

## 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 .....	121
II. THE IHRA DEFINITION OF ANTISEMITISM .....	127
III. TITLE VI AND THE EXECUTIVE ORDER ON COMBATING ANTISEMITISM .....	143
IV. THE NEXT STEP FOR STATES AND UNIVERSITIES: PROACTIVELY ADOPTING THE IHRA DEFINITION .....	150
V. THE MODEL POLICY DOES NOT RESTRICT OR SUPPRESS SPEECH.....	154
A. What the Policy Does Not Do .....	154
1. The Model Policy Does Not Restrict or Prohibit Speech.....	154
2. The Model Policy Does Not Create Any Gray Area of Speech/Act Non-Distinction .....	155
3. Finally, Such a Policy Will Not Impermissibly Chill Speech .....	158
VI. ADOPTING THE DEFINITION HELPS STATES AND SCHOOLS MONITOR, PREVENT, AND EDUCATE ABOUT ANTISEMITISM .....	164
A. Adopting a Definition Would Help States and Schools Monitor and Report on Antisemitism .....	164
B. Adopting a Definition Would Help States and Schools Educate Their Constituencies About Antisemitism .....	168
VII. CRITICISM OF ISRAEL AND ANTISEMITISM .....	169
VIII. A CASE STUDY IN THE NECESSITY OF CLEARLY DEFINING TERMS .....	184
A. What Happened “Over There” .....	184
B. Could That Happen Here? .....	186
IX. CONCLUSION .....	195

## 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.<sup>1</sup> Unfortunately, it is also perhaps the most persistent.<sup>2</sup> And, despite the fact that we are still within living memory of the Holocaust,<sup>3</sup> for the past several years antisemitism has been making a public comeback,<sup>4</sup> even in these United States,<sup>5</sup> and even during a pandemic.<sup>6</sup>

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

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<sup>1</sup> 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).

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

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

<sup>4</sup> 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>.

<sup>5</sup> 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>.

<sup>6</sup> 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>.

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> The numbers continued to rise in 2018,<sup>12</sup> 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.”<sup>13</sup>

These statistics ought to raise serious concerns for American society and prompt further investment in identifying and dealing with the underlying illnesses<sup>14</sup> 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;<sup>15</sup> the proverbial “canary in the coal mine of intolerance.”<sup>16</sup>

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<sup>8</sup> 2018 REVIEW, *supra* note 5, at 7.

<sup>9</sup> *Id.* at 8.

<sup>10</sup> 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>.

<sup>11</sup> 2018 REVIEW, *supra* note 5, at 29.

<sup>12</sup> 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>.

<sup>13</sup> 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>.

<sup>14</sup> 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).

<sup>15</sup> 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](http://www.jewish-american-society-for-historic-preservation.org/images/The_Canary_in_the_Coal_Mine.pdf) (last visited Oct. 6, 2019).

<sup>16</sup> 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?’”<sup>17</sup> 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.<sup>18</sup> Historically, this has often been the Jews,<sup>19</sup> 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.”<sup>20</sup>

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.”<sup>21</sup>

There are multiple opinions<sup>22</sup> and best practices guides<sup>23</sup> on how to best combat antisemitism in a variety of different contexts.<sup>24</sup> For

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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/>.

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

<sup>18</sup> *Id.*

<sup>19</sup> 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.*

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

<sup>21</sup> 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.

<sup>22</sup> See BARI WEISS, *HOW TO FIGHT ANTISEMITISM* (2019).

<sup>23</sup> 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](https://brandeis-center.com/wp-content/uploads/2017/10/guide_01.pdf) (last visited July 30, 2021).

<sup>24</sup> 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 religion<sup>25</sup> or programming about the benefits of diversity,<sup>26</sup> former New York Times editor Bari Weiss urges Jews to take control by taking pride in their heritage.<sup>27</sup> 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.’”<sup>28</sup> The same report found that nearly *half of the general American population* is unfamiliar with the term.<sup>29</sup>

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

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<sup>25</sup> 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/>.

<sup>26</sup> *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).

<sup>27</sup> See, e.g., WEISS, *supra* note 22.

<sup>28</sup> 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](https://www.ajc.org/sites/default/files/pdf/2020-11/The_State_of_Antisemitism_in_America_2020.pdf)).

<sup>29</sup> “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](https://www.ajc.org/sites/default/files/pdf/2020-11/The_State_of_Antisemitism_in_America_2020.pdf).

<sup>30</sup> 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](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.<sup>31</sup> That is why numerous state legislatures<sup>32</sup> 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,<sup>33</sup> especially on campuses,<sup>34</sup> led several universities<sup>35</sup> to proactively embrace a definition of antisemitism to better educate their campus communities about what antisemitism is<sup>36</sup> 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-

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

<sup>31</sup> 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).

<sup>32</sup> 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.

<sup>33</sup> *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>.

<sup>34</sup> See Anderson, *supra* note 13.

<sup>35</sup> 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>.

<sup>36</sup> 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.<sup>37</sup> 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,<sup>38</sup> Professor Eugene Kontorovich, the intellectual force behind state anti-Boycott Divestment and Sanctions (“BDS”) bills,<sup>39</sup> and Senators Tim Scott and Bob Casey, sponsors of a similar act undertaken at the federal level.<sup>40</sup> This Article will illustrate how and why the efforts to have states and universities adopt the IHRA definition of antisemitism are proceeding<sup>41</sup> 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.<sup>42</sup> Next, the Article will explain the difference

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<sup>37</sup> *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).

<sup>38</sup> 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](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”).

<sup>39</sup> 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/>.

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

<sup>41</sup> 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/>.

<sup>42</sup> 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].”<sup>43</sup> 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.”<sup>44</sup> The Committee on Antisemitism and Holocaust Denial first developed their definition in 2003–2004,<sup>45</sup> and published it as a Working Definition in January 2005.<sup>46</sup> The U.S. State Department endorsed the definition as a guide in 2007,<sup>47</sup> started using it in 2010,<sup>48</sup> and in 2016,<sup>49</sup> when the Working Definition was formally adopted by a

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

<sup>43</sup> *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).

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

<sup>45</sup> 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>.

<sup>46</sup> 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).

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

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

<sup>49</sup> *Defining Antisemitism*, *supra* note 48.

plenary meeting of the then thirty-one countries in the IHRA,<sup>50</sup> officially adopted it.<sup>51</sup> 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.

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<sup>50</sup> 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/>.

<sup>51</sup> *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.<sup>52</sup>

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<sup>52</sup> *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 1879<sup>53</sup>—the history of hating Jews goes back much further.<sup>54</sup> There is nowhere near enough space in this article for even a brief history of antisemitism,<sup>55</sup> 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,<sup>56</sup> 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.<sup>57</sup> That is why the majority of antisemitism

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

<sup>53</sup> 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.

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

<sup>55</sup> 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).

<sup>56</sup> 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).

<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup>

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.<sup>62</sup>

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 \_\_.”<sup>63</sup> To justify their hatred in a

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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).

<sup>58</sup> 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).

<sup>59</sup> 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>.

<sup>60</sup> 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).

<sup>61</sup> 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*].

<sup>62</sup> 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>.

<sup>63</sup> 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.<sup>64</sup> For example, in the Middle Ages, the highest source of authority was religion;<sup>65</sup> in post-Enlightenment Europe, it was science;<sup>66</sup> and today, it involves using (or abusing) the language of human rights with selective claims of social justice that see only Jews,<sup>67</sup> or the Jewish state,<sup>68</sup> as worthy of condemnation.<sup>69</sup>

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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/>.

<sup>64</sup> 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>.

<sup>65</sup> 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>.

<sup>66</sup> 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).

<sup>67</sup> 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/>.

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

<sup>69</sup> *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,<sup>70</sup> or as worthlessly subhuman, as in the Nazi ideology,<sup>71</sup> 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,<sup>72</sup> then told that they are privileged whites when they demand recognition of their struggles.<sup>73</sup> “In the past, Jews were rendered alien to the West by being

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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/Hph5XM6IfgWN7VkObPAasI/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.

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

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

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

<sup>73</sup> *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 . . . .”<sup>74</sup>

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,<sup>75</sup> while the left will label them fundamentalists.<sup>76</sup> 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 influential<sup>77</sup> and too parasitical.<sup>78</sup>

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.”<sup>79</sup> 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.”<sup>80</sup> It does not

<sup>74</sup> Wald, *supra* note 58, at 19.

<sup>75</sup> 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 . . . .’”).

<sup>76</sup> *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.’”).

<sup>77</sup> 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](https://www.huffpost.com/entry/does-your-progressivism-include-jews_b_599704e1e4b02eb2fda31f41).

<sup>78</sup> 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/>

<sup>79</sup> 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](https://www.youtube.com/watch?v=80yu42Y-vNQ&t=2607s&ab_channel=BonjukCenter).

<sup>80</sup> *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).<sup>81</sup>

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.<sup>82</sup> 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.<sup>83</sup> 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.”<sup>84</sup> The Handbook also notes that it has been used

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

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

<sup>83</sup> 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).

<sup>84</sup> 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.<sup>85</sup>

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.<sup>86</sup> 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

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<sup>85</sup> *Id.* at 7.

<sup>86</sup> *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/](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.<sup>87</sup>

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.<sup>88</sup>

Antisemitism is no different than racism or sexism in that context matters and no two cases are ever exactly the same.<sup>89</sup> 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.<sup>90</sup>

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

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<sup>87</sup> *Working Definition of Antisemitism*, *supra* note 37 (emphasis added).

<sup>88</sup> *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).

<sup>89</sup> 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).

<sup>90</sup> 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>.

<sup>91</sup> 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.<sup>92</sup> 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.”<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> That is *precisely* why the state bills and the school policies *cannot* take the form of any kind of speech code.<sup>96</sup> But discriminatory harassment and criminal conduct are not just speech, even if words are sometimes used.<sup>97</sup> Unlike speech, such conduct is absolutely subject to government

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<sup>92</sup> 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/>.

<sup>93</sup> 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>.

<sup>94</sup> 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/>.

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

<sup>96</sup> 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”).

<sup>97</sup> 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](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.<sup>98</sup> To paraphrase the Jewish Supreme Court Justice Louis Brandeis,<sup>99</sup> 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.<sup>100</sup> 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,<sup>101</sup> a type of behavior that even Chemerinsky and Gillman admit can and should be regulated.<sup>102</sup> Behavior that is merely offensive to some would not be included.<sup>103</sup> To meet this ‘objectively offensive’

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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).

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

<sup>99</sup> *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.”).

<sup>100</sup> 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”).

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

<sup>102</sup> Chemerinsky & Gillman, *supra* note 93.

<sup>103</sup> 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),<sup>104</sup> and adopted by a growing number of universities at home (including New York University)<sup>105</sup> and abroad (including Oxford University and Cambridge University).<sup>106</sup> It is utilized by a variety of intergovernmental agencies (including the European Commission against Racism and Intolerance)<sup>107</sup> and non-governmental agencies (including the Iraq-based Global Imams

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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).

<sup>104</sup> 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>.

<sup>105</sup> 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.

<sup>106</sup> *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/>.

<sup>107</sup> *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).<sup>108</sup> Perhaps most importantly, hundreds of major Jewish organizations across the world,<sup>109</sup> and across the political and religious spectrums, representing people of all ages and backgrounds that are affected by antisemitism, including several major student organizations,<sup>110</sup> banded together to adopt the IHRA definition and urge others to adopt it as well,<sup>111</sup> 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.<sup>112</sup> And it is the definition that schools are affirmatively required to *proactively* consider when

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

<sup>109</sup> *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>.

<sup>110</sup> 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.

<sup>111</sup> 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/>.

<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup> 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.”<sup>115</sup> 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.”<sup>116</sup> 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.<sup>117</sup> Second, laws also serve a channeling function by reinforcing social norms.<sup>118</sup> Antisemitism is wrong (and antisemitic discrimination is illegal) whether or not the legislature takes the time to restate that clearly, and

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<sup>113</sup> “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)).

<sup>114</sup> 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>.

<sup>115</sup> 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/>.

<sup>116</sup> *Id.*

<sup>117</sup> 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.

<sup>118</sup> 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.<sup>119</sup> 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

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<sup>119</sup> 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 1964<sup>120</sup> 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,<sup>121</sup> 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.<sup>122</sup> 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."<sup>123</sup> This reasoning has been confirmed in court, both in regard to Title VI cases<sup>124</sup> and in the Title VII context as well.<sup>125</sup> While the

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<sup>120</sup> *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).

<sup>121</sup> 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>.

<sup>122</sup> 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/>.

<sup>123</sup> Marcus, *supra* note 121.

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

<sup>125</sup> 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.<sup>126</sup> On October 26, 2010, the Obama Justice Department released an opinion letter confirming the legal correctness of the 2004 Policy.<sup>127</sup>

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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).

<sup>126</sup> 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”).

<sup>127</sup> 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.<sup>128</sup> 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.<sup>129</sup> It is only illegal, and therefore subject to regulation, if it is based on an illegal discriminatory intent.<sup>130</sup> 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.<sup>131</sup> 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.<sup>132</sup> 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.

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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.*

<sup>128</sup> *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>.

<sup>129</sup> *Id.*

<sup>130</sup> 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>.

<sup>131</sup> 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>.

<sup>132</sup> 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.<sup>133</sup> Properly translated into legal terminology, they based their critiques on either First Amendment overbreadth doctrine concerns, vagueness concerns, or both.<sup>134</sup> A law or regulation is overbroad when it can prohibit protected as well as non-protected speech,<sup>135</sup> and a law is vague when people “of common intelligence must necessarily guess at its meaning,”<sup>136</sup> (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.<sup>137</sup>

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.”<sup>138</sup> Hate speech is protected, obviously, but that does not mean that we cannot call it what it is: hateful.<sup>139</sup> If that speech should cross the line and reach the level of discriminatory harassment, with or without accompanying acts,<sup>140</sup> “then and only then is regulation

<sup>133</sup> 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/>.

<sup>134</sup> 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](https://www.ohchr.org/Documents/Issues/Opinion/Submissions/NGOs/Foundation_for_Individual_Rights_in_Education_FIRE.pdf).

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

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

<sup>137</sup> 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*].

<sup>138</sup> *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)).

<sup>139</sup> 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>.

<sup>140</sup> 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/of-fices/list/ocr/letters/colleague-201010\\_pg2.html](https://www2.ed.gov/about/of-fices/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.”<sup>141</sup> The order only addresses harassment, not speech, and harassing actions (or verbal acts that rise to the level of harassment) are already impermissible.<sup>142</sup>

Second, “for there to be a violation of free speech, the order would have to be about regulating private speech, not government speech.”<sup>143</sup> 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.”<sup>144</sup> Without this exemption, the Court explained, government “would not work.”<sup>145</sup>

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.’”<sup>146</sup> 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.<sup>147</sup>

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

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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).

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

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

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

<sup>145</sup> *Id.* at 2246.

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

<sup>147</sup> 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.”<sup>148</sup> 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.<sup>149</sup>

To summarize, the Order is clearly not overbroad or vague. Regarding overbreadth, as the Supreme Court emphasized in *Broadrick v. Oklahoma*,<sup>150</sup> 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.”<sup>151</sup> 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.”<sup>152</sup> 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-

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<sup>148</sup> 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](https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010_pg2.html) (last visited Sept. 20, 2021).

<sup>149</sup> 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>.

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

<sup>151</sup> *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).

<sup>152</sup> *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.<sup>153</sup> 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.<sup>154</sup>

#### 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.<sup>155</sup> 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

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<sup>153</sup> 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>.

<sup>154</sup> 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>.

<sup>155</sup> 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,<sup>156</sup> 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.<sup>157</sup> “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.”<sup>158</sup> Sen. Joe Gruters, R-Sarasota, who sponsored the Florida version, put it simply:

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

<sup>157</sup> 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/>.

<sup>158</sup> *Id.*

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

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

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<sup>159</sup> 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>.

2021]

*DEFINING ANTISEMITISM*

153

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.<sup>160</sup> 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.<sup>161</sup> 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.”<sup>162</sup> To take one example that happened quite a few times in

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<sup>160</sup> 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).

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

<sup>162</sup> *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:<sup>163</sup> 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.<sup>164</sup> 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,”<sup>165</sup> and as the Department of Education’s Office For Civil Rights has made clear,<sup>166</sup> 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.”<sup>167</sup>

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.’”<sup>168</sup>

*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.”<sup>169</sup> Lower courts extended the Supreme Court’s reasoning in

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<sup>163</sup> 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/>.

<sup>164</sup> 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).

<sup>165</sup> Hutchison, *supra* note 100, at 475.

<sup>166</sup> 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).

<sup>167</sup> *Id.*

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

<sup>169</sup> *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,<sup>170</sup> which prohibits federally-funded programs from discriminating on the basis of race, color, and national origin.<sup>171</sup> 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,”<sup>172</sup> and that “[f]or . . . harassment, and any other conduct that violates the law, an aggressive disciplinary response is warranted.”<sup>173</sup>

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.<sup>174</sup> 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

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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.”).

<sup>170</sup> 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.

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

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

<sup>173</sup> *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).

<sup>174</sup> 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.<sup>175</sup> 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.’”<sup>176</sup>

In general, courts applied that standard to mean that lengthy investigations into permissible conduct could chill speech.<sup>177</sup> 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

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

<sup>176</sup> *Id.*

<sup>177</sup> *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.<sup>178</sup>

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."<sup>179</sup> Courts have also held that in terms of the chilling of First Amendment speech, "self-censorship alone is insufficient to show injury."<sup>180</sup>

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.<sup>181</sup> The same case

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

<sup>179</sup> *Id.* at 13–14.

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

<sup>181</sup> *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.<sup>182</sup> 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.<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup> Indeed, especially in the university context,<sup>186</sup> officials often receive praise for condemning this type of speech without crossing the line into censorship.<sup>187</sup> 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

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'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)).

<sup>182</sup> 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).

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

<sup>184</sup> 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.").

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

<sup>186</sup> *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).

<sup>187</sup> 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/](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).

...”<sup>188</sup> 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.<sup>189</sup>

Hate speech is protected, obviously, but that does not mean that we cannot call it hateful.<sup>190</sup> 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.”<sup>191</sup> 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.

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

<sup>189</sup> *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>.

<sup>190</sup> See Miller-Idriss & Friedman, *supra* note 185.

<sup>191</sup> *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.<sup>192</sup>

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.<sup>193</sup> 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

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<sup>192</sup> *Id.* at 488–89.

<sup>193</sup> 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-115hrg32325/html/CHRG-115hrg32325.htm>.

2021]

## DEFINING ANTISEMITISM

163

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

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.<sup>195</sup> 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.<sup>196</sup>

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.

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<sup>194</sup> 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>.

<sup>195</sup> 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>.

<sup>196</sup> *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.<sup>197</sup> 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.<sup>198</sup> 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,<sup>199</sup> the recent series of random physical attacks on identifiably Jewish persons in New York City,<sup>200</sup> and the rising number of desecrated Jewish cemeteries<sup>201</sup> and vandalized

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<sup>197</sup> 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).

<sup>198</sup> 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.

<sup>199</sup> *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>.

<sup>200</sup> 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>.

<sup>201</sup> 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.<sup>202</sup> There have been numerous physical attacks on Jewish businesses,<sup>203</sup> and on university campuses around the country, there have been countless well-documented examples of antisemitic harassment,<sup>204</sup> property damage,<sup>205</sup> and physical attacks<sup>206</sup> on Jewish students.<sup>207</sup> The problem is that states and universities often do not report, and sometimes even hesitate to admit,<sup>208</sup> that there has been a major spike in people discriminating against and targeting Jewish people in their jurisdictions.<sup>209</sup> 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.<sup>210</sup>

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

<sup>202</sup> 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/>.

<sup>203</sup> 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>.

<sup>204</sup> 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/>.

<sup>205</sup> See Interview by Lenny Giteck with Andrew Pessin, Professor, Conn. Coll. (Jan. 11, 2021), [https://antisemitismexposed.org/andrew-nessin/?fbclid=IwAR2JL5fb908-yCrojGdwsx9HraI\\_u-BcE8N7dPMY1c8MhjQV5YQNN6oSTQ](https://antisemitismexposed.org/andrew-nessin/?fbclid=IwAR2JL5fb908-yCrojGdwsx9HraI_u-BcE8N7dPMY1c8MhjQV5YQNN6oSTQ).

<sup>206</sup> 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](https://www.huffpost.com/entry/temple-university-latest-_b_5707919).

<sup>207</sup> 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>.

<sup>208</sup> 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>.

<sup>209</sup> 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>.

<sup>210</sup> 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,<sup>211</sup> 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.”<sup>212</sup> 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.<sup>213</sup>

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.<sup>214</sup>

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

<sup>211</sup> 34 C.F.R. § 668.46(c) (2021).

<sup>212</sup> 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/>.

<sup>213</sup> *Id.*

<sup>214</sup> *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 Act<sup>215</sup> (modified in 2009 by The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act),<sup>216</sup> 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.<sup>217</sup> 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.”<sup>218</sup> According to one ProPublica report, “investigators frequently did not mark down incidents as motivated by bias, even if there was evidence suggesting

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<sup>215</sup> 28 U.S.C. § 534.

<sup>216</sup> 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).

<sup>217</sup> 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>.

<sup>218</sup> “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.”<sup>219</sup>

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.<sup>220</sup> 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.<sup>221</sup> 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.”<sup>222</sup> 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,

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<sup>219</sup> 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.*

<sup>220</sup> 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>.

<sup>221</sup> *Id.*

<sup>222</sup> 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.<sup>223</sup> While those concerns are easily answered—primarily by having policies that focus only on actions and not speech<sup>224</sup>—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.<sup>225</sup>

#### 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.<sup>226</sup> Based on his public apologies, even Mahmoud Abbas would have to agree with that.<sup>227</sup>

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.<sup>228</sup> These stereotypes

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<sup>223</sup> 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>.

<sup>224</sup> Goldfeder, *Why We Should Applaud*, *supra* note 137.

<sup>225</sup> 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>.

<sup>226</sup> 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>.

<sup>227</sup> 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>.

<sup>228</sup> 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;<sup>229</sup> blood libels;<sup>230</sup> portraying Jews (not even actual *Israelis* but caricatures of religious *Jews*) as Satanic, demonic, and evil;<sup>231</sup> accusing Jews of dual loyalty;<sup>232</sup> and engaging in Holocaust denial<sup>233</sup> and Holocaust inversion.<sup>234</sup> When this happens, the symbols and signals used often belie the speaker’s true nefarious intent.<sup>235</sup> 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,<sup>236</sup> 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*),<sup>237</sup> while at the same time calling for the

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<sup>229</sup> *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).

<sup>230</sup> *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).

<sup>231</sup> *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](https://jcpa.org/pdf/SJP_unmasked_2018_web.pdf).

<sup>232</sup> *See id.* at 29.

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

<sup>234</sup> *See* DIKER & BERK, *supra* note 231, at 54–75.

<sup>235</sup> Goldfeder, *The Danger of Defining Your Own Terms*, *supra* note 197.

<sup>236</sup> 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.

<sup>237</sup> *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,<sup>238</sup> ethnic cleansing of the region,<sup>239</sup> and/or the genocidal extermination<sup>240</sup> of the millions of Jewish people who live there,<sup>241</sup> are all examples of things that are *also* likely to be antisemitic, depending on the circumstances.<sup>242</sup> 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,"<sup>243</sup> 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

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<sup>238</sup> *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.*

<sup>239</sup> *Nada Elia*, CANARY MISSION, [https://canarymission.org/professor/Nada\\_Elia](https://canarymission.org/professor/Nada_Elia) (last visited Oct. 13, 2021).

<sup>240</sup> 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/>.

<sup>241</sup> 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/>.

<sup>242</sup> 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.

<sup>243</sup> 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.<sup>244</sup>

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,

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<sup>244</sup> 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](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](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.”<sup>245</sup> 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.<sup>246</sup> 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.<sup>247</sup> 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.<sup>248</sup> 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.<sup>249</sup> Eighty-three of those, or 86 percent, were targeted at Israel, with eleven for the rest of the globe.<sup>250</sup> 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*.<sup>251</sup>

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.”<sup>252</sup> Of course, the most famous example

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<sup>245</sup> 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>.

<sup>246</sup> 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.”

<sup>247</sup> 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.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> 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/>.

<sup>252</sup> 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.<sup>253</sup> 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.<sup>254</sup> That resolution, which former Secretary General Kofi Annan described as a “low point” in UN history, was finally repealed on December 16, 1991.<sup>255</sup> 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.”<sup>256</sup>

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

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2016), <https://www.un.org/sg/en/content/sg/statement/2016-12-16/secretary-generals-briefing-security-council-situation-middle-east>.

<sup>253</sup> 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).

<sup>254</sup> 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>.

<sup>255</sup> *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>.

<sup>256</sup> 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.<sup>257</sup> 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.<sup>258</sup> 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.”<sup>259</sup> For thousands of years, Jews across the world have prayed to God at least three times a day (and often more)<sup>260</sup> for a safe return to Zion. The Bible itself references this ancient

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<sup>257</sup> 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.

<sup>258</sup> *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>.

<sup>259</sup> Goldfeder, *The Danger of Defining You Own Terms*, *supra* note 197.

<sup>260</sup> 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,<sup>261</sup> while the Prophets and Writings of the Hebrew Bible repeatedly record this aspiration.<sup>262</sup> 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.<sup>263</sup> 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.<sup>264</sup>

While it is not inherently antisemitic to be against political Zionism,<sup>265</sup> the reason that the IHRA definition includes “[d]enying the Jewish people their right to self-determination”<sup>266</sup> 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.”<sup>267</sup> 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

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<sup>261</sup> See, e.g., *Deuteronomy* 30:1-5.

<sup>262</sup> See, e.g., *Isaiah* 11:11-12; *Jeremiah* 29:14; 20:41-42; *Psalms* 126; *Psalms* 137.

<sup>263</sup> *About Us*, TORAH VEHA’ARETZ INST., <https://en.toraland.org.il/about/> (last visited Oct. 13, 2021).

<sup>264</sup> *Maimonides’ Introduction to Perek Helek*, MAIMONIDES HERITAGE CTR. 14, <https://www.mhcnyc.org/qt/1005.pdf>. (explaining the 12<sup>th</sup> Fundamental Principle).

<sup>265</sup> 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.

<sup>266</sup> *Defining Antisemitism*, *supra* note 48.

<sup>267</sup> FED. ASS’N DEP’T 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.<sup>268</sup>

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.<sup>269</sup> A recent Gallup poll found that 95 percent of American Jews support Israel<sup>270</sup>—which is the definition of Zionism that tends to get Jewish students and Jewish groups excluded around the country<sup>271</sup>—even if they may disapprove of some or all Israeli policies. The research also shows that religion plays an important part in those beliefs,<sup>272</sup> but even if that part was not clear,<sup>273</sup> if in practice a policy has the effect of excluding or demonizing 95 percent of a group based on their shared ethnic beliefs,<sup>274</sup> “then it should be obvious that you are discriminating against that group and their beliefs.”<sup>275</sup>

Some prominent examples of discriminatory anti-Zionism from the last few years include: the 2018 petition that fifty-three student groups

<sup>268</sup> 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>.

<sup>269</sup> See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

<sup>270</sup> Frank Newport, *American Jews, Politics and Israel*, GALLUP (Aug. 27, 2019), <https://news.gallup.com/opinion/polling-matters/265898/american-jews-politics-israel.aspx>.

<sup>271</sup> 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>.

<sup>272</sup> 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>.

<sup>273</sup> 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).

<sup>274</sup> 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).

<sup>275</sup> 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;<sup>276</sup> a student guide distributed by progressive groups at Vassar encouraging students to “slap a Zionist;”<sup>277</sup> a student government official at USC who was forced to resign amid a torrent of harassment that she was ‘racist’ for being Zionist;<sup>278</sup> a San Francisco State University Professor starting a campaign to declare that ‘Zionists’ are not welcome on campus<sup>279</sup>; and a Johns Hopkins teaching assistant tweeting about wanting to secretly deduct points from students who are Zionists.<sup>280</sup> Study after study has shown that this kind of discriminatory rhetoric eventually leads to action.<sup>281</sup> Sadly, these studies have been confirmed each time allegedly non-antisemitic “anti-Israel”<sup>282</sup> activism breaks through the

<sup>276</sup> 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/>.

<sup>277</sup> 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/>.

<sup>278</sup> 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>.

<sup>279</sup> 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/>.

<sup>280</sup> 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>.

<sup>281</sup> 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.

<sup>282</sup> 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,<sup>283</sup> leading to people getting hurt.<sup>284</sup> Or when the student groups that start by demanding Jews leave campus<sup>285</sup> end up threatening outright violence should they dare refuse to go.<sup>286</sup>

<sup>283</sup> 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/>.

<sup>284</sup> DIKER & BERK, *supra* note 231, at 28-33.

<sup>285</sup> 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>.

<sup>286</sup> 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.*, 114<sup>th</sup> 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](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,<sup>287</sup> coalitions,<sup>288</sup> campuses,<sup>289</sup> concerts,<sup>290</sup> demonstrations,<sup>291</sup> and even discussions<sup>292</sup>— unless, of course, they agree to denounce Zionism first.<sup>293</sup> Jews on campus have been denied letters of recommendation<sup>294</sup> and entry into events,<sup>295</sup> had their leadership credentials<sup>296</sup> and their loyalties

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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).

<sup>287</sup> 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/>.

<sup>288</sup> 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>.

<sup>289</sup> Bandler, *supra* note 279.

<sup>290</sup> 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/>.

<sup>291</sup> 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/>.

<sup>292</sup> *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>.

<sup>293</sup> 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/>.

<sup>294</sup> 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/>.

<sup>295</sup> 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/>.

<sup>296</sup> 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,<sup>297</sup> been called pejorative names (e.g., murderers, pigs, apartheid enablers, baby killers),<sup>298</sup> labeled as white supremacists,<sup>299</sup> and scapegoated for everything from racism<sup>300</sup> to the coronavirus<sup>301</sup> to police brutality.<sup>302</sup> In general, Jewish people are routinely excluded from progressive movements<sup>303</sup> public marches,<sup>304</sup> and liberal coalitions,<sup>305</sup> “all because of their stated or assumed support for Zionism.”<sup>306</sup>

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

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<sup>297</sup> 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>.

<sup>298</sup> 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>.

<sup>299</sup> 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>.

<sup>300</sup> 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>.

<sup>301</sup> 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>.

<sup>302</sup> 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/>.

<sup>303</sup> Berteaux, *supra* note 287.

<sup>304</sup> 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/>.

<sup>305</sup> 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>.

<sup>306</sup> Goldfeder, *The Danger of Defining Your Own Terms*, *supra* note 197, at 1431.

where a marginalized community feels threatened.”<sup>307</sup> This classic trope, in the vein of “some of my best friends are \_\_\_,” is a logically invalid claim of innocence by association,<sup>308</sup> 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.”<sup>309</sup>

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*.<sup>310</sup>

Or for some aspect of their Jewishness, including their actual or supposed Zionism.<sup>311</sup>

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!”<sup>312</sup> 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.”<sup>313</sup>

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<sup>307</sup> 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>.

<sup>308</sup> 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)).

<sup>309</sup> 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>.

<sup>310</sup> 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/>.

<sup>311</sup> 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.

<sup>312</sup> MARTIN KRAMER, THE WAR ON ERROR: ISRAEL, ISLAM, & THE MIDDLE EAST 260 (2016).

<sup>313</sup> 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."<sup>314</sup> To imagine that the state would go away "without wholesale killing of Jews"<sup>315</sup> is ridiculous. That means to be anti-Zionist, in the sense of wanting to destroy the Jewish State,<sup>316</sup> is to be okay with the mass slaughter of the Jews who live there.<sup>317</sup>

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.<sup>318</sup> 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

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*Antisemitism*, ISRAEL FOREVER FOUND., [https://israelforever.org/interact/blog/anti\\_zionism\\_is\\_the\\_new\\_antisemitism/](https://israelforever.org/interact/blog/anti_zionism_is_the_new_antisemitism/) (last visited Oct. 19, 2021).

<sup>314</sup> 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).

<sup>315</sup> 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/>.

<sup>316</sup> 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.

<sup>317</sup> Kliegman, *supra* note 315.

<sup>318</sup> 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.<sup>319</sup> On July 29, 2014, three German-Palestinian men filled six bottles with petrol and attempted to firebomb a synagogue in Wuppertal, Germany.<sup>320</sup> It is noteworthy that Nazis burned the original synagogue during the infamous Kristallnacht pogroms in 1938.<sup>321</sup> It was finally rebuilt in 2002.<sup>322</sup>

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.<sup>323</sup> 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.<sup>324</sup> Per the official ruling, despite the fact that the defendants admittedly tried to burn down a synagogue, “[t]he attack on

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<sup>319</sup> 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>.

<sup>320</sup> 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>.

<sup>321</sup> Yardley, *supra* note 319.

<sup>322</sup> *Id.*

<sup>323</sup> 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>.

<sup>324</sup> 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.”<sup>325</sup> 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.”<sup>326</sup>

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”<sup>327</sup> 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

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<sup>325</sup> 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>.

<sup>326</sup> *Id.*

<sup>327</sup> *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.<sup>328</sup>

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."<sup>329</sup> The German government commissioned an independent expert group to make a report with recommendations,<sup>330</sup> and the following year the government followed one of those recommendations<sup>331</sup> 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.<sup>332</sup>

#### 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*

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<sup>328</sup> Bottum, *supra* note 324.

<sup>329</sup> 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>.

<sup>330</sup> 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).

<sup>331</sup> *Id.*

<sup>332</sup> *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.*<sup>333</sup>

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.<sup>334</sup> 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 students<sup>335</sup>—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.”<sup>336</sup> 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

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<sup>333</sup> 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).

<sup>334</sup> 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/>.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

under the guise of anti-Zionism; and about how Jewish students “felt scared to be a Jew on campus.”<sup>337</sup>

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?”<sup>338</sup> The woman responds, “Bro, we’re going to fucking bomb Israel, bro. Fuck out of here, Jewish pieces of shit.”<sup>339</sup> GW did not feel that the incident involved a credible threat,<sup>340</sup> and the GW President used his own speech to condemn the video as hateful antisemitism.<sup>341</sup> Although student leaders on campus were adamant that this episode was “emblematic of a larger issue of anti-Semitism at the University”<sup>342</sup> and that they “feel unsafe,”<sup>343</sup> 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.”<sup>344</sup> This was not just any student, this was someone “entrusted by the University with authority over, and responsibility for, incoming freshmen.”<sup>345</sup> And this was also not just any immature comment; this was an actual threat of physical violence

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<sup>337</sup> *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>.

<sup>338</sup> 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>.

<sup>339</sup> 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/>.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> 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/>.

<sup>343</sup> Grace, *supra* note 339.

<sup>344</sup> 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>.

<sup>345</sup> 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."<sup>346</sup>

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.'"<sup>347</sup> 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?<sup>348</sup>

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

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<sup>346</sup> Bauer-Wolf, *supra* note 344 (alteration in original).

<sup>347</sup> Simon, *supra* note 345.

<sup>348</sup> 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)<sup>349</sup> and businesses,<sup>350</sup> and then hiding behind the claim of merely being anti-Israel. “[T]here are thousands<sup>351</sup> of readily available,<sup>352</sup> easily accessible,<sup>353</sup> examples”<sup>354</sup> 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.<sup>355</sup> Categorically, these include people: calling for death to Jews<sup>356</sup> (not Israelis, but *Jews*);<sup>357</sup> bemoaning that Hitler’s plan did not succeed;<sup>358</sup> spreading lies that depict Jewish religious beliefs as hateful;<sup>359</sup> denying the history<sup>360</sup> or the ancestry of the Jewish people;<sup>361</sup> banning or expelling individuals for

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<sup>349</sup> 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](http://media.aclj.org/pdf/16.05.04-CUNY-Letter_Redacted.pdf).

<sup>350</sup> 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/>.

<sup>351</sup> See DIKER & BERK, *supra* note 231, at 28-33.

<sup>352</sup> See generally *Because the World Should Know*, CANARY MISSION, <https://canarymission.org/> (last visited Sept. 21, 2021).

<sup>353</sup> See generally “Behind the Mask” – Unmasking Antisemitism Behind the BDS Campaign, MINISTRY OF STRATEGIC AFFS. (Sept. 15, 2019), <https://4il.org.il/1396/>.

<sup>354</sup> 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).

<sup>355</sup> Goldfeder, *The Danger of Defining Your Own Terms*, *supra* note 197.

<sup>356</sup> 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/>.

<sup>357</sup> 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>.

<sup>358</sup> 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/>.

<sup>359</sup> 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>.

<sup>360</sup> 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/>.

<sup>361</sup> See, e.g., ENERSEC USA, *Yasir Qadhi Anti-Semitic Rant*, YOUTUBE (Nov. 19, 2015), <https://www.youtube.com/watch?v=2bSxOmcY118&feature>.



being Jewish (again, not Israeli, but Jewish);<sup>362</sup> promoting the actual medieval Passover religious blood libel<sup>363</sup> (or any of its modern counterparts<sup>364</sup>); and harassing<sup>365</sup> and physically attacking<sup>366</sup> Jewish students<sup>367</sup> and Jewish businesses.<sup>368</sup> 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.

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<sup>362</sup> *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>.

<sup>363</sup> *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/>.

<sup>364</sup> 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>.

<sup>365</sup> 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/>.

<sup>366</sup> 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](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>.

<sup>367</sup> 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>.

<sup>368</sup> 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,<sup>369</sup> not two,<sup>370</sup> not three,<sup>371</sup> not four,<sup>372</sup> but five<sup>373</sup> 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.<sup>374</sup>

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.

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<sup>369</sup> 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](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).

<sup>370</sup> 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/>.

<sup>371</sup> *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/>.

<sup>372</sup> 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](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).

<sup>373</sup> 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/>.

<sup>374</sup> 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 outrageous<sup>375</sup> that when caught,<sup>376</sup> the perpetrators themselves had no choice but to apologize<sup>377</sup> for crossing the line from anti-Israel criticism into anti-Zionistic antisemitism.<sup>378</sup> 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,<sup>379</sup> antisemitic attacks shot up over 400 percent.<sup>380</sup> In cities across North America,<sup>381</sup> including Los Angeles<sup>382</sup> and New York,<sup>383</sup> hundreds of synagogues, Jewish community centers, kosher restaurants, Jewish-owned businesses, and individual Jewish

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<sup>375</sup> 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>.

<sup>376</sup> 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>.

<sup>377</sup> 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>.

<sup>378</sup> 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/>.

<sup>379</sup> 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>.

<sup>380</sup> 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>.

<sup>381</sup> See Dov Hikind (@HikindDov), TWITTER (May 20, 2021, 8:03 AM), <https://twitter.com/hikinddov/status/1395349533899595779?s=21>.

<sup>382</sup> 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>.

<sup>383</sup> 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/>.

people<sup>384</sup> have been targeted and attacked, beaten<sup>385</sup> 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,”<sup>386</sup> and the swastika; not to mention the pummeling<sup>387</sup> of innocent (non-Israeli, but clearly religious<sup>388</sup>) 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.<sup>389</sup> On college campuses, in between dodging protests outside of Hillel buildings,<sup>390</sup> ignoring death threats from fellow students,<sup>391</sup> and removing Nazi symbols,<sup>392</sup> Jewish students have been subjected to campaigns<sup>393</sup> supported by faculty<sup>394</sup> and student groups<sup>395</sup> alike that call Israel a colonialist settler state,

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<sup>384</sup> 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/>.

<sup>385</sup> 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/>.

<sup>386</sup> 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>.

<sup>387</sup> See, e.g., Chaim Deutsch (@ChaimDeutsch), TWITTER (May 20, 2021, 10:41 PM), <https://twitter.com/ChaimDeutsch/status/1395570403440009220>.

<sup>388</sup> 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/>.

<sup>389</sup> *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-preliminary-adl-data-reveals-uptick-in-antisemitic-incidents-linked-to-recent>.

<sup>390</sup> 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/>.

<sup>391</sup> 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](https://www.instagram.com/p/CO3mFXcgZyq/?utm_source=ig_embed&ig_rid=d0ab6404-3aba-4391-b502-fa2585e8437d).

<sup>392</sup> 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>.

<sup>393</sup> 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>.

<sup>394</sup> *Gender Studies Departments in Solidarity with Palestinian Feminist Collective*, PALESTINIAN FEMINIST COLLECTIVE, <http://genderstudiespalestinesolidarity.weebly.com> (last visited Sept. 21, 2021).

<sup>395</sup> 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 increase<sup>396</sup> 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.<sup>397</sup> 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.”<sup>398</sup>

#### 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

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<https://www.michigandaily.com/student-government/csg-response-to-the-israel-palestine-conflict-draws-mixed-reactions-from-u-m-community/>.

<sup>396</sup> 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>.

<sup>397</sup> 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>.

<sup>398</sup> *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.”<sup>399</sup> 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.<sup>400</sup> 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.<sup>401</sup>

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.”<sup>402</sup> 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

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<sup>399</sup> See, e.g., *Wielding Antidiscrimination Law to Suppress the Movement for Palestinian Rights*, 133 HARV. L. REV. 1360, 1381 (2020).

<sup>400</sup> 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>.

<sup>401</sup> See Goldfeder, *Why We Should Applaud*, *supra* note 137.

<sup>402</sup> 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,<sup>403</sup> and that number is on the rise,<sup>404</sup> even though they make up less than 2 percent of the population.<sup>405</sup> 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.

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<sup>403</sup> 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).

<sup>404</sup> 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>.

<sup>405</sup> 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/>.