

HEARING BEFORE THE UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

A THREAT TO JUSTICE EVERYWHERE: STEMMING THE TIDE OF HATE CRIMES IN
AMERICA

TESTIMONY OF RABBI DR. MARK GOLDFEDER, ESQ.

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Chairman Durbin, Ranking Member Graham, and Members of the Committee,

Good morning. My name is Mark Goldfeder, and I am the Director of the National Jewish Advocacy Center, a nonprofit legal organization that combats antisemitism in all of its forms.¹ I am co-author of the Westlaw treatise ‘Religious Organizations and the Law.’² I served as the Founding Editor of the Cambridge University Press Series on Law and Judaism,³ and I teach Antisemitism and the Law at Touro University’s Touro Law Center.⁴ It is an honor to appear before you to discuss this important topic.

It is no secret that antisemitism has skyrocketed since Hamas’ brutal Oct. 7th massacre,⁵ but it is also no surprise. Sadly, there is a remarkably predictable uptick in incidents of anti-Jewish hate almost every time there is a conflict in the Middle East.⁶

What was surprising this time was how quickly the veneer of “anti-Zionism” was shattered by open expressions of enraged antisemitism directed toward innocent American Jews and their property, toward Jewish community institutions, and even religious facilities.

On college campuses across the country, between hiding from mobs in the library,⁷ avoiding dining halls because of death threats,⁸ and removing Nazi symbols from Chabad houses,⁹ Jewish students have been subjected to campaigns that employ classic antisemitic tropes (ranging from claims of dual loyalty to outright blood libels) and calls for them to be removed from campus if they dare to identify as Zionists¹⁰ — which the vast majority of Jewish people do.¹¹

And while it is true that antisemitic incidents have spiked by over 300 percent across the board, it is worth breaking down that number even further to see just how bad the problem has gotten.

According to statistics from the ADL’s Center for Extremism, in 2023, antisemitic assault incidents increased by 45%, antisemitic vandalism by 69%, and antisemitic harassment increased by 184%.¹² Those aren’t speech incidents, those are hate crimes. Most of the incidents took place between October 7th and the end of the year, but even before October 7th, there were monthly

¹ <https://jewishadvocacycenter.org/>

² <https://store.legal.thomsonreuters.com/law-products/Treatises/Religious-Organizations-and-the-Law-2023-2024-ed/p/106987952>

³ <https://cslr.law.emory.edu/news/releases/2017/11/first-title-in-jewish-law-series.html>

⁴ <https://www.tourolaw.edu/abouttourolaw/bio/456>

⁵ <https://www.axios.com/2024/01/10/antisemitic-incidents-hamas-israel-attack-2023-adl>

⁶ <https://www.adl.org/resources/fact-sheet/antisemitic-incidents-anti-israel-events-and-actions-around-world>

⁷ <https://www.cbsnews.com/newyork/news/cooper-union-pro-palestinian-rally-lawsuit-jewish-students-library/>

⁸ <https://www.campusreform.org/article/updated-kill-jews-cornells-kosher-dining-hall-shuts-death-threats-emerge/24291>

⁹ <https://wwmt.com/news/local/kalamazoo-nazi-swastika-vandalism-suspect-identified-racist-antisemitism-graffiti-spray-painted-jewish-hate-crime-valley-community-college-hate-speech>

¹⁰ <https://www.adl.org/resources/blog/what-do-anti-israel-student-organizers-really-want-examining-extreme-demands-behind>

¹¹ <https://www.jpost.com/diaspora/article-808658>

¹² <https://www.adl.org/resources/report/audit-antisemitic-incidents-2023>

increases in February, March, April, May, and September. Each of these months broke the prior record for most antisemitic incidents recorded in a single month.¹³

Antisemitic incidents also increased year-over-year in all major location categories. Incidents at K-12 schools increased by 135%. Incidents at Jewish institutions jumped by 237%. And of course, incidents on college and university campuses spiked by a staggering 321%.¹⁴

Let us be clear. Hate speech, no matter how offensive, is protected by the First Amendment. But assault and battery, arson, trespassing, vandalism, breaking and entering, destruction of property, harassment and true threats are all examples of unlawful antisemitic behaviors and hate crimes that have happened in the last few months and that can and should be regulated.

Over 90 percent of American Jews say that antisemitism is a serious concern.¹⁵ A recent Gallup poll found that a majority of American Jews, 60%, said that they are afraid to share their religious affiliation, far more than the 25% of Americans overall who said the same.¹⁶ And they are not uncomfortable for no reason. In 2023 our synagogues were forced to become fortresses.¹⁷ In 2024, our children still go to school under armed guard.¹⁸ I am incredibly grateful to observe a degree of bipartisan consensus here in Congress that more needs to be done to protect this vulnerable minority, not just because antisemitism is wrong but because it is a danger and a threat to our democracy.¹⁹

Which brings me to the next point. In a hearing about hate crimes, why am I focusing specifically on anti-Jewish hate crimes. Three reasons.

First, because there is an acute problem taking place right now, before our very eyes. The majority of religiously motivated hate crimes are committed against Jewish people,²⁰ and the numbers are getting worse. We need to deal with that reality now, before more people get hurt.

Second, this is not about Jewish exceptionalism, it is only about equality. There is an equal protection problem here, and as I will explain, some of it is definitional, and can be fixed. Throughout the generations no other hatred has been this amorphous and shifting, and defying of definition; for example, modern antisemitism is such that people can and do commit horrible acts of antisemitic discrimination and then claim that they were merely being “anti-Israel”. Notwithstanding the above, the importance of clarity in such definitions is not entirely unique to antisemitism, and to the extent that any other group feels it is being routinely and systemically discriminated against, and that there is a need for a definition to clarify what is and is not problematic, that group’s concerns should likewise be addressed. In a somewhat similar vein, the

¹³ Id.

¹⁴ Id.

¹⁵ <https://www.npr.org/2024/02/13/1230928104/large-majorities-americans-antisemitism-serious-problem-ajc>

¹⁶ <https://news.gallup.com/poll/646469/americans-show-heightened-concern-antisemitism.aspx>

¹⁷ <https://www.npr.org/2023/10/17/1206591813/how-u-s-synagogues-have-been-thinking-about-their-safety-since-the-amas-attacks>

¹⁸ <https://www.curbed.com/2023/11/uja-program-armed-guards-at-jewish-schools.html>

¹⁹ <https://www.state.gov/no-sanction-for-antisemitism/>; see also <https://documents.un.org/doc/undoc/gen/n19/289/00/pdf/n1928900.pdf>

²⁰ <https://www.statista.com/statistics/737660/number-of-religious-hate-crimes-in-the-us-by-religion/>

Black Lives Matter movement has argued that many states and universities do not in fact understand structural racism, and students at dozens of schools have published their lists of demands for change. These requests are along those lines.

Finally, it is important to address antisemitism in the context of the broader hate crimes conversation because history has repeatedly shown that antisemitism is often the proverbial “canary in the coal mine of intolerance.”²¹ This time, it didn’t even take very long for the chants to morph²² from death to Israel to death to America,²³ and from spray painting Hillel Houses²⁴ and desecrating menorahs²⁵ to disrupting Pride marches,²⁶ defacing George Washington’s statue,²⁷ and vandalizing the Freedom Bell. Stopping antisemitic hate crimes is a matter of self-preservation for all Americans because even if you aren’t Jewish, they are coming for you next. Just ask them, they aren’t shy.

And so, I would like to talk about solutions. Here are three practical steps that the government can take to immediately help stem the tide of unlawful hate directed against Jewish Americans, to the benefit of all Americans.

The first step is to use your oversight powers to ensure that the various agencies are enforcing the laws we already have as written. This includes of course, Title VI of the Civil Rights Act of 1964.²⁸ A hostile environment under Title VI is a situation where someone's ability to participate in or benefit from a program or activity funded by the federal government is limited or denied due to conduct based on race, color, or national origin. If those words mean anything, they must include what is happening to Jewish students on campus based on their real or perceived race or national origin.

It also includes the laws that provide for punishment when foreign students provide support for terrorism. The Immigration and Nationality Act²⁹ mandates that those engaging in terrorist activity are barred from entering the United States, and eligibility also applies to those who have “persuaded others to endorse or support one of these named terrorist groups,”³⁰ such as Hamas, which has been designated as a foreign terrorist organization by the State Department since 1997.³¹ Student groups are openly working as agents of Hamas and handing out recruitment flyers on our campuses.³² My organization, NJAC, has brought five federal anti-terrorist act lawsuits since October 7 to go after some of these bad actors.³³ But we should not have to do that.

²¹ <https://www.theguardian.com/commentisfree/2018/mar/30/antisemitism-jews-canary-coalmine-fake-news>

²² <https://www.youtube.com/shorts/cGb-YdCbBZ0>

²³ <https://www.foxnews.com/politics/death-to-america-rapidly-emerging-key-slogan-anti-israel-agitators-us>

²⁴ <https://www.bu.edu/articles/2023/graffiti-at-bu-hillel-being-investigated/>

²⁵ <https://news.yale.edu/2023/12/10/yale-statement-desecration-menorah>

²⁶ <https://www.nbcnews.com/nbc-out/out-news/lgbtq-pride-march-israel-hamas-war-protests-rcna156595>

²⁷ <https://www.fox5dc.com/news/george-washington-statue-in-dc-defaced-with-free-gaza-graffiti>

²⁸ <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html>

²⁹ <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act>

³⁰ <https://fam.state.gov/FAM/09FAM/09FAM030206.html>

³¹ <https://www.state.gov/foreign-terrorist-organizations/>

³² <https://x.com/jessicaschwalb7/status/1830799076733948111?s=46&t=JgqIRir0Ga3myGCeXj5xJg>

³³ <https://www.gtlaw.com/en/news/2024/05/press-releases/greenberg-traurig-national-jewish-advocacy-center-schoen-law-firm-and-holtzman-vogel-represent-american-and-israeli-victims-of-hamas>

Our laws also include requirements for schools to disclose the foreign funding they are receiving. One recent study cited by the Institute for the Study of Global Antisemitism and Policy have found that the receipt of undocumented money is associated with the erosion of free speech norms, and a rise in antisemitism, while another study found a positive directional association between campus antisemitic incidents and antisemitic incidents on the county level including hate crimes.³⁴ From 2015-2020, institutions that accepted money from authoritarian Middle Eastern donors, had, on average, 300% more antisemitic incidents than those institutions that did not.³⁵ The Defending Education Transparency and Ending Rogue Regimes Engaging in Nefarious Transactions (DETERRENT) Act, which passed the House with wide bipartisan support, might be helpful.

To the extent that these laws and others are not being enforced, Congress could also add teeth in the form of penalties for failure to follow the requirements, including fines for not enforcing the law, or the withholding of additional grants.

Second, there has been an abdication of authority when it comes to the First Amendment. University Presidents and law school deans unabashedly explain that the First amendment is hard to understand and claim that they cannot possibly comprehend its limits.³⁶ That is a terrible answer, and yet for their benefit and for everyone's benefit, Congress should clarify or ask the DOJ to clarify, what they already know deep down.

The First Amendment is not a free pass to threaten, harass, intimidate or otherwise violate the rights of others. There are limits to what constitutes speech, and there are rules for when it crosses over into actionable unlawful conduct. For example: The First Amendment does not protect arson, trespassing, vandalism, harassment, assault or the destruction of property. It does not protect against threats or intimidation, or incitement. To quote one of your former colleagues, and former University of Florida President Ben Sasse: "Just as we have an obligation to protect speech, we have an obligation to keep our students safe. Throwing fits, storming buildings, vandalizing property, spitting on cops and hijacking a university aren't speech."³⁷

Schools do not have to wait for more people to get hurt: The Supreme Court in *Healy v. James* (1972)³⁸ cited *Tinker v. Des Moines* (1969)³⁹ to hold that university officials do not have to tolerate student activities that breach reasonable campus rules, interrupt the educational process or interfere with other students' rights to receive an education. This is especially true when the student speech is happening in school-sponsored forums or is reasonably perceived as bearing the imprimatur of the institution. Under *Bethel v. Fraser* (1986)⁴⁰ and *Hazelwood v. Kuhlmeier* (1988)⁴¹ schools have even greater latitude to limit student expression if they can establish a legitimate pedagogical

³⁴ "The Corruption of the American Mind," ISGAP (2024), https://isgap.org/wp-content/uploads/2024/01/TheCorruption-of-the-American-Mind_V2-2.pdf

³⁵ Id.

³⁶ <https://www.wsj.com/us-news/education/columbia-university-president-what-i-plan-to-tell-congress-tomorrow-5f157620>

³⁷ <https://www.wsj.com/articles/the-adults-are-still-in-charge-at-the-university-of-florida-israel-protests-tents-sasse-eca6389b>

³⁸ *Healy v. James*, 408 U.S. 169 (1972)

³⁹ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)

⁴⁰ *Bethel School District v. Fraser*, 478 U.S. 675

⁴¹ *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)

concern. Ensuring that all students have a safe and harassment-free environment in which to learn is an overwhelmingly legitimate pedagogical concern.

Finally, Congress should clarify that when you attack a Jewish person or unlawfully discriminate against them based on any aspect of their Jewish identity, that is antisemitism and will be treated as such under federal law.

Because Jewish identity is so multifaceted, without a standard definition for authorities to reference when analyzing the intent behind illegal, discriminatory actions, including hate crimes, it is easy for antisemites to hide behind this ambiguity and commit unlawful acts against Jews with impunity. There is a bill before the Senate now, the Antisemitism Awareness Act,⁴² which solves that problem by requiring the relevant authorities to consider, as contextual rebuttable evidence, the gold-standard International Holocaust Remembrance Alliance, or IHRA, definition of antisemitism⁴³ when assessing the motivation behind already unlawful behavior if there is an allegation that the target was chosen because of an aspect of their Jewish identity. This bill has passed the House and is waiting further consideration here in the United States Senate.

There can be no clearer demonstration than the events of the last year as to why the IHRA definition includes examples of antisemitic anti-Zionism, such as holding Jews “collectively responsible for actions of the state of Israel,” among modern manifestations of anti-Jewish hate.

Just like it is racial or ethnic bias to attack a Chinese person over China’s trade policies and national origin discrimination to fire a Russian because Russia attacked Ukraine, it is antisemitic to target Jewish people with discriminatory actions because of a real or perceived connection they might have to the Jewish state.

This idea should not be controversial, and it is certainly not partisan; as the White House’s National Strategy to Counter Antisemitism recently stated, “Jewish students and educators are targeted for derision and exclusion on college campuses, often because of their real or perceived views about the State of Israel. When Jews are targeted because of their beliefs or their identity, when Israel is singled out because of anti-Jewish hatred, that is antisemitism. And that is unacceptable.”

This should be obvious but it isn’t. I am the general counsel for 24 Hillels in Georgia. Last year, pro-Hamas students surrounded an innocent Jewish student and threw him to the ground. They threatened to kill him, his family, and all ‘Israelis.’ For the record, the student was not Israeli, he was just Jewish. The police said this was not a hate crime because he didn’t say Jew, he said Israel. The perpetrator was back on campus a few hours later and the Jewish community understood that they were not safe.

⁴² <https://www.congress.gov/bill/118th-congress/house-bill/6090>

⁴³ <https://holocaustremembrance.com/resources/working-definition-antisemitism>

There are very few things that the Bush,⁴⁴ Obama,⁴⁵ Trump,⁴⁶ and Biden⁴⁷ administrations have agreed on, but the IHRA definition is one of them. Not to mention a supermajority of US states that have embraced it, as well as the vast majority of Jews across every ideological spectrum.⁴⁸ It is also the only definition with an actual track record of demonstrable effectiveness in curbing anti-Jewish hate and bigotry.⁴⁹ The IHRA definition of antisemitism also contains the appropriate caveats and carefully balanced safeguards that take into account the importance of nuance and context in situations that involve allegations of discriminatory intent.

For example, the definition makes clear that criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic and that all of the examples are not meant to be dispositive but rather are the types of things that could, taking into account the overall context, be evidence of antisemitism.

Of course, Jews are not monolithic, and there is a small minority within the Jewish community, including my distinguished friend Dr. Stern, that do not support this bill because they are afraid it might be misapplied in some way to restrict speech. First, it is important to reiterate that this minority does not represent the Jewish community, which has spoken in a clear and loud voice. Every major Jewish organization in the country, by membership estimates over 90 percent of American Jews, support this bill wholeheartedly.⁵⁰ That is more than a consensus, it is a mandate. Second, the argument that the bill, which by definition only applies to unlawful conduct, not speech, could be used the wrong way is not an argument against the bill, rather it is an argument to make sure the bill is carefully crafted, which it is. To the extent that the concern is that such a bill might somehow “chill” protected speech, a unanimous Supreme Court ruling in *Wisconsin vs. Mitchell* (1993)⁵¹ held that when it comes to evaluating discriminatory actions “The First Amendment does not prohibit the evidentiary use of speech to prove motive or intent.”⁵² That is just how antidiscrimination laws always work.

The truth is that the Antisemitism Awareness Act does not go far enough. It only requires the Department of Education to make use of the IHRA definition when assessing unlawful discriminatory behavior under Title VI. It is an excellent bill that was written well before October 7th, yet since that time, it has unfortunately only become clearer that the Jewish community needs their protections clarified in other contexts as well, including for example in the Title VII employment context, or, as is the subject of this hearing, hate crimes. There is a sister bill in the House called the Define to Defeat Act,⁵³ which expands on the Antisemitism Awareness Act, and applies the same definition in these contexts. Again, there has been wide bipartisan support for the

⁴⁴ <https://2001-2009.state.gov/g/drl/rls/56589.htm>

⁴⁵ <https://www.state.gov/defining-antisemitism/>

⁴⁶ <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-combating-anti-semitism/>

⁴⁷ <https://www.state.gov/the-international-holocaust-remembrance-alliance-working-definition-of-antisemitism/>

⁴⁸ <https://www.adl.org/resources/letter/letter-urging-inclusion-ihra-working-definition-antisemitism-un-action-plan>

⁴⁹ <https://op.europa.eu/en/publication-detail/-/publication/d3006107-519b-11eb-b59f-01aa75ed71a1/language-en>

⁵⁰ <https://www.jpost.com/diaspora/article-788346>

⁵¹ *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)

⁵² *Id.*

⁵³ <https://www.congress.gov/bill/118th-congress/house-bill/7945/text>

Antisemitism Awareness Act, and hopefully, that bipartisan support will continue and even allow for its expansion in the Senate; it is hard to imagine someone being supportive of Jewish people being properly protected under Title VI of the Civil Rights Act but not, for example, under Title VII of that same law, or for protection against hate crimes.

I would venture to state that on this point there is no disagreement, in fact, when Dr. Stern was working on the original IHRA definition, he wrote and I quote “the purpose of this definition is twofold: 1) to provide a common standard and guidance for organizations... wishing to identify and catalog antisemitic incidents, and 2) law enforcement officials asked with determining whether a crime is antisemitic.”⁵⁴ Now I would say that if a definition is good in those contexts it is also good in helping determine whether action is unlawful even if not criminal. But on hate crimes at least, I think we agree.

To the extent that for some reason the bill isn’t called for a vote, I would urge you to pass an even simpler bill, a clarification act, reiterating one salient point: For the *vast* majority of Jewish people across time and space, Zionism is and always has been an integral part of their Jewish identities. Congress can and should immediately clarify, in no uncertain terms, that unlawfully targeting a Jewish person for any aspect of their Jewish identity, including a belief in Zionism, is antisemitism, and will be treated as such.

I will conclude by pointing out the obvious: protecting Jews does not come at the expense of any other group. You can be vigorously pro-Palestinian without being antisemitic, and you can even be virulently antisemitic without committing unlawful actions. But that is not what is happening. According to the FBI, the majority of religiously motivated hate crimes in the United States are committed against Jewish people. That number is on the rise despite the fact that Jews make up only between 2 and 2 and a half percent of the population. This trend is terrifying, and there is much work to be done to defeat it. I stand ready to work with the Committee and any Member on this important matter and welcome any questions.

⁵⁴ <https://kennethsstern.com/wp-content/uploads/2021/01/102904-email-re-definition-of-antisemitism.pdf>