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## Israel, Palestine and the First Amendment: Introduction to the Special Issue

Omar M. Dajani\*

Is there an emerging Israel-Palestine exception to the First Amendment? The Constitution's protection of expressive freedom serves in part to ensure that democratic decision-making is based on informed, rigorous, and inclusive debate—a function as crucial to the development of foreign policy as to domestic governance. In *Israel, Palestine and the First Amendment*, the 2022 Symposium co-convened by the *University of the Pacific Law Review* and McGeorge School of Law's Global Center for Business and Development, we examined several contexts in which the boundaries of freedom of speech are being tested by the regulation of expression implicating the State of Israel and advocacy for Palestinian rights. As described below, the Symposium brought together an extraordinary group of experts—diverse in expertise, discipline, and perspective—many of whom have contributed papers to this Special Issue.

The first panel, which included presentations by Lara Friedman,<sup>1</sup> Brian Hauss,<sup>2</sup> Yehuda Kurtzer,<sup>3</sup> and Eugene Volokh,<sup>4</sup> considered the constitutional and policy debates surrounding federal and state legislation constraining Americans' right to boycott Israel (and Israeli settlements in the occupied Palestinian territory). Enacted largely in response to the global movement advocating boycotts, divestment and sanctions (BDS) to pressure Israel (and entities involved in its military occupation of Palestinian territory) to comply with international law,<sup>5</sup> legislation of this kind has proliferated over the last decade. In her article,<sup>6</sup> Friedman meticulously traces the history of federal and state laws targeting advocacy critical of Israel. She explores the continuing controversy about how the

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\* Professor of Law and Co-Director, Global Center for Business and Development, McGeorge School of Law, University of the Pacific. I extend my sincere thanks to the 2022–23 and 2023–24 editorial teams at the *University of the Pacific Law Review* for their superb work on this issue. Particular appreciation is owed to Tristan Hanna, Sierra Horton, Alec Watson, and Steve Zelezny—superstars, all. I am also grateful to Dean Michael Hunter Schwartz, Associate Dean for Academic Affairs Mary-Beth Moylan, Associate Dean for Faculty Scholarship Frank Gevurtz, and Associate Dean for Diversity, Equity and Inclusion Larry Levine for their enthusiastic support for the symposium.

1. President, Foundation for Middle East Peace.

2. Brian Hauss, Senior Staff Attorney, ACLU Speech, Privacy and Technology Project.

3. President, Shalom Hartman Institute of North America.

4. Gary D. Schwartz Distinguished Professor of Law, University of California, Los Angeles.

5. The BDS Movement describes itself as “a Palestinian-led movement for freedom, justice, and equality.” It has issued three primary demands to Israel: “ending its occupation and colonization of all Arab lands and dismantling the Wall;” “recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality;” and “respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN Resolution 194.” *What Is BDS?*, BDS MOVEMENT, <https://bdsmovement.net/what-is-bds> (last visited July 12, 2023) (on file with the *University of the Pacific Law Review*).

6. Lara Friedman, *Targeting Free Speech & Redefining Antisemitism: How Pro-Israel Actors Are Using US Laws to Attack Palestinian Activism and Solidarity*, 54 U. PAC. L. REV. 612 (2022).

law should define antisemitism, highlighting the weaponization of the International Holocaust Remembrance Alliance’s controversial definition<sup>7</sup> and analyzing the more nuanced approach taken in the Biden Administration’s recently unveiled National Strategy to Counter Antisemitism. She also documents how model laws designed to combat BDS are being retooled to penalize boycotts by progressive political movements of a range of industries, including enterprises that sell fossil fuels or guns and ammunition.

Friedman’s article provides valuable political context for the contributions by Volokh<sup>8</sup> and Hauss,<sup>9</sup> which debate the constitutionality of anti-BDS legislation. The differences between them turn in part on their reading of two United States Supreme Court cases: *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*<sup>10</sup> and *NAACP v. Claiborne Hardware*.<sup>11</sup> Volokh argues that anti-BDS laws do not violate the First Amendment because a decision not to do business with someone is not “inherently expressive” conduct, under *FAIR*. In his view, *Claiborne Hardware* should be narrowly interpreted to protect *advocacy* of boycotts, but not the *conduct* of engaging in one. Hauss, in contrast, reads *Claiborne Hardware* more broadly to proclaim a right to participate in politically motivated consumer boycotts subject only to a few exceptions. He contends that the constitutionally protected character of boycotts springs from the First Amendment’s protection not only of speech, but also of peaceable assembly. Recounting the important role that boycotts have played in American protest movements since the nation’s Founding, he submits that the First Amendment’s Assembly Clause ensures that the people of the United States enjoy the right to “band together” and “make their views known, when, individually, their voices would be faint or lost.”<sup>12</sup> *FAIR*, accordingly, is inapposite because the conduct at issue in that case pertained to individual symbolic expression, not the right to assemble. In light of the Supreme Court’s decision this year to deny certiorari in *Arkansas Times LP v. Waldrip*,<sup>13</sup> these questions will continue to be litigated. And as debate regarding the merits of anti-BDS legislation continues in federal and state governments, the analysis offered by Friedman, Volokh, and Hauss is necessary reading.

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7. *What is Antisemitism?*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism> (last visited Aug. 27, 2023).

8. Eugene Volokh, *The First Amendment and Refusals to Deal*, 54 U. PAC. L. REV. 732 (2022).

9. Brian Hauss, *The Right to Boycott as a Right of Assembly*, 54 U. PAC. L. REV. 646 (2022).

10. 547 U.S. 47 (2006).

11. 458 U.S. 886, 907 (1982).

12. *Claiborne Hardware*, 458 U.S. at 907 (quoting *Citizens Against Rent Control Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294, 296 (1981)).

13. 37 F.4th 1386, 1392 (8th Cir. 2022), *cert. denied*, — S. Ct. —, No. 22-379, 2023 WL 2123748 (U.S. Feb. 21, 2023).

The Symposium's second panel, which included presentations by Ethan Katz,<sup>14</sup> Zoha Khalili,<sup>15</sup> Maha Nassar,<sup>16</sup> and Kenneth Stern,<sup>17</sup> explored how universities have managed the sometimes clamorous debate on their campuses about Israel-Palestine amidst increasing scrutiny by government, donors, and the media. In several highly publicized cases, faculty members have been denied employment, tenure, or both because of expression critical of Israel, and students advocating Palestinian rights report discrimination, censorship, and harassment. At the same time, as antisemitic threats and violence are on the rise in the United States, openly Jewish students report feeling unsafe on university campuses on account of their identity or support for Israel. In light of these dynamics, the panel discussed to what extent, for what purposes, and through what means it is appropriate for universities to regulate expression related to Israel-Palestine on campus. In addition to illuminating the constitutional limits on university actions, it considered broader questions of policy: how universities can facilitate robust debate about issues of pressing public concern while at the same time protecting members of their community from hate and discrimination; what the boundaries of acceptable discourse are in a context where rights, identity, and power converge; how universities can promote, and signal commitment to, values without infringing upon academic freedom; and how learning and discourse about polarizing issues can be encouraged.

Stern reflects on many of these questions in his essay.<sup>18</sup> Based on his long experience as an educator with expertise in antisemitism awareness and as lead drafter of the IHLA definition of antisemitism, he urges universities to err on the side of academic freedom. Khalili's essay,<sup>19</sup> in turn, examines one recent episode in which these questions have generated national attention. In 2022, when the Law Students for Justice in Palestine (LSJP) chapter at Berkeley Law issued a call to a number of other student groups on campus, requesting that they refrain from inviting speakers who "have expressed and continued to hold views or host/sponsor/promote events in support of Zionism, the apartheid state of Israel, and the occupation of Palestine," the backlash—from the media, the university administration, and outside advocacy groups—was fierce. Khalili undertakes to situate these events in the context of longstanding pressures faced by advocates of Palestinian rights on university campuses. She also argues that punishing LSJP or other organizations for issuing or abiding by the call would have represented unconstitutional viewpoint discrimination.

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14. Associate Professor of History and Co-Director of the Antisemitism Education Initiative, University of California, Berkeley.

15. Senior Staff Attorney, Palestine Legal.

16. Associate Professor of Modern Middle East History, University of Arizona.

17. Director, Bard Center for the Study of Hate.

18. Kenneth Stern, *Academic Freedom, Boycotts, Definitions and Democracy*, 54 U. PAC. L. REV. 716 (2022).

19. Zoha Khalili, *Should We Ban Solidarity—and Student Groups—to Avoid Offending Israel Apologists?*, 54 U. PAC. L. REV. 706 (2022).

The Symposium's third panel, which included presentations by Lindsey Andersen,<sup>20</sup> Susan Benesch,<sup>21</sup> and Marwa Fatafta,<sup>22</sup> examined efforts by digital platforms to address similar questions, in a space where expression has tended to be treated as outside the boundaries of First Amendment protection. Platforms like Facebook, Twitter, TikTok, and YouTube have been criticized for failing to do enough to respond to the proliferation of hateful expression, including antisemitic, Islamophobic, and anti-Palestinian speech. Their attempts at moderating content, however, have sometimes reflected bias, resulting in the censorship of pro-Palestinian voices, among others. In this context, as well, both the standards and the processes devised by these platforms raise urgent questions of both law and policy.

Benesch begins her essay<sup>23</sup> with the startling observation that "private corporations have built and implemented larger systems for censorship than any government ever has." Analyzing a set of decisions by Meta, the owner of Facebook, she urges the development of a more robust and regular system for auditing content moderation by digital platforms, recommending that Israel-Palestine-related content could serve as a valuable pilot.

The Symposium concluded with a final panel in which Mira Sucharov<sup>24</sup> and Dima Khalidi<sup>25</sup> reflected upon the discussions throughout the day. Sucharov's essay<sup>26</sup> uses the episode at UC Berkeley, described above, as a point of departure for an important intervention. Describing and drawing upon a survey of American Jewish attitudes toward Zionism that she recently conducted, she suggests that disagreements regarding the boundaries of appropriate discussion of Israel and Palestine on university campuses are exacerbated by differing understandings of what Zionism means. Efforts to build solidarity with the struggle for Palestinian rights may accordingly be advanced by choosing less ambiguous terms. Khalidi's essay<sup>27</sup> also makes a case for speaking plainly. She provides important context by telling the stories of some of the activists, represented by Palestine Legal, whose voices have been silenced by the legislation and campus dynamics discussed during the Symposium. She also offers a critique of the Symposium itself, suggesting that its framing and participants reflect broader power dynamics and represent a missed opportunity for a more penetrating and more critical exploration of the issues at stake.

This Special Issue offers the first sustained examination in a U.S. law journal of the constitutional and policy implications of restrictions on Palestinian rights

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20. Associate Director, Human Rights, BSR.

21. Executive Director, Dangerous Speech Project and Faculty Associate, Berkman Klein Center for Internet & Society, Harvard University

22. Middle East and North Africa Policy Manager, Access Now.

23. Susan Benesch, *Content Moderation Needs Auditing at Scale, Starting with Israel and Palestine*, 54 U. PAC. L. REV. 604 (2022).

24. Professor of Political Science, Carleton University, and Founding Signatory and Advisory Council Member for the Jerusalem Declaration on Antisemitism.

25. Founder and Director, Palestine Legal.

26. Mira Sucharov, *Identity, Social Justice, and Learning Communities in the Age of Contested Campus Politics*, 54 U. PAC. L. REV. 722 (2022).

27. Dima Khalidi, *Attacking the Palestine Freedom Movement Means Attacking the First Amendment Too*, 54 U. PAC. L. REV. 682 (2022).

advocacy in a range of different contexts. Like the Symposium that produced it, this Issue is in itself a powerful argument for free and open discourse about the issues that divide us. At a time when the United States government appears unwilling to invest in facilitating a negotiated peace in Israel-Palestine, and prominent American,<sup>28</sup> Israeli,<sup>29</sup> and Palestinian<sup>30</sup> human rights organizations have characterized the legal regime in the territory governed by Israel as apartheid, ensuring Americans are able to talk about Israel-Palestine is as important as what we say.

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28. See, e.g., HUMAN RIGHTS WATCH, A THRESHOLD CROSSED AND THE CRIMES OF APARTHEID AND PERSECUTION (2021), <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>.

29. See, e.g., B'TSELEM, A REGIME OF JEWISH SUPREMACY FROM THE RIVER TO THE SEA: THIS IS APARTHEID (2021), [https://www.btselem.org/publications/fulltext/202101\\_this\\_is\\_apartheid](https://www.btselem.org/publications/fulltext/202101_this_is_apartheid).

30. Susan Power, *The Legal Architecture of Apartheid*, AL HAQ (2021), <https://aardi.org/2021/04/02/the-legal-architecture-of-apartheid-by-dr-susan-powers-al-haq/>.

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