

SYSTEMIC ISLAMOPHOBIA IN AMERICAN COURTS

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I am a 71-year-old proud Jewish attorney. A retired commercial litigator, I have a more than full time *pro bono* practice representing students, faculty, doctors, schoolteachers and others who have been terminated, suspended, investigated, harassed, sued or doxed for pro-Palestinian expression. My clients include Muslim and Arab Americans and immigrants, and their Jewish, Sikh and Christian supporters.

I have appeared in forty seven pertinent litigations in the courts of three states, and federal courts in eight. I am admitted in New York, where I live. I have now had enough experience in this specialty to have identified and analyzed what I believe to be systemic Islamophobia in our courts¹. The situation seems analogous to the Mississippi court system in 1964, when white supremacy was regarded as the status quo. Here, it is very difficult for quite meritorious cases to survive motions to dismiss.² The excuses, rationales, and fallacies used by the courts to reach this result are fascinating-- and despicable. Only by naming something can one seek to fix it. I have started filing appeals, motions to reargue, and letters to administrative judges calling out this racism.

Garden variety. Of course, there are still a few judges who wear their bias on their sleeve, as if they are either proud of, or unaware of it.

Twin decisions in *Lax v. City University of New York* would be a fit subject for a law review article on systemic bias in a court system. Lax, a serial litigant, brought seven actions against the City University, where he is a tenured professor and department chair, alleging an antisemitic environment, without ever winning a verdict, and named certain junior professors as individual defendants in this

¹ Federal courts nationally are doing much better than state, but there are some exceptions which I mention.

² See the early and prescient white paper by Palestine Legal and the Center for Constitutional Rights, "The Palestine Exception to Free Speech" (2015) <https://palestinelegal.org/the-palestine-exception>

most recent one. His complaint asserted, among many other claims³, that the individual defendants' failure to invite him to join a private, off campus mailing list of likeminded faculty, as to which they had publicly posted a policy that barred all department chairs who might have a say in their tenure or renewal, was antisemitic. Judge Gina Abadi found this not to be speculative, relying in part on Professor Lax's assertion that his wild claims would be “borne out by discovery”. The judge seemed blissfully unaware that she was improperly resolving issues of credibility on a motion to dismiss: “The Jackson Lewis report also *blithely* accepted the excuses from the PFC as to the exclusion of plaintiffs from their organization” , *Lax v City Univ. of NY*, 80 Misc 3d 1205[A], 2023 NY Slip Op 50922[U], *5 (Sup Ct, Kings County 2023) (emphasis added).

This same judge soon after dismissed the individual defendants' cross-claims against the public university defendant, for its custom and practice of allowing Professor Lax to harass them ceaselessly in the university environment for years on end, via baseless administrative complaints, attempts to get them fired or denied tenure, and even falsely accusing them of antisemitism by name in the pages of the *New York Post*,⁴ , on the grounds that these were “bare legal conclusions unsupported by factual allegations”, *Lax v City Univ. of NY*, 83 Misc 3d 1245[A] (Sup Ct, Kings County 2024).

Nothing to see here. In some cases, judges (I have often noted the fear flashing in their eyes) find ways to avoid outcomes in their Courts. In *Tellez v. NYC Dept. of Parks*, 100628/2025, arriving an hour early, I watched Judge Hasan Kingo expertly broker a \$750,000 settlement in a medical malpractice case. When I and defendants' counsel appeared to present our own settlement of a case involving the attempted termination of a license to operate a New York City community garden, the judge, under the watchful eye of two *New York Post* reporters in the courtroom, issued a surprise *sua*

³ Including that the defendants would not shake his hand, that scheduling an event on LGBT discrimination on a Friday night in a 24/7 university was antisemitic, as was the failure to invite him, a Trump supporter, to speak at a feminist event.

⁴ Not to mention frivolously suing them for failing to shake hands.

sponte order directing the City to present the individuals responsible for the decision to settle, to justify themselves, and for me to make a presentation persuading him why I thought my clients were entitled to any relief for a violation of their First Amendment rights. Within a day, the City had backed out of the settlement, as I am sure Judge Kingo intended. I voluntarily dismissed the case and re-filed in federal court-- something which we should never need to do, and which represented a willful failure of the New York courts to do justice.

Zeno's Arrow. The Greek philosopher offered several thought experiments about the impossibility of motion, including one in which the arrow never reaches a target, and another in which Achilles can never catch up to a tortoise. This is a fitting analogy and name for cases in which a court breaks a compelling case down to its component parts in a sophistical way, finally concluding there is no case at all.

In *Saad v. Pace University*, 654638/2024 (New York County 2024), I represented an Arab American student who had been suspended on a complaint filed by a Zionist student who had obtained a mutual stay away order, then provoked my client into violating it. Mr. Saad had uttered First Amendment-protected, pro-Palestinian speech on a private social media account, which the complainant said made him feel unsafe. Pace's numerous acts privileging the complainant over my client culminated in a student conduct hearing in which a video was shown in which, during a verbal exchange on a sidewalk, the complainant can be seen lunging at my client, and is physically restrained by a friend of his. The complainant absurdly testified that he merely was stepping closer, to make sure Mr. Saad could hear him. The hearing officer, ignoring the video evidence, stated that he found the complainant credible, but my client, who was a model of rectitude, not.

Judge Moyne's order in *Saad* is also worthy of a law review note, as it is exemplary of the leaps of logic and law a Court takes to dismiss a complaint filed by an Arab or Muslim student. This was a

plenary New York State and New York City Human Rights Laws action. The Court in effect held that law-suits alleging that pretextual, biased disciplinary actions taken by universities can only be redressed in an Article 78 mandamus-- then held that the action was timebarred; that the Client's very specific assertions about Pace's behavior (100 paragraphs worth) were speculative; and that anyway, his suspension, which might have ended his college education, did not shock the Court's conscience. In this way, an action addressing a very severe injustice is sophistically and dishonorably broken down into very small components, which are then swept into a dust-pan and disposed of in the trash.

For an interesting companion to the *Saad* decision, see *Mirza v Coll. of Mount St. Vincent*, 85 Misc 3d 1234[A], (Sup Ct, Bronx County 2025) (not my case). The Plaintiff, dismissed from a Physician Assistant program, alleged quite specific facts regarding disparate treatment of Muslim students. The same law firm that represents Pace in *Saad* was defense counsel, and prevailed on the same arguments: that the allegations are “speculative”, that the NYSHRL was unavailable to a student suing a college for a pretextual disciplinary action, that an article 78 with its “arbitrary and capricious” standard completely alien to NYSHRL litigation was the only remedy, and that expelling the student and ending her career did not shock the Court's sense of fairness.

Mirza was rapidly reversed by by the Appellate Division-- not remanded, but reversed, and the petition granted (in a much shorter decision): “A review of the record makes it clear that the faculty members of the College's Professional Conduct Review Committee and Academic Performance Committee unreasonably failed to view the totality of the circumstances and abused their discretion”, *Matter of Mirza v Coll. of Mount St. Vincent*, 241 AD3d 1163, 1164 (1st Dept 2025). This outcome, while salutary, is no substitute for Courts acknowledging that Arab and Muslim litigants have Constitutional rights.

A horrifying take-away from these decisions is that Arab and Muslim students, discriminated against by their universities, are excluded from the protection of New York's antidiscrimination laws.

Both the *Saad* and *Mirza* courts held, in the face of substantial statewide precedent, that students complaining of pretextual disciplinary actions are relegated to an Article 78 mandamus action, with its “arbitrary and capricious” standard quite alien to most decisions about Constitutional rights⁵. After all, in a pathological, biased system, suspending or expelling that annoying Arab or Muslim student is not arbitrary or capricious, as both the *Saad* and *Mirza* courts decided.

Holding that student disciplinary outcomes can only be challenged via mandamus ignores that the most common way that universities discriminate against students is via pretextual student conduct proceedings. The courts also both made another willful error of law-- it is clear that “academic” means only grade-related discipline, and student conduct charges were not subject to the rule that only mandamus actions were permitted (the *Saad* court disregarded cases I cited on this point) . However, even that limitation violates Constitutional rights, as the second most common way that universities discriminate against students is by flunking them.

The Tilted Playing Field. I feel safe saying that Arab and Muslim litigants in particular are impacted by “rules” such as “it shoulda been a mandamus”. I am not aware of a single case in which that rationale was used to dismiss an antisemitism action.⁶

In analyzing *Lax*, above, I gave examples of the ways in which Jewish litigants are privileged

⁵ Actually, “arbitrary and capricious” has been held synonymous with “rational basis”, the lowest and most relaxed level of constitutional review. Government actions impacting significant rights are reviewed under “intermediate scrutiny”. Cases in which particular viewpoints are targeted (such as anti-Zionist or pro-Palestinian expression) are subject to the most exacting standard, “strict scrutiny”, which requires that challenged regulations be “narrowly tailored to serve a compelling state interest”, *Agudath Isr. v. Cuomo*, 983 F3d 620, 633 (2d Cir 2020). Forcing a student who has been punished for pro-Palestinian speech to bring an Article 78 thus further infringes their First Amendment rights (insult to injury) and deprives them of the protection of strict scrutiny.

⁶ Universities of course do not typically sanction Zionist or Jewish students for political expression or actions-- even quite overtly racist and violent ones, witness the horribly iconic example I discuss just below: When Columbia was sued by a Jewish student it had suspended for spraying Arab and Muslim protesters with a chemical, Columbia did not obtain dismissal on the grounds that “it shoulda been a 78”. It paid him almost \$400,000 and agreed to lift the suspension. Another example of grotesque disparate treatment occurred at the University of Pennsylvania. It complacently turned over the records demanded by the vicious House Committee on Muslim and Arab community members, and defended this action in Court. However, when the Trump administration then sought records on Jewish students, the university declared itself shocked, shocked, like Claude Rains in *Casablanca*, and resisted disclosure, *EEOC v. University of Pennsylvania*, 2:25-cv-06502 (EDPA 2025).

over anti-Zionist ones-- in that case, very flimsy assertions of antisemitism were held not to be speculative, while very concrete claims of Islamophobia were dismissed as conclusory.

There are other significant influences at work. The basic form antisemitism litigation takes is a lawsuit brought by one or more students against a university alleging a hostile environment, which names Arab and Muslim students and faculty falsely as antisemites, but does not include them as parties. In that sense, the *Lax* case, which named junior professors individually, is an outlier.

University defendants almost universally do not counter by denying antisemitism on campus-- even though the assertions in these usually “shotgun” complaints rely very largely on the exploded premise that anti-Zionism is antisemitism.⁷ Instead, their defense usually consists of acknowledging a hostile environment which does not exist, but saying they are doing everything needed to handle it. In so doing, they throw the students and professors unfairly accused of antisemitism under the bus.

Courts then are being asked to decide cases which will have the most powerful impacts on the speech and status of Arab and Muslim students, without even hearing their views.

In *Ingber v. NYU* 1:23-cv-10023 (SDNY 2023), I moved to intervene on behalf of NYU professors and students, including at least one named in the complaint. As the local rules required, I filed a pre-motion letter requesting leave. After months of adjournments and a change of judge, I showed up when argument was finally scheduled-- only to be startled when Judge Loretta Preska read a five page decision from the bench, denying a motion I had not yet made, on the grounds that my clients, including an adjunct professor fired from NYU, lacked “article III standing” to complain of being run over. When I furiously complained, Judge Preska relented and withdrew her decision, and I finally filed my motion to intervene. However, while pending, this was mooted by a secret settlement NYU signed with the plaintiffs, in which the only document filed on the docket was a voluntary

⁷ As I mentioned, the federal courts have done a much better job. I can now string-cite about fifteen cases holding that anti-Zionism is not antisemitism, but First Amendment-protected expression. Yet most universities seem frightened of the optics of defending themselves against antisemitism claims.

dismissal. NYU boasted that the confidential settlement included a promise by the University to apply the unconstitutional IHRA standards to disciplinary proceedings (these define calling an Israeli a Nazi, or denying the “right” to a homeland, as antisemitism). Thus, agreements were made powerfully harming my clients, without them ever being granted a voice or even knowing the terms.

As a result, wild claims about students, which I personally know to be false, become part of a public court record without any live testimony ever being heard to contradict them. It is very common, for example, for aggressive counter-protesters to insist on a right to charge into encampments and protests to bully, threaten and film the participants, and then claim that, as Jewish students, they were discriminated against by being barred from a part of the public campus. At Harvard, an individual who was stepping on students participating in a die-in succeeded in obtaining disciplinary action against students who peacefully ushered him away, and at Columbia, a number of my clients have been suspended or expelled for participating, as a last resort, in a peaceful human chain, to prevent highly aggressive known counterprotesters, one of whom was visibly inebriated, from bullying, threatening and filming students, later to dox them on Canary Mission. Unspoken in all this is that university campus safety and local police abdicated a duty to keep aggressive counterprotesters apart, a reasonable time, place and manner restriction clearly established in case law involving those screaming abuse at Pride marchers or haranguing women entering abortion clinics. Then Courts uncritically recited these allegations under the doctrine that, on a motion to dismiss, all the Plaintiff’s allegations are to be deemed true⁸; our people, not being parties, are never given the chance to respond; the university settles the case; and the false assertions made in the complaint and echoed in the decision denying the motion to dismiss are then cited in other cases as “proof” of the existence of a hostile environment.

Litigation is a battle of narratives, and much of the time, we never get the first word in about ours.

⁸ A basic procedural right not routinely extended to parties asserting Islamophobia, see the Lax case above.

The most heartbreaking and horrifying instance I can offer occurred at my alma mater, Columbia-- a true “you can't make this shit up” moment, which I hope will eventually be understood by everyone to be the most shameful moment in Columbia history, at which it abdicated any understanding that it is validly a “university”, with all that entails. Two former Israeli soldiers, students at Columbia, disguised themselves and infiltrated a pro-Palestinian demonstration, spraying the protesters with a substance which the victims believed to be an Israeli military crowd control “skunk spray”. Some victims, who had previously been attacked with that substance in the West Bank, went to emergency rooms with symptoms such as difficulty breathing, nausea, and vaginal bleeding. Columbia suspended the perps-- one of whom sued the university claiming that suspension was an excessive sanction for what he characterized as a harmless prank, claiming that the substance used was a “harmless fart spray” purchased on Amazon, *Doe v. Columbia University* 1:24-cv-02870 (SDNY 2024).

Columbia, to its undying shame, settled this case, reinstating the plaintiff-- and paying him \$395,000. Erum Salam, “Columbia pays \$395,000 to student suspended over protest ‘fart spray’”, *The Guardian* November 1, 2024 <https://www.theguardian.com/us-news/2024/nov/01/columbia-student-protest-lawsuit> The docket indicates that Columbia never moved to dismiss, and that the settlement was made confidentially and only a stipulation of dismissal was filed.

Columbia has never reinstated (let alone paid) the students it suspended and expelled for the peaceful human chain.

Salting the Earth. In *Vinueza v. NYU*, Index: 158944-2024 (Supreme Court, New York County 2024), Doc. # 43, the Plaintiff, an NYU student, was told that she would receive a written reprimand for an act of pro-Palestinian expression, but then was placed on probation with very punitive conditions via an email which admitted (rather unwisely) that a “stakeholder” had intervened. The purpose of her CPLR Section 3102 petition for pre-complaint discovery was simply to determine the identity of the

stakeholder.

Judge James Clynes went a mile out of his way to salt the earth so litigation could never grow there again: “Petitioner seeks discovery in aid of a complaint that is time-barred and nonmeritorious. In addition, petitioner's request constitutes an inappropriate fishing expedition disallowed under 3012(c)”. This order has of course already been cited by defendants in other cases of mine, as if it were a CPLR 3211(a)(7) dismissal, though this language refers to a hypothetical future complaint not drafted or filed yet. Judge Clyne's statement that the underlying action was “time-barred”, though he did not elucidate, could only have been based on the improper “it shoulda been a 78” theory I discuss above in connection with the *Saad* case.

Justice Clynes, as far as I recall, has never met me, yet he felt entitled to imply that I bring frivolous cases and engage in fishing expeditions.

“That's not discrimination!” It is obvious to anyone observing this conflagration at ground level that Muslim and Arab students by the hundreds are being pretextually sanctioned under university speech codes. The variations are almost endless: chants, posters, social media posts, matter written on blackboards in easily erasable chalk, and instances of freedom of speech on free speech bulletin boards and walls (how shocking!) are, at the university's option, either being characterized as antisemitism (under the unconstitutional IHRA standards) or as “non-discriminatory harassment” (for making Zionist community members feel “unsafe”, some of whom have claimed “unsafety” while belligerently charging into encampments and demonstrations). The speech element of this cannot elide the obvious fact that Arab and Muslim students are being targeted for being very distressed, and outspoken, about the carpet bombing of Arab and Muslim people in Gaza.⁹ It literally adds up to an offense of demonstrating, or merely speaking, while Arab or Muslim. It is not rocket science that viewpoint and

⁹ I have spoken to several Palestinian students who have lost fifteen or more family members to Israeli violence in Gaza in the last three years. I haven't lost fifteen family members, even to natural causes, in 71 years of life.

racial discrimination can converge-- in no way are they mutually exclusive categories. Yet courts treat them as if they are. Commonly, in discrimination cases against private universities, courts wilfully commit what I maintain is an Egregious Ontological Error, redefining a dispute out of the discrimination laws by calling it a speech controversy. Witness the *Saad* court: “To the extent plaintiff asserts that Pace implemented punitive measures against him so as to chill speech criticizing Israel or supporting Palestinian rights..., the court observes that plaintiff has not pleaded a violation of his First Amendment right to free speech. In any event, [n]either private universities nor their employees are ‘state actors’ for the purpose of constitutional claims, including claims alleging violation of the right to free speech”.

This echoes, adopts and enables the shocking disparate treatment we are witnessing within the universities. For example, an implacable and seemingly invincible Israeli professor at Columbia's business school, Shai Davidai, doxed twenty year old hijab-wearing women students, among others, on his social media for almost two years, calling them antisemites and terrorist supporters, and often publishing their names and photographs. Whenever one of his targets filed a Title VI complaint, the university concluded that it was powerless to act, because he was attacking them for their views, not their membership in a protected class. Yet, publicly adopting IHRA under pressure and threats from the grotesquely bigoted Trump administration and the insensate House Committee, Columbia has made findings of antisemitism in cases in which Arab or Muslim students used the words “Zionist”¹⁰ or “genocide”.

Davidai was only forced out by Columbia when he began punching upwards, targeting administration and trustees. The university issued a public statement as he resigned that it had closed its investigation “without issuing any findings or conclusions of wrongdoing, and without imposing any discipline or penalty.” Daksha Pillal, “Inside the inconclusive, 17-month-long investigation into former

¹⁰ The perversity of being punished for calling someone a “Zionist” who proudly calls themselves that should be obvious.

Business School professor Shai Davidai”, *The Columbia Daily Spectator*, August 27, 2025

<https://www.columbiaspectator.com/news/2025/08/27/inside-the-inconclusive-17-month-long-investigation-into-former-business-school-professor-shai-davidai/>

It seems to me we are living in two worlds at once. Outside the university, politicians, journalists, judges and other public figures are increasingly expressing shock at Israeli violence in Gaza, including calling it a genocide, while inside the university, we are all required to be nicey-nice, under threat of losing our jobs, educations and careers. It is a very sad day when there is much less freedom inside the universities, than outside.

Fun with Words. Courts also play games with language. The most astonishing and unforgettable example I have personally encountered is Judge Mitchell Goldberg in the Eastern District of Pennsylvania, holding that a letter to the University of Pennsylvania demanding documents on professor Huda Fakhreddine from the McCarthyesque House Committee on Education and the Workforce could not be coercive because, you know, the rabidly Islamophobic committee said “please”. Seriously. “The January 24, 2024 documents request states the following: “To assist the Committee in understanding the antisemitism crisis at Penn and the university's response, *please produce* the following items no later than February 7, 2024.’....I do not find this language coercive”, *Fakhreddine v Univ. of Pennsylvania*, 2025 US Dist LEXIS 16373, at *12 (ED Pa Jan. 30, 2025, Civil Action No. 24-cv-1034).

“ ‘Jesus wept.’ See John 11:35”, *Nathan v Alamo Hgts. Ind., Sch. Dist.*, 795 F Supp 3d 910, 919 (WD Tex 2025).

Appearing before Judge Goldberg was very educational. The judge was so stiff, professionally civilized, and judgely that I never figured out how much he detested me and Dr. Fakhreddine until much later. In the same decision, he quotes a typographical error I unfortunately made with a large

[SIC] after it, which seems petty, then accuses me of citing an overturned case, the most horrifying error a new law firm associate can make, and often grounds for termination. However, the Shepherd's feature in Lexis shows that case as good law.

The judge ordered us to appear in Philadelphia to argue the state law claims only-- which led me to believe that he was planning to deny the motion to dismiss the federal free speech count, because otherwise, why waste time with state law? I was wrong. Judge Goldberg wished to glean some information from me to bolster his dismissal of my state claims with prejudice-- flying in the face of consistent, ubiquitous case law that, when a federal claim is dismissed on jurisdictional grounds, the state claims should be dismissed without prejudice, so that the plaintiff can refile them in state court. Judge Goldberg, however, salted the Earth like Judge Clynes, so that litigation could never grow there again.

Making me travel to Philadelphia to help Judge Goldberg dismiss my case cost about \$1,000 out of pocket, for LIRR and Amtrak trains, cabs, meals, and hotel-- a large sum of money for a retired attorney living on Social Security.

On appeal, the Third Circuit Court of Appeals not only changed the dismissal of the state claims to without prejudice, it administered the Judge a slap by doing the same for the free speech claim-- an outcome I had not dared hope for. By then, Judge Goldberg had left the bench, returning to private practice-- a wise decision, because he wasn't so judgely after all.

Decontextualization. I learned very early to include a section in my briefs, titled “This Court Should Take the Historical Context into Account”: “This Court can take judicial notice of the important historical backdrop against which this case is being litigated, *Matter of Avella v. City of N.Y.*, 29 N.Y.3d 425, 449 (2017) (“[H]istorical context further supports reversal”); *Matter of Hoffmann v. N.Y. State Indep. Redistricting Comm'n*, 41 N.Y.3d 341, 387 (2023) (“[T]he Constitution should be

interpreted consistent with this historical context”); *Stefanik v. Hochul*, 211 N.Y.S.3d 574, 581 (3rd Dept. 2024), *affirmed*, 2024 N.Y. LEXIS 1146 (2024), (court “[c]onsider[ed] ...historical context”); *Matter of Riches v. N.Y.C. Council*, 899 N.Y.S.2d 177, 185 (1st Dept. 2010), appeal dismissed, 15 N.Y.3d 735 (2010) (statute “viewed in the historical context”).

No court has ever yet accepted this invitation. Yet students are not being suspended and expelled or professors fired as a mere one-off, an incident like an automobile accident on the Belt Parkway which can be examined with blinders on, simply in terms of who hit whom. There are historical movements at work here which are the background to all these cases, as well as ones which my complaints refer to as impacting particular cases. Every student disciplinary action takes place in the context of the Trump administration's war on pro-Palestinian expression, and its concurrent attack on Muslim and Arab people (the President called Muslim immigrants from Somalia “garbage”¹¹); of the House Committee's information letters and subpoenas (House Committee members have said that Muslims do not belong in America, or should not be allowed to pray in public, or should (along with Jews) accept Christ); the activities of billionaires such as Marc Rowan (instrumental in forcing the resignation of president Liz McGill at his alma mater, University of Pennsylvania, and pressuring the university to cancel the “Palestine Writes” festival, co-led by my client Dr. Fakhreddine); of state governors such as Greg Abbott and Kathy Hochul (both of whom have used their authority as governor to pressure universities to punish pro-Palestinian expression), and the tender attentions of the *New York Post* (which called my community garden client the “Garden of Hate”). Specific instances I mention in complaints, which courts refused to allow me to investigate via discovery, were the “stakeholder” who obtained a harsher outcome for my client in *Vinueza v. NYU*, above, and the phone call which Governor

¹¹ Arthur Cohen wrote in *The Tremendum*: “The debasement of language, the stripping of its shading and moral intensity began in the West long before Hitler and continues after he is gone. It will help us to explain a kind of cauterization of conscience by the use of metaphor and euphemism; to understand that in official Nazi language the extermination of Jews was precisely that-- the disinfectant of lice, the burning of garbage, the incineration of trash, and hence language never had to say exactly what acts its words commanded: kill, burn, murder that old Jew, that middle-aged Jew, that child Jew.”

Hochul made to President Joyce Brown of the Fashion Institute of Technology, requesting harsher treatment of Students for Justice in Palestine, *Mury v Fashion Inst. of Tech.*, 2024 NY Slip Op 34070[U] (Sup Ct, NY County 2024).

In order to hold that the mistreatment of Arab and Muslim people is not “arbitrary and capricious”, it is highly convenient to ignore the historical forces at work. “Victims of empire don't die, they simply cease to exist. They burn away like fog”. Omar El Akkad, *One Day, Everyone Will Always Have Been Against This* (New York: Alfred A. Knopf 2025) ebook

Plausibility. Now, for my personal favorite. Two Supreme Court holdings revolutionized motion to dismiss practice some years ago by adding a “plausibility” standard: *Bell Atl. Corp. v Twombly*, 550 US 544, 570 (2007) (“[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face”); *Ashcroft v Iqbal*, 556 US 662, 678 (2009) (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged”). This in effect opened a door for courts to assess credibility and resolve disputed fact issues. Movement attorneys are typically therefore harmed much more often by *Twombly* and *Iqbal* than benefited, as plausibility is naturally much more used to support existing ontologies than to help with the development of new ones.

In a perfect world, plausibility would aid in the disposition of claims such as: “Defendant then teleported into Plaintiff's securely locked storage room, where he used his light saber to destroy the valuable art work therein”. After all, we all know there is no such thing as “teleportation” or a “light saber”. A plausibility standard saves judges time and litigants money, by allowing the rapid resolution of claims which violate the laws of physics.

However, dismissal on plausibility grounds is often based on the unspoken premise that

Islamophobia, like teleportation, does not exist (while we all know antisemitism does). I could glean examples from any of the cases I have cited, but Judge Goldman's off-the-hook holdings in *Fakhreddine* are my personal favorites in this area as well: “I conclude Plaintiffs lack standing to bring this challenge. They have not alleged what information Penn will disclose or how it will harm them. While the House Committee's letter does mention Plaintiff Fakhreddine by name and thus could suggest that some produced documents might be about her, there is no allegation that those documents would contain defamatory statements or reveal private details such as her home address. The fact that Plaintiffs were harassed before is not enough; Plaintiffs need to show that Penn's documents would contribute to that harassment....Plaintiffs need more specific allegations of harm before they can bring this lawsuit”¹². *Fakhreddine v Univ. of Pennsylvania*, 2024 US Dist LEXIS 110406, at *7-8 (ED Pa June 24, 2024, Civil Action No. 24-cv-1034) Run through the English-to-English Translator, this emerges, “Dr. Fakhreddine has not plausibly pled that the entity whose members already accused her of antisemitism on national television and demanded she be fired, and which directed a letter to the University asking for documents about her specifically, could ever do anything to harm her”.¹³

This is wrong on so many levels. We were asking for prospective injunctive relief (which is in fact the only relief available under the First Amendment). Injunctive relief is intended to avoid the likelihood of irreparable harm, not its certainty. If someone is driving a bulldozer towards your house, you do not have to plead that it will hit the right or left side, or the speed at which it will hit. Nor does a claim lack plausibility because the bulldozer might still turn away.

Another insensate slap at us by Judge Goldberg was his holding we could not plausibly prove what documents the University had already given the House. Penn knew exactly what it had turned

¹² “Horsefeathers!” *Kelly v Hegseth*, 2026 US Dist LEXIS 29709, at *28 (DDC Feb. 12, 2026, No. 26-81 (RJL)).

¹³ Judge Preska's *sua sponte* rejection of a motion I had not made yet also held that an Arab American professor fired by NYU for alleged (nonexistent) antisemitism had no standing to complain. In litigating these cases, I frequently am reminded of the holding in *Scott v. Sandford*, 60 U.S. 393, 407 (1857) that the black man “had no rights which the white man was bound to respect”.

over, and refused to share it with us. Though the Judge acknowledged, “Plaintiffs complain they should not have to allege what only Penn knows”, he dismissed the case precisely because we could not do that.

In most of the cases I cite, a defendant which knew perfectly well it had committed egregious discriminatory acts against Muslim or Arab students, successfully argued that I could not prove so in the complaint. But in all other contexts, I am not required to *prove* my case in a pleading, without discovery or witness testimony. *Twombly* and *Iqbal*, as misinterpreted, have done tremendous harm. Courts have recognized this in other contexts: “ Twombly and Iqbal did not disturb the well-settled rule that courts 'must accept as true the reasonable inferences that [can] be drawn from [a plaintiff's] allegations””, *KSW Mech. Servs. v Mech. Contrs. Assn. of NY*, 2012 US Dist LEXIS 63507, at *3-4 (SDNY May 4, 2012). I am waiting for them to do so in cases involving Arab and Muslim litigants.

It is a corollary that defendants are constantly, improperly, asking courts to resolve disputed fact issues on motions to dismiss, and that some courts accept that invitation. Above, I quote Judge Abadi who did not seem to realize in the *Lax* case that appending the adjective “blithely” to a statement communicated a finding on a party's credibility. In a motion to dismiss I am answering right now, the Defendant's brief headings make this ask clear: “The Letter of Censure Does Not Qualify as an Adverse Action....UCSF’s Interests Justified the Letter of Censure....Defendants Did Not Suspend Marya’s Clinical Privileges....Marya’s Termination Does Not Give Rise to a Retaliation Claim”. *Marya v. University of California*, 3:25-cv-04716-MMC (N.D. Ca. 2025).

“I Don't Hear You”. I have noticed since my career began in 1980, that when I make an argument or cite case law which is irrefutable to a judge already determined to rule against me, she commonly acts as if I did not speak, or as if my words had less meaning than the barking of a dog (which typically reveals whether the animal is happy, sad, angry or frightened).

I have had this experience in every one of the cases I mention. Since I began this work in 2023, I have been asking courts to be mindful of the historical context. None have paid attention. I have been citing cases which make clear that a NYSHRL case does not need to be brought as a 78. No judge has bothered even to distinguish these.

It is amusing and infuriating that I cited *Lane v. Pace Univ.*, 2012 NY Slip Op 31464(U), ¶ 5 (Supreme Court, New York County 2012) to Judge Moyne in *Saad v. Pace*. That case holds: “[A]s it is undisputed that Pace's disciplinary determination did not involve any academic issues, plaintiff is not required to assert his claim against Pace in an Article 78 proceeding”. The Judge never breathed a word about it; how could he?

But we have now hit a nadir, at which I am warning courts that it would be radically, terribly wrong to deny Arab and Muslim students access to the NYSHRL-- and they are doing it anyway.

Last week, just after *Saad* and *Vinueza* were decided, university counsel submitted these decisions to the judge in two companion cases, *Mohamad v. University of Rochester* E2025013016 (Supreme Court, Monroe County 2025) and *Beiter v. University of Rochester* E2025017593 (Supreme Court, Monroe County 2025). I responded immediately by filing a letter (NYSCEF #22 in *Mohamad*) which began, “I have never written to a Court at such a height of indignation....Reading the two New York supreme court cases which University counsel submitted today is like stepping through a science fiction portal, into the Star Trek mirror universe, (or, more properly, Mississippi in 1964). The Courts both refuse to view the context of national unrest in which these disputes are playing out; they resolve disputed fact issues on the papers, which is improper either on a 3211 motion or a special proceeding; and, most impactfully, both stand for the proposition that students suing their universities for discrimination (and damages) are now excluded from the coverage of the New York State Human Rights law and may only bring Article 78's”.

Ten days later, Judge Kevin Nasca dismissed both cases...on the grounds they “shoulda been a

78”.

I am reminded of the sociology concept of the Overton Window. “The core concept is that politicians are limited in what policy ideas they can support — they generally only pursue policies that are widely accepted throughout society as legitimate policy options. These policies lie inside the Overton Window. Other policy ideas exist, but politicians risk losing popular support if they champion these ideas. These policies lie outside the Overton Window.” Mackinac Center for Public Policy, “The Overton Window”, <https://www.mackinac.org/OvertonWindow>

It breaks my friggin' heart that in 2026, the idea that Arab and Muslim students should have access to antidiscrimination laws, is outside the Overton Window.

Or Just Berate and Insult Us. “Whether properly characterized as paranoid, anti-Semitic, delusional, or merely fantastical, the suggested 'inference' is illusory (and likely malignant) and warrants no consideration in a court of the United States,” *Tampa Bay Students for a Democratic Society v. Law*, 8:25-cv-02752-SDM-AAS (M.D. Fla 2025). Yes, because an influential Zionist donor, trustee or organization abusing its power to intervene in administrative proceedings at a university is physically impossible like teleportation (but, oops, the “stakeholder” in *Vinueza*).

CONCLUSION

There are days when I feel like Cassandra, blessed with insight but cursed never to be believed. I am a professional optimist, however, and hope to live long enough to share the honor of having exposed unbearably unjust actions, which are ending the educations and careers of Arab and Muslim students, due to their skin color, religion and beliefs. This essay is a step in that direction.