



Summary

Jewish Identity and Civil Rights in America

Kenneth L. Marcus
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What does it mean
to be Jewish?

This ancient question
has become a
pressing civil rights
controversy.

Despite a recent resurgence of anti-Semitic incidents on American college campuses, the U.S.

Department of Education's powerful Office for Civil Rights (OCR) has been unable to protect Jewish students. This failure has been a problem not of execution but of conceptualization. OCR has been unable to address anti-Jewish harassment because it lacks a coherent conception of both Jewish identity and anti-Jewish hatred. Given jurisdiction over race and national origin but not religion, federal agents have had to determine whether Jewish Americans are covered under one of these two criteria. They have been unable to do so. This has led to enforcement paralysis, as well as explosive internal confrontations and recriminations within the federal government.

OCR's actions have created significant anomalies. African Americans, Arabs, Hispanics, female, older students or even boy scouts who charge their schools with discrimination can have their cases investigated by the federal government. On the other hand, if a Jewish student submitted the same complaint to OCR, it would be rejected on the grounds that Judaism is not a racial or national origin category. OCR officials might sympathize with the complaining student and might recommend that she try to hire a private attorney if she could afford one. OCR would not, however, open an official file, send a team of investigators, provide its own civil rights lawyers, or deploy its formidable federal law enforcement apparatus to protect the Jewish student in the same way it would for students of another ethnicity.

Although *Jewish Identity and Civil Rights in America* initially drew attention for its revelations of internal conflicts within OCR – including previously unreported irregularities in OCR's famous investigation of anti-Semitic bigotry at the University of California at Irvine – its most important contribution is to demonstrate why and how OCR must address anti-Semitism in American higher education. In 2004 OCR announced that discrimination on the basis of ethnicity or ancestry is no less permissible

against groups that also have religious attributes than against groups that do not. But for most of its history – and even today – OCR has failed to extend civil rights protections to Jewish students for several reasons beyond bureaucratic inertia. These have included reluctance to protect a religious group under a statute that does not mention “religion” and understandable squeamishness over the prospect of characterizing Jews a “race.” This reluctance extends beyond OCR, preventing senior officials from acknowledging that OCR is legally compelled under applicable precedents to prosecute anti-Semitism under its authorizing statutes.

However, the U.S.

Supreme Court has already held, under an analogous nineteenth century statute, that Jewish Americans must be able to be regarded as a “race” for the limited purpose of extending them the same legal protections against discrimination that are afforded to other groups. The same logic applies to OCR's statute, which was enacted precisely to provide a means of enforcing nineteenth century civil rights laws. In other words, the Supreme Court's current constitutional approach to statutory questions of Jewish identity compels OCR to provide Jewish students with precisely the protections that it has refused to extend.

Are Jews just a religious group?
Or are they an ethnic group?
Or both?

The use of an anti-racism provision to protect Jewish Americans from discrimination inevitably raises sensitivities about whether Jews can be considered a distinct “race.” On the other hand, it is not much more credible to assert that “race” exists as a biologically meaningful category that simply does not include Jews. Many commentators have recognized that the weight of contemporary science rejects not only the notion that Jews are a racial group but also the entire racial concept, except as a means of describing social constructions. Using antiracism provisions to combat anti-Semitism both respects the original statutory intent of Congress and recognizes that antiracism efforts, by their nature, target bigotry whose perpetrators are driven by irrational prejudices. Moreover, the modern understanding of antidiscrimination provisions asks only whether a group shares ethnic or ancestral ties (as Jews do), not whether it is biologically distinct.

Jewish Identity and Civil Rights in America explains that, in the future, the courts could take different approaches to interpreting Jewish identity. Importantly, however, *Jewish Identity* demonstrates that all of these

approaches lead ultimately in the same direction. Whether one emphasizes popular understandings, scientific evidence or congressional intent, Jewish Americans must receive the same protections as other groups. Understanding these approaches requires one to explore new scholarship in a host of fields: Jewish cultural studies, critical race theory, population genetic demography, contemporary anthropology, legislative history, et cetera. Based on research in these fields, *Jewish Identity and Civil Rights in America* demonstrates that OCR is compelled to extend protections to Jewish students regardless of which methodological approach which is employed.

OCR would not deploy its formidable federal law enforcement apparatus to protect the Jewish student in the same way it would for students of another ethnicity.

Kenneth L. Marcus is Director of the Initiative on Anti-Semitism and Anti-Israelism at the Institute for Jewish & Community Research and holds the Lillie and Nathan Ackerman Chair in Equality and Justice in America at CUNY/ Baruch College. Previously, Marcus was the Staff Director at the U.S. Commission on Civil Rights and was delegated the authority of Assistant U.S. Secretary of Education for Civil Rights.

Kenneth L. Marcus is one of the most important new voices in civil rights policy to come along in many years. He combines the brilliance of a great lawyer, the flair of a compelling writer, and the tenacity of a policy-maker who has spent many years battling in the trenches. *Jewish Identity and Civil Rights in America* ... should be required reading for anyone who wants to understand one of the most disturbing failures of civil rights enforcement today.

*Abigail Thernstrom, Vice Chair,
U.S. Commission on Civil Rights*

In *Jewish Identity and Civil Rights in America*, Professor Marcus brilliantly wrestles with two interrelated questions. What does it mean to be Jewish? And what does it mean to be antisemitic? Marcus demonstrates how the multiple understandings of Jewishness—as a religion, as an ethnic identity, and so forth—engender problems when we seek to define antisemitism and its legal ramifications....

Stephen M. Feldman, Jerry W. Housel / Carl E. Arnold Distinguished Professor of Law and Adjunct Professor of Political Science, University of Wyoming

Kenneth Marcus brings a wealth of legal knowledge and a richness of professional experience to illuminate a problem of growing concern: the surfacing of anti-Jewish hostility on a number of American university campuses and the general failure of university administrators to act effectively... [T]his well-informed, clarifying book is a

must-read."

*Alvin H. Rosenfeld, Director,
Institute for the Study of
Contemporary Antisemitism;
Irving M. Glazer Chair in Jewish
Studies, Indiana University*

Ken Marcus has written a seminal work on Jews and racial identity, distilling the major arguments surrounding the federal government's decision not to investigate

allegations of anti-Semitism on American colleges and universities...

*Marc Dollinger, Richard and Rhoda Goldman
Chair in Jewish Studies and Social Responsibility, San
Francisco State University*

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