

# POLITICIZING ANTISEMITISM AMIDST TODAY'S EDUCATIONAL CULTURE WARS

by  
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*The traditional narrative of American Jewry emphasizes American exceptionalism with respect to antisemitism. But there have been clear signs of a resurgence of public antisemitism in the United States even before the massive rise in antisemitic expression and incidents associated with the Israel-Hamas war of fall 2023.*

*One of the notable aspects of the rise and normalization of antisemitic expression is the deployment of antisemitism as a political tool. For example, in addition to Democrats and Republicans accusing each other of complicity in antisemitism, both federal policy since the Trump era and state anti-antisemitism legislation have targeted campus antisemitism in a conservative attack on progressive ideology in education. This Article argues that the campus-focused federal anti-antisemitism initiatives are not likely to be particularly effective in practice in reducing antisemitism and could well backfire—generating objections from both free speech libertarians and progressives. As for state laws prohibiting antisemitism in the educational context, the Article shows—through an analysis of Florida legislation—not only how much more extensive such enactments can be than their counterparts in federal policy, but also how easily critical Jewish studies can be swept into the illiberal prohibitions on antiracist education that states have adopted. Thus, state-based turns to educational censorship can blunt, undermine, and eclipse anti-antisemitism initiatives.*

*Ultimately, viewing antisemitism through a purely political lens de-historicizes it and risks leaching it of its moral valence. Even on the political front, though, the current debates between Republicans and Democrats on antisemitism ignore the elephant in the room. Conservative politicians should stop*

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*legitimizing white supremacy through expression and association, and progressive leaders should acknowledge the critical role of antisemitism in organizing an insidious and increasingly confident white nationalist movement. That a Trump victory in the 2024 presidential election is even conceivable is an object lesson in why it is necessary to face up to the role of antisemitism in weaponizing white power extremism in America—and why democracy requires us to set aside political partisanship to combat it.*

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## INTRODUCTION

Antisemitism—known as the oldest hatred<sup>1</sup>—has been experiencing a global resurgence online and in the physical world, both in expression and action. Although antisemitic threats have reached “historic levels”<sup>2</sup> since Hamas’s attack on Israeli civilians on October 7, 2023 and the resulting Israel-Hamas war, troubling increases in antisemitism predate the responses associated with those events.<sup>3</sup> Coded antisemitism

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<sup>1</sup> Gabriel Weimann & Natalie Masri, *Tiktok’s Spiral of Antisemitism*, 2 JOURNALISM & MEDIA 697, 699 (2021).

<sup>2</sup> See, e.g., Eileen Sullivan, *F.B.I. Says Israel-Hamas War Raises Potential for Attack Against Americans*, N.Y. TIMES (Oct. 31, 2023), <https://www.nytimes.com/2023/10/31/us/politics/wray-threats-us.html> (quoting FBI director).

<sup>3</sup> See *infra* Section I.A. This Article was prepared in connection with the March 2023 Law vs. Antisemitism conference. As such, it focuses principally on matters that predate Hamas’s attacks and the Israel-Hamas war. I refer to those developments chiefly to update data and events and to address whether they affect the Article’s principal claims.

has a storied past and continues to flourish,<sup>4</sup> but even explicit antisemitism has been “going mainstream.”<sup>5</sup> When hundreds of people armed with guns and lit torches chanted “Jews will not replace us” at a white supremacist rally<sup>6</sup> and the then-president of the United States assured the country that there were “very fine people on both sides”;<sup>7</sup> when a gunman murdered 11 worshipers at the Tree of Life Synagogue in America’s most lethal antisemitic terror attack;<sup>8</sup> when press reports of antisemitism-fueled attacks in the United States started to appear with frequency;<sup>9</sup> when the COVID-19 pandemic generated conspiracy theories blaming Jews for the virus;<sup>10</sup> when a celebrity with millions of fans praised Hitler in public;<sup>11</sup> when a former president and prominent conservative politicians broke bread with modern Nazis;<sup>12</sup> when some progressives decried Zionism in terms echoing antisemitic tropes;<sup>13</sup>

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<sup>4</sup> See, e.g., Lili Levi, *Racialized, Judaized, Feminized: Identity-Based Attacks on the Press*, 20 FIRST AMEND. L. REV. 147, 164 n.38 (2022) (referring to the antisemitic meaning of three parentheses placed around Jewish names in online posts).

<sup>5</sup> See, e.g., Michelle Boorstein & Isaac Arnsdorf, *Overt U.S. Antisemitism Returns with Trump, Kanye West: ‘Something Is Different’*, WASH. POST (Oct. 27, 2022, 8:13 AM), <https://www.washingtonpost.com/religion/2022/10/27/antisemitism-kanye-trump-adidas-jews/>; *Antisemitic Celebrities Stoke Fears of Normalizing Hate*, POLITICO (Dec. 4, 2022, 6:48 AM), <https://www.politico.com/news/2022/12/04/antisemitic-celebrities-stoke-fears-of-normalizing-hate-00072073>.

<sup>6</sup> See, e.g., Emma Green, *Why the Charlottesville Marchers Were Obsessed with Jews*, ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/nazis-racism-charlottesville/536928/>; *Six Months Later: White Supremacists After Charlottesville*, ANTI-DEFAMATION LEAGUE: BLOG (Feb. 11, 2018), <https://www.adl.org/resources/blog/six-months-later-white-supremacists-after-charlottesville>.

<sup>7</sup> See, e.g., Rosie Gray, *Trump Defends White-Nationalist Protesters: ‘Some Very Fine People on Both Sides’*, THE ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012/G>.

<sup>8</sup> See, e.g., Campbell Robertson, Christopher Mele & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html>.

<sup>9</sup> See, e.g., Ruth Graham, *Antisemitic Incidents Reach New High in U.S., Anti-Defamation League Says*, N.Y. TIMES (Mar. 23, 2023), <https://www.nytimes.com/2023/03/23/us/antisemitism-anti-defamation-league-report.html>.

<sup>10</sup> See, for example, Kelly W. Sundberg, Lauren M. Mitchell & Dan Levinson, *Health, Religiosity and Hatred: A Study of the Impacts of COVID-19 on World Jewry*, 62 J. Religion & Health 428 and sources cited therein.

<sup>11</sup> See, e.g., Azi Paybarah, *Kanye West Draws Fresh Denunciation for Hitler Praise in Alex Jones Interview*, WASH. POST, <https://www.washingtonpost.com/politics/2022/12/01/kanye-west-alex-jones-hilter-interview/> (Dec. 2, 2022, 7:52 AM).

<sup>12</sup> See, e.g., Peter Baker, *Trump’s Far-Right Embrace*, N.Y. TIMES (Nov. 29, 2022), <https://www.nytimes.com/2022/11/29/briefing/nick-fuentes-trump.html>.

<sup>13</sup> See *infra* Section I.B.1.

when youngsters faced daily exposure to unashamedly antisemitic TikToks,<sup>14</sup> and when white nationalists manipulated the virality of online speech to amplify their messages, to serve as dog whistles for the already-converted, and to influence the views of new audiences,<sup>15</sup> observers might have been forgiven for worrying about chinks in the traditional account of American exceptionalism as to Jews and anti-semitism.

Even before October 7, 2023 and its aftermath, what appeared to be an increasing normalization of antisemitism in both American politics and culture made many Jews feel more at risk than they did a decade ago.<sup>16</sup> If these trends continue, the future portends a growing otherization of Jews in the United States. But the threat goes beyond Jews. The shocking January 6, 2021 attack on the U.S. Capitol<sup>17</sup> revealed the extent to which a large number of American citizens would accept the use of political violence in the service of anti-democratic electoral conspiracy theories.<sup>18</sup> The visibility of antisemitism during January 6th and the strategic linkage between antisemitism and the broader project of white nationalism expose not just a threat against Jews, but a general menace to American democracy.<sup>19</sup>

One key question is how best to confront the normalization of antisemitism in order to protect both Jews and American democracy. Elected officials have responded with rhetoric decrying the increase in antisemitism.<sup>20</sup> In May 2023, Presi-

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<sup>14</sup> See, e.g., *Antisemitism on TikTok*, ANTI-DEFAMATION LEAGUE: BLOG (June 1, 2021), <https://www.adl.org/resources/blog/antisemitism-tiktok>.

<sup>15</sup> See *infra* Part I.

<sup>16</sup> Press Release, Anti-Defamation League, *ADL Survey Finds American Jews Feel More Threatened Than at Any Time in Past Decade* (Apr. 20, 2020), <https://www.adl.org/resources/press-release/adl-survey-finds-american-jews-feel-more-threatened-any-time-past-decade>.

<sup>17</sup> Alan Feuer, *Jan. 6 Rioters Have Been Held to Account. That Might Be the Easy Part.*, N.Y. TIMES (Sept. 6, 2023), <https://www.nytimes.com/2023/09/06/us/politics/enrique-tarrio-trump-jan-6.html>.

<sup>18</sup> *The January 6 Effect: An Evolution of Hate and Extremism*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/january-6-effect-evolution-hate-and-extremism> (last visited Dec. 29, 2023).

<sup>19</sup> I use the terms such as “white nationalism” and “white power” here not in any precise, sociological sense to describe ideological movements, but as loose, interchangeable umbrella terms to signify right-wing ideologies whose adherents object to what they view as the diminishment of white power and culture. A recent survey reveals that “highly antisemitic Americans are three times more likely to support violence to achieve certain political goals compared to the general population.” ANTI-DEFAMATION LEAGUE, *ANTISEMITISM AND SUPPORT FOR POLITICAL VIOLENCE* (2023), <https://www.adl.org/resources/report/antisemitism-and-support-political-violence>.

<sup>20</sup> See, e.g., H.R. Res. 1125, 117th Cong. (2022); S. Res. 252, 117th Cong. (2021) (A resolution “[u]nequivocally condemning the recent rise in antisemitic violence and harassment targeting Jewish Americans, and standing in solidarity with those affected by antisemitism, and for other purposes.”). Members of the Senate and House have founded bipartisan task forces to combat antisemitism. See, e.g., *Senate Bipartisan Task Force for Combating Antisemitism*, JACKY

dent Biden unveiled the United States' first national strategy to combat antisemitism, which recommends speaking out about antisemitism as a key element in reversing its normalization.<sup>21</sup> At the same time, antisemitism has become politically instrumentalized in today's polarized politics. Charges of antisemitism have been used as public relations tools, electoral strategies, political point-scoring, and justifications to advance goals far beyond responding to antisemitism.<sup>22</sup> For years, Democrats have accused Republicans, including former President Trump, of hypocritically mainstreaming antisemitic tropes and flirting with white nationalism while simultaneously purporting to denounce antisemitism.<sup>23</sup> In response, Republican politicians, including Trump, have castigated the Democratic party over what they have called the antisemitism of its progressive members' anti-Zionism.<sup>24</sup> Political contention over antisemitism has only grown since.

It is against that backdrop that this Article addresses "anti-antisemitism" legal initiatives in the educational context.<sup>25</sup> On the federal front, after Antisemitism Awareness bills addressing antisemitism on campus failed in Congress,<sup>26</sup> then-President Trump issued Executive Order 13899 (Trump Executive Order) in 2019 to require executive departments and agencies to address charges of antisemitism on campus in their enforcement of Title VI of the Civil Rights Act of 1964, and to consider the definition of antisemitism adopted by the International Holocaust Remembrance Alliance (IHRA) in doing so.<sup>27</sup> That order continues in place under the Biden Administration. States also addressed concerns expressed by Jewish groups about campus antisemitism.<sup>28</sup> For example, in keeping with the Trump Executive

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ROSEN, <https://www.rosen.senate.gov/about-jacky/senate-bipartisan-task-force-for-combating-antisemitism> (last visited Nov. 30, 2023); Jacky Rosen & James Lankford, Opinion, *Senators: We're Coming Together to Combat Anti-Semitism*, CNN, (Oct. 28, 2019, 6:01 PM), <https://www.cnn.com/2019/10/28/opinions/senate-task-force-to-combat-anti-semitism-rosen-lankford/index.html>; see also *infra* Section I.B.

<sup>21</sup> THE WHITE HOUSE, U.S. NATIONAL STRATEGY TO COUNTER ANTISEMITISM 35–37 (2023), <https://www.whitehouse.gov/wp-content/uploads/2023/05/U.S.-National-Strategy-to-Counter-Antisemitism.pdf>.

<sup>22</sup> See *infra* Section I.B.

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

<sup>24</sup> *Id.*

<sup>25</sup> This Article does not address hate crime-related legislation or the recommendations in the U.S. NATIONAL STRATEGY TO COUNTER ANTISEMITISM to make maximal possible use of existing state and federal anti-discrimination laws to combat antisemitism, where applicable. THE WHITE HOUSE, *supra* note 21, at 43–45. I will explore the limitations of private remedies, such as corporate boycotts and social media content moderation, in a forthcoming paper.

<sup>26</sup> See *infra* notes 172–173 and accompanying text.

<sup>27</sup> Exec. Order No. 13899 § 2, 3 C.F.R. 395 (2019). See *infra* Sections II.A & II.B for a discussion and comparison of these "anti-antisemitism" statutes.

<sup>28</sup> See, e.g., *Antisemitism on Campus*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/antisemitism-campus> (last visited Nov. 30, 2023); *Educational Institutions Action Items*, AM.

Order, Florida amended its educational discrimination law to prohibit antisemitic discrimination, which it defined in ways closely inspired by the IHRA definition.<sup>29</sup> Florida is also among a significant number of states that mandate Holocaust education.<sup>30</sup>

This Article contends that such contemporary anti-antisemitism legal initiatives have not been particularly successful in countering rising antisemitism—and could even rebound to exacerbate antisemitism in practice. The attempts to protect Jews on campus through law are unstable and controversial on their own terms.<sup>31</sup> The Antisemitism Awareness Act and the Trump Executive Order led to significant dispute, both within and outside the American Jewish community.<sup>32</sup> While attacks on Jewish students and clashes between pro-Israel and pro-Palestinian protesters over the Israel-Hamas war have led to renewed attention to charges of campus antisemitism, the issue has triggered even sharper public debate over contending views of speech and student protest.<sup>33</sup> As for state law, while the Florida antisemitism amendment to the Educational Equity Act did not trigger much public discussion, it too is open to criticism on its own terms. Indeed, aspects of the Florida legislation appear to go even further than the federal framework.<sup>34</sup>

These educational anti-antisemitism initiatives risk politicizing antisemitism, allowing its use both as a tool in partisan political gamesmanship and as a weapon in substantive political fights over other issues. Conservative politicians have used concern about antisemitism on campus as part of a strategy to oppose what they see as progressive hegemony in higher education. But using antisemitism to advance the broader political project of controlling the “left-wing” academy does not directly confront the harms of the broader growing threats against Jews. To the extent that their enforcement is left to regulation and administrative discretion, uncertainty and variability are the most likely results—

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JEWISH COMM., <https://www.ajc.org/call-to-action/educational-institutions> (last visited Nov. 30, 2023).

<sup>29</sup> Florida Educational Equity Act (FEEA), FLA. STAT. § 1000.05(8) (2023). *See infra* Section II.B.

<sup>30</sup> *See infra* Section II.B.

<sup>31</sup> *See infra* Section II.C.

<sup>32</sup> *See id.*

<sup>33</sup> *See infra* Sections I.B and II.A. News organizations report “violent threats against Jewish students, huge pro-Palestinian protests, doxxing campaigns sponsored by outside conservative groups and Jewish donors pulling major contributions.” *See, e.g.,* Lisa Lerer & Rebecca Davis O’Brien, *In Protests Against Israel Strikes, G.O.P. Sees ‘Woke Agenda’ at Colleges*, N.Y. TIMES (Nov. 1, 2023), <https://www.nytimes.com/2023/11/01/us/politics/republicans-israel-war-protests-college-campuses.html>. This escalation has focused the media and Congress’s attention to the subject.

<sup>34</sup> *See* Section II.C. Specifically, in its presumptively automatic establishment of antisemitic intent, in the ways in which it rephrases elements of the IHRA-adopted definition of antisemitism, and in its private right of action for any “aggrieved party,” the Florida statute in its terms extends beyond the federal regime under the Trump Executive Order.

undermining deterrence goals. When used to control speech alone, such enforcement can threaten American commitments to free expression. Furthermore, by adopting a particular definition of antisemitism, they choose among a variety of conceptions of antisemitism and put the government in the position of defining the details of both Jewish identity and discrimination based on religious affiliation. Without attacking the usefulness of the IHRA definition, particularly in many data-collecting and educative contexts, its incorporation as law in the United States raises additional difficulties in practice as well. The controversy the legal rules engender could also truncate public understanding of antisemitism by focusing on and effectively limiting it to the political—effectively making *all* antisemitism debatable. The politicization of antisemitism can all too easily submerge its moral valence.

More broadly, these anti-antisemitism statutes could well be on a collision course with today's strategic conservative reframing of education as a locus of the new "culture wars." The articulated goals of these anti-antisemitism statutes can be undermined by today's virally-spreading conservative attacks on educational freedom and antiracist teaching. A variety of statutes—referred to as "educational gag orders," "CRT bans," "anti-CRT" bills, "backlash bills," and "anti-woke" provisions—have swept the nation.<sup>35</sup> In seeking

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<sup>35</sup> On the common nomenclature, see JONATHAN FRIEDMAN & JAMES TAGER, PEN AMERICA, EDUCATIONAL GAG ORDERS 7 (2021), [https://pen.org/wp-content/uploads/2022/02/PEN\\_EducationalGagOrders\\_01-18-22-compressed.pdf](https://pen.org/wp-content/uploads/2022/02/PEN_EducationalGagOrders_01-18-22-compressed.pdf) (characterizing such legislation as "educational gag orders"); Jonathan P. Feingold, *Reclaiming Equality: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV. 723, 725 n.8 (2022) (noting that others refer to them as CRT bans and anti-CRT bills, but choosing the phrase "Backlash Bills" instead in order to "locate[] this body of legislation as one front in the coordinated backlash that followed our national turn toward antiracism in the summer of 2020"). This Article uses all of those terms.

The term "CRT" stands for "critical race theory," "an academic framework that interrogates the relationship between race, racism, and the law." *Id.* at 724. Recently, however, the phrase "CRT" has been transformed by right-wing politicians into a code word for anti-white propaganda in a campaign apparently devised by conservative activist Chris Rufo to push back against gains by antiracist initiatives. *E.g., id.* at 739 n.80; FRIEDMAN & TAGER, *supra* at 20–21. In that vein, politicians such as Florida Governor Ron DeSantis have characterized such measures as "anti-woke" statutes, designed to reverse "woke indoctrination." *E.g.,* Press Release, Ron DeSantis, Gov. of Fl., Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations> [hereinafter Press Release, DeSantis Announces Legislative Proposal]. For popular discussions of the differences between CRT as a legal theory and its politicized appropriation by the right, see, for example, Adam Harris, *The GOP's 'Critical Race Theory' Obsession*, ATLANTIC (May 7, 2021), <https://www.theatlantic.com/politics/archive/2021/05/gops-critical-race-theory-fixation-explained/618828>; see also William H. Frey, *Anti-CRT Bills Are Aimed to Incite the GOP Base—Not Parents*, BROOKINGS INST. (Mar. 30, 2022), <https://www.brookings.edu/articles/anti-crt-bills-are-aimed-to-incite-the-gop-base-not-parents>; Kimberlé Williams Crenshaw, Remark, *This Is Not a Drill: The War Against Antiracist Teaching in America*, 68 UCLA L. REV. 1702, 1705–1706 (2022) (on the "full-scale disinformation campaign against Critical Race Theory (CRT), intersectionality, and a host of social justice texts and frameworks").

to lead the fight to reform “woke indoctrination,”<sup>36</sup> Florida has recently adopted legislation designed to limit instruction about “divisive concepts” such as race, racism, and gender identity in public education venues.<sup>37</sup> Another front in the conservative attack on education and freedom of thought is the political strategy of book bans. Florida is again among a number of states that are removing books from library shelves to comply with the state’s prohibitions on certain types of instruction, *inter alia*, about race.<sup>38</sup>

To be sure, anti-CRT and educational gag order statutes are not aimed at Jews or anti-antisemitism projects. Their core targets are clearly African American-focused antiracist initiatives pushing America to confront the full legacy of its history of slavery, white supremacy, and institutional racism.<sup>39</sup> Without seeking to distract from the harms of educational gag orders for the groups and ideas directly targeted, this Article argues that such harms are likely to extend beyond their original targets in practice. Specifically, the provisions may well also lead to censorship, *inter alia*, of critical explorations of Jewish history, the nature and meaning of antisemitism and antisemitic discrimination, and Jewish identities and intersectionality (e.g., Judaism and whiteness, Jewish LGBTQIA+ identity, the concerns of Jews of color, Judaism and gender).<sup>40</sup> This concern is not merely hypothetical: the reactionary trend has already captured Jewish-focused work of Jewish authors, Holocaust literature, and award-winning plays about antisemitism and LGBTQIA+ issues.<sup>41</sup>

Regardless of statutes mandating Holocaust education and purporting to protect Jewish students on campus, the only way that such provisions could realistically avoid the state’s educational prohibitions would be through highly limiting *individual*-focused interpretations of antisemitic discrimination. But one core aspect of antisemitism is the purported power and deceitfulness of Jews as a *group*—indeed a cabal—already controlling government, finance, and media, and bent on achieving total world domination.<sup>42</sup> The moment that antisemitic discrimination in schools

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There are a variety of types of “anti-CRT” statutes. *See, e.g.*, Feingold, *supra*, at 729–35 (describing three: facial CRT bans, CRT gestures, and CRT silent bans). The Florida statute, presumably in order to trigger less constitutional concern, is a CRT-silent provision, using facially neutral language to define its scope. This Article focuses on Florida’s legislation.

<sup>36</sup> Press Release, DeSantis Announces Legislative Proposal, *supra* note 35.

<sup>37</sup> *See infra* Part III.

<sup>38</sup> *Id.*

<sup>39</sup> FRIEDMAN & TAGER, *supra* note 35, at 44, 54.

<sup>40</sup> *See id.* at 4.

<sup>41</sup> *See* Marlene Sokol, Ian Hodgson & Divya Kumar, *What Was Rejected from Florida Textbooks? Passages About the Holocaust and George Floyd*, MIA. HERALD (May 15, 2023, 12:04 PM), <https://www.miamiherald.com/new/local/education/article275380156.html>.

<sup>42</sup> *Antisemitism*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/antisemitism> (last visited Nov. 30, 2023).

is framed in terms of group and intersectional identity, it risks triggering the expansive prohibitions of Florida's "anti-woke" crusade. Furthermore, each of the rationales used by conservative proponents in support of these statutes has harmful consequences for broad-ranging study of antisemitism. Thus, even if the recent anti-antisemitism initiatives were not subject to critique on their own terms, their effectiveness could be neutralized by the "anti-woke" statutory juggernaut.

Admittedly, the new "anti-CRT" statutes face constitutional hurdles.<sup>43</sup> But while powerful arguments can be made to contest them, the statutes will not all fail constitutional scrutiny in whole or in part. The provisions are being defended aggressively by the states.<sup>44</sup> Courts have deemed the educational context to give states significant discretion, particularly in the K–12 context.<sup>45</sup> Scholars argue that the current Supreme Court's interpretation of antidiscrimination claims under the Fourteenth Amendment would make successful claims on that ground quite difficult.<sup>46</sup> As for First Amendment claims, while statutory vagueness poses problems, proponents point to regulations that can reduce vagueness and limit an excessive focus on viewpoint.<sup>47</sup> Lawyers claim that surgical redrafting can avoid legal hurdles while still promoting the goals of anti-CRT legislation, and states like Florida are including savings clauses in their statutes to require constitutional application and address carve-outs of unconstitutional aspects.<sup>48</sup> Even if parts of such legislation are struck down, much of the *in terrorem* effect of the unconstitutional provisions can be captured by more procedurally phrased provisions such as reporting and disclosure requirements, tenure rules, and other mechanisms that could advance governmental viewpoint preferences more indirectly. In any event, it is easy to imagine that such legislation can trigger extensive self-censorship effects even if all its provisions do not survive legal challenge intact. Whether or not such anti-antisemitism laws ultimately succumb to constitutional attack in whole or in part, they serve more as

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<sup>43</sup> See *infra* Part III.

<sup>44</sup> *Id.*; see also Eesha Pendharkar, *Legal Challenges to 'Divisive Concepts' Laws: An Update*, EDUCATION WEEK (Oct. 17, 2022), <https://www.edweek.org/policy-politics/legal-challenges-to-divisive-concepts-laws-an-update/2022/10>.

<sup>45</sup> See, e.g., FRIEDMAN & TAGER, *supra* note 35, at 64; *Virgil v. School Bd.*, 862 F.2d 1517, 1518 (11th Cir. 1989).

<sup>46</sup> See, e.g., FRIEDMAN & TAGER, *supra* note 35, at 65.

<sup>47</sup> See, e.g., Adam Kissel, *The Smart Lawmaker's Guide to Writing Anti-Critical Race Theory Laws That Will Stand Up in Court*, FEDERALIST (Dec. 13, 2022), <https://thefederalist.com/2022/12/13/the-smart-lawmakers-guide-to-writing-anti-critical-race-theory-laws-that-will-stand-up-in-court>.

<sup>48</sup> See, e.g., FEEA, FLA. STAT. § 1000.05(8)(c) (2023). Moreover, PEN America has recently published a report that shows educational gag order supporters "shift[ing] their focus to curricular and governance restrictions—such as bans on diversity, equity, and inclusion (DEI) initiatives at universities—rather than classroom instruction gag orders, in part as a response to successful legal action." JEFFREY ADAM SACHS & JEREMY C. YOUNG, *AMERICA'S CENSORED CLASSROOMS 2023* (2023).

performative political expression than as realistic and effective solutions to the growing threats of antisemitism worldwide today.

Ultimately, viewing antisemitism through a purely political lens de-historicizes it and risks leaching it of its moral valence. Even on the political front, though, the current debates between Republicans and Democrats on antisemitism ignore the elephant in the room. Conservative politicians should stop legitimizing white supremacy through expression and association, and progressive leaders should acknowledge the critical role of antisemitism in organizing an insidious and increasingly confident white nationalist movement. That a Trump victory in the 2024 presidential election is even conceivable is an object lesson in why it is necessary to face up to the role of antisemitism in weaponizing white power extremism in America—and why democracy requires us to set aside political partisanship to combat it.

The Article proceeds in four parts. Part I sketches the rise in antisemitic incidents and expression both on and offline, using survey data and anecdotal accounts of antisemitic statements by government officials and political candidates to describe the politicization of antisemitism. Part II describes recent legal responses to the rise in antisemitism, discussing Congressional consideration of Antisemitism Awareness legislation, the Trump Executive Order, and the passage of anti-antisemitism prohibitions in the context of education in Florida. Part II raises critiques of these legal initiatives on their own terms. Part III zooms out to situate the anti-antisemitism legislation against the adoption in a number of states (including Florida) of illiberal and politicized educational gag orders and book bans that threaten academic inquiry, educational independence, and the anti-subordination battles of African Americans. The Part explains how state “anti-CRT” legislation such as Florida’s—which principally target certain types of discussion of race and gender identity—can also be extended in practice to prohibit education designed to foster a rich and nuanced study of antisemitism and how to combat it effectively. Part IV highlights the interconnectedness between antisemitism and other prejudice, identifies the strategic role played by antisemitism in today’s white power extremism, and calls for bipartisan attention to effective responses to the normalization of antisemitism for the benefit of American society as a whole.

## I. THE CURRENT RESURGENCE OF PUBLIC ANTISEMITISM

The history of Jewish life in the United States has been marked by complexity—stability; opportunity; and the possibility of assimilation coexisting with social, educational and professional exclusion; antisemitic rhetoric; private and even government-sanctioned discrimination; and instances of threats and violence.<sup>49</sup> Still,

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<sup>49</sup> See Britt P. Tevis, *State of the Field: Trends in the Study of Antisemitism in United States History*, 105 *AM. JEWISH HIST.* 255, 256 (2021) (explaining the influence of two scholars whose work promoted the idea of antisemitism in the United States as a “relatively insignificant

while the systematic and intentional extermination of over six million Jews in the Holocaust has doubtless engendered echoes of trauma, and while many American Jews have remained aware of continuing public and state-sanctioned antisemitism in Europe and the Middle East, most have seen the United States as an exceptional

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aberration” and describing rising challenges to that view). One of the ways in which the utopian story—in which American antisemitism is exceptional and mostly social—is incomplete is the recognition that antisemitism infused not only segregated social life, but also political life and even legal protections.

Recent historical writing focuses on legal and political restraints on Jews. In one instance of explicit state-sanctioned discrimination against Jews “as a class,” in 1862, Ulysses S. Grant signed a sweeping anti-Jewish decree expelling Jews from the war zone under his command assertedly in response to their illegal trading contrary to the Union’s blockade of the Confederacy. *See, e.g., Ulysses S. Grant and General Orders No. 11*, NAT’L PARK SERV., <https://www.nps.gov/articles/000/ulysses-s-grant-and-general-orders-no-11.htm> (Jan. 14, 2021). This led to controversy and Abraham Lincoln revoked the order. Grant thereafter expressed remorse, saying in a letter “I have no prejudice against sect or race, but want each individual to be judged by his own merit. General Orders No. 11 does not sustain this statement, I admit, but then I do not sustain that order.” The scholars of the “antisemitism as exceptional” school minimized the significance of the Order and focused on Grant’s later statements.

Another example is “the Seligman affair,” in which one of the wealthiest and best-known American Jews, Joseph Seligman, and his family were denied accommodations at the Grand Union Hotel in 1877 because they were Jews. *See, e.g., Britt P. Tevis, “Jews Not Admitted”: Anti-Semitism, Civil Rights, and Public Accommodation Laws*, 107 J. AM. HIST. 847, 847 (2021). Although many now see this exclusion as an example of social antisemitism, it was recognized at the time it occurred as “a legal episode about Jews’ civil rights.” *Id.* at 848. Tevis argues that “the Seligman affair exemplifies . . . legally-sanctioned anti-Semitism: anti-Jewish discrimination enabled by state and federal legislation or permitted by the judiciary. As a classification, legally sanctioned anti-Semitism applies to assorted incidents that scholars have understood as disparate and anomalous.” *Id.* For an argument emphasizing legal status of Jews in revolutionary America, see Paul Finkelman & Lance J. Sussman, *When Freedom Began to Ring*, JEWISH REV. OF BOOKS (July 3, 2023), <https://jewishreviewofbooks.com/american-jewry/14147/when-freedom-began-to-ring>.

Professor Felice Batlan’s article for this Symposium issue provides a striking example of the underlying antisemitic intent of the United States’ late 19th century immigration rules. Felice Batlan, *The Displaced Persons Act of 1948 and Home-Grown Antisemitism*, 27 LEWIS & CLARK L. REV. 1057 (2024). This is only one example of exclusionary immigration laws particularly impacting Jews. *See, e.g., Ruth Franklin, The Millions We Failed to Save*, 70 N.Y. REV. OF BOOKS, June 22, 2023, at 37, <https://www.nybooks.com/articles/2023/06/22/the-millions-we-failed-to-save-us-and-the-holocaust-pbs>; Tony Michels, *Is America “Different”? A Critique of American Jewish Exceptionalism*, 96 AM. JEWISH HIST. 201, 215 (2010).

locus of safety.<sup>50</sup> Laws here have been interpreted to protect Jews against discriminatory harassment.<sup>51</sup> Exclusionary immigration laws designed to limit Jewish immigration have been reversed.<sup>52</sup> Educational institutions have apologized for their discriminatory admissions practices and Jewish quotas.<sup>53</sup> High public officials have expressed solidarity with Jewish people in response to antisemitic attacks and violence.<sup>54</sup> Although a thread of antisemitic rhetoric has persisted in society, assimilated Jews have typically viewed it as relatively limited.<sup>55</sup> That antisemitism has featured

<sup>50</sup> By and large, Jews felt safe particularly if they did not “make trouble” and were not “too Jewish.” See, e.g., Kirsten Fermaglich, “*Too Long, Too Foreign . . . Too Jewish*”: Jews, Name Changing, and Family Mobility in New York City, 1917–1942, 34 J. AM. ETHNIC HIST., Spring 2015, at 34, 34–47. Still, both government and private American companies followed antisemitic policies, even in light of their knowledge of Nazi persecutions. See LAUREL LEFF, BURIED BY THE TIMES: THE HOLOCAUST AND AMERICA’S MOST IMPORTANT NEWSPAPER (2005); DEBORAH E. LIPSTADT, BEYOND BELIEF: THE AMERICAN PRESS AND THE COMING OF THE HOLOCAUST, 1933–1945 (1986); Jack Beatty, *Hitler’s Willing Business Partners*, ATLANTIC MONTHLY (Apr. 2001), <https://www.theatlantic.com/magazine/archive/2001/04/hitlers-willing-business-partners/303146>; Daniel A. Gross, *The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing that They Were Nazi Spies*, SMITHSONIAN MAG. (Nov. 18, 2015), <https://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324>; Rafael Medoff, *American Responses to the Holocaust: New Research, New Controversies*, 100 AM. JEWISH HIST. 379 (2016) and sources cited therein; Nina Valbousquet, “*Un-American*” Antisemitism?: *The American Jewish Committee’s Response to Global Antisemitism in the Interwar Period*, 105 AM. JEWISH HIST. 77, 78 (2021) (on the need to “complicate the narrative of . . . American Jewish exceptionalism”).

<sup>51</sup> See *Questions and Answers on Executive Order 13899 (Combatting Anti-Semitism) and OCR’s Enforcement of Title VI of the Civil Rights Act of 1964*, U.S. DEP’T OF EDUC. (Jan. 19, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-anti-semitism-20210119.pdf>; *What to Do if You Face Antisemitism at Work*, EQUAL EMP. OPPORTUNITY COMM’N., [https://www.eeoc.gov/sites/default/files/2023-05/WTDD%20Antisemitism%20at%20Work%20May%202023-9\\_508%20final.pdf](https://www.eeoc.gov/sites/default/files/2023-05/WTDD%20Antisemitism%20at%20Work%20May%202023-9_508%20final.pdf) (last visited Nov. 30, 2023).

<sup>52</sup> See Ingrid Anderson, *What History Reveals About Surges in Anti-Semitism and Anti-Immigrant Sentiments*, PBS: NEWS HOUR (Oct. 29, 2018, 3:43 PM), <https://www.pbs.org/newshour/nation/what-history-reveals-about-surges-in-anti-semitism-and-anti-immigrant-sentiments>; see generally Batlan, *supra* note 49.

<sup>53</sup> See, e.g., Chris Peacock, *Stanford Apologizes for Admissions Limits on Jewish Students in the 1950s and Pledges Action on Steps to Enhance Jewish Life on Campus*, STANFORD REP. (Oct. 12, 2022), <https://news.stanford.edu/report/2022/10/12/task-force-report-jewish-admissions-and-jewish-life>; see also Tevis, *supra* note 49, at 271–73 (on university Jewish quotas).

<sup>54</sup> E.g., Press Release, The White House, Statement by President Joe Biden Marking Four Years Since the Attack on Pittsburgh’s Tree of Life Synagogue (Oct. 27, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/27/statement-by-president-joe-biden-marking-four-years-since-the-attack-on-pittsburghs-tree-of-life-synagogue>.

<sup>55</sup> This is not to say that the perception of safety has been realistic throughout. See, e.g., David Greenberg, *America’s Forgotten Pogroms*, POLITICO (Nov. 2, 2018), <https://www.politico.com/magazine/story/2018/11/02/americas-forgotten-pogroms-222181> (describing antisemitic attacks on Jews in Boston and New York as coordinated and akin to “pogroms”).

centrally in American Jewish humor may itself be evidence of an assumption of safety.<sup>56</sup>

As detailed below, however, there has been a marked uptick in both antisemitic expression and violent anti-Jewish incidents in recent years in the United States.<sup>57</sup> News reporting has highlighted antisemitic expression by some prominent people, but the reality is that their comments are only the tip of the iceberg—and perhaps notable mostly to the extent that they open the door to the normalization of antisemitism.<sup>58</sup> Today’s antisemitism has new and particularly threatening characteristics—in terms of its intensity, reach, explicitness, strategic deployment to advance political goals, and apparently increasing regularization both here and elsewhere. And, as will be described below, antisemitism is being used as part of bigger fights between conservatives and progressives over American values. Of course, the bare number of violent antisemitic incidents and even the total number of antisemitic social media posts are comparatively low. But the key point is their impact and the upward trend.

#### A. *A Rise in Antisemitic Incidents*

Antisemitic threats and violence have been on the increase as is reflected in rhetoric online and offline, the growth of antisemitic extremist groups, and an increase in antisemitic incidents.<sup>59</sup> This trend has only grown worse since Hamas’s

<sup>56</sup> See, e.g., JOSEPH TELUSHKIN, *JEWISH HUMOR* 16–17 (1992).

<sup>57</sup> See *infra* Section I.A.

<sup>58</sup> *Antisemitic Celebrities Stoke Fears of Normalizing Hate*, *supra* note 5.

<sup>59</sup> See, e.g., Robertson et al., *supra* note 8; Jill Cowan, *What to Know About the Poway Synagogue Shooting*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/us/synagogue-shooting.html> (a shooting at a synagogue in Poway in 2019); Rebecca Liebson, Neil Vigdor, Michael Gold & Eliza Shapiro, *5 Wounded in Stabbing at Rabbi’s Home in N.Y. Suburb*, N.Y. TIMES (Dec. 28, 2019), <https://www.nytimes.com/2019/12/28/nyregion/monsey-synagogue-stabbing-anti-semitic.html> (a knife attack at a rabbi’s home in Monsey); Ruth Graham & Adam Goldman, *As F.B.I. Breached Texas Synagogue, Hostages Were Dashing for Exit*, N.Y. TIMES (Jan. 21, 2022), <https://www.nytimes.com/2022/01/21/us/texas-synagogue-hostages-fbi.html> (the 2022 hostage crisis at a Texas synagogue); Maya King & Amanda Holpuch, *Man Charged with Hate Crimes in Shootings Outside Synagogues in L.A.*, N.Y. TIMES (Feb. 17, 2023), <https://www.nytimes.com/2023/02/17/us/los-angeles-synagogues-shooting.html> (the shooting of two Jews leaving services in Los Angeles in 2023); see also Jonathan D. Sarna, *How Antisemitic Conspiracy Theories Contributed to the Recent Hostage-Taking at the Texas Synagogue*, THE CONVERSATION (Jan. 20, 2022, 11:46 AM), <https://theconversation.com/how-antisemitic-conspiracy-theories-contributed-to-the-recent-hostage-taking-at-the-texas-synagogue-175229> (reporting on perpetrator’s view that Jews “control the world” and could use their power to free a Pakistani convicted of attempting to kill American soldiers and blow up the Statue of Liberty). The FBI has confirmed warnings of threats to Jewish houses of worship. Michael Paulson & Ruth Graham, *Between Kanye and the Midterms, the Unsettling Stream of Antisemitism*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2022/11/04/us/kanye-antisemitism-midterms.html>.

attack on Israeli civilians on October 7, 2023. The Anti-Defamation League (ADL) reported a “337-percent increase” in antisemitic incidents since 2022.<sup>60</sup> Even prior to these events, though, the ADL *Audit of Antisemitic Incidents* had found that antisemitic incidents rose to historic levels in 2022, with a total of 3,697 incidents constituting an increase of 36% compared to 2021.<sup>61</sup> The ADL *Audit of Antisemitic Incidents 2021* had itself reported a record-setting increase in antisemitic incidents at that time, describing those results as reflecting an all-time high since the ADL commenced its antisemitic incident tracking in 1979.<sup>62</sup> This made the 2022 results

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Antisemitic expression has increased as well. Section I.B *infra* details the normalization of antisemitism by politicians and elected officials. Celebrities as well have made eye-poppingly antisemitic statements. For example, Kanye West, who now goes by Ye, promised to “go[] death con 3 on JEWISH PEOPLE” and admitted that he “likes Hitler.” *Unpacking Kanye West’s Antisemitic Remarks*, ANTI-DEFAMATION LEAGUE: BLOG, <https://www.adl.org/resources/blog/unpacking-kanye-wests-antisemitic-remarks> (Oct. 31, 2022); Paybarah, *supra* note 11. Ye recently apologized for his antisemitic statements. Herb Scribner, *Ye Apologizes on Instagram for Antisemitic Comments*, WASH. POST (Dec. 26, 2023, 3:26 PM), <https://www.washingtonpost.com/style/2023/12/26/kanye-west-apology-hebrew-instagram-antisemitism>. I will address celebrity endorsements of antisemitism in forthcoming work. The *U.S. National Strategy to Counter Antisemitism* reflects the Executive’s recognition of rising antisemitism and its normalization. See THE WHITE HOUSE, *supra* note 21.

<sup>60</sup> ADL Reports Unprecedented Rise in Antisemitic Incidents Post-Oct. 7, ANTI-DEFAMATION LEAGUE (Dec. 11, 2023), <https://www.adl.org/resources/press-release/adl-reports-unprecedented-rise-antisemitic-incidents-post-oct-7> (“U.S. antisemitic incidents reached the highest number of incidents during any two-month period since ADL . . . began tracking in 1979.”); *U.S. Antisemitic Incidents Skyrocketed 360% in Aftermath of Attack in Israel, According to Latest ADL Data*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/press-release/us-antisemitic-incidents-skyrocketed-360-aftermath-attack-israel-according> (Jan. 17, 2024). In addition to the increase in antisemitic incidents, there has been an increase in anti-Muslim threats and incidents. See, e.g., Chelsea Bailey, *Reports of Antisemitism, Anti-Arab and Anti-Muslim Bias Continue to Surge Across the US, New Data Shows*, CNN, <https://www.cnn.com/2023/12/11/us/adl-cair-hate-crimes-bias-incidents-rea/index.html> (Dec. 11, 2023, 10:19 AM).

<sup>61</sup> ANTI-DEFAMATION LEAGUE, AUDIT OF ANTISEMITIC INCIDENTS 2022, at 5 (2023), <https://www.adl.org/resources/report/audit-antisemitic-incidents-2022> [hereinafter 2022 ADL AUDIT]; Press Release, Anti-Defamation League, U.S. Antisemitic Incidents Hit Highest Level Ever Recorded, ADL Audit Finds, (Mar. 22, 2023), <https://www.adl.org/resources/press-release/us-antisemitic-incidents-hit-highest-level-ever-recorded-adl-audit-finds> [hereinafter ADL, Antisemitic Incidents Highest Level]. The 3,697 antisemitic incidents reported by the 2022 ADL *Audit* constitutes a staggering average of 10 antisemitic incidents per day.

<sup>62</sup> ANTI-DEFAMATION LEAGUE, AUDIT OF ANTISEMITIC INCIDENTS 2021, at 5 (2022), <https://www.adl.org/resources/report/audit-antisemitic-incidents-2021> [hereinafter 2021 ADL AUDIT]; Press Release, Anti-Defamation League, ADL Audit Finds Antisemitic Incidents in United States Reached All-Time High in 2021 (Apr. 25, 2022), <https://www.adl.org/news/press-releases/adl-audit-finds-antisemitic-incidents-in-united-states-reached-all-time-high-in> [hereinafter ADL, All Time High]. The 2021 ADL Audit reported a total of 2,717 antisemitic incidents across the United States in 2021. According to the ADL, “[t]his is a 34% increase from the 2,026 incidents tabulated in 2020 and the highest number on record since ADL began

even more striking. As the ADL Center on Extremism describes it, the 2022 results “follow[] an upward trendline of hate and vitriol directed against the American Jewish community over the last five years” and represent “the third time in the past five years that the year-end total has been the highest number ever recorded.”<sup>63</sup> The latest ADL report also found a doubling of white supremacist group activity, including a 102% increase in antisemitic propaganda distributions by white supremacist groups.<sup>64</sup> The latest data may even undercount rising antisemitism due to underreporting of hate crimes.<sup>65</sup>

Over the years, ADL’s data reflecting a rise in antisemitism have been confirmed by other entities’ empirical results.<sup>66</sup> For example, a survey by the Center for the Study of Hate and Extremism at California State University confirmed that “[a]nti-Jewish hate crime rose 59% in 2021” in major U.S. cities surveyed.<sup>67</sup> The FBI Hate Crime Statistics Report indicated that over 50% of nationally reported

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tracking antisemitic incidents in 1979.” 2021 ADL AUDIT, *supra*, at 5. This amounts to an average of more than seven instances per day. The ADL Center on Extremism has posted online its “H.E.A.T. Map,” an interactive online tool reflecting antisemitic incidents and events that can be searched by users geographically. ADL H.E.A.T. Map, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/tools-to-track-hate/heat-map> (last visited Nov. 30, 2023).

The 2022 ADL Audit found increases in each of the reported categories of antisemitic incidents: 29% increase in harassment compared to 2021, a 51% surge in vandalism; and a 26% increase in physical assaults. 2022 ADL AUDIT, *supra* note 61, at 5. The 2022 Audit also found a 49% increase in antisemitic incidents in K–12 educational institutions, and a 41% increase in college campus incidents. *Id.*

<sup>63</sup> ADL, Antisemitic Incidents Highest Level, *supra* note 61.

<sup>64</sup> *Id.*; 2022 ADL AUDIT, *supra* note 61, at 5.

<sup>65</sup> See *infra* note 68 (describing hate crime reporting difficulties by states undermining the reliability of the FBI’s hate crime information reporting process).

<sup>66</sup> Confirmation is useful because ADL is not an academic enterprise. It is a Jewish-identified advocacy organization, created in the early 20th century, with the goal “to stop the defamation of the Jewish people and secure justice and fair treatment to all.” ADL’s Mission & History, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/about/mission-and-history> (last visited Nov. 30, 2023). In addition to combating antisemitism, the organization advocates against anti-Black racism and hate in general. *Id.*

Criticisms of ADL’s survey numbers have focused on the fact that the organization has not asked precisely the same questions throughout its survey years and that it has included anti-Zionist harassment in its reports of antisemitism. *E.g.*, Mari Cohen, *The ADL’s Antisemitism Findings, Explained*, JEWISH CURRENTS (Apr. 4, 2023), <https://jewishcurrents.org/the-adls-antisemitism-findings-explained>. ADL’s Audits are explicit in describing the organization’s empirical methodology. See, *e.g.*, 2022 ADL AUDIT, *supra* note 61, at 30; 2021 ADL AUDIT, *supra* note 62, at 27–28.

<sup>67</sup> BRIAN LEVIN, KIANA PERST, ANALISSA VENOLIA & GABRIEL LEVIN, CTR. FOR THE STUDY OF HATE & EXTREMISM, REPORT TO THE NATION: 2020S—DAWN OF A DECADE OF RISING HATE (2022), <https://www.csus.edu/hate-and-extremism-center>. That report states that “Jews have been the top religious bias nationally for hate crime since 1991 and are consistently the top overall bias target in New York City, where one in six American Jews reside.” *Id.*

hate crimes based on religion targeted the Jewish community in 2020.<sup>68</sup> Harassment increased 43% in 2021 over 2020, vandalism by 14%, and antisemitic assault by 167%.<sup>69</sup>

American Jews have been expressing concern with the rise in evident antisemitism. A 2021 American Jewish Committee (AJC) survey of U.S. Jews reported that 90% thought antisemitism was a problem, with 82% perceiving an increase in antisemitism and 12% reporting being targeted online with antisemitism.<sup>70</sup> The Pew Research Center's 2020 study of Jewish Americans found that "Jewish Americans generally perceive a rise in anti-Semitism," with more than "nine-in-ten U.S. Jews surveyed say[ing] there is at least some anti-Semitism in America, and three-quarters say[ing] there is more anti-Semitism in the U.S. today than there was five years ago."<sup>71</sup> About 60% of Jews report "having had a direct, personal experience with anti-Semitism . . . such as seeing anti-Semitic graffiti or vandalism, experiencing

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<sup>68</sup> 2020 *FBI Hate Crimes Statistics*, CMTY. RELS. SERV., U.S. DEP'T OF JUST. (Apr. 4, 2023), <https://www.justice.gov/crs/highlights/2020-hate-crimes-statistics>. Rates were similar in 2021: the FBI's report indicates 51.4% of religion-related incidents were anti-Jewish crimes. *FBI Releases Supplement to the 2021 Hate Crimes Statistics*, CMTY. RELS. SERV., U.S. DEP'T OF JUST. (Apr. 4, 2023), <https://www.justice.gov/crs/highlights/2021-hate-crime-statistics>. Prior to supplementing the 2021 report, the FBI's 2021 data indicated a significant decline in anti-Jewish crime. The Department of Justice explained that "December 2022 marked the first year using annual hate crimes statistics reported entirely through the National Incident-Based Reporting System (NIBRS). As a result of the shift to NIBRS-only data collection, law enforcement agency participation in submitting all crime statistics, including hate crimes, fell significantly from 2020 to 2021." *Id.*; see also Cynthia Miller-Idriss, *The FBI's 2021 Hate Crime Data Is Worse Than Meaningless*, LAWFARE (Dec. 16, 2022, 8:30 AM), <https://www.lawfareblog.com/fbis-2021-hate-crime-data-worse-meaningless> ("[N]early 40 percent of agencies across the country failed to report any data at all for 2021—only 11,883 of 18,812 agencies reported. . . . [T]he federal hate crime data for 2021 [is] meaningless. . . . The only accurate statement that could be made about the 2021 data is that overall hate crimes have increased significantly. A report of 7,300 incidents submitted by only 63 percent of local agencies is a big jump from 8,300 incidents reported by over 80 percent of jurisdictions. But there is no way to describe how big the growth was, in part because reporting was so uneven across urban and rural areas. Much of the missing data, for example, is from major metropolitan regions where big increases in hate crimes have already been documented. . . . The 2021 data should not have been publicly reported at all. It is simply not meaningful—in fact, it is actually misleading—to share a 'national' data report that can't be used properly."); THE WHITE HOUSE, *supra* note 21, at 23–27 (on recommendations to improve hate crime reporting and law enforcement).

<sup>69</sup> 2021 ADL AUDIT, *supra* note 62, at 7 (noting that "[t]he surge of incidents in May coincides with the military conflict between Israel and Hamas." (emphasis omitted)).

<sup>70</sup> AM. JEWISH COMM., THE STATE OF ANTISEMITISM IN AMERICA 2021, at 4–5 (2021), <https://www.ajc.org/AntisemitismReport2021/AmericanJews>.

<sup>71</sup> PEW RSCH. CTR., JEWISH AMERICANS IN 2020, at 120 (2021), <https://www.pewresearch.org/religion/2021/05/11/anti-semitism-and-jewish-views-on-discrimination>.

online harassment, or hearing someone repeat an anti-Semitic trope.”<sup>72</sup> Over half of American Jews say “they feel less safe as Jews in America than they did five years ago.”<sup>73</sup> Almost a third of American Jews said in 2020 that they had avoided certain places and activities, and more than a third thereafter report taking steps to conceal their Jewish identity in public.<sup>74</sup>

Jewish institutions have been a consistent target of antisemitic attacks. The ADL reported that in 2021, there were 525 reported incidents at Jewish institutions such as synagogues, Jewish community centers and Jewish schools—an increase of 61% from 327 in 2020.<sup>75</sup> The deadliest such incident was the antisemitic terror attack on Sabbath worshippers at the Tree of Life synagogue in Pittsburgh in 2018, which killed 11 people and wounded 6.<sup>76</sup> The Colleyville attack led the Department of Homeland Security, the FBI, and the National Counter Terrorism Center to issue a Joint Intelligence Bulletin indicating “enduring nature of violent threats posed to Jewish communities” and suggested the likelihood of copycat attacks.<sup>77</sup> Although there were no mass casualties in any of the 2022 incidents, the 2022 ADL Audit reports higher numbers than 2021. Bomb threats toward Jewish institutions increased from 8 to 91 incidents in 2022, and incidents at Jewish institutions such as synagogues, Jewish community centers, and Jewish schools rose 12% from 2021.<sup>78</sup>

In addition to targeting Jewish institutions, attacks targeting individuals thought to be Jewish are also on the rise. In 2022, ADL counted 139 people as

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<sup>72</sup> *Id.* An ADL survey confirms this as well. *Survey on Jewish Americans’ Experiences with Antisemitism*, ANTI-DEFAMATION LEAGUE (Apr. 17, 2020), <https://www.adl.org/resources/report/survey-jewish-americans-experiences-antisemitism>.

<sup>73</sup> *Survey on Jewish Americans’ Experiences with Antisemitism*, *supra* note 72 (finding that “[n]early two thirds of Jews (63%) reported that they are less safe than they were a decade ago”).

<sup>74</sup> Avi Mayer, *The State of Antisemitism in America: Insights and Analysis*, AM. JEWISH COMM. (Oct. 26, 2020), <https://www.ajc.org/news/AntisemitismReport2020/the-state-of-antisemitism-in-america-2020-insights-and-analysis>; *see also* Clare Ansberry, *American Jews Question: How Public Should We Be About Our Faith?*, WALL ST. J., <https://www.wsj.com/us-news/for-american-jews-a-delicate-dance-of-how-visible-to-be-in-a-time-of-war-91adda9d> (Dec. 7, 2023, 7:46 PM).

<sup>75</sup> 2021 ADL AUDIT, *supra* note 62, at 23. Of the total, 413 were incidents of harassment, 101 were incidents of vandalism and 11 were assaults. *Id.*

<sup>76</sup> Robertson et al., *supra* note 59; Press Release, The White House, *supra* note 54.

<sup>77</sup> ANTI-DEFAMATION LEAGUE, HATE IN THE EMPIRE STATE: EXTREMISM & ANTISEMITISM IN NEW YORK, 2020–2021, at 6 (2022), <https://www.adl.org/resources/report/hate-empire-state-extremism-antisemitism-new-york-2020-2021>; *see also* Perry Stein, *Arrest Made in N.J. Synagogue Threat as FBI Director Decries Antisemitism*, WASH. POST (Nov. 10, 2022, 2:29 PM), <https://www.washingtonpost.com/national-security/2022/11/10/new-jersey-synagogue-arrest-antisemitism-wray> (reporting arrest of man arrested for posting manifesto containing threats to attack a synagogue and kill all the Jews in New Jersey); Paulson & Graham, *supra* note 59.

<sup>78</sup> 2022 ADL AUDIT, *supra* note 61, at 5.

victims of assault, with disproportionate targeting of Orthodox Jews.<sup>79</sup> “Jewish people (or people perceived to be Jewish) were harassed verbally or in writing with antisemitic slurs, stereotypes or conspiracy theories,” with such harassment increasing 29% over 2021.<sup>80</sup> Since the Israel-Hamas war, the FBI reports a 60% jump in U.S. hate crime investigations, the “biggest chunk” of which are threats against the Jewish community.<sup>81</sup>

Antisemitic incidents occurred in all 50 states and the District of Columbia in and after 2020.<sup>82</sup> According to the most recent ADL Audit report, “the states with the highest number of incidents [in 2022 were] New York (580), California (518), New Jersey (408), Florida (269) and Texas (211). Combined, these five states account for 54% of the total incidents.”<sup>83</sup> In Florida, ADL reports that “80% of the religiously motivated incidents in 2020” involved hate crimes against Jews.<sup>84</sup> “[A]ntisemitic hate crimes have risen 300% since 2012. . . . In 2021, the number of

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<sup>79</sup> *Id.* at 8; ADL, Antisemitic Incidents Highest Level *supra* note 61.

<sup>80</sup> 2022 ADL AUDIT, *supra* note 61, at 8.

<sup>81</sup> Rebecca Beitsch, *FBI Sees 60 Percent Jump in Hate Crime Cases Since Israel-Hamas War*, THE HILL (Dec. 5, 2023, 12:00 PM), <https://thehill.com/policy/national-security/4342863-fbi-hate-crimes-israel-hamas-war>.

<sup>82</sup> ADL, All Time High, *supra* note 62; 2021 ADL AUDIT, *supra* note 62, at 7; 2022 ADL AUDIT, *supra* note 61, at 9.

<sup>83</sup> 2022 ADL AUDIT, *supra* note 61, at 9. The findings are only slightly different from prior reported years. In 2021, for example, ADL found that the “states with the highest number of [antisemitic] incidents were New York (416), New Jersey (370), California (367), Florida (190), Michigan (112) and Texas (112),” which, when “combined . . . accounted for 58 percent of the total incidents.” ADL, All Time High, *supra* note 62.

<sup>84</sup> ANTI-DEFAMATION LEAGUE, HATE IN THE SUNSHINE STATE: EXTREMISM & ANTISEMITISM IN FLORIDA, 2020–2022, at 5 (2022), <https://www.adl.org/resources/report/hate-sunshine-state-extremism-antisemitism-florida-2020-2022>. The antisemitic activity is associated with the fact that “new white supremacist groups have formed, including White Lives Matter, Sunshine State Nationalists, NatSoc Florida, and Florida Nationalists, while existing neo-Nazi and accelerationist groups have broadened their audience both online and on the ground activities.” *Id.* at 4. There has developed in Florida an “extensive, interconnected network of white supremacists and other far-right extremists. . . . which often collaborates in planning and executing propaganda distribution campaigns, banner drops and in-person demonstrations . . . .” *Id.* at 5. ADL “recorded over 400 instances of white supremacist propaganda distribution in Florida,” of which almost a quarter included antisemitic expression or targeted Jewish institutions. *Id.* In addition, an ADL study shows “extremist groups such as Oath Keepers and the Proud Boys” which espouse antisemitic ideas have begun “to focus on the local level, disrupting school board meetings and even running for political office.” *Id.* at 4. “These groups maintain a robust social media presence across both mainstream and fringe platforms. From behind their computer screens, individuals and groups recruit, radicalize and organize on both the national and local levels. They use message boards, chats and channels to share propaganda materials, engage in antisemitic conspiracy theorizing, promote violence and plan in-person events. Media coverage of their incidents is used to boast their perceived successes, raise money and further bolster their followings.” *Id.* at 6.

reported [antisemitic] incidents increased 50% over 2020 numbers, rising from 127 to 190. This included 142 instances of harassment, 47 instances of vandalism and one antisemitic assault.”<sup>85</sup> Violent antisemitic rhetoric surged online in August 2022 following the FBI’s execution of a search warrant at former President Trump’s Mar-a-Lago compound.<sup>86</sup>

It is possible to discern a connection between antisemitism and conspiracy theories and disinformation today. A recent ADL study finds a correlation between those who believe conspiracy theories and those who believe the greatest number of antisemitic tropes.<sup>87</sup> Widespread disinformation and conspiracy theories—including continuing claims that Jews or Israel were behind 9/11<sup>88</sup> and that Jews were responsible for COVID as part of their plot for world domination<sup>89</sup>—circulated both online and in person, often associated with the propaganda of white supremacist groups. Even after 20 years, the conspiracy theory exists that Israel and the Mossad were responsible for the terrorist attack of 9/11.<sup>90</sup> The QAnon conspiracy theory had a distinctly antisemitic cast.<sup>91</sup> Antisemitic conspiracy theories focus on George Soros, the Hungarian-born Jewish philanthropist.<sup>92</sup> There was an underlying thread

<sup>85</sup> *Id.* at 5.

<sup>86</sup> *Id.* at 5 (“Threats have largely targeted federal law enforcement and Department of Justice officials, including specific law enforcement officers who were onsite for the search and magistrate Judge Bruce Reinhart, who signed off on the search warrant.”).

<sup>87</sup> See also *Antisemitic Attitudes in America: Conspiracy Theories, Holocaust Education and Other Predictors of Antisemitic Belief*, ANTI-DEFAMATION LEAGUE (Mar. 17, 2023), <https://www.adl.org/resources/report/antisemitic-attitudes-america-conspiracy-theories-holocaust-education-and-other> [hereinafter *Antisemitic Attitudes: Predictors*].

<sup>88</sup> *Antisemitic Conspiracies About 9/11 Endure 20 Years Later*, ANTI-DEFAMATION LEAGUE (Sept. 9, 2021), <https://www.adl.org/resources/reports/antisemitic-conspiracies-about-911-endure-20-years-later>.

<sup>89</sup> See, e.g., *Coronavirus: Antisemitism*, ANTI-DEFAMATION LEAGUE: BLOG (Apr. 22, 2020), <https://www.adl.org/resources/blog/coronavirus-antisemitism>; Flora Cassen, *Jews Control Chinese Labs That Created Coronavirus: White Supremacists’ Dangerous New Conspiracy Theory*, HAARETZ: JEWISH WORLD (May 3, 2020), <https://www.haaretz.com/jewish/2020-05-03/ty-article-opinion/.premium/the-jews-control-the-chinese-labs-that-created-coronavirus/0000017f-db9f-df9c-a17f-ff9f5cf60000>.

<sup>90</sup> *Antisemitic Conspiracies About 9/11 Endure 20 Years Later*, *supra* note 88.

<sup>91</sup> E.g., *QAnon’s Antisemitism and What Comes Next*, ANTI-DEFAMATION LEAGUE (Sept. 17, 2021), <https://www.adl.org/resources/report/qanons-antisemitism-and-what-comes-next>; Eileen B. Hershenov & Ryan B. Greer, *Antisemitism and Threats to American Democracy*, JUST SEC. (Jan. 26, 2023), <https://www.justsecurity.org/84901/antisemitism-and-threats-to-american-democracy>; Martin J. Riedl, Katie Joseff, Stu Soorholtz & Samuel Woolley, *Platformed Antisemitism on Twitter: Anti-Jewish Rhetoric in Political Discourse Surrounding the 2018 U.S. Midterm Election*, NEW MEDIA & SOC’Y (Mar. 24, 2022), <https://journals.sagepub.com/doi/10.1177/14614448221082122>.

<sup>92</sup> E.g., Seth Cohen, *The Troubling Truth About the Obsession with George Soros*, FORBES (Sept. 12, 2020, 10:37 AM), <https://www.forbes.com/sites/sethcohen/2020/09/12/the-troubling-truth-about-the-obsession-with-george-soros>.

of antisemitism in the January 6th attack on the Capitol, with some insurrectionists wearing clothing with antisemitic messages and images.<sup>93</sup> Most generally, there is widespread dissemination of key antisemitic tropes.<sup>94</sup> While some of the reported harassment incidents against Jews have been linked to anti-Zionist or anti-Israel sentiments relating to fighting between Israel and Hamas, a notable percentage of the anti-Zionist attacks have been attributable to “white supremacist groups’ efforts to foment anti-Israel and antisemitic beliefs.”<sup>95</sup>

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<sup>93</sup> See, e.g., Elana Schor, *Anti-Semitism Seen in Capitol Insurrection Raises Alarms*, ASSOC. PRESS (Jan. 13, 2021, 10:20 AM), [https://apnews.com/article/election-2020-donald-trump-race-and-ethnicity-discrimination-elections-a72d2c399574206d64606f3d254c4b01?utm\\_source=copy&utm\\_medium=share](https://apnews.com/article/election-2020-donald-trump-race-and-ethnicity-discrimination-elections-a72d2c399574206d64606f3d254c4b01?utm_source=copy&utm_medium=share); *The Jan. 6 Rioter Who Wore a ‘Camp Auschwitz’ Sweatshirt Gets 75 Days in Jail*, NPR (Sept. 16, 2022, 9:56 AM), <https://www.npr.org/2022/09/16/1123424585/jan-6-rioter-camp-auschwitz-sweatshirt-sentenced-jail>; Sylvia Barack Fishman, *American Jews and the Domestic Arena (July 2020–July 2021): Not Like All Other Years*, in AMERICAN JEWISH YEAR BOOK 2021, at 127, 140 (Arnold Dashefsky & Ira M. Sheskin eds., 2022).

<sup>94</sup> See, e.g., KENNETH L. MARCUS, LOUIS D. BRANDEIS CTR. FOR HUM. RTS. UNDER L., FACT SHEET ON THE ELEMENTS OF ANTI-SEMITIC DISCOURSE, [https://www.ohchr.org/sites/default/files/Documents/AboutUs/CivilSociety/ReportHC/75\\_The\\_Louis\\_D.\\_Brandeis\\_Center\\_Fact\\_Sheet\\_Anti-Semitism.pdf](https://www.ohchr.org/sites/default/files/Documents/AboutUs/CivilSociety/ReportHC/75_The_Louis_D._Brandeis_Center_Fact_Sheet_Anti-Semitism.pdf).

<sup>95</sup> 2022 ADL AUDIT, *supra* note 61, at 5 (“In 2022, 241 incidents involved references to Israel or Zionism. This is a decline from 345 such incidents in 2021, which was an unusually high year due to antisemitic reactions to the May 2021 military conflict between Israel and Hamas. This number is still 35% higher than the number of Israel/Zionism-related incidents in 2020. Of 2022’s 241 anti-Zionist/anti-Israel-related incidents, 70 incidents could be identified as having been perpetrated by individuals associated with hostile anti-Zionist activist groups, most commonly Witness for Peace and Students for Justice in Palestine and its affiliates.”); 2021 ADL Audit, *supra* note 62, at 12, 23; ADL, All Time High, *supra* note 62; see also *White Supremacist Leaders Applaud Hamas and Violence Against Israelis*, ANTI-DEFAMATION LEAGUE: BLOG (Oct. 10, 2023), <https://www.adl.org/resources/blog/white-supremacist-leaders-applaud-hamas-and-violence-against-israelis>.

The online picture is worrisome as well.<sup>96</sup> Both Twitter (now X) and TikTok have been characterized as having an “antisemitism problem.”<sup>97</sup> White nationalist “groypers” are “thriving on Instagram, posting memes with racist, anti-semitic, and homophobic tropes while others pose as clean-cut conservatives to lure in new, college-aged recruits.”<sup>98</sup> Holocaust denial content is “readily accessible” on Facebook,

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<sup>96</sup> Antisemitic and anti-Muslim hate speech has surged on the Internet since the start of the Israel-Hamas war. Sheera Frenkel & Steven Lee Myers, *Antisemitic and Anti-Muslim Hate Speech Surges Across the Internet*, N.Y. TIMES (Nov. 15, 2023), <https://www.nytimes.com/2023/11/15/technology/hate-speech-israel-gaza-internet.html>. However, online antisemitism has been evident for some time before this most recent Middle East conflict. U.N. & UNESCO, HISTORY UNDER ATTACK: HOLOCAUST DENIAL AND DISTORTION ON SOCIAL MEDIA (2022), <https://unesdoc.unesco.org/ark:/48223/pf0000382159>. Some of the online antisemitism seems “organic”—expression of genuine dislike of Jews. However, the online environment also includes the deployment of antisemitism strategically and politically. There have been many reports of foreign governments such as Russia seeking to influence American politics by injecting racism, antisemitism, and general disorder into the social media used by American voters. See, e.g., Philip Ewing, *Russians Targeted U.S. Racial Divisions Long Before 2016 and Black Lives Matter*, NPR (Oct. 30, 2017, 5:00 AM), <https://www.npr.org/2017/10/30/560042987/russians-targeted-u-s-racial-divisions-long-before-2016-and-black-lives-matter>. Another context in which strategic usage of online harassment can be seen is the avalanche of identity-based harassment against reporters. Obviously, such harassment is designed not only to terrify and intimidate the journalists against whom it is deployed, but also to intimidate the press in its democratic functions. This phenomenon is only one aspect of the growth of online harassment against Americans online. Recent studies of the overwhelming amount of online harassment that is identity-based prove the point. See, e.g., Emily A. Vogels, *The State of Online Harassment*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment> (reporting that 41% of Americans have experienced online harassment themselves and noting that gender, sexual orientation, political affiliation, race, and religion were frequent targets for harassment); see also Brooke Auxier, *About One-in-Five Americans Who Have Been Harassed Online Say It Was Because of Their Religion*, PEW RSCH. CTR. (Feb. 1, 2021), <https://www.pewresearch.org/fact-tank/2021/02/01/about-one-in-five-americans-who-have-been-harassed-online-say-it-was-because-of-their-religion> (reporting that 8% of the American population believed they were targeted online because of their religion—although the survey did not address Jews); Sabine von Mering & Monika Hübscher, *Introduction to ANTISEMITISM ON SOCIAL MEDIA 1* (Monika Hübscher & Sabine von Mering eds., 2022).

<sup>97</sup> E.g., Nico Grant, *Security Training Group Asks Musk to Rid Twitter of Antisemitism*, N.Y. TIMES (Nov. 1, 2022), <https://www.nytimes.com/2022/11/01/technology/musk-twitter-antisemitism-security-group.html>; see also JAKOB GUHL & JACOB DAVEY, INST. FOR STRATEGIC DIALOGUE, HOSTING THE ‘HOLOHOAX’: A SNAPSHOT OF HOLOCAUST DENIAL ACROSS SOCIAL MEDIA 1 (2020), <https://www.isdglobal.org/wp-content/uploads/2020/08/Hosting-the-Holohoax.pdf>; Weimann & Masri, *supra* note 1, at 700–01.

<sup>98</sup> Tess Owen, *Instagram Has a White Nationalist ‘Groypers’ Problem*, VICE NEWS (Jan. 24, 2023, 6:59 AM), <https://www.vice.com/en/article/jgp7qg/instagram-groypers-white-nationalists>. The term “groypers” refers to followers of white nationalist live streamer Nick Fuentes and his America First organization. *Id.*

Twitter, and Reddit.<sup>99</sup> Antisemitism is less coded and more explicit on more fringe platforms such as Telegram or Gab.<sup>100</sup> After his antisemitic comments online and on mainstream media led to account suspensions, Ye (formerly Kanye West) considered buying right-leaning “free speech” alternative social media app Parler.<sup>101</sup> The failure to moderate and take down problematic speech allows antisemitism to propagate online.<sup>102</sup> This was demonstrated by the marked spike in antisemitism on Twitter after the company was purchased by “free speech absolutist” Elon Musk.<sup>103</sup> Online harassment of Jewish, African American, and women journalists has been endemic.<sup>104</sup> Thirty-six percent of Jewish respondents to an ADL survey of online antisemitism report having experienced online harassment.<sup>105</sup> Social media is now

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<sup>99</sup> GUHL & DAVEY, *supra* note 97, at 1; *see also* Elizabeth Dwoskin, Taylor Lorenz, Naomi Nix & Joseph Menn, *Antisemitism Was Rising Online. Then Elon Musk’s X Supercharged It.*, WASH. POST (Nov. 19, 2023, 12:00 PM), <https://www.washingtonpost.com/technology/2023/11/19/antisemitism-internet-elon-musk-israel-war>.

<sup>100</sup> Owen, *supra* note 98.

<sup>101</sup> Rachel Lerman, *Kanye West Will Not Buy Parler After All*, WASH. POST (Dec. 1, 2022, 6:31 PM), <https://www.washingtonpost.com/technology/2022/12/01/parler-kanye-west-deal-ended/>; Kate Conger, *Kanye West’s Deal to Buy Parler Unravels*, N.Y. TIMES (Dec. 1, 2022), <https://www.nytimes.com/2022/12/01/technology/kanye-west-parler.html>.

<sup>102</sup> *See* Owen, *supra* note 98 (noting that “[t]he groypers’ presence on Instagram seems to violate content policies articulated by its parent company Meta, which explicitly prohibits ‘praise, support, and representation of white nationalist and white separatism’ on its platforms”).

<sup>103</sup> Sheera Frenkel & Kate Conger, *Hate Speech’s Rise on Twitter Is Unprecedented, Researchers Find*, N.Y. TIMES (Dec. 2, 2022), <https://www.nytimes.com/2022/12/02/technology/twitter-hate-speech.html>; *see also* Stuart A. Thompson, *Antisemitic Campaign Tries to Capitalize on Elon Musk’s Twitter Takeover*, N.Y. TIMES (Oct. 28, 2022), <https://www.nytimes.com/2022/10/28/technology/musk-twitter-antisemitism.html>; Dwoskin et al., *supra* note 99. Musk reinstated previously blocked accounts, including that of Donald Trump. Frenkel & Conger, *supra*.

<sup>104</sup> *See, e.g.*, Levi, *supra* note 4, at 163–64. I argued in that article that the press function is under a growing and dangerous form of attack through identity-based—antisemitic, racist, and misogynistic—online harassment of journalists. Through references to the Holocaust, lynching, rape and dismemberment, the rhetorical tools of intimidation are being strategically used to silence non-white, non-male, and non-Christian journalists. In addition to causing psychological and physical harms for individual reporters, I asserted that the threats collectively undermine all journalists, the function of journalism, and the press itself as a democratic institution tasked with the roles of reporter, educator, and watchdog over power.

<sup>105</sup> ANTI-DEFAMATION LEAGUE, ONLINE HATE AND HARASSMENT: THE AMERICAN EXPERIENCE 2021, at 6, 10 (2021), <https://www.adl.org/resources/report/online-hate-and-harassment-american-experience-2021>. Beyond the strictly online context, the Pew Research Center reports that “[a]bout six-in-ten Jews report having had a direct, personal experience with anti-Semitism in the past 12 months, such as seeing anti-Semitic graffiti or vandalism, experiencing online harassment, or hearing someone repeat an anti-Semitic trope.” JEWISH AMERICANS IN 2020, *supra* note 71, at 120.

effectively used to amplify and “viralize” antisemitic messages, enhancing the mainstreaming of antisemitism online and in real life (IRL).<sup>106</sup> Antisemites weaponize online harassment, including harassment of reporters, in order to intimidate and deter reporting on and criticism of white supremacy.<sup>107</sup> They use the Internet’s collaborative tools to plan and successfully execute antisemitic coordination. Feeling protected by the libertarian turn in the Supreme Court’s free speech jurisprudence and emboldened by the conservative social backlash against “cancel culture,” they traffic in nakedly antisemitic public speech that in prior years would only have been whispered in private conversations. Both explicit antisemitism and coded antisemitic references by public figures and officials serve as tacit permissions, opening the door to legitimizing the hatred of Jews.<sup>108</sup> Antisemites hide behind existing debates on the definition of political antisemitism to distract from their dissemination of what everyone would agree is antisemitic.

The fact that obviously antisemitic material is expressed publicly without shame suggests that there has been a normalization of antisemitism and an increased acceptance or at least toleration by audiences. In addition, some notable celebrities are now publicly using antisemitic tropes and suggesting Holocaust denial in their social media, increasing the visibility of such ideas and, potentially, their influence.<sup>109</sup> Overall, the platforms’ terms of service have not been particularly effective

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<sup>106</sup> See, e.g., LIBBY HEMPHILL, ANTI-DEFAMATION LEAGUE, *VERY FINE PEOPLE: WHAT SOCIAL MEDIA PLATFORMS MISS ABOUT WHITE SUPREMACIST SPEECH* 13 (2022), <https://www.adl.org/resources/report/very-fine-people>.

<sup>107</sup> One of the particularly pernicious effects of such strategic use of technological capacity online is the hyper focus on antisemitic, anti-Black, and misogynistic harassment of Jewish, Black, and women journalists. See, e.g., Levi, *supra* note 4, at 163–64.

<sup>108</sup> See *infra* Section I.B and sources cited therein; see also Owen, *supra* note 98 (explaining that “[t]he groypner movement is known for weaponizing irony and euphemism to push out hateful content, which allows them to claim they were ‘just joking’ if someone thinks they’ve gone too far” and that “one of the biggest challenges faced by content moderators has been far-right extremist groups’ resilience and abilities to develop a shared, coded language which they use to signpost their hateful views while also skirting policies banning hate speech”); U.N. & UNESCO, *supra* note 96, at 46–53 (on circulation of camouflaged, covert, coded and “humorous” Holocaust denial and distortion on social media).

<sup>109</sup> Recently, one scholar has argued that even though there has been an increase in antisemitic expression on social media, the total number of antisemitic posts is a very small percentage of the massive traffic on social media platforms such as Twitter. Michael Bossetta, *Antisemitism on Social Media Platforms*, in *ANTISEMITISM ON SOCIAL MEDIA* 227, 228–32 (Monika Hübscher & Sabine von Mering eds., 2022). However, the fact that antisemitic content is only a small percentage of all Twitter content says nothing about the radicalizing impact of strategic antisemitism online. That there is much inoffensive content on the Internet says nothing about and does not offset the harms of the antisemitic content that is available. A few antisemitic posts can be viewed by—and affect the views of—millions. Moreover, the impact of antisemitism online cannot simply be assessed (and dismissed) by looking at a single platform and without addressing the use patterns of the various platforms by different audiences. Further, the online

in quelling antisemitic content online.<sup>110</sup> Online antisemitism feeds into and promotes antisemitism.

A recent survey concludes that 85% of Americans believe at least one anti-Jewish trope, and 20% believe six or more.<sup>111</sup> The survey compares the 20% figure to the 11% found in the ADL's 2019 survey and finds that it "is the highest level measured in decades."<sup>112</sup> A "significant proportion of Americans" see Jews as "clannish outsiders," "more loyal to Israel than to the United States," and "disproportionately powerful."<sup>113</sup> Forty percent of the survey respondents "at least slightly believe that Israel treats Palestinians like Nazis treated the Jews," and 18% say they are "uncomfortable spending time with a person who supports Israel."<sup>114</sup> And "while young adults . . . show less belief in anti-Jewish tropes . . . than older adults . . . the difference is substantially less than measured in previous studies."<sup>115</sup>

A follow up study seeking to probe the "whys" of these results found that, "[g]enerally speaking," respondents who agreed with more anti-Jewish tropes:

[K]new significantly less about Jews, Judaism, and Jewish history, including under-counting the number of Jews who died in the Holocaust and overestimating the proportional size of the American Jewish community[;] [w]ere somewhat more likely to not have any relationships with Jewish people and/or classify their past experiences with Jews more negatively[;] [w]ere significantly less likely to think that Jews face organized hostility or danger for being Jewish, or that Jew-hatred is a serious or growing problem[;] . . . [and] [w]ere significantly more likely to believe a range of conspiracy theories, including a

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picture cannot reasonably be understood independently of the rest of the expressive environment, including the antisemitic comments made by politicians and popular celebrity influencers. An analysis that looks at online traffic at such a macro level invites misinterpretation.

<sup>110</sup> Press Release, Anti-Defamation League, Social Media Platforms Fail to Address Antisemitism, According to New ADL Report (July 30, 2021).

<sup>111</sup> *Antisemitic Attitudes in America: Topline Findings*, ANTI-DEFAMATION LEAGUE (Jan. 12, 2023), <https://www.adl.org/resources/report/antisemitic-attitudes-america-topline-findings> [hereinafter *Antisemitic Attitudes: Topline Findings*]; *Antisemitic Attitudes: Predictors*, *supra* note 87.

<sup>112</sup> *Antisemitic Attitudes: Topline Findings*, *supra* note 111.

<sup>113</sup> *Antisemitic Attitudes: Predictors*, *supra* note 87 (describing findings of earlier 2023 survey).

<sup>114</sup> *Antisemitic Attitudes: Topline Findings*, *supra* note 111.

<sup>115</sup> *Id.* In addition, the study found that "young adults hold significantly more anti-Israel sentiment than older adults." *Id.* In a more recent Harvard-Harris Poll, 67% of the 18–24-year-old respondents to the question "Do you think that Jews as a class are oppressors and should be treated as oppressors or is that a false ideology?" agreed that Jews as a class are oppressors. HARV. CTR. FOR AM. POL. STUD. (CAPS) & HARRIS INSIGHTS & ANALYTICS, DECEMBER 2023: HARVARD CAPS-HARRIS POLL 57 (2023), [https://harvardharrispoll.com/wp-content/uploads/2023/12/HHP\\_Dec23\\_KeyResults.pdf](https://harvardharrispoll.com/wp-content/uploads/2023/12/HHP_Dec23_KeyResults.pdf).

conspiracy theory question designed to resemble the Great Replacement Theory . . . . In contrast, researchers found that few of these factors had statistically significant relationships with sentiment toward Israel.<sup>116</sup>

ADL research “indicates that there’s a strong relationship between denying the significance of antisemitism and believing anti-Jewish tropes. . . . Indeed, given the unusually strong empirical and conceptual relationship, it appears that denying Jews experience antisemitism is a feature of contemporary antisemitism.”<sup>117</sup>

Without exaggerating the threat,<sup>118</sup> there is ample reason for Jews to be concerned. Antisemitic threats and attacks are growing globally.<sup>119</sup> One striking thing about speech about Jews since at least the start of the pandemic is that it seems increasingly acceptable to express antisemitism, even outright, uncoded antisemitism. Such attitudes expressed by prominent public figures send signals to others that antisemitic expression and even behavior are increasingly acceptable or that challenging a perceived taboo against hate speech about Jews is tantamount to heroic dissent from Jewish-controlled censorship. Antisemitic statements and even seeming approval of Holocaust denial by celebrity and political figures trigger a reasonable concern that fans, and especially young people with impressionable minds, will be influenced in their views and actions in antisemitic directions.<sup>120</sup>

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<sup>116</sup> *Antisemitic Attitudes: Predictors*, *supra* note 87. Researchers also found that the term “Jew” had a “whitening effect” on how study respondents interpreted an individual’s race. *Id.* The experiment testing the racial categorization of Jews indicated that “[f]or white-identifying respondents, perceiving Jews as white was associated with believing 1.18 fewer anti-Jewish tropes, even while controlling for other demographic factors. The relationship between perceiving Jews as white and one’s level of anti-Jewish attitudes was not statistically significant for respondents who identified as people of color.” *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Some conservatives argued after Trump’s election that organizations such as ADL had “stoked the [antisemitism] panic with wildly exaggerated rhetoric” and had a “strong self-interest in . . . exaggerated complaints.” David Bernstein, Opinion, *The Great Anti-Semitism Panic of 2017*, WASH. POST: VOLOKH CONSPIRACY (Mar. 8, 2017, 4:09 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/08/the-great-anti-semitism-panic-of-2017>. However persuasive that politically partisan view may have been at the time, attacks on Jews *have* increased materially in the United States—and the more recent findings by ADL and other organizations tracking antisemitism show an undeniable and worrisome upward trend in mainstreamed antisemitism. *See* ADL, All Time High, *supra* note 62.

<sup>119</sup> *See* THE WHITE HOUSE, *supra* note 21, at 33; ADL INT’L AFFS., CHOOSING ANTISEMITISM: INSTRUMENTALIZATION AND TOLERANCE OF ANTISEMITISM IN CONTEMPORARY EUROPEAN POLITICS (2021), <https://www.adl.org/resources/report/choosing-antisemitism-instrumentalization-and-tolerance-antisemitism-contemporary>; Fred Pleitgen, Katharina Krebs & Rob Picheta, ‘An Existential Threat’: Antisemitic Attacks Soar Across Europe Amid Israel-Hamas War, CNN (Nov. 4, 2023, 12:00 AM), <https://www.cnn.com/2023/11/04/world/an-existential-threat-antisemitic-attacks-soar-across-europe-amid-israel-hamas-war/index.html>.

<sup>120</sup> *Antisemitic Celebrities Stoke Fears of Normalizing Hate*, *supra* note 5. Shifts in media coverage are likely to have an effect as well. As Professor Laurel Leff has noted, news coverage since

Jews are a very small minority worldwide and in the United States, with people of Jewish background (including those who do not either practice or particularly identify as Jewish) only making up about 2% of the U.S. population, largely clumped in major cities.<sup>121</sup> This can make it easy to characterize antisemitism as a narrow problem with a limited target group. Even for those who do not see themselves as antisemites, it is predictable that many might not care about such a small minority of people most of them have never met. Claims of exaggeration and disproportionate attention to antisemitism as opposed to other forms of hatred can also emerge. Surveys indicate a distinct difference in the degree to which Jews and non-Jews see the threat of antisemitism. A recent AJC survey, for example, found a significant contrast in the fact that 60% of the general public as opposed to 90% of Jews thought antisemitism was a serious problem in America today.<sup>122</sup> Some also use a comparative lens to conclude that antisemitism is “an overrated problem”<sup>123</sup> and interpret a focus on antisemitism as an example of preferential treatment of Jews by contrast to society’s failure to address pervasive racism against African Americans.<sup>124</sup>

Antisemitism is not trivial and should not be ignored or rendered invisible. It brings with it real psychic, physical, and institutional harms and has a symbolic salience much greater than incident numbers, especially in light of underreporting. History proves that murderous antisemitism can metastasize rapidly. But there is another reason not to ignore the rise in antisemitic words and actions. Although antisemitism targets Jews as a whole, individual Jews, and Jews in particular industries, it is also a key component of white supremacy and violent extremism targeting other groups as well. The reality is that while antisemitism is a Jewish problem, it is not *just* and *only* a Jewish problem. Antisemitism should therefore be recognized as the morally repugnant, anti-democratic, and serious social and political problem

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the October 7th Hamas attack on Israelis has dispensed with the “[d]ueling narratives of historical trauma” that characterized prior coverage of the Israeli-Palestinian conflict. Laurel Leff, Opinion, *How the Nakba Has Eclipsed the Holocaust in U.S. Media Since October 7*, HAARETZ (Dec. 10, 2023), <https://www.haaretz.com/opinion/2023-12-10/ty-article-opinion/.premium/how-the-nakba-has-eclipsed-the-holocaust-in-u-s-media-since-october-7/0000018c-5328-db23-ad9f-7bf8c3be0000>. Instead, she claims, the role of the Holocaust in Israel’s origin story is hardly ever mentioned, while “the story of Palestinian displacement and suffering has come to dominate. But without mention of the then fresh Jewish trauma of the Holocaust, Jews’ reasons for wanting, perhaps needing, a state, are absent, leaving a blank that can be filled by motivations such as settler colonialism or white supremacy.” *Id.*

<sup>121</sup> PEW RSCH. CTR., *supra* note 71, at 114; AM. JEWISH POPULATION PROJECT, AMERICAN JEWISH POPULATION ESTIMATES 2020, at 9 (2021), [https://ajpp.brandeis.edu/us\\_jewish\\_population\\_2020](https://ajpp.brandeis.edu/us_jewish_population_2020); LEVIN ET AL., *supra* note 67.

<sup>122</sup> AM. JEWISH COMM., *supra* note 70, at 4.

<sup>123</sup> SINA ARNOLD, FROM OCCUPATION TO OCCUPY: ANTISEMITISM AND THE CONTEMPORARY AMERICAN LEFT 105 (Jacob Blumenfeld trans., Ind. Univ. Press 2022) (2017).

<sup>124</sup> *Id.* at 105–06.

that it is—and not only for Jews.<sup>125</sup> The difficulty, as discussed in Section I.B below, is that instead of recognizing this threat, politicians exploit accusations of antisemitism for their own partisan purposes, trade in antisemitic tropes when they find doing so convenient, and enact legislation that can undermine their own anti-antisemitism initiatives when it suits their ideological agendas.

### B. *The Politicization of Antisemitism*

Jewish groups have been publicizing the worrisome growth in antisemitic incidents and rhetoric and decrying the apparent normalization of both coded and explicit antisemitic tropes in public discourse.<sup>126</sup> Public officials, corporations, and social media representatives have responded by expressing solidarity with Jewish people and making commitments to address antisemitism. The House of Representatives and the Senate have both adopted statements condemning antisemitism.<sup>127</sup> During his candidacy, President Biden promised that his administration would “[l]ead a comprehensive approach to battling anti-Semitism that takes seriously both the violence that accompanies it and the hateful and dangerous lies that underlie it.”<sup>128</sup> In advance of Passover 2023, President Biden published an op-ed in which he condemned antisemitism as “unconscionable and despicable,” assured American Jews of his commitment to “the safety of the Jewish people,” and said “I stand with you. America stands with you.”<sup>129</sup> And, as previously noted, the White House adopted the country’s first national antisemitism strategy in May 2023.<sup>130</sup> Republicans as well have touted their concern about, and leadership in, fighting

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<sup>125</sup> See THE WHITE HOUSE, *supra* note 21, at 6–9.

<sup>126</sup> ADL’s various surveys, cited in Section I.A, *supra*, are a case in point. See also *A Call to Action Against Antisemitism in America*, AM. JEWISH COMM., <https://www.ajc.org/call-to-action/report> (last visited Nov. 30, 2023).

<sup>127</sup> S. Res. 252, 117th Cong. (2021); H.R. Res. 894, 118th Cong. (2023); Press Release, Jacky Rosen, U.S. Sen. (Nev.), Rosen, Texas Senators Lead and Pass Bipartisan Resolution Condemning Antisemitic Attack on Congregation Beth Israel (Feb. 18, 2022) <https://www.rosen.senate.gov/2022/02/18/rosen-texas-senators-lead-and-pass-bipartisan-resolution-condemning-antisemitic-attack-on-congregation-beth-israel>; see also Mychael Schnell, *House Passes Measure Condemning Antisemitism; One GOP Lawmaker Votes ‘No’*, THE HILL (May 18, 2022, 11:57 PM), <https://thehill.com/homenews/house/3493824-house-unanimous-on-measure-condemning-antisemitism-apart-from-one-gop-no-vote>; Anti-Semitism Awareness Act of 2016, S. 10, 114th Cong. (2016) (defining antisemitism “for the enforcement of Federal antidiscrimination laws concerning education programs or activities”).

<sup>128</sup> *Views on Israel of Joe Biden*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/views-on-israel-of-u-s-presidential-candidates-2020-joe-biden> (last visited Nov. 30, 2023).

<sup>129</sup> Joe Biden, Opinion, *To Fight Antisemitism, We Must Remember, Speak Out and Act*, CNN (Apr. 5, 2023, 5:00 AM), <https://www.cnn.com/2023/04/05/opinions/joe-biden-fighting-antisemitism-speaking-out-passover>.

<sup>130</sup> See THE WHITE HOUSE, *supra* note 21.

growing antisemitism in their expressed justifications for proposing anti-antisemitism legislation as discussed below.

Despite the rhetoric and whatever their intent, actors in the political sphere—and often conservative Republicans—enlist antisemitism as a tool in political fights about other things and to score partisan political points. They both diminish antisemitism in fact and use it as a weapon in broader cultural and ideological wars fought over right-wing politics. They do not engage the weaponizing of antisemitism by white nationalists. They do not confront the strategic use of antisemitism as a political weapon. They deny the normalization of antisemitism that comes along with their use of antisemitism charges in polarizing, partisan theater. Their proponents do not express concern over the impact on Jews of the partisan controversies they spark. The following Section argues that politicians have instrumentalized antisemitism to achieve their own political objectives and in doing so have helped exacerbate antisemitism rather than combating it.

### *1. Antisemitic Expression by Politicians*

Politicians have played both sides when it comes to the deployment of antisemitic tropes. Former President (and now 2024 presidential candidate) Donald Trump has styled himself as a friend and protector of Jews, yet he consistently subjects them to insult using classic antisemitic tropes. Consistent concern has been expressed since his candidacy in 2016 that he is antisemitic.<sup>131</sup>

A few examples are emblematic. In the fall of 2022, for example, Trump posted the following on his Truth Social app: “No President has done more for Israel than I have. . . . U.S. Jews have to get their act together and appreciate what they have in Israel—Before it is too late!”<sup>132</sup> The “dual loyalties” trope that accuses American

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<sup>131</sup> E.g., Bess Levin, *Donald Trump, Who Reportedly Praised Hitler in Private, Gives Antisemites the Greenlight to Go After Jews*, VANITY FAIR (Oct. 17, 2022), <https://www.vanityfair.com/news/2022/10/donald-trump-jews-israel-truth-social>; David Remnick, *Is Donald Trump an Anti-Semite?*, NEW YORKER (Dec. 21, 2021), <https://www.newyorker.com/news/daily-comment/is-donald-trump-an-anti-semite> (“In the 2016 campaign, Trump ran an ad attacking a ‘global power structure’ showing images of three Jews: the financier George Soros, the then chair of the Federal Reserve Janet Yellen, and the investment banker Lloyd Blankfein. One of Trump’s tweets aimed at Hillary Clinton (‘Most Corrupt Candidate Ever!’) deployed images of the six-pointed Star of David and stacks of currency. Trump rebuffed the criticism; his social-media director said the star was that of a ‘sheriff’s badge.’”). There have been stories that Trump had a copy of Adolf Hitler’s speeches on his bedside cabinet. E.g., *Donald Trump’s Ex-Wife Once Said Trump Kept a Book of Hitler’s Speeches by His Bed*, BUS. INSIDER (Sept. 1, 2015, 5:25 AM), <https://www.businessinsider.com/donald-trumps-ex-wife-once-said-he-kept-a-book-of-hitlers-speeches-by-his-bed-2015-8>. Other stories report that he had said “Hitler did a lot of good things” to his then-chief of staff. E.g., Martin Pengelly, *Trump Told Chief of Staff Hitler ‘Did a Lot of Good Things’*, *Book Says*, GUARDIAN (July 7, 2021, 9:24 AM), <https://www.theguardian.com/us-news/2021/jul/06/donald-trump-hitler-michael-bender-book>.

<sup>132</sup> Donald J. Trump (@realDonaldTrump), TRUTH SOC. (Oct. 16, 2022, 4:54 AM), <https://truthsocial.com/@realDonaldTrump/posts/109177817932811190>; Rosalind S. Helderman,

Jews of having split loyalties between the United States and Israel and the threatening ambiguity of the “before it is too late” remark led many to see this as classic antisemitism.<sup>133</sup> Trump’s statements reflect both an assumption of Jewish power and a reminder (to Jews) of its fragility—an assertion that Jews’ standing in America depends on supporting him and a warning about what could happen if Jews are disloyal to him.

This was only one recent example. In a 2019 speech at the Israeli American Council in Hollywood, Florida, “Trump hit all of his favorite anti-Semitic tropes [about dual loyalties and money] before a room full of Jewish people.”<sup>134</sup> In 2017, in his first response to the violence at the white supremacist Unite the Right rally in Charlottesville, Trump said there “were very fine people on both sides” of the conflict.<sup>135</sup> (Notorious bigot David Duke immediately thanked Trump on Twitter for

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*Trump Attacks American Jews, Posting They Must ‘Get Their Act Together’ on Israel*, WASH. POST, <https://www.washingtonpost.com/politics/2022/10/16/trump-jews-israel> (Oct. 16, 2022, 1:43 PM); see also Julie Hirshfeld Davis, *The Toxic Back Story to the Charge that Jews Have a Dual Loyalty*, N.Y. TIMES (Aug. 21, 2019), <https://www.nytimes.com/2019/08/21/us/politics/jews-disloyal-trump.html>.

<sup>133</sup> E.g., Tal Axelrod, *White House Blasts What It Calls Trump’s ‘Antisemitic’ Comments*, ABC NEWS (Oct. 17, 2022, 12:34 PM), <https://abcnews.go.com/Politics/white-house-blasts-calls-trumps-antisemitic-comments/story?id=91634336>. See generally *Antisemitic Attitudes: Predictors*, *supra* note 87 (for additional discussion of “dual loyalties” trope).

<sup>134</sup> Bess Levin, *Trump Goes Full Anti-Semite in Room Full of Jewish People*, VANITY FAIR (Dec. 9, 2019), <https://www.vanityfair.com/news/2019/12/donald-trump-anti-semitic-remarks>. After a “warm-up” grounded on the dual loyalties trope, Trump “dove right into the stereotype about Jews and money, telling the group: ‘A lot of you are in the real estate business, because I know you very well. You’re brutal killers, not nice people at all,’ he said. ‘But you have to vote for me—you have no choice. You’re not gonna vote for Pocahontas, I can tell you that. You’re not gonna vote for the wealth tax. Yeah, let’s take 100% of your wealth away!’” *Id.*; see also Masha Gessen, *The Real Purpose of Trump’s Executive Order on Anti-Semitism*, NEW YORKER (Dec. 12, 2019), <https://www.newyorker.com/news/our-columnists/the-real-purpose-of-trumps-executive-order-on-anti-semitism> (characterizing Trump as a “pro-Zionist anti-Semite” who sees Jews as “alien beings whom he associates with the state of Israel” and whose comments at the Israeli American Council meeting were “plain, easily recognizable anti-Semitism”).

<sup>135</sup> *Full Text: Trump’s Comments on White Supremacists, ‘Alt-Left’ in Charlottesville*, POLITICO, <https://www.politico.com/story/2017/08/15/full-text-trump-comments-white-supremacists-alt-left-transcript-241662> (Aug. 15, 2017, 6:16 PM). Trump apologists sought thereafter to further explain the comment to remove its apparent support of white supremacy by focusing on his condemnation of “hatred, bigotry and violence” and asserting that he was talking not about the neo-Nazis, but others who were there to protest peacefully against the removal of a Robert E. Lee statue. However critics suggest this reading is deliberately misleading. See, e.g., Tim Murphy, *Donald Trump and His Allies Are Trying to Rewrite the History of Charlottesville*, MOTHER JONES (Sept. 3, 2020), <https://www.motherjones.com/politics/2020/09/donald-trump-and-his-allies-are-trying-to-rewrite-the-history-of-charlottesville> (“Trump’s defenders have seized on that line to argue that it’s false to say Trump praised white supremacists. But that requires a willful ignorance of who organized the rally and who attended it. Unite the Right was not some spontaneous

his “honesty & courage” after he made the statement.<sup>136</sup>) Last fall, Trump ate dinner at Mar-a-Lago with Ye and Nick Fuentes, “a leading alt-right figure who has questioned the existence of the Holocaust, criticized interracial marriage, and praised Jim Crow-era segregation.”<sup>137</sup> Rather than criticize Ye, Trump stated on Twitter that Ye hadn’t made any antisemitic comments at dinner, and claimed not to be aware of Fuentes’ past antisemitic and racist remarks.<sup>138</sup> Regardless of Trump’s “true” attitude toward Jews and white supremacists, his behavior sought political advantage by courting both white power extremists and Jews.<sup>139</sup> His statements emboldened white supremacy and antisemitism during his term as President and doubtless continue to do so today.<sup>140</sup> At the same time, he sought to use expressions of support for Israel and Jewish students as ways to quiet Jewish objections and presumably to draw Jewish voters away from the Democratic party.<sup>141</sup>

Trump was not the only Republican politician to flirt with antisemitic tropes and sound forgiving of the far right despite claims of philosemitism. Despite Republican support for Israel and public statements decrying antisemitism, Republican members of Congress and candidates for legislative seats have appeared at white supremacist events, made antisemitic comments, and failed to distance themselves from antisemitic supporters.<sup>142</sup> In addition to antisemitic statements and associations by other prominent politicians, the political role of antisemitism could be seen

demonstration, nor was it a big-tent gathering meant to rope in a broad coalition. It was plainly advertised as a white supremacist rally, by and for neo-Nazis.”)

<sup>136</sup> E.g., Murphy, *supra* note 135.

<sup>137</sup> Brent D. Griffiths, *Marjorie Taylor Greene Made a Surprise Appearance at a Conference Hosted by a Man the ADL Called a ‘White Supremacist Pundit’*, BUS. INSIDER (Feb. 26, 2022, 10:32 AM), <https://www.businessinsider.com/marjorie-taylor-greene-makes-surprise-appearance-at-alt-right-conference-2022-2>; Jared Gans, *Trump: Ye Dinner Happened Because I’m ‘Overly Generous’*, THE HILL (Dec. 23, 2022, 2:35 PM), <https://thehill.com/blogs/blog-briefing-room/3786726-trump-ye-dinner-happened-because-im-overly-generous>.

<sup>138</sup> E.g., Gans, *supra* note 137.

<sup>139</sup> E.g., Charles Sykes, Opinion, *The Warped Electoral Logic Behind Trump’s Antisemitism*, POLITICO (Dec. 7, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/12/07/electoral-logic-behind-trumps-antisemitism-00072661>.

<sup>140</sup> See *id.* (quoting Daily Stormer founder Andrew Anglin celebrating “Glorious Leader Donald Trump”).

<sup>141</sup> On this as a Republican strategy more generally, see, for example, Glenn Thrush, *Eager to Court Jews (and Fracture Democrats), Republicans Push Bills on Anti-Semitism*, N.Y. TIMES (Mar. 24, 2019), <https://www.nytimes.com/2019/03/24/us/politics/senate-republicans-antisemitism.html>.

<sup>142</sup> Some, such as Arizona Rep. Paul Gosar, have lengthy histories of ties to antisemitic and far-right, pro-Nazi actors. Andrew Kaczynski & Em Steck, *Rep. Paul Gosar’s Lengthy Ties to White Nationalists, Pro-Nazi Blogger and Far-Right Fringe Received Little Pushback for Years*, CNN (Mar. 6, 2022, 2:03 PM), <https://www.cnn.com/2022/03/06/politics/republican-paul-gosar-white-nationalists-kfile>; Fishman, *supra* note 93, at 142. For another prominent example, Georgia Rep. Marjorie Taylor Greene appeared at the America First Political Action Conference, organized

in the antisemitic thread visible in the January 6th attack on the Capitol.<sup>143</sup> Most Republicans did not address this in their attempts to minimize the attack. More recently, various high-profile Republicans—including Ron DeSantis, Rick Scott, Marjorie Taylor Greene, and others—echoed Trump’s references to Manhattan D.A. Alvin Bragg as “Soros-backed.”<sup>144</sup>

In addition to the typical associations of Jews with power and control, one of the other notable characteristics of the political discourse has been minimization of the Holocaust. Conspiracy theories have circulated through society in the recent past, including with respect to the pandemic.<sup>145</sup> Representative Marjorie Taylor

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by Nick Fuentes. Griffiths, *supra* note 137. She has in the past compared mask mandates to the Holocaust and compared coronavirus protections to the yellow stars the Nazis required Jews to wear. *Id.*; Jacqueline Alemany, *House Democrats Seek to Censure Marjorie Taylor Greene over ‘Biden is Hitler’ Comment*, WASH. POST (Oct. 7, 2022, 11:49 AM), <https://www.washingtonpost.com/politics/2022/10/07/mtg-censure-house-democrats>; see also Jonathan Chait, *There’s No Comparison Between How the Parties Handle Antisemitism: Marjorie Taylor Greene Shows It Pays in the GOP*, N.Y. MAG.: INTELLIGENCER (Oct. 18, 2022), <https://nymag.com/intelligencer/2022/10/marjorie-taylor-greene-donald-trump-anti-semitismdemocrats-punish-their-bigots-republicans-reward-them.html> (“She has mused that ‘an unholy alliance of leftists, capitalists, and Zionist supremacists has schemed to promote immigration and miscegenation, with the deliberate aim of breeding us out of existence in our own homelands’—imagine if Omar said that one!—and, more notoriously, that the Rothschilds planned a series of forest fires using space lasers in order to buy up land.”); Hannah Knowles, Colby Itkowitz & Isaac Arnsdorf, *Jewish Leaders Call on GOP Candidates to Reject Antisemitic Comments*, WASH. POST, <https://www.washingtonpost.com/politics/2022/10/31/antisemitism-republicans-elections> (Nov. 1, 2022, 11:58 AM) (noting that Pennsylvania GOP gubernatorial nominee Doug Mastriano made barely veiled antisemitic comments about his Jewish opponent, Pennsylvania Attorney General Josh Shapiro and “[i]n Arizona, the GOP candidate in a . . . House race, Eli Crane, urged the audience to look up an antisemitic sermon at a recent campaign stop. Speaking last month in Casa Grande, Crane said that he was motivated to run because of ‘radical ideologies that are destroying this country’ and that he was most concerned about ‘Cultural Marxism,’ which the Southern Poverty Law Center has described as an antisemitic baseless claim gaining traction on the American right. He encouraged the audience to watch a speech by a right-wing pastor who blamed cultural change on a group of German Jewish philosophers and condemned Barack Obama for having a ‘homosexual agenda.’”); Mehdi Hasan, *Six GOP House Members Who Need to Resign for Anti-Semitism Before Ilhan Omar*, INTERCEPT (Feb. 15, 2019, 7:00 AM), <https://theintercept.com/2019/02/15/ilhan-omar-aipac-republicans-anti-semitism> (identifying the antisemitic comments and associations of Representatives Kevin McCarthy, Steve Scalise, Louie Gohmert, Matt Gaetz, Steve King, and Paul Gosar).

<sup>143</sup> See, e.g., Schor, *supra* note 93 (noting image of an insurrectionist sporting a “Camp Auschwitz” sweatshirt).

<sup>144</sup> E.g., Philip Bump, *What It Means to Be ‘Soros-Backed’*, WASH. POST (Mar. 20, 2023, 6:01 PM), <https://www.washingtonpost.com/politics/2023/03/20/trump-soros-desantis-bragg>.

<sup>145</sup> See, e.g., Laurie Kellman, *Report: Pandemic Amped Up Anti-Semitism, Forced It Online*, ASSOC. PRESS (Apr. 7, 2021, 1:02 AM), <https://apnews.com/article/race-and-ethnicity-conspiracy-theories-israel-coronavirus-pandemic-financial-markets-32bc8c63d8759ded9c1f2cb8ca7301e0>; *Coronavirus Crisis Elevates Antisemitic, Racist Tropes*, ANTI-DEFAMATION LEAGUE: BLOG

Greene's comments characterizing pandemic-related public health measures by reference to the Holocaust and Nazi policies are one example.<sup>146</sup> Conservative lawmakers have endorsed QAnon conspiracist thinking without addressing either its falsity or its associated antisemitism.<sup>147</sup> Even when powerful Republican politicians did not explicitly endorse antisemitism-inflected conspiracy theories, their silence in response provided tacit support.

Arguably, prominent politicians' inconsistent rhetoric in connection with Jews has helped mainstream and normalize the spread of antisemitic tropes and ideas. If Donald Trump, supposedly a friend and ally of Jews, can suggest Jews are nasty, greedy, powerful, and loyal to Israel above their own American homeland, then why should such notions be deemed antisemitic and unacceptable in public discourse? At a minimum, such politicians' rhetoric has not forcefully combatted antisemitism in the public sphere.

The issue of antisemitism has risen to national focus recently as a result of protests in the United States over the Israel-Hamas war. A survey of Americans' views of the war indicates bipartisan concern about violence against Jews in the United States.<sup>148</sup> By and large, Republicans have supported Israel<sup>149</sup> and highlighted antisemitic and anti-Israeli attacks and disruption on university campuses.<sup>150</sup> At the same time, conservative politicians have not confronted the disconnect between their calls for campus speech controls over pro-Palestinian student protests and their

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(Mar. 17, 2020), <https://www.adl.org/blog/coronavirus-crisis-elevates-antisemitic-racist-tropes>; Kelly W. Sundberg, Lauren M. Mitchell & Dan Levinson, *Health, Religiosity and Hatred: A Study of the Impacts of COVID-19 on World Jewry*, 62 J. RELIGION & HEALTH 428, 436 (2022).

<sup>146</sup> E.g., Ron Kampeas, *In Latest Nazi Analogy, Marjorie Taylor Greene Invokes 'Medical Brown Shirts' in Decrying Vaccination Outreach*, JEWISH TELEGRAPHIC AGENCY (July 7, 2021, 11:06 AM), <https://www.jta.org/quick-reads/in-latest-nazi-analogy-marjorie-taylor-greene-invokes-medical-brown-shirts-in-decrying-vaccination-outreach>; Amy B. Wang, *Rep. Greene Slammed for Comparing House Covid Restrictions to the Holocaust*, WASH. POST (May 22, 2021, 3:22 PM), <https://www.washingtonpost.com/politics/2021/05/22/rep-greene-slammed-comparing-house-covid-restrictions-holocaust>.

<sup>147</sup> Clare Foran, *'An Existential Threat': The Republicans Calling for Their Party to Reject QAnon Conspiracy Theories*, CNN, <https://www.cnn.com/2021/04/10/politics/qanon-republican-party-congress/index.html> (Apr. 10, 2021, 11:18 AM). See generally *QAnon's Antisemitism and What Comes Next*, ANTI-DEFAMATION LEAGUE (Sept. 17, 2021), <https://www.adl.org/resources/report/qanons-antisemitism-and-what-comes-next>.

<sup>148</sup> PEW RSCH. CTR., AMERICANS' VIEWS OF THE ISRAEL-HAMAS WAR 5 (2023), <https://www.pewresearch.org/politics/2023/12/08/americans-views-of-the-israel-hamas-war>.

<sup>149</sup> See *id.* at 13.

<sup>150</sup> See, e.g., Annie Karni, *Questioning University Presidents on Antisemitism, Stefanik Goes Viral*, N.Y. TIMES, <https://www.nytimes.com/2023/12/07/us/politics/elise-stefanik-antisemitism-congress.html> (Dec. 8, 2023); Lerer & O'Brien, *supra* note 33.

historical complaints about left-wing “cancel culture” in higher education.<sup>151</sup> Some notable Republicans have publicly continued their associations with members of the antisemitic far right.<sup>152</sup> Former GOP presidential candidate Vivek Ramaswamy has boosted far-right conspiracy theories during primary debates.<sup>153</sup> Critics claim that Republican policies, particularly with respect to immigration, are inflected with the bigoted and antisemitic great replacement theory.<sup>154</sup>

While the great majority of public antisemitic statements and appearances since 2016 have been made by Trump-supported Republican politicians, there have been examples on the Democratic side as well. For example, Representative Ilhan Omar’s references to Jews—including a comment that “it’s all about the Benjamins baby”—to explain Republican support for Israel clearly referred to the antisemitic trope of Jewish greed and financial control in its suggestion of undue financial pressure on lawmakers by a Jewish lobby.<sup>155</sup> Her comment that Israel’s supporters have an “allegiance to a

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<sup>151</sup> See Nicholas Confessore, *As Fury Erupts Over Campus Antisemitism, Conservatives Seize the Moment*, N.Y. TIMES (Dec. 10, 2023), <https://www.nytimes.com/2023/12/10/us/universities-antisemitism-conservatives-liberals.html> (quoting Alex Morey, director of campus rights advocacy for the Foundation for Individual Rights and Expression, on the Republican “hypocrisy”).

<sup>152</sup> See, e.g., Robert Downen, *Texas GOP Chair Stays Silent on Allies’ Connections to Antisemitic Extremists*, TEX. TRIB. (Oct. 27, 2023), <https://www.texastribune.org/2023/10/27/matt-rinaldi-texas-gop-republicans-nick-fuentes>; Danielle Wallace, *Schumer Blasts House Republican for ‘Antisemitic’ Meme Accusing Congress of Snubbing ‘American Patriotism’*, FOX NEWS (Dec. 6, 2023, 2:56 PM), <https://www.foxnews.com/politics/schumer-blasts-house-republican-antisemitic-meme-accusing-congress-snubbing-american-patriotism> (regarding Rep. Thomas Massie’s post on X implying that Congress prefers Zionism over American patriotism).

<sup>153</sup> See, e.g., David Gilbert, *White Supremacists Are Celebrating Vivek Ramaswamy’s ‘Great Replacement’ Rant*, WIRED (Dec. 7, 2023, 9:50 AM), <https://www.wired.com/story/vivek-ramaswamy-debate-great-replacement-theory-conspiracy>.

<sup>154</sup> See, e.g., Greg Sargent, Opinion, *Mike Johnson’s Conspiracy Theories About ‘Illegals’ Mark a New GOP Low*, WASH. POST (Oct. 27, 2023, 6:00 AM), <https://www.washingtonpost.com/opinions/2023/10/27/mike-johnson-great-replacement-theory-house-speaker>; see also text accompanying notes 311–14, *infra*.

<sup>155</sup> Cody Nelson, *Minnesota Congresswoman Ignites Debate on Israel and Anti-Semitism*, NPR (Mar. 7, 2019, 5:40 PM), <https://www.npr.org/2019/03/07/700901834/minnesota-congresswoman-ignites-debate-on-israel-and-anti-semitism>. Observers have pointed to differences in party response to antisemitic associations. E.g., Michael Hiltzik, *Column: Overt Racism and Antisemitism Have Become Part of Our Political Discourse. How Did That Happen?*, L.A. TIMES (Oct. 21, 2022, 10:17 AM), <https://www.latimes.com/business/story/2022-10-21/column-overt-racism-and-antisemitism-have-become-part-of-our-political-discourse-whos-responsible> (“The response from party leaders was swift and explicit: ‘Congresswoman Omar’s use of anti-Semitic tropes and prejudicial accusations about Israel’s supporters is deeply offensive,’ House Speaker Nancy Pelosi . . . and members of her leadership team said. ‘We condemn these remarks and we call upon Congresswoman Omar to immediately apologize for these hurtful comments.’ Omar apologized. By contrast, no mainstream GOP voices have been raised about Greene’s remarks, or ties between Rep. Paul Gosar . . . and white nationalists.”). The antisemitism that the right appears ready to criticize most forcefully is the antisemitism of the left rather than that of its own party. See Sheryl

foreign country” suggested the antisemitic trope of dual loyalties.<sup>156</sup> Journalists have reported that the Democrats’ responses to comments such as these have revealed sharp divisions within the Democratic party over what some see as insufficient sensitivity to antisemitic anti-Zionism.<sup>157</sup> These concerns have become more evident among Democrats in light of reactions by the progressive wing of the Democratic party to the Israel-Hamas war.<sup>158</sup>

Even prior to the post-October 7th debates about Jews and Israel, charges of antisemitism have been used as public relations ploys and political weapons for partisan political advantage.<sup>159</sup> Observers could be faulted for seeing the “antisemitism card” as a rhetorical and performative tool in broader partisan political fights in

Gay Stolberg, *House Votes to Condemn All Hate as Anti-Semitism Debate Overshadows Congress*, N.Y. TIMES (Mar. 7, 2019), <https://www.nytimes.com/2019/03/07/us/politics/ilhan-omar-anti-semitism-vote.html>. Both houses of Congress have issued statements condemning antisemitism. See *supra* note 127.

<sup>156</sup> See, e.g., Mike DeBonis & Rachael Bade, *House Democrats Splinter over Response to Rep. Omar’s Alleged Anti-Semitism*, WASH. POST (Mar. 6, 2019, 7:37 PM), [https://www.washingtonpost.com/politics/house-democrats-erupt-in-protests-over-indirect-sanction-of-rep-omar-for-alleged-anti-semitism/2019/03/06/c06bcd18-4022-11e9-85ad-779ef05fd9d8\\_story.html](https://www.washingtonpost.com/politics/house-democrats-erupt-in-protests-over-indirect-sanction-of-rep-omar-for-alleged-anti-semitism/2019/03/06/c06bcd18-4022-11e9-85ad-779ef05fd9d8_story.html).

<sup>157</sup> See, e.g., *id.*; Jonathan Weisman, *Showdown over Omar’s Comments Exposes Sharp Divisions Among Democrats*, N.Y. TIMES (Sept. 30, 2021), <https://www.nytimes.com/2021/06/10/us/politics/ilhan-omar-israel.html>; Fishman, *supra* note 93, at 141–42 (reporting American Jewish perception of greater antisemitism on the political right, and “raw” feelings within Democratic circles over Jewish Democrats’ public rebuke of Rep. Omar over her tweet).

<sup>158</sup> See, e.g., Annie Karni, *Schumer Condemns Antisemitism, Warning the Left Against Abetting It*, N.Y. TIMES (Nov. 29, 2023), <https://www.nytimes.com/2023/11/29/us/politics/schumer-antisemitism-israel-hamas.html> (reporting on Senator Chuck Schumer’s speech); Charles Homans, *Rashida Tlaib, Censured by the House, Is Praised and Condemned at Home*, N.Y. TIMES, <https://www.nytimes.com/2023/11/13/us/politics/rashida-tlaib-palestine-israel.html> (Nov. 14, 2023) (describing censure of Representative Rashida Tlaib over apparent endorsement of “from the river to the sea” slogan); Haley Talbot, *Jayapal Issues New Statement that She ‘Unequivocally Condemns Hamas’ Use of Rape and Sexual Violence as an Act of War*, CNN, <https://www.cnn.com/2023/12/05/politics/pramila-jayapal-statement/index.html> (Dec. 5, 2023, 9:59 PM) (describing “firestorm” over a comment in a CNN interview by Representative Pramila Jayapal about Hamas’s use of rape and her subsequent statement).

<sup>159</sup> Donald Trump’s signing of his antisemitism-focused Executive Order at a Hanukkah party and Ron DeSantis’s ceremonial signing of HB 741 in Jerusalem are only two blatant examples of public relations events. See, e.g., Amir Tibon, *Trump Signs Anti-Semitism Executive Order as Hanukkah Comes Early at White House*, HAARETZ (Dec. 12, 2019), <https://www.haaretz.com/us-news/2019-12-12/ty-article/.premium/hanukkah-comes-early-at-white-house-as-trump-signs-anti-semitism-executive-order/0000017f-e5c3-df2c-a1ff-ffd3decc0000>; Marcy Oster, *Florida Gov. Ron DeSantis Signs Legislation Against Antisemitism Into Law*, JERUSALEM POST (June 4, 2019, 4:26 AM), <https://www.jpost.com/american-politics/florida-gov-ron-desantis-signs-legislation-against-antisemitism-into-law-591517>.

recent years.<sup>160</sup> Republicans have insistently criticized Democrats for failing to decry progressive antisemitism in the Democratic party. They have criticized their opponents for diluting the specific harms of antisemitism by universalist criticisms of prejudice; for insufficiently repudiating progressive antisemitism and criticism of Israel; and for being blind to the circumstances in which anti-Zionism and anti-Israelism are both antisemitic and political critiques.<sup>161</sup> In turn, Democrats have accused Republicans of overlooking the antisemitic statements and behavior of their own party and, more generally, the antisemitism of white nationalists with whom notable Republicans have associated.<sup>162</sup> They have accused the Republican party of supporting racism and antisemitism in the words and policies of their politicians who court white supremacists.<sup>163</sup> Democrats have also attacked Republican legislative anti-antisemitism initiatives as disguised political support for Israel and disempowerment of Palestinians rather than policies realistically designed to reduce antisemitism in America.<sup>164</sup> Each side in this politicized dialogue appears to associate the other with the deployment of antisemitism charges in bad faith.<sup>165</sup>

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<sup>160</sup> See, e.g., Michael R. Bloomberg, Opinion, *Both Parties Must Fight Anti-Semitism in Their Ranks*, BLOOMBERG (Dec. 6, 2021, 5:34 PM), <https://www.bloomberg.com/opinion/articles/2021-12-07/republicans-and-democrats-alike-must-fight-anti-semitism-in-their-ranks>.

Politicians' statements about antisemitism suggest that they position Jews as players in a non-Jewish drama with roles for their imaginary ideal-types of "Jewish" and "Jew." Query what happens when the actual Jews do not fit their roles. See David Schraub, *On Loving "Jews" and Hating Jews*, AJS PERSPS., Spring 2020, at 22, 22–23. Moreover, as with any other identity group whose concerns become instruments in advancing broader political interests, Jews' worries over rising antisemitism can be deployed strategically by politicians to benefit political narratives reaching far beyond the interests of the Jews themselves.

<sup>161</sup> See, e.g., Thrush, *supra* note 141; see also Sheryl Gay Stolberg & Glenn Thrush, *Democrats Put Off Anti-Semitism Resolution After Fierce Backlash*, N.Y. TIMES (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/us/politics/anti-semitism-resolution.html> (reporting resistance by Democrats to address antisemitic statements by their fellow Democrats).

<sup>162</sup> See, e.g., Rachel Oswald, *House GOP Overlooks Internal Antisemitism, Points at Democrats*, ROLL CALL (Dec. 1, 2022, 5:30 AM), <https://rollcall.com/2022/12/01/house-gop-overlooks-internal-antisemitism-points-at-democrats>.

<sup>163</sup> See, e.g., Ilhan Omar & Jan Schakowsky, *We Must Confront Threat of White Nationalism—Together*, CNN, <https://www.cnn.com/2019/05/14/opinions/stop-white-nationalism-together-omar-schakowsky/index.html> (May 14, 2019, 10:55 AM).

<sup>164</sup> E.g., Mychael Schnell, *These House Democrats Voted Against Pro-Israel Resolution After Jayapal Comments*, THE HILL (July 18, 2023, 8:34 PM), <https://thehill.com/homenews/house/4104684-these-house-democrats-voted-against-pro-israel-resolution-after-jayapal-comments>.

<sup>165</sup> For discussions of such claims of bad faith, see, for example, David Schraub, *Playing with Cards: Discrimination Claims and the Charge of Bad Faith*, 42 SOC. THEORY & PRAC. 285 (2016); Mark Goldfeder, *Codifying Antisemitism*, 127 PENN ST. L. REV. 405, 433, 449–52 (2023); Karen Zraick, *Ilhan Omar's Latest Remarks on Israel Draw Criticism*, N.Y. TIMES (Mar. 1, 2019), <https://www.nytimes.com/2019/03/01/us/politics/ilhan-omar-israel.html>.

To be sure, there is a danger in reaching grand conclusions on the basis of a string of individual examples. But politicians who operate on the national stage have loud voices, amplified today by the fact that they can reach the voting public directly online, without the need for the traditional intermediation of the press. They are listened to by partisan audiences. Their deployment of even casual antisemitic tropes is likely to have an impact on the political discourse—at a minimum for their partisans. And the politicization of antisemitism can have more insidious effects as well by reinforcing the otherization of Jews. When antisemitism is used as a tool of political one-upmanship, it sends a public message trivializing and even normalizing antisemitism. It is dangerous to ignore such likely effects.

Beyond political theater and strategies for electoral advantage,<sup>166</sup> politicians are also using antisemitism to advance particular substantive political goals. For one thing, conservative discourse has inveighed against progressive indoctrination in universities for some time. Antisemitism on campus can serve as a convenient tool to help advance the broader project of controlling what conservatives see as excessive liberalism in the academy.<sup>167</sup> Recently, conservatives have explicitly been casting the attacks on Jews and Israel on campus as indicators that universities are “incubators of a dangerous, far-left ideology.”<sup>168</sup> “This message has unified broad parts of the party[.]”<sup>169</sup> Across the political aisle, progressives who have disagreements with Israeli policies toward Palestinians and/or who consider themselves anti-Zionist can find it useful for their substantive goal of reducing American financial and military support for the government of Israel to deny progressive antisemitism, fail to recognize it when it is associated with political speech, and focus only on its right-wing version.

That politicians use their activities for public relations, reelection, and achieving substantive political aims is not particularly surprising, of course. My concern here is that the weaponization of antisemitism in partisan political contexts can diminish the moral aspects of the question, zoom in too microscopically on antisemitism as related to Israeli-Palestinian politics, lead to initiatives that are likely to exacerbate the contestation in the environment for Jews in the United States, and distract us from the threats to democracy posed by antisemitism in illiberal movements.

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<sup>166</sup> See Sykes, *supra* note 139.

<sup>167</sup> See, e.g., Confessore, *supra* note 151.

<sup>168</sup> Lerer & O'Brien, *supra* note 33.

<sup>169</sup> *Id.* (“including socially conservative grass-roots activists who are focused on issues like school curriculums and so-called parents’ rights, evangelical voters driven by their faith to support Israel, and the highest-ranking members of the party establishment”).

## II. THE NEW LEGAL LANDSCAPE—ANTI-ANTISEMITISM IN EDUCATION INITIATIVES

Even before recent events, both federal and state governments have claimed to address antisemitism, from officials' public statements condemning antisemitic acts to proposing (and in some circumstances passing) legislation on the subject, particularly in the educational context.<sup>170</sup> This Part argues that the recent legal attempts

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<sup>170</sup> See *infra* Section II.B. In addition to legal initiatives directed at antisemitism in education, some scholars have sought to regulate public expressions of antisemitism in electronic media through the Federal Communications Commission's authority to regulate broadcasting and cable. Some scholars and advocacy groups have suggested that the Commission use its existing policies prohibiting news distortion and broadcast hoaxes to fight antisemitism. FCC, *THE PUBLIC AND BROADCASTING* 11–12 (2021), <https://www.fcc.gov/media/radio/public-and-broadcasting> [hereinafter FCC]; see, e.g., Joel Timmer, *Potential FCC Actions Against "Fake News": The News Distortion Policy and the Broadcast Hoax Rule*, 24 *COMM'N. L. & POL'Y* 1 (2019) [hereinafter Timmer, *Potential FCC Actions Against "Fake News"*] (explaining the limits of the FCC's news distortion and broadcast hoax policies); Joel Timmer, *Broadcasters and Trump's False Information on Coronavirus: What Role for the FCC?*, *JUST SEC.* (Apr. 27, 2020), <https://www.justsecurity.org/69843/broadcasters-and-trumps-false-information-on-coronavirus-what-role-for-the-fcc> (describing how the FCC policies may take action against inaccurate news reports in the context of the COVID-19 pandemic); Marie Fang, Elana Handelman & Lucia Radder, *Worse than a Wasteland: Protecting Consumers of Cable "News" in the Public Interest*, *COMM'NS LAW.*, Summer 2021, at 32 (criticizing the FCC's inaction amidst an influx of false and misleading news); Nareissa L. Smith, *Consumer Protection in the Marketplace of Ideas: A Proposal to Extend the News Distortion Doctrine to Cable Television News Programs*, 40 *T. MARSHALL L. REV.* 223 (2015) (proposing a legal framework for extending the FCC's regulatory authority under the news distortion and broadcast hoax policies to cable news outlets); cf. Charles L. Bonani, *Weapons of Mass Distortion: Applying the Principles of the FCC's News Distortion Doctrine to Undisclosed Financial Conflicts of Interest in Corporate News Media's Military Coverage*, 27 *WASH. & LEE J. C.R. & SOC. JUST.* 231 (2020) (arguing that undisclosed financial conflicts of interest constitute news distortion under the FCC policy).

The Commission's news distortion policy is as follows:

The Commission often receives complaints concerning broadcast journalism, such as allegations that stations have aired inaccurate or one-sided news reports or comments, covered stories inadequately, or overly dramatized the events that they cover. For the reasons noted previously, the Commission generally will not intervene in these cases because it would be inconsistent with the First Amendment to replace the journalistic judgment of licensees with our own. However, as public trustees, broadcast licensees may not intentionally distort the news. The FCC has stated that 'rigging or slanting the news is a most heinous act against the public interest.' The Commission will investigate a station for news distortion if it receives documented evidence of rigging or slanting, such as testimony or other documentation, from individuals with direct personal knowledge that a licensee or its management engaged in the intentional falsification of the news. Of particular concern would be evidence of the direction to employees from station management to falsify the news. However, absent such a compelling showing, the Commission will not intervene.

FCC, *supra*, at 11–12. The policy has been interpreted to have four elements: (1) deliberate intention to distort the news significantly; (2) documented evidence beyond the news story itself

to address antisemitism can best be understood as mostly rhetorical and politically performative. It also claims that such legislation can sow division and even ultimately threaten to increase antisemitism.

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of the station's intent to distort; (3) involvement of management, and not just newsroom employees, in the intentional falsification of the news; and (4) a showing that the distortion is about a significant matter and not merely something trivial or incidental. Chad Raphael, *The FCC's Broadcast News Distortion Rules: Regulation by Drooping Eyelid*, 6 COMM'N L. & POL'Y 485, 495–96 (2001). For a history of the Commission's news distortion policy, see Lili Levi, *Reporting the Official Truth: The Revival of the FCC's News Distortion Policy*, 78 WASH. U. L.Q. 1005 (2000). It should be noted that the news distortion policy has not been adopted as a rule. Timmer, *Potential FCC Actions Against "Fake News," supra*, at 6. The news distortion policy has been narrowly interpreted by the Commission, despite the possibility after the D.C. Circuit's opinion in *Serafyn v. FCC* that it could be broadened. 149 F.3d 1213 (D.C. Cir. 1998); *see also* Levi, *supra*, at 1014–43 (describing the *Serafyn* decision and its possible implications). Most of the few cases in which the Commission found a violation of its policy concerned staged news stories or involved mandated disclosure of reporter conflicts of interest. *See* Timmer, *Potential FCC Actions Against "Fake News," supra*. Recent attempts to involve the FCC have not proven successful either. For example, the Commission quickly rejected Free Press's recent emergency petition requesting an FCC investigation of broadcast coverage of COVID-19 misinformation, stating that "the Commission does not—and cannot and will not—act as a self-appointed, free-roving arbiter of truth in journalism." Free Press Emergency Petition for Inquiry, 35 FCC Rcd. 3032 (2020). The policy has been described as "effectively dormant" today, with the Commission finding that there was no violation of the policy in the eight cases in which the issue was considered since 1999. Bonani, *supra*, at 238; *see also* Timmer, *Potential FCC Actions Against "Fake News," supra*, at 20, 22.

Although the Commission's policy prohibits broadcast licensees from intentionally distorting the news, it can only be considered in license renewal proceedings or transfers. 47 U.S.C. § 309; Raphael, *supra*, at 498 ("Although the Commission sometimes considers distortion complaints on a case-by-case basis, it cannot impose fines for violations but can consider them only in evaluating the overall character qualifications of broadcasters when they apply for license renewals."). Moreover, the FCC's news distortion policy only applies to broadcast stations and not to the broadcast networks which are not themselves licensed by the Commission, to cable networks such as Fox News or CNN, or to newspapers. *See* FCC, *supra*, at 6. The Commission does not have jurisdiction to regulate online content either. *Id.*

There are questions of how exactly the Commission would apply its news distortion policy to antisemitism, especially if the licensee at issue was merely transmitting antisemitic comments it believed to be newsworthy without itself intending to distort the news. Thus, even if the FCC were to shift gears and begin to apply the news distortion policy to stem antisemitism, both the elements of the Commission's doctrines themselves and the limits to the FCC's jurisdiction would significantly circumscribe the agency's ability to stem antisemitic expression effectively.

A. *Congressional Bills and Trump's Executive Order 13899*

Jewish organizations have publicized the problem of increasing antisemitism and called, *inter alia*, for “anti-antisemitism” legislation and social media monitoring reform to reduce anti-Jewish expression and violence.<sup>171</sup> In addition to the applicable hate crimes laws existing on the books, both Congress and state legislatures have addressed the rise in antisemitism in the United States. With respect to legislation, Congress considered the Antisemitism Awareness Act to address increasing claims of antisemitic harassment on college campuses in 2016, 2018, and 2019.<sup>172</sup> The Antisemitism Awareness bills articulated a twofold purpose: to enshrine in statute the Department of Education’s policy of including antisemitism as a trigger for Title VI investigations of colleges and to adopt the IHRA’s working definition of antisemitism as a matter of statute.<sup>173</sup>

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<sup>171</sup> See, e.g., *A Call to Action Against Antisemitism in America*, *supra* note 126.

<sup>172</sup> The Senate voted unanimously in support of the bill, but the provision failed in the House in 2016 and thereafter did not come up for a vote when reintroduced. Anti-Semitism Awareness Act of 2016, S. 10, 114th Cong. (2016); Anti-Semitism Awareness Act of 2016, H.R. 6421, 114th Cong. (2016); Anti-Semitism Awareness Act of 2018, S. 2940, 115th Cong. (2018); Anti-Semitism Awareness Act of 2019, S. 852, 116th Cong. (2019).

<sup>173</sup> The Antisemitism Awareness Act was designed to clarify circumstances in which the Department of Education should investigate charged incidents of antisemitism on college campuses under the Department’s anti-discrimination enforcement authority under Title VI of the Civil Rights Act of 1964. While Title VI in its terms only prohibits discrimination on the basis of race, color or national origin, since the Obama Administration, the Department of Education has interpreted its mandate under the statute as allowing investigation when Jews, Muslims, Sikhs and members of other religious groups charge that they have been discriminated against based on their group’s actual or perceived shared ancestry or ethnic characteristics. The website of the Office of Civil Rights of the Department of Education reflects the policy interpretation that Title VI:

protects students of any religion from discrimination, including harassment, based on a student’s actual or perceived: shared ancestry or ethnic characteristics, *or* citizenship or residency in a country with a dominant religion or distinct religious identity. For example, OCR can investigate complaints that students were subjected to ethnic or ancestral slurs; harassed for how they look, dress, or speak in ways linked to ethnicity or ancestry (e.g. skin color, religious attire, language spoken); or stereotyped based on perceived shared ancestral or ethnic characteristics. Hindu, Jewish, Muslim, and Sikh students are examples of individuals who may be harassed for being viewed as part of a group that exhibits both ethnic and religious characteristics.

*Shared Ancestry or Ethnic Characteristics*, U.S. DEP’T OF EDUC.: OFF. OF C.R., <https://www2.ed.gov/about/offices/list/ocr/sharedancestry.html> (May 25, 2023).

The Antisemitism Awareness Act incorporated a definition of antisemitism adopted by the IHRA, an intergovernmental organization of which the United States is a member. Although the definition is commonly referred to as the “IHRA definition,” it actually has a rather more complicated genealogy. It was drafted by the Committee on Antisemitism and Holocaust Denial as part of the European Monitoring Centre on Racism and Xenophobia’s inquiry into antisemitism in 2005 and then ultimately adopted by the 31 members of the IHRA in 2016. For

The proposed Antisemitism Awareness Acts engendered controversy. The legislation gained the support of Jewish groups such as the AJC and ADL.<sup>174</sup> Proponents characterized it as a step in combating evolving forms of antisemitism faced by Jewish students on campus by offering a standard definition to educate users and combat implicit bias.<sup>175</sup> Opponents saw it as a dangerous example of “the politics of the gesture.”<sup>176</sup> Liberal groups and Palestinian activists expressed objections to the proposed legislation, arguing that it would undermine academic freedom and the ability of Palestinian students to stage anti-Israel and anti-Zionist protests on campus.<sup>177</sup> Kenneth Stern, an original author of the IHRA definition, opposed its inclusion in civil rights law, arguing that the definition was a working definition “intended for data collectors writing reports about anti-Semitism in Europe” and

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a more complete description of the definition’s genealogy, see, for example, Goldfeder, *supra* note 165, at 411–12.

The IHRA’s “non-legally binding working definition of antisemitism,” which has been adopted by the Department of State, states that “Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.” The IHRA then provided illustrative examples of contemporary antisemitism. *What is Antisemitism?*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism> (last visited Nov. 30, 2023).

In addition to adopting the IHRA definition, the proposed Antisemitism Awareness Act bills provided that “[i]n reviewing, investigating, or deciding whether there has been a violation of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) on the basis of race, color, or national origin, based on an individual’s actual or perceived shared Jewish ancestry or Jewish ethnic characteristics, the Department of Education shall take into consideration the definition of anti-Semitism as part of the Department’s assessment of whether the practice was motivated by anti-Semitic intent.” Anti-Semitism Awareness Act of 2016, H.R. 6421 § 4; Anti-Semitism Awareness Act of 2018, S. 2940 § 4; Anti-Semitism Awareness Act of 2019, S. 852 § 4.

<sup>174</sup> *Letter to House Leaders Regarding Anti-Semitism Awareness Act*, ANTI-DEFAMATION LEAGUE (Dec. 4, 2018), <https://www.adl.org/resources/letter/letter-house-leaders-regarding-antisemitism-awareness-act> (signed by ADL and 12 other organizations).

<sup>175</sup> See, e.g., Press Release, Anti-Defamation League, ADL Hails Introduction of Anti-Semitism Awareness Act (Mar. 27, 2019), <https://www.adl.org/resources/press-release/adl-hails-introduction-anti-semitism-awareness-act>; Goldfeder, *supra* note 165, at 438–39.

<sup>176</sup> See Jonathan Judaken, *The Politics of the Gesture: The Anti-Semitism Awareness Act, Antiracism, and Intersectionality*, 105 AM. JEWISH HIST. 205, 206 (2021) (attributing “politics of the gesture” criticism of the Anti-Semitism Awareness Act to Pamela Nadel).

<sup>177</sup> E.g., PEN AMERICA, WRONG ANSWER: HOW GOOD FAITH ATTEMPTS TO ADDRESS FREE SPEECH AND ANTI-SEMITISM ON CAMPUS COULD BACKFIRE (2017), [https://pen.org/wp-content/uploads/2017/11/2017-wrong-answer\\_11.9.pdf](https://pen.org/wp-content/uploads/2017/11/2017-wrong-answer_11.9.pdf); Press Release, Am. Civ. Liberties Union, ACLU Statement on Senate Introduction of ‘Anti-Semitism Awareness Act’ (May 23, 2018, 2:00 PM), <https://www.aclu.org/press-releases/aclu-statement-senate-introduction-antisemitism-awareness-act>.

that it “was never supposed to curtail speech on campus.”<sup>178</sup> Critics pointed to the vagueness of the IHRA definition.<sup>179</sup> They raised questions as to its constitutionality to the extent that it could be used to punish antisemitic incidents consisting only of pure speech.<sup>180</sup> They warned as well about the likelihood of excessive university self-censorship.<sup>181</sup> They wondered whether it was appropriate for Congress to define antisemitism<sup>182</sup> and to pick among various available definitions. The CEO of PEN America argued that the Antisemitism Awareness Act was about “scoring political points, not protecting religious minorities” and that it would not stop hate crimes against Jews.<sup>183</sup> Looked at through a political lens, viewpoints on the issue tended to map onto partisan politics, with conservatives seeing anti-Zionist activity on campus as an example of the leftward slant of universities complicit in new forms of antisemitism, and progressives interpreting the proposed legislation as an example of pro-Israel, anti-Palestinian repression designed to advance a right-wing educational agenda.<sup>184</sup>

Against that background, and after the Antisemitism Awareness bills failed to become law, then-President Trump signed Executive Order 13899 on Combating

<sup>178</sup> Kenneth S. Stern, Opinion, *Will Campus Criticism of Israel Violate Federal Law?*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html>; KENNETH S. STERN, *THE CONFLICT OVER THE CONFLICT: THE ISRAEL/PALESTINE CAMPUS DEBATE* 118 (2020). For a claim that this was revisionist history on Stern’s part, see Goldfeder, *supra* note 165, at 415–16 (citing to views of other drafters). For an argument in support of Stern’s approach on the ground that a major flaw of the Anti-Semitism Awareness Act was its inability to “navigate between acts of individual racism and institutional racism” and its failure to promote intersectional antiracism rather than essentializing identity, see Judaken, *supra* note 176, at 209–10.

<sup>179</sup> See, e.g., Joe Cohn, *Anti-Semitism Awareness Act Continues to Threaten Free Speech on Campus*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Apr. 12, 2019), <https://www.thefire.org/news/anti-semitism-awareness-act-continues-threaten-free-speech-campus>; Suzanne Nossel, *Congress’s Anti-Semitism Act Won’t Stop Hate Crimes Against Jews*, FOREIGN POL’Y (May 1, 2019, 6:24 PM), <https://foreignpolicy.com/2019/05/01/congress-anti-semitism-act-wont-stop-hate-crimes-against-jews>.

<sup>180</sup> E.g., PEN AM., *supra* note 177, at 18–19 (addressing problems with the proposed bill’s First Amendment savings clause).

<sup>181</sup> E.g., *id.* at 19 (“[T]he likely outcome here will be schools overreacting and being overly censorious toward speech on this particular topic. Such an approach would impair free expression, and open the door to efforts to curtail other forms of speech that specific groups may regard as inherently offensive.”); Stern, *supra* note 178.

<sup>182</sup> E.g., Stern, *supra* note 178 (“What’s next? Should Congress define what speech is Islamophobic? Anti-Palestinian? Racist? Anti-white? How about defining “anti-United States” speech? We could dust off the files of the House Un-American Activities Committee.”).

<sup>183</sup> Nossel, *supra* note 179.

<sup>184</sup> This kind of debate has continued particularly sharply in response to pro-Palestinian protests on American college campuses since the start of the Israel-Hamas war.

Anti-Semitism on December 11, 2019.<sup>185</sup> The Trump Executive Order—similar in many ways to the failed legislative bills—asserted that discrimination against Jews based on an individual’s race, color, or national origin may violate Title VI of the Civil Rights Act of 1964.<sup>186</sup> It announced “the policy of the executive branch to enforce Title VI against prohibited forms of discrimination rooted in anti-Semitism as vigorously as against all other forms of discrimination” and required all federal departments and agencies charged with enforcing Title VI to consider the International Holocaust Remembrance Alliance’s (IHRA) working definition of anti-Semitism and the IHRA’s contemporary examples of anti-Semitism “to the extent that any examples might be useful as evidence of discriminatory intent.”<sup>187</sup>

As expected in light of the history of the Antisemitism Awareness Act bills, the Trump Executive Order was controversial, both within and outside the Jewish community.<sup>188</sup> Critics saw the Trump Executive Order as effectively adopting the failed Antisemitism Awareness Act through the back door.<sup>189</sup> They expressed concern, repressing worries about the Antisemitism Awareness Act, that the adoption of the IHRA definition of antisemitism—with its inclusion of anti-Israel statements as possible examples of contemporary antisemitism—would unduly interfere with the legitimate political speech of Palestinian rights activists.<sup>190</sup>

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<sup>185</sup> Exec. Order No. 13899, 3 C.F.R. 395 (2019).

<sup>186</sup> Title VI, 42 U.S.C. § 2000d.

<sup>187</sup> Exec. Order No. 13899.

<sup>188</sup> *E.g.*, Julie Zauzmer Weil & Susan Svrluga, *Trump’s Executive Order on Anti-Semitism Adds to the Fierce Campus Debate About Israel and Palestinian Rights*, WASH. POST (Dec. 11, 2019, 7:50 PM), <https://www.washingtonpost.com/religion/2019/12/11/trumps-executive-order-anti-semitism-plunges-into-fierce-campus-conflicts-about-israel-palestine>; Elizabeth Dias, Maggie Haberman & Ellen Almer Durston, *Trump’s Order to Combat Anti-Semitism Divides Its Audience: American Jews*, N.Y. TIMES (Dec. 18, 2019), <https://www.nytimes.com/2019/12/12/us/politics/trump-anti-semitism-jews.html>. While both conservative and liberal Jewish groups agree as to the harms of antisemitism, there appears to be a divide within the Jewish community with respect to the legislation’s adoption of the IHRA definition of antisemitism and particularly its examples that include anti-Israel comments as definitionally antisemitic. Some in the Jewish community feared that the Order effectively characterized Jews as a separate nation. This conception appears to have been influenced by a story in the *New York Times* (about the Executive Order before its release) claiming that the order “will effectively interpret Judaism as a race or nationality, not just a religion.” Peter Baker & Maggie Haberman, *Trump Targets Anti-Semitism and Israeli Boycotts on College Campuses*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2019/12/10/us/politics/trump-antisemitism-executive-order.html>.

<sup>189</sup> *E.g.*, Jihan Abdallah, *Rights Groups Slam Trump’s Anti-Semitism Executive Order*, AL JAZEERA (Dec. 11, 2019), <https://www.aljazeera.com/news/2019/12/11/rights-groups-slam-trumps-anti-semitism-executive-order>.

<sup>190</sup> *E.g.*, PALESTINE LEGAL, BACKGROUND ON EFFORTS TO REDEFINE ANTISEMITISM AS A MEANS OF CENSORING CRITICISM OF ISRAEL (2020), <https://palestinelegal.org/redefinition-efforts>.

President Biden did not reverse former President Trump's Executive Order 13899 (as he did Trump's September 22, 2020 Executive Order 13950, entitled "Combating Race and Sex Stereotyping").<sup>191</sup> The Department of Education's Office for Civil Rights has been continuing its policy of interpreting Title VI as applying to antisemitic acts on campus.<sup>192</sup> However, although regulations implementing Executive Order 13899 were expected to be issued by the Department of Education in December 2022, the Department recently released a statement that its backlog required putting off the adoption of such regulations until 2024.<sup>193</sup>

This Article argues that statutes such as the Antisemitism Awareness Act and the Trump Executive Order are likely to have little positive effect in stemming the rise of antisemitism described in Part I above and may well be counterproductive. Arguably, the controversy over such anti-antisemitism initiatives is itself problematic for the Jewish community. While controversy often leads to side-taking for many people, it can also increase distaste for conflict, avoidance, and neutral, non-aligned stances. We might expect many to conclude "a pox on both their houses," leading to apathy in response to rising antisemitism. Alternatively, and especially in light of the recent protests over the Israel-Hamas war, disputes over political speech could well obscure a realistic assessment of the breadth of antisemitism and antisemitic conduct. Controversy as to the precise meaning of slogans such as "from the river to the sea, Palestine shall be free"<sup>194</sup> can easily deflect attention from the complex phenomenon of antisemitism and conceal or minimize its role outside the context of the Israel-Hamas conflict. To the extent that enforcement of educational anti-antisemitism initiatives is left to regulations and the discretion of administrators under the new initiatives, uncertainty and variability are likely to undermine the deterrent effect of the new rules and their degree of success. To be sure, the events

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<sup>191</sup> Exec. Order No. 13,985, 3 C.F.R. 409 (2021).

<sup>192</sup> *E.g.*, Press Release, U.S. Dep't of Educ., U.S. Department of Education's Office for Civil Rights Announces Resolution of Anti-Semitic Harassment Investigation of Kyrene School District #28 (Aug. 23, 2022), <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-anti-semitic-harassment-investigation-kyrene-school-district-28>; *see also* THE WHITE HOUSE, *supra* note 21, at 41.

<sup>193</sup> *RIN: 1870-AA15*, OFF. OF INFO. & REGUL. AFFS., <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1870-AA15> (last visited Nov. 30, 2023); *see* Dion J. Pierre, *Biden Administration Delays Civil Rights Protections Against Antisemitism to December; Palestinian Group Lauds Move*, ALGEMEINER (Jan. 4, 2023, 6:09 PM), <https://www.algemeiner.com/2023/01/04/biden-administration-again-delays-civil-rights-protections-against-antisemitism-to-december/>. As of this writing, according to the Department of Education Unified Agenda, the regulations remain in the "Proposed Rule Stage." *Agency Rule List—Spring 2023: Department of Education*, OFF. OF INFO. & REGUL. AFFS., <https://www.reginfo.gov/public/do/eAgendaMain> (last visited Nov. 30, 2023).

<sup>194</sup> *See, e.g.*, Joe Hernandez, *How Interpretations of the Phrase 'From the River to the Sea' Made It So Divisive*, NPR (Nov. 9, 2023, 5:01 AM), <https://www.npr.org/2023/11/09/1211671117/how-interpretations-of-the-phrase-from-the-river-to-the-sea-made-it-so-divisive>.

on American college campuses since the start of the Israeli response to Hamas's attacks and hostage taking on October 7th have led to public attention to antisemitism at elite universities.<sup>195</sup> However, Jewish proponents should recognize that if calls for campus speech censorship are effective, the rules are also likely to be applied across the board—not only to quell pro-Palestinian speech perceived by Jewish students as antisemitic, but also Jewish, pro-Zionist and pro-Israel protest speech perceived as Islamophobic by anti-Israel protesters. In addition, as discussed in Part III below, recent developments in state law may well undercut the effectiveness of anti-

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<sup>195</sup> Republican Representative Elise Stefanik's hearing on campus antisemitism went viral, leading to one university president's resignation and to calls for the resignation of others. Karni, *supra* note 150; Stephanie Saul, Alan Blinder, Anemona Hartocollis & Maureen Farrell, *Penn's Leadership Resigns Amid Controversies Over Antisemitism*, N.Y. TIMES, <https://www.nytimes.com/2023/12/09/us/university-of-pennsylvania-president-resigns.html> (Dec. 11, 2023); Miles J. Herszenhorn & Claire Yuan, *74 Members of Congress Demand Harvard President Gay Resign in Letter to Governing Board Members*, HARV. CRIMSON, <https://www.thecrimson.com/article/2023/12/9/congress-resignation-calls> (Dec. 8, 2023, 6:46 PM). In light of criticism over intense campus protests over the Israel-Hamas war, elite universities have pledged to fight antisemitism and convened task forces on the issue. Anemona Hartocollis, Stephanie Saul, Nicholas Fandos & Alan Blinder, *Harvard, Columbia and Penn Pledge to Fight Antisemitism on Campus*, N.Y. TIMES (Nov. 10, 2023), <https://www.nytimes.com/2023/11/10/us/harvard-columbia-antisemitism.html>. The Department of Education has commenced investigations of several colleges and universities over claims of antisemitism. Anemona Hartocollis, *Federal Civil Rights Investigation Opened into Antisemitism at Harvard*, N.Y. TIMES (Nov. 29, 2023), <https://www.nytimes.com/2023/11/29/us/harvard-antisemitism-civil-rights-investigation.html>.

That anti-Israel protests on campus have generated charges of antisemitism and calls to control campus protests does not undermine this Article's argument, however. Such calls are highly contested and their adoption is far from certain in any event. Negative responses to the attempt to curb antisemitism on campus come from people with varying positions—including those with libertarian approaches to freedom of speech, those who support academic freedom, those who doubt the sincerity of proponents' intentions, and those who disagree as with what should be considered antisemitism. *See, e.g.*, Karoun Demirjian & Liam Stack, *In Congress and on Campuses, 'From the River to the Sea' Inflames Debate*, N.Y. TIMES, <https://www.nytimes.com/2023/11/09/us/politics/river-to-the-sea-israel-gaza-palestinians.html> (Nov. 12, 2023). Opponents argue the attempts to combat antisemitism on campus will censor pro-Palestinian and progressive political speech and be applied in a discriminatory way in support of the most conservative Jewish definitions of antisemitism. And if anti-antisemitism initiatives on campus are adopted, then antisemites will doubtless see proof that Jews use their money and influence to control the world. Once the issue is reframed from combating antisemitism to undermining fundamental American free speech values, concern about antisemitism is likely to pale. Jews who support campus speech censorship are likely to lose support. This is particularly the case in light of splits within the American Jewish community itself with respect to connections to Israel and support of the Israel-Hamas war. Moreover, even if colleges succeed in reducing antisemitism in the intense on campus conflicts over the Israel-Hamas war, what is likely to happen thereafter as circumstances on campus calm down? In any event, effectively combating antisemitism in society is a much broader matter. It would disserve the ultimate goal if anti-antisemitism regulation in the educational context were to be interpreted as solving the problem as a whole.

antisemitism initiatives in the educational context. The focus on higher education alone might also send the wrong message about the government's prioritization of antisemitic contexts, expression, and action.<sup>196</sup>

### B. *State Law Anti-Antisemitism Legislation—The Florida Example*

State legislative activity followed the federal initiatives.<sup>197</sup> Under Governor Ron DeSantis's leadership, the Florida legislature amended the Florida Educational Equity Act in 2019 to require public K–20 educational institutions to treat discrimination “motivated by anti-Semitic intent in an identical manner to discrimination motivated by race.”<sup>198</sup> The amendment also included a definition of antisemitism

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<sup>196</sup> For those not immersed in the particulars of the objections to the Antisemitism Awareness bills, that they repeatedly failed in Congress could be interpreted as a deprioritization of the issue as well. And while DOE Commissioner Lhaman's comments indicate the Department of Education's continuing commitment to its prior policy, the delays in the Department's adoption of regulations might be read by some as reinforcing a sense of government backing off its concerns even about antisemitism on campus. To be sure, the White House's adoption of a national strategy to combat antisemitism could serve as a counterweight, although media coverage of that initiative has been sparse compared to the focus in media and public discourse over antisemitism on campus associated with student protests over Israel.

<sup>197</sup> Although 33 states have adopted the IHRA definition, either legislatively or through executive action, this Section focuses exclusively on the Florida legislation. *CAM Information Hub Database of IHRA Antisemitism Definition Adoptions by US States*, COMBAT ANTISEMITISM MOVEMENT (June 23, 2023), <https://combatantisemitism.org/government-and-policy/cam-information-hub-database-of-ihra-antisemitism-definition-adoptions-by-us-states-2>. This choice is not dictated simply by space limits. As discussed *infra*, the Florida legislation is notable, *inter alia*, for its adoption of a private right of action and what appears to be presumptive rather than case-by-case analyses of claims of antisemitic discrimination. Florida is also an appropriate focus because of Governor DeSantis's particular focus on education as the locus of today's culture wars over “woke activism.” See Josh Moody, *DeSantis Higher Ed Bill Heads for the Legislature*, INSIDE HIGHER ED (Feb. 26, 2023), <https://www.insidehighered.com/news/2023/02/27/new-florida-bill-aims-enact-desantiss-higher-ed-reforms>. From the politically-motivated restructuring of New College (see, e.g., Benjamin Wallace-Wells, *What Is Ron DeSantis Doing to Florida's Public Liberal-Arts College?*, NEW YORKER (Feb. 22, 2023), <https://www.newyorker.com/news/the-political-scene/what-is-ron-desantis-doing-to-floridas-public-liberal-arts-college>) to the staccato enactment of legislation that constitutes a breathtaking attack on universities and academic freedom (see *infra* Part III), Florida's politically ambitious governor and its conservative legislature have made the state ground zero in today's controversies over identity and education.

<sup>198</sup> FEEA, FLA. STAT. § 1000.05(8) (2023) (“A public K–20 educational institution must treat discrimination by students or employees or resulting from institutional policies motivated by anti-Semitic intent in an identical manner to discrimination motivated by race. For purposes of this section, the term ‘anti-Semitism’ includes a certain perception of the Jewish people, which may be expressed as hatred toward Jewish people, rhetorical and physical manifestations of anti-Semitism directed toward a person, his or her property, or toward Jewish community institutions or religious facilities.

(a) Examples of anti-Semitism include:

grounded on the IHRA definition and included a list of examples of speech-based antisemitism.<sup>199</sup> (In addition, since 1994, Florida law has included a requirement that public schools provide instruction about the Holocaust.<sup>200</sup>) The Article argues in this Section that the state legislation raises questions on its own terms.

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1. Calling for, aiding, or justifying the killing or harming of Jews, often in the name of a radical ideology or an extremist view of religion.
  2. Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as a collective, especially, but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.
  3. Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, the State of Israel, or even for acts committed by non-Jews.
  4. Accusing Jews as a people or the State of Israel of inventing or exaggerating the Holocaust.
  5. Accusing Jewish citizens of being more loyal to Israel, or the alleged priorities of Jews worldwide, than to the interest of their own nations.
- (b) Examples of anti-Semitism related to Israel include:
1. Demonizing Israel by using the symbols and images associated with classic anti-Semitism to characterize Israel or Israelis, drawing comparisons of contemporary Israeli policy to that of the Nazis, or blaming Israel for all inter-religious or political tensions.
  2. Applying a double standard to Israel by requiring behavior of Israel that is not expected or demanded of any other democratic nation or focusing peace or human rights investigations only on Israel.
  3. Delegitimizing Israel by denying the Jewish people their right to self-determination and denying Israel the right to exist. However, criticism of Israel that is similar to criticism toward any other country may not be regarded as anti-Semitic.
- (c) Nothing in this subsection shall be construed to diminish or infringe upon any right protected under the First Amendment to the United States Constitution, or the State Constitution. Nothing in this subsection shall be construed to conflict with federal or state discrimination laws.”).

<sup>199</sup> *Id.*

<sup>200</sup> The current version of the Holocaust education mandate in Florida can be found in Florida Statutes section 1003.42(g). FLA. STAT. § 1003.42(g) (“(1) The history of the Holocaust (1933–1945), the systematic, planned annihilation of European Jews and other groups by Nazi Germany, a watershed event in the history of humanity, to be taught in a manner that leads to an investigation of human behavior, an understanding of the ramifications of prejudice, racism, and stereotyping, and an examination of what it means to be a responsible and respectful person, for the purposes of encouraging tolerance of diversity in a pluralistic society and for nurturing and protecting democratic values and institutions, including the policy, definition, and historical and current examples of anti-Semitism, as described in s. 1000.05(7), and the prevention of anti-Semitism. Each school district must annually certify and provide evidence to the department, in a manner prescribed by the department, that the requirements of this paragraph are met. The department shall prepare and offer standards and curriculum for the instruction required by this paragraph and may seek input from the Commissioner of Education’s Task Force on Holocaust

First, the arguments marshaled against the Antisemitism Awareness bills and Executive Order 13899 and sketched in Section II.A above could be deployed vis-à-vis the Florida law as well. But Florida's 2019 anti-antisemitism initiative, although presumably influenced by Executive Order 13899 and the Antisemitism Awareness bills, raises additional questions beyond the Order.

For example, the Antisemitism Awareness Act and the Trump Executive Order would require the Department of Education to "consider" the IHRA definition of antisemitism (with its examples) in assessing whether a practice on campus was motivated by discriminatory intent.<sup>201</sup> By contrast, the Florida amendment to the Educational Equity Act simply includes antisemitism as discrimination and defines discrimination by borrowing much of the language and examples of the IHRA definition.<sup>202</sup> Because the statutory language suggests that antisemitic intent shall be inferred from finding facts that fit the IHRA examples without a requirement of contextual analysis, the statute could reasonably be interpreted as allowing findings of antisemitic discrimination automatically, without case-by-case determination of intent beyond finding factual evidence satisfying the examples.<sup>203</sup> This would seem to give the assessing entity in Florida much less discretion to engage in a case-by-case consideration of antisemitism claims than would be expected of the Federal Department of Education (and under the IHRA definition itself).<sup>204</sup>

This is particularly worrisome because, unlike the IHRA definition, the Florida statute establishes state discrimination law. Therefore, any flaws and limitations of the IHRA approach—or an interpretation of the IHRA definition that ignores its requirement of contextual interpretation—threaten more significant consequences. For example, the IHRA definition, by focusing on the "perception of Jews," could be said to limit antisemitism to the subjective attitudes and intent of those com-

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Education or from any state or nationally recognized Holocaust educational organizations. The department may contract with any state or nationally recognized Holocaust educational organizations to develop training for instructional personnel and grade-appropriate classroom resources to support the developed curriculum. (2) The second week in November shall be designated as 'Holocaust Education Week' in this state in recognition that November is the anniversary of Kristallnacht, widely recognized as a precipitating event that led to the Holocaust.").

<sup>201</sup> Exec. Order No. 13899, 3 C.F.R. 395 (2019); Anti-Semitism Awareness Act of 2019, S. 852.

<sup>202</sup> Compare § 1000.05(8), with *What is Antisemitism?*, *supra* note 173.

<sup>203</sup> On the other hand, the statute does contain a savings clause (one of the bases for the court's distinction between the antisemitic discrimination provision and Florida's Stop WOKE Act, discussed below). § 1000.05(8)(c); *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, 641 F. Supp. 3d 1218, 1275 (N.D. Fla. 2022).

<sup>204</sup> It also raises the question whether the statute is likely to be unconstitutionally applied to purely speech-based findings of discrimination, as discussed in text accompanying notes 177–180, *supra*. But see *Pernell*, 641 F. Supp. 3d at 1236–45 and *supra* note 203.

municating antisemitism or engaging in antisemitic activity. This aspect of the definition has been criticized for creating significant proof problems.<sup>205</sup> “Antisemitism, like racism, is not always easy to spot” and the vantage point chosen to identify antisemitism is likely to lead to varying interpretations.<sup>206</sup> This makes efforts to define and identify much modern antisemitism “inevitably complicated and contentious.”<sup>207</sup> It is not clear that the definition can resolve those inconsistencies, especially in light of its linguistic vagueness. In addition, the IHRA definition’s focus on “hatred” of Jews may be overly limiting by excluding many types of antisemitism whose subjective motivations may not rise to the strong level of “hatred.”<sup>208</sup> Exclusion and discrimination based on distaste, discomfort with “otherness,” often-subconscious beliefs in antisemitic tropes, or concerns about the social or economic impact of associating with Jews should still be considered antisemitic, even though

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<sup>205</sup> Dov Waxman, David Schraub & Adam Hosein, *Arguing About Antisemitism: Why We Disagree About Antisemitism, and What We Can Do About It*, 45 ETHNIC & RACIAL STUD. 1803, 1804 (2022). At the same time, intent has been a central inquiry of the anti-discrimination context in the United States, and the IHRA definition has been said to inquire into intent in campus antisemitism contexts only as a way of permissibly determining antisemitic motive. See Goldfeder, *supra* note 165, at 429, 432.

<sup>206</sup> Waxman et al., *supra* note 205, at 1804. Philosopher Eve Garrard also argues that the focus of the IHRA definition on intent leaves unaddressed the type of significant institutional antisemitism that exists even without such antisemitic intent. Eve Garrard, *The IHRA Definition, Institutional Antisemitism, and Wittgenstein*, FATHOM (Dec. 2020), <https://fathomjournal.org/the-ihra-definition-institutional-antisemitism-and-wittgenstein> (“When an organisation—a business, say, or a public service or a political party—has practices or policies which significantly disadvantage Jews *for no good reason* (very important clause) then its behaviour is institutionally antisemitic. . . . [I]n cases of institutional antisemitism no individual member of the institution need have deliberately and knowingly singled out Jews for unfair treatment: it’s the way the overall institution operates which creates the discriminatory impact. So, for example, if an organisation decides to hold all of its most important policy and career promotion meetings on Saturday mornings (when no observant Jews would be able to attend), and there’s no good reason for this timing of the meetings, then this looks like a case of institutional antisemitism.”).

<sup>207</sup> Waxman et al., *supra* note 205, at 1804. Professors Waxman, Schraub, and Hosein have offered a useful taxonomy of four different approaches to identifying antisemitism: a focus on the perpetrator’s motives, a focus on the victim’s perception, a focus on objective affects or outcomes of harm to Jewish people, and a focus on discourse and representation grounded in our political culture. In specific circumstances, there will doubtless be disagreement as to the antisemitic character of particular phenomena even within each vantage point. The results are likely to differ even more when the different vantage points are used to assess the character of particular expression charged to be antisemitic. To be sure, proponents of the IHRA definition argue that the argument in text gets it exactly backwards; it is precisely *because* it is difficult for non-Jews to understand the breadth and complexity of antisemitism that a standard definition that has achieved significant consensus would be a useful resolution. See, e.g., Goldfeder, *supra* note 165, at 438–39.

<sup>208</sup> *What is Antisemitism?*, *supra* note 173.

they may not satisfy the high psychological level of “hatred.”<sup>209</sup> Since Florida’s statute has effectively dispensed with much of the conditional and contextual character of the IHRA definition itself, and ignoring the principally performative character of the provision’s ‘savings’ clause, the issues identified above become more salient.

In addition, the changes made in the Florida statute to the language in the IHRA definition also appear to both expand its scope and vagueness, and in some instances, to narrow it. For example, the IHRA definition identifies “[a]pplying double standards by requiring of [Israel] a behavior not expected or demanded of any other democratic nation” as a possible indicator of antisemitic intent.<sup>210</sup> By contrast, one of the examples of antisemitism in the Florida statute is “[a]pplying a double standard to Israel by requiring behavior of Israel that is not expected or demanded of any other democratic nation *or focusing peace or human rights investigations only on Israel.*”<sup>211</sup> Since the Florida statute concerns K–20 educational institutions, does this mean that a Florida law school could not focus on human rights investigations in Israel without also focusing on other countries as well?

For another instance, the Florida statute includes as an example of antisemitism “[c]alling for, aiding, or justifying the killing or harming of Jews, often in the name of a radical ideology or an extremist view of religion.”<sup>212</sup> But the word “often” does not appear in the IHRA definition. While calling for the killing of Jews qua Jews is both antisemitic and morally unacceptable, could the Florida provision apply to someone on a school talk show who jokingly (or even seriously) says she would celebrate the death of George Soros?

Florida section 1000.05(8)(a)(3) changes the IHRA definition by adding “the State of Israel” to “[a]ccusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.”<sup>213</sup> Would this cover harassment of Jewish Zionist students with claims asserting that their support of Israel makes them complicit in and therefore responsible for human rights violations vis-à-vis Palestinians?<sup>214</sup>

<sup>209</sup> See, e.g., Garrard, *supra* note 206.

<sup>210</sup> *What is Antisemitism?*, *supra* note 173.

<sup>211</sup> FEEA, FLA. STAT. § 1000.05(8)(b)(2) (2023) (emphasis added).

<sup>212</sup> § 1000.05(8)(a)(1) (emphasis added).

<sup>213</sup> *What is Antisemitism?*, *supra* note 173. The relevant portion of the Florida statute reads as follows: “Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, *the State of Israel*, or even for acts committed by non-Jews.” § 1000.05(8)(a)(3) (emphasis added).

<sup>214</sup> The IHRA definition includes “[h]olding Jews collectively responsible for actions of the state of Israel.” *What is Antisemitism?*, *supra* note 173. This provision is missing from the Florida statute. While the drafters of Florida’s legislation may have thought that they had covered the same sorts of antisemitic behavior as that provision in the statute’s § 1000.05(8)(a)(3), holding Jews collectively responsible for the actions of the state of Israel is not fully conceptually coextensive with “[a]ccusing Jews as a people of being responsible for real or imagined wrongdoing

The Florida statute also collapses several of the IHRA examples in its “[e]xamples of anti-Semitism related to Israel” and provides, “*Demonizing Israel by using the symbols and images associated with classic anti-Semitism to characterize Israel or Israelis, drawing comparisons of contemporary Israeli policy to that of the Nazis, or blaming Israel for all inter-religious or political tensions.*”<sup>215</sup> The IHRA definition does not include the italicized language, which—in addition to its breadth and vagueness—directly addresses political speech.<sup>216</sup> The Florida statute also dispenses with the specific examples of classic antisemitism provided in the IHRA—“claims of Jews killing Jesus or blood libel”<sup>217</sup>—and provides no further definition of “classic” antisemitism to guide educational administrators in assessing antisemitic discrimination.

Finally, while the Florida statute follows the IHRA definition in identifying accusations that Jews or Israel invented or exaggerated the Holocaust, it does not include the IHRA example of Holocaust denial. The IHRA definition includes “[d]enying 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).”<sup>218</sup> Would that mean that the Florida anti-antisemitism in education law would permit a teacher in a Florida school to teach as historical fact that Germany had no governmental or private supporters or accomplices in effectuating the Holocaust?

Furthermore, the Florida statute creates a private right of action for anyone aggrieved by violation of the Educational Equity Act, along with providing for attorney’s fees and costs to the prevailing party.<sup>219</sup> In contrast to the federal Executive

committed by a single Jewish person or group, the State of Israel, or even for acts committed by non-Jews.” § 1000.05(8)(a)(3).

<sup>215</sup> § 1000.05(8)(b)(1) (emphasis added).

<sup>216</sup> *What is Antisemitism?*, *supra* note 173; Garrard, *supra* note 206.

<sup>217</sup> *What is Antisemitism?*, *supra* note 173.

<sup>218</sup> *Id.* The exclusion of this clause from the Florida statute is puzzling. Perhaps it was due to First Amendment concerns by the drafters of the Florida statute, but the statute has a savings clause and the provision regarding Jewish exaggeration of the Holocaust can be interpreted as equally implicating free speech issues. In any event, general Holocaust denial could be interpreted in application as implying Jewish invention or exaggeration, although this would require an indirect reading of the statutory provision. If it were read that way, then the free speech issues with which the legislature might have been concerned would of course return. Another of the Florida provisions that might have been influenced by constitutional concerns is “[d]elegitimizing Israel by denying the Jewish people their right to self-determination and denying Israel the right to exist.” FEEA, FLA. STAT. § 1000.05(8)(b)(3) (2023). The language in the IHRA definition is: “[d]enying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.” *What is Antisemitism?*, *supra* note 173.

<sup>219</sup> § 1000.05(9) (“A person aggrieved by a violation of this section or a violation of a rule adopted under this section has a right of action for such equitable relief as the court may

Order 13899, which purports only to guide the decisions of the Department of Education and other executive departments charged with Title VI enforcement and does not contemplate litigation against the government, the Florida law in fact invites litigation by anyone “aggrieved.” The lure of attorney’s fees and costs—not the typical rule in American litigation—could well serve as an invitation to litigation. And since the statute does not define “persons aggrieved,” there could be a broad range and number of possible litigants under section 1000.05(8). The potential monetary liability for the state could have a chilling effect (as well as feeding into the antisemitic trope of Jewish greed if the principal plaintiffs or their lawyers were Jewish). The fear of an avalanche of litigation could create incentives for schools and universities to crack down on any campus speech that could arguably be characterized as antisemitic.<sup>220</sup> A wave of sometimes-frivolous litigation could also backfire against Jews, leading to a backlash over excessive litigiousness and taking unfair advantage of available legislation.

In addition to these policy concerns, the Florida statutory amendment in section 1000.05(8) raises some legal challenges as suggested above.<sup>221</sup> To the extent that such statutes are seen to be grounded on and promote viewpoint discrimination, they could well fail under strict First Amendment scrutiny. However, in analogous contexts, proponents of anti-antisemitism legislation focused on campus behavior have argued that such provisions are facially constitutional. They have claimed that such statutes and the Trump Executive Order on which they are based are not designed to address expression but, rather, to ensure that discrimination on the basis of antisemitic intent is treated “in an identical manner to discrimination motivated by race.”<sup>222</sup> With respect to Florida’s statute, they could claim that even if the IHRA-influenced definition allows for the consideration of speech, speech is addressed not to censor it but to determine antisemitic intent. Enforcement would require discriminatory conduct.<sup>223</sup>

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determine. The court may also award reasonable attorney’s fees and court costs to a prevailing party.”).

<sup>220</sup> See *infra* notes 271–274 and accompanying text.

<sup>221</sup> A full elaboration and assessment of arguments about the constitutionality of Florida’s legislation are beyond the scope of this Article.

<sup>222</sup> § 1000.05(8); see, e.g., Goldfeder, *supra* note 165, at 435–37; see also *What is the Anti-Semitism Awareness Act Really All About?*, ANTI-DEFAMATION LEAGUE: BLOG (Dec. 11, 2019), <https://www.adl.org/resources/blog/what-anti-semitism-awareness-act-really-all-about> (making this argument in the context of the Antisemitism Awareness bill in 2019 and citing to testimony to that effect by former Solicitor General Paul Clement); Kenneth L. Marcus, *Higher Education, Harassment, and First Amendment Opportunism*, 16 WM. & MARY BILL RTS. J. 1025, 1042 (2008).

<sup>223</sup> Supporters would argue that although the definition incorporated into the statute explicitly identifies speech-based antisemitism, there can be no recovery without a showing of “discrimination”—which, although the term is not defined in the statute, need not be limited to speech.

The constitutionality of this provision has not yet been tested in the Florida courts, although dicta in a recent case addressing the constitutionality of the Individual Freedom Act distinguished it from the antisemitic discrimination provision on the ground that, unlike the Individual Freedom Act, the anti-antisemitism legislation included a savings clause that required it not to be construed to infringe First Amendment rights or federal and state antidiscrimination laws.<sup>224</sup> The statute does include a savings clause stating that “[n]othing in this subsection shall be construed to diminish or infringe upon any right protected under the First Amendment,” nor shall it “be construed to conflict with federal or state discrimination laws.”<sup>225</sup> And the court indicated in dicta in *Pernell* the proviso that “criticism of Israel that is similar to criticism toward any other country may not be regarded as anti-Semitic” may be deemed to undercut the constitutional claim.<sup>226</sup>

However, opponents of such legislation could well argue that the IHRA examples are likely to trigger speech-based liability in practice—or chilling effects for fear thereof—regardless of the savings clause. This is not a hypothetical scenario. In the cover letter advising the Florida Secretary of State that he had signed into law CS/CS/HB 741, Governor DeSantis stated that he “direct[ed] the Florida Department of Education . . . to ensure that implementation is consistent with First Amendment freedoms” but also that the new legislation:

permits regulation to combat anti-Semitism within the realm of government institutions—such as an institution’s anti-Semitic hiring or admissions policies, an instructor’s indulgence of bizarre theories or pedagogical perversions, and student behavior that is harmful or disruptive. The legislation would, however, not apply to areas, such as lawful demonstrations and public-forum student speech, that fall within the free speech protections of the First Amendment.<sup>227</sup>

This clearly expresses the Governor’s very limited view of the applicability of First Amendment prohibitions.

*C. On Its Own Terms: Why the Recent Legal Landscape Is Not Likely to Be “Good for the Jews” (or Anyone Else)*

On its own terms, Florida section 1000.05(8) is not likely to be “good for the Jews”<sup>228</sup> despite the intentions of those who see it as protecting Jewish students

<sup>224</sup> *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, 641 F. Supp. 3d 1218, 1275 (N.D. Fla. 2022).

<sup>225</sup> FEEA, FLA. STAT. § 1000.05(8)(c) (2023).

<sup>226</sup> *Pernell*, 641 F. Supp. 3d at 1275; § 1000.05(8)(b).

<sup>227</sup> Letter from Ron DeSantis, Governor of Fla., to Laurel Lee, Fla. Sec’y of State (May 31, 2019), <https://www.flgov.com/wp-content/uploads/2019/05/05.31.2019-Transmittal-Letter.pdf>.

<sup>228</sup> The supposed Jewish preoccupation with what is “good for the Jews” is itself an antisemitic trope—one that brings to mind supposed Jewish self-interest and clannishness. It even

from antisemitic harassment and harm. It may backfire against the Jewish community and, contrary to its goal, may increase antisemitism in practice rather than checking it. It is also likely to be bad for the Jews because there are risks to society as a whole when many believe that a statute's central element threatens free campus discussion and when adopting it puts government in the position of defining core religious beliefs.

The controversy over the use of the IHRA definition is likely to create problems for Jews. For at least some people, the very controversy over the issue—including criticisms by prominent civil libertarian groups such as the ACLU and PEN America, as well as pro-Palestinian advocacy groups<sup>229</sup>—could well reinforce the antisemitic tropes of a Jewish bloc controlling American government in order to benefit themselves and Israel. Conservative politicians could seek to use anti-antisemitic legal initiatives like Executive Order 13899 and the Florida antisemitic discrimination provision as the basis for a loyalty quid pro quo from the Jewish community despite the fact that the initiatives are likely to be ineffective at combating antisemitism. former President Trump has already asked for Jewish political loyalty on the basis of his pro-Israel positions.<sup>230</sup>

The Florida legislature's decision to adopt the definition and its examples as the state's single and mandated definition of discrimination against Jews in education does not confront the contested nature of what counts as antisemitism today in political contexts or the multiple possible ways of thinking about it. As has been noted, antisemitism has become politicized in recent years because of controversies

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appears in the stereotype-laden old “elephant joke.” See Martha Minow, *The Constitution and the Subgroup Question*, 71 IND. L.J. 1, 1 (1995) (“[A] number of people were confronted with an elephant and asked to write a report. The Frenchman wrote about ‘The Elephant and Its Loves’; the German wrote about ‘A Preliminary Investigation into the Metaphysical Implications of the Elephant’; the Englishman wrote about ‘Hunting Elephants in India’; the Indiana University law school dean wrote about ‘The Global Community and the Elephant’; and the Jew wrote ‘The Elephant and the Jewish Question’—asking whether the elephant is good or bad for the Jews.”). For Stanley Fish, it provides the occasion to discuss “the paradigmatic question of identity politics, the politics that is derived not from some general, even universal, assertion of what is good, but from a particularized concern with insular interests. Is it good for *us*, for those of our kind, for our tribe?” Stanley Fish, Opinion, *Is It Good for the Jews?*, N.Y. TIMES (Mar. 4, 2007, 9:36 PM), <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2007/03/04/is-it-good-for-the-jews>. I use the phrase here ironically, to remind us that in a world in which open antisemitism is becoming normalized, even policies that look on their face to be “good for the Jews” need to be assessed skeptically (and that they may not be good for anyone).

<sup>229</sup> See, e.g., PEN AM., *supra* note 177, at 17–19; Press Release, ACLU, *supra* note 177; PALESTINE LEGAL, *supra* note 190.

<sup>230</sup> E.g., Domenico Montanaro & Tamara Keith, *Trump's ‘Disloyalty’ Claim About Jewish Democrats Shows He Doesn't Get How They Vote*, NPR (Aug. 22, 2019, 5:00 AM), <https://www.npr.org/2019/08/22/753131249/trumps-disloyalty-claim-about-jewish-democrats-shows-he-doesn-t-get-how-they-vot>.

over Israel as well as domestic political polarization.<sup>231</sup> The politicized character of the legislation—either way—all too easily leads political opponents to minimize the significance of the problem pointed out in the partisan-passed statute.

Provisions like this—which adopt a definition of antisemitism to be used by the state as law—put the government in the position of choosing among various alternative definitions of antisemitism proposed by Jews themselves.<sup>232</sup> To be sure, as proponents have argued, the IHRA definition of antisemitism has been adopted by many entities and states, in a variety of contexts.<sup>233</sup> The most strident critics of using the IHRA definition of antisemitism in the Title VI context *do* at times characterize it in incomplete and misleading ways, including ignoring its conditional characterizations and requirement of contextual assessment.<sup>234</sup> There does appear to be international consensus as to its usefulness.<sup>235</sup> It is also doubtless the case that transparency and consistency in government implementation of antidiscrimination rules are desirable. And while, as one supporter puts it, “it’s quite true that the IHRA

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<sup>231</sup> *E.g.*, Waxman et al., *supra* note 205, at 1804 (“[P]oliticians of all stripes have accused their rivals of engaging in antisemitism, or at least tolerating it, and members of the public are now more prone to perceive and condemn antisemitism when it comes from the other side of the political spectrum (a tendency amplified by social media and its ‘echo chamber’). But while the politicization, and, no doubt, occasional ‘weaponization’ of antisemitism charges have fuelled [sic] many of the controversies concerning antisemitism in recent years, these controversies have also arisen because in many instances antisemitism is not obvious or incontrovertible. In other words, antisemitism has become contentious not only because charges of antisemitism have sometimes been deliberately deployed for political gain, or because many people on the left only see antisemitism on the right, and vice versa. It is also because antisemitism today is not always easy to identify or even define.”).

<sup>232</sup> *See generally* Michael Starr, *War of the Words: The Conflict Between Definitions of Antisemitism*, JERUSALEM POST (Apr. 22, 2021, 10:15 PM), <https://www.jpost.com/diaspora/antisemitism/war-of-the-words-the-conflict-between-definitions-of-antisemitism-665935> (discussing various proposed definitions of antisemitism).

<sup>233</sup> *See, e.g.*, Goldfeder, *supra* note 165, at 407.

<sup>234</sup> *See, e.g., id.* at 449–52; *see also* Cary Nelson, *Accommodating the New Antisemitism: A Critique of ‘The Jerusalem Declaration’*, FATHOM J. (2021), <https://fathomjournal.org/wp-content/uploads/2021/04/Nelson-PDF-2.pdf> (describing and critiquing two recent alternatives to the IHRA definition). For example, although IHRA specifically noted that antisemitism “might include the targeting of the state of Israel, conceived as a Jewish collectivity,” it made clear that “criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic.” The definition also makes clear that “taking into account the overall context” would be necessary to assess the antisemitic character of speech or behavior found to fit the contemporary examples included in the definition. *What is Antisemitism?*, *supra* note 173.

<sup>235</sup> *See Definition of Antisemitism*, EUR. COMM’N, [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/combating-antisemitism/definition-antisemitism\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/combating-antisemitism/definition-antisemitism_en) (last visited Dec. 5, 2023) (noting that 25 E.U. Member States have adopted or endorsed the IHRA working definition of antisemitism).

definition doesn't provide us with a philosophically satisfactory account of antisemitism," an imperfect and incomplete definition may in principle be the best we can do with respect to certain kinds of concepts.<sup>236</sup> Finally, it is also true that any definition can be misused and that the IHRA definition includes conditional verbs designed to require contextual analysis.<sup>237</sup> Nevertheless, in our constitutional and democratic order, government should not be choosing a particular definition of religion or religious discrimination as a matter of law, particularly when those to whom it applies have themselves expressed internal conflict about it.

Even from the pragmatic point of view that supports generally applicable transparent standards even in the context of religious discrimination, the value of standardization diminishes in proportion to its vagueness and lack of clarity. It is one thing for a definition designed for research and data collection to contain even significant imprecision when the effect of overbroad application would simply be to include as antisemitic some behavior whose prejudicial character could be contested.<sup>238</sup> It is entirely different, however, to use an imprecise definition when its

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<sup>236</sup> Garrard, *supra* note 206. Ms. Garrard, a philosopher, argues that no definition for these kinds of concepts can ever determine results in future cases without contextual judgment. In her view, the definition is:

useful because it helps people to see what kind of thing antisemitism is, and thereby inform their judgement on new cases which may come their way, and adjust their behaviour accordingly. That is, it's politically useful; it helps us to understand past examples, and to adjudicate new conflicts. (It's not only antisemitism which raises this issue: racism and sexism are other concepts where we are unlikely to find an unchanging essence present in every case.) Does this mean that the IHRA definition of antisemitism won't do all our judging for us? Yes, it does mean that; we'll still have to work out which cases of criticism of Israel, for example, actually amount to antisemitism. The IHRA definition, particularly in the examples it provides, alerts us to the fact that antisemitism is in the offing; but our own moral capacities, and sensitivity to the individual context, will still be needed to tell us what we should say or do in the particular context we're facing. But that's what morality is like: simple straightforward moral rules can only take us so far; to work out how they apply to the case in front of us, we have to think for ourselves.

*Id.*

<sup>237</sup> *Id.* ("It is, of course, always possible that the IHRA text could be misused to assert the mistaken claim that criticism of Israel is always antisemitic. Misuse is a possibility with any text, but here the IHRA definition itself, with its cautious conditional claims, protects us all from accepting either of these implausible views."). Query, however, whether in highly politicized and partisan circumstances, such misuse—ignoring the conditionality of the IHRA definition—is more likely than, say, unintentional misuse of a definition not involving such hot-button issues.

<sup>238</sup> One might also question whether the definition is truly comprehensive. For example, many orthodox Jews complained that public health measures prohibiting gatherings early during the COVID pandemic and a European Union ruling that allowed countries to prohibit kosher slaughtering practices as part of their animal welfare laws fundamentally interfered with their ability to practice their religion. See, e.g., Sarah Pulliam Bailey, *Orthodox Jewish Leaders Sue to Block New York Restrictions Where Covid-19 Cases Are Rising*, WASH. POST (Oct. 8, 2020, 5:29 PM), <https://www.washingtonpost.com/religion/2020/10/08/orthodox-jewish-leaders-sue->

application could lead to significant enforcement sanctions including university expulsion, impact on student records, possible lawsuits, and fines. Furthermore, resting enforcement on an imprecise definition is likely to increase the risk of excessive censorship by university administrators afraid of losing their institutions' federal funding.

More broadly, the legal rules and the attendant controversy they will engender when enforced risk a truncation in the notion of antisemitism. If people begin to interpret antisemitism primarily through a political lens—such as anti-Zionism and anti-Israelism, which are contested political ideas—anti-antisemitism legislation of this type risks making the overall notion of antisemitism debatable. If antisemitism is defined principally with respect to support or opposition to the state of Israel, then the incentives to combat it will depend on one's political views regarding the Middle East. This narrow focus can predictably lead society to ignore or minimize the normalization of anti-Jewish rhetoric and action beyond such politics.

Even with a more capacious than political conception of antisemitism, Florida's anti-antisemitism laws and others like them are unlikely to quell the rise of antisemitism materially. At a minimum, even on campus, the provisions have to be applied through regulations and enforced by the Department of Education's Office of Civil Rights and by State Departments of Education, school districts, individual school administrators and teachers. Some enforcement agencies, such as the Department of Education, have not yet adopted regulations. Others, like state education statutes, leave significant discretion to numerous institutional parties. At a minimum, we can expect inconsistency and variability in the application of these rules.

### III. ANTI-ANTISEMITISM LEGISLATION AND THE NEW EDUCATIONAL CULTURE WARS

While Florida's anti-antisemitism initiatives are open to critique on their own grounds as indicated in Part II above, whatever benefits they might provide may well be undermined by other developments in today's increasingly politicized "educational culture wars." Simply put, this Part argues that the antisemitism provisions may be subject to practical irrelevance in important applications as a result of the state's rapid adoption of "divisive concepts" legislation. This means that the existing anti-antisemitism legislation may, as a practical matter, be undermined by conservatives' pivot to educational regulation. This is particularly the case with respect to legislation that takes direct aim at Florida university departments, curricula, and

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block-new-york-restrictions-where-covid-19-cases-are-rising (on COVID public health measures); Arthur Neslen, *EU States Can Ban Kosher and Halal Ritual Slaughter, Court Rules*, POLITICO (Dec. 17, 2020, 1:41 PM), <https://www.politico.eu/article/eu-states-can-ban-kosher-and-halal-ritual-slaughter-court-rules> (on Kosher slaughter methods in the European Union). Even if they might feel such restrictions constitute religious antisemitism, the IHRA definition does not appear to cover such instances.

faculty.<sup>239</sup> The point here is not to distract from the Florida legislation's direct hostility to critical race and gender studies by focusing on more indirect or collateral threats to Jewish studies. Rather, it is to say that this legislation may well affect critical Jewish and antisemitism studies and thereby undermine the anti-antisemitism legislation that the state already has in its statute books.<sup>240</sup>

Whether styled as Governor DeSantis's "anti-woke" legislation seeking to protect students from assertedly harmful "woke" indoctrination denying American history and values<sup>241</sup> or as exercises of "parental rights,"<sup>242</sup> numerous states have adopted "educational gag orders" prohibiting educators and administrators from discussing certain "divisive" ideas related to race, gender, and LGBTQIA+ identities. As PEN America has documented, states have been considering and, as of this

<sup>239</sup> The 2023 Florida legislative session saw the introduction of related bills H.B. 999 in the House and S.B. 266 in the Senate. Ultimately, S.B. 266 was passed by the legislature and signed into law by the Governor on May 15, 2023. H.B. 999, 2023 Leg., Reg. Sess. (Fla. 2023); 2023 Fla. Sess. Law Serv. Ch. 2023-82 (West) (codified as amended in scattered sections FLA. STAT. §§ 1001–1009).

<sup>240</sup> One perhaps "too cute" point: Is this argument, which implies that *sub rosa* reversal of section 1000.05(8) by application of section 1000.05(4)(a) and new legislation would be problematic, inconsistent with the critiques of section 1000.05(8) in Sections II.B and II.C, *infra*? After all, if section 1000.05(8) is bad law, why should we care if it is undermined by other statutes? I don't see the argument in Part III undermining Part II or vice versa. At a minimum, whatever its effectiveness, the intent of the FEEA is to protect Jewish students from antisemitism, whereas the intent of anti-CRT statutes is to silence alternative visions of American history by African American voices. Most of the critiques addressed in Part II would not contest the salutary aim of including antisemitism (or Islamophobia, anti-Sikhism, anti-Hinduism, etc.) in what can be deemed a basis for prohibitions on discrimination in education. The critiques, rather, seem to focus on the IHRA framework for defining antisemitism and the attendant possibility of overprotection of Jewish speech and sensibilities at the expense of expansive and challenging political discussion about Israel on campus. The "anti-woke" statute, when applied to some types of Jewish teaching and teaching about antisemitism, is likely to censor Jewish voices and expose Jews to antisemitism. Moreover, the reasonable possibility that initiatives like DeSantis's Stop WOKE Act could have a broader prohibitory sweep than their intended targets is an argument for why Jews concerned about fighting antisemitism should resist educational gag orders. FEEA, FLA. STAT. §§ 1000.05(8), (4)(a) (2023).

<sup>241</sup> Press Release, DeSantis Announces Legislative Proposal, *supra* note 35; Greg Allen, *Florida Gov. DeSantis Takes Aim at What He Sees as Indoctrination in Schools*, NPR (July 13, 2022, 10:27 AM), <https://www.npr.org/2022/07/13/1110842453/florida-gov-desantis-is-doing-battle-against-woke-public-schools>.

<sup>242</sup> Another problem is that recent curricular legislation passed by states like Florida, as well as recent book bans, have been justified by reference to parental rights to control what their children are exposed to in lower grades and concerns about children being upset by age-inappropriate curricular fare. *E.g.*, Klara Alfonseca & Mary Kekatos, *Debate over 'Parental Rights' Is the Latest Fight in the Education Culture Wars*, ABC NEWS (Sept. 14, 2023, 2:09 AM), <https://abcnews.go.com/US/debate-parental-rights-latest-fight-education-culture-wars/story?id=103024033>.

writing, 19 have passed conservative restrictions impacting teaching via legislation, policy, or executive order.<sup>243</sup> According to an August 2022 PEN America report, proposed educational gag orders have increased 250% compared to 2021.<sup>244</sup> Recent legislation has reportedly been more punitive as well.<sup>245</sup>

Florida is a high-profile example of a state with educational gag legislation aimed both at discussions of race (the Individual Freedom Act, often referred to by the DeSantis-proffered acronym, the Stop W.O.K.E. Act<sup>246</sup>) and sexual orientation and gender identity (the Parental Rights in Education Act, nicknamed by opponents as the “Don’t Say Gay” bill<sup>247</sup>). Despite the facially neutral phrasing of statutes such as Florida’s, these “anti-CRT” bills are hard to see as anything other than ideological attempts to “silence Black voices and erase the full and accurate history and contemporary experiences of Black people.”<sup>248</sup>

<sup>243</sup> *Map of Educational Gag Orders*, PEN AM., <https://pen.org/issue/educational-censorship> (last visited Dec. 5, 2023).

<sup>244</sup> Jeremy C. Young & Jonathan Friedman, *America’s Censored Classrooms*, PEN AMERICA (Aug. 17, 2022), <https://pen.org/report/americas-censored-classrooms>.

<sup>245</sup> *Id.*

<sup>246</sup> DeSantis announced the name of the provision as the “Stop the Wrongs to Our Kids and Employees (W.O.K.E.) Act. Press Release, DeSantis Announces Legislative Proposal, *supra* note 35. The statutory background may be a bit confusing. For a useful overview, see Lacey Hofmeyer & Nathan Adams, *The Individual Freedom Act and Florida Education*, FLA. EDUC. L., Fall 2022, at 6, <https://www-media.floridabar.org/uploads/2022/10/Education-Law-Committee-Fall-2022-Final-1.pdf>. The Individual Freedom Act was the title of Committee Substitute for House Bill 7 (CS/HB 7), which was passed at the end of Florida’s 2022 legislative session. 2022 Fla. Laws 534. The bill, which was signed by Governor DeSantis, amended, among other provisions, chapter 760 of the Florida Civil Rights Act; section 1000.05(4)(a) of the Florida Educational Equity Act; the Public K–12 educational instruction and materials standards under sections 1003.42 and 1006.31; and educator professional development standards under section 1012.98 of the Florida statutes. *Id.* In this Article, I focus on the amendment to the Florida Educational Equity Act required by the Individual Freedom Act, although the Hofmeyer & Adams article, *supra*, provides detailed review of the other statutory amendments and reveals their interconnection. See also Jack Forrest, *Federal Appeals Court Leaves DeSantis’ Anti-‘Woke’ Law Blocked in Florida Public Colleges*, CNN: POLITICS (Mar. 17, 2023, 7:45 AM), <https://www.cnn.com/2023/03/17/politics/desantis-anti-woke-law-appeal-block/index.html>.

<sup>247</sup> Parental Rights in Education Act, H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (codified at FLA. STAT. § 1001.42(8)(c)). The “Don’t Say Gay” legislation provides, inter alia, that “classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards.” *Id.* The intent of the provision is to “keep assignments with details like ‘Sally has two moms or Johnny has two dads’ out of the classroom.” Jeffrey Sachs, Jonathan Friedman & Jeremy C. Young, *These 4 Florida Bills Censor Classroom Subjects and Ideas*, PEN AMERICA (Mar. 17, 2022), <https://pen.org/these-4-florida-bills-censor-classroom-subjects-and-ideas> (quoting the bill’s sponsor).

<sup>248</sup> Janai Nelson, Opinion, *Ron DeSantis Wants to Erase Black History. Why?*, N.Y. TIMES (Jan. 31, 2023), <https://www.nytimes.com/2023/01/31/opinion/ron-desantis-black-history>.

In addition, Florida recently further amended its education statutes radically: to provide that the Board of Governors periodically review the mission of each state university including any curricula “based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities”;<sup>249</sup> that it adopt regulations for comprehensive five-year post-tenure review of all state university faculty;<sup>250</sup> that the university president have final authority over hiring full-time faculty;<sup>251</sup> that a state university “may not require any statement, pledge, or oath”<sup>252</sup> (including any diversity pledges); that a state university may not expend state or federal funds to “promote, support, or maintain any programs or campus activities that: (a) Violate s. 1000.05; or (b) Advocate for diversity, equity, and inclusion, or promote or engage in political or social activism . . . .”;<sup>253</sup> and that:

general education core courses may not distort significant historical events or include a curriculum that teaches identity politics, violates s. 1000.05, or is based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities.<sup>254</sup>

Just as most of such provisions elsewhere have been proposed by conservative Republican legislators,<sup>255</sup> Florida’s versions reflect the Republican control of the state’s legislature and the public positions of Governor Ron DeSantis. Although the language of the Individual Freedom Act provisions purport to identify certain “divisive concepts” in a facially neutral manner by referring to all races, it is clear that they are designed to prohibit the teaching in Florida schools and public universities of the right wing’s politicized characterization of critical race theory, notions of continuing systemic discrimination against African Americans, and other challenges to

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html; *see also* Fabiola Santiago, Opinion, *Passing the ‘Anti-Woke’ Bill is Last Feather on the Florida Legislature’s Racist Cap*, MIA. HERALD, <https://www.miamiherald.com/news/local/news-columns-blogs/fabiola-santiago/article259268609.html> (Mar. 14, 2022, 8:44 AM).

<sup>249</sup> FLA. STAT. § 1001.706(5)(a) (2023).

<sup>250</sup> FLA. STAT. § 1001.706(6)(b) (2023).

<sup>251</sup> FLA. STAT. § 1001.741(1) (2023). In addition, the statute provides that faculty personnel actions, including “evaluations, promotions, tenure, discipline, or termination, may not be appealed beyond the level of a university president or designee,” and that the “filing of a grievance does not toll the action or decision of the university.” § 1001.741(2).

<sup>252</sup> FLA. STAT. § 1001.741(1)(b) (2023).

<sup>253</sup> FLA. STAT. § 1004.06(2) (2023).

<sup>254</sup> FLA. STAT. § 1007.25(c) (2023). In addition, new section 1007.55 provides, *inter alia*, that “[p]ublic postsecondary educational institution boards of trustees and presidents are responsible for annually reviewing and approving, at a public meeting, general education course requirements.” FLA. STAT. § 1007.55(2).

<sup>255</sup> Young & Friedman, *supra* note 244.

American color blindness.<sup>256</sup> The new legislation extends the limits of what may be taught in public universities in Florida even beyond the prohibitions of the Stop WOKE Act.<sup>257</sup> This legislation stymies diversity, equity, and inclusion efforts; undermines academic freedom for both faculty and students; establishes and authorizes processes for politicized micromanagement of curricula; centralizes control in politically appointed boards of trustees; marginalizes African American critical studies scholars and students; and poses threats for other groups subject to prejudice.<sup>258</sup> In addition to their approaches to what can be taught, the educational gag orders being enacted now, including in Florida, appear designed to promote a particular type of patriotism and American exceptionalism and a Whiggish and, in practice, white conception of American history.<sup>259</sup>

There is an underexplored potential conflict between the Florida Educational Equity Act (FEEA) section 1000.05(8) and the state's new educational gag order strategy.<sup>260</sup> Jews should join in the resistance to illiberal educational gag orders—not only because they harm education, suppress Black voices, undermine the country's ability to face its racial past, promote white supremacy, and subvert academic freedom, but because they also pose direct threats of harm to Jewish attempts to fight antisemitism.<sup>261</sup>

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<sup>256</sup> Florida public officials' public statements amply support this reading. See FRIEDMAN & TAGER, *supra* note 35, at 4.

<sup>257</sup> Fla. H.B. 999; Fla. S.B. 266, 2023 Fla. Sess. Law Serv. Ch. 2023-82 (West) (codified as amended in scattered sections FLA. STAT. §§ 1001–1009); see also Hannah Natanson, Lori Rozsa & Susan Svrluga, *Florida Bills Would Ban Gender Studies, Limit Trans Pronouns, Erode Tenure*, WASH. POST, <https://www.washingtonpost.com/education/2023/03/05/florida-bills-would-ban-gender-studies-transgender-pronouns-tenure-perks> (Mar. 5, 2023, 12:33 PM).

<sup>258</sup> Katheryn Russel-Brown, "The Stop WOKE Act": HB 7, Race, and Florida's 21st Century Anti-Literacy Campaign 31–36 (2022) (on file with UF Law Scholarship Repository), <https://scholarship.law.ufl.edu/facultypub/1200> (describing some of the widespread impacts of the Stop WOKE Act).

<sup>259</sup> See Jeffrey Sachs, Jeremy Young & Jonathan Friedman, *Educational Gag Orders Seek to Enforce Compulsory Patriotism*, PEN AM. (Mar. 30, 2022), <https://pen.org/update-educational-gag-orders-seek-to-enforce-compulsory-patriotism>.

<sup>260</sup> Neither H.B. 999/S.B. 266 nor the Stop WOKE Act specify antisemitism studies in their litany of prohibitions. Moreover, section 1000.05(4)(a) provides that instruction promoting the identified concepts in the amendment "shall constitute discrimination on the basis of race, color, national origin, or sex." Does it undermine the argument in text that religion and ethnicity are not specified in the Individual Freedom Act amendment? I argue that the incorporation of antisemitism as a ground for a finding of prohibited discrimination under section 1000.05(8) refers back to section 1000.05(4)(a) as well. FEEA, FLA. STAT. §§ 1000.05(4)(a), (8) (2023).

<sup>261</sup> Although even this is contested, it appears that some scholars of Jewish studies have identified a "New Antisemitism," focused on the left. See, e.g., Kenneth L. Marcus, *Jurisprudence of the New Anti-Semitism*, 44 WAKE FOREST L. REV. 371 (2009); Blake Flayton, Opinion, *On the Frontlines of Progressive Anti-Semitism*, N.Y. TIMES (Nov. 14, 2019), <https://www.nytimes.com/2019/11/14/opinion/college-israel-anti-semitism.html>; Nelson, *supra* note 234. Some Jews

Proponents of the culture wars over education say they wish to reform racist and discriminatory indoctrination in today's overly liberal classrooms. They typically offer three types of justifications for this rash of state statutes by their conservative proponents.<sup>262</sup> The first is that the emphasis in critical race theory on structural discrimination and white supremacy as pervading American history, law, and institutions is flawed history, an unsupported account of the current moment, unpatriotic, and tantamount to discrimination against white people.<sup>263</sup> The second justification is based on what has been called "white innocence" and the concern that such instruction improperly upsets children and makes students uncomfortable and feel guilty for things they did not do.<sup>264</sup> Third, proponents argue that "parental rights"

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who focus on left-wing anti-Zionism see a tension between anti-racism and anti-antisemitism. David Hirsh, *Anti-Zionism and Antisemitism: Cosmopolitan Reflections*, (Inst. for Study of Glob. Antisemitism & Pol'y, Working Paper No. 1940-610X, 2007), <https://isgap.org/wp-content/uploads/2013/08/ISGAP-Working-Papers-David-Hirsh.pdf> ("explor[ing] the possibility that antisemitism may be an effect even of some antiracist forms of anti-Zionism"); see also ARNOLD, *supra* note 123, at 99–119 (asserting that "[a]t least since the debates over a 'New Antisemitism,' the relationship between racism and antisemitism has been steeped in controversy."); DAVID BERNSTEIN, NICOLE LEVITT & DANIEL NEWMAN, *JEWISH INST. FOR LIBERAL VALUES, CRITICAL SOCIAL JUSTICE IDEOLOGY AND ANTISEMITISM* (2021), [https://jilv.org/wp-content/uploads/2021/09/CSJ\\_AntisemitismWhitePaperRv2.pdf](https://jilv.org/wp-content/uploads/2021/09/CSJ_AntisemitismWhitePaperRv2.pdf) (arguing that radical versions of what they call "Critical Social Justice ideology" contribute to the rise of antisemitism).

Even prior to the Israel-Hamas war, ADL reports had indicated that much of the anti-Zionist activism on college campuses, driven by pro-Palestinian student groups, expressed criticism of Israel in progressive anti-racist rhetoric. For ADL's recent summaries of anti-Zionist activity on American college campuses, see *Antisemitism and the Radical Anti-Israel Movement on U.S. Campuses, 2019*, ANTI-DEFAMATION LEAGUE (May 20, 2020), <https://www.adl.org/resources/report/antisemitism-and-radical-anti-israel-movement-us-campuses-2019>; *The Anti-Israel Movement on U.S. Campuses, 2020–2021*, ANTI-DEFAMATION LEAGUE (Dec. 7, 2021), <https://www.adl.org/resources/report/anti-israel-movement-us-campuses-2020-2021>; *Anti-Israel Activism on U.S. Campuses, 2021–2022*, ANTI-DEFAMATION LEAGUE (Oct. 12, 2022), <https://www.adl.org/resources/report/anti-israel-activism-us-campuses-2021-2022>. The rhetoric used in demonstrations against the Israel-Hamas war also fits into progressive frames of anti-colonialism, anti-apartheid resistance, antiracism, and human rights.

<sup>262</sup> See, e.g., Allen, *supra* note 241 (Gov. DeSantis's public statements reflecting all three strands).

<sup>263</sup> E.g., Kali Holloway, "Critical Race Theory" Is White History, *NATION* (Nov. 16, 2021), <https://www.thenation.com/article/society/crt-race-history>; Ray Nothstine, *Review: Critical Race Theory Leans Heavily on False History and Marxist Worldview*, *CAROLINA J.* (Dec. 14, 2021), <https://www.carolinajournal.com/opinion/review-critical-race-theory-leans-heavily-on-false-history-and-marxist-worldview>.

<sup>264</sup> See, e.g., Osamudia James, *White Injury and Innocence: On the Legal Future of Antiracism Education*, 108 VA. L. REV. 1689, 1737–40 (2022) (arguing that antiracist education is vulnerable to legal challenge under antidiscrimination law because it directly confronts the fundamental norms of antidiscrimination law—"anticlassification, colorblindness and white innocence"—which reveals how such norms entrench, rather than undercut, American racial hierarchy).

should control education rather than what Governor DeSantis has decried as the “woke indoctrination” of leftist teachers and administrators.<sup>265</sup> Each of these rationales is highly problematic both with respect to its intended targets and also when assessed through an antisemitism lens.

The new educational gag orders are animated by both a distinctly individualistic political ideology and an individual-focused conception of identity. What is common to these legislative initiatives is that they impose sanctions on discussions relating to identity that challenge the received image of America as a place of *individual* opportunity and discrimination based only on *individual* belief and action. This kind of argument, by definition, rejects any attempt to understand subordination as structural, systemic, and institutional. As a practical matter, it eliminates even intensive consideration of such an alternative reading of history.

I argue that the moment that the discussion of antisemitism becomes a discussion of group-based and structural prejudice, then the Individual Freedom Act can apply to speech about Jews as well. Denial of structural discrimination undermines the ability to understand key aspects of antisemitism. The moment that instruction discusses antisemitism as a conspiratorial theory of group world domination, rather than simply unconnected and historical examples of individual animus, it can all too easily fit into the template underlying the anti-antiracist education initiatives. In Florida, it is not hard to imagine some school administrators or right-wing Christian parents arguing that critical analyses of American Jewish history and antisemitism, including arguments about antisemitism as foundational to Christianity, are prototypical examples of the type of instruction prohibited by the Individual Freedom Act provisions. It is hard to imagine even teaching the Holocaust—a mandatory subject in Florida<sup>266</sup>—adequately without an understanding of theories of racial supremacy. And given the sweeping, if vague, language of the new amendments to Florida’s education laws, there is little reason to believe that majors in Jewish Studies or Holocaust Studies might not be swept into their prohibitions.<sup>267</sup> This is because

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<sup>265</sup> Press Release, Ron DeSantis, Gov. of Fla., Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education (Mar. 28, 2022), <https://flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education>.

<sup>266</sup> FLA. STAT. § 1003.42(g)(1); *see also* Press Release, Fla. Dep’t of Educ., Florida Recognizes Holocaust Education Week (Nov. 9, 2022), <https://www.fldoe.org/newsroom/latest-news/florida-recognizes-holocaust-education-week.stml>.

<sup>267</sup> *See, e.g.*, C. Mandler, *Florida Bill Targets “Diversity, Equity, or Inclusion” on College Campuses*, CBS NEWS, <https://www.cbsnews.com/news/florida-hb-999-diversity-equity-inclusion-college-campus-bill-advances> (Mar. 26, 2023, 3:38 PM); Adam Kovac, *How a Florida Bill Could Hurt Jewish Studies*, FORWARD (Mar. 17, 2023), <https://forward.com/news/540399/bill-999-florida-jewish-studies-critical-race-theory> (“House Bill 999 [the House version of the legislation ultimately enacted, as described *supra* notes 246–254], a controversial Florida education bill aimed at severely curtailing race and gender studies, could also inadvertently affect the state’s Judaic studies programs. . . . The wording of the bill is so vague that some fear it could

such studies are likely to involve not only discussion of cross-cutting prejudices, but also contested issues of group identity. Florida section 1000.05(4)(a) could well sweep into its prohibitions important discussions of antisemitism seen through the lens of group identity, group rights, and group inequity. Even political humor could trigger attention: would the tongue-in-cheek political critique in Tom Lehrer's "National Brotherhood Week" capture the censor's attention because it used general ethno-religious stereotypes?<sup>268</sup>

The problem with highly individualistic interpretations of prejudice is that they make it very difficult to account for something like antisemitism, whose prejudicial character is grounded on conspiracist thinking about the power and hegemony of the group.<sup>269</sup> The adamantly individualistic interpretation of history, identity, and

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have repercussions for courses and programs that are not in the crosshairs of right-wing shibboleths but could become collateral damage. . . . 'It's really hard to imagine how an assault on the humanities and the social sciences and the way in which those things are taught will not affect your studies,' said University of Florida Center for Jewish Studies director Norman Goda. . . . Language in the bill says course material must be taught in a way that's factual. But Goda said that teaching students rote facts is what's done at the high school level—not in higher education. He pointed to the field of Holocaust studies, where academics have spent the past few decades examining the Shoah through the filter of gender, noting it has affected the understanding of everything from German policies to how survivors remembered their experiences." For other examples suggesting the impact of anti-CRT legislation on Jewish teaching, see Linda K. Wertheimer, *The 'Anti Woke' Legislation Making K-12 Teachers in New Hampshire Nervous*, BOSTON GLOBE, <https://www.bostonglobe.com/2023/09/28/magazine/anti-woke-legislation-in-nh-schools> (Sept. 28, 2023, 11:56 AM) (quoting a former social studies teacher's comment: "I don't know how you can have a lesson on the Holocaust and genocide and the issue of racism can't come up."); Andrew Lapin, *Florida Rejects Holocaust Education Textbooks in Clampdown on 'Woke' Instruction*, JEWISH TELEGRAPHIC AGENCY (May 11, 2023, 5:55 PM), <https://www.jta.org/2023/05/11/united-states/florida-rejects-holocaust-education-textbooks-in-clampdown-on-woke-instruction>. Cf. Conor Murray, *Anti-Defamation League Becomes Latest Anti-'Woke' Target After Elon Musk Threatens Lawsuit*, FORBES, <https://www.forbes.com/sites/conormurray/2023/09/06/anti-defamation-league-becomes-latest-anti-woke-target-after-elon-musk-threatens-lawsuit> (Sept. 7, 2023, 12:25 PM) ("[R]ight-wing pundits and social media users are piling on [ADL] and accusing it of being a hate group that targets white people.").

<sup>268</sup> See Tom Lehrer, *National Brotherhood Week*, YOUTUBE, at 01:06 (July 26, 2007), <https://www.youtube.com/watch?v=allJ8ZCs4jY> (recorded Sept. 11, 1967) ("Oh the Protestants hate the Catholics; And the Catholics hate the Protestants; And the Hindus hate the Muslims; And everybody hates the Jews."). The song ridicules the nationwide initiative launched in the 1920s, in which one day per year (later increased to one week) was set aside to combat antisemitic, anti-Catholic, and anti-immigrant sentiment. See, e.g., Jennifer Goren, *Whatever Became of National Brotherhood Week?*, THE WORLD (Feb. 21, 2018, 4:30 PM), <https://theworld.org/stories/2018-02-21/whatever-became-national-brotherhood-week>.

<sup>269</sup> Teaching a view that emphasizes the fundamentally group-based conception of Jews embedded in antisemitism, or that interrogates the impacts of gender and class on Jewish history, or that makes anti-Christian claims in describing antisemitism will inevitably trigger the

discrimination as the only appropriate and acceptable educational values is an attitude that could easily metastasize beyond anti-Black racism, gender identity, and antisemitism to cover education about many controversial issues. What would be left of education then?

Similarly, the “reverse racism” argument is cynical and reaffirms white supremacy. Specifically with respect to antisemitism, the desire to spare mainstream students, often coded as white but also easily codable as non-Jewish, from discomfort is also very bad for any serious attempt to grapple with antisemitism. Antisemitism is ugly and uncomfortable. Antisemitic oven jokes, Happy Merchant memes,<sup>270</sup> and Holocaust images are shocking and uncomfortable. Showing non-Jewish people their many conscious and unconscious antisemitic ideas is not comfortable. Chiding them for the antisemitic tropes they use and laugh at is uncomfortable. And challenging the exceptionalist account of antisemitism in the United States is also likely to be uncomfortable.

As for the third justification, centering the authority of parental control begs the question of which parents get to control the narratives students learn. While parents indubitably have an interest in their children’s education, the students’ own interests should be seen as equally critical. Moreover, the state, in offering public education, has an interest in deploying expertise in designing the curriculum, hiring faculty and administrators, and teaching students civic values. Importantly, in this endeavor the state represents *all* the students’ parents—including African American parents who would want their children represented and heard at school, liberal white parents who would wish their children to be exposed to diverse and challenging ideas, immigrants who wish inclusion for their children, etc.—and not just the interests of the conservative parents who wish to return public education to a traditional and white-centered model of an imaginary 1950s.

In addition to the theoretical tension between anti-antisemitism and the DeSantis-approved “anti-woke” provisions in statutory text, it is also important to analyze them in practice. It is predictable—perhaps even to the drafters—that school districts will have difficulty distinguishing among their obligations. Because of the vagueness of the language, those charged with educating Florida students have already been confused about the scope of the statutes. With respect to the core foci of the anti-CRT and gender-focused prohibitions, school administrators and teachers have already begun to interpret the prohibitions broadly. Teachers at every level

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prohibited type of thinking that Republican state legislators are seeking to eliminate from school and university classrooms.

<sup>270</sup> *Hate Symbol: The Happy Merchant*, ANTI-DEFAMATION LEAGUE: HATE ON DISPLAY, <https://www.adl.org/resources/hate-symbol/happy-merchant> (last visited Dec. 5, 2023); see also MARCUS, *supra* note 94.

already report a chilling effect across the board.<sup>271</sup> The possibility of their impact on Jewish-focused education is not hypothetical. There are already reports of Florida teachers interpreting the provisions of the new law so broadly that they prohibit teaching about the Holocaust, despite the state's Holocaust education mandate.<sup>272</sup> As it is, Florida has been charged with failing to implement the state's Holocaust education mandate in a consistent way, likely due to the discretion given to school principals in implementation.<sup>273</sup> Even for those teachers who are not deterred from

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<sup>271</sup> Tim Craig & Lori Rozsa, *In His Fight Against 'Woke' Schools, DeSantis Tears at the Seams of a Diverse Florida*, WASH. POST (Feb. 7, 2022, 7:00 AM), <https://www.washingtonpost.com/nation/2022/02/07/desantis-anti-woke-act> (quoting a Florida teacher: "Part of the way you teach the Holocaust in the state of Florida is associating it with prejudice and racism. . . . Once you make teaching racism taboo, you've made it very difficult to teach about antisemitism. I don't understand how you'd teach the civil rights movement without connecting it to economic injustice and racism."); see also Hannah Natanson, *'Slavery Was Wrong' and 5 Other Things Some Educators Won't Teach Anymore*, WASH. POST, <https://www.washingtonpost.com/education/2023/03/06/slavery-was-wrong-5-other-things-educators-wont-teach-anymore> (Mar. 6, 2023, 7:33 AM).

<sup>272</sup> Craig & Rozsa, *supra* note 271; see also *From Slavery to Socialism, New Legislation Restricts What Teachers Can Discuss*, NPR: FRESH AIR (Feb. 3, 2022, 2:10 PM), <https://www.npr.org/transcripts/1077878538> ("[A]s a recording that was shared with NBC News reveals, a school administrator told her teachers, her staff, essentially, that when they discuss the Holocaust, they need to present it with opposing points of view. Now, I think it's important to note the Texas law that the teacher was referring—the administrator was referring to probably does not require both-sides'ing (ph) the Holocaust. But that is exactly the concern here. These laws are so ambiguous. And the punishments are so draconian that this is what you'll see. People will end up adopting ludicrous positions out of an abundance of caution."). Similarly, the administration of the Douglas Anderson School of Performing Arts in Duval County, Florida cancelled the student production of Paula Vogel's award-winning play *Indecent*, which:

explores the story behind the 1907 Yiddish play, *God of Vengeance*, and how it was censored on Broadway in 1923 for obscenity, in part, over its depictions of lesbian relationships. [The play] takes inspiration from the origins and story of *God of Vengeance*, its subsequent obscenity trial, and its aftermath, to explore themes of LGBTQ+ rights, immigration, censorship, and antisemitism in the early 20th century.

Press Release, PEN Am., National Organizations Condemn Cancellation of Student Play at Douglas Anderson School of Performing Arts in Duval County, FL (Jan. 10, 2023), <https://pen.org/press-release/national-organizations-condemn-cancellation-of-student-play-at-douglas-anderson-school-of-performing-arts-in-duval-county-fl>. Not only does the decision to cancel implicate issues of antisemitism, it can also be seen as an example of the treatment of layered and intersectional identities—which will inevitably be swept into the legal net.

<sup>273</sup> See, e.g., Austen Erblat, *Florida Lawmakers Seek to Expand African American and Holocaust Education Statewide*, WLRN (Jan. 21, 2022, 10:25 AM), <https://www.wlrn.org/news/2022-01-21/florida-lawmakers-seek-to-expand-african-american-and-holocaust-education-statewide>. In 2019, the Florida Board of Education enhanced school reporting requirements relating to Holocaust and African American history instruction. E.g., Jeffrey S. Solocheck, *Teaching African-American and Holocaust History? Prove It, Florida Board of Education Says*, TAMPA BAY TIMES (Sept. 20, 2019), <https://www.tampabay.com/news/gradebook/2019/09/20/teaching-african-american-and->

Holocaust education, what more subtle coverage concerns will be triggered by the new legislation? For example, will teachers avoid addressing the influence of Jim Crow statutes on Nazi antisemitic laws?<sup>274</sup>

A further issue is raised by the argument that one of the antisemitic tropes to which Jews have been subjected is what one analyst has called “lust libel,”<sup>275</sup> namely antisemitic tropes about Jewish sexuality and perversion.<sup>276</sup> Given the sexual violence, nudity, and medical experimentation that occurred in concentration camps, the highly grotesque and sexualized imagery of Jewish people during the Nazi period, the asserted promotion of homosexuality by Jews at the time, and the Hitler regime’s libelous claims of Jews as pedophiles trafficking Aryan children, it would be surprising if at least some of those issues were not to be found in books, films,

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holocaust-history-prove-it-florida-board-of-education-says; see also Andrew Marra, *Florida School Districts Told to Report Holocaust Lessons After Spanish River High Controversy*, PALM BEACH POST (Sept. 24, 2019, 3:17 PM), <https://www.palmbeachpost.com/story/news/education/2019/09/24/florida-school-districts-told-to-report-holocaust-lessons-after-spanish-river-high-controversy> (discussing the impetus for adoption of reporting requirements: a high school principal who “told a parent . . . that students could opt out of the Holocaust lessons because ‘not everyone believes the Holocaust happened,’ and that he ‘can’t say the Holocaust is a factual, historical event.”). See generally Letter from Yael Hershfield, Interim Reg’l Dir., ADL, & Elizabeth Gelman, Exec. Dir., Fla. Holocaust Museum, to Richard Corcoran, Comm’r, Fla. Dep’t of Educ. (Apr. 2, 2021), <https://jewishcurrents.org/wp-content/uploads/2021/06/Letter-concerns-over-Holocaust-education-standards-4.21-1.pdf> (critiquing recent proposed Holocaust education standards); LINDSAY STILLMAN, ARIZ. ST. UNIV. & PHX. HOLOCAUST ASS’N, MANDATES ON HOLOCAUST AND GENOCIDE EDUCATION IN THE UNITED STATES (2021), <https://shprs.asu.edu/sites/default/files/2021-10/207547%20-%20Holocaust%20Mandates%20Booklet%20FINAL%20DIGITAL%20%281%29.pdf> (reviewing Holocaust instruction mandates in the United States).

<sup>274</sup> See, e.g., Becky Little, *How the Nazis Were Inspired by Jim Crow*, HISTORY (Aug. 4, 2023), <https://www.history.com/news/how-the-nazis-were-inspired-by-jim-crow>; THE WHITE HOUSE, *supra* note 21, at 8.

<sup>275</sup> Jonah Cohen, *The Lust Libel: Sexual Antisemitism in History and Contemporary Culture*, FATHOM (Nov. 2022), <https://fathomjournal.org/the-lust-libel-sexual-antisemitism-in-history-and-contemporary-culture> (“Going back to the Middle Ages, European art and literature have depicted the Jews as perverse, predatory, pornographic, horny vampires of the Orient. That ghoulish portrait—which, for short, can be called the ‘lust libel’—is one of the more enduring of the classical antisemitic stereotypes. Today, it is all over the internet, influencing not just disaffected white men but even some prominent members of American popular culture.”). This issue has drawn the attention of at least one recent academic conference. See, e.g., *Antisemitism and Sexuality Reconsidered*, GERMAN HIST. INST., <https://www.ghi-dc.org/events/event/date/antisemitism-and-sexuality-reconsidered> (last visited Dec. 5, 2023).

<sup>276</sup> *Antisemitism & Anti-LGBTQ+ Hate Converge in Extremist and Conspiratorial Beliefs*, ANTI-DEFAMATION LEAGUE: BLOG (Jan. 24, 2023), <https://www.adl.org/resources/blog/antisemitism-anti-lgbtq-hate-converge-extremist-and-conspiratorial-beliefs>.

and plays about the Holocaust and concentration camps.<sup>277</sup> Considering Florida Education Commissioner Manny Diaz, Jr.'s tweet that “[a] teacher or any adult faces a felony if they knowingly distribute egregious materials such as images which depict sexual conduct, sexual battery, bestiality or sadomasochistic abuse. Who could be against that?,”<sup>278</sup> it would not be surprising if Florida teachers avoided such subjects.

The chill spreads beyond the classroom. There has been a significant uptick in book bans—efforts to remove books from school libraries and classrooms—all over the United States.<sup>279</sup> Conservative parent and advocacy groups are deeply involved in these efforts.<sup>280</sup> Recently, the new legislation was used to justify removing Jewish and Holocaust-themed books from circulation in a school district library.<sup>281</sup> PEN

<sup>277</sup> Paul Weindling, Anna von Villiez, Aleksandra Loewenau & Nichola Farron, *The Victims of Unethical Human Experiments and Coerced Research Under National Socialism*, 40 ENDEAVOUR 1, 1, 4 (2016); LAURIE MARHOEFER, *SEX AND THE WEIMAR REPUBLIC: GERMAN HOMOSEXUAL EMANCIPATION AND THE RISE OF THE NAZIS 178–79* (2015); Cohen, *supra* note 275.

<sup>278</sup> Tesfaye Negussie & Rahma Ahmed, *Florida Schools Directed to Cover or Remove Classroom Books That Are Not Vetted*, ABC NEWS (Feb. 6, 2023, 11:08 AM), <https://abcnews.go.com/Politics/florida-schools-directed-cover-remove-classroom-books-vetted/story?id=96884323>.

<sup>279</sup> See, e.g., Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES (June 22, 2023), <https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html>. For a popular history of book bans in the United States, see, for example, Erin Blakemore, *The History of Book Bans—and Their Changing Targets—in the U.S.*, NAT'L GEOGRAPHIC (Apr. 24, 2023), <https://www.nationalgeographic.com/culture/article/history-of-book-bans-in-the-united-states>. For recent discussions of the constitutional questions implicated in book bans, see, for example, Marisa Shearer, *Banning Books or Banning BIPOC?*, 117 N.W. U. L. REV. ONLINE 24 (2022), [https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1323&context=nulr\\_online](https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1323&context=nulr_online); Ryan L. Schroeder, Note, *How to Ban a Book and Get Away with It: Educational Suitability and School Board Motivations in Public School Library Book Removals*, 107 IOWA L. REV. 363 (2021); McKenna Deutsch, Comment, *Burned, Banned, and Censored: The Need for an International Framework that Addresses the Right to Read*, 39 WIS. INT'L L.J. 329, 332–39 (2022).

<sup>280</sup> See, e.g., Harris & Alter, *supra* note 279; Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AMERICA (Sept. 19, 2022), <https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools> (“From July 2021 to June 2022, PEN America’s Index of School Book Bans lists 2,532 instances of individual books being banned, affecting 1,648 unique book titles. The 1,648 titles are by 1,261 different authors, 290 illustrators, and 18 translators, impacting the literary, scholarly, and creative work of 1,553 people altogether.”).

<sup>281</sup> E.g., Andrew Lapin, *Holocaust Novel Removed as Florida School District Purges Libraries to Comply with State Law*, JEWISH NEWS (Mar. 14, 2023, 8:28 AM), <https://www.jewishnews.co.uk/holocaust-novel-removed-as-florida-school-district-purges-libraries-to-comply-with-state-law>; Andrew Lapin, *Florida High School Pulls Graphic Novel Adaptation of Anne Frank’s Diary, Saying It Is ‘Not Age Appropriate’*, FORWARD (Apr. 5, 2023), <https://forward.com/fast-forward/542410/florida-high-school-pulls-graphic-novel-adaptation-of-anne-franks-diary-saying-it-is-not-age-appropriate>; Beth Harpaz, *Jewish Writers, Bible Stories and Holocaust History Are on New List of*

America reports that as of June 2022, 4% of the banned books (64 titles) “include characters and stories that reflect religious minorities, such as Jewish, Muslim and other faith traditions.”<sup>282</sup> These include very popular and prize-winning books including, for example, Jodi Picoult’s *The Storyteller*,<sup>283</sup> Art Spiegelman’s *Maus*,<sup>284</sup> and even Anne Frank’s *Diary*.<sup>285</sup> Some Florida schools have decided to remove or cover classroom books that have not been approved.<sup>286</sup> This is despite the fact that the majority of voters polled by the American Library Association oppose book removals from public libraries.<sup>287</sup>

Can a conference such as the Law vs. Antisemitism conference confidently take place at a public university in Florida without risk?<sup>288</sup> After all, speakers at the conference and papers in this Symposium volume discuss and criticize the anti-CRT bans in ways that might trigger state prohibitions.<sup>289</sup> Can a student group invite a

*Every Banned Book in the US*, FORWARD (Sept. 26, 2023), <https://forward.com/fast-forward/562083/book-ban-pen-list-jewish-authors>.

<sup>282</sup> Friedman & Johnson, *supra* note 280.

<sup>283</sup> JODI PICOULT, *THE STORYTELLER* (2013); e.g., Andrew Lapin, *Jodi Picoult Holocaust Novel Banned from School in ‘Inappropriate’ Books Row*, JEWISH CHRON. (Mar. 14, 2023, 4:34 PM), <https://www.thejc.com/news/world/jodi-picoult-holocaust-novel-banned-from-school-in-inappropriate-books-row-5ciENrdr4HmK7DDw2114ku>.

<sup>284</sup> ART SPIEGELMAN, *MAUS: A SURVIVOR’S TALE* (1973); *Holocaust Novel ‘Maus’ Banned in Tennessee School District*, PBS NEWS HOUR (Jan. 27, 2022, 9:33 PM), <https://www.pbs.org/newshour/arts/holocaust-novel-maus-banned-in-tennessee-school-district>; Jenny Gross, *School Board in Tennessee Bans Teaching of Holocaust Novel ‘Maus,’* N.Y. TIMES (Jan. 27, 2022), <https://www.nytimes.com/2022/01/27/us/maus-banned-holocaust-tennessee.html>.

<sup>285</sup> ANNE FRANK, *THE DIARY OF A YOUNG GIRL* (Susan Massotty trans., 2010); *Jewish Banned Books*, JEWISH BOOK COUNCIL, <https://www.jewishbookcouncil.org/books/reading-lists/jewish-banned-books> (last visited Dec. 5, 2023) (also listing as banned: ANDRE ACIMAN, *CALL ME BY YOUR NAME* (2007); CHRISTOPHER NOXON, *GOOD TROUBLE: LESSONS FROM THE CIVIL RIGHTS PLAYBOOK* (2019); LOIS LOWRY, *NUMBER THE STARS* (2014); WILLIAM STYRON, *SOPHIE’S CHOICE* (1992), and ELIE WIESEL, *THE NIGHT TRILOGY* (2008)).

<sup>286</sup> Negussie & Ahmed, *supra* note 278 (“Michael Barber, communications director of Manatee County schools, told ABC News on Friday that teachers could be charged with a third-degree felony if they share a book that’s considered pornographic or obscene under Florida law. But many teachers misinterpret the law as meaning they could be indicted for simply sharing any unvetted material, he said.”); Ryan Ballogg, *‘We Know Who the Radicals Are’: What People Think of Florida Teachers Hiding Bookshelves*, MIA. HERALD (Jan. 25, 2023, 10:30 AM), <https://www.miamiherald.com/news/local/education/article271630367.html>.

<sup>287</sup> *Voters Oppose Book Bans in Libraries*, AM. LIBR. ASS’N, <https://www.ala.org/advocacy/voters-oppose-book-bans-libraries> (last visited Dec. 5, 2023).

<sup>288</sup> Interestingly, the next Law vs. Antisemitism conference is scheduled to take place at FIU College of Law in early 2024. Query whether the laws on the books will lead to a chilling effect on what is discussed.

<sup>289</sup> In addition to this paper, see, for example, Diane Kemker, *Using a “Moves to Innocence” Approach to Dissect and Debunk the Claim that Critical Race Theory Is Antisemitic*, 27 LEWIS & CLARK L. REV. 1145 (2024).

critical scholar in the field of race or gender studies to address a class or the school outside of a class context? Flipping the hypothetical, could a conservative student group in Florida invite a speaker who many believe expresses racist or anti-gay views or would the statute preclude such campus talks by Judge S. Kyle Duncan or Judge James Ho?<sup>290</sup>

Furthermore, to the extent that the press—such as the *Miami Herald*—has criticized the legislation and been perceived as objecting to governance under the DeSantis administration,<sup>291</sup> the state’s newly energized attacks on the press<sup>292</sup> surely deepen the political character of the controversy.

Legislation such as the Stop WOKE Act, the Individual Freedom Act, the pending Florida gag bills, and the orgy of book bans are bad for academic freedom, for students, for citizens, and for democracy. They are likely to inflame racism and misogyny. They are also likely to undermine the state’s commitment to prohibiting antisemitism on campus. Sadly, the end result of the current legal landscape is to advance the racist and antisemitic goals of white nationalist groups.<sup>293</sup>

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Furthermore, what if the NAACP or other African American or Jewish groups instituted an academic boycott of Florida in the future? In fact, the NAACP issued a travel advisory for Florida, with the advisory “com[ing] in direct response to Governor Ron DeSantis’ aggressive attempts to erase Black history and to restrict diversity, equity, and inclusion programs in Florida schools.” Press Release, NAACP, NAACP Issues Travel Advisory in Florida (May 20, 2023), <https://naacp.org/articles/naacp-issues-travel-advisory-florida>.

<sup>290</sup> See generally Greta Reich, *Judge Kyle Duncan’s Visit to Stanford and the Aftermath, Explained*, STANFORD DAILY (Apr. 5, 2023, 11:39 AM), <https://stanforddaily.com/2023/04/05/judge-duncan-stanford-law-school-explained> (reporting protests at Stanford Law School over a visit and talk about “Guns, Covid, and Twitter” by conservative Judge Kyle Duncan); Jesse O’Neill, *Federal Judges Say They Won’t Hire Clerks From ‘Intolerant’ Stanford Law School*, N.Y. POST (Apr. 2, 2023, 9:51 AM), <https://nypost.com/2023/04/02/james-ho-and-elizabeth-branch-say-they-will-not-hire-clerks-from-stanford> (reporting the announcement by Judge Ho that he “will no longer hire clerks from Stanford Law School after students there protested the visit of another conservative judge [Judge Duncan]”).

<sup>291</sup> Editorial, *These Ideas Are the Worst. Of Course, DeSantis, Florida Republicans Want to Put Them into Law*, MIA. HERALD (Jan. 18, 2022, 1:21 PM), <https://www.miamiherald.com/opinion/editorials/article257211932.html>.

<sup>292</sup> See, e.g., H.B. 991, 2023 Leg., Reg. Sess. (Fla. 2023); see also Lili Levi & Lyrissa Lidsky, Opinion, *Here’s How Florida Could Become the Capital of Weaponized Libel Suits*, DAILY BEAST, <https://www.thedailybeast.com/florida-could-become-the-capital-of-weaponized-libel-suits> (Mar. 3, 2023, 8:59 AM) (for a critical view of the bill). Although H.B. 991 was ultimately withdrawn by its sponsor, he promised that a revised version would be introduced in the next legislative session. Mary Ellen Klas, *Defamation Bill Dead for This Florida Legislative Session, Sponsor Says*, TAMPA BAY TIMES, <https://www.tampabay.com/news/florida-politics/2023/04/26/defamation-bill-dead-this-florida-legislative-session-sponsor-says> (Apr. 27, 2023).

<sup>293</sup> Recently, newspaper articles have adverted to an apparent diminution of focus on “anti-woke” messaging in the Republican presidential race, including by Florida Governor Ron DeSantis. See, e.g., Trip Gabriel & Nicholas Nehamas, *Where’s ‘Woke’? Republicans Test a Different*

To be sure, the reactionary legislative moves to “reform” education in Florida have been met with lawsuits.<sup>294</sup> Book bans also have been challenged. Recently, the court in *Pernell v. Florida Board of Governors of the State University System* issued a preliminary injunction prohibiting the state from enforcing important elements of section 1000.05(4)(a) in the university setting and a panel of the Eleventh Circuit Court of Appeals denied the state’s request for a stay of the injunction.<sup>295</sup> The language of the Stop WOKE and Don’t Say Gay statutes are both vague and viewpoint-based.<sup>296</sup> In issuing the injunction, Judge Walker lambasted the legislation as an example of “rank viewpoint discrimination.”<sup>297</sup>

While it is beyond the scope of this Article to handicap the constitutional arguments in educational gag order cases, it should be noted that the lawsuits are being fought aggressively by the states. Especially in light of judicial recognition of the curricular discretion granted to states in the educational context, and particularly in the K–12 context, it is not self-evident that statutes such as those enacted in Florida

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*Education Message*, N.Y. TIMES (Aug. 28, 2023), <https://www.nytimes.com/2023/08/28/us/politics/republican-education-woke-2024.html>. Does this indicate that the attack on critical theory in education has waned, reducing the threat described in this Article? I think not. That Republican presidential primary contenders are looking to seek electoral advantage by appealing to broader audiences than culture war activists should not be surprising as a matter of political strategy. Moreover, the *Economist* reports that “[c]onservative activists may have lost most of their school-board battles, but in many ways they are winning the war.” *Anti-Woke Activists Are Winning the Culture War in America*, THE ECONOMIST (Dec. 9, 2023), <https://www.economist.com/united-states/2023/12/09/anti-woke-activists-are-losing-many-of-their-school-board-battles> (reporting, *inter alia*, that “[a]ccording to *Education Week*, 44 states have introduced bills or taken other steps to restrict CRT since January 2021; 18 have imposed bans or limits”). Teachers have lost their jobs and high school history standards and AP classes have been changed in response to the legislation. *Id.* Public universities have experienced the effects. *See, e.g.*, AM. ASS’N UNIV. PROFESSORS (AAUP), REPORT OF A SPECIAL COMMITTEE: POLITICAL INTERFERENCE AND ACADEMIC FREEDOM IN FLORIDA’S PUBLIC HIGHER EDUCATION SYSTEM (2023), <https://www.aaup.org/report/report-special-committee-political-interference-and-academic-freedom-florida%E2%80%99s-public-higher>. The chilling effect on professors changing their teaching for fear of job retaliation has been evident. *See, e.g.*, Daniel Golden, *Muzzled by DeSantis, Critical Race Theory Professors Cancel Courses or Modify Their Teaching*, PROPUBLICA (Jan. 3, 2023, 7:00 AM), <https://www.propublica.org/article/desantis-critical-race-theory-florida-college-professors>.

<sup>294</sup> *E.g.*, *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, 641 F. Supp. 3d 1218 (N.D. Fla. 2022); *Honeyfund.com, Inc. v. DeSantis*, 622 F. Supp. 3d 1159 (N.D. Fla. 2022); *Falls v. DeSantis*, 609 F. Supp. 3d 1273 (N.D. Fla. 2022), *dismissed for lack of standing*, 2023 WL 3568526 (N.D. Fla. May 19, 2023).

<sup>295</sup> *Pernell*, 641 F. Supp. 3d at 1291; *Pernell v. Fla. Bd. of Governors of the State Univ.*, No. 22-13992 & No. 22-13994, 2023 U.S. App. LEXIS 6591, at \*3 (11th Cir. 2023) (denying motions to stay injunction).

<sup>296</sup> *Pernell*, 641 F. Supp. 3d at 1278, 1286.

<sup>297</sup> *Id.* at 1275.

would necessarily be ruled unconstitutional in their entirety.<sup>298</sup> Lawyers claim that surgical redrafting can avoid legal hurdles while still promoting the goals of anti-CRT legislation. Proponents point to regulations that can reduce vagueness and excessive viewpoint focus.<sup>299</sup> Even if part of such legislation is struck down, much of the *in terrorem* effect of the struck provisions can be captured by more procedurally phrased provisions such as reporting and disclosure requirements.<sup>300</sup> Moreover, states like Florida are including savings clauses in their statutes to retain the provisions after carve-outs of unconstitutional aspects.<sup>301</sup> It is easy to imagine that such legislation can trigger extensive self-censorship effects even if all its provisions do not survive legal challenge intact. Indeed, even as enjoined, the “anti-woke” legislative push is having an appreciable effect on the educational coverage and library policies of Florida public schools and colleges.<sup>302</sup> Even if, as is likely, some or all of these provisions will be struck down under the Constitution, such enunciatory legislation is dangerous because it is designed to influence behavior through articulation of political theater. Bureaucrats get the message. Their speech is likely chilled, regardless of what happens in court. There is already ample evidence of this trend.<sup>303</sup>

#### IV. ZOOMING OUT TO HIGHLIGHT THE STRATEGIC ROLE OF ANTISEMITISM IN TODAY’S WHITE POWER EXTREMISM

Ultimately, viewing antisemitism through purely political and strategic lenses de-historicizes it and risks leaching it of its moral valence. Antisemitism should not be defined by contending viewpoints on the politics of the Middle East. And the history of the Jewish people makes it rational to be concerned about the normalization of an ideology that has already led to genocide. It is appropriate for Jews to

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<sup>298</sup> See, e.g., Tess Bissell, Note, *Teaching in the Upside Down: What Anti-Critical Race Theory Laws Tell Us About the First Amendment*, 75 STAN. L. REV. 205 (2023) (arguing that the First Amendment should be read to strike down anti-CRT statutes even in the K–12 context); Keith E. Whittington, *Professorial Speech, the First Amendment, and Legislative Restrictions on Classroom Discussions*, 58 WAKE FOREST L. REV. 463 (2023).

<sup>299</sup> See, e.g., Kissel, *supra* note 47.

<sup>300</sup> See, e.g., FEEA, FLA. STAT. § 1000.05(7)(e) (2023) (“Requiring all district school boards and Florida College System institution boards of trustees to submit data and information necessary to determine compliance with this section. The Commissioner of Education shall prescribe the format and the date for submission of such data and any other educational equity data. If any board does not submit the required compliance data or other required educational equity data by the prescribed date, the commissioner shall notify the board of this fact and, if the board does not take appropriate action to immediately submit the required report, the State Board of Education shall impose monetary sanctions.”).

<sup>301</sup> § 1000.05(8)(c).

<sup>302</sup> Negussie & Ahmed, *supra* note 278; Lapin, *supra* note 283.

<sup>303</sup> See Negussie & Ahmed, *supra* note 278.

object to antisemitism as a moral matter. But even in the political realm, it is important to zoom out and recognize the underexplored relationship between the ideology of antisemitism and the growing white power movement in the United States today.

This vantage point highlights the importance of addressing trends in antisemitism broadly and effectively—not only to protect Jews, but also to battle illiberal attacks on democracy itself. White nationalism—with its goal of establishing a white, Christian ethno-state—appears to be expanding its strategies and normalizing its conspiracist accounts.<sup>304</sup> Antisemitism appears to be a critical element in the ideology of white nationalism. The January 6th attack on the Capitol revealed the willingness of a large number of American citizens to accept the use of political violence in the service of a conspiracy theory.<sup>305</sup> The visibility of antisemitism during January 6th and the strategic linkage between antisemitism and the broader project of white nationalism<sup>306</sup> represent a menace to American democracy.<sup>307</sup> Yet, even on

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<sup>304</sup> Gabriel R. Sanchez, Keon L. Gilbert & Carly Bennett, *White Nationalism Remains Major Concern for Voters of Color*, BROOKINGS INST. (Mar. 30, 2023), <https://www.brookings.edu/articles/white-nationalism-remains-major-concern-for-voters-of-color-and-appears-to-be-connected-ideologically-to-the-growing-christian-nationalism-movement>; ANTI-DEFAMATION LEAGUE, HATE BEYOND BORDERS: THE INTERNATIONALIZATION OF WHITE SUPREMACY 7–8 (2019), <https://www.adl.org/resources/report/hate-beyond-borders-internationalization-white-supremacy>.

<sup>305</sup> See, e.g., David Masciotra, *Right-Wing Extremism Is Even More Common Than You Think*, WASH. MONTHLY (Apr. 10, 2023), <https://washingtonmonthly.com/2023/04/10/right-wing-extremism-is-even-more-common-than-you-think> (quoting the argument by Prof. DiMaggio, author of *Rising Fascism in America: It Can Happen Here*, that “the effort to focus on a small number of right-wing activist groups and political officials is inadequate to examine how the nation understands January 6-style violence and attempts to subvert elections. We find that susceptibility to various forms of right-wing extremism, including heteronormative biases, white nationalism, Christian nationalism, and authoritarianism, is significantly correlated with positive perceptions of the J-6 participants, of Trump himself, and of efforts to excuse Trump for what happened on J-6. Much of the national discourse on J6 is incredibly limited. We believe that J6 represented a pivotal moment in modern history. It was not only about right-wing activists coming together hoping that Trump would be the president to impose an authoritarian, white nationalist, heteronormative Christian nationalist socio-political order. It’s also about a sizable segment of the population that agrees with these goals. That should concern anyone who believes in secular democracy, equal rights, and the rule of law.”).

<sup>306</sup> I use the terms such as “white nationalism” and “white power” here not in any precise, sociological sense to describe ideological movements, but as loose, interchangeable umbrella terms to signify right-wing ideologies whose adherents object to what they view as the diminishment of white power and culture.

<sup>307</sup> A recent survey reveals that “highly antisemitic Americans are three times more likely to support violence to achieve certain political goals compared to the general population.” ANTI-DEFAMATION LEAGUE, ANTISEMITISM AND SUPPORT FOR POLITICAL VIOLENCE 3 (2023), <https://www.adl.org/resources/report/antisemitism-and-support-political-violence>.

the political front, the current debates on antisemitism between Republicans and Democrats ignore this elephant in the room.

Despite its particularities, antisemitism is deeply interconnected with other prejudices. To be sure, American society's prejudices toward Jews, African Americans, Muslims, people of Hispanic background, immigrants, LGBTQIA+ persons, and others all differ in many ways. But the point of view of far-right extremists is instructive as to interconnections. For example, antisemitism is used strategically as a unifying tool by the far right. Racists use antisemitism to unite the base, to provide a common thread for the diversity in white power groups,<sup>308</sup> and to serve as a wedge between marginalized groups.<sup>309</sup> According to a recent report, a leaked style guide by Daily Stormer founder Andrew Anglin:

explained that his goal is recruiting new neo-Nazis, and that blaming Jews was the best way to do that. "As Hitler said, people will become confused and disheartened if they feel there are multiple enemies," Anglin wrote in the guide. "As such, all enemies should be combined into one enemy, which is the Jews."<sup>310</sup>

Apparently, the strategy of focusing hate on the Jews is an efficient way to attract adherents to their broader political vision of a white nation.

For example, many white supremacists hew to the great replacement theory, pursuant to which immigrants and other nonwhite people will replace the fundamental identity of America as a white Protestant nation.<sup>311</sup> One of the elements of

<sup>308</sup> E.g., ALEXANDER MELEAGROU-HITCHENS, BENNETT CLIFFORD & LORENZO VIDINO, GEORGE WASH. UNIV. PROGRAM ON EXTREMISM, ANTISEMITISM AS AN UNDERLYING PRECURSOR TO VIOLENT EXTREMISM IN AMERICAN FAR-RIGHT AND ISLAMIST CONTEXTS 3 (2020), <https://extremism.gwu.edu/reports> (reporting on "pervasive [antisemitism] throughout several categories of American extremist movements, both violent and non-violent" which acts as a "common denominator between extremist groups," and how "antisemitism, as a belief and world-structuring theory, can at times serve as a gateway issue for individuals into further radicalization").

<sup>309</sup> See, e.g., Ben Lorber, Dove Kent & Leo Ferguson, *The Right Wants to Keep Jewish and Black Non-Jewish Communities Divided*, POL. RSCH. ASSOCS. (Jan. 17, 2020), <https://politicalresearch.org/2020/01/17/right-wants-keep-jewish-and-black-non-jewish-communities-divided>.

<sup>310</sup> Joseph Menn, *Surging Twitter Antisemitism Unites Fringe, Encourages Violence, Officials Say*, WASH. POST (Dec. 3, 2022, 7:00 AM), <https://www.washingtonpost.com/technology/2022/12/03/twitter-antisemitism-violence-jan-6>.

<sup>311</sup> E.g., Andrew S. Winston, "Jews Will Not Replace Us!": *Antisemitism, Interbreeding and Immigration in Historical Context*, 105 AM. JEWISH HIST. 1 (2021). Sadly, it is not only die-hard Nazis whose worldview is grounded on fear of the great replacement. See Jason Stanley, *Opinion, Buffalo Shooting: How White Replacement Theory Keeps Inspiring Mass Murder*, GUARDIAN (May 15, 2022, 1:32 PM), <https://www.theguardian.com/commentisfree/2022/may/15/buffalo-shooting-white-replacement-theory-inspires-mass> (arguing that white replacement theory "has

the great replacement theory today is the view that it is Jews who are engineering the great replacement as part of their conspiracy to achieve world domination.<sup>312</sup> Here too, antisemitism is used as a tool in a broader political project.

Civil rights organizer and Executive Vice President of Race Forward Eric Ward has argued that antisemitism is the key ideology for the growing white nationalist groups whose goal is to establish a white ethno-state in which African Americans and Jews will have no place.<sup>313</sup> He claims that this makes it imperative for African Americans, as well as Jews and the rest of democracy-protecting civil society to fight antisemitism.<sup>314</sup>

What has been called domestic terrorism by extremists is deeply interconnected with antisemitism.<sup>315</sup> There is a growing threat to American democracy in the

been mass popularized and normalized” by Tucker Carlson and Republican party members, and that even though they do not explicitly mention Jews, the connection is made by their audiences).

<sup>312</sup> See, e.g., “*The Great Replacement: An Explainer*,” ANTI-DEFAMATION LEAGUE (Apr. 19, 2021), <https://www.adl.org/resources/backgrounder/great-replacement-explainer>; Jason Wilson & Aaron Flanagan, *The Racist ‘Great Replacement’ Conspiracy Theory Explained*, S. POVERTY L. CTR. (May 17, 2022), <https://www.splcenter.org/hatewatch/2022/05/17/racist-great-replacement-conspiracy-theory-explained>; Mattias Ekman, *The Great Replacement: Strategic Mainstreaming of Far-Right Conspiracy Claims*, 28 CONVERGENCE 1127, 1131 (2022). Among those expressing their belief in the great replacement of whites as orchestrated by Jews was the shooter who killed 10 and injured 13 in an attack on a grocery store in Buffalo. See, e.g., Shane Burley, *How Buffalo Suspect’s Hateful Propaganda Connects Black Americans and Jews*, NBC NEWS (May 18, 2022, 9:24 AM), <https://www.nbcnews.com/think/opinion/buffalo-suspects-hateful-propaganda-connects-black-americans-jews-rcna29390>; Helen Lewis, *The Intersectionality of Hate*, ATLANTIC (May 17, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/buffalo-shooting-anti-black-racist-ideology-anti-semitism/629891>.

<sup>313</sup> Eric K. Ward, *Skin in the Game: How Antisemitism Animates White Nationalism*, POL. RSCH. ASSOCS. (June 29, 2017), <https://politicalresearch.org/2017/06/29/skin-in-the-game-how-antisemitism-animates-white-nationalism>.

<sup>314</sup> Eric K. Ward, Keynote, *Skin in the Game Revisited*, 27 LEWIS & CLARK L. REV. 1047 (2024). One of the “four pillars” of the White House’s national antisemitism policy is to “[b]uild cross-community solidarity and collective action to counter hate” in recognition of the interconnection of different forms of bias. THE WHITE HOUSE, *supra* note 21, at 48–52.

<sup>315</sup> See, e.g., Daniel Byman, *When to Call a Terrorist a Terrorist*, FOREIGN POL’Y (Oct. 27, 2018, 11:35 PM), <https://foreignpolicy.com/2018/10/27/when-to-call-a-terrorist-a-terrorist>. *But see*, e.g., Shirin Sinnar, *Hate Crimes, Terrorism, and the Framing of White Supremacist Violence*, 110 CALIF. L. REV. 489 (2022) (warning of the risks that come with treating white supremacist crime as domestic terrorism); Rachael Hanna & Eric Halliday, *Discretion Without Oversight: The Federal Government’s Powers to Investigate and Prosecute Domestic Terrorism*, 55 LOY. L.A. L. REV. 775 (2022) (warning that the political speech and protests of diffuse movements can be classified as domestic terrorism); *see also* *Confronting the Rise in Anti-Semitic Domestic Terrorism: Hearing Before the Subcomm. on Intel. & Counterterrorism of the H. Comm. on Homeland Sec.*, 116th Cong. 7–19 (2020) (statement of Jonathan Greenblatt, CEO, Anti-Defamation League) (urging federal action to address the rise in antisemitism including passage of the Domestic Terrorism Prevention Act and examination of whether “violent white supremacist organizations overseas, those

growth of domestic extremism.<sup>316</sup> ADL's 2021 Audit of Antisemitic Incidents "recorded 484 antisemitic incidents attributed to known . . . extremist groups or individuals inspired by . . . extremist ideology. . . represent[ing] 18% of the total number of incidents" that year.<sup>317</sup> White supremacist groups or extremists were responsible for 422 antisemitic propaganda distributions, a 52% increase over the previous year.<sup>318</sup> In 2022, there was a 38% increase in white supremacist propaganda distributions, including "racist, antisemitic and anti-LGBTQ+ fliers, stickers, banners, graffiti and posters, as well as laser projections."<sup>319</sup> The 2022 ADL Audit found "high volume increases in organized white supremacist propaganda activity (102% increase to 852 incidents)."<sup>320</sup> The Goyim Defense League, a loose network of antisemitic extremists, instigated other antisemitic activity in 2021<sup>321</sup> and took credit for the banners on a Los Angeles freeway approving of Ye's antisemitic statements.<sup>322</sup> New York, with its comparatively large Jewish population, "led the nation in antisemitic incidents" in 2020 and 2021.<sup>323</sup> Law enforcement representatives have been warning of the dangers of domestic terrorism for some time. The Department of Homeland Security has issued bulletins on the threat of domestic terrorism from lone wolves or members of small groups with ideological beliefs.<sup>324</sup> Whatever

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frequently connecting with and inspiring equally violent hate groups here at home meet the criteria to be designated Foreign Terrorist Organizations." It is beyond the scope of this Article to take a position on questions relating to the legal treatment of extremist white supremacist activity in the United States.

<sup>316</sup> ADL, HATE IN THE EMPIRE STATE, *supra* note 77, at 6 ("[I]n 2021, the department released four terrorism advisory bulletins, underscoring a uniquely heightened threat environment. In March 2021, the Office of the Director of National Intelligence released a report specifically highlighting the increased threat posed by Domestic Violent Extremists (DVEs). This assessment stated that 'racially or ethnically motivated violent extremists (RMVEs) and militia violent extremists (MVEs) present the most lethal DVE threats' and are most likely to conduct mass casualty attacks.").

<sup>317</sup> See 2021 ADL AUDIT, *supra* note 62, at 5.

<sup>318</sup> *Id.* at 5–6.

<sup>319</sup> *White Supremacist Propaganda Soars to All-Time High in 2022*, ANTI-DEFAMATION LEAGUE (Mar. 8, 2023), <https://extremismterms.adl.org/resources/report/white-supremacist-propaganda-soars-all-time-high-2022>.

<sup>320</sup> 2022 ADL AUDIT, *supra* note 61, at 11.

<sup>321</sup> 2021 ADL AUDIT, *supra* note 62, at 6.

<sup>322</sup> *E.g.*, A.J. McDougall, *White Supremacist Group Hangs Antisemitic, Pro-Kanye Banner Over L.A. Highway*, DAILY BEAST (Oct. 23, 2022, 3:54 PM), <https://www.thedailybeast.com/antisemitic-white-supremacist-group-hangs-kanye-was-right-about-the-jews-banner-over-los-angeles-highway>.

<sup>323</sup> ADL, *supra* note 77, at 21.

<sup>324</sup> *E.g.*, DEP'T OF HOMELAND SEC., NATIONAL TERRORISM ADVISORY SYSTEM BULLETIN (June 7, 2022), <https://www.dhs.gov/ntas/advisory/national-terrorism-advisory-system-bulletin-june-7-2022> (providing list of past incidents motivated by white supremacist, racist and antisemitic incidents).

the controversy over whether or not this development should be addressed under the legal rubrics previously limited to international terrorism,<sup>325</sup> the point here is to emphasize that antisemitism is central to the ideas of the extreme right which also target African Americans and other non-white persons.

White supremacist groups have been engaging in a rebranding campaign to mainstream their ideas. The recharacterization of white power groups as the “alt-right” normalizes them and suggests that their views are and should be part of the discussion—that their views are respectable options.<sup>326</sup> They can look to the highly libertarian and speaker-protective interpretation of the First Amendment taken by the Roberts Court to suggest constitutional legitimization of their participation in the speech marketplace.<sup>327</sup> To the extent that antisemitism is normalized in the discourse emboldened by politicians and celebrities, far-right extremists can jump on that bandwagon without being targeted as extremist in their commitments. Antisemitism is a very useful tool in the rebranding of white supremacy.

Antisemitism is also helpful in ideological networking for these groups. White power groups have begun to increase their effectiveness by engaging in collaboration and setting up networks of like-minded fascists.<sup>328</sup> Antisemitism can be seen as a gateway recruitment tool for the broader white nationalist agenda. Simply put, if “everybody hates the Jews” at least to some degree, then various white nationalist groups leading their charge with antisemitism first are likely to find common ground. Antisemitism is strategically used to unite the right against Jews and African Americans and to provide a common enemy to other marginalized groups.<sup>329</sup> In

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<sup>325</sup> See, e.g., Sinnar, *supra* note 315.

<sup>326</sup> See, e.g., Burton Speakman, *A Knight in Sheep's Clothing: Media Framing of the Alt-Right Can Alter the Image of Racist Groups*, 16 J. CREATIVE COMMUNISMS 81 (2021); Serge F. Kovaleski, Julie Turkewitz, Joseph Goldstein & Dan Barry, *An Alt-Right Makeover Shrouds the Swastikas*, N.Y. TIMES (Dec. 10, 2016), <https://www.nytimes.com/2016/12/10/us/alt-right-national-socialist-movement-white-supremacy.html>. For a discussion of alt-right groups and Christianity, see Christopher Ross, Note, *The Alt-Right, the Christian Right, and Implications on Free Speech*, 20 RUTGERS J. L. & RELIGION 47, 52–65 (2019).

<sup>327</sup> See Gary J. Simson, *The Roberts Court's Overprotection of Free Speech and the Perfect Storm with Social Media*, 90 TENN. L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4444810](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4444810).

<sup>328</sup> E.g., ANTI-DEFAMATION LEAGUE, HATE BEYOND BORDERS, *supra* note 304, at 3–4, 7–8.

<sup>329</sup> See Elizabeth D. Katz, “Racial and Religious Democracy”: *Identity and Equality in Midcentury Courts*, 72 STAN. L. REV. 1467, 1467 (2020) (describing how “the intersection of racial and religious identities has meaningfully influenced legal and political efforts to achieve equality.”); Rachel Kranson, *Rethinking the Historiography of American Antisemitism in the Wake of the Pittsburgh Shooting*, 105 AM. JEWISH HIST. 247, 251 (2021). (“American racism does not compete with antisemitism but amplifies it . . .”); DEBORAH LIPSTADT, ANTISEMITISM HERE AND NOW xi (2019) (“[A]ntisemitism flourishes in a society that is intolerant of others, be they immigrants or racial or religious minorities. When expressions of contempt for one group become normative, it is virtually inevitable that similar hatred will be directed at other groups.”). In toto,

addition, these groups can exploit antisemitism strategically as a wedge-creating tactic between Jews and other groups, either to differentiate or to conflate different sorts of prejudices whenever they think it would advance their broader aims.

Without stripping antisemitism and other prejudices of their particularity, it should be broadly recognized that prejudice against Jews is a critical tool deployed by racists of all stripes to advance the broader socio-political agendas of white power groups in America today. Antisemitism is a central tenet of white power movements, and white power movements are today a key threat to American democracy. In the words of Michael Dyson when addressing the controversy over Ye's antisemitic comments, "Until we see antisemitism as a toxic species of white supremacy that threatens Black security and democracy's future, none of us are truly safe."<sup>330</sup> January 6th, with its overtones of antisemitism and white nationalism, was a chilling example of large numbers of Americans' willingness to overthrow a democratically-elected government through violent means if they are fed conspiracist disinformation about a stolen election.<sup>331</sup> White nationalist extremists have doubtless been emboldened by their public recognition in right-wing Republican circles. But the split between centrist and progressive wings of the Democratic party on the issue of Jews, Israel, Zionism, and antisemitism is likely to embolden white supremacists as well.<sup>332</sup> This should serve to underline the urgency of weaponized antisemitism as a problem spreading beyond Jewish communities and affecting American democracy itself.

It is both a moral and political imperative for Republican politicians to distance themselves from white supremacists in both rhetoric and association. Conservative

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then, white power groups amplify antisemitism, render at least some aspects of it socially acceptable, help attract and persuade audiences to adopt views denigrating Jews, and reinforce anti-Black racism at the same time.

<sup>330</sup> Michael Eric Dyson, Opinion, *Blacks and Jews, Again*, N.Y. TIMES (Nov. 20, 2022), <https://www.nytimes.com/2022/11/20/opinion/kyrie-irving-kanye-west-antisemitism.html>.

Politics too can draw a through line between antisemitism and white nationalism. As noted above, antisemitism is strategically used by politicians to achieve their own political objectives. Voters' awareness of politicians' strategies surely improves the process of self-governance in democracy.

<sup>331</sup> See, e.g., Schor, *supra* note 93; Masciotra, *supra* note 305.

<sup>332</sup> White supremacists have incentives to take advantage of differences in the Democratic party over the Israel-Palestine conflict in whatever ways they can. Already, some white supremacists disingenuously claim to support the Palestinian cause and may well seek cover for their views by parroting the language of anti-Zionist progressives. ADL reports that one white supremacist, Matthew Parrott, explicitly claimed to "stand in solidarity with the Palestinian people" and called for Jews to "cease and desist their genocidal campaigns." *White Supremacist Leaders Applaud Hamas and Violence Against Israelis*, *supra* note 95 (also reporting Parrott's assertion that the attack on Israel was "the very opposite of 'unprovoked'"). On October 8, 2023, the neo-Nazi group Natsoc Florida posted, "The Israeli people deserve zero sympathy. Fuck Israel. They deserve everything that is happening to them right now. I sincerely hope that Hezbollah and the Taliban are able to make it to the fight." *Id.*

politicians should stop legitimizing white supremacy through deeds, words, platforms, and silence. Progressive leaders as well should acknowledge the critical role of antisemitism in organizing an insidious and increasingly confident white nationalist movement. Instead of dismissing Jewish concerns about antisemitism simply as right-wing political propaganda, progressives should acknowledge that antisemitism is a powerful tool in the weaponization of white nationalism. If not, the disputes among politicians and partisans about the boundaries of antisemitism will too easily distract from the political and ideological ground gained by groups whose fundamental tenets are perilous for democracy and a pluralistic society.

## CONCLUSION

Antisemitic expression and behavior have been increasing notably in the United States, gaining strength from the refusals of some notable politicians to divorce themselves from antisemitic remarks or groups, the normalization of antisemitic tropes in the words of some lawmakers and celebrities, the strategic social media messaging of growing white nationalist groups, the social disequilibrium ushered in by the COVID pandemic, and the recent Israel-Hamas war responding to Hamas's October 7, 2023 attack on Israelis. While many are focusing on the question of distinguishing between anti-Zionism and antisemitism, there is an apparent growth in, and normalization of, traditional and explicit antisemitism both online and IRL.

For some time, politicians have been using the apparent rise of antisemitism as a tool in their partisan political fights, lobbing charges of hypocrisy regarding antisemitism against each other as part of their political framing, public relations, and electoral strategies. Antisemitism has also been used as part of substantive political agendas—a tool to achieve broader ends than combating antisemitism itself. Republicans, for example, have been waging war on what they see as a leftward turn in academia and have deployed antisemitism on campus as a convenient vehicle to advance their fight. Democrats, in turn, have sought to distinguish antisemitism from anti-Israelism<sup>333</sup> and charged Republicans with wielding antisemitism as a political tool to appeal to white nationalist voters and to protect right-wing policies of Israel against Palestinian challenge.<sup>334</sup>

Recent conservative attempts to address antisemitism in the education context have produced controversial legal developments. Former President Trump's Executive Order 13899 interpreting Title VI as including antisemitic discrimination and

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<sup>333</sup> See, e.g., Rick Klein & MaryAlice Parks, *The Note: Democratic Unity Frays over Anti-Semitism and Israel*, ABC NEWS (Mar. 7, 2019, 3:00 AM), <https://abcnews.go.com/Politics/note-democratic-unity-frays-anti-semitism-israel/story?id=61510648>.

<sup>334</sup> See, e.g., Ron Kampeas, *At AIPAC, Republicans and Democrats Spar on What Defines Anti-Semitism*, JEWISH TELEGRAPHIC AGENCY (Mar. 26, 2019, 4:57 PM), <https://www.jta.org/2019/03/26/politics/at-aipac-republicans-and-democrats-spar-on-what-defines-anti-semitism>.

subsequent Florida law modeled on the Order both rely on the IHRA definition of antisemitism. This has led to controversy, with some groups opposing these initiatives on constitutional and public policy grounds, with a particular focus on the inclusion of certain types of anti-Israel speech as examples of possible antisemitism under the IHRA definition.

Further, a close look reveals that such legislative initiatives may be rendered toothless by the highly politicized right-wing “education culture wars” that have swept the nation. As is evident from recent Florida legislation, the state-level trend of scorched-earth “anti-woke” education statutes, which seek authoritative erasure of attempts to address systemic anti-Black racism, will likely crush at least some anti-antisemitism initiatives as well. Although they are not aimed at Jews, educational gag orders and book ban trends such as Florida’s are likely to sweep into their prohibitions such things as Holocaust study and books, critical Jewish and intersectional education, and liberal Jewish-focused theories and publications. Educational gag orders and anti-CRT laws are typically grounded on a highly individualistic ideology that would undermine a broad and rich account of antisemitism as well as anti-Black racism. In their breadth and vagueness, such statutes can easily apply to discussions of antisemitism as a conspiracy about group identity. Even if some of these education-focused initiatives fail in the courtroom in whole or in part, they have already had a notable *in terrorem* effect on educators, school administrators, and others dependent on legislative largesse. In the meantime, proponents of sanitized history and homogenized identity have every incentive to reframe and redraft around the legal roadblocks they encounter.

The recent education-focused legal initiatives to combat rising antisemitism—both at the federal and state level—have created controversy, invited litigation, threatened anti-Jewish backlash, and evidenced little practical success in combating the overall problem. A more holistic approach designed to minimize the politically instrumental use of antisemitism in partisan clashes and to resist the illiberal “anti-woke” educational culture wars could be more fruitful.<sup>335</sup> This is the moment for such a pivot, as the rising normalization of antisemitism is a crisis not only for Jews, but for democracy as a whole.<sup>336</sup> The ideology of antisemitism binds together the activities and strategies of white nationalists. Their broad authoritarian project involves not just antisemitic terrorization and otherization of Jews, but the destruction of American diversity in favor of a white, Christian, patriarchal, heterosexual, and gender-conforming nation with no room for, *inter alia*, Jews, Blacks, Muslims, LGBTQIA+ people, and non-European immigrants. To the extent we want American democracy to flourish, it behooves us to turn away from mere political theater, challenge white nationalism, and address antisemitism in ways that transcend partisan politics.

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<sup>335</sup> I will offer more discussion of the “whole society” approach recommended in the Biden Administration’s recent *U.S. National Strategy to Counter Antisemitism*, THE WHITE HOUSE, *supra* note 21, in future work.

<sup>336</sup> THE WHITE HOUSE, *supra* note 21, at 6, 9, 53.