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Litigation Is No Way to Fight Antisemitism

Sharon Ann Musher

In her 2017 testimony before the US House of Representatives on the Judiciary, historian Pamela Nadell described the present as a moment when “the volume on antisemitism . . . is turned way up.” Nevertheless, she opposed the idea that a “climate of fear” so “severe, pervasive, or persistent” existed on US college and university campuses that it “impinge[d] upon Jewish students’ learning and thriving.” Drawing on social scientific studies, experiences on her own campus (American University), and impressions of her colleagues’ encounters (bolstered by a term as president of the Association of Jewish Studies), Nadell concluded that antisemitic incidents were the exception, rather than the rule, and that higher education had not become the hotbed of antisemitism that some journalists and pro-Israel groups claimed. Instead, Nadell contended that when such instances occurred, university leaders quickly and forcefully intervened, as they did in response to racist incidents, to condemn them and counsel distraught students.¹

Studies on antisemitism on campus, including the ones Nadell cites, contradict one another. Some find it to be surging, while others contend that Jewish students do not feel threatened.² The range of institutions investigated and the Jewish affiliation of those sampled help to explain such disparities. But even more significantly, different findings stem from the varying ways that researchers, sponsoring institutions, and genera-

1. Pamela Nadell, “Examining Anti-Semitism on College Campuses,” Testimony before United States House of Representative Committee on the Judiciary, Washington, DC, November 7, 2017.

2. See for example, “Audit of Anti-Semitic Incidents: Year in Review 2018,” Anti-Defamation League, <https://www.adl.org/audit2018> and Jeremy Bauer-Wolf, “A Surge of Anti-Semitism,” *Inside Higher Ed*, December 15, 2018, <https://www.insidehighered.com/news/2018/12/05/anti-semitic-incidents-surge-college-campuses-after-pittsburgh-synagogue-shooting>, as opposed to Ari Kelman, et al., “Safe on the Sidelines: Jewish Students and the Israel-Palestine Conflict on Campus,” Stanford University, September 2017, <https://stanford.app.box.com/v/SafeandonthesidelinesReport> and Graham Wright, et al., “The Limits of Hostility: Students Report on Antisemitism and Anti-Israel Sentiment at Four US Universities,” Steinhardt Social Research Institute, Brandeis University, December 2017, <https://www.brandeis.edu/ssri/pdfs/campusstudies/LimitsofHostility.pdf>.

tions understand antisemitism.³ Such conflicting ideas should be debated in classrooms, professional associations, and media, but they should not be legislated, as the Anti-Semitism Act attempted to do and President Trump's Executive Order (EO) on Anti-Semitism succeeded in doing.

Based on my work with the Alliance for Academic Freedom, and in countering academic boycotts and Israel-related resolutions in professional associations since the American Studies Association's boycott of Israel in 2013, my own feeling is that antisemitism is more pervasive in academia than Nadell suggests. Like other forms of hate, including racism and Islamophobia, it has been growing both on our campuses and in our broader society.⁴ Over the past few years, we have seen students barred from academic opportunities and spaces "because of the assumption that their Jewishness converts them into agents of the Israeli government."⁵ We have witnessed faculty members refusing to write letters of recommendation for students because they wished to study in Israel.⁶ We have seen swastikas drawn on public property, eviction notices posted on the dorm rooms of those perceived to be Jewish, and spitting, shoving, and hitting.⁷ Fueled by both the right and left, discrimination is real and should not be underestimated.⁸

3. Linda Maizels, "ADL Says Anti-Semitism Is Rising. Students Disagree," *Forward*, March 5, 2018, <https://forward.com/opinion/395655/adl-says-anti-semitism-is-rising-students-disagree/>.

4. See, for example, Emanuella Grinberg, "4 Days, 5 Reports of Hate Crimes, and a Disturbing Trend Developing in America," December 12, 2018, <https://www.cnn.com/2018/12/11/us/hate-crimes/index.html>. The Alliance for Academic Freedom (AAF) includes liberals and progressives critical of Israeli policies toward the Palestinians and supportive of Palestinian and Jewish national aspirations. For more on the AAF, see <https://thirdnarrative.org/uncategorized/alliance-for-academic-freedom/>.

5. David Schraub, "Why Trump's Executive Order on Anti-Semitism Touched Off a Firestorm," *The Atlantic*, December 12, 2019, <https://www.theatlantic.com/ideas/archive/2019/12/dilemma-jewish-identity/603493/>; Jennifer Medina, "Student Coalition at Stanford Confronts Allegations of Anti-Semitism," *New York Times*, April 14, 2015, <https://www.nytimes.com/2015/04/15/us/student-coalition-at-stanford-confronts-allegations-of-anti-semitism.html>.

6. Isaac Stanley-Becker, "University of Michigan Promises to Discipline Faculty in Israel Boycott Controversy," *Washington Post*, October 11, 2018, <https://www.washingtonpost.com/news/morning-mix/wp/2018/10/11/university-of-michigan-promises-to-discipline-faculty-in-israel-boycott-controversy/>.

7. See, for examples, Amcha Initiative, "Swastikas," 2015 to the present, <https://amchainitiative.org/swastika-tracker/>; Lee Brown, "'Eviction' Notices Placed on Doors of Jewish Students at Emory University," *New York Post*, April 5, 2019, <https://nypost.com/2019/04/05/eviction-notices-placed-on-doors-of-jewish-students-at-emory-university/>; Ilanit Chernick, "Activists Get Violent During Reservist Duty Event at York University," *Jerusalem Post*, November 28, 2019, <https://www.jpost.com/Diaspora/Activists-get-violent-during-Reservists-on-Duty-at-York-University-608617>.

8. See for example, Stephen H. Norwood, *Antisemitism and the American Far Left* (Cambridge: Cambridge University Press, 2013) and Deborah E. Lipstadt, *Antisemitism: Here and Now* (New York: Schocken, 2019).

But it also needs to be approached sensitively. Learning requires freedom from harassment and intimidation, as well as exposure to ideas that sometimes offend. No act nor executive order was necessary to specify that schools would risk losing federal funding if they did not respond to discrimination based on perceived religion. Although Title VI of the Civil Rights Act of 1964 originally specified that it protected students from harassment based on race and nationality, since the early 2000s, it has been extended to counter religious intimidation that creates a “hostile environment so severe, pervasive, or persistent so as to interfere with or limit some students’ ability to participate in or benefit from the services, activities, or opportunities offered by schools.”⁹ Title VI protects students from discriminatory acts, but it does not counter bigoted speech. Even hateful statements and symbols are safeguarded, so long as they do not deface public property nor threaten individual students based on their perceived race, national origin, or religion.¹⁰

Trump’s EO, in contrast, institutionalized a controversial definition of antisemitism, empowering government agencies to investigate potentially discriminatory speech in addition to actions. It espoused a working definition of antisemitism developed in the early 2000s to measure rising antisemitism in Western Europe. The definition cited contentious examples of antisemitism, including comparing Israeli policy to that of the Nazis, singling out Israel, creating a double standard, and claiming Israel is racist. The US State Department adopted the definition in 2010.¹¹ The International Holocaust Remembrance Alliance (IHRA) implemented it six years later.¹² It became state law in South Carolina (2018) and Florida (2019) and would have become national law, if the bipartisan Anti-Semitism Awareness Act of 2017 and 2018 had not stalled in the Congress. Trump’s EO, however, mandated that government departments

9. Ken Marcus, “Dear Colleague,” letter, US Department of Education, Office for Civil Rights (OCR), September 13, 2004, <https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>; Russlynn Ali, “Dear Colleague,” letter, US Department of Education, OCR, October, 26, 2010, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

10. Kenneth Stern, *The Conflict over the Conflict: The Israel/Palestine Campus Debate* (Toronto: University of Toronto Press, 2020), 155.

11. United States Department of State, “Defining Anti-Semitism,” <https://www.state.gov/defining-anti-semitism/>.

12. International Holocaust Remembrance Alliance, “Working Definition of Anti-semitism,” 2016, <https://www.holocaustremembrance.com/working-definition-antisemitism>.

and agencies related to discrimination, as well as others, “consider” the IHRA definition of antisemitism when enforcing Title VI.¹³

Requiring such consideration has the potential to suppress free speech and jeopardize academic freedom. Fear that universities might lose federal support will make faculty hesitant to bring speakers to campus that focus on the Middle East, reluctant to teach courses in the field, and cautious about assigning readings written by critics of Zionism.¹⁴ Concerned students, faculty, parents, and alumni might threaten Title VI cases as they demand investigations of contentious faculty, classes, public lectures, films, and other events.¹⁵ Certainly, the EO weaponizes watchdog, pro-Israel groups, such as Canary Mission and Amcha, to use Title VI to threaten federal support for programs employing those engaged in what they consider to be anti-Israel rhetoric. And administrators will feel increased pressure to weigh in on controversial speeches, classes, and faculty who address the Palestinian-Israeli conflict in ways that might violate the IHRA’s definition.¹⁶

The consequences will be a silencing of open dialogue and exchange. We might expect backlash in the shape of growing BDS support, stigmatization of Israel, and general anti-Israel sentiment among Jews and non-Jews. Nadell is right to point out that these issues pit Jews v. Jews. The American Jewish community does not stand united as it pertains to Israel. And codifying a contentious definition of antisemitism will only further the growing divide as well as fuel antisemitic arguments that Jews use their money, the press, and political power to silence dissent.

What might happen instead? Universities and colleges could work to foster freedom of speech and academic freedom, on the one hand, while simultaneously countering discriminatory speech and action. They could proactively establish procedures for reporting bias incidents, investigating them, taking steps to end harassment, and endeavoring to prevent it from recurring.¹⁷ They could survey their campus culture, and fund programming and classes that raise awareness about various forms of hate, their intersections, and ways to combat them. Universities might,

13. “How Trump’s Executive Order on Antisemitism Originated in Harry Reid’s Office,” *Jewish Insider*, December 11, 2019, <https://jewishinsider.com/2019/12/how-trumps-executive-order-on-antisemitism-originated-in-harry-reids-office-2/>; “Executive Order on Combating Anti-Semitism,” December 11, 2019, <https://www.whitehouse.gov/presidential-actions/executive-order-combating-anti-semitism/>.

14. Ken Stern, written testimony, “Examining Anti-Semitism on College Campuses,” Hearing before the United States House of Representatives Committee on the Judiciary, November 7, 2017, Washington, D.C., 14.

15. Stern, testimony, 13.

16. Stern, testimony, 13.

17. Ali, “Dear Colleague.”

for example, teach the history of antisemitism as a form of racism—like Islamophobia—and encourage those who are different from one another to engage in dialogue to promote tolerance rather than shutting down exchanges through boycotts, speech codes, and the institutionalization of definitions. Furthermore, they might support educational endeavors that complicate pro-Israel and pro-Palestinian narratives and work toward reconciliation—before it is too late.