Legislative Threats to Academic Freedom: Redefinitions of Antisemitism and Racism

(MARCH 2022)

The statement that follows, prepared by a subcommittee of the Association's Committee A on Academic Freedom and Tenure, was approved by Committee A in March 2022.

Introduction

The past few years have seen an increase in partisan political attempts to restrict the public education curriculum and to portray some forms of public education as a social harm. Two targets are particularly evident: teaching about the history, policies, and actions of the state of Israel and teaching about the history and perpetuation of racism and other accounts of state-enabled violence in the United States. In both cases, conservative politicians have justified restrictive legislation under the guise of protecting students from harm, including discriminatory treatment or exclusion. In the first case, legislation defines antisemitism to include political criticism of the state of Israel. In the second, legislation defines critical analysis of the history of slavery and its legacies in US society as being itself racially discriminatory against whites. In this way, politicians obfuscate or deny the serious challenges their actions pose to free speech and academic freedom. The evident purpose of such legislation is to protect Israel or the United States from critical examination of their history and policies.

There is a clear connection between recent laws on antisemitic speech and those on teaching about racism. New legislation on antisemitic speech amends civil rights laws to address antisemitism as a special form of discrimination. But civil rights laws already include antisemitism among prohibited forms of discrimination. Thus, while the growth of antisemitism is a severe threat, it can and should be addressed under existing civil rights laws as religious or race discrimination. These new laws, however, expand the definition of antisemitism to encompass political speech, with several discriminatory effects. Political critiques of Israeli state actions—including discrimination and violence against Palestinians—become subject to the charge of antisemitism, skewing the social and legal meaning of equality and obscuring other prohibited forms of discrimination. Redefinitions also feed Far Right attempts to depict teaching about systemic racism, including pedagogy employing "critical race theory," as discriminating against white people. Such legislation reinterprets social understandings of equality and justice by inverting the very meaning of racism, misrepresenting its perpetrators as its victims. Scrubbed of its past, a now innocent nation bears no responsibility for ongoing racial or settler-colonial violence.

The core assertion of the AAUP's 2021 *Statement on Legislation Restricting Teaching about Race* applies equally to legislative restrictions on teaching about the history and ongoing actions of Israel: "Since its founding in 1915, the AAUP has steadfastly opposed political interference in the conduct of this country's

institutions of higher education. Today the AAUP condemns in the strongest possible terms the recent actions to ban, limit, or distort the teaching of history and related academic subjects."

The IHRA Definition of Antisemitism

In 2016, the International Holocaust Remembrance Alliance (IHRA) offered a "working definition" of antisemitism that has since been widely adopted all over the world. The problem with the definition, as its many critics have pointed out, is that it equates criticism of the policies of the state of Israel with antisemitism. Fifty-six scholars of antisemitism, Jewish history, and the Israel-Palestine conflict have called the IHRA definition "highly problematic and controversial," noting that it privileges the political interests of the state of Israel and suppresses discussion and activism on behalf of Palestinian rights. It has provided a pretext to bring coercive legal actions against supporters of the boycott, divestment, and sanctions movement, denying proponents of this peaceful form of economic and cultural protest their freedom of expression. And it has led to cancellation of university courses and conferences on the rights of Palestinians and to targeting faculty members in Middle East studies for dismissal and other severe sanctions. In an effort to remedy the effects of the IHRA definition, a group of scholars in the United States, Israel, Europe, and the United Kingdom drafted the "Jerusalem Declaration on Antisemitism," which—with the explicit aim of protecting academic freedom—acknowledges the importance of combating antisemitism while seeking a clearer definition of it, one that does not blur the distinction between antisemitic speech and political critiques of Israel and Zionism.

Kenneth Stern, one of the authors of the IHRA definition, has stated that it "was never intended as a tool to target or chill speech on a college campus." Stern has objected to what he has called the "weaponizing" of the definition, arguing that its misuse undermines efforts to detect and combat real instances of antisemitism. As a result, Stern has opposed attempts to enact legislation that incorporates the IHRA definition, including the Anti-Semitism Awareness Act, first introduced in Congress in 2018. This controversial bill, which did not pass, would have required the Department of Education, under Title VI of the Civil Rights Act of 1964, to consider factors and examples similar to those encompassed by the IHRA definition when evaluating complaints of antisemitic discrimination. Although the federal Anti-Semitism Awareness Act failed, efforts continue in the states, where lawmakers have proposed similar bills, framing them, ironically, as tests of commitment to diversity and inclusion.

In 2019, Florida legislators amended the Florida Educational Equity Act to add religion to the existing statutory prohibitions of discrimination—including race, sex, and disability—in K–20 public education. These amendments, known as HB 741, define antisemitism by incorporating and extending ("weaponizing," in Stern's term) the IHRA definition.

Florida's HB 741 defines antisemitism to include criticism of Israel, such as "blaming Israel for all inter-religious or political tensions"; "applying a double standard to Israel by requiring behavior of Israel that is not expected or demanded of any other democratic nation, or focusing peace or human rights investigations only on Israel"; and "delegitimizing Israel by denying the Jewish people their right to self-determination and denying Israel the right to exist." This statutory conflation of antisemitism with criticism of Israel creates an unconstitutionally overbroad prohibition of protected speech on matters of public concern.

These antisemitism bills also constitute state interference with academic freedom, thereby undermining the public mission of higher education to serve the common good through open, searching, and critical pedagogy; research; and extramural speech. Restrictions such as the Florida statute's overbroad definition of antisemitism constitute a state-imposed orthodoxy that prohibits or discourages faculty members and students from engaging in academic work that may question the state's positions on Israel or Zionism. These legislative attacks are presented in the guise of protecting students from discrimination. In reality, these restrictions themselves discriminate on the basis of speech content and pedagogical viewpoint.

In targeting public education, the Florida law violates both the First Amendment and principles of academic freedom through state censorship of teaching, research, and public speech on particular issues. Further, the law creates a chilling effect for faculty members and students who fear penalties from statutory enforcement and adverse actions by college and university administrations. The US Supreme Court has recognized the dangers of state censorship and control over education. As the court famously pronounced in its 1967 decision in *Keyishian v. Board of Regents*, academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . [T]he Nation's future depends upon leaders trained through

wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" In its 2021 decision in *Mahanoy Area School District v. B.L.*, the Supreme Court asserted that academic freedom is most urgently needed in "the protection of unpopular ideas, for popular ideas have less need for protection."

Legislation like Florida's HB 741 imposes broad restrictions on speech by faculty members and students, subjecting both to charges of antisemitic religious discrimination for criticism of Israel, whether this speech takes place in the classroom, during political demonstrations, or in other forums. This legislation thereby undermines the ability of an institution of higher learning to achieve an "atmosphere of speculation, experiment and creation" and of "wide exposure" to diverse "ideas and mores"—all of which are "of paramount importance in the fulfillment of [a university's] mission," according to the Supreme Court's 1978 decision in *Regents of the University of California v. Bakke*. As the AAUP-endorsed *Joint Statement on Rights and Freedoms of Students* (1967) emphasizes, "Freedom to teach and freedom to learn are inseparable facets of academic freedom."

Florida's recent legislative activity, however, extends its censorship beyond antisemitism and racism. Expanded political attacks include the "anti-woke" bill restricting K–12 teaching about racial history and racism, the "don't say gay" bill restricting public school teachers from discussing sexual orientation or gender identity with students, and the enactment of a statute requiring public universities to conduct an annual survey to assess "viewpoint diversity" on campus. Together, such legislation creates a widespread chilling effect on teachers attempting to engage their students in critical thinking about fundamental historical and current issues.

The Attack on "Critical Race Theory"

Nearly forty years ago, a group of American legal scholars developed what they called critical race theory (CRT). CRT is a form of analysis that describes the many different and even contradictory types of scholarship that seek to analyze the role of law and of institutions in perpetuating racial and other forms of social inequality. While CRT is often invoked in contestations over the US role in the trans-Atlantic slave trade, the breadth of work that occurs beneath its banner has come to include the experiences and knowledge systems of Latinx, Black, Indigenous, Asian, and other non-European peoples. For CRT scholars, critical race theory is a "verb"—a practice that responds to historical and sociocultural changes, not a prescribed way of thinking.

The attack on critical race theory is another example of the curbing of free inquiry in the interests of a state, this time the United States. While the controversies over teaching about slavery preoccupy the current moment, legislating what counts as US history has more far-reaching effects. If the immediate goal is to cleanse the teaching of American history from the charge of systemic racism, to eliminate portrayals of the evils of slavery, and to protect white children from experiencing the anxiety or shame they might feel when learning of discrimination based on race, then other histories of violence—including restrictions on Asian immigration, the conquest of Indigenous lands, and the assumptions about gender and sex that accompany them—are subject to similar erasure. Ironically, those who seek to suppress critical, evidence-based pedagogy about US histories of racism, empire, and settler colonialism justify their efforts in the name of equality. In the words of Texas congressman James White, "Antiracism and CRT emphasize that racial divisions are the foundation of our American society, rejecting the time-honored classical liberal principle of equality under the law."[1] There is a doubly perverse logic operating here. White and other like-minded legislators invoke equality to reject critical analysis of history and arguments for social justice and to deny teachers of history their liberty of expression and their academic freedom.

The official history that anti-CRT and "divisive concepts" legislation aims to mandate proclaims that the United States is an "exceptional nation." For example, in his opinion on "whether the teaching of Critical Race Theory or so-called 'antiracism' in Montana schools violates the U.S. Constitution; Title VI of the Civil Rights Act of 1964; Article II, Section 4, of the Montana Constitution; or the Montana Human Rights Act," the state's attorney general, Austin Knudsen, writes, "The Founders waged an ideological revolution—one that ushered in a new epoch and reordered society around timeless truths." For evidence regarding critical race theory and antiracism, Knudsen's opinion relies most heavily on the avowedly partisan and non-peer-reviewed writings of Manhattan Institute fellow Chris Rufo, who

1. Letter to Texas attorney general Ken Paxton from Representative James White, Texas State House of Representatives (August 3, 2021).

weaponized critical race theory as a strategy for the Republican party.

Statements such as these seek to control how educators discuss the nation's history. Proponents of anti-CRT legislation argue that pedagogy that directly or indirectly challenges the presumption of American exceptionalism should be cause for legal action, ostensibly because it contradicts truths—such as the doctrine of the equality of persons—enshrined in the nation's founding documents. The bills cite federal and state law, most notably the Equal Protection Clause of the Fourteenth Amendment, to imply that robust analyses of the nation's long history of racial inequality are themselves discriminatory. As the AAUP commented in a 2021 brief to the Texas attorney general, the proponents of such legislation seek "to use the Constitution itself to censor ideas that promote racial awareness and sensitivity, and would do so via a provision—the Equal Protection Clause of the Fourteenth Amendment—that was specifically written to overturn systems of legalized racial hierarchy."

The misuse and abuse of antidiscrimination law in these bills represents an intensification of the reaction by conservative activists against the civil rights movement and its legal victories. This countermovement deploys laws originally designed to protect groups from discrimination to block attempts to remedy the compounded effects of past discrimination on these groups and to impede further progress. By misrepresenting what goes on in classrooms that employ the resources of antiracism, these new laws maintain that such teaching creates a hostile environment for white students and accordingly forbid the dissemination of knowledge regarding the histories and realities of what constitutes legal discrimination and, more broadly, the meaning and scope of social harm.

Conclusion

For more than a century, the AAUP has promoted principles of academic freedom as essential for effective teaching and scholarly inquiry in higher education. In the 2007 statement *Freedom in the Classroom*, the Association opposed groups that "sought to regulate classroom instruction [by] advocating the adoption of statutes that would prohibit teachers from challenging deeply held student beliefs or that would require professors to maintain 'diversity' or 'balance' in their teaching." The AAUP's 2021 *Statement on Legislation Restricting Teaching about Race* affirmed this position, as we do once again. We further affirm the recommendations in the AAUP's 2016 report *The History, Uses, and Abuses of Title IX*, which urged that colleges and universities promote teaching and research "dedicated to the analysis of inequality" by "improv[ing] the conditions of interdisciplinary learning on campus" and that they adequately fund departments that come out of activist intellectual traditions—including Black studies, Indigenous studies, ethnic studies, gender and sexuality studies, and allied disciplines—because "promoting such teaching and research will provide students and society at large with the tools for understanding inequality, not as a fact of individual motivation and insult but as a structural issue whose analysis requires a wide range of approaches across the disciplines."

Proponents of overly broad definitions of antisemitism and proponents of eliminating teaching about the history of racial and other violence share a desire to mobilize the government to enforce particular, emaciated accounts of history, harm, and injury. As the *Statement on Legislation Restricting Teaching about Race* observes, "When politicians mandate the academic content that faculty can and cannot teach or the scholarly areas they can or cannot research or study, they prevent colleges and universities from fulfilling their missions. Such actions also severely violate both academic freedom, the cornerstone of American higher education, and the faculty's primary role in institutional decision-making." Such restrictions on faculty members portray robust academic inquiry and teaching as dangerous, deny students the opportunity to learn, and undercut the purpose of higher education. We therefore urge the defeat of these legislative initiatives and others of their kind in order to protect the academic freedom that is vital to the preservation of democracy. ■