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ESSAY

FREE SPEECH AS WHITE PRIVILEGE: RACIALIZATION, SUPPRESSION, AND THE PALESTINE EXCEPTION

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INTRODUCTION

Free speech is under siege. This is not to say that all speakers and viewpoints are at equal risk—some voices receive support and protection, while others are subject to threats and suppression. Pro-Palestinian speech falls into the latter category. Critics argue that there has long been a “Palestine Exception” to free speech,¹ but attempts to silence pro-Palestinian advocacy have dramatically increased since Israel began its assault on Gaza in October of 2023. This assault was launched after incursions by Hamas militants that killed approximately 1,200 Israelis.² In response, Israel has killed more than forty-six thousand Palestinians to

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¹ See Palestine Legal, *The Palestine Exception to Free Speech: A Movement Under Attack in the US* 4–5 (2015), <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/560c2e0ae4b083d9c363801d/1443638794172/Palestine+Exception+Report+Final.pdf> [https://perma.cc/W4JT-79UR].

² See Patrick Kingsley, Aaron Boxerman, Natan Odenheimer, Ronen Bergman & Marco Hernandez, *The Day Hamas Came*, N.Y. Times (Dec. 22, 2023), <https://www.nytimes.com/interactive/2023/12/22/world/europe/beeri-massacre.html>.

date³ and left over two million on the brink of famine and disease.⁴ The scale of destruction has been so vast that a United Nations Special Rapporteur has concluded that there are “reasonable grounds” to believe that Israel has been committing genocide in Gaza,⁵ and at least one U.S. Federal District Court has likewise found that Israel’s actions “may plausibly constitute a genocide in violation of international law.”⁶

This devastating war on Gaza has inspired widespread protests in support of Palestine on campuses and in cities across America,⁷ which has in turn elicited fierce backlash from defenders of Israel in government and other positions of authority.⁸ Much of this backlash has directly impinged upon academic freedom. While definitions of academic freedom may vary,⁹ the concept should at least encompass the right of the academic

³ See Emma Graham-Harrison, *The Devastating Impact of 15 Months of War on Gaza*, *The Guardian* (Jan. 15, 2025, 2:26 PM), <https://www.theguardian.com/world/2025/jan/15/the-devastating-impact-of-15-months-of-war-on-gaza>. This figure is based on reports from Gaza health officials. *Id.* An analysis by outside experts estimates that the number of deaths resulting from traumatic injury in Gaza is actually far higher, having reached 64,000 by June 2024. See Zeina Jamaluddine, Hanan Abukmail, Sarah Aly, Oona M R Campbell & Francesco Checchi, *Traumatic Injury Mortality in the Gaza Strip From Oct. 7, 2023, to June 30, 2024: A Capture-Recapture Analysis*, 405 *Lancet* 469, 469 (Feb. 8, 2025). If indirect deaths from destroyed health care infrastructure, lack of shelter, illness, and related factors are included, the total death count attributable to Israel’s military actions may exceed 186,000. See Rasha Khatib, Martin McKee & Salim Yusuf, *Counting the Dead in Gaza: Difficult but Essential*, 404 *Lancet* 237, 237 (July 10, 2024).

⁴ See Mark Landler, *Nowhere to Go: How Gaza Became a Mass Death Trap*, *N.Y. Times* (Oct. 7, 2024), <https://www.nytimes.com/2024/10/07/world/middleeast/gaza-civilians-deaths-israel-war.html>; Matthew Mpoke Bigg, *Gazans Are so Malnourished that They Could Face Famine, Report Warns*, *N.Y. Times* (Oct. 18, 2024), <https://www.nytimes.com/2024/10/17/world/middleeast/gaza-malnourished-famine-warnings.html>.

⁵ Francesca Albanese, *Hum. Rts. Council, Anatomy of a Genocide: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, at 1, U.N. Doc. A/HRC/55/73 (July 1, 2024) <https://www.un.org/unispal/document/anatomy-of-a-genocide-report-of-the-special-rapporteur-on-the-situation-of-human-rights-in-the-palestinian-territory-occupied-since-1967-to-human-rights-council-advance-unedited-version-a-hrc-55/> [https://perma.cc/7HHL-87FE].

⁶ *Def. for Child. Int’l-Palestine v. Biden*, 714 F. Supp. 3d 1160, 1163 (N.D. Cal. 2024).

⁷ See *A Snapshot of Support for Palestinians Across America*, *N.Y. Times* (Nov. 7, 2023), <https://www.nytimes.com/2023/11/04/us/protests-israels-gaza.html>; Colbi Edmonds, Anna Betts & Anemona Hartocollis, *What to Know About the Campus Protests Over the Israel-Hamas War*, *N.Y. Times* (Apr. 28, 2024), <https://www.nytimes.com/2024/04/17/us/college-protests-israel-hamas-war-antisemitism.html>.

⁸ See 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>.

⁹ See, e.g., Erwin Chemerinsky, *Education, The First Amendment, and the Constitution*, 92 *U. Cin. L. Rev.* 12, 14 (2023) (treating academic freedom as “the belief that teachers should

community to engage in research, teaching, and debate to advance knowledge and understanding on matters of public concern. Responses to pro-Palestinian speech in higher education have clearly compromised these values. Students have been arrested and subjected to institutional sanctions;¹⁰ faculty members have been censured and terminated;¹¹ and universities have been threatened with the prospect of losing their federal funding and accreditation if they allow pro-Palestinian protests on campus.¹²

Many supporters of Israel contend that restrictions on pro-Palestinian advocacy at colleges and universities are justified, arguing that much of this speech is antisemitic and makes some Jewish students feel unsafe.¹³ Others have suggested that there is a double standard between racism and antisemitism at play when universities fail to condemn some forms of pro-Palestinian speech, especially when speakers express support for Hamas's 2023 attack. For example, Berkeley School of Law Dean Erwin Chemerinsky asked in the pages of the *New York Times* if "anyone [thought] the officials would be silent if there was a Ku Klux Klan gathering on a college campus celebrating white supremacist violence?"¹⁴

be able to express themselves in their classrooms and in their scholarship, and students should be able to express themselves as well"); Robert C. Post, *Academic Freedom and Legal Scholarship*, 64 *J. Legal Educ.* 530, 533 (2015) (conceptualizing academic freedom as the right of a scholar to pursue their research and ideas freely); Am. Ass'n of Univ. Professors, 1940 Statement of Principles on Academic Freedom and Tenure, <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> [<https://perma.cc/VN9D-4V5T>].

¹⁰ See *Where Protestors on U.S. Campuses Have Been Arrested or Detained*, *N.Y. Times* (July 22, 2024, 8:30 PM), <https://www.nytimes.com/interactive/2024/us/pro-palestinian-college-protests-encampments.html>.

¹¹ Anemona Hartocollis, *Professors in Trouble Over Protests Wonder if Academic Freedom Is Dying*, *N.Y. Times* (Oct. 23, 2024), <https://www.nytimes.com/2024/10/23/us/faculty-protests-academic-freedom-tenure-discipline.html>; see also Stephanie Saul, *Columbia Professor Says She Was Pushed to Retire Because of Her Activism*, *N.Y. Times* (Jan. 10, 2025), <https://www.nytimes.com/2025/01/10/us/columbia-professor-katherine-franke-retires.html> (detailing how Columbia University faculty members were subject to investigation based on their advocacy on behalf of pro-Palestinian students).

¹² See Ed Pilkington, *Republicans Threaten to Punish Colleges That Allow Pro-Palestinian Protests*, *The Guardian* (Oct. 9, 2024, 5:00 AM), <https://www.theguardian.com/us-news/2024/oct/09/republicans-crackdown-universities-pro-palestinian-protests>.

¹³ See Zach Montague, *Campus Protest Investigations Hang Over Schools as New Academic Year Begins*, *N.Y. Times* (Oct. 5, 2024), <https://www.nytimes.com/2024/10/05/us/politics/college-campus-protests-investigations.html>.

¹⁴ Erwin Chemerinsky, *College Officials Must Condemn On-Campus Support for Hamas Violence*, *N.Y. Times* (Oct. 20, 2024), <https://www.nytimes.com/2024/10/20/opinion/hamas-colleges-free-speech.html>. Black and Jewish student groups at Berkeley issued statements criticizing Chemerinsky's piece, arguing that it "misappropriates Black suffering" and

Similarly, former Harvard University President Lawrence Summers declared it to be “inconceivable that the University would allow a Ku Klux Klan-allied student group to be recognized with access to funds and listservs.”¹⁵ The implication seems to be that the kind of anti-Black speech associated with the Klan would never be tolerated on college campuses, and that racialized minorities have been a special favorite of legal and institutional protection against hateful expression.

The problem with this argument is that it is demonstrably false. Not so very long ago, during my own time as a Harvard undergraduate, the Institute of Politics invited former Ku Klux Klan Grand Wizard David Duke to speak at the University’s Kennedy School of Government—and apparently had the audacity to ask the Black Student Association to cosponsor the event.¹⁶ Leaders of student groups ranging from the Harvard Democrats to the Harvard Republican Club to Harvard-Radcliffe Hillel were all quoted as supporting Duke’s right to speak on campus even if they disapproved of his message.¹⁷ A few months before that, a student was permitted to hang a Confederate flag from the entryway of her dormitory for several weeks despite its obvious connections to white supremacy and notwithstanding the strong objections and emotional pleas advanced by Black students.¹⁸ Nor has toleration of racist imagery and rhetoric been confined to the university setting. To the contrary, free speech doctrines have broadly and consistently functioned to give white

“weaponizes concerns for Jewish safety to manufacture further consent for a genocide.” Berkeley J. of Black L. & Pol’y & Berkeley L. Jews for Palestine, ‘Hypocritical and Insulting’: Black and Jewish Students at Berkeley Law Say Dean Chemerinsky Uses Them as Props to Vilify Palestine Solidarity Movement, *Daily Californian* (Oct. 25, 2024), https://www.dailycal.org/opinion/op-eds/hypocritical-and-insulting-black-and-jewish-students-at-berkeley-law-say-dean-chemerinsky-uses-them/article_9cbe4ccc-9299-11ef-bec1-83f03a661cc9.html [https://perma.cc/CY4X-M4VQ].

¹⁵ See Emma H. Haidar & Cam E. Kettles, Garber’s Statement on the PSC Ignites Controversy Over Institutional Voice Policy, *Harv. Crimson* (Oct. 10, 2024), <https://www.thecrimson.com/article/2024/10/10/garber-psc-statement-institutional-voice/> [https://perma.cc/GVD6-U3G2].

¹⁶ See Anna D. Wilde, BSA Will Not Sponsor Duke, *Harv. Crimson* (Dec. 19, 1991), <https://www.thecrimson.com/article/1991/12/19/bsa-will-not-sponsor-duke-pthe/> [https://perma.cc/FU7D-EQRB].

¹⁷ See Jonathan Samuels, Campus Groups Unite to Protest Possible Duke Visit, *Harv. Crimson* (Feb. 22, 1992), <https://www.thecrimson.com/article/1992/2/22/campus-groups-unit-e-to-protest-possible/> [https://perma.cc/SJA5-YVPB].

¹⁸ See S. Allen Counter Jr., The Hurtful Confederate Flag at Harvard, *Harv. Crimson* (Oct. 22, 2015), <https://www.thecrimson.com/article/2015/10/22/allen-counter-confederate-flag/> [https://perma.cc/DRN5-5KUH].

people the liberty to engage in hateful speech and to deny Black, Brown, and other racialized individuals the kinds of protection from fear and harm that supporters of Israel are now demanding. In other words, the Palestine Exception to free speech is real—and it is part of a deeper legal tradition that has enshrined free speech as an element of white privilege.

The remainder of this Essay illustrates the nexus between free speech and white privilege in the following way. Part I reviews the case law to document the courts' consistent refusal to limit racist expression by white actors targeting racialized groups. Part II then analyzes the ways in which the law has racialized Palestinians and Muslims as being both worthy of condemnation by hateful speakers and undeserving of legal protection for their own advocacy. Part III situates attacks on pro-Palestinian speech in the context of the wider movement to silence critical voices and scholarship. Finally, this Essay concludes by emphasizing the importance of academic freedom as a means of amplifying suppressed voices and advancing narratives that challenge existing allocations of power and privilege.

I. THE FIRST AMENDMENT AS A SHIELD FOR RACIST SPEECH

The idea that the First Amendment exists to protect all speech regardless of its content is nothing more than a comforting myth. Indeed, for the first 150 years or so after it was ratified, the First Amendment did not apply against state and local governments at all—meaning that states were free to regulate or punish speech on the basis of its message with impunity.¹⁹ Even in cases where the First Amendment's Speech Clause did apply, the Supreme Court allowed federal and state governments to criminalize dissenting speakers well into the twentieth century. The Court routinely upheld the convictions of anti-war activists, socialists, and other government protesters whose ideas were deemed to represent a “clear and

¹⁹ See, e.g., *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (declining to hold that the Fourteenth Amendment prohibits states from regulating speech, and noting that if it did, it would not “prevent the subsequent punishment of such as may be deemed contrary to the public welfare”); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 538 (1922) (“[T]he Constitution of the United States imposes upon the states no obligation to confer upon those within their jurisdiction either the right of free speech or the right of silence.”). The First Amendment's Speech Clause was not made applicable against the states until 1925, and even then it was held to allow the state to “punish those who abuse this freedom by utterances inimical to the public welfare.” *Gitlow v. New York*, 268 U.S. 652, 667 (1925).

present danger”²⁰ or a “revolutionary spark . . . [that] may burst into a sweeping and destructive conflagration.”²¹

The Court did not articulate a more protective test for evaluating potentially-inciteful speech until the latter years of the Warren Court era in *Brandenburg v. Ohio*.²² Notably, however, *Brandenburg* did not involve leftist activists or anti-war protesters; it involved white supremacists at a Ku Klux Klan rally. Several armed figures gathered around a burning cross and made numerous derogatory remarks about Black people, while a speaker clad in Klan regalia argued that “the n— should be returned to Africa, the Jew returned to Israel.”²³ The speaker added that “if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.”²⁴ Much like the defendants in previous cases, the speaker was convicted under a state statute that prohibited advocacy of using crime or violence as a means to accomplish political reform—but this time, the Court held that imposing punishment was beyond the reach of the law.²⁵ The mere possibility that his racist ideology and references to “revengeance” could provide a revolutionary spark was no longer sufficient.²⁶ At least with respect to the Klan, a much higher standard applied: the speaker could not be penalized unless he intended to incite “imminent lawless action” that was actually likely to ensue.²⁷

Yet in the more recent context of Black Lives Matter protests, there are signs that courts are backing away from this protective standard. *Doe v. McKesson*²⁸ is an instructive illustration. There, the U.S. Court of Appeals for the Fifth Circuit held that imposing civil liability on a protest organizer for injuries suffered by a police officer did not run afoul of the First Amendment—even though the defendant did not injure the officer himself and did not intentionally incite anyone else to do so.²⁹ It was enough that the defendant allegedly created “unreasonably unsafe” conditions by beginning the protest in front of a police station, leading it

²⁰ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

²¹ *Gitlow*, 268 U.S. at 669.

²² 395 U.S. 444 (1969).

²³ *Id.* at 445–47.

²⁴ *Id.* at 446.

²⁵ *Id.* at 448–49.

²⁶ *Id.* at 447–48.

²⁷ *Id.* at 447.

²⁸ 71 F.4th 278 (5th Cir. 2023).

²⁹ *Id.* at 291.

to a public highway, and failing to control the actions of fellow protestors along the way.³⁰ Although the district court subsequently rejected the officer's claim on remand,³¹ the case is still wending its way through the appellate process and may yet result in greater liability for the Black Lives Matter protestor in *McKesson* than was ever imposed on the Klansman in *Brandenburg*.

Similar moves to protect white privilege can be seen in other First Amendment settings. Consider the Supreme Court's treatment of "true threats" and "fighting words." The Court has recognized these as forms of speech that are not entitled to Constitutional protection. The government is accordingly free to prohibit and punish "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,"³² along with "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."³³ Etienne Toussaint notes that the fighting words doctrine has frequently been invoked in cases involving racially charged conflicts between Black citizens and the police, leading him to argue that Blackness itself has come to be regarded as a form of fighting words.³⁴

At the same time, racist white speakers have repeatedly escaped regulation and punishment under these doctrines. For instance, courts have held that neo-Nazis could not be prohibited from marching through a neighborhood containing thousands of Holocaust survivors, concluding that displaying swastikas and expressing hateful messages did not constitute fighting words or a sufficient threat to justify suppression.³⁵ The Supreme Court has likewise ruled that a state could not prosecute a white juvenile for burning a cross in a Black family's yard under an anti-racist crime ordinance, holding that the government cannot single out

³⁰ *Id.* at 292.

³¹ *Ford v. McKesson*, 739 F. Supp. 3d 344, 346–47 (M.D. La. 2024).

³² *Virginia v. Black*, 538 U.S. 343, 359 (2003).

³³ *Cohen v. California*, 403 U.S. 15, 20 (1971).

³⁴ Etienne C. Toussaint, *Blackness as Fighting Words*, 106 Va. L. Rev. Online 124, 145 (2020).

³⁵ See *Village of Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21, 26 (Ill. 1978); *Collin v. Smith*, 578 F.2d 1197, 1210 (7th Cir. 1978).

racist fighting words for particular punishment.³⁶ Similarly, in a case arising out of a Klan rally where members “talked real bad about the blacks and the Mexicans” and burned a cross, the Court invalidated a statute that made cross burning *prima facie* evidence of intent to intimidate—despite the obvious and undisputed links between cross burning, racialized hate, and threats of violence.³⁷

Critical race theorists have emphasized the deep and numerous ways that this sort of racist expression harms its targets and have argued that the First Amendment should allow for at least some narrowly focused restrictions on hate speech.³⁸ These arguments have proven unavailing. When it comes to racist expression, the Supreme Court has opined that “the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate.”³⁹ Thus, when state colleges and universities have attempted to adopt policies prohibiting racist speech, courts have generally invalidated the prohibitions on First Amendment grounds. Take the example of the University of Michigan. After a series of incidents including the distribution of a flier declaring “open season” on Black students and the display of a Klan uniform from a dorm window, the University adopted a policy prohibiting behavior that stigmatized other students on the basis of race, ethnicity, religion, and several other statuses.⁴⁰ A federal district court held the policy unconstitutional, explaining that while it was “sympathetic to the University’s obligation to ensure equal educational opportunities for all

³⁶ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). For a critical analysis of the case, see Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 *Vill. L. Rev.* 787 (1992).

³⁷ *Black*, 538 U.S. at 349, 367.

³⁸ See, e.g., Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 *Harv. C.R.-C.L. L. Rev.* 133, 134, 172–73 (1982) (acknowledging that restrictions such as torts for racial insults would trigger close scrutiny as content-based regulations of speech, but arguing that the government’s interest in eliminating harms of racism outweighs the speaker’s interest in uttering racial insults); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 *Mich. L. Rev.* 2320, 2356–58 (1989) (proposing three identifying characteristics to distinguish racist hate messages as part of a narrow definition of actionable racist speech); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 *Duke L.J.* 431, 449–57 (arguing that a narrowly drafted regulation to regulate racist speech can fit within existing First Amendment doctrine).

³⁹ *Matal v. Tam*, 582 U.S. 218, 246 (2017) (internal quotation marks omitted) (holding that Congress could not prohibit registration of racist or other disparaging trademarks).

⁴⁰ *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 853–54 (E.D. Mich. 1989).

of its students, such efforts must not be at the expense of free speech.”⁴¹ A University of Wisconsin policy authorizing discipline of students who made racist or discriminatory comments directed at other individuals met a similar fate in the courts.⁴² These examples are not outliers. According to Erwin Chemerinsky, hundreds of colleges and universities have attempted to enact measures regulating hateful speech over the years, and “every hate speech code challenged in any court has been declared unconstitutional.”⁴³

Despite the overwhelming weight of this caselaw, public officials and university administrators are now purporting to prohibit pro-Palestinian speech on campuses. An Executive Order from Texas Governor Greg Abbott provides an illustration. The order directs all Texas higher education institutions to “[r]eview and update free speech policies to address the sharp rise in antisemitic speech and acts on university campuses[,] establish appropriate punishments, including expulsion from the institution,” and ensure “that groups such as the Palestine Solidarity Committee and Students for Justice in Palestine are disciplined for violating these policies.”⁴⁴ The Chancellor of the State University System of Florida issued a comparable directive, advising university presidents that campus chapters of National Students for Justice in Palestine “must be deactivated.”⁴⁵

Recent actions by the federal government targeting pro-Palestinian speech have been even more draconian. The Trump Administration summarily cancelled \$400 million in grants to Columbia University in March 2025, claiming that the university has failed “to protect Jewish students from harassment and anti-Semitism.”⁴⁶ The government made clear that it would not even discuss restoring the funds unless Columbia adopted the Trump Administration’s preferred definition of antisemitism

⁴¹ *Id.* at 868.

⁴² *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991).

⁴³ Chemerinsky, *supra* note 9, at 25.

⁴⁴ 49 Tex. Reg. 2237 (Apr. 12, 2024).

⁴⁵ Memorandum from Ray Rodrigues, Chancellor, State Univ. Sys. of Fla., to State Univ. Sys. Presidents 1 (Oct. 24, 2023) [hereinafter Rodrigues], <https://www.flbog.edu/wp-content/uploads/2023/10/Deactivation-of-Students-for-Justice-in-Palestine.pdf> [https://perma.cc/5V PW-RDMH].

⁴⁶ DOJ, HHS, ED, and GSA Announce Initial Cancellation of Grants and Contracts to Columbia University Worth \$400 Million, U.S. Gen. Servs. Admin. (Mar. 7, 2025), <https://www.gsa.gov/about-us/newsroom/news-releases/doj-hhs-ed-and-gsa-announce-initial-cancellation-of-grants-and-contracts-03072025> [https://perma.cc/JE3N-7M6A].

and implemented a long list of disciplinary and administrative reforms, including placing the Department of Middle Eastern, South Asian, and African Studies under academic receivership.⁴⁷ The Department of Education subsequently sent letters to sixty other colleges and universities, warning that they may also face enforcement actions based on “the relentless antisemitic eruptions that have severely disrupted campus life for more than a year.”⁴⁸

How could such government orders even plausibly be defended as consistent with the First Amendment? And what explains the sudden enthusiasm to regulate speech on campus after racist speech has been tolerated so consistently for so long? As explained below, the answer lies in the racialization of Muslims and Palestinians as inherently threatening people who deserve to be condemned and silenced under the law.

II. THE RACIALIZATION OF MUSLIMS AND PALESTINIANS

Race is a social and legal construction that imputes essential characteristics to certain groups of people to justify their subordination.⁴⁹ Examples of this phenomenon abound throughout U.S. history. Black people have been racialized as biologically inferior and enslaveable;⁵⁰ Indigenous people as savages justifiably dispossessed and displaced from their lands;⁵¹ Asian immigrants and their descendants as unassimilable

⁴⁷ See Katherine Rosman, Legal Experts Question Trump’s Authority to Cancel Columbia’s Funding, N.Y. Times (Mar. 17, 2025), <https://www.nytimes.com/2025/03/17/nyregion/columbia-trump-administration-funding-fight.html>; Letter from Josh Bruenbaum, Comm’r of the Fed. Acquisition Serv., Gen. Svcs. Admin., Sean R. Keveney, Acting Gen. Couns., U.S. Dep’t Health & Hum. Svcs. & Thomas E. Wheeler, Acting Gen. Couns., U.S. Dep’t of Educ., to Katrina Armstrong, Interim President, Columbia University (Mar. 13, 2025) (on file with N.Y. Times).

⁴⁸ Press Release, U.S. Dep’t of Educ., U.S. Department of Education’s Office for Civil Rights Sends Letters to 60 Universities Under Investigation for Antisemitic Discrimination and Harassment (Mar. 10, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-office-civil-rights-sends-letters-60-universities-under-investigation-antisemitic-discrimination-and-harassment> [<https://perma.cc/9RRW-65EQ>].

⁴⁹ See, e.g., Ian F. Haney López, The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice, 29 Harv. C.R.-C.L. L. Rev. 1, 3 (1994); Khiara M. Bridges, The Dangerous Law of Biological Race, 82 Fordham L. Rev. 21, 24 (2013); Khiara M. Bridges, Critical Race Theory: A Primer 127–40 (2019).

⁵⁰ See Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1707, 1717–18 (1993).

⁵¹ See id. at 1721–22; Maggie Blackhawk, The Constitution of American Colonialism, 137 Harv. L. Rev. 1, 24 (2023).

foreigners subject to internment;⁵² Mexicans and Chicanos as dangerous criminals or indolent “wetbacks” rounded up for deportation.⁵³ And even before the attack on the World Trade Center in September of 2001, people perceived to be Arab or Muslim had been racialized as potential terrorists who posed a threat to national security.⁵⁴

Scholars have analyzed the myriad ways that U.S. law and culture have constructed this Islamophobic narrative.⁵⁵ One step in this process has been the conflation of Arab and Muslim identity. Despite the fact that a majority of Arabs in the United States are actually Christian, Americans have long assumed that all Arabs are Muslim and that all Muslims are Arab.⁵⁶ A second step has been the conflation of Muslims and terrorists. Movies and television typically depict Muslims in terrorist roles, news media frequently link Muslims with terrorism while downplaying the terroristic nature of white Christians who engage in acts of mass violence, and law enforcement agencies publicly fixate on the dangers of “Radical Islamic Extremism.”⁵⁷ Perhaps most famously, during his first campaign for the White House, Donald Trump argued that “Islam hates us” and called for a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.”⁵⁸ The Supreme Court upheld the Trump Administration’s ensuing “Muslim ban,” holding that it was plausibly related to its ostensible security objectives.⁵⁹ All of these factors have contributed to the

⁵² See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 *Calif. L. Rev.* 1241, 1287–88 (1993).

⁵³ See Haney López, *supra* note 49, at 33; René Reyes, *Critical Remembering: Amplifying, Analyzing, and Understanding the Legacy of Anti-Mexican Violence in the United States*, 26 *Harv. Latin Am. L. Rev.* 15, 38 (2023); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 *BYU L. Rev.* 1457, 1488 (2014).

⁵⁴ See, e.g., Sahar Aziz, *Racing Religion in the Palestine-Israel Discourse*, 118 *AJIL Unbound* 118, 119 (2024); Caroline Mala Corbin, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 *Fordham L. Rev.* 455, 458 (2017); Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 *N.Y.U. Ann. Surv. Am. L.* 29, 74 (2013).

⁵⁵ See Corbin, *supra* note 54, at 457–62; Aziz, *supra* note 54, at 119; Beydoun, *supra* note 54, at 43–48; see also Sahar Aziz, *The Racial Muslim: When Racism Quashes Religious Freedom* 4–6 (2022) (constructing a typology of “the Racial Muslim” to examine how and “why Islamophobia . . . has become entrenched in American race politics and in turn produces anti-Muslim racism”).

⁵⁶ Beydoun, *supra* note 54, at 37–38. And just as most Arab Americans are not Muslim, most Muslims are not Arab. See *id.* at 40.

⁵⁷ See Corbin, *supra* note 54, at 484; Aziz, *supra* note 54, at 119.

⁵⁸ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018).

⁵⁹ *Id.* at 2421–22.

racialized perception that “‘all terrorists are Muslim,’ which sometimes even morphs into ‘all Muslims are terrorists’”⁶⁰—even though statistics show that white supremacists and other right-wing extremists have been responsible for the vast majority of terrorist attacks in the United States.⁶¹

Professor Sahar Aziz has demonstrated how the racialization of Arabs and Muslims in general has applied to Palestinians in particular.⁶² American support for Israel has played a significant role in this process. This support has been based not just on geopolitical and strategic considerations that focus on regional stability, but also on cultural ones that characterize the conflict between Israelis and Palestinians as a clash between civilized democracy and violent barbarism.⁶³ Religious politics have also played a role. Donald Trump’s nominee to be U.S. ambassador to the United Nations has openly embraced the idea that Israel has a biblical claim to the entire West Bank,⁶⁴ and many American Evangelical Christians believe that the Jewish people’s return to the biblical Promised Land is linked to the second coming of Jesus.⁶⁵ The effect of such narratives has been to otherize practically all Palestinians as threats to “Judeo-Christian” civilization and whose aspirations of self-determination are framed as presumptively antisemitic.

In light of these narratives, it is not surprising that public figures in both Israel and the United States have suggested that Palestinians in Gaza should be held collectively responsible for Hamas’s October 2023 attack. One U.S. Congressman was quoted as saying Gaza should be bombed “like Nagasaki and Hiroshima,”⁶⁶ while another reportedly responded to a question about deaths of children in Gaza by saying “we should kill ’em

⁶⁰ Corbin, *supra* note 54, at 457.

⁶¹ *Id.* at 483.

⁶² See Aziz, *supra* note 54, at 121–23.

⁶³ See *id.* at 119–20.

⁶⁴ See Joseph Gedeon, Trump UN Nominee Backs Israeli Claims of Biblical Rights to West Bank, *The Guardian* (Jan. 21, 2025, 2:10 PM), <https://www.theguardian.com/us-news/2025/jan/21/trump-un-elise-stefanik-israel>.

⁶⁵ See Aziz, *supra* note 54, at 120; see also Ruth Graham & Anna Betts, For American Evangelicals Who Back Israel, ‘Neutrality Isn’t an Option’, *N.Y. Times* (Oct. 18, 2023), <https://www.nytimes.com/2023/10/15/us/american-evangelicals-israel-hamas.html> (explaining that many American Evangelicals believe that Israel’s existence is inextricably linked to the end times and the establishment of a divine theocratic kingdom on earth).

⁶⁶ Ramon Antonio Vargas, Congressman Rebuked for Call to Bomb Gaza ‘Like Nagasaki and Hiroshima’, *The Guardian* (Mar. 31, 2024, 9:41 AM), <https://www.theguardian.com/us-news/2024/mar/31/tim-walberg-republican-congressman-gaza>.

all.”⁶⁷ Even when not arguing for such an overwhelmingly eliminationist response, other voices have still maintained that support for Palestinian liberation is tantamount to antisemitism and endorsement of terror. For example, shortly after campus protests against Israel’s assault on Gaza began, the Anti-Defamation League issued an open letter to approximately 200 college and university presidents, urging them to investigate their local chapters of Students for Justice in Palestine (“SJP”) and suggesting that the group’s speech and advocacy could constitute “material support” for terrorism in violation of state and federal law.⁶⁸ The Chancellor of the Florida State University System made similar links between pro-Palestinian speech and support for terrorism in his letter when calling for the deactivation of SJP chapters referenced above.⁶⁹

Such efforts to connect pro-Palestinian speech with terrorism are not merely rhetorical gestures. The Trump Administration has recently moved to deport Mahmoud Khalil, a lawful permanent resident of the United States with Palestinian heritage who helped to lead campus protests at Columbia last year. Mr. Khalil has not been charged with any criminal offenses, but government officials have accused him of “siding with the terrorists” and argue that his advocacy has made him a “national security threat.”⁷⁰ Khalil’s lawyers have argued that he is being targeted for engaging in constitutionally protected speech,⁷¹ and the Trump Administration has not even attempted to deny that the removal proceedings are based on the content of his expression—to the contrary, Secretary of State Marco Rubio submitted a memorandum to the court asserting that Khalil’s “past, current, or expected beliefs, statements or

⁶⁷ Scotty T. Reid, US Congressman Andy Ogles Stirs Outrage with Gaza Comment—‘Kill Them All’, *Al Jazeera* (Feb. 21, 2024), <https://www.aljazeera.com/news/2024/2/21/us-congressman-andy-ogles-stirs-outrage-with-gaza-comment-kill-them-all> [<https://perma.cc/N4E9-4D89>].

⁶⁸ Letter from Jonathan A. Greenblatt, CEO & Nat’l Dir., Anti-Defamation League, Alyza D. Lewin, President, Louis D. Brandeis Ctr. for Hum. Rts. & Kenneth L. Marcus, Founder & Chairman, Louis D. Brandeis Ctr. for Hum. Rts., to Presidents of Colls. & Univs. (Oct. 25, 2023), <https://www.adl.org/resources/letter/adl-and-brandeis-center-letter-presidents-college-s-and-universities> [<https://perma.cc/6JBW-KAU7>].

⁶⁹ See Rodrigues, *supra* note 45.

⁷⁰ Minh Kim, Charlie Savage & Edward Wong, The U.S. Is Trying to Deport Mahmoud Khalil, a Legal Resident. Here’s What to Know., *N.Y. Times* (Mar. 12, 2025), <https://www.nytimes.com/2025/03/10/us/politics/mahmoud-khalil-legal-resident-deportation.html>.

⁷¹ See Amended Petition for Writ of Habeas Corpus & Complaint at 1, *Khalil v. Trump*, No. 25-cv-01935 (S.D.N.Y. Mar. 13, 2025); see also Court Cases: *Khalil v. Trump*, ACLU (Mar. 11, 2025), <https://www.aclu.org/cases/khalil-v-trump> [<https://perma.cc/TXJ2-XCX4>].

associations” made him deportable.⁷² A federal immigration judge apparently found this assertion sufficient and held that the government had met its burden to establish Khalil’s removability from the country.⁷³

Nor is Mr. Khalil’s case an isolated event. President Trump ominously boasted that Khalil’s detention is only “the first arrest of many to come,”⁷⁴ and subsequent events have borne out this threat. Mohsen Mahdawi, another Palestinian student who was active in campus protests at Columbia, was arrested when he showed up to take his citizenship test at an immigration center in Vermont and is now facing deportation proceedings as well.⁷⁵ Rümeyza Öztürk, a Turkish Ph.D. student at Tufts University, was seized on the street by federal agents while on her way to break Ramadan fast and has been targeted for removal for coauthoring a pro-Palestinian opinion piece in a campus newspaper.⁷⁶ Badar Khan Suri, a fellow at Georgetown University’s Prince Alwaleed bin Talal Center for Muslim-Christian Understanding, has likewise been detained and declared removable on the basis of pro-Palestinian social media posts.⁷⁷ None of these individuals has been charged with any crimes,⁷⁸ but rather they have been held because they dared to speak out on issues of grave humanitarian and political concern. Clearly, Palestinians have been racialized and otherized to such a degree as to place them outside the

⁷² U.S. Department of Homeland Security’s Submission of Documents at Tab A, Mahmoud Khalil (Exec. Office of Immigr. Rev., Immigr. Ct. La. Apr. 9, 2025). See also Jake Offenhartz, Pressed for Evidence Against Mahmoud Khalil, Government Cites Its Power to Deport People for Beliefs, Associated Press (Apr. 10, 2025, 8:32 PM), <https://apnews.com/article/mahmoud-khalil-columbia-university-trump-c60738368171289ae43177660def8d34>.

⁷³ See Jonah E. Bromwich, Immigration Judge Rules Khalil Can Be Deported, but Legal Hurdles Remain, N.Y. Times (Apr. 11, 2025), <https://www.nytimes.com/2025/04/11/nyregion/khalil-jena-deportation-ruling.html>.

⁷⁴ Ana Ley, Columbia Activist in Detention Was Public Face of Protest Against Israel, N.Y. Times (Mar. 20, 2025), <https://www.nytimes.com/2025/03/10/nyregion/mahmoud-khalil-ice-louisiana.html>.

⁷⁵ Sharon Otterman & Ana Ley, Columbia Activist Arrested by ICE at His Appointment for Citizenship, N.Y. Times (Apr. 14, 2025), <https://www.nytimes.com/2025/04/14/nyregion/columbia-student-palestinian-arrested-ice.html>.

⁷⁶ Jenna Russell, Safak Timur, Anemona Hartocollis & Eduardo Medina, Federal Government Detains International Student at Tufts, N.Y. Times (Mar. 26, 2025), <https://www.nytimes.com/2025/03/26/us/ice-tufts-student-detained-rumeysa-ozturk.html>.

⁷⁷ Hank Sanders & Zolan Kanno-Youngs, D.H.S. Detains a Georgetown University Academic, N.Y. Times (Mar. 19, 2025), <https://www.nytimes.com/2025/03/19/us/politics/georgetown-suri-detained.html>.

⁷⁸ See Otterman & Ley, *supra* note 75; Russell et al., *supra* note 76; Sanders & Kanno-Youngs, *supra* note 77.

scope of First Amendment and related protections that have long been afforded to other—and whiter—speakers.

To be sure, Jewish people have also been otherized under American law and culture in important ways. In addition to historical practices that restricted Jewish immigration and imposed quotas on Jewish admission to educational and social institutions, more recent examples of antisemitism are not hard to find.⁷⁹ Much of the Klan speech discussed in Part I included explicit antisemitic language alongside its anti-Black and Brown elements.⁸⁰ Just a few years ago, torch-bearing white supremacists chanted “Jew will not replace us” at a “Unite the Right” rally that was organized to protest the planned removal of Confederate monuments in Virginia.⁸¹ And let us not forget Marjorie Taylor Greene’s reported suggestion that California wildfires were caused by Jewish space lasers.⁸² But despite the undeniable reality and persistence of antisemitism, it remains the case that Jewish people have been accepted and racialized as white to a much greater degree than Arab and Muslim people have been⁸³—at least when doing so has served the interests of those seeking to defend existing allocations of white power and privilege.⁸⁴ As will be argued below, it is precisely this kind of selective and opportunistic embrace of white Judeo-Christian identity that lies behind many of the ongoing efforts to suppress pro-Palestinian speech, which are in turn part

⁷⁹ See Lili Levi, *Politicizing Antisemitism Amidst Today’s Educational Culture Wars*, 27 *Lewis & Clark L. Rev.* 1185, 1197–1211 (2024).

⁸⁰ See *supra* notes 22–37 and accompanying text.

⁸¹ See Hawes Spencer & Sheryl Gay Stolberg, *White Nationalists March on University of Virginia*, *N.Y. Times* (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/white-nationalists-rally-charlottesville-virginia.html>.

⁸² See Catie Edmondson, *Marjorie Taylor Greene’s Controversies Are Piling Up. Republicans Are Quiet.*, *N.Y. Times* (May 25, 2021), <https://www.nytimes.com/2021/01/29/us/politics/marjorie-taylor-greene-republicans.html>; Marina Dunbar, *Marjorie Taylor Greene Condemned Over Helene Weather Conspiracy Theory*, *The Guardian* (Oct. 7, 2024, 2:35 PM), <https://www.theguardian.com/us-news/2024/oct/07/marjorie-taylor-greene-hurricane-helene>.

⁸³ See Levi, *supra* note 79 at 1194–97 (arguing that American Jews have largely seen the United States “as an exceptional locus of safety” and assimilation); Aziz, *supra* note 54, at 119 (discussing post-World War II expansion of “the top rung of the racio-religious hierarchy to include Jewish and Catholic Americans of European origin as socially white”); Eric L. Goldstein, *Contesting the Categories: Jews and Government Racial Classification in the United States*, 19 *Jewish Hist.* 79, 96–98 (2005) (discussing American Jewish people’s own evolving and sometimes conflicted understanding of their relationship to whiteness).

⁸⁴ Cf. Derrick A. Bell, Jr., *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 *Harv. L. Rev.* 518, 523 (1980) (arguing that the interests of minority groups will only be advanced when they converge with the interests of the white majority).

of a broader effort to insulate white narratives from critical interrogation and analysis.

III. WHITE PRIVILEGE, CRITICAL SCHOLARSHIP, AND THE POWER OF NARRATIVE

One need not be a left-wing conspiracy theorist to discern links between efforts to silence pro-Palestinian speech and the larger conservative campaign against critical voices. Many conservative figures have explicitly and unabashedly emphasized the connections themselves.⁸⁵ Florida Governor Ron DeSantis, for instance, has argued that university diversity and inclusion initiatives are part of a “woke agenda” that has fueled “anti-Jewish” discrimination.⁸⁶ North Carolina Congressman Virginia Foxx has similarly argued that “the race-based ideology of the radical left” has taken hold on university campuses, and that “antisemitism and hate are among [its] poison fruits.”⁸⁷ It is thus no coincidence that states that have banned critical race theory (“CRT”) in schools have also been among the most aggressive in targeting pro-Palestinian student groups on campuses and in seeking to suppress their views.⁸⁸ Nor is it any coincidence that the Trump Administration is threatening to withhold funding from colleges and universities with Diversity, Equity, and Inclusion programs⁸⁹ at the same time that it is

⁸⁵ See Lerer & O’Brien, *supra* note 8.

⁸⁶ *Id.*

⁸⁷ 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>.

⁸⁸ Texas and Florida are two prominent examples. See *supra* notes 44–45 and accompanying text; see also Michael Powell, In Texas, a Battle Over What Can Be Taught, and What Books Can Be Read, *N.Y. Times* (June 22, 2023), <https://www.nytimes.com/2021/12/10/us/texas-critical-race-theory-ban-books.html> (discussing the fallout from Texas’s law that curtailed what public school teachers can teach about slavery and racism); Sarah Mervosh, DeSantis Faces Swell of Criticism Over Florida’s New Standards for Black History, *N.Y. Times* (July 21, 2023), <https://www.nytimes.com/2023/07/21/us/desantis-florida-black-history-standards.html> (reviewing public backlash against Florida’s rewritten standards on African-American history and related efforts to prohibit teaching of CRT).

⁸⁹ Letter from Craig Trainor, Acting Assistant Sec’y for C.R., U.S. Dep’t of Educ. (Feb. 14, 2025), <https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf> [<https://perma.cc/M6A5-5FGP>]; see also Sonja B. Starr, The Department of Education Threatens to Pull the Plug on Colleges, *N.Y. Times* (Feb. 26, 2025), <https://www.nytimes.com/2025/02/26/opinion/education-department-dei.html> (arguing that in attempting to regulate how schools teach race and implement Diversity, Equity, and Inclusion programs, the Department of Education “threaten[s] to punish speech by withdrawing funding”).

threatening similar enforcement measures against schools that it deems too permissive of Pro-Palestinian speech.

But what is really behind these bans, and what are their conservative white proponents so afraid of? These measures cannot credibly be defended as efforts to condemn all hateful speech or even all antisemitic speech—after all, at the same time that Ron DeSantis was calling for harsh measures again pro-Palestinian protestors on Florida campuses, he was pointedly refusing to condemn neo-Nazi demonstrators in the state who displayed swastikas and chanted “Jews get the rope.”⁹⁰ Instead, bans on CRT and pro-Palestinian speech are manifestations of a desire to protect self-serving accounts of American and Israeli exceptionalism with respect to freedom and democracy. They are also manifestations of white privilege and white fragility.⁹¹

One of the ways in which these bans reinforce white privilege and protect against white fragility is by excluding the experiences of racialized peoples from public narratives. This is in keeping with long historical practice in which dominant groups tell stories that make their superior position seem natural and just while simultaneously silencing counter-stories that might undermine the established social order.⁹² The furor over The 1619 Project is a paradigmatic case in point. This project, which began as an initiative in *The New York Times*, seeks “to reframe the country’s history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative.”⁹³ Accordingly, it locates the beginning of American history not at the signing of the Declaration of Independence in 1776, but at the arrival of the first slave ship off the coast of Virginia in 1619.⁹⁴ Nikole Hannah-Jones’s lead essay in the series emphasizes that recentring

⁹⁰ Nicholas Nehamas & Maggie Haberman, Vocal on Israel, DeSantis Is Challenged on His Silence on Neo-Nazis in Florida, N.Y. Times (Oct. 28, 2023), <https://www.nytimes.com/2023/10/28/us/politics/desantis-israel-antisemitism.html>.

⁹¹ See Caroline Mala Corbin, A Critical Race Theory Analysis of Critical Race Theory Bans, 14 U.C. Irvine L. Rev. 57, 60 (2024) (arguing that CRT bans “reflect white privilege and especially its companion, white fragility”).

⁹² Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411, 2412–13 (1989).

⁹³ The 1619 Project, N.Y. Times (Sept. 4, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html>.

⁹⁴ See Nikole Hannah-Jones, Our Democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True, N.Y. Times (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>.

American history in this way demonstrates that “[t]he United States is a nation founded on both an ideal and a lie.”⁹⁵

White conservatives reacted with predictable outrage. Some anti-CRT legislation expressly singled out the *Times*’s initiative by name, prohibiting school teachers from “requir[ing] an understanding of the 1619 Project” or from teaching that “slavery and racism are anything other than deviations from, betrayals of, or failures to live up to the authentic founding principles of the United States, which include liberty and equality.”⁹⁶ Efforts to amplify other long-suppressed narratives like the Tulsa Race Massacre of 1921⁹⁷ and the sustained campaign of anti-Mexican violence in the American Southwest in the 1910s⁹⁸ have been met with similar resistance from those who insist that white people should not be made to feel guilty for past acts of racist violence,⁹⁹ or who are eager to safeguard narratives of white heroism and valor from destabilization.¹⁰⁰

Bans on pro-Palestinian speech fall squarely within this pattern. As discussed in Part II above, the dominant narrative in the United States racializes Palestinians as terrorists. Companion narratives valorize the Zionists who established the modern state of Israel by analogizing them to the Pilgrims who settled in Massachusetts Bay or the Patriots who declared independence from Britain.¹⁰¹ These narratives serve to justify not only Israel’s actions in Gaza, but also America’s support for Israel. Counternarratives threaten to undermine the complacency surrounding this status quo. By amplifying and listening to the voices of Palestinians

⁹⁵ *Id.*

⁹⁶ See, e.g., Tex. Educ. Code Ann. § 28.0022 (West 2021).

⁹⁷ See generally Tulsa Race Massacre Symposium Issue, 57 *Tulsa L. Rev.* 1 (2021) (exploring the Tulsa Race Massacre of 1921 through a series of essays).

⁹⁸ See Monica Muñoz Martinez, *The Injustice Never Leaves You: Anti-Mexican Violence in Texas* 8 (2018) (describing how an account of history perpetuating a “celebratory version of events” and institutional negligence in recordkeeping has “bolstered efforts to erase this period of terror from state history”). See generally Reyes, *supra* note 53 (examining the systemic violence against ethnic Mexicans in Texas and the American Southwest to challenge the traditional narratives of heroism and progress surrounding this period).

⁹⁹ See generally Corbin, *supra* note 91, at 73 (noting that many CRT bans “try to ensure that no race is ever blamed for racial inequality or is made to feel bad about it”); Leah M. Watson, *The Anti-“Critical Race Theory” Campaign—Classroom Censorship and Racial Backlash by Another Name*, 58 *Harv. C.R.-C.L. L. Rev.* 487, 497 (2023) (arguing that limitations on the teaching of racism “distort, and often altogether erase, the lived experiences of BIPOC people in an ill-conceived effort to protect white students from guilt”).

¹⁰⁰ See Reyes, *supra* note 53, at 31–33.

¹⁰¹ See Ta-Nehisi Coates, *The Message* 175–180 (2024).

and their allies,¹⁰² we may come to see that much like the United States, Israel is itself “a nation founded on both an ideal and a lie”—i.e., it may well be a land of freedom and democracy for Jews, but it is a land of oppression and apartheid for Palestinians.

Recent examples of counternarratives demonstrate the point. In his new book, *The Message*, Ta-Nehisi Coates describes his own experience visiting Israel and Palestine.¹⁰³ Coates recounts numerous illustrations of the disconnect between the dominant narrative of Israeli democracy and the lived reality of Palestinian oppression, including Israeli control over all water in the occupied West Bank—even the rain that falls from the sky.¹⁰⁴ Palestinians cannot so much as gather this rainwater in cisterns without approval from the Israeli government.¹⁰⁵ In Coates’ words, “Israel had advanced beyond the Jim Crow South and segregated not just the pools and fountains but the water itself.”¹⁰⁶ These and the many other parallels between Israeli apartheid and American segregation left him with the realization “that there was still one place on the planet—under American patronage—that resembled the world that [his] parents were born into.”¹⁰⁷

Coates also emphasizes the extent to which these realities have been obscured by the elevation of Israeli narratives combined with the erasure of Palestinian voices in American media sources. Strikingly, Coates notes that less than two percent of opinion pieces about Palestine in major journals and newspapers from 1970 to 2019 were written by Palestinian authors.¹⁰⁸ This kind of silencing and erasure all but guarantees that most Americans will remain blissfully unaware of Palestinian perspectives on historical events and may also be ignorant of the underlying historical events themselves. How many Americans have ever heard of the Nakba, the forcible displacement of some 750,000 Palestinians from their ancestral homes that accompanied the creation of Israel in the 1940s?¹⁰⁹

¹⁰² For a collection of Palestinian perspectives on the Israeli occupation and the war on Gaza, see *From the River to the Sea: Essays for a Free Palestine* (Sai Englert, Michal Schatz & Rosie Warren eds., 2023).

¹⁰³ See generally Coates, *supra* note 101.

¹⁰⁴ See Coates, *supra* note 101, at 127–28.

¹⁰⁵ See *id.*

¹⁰⁶ *Id.* at 128.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 230.

¹⁰⁹ See Rabea Eghbariah, *Toward Nakba as a Legal Concept*, 124 *Colum. L. Rev.* 887, 889 (2024).

How might their understanding of Palestinians change if they knew their stories?

Yet ongoing threats to free speech and academic freedom make it difficult to even get these stories told. Indeed, the dominant narratives about Israel and Palestine are so well entrenched in American culture that it is not just conservative politicians that are seeking to defend them—even educational institutions that have more commonly been regarded as liberal have been suppressing counternarratives that tell a different story. When student editors at the *Columbia Law Review* first attempted to publish an article about the Nakba online, the board of faculty and alumni directors tried to delay publication and temporarily took down the journal’s website.¹¹⁰ A previous version of the article had also been pulled from publication by the *Harvard Law Review* after an emergency meeting of the editorial board.¹¹¹ Even when scholars and students have limited themselves to silent expression of solidarity, they have still faced repercussions: Harvard University recently went so far as to punish students for quietly studying in the library while wearing keffiyehs and displaying small signs saying “imagine it happened here” on their desks.¹¹² And these are some of the very same institutions that have been characterized by conservatives as places where “wokeism” has run amok and where antisemitism has been allowed to run unchecked!¹¹³

Acts of suppression have also been directed at Jewish voices that are supportive of Palestine and critical of Israel. In addition to suspending Students for Justice in Palestine, Columbia University suspended the local chapter of Jewish Voice for Peace¹¹⁴—a group that describes itself as “the

¹¹⁰ Sharon Otterman, *Columbia Law Review Website Is Taken Offline Over Article Criticizing Israel*, N.Y. Times (June 4, 2024), <https://www.nytimes.com/2024/06/04/nyregion/columbia-law-review-website.html>.

¹¹¹ *Id.*

¹¹² Michelle N. Amponsah & Joyce E. Kim, *Pro-Palestine Students Banned From Widener Library for 2 Weeks After ‘Study-In’ Protest*, Harv. Crimson (Oct. 3, 2024), <https://www.thecrimson.com/article/2024/10/3/students-suspended-library-palestine-protest/> [<https://perma.cc/787B-RWWU>].

¹¹³ See Anemona Hartocollis, *Republicans Try to Put Harvard, M.I.T. and Penn on the Defensive About Antisemitism*, N.Y. Times (Dec. 5, 2023), <https://www.nytimes.com/2023/12/05/us/harvard-university-of-pennsylvania-mit-antisemitism-congress.html>; Nicholas Fandos, Stephanie Saul & Sharon Otterman, *Columbia’s President Tells Congress that Action Is Needed Against Antisemitism*, N.Y. Times (Apr. 17, 2024), <https://www.nytimes.com/2024/04/17/nyregion/columbia-university-president-nemat-shafik-hearing.html>.

¹¹⁴ See Liset Cruz & Claire Fahy, *Columbia Faces Protests After Suspending 2 Pro-Palestinian Groups*, N.Y. Times (Nov. 15, 2023), <https://www.nytimes.com/2023/11/15/nyregion/columbia-university-ban-student-groups-israel-hamas-war.html>.

world's largest Jewish organization standing in solidarity with Palestine.”¹¹⁵ Other universities cancelled or postponed screenings of *Israelism*, an award-winning documentary directed by two Jewish filmmakers.¹¹⁶ The film focuses on the experiences of American Jews who grew up as staunchly Zionist and pro-Israel, but whose perspectives were dramatically changed when they visited the occupied territories and witnessed the realities of daily life for Palestinians.¹¹⁷ The film is thus another vivid illustration of both the dominance of conventional narratives and the destabilizing potential of counternarratives—which is presumably the reason that defenders of the conventional narrative are so eager to keep them out of the conversation. Academic freedom must serve as a counterweight to these censorious efforts.

CONCLUSION

The Supreme Court once opined that academic freedom “is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”¹¹⁸ The wide-ranging campaign to silence pro-Palestinian speech shows how far we have deviated from those principles. There is indeed a pall of orthodoxy over American classrooms, campuses, and culture—an orthodoxy that presents the United States and Israel as exceptional places of freedom and democracy and racializes Muslims and Palestinians as threats to the civilized order. Those are pernicious and racist narratives, and they are situated in a legal context in which the scope and limits of freedom of expression have been defined in ways that promote white privilege over racial equality.

Counternarratives have the potential to destabilize these harmful structures at both the legal and cultural level. With respect to legal doctrine, critical scholarship can highlight the systemic inequities and racial inconsistencies that are endemic in Free Speech and other areas of jurisprudence. At the level of cultural discourse, scholars can also amplify

¹¹⁵ Jewish Voice for Peace, <https://www.jewishvoiceforpeace.org/> [https://perma.cc/6FW5-5SK3].

¹¹⁶ See Vimal Patel & Anna Betts, Campus Crackdowns Have Chilling Effect on Pro-Palestinian Speech, N.Y. Times (Dec. 17, 2023), <https://www.nytimes.com/2023/12/17/us/campus-crackdowns-have-chilling-effect-on-pro-palestinian-speech.html>.

¹¹⁷ See *Israelism*, <https://www.israelismfilm.com/> [https://perma.cc/BQW3-2WHV].

¹¹⁸ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

the voices and experiences of those who have historically been marginalized or erased from the conversation. This Essay has endeavored to advance both of those goals in at least some small measure. But in order for these aspirations to be realized, counternarratives must be given “breathing space to survive.”¹¹⁹ Academic freedom can play a vital role in creating that breathing space. Scholars must have the courage and freedom to write; journals must have the courage and freedom to publish; students must have the courage and freedom to learn; and universities must have the courage and freedom to protect all of the above. Our collective humanity and decency may depend upon it.

¹¹⁹ NAACP v. Button, 371 U.S. 415, 433 (1963).