TITLE VI, ANTI-SEMITISM, AND THE PROBLEM OF COMPLIANCE

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Abstract

The Executive Order on Combatting Anti-Semitism issued by President Trump in December 2019 serves the salutary purpose of continuing the policy of the Obama administration authorizing the Department of Education to enforce Title VI of the Civil Rights Act of 1964 against anti-Semitic harassment in educational institutions as discrimination based on national origin. However, the definition of anti-Semitism that the Executive Order requires educational institutions to "consider" appears to regulate core political speech. If that definition is actually applied by ED in enforcement proceedings, it will infringe on the right to free speech protected by the First Amendment.

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INTRODUCTION

On December 11, 2019, President Trump issued an "Executive Order on Combatting Anti-Semitism" (the Executive Order), which in section 1 announced the policy of his administration "to enforce Title VI against prohibited forms of discrimination rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI."[1] The Executive Order was met with strong expressions of both approval and disapproval.[2] For the reasons discussed below, the Executive Order is salutary in applying Title VI's ban on national origin discrimination to anti-Semitism, but its definition of anti-Semitism is likely to have a chilling effect on protected speech relating to Israel. In the final analysis, much will depend on how the US Department of Education (ED) acts to enforce it. In the meantime, given the uncertainties created by the Executive Order, it will be difficult for college and university administrators to know how to fulfill their obligation to comply with Title VI in this context without infringing on the freedom of speech of students and faculty and academic freedom of their institutions as a whole.[3]

I. Background and Contents of the Executive Order

Title VI of the Civil Rights Act of 1964 provides that no individual may be excluded from participation in, be denied the benefits of, or otherwise be subjected

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1 https://www.whitehouse.gov/presidential-actions/executive-order-combatting-anti-semitism/.

2 On the pro side, see, for example, Jared Kushner, *President Trump Is Defending Jewish Students*, N.Y. Times (Dec. 11, 2019), https://www.nytimes.com/2019/12/11/opinion/hared-kushner-trump-anti-semitism.html; Chandler Thornton, *Trump Is Right to Take Aim at Anti-Semitism on College Campuses* (Dec. 12, 2019), https://www.cnn.com/2019/12/12/opinions/trump-is-right-to-take-aim-at-anti-semitism-on-college-campuses-thornton/index.html; *ADL Welcomes Executive Order Combatting Anti-Semitism*, https://www.adl.org/news/press-releases/adl-welcomes-executive-order-combatting-anti-semitism; Allison Kaplan Sommer, *"Harassment Is Not Free Speech": Trump's Anti-Semitism Czar Rejects Criticism Over Executive Order*, Haaretz (Dec. 18, 2019), https://www.haaretz.com/us-news/premium-trump-s-anti-semitism-czar-rejects-criticism-over-executive-order-1.8288943. On the con side, see, for example, Judith Butler, *Trump Elevates an Anti-Semitic Slur into Law*, Foreign Pol'y (Dec. 21, 2019), https://foreignpolicy/2019/12/21/trump-elevates-an-anti-semitic-slur-into-law/; Masha Gessen, *The Real Purpose of Trump's Executive Order on Anti-Semitism*, New Yorker (Dec. 12, 2019), https://newyorker.com/news/our-columnists/the-real-purpose-of-trumps-executive-order-on-anti-semitism; Eric Alterman, *Trump's Executive Order on Anti-Semitism Isn't About Protecting Jews*, The Nation (Dec. 19, 2019), https://www.thenation.com/article/executive-order-anti-semitism/; Michael Brenner, *Why President Trump's Executive Order to Fight Anti-Semitism Is Dangerous for Jews*, Washington Post, Dec. 15, 2019. For views that are both sympathetic to and critical of the Executive Order, see, for example, Noah Feldman, *The Strange Thing About Trump's Anti-Semitism Order*, Bloomberg (Dec. 12, 2019), https://www.bloomberg.com/opinion/articles/2019-12-12/trump-s-strange-anti-semitism-executive-order; Heather Mac Donald, *Opposing Anti-Semitism the Wrong Way*, City J. (Dec. 18, 2019), https://www.cityjournal.org/executive-order-anti-semitism; Tyler Coward, *Trump's Anti-Semitism Executive Order Undermines Campus Free Speech*, Nat'l Rev. (Dec. 16, 2019), https://www.nationalreview.com/2019/12/trumps-anti-semitism-executive-order-undermines-campus-free-speech/.

3 For a concise statement of the meaning of academic freedom, see *1940 Statement of Academic Freedom and Tenure*, AAUP, Policy Documents & Reports at 3–7 (10th ed. 2006), http://www.aaup.org/AAUP/pubsres/policydocs/contents//1940statement.htm. For a summary of the development of the principles of academic freedom and how its principles have been applied to a variety of issues, see Frederick P. Schaffer, *A Guide to Academic Freedom*, J. Collective Bargaining in the Acad. (Apr. 2014), https://thekeep.eiu.edu/cgi/viewcontent.cgi?article=1325&context=jcba.

to discrimination on the ground of "race, color or national origin" in connection with any program or activity receiving federal financial assistance, which include virtually all public and private colleges and universities. Unlike Title VII, which prohibits certain forms of discrimination in employment, Title VI does not prohibit discrimination on the ground of religion. Accordingly, ED's Office of Civil Rights (OCR) lacks authority to investigate and sanction incidences of religious discrimination in educational institutions.

The question of whether Title VI applies to anti-Semitism turns on the vexing issue of whether Jews are a group defined by religion only, or whether they also constitute a group defined by race or national origin. For more than forty years after the passage of Title VI, OCR apparently regarded Jews solely as a religious group and, accordingly, took no enforcement actions against complaints of anti-Semitism. This position became increasingly untenable as expressions of anti-Semitism on college campuses increased around the turn of the last century,[4] and the Obama administration responded accordingly.[5] A letter dated September 8, 2010, from Assistant Attorney for Civil Rights General Thomas E. Perez to Assistant Secretary of Education for Civil Rights Russlyn H. Ali stated that "[a]lthough Title VI does not prohibit discrimination on the basis of religion, discrimination against Jews, Muslims, Sikhs, and members of other groups violates Title VI when that discrimination is based on the group's actual or perceived shared ancestry or ethnic characteristics."[6] Then, in a guidance by Assistant Secretary Ali dated October 26, 2010, which dealt with the subject of bullying in educational institutions,[7] ED announced its position that "anti-Semitic harassment can trigger responsibilities under Title VI." The letter reasoned as follows:

> While Title VI does not cover discrimination based solely on religion, groups that face discrimination on the basis of actual or perceived shared ancestry

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4 *See* U.S. Comm'n on Civ. Rts., Campus Anti-Semitism (2006). There is a vast literature on the resurgence of anti-Semitism more generally, in the United States and across the globe—a subject that is beyond the scope of this article. For the most recent factual contribution to this literature, see ADL, Audit of Antisemitic Incidents 2019 (released May 12, 2020), https://www.adl.org/audit2019.

5 For an interesting exploration of the relationship between anti-Semitism and anti-Zionism and the background to the policy adopted by the Obama administration, see Kenneth L. Marcus, Jewish Identity and Civil Rights in America (2010). Mr. Marcus, in his earlier tenure as Assistant Secretary of Education for Civil Rights, issued a guidance dated September 13, 2004, that noted the increase in complaints of race or national origin discrimination commingled with aspects of religious discrimination against Arab Muslim, Sikh, and Jewish students; it went on to note that where such commingling occurred, OCR has jurisdiction to enforce Title VI's prohibition of national origin discrimination notwithstanding the presence of religious discrimination. Kenneth L. Marcus, *The New OCR Anti-Semitism Policy*, Scholars for Peace in the Middle East (Apr. 30, 2011), text at notes 7–12, https://spme.org/campus-news-climate/the-new-ocr-anti-semitism-policy/9758/#_ftnref7; Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 5 Wm. & Mary Bill Rts. J. 837, 838 (2007), https://scholarship.law.wm.edu/wmborj/vol15/iss3/4. Mr. Marcus left OCR shortly thereafter, and his analysis did not result in any enforcement action until it was adopted by the Obama administration in 2011.

6 Marcus, *The New OCR Anti-Semitism Policy, supra* note 5, at text accompanying note 9. The link to the DOJ website cited by Mr. Marcus has been removed.

7 https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html. Such guidance is commonly referred to as "Dear Colleague" letters because they take the form of letters to educational institutions containing the salutation "Dear Colleague."

> or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (*e.g.*, Muslims or Sikhs). Thus harassment against students who are members of any religious group triggers a school's Title VI responsibilities when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members religious practices. [footnotes omitted]

Although perhaps overdue, this policy was hardly unprecedented. In *Shaare Tefila Congregation v. Cobb*[8] the Supreme Court held that Jews could bring a claim for racial discrimination under the Reconstruction era Civil Rights Act guaranteeing all citizens "the same right ... as is enjoyed by white citizens ... to inherit, purchase, lease, sell, hold, and convey real and personal property."[9] The Court applied the reasoning of an earlier case involving Arabs[10] that at the time the statue was enacted, "race" was understood differently than it is today and that the law was "'intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.'"[11] Similarly, Title VII prohibits employment discrimination on the ground of national origin, and the regulations implementing Title VII have long defined national origin discrimination as including the denial of equal employment opportunity "because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."[12] To use more recent vocabulary, the meaning of national origin includes ethnicity.[13] Thus, it fits comfortably within established law and precedent to describe Jews as a group based on national origin as well as a religion.[14]

In sum, one thrust of the Executive Order is to reaffirm (in an admittedly dramatic fashion[15]) the policy of the Obama administration that Title VI prohibits anti-Semitic discrimination or harassment as well as discrimination against other

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8 481 U.S. 615 (1987).

9 42 U.S.C. § 1982.

10 St. Francis Coll. v. Al-Kazraji, 481 U.S. 604 (1987).

11 *Id*. at 617.

12 29 C.F.R. § 1606.1.

13 This is quite explicit in the Equal Opportunity Employment Commission's (EEOC) Overview of Title VII and in its Compliance Guidance. *See* https://www.eeoc.gov/laws/types/nationalorigin.cfm and https://www.eeoc.gov/laws/guidance/national-origin-guidance.cf.

14 Some of the most vehement criticism of the Executive Order came from those who viewed it as embodying the traditional anti-Semitic trope that Jews are a separate race or nationality, thus giving comfort to those who view Jews as the Other or believe they have dual loyalty. *See, e.g.*, Brenner, *supra* note 2. While perhaps understandable, such criticism is based on a misunderstanding of the meaning of national origin in the context of the civil rights laws.

15 As the policy of the Obama administration was announced in an ED guidance letter, it might have been expected that the continuation of that policy would take the same form. The use of an executive order for this purpose would appear to have been designed to achieve maximum political effect.

ethnic groups who share a common religion.[16] In that respect, and without regard to its political motivation, the Executive Order should be viewed as an unalloyed good.

II. The Executive Order's Definition of Anti-Semitism

However, the Executive Order goes on in section 2(a) to require federal agencies charged with enforcing Title VI to "consider" the following:

> (i) the non-legally binding working definition of anti-Semitism adopted on May 26, 2016, by the International Holocaust Remembrance Alliance (IHRA),[17] which states, "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"; and
>
> (ii) The "Contemporary Examples of Anti-Semitism" identified by the IHRA, to the extent that any examples might be useful as evidence of discriminatory intent.

Prior efforts had been made to effectuate the same result as the Executive Order, including consideration of a similar definition of anti-Semitism, through federal legislation.[18] Those efforts were unsuccessful largely due to concerns that the law would infringe on First Amendment rights.[19]

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16 It should be noted in this connection that during the Obama administration, OCR was sensitive to the First Amendment issues involved in allegations of anti-Semitism based on speech critical of Israel and/or supportive of Palestinian rights and dismissed complaints that were based on constitutionally protected speech. *See, e.g.*, Ctr. for Constitutional Rts., In Victory for Student Free Speech, Department of Education Dismisses Complaints (Sept. 4, 2013), https://ccrjustice.org/home/press-center/press-releases/victory-student-free-speech-department-education-dismisses.

17 The IHRA is an intergovernmental organization that unites governments and experts to strengthen, advance, and promote Holocaust education, research, and remembrance, and to uphold the commitments to the 2000 Stockholm Declaration. It currently has thirty-four member countries. *See* https://holocaustremembrance.com/about-us.

18 S. 10, Anti-Semitism Awareness Act of 2016, https://www.congress.gov/bill/114th-congress/senate-bill/10/text. The bill proposed defining anti-Semitism in accordance with the definition set forth by the Special Envoy to Monitor and Combat Anti-Semitism of the Department of State in the Fact Sheet issued on June 8, 2010, as adapted from the Working Definition of Anti-Semitism of the European Center on Racism and Xenophobia (now known as the European Agency for Fundamental Rights). A slightly revised version of that working definition was adopted by the IHRA in 2016. The bill was passed by the Senate but stalled in the House of Representatives. A similar bill was introduced but went nowhere in 2018 and 2019. *See* H.R. 2940, Anti-Semitism Awareness Act of 2018, https://www.congress.gov/bill/115th-congress/senate-bill/2940; S. 852, Anti-Semitism Awareness Act of 2019, https://www.congress.gov/bill/116th-congress/senate-bill/852/text.

19 *See, e.g.*, ACLU Letter, Oppose H.R. 6421/S. 10, The Anti-Semitism Awareness Act of 2016, https://www/aclu.org/letter/oppose-hr-6421s-10-anti-semitism-awareness-act-2016; Joe Cohn, *Problematic Campus Anti-Semitism Bill Clears Senate*, https://www.thefire.org/problematic-campus-anti-semitism-bill-clears-senate/; Carey Nelson et al., *What's Wrong with the Anti-Semitism Awareness Act*, Inside Higher Educ. (June 12, 2018), https://www.insidehighered.com/views/2018/06/12/criticism-anti-semitism-awareness-act-opinion; *ACLU Statement on Senate Introduction of "Anti-Semitism Awareness Act"* (May 23, 2018), https://www.aclu.org/press-releases/aclu-statement-senate-introduction-anti-semitism-awareness-act; Joe Cohn, *Anti-Semitism Awareness Act continues to threaten free speech on*

The working definition of anti-Semitism adopted by the IHRA, like all IHRA decisions, is not legally binding. It is also not a particularly good one. In addition to the vagueness of the term "a certain perception of Jews," the overall phrasing of the definition is exceedingly awkward; indeed, it reads as though it was translated from a language other than English. Moreover, the definition's scope does not include expressions of feelings other than hatred (such as contempt or a sense of superiority), or cultural expressions of anti-Semitism or actions (such as acts of discrimination) that are not usually thought of as rhetorical or physical manifestations.[20]

The more significant problem lies with the illustrations of anti-Semitism that accompany the IHRA working definition and that the Executive Order requires federal agencies to consider. Some of these illustrations involve familiar, historical stereotypes of and accusations against Jews as well as Holocaust denial.[21] Others relate to criticism of Israel. In the latter category, the IHRA illustrations begin with the following:

> Manifestations [of anti-Semitism] might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel

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campus (Apr. 12, 2019), https://www.thefire.org/anti-semitism-awareness-act-continues-to-threaten-free-speech-on-campus/.

20 See, for example, the following definition of anti-Semitism: "A persisting latent structure of hostile beliefs towards *Jews as a collectivity* manifested in *individuals* as attitudes, and in *culture* as myth, ideology, folklore and imagery, and in *actions*—social or legal discrimination, political mobilization against Jews, and collective or state violence—which results in and/or is designed to distance, displace, or destroy Jew as Jews" (emphasis in original). Helen Fein, *Dimensions of Antisemitism: Attitudes, Collective Accusations, and Actions, in* The Persisting: Sociological Perspectives and Social Contexts of Modern Antisemitism 67 (Helen Fein ed., 1987). *See generally* Deborah E. Lipstadt, Antisemitism Here and Now (2019).

21 The examples include a general introductory statement that "[a]ntisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for 'why things go wrong.'" It then lists specific examples, including the following:

- Making mendacious, dehumanizing, or stereotypical allegations about Jews as such or the power of Jews as collective—such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.
- Accusing Jews as a people of being responsible or real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.
- Denying the fact, scope or mechanisms (*e.g.*, gas chambers) or intentionality of the genocide of the Jewish people at the hands of Nationalist Socialist Germany and its supporters and accomplices during World War II (the Holocaust).
- Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
- Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.

Several others involve the application of certain traditional anti-Jewish stereotypes or accusations to Israel or Israelis or to Jews in light of the existence of Israel:

- Using the symbols and images associated with classic antisemitism (*e.g.*, claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.

* * *

- Holding Jews collectively responsible for actions of the state of Israel.

similar to that leveled against any other country cannot be regarded as antisemitic.

The IHRA definition goes on to list a number of contemporary examples of anti-Semitism including the following:

- Denying Jewish people their right to self-determination, e.g. by claiming that the existence of a State of Israel is a racist endeavor.
- Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.

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- Drawing comparisons of contemporary Israeli policy to that of the Nazis.

These examples are connected to an ongoing and fraught debate as to the extent to which anti-Semitism overlaps with anti-Zionism or alternatively hostility to the State of Israel.[22] On the one hand, arguments about Zionism and Israel are political arguments that are not logically connected to anti-Semitism and have not until recently been historically associated with anti-Semitism.[23] On the other hand, while criticism of Israeli policy is not necessarily anti-Semitic, it can be expressed in ways that indicate an underlying anti-Jewish animus or that help create an environment conducive to anti-Semitism. This is especially so when combined with the application of traditional anti-Semitic tropes and stereotypes to Israel and Israelis and/or what can be fairly characterized as an obsession with the injustices allegedly committed by Israel to the exclusion of all others.[24]

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22 *See, e.g.*, *Debate: Anti-Zionism Is Anti-Semitism*, INTELLIGENCE2, https://www.intelligencesquared.com/events/anti-zionsim-is-anti-semitism/. The first example quoted above does not explicitly mention anti-Zionism, but rather the denial of the Jewish people's "right to self-determination." However, for more than a century, the primary expression of that right to self-determination among the Jewish people has been the Zionist movement, and the primary goal of that movement for most of that period was the establishment of a homeland in Palestine in the form of a sovereign Jewish state. Moreover, the introduction to those illustrations and all of the examples cited refer to criticism of the State of Israel. Thus, the issue presented by the Executive Order concerns criticism of the State of Israel and its right to exist as a Jewish state; it matters not in this context whether the speech at issue is characterized as anti-Zionist or anti-Israel.

23 *See, e.g.*, Michael Walzer, *Anti-Zionism and Anti-Semitism*, DISSENT MAG. (Fall 2019), https://www.dissentmagazine.org/article/anti-zionism-and-anti-semitism. Dr. Walzer, a well-known political theorist who supports the right of Jews to a sovereign state of their own in Israel but is highly critical of Israel's occupation of the West Bank and Gaza and its discrimination against Palestinian citizens of Israel, concludes that "[w]hat's wrong with anti-Zionism is anti-Zionism itself. Whether you are an anti-Semite, a philo-Semite, or Semiticly indifferent, this is a very bad politics."

24 *See, e.g.*, ADL, WHAT. IS . . . ANTI-ISRAEL, ANTI-SEMITIC, ANTI-ZIONIST?, https://www/adl.org/resources/tools-and-strategies/what-is-anti-israel-anti-semitic-anti-zionst; AJC, ANTI-SEMITISM MASKED AS ANTI-ZIONISM, https://www.ajc.org/antisemitism-masked-as-anti-zionism. For rather more complex and sophisticated discussions of this issue, see David Hirsh, *Hostility to Israel and Antisemitism: Toward a Sociological Approach*, ENGAGEONLINE J. FOR THE STUDY OF ANTISEMITISM (2013), https://engageonline.wordpress.com/2013/07/18/hostility-to-israel-and-antisemitism-toward-a-sociological-approach-david-hirsh/; DAVID HIRSH, *Anti-Zionism and Antisemitism: Cosmopolitan Reflections*, Yale Initiative for the Interdisciplinary Study of Antisemitism Working Paper Series (2007), http://research.gold.ac.uk/2061/1/Hirsh_Yale_paper.pdf; ALVIN ROSENFELD, ANTI-ZIONSIM AND ANTISEMITISM: THE DYNAMICS OF DELEGITIMIZATION (2019).

III. The Potential Conflict Between the Executive Order and Freedom of Speech

Whatever one's view of the extent to which speech that is critical of Zionism or of the State of Israel may be anti-Semitic, the more critical problem with the Executive Order is that the IHRA working definition of anti-Semitism, with its illustrations that include certain types of anti-Zionist or anti-Israel speech, when incorporated into a legally enforceable test for discrimination, is likely to curtail or shut down debate and thereby infringe on free speech and academic freedom.

To begin with, the terms "targeting," "racist," and "double standards" are inherently vague, subjective, and difficult to apply. The strength of a people's claim to a sovereign state of its own necessarily depends on numerous historical, political, and economic circumstances. The same is true of evaluations of conduct relating to war or military occupation. Moreover, it is far from clear what evidence is to be considered on the issue of double standards. Is it sufficient to point to the speaker's silence on allegedly similar misconduct by states other than Israel, or would it be necessary to interrogate the speaker to determine his or her views, for example, on China's occupation of Tibet or treatment of the Uighurs or Syria's brutality in suppressing the uprising of its own people? Furthermore, does proof of double standards necessarily demonstrate a discriminatory intent? Might it not rather be the result, say in the case of the Palestinians, of their devotion to what they consider their homeland and an indifference to the national claims of Catalonians or Kurds? If so, does that mean that the analysis might depend on the identity of the speaker?[25] The vagueness of these terms leaves colleges and universities in the dark as to how to comply and makes them vulnerable to selective enforcement based on political or ideological preferences. This, in turn, may tend to create a chilling effect on what colleges and universities teach or what speech they permit as they seek to avoid controversial issues. These consequences are, of course, the types of harm that the First Amendment vagueness doctrine is intended to prevent.[26]

Furthermore, speech that denies the Jewish people the right to its own sovereign state or that criticizes Israeli government conduct is clearly core political speech. As the Supreme Court has reiterated on several occasions, "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'"[27] Such speech is protected by the First Amendment regardless of the speaker's hypocrisy or use of harsh language or inappropriate historical comparisons. The use of those examples as part of the working definition of anti-Semitism, leading to a determination by ED to terminate federal funding to a university, makes that definition overbroad and therefore violative of the Free Speech Clause of the First Amendment.[28]

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25 For example, one might well reach a different conclusion in the case of the double standards applied by certain left-wing Western intellectuals. *See* Mitchell Cohen, *Anti-Semitism and the Left That Doesn't Learn*, Dissent Mag. (Jan. 2008).

26 *See, e.g.*, Coates v. Cincinnati, 402 U.S. 611 (1971).

27 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)). *See also* FCC v. League of Women Voters, 468 U.S. 364, 378 (1984).

28 *See. e.g.*, Houston v. Hill, 482 U.S. 451 (1987).

Persuasive arguments along these lines against the use of the IHRA working definition in a legal context, including Title VI, have been made by one of its principal authors.[29]

The Executive Order does not ignore this issue entirely. It goes on to provide in section 2(b),

> In considering the materials described in subsections (a)(i) and (a)(ii) of this section, agencies shall not diminish or infringe upon any right protected under Federal law or under the First Amendment. As with all other Title VI complaints, the inquiry into whether a particular act constitutes discrimination prohibited by Title VI will require detailed analysis of the allegations.

The first sentence of that caveat may be seen as merely a restatement of the obvious—that the Executive Order cannot validly require consideration of the IHRA working definition and examples of anti-Semitism, if such consideration would engender a violation of First Amendment rights. Nevertheless, there is perhaps some benefit in reminding federal agencies of their obligation to interpret and apply the Executive Order in a manner consistent with those rights.[30] The

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29 *See, e.g.*, WRITTEN TESTIMONY OF KENNETH S. STERN BEFORE THE HOUSE JUDICIARY COMMITTEE (Nov. 7, 2017), https://docs.house.gov/meetings/JU/JU00/20171107/106610/HHRG-115-JU00-Wstate-SternK-20171107.pdf. Indeed, a well-known scholar of anti-Semitism, who believes that denying the right of Israel to exist as a Jewish state *is* anti-Semitic, nevertheless expresses strong opposition to efforts to restrict "offensive" speech on campus, including to "pass legislation defining anti-Semitism and determining when anti-Israel speech crosses the line into antisemitism," arguing that should restrictions on "offensive" speech be enacted, "those who speak on Israel's behalf would soon find themselves disinvited because they might make some students 'uncomfortable.'" LIPSTADT, *supra* note 20, at 189–90.

30 This is consistent with the long-standing policy of OCR that "the Federal civil rights laws it enforces protect students from prohibited discrimination, and are not intended to restrict expressive activities or speech protected under the U.S. Constitution's First Amendment." OCR, FAQS ON RACE AND NATIONAL ORIGIN DISCRIMINATION, https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html. OCR's answer to this particular FAQ on discrimination and the First Amendment goes on to state,

> The fact that discriminatory harassment involves speech, however, does not relieve the school of its obligation to respond if the speech contributes to a hostile environment. Schools can protect students from such harassment without running afoul of students' and staff First Amendment rights. For instance, in a situation where the First Amendment prohibits a public university from restricting the right of students to express persistent and pervasive derogatory opinions about a particular ethnic group, the university can instead meet its obligation by, among other steps, communicating a rejection of stereotypical, derogatory opinions and ensuring that competing views are heard. Similarly, educational institutions can establish a campus culture that is welcoming and respectful of the diverse linguistic, cultural, racial, and ethnic backgrounds of all students and institute campus climate checks to assess the effectiveness of the school's efforts to ensure that it is free from harassment. Schools can also encourage students on all sides of an issue to express disagreement over ideas or beliefs in a respectful manner. Schools should be alert to take more targeted responsive action when speech crosses over into direct threats or actionable speech or conduct.

These types of responses appear consistent with the protection of First Amendment rights and should be sufficient to comply with Title VI's provision prohibiting discrimination.

second sentence of section 2(b), read together with the final phrase of section 2(a)(ii), appears designed to give guidance on how to reconcile the Executive Order with the First Amendment by suggesting that speech falling within the examples accompanying the IHRA definition should be considered only as some evidence of an anti-Semitic intent and that such evidence must be evaluated in light of all the facts. For the reasons set forth below, that does not obviate the problem.

IV. Freedom of Speech and Hostile Environment Discrimination

Defenders of the approach taken by the Executive Order start with the well-established principle that national origin discrimination under Title VI may be proved by actions and/or speech that create a hostile environment—that is, that are sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the [educational] services, activities or privileges provided by a [college and university].[31] In this context, anti-Semitic speech is relevant evidence in determining both (1) whether the alleged discrimination is on the basis of national origin—in this case, whether it relates to the Jewishness of the target and (2) whether the speech is sufficiently severe (i.e., offensive) to create a hostile environment. Thus, it is argued, those forms of anti-Israel speech falling within the examples of anti-Semitic speech accompanying the IHRA working definition may be used to establish harassment on the basis of national origins even though the definition and accompanying illustrations constitute content-based regulation of speech.

This argument is in a sense an alternative approach to resolving the tension between free speech and the struggle against racial, sexual, and religious discrimination. One approach is to define and outlaw "hate speech," particularly within the university setting. This was attempted on several college campuses beginning approximately twenty years ago and was the subject of lively scholarly debate.[32] However, the courts made clear that "hate speech" was constitutionally protected speech and that efforts to ban it violated the First Amendment.[33] The courts applied those holdings

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31 OCR, Guidance on Racial Incidences and Harassment Against Students, 59 Fed. Reg. No. 47 (Mar. 10, 1994), https://www2.ed.gov/about/offices/list/ocr/docs/race394.html.

32 For views supporting the regulation of "hate speech", see, gfor example, J. Peter Byrne, *Racial Insults and Free Speech Within the University.* 79 Geo L.J. 399 (1991); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 N.w. U. L. Rev. 343 (1991); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431; Mari Matsuda, *Pubic Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2370–73 (1989). For views opposing the regulation of "hate speech", see, for example, Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. Cin. L. Rev. 1 (1991); David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 Cal. L. Rev. 825 (1991); Evan G.S. Siegel, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech*, 39 Emory L.J. 1351 (1990); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484. For a nuanced account of the issues and values involved that places the burden of persuasion on those who would restrict racist speech, see Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 Wm. & Mary L. Rev. 267 (1991).

33 *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

to university settings, and consistently struck down their speech codes.[34]

The second approach is to regulate offensive speech (as well as conduct, of course) as harassment creating a hostile environment depriving women and racial minorities of their equal rights. The relevant case law relates almost entirely to claims of employment discrimination in the workplace under Title VII of the Civil Rights Act of 1964.[35] Most of those claims, to the extent they depend on speech as well as action, involve speech consisting of epithets or sexually explicit images. However, as a number of scholars have pointed out, those epithets and images for the most part constitute speech protected by the First Amendment in other contexts; furthermore, courts have also considered core political or religious speech as evidence of the creation of a hostile environment.[36]

For the most part, parties have not raised free speech issues in these cases. Accordingly, courts have rarely had to consider the question of how to justify the regulation of speech in the context of workplace harassment claims. A few courts have addressed the issue and concluded that the imposition of liability on the employer, based on harassing speech, was proper because the employees were a captive audience.[37] The Supreme Court has not addressed the issue directly, although there are suggestive *dicta* in the Court's opinion in *R.A.V. v. City of St. Paul*.[38]

In that case, the Supreme Court struck down a St. Paul Bias-Motivated Crime Ordinance, which prohibited persons from placing "on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others *on the basis of race, color, creed,*

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34 *See, e.g.*, DeJohn v. Temple Univ., 537 F.3d 301 (3d Cir. 2008); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1182–85 (6th Cir. 1995); Roberts v. Haragan, 346 F. Supp. 2d 853, 867–73 (N.D. Tex. 2004); Bair v. Shippensburg Univ., 280 F. Supp. 2d 357 (M.D. Pa. 2003); Booher v. Bd. of Regents, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998*); UMW Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

35 Title VII makes it unlawful for an employer "to discriminate against any individual with respect to ... compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). According to EEOC Guidelines, which the courts have followed, such unlawful discrimination includes sexual harassment, which includes both "*quid pro quo*" harassment and "hostile environment" harassment. The latter form of harassment includes "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3) (1993). *See also Meritor Savings Bank v. Vinson,* 477 U.S. 57, 67 (1986), which added the requirement that to establish a claim for harassment, plaintiff must prove that the workplace conduct was sufficiently severe or pervasive to alter the condition of the victim's employment and create an abusive working environment.

36 *See* Richard J. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 Sup. Ct. Rev. 1, 8–9; Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791, 1800–16 (1992); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 Ohio State L.J. 481, 491–98 (1991).

37 See Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1535 (M.D. Fla. 1991); Resident Advisory Bd. v. Rizzo, 503 F. Supp. 383, 402 (E.D. Pa. 1980).

38 505 U.S. 377 (1992).

religion or gender."[39] In an opinion by Justice Scalia for a five-member majority, the Court accepted as authoritative the holding of the Minnesota Supreme Court that the ordinance reaches only those expressions that constitute "fighting words" within the meaning of *Chaplinsky v. New Hampshire*[40] and accepted without deciding that *Chaplinsky* remained good law. However, the opinion reasoned that even within the context of speech not protected by the First Amendment, the "government may not regulate on the basis of hostility—or favoritism—towards the underlying message expressed."[41] The Court therefore concluded that the ordinance was facially unconstitutional because the italicized language above, by selectively limiting the scope of the prohibition, made it impermissibly content-based and therefore violated the First Amendment.[42] The opinion acknowledged, however, that the prohibition against content discrimination is not absolute. It stated that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is '*justified* without reference to the content of the . . . speech.'"[43] As an example, the Court noted that "sexually derogatory 'fighting words', among other words, may produce a violation of Title VII's prohibition against sexual discrimination in employment practices."[44] That language was specifically in response to the statement in the concurring opinion of Justice White that the reasoning of the Court's opinion would mean that "hostile work environment claims based on sexual harassment should fail First Amendment review."[45]

It therefore appears that all members of the Court in *R.A.V.* (the five Justices who joined the opinion of Justice Scalia and the four concurring Justices) agree that speech, including unprotected "fighting words," as well as certain presumably protected "other words," may produce a hostile environment in violation of Title VII without infringing on the right of free speech. However, the opinion gives no clue as to what, if any, First Amendment limitations might apply. The Court has not addressed the issue again since *R.A.V.*[46]

Where the courts have been mostly silent, legal scholars have filled the gap. Professor Browne concludes that Title VII's prohibition of speech that creates a hostile environment is unconstitutional because it is vague, overbroad, and violative of the fundamental principle of First Amendment jurisprudence that government regulation of speech must be content neutral.[47] He specifically rejects

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39 *Id.* at 379 (emphasis added).

40 315 U.S. 568 (1942).

41 *R.A.V.*, 505 U.S. at 386.

42 *Id.* at 391–96.

43 *Id.*

44 *Id*.

45 *Id.* at 409–10.

46 The Court had an opportunity but declined to do so in *Harris v. Forklift Systems, Inc*., 510 U.S. 17 (1993), discussed in Fallon, *supra* note 36, at 1–12.

47 Browne, *supra* note 36, at 481.

the application of the "captive audience" doctrine to the workplace, arguing persuasively that the case law limits that doctrine to the home and that in any event it has never been used to justify content-based limitations on speech.[48]

Others have concluded that it is permissible for speech that would be protected from censorship under the First Amendment in other contexts to create liability for discrimination under Title VII but differ on the reasons why this should be so. Professor Post contends that racist speech may be regulated in the workplace because it is not an appropriate place for "public discourse," that is, the "communicative processes necessary for the formation of public opinion" or a "dialogue among autonomous self-governing citizens."[49]

Professor Volokh argues that harassment law suppresses speech by creating an incentive for employers to do so because offensive speech creates the risk of liability and is of no benefit to the employer. Moreover, that incentive is not mitigated by the requirement that the offensive speech be severe and pervasive. Employers are in no position to predict how courts will apply those vague terms to particular examples of speech that may offend some of their employees or to know how often the offensive speech has occurred in the past or will occur in the future. Accordingly, employers will tend to err on the side of caution and ban offensive speech regardless of whether a court might find it sufficient to create a hostile environment.[50] Professor Volokh further argues that none of the existing First Amendment exceptions apply to claims of hostile environment harassment.[51] He rejects Professor Post's approach on the ground that it ignores the fact that much public discourse does, in fact, take place in the workplace and that inasmuch as the First Amendment protects many categories of speech that do not qualify as "public discourse" as defined by Professor Post, there is no reason why it should not do so in the workplace.[52] Like Professor Browne, and for similar reasons, Professor Volokh also rejects the application of the "captive audience" doctrine to the workplace.[53] Instead, Professor Volokh argues that the regulation of certain speech in the workplace can be justified only by balancing the right of employees to free speech against the important governmental interest in preventing discrimination on the grounds of race, sex, or religion.[54] He proposes as the key factor in determining the outcome of such a balancing whether the harassing speech is directed to an unwilling listener who finds it offensive (which may give

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48 *Id.* at 516–20.

49 Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 Wm. & Mary L. Rev. 267, 288–89 (1990).

50 Volokh, *supra* note 36, at 1809–14.

51 *Id.* at 1819–43.

52 *Id.* at 1824–26. Professor Browne makes similar arguments against Professor Post's approach. Browne, *supra* note 36, at ___.

53 Volokh, *supra* note 36, at 1832–43.

54 Professor Strossen also adopts a balancing approach that is sensitive to the context and specific facts of each case but leaves uncertain the weight to be given to various factors and therefore precisely how a balancing test should be applied. Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 Vill. L. Rev. 757, 767–68 (1992).

rise to Title VII liability) or whether such speech is undirected (which may not give rise to Title VII liability).[55] In that connection, he argues against distinctions, based on a theory of a hierarchy of First Amendment values, between relatively low value speech, such as epithets, and high value speech, such as core political speech.[56]

Professor Fallon begins by agreeing with Professor Volokh that at least some of the speech that has been used to establish sexual harassment under Title VII does not fall within any of the exceptions to the First Amendment and cannot be regulated under any of the theories applicable to other contexts.[57] In addition, like Professor Volokh, Professor Fallon argues that there is a meaningful distinction between targeted and nontargeted speech.[58] However, Professor Fallon disagrees with Professor Volokh on at least three critical points. First, Professor Fallon argues that weight must be given to the particular characteristics of the workplace. Although he recognizes that the Supreme Court has hesitated to extend the "captive audience" doctrine, he nevertheless argues that a strong case can be made for treating employees as a captive audience because of the economic necessity of work, the high cost of changing jobs, the amount of time spent at the workplace, and the difficulty in responding to harassment, especially when it comes from or is sanctioned by those with authority.[59] Second, Professor Fallon argues that the tension between the First Amendment and the claim of harassment under Title VII is mitigated by the requirement that actionable harassment has an objective component—that is, plaintiff must prove that the harassing speech is sufficiently "severe or pervasive to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile."[60] Third, and most importantly, in balancing the right to free speech and against the interest in combatting discrimination, Professor Fallon argues that account must be taken of the relative value of the speech, with particular protection afforded to "reasoned contributions to political debate" as opposed to "gratuitously offensive or abusive but non-targeted speech."[61]

V. The Constitutionality of the Executive Order on Anti-Semitism

For the most part, the same factors relevant to the constitutionality of harassment law in the workplace setting under Title VII apply in the university setting under Title VI, whether or not account is taken of the Executive Order. What the Executive Order does, however, is make clear the precise extent to which protected speech may underlie claims of hostile environment and thereby give

55 Volokh, *supra* note 36, at 1843–67.

56 *Id.* at 1855–57.

57 Fallon, *supra* note 36, at 12–20.

58 *Id.* at 42.

59 *Id.* at 43.

60 *Id.* at 44–46 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). According to Professor Fallon, "a reasonableness standard seems crucial to the Supreme Court's understanding of the sphere of permissible regulation, and a 'reasonable victim' test provides the best mechanism yet proposed for accommodating the conflicting values at stake." *Id.* at 46.

61 *Id.* at 47.

specific focus to the First Amendment analysis. For the reasons discussed below, a finding of harassment based on the types of anti-Israel speech identified in the examples accompanying the IHRA working definition of anti-Semitism referenced in the Executive Order would be unconstitutional.

Let us consider first the setting. Some have argued that universities are an especially appropriate context for the regulation of "hate speech." There are several reasons why this might be so. First, the university should have the authority to regulate speech in furtherance of their educational mission and academic values, including speech not only as part of the curriculum and classroom instruction, but also within the wider university setting of the university.[62] Second, universities owe a duty of care to a young and vulnerable population.[63] Third, universities resemble workplaces in that it may be hard for students to avoid harassers on a college campus; harassment may interfere with the enjoyment of educational opportunities: and it is difficult and burdensome to change universities. Thus, like employees, students are a "captive audience."[64]

Others have argued that universities are an especially inappropriate place for the regulation of "hate speech." The weightiest of those arguments is that the universities are among the most important venues for the "marketplace of ideas" in which free and unrestricted speech is critical to their mission.[65] This is, of course, an idea to which the Supreme Court has lent support in its jurisprudence on the intersection between free speech and academic freedom.[66] Indeed, it appears well settled, despite some scholarly criticism of this conclusion, that state universities are state actors subject to *at least* the same First Amendment limitation in their regulation of speech as would apply to other venues.[67] In addition, except perhaps in the residential housing setting, students are not a "captive audience"; they are free to select their courses and extracurricular activities and programs and can choose whom to eat, drink, and hang out with. It is true that one often encounters some of the same people in dormitory, cafeteria, and classroom settings; however, one can usually avoid conversation with those whom one finds offensive. In any event, the "captive audience" doctrine does not apply to the type of content-based regulation of core political speech envisioned by the working definition of anti-

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62 Byrne, *supra* note 32, at 417–27.

63 Matsuda, *supra* note 32, at 2370–71; *See also* Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulations*, 82 Cal. L. Rev. 871, 887 (1994).

64 , *supra* note 36, at 52 . *See also* Note, *Racist Speech on Campus: A Title VII Slution to a First Amendment Problem*, 64 S. Cal. L. Rev. 105, 126 (1990).

65 *See, e.g.*, Nadine Strossen, Hate: Why We Should Resist It with Free Speech, Not Censorship 18–19 (2018).

66 *See, e.g.*, Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967).

67 *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Healy v. James, 408 U.S. 169, 200 (1972). Indeed, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court noted in *dicta* that "the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment."

Semitism referred to in the Executive Order.[68] Finally, it is clear from First Amendment case law that the courts do not regard university students as a particularly vulnerable population that needs protection from speech they may find offensive.[69]

In any event, two of the other, more critical factors, weigh against the effort to regulate as harassment the types of anti-Israel speech identified in the Executive Order. First, judging from reported incidents, such speech is usually nontargeted—generally occurring in the context of public lectures, demonstrations, handouts, and classrooms. To take a paradigmatic example, a student alleges that he is the victim of anti-Semitism and feels unwelcome and intimidated because of a number of forums and speeches sponsored by student groups at which speakers denounce Israel as an apartheid state, and students wave Palestinian flags and chant "from the river to the sea, Palestine shall be free." Such protected, nontargeted speech in a public place is clearly a case where students can and are required to avert their eyes and ears.[70]

The classroom setting may occasionally present a more complicated situation. Certainly, most classroom speech is directed to all members of the class and is therefore nontargeted. However, it may sometimes be directed at a particular student. For example, a teacher's statement in a class on the Israeli–Palestinian conflict that the Israeli Defense Forces had committed war crimes in connection with a particular military operation is nontargeted; however, if the teacher singles out a particular student who had served in the Israeli Defense Forces and for that reason calls her a murderer, it would be targeted.[71]

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68 *See Cohen v. Cal.*, 403 U.S. 15 (1971), where the the Court reversed the conviction, under a statute that prohibited "'maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person [by] offensive conduct," of a man who wore a jacket in the corridor outside a court bearing the words "Fuck the Draft." The Court found that the words on the jacket were not "fighting words" and were therefore protected by the First Amendment, because (1) they were not clearly directed to a particular hearer; (2) they were not intended to provoke a given group to a hostile reaction; and (3) persons confronted and offended by the jacket could simply avert their eyes and were thus not a captive audience, like persons subjected to a sound truck in their homes. *Id.* at 20–22. Instead, the Court found that this was a case that fell within "the usual rule that governmental bodies may not prescribe the form or content of individual expression." *Id.* at 24. The Court adopted a similar approach in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), striking down an ordinance that prohibited drive-in movie theaters with screens visible from public streets from showing films containing nudity. The Court reasoned that "[s]uch selective restrictions have been upheld only when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure" and, quoting *Cohen*, that otherwise "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting his eyes.'" *Id.* at 211.

69 The Supreme Court has never upheld a content-based restriction of speech in a university setting on that ground. On the contrary, it has consistently applied the same First Amendment analysis with respect to content-based regulations in the university settings as it does elsewhere. *See, e.g., Rosenberger*, 515 U.S. 819. Indeed, even in the context of public secondary schools, where the Court has upheld speech regulation that would not survive constitutional challenge in a university context, the Court has rejected the broad argument in favor of proscribing "offensive" speech because "much political speech might be offensive to some." Morse v. Frederick, 551 U.S. 393, 409 (2007). *See also* cases cited *supra* note 34.

70 *See Cohen*, 403 U.S. at 22.

71 *See, e.g., Hayut v. State University N.Y.*, 352 F.3d 733 (2d Cir. 2003), where the court found that a professor's classroom comments to a female student were sufficiently offensive, severe, and

Second, and most importantly, whatever characterizations one may choose to use, the examples of anti-Semitic speech relating to criticism of Israel that are part of the IHRA working definition of anti-Semitism represent core political speech, public discourse, or reasoned contributions to political debate, and thus deserving the highest level of protection under the First Amendment.[72] If such speech can serve as the basis for a finding of a hostile environment under Title VI, then no speech that some students may find offensive is safe on university campuses—whether it is criticism of affirmative action or of white privilege, condemnation of cultural appropriation or appreciation of intercultural exchange, critiques of colonialism or defenses, or colonialism. The current administration has chosen to focus on anti-Semitism; a future administration may focus on Islamophobia. It is noteworthy in this regard that even those who favor regulation of "hate speech" in university settings have generally limited it to epithets and other gross expressions of racial contempt and hostility.[73] Otherwise, the regulation of "hate speech," even if accomplished through the enforcement of laws against prohibited categories of harassment, rather than through speech codes, threatens to suppress any expression of controversial views.

Occasionally students (and even faculty) undertake to suppress views they consider offensive by interfering with the presentation of lectures or other forms of speech. This has occurred in several cases involving Israeli speakers or speakers viewed as pro-Israel.[74] Appropriate punitive and/or remedial action should be

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pervasive that a reasonable person could conclude that he had created a hostile environment. The professor repeatedly called the student "Monica" because of a purported resemblance to Monica Lewinsky and would ask her in class about "her weekend with Bill" and make other sexually suggestive remarks such as "[b]e quiet Monica, I will give you a cigar later."

72 The First Amendment analysis would be different in a case where personally abusive anti-Semitic epithets were directed at a Jewish student or a group of Jewish students for the purpose of evoking a hostile reaction. *See* discussion of *Cohen, supra* note 68.

73 For example, Professor Byrne argues in support of regulating only "racial insults," which he defines "as a verbal or symbolic expression by a member of one ethnic group that describes another ethnic group or an individual member of another group in terms conventionally derogatory, that offends members of the target group, and that a reasonable and unbiased observer, who understands the meaning of the words and the context of their use, would conclude was purposefully or recklessly abusive. Excluded from this definition are expressions that convey rational but offensive propositions that can be disputed by argument and evidence. An insult, so conceived, refers to a manner of speech that seeks to demean rather than to criticize, and to appeal to irrational fears and prejudices rather than to respect for others and informed judgment." Byrne, *supra* note 32, at 400. Professor Lawrence defended the Stanford University speech code ,which provided that "[s]peech or other expression constitutes harassment by personal vilification if it: a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and c) makes use of insulting or 'fighting'' words or non-verbal symbols." Lawrence, *supra* note 32, at 450–51. And Professor Matsuda would outlaw messages "of racial inferiority . . . directed against a historically oppressed group" which are "prosecutorial, hateful, and degrading." Matsuda, *supra* note 32, at 2357. None of these formulations appears to apply to the examples of anti-Israel speech cited by the IHRA working definition of anti-Semitism.

74 *See, e.g.*, Lucy Sheriff, *Kings College Investigates "Hate Attack" Against Israel's Ex-Secret Service Chief Ami Ayalon*, Huffington Post UK (Jan. 21, 2016), https://www.huffingtonpost.co.uk/2016/01/21/kings-college-london-hate-attack-israeli-ex-secret-service-ami-ayalon_n_9037882; Dale Carpenter, *Israeli Academic Shouted Down in Lecture at University of Minnesota*, Wash. Post, Nov. 14, 2015; Justus

taken regarding such misconduct that deprives other students of their opportunity and right to hear the speakers. However, unless the interference is accompanied by epithets or other clearly anti-Semitic language besides opposition to Israel, such incidents would appear to be based on political differences rather than harassment on the basis of national origin.[75]

It may be argued in defense of the Executive Order, as Professor Fallon argues in defense of harassment law generally under Title VII, that the impact on free speech is somewhat lessened by the objective test under Title VI requiring that the offensive speech be "sufficiently severe that it would have adversely affected the enjoyment of some aspect of the recipient's educational program by a reasonable person, of the same age and race as the victim, under similar circumstances."[76] Thus, for example, a Jewish student offended by anti-Israel speech would be required to establish that its impact is severe to a reasonable Jewish student.[77] Although there are clearly differing attitudes among Jewish students (as there are among other racial and ethnic groups), it would seem a plausible argument that Zionism is a central part of the Jewish identity of many students, and therefore harsh or unfair criticism of Israel has a severe effect.[78]

Reid Weiner, *The Threat to Freedom of Speech About Israel: Campus Shout-Downs and the Spirit of the First Amendment,* Jewish Pol. Stud. Rev. 6 (Spring 2013), https://www.jstor.org/stable/23611126?read-now=1&seq=1#metadata_info_tab_contents.

75 *Cf. Wisconsin v. Mitchell*, 508 U.S. 476 (1993), where the Court upheld a state hate-crimes statute that enhanced the sentence for bias-motivated assaults. The Court reasoned that a defendant's motive for committing an offense is traditionally a factor to be considered at sentencing and that "motive plays the same role under the Wisconsin statute as it does under federal and state anti-discrimination laws, which we have previously upheld against constitutional challenge." *Id.* at 487. It distinguished *R.A.V.* on the ground that "[w]hereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (*i.e.*, 'speech' or 'messages'), the statute in this case is aimed at conduct unprotected by the First Amendment." *Id.* at 487–88. The case presented by the Executive Order is more like *R.A.V.* than *Mitchell*. The IHRA working definition of anti-Semitism is directed at expression, not conduct. Moreover, there is nothing in *Mitchell* to support the use of core political speech as evidence of a bias-motivated offense. On the contrary, the evidence of bias there was the assailant's words: "There goes a white boy; go get him." *Id.* at 480.

76 OCR, *dsupra* note 31. This standard follows the precedents in sexual harassment cases under Title VII that define reasonableness from the perspective of a reasonable woman. *See, e.g.*, Andrews v. Phila., 895 F.2d 1469, 1483 (3d Cir. 1990); Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

77 Professor Fallon contends that in the context of sexual harassment cases under Title VII, a "reasonable woman standard should survive First Amendment scrutiny. Men can fairly be asked to take into account, and substantially adapt their behavior to, the understanding of reasonable women that speech is sufficiently threatening, abusive, demeaning, or unreasonably recurring to create a hostile and unequal work environment." Fallon, *supra* note 36, at 46. This makes sense in part because all men grow up and live their lives among women—mothers, sisters, friends, girlfriends, and/or wives. It is unclear whether the same always applies to racial, ethnic or religious minorities. For example, Jews make up approximately two percent of the U.S. population. It is doubtful whether most non-Jews even know which anti-Israel speech is offensive and severe to a "reasonable Jew"; however, it seems pretty clear that Palestinians and their supporters on college campuses are aware that for many Jews, their connection to Israel is a key part of their identity and that attacks on Israel, especially its right to exist as a Jewish state, are deeply offensive.

78 In a recent settlement of a lawsuit alleging discrimination against Jewish students at San Francisco State University prior to the issuance of the Executive Order, the university agreed to a number of remedial actions, including a public statement that "it understands that, for many Jews, Zionism is an important part of their identity.." *See* The Lawfare Project Press Release, California

Moreover, as noted above, Professor Volokh casts doubt on the mitigating effect of an objective standard, pointing out the practical incentives for an employer to err on the side of caution by prohibiting any instance of speech that anyone might find offensive and without regard as to how pervasive it is be found as the employer usually cannot know what other employees may find offensive or how pervasive such speech may be. It is unclear, however, and Professor Volokh cites no data, that harassment law has had the effect he predicts. In light of what appears to be the continued prevalence of offensive sexual and racial talk in the workplace, there is room for doubt. The reason for that may be that it takes a particularly determined employee to make a complaint to the employer and a particularly resourced or knowledgeable employee to obtain legal counsel to bring a lawsuit. However, as discussed below, the situation is quite different under Title VI and the university setting, where complaints are easy to make, and the chilling effect is likely to be real despite the "reasonable victim" standard.

VI. The Relevance of Government Enforcement of Title VI

When Title VI was enacted, its focus was to prohibit discrimination by the recipient of federal financial assistance—in this case colleges and universities. It was generally assumed at that time, in light of the history of segregation, that acts of discrimination would be by the administration or employees of the college or university. Over time, however, Title VI, like Title IX, was extended to include acts of discrimination or harassment by students against other students on the plausible theory that colleges and universities may not turn a blind eye to such misconduct but have a responsibility to respond in ways designed to discourage and/or remedy it.

Both OCR and university procedures make it easy for students to make complaints of racial and national origin discrimination.[79] In addition, a number of local and national organizations are available to assist them or to allege harassment even in the absence of a named complainant.[80] In response to a complaint, colleges and universities are required to conduct an investigation and then take any appropriate

State University (CSU) Agrees to Landmark Settlement with the Lawfare Project and Winston & Strawn LLP to Safeguard Jewish Students' Rights (Mar. 20, 2019), https://www.thelawfareproject.org/releases/2019/3/20/sfsu-settlement.

79 OCR provides an electronic complaint form for any claims of discrimination under Title VI. https://www2.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt. It is anomalous that although OCR mandates rather specific procedures at universities to ensure that students know how and where they can file complaints of gender discrimination under Title IX, it does not do so for complaints of racial or national origin discrimination under Title VI. However, it is common for universities to follow similar procedures with respect to the filing of all student complaints of discrimination. *See, e.g.*, The City University of New York Policy on Equal Opportunity and Non-Discrimination, https://www.cuny.edu/about/administration/offices/legal-affairs/policies-procedures/equal-opportunity-and-non-discrimination-policy/.

80 For a list of recent allegations of anti-Semitism on college campuses, virtually all of which involve to some degree of core political speech critical of Israel, see Lara Friedman, *Weaponizing Antisemitism Fears to Quash Campus Free Speech—Case Tracker*, Foundation for Middle East Peace, https://fmep.org/wp/wp-content/uploads/Targeting-US-AcademiaTitle-VI.pdf.

action in light of its findings.[81] OCR enforcement of Title VI usually takes the form of a review of the adequacy of such an investigation of and response to a complaint, although students or advocacy organizations sometimes file complaints directly with OCR.[82] In either case, because of the standard of "severe and pervasive," even if OCR is nominally addressing only a single complaint, it will often investigate and evaluate the institution's response to an aggregation or accumulation of complaints, or even of incidents that did not produce any complaint.[83] ED periodically makes the fact of such investigations public,[84] thereby impacting the reputation of the university, even when it later turns out there was no Title VI violation. And, of course, the ultimate sanction threatened by such investigations is loss of federal funds.

What this means for university administrators is that they must be exquisitely responsive to complaints of harassment, including anti-Semitic harassment, usually finding it necessary to conduct thorough (and therefore lengthy) investigations, sometimes with the assistance and expense of outside counsel.[85] If OCR opens an

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81 According to OCR's response to a frequently asked question concerning the responsibility of universities to address racial and national origin discrimination under Title VI: "When an educational institution knows or reasonably should know of possible racial or national origin harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. If an investigation reveals that the harassment created a hostile environment, the educational institution must take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects." https://www2.ed.gov/about/o ffices/list/ocr/frontpage/faq/race-origin.html. OCR has applied that requirement in connection with its investigations of complaints against universities. *See* Letter dated April 16, 2012 from OCR to the University of California, San Diego, https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html.

82 According to OCR's response to a frequently asked question concerning how it addresses racial and national origin discrimination against students, "OCR investigates and resolves allegations that educational institutions that are recipients of federal funds have failed to protect students from harassment based on race, color or national origin. Where OCR identifies concerns or violations, educational institutions often resolve them with agreements requiring the educational institutions to adopt effective anti-harassment policies and procedures, train staff and students, address the incidents in question, and take other steps to restore a nondiscriminatory environment." https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html.

83 This statement is based on the author's experience as general counsel of the largest urban public university system in the United States and discussions with other university counsel around the country.

84 *See* OCR, *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of October 2, 2020 7:30am Search*, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/index.html. *See also* OCR, U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i.

85 For example, in a case in which the author was personally involved, on February 22, 2016, the Zionist Organization of America wrote a letter to the Chancellor of the City University of New York setting forth numerous allegations of anti-Semitism. https://zoa.org/2016/02/10315402-letter-to-cuny-chancellor-and-board-of-trustees-jew-haters-spread-fear-at-cuny-colleges/. These allegations covered an extended period of time and several different campuses of the university system; many had previously been investigated and responded to. Nevertheless, the administration felt it necessary to retain a law firm to conduct a new and independent investigation. After six months, the investigators, who were both prominent lawyers—both former prosecutors and one a

investigation into the matter, the burden, expense, and publicity increase, and the university is under significant pressure to consider entering into an enforcement agreement with OCR, even when the facts do not seem to warrant a finding of a hostile environment. This does not necessarily mean that the prospect of Title VI enforcement has actually induced universities to regulate speech in ways that impinge on First Amendment rights or academic freedom. As with the workplace setting under Title VII, it is difficult to find good evidence supporting or rebutting the existence of a chilling effect. However, what is clear is that universities that permit or encourage a wide range of opinion and events on the issue of Israel/Palestine will pay a price in terms of the burden and expense of investigating complaints and responding to OCR investigations.

VII. The Challenge of Compliance with the Executive Order

Of course, universities and their communities will pay an even greater price—in the actual suppression of free speech—if the anti-Israel speech examples accompanying the IHRA working definition of anti-Semitism are in fact applied by ED to find harassment under Title VI. As noted above, the Executive Order does not explicitly adopt this definition but only requires that universities "consider" it. It is possible that ED will not rely on it, or will give it very little weight, as it evaluates the response of universities to particular claims of anti-Semitism. Accordingly, any constitutional challenge to the Executive Order on its face at this time would likely fail.[86]

Nevertheless, it would appear entirely possible that this administration will give priority to combating the resurgence of anti-Semitism on college campuses by vigorously enforcing compliance with the IHRA working definition of anti-Semitism over protecting First Amendment rights. Concern in this regard is increased by

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former federal judge—issued a report that "found that almost all of the alleged offensive speech was protected under the First Amendment, and that a few incidents of alleged conduct subject to discipline involved perpetrators who could not be identified. In one case where individuals could be identified, the report noted, the college in question disciplined the students responsible for violating university policy. The report also acknowledged that CUNY officials responded promptly and appropriately in condemning hateful speech and threatening conduct." *See* CUNY Anti-Semitism Report (Oct. 10, 2016), https://www1.cuny.edu/mu/forum/2016/10/10/cuny-anti-semitism-report/.

86 Challenges may often be made to the constitutionality of a statute or regulation on its face on the ground that it is vague and/or overbroad. However, where there is real uncertainty as to whether or how a government agency ED will apply the challenged provision, a court will be hesitant to entertain such a challenge. *See* Nat'l Endowment for the Arts [NEA] v. Finley, 524 U.S. 569 (1998). In that case, the Court rejected a facial challenge to a federal law authorizing NEA to make artistic grants on the basis of "artistic excellence and artistic merit . . . taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *Id.* at 576. As part of its reason for the decision, the Court held, "Given the varied interpretations of the criteria and the vague exhortation to 'take them into consideration', it seems unlikely that this provision will introduce any greater element of selectivity than the determination of 'artistic excellence' itself. And we are reluctant, in any event, to invalidate legislation 'on the basis of its hypothetical application to situations not before the Court.'" (Citation omitted.) *Id.* at 583–84. The Court, however, went on to note that particular applications of the statutory criteria might violate the Free Speech Clause if the denial of a grant were shown to be based on invidious viewpoint discrimination. *Id.* at 587. Here, too, it is likely that a court would decline to rule on the facial validity of the Executive Order, which requires only that the IHRA working definition of anti-Semitism be "considered"; rather, it would likely wait for a challenge to the Executive Order as applied.

Jared Kushner's op-ed in the *New York Times* in support of the Executive Order, stating that the IHRA definition "makes clear what our administration has stated publicly and on the record: Anti-Zionism is anti-Semitism."[87] That statement flatly contradicts the caveat contained in the Executive Order and portends an approach to enforcement that would completely ignore free speech rights.

In the meantime, universities must wait and see how OCR proceeds to enforce Title VI in light of the Executive Order in order to understand how to deal with its potentially conflicting obligations to prevent unlawful discrimination and to protect free speech. They are likely to remain in the dark for a long time. OCR investigations often take years to complete, and only when the results of a number of such investigations are known is it likely that colleges and universities will gain any sense of how OCR proposes to interpret and enforce the Executive Order. Other forms of guidance are not likely to be forthcoming.[88]

In sum, for the foreseeable future, colleges and universities must struggle as best they can to discourage and respond to campus anti-Semitism while adhering strictly to their obligation to protect free speech. When those goals appear to be in conflict, because of the examples accompanying the IHRA working definition of anti-Semitism referenced by the Executive Order, colleges and universities should adhere to the Executive Order's caveat that nothing in it is intended to infringe on the right of free speech. And in seeking to protect the right to free speech and academic freedom on campus,[89] they should act forcefully and even-handedly in response to *all* incidents in which students or faculty seek to suppress free speech—whether favorable to or critical of Israel.

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87 *See supra* note 2.

88 ED rarely promulgates formal regulations in the area of civil rights and generally issues guidance letters in a particular area only after it has completed a number of investigations and developed a consistent approach.

89 It is noteworthy that the first two complaints filed with OCR alleging anti-Semitic discrimination under Title VI, against Columbia University and UCLA, respectively, both involve allegations about criticism of Israel by professors or a visiting professor made in class. The details of the UCLA complaint, including a video of the lecture, can be found at https://equity.ucla.edu/public_accountability/transparent-progress/incident-in-anthro-lecture/. The Columbia complaint is not yet publicly available; an article based on a view of a redacted copy of the complaint, can be found at Rachel Frazin, *Columbia University Student First to File Anti-Semitism Complaint Under Trump Order*, The Hill (Dec. 26, 2019), https://thehill.com/homenews/administration/475980-columbia-university-student-first-to-file-anti-semitism-complaint. Since the speech in question was delivered by a teacher in a class in which the subject of Israel was relevant to the subject being taught, these claims appear to raise a core issue of academic freedom as well as free speech generally. More recently, OCR settled a complaint of anti-Semitism against New York University that predated the Executive Order. Although there was no finding of wrongdoing, the parties entered into an agreement in which the university agreed to add discrimination based on shared ancestry and ethnic characteristics, including anti-Semitism, to its nondiscrimination and antiharassment policy. According to the attorney for the complainant, NYU also agreed to adopt the IHRA working definition of anti-Semitism. However, according to a spokesman for NYU, the university agreed to adopt only the core definition without the examples and "will devise its own examples to implement the new policies and, in a statement, will affirm its long-held commitment to academic freedom and free speech." *See* Kery Murakami, *NYU Settles Anti-Semitism Case*, Inside Higher Educ. (Oct. 2, 2020), https://www.insidehighered.com/news/2020/10/02/new-york-university-settles-anti-semitism-case-education-department.