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Attacking the Palestine Freedom Movement Means Attacking the First Amendment Too

Dima Khalidi

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Attacking the Palestine Freedom Movement Means Attacking the First Amendment Too

Dima Khalidi*

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I. THE SYMPOSIUM: CONTEXT MATTERS

Today, the most right-wing government yet is wielding its power in Israel.¹ We have witnessed—in the first three months of 2023 alone—Israeli military raids on Palestinian towns, villages, and refugee camps that have resulted in the assassination of dozens of Palestinians, including children, and an Israeli settler

* Director, Palestine Legal. Many thanks to the symposium organizers who put countless hours into planning and executing a smooth event, and publishing its contents here. I’m grateful to numerous colleagues for their wise counsel about the approach to this symposium, and for feedback on this paper, including Palestine Legal staff, George Bisharat, Omar Dajani, Nour Erakat, Maria LaHood, Nadine Naber, and Diala Shamas. Any faults, however, are entirely my own. I am most grateful to the activists on the front lines boldly organizing for justice, and to my Palestine Legal colleagues using the law to support the movement, and documenting the impact of the repression machine on countless targeted individuals who are pushing for collective freedom.

1. Israel Frey, *Think Like Opponents of the Fascist Regime*, HAARETZ (Dec. 13, 2022), <https://archive.fo/IEkpT> (on file with the *University of the Pacific Law Review*).

rampage facilitated by the Israeli military that set fire to and destroyed a Palestinian village, injuring hundreds.² The context on the ground in Palestine ought to be at the center of any discussion on First Amendment rights in the U.S. when it comes to advocacy for Palestinian rights because speech doesn't happen in a vacuum, divorced from its subject. So too should the seventy-five-plus years of dispossession and subjugation of the Palestinian people as the Zionist project has erected an exclusionary state meant to privilege Jewish people over the indigenous Palestinians inhabiting the land.

The events of today show that this project is ongoing: Israel continues to confiscate land and militarily occupy the West Bank holding hundreds of thousands of Palestinians hostage while continuing to build illegal settlements for Jews only.³ It also maintains a brutal siege on Gaza while periodically unleashing its world-class military arsenal on the densely populated enclave, and denying its Palestinian citizens equality under the law. Israel's systems of domination throughout historic Palestine amount to international crimes, including what many international law experts have defined as apartheid.⁴

This context is also critical to understand and address the questions posed by the Symposium. Beginning from an understanding of the power differential between Palestinians and the state of Israel can avoid a pervasive dynamic in academic and policy-based discussions, and in Palestine Legal's broader work to challenge the repression of a justice movement. In all these arenas, there is a consistent decontextualization of the repression of a human rights movement from the power disparity between Israel and Palestinians on the ground, and between the array of well-endowed Israel advocacy groups and the grassroots movement for Palestine in the U.S. This inevitably results in a perception of "the conflict"—the physical one in Palestine, and the rhetorical one in the U.S.—as a story of two sides on an equal footing trying to be heard, and suffering from the overreaches of the other. This (mis)perception in turn obfuscates any discussion related to advocacy for Palestinian rights by divorcing the tactics of the movement from the reality that undergirds the reason for such advocacy in the first place.

The Symposium fell into some of these pitfalls. Given my role in the Symposium, as a commentator on the final panel to reflect on discussions that took place on other panels, I will use this space to advance a few thoughts on the

2. See Oren Ziv, *January Was the West Bank's Deadliest Month in Nearly a Decade*, +972 MAG. (Feb. 1, 2023), <https://www.972mag.com/west-bank-january-palestinian-deaths> (on file with the *University of the Pacific Law Review*); *Palestine's Huwara Should Be Wiped Out: Top Israeli Minister*, ALJAZEERA (Mar. 1, 2023), <https://www.aljazeera.com/news/2023/3/1/israel-arrests-settlers-after-anti-palestinian-pogrom> (on file with the *University of the Pacific Law Review*).

3. Mohammed Haddad, *Nakba Day: What Happened in Palestine in 1948?*, ALJazeera (May 15, 2022), <https://www.aljazeera.com/news/2022/5/15/nakba-mapping-palestinian-villages-destroyed-by-israel-in-1948> (on file with the *University of the Pacific Law Review*).

4. AMNESTY INT'L, *ISRAEL'S APARTHEID AGAINST PALESTINIANS: CRUEL SYSTEM OF DOMINATION AND CRIME AGAINST HUMANITY* (2022), <https://www.amnesty.org/en/documents/mde15/5141/2022/en> (on file with the *University of the Pacific Law Review*); HUM. RTS. WATCH, *A THRESHOLD CROSSED: ISRAELI AUTHORITIES AND THE CRIMES OF APARTHEID AND PERSECUTION* (2021); B'TSELEM, *A REGIME OF JEWISH SUPREMACY FROM THE JORDAN RIVER TO THE MEDITERRANEAN SEA: THIS IS APARTHEID* (2021).

Symposium itself and some of the discussions it engendered. I address both the limitations of the conference, and also ways that these limitations played out on some of the panels. First, because of its framing and composition, the symposium ultimately touched little on the First Amendment and ways it operates in the context of debates on Israel and Palestine. This mirrored the problematic dynamics noted above that dominate discourse on the issue, and which are partly a result of a failure to center Palestinian voices. Conversations thus focused on Israel supporters' reactions to the tactics of a human rights movement, rather than on the First Amendment violations actually taking place, and the underlying oppression that Palestine advocates are struggling against. Ultimately, I posit that the Symposium was a missed opportunity to adopt a "justice framework," as participant Maha Nassar might call it, for a forum like this. Second, because the panel on legislation targeting the movement for Palestinian rights illustrated some of these dynamics, it was missing some crucial context and viewpoints. I therefore share some of this context and explain how this legislative assault is a prime example of how First Amendment principles are being sacrificed to protect Israel. Finally, the topic of student tactics and reactions to those tactics dominated the panel on campus politics in ways that reflect this problematic dynamic. This section therefore recenters the discussion on how a "Palestine Exception" to free speech reigns on campuses, and how that has reinforced the anti-Palestinian racism that drives the repression of the Palestine movement.

While I will not comment on the third panel about the regulation of the online arena, that conversation showed how social media companies single out Palestinians and their supporters for censorship at Israel and its allies' behest. Social media companies, like other institutions, develop and execute content moderation policies under significant pressure from Israel and its allies' concerted campaigns. They also operate with a profit motive that bends to censorship demands from governments intent on silencing dissent.

I conclude with some general reflections on ways we can approach this subject with a clear, unapologetic commitment to protecting the marginalized, oppressed, and other human rights advocates for freedom and justice.

II. A MISSED OPPORTUNITY

The Symposium was a first in focusing on First Amendment issues in the context of U.S. advocacy on Palestine and Israel, and it was a praiseworthy feat to organize such a sweeping topic into a day of online panels. I offer some reflections on ways the Symposium could have better addressed some of the fundamental First Amendment issues we are grappling with—in the context of the Palestine movement and beyond. First, the Symposium lacked a common premise that would have helped to focus the conversations more on the legal issues presented, and to provide much needed context for the conversations. Second, the small number of Palestinian speakers reinforced the marginalization of Palestinians that is par for the course in many arenas, including law schools. This inevitably impacted the focus and the depth of the discourse. And finally, because of these two flaws,

critiques of Palestinian tactics used to address the marginalization, erasure, and the normalization of Israel's oppression of Palestinians became a focus of the conversations, at the expense of illuminating the serious harm being done to Palestinians, their allies, and fundamental principles of free expression.

The result was a missed opportunity to uncover what's really at stake in this discussion and the real harms being perpetrated. The truth is that the infringement of First Amendment rights—like the infringement of human rights on the ground in Palestine—is happening in one direction. There is no Palestinian oppression of Israel on a systemic scale. And in the U.S., government interference in First Amendment activities affects Palestinians and their allies, not Israel advocates. That's what defines a First Amendment violation. The fact that more people are advocating for Palestinian rights and against Israel's settler colonial apartheid regime, and that the movement's tactics aim to decrease support for Israel, does not create a First Amendment violation because Israel's supporters feel isolated. Nor is it anti-Jewish or encouraging antisemitism, like so many Israel supporters claim. The best analogy is the argument of reverse racism, which has upended anti-discrimination laws and manufactured the notion that remedies for racism have created anti-whiteness. The attempt to equate systemic and institutionalized anti-Black racism that has had material consequences for generations of Black Americans with white people's fear of losing social and economic dominance only exacerbates that racism. Unfortunately, the real harms and constitutional violations were not fully explored through the Symposium because panelists who had little or no direct experience with the repression that Palestinians and their allies face focused on questioning the impact of the movement's tactics on Israel supporters. This made the underlying oppression of Palestinians, and repression of the Palestine movement in ways that undermine the First Amendment, secondary, mirroring mainstream discourse on the issue.

A. Lacking a Shared Premise

It's fair to say that we're in a unique moment. On one hand, support for Palestinian rights has never been stronger.⁵ That trend is likely to continue as Israel reveals its true colors and government officials spew outright racism and incite violence against Palestinians. On the other hand, efforts to stop this growing support have never been more severe.

This is not a coincidence. The more the movement for Palestinian rights grows and influences people, the bigger the threat to Israel's occupation and expropriation of Palestinian land and exile, continued exclusion, and subjugation of Palestinian people, which Israel has carried out with impunity, and vital U.S.

5. Ellen Knickmeyer & Emily Swanson, *Poll: Many Democrats Want More US Support for Palestinians*, ASSOCIATED PRESS (June 23, 2021), <https://apnews.com/article/donald-trump-joe-biden-only-on-ap-middle-east-government-and-politics-8417ab720a42826a5e14f2dd31ff4fc8> (on file with the *University of the Pacific Law Review*); Zoha Qamar, *More Democrats than Ever Support the Palestinian Cause, and That's Dividing the Party*, FIVETHIRTYEIGHT (Sept. 22, 2022), <https://fivethirtyeight.com/features/democrats-israeli-palestinian-conflict-divide> (on file with the *University of the Pacific Law Review*).

military, financial and political support, for seventy-five years since 1948.⁶ Palestine Legal's documentation of the repression of the U.S. Palestine movement makes crystal clear Israel and its allies are desperately trying to shut down a global movement for freedom. They are doing so by promoting the erosion of fundamental freedoms around the world. Only in a world where we aren't free to express dissent, where might makes right, and where international law is negotiable are Israel's actions defensible. This context should be a starting point for conversations about Palestine and the solidarity movement in the U.S.

The reality, however, is it is still extremely difficult to start from a shared understanding of this context. There is an expansive effort to censor Palestine, which not only prevents Palestinian voices from being heard, but also tries to undermine, through false narratives and propaganda, these very premises. Israel supporters routinely buck prevailing experts⁷ and claim Israel's settlement enterprise is not a violation of international law.⁸ They assert that Jewish spiritual connections to the land, together with military might and the tragedies Jewish people have suffered, justify the ethnic cleansing and perpetual subjugation of an indigenous population in order to create a Jewish state.⁹ Many even question the very existence of Palestinians as a people.¹⁰ Such premises will dramatically change the starting point for a conversation on the topic.

To see the consequences, we need only look at two examples of conferences that Israel advocacy groups attacked for starting from a premise of Palestinian humanity and agency and material inequities on the ground. In 2011, Palestinian-American law professor George Bisharat organized a conference at UC Hastings titled "Litigating Palestine." It invited participants to explore and assess avenues to achieve Palestinian rights in the courts. The conference was thus premised on several facts: "that Palestinians...have human, civil, and political, that is, national rights"; "that Israel has a...well-documented record of violating" these rights; and

6. Stephen Zunes, *Why the US Supports Israel*, INST. FOR POL'Y STUD. (May 1, 2022), https://ips-dc.org/why_the_us_supports_israel (on file with the *University of the Pacific Law Review*).

7. AMNESTY INT'L, DESTINATION: OCCUPATION 29 (2019), <https://www.amnesty.org/en/latest/campaigns/2019/01/chapter-3-israeli-settlements-and-international-law> ((on file with the *University of the Pacific Law Review*) ("Israel's policy of settling its civilians in occupied Palestinian territory and displacing the local population contravenes fundamental rules of international humanitarian law.")).

8. *Compare id.*, with Andrew Loewy, *Israeli Settlements Are Legitimate Under International Law*, JERUSALEM POST (July 3, 2021), <https://www.jpost.com/opinion/israeli-settlements-are-legitimate-under-international-law-opinion-672758> ((on file with the *University of the Pacific Law Review*) (quoting a former dean of Yale Law School who argued that the "construction of settlements in the West Bank following the Six Day War are permissible under international law").

9. Jonathan Ofir, *Israeli Historian Benny Morris Doubles Down on His Advocacy for Ethnic Cleansing*, MONDOWEISS (Jan. 18, 2019), <https://mondoweiss.net/2019/01/historian-advocacy-cleansing> (on file with the *University of the Pacific Law Review*).

10. Amy Gardner & Philip Rucker, *Gingrich Calls Palestinians an 'Invented' People*, WASH. POST (Dec. 9, 2011), https://www.washingtonpost.com/politics/gingrich-calls-palestinians-aninvented-people/2011/12/09/gIQAlibCjO_story.html (on file with the *University of the Pacific Law Review*); Alasdair Soussi, *The Mixed Legacy of Golda Meir, Israel's First Female PM*, ALJAZEERA (Mar. 18, 2019), <https://www.aljazeera.com/features/2019/3/18/the-mixed-legacy-of-golda-meir-israels-first-female-pm> (on file with the *University of the Pacific Law Review*).

that there are “efforts to protect and advance Palestinian rights in courtrooms around the globe.”¹¹

Israel advocacy groups attacked the conference as “one-sided” and “delegitimizing” because it didn’t include speakers who advanced Israel’s perspective. The groups lobbied school administrators to cancel it and pull official endorsements.¹² As Bisharat noted in response to these attacks, “The purpose was to train lawyers in defending Palestinian rights, not to debate whether those rights exist,” and “. . . If you had a conference on Holocaust reparation cases, you wouldn’t include Holocaust deniers.”¹³ Ultimately, the law school withdrew its branding from conference materials, and prevented the dean and chancellor from opening the conference, just hours before it was scheduled to begin.

In 2019, a conference at Duke and University of North Carolina entitled “Conflict over Gaza: People, Politics and Possibilities” was attacked. The conference’s intent was to “shed much-needed light on the current realities in the Gaza Strip, giving participants a deeper understanding of the context of these realities.”¹⁴ Participants included scholars and practitioners with deep knowledge about and experience working and living in Gaza, and also highlighted Gazan culture through music, food, and film. After the conference, a North Carolina representative filed a complaint with the Department of Education, claiming the conference “misrepresented the complex situation in Gaza,” and complaining that many experts who spoke at the conference engaged in boycotts protesting Israel’s treatment of Palestinians.¹⁵

Three months later, the Trump Administration’s Department of Education published a letter threatening to withdraw funding from the Duke-UNC Consortium for Middle East Studies, which sponsored the event.¹⁶ The letter criticized the consortium for, among other things, decisions by its graduates to “pursue academic careers rather than in government or business.” It threatened to

11. George Bisharat, *Introduction to “Litigating Palestine: Can Courts Secure Palestinian Rights?”*, 35 HASTINGS INT’L & COMP. L. REV. 91 (2012).

12. Cecile Surasky, *Pressure on Law Conference Threatens Free Speech*, SFGATE (Apr. 20, 2011), <https://www.sfgate.com/opinion/openforum/article/Pressure-on-law-conference-threatens-free-speech-2375014.php> (on file with the *University of the Pacific Law Review*); Doug Kahn, *A Campaign to Delegitimize Israel*, SFGATE (Apr. 26, 2011), <https://www.sfgate.com/opinion/openforum/article/A-campaign-to-delegitimize-Israel-2373982.php> (on file with the *University of the Pacific Law Review*).

13. Bob Egelko, *Hastings’ Board Pulls UC Brand from Meeting*, S.F. CHRON. (Apr. 12, 2011), <https://www.sfgate.com/bayarea/article/Hastings-board-pulls-UC-brand-from-rights-meeting-2375234.php> (on file with the *University of the Pacific Law Review*).

14. *Conflict Over Gaza: People, Politics, and Possibilities*, UNIV. OF N.C. AT CHAPEL HILL, <https://gazaconference.web.unc.edu/> (last visited Apr. 2, 2023) (on file with the *University of the Pacific Law Review*).

15. *Rep. Holding Requests Investigation into Anti-Semitism at Duke-UNC Conference*, WNCN CBS 17 (Apr. 17, 2019), <https://www.cbs17.com/news/local-news/orange-county-news/rep-holding-requests-investigation-into-anti-semitism-at-duke-unc-conference/1931059888/> (on file with the *University of the Pacific Law Review*).

16. Letter Regarding the Duke-UNC Consortium for Middle East Studies, 84 Fed. Reg. 48919, 48921 (Sept. 17, 2019); Erica Green, *US Orders Duke and UNC to Recast Tone in Mideast Studies*, N.Y. TIMES (Sept. 19, 2019), <https://www.nytimes.com/2019/09/19/us/politics/anti-israel-bias-higher-education.html> (on file with the *University of the Pacific Law Review*).

cut off federal funding to Middle East Studies, requiring Duke-UNC to provide a “revised schedule of activities...including a description demonstrating how each activity promotes foreign language learning and advances the national security interests and economic stability of the United States.”¹⁷

These examples are illustrations of the extreme scrutiny that is the everyday reality for anyone who is Palestinian or studies or speaks out about Palestine. Fear of this kind of backlash unfortunately means that academics and universities often engage in self-censorship to avoid such attacks. This Symposium is perhaps another victim of the very real threats of infringements on academic freedom when it comes to academic work around Palestine. The Symposium synopsis described it as an exploration of the First Amendment implications of debates on Israel-Palestine. It framed the Symposium as a debate between two sides with competing interests regarding free speech and its consequences. On one hand, Palestinians say they are being censored and their free speech is under assault, and on the other hand, Israel supporters say they are battling an anti-Israel movement which creates antisemitism and national origin discrimination.

The result of a relativist “two competing sides” framing, which obscures structural inequalities and grants equal value to the narratives of those in power and those facing oppression, was twofold in this case. First, because it did not start from a common justice premise, the Symposium ended up revolving, not around the implications of repression on the legal landscape or the severe threats to constitutional principles this issue represents, but on explorations of antisemitism, antizionism, and interrogations of Palestinian strategies to overcome erasure and silencing. When we pose the issue as a problem of two sides and their competing feelings, we not only drown out the power disparity, by putting those two sides on an equal playing field, but we also lose sight of the underlying reasons for the activism at issue. This inevitably favors Israel and its supporters, who prefer to obfuscate the underlying injustices Israel perpetrates. Perhaps more important for a legal audience, the legal principles of free speech, academic freedom and human rights that theoretically govern become peripheral, and we lose the opportunity to delve into ways legal principles are or should be applied.

B. Lacking Robust Palestinian Participation

A second result of the Symposium’s framing was the recreation of the marginalization of Palestinians that we see every day. Mainstream actors routinely treat Palestinian perspectives and experiences, if they’re included at all, as secondary to those promoted by Israel and its allies. Palestinians thus have to react to the framing and the perspectives of Israel advocates. The conference featured only four Palestinians, including the conference organizer, who played a

17. Letter Regarding the Duke-UNC Consortium for Middle East Studies, 84 Fed. Reg. 48919, 48921 (Sept. 17, 2019); see also *2019 Year-in-Review: Movement for Palestinian Rights Thrives Despite Censorship*, PALESTINE LEGAL, <https://palestinelegal.org/2019-report#spotlight-devos> (last visited Apr. 2, 2023) (on file with the *University of the Pacific Law Review*).

moderating role. Other participants had a range of different backgrounds and political persuasions. Although Jewish participants in the Symposium were diverse in viewpoint, they greatly exceeded Palestinian voices in number. A number of Jewish participants (at least nine, I believe) of different political persuasions participated, along with a handful of participants with other backgrounds.¹⁸ I raise this disparity in representation not because I believe mere identity matters, but because the experience associated with that identity does. What Palestinians on the front lines of Israel's colonial violence and its repression machine have to say—what we know, what we've seen, how we frame things—is often more hard-hitting and is spoken with more clarity and courage than what our allies are willing or able to say. The fact that mainstream actors have long systematically marginalized, silenced, and excluded Palestinian voices from academic and other arenas¹⁹ made this disparity in the symposium all the more disappointing, and inevitably resulted in a warped discourse.

It's thanks to political upheaval around other social justice issues that activists have brought to the fore the grave ways silencing and marginalizing the voices of the most impacted reinforces structural violence. The uprisings that followed the horrifically banal murder of George Floyd and other victims of police violence, protesting the long history of police brutality and the structural racism and inequality that created it, led to the beginnings of a reckoning around the representation of Black voices in all arenas.²⁰ The prevailing assumption was that if we are really committed to ending anti-Blackness, we need to ensure that Black communities have a central seat at the table in (or lead) discussions about the Black experience. And that introspection extended to other issues as well, including Palestine, to some degree. For example, it was only in 2022 that *The Nation*, a left-of-center publication, hired its first Palestine correspondent—and was subjected to much hate mail as a result. In academia, the politics that ensure people of color have power over narratives about their own communities was established in the 1960s and 1970s as part of the movement to institute Ethnic Studies programs. Until now, anyone committed to racial justice research had to contend with the established assumption that allowing those in power to dominate the production of knowledge about those who are oppressed reproduces colonial and racial violence.

18. Symposium, *Israel, Palestine, and the First Amendment: Defining the Boundaries of Freedom of Speech*, 54 U. PAC. L. REV. 604 (2022).

19. See, e.g., Maha Nassar, *US Media Talks a Lot About Palestinians—Just Without Palestinians*, +972 MAG. (Oct. 2, 2020), <https://www.972mag.com/us-media-palestinians/> (on file with the *University of the Pacific Law Review*); Nora Lester Murad, *Censorship of Palestinians Is So Normal, Even Antiracists Don't See It* (Nov. 9, 2022), <https://noralestermurad.com/censorship-of-palestinians-is-so-normal-even-antiracists-dont-see-it> (on file with the *University of the Pacific Law Review*).

20. See, e.g., Brandon Griggs, *This Is Pop Culture's Moment of Reckoning on Matters of Race*, CNN (June 25, 2020), <https://www.cnn.com/2020/06/25/entertainment/pop-culture-reckoning-race-trnd/index.html> (on file with the *University of the Pacific Law Review*); Elaine Low & Angelique Jackson, *The Reckoning over Representation: Black Hollywood Speaks Out, but Is the Industry Listening?*, VARIETY (June 30, 2020), <https://www.nbcnews.com/news/nbcblk/reckoning-over-representation-black-hollywood-speaks-out-industry-listening-n1232652> (on file with the *University of the Pacific Law Review*).

Nevertheless, there continues to be a systematic problem of ignoring or discrediting Palestinian voices in matters that most affect them. The issue is not one of representation based on identity. It's about making space for and elevating Palestinians who are on the front lines and experiencing the repression to speak for themselves, rather than other voices who don't have the same personal motivation, or experiences to speak to what's happening and the consequences for the most impacted. Failing to do so reinforces the problem of subjugation, erasure, and lack of agency that Israel and its allies rely on, and media, academic and other arenas exacerbate.

C. Overly Emphasizing Impacts of Palestinian Strategies on Zionists' Feelings

The above two issues resulted in a problem that stems from Israel's rejection of any and all strategies of Palestinian resistance, which Israel and its allies inevitably label as terrorist, antisemitic, and/or rejectionist. For one, there is significant handwringing among Israel's supporters about Palestinians' refusal to be tokenized and used to normalize Israel's occupation and oppression of Palestinians.²¹ This refusal, called anti-normalization, assists Palestinians in participating in different arenas on their own terms, rather than having to establish their very existence, let alone their humanity, when they engage on the issue of Palestine. Anti-normalization rejects Israel's efforts to "whitewash its violations of international law and human rights. . . [and] to re-brand itself, or present itself as normal — even 'enlightened' — through an intricate array of relations and activities encompassing hi-tech, cultural, legal, LGBT and other realms."²²

Practically, in addition to rejecting state-level efforts to normalize relations with Israel, anti-normalization represents a principled position to avoid engaging in certain forums because "[p]rojects, initiatives and activities that do not begin from a position of shared principles to resist Israel's oppression invariably allow for an approach to dealing with Israel *as if* its violations can be deferred, and as if coexistence. . . can precede, or lead to, the end of oppression."²³ Israel advocates routinely deride Palestinians and their allies for taking such positions, erroneously claiming that it is a refusal to talk to Jews and Israelis, and is therefore "antisemitic," and amounts to rejection of coexistence, dialogue, and peace. They ignore that such principles are "entirely based on *political*, rather than *racial*, considerations. . . . Countering normalization is a means to resist oppression, its mechanisms and structures. As such, it is categorically unrelated to or conditioned upon the *identity* of the oppressor."²⁴ They also disregard the fact that "Dialogue, 'healing,' and 'reconciliation' processes that do not aim to end oppression,

21. See, e.g., *A Strategy of Rejection: The Anti-Normalization Campaign*, ANTI-DEFAMATION LEAGUE (MAY 25, 2012), <https://www.adl.org/resources/news/strategy-rejection-anti-normalization-campaign> (on file with the *University of the Pacific Law Review*).

22. *What Is Normalization?*, 972 MAG. (Dec. 27, 2011), <https://www.972mag.com/what-is-normalization> (on file with the *University of the Pacific Law Review*).

23. *Id.*

24. *Id.*

regardless of the intentions behind them, serve to privilege oppressive co-existence at the cost of co-resistance, for they presume the possibility of coexistence before the realization of justice.”²⁵

The question of tactics of the movement came to the forefront in this Symposium in a few ways. Despite our expertise on the subject, as head of an organization that supports the Palestine movement in the U.S., I declined our participation on the panel about the waves of legislation targeting boycott, divestment, and sanctions (BDS) for Palestinian rights because a representative of the Shalom Hartman Institute—a Jerusalem-based organization that receives Israeli government and military funding²⁶—had accepted to join.

The position was based on principle. The organization’s participation would have crossed the picket line, given the strong condemnation of and calls to boycott the organization’s activities to faith-wash Israel and justify and strengthen the Zionist project.²⁷ This position avoided normalizing an entity that has long tried to pose as a purveyor of mutual understanding between oppressor and oppressed, while backing and receiving backing from the oppressive entity itself. It had nothing to do with the panelist, Yehuda Kurtzer’s identity, or even his personal political positions, but with the institution he was representing. I noted my objection during the panel’s Q&A and offered interventions regarding anti-BDS laws. Because of the politically problematic composition of the panel, it ended up having no Palestinians or BDS advocates, even while other panelists were questioning the intent and advisability of Palestinian BDS tactics.

After this enactment of anti-normalization, the closing panel I participated in—meant to be a space for reflection on the symposium topics—instead focused on questions about anti-normalization and its impact on discourse on Palestine. My goal was to insert into the discussion some of the concrete stories of censorship and violations of First Amendment rights that permeate our work, as a corrective to the above mentioned gaps I noticed in the previous discussions. Instead, the conversation again, consciously or not, painted those supporting Israel as open to dialogue and peace and those supporting Palestinian liberation and human rights as enacting bias and harm, reflecting what Maha Nassar might call a “peace

25. *Id.*

26. See Ali Abunimah, *Islamophobia Bankroller Behind Organizer of Israel Junket for US “Muslim Leaders”*, ELEC. INTIFADA (Jan. 4, 2015), <https://electronicintifada.net/blogs/ali-abunimah/islamophobia-bankroller-behind-organizer-israel-junket-us-muslim-leaders> (on file with the *University of the Pacific Law Review*). According to its annual reports, SHI received 23% of its revenue in 2016 from the Israeli government, and 19% in 2021–22. SHALOM HARTMAN INST., ANNUAL REPORT 2016, at 57 (2017), https://static.hartman.org.il/dev/uploads/2020/04/Annual_Report_2016_update.pdf (on file with the *University of the Pacific Law Review*).

27. Palestinian BDS Nat’l Comm., *Boycott the Muslim Leadership Initiative and Similar Attempts to “Faithwash” Israel’s Regime of Oppression*, BDS MOVEMENT (Jan. 26, 2015), <https://bdsmovement.net/news/boycott-muslim-leadership-initiative-and-similar-attempts-%E2%80%9Cfaithwash%E2%80%9D-israel%E2%80%99s-regime> (on file with the *University of the Pacific Law Review*); Hatem Bazian, *American Muslims Must Not Become Tools of Israeli Propaganda*, AM. MUSLIMS FOR PALESTINE (Dec. 5, 2016), <https://www.ampalestine.org/media/media-room/news/american-muslims-must-not-become-tools-israeli-propaganda> (on file with the *University of the Pacific Law Review*).

narrative.”²⁸ It thereby repeated a problematic centering of Zionist feelings about Palestinian refusals to engage for political reasons over the real material harms and erasure that Israel enacts on them that are the reason for anti-normalization tactics in the first place. It also sidelined the interventions I intended to make to recenter the real harms that Zionist repression tactics are creating to Palestinians and their allies, and to First Amendment principles.

To be clear, I do not propose that all discussions should only be between people who agree. I do, however, think that considerations of the power dynamics at play are critical when we forge conversations about situations of extreme injustice. For example, if it was the 1980s, at the height of the South African boycott, divestment, and sanctions movement, what would it mean if a conference exploring the anti-Apartheid movement and its free speech implications featured someone advocating for legislation blocking the boycott? Or someone whose work bolstered the apartheid regime? What would it mean to have more white Afrikaner participants than Black South Africans, even if some of the former supported the anti-apartheid movement? Would it be a surprise if anti-apartheid activists and academics refused to participate in a panel like this? Would it not behoove us to have a shared premise that the apartheid regime was built on a brutal settler colonial history that caused untold harm to Black South Africans, rather than inviting people who question that very premise to show “balance”?

It is hard to fathom any scholar or activist proposing such a panel then, or some equivalent in the present Black Lives Matter era, whereby Black activists would be expected to dialogue with people supporting racial profiling and the criminalization of Black communities. And I argue it should be equally hard to put on such a panel exploring the movement for Palestinian rights without centering Palestinians and sharing a basic premise about the oppression of Palestinians. These examples don’t exactly mirror the Symposium at hand, but they illustrate the implications of failing to forefront an oppressive reality and the people who directly experience and are resisting that reality. The consequence is an inevitable replication of that oppressive reality.

Another example of an action that could be viewed as enacting “anti-normalization” is the incident at UC Berkeley Law School, in which law student groups undertook pledges not to host Zionist speakers. For a discussion of the legal and political underpinnings of that campaign, and the disingenuous attacks that tried to undermine it, see my colleague Zoha Khalili’s essay in this Symposium volume.²⁹ She describes the history of anti-Palestinian attacks at Berkeley that predated the campaign and the severe harassment that students who endorsed the campaign faced. She also discusses the First-Amendment-protected nature of the campaign, despite wild and false allegations that it discriminates against Jewish speakers. The complete decontextualization of the Berkeley law students’

28. Symposium, *Israel, Palestine, and the First Amendment: Defining the Boundaries of Freedom of Speech*, 54 U. PAC. L. REV. 604 (2022).

29. Zoha Khalili, *Should We Ban Solidarity—and Student Groups—to Avoid Offending Israel Apologists?*, 54 UNIV. PAC. L. REV. 706 (2023).

campaign allowed for such a distortion of its intent and impact—and of First Amendment law. The attacks divorced the campaign both from the long history of attacks on Palestinians’ speech and academic freedom rights at Berkeley, and the underlying oppression of Palestinians that the campaign intended to counter. Opponents were thus able to characterize the campaign as discriminatory against Zionists (who Israel groups try to define as coterminous with Jews, and thus a protected class under anti-discrimination law), rather than an attempt to redress Israel and UC Berkeley’s institutional discrimination against Palestinians. A reverse racism argument if ever there was one.

My overarching point is that the Symposium ultimately facilitated the obfuscation of a vast repression machine by promoting a two-equal-sides narrative, and failing to premise conversations on a fundamental understanding of the power dynamic between colonizers and the colonized, the censors and the censored. Critiques of Palestinian tactics to challenge the oppressive state and the repression machine it enables, led to an over-emphasis on Israel’s apologists’ reactions and feelings, rather than on harms Palestinians are experiencing, and the First Amendment implications. Ultimately, it was a missed opportunity to foreground the real First Amendment crises we’re grappling with. Attacks on the Palestine movement in the U.S. have in some ways become harbingers of the threat to the constitutional principles of free expression and association. The next sections provide some critical context that was missing from symposium discussions, and draws out the broader implications of the current climate of repression of the Palestine movement.

III. FIRST AMENDMENT PRINCIPLES SACRIFICED TO SHIELD ISRAEL

The first panel on legislation-targeting boycotts for Palestinian rights included significant discussion on how and whether boycotts are protected First Amendment activities. Panelists also, however, opined on the purpose and advisability of boycotts for Palestinian rights, and on definitions of Zionism and antisemitism that justified their views on boycotts. The purpose of a boycott is indeed a relevant inquiry, and it is imperative that Palestinians define that purpose. The alternative is to have an erroneous misrepresentation of the boycott, as some panelists advanced. The advisability of a boycott should also only be a question for Palestinians to answer, as it is their own oppression they are opposing, and their own freedom they are fighting for. The following attempts to provide some context about and explicate the legal implications of efforts to legislate against boycotts—both for the Palestine movement and beyond—that were only partially exposed on the panel.

A. Legislation Aimed at Criminalizing a Human Rights Movement

Since 2014, Palestine Legal has tracked nearly 300 bills that have been introduced in state legislatures and the United States Congress targeting advocacy for Palestinian rights, especially the Boycott Divestment and Sanctions

movement.³⁰ Particularly in the last few years, more and more of these bills aim to codify a highly contested anti-Palestinian definition of antisemitism intended to censor advocacy for Palestinian rights. Elected officials are now at the forefront of undermining the movement for Palestinian rights, at the express behest of Israeli officials, and with the support of right-wing forces like the American Legislative Exchange Council (ALEC), and Christian Zionists.³¹

As we documented in a 2015 report with the Center for Constitutional Rights, there has been a widespread, multi-sector attack on the Palestine movement, which has largely happened from the top-down.³² Legislatures became primary sites for this attack with the initiation of anti-boycott laws in 2014, after the American Studies Association passed an academic boycott resolution—the first major academic association boycott endorsement. Waves of similar state legislation followed across the country. The laws have their origins in Israel’s own anti-boycott law,³³ and have spread via templates promoted by ALEC—a right-wing organization also behind racist laws that protect vigilante murderers, block voting rights, criminalize Indigenous and environmental protests, and ban the teaching of racial justice issues in classrooms.³⁴

To divorce the evolution of anti-boycott laws from this broader Israel-government and right-wing supported attack on the global movement for Palestinian rights conceals a key element of the First Amendment analysis. The intent of laws is as important as their impact. Legislators and lobbyists have made crystal clear that such legislation is aimed at shutting down a growing movement for Palestinian rights,³⁵ which Israel and its allies hope will shield it from accountability for its crimes against Palestinians.

30. *Legislation Targeting Advocacy for Palestinian Rights*, PALESTINE LEGAL, <https://legislation.palestinelegal.org> (last visited Mar. 26, 2023) (on file with the *University of the Pacific Law Review*).

31. Liz Essley White, *How a Bill That Seeks to Shut Down Boycotts of Israel Is Spreading State-to-State*, CTR. FOR PUB. INTEGRITY (May 1, 2019), <https://publicintegrity.org/politics/state-politics/copy-paste-legislate/how-a-bill-that-seeks-to-shut-down-boycotts-of-israel-is-spreading-state-to-state> (on file with the *University of the Pacific Law Review*). See also Alex Kane & Nashwa Bawab, *God, Gas, and Cash: How Texas Fell in Love with Israel – And Then Trampled on the Constitution*, INTERCEPT (June 1, 2019), <https://theintercept.com/2019/06/01/israel-texas-government-relationship/>.

32. PALESTINE LEGAL & CTR. FOR CONST. RTS., *THE PALESTINE EXCEPTION TO FREE SPEECH 4–7* (2015), <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/560c2e0ae4b083d9c363801d/1443638794172/P%20alestine+Exception+Report+Final.pdf> (on file with the *University of the Pacific Law Review*).

33. “*Anti-Boycott Law*”—*Prevention of Damage to the State of Israel Through Boycott*, ADALAH, <https://www.adalah.org/en/law/view/492> (last visited Mar. 26, 2023) (on file with the *University of the Pacific Law Review*).

34. CTR. FOR CONST. RTS. ET AL., *ALEC ATTACKS* (2018), <https://www.alecattacks.org> (on file with the *University of the Pacific Law Review*).

35. One Israel advocate explicitly referenced the intent to curtail campus activism and BDS campaigns, saying, “While you were doing your campus antics, the grown-ups were in the state legislatures passing laws that make your cause improbable.” White, *supra* note 28.

B. First Amendment Protections Are Clear

Since the Symposium took place, the Supreme Court has denied certiorari to a case challenging Arkansas' anti-boycott law.³⁶ It thereby refused the chance to uphold its precedent recognizing that boycotts aimed at affecting social, political, and economic change encompass First Amendment rights of speech, association, assembly, and petition. This denial lets stand the only decision by a Circuit Court on the merits of a challenge to an anti-boycott law, which upheld, in an *en banc* decision that reversed a panel of Circuit judges, Arkansas' anti-boycott law.³⁷ Several district courts have ruled that similar laws are an unconstitutional infringement on First Amendment rights.³⁸ Nevertheless, until the Supreme Court decides to weigh in on the tide of anti-boycott laws, more will be enacted and the template will continue to proliferate with attempts to curtail other boycotts.

Until then, the reigning precedent is the Court's 1982 decision, *NAACP v. Claiborne Hardware*, in which the Court made clear that the purpose of boycotts is important to consider. The Court described the 1960s boycott of white businesses that enabled racial injustices as one in which Black Mississippians "banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect."³⁹ The Court understood that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."⁴⁰

The very purpose of the First Amendment is in fact to prevent the government from interfering in collective efforts to redress wrongs or convey a viewpoint, however much government officials dislike it. Political speech receives the highest protection, and the Court recognized in *Claiborne* that the state doesn't have the "right to prohibit peaceful political activity such as that found in the boycott."⁴¹ While it recognized the boycotters "certainly foresaw—and directly intended—that the merchants would sustain economic injury as a result of their campaign," the Court distinguished the boycott from other efforts that are economically motivated and anti-competitive.⁴² Indeed, the Court was clear that states could not prohibit "a nonviolent, politically motivated boycott designed to force

36. Brian Hauss, *Supreme Court Declines to Review Challenge to Law Restricting Israel Boycotts*, ACLU (Feb. 21, 2023), <https://www.aclu.org/press-releases/supreme-court-declines-to-review-challenge-to-law-restricting-israel-boycotts> (on file with the *University of the Pacific Law Review*).

37. *Id.*

38. *A & R Eng'g & Testing, Inc. v. City of Houston*, 582 F. Supp. 3d 415, 436–37 (S.D. Tex. 2022); *Martin v. Wrigley*, 540 F. Supp. 3d 1220, 1229 (N.D. Ga. 2021); *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 745 (W.D. Tex. 2019), *vacated and remanded sub nom. Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020); *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1044 (D. Ariz. 2018), *vacated and remanded*, 789 F. App'x 589 (9th Cir. 2020); *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1023 (D. Kan. 2018).

39. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982).

40. *Id.* at 908 (citing *Citizens Against Rent Control/Coalition for Fair Hous. V. City of Berkeley*, 454 U.S. 290, 294 (1981)).

41. *Id.* at 913.

42. *Id.* at 914.

governmental and economic change”⁴³ and “to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself.”⁴⁴

Proponents of today’s anti-boycott laws try to circumvent this clear precedent in a couple of ways. First, they label boycotts for Palestinian rights as “discriminatory”, which they claim justifies measures punishing people who participate —whether by denying them state contracts or investments. Per this argument, a discriminatory boycott is not protected by the First Amendment because its very purpose is illegal. This is confirmed by subsequent case law that “recognize[s] that a boycott (as with any mode of expression) designed to secure an unlawful objective is not protected by the First Amendment.”⁴⁵

It should be telling that the claim of antisemitic discrimination underpins the majority of attacks that we see against advocacy for Palestinian rights. It hinges on the argument that advocacy against the Israeli state for its oppression of Palestinians is anti-Jewish because Israel is a self-proclaimed “Jewish state.” The antisemitism definition Israel groups are promoting across the country (and internationally)⁴⁶ tries to cement this concept. Seven of the ten examples of antisemitism the definition provides relate to Israel, including “denying Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor,” and “applying double standards” to Israel’s behavior.⁴⁷ Florida’s law adopting this definition even goes so far as to pose “focusing peace or human rights investigations only on Israel” as an example of antisemitism.⁴⁸

It is the epitome of gall to call a movement challenging a state’s pervasive, all-encompassing, racially motivated discrimination, segregation, and what many international law experts have defined as apartheid,⁴⁹ as “discriminatory.” Such a label completely ignores Palestinian civil society’s call for BDS, which clearly targets complicity with Israel for its violations of international law, not a company, entity, or individual for their ethnic, religious or national origin affiliations.⁵⁰ It also willfully ignores the purpose of the boycotts: to address historic wrongs and use collective power to create change where governments have failed to protect and/or actively conspired against the realization of Palestinian rights. The

43. *Id.*

44. *Id.*

45. *See* *Jews for Jesus, Inc. v. Jewish Cmty. Rels. Council of N.Y., Inc.*, 968 F.2d 286, 297 (1992) (citing *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 425–27 (1990)).

46. European Legal Support Center, *Suppressing Palestinian Rights Advocacy through the IHRA Working Definition of Antisemitism: Violating the Rights of Freedom of Expression and Association in the European Union and the UK* (June, 2023), https://res.cloudinary.com/elsc/images/v1685978238/The-Practice-of-Suppressing-Palestinian-Rights-Advocacy-FINAL-PP/The-Practice-of-Suppressing-Palestinian-Rights-Advocacy-FINAL-PP.pdf?_i=AA.

47. *Types of Legislation*, PALESTINE LEGAL, <https://legislation.palestinelegal.org/types-of-legislation/#antisemitism-redefinition> (last visited Mar. 26, 2023) (on file with the *University of the Pacific Law Review*).

48. FLA. STAT. § 1000.05 (2019).

49. AMNESTY INT’L, *supra* note 5; HUM. RTS. WATCH, B’TSELEM, *supra* note 5..

50. *See FAQs*, BDS MOVEMENT, <https://bdsmovement.net/faqs#collapse16231> (last visited Mar. 26, 2023) (on file with the *University of the Pacific Law Review*).

Palestinian call for BDS is the historical, moral, and political equivalent of boycotts for civil rights in the United States, and the BDS movement against apartheid South Africa. To call them discriminatory would also require the logical absurdity of calling the boycott by Black Mississippians of white businesses in the context of de jure racial segregation “discriminatory.” The Court’s clear affirmation of that boycott as “politically motivated” and therefore protected must extend to this boycott as well, as several courts have now concluded.⁵¹

The other argument by proponents of the anti-boycott laws is that you can separate the speech parts of a boycott from the conduct of refusing to deal. If the Court had said in *Claiborne* that Black people were free to boycott, but could be sued by white store owners for refusing to purchase from those stores, it would have rendered First Amendment protection of boycotts meaningless, opening up a time-honored tactic of the powerless to criminalization. The Court clearly understood the boycott’s purpose was to exact economic harm to create change, and saw it as the expressive tool to effect that change. Brian Hauss’s contribution to this Symposium edition provides a thorough dissection of this argument that others on the panel promoted.⁵²

C. The Slope Is Slippery, Indeed

A last note regarding the legislative assault on the Palestine movement concerns what Lara Friedman’s contribution pays significant attention to—the rapid embrace of laws targeting boycotts for Palestinian rights as templates to target other social justice causes.⁵³ In January 2023 alone, state legislatures introduced at least thirty-four new anti-boycott bills, using the same template to target efforts to address climate change, gun violence, abortion access, transgender health services, and even a global pandemic.⁵⁴ Right-wing legislatures are introducing and passing these bills left and right, with the clear purpose of undermining movements calling for the isolation of industries harming people and

51. See cases cited *supra*, note 36.

52. Brian Hauss, *The Right to Boycott as a Right of Assembly*, 54 UNIV. PAC. L. REV. (2023); see Adam Serwer, *Boycott Bans Are an Assault on Free Speech*, ATLANTIC (Mar. 9, 2023), <https://www.theatlantic.com/ideas/archive/2023/03/supreme-court-arkansas-anti-israel-boycotts/673310/> (on file with the *University of the Pacific Law Review*).

53. Lara Friedman, *Targeting Free Speech & Redefining Antisemitism: How Pro-Israel Actors Are Using US Laws to Attack Palestinian Activism & Solidarity*, 54 UNIV. PAC. L. REV. (2023).

54. *Free Speech-Quashing Laws Based on Israel-Focused Anti-Boycott Laws*, FOUND. FOR MIDDLE EAST PEACE, <https://fmep.org/wp/wp-content/uploads/BDS-Laws-as-Template-for-Laws-on-Other-Issues.pdf> (last visited Feb. 2, 2022) (on file with the *University of the Pacific Law Review*); Meg Cunningham, *Model Legislation Targets Banks That Divest From Fossil Fuel Companies*, ABC NEWS (Dec. 22, 2021), <https://abcnews.go.com/Politics/model-legislation-targets-banks-divest-fossil-fuel-companies/story?id=81865813> (on file with the *University of the Pacific Law Review*); Erika Bolstad, *Boycotting the Boycotters: In Oil-Friendly States, New Bills Aim to Block Divestment from Fossil Fuels*, IN THESE TIMES (Mar. 19, 2021), <https://inthesetimes.com/article/fossil-fuel-divestment-ban-texas-north-dakota-oil> (on file with the *University of the Pacific Law Review*); Debra Kahn, *Cracks in the Anti-ESG Foundation*, POLITICO (Jan. 24, 2023), <https://www.politico.com/newsletters/the-long-game/2023/01/24/cracks-in-the-anti-esg-foundation-00079204> (on file with the *University of the Pacific Law Review*).

the planet. Absurdly, legislators also call these efforts “discriminatory” against the industries they target.

If we are concerned with First Amendment issues related to Palestine and Israel, another critical issue not centered in the Symposium, with equally broad implications on First Amendment rights, is legislation promoting the distorted antisemitism definition. This legislation has much in common with legislative attacks on so-called “Critical Race Theory” (CRT). In addition to both legislative initiatives being promoted by the right-wing ALEC,⁵⁵ they have a similar purpose: to shield people from unpleasant histories and critical analyses of two settler-colonial states. Like antisemitism-redefining and anti-boycott bills, which purport to fight discrimination against Jewish people and Israel, proponents of CRT laws “justify their efforts in the name of equality” by “[implying] that robust analyses of the nation’s long history of racial inequality are themselves discriminatory.”⁵⁶ With antisemitism definition laws, “[p]olitical critiques of Israeli state actions—including discrimination and violence against Palestinians—become subject to the charge of antisemitism, skewing the social and legal meaning of equality and obscuring other prohibited forms of discrimination.”⁵⁷ Similarly, anti-CRT laws “depict teaching about systemic racism . . . as discriminating against white people.”⁵⁸ The AAUP has detailed the way that both legislative efforts not only undermine First Amendment rights and academic freedom principles, and create a chilling effect on teachers and students.⁵⁹ They also promote the “misuse and abuse of antidiscrimination law” by “deploy[ing] laws originally designed to protect groups from discrimination” to instead thwart correctives to the same systemic harms”.⁶⁰

55. Ed Pilkington, *Revealed: Rightwing Push to Suppress Criticism of Israel on US Campuses*, GUARDIAN (Oct. 17, 2019), <https://www.theguardian.com/us-news/2019/oct/16/conservative-activists-want-to-outlaw-antisemitism-in-public-education-why-is-that-a-bad-thing> (on file with the *University of the Pacific Law Review*); see also Lara Friedman, *States Are Moving to Class Criticism of Israel as Antisemitism*, JEWISH CURRENTS (Feb. 20, 2020), <https://jewishcurrents.org/states-are-moving-to-class-criticism-of-israel-as-antisemitism> (noting that Randy Fine, an ALEC member and the Florida state representative pushing for legislation adopting IHRA, explained his hopes for what the bills would achieve in these terms: “Students for Justice in Palestine is now treated the same way as the Ku Klux Klan—as they should be.”); Alex Kotch & Don Wiener, *ALEC Inspires Lawmakers to File Anti-Critical Race Theory Bills*, COMMON DREAMS (July 28, 2021), <https://www.commondreams.org/views/2021/07/28/alec-inspires-lawmakers-file-anti-critical-race-theory-bills> (on file with the *University of the Pacific Law Review*).

56. AM. ASSOC. OF UNIV. PROFESSORS COMM. A ON ACAD. FREEDOM & TENURE, LEGISLATIVE THREATS TO ACADEMIC FREEDOM: REDEFINITIONS OF ANTISEMITISM AND RACISM (Mar. 2022), <https://www.aaup.org/report/legislative-threats-academic-freedom-redefinitions-antisemitism-and-racism> (on file with the *University of the Pacific Law Review*).

57. *Id.*

58. *Id.*

59. See Letter from Palestine Legal, et al., to Hon. Catherine E. Lhamon, Assistant Sec’y for C.R., & Monique Dixon, Deputy Assistant Sec’y for Pol’y 4–5 (Aug. 31, 2022), <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/63b6de30db689e6788acce6/1672928817287/Civil+Rights+Orgs+Letter+to+OCR+8-31-22.pdf> (on file with the *University of the Pacific Law Review*); AM. ASSOC. OF UNIV. PROFESSORS COMM. A ON ACAD. FREEDOM & TENURE, *supra* note 52.

60. AM. ASSOC. OF UNIV. PROFESSORS COMM. A ON ACAD. FREEDOM & TENURE, *supra* note 52.

The slippery slope doesn't just apply to anti-boycott laws. As the AAUP acutely concludes with respect to anti-CRT laws:

If the immediate goal is to cleanse the teaching of American history from the charge of systemic racism, to eliminate portrayals of the evils of slavery, and to protect white children from experiencing the anxiety or shame they might feel when learning of discrimination based on race, then other histories of violence—including restrictions on Asian immigration, the conquest of Indigenous lands, and the assumptions about gender and sex that accompany them—are subject to similar erasure.⁶¹

Beyond education, some antisemitism redefinition bills adopt the definition as a tool for “training, education, recognizing, and combating antisemitic hate crimes or discrimination and for tracking and reporting antisemitic incidents.”⁶² Using the definition to track and combat hate crimes will result in Palestine advocates—especially those in Arab, Muslim, and Palestinian communities—being surveilled, targeted, and harassed by law enforcement without justification.⁶³ Such bills give law enforcement yet another tool to intervene in communities that support Palestinian rights, continuing the terrible legacy of post-9/11 “counter-terror” surveillance that criminalized constitutionally protected speech and political activism among Muslim, immigrant, and other communities of color.⁶⁴ To prevent such criminalization and preserve freedom of expression, thought, and academia, it is imperative that we challenge these laws designed to undermine communities engaged in justice work.

IV. A “PALESTINE EXCEPTION” AND ANTI-PALESTINIAN DISCRIMINATION ON CAMPUSES

The discussion about how Palestine-Israel politics has played out on campuses and the implications for the First Amendment can be a vast one. The focus in Symposium conversations on reactions to Palestine activists' tactics drowned out critical context. It's impossible to fully grasp the campus arena without understanding the extent of the repression that Palestine advocates face. Palestine Legal has documented this extensively, illuminating the primary tactics that Israel

61. *Id.*

62. See H.B. 1606, 2023 Sess. (Va. 2023).

63. In 2021, Palestine Legal received several reports of people being questioned for their activism on social media by law enforcement agents who claimed that they were simply following up on complaints. These reports show a pattern of smear campaigns launched by individuals or Israel advocacy groups, who then file complaints to enlist law enforcement authorities to monitor and intimidate activists. PALESTINE LEGAL, 2021 YEAR IN REVIEW: PALESTINIAN UPRISING GENERATES RECORD SOLIDARITY—AND FIERCE BACKLASH 16 (2022), <https://palestinelegal.org/2021-report> (on file with the *University of the Pacific Law Review*).

64. Danya Zituni, *Several US Cities Have Increased Policing of Palestine Solidarity*, TRUTHOUT (Dec. 12, 2022), https://truthout.org/articles/several-us-cities-have-increased-policing-of-palestine-solidarity/#gf_1097213664 (on file with the *University of the Pacific Law Review*).

and its allies use, as well as the trends in repression from year to year.⁶⁵ I focus here on how Israel and its allies have waged a censorship war against Palestine advocates on campuses, undermining free speech and academic freedom in dangerous ways, subverting anti-discrimination laws, and causing anti-Palestinian discrimination. The primary weapons Israel-aligned groups have used are accusations of antisemitism, often backed by the above-mentioned redefinition of antisemitism. Even where this redefinition is not codified into law or university policies, accusations have led universities to implement heightened scrutiny of Palestine activism and academic work, often resulting in free speech violations and discrimination against Palestinians and their allies.

A couple of different tactics drive these accusations. The first involves an astonishing online bullying machine that has evolved over the last decade to create an environment of fear and intimidation for Palestine advocates—mainly students and academics. Several groups, some of them anonymous, are focused on generating and disseminating negative content, facilitating doxing of Palestine advocates, and pressuring schools, employers, and law enforcement to investigate individuals. The most infamous, Canary Mission, is an anonymously-run blacklisting site that targets students, professors, and community activists who have publicly advocated for Palestinian rights. The website describes its mission as “investigat[ing] hatred across the entire political spectrum.”⁶⁶ The vast majority of individuals, however, are profiled solely because they are advocates for Palestinian rights and/or support BDS.

The site profiles thousands of individuals. Blacklisted individuals have reported being questioned by employers, graduate schools, and the FBI⁶⁷ about their support for Palestinian rights after Canary Mission contacted law enforcement. They have been put on leave, denied bank accounts, and received death threats. Israeli officials have also used Canary Mission to deny entry to Israel and occupied Palestinian territory.⁶⁸ Palestinians returning home, students, and faculty have reported seeing and being questioned about their Canary Mission profiles when passing through Israeli border control.⁶⁹

65. PALESTINE LEGAL & CTR. FOR CONST. RTS., *supra* note 28; *see also* PALESTINE LEGAL, 2020 YEAR-IN-REVIEW: THE MOVEMENT WILL NOT BE CANCELED (2021), <https://palestinelegal.org/2020-report> (on file with the *University of the Pacific Law Review*); PALESTINE LEGAL, *supra* note 59, at 16; PALESTINE LEGAL, 2022 YEAR-IN-REVIEW: BOLDER AND MORE RESILIENT PALESTINE ADVOCACY RESISTS GROWING BACKLASH (2023), <https://palestinelegal.org/2022-report> (on file with the *University of the Pacific Law Review*).

66. *Palestine Legal Submits Report to UN on Canary Mission Discrimination*, PALESTINE LEGAL (Mar. 30, 2021), <https://palestinelegal.org/news/2021/3/30/palestine-legal-submits-report-to-un-canary-mission-discrimination> (on file with the *University of the Pacific Law Review*).

67. Alex Kane, *The FBI Is Using Unvetted, Right-Wing Blacklists to Question Activists About Their Support for Palestine*, INTERCEPT (June 24, 2018), <https://theintercept.com/2018/06/24/students-for-justice-in-palestine-fbi-sjp/> (on file with the *University of the Pacific Law Review*).

68. Mairav Zonszein, *Israel Denies Entry to Four American Civil Right Leaders*, +972 Mag. (May 3, 2018), <https://www.972mag.com/israel-denies-entry-to-prominent-american-civil-rights-leaders> (on file with the *University of the Pacific Law Review*).

69. Josh Nathan-Kazis, *Canary Mission’s Threat Grows, from U.S. Campuses to the Israeli Border*, FORWARD (Aug. 3, 2018), <https://forward.com/news/407279/canary-missions-threat-grows-from-us-campuses-to-the-israeli-border> (on file with the *University of the Pacific Law Review*).

This and other groups that engage in similar blacklisting and doxing tactics have created a vast private surveillance operation that tracks individuals on social media, and appears to have on the ground surveillance capabilities as well.⁷⁰ Surveillance firms run by ex-Israeli spies and other outfits also engage in black ops against student activists.⁷¹ One Israel advocate boasted about Canary Mission's intent and effect on Palestine activists in undercover footage captured for a censored Al Jazeera documentary. He explained, "[T]hey either shut down or they spend time responding to it and investigating it, which is time they can't spend attacking Israel. That's incredibly effective."⁷² There is evidence that the Israeli government has funded and dictated similar strategies to attack the movement.⁷³ Though the movement has persevered, the impact on students and academics has been severe, causing loss of employment, academic and other investigations, anxiety about safety, job prospects, ability to visit family in Palestine, and engaging in or being public about activism for Palestinian rights.⁷⁴

The other mechanism that Israel groups use to make antisemitism accusations are legal discrimination complaints. Israel advocates have subjected students, professors, and campus administrators across the U.S. to a barrage of legal complaints, deploying the antisemitism redefinition to censor speech critical of Israel or favorable to Palestinian rights. Since 2019, Israel advocates have filed at least fifteen complaints with the Department of Education's Office for Civil Rights (OCR), alleging campus speech about Palestine threatens Jewish students and violates civil rights law.⁷⁵

70. Josh Nathan-Kazis, *A New Wave of Hardline Anti-BDS Tactics Are Targeting Students, and No One Knows Who's Behind It*, FORWARD (Aug. 2, 2018), <https://forward.com/news/407127/a-new-wave-of-hardline-anti-bds-tactics-aretargeting-students-and-no-one/> (on file with the *University of the Pacific Law Review*).

71. Adam Entous, *How a Private Israeli Intelligence Firm Spied on Palestinian Activists in the U.S.*, NEW YORKER (Feb. 28, 2019), <https://www.newyorker.com/news/news-desk/how-a-private-israeli-intelligence-firm-spied-on-pro-palestinian-activists-in-the-us> (on file with the *University of the Pacific Law Review*).

72. See *Canary Mission's Veil of Anonymity Pierced*, PALESTINE LEGAL (Aug. 30, 2018), <https://palestinelegal.org/news/2018/8/30/canary-missions-veil-of-anonymity-pierced> (on file with the *University of the Pacific Law Review*).

73. Ali Abunimah, *Israel Using "Black Ops" Against BDS, Says Veteran Analyst*, ELEC. INTIFADA (Sept. 5, 2016), <https://electronicintifada.net/blogs/ali-abunimah/israel-using-black-ops-against-bds-says-veteran-analyst> (on file with the *University of the Pacific Law Review*).

74. See, e.g., Alex Kane, *'It's Killing the Student Movement: 'Canary Mission's Blacklist of Pro-Palestine Students Is Taking a Toll*, INTERCEPT (Nov. 22, 2018), <https://theintercept.com/2018/11/22/israel-boycott-canary-mission-blacklist> (on file with the *University of the Pacific Law Review*).

75. This is likely an undercount as public information is limited. For a list of complaints filed, see Letter from Palestine Legal, et al., to Hon. Catherine E. Lhamon, Assistant Sec'y for C.R., & Monique Dixon, Deputy Assistant Sec'y for Pol'y 4 n.11 (Aug. 31, 2022), <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/63b6de30db689e6788acce6b/1672928817287/Civil+Rights+Orgs+Letter+to+OCR+8-31-22.pdf> (on file with the *University of the Pacific Law Review*). Additional complaints filed include one against George Washington University, and one against UC Berkeley, see *id.* at 5; Christian Martinez, *UC Berkeley Student Groups' Refusal to Invite Zionist Speakers Drwas Civil Rights Complaint*, L.A. TIMES (Nov. 24, 2022), <https://www.latimes.com/california/story/2022-11-24/uc-berkeley-law-student-groups-ban-zionist-speakers> (on file with the *University of the Pacific Law Review*).

Israel-aligned groups have threatened many more complaints in legal letters to university administrators, which they routinely publish to achieve damaging headlines that embarrass universities, as we documented in a letter to OCR:

Citing the IHRA definition (or definitions with similar content), Israel advocates have sent legal complaints and/or threatening letters focused on classroom discussions (UCLA), guest lectures (Indiana), film screenings (Pitzer and Pomona Colleges), youth organizing conferences (University of Michigan), student resolutions to divest from human rights violations (University of Illinois) and similar speech activity. The complaints demand that universities punish students, faculty, and guest speakers who talk about Palestinian history, identity, and conditions, or U.S. policy towards Palestinians.⁷⁶

To illustrate the impact of both the online bullying and other accusations of antisemitism, one example in particular shows how such targeted campaigns against individuals can result in anti-Palestinian discrimination.⁷⁷ In June 2020, Ahmad Daraldik made history as the first Palestinian-American president of the Florida State student senate.⁷⁸ Days later, his detractors surfaced a photo of Ahmad in Palestine standing next to a statue of Nelson Mandela in the occupied Palestinian city of Ramallah, with a caption expressing outrage at the Israeli occupation. Almost immediately Ahmad faced a harassment campaign attempting to shame him for sharing his experiences as a Palestinian. Ahmad was broadly attacked as unfit for office, based on the IHRA definition and a similar rationale that speech describing Palestinian life under Israeli occupation is antisemitic.

Ahmad endured months of anti-Palestinian bullying including dozens of Islamophobic, racist, violent and misogynistic private messages; Florida legislators pressuring students to take action against him, including via threats to withdraw state funding for the school; three petitions calling for Ahmad's removal and even expulsion; two university measures adopting the IHRA definition; two resolutions passed by city councils in Florida condemning Ahmad; a statement released by the FSU administration condemning Ahmed for "anti-Israel rhetoric," which was later edited to refer to "anti-Semitic rhetoric"; and a mission on Act.il, an app partially funded by Israel, urging social media users to send pre-drafted messages to FSU complaining about Ahmad in return for rewards, badges, and

76. Letter from Palestine Legal, et al., to Hon. Catherine E. Lhamon, Assistant Sec'y for C.R., & Monique Dixon, Deputy Assistant Sec'y for Pol'y (Aug. 31, 2022), <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/63b6de30db689e6788acce6/1672928817287/Civil+Rights+Orgs+Letter+to+OCR+8-31-22.pdf> (on file with the *University of the Pacific Law Review*).

77. For a treatment of the way that anti-Palestinian racism manifests, see Yasmeen Abu-Laban & Abigail B. Bakan, *Anti-Palestinian Racism and Racial Gaslighting*, POL. Q., Sept. 2022, at 508, <https://onlinelibrary.wiley.com/doi/pdf/10.1111/1467-923X.13166> (on file with the *University of the Pacific Law Review*).

78. *Student Leader Challenges Anti-Palestinian Campus Climate at FSU*, PALESTINE LEGAL (Apr. 13, 2021), <https://palestinelegal.org/case-studies/2021/4/13/student-leader-challenges-anti-palestinian-campus-climate-at-florida-state-university> (on file with the *University of the Pacific Law Review*).

online points.⁷⁹ From the stress of constant bullying messages and the pressure campaign against him, Ahmad had difficulty sleeping, fell ill, fell behind academically, could not participate in student government, lost his sense of security, and could not function on a daily basis or speak about being Palestinian without causing further disruptions to his education. Palestine Legal represented Ahmad throughout this ordeal, and filed a discrimination complaint against FSU with OCR, which opened an investigation into the complaint over two years later.⁸⁰

This example of Israel advocates weaponizing antisemitism accusations against Palestinians illustrates how many accusations, and the antisemitism definition they rely on, twist anti-discrimination laws in ways that obfuscate the real discrimination and racism at issue: that of Israel against Palestinians. The antisemitism definition is but an extension of that racism—a way to disingenuously turn the tables against a political movement that is challenging Israel’s oppression of Palestinians. The extreme personal attacks that hundreds of Palestine advocates face have a severe impact on their ability to continue advocacy, their mental and physical health, and ultimately, the civic space available to advocate for, learn about, and teach on Palestine freely and without fear of intimidation and bullying.

The rise in antisemitism, alongside other racism and bigotry, is undeniable, and we must all challenge the growing brazenness of such bigotry in the United States in order to create safety for our various communities.⁸¹ The primary locus of this problem is the growing white nationalist movement that is responsible for inciting several deadly attacks against Jewish, Black, Asian and other communities in the U.S. To properly address the roots of antisemitic bigotry requires honesty about its sources, about what is actually political discourse and not bigotry, and about the fact that Israel is itself a purveyor of racism, as its current government reveals unabashedly.

Unfortunately, the weaponization of the antisemitism smear against Palestine advocacy has taken on uncontrollable proportions. The Israel juggernaut is rolling full steam ahead, with human rights and the First Amendment directly in its path. Our ability to confront common threats ultimately depends on courageously confronting Israel’s history of and continuing harm, which so many Palestinians and their allies are exposing, at no small risk to themselves. The limitations of the conference discussed above prevented a serious investigation into these threats their legal implications for all.

79. *Id.*

80. *Dept. of Education Opens Investigations into Anti-Palestinian Discrimination at Florida State University*, PALESTINE LEGAL (June 22, 2023), <https://palestinelegal.org/news/dept-of-ed-investigates-fsu> (on file with the *University of the Pacific Law Review*).

81. For an approach based in the concept of safety through solidarity, see *Principles for Dismantling Antisemitism: A Progressive Jewish Response to the Jerusalem Declaration*, JEWISH VOICE FOR PEACE (Apr. 5, 2021), <https://www.jewishvoiceforpeace.org/2021/04/jerusalem-declaration> (on file with the *University of the Pacific Law Review*).

V. CONCLUDING OBSERVATIONS

The Symposium provided a unique opportunity to explore the First Amendment implications of Israel-aligned groups' repression of the Palestine movement in the U.S. This paper highlights ways the framing and composition of the symposium led instead to a focus on how the movement impacts Israel advocates. This resulted in an insufficient exploration of the First Amendment crises to which Israel groups' repression of the Palestine movement is contributing, and on the harms to Palestinians and their allies. To fill that gap, this paper provides context about the legislative assault on Palestine advocacy and the threats it poses to fundamental rights. It also describes the vast repression machine Israel and its allies operate in the campus arena, and its impact on people who speak out for Palestinian rights.

Ultimately, this paper shows that targeting a justice movement requires attacking the First Amendment and other rights that allow a movement to build. The experiences of other justice movements, facing similar assaults on their ability to organize, echo this relentless targeting of Palestine advocates. We may not all have the same interest in advancing justice and human rights, but those of us who do must first protect the human rights defenders and justice seekers who are under attack. Ultimately, they are the ones on the front lines, pushing the boundaries. They are the ones demanding that we stop turning a blind eye to the vast harms that governments and private corporations enable and take unapologetic, bold stances for a just world.

This may mean using the legal tools we have to defend and expand the space for movements to push for the bold change we need to protect people and planet. It also means intentionally working to uplift the voices and experiences of those most affected and most often silenced. And it means moving with humility and working across movements, knowing our futures are bound together, so if one of us isn't free, none of us will be. Perhaps a future symposium can adopt such goals and premises, without fear of attacks from reactionary forces aiming to thwart movements for collective freedom.

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