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Mark Goldfeder

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Codifying Antisemitism

Mark Goldfeder*

ABSTRACT

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

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I. INTRODUCTION

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

—Gary Gulman

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. *Development of the IHRA Definition*

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

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

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

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

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

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

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

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

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

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

38. *Id.*

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

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

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

42. *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

59. *Id.*

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

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

62. *Id.* at 18.

63. *Id.* at 24.

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

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

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

B. Debunking Criticisms

1. IHRA's Israel Examples

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

74. *See id.*

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

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

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

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

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

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

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

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

79. As David Hirsh has so eloquently explained:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

92. *Id.* at 21–22.

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

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

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

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

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

95. Yossi Klein Halevi, described what antisemitism does:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

120. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

HF 2220 (LSB 5469HV (4) 89)

RELATING TO ANTISEMITISM IN THE STATE OF IOWA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

139. Isaac Scher, *Three States Push to Curb Pro-Palestine Activism*, JEWISH CURRENTS (Apr. 26, 2022), <http://bit.ly/3XT0dqc>.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

145. See *Civil Rights Act (1964)*, NAT’L ARCHIVES, <https://bit.ly/3E002WU> (last visited Oct. 17, 2022).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Why is Jewish Suffering Worthy of Exceptional Treatment?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

Id.

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

188. See Goldfeder, *supra* note 104.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. A Case Study in Bad Faith Argumentation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

214. *Id.* at 1.