

Codifying Antisemitism

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ABSTRACT

Antisemitic harassment and discrimination are unlawful in many contexts, but without a standard definition of what ‘antisemitism’ includes, that idea is almost meaningless. This has led to an equal protection problem for members of the Jewish community, which is why states across the country have started to pass laws adopting the International Holocaust Remembrance Alliance (“IHRA”) Definition of antisemitism for use in clarifying the application of existing legal protections for Jewish people from crime and discrimination. Thus far, the bills that have passed have for the most part been overwhelmingly bipartisan, but there have been minor pockets of pushback in a number of states. While a handful of the questions raised reflect honest concerns that deserve to be fully addressed for the benefit of legislators, unfortunately, the majority of the ‘opposition’ has been led by a small corps of disingenuous lobbying groups that as a matter of self-interest continue to purposefully lie about what these bills actually do—and by the same token could never do—in an apparent attempt to give greater cover to antisemitism and antisemites. This Article will answer some of the most common questions that lawmakers, citizens, and other interested stakeholders might have about statutes that utilize the IHRA Definition for the narrow purpose of assessing motivation when analyzing discriminatory conduct claims, so that critics can no longer hide behind the vague and erroneous assertion that such policies are somehow unfair to other groups or would in any way offend the First Amendment.

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I. INTRODUCTION

“I went to Boston College. It’s a Catholic college, yeah I had a nickname there: Jew.”

—Gary Gulman

During the 2022 legislative session, data showed antisemitic attacks across the United States were at an all-time high.¹ In response, Iowa became the first state to pass a law² adopting the International Holocaust Remembrance Alliance (“IHRA”) definition of antisemitism (“IHRA Definition”).³ The IHRA Definition is, to date, the only consensus-driven and internationally accepted definition of antisemitism. The law⁴ requires

1. See Paul Caine, *Anti-Defamation League Reports Record Number of Antisemitic Incidents Across U.S. in 2021*, WTTW: NEWS (Apr. 26, 2022, 7:30 PM), <https://bit.ly/3CckKwD>.

2. See IOWA CODE § 216F.1 (2022). South Carolina had previously adopted an appropriations restriction based on an earlier version of the Working Definition. See H.B. 4950, 122d Gen. Assemb., 2d Reg. Sess. (S.C. 2018).

3. See *The Working Definition of Antisemitism*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://bit.ly/3rxsuV2> (last visited Oct. 5, 2022).

4. The laws being discussed are based on a model bill I drafted in consultation with a number of major Jewish and non-Jewish organizations that focus on both free speech

authorities to make use of the IHRA Definition when assessing the motivation behind illegal discriminatory conduct.

Shortly after Iowa signed the bill into law, the Tennessee⁵ and Arizona⁶ Legislatures passed versions of the model bill, and a number of other states (including Georgia⁷ and New Jersey)⁸ also considered similar legislation. Additionally, South Carolina⁹ and Florida¹⁰ adopted the IHRA Definition for much the same use in their education systems. In total, more than half of the states in this country¹¹ have endorsed the definition in some official fashion, whether by proclamation,¹² executive order,¹³ or resolution.¹⁴ In so doing, they have joined the over 870 separate governments, Non-Governmental Organizations (NGOs), universities, and other key institutions that have adopted the IHRA Definition,¹⁵ demonstrating an indisputable worldwide consensus.

It is significant that the IHRA Definition is being embraced both nation-wide and world-wide, sparking a number of articles that encourage the adoption and use of the IHRA Definition in other contexts, including when monitoring and tracking anti-Jewish sentiment in traditional¹⁶ and on social media,¹⁷ and when assessing the records of so-called human rights organizations.¹⁸ Still, statewide bills addressing antisemitic discrimination in regulatory contexts represent a crucially

and civil rights. *See generally* Mark Goldfeder, *Defining Antisemitism*, 52 SETON HALL L. REV. 119 (2021). This current piece elaborates on the 2021 article, with a focus on the practical application of the theory discussed therein.

5. *See* 2022 Tenn. Pub. Acts 1075.

6. *See* H.B. 2675, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

7. *See* H.B. 1274, 2022 Gen. Assemb., Reg. Sess. (Ga. 2022).

8. *See* S. 2434, 220th Leg. (N.J. 2022).

9. *See* H.B. 4000, 123d Gen. Assemb., 1st Reg. Sess. (S.C. 2019).

10. *See* FLA. STAT. §1000.05(8) (2022).

11. *See Half of All US States Now Using IHRA Definition of Antisemitism*, 124 NEWS (Apr. 28, 2022, 11:44 AM), <https://bit.ly/3ykZhk0>.

12. *See Kansas Legislature Adopts IHRA Working Definition of Anti-Semitism*, CLEV. JEWISH NEWS (Mar. 25, 2022, 6:00 AM), <https://bit.ly/3fOgITK>; Aaron Bandler, *NY Gov Issues Proclamation Embracing IHRA Definition of Antisemitism*, JEWISH J. (June 14, 2022), <https://bit.ly/3V7p8Ww>.

13. *See* Exec. Order No. 2022-06D (Ohio 2022).

14. *See* H.C.R. 5030, 2021–2022 Leg., 2022 Reg. Sess. (Kan. 2022).

15. *See* Zvika Klein, *865 Entities Have Adopted or Endorsed IHRA Definition of Antisemitism*, THE JERUSALEM POST (Mar. 16, 2022), <https://bit.ly/3RFoix2>.

16. *See National Religious Broadcasters Adopt IHRA Antisemitism Definition*, THE MEDIA LINE (Mar. 9, 2022), <http://bit.ly/3j4w4Fp>.

17. *See* Letter from 180 Nonprofit and Civil Rights Organizations to Elon R. Musk, Twitter CEO (Nov. 16, 2022), <https://bit.ly/3j6z305>.

18. *See generally, e.g.*, Michael B. Atkins & Miriam F. Elman, *BDS as a Threat to Academic Freedom and Campus Free Speech in the United States*, 29 MICH. ST. INT'L L. REV. 213 (2021); Gerald Steinberg, *Applying the IHRA Working Definition to the UN and Human Rights NGOs*, in *CONTENDING WITH ANTISEMITISM IN A RAPIDLY CHANGING POLITICAL CLIMATE* 44 (Ind. Univ. Press 2021).

important new development in the fight against antisemitism, the merits of which are worthy of their own respective analysis. This is particularly important in light of the small, yet vocal, number of groups bent on preventing accurate identification and correction of antisemitic activity (often, unfortunately, the sort of antisemitism that they engage in directly)¹⁹ by mounting a disinformation campaign to foment suspicion and misconceptions about what these bills do.²⁰

One reason that state legislatures are finally stepping up and adopting the IHRA Definition is that despite a demonstrable rise in antisemitic activity across the country²¹ and the fact that over 90% of American Jews are concerned about antisemitism,²² recent surveys have shown that roughly half of the U.S. population *does not even know what antisemitism is*.²³ Practically speaking, one cannot educate about antisemitism, combat antisemitic activity, or for that matter, fight back *against* an unfair antisemitic accusation if one cannot first define the term clearly. In fact, as described below, at least some of the rise in

19. This is particularly true of the Council on American-Islamic Relations (CAIR). Opposition from CAIR should not be interpreted as representing the united view of the Muslim community. In fact, the IHRA Definition was unanimously adopted, along with all its examples, including the ones related to the State of Israel, by the Global Imams Council, the largest international non-governmental body of Muslim religious leaders. See Memorandum from Imam Budari, President of Senior Imams Comm. on Adoption of the IHRA Working Definition of Antisemitism, to the Global Imams Council (Oct. 29, 2020), <https://bit.ly/3SZg44h>. It is also critical to note that CAIR was named by the U.S. Department of Justice as an unindicted co-conspirator in the *United States v. Holyland Foundation* case, the largest terror finance case in American history, which resulted in a conviction on all 108 counts. See Sean Durns, *CAIR Isn't Credible*, THE JERUSALEM POST (June 3, 2019, 10:10 PM), <https://bit.ly/3fMsuxS>. That case involved the provision of support for the Hamas terror organization, whose charter calls for the genocide of all Jewish persons everywhere. Last November, shortly before a terrorist targeted a synagogue in Colleyville, Texas, one of CAIR's executive directors gave a speech calling synagogues and other Jewish organizations "enemies" that are part of a massive conspiracy behind Islamophobia. The speech by Zahra Billoo, one of CAIR's Executive Directors, showcased classic antisemitism in attacking the mainstream U.S. Jewish community. Despite near-universal condemnation of her remarks, including from within the Muslim community, CAIR stood proudly behind her and defended them as merely expressing "an opinion about Palestinian human rights." See Hen Mazzig, *Don't Let CAIR off the Hook for Its Role in the Colleyville Hostage Crisis*, NEWSWEEK (Jan. 18, 2022, 6:30 AM), <https://bit.ly/3ykMP3T>.

20. See, e.g., Jill Nolin, *State Senate Next Stop for Bill that Aims to Define Antisemitism in State Law*, ACLU GA. (Feb. 28, 2022), <https://bit.ly/3SSZ8fG>.

21. See ADL Audit Finds Antisemitic Incidents in United States Reached All-Time High in 2021, ANTI-DEFAMATION LEAGUE (Apr. 25, 2022), <https://bit.ly/3yiT5c4>. For some anecdotal examples of the mainstreaming of antisemitism, see Gabriel Groisman, *Anti-Semitism is Back. Will You Stand by or Stand Up?*, HUFFPOST (June 23, 2016, 11:16 AM), <https://bit.ly/3T1W1Sm>.

22. See *Over 90% of American Jews Concerned About Antisemitism – Survey*, THE JERUSALEM POST (Jan. 21, 2022), <https://bit.ly/3LZbtg5>.

23. Ben Sales, *Surveys: Half of Americans Don't Know What Anti-Semitism Means*, S. FLA. SUN SENTINEL: JEWISH J. (Oct. 27, 2020, 4:04 PM), <https://bit.ly/3xTlq8U>.

antisemitic incidents can be attributed to an equal protection deficit first created and then exacerbated by the continued absence of a uniform definition.²⁴ Until now, there has been a material void in most of our civil rights laws: Antisemitic discrimination is unlawful,²⁵ but no one knows exactly what this means or even how to go about determining if an action was motivated by antisemitism.²⁶ These new bills, however, give authorities the tools they need to fill that lacuna in the text and make those required determinations.

Freedom of speech is an important right, and bills incorporating the IHRA Definition do not implicate or infringe upon it. Any person or institution can think and say whatever they want to about Jewish people, the Jewish religion, or the Jewish State. But when it comes to illegal conduct—i.e., the commission of discrimination, harassment, and criminal activity, the nature of which these laws actually help clarify—an

24. As Assistant Secretary of Education for Civil Rights, Kenneth Marcus explained on the Tikvah Podcast:

Protecting the rights of Jewish students has always been more difficult than other groups, and of course I've worked to protect the rights of virtually every racial and ethnic minority, as well as women, the disabled, the aged, and other groups, and yet there's always more controversy attached to any issue involving anti-Semitism. In fact, even the very basic notion that we should protect Jewish students from anti-Semitism at all had enormous pushback, and it should be surprising I think to your listeners that it was only in 2004 that we provided basic protections to Jewish students, and that even then this policy was largely disregarded for a significant part of the period between 2004 and 2010. This is very recent, and yet I had pushback along a number of different lines. There were conservatives who thought that I was interpreting the statute too broadly and that we should have a narrower interpretation of the statute. I considered that to be wrong. I think that there's simply no reasonable interpretation of the statute under which Jews lack protections, it's simply a straightforward interpretation. There were liberals who thought that the resources of the civil-rights apparatus should be focused on under-represented or non-privileged groups, and that American Jews by and large had sufficient privilege and resources and should not be the beneficiaries of civil-rights investigations. There were bureaucrats who tended to be change-averse, and who are reluctant to change the way things were going. There were some on the left who were suspicious of any effort within a Republican administration to do anything that would protect a religious group, since that looked like some sort of, perhaps, dubious use of the law to protect a religion. Everybody it seems, left, right, and center, had some reason to be suspicious of efforts to protect Jewish students, whether they had anything to do with anti-Zionism or not, so even the most basic efforts to protect Jewish students have faced far greater pushback than what I've seen with every other group.

Podcast: Kenneth Marcus on How the IHRA Definition of Anti-Semitism Helps the Government Protect Civil Rights, MOSAIC (July 30, 2021), <https://bit.ly/3SB9OPA>.

25. See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000d (“Title VI”); *id.* § 2000e (“Title VII”). For a chart of bias categories included in state law, see *Federal Bias Categories Included by State Laws*, U.S. DEP’T OF JUST., <https://bit.ly/3RYInQ7> (last visited Oct. 13, 2022).

26. See 162 CONG. REC. S6649–50 (2016) (statements of Reps. Scott and Casey).

objective way must exist to determine if, and when, an action constitutes unlawful discrimination.

In theory, cracking down on unlawful discrimination should not be controversial. Antidiscrimination laws always require officials to “deduce . . . that the protected trait was the reason for the adverse treatment at issue.”²⁷ When, as in this case, a term needs some additional clarification, then the government should obviously be able to clarify what exactly the term means.²⁸ Yet, even though the rate of antisemitic incidents continues to rise across the country,²⁹ and even as more states move to pass these ‘antisemitism laws’ with wide bipartisan support, a small number of groups have vocally opposed these efforts, falsely claiming that the bills that add the clarifying definition could theoretically impinge on free speech.³⁰ While this writer’s contention is that many of these groups are acting in bad faith,³¹ there are still hundreds of well-meaning lawmakers who unfortunately might have been confused or even misled by the deliberate obfuscation of these actors. It is therefore important for the record to be clear about what the

27. Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731 (2011). Goldberg also states:

The causation determination is necessary because one of the central inquiries in a discrimination case is whether the challenged acts were “because of” a protected characteristic. Title VII of the Civil Rights Act of 1964 provides, for example, that “[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual’s race, color, religion, sex, or national origin.*”

Id. at 731 n.3 (quoting 42 U.S.C. § 2000e-2(a)(1)).

28. See, e.g., Alex Reed, *The Title VII Amendments Act: A Proposal*, 59 AM. BUS. L. J. 339, 383-385 (2022) (proposing new legislation confirming various protections for the LGBT community under Title VII, even after the Supreme Court’s ruling in *Bostock v. Clayton County*); see also *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (holding that Title VII protects employees against discrimination because they are gay or transgender); Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7,023 (Jan. 20, 2021) (President Biden’s executive order further clarifying that gender identity and sexual orientation are to be treated as sex-based classes protected under Title VII).

29. See Luke X. Martin, *Kansas City’s Young Jews Worry About Their Safety as Antisemitic Incidents Hit Historic Highs*, NPR: KCUR (Apr. 7, 2022, 3:00 AM), <https://bit.ly/3RfNt9d>; *Fight Antisemitism*, ADL, <https://bit.ly/3fm7IES> (last visited Oct. 14, 2022); *Anti-Semitism and Jewish Views on Discrimination*, PEW RSCH. CTR. (May 11, 2021), <https://pewrsr.ch/3Rd7qNZ>.

30. See, e.g., Tyler Coward, *Biden Administration Commits to Anti-Semitism Definition That Could Stifle Campus Speech*, FIRE (Mar. 19, 2021), <https://bit.ly/3SCa7cS>.

31. See Ismail Allison, *CAIR Welcomes Maryland County Council’s Shelving of Resolution to Adopt IHRA’s Anti-Free Speech Framework of Antisemitism*, CAIR (July 25, 2022, 2:27 PM), <https://bit.ly/3LMb2p3>; but see Dmitriy Shapiro, *CAIR Backs Leader After ‘Virulently Anti-Semitic’ Speech Attacking Mainstream Jewish Entities*, JEWISH NEWS SYNDICATE (Dec. 14, 2021), <https://bit.ly/3xQgqBO>.

IHRA Definition is; why these laws make use of it; and how this type of legislation can and should be used to better provide the Jewish community with equal protections under the law—*without* infringing at all on the protected rights of any other group.

Other books and articles have addressed the various reasons why the IHRA Definition is the constitutionally appropriate tool for legislatures to assess unlawful discriminatory conduct.³² This Article, however, addresses some of the common points and questions that have been raised on the ground during the legislative processes thus far, in the hope that proper clarification can lead to successful adoption of IHRA Definition bills in additional jurisdictions.

II. BACKGROUND: THE INTERNATIONAL HOLOCAUST REMEMBRANCE ALLIANCE (“IHRA”) DEFINITION OF ANTISEMITISM

A. *Development of the IHRA Definition*

The IHRA is an intergovernmental organization whose purpose is to work with governments and experts in a united front “to strengthen, advance and promote Holocaust education, research and remembrance worldwide and to uphold the commitments of the 2000 Stockholm Declaration and the 2020 Ministerial Declaration.”³³ In the early 2000s, a resurgence of antisemitic activity on the international stage³⁴ prompted the Organization for Security and Cooperation in Europe (“OSCE”) to organize its first conference on antisemitism in 2003. The resurgence also prompted the European Monitoring Centre on Racism and Xenophobia (“EUMC”) to commission its first-ever study of antisemitism that same year.³⁵ A second OSCE conference and another EUMC study followed the year after, and as part of its own internal review, the EUMC acknowledged that it was hampered by the lack of a common and comprehensive definition of antisemitism, as well as

32. See generally, e.g., KENNETH L. MARCUS, *THE DEFINITION OF ANTI-SEMITISM* (2015); Goldfeder, *supra* note 4, at 126.

33. INT’L HOLOCAUST REMEMBRANCE ALL., <https://bit.ly/3r5d625> (last visited Oct. 14, 2022). For information about the 2000 Stockholm Declaration, see *Stockholm Declaration*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://bit.ly/3Rd7Aoz> (last visited Oct. 14, 2022). For information about the 2020 Ministerial Declaration, see *2020 IHRA Ministerial Declaration*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://bit.ly/3Rb9V3j> (last visited Oct. 14, 2022).

34. See *Antisemitism*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://bit.ly/3BNNhZ4> (last visited Oct. 14, 2022); see also Andrew Baker et al., *The Origins of the Working Definition*, in *IN DEFENCE OF THE IHRA WORKING DEFINITION OF ANTISEMITISM* 8, 9 (Alan Johnson ed., 2021), <https://bit.ly/3fkiRGm>.

35. See Baker et al., *supra* note 34, at 9.

challenged by a lack of clarity in understanding “new forms and manifestations” of antisemitism as they relate to the Jewish State.³⁶

EUMC Director, Beate Winkler, and American Jewish Committee’s Director of International Jewish Affairs, Rabbi Andrew Baker, agreed to develop such a definition. The Committee on Antisemitism and Holocaust Denial spent several months working to develop one,³⁷ and they concluded the drafting in January 2005. The definition was formally released as a “Working Definition” two months later.³⁸

The Working Definition was adopted as a guide by the U.S. Commission on Civil Rights in 2006³⁹ and by the U.S. State Department as early as 2007.⁴⁰ It later served as the bases for the State Department’s official working definition, published in 2010.⁴¹ The State Department formally adopted the definition in 2016,⁴² after it was officially accepted by a plenary meeting of the then 31 countries in the IHRA.⁴³ The Working Definition later became known as the IHRA Definition. Since that time, over 870 governments, universities, NGOs, and other key institutions have also adopted the definition, demonstrating a substantial and clear worldwide consensus. The IHRA Definition has been endorsed by a growing number of world leaders, including the UN Secretary-General⁴⁴ and U.S. presidents of both parties,⁴⁵ and it is used by several departments within the U.S. federal government, including the Departments of Education and Justice.⁴⁶

36. *Id.* (internal quotation marks omitted); *see also* KENNETH L. MARCUS, THE DEFINITION OF ANTI-SEMITISM 159–160 (2015) (noting that after the EUMC report, the Organization for Security and Co-operation in Europe (OSCE)’s Berlin Declaration recognized that post WW2 antisemitism had changed and was now at times directed against Jews as a collective and Israel as an embodiment of the Jew).

37. *See* Manfred Gerstenfeld, *To Fight Anti-Semitism, You Have to Define It*, ISRAEL NAT’L NEWS (May 3, 2018, 3:50 PM), <https://bit.ly/3dJULo5>.

38. *Id.*

39. *See generally* U.S. COMM’N ON C.R., FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS REGARDING CAMPUS ANTI-SEMITISM (2006), <http://bit.ly/3TKbnew>.

40. *See* “Working Definition” of Anti-Semitism, U.S. DEP’T OF STATE, OFF. TO MONITOR & COMBAT ANTI-SEMITISM (Feb. 8, 2007), <http://bit.ly/3UURRg7>.

41. *See Defining Antisemitism*, U.S. DEP’T OF STATE, <https://bit.ly/3Eb9vqM> (last visited Oct. 2, 2022).

42. *See id.*

43. *See 31 Countries Adopt New Definition of Antisemitism That Includes Anti-Zionism*, THE TOWER (June 3, 2016, 3:34 PM), <https://bit.ly/3UWwvQd>.

44. *See* Press Release, United Nations, Anti-Semitism Rising Even in Countries with No Jews at All Secretary-General Tells Event on Power of Education to Counter Racism, Discrimination (Sept. 26, 2018), <https://bit.ly/3y9WvOk>.

45. *See Biden Administration ‘Embraces and Champions’ IHRA Definition of Anti-Semitism*, i24NEWS (Feb. 2, 2021, 4:44 PM), <https://bit.ly/3RwwIXD>.

46. *See* Combating Anti-Semitism, Exec. Order No. 13899, 84 Fed. Reg. 68779 (Dec. 11, 2019) (directing the Department of Education’s Office of Civil Rights, which handles Title VI complaints, and the Civil Rights Division of the Department of Justice,

While there can be no single exclusive or exhaustive definition of antisemitism, which can and does assume many forms, the IHRA Definition provides an objective baseline standard for what is and is not antisemitic and has proven to be an essential tool for identifying contemporary manifestations of anti-Jewish bigotry or hate.⁴⁷ The definition, including its accompanying illustrations, reads as follows:

Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.

To guide IHRA in its work, the following examples may serve as illustrations:

Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic. Antisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for “why things go wrong.” It is expressed in speech, writing, visual forms and action, and employs sinister stereotypes and negative character traits.

Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious sphere could, taking into account the overall context, include, but are not limited to:

- Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.
- Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective—such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.
- Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.
- Denying the fact, scope, mechanisms (e.g., gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust).

which is responsible for coordinating Title VI implementation and the federal agencies’ enforcement efforts, to use the IHRA Definition).

47. See Ira Forman, *Combatting Antisemitism: Why the World Needs to Adopt the IHRA Definition*, THE JERUSALEM POST (Oct. 10, 2020, 9:48 PM), <https://bit.ly/3dza2wy>.

- Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
- Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.
- Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.
- Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.
- Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.
- Drawing comparisons of contemporary Israeli policy to that of the Nazis.
- Holding Jews collectively responsible for actions of the state of Israel.

Antisemitic acts are criminal when they are so defined by law (for example, denial of the Holocaust or distribution of antisemitic materials in some countries). Criminal acts are antisemitic when the targets of attacks, whether they are people or property – such as buildings, schools, places of worship and cemeteries – are selected because they are, or are perceived to be, Jewish or linked to Jews. Antisemitic discrimination is the denial to Jews of opportunities or services available to others and is illegal in many countries.⁴⁸

In 2017, the European Commission published the *Handbook for the Practical Use of the IHRA Working Definition of Antisemitism*. The *Handbook* is an excellent resource that goes through all aspects of the definition—including every single one of the illustrative examples—and explains why each is a manifestation of antisemitism. It also gives real-life examples of actual antisemitic incidents that fit each of the descriptions.⁴⁹

The guiding examples are an integral part of the definition, not an afterthought or an addition. Those who claim that the definition section

48. *What is Antisemitism?*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://bit.ly/3S3MgSI> (last visited Oct. 5, 2022).

49. See BENJAMIN STEINITZ ET AL., EUR. COMM’N, HANDBOOK FOR THE PRACTICAL USE OF THE IHRA WORKING DEFINITION OF ANTISEMITISM 11–16 (2021), <https://bit.ly/3EievtJ>.

does not implicitly include all of the examples,⁵⁰ or who argue that the listed examples are somehow more controversial than the definition section itself,⁵¹ simply misunderstand both its structure and content. Having explained what antisemitism is, the definition itself offers both classic and contemporary examples of things which could, considering the overall context, be antisemitic. An illustrative example of a particular class or style is just “something that has many of the typical features of such a class or style, and that you consider clearly represents it.”⁵² By the same token, “[i]f you use something as an illustrative example, or for illustrative purposes, you use it to show that what you are saying is true or to make your meaning clearer.”⁵³ Illustrative examples do not change or add to a definition; they illuminate what is already there.⁵⁴ The definition is obviously not limited to those examples, but it should *always* be interpreted *in light of* those authoritative guiding illustrations, even in those contexts where the definition is written in its truncated form and the examples are not explicitly enumerated.

In recent years Dr. Kenneth Stern, one of the Committee on Antisemitism and Holocaust Denial members who worked on the definition,⁵⁵ has gained notoriety for claiming that the IHRA Definition was never meant to do anything but help data collectors “know what to include and exclude.”⁵⁶ But as Rabbi Andrew Baker, Deidre Berger, and Michael Whine, three of the central Committee members and original IHRA authors, have clarified,⁵⁷ this oft-cited claim is nothing more than historical revisionism. In their words, the definition “was called a working definition for a reason. This was not meant to be a tool for

50. See generally, e.g., JAMIE STERN-WEINER, *THE POLITICS OF A DEFINITION: HOW THE IHRA WORKING DEFINITION OF ANTISEMITISM IS BEING MISREPRESENTED* (2021), <https://bit.ly/3SFgxZp>.

51. See, e.g., *IJV Urges the Canadian Government to Reconsider its Use of the IHRA Definition of Antisemitism*, IJV CAN. (June 26, 2019), <https://bit.ly/3rEuw5C>.

52. Example, COLLINS, <https://bit.ly/3CLcMMF> (last visited Oct. 5, 2022).

53. Illustrative, COLLINS, <https://bit.ly/3SI6ToX> (last visited Oct. 5, 2022).

54. For those familiar with the legal world, this is somewhat akin to how the American Law Institute’s Restatements of the Law contain Illustrations, which are examples of how particular provisions would apply to specific sets of facts, and how many jurisdictions have adopted Restatement sections verbatim. Cf. Suzanne Ehrenberg & Susan Valentine, *Lecture Notes for Restatements of the Law*, CHI.-KENT COLL. OF L. (1999), <http://bit.ly/3j6BK1H>.

55. See Bayla Zohn, *Who Wrote the IHRA Working Definition of Anti-Semitism?*, THE LOUIS D. BRANDEIS CTR FOR HUM. RTS. UNDER L., <https://bit.ly/3rfqBMp> (last visited Oct. 14, 2022).

56. Kenneth Stern, *I Drafted the Definition of Antisemitism. Rightwing Jews Are Weaponizing It*, THE GUARDIAN (Jan. 6, 2021, 6:57 PM), <https://bit.ly/3y8XEG0>.

57. See Letter from Rabbi Andrew Baker, Deidre Berger & Michael Whine to Kathrin Meyer, Secretary General, IHRA, and Katharina von Schnurbein, Eur. Comm’n Coordinator on Combating Antisemitism and Fostering Jewish Life (Jan. 20, 2021), <http://bit.ly/3TAYK5h>.

academic researchers, but for those . . . who would put it to use.”⁵⁸ From the very beginning, this included “those in authority who are responsible for identifying and responding to antisemitic hate crimes and other antisemitic events, such as police, prosecutors, and judges, among others.”⁵⁹ In addition, assuming that the definition is objectively valid, which Stern does, it is not at all clear why it would be less valid or reliable for use in some contexts than in others.

Notably, the practical regulatory usage of the IHRA Definition has already been used in other parts of the world for years.⁶⁰ For instance, as the *Handbook* describes, the definition has been used in Europe, among other things

to train police officers, prosecutors, judges, educators, state employees and human rights monitoring bodies to identify and track various manifestations of antisemitism; . . . to support decision-making processes by states, human rights monitoring organisations, law enforcement agencies, the judiciary, municipal governments, educators, civil society organisations and Jewish communities; [and] to identify aspects of antisemitism in court hearings, prosecutor actions, police recording, investigations and hate crime statistics[.]⁶¹

The *Handbook* also explains that “[l]aw enforcement and the judiciary – including the police, public prosecutors, and judges – regularly face the reality of antisemitic crimes . . . and discriminatory behaviour”⁶² and proceeds to demonstrate how the IHRA Definition can specifically help prosecutors and judges “determine the bias motivation of a crime[.]”⁶³ In recent years, further contrary to Dr Stern’s assertion, a number of other guides,⁶⁴ fact sheets,⁶⁵ and policy papers⁶⁶ have also been published in the United States defending the use of the IHRA Definition to combat antisemitism in these and other important contexts.

58. Baker et al., *supra* note 34, at 10.

59. *Id.*

60. For a discussion of how Canada has done this as part of its national “Anti-Racism Strategy,” see generally THE INT’L LEGAL F. & CTR. FOR ISR. AND JEWISH AFFS., THE IHRA WORKING DEFINITION OF ANTISEMITISM- LEGAL ANALYSIS (2020), <https://bit.ly/3EjEcdo>.

61. STEINITZ ET AL., *supra* note 49, at 7.

62. *Id.* at 18.

63. *Id.* at 24.

64. See generally, e.g., INT’L HOLOCAUST REMEMBRANCE ALL., A GUIDE TO UNDERSTANDING AND ADOPTING IHRA WORKING DEFINITION OF ANTISEMITISM (2021), <https://bit.ly/3SErw5o>.

65. See generally, e.g., THE LOUIS D. BRANDEIS CENTER FOR HUM. RTS. UNDER L., FAQs ABOUT DEFINING ANTI-SEMITISM (2022), <https://bit.ly/3RxbJnn>.

66. See generally, e.g., NGO MONITOR, RECOMMENDATIONS: IMPLEMENTING THE IHRA DEFINITION OF ANTISEMITISM FOR NGO FUNDING (2021), <https://bit.ly/3C92HHB>.

B. Debunking Criticisms

1. IHRA's Israel Examples

Critics of the IHRA Definition tend to focus on the seven specific examples that illustrate how anti-Zionism can sometimes cross the line into antisemitism.⁶⁷ At the outset it must be noted that according to the IHRA Definition, “criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic.”⁶⁸ This is “a fact so important, yet so routinely ignored by the critics of the definition as to suggest a deliberate repression on their part.”⁶⁹ Sadly, that clear component of the definition has not deterred hostile ‘activists’ in their campaign to derail efforts that promote acceptance of the IHRA Definition—and as many have noticed, the most vocal groups are often the ones who themselves have a history of problematic antisemitism, with an accompanying vested interest in making sure that it is not defined.⁷⁰

Perhaps, theoretically, antisemites would be more willing to accept the IHRA Definition if it did not mention the Jewish State.⁷¹ However, for many Jews, their ethnicity and religious beliefs intersect in Zionism—broadly speaking, the movement for the re-establishment, and now the development and protection, of a sovereign Jewish nation in its ancestral homeland.⁷² Thus, for a large segment of the Jewish world, it

67. See, e.g., *Background on Efforts to Redefine Antisemitism as a Means of Censoring Criticism of Israel*, PALESTINE LEGAL (Jan. 2020), <http://bit.ly/3kDAALJ>.

68. *What is Antisemitism?*, *supra* note 48.

69. Alan Johnson, *Introduction: Seeing the IHRA Plain*, in *IN DEFENCE OF THE IHRA WORKING DEFINITION OF ANTISEMITISM* 4, 4 (Alan Johnson ed., 2021), <https://bit.ly/3fkiRGm>.

70. See @StopAntisemitism, Twitter (Aug. 3, 2020, 8:46 PM), <https://bit.ly/3j1vgkE>.

71. In recent years at least two groups have tried to ‘rectify’ the situation by creating new definitions. The problem with those definitions is threefold: 1) they do not add anything new to the IHRA Definition, see Mark Goldfeder, *The IHRA Definition Isn't Perfect. But Its Critics Aren't Making Things Better.*, FORWARD (Apr. 6, 2021), <https://bit.ly/3V51JEX>; 2) they do not actually solve the problems they were theoretically intended to, and antisemites still see them as being overly broad especially when it comes to Israel, see M. Muhannad Ayyash, *The Jerusalem Declaration on Antisemitism is an Orientalist Text*, ALJAZEERA (Apr. 21, 2021), <https://bit.ly/3fDDoG1>; and 3) their acceptance would only dull the IHRA consensus and be a feather in the antisemites’ cap, see Mark Goldfeder, *New Definitions of Anti-Semitism Are Dangerous*, JEWISH NEWS SYNDICATE (Apr. 1, 2021), <https://bit.ly/3EAsX0D>.

72. See Mark Goldfeder, *A Yom Ha'atzmaut Reflection and Response*, JEWISH J. (May 6, 2022), <https://bit.ly/3SzQvGS>, briefly describing the religiously well-documented history of the Jewish people’s Zionistic yearnings:

Jews were Zionists before there were Muslims, and even before there were Christians. In multiple places throughout the New Testament, for example, the yearning for redemption is expressed in terms of the familiar and by-then-already-classic formulation of Jewish Zionism (see Matthew 21:5 and John

would be impossible to categorically separate Israel from the question of Jewish ethnic identity and religion.⁷³ Identifying with Israel in this way, as part of the Jewish religion/ethnic background/culture, is also not synonymous with ‘political Zionism,’ or with support for any or all particular policies of the Israeli government.⁷⁴

It is also true that *antisemites* do not distinguish Israel from their antisemitism. Commonly, antisemites attack visibly Jewish people for their ‘Zionism’ because they are allegedly ‘angry’ about Israel.⁷⁵ Yet, many people being attacked are themselves members of communities that are not openly supportive of the State of Israel.⁷⁶

Thus, to ‘separate’ Zionism from antisemitism would, as David Hirsh has succinctly explained, be unfair to the many innocent Jewish victims around the world who are regularly, actually (not theoretically), sometimes even physically, targeted and attacked ‘because’ of their real or imagined—but at the very least *perceived*—connection to the State of Israel:

[Th]e fault does not lie with the drafters of the definition, the fault lies with the actual phenomenon of antisemitism which the drafters are trying to encapsulate and describe. Antisemites come for Jews, accusing them of being agents of Israel and Zionism. This kind of

12:15, paraphrasing Zechariah 9:9). The Quran itself is also quite clear about the long history of Jews in the Holy Land—and especially in Jerusalem. (See, for example, Surah Bani Isra’il, verses 1–7; *see also* Sheikh Abdul Hadi Palazzi, *Allah is a Zionist*, TABLET (Mar. 18, 2010), <https://bit.ly/3fyAbaG>). While it is true that the Jews were twice expelled from their ancient kingdom of Israel, it is also true that they never fully left; since biblical times there has *always* been a Jewish community living in the eternal Jewish homeland. In the late-19th and early-20th centuries, Jews from around the world came to buy and cultivate land to further expand those *existing* Jewish communities that had remained in Israel as a continuous presence throughout all of the exiles.

Id.

73. See Alyza D. Lewin, *Recognizing Anti-Zionism as an Attack on Jewish Identity*, 68 CATH. U. L. REV. 643, 643–645 (2019).

74. *See id.*

75. *See, e.g., Antisemitic Incidents at Anti-Israel Events and Actions Around the World*, ANTI-DEFAMATION LEAGUE (June 1, 2021), <http://bit.ly/3EyBW1y> (describing that whenever there is conflict in the Middle East, antisemitic attacks against domestic Jewish people and institutions skyrocket); Simon Ostrovsky, *Latest Israel-Gaza Conflict Sent Waves of Antisemitism Across the U.S.*, PBS (June 26, 2021, 4:30 PM), <http://bit.ly/3Tygoqd> (same).

76. *See* Nicole Chavez et al., *Anti-Semitic Attacks Are Being Reported in US Cities as Tensions Flare over the Israeli-Palestinian Conflict*, CNN (May 21, 2021, 5:30 PM), <https://cnn.it/3SV7KCi>; Luke Tress, *New York Police’s Hate Crimes Unit Investigating 3 Alleged Antisemitic Attacks*, THE TIMES OF ISR. (Feb. 6, 2022, 10:35 PM), <https://bit.ly/3yjWLDH>; Sam Sokol, *Hasidic Man Assaulted in Antisemitic Attack in Brooklyn*, HARETZ (July 11, 2021), <https://bit.ly/3EeBBBE>. This impulsive lashing out is in and of itself a manifestation of the classic antisemitic impulse to find a scapegoat in the Jew, whichever Jews happens to be closest.

antisemitism defines ‘Zionism’ as racism, apartheid, imperialism and Nazism. In this context, the plurality of the ways in which Jews define their own identities and how they define their own relationships to Zionism and Israel are not relevant. What matters is the identity which is thrust upon them, in a hostile way from outside and without their consent, by antisemitism. Racism constructs race. Anti-Zionism constructs this kind of antisemitism.⁷⁷

The problem of course, is that antizionists apply *their* definition of Zionism to people and institutions without the participation or consent of those they designate as ‘Zionist.’⁷⁸ And they do so in a way that does not accurately reflect the perspectives of those they are labelling. People can be held accountable for ideas, identities, or viewpoints that they affirmatively embrace for themselves, but that is not how antisemitic antizionism works.⁷⁹ Instead, it attempts to hold people accountable for

77. David Hirsh, *It Was the New Phenomenon of Israel-Focused Antisemitism That Required the New Definition of Antisemitism*, in IN DEFENCE OF THE IHRA WORKING DEFINITION OF ANTISEMITISM 15, 19 (Alan Johnson ed., 2021), <https://bit.ly/3fkiRGm>.

78. It is possible to be politically anti-Zionist without it bleeding into antisemitism. The difference between political anti-Zionism and antisemitism can sometimes be reflected legally in the difference between primary boycotts and secondary or tertiary boycotts as follows:

A primary boycott is usually defined as a boycott in which the boycotter is acting against the entity that it has a grievance with (for example, retail clerks picketing their employer over wages or working conditions). A secondary boycott is one in which the party boycotting an entity has a goal of affecting a third party, rather than the boycotted entity. A tertiary boycott is one in which the goal is to affect a fourth party, who supports the third party supporting the boycotted entity. BDS Movement activists [who often hide their antisemitism behind ‘anti-Zionism,’ for the most part, are engaging in something of a hybrid of a secondary-tertiary boycott. Their issue appears to be with the State of Israel, but they are not just engaging in a boycott of the government of Israel. The bulk of the individual companies, academics, institutions, and others who are targeted by BDS are not representing the government of Israel, and the bulk of the boycott activity is directed against them (a secondary boycott) and the people that support them (a tertiary boycott). Secondary-tertiary boycotts have very little protection under the First Amendment. The BDS supporters are not trying to protect their own constitutional rights; they are trying to use commerce to inflict harm on a foreign nation (and to discriminate against Americans who are of Jewish descent or who support Israel).

Mark Goldfeder, *Stop Defending Discrimination: Anti-Boycott, Divestment, and Sanctions Statutes Are Fully Constitutional*, 50 TEX. TECH L. REV. 207, 223–24 (2018).

79. As David Hirsh has so eloquently explained:

[I]t is antizionism that defines most Jews as Zionist. [Not only that,] the Zionism thus ascribed to Jews is understood as a form of racism. Antizionism does not allow Jews, individuals or communities, to define their own identities. It defines their Zionism for them, against their will, and without consultation. It defines Zionism as racism and as support for apartheid. In so doing it defines most Jews as alien to any decent community of human beings.

David Hirsh, *How the Word “Zionist” Functions in Antisemitic Vocabulary*, J. CONTEMP. ANTISEMITISM, Jan. 2021, at 1, 6.

an identity created, defined, and erroneously applied to them by someone else. Antisemites should not get to define all Jews as Zionists, all Zionists as racists, and then all antisemitism as excluding all forms of anti-Zionism.

The consensus around the IHRA Definition, on the other hand, gives a good sense of how Jewish people actually define themselves, and the anti-Zionism that crosses the line into anti-Jewish sentiment. The IHRA Definition is not *just* academic. “Any definition does not come first out of thought but out of an understanding of, and an effort to describe, a thing which exists.”⁸⁰ The plain fact is that the IHRA Definition should be adopted simply because it is a true and accurate description that captures the essence of antisemitism in many of its various forms, regardless of the ideological source. But even aside from its textbook correctness, the definition draws additional strength from the unprecedented reality that there exists a strong consensus of tens if not hundreds of thousands of people across nearly every sub-demographic in the Jewish world who agree that this explanation best encapsulates their shared identity and lived experiences on how antisemitism manifests, including as it relates to Israel.⁸¹ For example, in the United States, the truly consensual nature of the definition as reflecting mainstream U.S. Jewish sentiments can be seen by the fact that the Conference of Presidents of Major American Jewish Organizations, an umbrella group that represents most of the Jewish community, recently announced that 51 of its 53 member organizations have adopted the IHRA Definition.⁸² Additionally, the Jewish Federations of North America has made the adoption of IHRA one of its priorities.⁸³ Because the Jewish community is not monolithic, there are of course still dissenting voices within it, as there would be on any issue. But the overall degree of agreement is immense and remarkable, and while there have been some ill-intentioned efforts to create the misimpression of division within the Jewish community itself, this is easily and demonstrably debunked.

Digging a little deeper, the Jewish consensus behind IHRA is born out of the fact that while antisemites across time and space may conceal

80. David Hirsh, *It Was the New Phenomenon of Israel-Focused Antisemitism That Required the New Definition of Antisemitism*, in IN DEFENCE OF THE IHRA WORKING DEFINITION OF ANTISEMITISM 15, 19 (Alan Johnson ed., 2021), <https://bit.ly/3fkiRGm>.

81. See Goldfeder, *supra* note 4, at 141.

82. See *Conference of Presidents Member Organizations Adopt IHRA Definition*, CONF. OF PRESIDENTS OF MAJOR AM. JEWISH ORGS. (Jan. 26, 2021), <https://bit.ly/3fKf3OY>.

83. See THE JEWISH FED’NS OF N. AM., THE JEWISH FEDERATIONS OF NORTH AMERICA’S RECOMMENDATIONS TO PRESIDENT-ELECT JOSEPH R. BIDEN, VICE PRESIDENT-ELECT KAMALA HARRIS AND THE BIDEN-HARRIS TRANSITION COMMITTEE 5–6 (2020), <https://bit.ly/3CAER98>.

or deny their bigotry through different justifications, their feelings tend to manifest in similar thematic patterns, and their pretenses tend to reiterate common, conspiracy-driven theories.⁸⁴ As the IHRA bills underscore, antisemitism often holds Jews as a collective,⁸⁵ the idea being that while individual Jews might be tolerable, Jews as a separate collective identity should not be allowed to exist with the same rights as other groups.⁸⁶ That is why even as antisemitism has historically evolved, each iteration in any given era tends to focus on the primary form and expression of collective Jewish identity at that point in time.⁸⁷ In the Middle Ages, Jews were mostly a religious-identity community and were therefore hated for their religious affiliation, even if they were not religiously observant.⁸⁸ In the nineteenth and twentieth centuries, when many Jews had secularized, Jews were collectively brutalized for their ethnicity, and later for their race, regardless of the actual extent of their Jewish ancestry.⁸⁹ Today, when the primary collective expression of Jewish identity is through Jewish self-determination in their nation state, Jews around the world are hated and held accountable for ‘their’ country—regardless of their actual connection or lack thereof to the State of Israel.⁹⁰

84. See Kenneth Waltzer, *Contending with Antisemitism in Its Many Forms*, in *CONTENDING WITH ANTISEMITISM IN A RAPIDLY CHANGING POLITICAL CLIMATE* 137, 140 (Alvin H. Rosenfeld, ed. 2021) (“It is worth stating here that antisemitism is above all a hatred rooted in an idea or portrait of the Jew as a negative being, an extraordinarily malevolent and powerful being, a threat, or a danger. Antisemitic thought at its core is shaped by conspiratorial presumptions; is accompanied by related beliefs about the Jews as powerful, influential, and dangerous; and is Manichean—drawing a world sharply divided between good and evil, in which the Jew is the opposite of the good and constitutes the malevolent, deformed, and threatening Other.”).

85. See Goldfeder, *supra* note 4, at 128.

86. See The Rabbi Sacks Legacy, *Rabbi Sacks on the Connection Between Judaism and Israel*, YOUTUBE (Apr. 30, 2019), <http://bit.ly/3Oaw154>. Per Ahlmark, the former leader of the Swedish Liberal Party and Deputy Prime Minister of Sweden, remarked that while antisemitism begins primarily by attacking the collective Jews, “such attacks start a chain reaction of assaults on individual Jews and Jewish institutions.” Irwin Cotler, *Global Antisemitism: Assault on Human Rights* 5 (Inst. for the Study of Glob. Antisemitism and Pol’y, Working Paper Cotler 2009), <https://bit.ly/3TaZfDQ> (quoting Per Ahlmark, Speech at The International Conference on “The Legacy of Holocaust Survivors”: Combating Old – New Antisemitism (Apr. 11, 2002)).

87. See James Wald, *The New Replacement Theory: Anti-Zionism, Antisemitism, and the Denial of History*, in *ANTI-ZIONISM AND ANTISEMITISM: THE DYNAMICS OF DELEGITIMIZATION* 3, at 3 (Alvin H. Rosenfeld, ed. 2019).

88. See Thomas F. Madden, *The Truth About the Spanish Inquisition*, *CATH. CULTURE* (2003), <https://bit.ly/3ErKF62>.

89. *The Nuremberg Laws: Background & Overview*, JEWISH VIRTUAL LIBR., <https://bit.ly/3SFG0QK> (last visited Jan. 23, 2021).

90. See The Rabbi Sacks Legacy, *The Mutating Virus: Understanding Antisemitism* / *Rabbi Jonathan Sacks*, YOUTUBE (Sept. 28, 2016), <https://bit.ly/3UCgoas>; see also Goldfeder, *supra* note 4, at 131 (discussing same).

Put differently, one way that antisemitism classically manifests itself is “political antisemitism,” a term coined by Lesley Klaff and Bernard Harrison and defined as “a delusive explanatory theory concerning the supposedly central role played not by this or that individual Jew but by a supposedly all-powerful and malign Jewish collectivity in controlling non-Jewish life and history.”⁹¹ As they describe it, while the specific accusations leveled against Jews might change across time and depending on location, the main tenets of the theory remain roughly the same in all its iterations:

PA1. The Jewish community is organized to pursue goals of its own at what-ever cost to the lives and interests of non-Jewish groups. In consequence, it is directly and solely responsible for human suffering on a scale far exceeding anything that can be alleged against any other human group.

PA2. The Jewish community is conspiratorially organized in the pursuit of its self-seeking and heinous goals to an extent that endows it with demonic powers not to be suspected from the weak and harmless appearance of its individual members.

PA3. Through the efficacy of its conspiratorial organization and through its quasi-miraculous ability to acquire and manage money, the Jewish community has been able to acquire secret control over most of the main social, commercial, political, and governmental institutions of non- Jewish society.

PA4. Given the secret control exercised by world Jewry over (only apparently) non-Jewish institutions and given the obsessive concern of the Jewish community with its own interests to the exclusion of those of non-Jews, it is simply not feasible to remedy the evils occasioned by the presence of the Jews in non-Jewish society by any means short of the total elimination of the Jews.

PA5. Since the evils that the Jews do in the world owe their existence solely to Jewish wickedness, the elimination of the Jews will cause those evils to cease, without the need for any further action on the part of non-Jews, whose world will, in the nature of things, return forthwith to the perfect state of order natural to it, from which it would never have lapsed had it not been for the mischievous interventions of the Jews.⁹²

If you just replace the word “Jew” with “Israel” in any or all of those paragraphs, it becomes immediately clear that the examples in the

91. Harrison Bernard & Lesley Klaff, *The IHRA Definition and Its Critics, in* *CONTENDING WITH ANTISEMITISM IN A RAPIDLY CHANGING POLITICAL CLIMATE* 9, 21 (Alvin H. Rosenfield ed., 2021).

92. *Id.* at 21–22.

IHRA Definition that are related to the State of Israel are not there to proscribe any legitimate criticism of Israel as a state. Instead, the purpose is to describe to someone unfamiliar with the history of antisemitism how earlier versions of an age-old hatred are recycled, repackaged, and revived. The historical progression of antisemitism is often simplified by advocates into these three stages: (1) “You cannot live among us *as Jews*,” which has led to forced conversions; (2) “You cannot live among us,” which has resulted in mass deportations and exile; and finally, (3) “You cannot live,” which culminated in the Holocaust.⁹³ In the new version of antisemitism, Jews are constantly told that you cannot live among us as a state. They are told that you must stop being Jewish (as a state) or go somewhere else (as a state), or you must die (as a state).

For the antisemitic ‘critic,’ Israel, the only Jewish state, is also the only nation that essentializes and epitomizes evil.⁹⁴ To the antisemite, Israel is inherently synonymous with the worst thing one can be affiliated with at a given moment.⁹⁵ That is why, in their minds and in their papers, Zionism is therefore tantamount to Nazism, racism, colonialism, etc., and it remains the primary obstacle to societal progress or decency. *If only the Jewish state could be successfully eliminated, everything else would be better.*

The antisemites’ hatred of Israel thus “follows a pattern made familiar by earlier versions. . . . That is to say, it offers an ‘explanation’ of certain disturbing features of modern life . . . in terms of the putative centrality to these disquieting events of ‘the Jew,’ as represented for present purposes by the state of Israel.”⁹⁶ When is criticism of Israel

93. Felice Gaer, “*If Not Now, When?*”: *Jewish Advocacy for Freedom of Religion*, THE REV. OF FAITH & INT’L AFFS., Aug. 2012, at 73, 74 (2012) (emphasis added). This idea has been attributed to the Jewish philosopher Emil Fackenheim. See, e.g., Rabbi Stephen Lewis Fuchs, *Antisemitism Can Spread Like Wildfire ... Will It?*, FINDING OURSELVES IN THE BIBLE (Jan. 8, 2023), <http://bit.ly/3wq0Llo>.

94. See e.g., G.A. Res. 3379 (XXX), at 84 (Nov. 10, 1975) (defining Zionism as “a form of racism”).

95. Yossi Klein Halevi, described what antisemitism does:

What antisemitism does is turn . . . ‘the Jew’ into the symbol of whatever it is that a given civilization defines as its most loathsome qualities. . . . Under Christianity, before the Holocaust and Vatican II, ‘the Jew’ was the Christ Killer. . . . Under communism, ‘the Jew’ was the capitalist. Under Nazism, ‘the Jew’ was the race-polluter. . . . Now we live in the civilization where the most loathsome qualities are racism, colonialism, apartheid—and lo and behold, the greatest offender in the world today, with all of the beautiful countries in the world, is the Jewish state.

Yossi Klein Halevi, *The Latest Incarnation of Anti-Semitism*, YOUTUBE (Nov. 15, 2018), <http://bit.ly/3EfDKeS>.

96. Bernard & Klaff, *supra* note 91, at 26.

antisemitic?⁹⁷ As the IHRA Definition makes clear, criticism of Israel becomes antisemitic when people use classic antisemitic tropes or frameworks to treat the “collective Jew among the nations” as a proxy for how antisemites historically would talk about Jews⁹⁸ or the Jewish community.⁹⁹

If Zion is essentially evil, then anyone who is ‘Zionistic’ must be essentially evil as well. Sadly, people on both the right¹⁰⁰ and the left¹⁰¹ have expressed such hatred. As David Hirsh best put it:

Attacking, denigrating, and threatening ‘Zionists’ has become the norm, with the crystal-clear understanding that ‘Zionist’ is now merely an epithet for ‘Jew’ the same way ‘banker,’ ‘cabal,’ ‘globalist,’ ‘cosmopolitan,’ ‘Christ-killer,’ and numerous other such dog-whistles [and dark metonymies] have been used over the centuries to target, demonize, and incite against Jews.¹⁰²

Martin Luther King, Jr. also famously declared, “[w]hen people criticize Zionists, they mean Jews. You’re talking anti-Semitism!”¹⁰³

97. Guides on how to criticize Israel without being antisemitic have been created. See e.g., Emanuel Miller & Soshanna Keats Jaskoll, *How to Criticize Israel Without Being Antisemitic*, HONEST REPORTING (Feb. 14, 2019, 12:00 AM), <https://bit.ly/3dIt7Ys>.

98. See Judea Pearl, *Is Anti-Zionism Hate?*, L.A. TIMES (Sept. 16, 2014, 12:05 PM), <https://lat.ms/3LF8h9b> (“Anti-Semitism rejects Jews as equal members of the human race; anti-Zionism rejects Israel as an equal member in the family of nations.”).

99. See generally IRWIN COTLER, THE JEWISH PEOPLE POL’Y PLAN. INST., NEW ANTI-JEWISHNESS (2002), <https://bit.ly/3xQSCO2>.

100. See, e.g., *Zio-Watch News Round-Up*, DAVID DUKE, <https://bit.ly/3r3sJqK> (last visited Oct. 16, 2022); JEWS FOR RACIAL & ECON. JUST., UNDERSTANDING ANTISEMITISM: AN OFFERING TO OUR MOVEMENT 21 (n.d.), <https://bit.ly/3dFsCyC>.

101. See David Hirsh, *How the Word “Zionist” Functions in Antisemitic Vocabulary*, J. OF CONTEMP. ANTISEMITISM, Jan. 2021, at 1, 2.

102. Letter from Mark Goldfeder, Special Couns. Am. Ctr. for L. & Just. & Jeff Ballabon, Senior Couns. Am. Ctr. for L. & Just., to Catherine E. Lhamon, Assistant Sec’y for Civ. Rts. (July 19, 2022), <https://bit.ly/3UEiYg7>; see also Andrew Pessin, *Irwin Cotler: Laundering Antisemitism Corrupts Our Common Humanity*, THE ALGEMEINER (Apr. 4, 2016, 1:31 PM), <https://bit.ly/3r7r17z> (discussing “remarks by Iranian leaders, and the charters of groups such as Hamas and Hezbollah, explicitly calling for the destruction of Israel and the murder not of ‘Zionists,’ but of Jews.”).

103. Martin Kramer, *In the Words of Martin Luther King . . .*, MARTIN KRAMER ON THE MIDDLE E. (Mar. 12, 2012), <https://bit.ly/3BGzjbD>; see also Hirsh, *supra* note 101, at 3:

[I]n our day the word “Zionism” itself often functions as an antisemitic curse word, which hurts and discredits Jews. When Jews are denounced as “Zionist,” they are being accused of thinking they are better than everyone else and of supporting racism. It is a repackaging of old antisemitic understandings of the term “Chosen people,” a term that was already in Christian traditions a repackaging of nuanced, complex, and developing ways in which Jews thought about themselves. The word “Zionism” frequently constructs Jews as participating in dishonest global networks, conspiracies of lies and propaganda, in their own selfish interest. It positions most Jews as though they are in alliance with a formidable global system of oppression, sometimes called

As it relates to the IHRA Definition, because modern antisemitism often manifests under the guise of anti-Zionism,¹⁰⁴ the definition includes several helpful examples of when criticism of Israel *can*, considering the overall context, cross the line into antisemitism. And as it relates to these bills, which make use of the IHRA Definition when assessing the motivation behind potentially discriminatory conduct, the examples provide added clarity and definitive guidelines to the material benefit of those officials tasked with determining the presence of anti-Jewish bias.

The IHRA Definition does not provide examples about Israel in order to shut down legitimate criticism of Israel, as the definition explicitly clarifies twice. It does so because of the false belief that *no* expression related to Israel can ever cross the line from political disagreement to drawing on and perpetuating antisemitic tropes,¹⁰⁵ and to prevent people from pretending that the line between politics and

“modernity,” or “capitalism,” or “imperialism.” The word “Zionism” in antizionist usage conveys a familiar mixture of contempt and fear, as have previous words that have been used against Jews. It does this in a world in which the old words and languages of Jew-hatred have appeared discredited.

Id.

104. See Mark Goldfeder, *Anti-Semitism's True Nature Reveals Itself*, N.Y. DAILY NEWS: OP. (May 25, 2021, 7:30 AM), <https://bit.ly/3BLPvbx>.

105. See Goldfeder, *supra* note 4, at 136; see also Eve Garrard, *The IHRA Definition, Institutional Antisemitism, and Wittgenstein*, in IN DEFENCE OF THE IHRA WORKING DEFINITION OF ANTISEMITISM 46 (Alan Johnson ed., 2021), <https://bit.ly/3BMmsVf>:

[T]he other (putatively moral) objection – the claim that IHRA underpins an attack on the freedom of speech of critics of Israel – is not even true. Here’s why: the IHRA definition is peppered with conditional verbs, saying that this or that ‘may’ be antisemitic, or ‘could’ or ‘might’ be antisemitic. Its list of examples is prefaced by the remark that they ‘could’ provide cases of contemporary antisemitism, but that such antisemitism is ‘not limited’ to just those examples. But to say that a practice may be antisemitic is to allow that it may not be. To say that applying double standards to Israel could in some cases be antisemitic leaves room for the possibility that in some cases it isn’t antisemitic. That’s how these conditional verbs work. And the reason that we need words that work in this cautious way is that racism of any kind occurs in the complicated contexts of our moral lives, and good moral judgements are highly context-sensitive. So the charge that the IHRA definition threatens our freedom of speech simply isn’t true; what the definition does do is alert us to the fact that some ways of talking about Israel are antisemitic. The only view which this definition threatens is the view that criticism of Israel can never, ever, in any circumstances, be antisemitic. But this is not a view which is even remotely plausible (although some critics of the IHRA definition do seem to find it attractive). It is, of course, always possible that the IHRA text could be misused to assert the mistaken claim that criticism of Israel is always antisemitic. Misuse is a possibility with any text, but here the IHRA definition itself, with its cautious conditional claims, protects us all from accepting either of these implausible views.

Id. With regard to the bills in question, it is worth reiterating that, of course, even outright antisemitic speech would still be protected.

discriminatory hatred is somehow murkier when it comes to antisemitism than the line between sexist and non-sexist or racist and non-racist or homophobic and non-homophobic speech.¹⁰⁶ It is not.

As former Assistant Secretary of Education for Civil Rights Kenneth Marcus explained:

[T]he ideology of the new anti-Semitism consists of negative stereotypes describing the Jewish state and its members, supporters, and coreligionists as threatening, immoral, and categorically different from other people, and it favors the use of restriction, exclusion, and suppression to solve the 'Israel problem.' This substitution is endemic of the new anti-Semitism.¹⁰⁷

And in practice, as noted Holocaust historian Kenneth Waltzer has explained, examples of the type of line crossing described in the IHRA Definition are not that difficult to discern:

When anti-Zionism continuously treats Israel as a caricature of extreme evil, offering cartoon versions of Zionism as inherently racist and colonialist, removed from real history, this is antisemitic anti-Zionism. When adherents of anti-Zionism insist that, even though all other nations enjoy a right to self-determination and sovereignty, Jews are not similarly eligible, this is antisemitic anti-Zionism. When anti-Zionism absorbs mystical claims or tropes about Jewish evil and power into discussion of the Jewish state and attributes claims made about Jews as part of the long history of antisemitism to the Jewish collective today, this too is antisemitic anti-Zionism. When anti-Zionism absorbs representations, images, and depictions of the physical Jew clearly derived from the long history of antisemitism into its standard discourse, we are witnessing antisemitic anti-Zionism. . . . When magical powers able to hypnotize the world are attributed to Jews, this is antisemitic anti-Zionism. When anti-Zionists raise questions about the fitness for student office of students of Jewish background or affiliated with Jewish community institutions, because they will not be able to act objectively in representing other students, this is also antisemitic anti-Zionism. When anti-Zionists accuse Jews who call out antisemitism of raising the issue in bad faith in order to silence anti-Zionism, this too is antisemitic anti-Zionism. . . . Finally, when anti-Zionists argue that European or American Jews far removed from Israel or Palestine

106. In general, no one who calls sexist speech sexist, racist speech racist, or homophobic speech homophobic, is accused of chilling speech. See Jonathan Friedman & Cynthia Miller-Idriss, *When Hate Speech and Free Speech Collide*, DIVERSE: OP. (Dec. 5, 2018), <http://bit.ly/3TDXWfZ>. And yet when it comes to calling antisemitic speech antisemitic, people suddenly have reservations. See, e.g., Stern, *supra* note 56.

107. Kenneth L. Marcus, *Jurisprudence of the New Anti-Semitism*, 44 WAKE FOREST L. REV. 371, 376 (2009).

(such as the Jews in the Paris kosher grocery Hypercacher, shot after the Charlie Hebdo attack) are fair game for attack as part of the broad anticolonial “resistance” because all Jews everywhere are allies of Israel, this too is antisemitic anti-Zionism.¹⁰⁸

As Waltzer notes, it is ironic and idiosyncratically true of antisemitism—as opposed to other forms of discrimination—that even attempts to describe or define the phenomenon are often themselves rejected by antisemites *using classic antisemitic tropes about Jewish power*. Instead of believing or acknowledging the experiences of Jewish people who have been targeted and subject to abuse, and dispensing with any notion of good faith,¹⁰⁹ the antisemitic rejectionists instead blame and smear the victims themselves, accusing the Jews/Zionists¹¹⁰ of once again organizing their secret cabal to act maliciously and manipulate others into doing their bidding and silencing others.¹¹¹ If it were not so

108. See Waltzer, *supra* note 84, at 148.

109. See Howard Jacobson, *Let's Be Clear – Antisemitism is a Hate Apart*, THE GUARDIAN (Oct. 22, 2016, 7:04 PM), <https://bit.ly/3C8T5gf>:

The mantra bedevilling reasonable conversation about Israel is that the Jews have only one motive in labelling anti-Zionism antisemitic and that is to stifle legitimate criticism of Israel. This assertion defames Jews, the majority of whom, in my experience, take issue not with the idea of legitimate criticism, but with what in any given instance “legitimacy” amounts to. Criticism is not an inviolable concept. It can be moderate or extreme, truthful or mendacious, well-intentioned or malign. To complain when it is unjust is not to shut down debate The effect of a libel is to exhaust trust. It should not be automatically assumed that, when it comes to Israel, Jews are incapable of arguing honestly, an assumption that itself edges dangerously close to the racism that is being denied.

Id.

110. On the far right, David Duke, former grand wizard of the Klu Klux Klan, “has been trying to popularize the term ‘Zio’ (short for Zionist) as a stand-in for [the word] Jew,” so as to be able to criticize Jewish people without being immediately called antisemitic. JEWS FOR RACIAL & ECON. JUST., *supra* note 100, at 21; see also *Zio-Watch News Round-Up*, DAVID DUKE, <https://bit.ly/3TvwzspD> (last visited Oct. 16, 2022).

111. An example of this is seen in the difference between the Macpherson Principle, which says that if a person says they have been victimized, “then authorities and institutions should conduct their investigation on the same initial assumption, that the complaint is made in good faith,” and the Livingstone Formulation, which is the standard articulation of the opposite assumption:

The Livingstone Formulation says that that when people raise the issue of antisemitism, they are probably doing so in bad faith in a dishonest effort to silence legitimate criticism of Israel. It warns us to be suspicious of Jewish claims to have experienced antisemitism. It warns us to begin with the skeptical assumption that such claims are often sneaky tricks to gain the upper hand for Israel in debates with supporters of the Palestinians. And this is the substantial position of the ‘call to reject’ the IHRA definition of antisemitism. The Livingstone Formulation does not allege that Jews often misjudge what has happened to them, it alleges that they lie about what has happened to them. It is not an allegation of error, or over-zealousness, perhaps explicable by reference to the antisemitism of the past. It is an allegation of conspiracy.

sad,¹¹² the absurdity and hypocrisy of those who push these views would be comical.¹¹³

The late great Chief Rabbi Lord Jonathan Sacks once observed that one reason why antisemitism is so hard to define is because it is a “mutating virus.”¹¹⁴ Jews are criticized for being whatever a society, or a part of a society, hates at that particular moment.¹¹⁵ Jews have been, sometimes simultaneously, targeted for being radicals *and* fundamentalists; capitalists *and* socialists; too liberal *and* too conservative; elitist *and* impoverished. It matters little that the reasons are entirely contradictory and inconsistent. Sadly, hating Jews has been one of the few things that has managed to unite people across every aisle.¹¹⁶ This is why a consensus-driven definition is so critically needed.

A definition that can properly encompass all these possibilities and many more must be able to cut through any of the excuses that might be offered to justify this timeless hatred and focus instead on the *actions* taken by those who harbor hate and engage in bigotry. A praxeological, or conduct-based definition like the IHRA’s, fills that void.¹¹⁷ The examples in the IHRA Definition highlight the *manifestations* of antisemitism, i.e., what antisemites *do*, as opposed to *why* they do it. That is why the IHRA Definition, along with its examples, is especially helpful in assessing the motivation behind potentially antisemitic actions.

Hirsh, *supra* note 80, at 16. *See also* David Hirsh, *Accusations of Malicious Intent in Debates About the Palestine-Israel Conflict and About Antisemitism*, 11 *TRANSVERSAL* 47, 47 (2010); Steinberg, *supra* note 18, at 48–49 (“To the degree that the reference to a ‘hidden agenda’ is an echo of Jewish conspiracy theories, it is itself an example of antisemitism, in which classical antisemitic themes are attributed to Jewish and non-Jewish supporters of Israel.”).

112. One common motif is to accuse anyone who calls out anti-Semitic or anti-Zionism of Islamophobia. *See* Asaf Romirowsky & Richard Cravatts, *Blaming the Victim for Anti-Semitism*, *THE JERUSALEM POST*: OP. (Apr. 20, 2013, 10:56 PM), <https://bit.ly/3rfkoAe>; *see also* Mark Goldfeder, *Have the Democrats Finally Had It with Ilhan Omar*, *NEWSWEEK*: OP. (June 10, 2021, 6:13 PM), <https://bit.ly/3rkVIq9>; David Harris, *Ilhan Omar Has a Problem with Jews*, *NEWSWEEK*: OP. (July 1, 2021, 12:45 PM), <https://bit.ly/3BYj2ie>.

113. This is also similar to the phenomenon of declaring that every time the Jews or the Jewish State do something good, they must only be doing it for nefarious reasons. *See* Alan Dershowitz, *The Pinkwashing Campaign Against Israel: Another Conspiracy Theory*, *HUFFPOST: THE BLOG* (May 1, 2013), <https://bit.ly/3UJL5L7>.

114. The Rabbi Sacks Legacy, *The Mutating Virus: Understanding Antisemitism / Rabbi Jonathan Sacks*, *YOUTUBE* (Sep. 28, 2016), <https://bit.ly/3ftG7lw>.

115. *See* Manfred Gerstenfeld, *Anti-Israelism and Anti-Semitism: Common Characteristics and Motifs*, *JEWISH POL. STUD. REV.*, Spring 2007, at 83, 85.

116. *See Israel Hatred: The Common Denominator between the American Far-Left and Far-Right*, *THE MEDIALINE* (July 30, 2020), <https://bit.ly/3riBYUc>.

117. *See* Mark Goldfeder, *Ga. Legislature Should Act on New Antisemitism Bill*, *THE ATLANTA J.-CONST.*: OP. (Feb. 11, 2022), <https://bit.ly/3SKeW4g>.

2. The Impermissibility of Speech Codes and Why IHRA Definition Bills Avoid Regulating Speech

Before discussing the use of the IHRA Definition in a regulatory context, we must first differentiate between what a definition itself *does*, and how that definition might then be used to regulate behavior, because certain disingenuous opponents purposefully conflate the two in an effort to keep ‘antisemitism’ vague in theory and in practice.

A definition is nothing more than “the formal statement of the meaning or significance of a word, phrase, idiom, etc., as found in dictionaries.”¹¹⁸ The IHRA Definition does not, and by definition, *could* not do *anything at all* to regulate behavior or to silence speech, including even outright antisemitic speech. The definition is simply a tool used to label antisemitism correctly.

Indeed, the IHRA Definition does not criminalize anything. Instead, it clarifies what discriminatory antisemitism looks like. This clarification is particularly important for authorities that investigate discriminatory antisemitism, including acts which have notably been made illegal by prior law. The definition does not say that anything definitively does, or does not, constitute antisemitism; “[w]hat it does do is draw attention to the kinds of things that we know, from experience, are sometimes antisemitic.”¹¹⁹ The IHRA Definition says that if you see these hallmarks, then you should make an objective judgment about whether the elements of the case, taken together in their full context, indicate the presence of antisemitism. “The alarm bells tell you where to look, they do not make final or fixed judgments.”¹²⁰ In other words, the definition and the accompanying examples can help an official assess whether the conduct in question was motivated by illegally discriminatory intent, which is exactly the assessment they are *supposed* to make when applying anti-discrimination laws.¹²¹

118. *Definition*, DICTIONARY.COM, <https://bit.ly/2so3dyc> (last visited Oct. 17, 2022).

119. Hirsh, *supra* note 80, at 20.

120. *Id.*

121. Otherwise, anti-discrimination laws simply could not work. *See Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (“*Mitchell* argues that the Wisconsin penalty-enhancement statute is invalid because it punishes the defendant’s discriminatory motive, or reason, for acting. But motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge.”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976). Title VII of the Civil Rights Act of 1964, for example, makes it unlawful for an employer to discriminate against an employee “because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (emphasis added). In *Hishon*, the Supreme Court rejected the argument that Title VII infringed employers’ First Amendment rights. *See Hishon*, 467 U.S. at 78.

Some might argue that using a definition to label something as problematic can create an effective norm, which might then end up silencing some antisemitic speech by making it socially unacceptable. Making something socially unacceptable, however, is neither unconstitutional, nor a regulation of speech, or even out of the ordinary. Indeed, the free exchange of ideas, whether hate speech or a counter thereto, is how we are *meant* to ascertain the truth.¹²² Norms represent society's acceptance of the correctness of a position. The use of counter speech, in the form of applying a well-accepted definition in order to expose open or latent antisemitism, is precisely the right response to antisemitic rhetoric.

As Justice Brandeis famously explained in his concurrence in *Whitney v. California*, “[i]f there be time to expose through discussion, the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”¹²³ Applying the IHRA Definition to call out antisemitism is the “more speech” that Justice Brandeis was prescribing; indeed, the very “processes of education” that is required to respond to the falsehoods and fallacies that antisemites generate. Normally, anyone is free to call out racist or sexist or homophobic speech without being accused of silencing racists or being criticized for creating norms in which sexism or homophobia is unacceptable.¹²⁴ In this sense antisemitism is, or at least should be, no different than any other bigotry.

Using the IHRA Definition to determine whether a given statement or position is antisemitic does not change the fact that anyone anywhere can say whatever they want, whenever they want, and however abhorrent they want, about Judaism, the Jewish people, or the Jewish State. Freedom of speech, even offensive hateful speech, is an important cornerstone of a free society and part of what makes our democracy great.¹²⁵ But the fact that hate speech is constitutionally protected does not mean that we cannot use a definition to illustrate and explain why it

And more recently, in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389–390 (1992), the Supreme Court cited Title VII (as well as 18 U.S.C. § 242 and 42 U.S.C. §§ 1981 and 1982) as an example of a permissible content-neutral regulation of conduct.

As Kenneth Stern, one of the IHRA drafters, has explained: “The US Supreme Court case of *Wisconsin v. Mitchell* sets the model for the language in the working definition.” Kenneth S. Stern, *Antisemitism Rests on Intent Not Motive. It's Clear from the IHRA Definition*, THE TIMES OF ISR. (Jan. 25, 2022, 9:08 PM), <https://bit.ly/3Clgufw>.

122. See *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

123. *Whitney v. California*, 274 U.S. 357, 377 (1927).

124. See Friedman & Miller-Idriss, *supra* note 106.

125. Of course, there are policies, like certain university speech codes, that are problematic. See, e.g., *What are Speech Codes?*, FIRE, <https://bit.ly/3UMWM3A> (last visited Oct. 17, 2022). But these bills are explicitly not like that.

is hateful,¹²⁶ and the fact that this makes antisemites uncomfortable—as it leads people to weigh the competing viewpoints and hopefully *stop* engaging in antisemitism—is exactly what the counter-speech doctrine suggests and expects to happen.¹²⁷

In short, it is unequivocally true that as a general matter, the government may *not* regulate speech “because of its message, its ideas, its subject matter, or its content.”¹²⁸ That means people can say absolutely antisemitic things, and that other people can label those statements or positions as problematic. There is no serious debate on this issue, leading to the conclusion that *none* of the antisemitism bills which incorporate the IHRA Definition in any way attempt to regulate, limit, or chill speech. For example, look at the narrowly tailored actual text of the Iowa State antisemitism bill as codified in 2022:

HF 2220 (LSB 5469HV (4) 89)

RELATING TO ANTISEMITISM IN THE STATE OF IOWA.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. NEW SECTION. 216F.1 Definition.

For purposes of this chapter, “antisemitism” means the working definition of antisemitism adopted by the international holocaust remembrance alliance on May 26, 2016, and includes the contemporary examples of antisemitism identified by the international holocaust remembrance alliance.

Sec. 2. NEW SECTION. 216F.2 Rules of construction.

This chapter shall not be construed to diminish or infringe upon any right protected under the first amendment to the United States Constitution, or the Constitution of the State of Iowa. This chapter shall not be construed to conflict with local, federal, or state discrimination laws.

126. See Moshe Goldfeder, *Hate Speech*, MISHPACHA (Apr. 25, 2022), <https://bit.ly/3UHHsoK>. Moshe Goldfeder another name used by the author of this piece.

127. See David L. Hudson Jr., *Counterspeech Doctrine*, THE FIRST AMEND. ENCYC. (Dec. 2017), <https://bit.ly/3E1CVYv>. (“The counterspeech doctrine posits that the proper response to negative speech is to counter it with positive expression. It derives from the theory that audiences, or recipients of the expression, can weigh for themselves the values of competing ideas and, hopefully, follow the better approach . . . Justice Louis D. Brandeis established it in his classic concurring opinion in *Whitney v. California* (1927), when he wrote: ‘If there be time to expose through discussion, the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.’”).

128. *Police Dep’t of Chi. v. Mosle*, 408 U.S. 92, 95 (1972).

Sec. 3. NEW SECTION. 216F.3 Determination of discriminatory acts — consideration of antisemitism.

1. In reviewing, investigating, or deciding whether there has been a violation of any relevant policy, law, or regulation prohibiting discriminatory acts, the state shall take into consideration the definition of antisemitism set forth in this chapter for purposes of determining whether the alleged act was motivated by discriminatory antisemitic intent. 2. A court or other relevant authority shall apply the same legal standard as applicable to like claims of discrimination arising under laws of this state protecting civil rights including chapter 216.

Sec. 4. NEW SECTION. 216F.4 State personnel discrimination training.

For the purposes of training of state personnel related to discrimination and anti-bias training, the definition of antisemitism shall be used as an educational tool to familiarize staff and officials with antisemitism.

Practically speaking, the Iowa bill is narrowly tailored. The bill does not limit or chill anyone's freedom of speech or expression. In fact, the bill emphatically employs a savings clause, doubling down on First Amendment protections.

The Supreme Court has unanimously ruled that that the First Amendment allows for the evidentiary use of speech to rebuttably assess motive without there being any concern of impermissibly chilling speech.¹²⁹ The First Amendment *does not*, however, protect harassing or discriminatory or criminal *conduct*,¹³⁰ i.e., the only areas that these bills actually address.

Antisemitic speech, without more, is constitutionally protected, and bills incorporating the IHRA Definition do not in any way attempt to alter or undermine that protection. While some various lobbying groups have made the claim that these bills could prohibit constitutionally

129. “[T]he First Amendment . . . does not prohibit the evidentiary use of speech . . . to prove motive or intent.” *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

130. Discriminatory conduct, for example, can include physical, verbal, graphic, or written conduct if that behavior “is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities or opportunities offered by a school.” Letter from Russlynn Ali, Ass’t Sec’y for C.R., Off. for C.R., U.S. Dep’t of Educ., to Colleague (Oct. 26, 2010), <http://bit.ly/3E3QODG>. According to the OCR, “[h]arassing conduct may take many forms, including verbal acts.” *Id.*; see also *Is Your Speech Protected by the First Amendment?*, FREEDOM F. INST., <http://bit.ly/3GjAYrh> (last visited Nov. 15, 2022).

protected speech,¹³¹ no support has been given to identify even a single provision that would hinder the ability to criticize Israel or to engage in more classic blatant and virulent antisemitic speech.¹³²

That is why, after all of the academic works,¹³³ public debates,¹³⁴ legislative sessions,¹³⁵ and informational conferences¹³⁶ that have been dedicated to thoroughly debunking this notion, arguments to the effect that these bills somehow nefariously limit constitutionally protected speech are more than just red herrings. At this point they are bad faith lies being spread in a purposeful disinformation campaign. Of course, it is true that someone could theoretically draft a *different* bill incorporating the IHRA Definition to limit speech, but that is not the case with any of the bills already established. The time has come to stop these bad faith actors¹³⁷ from tilting at windmills.

Nevertheless, because many organizations and publications continue to try and misinform the public by sowing seeds of confusion that are disingenuous at best,¹³⁸ we can quickly address their ‘concerns’ head on. One prominent scholar, for example, recently provided an illustration for why he does not support these bills by offering the following hypothetical: “Is it antisemitic for a Palestinian student to say that they don’t think Israel should exist? . . . [A]re you going to require that this be looked at as a possible violation of the law?”¹³⁹

According to the IHRA Definition, the answer to the first question—whether such a statement is antisemitic—depends upon further contextual information. In some instances, considering the overall context, it might very well be antisemitic for a person, Palestinian or otherwise, to say that the State of Israel should not exist. But the answer to the second question—is this a possible violation of the law—is an

131. See, e.g., *Opinion: As Jewish Georgians, We Oppose HB1274’s Problematic Definition of Antisemitism*, THE ATLANTA J.-CONST.: OP. (Feb. 25, 2022), <http://bit.ly/3XT02Ly>.

132. See, for example, the testimony of the ACLU below, which raises the specter of the First Amendment but can identify no instance of how the bill would actually infringe upon it.

133. See, e.g., Goldfeder, *supra* note 4, at 126.

134. See, e.g., Steven H. Resnicoff et al., *Speech at the DePaul Univ. Symposium: Defining Antisemitism and Why it Matters: An In-Depth Exploration* (Apr. 26, 2022).

135. See, e.g., Joe Sabag, *Florida H741 Testimony – 3/28/19*, YOUTUBE (Mar. 28, 2019), <https://bit.ly/3ENNAWZ>.

136. See, e.g., U.S. Department of State, *DOS Anti-Semitism Conference: “IHRA Working Definition,”* YOUTUBE (Nov. 3, 2020), <https://bit.ly/3Tatfzv>.

137. See Press Release, CAIR, *CAIR Condemns Anti-Free Speech Bills Signed into Law by Iowa Governor as ‘Doomed and Unconstitutional’* (Mar. 25, 2022, 10:48 AM), <https://bit.ly/3g8pN9X>.

138. See *supra* note 19 and accompanying text.

139. Isaac Scher, *Three States Push to Curb Pro-Palestine Activism*, JEWISH CURRENTS (Apr. 26, 2022), <http://bit.ly/3XT0dqC>.

obvious and emphatic ‘of course not.’ It is not illegal for *anyone*, Palestinian or otherwise, to say that they do not think the State of Israel should exist, and nothing in the bills indicate otherwise. This is definitionally free speech.

To be clear, it *would* be a violation of the law for *anyone*, Palestinian or otherwise, to commit a hate crime against an innocent Jewish person or institution simply *because* they think that the State of Israel should not exist. I would hope that this scholar would agree. The latter scenario, not the former, is what the bills regulate with the helpful aid of the IHRA Definition.

It should be reiterated that one can fully support the Palestinian right to self-determination, and any other aspect of the ‘Palestinian cause,’ *without* doing anything that would be considered antisemitic. The anti-Zionist antisemites we are discussing are no friends of the Palestinians either. I am making strict reference to the self-righteous, reflexive notion that being pro-Palestinian means being anti-everything-Israel as it ignores the reality of studies that consistently show how the vast majority of Arabs in the region would prefer to live under Israeli rule rather than under the Palestinian Authority,¹⁴⁰ and how efforts to harm the State of Israel actually harm the Palestinians more than they harm the Israelis.¹⁴¹ But even if a particular person’s beliefs about the ‘Palestinian cause’ *are* antisemitic, the person has every right to think and say antisemitic things. What the person *cannot* do is use their understanding of the Palestinian cause as the basis for harmful or unlawfully discriminatory *treatment* of Jews. There should be nothing controversial about that.

In sum, all these bills do is use the IHRA Definition to analyze intent *after* there has already been an act that is alleged to have been discriminatorily or criminally unlawful. All they do is ensure that when assessing the motivation behind illegal discriminatory *actions* (not speech) that target Jewish people, *when* there is an allegation that the (already committed) action was *motivated* by anti-Jewish sentiment, authorities *consider* (as rebuttable evidence in determining whether such motivation was actually present) the world’s most well-accepted definition of antisemitism—a definition that has already been officially adopted by over 870 separate governments, NGOs and other key

140. See 93% of East Jerusalem Arabs Prefer Israeli Rule, Poll Shows, ISR. HAYOM (Dec. 15, 2021, 7:33 AM), <https://bit.ly/3D3KmNL>.

141. See Carrie Sheffield, *Boycott Israel Movement Stunts the Palestinian Economy*, FORBES (Feb. 22, 2015, 4:20 PM), <https://bit.ly/3D1Gn4s>.

institutions, including several departments of our own federal government.¹⁴²

C. The Permissibility (and Even Necessity) of Regulating Unlawful Discriminatory Conduct

While it is true that the government cannot generally regulate speech or expression,¹⁴³ it can, should, and does regularly regulate certain kinds of destructive behavior.¹⁴⁴ Such regulation is at the core of all criminal and many civil laws, including the federal and state statutes that regulate illegal discriminatory conduct on the bases of race, religion, national origin, gender, or ethnicity.¹⁴⁵ “The Supreme Court has consistently found that state and federal anti-discrimination laws that relate to race, religion, color, and national origin do not violate the highest level of First Amendment protections.”¹⁴⁶ Crime and illegal discrimination are *not* forms of expression protected by the First Amendment.

In some instances, it is easy to establish the type of discriminatory behavior that could potentially violate the law. For example, the very act of illegally hiring, firing, or refusing to house a person based on a protected characteristic is itself the operative factor. But other cases, like discriminatory harassment, can be more difficult to pin down.

In general, “[u]nlawful harassment is defined as unwelcome conduct directed at an individual based on a characteristic that is protected by antidiscrimination law” and has a negative effect on the person to whom the conduct is directed.¹⁴⁷ For example, the U.S. Equal Employment Opportunity Commission defines harassment under Title VII of the Civil Rights Act of 1964 as:

142. See 865 Entities Worldwide Have Adopted IHRA Antisemitism Definition Since 2016, *Comprehensive CAM and Kantor Center Study Reveals*, COMBAT ANTI-SEMITISM (Mar. 22, 2022), <https://bit.ly/3EP6LzN>.

143. With certain obvious and limited exceptions including, for example, speech likely to incite imminent lawless action. See John R. Vile, *Incitement to Imminent Lawless Action*, THE FIRST AMEND. ENCYC., <https://bit.ly/3eE5eli> (last visited Oct. 17, 2022).

144. See Lily Wu, *Attorneys: First Amendment Protects Hate Speech, Not Hate Crimes*, KWCH 12 NEWS (Apr. 16, 2021, 7:38 PM), <https://bit.ly/3eyhVON>.

145. See *Civil Rights Act (1964)*, NAT’L ARCHIVES, <https://bit.ly/3EO02WU> (last visited Oct. 17, 2022).

146. Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout Is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29, 61 (2018) (citing Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987); Holder v. Humanitarian L. Project, 561 U.S. 1, 39 (2015); Christian Legal Soc’y v. Martinez, 561 U.S. 661, 697–98 (2010)).

147. *What is Unlawful Harassment?*, SKILLSOFT COMPLIANCE, <https://bit.ly/3gemBtA> (last visited Oct. 17, 2022).

unwelcome conduct that is based on race, color, religion, sex (including sexual orientation, gender identity, or pregnancy), national origin, older age (beginning at age 40), disability, or genetic information (including family medical history). Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive . . . Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.¹⁴⁸

Well-established Supreme Court precedent requires behavior to be “objectively offensive” in order to fall under the category of discriminatory harassment,¹⁴⁹ a type of destructive conduct that, unlike speech, can and should be regulated.¹⁵⁰ Behavior that is merely offensive to some would *not* be included.¹⁵¹ As the Court has noted, “the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances[.]’”¹⁵²

It is also important to remember that even under anti-discrimination laws, not all forms of harassing behavior are illegal. For example, in the school context, generic bullying behavior, even if it is severe and pervasive, does not run afoul of Title VI of the federal Civil Rights Act of 1964, which requires recipients of federal funding to ensure their programs and activities are free from harassment, intimidation, and discrimination on the basis of race, color and national origin.¹⁵³ Bullying is only illegal, and therefore subject to regulation, if it is done with an illegal discriminatory intent, i.e., if the bullying behavior is based on the

148. *Harassment*, EEOC, <http://bit.ly/3hJOomi> (last visited Nov. 15, 2022).

149. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999).

150. See Erwin Chemerinsky & Howard Gillman, *A Bill to Police Campus Speech*, WALL ST. J. (Dec. 15, 2016, 7:31 PM), <http://bit.ly/3X6qYYn>.

151. See *Davis*, 526 U.S. at 651 (stating that for behavior be considered harassment in the educational context, it must be “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities”); see also *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 205–10 (3d Cir. 2001) (detailing analogous standards for Title VI, which prohibits racial discrimination in education; Title VII, which prohibits workplace harassment; and Title IX, which prohibits sexual harassment in education).

152. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

153. See *Civil Rights Requirements- A. Title VI of the Civil Rights Act of 1964*, 42 U.S.C. 2000d *et seq.* (“*Title VI*”), U.S. DEP’T OF HEALTH & HUM. SERVS. (July 26, 2013), <https://bit.ly/3TrNVCL>.

race, color, or national origin of the intended target, and had a tangible negative impact on the victim.

The idea that an official might be confused as to what constitutes an antisemitic act and what is merely speech or expression is untenable for the simple reason that authorities do not seem to be troubled by the fact that they sometimes need to draw a line and define what constitutes sexual harassment or even harassment based on a person's color, race, nationality, or sexual orientation. If you believe that it is possible to identify the difference between speech and conduct in every discriminatory context *except* when it comes to the Jews, i.e., if you cannot recognize that you are in fact applying a different standard for dealing with anti-Jewish discrimination,¹⁵⁴ then there might be an even deeper problem at play.

The reason that states need to adopt a definition of antisemitism has nothing to do with establishing new laws or creating new categories, and everything to do with defining a term to ensure equal protection by clarifying the application of existing laws. It is also true that from a First Amendment perspective, you do not want each state to decide what is and is not problematic—that might lead to First Amendment vagueness problems. In order to meet the 'objectively offensive' standard required by the law, the definition used in the discriminatory antisemitism motivational analysis must be an objectively valid one. To that end, it is obvious that the definition that should be used is the conduct-based, consensus-driven IHRA Definition—the *only* internationally recognized definition of antisemitism that is, or ever has been, ubiquitously accepted.

III. ANALYSIS

A. *The Need to Codify a Definition of Antisemitism*

Before we can discuss the need to codify a definition of antisemitism, we must first reiterate what codifying the definition does *not* mean. Codifying the IHRA Definition *does not* mean criminalizing anything that is antisemitic within the meaning of the IHRA Definition. Rather, codifying the IHRA Definition seeks to legislatively affirm that the IHRA Definition is the appropriate tool for use in the regulatory context, for the limited purpose of assessing motive behind already unlawful discriminatory conduct.

Throughout the months of legislative hearings accompanying the passage of the first statewide antisemitism bills, many lawmakers and other stakeholders have raised issues or concerns. The three most

154. See Natan Sharansky, *Foreword*, JEWISH POL. STUD. REV., Fall 2004, at 5, 5.

commonly asked questions are addressed in this section. They include the necessity and importance of passing statewide bills, why antisemitism in particular needs a clarifying definition, and what it means to incorporate a definition by reference.

1. Is It Necessary and/or Important for States to Pass This Bill?

Many lawmakers have wondered why these bills are necessary and/or important given that discrimination is by definition already unlawful.

First, there is an urgency to change something in response to what the data can show policymakers about the increasing frequency and severity of antisemitic attacks.¹⁵⁵ Beyond that, the bills are *necessary* because Jewish identity and corresponding manifestations of antisemitism are so multifaceted, incorporating aspects of religion, race, culture, national origin,¹⁵⁶ and ethnicity, that without a standard definition, it is easy for antisemites to hide behind this ambiguity, commit horrible antisemitic acts, and then claim their actions do not constitute antisemitism because the act was not based on a particular characteristic.¹⁵⁷ This vagueness is at the very core of an equal protection deficit that, as will be more fully described in the next section, has partially contributed to the increasing rates of antisemitic incidents presently being observed.¹⁵⁸ To that end, the bills do not revise *any* existing anti-discrimination policies. Rather, they simply define a term that was *supposed* to have been easily understood but in practice is not, and thereby ensure that the rules are *not* applied arbitrarily. This brings us to the second point.

The bills are *important* because people genuinely seem to be unaware of what antisemitism is and how systematically prevalent and

155. See JACOB BLAUSTEIN INST. FOR THE ADVANCEMENT OF HUM. RTS., ANTISEMITISM IN THE UNITED STATES 6 (2019), <https://bit.ly/3D5Bjvh>.

156. For an example of national origin antisemitism, see Jonathan S. Tobin, *The Left Slides into Acceptance of Anti-Semitism*, JEWISH NEWS SYNDICATE (June 22, 2021), <https://bit.ly/3Tuh54h>. In the words of Peter Beinart, no fan of the Jewish State, “[w]hatever your politics on Israel-Palestine, discriminating against a food truck owner because he’s an American of Israeli descent is anti-Semitism, pure and simple.” *Id.* (quoting @PeterBeinart, TWITTER (June 21, 2021, 9:51 PM), <https://bit.ly/3TrNSai>).

157. For discussion of a similar problem, see generally, e.g., Mark Goldfeder, *Why Arkansas Act 710 Was Upheld, and Will Be Again*, 74 ARK. L. REV. 607 (2022) (analyzing ongoing anti-Boycott, Divestment, and Sanctions litigation, wherein plaintiffs continuously allege that their discriminatory actions are nothing more than protected political expression). Without clear definitions, existing laws simply will be unenforceable when those engaging in discrimination are free to claim it’s only politics.

158. See Mark Goldfeder, *Universities Must Shift Their Conception of Jewish Students as a Group*, JEWISH J. (Aug. 6, 2021), <https://bit.ly/3giyMpn>.

insidiously deep it has sadly become in this country.¹⁵⁹ Jews make up only 2% of the U.S. population, yet they are the victims of more than half of all hate crimes directed at a specific religious group and 13% of hate crimes overall.¹⁶⁰ A 2021 report found that one in every four American Jews had been a victim of antisemitism over the past year.¹⁶¹ Even with those numbers rising,¹⁶² nearly half of all Americans still say they have either never *heard* the word antisemitism, or at the very least, do not know what it means.¹⁶³ An official charged with determining the intent behind discrimination claims simply cannot assess the context of alleged antisemitism if the person does not know what the term means—which is also why some laws, like Iowa’s, also include a call for additional education and training on the subject.¹⁶⁴

2. Why is Jewish Suffering Worthy of Exceptional Treatment?

Others have asked why it is so important (and whether it is somehow ‘unfair’) for there to be a definition of antisemitism when other persecuted minorities do not (or do not yet) have similar definitions of racial or ethnic discrimination related to their group experience that a person charged with assessing intent can use as a guiding reference.

To be clear, these bills are *not* in any way about establishing Jewish exceptionalism; they are about ensuring Jewish equality. In fact, the claim that the Jews are somehow trying to seek an unfair advantage over other groups is itself a fairly common antisemitic claim.¹⁶⁵ While it is true that some academics like David Feldman have argued against ‘privileging’ the Jews over other minority groups by adopting clear and specific protections against antisemitism,¹⁶⁶ the response, especially in light of the Black Lives Matter/All Lives Matter debate, has been swift and powerful. As David Hirsch explained: “Jews go to their institutions

159. See Robert Shrimley, *An Unheard Hatred: How Anti-Semitism is Dangerously Ignored*, FIN. TIMES (Feb. 4, 2021), <https://on.ft.com/3VBSfW>.

160. See *2019 Hate Crime Statistics*, FBI: UCR, <https://bit.ly/3yMvIle> (last visited Oct. 17, 2022).

161. See Avi Mayer, *The State of Antisemitism in America 2021: Insights and Analysis*, AM. JEWISH COMM. (Oct. 25, 2021), <https://bit.ly/3VAx15B>.

162. See *ADL Tracker of Antisemitic Incidents*, ANTI-DEFAMATION LEAGUE, <https://bit.ly/3TbtGz> (last visited Oct. 17, 2022).

163. See AM. JEWISH COMM., *THE STATE OF ANTISEMITISM IN AMERICA 2020 29* (2020), <https://bit.ly/3yNexq5>.

164. Several states are also including IHRA as a pedagogical standard in Holocaust Education mandates. See, e.g., Nicole Raz, *Arizona Passes Long-Delayed Holocaust Education Bill After Sidelining Debate over Antisemitism Definitions*, JEWISH TELEGRAPHIC AGENCY (July 6, 2021, 9:16 AM), <https://bit.ly/3MC4k5A>.

165. See, e.g., UNIV. OF TORONTO, *REPORT OF THE UNIVERSITY OF TORONTO ANTI-SEMITISM WORKING GROUP 20* (2021), <https://bit.ly/3MFu3Km>.

166. See David Feldman, *The Government Should Not Impose a Faulty Definition of Antisemitism on Universities*, THE GUARDIAN (Dec. 2, 2020), <https://bit.ly/3VyMJPQ>.

and ask for protection against antisemitism. Feldman answers that all students and staff should be protected from all racism. He responds to ‘Jewish Lives Matter’ in a rather ‘All lives matter’ way.”¹⁶⁷ There must be pushback on this line of questioning because “[t]o say that antisemitism matters[,] is not to say that other issues don’t matter.”¹⁶⁸ In other words, combating illegal antisemitism does not come at the expense of any other group but antisemites.¹⁶⁹

The starting question for codifying antisemitism should never be about equivocating the needs of other affinity groups, it should be: “Do the Jewish people we are supposed to be protecting have a unique need that requires a distinct response?” And the answer to *that* question is clearly yes. Jewish people need this because history has shown that anti-Jewish hatred has been consistent, rampant, venomous, amorphous, evolving, and hard to define, and therefore even harder to educate about and combat.¹⁷⁰ Throughout the centuries, antisemites have abused this ambiguity to operate with impunity, exploiting the absence of a standard to escape any kind of culpability. Today, perpetrators of horrific, unlawful acts of antisemitic crime and discrimination often later claim that they were merely expressing ‘anti-Israel’ political sentiments by

167. David Hirsh, *Jews Are Asking for Protection from Their Universities from Antisemitism. David Feldman’s ‘All Lives Matter’ Response is Not Helpful*, FATHOM J. (Dec. 2020), <https://bit.ly/3CB5Gdd>.

168. David Hirsh, *It Was the New Phenomenon of Israel-Focused Antisemitism that Required the New Definition. David Hirsh Responds to a ‘Recent Call to Reject’ the IHRA*, FATHOM J. (Jan. 2021), <https://bit.ly/3EOyH6M>; see also Jacobson, *supra* note 109:

To assert that antisemitism is unlike other racisms is not to claim a privilege for it. Hating a Jew is no worse than hating anyone else. But while many a prejudice is set off by particular circumstance – the rise in an immigrant population or a locally perceived threat – antisemitism is, as often as not, unprompted, exists outside time and place and doesn’t even require the presence of Jews to explain it. When Marlowe and Shakespeare responded to an appetite for anti-Jewish feeling in Elizabethan England, there had been no Jews in the country for 300 years. Jewishness, for its enemies, is as much an idea as it is anything else.

Id.

169. It is also sadly true that at least within many popular social justice movements, “anti-Semitism has been forgotten as a human rights cause by the generation that claims to be so invested in human rights.” Leora Eisenberg, *When Your Liberal Values Need Not Apply*, THE TIMES OF ISR. (May 26, 2016, 10:22 PM), <https://bit.ly/3McQF4B>. This is true for movements that focus on issues ranging from climate change to racism. See Jonathan A. Greenblatt, *Antisemitism on the Left is Subtler than on the Right. But it’s Getting Worse.*, WASH. POST (Oct. 27, 2021, 2:56 PM), <https://wapo.st/3TbAnf8>. This uncaring exclusion has last left many Jews, who have shown up consistently for all these movements, “wondering where their allies have gone.” Melissa Block & Jerome Socolovsky, *Antisemitism Spikes, and Many Jews Wonder: Where Are Our Allies?*, NPR (June 7, 2021, 5:00 AM), <https://n.pr/3SHixjS>.

170. See The Rabbi Sacks Legacy, *The Mutating Virus: Understanding Antisemitism | Rabbi Jonathan Sacks*, YOUTUBE (Sept. 28, 2016), <https://bit.ly/3gdfPUP>.

attacking Jewish institutions, individuals, or points of Jewish collective identity.¹⁷¹

These bills also correct a longstanding equal protection issue. Antisemitism remains a major issue on college campuses, where most minority groups have long received protection under Title VI.¹⁷² Unlike those groups, however, for a long time the federal government did not consider the Jewish community to be protected under Title VI because the law does not apply to *religious* groups. The government simply ignored the facts that (a) Jewish identity is not merely religious in nature, and (b) antisemitic bias is often based on Jewish characteristics other than religion. They also ignored longstanding Supreme Court precedent, holding that “Jewish people are permitted to seek redress for racial discrimination as a distinct race for the purposes of federal civil rights statutes.”¹⁷³

Data shows that over time, the lack of proper legal recognition of Jewish identity and antisemitism has led to a severe equal protection deficit for the Jewish community, and has taken a toll on the ability of Jewish people to, for example, participate fully in university life or exercise their own civil liberties in support of their Jewish or pro-Israel

171. See, e.g., Goldfeder, *supra* note 104.

172. See *Civil Rights Requirements*, *supra* note 153.

173. *Simon v. Par. of Jefferson*, Civil Action No. 09-300, 2010 WL 745035, at *1 (E.D. La. Mar. 1, 2010) (citing *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987)); see also *Proa v. NRT Mid Atl., Inc.*, 618 F. Supp. 2d 447, 460–61 (D. Md. 2009), *aff'd*, 398 F. App'x 882 (4th Cir. 2010) (“The Supreme Court has held that § 1981 applies exclusively to racial discrimination, but that a ‘race’ encompasses ‘any identifiable class of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.’ This includes Jewish people. *Cf.* *Runyon v. McCrary*, 427 U.S. 160, 168, 174–175 (1976) [(Section 1981, like the Civil Rights Act of 1866, reaches private acts of racial discrimination)]; *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) [(Congress intended § 1981 to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics)]; *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) [(same for § 1982)].”); see also *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 567 (E.D. Cal. 1982) (noting that the history of racial discrimination against *Jews* is “so well known as almost not to require documentation”); *United States v. Nelson*, 277 F.3d 164, 176–78 (2d Cir. 2002) (explaining that the framers of the Thirteenth Amendment understood *Jews* to be a “race”); *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 354–55 (S.D.N.Y. 2014) (describing how “courts have regularly found that anti-Semitic harassment and discrimination amount to racial discrimination” (citing *Bachman v. St. Monica’s Congregation*, 902 F.2d 1259, 1261 (7th Cir. 1990) (finding that *Jews* constitute a race within the meaning of federal civil rights statutes); *Lenoble v. Best Temps, Inc.*, 352 F. Supp. 2d 237, 247 (D. Conn. 2005) (noting that “*Jews* are a distinct race for § 1981 purposes”); *Powell v. Indep. Blue Cross, Inc.*, Civil Action No. 95-2509, 1997 WL 137198, at *6 (E.D. Pa. Mar. 26, 1997) (finding that § “1981 must be read to encompass discrimination against a plaintiff because of his Jewish ancestry or ethnicity”); *Singer v. Denver Sch. Dist. No. 1*, 959 F. Supp. 1325, 1331 (D. Colo. 1997) (noting that *Jews* are “a distinct racial group for the purposes of § 1981”)).

identity.¹⁷⁴ Even today,¹⁷⁵ at colleges and universities across the country, institutional offices of Diversity, Equity, and Inclusion (DEI) that focus on historically marginalized populations, including racial and ethnic groups that have traditionally experienced discrimination, rarely include Jews and antisemitism in their programmatic missions or educational materials.¹⁷⁶ And a recent study found that an overwhelming number of DEI staff are openly antisemitic.¹⁷⁷

Thankfully, federal officials have finally recognized this error and corrected their own institutional definitional (mis)understanding for how to properly protect Jewish students. In 2004, the Department of Education's Office for Civil Rights, which is responsible for enforcing Title VI, issued a series of policy statements announcing that they would henceforth investigate antisemitism complaints, to the extent that they implicate ethnic or ancestral bias. As the policy directive explained, "[g]roups that face discrimination on the basis of shared ethnic characteristics may not be denied the protection of our civil rights laws on the ground that they also share a common faith."¹⁷⁸

174. See, e.g., *Examining Anti-Semitism on College Campuses: Hearing Before the H. Comm. On the Judiciary*, 115th Cong. (2017) (statement of Rabbi Abraham Cooper).

175. See Jay P. Greene & James D. Paul, *Antisemitism is a Growing Problem Among College Diversity Administrators*, NEWSWEEK: OP. (Dec. 22, 2021, 6:00 AM), <https://bit.ly/3CemEN8>; see also Michelle Cordero, *New Study: Diversity Officers at U.S. Colleges Are Anti-Israel*, THE HERITAGE FOUND.: HERITAGE EXPLAINS (Dec. 19, 2021), <https://herit.ag/3e94AMq>.

176. See, e.g., Ira Bedzow, *DEI Training Needs to Take Antisemitism Seriously*, FORBES (Nov. 24, 2021, 3:41 PM), <https://bit.ly/3EIHnRP>, which states:

Stanford's DEI committee's justification—i.e. that Jews possess privilege and power—is a theme that comes right out of the *Protocols of the Elders of Zion* and Henry Ford's *The International Jew: The World's Foremost Problem*. The only difference is that Ford claimed that Jews are “dispersed among the nations, but never merging themselves with nations and never losing a very distinctive identity,” while the DEI committee said that Jews could at least “pass” for white people. Or, as James Baldwin once described antisemitism, the committee was “really condemning the Jew for having become an American white man.”

Id.

177. Jay Greene & James Paul, *Inclusion Delusion: The Antisemitism of Diversity Equity and Inclusion Staff at Universities*, THE HERITAGE FOUND. (Dec. 8, 2021), <https://herit.ag/3SYRhNA>. It is not just on campus either:

The most prominent example of this from the corporate world was when Kamau Bobb, the head of diversity at Google, wrote that Jews have an “insatiable appetite for war” and an “insensitivity to the suffering [of] others.” Amazingly, Bobb was only reassigned to work on STEM education efforts for Google. Bobb let the mask slip by accusing “Jews” of these crimes rather than simply saying “Israelis” or “Zionists.”

Id.

178. See Letter from Kenneth L. Marcus, Deputy Assistant Sec'y for Enf't, Off. of C.R., U.S. Dep't of Educ., to Colleague (Sept. 13, 2004), <https://bit.ly/3V7vZ1T>.

This broader understanding of antisemitism has encompassed more than just a hatred based on religion or religious practices. It has also been confirmed in the context of Title VII cases. As Judge Mark Hornsby wrote in *Bonadona v. Louisiana Coll.*:

America is no stranger to anti-Semitism, which is often rooted in prejudice against a person based on his heritage/ethnicity without regard to the person's particular religious beliefs. Jewish citizens have been excluded from certain clubs or neighborhoods, and they have been denied jobs and other opportunities based on the fact that they were Jewish, with no particular concern as to a given individual's religious leanings. Thus, they have been treated like a racial or ethnic group that Title VII was designed to protect from employment discrimination based on membership in that group.¹⁷⁹

While federal law has steadily been coming around to the notion that Jewish identity (and anti-Jewish bias) can be multifaceted, modern antisemites have continued to push for a limited notion of antisemitism that allows them to attack Jews indiscriminately so long as they can credibly claim that they did not target Jews because of their religion, but rather for some other aspect of their identity. Nowadays, the most common example of this behavior is when Jewish people and institutions are attacked because antisemites hold them collectively responsible for the actions of the Jewish State. For example, in 2017, a German court decided that the firebombing of a synagogue in Wuppertal was not antisemitic because the criminals claimed that it was just the way they chose to express their anti-Israel politics.¹⁸⁰ Later that same year, and

179. See *Bonadona v. La. Coll.*, No. 18-CV-0224, 2018 WL 4353979, at *4 (W.D. La. July 13, 2018).

180. Benjamin Nägele, *Judge Rules Wuppertal Synagogue Firebombing Was Not Anti-Semitic, so What Happened?*, B'NAI B'RITH INT'L (Jan. 17, 2017), <https://bit.ly/3yggpaD>. This was also not an isolated incident. From an antisemite's perspective, Jews across the world are consistently viewed as understandable targets because they are surrogates of Israel. See David Harris, *Antisemitism and Four Travesties of Justice*, THE TIMES OF ISR. (Apr. 22, 2021, 7:21 PM), <https://bit.ly/3yldHQZ>; Rivka Bond, *On Becoming Un-assimilated*, THE TIMES OF ISR. (May 6, 2016, 12:03 PM), <https://bit.ly/3T2EF7W>. See also Efraim Karsh, *The War Against the Jews*, MIDDLE E. F. (July 2012), <https://bit.ly/3CdfnNw> describing how:

The 2006 Lebanon war has once more underlined just how widely Jews and Israelis are perceived as one and the same. During the crisis, there was a doubling of anti-Semitic attacks and incidents in the UK compared with July 2005 and a threefold increase in these events in Canada over the same period in the previous year. At the same time, the Jewish Memorial for Holocaust victims in Brussels and Berlin's Holocaust memorial have been desecrated and daubed with swastikas as have two synagogues in Sydney, Australia, and one in the Brazilian town of Campinas; twenty Jewish shops in Rome were also vandalized and daubed with swastikas, and a Pakistani-American walked into the Jewish Community center in Seattle in July 2006 and opened fire on innocent Jewish civilians, killing one and wounding five.

largely in response to this incident, Germany adopted the IHRA Definition.¹⁸¹

The above type of conflation occurs in the United States too. In 2008, during a period of increased fighting in the Middle East, a Molotov cocktail was thrown at a synagogue in Chicago.¹⁸² In December 2019, during the Jewish holiday of Hanukkah, a man broke into a Hasidic Rabbi's home in Monsey, New York, and brutally stabbed five people with a giant sword.¹⁸³ According to court records filed by federal prosecutors, his recent search history included looking for "Zionist temples."¹⁸⁴ The Rabbi whose house was attacked is a member of the Kosov Hasidic sect, which is not actually Zionist. In fact, one of his Hasidic followers, the man who managed to first slow down the attacker by throwing a table and then followed him outside to get his license plate number which ultimately led to his arrest, *turned down* a \$20,000 prize for his heroism offered by the Jewish Federation of Rockland County and the Anti-Defamation League—in light of the 'Zionist' values embodied by those organizations. He did not want to even be associated with anything remotely Zionist, and later told reporters: "I was not willing to offer my soul for \$20,000. . . . My identity for \$20,000 was not for sale." This man, an open and determined anti-Zionist, was attacked with a sword for his 'Zionism.' There is no clearer demonstration that these bills are not meant to protect Israel—they are meant to protect *Jews* from being attacked by antisemites 'because' of Israel.¹⁸⁵

Unfortunately, these attacks are common. In May of 2021, while Israel was defending itself against the terrorist group Hamas, antisemitic attacks shot up by over 400%.¹⁸⁶ Across the United States, hundreds of random synagogues, Jewish community centers, kosher restaurants, Jewish-owned businesses, and individual Jews were targeted and

Id.

181. See *Germany Endorses Working Definition of Antisemitism*, INT'L HOLOCAUST REMEMBRANCE ALL. (Sept. 20, 2017), <https://bit.ly/3fBTBvm>.

182. See Ofelia Casillas, *Arsonist Hits N. Side Synagogue*, CHI. TRIB. (Dec. 30, 2008, 12:00 AM), <https://bit.ly/3rB4n88>.

183. See Kevin Armstrong et al., *Knife-wielding Man Shattered Night of Celebration, Witnesses Say, Renewing Fears of Violence Against Jews*, THE WASH. POST (Dec. 29, 2019, 10:18 PM), <https://wapo.st/3geikX0>.

184. Joseph Ostapiuk, *Feds: Hanukkah Stabbing Suspect Searched for 'Zionist Temples of Staten Island'*, SILIVE (Dec. 31, 2019, 8:34 AM), <https://bit.ly/3fP9wXd>.

185. Rossella Tercatin, *A Gesture to Honor Monsey Hero Ended up in Controversy; Here is Why*, THE JERUSALEM POST (Feb. 18, 2020, 7:30 PM), <https://bit.ly/3yIuoGz>.

186. See Jemima McEvoy, *Synagogue Attacks and Slurs: Jewish Community Rocked by Rise in Anti-Semitism Amid Israel-Gaza Fighting*, FORBES (May 20, 2021, 2:30 PM), <https://bit.ly/3rATvXz>; see also Shahar Eilam & Tom Eshed, *Increased Antisemitism in the United States Following Operation Guardian of the Walls: Permanent or Short Lived?*, THE INST. FOR NAT'L SEC. STUD. (Nov. 10, 2021), <https://bit.ly/3ynBpMB>.

attacked, beaten and bullied, all because they were Jewish.¹⁸⁷ Many of those who were targeted were not religious, and some were not even Zionists. Their only ‘crime’ was being visibly Jewish at a time when antisemites were angry at Israel.¹⁸⁸ And of course none of this was surprising; the same things happened in 2014 during the last Gaza war¹⁸⁹ with the same 400% increase in antisemitic incidents.¹⁹⁰

When anti-Zionist ideology crosses over into antisemitic acts, they can and should be legally remedied. These bills will help the government to do that by codifying a definition that affords Jewish persons proper recognition, and therefore *equal* governmental protection from crime and discrimination, by correctly defining antisemitism as more than just attacking Jews for their religious identity or observance. Such bills will help ensure that when people discriminate against Jews for any aspect of their Jewish identity, whether religious, ethnic, or beyond, such bigotry is addressed accurately and with the same care, procedures, and processes in place, as discrimination against any other member of a minority group targeted for their racial or ethnic identity.

However, and notwithstanding all of the above, the importance of clarity and standards when defining forms of bigotry is *not* entirely unique to antisemitism. If any other group feels that it is being routinely and systemically discriminated against, and believes that there is a need for a uniform consensus definition to clarify what is and is not bias-motivated illegal conduct, that group’s concerns *should* likewise be heeded in a legislative manner and would more than likely receive the in-kind support of much of the mainstream Jewish community.¹⁹¹ Indeed, in 2018, the All-Party Parliamentary Group on British Muslims published a “Call for Evidence” asking for assistance “to facilitate the adoption of a working definition of Islamophobia that can be widely accepted by Muslim communities, political parties, and the Government,”¹⁹² and in

187. See Andrew Pessin, *Remarks at the No Fear Rally Against Antisemitism*, THE TIMES OF ISR. (July 13, 2021, 5:44 PM), <https://bit.ly/3RK2oZw> (“Just last week, within one week, in Boston, a gunman arrested en route to a synagogue, a rabbi stabbed, an anti-Israel rally targeting not the Israeli consulate but the ADL.”).

188. See Goldfeder, *supra* note 104.

189. See Benjamin Weinthal, *Why Anti-Zionism is Modern Anti-Semitism*, NAT’L REV. (July 29, 2014, 4:18 PM), <https://bit.ly/3Ckz86e>.

190. See Itamar Eichner, *Report: 400% Rise in Anti-Semitic Incidents During Gaza War*, YNET NEWS (Jan. 25, 2015, 12:53 PM), <https://bit.ly/3CbAtMA>.

191. Several Jewish organizations, including StandWithUs and the National Jewish Advocacy Center, have already been working with other minority communities to help them learn from the IHRA Definitions’ success.

192. @APPGBritMuslims, TWITTER (Apr. 23, 2018, 12:29 PM), <https://bit.ly/3M8VvA1>.

2021 a group of Hindu scholars published a working definition of Hinduphobia.¹⁹³

3. Can You Incorporate a Definition into a Law by Reference and Why Would You Want to Do So?

Many lawmakers have asked why the antisemitism bills, like Iowa's, incorporate the IHRA Definition by reference,¹⁹⁴ rather than laying out the definition as part of the text of the bill itself. Some have even assumed or implied that it might be an unlawful delegation of legislative authority to do so. There are really two parts to this question: (1) is it legal for a bill to incorporate a standard by reference; and (2) if so, why is it important for these bills to do so? Each deserves an answer.

In response to the first question, it is not in any way illegal or problematic for state or federal legislation to incorporate a standard by reference in the way that these antisemitism bills incorporate the IHRA Definition. In order for legislation to incorporate material by reference, without having to spell out the information as part of the legislative text, “the host document must identify with detailed particularity what specific material it incorporates and clearly indicate where that material is found in the various documents.”¹⁹⁵ The sufficient particularity standard is an objective standard. It ensures that the determination is based on “whether one reasonably skilled in the art would understand the application as describing with sufficient particularity the material to be incorporated.”¹⁹⁶ When a legislature incorporates an existing standard, the legislature is presumed to be familiar with the standard in its entirety and to approve of it,¹⁹⁷ and “[w]hen a document incorporates outside material by reference, the subject matter to which it refers becomes a part of the incorporating document just as if it were set out in full.”¹⁹⁸

It *can* be an impermissible delegation of a legislature's power if a statute were to try and adopt a *fluid*, as opposed to a static, definite standard into law by reference—i.e., if a bill incorporated a standard *plus* any modifications it might undergo in the future. If that were to happen,

193. See *Hinduphobia*, HINDU AM. FOUND., <https://bit.ly/3yAvjZ> (last visited Oct. 6, 2022).

194. See John Mark Keyes, *Incorporation by Reference in Legislation*, 25 STATUTE L. REV. 180, 180 (2004) (“Incorporation by reference is a drafting technique for providing that a legislative text . . . includes material . . . expressed elsewhere . . . [w]ithout reproducing it word-for-word . . .”).

195. *Zenon Env't, Inc. v. U.S. Filter Corp.*, 506 F.3d 1370, 1378 (Fed. Cir. 2007) (citing *Cook Biotech Inc. v. Acell, Inc.*, 460 F.3d 1365, 1376 (Fed. Cir. 2006)).

196. *Harari v. Lee*, 656 F.3d 1331, 1334 (Fed. Cir. 2011).

197. See *Repass v. Workers' Comp. Div.*, 569 S.E.2d 162, 177 (W. Va. 2002).

198. *Diamond Resort Haw. Corp. v. Bay W. Kailua Bay, LLC*, CV. NO. 10-00117, 2011 U.S. Dist. LEXIS 19544, at *19 (D. Haw. Feb. 25, 2011) (quoting *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1428 (9th Cir. 1986)).

then a legislature could be said to be delegating its authority to the non-elected experts/authors of the standard, who could then change the standard in some way not currently contemplated by the legislature.¹⁹⁹ This concern is precisely why the antisemitism bills are careful and clear to establish definiteness by incorporating “the working definition of antisemitism adopted by the International Holocaust Remembrance Alliance on May 26, 2016.”²⁰⁰ That is a static, unchanging definition, tied to a specific date. If, for example, the IHRA itself were to update their definition, the definition in the *statute* would *not* change, unless and until the legislature specifically addressed and approved of the changes, and then voted to amend the definition in the bill to a new (and static) definition.

It is also worth noting that the bills incorporating the IHRA Definition are not in any way unconstitutionally vague or overbroad. A law is considered vague when people “of common intelligence must necessarily guess at its meaning[,]”²⁰¹ i.e., when it does not give sufficiently clear notice to a reasonable person of what it demands or prohibits. As the Supreme Court explained in *Kolender v. Lawson*, “the void-for-vagueness doctrine requires . . . sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”²⁰² A policy using the IHRA Definition to contextually assess the motivation behind potentially illegal discriminatory conduct before assuming it did or did not involve antisemitism provides such definiteness and clarity. Such a policy applies the well-accepted, and constitutionally upheld, definitions of discriminatory conduct, which are used in all similar circumstances, to reiterate that discriminatory antisemitic conduct is unacceptable. Furthermore, such a policy ensures that the application of the law will *not* be handled arbitrarily by providing an objective and clear definition of what antisemitism is, specifically for the purpose of discouraging the possibility of subjective enforcement. The IHRA Definition is fairly self-explanatory, such that a person of common intelligence would not be confused as to its meaning. In addition, for all of those concerned that Jews are ‘weaponizing’ criticism of Israel and will try and label everyone antisemites, the IHRA Definition repeatedly affirms that criticism of Israel, like that of any other nation, is not antisemitic and is the absolute best defenses available to an unfounded or politically motivated charge of antisemitism.

199. See *Repass*, 569 S.E.2d at 177; see also *Mich. Mfrs. Ass’n v. Dir. of Workers’ Disability Comp. Bureau*, 352 N.W.2d 712, 715 (Mich. Ct. App. 1984).

200. IOWA CODE § 216F.1 (2022) (emphasis added).

201. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

202. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

As it relates to overbreadth, the Supreme Court has emphasized in *Broadrick v. Oklahoma* that declaring a regulation overbroad is “manifestly strong medicine,” to be employed “sparingly and only as a last resort,” and not in situations in which “a limiting construction has been or could be placed on the challenged statute.” The bills in question are explicitly limited to assessing intent for discriminatory conduct, not speech. They contain a clear savings clause with an explicit, limiting construction. Even if there were still any grey areas, they are to be construed in a limited fashion, consistent with constitutional law, and with those additional savings clauses thrown on top for good measure.

The answer to the second question—why it is *important* to incorporate the IHRA Definition by reference, instead of pushing for each individual state to simply adopt the same definition and call it their own—is fourfold.

First, from a First Amendment perspective, adopting a well-accepted and well-understood definition with a history of application is what we need to decide if behavior meets the ‘objectively offensive’ standard required by the law. Adopting such a definition also ensures against accusations of vagueness or of subjective enforcement. The definition comes with almost two decades worth of explanation and experience.

Second, adopting a static definition, rather than including the whole text in the bill, ensures that the IHRA Definition is what is *actually* adopted and utilized. Incorporating the definition lessens the likelihood that antisemitic lobbies will try and stall the legislative process by offering endless amendments designed to weaken the definition—or at the very least to weaken the consensus around it by having multiple different versions in the ether such that it would no longer be possible to say that yet *another* institution has adopted the same IHRA Definition.

Which brings us to the third and inter-connected aspect of why it is important to adopt the definition by reference: uniformity. Even if all states would adopt the identical definition, the strength of the IHRA Definition’s consensus, and its undeniable validity, would be somewhat diminished if everyone agreed to adopt their own state-specific versions.²⁰³

Finally, codifying a well-accepted uniform standard, which can easily be plugged in to any other state’s code, lowers the costs for legislators and makes it more likely that additional states and jurisdictions will move to fill the gap in their own antidiscrimination

203. See *Defining Antisemitism*, *supra* note 41 (explaining how the State Department has adopted this same May 26, 2016, IHRA definition “and has encouraged other governments and international organizations to use it as well”).

statutes. As Dru Stevenson has explained, among the benefits of codification are that:

Once a state's statutes are in codified form—sorted topically, with numbered and subordinated sections, indexed, and so forth—it becomes much easier to plug in a code or section, borrowed either from a sister jurisdiction or a model act, to fill a gap or to replace an existing hodgepodge section with a systematic treatment of a legal subject. Codified law makes interjurisdictional comparisons easier, replacement or gapfilling more precise, and the advantages of harmonization more apparent to lawmakers . . . The topical and systematic form of codes highlights the appeal of harmonization, rather than competition, with neighboring jurisdictions.²⁰⁴

B. A Case Study in Bad Faith Argumentation

The most prominent group to come out against the adoption of the IHRA Definition has been the American Civil Liberties Union (ACLU). In recent years, the ACLU has been battling a well-earned reputation for fostering and protecting antisemitism and antisemites,²⁰⁵ and its position on this issue speaks volumes. While other less learned organizations might be excused for their ignorance, the ACLU should not be, and their strident opposition, based on claims that finds no basis in the bills' text or practical effect, deserves condemnation.²⁰⁶ Here then, reproduced in full, are the remarks made by the ACLU of Georgia's Policy Counsel in his testimony opposing a version of the bill that was almost identical to Iowa's.²⁰⁷ The bolded insertions are this author's annotated refutations:²⁰⁸

Today I would like to share the ACLU of Georgia's grave concerns about HB 1274 as currently drafted. Our primary concern with HB 1274 is that this bill would prohibit constitutionally protected speech

204. Dru Stevenson, *Costs of Codification*, 2014 U. ILL. L. REV. 1129, 1157 (2014).

205. The American Civil Liberties Union (ACLU) is also not impartial in this matter. Many of its senior policymakers have been criticized for their open affiliations with groups that actively promote anti-Jewish discrimination and crime. See Alana Goodman, *ACLU Becomes Top Legal Defender of Anti-Semitic BDS Campaign*, THE WASH. FREE BEACON (Sept. 15, 2021, 5:00 AM), <https://bit.ly/3MKtyik>. The ACLU has also been called out by leading First Amendment experts for repeatedly lying about and mischaracterizing laws to protect antisemites and promote anti-Jewish bias. See David Bernstein, *The ACLU's Shameful Role in Promoting Antisemitism*, REASON (Mar. 11, 2019, 9:32 AM), <https://bit.ly/3D5xOFE>.

206. This seems to be part of a larger identity crisis the ACLU is now experiencing. See, e.g., @RealTimers, TWITTER (Jan. 28, 2022, 11:14 PM), <https://bit.ly/3s3jSFU>; Michael Powell, *Once a Bastion of Free Speech, the ACLU Faces an Identity Crisis*, N.Y. TIMES (Sept. 28, 2021), <http://bit.ly/3VhgK67>.

207. *Hearing on H.B. 1274 Before the H. Judiciary Comm.*, 2022 Leg., Reg. Sess. (Ga. 2022) (statement of David Goldman, Pol'y Couns., ACLU of Ga.).

208. To be clear, this is not a personal attack on the individual who delivered the testimony, but rather on the institution that provided these talking points.

[The bill does not deal with speech, but rather with conduct. If that was not clear from the words of the bill itself, which it undoubtedly is, there is even a First Amendment savings clause that literally spells it out.] and risk criminalizing the expression of criticism of the state of Israel. **[The bill does not criminalize anything, even actions, and certainly not speech or expression. Note the complete lack of evidence, and the glaring inability to point to a single provision in the bill that would do any of these things.]**

The International Holocaust Remembrance Alliance's definition adopted by this bill is overly broad. **[These are parroted talking points of antisemites, with no explanation of why or how it is too broad.]** While the definition goes to some lengths to exclude criticism of Israel, the line between criticism of Israel and discriminatory animus remains too blurred to function as a law that ultimately punishes people for their speech. **[This is correct—which is why the bill *does not punish people for their speech*. The line between speech and illegal discriminatory conduct, which is what these bills deal with, is not blurry at all.]** One such note in the IHRA's definition is that "criticism of Israel similar to that level against any other country cannot be regarded as anti-Semitic." This language is unclear and unenforceable. **[First, the definition gives actual examples of the kinds of "criticism" that could constitute antisemitism, but regardless, no part of the bill attempts to "enforce" that language. That would be a speech code, and those who support the adoption of the IHRA Definition do not claim that would be lawful. Again, the IHRA Definition is merely intended to be an aid in determining whether certain content is substantively antisemitic, not whether the government may permissibly punish such speech—of course it could not.]** The State of Georgia is not a ministry of information that decides whether certain criticism of Israel is "similar to that leveled against any other country." **[Of course not, nor does this bill ever ask the State of Georgia to do that.]** For example, as a Jewish American, **[Note the use of tokenism, which is unacceptable in almost all other contexts.]** who is frequently critical of recent Israeli administrations, I wonder whether my speech could be construed to run afoul of these restrictions. **[Nowhere in the bill is there any restriction on speech of any kind, even outright antisemitic speech.]** Or more likely, would a non-Jewish person making the exact same criticisms as me be considered anti-Semitic while I am not. **[First, note the assumption of bad faith on the part of these imaginary accusers. Second, both Jews and non-Jews are capable of engaging in antisemitism. Neither the IHRA Definition nor the bill in question is concerned with this aspect of a perpetrator of antisemitism. If we are dealing with speech, then depending on**

what the Jewish or non-Jewish person said, the IHRA Definition might label either both or neither of the statements antisemitic. But that has nothing to do with the bill the ACLU counsel was testifying against. Note the conflation, as we have described, of the definition and the bill.] That is the determination we are leaving to the State of Georgia to make, **[No, it is not.]** and that is problematic. **[Or would be, if it were at all true.]** This definition remains useful as a moral or sociological definition, but not as a legal one. **[Note the lack of consistency—is it overly broad or not? If so, why is it useful there? If not, why should antisemites be allowed to commit discriminatorily antisemitic acts? If the IHRA Definition is useful for identifying antisemitism (“as a moral or sociological definition”), it is appropriate for the purposes of these bills.]** Even the Office of the United Nations High Commissioner for Human Rights (OHCHR), which has adopted the IHRA’s language as a working definition, has clearly stated that this definition is a “‘non-legally binding’ definition intended to guide and educate. **[The definition itself is just a definition; it is not legally binding, and it is intended to guide. A bill, such as this one, uses it in a regulatory framework to guide officials who are charged with protecting real people against antisemitism. The High Commissioner actually encouraged states to do just that, noting that “[w]here public bodies use the definition in any regulatory context, due diligence must be exercised to ensure that freedom of expression within the law is protected for all.” These bills demonstrate all such due diligence.]** It is not a means to squelch debate or free speech, **[On this we completely agree—because no one said that it was. Certainly, nowhere in the bill is this even suggested as a remote possibility.]** and those who misuse it in this way should be opposed.” **[Of course they should—but that has nothing to do with this bill, which does not misuse it in this way.]**

The ACLU of Georgia also believes that this legislation is unnecessary. **[See above for why it is necessary. Antisemitism is surging around the country, and the Peach State has not been immune. Over the last five years Georgia has had 188 reported incidents of antisemitism, and in 2018 it had the highest number of incidents in the Southeast.²⁰⁹] Importantly, Jewish Georgians are already protected by the Georgia code and the Civil Rights Act of 1964, under which numerous courts have held that Jews, whether actively religious or not, are protected from discrimination under the “race” and “national origin” language. **[Unfortunately, however, without a definition explaining what antisemitic discrimination looks like, these protections are clearly****

209. See ADL H.E.A.T. MAP™ (HATE, EXTREMISM, ANTISEMITISM, TERRORISM), ANTI-DEFAMATION LEAGUE, <https://bit.ly/3yUGY5p> (last visited Oct. 18, 2022).

and demonstrably insufficient. See the rising national rates of reported incidents for proof.] Ultimately, HB 1274 would have a chilling effect on constitutionally protected political speech. **[A return to an unsubstantiated assertion already debunked. Still not one shred of evidence, not one explanation of how this bill would ever have an effect on speech of any kind, not one indication that counsel is aware of unanimous Supreme Court precedent declaring that the evidentiary use of speech to assess motivation behind illegal discriminatory acts does not chill speech, and not one provision counsel could point to as indicative of the problem they are ‘gravely concerned’ about.]** This committee should not pass this legislation as drafted and at the very least, this committee must reconsider incorporating the IHRA’s definition of anti-Semitism into Georgia law. **[Note the quiet implication that there might be something problematic about incorporating a definition by reference.]** Thank you.²¹⁰

Case study closed. This is not a game. There are real people here who are facing real and often violent attacks by perpetrators who then hide behind the lack of a definition to walk away free from accountability. The ACLU should be nothing less than ashamed to give ‘testimony’ of this nature and poor legal caliber.

IV. CONCLUSION: WHAT DOES IT MEAN FOR A STATE TO ADOPT IHRA AS PART OF AN ANTISEMITISM BILL?

One cannot fight a problem if one cannot even identify when it has occurred. Rectifying that problem when it comes to antisemitism begins with the ability to properly define its parameters. When antisemitic ideas, including antisemitic anti-Zionism, form the basis for, or provide the intent behind, or motivate illegal antisemitic *acts*, then authorities must be in a position to respond in a way that protects the Jewish community. God willing, these bills will help the government to do that.

Because Jewish identity is so multifaceted, in the absence of a standard definition for authorities to reference, antisemites have learned that it is easy to hide behind this ambiguity. Antisemites can, and do, commit heinous acts with impunity, then claim it was not antisemitism but rather some other more socially acceptable bias (e.g., anti-Zionism) that the victim deserves to be confronted with. The predator in turn pretends to be the prey. Practically speaking, the bills that some states have passed, and the bills many more states are considering, are actually quite narrow. All they do is ensure that when analyzing the intent behind illegal discriminatory actions (not speech) that target Jewish people,

210. *Hearing on H.B. 1274 Before the H. Judiciary Comm.*, 2022 Leg., Reg. Sess. (Ga. 2022) (statement of David Goldman, Pol’y Couns., ACLU of Ga.).

when there is an allegation that the action was motivated by anti-Jewish sentiment, authorities consider (as rebuttable, contextual evidence of whether antisemitism was involved) the world's most well-accepted definition of antisemitism.

Despite what some have tried to claim, if a person wishes to criticize Israel, even harshly, then these laws should not worry that person *at all*. In fact, even if a person was spewing more traditional antisemitic hatred, say about specific religious practices, they would still have nothing to fear because these laws, demonstrably, have nothing to do with silencing *anyone* about *anything*. If, however, people are actually engaging in the kind of destructive *conduct* that would be illegal if done for discriminatory purposes, *and* their motive seems to be based on targeting Jewish people, then the person investigating and charged with assessing whether or not there was antisemitic intent involved *should* be using the gold-standard definition of antisemitism as a measure to compensate or correct for any potential ignorance or implicit bias. Anyone opposing these bills must be called upon to substantiate why they disagree with that statement.

Once again, these bills categorically do *not* criminalize or make *anything* illegal. Nor do they create any new protected class, enhance any punishment, or regulate and restrict academic freedom. Unlawful discriminatory actions, harassment, and crimes, that are motivated by antisemitic intent, are already unlawful by definition. But without a standard definition of what antisemitism includes, it is too easy for officials to either willfully or accidentally fail to see the problem and therefore fail to enforce existing laws and regulations about bigotry and discrimination. These bills fill in that missing gap in the text.

One final reason to pass these bills is because of what antisemitism is *not*. It is *not* just about the Jews, and it is not just a Jewish problem. As the late Chief Rabbi Jonathan Sacks famously explained, at the root of antisemitic hatred is a society's unhealthy inability to tolerate difference. "[T]he hate that begins with Jews never ends with Jews. . . . Antisemitism is the world's most reliable early warning sign of a major threat to freedom. . . . It matters to all of us. Which is why we must fight it together."²¹¹ As Ahmed Shaheed, the United Nations Special Rapporteur on freedom of religion or belief, noted in his recent Human Rights Council report on antisemitism,²¹² the same report in which he

211. The Rabbi Sacks Legacy, *Rabbi Sacks on the Mutation of Antisemitism / Animation / Rabbi Jonathan Sacks*, YOUTUBE (Sept. 9, 2015), <https://bit.ly/3gkMdVt>. See generally RABBI JONATHAN SACKS, THE DIGNITY OF DIFFERENCE: HOW TO AVOID THE CLASH OF CIVILIZATIONS (2002).

212. See generally Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *Elimination of All Forms of Religious Intolerance*, U.N. DOC. A/74/358 (Sept. 20, 2019). See *infra* note 213 and accompanying text for reasons why this might be the case.

recommended that governments around the world use the IHRA Definition,²¹³ “antisemitism, if left unchecked by governments, poses risks not only to Jews, but also to members of other minority communities. Antisemitism is toxic to democracy and mutual respect of citizens and threatens all societies in which it goes unchallenged.”²¹⁴

Let us challenge it together; country by country and state by state.

213. The Special Rapporteur included a thorough discussion of the IHRA as well as critics of the definition who claimed that it would restrict political expression about Israel. He noted, however, that

[T]he IHRA definition does not designate these as examples of speech that are ipso facto antisemitic and further observes that a contextual assessment is required under the definition to determine if they are antisemitic. Nevertheless, the potential chilling effects of the use of these examples by public bodies on speech that is critical of Israeli government policies and practices must be taken seriously as should the concern that criticism of Israel sometimes has been used to incite hatred towards Jews in general such as through expression that feed on traditional antisemitic stereotypes of Jews. Therefore, the use of the definition, as a non-legal educational tool, could minimize such chilling effects and contribute usefully to efforts to combat antisemitism. *Where public bodies use the definition in any regulatory context, due diligence must be exercised to ensure that freedom of expression within the law is protected for all.*

Shaheed, *supra* note 212, at 13 (emphasis added). As this article has once again demonstrated, that due diligence has been taken.

214. *Id.* at 1.

Defining Antisemitism

*Mark Goldfeder**

“Some people hate Jews. Fine, alright it’s been done.
I mean, that’s part of my problem with it.
Could you hate somebody new?”
-Gary Gulman

Antisemitic harassment is illegal, but without a standard definition of what ‘antisemitism’ includes, that idea is almost meaningless. That is why state legislatures and university administrators across the country are debating enacting policies that adopt the International Holocaust Remembrance Alliance (“IHRA”) definition of antisemitism. This Article will illustrate precisely how a state bill or a university policy utilizing the IHRA definition for assessing motivation when analyzing discriminatory conduct claims would actually function, so that critics can no longer vaguely claim that such policies would somehow offend the First Amendment. It will also explain the difference between protected political speech and thinly-veiled antisemitism, and provide a case study to illustrate the very real danger of what can happen when perpetrators are allowed to confuse speech with acts and conflate politics with demonizing and discriminatory hatred.

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I. INTRODUCTION

Antisemitism, loosely defined (we shall soon see why) as the prejudice against and hatred of the Jewish people, is often called the oldest form of hatred in the history of man.¹ Unfortunately, it is also perhaps the most persistent.² And, despite the fact that we are still within living memory of the Holocaust,³ for the past several years antisemitism has been making a public comeback,⁴ even in these United States,⁵ and even during a pandemic.⁶

Each year since 1979, the Anti-Defamation League has published a report that measures the number of antisemitic acts in the United States.⁷ In 2017, there were 1,986 reported antisemitic incidents, a 57 percent increase over the previous year, and the biggest annual jump

¹ Hillel Halkin, *The Persistence of the Oldest Hatred*, N.Y. TIMES (Sept. 10, 2019), <https://www.nytimes.com/2019/09/10/books/review/how-to-fight-anti-semitism-bari-weiss.html>; see generally Ildikó Barna et al., *Contemporary Forms of the Oldest Hatred: Modern Antisemitism in the Visegrád Countries*, in THE NOBLE BANNER OF HUMAN RIGHTS: ESSAYS IN MEMORY OF TOM LANTOS, 303–38 (Katrina Lantos Swett, Anna-Mária Biró & Máté Fischer eds., 2018).

² *Introduction*, in ANTISEMITISM: A HISTORY 8 (Albert S. Lindemann & Richard S. Levy eds., 2010).

³ See generally FACING HISTORY AND OURSELVES, HOLOCAUST AND HUMAN BEHAVIOR, 606–11, 662 (2017).

⁴ Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *The Elimination of All Forms of Religious Intolerance*, U.N. Doc. A/74/358 (Sept. 20, 2019); Eva Cossé, *The Alarming Rise of Antisemitism in Europe: European Governments and Public Should Stand Up Against Hate*, HUM. RTS. WATCH (June 4, 2019, 10:12 AM), <https://www.hrw.org/news/2019/06/04/alarmed-rise-anti-semitism-europe>.

⁵ See generally AUDIT OF ANTI-SEMITIC INCIDENTS: YEAR IN REVIEW 2018, ANTI-DEFAMATION LEAGUE (2019), <https://www.adl.org/media/13144/download> [hereinafter 2018 REVIEW]; LEONARD SAXE ET AL., BRANDEIS UNIV.: MAURICE & MARILYN COHEN CTR. FOR MODERN JEWISH STUDIES, HOTSPOTS OF ANTISEMITISM AND ANTI-ISRAEL SENTIMENT ON US CAMPUSES (2016), <https://bir.brandeis.edu/bitstream/handle/10192/33070/AntisemitismCampuses102016.pdf?sequence=1&isAllowed=y>.

⁶ Dina Porat, Position Paper, *Blaming the Jews and Israel for the Coronavirus Pandemic: Historical Background and Current-Day Reactions*, TEL AVIV UNIV.: KANTOR CTR., July 6, 2020; see also Walter Russell Mead, *Amid the Pandemic, Anti-Semitism Flares Up*, WALL ST. J. (Apr. 15, 2020, 6:53 PM), <https://www.wsj.com/articles/amid-the-pandemic-anti-semitism-flares-up-11586991224>; Samantha Mandeles, *Investigation: How Anti-Israel Activists Are Hijacking The Coronavirus Crisis And Turning It Against Israel*, LEGAL INSURRECTION (Apr. 9, 2020, 9:00 PM), <https://legalinsurrection.com/2020/04/investigation-how-anti-israel-activists-are-hijacking-the-coronavirus-crisis-and-turning-it-against-israel/#more-312987>.

⁷ 2018 REVIEW, *supra* note 5; *Anti-Semitic Incidents Remained at Near-Historic Levels in 2019; Assaults Against Jews More Than Doubled*, ANTI-DEFAMATION LEAGUE (Apr. 30, 2019), <https://www.adl.org/news/press-releases/anti-semitic-incidents-remained-at-near-historic-levels-in-2018-assaults>.

since the organization started tracking these numbers.⁸ In 2018, there was a 105 percent increase in the number of recorded physical assaults on Jewish people, including the deadliest attack on Jews in the history of the United States at the Tree of Life Synagogue in Pittsburgh.⁹ On university campuses around the country, antisemitism has become entrenched, systemic, broad, and deep, with recent studies showing that the number of Jewish students experiencing antisemitism on campuses across the United States spiked to nearly 75 percent.¹⁰ In 2017 alone there were more than 204 reports of antisemitic incidents of harassment, vandalism, or assault against Jewish students on campus—an 89 percent increase from the previous year.¹¹ The numbers continued to rise in 2018,¹² and the student organization, Hillel International, “reported that antisemitic incidents reached an all-time high . . . during the 2019–2020 academic year at the 550 U.S. colleges and universities that it serves.”¹³

These statistics ought to raise serious concerns for American society and prompt further investment in identifying and dealing with the underlying illnesses¹⁴ that fuel this never-ending hatred. This is true not only because it is simply wrong to be antisemitic, but also because history has shown that antisemitism is often a form of gateway racism;¹⁵ the proverbial “canary in the coal mine of intolerance.”¹⁶

⁸ 2018 REVIEW, *supra* note 5, at 7.

⁹ *Id.* at 8.

¹⁰ LEONARD SAXE ET AL., BRANDEIS UNIV.: MAURICE & MARILYN COHEN CTR. FOR MODERN JEWISH STUDIES, ANTISEMITISM AND THE COLLEGE CAMPUS: PERCEPTIONS AND REALITIES 1, 13 (2015), <https://bir.brandeis.edu/bitstream/handle/10192/30810/AntisemitismCampus072715.pdf>.

¹¹ 2018 REVIEW, *supra* note 5, at 29.

¹² See Jeremy Bauer-Wolf, *A Surge of Anti-Semitism*, INSIDE HIGHER ED (Dec. 5, 2018), <https://www.insidehighered.com/news/2018/12/05/anti-semitic-incidents-surge-college-campuses-after-pittsburgh-synagogue-shooting>.

¹³ Greta Anderson, *Responding to Rise in Campus Anti-Semitism*, INSIDE HIGHER ED (Sept. 9, 2020), <https://www.insidehighered.com/news/2020/09/09/anti-semitism-rise-new-semester-starts>.

¹⁴ See, e.g., NATHAN W. ACKERMAN & MARIE JOHODA, ANTI-SEMITISM AND EMOTIONAL DISORDER; A PSYCHOANALYTICAL INTERPRETATION (Max Horkheimer & Samuel H. Flowerman eds., 1950) (discussing the social and psychological roots of prejudice, with a focus on the research highlighting the close correlation between a number of deep-rooted personality disturbances and antisemitism).

¹⁵ DENNIS PRAGER & JOSEPH TELUSHKIN, WHY THE JEWS?: THE REASON FOR ANTISEMITISM, THE MOST ACCURATE PREDICTOR OF HUMAN EVIL 201 (2003); Jerry Klinger, *The Canary in the Coal Mine? American Jewry 1654-1770*, JEWISH AM. SOC. FOR HISTORIC PRESERVATION, http://www.jewish-american-society-for-historic-preservation.org/images/The_Canary_in_the_Coal_Mine.pdf (last visited Oct. 6, 2019).

¹⁶ Bill Rinehart, *Rising Antisemitism Is 'Canary in a Coal Mine' For Other Communities*, CIN. PUB. RADIO (Apr. 9, 2019), <https://www.wvxu.org/local-news/2019-04-09/rising-anti-semitism-is-canary-in-a-coal-mine-for-other-communities>; Jonathan Freedland,

It is impossible to fully answer the question of *why* antisemitism persists, but former Chief Rabbi Lord Jonathan Sacks believed that “one root cause is the cognitive failure called scapegoating. When bad things happen to a group, its members can ask one of two questions: ‘What did we do wrong?’ or ‘Who did this to us?’”¹⁷ A group that asks what they can do differently in the future will move forward, but a group that asks who else they can blame will begin to persecute the ones who look most different.¹⁸ Historically, this has often been the Jews,¹⁹ but Rabbi Sacks posits that the underlying problem is a society’s unhealthy inability to tolerate difference. “And because we are all different, the hate that begins with Jews never ends with Jews Antisemitism is the world’s most reliable early warning sign of a major threat to freedom It matters to all of us. Which is why we must fight it together.”²⁰

As Ahmed Shaheed, the United Nations Special Rapporteur on freedom of religion or belief, noted in his recent Human Rights Council report on antisemitism, “antisemitism, if left unchecked by Governments, poses risks not only to Jews, but also to members of other minority communities. Antisemitism is toxic to democracy and mutual respect of citizens and threatens all societies in which it goes unchallenged.”²¹

There are multiple opinions²² and best practices guides²³ on how to best combat antisemitism in a variety of different contexts.²⁴ For

Opinion, *Antisemitism Matters: Jews Are the Canary in the Coalmine*, GUARDIAN (Mar. 30, 2018, 12:04 PM), <https://www.theguardian.com/commentisfree/2018/mar/30/antisemitism-jews-canary-coalmine-fake-news>; *Antisemitism May Be Canary in the Coal Mine of Intolerance*, JEWISH NEWS OF N. CAL. (Dec. 19, 2014), <https://www.jweekly.com/2014/12/19/anti-semitism-may-be-canary-in-the-coal-mine-of-intolerance/>.

¹⁷ *The Mutation of Antisemitism*, OFF. OF RABBI SACKS (Apr. 19, 2017), <https://rabbisacks.org/the-mutation-of-antisemitism/> [hereinafter *Mutation of Antisemitism*].

¹⁸ *Id.*

¹⁹ As Rabbi Sacks notes, “for a thousand years [the Jews] were the most conspicuous non-Christian minority in Europe and today because Israel is the most conspicuous non-Muslim country in the Middle East.” *Id.*

²⁰ *Id.* See generally RABBI JONATHAN SACKS, *THE DIGNITY OF DIFFERENCE: HOW TO AVOID THE CLASH OF CIVILIZATIONS* (2002).

²¹ See Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *The Elimination of All Forms of Religious Intolerance 2/23*, U.N. Doc. A/74/358 (Sept. 20, 2019). See below for reasons why this might be the case.

²² See BARI WEISS, *HOW TO FIGHT ANTISEMITISM* (2019).

²³ See Kenneth L. Marcus, *Best Practices Guide for Combating Campus Antisemitism and Anti-Israelism*, LOUIS D. BRANDEIS CTR. FOR HUMAN RIGHTS UNDER LAW, https://brandeis-center.com/wp-content/uploads/2017/10/guide_01.pdf (last visited July 30, 2021).

²⁴ See, e.g., ONLINE ANTISEMITISM TASK FORCE (2019), <https://www.antisemitismtaskforce.org/> (last visited Aug. 28, 2020) (“[D]edicated solely to proactively seeking out, monitoring, and actively reporting online antisemitic content to remove it from the web.”).

example, while many organizations push for more nuanced general education about religion²⁵ or programming about the benefits of diversity,²⁶ former New York Times editor Bari Weiss urges Jews to take control by taking pride in their heritage.²⁷ In the meantime, however, from a policy perspective, the government must take steps to stem a quantifiable and incontrovertible antisemitic tide. State officials and institutions, including educational institutions, have a responsibility to protect citizens and students from hate and bigotry. They must be given the necessary tools to both educate their constituencies about what contemporary antisemitism looks like and stem those criminal and discriminatory acts that are motivated by antisemitism.

One major problem is the lack of an accepted definition of antisemitism. A recent survey found that “*more than half* of Americans 18 to 29 years old—the cohort most widely represented among college students and recent graduates—said they didn’t know the meaning of the word ‘anti-Semitism.’”²⁸ The same report found that nearly *half of the general American population* is unfamiliar with the term.²⁹

Antisemitic harassment is illegal,³⁰ but without a standard definition of what antisemitism includes, that idea is almost

²⁵ Joshua M. Z. Stanton & Benjamin P. Marcus, *The Key to Fighting Antisemitism? Children*, FORWARD (Feb. 26, 2019), <https://forward.com/opinion/419961/the-key-to-fighting-antisemitism-children/>.

²⁶ *Confront Hate and Antisemitism: Teaching About Antisemitism*, U.S. HOLOCAUST MEM’L MUSEUM (2019), <https://www.ushmm.org/confront-antisemitism/teaching-about-antisemitism> (providing resources and guides to teach about fighting all kinds of prejudice); RABBI EVAN MOFFIC, *FIRST THE JEWS: COMBATING THE WORLD’S LONGEST-RUNNING HATE CAMPAIGN* (2019) (urging people to respond to antisemitism by learning to appreciate the other and focus on common ground).

²⁷ See, e.g., WEISS, *supra* note 22.

²⁸ Seffi Kogen, *It’s Time We Taught Anti-Semitism*, INSIDE HIGHER ED (Feb. 2, 2021), <https://www.insidehighered.com/views/2021/02/02/anti-semitism-major-problem-campuses-and-students-must-be-educated-about-it-opinion> (citing AVI MAYER, AM. JEWISH COMM., *THE STATE OF ANTISEMITISM IN AMERICA 2020* (2020), https://www.ajc.org/sites/default/files/pdf/2020-11/The_State_of_Antisemitism_in_America_2020.pdf).

²⁹ “While just over half (53%) of the general public has heard of antisemitism and knows what it means, a quarter of respondents (25%) said they had heard the term but aren’t sure what it means and fully a fifth—21%—said they had never heard the term before.” AVI MAYER, AM. JEWISH COMM., *THE STATE OF ANTISEMITISM IN AMERICA 2020*, at 7 (2020), https://www.ajc.org/sites/default/files/pdf/2020-11/The_State_of_Antisemitism_in_America_2020.pdf.

³⁰ Aside from a variety of more explicit state anti-discrimination laws (see JEROME HUNT, CTR. FOR AM. PROGRESS ACTION FUND, *A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES* 5–6 (2012), https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf), Title VII of the Civil Rights Act of 1964 protects employees against many forms of discrimination, including race, gender, national origin, sex, and religion, while Title VI protects Jewish

meaningless.³¹ That is why numerous state legislatures³² are considering enacting specific statutes that not only address antisemitic behavior, but adopt a definition of antisemitism to better protect against discriminatory antisemitic harassment. State laws would affect state schools, but to their credit many university systems—both public and private—are not waiting to be told that they have to care more about, and do more for, their Jewish students. The clear rise in antisemitic feeling and behavior,³³ especially on campuses,³⁴ led several universities³⁵ to proactively embrace a definition of antisemitism to better educate their campus communities about what antisemitism is³⁶ and to better protect against illegal antisemitic harassment.

This Article is addressed to the remainder of state legislatures and university officials who have not yet clarified their existing anti-

students from discrimination based on their race or national origin. *See* Civil Rights Act of 1964 §§ 6–7, 42 U.S.C. § 2000e (1964).

³¹ Some have asked why antisemitism needs defining more than other discriminatory behaviors, and as discussed in various sections throughout this article, the answer is threefold: 1) throughout the generations no other hatred has been this amorphous and shifting, and therefore defying of definition; 2) related to that, modern antisemitism is unique because people can and do commit horrible acts of antisemitic discrimination and then claim that they were merely being “anti-Israel,” and the lack of a definition allows them to get away with it; and 3) notwithstanding all of the above, the importance of clarity in such definitions is not unique to antisemitism—to the extent that any other group feels it is routinely and systemically discriminated against, and that there is a need for a definition to clarify what is and is not hate speech—that group’s concerns should be addressed in a similar manner. In a somewhat related vein, the Black Lives Matter movement *has* argued that many states and universities do not understand structural racism, and students at dozens of schools have published their lists of demands for change. *See, e.g.*, THE DEMANDS, <https://www.thedemands.org/> (last visited Jan. 17, 2020).

³² As of the time of this writing, at least thirteen states are considering legislation to adopt the IHRA definition of anti-Semitism, not including Florida, which already adopted the definition.

³³ *Antisemitic Incidents Hit All-Time High in 2019*, ANTI-DEFAMATION LEAGUE (May 12, 2020), <https://www.adl.org/news/press-releases/antisemitic-incidents-hit-all-time-high-in-2019>.

³⁴ *See* Anderson, *supra* note 13.

³⁵ *See, e.g.*, *Arizona State University Student Government Adopted SR 05 in Support of the Jewish Students and the Pro Israel Community with a 15-1-3 Vote*, STUDENTS SUPPORTING ISRAEL (2019), <https://www.ssimovement.org/asu.html>; *Pace University Student Government Adopts Universal Definition of Anti-Semitism*, JEWISH NEWS SYNDICATE (Oct. 29, 2020), <https://www.jns.org/pace-university-student-government-adopts-universal-definition-of-anti-semitism/>; *Florida State University Adopts IHRA’s Definition of Antisemitism*, JERUSALEM POST (Aug. 17, 2020), <https://www.jpost.com/diaspora/florida-state-university-adopts-ihras-definition-of-antisemitism-638706>.

³⁶ John Thrasher, *A Message from President John Thrasher: An Update on Antisemitism and Religious Discrimination*, FLA. ST. U. NEWS (Aug. 12, 2020, 3:50 PM), <https://news.fsu.edu/news/university-news/2020/08/12/a-message-from-president-john-thrasher-an-update-on-antisemitism-and-religious-discrimination/>.

discrimination provisions by defining antisemitism. It proposes two somewhat interrelated policy actions: (a) the passing of state-level legislation, and (b) the adoption of university policies, to define antisemitism using the internationally accepted International Holocaust Remembrance Alliance (“IHRA”) definition of antisemitism.³⁷ These actions would not create any new laws or regulations, but would only ensure that existing laws and regulations protecting Jewish people are enforced.

These proposals build on the work of many others, including the groundbreaking work of former U.S. Department of Education Assistant Secretary for Civil Rights Kenneth Marcus,³⁸ Professor Eugene Kontorovich, the intellectual force behind state anti-Boycott Divestment and Sanctions (“BDS”) bills,³⁹ and Senators Tim Scott and Bob Casey, sponsors of a similar act undertaken at the federal level.⁴⁰ This Article will illustrate how and why the efforts to have states and universities adopt the IHRA definition of antisemitism are proceeding⁴¹ and are likely to succeed. Most importantly, it will also delineate precisely what a state bill or a university policy utilizing the IHRA definition to assess the motivation behind discriminatory conduct claims would *not* do, so that future critics cannot vaguely raise First Amendment or constitutional concerns.⁴² Next, the Article will explain the difference

³⁷ *Working Definition of Antisemitism*, INT’L HOLOCAUST REMEMBRANCE ALLIANCE, <https://www.holocaustremembrance.com/resources/working-definitions-characters/working-definition-antisemitism> (last visited Jan. 22, 2021).

³⁸ See Kenneth L. Marcus, *The New OCR Anti-Semitism Policy*, 2 J. FOR STUDY OF ANTISEMITISM 479 (2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1813192. Marcus was instrumental in ensuring that Title VI would also be used to protect students of faith. See also Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL RTS J. 837, 839 (2007) (arguing “anti-Semitic harassment at [institutions receiving federal assistance], constitutes racial discrimination prohibited by Title VI when sufficiently severe, pervasive, and objectively offensive as to deny equal educational opportunities to Jewish students”).

³⁹ See *Podcast: Eugene Kontorovich on the Legalities and Controversies of Anti-BDS Law*, MOSAIC MAG. (Mar. 7, 2019), <https://mosaicmagazine.com/observation/history-ideas/2019/03/podcast-eugene-kontorovich-on-the-legalities-and-controversies-of-anti-bds-law/>; see also Eugene Kontorovich, *Opinion, Israel Anti-Boycott Bill Does Not Violate Free Speech*, WASH. POST (July 27, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/27/israel-anti-boycott-bill-does-not-violate-free-speech/>.

⁴⁰ See Anti-Semitism Awareness Act of 2019, S. 852, 116th Cong. (2019).

⁴¹ This gradual adoption is proceeding domestically and around the world. See Chris Parr, *More Universities Adopt IHRA Antisemitism Definition*, RES. PROF. NEWS (Dec. 9, 2020), <https://www.researchprofessionalnews.com/rr-news-uk-universities-2020-12-more-universities-adopt-ihra-antisemitism-definition/>.

⁴² For a discussion of similar concerns raised in the context of state BDS legislation, see Mark Goldfeder, *Stop Defending Discrimination: Anti-Boycott, Divestment, and*

between criticism of Israel and thinly veiled antisemitism. Finally, the Article will provide a case study to illustrate the very real danger of what can happen when perpetrators are allowed to obfuscate their intentions by confusing speech with acts and conflating politics with demonizing and discriminatory hatred.

II. THE IHRA DEFINITION OF ANTISEMITISM

The International Holocaust Remembrance Alliance (originally the Task Force for International Cooperation on Holocaust Education, Remembrance, and Research) is an intergovernmental organization that “unites governments and experts to strengthen, advance and promote Holocaust education, research and remembrance and to uphold the commitments to [the 2000 Declaration of the Stockholm International Forum on the Holocaust].”⁴³ As “the only intergovernmental organization mandated to focus solely on Holocaust-related issues,” and “with evidence that the scourge of antisemitism is once again on the rise,” IHRA experts resolved to take a leading role in combatting antisemitism, and “determined that in order to begin to address the problem of antisemitism, there must be clarity about what antisemitism is.”⁴⁴ The Committee on Antisemitism and Holocaust Denial first developed their definition in 2003–2004,⁴⁵ and published it as a Working Definition in January 2005.⁴⁶ The U.S. State Department endorsed the definition as a guide in 2007,⁴⁷ started using it in 2010,⁴⁸ and in 2016,⁴⁹ when the Working Definition was formally adopted by a

Sanctions Statutes are Fully Constitutional, 50 TEX. TECH. L. REV. 207, 218–38 (2018) [hereinafter Goldfeder, *Stop Defending Discrimination*].

⁴³ *About Us*, INT’L HOLOCAUST REMEMBRANCE ALLIANCE, <https://www.holocaustremembrance.com/about-us> (last visited Jan. 17, 2020); *Stockholm Declaration*, INT’L HOLOCAUST REMEMBRANCE ALLIANCE, <https://holocaustremembrance.com/about-us/stockholm-declaration> (last visited Jan. 17, 2020).

⁴⁴ *Antisemitism*, INT’L HOLOCAUST REMEMBRANCE ALLIANCE, <https://www.holocaustremembrance.com/antisemitism> (last visited Jan. 17, 2020).

⁴⁵ See *Anti-Semitism Across Borders: Hearing Before the Subcomm. on Afr., Glob. Health, Glob. Human Rights, & Int’l Orgs. of the H. Comm. on Foreign Affairs*, 115th Cong. (2017), <https://www.govinfo.gov/content/pkg/CHRG-115hhrg24753/html/CHRG-115hhrg24753.htm>.

⁴⁶ Manfred Gerstenfeld, *To Fight Antisemitism, You Have to Define It*, ARUTZ SHEVA, <http://www.israelnationalnews.com/Articles/Article.aspx/22096> (last visited Aug. 1, 2020).

⁴⁷ <https://2001-2009.state.gov/g/drl/rls/56589.htm>

⁴⁸ *Id.*; *Defining Antisemitism*, U.S. DEP’T OF STATE, <https://www.state.gov/defining-anti-semitism/> (last visited Oct. 19, 2021).

⁴⁹ *Defining Antisemitism*, *supra* note 48.

plenary meeting of the then thirty-one countries in the IHRA,⁵⁰ officially adopted it.⁵¹ The definition (along with its accompanying illustrations) reads as follows:

“Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.”

To guide IHRA in its work, the following examples may serve as illustrations:

Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic. Antisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for “why things go wrong.” It is expressed in speech, writing, visual forms and action, and employs sinister stereotypes and negative character traits.

Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious sphere could, taking into account the overall context, include, but are not limited to:

- Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.
- Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective—such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.

⁵⁰ 31 Countries Adopt New Definition of Anti-Semitism that Includes Anti-Zionism, TOWER (June 3, 2016, 3:24 PM), <http://www.thetower.org/3462-31-countries-adopt-new-definition-of-anti-semitism-that-includes-anti-zionism/>.

⁵¹ *Defining Antisemitism*, *supra* note 48.

- Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.
- Denying the fact, scope, mechanisms (e.g.,] gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust[).]
- Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
- Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.
- Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.
- Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.
- Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.
- Drawing comparisons of contemporary Israeli policy to that of the Nazis.
- Holding Jews collectively responsible for actions of the state of Israel.

Antisemitic acts are criminal when they are so defined by law (for example, denial of the Holocaust or distribution of antisemitic materials in some countries).

Criminal acts are antisemitic when the targets of attacks, whether they are people or property—such as buildings, schools, places of worship and cemeteries—are selected because they are, or are perceived to be, Jewish or linked to Jews.

Antisemitic discrimination is the denial to Jews of opportunities or services available to others and is illegal in many countries.⁵²

⁵² *Defining Antisemitism*, *supra* note 48 (quoting *Working Definition of Antisemitism*, INT'L HOLOCAUST REMEMBRANCE ALLIANCE, <https://www.holocaustremembrance.com/>

There are two reasons why this definition is appropriate to use when assessing motivation behind discriminatory acts. The first relates to the practical difficulty of defining antisemitism, and the second relates to the legal standard of objectivity required when assessing discriminatory intent.

While the term antisemitism is relatively modern—it was first popularized by German journalist Wilhelm Marr in 1879⁵³—the history of hating Jews goes back much further.⁵⁴ There is nowhere near enough space in this article for even a brief history of antisemitism,⁵⁵ but it is worth noting that some patterns consistently emerge, in particular when it comes to antisemitism's focus; the form if not the content of its justifications; and the effective process by which it allows otherwise decent people to do horrible things.

In terms of its focus, antisemitism often looks at Jews as a collective,⁵⁶ the idea that while individual Jews might be tolerable, Jews as a separate collective identity should not be allowed to exist with the same rights as other groups.⁵⁷ That is why the majority of antisemitism

resources/working-definitions-charters/working-definition-antisemitism (last visited Jan. 22, 2021).

⁵³ FACING HISTORY AND OURSELVES, *supra* note 3. Why not the term anti-Jewish? According to Marr's biographer, Moshe Zimmerman, the term antisemitism itself, as opposed to anti-Jewish, "became popular . . . because of its scientific pretensions. The term was also somewhat vague and thus 'good cover' against 'legal suits,' casting 'a cloak of uncertainty over the intent of the hatred against the Jews.'" Thorsten Fuchshuber, *From Wilhelm Marr to Mavi Marmama: Antisemitism and Anti-Zionism as Forms of Anti-Jewish Action*, in ANTI-ZIONISM AND ANTISEMITISM: THE DYNAMICS OF DELEGITIMIZATION 30, 31–32 (2019) (citing MOSHE ZIMMERMANN, WILHELM MARR THE PATRIARCH OF ANTI-SEMITISM 90, 94 (1986)). In short, "the term *antisemitism* served the same 'purpose which the term "anti-Zionism" serves today—evading the accusation of engaging in something improper.'" *Id.* at 32.

⁵⁴ *Anti-Semitism*, HIST. (last updated June 10, 2019), <https://www.history.com/topics/holocaust/anti-semitism>.

⁵⁵ See, e.g., LÉON POLIAKOV, THE HISTORY OF ANTISEMITISM: FROM THE TIME OF CHRIST TO THE COURT JEWS (Richard Howard trans., Univ. Penn. Press 2003) (1955); ROBERT S. WISTRICH, ANTISEMITISM: THE LONGEST HATRED (1991); HADASSA BEN-ITTO, THE LIE THAT WOULDN'T DIE: THE PROTOCOLS OF THE ELDERS OF ZION (2005); MICHAEL BURLEIGH, THE RACIAL STATE: GERMANY 1933–1945 (1991); ANTISEMITISM: A HISTORICAL ENCYCLOPEDIA OF PREJUDICE AND PERSECUTION (Richard S. Levy ed., 2005); JAMES W. PARKES, ANTISEMITISM (1963).

⁵⁶ When Marr founded the 'League of Antisemites,' for example, he wrote that "[n]ot individual Jews, but the Jewish spirit and Jewish consciousness have overpowered the world." Wilhem Marr, *Der Sieg des Judenthums ueber das Germanenthum vom nicht confessionellen Standpunkt aus betrachtet*, (Paul Mendes-Flohr & Jehuda Reinharz trans., 1879) in THE JEW IN THE MODERN WORLD: A DOCUMENTARY HISTORY 331, 332 (Paul Mendes-Flohr & Jehuda Reinharz eds., 2d ed. 1995).

⁵⁷ See, e.g., *Rabbi Sacks on the Connection Between Judaism and Israel*, OFF. OF RABBI SACKS (Apr. 29, 2019), <https://rabbisacks.org/rabbi-sacks-on-the-connection-between-judaism-and-israel/>. See also Per Ahlmark, former leader of the Swedish Liberal Party

in any given era tends to focus on the primary form of collective Jewish identity at that point in time.⁵⁸ Throughout the Middle Ages Jews were mostly a religious community and so they were hated for their religion—even if the particular Jews being oppressed were not religiously Jewish.⁵⁹ In the nineteenth and twentieth centuries, when many Jews became secularized, the primary unifying collective identity of Jews was their ethnicity, and so the hatred mutated to focus on race—even when the assimilated Jews being murdered had only a trace amount of Jewish blood.⁶⁰ Today, when the primary collective embodiment of Jewish people on the world stage is the people of Israel in their nation state, Jews around the world are hated and held accountable for ‘their’ state—even if they are not Israeli.⁶¹

In each instance the essence of antisemitism remains the same—even if the focus somewhat shifts. Antisemitism, or anti-Jewishness, is anchored in the denial of the very legitimacy of the Jews as a people [It is] an assault upon whatever is the core of Jewish self-definition at any given moment in time—be it the Jewish religion, or Israel as the ‘civil religion’ or juridical expression of the Jewish people.⁶²

While antisemitism’s focus can shift over time, in every generation those manifesting such bigotry use some variant of the same refrain: “we don’t hate Jews, we just can’t stand __.”⁶³ To justify their hatred in a

and Deputy Prime Minister of Sweden, remarking that while antisemitism may begin by primarily attacking the collective Jews, “[s]uch attacks . . . [start] a chain reaction of assaults . . . on individual Jews and Jewish institutions.” Per Ahlmark, *The Old in the New Anti-Semitism*, PROJECT SYNDICATE, <https://www.project-syndicate.org/commentary/the-old-in-the-new-anti-semitism>; Per Ahlmark, *Speech at International Conference on the Legacy of Holocaust Survivors*, in VIDAL SASSOON INTERNATIONAL CENTER FOR THE STUDY OF ANTISEMITISM, ANNUAL REPORT 8 (2002).

⁵⁸ James Wald, *The New Replacement Theory: Anti-Zionism, Antisemitism, and the Denial of History*, in ANTI-ZIONISM AND ANTISEMITISM: THE DYNAMICS OF DELEGITIMIZATION 2, 2–3 (2019).

⁵⁹ See, e.g., Thomas F. Madden, *The Truth About the Spanish Inquisition*, CRISIS (Oct. 1, 2003), <https://www.crisismagazine.com/2003/the-truth-about-the-spanish-inquisition-2>.

⁶⁰ See, e.g., *The Nuremberg Laws: Background & Overview*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/background-and-overview-of-the-nuremberg-laws> (last visited Jan. 23, 2021).

⁶¹ See, e.g., *The Mutating Virus: Understanding Antisemitism*, OFF. OF RABBI SACKS (Sept. 27, 2016), <https://rabbisacks.org/mutating-virus-understanding-antisemitism/> [hereinafter *The Mutating Virus*].

⁶² Irwin Cotler, *Global Antisemitism: Assault on Human Rights* (Yale Initiative for the Interdisc. Study of Antisemitism, Working Paper No. 3, 2009), <https://isgap.org/wp-content/uploads/2011/10/irwin-cotler-online-final1.pdf>.

⁶³ Students Supporting Israel at Columbia University - SSI Columbia (@SSIColumbia), FACEBOOK (Sept. 14, 2018), <https://www.facebook.com/>

socially acceptable way, antisemites need a rationale that can pass in polite society—ideally one that appeals directly to the highest source of authority currently in vogue. As Rabbi Sacks notes, sometimes the justification maps directly onto the target.⁶⁴ For example, in the Middle Ages, the highest source of authority was religion;⁶⁵ in post-Enlightenment Europe, it was science;⁶⁶ and today, it involves using (or abusing) the language of human rights with selective claims of social justice that see only Jews,⁶⁷ or the Jewish state,⁶⁸ as worthy of condemnation.⁶⁹

watch/?v=300860790706207. In the enduring words of Rabbi Sacks, “We don’t hate Jews, they said in the Middle Ages, just their religion. We don’t hate Jews, they said in the 19th century, just their race. We don’t hate Jews, they say now, just their nation state.” *Antisemitism, or any Hate, Become Dangerous When Three Things Happen*, OFF. OF RABBI SACKS (Sept. 13, 2018), <https://rabbisacks.org/antisemitism-hate-become-dangerous-three-things-happen-rabbi-sacks-speaks-house-lords/>.

⁶⁴ Rabbi Jonathan Sacks, Keynote Address of The Future of the Jewish Communities in Europe Conference Before The European Parliament in Brussels (Sept. 27, 2016) [hereinafter *The Future of Jewish Communities in Europe*], <https://www.ohchr.org/Documents/Issues/Religion/Submissions/OfficeofRabbiSacks.pdf>.

⁶⁵ During the medieval crusades and the pogroms of the nineteenth and twentieth centuries, in which Jews were massacred and maimed, the persecutors focused more on Christian themes for their religious justifications, including charges of deicide and blood libels. See MARVIN PERRY & FREDERICK M. SCHWEITZER, *ANTISEMITISM: MYTH AND HATE FROM ANTIQUITY TO THE PRESENT* 73–117 (2002). Throughout the Biblical period, though, the people of Israel also experienced various forms of overtly religious persecution, largely because they refused to accept the pagan and idolatrous practices of their surrounding communities. See *A Brief History on Anti-Semitism*, ANTI-DEFAMATION LEAGUE (2013), <https://www.adl.org/sites/default/files/documents/assets/pdf/education-outreach/Brief-History-on-Anti-Semitism-A.pdf>.

⁶⁶ Hence the reliance on pseudoscientific studies about racial eugenics. See *Antisemitism in History: Racial Antisemitism, 1875–1945*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/antisemitism-in-history-racial-antisemitism-18751945> (last visited Jan. 30, 2021).

⁶⁷ See, e.g., Channah Newman, *Pursuit of ‘Social Justice’ Gives Strength to Anti-Semitism*, JEWISH CHRON. (Dec. 2, 2018, 7:26 PM), <https://jewishchronicle.timesofisrael.com/pursuit-of-social-justice-gives-strength-to-anti-semitism/>.

⁶⁸ Sina Arnold & Blair Taylor, *Antisemitism and the Left: Confronting an Invisible Racism*, 9 J. OF SOC. JUST. 2, 20 (2019).

⁶⁹ *The Future of Jewish Communities In Europe*, *supra* note 64. As Rabbi Sacks explains,

Today the highest source of authority worldwide is human rights. That is why Israel—the only fully functioning democracy in the Middle East with a free press and independent judiciary—is regularly accused of the five cardinal sins against human rights: racism, apartheid, crimes against humanity, ethnic cleansing and attempted genocide. The new antisemitism has mutated so that any practitioner of it can deny that he or she is an antisemite. After all, they’ll say, I’m not a racist. I have no problem with Jews or Judaism. I only have a problem with the State of Israel. But in a world of 56 Muslim nations and 103 Christian ones, there is only one Jewish state, Israel, which constitutes one-quarter of one per cent of the land mass of the Middle East. Israel is the only one of the 193

Finally, in terms of its insidious process, one of the rare unifying themes that emerges from the history of antisemitism is the consistent to dehumanize the Jewish people. Whether they portray Jews as malevolently superhuman, as in the Protocols of the Elders of Zion,⁷⁰ or as worthlessly subhuman, as in the Nazi ideology,⁷¹ antisemites throughout history have found that it is easier to despise and eventually kill that which they do not consider human. Jews have also been ‘othered’ in more subtle ways; for example, in America, Jews are regularly considered non-white when whites are privileged,⁷² then told that they are privileged whites when they demand recognition of their struggles.⁷³ “In the past, Jews were rendered alien to the West by being

member nations of the United Nations that has its right to exist regularly challenged, with one state, Iran, and many, many other groups, committed to its destruction.

That is why, as he has explained elsewhere, “[w]henver you hear human rights invoked to deny Israel’s right to exist, you are hearing the new antisemitism.” *See Mutation of Antisemitism, supra* note 17. At other times, the justification for antisemitism latches on to whatever concrete policy aim is likely to stir up popular support. For example, the Jewish people were enslaved in Egypt for reasons that were eerily foreboding of the kind of thing that would routinely happen to this nation. The Biblical Pharaoh rationalized his actions in the beginning to oppress his Jewish population by blaming the soon-to-be victims, saying: “Come, let us deal shrewdly with them. Otherwise, lest they multiply, and if a war breaks out, they join our enemies and fight against us and escape from the land.” *Exodus* 1:10. As Jeff Jacoby keenly noted, Pharaoh’s notion of dealing wisely with this national security threat entailed “slave labor, followed by mass murder.” Jeff Jacoby, *Hitler, Pharaoh, and the Anti-Semitic Culture of Victimhood*, *Bos. GLOBE* (Apr. 18, 2012), <https://www.bostonglobe.com/opinion/2012/04/18/hitler-pharaoh-and-anti-semitic-culture-victimhood-victims-who-persecute/Hph5XM6lfgWN7VkObPAasI/story.html>. “Then Pharaoh commanded all his people, ‘Every boy that is born to the Hebrews, you shall throw into the Nile.’” *Id.* (quoting *Exodus* 1:22). Thirty centuries later, when the Nazis came to power, their crimes against the Jews were also described as self-defense. “‘The Jews of the whole world are trying to destroy Germany,’ screamed government posters as the Nazis unleashed a boycott of Jewish-owned businesses. ‘German people, defend yourselves!’” Jacoby, *supra* note 69.

⁷⁰ See KENNETH L. MARCUS, *THE DEFINITION OF ANTI-SEMITISM* 44 (2015).

⁷¹ See generally Johannes Steizinger, *The Significance of Dehumanization: Nazi Ideology and Its Psychological Consequences*, 19 *POL., RELIGION & IDEOLOGY* 139 (2018).

⁷² See KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS & WHAT THAT SAYS ABOUT RACE IN AMERICA* 2 (1998).

⁷³ See ERIC L. GOLDSTEIN, *THE PRICE OF WHITENESS: JEWS, RACE, AND AMERICAN IDENTITY* 224 (2006). In a recent example of this phenomenon, the widely criticized latest draft of California’s new proposed ethnic studies curriculum was condemned as antisemitic for a number of reasons, including that it both fails to discuss antisemitism and that it reinforces negative stereotypes about Jews. For example, it uses the word “privileged” to describe only one ethnic group—the Jews—and recommends that students discuss how Jews “sometimes have experienced conditional whiteness and privilege.” See Matthew Foldi & Adam Kredo *Describing Jews as ‘Privileged,’ Ethnic Studies Curriculum Sparks Backlash*, *WASH. FREE BEACON* (Jan. 20, 2021, 3:17 PM), <https://freebeacon.com/issues/describing-jews-as-privileged-ethnic-studies-curriculum-sparks-backlash/>.

orientalized. Today, Jews are rendered alien to the Middle East by being redefined as European”⁷⁴

The practical problem with defining antisemitism is that it is a mutating virus; Jews are criticized for being whatever society, or a particular part of society, hates at that moment. The right will call them radicals,⁷⁵ while the left will label them fundamentalists.⁷⁶ They are simultaneously too liberal or too conservative, both too rich and a drain on the society. They are variously too strong or too weak, at once too influential⁷⁷ and too parasitical.⁷⁸

In the words of Robert Williams, Deputy Director for International Affairs at the United States Holocaust Memorial Museum: “Antisemitism has many influences, including religious discrimination, racism, white nationalism, identitarianism, anti-Zionism, anti-Globalism, Soviet legacies, extreme Islamism, post-colonialism, anti-Americanism, conspiracy thinking, populism, and other currents.”⁷⁹ Or, as Eugene Kontorovich recently told Congress: “The most effective anti-Semites have always sought to justify their bigotry by what the Jews do In every age, the oldest hatred clothes itself in the justifications that appeal to contemporary values and public policy considerations.”⁸⁰ It does not

⁷⁴ Wald, *supra* note 58, at 19.

⁷⁵ Fahima Kattani-Ghanayem, *The Jewish Fundamentalist Roots of Trump’s “Peace Deal,”* PALESTINE-ISRAEL J. POL., ECON. & CULTURE, <https://pij.org/articles/2004/the-jewish-fundamentalist-roots-of-trumps-peace-deal> (“[T]he roots of violence in the Middle East belong to ‘Jewish fundamentalism’”).

⁷⁶ *Why is Billionaire George Soros a Bogeyman for the Hard Right?*, BRIT. BROAD. CORP. (Sept. 7, 2019), <https://www.bbc.com/news/stories-49584157> (“[Arthur Finkelstein] suggested Soros, and it was a perfect choice, Grassegger says. ‘The very right hated him because he was Jewish, people at the very left hated him because he was a capitalist.’”).

⁷⁷ David Duke spoke at a neo-Nazi rally in Charlottesville, Virginia, declaring that “[t]he truth is, the American media, and the American political system, and the American Federal Reserve, is dominated by a tiny minority: the Jewish Zionist cause.” See Mirah Curzer, *Does Your Progressivism Include Jews?*, HUFFINGTON POST (Aug. 18, 2017, 11:26 AM), https://www.huffpost.com/entry/does-your-progressivism-include-jews_b_599704e1e4b02eb2fda31f41.

⁷⁸ Travis Patron, the leader of the Canadian Nationalist Party, describes Jews as “swindlers,” “snakes,” “inside manipulators,” and a “parasitic tribe.” See Canadian Nationalist Party, *Beware the Parasitic Tribe*, FACEBOOK (July 11, 2020, 3:44 AM), <https://web.archive.org/web/20200714201357/https://www.facebook.com/NationalistCA/videos/681224405758300/>

⁷⁹ Bonjuk Center, *Today’s Antisemitism & Its Relationship to Holocaust Denial and Distortion with Dr. Robert Williams*, YOUTUBE, at 2:49–3:14 (Oct. 29, 2020), https://www.youtube.com/watch?v=80yu42Y-vNQ&t=2607s&ab_channel=BonjukCenter.

⁸⁰ *Confronting the Rise in Anti-Semitic Domestic Terrorism: Hearing Before the H. Comm. on Homeland Sec. and the Subcomm. on Intelligence & Terrorism*, 116th Cong. (2020) (statement of Prof. Eugene Kontorovich), <https://homeland.house.gov/download/011520-kontorovich-testimony>.

matter if the reasons are contradictory—in the span of one generation, the main theory of antisemitism shifted from Jews being an inferior race worthy of destruction (by the Nazis in the Holocaust) to Jews being a powerful race that tries to destroy others (like the Nazis, in Holocaust inversion).⁸¹

A definition of antisemitism that encompasses all of these possibilities and more must be able to cut through the various timely rationales given for a hatred of and hostility towards Jews, and focus rather on the actions taken by those expressing or harboring the hate; a praxeological definition, if you will.⁸² For our purposes, (i.e., for the limited purpose of finding the right definition for states and universities to adopt to better understand antisemitic intent in discriminatory conduct claims, and to better educate their constituencies about what antisemitism is) the IHRA definition serves this goal best. The examples it gives focus on the *manifestations* of antisemitism, (i.e., what antisemites *do*, as opposed to *why* they do it).

Over the last decade and a half, the IHRA definition has become the internationally accepted standard definition of antisemitism.⁸³ While there can be no one exclusive or exhaustive definition of antisemitism—as it can and does take many forms—the IHRA definition provides an objective baseline standard for what is and is not acceptable.

The IHRA definition comes as close to a world consensus as we are ever likely to get and is therefore the obvious choice for an objective standard for analysis. Per the recently published European Commission Handbook for the practical use of the IHRA Working Definition of Antisemitism, “[e]ntities that have adopted, endorsed, applied or taken note of the IHRA Working Definition of Antisemitism include parliaments, governments, federal and state ministries, municipalities, city councils, law enforcement agencies, the judiciary, educational institutions, universities, civil society organisations and Jewish community security organisations.”⁸⁴ The Handbook also notes that it has been used

⁸¹ Balázs Berkovits, *Social Criticism and the “Jewish Problem”*, in *ANTI-ZIONISM AND ANTISEMITISM: THE DYNAMICS OF DELEGITIMIZATION* 53–54 (Alvin H. Rosenfeld ed., 2019).

⁸² For a masterful work on the history and complexity of defining antisemitism, see MARCUS, *supra* note 70.

⁸³ Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *The Elimination of All Forms of Religious Intolerance*, U.N. Doc. A/74/358 (Sept. 20, 2019).

⁸⁴ FED. ASS’N DEP’T S FOR RSCH. & INFO. ON ANTISEMITISM E.V., EUR. COMM’N, HANDBOOK FOR THE PRACTICAL USE OF THE IHRA WORKING DEFINITION OF ANTISEMITISM, DS-03-21-002-EN-N (Jan. 7, 2021), <https://op.europa.eu/en/publication-detail/-/publication/d3006107-519b-11eb-b59f-01aa75ed71a1/language-en>.

to train police officers, prosecutors, judges, educators, state employees and human rights monitoring bodies to identify and track various manifestations of antisemitism; to categorize antisemitic incidents, as collected by police officers, interior and justice ministries, civil society organisations, hate crime monitoring bodies and academics; to support decision-making processes by states, human rights monitoring organisations, law enforcement agencies, the judiciary, municipal governments, educators, civil society organisations and Jewish communities; to identify aspects of antisemitism in court hearings, prosecutor actions, police recording, investigations and hate crime statistics and to help direct funding to civil society organisations and human rights organisations.⁸⁵

The definition has been an essential tool used to determine contemporary manifestations of antisemitism. The pushback on broader adoption comes from the fact that among the list of potentially antisemitic behavior provided, the definition includes useful examples of discriminatory anti-Israel acts that *can* sometimes cross the line into antisemitism.

Critics challenge the use of the IHRA definition in policymaking on two main grounds. First, they claim that the safe harbor provision for “criticism for Israel similar to that leveled against any other country” is insufficient.⁸⁶ For example, a person may hold Israel to a higher standard than other countries because they are (for any number of reasons why) more invested in that state, and *not* because they are antisemitic. Or they may criticize Israel just because the context of what they are discussing at the particular time is Israel-related and has nothing to do with other countries. Critics claim that under the IHRA definition all such criticism would be considered antisemitic. But that argument is a red herring because that is precisely why the definition

⁸⁵ *Id.* at 7.

⁸⁶ *Working Definition of Antisemitism*, *supra* note 37. See, e.g., Zach Greenberg, *OCR’s Use of Overly Broad Anti-Semitism Definition Threatens Student and Faculty Speech*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Sept. 14, 2018), <https://www.thefire.org/ocrs-use-of-overly-broad-anti-semitism-definition-threatens-student-and-faculty-speech/>; Letter from Dima Khalidi, Director, Palestine Legal, et al., to Rep. Bob Goodlatte and Rep. John Conyers, Jr., (Dec. 5, 2016), <https://ccrjustice.org/sites/default/files/attach/2017/02/Anti-Semitism%20Awareness%20Act%20Opposition%20Letter%20final.pdf>; *The BCCLA Opposes the International Campaign to Adopt the International Holocaust Remembrance Association (IHRA) Definition of Antisemitism*, B.C. CIV. LIBR. ASS’N (June 18, 2019), https://bccla.org/our_work/the-bccla-opposes-the-international-campaign-to-adopt-the-international-holocaust-remembrance-association-ihra-definition-of-antisemitism/.

includes the explicit caveat that the examples given, “*could, taking into account the overall context,*” be antisemitic.⁸⁷

Context is crucial here, as it is in all instances of alleged discrimination. For example, in the context of employment discrimination, the Supreme Court has been clear that

the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering “all the circumstances.” In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.⁸⁸

Antisemitism is no different than racism or sexism in that context matters and no two cases are ever exactly the same.⁸⁹ The reason the specific examples are provided in the IHRA definition (and are important) is explicitly *not* because all forms of criticism about Israel are antisemitic—as the definition takes pains to point out—but precisely because some people claim that *no* criticism of Israel can *ever* cross the line.⁹⁰

The second objection to using the IHRA definition in a policy context (famously made by one of its original main drafters, Dr. Kenneth Stern),⁹¹ is that in the wrong hands, it could theoretically be used to stifle

⁸⁷ *Working Definition of Antisemitism*, *supra* note 37 (emphasis added).

⁸⁸ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23) (internal citations omitted).

⁸⁹ Of course, it is also true that context can belie pretext in these situations as well. “Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.” *Gómez-González v. Rural Opportunities*, 626 F.3d 654, 662–663 (1st Cir. 2010) (citing *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)), *quoted in* *Lugo v. Avon Prod., Inc.*, 777 F. Supp. 2d 275, 290 (D.P.R. 2011), *on reconsideration in part* (May 10, 2011).

⁹⁰ The same is true of the other examples, i.e., they may not be antisemitic in any given circumstance, but they certainly *can* be, contextually. For instance, while it may be true that any particular Jewish person is loyal to the State of Israel, the charge that *Jews* have dual loyalty is an old antisemitic canard straight out of the Protocols of the Elders of Zion, and tied to the even older (at least Middle Ages, arguably even Biblical) antisemitic canard that Jews are all incapable of real loyalty and part of a worldwide conspiracy that threatens their home countries and justifies acts of discrimination or violence. See Julie Hirschfield Davis, *The Toxic Back Story to the Charge That Jews Have a Dual Loyalty*, N.Y. TIMES (Aug. 21, 2019), <https://www.nytimes.com/2019/08/21/us/politics/jews-disloyal-trump.html>.

⁹¹ See, e.g., Kenneth S. Stern, Opinion, *Will Campus Criticism of Israel Violate Federal Law?*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html>.

speech.⁹² To quote an oft-cited piece on the subject, noted scholars Erwin Chemerinsky and Howard Gillman came out against legislating the IHRA definition because, they argued, “[s]chools can prevent and punish threats, harassment and destruction of property, but never the expression of views.”⁹³ Their argument is completely valid but ultimately misleading; the correct conclusion to be drawn from their concerns is that any policy using the IHRA definition must be crafted properly to avoid censoring speech—not that the IHRA definition cannot be used in a policy about discriminatory harassment.⁹⁴ Of course, this kind of policy making needs to be done carefully, because free speech is a core aspect of democracy, and there is no general hate speech exception for antisemitism or any other kind of hatred.⁹⁵ That is *precisely* why the state bills and the school policies *cannot* take the form of any kind of speech code.⁹⁶ But discriminatory harassment and criminal conduct are not just speech, even if words are sometimes used.⁹⁷ Unlike speech, such conduct is absolutely subject to government

⁹² See, e.g., *ACLU Statement on Senate Introduction of ‘Anti-Semitism Awareness Act,’* ACLU (May 23, 2018), <https://www.aclu.org/press-releases/aclu-statement-senate-introduction-anti-semitism-awareness-act?redirect=news/aclu-statement-senate-introduction-anti-semitism-awareness-act>; Will Creeley, *State Department’s Anti-Semitism Definition Would Likely Violate First Amendment on Public Campuses*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (May 22, 2015), <https://www.thefire.org/state-departments-anti-semitism-definition-would-likely-violate-first-amendment-on-public-campuses/>.

⁹³ Erwin Chemerinsky & Howard Gillman, *A Bill to Police Campus Speech*, WALL ST. J. (Dec. 15, 2016, 6:31 PM), <https://www.wsj.com/articles/a-bill-to-police-campus-speech-1481846338>.

⁹⁴ Thankfully, even some progressive groups have come to recognize this distinction. See, e.g., Jordan Devon & Karen Mock, *Why We Support the IHRA Definition of Antisemitism...Cautiously*, CANADIAN JEWISH REC., (Nov. 5, 2020), <https://canadianjewishrecord.ca/2020/11/05/why-we-support-the-ihra-definition-of-antisemitism-cautiously/>.

⁹⁵ *Is Hate Speech Legal?*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Mar. 28, 2019), <https://www.thefire.org/issues/hate-speech/>.

⁹⁶ See Sara L. Zeigler, *Anti-Discrimination Laws*, THE FIRST AMEND. ENCYC. (2009), <https://www.mtsu.edu/first-amendment/article/1207/anti-discrimination-laws> (noting how lower courts have struck down university regulations deemed overbroad in their attempts to minimize offensive speech on campus or that prohibited “offensive” speech “in such a way that limited the ability of students or faculty to discuss the effects of biological sex differences or competing views on whether homosexuality could be ‘cured’ through psychological counseling”).

⁹⁷ Discriminatory conduct, for example, can include physical, verbal, graphic, or written conduct if that behavior “is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities or opportunities offered by a school.” According to the OCR, “[h]arassing conduct may take many forms, including verbal acts.” Office of the Assistant Sec’y of Civil Rights, OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF EDUC., *Dear Colleague Letter* (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010_pg2.html. Here is an easy example of how this works: if a student is told she cannot serve on a leadership board because she is Jewish, that includes a verbal act which will be

regulation.⁹⁸ To paraphrase the Jewish Supreme Court Justice Louis Brandeis,⁹⁹ the proper response to hate speech is more speech, counter-speech, so that bad ideas can be publicly confronted and constructively dealt with in broad daylight. There can be no counter speech, however, when one side is intimidated into silence. At its core, the main purpose of an anti-discrimination bill or policy that adopts a definition of antisemitism is to provide for equality in the free speech arena by removing illegal harassing conduct motivated by definitional antisemitism.¹⁰⁰ This is not about establishing Jewish exceptionalism, but rather about ensuring equality. This is not a major revision of anti-discrimination policy; this is a simple clarification of a term.

Well-established Supreme Court precedent requires behavior to be “objectively offensive” to fall under the category of discriminatory harassment,¹⁰¹ a type of behavior that even Chemerinsky and Gillman admit can and should be regulated.¹⁰² Behavior that is merely offensive to some would not be included.¹⁰³ To meet this ‘objectively offensive’

treated as discriminatory conduct. The question really is not about the form the behavior takes but rather whether or not it “creates a pervasively hostile environment for vulnerable students.” *Speech on Campus*, ACLU, <https://www.aclu.org/other/speech-campus> (last visited Aug. 16, 2020).

⁹⁸ Brett A. Sokolow et al., *The Intersection of Free Speech and Harassment Rules*, 38 HUM. RTS. 19, 19–20 (2011).

⁹⁹ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

¹⁰⁰ See Harry G. Hutchison, *Campus Free Speech in the Mirror of Rising Anti-Semitism*, 52 ST. MARY’S L. J. 419, 452 (2021) (noting that “[s]peech rights are subordinate to the judgment that the ultimate liberty is not speech but the right to live in peace”).

¹⁰¹ *Davis ex rel. Lashonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999).

¹⁰² Chemerinsky & Gillman, *supra* note 93.

¹⁰³ In the context of an OCR investigation,

A violation of Title VI may be found if a recipient has created or is responsible for a racially hostile environment i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is *sufficiently severe, pervasive or persistent* so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient. A recipient has subjected an individual to different treatment on the basis of race if it has effectively caused, encouraged accepted, tolerated or failed to correct a racially hostile environment of which it has actual or constructive notice.

Letter from Kelli Douglas, Supervisory Attorney, U.S. Dep’t of Educ., to Dr. Matthew Seebaum (Mar. 27, 2018) (emphasis added), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/07171262-a.pdf>. The standard is even easier for complainants to prove than it is in money damages cases and Title IX cases. To be considered harassment in the educational context, the behavior must be “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal

standard, the definition used in the discriminatory antisemitism motivational analysis must be an objectively well-accepted one. To that end, it is once again clear that the IHRA's definition should be used. As noted above, the IHRA definition is used by the federal government, the thirty-one member countries of the International Holocaust Remembrance Alliance, almost all fifty countries (except Russia) that comprise the Organization for Security and Cooperation in Europe ("OSCE"), the European Commission, the European Parliament, and all EU Member states, as well as Serbia, Bahrain, and Albania. It has been endorsed by a growing number of world leaders (including UN Secretary-General António Guterres),¹⁰⁴ and adopted by a growing number of universities at home (including New York University)¹⁰⁵ and abroad (including Oxford University and Cambridge University).¹⁰⁶ It is utilized by a variety of intergovernmental agencies (including the European Commission against Racism and Intolerance)¹⁰⁷ and non-governmental agencies (including the Iraq-based Global Imams

access to an institution's resources and opportunities" See *Davis ex rel.*, 526 U.S. at 652; see also *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 205–10 (3rd Cir. 2001) (detailing analogous standards for Title VI, which prohibits racial discrimination in education; Title VII, which prohibits workplace harassment; and Title IX, which prohibits sexual harassment in education).

¹⁰⁴ Press Release, António Guterres, U.N. Secretary General, Anti-Semitism Rising Even in Countries with No Jews at All, Secretary-General Tells Event on Power of Education to Counter Racism, Discrimination, U.N. Press Release SG/SM/19252-RD/1022 (Sept. 26, 2018), <https://www.un.org/press/en/2018/sgsm19252.doc.htm>.

¹⁰⁵ See Rachel Wolf, *NYU Adopts IHRA Definition of Antisemitism*, JERUSALEM POST (Oct. 3, 2020, 11:59 AM), <https://www.jpost.com/diaspora/antisemitism/nyu-dept-of-education-settle-antisemitism-lawsuit-with-student-644315>. Other universities where IHRA has been adopted (often by student government resolution) include the University of Minnesota, University of Georgia, Indiana University, Texas A&M, Capital University, Kent State University, Chapman University, Ryerson University (Canada), Wake Forest University, Texas A&M, St. Thomas University, Arizona State University, Buenos Aires University, Foothill College, Pace University, City College of New York, St. Lawrence University, University of Manitoba, Florida State University, California State University Northridge, and the Georgia Institute of Technology.

¹⁰⁶ *Antisemitism: IHRA Definition of Antisemitism*, UNIV. OF OXFORD: EQUALITY & DIVERSITY UNIT, <https://edu.admin.ox.ac.uk/antisemitism> (last visited Jan. 17, 2020). More than one in five British Universities already adopted the IHRA definition. See Aaron Bandler, *1 in 5 British Universities Have Adopted IHRA Definition of Anti-Semitism, Survey Says*, JEWISH J. (Sept. 30, 2020), <https://jewishjournal.com/news/worldwide/322348/1-in-5-british-universities-have-adopted-ihra-definition-of-anti-semitism-survey-says/>; see also *Three More UK Universities Adopt IHRA Definition of Antisemitism*, EUR. JEWISH CONG. (Nov. 25, 2020), <https://eurojewcong.org/news/communities-news/united-kingdom/three-more-uk-universities-adopt-ihra-definition-of-antisemitism/>.

¹⁰⁷ *ECRI's Opinion on the IHRA Working Definition of Antisemitism*, EUR. COMM'N AGAINST RACISM & INTOLERANCE (Dec. 2, 2020), <https://rm.coe.int/opinion-ecri-on-ihra-wd-on-antisemitism-2755-7610-7522-1/1680a091dd>.

Council).¹⁰⁸ Perhaps most importantly, hundreds of major Jewish organizations across the world,¹⁰⁹ and across the political and religious spectrums, representing people of all ages and backgrounds that are affected by antisemitism, including several major student organizations,¹¹⁰ banded together to adopt the IHRA definition and urge others to adopt it as well,¹¹¹ because they all agree that it best reflects their shared lived experience and the realities of how antisemitism manifests itself today. This conduct-based, consensus-driven international definition of what constitutes problematic and offensive antisemitism is the only internationally recognized definition of antisemitism that there is, or ever has been.

The IHRA definition is also the definition against which educational institutions are already evaluated by the federal government when it investigates claims of discriminatory conduct—so schools do not lose anything by officially embracing it.¹¹² And it is the definition that schools are affirmatively required to *proactively* consider when

¹⁰⁸ *GIC Adopts IHRA Definition of Antisemitism*, GLOBAL IMAMS COUNCIL: NEWS (Oct. 30, 2020), <https://imams.org/news/gic-adopts-ihra-definition-of-antisemitism/>.

¹⁰⁹ *See, e.g., Jewish Students Are Protected by the IHRA Definition of Antisemitism*, GUARDIAN (Jan. 22, 2021, 12:28 PM), <https://www.theguardian.com/news/2021/jan/22/jewish-students-are-protected-by-the-ihra-definition-of-antisemitism>.

¹¹⁰ Including, in America, Alpha Epsilon Pi; Ameinu; American Friends of Likud; America-Israel Friendship League; American Israel Public Affairs Committee; American Jewish Committee; American Jewish Congress; American Jewish Joint Distribution Committee; American Sephardi Federation; American Zionist Movement; AMIT; Anti-Defamation League; ARZA; B'nai B'rith International; Bnai Zion; CAMERA; Central Conference of American Rabbis; Emunah of America; Friends of the Israel Defense Forces; Greater Miami Jewish Federation; Hadassah, Women's Zionist Organization of America; HIAS; Hillel International; Israel Bonds/Development Corporation for Israel; JCC Association of North America; Jewish Council for Public Affairs; Jewish Federations of North America; Jewish Institute for National Security of America; Jewish Labor Committee; Jewish National Fund; Jewish United Fund of Metropolitan Chicago; Jewish Women International; Mercaz USA, Zionist Organization of the Conservative Movement; NA'AMAT USA; NCSEJ: National Coalition Supporting Eurasian Jewry; National Council of Jewish Women; National Council of Young Israel; ORT America, Inc.; Rabbinical Assembly; Rabbinical Council of America; Religious Zionists of America; UJA-Federation of New York; Union for Reform Judaism; Union of Orthodox Jewish Congregations of America; United Synagogue of Conservative Judaism; WIZO; Women's League for Conservative Judaism; Women of Reform Judaism; World ORT USA; World Zionist Executive USA; and the Zionist Organization of America.

¹¹¹ Aaron Bandler, *More Than 120 Jewish and Pro-Israel Organizations Call on Facebook to Adopt IHRA Definition of Anti-Semitism*, JEWISH J. (Aug. 10, 2020), <https://jewishjournal.com/featured/320140/more-than-120-jewish-and-pro-israel-organizations-call-on-facebook-to-adopt-ihra-definition-of-anti-semitism/>.

¹¹² See L. Rachlem Lerman & Janilyn Brouwer Daub, *What Do Colleges and Universities Need to Know About the Executive Order and Title VI?*, NAT'L L. REV. (Jan. 3, 2020), <https://www.natlawreview.com/article/what-do-colleges-and-universities-need-to-know-about-executive-order-and-title-vi>.

formulating policies to create a safe environment on campus.¹¹³ Therefore, universities should make use of this definition to better protect students from discriminatory conduct *before* there are any complaints. Likewise, states should use this definition when enacting or clarifying anti-discrimination statutes to protect their citizens from discriminatory harassment.

There is yet another reason for adopting the IHRA definition of antisemitism, namely for its considerable importance as an educational tool; that at least should be entirely uncontroversial.¹¹⁴ When the Florida legislature passed an antisemitism bill in 2019, the signing statements made clear why the legislators felt it was important. Governor Ron DeSantis proclaimed that he was “proud to sign this bill to make clear through a bipartisan effort that anti-Semitism has no place in our state and our educational institutions will not tolerate discrimination against the Jewish people.”¹¹⁵ Representative Randy Fine, who was instrumental in the bill’s passage, also noted that “[b]y requiring that Florida’s public education systems treat anti-Semitism the same way as they treat racism, we send an unambiguous message that Jewish children will be protected from those who would discriminate against or maliciously target them.”¹¹⁶ Laws like this do two things: first, they remove any ambiguity as to the State’s definition of problematic discrimination, and put everyone on notice by demarcating the limits of acceptable behavior.¹¹⁷ Second, laws also serve a channeling function by reinforcing social norms.¹¹⁸ Antisemitism is wrong (and antisemitic discrimination is illegal) whether or not the legislature takes the time to restate that clearly, and

¹¹³ “As a condition of receiving federal financial assistance, a school corporation gives the DOE ‘an assurance that the program will be conducted . . . in compliance with all requirements imposed by or pursuant to this part.’” This imposes an affirmative obligation to provide an equal opportunity. Ivan E. Bodensteiner, *Peer Harassment—Interference with an Equal Educational Opportunity in Elementary and Secondary Schools*, 79 NEB. L. REV. 1, 24 (2000) (quoting 34 C.F.R. § 100.4(a) (1999)).

¹¹⁴ Ira Forman, *Combating Antisemitism: Why the World Needs to Adopt the IHRA Definition*, JERUSALEM POST (Oct. 10, 2020), <https://www.jpost.com/opinion/combating-antisemitism-why-the-world-needs-to-adopt-the-ihra-definition-645275>.

¹¹⁵ Staff, *Governor Ron DeSantis Signs Anti-Semitism Protections Bill CS/CS/HB 741*, RON DESANTIS 46TH GOVERNOR OF FLA. (May 31, 2019), <https://www.flgov.com/2019/05/31/governor-ron-desantis-signs-anti-semitism-protections-bill-cs-cs-hb-741/>.

¹¹⁶ *Id.*

¹¹⁷ This Article does not take any position on the specific language choices in the Florida State bill, nor on any other state bills or school policies that are not derived from the model bill and model policy contained herein.

¹¹⁸ Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 506 (1991).

with an explicit definition. But when they *do* take the time to make the point, people notice and reflect.

Like states, universities can and should use the IHRA definition outside of the disciplinary context to better understand antisemitism in all its current manifestations, and to teach the university community how to recognize antisemitism in its many different forms.¹¹⁹ As will be discussed in the next section, universities have an affirmative obligation under federal law to maintain a discrimination-free environment and must take prompt and effective steps to ensure that a targeted community is not deprived of educational opportunities. That process may involve training programs for staff, faculty, and students; forums for antisemitism victims to share their experiences; or even just the adoption of a barometer for when the university will use its own speech to call out and label antisemitic rhetoric without censoring it—and in doing so explain to the university community how and why such rhetoric runs counter to the university's values of mutual respect and inclusion. In all of these instances, the IHRA definition will be helpful. Using the definition in this way does not ban or remove hate speech—it just acknowledges its existence, no different than calling racist speech racist or sexist speech sexist. Universities can and should embrace the IHRA definition for educational (and ethical) reasons, but again, that part is easy. The real crux of the problem, and therefore the crux of this Article, is what happens when things move beyond rhetoric to discriminatory conduct.

III. TITLE VI AND THE EXECUTIVE ORDER ON COMBATING ANTISEMITISM

While this Article proposes two somewhat interrelated actions for officials to take, namely (a) the passing of state-level legislation and (b) the adoption of university policies that define antisemitism, one of those initiatives has already been partly effected in practice because all

¹¹⁹ See, for example, the recent statement of FSU President John Thrasher embracing IHRA for its educational importance:

As a minority group, the Jewish people have faced bias and discrimination and have been marginalized for centuries. It is one of the oldest forms of bigotry and is as intolerable as all forms of hate. The United States, the State of Florida, and Florida State University recognize the International Holocaust Remembrance Alliance (IHRA) working definition of Antisemitism and its contemporary examples. I encourage everyone to educate themselves on the IHRA definition and examples of Antisemitism, as I have done myself.

A Message from President John Thrasher: An Update on Antisemitism and Religious Discrimination, FLA. ST. UNIV. (Aug. 12, 2020), <https://news.fsu.edu/news/university-news/2020/08/12/a-message-from-president-john-thrasher-an-update-on-antisemitism-and-religious-discrimination/>.

schools that accept federal funds (which is almost all schools) are *already* required to consider the IHRA definition when assessing the motivation behind discriminatory conduct.

In the United States, Title VI of the federal Civil Rights Act of 1964¹²⁰ requires recipients of federal funding to ensure their programs and activities are free from harassment, intimidation, and discrimination on the basis of race, color, and national origin. Notably, the Act does not give the Department of Education's Office for Civil Rights ("OCR") jurisdiction to investigate religious bias, and so until 2004, OCR typically refused to investigate antisemitism complaints on the ground that Jews are a religious group, and not a race or national origin. In a September 13, 2004, Dear Colleague letter,¹²¹ then Deputy Assistant Secretary of Education for enforcement, Kenneth L. Marcus, issued a series of policy statements announcing that OCR would henceforth investigate antisemitism complaints to the extent that they implicate ethnic or ancestral bias. The logic behind the clarification is simple: much of the hatred embodied in antisemitism (and the same is true for Islamophobia) has nothing to do with specific religious practices, and everything to do with ethnicity or ancestral bias.¹²² As the OCR policy directive explained, "[g]roups that face discrimination on the basis of shared ethnic characteristics may not be denied the protection of our civil rights laws on the ground that they also share a common faith."¹²³ This reasoning has been confirmed in court, both in regard to Title VI cases¹²⁴ and in the Title VII context as well.¹²⁵ While the

¹²⁰ *Civil Rights Requirements- A. Title VI of the Civil Rights Act of 1964*, 42 U.S.C. 2000d et seq. ("Title VI"), U.S. DEP'T OF HEALTH & HUM. RES., <https://www.hhs.gov/civil-rights/for-individuals/special-topics/needier-families/civil-rights-requirements/index.html> (last updated July 26, 2013).

¹²¹ Kenneth L. Marcus, *Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges*, U.S. DEP'T OF EDUC.: OFFICE FOR CIVIL RIGHTS (Sept. 13, 2004), <https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>.

¹²² People don't often hate Jews because, for instance, they wear phylacteries during morning prayer or light Shabbat candles on Friday evenings. They do, however, even today, sometimes hate them for their 'race,' i.e., their ethnicity or national origin. For a recent example of this phenomenon, see Aaron Bandler, *Wilshire Boulevard Temple Vandalized With "I Hate Your Race" Graffiti*, JEWISH J. (Jan. 18, 2021), <https://jewishjournal.com/news/327594/wilshire-boulevard-temple-vandalized-with-i-hate-your-race-graffiti/>.

¹²³ Marcus, *supra* note 121.

¹²⁴ T.E. v. Pine Bush Cent. Sch. Dist., 58 F. Supp. 3d 332, 354 (S.D.N.Y. 2014).

¹²⁵ In the words of Judge Mark Hornsby:

America is no stranger to anti-Semitism, which is often rooted in prejudice against a person based on his heritage/ethnicity without regard to the person's particular religious beliefs Jewish citizens have been excluded from certain clubs or neighborhoods, and they have been denied

Supreme Court has not yet weighed in on the issue, the Court *has* twice held that other statutes similarly intended to protect identifiable classes of persons subject to intentional discrimination “because of their ancestry or ethnic characteristics” included Jewish people—whether or not they would be classified as a race in terms of modern scientific theory.¹²⁶ On October 26, 2010, the Obama Justice Department released an opinion letter confirming the legal correctness of the 2004 Policy.¹²⁷

jobs and other opportunities based on the fact that they were Jewish, with no particular concern as to a given individual’s religious leanings.

Michael Kunzelman, *Judge: Jewish Heritage Can be Basis for Race Discrimination*, ASSOCIATED PRESS (July 16, 2018), <https://apnews.com/article/82c5075c54ce4f179e6517f0e4f07824>. Thus, they have been treated like a racial or ethnic group that Title VII was designed to protect from employment discrimination based on membership in that group. See *Bonadona v. La. Coll.*, No. 18-CV-0224, 2018 WL 4353979, at *4 (W.D. La. July 13, 2018).

¹²⁶ See *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 354–55 (S.D.N.Y. 2014) for a broad overview of federal courts that have included Jewish people in this identifiable class:

Regardless of whether religious bias alone can form the basis of a Title VI claim or anti-Semitism can provide a basis for national origin discrimination, courts have regularly found that anti-Semitic harassment and discrimination amount to racial discrimination. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18, 107 S. Ct. 2019, 95 L. Ed. 2d 594 (1987) (explaining “that the Court of Appeals erred in holding that Jews cannot state a § 1982 claim against other white defendants”); *Sherman v. Town of Chester*, 752 F.3d 554, 567 (2d Cir. 2014) (holding that “Jews are considered a race for the purposes of §§ 1981 and 1982”); *United States v. Nelson*, 277 F.3d 164, 177 (2d Cir. 2002) (holding that “Jews count as a ‘race’ under certain civil rights statutes enacted pursuant to Congress’s power under the Thirteenth Amendment”); *Bachman v. St. Monica’s Congregation*, 902 F.2d 1259, 1261 (7th Cir. 1990) (finding that Jews constitute a race within the meaning of federal civil rights statutes); *Lenoble v. Best Temps, Inc.*, 352 F. Supp. 2d 237, 247 (D. Conn. 2005) (noting that “Jews are a distinct race for § 1981 purposes”); *Powell v. Independence Blue Cross, Inc.*, No. 95-CV-2509, 1997 U.S. Dist. LEXIS 3866, 1997 WL 137198, at *6 (E.D. Pa. Mar. 26, 1997) (finding that “[§] 1981 must be read to encompass discrimination against a plaintiff because of his Jewish ancestry or ethnicity”); *Singer v. Denver Sch. Dist. No. 1*, 959 F. Supp. 1325, 1331 (D. Colo. 1997) (noting that Jews are “a distinct racial group for the purposes of § 1981”).

¹²⁷ Kenneth L. Marcus, *The New OCR Antisemitism Policy*, 2 J. FOR STUDY OF ANTISEMITISM 479, 480 (2011); see also Mark Joseph Stern, *No, the Trump Administration is Not Redefining Judaism as a Nationality*, SLATE (Dec. 11, 2019, 12:29 PM), <https://slate.com/news-and-politics/2019/12/trump-antisemitism-executive-order-israel-judaism.html>.

Debunking claims that the policy somehow redefined Jews as a race or nationality:

The Obama administration reaffirmed this position in a 2010 letter written by Assistant Attorney General Thomas E. Perez, who is now the chair of the Democratic National Committee. “We agree,” Perez wrote, with Marcus’ analysis. “Although Title VI does not prohibit discrimination on the basis of religion, discrimination against Jews, Muslims, Sikhs, and

It is important to remember that even under Title VI, not all forms of harassing behavior are illegal.¹²⁸ For example, typical school bullying behavior does not run afoul of Title VI, so long as the bullying is not based on race, color, or national origin.¹²⁹ It is only illegal, and therefore subject to regulation, if it is based on an illegal discriminatory intent.¹³⁰ The problem for OCR was that without a definition of antisemitism to use as a reference, the unanswered question of how to determine illegal antisemitic intent meant that Jewish students were always vulnerable to attack and then obfuscation.

That is why on December 11, 2019, the federal government did two things. First, they announced an executive order codifying the now longstanding OCR policy that, for the purposes of Title VI discrimination claims, Jewish students are protected against antisemitism. Second, the order also stated that when evaluating these claims, the Department should consider the IHRA's definition of antisemitism.¹³¹ This type of executive order is not at all uncommon; for example, on his very first day in office, President Biden issued an executive order clarifying that gender identity and sexual orientation should be treated as sex-based classes protected under Title VII.¹³² Like his predecessor, he was not creating new laws; he was just clarifying how the federal government understands and applies the definitions in existing anti-discrimination law.

members of other religious groups violates Title VI when that discrimination is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than its members' religious practice." . . . On Wednesday, I asked Perez's former principal deputy, Sam Bagenstos—now a professor at University of Michigan Law School—whether he felt this reasoning equated any religious group of a nationality or race. "The key point we were making," he told me, "is that sometimes discrimination against Jews, Muslims, and others is based on a perception of shared race, ethnicity, or national origin, and in those cases it's appropriate to think of that discrimination as race or national origin discrimination as well as religious discrimination. It doesn't mean that the government is saying that the group is a racial or national group. The government is saying that the discrimination is based on the discriminator's perception of race or national origin . . ."

Id.

¹²⁸ *Race and National Origin Discrimination Frequently Asked Questions*, U.S. DEP'T OF EDUC.: OFFICE FOR CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html>.

¹²⁹ *Id.*

¹³⁰ U.S. DEP'T OF JUST. CIVIL RIGHTS DIV., *Section VI: Proving Discrimination—Intentional Discrimination*, in *TITLE VI LEGAL MANUAL*, <https://www.justice.gov/crt/fcs/T6Manual6>.

¹³¹ Exec. Order No. 13899, 84 Fed. Reg. 68,779 (Dec. 11, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-12-16/pdf/2019-27217.pdf>.

¹³² Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf>.

Critics, however, claimed that by formally adopting the IHRA definition the order was somehow an attack on free speech.¹³³ Properly translated into legal terminology, they based their critiques on either First Amendment overbreadth doctrine concerns, vagueness concerns, or both.¹³⁴ A law or regulation is overbroad when it can prohibit protected as well as non-protected speech,¹³⁵ and a law is vague when people “of common intelligence must necessarily guess at its meaning,”¹³⁶ (i.e., when it does not give sufficiently clear notice to a reasonable person of what it demands or prohibits). These arguments, as applied to the Executive Order and similar policies, are wrong, for the following six reasons.¹³⁷

First, the order simply did not restrict or prohibit speech. Every person remains perfectly free to say what they want, however abhorrent, about Jews and/or the Jewish state. As the Supreme Court in *Tinker v. Des Moines* explained, “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”¹³⁸ Hate speech is protected, obviously, but that does not mean that we cannot call it what it is: hateful.¹³⁹ If that speech should cross the line and reach the level of discriminatory harassment, with or without accompanying acts,¹⁴⁰ “then and only then is regulation

¹³³ See, e.g., David Jackson, *Trump Signs Executive Order on Anti-Semitism that Critics Say Attacks Free Speech*, USA TODAY (Dec. 11, 2019, 8:03 PM), <https://www.usatoday.com/story/news/2019/12/11/trump-sign-anti-semitism-order-critics-say-stifles-free-speech/4396213002/>.

¹³⁴ See, e.g., *Submission by the Foundation for Individual Rights in Education to the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression Regarding Academic Freedom on College Campuses*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Apr. 28, 2020), https://www.ohchr.org/Documents/Issues/Opinion/Submissions/NGOs/Foundation_for_Individual_Rights_in_Education_FIRE.pdf.

¹³⁵ Richard Parker, *Overbreadth*, FIRST AMEND. ENCYC., <https://www.mtsu.edu/first-amendment/article/1005/overbreadth> (last updated Sept. 2017).

¹³⁶ *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

¹³⁷ See Mark Goldfeder, *Why We Should Applaud Trump’s Executive Order on Anti-Semitism*, HILL (Dec. 16, 2019, 2:00 PM), <https://thehill.com/opinion/civil-rights/474271-why-we-should-applaud-trumps-executive-order-on-anti-semitism> [hereinafter Goldfeder, *Why We Should Applaud*].

¹³⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

¹³⁹ Phil Ciciora, *How Should Universities Handle Controversial Speech?*, ILL. NEW BUREAU: CAMPUS NEWS (Aug. 30, 2017, 8:30 AM), <https://news.illinois.edu/view/6367/549565>.

¹⁴⁰ Office of the Assistant Sec’y of Civil Rights, *Dear Colleague Letter*, U.S. DEP’T OF EDUC.: OFFICE FOR CIVIL RIGHTS (Oct. 26, 2010) https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010_pg2.html (emphasis added).

Harassing conduct may take many forms, including verbal acts . . . when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from

appropriate. Speech codes are constitutionally problematic; regulating discriminatory *conduct* is not.”¹⁴¹ The order only addresses harassment, not speech, and harassing actions (or verbal acts that rise to the level of harassment) are already impermissible.¹⁴²

Second, “for there to be a violation of free speech, the order would have to be about regulating private speech, not government speech.”¹⁴³ All the Executive Order does (and, for that matter, all that similar school policies and state bills would do) is explain how the government defines antisemitism when it is deciding where to allocate its money. The Supreme Court, in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, held that “[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”¹⁴⁴ Without this exemption, the Court explained, government “would not work.”¹⁴⁵

Third, for those who complain that the government was somehow taking sides by adopting a well-accepted definition of antisemitism, thereby raising the specter of viewpoint discrimination, the answer to that question is once again right there in *Walker*: “[w]e have . . . refused ‘[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals.’”¹⁴⁶ The government is free to advance its own permissible goals, including opposition to antisemitic discrimination, as defined by a well-accepted standard, and doing so is not impermissible viewpoint discrimination.¹⁴⁷

Fourth, the order does not chill speech because there is no threat that the government will ever even investigate, let alone bar, any permissible speech of any kind. The order directs those charged with enforcing Title VI to consider the IHRA definition *only* to help ascertain the motivation for discriminatory conduct, and *not*, as some would contend, as a substitute for either the applicable harassment standard

the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.

Id. (emphasis added).

¹⁴¹ Goldfeder, *Why We Should Applaud*, *supra* note 137 (emphasis added).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Walker v. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015).

¹⁴⁵ *Id.* at 2246.

¹⁴⁶ *Id.* (quoting *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

¹⁴⁷ See Goldfeder, *Stop Defending Discrimination*, *supra* note 42, at 219.

(i.e., what counts as discriminatory conduct in the first place) or the applicable First Amendment speech analysis.

Fifth, for those who argue that it is hard to distinguish acts from speech, the order does not create any new gray areas of overly broad speech/act non-distinction. It simply uses the longstanding definition of harassing conduct in Title IX and Title VI cases, a definition that has been upheld numerous times in a variety of cases and contexts. The standard, and therefore the order, only affects conduct that is so “severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.”¹⁴⁸ To the extent that speech is at all implicated, it is only for evidentiary purposes, i.e., to clarify what is considered discriminatory towards Jewish people where the law has declared discrimination unacceptable.

And finally, the Order does have a savings clause, which specifically limits the use of the IHRA definition to fall within constitutional parameters.¹⁴⁹

To summarize, the Order is clearly not overbroad or vague. Regarding overbreadth, as the Supreme Court emphasized in *Broadrick v. Oklahoma*,¹⁵⁰ declaring a regulation overbroad is “manifestly[] strong medicine[,]” to be employed “sparingly and only as a last resort[,]” and not in situations in which “a limiting construction has been or could be placed on the challenged statute.”¹⁵¹ The Order (like all similar policies) is limited to assessing intent for discriminatory conduct, not speech, and is to be constructed in a limited fashion, consistent with constitutional law. As it relates to vagueness, as the Court explained in *Kolender v. Lawson*, “the void-for-vagueness doctrine requires . . . sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”¹⁵² A policy using the IHRA definition to contextually assess the motivation behind potentially illegal discriminatory conduct before assuming it did or did not involve antisemitism provides such definiteness and clarity. It uses the well-

¹⁴⁸ Office of the Assistant Sec’y of Civil Rights, *Dear Colleague*, U.S. DEP’T OF EDUC.: OFFICE FOR CIVIL RIGHTS, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010_pg2.html (last visited Sept. 20, 2021).

¹⁴⁹ Exec. Order No. 13899, 84 Fed. Reg. 68,779 (Dec. 11, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-12-16/pdf/2019-27217.pdf>.

¹⁵⁰ *See generally* *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

¹⁵¹ *Id.* at 613; *see also* *Parker*, *supra* note 135 (describing other cases in which the Court refused to invalidate statutes for overbreadth, and instead applied limiting constructions).

¹⁵² *Kolender v. Lawson*, 461 U. S. 352, 357 (1983).

accepted and constitutionally upheld definition of discriminatory conduct used in all similar circumstances to reiterate that discriminatory antisemitic conduct is unacceptable. And it ensures that the application of the law will *not* be applied arbitrarily, by providing an objective and clear definition of what antisemitism is, specifically for the purpose of *discouraging* the possibility of subjective enforcement.

Critics were also wrong that the passage of the Order would create a huge number of cases or spur overreaching on the part of people or organizations hoping to abuse the Order and actually suppress speech.¹⁵³ Instead, for the most part, universities have settled the few complaints that have been brought and agreed to adopt the IHRA definition pro-actively moving forward.¹⁵⁴

IV. THE NEXT STEP FOR STATES AND UNIVERSITIES: PROACTIVELY ADOPTING THE IHRA DEFINITION

After the President's Executive Order, *all* universities that accept federal money (which in practice is almost all universities) are required to use the IHRA definition when evaluating discrimination claims that appear to be antisemitic.¹⁵⁵ The problem, though, is that most universities only become aware of the necessity of having a definition, and the reasons why the IHRA definition is the right one, after someone files a complaint against them for getting it horribly wrong.

Instead of waiting for an antisemitic incident followed by a complaint that forces them to defensively evaluate their current standards in light of the federal government's approach, all universities should immediately and proactively embrace the IHRA definition of antisemitism for use in evaluating motivation in discriminatory conduct claims. Again, universities should also be using the IHRA definition proactively as an educational tool, outside of the disciplinary context entirely, in their staff training, student orientation, anti-discrimination materials, and other contexts. And, again, because the Executive Order is already in place, making the policy change in the limited context of evaluating the motivation behind discriminatory conduct will cost universities nothing. But doing so *would* send a strong signal to their Jewish populations that their presence is valued, their experiences are

¹⁵³ See Kenneth Stern, *I Drafted the Definition of Antisemitism. Rightwing Jews Are Weaponizing It*, GUARDIAN (Dec. 13, 2019 6:25 AM), <https://www.theguardian.com/commentisfree/2019/dec/13/antisemitism-executive-order-trump-chilling-effect>.

¹⁵⁴ See, e.g., Kery Murakami, *NYU Settles Anti-Semitism Case*, INSIDE HIGHER ED (Oct. 2, 2020), <https://www.insidehighered.com/news/2020/10/02/new-york-university-settles-antisemitism-case-education-department>.

¹⁵⁵ See *supra* pp. 24–25.

real, and their voices are heard. It would show Jewish students that the university cares about them and is not waiting to be forced to make the change. Here is what such a model policy change might look like:

The University will revise its non-discrimination and anti-harassment policies to include a statement that the University prohibits discrimination on the basis of shared ancestry and ethnic characteristics, including antisemitism (as defined in Section 2(1)(i) of the Executive Order on Combatting Antisemitism (Exec. Order No. 13899)). The policy will not affect or regulate speech; the definition will only be considered in the context of analyzing the motivation behind the discriminatory conduct in a discriminatory conduct claim. It is only to be used after a person has been credibly accused of engaging in discriminatory acts toward Jewish people—acts that are so severe, pervasive, or persistent that they interfere with or limit the ability of the victim to participate in or benefit from an educational service, activity, opportunity, or privilege. Then and only then will the University use this definition as contextual, rebuttable evidence of a discriminatory motive, to the extent that any examples might be useful as evidence of discriminatory intent, and with the additional caveat that whether a particular act constitutes discrimination prohibited by Title VI will require a detailed analysis of the specific allegations.

When it comes to passing state legislation on antisemitism, the arguments in favor are equally pressing. The primary sponsor of a draft antisemitism bill in Arizona,¹⁵⁶ Rep. Alma Hernandez, D-Tucson, explained that she sponsored it to fight back against the antisemitic tide that her community and the nation are seeing, and to send a message of support for the Jewish victims.¹⁵⁷ “We know that [antisemitism] is on the rise—not only in my community, which is a Jewish community. We feel this is extremely important because of everything we’re seeing around the country and around the world.”¹⁵⁸ Sen. Joe Gruters, R-Sarasota, who sponsored the Florida version, put it simply:

¹⁵⁶ H.R. 2683, 54 Leg., 2d Reg. Sess. (Ariz. 2020).

¹⁵⁷ Wissam Melhem, *Bill to Define Anti-Semitism Passes State House*, ARIZ. MIRROR (Mar. 9, 2020, 7:00 AM), <https://www.azmirror.com/2020/03/09/bill-to-define-anti-semitism-passes-state-house/>.

¹⁵⁸ *Id.*

“[a]ntisemitism is on the rise, and we have the ability to do something about it.”¹⁵⁹

The purpose of a state antisemitism bill is simple: provide state officials with a definition of antisemitism to consider when reviewing, investigating, or determining whether there has been a violation of any law, or any policy prohibiting discriminatory acts or practices on the basis of race, religion, or national origin. Here is what a model bill might look like:

A bill to be entitled: An act relating to Antisemitism in the State of XXX

SO AS TO PROVIDE STATE OFFICIALS WITH A DEFINITION OF ANTISEMITISM TO CONSIDER WHEN REVIEWING, INVESTIGATING, OR DETERMINING WHETHER THERE HAS BEEN A VIOLATION OF ANY LAW OR ANY POLICY PROHIBITING DISCRIMINATORY ACTS OR PRACTICES ON THE BASES OF RACE, RELIGION, OR NATIONAL ORIGIN, AND TO PROVIDE THAT NOTHING IN THIS ACT MAY BE CONSTRUED TO DIMINISH OR INFRINGE UPON ANY RIGHTS AFFORDED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION OR ARTICLE XXX SECTION XXX OF THE CONSTITUTION OF THIS STATE.

Findings:

- 1) Antisemitism, including harassment on the basis of actual or perceived Jewish origin, ancestry, ethnicity, identity, affiliation, or faith, remains a persistent, pervasive, and disturbing problem in contemporary American society;
- 2) Jewish people continue to be a targeted minority in the United States. Data shows, for instance, that Jews are consistently the most likely of all religious groups to be victimized by incidents of hate, and that such incidents are increasing at an alarming rate;
- 3) State officials and institutions have a responsibility to protect citizens from acts of hate and bigotry motivated by

¹⁵⁹ Samantha J. Gross, *Two Days After Deadly Synagogue Shooting, Florida Senate Passes Anti-Semitism Bill*, MIA. HERALD (Apr. 29, 2019), <https://www.miamiherald.com/news/politics-government/state-politics/article229800129.html>.

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discriminatory animus, including antisemitism, and must be given the tools to do so;

4) Valid monitoring, informed analysis and investigation, and effective policy-making all require uniform definitions;

5) While there can be no exhaustive definition of antisemitism, as it can take many forms, the International Holocaust Remembrance Alliance (“IHRA”) Working Definition has been an essential definitional tool used to determine contemporary manifestations of antisemitism, and includes useful examples of discriminatory anti-Israel acts that cross the line into antisemitism.

6) The IHRA definition is used by various agencies of the federal government and the thirty-one governments that are members of IHRA; recommended for use by the European Council and the European Parliament, endorsed by the UN Secretary General and the Secretary General of the OAS, included in policy guides prepared by the Organization for Security and Cooperation in Europe, and formally adopted by a growing number of European and Middle Eastern nations.

7) Use of this definition of antisemitism, although it is not to be taken as an exhaustive definition, will increase the awareness and understanding of the parameters of contemporary anti-Jewish discrimination in certain circumscribed areas.

Be it enacted by the General Assembly of the State of XXX:

A) For purposes of this Act, the term “definition of antisemitism” refers to the International Holocaust Remembrance Alliance Working Definition, as adopted on May 26, 2016, including the “contemporary examples of antisemitism,” while noting that “criticism of Israel similar to that leveled against any other country is not antisemitic.”

B) Nothing in this subsection shall be construed to diminish or infringe upon any right protected under the First Amendment to the United States Constitution, or the State Constitution.

Nothing in this subsection shall be construed to conflict with local, federal or state discrimination laws.

C) In reviewing, investigating, or deciding whether there has been a violation of any policy, law, or regulation prohibiting discriminatory acts, the State shall take into consideration the definition of antisemitism set forth in paragraph (A) above for purposes of determining whether the alleged act was motivated by discriminatory antisemitic intent.

D) For the purposes of applying paragraph C, a discriminatory act includes any harassing conduct that is so severe, pervasive or persistent so as to interfere with or limit the ability of the victim to participate in or benefit from an educational service, activity, opportunity or privilege.

To alleviate any remaining concerns about protected speech, it is critically important to be abundantly clear about what the model bill and model policy do not do. They do not create any new anti-discrimination laws or regulations; they only clarify what constitutes discriminatory conduct under existing laws. For simplicity's sake, because the bill reflects a statewide policy clarification, and because the arguments for each are identical, for the purposes of the rest of this Article, all reference to the model policy in a university setting also includes the comparable provisions of the model state bill, as applicable.

V. THE MODEL POLICY DOES NOT RESTRICT OR SUPPRESS SPEECH

The following section responds to some of the most common questions about policies adopting the IHRA definition. It is important to respond thoroughly because even proponents of the IHRA definition have been openly concerned about the definition being used in the wrong way (i.e., to limit speech protected under the First Amendment). The answer, of course, is not to throw out the definition, but rather to make sure that it is only used correctly (i.e., in a way that does not restrict speech). The model policy does just that, and nothing else.

A. *What the Policy Does Not Do*

1. The Model Policy Does Not Restrict or Prohibit Speech

While it is true that the IHRA definition can and should be used in a variety of circumstances, including educational and reporting situations, when it comes to the *disciplinary* context it must be used

narrowly to avoid any First Amendment issues. That is why the recommended policy deals only with behavior, and the First Amendment protects neither criminal behavior nor discriminatory acts.¹⁶⁰ People are free to think, feel, and say whatever they want, however abhorrent, about Jews and about the Jewish state. All the policy update does is use a standard and widely accepted definition of antisemitism to clearly delineate what would reasonably be defined as discriminatory towards Jewish people in a praxeological sense. It does not create any new protected class or enhance any punishment, nor does it regulate or restrict academic freedom. Much antisemitic hate speech is constitutionally protected, just like racist and sexist speech, and the policy will not change that. Rather, it simply ensures that state and/or school authorities consider the federal government's well-accepted definition of antisemitism when considering and labeling *actions* as having been motivated by discriminatory intent.

2. The Model Policy Does Not Create Any Gray Area of Speech/Act Non-Distinction

The policy avoids this potentially significant trap by defining the kind of discriminatory conduct that is problematic in this context using the long-standing definition of harassment used by the Department of Education in its Title VI cases and guidance.¹⁶¹ The IHRA definition is used only to help ascertain motivation for the conduct, and not as a substitute for either the applicable harassment standard or the applicable First Amendment speech analysis.

Lest there be any confusion, in theory even “just” speech *could* cross over into illegal harassment: per the OCR’s Title VI Guidance, speech crosses over from protected territory into harassing verbal conduct when it is “sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient.”¹⁶² To take one example that happened quite a few times in

¹⁶⁰ Lata Nott, *Is Your Speech Protected by the First Amendment?*, FREEDOM F. INST., <https://www.freedomforuminstitute.org/first-amendment-center/primers/basics/> (last visited Aug. 16, 2020).

¹⁶¹ *See Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/harassment> (last visited Aug. 16, 2020).

¹⁶² *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. No. 47 (Mar. 10, 1994), <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html>.

recent memory:¹⁶³ if a Jewish student is told that she cannot join a club or hold a leadership position because she is Jewish, that is not the kind of speech that the First Amendment shields. That would constitute a “verbal act” which, like all other discriminatory acts, is subject to regulation.¹⁶⁴ The well-established policies and practices of the Department of Education bear this out: “[t]he Civil Rights Act and Education Amendments Act mandate compliance obligations pursuant to the Department of Education’s financial assistance rules,”¹⁶⁵ and as the Department of Education’s Office For Civil Rights has made clear,¹⁶⁶ their “regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment.”¹⁶⁷

How then are we to make sure that the adoption of a harassment policy does not infringe on core protected speech? By following the law and being careful not to overreach. As the Third Circuit ruled in *DeJohn v. Temple University*, “there is no ‘harassment exception’ to the First Amendment’s Free Speech Clause; that is . . . ‘[w]here pure expression is involved,’ anti-discrimination law ‘steers into the territory of the First Amendment.’”¹⁶⁸

No one is disputing that.

The Court, however, continued by explaining that to be constitutionally upheld, all that is required is a bright line in the policy itself differentiating between speech that is pure expression and verbal acts that constitute objectively harassing conduct. The placement of that line comes from Supreme Court jurisprudence in the Title IX arena: “[a]bsent any requirement akin to a showing of severity or pervasiveness—that is, a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual’s work—the policy provides no shelter for core protected speech.”¹⁶⁹ Lower courts extended the Supreme Court’s reasoning in

¹⁶³ See Richard L. Cravatts, *Targeting Jewish Student Leaders for Banishment and Shaming*, TIMES ISRAEL (Jan. 16, 2021, 1:10 AM), <https://blogs.timesofisrael.com/targeting-jewish-student-leaders-for-banishment-and-shaming/>.

¹⁶⁴ This too is not uncommon or idiosyncratic in First Amendment jurisprudence. See, e.g., *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 439 (1911).

¹⁶⁵ Hutchison, *supra* note 100, at 475.

¹⁶⁶ Gerald A. Reynolds, *First Amendment: Dear Colleague*, U.S. DEP’T OF EDUC.: OFFICE FOR CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/firstamend.html> (last visited Aug. 16, 2020).

¹⁶⁷ *Id.*

¹⁶⁸ *DeJohn v. Temple Univ.*, 537 F.3d 301, 316 (3d Cir. 2008) (internal citations omitted).

¹⁶⁹ *Id.* at 317–18 (internal citations omitted) (emphasis added) (quoting *Saxe*, 240 F.3d at 210–11 (referencing *Davis Next Friend LaShonda D. v. Monroe County Bd. of*

Davis v. Monroe County to cases brought under Title VI and Title VII of the Civil Rights Act of 1964,¹⁷⁰ which prohibits federally-funded programs from discriminating on the basis of race, color, and national origin.¹⁷¹ When conduct (including this type of verbal conduct) rises to the level of discriminatory harassment, with or without accompanying acts, then and only then is regulation appropriate. Even free speech organizations recognize that “manifestly malicious and intimidating speech can impair equal access to the full benefits of a college education,”¹⁷² and that “[f]or . . . harassment, and any other conduct that violates the law, an aggressive disciplinary response is warranted.”¹⁷³

Arguments that a carefully crafted policy could still lead to a slippery slope ending in a speech code are simply wrong, and more importantly they are legally invalid.¹⁷⁴ Speech codes are constitutionally problematic, while regulating discriminatory conduct is not. To break a slippery slope argument, provide a clear stopping point—an obvious bright line. The bright line here, we can all agree, is the First Amendment and the right to free speech. That is why the model policy includes the actual bright line articulated by the Courts for when such a policy does *not* violate the First Amendment.

The notion that state officials or university administrators will be somehow unable to differentiate between *acts* and *speech* is not an

Educ., 526 U.S. 629, 652 (1999)) (“[I]n the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.”).

¹⁷⁰ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vison*, 477 U.S. 57, 65–67 (1986)) (“When the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ Title VII is violated.”). Note that case law in Title VII and OCR guidance in Title VI use the disjunctive standard to better protect students, while Title IX and private damages claims in Title VI use the more severe conjunctive standard.

¹⁷¹ See, e.g., *Bryant v. Indep. Sch. Dist. No. 1-38*, 334 F.3d 928, 934 (10th Cir. 2003).

¹⁷² *Hateful Expression*, PEN AM.: CAMPUS FREE SPEECH GUIDE, <https://campusfreespeechguide.pen.org/issue/hateful-expression/> (last visited Oct. 13, 2021).

¹⁷³ *How to Respond to Expressions of Hate on Campus*, PEN AM.: CAMPUS FREE SPEECH GUIDE, <https://campusfreespeechguide.pen.org/role/administrator/#hateful-expression> (last visited Aug. 26, 2021).

¹⁷⁴ Any proponents of the notion that regulating harassing speech will lead to the development of more speech codes need only to peruse the current jurisprudence on hostile work environment claims and the multiplicity of courts that refuse to enforce rules against most of what could colloquially be considered “harassing” conduct out of fear of creating “general civility code.” See *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); see also Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding A Collision*, 37 VILL. L. REV. 757, 757 (1992); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1793 (1992).

argument for why there should not be an accepted definition of antisemitism. If, for example, a school cannot distinguish between *acts* and *speech*, then it presumably cannot distinguish between racist speech (protected) and racial harassment (not protected), between sexist speech (protected) and sexual harassment (not protected), or any other form of discrimination. If the state government or the university administration feel that they *can* distinguish between speech and acts in other contexts, but not in the context of antisemitic speech, then that is in itself profoundly and problematically antisemitic.

3. Finally, Such a Policy Will Not Impermissibly Chill Speech

Based on the above, it should be clear that the model policy does not in any way restrict protected speech. That being said, the next easy argument for critics to make is that the use of a definition in this very limited context will somehow “chill” protected speech in a different context. That argument is simply too broad; under that line of thought, state officials or university administrators would not be allowed to publicly denounce racism out of fear of ‘chilling’ racist speech. The more technical version of the argument, however, is worth addressing. As the Supreme Court made clear, in the First Amendment context, courts must “look through forms to the substance” of government conduct.¹⁷⁵ And as the Ninth Circuit has aptly described it, the fear of chilling speech is that “[i]nformal measures, such as ‘the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation,’ can violate the First Amendment also. . . . [G]overnment officials violate this provision when their acts ‘would chill or silence a person of ordinary firmness from future First Amendment activities.’”¹⁷⁶

In general, courts applied that standard to mean that lengthy investigations into permissible conduct could chill speech.¹⁷⁷ Here, however, there is no threat whatsoever that the government will ever investigate, let alone bar, permissible speech of any kind. The bill only addresses harassment, and speech that rises to the level of harassment is already impermissible. It is worth emphasizing again that the question of whether any specific speech or conduct is harassing is, and should be, a *separate inquiry* from the antisemitism inquiry, and that the definition only comes into play *after* it has been determined to be

¹⁷⁵ *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*; see also *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012); *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992); *Rakovich v. Wade*, 850 F.2d 1180 (7th Cir. 1988), *abrogated by Spiegla v. Hull*, 371 F.3d 928 (7th Cir. 2004); *Am. Civ. Liberties Union v. City of Pittsburgh*, 586 F. Supp. 417, 427 (W.D. Pa. 1984).

harassing, and therefore not protected by the First Amendment. The definition does not affect which behavior is harassing. The definition is important because while some forms of harassment (i.e., typical bullying behavior) do not run afoul of Title VI, if the discriminatory behavior is motivated by the victim's race or national origin, then it *is* illegal and can be regulated.

The idea that a permissible regulation of impermissible discriminatory conduct would be unacceptable because it could theoretically lead to regulation of permissible speech turns law enforcement on its head by treating actual perpetrators as potential future victims. This is not a valid legal argument. As the Supreme Court in *Laird v. Tatum* held:

In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or "chilling," effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. In none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some *other* and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.¹⁷⁸

The court went on to note that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm," even if the apprehensions arise from the fear that the government may in the future "misuse the information in some way that would cause direct harm to respondents."¹⁷⁹ Courts have also held that in terms of the chilling of First Amendment speech, "self-censorship alone is insufficient to show injury."¹⁸⁰

In *Abbott v. Pastides*, the Court held that even if the university were to launch an inquiry into student complaints *involving* speech, that would not be sufficient to argue for a chilling effect.¹⁸¹ The same case

¹⁷⁸ *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (internal citations omitted).

¹⁷⁹ *Id.* at 13–14.

¹⁸⁰ *Lopez v. Candaele*, 630 F.3d 775, 792 (9th Cir. 2010).

¹⁸¹ *Abbott v. Pastides*, 900 F.3d 160, 163 (4th Cir. 2018). Even if there *were* a chilling effect, which there is not, as Hutchison notes, "[t]he Supreme Court has established that

also established that procedural meetings as a result of a complaint do not qualify as chilling speech.¹⁸² In *Morrison v. Board of Education*, the Sixth Circuit ruled en banc in favor of the Board when a student claimed that the district policy prohibiting stigmatizing or insulting comments regarding another student's sexual orientation chilled his religious requirement to tell others that their conduct violated his understanding of Christian morality.¹⁸³ Finally, in *Lopez v. Candaele*, the Court held that advising a student via letter that other students perceived their language as "hateful propaganda" did not constitute a threat of enforcement under the college's sexual harassment policy and was not a sufficient injury-in-fact.¹⁸⁴ But again, the case for IHRA is even easier because we are not dealing with censoring speech, but rather with assessing motive behind impermissible conduct.

In general, no one who calls sexist speech sexist, racist speech racist, or homophobic speech homophobic, is accused of chilling speech.¹⁸⁵ Indeed, especially in the university context,¹⁸⁶ officials often receive praise for condemning this type of speech without crossing the line into censorship.¹⁸⁷ As the American Civil Liberties Union ("ACLU") recognized, it is fully consistent with the First Amendment that "campus administrators should . . . speak out loudly and clearly against expressions of racist, sexist, homophobic" and other bias, and "react promptly and firmly to counter acts of discriminatory harassment

'a university's mission is education,' depriving the First Amendment of power to preclude a university from imposing 'reasonable regulations compatible with that mission upon the use of its campus and facilities.'" Hutchinson, *supra* note 100, at 488 (citing *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981)). Hence, a university has the "right to exclude . . . First Amendment activities that . . . substantially interfere with the opportunity of other students to obtain an education." *Widmar v. Vincent*, 454 U.S. at 277 (citing *Healy v. James* 408 U.S. 169, 188–89 (1972)).

¹⁸² See *Abbott v. Pastides*, 263 F. Supp. 3d 565, 578 (D.S.C. 2017), *aff'd*, 900 F.3d 160 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1291 (2019).

¹⁸³ *Morrison v. Bd. of Educ.*, 521 F.3d 602, 605 (6th Cir. 2008).

¹⁸⁴ See *Lopez*, 630 F.3d at 783; see also *id.* at 792 ("Under these circumstances, we must conclude that Lopez fails to meet the standard required of a pre-enforcement plaintiff to prove injury in fact, because he has not met the low threshold of clearly showing that he faces a specific, credible threat of adverse government action based on a violation of the sexual harassment policy.").

¹⁸⁵ Cynthia Miller-Idriss & Jonathan Friedman, *When Hate Speech and Free Speech Collide*, DIVERSE (Dec. 5, 2018), <https://diverseeducation.com/article/133611/>.

¹⁸⁶ *To the Point: Campus Inclusion and Freedom – Hateful Incidents on Campus*, AM. COUNCIL EDUC., <https://www.acenet.edu/Documents/To-The-Point-Hateful-Incidents.pdf> (last visited Aug. 30, 2020).

¹⁸⁷ Nadine Strossen, *Counterspeech in Response to Changing Notions of Free Speech*, A.B.A.: HUM. RTS. MAG., https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/counterspeech-in-response-to-free-speech/ (last visited Aug. 16, 2020).

...”¹⁸⁸ All the model policy does is ask that antisemitism be treated the same way other forms of discrimination are already treated. In fact, some states have already started doing this by law.¹⁸⁹

Hate speech is protected, obviously, but that does not mean that we cannot call it hateful.¹⁹⁰ Why then, should it be any different when it comes to antisemitism? To the extent that speech is at all affected by the adoption of a well-accepted definition, it is only to help clarify the motivation behind acts considered discriminatory towards Jewish people, where the law already declared discriminatory acts (not discriminatory speech alone) unacceptable. The actions are already impermissible; calling them what they are does not chill speech.

None of this should be controversial. The Supreme Court already firmly ruled in *Wisconsin v. Mitchell* that “[t]he First Amendment . . . does not prohibit the evidentiary use of speech . . . to prove motive or intent.”¹⁹¹ That case asked whether enhanced penalties for racially-motivated crimes violate a defendant’s First Amendment rights. In their unanimous opinion in favor of the state, the Court also dealt with the “chilling” argument:

Finally, there remains to be considered Mitchell’s argument that the Wisconsin statute is unconstitutionally overbroad because of its “chilling effect” on free speech. Mitchell argues . . . that the statute is “overbroad” because evidence of the defendant’s prior speech or associations may be used to prove that the defendant intentionally selected his victim on account of the victim’s protected status. Consequently, the argument goes, the statute impermissibly chills free expression with respect to such matters by those concerned about the possibility of enhanced sentences if they should in the future commit a criminal offense covered by the statute. We find no merit in this contention.

¹⁸⁸ *Speech on Campus*, ACLU, <https://www.aclu.org/other/speech-campus> (last visited Aug. 16, 2020).

¹⁸⁹ *Florida Gov. Ron DeSantis Signs Bill Banning Anti-Semitism in Schools, Universities*, TOWER (June 4, 2019, 8:07 AM), <http://www.thetower.org/7379-florida-gov-ron-desantis-signs-bill-banning-anti-semitism-in-schools-universities/> (detailing a Florida bill that applies the definition to laws already barring discrimination in the education system); see Ron Kampeas, *Florida Bill Would Add Protections Against Anti-Semitism to Education System*, JEWISH TELEGRAPHIC AGENCY (Jan. 24, 2019, 6:09 AM), <https://www.jta.org/quick-reads/florida-state-bill-would-add-protections-against-anti-semitism-to-education-system> (describing Fla. SB 471 (2019), <https://www.flsenate.gov/Session/Bill/2019/741/BillText/er/PDF>).

¹⁹⁰ See Miller-Idriss & Friedman, *supra* note 185.

¹⁹¹ *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional “overbreadth” cases. We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim’s protected status, thus qualifying him for penalty enhancement We are left, then, with the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property. This is simply too speculative a hypothesis to support Mitchell’s overbreadth claim.¹⁹²

In other words, the proposed policy of using a standard definition of antisemitism for evidentiary purposes when analyzing intent behind discriminatory conduct to determine the motive for the harassment is fully constitutional.¹⁹³ The First Amendment does not protect harassing conduct, but it does allow for the evidentiary use of speech to (rebuttably) assess motive without a concern of chilling speech. The policies recommended in this Article do not change the standard for harassing conduct; all they do is provide a definition to guide the evidentiary analysis.

In truth, the lack of a definition, which creates the ability for antisemites to get away with their destructive behavior and intimidate Jewish students, is actually what damages the free exchange of ideas at universities. To quote two leading scholars of antisemitism, Professors Dave Rich and Phillip Spencer, to be concerned that the definition will have a “chilling effect’ . . . is to turn things entirely on their head. It is

¹⁹² *Id.* at 488–89.

¹⁹³ As Paul Clement told a Congressional hearing on campus antisemitism in 2017, discussing a proposed similar federal act, there really isn’t even a debatable question: [S]omebody . . . can engage on campus in the most abhorrent anti-Semitic speech and the Education Department will not take action against them just for that. But, if they couple that abhorrent speech with say a physical attack on a Jewish student, then this Act and the Constitution allow the use of that anti-Semitic speech to demonstrate the motive of the person engaged in the harassment There were not that many things that Chief Justice Rehnquist and Justice Blackman agreed on, but this was one of them: no First Amendment problem.

Anti-Semitism on College Campuses: Hearing Before the H. Comm. on the Judiciary, 115th Cong. 45 (2017) (Statement of Paul Clement, Partner, Kirkland & Ellis LLP), <https://www.govinfo.gov/content/pkg/CHRG-115hhrg32325/html/CHRG-115hhrg32325.htm>.

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antisemitic speech which has a chilling effect on Jewish students, academic and professional staff.”¹⁹⁴

Recall that the standard we are discussing involves behavior that denies Jewish students the ability to partake in educational opportunities. When Jewish students are targeted with verbal and physical abuse, it is not political discourse that they are experiencing.¹⁹⁵ As Sandra Hagee Parker once told Congress while discussing the discriminatory harassment of Jewish students on campus:

It is harassment aimed to silence and shut down the perspective of Jewish students and those who support them. Allowing this behavior to shut down free speech is at odds with the free thinking and safe environment our Nation’s colleges strive to create Providing a standard by which to judge these acts, no more chills free speech than the presence of a thermometer prevents the temperature from rising. Both sides of the argument deserve to be heard, but at present, one side is using the First Amendment as both a sword with which to inflict harm and a shield with which to protect itself from the consequences of its actions [T]he exercise of free speech is not an affirmative defense for harassment.¹⁹⁶

All of the above sounds fairly simple and—being that the IHRA definition is widely accepted and consensus driven—appropriate. Which leads to the next question: What then, would the adoption of the IHRA definition do, other than explain a term? In other words, if adopting the definition in this narrow clarifying context does so little, and will only be used to help determine discriminatory intent after a discriminatory conduct complaint, then why is it so important for States and universities to take these steps? The answer to that is twofold.

¹⁹⁴ Dave Rich & Phillip Spencer, *David Feldman Should Not Be Encouraging Those Who Denigrate Jews*, JEWISH CHRON. (Dec. 14, 2020), <https://www.thejc.com/comment/opinion/david-feldman-should-not-be-encouraging-those-who-denigrate-jews-1.509689>.

¹⁹⁵ See Ilanit Chernick, *Jewish Students Allegedly Assaulted at Labour Rally in Bristol*, JERUSALEM POST (Dec. 11, 2019), <https://www.jpost.com/diaspora/jewish-students-allegedly-assaulted-at-labour-rally-in-bristol-610606>.

¹⁹⁶ *Anti-Semitism on College Campuses: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. 45 (2017) (statement of Sandra Hagee Parker, Chairwoman, Christians United for Israel Action Fund), <https://www.govinfo.gov/content/pkg/CHRG-115hhr32325/html/CHRG-115hhr32325.htm>.

VI. ADOPTING THE DEFINITION HELPS STATES AND SCHOOLS MONITOR,
PREVENT, AND EDUCATE ABOUT ANTISEMITISM

A. *Adopting a Definition Would Help States and Schools Monitor
and Report on Antisemitism*

First, do not underestimate the importance of properly defining terms.¹⁹⁷ It is crucial to adopt the IHRA definition because, until now, the absence of a definition of antisemitism has been an Achilles' heel for those who expect state actors, including colleges and universities, to take a stronger stand on campus antisemitism. Consider the alternative to adopting a definition; everyone agrees that antisemitic harassment is illegal, but frankly speaking, no one knows what that means. Without a definition, the status quo basically empowers whatever official is charged on any given day with determining whether any particular case involved antisemitic bias with unfettered discretion and no objective guidelines.¹⁹⁸ Sometimes antisemitic crimes and discrimination are undeniable. One can easily point to any of the following incidents of violence against those of Jewish descent: the shootings at the Tree of Life Synagogue in Pittsburgh, Pennsylvania in 2018 and at the Chabad of Poway in California in 2019,¹⁹⁹ the recent series of random physical attacks on identifiably Jewish persons in New York City,²⁰⁰ and the rising number of desecrated Jewish cemeteries²⁰¹ and vandalized

¹⁹⁷ See generally Mark Goldfeder, *The Danger of Defining Your Own Terms: Responding to the Harvard Law Review on Anti-Discrimination Law and the Movement for Palestinian Rights*, 3 J. CONTEMP. ANTISEMITISM 141 (2020) [hereinafter Goldfeder, *The Danger of Defining Your Own Terms*] (noting the tendency amongst some legal writers to set up multiple strawman arguments by defining terms in self-serving ways).

¹⁹⁸ See *Anti-Semitism on College Campuses: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. 45 (2017) (statement of Paul Clement, Partner, Kirkland & Ellis LLP), <https://www.govinfo.gov/content/pkg/CHRG-115hhrg32325/html/CHRG-115hhrg32325.htm>

Whatever Congress does here, if Congress does nothing it is still going to be the Education Department's position that [T]itle VI forbids harassment motivated by anti-Semitism. So, the question really boils down to whether the Education Department officials are going to make that judgment without a definition or with a definition. And I certainly think it serves First Amendment values to guide that discretion.

¹⁹⁹ *San Diego Synagogue Shooting: One Person Dead in Poway, California*, BRIT. BROAD. CORP. (Apr. 29, 2019), <https://www.bbc.com/news/world-us-canada-48081535>.

²⁰⁰ See Liam Stack, *'Most Visible Jews' Fear Being Targets as Antisemitism Rises*, N.Y. TIMES (Feb. 17, 2020), <https://www.nytimes.com/2020/02/17/nyregion/hasidic-jewish-attacks.html>.

²⁰¹ See Adam Nossiter, *Jewish Graves Desecrated in Historic French Cemetery*, N.Y. TIMES (Dec. 4, 2019), <https://www.nytimes.com/2019/12/04/world/europe/jewish-graves-france-desecrated.html>; Deanna Paul, *Dozens of Jewish Graves Vandalized with Swastikas and Anti-Semitic Slurs*, WASH. POST (Mar. 21, 2019),

synagogues.²⁰² There have been numerous physical attacks on Jewish businesses,²⁰³ and on university campuses around the country, there have been countless well-documented examples of antisemitic harassment,²⁰⁴ property damage,²⁰⁵ and physical attacks²⁰⁶ on Jewish students.²⁰⁷ The problem is that states and universities often do not report, and sometimes even hesitate to admit,²⁰⁸ that there has been a major spike in people discriminating against and targeting Jewish people in their jurisdictions.²⁰⁹ So long as the meaning of antisemitism is left murky and inconsistent, it will be easy for officials to look the other way and fail to enforce existing regulations regarding bigotry.²¹⁰

<https://www.washingtonpost.com/religion/2019/03/21/dozens-jewish-graves-vandalized-with-swastikas-anti-semitic-slurs/>.

²⁰² See, e.g., Marcy Oster, *Florida Man to be Charged with Vandalism of 2 Synagogues*, FORWARD (July 27, 2020), <https://forward.com/fast-forward/451533/florida-man-will-be-charged-with-vandalism-of-2-reform-synagogues-in/>; see also *Synagogues in Los Angeles and Richmond Vandalized During Protests*, TIMES OF ISRAEL (June 1, 2020, 4:50 AM), <https://www.timesofisrael.com/synagogues-in-los-angeles-and-richmond-vandalized-during-protests/>.

²⁰³ SA: 21 Arrested at Violent BDS Protest in South Africa, CHRISTIANS UNITED FOR ISRAEL (Mar. 26, 2015), <https://www.cufi.org.uk/news/sa-21-arrested-at-violent-bds-protest-in-south-africa>.

²⁰⁴ See William A. Jacobson, *Dorm Storming at NYU Targets Jewish Students*, LEGAL INSURRECTION (Apr. 24, 2014, 1:32 PM), <https://legalinsurrection.com/2014/04/dorm-storming-at-nyu-targets-jewish-students/>. See generally William A. Jacobson, *Anti-Israel Student Group Suspended at Northeastern for Vandalism, Intimidation, Disruption*, LEGAL INSURRECTION (Mar. 13, 2014, 10:00 AM), <https://legalinsurrection.com/2014/03/anti-israel-student-group-suspended-at-northeastern-for-vandalism-intimidation-disruption/>.

²⁰⁵ See Interview by Lenny Giteck with Andrew Pessin, Professor, Conn. Coll. (Jan. 11, 2021), https://antisemitismexposed.org/andrew-nessin/?fbclid=IwAR2JL5fb908-yCrojGdwsx9HraI_u-BcE8N7dPMY1c8MhjQV5YQNN6oSTQ.

²⁰⁶ See Frances Dinkelspiel, *Jewish Student Sues UC Berkeley Over Assault by Palestine Supporter*, BERKELEYSIDE (Mar. 7, 2011, 12:19 PM), <https://www.berkeleyside.com/2011/03/07/jewish-student-sues-uc-berkeley-over-assault-by-palestine-supporter>. See generally Edwin Black, *Temple University – Latest Anti-Semitic Hotspot Protested Amid Record Donation Drive*, HUFFINGTON POST (Oct. 25, 2014), https://www.huffpost.com/entry/temple-university-latest-_b_5707919.

²⁰⁷ Tori Cheifetz, *Jewish Students ‘Held Hostage’ in Toronto Hillel*, JERUSALEM POST (Feb. 15, 2009), <https://www.jpost.com/jewish-world/jewish-news/jewish-students-held-hostage-in-toronto-hillel>.

²⁰⁸ Some even call on the Jewish students to “get tougher skin.” Greta Anderson, *Responding to Rise in Campus Anti-Semitism*, INSIDE HIGHER ED (Sept. 9, 2020), <https://www.insidehighered.com/news/2020/09/09/antisemitism-rise-new-semester-starts>.

²⁰⁹ AMCHA INITIATIVE, THE HARASSMENT OF JEWISH STUDENTS ON U.S. CAMPUSES: HOW ELIMINATIONIST ANTI-ZIONISM AND ACADEMIC BDS INCITE CAMPUS ANTISEMITISM 8–17 (2019), <https://amchainitiative.org/wp-content/uploads/2019/09/Eliminationist-Anti-Zionism-and-Academic-BDS-on-Campus-Report.pdf>.

²¹⁰ Evan Gerstmann, *Hate Crimes Against Jewish Students Are at an All-Time High*, FORBES (Sept. 9, 2020, 5:12 PM), <https://www.forbes.com/sites/evangerstmann/>

Thankfully, there is an easy fix. The IHRA definition simply defines antisemitism the same way that the federal government does, and adopting it would only require states and universities to apply their own rules fairly. State anti-discrimination laws and university conduct codes that forbid student groups from engaging in discriminatory activities should be enforced across the board. If there is a definition, then administrators cannot simply shrug and say that they “don’t know what antisemitism looks like.”

Under the federal Clery Act,²¹¹ universities are required to file an annual report on campus crime. The law is meant to provide transparency around policy and statistics, and one of the four categories they must disclose are hate crimes. The problem is that, “[m]any universities interpret the guidelines as narrowly as possible, leaving out antisemitic vandalism that would likely be categorized as hate crimes if they happened off-campus.”²¹² In 2017, for example, after someone drew a swastika on a bathroom stall in Binghamton University’s library, the school condemned the incident as a “hate crime” in a public statement but then failed to report it in its annual crime report. When asked, the university spokesman said there was not enough evidence that it was motivated by bias.²¹³

Binghamton University is hardly alone. Ithaca College, for example, had three swastika incidents in 2018—two classified by police as aggravated harassment, 1st degree—and one instance of a Jewish student having his *mezuzah* (religious parchment) knocked off his door, but it also reported zero hate crimes for the year. According to an in depth-analysis done by the Forward:

[C]omparing news reports of campus antisemitism between 2016 and 2018 to the filings for those years found that fewer than half of the incidents that could have been reported as hate crimes actually were. Out of a total of 158 incidents at 64 schools, 93—including antisemitic vandalism at brand-name schools known for vibrant Jewish communities like Harvard, Princeton, MIT, UCLA and the University of Maryland—were left out of the federal filings.²¹⁴

2020/09/09/hate-crimes-against-jewish-students-are-at-an-all-time-high/?sh=23eb23bc632f.

²¹¹ 34 C.F.R. § 668.46(c) (2021).

²¹² Aiden Pink, *Colleges Express Outrage About Anti-Semitism—But Fail to Report it as a Crime*, FORWARD (Aug. 17, 2020), <https://forward.com/news/national/452483/college-antisemitic-hate-crimes/>.

²¹³ *Id.*

²¹⁴ *Id.*

At best, this points to a lack of understanding or awareness on the part of university administrators about what antisemitism looks and feels like; multiple schools told the Forward that their lack of swastika reporting was an inadvertent error. At worst, it might point to something more sinister, with schools hiding behind the vagueness of ‘antisemitism’ to purposefully sweep it under the rug and avoid the bad publicity. Regardless, adopting a bright-line definition will solve either or both of those problems. In the above-mentioned incidents, if the schools adopted the IHRA definition, then going forward it should be clear to whomever files the annual reports that a swastika is an antisemitic symbol.

Similarly, state legislation adopting the IHRA definition would also fix a troubling problem in terms of the federal reporting that states are required to do. Under the 1990 Hate Crime Statistics Act²¹⁵ (modified in 2009 by The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act),²¹⁶ the Attorney General, through the FBI, is tasked with tracking and tabulating crimes committed because of the victim’s race, religion, disability, sexual orientation, or ethnicity (i.e., crimes in which there was “manifest evidence of prejudice” against these protected groups) regardless of differences in how state laws define who is protected and regardless of whether or not the incidents in question were actually prosecuted as hate crimes.²¹⁷ The FBI relies on local law enforcement agencies to collect and submit data, but thousands of police agencies opt out of the reporting, and even “among the 15,000 that do, some 88 percent reported they had no hate crimes.”²¹⁸ According to one ProPublica report, “investigators frequently did not mark down incidents as motivated by bias, even if there was evidence suggesting

²¹⁵ 28 U.S.C. § 534.

²¹⁶ Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub L. No. 111-84, §§ 4701-4713, 123 Stat. 2835 (2009) (codified at 18 U.S.C. § 249).

²¹⁷ Ken Schwencke, *Why America Fails at Gathering Hate Crime Statistics*, PROPUBLICA (Dec. 4, 2017, 8:00 AM), <https://www.propublica.org/article/why-america-fails-at-gathering-hate-crime-statistics>.

²¹⁸ “Local law enforcement agencies reported a total of 6,121 hate crimes in 2016 to the FBI, but estimates from the National Crime Victimization Survey, conducted by the federal government, pin the number of potential hate crimes at almost 250,000 a year—one indication of the inadequacy of the FBI’s data. . . . It’s true that many hate crime cases fall away before they start because about half the victims never report them to authorities. But to understand why so many cases that *are* reported to authorities still fall through the cracks, ProPublica requested incident reports or aggregate data from more than 350 law enforcement agencies in 48 states, including the 50 largest agencies nationwide, on the bias-motivated crimes they had investigated since 2010. More than 280 agencies responded, but in many cases only to say they hadn’t investigated any such incidents, or had no records, or that their records were bad.” *Id.*

this was so. A spray-painted swastika, for example, might be classified simply as vandalism and not also as a hate crime.”²¹⁹

In 2019, for the second straight year, the number of law enforcement agencies participating in providing statistics declined, but even with fewer agencies reporting, the number of reported hate crimes actually increased by 113 percent from the previous year.²²⁰ In particular, as it relates to this Article, the year 2019 saw a 14 percent increase in anti-Jewish hate crimes, and all across the country 63 percent of the total reported religion-based crimes were directed against Jewish people and Jewish institutions.²²¹ If states adopted a standard definition of antisemitism—the IHRA definition—simply for the purpose of evaluating motive in potential bias incidents, it would be incredibly helpful in making sure that the statistics about anti-Jewish crime more accurately reflect the reality of lived experiences of Jewish people.

B. Adopting a Definition Would Help States and Schools Educate Their Constituencies About Antisemitism

Second, adopting the definition would have an important educational aspect. In some instances, people may not even realize that they are engaging in or supporting antisemitism when, for example, they express certain anti-Zionist views. Of course, not all criticisms of Israel are antisemitic, but there is a popular false dichotomy: since not *all* anti-Israel rhetoric is necessarily antisemitism, none of it should be included in a definition of antisemitism. “What this argument does is provide a convenient way for modern antisemites to remain in polite society while espousing incredible hate under the thinnest of anti-Zionistic veils. Antisemites should not get to decide the definition of antisemitism.”²²² In this context too, the IHRA definition is important and helpful *because* it includes useful examples of discriminatory anti-Israel statements that cross the line into antisemitism. If critics claim that the adoption of such a definition would shut down criticisms of the State of Israel or its leaders, that is *patently* false. According to the definition itself, not all criticism of Israel is antisemitism, even harsh criticism, but when anti-Zionism crosses certain lines, it *can* be antisemitic. As discussed earlier,

²¹⁹ In most states, local law enforcement agencies are supposed to “send their hate crime data to the state, which is then supposed to submit it to the FBI,” but the report also “found several instances in which this chain broke down.” *Id.*

²²⁰ ADL Calls for Improved Hate Crime Reporting in Response to New FBI Data, ANTI-DEFAMATION LEAGUE (Nov. 16, 2020), <https://www.adl.org/news/press-releases/adl-calls-for-improved-hate-crime-reporting-in-response-to-new-fbi-data>.

²²¹ *Id.*

²²² Goldfeder, *The Danger of Defining Your Own Terms*, *supra* note 197, at 142.

critics of the definition generally focus on the danger of governments using it to stifle free speech.²²³ While those concerns are easily answered—primarily by having policies that focus only on actions and not speech²²⁴—that is a conversation about the contours of protecting hate speech. It is a *far* different argument to pretend that the speech itself is *not* antisemitic, but that is the argument that antisemites often try to exploit.²²⁵

VII. CRITICISM OF ISRAEL AND ANTISEMITISM

Legitimate criticism of Israel is fine under the IHRA definition, and if you are merely criticizing Israel, even harshly and regularly, then the definition should not affect you one iota. By now it should be clear that this entire discussion has *nothing* to do with any attempt to fight against Palestinian rights, or to silence advocates for the Palestinian cause. Here is an easy example to differentiate: Mahmoud Abbas is the President of the Palestinian Authority and arguably the world's leading advocate for Palestinian rights. To agree with his political views is *not* inherently antisemitic. To agree with his public statements at times *denying* the Holocaust and at other points *blaming* the genocide on the Jewish victims' behavior *is* inherently antisemitic.²²⁶ Based on his public apologies, even Mahmoud Abbas would have to agree with that.²²⁷

When is criticism of Israel antisemitic? Sometimes the answer is clear, like when proponents use classic antisemitic tropes to discuss the “collective Jew among the Nations” as a proxy for how antisemites historically would talk about Jewish individuals.²²⁸ These stereotypes

²²³ Elizabeth Redden, *Trump Signs Order on Campus Antisemitism*, INSIDE HIGHER ED (Dec. 12, 2019), <https://www.insidehighered.com/news/2019/12/12/trump-order-antisemitism-campus-draws-free-speech-concerns>.

²²⁴ Goldfeder, *Why We Should Applaud*, *supra* note 137.

²²⁵ Mark Goldfeder, *House Should Censure Anti-Semitic Rep. Rashida Tlaib*, FOX NEWS (Dec. 3, 2020), <https://www.foxnews.com/opinion/rashida-tlaib-anti-semitism-mark-goldfeder>.

²²⁶ Jonathan Freedland, *It's Right to Condemn Mahmoud Abbas for His Antisemitic Remarks*, GUARDIAN (May 2, 2018, 7:14 AM), <https://www.theguardian.com/commentisfree/2018/may/02/condemn-mahmoud-abbas-antisemitic-remarks-holocaust>.

²²⁷ Stephen Farrell, *Palestinian Leader Abbas Offers Apology for Remarks on Jews*, REUTERS (May 4, 2018, 6:30 AM), <https://www.reuters.com/article/us-israel-palestinians-abbas/palestinian-leader-abbas-offers-apology-for-remarks-on-jews-idUSKBN115131>.

²²⁸ Irwin Cotler, *New Anti-Jewishness*, THE JEWISH PEOPLE POL'Y PLANNING INST. 7 (Nov. 2002), <http://jppi.org.il/uploads/Alert%201%20New%20Anti%20Jewishness.pdf>.

include, but are not limited to: “accusations of” Jewish conspiracies;²²⁹ blood libels;²³⁰ portraying Jews (not even actual *Israelis* but caricatures of religious *Jews*) as Satanic, demonic, and evil;²³¹ accusing Jews of dual loyalty;²³² and engaging in Holocaust denial²³³ and Holocaust inversion.²³⁴ When this happens, the symbols and signals used often belie the speaker’s true nefarious intent.²³⁵ Again, no one is saying this speech should be criminalized or contained, just that it should be *labeled* correctly.

Sometimes antisemitism might not be as obvious to a casual observer. That is exactly why there needs to be a definition to assess context and motivation. That is also why antisemites do not like the IHRA definition—because it takes away their freedom to push past the line. In practice, denying history to claim that Jews are not indigenous to Israel,²³⁶ denying (only) the Jewish people their right to self-determination (as consecrated in both *the International Covenant on Civil and Political Rights* and *the International Covenant on Economic, Social and Cultural Rights*),²³⁷ while at the same time calling for the

²²⁹ *What is...Anti-Israel, Anti-Semitic, Anti-Zionist?*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/tools-and-strategies/what-is-anti-israel-anti-semitic-anti-zionist> (last visited Aug. 1, 2020).

²³⁰ *See Blood Libel: A False, Incendiary Claim Against Jews*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/resources/glossary-terms/blood-libel> (last visited Aug. 1, 2020).

²³¹ *See generally* DAN DIKER & JAMIE BERK, JERUSALEM CTR. FOR PUB. AFFS., STUDENTS FOR JUSTICE IN PALESTINE UNMASKED: TERROR LINKS, VIOLENCE, BIGOTRY, AND INTIMIDATION ON US CAMPUSES 54–72 (2018), https://jcpa.org/pdf/SJP_unmasked_2018_web.pdf.

²³² *See id.* at 29.

²³³ ENERSEC USA, *Yasir Qadhi Anti-Semitic Rant*, YOUTUBE (Nov. 19, 2015), <https://www.youtube.com/watch?v=2bSxOmcyl18&feature=youtu.be&t=466>.

²³⁴ *See* DIKER & BERK, *supra* note 231, at 54–75.

²³⁵ Goldfeder, *The Danger of Defining Your Own Terms*, *supra* note 197.

²³⁶ Roberta P. Seid, *Omar Barghout at UCLA: A Speaker Who Brings Hate*, JEWISH J. (Jan. 16, 2014), <https://jewishjournal.com/commentary/opinion/126186/>. In the words of former Minister of Justice and Attorney General of Canada Irwin Cotler, “[i]f ‘Holocaust Revisionism’ is an assault on Jewish memory and historical experience, ‘Middle East Revisionism’ constitutes no less an assault on Jewish memory and historical experience. It cynically serves to invert the historical narrative so that Israel is seen an ‘alien’ and ‘colonial implant’ in the region. . . .” Cotler, *supra* note 62, at 7.

²³⁷ *See* G.A. Res. 2200A (XXI), *International Covenant on Civil and Political Rights* (Mar. 23, 1976), <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; G.A. Res. 2200(a) (XXI), *International Covenant on Economic, Social and Cultural Rights* (Jan. 3, 1976), <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>. “Jews are being singled-out and discriminated against when they alone are denied this right. As Martin Luther King, Jr. put it: ‘this is the denial to the Jews of the same right, the right to self-determination, that we accord to African nations and all other peoples of the globe. In short, it is anti-Semitism.’” Cotler, *supra* note 62.

elimination of the world's only Jewish state,²³⁸ ethnic cleansing of the region,²³⁹ and/or the genocidal extermination²⁴⁰ of the millions of Jewish people who live there,²⁴¹ are all examples of things that are *also* likely to be antisemitic, depending on the circumstances.²⁴² And when 'criticism' of Israel is done in a discriminatory manner (i.e., when Israel is singled out for disparate and disparaging treatment) "not because of what it's done, [but] because of what it is: a Jewish state,"²⁴³ this is antisemitism, and it should not be taken lightly, for two reasons. First, because it is ethically objectionable; and second, because it is dangerous.

This modern form of antisemitism is morally indistinguishable from the historical forms of antisemitism that blamed all manner of evil on 'the Jew.' As Yossi Klein Halevi explains:

What antisemitism does is turn 'the Jew' into the symbol of whatever it is that a given civilization defines as its most loathsome qualities Under Christianity, before the Holocaust and Vatican II, 'the Jew' was the Christ Killer [U]nder communism, 'the Jew' was the capitalist. Under Nazism 'the Jew' was the race-polluter Now we live in the civilization where the most loathsome qualities are racism, colonialism, apartheid—and lo and behold, the greatest offender in the world today, with all of the beautiful countries in the world, is the Jewish state. The Jewish state is the symbol

²³⁸ *BDS: In Their Own Words*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/bds-in-their-own-words> (last visited Oct. 13, 2021). As a matter of reference, there are about fifty-seven Islamic nations and 159 in which Christians form the majority. *Id.* Many of these countries have established state religions, and so the idea of there being a state religion alone cannot in and of itself be the problem. *Id.* The difference, of course, and the problem, is the Jewishness. *Id.*

²³⁹ *Nada Elia*, CANARY MISSION, https://canarymission.org/professor/Nada_Elia (last visited Oct. 13, 2021).

²⁴⁰ Micha Danzig, 'Palestine From the River to the Sea' Has Always Been a Call for Annihilation Not Liberation, JEWISH J. (Dec. 3, 2018), <https://jewishjournal.com/commentary/blogs/242943/palestine-river-sea-always-call-annihilation-not-liberation/>.

²⁴¹ Jackson Richman, 'Day of Rage' Protesters in Boston Chant Anti-Israel, Pro-Hamas Slogans, Call for Intifada, JEWISH J. (July 3, 2020), <https://jewishjournal.com/israel/318428/day-of-rage-protesters-in-boston-chant-anti-israel-pro-hamas-slogans-call-for-intifada/>.

²⁴² Again, context matters. For example, a globalist who believes there should be no states is not antisemitic if they think there should be no Israel.

²⁴³ Adam Levick, *Guardian Letter by Palestinian Artists and Academics: Zionists Are Racists*, CAMERA-UK (Nov. 30, 2020), <https://camera-uk.org/2020/11/30/guardian-letter-by-palestinian-artists-and-academics-zionists-are-racists/>.

of the genocidal, racist, apartheid state The state of the Jews has become ‘the Jew’ of the states.²⁴⁴

An example of this type of treatment is unfortunately often on display at the United Nations. “It is legitimate for the UN to criticize Israel, which should be held accountable like every other country. However, it is not legitimate when UN bodies do so unfairly, selectively,

²⁴⁴ Yossi Klein Halevi, *The Latest Incarnation of Anti-Semitism*, YOUTUBE, 0:23-1:54 (Nov. 15, 2018), https://www.youtube.com/watch?v=qmRZFeyghvY&ab_channel=YossiKleinHalevi. Israel is not colonialist or settler-colonialist because the Jews are indigenous to the land and have maintained a continual presence there. Land prior to the creation of the state was purchased legally and Israel acquired more territory in clearly defensive wars, the vast majority of which it already gave back in the name of peace. See Dore Gold, *The Myth of Israel as a Colonialist Entity: An Instrument of Political Warfare to Delegitimize the Jewish State*, 23 JEWISH POL. STUD. REV. 84, 85 (2011). Israel is also not an apartheid state; there are actual legal definitions of apartheid, primarily G.A. Res. 2068 (XXVIII), *International Convention on the Suppression and Punishment of the Crime of Apartheid*, (July 18, 1976) https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.10_International%20Convention%20on%20the%20Suppression%20and%20Punishment%20of%20the%20Crime%20of%20Apartheid.pdf, which says that

For the purpose of the present Convention, the term ‘the crime of apartheid’, which shall include similar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to the following inhumane acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them

And also, Rome Statute of the International Criminal Court, Art. VII2(h), which states that:

The ‘crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.

In the words of Judge Richard Goldstone, “in Israel, there is no apartheid. Nothing there comes close to the definition of apartheid under the 1998 Rome Statute.” Richard J. Goldstone, *Israel and the Apartheid Slander*, N.Y. TIMES (Oct. 31, 2011), <https://www.nytimes.com/2011/11/01/opinion/israel-and-the-apartheid-slander.html>. Israel has made over thirty attempts at peace, including some that even the leaders of the Arab world hailed as fair. See DENNIS ROSS, *THE MISSING PEACE: THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE 1699* (2005) (quoting Saudi Prince Bandar that “[i]f Arafat does not accept what it available now, it won’t be a tragedy, it will be a crime”). A state cannot be practicing apartheid if they keep on trying to make peace. In addition, the claims of disparity are demonstrably false. While Israel does make distinctions between the rights of citizens and non-citizens (as does every other country) Israeli Arabs have full and equal rights, and are represented in every branch of government. In fact, as of the time of this writing, the Arab-led Joint List is the third largest bloc in the Israeli government.

massively, sometimes exclusively, and always obsessively.”²⁴⁵ In other words, political anti-Israel activity is fine; discriminatory anti-Israel activity that scapegoats the Jewish state the same way that antisemites have always scapegoated the Jewish people, is *not* fine. The problem is that this happens all the time.²⁴⁶ For instance, the UN Human Rights Council was established in 2006 to address human rights issues around the globe. In its first year, 100 percent of its condemnatory resolutions—all nine—targeted Israel.²⁴⁷ Israel remains the only country in the entire world that has a permanent agenda item dedicated to it. From 2006 to 2016, 68 of the 135 UNHRC resolutions—over 50 percent—were targeted at Israel.²⁴⁸ In the UN Commission on Human Rights, half of all the resolutions that censure states are targeted at Israel, and the General Assembly is even worse. From 2012 to 2015, the GA adopted ninety-four resolutions criticizing countries.²⁴⁹ Eighty-three of those, or 86 percent, were targeted at Israel, with eleven for the rest of the globe.²⁵⁰ As of the time of this writing, in the current seventy-fifth session of the UN General Assembly (2020-2021) there have been seventeen resolutions against Israel, and seven about *the rest of the world combined*.²⁵¹

Former Secretary General Ban Ki-moon conceded that there is an anti-Israel bias within the UN that threatens the work the UN is attempting to do. As he explains, “[d]ecades of political maneuvering have created a disproportionate number of resolutions, reports and conferences criticizing Israel.”²⁵² Of course, the most famous example

²⁴⁵ Hillel C. Neuer, *The Struggle Against Anti-Israel Bias at the UN Commission on Human Rights*, JERUSALEM CTR. FOR PUB. AFFS. (Jan. 1, 2006), <https://www.jcpa.org/phas/phas-040-neuer.htm>.

²⁴⁶ See Eugene Kontorovich, *Unsettled: A Global Study of Settlements in Occupied Territories*, 9 J. LEGAL ANALYSIS 285 (2017) (discussing how the *international* community treats *settlement* activity in the disputed territories in Israel differently than any other areas in the world that might be considered “occupied territory.”

²⁴⁷ See *The U.N. and Israel: Key Statistics from UN Watch*, UN WATCH (Aug. 23, 2016), <https://unwatch.org/un-israel-key-statistics>. During this same time, there were: blatant extrajudicial killings in Bangladesh, two million displaced Ugandans—80 percent women and children—due to the Lord’s Resistance Army in northern Uganda, and other such atrocities, but the Human Rights Council’s sole attention during its first year was to condemn Israel.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ For comparison sake, North Korea, Syria, and Iran each have one. See *2020-2021 UNGA Resolutions on Countries*, UN WATCH (Dec. 16, 2020), <https://unwatch.org/2020-2021-un-general-assembly-resolutions-singling-out-israel-texts-votes-analysis/>.

²⁵² Ban Ki-moon, U.N. Secretary-General, Secretary-General’s Briefing to the Security Council on the Situation in the Middle East, Including the Palestinian Question (Dec. 16,

of antisemitic slander at the UN was Resolution 3379 of November 10, 1975, which declared Zionism to be a form of racism and racial discrimination.²⁵³ Before the vote, the U.S. Ambassador to the United Nations, Daniel Patrick Moynihan, warned that, “[t]he United Nations is about to make anti-Semitism international law. . . . The United States does not acknowledge, it will not abide by, it will never acquiesce in this infamous act . . . A great evil has been loosed upon the world.²⁵⁴ That resolution, which former Secretary General Kofi Annan described as a “low point” in UN history, was finally repealed on December 16, 1991.²⁵⁵ Still, in 2015, Ban Ki-moon noted that the resolution was based on “hatred and ignorance,” and admitted that “[t]he reputation of the United Nations was badly damaged by the adoption of resolution 3379, in and beyond Israel and the wider Jewish community.”²⁵⁶

This type of discrimination does not only happen at the international macro level; it also occurs when individual students and/or student groups are singled out and discriminated against because of their stated or assumed support of ‘Zionism.’ And so, it is worth explaining why discrimination against ‘Zionists’ is problematic—with the twin caveats that not all antisemitic anti-Zionism is illegal (for

2016), <https://www.un.org/sg/en/content/sg/statement/2016-12-16/secretary-generals-briefing-security-council-situation-middle-east>.

²⁵³ On the day it was passed, Israeli Ambassador Chaim Herzog addressed the General Assembly and pointed out the absurdity of the claim noting that:

You dare talk of racism when I can point with pride to the Arab ministers who have served in my government; to the Arab deputy speaker of my Parliament; to Arab officers and men serving of their own volition in our border and police defense forces, frequently commanding Jewish troops; to the hundreds of thousands of Arabs from all over the Middle East crowding the cities of Israel every year; to the thousands of Arabs from all over the Middle East coming for medical treatment to Israel; to the peaceful coexistence which has developed; to the fact that Arabic is an official language in Israel on a par with Hebrew; to the fact that it is as natural for an Arab to serve in public office in Israel as it is incongruous to think of a Jew serving in any public office in an Arab country, indeed being admitted to many of them. Is that racism? It is not! That . . . is Zionism.

Chaim Herzog, Response to ‘Zionism is Racism’ (Nov. 10, 1975), in *GREAT SPEECHES OF THE TWENTIETH CENTURY* 163 (Bob Blaisdell ed., 2011).

²⁵⁴ Daniel Patrick Moynihan, Response to United Nations Resolution 3379 (Nov. 10, 1975), in *Online Speech Bank*, AMERICAN RHETORIC, <https://www.americanrhetoric.com/speeches/danielpatrickmoynihanun3379.htm>.

²⁵⁵ *Israel at the UN: A History of Bias and Progress – September 2012*, ANTI-DEFAMATION LEAGUE (2013), <https://www.adl.org/sites/default/files/documents/israel-international/un-international-organizations/c/Israel-at-the-UN-1.pdf>.

²⁵⁶ Press Release, U.N. Secretary-General, Secretary-General Commemorates Anniversary of Chaim Herzog’s Speech Condemning General Assembly Resolution Equating Zionism with Racism, U.N. Press Release SG/SM/17319 (Nov. 11, 2015), <https://www.un.org/press/en/2015/sgsm17319.doc.htm>.

example, when it involves free speech) and not all anti-Zionism is *inherently* antisemitic (for instance, political anti-Zionism). But anti-Zionism that allows for discrimination against Jewish people and/or their allies because of their affiliation with, affinity for, or support of the biblical/prophetic/historical/ethnic/cultural/Jewish ideal of Zionism is antisemitism.²⁵⁷ Antisemites should not get to narrowly define what *they* think Zionism does or should mean to Jewish people, claim that it is racist, project that onto Jews, and then discriminate against them for allegedly holding that super-imposed bogeyman belief. Zionism is the movement for the re-establishment and now, development and protection, of a Jewish nation in its ancestral homeland.²⁵⁸ Discriminating against a Jewish person or group just because they are Zionist is illegal because Zionism is demonstrably *not* just a political movement. “For the vast majority of Jewish people across time and space, Zionism is and always has been an integral part of their Jewish, often their religious, identities.”²⁵⁹ For thousands of years, Jews across the world have prayed to God at least three times a day (and often more)²⁶⁰ for a safe return to Zion. The Bible itself references this ancient

²⁵⁷ The difference between political anti-Zionism and antisemitism is sometimes reflected legally in the difference between primary boycotts and secondary or tertiary boycotts.

A primary boycott is usually defined as a boycott in which the boycotter is acting against the entity that it has a grievance with (for example, retail clerks picketing their employer over wages or working conditions). A secondary boycott is one in which the party boycotting an entity has a goal of affecting a third party, rather than the boycotted entity. A tertiary boycott is one in which the goal is to affect a fourth party, who supports the third party supporting the boycotted entity. BDS Movement activists [for the most part] are engaging in something of a hybrid of a secondary-tertiary boycott. Their issue appears to be with the State of Israel, but they are not just engaging in a boycott of the government of Israel. The bulk of the individual companies, academics, institutions, and others who are targeted by BDS are not representing the government of Israel, and the bulk of the boycott activity is directed against them (a secondary boycott) and the people that support them (a tertiary boycott). Secondary—tertiary boycotts have very little protection under the First Amendment. The BDS supporters are not trying to protect their own constitutional rights; they are trying to use commerce to inflict harm on a foreign nation (and to discriminate against Americans who are of Jewish descent or who support Israel).

Goldfeder, *Stop Defending Discrimination*, *supra* note 42, at 223–24.

²⁵⁸ *Frequently Asked Questions About Israel: What is Zionism?*, ISRAEL MINISTRY FOREIGN AFFS. (Nov. 1, 2001), <https://mfa.gov.il/MFA/MFA-Archive/2001/Pages/Frequently%20Asked%20Questions%20About%20Israel.aspx#zionism>.

²⁵⁹ Goldfeder, *The Danger of Defining You Own Terms*, *supra* note 197.

²⁶⁰ Briana Simon, *Zion in the Sources: Yearning for Zion*, WORLD ZIONIST ORG., <https://www.wzo.org.il/index.php?dir=site&page=articles&op=item&cs=3318&langpage=heb> (last visited Aug. 4, 2020).

Jewish hope,²⁶¹ while the Prophets and Writings of the Hebrew Bible repeatedly record this aspiration.²⁶² From a Jewish law perspective, over half of the Biblical commandments that religious Jewish people are bound to obey are specifically tied to the Jewish homeland.²⁶³ From a doctrinal point of view, belief in and hope for the return to Zion is literally part of the Thirteen Principles of Jewish Faith.²⁶⁴

While it is not inherently antisemitic to be against political Zionism,²⁶⁵ the reason that the IHRA definition includes “[d]enying the Jewish people their right to self-determination”²⁶⁶ is precisely because it recognizes that for *many*, if not *most* Jewish people, Zionism is a fundamental *Jewish* belief, and discriminating against someone for their religious belief (or ethnoreligious identity) is wrong. “Denying the Jewish people the right to self-determination and a national homeland is antisemitic because it denies the *religious* and historic ties of Jews to the land of Israel.”²⁶⁷ As Alyza Lewin eloquently put it:

Zionism is as integral to Judaism as observing the Jewish Sabbath or maintaining a kosher diet. Not all Jews observe Shabbat or kashrut, but those who do, do so as an expression of their Jewish identity. Similarly, not all Jews are Zionists. But for many Jews identifying with and expressing support for the Jewish homeland is also an expression of their Jewish religious and ethnic identity. Harassing, marginalizing, demonizing and excluding these Jews on the basis of the Zionist part of their identity is just as unlawful and discriminatory as attacking a person for observing Shabbat or keeping kosher. It’s comparable to demanding that a Catholic student disavow the Vatican or that a Muslim student shed his/her connection to Mecca. Excluding an individual in this

²⁶¹ See, e.g., *Deuteronomy* 30:1-5.

²⁶² See, e.g., *Isaiah* 11:11-12; *Jeremiah* 29:14; 20:41-42; *Psalms* 126; *Psalms* 137.

²⁶³ *About Us*, TORAH VEHA’ARETZ INST., <https://en.toraland.org.il/about/> (last visited Oct. 13, 2021).

²⁶⁴ *Maimonides’ Introduction to Perek Helek*, MAIMONIDES HERITAGE CTR. 14, <https://www.mhcny.org/qt/1005.pdf>. (explaining the 12th Fundamental Principle).

²⁶⁵ As many are aware, there are even fringe religious Jewish groups that call themselves anti-Zionists, like the Neturei Karta group. Although it is worth noting that while they are against modern political Zionism, they *also* believe in the Jewish right to a homeland in the Land of Israel, and pray for that to happen every day. They just believe that the time of redemption must come first.

²⁶⁶ *Defining Antisemitism*, *supra* note 48.

²⁶⁷ FED. ASS’N DEP’T’S FOR RSCH. & INFO. ON ANTISEMITISM E.V., EUR. COMM’N, HANDBOOK FOR THE PRACTICAL USE OF THE IHRA WORKING DEFINITION OF ANTISEMITISM, DS-03-21-002-EN-N 14 (Jan. 7, 2021), <https://op.europa.eu/en/publication-detail/-/publication/d3006107-519b-11eb-b59f-01aa75ed71a1/language-en> (emphasis added).

manner on the basis of his/her identity is discrimination. . . .
[I]t demands that Jews shed a key component of their identity as Jews—namely, the historic Jewish yearning and determination to return to Zion.²⁶⁸

It is also clear that anti-Zionist discrimination functions as anti-Jewish discrimination from an objective legal perspective, under a disparate impact analysis. That measure ignores motivation and looks rather at the discriminatory effect of a given action or policy.²⁶⁹ A recent Gallup poll found that 95 percent of American Jews support Israel²⁷⁰—which is the definition of Zionism that tends to get Jewish students and Jewish groups excluded around the country²⁷¹—even if they may disapprove of some or all Israeli policies. The research also shows that religion plays an important part in those beliefs,²⁷² but even if that part was not clear,²⁷³ if in practice a policy has the effect of excluding or demonizing 95 percent of a group based on their shared ethnic beliefs,²⁷⁴ “then it should be obvious that you are discriminating against that group and their beliefs.”²⁷⁵

Some prominent examples of discriminatory anti-Zionism from the last few years include: the 2018 petition that fifty-three student groups

²⁶⁸ Alyza Lewin, *Fighting Back Against Jew-hatred on Campus*, JEWISH STAR (July 9, 2020), <https://www.thejewishstar.com/stories/fighting-back-against-jew-hatred-on-campus,19410>.

²⁶⁹ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

²⁷⁰ Frank Newport, *American Jews, Politics and Israel*, GALLUP (Aug. 27, 2019), <https://news.gallup.com/opinion/polling-matters/265898/american-jews-politics-israel.aspx>.

²⁷¹ Marcy Oster, *USC Student Gov't Head Quit Because She Was Harassed for Being Pro-Israel*, JERUSALEM POST (Aug. 7, 2020), <https://www.jpost.com/diaspora/antisemitism/usc-student-govt-head-quit-because-she-was-harassed-for-being-pro-israel-637802>.

²⁷² Frank Newport, *Religion Plays Large Role in Americans' Support for Israelis*, GALLUP (Aug. 1, 2014), <https://news.gallup.com/poll/174266/religion-plays-large-role-americans-support-israelis.aspx>.

²⁷³ And even accounting for some of the modern pushback on disparate impact theory generally. See, e.g., Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 254 (2011).

²⁷⁴ The most common measure of adverse impact—and the measure used by the Uniform Guidelines on Employee Selection Procedures—is the Four-Fifths Rule, or 80 Percent Rule. See Nathan Mondragon, *What is Adverse Impact? And Why Measuring It Matters*, HIREVUE (Mar. 25, 2018), <https://www.hirevue.com/blog/hiring/what-is-adverse-impact-and-why-measuring-it-matters>. The Four-Fifths Rule was “codified in the 1978 Uniform Guidelines on Employee Selection Procedures, a document used by the U.S. Equal Employment Opportunity Commission (“EEOC”), Department of Labor, and Department of Justice in Title VII enforcement.” DAN BIDDLE, *ADVERSE IMPACT AND TEST VALIDATION: A PRACTITIONER’S GUIDE TO VALID AND DEFENSIBLE EMPLOYMENT TESTING* 2–5 (2d ed. 2006).

²⁷⁵ Goldfeder, *The Danger of Defining Your Own Terms*, *supra* note 197, at 44.

at NYU signed, pledging to boycott “not only Israeli goods or initiatives,” but also their fellow students who were members of Zionist groups;²⁷⁶ a student guide distributed by progressive groups at Vassar encouraging students to “slap a Zionist;”²⁷⁷ a student government official at USC who was forced to resign amid a torrent of harassment that she was ‘racist’ for being Zionist;²⁷⁸ a San Francisco State University Professor starting a campaign to declare that ‘Zionists’ are not welcome on campus²⁷⁹; and a Johns Hopkins teaching assistant tweeting about wanting to secretly deduct points from students who are Zionists.²⁸⁰ Study after study has shown that this kind of discriminatory rhetoric eventually leads to action.²⁸¹ Sadly, these studies have been confirmed each time allegedly non-antisemitic “anti-Israel”²⁸² activism breaks through the

²⁷⁶ Daniel Brooks, *NYT to Jews on Campus: Stop Whining, You Deserve the Hate*, TIMES ISRAEL: BLOGS (Jan. 26, 2021, 9:07 PM), <https://blogs.timesofisrael.com/nyt-to-jews-on-campus-stop-whining-you-deserve-the-hate/>; Adela Cojab Moadeb, *Student Who Sued NYU for Anti-Semitism: Trump Has ‘Empowered’ Jews on Campus*, N.Y. POST (Dec. 14, 2019), <https://nypost.com/2019/12/14/student-who-sued-nyu-for-anti-semitism-trump-has-empowered-jews-on-campus/>.

²⁷⁷ Nina Schutzman, *Vassar College Students Face Penalties for Making, Sharing Guide Deemed Antisemitic*, POUGHKEEPSIE J., (Sept. 5, 2018), <https://www.poughkeepsiejournal.com/story/news/education/2018/09/05/vassar-college-students-face-penalties-antisemitic-guide/1195842002/>.

²⁷⁸ Rose Ritch, *I Was Harassed and Persecuted on Campus Just for Being a Zionist*, NEWSWEEK (Aug. 10, 2020), <https://www.newsweek.com/i-was-harassed-persecuted-campus-just-being-zionist-opinion-1523873>.

²⁷⁹ Aaron Bandler, *SF Professor Under Fire for Saying That Zionists Aren’t Welcome on Campus*, JEWISH J. (Mar. 26, 2018), <https://jewishjournal.com/news/united-states/232343/sf-professor-fire-saying-zionists-wouldnt-allowed-campus/>.

²⁸⁰ See Letter to Ronald J. Daniels, President, Johns Hopkins Univ., and Dr. David Yarkony, Chair and D. Mead Johnson Professor of Chemistry, Johns Hopkins Univ. (Dec. 3, 2020), <https://www.standwithus.com/post/letter-to-johns-hopkins-university-regarding-antisemitic-posts-from-graduate-researcher-and-ta>; Cnaan Lipshiz, *Johns Hopkins University TA Suggests Penalizing Pro-Israel Students*, JERUSALEM POST (Jan. 9, 2021), <https://www.jpost.com/diaspora/antisemitism/johns-hopkins-ta-suggests-penalizing-pro-israel-students-654780>.

²⁸¹ See, e.g., Morton A. Klein, *ZOA Center for Law and Justice Director Susan Tuchman’s Testimony on Anti-Semitism Before the U.S. Commission on Civil Rights*, ZIONIST ORG. AM. (Nov. 18, 2005), <https://zoa.org/2005/11/102058-zoa-center-for-law-and-justice-director-susan-tuchmans-testimony-on-anti-semitism-before-the-u-s-commission-on-civil-rights/>:

According to the Center for the Prevention of Hate Violence at the University of Southern Maine, in virtually every one of the investigations of serious violence or threats in high schools or colleges conducted by the Maine Attorney General’s Office over the past eight years, the same pattern exists: the act of violence was not the beginning but rather the end of a stream of escalating harassment which at some point began with the use of degrading language.

²⁸² Jeremy Bauer-Wolf, *After Threat of Violence, Calls to Fire RA*, INSIDE HIGHER ED (Aug. 1, 2018), <https://www.insidehighered.com/news/2018/08/01/calls-stanford-ra-be-fired-after-he-threatens-fight-zionists>.

“nonviolent” veil,²⁸³ leading to people getting hurt.²⁸⁴ Or when the student groups that start by demanding Jews leave campus²⁸⁵ end up threatening outright violence should they dare refuse to go.²⁸⁶

²⁸³ Rachel Frommer, *British Jewish Leaders Outraged by London University Anti-Israel Protest Which Required Police Intervention*, ALGEMEINER (Oct. 28, 2016), <https://www.algemeiner.com/2016/10/28/british-jewish-leaders-outraged-by-london-university-anti-israel-protest-which-required-police-intervention/>.

²⁸⁴ DIKER & BERK, *supra* note 231, at 28-33.

²⁸⁵ SJP UIUC, *Smashing Fascism: Radical Resistance Against White Supremacy*, FACEBOOK (Sept. 1, 2017), <https://www.facebook.com/SJP.UIUC/photos/a.631907060208926.1073741828.568877179845248/1443649489034675/?type=3>.

²⁸⁶ William A. Jacobson, *Anti-Israel Rally at U. Illinois: “No Zionists, No KKK, Resisting Fascists All the Way,”* LEGAL INSURRECTION (Sept. 6, 2017, 7:00 PM), <https://legalinsurrection.com/2017/09/anti-israel-rally-at-u-illinois-no-zionists-no-kkk-resisting-fascists-all-the-way>. This is not entirely surprising because while many ‘anti-Israel’ activists probably believe the easily refutable “hyperbolic calumnies” that they are fed and think that they are doing something noble, the leaders of the movement often do know better, and they prey upon innocent college-age kids to fill their heads with lies and indoctrinate them in hate. See Paul Miller, *From UCLA to NYU, BDS Supporters Struggle with Dialogue*, OBSERVER (Feb. 27, 2014) <https://observer.com/2014/02/from-ucla-to-nyu-bds-supporters-struggle-with-dialogue/>. Many of their followers probably do not know that several prominent anti-Israel organizations and academics are closely affiliated with violent radical antisemitic groups and convicted murderous terrorists. See Eitan Fischberger, *Anti-Academia at San Francisco State University*, JEWISH J. (Jan. 13, 2021), <https://jewishjournal.com/commentary/327404/anti-academia-at-san-francisco-state-university/>. For example, on the left, a recent study found that anti-Israel pro-Boycott Divestment and Sanctions (“BDS”) activity is the strongest predictor of anti-Jewish hostility on campus. See AMCHA INITIATIVE, REPORT ON ANTISEMITIC ACTIVITY IN 2015 AT U.S. COLLEGES AND UNIVERSITIES WITH THE LARGEST JEWISH UNDERGRADUATE POPULATIONS 1, 11–12 <http://www.amchainitiative.org/wp-content/uploads/2016/03/Antisemitic-Activity-at-U.S.-Colleges-and-Universities-with-Jewish-Populations-2015-Full-Report.pdf>. Meanwhile, in 2016 Congress heard testimony from former U.S. Department of the Treasury terrorism finance analyst Jonathan Schanzer linking the BDS movement to radical terror groups whose mission is the destruction of Israel. See *Israel Imperiled: Threats to the Jewish State: Hearing Before H. Foreign Affairs Comm. Subcomm. On Terrorism, Nonproliferation, and Trade and the Subcomm. On the Middle E. and N. Afr.*, 114th Cong. (2016) (statement of Jonathan Schanzer), <https://docs.house.gov/meetings/FA/FA18/20160419/104817/HHRG-114-FA18-Wstate-SchanzerJ-20160419.pdf>. Since that time, his testimony has been confirmed and greatly expanded upon, with new reports finding that the nonprofit umbrella group for U.S.-based BDS organizations funnels money to terrorist organizations that try to carry out the more sinister BDS aims; see Armin Rosen & Liel Leibovitz, *BDS Umbrella Group Linked to Palestinian Terrorist Organizations*, TABLET (June 1, 2018), <https://www.tabletmag.com/sections/news/articles/bds-umbrella-group-linked-to-palestinian-terrorist-organizations>). See also William A. Jacobson, *UC-Berkeley Anti-Israel Activists Rip Up Photo of Rasmea Odeh’s Terror Victims*, LEGAL INSURRECTION (Feb. 16, 2020, 9:00 PM), <https://legalinsurrection.com/2020/02/uc-berkeley-anti-israel-activists-rip-up-photo-of-rasmea-odehs-terror-victims/#more>. More than thirty of the BDS movement’s leaders are actual violent terrorists; see STATE OF ISRAEL: MINISTRY OF STRATEGIC AFFAIRS AND PUBLIC DIPLOMACY, TERRORISTS IN SUITS: THE TIES BETWEEN NGOS PROMOTING BDS AND TERRORIST ORGANIZATIONS, (2019), https://www.gov.il/BlobFolder/generalpage/terrorists_in_suits/en/De-Legitimization%20Brochure.pdf; Emily Jones, *Terrorists in Suits: Senior Leaders of Anti-Israel BDS Groups Tied to Palestinian Terror*,

Sometimes, instead of flyers and pronouncements, the discriminatory anti-Zionism takes the even quieter form of conditional invitations to opportunities, with entry to Jewish participants contingent on them disavowing an aspect of their Jewish identity. Over the last several years, Jewish individuals and groups have routinely been told they are not welcome at conferences,²⁸⁷ coalitions,²⁸⁸ campuses,²⁸⁹ concerts,²⁹⁰ demonstrations,²⁹¹ and even discussions²⁹²— unless, of course, they agree to denounce Zionism first.²⁹³ Jews on campus have been denied letters of recommendation²⁹⁴ and entry into events,²⁹⁵ had their leadership credentials²⁹⁶ and their loyalties

CBN NEWS (Feb. 4, 2019), <https://www1.cbn.com/cbnnews/israel/2019/february/report-senior-leaders-of-anti-israel-bds-organizations-are-terrorists-in-suits>. On the far right, former grand wizard of the Klu Klux Klan David Duke has been trying to popularize use of the word Zio (short for Zionist) as a stand in for the word Jew, to be able to criticize Jewish people without being immediately called antisemitic. See generally DAVIDDUKE.COM: ZIO-WATCH NEWS ROUND-UP, <http://davidduke.com/category/zio-watch/> (last visited Aug. 30, 2020); *Understanding Antisemitism: An Offering to Our Movement*, JEWS FOR RACIAL & ECON. JUST., <https://www.jfrej.org/assets/uploads/JFREJ-Understanding-Antisemitism-November-2017-v1-3-2.pdf> (last visited Aug. 30, 2020).

²⁸⁷ Anthony Berteaux, *In the Safe Spaces on Campus, No Jews Allowed*, TOWER (Feb. 2016), <http://www.thetower.org/article/in-the-safe-spaces-on-campus-no-jews-allowed/>.

²⁸⁸ Geremia Di Maro, *Minority Rights Coalition to Reconsider Membership for Jewish Leadership Council*, CAVALIER DAILY (Mar. 3, 2018), <https://www.cavalierdaily.com/article/2018/03/minority-rights-coalition-to-reconsider-membership-for-jewish-leadership-council>.

²⁸⁹ Bandler, *supra* note 279.

²⁹⁰ Rabbi Yonah Bookstein, *Matisyahu Played, but BDS Racism is Winning*, JEWISH J. (Aug. 24, 2015), <https://jewishjournal.com/israel/176973/matisyahu-played-but-bds-racism-is-winning/>.

²⁹¹ Ariel Behar, *Sarsour Group Says 'No Zionists' at Civil Rights Rally*, ALGEMEINER (June 24, 2020), <https://www.algemeiner.com/2020/06/24/sarsour-group-says-no-zionists-at-civil-rights-rally/>.

²⁹² *A Strategy of Rejection: The Anti-Normalization Campaign*, ANTI-DEFAMATION LEAGUE (May 25, 2012), <https://www.adl.org/news/article/a-strategy-of-rejection-the-anti-normalization-campaign>.

²⁹³ Deborah Lipstadt, *It's Time to Walk Away from the Women's March*, HADASSAH MAG. (Jan. 2019), <https://www.hadassahmagazine.org/2019/01/03/time-walk-away-womens-march/>.

²⁹⁴ Jackson Richman, *Michigan Jewish Student Denied Recommendation by Professor, Citing BDS as Reason*, JEWISH NEWS SYNDICATE (Sept. 18, 2018), <https://www.jns.org/jewish-student-denied-recommendation-by-university-of-michigan-professor-citing-bds-as-reason/>.

²⁹⁵ Dave Schechter, *Hillels of Georgia Seeks Anti-Semitism Probe of Georgia Tech*, ATLANTA JEWISH TIMES (Jan 12, 2020), <https://atlantajewishtimes.timesofisrael.com/hillels-of-georgia-seeks-anti-semitism-probe-of-georgia-tech/>.

²⁹⁶ Aaron Bandler, *USC Student VP Resigns, Says She Was Bullied for Being a Zionist*, JEWISH J. (Aug. 6, 2020), <https://jewishjournal.com/featured/319981/usc-student-vp-resigns-says-she-was-bullied-for-being-a-zionist/>.

questioned,²⁹⁷ been called pejorative names (e.g., murderers, pigs, apartheid enablers, baby killers),²⁹⁸ labeled as white supremacists,²⁹⁹ and scapegoated for everything from racism³⁰⁰ to the coronavirus³⁰¹ to police brutality.³⁰² In general, Jewish people are routinely excluded from progressive movements³⁰³ public marches,³⁰⁴ and liberal coalitions,³⁰⁵ “all because of their stated or assumed support for Zionism.”³⁰⁶

Of course, it is true that some Jews are themselves anti-Zionistic. One problem (as Blake Flayton, a self-described progressive Zionist student at George Washington University, described it) is that all too often, progressive “groups protect themselves against accusations of antisemitism by trotting out their anti-Zionist Jewish supporters, despite that such Jews are a tiny fringe of the Jewish community. Such tokenism is seen as unacceptable—and rightfully so—in any other space

²⁹⁷ Barry Kosmin, *UCLA Student Is Latest Victim of Antisemitism on Campus*, CNN (Mar. 10, 2015), <https://www.cnn.com/2015/03/10/opinions/kosmin-anti-semitism-campus/index.html>.

²⁹⁸ Zina Rakhamilova, #NOHATEONCAMPUS, JERUSALEM POST (Nov. 3, 2018), <https://www.jpost.com/Opinion/NOHATEONCAMPUS-570999>; Blake Flayton, *On the Frontlines of Progressive Anti-Semitism*, N.Y. TIMES (Nov. 14, 2019), <https://www.nytimes.com/2019/11/14/opinion/college-israel-anti-semitism.html>.

²⁹⁹ Nada Elia, *Birds of a Feather: White Supremacy and Zionism*, MIDDLE EAST EYE (Aug. 24, 2017), <https://www.middleeasteye.net/opinion/birds-feather-white-supremacy-and-zionism>.

³⁰⁰ Farah Stockman, *Women’s March Roiled by Accusations of Anti-Semitism*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/23/us/womens-march-anti-semitism.html>.

³⁰¹ Brenda Katten, *Even During the Coronavirus Pandemic, Jews Are Ever the Scapegoat*, JERUSALEM POST (May 14, 2020), <https://www.jpost.com/opinion/even-during-the-coronavirus-pandemic-jews-are-ever-the-scapegoat-627982>.

³⁰² Ricki Hollander, *Black Lives Matter, JVP’s Deadly Exchange, and Israel*, CAMERA (July 2, 2020), <https://www.camera.org/article/black-lives-matter-jvps-deadly-exchange-and-israel/>.

³⁰³ Berteaux, *supra* note 287.

³⁰⁴ Bari Weiss, *I’m Glad the Dyke March Banned Jewish Stars*, N.Y. TIMES (June 27, 2017), <https://www.nytimes.com/2017/06/27/opinion/im-glad-the-dyke-march-banned-jewish-stars.html>; William A. Jacobson, *Jewish Voice for Peace-Chicago Sides with “Dyke March” Anti-Semites*, LEGAL INSURRECTION (June 26, 2017, 8:40 PM), <https://legalinsurrection.com/2017/06/jewish-voice-for-peace-chicago-sides-with-dyke-march-anti-semite/>.

³⁰⁵ Geremia Di Maro, *Minority Rights Coalition to Reconsider Membership for Jewish Leadership Council*, CAVALIER DAILY (Mar. 3, 2018), <https://www.cavalierdaily.com/article/2018/03/minority-rights-coalition-to-reconsider-membership-for-jewish-leadership-council>.

³⁰⁶ Goldfeder, *The Danger of Defining Your Own Terms*, *supra* note 197, at 1431.

where a marginalized community feels threatened.”³⁰⁷ This classic trope, in the vein of “some of my best friends are ___,” is a logically invalid claim of innocence by association,³⁰⁸ and is so lazily dismissive that “it has become shorthand for weak denials of bigotry—a punch line about the absence of thoughtfulness and rigor in our conversations about racism.”³⁰⁹

Jews, like any other group, are not homogenous and so, as Professor Andrew Pessin has noted, it is dire that the question of anti-Semitism be framed correctly:

For if Jews come in many types . . . it is perfectly conceivable that someone legitimately characterizable as an antisemite might not hate all or even most Jews. The crucial question should not be whether he hates all or most Jews, in other words. It is whether the people he hates, *he hates for their Jewishness*.³¹⁰

Or for some aspect of their Jewishness, including their actual or supposed Zionism.³¹¹

Unfortunately, as the dozens of examples above make clear, it is too often true that, as Martin Luther King, Jr. once said: “[w]hen people criticize Zionists, they mean Jews. You’re talking anti-Semitism!”³¹² To claim that Zionism and Judaism are completely separate phenomena is to be ignorant. Or, as Dennis Prager would say, is like pretending that “Italy has nothing to do with being Italian.”³¹³

³⁰⁷ Blake Flayton, Opinion, *On the Frontlines of Progressive Anti-Semitism*, N.Y. TIMES (Nov. 14, 2019), <https://www.nytimes.com/2019/11/14/opinion/college-israel-anti-semitism.html>.

³⁰⁸ See Matthew P. Winslow, *Reactions to the Imputation of Prejudice*, 26 BASIC & APPLIED SOC. PSYCH. 289, 289–97 (2004) (Experiment 2). As one expert explained, “it is like saying there is no such thing as sexism because we all have a close friend or family member who is a woman.” ELIZABETH ANNE MCGIBBON & JOSEPHINE B. ETOWA, ANTI-RACIST HEALTH CARE PRACTICE 159 (2009)).

³⁰⁹ See John Eligon, *The ‘Some of My Best Friends Are Black’ Defense*, N.Y. TIMES (Feb. 16, 2019), <https://www.nytimes.com/2019/02/16/sunday-review/ralph-northam-blackface-friends.html>.

³¹⁰ Andrew Pessin, *The Indelible Stain of Antisemitism: The Failed Practice of ‘Jew-Washing’*, TIMES OF ISRAEL: THE BLOGS (June 24, 2017, 11:04 PM), <https://blogs.timesofisrael.com/the-indelible-stain-of-antisemitism-the-failed-practice-of-jew-washing/>.

³¹¹ See Newport, *supra* note 270 above for a discussion of the research, which found that 95 percent of American Jews support Israel—which, is the definition of Zionism that tends to get Jewish students and Jewish groups excluded on campuses around the country—and that their Judaism plays an important part in that belief.

³¹² MARTIN KRAMER, THE WAR ON ERROR: ISRAEL, ISLAM, & THE MIDDLE EAST 260 (2016).

³¹³ Dennis Prager, *Criticizing Israel Is Fine, but Anti-Zionism Is Anti-Semitic*, N.Y. POST (Aug. 20, 2019), <https://nypost.com/2019/08/20/criticizing-israel-is-fine-but-anti-zionism-is-anti-semitic/>; see also Forest Rain Marcia, *Anti-Zionism Is The New*

It is also worth remembering that to be anti-Zionist today is to be against the survival of the world's only Jewish state. As Alan Johnson noted: "[a]nti-Zionism has come to mean something entirely different . . . *after* the creation of the State of Israel in 1948: it has come to mean a programme of comprehensive hostility to all but a sliver of world Jewry, a programme for the eradication of actually existing Jewish self-determination."³¹⁴ To imagine that the state would go away "without wholesale killing of Jews"³¹⁵ is ridiculous. That means to be anti-Zionist, in the sense of wanting to destroy the Jewish State,³¹⁶ is to be okay with the mass slaughter of the Jews who live there.³¹⁷

The examples in the IHRA definition are there for a reason. State officials and school administrators themselves might need more training in what is and is not acceptable, which is why an objective and consensus driven standard is necessary.³¹⁸ Too often perpetrators and enablers let the conflation of criticism of Israel and antisemitism serve as a shield for antisemites. Without a clear definition and the contextual

Antisemitism, ISRAEL FOREVER FOUND., https://israelforever.org/interact/blog/anti_zionism_is_the_new_antisemitism/ (last visited Oct. 19, 2021).

³¹⁴ Alan Johnson, *The Left and the Jews: Time for a Rethink*, FATHOM J., <http://fathomjournal.org/the-left-and-the-jews-time-for-a-rethink/> (last visited Aug. 22, 2021).

³¹⁵ Aaron Kliegman, *Anti-Zionism Is, by Definition, Antisemitism*, WASH. FREE BEACON (Jan. 17, 2019, 3:40 PM), <https://freebeacon.com/blog/anti-zionism-is-by-definition-anti-semitism/>.

³¹⁶ As in the oft-used Hamas jihadist rallying cry, 'from the river to the sea,' that is sadly all too often echoed by commentators, see, e.g., Micha Danzig, *'Palestine From the River to the Sea' Has Always Been a Call for Annihilation Not Liberation*, JEWISH J. (Dec. 3, 2018), <https://jewishjournal.com/commentary/blogs/242943/palestine-river-sea-always-call-annihilation-not-liberation/>, and politicians, see, e.g., Dr. Mark Goldfeder, *Dr. Mark Goldfeder: House Should Censure Anti-Semitic Rep. Rashida Tlaib*, FOX NEWS (Dec. 3, 2020), <https://www.foxnews.com/opinion/rashida-tlaib-anti-semitism-mark-goldfeder>, who then feign ignorance, and by students on campus, see Aaron Bandler, *SJP Protesters Chant 'From the River to the Sea Palestine Will Be Free' During Hen Mazzig Speech*, JEWISH J. (Nov. 15, 2019), <https://jewishjournal.com/news/united-states/307197/sjp-protesters-chant-from-the-river-to-the-sea-during-hen-mazzigs-speech-at-vassar-college/>; Morton A. Klein & Susan B. Tuchman, *ZOA Letter to CUNY Leaders About Anti-Semitic, Violence-Inducing Rallies There*, ZIONIST ORG. AM. (Feb. 22, 2016), <https://zoa.org/2016/02/10315402-letter-to-cuny-chancellor-and-board-of-trustees-jew-haters-spread-fear-at-cuny-colleges/>, who don't.

³¹⁷ Kliegman, *supra* note 315.

³¹⁸ And students need protection from 'intellectuals' who have no qualms about spreading horrific lies made out of whole cloth in quasi-academic settings. See Liora Rez, *We Must Define Antisemitism to Stop Antisemitism*, JERUSALEM POST (Dec. 5, 2020, 9:47 PM), <https://www.jpost.com/opinion/we-must-define-antisemitism-to-stop-antisemitism-651256>. It is a shame that impressionable students are taken advantage of by people they trust co-opting the language of social justice to lead them down a dark path of hate. The IHRA definition is a tool that can shed some light to hopefully help bring many of them back.

understanding of how anti-Zionist language is often used to perpetuate antisemitic tropes, this issue will not be resolved, and students will continue to harass and be harassed by their peers, and potentially professors, on the basis of Jewish identification. Because this is the hardest part of the definition for many people to understand, it is worth providing a case study to illustrate the principle.

VIII. A CASE STUDY IN THE NECESSITY OF CLEARLY DEFINING TERMS

There is a real danger in allowing people to confuse conduct with speech, and antisemitism with criticism of Israel. The double conflation allows antisemites to do whatever they want to Jewish people, and then immediately claim that they, in fact, are the victims having their “political speech” silenced.

A. *What Happened “Over There”*

A recent German court case provides an illustrative example of what can happen when authorities allow antisemitic crime to hide behind the veil of criticism for Israel—the blurring of what it means to be anti-Israel and anti-Jew.³¹⁹ On July 29, 2014, three German-Palestinian men filled six bottles with petrol and attempted to firebomb a synagogue in Wuppertal, Germany.³²⁰ It is noteworthy that Nazis burned the original synagogue during the infamous Kristallnacht pogroms in 1938.³²¹ It was finally rebuilt in 2002.³²²

Several months later, in 2015, the district court in Wuppertal ruled that this attack was not antisemitic, but merely anti-Israel political speech, and exempted the criminals from jail time.³²³ On January 13, 2017, a German superior court upheld the lower court’s ruling, affirming that German synagogues are legitimate targets of protest against Israel.³²⁴ Per the official ruling, despite the fact that the defendants admittedly tried to burn down a synagogue, “[t]he attack on

³¹⁹ Jim Yardley, *Europe’s Anti-Semitism Comes Out of the Shadows*, N.Y. TIMES (Sept. 23, 2014), <https://www.nytimes.com/2014/09/24/world/europe/europes-anti-semitism-comes-out-of-shadows.html>.

³²⁰ Benjamin Weinthal, *German Court Calls Synagogue Torching an Act to ‘Criticize Israel,’* JERUSALEM POST (Jan. 13, 2017), <https://www.jpost.com/diaspora/german-court-calls-synagogue-torching-an-act-to-criticize-israel-478330>.

³²¹ Yardley, *supra* note 319.

³²² *Id.*

³²³ Benjamin Weinthal, *German Judge: Torching of Synagogue Not Motivated by Anti-Semitism*, JERUSALEM POST (Feb. 7, 2015, 8:20 PM), <https://www.jpost.com/diaspora/german-judge-torching-of-synagogue-not-motivated-by-anti-semitism-390294>.

³²⁴ Joseph Bottum, *A German Court Rationalizes an Attack on a Synagogue*, WASH. EXAMINER (Jan. 26, 2017, 3:34 PM), <https://www.washingtonexaminer.com/weekly-standard/a-german-court-rationalizes-an-attack-on-a-synagogue>.

the Wuppertal synagogue cannot be defined as anti-Semitic, there is simply no proof for an anti-Semitic motivation.”³²⁵ As the Jewish community leader made clear in an interview with the German magazine *Spiegel*, “[t]his was not an Israeli embassy, but a house of God, used by Jewish German citizens, not Israelis, to practice their faith. If one were to make up a textbook definition of anti-Zionism becoming anti-Semitic, this would be it.”³²⁶

This case illustrates why the Israel-related examples included in the IHRA definition, such as “[h]olding Jews collectively responsible for actions of the state of Israel”³²⁷ are so critically necessary. In the words of essayist Joseph Bottum:

To see the logic at play, suppose that three white men had attacked a traditionally black church in Birmingham, Alabama, scrawling graffiti and trying to set the church on fire Yes, the judge explained, they had been unlawfully violent and thus deserved to be convicted. But he suspended their sentences because their purpose in attacking the African-American church had not been to harm Americans but to protest the failure of the Nigerian government to halt the kidnapping of schoolgirls by the radical African militia Boko Haram. Or suppose something similar, but this time in Manila. After a court in the Philippines convicted several citizens of defacing a local mosque, the judge suspended their sentences—on the grounds that, however illegally they had behaved, they were engaged in legitimate political protest over the oppression of Christian guest workers by the Islamic government in Saudi Arabia. And then suppose that three men in Germany were arrested for throwing a Molotov cocktail at a synagogue. After their conviction, however, their sentences were suspended—again on the grounds that their admittedly illegal violence was motivated by a desire not to hurt German Jews but by a legitimate wish to protest the policies and actions of the foreign state of Israel Only the last of these three events is true, of course. But more to the point, only the last is even imaginable. Black citizens of the United States are never taken as symbolic representatives of African governments. For that matter, imagine the outcry if a judge condoned violence

³²⁵ Benjamin Nägele, *Judge Rules Wuppertal Synagogue Firebombing Was Not Anti-Semitic, So What Happened?*, B'NAI B'RITH INT'L (Jan. 17, 2017), <https://www.bnai-brith.org/expert-analysis/judge-rules-wuppertal-synagogue-firebombing-was-not-anti-semitic-so-what-happened>.

³²⁶ *Id.*

³²⁷ *Working Definition of Antisemitism*, *supra* note 37.

against the places of worship of native citizens who happened to be Muslim—because a distant government was doing something objectionable.³²⁸

The German Muslims who attacked the Wuppertal synagogue in 2014 took Germany's Jews as representatives of Israel, and in 2017 the German courts agreed, simply as a matter of law.

Think about that for a moment.

Once non-Israeli Jews have been legally recognized as (target-worthy) symbols of Israel, not even a ray of daylight can slip between opposition to Israel and opposition to Jews.

The unbelievable ruling in that case led to scrutiny in Germany and international criticism. As Deidre Berger, the director of the Berlin Ramer Institute for German-Jewish Relations of the American Jewish Committee explained, "[t]he lack of a unified definition has led to anti-Semitic incidents being all too often ignored in recent years. . . . The fact, for example, that the courts considered an arson attack on a synagogue in Wuppertal as non-anti-Semitic illustrates the necessity of a definition."³²⁹ The German government commissioned an independent expert group to make a report with recommendations,³³⁰ and the following year the government followed one of those recommendations³³¹ by endorsing the same global standard definition of antisemitism that this Article supports: the IHRA definition, which would, of course, have labeled those horrific acts as antisemitic.³³²

B. *Could That Happen Here?*

Of course, it could.

As far back as 2002 the presidents of more than 300 American colleges signed a statement which read, in relevant part:

We are concerned that recent examples of classroom and on-campus debate have crossed the line into intimidation and hatred, neither of which have any place on university campuses. *In the past few months, students who are Jewish or*

³²⁸ Bottum, *supra* note 324.

³²⁹ Jefferson Chase, *German Government Adopts International Anti-Semitism Definition*, DEUTSCHE WELLE (Sept. 20, 2017), <https://www.dw.com/en/german-government-adopts-international-anti-semitism-definition/a-40608166>.

³³⁰ See *Germany Endorses Working Definition of Antisemitism*, INT'L HOLOCAUST REMEMBRANCE ALLIANCE (Sept. 20, 2017), <https://holocaustremembrance.com/stories/germany-endorses-working-definition-antisemitism> (referencing that the adoption of the IHRA definition was the result of recommendations made by an independent group of experts).

³³¹ *Id.*

³³² *Id.*

*supporters of Israel's right to exist—Zionists—have received death threats and threats of violence. Property connected to Jewish organizations has been defaced or destroyed. Posters and websites displaying libelous information or images have been widely circulated, creating an atmosphere of intimidation. These practices and others, directed against any person, group or cause, will not be tolerated on campuses. All instances will be investigated and acted upon so that the campus will remain devoted to ideas based on rational consideration.*³³³

In 2005, a hearing before the U.S. Commission on Civil Rights regarding antisemitic incidents on college campuses found that antisemitism and anti-Israelism are systemic ideologies found in varying degrees in colleges and universities throughout the United States. Death threats, threats of violence against Jewish students or students who are supporters of Israel, and banners and posters containing antisemitic rhetoric and images are among the manifestations of these ideologies, which create an environment of intimidation and harassment in contrast to the norms and values of the university.³³⁴ The Commission heard stories of swastikas being painted on Hillel buildings and signs with the Star of David dripping blood; of campus newspaper cartoons with pictures of Jews in ovens; stories of “harassment, physical intimidation, physical assault and vandalism” perpetrated against Jewish students³³⁵—often tied to anti-*Israel* rationales. Panelists explained how Jewish students were afraid to wear anything that could identify them as Jewish for fear of being targeted, and how it was “difficult for them to concentrate on their academic responsibilities because their thoughts are so focused on their discomfort or even on their fear for their physical safety on campus.”³³⁶ Twelve years later, in 2017, the Congressional Committee on the Judiciary was still hearing stories about violent attacks on campus: about shouts of “Death to Jews” made on campus in the context and

³³³ The American Jewish Committee, *College Presidents Decry Intimidation on Campuses*, SCHOLARS FOR PEACE IN THE MIDDLE EAST (Oct. 15, 2002), <https://spme.org/campus-news-climate/college-presidents-decry-intimidation-on-campuses/639/> (emphasis added).

³³⁴ Morton A. Klein, *ZOA Center for Law and Justice Director Susan Tuchman's Testimony on Anti-Semitism Before the U.S. Commission on Civil Rights*, ZIONIST ORG. OF AM. (Nov. 18, 2005), <https://zoa.org/2005/11/102058-zoa-center-for-law-and-justice-director-susan-tuchmans-testimony-on-antisemitism-before-the-u-s-commission-on-civil-rights/>.

³³⁵ *Id.*

³³⁶ *Id.*

under the guise of anti-Zionism; and about how Jewish students “felt scared to be a Jew on campus.”³³⁷

Again, we must reiterate that not every instance of antisemitism deserves disciplinary action; free speech *must* be protected. But that does not mean that antisemitism should not be correctly labeled. In a 2019 viral social media video of students at George Washington University (“GW”), one student asks the other, “What are we going to do to Israel?”³³⁸ The woman responds, “Bro, we’re going to fucking bomb Israel, bro. Fuck out of here, Jewish pieces of shit.”³³⁹ GW did not feel that the incident involved a credible threat,³⁴⁰ and the GW President used his own speech to condemn the video as hateful antisemitism.³⁴¹ Although student leaders on campus were adamant that this episode was “emblematic of a larger issue of anti-Semitism at the University”³⁴² and that they “feel unsafe,”³⁴³ GW handled this situation correctly. While GW took no disciplinary action, the GW President did call out the language as problematic from a university values standpoint.

A slightly harder case arose at Stanford in 2018, when an incoming resident assistant-to-be threatened to “physically fight” Zionists on campus and “abolish [their] ass.”³⁴⁴ This was not just any student, this was someone “entrusted by the University with authority over, and responsibility for, incoming freshmen.”³⁴⁵ And this was also not just any immature comment; this was an actual threat of physical violence

³³⁷ *Examining Anti-Semitism on College Campuses: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. 45 (2017) (statement of Sandra Hagee Parker, Chairwoman, Christians United for Israel Action), <https://www.govinfo.gov/content/pkg/CHRG-115hhrg32325/html/CHRG-115hhrg32325.htm>.

³³⁸ Marina Pitofsky, *George Washington University Leaders, Students Condemn Anti-Semitic Snapchat Video*, HILL (Nov. 9, 2019, 11:06 PM), <https://thehill.com/blogs/blog-briefing-room/news/469768-george-washington-university-leaders-students-condemn-anti>.

³³⁹ Dani Grace et al., *Officials Condemn, Work to Respond to Anti-Semitic Snapchat Video*, GW HATCHET (Nov. 6, 2019, 2:12 PM), <https://www.gwhatchet.com/2019/11/06/officials-condemn-work-to-respond-to-abhorrent-snapchat-video/>.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² Shannon Mallard & Zach Schonfeld, *Student Leaders Host Forums, Extend Support in Wake of Anti-Semitic Post*, GW HATCHET (Nov. 11, 2019, 1:38 AM), <https://www.gwhatchet.com/2019/11/11/student-leaders-host-forums-extend-support-in-wake-of-anti-semitic-post/>.

³⁴³ Grace, *supra* note 339.

³⁴⁴ Jeremy Bauer-Wolf, *After Threat of Violence, Calls to Fire RA*, INSIDE HIGHER ED (Aug. 1, 2018), <https://www.insidehighered.com/news/2018/08/01/calls-stanford-ra-be-fired-after-he-threatens-fight-zionists>.

³⁴⁵ Ben Simon, *The Mob That Never Was: A Defense of Justified Outrage*, STAN. REV. (Aug. 17, 2018), <https://stanfordreview.org/the-mob-that-never-was-a-defense-of-justified-outrage/>.

against other students. To his credit, even in the student's original retraction, he did not pretend that he had not really threatened people. Rather, he admitted to merely reconsidering his strategy. "I edited this post because I realize intellectually beating Zionists is the way to go Physical fighting is never an answer to [sic] when trying to prove people wrong."³⁴⁶

Like GW, Stanford assessed no credible threat, and that may have been the right decision. But the Jewish community was still bewildered why this incident was turned into yet another *political* referendum, with progressive students at Stanford rushing to the would-be RA's defense and "either praising his 'immense moral and intellectual stature' or assailing his critics' 'bullying tactics.'"³⁴⁷ Even with a no-credible-threat determination, why would anyone *defend* this clearly wrong behavior? To better understand their confusion, try the thought experiment proposed by Rabbi Dov Greenberg, the executive director of the Rohr Chabad House at Stanford:

Replace the word "Zionist" with "LGBT" or "supporters of #BlackLivesMatter" in Daoud's post. Almost certainly, the outcry would be universal and deafening. Yet, for some reason, when it comes to threatening physical violence against fellow students who support Israel, the response is indifference or, worse still, support. Somehow, the target of hate becomes the villain and the aggressor becomes the victim. How has this come to pass?³⁴⁸

The answer is simple. It has come to pass because people pretend that they cannot distinguish between criticism of the State of Israel and threats of violence or discrimination against other students on an American university campus. Whether or not a threat is deemed credible, *no* threat should be excused or defended as just "political speech," because when a credible threat does inevitably happen, that excuse will be used as well.

These are just snapshots of the Jewish American college experience, and these incidents must be understood contextually as part of the greater Jewish American experience contending with a rising tide of antisemitism, masquerading as criticism of the State of Israel. Over the last several years, multiple reports and studies have documented

³⁴⁶ Bauer-Wolf, *supra* note 344 (alteration in original).

³⁴⁷ Simon, *supra* note 345.

³⁴⁸ Dov Greenberg, *Stanford Student Threatens Violence Against Pro-Israel Students*, NAT'L REV. (July 31, 2018, 6:30 AM), <https://www.nationalreview.com/2018/07/universities-must-oppose-immoral-dangerous-bds-movement/>.

incidents of criminals attacking Jewish people (often students)³⁴⁹ and businesses,³⁵⁰ and then hiding behind the claim of merely being anti-Israel. “[T]here are thousands³⁵¹ of readily available,³⁵² easily accessible,³⁵³ examples”³⁵⁴ of activists on and off university campuses “crossing the line into straight antisemitism” in ways that, at first glance, do not reflect the pretext of criticism for Israel.³⁵⁵ Categorically, these include people: calling for death to Jews³⁵⁶ (not Israelis, but *Jews*);³⁵⁷ bemoaning that Hitler’s plan did not succeed;³⁵⁸ spreading lies that depict Jewish religious beliefs as hateful;³⁵⁹ denying the history³⁶⁰ or the ancestry of the Jewish people;³⁶¹ banning or expelling individuals for

³⁴⁹ See, e.g., Letter from Jay Alan Sekulow, Chief Counsel, Am. Ctr. for Law & Justice, to James B. Milliken, Chancellor, The City University of New York (May 4, 2016), http://media.aclj.org/pdf/16.05.04-CUNY-Letter_Redacted.pdf.

³⁵⁰ See, e.g., Tom Tugend, *LA Jews Reeling After Local Institutions Looted and Burned in Floyd Protests*, TIMES OF ISRAEL (June 3, 2020, 2:01 A.M.), <https://www.timesofisrael.com/la-jews-take-stock-after-george-floyd-protests-batter-local-institutions/>.

³⁵¹ See DIKER & BERK, *supra* note 231, at 28-33.

³⁵² See generally *Because the World Should Know*, CANARY MISSION, <https://canarymission.org/> (last visited Sept. 21, 2021).

³⁵³ See generally “Behind the Mask” – Unmasking Antisemitism Behind the BDS Campaign, MINISTRY OF STRATEGIC AFFS. (Sept. 15, 2019), <https://4il.org.il/1396/>.

³⁵⁴ See generally AMCHA INITIATIVE, <https://amchainitiative.org/search-by-incident#incident/display-by-date/> (last visited Sept. 21, 2021) (containing a database that allows one to search and filter data on incidents of antisemitic activity that occurred on U.S. college and university campuses from 2015 to present day).

³⁵⁵ Goldfeder, *The Danger of Defining Your Own Terms*, *supra* note 197.

³⁵⁶ Josh Nathan-Kazis, *Megadonor Who Withdrew From AIPAC Conference Has History of Controversial Tweets*, FORWARD (Mar. 19, 2019), <https://forward.com/fast-forward/421149/adam-milstein-aipac-twitter-omar-tlaib-muslim/>.

³⁵⁷ Sam Sokol, *South Africa BDS Leader Defends Call to ‘Kill the Jew,’* JERUSALEM POST (Sept. 2, 2013, 7:45 PM), <https://www.jpost.com/jewish-world/jewish-features/south-africa-bds-leaders-defends-call-to-kill-the-jew-325075>.

³⁵⁸ See Daniel Greenfield, “I Would Have Killed All the Jews in the World”: *SJP’s Holocaust Hate*, FRONTPAGE MAG. ARCHIVE (Feb. 5, 2018), <https://archives.frontpagemag.com/fpm/i-would-have-killed-all-jews-world-sjps-holocaust-daniel-greenfield/>.

³⁵⁹ See generally Frank Barat, *An Interview with Roger Water*, COUNTERPUNCH (Dec. 6, 2013), <https://www.counterpunch.org/2013/12/06/an-interview-with-pink-floyds-roger-waters/>; C.R. Rublin, *Incitement Against Jews By U.S.-Based Neo-Nazi and White Supremacist Members of Pro-Palestinian and BDS Facebook Groups*, SPME (May 29, 2019), <https://spme.org/antisemitism/incitement-against-jews-by-u-s-based-neo-nazi-and-white-supremacist-members-of-pro-palestinian-and-bds-facebook-groups/25536/>; *Watch and Share Our PACBI Live Broadcast with Roger Waters*, BDS (July 26, 2017), <https://bdsmovement.net/news/watch-and-share-our-pacbi-live-broadcast-roger-waters>.

³⁶⁰ See *Israel to Allocate \$50m to Explore Foundations of Alleged Temple*, MIDDLE EAST MONITOR (Dec. 19, 2017, 12:38 AM), <https://www.middleeastmonitor.com/20171219-israel-to-allocate-50m-to-explore-foundations-of-alleged-temple/>.

³⁶¹ See, e.g., ENERSEC USA, *Yasir Qadhi Anti-Semitic Rant*, YOUTUBE (Nov. 19, 2015), <https://www.youtube.com/watch?v=2bSxOmcyl18&feature>.

being Jewish (again, not Israeli, but Jewish);³⁶² promoting the actual medieval Passover religious blood libel³⁶³ (or any of its modern counterparts³⁶⁴); and harassing³⁶⁵ and physically attacking³⁶⁶ Jewish students³⁶⁷ and Jewish businesses.³⁶⁸ Yet in all of the above instances, the perpetrators denied they were antisemitic, and claimed they were only anti-Israel.

Could it happen here? Of course it could.

³⁶² *Matisyahu: Spanish Festival Ban is 'Appalling, Offensive,'* TIMES OF ISRAEL (Aug. 17, 2015, 11:10 PM), <https://www.timesofisrael.com/matisyahu-spanish-festival-ban-is-appalling-offensive/>; Yair Rosenberg, *Israel Boycott Activists Call for Jews to Be Expelled from South African University*, TABLET (Feb. 12, 2015), <https://www.tabletmag.com/sections/news/articles/israel-boycott-activists-call-for-jews-to-be-expelled-from-south-african-university>.

³⁶³ *Miftah Attacks Me, Refuses to Condemn Its Blood Libel*, ELDER OF ZIYON (Mar. 30, 2013), <http://elderofziyon.blogspot.com/2013/03/miftah-attacks-me-refuses-to-condemn.html>; *Jewish Kabbalistic Occult Ritual Child Murder Throughout History*, BITCHUTE (Oct. 5, 2019), <https://www.bitchute.com/video/987FZhimkQpV/>.

³⁶⁴ See Yair Rosenberg, *'Israelis Toast Syrian Slaughter': The Making of a Modern Blood Libel, Just in Time for Passover*, TABLET MAG. (Apr. 14, 2017), <https://www.tabletmag.com/sections/news/articles/israelis-toast-syrian-slaughter-the-making-of-a-modern-blood-libel-just-in-time-for-passover>.

³⁶⁵ See, e.g., William A. Jacobson, *Anti-Israel Student Group Suspended at Northeastern for Vandalism, Intimidation, Disruption*, LEGAL INSURRECTION (Mar. 13, 2014, 10:00 AM), <https://legalinsurrection.com/2014/03/anti-israel-student-group-suspended-at-northeastern-for-vandalism-intimidation-disruption/>; William A. Jacobson, *Dorm Storming at NYU Targets Jewish Students*, LEGAL INSURRECTION (Apr. 24, 2014, 1:32 PM), <https://legalinsurrection.com/2014/04/dorm-storming-at-nyu-targets-jewish-students/>.

³⁶⁶ See, e.g., Edwin Black, *Temple University—Latest Anti-Semitic Hotspot Protested Amid Record Donation Drive*, HUFFINGTON POST (Oct. 25, 2014), https://www.huffpost.com/entry/temple-university-latest_b_5707919; Frances Dinkelspiel, *Jewish Student Sues UC Berkeley Over Assault by Palestine Supporter*, BERKELEYSIDE (Mar. 7, 2011, 12:19 PM), <https://www.berkeleyside.com/2011/03/07/jewish-student-sues-uc-berkeley-over-assault-by-palestine-supporter>.

³⁶⁷ Tori Cheifetz, *Jewish Students 'Held Hostage' in Toronto Hillel*, JERUSALEM POST (Feb. 15, 2009, 10:40 PM), <https://www.jpost.com/jewish-world/jewish-news/jewish-students-held-hostage-in-toronto-hillel>.

³⁶⁸ See, e.g., *SA: 21 arrested at violent BDS protest in South Africa*, CHRISTIANS UNITED FOR ISRAEL (Mar. 26, 2015), <https://www.cufi.org.uk/news/sa-21-arrested-at-violent-bds-protest-in-south-africa>.

Over the last several months, there have been not one,³⁶⁹ not two,³⁷⁰ not three,³⁷¹ not four,³⁷² but five³⁷³ instances of Chabad Jewish community centers being set on fire across the United States. To date, the police have made no arrests, but it does not in any way strain the imagination to think that violent acts of antisemitism committed in this country—acts like setting Jewish community centers on fire—could be painted by the perpetrators (or those who wished to excuse them) as being somehow “only” politically motivated (i.e., anti-Israel and not anti-Jewish) despite the fact that none of the Chabad centers are or were affiliated with the State of Israel. To bring the matter closer to home, on January 13, 2021, security officers in Montreal caught a man desecrating a synagogue with swastikas. They also recovered a gasoline canister and lighter from his person and charged him with possessing incendiary and explosive materials with the intention of committing a criminal act. The perpetrator was an anti-Israel activist who had apparently been radicalized over time by propaganda.³⁷⁴

That is why a definition of antisemitism must refute the false idea that just because not *all* anti-Israel activity is inherently antisemitic, *none* of it should be considered antisemitic. Otherwise, antisemitic sentiment will continue to grow unchecked behind a socially acceptable excuse, until eventually something snaps, and it escalates to acts of outright violence and discrimination. Criticizing Israel is fine but hiding behind that criticism to be antisemitic is not.

³⁶⁹ Josh Shannon, *Investigator: Fire at UD's Chabad Center for Jewish Life was Intentionally Set*, NEWARK POST (Aug. 26, 2020), https://www.newarkpostonline.com/news/investigator-fire-at-ud-s-chabad-center-for-jewish-life-was-intentionally-set/article_f3802a5a-a865-5233-8de0-2a4f331d9c37.html.

³⁷⁰ Brandon Holveck, *Attempted Arson at Brandywine Hundred Chabad Center Investigated 2 months After Newark Chabad Center Fire*, DEL. ONLINE (Nov. 1, 2020, 9:45 AM), <https://www.delawareonline.com/story/news/local/2020/11/01/state-fire-marshall-investigating-attempted-arson-brandywine-hundred-chabad-center/6112507002/>.

³⁷¹ *Investigators: Second Arson At A Delaware Chabad Center For Jewish Life*, FIRST STATES UPDATE (Nov. 1, 2020), <http://firststateupdate.com/2020/11/investigators-second-arson-at-a-delaware-chabad-center-for-jewish-life/>.

³⁷² Fox 12 Staff, *Reward Increased in Arson Investigation at Chabad Center for Jewish Life in SW Portland*, FOX 12 OR. (Oct. 2, 2020), https://www.kptv.com/news/reward-increased-in-arson-investigation-at-chabad-center-for-jewish-life-in-sw-portland/article_7b72d848-0513-11eb-a0a6-8f7feb829485.html.

³⁷³ Marcy Oster, *Chabad Jewish Center in Portland Damaged in Second Fire in 5 Days*, TIMES OF ISRAEL (Aug. 20, 2020, 9:30 AM), <https://www.timesofisrael.com/chabad-jewish-center-in-portland-damaged-in-second-fire-in-5-days/>.

³⁷⁴ See David Lazarus, *Man Arrested After Swastikas Spray-Painted on Doors of Montreal Synagogue*, JEWISH TELEGRAPHIC AGENCY (Jan. 14, 2021), <https://www.jta.org/quick-reads/man-arrested-after-swastikas-spray-painted-on-doors-of-montreal-synagogue>.

To be fair, sometimes the excuse is so flimsy that it simply cannot, and does not, work. For instance, some of the examples of antisemitism described above were so outrageous³⁷⁵ that when caught,³⁷⁶ the perpetrators themselves had no choice but to apologize³⁷⁷ for crossing the line from anti-Israel criticism into anti-Zionistic antisemitism.³⁷⁸ But other times, like in Wuppertal, the excuse seems absurd, yet somehow passes muster. Regardless, antisemites trying to justify their actions should not get to decide the definitions of either Zionism or antisemitism.

And the problems are only getting worse, the excuses thinner, and the real objective clearer. As this Article was going to print, there was an outbreak of violence in the Middle East between Hamas, a U.S. and E.U. designated terror organization, and Israel, a key U.S. ally. Suddenly, in countries around the world,³⁷⁹ antisemitic attacks shot up over 400 percent.³⁸⁰ In cities across North America,³⁸¹ including Los Angeles³⁸² and New York,³⁸³ hundreds of synagogues, Jewish community centers, kosher restaurants, Jewish-owned businesses, and individual Jewish

³⁷⁵ See Marc Lamont Hill, Opinion, *I'm Sorry My Word Choices Caused Harm*, PHILA. INQUIRER (Dec. 1, 2018, 12:05 PM), <https://www.inquirer.com/philly/opinion/commentary/marc-lamont-hill-temple-university-cnn-palestine-israel-united-nations-20181201.html>.

³⁷⁶ See Marcy Oster, *Palestinian Nonprofit Belatedly Apologizes for Blood Libel Article*, JEWISH TELEGRAPHIC AGENCY (Apr. 2, 2013, 2:08 PM), <https://www.jta.org/2013/04/02/israel/palestinian-nonprofit-belatedly-apologizes-for-blood-libel-article>.

³⁷⁷ See Kate Sullivan, Eli Watkinds, & Manu Raju, *Omar: 'I Unequivocally Apologize' After Backlash Over New Israel Tweets*, CNN (Feb. 12, 2019, 6:25 AM), <https://www.cnn.com/2019/02/11/politics/ilhan-omar-aipac-backlash/index.html>.

³⁷⁸ Rob Gloster, *Lecturer Apologizes for Retweet that UC Berkeley Condemned as Anti-Semitic*, JEWISH NEWS OF N. CAL. (Nov. 21, 2017), <https://www.jweekly.com/2017/11/21/lecturer-apologizes-retweet-uc-berkeley-condemned-anti-semitic/>.

³⁷⁹ See generally *Antisemitic Incidents at Anti-Israel Events and Actions Around the World*, ADL (June 1, 2021), <https://www.adl.org/resources/fact-sheets/antisemitic-incidents-at-anti-israel-events-and-actions-around-the-world>.

³⁸⁰ Jemima McEvoy, *Synagogue Attacks and Slurs: Jewish Community Rocked by Rise in Anti-Semitism Amid Israel-Gaza Fighting*, FORBES (May 20, 2021, 2:30 PM), <https://www.forbes.com/sites/jemimamcevoy/2021/05/20/synagogue-attacks-and-slurs-jewish-community-rocked-by-rise-in-anti-semitism-amid-israel-gaza-fighting/?sh=6f89394e2262>.

³⁸¹ See Dov Hikind (@HikindDov), TWITTER (May 20, 2021, 8:03 AM), <https://twitter.com/hikinddov/status/1395349533899595779?s=21>.

³⁸² Ruth Graham, *Los Angeles Mayor Calls Attack on Diners 'Anti-Semitic'*, N.Y. TIMES (May 20, 2021), <https://www.nytimes.com/2021/05/20/us/jewish-hate-crime-los-angeles.html>.

³⁸³ See generally Joseph Borgen, *Brutally Beaten By Group Of Suspects in Manhattan's Diamond District, Speaks Out: 'My Whole Face Felt Like It Was on Fire for Hours'*, CBS N.Y. (May 24, 2021, 10:15 AM), <https://newyork.cbslocal.com/2021/05/24/jewish-man-brutally-beaten-in-manhattans-diamond-district/>.

people³⁸⁴ have been targeted and attacked, beaten³⁸⁵ and bullied, cursed, and demonized because they are Jewish. In every instance, the thin veneer of “anti-Zionism” was shattered by the open expressions of enraged anti-Semitism, including the use of such classics as “kill the Jews,” “rape their daughters,”³⁸⁶ and the swastika; not to mention the pummeling³⁸⁷ of innocent (non-Israeli, but clearly religious³⁸⁸) Jewish people. On social media platforms, the hate has been even more transparent. In just one week, the phrase “Hitler was right,” or some version of it, was tweeted over 17,000 times.³⁸⁹ On college campuses, in between dodging protests outside of Hillel buildings,³⁹⁰ ignoring death threats from fellow students,³⁹¹ and removing Nazi symbols,³⁹² Jewish students have been subjected to campaigns³⁹³ supported by faculty³⁹⁴ and student groups³⁹⁵ alike that call Israel a colonialist settler state,

³⁸⁴ See Ben Sales, *Jews Attacked, One Person Burned Amid Pro-Palestinian Protests in New York City*, TIMES OF ISRAEL (May 21, 2021), <https://www.timesofisrael.com/jews-attacked-one-person-burned-amid-pro-palestinian-protests-in-new-york-city/>.

³⁸⁵ See Reuven Fenton & Amanda Woods, *Jewish Man Beaten During Wild NYC Protests Afraid to Wear Yarmulke*, N.Y. POST (May 21, 2021, 5:23 PM), <https://nypost.com/2021/05/21/jewish-man-beaten-during-wild-midtown-protests-afraid-to-wear-yarmulke/>.

³⁸⁶ Laura Sharman, *‘The Worst it has Been in 30 Years’: London Jews Suffer Horrific Rise in Anti-Semitic Attacks*, EVENING STANDARD (May 21, 2021), <https://www.standard.co.uk/news/london/rabbi-antisemitism-rise-london-jewish-community-cst-b936325.html>.

³⁸⁷ See, e.g., Chaim Deutsch (@ChaimDeutsch), TWITTER (May 20, 2021, 10:41 PM), <https://twitter.com/ChaimDeutsch/status/1395570403440009220>.

³⁸⁸ See Andrew Lapin, *Pro-Palestinian Demonstrators Assault Jews in Los Angeles*, TIMES OF ISRAEL (May 19, 2021, 10:59 PM), <https://www.timesofisrael.com/pro-palestinian-demonstrators-assault-jews-in-los-angeles/>.

³⁸⁹ *Preliminary ADL Data Reveals Uptick in Antisemitic Incidents Linked to Recent Mideast Violence*, ADL (May 20, 2021), <https://www.adl.org/news/press-releases/ant-semitic-incident-linked-to-recent-mideast-violence>.

³⁹⁰ Tabby Refael, *Thank You, Progressive Jews, for Defending Israel in Difficult Spaces*, JEWISH J. (May 21, 2021), <https://jewishjournal.com/commentary/columnist/336899/thank-you-progressive-jews-for-defending-israel-in-difficult-spaces/>.

³⁹¹ See RHUL JSOC (@rhuljscoc), INSTAGRAM (May 14, 2021), https://www.instagram.com/p/CO3mFXcgZyq/?utm_source=ig_embed&ig_rid=d0ab6404-3aba-4391-b502-fa2585e8437d.

³⁹² See Jennifer Hassan, *During Israel-Hamas Conflict, British Jews Come Under Physical and Verbal Attack*, WASH. POST (May 21, 2021), <https://www.washingtonpost.com/world/2021/05/21/israel-gaza-jewish-attacks-rise>.

³⁹³ See *Princeton University Community Statement of Solidarity with the Palestinian People*, DAILY PRINCETONIAN (May 18, 2021, 8:40 PM), <https://www.dailyprincetonian.com/article/2021/05/princeton-university-community-statement-of-solidarity-palestine-israel>.

³⁹⁴ *Gender Studies Departments in Solidarity with Palestinian Feminist Collective*, PALESTINIAN FEMINIST COLLECTIVE, <http://genderstudiespalestinesolidarity.weebly.com> (last visited Sept. 21, 2021).

³⁹⁵ See, e.g., George Weykamp, *CSG Response to Events in Israel and Palestine Draws Mixed Reactions from U-M Community*, MICH. DAILY (May 13, 2021),

negating the history of their people, denying the deep Jewish connection to the Jewish State, and dismissing the lives of their coreligionists as unimportant, if they are even worth mentioning at all.

Of course, none of this is surprising—during the last war in Gaza, there was a predictable 400 percent increase³⁹⁶ in antisemitic incidents. But for those still pretending that anti-Zionism is unrelated to antisemitism or fighting against the adoption of the IHRA definition on those grounds, May and June of 2021 should have been clarifying—and embarrassing.³⁹⁷ Regardless of your politics and beliefs, ask yourself this question: If anti-Zionism is not related to antisemitism, why are all of these people suddenly attacking Jews around the world, collectively and at random?

There is no clearer demonstration than recent events as to why we need the IHRA, and why the IHRA definition includes examples of problematic anti-Zionism, such as “[h]olding Jews collectively responsible for actions of the state of Israel.”³⁹⁸

IX. CONCLUSION

Until now, the absence of a legal definition of antisemitism has been an Achilles’ heel for those who expect the government and/or university systems to take a stronger stand against antisemitism. So long as the meaning of antisemitism has been left murky and inconsistent, it has been easy for officials to shrug their shoulders, or even to look the other way, while failing to enforce existing laws and regulations about bigotry and discrimination.

Valid monitoring, informed analysis and investigation, and effective policy-making all require uniform definitions. While there can be no exhaustive definition of antisemitism—as it can take many forms—the IHRA definition has been an essential definitional tool used to educate people about what antisemitism is, how Jewish people experience it, and how to detect its contemporary manifestations. The government has a responsibility to protect its citizens, and universities have a responsibility to protect students and faculty from acts of hate and bigotry motivated by discriminatory animus—including

<https://www.michigandaily.com/student-government/csg-response-to-the-israel-palestine-conflict-draws-mixed-reactions-from-u-m-community/>.

³⁹⁶ Itamar Eicher, *Report: 400% Rise in Anti-Semitic Incidents During Gaza War*, YNET NEWS (Jan. 25, 2015, 12:53 PM), <https://www.ynetnews.com/articles/0,7340,L-4618843,00.html>.

³⁹⁷ Mark Goldfeder, *Anti-Semitism’s True Nature Reveals Itself*, N.Y. DAILY NEWS (May 25, 2021, 7:30 AM), <https://www.nydailynews.com/opinion/ny-oped-anti-semitisms-true-nature-reveals-itself-20210525-yw3dypevcbdejibzlbwkpt56tm-story.html>.

³⁹⁸ *Working Definition of Antisemitism*, *supra* note 37.

antisemitism—and they must be given the tools to do so. It is no longer acceptable for officials charged with protecting people from antisemitism to not have an official definition of what antisemitism means. It is equally unacceptable to insist on a definition of antisemitism that does not include the most troubling anti-Zionist sentiments.

Despite what critics say, the IHRA definition is not “new” and it does not include “the formal redefining of antisemitism to include anti-Zionism.”³⁹⁹ Not all criticism of Israel is antisemitism, but when anti-Zionism crosses certain lines it *can* be antisemitic. Critics of the definition generally focus on the danger of governments using it to stifle free speech.⁴⁰⁰ But those concerns are easily answered, primarily by clarifying that the definition should be used (a) to monitor and respond to antisemitism, and (b) to help evaluate intent in discriminatory conduct cases, which involve actions and *not* free speech.⁴⁰¹

Embracing the IHRA definition of antisemitism for educational and reporting purposes should be uncontroversial. Adopting it for analyzing discrimination and harassment claims will not affect or regulate free speech. It is only to be used after a person has been credibly accused of engaging in discriminatory acts toward Jewish people; acts so severe or pervasive that they limit the ability of the victim to participate in or benefit from an opportunity. Then and only then should the definition be used as contextual, rebuttable evidence of a discriminatory motive, “to the extent that any examples might be useful as evidence of discriminatory intent,” and with the additional caveat that “whether a particular act constitutes discrimination prohibited by Title VI will require a detailed analysis of the specific allegations.”⁴⁰² Taken in this light, there should be no concern of chilled speech. If a person is merely criticizing Israel, even harshly, then this policy should not worry them at all. If, however, they are engaging in discriminatory conduct against Jews, to the extent that the Jewish victims are unable to participate in educational opportunities, *and* their motive seems to be based on their race or national origin, then perhaps those in charge of investigating the discriminatory behavior would benefit from utilizing a universal, gold-standard definition of antisemitism to correct for any lack of knowledge

³⁹⁹ See, e.g., *Wielding Antidiscrimination Law to Suppress the Movement for Palestinian Rights*, 133 HARV. L. REV. 1360, 1381 (2020).

⁴⁰⁰ See Elizabeth Redden, *Trump Signs Order on Campus Antisemitism*, INSIDE HIGHER ED (Dec. 12, 2019), <https://www.insidehighered.com/news/2019/12/12/trump-order-antisemitism-campus-draws-free-speech-concerns>.

⁴⁰¹ See Goldfeder, *Why We Should Applaud*, *supra* note 137.

⁴⁰² Exec. Order No. 13899, 84 Fed. Reg. 68,779 (Dec. 11, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-12-16/pdf/2019-27217.pdf>.

or even implicit bias on the subject.” There should be nothing controversial about that either.

Adopting the definition with its examples is a necessary corrective for the unfortunate reality that, on and off campuses across the country, people have engaged in horrific antisemitic behavior under the guise of anti-Israel rhetoric. Not all criticism of Israel is antisemitism, but in practice some of it is, and this policy clarification only touches the kinds of egregious behavior that the First Amendment does not protect. All too often, Jewish students are afraid to attend events or wear their yarmulkes or Stars of David in public, out of fear for their safety. All too often, school administrators shrug their collective shoulders and dismiss their students’ fears and complaints of discrimination as a normal part of the university’s marketplace of ideas, simply because the violators falsely claim to only hate Israel, not Jews—even as they target Jews. That is not the case, and it has never been the case. Legitimate criticism of Israel is fine, and the freedom of speech, even when offensive, should be cherished and protected as part of what makes our democracy healthy and great. But the conflation of speech with conduct, and antisemitism with criticism of Israel, allows antisemites to commit antisemitic acts and then claim that they were merely expressing political views. When anti-Zionism crosses over into harassment and invidious discrimination, it can and should be stopped. According to the FBI, most religiously motivated hate crimes in the United States are committed against Jewish people,⁴⁰³ and that number is on the rise,⁴⁰⁴ even though they make up less than 2 percent of the population.⁴⁰⁵ These trends are terrifying, and there is much work to be done to reverse them. It starts with calling out antisemitism for what it is.

It starts by defining the problem.

⁴⁰³ See *Antisemitism in the United States: Statistics on Religious Hate Crimes (1996-2019)*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/statistics-on-religious-hate-crimes> (last visited Aug. 4, 2020).

⁴⁰⁴ See Quincy Walter, *Anti-Semitic Crime in The U.S. Reaches Record Level*, WBUR NEWS (May 12, 2020), <https://www.wbur.org/news/2020/05/12/antisemitic-crime-record-level>.

⁴⁰⁵ Emily Guskin, *How Many Jews Live in the U.S.? That Depends on How You Define ‘Jewish.’*, WASH. POST (Feb. 23, 2018, 6:00 AM), <https://www.washingtonpost.com/news/post-nation/wp/2018/02/23/measuring-the-size-of-the-u-s-jewish-population-comes-down-to-identity/>.