

HEARING BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON THE CONSTITUTION AND
LIMITED GOVERNMENT

‘ANTISEMITISM ON COLLEGE CAMPUSES’

TESTIMONY OF RABBI DR. MARK GOLDFEDER, ESQ.
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MAY 15, 2024

Chairman Roy, Ranking Member Scanlon, and Members of the Subcommittee,

Good afternoon. My name is Mark Goldfeder, and I am the Director of the National Jewish Advocacy Center, a nonprofit legal organization set up to combat antisemitism in all of its different manifestations. I am co-author of the Westlaw treatise ‘Religious Organizations and the Law’ and I served as the Founding Editor of the Cambridge University Press Series on Law and Judaism. As a practicing attorney, educator in the University/college arena, and an ordained Rabbi, my personal and professional pursuits have involved addressing the real-life consequences and attributes of antisemitism for my entire adult life. It is an honor to be before the Subcommittee to discuss this important topic.¹

Antisemitism is often called the oldest form of hatred.² Unfortunately it is also perhaps the most persistent.³ And, despite the fact that we are still within living memory of the Holocaust,⁴ I don’t need to cite the statistics to describe what you can all see for yourselves. Once again antisemitism is on the rise.

On university campuses around the country antisemitism has become entrenched, systemic, broad and deep. Even pre-October 7th studies showed that nearly 75 percent of Jewish students across the United States had experienced antisemitism on campus,⁵ and that number is only growing.

Antisemitism is a serious concern for over 90 percent of American Jews and I am incredibly grateful to observe bipartisan consensus both here in the U.S. Congress and in state legislatures throughout the country that more needs to be done to protect this vulnerable minority. But it is also a serious concern for the rest of American society, generally, because history has repeatedly shown⁶ that antisemitism is often a form of gateway racism; the proverbial “canary in the coal mine of intolerance.”⁷

¹ Parts of this testimony have been drawn from my previous writings on the subject, including but not limited to: Goldfeder, Mark (2021) "Defining Antisemitism," *Seton Hall Law Review*: Vol. 52 : Iss. 1 , Article 3. Available at: <https://scholarship.shu.edu/shlr/vol52/iss1/3>, and Goldfeder, Mark (2023) "Codifying Antisemitism," *Penn State Law Review*: Vol. 127: Iss. 2, Article 4.

² Hillel Halkin, *The Persistence of the Oldest Hatred*, N. Y. TIMES: SUNDAY BOOK REVIEW (Sept. 29, 2019), <https://www.nytimes.com/2019/09/10/books/review/how-to-fight-antisemitism-bari-weiss.html>; Ildikó Barna et al., *Contemporary Forms of the Oldest Hatred: Modern Antisemitism in the Visegrád Countries* in *THE NOBLE BANNER OF HUMAN RIGHTS: ESSAYS IN MEMORY OF TOM LANTOS*, 303–38 (Katrina Swett, Anna-Mario Biro, and Mate Fischer eds. 2018).

³ *Antisemitism: A History* 8 (Richard S. Levy and Albert S. Lindemann eds. 2010).

⁴ The Persistence of Antisemitism, *Holocaust and Human Behavior*, (last visited Oct. 6, 2019), <https://www.facinghistory.org/holocaust-and-human-behavior/chapter-11/persistence-antisemitism>.

⁵ *Antisemitism and the College Campus: Perceptions and Realities*, BRANDEIS UNIV.: MAURICE AND MARILYN COHEN CENTER FOR MODERN JEWISH STUDIES (2015), <https://bir.brandeis.edu/bitstream/handle/10192/30810/AntisemitismCampus072715.pdf>.

⁶ DENNIS PRAGER & JOSEPH TELUSHKIN, *WHY THE JEWS? THE REASON FOR ANTISEMITISM, THE MOST ACCURATE PREDICTOR OF HUMAN EVIL*, (2003); Jerry Klinger, *The Canary in the Coal Mine? American Jewry 1654-1770*, Jewish American Society for Historic Preservation (last visited Oct. 6, 2019), http://www.jewish-american-society-for-historic-preservation.org/images/The_Canary_in_the_Coal_Mine.pdf.

⁷ Bill Rinehart, *Rising Antisemitism is ‘Canary in a Coal Mine’ For Other Communities*, CINCINNATI PUBLIC RADIO (Apr. 9 2019), <https://www.wvxu.org/post/rising-antisemitism-canary-coal-mine-other-communities#stream/0>; Jonathan Freedland, *Antisemitism matters: Jews are the canary in the coalmine*, THE GUARDIAN (Mar. 30 2018),

It is very challenging to answer the question of *why* antisemitism persists, but former Chief Rabbi Lord Jonathan Sacks of blessed memory has explained that the underlying problem is a society's unhealthy inability to tolerate difference. "And because we are all different, the hate that begins with Jews never ends with Jews. Antisemitism is the world's most reliable early warning sign of a major threat to freedom... It matters to all of us. Which is why we must fight it together."⁸ As Ahmed Shaheed, the United Nations Special Rapporteur on freedom of religion or belief noted in his recent Human Rights Council report on antisemitism, "antisemitism, if left unchecked by governments, poses risks not only to Jews, but also to members of other minority communities. Antisemitism is toxic to democracy and mutual respect of citizens and threatens all societies in which it goes unchallenged."⁹ One need look no further than the college campuses, where already the chants have morphed from death to Israel to Death to America.

There is not enough time for even a brief history of antisemitism,¹⁰ but it is worth noting that there are some patterns that consistently emerge every time it publicly rears its ugly head, in particular when it comes to antisemitism's focus; the form if not the content of its justifications; and the effective process by which it allows otherwise decent people to do horrible things.

In terms of its focus, antisemitism often looks at Jews as a collective,¹¹ the idea being that while individual Jews or small groups of Jews might be tolerable, Jews as a separate collective identity should not be allowed to exist with the same rights as other groups.¹² That is why the majority of antisemitism in any given era tends to focus on the primary form of collective Jewish identity at that point in time.¹³ Throughout the Middle Ages, Jews were, for the most part, a religious

<https://www.theguardian.com/commentisfree/2018/mar/30/antisemitism-jews-canary-coalmine-fake-news>;

Antisemitism may be canary in the coal mine of intolerance, THE JEWISH NEWS OF NORTHERN CALIFORNIA (Dec. 19, 2014), <https://www.jweekly.com/2014/12/19/antisemitism-may-be-canary-in-the-coal-mine-of-intolerance/>.

⁸ *Id.* See also, generally, RABBI JONATHAN SACKS, *THE DIGNITY OF DIFFERENCE: HOW TO AVOID THE CLASH OF CIVILIZATIONS* (Bloomsbury Publishing, 2002).

⁹ Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *The Elimination of all forms of Religious Intolerance*, U.N. DOC. A/74/358 (Sept. 23, 2019). See *infra* for reasons why this might be the case.

¹⁰ See e.g., POLIAKOV, LEON, *THE HISTORY OF ANTISEMITISM*. PHILADELPHIA (Univ. Penn. Press 2003); ROBERT S. WISTRICH, *ANTISEMITISM: THE LONGEST HATRED* (1991); BEN-ITTO, HADASSA, *THE LIE THAT WOULDN'T DIE: THE PROTOCOLS OF THE ELDERS OF ZION* (2005); BURLEIGH, MICHAEL, *THE RACIAL STATE: GERMANY 1933-1945* (1991); *ANTISEMITISM: A HISTORICAL ENCYCLOPEDIA OF PREJUDICE AND PERSECUTION* (Richard S. Levy ed., 2005); JAMES W. PARKES, *ANTISEMITISM* (Mitchell Valentine 1963).

¹¹ When Marr founded the 'League of Antisemites,' for example, he wrote that "Not individual Jews, but the Jewish spirit and Jewish consciousness have overpowered the world." WILHELM MARR, *Der Sieg des Judenthums ueber das Germanenthum vom nicht confessionellen Standpunkt ausbetrachtet*, (Paul Mendes-Flohr & Jehuda Reinharz trans., 1879) in *THE JEW IN THE MODERN WORLD: A DOCUMENTARY HISTORY* 331, 332 (Paul Mendes-Flohr & Jehuda Reinharz eds., 1995).

¹² Videos and Audio, *Rabbi Sacks on the connection between Judaism and Israel*, THE OFFICE OF RABBI SACKS (Apr. 29, 2019), <https://rabbisacks.org/rabbi-sacks-on-the-connection-between-judaism-and-israel/>. See also Per Ahlmark, former leader of the Swedish Liberal Party and Deputy Prime Minister of Sweden, remarking that while antisemitism may begin by primarily attacking the collective Jews... "such attacks start a chain reaction of assaults on individual Jews and Jewish institutions." Per Ahlmark, "Combating Old/New Antisemitism," Yad Vashem, speech at International Conference on the "Legacy of Holocaust Survivors," in Vidal Sassoon International Center for the Study of Antisemitism, *Annual Report* (2002), available at www.yad-vashem.org.il/about_yad/what_new/data_whats_new/whats_new_international_conference_ahlmark.html.

¹³ JAMES WALD, *The New Replacement Theory: Anti-Zionism, Antisemitism, and the Denial of History*, in *ANTI-ZIONISM AND ANTISEMITISM: THE DYNAMICS OF DELEGITIMIZATION*, 2, 2-3 (2019).

community and so they were hated for their religion- even if the particular Jews that were being oppressed were not religiously Jewish.¹⁴ In the 19th and 20th centuries, when many Jews became secularized, the primary unifying collective identity of Jews was their ethnicity, and so the hatred mutated to focus on race- even when the assimilated Jews that were being oppressed had only a trace amount of Jewish blood in them.¹⁵ Today when the primary collective embodiment of Jewish people on the world stage is the people of Israel in their nation state, Jews around the world are hated and held accountable for ‘their’ state- even if they are not Israeli nor live in Israel.¹⁶

In each instance the essence of antisemitism is the same, even if the focus somewhat shifts. It is “anchored in the denial of the very legitimacy of the Jews as a people... [It is] an assault upon whatever is the core of Jewish self-definition at any given moment in time- be it the Jewish religion, or Israel as the ‘civil religion’ or juridical expression of the Jewish people.”¹⁷

And while antisemitism’s focus can shift over time, in every generation those manifesting such bigotry use some variant of the same refrain; ‘we don’t hate Jews, we just can’t stand ____.’ In order to justify their hatred in a socially acceptable way, antisemites need a rationale that can pass in polite society- ideally one that appeals directly to the highest source of authority that is currently en vogue. As Rabbi Sacks notes, sometimes the justification maps directly onto the target. In the Middle Ages, for example, the highest source of authority was religion;¹⁸ in post-Enlightenment Europe it was science,¹⁹ and today it involves using (or abusing) the language of human rights with selective claims of social justice that see only Jews,²⁰ or the Jewish state,²¹ as worthy of condemnation.²²

¹⁴ THOMAS F. MADDEN, THE TRUTH ABOUT THE SPANISH INQUISITION 24–30 (2003), *available at* <https://www.catholicculture.org/culture/library/view.cfm?recnum=5236>.

¹⁵ *The Nuremberg Laws: Background & Overview*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/background-and-overview-of-the-nuremberg-laws> (last visited Jan. 23, 2021).

¹⁶ Videos and Audio, *The Mutating Virus: Understanding Antisemitism*, THE OFFICE OF RABBI SACKS (Sept. 27, 2016), <https://rabbisacks.org/mutating-virus-understanding-antisemitism/>.

¹⁷ Irwin Cotler, *Global Antisemitism: Assault on Human Rights*, (Yale Univ. Initiative for the Interdisciplinary Study of Antisemitism Working Paper No. 3, 2009), <https://isgap.org/wp-content/uploads/2011/10/irwin-cotler-online-final1.pdf>.

¹⁸ During the medieval crusades and the pogroms of the 19th and 20th centuries, in which Jews were massacred and maimed, the persecutors focused more on Christian themes for their religious justifications, including charges of deicide and blood libels. See MARVIN PERRY AND FREDERICK M. SCHWEITZER, *The Diabolization of Jews*, in ANTISEMITISM 73–117 (2002). Throughout the Biblical period as well though the people of Israel experienced various forms of overtly religious persecution, largely because they refused to accept the pagan and idolatrous practices of their surrounding communities. See *A Brief History on Anti-Semitism*, ANTI-DEFAMATION LEAGUE (2013), <https://www.adl.org/sites/default/files/documents/assets/pdf/education-outreach/Brief-History-on-Antisemitism-A.pdf>.

¹⁹ Hence the reliance on pseudoscientific studies about racial eugenics. See *Antisemitism in History: Racial Antisemitism, 1875–1945*, U.S. HOLOCAUST MEMORIAL MUSEUM <https://encyclopedia.ushmm.org/content/en/article/antisemitism-in-history-racial-antisemitism-18751945> (last visited Jan. 30, 2021).

²⁰ See e.g., Channah Newman, *Pursuit of ‘social justice’ gives strength to anti-Semitism*, THE JEWISH CHRONICLE (Dec. 2, 2018), <https://jewishchronicle.timesofisrael.com/pursuit-of-social-justice-gives-strength-to-anti-semitism/>.

²¹ Sina Arnold and Blair Taylor, *Antisemitism and the Left: Confronting an Invisible Racism*, 9 J. OF SOCIAL JUSTICE (2019).

²² [THE](#) OFFICE OF RABBI SACKS *supra* note 42. As Rabbi Sacks explains,

Today the highest source of authority worldwide is human rights. That is why Israel—the only fully functioning democracy in the Middle East with a free press and independent judiciary—is regularly

Finally, in terms of its insidious process, one of the rare unifying themes that emerges from the history of antisemitism is the consistent attempt at dehumanization of the Jewish people. Whether they are portraying Jews as malevolently superhuman, as in the Protocols of the Elders of Zion,²³ or as worthlessly subhuman, as in the Nazi ideology,²⁴ antisemites throughout history have found that it is easier to despise and eventually kill that which they do not consider human.

Jews have also been ‘othered’ in more subtle ways; for example, in America they have been considered non-white when whites are being privileged²⁵ and then been told that they are privileged whites when they demand recognition of their struggles.²⁶ “In the past Jews were rendered alien to the West by being orientalized. Today, Jews are rendered alien to the Middle East by being redefined as European...”²⁷ They killed us in Europe and chanted for us to go back to the Middle East, now they are chanting for all of us to go back to Poland.

The practical problem with defining antisemitism is that the rationales are everchanging; Jews are criticized for being whatever a society, or a particular part of a society, hates at that particular

accused of the five cardinal sins against human rights: racism, apartheid, crimes against humanity, ethnic cleansing and attempted genocide. The new antisemitism has mutated so that any practitioner of it can deny that he or she is an antisemite. After all, they’ll say, I’m not a racist. I have no problem with Jews or Judaism. I only have a problem with the State of Israel. But in a world of 56 Muslim nations and 103 Christian ones, there is only one Jewish state, Israel, which constitutes one-quarter of one per cent of the land mass of the Middle East. Israel is the only one of the 193 member nations of the United Nations that has its right to exist regularly challenged, with one state, Iran, and many, many other groups, committed to its destruction...

That is why, as he has explained elsewhere, “[w]henver you hear human rights invoked to deny Israel’s right to exist, you are hearing the new antisemitism.” See THE OFFICE OF RABBI SACKS, *supra* note 42. At other times, the justification for antisemitism latches on to whatever concrete policy aim is likely to stir up popular support. For example, the Jewish people were enslaved in Egypt for reasons that were eerily foreboding of the kind of thing that would routinely happen to this nation. The Biblical Pharaoh rationalized his actions in beginning to oppress his Jewish population by blaming the soon-to-be victim, saying: “Come, let us deal wisely with them. Otherwise, they may become so many that if there is a war they will join our enemies, fight against us, and leave the land.” *Exodus* 1:10. As Jeff Jacoby has keenly noted, Pharaoh’s notion of dealing wisely with this ‘national security threat’ entailed “slave labor, followed by mass murder.” “Then Pharaoh commanded all his people, ‘Every boy that is born to the Hebrews, you shall throw into the Nile.’” *Exodus* 1:22. See Jeff Jacoby, *Hitler, Pharaoh, and the Anti-Semitic Culture of Victimhood*, BOSTON GLOBE (Apr. 18, 2012), <https://www.bostonglobe.com/opinion/2012/04/18/hitler-pharaoh-and-anti-semitic-culture-victimhood-victims-who-persecute/Hph5XM6lfgWN7VkObPAasl/story.html>. Thirty centuries later, when the Nazis came to power, their crimes against the Jews were also described as self-defense. “The Jews of the whole world are trying to destroy Germany,” screamed government posters as the Nazis unleashed a boycott of Jewish-owned businesses. “German people, defend yourselves!”*Id.*

²³ See MARCUS, *infra* note 72, at 44.

²⁴ See Johannes Steizinger, *The Significance of Dehumanization: Nazi Ideology and Its Psychological Consequences*, 19 POLITICS, RELIGION & IDEOLOGY 139–57 (2018).

²⁵ See KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (1998).

²⁶ ERIC L. GOLDSTEIN, THE PRICE OF WHITENESS: JEWS, RACE, AND AMERICAN IDENTITY (2006). In a recent example of this phenomenon, the widely criticized latest draft of California’s new proposed ethnic studies curriculum has been condemned as antisemitic for a number of reasons, including the fact that it both fails to discuss antisemitism, and reinforces negative stereotypes about Jews. For example, it uses the word “privileged” to describe only one ethnic group – the Jews, and recommends that students discuss how Jews “sometimes have experienced conditional whiteness and privilege.” Matthew Foldi and Adam Kredo *Describing Jews as ‘Privileged,’ Ethnic Studies Curriculum Sparks Backlash*, Washington Free Beacon (Jan. 20, 2021).

²⁷ WALD, *supra* note 54, at 19.

moment. Politically, the right will call them radicals, while the left will label them fundamentalists. They are characterized simultaneously as being too liberal or too conservative, both too rich and a drain on the society, too strong or too weak, at once too influential and too parasitical. It does not matter if the reasons are contradictory; in the span of one generation the main theory of antisemitism went from Jews being an inferior race worth of destruction (by the Nazis in the Holocaust) to being a powerful race that tries to destroy others (like the Nazis, in Holocaust inversion).²⁸

So what can the Subcommittee as a legislative body do to address such a mutating virus? Well in order to fight antisemitism we need solutions that can cut through all the various timely rationales given for a timeless hatred. We need to focus on practical measures. And so, to that end I wish to offer three suggested efforts.

First, and foremost, antisemites should not get to decide what is and is not Judaism, and what it and is not antisemitism. For the *vast* majority of Jewish people across time and space, Zionism is and always has been an integral part of their Jewish, often their religious, identities. Congress should clarify that unlawfully targeting a Jewish person for any aspect of their Jewish identity, including a belief in Zionism, is antisemitism, and will be treated as such.

Of course, Jews like any other group, are not monolithic, and a small percentage of Jewish people are themselves anti-Zionists. That does not change the fact that the overwhelming majority of Jews are one way, and such tokenism is seen as unacceptable — and rightfully so — in any other space where a marginalized community feels threatened.²⁹ Antisemites love to point to the Jews who agree with them, and this classic trope, in the vein of well “some of my best friends are _____,” is a logically invalid claim of innocence by association,³⁰ and so lazily dismissive that “it has become shorthand for weak denials of bigotry — a punch line about the absence of thoughtfulness and rigor in our conversations about racism.”³¹

Jews, like any other group, are not homogenous and so, as Professor Andrew Pessin has noted, it is dire that the question of anti-Semitism be framed correctly: “For if Jews come in many types... it is perfectly conceivable that someone legitimately characterizable as an antisemite might not hate all or even most Jews...The crucial question should not be whether he hates all or most

²⁸ BAKAZS BERKOVITS, *Social Criticism and the “Jewish Problem,”* in ANTI-ZIONISM AND ANTISEMITISM: THE DYNAMICS OF DELEGITIMIZATION 53, 53 (2019).

²⁹ Blake Flayton, *On the Frontlines of Progressive Anti-Semitism*, N.Y. TIMES (Nov. 14, 2019), <https://www.nytimes.com/2019/11/14/opinion/college-israel-antisemitism.html>.

³⁰ See Matthew P. Winslow, *Reactions to the Imputation of Prejudice*, 26 BASIC AND APPLIED SOCIAL PSYCHOLOGY 289–97. As one expert explained, “it is like saying there is no such thing as sexism because we all have a close friend or family member who is a woman.” *I’m not racist, I have black friends*, WIKIPEDIA, https://en.wikipedia.org/wiki/I%27m_not_racist,_I_have_black_friends#cite_note-10 (last updated Dec. 23, 2020) (citing ELIZABETH ANNE MCGIBBON AND JOSEPHINE B. ETOWA, ANTI-RACIST HEALTH CARE PRACTICE 159 (2009)).

³¹ See John Eligon, *The ‘Some of My Best Friends Are Black’ Defense*, N.Y. TIMES (Feb. 16, 2019), <https://www.nytimes.com/2019/02/16/sunday-review/ralph-northam-blackface-friends.html>.

Jews...It is whether the people he hates, *he hates for their Jewishness*.³² Or for some aspect of their Jewishness, including, for example, their Zionism.³³

My second suggestion is that Congress make sure that the federal government is enforcing laws already in place; including of course, Title VI of the Civil Rights Act of 1964, but also the laws that provide for punishment when foreign students provide support for terrorism. The Immigration and Nationality Act mandates that those engaging in terrorist activity are barred from entering the United States, and eligibility also applies to those who have “persuaded others to endorse or support one of these named terrorist groups,” such as Hamas, which has been designated as a foreign terrorist organization by the State Department since 1997. Congress could also add teeth in the form of penalties for failure to follow the requirements for schools to disclose foreign funding.

Finally, Congress should make clear that the First Amendment is not some mystery that no one knows how to apply, and that the government expects Universities to apply it correctly.

On campuses across the United States, Jewish students are being harassed, intimidated, demeaned and abused, and in too many cases, administrators wringing their hands and refusing to exercise leadership are hiding behind the First Amendment, pretending that this is all about free speech and it is just too complicated. They are ignoring the desperate pleas for help, implying that someone has to actually get physically hurt or killed before they can step in. Congress should emphatically communicate the requirement for schools to enforce the First Amendment, wholeheartedly — but first, make sure that everyone understand its outer limits.

The First Amendment is not a free pass to threaten, harass, intimidate or otherwise violate the rights of others. It is true that freedom of speech, even offensive and hateful speech, needs to be protected; but there are limits to what constitutes speech, and there are rules for when it crosses over into actionable unlawful conduct.

At many schools, incidents have already clearly crossed these lines. The First Amendment does not protect trespassing, vandalism, harassment, assault or the destruction of property. Nor does it protect speech that is not to inform or persuade, but rather to disrupt lawful endeavors — activities like [studying in a library](#), for instance. The First Amendment also does not protect someone who is making true threats, which the Supreme Court in *Virginia v. Black* (2003) defined as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Nor does it protect intimidation, which is “a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” Just a few months ago, in *Counterman v. Colorado* (2023) the Supreme Court clarified that the intent standard for

³² Andrew Pessin, *The Indelible Stain of Antisemitism: The Failed Practice of “Jew-Washing,”* THE TIMES OF ISRAEL, (June 14, 2017) <https://blogs.timesofisrael.com/the-indelible-stain-of-antisemitism-the-failed-practice-of-jew-washing/>.

³³ This is also clear under a disparate impact analysis. A recent Gallup poll found that 95% of Americans Jews support Israel³³— which, is the definition of Zionism that tends to get Jewish students and Jewish groups excluded on campuses around the country³³— even as they may disapprove of certain Israeli policies. The research also shows that religion plays an important part in those beliefs.³³ If you exclude or demonize 95% of a group based on their shared ethnic beliefs, then it should be obvious that you are discriminating against that group and their beliefs.

true threats is not that the person speaking actually intends to threaten the victim. Instead, they asserted that the First Amendment does not protect a person who consciously disregards a substantial risk that his communications would be viewed as threatening violence.

All of the above have occurred on American campuses in recent weeks if not days. But the problem here is somewhat more acute, and there is an answer.

There is no First Amendment protection for speech that involves incitement, which the Court in *Brandenburg v. Ohio* (1969) explained includes speech that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg* is famously a very high standard, and *that* is precisely where the universities are hiding. Despite the dozens of anecdotal incidents, and despite all of the [well-known studies](#) confirming that the kind of inflammatory discriminatory antisemitic [rhetoric](#) that these groups have been spreading [leads](#) directly to antisemitic violence, officials are telling students and parents that their hands are tied because in most cases (excluding, for example, Rutgers and Cornell) there has not been sufficiently *direct* incitement.

The truth is that even the *Brandenburg* standard has clear and applicable limits; schools can still impose reasonable time, place and manner restrictions, for instance. Even under the *Brandenburg* paradigm, any student rally that disrupts the educational enterprise and functioning of a school may be restricted by that school without offending the First Amendment.

But this argument is also unnecessary — *because Brandenburg is the wrong standard for schools to be using*, and university presidents and general counsels need to correct that misunderstanding immediately.

In [Tinker v. Des Moines](#), the Supreme Court found that the Constitution permits schools to limit speech that will “materially and substantially interfere” with the “requirements of appropriate discipline” in the operation of the school” or “invad[es] the rights of others.” That is the standard that these schools must now vigilantly enforce.

Of course, private colleges and universities can, in most cases, restrict certain speech, conduct and demonstrations, without triggering any constitutional issues. But even a public university is not a public street, and the rules for what speech must be allowed on each are very different.

The Supreme Court in *Healy v. James* (1972) cited *Tinker* to hold that university officials do not have to tolerate student activities that breach reasonable campus rules, interrupt the educational process or interfere with other students’ rights to receive an education. This is especially true when the student speech is happening in school-sponsored forums or is reasonably perceived as bearing the imprimatur of the institution (e.g. [NYU SJP](#)). Additionally, the Supreme Court in *Bethel v. Fraser* (1986) and *Hazelwood v. Kuhlmeier* (1988) held that schools have [even greater latitude](#) to limit student expression if they can establish a legitimate pedagogical concern. Ensuring that all students have a safe and harassment-free environment in which to learn is an overwhelmingly legitimate pedagogical concern.

Legally, schools do not have to wait for a disruption to occur: they can ban potentially disruptive expression if they can “reasonably forecast” that the speech in question would disrupt school discipline or operation, or if it would violate the rights of other students. In [Melton v. Young](#), for instance, the court ruled in favor of school officials who prohibited the wearing of a Confederate flag jacket because it was reasonable to assume that it would be disruptive in an environment of heightened racial tension. [Cheering on the slaughter](#) as victims’ bodies are still being recovered — announcing solidarity with this “resistance” movement, who uses rape and torture and murder as “legitimate” tools in an “armed struggle” — is certainly no less likely to cause a disruption than a jacket.

Jewish students are telling university administrators that they are afraid to be on campus. These leaders have a legal obligation to fix that, and they have the tools to do it. Universities can protect speech, even hateful speech, but use both common sense and the relevant case law to know where to draw the line. We also do not have to imagine what responsible leadership look like in practice- President Ben Sasse at the University of Florida, is one example of someone who has stepped up to show the way.

Thank you for this opportunity to testify. I stand ready to work with the Subcommittee and any Member of Congress on this important matter and welcome any questions on my Testimony.