

## JURISPRUDENCE OF THE NEW ANTI-SEMITISM

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*[I]f the watchman sees the sword advancing and does not blow the horn, so that the people are not warned, and the sword comes and destroys one of them . . . I will demand a reckoning for his blood from the watchman.*

*Ezekiel 33:6<sup>1</sup>*

### INTRODUCTION

In his best-known work, Nobel laureate Elie Wiesel tells the story of his father's death in the Shoah.<sup>2</sup> As a young boy in Nazi-occupied Hungary, Wiesel saw the extermination begin with a decree forbidding Jews from leaving their homes, on pain of death, for three days. After this time had passed, a new decree was issued: "Every Jew must wear the yellow star."<sup>3</sup> When friends asked Wiesel's father what he thought of the situation, he responded that it was not so grim. Perhaps, Wiesel comments, his father did not

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1. *Ezekiel 33:6* (Tanakh). Chief Rabbi Jonathan Sacks of the United Kingdom first observed the relevance of this parable to the problem of the new anti-Semitism. See Jonathan Sacks, *A New Antisemitism?*, in *A NEW ANTISEMITISM? DEBATING JUDEOPHOBIA IN 21ST-CENTURY BRITAIN* 38, 42 (Paul Iganski & Barry Kosmin eds., 2003).

2. *ELIE WIESEL, NIGHT* (Stella Rodway trans., 1989).

3. *Id.* at 20. For a historical analysis of the Nazi use of this symbol, see Philip Friedman, *The Jewish Badge and the Yellow Star in the Nazi Era*, 17 *HISTORIA JUDAICA* 41 (1955).

want to dishearten them further.<sup>4</sup>

“The yellow star?” he asked. “Oh, well, what of it? You don’t die of it.”<sup>5</sup>

Wiesel knew better. “Poor Father!” he lamented. “Of what then did you die?”<sup>6</sup> If Wiesel’s comment shudders through us now, it is because Wiesel’s father moves among us still, more than sixty years after his murder, asking Jews to accept with equanimity the yellow stars that others seek to affix—marks that stigmatize, shame, and ghettoize Jewish bearers<sup>7</sup> in Israel and throughout the diaspora, as Jews have been marked since ancient times.<sup>8</sup> In affixing the yellow star, the Nazis and their enablers set in place a mechanism that could have only one conclusion. This is the meaning of the yellow star wherever it is found: “Anti-Semitism may begin with words, but rarely stops with words.”<sup>9</sup> When we examine such marks in the twenty-first century, it is not because they have the same history, but because they have the same teleology.

## I. THE NEW ANTI-SEMITISM

### A. *The Question*

What is wrong with the new, putatively political anti-Semitism that is now resurgent across the globe, including on American college campuses? The question is deceptively simple, but it carries considerable resonance.<sup>10</sup> Numerous governmental agencies,<sup>11</sup>

4. See WIESEL, *supra* note 2, at 20.

5. *Id.*

6. *Id.* Similarly, in 1942, Helmut Knochen, then the chief of the security service and the security police for occupied France and Belgium, observed that the Jewish badge was “another step on the road to the final solution.” Israel Gutman, *Jewish Badge*, in 1 ENCYCLOPEDIA OF THE HOLOCAUST 138, 141 (Israel Gutman ed., 1990).

7. A contemporaneous observer characterized the “impression one receives” from such badges as “appalling. . . . [O]ne quietly arrives at the conclusion that one is dealing here with a completely degenerate, inferior part of human society.” Friedman, *supra* note 3, at 42 (quoting Herbert Morgen).

8. See generally Gutman, *supra* note 6, at 138–43. Such marks have included “the Jewish hat, the Jewish yellow spot, the Jewish badge, and the Star of David.” Friedman, *supra* note 3, at 41.

9. See U.S. DEP’T OF STATE, CONTEMPORARY GLOBAL ANTI-SEMITISM: A REPORT PROVIDED TO THE UNITED STATES CONGRESS (2008) (quoting Vice President Richard B. Cheney), available at <http://www.state.gov/documents/organization/102301.pdf> [hereinafter 2008 GLOBAL ANTI-SEMITISM REPORT]. For an analysis of the historical relationship between anti-Semitic propaganda and anti-Semitic persecution, see ALEXANDER TESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS 11–27 (2002).

10. The form of this question is adopted from the analogous inquiry pursued in Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

11. See, e.g., ALL-PARTY PARLIAMENTARY GROUP AGAINST ANTISEMITISM,

nongovernmental organizations,<sup>12</sup> scholars,<sup>13</sup> and civil-rights practitioners<sup>14</sup> have documented the dangers inherent in anti-Semitism's recent manifestations, both globally and on United States college campuses.<sup>15</sup> Yet many critics still deny its existence,<sup>16</sup> severity,<sup>17</sup> newness,<sup>18</sup> anti-Semitic nature,<sup>19</sup> or difference from mere

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REPORT OF THE ALL-PARTY PARLIAMENTARY INQUIRY INTO ANTISEMITISM (2006), available at <http://thepeca.org/Report.pdf> [hereinafter 2006 ALL-PARTY REPORT]; 2008 GLOBAL ANTI-SEMITISM REPORT, *supra* note 9; U.S. DEP'T OF STATE, REPORT ON GLOBAL ANTI-SEMITISM (2005), available at <http://www.state.gov/g/drl/rls/40258.htm> [hereinafter 2005 GLOBAL ANTI-SEMITISM REPORT].

12. See, e.g., ILAN MOSS, EUROPEAN JEWISH CONG., ANTI-SEMITIC INCIDENTS AND DISCOURSE IN EUROPE DURING THE ISRAEL-HEZBOLLAH WAR (2006), available at [http://www.eurojewcong.org/ejc/DOC/601\\_AS\\_report.pdf](http://www.eurojewcong.org/ejc/DOC/601_AS_report.pdf); THE STEPHEN ROTH INST. FOR THE STUDY OF CONTEMPORARY ANTISEMITISM AND RACISM, TEL AVIV UNIV., ANTISEMITISM WORLDWIDE 2007 (Dina Porat & Esther Webman eds., 2008), available at <http://www.tau.ac.il/Anti-Semitism/asw2007/gen-analysis-07.pdf> [hereinafter ANTISEMITISM WORLDWIDE].

13. See, e.g., PHYLLIS CHESLER, THE NEW ANTI-SEMITISM: THE CURRENT CRISIS AND WHAT WE MUST DO ABOUT IT (2003); BERNARD HARRISON, THE RESURGENCE OF ANTI-SEMITISM: JEWS, ISRAEL, AND LIBERAL OPINION (2006); WALTER LAQUEUR, THE CHANGING FACE OF ANTISEMITISM: FROM ANCIENT TIMES TO THE PRESENT DAY (2006); GABRIEL SCHOENFELD, THE RETURN OF ANTI-SEMITISM (2004); PIERRE-ANDRÉ TAGUIEFF, RISING FROM THE MUCK: THE NEW ANTI-SEMITISM IN EUROPE (2004); Sacks, *supra* note 1; Ruth R. Wisse, *On Ignoring Anti-Semitism*, in *THOSE WHO FORGET THE PAST: THE QUESTION OF ANTI-SEMITISM 189* (Ron Rosenbaum ed., 2004).

14. See, e.g., ABRAHAM FOXMAN, NEVER AGAIN? THE THREAT OF THE NEW ANTI-SEMITISM (2003).

15. For documentation of the recent anti-Semitism problems on American college campuses, see, for example, GARY A. TOBIN ET AL., THE UNCIVIL UNIVERSITY (2005); U.S. COMM'N ON CIVIL RIGHTS, CAMPUS ANTI-SEMITISM (2006), available at <http://www.usccr.gov/pubs/081506campusantibrief07.pdf> [hereinafter CAMPUS ANTI-SEMITISM]; Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL RTS. J. 837 (2007). In other countries, recent campus anti-Semitism has been detailed. E.g., ACADEMICS AGAINST ISRAEL AND THE JEWS (Manfred Gerstenfeld ed., 2007); MICHEL WIEVIORKA, THE LURE OF ANTI-SEMITISM: HATRED OF JEWS IN PRESENT-DAY FRANCE 311–56 (Kristin Couper Lobel & Anna Declerck trans., 2007); Geoffrey Short, *Antisemitism on Campus: A View from Britain*, in ANTISEMITISM: THE GENERIC HATRED 119 (Michael Fineberg et al. eds., 2007); Manfred Gerstenfeld, *2007–2008: Another Year of Global Academic Anti-Semitism and Anti-Israelism 1*, ISRAEL E NEWS, Sept. 14, 2008, <http://www.israelenews.com/view.asp?ID=3098>.

16. See, e.g., NORMAN FINKELSTEIN, BEYOND CHUTZPAH: ON THE MISUSE OF ANTI-SEMITISM AND THE ABUSE OF HISTORY (2005) (denying the existence of a new anti-Semitism).

17. See, e.g., Leon Wieseltier, *Against Ethnic Panic: Hitler Is Dead*, in *THOSE WHO FORGET THE PAST: THE QUESTION OF ANTI-SEMITISM*, *supra* note 13, at 178, 178 (arguing that claims of a new anti-Semitism are overstated and panic-ridden). Ruth R. Wisse rebuts Wieseltier's argument in Wisse, *supra* note 13, at 189–207 (urging the West not to ignore or underestimate current problems as it ignored Hitler's persecution of European Jews). While Walter Laqueur has clearly adumbrated the dangers of the new anti-Semitism, he has admonished that "it is also true that there was and is a tendency to exaggerate

criticism of Israeli policies.<sup>20</sup> Moreover, some argue that it is a stratagem devised to silence opposition to these policies<sup>21</sup> (although others not only reject this argument but also denounce certain of its recent expressions for perpetuating anti-Jewish stereotypes).<sup>22</sup> For this reason, it is necessary to demonstrate that persons subjected to the new anti-Semitism are harmed in a manner that should be cognizable to the law.

This inquiry is not unlike the justificatory process that was once believed necessary to demonstrate the wrongfulness of racial

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the intensity of the ‘new anti-Semitism.’” LAQUEUR, *supra* note 13, at 16.

18. See, e.g., Anthony Julius, *Is There Anything “New” in the New Antisemitism?*, in *A NEW ANTISEMITISM? DEBATING JUDEOPHOBIA IN 21ST-CENTURY BRITAIN*, *supra* note 1, at 68; Brian Klug, *The Myth of the New Anti-Semitism: Reflections on Anti-Semitism, Anti-Zionism and the Importance of Making Distinctions*, THE NATION, Feb. 2, 2004, at 23, 23, available at <http://www.thenation.com/doc/20040202/klug>. Some critics have tried to exploit the fact that “newness” has been attributed to anti-Semitism since at least the 1970s with differing meanings. See, e.g., FINKELSTEIN, *supra* note 16. The earlier works had referred simply to postwar anti-Semitism emanating, for example, from neo-Nazi groups; since at least the beginning of the twenty-first century, however, this term refers to substantive differences from earlier forms of anti-Semitism. LAQUEUR, *supra* note 13, at 5. In fact, Alvin Rosenfeld has identified four new elements to the “new” anti-Semitism: the conflation of interests among the extreme right, the intellectual left, and radical Islam; the use of traditional anti-Semitic tropes projected upon the State of Israel; the disproportionate focus of activity within the Islamic world rather than within Christianity; and insistent questioning of the right of the Jewish people to self-determination. See ALVIN ROSENFELD, “PROGRESSIVE” JEWISH THOUGHT AND THE NEW ANTI-SEMITISM 7–9 (2006). In the multimillennial history of anti-Semitism, these strands would still count as “new” even if some of them could be traced back to the 1967 War or even to the immediate aftermath of World War II.

19. That is to say, they question whether the “new anti-Semitism” is in fact anti-Semitic. See, e.g., FINKELSTEIN, *supra* note 16, at 21 (arguing that “the allegation of a new anti-Semitism is neither new nor about anti-Semitism”).

20. There are few, if any, commentators who argue that all criticism of Israel constitutes anti-Semitism. Moreover, some or all of the most vehement supporters of Israel have explicitly and forcefully rejected this argument. Nevertheless, those who document the new anti-Semitism inevitably are required to point out that “[t]he fact that criticism of Israel is not per se antisemitism is so obvious that it hardly needs repeating once again.” LAQUEUR, *supra* note 13, at 6.

21. See, e.g., FINKELSTEIN, *supra* note 16, at 28 (claiming that “the club of anti-Semitism was mainly wielded to assail Israel’s critics”); JOHN J. MEARSHEIMER & STEPHEN M. WALT, THE ISRAEL LOBBY AND U.S. FOREIGN POLICY 191–96 (2007) (describing anti-Semitism claims as the “Great Silencer”); Michael Lerner, Op-Ed., *There Is No New Anti-Semitism*, BALTIMORE SUN, Feb. 20, 2007 (arguing that “[t]he impact of the silencing of debate about Israeli policy on Jewish life has been devastating”).

22. As Bernard Harrison has observed, this charge is often combined with stereotypical assertions of Jewish conspiratorial control of the government and the media. BERNARD HARRISON, ISRAEL, ANTI-SEMITISM, AND FREE SPEECH 32–33 (2007).

segregation in the public schools<sup>23</sup> and sexual harassment in the workplace.<sup>24</sup> In each case, the wrong consists of a violation of the antidiscrimination principle, but the manner in which each wrong may be deemed discriminatory requires analysis.<sup>25</sup> In this case, it must be shown how some incidents of the new anti-Semitism, which may appear to target Israel rather than individual Jews as such, nevertheless constitute prohibited forms of discrimination against Jewish Americans. Under the conventional rubrics, the question amounts to whether the new anti-Semitism abrogates antidifferentiation or antisubordination principles.<sup>26</sup> Ultimately, the answer will turn on the extent to which this new phenomenon demeans Jews, encourages anti-Jewish prejudice, and derogates Jews as morally inferior. This Article will argue that the new anti-Semitism achieves these results in part through reracialization processes that stigmatize Jews as morally blameworthy and that mark them for reprisal.<sup>27</sup>

### B. Definitions

The new anti-Semitism, like anti-Semitism proper, encompasses

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23. See, e.g., Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421 (1960); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2422–24 (1994); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 355 (1949).

24. See, e.g., CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 174 (1979); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1230 (1998); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1023–26 (1986); Franke, *supra* note 10, at 693.

25. The most recent effort to comprehensively and analytically investigate the wrongfulness of illicit discrimination is DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* (2008).

26. For an overview of these principles, see John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 431–33, 436–38 (2002).

27. “Racialization” or “racial formation” has been defined as “the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed.” MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 55 (2d ed. 1994). Alternatively, Omi and Winant have also defined racial formation as “the process by which social, economic and political forces determine the content and importance of racial categories, and by which they are in turn shaped by racial meanings.” MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S*, at 61 (1986) [hereinafter OMI & WINANT, *FROM THE 1960S TO THE 1980S*]. “Racialization is an ideological process, an historically specific one. Racial ideology is constructed from pre-existing conceptual (or, if one prefers, “discursive”) elements and emerges from the struggles of competing political projects and ideas seeking to articulate similar elements differently.” Michael Omi & Harold Winant, *Racial Formations, in RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY* 26, 31 (Paula S. Rothenberg ed., 2d ed. 1992) [hereinafter Omi & Winant, *Racial Formations*].

ideology, attitude, and practice. Many important definitions of anti-Semitism, such as Merriam-Webster's long-standing, influential formulation<sup>28</sup> ("hostility toward or discrimination against Jews as a religious, ethnic, or racial group"<sup>29</sup>), recognize both the attitudinal and the practical aspects of the phenomenon.<sup>30</sup> The ideological dimension of anti-Semitism was classically recognized in Theodor Adorno's midcentury definition: "This ideology [of anti-Semitism] consists . . . of stereotyped negative opinions describing the Jews as *threatening, immoral, and categorically different* from non-Jews, and of hostile attitudes urging various forms of *restriction, exclusion, and suppression* as a means of solving 'the Jewish problem.'"<sup>31</sup>

While the influence of Adorno's early work on prejudice has suffered from the passage of time, this now-antique conception shows disquieting freshness as a characterization of the new anti-Semitism, as long as the concept of Israel is substituted for "Jewish" and "the Jews."<sup>32</sup> Thus, the ideology of the new anti-Semitism consists of negative stereotypes describing the Jewish state and its members, supporters, and coreligionists as immoral, threatening, and categorically different than other people, and it favors the use of exclusion, restriction, and suppression in solving the "Israel problem." Thus, the ideology of the new anti-Semitism consists of negative stereotypes describing the Jewish state and its members, supporters, and coreligionists as *threatening, immoral, and categorically different* from other people, and it favors the use of *restriction, exclusion, and suppression* to solve the "Israel problem."

This substitution is endemic of the new anti-Semitism. In an important modern reformulation of the definition of anti-Semitism,<sup>33</sup>

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28. The U.S. Department of State has relied upon Merriam-Webster's long-standing definition of anti-Semitism as "hostility toward or discrimination against Jews as a religious, ethnic, or racial group." 2008 GLOBAL ANTI-SEMITISM REPORT, *supra* note 9, at 6 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 96 (Philip Babcock Gove ed., 2002) [hereinafter WEBSTER'S]).

29. Significantly, since the term "anti-Semitism" was first coined, it has referred only to an animosity directed at Jews rather than to a general antipathy towards the various semitic peoples. See LAQUEUR, *supra* note 13, at 21-22; BERNARD LEWIS, SEMITES AND ANTI-SEMITES: AN INQUIRY INTO CONFLICT AND PREJUDICE 117 (1986).

30. The Merriam-Webster definition is useful in its breadth, as it suggests the multiplicity of prejudices subsumed under this category. WEBSTER'S, *supra* note 28, at 96.

31. T.W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY 71 (1950).

32. For a discussion of *The Authoritarian Personality's* waning influence and an example of its continuing vitality, see Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313, 318-19 (2000).

33. The extent of the EUMC Working Definition's influence may be seen, for example, in its adoption by both the 2008 GLOBAL ANTI-SEMITISM REPORT, *supra* note 9, at 6, and the 2006 ALL-PARTY REPORT, *supra* note 11, at 5.

the European Monitoring Centre on Racism and Xenophobia (“EUMC”) established the following working definition: “Anti-Semitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of anti-Semitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.”<sup>34</sup> The U.S. Department of State recently determined that “this definition provides an adequate initial guide by which anti-Semitism can eventually both be defined and combated.”<sup>35</sup> The EUMC definition is important for its explicit recognition that “such manifestations could also target the State of Israel, conceived as a Jewish collectivity.”<sup>36</sup> In particular, the EUMC definition provides several recent examples of anti-Semitism in public life, the media, schools, the workplace, and religious institutions that relate to this collectivity, including the following:<sup>37</sup>

Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective—such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.<sup>38</sup>

Accusing Jews as a people of being responsible for real or

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34. European Forum on Antisemitism, Working Definition of Antisemitism, <http://www.european-forum-on-antisemitism.org/working-definition-of-antisemitism/english> (last visited Mar. 17, 2009) [hereinafter Working Definition].

35. OFFICE TO MONITOR & COMBAT ANTI-SEMITISM, U.S. DEPT’ OF STATE, FACT SHEET: “WORKING DEFINITION” OF ANTI-SEMITISM (2007). The State Department also adopted the EUMC’s working definition in the 2008 GLOBAL ANTI-SEMITISM REPORT, *supra* note 9, at 6.

36. Working Definition, *supra* note 34.

37. *Id.*

38. This “classic stereotype” criterion for the new anti-Semitism has been widely recognized. See, e.g., CAMPUS ANTI-SEMITISM, *supra* note 15, at 72 (“On many campuses, anti-Israeli or anti-Zionist propaganda has been disseminated that includes traditional anti-Semitic elements, including age-old anti-Jewish stereotypes and defamation . . . [such as] the medieval anti-Semitic blood libel . . . as well as . . . ancient stereotypes of Jews as greedy, aggressive, overly powerful, or conspiratorial.”). One particularly important example of such stereotypes, “demonization,” has frequently been identified as an indicator of anti-Semitism. See, e.g., Bernard Lewis, *The New Anti-Semitism: First Religion, Then Race, Then What?*, 75 AM. SCHOLAR 25, 26–27 (2006) (identifying demonization as an indicator of anti-Semitism); Natan Sharansky, *Seeing Anti-Semitism in 3D*, JERUSALEM POST, Feb. 24, 2004, at 13 (“The first [criterion for anti-Semitism] is . . . demonization. . . . Jews were demonized for centuries as the embodiment of evil. Therefore, today we must be wary of whether the Jewish state is being demonized . . .”); Letter from Robert Wistrich, Dir., Vidal Sassoon Int’l Ctr. for the Study of Anti-Semitism, Hebrew Univ. of Jerusalem, to Brian Klug, Senior Research Fellow, Oxford Univ. (2005), available at <http://sicsa.huji.ac.il/klug.html>.

imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.<sup>39</sup>

Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust).

Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.

Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.<sup>40</sup>

These examples demonstrate the EUMC's insight that the putatively political or anti-Israeli cast of much new anti-Semitism shrouds significant continuities with antecedent forms of the "longest hatred." In addition, the EUMC working definition provides the following examples of "the ways in which anti-Semitism manifests itself with regard to the State of Israel taking into account the overall context":<sup>41</sup>

Denying the Jewish people their right to self-determination . . . .<sup>42</sup>

Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.<sup>43</sup>

Using the symbols and images associated with classic anti-Semitism (e.g., claims of Jews killing Jesus or blood libel)

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39. The attribution of collective wrongdoing to particular individuals, regardless of fault, is the defining attribute of prejudice under some conceptions. *See, e.g.*, GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 8 (1958) (defining prejudice as "an avertive or hostile attitude toward a person who belongs to a group, simply because he belongs to that group, and is therefore presumed to have the objectionable qualities ascribed to the group"). In traditional Christian anti-Semitism, this played out in the deicide myth; more recently, it has manifested itself in assaults on diasporic Jews for fabricated complicity in alleged Israeli atrocities.

40. Working Definition, *supra* note 34.

41. *Id.*

42. *See, e.g.*, Irwin Cotler, *Human Rights and the New Anti-Jewishness*, *JERUSALEM POST*, Feb. 6, 2004, at 19 (identifying "discrimination against, denial of, or assault upon the right of the Jewish people to live as an equal member of the family of nations" as a characteristic of the new anti-Semitism); Sharansky, *supra* note 38, at 13 (identifying "den[ial of] the legitimacy of the Jewish state" as a touchstone of the new anti-Semitism, reminiscent of earlier anti-Semites who "tried to deny the legitimacy of the Jewish religion, the Jewish people, or both"); Letter from Robert Wistrich, *supra* note 38 (describing the same).

43. For discussions of the double-standards indicator, see, for example, Lewis, *supra* note 38, at 26–27 (identifying double standards as an indicator of anti-Semitism); Sharansky, *supra* note 38, at 13 (noting that the use of double standards for Israel resembles the discriminatory treatment that the Jewish people have received for centuries).



to characterize Israel or Israelis.<sup>44</sup>

Drawing comparisons of contemporary Israeli policy to that of the Nazis.<sup>45</sup>

Holding Jews collectively responsible for actions of the state of Israel.<sup>46</sup>

The EUMC emphasizes, however, that criticism of Israel similar to that leveled against other countries does not constitute a form of anti-Semitism.<sup>47</sup> Indeed, virtually all commentators agree that criticism of Israel is not a form of anti-Semitism per se. For this reason, Alan Dershowitz has argued that the claim that critics of Israel are derogated as anti-Semites is a “straw man” and a “fabrication.”<sup>48</sup> The new anti-Semitism is a form of prejudice, not a form of criticism.

Some have argued that the criteria for distinguishing legitimate criticism of Israel from anti-Semitism are not self-evident and present philosophical and political difficulties.<sup>49</sup> In fact, the criteria by which anti-Semitic criticisms of Israel may be distinguished from non-anti-Semitic criticisms<sup>50</sup> have now become largely conventional.<sup>51</sup> They include the use of classic anti-Semitic

44. See *supra* note 38 and sources cited therein.

45. For discussions of Holocaust inversion as an indicator of anti-Semitism, see, for example, 2008 GLOBAL ANTI-SEMITISM REPORT, *supra* note 9, at 22; HARRISON, *supra* note 22, at 22–23; Howard Jacobson, *Wordsmiths and Atrocities Against Language: The Incendiary Use of the Holocaust and Nazism Against Jews*, in A NEW ANTISEMITISM? DEBATING JUDEOPHOBIA IN 21ST-CENTURY BRITAIN, *supra* note 1, at 102. An example may be seen in Oxford don Tom Paulin, who has argued that “Brooklyn-born” Jewish settlers should be killed: “They should be shot dead . . . . I think they are Nazis, racists, I feel nothing but hatred for them.” Omayma Abdel-Latif, “*That Weasel Word*,” AL-AHRAM WKLY. ONLINE, Apr. 4–10, 2002, <http://weekly.ahram.org/2002/580/cu2.htm>.

46. Working Definition, *supra* note 34.

47. *Id.*

48. See ALAN DERSHOWITZ, THE CASE AGAINST ISRAEL’S ENEMIES: EXPOSING JIMMY CARTER AND OTHERS WHO STAND IN THE WAY OF PEACE 4 (2008).

49. See, e.g., Jonathan Judaken, *So What’s New? Rethinking the “New Antisemitism” in a Global Age*, 42 PATTERNS OF PREJUDICE 531, 553 (2008).

50. It is now quite common to distinguish between anti-Semitism and “legitimate criticism of Israel.” In fact, this distinction is a fallacy of false alternatives. First, there are many criticisms of Israel that are neither anti-Semitic nor legitimate. For example, some criticisms may use unsound reasoning or preposterous factual assertions, but their speaker is pure of heart. Even if these criticisms should replicate or advance the cause of bigotry, they are not themselves anti-Semitic. Conversely, there are other criticisms of Israel that are legitimate (and even true), although the intent of the person speaking them is anti-Semitic. For example, a Judaeophobe might ignore the sins of all other nations while harping incessantly on Israeli failings that are quite real. Even if these criticisms should (incidentally) advance the cause of social justice, however, they are no less stained by the bigotry that is their source.

51. See Marcus, *supra* note 15, at 846–68 (distilling from numerous sources these four conventional criteria that distinguish the new anti-Semitism from

stereotypes, including the demonization of Jews or the Jewish state; the use of double standards for Israel and all other nations, including denial of national self-determination only to the Jews; comparisons between Israel and Nazi Germany; and holding Jews collectively responsible for Israeli policy.<sup>52</sup> What these four criteria have in common is that they all indicate when facially anti-Israeli expressions are in fact an expression of an underlying anti-Jewish animus.

The new anti-Semitism is the form of this bigotry that cloaks itself in the terms of a political discourse, directing towards Israel or Zionism the particular stereotypes and defamations traditionally directed at the Jewish people.<sup>53</sup> As the U.S. Department of State has recently observed, “the distinguishing feature of the new anti-Semitism is criticism of Zionism or Israeli policy that—whether intentionally or unintentionally—has the effect of promoting prejudice against all Jews by demonizing Israel and Israelis and attributing Israel’s perceived faults to its Jewish character.”<sup>54</sup> Needless to say, the form of anti-Zionism that is addressed here, and throughout this Article, is entirely distinct from those historical forms of anti-Zionism that do not arise from anti-Jewish animus but that instead arise, for example, from theological principle or political strategy.<sup>55</sup>

### C. *The Problem*

The new anti-Semitism is thus the fusion of anti-Semitism and anti-Zionism to facilitate the dehumanization and destruction of Jews, individually and collectively.<sup>56</sup> It is harmful because it

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other criticisms of Israel).

52. *Id.*

53. 2008 GLOBAL ANTI-SEMITISM REPORT, *supra* note 9, at 32 (noting that “[w]hile traditional anti-Semitism remains prevalent among extremist fringe groups and populations where xenophobic attitudes persist, ‘new anti-Semitism’ commonly manifests itself in the guise of opposition to Zionism and the existence and/or policies of the [S]tate of Israel”).

54. *Id.* at 4. The U.S. Department of State uses the Merriam-Webster definition, under which anti-Semitism is defined as “hostility toward or discrimination against Jews as a religious, ethnic, or racial group.” *Id.* at 6.

55. Confusion unavoidably results from the conflicting use of multiple conceptions of anti-Zionism, which in turn arises from the multiple conceptions of Zionism. As Bernard Lewis has explained, there are at least three distinct notions of Zionism: (1) the original belief, shared by only some Jews, that a Jewish national home was required to shelter Jews from persecution in what would eventually become a Jewish state, (2) the view shared by almost all Jews that the Jewish state, once established, should not be destroyed in order to achieve a certain conception of justice in the Middle East, and (3) the Jewish people as a whole with no exceptions. See LEWIS, *supra* note 29, at 17–19. The forms of anti-Zionism discussed here are opposed not to the first conception of Zionism but to the second and third.

56. The concept thus clearly excludes those who oppose the pre-Messianic establishment of the State of Israel as theologically premature, such as the

stigmatizes not only the Jewish state but also Jewish individuals, marking them as inhuman and subject to degradation.<sup>57</sup> Skeptics argue that much political anti-Semitism consists merely of anti-Israeli or anti-Zionist criticism and is not harmful to individual Jews. Those Jews who demonstrate personal harms are sometimes dismissed as “hysterical”<sup>58</sup> or are referred to psychotherapists.<sup>59</sup> In fact, this Article will demonstrate that the harm of the new anti-Semitism is inflicted on Jews individually and collectively, regardless of diasporic status.

In many cases, age-old anti-Semitic stereotypes and defamations are recast in contemporary political terms, castigating Israel and Zionism in terms historically used to denigrate Jews and Judaism.<sup>60</sup> In this formulation, Israel (mordantly characterized as the “Jew of the nations”<sup>61</sup>) is made the repository of age-old stereotypes and defamations classically equated with Jews: as “supernaturally powerful and crafty,” as conspiratorial, and as a malignant force responsible for the world’s evils.<sup>62</sup>

This political turn in anti-Semitism has had another consequence. Where political speech has social and legal protection, such as on the American college campus, politically inflected hate and bias incidents are more difficult to police without implicating constitutional protections and academic freedom concerns.<sup>63</sup> Indeed,

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*Neturei Karta*, or who oppose the State of Israel on general antinationalist grounds, including some anarchists, or who merely criticize substantive policies of the State of Israel as they would those of any other government.

57. In some instances, this is explicit, as in Iranian President Mahmoud Ahmadinejad’s August 2, 2006, comment on the status of Zionists: “Are they human beings?” he asked. “They are a group of blood thirsty savages putting all other criminals to shame.” Aaron Abramovich, Dir.-Gen., Isr. Foreign Ministry, Address to the International Conference of the Global Forum for Combating Antisemitism (Feb. 24, 2008) (transcript available at the Israel Ministry of Foreign Affairs Online News Archives) (quoting Iranian President Mahmoud Ahmadinejad).

58. See Letter from Charles R. Love, Program Manager, Office for Civil Rights, Region IX, U.S. Dep’t of Educ., to Dr. Michael V. Drake, Chancellor, Univ. of Cal., Irvine 7 n.10 (Nov. 30, 2007), available at [http://www.oeregister.com/newsimages/news/2007/12/OCR\\_Report\\_120507-Z05145157-0001.pdf](http://www.oeregister.com/newsimages/news/2007/12/OCR_Report_120507-Z05145157-0001.pdf) [hereinafter Civil Rights Letter].

59. See Marcus, *supra* note 15, at 855.

60. CAMPUS ANTI-SEMITISM, *supra* note 15, at 72; Marcus, *supra* note 15, at 844–46.

61. SCHOENFELD, *supra* note 13, at 147.

62. *Id.*

63. For discussions of the importance of free speech and academic freedom in higher education, see, for example, DAVID E. BERNSTEIN, YOU CAN’T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 59–72 (2003); ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA’S CAMPUSES (1998); Kenneth L. Marcus, *Higher Education, Harassment, and First Amendment Opportunism*, 16 WM. & MARY BILL RTS. J. 1025 (2008); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484. In this context, it

virtually any form of abuse may be considered protected—and its opposition deemed censorious—when the context is an academic campus and the perpetrator is careful to adopt the tropes of political discourse.<sup>64</sup> This has been an enormous challenge for civil rights enforcement in this area.

Anti-Semitism can be explained in terms of both its *local* and *systemic* dimensions.<sup>65</sup> The local dimension explains how particular practices operate in individual cases.<sup>66</sup> The systemic dimension locates these practices within a hierarchy of power that tends towards the dehumanization of the Jewish state and its members, actual or potential.<sup>67</sup>

Systemically, political anti-Semitism operates geopolitically through state-sponsored and non-state-sponsored instruments to delegitimize the Jewish people and the Jewish state, using state-controlled and private media, universities, and elementary and secondary educational systems to racialize the Jewish people as an inferior group, assigned for destruction.<sup>68</sup> Locally, this system is policed through both one-on-one or group encounters and public events at which individual Jews and Jewish collectivities are targeted for contempt.<sup>69</sup>

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bears mentioning that this Article does not recommend the use of speech codes to regulate anti-Semitic campus expression; rather, it explains why certain forms of anti-Semitism would fall within the ambit of even narrowly drawn antiharassment policies. Additional discussions of the balance between freedom of speech and equal protection in higher education may be found in J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Lawrence Friedman, *Regulating Hate Speech at Public Universities after R.A.V. v. City of St. Paul*, 37 HOW. L.J. 1 (1993); Richard A. Glenn & Otis H. Stephens, *Campus Hate Speech and Equal Protection: Compelling Constitutional Values*, 6 WIDENER J. PUB. L. 349 (1997); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933 (1991).

64. Byrne, *supra* note 63, at 399–400.

65. Katherine Franke employs this dichotomy in defense of her thesis analysing what is wrong with sexual harassment. See Katherine M. Franke, *Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams*, 83 CORNELL L. REV. 1245, 1252 (1998).

66. *Id.*

67. This analysis follows the method and language that Katherine M. Franke and Kathryn Abrams have used to describe the wrongfulness of sexual harassment. See Kathryn Abrams, *Postscript, Spring 1998: A Response to Professors Bernstein and Franke*, 83 CORNELL L. REV. 1257, 1265 (1998); Franke, *supra* note 65, at 1252.

68. 2008 GLOBAL ANTI-SEMITISM REPORT, *supra* note 9, at 38–59 (detailing state-sponsored global anti-Semitism, anti-Semitism in the United Nations system, and anti-Semitism in private media).

69. Those who employ anti-Zionist rhetoric to harass Jewish students on U.S. campuses sometimes acknowledge the connection between their efforts and the broader geopolitical engagements, i.e., that verbal anti-Zionism is a

#### D. A Road Map

As a jurisprudential matter, the question is at what point the new anti-Semitism constitutes discrimination on the basis of a prohibited categorization. In some contexts, such as the workplace, the question is at what point it constitutes unlawful religious discrimination.<sup>70</sup> In other contexts, such as the university, the question is at what point it constitutes unlawful racial discrimination.<sup>71</sup> Surrounding these issues, or circumscribing them, is the extent to which otherwise actionable anti-Semitism may be protected by the First Amendment or the doctrine of academic freedom.<sup>72</sup>

In 2004, the Zionist Organization of America (“ZOA”) filed a complaint with the U.S. Department of Education’s Office for Civil Rights (“OCR”) describing an extraordinary pattern of anti-Semitic intimidation, harassment, threats, and vandalism at the University of California at Irvine (“Irvine”).<sup>73</sup> At that university, pro-Israel Jewish students have been subject to stalking, rock throwing, and various forms of intimidation, and a Holocaust memorial was damaged or destroyed.<sup>74</sup> Signs have been posted on campus showing a Star of David dripping with blood.<sup>75</sup> Speakers at campus events have chastised Jews for arrogance and have spoken of the distinction between the “good Jews” and the “bad Jews.”<sup>76</sup>

Despite the severity of these incidents, OCR dismissed the

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temporary, next-best effort to achieve the same goals sought by suicide bombers and others who engage more directly in violent jihad against the Jews:

Our weapon, our jihad, our way of struggling in this country is with our tongues. We speak out, and we deflate their morale, and this is the best we can do right now. And our brothers and sisters, on the other side of the world, they’re handling business in their own way. May Allah give them strength . . . .

Aaron Hanscom, *UC-Intifada*, FRONTPAGE MAG., Feb. 20, 2007, <http://www.frontpagemag.com/Articles/Read.aspx?GUID=D64DF0F8-5E16-4568-AFE4-5D2990DFF375> (describing an anti-Israel protest at the University of California at Irvine).

70. See, e.g., Michael Booth, *Religious Slurs May Amount to Hostile Workplace*, *N.J. High Court Says*, N.J. L.J., Aug. 5, 2008, available at <http://www.law.com/jsp/article.jsp?id=1202423520610>.

71. In American educational institutions, the question is framed in terms of race because Title VI of the Civil Rights Act does not bar discrimination on the basis of religion. See Kenneth L. Marcus, *The Most Important Right We Think We Have but Don’t: Freedom from Religious Discrimination in Education*, 7 NEV. L.J. 171, 172 (2006).

72. This issue is discussed at length in Marcus, *supra* note 63.

73. See Civil Rights Letter, *supra* note 58, at 2, 4–5.

74. *Id.*

75. OC INDEPENDENT TASK FORCE ON ANTI-SEMITISM, REPORT: THE UNIVERSITY OF CALIFORNIA AT IRVINE 11–12 (2008), available at <http://octaskforce.files.wordpress.com/2008/02/orange-county-task-force-report-on-anti-semitism-at-uci.pdf> [hereinafter TASK FORCE].

76. CAMPUS ANTI-SEMITISM, *supra* note 15, at 15.

complaint in November 2007.<sup>77</sup> Yet in early 2008, an independent task force investigating the Irvine allegations concluded that the “acts of anti-Semitism are real and well documented” and that “Jewish students have been harassed.”<sup>78</sup> Most strikingly, the Task Force urged that “[s]tudents with a strong Jewish identity should consider enrolling elsewhere unless and until tangible changes are made.”<sup>79</sup> Part II of this Article will describe this case, demonstrating that what prevented OCR from grasping the civil-rights violations at Irvine was, in part, its failure to understand how anti-Israelism could constitute discrimination against Jews. In other words, government lawyers did not comprehend the wrongfulness of the new anti-Semitism.

In Part III, this Article will trace the evolution of anti-Semitism in order to demonstrate the continuities between the new anti-Semitism and its predecessors. This is important because those who deny the wrongfulness of the new anti-Semitism are forced to argue that it is not connected with religiously or racially motivated hatred of Jews. Indeed, the nature of the wrong exemplified at Irvine has not been fully theorized, which has left judicial and quasi-judicial decision makers with insufficient guidance.<sup>80</sup> Part V describes the wrongfulness or harm entailed by political anti-Semitism as a violation of the antidiscrimination principle, understood in terms of both antidifferentiation theory and antisubordination theory.

## II. *IN RE UNIVERSITY OF CALIFORNIA AT IRVINE*

The OCR resolution in *In re University of California at Irvine*<sup>81</sup> demonstrates not only government failure to grasp the essential features of the new anti-Semitism but also the stakes involved when it fails to do so. The *Irvine* case, now a source of considerable controversy,<sup>82</sup> was OCR’s first major case under its 2004 anti-

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77. Civil Rights Letter, *supra* note 58, at 11.

78. TASK FORCE, *supra* note 75, at 26.

79. *Id.* at 27.

80. Most broadly, the problem may be understood as the inexistence of a critical Jewish theory of American law. While an important body of Jewish legal scholarship exists, it primarily examines questions of Jewish law or issues regarding the role of Jewish lawyers and jurists. What does not exist is a body of scholarship that examines the place of Jews in American law akin to feminist legal theory, critical race theory, LatCrit theory, or queer theory. For an expression of analogous concerns regarding an overlapping set of questions, see generally John Tehranian, *Compulsory Whiteness: Towards a Middle Eastern Legal Scholarship*, 82 IND. L.J. 1 (2007).

81. Civil Rights Letter, *supra* note 58.

82. For example, the Conference of Presidents of Major American Jewish Organizations (“the Conference”) announced that it was “troubled” by the decision of the OCR, which the Conference explained “will affect Jewish students not only at UCI [University of California, Irvine], but also at other colleges and universities across the United States.” Letter from June Walker, Chairperson, Conference of Presidents of Major Am. Jewish Orgs., & Malcolm

Semitism policy.<sup>83</sup> In this case, ZOA alleged a substantial pattern of anti-Semitic harassment at Irvine over a period of several years.<sup>84</sup> After a lengthy investigation, OCR found insufficient evidence to proceed against Irvine.<sup>85</sup> OCR's decision has provoked strong congressional response from Senate Judiciary Committee members who are concerned that OCR's resolution "is inconsistent with its prior policy statements."<sup>86</sup> The senators are right.<sup>87</sup> OCR's decision in this highly publicized case not only disregards OCR's formal policy, but bespeaks a fundamental inability to grasp the two issues on which this case turns: the nature of Jewish identity and the character (and wrongfulness) of the new anti-Semitism.

#### A. *The Facts*

The complaint alleges with unusual specificity that Irvine has fostered a hostile environment for Jewish students, in violation of the prohibition on racial and national origin discrimination contained in Title VI of the Civil Rights Act of 1964. Specifically, the complaint alleges that Jewish students have been physically and verbally harassed, threatened, shoved, stalked, and targeted by rock throwing; Jewish property has been defaced with swastikas; and a Jewish holocaust memorial has been vandalized. Jewish students have been called "dirty Jew" and "fucking Jew," told to "go back to Russia" and "burn in hell," and have been subjected to comments such as "slaughter the Jews."<sup>88</sup> One Jewish student who wore a pin

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Hoenlein, Executive Vice Chairman, to Stephanie Monroe, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (Feb. 8, 2008), *quoted in* Press Release, Zionist Org. of Am., ZOA Applauds Presidents' Conference for Criticizing Office for Civil Rights' Troubling Decision on Campus Anti-Semitism (Mar. 20, 2008), [http://www.zoa.org/sitedocuments/pressrelease\\_view.asp?pressreleaseID=354](http://www.zoa.org/sitedocuments/pressrelease_view.asp?pressreleaseID=354).

83. The author drafted this policy while serving as the head of OCR. The policy is commemorated in two primary legal guidance memoranda. See Memorandum from Kenneth L. Marcus, Deputy Assistant Sec'y for Enforcement, Office for Civil Rights, U.S. Dep't of Educ. (Sept. 13, 2004), *available at* <http://www.ed.gov/about/offices/list/ocr/religious-rights2004.html> [hereinafter Dear Colleague Letter]; Letter from Kenneth L. Marcus, Deputy Assistant Sec'y for Enforcement, Office for Civil Rights, U.S. Dep't of Educ., to Sidney Groeneman, Senior Research Assoc., Inst. for Jewish & Cmty. Research 1-2 (Oct. 22, 2004), *available at* <http://www.eusccr.com/letterforcampus.pdf> [hereinafter Guidance Letter].

84. Civil Rights Letter, *supra* note 58, at 1-5.

85. *Id.* at 10-11.

86. Letter from Senators Arlen Specter, Jon Kyl & Sam Brownback, Comm. on the Judiciary, to Margaret Spellings, Sec'y, U.S. Dep't of Educ. 1 (Feb. 27, 2008), *available at* <http://www.zoa.org/media/user/documents/publ/SenJudicCom0208.pdf>.

87. The author drafted the policies to which the senators refer.

88. Civil Rights Letter, *supra* note 58, at 2, 4-5. While this summary is primarily based on OCR's findings, it is conspicuous that the Task Force's contemporaneous investigative report on the same allegations is considerably more detailed, comprehensive, and graphic. For example, while OCR documents numerous swastikas drawn, etched, or carved on the Irvine campus,

bearing the flags of the United States and Israel was told to “take off that pin . . . or we’ll beat your ass.”<sup>89</sup> Another reported receiving hate messages such as “Jewish students are the plague of mankind” and “Jews should be finished off in the ovens.”<sup>90</sup>

In addition, as OCR’s investigation has confirmed, numerous campus speakers have provided lectures that some Jewish students have considered to be either anti-Israeli, anti-Jewish, or both.<sup>91</sup> Many of these speakers were “known for strong rhetoric and criticism of the foreign policies and in some cases the existence of the State of Israel.”<sup>92</sup> In May 2004, one speaker argued that “[t]his ideology of Zionism is so racist, so arrogant, based on so much ignorance.”<sup>93</sup> On May 18, 2006, another expressed the so-called Holocaust inversion, announcing that “[t]hey are the new Nazis . . . they’re saying when you see an Israeli flag next to an American flag, they’re saying we’re with imperialism. We are down with colonialism. We are down with white supremacy.”<sup>94</sup> That same speaker warned that:

[Y]ou settle on stolen land, you gotta deal with the consequences. So now its [sic] time for you to live in some fear now, because you were so good at dispensing fear. You were so good at making people think that y’all was all that and the Islamic tide started coming up.<sup>95</sup>

On that same day, another Irvine speaker, Amir Abdul Malik Ali, succinctly expressed the classic stereotypes of Jewish deceptiveness, conspiracy, and control: “Liars. Straight up liars, Rupert Murdoch, Zionist Jews.”<sup>96</sup> Next, he used the conspiracy stereotype to anticipate and defuse the inevitable anti-Semitism charge: “They say that it’s anti-Semitic if you say that the Zionists control the media.”<sup>97</sup> Malik Ali argued that this claim reflects Jewish arrogance and racism:

They have taken the concept of chosen people and fused it with the concept of white supremacy. Once you take the concept of chosen people with white supremacy and fuse them together,

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the Task Force provides this example of a swastika display that one student found particularly intimidating: an Irvine Jewish student was accosted by another student who “said ‘Fuck Israel’ and then lowered his trousers to show a swastika tattooed on his body.” TASK FORCE, *supra* note 75, at 10.

89. Civil Rights Letter, *supra* note 58, at 2.

90. *Id.* at 8 n.11.

91. *Id.* at 5–7.

92. *Id.* at 6.

93. *Id.* at 6 n.7.

94. *Id.*

95. *Id.*

96. *Id.* at 6 n.8.

97. *Id.*



you will get a people who are so arrogant that that will actually make a statement [that] implies that [they] are the only Semites. That's arrogance and that's the type of arrogance they display every day and that's the same type of arrogance that's getting them into trouble today.<sup>98</sup>

Finally, Malik Ali perpetuated the blood libel: "You all definitely don't love children and you know why? Because you all kill them."<sup>99</sup>

### B. OCR Policy

Until 2004, OCR's practice was to decline prosecution of cases alleging harassment of Jewish students.<sup>100</sup> The rationale for this surprising practice was that Title VI of the Civil Rights Act of 1964 only prohibits discrimination on the basis of "race, color, or national origin" in federally assisted programs or activities such as colleges and public schools.<sup>101</sup> It does not, however, prohibit discrimination on the basis of religion.<sup>102</sup> Although Congress has subsequently extended this prohibition to cover discrimination on the basis of sex, disability, age, and membership in certain patriotic youth organizations, it has never prohibited religious discrimination in this manner.<sup>103</sup>

The Supreme Court provided a legal response to that objection in 1987, but OCR did not embrace its teaching for seventeen years. In *Shaare Tefila Congregation v. Cobb*, the Supreme Court held that, for purposes of construing the scope of civil-rights protections, Jews may be considered to be a "race" within the meaning of the Civil Rights Act of 1866.<sup>104</sup> The Court reasoned that Jews, like other groups now considered to be "white," were considered to be members of a distinct racial group when the 1866 Act was enacted.<sup>105</sup> The Court did not, however, address whether Jews may also be

98. *Id.*

99. *Id.*

100. Marcus, *supra* note 15, at 858.

101. See 42 U.S.C. § 2000(d) (2000).

102. Marcus, *supra* note 71, at 172.

103. See, e.g., Education Amendments Act of 1972, tit. 9, 20 U.S.C. §§ 1681–1688 (2000) (sex); Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905 (2006); Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a) (2000) (disability); Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107 (2000) (age).

104. 481 U.S. 615, 617–18 (1987).

105. *Id.* Giving some spin to the decision, the American Jewish Congress's Marc D. Stern commented that "[t]he Court thus added an additional level of legal protection for Jews, although it did so by emphasizing the identity of Jews as an ethnic group, not a religious one." Marc D. Stern, *Antisemitism and the Law: Constitutional Issues and Antisemitism*, in *ANTISEMITISM IN AMERICA TODAY: OUTSPOKEN EXPERTS EXPLORE THE MYTHS* 385, 394 (Jerome A. Chanes ed., 1995). Having reinterpreted *Shaare Tefila Congregation* in this way (as an ethnicity case, rather than a "race" case), Stern comments that "[p]erhaps by the end of the twentieth century, that description of American Jews was, in any event, more apt." *Id.*

considered members of a distinct race within the meaning of the Civil Rights Act of 1964. Some have considered this to be problematic because scientific and colloquial understandings of race<sup>106</sup> and Jewish identity changed considerably between 1866 and 1964.<sup>107</sup> However, the Court did observe in dicta that the Equal Protection Clause of the Fourteenth Amendment prohibits racial discrimination as sweepingly as does the 1866 Act.<sup>108</sup> This is important because the 1964 Act was designed to enforce the rights established under the Fourteenth Amendment.

In 2004, OCR issued a series of policy statements regarding “complaints of race or national origin harassment commingled with aspects of religious discrimination against Arab Muslim, Sikh, and Jewish students.”<sup>109</sup> On September 13, 2004, OCR issued a widely disseminated formal “Dear Colleague” letter informing recipient institutions that it would exercise its Title VI jurisdiction to defend members of groups, such as Jews, which exhibit both ethnic and religious characteristics.<sup>110</sup> Thus, for example, it would “aggressively investigate[ ] alleged race or ethnic harassment against Arab Muslim, Sikh and Jewish students.”<sup>111</sup> OCR reasoned that “[g]roups that face discrimination on the basis of shared ethnic characteristics may not be denied the protection of our civil rights laws on the ground that they also share a common faith.”<sup>112</sup>

The following month, in another guidance letter, OCR emphasized that, for purposes of extending civil-rights protections under the Civil Rights Act of 1964, “‘Jewish’ may be interpreted as an ethnic [or] . . . racial category . . . even if the alleged victims are Caucasian and American-born.”<sup>113</sup> This guidance letter emphasized that “anti-Semitic harassment may include adverse action taken against individuals based on a victim’s ethnic background or ancestry, notwithstanding the prospect that such harassment may constitute religious discrimination as well.”<sup>114</sup> OCR concluded that “[i]n short, OCR recognizes that Title VI covers harassment of

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106. “Race” has been usefully explained as “an unstable and ‘decentered’ complex of social meanings constantly being transformed by political struggle.” Omi & Winant, *Racial Formations*, *supra* note 27, at 68.

107. Marcus, *supra* note 15, at 860. The tendency among contemporary commentators to “dismiss the discrepancy as a shift in the meaning of the word ‘race’” is a mistake; in fact, it reveals changes in racial thinking of “who is who, of who belongs and who does not, of who deserves what and who is capable of what.” MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* 5–6 (1988).

108. *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 n.5 (1987).

109. Dear Colleague Letter, *supra* note 83.

110. *Id.*

111. *Id.*

112. *Id.*

113. Guidance Letter, *supra* note 83, at 1 (citing *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987)).

114. *Id.* at 1–2.

students of Jewish heritage regardless of whether the students may be Caucasian and American born. OCR cannot turn its back on victims of anti-Semitism on the grounds that Jewish heritage may include both religious and ethnic characteristics.”<sup>115</sup>

These two guidance letters established that OCR would prosecute anti-Semitism cases, except for rare cases in which anti-Jewish discrimination is based solely on the tenets of Jewish religion. OCR based this guidance upon *St. Francis College v. Al-Khazraji*<sup>116</sup> and *Shaare Tefila Congregation*.<sup>117</sup> In *St. Francis College*, the Supreme Court held that Arabs are a “race” within the meaning of the Civil Rights Act of 1866.<sup>118</sup> In *Shaare Tefila Congregation*, the Court extended this holding to encompass Jews.<sup>119</sup> The Court’s reasoning in both cases was that the term “race,” within the meaning of the 1866 Act, is not limited by contemporary usage of the term. Rather, the Court construed “race” broadly to include groups of shared “ethnic or ancestral heritage,” finding that Congress had used the term this broadly at the time.<sup>120</sup> OCR’s rationale in extending *Shaare Tefila Congregation* was that the 1964 Act was intended to enforce the same rights established through nineteenth-century civil-rights legislation.<sup>121</sup>

More recently, however, former Assistant Secretary of Education for Civil Rights Stephanie Monroe has taken a narrow view of Title VI’s protections, which appears to exclude Jews. She has conveyed this position in somewhat coded bureaucratic language: “OCR has jurisdiction to investigate complaints raising allegations of religious discrimination or anti-Semitic harassment *if the allegations also include discrimination over which OCR has subject matter jurisdiction*, such as, race or national origin (including discrimination based on a person’s ancestry or ethnic characteristics).”<sup>122</sup>

Thus, under current guidance, OCR will only prosecute anti-Semitism charges “if the allegations also include” other matters “over which OCR has subject matter jurisdiction.”<sup>123</sup> In other words, OCR will not address anti-Semitism per se. In order to understand the import of Monroe’s statement, one need only observe that one can substitute virtually anything for the term “anti-Semitic harassment,” as it appears in her letter, and the meaning of the

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115. *Id.* at 2.

116. 481 U.S. 604 (1987).

117. 481 U.S. 615 (1987).

118. *St. Francis Coll.*, 481 U.S. at 613.

119. *Shaare Tefila Congregation*, 481 U.S. at 617–18.

120. *St. Francis Coll.*, 481 U.S. at 613.

121. Marcus, *supra* note 15, at 865–72.

122. Letter from Stephanie Monroe, Assistant Sec’y for Civil Rights, Dep’t of Educ., to Kenneth L. Marcus, Staff Dir., U.S. Comm’n on Civil Rights 1 (Dec. 4, 2006) (emphasis added), available at <http://www.eusccr.com/lettermonroe.pdf>.

123. *Id.*

statement is unchanged. Thus, OCR will also unquestionably investigate “complaints raising allegations of,” for example, UFO sightings, lost kittens, or gubernatorial philandering “if the allegations also include discrimination over which OCR has subject matter jurisdiction.”<sup>124</sup> This is because OCR’s mandate is to investigate all complaints that contain allegations of discrimination over which it has jurisdiction, even if the complaints also contain extrajurisdictional material.<sup>125</sup> Needless to say, OCR will ignore the portions of the complaint that address only UFOs, kittens, governors, or anti-Semitism; but it will focus diligently upon the other, jurisdiction-conferring matters within the complaint.

### C. OCR Resolution

Having interpreted its own anti-Semitism policy in this manner—rendering it meaningless or incoherent—OCR is now unable to address serious anti-Semitism allegations in a meaningful way. After investigating the Irvine case for over three years, OCR dismissed the ZOA complaint in a way that demonstrates its inability to grasp the issues at stake. ZOA alleged, inter alia, that anti-Jewish and anti-Zionist conduct at Irvine created a hostile environment for Jewish students on the basis of their ethnic and ancestral heritage.<sup>126</sup> OCR dismissed the complaint without even addressing ZOA’s ancestry claims because it no longer adheres to its policy for doing so.<sup>127</sup>

In a thirteen-page closure letter, OCR rejected ZOA’s claims on the grounds of timeliness, sufficiency of Irvine’s response, and failure to provide sufficient factual information to proceed.<sup>128</sup> Astonishingly, OCR entirely ignored ZOA’s claims that Irvine’s Jewish students faced discrimination on the basis of their ethnic and ancestral heritage (i.e., their “race” in the *Shaare Tefila Congregation* sense). Moreover, OCR reviewed ZOA’s national origin claims only to determine whether Jewish students of Israeli origin faced anti-Israeli national origin discrimination.<sup>129</sup> OCR’s opinion does not even consider whether anti-Jewish ethnic bias constitutes national origin discrimination in any other respect. OCR provides no explanation of its failure to address ZOA’s allegations of anti-Jewish ethnic and ancestral discrimination. It simply ignores the allegations as if they had not been made.<sup>130</sup>

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124. *Id.*

125. *Id.*

126. Civil Rights Letter, *supra* note 58, at 1.

127. *Id.*

128. Letter from Charles R. Love, Program Manager, Office for Civil Rights, Region IX, U.S. Dep’t of Educ., to Susan Tuchman, Zionist Org. of Am. 2, 13 (Nov. 30, 2007).

129. *Id.* at 1–2.

130. *See id.*; Civil Rights Letter, *supra* note 58; *cf.* Complaint at 10–11, *In re* Univeristy of California at Irvine, OCR Case No. 09-05-2013 (Oct. 2004).

D. *OCR Policy and Jewish Identity*

Beyond ignoring its own publicly stated policies and Supreme Court precedent, OCR's *Irvine* approach fails to understand Jewish identity. OCR's current assumption that Jews are only a religious group fails to appreciate that Jews share not only religion but also bonds of ancestry and ethnicity. Indeed, as we have seen above, the U.S. Department of State has adopted Merriam-Webster's longstanding definition of anti-Semitism as "hostility toward or discrimination against Jews as a religious, ethnic, or racial group."<sup>131</sup> The notion that Jews are only a religious group without ethnic or ancestral ancestry is a gaping error, although it is one that follows from OCR's understandable squeamishness about associating Judaism with either racial distinctness or national separateness.

The use of an antiracism provision to protect Jewish Americans from discrimination inevitably raises sensitivities about whether Jews can be considered a distinct "race." The very utterance of the words "Jews" and "race" in a single sentence evokes memories of Dr. Mengele and the pseudoscientific notion that Jews are members of a biologically inferior racial grouping.<sup>132</sup> On the other hand, it is little more credible to assert that "race" exists as a biologically or anthropologically meaningful category that simply does not include Jews. Most commentators have long agreed that the weight of contemporary science rejects not only the notion that Jews are a racial group, but the entire racial concept, except as a means of describing social constructions.<sup>133</sup> Jews are, in this sense, neither more nor less racially distinct than other groups except to the extent that they have been perceived, portrayed, and constructed as such by racists. Using antiracism provisions to combat anti-Semitism both respects original statutory intent and also reflects that antiracism efforts by their nature target a prejudice that is founded upon irrational or inaccurate group identifications. Moreover, the modern, post-*Shaare Tefila Congregation* understanding of antidiscrimination provisions asks only whether Jews are an ethnic or ancestral group—which Jews clearly are—not whether they are a

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131. 2008 GLOBAL ANTI-SEMITISM REPORT, *supra* note 9, at 6.

132. See Bat-Ami Bar On & Lisa Tessman, *Race Studies and Jewish Studies: Toward a Critical Meeting Ground*, in JEWISH LOCATIONS: TRAVERSING RACIALIZED LANDSCAPES 1, 7 (Lisa Tessman & Bat-Ami Bar On eds., 2001) (describing the impact of the Shoah upon the racial self-perception of American Jews).

133. The notion of biological racial distinctions was rejected, for example, in the United Nations Economic and Social Council's 1950 Statement of Race, drafted by Columbia University anthropologist Ashley Montagu, which announced that "scientists have reached general agreement that mankind is one: that all men belong to the same species, *Homo sapiens*." JON ENTINE, ABRAHAM'S CHILDREN: RACE, IDENTITY AND THE DNA OF THE CHOSEN PEOPLE 250–51 (2007).

biologically distinct race.<sup>134</sup>

*E. OCR Policy and Anti-Semitism*

If OCR's current practices misunderstand both Jewish identity and OCR's own policies, they also misconstrue contemporary anti-Semitism. Commendably, OCR investigators took the unusual step of attending several Irvine programs featuring speakers who were anticipated to present anti-Semitic content. Putting aside any First Amendment issues that might arise in this review, however, OCR clearly misunderstood the import of the events that it observed.

Based on direct observation, OCR determined that "during these events many speakers criticized Israel, its governmental policies, its treatment of the Palestinians, and Jews throughout the world who support Israel."<sup>135</sup> Moreover, OCR found that some speakers failed to distinguish between their opposition to Zionism and their opposition to Jews.<sup>136</sup> As if to mitigate this finding, however, OCR observed that "their criticism of Jews was focused on their perceived support of Israel."<sup>137</sup> OCR also found that some Irvine speakers during the course of the investigation "made broad generalizations *about Jews*, which were offensive to Jewish students."<sup>138</sup> Nevertheless, OCR determined that "although offensive to the Jewish students, the . . . events at issue were not based on the national origin of the Jewish students, but rather based on opposition to the policies of Israel."<sup>139</sup> For this reason, OCR concluded that "[t]hese incidents, therefore, were not within OCR's subject matter jurisdiction."<sup>140</sup>

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134. At the same time, however, it should be acknowledged that at least some contemporary population geneticists have identified genetic patterns that are significantly more common to Jews, or to some Jewish sub-groups, than to other populations. *See, e.g.,* ENTINE, *supra* note 133, at 351 (acknowledging genetically "identifiable human races and ethnic groups, including Jews" but rejecting "simplistic racial stereotyping"); DAVID B. GOLDSTEIN, *JACOB'S LEGACY: A GENETIC VIEW OF JEWISH HISTORY* 117 (2008) (observing that it is now possible "to predict accurately those individuals claiming Jewish ancestry on the basis of their genetic composition alone"). Surveying the literature, Hillel Halkin comments that the burgeoning field of Jewish genetics has demonstrated that there is a "high degree of Y-chromosome similarity among Jewish males from all over the world, coupled with a much lower degree when the comparison [i]s made between Jews and non-Jews from the same region." Hillel Halkin, *Jews and Their DNA*, COMMENT., Sept. 2008, at 37, 37.

135. Civil Rights Letter, *supra* note 58, at 6.

136. *Id.*

137. *Id.*

138. *Id.* (emphasis added). OCR acknowledged that some Irvine Jewish students felt deeply offended, intimidated, and harassed. *Id.* The Task Force's report went further, indicating that at least one Irvine gentile testified, "I am not even Jewish and I feel scared for Jewish students on campus." TASK FORCE, *supra* note 75, at 9.

139. Civil Rights Letter, *supra* note 58, at 6.

140. *Id.*

This blithe dismissal misses the point of contemporary anti-Semitism; namely, that it frequently assumes the guise of anti-Zionism in order to evade social censure.<sup>141</sup> As the State Department observed earlier this year, a distinguishing feature of the new anti-Semitism is “criticism of Zionism or Israeli policy that—whether intentionally or unintentionally—has the effect of promoting prejudice against all Jews by demonizing Israel and Israelis and attributing Israel’s perceived faults to its Jewish character.”<sup>142</sup> This fundamental tenet of contemporary anti-Semitism has been confirmed by many authorities, including the U.S. Commission on Civil Rights, the European Union Agency for Fundamental Rights, and the United Kingdom’s All-Party Parliamentary Group Against Anti-Semitism.<sup>143</sup>

OCR dismissed the evidence because it failed to grasp that the anti-Zionist rhetoric at Irvine was not just anti-Israeli but more broadly anti-Jewish. To assume, as OCR did, that the anti-Zionist rhetoric does not relate to the Jewish-American students’ “national origin” is to misunderstand that anti-Zionist rhetoric is used to demonize both Israel and the Jewish people in a way that creates a hostile environment for Jewish students. The hostility is not based on any narrowly conceived notion of Jewish nationality, of course, but rather on the mixed-religious/ethnic/ancestral characteristics of Jewish identity.

### III. HISTORY: THE EVOLUTION OF THE NEW ANTI-SEMITISM<sup>144</sup>

The new anti-Semitism is not an isolated phenomenon but the coalescence of geographically and historically disparate strands in what has been characterized as the “globalisation of anti-Semitism.”<sup>145</sup> Under globalized conditions entailing a “dual compression of both space and time,” elements of ancient and medieval Christian and Muslim thought merge with German, Russian, and Arab contributions to form a volatile, continually changing mix.<sup>146</sup> Generally speaking, contemporary American campus anti-Semitism now has six distinct sources: traditional European-Christian Jew-hatred; aggressive anti-Israelism that crosses the line into anti-Semitism (“transgressive anti-Israelism”); traditional Muslim anti-Semitism; anti-Americanism and anti-globalism that spill over into anti-Zionism and anti-Semitism (“spillover anti-globalism”);<sup>147</sup> black anti-Semitism; and

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141. See generally TOBIN ET AL., *supra* note 15, at 95.

142. 2008 GLOBAL ANTI-SEMITISM REPORT, *supra* note 9, at 4.

143. See Marcus, *supra* note 15, at 845–49 and sources cited therein.

144. An earlier, abbreviated version of this section appears in Marcus, *supra* note 63, at 1040–41.

145. WIEVIORKA, *supra* note 15, at 75.

146. See *id.*

147. The first four sources are identified in 2005 GLOBAL ANTI-SEMITISM

fundamentalist intolerance.<sup>148</sup>

Currently, the largest part of the problem in the United States consists of the new anti-Semitism, which includes transgressive anti-Israelism, traditional Muslim anti-Semitism, and spillover anti-globalism, with strong influences from traditional Christian and contemporary Muslim anti-Semitism.<sup>149</sup> This globalized feature of the new anti-Semitism has an important ramification for its proper study: both the nature and severity of the new domestic anti-Semitism must be understood in a global and historical context.

#### A. *Early Christian Anti-Semitism*

The advent of Christianity radically altered the place of Jews in the world,<sup>150</sup> establishing the basic themes of anti-Judaism that endure to the present.<sup>151</sup> Previously, the Jewish community's perceived isolation and exceptionalism had stirred resentment during ancient Egyptian, Greek, and Roman times, exacerbated by widespread xenophobia during those periods.<sup>152</sup> This antagonism was not unusual among the conflicts of various ethnicities.<sup>153</sup> Early Christianity, however, developed a particular hostility for the Jews, based on a perception that Jews had rejected Jesus as their savior and been complicit in his death.<sup>154</sup>

The systematic Christian vilification of Judaism began approximately one hundred years after the death of Jesus Christ.<sup>155</sup> Historians differ as to whether Christianity was anti-Semitic from its very origin or whether animosity towards Jews was largely developed through subsequent interpretation of early texts.<sup>156</sup>

Certainly the Christian scriptures contain derogatory references towards Jews.<sup>157</sup> For example, the book of Revelation has frequent references to the "synagogue of Satan."<sup>158</sup> In certain Gospels, the Jews are blamed for the crucifixion of Jesus.<sup>159</sup> This conception of the Jews as deicides and Christ-killers has been the most powerful

REPORT, *supra* note 11.

148. Marcus, *supra* note 15, at 844.

149. *Id.* at 844–45, 848–49.

150. LAQUEUR, *supra* note 13, at 3.

151. LEWIS, *supra* note 29, at 100.

152. LAQUEUR, *supra* note 13, at 2–3. For a comparison of pagan and early-Christian anti-Semitism, see MARVIN PERRY & FREDERICK M. SCHWEITZER, *ANTISEMITISM* 74–75 (2002).

153. LAQUEUR, *supra* note 13, at 3.

154. *Id.*

155. *Id.* at 45.

156. *Id.* at 45–46.

157. See, e.g., PERRY & SCHWEITZER, *supra* note 152, at 4, 18–42 (assessing anti-Semitic references in early Christian texts).

158. LAQUEUR, *supra* note 13, at 46–47.

159. *Id.* at 47 (discussing the Gospel of John). Indeed, in Matthew, Jews are attributed collective responsibility for the death of Jesus. See *Matthew* 27:22–25 (“Let him be crucified. . . . His blood be on us and on our children.”).



justification for anti-Semitic persecution for two thousand years.<sup>160</sup> From John and his interpreters, Christians developed the conception of a Jewish Antichrist and the conception of the Jewish people as noxious to God.<sup>161</sup> This condemnation became both more complex and more severe in subsequent generations.<sup>162</sup> God had rejected the Jews; the Jews had sinned and fallen, and God hated the Jews.<sup>163</sup>

During the Middle Ages, Christians commonly believed Jews to be children of the devil, whose story was central to countless medieval sermons, books, plays, and works of art.<sup>164</sup> The church itself developed an image of the Jews that led to persecution, murder, and expulsion.<sup>165</sup> Throughout the Middle Ages, allegations of Jewish ritual murder were accompanied by trials, burnings, torture, expulsion, and massacres.<sup>166</sup> By the twelfth century, Christians in England had begun to disseminate the blood libel.<sup>167</sup> This defamation consisted of the allegation that Jews abducted, abused, tortured, and slaughtered Christian infants or young children and consumed their blood (usually on the holiday of Passover) for religious purposes.<sup>168</sup> During and after the Middle Ages, starting in England, there have been about 150 cases in which the blood libel has resulted in the arrest and murder of Jews, usually by a mob and sometimes following torture and a trial.<sup>169</sup>

#### B. *Early Muslim Anti-Semitism*

For most of the fourteen hundred years of Arab-Jewish relations, the Arabs were not anti-Semitic in the European sense: disliking Jews not because they are Semites, but because they are

160. PERRY & SCHWEITZER, *supra* note 152, at 26.

161. LAQUEUR, *supra* note 13, at 47.

162. *Id.*

163. *Id.*

164. *Id.* at 55.

165. *Id.*

166. PERRY & SCHWEITZER, *supra* note 152, at 44.

167. *Id.* at 48–49 (describing the first distinct ritual murder hoax in 1144 in Norwich, England, as well as copycat incidents throughout England in 1181, 1183, 1192, and thereafter).

168. LAQUEUR, *supra* note 13, at 55. *See generally* PERRY & SCHWEITZER, *supra* note 152, at 43–72 (discussing historical allegations of Jewish ritual murder).

169. LAQUEUR, *supra* note 13, at 56. For example, Germans responded to these myths by torturing Jews and breaking them on the wheel in Pforzheim and Weissenburg in 1270, torching a synagogue and burning over 180 Jews who had sought refuge there in 1285, slaughtering Jews “in heaps” in Thuringia in 1303, and setting afire a house crammed full with some 300 Jews in Baden in 1332. PERRY & SCHWEITZER, *supra* note 152, at 52. Indeed, ritual murder hoaxes against the Jewish people continued into the twentieth century in the United States. *Id.* at 44 (describing four such incidents in the northeastern United States).

not Christians.<sup>170</sup> Through the Middle Ages, the majority of Jews lived in Muslim lands, where they were generally better treated than in Christendom.<sup>171</sup> Even under Islam, however, Jews faced hostility, persecution, and unequal treatment.<sup>172</sup> In general, Jews played a smaller role in Muslim religious traditions than in Christianity. Muslims believed that Jews had been hostile to Muhammad, but they did not believe that Jews had killed him.<sup>173</sup>

The Koran itself has been the source of Muslim anti-Semitism, although it has also been the source of more tolerant attitudes.<sup>174</sup> The Koran teaches repeatedly that Allah cursed the Jews for their disbelief and that Allah is an enemy to the disbelievers.<sup>175</sup> Moreover, it teaches that the Jews of Medina had not only been defeated by Muhammad, but were humiliated and impoverished under the wrath of God.<sup>176</sup> From this story, the Muslims derived an image of the Jews as weak, pathetic, and inferior,<sup>177</sup> which is in strong contrast to the Christian view of the Jews as powerful, diabolical, and conspiratorial.<sup>178</sup> Moreover, the Koran does not present a myth of guilt and betrayal of the sort that has colored Christian views of the Jewish people during many historical periods.<sup>179</sup>

It does, however, warn that most Jews are evildoers and that "you shall always discover treachery in them except a few of them."<sup>180</sup> Moreover, it cautions, "do not take Jews and Christians for friends," and it says that Allah turned some of them into monkeys and pigs.<sup>181</sup> Indeed, in one passage it calls for beheading them.<sup>182</sup> Later, in the hadith, there is a famous passage in which Muslims

170. LEWIS, *supra* note 29, at 117.

171. LAQUEUR, *supra* note 13, at 67.

172. *Id.*; LEWIS, *supra* note 29, at 124.

173. LAQUEUR, *supra* note 13, at 67; LEWIS, *supra* note 29, at 117–18. Indeed, the Koran teaches that the Jews did not kill Jesus either, nor did they crucify him. *Id.* at 120 (citing The Koran 4:156–57).

174. LAQUEUR, *supra* note 13, at 67–68. Some have argued that Arabs should not be described as "anti-Semitic" because they are Semites too. This argument misconstrues the meaning of "anti-Semitism," which has always referred to animosity towards Jews and not towards Semites generally. See LEWIS, *supra* note 29, at 117.

175. LAQUEUR, *supra* note 13, at 67.

176. *Id.*; LEWIS, *supra* note 29, at 122.

177. LAQUEUR, *supra* note 13, at 67; see also LEWIS, *supra* note 29, at 126 (arguing that the "outstanding characteristic . . . of the Jews as seen and as treated in the classical Islamic world is their unimportance").

178. LEWIS, *supra* note 29, at 122–23. Thus, for example, the blood libel did not appear among Muslims until it was introduced to the Ottomans by their Greek subjects in the fifteenth century. *Id.*

179. *Id.* at 122.

180. LAQUEUR, *supra* note 13, at 68. To some extent, these passages may be balanced by other passages in which Jews are discussed in more respectful terms. LEWIS, *supra* note 29, at 122.

181. LAQUEUR, *supra* note 13, at 68.

182. *Id.*

are urged to kill all of the Jews in the world in a final struggle.<sup>183</sup>

C. *German Racialist and Anti-Zionist Anti-Semitism*

The nineteenth century saw a shift from religious to racialist anti-Semitism,<sup>184</sup> attributed largely to German journalist Wilhelm Marr and his colleagues.<sup>185</sup> Racialist anti-Semitism constructed Jews as members of a distinct Semitic racial group with biological characteristics that were the basis for perceived moral and intellectual traits and deficiencies.<sup>186</sup> This change was essentially a deliberate effort to justify continued adherence to anti-Jewish attitudes in the face of changing social attitudes towards religion and religious discrimination.<sup>187</sup> Given changing European attitudes towards religion and religious prejudice, as well as the emancipation of European Jewry, Marr argued that Jews should not be attacked as Christ-killers and that medieval accusations of ritual murder were not credible.<sup>188</sup> In place of religious anti-Semitism, Marr and his associates developed a racial conception of the threat which the Jewish people posed to German culture and modern life.<sup>189</sup>

The “classic case of the convergence of anti-Semitism and anti-Zionism” was the work of Nazi propagandists during the war years and, later, the work of postwar Arab propagandists working under their influence.<sup>190</sup> The Germans began developing the anti-Zionist ideology long before World War II had begun, although early German anti-Zionism has been described as “little more than an addendum to a well-worn diatribe against international Jewish political machinations and inveterate malevolence.”<sup>191</sup> During the

183. *Id.*

184. *Id.* at 91.

185. *See id.* at 21. Although some historians credit Marr with coining the term “anti-Semitism” in the 1870s, others have established that the term was developed earlier but that Marr was largely responsible for popularizing it. *Id.*

186. The racial conception of Jews derives from the fifteenth century, although it received its fullest expression in the ideology of Marr and his German successors. LEWIS, *supra* note 29, at 81.

187. *See* LAQUEUR, *supra* note 13, at 21–22; Letter from Robert Wistrich, *supra* note 38.

188. LAQUEUR, *supra* note 13, at 21.

189. *Id.*

190. Jeffrey Herf, *Convergence: The Classic Case Nazi Germany, Anti-Semitism and Anti-Zionism During World War II*, in ANTI-SEMITISM AND ANTI-ZIONISM IN HISTORICAL PERSPECTIVE: CONVERGENCE AND DIVERGENCE 50, 66 (Jeffrey Herf ed., 2007) (advising that reflection on this “classic case” can serve “as one starting point for examining what kind of residues and aftereffects it left behind and for a clearer understanding of when Jew hatred converges with and diverges from a rejection of the idea and reality of the Jewish state”).

191. Derek J. Penslar, *Anti-Semites on Zionism: From Indifference to Obsession*, in ANTI-SEMITISM AND ANTI-ZIONISM IN HISTORICAL PERSPECTIVE: CONVERGENCE AND DIVERGENCE, *supra* note 190, at 1, 10. Scholars disagree as to whether the earliest, nineteenth-century responses of German anti-Semites to Zionism can best be described as indifference, or as enthusiastic support

war, German propagandists developed anti-Zionism intellectually and merged it with German anti-Semitism doctrine.<sup>192</sup> During the war, the Reich Press Office directed journalists to avoid the term “anti-Semitism,” using instead terms such as “hostility to the Jews” (*Judengegnerschaft*) in order to bring the Arabs over to the side of the Axis powers.<sup>193</sup>

Wilhelm Marr wrote of Zionism at the time of the First Zionist Congress of 1897 that “the entire matter is a foul Jewish swindle, in order to divert the attention of the European peoples from the Jewish problem.”<sup>194</sup> Arthur Rosenberg, later to become the Nazi Party’s chief propagandist, wrote in a 1921 anti-Zionist tract that “the Jews are using the old method of exploiting and driving out by legal means the real population which has lived here for thousands of years in order to create a purely Jewish . . . gathering point for pursuing a wide-ranging oriental policy.”<sup>195</sup> The following year, Rosenberg argued that Zionism was an anti-German movement drawing support from both reactionary capitalists and Bolsheviks.<sup>196</sup> Four years later, in *Mein Kampf*, Adolph Hitler developed upon Rosenberg’s work and anticipated subsequent anti-Zionist ideology with his assertion that the Jews “do not at all intend to build a Jewish state in Palestine . . . [but] an organization centre for their international world-swindling furnished with its own state rights.”<sup>197</sup>

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based on a desire to rid Germany of Jews. *See id.* at 3–4, 7, 10–11; FRANCIS R. NICOSIA, *ZIONISM AND ANTI-SEMITISM IN NAZI GERMANY* 15 (2008).

192. *See* Herf, *supra* note 190, at 53–60.

193. *Id.* at 54. Interestingly, however, Bernard Lewis has argued that the close relationship between Nazi Germany and factions of Arab leadership between 1933 and 1945 was due, not to German efforts to attract Arab support, but to Arab efforts to attract German support. LEWIS, *supra* note 29, at 140.

194. Penslar, *supra* note 191, at 7 (quoting MOSHE ZIMMERMANN, *WILHELM MARR: THE PATRIARCH OF ANTISEMITISM* 88 (1986)). This argument marked a turn in Marr’s thinking on Zionism. During the 1870s and 1880s, he had written favorably of the emigration of German Jews to Palestine. *Id.*

195. MATTHIAS KÜNTZEL, *JIHAD AND JEW-HATRED: ISLAMISM, NAZISM AND THE ROOTS OF 9/11*, at 29 (Colin Meade ed., 2007) (quoting ARTHUR ROSENBERG, *DER STAATSFINDLICHE ZIONISMUS* (Munich ed., 1938) (1921)); *see also* JEFFREY HERF, *THE JEWISH ENEMY: NAZI PROPAGANDA DURING WORLD WAR II AND THE HOLOCAUST* 75 (2006).

196. Penslar, *supra* note 191, at 10.

197. *See* KÜNTZEL, *supra* note 195, at 10 (quoting ADOLF HITLER, *2 MEIN KAMPF* 356 (Ralph Mannheim trans., 1943)). The full passage is instructive insofar as it presages subsequent attacks on the legitimacy of the State of Israel:

For while the Zionists try to make the rest of the world believe that the national consciousness of the Jew finds its satisfaction in the creation of a Palestinian state, the Jews again slyly dupe the dumb *Goyim*. It doesn’t even enter their heads to build up a Jewish state in Palestine for the purpose of living there; all they want is a central organization for their international world swindle, endowed with its sovereign right and removed from the intervention of other states: a haven for convicted scoundrels and a university for budding crooks.

During the war years, Nazi policymakers systematically opposed the formation of a Jewish state.<sup>198</sup> Earlier, German policymakers had encouraged the emigration of Jews from Germany whenever possible.<sup>199</sup> By 1937, however, the German government determined that the formation of a Jewish state was not in their interests, since an independent Jewish state could serve as a base of resistance to Nazi policies.<sup>200</sup>

#### D. Russian Anti-Semitism

Walter Laqueur has argued that the postwar mutation of racial anti-Semitism into an anti-Jewish anti-Zionism likely occurred first in the Soviet Union, where Jews were frequently persecuted as “Zionists” by Stalin and his successors.<sup>201</sup> Soviet spokesmen were consistently hostile to Zionism.<sup>202</sup> This use of the term “Zionism” was purely euphemistic or pretextual, since most true Russian Zionists had emigrated to Palestine by the end of the war.<sup>203</sup> This mutation in the rhetoric of anti-Semitism mirrors the parallel transition in nineteenth-century Germany, where racist anti-Semitism developed as a self-conscious alternative to the purely religious Judaeophobic antipathies which were already considered

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ADOLF HITLER, 2 MEIN KAMPF 324–25 (Ralph Mannheim trans., 1943). Interestingly, there was some support in the German Foreign Office for Jewish emigration to Palestine between 1934 and 1937; however, from at least June 1937, the Nazi regime opposed the establishment of an independent Jewish state on the ground that it would serve as a political base for world Jewry. See Herf, *supra* note 190, at 52–53. The position of certain German diplomats towards Jewish emigration was not inconsistent with other European calls for “sending them all back to Palestine.” See Pierre Birnbaum, *The French Radical Right: From Anti-Semitic Zionism to Anti-Semitic Anti-Zionism*, in ANTI-SEMITISM AND ANTI-ZIONISM IN HISTORICAL PERSPECTIVE: CONVERGENCE AND DIVERGENCE, *supra* note 190, at 145, 145 (quoting EDOUARD DRUMONT, LE TESTAMENT D’UN ANTISEMITE 45 (1891)). Despite this early anomaly, however, Herf concludes that “[t]hroughout its history, beginning with Hitler’s early speeches in 1920, Nazism was unequivocal in the ideological convergence of anti-Zionism and anti-Semitism.” Herf, *supra* note 190, at 65.

198. LEWIS, *supra* note 29, at 142–43.

199. *Id.* at 143.

200. *Id.* at 143–44.

201. See LAQUEUR, *supra* note 13, at 180. In Soviet political rhetoric, as in later Muslim polemical writing, the term “‘Zionist’ simply means ‘Jew,’ and therefore anti-Zionist means anti-Jew.” LEWIS, *supra* note 29, at 19.

202. This does not necessarily imply, however, that Soviet anti-Zionism was always motivated by anti-Semitism, since Russian authorities were also concerned about Zionism’s anti-assimilationist and national consciousness-raising characteristics. See Zvi Gitelman, *The Evolution of Soviet Anti-Zionism: From Principle to Pragmatism*, in ANTI-ZIONISM AND ANTISEMITISM IN THE CONTEMPORARY WORLD 11, 12 (Robert S. Wistrich ed., 1990).

203. LAQUEUR, *supra* note 13, at 180. Indeed, the Soviets had long since broadened the term to include all kinds of people whom the regime considered to be politically hostile. See Gitelman, *supra* note 202, at 17.

backward.<sup>204</sup>

The Soviet Union was fertile soil for the development of a new anti-Semitism. During the nineteenth century, no other European country pursued repressive anti-Semitic policies as much as tsarist Russia.<sup>205</sup> Russian anti-Semitism originated as a combination of primitive xenophobic hatred of the Jew as “alien” and Christian orthodox religious views of the Jew as deicide.<sup>206</sup> In addition, the involvement of some Russian Jews in radical politics gave conservative anti-Semites a pretext to divert popular political discontent “away from the regime and against Jewry by means of pogroms.”<sup>207</sup> It was in this context that *The Protocols of the Elders of Zion*—apparently fabricated in Russia and France in the 1890s<sup>208</sup>—was first published under the auspices of the secret police by the Tsar’s press, although the Tsar personally understood the work to be fraudulent.<sup>209</sup> The *Protocols* appear to have had no significant impact on Russia at the time.<sup>210</sup>

Later, in the Soviet Union, Stalin initiated the “liquidation of Jewish institutions” and persecution of Jewish leaders.<sup>211</sup> Under Soviet doctrine, anti-Zionism was tied to both traditional stereotypes of Jewish conspiracy (influenced by the *Protocols*) and an attack on the Jewish conception of “chosenness”:

The chosen people: is that not racism? What is the difference between Zionism and fascism, if the essence of the ideology is racism, hatred towards other peoples? The chosen people. The people elected by God. Where in the second half of the twentieth century does one hear anyone advocating this criminally absurd theory of the superiority of one race and one people over others.<sup>212</sup>

Here we see German-inflected anti-Semitism merging most forcefully with an attack upon the idea of Zionism from a purportedly antiracist position. Moreover, in Soviet usage, “terms like Judaism, Zionism, the Jewish bourgeoisie, and Israel are used interchangeably.”<sup>213</sup>

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204. Kenneth L. Marcus, *The Second Mutation: Israel and Political Anti-Semitism*, INFOCUS, Spring 2008, at 1, available at <http://www.jewishpolicycenter.org/article/114>. For a discussion of this earlier transition, see Letter from Robert Wistrich, *supra* note 38.

205. See ROBERT S. WISTRICH, *ANTISEMITISM: THE LONGEST HATRED* 171 (1991).

206. *Id.*

207. *Id.* at 172.

208. LAQUEUR, *supra* note 13, at 85.

209. See WISTRICH, *supra* note 205, at 173.

210. LAQUEUR, *supra* note 13, at 85.

211. WISTRICH, *supra* note 205, at 175.

212. *Id.* at 180 (quoting Soviet Ambassador Yakov Malik).

213. *Id.* at 182.

*E. Arab and Muslim Political Anti-Semitism*

Contemporary Arab and Muslim political anti-Semitism is deeply influenced by three sources:<sup>214</sup> the Israel-Palestine political conflict,<sup>215</sup> traditional Muslim religious texts,<sup>216</sup> and Nazi racial anti-Semitism.<sup>217</sup> From the beginning, Arab anti-Zionism differed from its European counterpart in both function and content. Functionally, while European anti-Semites regarded Zionism as a manifestation of Judaism, Arabs saw it as a defining feature.<sup>218</sup> Substantively, Arab anti-Semitism necessarily rejected the notion of Jewish nationality, which was central to European conceptions of noxious Jewish unassimilability.<sup>219</sup>

During the early twentieth century, increased Jewish immigration in Palestine led to increased interest in anti-Semitic propaganda. For example, during large waves of Zionist immigration, Arab translations of the *Protocols* appeared in Arabic and became increasingly popular.<sup>220</sup> During the interwar period, Arab socialists and communists associated Jews with fascist movements, while Arab royalists and fascist sympathizers associated Jews with communism.<sup>221</sup> The elements common to these contradictory narratives included the European view of “the Jew as universal solvent, the destroyer of social order and bringer of chaos,

214. See generally Esther Webman, *The Challenge of Assessing and Understanding Arab/Islamic Antisemitism* (forthcoming 2009) (on file with the United States Holocaust Memorial Museum). In light of certain contemporary anti-Muslim sentiments, it should be emphasized that many Arab and Muslim individuals are free of the anti-Semitic sentiments described in this section. The same can be said of other groups. The emphasis on anti-Semitic currents in various traditions is not intended to deny or diminish the existence of contrary views within the same populations and traditions.

215. See, e.g., Yehoshafat Harkabi, *On Arab Antisemitism Once More*, in *ANTISEMITISM THROUGH THE AGES* 227, 227–40 (Shmuel Almog ed., 1988); Penslar, *supra* note 191, at 12.

216. See, e.g., Andrew G. Bostom, *A Survey of Its Theological-Juridical Origins and Historical Manifestations*, in *THE LEGACY OF ISLAMIC ANTISEMITISM* 31 (Andrew G. Bostom ed., 2008).

217. See, e.g., KÜNTZEL, *supra* note 195. Some commentators, such as Bat Ye’or, are careful, however, to emphasize that Nazi influence is secondary to the Muslim religious base. Bat Ye’or, *Modern Egyptian Jew Hatred: Indigenous Elements and Foreign Influences*, in *THE LEGACY OF ISLAMIC ANTISEMITISM*, *supra* note 216, at 613, 616–17. Similarly, Jeffrey Herf cautions that “differences in language, historical experience and political context should be kept in mind to avoid facile analogies,” but nevertheless urges that “the comparative historical imagination should not shrink from comparisons when merited.” Herf, *supra* note 190, at 66.

218. Penslar, *supra* note 191, at 12.

219. *Id.* at 13. As Penslar has pointed out, Arab anti-Semites were forced to reject the European conception of the Jews as a retrograde nation, because even this derogatory description could serve to legitimize the principles of Zionism. *Id.*

220. *Id.* at 13–14.

221. *Id.*

housed in both the left and right ends of the political and economic spectrum” and endowed with preternatural sexual powers, though otherwise weak and degraded.<sup>222</sup>

Post-1948 Arab anti-Semitism “blend[s] contempt with fear,” replacing the stereotype of the pathetic Jew with a conception of Jewish global power.<sup>223</sup> Since 1948—when the loss of Palestine to the Jewish state was viewed as the era’s defining catastrophic event—assaulted Arab dignity became a common theme in contemporary Arab anti-Semitism. While the Soviets were developing a political anti-Semitism, in fact, a similar project was also under way in the Middle East.<sup>224</sup>

During the Nazi period, German anti-Semitism was exported to Arab countries in a deliberate, coordinated fashion and grafted onto local political concerns in order to become more palatable to the local populations.<sup>225</sup> Thus, by the time the Third Reich collapsed, an offshoot had already been carefully planted in Muslim lands through which the mission could be continued. The Nazi influence includes “the technique with which the anti-Semitic material has been reworked, and the political purpose being pursued,”<sup>226</sup> the idea of an international Jewish conspiracy,<sup>227</sup> and the concept of Jewish contamination.<sup>228</sup> This last Nazi legacy is the basis for the widespread Arab view that a Jewish cancer (or catastrophic disease) infests the world.<sup>229</sup> This metaphor has been given recent expression, for example, by Iranian President Mahmoud Ahmadinejad,<sup>230</sup> Hezbollah Secretary-General Hassan Nasrallah,<sup>231</sup>

222. *Id.* at 14.

223. *Id.* at 15. Penslar argues that “[o]lder forms of contempt for Jews have, in recent decades, taken the form of the widespread view that, humiliating though it was to be subjugated by Christian Europe, it has been all the more galling to witness Palestine falling under the rule of Jews.” *Id.*

224. See KÜNTZEL, *supra* note 195.

225. *Id.* The formative Nazi influence on Arab and Muslim anti-Semitism is also discussed in LEWIS, *supra* note 29, at 140–63.

226. Ye’or, *supra* note 217, at 617.

227. See Herf, *supra* note 190, at 65.

228. Ye’or, *supra* note 217, at 616.

229. *Id.*

230. For example, in August 2006, Mahmoud Ahmadinejad commented, “The world powers established the filthy bacteria, the Zionist regime which is lashing out at the nations in the region like a wild beast.” Abramovich, *supra* note 57. Responding to this remark, Israeli Foreign Minister Abramovich asked, “Doesn’t this remind us of similar words from the past?” *Id.* Similarly, Ahmadinejad has commented that “[v]ery soon this stain of disgrace will be purged from the centre of the Islamic world—and this is attainable.” Matthias Küntzel, *Hitler’s Legacy: Islamic Antisemitism in the Middle East* (Nov. 30, 2006) (unpublished manuscript, on file with the Institution for Social and Policy Studies at Yale University), available at <http://www.matthiaskuentzel.de/contents/hitlers-legacy-islamic-antisemitism-in-the-middle-east> (citations omitted).

231. “All the major disasters which befell the region stem from the existence of the state called Israel. So long as there is a state called Israel, disasters and



and others.<sup>232</sup> Additionally, as in Nazi Germany, Jews and Israel are represented as “a monstrous danger threatening the whole Arab nation.”<sup>233</sup>

Arab and Muslim anti-Zionism is sometimes explicit in its condemnation of all Jews regardless of nationality or politics. Canada’s former Minister of Justice, Irwin Cotler, has explained this point in an important article:

Hezbollah leader Hassan Nasrallah not only speaks of Israel’s “disappearance,” but has said that “If all the Jews were gathered in Israel it would be easier to kill them all at the same time.” In a lesser known, but no less defamatory and incendiary expression, Nasrallah has said that, “if we searched the entire world for a person more cowardly, despicable, weak and feeble in psyche, mind, ideology and religion, we would not find anyone like the Jew. Notice, I do not say the Israeli.” Shi’ite scholar Amal Saad-Ghorayeb, author of the book, *Hezbollah: Politics and Religion*, says this statement “provides moral justification and ideological justification for dehumanizing the Jews.” In this view, she went on, “the Israeli Jew becomes a legitimate target for extermination and it also legitimizes attacks on non-Israeli Jews.”<sup>234</sup>

In Nazi style,<sup>235</sup> the Hamas Covenant accuses the Jews of fomenting wars throughout the world in order to enrich themselves, stretching as far back as the French and Russian Revolutions and leading up to the present, including the First and Second World Wars.<sup>236</sup> “There is no war going on anywhere,” the Covenant claims,

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suffering will continue. This is a cancerous body in the region. . . . When a cancer is discovered, it must be dealt with fearlessly; it must be uprooted.” Hassan Nasrallah, Speech at the Shi’ite Moslem “Ashura” Flagellation Ceremony (Apr. 9, 2009) (transcript available at the Israel Ministry of Foreign Affairs Online News Archives). This passage is also quoted in SCHOENFELD, *supra* note 13, at 23, and in KÜNTZEL, *supra* note 230.

232. For example, in 2005, Palestinian Authority (“PA”) TV broadcast a sermon by Sheik Ibrahim Mudeiris, a paid employee of the PA, which included the following assertion: “With the establishment of the [S]tate of Israel, the entire Islamic nation was lost, because Israel is a cancer spreading through the body of the Islamic nation, and because the Jews are a virus resembling AIDS, from which the entire world suffers.” *This Week’s Palestinian Authority Sermon: We (Muslims) Will Rule America; Israel Is a Cancer; Jews Are a Virus Resembling AIDS; Muslims Will Finish Them Off* (PA television broadcast May 17, 2005), available at <http://www.memri.org/bin/articles.cgi?Page=subjects&Area=antisemitism&ID=SP90805>. To view the sermon, see <http://memritv.org/clip/en/669.htm>.

233. Ye’or, *supra* note 217, at 617.

234. Irwin Cotler, *The New Antisemitism: An Assault on Human Rights*, in ANTISEMITISM: THE GENERIC HATRED, *supra* note 15, at 15, 16–17 (citations omitted).

235. See KÜNTZEL, *supra* note 195, at 2.

236. The Covenant of the Islamic Resistance Movement art. XXII, Aug. 18,

“without having their finger in it.”<sup>237</sup> According to Hamas, what makes this possible is the great wealth that Jews have amassed, through which they now control “world media, news agencies, the press, publishing houses, [and] broadcasting stations.”<sup>238</sup> Moreover, to this day, “World Zionists” have a “limitless” plan for global domination: “After Palestine, the Zionists aspire to expand from the Nile to the Euphrates. When they will have digested the region they overtook, they will aspire to further expansion, and so on.”<sup>239</sup> Following the hadith, the Covenant announces that “[t]he Day of Judgment will not come about until Moslems fight the Jews (killing the Jews).”<sup>240</sup>

#### F. American Anti-Semitism

In the United States, there has been anti-Semitic prejudice and discrimination from the very beginning,<sup>241</sup> although no ghettos, pogroms, or systematic persecution.<sup>242</sup> A dozen years ago, the leading historian of American anti-Semitism observed that “Christian viewpoints underlie all American anti-Semitism.”<sup>243</sup> In the twenty-first century, immigration patterns and increased religious diversity have broadened the range of domestic anti-Semitism, particularly with respect to increased Muslim anti-Semitism. Indeed, virtually every form of anti-Semitism expressed throughout the world has been given voice in the United States as well.<sup>244</sup> While Jews have frequently encountered discrimination and abuse in the United States, however, they have rarely suffered as severely as some other groups.<sup>245</sup>

In the United States, the college campus may seem an ironic place to find a resurgence of this particular evil, since the campus

1988, available at [http://avalon.law.yale.edu/20th\\_century/hamas.asp](http://avalon.law.yale.edu/20th_century/hamas.asp).

237. *Id.*

238. *Id.*

239. *Id.* art. XXXII. The Covenant asserts that “[t]heir plan is embodied in the ‘Protocols of the Elders of Zion,’ and their present conduct is the best proof of what we are saying.” *Id.*

240. *Id.* art. VII. The full quotation, attributed to the Prophet, is as follows:

The Day of Judgement [sic] will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Moslems, O Abdulla, there is a Jew behind me, come and kill him. Only the Gharkad tree, (evidently a certain kind of tree) would not do that because it is one of the trees of the Jews.

*Id.*

241. LEONARD DINNERSTEIN, *ANTISEMITISM IN AMERICA*, at viii (1994); LAQUEUR, *supra* note 13, at 142.

242. LAQUEUR, *supra* note 13, at 142.

243. DINNERSTEIN, *supra* note 241, at ix.

244. See LAQUEUR, *supra* note 13, at 142–47; Jack Wertheimer, *Antisemitism in the United States: A Historical Perspective*, in *ANTISEMITISM IN AMERICA TODAY: OUTSPOKEN EXPERTS EXPLORE THE MYTHS*, *supra* note 105, at 33, 33.

245. Wertheimer, *supra* note 244, at 35.

has traditionally been associated with an enlightened tolerance.<sup>246</sup> On the other hand, colleges have two qualities that may explain in part how they have come to serve as a means by which anti-Semitism is transmitted. First, like the Internet, college campuses serve as nodes through which global trends are transmitted. Second, like non-governmental organizations, college campuses have become bastions of all forms of political progressivism, including those which are now disproportionately associated with the new anti-Semitism. It is this latter phenomenon which led Abigail Thernstrom, now Vice Chair of the U.S. Commission on Civil Rights, to characterize American universities as “islands of repression in a sea of freedom.”<sup>247</sup>

At San Francisco State University, an angry mob chased dozens of Jewish students and faculty, under police escort, from a peace protest and into the nearby Hillel.<sup>248</sup> “Hitler did not finish the job,” they yelled. “Get out or we will kill you.”<sup>249</sup> Flyers advertised: “Palestinian Children Meat Slaughtered According to Jewish Rites Under American License.”<sup>250</sup> At the University of California at Santa Cruz, campus demonstrators accosted a soft-spoken Jewish freshman wearing a traditional Star-of-David necklace.<sup>251</sup> The hecklers demanded: “Do you know how many Palestinian babies are dead because of you?”<sup>252</sup> At Columbia, professors badgered students from Israel: “How many Palestinians have you killed?”<sup>253</sup> In Madison, Wisconsin, a classroom displayed the messages: “Kill the Jews” and “Make it snow Jewish ash.”<sup>254</sup> At the University of California at Irvine, the site of innumerable anti-Jewish incidents, a Jewish student invited a militant Islamist lecturer to dine with him

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246. See generally TOBIN ET AL., *supra* note 15.

247. Chester E. Finn, Jr., *The Campus: “An Island of Repression in a Sea of Freedom,”* COMMENT., Sept. 1989, at 17, 17.

248. Laurie Zoloth, *Fear and Loathing at San Francisco State*, in THOSE WHO FORGET THE PAST: THE QUESTION OF ANTI-SEMITISM, *supra* note 13, at 258, 259–61.

249. *Id.* at 260.

250. TOBIN ET AL., *supra* note 15, at 239.

251. For a general discussion of the situation at Santa Cruz, see Leila Beckwith, Tammi Rossman-Benjamin & Ilan Benjamin, *Faculty Efforts to Combat Anti-Semitism and Anti-Israeli Bias at the University of California-Santa Cruz*, in ACADEMICS AGAINST ISRAEL AND THE JEWS, *supra* note 15, at 122, 122.

252. Marcus, *supra* note 204.

253. Noah Liben, *The Columbia University Report on Its Middle Eastern Department’s Problems: A Paradigm for Obscuring Structural Flaws*, in ACADEMICS AGAINST ISRAEL AND THE JEWS, *supra* note 15, at 95, 97; see also Martin Kramer, *Columbia University: The Future of Middle East Studies at Stake*, in ACADEMICS AGAINST ISRAEL AND THE JEWS, *supra* note 15, at 103, 103.

254. Marc Ballon, *Campus Turmoil: Jewish Students and Activists Call UC Irvine a Hotbed of Anti-Semitic Harassment*, JEWISH J., Mar. 10, 2005, available at [http://www.jewishjournal.com/articles/item/campusturmoil\\_20050311](http://www.jewishjournal.com/articles/item/campusturmoil_20050311).

in Jerusalem to talk about how they might live together in peace.<sup>255</sup> The Imam responded, “There will be peace when you are gone.”<sup>256</sup> In 2006, the U.S. Commission on Civil Rights surveyed the condition of American universities and concluded that anti-Semitism is once again a “serious problem” on many campuses throughout the United States.<sup>257</sup>

#### IV. THE NEW ANTI-SEMITISM

Bernard-Henri Lévy has argued that the new anti-Semitism rests upon three pillars which collectively constitute a new form of anti-Jewish discourse. They may be described loosely as anti-Semitism-denial, Holocaust-denial, and anti-Zionism.<sup>258</sup> These three pillars correspond, respectively, to what Lévy calls the “triple pillars of the cult of victimhood, the taste for memory, and the punishment of evildoers.”<sup>259</sup> The newness of this form of an old discourse is, Lévy argues, necessary in the post-Holocaust West for a widespread anti-Semitic movement

to emerge, for people to feel once again the desire and, above all, the *right* to burn all the synagogues they want, to attack boys wearing yarmulkes, to harass large numbers of rabbis, to kill not just one but many Ilan Halimis<sup>260</sup>—in order for anti-Semitism to be reborn on a grand scale.<sup>261</sup>

The first pillar, anti-Semitism-denial, addresses the “love of victimhood,” instantiating the proposition that “[t]he Jews are no longer exploiting the wealth of nations but monopolizing that much rarer good[,] . . . human compassion.”<sup>262</sup> This putative hoarding of victimhood capital is “the first reason to start resenting them again and, in clear conscience, in the name of the sacred concern due to all

255. For discussions of anti-Semitic activity at the University of California at Irvine, see Leila Beckwith, *Anti-Zionism / Anti-Semitism at the University of California-Irvine*, in *ACADEMICS AGAINST ISRAEL AND THE JEWS*, *supra* note 15, at 115, 115; Marcus, *supra* note 15, at 853–55.

256. Amir Abdel Malik, Address at the University of California at Irvine (Oct. 5, 2006), available at <http://www.standwithus.org/VIDEO/?VID=6>.

257. *CAMPUS ANTI-SEMITISM*, *supra* note 15, at 72. The contemporary resurgence of anti-Semitism on American campuses is detailed in TOBIN ET AL., *supra* note 15; Marcus, *supra* note 15, at 837–42.

258. See BERNARD-HENRI LÉVY, *LEFT IN DARK TIMES: A STAND AGAINST THE NEW BARBARISM* 155–58 (Benjamin Moser trans., 2008).

259. *Id.* at 155.

260. Halimi was a young French Jew of Moroccan ancestry who was kidnapped, tortured over a period of three weeks, and murdered on January 21, 2006, by a gang of Muslim immigrants known as the “Barbarians.” Nidra Poller, *The Murder of Ilan Halimi: A Jewish Man is Kidnapped in Paris, Tortured for 24 Days and Then Dies*, WALL ST. J., Feb. 26, 2006, available at <http://www.opinionjournal.com/extra/?id=110008006>.

261. LÉVY, *supra* note 258, at 155.

262. *Id.*

the world's dead, to start hating them again."<sup>263</sup>

The second pillar, Holocaust-denial, addresses the "duty of memory,"<sup>264</sup> applying classical anti-Semitic tropes to deflect the history of Jewish persecution. In its strong form, this deflection takes the shape of outright denial, accusing Jews of using extraordinary craft and malevolent genius to con the world into "the biggest fraud in the history of mankind."<sup>265</sup> In its weaker form, this deflection takes the form of a Holocaust-minimization or revisionism, diminishing the size, scope, and uniqueness of importance of the Shoah; accusing Jewish victims of complicity in their own demise; or alleging secret conspiracies between Hitler and the Zionists.<sup>266</sup> Holocaust inversion—by which Jews are alleged to have assumed the role of Nazis—may be construed as a form of Holocaust revisionism, since it minimizes the scope of the Nazi crimes.<sup>267</sup> The belief that Nazi crimes were no worse than Israeli conduct has "brought welcome relief to many who had long borne a burden of guilt for the role which they, their families, their nations, or their churches had played in Hitler's crimes against the Jews, whether by participation or complicity, acquiescence or indifference."<sup>268</sup>

The third pillar, addressing "triumphal antifascism" or the "punishment of evildoers," consists in a particularly toxic form of the ideology of anti-Zionism.<sup>269</sup> This ideology depicts Israel as a "[s]tolen" state, "[p]erpetuated thereafter by crime, occupation, violence, and lies," a "fascist State," a "racist State," the "worst State . . . on the face of the earth."<sup>270</sup> Those anti-Zionists who adhere to a putatively antiracist ideology deny that they harbor any animus against Jews per se.<sup>271</sup> Rather, what they oppose is "people who traffic in their own memory (Holocaust deniers) and push out the memories of others (competition among victims) for the sole purpose of legitimizing an illegitimate state (third cornerstone of the system—its anti-Zionist stone)."<sup>272</sup>

263. *Id.* at 156.

264. *Id.* at 155.

265. *Id.* at 156–57.

266. *Id.* at 157.

267. See LEWIS, *supra* note 29, at 14 (observing that "[i]f the Israelis were no better than the Nazis, then it follows that the Nazis were no worse than the Israelis").

268. *Id.* Lewis has argued that this notion has "evoked a powerful response," not only among the heirs of the Nazis and their collaborators, but also "in the English-speaking countries, where many had chafed under the restraints imposed upon them by the revulsion against anti-Semitism in the immediate post-Hitler era." *Id.*

269. LÉVY, *supra* note 258, at 155, 157–58.

270. *Id.* at 158.

271. *Id.*

272. *Id.*

## V. THE HARMS OF THE NEW ANTI-SEMITISM

A. *The Theory of Discrimination*

Two primary theoretical frameworks have emerged to explain the wrongfulness of the various forms of conduct which constitute illicit discrimination. Broadly speaking, they can be described as antidifferentiation (or anticlassification) theory and antisubordination (or anticast) theory.<sup>273</sup> Interestingly, these two bodies have evolved over time in a manner which demonstrates a core, common concern. This concern may be described as “dehumanization.”<sup>274</sup> This core concern of equal protection theory is precisely the way in which the harm entailed in the new anti-Semitism should be understood.

A student complains that she is unable to withstand the extent of anti-Jewish animus to which she was regularly subjected on her campus. After a spate of serious anti-Semitic incidents on her campus, she says something like the following: “Not only do I feel scared to walk around proudly as a Jewish person on . . . campus, I am terrified for anyone to find out. Today I felt threatened that if students knew that I am Jewish and that I support a Jewish state, I would be attacked physically.”<sup>275</sup> At first blush, her professed inability to obtain equal educational opportunity would appear to be a paradigmatic case of the harm or injury which she is required to demonstrate in an antidiscrimination case. Skeptics may reply, however, that her claims of injury are exaggerated or manufactured. They may argue, for example, that there was no harm, that any injury could have been avoided by the victim, or that the extent of the harm was exacerbated by the victim’s excessive sensitivity. Let us assume that the precipitating factors for her departure include a lengthy pattern of anti-Zionist diatribes at campus-sponsored events, destruction and vandalism of Jewish emblems (such as a Holocaust memorial and posters for Jewish communal events), and numerous threats aimed at various students, which may or may not include her. Further, assume that the university’s administration has long been on notice of these facts and has failed to address them, perhaps on the ground that, as a general rule, it does not

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273. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9 (2003).

274. See Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 526–27 (2003).

275. Susan B. Tuchman, Statement Submitted to the U.S. Commission on Civil Rights Briefing on Campus Anti-Semitism, in *CAMPUS ANTI-SEMITISM*, *supra* note 15, at 15. The actual graduate student who expressed these fears in a letter to the Irvine Chancellor was reportedly advised by the university administration to visit the university’s counseling center to “work through her feelings.” *Id.* at 16.

intervene in the exercise of student political expression. These are actual allegations drawn from some American campuses, and all of them were alleged in the *Irvine* case.

How was this individual student—who likely is an American-born Jewish woman—harmed in a way that should be cognizable under the law? More specifically, in what sense has the university, by permitting this environment to develop on campus, violated the antidiscrimination principle contained in both the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Title VI of the Civil Rights Act of 1964?

### B. *Antidifferentiation Theory*

Under antidifferentiation theory, wrongful discrimination consists of unequal treatment based on suspect characteristics, such as race, religion, or national origin. Discrimination so construed may be understood as a failure of impartiality.<sup>276</sup> Antidifferentiation theory is the basis for the Supreme Court's repeated assertions that judicial strict scrutiny should be applied to governmental actions that distribute benefits or burdens on the basis of individual racial or ethnic classifications.<sup>277</sup> This approach has increasingly been associated with conservative commentators in recent years<sup>278</sup> and is apparent in recent Supreme Court decisions addressing affirmative action. In *Gratz v. Bollinger*, for example, antidifferentiationism was articulated in these terms: "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."<sup>279</sup> While it is most closely associated with different-treatment analysis, antidifferentiation theory also supports some forms of hostile-environment analysis, including the Court's consideration of teacher-on-student and student-on-student harassment in educational settings.<sup>280</sup> Arguably, it is now the "standard view" that American antidiscrimination law is based upon antidifferentiation theory, although some commentators argue that this theory does not fully explain contemporary civil rights jurisprudence.<sup>281</sup>

In recent years, the Court has offered two rationales for the

276. David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 940–41 (1989).

277. See, e.g., *Johnson v. California*, 543 U.S. 499, 505–06 (2005); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995).

278. Hasnas, *supra* note 26, at 432.

279. 539 U.S. 244, 270 (2003) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

280. See *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (student-on-student); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (teacher-on-student). For an explanation of how antidifferentiation theory now provides a basis for sexual harassment law, see Balkin & Siegel, *supra* note 273, at 13–14.

281. See Balkin & Siegel, *supra* note 273, at 1, 16.

antidifferentiation theory: individual stigma and social conflict.<sup>282</sup> Strict judicial scrutiny is afforded to classifications which have these impacts.<sup>283</sup> First, use of prohibited classification (such as a racial distinction) “demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”<sup>284</sup> This has been explained in terms of the tendency of racial classifications to reinforce stereotypes of racial inferiority.<sup>285</sup> The genesis of this notion is in the Court’s finding in *Brown v. Board of Education* that the segregation of black children “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>286</sup> More broadly, it has been explained as the indignity arising from “reduction” of individual identity to ancestral group membership.<sup>287</sup> This may be construed as a form of “dehumanization,” insofar as the concern is that the victim’s common humanity and individual dignity are robbed by classifications that reduce the victim to a single immutable characteristic. Second, prohibited classifications “lead to a politics of [inter-group] racial hostility.”<sup>288</sup> The Court’s concern here is that governmental endorsement of “race-based reasoning and the conception of a Nation divided into racial blocs” contributes to “an escalation of racial hostility and conflict.”<sup>289</sup> Historically, the Court has emphasized this encouragement of prejudice as a feature of illicit discrimination.<sup>290</sup> The Court has struck down state statutes which operate as “a stimulant to that race prejudice which is an impediment to securing . . . equal justice.”<sup>291</sup> As David Strauss has pointed out, this approach may also overlap with antisubordinationism.<sup>292</sup>

Chief Justice Roberts has argued that this antidifferentiation approach formed the basis for the Court’s decision in *Brown*, which “held that segregation deprived black children of equal educational

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282. See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 517 (2000); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603–04 (1990) (O’Connor, J., dissenting).

283. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995).

284. *Cayetano*, 528 U.S. at 517.

285. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

286. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). This emphasis on “status in the community” could “also reflect a subordination approach.” Strauss, *supra* note 276, at 942.

287. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2796 (2007) (Kennedy, J., concurring) (“Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake.”).

288. *Croson*, 488 U.S. at 493.

289. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O’Connor, J., dissenting).

290. See Strauss, *supra* note 276, at 944–45.

291. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879); see, e.g., *id.* (striking down statute which barred blacks from serving on juries).

292. Strauss, *supra* note 276, at 945.



opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority.<sup>293</sup> In other words, “[i]t was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954.”<sup>294</sup> Justice Roberts concedes, however, that this hallowed ground is highly contested and that various parties claim *Brown* as the heritage of their approach.<sup>295</sup>

### C. Antisubordination Theory

Under antisubordination theory, wrongful discrimination consists of “any conduct that has the effect of subordinating or continuing the subordination of a minority group”<sup>296</sup> or which demeans individuals by denying them the concern and respect which flows from their equal moral worth.<sup>297</sup> In Owen Fiss’s influential formulation, “what is critical . . . is that the state law or practice aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group.”<sup>298</sup> Under this approach—which is based on “effects” rather than “intent”—conduct which “has the unintended consequence of increasing or preserving” a minority group’s disadvantaged status is foreclosed even if not directed purposely towards that group.<sup>299</sup> For example, the Supreme Court struck down antimiscegenation laws in *Loving v. Virginia* partly on the ground that they are “measures designed to maintain White Supremacy.”<sup>300</sup> In recent years, antisubordination theory has been more influential among academic commentators than among members of the Supreme Court, although its academic influence is formidable.<sup>301</sup>

Antisubordination theory has been importantly refined within feminist jurisprudence, particularly among commentators focusing on the question of “what’s wrong with sexual harassment,” i.e., why should sexual harassment be understood to constitute a form of sex discrimination?<sup>302</sup> Catharine MacKinnon argues that sexual

293. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2744 (2007).

294. *Id.*

295. *Id.*

296. Hasnas, *supra* note 26, at 436.

297. This latter formulation is based on the theory presented in HELLMAN, *supra* note 25, at 35. Hellman’s contemporary formulation is analogous to Kenneth Karst’s concept of equal citizenship. *See, e.g.*, Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 247–48 (1983).

298. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976).

299. Hasnas, *supra* note 26, at 436–37.

300. 388 U.S. 1, 11 (1967); *see also* Strauss, *supra* note 276, at 941.

301. *See, e.g.*, Colker, *supra* note 24; Sunstein, *supra* note 23.

302. *See, e.g.*, Franke, *supra* note 10.

harassment is wrong because it institutionalizes the sexual subordination of women.<sup>303</sup> In MacKinnon's influential view, the wrongfulness of sexual harassment arises largely from its use as "an instrument of sex-role stereotyping."<sup>304</sup> MacKinnon observes that "a sex stereotype is present in the male attitude, expressed through sexual harassment, that women are sexual beings whose privacy and integrity can be invaded at will, beings who exist for men's sexual stimulation or gratification."<sup>305</sup> Influenced by both Marxism and the civil rights movement, MacKinnon argues that sexual harassment dehumanizes women by relegating them to subservience by exploiting both "their sexuality and their work," just as African Americans have suffered both personal and economic exploitation.<sup>306</sup>

In *What's Wrong with Sexual Harassment*, a critique of feminist antisubordination theory, Katharine Franke argues that "the antisubordination view of sexual harassment, while providing the something more that is lacking in the antisex and 'but for' paradigms, seems to over determine the nature of the harm as something males do to females."<sup>307</sup> Franke argues that this approach failed to acknowledge the problem of same-sex sexual harassment.<sup>308</sup> In order to address this problem, Franke refines MacKinnon's antisubordination approach in "hetero-patriarchal terms," arguing that "sexual harassment is understood as a mechanism by which an orthodoxy regarding masculinity and femininity is enforced, policed, and perpetuated in the workplace."<sup>309</sup> Specifically, Franke situates sexual harassment within the "technology of sexism"<sup>310</sup> that constructs gender identity according to "fundamental gender stereotypes: men as sexual conquerors and women as sexually conquered."<sup>311</sup>

In an important response to Franke's work, Kathryn Abrams concedes that feminist sexual harassment theory needs refinement in order to better accommodate same-sex harassment issues but that it should retain its emphasis on sexual subordination.<sup>312</sup> In *The New Jurisprudence of Sexual Harassment*, she argues that sexual harassment jurisprudence does not require Franke's "readjustment of the balance away from a theory of subordination toward a theory of gendering."<sup>313</sup> Instead, it should be refined by "a more contingent,

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303. MACKINNON, *supra* note 24, at 174–75.

304. Franke, *supra* note 10, at 715.

305. MACKINNON, *supra* note 24, at 179.

306. Franke, *supra* note 10, at 726.

307. *Id.* at 759.

308. *Id.* at 760–62.

309. *Id.* at 760.

310. *Id.* at 693.

311. *Id.*

312. Abrams, *supra* note 24, at 1172.

313. *Id.* at 1230.

multifaceted account of women's subordination through sexual harassment."<sup>314</sup> In terms arguably similar to Franke's,<sup>315</sup> Abrams theorizes that the wrongfulness of sexual harassment inheres in its tendency to "preserve male control and entrench masculine norms in the workplace."<sup>316</sup>

*D. Political Anti-Semitism as Wrongful Differentiation, Subordination, and Forced Covering*

The new anti-Semitism functions both as differentiation and as subordination. Jewish students are wrongfully differentiated in the basic sense that they are denied equal educational opportunities, as in the *Irvine* case, for reasons relating to their ethnic and ancestral identity. A Jewish student who is so deeply demeaned that she cannot maintain her place at a university does not have opportunities equal to that of a non-Jewish student. While it can be shown that some Jewish students have subjectively experienced this deep level of offensiveness, the harassment standard requires demonstration of objective offensiveness. The question, then, is whether Jewish students have been reasonable in the offense which they have taken to incidents reported as harassment. As shown below, Irvine's conduct—that is, its maintenance of a particular campus environment—both demeans Jewish students and foments social division to the requisite extent. At the same time, the new anti-Semitism maintains a system of moral subordination in which Jews are constructed as racialized others, biologically distinct from and morally inferior to the dominant gentile majority.

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314. *Id.*

315. Franke, *supra* note 65, at 1246 (commenting on the similarities between their respective formulations and suggesting that each had added to the other's work).

316. Abrams, *supra* note 24, at 1172.

1. *The New Anti-Semitism as Wrongful Differentiation*

a. *The New Anti-Semitism as Demeaning.* The new anti-Semitism is a technology of dehumanization: a mechanism by which an old system of stereotypes and defamations—increasingly congealed in some circles into an orthodoxy—regarding the role of global Jewry is disseminated, policed, and perpetuated. If the wrongfulness of sexual harassment arises largely from its use as “an instrument of sex-role stereotyping,”<sup>317</sup> then the wrongfulness of new anti-Semitism arises similarly from its use as an instrument in stereotyping the role that Jews play, individually and collectively, in their communities, Israel, and the world. Philosopher Pierre-Andre Taguieff has characterized that stereotyping role effectively:

Like the old “anti-Semitism,” in the strong sense of the term, it is characterized by an absolute hatred of Jews as representatives of a single, intrinsically negative entity or exemplars of an evil force—that is, a total hatred in which Jews are “considered in themselves as endowed with a malign essence.” . . . The charge that Jews have a will to dominate, or are involved in a “plot to conquer the world,” is recycled in this fantasy, as is the long-stereotypical rumble of accusation: “The Jews are guilty,” which for more than half a century has been repeatedly translated into “the Zionists are guilty,” “Zionism is guilty,” or “Israel is guilty.”<sup>318</sup>

The new anti-Semitism is dehumanizing to Jews because, as it grafts ancient anti-Jewish motifs upon the State of Israel, it not only carries them forward into a new century, but also seeks to silence any objections to its claims of censorship. For example, those Jews who have the temerity to call these forms of anti-Zionism by their true names are accused, in terms often redolent of old-fashioned anti-Semitism, of controlling media, government, and financial power to extinguish opposition.<sup>319</sup>

This stereotyping harms individual diasporic Jews in two respects: by demeaning an element deeply constitutive of Jewish identity and by laying the groundwork for further anti-Jewish assault. Insofar as Zionism has, since antiquity, been a central part of Jewish identity, it is not coherent to suggest that anti-Zionism is not also anti-Jewish. As Ruth Wisse has commented, Judaism without Zionism would no more be Judaism than Israel without Jews would be Israel.<sup>320</sup> The assault on Zionism is, in this sense, an

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317. Franke, *supra* note 10, at 715.

318. TAGUIEFF, *supra* note 13, at 4 (citation omitted).

319. See HARRISON, *supra* note 22, at 30–39; Marcus, *supra* note 63, at 1048–49.

320. See Wisse, *supra* note 13, at 192.

effort to destroy a central aspect of diasporic Jewish identity. Irwin Cotler has described the new anti-Semitism as an “assault upon the Jewish people’s right to self-determination,” the “religious and national sensibility of the Jewish people,” and Jewish memory and experience.<sup>321</sup>

On numerous college campuses, swastikas are drawn, carved, or etched in highly visible locations or in locations closely associated with individual Jewish students or Jewish groups.<sup>322</sup> In some cases, the swastikas are coupled with Jewish stars or Israeli flags. The swastika, in whatever form, location, or medium, is culturally significant as an emblem of the destruction of European Jewry. Even where the swastika is coupled with symbols of the Israeli state, its potentially harassing effect on Jews is unmistakable. In this respect, anti-Zionist expression can be compared to pornography: in certain forms, both are constitutionally protected, yet their aggressive usage may have a predictable effect on the creation of a hostile environment.<sup>323</sup>

The New Jersey Supreme Court recently adopted this position in the important 2008 case of *Cutler v. Dorn*, which establishes, under the laws of that state, that anti-Semitic harassment may be demonstrated under the same standard used in racial and sexual harassment cases.<sup>324</sup> In this police department workplace discrimination case, the New Jersey Supreme Court unanimously upheld a jury verdict which determined that a hostile environment was created by a pattern of derogatory comments relating to Jews, the Holocaust, and a particular Jewish police officer.<sup>325</sup> In one notable incident, the officer found that a sticker of an Israeli flag

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321. See Cotler, *supra* note 42, at 18.

322. See Marcus, *supra* note 15, at 890.

323. Marcus, *supra* note 63, at 1045 (articulating briefly the analogy between anti-Zionism and pornography).

324. *Cutler v. Dorn*, 955 A.2d 917, 927–29 (N.J. 2008). The appellate court’s contrary holding, which relied upon the decision in *Heitzman v. Monmouth County*, 728 A.2d 297 (N.J. Super. Ct. App. Div. 1999), to reverse the denial of a motion for dismissal notwithstanding the verdict, was reversed, and *Heitzman* was overturned to the extent it held that religious harassment must be determined based on a more demanding standard than racial and sexual harassment. *Cutler*, 955 A.2d at 929–30.

325. *Cutler*, 955 A.2d at 930. The then-chief of police commented on the plaintiff police officer’s Jewish ancestry once or twice per month, including frequent comments regarding various traditional Jewish stereotypes (about noses, money, business, etc.), referred to the officer as “the Jew” in his presence, and asked him not to wear a yarmulke although another officer was permitted to wear a “Jesus First” pin on his lapel. *Id.* at 921. In addition, another officer referred to “dirty Jews” in the officer’s presence and was, in the officer’s opinion, insufficiently reprimanded for it. *Id.* at 922. The officer also heard his brethren repeatedly say, “Let’s get rid of all those dirty Jews.” *Id.* at 923. The court noted that “[t]he supervisors’ comments perpetuated some of the odious and vicious stereotypes of Jews circulated during medieval times and the Nazi era.” *Id.* at 927 n.10.

had been affixed to his locker.<sup>326</sup> A few weeks thereafter, a sticker of a German flag was placed above the sticker of the Israeli flag.<sup>327</sup> The New Jersey Supreme Court, as an initial matter, dispensed with the objection that some of the anti-Semitic remarks were not specifically directed at the plaintiff, explaining that “[c]ircumstances can give rise to an actionable hostile work environment claim even where the plaintiff was not the ‘target’ of the offensive or harassing conduct.”<sup>328</sup> The court then held that the plaintiff had adequately proven his harassment case.<sup>329</sup> Chastising the appellate court, the *Cutler* court then explicitly adopted the pornography analogy: “If the ‘ribbing’ [that the plaintiff received] had been sexual in nature and female police officers were made to ‘go-along-with’ . . . bawdy pictures of nude women, we doubt that a female officer’s sexually hostile workplace claim would have been dismissed or a jury’s verdict overturned.”<sup>330</sup>

b. *The New Anti-Semitism as Socially Disruptive.* Just as political anti-Semitism is demeaning to Jews, whether intended as such or not, it also foments social division in the same manner as other racist or ethnic hate and bias. That is to say, anti-Semitic speech-acts increase the likelihood of anti-Semitic hate and bias incidents. This is, at least in part, an application of research finding that the presence of stereotypical images of a particular group tends to increase the level of implicit bias.<sup>331</sup> The rhetoric of anti-Zionism has measurably increased not only verbal but also physical attacks on individual Jews around the world, as the State Department has documented.<sup>332</sup> The extent of “inter-group hostility” occasioned by contemporary political anti-Semitism has been likened to an extension of Middle East conflict by other means. Moreover, the attribution of demonic characteristics to Israel has a clear historical connection to efforts to lay the groundwork for extermination.

The relationship between traditional anti-Semitic expression and anti-Jewish hate and bias incidents is well-established.<sup>333</sup> As Alexander Tsesis has observed of the Shoah, “[p]ropagandists not only made anti-Semitism acceptable, they made it respectable.”<sup>334</sup>

326. *Id.* at 922.

327. *Id.*

328. *Id.* at 925.

329. *Id.* at 927.

330. *Id.*

331. See Irene V. Blair, Jennifer E. Ma & Alison P. Lenton, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 832–33 (2001); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 982 (2006) (noting that this finding is supported both by social-scientific evidence and common sense).

332. 2008 GLOBAL ANTI-SEMITISM REPORT, *supra* note 9, at 11.

333. TSESIS, *supra* note 9, at 11–27.

334. *Id.* at 23.

This has, of course, been the principal cause of concern with verbal expressions of the new anti-Semitism. Anti-Semitic slogans did not pose an immediate danger to Jews as the Nazis rose to power.<sup>335</sup> It is in this vein that one could ask, with Elie Wiesel's father, whether anyone has ever died from the pattern of stereotypes, defamations, and hateful speech to which Jews have been subjected. Yet, as Tsesis has shown (and Elie Wiesel suggested), years of indoctrination paved the way to the Final Solution.<sup>336</sup> The Nazi experience demonstrates that the most dangerous speech may not pose an immediate threat of harm, taking years to develop "until it becomes culturally acceptable first to libel, then to discriminate, and finally to persecute outgroups."<sup>337</sup>

The explicitness of this connection is sometimes present in domestic campus expressions of this conflict. Even when this connection is not explicit, however, anti-Zionism provides support for more explicitly anti-Semitic activity. This phenomenon, which may be a product of recklessness rather than intent, has been described by anti-Zionist philosopher Michael Neumann, who has conceded that his work, and that of other anti-Zionists, "is a gift to neo-Nazis and racists of all sorts."<sup>338</sup> Neumann's justification for providing this gift is that this anti-Semitism is trivial relative to the moral character of the "war crimes" which he attributes to Israel.<sup>339</sup>

## 2. *The New Anti-Semitism as a System of Subordination*

This Article has already examined some of the ways in which the new anti-Semitism demeans Jews and encourages anti-Semitic hate and bias incidents.<sup>340</sup> This section will examine the function of

335. *Id.*

336. *Id.* at 26.

337. *Id.*

338. David Hirsh, *Anti-Zionism and Antisemitism: Cosmopolitan Reflections* 26 (Yale Initiative for the Interdisciplinary Study of Antisemitism, Working Paper No. 1, 2007), available at <http://www.yale.edu/yiisa/workingpaper/hirsh/David%20Hirsh%20YIISA%20Working%20Paper1.pdf> (quoting Professor of Philosophy Michael Neumann).

339. Neumann explains his position as follows:

Undoubtedly there is genuine antisemitism in the Arab world: the distribution of the Protocols of the Elders of Zion, the myths about stealing the blood of gentile babies. This is utterly inexcusable. . . . The progress of Arab antisemitism fits nicely with the progress of Jewish encroachment and Jewish atrocities. This is not to excuse genuine antisemitism; it is to trivialize it. . . . Israel has committed war crimes. It has implicated Jews generally in these crimes, and Jews generally have hastened to implicate themselves. This has provoked hatred against Jews. Why not? Some of this hatred is racist, some isn't, but who cares? Why should we pay any attention to this issue at all?

*Id.* (quoting Michael Neumann, *What is Antisemitism?*, COUNTERPUNCH, June 4, 2002).

340. See *supra* notes 317–39 and accompanying text.

the new anti-Semitism as a racialized system of moral subordination, affixing Jews with racial attributions which are imbued with stereotypes and markers of moral inferiority.<sup>341</sup> Unlike other subordination systems, the new anti-Semitism typically racializes Jews not primarily as biologically inferior nonwhites but as paragons of a perverse racial whiteness, combining dysfunctional ethnic traits with an arrogant racial supremacism. This process is not merely demeaning to Jews, individually and collectively; rather, it functions to dehumanize by constructing Jewishness from racial attributes which are rejected as beneath common humanity. This attribution frames Jews as suitable, by reason of racial guilt, for dispossession or destruction.

a. *The Jewish Racial Question.* The putative whiteness of American Jews is a highly contested question that has generated an astonishing range of mutually contradictory responses. Commentators variously argue, to provide just a few examples, that Jews are obviously white;<sup>342</sup> that they are definitely not white;<sup>343</sup> that they are “off-white”;<sup>344</sup> that they are sometimes off-white and sometimes white;<sup>345</sup> that they recently became white; that they have occupied many different locations on the whiteness scale;<sup>346</sup> that their shiftiness on the whiteness scale is a significant source of anxiety to others;<sup>347</sup> that they are still negotiating a costly process in

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341. This reracialization illustrates the principle that racial formation can be externally imposed, as, for example, when social and political phenomena are explained in terms of an out-group’s defective cultural norms. OMI & WINANT, FROM THE 1960S TO THE 1980S, *supra* note 27, at 66. Adverse racial attributions and racial myths have, similarly, been affixed to other American groups in recent years: African Americans, for example, as having defective cultural norms and dysfunctional families. *Id.*

342. This position is usefully explored in Melanie Kaye/Kantrowitz, *Notes from the (Shifting) Middle: Some Ways of Looking at Jews*, in JEWISH LOCATIONS: TRAVERSING RACIALIZED LANDSCAPES, *supra* note 132, at 115 [hereinafter Kaye/Kantrowitz, *Looking at Jews*]. Jews are also seen as nonwhite by white supremacists. See, e.g., MELANIE KAYE/KANTROWITZ, THE COLORS OF JEWS: RACIAL POLITICS AND RADICAL DIASPORISM 8 (2007) [hereinafter KAYE/KANTROWITZ, COLORS OF JEWS] (quoting ANDREW MACDONALD, THE TURNER DIARIES (2d ed. 1980)).

343. See, e.g., MICHAEL LERNER, THE SOCIALISM OF FOOLS: ANTI-SEMITISM ON THE LEFT 123 (1992); Michael Lerner, *Jews are Not White*, VILLAGE VOICE, May 18, 1993, at 33; Ralph Ellison, *The New Leader* (1963), reprinted in WHAT DID THEY THINK OF THE JEWS?, at 561 (Allan Gould ed., 1991) (imputing this position to Ralph Ellison).

344. CHARLES MILLS, THE RACIAL CONTRACT 78–80 (1997). Mills also interestingly employs the term “inferior whites.” *Id.* at 80.

345. KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA 1 (1998).

346. Lisa Tessman, *Jewish Racializations: Revealing the Contingency of Whiteness*, in JEWISH LOCATIONS: TRAVERSING RACIALIZED LANDSCAPES, *supra* note 132, at 131, 131.

347. Daniel Itzkowitz argues that the most salient characteristic of the “are



which they have become mostly, but perhaps incompletely, white,<sup>348</sup> and that they should take ownership of their socially constructed status as whites, since it is the only position plausibly available to them, but they should do so in solidarity with nonwhite people.<sup>349</sup> In general, the more sophisticated contemporary commentators agree that the whiteness or nonwhiteness of American Jews has largely been a social construct and that, however read, Jewish nonwhiteness has entailed both social power and social disadvantage in varying mixtures at different periods in time.

The question of Jewish racial construction may appear obvious to those who observe that many American Jews appear white, are perceived as white, and see themselves as white.<sup>350</sup> This observation categorically fails to address what Melanie Kaye/Kantrowitz calls “the other Jews, the ones who don’t look white,” such as some “Misrachi Jews from the Middle East, Latino/as from Latin America, Beta Israel from Ethiopia, Cochins from India, Chinese Jews from China . . . Jews by choice . . . [and] [b]iracial and multiracial Jews.”<sup>351</sup> These groups arguably are “[i]nvisible,

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Jews white?” question is its indeterminacy and the resulting anxiety: in Europe, where Jews were systematically murdered for racial inferiority, part of the perniciousness was precisely that you couldn’t tell—so sinister and yet passing. Daniel Itzkovitz, *Secret Temples*, in *JEWS AND OTHER DIFFERENCES: THE NEW JEWISH CULTURAL STUDIES* 176, 178, 180 (Jonathan Boyarin & Daniel Boyarin eds., 1997).

348. ERIC L. GOLDSTEIN, *THE PRICE OF WHITENESS: JEWS, RACE, AND AMERICAN IDENTITY* 5 (2006).

349. Tessman, *supra* note 346, at 141.

350. See Kaye/Kantrowitz, *Looking at Jews*, *supra* note 342, at 115. In particular, Kaye/Kantrowitz poignantly observes that many light-skinned Ashkenazic Jews do not face various forms of disadvantage frequently experienced in communities of color: “Along the city streets and state highways, where black and brown people are routinely stopped, harassed, sometimes tortured and killed, these Jews pass freely. In stores no one immediately pegs them as shoplifters. Encountering these Jews in apartment building lobbies or elevators, no one assumes that they don’t belong.” *Id.* at 115–16. At the same time, Kaye/Kantrowitz acknowledges that this distinction cannot be pushed too far because some Jews do share in experiences of persecution, which must also be explained. She does so by noting the specific locations and marks that separate those Jews who are most likely to suffer from contemporary bigotry: “Hate violence against these Jews manifests, almost always, in Jewish spaces—that’s how they’re identified—or to Jews who visibly mark themselves, meaning, usually, orthodox men.” *Id.* at 116; see also ANTISEMITISM WORLDWIDE, *supra* note 12, at 2–3 (noting that, in 2007, most anti-Semitic physical attacks were perpetrated against “Jews on their way to or from Jewish facilities, and bore symbols of their religious identity”).

351. Kaye/Kantrowitz, *Looking at Jews*, *supra* note 342, at 116. For a comprehensive discussion of these and other diverse elements within the Jewish community, see DIANE KAUFMANN TOBIN ET AL., *IN EVERY TONGUE: THE RACIAL AND ETHNIC DIVERSITY OF THE JEWISH PEOPLE* (2005). See also KAYE/KANTROWITZ, *COLORS OF JEWS*, *supra* note 342. Tobin et al. estimate that at least twenty percent of the American Jewish community consists of African, African American, Hispanic, Asian, Native American, Sephardic, Mizrahi,

marginalized, not even imagined” in the narrative of obvious Jewish whiteness.<sup>352</sup> In fact, that narrative cannot entirely cover even those Jews who seem most obviously white:

Even the Jew who looks white on New York City’s Upper West or Lower East Side may look quite the opposite in Maine or Colorado. Besides, what happens when you speak your (Jewish-sounding) name, or when your (less-white-looking) parent or child or lover meets you at work? What happens to your whiteness when you enter a Jewish space: a synagogue, Judaica bookstore, klezmer performance, or Jewish community center?<sup>353</sup>

Kaye/Kantrowitz provides what she calls the “correct” answer to the question of Jewish whiteness: “Jews are a multiracial, multiethnic people, and, anyway, what’s white?”<sup>354</sup> As she acknowledges, however, this response seldom satisfies her interlocutors, who respond with an annoyed insistency: “Yeah, but white Jews: Are white Jews white?”<sup>355</sup> By this, of course, the questioner refers to those light-skinned Ashkenazic Jews who look white. At this point, Kaye/Kantrowitz can only throw her hands up in despair, asking further correct but unsatisfying questions: “Isn’t whiteness, like race itself, a historical invention? What does whiteness confer or deprive, ensure or endanger?”<sup>356</sup>

Katya Gibel Azoulay, who occupies a peculiar vantage point on this issue as a Black-Jewish Israeli-American Africana studies scholar, has argued that “[a]nyone familiar with twentieth-century anti-Semitism, particularly in Europe and the United States, should question the presumption that Jewishness and whiteness are coterminous particularly when it is recalled that until recently Jews were identified as a race. . . . White-skinned Jews, perhaps; Caucasian and Jewish is an oxymoron.”<sup>357</sup>

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biracial, and multiracial Jews. TOBIN ET AL., *supra*, at 21.

352. Kaye/Kantrowitz, *Looking at Jews*, *supra* note 342, at 116.

353. *Id.*

354. *Id.* (emphasis omitted).

355. *Id.* (emphasis omitted).

356. *Id.*

357. Katya Gibel Azoulay, *Jewish Identity and the Politics of a (Multi)Racial Category*, in JEWISH LOCATIONS: TRAVERSING RACIALIZED LANDSCAPES, *supra* note 132, at 89, 93. Gibel Azoulay maintains that:

The tendency of most—though not all—American Jews to refer to themselves alternatively as “white” and as “Jewish” witnesses a collective amnesia of the roots of the Jewish people in the East. This predictably paved the way for Palestinians to be imagined as “people of color,” while American Jews represented themselves, and were represented, as white Europeans rather than one branch of a *people* whose different colors and accoutrements of national identities reflect diasporic migrations and mixings. A visit to Israel quickly dispels the myth of white Jewish Israelis versus brown Muslim and Christian

b. *Historical Perceptions of Jewish Race.* Jews were once considered the paradigmatic example of racial stability.<sup>358</sup> In 1669, Increase Mather contrasted Anglo-American racial heterogeneity with the racial purity of the Jews:

The providence of God hath suffered other nations to have their blood mixed very much, as you know it is with our own nation: there is a mixture of British, Roman, Saxon, Danish, [and] Norman blood. But as for the body of the Jewish nation, it is far otherwise. Let an English family live in Spain for five or six hundred years successively, and they will become Spaniards. But though a Jewish family live in Spain a thousand years, they do not generate into Spaniards (for the most part).<sup>359</sup>

Similarly, Johann Frederick Blumenbach's 1775 treatise, *On the Natural Varieties of Mankind*, describes the Jewish "racial face" as the foremost example of "the unadulterated countenance of the nations."<sup>360</sup> As far back as the Middle Ages and until as recently as the Second World War, Jews were thought to possess heritable biological attributes that set them apart as a distinct race—and an inferior race at that, with strange and subhuman traits such as male menstruation.<sup>361</sup>

Jews have been variously perceived as black, Asian, or white, depending on the nature of the perceiver's bias. Jews have, in some cases, been seen as the paradigmatic case of pure racial immutability<sup>362</sup> and, paradoxically, in other cases as the archetype of mongrelized racial mixture.<sup>363</sup> For centuries in Europe, Jews were considered to be nonwhite, even black, since they were understood to

Palestinians—despite the persistence of social discrimination and cultural elitism that cuts across party lines.

*Id.* at 97 (citation omitted).

358. Tessman, *supra* note 346, at 133.

359. JACOBSON, *supra* note 107, at 177 (alteration in original).

360. Blumenbach argued, authoritatively for his time, that "Jews . . . under every climate, remain the same as far as the fundamental configuration of face goes, remarkable for a racial character almost universal, which can be distinguished at the first glance even by those little skilled in physiognomy." *Id.* at 171 (quoting JOHANN FRIEDRICH BLUMENBACH, *ON THE NATURAL VARIETIES OF MANKIND* 234 (Bergman ed., 1969) (1775)).

361. Tessman, *supra* note 346, at 132–34.

362. See Robert Singerman, *The Jew as Racial Alien: The Genetic Component of American Anti-Semitism*, in *ANTI-SEMITISM IN AMERICAN HISTORY* 103, 105 (David A. Gerber ed., 1986) (citing Josiah Clark Nott, *Physical History of the Jewish Race*, 1 S.Q. 436 (1850)).

363. According to Count Joseph Arthur de Gobineau, for example, "the Semites were a white hybrid race bastardized by a mixture with blacks." Singerman, *supra* note 362, at 104 (citing HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 174 n.39 (3d ed. 1966)).

have intermarried with Africans.<sup>364</sup> W.E.B. Du Bois illustrated this perception in his autobiography.<sup>365</sup> Writing of his trip to Germany at the end of the nineteenth century, Du Bois notes (with no particular astonishment) that he was mistaken for a Jew several times.<sup>366</sup> Needless to say, this perception of the Jew as black occurred in times and places where the conflation marked a sense of the inferiority of these two groups. Gilman concludes that “being black, being Jewish, being diseased, and being ‘ugly’ come to be inexorably linked.”<sup>367</sup>

In the United States, Jews were also sometimes viewed as Asian.<sup>368</sup> Thus, for example, Oliver Wendell Holmes’s *At the Pantomime* (1874):

Amidst the throng the pageant drew  
Were gathered Hebrews, not a few,  
Black bearded, swarthy,—at their side  
Dark, jeweled women, orient-eyed.<sup>369</sup>

In this vein, critics “attributed George Gershwin’s talent for” African American-inspired music “to the common Oriental ancestry in both Negro and Jew.”<sup>370</sup> Indeed, the perception of Jews’ Mongol-Khazar

364. See SANDER GILMAN, *THE JEW’S BODY* 171–73 (1991). In the 1780s, one writer expressed this perception: “[T]here is no category of supposed human beings which comes closer to the Orang-Utan than does a Polish Jew . . . . Covered from foot to head in filth, dirt and rags . . . the color of a Black. . . .” *Id.* at 172. In the nineteenth century, similarly, commentators still perceived “the African character of the Jew, his muzzle-shaped mouth and face removing him from certain other races.” *Id.* at 174.

365. For example, consider Du Bois’s description of his visit to Slovenia:  
[M]y dark face elicited none of the curiosity which it had in blonde north Germany, for there were too many dark Gypsies and other brunettes. I saw poverty and despair. I was several times mistaken for a Jew; arriving one night in a town of north Slovenia, the driver of a rickety cab whispered in my ear, “*Unter die Juden?*” [among Jews]. I stared and then said yes. I stayed in a little Jewish inn.

W.E.B. DU BOIS, *THE AUTOBIOGRAPHY OF W.E.B. DU BOIS: A SOLILOQUY ON VIEWING MY LIFE FROM THE LAST DECADE OF ITS FIRST CENTURY* 110 (Henry Louis Gates, Jr. ed., Oxford Univ. Press 2007) (1968).

366. *Id.* Such misperceptions have been the gist of imaginative and documentary literature into modern times. See, e.g., PHILIP ROTH, *THE HUMAN STAIN* (2000) (telling the fictional story of an African American who passed as a “white” Jew throughout his twentieth-century professorial career); Laurie Zoloth, *Passing Through: Jew as Black in the International Sweethearts of Rhythm*, in *JEWISH LOCATIONS: TRAVERSING RACIALIZED LANDSCAPES*, *supra* note 132, at 169 (telling the true story of a Jewish jazz singer who passed as black to participate in an early twentieth-century black women’s jazz band).

367. GILMAN, *supra* note 364, at 173.

368. Singerman, *supra* note 362, at 103.

369. JACOBSON, *supra* note 107, at 182 (quoting *THE POLITICAL WORKS OF OLIVER WENDELL HOLMES* 189 (Cambridge ed., 1975) (1862)).

370. *Id.* at 5 (quoting JEFFREY MELNICK, *A RIGHT TO SING THE BLUES: AFRICAN AMERICANS, JEWS, AND AMERICAN POPULAR SONG* 123 (1999)).

blood was used early in the twentieth century in efforts to restrict Jewish immigration.<sup>371</sup>

What is remarkable here is the extent to which Jewish racial difference (or nonwhiteness), which is now largely dismissed as cultural myth or pseudoscientific fallacy, was once perceived with certainty as a visibly obvious biological fact. In this sense, Sander Gilman observes, “The Jews’ disease is written on the skin. It is the appearance, the skin color, the external manifestation of the Jew which marks the Jew as different.”<sup>372</sup> This culturally laden, historically situated form of perception has parallels with other groups but particular salience in the case of Jewish Americans: “visible Jewishness in American culture between the mid-nineteenth and mid-twentieth centuries represented a complex process of social value *become* perception.”<sup>373</sup> Specifically, the “social and political meanings attached to Jewishness generate a kind of physiognomical surveillance that renders Jewishness itself discernible as a particular pattern of physical traits (skin color, nose shape, hair color, and texture, and the like)—what Blumenbach called ‘the fundamental configuration of face.’”<sup>374</sup> This configuration registers in social perceptions as Jewish “difference” to the extent that it is keyed to the “particular social and historical” conditions of Jewish Americans over time.<sup>375</sup>

Jews, like other immigrants who entered the United States under the 1790 naturalization law, “were increasingly seen as a [distinct] racial group” during the nineteenth century.<sup>376</sup> In the case of Jews, that meant that they were perceived “as Orientals, Semites, or Hebrews.”<sup>377</sup> During the mid-to-late nineteenth century, this perception became stronger as the demographics of new Jewish immigrants “tilted away from German and other West European Jews . . . [to] the Yiddish-speaking Jews of Eastern Europe,” Poland, and Russia.<sup>378</sup>

It was only during the course of the twentieth century that Jews, “like other non-Anglo-Saxon immigrants,” gradually were recognized as Caucasians.<sup>379</sup>

c. *Early White Jewish American Racial Formation.* It is now increasingly understood that light-skinned Ashkenazic Jews have

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371. Singerman, *supra* note 362, at 103.

372. GILMAN, *supra* note 364, at 172.

373. JACOBSON, *supra* note 107, at 174.

374. *Id.*

375. *Id.* It is only in this way, for instance, that a nineteenth-century essayist could observe that “among cultured Jews the racial features are generally less strongly defined.” *Id.* (internal quotation omitted).

376. *Id.* at 172.

377. *Id.*

378. *Id.*

379. *Id.*

been widely, if not universally, perceived as white only since World War II.<sup>380</sup> Ironically, Jewish Americans have been active participants in the development of this whiteness myth since World War II, grasping for the golden ring of whiteness as a means of escaping the racial identities that were so disastrous in Europe.<sup>381</sup> As Bat-Ami Bar On and Lisa Tessman have explained: “Having been racialized with genocidal results, post-Holocaust Jews have been striving to escape their own racialization.”<sup>382</sup>

Bar On and Tessman concede that “Jews responded to their own racialization before the Holocaust, but the Holocaust gave a strong impetus to Jewish attempts at deracialization.”<sup>383</sup> While this transformation had peculiar importance for Jewish Americans, it generally fell within the pattern of assimilation which other ethnic groups pursued in the postwar period.<sup>384</sup> If Ashkenazic Jewish racial formation during the post-war years differed from that of other light-skinned ethnic groups, it was in the ambivalence with which Jews accepted this transformation; having long suffered from intense persecution, Jews were more likely to identify with the plight of African Americans.<sup>385</sup>

This midcentury racial reformation has had unforeseen consequences. Moreover, this development has fueled various forms of anti-Semitism, including black anti-Semitism, for several decades. As James Baldwin once explained, “[i]n the American context, the most ironical thing about Negro anti-Semitism is that the Negro is really condemning the Jew for having become an American white man—for having become, in effect, a Christian.”<sup>386</sup> Baldwin meant that twentieth-century Jewish American racial privilege had become a source of resentment: “The Jew profits from his status in America, and he must expect Negroes to distrust him for it.”<sup>387</sup> In this context, the historical experience of Jewish persecution not only fails

380. BRODKIN, *supra* note 345, at 3.

381. *See* Bar On & Tessman, *supra* note 132, at 7.

382. *Id.*

383. *Id.*

384. *See* Azoulay, *supra* note 357, at 102.

The binary division characterizing the American racial structure facilitated the mobility and leverage of white-skinned ethnic groups, including Jews from Europe, on condition that they adapt to the norms set by the dominant group, white Anglo-Protestants. If they conformed to this model, individual Jews might aspire to and attain a successful assimilation.

*Id.*

385. GOLDSTEIN, *supra* note 348, at 145–46. Goldstein argues that during the 1920s and 1930s American Jews emphasized their distinctiveness in racial terms but attempted to do so in a way that would “not put their whiteness into question.” *Id.* at 166.

386. James Baldwin, *Negroes Are Anti-Semitic Because They’re Anti-White*, N.Y. TIMES, Apr. 9, 1967, § 6 (Magazine), at 26, 137, reprinted in JAMES BALDWIN, COLLECTED ESSAYS 739, 744 (1998).

387. *Id.*

to engender solidarity, but in fact may exacerbate conflicts with other minority groups. “The Jew does not realize,” Baldwin observed, “that the credential he offers, the fact that he has been despised and slaughtered, does not increase the Negro’s understanding. It increases the Negro rage.”<sup>388</sup>

d. *Contemporary Jewish Racial Reformation.* Adapting to contemporary norms, the new anti-Semitism reframes Jews in antiracist terms as neo-colonizing supremacist whites. This new racial construction retains stereotypical, racialized perceptions of the Jew as greedy, murderous, conspiratorial, power-hungry, treacherous, and diabolical, while infusing these characteristics with attributes of racialism, colonialism, and imperialism.<sup>389</sup> Opportunistically, this reformation continues the process of racial reformation that began, with much Jewish participation, in the mid-twentieth century. This process has a dehumanizing effect, projecting onto Jews the most despised evils of the world’s racist, colonialist, and anti-Semitic past in order to justify any harms (dispossession, destruction, etc.) that might be visited upon them.

This new racial construction has been called the “Jewish Cracker theory.”<sup>390</sup> That term, used at Irvine by an adherent of the new anti-Semitism, expresses the effort to fuse traditional contempt for Jewish religious doctrine, anti-Jewish ethnic antagonism, and a contemporary “antiracist” view of white guilt. At Irvine, public speeches lambasting Jewish cultural arrogance contribute to this racial formation by fusing misconceptions of Jewish chosenness with accusations of white supremacy.<sup>391</sup> This emphasis on Jewish arrogance plays upon traditional stereotypes as expressed in recent textbook descriptions of a putative “aggressive [and] evil tendency that is rooted in the Jewish personality.”<sup>392</sup>

The racializing quality of the new anti-Semitism can be seen in attributions of physical or biological difference to Israelis and Jews. For example, at Columbia University, one professor has reportedly

388. *Id.*

389. Indeed, the new racial construction incorporates all seven classic categories of Jewish racial stereotype: deceitfulness, artfulness, and crookedness; foreignness and differentness; irreconcilability, hostility, and agitation; commercial talent; corruption and greed; powerful, power-hungry, and conspiratorial; and deicidal and demonic. EUROPEAN MONITORING CTR. ON RACISM & XENOPHOBIA, MANIFESTATIONS OF ANTISEMITISM IN THE EU 2002–2003, at 12–13, available at <http://fra.europa.eu/fraWebsite/material/pub/AS/AS-Main-report.pdf>.

390. Tuchman, *supra* note 275, at 15.

391. See, e.g., *id.* at 15; Civil Rights Letter, *supra* note 58, at 6 n.8 (“They have taken the concept of the chosen people and fused it with the concept of white supremacy.”) (quoting Amir Abdel Malik Ali).

392. SCHOENFELD, *supra* note 13, at 19 (alteration in original) (quoting B’NAI B’RITH INTERNATIONAL, JIHAD, JEWS, AND ANTI-SEMITISM IN SYRIAN SCHOOL TEXTS 15–16 (2001)).

described the “deep marks” which misconduct has inscribed “on the faces of Israeli Jews, the way they talk, walk and the way they greet each other,” arguing that “[t]here is a vulgarity of character that is bone-deep and structural to the skeletal vertebrae of its culture.”<sup>393</sup> Similarly, at the University of California at Los Angeles, one cleric announced, “Israel is as racist as apartheid could ever be . . . you can take a Jew out of the ghetto, but you can’t take the ghetto out of the Jew.”<sup>394</sup>

In some cases, this new racial formation is combined with older attributions of Jewish racial difference. It is common in some countries to describe Jews as apes and pigs, based upon Koranic scripture.<sup>395</sup> Additionally, government-owned media in some countries have frequently run hybrid new-old anti-Semitic content, such as the notion that “trickery is in the nature of the Jews” as “venom is in the serpent’s son.”<sup>396</sup> The new anti-Semitism both builds upon and enlarges each of the anti-Semitic projects that preceded it in both ideological and racial content: early Christian and medieval religious anti-Semitism, Nazi and midcentury racist anti-Semitism, etc. This integration of religious, racist, and political anti-Semitism is intended to advance anti-Zionism by building upon those of its antecedents that dehumanize and demean

393. Sarah Stern, *Campus Anti-Semitism*, in *CAMPUS ANTI-SEMITISM*, *supra* note 15, at 22, 25 (quoting Columbia University professor Hamid Dabashi). Professor Dabashi, however, has sworn that this quotation does not correctly translate his statement, but he has not provided an alternative version. *CAMPUS ANTI-SEMITISM*, *supra* note 15, at 59.

394. Ballon, *supra* note 254 (quoting Imam Muhammad-al-Asi).

395. For documentation of recent usage of the “Jews are apes and pigs” insult in Muslim countries, see Menahem Milson, *Arab and Islamic Antisemitism*, *MIDDLE EAST MEDIA RES. INST.*, May 27, 2008, <http://www.memri.org/bin/articles.cgi?Page=subjects&Area=antisemitism&ID=IA44208>. The scriptural foundation may be found at the Koran 2:65, 5:60, 7:166.

396. This excerpt is taken from a statement by Sheikh Mansour Al-Rifa’i ‘Ubeid, Egypt’s former under secretary for religious affairs in charge of mosques and the Koran, who wrote the following in an article for *Aqidati*, which is published by the official Egyptian daily *Al-Gumhuriya*:

[T]rickery is in the nature of the Jews, and they will never [be able to] get rid of it, therefore we have to be wary of them when we deal with them in commerce or anything else. There is venom in the serpent’s son [i.e. the Jew] and he spits it on friend and foe alike. No Jew knows a beautiful friendship, but only his own interest. That is why they abrogated agreements and covenants and did not honor a friend’s right. They are what was said about them [Koran 9:10] “They do not honor a pledge or a covenant that they gave to a believer [Muslim].”

*Egyptian Government Weekly: Treason and Deception Are in the Blood of the Jews*, *MIDDLE EAST MEDIA RES. INST.*, Oct. 23, 2003, <http://www.memri.org/bin/articles.cgi?Page=subjects&Area=antisemitism&ID=SP59403> (quoting Sheikh Mansour Al-Rifa’i ‘Ubeid, *Treason and Deception Are in Their Blood*, *AQIDATI*, Oct. 14, 2003, available at <http://www.algomhuria.net.eg/akidaty/today/truth/detail01.asp>) (alterations in original).



not only Israel but world Jewry.<sup>397</sup>

As the racial theatre on a field of political contestation it is doubly ironic. During earlier periods of white dominance Jews were constructed as paragons of racial color; more recently, as whiteness has become associated with racial guilt, Jews are increasingly constructed as preeminently white.<sup>398</sup> At the same time, the new Jewish racial formation is imbued largely with precisely those forms of racial guilt which have historically marked Jewish victimization (racism, *dhimmitude*, colonialization, and genocide). This inversion is a projection onto Jews, as racialized other, of all of the traits which contemporary in-groups deny or repress from within their own psyches.

#### CONCLUSION

“The Jews are guilty,” Joseph Goebbels pronounced in 1931, “the punishment is coming.”<sup>399</sup> In order to justify the atrocities which he was about to perpetrate, it was necessary first to accuse the Jewish people of a proportionally large crime. Goebbels understood that a people must first be demonized before it can be destroyed.<sup>400</sup> When the punishment is predetermined, the “crime” must be designed to fit the punishment. Today, Jews face another such indictment with a critical rhetorical difference: as racial and religious anti-Semitism ceased to be *salonfähig* in the Western world,<sup>401</sup> “society” (and many others) turned from racial anti-

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397. ROBERT S. WISTRICH, MUSLIM ANTI-SEMITISM: A CLEAR AND PRESENT DANGER 14 (2002), available at <http://www.ajc.org/atf/cf/%7B42D75369-D582-4380-8395-D25925B85EAF%7D/WistrichAntisemitism.pdf>.

398. See LERNER, *supra* note 343, at 123 (observing that “Jewish history, totally denied or obscured by whites, is now excluded as white”).

399. TAGUIEFF, *supra* note 13, at 123 n.5 (citing SAUL FRIEDLANDER, 1 NAZI GERMANY AND THE JEWS: THE YEARS OF PERSECUTION 111 (1997)).

400. As Bernard Harrison has explained:

[f]or a political movement to turn anti-Semitism into a winning element in its program and propaganda, it is necessary to actively induce fear of Jews, considered as something more than a collection of rather pathetic and contemptible individuals . . . to induce fear in them, that is, considered as constituting a shadowy but well-organized and infinitely malign political entity.

HARRISON, *supra* note 13, at 14 (emphasis omitted).

401. See *id.* Psychologists have noted a reluctance among subjects to express blatant anti-Semitism in the post-Holocaust period, as this attitude has become an object of shame. See generally Jovan Byford, ‘Serbs Never Hated the Jews’: The Denial of Antisemitism in Serbian Orthodox Christian Culture, 40 PATTERNS OF PREJUDICE 159 (2006). Michael Billig has amplified that, in contemporary society, “[t]here are taboos, which restrict what can be uttered. Overt uninhibited anti-semitism and racism are not to be spoken in polite company. Those who wish to criticize nonwhites or Jews from the outside, must find complex, indirect and apologetic ways of doing so.” MICHAEL BILLIG, FREUDIAN REPRESSION: CONVERSATION CREATING THE UNCONSCIOUS 259 (1999). In this context, Peter Pulzer has noted the relevance of Freud’s dicta that “what

Semitism to political anti-Semitism (or anti-Zionism).<sup>402</sup> Nevertheless, the same anti-Jewish tropes remain: the use of classic anti-Jewish stereotypes and defamations, the use of double standards, and the collective attribution of guilt to all Jewish people.<sup>403</sup> The wrongfulness of the new anti-Semitism inheres not only in its differential abuse of Jewish persons, but also in its participation in a system of thought and expression which has as its end the destruction of the Jewish people.

The two predominant motifs that link this new anti-Semitism with its antecedents are the blood libel, in which Jews or Israelis are accused of murdering children for pleasure or religious ceremony, and global conspiracy, in which Jews are accused of colluding to amass great power at the expense of others.<sup>404</sup> Robert Wistrich described this view as the “Manichean notion that Zionism is engaged in a deadly, occult kind of conspiracy against the forces of light . . . [which is based] on some of the oldest anti-Jewish superstitions in Western culture.”<sup>405</sup>

In contemporary discourse, Israel is identified as the source of incomparable evil, all Jews are attributed guilt for the actions of Israel, and thus anti-Jewish attacks are considered justifiable. The twist in the new anti-Semitism is, as Jonathan Sacks has observed, that “the worst crimes of antisemites of the past—racism, ethnic cleansing, attempted genocide, crimes against humanity—are now attributed to Jews and the State of Israel, so that if you are against Nazism, you must, ipso facto, be utterly opposed to Jews.”<sup>406</sup> Philosopher Pierre-Andre Taguieff has identified the syllogism as follows: “Jews are all more or less crypto-Zionists. Zionism is a form of colonialism, imperialism, and racism. Therefore Jews are colonialists, imperialists, and racists, whether overt or covert.”<sup>407</sup> Thus, Jews may be punished for the conduct of the Jewish State, actual or perceived.

Globally, this new indictment is disseminated both by Saudi-funded propagandists and by terrorist organizations such as Hamas. Former Dutch Parliamentarian Ayaan Hirsi Ali has described with

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nobody desires to do does not have to be forbidden” and “whatever is expressly forbidden must be an object of desire.” Peter Pulzer, *The New Antisemitism, or When Is a Taboo Not a Taboo?*, in *A NEW ANTISEMITISM? DEBATING JUDEOPHOBIA IN 21ST-CENTURY BRITAIN*, *supra* note 1, at 79, 79.

402. See HARRISON, *supra* note 13, at 14.

403. Marcus, *supra* note 63, at 1039–40.

404. See Hirsh, *supra* note 338. Jonathan Sacks observes that “[a]ntisemitism exists and is dangerous whenever two contradictory factors appear in combination: the belief that Jews are so powerful that they are responsible for the evils of the world, and the knowledge that they are so powerless that they can be attacked with impunity.” Sacks, *supra* note 1, at 40.

405. Robert S. Wistrich, *Introduction to ANTI-ZIONISM AND ANTISEMITISM IN THE CONTEMPORARY WORLD* 4, 4 (Robert S. Wistrich ed., 1990).

406. Sacks, *supra* note 1, at 46 (emphasis omitted).

407. TAGUIEFF, *supra* note 13, at 4.

who possess Israeli citizenship. This dehumanization is achieved in part through racializing discourses that subordinate Jews or the Jewish state as a morally inferior group. These discourses frequently adopt traditional anti-Semitic rhetoric while incorporating modern permutations, including even putatively antiracist elements. Many Jewish students may avoid personal harm by covering their identity, whether intentionally or not, but the increasing need to do so in some communities is itself a wrongful harm. While the law may be a blunt instrument to address conduct that perpetuates itself through public discourse, it is no less available as a means of remedying those forms of assault that assume the guise of politics.

Some will respond that this overstates the extent of the current problem. They will argue, with Elie Wiesel's late father, that there is little grimness in the yellow stars which campus speakers would attach to Israelis and "Zionists." Indeed, those who do "blow the horn," in Ezekiel's phraseology, on the new anti-Semitism, are often attacked for exposing a problem that others would prefer to deny.

Wiesel's *Night* addresses this problem in its parable of Madame Schächter.<sup>418</sup> On a train bound for Auschwitz and the Shoah, Madame Schächter was ostracized for the warnings she gave her fellow Jews one night. Pointing towards the distant camps, still out of sight, she screamed, "Look! Look at it! Fire! A terrible fire! Mercy! *Oh, that fire!*"<sup>419</sup> Seeing only darkness, her compatriots tried to console and quiet her. "It's all right. . . . There's nothing there. . . . Sit down."<sup>420</sup> Seeing the approaching dangers, Madame Schächter pleaded, "Jews, listen to me! I can see a fire! There are huge flames! It is a furnace!"<sup>421</sup> Seized by the terror of their situation, but unable to grasp it, they sat her down, tied her up and gagged her.<sup>422</sup> When she broke free, they beat her into silence and submission.<sup>423</sup> In the morning, as the train approached Birkenau, the reception center for Auschwitz, they saw that she had been right, but it was too late.<sup>424</sup>

Similarly, the watchmen of the new anti-Semitism will be attacked by those who have learned nothing from history. Once again, it is required of those who perceive the gathering risk to "blow the horn . . . so that the people are . . . warned" lest Ezekiel's blood reckoning come to pass again.<sup>425</sup>

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418. WIESEL, *supra* note 2, at 33–37.

419. *Id.* at 34.

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.* at 35.

424. *Id.* at 37.

425. *Ezekiel* 33:6 (Tanakh).

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418. WIESEL, *supra* note 2, at 33–37.

419. *Id.* at 34.

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.* at 35.

424. *Id.* at 37.

425. *Ezekiel* 33:6 (Tanakh).