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Legal Form and Legal Legitimacy: The IHRA Definition of Antisemitism as a Case Study in Censored Speech

Rebecca Ruth Gould
University of Birmingham, UK

Abstract

The challenge posed by legal indeterminacy to legal legitimacy has generally been considered from points of view internal to the law and its application. But what becomes of legal legitimacy when the legal status of a given norm is itself a matter of contestation? This article, the first extended scholarly treatment of the International Holocaust Remembrance Alliance (IHRA)'s new definition of antisemitism, pursues this question by examining recent applications of the IHRA definition within the UK following its adoption by the British government in 2016. Instead of focusing on this definition's substantive content, I show how the document reaches beyond its self-described status as a "non-legally binding working definition" and comes to function as what I call a quasi-law, in which capacity it exercises the *de facto* authority of the law, without having acquired legal legitimacy. Broadly, this work elucidates the role of speech codes in restricting freedom of expression within liberal states.

Keywords

free speech, academic freedom, censorship, speech codes, hate speech, legal indeterminacy, Critical Legal Studies, Critical Race Studies, political theory, universities, Israel/Palestine

> "In a democratic society the only speech government is likely to succeed in regulating will be that of the politically marginalized."
>
> —David Cole[1]

1. David Cole, "Neutral Standards and Racist Speech," *Reconstruction* 2 (1992), 68.

Corresponding author:
Rebecca Ruth Gould, College of Arts and Law, University of Birmingham, Birmingham, B15 2TT UK.
Email: r.r.gould@bham.ac.uk

Among the most lasting accomplishments of Critical Legal Studies (CLS) has been to draw the attention of legal theorists to the factors that condition the law's legitimacy. Critical legal theorists have drawn attention to legal reasoning's indeterminacy, particularly in the context of legal adjudication. For Duncan Kennedy, the indeterminacy of the law is closely related to its formal qualities. As Kennedy argues in a seminal article, the application of rules "indirectly brings about the agreed distribution"[2] of outcomes, and ultimately, power.

While the point is simple, the implications are manifold: law is a system of rules, marked by a surplus of meanings, each in its own way overdetermined by factors external to the law. As a result, according to this critique, "the rule of law is impossible because a legal rule has no single objective meaning"[3] and "competing rules will always be available for a judge to choose in almost any litigated case."[4] For CLS theorist Gary Peller, "legal reasoning is political and ideological in the manner in which legal discourse excludes (or suppresses) other modes of discourse, [and in] the way in which it differentiates itself from 'mere' opinion or will."[5] While subsequent legal theorists have challenged the CLS insistence on the indeterminacy of the law as overreaching and unsubstantiated, even detractors acknowledge the usefulness of the CLS critique.[6]

These pages reflect on a different kind of legal indeterminacy: not within the law itself, but within the law's relationship to the world it regulates. The indeterminacy that structures this discussion traverses the legal and the non-legal, the semi-legal, and the quasi-legal. It is made manifest in the applications of a document that proposes to define antisemitism anew, as detailed here. These applications illustrate how non-legal rules and regulations can have legal implications even when they lack legal legitimacy, which I understand here to entail adherence to the rule of law, including adherence to the rule of law and compliance with core civil liberties.

I examine here the form and application of an increasingly influential document that proposes a new definition of antisemitism. Of specific interest is the relationship between definitions and examples, the document's self-description as "legally non-binding," the history of its application, and the legal dynamics bearing on its deployment in university contexts. These dimensions are continuously and contingently generated by legal form. As part of my broader argument, I argue that even the most offensively racist or otherwise discriminatory speech must not be censored solely on grounds of its racism.

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2. Duncan Kennedy, "Legal Formality," *The Journal of Legal Studies* 2(2) (1973), 386.
3. Anita L. Allen, "Where Liberalism Stands," *Transition* 53 (1991), 32 (summarizing the CLS position).
4. Andrew Altman, "Legal Realism, Critical Legal Studies, and Dworkin," *Philosophy and Public Affairs* 15 (1986), 211.
5. Gary Peller, "The Metaphysics of American Law," *California Law Review* 73 (1985), 1153.
6. Critical responses to the CLS position on legal indeterminacy include Ken Kress, "Legal Indeterminacy," 77 *California Law Review* (1989), 283–337; Kent Greenawalt, "How Law Can be Determinate," *UCLA Law Review* 38 (1990), 1–86; *idem, Law and Objectivity* (Oxford: Oxford University Press, 1992); and Brian Leiter and Jules L. Coleman, "Determinacy, Objectivity, and Authority," *University of Pennsylvania Law Review* 142 (1993), 549–637.

As Habermas has diagnosed, while "established law guarantees … enforcement … and therewith the certainty of law," "rational procedures for creating and applying law" constitute its norms as deserving of obedience (*Rechtsgehorsam*) and comprise the basis of the law's legitimacy.[7] Lacking the qualities that typically account for legal legitimacy in liberal states, the International Holocaust Remembrance Alliance (IHRA) document defining antisemitism has introduced a unique dynamic into the adjudication of controversial speech. Its adoption by a handful of European states has increased the impetus for government agencies and public bodies to treat Israel-critical speech as presumptively antisemitic. Yet, while the predisposition of public institutions has arguably shifted across Europe as a result of this new definition, this transformation has not been subjected to adequate legal scrutiny. The form of the document itself – by which I mean its self-presentation as well as its method of application – advocates the censorship of Israel-critical speech. How this censorship has taken place – in the absence of adequate engagement with any recognized legal framework, yet by drawing heavily on nebulous concepts of legal authority – is this article's subject.

Due to its exceedingly wide remit, "liberal" is among the most difficult concepts to define in all of political theory.[8] I use "liberal" here to denote a theory of state that assumes the superiority of a division of governmental powers and of limited government in the interest of protecting civil liberties. However, a corollary of this definition is that it is not adequate to itself; it describes how liberalism conceptualizes itself but fails to document its actual workings in the present. Hence, liberalism is a theory of state that perceives itself to function as a defender of civil liberties, while in subtle ways enabling their curtailment. While nominally the liberal jurisprudential tradition does not permit special interest groups to censor Israel-critical or otherwise offensive nonviolent speech, such curtailments are more common than is often acknowledged. The flaws apparent in the liberal conception of state have become particularly manifest in recent decades, with the transformation of the classical liberal state into a neoliberal polity that regulates private expression in unprecedented ways.

My focus here is on the legal indeterminacy of the quasi-law legal domain, which is dominated by what is referred to in legal scholarship as soft law.[9] As Timothy Garton Ash

7. Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats: Unbestimmtheit des Rechts und Rationalität der Rechtsprechung* (Frankfurt am Main: Suhrkamp, 1992), p. 242; translated by William Rehg in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996), p. 198. I have followed Rehg's translation with minor modifications.
8. For useful attempts at a conceptual history that have influenced my thinking here see Raymond Geuss (e.g. "Liberalism and Its Discontents," *Political Theory* 30(3) [2002], 320–38) and Duncan Bell (e.g. "What Is Liberalism?" *Political Theory* 42(6) [2014], 682–715). Notably, neither theorist actually goes so far as to *define* liberalism once and for all; nor do I attempt to do so here.
9. See Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford: Oxford University Press, 2003); Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016).

has noted, "soft law … well describes the nonbinding character of most international agreements on freedom of expression."[10] A quasi-law is a document, definition, code, or policy that a government-backed regulatory body has adopted to guide its deliberations and policies.[11] Habermas describes the type of discourse that the IHRA document seeks to regulate (more precisely, to be absorbed into) as a "procedural norm [*Verfahrensnorm*]" that furnishes "quasi-public [*halböffentliche*] bodies, such as universities, professional associations, agencies … with specific capacities." According to Habermas, such norms exist halfway "between morally laden and largely nonmoralized rules."[12] While they have ethical implications, like the law generally, such norms are not themselves ethical in nature, but rather seek regulate the social order in morally relevant ways.

By mimicking normative dimensions of the law, quasi-laws (or *Verfahrensnormen* in the somewhat different language of Habermas) empower special interest groups to act as proxies for the state. These groups then pursue their agendas through threats of legal prosecution, borrowing from the coercive force of the law, while lacking democratic legitimacy. They target expressive content for censorship, in the absence of any precise legal mandate. Although there are doubtless occasions in which the cumulative force of a quasi-law can have a positive ethical impact by highlighting certain forms of discourse as offensive, racist, or otherwise unethical, the cases discussed here illustrate how the application of the IHRA document endangers civil liberties. While I have endeavored to offer a nuanced treatment of the philosophical, ethical, and legal dimensions of the new regulatory regime that attends criticism of Israel within the UK and the United States, my analysis overall argues for the abdication of this regulatory regime–and not only with regard to antisemitism, but with regard to all forms of racism–on the grounds of its inherent propensity for civil liberties violations.

Procedural norms exacerbate the indeterminacy that already inheres within the law by interpollating quasi-legal form. Even when they align with ideals that conform to society's general ethical convictions – including anti-racism – quasi-legal norms compromise the rule of law when they rely on unauthorized deployment of the law's coercive force. Duncan Kennedy's theorization of the relationship between autonomy and freedom is relevant to this analysis. Kennedy argues that while "the role of rules in a liberal state is to provide autonomy,"[13] the proliferation of such rules can actually limit freedom. Along similar lines, the extension of the law beyond governmental domains reaches beyond the remit of guaranteeing autonomy and actively inhibits freedom.

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10. Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World* (New Haven, CT: Yale University Press, 2016), p. 84.
11. In the pages that follow, for UK contexts, I use "government" to signify the executive branch exclusively (which was controlled by the Conservative Party for the duration of the events described herein). The "state" by contrast is a broader political construct of which the government is only a part. This distinction is important in light of my argument that, in precipitously adopting the IHRA definition and in the absence of parliamentary scrutiny, the government acted in ways contrary to the interests, integrity, and will of the general body politic.
12. Habermas, *Faktizität und Geltung*, p. 252 (=*Between Facts and Norms*, pp. 205–6).
13. Kennedy, "Legal Formality," 371.

The IHRA document offers a case study in the suppression of freedom enacted by a quasi-legal norm. I argue here that, whatever the intentions of its promoters and adopters, and partly due to the intrinsic imprecision of its definition, this document has had a predominantly negative effect within civil society, particularly in university contexts. While I point to specific violations of due process and question certain of this document's substantive claims, my critique of this new antisemitism definition runs deeper, and addresses the dangers of formalizing quasi-legality itself. The applications detailed below expose specific problematic outcomes and also highlight broader issues attending the regulation of speech within liberal states. In line with prior categorical arguments against hate speech bans,[14] I contend that the IHRA document cannot effectively combat antisemitism in the public sphere. In contrast to others who have rightly contested the definition's content, my argument is based on its ambiguous legal status, as well as on the indeterminate applications that arise from confusions regarding its legal status.

I. Introducing the IHRA Document

Can defining racism endanger to civil liberties? Can a definition that seeks to clarify antisemitism's meaning, with a view to abolishing it from public spaces, in practice aggravate the phenomenon it seeks to suppress? Viewed abstractly as a tool to combat antisemitism, the definition proposed by the IHRA (an intergovernmental organization founded in 1998) would appear to be an noble effort to combat forms of hate and abuse that offend human dignity. Some of the views that this definition endeavors to codify are, on a surface level, non-controversial. Why then would this document have attracted negative commentary from a range of leading jurists and legal scholars, including former appellate court judge Sir Stephen Sedley and Hugh Tomlinson QC, both of whom have questioned the IHRA document on procedural as well as substantive grounds?[15]

"Antisemitism," the document states, "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."[16] The definition's wording has

14. Eric Heinze, "Towards the Abolition of Hate Speech Bans: A 'Viewpoint Absolutist Perspective,'" in Titia Loenen and Jenny Goldschmidt (eds), *Religious Pluralism and Human Rights in Europe* (Antwerp: Intersentia, 2007), pp. 295–309; Marloes van Noorloos, "The Politicisation of Hate Speech Bans in the Twenty-first-century Netherlands: Law in a Changing Context," *Journal of Ethnic and Migration Studies* 40(2) (2014), 249–65, and the essays gathered in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012) and Part II of James Weinstein and Ivan Hare (eds), *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009).
15. Sir Stephen Sedley, "Defining Anti-Semitism," *London Review of Books* 39.9.4 (2017), 8 and Hugh Tomlinson QC, "In the Matter of the Adoption and Potential Application of the International Holocaust Remembrance Alliance Working Definition of Anti-Semitism" (http://freespeechonisrael.org.uk/ihra-opinion/).
16. The full text of the definition and accompanying guidance is on the IHRA website: https://www.holocaustremembrance.com/sites/default/files/press_release_document_antisemitism.pdf.

been challenged on various grounds by scholars and activists who understand antisemitism differently. The conflict over definitions has made apparent the need to arrive at a clear legal understanding, not only of the particular form of racism referenced in the definition, but, arguably even more urgently, of the implications of naming racism for legal purposes. That the movement to define the racist content of other manifestations of prejudice for legal purposes has gained traction in Parliament only adds to the exigency of critically scrutinizing applications of the IHRA document.[17] This article examines the uses that have been made of the definition, along with the guidance document that accompanies it, in concrete institutional contexts since its "adoption" by the UK government in December 2016. ("Adoption" is in quotation marks because the process through which this took place is itself deserving of scrutiny, as discussed below.) In order to evaluate any procedural norm or regulatory instrument we must look beyond its substantive content; we must also ask: How does it function, and with what kind of legitimacy? I pose these questions here.

The appropriate nomenclature here is itself an area for debate. In the linguistic usage of its advocates, the four-line definition quoted above has become a synecdoche for the entire document, which includes a guidance section with eleven examples, six of which are focused on the criticism of Israel. Due to its inordinate focus on Israel, the document overall is more controversial than the definition, which appears neutral if vague. Yet the issue of quasi-legal indeterminacy, which is my central focus here, applies to both the definition considered in isolation from the rest of the document and the document taken as a whole. In most mainstream usages, particularly by its advocates, making the definition into a synecdoche for the entire text has enabled its proponents to conceal the fact that the UK government adopted only the definition, without taking a formal position on the examples.[18] Although it has not been widely publicized, the same caveat applies to many so-called "adoptions," which involved only the definition, and not the examples.[19] Neither the IHRA nor the Israel advocacy community have been scrupulous in clarifying these distinctions. I use the term "IHRA document" to refer to the combined definition,

17. See for example "Islamophobia" (House of Lords Hansard, vol. 785; available at https://hansard.parliament.uk/Lords/2017-10-17/debates/A731DF08-23EA-4D1F-B206-00FCB7EB2C67/Islamophobia; October 17, 2017).
18. These nuances are spelled out in a fact sheet compiled by the European Coordination of Committees and Associations for Palestine and the UK-based Free Speech on Israel, available at http://www.eccpalestine.org/wp-content/uploads/2017/12/Fact-Sheet_IHRA-Definition-Antisemitism_ECCPFSOI.pdf.
19. For example, the Pro-Director for Research at the London School of Economics (LSE) stated in a letter to an Israel advocacy group that, while LSE had decided, following consultation with Jewish staff and students, to "adopt" the IHRA definition, it explicitly did not adopt the examples. The letter added that "the School … does not accept that all the examples the IHRA lists as illustrations of anti-semitism fall within the definition of anti-semitism unless there were additional evidence to suggest anti-semitic intent" (letter from Julia Black dated January 12, 2018). Available at https:// goo.gl/jP8qoz. Such ambivalent responses could be multiplied many times. In general it appears that, while the IHRA has conflated the definition and the examples as if every "adoption" entailed acceptance of both, most adoptions do not extend to the examples.

which was adopted by the UK in the form of a press release, and the guidance document, which was *not* adopted by the government and which therefore has an even more quasi-legal status than the already ambiguous definition.

The speed with which the IHRA definition has been promoted within the UK, and the relatively low level of opposition it has encountered, is traceable in part to a pervasive liberal consensus around hate speech and the need for its regulation. The IHRA document presents a unique opportunity to rethink the on-going curtailment of controversial speech across a range of liberal European democracies. This quasi-law throws into relief how regulating and abrogating speech can restrict civil liberties. Since its adoption by the UK Prime Minister Theresa May, at least five universities, and likely many more, have had planned events cancelled or otherwise censored due to a perceived need to comply with this definition, even in the absence of its legal ratification.[20] However, the implications of this document reach well beyond specific event cancellations, and testify to a broader encroachment of the liberal state on expressive domains. I discuss these broader legal implications in sections VI and VII.

Limiting the critique of the IHRA document to its substantive definition of antisemitism, as most engagements with the document have done thus far, perpetuates (or at least facilitates) a hermeneutical error. The IHRA document was never intended to operate within a neutral academic space. It is neither a work of scholarship nor a reasoned argument. Rather, it is a text addressed to a particular political conjuncture, wherein universities and other public bodies increasingly regulate hate public discourse on viewpoint-selective grounds, while a range of organizations and political parties seek to defer, deflect, and sometimes suppress criticism of the Israeli state. The IHRA definition is a policy recommendation by a cluster of interest groups that have been tacitly granted that status of a quasi-law. Debating the IHRA document solely through its definition of antisemitism runs the risk of blinding us to its even more consequential suppression of free speech.

The failure to distinguish between acts of violence, which are appropriately sanctioned by law, and offensive speech to which democracies must extend considerably greater latitude, is among the gravest flaws in the liberal state's ever-expanding regulatory regime relating to offensive speech, as noted by the Institute for Race Relations in their submission to the Labour Party Inquiry into anti-Semitism (2016).[21] While I recognize the need for a parallel debate that would address whether the IHRA definition (or any other definition) can help to combat actual violence that takes the form of hate crimes, I assemble here the evidence and arguments to support the case that the definition's effects are counterproductive when applied to the policing of speech.

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20. These universities include University of Manchester, the University of East London, the University of Central Lancashire, the University of Essex, and the University of Exeter. The list is limited to cases where there is a document testifying to a decision made by the relevant university officer to cancel or censor an event; if undocumented or unrecorded incidents were also factored in, the list would be much longer.

21. Ambalavaner Sivanandan et al., "Submission from the IRR to the Labour Party Inquiry into anti-Semitism and other forms of racism, including Islamophobia," *Race & Class* 58(2) (2016), 64–9.

The debate around the IHRA document thus far has been constrained by pseudo-deontology. Promoters of the IHRA document, like others pursuing parallel causes, present its adoption as an ethical mandate, and use this higher purpose to legitimate their reliance on the coercive power of the state. Most of those who support the IHRA definition as a tool for censoring speech also affirm their respect for freedom of expression, when "balanced" by other considerations.[22] Yet their disclaimers conflict with the actual applications of the IHRA in UK university contexts that these same groups have promoted since its adoption in 2016. A critique that focuses on concrete applications over normative content can reveal more about the definition's ontology than can a deontological reading that moralizes legal coercion as a means of combating antisemitism. The mode of analysis adopted here may be seen as an extension of the CLS approach to legal indeterminacy to a quasi-legal realm.

By way of offering a phenomenology of its applications, I describe three ways in which the definition has been implemented since its initial ratification by the IHRA and subsequent adoption by the UK government. The first application exemplifies how the definition has been used to abrogate speech by various political and advocacy bodies, including the Israeli Embassy, which has lobbied for the repackaging of events in ways that better suit the interests of that state. The second application, event cancellation, works analogously to no-platforming, and uses the IHRA document to forbid events that may perpetuate anti-Israel bias. The third application uses the IHRA document in the sense conceptualized by Habermas, as a procedural norm – a quasi-law – whereby an institution is pressured to take actions that would not have been taken in its absence. While I do not insist that the imposition of external pressure by interest groups is unilaterally negative in all instances, the cases discussed below offer evidence of long-term negative effects.

Each of the three applications discussed here show how the ends of political advocacy are pursued in non-governmental contexts when interest groups borrow from the coercive force of the law to silence their political opponents. For each application, a self-described "non-legally binding working definition" is given quasi-legal status through its indeterminate relationship to the law. It bears repeating that no act of Parliament or legislation has clarified this document's precise legal mandate. The "adoption" of the IHRA document occurred in the form of a governmental press release, not through a process of democratic deliberation.[23] Even though the

22. Appeals to "balance" feature frequently in this context as in most discussions of free speech within the UK and North America. Recent important critiques of balance as a condition for free speech include Akeel Bilgrami, "Truth, Balance, and Freedom," in A. Bilgrami and J. Cole (eds), *Who's Afraid of Academic Freedom?* (New York: Columbia University Press, 2015), pp. 10–26, and Eric Heinze, "An anti-liberal defence of free speech: Foundations of democracy in the Western philosophical canon," in M. Del Mar, B. Meyler, S. Stern (eds), *Oxford Handbook of Law and Humanities* (Oxford: Oxford University Press, forthcoming).
23. For the initial press release, see "Government leads the way in tackling anti-Semitism," https://www.gov.uk/government/news/government-leads-the-way-in-tackling-anti-semitism (December 12, 2016).

document has not been legally ratified, it has enabled interest groups to compel action by referencing precedents within the law. The effort underway to give this definition and the accompanying guidelines formal legal status adds particular urgency to this analysis.

The relatively weak opposition that IHRA-based censorship has faced within the academic legal community has motivated this article. Under present arrangements, it would be difficult for the IHRA definition to be granted formal legal status, given that all "adoptions" to date have been made by the executive branch of government and parliamentary ratification has never transpired at the state level.[24] Yet the very possibility of the document's legal ratification within a regulatory regime that would formally sanction Israel-critical speech ought to be cause for concern among scholars and activists concerned with safeguarding freedom of speech.

Having been allowed to function as if it were a law, the definition has increased the personal and professional risks entailed in speaking and writing critically about Israel. Close scrutiny of the definition's impact within UK civil society illustrates how guidelines, documents, and definitions that lack legal legitimacy can nonetheless wield legal authority, and draw on the coercive force of the law. My examples focus exclusively on the suppression of Israel-critical speech within the UK because the UK was the first country to "adopt" the IHRA definition, and it remains the only country along the transatlantic axis wherein public and quasi-public institutions regularly reference it and impute to it legal authority.

Operations of exclusion and inclusion are entailed in all acts of definition and structure every legal system, but the legal indeterminacy that recent applications of the IHRA document and other speech codes have generated call for particular kinds of scrutiny. While the IHRA document is quite distinct from the hate speech bans that have attracted substantial attention from legal scholars, the broader social and political forces that have enabled and encouraged its application with relatively little resistance within Europe are nearly identical. Among these are: an increasing blurring of the lines between words and actions, a faith in the ability of positive legislation to combat racial hatred, and an arguably naïve belief in the capacity of the state to deliver social justice. Such are the hallmarks of social-democratic liberalism, which, from the post-WWII period onwards witnessed, in the words of legal philosopher Neil MacCormick, "a vast extension in the powers of intervention of the state in previously private fields of activity."[25] These interventions, so marked in social-democratic liberalism, are also evident in liberalism's left-leaning progressive variants that in the US academy came to be aligned with Critical

24. As of March 2018, Germany, Austria, Lithuania, Bulgaria, and Romania have adopted the definition. The definition (not the examples) received the support of the European Parliament in June 2017, which prompted a letter of protest by leading European intellectuals (including Etienne Balibar and Jacques Rancière): "Non à l'instrumentalisation de la lutte contre l'antisémitisme," *Libération* http://www.liberation.fr/debats/2017/07/04/non-a-l-instrumentalisation-de-la-lutte-contre-l-antisemitisme_1581545 (July 4, 2017). In this instance as well, the legal implications of this vote are unclear.

25. Neil MacCormick, *H.L.A. Hart* (Stanford, CA: Stanford University Press, 1981), p. 8.

Race Theory. While these movements each appear to break with classical liberalism by advocating for an increased role of the state in public life, for my purposes here, they are also consequences of classical liberalism's approach to free speech. Late liberalism is aligned to censorship, even though classical liberal political thought opposes it. However, for my purposes, the differences among the liberalisms invoked here are less salient than are their convergences.

While the legal literature on hate speech is vast, the present article is the first scholarly treatment of the IHRA definition to consider the new frontiers it opens within the liberal state's regime of speech regulation. This article offers a study in legal indeterminacy – by which I denote the fluid relationship between legal and non-legal – in the fraught context of Israel/Palestine advocacy in the post-IHRA UK. Given the rapidity with which this definition has been adopted by other IHRA-member countries, the dynamics described herein are likely to reach well beyond the UK in the upcoming years. My critique of the IHRA document is also addressed to scholars, activists, and policymakers who engage in advocacy on behalf of other persecuted minorities. Given the political success of Israel advocates in silencing and penalizing Israel-critical speech, such individuals may look to the impact of the IHRA "adoption" as an example worth emulating for their own communities.[26] I hope that the argument developed here, and the examples assembled, will persuade such communities that they have more to lose than to gain by seeking legal sanctions against hateful speech. Finally, by revealing the resemblances among the regulation of different kinds of speech, I reveal what these varying regulatory regimes share in common as I explore their joint convergence with the aims of the neoliberal state.

II. Applying the IHRA Document

The IHRA document was adopted on December 12, 2016. Within weeks of the adoption, David Feldman, the Director of the Pears Institute for Antisemitism at Birkbeck University, came out publicly against it. Feldman predicted that its adoption posed a danger to free speech and would be harmful for Jews over the long term.[27] Feldman's warning proved prophetic. Three months later, Universities Minister Jo Johnson asked the CEO of Universities UK, a body that purports to represent UK universities, to "disseminate … in your institution" the IHRA's definition of antisemitism "to help clarify how anti-Semitism can manifest itself in the 21st century."[28] As Johnson wrote, the "definition is intended to help front-line services better understand and recognise instances of

26. For an indication that the IHRA definition is already having this effect, see an op-ed by the director of the Runnymede Trust, self-described as the "UK's leading independent race equality think tank," in which he points to the success of the new definition of antisemitism as a model for his organization's fight against Islamophobia: Omar Khan, "We need to change the way we talk about Islamophobia," *The Times* (November 14, 2017).
27. David Feldman, "Will Britain's new definition of antisemitism help Jewish people? I'm skeptical," *The Guardian* (December 28, 2016).
28. Jo Johnson, "Tackling Anti-Semitism on Campus," February 13, 2017.

anti-Semitism." Johnson specified "Israel Apartheid" events as those most in need of being "properly handled by higher education institutions to ensure that our values, expectations and laws are not violated." Johnson was referring to Israeli Apartheid Week (henceforth IAW), a yearly event series that, since 2005, has been organized on university campuses around the world to protest the eroding human rights situation within Palestine.[29] Since their inception, these events have attracted the ire and concern of liberal states, particularly Canada, the US, and the UK.[30] Johnson's directives concerning the management of IAW cease once he has clarified his expectations concerning the implementation of viewpoint selective censorship in the context of Israel/Palestine debate so as to minimize, mitigate, and if needed, ban Israel-critical speech.

The promotion of the IHRA document as a basis for cancelling IAW events was reinforced a few weeks later by the Prime Minister, in her public response to a question from an MP affiliated with the parliamentary group Conservative Friends of Israel. "Higher education institutions have a responsibility to ensure that they provide a safe and inclusive environment for all students," May stated to Parliament. She added that the Universities Minister had "written to remind institutions of these expectations, and he has also urged them to follow the Government's lead in adopting the International Holocaust Remembrance Alliance definition of anti-Semitism."[31] May's wording was misleading in terms of the legal force it imputed to the IHRA definition. Johnson's letter did not "urge" universities to *adopt* the definition; rather the letter asked that the definition be "disseminated … so that this position is widely known and clearly understood." In misrepresenting the government's legal relationship to the definition through strategic if subtle word choices, and in promoting it as a document to be adopted rather than disseminated, May's pronouncement contributed further to the indeterminate status of this legal form in the context of Israel/Palestine activism and discourse within the UK. Her statement normalized the condition whereby opposing sides promote their agendas through manipulation, both of legal norms and of the very concept of legality.[32]

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29. For background on IAW from a Palestinian advocacy perspective, see Hazem Jamjoum, "Israeli Apartheid Week: A Gauge of the Global BDS Campaign," *Generation Palestine: Voices from the Boycott, Divestment and Sanctions Movement*, Rich Wiles (ed.) (London: Pluto Press, 2013), pp. 204–15.
30. For political opposition to IAW by a Canadian MP, see the description of IAW as "hate speech" by Peter Shurman MP, in "Israel Apartheid Week," *Official Report of Debates* (February 25, 2010, Legislative Assembly of Ontario, First Session), 9556.
31. Theresa May, response to a question from Bob Blackman MP, March 1, 2017 (House of Commons Hansard, vol. 622; available at https://hansard.parliament.uk/Commons/2017-03-01/debates/62A8D14B-06F5-461B-B9F9-D20941A86413/Engagements#contribution-366A0E88-F597-4BCE-AD13-B88F691C81AE).
32. While this article focuses on the manipulation of the law by Israel advocates, I do not suggest that such manipulations are confined to one side. For evidence of legal manipulation in the service of a purportedly pro-Palestinian agenda, albeit in a very different context, see Rosa Freedman, *The United Nations Human Rights Council: A critique and early assessment* (Oxford: Routledge, 2013).

When the state urges a public body (such as a university) to adopt a definition, the pressure is significantly greater than when it simply disseminates this document. Government backing empowers interest groups (whether pro- or anti-Israeli), even if this "backing" has no precise legal meaning. Although distinctions between urging a definition's "adoption" and simply disseminating its contents may appear granular, the level of nuance involved in making these distinctions is precisely the point. With such porous boundaries, confusion regarding the appropriate relation between the state's mandate to preserve free speech and to prevent hate speech is not merely likely; *it is inevitable*. The blurring of lines between the legal and non-legal enables the former's politicization.

The press release concerning the government's adoption of the IHRA definition (in December), Johnson's letter (in February), and May's inaccurate summary of this letter to Parliament (in March) collectively set the stage for a dramatic curtailing of Israel-critical speech across the UK. Instead of IAW, UK universities in 2017 witnessed an unprecedented pattern of crackdowns on free speech and university-led efforts to suppress nonviolent civil protest. I now turn to three instances of this suppression that were explicitly linked to the government's adoption of the IHRA definition. Chosen from a large number of comparable examples, these cases bring into focus broader issues of legal legitimacy, including the state's jurisdiction over speech, the social impact of censoring speech, and the ways in which the blurring of boundaries between legal and non-legal generates indeterminacy. Each case contributes to an anthropology of legal norms, of the law's deployment for political ends, and of the complicity of public institutions in facilitating such misapplication, less as a result of bad intentions than an overabundance of caution.

Example one entails the abrogation of controversial speech.[33] On February 22, 2017, during one of the most turbulent weeks in the history of Israel/Palestine activism in British history, the Consellour for Civil Society Affairs at the Embassy of Israel in the UK wrote to the Director for the Student Experience at the University of Manchester.[34] He began by thanking the university official for meeting with him and Israel's ambassador to the UK (Mark Regev) in order to discuss "openly some of the difficult issues that we face." After briefly alluding to an EU-funded Erasmus programme arrangement, the embassy official devoted the remainder of his lengthy email to raising concerns around two events that were scheduled to take place within the framework of IAW. Both events, he argued, "breach the IHRA working definition of

33. "Abrogation" is a concept taken from Islamic law, wherein it refers to the dialectic between the two main sources of legal legitimacy: the Quran and the *sunna* (a body of originally oral traditions, including the sayings of the Prophet), whereby the latter is sometimes suspended in recognition of the greater authority of the former. For further on the legal nuances pertaining to abrogation (*naskh*), see John Burton, *The Sources of Islamic Law: Islamic theories of abrogation* (Edinburgh: Edinburgh University Press, 1990).

34. A ruling by the Information Commissioner's Office (available at https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014723/fs50692421.pdf) compelled the University of Manchester to release its correspondence on this matter, including the email exchange quoted here between Michael Freeman, Consellour for Civil Society Affairs at the Embassy of Israel, and Timothy Westlake, formerly of the University of Manchester (details released following an FOI request).

antisemitism and its guidelines that were recently adopted by the UK government and both events are in clear breach of the letter of guidelines [sic] issued on February 13th by Minister Jo Johnson." The embassy official asked the university to "look into these events and take the appropriate action."

The University of Manchester complied, if only partially, with the embassy's request. The title for one of the events, "You're doing to the Palestinians what the Nazis did to me," which was to feature Holocaust survivor Malika Sherwood, was summarily changed to "A Holocaust survivor's story and the Balfour declaration," against the will of the organizer and without the speaker's consent. The organizer was informed that "the use of the first title … is not to be permitted, because of its unduly provocative nature."[35] Unlike many events that were organized within the framework of IAW, this one was not forcibly cancelled. Nevertheless, the Israeli Embassy successfully influenced the bounds of permissible discourse by drawing on the perceived legal force of the new definition. This first instance of the definition's application exemplifies abrogation rather than outright cancellation. Inasmuch as it highlights the fact that coercively altered speech does not disappear by virtue of having been abrogated, the concept of abrogation (taken from Islamic law) captures more precisely than censorship or suppression the type of action taken against free expression by the University of Manchester.

My second example involves a more categorical application of the IHRA document, and bears practical analogies with the practice of no-platforming. Just a day before the Israeli Embassy contacted the University of Manchester to request that the institution "take the appropriate action" to modify the content of IAW events, the University of Central Lancashire (UCLan)'s Chief Operating Officer (COO) mandated the cancellation of an event on the basis of his own interpretation of the IHRA document. Following public pressure, the COO wrote to his university colleagues concerning an event scheduled for IAW that, "by linking the event to 'Israeliapartheidweek2017' the context moves away from pro Palestinian to antiIsraeli [sic]."[36] He concluded that because "the UK government has stated its support for the use of the IHRA's definition of antisemitism, and indeed will formally adopt this … we have new legal obligations to consider." With these words, and on his authority, the event was cancelled.

The COO's interpretation of the "legal obligations" entailed in the new definition was reiterated in a UCLan press office statement noting that "the proposed event would not be *lawful* and therefore it will not proceed as planned."[37] This statement, including the inaccurate assertion of unlawfulness, was never retracted by the university. The COO in fact specified that his team had "not reviewed in detail the content and balance of the speakers,"[38] prior to deciding to recommend the event's cancellation. The decision to

35. Email exchange quoted in Damien Gayle, "UK university censors title of Holocaust survivor's speech criticizing Israel," *The Guardian* (September 29, 2017).
36. Michael Ahern, email dated February 20, 2017. Unless otherwise indicated, all documents cited here relating to this case were provided to me following a Freedom of Information Act request to UCLan.
37. Rosa Doherty, "University cancels Israel Apartheid Week event," *The Jewish Chronicle* (February 22, 2017). Emphasis added.
38. Michael Ahern, email dated February 21, 2017 (subject heading "Israel Apartheid week 2017").

cancel the event was therefore based on the perception that a one-sided presentation of the Israel/Palestine conflict favoring the Palestinian perspective could place the university in legal jeopardy.

The documentation pertaining to this cancellation (shared following a Freedom of Information request to the university) indicates that its official position remains unchanged: the cancellation was legally justified, and even legally mandated. As with the University of Manchester, an indeterminate relation between a law and a norm (in this case a "non-legally binding working definition") empowered interest groups to wield the force of the law to suppress political speech that was lawful but discouraged by the government through the adopted definition.[39] Key terms encountered so far, including "adoption," "breach," and "lawful," were deployed in the contexts under discussion in strikingly arbitrary and one-sided ways. Rather than take seriously the implications for free speech, either as a basic right or as a legal norm, the authorities tasked with oversight of the events gave extreme, and often unquestioning, epistemic priority to the adopted definition.

If UCLan's interpretation of the legal status of the IHRA document were taken to its logical conclusion, any event presenting a one-sided perspective would be unlawful. Notwithstanding the patent absurdity of such a claim, it is given tacit legitimacy in the post-IHRA UK. In this context, the caution generated by legal indeterminacy succeeded only in shutting down political speech; it did nothing to eradicate antisemitism. In fact, the COO was keen to assure his colleagues that he had not detected antisemitism in the speaker line-up. As he wrote: "similar events have been held in previous years,"[40] without causing concern. All that made the IAW events different this time around was the new "social and legal context within which we operate" and the "new legal obligations" that resulted from this new context.[41] Antisemitism was less salient to the decision to cancel the event than was the need to comply with a perceived government mandate. It is impossible to reconcile the IHRA document with the rule of law because, as a legal form, it asks institutions to penalize political speech, while ignoring the broader framework within which all racism, including antisemitism, occurs. Viewed from a legal perspective, the IHRA document is excessively particular and lacking in the generality necessary for legal legitimacy. Hence, illegitimacy of the IHRA document reaches well beyond its controversial understanding of antisemitism, and extends to its equally flawed, and arguably more consequential, misrepresentation of its own legal status.[42]

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39. In this instance, and according to its own public statements, the main group appears to have been Stand With Us, which issued a press release following the cancellation (https://standwithus.co.il/uclan).
40. Michael Ahern, email dated February 21, 2017 (subject heading "Israel Apartheid week 2017").
41. Michael Ahern, email dated February 21, 2017 (subject heading "Israel Apartheid week 2017").
42. Whether one considers that the misrepresentation originates in its applications or in the organization that originally promoted the document is not necessary to resolve here, other than to note that there is a case to be made for both perspectives.

At first glance, UCLan would seem to have engaged in an excessively literalist interpretation of the IHRA document, but one item from the guidance document sheds light on how the administration could have reached the conclusion that Israel-critical (or otherwise biased) events could be conceived of as unlawful. Among its examples of how antisemitism manifests itself in the twenty-first century, the document specifies: "Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation." On this reading, any one-sided representation of the Israel/Palestine conflict that involves "double standards" is presumptively antisemitic. A large number of logical leaps need to be made in order to conclude that the application of double standards breaches legal boundaries. In terms of legality, one would first need to ascribe to the IHRA document a legal status that it lacks. In terms of substantive content, one would need to decontextualize the document, and interpret it according to a presumption of antisemitic content rather than giving a speaker or text the benefit of the doubt, as one must in a rule of law context. However, even if the hypothetical event *was* seen to be antisemitic (as it manifestly was not in this instance), its cancellation would still be problematic. I am interested in both lines of critique here: 1) in the ways in which the IHRA document has shut down purely political (and not antisemitic) speech; and 2) that its censorship of actual antisemitism is unhelpful in resisting this form of racism.

From the point of view of freedom of expression, what is at stake is less the matter of antisemitic content but rather the effect of the cancellation, now and in the future, on the rule of law as it relates to freedom of expression. This effect directly results from the legal force of the quasi-law, which brings the legal and the non-legal into newly indeterminate relation. Rather than contesting the university's interpretation of the law, it is enough to note here that, regardless of its flaws, this successfully implemented interpretation concretely restricted the scope for discussing Israel/Palestine within the UK. With the progressive normalization of the new definition, this process of open and covert censorship will inevitably repeat itself, if mainly by discouraging activism and marking criticism of Israel as professionally and legally dangerous.

My third example is the only one that did not achieve its formally declared end. On February 15, 2017, the University of Bristol, where I was employed at the time, received a complaint against an article I published in 2011, while working as a postdoctoral fellow at the Van Leer Institute in Jerusalem and residing in Bethlehem, on the opposite side of the Green Line. Entitled "Beyond Antisemitism,"[43] the article preceded my arrival in the UK by four years. The organization that issued the complaint demanded that I be investigated for antisemitism, and dismissed from my position if I refused to retract the article's argument that allegations of antisemitism are used to deflect criticism of the Israeli occupation. The UK's special envoy on post-Holocaust issues and former Conservative Party chairman Sir Eric Pickles MP entered the fray, telling a journalist that the article was "one of the worst cases of Holocaust denial" he had seen in recent years, and indicated that its author should "consider her position" at the university.[44] Other academics

43. Rebecca Gould, "Beyond Anti-Semitism," *Counterpunch* 18(19) (2011), 1–3. Available at https://www.researchgate.net/publication/228322693_Beyond_Anti-Semitism.

44. "Bristol University investigates claims of anti-Semitism after lecturer claims that Jews should stop 'privileging' the Holocaust," *Christians United for Israel* (February 24, 2017) https://www.cufi.org.uk/news/bristol-university-investigates-claims-of-anti-semitism-after-lecturer-claims-that-jews-should-stop-privileging-the-holocaust/.

at the University of Bristol meanwhile insisted that my article was "scrupulous in arguing that [the Holocaust] should not be employed for political ends, including to justify occupation and treatment of Palestinians in Israel."[45]

The complaining organization bolstered their case by referencing a precedent, wherein Sheffield-Hallam University had purportedly been criticized by the Office of the Independent Adjudicator for failing to engage with the IHRA document. The Universities Minister's letter of February 13, 2017 was also cited to indicate the new legal force that was being imputed to the IHRA definition following its adoption by the government. On this interpretation, by virtue of this adoption, universities are henceforth obliged to use the IHRA definition to limit every Israel-critical statement made by a student or staff (including retroactively, with reference in my case to an article published four years before I joined the university).

Following the complaint, the University of Bristol initiated a formal inquiry. A panel was convened to present its findings to the Deputy Vice Chancellor. No evidence of antisemitism was found, and hence no action was taken against me. But the chilling effect induced by the inquiry nonetheless lives on, at the University of Bristol and at other universities across the UK. The complaint failed to achieve its goal in that I retained my position at the university. However, when viewed with respect to its long-term consequences, this example is arguably the most significant among those discussed here. Like the other cases but to a greater degree, it illustrates the layers of indirect legal coercion that interest groups can bring to bear on institutions by strategically deploying quasi-legal documents, and by imputing to such documents the coercive force of the law even in the absence of legal legitimacy (due process, transparency, and of equitable application, all of which are entailed in the rule of law). All three applications – abrogation, no-platforming, and attempted expulsion – restrict speech in different ways. The last most directly reveals the wide-ranging impact of the legal indeterminacy introduced by the blurring of boundaries between the legal and the non-legal that the governmental adoption of this definition has put into effect.

Whereas abrogated events were permitted to proceed under different titles, and no-platformed events were relocated to off-campus venues, the level of coercion involved in the inquiry into my past work, especially in the context of external pressure and media coverage, was qualitatively distinct. Had the complaint achieved its end, it would have entailed a distinctively irrevocable violation of free speech; dismissal from a position cannot easily be replaced in the way that relocation to a different venue can compensate for a cancelled event. Even following the dismissal of the complaint, this experience imposes on me a different kind of obligation to silence. Beyond the position it takes regarding a particular employee's speech act, a university's actions and statements stand as a public judgement for (or against, as the case may be) a certain kind of discourse, and a certain range of intellectual possibilities. Hence, the link between myself and the institution involved in silencing me was at once more proximate and more problematic than was the case with the abrogated speech at the University of Manchester and the event cancellation at the University of Central Lancashire.

45. Camilla Turner, "Anti-Semitism row at Bristol University as lecturers rally round academic who claimed Jews should stop 'privileging' the Holocaust," *The Telegraph* (February 23, 2017).

III. A Document Designed for Abuse

Some readers may consider the foregoing examples of suppressed speech unfortunate exceptions that do not detract from the overall usefulness of the IHRA document in the effort to combat antisemitic speech. They may point out that the definition itself is suffused with tentative language and caveats in order to guard against partisan applications.[46] They might further argue that because false interpretations can be discredited based on textual and contextual analysis, and due process is guaranteed by law for those who find themselves accused of antisemitism, misapplications and misappropriations of the IHRA document pose no threat to civil liberties. It is precisely as a result of such objections (many of which have been used to diffuse criticism of the IHRA document) that I have chosen to focus on legal form as a criterion for legal legitimacy rather than quibbling with the document's substantive content. Insofar as the misreadings outlined here are possible – not likely, or even inevitable, simply *possible* – to that precise extent is civil liberty in general and freedom of speech in particular necessarily compromised.

The CLS argument concerning legal indeterminacy has shown *inter alia* that it is not necessary for a potential misreading to be activated for it to pose a danger to the rule of law. As Duncan Kennedy argues, the only actual constraint that the law is capable of imposing on a decision maker in the context of legal adjudication is that "it defines the distance I will have to work through in legal argument if I decide to [pass judgement] the way I initially thought I wanted to."[47] In light of Kennedy's argument for the role of the law in providing retroactive justifications for pre-existing agendas, the many possibilities for misapplication opened up by the IHRA document make it vulnerable to a range of politically motivated abuses.

The IHRA's erstwhile proponents might, in brief, revert to a substantive defense of its content, rather than engaging with a critique of its quasi-legal form. Meanwhile, the IHRA document will continue to be contested on substantive grounds. Given that the matter of what is and is not antisemitic, while worth pursuing for its own sake, will never admit of any *legal* solution, my engagement with the IHRA document's legal form – and not only the form of the document but also the mode of its application – focuses less on defining antisemitism, and more on the procedural implications of its adoption. While inquiry into the IHRA definition with respect to the classification of hate crimes might have laid the framework for a stronger argument in favor of its adoption, my focus here is limited to oral and written speech, in which context censorious applications of the definition have caused lasting harm.[48]

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46. A few phrases from the document can suffice to support this point: "may be expressed"; "the following examples may serve"; "might include"; "taking into account the overall context." However, far from conceding this point, I would argue that the ambiguity of the IHRA document's language is a major contributory factor to its indeterminacy and hence to its threat to civil liberty.
47. Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology," *Journal of Legal Education* 36 (1986), 530.
48. A consideration of the relevance of the IHRA document to hate crime classification would require scrutiny in a different legal context than the free speech framework pursued here. Such an inquiry would need to examine the ruling concerning the arson of a synagogue in

If one were to focus on a substantive argument against the definition, one could note that the core manifestations of modern antisemitism are already encompassed within a range of prior definitions, and the IHRA definition adds nothing new to the discussion, while significantly muddling existing understandings. Philosopher Brian Klug for example has developed a simpler definition of antisemitism that offers a more workable understanding of the concept and a more precise ascription of its meaning. Klug defines antisemitism as "a form of hostility towards Jews as Jews, in which Jews are perceived as something other than what they are."[49] By contrast with Klug's concise reliance on a formulation many will agree with, the definition that informs my examples – and many other examples not cited here – exacerbates the ideological clashes that so often attend debates relating to the Israel/Palestine conflict, wherein opposed sides typically speak past rather than engaging with each other. The legal mechanisms underwriting the application of the IHRA document provide a more salient context for its legal assessment than the debate around defining antisemitism, given its highly politicized dimensions in the present conjuncture.

The three applications of the IHRA document noted above – abrogation, no-platforming, and attempted expulsion – each in different ways illustrate how a quasi-law channels the law's coercion without having earned legal legitimacy. In the case involving the University of Manchester, the only direct state involvement was from Israel, not the UK, yet the legal apparatus of the British state was pervasive, dictating what could and could not be said, and what needed to be done to bring subversive speech into proper political alignment. In the case of no-platforming, even in the absence of a clear legal mandate, the university interpreted the law in such a way as to suggest that anti-Israel events had suddenly become unlawful within the UK. In the case of the complaint against my article, the state kept its distance, aside from sporadic comments to the media by an individual MP (albeit with a government post of "special envoy on post-Holocaust issues"), and left it to universities to interpret and implement legally indeterminate regulations, guided by a letter from the Universities Minister that was more performative than directive, but which overdetermined the university's response.

My examples suggest that, when it comes to censoring speech, indeterminate legal forms harm civil liberities, and redraw the boundaries between the legal and the non-legal, even in the absence of direct intervention from the state. Although the abrogation, no-platforming, and attempted expulsion transpired within a liberal-democratic state, they unfolded in ways that compromise the rule of law. The groups that advocated censorship of political speech did not wait for a directive from the state. Had they waited,

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the German city of Wuppertal by a refugee from Gaza, which a German court determined to not have been motivated by antisemitism, notwithstanding its clear anti-Israel motivations (Landgericht Wuppertal case 23 Ns-50 Js 156/14-26/15). The ruling (available at https://www.justiz.nrw.de/nrwe/lgs/wuppertal/lg_wuppertal/j2016/23_Ns_50_Js_156_14_26_15_Urteil_20160118.html) was widely decried by Jewish communal bodies for failing to apply the IHRA definition (or its earlier equivalents), and has been used to argue for the IHRA's adoption.

49. Brian Klug, "The collective Jew: Israel and the new antisemitism," *Patterns of Prejudice* 37(2) (2003), 117–38.

such intervention would not have been forthcoming, because the government was not legally empowered to exert pressure in this way. The universities that these groups lobbied limited the free speech of their students, staff, and visitors preemptively in order to ensure compliance. Taken as a whole, these examples reveal how indeterminate legal form extends the jurisdiction of the state through non-democratic means. In the present neoliberal conjuncture, they reveal a compliant public sector that will bend over backwards to accommodate governmental priorities without first inquiring into the legal, ethical, and political legitimacy of its sudden policy shifts.

In addition to suggesting that double standards should be treated as presumptively antisemitic, the new definition proposes that the denial of sovereignty to one specific people may be a manifestation of racism. It fails to acknowledge the many legitimate grounds for refusing to acknowledge "the Jewish people['s] … right to self-determination," including anarchism, or any form of categorical opposition to the sovereignty of the nation state. In his scholarship, Kenneth Marcus, Assistant Secretary for Civil Rights at the United States Department of Education, and a leading voice in Israel advocacy and IHRA promotion, has acknowledged that "Those who deny Israel's right to exist do not express anti-Semitic impulses when they also oppose all other forms of nationhood, as some anarchists and globalists."[50] Yet this vital nuance is entirely missing from the definition that Marcus has publicly backed. The coercive imposition of views relating to the self-determination of any group cannot be done coercively without compromising democratic legitimacy.[51] By facilitating its misapplication, the definition also risks an interpretation whereby support for the one-state option for Israel/Palestine within a state not defined through its religious identity might be classified as antisemitic.

As with any speech code, the document's applications depend on the interpreter. Extreme interpretations can always be presented as the fault of a particular interpreter. Yet past precedent offers no reason to expect a sudden manifestation of nuance. Rather than suggesting changes to the IHRA document of the sort proposed by council members of certain London boroughs who voted for its adoption,[52] I have argued for a more categorical form of rejection. As Heinze has argued, it is impossible to rewrite hate speech bans such that their defects will be eliminated. The problem is structural, related to their formal legal relationship to speech, rather than to their content. *Any* ban on controversial speech is generative of, and dependent on "deep contradictions that promote hypocrisy, discrimination, and disrespect for the rule of law."[53] Hence, the most adequate response

50. Kenneth Marcus, *Jewish Identity and Civil Rights in America* (Cambridge: Cambridge University Press, 2011), p. 62. In the rich literature on Jewish anarchism, see the recent volume *Revolutionary Yiddishland: A History of Jewish Radicalism*, Alain Brossat and Sylvie Klingberg (eds) (London: Verso, 2016).
51. For further analysis of this point in relation to the IHRA definition, see Eric Heinze, "No-platforming and safe spaces: Should universities censor more (or less) speech than the law requires?" (unpublished ms.).
52. See "Confusing debate on anti-Semitism motion at Brent Council," *Wembley Matters* (September 18, 2017).
53. Eric Heinze, "Viewpoint Absolutism and Hate Speech," *Modern Law Review* 69(4) (2006), 545.

to the IHRA document, and any definition of antisemitism or other racism that aspires to to legal status, is not revision, but categorical rejection.

Attempts to formulate a legal consensus around the definition of antisemitism are bound to fail. Israel-critical speech, can, like any kind of speech, surely be antisemitic, but it is doubtful that the law can usefully adjudicate this debate, although it can create an appropriate space for it. The debate around defining antisemitism falls outside the jurisdiction of the law, *precisely to the extent that it is contentious*. The problem with critiquing the IHRA solely on the grounds of its flawed definition of antisemitism is that it does not challenge the liberal consensus around viewpoint selective censorship. Meanwhile, more foundational reasons for opposing the IHRA document are neglected. The very existence of legitimate disagreement around the definition of antisemitism is an argument against its adoption by any government or public body for the purpose of penalizing speech. It is not so much the definition that ought to be contested as the assumption that it is feasible and appropriate to use the coercive force of the law to forcefully generate a consensus around any concept, including what counts as antisemitism.

Although the government's adoption of the IHRA document does not generate a legal mandate, my examples show how efforts to apply the definition as soft law have an overwhelming impact on freedom of expression. From this perspective, determining the IHRA document's legal mandate becomes irrelevant, and that is itself a source for concern. Careful scrutiny of the discursive impact of the IHRA document and other quasi-legal speech codes can help to expand the focus of free speech scholarship beyond its current focus on hate speech bans and other formally outlawed forms of speech to engage with more subtle forms of silencing and censorship. With the introduction of every new quasi-law, of every new procedural norm (regulation, document, definition, or guidelines), the legal system is transformed, along with the context for its implementation.

Legal philosopher Hans Lindahl defines legal contingency as the condition wherein "the legal is no longer merely legal, nor the non-legal only non-legal." In such a situation, reasons Lindahl, "values that hitherto appeared as legal also manifest themselves as non-legal, i.e., as no longer deserving of protection by the legal order."[54] The foregoing critique of the IHRA document supplements Lindahl's account of legal contingency with the indeterminacy of quasi-legal form. When a new legal form is introduced without having acquired legal legitimacy, the rule of law is compromised. Uncertain of their legal obligations, institutions overcompensate for the law's ambiguity through preemptive censorship. Erring on the side of caution in this instance means imputing *de facto* legal status to the soft laws that suppress free speech while meanwhile the black letter laws that prohibit discrimination remain more clearly defined and better understood.

Lindahl's concern is with the exclusion of values perceived to fall within a legal jurisdiction from the domain of legality. The IHRA document brings into focus the opposite process, and reveals the ever-widening jurisdiction of the law within the neoliberal state,

54. Hans Lindahl, "Dialectic and revolution: Confronting Kelsen and Gadamer on legal interpretation," *Cardozo Law Review* 24 (2003), 783.

which extends increasingly into private domains that were beyond the reach of prior regimes.[55] The viewpoint selective censorship of controversial speech is part of the expanding remit of the state that is transpiring across many liberal democracies. That centrality of hate speech bans to these operations arguably accounts for the rapidly proliferating scholarship on this topic.[56] Every new abrogation of speech appears to legitimate the state's extended mandate, often without due process or other guarantors of the rule of law. A legal-anthropological critique of the IHRA document can therefore attune us to the workings of the neoliberal state as it regulates offensive speech, whereas by contrast in prior eras the state was more likely to curtail its jurisdiction. While the curtailment of the state is arguably characteristic of classical liberalism, I have relied on a combined understanding of liberalism which focuses on the continuity between neoliberalism and prior liberal dispensations to argue that the contemporary censorious state also results from a liberal division of powers. By contrast, a purely democratic polity would place the regulation of speech entirely outside the pale of its jurisdiction and would refuse to balance one civil liberty against another.[57]

IV. A Definition without Definition

As a result of the dynamics described above, the Israel/Palestine conflict has become an unanticipated battleground for civil liberties in the post-IHRA UK. Some readers will note an irony: activists who present themselves as taking the Palestinian side of this conflict have also protested against the platforms given to controversial speakers from the opposing side.[58] The National Union of Students' no-platform policy, adopted in 1974, had the immediate effect of causing Zionist speakers to be no-platformed (a fate today more likely to be dealt to an anti-Zionist).[59] More recently, there have been reports of violence directed toward pro-Israeli speakers at University College London (UCL) and elsewhere in politically charged events at UK universities.[60] Hence, it is by no means the case that censorship has always travelled in one direction in the context of Israel/Palestine debate. The one-sided orientation of recent suppressions of Israel-critical speech is

55. The focus of many applications of the IHRA definition to statements on social media, wherein the line between public and private is blurred and often disregarded, illustrates this point.
56. Significant recent work on this topic includes Katharine Gelber and Luke McNamara, "The Effects of Civil Hate Speech Laws: Lessons from Australia," *Law & Society Review* 49(3) (2015), 631–64 and Erik Bleich, "Freedom of Expression versus Racist Hate Speech: Explaining Differences between High Court Regulations in the USA and Europe," *Journal of Ethnic and Migration Studies* 40(2) (2014), 283–300.
57. For an outline of this governmental form in relation to free speech, see Heinze, "An anti-liberal defence of free speech."
58. See for example Eric Heinze, "Israel, no-platforming – and why there's no such thing as 'narrow exceptions' to campus free speech," *The Conversation* (April 30, 2017) and Jonny Paul, "Benny Morris Talk Stirs Uproar at Cambridge," *Jerusalem Post* (February 7, 2010).
59. W.D. Rubinstein, *The Left, the Right and the Jews* (London: Croom Helm, 1982), p. 160.
60. UCL has issued a report of this event authored by Geraint Rees, Dean of the UCL Faculty of Life Sciences, "Investigation into the UCLU Friends of Israel Society event on 27th October 2016," available at https://www.ucl.ac.uk/news/news-articles/0117/Investigation_report.pdf.

largely the result of the impact of the IHRA document. Having silenced their opponents in the past, activists on the left now find their own freedoms increasingly curtailed. As history has shown many times, the more regulation there is of speech on any given issue, the more polarized the debate becomes. To the extent that Israel-critical speech is coercively penalized, censorship will only serve to draw the left more to its side.[61]

Governments around the world have been lobbied to adopt this definition since it was ratified by the IHRA in May 2016, under the Chairmanship of Romania (itself a well-known abuser of human rights and oppressor of minority populations).[62] Many governments have responded positively to the lobbying efforts. With the adoption of this definition by six of the thirty-one IHRA member states, the fight against antisemitism has been further politicized. Every adoption follows a predictable pattern, orchestrated for the same audience and with the same goal. Special interest groups applaud the governmental press release. Sympathetic media – typically *The Times of Israel, The Algemeiner Journal*, and *The Jerusalem Post* – celebrate the government's (ostensible) commitment to combating antisemitism. Yet, the cumulative effect of the press releases and media coverage is more reminiscent of virtue signaling than of a new approach to racism. In line with this article's argument and contrary to the convention of positioning Israel advocacy on the political right, I have argued here that the signs and symbols attending these public rehearsals of the adoption of the IHRA definition are diagnostic of the mechanisms of a neoliberal state that increasingly relies on informal institutions (including universities) to curtail civil liberties.

Although this new definition formally calls itself a "legally non-binding working definition," this claim is at best a partial truth. In states that ban hate speech as a matter of course, any definition of such speech that claims to be legally non-binding ends up in contradiction of itself. Among its many aims, the IHRA document seeks to classify and codify Israel-critical speech as a form of hate speech. There is no need to legislate against antisemitism (and hence no need to subject such legislation to parliamentary scrutiny) in a society that bans or otherwise penalizes hate speech, in order for a definition of a particular variety of hate speech to wield legal or quasi-legal force. Legal anthropology shows that the distinction between legal and quasi-legal form is less decisive than idealistic theories of the rule of law in liberal democracies suppose it to be.

The political dynamics that enable a definition promoted by a range of interest groups to redirect the state's monopoly on violence manifests the extended remit of neoliberal governance. This extension has implications for all advocacy activities, well beyond Israel/Palestine. Quasi-legal forms empower interest groups to campaign against views

61. I have not dealt here with the nonetheless relevant example of the "Israel Anti-Boycott Act," a bill currently making its way through US Congress that criminalizes pro-Palestinian activism to the extent of making support for a boycott of Israel a felony punishable by 20 years in prison. For the text of this legislation, see https://www.congress.gov/bill/115th-congress/senate-bill/720.

62. For apt observations on governments such as Turkey, that have supported Israel's politicized Holocaust narrative while denying the Armenian genocide, see Amos Goldberg, "The 'Jewish narrative' in the Yad Vashem global Holocaust museum," *Journal of Genocide Research* 14(2) (2012), 203–4.

they oppose on political grounds with the backing of the state, even in the absence of legal ratification. Although debates around Israel/Palestine may be of direct concern to only a small segment of society, the IHRA document's negotiation of the relationship between legal form and legal legitimacy offers a case study of what the future holds within for speech regimes within liberal democratic states.

The definition's quasi-legal status enables its abusive applications. In advocating for its implementation on university campuses, the definition's proponents, including the Simon Wiesenthal Center, the Board of Jewish Deputies, Academics for Israel, and StandWithUs, have sought to give the IHRA definition the *de facto* authority of the law,[63] Public institutions have shown notably little resistance to these tendencies. Alongside the other speech regimes from which it emerges, this definition therefore represents a notable development in the history of speech regulation. The legal ambiguities that attend this quasi-law also raise fundamental questions about the relationship between the state and public bodies, between laws and other regulatory codes, and the appropriate procedures and instruments for pursuing legal discrimination claims. The negotiation of these tensions has the potential to redraw the relations between civil rights and civil liberties in ways not seen since the free speech movement of the 1960s.

From a legal point of view, the newness of the IHRA definition lies less in its substantive content (although its targeting of leftist activism is without precedent) than in the form of legal indeterminacy it introduces, whereby it functions as a *de facto* law, while lacking democratic legitimacy. And yet, both the form and content of this document have deeper (epistemic if not empirical) roots in the movement to criminalize hate speech. The definition's targeting of discourse over action as the source of prejudice and hence as an appropriate subject for legal sanction, and of censorship as the most appropriate means of combating it, bears the imprint of new alignments between rightwing nationalism and Israel advocacy, particularly as regards the strategic use of accusations of antisemitism to silence unwelcome critique.[64] The combination of new rightwing influences with a longer-standing social-democratic faith in the perfectibility of the state and its role as an engine of social progress makes palpable the contingencies of the political categories that structure our everyday lives.

V. The IHRA Document as Speech Code

The IHRA has used its hybrid document to give legal force to a political argument concerning the relation between Jewish identity and the state of Israel that, in terms of the argument advanced here, falls outside the proper jurisdiction of the law. The document the IHRA endorsed in 2016 (along with the earlier, nearly identical, definition authored by Ken Stern, of which it is a minor, somewhat less nuanced, revision[65]) bears a family

63. See the press release "Other Universities Should Follow British University's Cancellation of 'Israel Apartheid Week,'" http://www.wiesenthal.com/site/apps/nlnet/content.aspx?c=lsKWLbPJLnF&b=8776547&ct=14985817 (February 21, 2017).

64. See Omran Shroufi, "The Gates of Jerusalem: European Revisionism and the Populist Radical Right," *Race & Class* 57(2) (2015), 24–42.

65. The IHRA definition was preceded by the nearly identical definition that was associated with the EU's Fundamental Rights Agency. However, this definition was dropped in 2013 due to its contentiousness. See Mira Bar Hillel, "The EU has retired its 'working definition' of

resemblance to the type of speech codes that first developed in the United States to regulate speech on university campuses. Following the definition's adoption by a range of governments, the document moved away from its status as a speech code and came to approximate more closely in functional terms to a legal hate speech ban. However, its legal status remains notional, phantasmagoric, and subject to manipulation. This transformation from speech code to definition sets a precedent for future efforts to police speech in the name of combating racism. As such, like their Critical Race Theory (CRT) predecessors, who were reacting against the non-regulation of speech in a First Amendment context, advocates for the definition's adoption promote the regulation of hate speech. This has the effect of extending the jurisdiction of the neoliberal state in ways that prior regimes (also liberal) did not countenance, even though it may be argued that liberal theories of free speech laid the foundation for our current predicament.

Advocates of the IHRA definition assume that the harm done by offensive speech legitimates the abrogation of civil liberties. As one typical statement by a government official put it: "Freedom of speech within the law is a long-standing British liberty, but all rights should be exercised with social responsibility."[66] As increasing numbers of institutions adopt the IHRA definition and internalize its guidance document, the more indeterminate the boundary between the legal and non-legal will become. Indeterminate boundaries between the legal and non-legal entrench viewpoint selective censorship. Given the numerous ambiguities that these developments have generated, a rigorous and systematic assessment of how quasi-legal texts such as the IHRA document ought to function within the jurisprudence of liberal democracies is imperative. That public bodies continue to base decisions around the boundaries of permissible speech and the legitimate grounds for punitive action on a definition, the meaning, status, and content of which is heavily contested, further underscores the need for a scholarly evaluation of the legal status and legitimacy of this document.[67]

The IHRA document is accompanied by detailed guidance notes that specify and delineate the discourse targeted for censorship, often overdetermining the range of interpretations without adequately constraining the scope of applications. This is one reason why the document runs contrary to democratic norms; its very substance violates the rule of law by singling out a specific group for protection that is not accorded to others, and thereby violates the law's commitment to equality for all.[68] The IHRA document treats

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anti-Semitism – it's about time," *The Independent* (December 5, 2013). Hence, rather than introducing a new definition, the IHRA has rebranded its ownership.

66. Justin Cohen, "Pickles warns Southampton uni over 'one-sided diatribe'," *Jewish News Online*, http://jewishnews.timesofisrael.com/pickles-to-southampton-uni-avoid-one-sided-diatribe/ (March 13, 2015).
67. To support this point it is enough to point to two legal opinions which are in direct contradiction of each other: the first by Hugh Tomlinson (n 15), and the second by David Wolfson, "The Adoption of the IHRA Definition of Antisemitism by the Government of the United Kingdom" (https://antisemitism.uk/wp-content/uploads/2017/07/Opinion-on-the-International-Definition-of-Antisemitism.pdf).
68. The discussion held at the House of Lords cited above at n 17, points to a clear double standard in the deployment of the new antisemitism definition as compared to definitions of

the denial of the "right to self-determination," to Jews as presumptively antisemitic, while having nothing to say about whether a congruent denial of this right to Palestinians could be construed as racist.[69] Double standards can be appropriate for activists' agendas, but they contradict the rule of law.

My concern here however is with the document's necessarily indeterminate legal status. In that regard, the powers arrogated to its promoters through the government's adoption of it should occasion concern. In the university context, there has been widespread confusion around whether universities are obliged or advised to adopt the definition. This confusion is strikingly revealed in the Universities UK (UUK) newsletters that were circulated to university vice-chancellors in summer 2017.[70] Four months following the Universities Minister's letter to UUK, the UUK CEO acknowledged in one of the newsletters the "concerns about a lack of clarity with the IHRA definition and about the claims that institutions are required to adopt this definition." The following month, a new UUK CEO wrote in a subsequent newsletter: "Given the ongoing confusion around the IHRA definition, I will write to [Universities Minister] Jo Johnson to seek his guidance on the matter."[71] The procedural failures involved in the introduction of the IHRA definition by government and its subsequent adoption by public bodies have demonstrated how a quasi-legal document can acquire *de facto* legal jurisdiction, simply through its *ad hoc* application by university authorities keen to comply with governmental policies, and willing to compensate for confusion with censorship. Within this context, censorship functions as an effective tool in risk mitigation, and this is arguably the primary drive behind the IHRA document's rapid adoption and uncritical application, rather than an actual commitment to combating antisemitism.

As a definition that poorly defines its own legal status, this quasi-legal document introduces a new kind of indeterminacy. Putatively, it is merely a working definition that seeks to combat a very specific kind of racism, yet its "soft" quality is hardened through coercive applications that are driven by interest groups whose mandate is often overdetermined by Israel advocacy. From this point of view, even if large numbers of Jews were not opposed to its substantive definition of antisemitism (and they are), the implementation and application of the IHRA document as a quasi-law would be fraught with conceptual, legal, and procedural difficulties. Having dwelled at length on the ambiguities of its

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Islamophobia. Whereas government ministers have been almost without exception eager to adopt the IHRA definition, or to appear to support it, the response of the Parliamentary Under Secretary of State (Lord Bourne of Aberystwyth) to the suggestion of adopting a definition of Islamophobia was: "There are many definitions, but we do not use a single definition of Islamophobia, and I do not accept that there is a need for a definitive one."

69. The point was made in a commentary on the IHRA document that was circulated by the NGO MEND (Muslim Engagement and Development) to city councils considering its adoption (I thank Malaka Mohammed for sharing this document with me).
70. See the UUK newsletter, "Chief Executive's News," Issue 12 (June 16, 2017) and Issue 15 (July 28, 2017).
71. According to the Department of Education (personal correspondence dated November 23, 2017), no letter seeking clarification from Johnson is held by the Department of Education or by Universities UK (who were asked to provide such documents pursuant to my request).

quasi-legal status, I will devote the remainder of this reflection to considering how the legal tensions exacerbated by this document opens new frontiers in neoliberal speech regimes, including the United States, where, notwithstanding its distinctive relationship to speech regulation movements to criminalize hateful speech have gained traction in recent decades.

VI. Why are Free Speech Protections Weak?

When they have been litigated by students alleging the violation of their free speech rights (at the University of Connecticut, George Mason University, the University of Wisconsin, and the University of Michigan), speech codes have generally been struck down by US courts.[72] Universities have tended to resist modifying or removing their speech codes even when ordered to do so by the courts. This attests to an institutional tendency (already noted above in connection with applications of the IHRA document) to prioritize legal compliance with a regulatory regime that criminalizes discrimination over legal obligations to uphold freedom of expression, even when, as in most liberal states today, the latter is as legally binding as the former.[73]

One explanation for the existing hierarchy of non-discrimination over free speech is that the potential legal risk of non-compliance with anti-discrimination laws is far greater than violating the free speech prerogatives of students, employees, and citizens. It is easier to prosecute discrimination, which relies on positive evidence, than it is to penalize free speech violations, which often operates by *suppressing* evidence evidence. Equality and diversity policies are enforced by means of quotas and other bureaucratic measurements. They therefore depend on the extension of the law into the furthest reaching public and private domains. By contrast, free speech is upheld through precisely the opposite mode of exercising of power. Within such a legal regime, censorship becomes an effective means of risk mitigation rather than a legal violation.

To return to Kennedy's distinction between freedom and autonomy, the state exists to institutionalize the autonomy "necessary to prevent civil war."[74] Although autonomy creates the infrastructure necessary for the attainment of freedom in any social order, it does not guarantee freedom, and too much regulation threatens it. Like any genuine freedom, upholding free speech requires either the withdrawal of the state, or, even more challenging from a legal point of view, the deployment of the state's monopoly on violence to prevent the abuse of its own power to coerce specific forms of speech and action. Given the legal complexities inherent in the state's mandate – as per Juvenal's maxim *quis custodiet ipsos custodies* – to exercise its powers by limiting them, the paradoxical form of governance needed to uphold freedom of expression is difficult to legislate, let alone enforce.[75] Although it sought to uphold civil liberties including free

72. A list of such cases is given in Kenneth Marcus, "Higher Education, Harassment, and First Amendment Opportunism," *William & Mary Bill of Rights Journal* 14(4) (2008), 1030 n27.
73. Jon B. Gould, "The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance," *Law & Society Review* 35(2) (2001), 345–92, esp. 387–8.
74. Kennedy, "Legal Formality," 372.
75. Juvenal, *Satires* VI, lines 347–348, literally translating as "Who will guard the guards themselves?"

speech by introducing new forms of regulation, the liberal state by no means offered a satisfactory or sustainable solution to the problem posed by the state's necessary hegemony, and neoliberalism has extended its contradictory remit. I shall refer to this dynamic as the *free speech paradox*.

The challenge of enforcing laws pertaining to freedom of expression makes them particularly susceptible to manipulation. From the First Amendment in the US Constitution to Article 10 of the European Convention on Human Rights to the Higher Education and Research Act 2017 (Section 2 [4] to [8], incorporating section 202 of the Education Reform Act 1988), freedom of expression legislation is often compromised by the universalist framework that necessarily structures its implementation. While free speech is among the most universally recognized of values, the generality of its potential applications, along with the legal dynamics outlined above, make its enforcement vulnerable to manipulation by interest groups with political agendas that conflict with the interests this freedom seeks to protect.[76]

While appeals to freedom of expression have a generalizing tendency, codes governing offensive speech are increasingly specific in ways that make them easier to litigate. As a targeted speech code that focuses on the protection of one minority in isolation from others, the IHRA document exemplifies this particularist tendency.[77] Given that institutions typically prioritize legal protections over legal risk, their preferences for speech codes over free speech, and for censorship as a form of risk mitigation, should hardly occasion surprise. Institutions risk government censure when they defend free speech. An example set by the Vice-Chancellor of Kingston University, Julius Weinberg, who criticized the government's "naming and shaming" of his university for offering a platform to a controversial speaker, is a rare exception to the typical administrative hesitance to robustly interpret their free speech obligations.[78] In the overregulated speech regimes of the neoliberal state, institutions that clamp down on free speech in the name of promoting diversity are unlikely to be held to account for free speech violations, particularly if the ideology being suppressed is out of favor with the authorities. The UK government's approach toward the Prevent duty, which aims to prevent radicalization, exemplifies the uneven manner in which free speech is upheld within UK universities.[79]

When laws mandating the protection of freedom of speech are violated and the censored discourse is already opposed by the government, the suppression is more likely to be overlooked by the regulating body. A university's decision to prioritize its equality and

76. This has given rise to what is called "First Amendment opportunism" in legal scholarship, on which see Frederick Schauer, "The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience," *Harvard Law Review* 117(6) (2004), 1765–1809, esp. 1769–74.
77. This failure of the IHRA definition to conceptualize antisemitism alongside other forms of racism is among the key criticisms pursued by Feldman in "Will Britain's new definition of antisemitism help Jewish people?"
78. Julius Weinberg, "I won't stop offering a platform to so-called 'hate speakers'," *The Guardian* (February 23, 2016).
79. See Peter Ramsay, "Is Prevent a safe space?" *Education, Citizenship and Social Justice* 12(2) (2017), 143–58.

diversity obligations over its free speech commitments is more likely to be struck down by the courts than to be penalized by the executive branch. No other branch of government is likely to extract a punishment; the ability to prosecute such violations in the first place depends on the claimant having access to legal means of redress. It is an unfortunate social fact that those most in need of legal protection are least likely to have access to legal redress and are therefore least likely to exercise their free speech prerogatives. In the cost-benefit analysis that guides most university administrations, freedom of expression is bound to lose out, or worse, to be manipulated by agendas and interest groups with greater leverage on the institution's legal and financial interests. Free speech violations are therefore less likely to result in damaging litigation than are failures to uphold equality and diversity mandates.

Hence, it is always safer for an institution to prioritize compliance with equality and diversity policies over the promotion and protection of free speech. It is also safer to interpret such policies in ways that benefit privileged complainants, rather than to prioritize the needs of vulnerable communities who lack adequate legal defenses and therefore are less likely to engage in litigation. These dynamics are unlikely to change so long as higher education is structured by neoliberal governance. Herein lies a lesson for policymakers, educators, legislators, and legal professionals committed to upholding the free speech prerogative that, as Heinze has argued persuasively, is "the only distinctly democratic interest."[80] While other values are necessary to a stable and prosperous society, non-viewpoint-punitive expression within public discourse on this view is a *sine qua non* for democratic governance.

The claims made thus far lead to a controversial conclusion: beyond being merely null in terms of its positive effects, the regulation of offensive speech actively impedes the struggle for social justice. The argument advanced here against using the IHRA document to police speech additionally opposes the recent turn within contemporary liberalism (left-leaning liberalism as well as neoliberalism, with which it shares much in common) away from materialist critiques of power, and the increased focus on words over acts as the sources of social harm. Words that wound (to borrow the title of a key text discussed in the next section) should not be conflated within the law with actual bodily harm.

VII. Critical Race Theory as Constraint

The statements used to promote the application of the IHRA document echo earlier endorsements of speech codes by certain strands of CRT, a movement as internally diverse as CLS and one of its direct descendants.[81] Without engaging with CRT in its fullness, the remaining pages endeavor to elucidate some of the core resemblances between the neoliberal regulation of Israel-critical speech and strands of CRT that promote the censorship of

80. Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press, 2016), p. 5.

81. For this genealogy, see K. W. Crenshaw, "Twenty years of critical race theory: Looking back to move forward," *Connecticut Law Review* 43 (2011), 1253–1352, and Duncan Kennedy, "Intersectionality and Critical Race Theory: A Genealogical Note from a CLS Point of View," *Social Science Research Network* (August 6, 2017; available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3014312).

hateful speech. In particular I am interested in the links that scholars involved in promoting the IHRA document within the UK have drawn between their own ambitions for censoring antisemitism and the inspiration their efforts draw from CRT.

To begin with, it should be noted that CRT has had a fruitful legacy across the social sciences and humanities, including by legal scholars concerned with Israel/Palestine. Noura Erakat, Nadera Shalhoub-Kevorkian, Nahed Samour, Sarah Ihmoud, and Suhad Daher-Nashif have all engaged productively with various strands of CRT to examine the intersections of Israeli law and policy, gender, militarism, and settler colonialism.[82] At the other end of the spectrum are critical race theorists whose positions on the relationship among language, law, and harm I will discuss critically from the point of view of their convergence with neoliberal approaches to regulating speech that also informs advocacy of the IHRA definition.

CRT is a variegated enterprise, and a constellation of multiple political agendas, linked together by a broad commitment to challenging the status quo through the prism of racial inequality. Although they belong to only one strand within the movement, some critical race theorists have provided the intellectual foundations for codifying and banning hate speech. This strand of the movement has been subjected to trenchant critique by a range of theorists, including Henry Louis Gates Jr., Robert Post, and Eric Heinze.[83] These theorists have argued that the case made by CRT for the suppression of hateful speech overestimates the likelihood that such suppression will eradicate racism and inequality. Writing from a radical Marxist perspective, Robin Kelley has pursued a similar line of critique in describing the contemporary student movement's unwarranted faith in the perfectibility of social institutions, once racism and other forms of social inequality have been overcome. Countering such naïveté, Kelley insists that "the fully racialized social and epistemological architecture upon which the modern university is built cannot be radically transformed by 'simply' adding darker faces, safer spaces, better training, and a curriculum that acknowledges historical and contemporary oppressions."[84] In short, the liberal state's strategies for promoting diversity are necessary but insufficient conditions for bringing civil rights and civil liberties into alignment.

82. Noura Erakat, "Whiteness as Property in Israel: Revival, Rehabilitation, and Removal," *Harvard Journal of Racial & Ethnic Justice* 31 (2015), 69–103; Nadera Shalhoub-Kevorkian, "Racism, Militarisation and Policing: Police Reactions to Violence against Palestinian Women in Israel," *Social Identities* 10(2) (2004), 171–94; Nahed Samour, "Is there a Role for Islamic International Law in the History of International Law?" *European Journal of International Law* 25 (2014), 313–19; Nadera Shalhoub-Kevorkian and Sarah Ihmoud, "Exiled at Home: Writing Return and the Palestinian Home," *Biography* 37(2) (2014), 377–97; Nadera Shalhoub-Kevorkian and Suhad Daher-Nashif, "Femicide and colonization between the politics of exclusion and the culture of control," *Violence Against Women* 19(3) (2013), 295–315.

83. The key critiques (by Gates, Donald Lively, Robert Post, Nadine Strossen, Anthony P. Griffin, and William B. Rubenstein) are gathered in *Speaking of Race, Speaking of Sex*. Heinze's critique is found in "Truth and Myth in Critical Race Theory and LatCrit: Human Rights and the Ethnocentrism of Anti-Ethnocentrism," *National Black Law Journal* 20 (2008), 107–62.

84. Robin D.G. Kelley, "Black Study, Black Struggle," *Boston Review* http://bostonreview.net/forum/robin-d-g-kelley-black-study-black-struggle (March 7, 2016). For a cognate critique of liberal multiculturalism from a radical antiracist perspective see Jared Sexton, *Amalgamation Schemes: Antiblackness and the Critique of Multiracialism* (Minneapolis, MN: University of Minnesota Press, 2008).

Viewed from the vantage point of liberalism and identity politics, the IHRA document is only among the most recent manifestations of the movement to abrogate speech that has been spearheaded in the academy by CRT. In his seminal critique of this movement, Gates notes that, whereas during the heyday of the civil rights era, civil rights and civil liberties marched "in unison" to "an intertwined destiny," today, "civil liberties are regarded by many as a chief obstacle to civil rights."[85] On Gates' reading, free speech is in peril when it is seen to conflict with the cultural and legal imperative to punish or abrogate controversial speech.

At best, university speech codes have been of indifferent value in overcoming racial injustice. At worst, they have entrenched the power of (usually white) elites, by providing additional tools with which to prosecute propagators of unpopular ideas. Consider the fate of putatively anti-racist speech codes at the University of Michigan. As noted by Gates, "During the year in which Michigan's speech code was enforced, more than twenty blacks were charged – by whites – with racist speech … not a single instance of white racist speech was punished."[86] In a European context, Keck notes that, notwithstanding the passage of the Racial and Religious Hatred Act (2006) within the UK, "the years following publication of the Danish cartoons in 2005 witnessed virtually no success for Muslim appeals to national and international legal institutions to restrict the publication of caricatures of the Prophet."[87] While freedom of expression laws have been used disproportionately to protect Islamophobic speech, Muslims have been systematically punished under anti-terrorism legislation for a range of thought crimes.[88]

These examples illustrate how laws that appear to have universalist application are in practice applied only for very particular ends. The rule of law is premised on the idea of equality, but this justice is delivered in social contexts structured by hierarchies intrinsic to the uneven logic of neoliberal capitalism. We must legislate in the knowledge, not only of the context within which the law is implemented, but also with attention to how new regulations redefine the status of the law itself, by encouraging the proliferation of quasi-laws, procedural norms, minor bureaucracies, quasi-governmental organizations, and interest groups, each of which complicates the task of implementing the law equitably. These dynamics exacerbate the free speech paradox that limits free expression in neoliberal states. The state can provision legal aid in an effort to equalize access to resources but it cannot definitively resolve this tension, which is inherent in the structure of every

85. Gates, "Critical Race Theory and Freedom of Speech," *Speaking of Race, Speaking of Sex*, p. 119. For a related account of this disjuncture, focusing on an earlier period, see Laura Weinrib, *Taming of Free Speech: America's Civil Liberties Compromise* (Cambridge, MA: Harvard University Press, 2016).

86. Gates, "Critical Race Theory and Freedom of Speech," p. 145. Also see the detailed discussion in Nadine Strossen, "Regulating Racist Speech on Campus: A Modest Proposal?" *Speaking of Race*, pp. 206–7 and *passim*. Strossen has more recently developed her argument around free speech in *HATE: Why We Should Resist it With Free Speech, Not Censorship* (Oxford: Oxford University Press, 2018).

87. Thomas M. Keck, "Hate Speech and Double Standards," *Constitutional Studies* 1(1) (2016), 107.

88. See the case of Tarek Mehanna, detailed in Rebecca Gould, "Punishing Violent Thoughts: Islamic Dissent and Thoreauvian Disobedience in post-9/11 America," *Journal of American Studies* (https://doi.org/10.1017/S0021875817001426).

liberal democracy. Apart from its importance for individual liberty, free speech limits the power of the state; it is important because, in its absence, the state has unlimited powers to persecute the weak and unpopular among us.

The American Civil Liberties Union (ACLU)'s opposition to the University of Michigan's restrictive speech code was decried by critical race theorist C. R. Lawrence.[89] Yet the ACLU's position proved to be more supportive of civil rights than that of CRT, at least in legal terms. In this instance, no benefit accrued to minorities through the speech code that was nominally supposed to protect them. Far from being an exception that proves the rule, this failure in speech code implementation typifies the broader political context within which universities operate, as even cursory reflection on broader sociological realities confirm. As former ACLU executive director Ira Glasser argues, the problem with legally restricting speech is that these restrictions create their own traps. "Once you have such restrictions in place," Glasser writes, "the most important questions to ask are: Who is going to enforce them? Who is going to interpret what they mean? Who is going to decide whom to target? The answer is: those in power." Glasser then asks, "Why should minorities be willing to trust the majority with the authority to decide who should be allowed to speak?"[90] Defenders of hate speech bans, including proponents of the adoption of the IHRA document, have left this question unanswered.

Aggravating its legally indeterminate status is the fact that most promoters of the IHRA definition also deem themselves to be uniquely qualified for its interpretation. Groups like the Board of Jewish Deputies present themselves to the world as representatives of the "Jewish perspective" (implicitly suggesting that there is only one such perspective). As with speech codes in general, they seek to apply the IHRA document on the assumption that the appropriate criteria for liability for "words that wound" is best determined by the victim.[91] This nativist approach has been formalized within CRT by Mari Matsuda, who argues that "The appropriate standard in determining whether language is persecutory, hateful, and degrading is the recipient's community standard."[92] Matsuda's legal reasoning becomes particularly vexed when used to define antisemitism, given the debates that rage *within* the Jewish community on this issue, and the fact that the variance tends to pivot on one's attitude toward Israel (or toward state sovereignty generally), a state concerning which many members of the Jewish community are harshly critical, and with which some reject any affiliation whatsoever.[93] But, as it turns out, the implementation of a viewpoint selective ban generates even greater levels of indeterminacy. In the case of anti-Israel discourse perceived to be antisemitic, who precisely is the victim? Obviously, the answer depends on context. And context is precisely what is missing, both from the IHRA itself and from the methodologies of its self-appointed interpreters.

89. Lawrence, "If He Hollers Let Him Go," *Speaking of Race, Speaking of Sex*, p. 86.
90. Glasser, "Introduction," *Speaking of Race, Speaking of Sex*, p. 7.
91. For a typical and influential such statement, see Jonathan Freedland, "My plea to the left: treat Jews the same way you'd treat any other minority," *The Guardian* (April 21, 2016).
92. Matsuda, "Public Response to Racist Speech," 40.
93. For nuances around existing definitions, see Klug, "The collective Jew."

In recent years, Israel advocates have followed the example of CRT speech code theorists and found ways to apply the definition to censor anti-Israeli speech. Some scholars in this tradition, such as Kenneth Marcus, have called for caution in the application of antisemitism allegations in their scholarship. Yet their scholarly caveats contradict their litigious actions, which have caused lasting damage to freedom of speech, even when their concerted efforts to suppress criticism of Israel were roundly rejected by the US Department of Education.[94] Meanwhile, within the UK, Israel advocates have used CRT to argue for a full identity between Zionism and Judaism while alleging all anti-Zionist rhetoric to be harmful and offensive to Jews.[95] In arguing that anti-Zionism is intrinsically antisemitic, Lesley Klaff cites Matsuda on the effects of "hate speech."[96] Having argued on this basis for the harms caused by offensive speech, Klaff follows the anti-free speech strand of CRT (and expands on its remit) in calling for legislation against forms of discourse such as anti-Zionism that are, in her view, inherently antisemitic. Given CRT's broad focus on controversial speech and "words that wound," it should not occasion surprise that the language adopted by critical race theorists has been deployed on both sides of the ideological divide that encompasses activism relating to Israel/Palestine. Klaff simply offers a particularly literalist application of this strand of CRT when she argues that "the academic-freedom justification for the use of the campus to express anti-Zionist views is *without merit*. The … metaphor [that] regards the only goal of the university as the enlightenment of mankind … is outdated."[97] Klaff's analysis reveals just how far a viewpoint selective approach can be used to suppress free speech by building on CRT.

In any politically charged situation marked by intense historical inequities, someone will always be ready to appropriate someone else's suffering for rhetorical ends. Hence, Matsuda's contention that "angry, survivalist expression, arising out of the Jewish experience of persecution and without resort to the rhetoric of generic white supremacy, is protected" as non-racist, simply because it invokes a history of suffering, is based on flawed legal logic is both essentialist and nativist.[98] The key qualifier for "protection" in

94. See Kenneth Stern, "Written Testimony of Kenneth S. Stern, Executive Director, Justus & Karin Rosenberg Foundation, Before the United States House of Representatives, Committee on the Judiciary," Hearing on Examining Anti-Semitism on College Campuses (November 7, 2017; https://judiciary.house.gov/wp-content/uploads/2017/10/Stern-Testimony-11.07.17.pdf), 7.
95. See especially Lesley Klaff, "Anti-Zionist Expression on the UK Campus: Free Speech of Hate Speech?" *Jewish Political Studies Review* 22(3–4) (2010), 87–109. Klaff's engagement with CRT is made explicit in the title of her unpublished presentation "Using section 26 Equality Act 2010 to combat institutional antisemitism: a critical race perspective on Fraser v University and College Union," Sheffield Hallam University Research Archive (SHURA), available at: http://shura.shu.ac.uk/14588/.
96. Klaff, "Anti-Zionist Expression," 103, citing Matsuda.
97. Klaff, "Anti-Zionist Expression," 92. Emphasis added.
98. Matsuda, "Public Response to Racist Speech," 40. Zionism here is classed as one of the "hard cases" in determining the scope of Matsuda's theory of punishable speech. In the context of the IHRA document, the question is not whether Zionism is hate speech, but whether criticism of Zionism can be classified as racist.

Matsuda's formulation is not that the rhetoric be empirically linked to the suffering to which it lays claim, but simply that it *invoke the appropriate rhetorical modes of identification*. Matsuda's theoretical paradigm reduces racism to the skillful deployment of rhetoric.

The strand of CRT that converges with the IHRA document's proponents assumes a total homology between words and the realities they describe, leaving little scope for irony, parody, and satire. Meanwhile, scholars of language, literature, and law have developed a range of tools for distinguishing among the claims made within each domain. Words are purposive representations of social norms, psychological states, and the fictions we deploy to move through the world and our lives. Giving these fictions legal status – by identifying the core harm of racism in the language used – misconstrues the real damage done by racism to generate and naturalize inequality. The IHRA document is not useful in combating racism, and its prejudicial application (for example to punish disenfranchised Palestinians and dissident Jews) is directly harmful to this goal. As Gates writes prophetically, "those who pit the First Amendment against the Fourteenth invite us to spend more time worrying about speech codes than coded speech."[99] Gates critiques CRT on the grounds that it (falsely) reduces racism to rhetoric, and rhetoric to reality. Wielded by the wrong interpretive hands, a definition that was drafted to protect Jews has become an instrument for persecuting Palestinians and Jewish anti-Zionists.[100] To the extent that misapplications go unchallenged, the persecution could extend to human rights advocates, anarchists, and any anti-nationalist or critic of state sovereignty.

Lest this article be charged with alleging a conspiracy among Israel advocates, my examples have demonstrate that the abuses widely on evidence in recent applications of the IHRA definition are intrinsic to all speech codes and hate speech bans, regardless of the groups they purport to defend. I have argued here for a principled rejection of the IHRA document, based not, or not primarily, on its definition of antisemitism, but rather on the coercive relation it seeks to codify among language, law, and the state. This coercive relation was not part of the vision that informed the document when it was first drafted by Kenneth Stern in 2005, in which context it was envisioned as a tool for identifying hate crime (rather than offensive speech in and of itself), although it might be argued that the flaws that have emerged are intrinsic to the very idea of defining racism for legal ends.[101] In contrast to its original author, the groups that now most visibly and influentially advocate for the adoption of the IHRA document have demonstrated either indifference or hostility to the values of free speech and due process.

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99. Gates, "Critical Race Theory and Freedom of Speech," p. 147.
100. The proportion of Jewish scholars and activists accused of antisemitism under the IHRA definition appears to be increasing. The attempted expulsion of Moshe Machover from the Labour Party (background documents gathered here: http://freespeechonisrael.org.uk/machover) is merely one of the most contested recent examples.
101. See Kenneth Stern, "The Working Definition – A Reappraisal," in *The Working Definition of Antisemitism – Six Years After* (Tel Aviv: The Stephen Roth Institute for the Study of Contemporary Antisemitism and Racism, 2010). Available at http://kantorcenter.tau.ac.il/sites/default/files/proceeding-all_3.pdf

Finally, I have argued that arguments currently in circulation for and against free speech suffer from many of the same flaws. If in different ways and for different reasons, they treat the speech prerogative as simply one among a range of fungible rights, that need to be balanced against each other, and which rather than the foundation of democratic legitimacy. Notwithstanding their internal differences, classical liberalism, CRT left-liberalism, and the regulatory speech regimes of the neoliberal state share in common a tendency to undermine free speech. The collective failure of these – quite different – liberalisms to adequately codify protections for freedom of expression in legal form has opened a space for quasi-legal documents to be assigned *de facto* legal mandates by people in positions of authority, in university contexts and elsewhere, who see censorship as a form of risk management while lacking a clear understanding of and respect for the rule of law. In order to overcome the progressive erosion of free speech in liberal democracies through institutional compliance the state must incentivize the active deployment of – and not merely the passive appeal to – citizens' free speech prerogative, and not just by individual citizens but by the institutions that regulate, police, monitor, and employ them.

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