Anti-Israelism and Anti-Semitism: The Invidious Conflation

I and others have warned that enactment of the Anti-Semitism Awareness Act now before Congress would threaten free speech and free inquiry on America's college campuses and beyond. As I've explained, this bill incorporates a conception — a "definition" plus *potential* examples — of anti-Semitism that conflates criticism of Israel's founding and continuing abuse of the Palestinians with anti-Semitism for the purpose inoculating Israel from such criticism. Anti-Zionist Jews and others have objected to this conflation for over 70 years.

What makes us so confident in predicting a threat to free speech?

We are confident in part because Donald Trump's assistant secretary of education for civil rights, who would enforce the legislation, is Kenneth L. Marcus, whose record makes him the poster boy for the invidious conflation.

Dima Khalidi, founder and director of Palestine Legal, writes in *The Nation*:

> *If this definition [of anti-Semitism] were adopted and implemented as Marcus would like, the DOE would be empowered to conclude that universities nurture hostile, anti-Semitic environments by allowing the screening of a documentary critical of Israel's 50-year military occupation of Palestinian lands such as Occupation 101, a talk critical of Israeli policy by a Holocaust survivor, a mock checkpoint enacted by students to show their peers what Palestinian life under a military occupation is like, a talk on BDS [boycott-divestment-sanctions] campaigns for Palestinian rights, or student resolutions to divest from companies complicit in Israel's human-rights abuses.*
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> *These aren't hypotheticals. These speech activities were the subject of real legal complaints, filed or promoted by Marcus and his Brandeis Center against* Brooklyn College *(2013),* University of California Berkeley *(2012), and* University of California Santa Cruz *(2009). The complaints were filed to the same DOE office which Marcus has been nominated to head [and to which he has since been confirmed].*

> *Crucially, all of these complaints were dismissed. Both a federal court and the DOE made clear that the activities at issue were not harassment against a protected group but constituted speech on matters of public concern, and therefore were protected by the First Amendment.*

Marcus founded and ran the Louis D. Brandeis Center for Human Rights Under Law (not affiliated with Brandeis University), which declares on its website, "In the Twenty-first Century, the leading civil and human rights challenge facing North American Jewry is the resurgent problem of anti-Semitism and *anti-Israelism* on university campuses. This social problem requires an immediate, effective, and coordinated legal response" (emphasis added).

Note the conflation. How could anti-Israelism on campus or anywhere else pose a "civil and human rights challenge to North American Jewry"? If Judaism values universal justice, which the great prophets admonished the ancient Hebrews to honor, attention to the systematic injustice that Israel inflicts on the Palestinians qua non-Jews should be welcomed rather than feared by all, including Jews. As I've argued, there is no reason to view even foundational criticism of Israel through a presumption of anti-Semitism. Indeed, the Center itself claims that "the civil and human rights of the Jewish people are inextricably bound to the pursuit of justice for all peoples." Unfortunately, that sentiment turns out to be mere lip service; it is not reflected in its actions — unless Palestinians are to be regarded as non-people. Alas, that seems to be the case.

The Center is not alone in this belief or activity. Similar programs are carried out by the Canary Mission (an anonymous website), which "documents people and groups that promote hatred of the USA, Israel and Jews on North American college campuses," and the David Horowitz Freedom Center, the self-identified "school of political warfare," which through its Israel Security Center headed by Caroline Glick stigmatizes criticism of Israel as the "mainstreaming of anti-Semitism" and smears professors who are Palestinian or who express sympathy for the Palestinians' plight. An assortment of other individuals, such as former student activist Bari Weiss, now a *New York Times* writer and editor feted for her courageous advocacy of free speech on campus, have also made it their mission to smear Palestinian sympathizers as Jew-haters.

Marcus previously worked in the George W. Bush administration's Education Department, Office of Civil Rights (OCR), and the U.S. Civil Rights Commission.

As assistant secretary of education, he would have the power to move against colleges and universities that in his view failed to discipline pro-Palestinian student activists and

professors on grounds that their statements and activities create a hostile climate for Jewish students and thereby violate their rights under Title VI of the 1964 Civil Rights Act.

However, even the lead author of the notion of anti-Semitism embodied in the Anti-Semitism Awareness Act has bridled at its use to police debate on campus. Kenneth Stern has written articles and given testimony in Congress warning against such use. As Stern wrote to the House Judiciary Committee in 2016, when a similar bill was under consideration and was eventually killed because of First Amendment concerns:

> *I write as the lead author of the … "Working Definition on Antisemitism," to encourage you not to move "The Anti-Semitism Awareness Act of 2016," which essentially incorporates that definition into law for a purpose that is both unconstitutional and unwise. If the definition is so enshrined, it will actually harm Jewish students and have a toxic effect on the academy….*
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> *Antisemitism – like all forms of bigotry – has an impact on some campuses. The worst way to address it is to create a de facto hate speech code, which is what this bill proposes to do.*
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> *In years past various Title VI cases were brought asserting that a hostile environment was created in substantial part by anti-Israel speech. All of them lost….*
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> *Students should not be harassed and intimidated and threatened. But a campus must be a place where students are challenged by difficult – and yes, disturbing and even hateful – ideas.*

In testimony before the committee, Stern said it is not true that "antisemitism on campus is an epidemic. Far from it. There are thousands of campuses in the United States, and in very few is antisemitism – or anti-Israel animus – an issue."

At the Mondoweiss website, civil-rights advocates Abed A. Ayoub, Phillip Agnew, and Harper Jean Tobin write that, while at the Brandeis Center, Marcus "abused the OCR complaint process by pushing frivolous protests that only serve to harass and stifle the speech of students he disagrees with."

Losing cases did not deter him, however. As he wrote in the *Jerusalem Post* in 2013, "These

cases – even when rejected – expose administrators to bad publicity.”

Harassment is a nice word for that kind of behavior. Why aren’t such activities called racism? (Marcus suggests that his complaints were exclusively against assault, physical intimidation, and the like, but the OCR dismissals say otherwise.)

Marcus continued, “Just last week, I heard from a university chancellor who is eager to work with the Schusterman Center for Israel studies at Brandeis University to avert the possibility of a civil rights complaint.” In light of the threat from the Brandeis Center, I doubt the chancellor was likely to err on the side of free speech and free inquiry. What one perceives as a hostile environment is highly subjective, but some believe that the mere perception of something as anti-Semitic is sufficient to *make* it anti-Semitic. Intentions and truth are irrelevant.

“As Assistant Secretary,” Ayoub, Agnew, and Tobin write, Marcus will “be able to wield the threat of bad publicity in an attempt to force universities to restrict the rights of groups such as Students for Justice in Palestine.”

That’s a good reason to favor defeat of the Anti-Semitism Awareness Act: it would enable Marcus, in Khalidi’s words, to “try to do from the inside of the DOE what he has failed to do from the outside.”