

## ZIONISM AND TITLE VI

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After the attack on Israel of October 7, 2023, a new protest movement erupted on America’s campuses. Unlike the protests of previous decades, these protests were explicitly focused on Zionism, the movement for a Jewish national home in Israel. Rather than merely demand a Palestinian state or an end to the current war, they featured such chants as “[s]ettlers, settlers, go back home. Palestine is ours alone,”<sup>1</sup> or (in Arabic) “from water to water, Palestine is Arab” — better known by the English slogan “from the river to the sea.”<sup>2</sup> Messages such as “Zionist not allowed,” posted in the Multicultural Center of the University of California, Santa Barbara,<sup>3</sup> or “Zionists not welcome here,” chanted outside Hillary Clinton’s class at Columbia<sup>4</sup> or Harvard’s Hillel,<sup>5</sup> personalized a conflict unfolding thousands of miles away. So did the

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<sup>1</sup> Emma Green, *How a Student Group Is Politicizing a Generation on Palestine*, NEW YORKER (Dec. 15, 2023), <https://www.newyorker.com/news/annals-of-education/how-a-generation-is-being-politicized-on-palestine> [<https://perma.cc/M74P-4NQY>] (comparing the pro-Palestinian movement of the 1990s to a recent protest at Hunter College); Michael Starr, “Globalize the Intifada,” *Rutgers President, Jewish Students Flee Meeting*, JERUSALEM POST (Apr. 8, 2024, at 21:27 ET), <https://www.jpost.com/diaspora/antisemitism/article-795989> [<https://perma.cc/2SFL-DE7J>]; *Live: Pro-Palestinian Demonstrators Continue to Push for Divestment on Deering Meadow Following Agreement*, DAILY NW. (May 3, 2024, at 12:05 ET), <https://dailynorthwestern.com/2024/04/25/campus/live-pro-palestinian-student-activists-set-up-encampment-on-deering-meadow> [<https://perma.cc/6PAY-SW9S>].

<sup>2</sup> Kassy Akiva, *WATCH: Harvard Students Chant “Palestine Is Arab” During On-Campus Protest*, DAILY WIRE (Feb. 13, 2024), <https://www.dailywire.com/news/watch-harvard-students-chant-palestine-is-arab-during-on-campus-protest> [<https://perma.cc/77AY-EBF5>]; Stephen E. Sachs (@StephenESachs), X (Apr. 26, 2024, at 14:23 ET), <https://x.com/StephenESachs/status/1783924779478880328> [<https://perma.cc/U5KD-G3XU>] (identifying the Arabic slogan at the Harvard encampment).

<sup>3</sup> Image posted by Tessa Veksler (@tessaveksler), INSTAGRAM, *Zionists Not Allowed* (Feb. 26, 2024), at 1–2, <https://www.instagram.com/p/C31UnNORoaQ> [<https://perma.cc/WV69-SY9M>].

<sup>4</sup> See Anvee Bhutani, *Tensions Simmer — But Don’t Boil Over — As Columbia Students Return to Campus*, THE GUARDIAN (Sep. 7, 2024, at 12:00 ET), <https://www.theguardian.com/us-news/article/2024/sep/07/columbia-university-students-protest> [<https://perma.cc/C6C4-GXYA>].

<sup>5</sup> See Rachael A. Dziaba & Cam E. Kettles, *Jews for Palestine Rally Outside Harvard Hillel to Protest Former IDF Spokesperson*, HARV. CRIMSON (Nov. 19, 2024, at 11:59 ET), <https://www.thecrimson.com/article/2024/11/19/jews-for-palestine-hillel-protest> [<https://perma.cc/Y2GY-SKQA>].

occasional expulsion of Zionist students from membership in campus student groups.<sup>6</sup>

Both the federal government<sup>7</sup> and private plaintiffs<sup>8</sup> accused universities of failing to protect their Jewish or Israeli students, faculty, or staff. The University of California, Los Angeles (UCLA), for example, was accused of letting protesters deny passage through campus to all those unwilling to denounce Zionism, with university personnel on hand to direct them another way.<sup>9</sup> This was said to violate Title VI of the Civil Rights Act of 1964,<sup>10</sup> section 601 of which provides that “[n]o 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>11</sup>

Professors Benjamin Eidelson and Deborah Hellman raise doubts about the basis of many such claims.<sup>12</sup> Their argument can be read as

<sup>6</sup> See, e.g., COLUMBIA UNIV. TASK FORCE ON ANTISEMITISM, REPORT #2: COLUMBIA UNIVERSITY STUDENT EXPERIENCES OF ANTISEMITISM AND RECOMMENDATIONS FOR PROMOTING SHARED VALUES AND INCLUSION 60–61 (2024), <https://president.columbia.edu/sites/default/files/content/Announcements/Report-2-Task-Force-on-Antisemitism.pdf> [https://perma.cc/6955-HESX].

<sup>7</sup> See, e.g., Press Release, U.S. Dep’t of Health & Hum. Servs., HHS’ Civil Rights Office Finds Columbia University in Violation of Federal Civil Rights Law (May 22, 2025), <https://www.hhs.gov/press-room/ocr-columbia-violates-federal-civil-rights-law.html> [https://perma.cc/XYF8-RSV5]; Press Release, U.S. Dep’t of Health & Hum. Servs., HHS’ Civil Rights Office Finds Harvard University in Violation of Federal Civil Rights Law (June 30, 2025), <https://www.hhs.gov/press-room/hhs-finds-harvard-in-violation.html> [https://perma.cc/WG9H-52Q8].

<sup>8</sup> First Amended Complaint ¶¶ 500–507, *Frankel v. Regents of the Univ. of Cal.*, No. 24-cv-04702 (C.D. Cal. filed Oct. 22, 2024) [hereinafter *Frankel* Amended Complaint]; First Amended Complaint ¶¶ 622–638, *Students Against Antisemitism, Inc. v. Trs. of Columbia Univ.*, No. 24-cv-01306 (S.D.N.Y. filed June 17, 2024); First Amended Complaint ¶¶ 181–188, *Louis D. Brandeis Ctr., Inc. v. Regents of the Univ. of Cal.*, No. 23-cv-06133 (N.D. Cal. filed May 3, 2024); see also *Stand With Us Ctr. for Legal Just. v. Mass. Inst. Tech.*, No. 24-1800, 2025 WL 2962665, at \*6–16 (1st Cir. Oct. 21, 2025) (rejecting a Title VI claim).

<sup>9</sup> *Frankel* Amended Complaint, *supra* note 8, ¶¶ 128–137. For contrasting views, see Joseph Fishkin, *Making Policy Based on Falsehoods: The Federal Government vs UCLA*, BALKINIZATION (Aug. 31, 2025), <https://balkin.blogspot.com/2025/08/making-policy-based-on-falsehoods.html> [https://perma.cc/T47R-U8TL], and David Bernstein, *Debating the UCLA Anti-Israel Encampment*, REASON: VOLOKH CONSPIRACY (Sep. 16, 2025, at 09:28 ET), <https://reason.com/volokh/2025/09/16/debating-the-ucla-anti-israel-encampment> [https://perma.cc/6ARU-5P6Q].

<sup>10</sup> Pub. L. No. 88-352, tit. VI, 78 Stat. 252 (1964) (codified at 42 U.S.C. §§ 2000d to 2000d-7).

<sup>11</sup> 42 U.S.C. § 2000d; *Frankel* Amended Complaint, *supra* note 8, ¶ 501.

<sup>12</sup> Benjamin Eidelson & Deborah Hellman, *Antisemitism, Anti-Zionism, and Title VI: A Guide for the Perplexed*, 139 HARV. L. REV. F. 1, 1–2 (2025). For other recent and relevant discussions of Title VI, see generally David E. Bernstein & David L. Bernstein, *Supporting Free Speech and Countering Antisemitism on American College Campuses*, HARV. J.L. & PUB. POL’Y: PER CURIAM, Summer 2025, <https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2025/06/Bernsteins-Campus-Free-Speech-vf.pdf> [https://perma.cc/2QHS-QN7K]; Jacob E. Gersen & Jeannie Suk Gersen, *The Six Bureaucracy* (Harvard Pub. L. Working Paper No. 25-20, 2025), <https://ssrn.com/abstract=5199652> [https://perma.cc/K7K9-FA9Z]; Zachary D. Fasman & Samuel

threefold. First, Judaism is a religion, yet section 601 doesn't forbid *religious* discrimination — only discrimination on the grounds of race, color, or national origin.<sup>13</sup> It doesn't protect the religious beliefs of Jews any more than those of Muslims or of Christians. To the extent that Zionism is a political view or “religious conviction about . . . the land of Israel,”<sup>14</sup> one that happens to be held by many ethnic Jews, it isn't an aspect of race (in the sense of “ancestry or ethnic characteristics”<sup>15</sup>), but of “race-associated cultural practices” (akin to “wearing braids, locks, or cornrows”).<sup>16</sup> If requiring students to accept Jesus as their personal savior wouldn't violate Title VI, the argument might go, neither would requiring them to reject a Jewish national home in Israel — let alone failing to intervene when protest groups do the same.

Second, the authors argue, a highly plausible reading of current doctrine construes section 601 to reach only “*intentional* discrimination,” the deliberate targeting on forbidden grounds of specific individuals or groups.<sup>17</sup> A classroom in which a teacher describes the Holocaust as a “fantastic lie,”<sup>18</sup> accuses Israel of the 9/11 attacks,<sup>19</sup> and so on, might be “offensive and alienating”<sup>20</sup> to Jewish students (and others); so too if students are spreading conspiracies and the “teacher shrugs it off.”<sup>21</sup> But if no one “intentionally treat[s] racially Jewish students differently,” perhaps because no one realizes there are “any Jewish students in the class,”<sup>22</sup> this seemingly hostile environment merely has a disparate

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Estreicher, *Antisemitism, Anti-Zionism and Title VI: College and University Responsibility for Campus Harassment of Jewish Students* (New York Univ. Sch. L., Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 25-30, 2025), <https://ssrn.com/abstract=5399435> [<https://perma.cc/XZ4Z-XJPQ>]; Joshua J. Freundel, *Antizionism and Title VI: A Perplexed Response* (July 17, 2025) (unpublished manuscript) (on file with the Harvard Law School Library).

<sup>13</sup> Eidelson & Hellman, *supra* note 12, at 2–6.

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (construing the Civil Rights Acts of 1866 and 1870); see *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987) (quoting *Al-Khazraji*, 481 U.S. at 613); Dear Colleague Letter from Catherine E. Lhamon, Ass't Sec'y for C.R., U.S. Dep't of Educ. at 1 (May 7, 2024) [hereinafter Lhamon Letter], <http://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-202405-shared-ancestry.pdf> [<https://perma.cc/5T24-7J36>] (applying the same framework to Title VI); Eidelson & Hellman, *supra* note 12, at 4–5 (discussing these sources).

<sup>16</sup> Eidelson & Hellman, *supra* note 12, at 10.

<sup>17</sup> *Id.* at 8 (emphasis added) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001)).

<sup>18</sup> Benny Morris, *Exposing Abbas*, NAT'L INTEREST (May 19, 2011), <https://nationalinterest.org/feature/exposing-abbas-5335> [<https://perma.cc/VGF9-BBNE>] (describing the views of the doctoral dissertation written by Palestinian Authority President Mahmoud Abbas); accord Greg Myre, *Man in the News; Soft-Spoken but Not Afraid to Voice Opinions — Mahmoud Abbas*, N.Y. TIMES (Mar. 11, 2003), <https://www.nytimes.com/2003/03/11/world/man-in-the-news-soft-spoken-but-not-afraid-to-voice-opinions-mahmoud-abbas.html> [<https://perma.cc/8WCC-TSXS>].

<sup>19</sup> See, e.g., ANTI-DEFAMATION LEAGUE, ANTISEMITIC CONSPIRACIES ABOUT 9/11 ENDURE 20 YEARS LATER (2021), <https://www.adl.org/resources/report/antisemitic-conspiracies-about-911-endure-20-years-later> [<https://perma.cc/2XSE-5BHC>].

<sup>20</sup> Eidelson & Hellman, *supra* note 12, at 7.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

*impact* on Jews, outside the scope of section 601.<sup>23</sup> (The teacher might be delighted to find Jews in her class, to whom she can also teach about Jewish perfidy; she treats her students the same way regardless, so how can she be discriminating?) Indeed, “‘Zionist-free’ areas on campus” arguably needn’t discriminate by race or national origin, as long as they sincerely and without pretext or prejudice admit anyone willing to denounce a Jewish state.<sup>24</sup> With their schools immune from private lawsuits, such Zionist-free zones could have been challenged only by agency enforcement of disparate-impact regulations under another provision, section 602<sup>25</sup> — regulations that were “on shaky legal footing”<sup>26</sup> and which the current Administration has now repealed.<sup>27</sup>

Third, the authors argue, because universities are regularly home to vigorous free speech, student perceptions of an actionably hostile environment will often be *unreasonable* — involving conduct to which students reasonably take offense, but from which no student “could reasonably expect to be shielded.”<sup>28</sup> To qualify as discrimination under Title VI (or the similar Title IX), a “hostile environment” has to be more than just an environment that’s hostile: It has to be “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit,”<sup>29</sup> and the institution has to react with “deliberate indifference.”<sup>30</sup> If masked crowds occupy campus to chant “globalize the intifada”<sup>31</sup> (or, perhaps, “Jews will not replace us”<sup>32</sup>), that’s life in the big city — something that “could not ordinarily contribute to a hostile environment under Title VI.”<sup>33</sup> Students are entitled to their political beliefs, and merely expressing those beliefs, with First Amendment protection and without any threat of “imminent lawless action,”<sup>34</sup> can’t “be ‘severely’ and ‘objectively’ offensive” under the statute — unless it “can only reasonably be understood as malicious”

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<sup>23</sup> *Id.* at 9.

<sup>24</sup> *Id.* at 9, 11.

<sup>25</sup> See *id.* at 8 & nn.51–52 (quoting 42 U.S.C. § 2000d-1); *id.* at 9 & n.53 (citing *Alexander v. Sandoval*, 532 U.S. 275, 283–86 (2001)).

<sup>26</sup> *Id.* at 12.

<sup>27</sup> See Rescinding Portions of Department of Justice Title VI Regulations to Conform More Closely with the Statutory Text and to Implement Executive Order 14281, 90 Fed. Reg. 57141, 57141 (Dec. 10, 2025) (amending 28 C.F.R. 42.104(b)–(c)).

<sup>28</sup> Eidelson & Hellman, *supra* note 12, at 13; see *id.* at 11–15.

<sup>29</sup> See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (construing 20 U.S.C. § 1681(a)).

<sup>30</sup> *Id.* at 644; cf. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (describing Title VI and Title IX as “parallel”); Eidelson & Hellman, *supra* note 12, at 8 n.49 (noting the parallelism).

<sup>31</sup> Eidelson & Hellman, *supra* note 12, at 15.

<sup>32</sup> Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), <https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html> [https://perma.cc/6T9S-LPJT]; see *infra* text accompanying notes 177–78.

<sup>33</sup> Eidelson & Hellman, *supra* note 12, at 15.

<sup>34</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (setting out the Supreme Court’s First Amendment test for incitement).

(chosen specifically for its offensiveness),<sup>35</sup> and maybe not even then.<sup>36</sup> Excluding Zionists from student groups might qualify, but only if the excluders are reasonably seen as too willing to accept the removal of most Jews “from diverse aspects of campus life.”<sup>37</sup>

The authors are careful scholars and their Essay a careful work. Yet their measured tone undersells both the extremism of the current protest movement and the implications of these statutory claims. While the merits of each lawsuit turn on the details of each campus, the current movement’s focus on Zionism hasn’t rendered Title VI obsolete.

Made a condition of full participation in university life, anti-Zionism is a form of national-origin discrimination: It creates a hostile environment for Israelis forced to abjure their national origin or Jews forced to abjure their nationhood. The authors acknowledge that many Israelis and Jews *are* Zionists,<sup>38</sup> but they say little about *why*, and this matters for how one applies Title VI. Anti-Zionism doesn’t merely contravene some religious or political belief common among Israelis; it denies that there should *be* “Israelis,” calling for the abolition of a specifically Israeli nationality. And it implicates not just Jews’ religious beliefs about the land of Israel, but their membership in the Jewish people: the *nation* of Israel, of which the State of Israel is the associated nation-state. Israel is the Jewish state, the “national home for the Jewish people,”<sup>39</sup> in the same ordinary sense in which Greece is the Greek state or Czechia the Czech state. Ethnic Greeks living elsewhere need neither hold passports from the Hellenic Republic, nor feel any affinity for the country of Greece, nor approve of its history, policies, or government; they’re perfectly free to live out their lives while paying no attention to Greece. But a university’s insistence on an “anti-Hellasiist” renunciation of a Greek state — or on a similar renunciation of a Jewish or a Palestinian state — might still violate Title VI.

Such a university couldn’t easily escape liability by making the same demands of everyone. The doctrinal arguments against “untargeted” hostile environments aren’t as great an obstacle as the authors suggest, and a world without them would be quite different from what most people expect. If the narrower reading of Title VI (and Title IX) were correct, then a university that sponsored nightly cross burnings and white power rallies, plastered each dorm room with woman-degrading pornography, and forced everyone entering a classroom to stomp on a Greek flag and kiss a Turkish one (or vice versa) *still* might not, on the ground of race, sex, or national origin, have intentionally excluded

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<sup>35</sup> Eidelson & Hellman, *supra* note 12, at 15 & n.90.

<sup>36</sup> *Id.* at 18.

<sup>37</sup> *Id.* at 19.

<sup>38</sup> *See id.* at 18–19.

<sup>39</sup> Letter from Arthur James Balfour, British Foreign Sec’y, to Lord Rothschild (Nov. 2, 1917), [https://avalon.law.yale.edu/20th\\_century/balfour.asp](https://avalon.law.yale.edu/20th_century/balfour.asp) [<https://perma.cc/UT3U-KAU6>]; *accord* H.R.J. Res. 322, 67th Cong., 42 Stat. 1012 (1922).

anyone from participation in, denied them the benefits of, or subjected them to discrimination under its programming. Perhaps this reading is correct; but a fair number of courts have disagreed with it, and those rejecting “untargeted” hostile-environment claims should know what they’ve signed up for.

Nor can a university pass the buck to protesters, chalking up its hostile educational environment to the give-and-take of campus life. When a university abandons its ordinary rules, ceding to a protest movement the authority to deny access to campus spaces and resources, it bears greater responsibility for that movement’s actions and renders more menacing that movement’s demands. Jewish and Israeli students who might try to ignore slogans for their ethnic cleansing on the quad might not be able to ignore them when chanted in the library or spraypainted on its windows,<sup>40</sup> and when the university reacts with deliberate indifference. By contrast, if Title VI generally doesn’t require universities to interfere with otherwise rule-abiding and First Amendment-protected student speech, then hostile-environment law might (again) be far more limited than many expect — under current doctrine, letting student Klan chapters call for “revengeance” and for black Americans to “be returned to Africa,” as in *Brandenburg v. Ohio*,<sup>41</sup> let alone for the exclusion of Zionists. The authors’ softened description of the current protest movement’s comfort with violence is ultimately fruitless, as far more explicit statements (say, “Zionists don’t deserve to live”<sup>42</sup>) might, on the arguments presented, receive precisely the same treatment.

These free-speech considerations serve as an important reminder of the limits of how much law can do. However one reads Title VI, it may be that a student Klan chapter has a legal right to do a moral wrong. Whether anti-Zionism counts as antisemitism in law is thus a distinct question from whether it’s antisemitic in fact.<sup>43</sup> Today’s antisemitism is less a religious prejudice or a racial bias than a conspiracy theory, an

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<sup>40</sup> See, e.g., *Gartenberg v. Cooper Union for the Advancement of Sci. & Art.*, 765 F. Supp. 3d 245, 255–56, 268 (S.D.N.Y. 2025) (describing window graffiti “send[ing] a message that Jews as a class do not belong in Israel while justifying and encouraging violence against those Jews who do live there,” *id.* at 268).

<sup>41</sup> 395 U.S. 444 (1969) (per curiam); *id.* at 447 (finding such speech protected).

<sup>42</sup> Sharon Otterman, *Pro-Palestinian Group at Columbia Now Backs “Armed Resistance” by Hamas*, N.Y. TIMES (Oct. 9, 2024), <https://www.nytimes.com/2024/10/09/nyregion/columbia-pro-palestinian-group-hamas.html> [<https://perma.cc/J5E3-6P9R>] (describing how Columbia University Apartheid Divest (CUAD) rescinded its prior apology for this student statement); see also Chris Mendell & Gelila Negesse, *Over 80 Student Groups Form Coalition Following Suspension of SJP, JVP*, COLUM. SPECTATOR (Dec. 6, 2023, at 21:54 ET), <https://www.columbiaspectator.com/news/2023/11/29/over-80-student-groups-form-coalition-following-suspension-of-sjp-jvp> [<https://perma.cc/C8VG-BHN9>] (describing CUAD’s formation as an umbrella pro-Palestine coalition of more than 80 student groups at Columbia).

<sup>43</sup> Cf. Lawrence H. Summers, President, Harvard Univ., Address at Morning Prayers (Sep. 17, 2002), <https://www.harvard.edu/president/news-speeches-summers/2002/address-at-morning-prayers> [<https://perma.cc/5ZBG-HHA7>] (describing positions and “actions that are anti-Semitic in their effect if not their intent”).

excessive willingness to believe that Jews and Israel are up to no good<sup>44</sup> — whether it's that Jews control the media,<sup>45</sup> that “Israel did 9/11,”<sup>46</sup> or that Jews created the plague by poisoning wells.<sup>47</sup> One reason the current protest movement might strike many Jews and Israelis as threatening is that they believe that its factual claims *aren't true*, and that these claims wouldn't be so widely *believed* but for an undue suspicion of Jews. Such questions are of course matters of deep controversy, “enmeshed with hotly disputed views about world affairs.”<sup>48</sup> A federal court might not be able to *say*, as a finding of fact, that labeling either Zionism or Israel's current war as “genocidal” is another such conspiracy theory (or, indeed, a blood libel). Nor perhaps might it resolve, amid litigation, whether these allegations seem so *uniquely* urgent to so many out of a generalized or unconscious dislike, disregard, or just unfair distrust of Israelis or Jews. But whether courts can say so or not, it still might be true.

### I. ZIONISM AND NATIONAL ORIGINS

To put the argument in its starkest terms, set aside for the moment the complications of campus protests and rules violations. Say that a federally funded university officially declared itself to be anti-Zionist: posting large signs over each campus gate reading “No Dogs or Zionists Allowed,” requiring denunciations of Zionism from all those it admitted or hired, and so on. Might *this* “add up to a hostile environment” for Jews or for Israelis<sup>49</sup> — one so severe, pervasive, and objectively offensive as to limit their educational opportunities?

On one reading of “on the ground of race . . . or national origin,”<sup>50</sup> “the short answer” might seem to be “no.”<sup>51</sup> To the extent that Zionism is a political or religious belief about a polity in the Middle East, it isn't a racial or ancestral category; those categories aren't “defined in terms of beliefs” any more than in terms of hairstyles.<sup>52</sup> Absent evidence of pretext or uneven application,<sup>53</sup> anti-Zionist litmus tests might seem

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<sup>44</sup> See JOVAN BYFORD, CONSPIRACY THEORIES: A CRITICAL INTRODUCTION 95–96 (2011); Yair Rosenberg, *Why So Many People Still Don't Understand Anti-Semitism*, THE ATLANTIC (Jan. 19, 2022), <https://www.theatlantic.com/ideas/archive/2022/01/texas-synagogue-anti-semitism-conspiracy-theory/621286> [https://perma.cc/97V5-W998].

<sup>45</sup> See BYFORD, *supra* note 44, at 68, 77.

<sup>46</sup> *Id.* at 110.

<sup>47</sup> *Id.* at 48. See generally TZAFRIR BARZILAY, POISONED WELLS: ACCUSATIONS, PERSECUTION, AND MINORITIES IN MEDIEVAL EUROPE, 1321–1422 (2022) (describing the history of medieval well-poisoning claims).

<sup>48</sup> Eidelson & Hellman, *supra* note 12, at 23.

<sup>49</sup> *Id.* at 10.

<sup>50</sup> 42 U.S.C. § 2000d.

<sup>51</sup> Eidelson & Hellman, *supra* note 12, at 10.

<sup>52</sup> *Id.*

<sup>53</sup> See *id.* at 11.

wholly distinct from discrimination against Jews *qua* Jews (or Israelis *qua* Israelis).<sup>54</sup>

Yet the argument needn't end there. As a statutory matter, another reading of section 601 is available (as discussed by the authors, as well as below).<sup>55</sup> At a more fundamental level, though, neither racial nor national origins need be *defined* in terms of beliefs for such origins to be *implicated* by requirements about beliefs. Obliging students to affirm that “Asians are inferior” could lead reasonable Asian students to consider themselves “excluded” “on the ground of race”<sup>56</sup> — though Asian-ness isn't defined as a matter of belief, and though the university might hold its view in good faith and without any intent to exclude them. Likewise, reasonable Israeli students might find the demand that they reject their own national existence to be a severe, pervasive, and objectively offensive barrier to their educational opportunities *as Israelis* — and Jews, considered as a nation, might find the same.

This sort of national rejection is precisely what anti-Zionism does demand. Zionism is the movement for the nation of Israel to have a national homeland<sup>57</sup> — and, since the early twentieth century at least, for that homeland to be located in some portion of the traditional land of Israel, to which many Jews had immigrated.<sup>58</sup> One can be a Zionist and demand that Israel's government change a great many of its policies; one can be a Zionist and wish for a Palestinian state as Israel's neighbor and trading partner; one can be a Zionist and believe that Israel's borders should be very different than they are (say, shrunk to the armistice lines of 1949,<sup>59</sup> to the United Nations partition of 1947,<sup>60</sup> to the Peel Commission partition of 1937,<sup>61</sup> or to “the size of a tablecloth,”<sup>62</sup> as Chaim Weizmann once put it); one might even be a Zionist and envision a Jewish state as a home and refuge within a larger Arab federation, as David Ben-Gurion once proposed.<sup>63</sup> But *anti-Zionism*, in

<sup>54</sup> Cf. *id.* at 2 (leaving applications to Israelis as an exercise for the reader).

<sup>55</sup> See *id.* at 7 & n.44, 11–19; *infra* Part II, pp. 61–64.

<sup>56</sup> 42 U.S.C. § 2000d.

<sup>57</sup> See Theodor Herzl, *The Zionist Congress*, 72 CONTEMP. REV. 587, 588 (1897) (“Zionism has for its object the creation of a home, secured by public rights, for those Jews who either cannot or will not be assimilated in the country of their adoption.”); see also *id.* at 599 (asking whether “a Jewish nation still exist[s],” and answering in the affirmative).

<sup>58</sup> See sources cited *supra* note 39; see also GUR ALROEY, AN UNPROMISING LAND: JEWISH MIGRATION TO PALESTINE IN THE EARLY TWENTIETH CENTURY 5 (2014) (describing waves of twentieth-century immigration).

<sup>59</sup> See, e.g., General Armistice Agreement, Jordan-Isr., art. V, Apr. 3, 1949, U.N. Doc. S/1302/Rev. 1, <https://docs.un.org/en/S/1302/Rev.1> [<https://perma.cc/QD37-K5E4>].

<sup>60</sup> G.A. Res. 181 (II), U.N. Doc. A/519, at 131 (Nov. 29, 1947), [https://docs.un.org/en/A/RES/181\(II\)](https://docs.un.org/en/A/RES/181(II)) [<https://perma.cc/DB7D-V4ST>].

<sup>61</sup> PALESTINE ROYAL COMMISSION REPORT 380–93 (1937), <https://unispa.un.org/pdfs/Cmd5479.pdf> [<https://perma.cc/5DZC-2VWL>].

<sup>62</sup> NORMAN ROSE, CHAIM WEIZMANN: A BIOGRAPHY 320 (1989).

<sup>63</sup> OREN KESSLER, PALESTINE 1936: THE GREAT REVOLT AND THE ROOTS OF THE MIDDLE EAST CONFLICT 39 (2023).

the sense in which the current movement uses the term, requires the rejection of any specifically Jewish state in any part of Israel — as in the oft-repeated slogan “We don’t want no two states! We want all of ‘48!”<sup>64</sup> It requires the abolition of a national identity currently held by millions of people in the state in which they live. In this way it’s less like calls for Korean reunification (which typically claim to fulfill the wishes of those being reunified), and more like demands for abolishing Greece as the state of the Greeks (say, through consolidation with Turkey in a single binational polity), or for abolishing Ukraine as the state of the Ukrainians (say, through “consolidation” with Russia).

Eliminating a national identity would be a particularly unusual demand from universities, which usually allow a variety of views on the self-determination of various peoples. So long as students and faculty are free to pursue such goals on their own, a university can’t be accused of creating a hostile environment for Israelis, Palestinians, Kurds, or Basques simply by failing to endorse their national goals, or indeed by leaving all foreign policy questions to the State Department. But demanding an explicit *rejection* of those goals as a condition of university membership certainly could create a hostile environment, singling out the national aspirations of a specific people and portraying that people, among all others, as unworthy of determining its own course.

For comparison, consider an “anti-Hellastist” movement for abolishing the Hellenic Republic. The Greek Revolution against the Ottomans was hardly an immaculate affair; though accounts differ, one historian describes it as starting in 1821 with massacres on both sides,<sup>65</sup> continuing with an ethnic cleansing of Muslims,<sup>66</sup> and leading to a Peloponnese in which “[t]here was no longer an indigenous Muslim population to speak of,”<sup>67</sup> with “this targeted and categorical violence” being “the goal of the warfare” rather than “an unintended consequence.”<sup>68</sup> This is a far cry from a U.N. partition plan, though there were also attempts at coexistence;<sup>69</sup> still, one could surely imagine a protest movement that denounced all supporters of Greek statehood as vile “Hellastists,”

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<sup>64</sup> Theo Baker, *The War at Stanford*, THE ATLANTIC (Mar. 26, 2024), <https://www.theatlantic.com/ideas/archive/2024/03/stanford-israel-gaza-hamas/677864> [<https://perma.cc/D8T4-URP9>]; Erwin Chemerinsky, Opinion, *Nothing Has Prepared Me for the Antisemitism I See on College Campuses Now*, L.A. TIMES (Oct. 29, 2023, at 10:47 PT), <https://www.latimes.com/opinion/story/2023-10-29/antisemitism-college-campus-israel-hamas-palestine> [<https://perma.cc/EN42-QVPE>].

<sup>65</sup> YANNI KOTSONIS, THE GREEK REVOLUTION AND THE VIOLENT BIRTH OF NATIONALISM 189–91, 194–96 (2025).

<sup>66</sup> *Id.* at 204–07.

<sup>67</sup> *Id.* at 208.

<sup>68</sup> *Id.* at 14; see also MARK MAZOWER, THE GREEK REVOLUTION: 1821 AND THE MAKING OF MODERN EUROPE 186 (2021) (describing population changes).

<sup>69</sup> Compare KOTSONIS, *supra* note 65, at 192 (describing efforts by some Muslims and Christians in Greece to defend members of the other group), with BENNY MORRIS, 1948: A HISTORY OF THE FIRST ARAB-ISRAELI WAR 145 (2008) (describing the mayor of Haifa’s plea for Arab residents to remain as citizens of Israel after independence), and EFRAIM KARSH, PALESTINE BETRAYED 136–38 (2010) (same).

adherents of an ethnosupremacist ideology that’s given citizenship rights to those “of Greek origin.”<sup>70</sup> Yet if a university joined that anti-Hellasisist movement, conditioning access to campus on endorsing anti-Hellasisism and condemning any “normalization”<sup>71</sup> of the Greek state, it’d impose a unique barrier to the participation of Greeks and Greek citizens. They, unlike others, would be required to denounce their *own* national origin as unworthy of existence — not just because of something wrong with Greece’s actions, past or present (after all, the polity of Germany still exists!), but of something wrong with *being* Greek. They’d be made to agree that Greece’s alleged sins deserve not just a national accounting but a national death penalty.

As the comparison suggests, anti-Zionist litmus tests impose a unique burden in a second way, precisely because the suffering that attended the partition, civil war, and invasion of Israel by its neighbors was *not* unique.<sup>72</sup> The end of World War II also saw the forced redrawing of borders in Europe,<sup>73</sup> including the violent expulsion of over ten million ethnic-German civilians, up to 1.5 million of whom died in the process.<sup>74</sup> From Czechoslovakia alone, roughly 800,000 German civilians were deported to the Soviet Zone and 1.3 million to the American Zone;<sup>75</sup> and yet “Czechism” is rarely equated with Zionism as a forbidden ethnosupremacist ideology. Neither is “Pakistanism,” despite the scale of death and exile in the partition of Pakistan and India.<sup>76</sup> To one commentator, “[t]here was a war and a bunch of people got kicked out of their villages’ is absolutely the least-weird and least-distinctive aspect of the whole Zionist enterprise”<sup>77</sup> — but because Zionism has a name of

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<sup>70</sup> Greek Citizenship Code, arts. 5(1)(d), 10(1) (Haris Psarras trans., 2010), GLOB. CITIZENSHIP OBSERVATORY, [https://data.globalcit.eu/NationalDB/docs/GRE%20Citizenship%20Code%20\(as%20of%202010,%20English\)\\_1.pdf](https://data.globalcit.eu/NationalDB/docs/GRE%20Citizenship%20Code%20(as%20of%202010,%20English)_1.pdf) [<https://perma.cc/26FX-92CE>].

<sup>71</sup> See, e.g., Palestinian BDS Nat’l Comm., *The BDS Movement’s Anti-Normalization Guidelines Explained*, BDS (Oct. 29, 2022) [hereinafter BDS Normalization Guidelines], <https://bdsmovement.net/news/bds-movement-anti-normalization-guidelines> [<https://perma.cc/Y95B-7469>].

<sup>72</sup> On that invasion, see, for example, *Arab Armies Invade Palestine; Reach Gaza, Bomb Tel Aviv Again; U.S. Considers Lifting Arms Ban*, N.Y. TIMES, May 16, 1948, at 1.

<sup>73</sup> See, e.g., Protocol of the Proceedings of the Berlin Conference, No. 1383, art. IX(B) (Aug. 1, 1945), in 2 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, THE CONFERENCE OF BERLIN (THE POTSDAM CONFERENCE), 1945, at 1477, 1491–92 (1960).

<sup>74</sup> R. M. DOUGLAS, ORDERLY AND HUMANE: THE EXPULSION OF THE GERMANS AFTER THE SECOND WORLD WAR 1–2 (2012).

<sup>75</sup> *Id.* at 128 (reporting dueling estimates of 775,000 or 800,000–1,000,000 for the Soviet Zone); *id.* at 222 (American Zone).

<sup>76</sup> See, e.g., FED. RES. DIV., LIBR. OF CONG., PAKISTAN: A COUNTRY STUDY 34 (Peter R. Blood ed., 6th ed. 1995) (suggesting a minimum of 250,000 deaths and 12–24 million refugees).

<sup>77</sup> Matthew Yglesias, *The Failures of Zionism and Anti-Zionism*, SLOW BORING (May 23, 2024), <https://www.slowboring.com/p/the-failures-of-zionism-and-anti> [<https://perma.cc/7YW8-22W3>].

its own, one can speak of “anti-Zionism” without seeming to disparage a specific national origin, the way “anti-Israelism” plainly would.<sup>78</sup>

Or, for that matter, “antisemitism”: for Jews too can assert their national identity as against anti-Zionist litmus tests. Some discussions of anti-Jewish discrimination ask if antisemitism is *always* national-origin discrimination, which it isn’t. The Supreme Court once described the term “national origin” as referring to “the country where a person was born, or, more broadly, the country from which his or her ancestors came”<sup>79</sup> — and as one district court noted, “Jews, like Catholics and Protestants, hail from a variety of different countries.”<sup>80</sup> In another case, involving racial interference with property rights, the Court held that targeting Jews for their “ancestry or ethnic characteristics” was race discrimination,<sup>81</sup> so Title VI antisemitism claims are often described in racial terms.<sup>82</sup>

But a university policy that addresses Jews’ connections to Israel, rather than their genetics or theology, is another matter. Targeted discrimination against Israelis and their descendants (whether Israeli Jews, Israeli Arabs, or Israeli anything-else) would be national-origin discrimination; and discrimination against Jews, as against Greeks, can also be based on “the country from which [their] ancestors came.”<sup>83</sup> (Those whose ancestors left Athens when it was part of the Ottoman Empire might still be discriminated against for being Greeks; so too those whose ancestors were expelled from Judea.) In the very opinion in which the Court described national origin in terms of countries, it also suggested that “the terms ‘national origin’ and ‘ancestry’ were considered synonymous” by the enacting Congress<sup>84</sup> — meaning that Jews may well fall in this category when affected with respect to their nationhood rather than their religion or genetic lineage.<sup>85</sup>

Again, the fact that “anti-Zionism” has its own name unduly confuses things. An obligatory commitment to “anti-Czechism” would make obvious how such litmus tests could create severe and pervasive offense — not only for the holders of Czech passports and their descendants, but

<sup>78</sup> Cf. Jonathan Karp, *Anti-Israelism*, JEWISH REV. BOOKS (Winter 2024), <https://jewishreviewofbooks.com/american-jewry/15563/anti-israelism> [<https://perma.cc/J6HP-6BQY>] (describing anti-Israel bigotry).

<sup>79</sup> *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973).

<sup>80</sup> *Lapine v. Edward Marshall Boehm, Inc.*, No. 89 C 8420, 1990 WL 43572, at \*5 (N.D. Ill. Mar. 28, 1990); see also Eidelson & Hellman, *supra* note 12, at 3 n.12 (describing national-origin claims as “much shakier” (quoting Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL RTS. J. 837, 874 (2007))).

<sup>81</sup> *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987) (quoting *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987)) (applying 42 U.S.C. § 1982).

<sup>82</sup> *E.g.*, Eidelson & Hellman, *supra* note 12, at 5; Marcus, *supra* note 80, at 840.

<sup>83</sup> *Espinoza*, 414 U.S. at 88.

<sup>84</sup> *Id.* at 89 (quoting H.R. 7152, 88th Cong., § 804 (Oct. 2, 1963)).

<sup>85</sup> See Eidelson & Hellman, *supra* note 12, at 3 (discussing the “longstanding conception of Jews as a people or nation”).

also for ethnic Czechs, of whom asking that they join in abolishing the state of their people might be asking too much. Were Israel named “Judea” instead (as many once expected),<sup>86</sup> it’d be easy to see why Jews might have a personal stake in a demand that they denounce its existence, or why insisting on “anti-Judaism” might be objectively offensive to them *qua* members of the Jewish people, whose state it is.

But whether one says “the Jewish people” in English or “*am yisrael*” in Hebrew is of no consequence. What matters here isn’t just the role that Israel might play in individual Jews’ identities (which, like much else, varies wildly among individual Jews), but the central role that Jews play in *Israel’s* identity. While many ethnic Greeks live in other states and many non-ethnic Greeks are citizens of Greece, the nation-state is still defined by its nation; it’s still the *Hellenic* Republic. Likewise, while many Jews live in other states and many non-Jews are citizens of Israel, it’s still the Jewish state. Israel and the Jews have every right to the same treatment as Greece and the Greeks: Insisting on their rejection of their own nationhood imposes a national-origin burden, of which Title VI may take note.

## II. NATIONAL ORIGINS AND HOSTILE ENVIRONMENTS

The anti-Zionist university has a second line of defense. As currently read, section 601 protects against “intentional discrimination.”<sup>87</sup> But like the teacher who teaches her whole class that “Israel did 9/11,” the anti-Zionist university needn’t target anyone for different treatment. Any added burden on Jews or Israelis of abjuring their *own* national origin is arguably just a disparate impact, not disparate treatment — a matter of “statistical disparities” and “competing explanations for those disparities,” not of practices “adopted . . . with a discriminatory intent.”<sup>88</sup> (Some Jews and Israelis support abolishing a Jewish state, and the university might want as many of *them* as possible; so how can such litmus tests be said to discriminate?) Thus the authors’ discussion of whether anti-Zionism falls outside section 601 and can’t be challenged by private parties — only by agencies under disparate-impact regulations, regulations the Administration recently repealed.<sup>89</sup>

As the authors correctly recognize, some anti-Zionist advocacy has at times treated individual Jews and Israelis differently.<sup>90</sup> Sometimes Jews are simply assumed to be Zionist — as when a UCLA checkpoint allegedly denied someone passage “for wearing a Star of David

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<sup>86</sup> See Martin Kramer, *Why Israel Is Called Israel and Not Judea*, MOSAIC (June 10, 2021), <https://ideas.tikvah.org/mosaic/observations/why-israel-is-called-israel-and-not-judea> [https://perma.cc/HVF7-EY3Z].

<sup>87</sup> See *supra* note 17 and accompanying text, p. 52.

<sup>88</sup> *Watson v. Ft. Wor. Bank & Tr.*, 487 U.S. 977, 987 (1988).

<sup>89</sup> See *supra* notes 25–27 and accompanying text.

<sup>90</sup> See Eidelson & Hellman, *supra* note 12, at 11.

necklace.”<sup>91</sup> Sometimes Israelis are asked for their views when others aren’t — as under the Boycott-Divestment-Sanctions movement’s anti-normalization guidelines, which require express affirmations before any Israelis may be brought “together” with Arabs to “present their respective narratives” or placed “on the same platform (common panel, festival evening, joint activity, sports match, etc.).”<sup>92</sup> And sometimes universities consciously “treat[] the concerns and sensitivities of Jewish students wildly differently than those of students from other minority groups”<sup>93</sup> — as when Northwestern issued a stern official response to stickers reading “It’s Okay to Be White,”<sup>94</sup> a phrase (whatever its associations) rather less aggressive than the unremarked graffiti of “Death 2 Israel.”<sup>95</sup>

Yet even when anti-Zionism is imposed equally on all, its broader hostile-environment consequences might not be matters of disparate impact only. Appellate courts have often allowed hostile-environment claims without a disparate impact analysis;<sup>96</sup> this practice is intuitively plausible, because making a place intolerable to a reasonable person of a given race, color, or national origin doesn’t merely sound in statistical disparity. True, *some* women enjoy violent pornography or misogynistic music, and they won’t be dissuaded by an environment where such things are “nearly impossible to escape”;<sup>97</sup> yet music that’s “audible to all” might still “expose female employees to uniquely ‘disadvantageous terms or conditions of employment.’”<sup>98</sup> Likewise, while *some* women might not mind an environment “permeated with gender-derogatory slurs,” intentionally letting the slurs go unabated might not count as

<sup>91</sup> *Frankel Amended Complaint*, *supra* note 8, ¶ 132.

<sup>92</sup> BDS Normalization Guidelines, *supra* note 71.

<sup>93</sup> Bernstein & Bernstein, *supra* note 12, at 23.

<sup>94</sup> *University Condemns Acts of Hate*, NW NOW (May 1, 2019), <https://news.northwestern.edu/stories/2019/04/university-condemns-acts-of-hate> [<https://perma.cc/59QL-KC58>].

<sup>95</sup> Lily Cohen, Opinion, *Lily Cohen: Why I Resigned from Northwestern’s Antisemitism Committee*, CHI. TRIB. (May 8, 2024, at 13:19 CT), <https://www.chicagotribune.com/2024/05/08/opinion-why-i-resigned-northwestern-antisemitism-committee> [<https://perma.cc/8W4P-C4X6>]; see Bernstein & Bernstein, *supra* note 12, at 23 n.143. While universities’ judgments about when to speak out do depend on many factors, see Eidelson & Hellman, *supra* note 12, at 23–24, they can’t depend on race, color, or national origin, and such discriminatory intent can sometimes be proven by circumstantial evidence (as may be the case here). See Bernstein & Bernstein, *supra* note 12, at 24 n.143.

<sup>96</sup> See, e.g., *Sharp v. S&S Activewear, L.L.C.*, 69 F.4th 974, 977 (9th Cir. 2023); *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 812–13 (11th Cir. 2010); *Yuknis v. First Student, Inc.*, 481 F.3d 552, 554 (7th Cir. 2007); *Vinson v. Taylor*, 753 F.2d 141, 146 (D.C. Cir. 1985), *aff’d and remanded sub nom. Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); cf. *Petrosino v. Bell Atl.*, 385 F.3d 210, 223 (2d Cir. 2004) (concluding that “although all Bell Atlantic employees at the Edgewater Garage were routinely exposed to sexually offensive language and graphics, . . . a reasonable jury could find this conduct more demeaning of women than men”); *Yuknis*, 481 F.3d at 554 (suggesting that “one could be in the target *area* because a group of which one was a member was being vilified, although one was not singled out”).

<sup>97</sup> *Sharp*, 69 F.4th at 977.

<sup>98</sup> *Id.* at 979 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

“facially neutral,” for the very same “gender-specific actions” can expose a female employee “to humiliation and discrimination that none of her male co-workers face[.]”<sup>99</sup> Such environments must “be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances’”<sup>100</sup> — not because all people of a certain group always think the same way,<sup>101</sup> nor even because race, sex, or national-origin differences sometimes correlate with cultural ones,<sup>102</sup> but because we’re all more likely to notice (and be offended by) slights that implicate our own identities as opposed to those of others.<sup>103</sup>

The authors describe these courts’ readings of section 601 as “questionable,”<sup>104</sup> pointing out that other cases stress the need for an intentional difference in treatment.<sup>105</sup> Yet maybe these dueling lines of caselaw can be reconciled. What matters most in distinguishing disparate-treatment from disparate-impact hostile-environment claims might be whether the conduct intentionally allowed by the defendant “makes the [environment] uncomfortable *for women*,” rather than “for cat lovers” or “for fastidious people” — for a group “whom the statute protects,”<sup>106</sup> not for some other group statistically represented therein. Unlike, say, imposing a height requirement that just *happens* to affect a greater percentage of Danes or of Sardinians, intentionally refusing to correct a racially or nationally hostile environment renders some groups “excluded from participation” precisely “on the ground of [their] race, color, or national origin.”<sup>107</sup>

Perhaps this reading is mistaken. In that case the authors’ argument entails that the Administration shouldn’t be throwing out the hostile-environment baby with the pure-statistical-disparity bathwater<sup>108</sup> — and that what remains<sup>109</sup> of hostile-environment law might look very different than most people expect. Even a university that sponsors

<sup>99</sup> *Reeves*, 594 F.3d at 808 n.2.

<sup>100</sup> *Oncale*, 523 U.S. at 81 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)) (describing the standard for determining “the objective severity of harassment” in hostile-environment sex discrimination claims under Title VII).

<sup>101</sup> See *Eidelson & Hellman*, *supra* note 12, at 10 & n.64, 18 n.108 (describing any such assumption as in tension with equal protection principles).

<sup>102</sup> Consider, in this context, the different meanings usually associated with a swastika in India or in Germany.

<sup>103</sup> *Cf. Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (suggesting that a Hispanic employee could establish a hostile environment claim based on her employer’s “discriminatory service to its Hispanic clientele”).

<sup>104</sup> *Eidelson & Hellman*, *supra* note 12, at 12.

<sup>105</sup> See *id.* at 7–8, 8 n.46.

<sup>106</sup> *Yuknis v. First Student, Inc.* 481 F.3d 552, 554 (7th Cir. 2007) (emphasis added).

<sup>107</sup> 42 U.S.C. § 2000d; *cf. Eidelson & Hellman*, *supra* note 12, at 7 (discussing the source-of-offensiveness reading).

<sup>108</sup> See *Rescinding Portions of Department of Justice Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14281*, 90 Fed. Reg. 57141, 57144 (Dec. 10, 2025) (condemning the use of a mere “statistical disparity . . . to impose liability” on its own).

<sup>109</sup> See 90 Fed. Reg. at 57141.

nightly cross burnings in the quad needn't *intend* to drive off students or faculty of a particular race; as the Supreme Court has helpfully told us, sometimes burning a cross is merely "a sign of celebration and ceremony,"<sup>110</sup> one that "carries no intimidating message" but serves merely as "a symbol of Klan ideology and of Klan unity."<sup>111</sup> So too a university that requires its students to stomp on Greek flags, which needn't *intend* to drive away Greek students, but rather to welcome all those willing to condemn the Greek nation's many crimes; this requirement wouldn't be disparate treatment *of* Greek students, but merely impose a disparate impact *on* them. And so too a university that requires its students to affirm antisemitic conspiracy theories — say, "Israel did 9/11," Jews faked the Holocaust, Jews created the plague by poisoning wells, and so on — all of which might be sincerely held on the university's part and not intended to exclude anyone. Again, it's *possible* that this result is indeed what the statute permits, and that no one in any of these scenarios is being "excluded from participation" by the university "on the ground of race, color, or national origin."<sup>112</sup> But if so, then campus anti-Zionism is the least of our worries.

### III. HOSTILE ENVIRONMENTS AND FREE SPEECH

In the real world, of course, universities rarely do any of these things. But they sometimes let protest groups do similar things without any interference or with active assistance (as alleged at UCLA). As Professor Danielle Allen has written, if a campus "regularly had groups of kids chanting 'White power,' I would not be comfortable sending my children there, even if those chanters never took a 'targeted' action against a specific person."<sup>113</sup> When protesters chant "globalize the intifada" instead, does Title VI force the university to intervene? Or does that exceed what reasonable students may demand by way of "insulation,"<sup>114</sup> because schools can't be expected wholly to "protect adults from one another's hostile sentiments"<sup>115</sup> — especially if those sentiments are

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<sup>110</sup> *Virginia v. Black*, 538 U.S. 343, 356 (2003).

<sup>111</sup> *Id.* at 357; *see also id.* at 356 (describing the ambiguously romantic "wedding of two Klan members" held "beneath a blazing cross" at "a joint Nazi-Klan rally in 1940" (quoting WYN CRAIG WADE, *THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA* 271 (1987))).

<sup>112</sup> 42 U.S.C. § 2000d.

<sup>113</sup> Danielle Allen, Opinion, *We've Lost Our Way on Campus. Here's How We Can Find Our Way Back.*, WASH. POST (Dec. 10, 2023), <https://www.washingtonpost.com/opinions/2023/12/10/antisemitism-campus-culture-harvard-penn-mit-hearing-path-forward> [<https://perma.cc/LS2W-R8ZA>]; *cf.* Amanda Schwoerke, Opinion, *Harvard's Breaking with Birzeit Was the Right Move*, HARV. CRIMSON (Apr. 28, 2025), <https://www.thecrimson.com/article/2025/4/28/Schwoerke-harvard-birzeit-discriminate> [<https://perma.cc/GC9U-VZ29>] ("My mother was Black. She was born in 1951. You couldn't have dragged her onto a campus where a student chapter of the Ku Klux Klan controlled student government and held rallies attracting hundreds in their white hoods.")

<sup>114</sup> Eidelson & Hellman, *supra* note 12, at 13.

<sup>115</sup> *Id.* at 21.

“merely reckless” as to “identity-related offense”?<sup>116</sup> Indeed, if students have a First Amendment right to speak their minds on public campuses,<sup>117</sup> then how can Title VI take that right away, if it applies the same way to public institutions as to private ones?<sup>118</sup>

Universities are often said to be traditional places for protest (though one might wonder why academic campuses, where bare-knuckled exchanges should take place in the realm of ideas and not of fists, need also be home to such anti-intellectual pursuits as beating drums or chanting slogans).<sup>119</sup> Regardless, many of the protest activities giving rise to legal challenges were *already* against university rules.<sup>120</sup> This fact complicates the authors’ applications of Title VI, in four ways.

*First*, when universities fail to enforce their own rules to keep their campuses free from discrimination, they take on responsibility for the violations they condone.<sup>121</sup> Protesters have every right to hold signs, but they have no right to bar students, faculty, or staff from portions of the campus otherwise accessible to all. Using physical intimidation to prevent someone from walking through campus can be a form of assault;<sup>122</sup> if a university is deliberately indifferent to protesters’ doing that (or even helps them), it can’t plead innocence to a claim that someone was “denied the benefits”<sup>123</sup> of the federally funded space. (If a university racially segregates a single square inch of the quad, the student forbidden from stepping there has still been “subjected to discrimination” under Title VI.<sup>124</sup>) The deliberate indifference standard is a high one.<sup>125</sup>

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<sup>116</sup> *Id.* at 14 (describing such speech as within the norms of free expression on university campuses).

<sup>117</sup> See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995).

<sup>118</sup> See Eidelson & Hellman, *supra* note 12, at 21; Lhamon Letter, *supra* note 15, at 2–3.

<sup>119</sup> Cf. JOHN R. SEARLE, *THE CAMPUS WAR: A SYMPATHETIC LOOK AT THE UNIVERSITY IN AGONY* 41–44, 53–70, 161–70 (1971) (analogizing protest movements to religious movements and protests to religious observances, designed to fill a spiritual void on campus among those alienated from the university’s intellectual mission).

<sup>120</sup> See, e.g., Univ. Senate, *The Rules of University Conduct*, COLUM. UNIV. § 443(a)(7)–(8) (Sep. 29, 2016), [https://senate.columbia.edu/sites/senate.columbia.edu/files/content/Committee\\_Rules%20of%20University%20Conduct/Rules%20of%20University%20Conduct.pdf](https://senate.columbia.edu/sites/senate.columbia.edu/files/content/Committee_Rules%20of%20University%20Conduct/Rules%20of%20University%20Conduct.pdf) [<https://perma.cc/RV77-2KWX>].

<sup>121</sup> See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009) (noting that, under Title IX, a “plaintiff can establish [institutional] liability by showing that a single school administrator with authority to take corrective action responded to harassment with deliberate indifference”); *Ricketts v. Wake Cnty. Pub. Sch. Sys.*, 125 F.4th 507, 521 (4th Cir. 2025) (noting the same of Title VI and collecting cases); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998) (describing how, under Title VII, knowledge and refusal to act may be read as “adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer’s policy”).

<sup>122</sup> Cf. Press Release, Suffolk Cnty. Dist. Att’y, Anger Management and 80 Hours of Community Service Ordered for Two Harvard Students Charged in 2023 Campus Assault (Apr. 29, 2025), <https://www.suffolkdistrictattorney.com/press-releases/items/2025/4/29/anger-management-and-80-hours-of-community-service-ordered-for-two-harvard-students-charged-in-2023-campus-assault> [<https://perma.cc/2BLP-NJPZ>] (accusing two individuals of such conduct).

<sup>123</sup> 42 U.S.C. § 2000d.

<sup>124</sup> *Id.*

<sup>125</sup> See Eidelson & Hellman, *supra* note 12, at 20–21.

But if a protest checkpoint mandated agreement that “women are inferior to men” — a claim that needn’t be *intended* to provoke offense<sup>126</sup> — and the university sent personnel to oversee it (not to take down the checkpoint, but to make sure no one caused trouble by violating it), a lawsuit would surely follow.

*Second*, when severe and pervasive offense is accompanied by a university’s refusal to enforce its own rules, the offense becomes that much more pervasive and severe. If those creating the hostile environment can walk all over the university’s rules without consequence, it creates a sense of isolation and helplessness among those experiencing the hostility. Students who can’t depend on the school enforcing its rules against the criminal activity that accompanied many recent protests — such as trespass (taking over buildings, camping on the lawn),<sup>127</sup> vandalism (spraypainting “Khaybar,” a reference to a Muslim victory over Jews, on a campus Hillel),<sup>128</sup> intimidation (trapping students in a library),<sup>129</sup> and physical violence (punches and assaults)<sup>130</sup> — can’t expect the school to enforce its antidiscrimination rules either.

*Third*, when public universities maintain time, place, and manner rules for speech (and private ones impose more extensive restraints), these rules can affect whether speech is objectively offensive, in the sense that students can “reasonably expect to be shielded” from it.<sup>131</sup> Whether a protest is offensive and whether it breaks campus rules are two different things; as the authors argue, a “reasonable student has no greater expectation of being shielded from such disruption when a viewpoint or message is offensive than when it is not.”<sup>132</sup> But the reasonable student may have a greater expectation of avoiding offense in the library, say, because the university generally restricts protests there. If context matters when students have to ignore offensive protests they pass on the quad, it also matters when students try to escape those protests by

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<sup>126</sup> See Agnes Callard, Opinion, *Should We Cancel Aristotle?*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/opinion/should-we-cancel-aristotle.html> [<https://perma.cc/NK67-2BFR>] (describing how empirical claims can be intended to be taken literally, rather than offensively).

<sup>127</sup> See Bernstein & Bernstein, *supra* note 12, at 9.

<sup>128</sup> See *id.* at 5.

<sup>129</sup> See *id.* at 7; David Bernstein, *Campus Violence and Threats Against Jewish Students Since October 7, Part II*, REASON: VOLOKH CONSPIRACY (Sep. 16, 2025, at 09:26 ET), <https://reason.com/volokh/2025/09/16/campus-violence-and-threats-against-jewish-students-since-october-7-part-ii> [<https://perma.cc/5RZM-WM62>] (compiling incidents of threats).

<sup>130</sup> See Bernstein & Bernstein, *supra* note 12, at 6; see also David Bernstein, *Campus Violence and Threats Against Jewish Students Since October 7, Part I*, REASON: VOLOKH CONSPIRACY (Sep. 15, 2025, at 10:10 ET), <https://reason.com/volokh/2025/09/15/campus-violence-and-threats-against-jewish-students-since-october-7-part-i> [<https://perma.cc/7L5B-4A2M>] (compiling incidents of batteries). See generally David E. Bernstein, Title VI Hostile Environment Law in the Shadow of Antisemitic Violence (Oct. 23, 2025) (unpublished manuscript) (on file with the Harvard Law School Library) (describing campus violence since October 7).

<sup>131</sup> Eidelson & Hellman, *supra* note 12, at 13.

<sup>132</sup> *Id.* at 14 n.88 (emphasis omitted).

retreating to the reading room. Most of the time, of course, doing a bad job of keeping the library quiet isn't a Title VI violation. But a student who can't study without being part of a captive audience for racial offense — despite the university's promise that the library is available to all — may have been denied an educational benefit under Title VI.<sup>133</sup>

*Fourth*, when a protest violates these neutral time, place, and manner rules, this violation makes a difference for the First Amendment's protections. In crafting rules for student speech, universities have generally been unable “to reconcile suppression of potentially offensive expression with the First Amendment”;<sup>134</sup> instead they've fudged it, with half-hearted and inconsistent permission from the legal system.<sup>135</sup> But if free speech doctrine is taken seriously (as the authors properly do), and if Title VI is read the same way at public universities and private ones,<sup>136</sup> then the statute might not be able to protect students from a campus chock full of rule-abiding but racist expression on matters of public concern. Much racist speech might evade the authors' suggested category of “expression [that] can only reasonably be understood as malicious”<sup>137</sup>; Even “Jews will not replace us” expresses sincerely held views on political coalitions and immigration policy. And maybe First Amendment doctrine is broader still;<sup>138</sup> *Brandenburg* protects even explicit advocacy of racist violence, so long as the speech isn't “directed to inciting or producing imminent lawless action” and the violence is scheduled for the indefinite future.<sup>139</sup> (This Response takes no view of *Brandenburg*'s correctness, either as an original matter or on college campuses; but if these doctrines *are* correct, a fortiori coded advocacy of racist violence is okay too.) In any case, current doctrine likely doesn't let a public university expel students for holding nasty public policy views, and Title VI can't cancel the school's funding for *not* expelling them.<sup>140</sup> So the protests' compliance — or lack thereof — with

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<sup>133</sup> See cases cited *supra* note 121.

<sup>134</sup> DAVID E. BERNSTEIN, YOU CAN'T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 59 (2003).

<sup>135</sup> See *id.* at 59–64.

<sup>136</sup> See Eidelson & Hellman, *supra* note 12, at 21; Lhamon Letter, *supra* note 15, at 2–3.

<sup>137</sup> Eidelson & Hellman, *supra* note 12, at 15.

<sup>138</sup> See *id.* at 15 & n.90 (citing Alex Gourevitch, *The Right to Be Hostile*, BOS. REV. (May 6, 2025), <https://www.bostonreview.net/articles/the-right-to-be-hostile> [<https://perma.cc/GU7S-85WN>] (arguing that much protest speech involves “public expressions of hostility toward political views and often the people who hold them”)).

<sup>139</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

<sup>140</sup> See *Healy v. James*, 408 U.S. 169, 180–81 (1972) (describing students' rights vis-à-vis public universities); cf. 303 *Creative LLC v. Elenis*, 143 S. Ct. 2298, 2313–15 (2023) (noting that antidiscrimination laws can't override the First Amendment). To the extent a public university can (narrowly) restrict actions that “materially and substantially disrupt the work and discipline of the school,” *Healy*, 408 U.S. at 189 (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969)), and to the extent a private university can restrict much more, they must do so evenhandedly under Title VI. A school that threatens students with punishment for offending one group can't ignore similar offense to another. See Bernstein & Bernstein, *supra* note 12, at 24 n.143.

time, place, and manner rules is crucial to the Title VI inquiry. Maybe a school could respond to rule-abiding student Klan rallies through counterspeech, reassuring others of its desire for equality.<sup>141</sup> But if parents would still refuse to enroll children there (as Allen suggests), then Title VI simply does less than many thought to ensure that no one will, “on the ground of race, color, or national origin, be excluded from participation.”<sup>142</sup>

Turn now to the authors’ applications of Title VI to student groups and slogans. Given the considerations above, it’s odd to suggest that schools *could* violate Title VI by letting student groups ban Zionists, displaying an “insulting tolerance for a state of affairs” in which fewer Jews can take part in campus life.<sup>143</sup> If public university students have a First Amendment right to create expressive associations, even unpleasant ones,<sup>144</sup> then it’s hard to see how their university could stop them from creating the Anti-Zionist Math Club or the Neo-Confederate Chess Club — and if there are too few Jewish anti-Zionists or black neo-Confederates, the club might sincerely regret that fact rather than insultingly tolerate it. (The reasonableness of the insult might matter too: Would an Anti-Communist Club in the 1980s have insultingly tolerated the absence of students from the Eastern Bloc?) Current doctrine permits open-membership rules or similar viewpoint-neutral limits.<sup>145</sup> But Title VI arguably can’t require expressive groups to admit those who disagree with their missions on the viewpoint-relative ground of avoiding racial or national-origin offense,<sup>146</sup> offense that might not be intentional but merely reckless. Only private universities, which can limit the number and type of their student groups, could impose more specific rules; if a school picks and chooses which groups it recognizes, maybe it can insist on a Zionism-Neutral Math Club instead.<sup>147</sup>

Given protest groups’ demonstrated proclivity for breaking rules, though, it’s yet more surprising that the authors would portray the continued use of wink-and-nod slogans such as “globalize the intifada” as something that “give[s] reasonable cause for offense”<sup>148</sup> but that “could

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<sup>141</sup> See Lhamon Letter, *supra* note 15, at 3.

<sup>142</sup> 42 U.S.C. § 2000d.

<sup>143</sup> Eidelson & Hellman, *supra* note 12, at 19.

<sup>144</sup> See *Healy*, 408 U.S. at 187–88; *accord* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

<sup>145</sup> See *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 694 (2010).

<sup>146</sup> See *Rosenberger*, 515 U.S. at 834–35; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

<sup>147</sup> See, e.g., Ella L. Jones & John N. Peña, *Harvard Pauses Recognition of New Student Orgs, Leaving Unrecognized Clubs Without Resources*, HARV. CRIMSON (Sep. 27, 2023), <https://www.thecrimson.com/article/2023/9/27/student-org-recognition-pause> [<https://perma.cc/Q6DV-JRCP>]; see also HARV. UNIV., HARVARD UNIVERSITY NON-DISCRIMINATION POLICY 1, 3 (2023), [https://provost.harvard.edu/sites/g/files/omnuum12476/files/2025-07/non-discrimination\\_and\\_anti-bullying\\_policies.pdf](https://provost.harvard.edu/sites/g/files/omnuum12476/files/2025-07/non-discrimination_and_anti-bullying_policies.pdf) [<https://perma.cc/5NNM-UX97>] (forbidding discrimination by students on the basis of “religion” or “political beliefs”).

<sup>148</sup> Eidelson & Hellman, *supra* note 12, at 16.

not ordinarily *contribute* to a hostile environment under Title VI.<sup>149</sup> True, “intifada” may be “the prevailing Arabic word for Palestinian resistance”;<sup>150</sup> it can refer to things other than the discrete events known (even among Arabic speakers) as the First and Second Intifadas,<sup>151</sup> in which many Israeli civilians were targeted;<sup>152</sup> it can mean uprising or resistance generally, as when Arabic newspapers discuss the Paris protests of 1968.<sup>153</sup> But whether chanting it can *contribute* to a hostile environment is a different question, one that’s answered by the totality of the circumstances and from the perspective of the reasonable plaintiff.<sup>154</sup> And even were such chants limited to rule-abiding protests “in public spaces,”<sup>155</sup> they still might affect how threatening a plaintiff finds subsequent rules-*violating* protests in *nonpublic* spaces. So might the fact that such slogans were often chanted in protests that themselves violated campus rules; that they were chosen by protesters, not for Arabic media, but for American audiences; that *even the Arabic media* assumed the slogans were about the First and Second Intifadas;<sup>156</sup> that the slogans were deployed to assert continuity with the conflict in the Middle East (as in “long live the intifada,”<sup>157</sup> “intifada, intifada coming to America,”<sup>158</sup> and so on); and above all that the current protest movement, with occasional (and notable) exceptions, has been marked by its refusal to distinguish resistance in violent or nonviolent forms.

<sup>149</sup> *Id.* at 15 (emphasis added).

<sup>150</sup> *Id.* at 17.

<sup>151</sup> See, e.g., Danylo Hawaleshka, *The First Intifada Against Israel*, AL JAZEERA (Dec. 8, 2023), <https://www.aljazeera.com/gallery/2023/12/8/history-illustrated-the-first-intifada-against-israel> [https://perma.cc/E96V-7TPP]; Ali Adam, *Palestinian Intifada: How Israel Orchestrated a Bloody Takeover*, AL JAZEERA (Sep. 28, 2020), <https://www.aljazeera.com/news/2020/9/28/palestinian-intifada-20-years-later-israeli-occupation-continues> [https://perma.cc/9FKW-Q4ZL] (discussing “[t]he second Intifada”).

<sup>152</sup> See Steven Erlanger, *Intifada’s Legacy at Year 4: A Morass of Faded Hopes*, N.Y. TIMES (Oct. 3, 2004), <https://www.nytimes.com/2004/10/03/world/middleeast/intifadas-legacy-at-year-4-a-morass-of-faded-hopes.html> [https://perma.cc/FR5E-5JCF] (“At least two-thirds of the Israeli dead are civilians, singled out by suicide bombers.”).

<sup>153</sup> See Eidelson & Hellman, *supra* note 12, at 16 & n.95 (quoting PETER BEINART, *BEING JEWISH AFTER THE DESTRUCTION OF GAZA: A RECKONING* 89 (2025)); *supra* text accompanying notes 130–32.

<sup>154</sup> See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

<sup>155</sup> Eidelson & Hellman, *supra* note 12, at 15.

<sup>156</sup> See, e.g., *Harvard Pro-Palestine Students Rally with “Long Live Intifada” Chant*, AL MAYADEEN (Sep. 7, 2024, at 13:38 ET), <https://english.almayadeen.net/news/politics/harvard-pro-palestine-students-rally-with-long-live-intifad> [https://perma.cc/UYV3-MCKS] (“The chants highlight the Palestinian people’s December 8, 1987, Intifada . . . . And then, in the early 1990s and again in the early 2000s, thousands of Palestinians were killed, further solidifying the Intifada as a symbol of their struggle and sacrifices and inspiring generations to come.”).

<sup>157</sup> Madeleine A. Hung & Joyce E. Kim, *Harvard Pro-Palestine Groups Organize “Week of Action,” Drawing Criticism for “Intifada” Chants*, HARV. CRIMSON (Dec. 4, 2023), <https://www.thecrimson.com/article/2023/12/4/pro-palestine-week-of-action> [https://perma.cc/9DQM-8UD5].

<sup>158</sup> Azusa M. Lippit & Cam N. Srivastava, *HOOP Warns Harvard of Commencement Disruptions, Denounces Suspensions During Rally at Garber’s House*, HARV. CRIMSON (May 20, 2024, at 00:44 ET), <https://www.thecrimson.com/article/2024/5/20/harvard-hoop-rally-commencement-disruptions> [https://perma.cc/5XKQ-ZC8C].

Consider National Students for Justice in Palestine, an umbrella organization that boasts “over 350 Palestine solidarity organizations on campus,”<sup>159</sup> as well as faculty affiliates at Harvard and elsewhere.<sup>160</sup> Shortly after October 7, it released a “Day of Resistance Toolkit” in explicit support of the Hamas attack.<sup>161</sup> The toolkit used the term “intifada” only in reference to the “Unity Intifada,” in which “[a]ll Palestinian factions in Gaza” were finally “participating under unified command” in “a large-scale battle . . . within ‘48 Palestine”; praised the “resistance fighters” who were “still launching new attacks into 48”; argued that chapters should *not* distinguish violent from nonviolent resistance, for liberation “requires confrontation by any means necessary”; and added: “Resistance comes in all forms — armed struggle, general strikes, and popular demonstrations. All of it is legitimate, and all of it is necessary.”<sup>162</sup> The toolkit also urged chapters “above all [to] normalize and support our fearless resistance,” reminding them that “[w]hen people are occupied, resistance is justified”<sup>163</sup> — a version of a slogan chanted on many campuses<sup>164</sup> — and that “[s]ettlers are not ‘civilians’ in the sense of international law.”<sup>165</sup> (The widely circulated sample flier featured a

<sup>159</sup> *Who Are We?*, NAT’L STUDENTS FOR JUST. IN PAL., <https://www.nationalsjp.org/about> [<https://perma.cc/76X3-53SJ>].

<sup>160</sup> See, e.g., *Statement by Harvard Faculty and Staff for Justice in Palestine*, HARV. FACULTY & STAFF FOR JUST. IN PAL. (Jan. 6, 2024), <https://web.archive.org/web/20240120091155/https://www.harvardfsjp.org/statement> [<https://perma.cc/9UBQ-J4Z6>] (describing the Harvard group as a “chapter of the national network of Faculty and Staff for Justice in Palestine,” and linking to a description of Faculty for Justice in Palestine as being organized “in order to support NSJP,” *Call for Faculty for Justice in Palestine*, U.S. CAMPAIGN FOR THE ACAD. & CULTURAL BOYCOTT OF ISR., <https://web.archive.org/web/20240106055824/https://usacbi.org/faculty-for-justice-in-> [<https://perma.cc/494G-9DTM>] (archived Jan. 6, 2024)).

<sup>161</sup> NAT’L STUDENTS FOR JUST. IN PAL., DAY OF RESISTANCE TOOLKIT (n.d.), Parizer v. AJP Educ. Found., Inc., No. 24-cv-00724, 2025 WL 2382933 (E.D. Va. Aug. 15, 2025), Dkt. No. 1 [hereinafter NSJP Toolkit], [https://freebeacon.com/wp-content/uploads/2024/05/Exhibit-A\\_NSJP-Toolkit.pdf](https://freebeacon.com/wp-content/uploads/2024/05/Exhibit-A_NSJP-Toolkit.pdf) [<https://perma.cc/MUT5-A5KL>]. On the circulation of the since-deleted toolkit, see Complaint for Damages & Jury Trial Demand ¶¶ 53–63, *Parizer*, No. 24-cv-00724; Univ. of Md. Students for Just. in Pal. v. Bd. of Regents of the Univ. Sys. of Md., Civil No. 24-2683, 2024 WL 4361863, at \*4 (D. Md. Oct. 1, 2024), and Alan Blinder, *Inside the Pro-Palestinian Group Protesting Across College Campuses*, N.Y. TIMES (Nov. 17, 2023), <https://www.nytimes.com/2023/11/17/us/students-justice-palestine-campus-protests.html> [<https://perma.cc/DNR9-PBDU>].

<sup>162</sup> NSJP Toolkit, *supra* note 161 (emphasis omitted).

<sup>163</sup> *Id.*

<sup>164</sup> See, e.g., Johanna Alonso et al., *A Day of Tension and Protests on Campus*, INSIDE HIGHER ED (Oct. 13, 2023), <https://www.insidehighered.com/news/students/free-speech/2023/10/13/tension-over-israel-hamas-war-grows-college-campuses> [<https://perma.cc/4GS8-UBTP>]; Ali Martin et al., *On University Campuses, Students Wrestle with Israel-Hamas War*, CHRISTIAN SCI. MONITOR (Oct. 18, 2023, at 09:25 ET), <https://www.csmonitor.com/USA/2023/1013/On-university-campuses-students-wrestle-with-Israel-Hamas-war> [<https://perma.cc/N5PK-8GEU>].

<sup>165</sup> NSJP Toolkit, *supra* note 161.

paraglider,<sup>166</sup> resembling those used by Hamas to attack the Nova Music Festival.<sup>167</sup>)

Given this rather flexible understanding of resistance — Hamas itself being properly known as the “Islamic Resistance Movement,”<sup>168</sup> and its members having referred to plans for October 7 as “the intifada”<sup>169</sup> — how confident should a reasonable plaintiff be that the term is being used in its generic sense? Of course an individual protester might chant it in all innocence: imagining, perhaps, the “[r]esistance [that’s] justified when people are occupied”<sup>170</sup> as nothing at all like those recent unfortunate events in southern Israel. (Even a cross-burning might be about “Klan unity,” after all.<sup>171</sup>) But while the authors describe the slogans as rather “more ambiguous” than “more classic examples of hate speech,”<sup>172</sup> it might not be so: Chants of “white power” or the infamous “Fourteen Words” of white supremacy (“We must secure the existence of our people and a future for white children”<sup>173</sup>) are if anything *less* pro-ethnic cleansing than “from water to water, Palestine is Arab” or “settlers, settlers, go back home,” and *less* pro-violence than “resistance is justified when people are occupied,” “globalize the intifada,” “by any means necessary,”<sup>174</sup> or “sometimes history needs a push.”<sup>175</sup> No one *makes*

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<sup>166</sup> See *id.*; Maggie Hicks, *Pro-Palestinian Student Groups’ Use of This Image Is Drawing Outrage. Here’s Where It Came From.*, CHRON. HIGHER EDUC. (Oct. 11, 2023), <https://www.chronicle.com/article/pro-palestinian-student-groups-use-of-this-image-is-drawing-outrage-heres-where-it-came-from> [<https://perma.cc/9XEV-KVAE>].

<sup>167</sup> See Katie Hawkinson, *Video Shows the Exact Moment a Group of Hamas Paragliders Descended on a Desert Music Festival in Israel*, BUS. INSIDER (Oct. 8, 2023, at 13:15 ET), <https://www.businessinsider.com/video-israel-hamas-gaza-paragliders-music-festival-2023-10> [<https://perma.cc/77YH-H426>].

<sup>168</sup> JIM ZANOTTI, CONG. RSCH. SERV., IF12549, HAMAS: BACKGROUND, CURRENT STATUS, AND U.S. POLICY 1 (2024), [https://www.congress.gov/crs\\_external\\_products/IF/PDF/IF12549/IF12549.3.pdf](https://www.congress.gov/crs_external_products/IF/PDF/IF12549/IF12549.3.pdf) [<https://perma.cc/6C7B-475C>].

<sup>169</sup> Ali Sawafta & James Mackenzie, *Insight: A New Intifada? Young Palestinian Fighters Rise as West Bank Boils*, REUTERS (Mar. 14, 2023, at 02:09 ET), <https://www.reuters.com/world/middle-east/new-intifada-young-palestinian-fighters-rise-west-bank-boils-2023-03-14> [<https://perma.cc/8A3L-JQL3>] (quoting a “Hamas cadre,” six months before October 7, as stating that “[a]ll the signs are that the intifada is coming”).

<sup>170</sup> See Martin et al., *supra* note 164.

<sup>171</sup> *Virginia v. Black*, 538 U.S. 343, 357 (2003).

<sup>172</sup> Eidelson & Hellman, *supra* note 12, at 24.

<sup>173</sup> Liam Stack, *Alt-Right, Alt-Left, Antifa: A Glossary of Extremist Language*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/alt-left-alt-right-glossary.html> [<https://perma.cc/7BBA-WMN3>].

<sup>174</sup> Iddo Gefen, *What “Intifada Revolution” Looks Like*, THE ATLANTIC (May 5, 2024), <https://www.theatlantic.com/ideas/archive/2024/05/any-means-necessary/678286> [<https://perma.cc/6HCU-89SE>].

<sup>175</sup> Columbia Jewish & Israeli Students (@CUJewsIsraelis), X (Mar. 5, 2025, at 16:04 ET), <https://x.com/CUJewsIsraelis/status/1897392837114913091> [<https://perma.cc/59LU-V6VX>] (depicting a poster at Barnard’s Milstein Library displaying this latter slogan over a rifle and the image of Hamas leader Yahya Sinwar); cf. *CUAD Remains Committed to Our Demands | A Tribute to Yahya Sinwar | Al-Mayadeen Defends CUAD*, COLUM. UNIV. APARTHEID DIVEST: THE

protesters use these slogans anyway: If they misfire so routinely in communicating peaceful intentions, one wonders why, with so little effort at clarification, they're so consistently reused.<sup>176</sup>

The authors' efforts to proffer nonviolent interpretations of these slogans seems puzzling, for (under the authors' view) they also seem unnecessary: Even open endorsements of violence against Israeli civilians might be "merely reckless" as to "identity-related offense,"<sup>177</sup> rather than intended "to provoke, insult, or threaten" one's peers.<sup>178</sup> So too for ineffectively concealed endorsements of violence against Israeli civilians. Still, the authors' view aside, Title VI might not treat these slogans as always and everywhere creating a hostile environment — or require a university, on pain of losing federal funds, to punish each otherwise-rule-abiding protester who recites them. But in the totality of the circumstances on campus, including repeated and consequence-free violations of campus rules, could these slogans not *contribute* to a hostile environment? Of course they could — and may well have.

#### IV. ANTISEMITISM IN LAW AND FACT

While there's much that Title VI can do to fight discrimination, there's also much that it can't. The limits courts face in applying the law should remind us of the more important limits they face in finding the facts. When campus antisemitism is both serious and real, it may be hard for a court to say so; but however we answer the legal questions, the moral ones remain.

Consider the "objectively offensive" test. To determine which aspects of anti-Zionism are objectively offensive to the reasonable plaintiff, one can't avoid the question of what's reasonable or unreasonable to believe about the Middle East — a question (as the authors correctly recognize) that's deeply "enmeshed with hotly disputed views about world affairs."<sup>179</sup> If Zionism, or for that matter "Hellasism," really *were* an inherently genocidal ideology, it'd be unexceptional for the Math Club not to want Zionists or Hellasists among its ranks, and the reasonable plaintiff claiming national-origin offense would have to admit as much. Nor, without resolving such questions, could one decide whether

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BARRICADE (Nov. 7, 2024), <https://cuapartheiddivest.substack.com/p/cuad-remains-committed-to-our-demands> [<https://perma.cc/HP7V-QP67>] (suggesting that one "should look to [Yahya Sinwar] as a clear illustration of what it means to devote a full lifetime to the intifada," and that "[i]t's now the time for us to reflect on how we can make ourselves more like him").

<sup>176</sup> A reluctance "to prioritize sensitivity to Jewish students" as much as one otherwise would, "to the extent that the Israel-Palestine conflict is itself substantially about the just status relations of Jews and Palestinians in the Middle East," Eidelson & Hellman, *supra* note 12, at 17, would deliberately reduce one's consideration of fellow students based on the alleged actions of their correligionists abroad, and so would normally (and properly) be condemned as antisemitism.

<sup>177</sup> *Id.* at 14.

<sup>178</sup> *Id.* at 17.

<sup>179</sup> *Id.* at 23.

a class about the Armenian Genocide is reasonably felt as offensive to students from Turkey,<sup>180</sup> or a class about the Holocaust offensive to students from Germany, the way classes denying those genocides would be offensive to Armenians or Jews. Only the actual facts can reveal whether (in the authors' example) "I stand with the IDF" and "globalize the intifada" might be on a par, each being "reasonably felt as highly offensive toward a protected group"<sup>181</sup> — or whether this suggestion of equivalence might itself be a reasonable ground of offense.

Adversary proceedings before randomly chosen juries are rarely well designed to decide such questions, at least without relying on understandings that most already share. Nor can they easily resolve dueling claims about the conflict in Gaza, which depict it either as a bloodthirsty genocide or as a deeply moral and difficult war against a civilian-embedded terrorist enemy.<sup>182</sup> If, to many Israelis and Jews, the claims of the campus anti-Zionist movement aren't just false but *unreasonable* — for example, given the casualty counts among Israeli troops,<sup>183</sup> whose vulnerable presence on the ground in Gaza would be wholly unnecessary to a genocide conducted from the air — they won't always be able to expect the legal system to agree. Nor can they easily point to the unique campus reaction to Israel, as compared (for example) to the regime that held a million Muslims in camps in Xinjiang, as far more verifiably ordered by a far less democratic government<sup>184</sup> in which our schools are far more heavily invested.<sup>185</sup> Claims of "problematically selective concern" are hard to prove, as the authors note: Given "the highly contingent processes" focusing interest on "some causes as opposed to

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<sup>180</sup> See *Turkey Summons US Ambassador After Armenian "Genocide" Statement*, AL JAZEERA (Apr. 25, 2021), <https://www.aljazeera.com/news/2021/4/25/turkey-summons-us-ambassador-after-armenian-genocide-statement> [<https://perma.cc/KTN2-M5XZ>] (reporting the statement of Turkey's foreign ministry that America's official recognition of the Armenian Genocide had "hurt the Turkish people, opening a wound . . . in our relations").

<sup>181</sup> Eidelson & Hellman, *supra* note 12, at 18.

<sup>182</sup> Compare, e.g., Omer Bartov, Opinion, *I'm a Genocide Scholar. I Know It when I See It.*, N.Y. TIMES (July 15, 2025), <https://www.nytimes.com/2025/07/15/opinion/israel-gaza-holocaust-genocide-palestinians.html> [<https://perma.cc/7QNN-5B9P>], with John Spencer, Opinion, *I Am a War Scholar — There Is No Genocide in Gaza*, JERUSALEM POST (July 27, 2025, at 16:15 ET), <https://www.jpost.com/opinion/article-862390> [<https://perma.cc/P79S-RQ29>], and Arsen Ostrovsky & John Spencer, Opinion, *Israel Is Not Committing Genocide: Exposing the Distortion of Law and Truth*, JERUSALEM POST (Sep. 5, 2025, at 14:25 ET), <https://www.jpost.com/opinion/article-866434> [<https://perma.cc/2RW3-4MAZ>].

<sup>183</sup> *Swords of Iron: IDF Casualties*, MINISTRY OF FOREIGN AFFS. (ISR.) (Nov. 9, 2025), <https://www.gov.il/en/pages/swords-of-iron-idf-casualties> [<https://perma.cc/6699-W6GA>] (reporting 471 troops killed and 2,978 wounded since ground operations began on October 27, 2023).

<sup>184</sup> See, e.g., Press Release, Office to Monitor & Combat Trafficking in Persons, U.S. Dep't of State, *Forced Labor in China's Xinjiang Region* (Jan. 20, 2025), <https://www.state.gov/forced-labor-in-chinas-xinjiang-region> [<https://perma.cc/3HXW-CESC>].

<sup>185</sup> See James T. Areddy, *Research for Sale: How Chinese Money Flows to American Universities*, WALL ST. J. (Apr. 15, 2024, at 00:01 ET), <https://www.wsj.com/world/china/chinese-money-american-universities-244bab09> [<https://perma.cc/5AP9-53L7>].

others,” who can say?<sup>186</sup> But whether or not law can resolve such claims,<sup>187</sup> human beings do this every day: We’re capable of seeing “unreflective or unwitting anti-Jewish bias”<sup>188</sup> even when courts won’t.

This is a real problem for fighting antisemitism through the law, because antisemitism is *routinely* “enmeshed with hotly disputed views about world affairs.”<sup>189</sup> As one scholar notes, “[a]nimosity towards Jews is today seldom expressed in terms of demeaning stereotypes” or “dislike,” but “remains inherently conspiratorial,” with Jews imagined to be “intent on the destruction of independent nations”<sup>190</sup> — beliefs that “influence [one’s] everyday understanding of politics.”<sup>191</sup> Instead of “viewing Israel as a country whose policies and actions, like that of any other,” must be “criticised on merit,” some “view it as the source of uniquely harmful influence in the world,” with its “actions, and even its very existence, . . . believed to be an expression of the uniquely iniquitous nationalist ideology (Zionism).”<sup>192</sup> The “[t]ransgressions of the Israeli state” are thus “inherently more sinister,” “sufficiently egregious to undermine its basic legitimacy,” leaving Israel as the only U.N. member “whose very existence is routinely brought into question and Jews the only people whose right to self-determination, it is argued, should be retrospectively revoked.”<sup>193</sup> (Notably, this account was written more than a decade before the current war.)

Efforts to banish Zionists from campus life, if rooted in such views, are a form of bigotry: as one writer put it, “not a mere policy stance with which one might agree or disagree,” but “a prejudice, a sweeping judgment of an entire people, country, state, and culture that we would not tolerate if it were directed at anyone else.”<sup>194</sup> When critics inflate the “all-too-real flaws” of “a tiny country . . . into cosmic significance”; when they describe “every Israeli [as] a settler, an interloper, an agent of colonialism[,] . . . by definition oppressors and even combatants; when they claim that Israel is a counterfeit country, that Israeliness is a disease of mind and culture, they are being bigots, plain and simple.”<sup>195</sup> And attitudes that reject Zionism not just as a mistaken, unfair, or even chauvinist form of national identity or national pride, but rather as something loathsome and contaminating, something that must be condemned utterly and removed from our midst — Zionist students from student

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<sup>186</sup> Eidelson & Hellman, *supra* note 12, at 11 n.66.

<sup>187</sup> Cf. Fasman & Estreicher, *supra* note 12, at 3 (arguing that *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), attaches liability to “unequal treatment which the defendant does not explain away”).

<sup>188</sup> Eidelson & Hellman, *supra* note 12, at 11 n.66.

<sup>189</sup> *Id.* at 23.

<sup>190</sup> BYFORD, *supra* note 44, at 95.

<sup>191</sup> *Id.* at 96.

<sup>192</sup> *Id.* at 111.

<sup>193</sup> *Id.*

<sup>194</sup> Karp, *supra* note 78.

<sup>195</sup> *Id.*

groups,<sup>196</sup> Zionist speakers from the podium,<sup>197</sup> Zionist authors from the page<sup>198</sup> — all show the bigotry at work.

Antidiscrimination law often looks for neutral reasons, and anti-semites always have their reasons. Most of those who accused medieval Jews of poisoning the wells fully believed that it was true.<sup>199</sup> The outbreak of a novel plague had “made poisoning rumors seem reasonable.”<sup>200</sup> Rather than blame Jews outright, their accusers undertook months of costly official investigations (analogous, perhaps, to proceedings in the International Criminal Court), and their claims were so influential “precisely because they were believable.”<sup>201</sup> If you really thought “that Jews and lepers [had] conspired, supported by Muslim leaders, to poison all the wells in France,” why *wouldn't* you understand calls for the “mass execution of lepers and Jews”?<sup>202</sup> And why wouldn't you see those calls as grounded, not in any bias against Jews, but in a moral and upstanding opposition to well-poisoners?

A Title VI lawsuit against a university for teaching that Jews really did poison the wells would depend, for its practical success, on a society that had already internalized the accusation's falsehood. So too the more recent libels: A court won't find severe, pervasive, and objective offense if the matter seems up for grabs, even if the truth is not. As long as campuses enforce their own rules on time, place, and manner (as they rarely do, but as the law may require), the exchange of views — even biased or repulsive views — will go on. And the best hope of those repulsed by such views is that, through this exchange, the truth will eventually out.

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<sup>196</sup> See *supra* p. 51.

<sup>197</sup> See Christian Martinez, *UC Berkeley Student Groups' Refusal to Invite Zionist Speakers Draws Civil Rights Complaint*, L.A. TIMES (Nov. 24, 2022, at 06:00 PT), <https://www.latimes.com/california/story/2022-11-24/uc-berkeley-law-student-groups-ban-zionist-speakers> [<https://perma.cc/9HAE-HEZ7>].

<sup>198</sup> See Bylaws § 4.4(b), Berkeley J. Gender L. & Just. (July 10, 2023), <https://callink.berkeley.edu/organization/gaberkeleyjournalofgenderlawandjustice/documents/view/2218148> [<https://perma.cc/6DHX-LZX8>] (refusing, “in the interest of protecting the safety and welfare of Palestinian students on campus,” to “publish pieces by authors that have expressed and continued to hold views . . . in support of Zionism”).

<sup>199</sup> BARZILAY, *supra* note 47, at 6–7.

<sup>200</sup> *Id.* at 195.

<sup>201</sup> *Id.* at 194.

<sup>202</sup> *Id.* at 5.