

Backgrounder on Efforts to Redefine Antisemitism as a Means of Censoring Criticism of Israel

Last updated May 2019

Antisemitism—hatred, violence, intimidation or discrimination targeting Jews because of their ethnic and religious identity—is rampant and deadly. Mass shootings at two synagogues within the span of six months by alleged white supremacists—one of whom is also accused of setting fire to a nearby mosque—have served as a painful reminder that fighting antisemitism must go hand in hand with fighting racism and oppression in all forms.

Despite the clear threat of anti-Jewish rhetoric and attacks from white supremacists, however, many Israel lobby groups have focused instead on redefining antisemitism to include criticism of Israel. Israel lobby groups have prioritized codifying a widely criticized and overbroad redefinition of antisemitism that classifies virtually all speech supportive of Palestinian rights as antisemitic and have pushed such legislation in the aftermath of anti-Jewish attacks.¹

The redefinition is a tool to censor protected speech, to target viewpoints critical of Israel, and to chill one side of an important political debate by tarring those who support Palestinian rights as anti-Jewish.

1. Multiple Versions of the Redefinition Are Fundamentally the Same

The redefinition has several names and iterations, including: the “International Holocaust Remembrance Alliance (IHRA) definition,” the “State Department definition,” the “3D’s,” and the “European Union Monitoring Centre Working definition.” These versions are similar in both substance and effect, and all are manifestations of a political project attempting to expand the traditional definition of antisemitism to include criticism of Israel.

The International Holocaust Remembrance Alliance² adopted a non-binding definition of antisemitism in May 2016 the first part of which sets out a traditional and uncontroversial description: “Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical

¹ See, e.g., Press Release, Senator Tim Scott, Scott Fights to Curb Anti-Semitic Incidents Across the Nation (May 3, 2019), <https://www.scott.senate.gov/media-center/press-releases/scott-fights-to-curb-anti-semitic-incidents-across-the-nation> (linking deadly violence against Jews to the need for legislation redefining antisemitism: “[M]y Anti-Semitism Awareness Act has the backing of the Anti-Defamation League as well as numerous other advocates.”); Shari Dollinger, *We Are Not Alone*, HUMANEVENTS.COM (May 2, 2019), <https://humanevents.com/2019/05/02/we-are-not-alone/> (citing deadly shootings in Jewish synagogues as the reason why legislation to redefine antisemitism is a central piece of Christians United for Israel’s 2019 legislative agenda); Josh Nathan-Kazis, *After Pittsburgh, Jewish Groups’ First Fight Is Against BDS — Not White Nationalism*, FORWARD (Nov. 5, 2018), <https://forward.com/news/413506/after-pittsburgh-jewish-groups-first-fight-against-bds-not-white/>.

² The IHRA is an intergovernmental body mandated to combat antisemitism which consists of 32 Member Countries, including the United States. The primary focus of the IHRA is Europe, given that the vast majority of its members are European states (25 of 32). *Countries & Membership*, IHRA, <https://www.holocaustremembrance.com/countries-and-membership> (last visited May 20, 2019).

manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.”³ The definition then radically departs from a traditional understanding of antisemitism with a list of illustrative examples, including:

- “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” and
- “Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.”⁴

The State Department definition, so called because it is listed on a U.S. Department of State webpage, is currently the same as the IHRA definition.⁵

The 3D’s definition was listed on the State Department website prior to 2018 and is substantially similar to the IHRA definition. The 3D’s begins with a general and uncontroversial description of how hatred of Jews is manifested but continues to describe 3 D’s of “Anti-Semitism Relative to Israel”: demonizing Israel, applying a double-standard to Israel, and delegitimizing Israel.⁶ Explanatory bullets are listed under each “D.” For example, “denying the Jewish people their right to self-determination” is listed as an illustration of what it means to “Delegitimize Israel.”⁷

The European Union Monitoring Centre (EUMC) Working Definition refers to a similar definition temporarily on the EUMC website in 2005, as described in Part 6 (Historical Background) below.

The IHRA definition (currently listed on the U.S. State Department website) and the 3D’s (formerly listed on the U.S. State Department website) are substantially the same. Although the IHRA definition does not use the “3D’s” as subject headers, each substantive point from the 3D’s explanatory bullets is incorporated into the IHRA’s contemporary examples of antisemitism. For example, the phrase “Demonize Israel” does not appear in the IHRA definition, but two of the examples used to illustrate the meaning of “demonization” in the 3D’s are also found in the IHRA definition.⁸ Likewise, the phrase “Delegitimize Israel” does not appear in the IHRA definition, but one of two examples from the 3D’s

³ *Working Definition of Antisemitism*, IHRA (adopted May 26, 2016), <https://www.holocaustremembrance.com/working-definition-antisemitism> [hereinafter IHRA, Working Definition of Antisemitism]; IHRA, Fact Sheet: Working Definition of Antisemitism (Mar. 27, 2019), https://www.holocaustremembrance.com/sites/default/files/inline-files/Fact%20Sheet%20Working%20Definition%20of%20Antisemitism_7.pdf [hereinafter IHRA, Fact Sheet].

⁴ IHRA, Working Definition of Antisemitism, *supra* note 3. The illustrative examples were highly contested by advocates for Palestinian rights in Europe, citing similar concerns to those outlined here. Some argued the examples were not in fact formally adopted by the IHRA Plenary. See *Six Reasons why no one should adopt the so-called “EUMC” or IHRA Working Definition of Antisemitism*, EUR. COORDINATION OF COMM.S & ASS’NS FOR PALESTINE (Dec. 18, 2017), <http://www.eccpalestine.org/six-reasons-why-no-one-should-adopt-the-so-called-eumc-or-ihra-working-definition-of-antisemitism/>.

⁵ *Defining Anti-Semitism*, U.S. DEP’T OF STATE, <https://www.state.gov/defining-anti-semitism/> (last visited May 20, 2019).

⁶ U.S. Dep’t of State, *Defining Anti-Semitism*, ARCHIVE.ORG (Jan. 20, 2017), <https://web.archive.org/web/20180117193205/https://www.state.gov/s/rga/resources/267538.htm>.

⁷ *Id.*

⁸ *Compare* IHRA, Working Definition of Antisemitism, *supra* note 3 (referring to “Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis” and “Drawing comparisons of contemporary Israeli policy to that of the Nazis”), *with* U.S. Dep’t of State, *supra* note 6 (referring to “Using the symbols and images associated with classic anti-Semitism to characterize Israel or Israelis” and “Drawing comparisons of contemporary Israeli policy to that of the Nazis”).

explaining the meaning of “delegitimize” does appear.⁹ “Double Standard” appears in both the IHRA and the 3D’s definition.¹⁰

2. The Redefinition Falsely Conflates Criticism of Israel with Antisemitism

Human rights advocacy calling for freedom, justice, and equality for Palestinians, or advocacy that vigorously criticizes Israeli policies, is simply not the same as anti-Jewish hate.

The redefinition brands critics of Israel and advocates for Palestinian rights as anti-Jewish by blurring important distinctions between criticism of Israel as a nation-state and antisemitism.¹¹ In fact, Jewish people and the Israeli state are not one and the same. Over half the world’s Jewish population lives outside of Israel. Over twenty percent of Israel’s population is not Jewish. The inaccurate assumption that the Israeli government represents Jewish people worldwide is itself antisemitic because it necessarily attributes Israeli government policies and practices to all Jews. Many Jews, including Israeli Jews, join people of all faiths from across the globe in criticizing Israel. Those criticisms are not based on anti-Jewish hate, but on the policies of the government of Israel as a nation-state.¹²

Confusing criticism of Israel with antisemitism dangerously impedes efforts to combat antisemitism because it distracts from white supremacists responsible for deadly attacks.¹³ “[R]ecent history shows a vicious cycle: as antisemitic violence on the right gets ever more dangerous, false accusations of antisemitism are weaponized by the right as political cover. And as this slander is made more and more, it

⁹ Compare IHRA, Working Definition of Antisemitism, *supra* note 3 (referring to “Denying the Jewish people their right to self-determination”), with U.S. Dep’t of State, *supra* note 6 (same).

¹⁰ Compare IHRA, Working Definition of Antisemitism, *supra* note 3 (referring to “Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation”), with U.S. Dep’t of State, *supra* note 6 (same).

¹¹ For further reading on this distinction, see JEWISH VOICE FOR PEACE, ON ANTISEMITISM: SOLIDARITY AND THE STRUGGLE FOR JUSTICE (2017); Neve Gordon, *The ‘New Anti-Semitism,’* LONDON REV. OF BOOKS (Jan. 4, 2018), <https://www.lrb.co.uk/v40/n01/neve-gordon/the-new-anti-semitism>; Saree Makdisi & Judith Butler, *Suppressing criticism of Zionism on campus is catastrophic censorship*, L.A. TIMES (Mar. 23, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-makdisibutler-uc-antisemitism-report-20160323-story.html>; Judith Butler, *No, it’s not anti-semitic*, LONDON REV. OF BOOKS (Aug. 21, 2003), <https://www.lrb.co.uk/v25/n16/judith-butler/no-its-not-anti-semitic>; Edward C. Corrigan, *Is Anti-Zionism Anti-Semitic? Jewish Critics Speak*, MIDDLE EAST POL’Y, Winter 2009, at 146, <http://www.mepc.org/anti-zionism-anti-semitic-jewish-critics-speak>.

¹² For example, many describe the dozens of Israeli laws that privilege Jews or discriminate against non-Jews as a system of racial discrimination. See *Fact Sheet: Is Israel an Apartheid State?*, INSTITUTE FOR MIDDLE EAST UNDERSTANDING (Oct. 4, 2013), <https://imeu.org/article/is-israel-an-apartheid-state> (linking to a Human Rights Watch report and a series of Israeli officials, former President Carter, and retired Marine General James Mattis all describing Israeli conditions of racial apartheid). For more information on Israel’s discriminatory laws, see *Israel’s Jewish Nation-State Law*, ADALAH (Feb. 8, 2018), <https://www.adalah.org/en/content/view/9569>; *The Discriminatory Laws Database*, ADALAH (Sept. 25, 2017), <https://www.adalah.org/en/content/view/7771>.

¹³ *Examining Anti-Semitism on College Campuses: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. (Nov. 7, 2017) (statement of Barry Trachtenberg, Chair of Jewish History at Wake Forest University), <https://docs.house.gov/meetings/JU/JU00/20171107/106610/HHRG-115-JU00-Wstate-TrachtenbergB-20171107.pdf> (“Moreover, and perhaps most dangerously of all, attempts to broaden the definition of antisemitism to encompass phenomena that are clearly not anti-Jewish can only make it more difficult to recognize, isolate, and oppose actual antisemitic hatred when it does appear.”); see also Brief for Jewish Studies Scholars as Amici Curiae Supporting Defendants, *Mandel v. Bd. of Tr. of the Cal. State Univ.*, No. 3:2017cv03511 (N.D. Cal. 2018), <https://palestinelegal.org/news/2017/11/7/jewish-studies-scholars-file-amicus>.

comes to take over our popular definition of antisemitism, therefore making it harder to recognize, call out and stop the real thing,” explained Jewish commentator Aaron Freedman.¹⁴ The British journalist Owen Jones has similarly written that “to defeat all forms of antisemitism—including those that masquerade as solidarity with oppressed Palestinians—we need to be able to identify them. That becomes impossible when the very meaning of the word is abused and lost.”¹⁵

The redefinition impedes debate on university campuses. Even the lead author of the IHRA/State Department definition of antisemitism, Kenneth Stern, opposes its use on college campuses in the United States because it undermines free speech principles necessary for critical thinking about both Israeli policy and antisemitism. In a 2016 New York Times op-ed, Stern wrote, “[t]he definition was intended for data collectors writing reports about anti-Semitism in Europe. It was never supposed to curtail speech on campus.”¹⁶

A group of Jewish studies scholars described the State Department definition as “a misleading and dangerous redefinition of partisan origins that fails to comport with the overwhelming consensus of scholars on the subject of anti-Jewish hate,” in an amicus brief to a federal court in the Northern District of California.¹⁷

3. The Redefinition Infringes on Free Speech Protections

Speech critical of Israeli policies or supportive of Palestinian rights cannot constitute the basis for government—including public university—regulation.¹⁸ The U.S. Constitution protects political speech activities from government interference in order to ensure that even those who protest government policies can speak their mind without fear of retribution.¹⁹ The Supreme Court has declared, “[s]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”²⁰ When the government targets a particular viewpoint, the First Amendment violation is all the more blatant.²¹ Efforts to codify the redefinition into law run afoul of these constitutional guarantees.

Blurring antisemitism with criticism of Israel will result in censorship of constitutionally protected political speech. The redefinition of antisemitism is so broadly drawn—and its examples so vague—that any speech critical of Israel or supportive of Palestinian rights could conceivably fall within it. For

¹⁴ Aaron Freedman, *Hatred of Jews Terrifies Me; So Do False Accusations of Antisemitism*, THE GUARDIAN, (May 14, 2019), <https://www.theguardian.com/commentisfree/2019/may/14/antisemitism-rashida-tlaib-mccain>.

¹⁵ Owen Jones, *Anti-Jewish Hatred Is Rising—We Must See It for What It Is*, THE GUARDIAN (Aug. 11, 2014), <http://www.theguardian.com/commentisfree/2014/aug/11/anti-jewish-hatred-rising-antisemitism-meaning>.

¹⁶ Kenneth Stern, *Will Campus Criticism of Israel Violate Federal Law?*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html>.

¹⁷ Brief for Jewish Studies Scholars as Amici Curiae Supporting Defendants, *supra* note 13.

¹⁸ Three federal district courts have held that state laws restricting political boycotts for Palestinian rights violate the First Amendment. *Amawi v. Pflugerville Indep. Sch. Dist.*, No. 1:18-CV-1091-RP (W.D. Tex. Apr. 25, 2019); *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016 (D. Ariz. 2018); *Koontz v. Watson*, 283 F. Supp. 3d 1007 (D. Kan. 2018).

¹⁹ *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

²⁰ *Connick v. Myers*, 461 U.S. 138, 145 (1983).

²¹ *See R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992).

example, a human rights advocate who speaks out for Palestinian rights, citing reports by such bodies as the United Nations or Amnesty International regarding Israeli human rights abuses, could be labeled antisemitic for applying a double standard because they did not simultaneously speak out for the rights of other oppressed groups.

Requiring government agencies to apply such a vague definition would force officials into the position of government censor. For example, to avoid applying the double standard in the IHRA definition, university officials would have to determine: must students criticize China, Saudi Arabia, or other states before or after criticizing Israel? Are universities required to punish students and faculty who call the Israeli state, or the United States, or any other government, “racist”? Is a campus discussion of Israel’s “Nation State” law (enacted in July 2018, to enshrine the right of national self-determination for Jews only²²) grounds for a federal investigation? Application of the IHRA definition would drive government officials into a morass of viewpoint-based distinctions and would compel and punish speech in violation of the First Amendment.

The U.S. Department of Education’s Office for Civil Rights (OCR) under the Obama administration emphatically affirmed that criticism of Israel is protected speech on campus. In August 2013, OCR dismissed three complaints against the University of California campuses at Berkeley, Irvine, and Santa Cruz, which had alleged that criticism of Israel created an antisemitic environment.²³ OCR also dismissed a complaint against Rutgers University in 2014,²⁴ which was subsequently reopened in 2018 to be analyzed under the IHRA definition.²⁵ The complaints were made under Title VI of the Civil Rights Act of 1964.

OCR **rejected** these complaints because the speech activities at issue “constitute[] expression on matters of public concern directed to the University community. **In the university environment, exposure to such robust and discordant expressions, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience.** In this context, the events that the complainants described do not constitute actionable harassment.”²⁶

²² See David M. Halbfinger & Isabel Kershner, *Israeli Law Declares the Country the ‘National-State of the Jewish People*, N.Y. TIMES (July 19, 2018), <https://www.nytimes.com/2018/07/19/world/middleeast/israel-law-jews-arabic.html>.

²³ Letter from Zachary Pelchat, Team Leader, U.S. Department of Education Office for Civil Rights (DOE OCR), San Francisco, to UC Berkeley Chancellor Robert Birgeneau, OCR Case No. 09-2-2259 (August 19, 2013), http://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR_.pdf [UC Berkeley determination letter]; Letter from Zachary Pelchat, Team Leader, DOE OCR, San Francisco, to Carole E. Rossi, Chief Campus Counsel, UC Santa Cruz, OCR Case No. 09-09-2145 (August 19, 2013), https://news.ucsc.edu/2013/08/images/OCR_letter-of-findings.pdf [UC Santa Cruz determination letter]; Letter from Zachary Pelchat, Team Leader, DOE OCR, San Francisco, to UC Irvine Chancellor Michael Drake, OCR Case No. 09-07-2205 (August 19, 2013), https://ccrjustice.org/sites/default/files/assets/files/OCR-UCIrvine_Letter_of_Findings_to_Recipient.pdf [UC Irvine determination letter].

²⁴ Letter from Emily Frangos, Compliance Team Leader, DOE OCR, New York, to Morton A. Klein, President, Zionist Organization of America, OCR Case No. 02-11-2157 (July 31, 2014), *available at* <https://www.documentcloud.org/documents/1300803-ocr-decision-on-title-vicomplaint-7-31-14.html>.

²⁵ Letter from Kenneth L. Marcus, Assistant Secretary for Civil Rights, to Susan B. Tuchman, Zionist Organization of America, Rutgers University – OCR Case No. 02-11-2157 (Aug. 27, 2018), <https://palestinelegal.org/s/US-Department-of-Education-and-Working-Definition1-1.pdf>.

²⁶ UC Santa Cruz determination letter and UC Berkeley determination letter, *supra* note 23.

4. The Redefinition Has Been Deployed to Chill Campus Speech

In recent years, an increasing number of individuals and organizations inside the United States have sought to raise awareness of Israel's military occupation and discriminatory treatment of Palestinians, with many of these discussions and activities taking place on college campuses. The redefinition already has been used to threaten these forms of protected expression calling for Palestinian human rights.

In April 2019, a group of anonymous students filed a lawsuit asking the court to force the cancellation of a panel at the University of Massachusetts Amherst (UMass). The panel planned to discuss censorship of speech supporting Palestinian rights. The lawsuit argued that the IHRA definition of antisemitism justified a court order to cancel the event because the panelists' criticism of Israel and its policies fell within the redefinition. The court rejected this argument, finding "nothing that would justify a prior restraint on speech" and no allegation that the panel "will include any other form of speech that is unprotected by the First Amendment."²⁷ The lawsuit came on the heels of letters from Israel advocacy organizations, the Massachusetts Republican Jewish Committee and the Massachusetts Republican Party to UMass, warning the university that sponsoring the event would be a violation of federal policies around antisemitism.²⁸

In April 2019, professor and former Harvard University president Larry Summers cited the redefinition to label educational activities at Harvard antisemitic. Summers was criticizing Harvard students' Israel Apartheid Week, during which they aimed to educate their peers about Israel's application of different sets of laws to Palestinians and Jewish Israelis. He claimed the events were antisemitic "in both effect and intent" according to the redefinition.²⁹

A November 2018 vigil organized by Jewish students at UC Berkeley to jointly mourn the deaths of Palestinian children killed in Gaza and Jewish people killed in the Pittsburgh massacre³⁰ is now the subject of a Title VI complaint to the U.S. Department of Education Office for Civil Rights (OCR).³¹ Attorneys who filed the complaint alleged that the vigil was to portray "Israel as a barbarian and racist nation," falling under the IHRA definition being applied by Marcus's OCR, and said the students who

²⁷ *Doe v. Manning*, No. 2019-01308-H (Mass. Sup. Ct., Suffolk Div., May 3, 2019) (denying motion for preliminary injunction), <http://palestinelegal.org/s/Doe-v-Manning-19cv1308-Decision-on-Ps-Mtn-Injunctive-Relief.pdf>; see also *Mass. Judge Refuses to Halt Pro-Palestinian Event at UMass Featuring Roger Waters & Linda Sarsour*, DEMOCRACY NOW! (May 3, 2019), https://www.democracynow.org/2019/5/3/mass_judge_refuses_to_halt_pro.

²⁸ Press Release, Mass GOP, UMass Amherst to Host Anti-Israel Event (April 23, 2019), <https://massgop.com/umass-amherst-to-host-anti-israel-event/>; Letter from Academic Council for Israel et al. to Kumble R. Subbaswamy, Chancellor, Univ. of Mass (Apr. 23, 2019), <https://amchainitiative.org/wp-content/uploads/2019/04/UMass-80-Org-Letter-4.23.19.pdf>.

²⁹ Lawrence H. Summers (@LHSummers), TWITTER (Apr. 4, 2019, 9:34 AM), <https://twitter.com/LHSummers/status/1113842399183351808>.

³⁰ Students for Justice in Palestine at UC Berkeley, *Joint Statement on Vigil With Jewish Voice for Peace at Berkeley*, FACEBOOK (Nov. 9, 2018), <https://www.facebook.com/notes/students-for-justice-in-palestine-at-uc-berkeley/joint-statement-on-vigil-with-jewish-voice-for-peace-at-berkeley/1917395535013465/>.

³¹ Aaron Bandler, *Pro-Israel Students File Complaint to Department of Education About SJP Vigil at Berkeley*, JEWISH JOURNAL (Nov. 13, 2018), <http://jewishjournal.com/news/nation/241882/pro-israel-students-file-complaint-department-education-sjp-vigil-berkeley/>.

organized the vigil should be expelled.³² Instead of the planned public event, students held a small private vigil due to the threats and intimidation.³³

Referencing the U.S. State Department's definition of antisemitism, the Indiana University campus branch of an Israel lobby group attempted to censor a November 2018 talk about Palestinian rights delivered by Jamil Dakwar, a prominent international human rights lawyer and director of the ACLU's Human Rights Program.³⁴

In 2017, the State Department definition formed the basis of a federal lawsuit against San Francisco State University (SFSU) professor Rabab Abdulhadi brought by the Lawfare Project, a right-wing anti-Palestinian legal organization. The Lawfare Project argued that according to the State Department definition at the time, campus advocacy for Palestinian rights created a hostile environment for Jewish students that violated their civil rights. In 2018, a court dismissed the lawsuit.³⁵

In September 2016, the University of California Berkeley suspended a course on Palestine in the middle of the semester, in blatant violation of academic freedom. The course suspension was a response to an international campaign by Israel advocacy organizations arguing, erroneously, that the course was "antisemitic anti-Zionism" and in violation of the University's Principles of Intolerance. The Principles of Intolerance were adopted as a milder version of the IHRA definition, after the IHRA/State Department definition had been rejected.³⁶

5. Use of the Redefinition Within the U.S.

Despite the U.S.'s robust constitutional protections guaranteeing free speech, there have been numerous attempts to incorporate the redefinition into U.S. law and policy.

U.S. State Department: At most, the State Department uses the redefinition of antisemitism for the limited purpose of data collection to identify antisemitism abroad, for example, in country reports on global antisemitism. As the State Department's 2008 report "Contemporary Global Anti-Semitism" explained, "The EUMC's working definition provides a useful framework for identifying and understanding the problem and is adopted for the purposes of this report."³⁷

The 2008 report contained this caveat: "While the report describes many measures that foreign governments have adopted to combat anti-Semitism, it does not endorse any such measures that prohibit

³² *Id.*

³³ Students for Justice in Palestine at UC Berkeley, *supra* note 30.

³⁴ Palestine Legal, *IIPAC Tries to Censor Jamil Dakwar's Lecture at Indiana University* (Dec. 17, 2018), <https://palestinelegal.org/news/2018/12/17/iipac-jamil-dakwar?rq=jamil%20dakwar>.

³⁵ For a full description of the case, see, Palestine Legal Case Page, *SF State: Lawsuits Tried to Silence Research, Advocacy on Palestine* (March 12, 2018), <https://palestinelegal.org/case-studies/2017/11/3/years-long-suppression-campaign-sfsu>.

³⁶ Palestine Legal Case Page, *UC Berkeley Suspended Course on Palestine* (Oct. 17, 2017), <https://palestinelegal.org/case-studies/2017/10/13/uc-berkeley-suspended-course-on-palestine>.

³⁷ U.S. Department of State, *2008 Contemporary Global Anti-Semitism Report*, 2 (Washington, D.C.: US State Department, 2008), <https://2009-2017.state.gov/j/drl/rls/102406.htm>.

conduct that would be protected under the US Constitution.”³⁸ This caveat is necessary because if a government body were to apply the proposed redefinition to restrict speech in the U.S., it would violate the First Amendment.

The current page on antisemitism on the State Department website emphasizes that the U.S. “uses this working definition to guide its foreign policy action and encourages other governments and international organizations to use it as well.”³⁹ This makes no mention of a domestic application.

U.S. Education Department: In August 2018, the head of the U.S. Department of Education Office for Civil Rights (OCR) for the Trump Administration, Kenneth Marcus, wrote a letter to the Zionist Organization of America, stating that the IHRA definition of antisemitism is “in use” by OCR.⁴⁰ Marcus’s declaration went through no known process of policy evaluation as is customary, and was criticized as procedurally irregular.⁴¹ The declaration contradicted the judgment of officials who rejected the redefinition of antisemitism under both the Trump and Obama administrations. In rejecting congressional requests to adopt the IHRA definition, Trump’s Education Secretary DeVos (Marcus’s superior) stated in September 2017 that the department “does not adopt definitions of particular forms of racism or national origin discrimination.”⁴² President Obama’s Secretary of Education Arne Duncan had sent a similar letter to members of Congress in December 2015.⁴³

U.S. Congress: Congress has twice refused to enact stand-alone legislation that would have required the DOE to consider this definition when investigating instances of alleged antisemitism on college campuses. The Anti-Semitism Awareness Act (“Act”) failed in 2016 and 2018 due in large part to First Amendment concerns raised by civil liberties and civil rights groups.⁴⁴ As noted above, Kenneth Stern, the redefinition’s original author, also opposed the Act.⁴⁵ A substantially similar bill was introduced in 2019.⁴⁶

³⁸ *Id.* The most recent State Department publication on anti-Semitism abroad was published in 2017, and it did not specify which definition of antisemitism it applied, nor did it include language acknowledging that the First Amendment of the U.S. Constitution would apply to any domestic application of the definition. See U.S. DEP’T OF STATE, EXCERPTS ON ANTI-SEMITISM FROM THE 2016 U.S. DEPARTMENT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2017), <https://www.state.gov/documents/organization/270416.pdf>.

³⁹ *Defining Anti-Semitism*, *supra* note 5.

⁴⁰ Marcus, *supra* note 25.

⁴¹ Letter from Palestine Legal et al. to Kenneth L. Marcus, Assistant Secretary for Civil Rights (Nov. 30, 2018), <https://palestinelegal.org/news/2018/12/3/civil-rights-groups-warn-doe>.

⁴² Letter from Betsy DeVos, Secretary of Education, U.S. Department of Education, to Rep. Brad Sherman (Sept. 8, 2017), <https://reason.com/assets/db/15369499618934.pdf>.

⁴³ Letter from Arne Duncan, Secretary of Education, U.S. Department of Education, to Rep. Brad Sherman and Sen. Harry Reid (Dec. 18, 2015) (on file with Palestine Legal).

⁴⁴ See, e.g., ACLU, *Oppose H.R. 6421/S.10, The Anti-Semitism Awareness Act of 2016* (Dec. 5, 2016),

<https://www.aclu.org/letter/oppose-hr-6421s-10-anti-semitism-awareness-act-2016>; Letter from Palestine Legal et al. to Rep. Bob Goodlatte and Rep. John Conyers, Jr. (Dec. 5, 2016),

<https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/584eca8ee6f2e17fd89fa3ca/1481558672194/AntiSemitism+Awareness+Act+Opposition+Letter+final.pdf>; Joe Cohn, *Problematic Campus Anti-Semitism Bill Clears Senate*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Dec. 2, 2016) <https://www.thefire.org/problematic-campus-anti-semitism-bill-clears-senate/>.

⁴⁵ Stern, *supra* note 16.

⁴⁶ Anti-Semitism Awareness Act of 2019, S. 852, 116th Cong. § 3 (2019).

State and Local Governments: The Florida state legislature passed a bill in April 2019 adopting the redefinition for the purposes of evaluating whether antisemitic discrimination has occurred in the state's public school system.⁴⁷ This version further restricts Palestinian human rights advocacy by defining it as antisemitic to “focus peace or human rights investigations only on Israel.”⁴⁸ In December 2017, Bal Harbour, FL passed an ordinance authorizing local law enforcement to use the State Department definition of antisemitism to investigate alleged incidents of antisemitic hate crimes.⁴⁹

In 2018, in South Carolina the proposed redefinition failed as a stand-alone bill and only succeeded as a rider to a budget bill that expires after one year.⁵⁰ Similar bills were defeated in Virginia⁵¹ and Tennessee⁵² in 2017. Tennessee lawmakers reintroduced similar legislation in 2019.⁵³ If enforced to punish First Amendment protected speech critical of Israeli government policy, these laws could expose education officials and local law enforcement to legal liability.

Universities: In California, the University of California (UC) Regents rejected a redefinition of antisemitism after Israel advocacy organizations lobbied the university in 2015.⁵⁴ A similar redefinition had been endorsed by the California legislature in a non-binding resolution in 2012, House Resolution No. 35, which encouraged suppression of political speech critical of Israel on California college campuses.⁵⁵

Across the country, some university student governments, including at the University of Wisconsin-Madison,⁵⁶ have adopted the redefinition through non-binding resolutions, often under pressure from

⁴⁷ H.B. 741, 2019 Reg. Sess. (Fla. 2019), <https://www.flsenate.gov/Session/Bill/2019/00741>.

⁴⁸ *Id.*

⁴⁹ See Elizabeth Koh, *Is Anti-semitism a Hate Crime? This Town Is Giving Police More Power to Find Out*, MIAMI HERALD (Dec. 14, 2017), <http://www.miamiherald.com/news/local/community/miami-dade/article189723404.html>.

⁵⁰ Ali Younes, *Critics denounce South Carolina's new 'anti-Semitism' law*, AL JAZEERA (May 16, 2018), <https://www.aljazeera.com/news/2018/05/critics-denounce-south-carolina-anti-semitism-law-180513113108407.html>.

⁵¹ See *Victory! Unconstitutional bill defeated in Virginia*, PALESTINE LEGAL (Jan. 30, 2017), <http://palestinelegal.org/news/2017/1/30/virginia-lawmakers-considering-unconstitutional-bill-aimed-at-censoring-palestine-advocacy-1>.

⁵² In April 2017, the Tennessee bill was “Deferred for Summer Study.” See *SB 0581*, TENN. GEN. ASSEMB., <http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB0581&ga=110> (last accessed May 22, 2019).

⁵³ H.B. 600/S.B. 1250, 111th Gen. Assemb. (Tenn. 2019), <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0600>.

⁵⁴ See *UC Drops Consideration of State Department Anti-Semitism Definition*, PALESTINE LEGAL (July 22, 2015), <http://palestinelegal.org/news/2015/7/22/uc-drops-consideration-of-state-department-anti-semitism-definition>.

⁵⁵ H. Res. 35, 2011-2012 Cal. State Assemb., Reg. Sess. (Cal. 2012), http://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201120120HR35. The non-binding resolution suggested that the University of California deny resources to speech critical of Israel, a blatant First Amendment violation.

⁵⁶ See Pat Schneider, *UW-Madison Student Council Adopts Anti-Semitism Resolution, Code of Conduct*, CAP TIMES (Sept. 8, 2017), http://host.madison.com/ct/news/local/education/university/uw-madison-student-council-adopts-anti-semitism-resolution-code-of/article_1dca4d79-f9b7-5d8f-bdd8-def837fc123e.html. Palestine Legal sent UW-Madison a legal letter warning that implementation of the redefinition would likely invite First Amendment legal challenges. *University of Wisconsin-Madison Students of Color Targeted for Organizing Against White Supremacy and Zionism*, PALESTINE LEGAL (Nov. 6, 2017), <https://palestinelegal.org/news/2017/11/6/wisconsin-students-of-color-targeted>.

outside Israel advocacy organizations. In 2017, the student government at Kent State University rejected an effort to adopt the redefinition of antisemitism after First Amendment concerns were raised.⁵⁷

6. Historical Background

The effort to redefine antisemitism to include common criticism of Israel originated over a decade ago when the American Jewish Committee and other U.S.-based Israel advocacy groups championed the idea of a Tel Aviv University professor, Dina Porat.⁵⁸ The 3D's test was popularized around the same time by a Jewish leader and former chairman of the Jewish Agency for Israel, Natan Sharansky.⁵⁹

Lobbying efforts by pro-Israel groups culminated in the European Union Monitoring Centre (EUMC) posting a very similar version of the definition to its website in 2005. But the definition, which was meant only as a "guide for data collection," was never formally adopted by the EUMC and, in fact, was subsequently discarded by the EUMC's successor body, the Fundamental Rights Agency (FRA), due to heavy criticism arising out of free expression concerns.⁶⁰ In 2013, the FRA removed the definition from its website because, according to an agency spokesperson, the FRA had never viewed the document as a valid definition.⁶¹ The document was pulled offline "together with other non-official documents,"⁶² to the consternation of Israeli officials and U.S.-based Israel advocacy groups which called on the agency to restore the working definition to its website.⁶³

In 2016, the Plenary of the IHRA adopted its non-binding working definition of antisemitism, which, as described above, revived the controversial examples from the 3D's describing speech critical of Israel as antisemitic.⁶⁴

In June 2017, the EU Parliament endorsed the IHRA working definition, calling on member states and EU institutions and agencies to apply the working definition.⁶⁵ Some EU member states, including the UK,

⁵⁷ See Mitch Felan, *USG Passes Anti-Semitism Denunciation Resolution After Initial BDS Movement Controversy*, KENT WIRED (Mar. 8, 2017), http://www.kentwired.com/article_5e99ba80-0471-11e7-9fd3-4bd95b192f17.html.

⁵⁸ Dina Porat, *The International Working Definition of Antisemitism and Its Detractors*, 5 ISR. J. FOREIGN AFF., no. 3, at 93, 94, (2011), http://www.kantorcenter.tau.ac.il/sites/default/files/DinaPorat5%209_0.pdf.

⁵⁹ Natan Sharansky, *Forward*, JEWISH POL. STUD. REV., Fall 2004, at 5.

⁶⁰ *The "IHRA Working Definition of Antisemitism". Fact-sheet and Recommendations issued by ECCP and Free Speech on Israel*, EUR. COORDINATION OF COMM.S & ASS'NS FOR PALESTINE (Dec. 7, 2017), <http://www.eccpalestine.org/the-ihra-working-definition-of-antisemitism-fact-sheet-and-recommendations-issued-by-eccp-and-free-speech-on-israel>; Seth Berkman, *Anti-Semitism Fight Hinges On Definition*, FORWARD (Sept. 25, 2012), <http://forward.com/articles/163105/anti-semitism-fight-hinges-on-definition>.

⁶¹ *EU anti-racism agency unable to define anti-Semitism, official says*, JTA (Dec. 4, 2013), <https://www.jta.org/2013/12/04/news-opinion/world/eu-anti-racism-agency-unable-to-define-anti-semitism-official-says>.

⁶² *EU drops its 'working definition' of anti-Semitism*, TIMES OF ISRAEL (Dec. 5, 2013), <http://www.timesofisrael.com/eu-drops-its-working-definition-of-anti-semitism/#ixzz37qJRBuJL>.

⁶³ Press Release, Am. Jewish Comm., AJC Urges EU to Act on Findings of Anti-Semitism Report (Nov. 8, 2013), <http://www.prnewswire.com/news-releases/ajc-urges-eu-to-act-on-findings-of-anti-semitism-report-231178991.html>.

⁶⁴ IHRA, Working Definition of Antisemitism, *supra* note 3.

⁶⁵ *European Parliament approves resolution to adopt working definition of anti-Semitism*, JTA (Jun. 1, 2017), <https://www.jta.org/2017/06/01/news-opinion/world/european-parliament-approves-resolution-to-adopt-working-definition-of-anti-semitism>.

have adopted the IHRA definition.⁶⁶ These countries do not have the same free speech protections as those enshrined in the First Amendment to the U.S. Constitution.⁶⁷

⁶⁶ IHRA, Fact Sheet, *supra* note 3.

⁶⁷ *See, e.g.*, ARTICLE 19, RESPONDING TO ‘HATE SPEECH’: COMPARATIVE OVERVIEW OF SIX EU COUNTRIES 4 (2018), https://www.article19.org/wp-content/uploads/2018/03/ECA-hate-speech-compilation-report_March-2018.pdf (identifying “widespread deficiencies in the respective national frameworks on ‘hate speech’ in terms of their compatibility with applicable international freedom of expression standards”).