

SYSTEMIC ISLAMOPHOBIA IN AMERICAN COURTS

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I dedicate this essay to Judge Hasa Kingo, whose contribution was so very meaningful

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 fifty pertinent litigations in the courts of three states, and federal courts of 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.

I am not telepathic, so cannot say that a particular judge is a bigot. The humans I name in this essay may simply be complicit in the behavior I describe. When I use the phrase "Islamophobia", I am describing actions and their impacts, not *mens rea*.

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>

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 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 like-minded 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*, 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).

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.

A Bullet to the Head of the Case. I have named these categories to describe types of Islamophobic sophistry, manipulation etc. which I have witnessed on multiple occasions. This one describes a behavior I have seen only once, thank God.

In *Tellez v. NYC Dept. of Parks*, 100628/2025, arriving an hour early, I watched Judge Hasa 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 an extraordinary *sua sponte* order (NYSCEF #40) *killing* our settlement-- apparently designed to be a sniper's bullet to the head of my case. "The court will not 'so-order' any agreement reached between the parties". This I have seen before, when a judge was frightened of the subject matter. "If the parties fail to reach a settlement by the next court date, August 1, 2025, this matter shall be marked off-calendar and proceed in accordance with the CPLR." Say what? If the parties fail to reach settlement, you go full speed ahead with a case, you don't mark it off. (But see "Just Go Away," below.) "All senior members and supervisors of the Office of Corporation Counsel who are involved in settlement discussions shall appear in person on August 1, 2025 at 80 Centre Street, Room 320, New York, NY at 10:00 AM....The City officers and/or attorneys within the Office of Corporation Counsel who approved the settlement agreement shall identify themselves and appear at the August 1, 2025 court appearance." This, more than anything else, killed my settlement. "If the parties reach a settlement, they shall submit fifteen (15) double-spaced, hard-copy originals of the fully executed agreement to the court for distribution at least one (1) day prior to the appearance on August 1, 2025." Who in hell were these for? "At the August 1, 2025 appearance, the parties shall explain how their executed agreement cures the constitutional First Amendment issues identified by the court, citing the specific provisions of the agreement that address those issues. The parties shall also explain how the agreement complies with New York City regulations governing the Parks Department

and the GreenThumb gardening program.”

I have never had a Court say, “You must sell me your settlement”. Ever. Corporation counsel are grown-ups. Their clients were grown-ups. I am an adult, and so were my clients. You would think, as a simple matter of contract law, we could agree on mutually satisfactory terms, to settle our case.

“[S]tipulations of settlement, especially those whose terms are placed upon the record in open court, are met with judicial favor. Absent a showing of fraud, overreaching, mistake, or duress, the stipulation should not be disturbed by the court”, *Suzuki v Peters*, 12 AD3d 612, 612 (2d Dept 2004). Not on my watch, says Judge Kingo!

I had appeared before Judge Kingo on a complex commercial matter twelve or fifteen years ago, and been impressed. He seemed more intelligent, careful and fair than most judges. He may be a case study in how bad systems destroy their best people.

He concluded in his order: “Failure to adhere to any of the foregoing directives may result in the court taking such actions as it deems just and proper under the circumstances.” I took this as a threat to dismiss *sua sponte* if I called him out on his inappropriate order.

Within a day, the City had backed out of the settlement-- in my opinion, as Judge Kingo intended. I voluntarily dismissed the case and re-filed in federal court; something which we should never need to do, and which was my best option facing willful, deliberate injustice-- aggression I would say-- from Judge Kingo.⁴

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

⁴ Judge Kingo had also expressed displeasure in open court when we told him we were settling the case: “The Court, as you can see, was prepared today to rule on the preliminary injunction. The Court devoted substantial time and judicial resource to a careful review of all of your briefs, and was fully prepared to issue its ruling on the requested relief.” It seems possible, under the circumstances, that that order, which we never saw, contained an improper *sua sponte* dismissal.

breaks a compelling case down to its component parts in a sophisticated 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 pretextual, biased disciplinary actions taken by universities can only be redressed in an Article 78 mandamus-- then held that the action was time-barred; that my 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

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.

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 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

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 described below, of the ex-IDF student who Columbia reqrded for skunk spraying Arab and Muslim classmates with a settlement of \$395,000. 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).

⁷ As I mentioned, the federal courts have done a much better job. I can now string-cite about fifteen cases holding that

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 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

anti-Zionism is not antisemitism, but First Amendment-protected expression. Yet most universities seem frightened of the optics of defending themselves against antisemitism claims.

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.

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

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

“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 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 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 willfully 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

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.

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 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

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

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 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*

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.”

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 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]

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”.

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).

A Note on the Low Quality of Motions to Dismiss. As I answer more motions to dismiss, I am struck by their very low quality: they are illogical, inconsistent, visibly dishonest, and evasive. I could argue that, because they mainly succeed, they don't have to be any better than that. But I think there are other take-aways.

In a case against a Congressperson who confessed proudly on X that she had privately demanded Columbia expel a particular student, *James v. Foxx*, 1:26-cv-00998-PAE (SDNY 2026), among the farrago of assertions made in her motion to dismiss is that the “chronology fails” because her post was made long after he was expelled, and could not have caused it. But we quote the tweet as her confession of a prior bad action which did contribute to sanctions against the student, so the statement about timing is obviously an intentional Non-sequitur (see category below).

Much of this motion also consists of *ad hominem* attacks on the student, listing other First Amendment-protected statements he made which have no bearing on the question whether a member of Congress may legitimately use her authority to bully a university into ending the education of a student she

dislikes. This is an instance of what I call the “He Had It Coming” defense: the defendant wishes the Court to find that the Plaintiff is a bad person who deserves no consideration, and no legal rights. .

On a motion to reargue the *Saad v. Pace* decision, university counsel has responded literally that history is irrelevant, and that my fifteen-case string cite holding that anti-Zionism is not antisemitism doesn't prove anything, because the cases are from other jurisdictions (though they are interpretations of national, not New York law, and of course there is no Second Circuit jurisprudence to the contrary).

I had probably answered ten or twelve of these before I fully appreciated how dishonest and disrespectful they were. It's easy to find Internet writing about excuse-making in everyday life: “[E]xcuses are a way to justify or rationalize poor behavior and they prevent us from feeling bad about what we did or didn’t do. They’re also a way we rationalize avoidance – how we justify not stepping into something we’re not wanting to do or that we’re nervous or unsure about doing. Excuses are an attempt to avoid being responsible for whatever it is you did... or didn’t do. It’s blaming outside factors for inside moves.” The sillier the excuse, the more harm it does: “[P]eople get upset when others don’t own their part when they’ve treated us with some form of disrespect”. Sylvia Flanagan, “Why You Should Stop Making Excuses”, *Sylvia Flanagan web-site*, April 10, 2023 <https://sandiego-therapist.com/2023/04/kick-starts-podcast-why-you-should-stop-making-excuses/>

Motions to dismiss which misrepresent obvious facts or claim history is irrelevant are an insult to my intelligence-- you would think the Court's also, except when the Court is in in on the deception, like two parents pretending to detect oncoming rain in a blue sky, because a trip to the park isn't convenient right now.

In fact, these low quality motions should be held to violate Court frivolity rules-- Federal Rule 11 and New York rule 130, among others. A ubiquitous element, for example, is asking the Court to resolve disputed fact issues against the Arab or Muslim plaintiff on a motion to dismiss in which doing so would be obviously, incontestably impermissible.

I wrote on my to-do list just now to track down some motions to dismiss made by the same law firms in other kinds of cases-- perhaps when defending one Fortune 1000 firm against another. I suspect what I will find is that those will be of much higher quality.

If I am right, the low quality of motions to dismiss in the Palestine space is a by-product of the racism: if a university treats Arab and Muslim students like second class citizens on campus, it would be inclined to do so in court as well-- especially if there were no negative consequences, and a chance that the judge will enthusiastically endorse the disrespect.¹⁴

“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.

¹⁴ Full disclosure, universities, not having forgotten the outmoded “loco parentis” role, treat white students like children as well-- they just don't suspend or expel them for expressions of opinion.

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.

Just Go Away. Judge Kingo really wanted me to dismiss the *Tellez* case first, then settle it

afterwards. “And any resolution that you reach beyond that doesn't require the Court's involvement..... [W]hat is the issue with to withdrawing this case at this juncture and mark it off the Court's calendar. And you can do as you wish in terms of trying to resolve it. I don't understand what the Court's involvement is.” (*Tellez, supra*, NYSCEF #39). Go away, kid, don't bother me. What does this court have to do with resolving a First Amendment controversy? Court? What court?

Appellate Fogger. Years ago, I had an epiphany I am rather proud of. The United States Supreme Court (on its best day) is an expert tailor that sits by the door of a garment factory, inspecting the garments as they are carried out of the door to be shipped. Some items are fine, she waves them on. Some are completely hosed, she dumps them in a garbage can. Most that require repair, she sends back inside, with instructions. Every once in a while, she applies her own needle, taking a few stitches. (That is the legislative role that the Court officially does not have.) In all cases, the goal is better garments, out the door.

By contrast, some state appeals courts, in very politicized and rather degraded areas, have sunk to the level of press agents. A terrible garment comes out of the factory, so they work up a press release explaining it's a good garment. Almost any judge who screwed up can be rationalized without being reversed: a decision unsupported by law can be re-spun as one that is better founded, or was “harmless error”, or or or.

Fairly rarely do you see a case where an appeals court intentionally immolates a well-made garment, but: Fordham refused to approve a Students for Justice in Palestine chapter as a student organization; the rejected students brought an Article 78, and won. The Supreme Court held that the denial was arbitrary and capricious because “Fordham procedurally violated its own rules concerning the recognition of student clubs by permitting a dean to overrule a vote of the USG, and imposed a newly identified factor in considering whether approval is warranted or not, namely whether a group

may add to the 'polarization' of persons with differing opinions on contested topics of the day”. *Matter of Awad v Fordham Univ.*, 64 Misc 3d 1234[A], 2019 NY Slip Op 51418[U], *5 (Sup Ct, NY County 2019). Because the original petitioners were about to graduate, the court also permitted an amendment to add a younger student.

The Appellate Division, First Department pulled on a thread until the garment disintegrated. “The motion to amend the petition should have been denied, as petitioner Shetty, who was not a student at respondent university when the original petitioners' application for recognition of a student club was rejected, lacks standing to challenge a determination that caused him no injury in fact,” *Matter of Awad v Fordham Univ.*, 189 AD3d 605, 605-606 (1st Dept 2020). Say what? Every generation of students who would have joined an SJP chapter which doesn't exist suffers new harm. “To the extent Shetty, now that he has matriculated, wishes to join a club similar to the proposed one that was denied recognition by the administrative action at issue, he may submit a new application for recognition of such a club. Since Shetty has not yet submitted such an application, any claim he might assert is not ripe for adjudication inasmuch as no administrative action final and binding upon [him] has been rendered”. I flash on a hamster wheel ceaselessly spinning (but the hamster has died). “Given that students currently enrolled in the respondent university's undergraduate program may file an application for recognition of a similar club at any time, this is not a matter likely to evade judicial review”. No? Six years later, and there's still no chapter at Fordham. But hey.

“Capable of repetition yet evading review” is an exception to mootness, the kind of thing that an iconic Supreme Court really concerned with all-good-garments-all-the-time might offer. The Appellate Division flipped *that* script, so the doctrine is now “Capable of repetition, *so* evading review”. A group of students applies for a SJP chapter. Fordham says no. They bring an Article 78, but always seem to graduate just before it's decided! Rinse and repeat!

Why would an appeals court destroy a beautiful, well-tailored garment? Because Arab and

Muslim students were about to wear it. That is all.

My categories overlap; they are not exclusive. *Awad* is also an example of Fun With Words, and of Zeno's Arrow. But it ends by Salting the Earth: “Even if we had found that standing exists and therefore had considered the merits of the petition, we would have concluded that the petition should not have been granted. Respondent followed its approval procedure and acted in the exercise of its honest discretion ... Respondent's conclusion that the proposed club, which would have been affiliated with a national organization reported to have engaged in disruptive and coercive actions on other campuses, would work against, rather than enhance, respondent's commitment [to] open dialogue and mutual learning and understanding, was not without sound basis in reason or taken without regard to the facts". Good night and good luck!

Beat the Devil. There is a memorable scene in Robert Bolt's *A Man for All Seasons*, in which Sir Thomas More is debating his son-in-law, William Roper, who exclaims: “So, now you give the Devil the benefit of law!”

Sir Thomas More: Yes! What would you do? Cut a great road through the law to get after the Devil?

William Roper: Yes, I'd cut down every law in England to do that!

Sir Thomas More: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat?

Judges sometimes don't really don't care what they tear down to get to the goal, or what the consequences are, for humans caught in the collapse, or generations to come who will have to live in the ruins.

The cases I cited above, which hold that “it shoulda been a 78”, are an example.

But the really iconic one comes from Judge Abadi in *Lax*. She tore down CUNY's venerable,

treasured Henderson rules, solely to ensure my clients could receive no protection from them.

The problem is, CUNY relies on them every damn day, to suspend and expel students, some of whom will sue. CUNY will argue that everything was done entirely properly pursuant to Henderson. But the student plaintiffs will then quote Justice Abadi for the proposition that the Henderson Rules don't mean shit: “The Henderson rules don't set forth any specific disciplinary procedure, or remedy that CUNY is required to follow, in responding to an alleged violation of such rules. Instead, the Henderson Rules provide that the President of the CUNY board holds full discretionary power in carrying the Henderson Rules in to effect”. Those words literally mean that the Henderson Rules are aspirational, too vague to be enforceable (!). CUNY should not be able to use Henderson as a shield in these cases any more, as Judge Abadi has bless-cursed the university with pure unfettered discretion-- which at some point (of course) slides across the line into arbitrary capriciousness. The funniest part is that Justice Abadi destroyed Henderson in granting CUNY's motion to dismiss our cross-claims. Be careful what you wish for!

The Hand-Wave. The recent “shoulda been a 78” cases cite back to an evil granddaddy case from sixteen years ago, which holds: “The instant plenary complaint, while couched in terms of unlawful discrimination and breach of contract, is in fact a challenge to a university's academic and administrative decisions and thus is barred by the four-month statute of limitations for a CPLR article 78 proceeding, the appropriate vehicle for such a challenge”. *Padiyar v Albert Einstein Coll. of Medicine of Yeshiva Univ.*, 73 AD3d 634, 635 (1st Dept 2010) .¹⁵

“Couched” is a tell. Someone should write a dissertation on it. It implies something is not straight in the communication: “[T]o express indirectly or obscurely:the threat couched under his polite

¹⁵ Despite the impressively definitive language, courts everywhere including the First Department for years afterward found a 78 was not required in HRL cases, until the recent swing back to bigotry expressed in *Saad*. The rule might be renamed “78 When We Feel Like It”, or even “78 Those Muslim and Arab Kids”.

speech”. “To couch”, *Wordreference*, <https://www.wordreference.com/definition/couching> “Since childhood, I've occasionally and often used couched to imply how something gets 'hidden in plain view' or disguised from the reader, intentionally written down, but (done innocently, perhaps mischievously, or even potentially maliciously,) veiled from the reader....Couched, as I've been using it and as I want to continue to use it, implies a degree of deceit or trickery, and is intentional.” “The definition of 'couched’”, *R/English*

https://www.reddit.com/r/ENGLISH/comments/lmkskk/the_definition_of_couched/

That's how I understand the sentence. “Those lying sack students contumaciously pretend this is about discrimination, but its really a simple student conduct matter”. Anyone couching this as discrimination is off their rocker, or trying to fool this Court.

That is the very model of a modern hand-wave. You walk into court, brown-skinned and indignant at the way you have been treated, but imagining you have one hundred years of jurisprudence at your back, and a respectful judge who will see *that* and see *you*, and *set* it right; but Nobody by That Name Lives Here.

The most astonishing take-away, is that five judges could write or endorse those lines, either without seeing, or caring, that they were disposing of an immense realm of rights, duties, interpretations, discussion, of admonitions, respectful disagreements and accords, all “bending towards justice”, in a grammatical fifty word sentence. Should we shiver tall structures with a single fist-blow without explaining what we are doing and why?

Yesterday morning, a judge who refused to hear me speak on the First Amendment, rushed to issue a decision which perfectly took speech concerns into account: he apparently did not wish the record to reflect What We Were Really Talking About. More often, I feel I must press hard, and at some risk, to give judges Hostile Homework: Please explain, in at least seven thousand words, why Arab and

Muslim students, whose educations are being blighted by bogus student conduct proceedings at the urging of Zionist donors, trustees or politicians, are no longer permitted to bring a plenary action under the Human Rights Law, to get discovery or a trial? Could you do that for me, Your Honor, please? I *respectfully request* appealable paper, so that, at some point, in pursuit of the ever-elusive “appearance of justice”, *In re Charles A. Field Delivery Serv.*, 66 N.Y.2d 516, 519 (1985), we can, at long last¹⁶, Talk About What We're Really Talking About.

The Non-sequitur. A bold non-sequitur, uttered with authority, occupies a surprisingly large part of the battlefield, even though There is no There There.

Witness Judge Goldberg's insistence that I had acknowledged that the House Committee had not coerced the University: “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."... (emphasis added).) I do not find this language coercive and apparently, neither do Plaintiffs....[who plead that] 'Penn was '[a]sked by the House Committee for information' and 'Penn is voluntarily complying...[T]he Information Letter is not a subpoena and has no legal compulsory effect." (emphasis added).) *Fakhreddine v Univ. of Pennsylvania*, 2025 US Dist LEXIS 16373, at *12 (ED Pa Jan. 30, 2025, Civil Action No. 24-cv-1034) .

This beats out Judge Kingo in the annals of dishonor. Kingo did not utter any language that anyone else has seen fit to quote¹⁷; Judge Goldberg's shameful illogic will be cited against me in my own cases the rest of my career, and against other lawyers for decades to come. Words that a Judge may

¹⁶ “When you make shoes for the devil, bring a long last.”

¹⁷ Yet, though it is possible that another judge trying to flee responsibility will borrow from the order I am sure it took an hour or so to write. I imagine Judge Kingo running right out of his coat, which then flutters to the ground.

have thought about for only a minute, and written with a smirk, can deny rights and remedies to very real and suffering people for a hundred years.

What I actually said about the House Committee in my Amended Complaint: “The House Committee on Education and the Workforce (the 'House Committee') has eagerly assumed the role of the House Unamerican Activities Committee of old ('HUAC'). On December 5, 2023, the Presidents of the University of Pennsylvania, Harvard, and MIT were called before the House Committee and asked questions which were intentionally phrased to place them in a false light as to their actions to combat anti-Semitism. This bad faith questioning was so effective that two of the three presidents have since been forced to resign, including Elizabeth Magill of Penn. The House Committee has eagerly joined billionaire donors, pro-Israel groups, other litigants, and segments of the media in accusing Penn of being a pervasively anti-Semitic environment (which it is not) — but to advance this narrative, every one of these participants in the hue-and-cry, including the House Committee, have asserted that anti Zionism, and in fact virtually any criticism of the state of Israel, is anti-Semitism. The new McCarthyism has, since long before October 7, been highly successful at getting individuals fired from jobs, expelled or suspended from universities, denied tenure or advancement, demoted from prominent media roles, and dropped by entertainment agents, as well as successfully obtaining the rescission of offers of employment, and of invitations to participate in conferences and workshops, speaking engagements and numerous other opportunities. This new McCarthyism, which was growing slowly before the Hamas atrocities on October 7, 2023, but is surging up very rapidly now, has already been hugely successful at ending careers and blighting lives, just like its predecessor.” (paragraphs 1-4).

I then said: “Since this was not a subpoena but a letter requesting voluntary compliance, Penn would have been within its rights to protect its community by refusing compliance. Instead, Penn, *its*

trustees off balance and frightened by the accusations of anti-Semitism, announced it would comply with the House Committee's letter, and, on information and belief, has begun producing documents. Penn's voluntary compliance with the Information Letter has already harmed Plaintiffs and will continue to do so, threatening the privacy, safety, academic freedom and careers of the individual Plaintiffs and of many other members of the Penn Faculty for Justice in Palestine” (#'s 7-8, emphasis added).

“A lie is halfway around the world while the truth is still putting its pants on”.¹⁸ Judge Goldberg's mischievous, dishonorable non-sequitur went viral. In *Khalil v Trustees of Columbia Univ. in the City of NY*, 2026 US Dist LEXIS 58267, at *38-39 (SDNY Mar. 19, 2026, No. 25-cv-2079 (AS)), a much more honorable judge, Arun Subramanian, devoted some thought-cycles to distinguishing Judge Goldberg: “Columbia also points to *Fakhreddine v. Univ. of Pa.*, 2025 U.S. Dist. LEXIS 16373, 2025 WL 345089 (E.D. Pa. Jan. 30, 2025), in which the court... determin[ed] that the plaintiffs conceded that Penn wasn't coerced into providing the plaintiffs' records. To hammer home that point, the court quoted and italicized parts of the operative complaint, which alleged that Penn was '[a]sked by the House Committee for information,' that 'Penn is 'voluntarily complying,' and that 'the Information Letter is not a subpoena and has no legal compulsory effect.' Here, plaintiffs allege that the federal government defendants are 'compel[ling] Columbia to do what [they] cannot do directly: violate students' First Amendment Rights,' and that by 'disclosing information about them to the Committee[] and otherwise capitulating to the illegal demands of the federal government, Columbia is intentionally exposing Plaintiffs to [harm] . . . for their First Amendment-protected criticism of Israel and their pro-Palestinian expression,'”

But the one thing the honorable Judge Subramanian did not do, was to look at my Complaint, to see what it really said.

¹⁸ Mark Twain, H.G. Wells, Bertrand Russell, Winston Churchill, W.C. Fields and Albert Einstein, who have so much in common beside being grumpy old white men, also share the status of never having said this.

Since *Fakhreddine*, I have sued MIT and Sarah Lawrence, and the House Committee, regarding information letters, and all defendants have cited Judge Goldberg's words. In a brief I filed just after midnight last night, I responded with an account of Judge Goldberg's insufferable sophistry.

I wrote 26 years ago: “Lying is theft. When you tell me something which I take to be true and as a result I invest my time, or my money, or even my care, you have stolen these things from me because you obtained them with false information”. Jonathan Wallace, “Lying is Theft”, *The Ethical Spectacle* May 2000 <https://www.spectacle.org/0500/lies.html>

No one who graduated law school could possibly have thought that I conceded that the House Committee did not coerce the university; no one in their right mind could believe that coercion evaporates if the bully says “please”. By saying it as if he believed it, Judge Goldberg gave me a “gift which keeps on giving”-- a CTD (citation transmitted disease).

Playing Chess Against The Judge. In 1972, we sweated every moment of American chess-master Bobby Fischer's match against the Soviet grandmaster Boris Spassky. Chess.com gives a blow by blow of the most memorable games, such as #10, in which “Fischer was crushed in the Najdorf Poisoned Pawn variation, his only loss ever as Black in that opening”.
<https://www.chess.com/article/view/fischer-vs-spasky-world-chess-championship-1972>

In analogizing litigation to chess, we usually think of opposing counsel as the adversary, and the judge as the “arbiter”, or tournament director. Sometimes, though, it becomes clear that you are actually playing against the judge, as was my experience in companion cases, both captioned *Gillian Mury v. Fashion Institute of Technology*, 152788/2024 and 652926/2024, both Supreme Court, New York County 2024, and both heard by Justice Lyle Frank. “Wallace was crushed in the Frank Poisoned Article 78 variation, his first loss ever as Plaintiff in that opening”.

The plaintiff was a residential assistant summarily terminated due to a single pro-Palestinian flyer she had permitted an acquaintance to post on a bulletin board on her dorm floor. I brought an Article 78 first, then, concluding it was a poor vehicle for a First Amendment claim against a public university, filed a plenary First Amendment action. I moved to consolidate those actions, or in the alternative to stay the 78 pending the determination of the First Amendment case, and then even asked leave to discontinue the 78. But Judge Frank masterfully exploited my error in filing the earlier petition, dismissing the First Amendment action in effect on the CPLR Section 3211(a)(4) ground that “there is another action pending between the same parties for the same cause of action in a court of any state or the United States”. The Judge disregarded the language immediately following: “[T]he court need not dismiss upon this ground but may make such order as justice requires”, including consolidation, staying one action, or dismissing the earlier rather than the later one.

These two cases are also instances of many of my other categories: Zeno's Arrow, the Tilted Playing Field, the Hand-wave, and Salting the Earth. But, here, I had the very concrete sense that the Judge was Boris Spassky, relentlessly exploiting every opening I inadvertently gave him.

When, as a result, in later cases, I started skipping the 78, and going straight for the plenary, I ran smack into “it shoulda been a 78”. This was in effect what the Ninth Circuit calls a “preclusion trap” caused by a 1094.5 claim, the California equivalent of a 78: “[A] [1094.5 federal claim] exhaustion requirement springs an improper 'preclusion trap' for § 1983 plaintiffs, in which a [federal claim] plaintiff could not go to federal court without going to state court first, but if he went to state court and lost, his claims would be barred in federal court by preclusion doctrines,” *Jamgotchian v Ferraro*, 93 F.4th 1150, 1156 (9th Cir 2024).

I recently brought a lawsuit against NYU for a summarily suspended and then non-renewed adjunct, which was assigned to Justice Frank. I asked him to recuse himself, on the grounds that we did

not get a fair hearing in *Mury*.

Not Represented. Decisions are being made everywhere which affect our rights, which find facts which will be cited against us, then are secretly settled with terms relating to sanctions for our speech that are not even disclosed.

The *New York Times* had sued Columbia seeking the disclosure of student record shared with Congress. I filed a proposed amicus: “Given the complexity of the privacy issues, and the absence of any party who can be relied upon to argue student privacy rights, it is respectfully suggested that this Court consider appointing a 'friend of the court' to represent student interests, *see United States v Adams*, 348 FRD 408, 409 (SDNY 2025) (Where 'there has been no adversarial testing of the Government's position generally or the form of its requested relief specifically....precedent and experience have recognized the authority of courts to appoint an amicus to assist their decision-making'). This attorney, once appointed, should review the records in question, and independently decide whether to oppose their disclosure entirely, or to participate in discussions or negotiations regarding confidentiality, redaction of records, and prior notice to affected students.” *Application of the New York Times Company in the matter of Columbia University Apartheid Divest*, 1:25-mc-00218 (SDNY 2025). The Court very nicely accepted my letter brief, then made no further reference to protection of the students' rights in granting the *Times'* application.

When students bring antisemitism lawsuits against universities, they usually get courts to echo false or contestable assertions about Arab and Muslim students. These may be merely recitals of assertions in the Complaint, which of course must be deemed true in deciding a CPLR Section 3211(a) (7) motion; but they will then of course be cited as if they were facts found at trial.

For example: “The demonstrators surrounded the library and proceeded to bang loudly on the library's doors and on its floor-to-ceiling glass windows, shouting demands to be let in and continuing to direct anti-Israel slogans and waive a Palestinian flag at the Jewish students inside the library. During the roughly twenty-minute ordeal, Cooper Union's administrators did nothing to disperse the protestors and instead directed law enforcement to stand down, even as the college's president had just escaped the building through a back exit. None of the protestors subsequently faced any discipline”, *Gartenberg v Cooper Union for the Advancement of Science & Art*, 765 F Supp 3d 245, 252-253 (SDNY 2025).

Students to whom I spoke who took part in the action said they had no idea there were any Jewish or Zionist students inside the library, could not see anybody through the glass doors, and reacted with indignation when they discovered they were locked out of the building with no explanation.

In a case with no Arab or Muslim parties or witnesses, brought solely by Zionist students against the university itself, no one seeks our version of events. Most universities are quite unlikely to assert no antisemitism occurred, for fear of being doxed and called antisemites themselves. Courts play into the hands of dishonorable litigants constructing “scaffolds of falsehoods” with these recitals.

I mentioned *Ingber v. NYU* 1:23-cv-10023 (SDNY 2023) as an instance of the Tilted Playing Field, but it belongs here as well. A *Gartenberg*-style litigation, it had the prospect of shaping up as including a rich collection of lies about us, which we would have no chance to counter. I asked for leave to move to intervene, which as I have described, Judge Preska denied before I had actually made the motion, signaling some irritation at the idea that Arab and Muslim members of the community even wished to have voices. When I finally made the motion, but before it could be decided, NYU entered a secret settlement with the plaintiffs, of which only a dismissal appeared on the record. The parties however issued a joint press release, in which they said, “NYU has committed to take groundbreaking

measures to address antisemitism, including in the wake of the October 7, 2023 terrorist attack and ensuing violence in the Middle East. These actions align with and strengthen NYU's existing measures to safeguard its community's Jewish and Israeli students and others who may experience discrimination or harassment". "Joint Statement on Settlement of Suit", NYU News, July 9, 2024

<https://www.nyu.edu/about/news-publications/news/2024/july/a-joint-statement-on-lawsuit.html>

In other words, huge commitments had been made which further limit the speech of Arab and Muslim members of the community, without their having had any voice, or even knowing exactly what these are.

I think I have earned a reference to Kafka's *The Trial*, in which Josef K. is "traded", prosecuted and finally killed, without ever knowing the charges against him. I read the work just once, as a teenager, but have never been able to forget the last sentences: "But the hands of one of the gentleman were laid on K.'s throat, while the other pushed the knife deep into his heart and twisted it there, twice. As his eyesight failed, K. saw the two gentlemen cheek by cheek, close in front of his face, watching the result. 'Like a dog!' he said[;] it was as if the shame of it should outlive him."

Don't You Bring All That Smelly History in Here. I recently submitted a reply I was rather proud of, in a case in which a Zionist attorney had repeatedly shamed a 27-year-old hijabi witness, asking her questions like "Are you in favor of killing Jewish babies?", which could not possibly be admissible in the court proceeding, but were just to shame her, "exposure for the sake of exposure".

The affidavit began: "On June 9, 1954 (five weeks before I was born), an iconic moment in American free speech history occurred towards the end of the Army-McCarthy hearings. 'McCarthy charged that one of [army defense counsel Joseph] Welch's [associates] had ties to a Communist

organization.¹⁹ As an amazed television audience looked on, Welch responded with the immortal lines that ultimately ended McCarthy's career: 'Until this moment, Senator, I think I never really gauged your cruelty or your recklessness.' When McCarthy tried to continue his attack, Welch angrily interrupted, 'Let us not assassinate this lad further, senator. You have done enough. Have you no sense of decency?'" <https://www.senate.gov/about/powers-procedures/investigations/mccarthy-hearings/have-you-no-sense-of-decency.htm>

At argument, the Court confusingly admonished me that my papers were “interesting”, but “unhelpful to this court”.²⁰ I have already noted in “I Don't Hear You”, history and precedent met with silence; here I was told that trying to place the immediate controversy in historical context somehow pulled focus, or confused the judge, was anyhow somewhat shameful, a sort of sleight of hand, three card monte with history concealed under one of the cups.

In my research, I found an older instance of Judge Preska singing, “Don't know much about history” (Sam Cooke, “Wonderful World”, 1960): “Professor Schrecker's testimony is inadmissible under Rule 702... Schrecker's proposed testimony explaining 'how the political and religious speech of Mr. Hashmi and al Muhajiroun was within the historical norm of protected speech' and 'the historical parallels between the McCarthy era and other eras of stifled dissent and compar[ing] them to the era

¹⁹ For the record, the organization was the National Lawyers' Guild (“NLG”) a left wing organization (and, needless to say, never a “Communist front”) of which I have been a proud member since 2012. I am honored to be their defense counsel, retained for the first time in the case of *Bibliotechnical Athenaeum v. National Lawyers' Guild*, 653668/2016 (Supreme Court New York County 2016), which was, like the instant matter, a lawsuit founded on the proposition that anti-Zionism is antisemitism (and my introduction to the genre). In 1950, the infamous House Unamerican Activities Committee issued a report calling NLG the “legal bulwark” of the Communist Party, https://archive.org/stream/reportonnational1950unit/reportonnational1950unit_djvu.txt. The Report recommended that the “American Bar Association consider the question of whether or not membership in the National Lawyers Guild, a subversive organization, is compatible with admissibility to the American bar”. On October 16, 2025, 75 years later, Rep. Lance Gooden of Texas wrote to then-Attorney General Pam Bondi, claiming that NLG was an antifa front (!) and calling for “disbarment of the NLG’s member attorneys, revocation of 501 status and benefits, and bringing criminal charges as the administration deems necessary and appropriate”. https://gooden.house.gov/_cache/files/d/2/d26a8206-b28b-45f9-a625-7945dec024ca/66943302A87178B208D975A926606CA3CE035EF64203ADA0C6DC52C9D27D3F86.nlg-letter-to-bondi-10.16.25-v5-final.pdf Same shit, different day.

²⁰ Weeks later (“l'esprit d'escalier”) I flash that I *should* have answered him, “You, sir, are being unhelpful to history”.

since 9/11'... cannot provide assistance to the jury in its determination of facts in issue or its understanding of the evidence”, *United States v Syed Hashmi*, 2009 US Dist LEXIS 117366, at *4 [SDNY Dec. 8, 2009])

“There used to be history, but there isn't any more”. Guy Debord, *La Societe du Spectacle* (Paris: Gallimard 1992) p. 142²¹

Being Beaten to Death With Your Shield. Laws that you thought were adopted to protect you, are being used to end you, often while the assailant rants at you in terms of righteous indignation.

This one is extremely common through-out the history of the First Amendment. When Professor Catherine McKinnon's proposed ordinance criminalizing pornography as embodying male violence against women, was held constitutional in Canada, “[t]he first judicial interpretation of the *Butler* ruling was in order to invoke the obscenity laws against a lesbian magazine”. Alexandra G. Bennett, “From Theory to Practice: Catharine MacKinnon, Pornography, and Canadian Law”, *Modern Language Studies*, Vol. 27, No. 3/4 (Autumn - Winter, 1997) 213, p. 227.

In our world, I have witnessed several instances of the First Amendment being used as a weapon to silence us.

For example, SLAPP (“strategic lawsuit against public participation”) laws were purportedly passed to protect people like us, from lawsuits filed against us by people with power and money. The Ur-situation which inspired the New York law was the billionaire developer suing the humble citizen who spoke against his project in a town board meeting.

Accuracy in Media attempted to use New York's anti-SLAPP statute to seek dismissal and

²¹ “The Historical Context Referenced Is Irrelevant to This Action” is the name of a section in a memo in opposition to my motion to reargue *Saad v. Pace*.

sanctions when sued by students it doxed by placing their photos on the side of an LED truck, captioned “Columbia's Leading Anti-Semite”, then stationing the truck outside the university and even their parents' homes²², *Hafez v Accuracy in Media, Inc.*, 88 Misc 3d 1228[A], 2026 NY Slip Op 50260[U] (Sup Ct, NY County 2026).

The University of California at San Francisco is asserting that state's SLAPP law in a counterclaim against a doctor terminated for pro-Palestinian speech, *Marya v. UCSF* Case No. 25CV125190 (Superior Court, Alameda County 2025). I was astonished at the idea that a government entity could sue an already beleaguered individual for violating *its* First Amendment rights, but hey: in strange California, that's a Thing.

And here's an example from the incomparable Judge Hasa Kingo: “You know, the Court in looking at that issue, the Court spent a lot of time looking at that issue prior to the withdrawal of the injunction. Has understood and continues to understand, that when you look at cases such as *West Virginia, State Board of Education versus Barnette*, 319 U.S. 624, granted, it's a 1943 case, but that is a case in which the courts, the Supreme Court emphatically stated, and I quote, 'That no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or matters of opinion, or for citizens to confess by word or act their faith therein.'...[E]ven when applied to commercial context, compelled speech is highly suspect.” (*Tellez, supra*, NYSCEF #39).

In other words, by the tender mercies of Judge Kingo, my LGBT, trans, poor, immigrant clients of color, constantly threatened with violence, and whom the city was attempting to evict from their garden,²³ were transformed into a mighty, oppressive government.

That's just sad.

²² AIM's founder sometimes rides the truck to its destination in a residential neighborhood, then, filmed by a cameraman, confronts the targets and their families in front of their houses, and asks neighbors if they knew they lived next door to a terrorist.

²³ I can't imagine a more metaphorical, even Biblical, fact situation than defending people being ejected from a garden.

Or You Could 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*).

On Criticizing Judges. Fueled by adrenaline and indignation, I wrote letters to Judge Kingo and Judge Goldberg, which I filed on the public docket, reproaching them for their bad actions. I have probably written seven such letters to courts in ten years, most not in the Palestine space. A lawyer friend from another state asked, “Don't you expect an order to show cause” for sanctions? I replied that there has not to date been any consequence, or even any response; my letters, like this essay, are truthful, well-documented, brimming with citations.²⁴

Courts take a deep interest in “instances of disrespect for the law, Judges and courts expressed by vulgar and insulting words or other incivility”²⁵, which are particularly at risk if said in a courtroom, but which “uttered, written, or committed outside the precincts of a court are not subject to professional discipline. Perhaps persistent or general courses of conduct, even if parading as criticism, which are degrading to the law, the Bar, and the courts, and are irrelevant or grossly excessive, would present a different issue”, *Justices of Appellate Div., First Dept. v Erdmann*, 33 NY2d 559, 559-560 (1973)²⁶. The case involved a colorful, even salty, criminal defense attorney, who had given a “self-

²⁴ I assume that a subset of white privilege which I call “Elderly White Cuteness” has been of some assistance.

²⁵ I had read this quote ten or fifteen times before that last word jumped off the page screaming. “Civility has been about making sure that the status quo [of] racial inequality, gender inequality, class inequality, stays permanent”. Leila Fadel, “In These Divided Times, Is Civility Under Siege?” *NPR* March 12, 2019 <https://www.wunc.org/2019-03-12/in-these-divided-times-is-civility-under-siege> , quoting Lynn Itagaki.

²⁶ Even the caption is astonishing. The case answers the abstract question, “What would you have to do to wind up

laudatory” interview to *Life Magazine* about his career and the New York Court system. “Since appellant’s out-of-court conduct was not censurable, it would not be appropriate to characterize further that conduct on the score of taste, civility, morality, or ethics. Accordingly, the order of the Appellate Division should be reversed and the petition dismissed.”

What are your options when the judges don’t earn your respect, or even think they need to? Only in a world of barons and serfs would the duty of respect run only uphill.²⁷ You could talk about it outside of court, as the Court of Appeals suggests; but still would be looking over your shoulder, for fear the Appellate Division judges will attack you like a drone swarm²⁸, emboldened that your complaints about systemic injustice have become, *ehhhhrm*, a little too *systemic*, and are uttered with too much of a potty mouth.

If I think the judge has erred, why should I not be able to tell her so in court? That’s what we do when we take an appeal or move to reargue. When do we cross the line into sanctionable speech? A huge concept in justice is knowing what behavior to avoid: “We hold that this statute is unconstitutionally vague under the Due Process Clauses of the Federal and State Constitutions because it fails to give fair notice to the ordinary citizen that the prohibited conduct is illegal,” *People v Bright*, 71 NY2d 376, 379 (1988) (loitering law). Of course, there is behavior we all know is risky, *Solow v Wellner*, 162 Misc 2d 565, 567 (App Term 1994) (“[C]ounsel’s vexatious behavior...included protracted argument on matters previously ruled upon by the court despite repeated warnings to stop, and persistent refusal to adhere to the trial court’s ruling”); *Mink v Conifer Park, Inc.*, 142 AD2d 899, 902 (3d Dept 1988) (“[D]isruptive tactics and use of coarse ‘gutter’ language in addressing opposing

respondent in a case where the entire Appellate Division of your department was the petitioner?” Martin Erdman told *Life Magazine*, among many other “cherce” epithets, that appellate judges were “the whores who became madams”. The Court of Appeals, in rejecting jurisdiction, had fired a warning shot, however, by saying that Erdman’s “impoverished vocabulary of the street” raised “no constitutional issue of privileged expression”.

²⁷ Jonathan Wallace, “The Return of The Medieval Mind”, *The Ethical Spectacle* January 2011

<https://www.spectacle.org/0111/medieval.html>

²⁸ “Incoming!”

counsel"); *Hester v Sendlebach*, 2005 N.Y. Misc. LEXIS 3370, at *2-3 (Sup Ct, Nassau County June 16, 2005, No. 3117/04]) (“[C]riticism of the Defendant's attorney's questions, ...mocking the Defendant's attorney, taking over the deposition himself for question after question, suggesting answers to his client, and making objections which were irrelevant and improper”).

Compare the second most shocking non-Palestine-related decision from a New York court I have ever read²⁹, in which a judge denied an elderly Holocaust survivor the guardian she wanted, an old friend, instead appointing one of her own regulars to the lucrative role. Her attorney reacted to this as I would have: The Court “appears to have completely ignored Dr. Dworecki's wishes and appears ready to run completely roughshod over them and her rights [in an] unwarranted, unrestricted and heavy-handed manner [that] deprives her of her rights and dignity,” *Matter of Kover*, 134 AD3d 64, 70 (1st Dept 2015) The attorney was sanctioned \$40,000 and withdrew from representation (the Holocaust survivor thus losing the attorney as well as the guardian of her choice) while the appellate division panel, which usually writes only a few paragraphs, issued an entire dissertation justifying every choice the judge below made, defending her against any implication of impropriety (the court as press agent).

Dissents, or even concurring opinions, in the Appellate Division are vanishingly rare; there hasn't been one in any appeal I brought or opposed in 45 years. A very short concurrence in *Kover* states: “However, I disagree with [the] criticism and distrust of Mr. Muster and concern about Mr. Muster's impartiality and/or conflict of interest in this proceeding”, *Matter of Kover*, at 93. The majority had trashed the Holocaust survivor's friend, in order better to protect the judge (see “Beat the Devil”, above).

A very lengthy dissent then ensues, also working fact by fact; then concluding that the “award of costs and sanctions is...particularly offensive because the dubious sanctions issue caused the court to

²⁹ The worst is *TOA Constr. Co., Inc. v Tsitsires*, 54 AD3d 109 (1st Dept 2008), in which the Appellate Division held that a tenant abandoned primary residence in his apartment, by sleeping on park benches due to fear of assault by a marauding slumlord.

turn its attention away from the real injustice done to Dr. Dworecki, and provided a convenient cover to mask the injustice”, *Matter of Kover*, at 95.

The unfortunate attorney in *Kover* found out he had crossed a line by being sanctioned, just as the defendant in *Bright* discovered he was loitering when the arresting policeman told him so.

To a *meta-free speech* attorney (engaging in frank speech about the First Amendment in the courtroom), the majority opinion in *Kover* resembles the “forks of blue flame springing up from the [Minas Morgul] tower and from the encircling hills into the sullen clouds” in Tolkien's *The Two Towers*.³⁰

It is instructive to analyze the *Kover* attorney's words under the standards of defamation law. He unequivocally did not slander the judge, because statements of opinion are not actionable, *Davis v Boehm*, 24 NY3d 262, 267 (2014) and in any event truth is an absolute defense, *Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 (1st Dept 2014).

What is the rationale, ever, for punishing a honest statement of opinion in court? There is only one possible one, the “proper functioning of our courts”, *Bennett v Towers*, 43 Misc 3d 661, 673 (Sup Ct, Nassau County 2014). But what do we do when the courts are not properly functioning, or are not even functioning as courts? “New York’s guardianship system is in dire need of reform to protect our most vulnerable citizens from exploitation and abuse”. “Senator Palumbo and Families Push for Guardianship Reform Urge Passage of Karilyn’s Law in 2025”, *The New York State Senate* January 21, 2025 <https://www.nysenate.gov/newsroom/articles/2025/anthony-h-palumbo/senator-palumbo-and-families-push-guardianship-reform-urge>³¹

³⁰ A category of judicial action missing from this essay is “Encouragement”, as in “it is good to kill an admiral from time to time, to encourage the others” (Voltaire). That is because I have not yet seen that in the Palestine space (knocking on wood).

³¹ In what appears to be an instance of what I call “decontextualization”, *supra*, a New Mexico federal court suggested that the corruption of the state's guardianship system did not rise to the level of a violation of constitutional rights because “Stein is free to speak or write about what he perceives as malfeasance by others in guardianship and conservatorship proceedings...In fact, in the filing of this lawsuit, Stein is exercising his First Amendment right of free speech to criticize the legislature and state supreme court, without reprisal of any kind from either the legislature, the state supreme court, or this Court”, *Stein v New Mexico*, 2016 US Dist LEXIS 204901, at *30-31 (DNM Apr. 29, 2016, No. 15-cv-00776 WJ-

The average³² attorney responds to systemic malfunction and injustice by remaining silent.³³

CONCLUSION

“There is an old legend that on one occasion God prayed, and his prayer was 'Be it my will that my justice be ruled by my mercy'.” Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press 1949) p. 66

KBM), aff'd 684 Fed. Appx. 720 (10th Cir. 2017). We did not sanction you this time, so you won? Imagine what this would look like in one of my cases: “Your freedom from oppression is proven by the fact you could file this case, even though we dismissed it unjustly because (pick one) It Shoulda Been a 78, we wished to Salt the Earth, the Hand-Wave, etc.”

³² Stop your bragging, Wallace.

³³ Though no one does, it would also be possible to respond with the fatuous “constructive criticism” favored on Internet parenting and self-help sites: “[Judge], I see a problem, I want to see if you agree that it’s a problem, and then if we do agree, let’s see how we can fix it together.” *Radical Candor* <https://www.radicalcandor.com/blog/constructive-feedback> (Need I say I think the blog is misnamed?)