

SUPPORTING FREE SPEECH AND COUNTERING ANTISEMITISM ON AMERICAN COLLEGE CAMPUSES

DAVID E. BERNSTEIN & DAVID L. BERNSTEIN*

INTRODUCTION

Many Jewish Americans were shocked and traumatized by the Hamas atrocities of October 7, 2023. Hamas's attack resulted in the largest loss of Jewish life on a single day since the Holocaust, and many Jews in the United States have familial or personal ties to the victims and their families. Jews naturally expected both outrage at Hamas and sympathy for Jewish losses from friendly voices, and at best embarrassed silence from those who had previously sympathized with Hamas.

Instead, almost as soon as Hamas's massacres, rapes, kidnappings, and other atrocities were reported, organized student groups around the United States began protesting against Israel and in favor of Hamas. This included widespread campus celebrations of Hamas's attack.¹ Many observers, Jews and non-Jews, saw praise for an attack on primarily Israeli Jewish civilians by an explicitly antisemitic² Islamist terrorist group³ as inherently antisemitic.

Since then, tens of thousands of students have taken part in demonstrations sponsored by organizations that overtly support Hamas, such as Students for Justice in Palestine.⁴ These

* David E. Bernstein is Distinguished University Professor, Antonin Scalia Law School. David L. Bernstein is Founder and CEO of the North American Values Institute (NAVI). The authors thank Will Creeley, Zalman Rothschild, and participants in a Voices for Liberty roundtable and the 2nd Annual Voices for Liberty Symposium for their helpful comments. Special thanks to Eugene Volokh for his advice regarding emerging constitutional issues. The authors also thank Anthony Cash for his research assistance. The authors benefited from a grant from the Antonin Scalia Law School's Liberty & Law Center's Voices for Liberty Project, generously funded by the Stanton Foundation.

¹ *Anti-Israel Activists Celebrate Hamas Attacks that Have Killed Hundreds of Israelis*, ANTI-DEFAMATION LEAGUE (Oct. 14, 2023), <https://www.adl.org/resources/article/anti-israel-activists-celebrate-hamas-attacks-have-killed-hundreds-israelis> [perma.cc/HV9R-FTZSkk].

² HAMAS COVENANT 1988: THE COVENANT OF THE ISLAMIC RESISTANCE MOVEMENT (Aug. 18, 1988), https://avalon.law.yale.edu/21st_century/hamas.asp [perma.cc/RSC6-ALSS] (translated).

³ While Hamas's status as a terrorist group should be obvious, for the record, the US, the EU, the UK, and Canada are among those who have officially designated Hamas as such.

⁴ See *What is Students for Justice in Palestine, the Hamas-supporting Anti-Israel Group Being Banned on College Campuses?*, AMERICAN JEWISH COMMITTEE (Feb. 23, 2024), <https://www.ajc.org/news/what-is-students-for-justice-in-palestine-the-hamas-supporting-anti-israel-group-being-banned> [perma.cc/X5ES-L9YE].

demonstrations have frequently included what many (quite reasonably) interpret as calls for violence against Israelis, Jews, or both.⁵

More generally, in the weeks and months following October 7, an unprecedented amount of antisemitic vitriol was unleashed on college campuses.⁶ Jewish students at many universities, especially elite universities on both coasts, reported incidents of harassment, vandalism, intimidation, and assault.⁷ Since October 7, many Jewish students have reported experiencing a hostile environment and feeling threatened, both physically and emotionally.

The obvious question is what, if anything, universities should do about this situation. This question at the top of the agenda of much of the American Jewish world since the fall of 2023. For example, a Facebook group called Mothers Against College Antisemitism went from zero to over fifty thousand members in a matter of weeks after October 7. The shock was felt especially acutely because the worst antisemitism incidents tended to occur at elite universities where Jews have long felt secure, and because the perpetrators were at least in a broad sense among Jews' historical allies on the progressive left.⁸

Many of these students do not support Hamas, but that does not relieve them of moral responsibility for participating in demonstrations sponsored by organizations that support Hamas and expressed support for the October 7 massacre. To take a relevant analogy, in 2017 white supremacists sponsored a "Unite the Right" rally in Charlottesville, VA. The rally was billed publicly as a conservative rally defending certain historical monuments, primarily of Confederate civil war heroes. Some rally-goers showed up for that reason, only to leave quickly once they discovered that the rally was sponsored by racists and antisemites who wanted to promote those views.

Progressives (and others) rightly suggested that anyone who stayed through the end of the rally despite knowing who sponsored it was morally blameworthy for, at best, giving tacit support to white supremacy. The same logic applies to students who attended rallies sponsored by groups that support Hamas: anyone willing to attend rallies sponsored by pro-Hamas groups who celebrated the October 7 massacre is morally blameworthy for, at best, giving tacit support to Hamas's genocidal agenda. One might excuse antiwar students for initially joining these protests, as they were the only game in town. But as weeks stretched into months, and the students failed to form antiwar groups that also opposed Hamas, one could only conclude that allying with groups that did support Hamas did not bother them. At the very least, this shows a striking indifference to the antisemitic ideology that animates Hamas.

⁵ *Stop and Think: Anti-Israel Chants and What They Mean*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/article/stop-and-think-anti-israel-chants-and-what-they-mean> [perma.cc/V76J-JLS7].

A good example is the slogan "globalize the Intifada." This slogan seems to suggest that the widespread terrorist violence of the Second Intifada should be visited upon Jews abroad. Activists who participate in this chant typically claim when asked that they are not endorsing violence, but rather are using the word Intifada in its literal Arabic sense of "struggle." This in turn makes one wonder why if the chanters: (a) don't intend to endorse violence; (b) know that Intifada sounds extremely violent to many listeners; and (c) are otherwise speaking in English, they don't simply chant, "globalize the struggle."

⁶ One underappreciated factor in the unease that Jewish students have felt since October 7 is that accompanying public pro-Hamas was a wave of antisemitic vitriol or privately run social networks that allow for user anonymity. See *Campus Antisemitism Online: The Proliferation of Hate on Sidechat*, ANTI-DEFAMATION LEAGUE (Jan. 22, 2024), <https://www.adl.org/resources/article/campus-antisemitism-online-proliferation-hate-sidechat> [perma.cc/7RER-FJDN].

⁷ For some data, see *83% of Jewish College Students Have Experienced or Witnessed Antisemitism Firsthand Since Oct. 7 Attack, Survey Finds*, HILLEL, <https://www.hillel.org/83-of-jewish-college-students-have-experienced-or-witnessed-antisemitism-firsthand-since-oct-7-attack-survey-finds> [perma.cc/K6C8-XDF6]. Harvard University's own report on campus antisemitism makes for searing reading. See PRESIDENTIAL TASK FORCE ON COMBATING ANTISEMITISM AND ANTI-ISRAELI BIAS, HARVARD UNIVERSITY FINAL REPORT (Apr. 29, 2025), <https://www.harvard.edu/wp-content/uploads/2025/04/FINAL-Harvard-ASAIB-Report-4.29.25.pdf> [perma.cc/LZS6-2Q9V].

⁸ The prejudices of the mainstream American Jewish community were such that an outbreak of antisemitism from, say, rural white nationalists in the Mountain West would be regrettable but not surprising; a similar outbreak amount self-

Campus antisemitism also became a major public issue outside Jewish circles. It has been the subject of numerous essays, opinion pieces, and several Congressional hearings. Not least, it attracted the attention of Donald Trump during his 2024 presidential campaign, with Trump promising a crackdown on universities that allowed antisemitism to fester.⁹

This article is the product of one and half years of back-and-forth conversations and correspondence between the authors. The authors are, respectively, a moderate Democrat who has spent most of his professional career in Jewish communal advocacy organizations (David L.), and a libertarian-leaning law professor (David E.). Each of us is a committed liberal, in the broad sense of the term.

This commitment to liberalism includes commitments to two positions that many think have been at odds since the Hamas atrocities of October 7, 2023, and the subsequent wave of antisemitism on American campuses. First, each of us is committed to freedom of expression, and believes that universities are a particularly vital locus for open debate. Second, each of us is also committed to the notion that American Jews should not be treated as second-class citizens or otherwise not receive the protection of relevant civil rights laws.

Since October 7, many commenters have seen these positions as irreconcilable and have chosen sides. Some argue that freedom of expression should triumph over antidiscrimination claims by Jews. Others argue the reverse. We, however, are discomfited by this choice, especially because we believe that free speech liberalism is part of a broader liberalism necessary for American Jews to thrive.

We also share the observation that pro-Hamas and antisemitic sentiment on campus arises as part of the general illiberalism attendant to the rise of illiberal left-wing ideologies.¹⁰ We believe that any significant crackdown on free speech will ultimately reinforce illiberalism on campus, and so any short-term gains to Jewish students will ultimately be outweighed by long-term harm to Jews' well-being.

Over the course of our discussions since October 7, we reached the conclusion that much of the apparent conflict between our liberal values is artificial. Many of the activities championed as part of the pro-Hamas/anti-Israel students' "freedom of expression" involve actions that either are not speech (such as taking over buildings), are not protected speech (such as vandalizing campus property with graffiti), or are protected speech that is subject to reasonable time, place, and manner restrictions violated by the activists (such as holding protests designed to disrupt

described antiracists at places like Columbia or the University of Pennsylvania felt more like familial betrayal. See Jonathan Tobin, *Antisemites are Still Proving Why We Need Israel*, JNS (May 1, 2025), <https://www.jns.org/antisemites-are-still-proving-why-we-need-israel/> [perma.cc/TQ4X-3E8M] ("That so many young people attending school are now the primary victims of the increase in antisemitism is a particularly cruel blow to the Jewish community. Most Jews rightly believed themselves to be fully accepted in American society and very much at home at the elite institutions of higher education, where they had thrived for a century after entry quotas at many schools were largely abandoned.").

⁹ Laura Meckler & Susan Svrluga, *Pro-Hamas Messages Intensify on College Campuses*, WASH. POST (Nov. 10, 2024), <https://www.washingtonpost.com/education/2024/11/10/pro-hamas-protesters-college-campuses> [perma.cc/TQ4X-3E8M] ("President-elect Donald Trump has promised to crack down on campus protests, and his allies expect the Department of Education to more aggressively investigate university responses to pro-Palestinian movements on campuses.").

¹⁰ See generally David L. Bernstein, *Woke Antisemitism: How a Progressive Ideology Harms Jews* (2022).

campus life). We spend the Part I of this article categorizing and documenting examples of such actions and argue that universities can (and should) crack down on them without infringing upon freedom of expression.

The second part of our article is devoted to more difficult cases, in which freedom of expression and the rights of Jewish students more clearly come into conflict. We analyze several such conflicts with the following background principles: (1) Government authorities should not penalize expressions of opinions, no matter how offensive, solely because such speech may contribute to a hostile environment; (2) while individual students and professors have free speech rights, university departments do not, and even university professors can be subject to investigation and potential discipline if the “opinion” they have expressed is that they intend to discriminate against Jewish students.

A third proposition, that Jewish students should receive the same antidiscrimination protections, and at the same level, as other students, has led to the one point of disagreement between the authors. Part III of this article begins by discussing the double-standard some universities apply to speech that offends Jewish students. As examples, we recount how Harvard and the University of Pennsylvania have declined to censor antisemitic speech on free speech grounds but are censorious with regard to speech deemed offensive to other minority constituencies.

We agree that if a university is cracking down on speech that offends certain minorities but not on speech offensive to Jews, the proper tack is to urge the university to, as former ACLU president Nadine Strossen puts it, “level up” and enhance free speech protections regardless of who is offended. But we disagree regarding what to do if a university obstinately refuses to level up, a disagreement we allow to play out in our article.

As we shall see, David L. believes that we should limit ourselves to consistently demanding that universities protect everyone’s free speech. David E., however, rejoins that both liberal equal protection principles and practical political considerations argue in favor of insisting that if universities insist on punishing speech offensive to other groups, they must apply the same standard to speech offensive to Jews.

Ultimately, our solution to the purported conflict between freedom of expression and prohibiting discrimination against Jewish students is deceptively simple: universities must consistently apply content-neutral university policies, discipline unlawful behavior, and maintain institutional neutrality.

I. THE EASY CASES—CONDUCT THAT IS NOT PROTECTED BY PRINCIPLES OF FREEDOM OF EXPRESSION

Campus anti-Israel activists have justified even the most lawless actions they have taken as protected speech.¹¹ They argue that extreme measures are necessary to protest Israel's purported genocide in Gaza.

In this section, we will review examples of actions by on-campus anti-Israel protestors that are not protected by freedom of expression, properly understood. Because these actions do not come within any plausible or accepted legal or liberal definition of freedom of speech, there is no conflict between the authors' free speech liberalism and our belief that universities should crack down on these actions.

Below we recount just a few of the many examples of vandalism; assault and battery; threats, intimidation, and harassment; disruptions of campus life; trespassory encampments; building "occupations"; and mask law violations. While these incidents were generally attendant to anti-Israel protests, none of them are properly seen as protected by principled support for freedom of expression, as they are all contrary to neutral regulations of behavior that do not target speech for its ideological content.

Many of these incidents have been reported elsewhere, but when discussed in the context of free speech on campus they are often conflated with peaceful, licit protests. We therefore believe that it's important to properly categorize these incidents to clarify that these actions are not protected by free speech principles and can be banned and punished without infringing on students' free speech rights.

A. Vandalism against Jewish Institutions

Last December, vandals broke into the San Francisco Hillel building and defaced it with antisemitic and anti-Western graffiti.¹² The vandals spray-painted "Khaybar" on the front entrance over the "SFHillel" sign.¹³ "Khaybar" refers to a battle between Muslims and local Jews during the Muslim conquests that ended with the slaughter of the Jewish tribes.¹⁴ The vandalism also included spray-painting Communist and anarchist symbols and phrases like "Death to Western imperialism."¹⁵

¹¹ Cf. Evelyn Douek & Genevieve Lakier, *Title VI as a Jawbone*, KNIGHT FIRST AMENDMENT INSTITUTE (Sept. 26, 2024), <https://knightcolumbia.org/blog/title-vi-as-a-jawbone> [perma.cc/28UK-5JAG] (suggesting that an illicit Columbia University encampment was "student speech" repressed when Columbia ordered it dismantled).

To be clear, both authors strongly deny that Israel is committing or has committed genocide in Gaza, though this isn't the proper forum to litigate the issue.

¹² Tim Fang, *San Francisco Hillel House Near SFSU Campus Vandalized with Antisemitic Graffiti*, CBS NEWS (Dec. 10, 2024), <https://www.cbsnews.com/sanfrancisco/news/sf-hillel-house-near-sfsu-campus-vandalized-antisemitic-graffiti/> [perma.cc/W7AL-MCR8].

¹³ Asaf Elia-Shalev, *SF Hillel Graffitied with Slogan About Battle that Ended in Muslim Slaughter of Jews*, THE TIMES OF ISRAEL (Dec. 11, 2024), <https://www.timesofisrael.com/sf-hillel-graffitied-with-slogan-about-battle-that-ended-in-muslim-slaughter-of-jews/> [perma.cc/NZ98-TZBP].

¹⁴ *Id.*

¹⁵ *Id.*

Many other Jewish spaces fell victim to similar acts of vandalism. For example, several hooded and masked individuals vandalized Drexel University's Raymond G. Perelman Center for Jewish Life by removing the metal letters spelling Perelman's name from the center's front entrance.¹⁶ The Hillel Building at Boston University was defaced with graffiti reading "Free Palestine."¹⁷ The BU Police Department and local district attorney investigated the graffiti as a hate crime.¹⁸

B. Assault and Battery

At Tulane University, anti-Israel protestors assaulted three Jewish students.¹⁹ An anti-Israel protester set an Israeli flag on fire, and a Jewish student tried to put the fire out.²⁰ The protester hit the Jewish student in the head with the flag pole.²¹ Another protester punched and hit a second Jewish student in the head with a megaphone, breaking his nose.²² And at least one Jewish student ended up in the emergency room.²³ Two protesters were arrested.²⁴

At the University of Massachusetts Amherst, after security left an event hosted by UMass Hillel in honor of the Israeli hostages, a student approached a Jewish attendee, punched him, seized the Israeli flag he was holding, and spat on it. The assailant was later taken into custody.²⁵

At the University of California at Berkeley, two anti-Israel students attacked a Jewish student.²⁶ Upon seeing the Jewish student draped in an Israeli flag, the anti-Israel students attempted to forcibly take the student's flag.²⁷ The students then "pull[ed] on his backpack,"

¹⁶ Joe Brandt, *Vandals Remove Benefactor's Name from Drexel University Jewish Life Building*, CBS NEWS (Apr. 3, 2024), <https://www.cbsnews.com/philadelphia/news/raymond-perelman-drexel-hillel-building-vandalism-philadelphia/> [perma.cc/P5EF-858W].

¹⁷ Sarah Rumpf-Whitten, *Jewish Organization's Building at Boston University Vandalized with Antisemitic Graffiti*, FOX NEWS (Nov. 9, 2023), <https://www.foxnews.com/us/jewish-organizations-building-boston-university-vandalized-anti-semitic-graffiti> [perma.cc/9CA7-8CFN].

¹⁸ Ethan Sobel, *BU Hillel Response to Antisemitic Graffiti Being Investigated as a Hate Crime*, BU HILLEL, <https://www.bu.edu/hillel/bu-hillel-response-to-antisemitic-graffiti-being-investigated-as-hate-crime/> [perma.cc/75BD-GQEK].

¹⁹ See Haley Cohen, *Pro-Palestinian Protesters Assault Several Jewish Students at Tulane, Witnesses Say*, JEWISH INSIDER (Oct. 27, 2023), <https://jewishinsider.com/2023/10/pro-palestinian-protesters-assault-several-jewish-students-at-tulane-2/> [perma.cc/XJ3W-GXBS].

²⁰ *Id.*

²¹ *Id.*

²² See David Swindle, *Anti-Israel Protesters 'Broke My Nose,' Says Jewish Student at Tulane*, JEWISH NEWS SYNDICATE (Oct. 30, 2023), <https://www.jns.org/they-broke-my-nose-jewish-tulane-student-tells-jns-of-anti-israel-protesters/> [perma.cc/WM9D-SRQJ].

²³ See Cohen, *supra* note 19.

²⁴ *Id.*

²⁵ See Kevin McGill, Stephen Smith & Collin Binkley, *Clashes over Israel-Hamas War Shatter Students' Sense of Safety on U.S. College Campuses*, THE ASSOCIATED PRESS (Nov. 15, 2023) <https://apnews.com/article/israel-palestinian-hamas-college-protest-tulane-29dca6e670639b73f5bfe7bfc6b6efee> [perma.cc/SB8T-CGSX]; Marlene Lenthang, *UMass Amherst Student Arrested for Allegedly Punching Jewish Student and Spitting on Israeli Flag*, NBC NEWS (Nov. 6, 2023), <https://www.nbcnews.com/news/us-news/umass-amherst-student-arrested-punching-jewish-pupil-spitting-israeli-rcna123787> [perma.cc/A35L-BR4Q].

²⁶ See Emilie Raguso, *Robbery Attempt of Israeli Flag at UC Berkeley Rally for Palestine*, THE BERKELEY SCANNER (Oct. 25, 2023), <https://www.berkeleyscanner.com/2023/10/25/uc-berkeley-crime/uc-berkeley-robbery-rally/> [perma.cc/T3JB-9HD9].

²⁷ *Id.*

which caused the Jewish student's metal water bottle to fall to the ground.²⁸ One of the anti-Israel students then picked up the metal water bottle and struck a Jewish student in the head before fleeing the scene.²⁹ At Columbia University an anti-Israel protester punched a visibly Jewish student in the face just outside Columbia's gates during a rally organized by the Columbia Palestine Solidarity Coalition. The assailant, wearing what appeared to be a Palestinian flag around his neck, stole an Israeli flag from another student's hands and called both students Nazis before the assault.³⁰

C. Threats, Intimidation, Harassment of Individuals

Several demonstrators harassed a small group of Jewish students from the City University of New York. The demonstrators blocked the kosher deli where the students were dining and shouted expletives and incendiary chants such as "Back to Brooklyn, out the Middle East" at the students.³¹ At the Massachusetts Institute of Technology (MIT), anti-Israel protesters targeted Jewish professors' offices. The students "rattled the door handles of offices ... with staff inside," chanting "From the river to the sea."³² Many staff at MIT's Middle East center allegedly felt "alarmed, intimidated, and even afraid."³³ Some reported they "felt trapped in their offices, anxious about the prospect of verbal and/or physical assault."³⁴

Anti-Israel protesters at Harvard harassed a Jewish student attempting to get away from them.³⁵ As video of the incident reveals, dozens of protesters surrounded the Jewish student, grabbing and pushing him and standing centimeters from his body. The protesters held up unraveled keffiyehs to continue to block the student from leaving. During this encounter, the protesters yelled "Shame!" and refused to let the student leave.³⁶

During an anti-Israel demonstration at Cooper Union in New York City, a group of Jewish students found themselves trapped inside the campus library as protesters gathered outside. Videos from the incident show demonstrators chanting "Free Palestine" and banging on the library's doors and windows. In response to the escalating situation, school staff locked the

²⁸ *Id.*

²⁹ *Id.*

³⁰ Lexi Boccuzzi, *Just Outside Columbia's Gates, Anti-Israel Protester Punches Visibly Jewish Student in the Face*, WASH. FREE BEACON (Dec. 10, 2024), <https://freebeacon.com/campus/just-outside-columbias-gates-anti-israel-protester-punches-visibly-jewish-student-in-the-face> [perma.cc/E4UT-VDKR].

³¹ Ronny Reyes, *Jewish CUNY Students Berated by Masked Anti-Israel Protestors Who Blocked Entrance of Kosher Deli, Hurling Racist Remarks at Them*, N.Y. POST (Sept. 4, 2024) <https://nypost.com/2024/09/04/us-news/jewish-cuny-students-berated-by-anti-israel-protesters/> [perma.cc/VJG3-62X2].

³² Complaint ¶ 147, *StandWithUs Center for Legal Justice. et al. v. Massachusetts Institute of Technology*, No. 1:24-cv-10577-RGS (D. Mass. Mar. 7, 2024).

³³ *Id.*

³⁴ *Id.* For a journalistic account of the incident, see Maggie Hicks, *At MIT, Fear, Frustration, and Flailing Administrators*, CHRONICLE OF HIGHER EDUC. (Nov. 22, 2023), <https://www.chronicle.com/article/at-mit-fear-frustration-and-flailing-administrators>.

³⁵ See Video posted by the Jerusalem Post (@thejerusalem_post), INSTAGRAM (Nov. 1, 2023), https://www.instagram.com/thejerusalem_post/reel/CzH5FO_NFRK/this-scene-occurred-at-harvard-university-a-jewish-student-was-surrounded-and-ha [perma.cc/N8RY-YMF6].

³⁶ *Id.*

library doors for approximately 20 minutes to ensure the safety of those inside and warned the Jewish students not to leave the library. Police on hand were allegedly ordered to stand down.³⁷

D. Disrupting University Events

At Rutgers, anti-Israel protesters disrupted a Q&A session given by Rutgers President Jonathan Holloway on the university's BDS referendum.³⁸ UCLA protesters disrupted final exams on campus, preventing many from attending their exams and forcing others to evacuate their exam rooms.³⁹

At Pomona College in Claremont, California, twenty-five masked and keffiyeh-adorned anti-Israel protesters disrupted the college's Convocation Ceremony held at the beginning of the academic year.⁴⁰ The demonstrators blocked the entrance to the chapel and refused to identify themselves or leave after police officers' demanded that they do so.⁴¹ The disruption came just days after Pomona banned encampments on their campus.⁴²

Anti-Israel protesters shouted down the "Pathways to Peace" panel at Cornell University.⁴³ The panel hosted former U.S. ambassadors to Israel and several Middle Eastern countries, former Palestinian Authority Prime Minister Salam Fayyad, and former Israeli Foreign Minister Tzipi Livni.⁴⁴ Protesters shouted at Livni, "500 children in 2014, and you killed them. You are a butcher."⁴⁵ The police arrested seventeen protesters for disrupting the event.⁴⁶

Anti-Israel protesters forced Israeli lawmaker Simcha Rothman offstage at a Federalist Society event at the University of California at Berkeley last September.⁴⁷ The event was about proposed judicial reform in Israel. Protesters started to shout down Rothman less than five minutes into his talk, and a shouting match ensued between the protestors and others in the auditorium—forcing Rothman to be ushered offstage to deliver the rest of his talk remotely.⁴⁸

³⁷ Luke Tress, *Jewish Students Barricade in Cooper Union Library as Protesters Chant 'Free Palestine,' on Day of Protest Across NYC Campuses*, JTA (Oct. 26, 2023), <https://www.jta.org/2023/10/26/ny/jewish-students-barricade-in-cooper-union-library-as-protesters-chant-free-palestine-on-day-of-protest-across-nyc-campuses> [perma.cc/Q3JQ-PWX6].

³⁸ Complaint ¶¶ 72, 74, 76, *Rivka v. Rutgers*, No. MIDL002766-24 (N.J. Super. Ct. Civ. Div. May 9, 2024).

³⁹ See *Frankel v. Univ. of Cal.*, 744 F. Supp. 3d 1015, 1022 (2024).

⁴⁰ Josh Moody, *Pro-Palestinian Protesters Disrupt Pomona College Convocation*, INSIDE HIGHER ED (Aug. 29, 2024), <https://www.insidehighered.com/news/quick-takes/2024/08/29/pro-palestinian-protesters-disrupt-pomona-convocation> [perma.cc/CZ7K-8C4R].

⁴¹ Andrew Alonzo, *Protest Disrupts Pomona College Convocation*, CLAREMONT COURIER (Aug. 27, 2024), <https://claremont-courier.com/schools/protest-disrupts-pomona-college-convocation-79266/> [perma.cc/P5JB-97FP].

⁴² *Id.*

⁴³ Judy Lucas, *Police Detain 17 Protesters at Cornell Israeli-Palestinian Panel*, THE ITHACA VOICE (Mar. 12, 2025), <https://ithacavoice.org/2025/03/police-detain-17-protesters-at-cornell-israeli-palestinian-panel/> [perma.cc/23Q3-Z48W].

⁴⁴ Susan Kelly, *'Pathways to Peace' Panel to Shed Light on Middle East Conflict*, CORNELL CHRONICLE (Feb. 27, 2025), <https://news.cornell.edu/stories/2025/02/pathways-peace-panel-shed-light-middle-east-conflict> [perma.cc/L7WD-N68W].

⁴⁵ Lucas, *supra* note 43.

⁴⁶ *Id.*

⁴⁷ Alec Regimbal, *An Israeli Lawmaker Was Forced Off Stage by Protesters at UC Berkeley*, SF GATE (Sept. 27, 2024), <https://www.sfgate.com/politics/article/israeli-lawmaker-forced-off-stage-at-uc-berkeley-19798255.php> [perma.cc/TDF4-XV3E].

⁴⁸ *Id.*

E. Illicit Encampments

A wave of anti-Israel encampments sprung up at universities around the country in April 2024. The first encampment was organized at Columbia University. Columbia and the NYPD eventually shut down the encampment because it “violate[d] university policies and disrupt[ed] learning on campus.”⁴⁹ The protestors responded by occupying the university’s Hamilton Hall, putting up barriers to resist being shut down by campus and local police.⁵⁰ The protestors held two custodians for a period of several hours against their will, and vandalized the building. Over a hundred protesters were arrested. In March 2025, Columbia announced that it would expel or suspend students who occupied Hamilton Hall or temporarily revoke their degrees.⁵¹

Several encampments sprung up at Rutgers campuses during final exams.⁵² The activists who established the encampments stated that their goal was to “disrupt finals with noise and get our escalation demands met.”⁵³ These encampments were not approved by the Rutgers administration, and they violated the university’s Time, Place, and Manner policy; Designated Areas policy; and Operating Procedures for All Demonstrations.⁵⁴ Yet, the Rutgers administration refused to enforce its policies against the encampments, allowing them to persist for several days and refusing to punish students who violated Rutgers policy.⁵⁵

Some of the encampments intentionally interfered with students’ access to classes and university facilities. At the University of California, Davis, demonstrators set up an encampment in the middle of their “Quad,” impeding students access to their classes.⁵⁶ The encampment blocked a person with disabilities from the disability-accessible pathway on the Quad. When he tried to access the path, protestors struck him in the face with the sharp end of an umbrella and told him he “was not welcome” because he was a “Zionist.”⁵⁷ The victim contacted U.C. Davis’s Americans with Disabilities Act Coordinator. According to the victim, instead of arranging for the encampment to be disbanded and the students punished, the coordinator instructed the victim to take a different path.⁵⁸

⁴⁹ Kiara Alfonseca, *As Columbia University Protests on Israel-Hamas War Come to Head, What to Know*, ABC NEWS (Apr. 30, 2024), <https://abcnews.go.com/US/columbia-university-student-protests-israel-gaza-war-continue/story?id=109493377> [perma.cc/8UCD-EGU4].

⁵⁰ Nadine El-Bawab, *How Pro-Palestinian Protests Unfolded on College Campuses Across the US: A Timeline*, ABC NEWS (May 4, 2024), <https://abcnews.go.com/US/pro-palestinian-protests-unfolded-college-campuses-us-timeline/story?id=109902300> [perma.cc/3VA5-YNWN].

⁵¹ Meredith Deliso, *Columbia Students Who Occupied Hamilton Hall in Pro-Palestinian Protest Expelled, Suspended*, ABC NEWS (Mar. 13, 2025), <https://abcnews.go.com/US/columbia-university-students-occupied-hamilton-hall-expelled-suspended/story?id=119774163> [perma.cc/JJH6-7C9J].

⁵² Complaint ¶¶ 92, 94, *Rivka v. Rutgers*, No. MIDL002766-24 (N.J. Super. Ct. Civ. Div. May 9, 2024).

⁵³ *Id.* ¶ 102.

⁵⁴ *Id.* ¶ 99.

⁵⁵ *Id.* ¶ 104.

⁵⁶ *Complaint*, *Groveman v. Univ. of Cal., Davis*, No. 2:24-cv-01421-DJC-AC (E.D. Cal. May 17, 2024), <https://www.courthousenews.com/wp-content/uploads/2024/05/uc-davis-protest-complaint.pdf> [perma.cc/4Z4W-2M7U].

⁵⁷ *Id.*

⁵⁸ *Id.*

And at the University of California at Los Angeles (UCLA), anti-Israel protesters established an encampment in a “major thoroughfare and gathering place” on campus.⁵⁹ The protesters built plywood and metal barriers guarding the encampment.⁶⁰ They created checkpoints and required passers-by to wear a wristband to cross them. People who “supported the existence of the state of Israel” were denied wristbands.⁶¹ Jewish students who refused to condemn “Zionism” could not attend classes or events and could not enter the library during midterm examinations because of the encampment.⁶² After law enforcement cleared the 10-day encampment, protesters continued to disrupt campus life, establishing a new encampment just four days after the police cleared the first one, reinforcing the new encampment with “barricades” and “fortifications.”⁶³ Protesters created a third encampment that blocked students from attending their final exams, disrupted nearby exams, and forced others to evacuate during their exams].⁶⁴

In response to the university’s failure to intervene, a federal judge issued an unusually scathing opinion granting a preliminary injunction in a lawsuit against UCLA, *Frankel v. Regents of the University of California*:

In the year 2024, in the United States of America, in the State of California, in the City of Los Angeles, Jewish students were excluded from portions of the UCLA campus because they refused to denounce their faith. This fact is so unimaginable and so abhorrent to our constitutional guarantee of religious freedom that it bears repeating, Jewish students were excluded from portions of the UCLA campus because they refused to denounce their faith. UCLA does not dispute this. Instead, UCLA claims that it has no responsibility to protect the religious freedom of its Jewish students because the exclusion was engineered by third-party protesters. But under constitutional principles, UCLA may not allow services to some students when UCLA knows that other students are excluded on religious grounds, regardless of who engineered the exclusion.⁶⁵

While the conclusion that illicit encampments trespassing on and occupying school property are not examples of protected free speech may seem obvious,⁶⁶ apparently not all First Amendment scholars agree. A recent essay by two prominent professors describes Columbia’s student encampment as a “protest encampment” making “political claims.”⁶⁷ They deem Columbia’s dismantling of the encampment to be “a significant repression of student speech,”

⁵⁹ *Frankel v. Univ. of Cal.*, 744 F. Supp. 3d 1015, 1021 (2024).

⁶⁰ *Id.*

⁶¹ Anemona Hartocollis, *U.C.L.A. Can’t Let Protestors Block Jewish Students from Campus, Judge Says*, THE NEW YORK TIMES (Aug. 14, 2024), <https://www.nytimes.com/2024/08/14/us/ucla-jewish-students-gaza-protests.html> [perma.cc/EQV4-UFKH] (quoting *Frankel v. Univ. of Cal.*, 744 F. Supp. 3d 1015, 1021 (2024)).

⁶² *Frankel v. Univ. of Cal.*, 744 F. Supp. 3d 1015, 1020 (2024); Amanda Starrantino, *Pro-Palestinian Encampment Blocks UCLA Students from Entering Library During Midterms*, CBS NEWS (Apr. 30, 2024), <https://www.cbsnews.com/losangeles/news/pro-palestinian-encampment-blocks-ucla-students-from-entering-library-during-midterms/> [perma.cc/F5QM-YJNS].

⁶³ *Frankel v. Univ. of Cal.*, 744 F. Supp. 3d 1015, 1022 (2024).]

⁶⁴ *Id.*

⁶⁵ *Frankel v. Regents of Univ. of California*, 2024 WL 3811250, at *1 (C.D. Cal. Aug. 13, 2024), *appeal dismissed*, No. 24-5003, 2024 WL 4803385 (9th Cir. Aug. 26, 2024).

⁶⁶ See CASS SUNSTEIN, *CAMPUS FREE SPEECH* 47 (2024) (“[A] prohibition on the construction of tents is not directed against speech; it is directed against tents.”).

⁶⁷ Douek & Lakier, *supra* note 11.

motivated in part by a desire to comply with Title VI, but they don't explain why trespassing on school property is a form of protected speech.⁶⁸

F. *Occupying University Buildings*

At MIT, the Coalition Against Apartheid (CAA), an anti-Israel student group, staged a “die in” at the university’s main entrance. This protest violated preexisting time, place, and manner rules regarding demonstrations.⁶⁹ MIT responded by suspending several of those students from “non-academic campus activities,” but the school stopped short of full suspensions because it feared that suspensions would affect those students’ legal status as aliens in the US on student visas.⁷⁰

A particularly egregious event transpired at Pomona College in Claremont, California.⁷¹ On the anniversary of October 7, several students walked out of classes to pressure the Pomona administration to “divest from weapons manufacturers.”⁷² The group grew to several hundred, with several wearing black clothing, masks, and head coverings.⁷³ They flooded Pomona’s Carnegie Hall, injuring a campus safety officer on their way in.⁷⁴ Organizers shouted phrases like “Intifada Intifada, long live the Intifada,” “Hey hey ho ho! Israel [sic] has got to go,” and “We don't want two states, We want '48!”⁷⁵ The demonstrators played loud Arabic music inside the building as well.⁷⁶ The chants disrupted several classes, prompting at least one professor to dismiss his class.⁷⁷ Students could not leave the classroom because demonstrators zip tied and blocked the doors exiting the building.⁷⁸ Some students escaped through windows on the second floor and balanced themselves on narrow siding to avoid the demonstrators.⁷⁹ Once the administration cleared out the demonstrators, they discovered significant vandalism: cut electrical cords in classrooms, sliced projector screens, stickers reading “Pomona Kills” over pictures of Pomona faculty, and spray paint on floors and a bust of a Pomona trustee.⁸⁰

⁶⁸ *Id.*

⁶⁹ Complaint ¶ 145, *StandWithUs Center for Legal Justice et al v. Massachusetts Institute of Technology*, No. 1:24-cv-10577-RGS (D. Mass. Mar. 7, 2024).

⁷⁰ Andrew Lapin, *MIT Partially Suspends Students Who Occupied Building for Pro-Palestinian ‘Die-In’*, JEWISH TELEGRAPHIC AGENCY (Nov. 13, 2023), <https://www.jta.org/2023/11/13/united-states/mit-partially-suspends-students-who-occupied-building-for-pro-palestinian-die-in> [perma.cc/R632-Y8EZ].

⁷¹ Kendall White & Charlie Hatcher, *Protesters Occupy, Vandalize Pomona’s Carnegie Hall on One-Year Anniversary of Oct. 7 Attacks*, THE CLAREMONT INDEPENDENT (Oct. 7, 2024), <https://www.claremontindependent.com/post/protestors-occupy-vandalize-pomona-s-carnegie-hall-on-one-year-anniversary-of-october-7th-attacks> [perma.cc/CM7V-GDLH].

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Document obtained by THE CLAREMONT INDEPENDENT, https://5255e4db-a8f6-497e-b8e2-3c19e5c3c8cb.usrfiles.com/ugd/5255e4_f770eddc98ef45c5bef72c1c6f5cb5da.pdf [perma.cc/4F6S-G269].

⁷⁶ White & Hatcher, *supra* note 71.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

G. Violating Anti-Masking Laws

Some states, such as Virginia, have laws banning masking in public. While a few courts have invalidated such laws, court decisions in Virginia and elsewhere have upheld them as consistent with the First Amendment.⁸¹ The idea behind these laws, often originally passed to combat the KKK, is that anonymity at rallies invites bad behavior by preventing authorities from identifying lawbreakers.

The authors understand concerns that masking laws inhibit anonymous speech. Given, however, that almost all the illegal behavior by anti-Israel protestors has been undertaken by masked perpetrators, we reluctantly conclude that the laws in question should be enforced.⁸² In Virginia, however, police at universities such as George Mason and the University of Virginia have refused to arrest masked protestors. The police have reported that the local Commonwealth's attorneys have told them that they will not prosecute individuals committing this felony unless they also committed other crimes while masked.

Virginia Attorney General Jason Miyares wrote to the presidents of the state universities across the Commonwealth. He reminded them of their duty to enforce the state's anti-masking law:

Of note, pursuant to § 18.2-422 of the Code of Virginia, it is unlawful for any person over 16 years of age to, with the intent to conceal his identity, wear any mask, hood or other device whereby a substantial portion of the face is hidden or covered so as to conceal the identity of the wearer, to be or appear in any public place, or upon any private property in this Commonwealth without first having obtained from the owner or tenant thereof consent to do so in writing. There are exceptions to this prohibition including but not limited to wearing a mask for a bona fide medical purpose. I urge you to confirm there is sufficient security at any demonstrations to promote student safety and to ensure that Virginia's criminal laws are followed.⁸³

Major Virginia state universities have nevertheless changed their policies only to require that masked students identify themselves to authorities if asked. In other words, they are still refusing to enforce Virginia law. And this enforcement is almost certainly selective and biased, given that it seems highly unlikely that the Commonwealth's Attorney would be similarly lax in enforcing the law against masked KKK demonstrators.⁸⁴ Even if local prosecutors decline to criminally prosecute students who violate the law, nothing is stopping the universities from suspending or expelling students who insist on breaking the law by masking at public protests.

* * *

⁸¹ *Hernandez v. Commonwealth*, 406 S.E.2d 398 (Va. App. 1991) (upholding Virginia's law); *State v. Miller*, 260 Ga. 669 (1990) (upholding Georgia's law).

⁸² See SUNSTEIN, *supra* note 66 ("[T]he requirement that students identify themselves is an effort to ensure against trespass. That, too, is legitimate.").

⁸³ Letter from Jason Miyares, Virginia Attorney General. (Nov. 16, 2023), <https://files.constantcontact.com/d3e83e11901/99d2bc94-226a-42bb-8bea-28f626cda252.pdf?rdr=true> [perma.cc/JR42-JSCC].

⁸⁴ Indeed, David B. was told by a member of the Board of Visitors at one Virginia state university that the Visitor challenged the president of the university as to whether the president would be equally quiescent if the masked Hamasniks on campus were instead masked Klansmen. "That's different," the president replied.

It may be true that at least some of the behaviors described above were tolerated by university administrators in the past in contexts other than anti-Israel protests. The protestors therefore may have a point when they argue that universities are treating them differently than climate protestors or BLM protestors were treated in the past. The correct response, though, is not for university administrators to repeat their past mistakes, but to take the opportunity to enforce the rules in a consistent, neutral manner.

The basic test for university enforcement of conduct rules should be this: if a group of student white supremacists was engaging in this behavior, are there existing rules that could be enforced and therefore would be enforced to stop them? If the answer is yes, then the exact same level of enforcement should be brought to bear against anti-Israel protestors. This is not because such protestors are necessarily akin to white supremacists, but because a university should not be enforcing (or not enforcing) its rules based on the ideological proclivities of the students breaking the rules.

II. THE HARDER CASES

Much of the controversy over campus antisemitism since Oct. 7, 2023 would have been avoided if universities had simply enforced preexisting content-neutral university policies or the law. Nevertheless, universities would have still needed to decide how to handle grossly offensive student speech not directed at particular students, perceived (or overtly) antisemitic speech by professors, whether and how to use the International Holocaust Remembrance Alliance's definition of antisemitism in enforcing civil rights rules, and when university staff, including professors, should be precluded from exercising administrative authority due to their "antizionist" or more explicitly antisemitic speech.

A. Grossly Offensive Student Speech Not Directed at Particular Students

Grossly offensive speech perceived to be hostile to Jews, particularly speech that is reasonably construed to endorse violence, can be banned when it is directed at individual students because of their Jewish ethnicity. Harassment of an individual is not protected by the First Amendment nor by more general liberal free speech principles.

A more difficult issue arises when such speech cannot reasonably be construed as a threat to, or harassment of, particular students. This includes speech calling for the violent destruction of Israel (e.g., Arabic chants of "From River to the Sea, Palestine is Arab)," violence against Israel, Jews, and their supporters (e.g., "Globalize the Intifada,") support for Hamas in general (e.g., "Glory to the Martyrs") and its October 7 atrocities in particular (e.g., flyers that feature paragliders, glorifying the Hamas terrorists who massacred Israelis after flying into Israel on paragliders), and pro-Hamas events on Oct. 7, 2024, the anniversary of the massacre.⁸⁵

⁸⁵ Solcyre Burga, *Pro-Palestinian Protests Speak on College Campuses Around the Globe*, TIME MAGAZINE (May 3, 2024), <https://time.com/6974699/pro-palestinian-protests-spark-on-college-campuses-across-the-globe/> [perma.cc/A3PU-3EXR]; 'From the River to the Sea' – Students Chant but Don't Know Which River or Sea, THE JERUSALEM POST (Dec. 7, 2023), https://www.jpost.com/diaspora/article-776987#google_vignette [perma.cc/JCB8-ULTV]; Michael Starr, 'Globalize the

Despite the extreme sentiments expressed, we share the view of those who contend that even grossly offensive speech that may contribute to a hostile environment falls within the freedom of expression rights of the students that should be respected on college campuses.⁸⁶ Moreover, to the extent that a university is a state institution, or a university is acting in response to mandates imposed by hostile environment law, cracking down on such speech would be unconstitutional.⁸⁷

Former Department of Education Office of Civil Rights General Counsel Kenneth Marcus agrees that the government may not punish speech protected by the First Amendment.⁸⁸ He argues, however, that universities nevertheless have a legal obligation to take non-censorious measures to counter a hostile environment created by protected speech, such as by engaging in counter-speech. Marcus may be correct about universities' legal obligations, but, law aside, we believe it would be more in keeping with the liberalism we support for universities to maintain institutional neutrality with regard to public controversies.

B. Hostile Speech by Professors

Well over ninety percent of Jewish Americans support the continued existence of Israel as the state of the Jewish people, the basic definition of Zionism shared by both sides of the conflict. Most Jews also believe that Zionism, defined as above, is important to their Jewish religious and cultural identity. Thus, when a professor denounces "Zionists," he is denouncing most of his Jewish students.

That raises the question of how far a professor can go in denouncing "Zionists" before they have gone beyond the realm of protected expression and into the realm of improper hostility to a segment of their students. Universities should tread lightly here. Merely expressing anti-Zionist

Intifada: Rutgers President, Jewish Students Flee Meeting, THE JERUSALEM POST (Apr. 8, 2024), <https://www.jpost.com/diaspora/antisemitism/article-795989> [perma.cc/Z4AA-8QGS].

⁸⁶ See, e.g., Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484 (1990).

⁸⁷ See, e.g., DAVID E. BERNSTEIN, YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS (2003); Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 L. & CONTEMP. PROBS. 299 (2000); Howard M. Wasserman, *University of Oklahoma Expels the First Amendment*, JURIST (Mar. 14, 2015), <http://jurist.org/forum/2015/03/howard-wasserman-first-amendment.php> [perma.cc/XKC6-SPR9] ("The need to avoid a hostile environment is not recognized as a basis for limiting otherwise-protected, even if hateful, expression."). See generally *College Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (holding that a university could not penalize students for engaging in a protest that included stomping on flags containing the word "Allah," even though this caused offense to Muslim students).

This position has been controversial among First Amendment scholars, but seems mandated by *NRA v. Vullo*, 602 U.S. ____ (2024) (holding that the government cannot use its regulatory authority to coerce private entities to punish or suppress disfavored political viewpoints protected by the First Amendment). See *Gartenberg v. Cooper Union*, 765 F. Supp. 3d 245 (S.D.N.Y. 2025) (holding, in a Title VI antisemitism case brought against Cooper Union, that Title VI must be enforced in a way that does not indirectly suppress protected speech).

⁸⁸ See, e.g., LOUIS D. BRANDEIS CENTER, BEST PRACTICES GUIDE FOR COMBATING CAMPUS ANTI-SEMITISM AND ANTI-ISRAELISM 2, <https://brandeiscenter.com/best-practices-guide-for-combating-campus-anti-semitism-and-anti-israelism-2> [perma.cc/463N-NC8Z]; Kenneth L. Marcus, *Letter to the Editor, The Real Problem with the University of California's Statement of Principles Against Intolerance*, WASH. POST (Sept. 29, 2015), https://www.washingtonpost.com/opinions/the-real-problem-with-the-university-of-californias-statement-of-principles-against-intolerance/2015/09/29/b17e1ff0-6618-11e5-bdb6-6861f4521205_story.html.

sentiment, as offensive as it is to many Jewish (and other) students,⁸⁹ such as making statements that Israel should not exist, should not by itself call into question a professor's ability to treat students fairly who disagree with him.

Indeed, punishing professors solely because their political opinions offend students could easily backfire on advocates for Jewish civil rights. There are many anti-Israel students, faculty, and administrators, who depict anti-Hamas or anodyne pro-Israel sentiment as innately hostile to Arab or Muslim students and would gleefully penalize a professor for expressing such sentiments.

Nevertheless, there is a line that a professor may not cross. If a professor announces that he finds "Zionist" students so repugnant that he can't grade them fairly, or will refuse to call on them in class, or will otherwise treat them unequally, he is announcing a dereliction of his duties and may be suspended or fired without trampling on his right to free expression.

For example, a Johns Hopkins University teaching assistant (TA) asked her Twitter followers if she should downgrade Zionist students' assignments.⁹⁰ Seventy eight percent said yes.⁹¹ The TA added that she would have "lost it" if she had been paired with a Jewish student who had a sticker of Tel Aviv on her laptop from her Birthright trip.⁹² The TA stated that "allah [is] looking out for me" because she "didn't get pinned with an [I]sraeli or some b**ch white boy to have to share my knowledge with."⁹³ Although Johns Hopkins conducted an investigation, the university never released any findings or revealed what action they took against the TA, but public records reveal that she was permitted to complete her studies.⁹⁴

Then, there are closer cases, such as the case of Maura Finkelstein. Finkelstein was a tenured professor who was then fired by Muhlenberg College. She claims that her dismissal was a response to her re-posting the following from another source:

⁸⁹ Eighty-five percent of American Jews and also of Americans more generally believe that the statement "Israel has no right to exist" is antisemitic. *Big Picture: Antisemitism in America Has Reached Shocking Levels, Affecting American Jewish Behavior and Sense of Security Like We Haven't Witnessed Before*, AMERICAN JEWISH COMMITTEE, <https://www.ajc.org/AntisemitismReport2024#prioritybox> [perma.cc/XB9C-23VD].

⁹⁰ *Johns Hopkins Won't Condemn Teaching Assistant's Poll on How to Grade 'Zionists'*, JEWISH PRESS (July 15, 2021), <https://www.jewishpress.com/news/us-news/johns-hopkins-wont-condemn-teaching-assistants-poll-on-how-to-grade-zionists/2021/07/15> [perma.cc/6XML-BBGA].

⁹¹ Faygie Holt, *Jewish Groups Await Action by Hopkins on TA Considering Grading 'Zionists' Lower*, JEWISH NEWS SYNDICATE (July 20, 2021), <https://www.jns.org/jewish-groups-await-action-by-hopkins-on-ta-considering-grading-zionists-lower/>.

⁹² *Johns Hopkins Won't Condemn*, *supra* note 90.

⁹³ *Id.*

⁹⁴ Stewart Ain, *Whatever happened to that John Hopkins teaching assistant who wanted to punish 'Zionist students'?*, THE FORWARD (July 15, 2021), <https://brandeiscenter.com/whatever-happened-to-that-john-hopkins-teaching-assistant-who-wanted-to-punish-zionist-students-forward> [perma.cc/FZ7M-CSSZ]. Her LinkedIn profile reveals that she received a grant in 2023 to finish her PhD thesis and completed it later that year. See Rasha Anayah LinkedIn Page, <https://www.linkedin.com/in/rasha-anayah-116784a7> [perma.cc/LV92-5KTF].

Do not cower to Zionists. Shame them. Do not welcome them in your spaces. Do not make them feel comfortable. Why should those genocide-loving fascists be treated any different than any other flat-out racist. Don't normalize Zionism. Don't normalize Zionists taking up space.⁹⁵

We are not in a position to judge whether Finkelstein's dismissal was solely or primarily the result of this posting. Regardless, if taken at face value, Finkelstein's claim raises the question of where to draw the line between faculty statements of political opinions that should be protected and faculty statements that give rise to reasonable inference that they are unwilling or unable to follow federal law and university rules prohibiting discrimination against Jewish and Israeli students.

FIRE argues that although "Finkelstein's speech may be offensive," her post is protected by Muhlenberg's promises of free speech and academic freedom.⁹⁶ The authors, by contrast, believe that Finkelstein's speech at least raises the implication that she would not welcome "Zionists" "taking up space" in her classroom, and obviously faculty members are not permitted to exclude or even discriminate against Zionist students.

At the very least, then, Finkelstein's rant provides ample justification for the university to inquire and investigate as to whether (a) Finkelstein was willing to affirm that her remarks do not apply to her obligations as a Muhlenberg professor; and (b) that she had not taken and did not intend to take exclusionary or discriminatory measures against "Zionist" students.

A related issue arises with regard to professors who have vowed to boycott Israel and any individual or business with ties to Israel. As a rule, the act of boycotting is not constitutionally protected because it's considered an economic act rather than a matter of free expression.⁹⁷ Meanwhile, anyone is free to advocate for a boycott, because advocacy is protected speech.⁹⁸ And regardless of constitutional considerations, no one is going to force a professor to submit a paper to an academic conference held at Tel Aviv University. In that sense, professors are free to boycott Israeli universities as they see fit.

A problem arises, however, when a professor engaging in a boycott is acting on behalf of his institution. The Boycott, Divestment, and Sanctions (BDS) movement advocates boycotting Israeli universities, which is against policy at all major universities. An individual professor has no right to go against lawful university policy when acting on behalf of the university.

⁹⁵ Ryan Quinn, *Tenured Jewish Professor Says She's Been Fired for Pro-Palestinian Speech*, INSIDE HIGHER ED (Sept. 27, 2024), <https://www.insidehighered.com/news/faculty-issues/academic-freedom/2024/09/27/tenured-jewish-prof-says-shes-fired-pro-palestine> [perma.cc/D7RY-HAQ8].

⁹⁶ Graham Piro, *In Major Hit to Tenure, Muhlenberg Fires Pro-Palestinian Professor*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Sept. 27, 2024), <https://www.thefire.org/news/major-hit-tenure-muhlenberg-fires-pro-palestinian-professor> [perma.cc/CP5Z-7EBJ]. But see Steven Lubet, *Zionists are Students Too: University Professors Should Take Heed*, THE HILL (Oct. 14, 2024), (suggesting that Finkelstein had a record of professional misconduct).

⁹⁷ For a thorough discussion, see generally Eugene Volokh, *The First Amendment and Refusals to Deal*, 54 U. PAC. L. REV. 732 (2023). Volokh's position is not accepted by all First Amendment scholars, but in our view, there is no way to distinguish constitutionally between "refusals to deal" framed as boycotts from "refusals to deal" framed as discrimination. If there is no right for a business or individual to discriminate in business transactions, there is also no right for a business or individual to engage in an economic boycott.

⁹⁸ NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982) ("The right of the NAACP and its members to advocate a politically motivated boycott is protected by the First Amendment.").

The BDS movement also advocates boycotting anyone with ties to Israeli universities and anyone who supports what the movement considers Israeli violations of international law and human rights. According to the semi-official BDS movement's guidelines that are followed by many BDS supporters, "an individual's academic freedom should be fully and consistently respected in the context of academic boycotts."⁹⁹

The caveat is that "an individual academic, Israeli or otherwise, cannot be exempt from being subject to 'common sense' boycotts (beyond the scope of the PACBI institutional boycott criteria) that conscientious citizens around the world may call for in response to what they widely perceive as egregious individual complicity in, responsibility for, or advocacy of violations of international law."¹⁰⁰ This guideline must be read in light of anti-Israel activists' tendentious and even absurd interpretations of international law, that in turn could lead to the boycott of many Israeli and American academics who have expressed support for Israeli policy.¹⁰¹

If a professor has said that he or she personally participates in the BDS movement in a way that is contrary to official university policy or the law--such as by discriminating against "Zionist" faculty candidates, or refusing to assist students who wish to study at Israeli universities--university policy should be that such a person may not serve as a dean, may not serve on hiring committees, may not serve on disciplinary committees, and may not have any decision-making role where they will have an opportunity to act on their stated principles and discriminate.¹⁰² The justification for such limitations is not the individuals' ideology, but their stated intent to act in ways inconsistent with their anticipated responsibilities when acting on behalf of the university. Universities that fail to adopt such rules are vulnerable to legal liability if their employees discriminate against Jewish or Israeli students.

That said, merely stating "I think the BDS movement is a good idea," cannot be construed as a declaration of intent to personally follow boycott guidelines. Nevertheless, universities are within their rights to expect all faculty to agree that they will not discriminate based on national origin, ties to a foreign country not subject to US legal sanction, or political views before allowing that individual to wield university power.

⁹⁹ PACBI Guidelines for the International Academic Boycott of Israel, BDS MOVEMENT (July 8, 2014), <https://bdsmovement.net/pacbi/academic-boycott-guidelines> [perma.cc/5MG6-J7UP].

¹⁰⁰ *Id.*

¹⁰¹ For example, activists commonly accused Israel of "genocide" in Gaza well before the devastation attendant to the post-October 7 military conflict gave the allegation even a patina of legal respectability. *E.g.*, Haidar Eid, *Israel's Policies in Gaza are Genocidal*, MONDOWEISS (Aug. 13, 2018), <https://mondoweiss.net/2018/08/israels-policies-genocidal> [perma.cc/4FS7-EQN9]; Ilan Pappé, *Israel's Incremental Genocide in the Gaza Ghetto*, ELECTRONIC INTIFADA (July 13, 2014), <https://electronicintifada.net/content/israels-incremental-genocide-gaza-ghetto/13562> [perma.cc/93PV-YN2Z]. Again, to be clear, both authors deny that Israel is committing or has committed genocide in Gaza.

¹⁰² See Steven Lubet, *The Dean of BDS*, THE BULWARK (June 29, 2020), <https://www.thebulwark.com/p/the-dean-of-bds> (contending that personally pledging to boycott Israeli institutions is inconsistent with being a dean).

C. Limiting the Speech of Academic Departments

For rather obvious reasons, academic departments should be ideologically neutral and thus should not take a position on political issues.¹⁰³ As subunits of the university, departments have no claim to academic freedom.¹⁰⁴ University policy should prohibit academic departments from taking stands on issues of public import.¹⁰⁵

A related issue is university departments hosting controversial speakers. In general, universities should tread lightly in regulating speakers. However, we believe that university administrators can step in when the event the department wishes to sponsor is political rather than academic in nature.

This can be a difficult line to draw, but a notable example of where the university should have intervened is the controversial Palestinian Writes Literature Festival held at the University of Pennsylvania shortly before October 7th.¹⁰⁶ Although the event's organizers claimed it was an academic celebration of Palestinian culture, few of the participants in this festival were academics, and some of the departments and programs that sponsored the festival, such as Department of Cinema and Media Studies, had no apparent *academic* reason to be concerned with either Palestinians or poetry.¹⁰⁷

Not surprisingly, the Festival had a “political tone,” and many of the invited speakers had a record of making blatantly antisemitic comments.¹⁰⁸ The Festival's organizers defended themselves from charges of antisemitism by invoking obvious antisemitic stereotypes suggesting that their critics were rich elites who “operate in the shadows.”¹⁰⁹

The Festival's director, Susan Abulhawa, claimed that Jewish Israelis are simply “Europeans” who “st[ole] an entire country.”¹¹⁰ She also said, “Every Israeli, whether in a synagogue, a checkpoint, a settlement, or shopping mall is a colonizer who came from foreign lands and kicked out the native inhabitants. They all serve in the racist colonial military. The whole country is one

¹⁰³ See FAQ: *Institutional Neutrality and the Kalven Report*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, <https://www.thefire.org/research-learn/faq-institutional-neutrality-and-kalven-report#:~:text=What%20about%20individual%20units%20or%20departments%20within%20colleges%3F> [perma.cc/NA5B-RH3E].

¹⁰⁴ As the influential *Kalven Report* argued regarding institutional neutrality, “The instrument of dissent and criticism is the individual faculty member or the individual student. The university is the home and sponsor of critics; it is not itself the critic.”, *Kalven Committee, REPORT ON THE UNIVERSITY'S ROLE IN POLITICAL AND SOCIAL ACTION*, UNIV. OF CHI. (Nov. 11, 1967), https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf [perma.cc/R4RG-FU5Y].

¹⁰⁵ See Tom Ginsburg, *Can Academic Freedom Survive the AAUP?*, CHRONICLE OF HIGHER EDUCATION (Feb. 18, 2025), <https://www-chronicle-com.mutext.gmu.edu/article/can-academic-freedom-survive-the-aaup> [perma.cc/Y2UR-JXFY].

¹⁰⁶ *Palestine Writes Literature Festival*, UNIV. OF PA. MIDDLE E. LANGUAGES & CULTURES, <https://melc.sas.upenn.edu/events/2023/09/22/palestine-writes-literature-festival> [perma.cc/NV88-VPEF].

¹⁰⁷ See *id.*

¹⁰⁸ Ramishah Maruf, *UPenn Donors Were Furious About the Palestine Writes Literature Festival. What About It Made Them Pull Their Funds?*, CNN (Oct. 25, 2023, 8:11 AM), <https://www.cnn.com/2023/10/25/business/palestine-writes-literature-festival-what-happened/index.html> [perma.cc/27HS-3HEA].

¹⁰⁹ David Bernstein, *Despite What Those Shadowy, Elite, Rich Jews Say, We're Not Antisemites*, VOLOKH CONSPIRACY (Sept. 9, 2023, 6:56 PM), <https://reason.com/volokh/2023/09/19/despite-what-those-shadowy-elite-rich-jews-say-were-not-antisemites> [perma.cc/7HAC-ZEW7].

¹¹⁰ Maruf, *supra* note 108.

big militarized tumor.”¹¹¹ And the Festival hosted Pink Floyd lyricist Roger Waters, who performed in Germany “dressed in a Nazi-like uniform,” “shot a prop machine gun into the audience,” and “desecrated the memory of Holocaust victim Anne Frank.”¹¹² Another speaker called Zionists “disgusting klannys” in reference to the Ku Klux Klan.¹¹³ Yet another speaker classified “most Jews” as “evil.”¹¹⁴

The Penn administration should have told these departments that they may not spend university money on, nor damage the university’s reputation by sponsoring, such an event. Faculty, outside organizations, and donors called for such a response.¹¹⁵ Instead, then-president Liz Magill—foreshadowing her congressional testimony—argued that Penn’s “fierce[] support” for “the free exchange of ideas” prevented the university from taking any action.¹¹⁶

Another example of politicized events is university departments that sponsored anti-Israel speakers on October 7th, 2024. This date supposedly reflected the beginning of a purported “genocide” by Israel of Palestinians. In fact, Israeli forces did not enter Gaza on October 7, and the only real significance of this date was that it was the day when Hamas invaded Israel and committed gross atrocities against Israeli civilians. The point of holding these events on October 7 was quite obviously to distract attention from those atrocities for political reasons.

Political groups on campus organized by students or faculty have the right to engage in such activity. But academic departments are not supposed to be political. Perhaps more important, unlike, for example, a student pro-Palestinian group, academic departments are subunits of the university administration, and their actions represent the university.

University administrators therefore can and should order departments not to expend university funds on events that primarily serve political rather than academic purposes. Administrators may follow the lead of Wake Forest president Susan Wenthe. She instructed Wake Forest departments to cancel their October 7, 2024, lecture by Rabab Abdulhadi,¹¹⁷ who had praised Islamic terrorists and had organized an event where her students could make posters that said, “My Heroes Have Always Killed Colonizers.”¹¹⁸ Wenthe meanwhile allowed an Interfaith Prayers for Peace and Community Reflection Event to take place on the same day.¹¹⁹

¹¹¹ Jason Holtzman, *Letter to University of Pennsylvania*, JEWISH FED’N OF GREATER PHILA. (quoting Abulhawa’s Twitter post on Jan. 28, 2023), <https://palestinewrites.org/2023/09/15/letter-to-the-university-of-pennsylvania/> [perma.cc/555V-D3ZG].

¹¹² Maruf, *supra* note 108.

¹¹³ Holtzman, *supra* note 111 (quoting Maysoon Zaid’s Twitter post on May 31, 2021).

¹¹⁴ Complaint at 35, *Yakoby v. Univ. of Pa.*, No. 2:23-cv-04789-KNS (E.D. Pa., Dec. 5, 2023) (quoting Rafaat Alareer but without a source).

¹¹⁵ Jessica Wu, *Dozens of Faculty Express ‘Deep Concern’ with Penn Response to Palestine Writes Festival*, THE DAILY PENNSYLVANIAN (Sept. 19, 2023, 10:54 PM), <https://www.thedp.com/article/2023/09/penn-faculty-letter-palestine-writes-festival> [perma.cc/4267-6PRL]; Stephanie Saul, *Penn’s Leadership Under Fire from Prominent Donors*, N.Y. TIMES (Oct. 13, 2023), <https://www.nytimes.com/2023/10/13/us/university-of-pennsylvania-israel-palestine.html>. [perma.cc/XM3X-UHTW]

¹¹⁶ M. Elizabeth Magill, *Statement on Palestine Writes Literature Festival*, UNIV. OF PA. ARTS & SCI. (Sept. 12, 2023), <https://pan-school.sas.upenn.edu/news/statement-palestine-writes-literature-festival> [perma.cc/4LW2-AJAH].

¹¹⁷ Susan R. Wenthe, *October 7 Community Update*, WAKE FOREST UNIV. (Sept. 26, 2024), <https://inside.wfu.edu/2024/09/october-7-community-update> [perma.cc/K7L5-N3JF].

¹¹⁸ *Jewish Groups to Pres. Wong: SFSU Prof Promoting Terrorism; Investigate*, AMCHA INITIATIVE, <https://amchainitiative.org/sfsu-professor-promoting-terrorism> [perma.cc/D6RH-2TKJ].

¹¹⁹ Wenthe, *supra* note 117.

D. Controversy over the IHRA Definition of Antisemitism

As President Donald Trump's executive order in 2019 mandated, federal government officials are required to adopt the International Holocaust Remembrance Association's definition of antisemitism in determining whether particular conduct had antisemitic intent and therefore constitutes illegal discrimination.¹²⁰ That definition gives examples of statements that, depending on the context, could be antisemitic.¹²¹

We believe that far too much ink has been wasted debated on whether the particular examples in the report should be deemed presumptively antisemitic. This is especially true given that the IHRA only states that these examples *could be antisemitic depending on context*.¹²²

We think the focus instead should be on the fact the IHRA definition teaches two important, and we think clearly correct, lessons. First, just because someone expresses hostility to "Zionists" rather than Jews does not by itself exempt their remarks from condemnation as antisemitic.¹²³

For example, when someone talks about the "Zionist-controlled media," or refers to Jewish students on campus as "Zios," or speaks of "Zionists" exaggerating the Holocaust, invoking classic antisemitism, the fact that they substitute "Zionists" for Jews does not make the statements any less antisemitic. Such antisemitic statements are protected in the ambit of freedom of speech. For the reasons discussed previously, students making such statements should not be punished by their universities. But they are still examples of antisemitism.

In addition to situations in which "Zionist" is simply a proxy for "Jew," there is the more subtle question of whether Zionism is so closely connected with Jewishness that discrimination against Zionism amounts, legally speaking, to discrimination against Jews. In the context of anti-gay discrimination, courts have routinely held that same-sex marriage is so closely correlated with gay identity that discrimination against individuals connected with the former amounts to discrimination based on sexual orientation.¹²⁴ This reasoning would apply even if the individual denied a request for a same-sex wedding cake was not himself gay. We are agnostic as to whether the relevant decisions are correct, but if they are, it would be difficult to explain why discrimination against individuals who seek services for same sex-weddings is discrimination

¹²⁰ Exec. Order No. 13,899, 84 Fed. Reg. 68779 (Dec. 11, 2019).

¹²¹ *Working Definition of Antisemitism*, INT'L HOLOCAUST REMEMBRANCE ALL. (May 26, 2016), <https://holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism> [perma.cc/9RD6-M9S3].

¹²² *Id.*

¹²³ *See id.* ("Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity."). This principle is starting to find its way into university policies. For example, NYU's Non-discrimination and Harassment Policy now reads, "Using code words, like 'Zionist,' does not eliminate the possibility that your speech violates the NDAH Policy. For many Jewish people, Zionism is a part of their Jewish identity. Speech and conduct that would violate the NDAH if targeting Jewish or Israeli people can also violate the NDAH if directed toward Zionists." *NYU's Guidance and Expectations on Student Conduct*, N. Y. UNIV., <https://www.nyu.edu/students/student-information-and-resources/student-community-standards/nyu-guidance-expectations-student-conduct.html> [perma.cc/57X3-TA7H].

¹²⁴ *E.g.*, *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 281 (Colo. App. 2015), *rev'd on other grounds sub nom.* *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 584 U.S. 617 (2018).

based on sexual orientation, but discrimination against Zionists is not discrimination against Jews.

As for the second lesson, antisemitic statements phrased as antizionism can be relevant evidence of motivation when the intent of a punishable action is disputed. For example, imagine Student A knocks over Student B, a Jewish student wearing a kippah, as the latter was walking to class. Student A claims it was an accident, but Student B suspects that it was a battery motivated by antisemitism, and files a complaint. Student B procures testimony that fifteen minutes before the incident in question, Student A posted on X that “I’m really in the mood to punch a Zionist today.” Surely this statement is relevant evidence that the incident was antisemitic battery, even though Student A referred to Zionists, not Jews.

III. THE ISSUE OF DOUBLE STANDARDS IN CAMPUS SPEECH REGULATION

Jewish students in a liberal society are entitled to the protection of antidiscrimination laws and policies that apply to them.¹²⁵ Refusing such protection to Jews while granting it to other groups is both discriminatory and illiberal. The authors thus wish to maximize protection of freedom of speech while minimizing institutional discrimination against Jewish students. The problem that we and like-minded people confront is that many institutions of higher education are staffed with administrators who lack a basic commitment to either of these values.¹²⁶

A. Double Standards at Harvard and University of Pennsylvania

The double standard many universities apply to antisemitic speech came to public attention in the course of widely watched congressional hearings in December 2023. The incumbent presidents of Harvard and the University of Pennsylvania pointed to their universities’ free speech commitments as a barrier to countermanding campus antisemitism.¹²⁷

Harvard president Claudine Gay claimed that although rhetoric from pro-Hamas protesters calling for the genocide of Jews was “personally abhorrent” to her, Harvard’s commitment to free speech prevented the university from cracking down on such rhetoric.¹²⁸ University of Pennsylvania President Liz Magill also relied upon her university’s free speech policies in explaining why the university allowed chants calling for the genocide of Jews. She asserted that

¹²⁵ Title VI of the 1964 Civil Rights prohibits universities that receive federal funds from discriminating against Jewish students on the basis of their shared ancestry. But Title VI does not cover discrimination against Jews on the basis of religion. For a history of how this distinction and the relevant law developed, see Kenneth L. Marcus, *The Landmark Case of Shaare Tefila v. Cobb*, 25 FED. SOC. REV. 17 (2024).

¹²⁶ On administrators’ disregard for free speech, see the many examples in FIRE’s annual report on universities. *FIRE’s Guide to Free Speech on Campus*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, <https://www.thefire.org/research-learn/fires-guide-free-speech-campus> [perma.cc/5KFS-X85L]. Regarding campus antisemitism, most administrators are simply indifferent, seeing Jews as not within the scope of “disadvantaged” groups they are supposed to care about. Sometimes, however, evidence reveals that they are antisemitic. See 3 *Columbia University Officials Lose Posts over Texts that ‘Touched on Ancient Antisemitic Tropes’*, ASSOCIATED PRESS (July 8, 2024, 1:00 PM), <https://apnews.com/article/columbia-university-administrators-antisemitism-text-69a97c6f21ef52664e780bfe202f305b> [perma.cc/KEW3-KVRH].

¹²⁷ *Holding Campus Leaders Accountable and Confronting Antisemitism: Hearing Before the H. Comm. on Educ. & the Workforce*, 118th Cong. (2023).

¹²⁸ *Id.* at 64–65.

Penn, though a private institution, has speech policies that are “guided by the United States Constitution.”¹²⁹

Gay and Magill relied on their respective universities’ purported commitment to free speech, but this commitment is belied by their schools’ records on free speech. The Foundation for Individual Rights and Expression (FIRE) ranks Harvard last in the nation for free speech, with an “abysmal” score of 0.00.¹³⁰ According to FIRE, 70% of Harvard students think it’s at least sometimes acceptable to shout down a speaker, and nearly 25% believe using violence to stop a speaker can be justified.¹³¹ More than half of the students surveyed reported they had held back their opinions at least once or twice in the past month.¹³²

FIRE also reports that since 2019, Harvard administrators, faculty, and students have attempted to silence twenty-two scholars’ speech through petitions, investigations, and disciplinary actions.¹³³ Harvard has also sanctioned at least six students for their expression during a campus controversy.¹³⁴ In 2021, the university directed undergraduate students to remove a flag depicting a bikini-wearing Nicki Minaj because “the community will find the flag offensive.”¹³⁵ Students cosplaying as Hamas terrorists and chanting in support of a worldwide intifada, however, apparently did not similarly offend community standards.

The complaint in a lawsuit filed by Harvard students against the university sums up Harvard’s hypocrisy on free speech: “America’s leading university has become a bastion of rampant anti-Jewish hatred and harassment” that has failed to protect Jewish students from a hostile environment.¹³⁶ Harvard, the complaint alleges, “permits students and faculty to advocate, without consequence, the murder of Jews and the destruction of Israel, the only Jewish country in the world.”¹³⁷ Meanwhile, the college “requires students to take a training class that warns that they will be disciplined if they engage in sizeism, fatphobia, racism, transphobia, or other disfavored behavior.”¹³⁸

¹²⁹ *Id.* at 62, 69, 70, 72.

¹³⁰ 2025 College Free Speech Rankings, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (2025), <https://rankings.thefire.org/rank/perma.cc/DKB6-DW4U>.

¹³¹ 2025 College Free Speech Rankings: Harvard University, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (2025), <https://rankings.thefire.org/rank/school/harvard-university> [perma.cc/Q2Y5-Z4W5].

¹³² *Id.*

¹³³ Scholars Under Fire Database, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (2025), https://www.thefire.org/research-learn/scholars-under-fire#home/?view_4_sort=field_2|asc&view_4_page=15 [perma.cc/9J28-B574].

¹³⁴ 2025 College Free Speech Rankings: Harvard University, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (2025), <https://rankings.thefire.org/rank/school/harvard-university> [perma.cc/Q2Y5-Z4W5].

¹³⁵ Anne Marie Tamburro, *Calling All Barbz: Twitter Rallies Behind Harvard Students Told to Remove Nicki Minaj Flag from Dorm Window*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Sept. 10, 2021), <https://www.thefire.org/news/calling-all-barbz-twitter-rallies-behind-harvard-students-told-remove-nicki-minaj-flag-dorm> [perma.cc/9TX7-6Z8G].

¹³⁶ Complaint at 1, *Kestenbaum v. President and Fellows of Harvard Coll.*, 1:24-cv-10092 (D. Mass. Jan., 10, 2024), <https://legalinsurrection.com/wp-content/uploads/2024/01/Kasowitz-Harvard-Antisemitism-Complaint.pdf> [perma.cc/6RN4-MVEL].

¹³⁷ *Id.* at 2.

¹³⁸ *Id.*

The University of Pennsylvania does not fare much better than Harvard in FIRE's rankings. Penn sits a measly three rankings above Harvard's last place.¹³⁹ A lawsuit filed against Penn alleges that "[p]laintiffs and their Jewish peers are routinely subjected to vile and threatening antisemitic slurs and chants such as 'Intifada Revolution,' 'from the River to the Sea,' 'Fuck the Jews,' 'the Jews deserve everything that is happening to them,' 'you are a dirty Jew, don't look at us,' 'keep walking you dirty little Jew,' get out of here kikes!'"¹⁴⁰

Meanwhile, "Penn, in contrast to its tolerance and enabling of those expressing and spreading antisemitism . . . aggressively enforces its codes to address bias against other minorities and readily disciplines students and faculty members who harass other groups or espouse viewpoints Penn selectively deems inappropriate."¹⁴¹ And while Penn has refused to discipline professors for egregiously antisemitic speech, it remains committed to punishing law professor Amy Wax for speech that it has deemed racist.¹⁴²

In short, it appears that any commitment Harvard and Penn had to free speech when Gay and Magill testified was quite selective. The universities protected pro-Hamas and anti-Israel speech even when it advocated genocide, while punishing or threatening to punish speech deemed offensive to other constituencies.

B. What to do about Double Standards

Enforcing a double standard in handling speech hostile or offensive to Jewish students may constitute a violation of Title VI and is not protected by the First Amendment. The liability arises because of discrimination: treating the concerns and sensitivities of Jewish students wildly differently than those of students from other minority groups is a discriminatory act.¹⁴³

¹³⁹ 2025 College Free Speech Rankings: University of Pennsylvania, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (2025).

¹⁴⁰ Complaint at 1, *Yakoby v. Univ. of Pa.*, 2:23-cv-04789 (Dec. 5, 2023), <https://legalinsurrection.com/wp-content/uploads/2023/12/university-of-pennsylvania-antisemitism-complaint.pdf> [perma.cc/2FQF-DBDP].

¹⁴¹ *Id.* at 5.

¹⁴² See, e.g., Bethan Sexton, UPenn Faces Free Speech Hypocrisy Storm for Refusing To Discipline Pro-Hamas Protesters - Despite Probing into Law Professor Who Said 'America Would be Better with Fewer Asians', DAILY MAIL (Oct. 25, 2023), <https://www.dailymail.co.uk/news/article-12672425/UPenn-free-speech-anti-Semitism-Amy-Wax.html> [perma.cc/C6EV-3L3X].

¹⁴³ Perhaps the most egregious example of a double standard we came across is at Northwestern University. Administrators there seemed unperturbed by vitriolic anti-Israel protestors, who, among other expressions of hostility to Jews at the university, called for the campus Hillel Jewish student organization to be shut down. David Bernstein, Disagreeing with Eugene About the Anti-Hillel Incidents at Northwestern University Last Week, Volokh Conspiracy (April 24, 2024, 1:25 PM), <https://reason.com/volokh/2024/04/24/disagreeing-with-eugene-about-the-anti-hillel-incidents-at-northwestern-university-last-week> [perma.cc/BUE9-U6YV]. By contrast, when several notes were found around campus stating "it's ok to be white," Northwestern issued four separate official statements denouncing the notes. *Id.*

To show a violation of Title VI, the complainant would likely need to show discriminatory intent, which in turn may be proven by circumstantial rather than direct evidence. See *Elagha v. Northwestern University*, 2025 WL 1384291 (N.D. Ill. 2025) ("While Elagha does not allege any blatant discriminatory behavior by Defendants, the allegations that Elagha made multiple complaints regarding the harassment and Defendants failed to respond to any of those complaints—or at least responded differently to her complaints than it had to similar claims by students outside of Elagha's protected class—at this stage, permit an inference of intentional discrimination.").

A forthcoming article suggests that a university may defend a claim based on double-standards by arguing that most "claims by Jewish students are enmeshed with hotly disputed views about world affairs means that efforts to accommodate them may pose risks of chilling political speech or intruding on academic freedom that are less acute in many other cases."

As *New York Times* columnist and former FIRE president David French has written, “The rule cannot be that Jews must endure free speech at its most painful, while favored campus constituencies enjoy the warmth of college administrators and the protection of campus speech codes.”¹⁴⁴ Of course, one can’t reasonably expect precise parallelism in the application of campus policies, but examples of grossly disparate treatment like those described above are sufficiently stark to create a presumption of discriminatory enforcement of speech rules.

The appropriate response to universities treating controversial speech differently depending on whose ox is gored is for universities to adopt and enforce rules universally respecting the right of students to express their opinions, even in grossly offensive ways. Universities should also adopt institutional neutrality regarding public controversies, including public controversies arising on campus. But the authors disagree about what should be done when a private university, not bound by the First Amendment, refuses to adopt one or both of these stances.

David L. argues that even if a school protects what it considers vulnerable minorities from hate speech, it should not be pressured to add Jews to the list of groups it protects. Adding Jews to the class of students protected from hate speech would, he predicts, lead to more illiberal conduct and speech codes on campus, reinforce illiberal ways of thinking that are the underlying source of the problem, and thus ultimately make things worse for campus Jews and the broader Jewish community.

David E., by contrast, thinks that illiberal ideology is so entrenched in the bureaucracy of many universities that they will not willingly enforce policies protecting “offensive” speech, nor will they adhere to institutional neutrality. Therefore, universities should be forced, through legal action or otherwise, to enforce strict nondiscrimination rules in applying speech policy. If microaggressions against Blacks, Hispanics, women, and so on meet with institutional pushback, so must micro- (and even more so macro-) aggressions against Jews. Indeed, the same goes for microaggressions against whites, men, and any other group that can claim the protection of civil rights laws.

In David E.’s opinion, the biggest driver of anti-speech policies at universities is that such policies can be used to support left-wing political agendas. Thus, satirical affirmative action bake sales will face crackdowns,¹⁴⁵ but not pro-Hamas demonstrations where demonstrators indulge in extremist rhetoric. If administrators were forced to crack down on the pro-Hamas demonstrators if they crack down on the bake sale proprietors, activist administrators would

The “natural comparator,” therefore, would not be how the university treats discrimination claims in general, but how it treats “claims of discrimination and exclusion raised by Palestinian, Arab, and Muslim students.” In fact, claims of discrimination are often “enmeshed with hotly disputed views” on hot-button political issues (e.g., affirmative action, abortion, same-sex marriage), and if a university is applying a double standard to Palestinian, Arab, and Muslim students, the correct solution is to stop doing so, not to also discriminate against Jewish students. Benjamin Eidelson & Deborah Hellman, *Antisemitism, Anti-Zionism, and Title VI: A Guide for the Perplexed*, HARV. L. REV. FORUM (forthcoming June 2025).

¹⁴⁴ David French, *What the University Presidents Got Right and Wrong About Antisemitic Speech*, N.Y. Times (Dec. 10, 2023), <https://www.nytimes.com/2023/12/10/opinion/antisemitism-university-presidents.html> [perma.cc/9YEM-T3ZM].

¹⁴⁵ For an incomplete list of incidents, see *College of William and Mary: Suppression of Affirmative Action Bake Sale*, FOUND. OF INDIVIDUAL RTS. & EXPRESSION, <https://www.thefire.org/cases/college-william-and-mary-suppression-affirmative-action-bake-sale> [perma.cc/6M7B-S9LF]. See also *Universities Shut Down Affirmative Action Bake Sales*, STUDENT PRESS L. CTR. (Oct. 1, 2003), <https://splc.org/2003/10/universities-shut-down-affirmative-action-bake-sales> [perma.cc/VP2L-A797].

likely think twice about trying to use speech rules to advance their ideological agenda. Only then would administrators seriously consider adopting and enforcing neutral protections for speech. And indeed, universities that were once insistent that they should not adopt institutional neutrality on political issues have changed their tune once they were challenged for not denouncing Hamas atrocities and pro-Hamas demonstrations on campus.¹⁴⁶

David L. predicts that most campus administrators would sooner pretend Jews are covered by existing speech codes than give up on the codes altogether. He believes that given the larger backlash in society against extreme forms of DEI, radical ideology, and hypocritical speech codes, universities will in the long term give into pressure to end such practices and that those who are trying to protect Jewish students should stay true to this larger objective.

CONCLUSION

The rising tide of antisemitism on American college campuses presents a serious challenge to universities' twin obligations to uphold freedom of expression and ensure a non-discriminatory environment for all students. The authors of this paper, though differing in some proposed solutions, are united in their belief that liberal values—freedom of speech and equal treatment under the law—are indispensable for the flourishing of Jewish life and for the health of academic communities.

As we have shown, universities frequently fail to enforce content-neutral rules prohibiting vandalism, harassment, and violence when Jewish institutions or students are targeted. This failure is not a defense of free speech but rather a symptom of selective enforcement. Simultaneously, universities often punish offensive speech directed at other minority groups while excusing or even defending grossly offensive speech targeting Jews, thereby entrenching double standards that violate Title VI and betray liberal ideals.

To correct these imbalances, universities must commit to applying rules consistently and fairly. They should discipline unlawful behavior regardless of political context, ensure that administrative powers are not wielded in discriminatory ways, and protect faculty expression while holding professors accountable when they violate nondiscrimination duties. Departments should refrain from engaging in partisan politics under the guise of academic inquiry, and universities should adopt institution-wide policies of neutrality on public controversies.

Liberalism demands not just abstract commitments but also principled consistency. The way forward is not to sacrifice free speech in the name of safety, nor to ignore discrimination in the name of free expression, but to robustly defend both. Only by doing so can universities become places where all students, including Jews, are equally free to speak, learn, and thrive.

¹⁴⁶ See Vimal Patel, *More Universities are Choosing to Stay Neutral on the Biggest Issues*, N.Y. Times (March 11, 2025), <https://www.nytimes.com/2025/03/11/us/institutional-neutrality-universities-free-speech.html> [perma.cc/3TMF-B4JZ].