents viewed BDS as being either antisemitic or as having antisemitic supporters, and 85 percent agreed that the statement “Israel has no right to exist” is antisemitic. Among the general public, 74 percent of respondents viewed the anti-Zionist platform of BDS as antisemitic. Armin Rosen, *Anti-Semitism in America*, TABLET (Nov. 1, 2020), <https://www.tabletmag.com/sections/news/articles/anti-semitism-ajc-report>. See also Daniel Schwammenthal, *BDS is Antisemitic*, NEW EUR. (Sept. 23, 2019), <https://www.ajc.org/news/bds-is-antisemitic>; see also *BDS: The Global Campaign to Delegitimize Israel*, ADL, <https://www.adl.org/resources/backgrounders/bds-the-global-campaign-to-delegitimize-israel> (last visited Mar. 10, 2021); see also David Hirsh, *Boycott, Divestment, and Sanctions (BDS) and Antisemitism*, ACAD. ENGAGEMENT NETWORK (Dec.

The BDS movement was launched in September 2001, just before the attacks of 9/11, at the *United Nations World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance* (WCAR) held in Durban, South Africa. There, radical anti-Israel groups hijacked a meeting aimed at creating a global front against racism and intolerance and reoriented its focus into a concerted attack against Israel. An associated forum of non-governmental organizations (NGOs) developed a global campaign to brand Israel as an heir to apartheid-era South Africa. These NGOs condemned Israel for alleged war crimes, ethnic cleansing, apartheid, and genocide. The demand was for Israel's "complete international isolation."

This platform and the mechanisms for boycott were in place years before the *Palestinian Campaign for the Academic and Cultural Boycott of Israel* (PACBI) was initiated in 2004.<sup>5</sup> Nevertheless, today, many BDS leaders and activists maintain that the movement originated not in Durban but in the subsequent call from Palestinian civil society organizations. By obfuscating the movement's true origins, the BDS movement seeks to blur any connection between it and the 2001 Durban meeting, from which the U.S. walked out in protest.<sup>6</sup>

BDS is a perspective that negates the importance of Israel as a refuge and a haven for the Jewish people, excludes Israel's remarkable achievements as a post-colonial nation after independence, ignores its relative successes integrating waves of multi-ethnic and multi-racial elements over seventy years, and neglects Israel's own efforts at peace. Moreover, because of the BDS movement's rigid policy of "anti-normalization," Israel is cast as uniquely malevolent and criminal among

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2016), <http://academicengagement.org/wp-content/uploads/2019/09/David-Hirsh-pamphlet.pdf>.

5. *Palestinian Campaign for the Academic and Cultural Boycott of Israel*, BDS, <https://bdsmovement.net/pacbi#:~:text=The%20Palestinian%20Campaign%20for%20the,Palestinian%20freedom%2C%20justice%20and%20equality> (last visited Feb. 4, 2021).

6. Rachel Fish, *BDS: Binaries, Divisions, Silencing*, in *SOCIAL JUSTICE AND ISRAEL/PALESTINE: FOUNDATIONAL AND CONTEMPORARY DEBATES* 247, 247–49 (Aaron J. Hahn Tapper & Mira Sucharov eds., 2019). Alex Joffe, *Why the Origins of the BDS Movement Matter*, *TIMES ISR.* (Aug. 31, 2016), <https://blogs.timesofisrael.com/why-the-origins-of-the-bds-movement-matter/>. William A. Jacobson, *The REAL History of the BDS Movement*, *LEGAL INSURRECTION* (Dec. 18, 2016), <https://legalinsurrection.com/2016/12/the-real-history-of-the-bds-movement/>.

the nations of the world, and thus any and all attempts at mutual understanding are to be avoided.<sup>7</sup>

## II. THE IMPACT OF BDS ON THE CAMPUS CLIMATE

### a. Academic Boycotts of Israel

Endorsing the academic boycott of Israel means rejecting events, activities and projects involving Israeli academic institutions (even those that promote dialogue and coexistence); opposing study abroad in Israel and other types of inter-university collaborative projects and exchanges; and refusing to write for Israeli journals, or to attend conferences there.

The Palestinian Campaign for the Academic and Cultural Boycott of Israel (PACBI), an international umbrella organization which coordinates certain activities of the BDS movement, has published an extensive list of guidelines<sup>8</sup> for implementing the academic boycott. The guidelines are remarkably broad in application, urging signatories to “boycott and/or work towards the cancellation or annulment of events, activities, agreements, or projects involving Israeli academic institutions or that otherwise promote the normalization of Israel in the global academy, whitewash Israel’s violations of international law and Palestinian rights, or violate the BDS guidelines.”<sup>9</sup>

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7. Steven Salaita, *A Moral Case Against Normalisation with Israel*, NEW ARAB (Aug. 31, 2017), <https://english.alaraby.co.uk/english/comment/2017/8/31/a-moral-case-against-normalisation-with-israel>. For critiques, see Miriam F. Elman, *BDS ‘Anti-Normalization’ Is a Mockery of Progressive Values*, ALGEMEINER (July 1, 2019), <https://www.algemeiner.com/2019/07/01/bds-anti-normalization-is-a-mockery-of-progressive-values/>; see also Asaf Romirowsky & Alexander H. Joffe, *The Anti-Israel Movement’s ‘Anti-Normalization’ Campaign*, NAT’L POST (Aug. 3, 2016), <https://nationalpost.com/opinion/the-anti-israel-movements-anti-normalization-campaign>; see also Joel Braunold & Huda Abuarquob, *A Bigger Threat than BDS: Anti-Normalization*, HAARETZ (July 2, 2015), <https://www.haaretz.com/jewish/.premium-worse-than-bds-anti-normalization-1.5374940>.

8. *PACBI Guidelines for the International Academic Boycott of Israel*, BDS (July 9, 2014), <https://bdsmovement.net/pacbi/academic-boycott-guidelines> [hereinafter *PACBI Guidelines*]. The PACBI Guidelines have been endorsed by the U.S. Campaign for the Academic and Cultural Boycott of Israel (USACBI). See *PACBI Guidelines for the International Academic Boycott of Israel*, US CAMPAIGN FOR ACAD. & CULTURAL BOYCOTT ISR., <https://usacbi.org/guidelines-for-applying-the-international-academic-boycott-of-israel/> (last updated July 31, 2014).

9. *PACBI Guidelines*, *supra* note 8.

At the same time, the guidelines are quite specific in the actual demands they make of those who pledge their support for them.<sup>10</sup> Faculty members and professional associations that endorse the academic boycott of Israel are encouraged to carry out a number of actions *on their own university and college campuses* in order to comply with the PACBI guidelines. These include: boycotting their own university's study abroad or exchange programs in Israel; refusing to publicize such programs among their students; refusing to write letters of recommendation for students wishing to study in Israel; attempting to shut down collaborative research between scholars at their own university and those in Israel; and boycotting academic programs or projects organized by students or faculty at their own university that "bring together Palestinians/Arabs and Israelis so that they can present their respective narratives or perspectives, or to work toward reconciliation" or that promote "co-existence."<sup>11</sup>

Consequently, irrespective of their views about Israel or the Israeli-Palestinian conflict, US-based scholars who pledge support for the academic boycott of Israel are, in effect, endorsing a campaign that not only targets Israeli universities for harm but also compromises educational opportunities for students and undermines the academic freedom of faculty.<sup>12</sup>

Consider by way of example a "Boycott Israel Resolution" presented in summer 2019 at the *Society for the Study of Social Problems (SSSP)*, a professional association comprised mainly of sociologists.<sup>13</sup> The resolution, had it passed, would have obliged each and every member of the Society to "refrain from participation in any form of academic and cultural cooperation, collaboration or joint projects with Israeli institutions," and to pressure their own institutions "to suspend all ties with

10. Signatories may include individual academics, academic associations and union, academic institutions, and unspecified "other" institutions. *See id.*

11. *PACBI Guidelines*, *supra* note 8.

12. *Academic BDS Petitions*, AMCHA INITIATIVE, <https://amchainitiative.org/faculty-boycotters/> (last visited Nov. 2, 2020).

13. Colleen Flaherty, *BDS Resolution Fails at Social Problems Conference*, INSIDE HIGHER ED (Aug. 20, 2019), <https://www.insidehighered.com/quicktakes/2019/08/20/bds-resolution-fails-social-problems-conference>; *see generally Who We Are*, SOC'Y FOR STUDY SOC. PROS., [https://www.sssp1.org/index.cfm/m/453/locationSectionId/0/Who\\_We\\_Are](https://www.sssp1.org/index.cfm/m/453/locationSectionId/0/Who_We_Are) (last visited Nov. 2, 2020).



Israeli universities, including collaborative projects, study abroad, funding and exchanges.”<sup>14</sup>

In a letter<sup>15</sup> sent to the Society’s membership, former presidents of the Society and its journal editors pointed to the discriminatory nature of the resolution and the harm it would do to individual researchers in the United States as well as Israel. They argued, as have others<sup>16</sup>, that “boycotts of academic institutions cannot be meaningfully separated from the individuals whom those institutions employ and whom such boycotts inevitably harm” and that a boycott of Israeli academic institutions is “therefore more accurately described as a blacklist.”<sup>17</sup> The resolution would “set a dangerous precedent,” the authors continued,

by sponsoring an inequitable and discriminatory policy—in violation of the SSSP’s mission statement—that would punish one nation’s universities and scholars. . . . In no other context does the SSSP discriminate on the basis of national origin—and for good reason. This is discrimination pure and simple. . . .

Furthermore, a blacklist of Israeli academic institutions harms all SSSP members by restricting their academic freedom to work with scholars from other institutions around the world. Such freedom is essential to SSSP members’ vital professional interest in academic freedom and open intellectual exchange. Without such freedom, researchers and educators cannot fulfill their professional responsibilities. The SSSP should not set policies that would restrict members’ academic right to conduct research and collaborate with colleagues as they see fit.<sup>18</sup>

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14. See *2019 Proposed Resolutions*, SOC’Y FOR STUDY SOC. PROS., <https://www.sssp1.org/index.cfm/pageid/2208/> (last visited Apr. 1, 2021).

15. Letter from SSSP Award Winners, Former SSSP Officers, and Former Editors of the SSSP Journal *Social Problems* to members of the SSSP (July 26, 2019) (on file at [https://gallery.mailchimp.com/33170cf42f40c39f6972ef9ec/files/a8791f6c-bec8-42a3-9402-87852085f229/SSSP\\_Letter\\_July\\_2019\\_1\\_1\\_.pdf](https://gallery.mailchimp.com/33170cf42f40c39f6972ef9ec/files/a8791f6c-bec8-42a3-9402-87852085f229/SSSP_Letter_July_2019_1_1_.pdf)) [hereinafter SSSP Letter].

16. See generally *THE CASE AGAINST ACADEMIC BOYCOTTS OF ISRAEL* (Cary Nelson & Gabriel Noah Brahm eds., 2015).

17. SSSP Letter, *supra* note 15.

18. *Id.*

A few weeks after the SSSP resolution was narrowly defeated, in August of 2019,<sup>19</sup> a group of scholar-activists in the *Foundations of Political Theory* section of the American Political Science Association (APSA)—the preeminent academic association for political science scholars in the United States<sup>20</sup>—promoted its own resolution calling for the academic boycott of Israel. As with the boycott proponents in SSSP, the sponsors of the proposed resolution in APSA’s *Foundations of Political Theory* section advanced misleading claims about the effects that an academic boycott of Israel would have on the academic freedom of scholars.<sup>21</sup> For example, an “FAQ” document that the resolution sponsors prepared stated:

Question: “Doesn’t academic boycott violate basic tenets of academic freedom?”

Answer: “Boycotts do not abridge or impact anyone else’s freedom . . . .”

Question: “Won’t an academic boycott alienate or harm Israeli academics[]?”

Answer: “[A]cademic boycotts target institutions, not individuals. So, no individual person is addressed by it and no one’s individual career will be harmed by it.”<sup>22</sup>

Many BDS advocates regularly insist that academic boycotts affect only Israeli academic institutions and not individual scholars—as if it were

19. Benjamin Weinthal, *Academic Organization Votes to Reject BDS*, JERUSALEM POST (Aug. 22, 2019), <https://www.jpost.com/bds-threat/society-for-the-study-of-social-problems-rejects-bds-599186>. In the summer of 2020, a resolution calling for the academic boycott of Israel which was *nearly identical* to the one introduced and defeated in 2019 was put before the membership of the SSSP. Despite calls for the resolution to be tabled because of an insufficient opportunity for debate due to the COVID-19 health crisis—and because the same resolution was already debated and rejected—the SSSP’s leadership allowed the resolution to proceed to a vote. The resolution failed to receive the necessary two-thirds majority for adoption.

20. *About ASPA*, AM. POL. SCI. ASS’N, <https://www.apsanet.org/ABOUT/About-APSA> (last visited Nov. 2, 2020).

21. Memorandum, American Political Science Association, Academic Boycott FAQ (on file with authors).

22. *Id.*

possible to deny funding and recognition and cause great reputational damage to some of the world's major research and teaching universities without negatively affecting the people who work and study in them. The reality, of course, is that individual scholars *are* being harmed.<sup>23</sup> Consider that a scholar affiliated with Israel's *Academic College of Management* recently admitted that she sometimes omits "Cohen" from her hyphenated name when she submits a manuscript: "That is what the BDS movement has driven us to do if we want to sustain our careers."<sup>24</sup> The fact that some Jewish academics in certain disciplines believe that they must hide their identities if they want to succeed professionally is a troubling outgrowth of the campus battles over Israel.

Scholars Andrew Pessin and Doron S. Ben-Atar have documented a host of similarly painful stories. Their co-edited book, *Anti-Zionism on Campus*,<sup>25</sup> shows the extent to which American, Canadian, South African, and Israeli professors are paying the price for speaking out against BDS or expressing their Zionist beliefs. The book is replete with documented examples of US-based scholars being subjected to smear campaigns and hostile intimidation—simply because they voiced perceived pro-Israel political positions or criticized and challenged the academic boycott of Israel.<sup>26</sup>

It is also important to note that this shunning and ostracism occurs even when there is not any overt hostility. A case in point from several years ago at Syracuse University involved a faculty member who withdrew an invitation to a prominent Israeli filmmaker and visiting professor at New York University, Shimon Dotan, rescinding an earlier offer that she had

23. See generally Elizabeth Redden, *BDS Movement Survives Challenge*, *INSIDE HIGHER ED* (Dec. 8, 2014), <https://www.insidehighered.com/news/2014/12/08/anthropologists-reject-resolution-opposing-academic-boycott-israel>; see also Cary Nelson, *ISRAEL DENIAL: ANTI-ZIONISM, ANTI-SEMITISM, AND THE FACULTY CAMPAIGN AGAINST THE JEWISH STATE* 22 (2019).

24. Nelson, *supra* note 23, at 37.

25. *ANTI-ZIONISM ON CAMPUS: THE UNIVERSITY, FREE SPEECH, AND BDS* (Andrew Pessin & Doron Ben-Atar eds., 2018).

26. See generally *id.*; see *SALEM ON THE THAMES: MORAL PANIC, ANTI-ZIONISM, AND THE TRIUMPH OF HATE SPEECH AT CONNECTICUT COLLEGE* (Richard Landes ed., 2020) (detailing another particularly egregious case of a Jewish faculty member who was denounced as a bigot and subjected to months of defamatory harassment after he voiced harsh criticism of the Hamas terror organization); see Elliot Kaufman, *We Found Our Outrage*, *JEWISH REV. OF BOOKS* (2020) (reviewing *SALEM ON THE THAMES: MORAL PANIC, ANTI-ZIONISM, AND THE TRIUMPH OF HATE SPEECH AT CONNECTICUT COLLEGE* (Richard Landes ed., 2020)).

extended to present his film at her academic conference.<sup>27</sup> In an email to Dotan, Professor M. Gail Hammer, of the department of religion, wrote:

I now am embarrassed to share that my SU colleagues, on hearing about my attempt to secure your presentation, have warned me that the BDS faction on campus will make matters very unpleasant for you and for me if you come. In particular my film colleague in English who granted me affiliated faculty in the film and screen studies program and who supported my proposal to the Humanities Council for this conference told me point-blank that if I have not myself seen your film and cannot myself vouch for it to the council, I will lose credibility with a number of film and women/gender studies colleagues. Sadly, I have not had the chance to see your film and can only vouch for it through my friend and through published reviews.

Clearly I am politically naïve. I also feel tremendous shame in renegeing on a half-offered invitation. . . .

Obviously, my decision here has nothing to do with you or your work. . . . I feel caught in an ideological matrix and by my own egoic needs to sustain certain institutional affiliations.<sup>28</sup>

Hammer's email is remarkably candid. She freely admits—even apologizes for—her decision to rescind the invitation, noting it had absolutely nothing to do with the quality or suitability of Dotan's film, which she claims to not having seen (the film, *The Settlers*, is a documentary about Israeli settlers in the West Bank, and in fact takes a highly critical view of Israel's post-1967 policies).<sup>29</sup> Hammer was concerned that her BDS-supporting colleagues would disapprove of Dotan's participation *because he is an Israeli academic* and that, if he was

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27. See Scott Jaschik, *Uninvited for Being Israeli*, INSIDE HIGHER ED (Sept. 6, 2016), <https://www.insidehighered.com/news/2016/09/06/syracuse-condemns-action-professor-rescind-invitation-israeli-scholar>; see also Conor Friedersdorf, *How Political Correctness Chills Speech on Campus*, ATLANTIC (Sept. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/09/what-it-looks-like-when-political-correctness-chills-speech-on-campus/497387/>.

28. See Friedersdorf, *supra* note 27.

29. See *The Settlers*, IMDB, <https://www.imdb.com/title/tt5278914/> (last visited Nov. 2, 2020).

to feature on the conference program, they might retaliate against her in some way.<sup>30</sup>

Regrettably, this is not an isolated case. In 2016, Israel's Ben-Gurion University (BGU) President Rivka Carmi expressed concern about what she defined as a "growing and worrisome phenomena:" informal boycotts of her faculty.<sup>31</sup> BGU faculty were complaining of being excluded from conferences in the U.S. and in Europe, getting their research proposals and manuscripts summarily rejected, and finding it difficult to place their graduate students into post-doctoral appointments.<sup>32</sup> Commenting on this boycott activity, Elman remarks that "such boycotts by definition operate under the radar and are hidden from view."<sup>33</sup> "[T]here are no videos of intimidating [or harassing] behavior to post on YouTube, and it [is] often hard to prove that the ostracism is occurring."<sup>34</sup>

It is worth noting that the incident at Syracuse with the Israeli filmmaker, described above, came to light because a faculty member made the tactical error (from the point of view of her BDS-supporting colleagues) of documenting her actual reasons for withdrawing the invitation to Professor Dotan to present at the conference. Without an incriminating email exchange, the story most likely would never have garnered national and international headlines. One wonders how many otherwise-deserving scholars never receive an invitation to present their research in the first place simply because they are Israeli or perceived to be "pro-Israel." But if BDS-aligned faculty are complying with their pledge to adhere to PACBI guidelines within their professional practices, then it is likely to be a considerably high number.

Indeed, for some faculty who subscribe to BDS and its call to boycott Israeli academic institutions, opposition to Israel has attained a kind of moral status that outstrips other principles—even advancing educational opportunities for their students. In September 2019, a recently tenured

30. See Friedersdorf, *supra* note 27.

31. Lidar Gravé-Lazi, *Carmi: Silent Boycotts a Worrisome Phenomenon*, JERUSALEM POST (July 30, 2016), <https://www.jpost.com/Israel-News/Politics-And-Diplomacy/Carmi-Silent-boycotts-a-worrisome-phenomenon-462775>.

32. Judy Maltz, *Israeli Academics Report Signs of Undeclared Boycott Targeting Them*, HAARETZ (Feb. 6, 2015), <https://www.haaretz.com/.premium-israeli-academics-cite-latent-boycott-1.5368845>.

33. Miriam F. Elman, *The Pressure on American Academics to Conform to BDS*, HAARETZ (July 9, 2016), <https://www.haaretz.com/opinion/the-pressure-on-american-academics-to-conform-to-bds-1.5438296>.

34. *Id.*

professor at the University of Michigan withdrew his offer to write a letter of recommendation in support of a student's study-abroad application once he realized that she was applying to study in Israel and not another country.<sup>35</sup> In support of this professor, scores of faculty pledged at the time that they also would also refuse to write reference letters for their students, should they wish to apply to study abroad programs in Israel.<sup>36</sup> For these faculty members, personal politics eclipsed professional responsibility; their stance essentially amounted to blaming their students for Israel's perceived wrongdoings.<sup>37</sup>

In response to the incident at University of Michigan, the Academic Engagement Network and the Anti-Defamation League partnered to draft a model policy on letters of recommendation for use in faculty handbooks.<sup>38</sup> The model language highlights that when faculty are asked to write letters of reference on behalf of students, as a matter of professional responsibility the primary consideration should be the student's academic merit and qualifications.<sup>39</sup> Political considerations and personal political viewpoints should not influence the decision to express or withhold support for the student.<sup>40</sup> This policy guidance was sent to hundreds of university and college presidents and chancellors urging its adoption.

If faculty members have a professional responsibility to avoid allowing their personal politics from interfering with educational opportunities for their students, campus administrators arguably have a special duty in this

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35. Isaac Stanley-Becker, *A Michigan Professor Supported a Student's Study-Abroad Application — Until He Realized Israel Was Her Destination*, WASH. POST (Sept. 20, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/09/20/a-michigan-professor-supported-a-students-study-abroad-application-until-he-realized-israel-was-her-destination/>; see Cary Nelson, *How the Israel Boycott Can Compromise Faculty and Harm Students*, CHRON. OF HIGHER EDUC. (Sept. 25, 2018), <https://www.chronicle.com/article/how-the-israel-boycott-can-compromise-faculty-and-harm-students/>.

36. *Stand with John Cheney-Lippold*, CHANGE, <https://www.change.org/p/stand-with-john-cheney-lippold> (last visited Apr. 10, 2021).

37. Richard Falk et al., *Standing with John Cheney Lippold*, ACADEME BLOG (Sept. 19, 2018), <https://academeblog.org/2018/09/19/standing-with-john-cheney-lippold/>.

38. *Faculty Guidance For Letters Of Recommendation*, ACAD. ENGAGEMENT NETWORK & ANTI-DEFAMATION LEAGUE, <https://www.adl.org/media/12164/download> (last visited Feb. 4, 2021) [hereinafter *AEN/ADL Model Policy*].

39. *See id.*

40. *Id.*

regard. When individuals who hold senior administrative positions advocate for the academic boycott of Israel, at the very least they throw their university's commitment to campus free speech, academic freedom, and open inquiry into question. It is important to ascertain if their advocacy for the academic boycott of Israel is "just talk," and hence speech that is protected by academic freedom, or if they are using their administrative positions to implement the PACBI boycott guidelines. This concern led the Academic Engagement Network in Fall 2019 to write a letter, which it has since made public, to Marty Meehan, the President of the University of Massachusetts, alerting him to the fact that eleven members of the faculty at University of Massachusetts Boston who had publicly endorsed the academic boycott of Israel were serving in administrative roles.<sup>41</sup> These included a "Dean of the Honors college, six department chairs, and four [ ] center or program directors."<sup>42</sup>

In the authors' view, administrators who are on record publicly endorsing the BDS/PACBI call for an academic boycott of Israel should make clear that, despite their personal political beliefs, they will not take actions in their official university capacities to implement the boycott.<sup>43</sup> Hundreds of American universities and colleges, as well as prominent associations of professors and higher education institutions, have publicly opposed and rejected the boycott of Israeli academic institutions on the grounds that academic boycotts violate academic freedom.<sup>44</sup> Campus

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41. Letter from Mark G. Yudof, Chair, Academic Engagement Network, Miriam Elman, Executive Director, Academic Engagement Network, & Tammi Rossmann-Benjamin, Executive Director, AMCHA Initiative, to Martin T. Meehan, President, U. of Mass. (Nov. 18, 2019) (on file at <https://amchainitiative.org/wp-content/uploads/2019/12/AEN-AMCHA-Ltr-to-Pres-Meehan-11-18-19.pdf>).

42. *Id.*

43. For more on the claim that pledging to refuse to collaborate with Israeli universities, while a stance protected by academic freedom, is inconsistent with the obligations of senior administrative office *see* Steven Lubet, *The Dean of BDS?*, BULWARK (June 29, 2020), <https://thebulwark.com/the-dean-of-bds/>; *see also* David Bernstein, *Is Supporting Academic Boycotts of Israel Consistent with Administering an Academic Program?*, REASON (May 12, 2020), <https://reason.com/2020/05/12/is-supporting-academic-boycotts-of-israel-consistent-with-administering-an-academic-program/>.

44. *See AAU Board Reaffirms Opposition to Israel Boycott*, ASS'N OF AM. U. (Feb. 14, 2016), <https://www.aau.edu/newsroom/press-releases/aau-board-reaffirms-opposition-israel-boycott> (reaffirming its December 2013 Statement on boycotting Israeli academic institutions); *see also* AM. ASS'N OF U. PROFESSORS, ON ACADEMIC BOYCOTTS 39–43 (2006); *see also Singling Out Israel: Why We Oppose the Boycott*, NAT'L ASS'N OF

administrators who would seek to implement the PACBI guidelines most likely would be circumventing the stated positions or policies of their own universities. They also would risk chilling speech and subverting the research of their faculties and students. After all, what junior faculty member or graduate student, knowing that a senior leader endorses the academic boycott of Israel, would risk his or her disapproval to co-host a conference or project with an Israeli university? Why risk the displeasure of one's Department Chair or Program Director by sending a manuscript to an academic journal published in Israel, or agree to attend a university-hosted academic event there? It would be reasonable for nonprotected faculty and graduate students, and perhaps tenured faculty too, to stay clear of such research opportunities and inter-university exchanges given their potential professional costs.

Notwithstanding the academy's overwhelming opposition to boycotts of Israeli institutions of higher education on academic freedom grounds,<sup>45</sup> BDS scholar-activists frequently claim that it is *their* academic freedom and freedom of speech that is being threatened, censored, or suppressed as a consequence of their anti-Israel positions. Many of them imagine that

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SCHOLARS (Jan. 29, 2014), [https://www.nas.org/blogs/statement/singling\\_out\\_israel\\_why\\_we\\_oppose\\_the\\_boycott](https://www.nas.org/blogs/statement/singling_out_israel_why_we_oppose_the_boycott); see also William A. Jacobson, *List of Universities Rejecting Academic Boycott of Israel (Update – 250!)*, SCHOLARS FOR PEACE IN THE MIDDLE EAST (Feb. 15, 2016), <https://spme.org/boycotts-divestments-sanctions-bds/list-of-universities-rejecting-academic-boycott-of-israel-update-250/20743/>; *University of California Statement, AMCHA INITIATIVE*, <https://amchainitiative.org/wp-content/uploads/2018/12/UC-Chancellors-statement-on-Israeli-academic-boycott-Dec-2018.pdf> (last visited Feb. 4, 2021); see also Isabella Sabri, *UC Chancellors Oppose Academic Boycott of Israeli Scholars, Higher Learning Institutions*, DAILY CALIFORNIAN (Jan. 2, 2018), <https://www.dailycal.org/2018/12/30/uc-chancellors-oppose-academic-boycott-of-israeli-scholars-higher-learning-institutions/>. In 2007, more than 450 college and university presidents signed a statement opposing academic boycotts of Israel and a 2014 letter rejecting anti-Israel boycotts garnered 250 signatures. See David May, *War by Other Means: A History of Anti-Israel Boycotts, From the Arab League to BDS*, FOUND. FOR DEF. OF DEMOCRACIES (Jan. 20, 2020), <https://www.fdd.org/analysis/2020/1/20/war-by-other-means/>.

45. See *AU Board Reaffirms Opposition to Israel Boycott*, *supra* note 44; *ON ACADEMIC BOYCOTTS*, *supra* note 44; *Singling Out Israel: Why We Oppose the Boycott*, *supra* note 44; Jacobson, *supra* note 44; *University of California Statement*, *supra* note 44; Sabri, *supra* note 44; May, *supra* note 44.



there is a concerted campaign to shut down criticism of Israel.<sup>46</sup> For example, recently in the online journal *Jadaliyya*, a group of scholars endorsing the academic boycott coauthored a symposium with several writing that “[a]cademics face a high social and professional cost for raising the question of Palestine, advocating on behalf of Palestinian liberation . . . to speak of the Palestinian cause in the US academy is not easy.”<sup>47</sup> They noted further that there is a “prevailing climate of taboo, discipline, and punishment surrounding any open discussion of Palestine in the academy.”<sup>48</sup> Similarly, in a symposium in the journal *Contemporary Political Theory* with authors writing in support of the academic boycott and the APSA resolution previously mentioned, one contributor claimed that “speaking out against Zionism and in support of Palestine requires ‘courage that few have’ and ‘comes with harsh consequences’ . . . Support for Palestine . . . remains a scary, uncomfortable, and perilous endeavor.”<sup>49</sup>

Faculty members unquestionably have the right to advocate for BDS. Whether the academic freedom and free speech rights of BDS advocates have been curtailed in these or other individual cases, however, is a separate question that merits close study and is beyond the scope of this article. It should be noted though that many anti-Israel scholars, including those referred to above, appear to have faced little difficulty placing their work in leading on-line platforms and in peer-reviewed journals. A recent book<sup>50</sup> which exposes the virulently anti-Israel scholarship of leading BDS scholar-activists underscores the fact that their work has been published in highly regarded academic presses and journals. If these academics are

46. See Hatem Bazian, *Israel's Losing Battle: Palestine Advocacy in the University*, AL SHABAKA (Apr. 2020), <https://al-shabaka.org/commentaries/israels-losing-battle-palestine-advocacy-in-the-university/>; see also ENFORCING SILENCE: ACADEMIC FREEDOM, PALESTINE, AND CRITICISM OF ISRAEL 4 (David Landy et al. eds., *Enforcing* 2020); see also Katherine Franke, *The Pro-Israel Push to Purge US Campus Critics*, N.Y. REV. (Dec. 12, 2018), <https://www.nybooks.com/daily/2018/12/12/the-pro-israel-push-to-purge-us-campus-critics/>; see also Kenneth Waltzer, Mark G. Yudof, & Katherine Franke, *Israel and Academic Freedom: An Exchange*, N.Y. REV. (Jan. 8, 2019), <https://www.nybooks.com/daily/2019/01/08/israel-and-academic-freedom-an-exchange/>.

47. Elisabeth Anker et al., *A Case for Discussing BDS at APSA, or: What Really Happened at the Foundations Meeting in DC*, JADALIYYA (Oct. 6, 2019), <https://www.jadaliyya.com/Details/40054>.

48. *Id.*

49. Kevin Bruyneel et al., *Boycott, Divestment and Sanctions (BDS) and Political Theory*, 18 CONT. POL. THEORY 448, 457 (2019).

50. See Nelson, *supra* note 23, at 113–16.

being silenced or threatened as a result of their speech, their publication records do not suggest it.<sup>51</sup>

In sum, while BDS scholar-activists rightly have been criticized for their anti-Israel positions (see Part IV, *infra*), we have seen scant empirical evidence to support the charge that they are frequently being silenced. There are virtually no examples of an anti-Israel guest speaker being disrupted by those opposed to BDS. By contrast, as we note in the following sections, censorship has occurred by those opposed to Israel, including by disruptions of meetings and speakers and, increasingly, by efforts to isolate and ostracize Jewish and pro-Israel students and groups.

b. Shout-downs and disruptions of Israeli and Israel-identified speakers

In the United States, freedom of speech is a fundamental individual right guaranteed by the First Amendment to the Constitution.<sup>52</sup> Although there is not a single, universally accepted theory of why freedom of speech should be protected as a constitutional right, among the most common arguments are that freedom of speech furthers democratic self-governance, aids the discovery of truth via the marketplace of ideas, promotes individual autonomy, and fosters tolerance.<sup>53</sup>

The First Amendment states: “Congress shall make no law . . . abridging the freedom of speech.”<sup>54</sup> By its terms, the First Amendment would appear to prohibit only Congress – the legislative branch of the US government – from abridging the freedom of speech. But the First Amendment has, through incorporation by the Fourteenth Amendment and subsequent judicial interpretation, been made applicable to the fifty US states as well.<sup>55</sup> Today, it is well-accepted that the First Amendment applies to actions of government, and of government officials, at all levels—federal, state, and local.<sup>56</sup> Relevant here, this includes state public

51. *Id.* See also Cary Nelson, *The Devil’s Intersectionality: Contemporary Cloaked Academic Antisemitism*, 2 J. CONT. ANTISEMITISM 1, 3–4 (2019).

52. U.S. CONST. amend. 1 (“Congress shall make no law . . . abridging the freedom of speech.”).

53. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 1005–12 (6th ed., 2019).

54. U.S. CONST. amend. 1.

55. CHERMERINSKY, *supra* note 53, at 549–53.

56. *Id.* at 553–63 (discussing, *inter alia*, the “state action” doctrine).

colleges and universities.<sup>57</sup> Privately run American colleges and universities are generally free to establish their own rules and thus to regulate speech beyond what the First Amendment would tolerate. In practice, however, the vast majority of private institutions pride themselves on promoting freedom of expression on their campuses.<sup>58</sup>

Of course, not every government restriction of speech is prohibited by the First Amendment. During the past 100-plus years, the Supreme Court has developed a robust First Amendment jurisprudence. Under the Court's precedents, a key issue in evaluating the constitutionality of government regulation of speech is whether the law in question is content-based or content-neutral.<sup>59</sup> As a general rule,<sup>60</sup> content-based restrictions—that is, regulation of expression because of its subject matter or viewpoint—are presumptively invalid<sup>61</sup> and must withstand strict judicial scrutiny to be deemed constitutional.<sup>62</sup> Viewpoint-based restrictions are almost always unconstitutional.<sup>63</sup> By contrast, content-neutral regulations—those that

57. See *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”); *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”).

58. See, e.g., *Private Universities*, FIRE, <https://www.thefire.org/resources/spotlight/public-and-private-universities/#:~:text=If%20a%20private%20college%20advertises,standard%20as%20a%20public%20institution.&text=They%20may%20not%20be%20bound,to%20provide%20what%20they%20promise> (last visited Feb. 4, 2021). FIRE observes that, while they are not subject to the First Amendment, “private universities are contractually bound to respect the promises they make to students with regard to protecting freedom of expression on campus . . . [for example in their] promotional materials and student conduct policies.” *Id.*

59. See CHEMERINSKY, *supra* note 53, at 1012–13.

60. *Id.* at 1012. There are some categories of speech, such as incitement or illegal activity, obscenity, and defamation, that are unprotected or less protected by the First Amendment even though they are, by definition, content-based. But even content-based distinctions within these categories of less-protected speech must meet strict judicial scrutiny. *Id.* at 1047–48, 1078–113.

61. *Id.* at 1012–13; see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys . . . . Discrimination against speech because of its message is presumed to be unconstitutional.”).

62. *Rosenberger*, 515 U.S. at 828.

63. One recent case involving an unconstitutional viewpoint-based regulation was *Matal v. Tam*, 137 S. Ct. 1744 (2017). In *Matal*, the Supreme Court struck down a provision

apply to all speech regardless of its message—generally will be upheld so long as they are narrowly tailored to further a significant government interest.<sup>64</sup>

Just as content-based restrictions on speech are presumptively invalid, laws regulating speech that are unduly vague,<sup>65</sup> overbroad,<sup>66</sup> or deemed to be a prior restraint<sup>67</sup> on speech will usually run afoul of the First Amendment. On the other hand, the Supreme Court has identified some categories of so-called “unprotected” speech that the government may lawfully prohibit and punish. These include incitement of illegal activity,<sup>68</sup> “fighting words,”<sup>69</sup> and obscenity.<sup>70</sup> The Court also has identified categories of less-protected speech, for example commercial speech, where the government has more latitude to regulate than usual under the First Amendment.<sup>71</sup>

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of the Lanham Act, the federal statute governing registration of trademarks, which prohibited the registration of a trademark that consists of matter “which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” *Id.* at 1753. The Court held that this provision of the Lanham Act impermissibly discriminated based on viewpoint, and thus violated the First Amendment, because government cannot attempt to regulate speech based on its offensiveness. *Id.* at 1765.

64. See CHEMERINSKY, *supra* note 53, at 1012–17. Viewpoint neutral means that the government cannot regulate speech based on the ideology of its message. Subject-matter neutral means that the government cannot regulate speech based on the topic of the speech. “For example, a law prohibiting the posting of all signs on public utility poles would be content-neutral because it would apply to every sign regardless of its subject matter or viewpoint.” *Id.* at 2017 (citing *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984)).

65. *Id.* at 1026 (“[T]he Supreme Court has declared that laws regulating speech are unconstitutionally vague when they are so ambiguous that a reasonable person cannot tell what expression is forbidden and what is allowed.”).

66. *Id.* at 1027 (“A law is unconstitutionally overbroad if it regulates substantially more speech than the Constitution allows to be regulated, and a person to whom the law constitutionally can be applied can argue that it would be unconstitutional as applied to others.”).

67. *Id.* at 1033–52 (discussing prior restraints on speech in depth).

68. *Id.* at 1078–92. The key case defining when the government may punish incitement to illegal activity is *Brandenburg v. Ohio*, in which the Supreme Court held that the government may not forbid or punish speech advocating violence or the use of force “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” 395 U.S. 444, 447 (1969).

69. See CHEMERINSKY, *supra* note 53, at 1093–1100.

70. *Id.* at 1109–18.

71. *Id.* at 1186–89.

In addition, *where* speech occurs can affect how much protection it receives from government regulation. The Court has identified three types of government-controlled spaces for purposes of First Amendment analysis: public forums, designated public forums, and nonpublic forums.<sup>72</sup> “In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. The same standards apply in designated public forums—spaces that have ‘not traditionally been regarded as a public forum’ but which the government has ‘intentionally opened up for that purpose. In a nonpublic forum, on the other hand—a space that is ‘not by tradition or designation a forum for public communication’—the government has much more flexibility to craft rules limiting speech.”<sup>73</sup>

On the university campus, one way that the BDS movement threatens to undermine free speech is when students aligned with BDS deliberately seek to interfere with lectures by Israeli speakers and Israel-themed activities and educational events. Students on public university campuses unquestionably have the right to protest against speech with which they disagree. At the same time, duly invited speakers have free speech rights as well, and students who attend such talks expect to be able to listen and engage with the speaker and other members of the audience. Ample opportunities and methods exist for protesters to express critical viewpoints without infringing on the speaker’s rights or the rights of others to hear the speaker; these include protest outside an event, silent protest inside with signs or badges, turned backs, silent walkouts, leafleting, and other methods. Protestors can also raise difficult questions in response to lectures during appropriate question-and-answer sessions.

But the Supreme Court has made clear that government cannot lawfully prevent or shut down speech on the ground that it is likely to provoke a hostile audience response.<sup>74</sup> This is the so-called rule against the “heckler’s

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72. *Id.* at 1229.

73. *Id.* at 1232 (quoting *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018)).

74. *See Terminiello v. Chicago*, 337 U.S. 1, 5 (1949); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Feiner v. New York*, 340 U.S. 315, 326–30 (1951) (Black, J., dissenting); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); and *Gregory v. City of Chicago*, 394 U.S. 111, 111–12 (1969). *See also*

veto.”<sup>75</sup> It is grounded on the principle that without this vital protection, government officials could use safety concerns to justify shutting down speech that they, or others, disfavor.<sup>76</sup> On the university campus, a “heckler’s veto” can occur when an invited speaker is either canceled or shut down as a consequence of the actual or potential hostile reaction from audience members in attendance.<sup>77</sup>

Regrettably, examples abound of students linked to pro-BDS student groups, especially Students for Justice in Palestine (SJP), attempting to disrupt and shout down speakers who have been duly invited to present on campus.<sup>78</sup> At UCLA, for example, an event in May 2018 celebrating

Bible Believers v. Wayne Cnty., 805 F.3d 228, 253 (6th Cir. 2015) (police unlawfully effectuated a heckler’s veto when they prevented a group of Christian evangelists from speaking at an Arab-American festival in response to hostile reaction from other festivalgoers who objected to the group’s anti-Muslim message. The court determined that the police officers had options available to them short of threatening the evangelists with citations if they did not leave the grounds, including instructing the hecklers to calm down and arresting them if they became violent, increasing the police presence, cordoning off the evangelist group speakers to protect them, and dispersing the entire crowd).

75. See, e.g., Zach Greenberg, *Rejecting the Heckler’s Veto*, FIRE (June 14, 2017), <https://www.thefire.org/rejecting-the-hecklers-veto/>.

76. *Id.*

77. See *id.* (“On the college campuses of a free society, a viewpoint gains acceptance in the ‘marketplace of ideas’ by the persuasive power of the arguments in support of it, not the physical might of its advocates. . . . Unfortunately, many colleges have recently ratified the heckler’s veto by canceling events featuring invited speakers in response to actual or perceived threats of violence or other disruption.”).

78. See, e.g., ISRAEL ON CAMPUS COALITION, 2019 CAMPUS TRENDS REPORT 5–9, 11–13 (2019), <https://israelcc.org/wp-content/uploads/2019/11/ICC-2019-Campus-Trends-Report.pdf?fbclid=IwAR1jC4Oq12fmQ1LydrP1y7zKOcfXE0okwxkoExUQyAhcX9lhVw6Y6nZaPOk>.

The report documents that

The 2018-2019 academic year saw the highest recorded level of anti-Israel disruptions of pro-Israel events. Disruptions occurred on campuses across the country and targeted events featuring Israeli speakers such as the Consul General of Israel in New York Dani Dayan and LGBTQ activist and former Israeli Defense Forces (IDF) commander Hen Mazzig. Anti-Israel students also disrupted a student government meeting at Georgia State University, a University of California Board of Regents meeting, and a Blue Ribbon Panel meeting at the University of Michigan. Also targeted were Israeli cultural celebrations like a Dead Sea spa night at the University of Rochester as well as Israel block parties at New York University (NYU), the University of California, Irvine, the University of Texas at Austin, and the University of Texas at San Antonio. *Id.*

indigenous people featuring Armenian, Kurdish and Israeli speakers was interrupted midway through the program.<sup>79</sup> Protesters shouted down the speakers and ripped down the Armenian flag.<sup>80</sup> Eventually campus police escorted the disrupters out of the room,<sup>81</sup> but the damage was done. The event ended soon after.

At Syracuse University, a 2018 talk by Israeli diplomat Dani Dayan was briefly disrupted by protesters.<sup>82</sup> Dayan was then-Israeli Consul General in New York, and a number of academic departments and the Deans Office at SU's Maxwell School of Citizenship & Public Affairs had co-hosted his guest lecture on the Syracuse campus.<sup>83</sup> The day before the event, chatter on social media revealed a planned shutdown of the talk (the ringleaders, who included students and community activists, later published an article in the local Syracuse newspaper stating explicitly that their goal was to disrupt the talk and prevent Dayan from speaking).<sup>84</sup> The

79. Aaron Bandler, *Protesters Disrupt UCLA SSI Event*, JEWISH J. (May 18, 2018), [https://jewishjournal.com/los\\_angeles/234289/pro-palestinian-protesters-disrupt-ucla-indigenous-peoples-event/](https://jewishjournal.com/los_angeles/234289/pro-palestinian-protesters-disrupt-ucla-indigenous-peoples-event/). See also Alyza Lewin, *Recognizing Anti-Zionism as an Attack on Jewish Identity*, 68 CATH. U. L. REV. 643, 648 (2019) (citing AMCHA INITIATIVE, *Disruption to SSI Event at UCLA 5.17.18 (2 Minute Beginning of Disruption)*, YOUTUBE (June 4, 2018), <https://www.youtube.com/watch?v=dXAcv9bCykA> (showing a crowd of people interrupting the event with flags, speakers, whistles, and chanting); AMCHA INITIATIVE, *Anti-Zionist Protesters Aggressively Disrupt an SSI Event at UCLA 5.17.18*, YOUTUBE (June 4, 2018), <https://www.youtube.com/watch?v=1VcelNw78Bg> (showing full disruption of UCLA event)).

80. Bandler, *supra* note 79; Lewin, *supra* note 79; AMCHA INITIATIVE, *supra* note 79.

81. Bandler, *supra* note 79.

82. Shiri Moshe, *Students, Activists Disrupt Talk by Israeli Ambassador at Syracuse University*, ALGEMEINER (Apr. 25, 2018, 5:54 PM), <https://www.algemeiner.com/2018/04/25/students-activists-disrupt-talk-by-israeli-ambassador-at-syracuse-university/>; Casey Darnell, *DPS Official Removes Anti-Israel Protester from Eggers Hall*, DAILY ORANGE (Apr. 24, 2018), <http://dailyorange.com/2018/04/dps-official-removes-anti-israel-protester-eggers-hall/>.

83. Moshe, *supra* note 82; Darnell, *supra* note 82; *PARCC Past Events*, SYRACUSE UNIV. MAXWELL SCH. OF CITIZENSHIP & PUB. AFFS., <https://www.maxwell.syr.edu/parcc/news/Events/> (last visited Mar. 2, 2021); *The Future of the Middle East: Israel's Integration into the Arab World*, SYRACUSE UNIV. MAXWELL SCH. OF CITIZENSHIP & PUB. AFFS., [https://www.maxwell.syr.edu/events/The\\_Future\\_of\\_the\\_Middle\\_East\\_Israel\\_s\\_Integration\\_into\\_the\\_Arab\\_World/](https://www.maxwell.syr.edu/events/The_Future_of_the_Middle_East_Israel_s_Integration_into_the_Arab_World/) (last visited Mar. 2, 2021).

84. Ursula Rozum et al., *Why We Protested Israeli Consul General's Visit to Syracuse University (Commentary)*, POST STANDARD (May 2, 2018),

Office of the Chancellor later released a letter noting that no disruption of Ambassador Dayan had occurred because the lecture eventually resumed after “two individuals” unaffiliated with the university were removed from the building.<sup>85</sup> But nothing in SU’s campus disruption policy<sup>86</sup> allows for protesters to shout down a speaker for a specified amount of time. In an open letter to the SU chancellor, the president of the National Association of Scholars concurred, urging the university leadership to take appropriate steps to enforce its disruption policy and ensure that intellectual freedom is protected.<sup>87</sup>

There are numerous other incidents during the past decade of attempted censorship by those opposed to Israel, including disruptions of speakers and events at “hotspot” campuses. These have been well documented by watchdog organizations such as the Israel on Campus Coalition (ICC) and the AMCHA Initiative.<sup>88</sup> For example, in 2010, students attempted to shut

[https://www.syracuse.com/opinion/2018/05/why\\_we\\_protected\\_israeli\\_consul\\_generals\\_visit\\_to\\_syracuse\\_university\\_commentary.html](https://www.syracuse.com/opinion/2018/05/why_we_protected_israeli_consul_generals_visit_to_syracuse_university_commentary.html).

85. See *62 Organizations Respond to Chancellor Syverud*, AMCHA INITIATIVE (May 18, 2018), <https://amchainitiative.org/wp-content/uploads/2018/05/62-Organizations-Respond-to-Chancellor-Syverud-5.18.18.pdf> (referring to the email from Jill Denny, Office of the Chancellor, Syracuse University contained therein).

86. *Campus Disruption Policy*, SYRACUSE UNIV. (Dec. 1994), [https://policies.syr.edu/policies/free-speech/campus-disruption-policy/#:~:text=Policy%20Statement&text=Syracuse%20University%20regulations%20on%20campus,York%20Educational%20Law%206450%20\(Art](https://policies.syr.edu/policies/free-speech/campus-disruption-policy/#:~:text=Policy%20Statement&text=Syracuse%20University%20regulations%20on%20campus,York%20Educational%20Law%206450%20(Art)

87. Peter Wood, *Letter to Syracuse University on Ambassador Dayan Event*, NAT’L ASS’N OF SCHOLARS (May 8, 2018), [https://www.nas.org/blogs/article/letter\\_to\\_syracuse\\_university\\_chancellor\\_on\\_ambassador\\_dayan\\_event](https://www.nas.org/blogs/article/letter_to_syracuse_university_chancellor_on_ambassador_dayan_event) (“Multiple protesters continued to chant outside the room. This was no mere expression of dissent. It was clearly an attempt to drown out Dayan’s speech. . . . While campus security did eventually remove the protesters from the stairwell, this did not happen until a substantial portion of the event had been disrupted, with attendees prevented from hearing.”); see also *Letter to Syracuse University Chancellor Syverud – 62 Organizations Calls for Steps to Address Exclusionary Behavior at Syracuse University*, AMCHA INITIATIVE (May 15, 2018), <https://amchainitiative.org/wp-content/uploads/2018/05/Letter-to-Syracuse-Chancellor-Syverud-5.15.18.pdf>.

88. See ISRAEL ON CAMPUS COALITION, 2019, *supra* note 78 (noting event disruptions from 2011-2019); Disruptions, AMCHA INITIATIVE, <https://amchainitiative.org/sjp-disruption-of-jewish-events/#disruption-of-jewish-events/display-by->

[date3/?view\\_266\\_page=1&view\\_266\\_filters=%5B%7B%22field%22%3A%22field\\_116%22%2C%22operator%22%3A%22in%22%2C%22value%22%3A%5B%222018%22%5D%7D%5D](date3/?view_266_page=1&view_266_filters=%5B%7B%22field%22%3A%22field_116%22%2C%22operator%22%3A%22in%22%2C%22value%22%3A%5B%222018%22%5D%7D%5D) (last visited Apr. 8, 2021). Most of the roughly 5,000 universities and



down a lecture by then Israeli Ambassador Michael Oren at UC-Irvine.<sup>89</sup> In 2015, at the University of Minnesota, protestors delayed a talk by Israeli Professor of Jewish Thought and Philosophy Moshe Halbertal, then a visiting professor at New York University School of Law, by “screaming criticism of Israel” until they were removed from the lecture hall by campus security officials.<sup>90</sup> And in April 2016, at San Francisco State University, then-mayor of Jerusalem Nir Barkat was shouted down by student protestors, who prevented him from speaking to the assembled audience. Security guards were reportedly called in to protect the mayor.<sup>91</sup>

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colleges in the U.S. are not awash in antisemitic forms of anti-Israel expression. See KENNETH S. STERN, *THE CONFLICT OVER THE CONFLICT: THE ISRAEL/PALESTINE CAMPUS DEBATE* 118–19 (2020). Anti-Israel and BDS activism tend to be geographically concentrated on campuses on the east and west coasts and in the Chicago hub. See ISRAEL ON CAMPUS COALITION, 2016-2017 YEAR END REPORT (2017), <https://www.templateroller.com/template/2100350/2016-2017-year-end-report-israel-on-campus-coalition.html#docpage-4>; see generally LEONARD SAXE ET AL., *HOTSPOTS OF ANTISEMITISM AND ANTI-ISRAEL SENTIMENT ON US CAMPUSES* (2016), <https://bir.brandeis.edu/bitstream/handle/10192/33070/AntisemitismCampuses102016.pdf>.

89. Between 500 to 700 people had gathered in an auditorium to hear Oren speak on US-Israeli relations. Ten students were subsequently found guilty of criminal misdemeanor charges for conspiring to disrupt and for disrupting the speech. Lauren Williams, Nicole Santa Cruz, & Mike Anton, *Students Guilty of Disrupting Speech in “Irvine 11” Case*, L.A. TIMES (Sept. 24, 2011), <https://www.latimes.com/local/la-xpm-2011-sep-24-la-me-irvine-eleven-20110924-story.html>.

90. Scott Jaschik, *Another “Heckler’s Veto”*, INSIDE HIGHER ED (Nov. 5, 2015), <https://www.insidehighered.com/news/2015/11/05/protest-u-minnesota-delays-speech-israeli-professor-half-hour>. Halbertal was repeatedly interrupted by some two dozen protestors, which prevented him from starting his talk for 30 minutes. Three of the protestors were arrested. Reportedly, those arrested were non-students affiliated with Minnesota’s Anti-War Committee group but were supported by the campus chapter of Students for Justice in Palestine and Students for a Democratic Society. Dale Carpenter, *Israeli Academic Shouted Down in Lecture at University of Minnesota*, WASH. POST (Nov. 4, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/04/israeli-academic-shouted-down-in-lecture-at-university-of-minnesota/>.

91. Josh Logue, *Pro-Palestinian Protestors Disrupt Speech at SF State*, INSIDE HIGHER ED (Apr. 8, 2016), <https://www.insidehighered.com/quicktakes/2016/04/08/pro-palestinian-protesters-disrupt-speech-sf-state>; Andrew Pessin, *San Francisco State U to Launch Investigation After Jewish Groups Denounce Shout-Down of Jerusalem Mayor’s Speech*, ALGEMEINER (Apr. 8, 2016), <https://www.algemeiner.com/2016/04/08/san-francisco-state-u-to-launch-investigation-after-jewish-groups-denounce-shout-down-of-jerusalem-mayors-speech/>.

In October 2019, at Duke University, some two dozen students yelled, chanted, and shouted down former Israeli Foreign Minister and peace negotiator Tzipi Livni, preventing her from talking and her audience from hearing.<sup>92</sup> Following the disruption, the protesting students filed out, self-censoring themselves.<sup>93</sup> The protesters had reportedly been invited by the organizing faculty to attend and were given an assurance that they would be called upon during the Q&A, when they could voice their opposing viewpoints.<sup>94</sup> But the students rejected this option. One student reportedly said that debate, discussion and dialogue with Livni was not possible and that it was hubris for the faculty to think they could learn *anything* from her.<sup>95</sup> Another student claimed that the extension of a speaking invitation to Livni was based on the assumption that everyone would benefit from the conversation; however, according to the student, this assumption itself is based on “white privilege” and the mere decision to host her was “an act of violence.”<sup>96</sup>

### c. Exclusion of Jewish Students from Campus Life

Jewish and Zionist students on many college and university campuses today face increasing pressures from their peers to publicly disavow their support for Israel. They are told, in effect, to “check their Zionism at the door” as the price of admission to participate in campus life, especially in progressive causes and campaigns. Zionism—the movement seeking self-determination for the Jewish people in their ancestral homeland<sup>97</sup>—is today viewed by a small but vocal minority of students and student

92. See Nathan Luzum, “Shame”: Tzipi Livni’s Israel Talk at Duke Interrupted by Student Protesters, DUKE CHRON. (Oct. 24, 2019), <https://www.dukechronicle.com/article/2019/10/tzipi-livni-israel-talk-duke-student-protesters>; Aaron Bandler, *Protesters Disrupt Former Israeli Foreign Minister’s Duke Speech*, JEWISH J. (Oct. 24, 2019), <https://jewishjournal.com/news/united-states/306141/protesters-disrupt-former-israeli-foreign-ministers-duke-speech/>.

93. Luzum, *supra* note 92.

94. *Id.*

95. *Id.*

96. *Id.*

97. See generally GIL TROY, *The Zionist Ideas: Visions for the Jewish Homeland—Then, Now, Tomorrow passim* (2018); Michael Brenner, *From Zionism to Zion*, in *ESSENTIAL ISRAEL: ESSAYS FOR THE 21ST CENTURY* 40, *passim* (S. Ilan Troen & Rachel Fish eds., 2017); *Zionism*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/glossary-terms/zionism> (last visited Mar. 3, 2021) (providing a brief overview of the term).

organizations as a racist ideology. Israel is cast as an illegitimate and irredeemable oppressor. To support Israel, and to be a Zionist, thus by definition makes one a racist—as well as a settler-colonialist, imperialist, an enabler of Apartheid, pro-genocide, and on some campuses even a white supremacist.<sup>98</sup>

It is beyond the scope of this article to debunk these misguided and myopic positions.<sup>99</sup> For the purposes here, what is important to consider is how such attitudes and perceptions about Israel and Zionism lead to actions that are negatively impacting the educational and expressive rights of college students. Jewish students have in recent years described being de-platformed and effectively cast out of progressive student coalitions advocating on behalf of causes such as police and prison reform; the protection of rights for women, LGBTQ individuals, and indigenous Native Americans; the Black Lives Matter movement; and the mitigation of global climate change.<sup>100</sup> None of these issues relates directly or even indirectly to Israel or the Israeli-Palestinian conflict. Yet Jewish students are effectively being told that they can join the progressive community on

98. See Rose Ritch, *I Was Harassed and Persecuted on Campus Just for Being a Zionist*, NEWSWEEK (Aug. 8, 2020), <https://www.newsweek.com/i-was-harassed-persecuted-campus-just-being-zionist-opinion-1523873>; see also Justine Murray, *Bias and Bigotry on the Syracuse University Campus*, JNS (July 15, 2020), <https://www.jns.org/opinion/bias-and-bigotry-on-the-syracuse-university-campus/>; see also Tamar Zieve, *After 'Anti-Fascist' Rally Targets Zionists, U. of Illinois 'Welcomes' Jews*, JERUSALEM POST (Sept. 27, 2017), <https://www.jpost.com/diaspora/after-anti-fascist-rally-targets-zionists-u-of-illinois-welcomes-jews-506069>.

99. For further critique of the BDS narrative on Israel and the Israeli-Palestinian conflict see generally CHERRYL SMITH, FRAMING ISRAEL: A PERSONAL TOUR OF MEDIA AND CAMPUS RHETORIC (2020); BEN-DROR YEMINI, INDUSTRY OF LIES: MEDIA, ACADEMIA, AND THE ISRAELI-ARAB CONFLICT (2017); JOSHUA MURAVCHIK, MAKING DAVID INTO GOLIATH: HOW THE WORLD TURNED AGAINST ISRAEL (2014); Donna Robinson Divine, *Word Crimes: Reclaiming the Language of the Israeli Palestinian Conflict*, 24 ISRAEL STUD. 1–16, *passim* (2019); Einat Wilf, *Arguing Israel Contra BDS*, ACAD. ENGAGEMENT NETWORK (Aug. 2018), <http://academicengagement.org/wp-content/uploads/2019/09/E-Version-Arguing-Israel-9.pdf>; S. Ilan Troen, *Countering the BDS Colonial Settler Narrative*, ACAD. ENGAGEMENT NETWORK (Apr. 2018), <http://academicengagement.org/wp-content/uploads/2019/09/Troen-Pamphlet-Final.pdf>.

100. See generally Blake Flayton, *On the Frontlines of Progressive Anti-Semitism*, N.Y. TIMES (Nov. 14, 2019), <https://www.nytimes.com/2019/11/14/opinion/college-israel-anti-semitism.html>; see also Maddie Solomon, *How Liberal Jews Are Being Pushed Out on Campus*, ALGEMEINER (June 13, 2019), <https://www.algemeiner.com/2019/06/13/how-liberal-jews-are-being-pushed-out-on-campus/>.

campus only if they first shed a significant part of their Jewish identity, namely their Zionist beliefs and their attachment to Israel.

A case in point happened in April 2018 at New York University, where fifty-three student organizations pledged, in a written joint statement, to boycott NYU's two registered pro-Israel student groups, resolving not to co-sponsor any events with them.<sup>101</sup> The fifty-three student groups that signed the statement also pledged to boycott NYU's own highly reputed academic programs in Tel Aviv as well as Israeli academic institutions and conferences.<sup>102</sup>

An incident at Williams College, in May 2019, provides another telling example of this kind of ostracism and exclusion. There, a pro-Israel student group, Williams Initiative for Israel (WIFI), had its application for Registered Student Organization status denied by a majority vote in the student council body on the grounds that WIFI's mission and programming would be offensive to Palestinian and Arab students because of Israel's oppressive policies and actions towards Palestinians.<sup>103</sup> The decision by the student government was condemned<sup>104</sup> by the College's president, Maud Mandel, and subsequently rendered moot when,

101. 50+ NYU Student Groups Endorse Boycott, Divestment, and Sanctions Movement for Palestinian Human Rights, MEDIUM (Apr. 9, 2018), <https://medium.com/@nyusjp/50-nyu-student-groups-endorse-boycott-divestment-and-sanctions-movement-for-palestinian-human-c27786ddc233>; *Pro-Israel Groups Urge President of NYU to Act on Discriminatory Statement*, JNS (Aug. 21, 2018), <https://www.jns.org/pro-israel-groups-urge-president-of-nyu-to-act-on-discriminatory-statement/>.

102. 50+ NYU Student Groups, *supra* note 101.

103. See Jeremy Bauer-Wolf, *Pro-Israel Student Group 'Silenced' at Williams*, INSIDE HIGHER ED (May 9, 2019), <https://www.insidehighered.com/news/2019/05/09/williams-college-student-government-rejects-pro-israel-group>; K.C. Johnson, *Separate and Unequal for Jewish Groups on Campus*, TABLET MAG. (May 20, 2019), <https://www.tabletmag.com/sections/news/articles/separate-and-unequal-on-campus>. See also Letter from Mark G. Yudof, Advisory Board Chairman, Academic Engagement Network, Michael Atkins, Interim Exec. Dir., Academic Engagement Network, & Miriam F. Elman, Incoming Exec. Editor, Academic Engagement Network, to Maud S. Mandel, President, Williams College (May 7, 2019) (on file at [https://www.berkshireeagle.com/mark-g-yudof-michael-atkins-and-miriam-f-elman-williams-must-accept-pro-israel-student/article\\_3a303439-d7b6-5cd7-b808-441bc893e87a.html](https://www.berkshireeagle.com/mark-g-yudof-michael-atkins-and-miriam-f-elman-williams-must-accept-pro-israel-student/article_3a303439-d7b6-5cd7-b808-441bc893e87a.html)).

104. Letter from Maud S. Mandel, President, Williams College (May 3, 2019) (on file at <https://president.williams.edu/writings-and-remarks/letters-from-the-president/college-council-vote-on-williams-initiative-for-israel/>).

following a complaint to the Department of Education, the Williams administration reversed the student government's decision and formally granted RSO privileges to WIFI.<sup>105</sup>

Emory University Professor Deborah E. Lipstadt, an historian known for her scholarship on the Holocaust and antisemitism, recently put it this way in an article for the *Atlantic*:

Most Jewish students on American campuses have not been subjected to overt acts of discrimination or verbal abuse. But many among them feel they have something to lose if they openly identify as Jews. If they are active in Hillel, the Jewish student organization, they may be informally barred from being active in progressive causes—for example, racial and LGBTQ equality, climate-change mitigation, and the fight against sexual assault. Those who want to be elected to student government are learning to scrub their résumés clean of any overtly Jewish or pro-Israel activities. They are not abandoning their Jewish identity; they are hiding it. They have become *Marranos*.<sup>106</sup>

Alyza Lewin, a civil rights attorney and President of the Louis D. Brandeis Center for Human Rights Under Law, argues that

“[i]ncreasingly, Jewish students on campus are asked to abandon their support for Israel, lest they face harassment or be barred from certain groups and clubs.<sup>107</sup> [What] may appear to be political jockeying [ ] is in fact religious discrimination. . . . When students on campus today wish to express this part of their Jewish identity, they encounter very deliberate and targeted efforts to isolate, intimidate, and demonize them.<sup>108</sup>

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105. See Aaron Bandler, *Education Department, Williams College Come to Resolution*, JEWISH J. (July 11, 2019), <https://jewishjournal.com/news/united-states/301452/education-department-concludes-williams-college-didnt-violate-federal-law-college-says/>.

106. Deborah Lipstadt, *Jews Are Going Underground*, ATLANTIC (Dec. 29, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/after-monsey-will-jews-go-underground/604219/>.

107. Alyza Lewin, *Recognizing Anti-Zionism as an Attack on Jewish Identity*, 68 CATH. U. L. REV. 643, 643 (2019).

108. *Id.* at 644. For example, consider how a student leader at the University of Southern California felt compelled to resign from office after she became the target of online attacks stemming from her Zionist identity and beliefs. See Ritch, *supra* note 98.

## III. ALLEGING VIOLATIONS OF TITLE VI OF THE CIVIL RIGHTS ACT

Increasingly, Jewish students who have been targeted because of their identification with Zionism or support for Israel are testing whether federal anti-discrimination law can be used to help protect their expressive rights on campus. The key law in question is Title VI of the Civil Rights Act of 1964 (“Title VI”). It provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>109</sup> Thousands of college and universities receive federal financial assistance through the US Department of Education; these institutions are thus covered by Title VI and must operate in a nondiscriminatory manner.<sup>110</sup>

Under Title VI, educational institutions may not discriminate against students or other individuals on campus on the basis of race, color, or national origin.<sup>111</sup> In addition, and as relevant here, colleges and universities could face liability under Title VI if they fail adequately to address a discriminatory “hostile environment” on their campuses. In *Davis ex rel. LaShonda v. Monroe Country Board of Education*,<sup>112</sup> the Supreme Court held that student-on-student harassing conduct may give rise to a Title VI hostile environment claim when the harassment is “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”<sup>113</sup> *Davis* involved a pattern of sexually harassing conduct by a student in a public secondary school, and the claim arose under Title IX of the Education Amendments of 1972, not Title VI. However, the legal standard that *Davis* established for peer-on-peer discriminatory

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109. See 42 U.S.C. § 2000d.

110. See *Education and Title VI*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> (last visited Apr. 10, 2021.)

111. See generally CONG. RESEARCH SERV., R45665, CIVIL RIGHTS AT SCHOOL: AGENCY ENFORCEMENT OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 5-20 (2019) (summarizing the case law on defining, regulating, and enforcing unlawful discrimination under Title VI).

112. *Davis ex rel. LaShonda v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).

113. *Id.* at 650 (“We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”).

harassment has been held to apply to other forms of discrimination in federal programs and activities, including ethnic discrimination in post-secondary education.<sup>114</sup>

By its terms, Title VI does not prohibit religious discrimination.<sup>115</sup> However, the Department of Education’s Office for Civil Rights (“OCR”), which enforces Title VI on American university campuses,<sup>116</sup> and the US

114. See *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (“Title IX . . . was patterned after Title VI of the Civil Rights Act of 1964); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 695–96 (1979); In 1994, the Department of Education’s Office of Civil Rights (“OCR”), which enforces Title VI in secondary and post-secondary education, issued an investigative guidance document regarding the procedures and analysis that OCR staff should follow when investigating issues of racial incidents and harassment against students. *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,448, 11,449 (Mar. 10, 1994); In it, OCR uses a standard for identifying hostile environment harassment that differs from the standard that the Supreme Court articulated in *Davis* five years later. Under OCR’s harassment standard, the DoE will find a Title VI violation if the institution “has created or is responsible for a racially hostile environment—i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient.” *Id.* OCR’s standard appears to differ from the Court’s *Davis* standard in two significant ways: first, in defining the severity of the conduct, OCR’s construction—“severe, pervasive or persistent”—is more lenient than the Court’s “severe, pervasive, and objectively offensive” requirement; second, OCR’s guidance that the harassing conduct must “interfere with or limit the ability” of the student to participate or benefit from the activities and services of the institution is arguably more lenient than the standard set by the Court in *Davis*. *Id.*; *Davis*, 526 U.S. at 650; Interestingly, and somewhat surprisingly, as of this writing the 1994 OCR guidance remains accessible on the DoE’s public website. *Racial Incidents and Harassment Against Students*, U.S. DEP’T OF EDUC. (Mar. 10, 1994), <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html>.

115. In omitting religious-based discrimination from the protections of Title VI, Congress was likely motivated by concerns that religiously-identified institutions be able to privilege their co-religionists in the admission of students, employment, and certain other decisions. See Kenneth Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL OF RTS. J. 837, 877–82 (2007) (discussing at length the legislative history on this point) (internal citations omitted).

116. Under the Civil Rights Restoration Act of 1987, OCR has institution-wide jurisdiction over a university that receives Federal funds. Civil Rights Restoration Act of 1987, Pub. L. 100–259, 102 Stat. 28; Title VI further authorizes and directs OCR to issue rules, regulations, and orders of general applicability in order to effectuate the provisions of Title VI. 42 U.S.C. § 2000d-1 (1964); To achieve compliance, OCR and other agencies authorized to extend federal grant monies are empowered to seek “termination of or refusal to grant or to continue [financial] assistance . . . to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply such requirement.” *Id.*

Department of Justice have long recognized that Title VI prohibits discrimination against members of certain religious groups when the discrimination is based on the members' shared actual or perceived ethnicity, ancestry, or national origin.<sup>117</sup> In 2004, the Assistant Secretary for Civil Rights at the Department of Education, Kenneth Marcus, authored a *Dear Colleague* guidance letter regarding the application of Title VI to discrimination against members of groups with shared ethnic characteristics. The guidance clarified that although Title VI does not cover religiously based discrimination and harassment,

[g]roups that face discrimination on the basis of shared ethnic characteristics may not be denied the protection of our civil rights laws on the ground that they also share a common faith. . . . OCR will exercise its jurisdiction to enforce the Title VI prohibition against national origin discrimination, regardless of whether the groups targeted for discrimination also exhibit religious characteristics. Thus, for example, OCR aggressively investigates alleged race or ethnic harassment against Arab Muslim, Sikh and Jewish students.”<sup>118</sup>

The *Dear Colleague* letter makes clear that students who face discrimination on account of their national origin or race—classes expressly covered by Title VI—do not forfeit the protections of the law merely because they happen also to share a common religious faith. Consider, for example, that Islamophobia—defined as “irrational fear of, aversion to, or discrimination against Islam or people who practice Islam,” i.e., Muslims<sup>119</sup>—can manifest as intolerance toward Arabs, an ethnic group whose members are largely Muslim. A college or university that were to turn a blind eye to severe or persistent harassing conduct toward Arab or Arab-American students could, under the OCR guidance, run

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117. See Letter from Kenneth L. Marcus, Deputy Assistant Sec’y for Enf’t, to Colleague (Sept. 13, 2004), available at <https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html> [hereinafter *Marcus Dear Colleague Letter*]; see also Letter from Thomas E. Perez, Assistant Attorney Gen., to Russlynn H. Ali, Assistant Sec’y of Educ. for Civil Rights (Sept. 8, 2010), available at [https://www.justice.gov/sites/default/files/crt/legacy/2011/05/04/090810\\_AAG\\_Perez\\_Letter\\_to\\_Ed\\_OCR\\_Title%20VI\\_and\\_Religiously\\_Identifiable\\_Groups.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/05/04/090810_AAG_Perez_Letter_to_Ed_OCR_Title%20VI_and_Religiously_Identifiable_Groups.pdf) [hereinafter *Perez Dear Colleague Letter*].

118. Marcus *Dear Colleague Letter*, *supra* note 117.

119. *Islamophobia*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Islamophobia> (last visited Mar. 7, 2021).



afoul of Title VI even though the students subjected to the harassment share a common religious faith.

In 2010, another *Dear Colleague* guidance letter, authored by Assistant U.S. Attorney General Thomas E. Perez, affirmed the correctness of the 2004 guidance and expanded on its central points.<sup>120</sup> The 2010 guidance provides: “Although Title VI does not prohibit discrimination on the basis of religion, discrimination against Jews, Muslims, Sikhs, and members of other religions *violates Title VI when that discrimination is based on the group’s actual or perceived shared ancestry or ethnic characteristics*, rather than its members’ religious practice.”<sup>121</sup> The guidance also clarified that Title VI prohibits discrimination against an individual “where it is based on actual or perceived citizenship or residency in a country whose residents share a dominant religion or distinct religious identity.”<sup>122</sup>

In December of 2019, President Donald Trump issued Executive Order No. 13899, titled *Executive Order on Combating Antisemitism*.<sup>123</sup> The EO states that in enforcing Title VI, and identifying evidence of actionable discrimination, all executive departments and agencies charged with enforcing Title VI (including the OCR) “shall consider” the non-legally binding working definition of antisemitism by the International Holocaust Remembrance Alliance (“IHRA”) as well as well the contemporary examples of antisemitism identified by the IHRA, “to the extent that any examples might be useful as evidence of discriminatory intent.”<sup>124</sup>

IHRA, an intergovernmental organization, issued its definition of antisemitism in 2016.<sup>125</sup> It provides: “Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.”<sup>126</sup> Arguably more important than the IHRA definition itself are the accompanying non-exhaustive examples of

120. Perez *Dear Colleague Letter*, *supra* note 117.

121. *Id.* (emphasis added).

122. *Id.*

123. Exec. Order No. 13899, 84 Fed. Reg. 68779 (Dec. 11, 2019).

124. *Id.*

125. *About the IHRA Working Definition of Antisemitism*, INT’L HOLOCAUST REMEMBRANCE ALL.,

<https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism?focus=antisemitismandholocaustdenial> (last visited Mar. 2, 2021).

126. *Id.*

contemporary manifestations of antisemitism.<sup>127</sup> The examples recognize traditional and classical tropes and canards about Jews, but crucially, they also acknowledge that contemporary antisemitism sometimes manifests as the delegitimization and demonization of, and the application of a double standard toward, the State of Israel.<sup>128</sup> Central to IHRA is the recognition that Jews are a people deserving of self-determination and that denying this right, due to an irrational fear or hatred of the very concepts of Jewish peoplehood and a Jewish homeland, is a contemporary example of antisemitism.<sup>129</sup>

The EO immediately stirred debate, some of it intense (undoubtedly also due in part to it being a Trump administration directive to federal agencies).<sup>130</sup> The ACLU, for example, expressed concern that the EO could encourage the government to equate any speech criticizing Israel with unlawful discrimination and thereby result in the suppression of political speech protected by the First Amendment.<sup>131</sup> Others cautioned, in a similar vein, that by requiring federal agencies to consider the IHRA

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127. *Id.*

128. *Id.*

129. See Bernard Harrison, *Israel and Antisemitism*, 2 J. CONTEMP. ANTISEMITISM 19–28 (2019); Leslie Klaff & Bernard Harrison, *Why Facebook Must Adopt IHRA*, JC (Oct. 16, 2020), <https://www.thejc.com/comment/opinion/why-facebook-must-adopt-ihra-1.507619> (stating that in 2010, the US State Department adopted this definition which includes the so-called “3 D’s” of demonizing, delegitimizing, and applying double standards to Israel). *Defining Antisemitism*, U.S. DEP’T OF STATE, <https://www.state.gov/defining-anti-semitism> (last visited Mar. 2, 2021). See also Natan Sharansky, *Why BDS Fails My 3D Test on Anti-Semitism*, NEWSWEEK (Sept. 25, 2019), <https://www.newsweek.com/antisemitism-bds-natan-sharansky-3d-test-1461305>.

130. See, e.g., David Schraub, *Why Trump’s Executive Order on Anti-Semitism Touched Off a Firestorm*, ATLANTIC (Dec. 12, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/dilemma-jewish-identity/603493/>.

131. *ACLU Comment on President Trump’s Executive Order on Combatting Ant-Semitism*, ACLU (Dec. 11, 2019), <https://www.aclu.org/press-releases/aclu-comment-president-trumps-executive-order-combating-anti-semitism> (“If the order were interpreted to [equate speech criticizing Israel with unlawful discrimination], it would be unconstitutional. Speech criticizing the Israeli government, or any government, is political speech protected under the First Amendment, and cannot be suppressed. Agencies are permitted to consider such speech as evidence of discriminatory intent — but not to prohibit it.”).

definition, the EO would have the effect, if not the intent, of stifling protected pro-Palestinian, anti-Israel, and/or anti-Zionist speech.<sup>132</sup>

Such concerns about the suppression or chilling of free speech are likely exaggerated. In the authors' view, the EO is best understood as an extension of the Bush II (Department of Education) and Obama (Department of Justice) administrations' guidance on Title VI<sup>133</sup> providing that anti-Jewish discrimination based on shared actual or perceived ethnicity or ancestry is actionable under Title VI.<sup>134</sup> By incorporating the IHRA definition and examples, the EO builds on the prior federal agency guidance letters by providing a framework for how to identify ethnic-

132. See, e.g., Frederick P. Schaffer, *Title VI, Anti-Semitism, and the Problem of Compliance*, 46 J. COLL. & UNIV. LAW 72, 72 (2021). Schaffer posits that although much will depend on how the Department of Education applies the EO in practice, by relying on the IHRA examples which view certain criticisms of Israel as antisemitic, its enforcement is likely to result in the suppression of "core political speech" protected by the First Amendment. *Id.* at 87. See also Kenneth Stern, *I Drafted the Definition of Antisemitism. Rightwing Jews are Weaponizing It*, GUARDIAN (Dec. 13, 2019), <https://www.theguardian.com/commentisfree/2019/dec/13/antisemitism-executive-order-trump-chilling-effect>. BDS advocates have also long argued against the IHRA working definition of antisemitism on the grounds that it would regulate and chill protected political speech due to its "conflation" of criticism of Israel and Zionism with antisemitism, especially if applied on college campuses. See, e.g., Barry Trachtenberg et al., *Shifting Sands: Zionism & American Jewry* in ZIONISM, ISRAEL, AND ANTI-SEMITISM DANGEROUS CONFLATION (2019).

133. See Marcus *Dear Colleague Letter*, *supra* note 117.

134. Prior efforts to achieve the same result as the EO were advanced, unsuccessfully, through federal legislation which used a definition of antisemitism very similar to the IHRA language. See Anti-Semitism Awareness Act, S. 10, 114th Cong. (2016), <https://www.congress.gov/bill/114th-congress/senate-bill/10/text?q=%7B%22search%22%3A%5B%22anti-semitism+awareness+act+of+2016%22%5D%7D&r=4&s=2>. The bill was passed by the Senate but stalled in the House of Representatives. A similar bill was later introduced but went nowhere in 2018 and 2019. See Anti-Semitism Awareness Act, S. 2940, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/2940>; see also Anti-Semitism Awareness Act of 2019, S. 852, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/852/text>. The Anti-Semitism Awareness Act had strong support from organizations that monitor antisemitism, prominent among them the Anti-Defamation League. See *What is the Anti-Semitism Awareness Act Really About?*, ADL (Dec. 11, 2019), <https://www.adl.org/blog/what-is-the-anti-semitism-awareness-act-really-all-about>. However, it also had critics who expressed concern about its impact on free speech. See, e.g., Joe Cohn, *Anti-Semitism Awareness Act Continues to Threaten Free Speech on Campus*, FIRE (Apr. 12, 2019), <https://www.thefire.org/anti-semitism-awareness-act-continues-to-threaten-free-speech-on-campus/>.

based discrimination against Jews. The EO does not change the legal requirements for demonstrating a Title VI violation, and it expressly prohibits government agencies from “diminish[ing] or infring[ing] upon” rights protected by the First Amendment or other federal law.<sup>135</sup>

Of course, much will depend on how the EO is enforced in practice. For example, the EO directs federal agencies that enforce Title VI to “consider” the IHRA definition and examples when determining if the conduct in question was motivated by discriminatory (i.e., antisemitic) intent. Requiring government agencies to “consider”—rather than, for example, “use” or “apply”—IHRA in each instance appears to reflect an acknowledgment that not all anti-Israel speech is necessarily motivated by antisemitism, and that making such a determination requires a careful assessment of the context based on all of the relevant circumstances. In addition, the IHRA examples themselves use a number of arguably vague and difficult-to-apply terms such as “targeting,” “racist,” and “double standards.” Taken as a whole, the language of the EO and its reliance on IHRA raises at least the possibility that the EO could be manipulated to attempt to suppress anti-Israel or anti-Zionist speech.<sup>136</sup>

Thus far, however, any such concerns have not materialized.<sup>137</sup> As noted above, it is important to emphasize that not all of the IHRA’s examples will necessarily evidence antisemitic intent; rather, each incident

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135. Exec. Order No. 13899, *supra* note 123.

136. See Schaffer, *supra* note 132, at 78 (observing that the terms “targeting,” “racist,” and “double standards” are inherently vague, subjective, and difficult to apply).

137. A 2014 complaint re-opened by the Department of Education’s Office of Civil Rights in September 2018 offers a case in point. The case involves an alleged antisemitic incident at Rutgers University in 2011 during which Jewish students, some of whom had a Jewish appearance (wearing a yarmulke) and who were identified as “Zionists” in a student email from the event, may have been discriminated against at an anti-Israel event which was open to the public by being charged an admission fee while other non-Jewish students were admitted free of charge. In re-opening the investigation, Assistant Education Secretary for Civil Rights Kenneth L. Marcus invoked the IHRA definition of antisemitism when stating that the 2011 incident merited further scrutiny. Marcus noted that “[i]n cases such as this, it is important to determine whether terms such as ‘Zionist’ are actually code for ‘Jewish.’” Nick Anderson, *Feds Reopen Probe of Alleged Anti-Semitic Incident at Rutgers*, WASH. POST (Sept. 12, 2018), <https://www.washingtonpost.com/education/2018/09/12/feds-reopen-probe-alleged-anti-semitic-incident-rutgers/>.

must be considered in context and in view of all the circumstances.<sup>138</sup> By way of example, drawing comparisons between Israeli government policy and that of Nazi Germany in the 1930s and 1940s, or expressing the view that the Jewish people should not have the right to self-determination—two of the contemporary manifestations of antisemitism according to the IHRA<sup>139</sup>—may be deeply offensive to Jews<sup>140</sup> (and others) but they will not, standing alone, trigger Title VI liability.

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138. See Exec. Order No. 13899, *supra* note 123 (“As with all other Title VI complaints, the inquiry into whether a particular act constitutes discrimination prohibited by Title VI will require a detailed analysis of the allegations . . . Nothing in this order shall be construed to alter the evidentiary requirements pursuant to which an agency makes a determination that conduct, including harassment, amounts to actionable discrimination, or to diminish or infringe upon the rights protected under any other provision of law.”). See also *About the IHRA Working Definition of Antisemitism*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism?focus=antisemitismandholocaustdenial> (last visited Mar. 2, 2021) (noting that the examples of antisemitism provided with the IHRA definition are illustrative only: “Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious sphere *could, taking into account the overall context*, include, but are not limited to. . . .”) (emphasis added).

139. *Working Definition of Antisemitism*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism?focus=antisemitismandholocaustdenial> (last visited Mar. 10, 2021).

140. See Alyza D. Lewin, *Zionism – The Integral Component of Jewish Identity that Jews are Historically Pressured to Shed*, 26 ISRAEL AFFS. 330, 332 (2020). The majority of American Jews view Zionism as a central feature of Jewish identity and belief and thus as more than simply a political movement. According to multiple polls, for most Jews, the yearning to re-establish a Jewish national homeland in the Land of Israel is considered a key aspect of Jewish identity and faith. As Lewin notes, “[t]he deep religious, ancestral, and ethnic connection of Jews to the Land of Israel is as old as Abraham and the Bible.” *Id.* “One can be a Zionist and criticise specific government policies. It is not possible, however, to demonise Zionists without demonising Jews.” *Id.* That anti-Zionist speech can be deeply offensive to Jewish members of the campus community was recognized in a 2019 settlement of a lawsuit alleging discrimination against Jewish students at San Francisco State University. See Jeremy Bauer-Wolf, *Cal State System Settles with Jewish Students*, INSIDE HIGHER ED (Mar. 22, 2019), <https://www.insidehighered.com/quicktakes/2019/03/22/cal-state-system-settles-jewish-students>. The settlement followed several years of litigation focused on a 2017 campus event in which the San Francisco State University Hillel chapter was blocked from participating, a decision that the lawsuit claims was authorized by university officials. As part of the settlement, the university agreed to issue a public statement affirming that “it understands that, for many Jews, Zionism is an important part of their identity.” *Id.*

Some early criticism of the EO came from certain voices from within the American Jewish community, who pushed back against the idea that Jews could be defined as a national or racial group.<sup>141</sup> But that approach—the notion of “legally cognizable Jewish nationhood (or race)”<sup>142</sup>—is precisely what forms the basis for affording Jews protection under Title VI in the first place. The approach was recognized implicitly in the 2004 and 2010 *Dear Colleague* letters and it finds direct support in the jurisprudence of the Supreme Court.<sup>143</sup> In 1987, the Court decided *Shaare Tefila Congregation v. Cobb*, involving a synagogue in Silver Spring, Maryland that had been spray-painted with KKK symbols, swastikas, and antisemitic slogans and slurs.<sup>144</sup> The congregation and some of its members filed suit in US district court, claiming their federal civil rights were violated and invoking, among other causes of action, 42 U.S.C. § 1982.<sup>145</sup> Section 1982, enacted as part of the Civil Rights Act of 1866, provides that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”<sup>146</sup> It has been interpreted to “forbid both official and private racially discriminatory interference with property rights.”<sup>147</sup>

The district court dismissed all of the plaintiffs’ claims and the court of appeals affirmed.<sup>148</sup> The appeals court reasoned that Section 1982 was not “intended to apply to situations in which a plaintiff is not a member of a racially distinct group, but is merely *perceived* to be so by defendants.”<sup>149</sup> Because Jews, in the modern understanding, are not a “racially distinct group,” the court of appeals believed that “discrimination against Jews is not racial discrimination.”<sup>150</sup>

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141. See Schraub, *supra* note 130.

142. *Id.*

143. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 618 (1987); see also Marcus *Dear Colleague Letter*, *supra* note 117; see also Perez *Dear Colleague Letter*, *supra* note 117.

144. *Shaare Tefila Congregation*, 481 U.S. at 616.

145. *Id.*

146. 42 U.S.C. § 1982 (2012).

147. *Shaare Tefila Congregation*, 481 U.S. at 616 (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 421 (1968)).

148. *Id.*

149. *Id.* at 617 (quoting *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523, 526 (4th Cir. 1986)).

150. *Id.* at 616, 617.

In a unanimous decision, the Supreme Court reversed.<sup>151</sup> The Court rejected the appeals court's conclusion that because Jews no longer are considered to be a separate race, Jews could not assert claims of racial discrimination under Section 1982. "[T]he question before us," Justice Byron White wrote for the Court,

is not whether Jews are considered to be a separate race by today's standards, but whether, at the time § 1982 was adopted, Jews constituted a group of people that Congress intended to protect. It is evident from the legislative history . . . that Jews and Arabs were among the peoples then considered to be distinct races, and hence within the protection of the statute. Jews are not foreclosed from stating a cause of action against other members of what today is considered to be part of the Caucasian race.<sup>152</sup>

As University of Chicago Law School Professor Daniel Hemel argues:

[*Shaare Tefila*] teaches that placing a group within a racial category for purposes of civil rights protection does not require us to endorse the idea that the group is racially distinct. . . . Just as African-Americans qualify for protection from racial discrimination even though the very idea of race is based on pseudoscience, anti-Semitism can be racism for legal purposes even though Jewishness cannot be reduced to racial terms.<sup>153</sup>

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The EO is likely to accelerate the trend of Title VI complaints being filed with OCR alleging failures on the part of university leaders to address persistent or severe harassment of Jewish and pro-Israel students. In 2019 and early 2020, following the receipt of complaints filed on behalf of various Jewish and Zionist undergraduate students, OCR opened Title VI

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151. *Id.* at 617–18.

152. *Id.*

153. Daniel Hemel, *Trump's Executive Order Has Firm Legal Grounding*, N.Y. TIMES (Dec. 12, 2019), <https://www.nytimes.com/2019/12/12/opinion/trumps-executive-order-has-firm-legal-grounding.html>.

investigations<sup>154</sup> at Duke University,<sup>155</sup> University of North Carolina-Chapel Hill,<sup>156</sup> New York University,<sup>157</sup> Williams College,<sup>158</sup> and University of California Los Angeles.<sup>159</sup> Most recently, on November 13, 2020, the University of Illinois at Urbana-Champaign (UIUC) reported

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154. OCR enforces Title VI primarily through its investigations and resolution of complaints. See *Civil Rights at School: Agency Enforcement of Title VI of the Civil Rights Act of 1964*, CONG. RES. SERV. (Apr. 4, 2019), <https://crsreports.congress.gov/product/pdf/R/R45665>; see also *Office of Civil Rights Case Processing Manual*, U.S. DEPT. OF EDUC. (Aug. 26, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm-2010.html> (setting forth the procedures by which OCR receives, analyzes, and disposes of allegations under Title VI and other statutes within its jurisdiction). Private parties, including students, may also file an action in court to enforce Title VI, though the Supreme Court has circumscribed the types of discrimination that are actionable. See *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001) (holding that while private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages, disparate impact claims are not actionable).

155. Letter from Zionist Organization of America to Kenneth L. Marcus, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (on file at <https://zoa.org/wp-content/uploads/2019/04/Letter-to-Kenneth-Marcus-re-UNC-Duke-Gaza-conference-4-17-19.pdf>); Letter from Ralph A. Suris, Chief Reg’l Attorney, Office for Civil Rights, to Zionist Organization of America (Dec. 10, 2019) (on file at <https://zoa.org/wp-content/uploads/2019/12/OCR-Resolution-Letter-to-ZOA-12-10-19.pdf>).

156. Letter from Zionist Organization of America to Kenneth L. Marcus, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (Apr. 17, 2019) (on file at <https://zoa.org/wp-content/uploads/2019/04/Letter-to-Kenneth-Marcus-re-UNC-Duke-Gaza-conference-4-17-19.pdf>); Letter from Ralph A. Suris, Chief Reg’l Attorney, Office for Civil Rights, to Zionist Organization of America (Nov. 6, 2019) (on file at <https://zoa.org/wp-content/uploads/2019/11/OCRs-resolution-letter-to-ZOA-11-6-19.pdf>).

157. Aaron Bandler, *Education Department to Investigate NYU’s Handling of Campus Anti-Semitism*, JEWISH J. (Nov. 15, 2019), <https://jewishjournal.com/news/united-states/307181/education-department-to-investigate-nyus-handling-of-campus-anti-semitism/>.

158. Jenny Fink, *Williams College Investigated for Alleged Civil Rights Violation After Students Vote Against Pro-Israel Group*, NEWSWEEK (June 4, 2019), <https://www.newsweek.com/williams-college-investigation-pro-israel-civil-rights-1442118>.

159. Aaron Bandler, *Department of Education to Investigate StandWithUs Complaint Against UCLA*, JEWISH J. (Jan. 9, 2020), <https://jewishjournal.com/news/united-states/309392/department-of-education-to-investigate-standwithus-complaint-against-ucla/>.



that OCR had opened a Title VI investigation into a complaint that had been filed earlier that year.<sup>160</sup>

The allegations in these complaints vary considerably from campus to campus.<sup>161</sup> In the case of Duke University and University of North Carolina (UNC), the complaint filed with OCR focused on a March 2019 academic conference co-sponsored by the Duke/UNC Consortium for Middle East Studies and which was open to students and faculty on both campuses.<sup>162</sup> According to the complaint, the conference, titled “Conflict over Gaza: People, Politics and Possibilities,” displayed a clear anti-Israel bias, including by featuring speakers who openly demonized Israel for its alleged role in the humanitarian crisis in Gaza and by failing to include scholars who had subject-matter expertise who could have provided important context and offered competing viewpoints and perspectives.<sup>163</sup> The conference also featured what the complaint described as a highly offensive and overtly antisemitic musical performance.<sup>164</sup> Further, swastikas and antisemitic posters were later discovered on the UNC campus.<sup>165</sup> The complaint charged that by failing to forcefully and unequivocally condemn the antisemitic hate speech voiced at the conference, UNC and Duke had essentially legitimized and normalized it.<sup>166</sup>

In the case of NYU, the detailed complaint, filed in April 2019, pointed to multiple incidents over a two year-period in which students were

160. See Greta Anderson, *U of Illinois, Jewish Groups Reach Resolution*, INSIDE HIGHER ED (Nov. 17, 2020), <https://www.insidehighered.com/quicktakes/2020/11/17/u-illinois-jewish-groups-reach-resolution>.

161. The Williams College complaint did not allege that university administrators had tolerated a hostile environment for Jewish students. Rather, it charged that the refusal by the College Council (CC) to recognize Williams Initiative for Israeli (WIFI) as a recognized student organization on the same terms as the CC has recognized dozens of other student groups, and the continued non-recognition, constituted discrimination against Jewish students on the basis of ethnicity or race. Letter from David Bernstein, George Mason U. L. Professor, to U.S. Dept. of Educ. Office for Civil Rights (May 2, 2019) (on file with authors).

162. See Letter from Morton Klein, Nat’l President, Zionist Org. of Am., & Susan Tuschman, Dir., Center for Law and Justice, to Kenneth Marcus, Assistant Sec’y for Civil Rights (Apr. 17, 2019) (on file at <https://zoa.org/wp-content/uploads/2019/04/Letter-to-Kenneth-Marcus-re-UNC-Duke-Gaza-conference-4-17-19.pdf>).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

allegedly harassed based on their shared Jewish ancestry.<sup>167</sup> The allegations centered around actions taken by NYU's Students for Justice in Palestine, a pro-Palestinian campus student group, which allegedly caused Jewish and pro-Israel students to feel unwelcome and unsafe.<sup>168</sup> As one of several examples cited in the complaint, in 2018 SJP reportedly tried to shut down a "Rave in the Park" celebration of Israel's 70<sup>th</sup> birthday that had been organized by a pro-Israel student group. Members of SJP reportedly encouraged passersby to file a noise complaint and wiped their feet and stomped on an Israeli flag.<sup>169</sup> One member of SJP reportedly set an Israeli flag on fire, and another forcibly seized a microphone from a pro-Israel student, causing injuries.<sup>170</sup> The complaint acknowledged that the university has publicly opposed efforts to adopt BDS-linked Israel divestment and boycott initiatives, including those that had been advanced or supported by SJP.<sup>171</sup> Yet it faults NYU for failing to do enough to hold SJP accountable, instead awarding the group a presidential service award.<sup>172</sup>

In a statement posted to its website in November 2019, NYU disputed that it had failed to address the concerns of Jewish and pro-Israel students on campus.<sup>173</sup> The statement noted that the SJP-allied students involved in disrupting the rave in Washington Square Park in 2018 were "referred to the University's student conduct office and that [the university leadership had publicly] rejected and criticized attempts to ostracize pro-Israel groups."<sup>174</sup> It also noted that university leaders had rejected and repudiated BDS, including calls by students to shutter NYU's campus in Tel Aviv, Israel.<sup>175</sup>

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167. Aaron Bandler, *Pro-Israel Students File Complaint Against NYU*, JEWISH J. (Apr. 24, 2019), <https://jewishjournal.com/news/united-states/297574/pro-israel-students-file-complaint-against-nyu/>.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Press Release, NYU, Statement on Reports of a Pending Investigation by the US Dept. of Education's Office of Civil Rights (Nov. 19, 2019) (on file at [https://www.nyu.edu/about/news-publications/news/2019/november/Pending\\_OCR\\_Investigation.html](https://www.nyu.edu/about/news-publications/news/2019/november/Pending_OCR_Investigation.html)).

174. *Id.*

175. *Id.*

As of this writing, the complaints at Duke, UNC, NYU, and Williams have been settled through voluntary resolutions in which the universities agreed to undertake certain measures without admitting any fault or liability.<sup>176</sup> OCR's investigations at UCLA and at UIUC remain open.<sup>177</sup>

In the case of Duke University, on December 3, 2019, it agreed to resolve the OCR complaint regarding its response to the Conflict in Gaza conference.<sup>178</sup> Under the resolution, Duke agreed to "affirm and bolster [its] commitment" to addressing harassment and discrimination by instituting several measures, including: (1) agreeing to issue a more robust public statement that it does not tolerate acts of discrimination or harassment, including antisemitic harassment; (2) revising its campus antidiscrimination policy to include, among the prohibited forms of discrimination, harassment based on antisemitism in any of its modern manifestations; and (3) including a training module on antisemitism and antisemitic harassment as a component of any training it offers to, or

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176. *See Resolution Agreement: Duke University*, ZIONIST ORG. OF AM. (Dec. 3, 2019), <https://zoa.org/wp-content/uploads/2019/12/Duke-Resolution-Agreement-with-OCR-12-3-19.pdf>; *Resolution Agreement: The University of North Carolina at Chapel Hill*, ZIONIST ORG. OF AM. (Oct. 14, 2019), <https://zoa.org/wp-content/uploads/2019/11/OCR-Resolution-Agreement-Complaint-No.-11-19-2215.pdf>; Letter from Timothy C. J. Blanchard, Reg'l Director, U.S. Dept. of Educ., (Sept. 25, 2020) (on file at <https://jewishinsider.com/wp-content/uploads/2020/09/NYU-OCR-Resolution-Agreement-9-25-20-With-Watermark.pdf>) [hereinafter *Blanchard Letter*]; Bandler, *supra* note 168.

177. *See Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of February 26, 2021 7:30am Search*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tvi.html?queries%5Btod%5D=Title+VI+-+National+Origin+Discrimination+Involving+Religion> (last visited Apr. 5, 2021). Regarding UIUC, the complaint filed with the OCR on behalf of Jewish and pro-Israel students charges that the administration at UIUC has failed to adequately respond to and address pervasive anti-Jewish harassment and discrimination on the campus. The complaint was filed in March 2020 and made public on October 23, 2020. *See* Greta Anderson, *Jewish Students Claim Civil Rights Violations*, INSIDE HIGHER ED (Oct. 26, 2020), <https://www.insidehighered.com/news/2020/10/26/jewish-students-university-illinois-allege-anti-semitic-environment>; *see also University of Illinois Jewish Students File Complaint with U.S. Department of Education*, LOUIS D. BRANDEIS CTR. HUM. RTS. UNDER LAW (Oct. 23, 2020), <https://brandeiscenter.com/university-of-illinois-jewish-students-file-complaint-with-u-s-department-of-education/>.

178. *Resolution Agreement: Duke University*, *supra* note 176.

requires of, students, faculty, and staff in connection with the revised antidiscrimination policy.<sup>179</sup>

The Duke resolution closely mirrored the agreement that the University of North Carolina entered with OCR two months earlier (October 2019).<sup>180</sup> In it, UNC agreed to publicly reiterate its commitment to ensuring that antisemitic harassment and discrimination will not be tolerated; to strengthen the university's antidiscrimination policy to include antisemitism; and to require that diversity and inclusion trainings for students, faculty, and staff include a section on how to avoid and respond to antisemitism on campus.<sup>181</sup>

Most recently, in September 2020, New York University and OCR agreed to voluntarily resolve OCR's investigation into the Title VI complaint, described *supra*.<sup>182</sup> The agreement that was reached, similar to those at Duke and UNC, required NYU to issue a robust public statement against antisemitism; update its nondiscrimination and anti-harassment policy to include discrimination against Jews based on shared ethnicity and ancestry; and include antisemitism awareness training as a required component of any training modules given to students, faculty, and staff regarding its nondiscrimination and anti-harassment policy.<sup>183</sup> It also requires NYU to host multiple town hall meetings with community members and to meet with Jewish student community and group leaders regarding the university's commitment and actions to address antisemitism on campus.<sup>184</sup>

What is perhaps most notable about NYU agreement, though, is that it expressly incorporates the IHRA definition of antisemitism. Specifically, concerning the revision of its nondiscrimination and anti-harassment policy, NYU must "include a statement that the University prohibits discrimination on the bases of shared ancestry and ethnic characteristics, *including antisemitism (as defined in Section (2)(a)(i) of the Executive Order on Combatting Antisemitism (Exec. Order No. 13899)*" (emphasis added).<sup>185</sup> Section 2(a)(i) is the part of the EO that requires "all executive

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179. *Id.*

180. *Resolution Agreement: The University of North Carolina at Chapel Hill, supra* note 176.

181. *Id.*

182. *Blanchard Letter, supra* note 176.

183. *Id.*

184. *Id.*

185. *Id.*

departments and agencies [] charged with enforcing Title VI” to “consider . . . the [IHRA definition].”<sup>186</sup> In addition, the NYU agreement notes that the training modules to be developed may incorporate the IHRA illustrative examples of antisemitism as referenced in EO 13899.<sup>187</sup>

#### IV. CONCLUSION

The voluntary resolution agreements that Duke, UNC, and NYU entered with OCR suggest that leaders of these institutions take seriously the charge that antisemitism has been allowed to fester on their campuses. By agreeing to issue robust university-wide statements condemning antisemitism and other forms of hate, revise campus antidiscrimination policies and develop antisemitism awareness training, these university leaders have signaled clearly their commitment to fostering a diverse, inclusive campus environment for all students including Jewish and Zionist students.

Indeed, the commitment that these universities have made to addressing antisemitism proactively through required ongoing educational programming and training is an especially important and positive outcome of the reliance on Title VI on these campuses. New initiatives have recently been launched by Hillel International and the Academic Engagement Network to help improve the campus climate for students by assisting officials and staff to better understand contemporary antisemitism and appreciate the needs and concerns of the campus Jewish

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186. Exec. Order No. 13899, *supra* note 123.

187. Blanchard *Letter*, *supra* note 176. At the time of this writing, it is unclear whether NYU will incorporate the IHRA definition of antisemitism in full within its revised nondiscrimination and anti-harassment policies. A spokesperson for the university noted last fall that while NYU agreed to adopt the core definition of IHRA, it will delineate its “own examples” while also affirming in a statement its “long-held commitment to academic freedom and free speech.” Kery Murakami, *NYU Settles Anti-Semitism Case*, INSIDE HIGHER ED (Oct. 2, 2020), <https://www.insidehighered.com/news/2020/10/02/new-york-university-settles-anti-semitism-case-education-department>. However, in a separate paragraph in the agreement, NYU acknowledges that “[it] has advised OCR” that in academic year 2020-21, NYU’s Center for Multicultural Education and Programs (CMEP) and the Bronfman Center [NYU Hillel] will partner “to develop a training module based on the [nondiscrimination and anti-harassment policy] and including section 2(a)(i) of Exec. Order No. 13899 and Title VI with respect to anti-Semitism.”). Thus, while NYU may ultimately not revise its nondiscrimination and anti-harassment policies to include the IHRA definition in its entirety, NYU’s training materials will likely present the complete IHRA working definition, including its identified contemporary examples of antisemitism.

community. As of this writing, some 10-15 campuses will participate in these pilot programs during the 2020-2021 academic year.<sup>188</sup>

University leaders also signal their commitment to fostering a diverse and inclusive campus when they exercise their own free speech rights to condemn hate speech that is inimical to the academy's mission. While students and faculty have the free speech right to support BDS, to present and teach the BDS narrative, and even to advocate for academic boycotts, university leaders are not bereft of tools with which to respond. As argued by the Academic Engagement Network:

What is required is . . . leadership—[ ] a willingness to provide a moral compass in condemning hateful speech that is antithetical to the [university's] values of tolerance, diversity and inclusion. Even racist and other prejudiced expression is constitutionally protected speech so long as there is not an immediate threat to safety. But the fact that our jurisprudence allows for such freedom of expression does not mean that this speech does not inflict injury to those so malevolently attacked [AEN 2019].<sup>189</sup>

Administrators can and should challenge the BDS platform and its policy positions. Many are now doing so. In the past several years chancellors and presidents at Pitzer, Vassar, Cornell, University of Minnesota, University of Illinois, University of Mass-Amherst, University of Montana, Columbia University and more have spoken out publicly in opposition to BDS—not only because it violates the central tenets of

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188. *New Initiatives Join Forces to Battle Anti-Semitism on College Campuses*, JNS (Oct. 29, 2020), <https://www.jns.org/new-initiatives-join-forces-to-battle-anti-semitism-on-college-campuses/>.

189. Letter from Acad. Engagement Network to Kumble Subbaswamy, C., UMass Amherst (Oct. 28, 2019) (on file at <https://academicengagement.org/aen-statements-and-letters>). See NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP (2018) (recommending non-censorial strategies to combat hateful speech, but also noting that those “committed to equality and individual dignity have a moral responsibility to condemn ‘hate speech’ and to express support for people whom it targets.”). An OCR FAQ states that schools are obligated to respond if speech contributes to a hostile environment and can protect students from such harassing speech without running afoul of students’ and staff First Amendment rights. Specifically, the OCR notes that universities can meet their obligations by, among other steps, “communicating a rejection of stereotypical, derogatory opinions and ensuring that competing views are heard.” *Race and National Origin Discrimination: Frequently Asked Questions*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html> (last visited Apr. 5, 2021).

academic freedom and campus free speech, but also because it often involves expressions of hatred that leave Jewish and Zionist students intimidated, marginalized, and demoralized.

In this regard, actions can also speak louder than words. Consider that when the SJP chapter at Northwestern brought a convicted terrorist and US immigration fraudster in as a guest speaker several years ago, the university president stood with the protesting Jewish students.<sup>190</sup> Instead of canceling the SJP event, he recognized that the student group had the free speech right to publicly glorify a terrorist.<sup>191</sup> But by joining the vigil to honor the two Jewish college students that Odeh had murdered, he also underscored what speech was consistent with the university mission, and what speech was not.<sup>192</sup> In short, it is certainly possible for campus leaders to disapprove of offensive, hateful and hurtful speech while also protecting campus free expression.<sup>193</sup>

190. Allyson Chiu, *Students React Following Rasmea Odeh's Talk on Campus*, DAILY NW. (May 18, 2017), <https://dailynorthwestern.com/2017/05/18/campus/students-react-following-rasmea-odehs-talk-on-campus>.

191. Catherine Kim, *Organizer Rasmea Odeh Speaks at Northwestern for SJP's Israeli Apartheid Week*, DAILY NW. (May 16, 2017), <https://dailynorthwestern.com/2017/05/16/campus/organizer-rasmea-odeh-speaks-at-northwestern-for-sjps-israeli-apartheid-week>.

192. A similar recent example is San Francisco State University (SFSU) President Lynn Mahoney's decision to attend and address a vigil against terrorism broadcast via Zoom on September 23, 2020. The vigil was hosted by Hillel and several SFSU offices as a protest to the hosting of PFLP leader Leila Khaled in an open classroom virtual event which had been scheduled for the same day. See Gabriel Greschler, *S.F. Hillel Hosts Vigil to Counter Khaled Event*, JEWISH NEWS OF N. CAL. (Sept. 24, 2020), <https://www.jweekly.com/2020/09/24/s-f-hillel-hosts-vigil-to-counter-khaled-event/>.

193. In this regard, it is worth noting how this defense of campus free speech helps pro-Israel and pro-Palestinian campus communities. Calls for censorship on the grounds that speech is offensive and triggering, hurts feelings, or "makes me feel unsafe" have already been used to silence pro-Israel and Zionist voices on campus. Thus, treating BDS as protected speech will benefit Jewish and Zionist students in the long run. See Pamela Paresky & Samantha Harris, *Yes, Anti-Zionism Is Anti-Semitic. But It's Still Protected Speech.*, FORWARD (Aug. 26, 2019), <https://forward.com/opinion/430307/yes-anti-zionism-is-anti-semitic-but-its-still-protected-speech>; see also STERN, *supra* note 88, at 270 (discussing how universities should protect Jewish students from discrimination and pervasive harassment but not shield them from "unpleasant, and even bigoted, ideas.").