

A Blind Eye to Campus Anti-Semitism?

Kenneth L. Marcus

September 2010

During the first years of the 21st century, the virus of anti-Semitism was unleashed with a vengeance in Irvine, California. There, on the campus of the University of California at Irvine, Jewish students were physically and verbally harassed, threatened, shoved, stalked, and targeted by rock-throwing groups and individuals. Jewish property was defaced with swastikas, and a Holocaust memorial was vandalized. Signs were posted on campus showing a Star of David dripping with blood. Jews were chastised for arrogance by public speakers whose appearance at the institution was subsidized by the university. They were called “dirty Jew” and “fucking Jew,” told to “go back to Russia” and “burn in hell,” and heard other students and visitors to the campus urge one another to “slaughter the Jews.” One Jewish student who wore a pin bearing the flags of the United States and Israel was told to “take off that pin or we’ll beat your ass.” Another was told, “Jewish students are the plague of mankind” and “Jews should be finished off in the ovens.”

When complaints were lodged over these incidents, which took place in 2003 and 2004, the university responded either with relative indifference or with little urgency. But when the federal government was asked in 2004 to intervene to deal with incidents that its own investigators had determined to be clear-cut violations of the civil rights of Irvine’s Jewish students, the U.S. Department of Education’s Office for Civil Rights failed to prosecute a single case. Indeed, it has finally become clear that the current policy of the office charged with enforcing civil rights at American universities involves treating anti-Jewish bias as being unworthy of attention—a state of affairs in stark contrast to the agency’s quite justified alacrity in responding to virtually every other possible case of discrimination. While one cannot identify the motive for this astonishing double standard with complete certainty, the justification for it involves an unwillingness to treat Jews as a distinct group beyond considerations of religious adherence.

Faced with the demand to address anti-Semitic actions verified by its own investigators, the federal government passed on prosecution because it was unable to define the group that was the victim of the assault. Washington found itself unable to answer the question “Who is a Jew?”

The lack of a coherent legal conception of Jewish identity has rendered the Office for Civil Rights (henceforth, OCR) unable to cope with a resurgence of anti-Semitic incidents on American college campuses, of which the Irvine situation is enragingly emblematic. The problem stems from the fact that federal agents have jurisdiction under Title VI of the Civil Rights Act over race and national-origin discrimination—but not over religion. And because they have been unable to determine whether Jewish Americans constitute a race or a national-origin group, they found themselves unable to address the anti-Semitism at UC-Irvine. This confusion has led to enforcement paralysis as well as explosive confrontations and recriminations within the agency.

In Title VI of the Civil Rights Act, passed in 1964, Congress prohibited discrimination on the basis of race, color, or national origin in federally funded universities and public schools. Over the years, other statutes have expanded the list of suspect classifications to include sex, age, disability, and even membership in the Boy Scouts and other patriotic youth groups. Yet adhering closely to its congressional mandate, OCR has generally declined to pursue anti-Semitism allegations, because none of the pertinent statutes mentions religion. Over the years, there have been suggestions that OCR should ban anti-Semitism under its race and national-origin jurisdiction, but OCR has been reluctant to suggest that Jews are members of a biologically or nationally distinct group. One can acquire Jewish identity by a process of conversion, and it was, after all, Adolf Hitler who insisted that “Jewry is without question a race and not a religious community” before he began his program of mass murder.

Yet even though being a Jew is not strictly a matter of ancestry, it is a group identity that involves more than adherence to a particular faith. Indeed, the idea that Judaism is nothing more than a religion in which Americans are merely practitioners of a “Mosaic” or “Hebrew” creed—a point of view once advocated by the founders of the Reform movement of Judaism—is now widely rejected by virtually every denomination of Judaism. In 2004, when I ran OCR during the first term of the George W. Bush administration, the office pledged for the first time to enforce Title VI against those forms of anti-Semitism that are based on Jewish ethnic or ancestral heritage. With that pledge, I conceded that purely religious discrimination is not prohibited under this law. Yet drawing on a unanimous U.S. Supreme Court decision in 1987, we at OCR declared that discrimination on the basis of ethnicity or ancestry was no more permissible against groups that have religious attributes than against groups that do not. That decision—in the case of *Shaare Tefila Congregation v. Cobb*—held that Jews are a “race” within the meaning of the Civil Rights Act of 1866, because Congress had, at the time of the 1866 Act’s passage, considered Jews a racial group. My argument was that the 1866 Act and the 1964 Civil Rights Act should be read together, because the latter statute was intended in part to fulfill the mandate of the former. This policy was largely disregarded, however, during the second George W. Bush administration and has also been disregarded during the Obama administration.

This failure to enforce the law is illustrated by the government’s refusal to respond to the situation at Irvine. In a lengthy, detailed, and disturbing 2004 complaint filed with OCR

against UC-Irvine, the Zionist Organization of America (ZOA) charged that the school fostered a hostile environment for Jewish students in violation of Title VI. With extraordinary specificity, ZOA detailed the situation Jewish students faced. As ZOA demonstrated, campus speakers were delivering lectures that some Jewish students considered to be anti-Israeli, anti-Jewish, or both. OCR would later observe that many of these speakers were known for using “strong rhetoric” when criticizing the State of Israel and, in some cases, denying Israel’s right to exist. In fact, this “strong rhetoric” included virtually the entire arsenal of traditional anti-Semitic propaganda: Holocaust inversion, racial hatred, ethnic stereotypes, conspiracy theories, physical intimidation, and even the medieval blood libel.

As the case proceeded before OCR, ZOA argued that one frequent Irvine speaker, Amir Abdel Malik Ali of the Masjid Al-Islam mosque in Oakland, California, used Irvine’s podiums to advance many of the most potent anti-Semitic stereotypes. In February 2005, Malik Ali argued, “This ideology of Zionism is so racist, so arrogant, based so much on ignorance.” Invited to return the following year, he called Jews “the new Nazis ... they’re saying ... when you see an Israeli flag next to an American flag, they’re saying we’re with imperialism. We are down with colonialism. We are down with white supremacy.” He warned Jewish students, “You settle on stolen land, you got to deal with the consequences.” More bluntly, he threatened that “now it’s time for you to live in some fear ... because you were so good at dispensing fear. You were so good at making people think that y’all was all that and the Islamic tide started coming up.” He railed against “liars. Straight up liars, Rupert Murdoch, Zionist Jews.” He used the conspiracy stereotype to anticipate and defuse the inevitable anti-Semitism charge: “They say it’s anti-Semitic if you say Jews control the media.” He argued that “anti-Semitism” charges reflect Jewish arrogance and racism: “They have taken the concept of the chosen people and fused it with the concept of white supremacy.” He explained, “Once you take the concept of chosen people with white supremacy and fuse them together, you will get a people who are so arrogant that they will actually make a statement and imply that [they] are the only Semites. That’s arrogance and it’s the same arrogance they display every day and that’s the same type of arrogance that’s getting them into trouble today.” Malik Ali culminated his remarks by invoking the classic blood libel, which Christians used from the Middle Ages onward to justify the indiscriminate killing of Jews: “You all definitely don’t love children and you know why? Because you kill them.”

Irvine’s administration was, ZOA argued, “silent and passive” in the face of these and other incidents. This, for example, was ZOA’s view of the administration’s response to a Jewish student who expressed her fears to several Irvine administrators, including its chancellor at the time. The student wrote: “Not only do I feel scared to walk around proudly as a Jewish person on the Irvine campus, I am terrified for anyone to find out.

Today I felt threatened that if students knew that I am Jewish and that I support a Jewish state, I would be attacked physically.” ZOA claimed that the school’s then-chancellor, Ralph J. Cicerone, never responded to the student’s letter. The student-services administrator who did respond, Thomas Parham, allegedly recommended that the student seek professional counseling. Irvine’s administration vigorously defended not only the

right but also the value of anti-Semitic hate speech. Vice Chancellor Miguel Gomez, for example, allegedly insisted that “one person’s hate speech is another person’s education.”

Yet after investigating the Irvine case for more than three years, OCR dismissed the ZOA complaint on November 30, 2007, on grounds of timeliness, the adequacy of Irvine’s response, and failure to provide sufficient factual information to proceed. In reply, Irvine officials proclaimed that their institution had been fully exonerated. Irvine’s much-heralded law-school dean, Erwin Chemerinsky, insisted that the “Office for Civil Rights of the United States Department of Education did a thorough investigation and concluded that there was no basis for finding that there was a hostile or intimidating environment for Jewish students on campus at the University of California, Irvine.”

It should have been clear to Chemerinsky that he was, at the least, overstating his case. In fact, OCR had dismissed several of ZOA’s claims on merely technical grounds, some claims have still not been resolved, and those that OCR did resolve are still under appeal. But the most important thing that Chemerinsky and his colleagues did not say (and what the public did not know until now) was that career OCR officials in California had reached the opposite conclusion *but were overruled by political appointees in Washington*.

What follows is the hidden history of OCR’s Irvine investigation, which has come to light largely through the testimony of OCR officials, not in the Irvine case, but in an employment discrimination case that OCR’s California regional director, Arthur Zeidman, subsequently brought against the agency.

According to OCR’s western regional leadership, the office’s top Washington appointees at the time—Deputy Assistant Secretary David Black and Assistant Secretary Stephanie Monroe—were disinclined to protect Jewish students from anti-Semitism but were also reluctant to make their position clear. Paul Grossman, OCR’s regional counsel, complained after the fact in a deposition taken in the Zeidman case that “it was pathetic to try to reach a legally sound conclusion to the Irvine investigation without headquarters guidance on the scope of our national origin jurisdiction but that, originally, is what our office was told to do.”

So the western regional leaders muddled through under Arthur Zeidman’s command, trying to read what tea leaves Washington might provide on the case. In December 2005, just a year and change after the original case was filed, Zeidman sent his final report to Washington. OCR’s San Francisco office had determined that “the totality of the circumstances at UC-Irvine constituted a hostile environment based on national origin.”

This report by the regional staff concluded that ZOA was right that Irvine students faced levels of discrimination that were so severe, pervasive, or objectively offensive as to limit their educational opportunities. Indeed, OCR career officials actually had drafted, revised, and prepared in final form a letter to Irvine informing campus leadership of their findings. Zeidman, however, was not yet prepared to find Irvine in full violation of Title

VI. Reviewing the actions that Irvine had taken to address the campus climate, he determined that it had made sufficient amends: “UC-Irvine took adequate steps to address the hostile environment, and was therefore in compliance with Title VI.” In other words, Zeidman split the difference: the Irvine campus would be revealed as a hotbed of anti-Semitism, but its senior administrators would be acquitted based on the actions they had taken.

David Black’s position on the Irvine case was quite simple: “The allegations in the UC-Irvine case were religious discrimination” and were therefore outside the scope of his office’s responsibilities because “OCR doesn’t have jurisdiction over religion.” He would have preferred to send the case to the Justice Department, if Justice would take it. Stephanie Monroe, who outranked Black, indicated that she wanted OCR to handle the matter itself rather than ship it off to another agency. Juggling this political hot potato, Black told Zeidman that the investigation was incomplete and sent him back to reinvestigate. Black wanted more careful scrutiny of certain technical issues—and also insisted, oddly, that Zeidman’s staff “investigate whether Jewish students were Americans or of Israeli origin.”

OCR headquarters did not act on Zeidman’s proposed resolution until August 2006, when ZOA’s Susan Tuchman complained to Monroe that OCR had still not interviewed a single Irvine administrator. “This is deeply disturbing,” Tuchman admonished, “and raises questions about how vigorously OCR is investigating the ZOA’s complaint.” In the course of a subsequent employment investigation, Sandra Battle, who was Zeidman’s supervisor, claimed that she and other senior OCR officials were very upset to read in Tuchman’s letter about how cursory Zeidman’s investigation had been. In fact, it appears that their real problem was not so much with the brevity of Zeidman’s investigation as it was with the nature of his conclusions. Black “was very blunt with me,” Zeidman recalls, “and ever so critical.” In Zeidman’s view, the hostile environment at Irvine had been fully established without need for further investigation because the facts spoke so clearly for themselves. Perhaps, he speculated, Black was simply delaying the process because he could think of no better way to avoid resolving the case in ZOA’s favor, given just how badly things had gotten at Irvine. When Zeidman defended his staff’s handling of the Irvine case, Black decided to rate Zeidman’s performance for the year as “minimally successful”—the first such negative rating Zeidman had received in his long career.

Despite their concerns, headquarters staff prepared a letter for Monroe’s signature, assuring Tuchman that its complaint “is being investigated in a rigorous and complete manner.” The letter did not acknowledge that the case had been dormant between December 2005 and July 2006. Nor did Monroe inform Tuchman that Black had been expressing precisely the opposite view in his disparagement of Zeidman. Most important, Monroe gave Tuchman no indication that her career staff had determined that Tuchman was right—and that, despite this, Monroe and her political appointees were in the process of overruling them. For his part, Zeidman argues that Washington officials were attempting “to coerce me to find a way to close the Irvine case on a misinterpretation of the law or on an unjustified technicality.”

In June 2007, under congressional pressure, Black sent four respected OCR lawyers to wrest control of the case from Zeidman. The most senior of the four, Randy Wills, does not recall Black's expressing dissatisfaction with the thoroughness of San Francisco's investigation. Black emphasized to Wills, however, that he was not pleased with the San Francisco office's conclusions. Specifically, Wills recalls, Black "was not pleased with the determination that some of these incidents, anti-Semitic incidents, allegedly perpetrated against Jewish students who were born in America constituted national origin discrimination, such that they would be subject to our jurisdiction." Clearly, then, this new legal team understood it was being tasked with reaching different conclusions, one way or another, despite the original investigators' findings.

Paul Grossman, who works as chief counsel in the San Francisco office of OCR, has argued that the Washington home base's difficulty with the Irvine case arose from an unresolvable conflict: officials had determined that they should not intervene to protect the Jewish students, for complex reasons, but that they did not want this position known, for obvious reasons.

Zeidman came to the conclusion that OCR's political leadership intended to establish, in his words, "some notion that Jewish Americans were not protected under Title [VI], but Jews of Israeli origin were." According to this interpretation, the law protected Jews from Israel who were subjected to the abuse that had become routine at UC-Irvine, but it did not protect American Jews.

In the end, OCR's final closure letter, which was signed by Charlie Love, Zeidman's top deputy, and seconded by the regional director acting under instructions from Washington, featured a finding that was 180 degrees from the conclusions the two men and others at OCR had actually reached. Love announced that "although offensive to the Jewish students, the . . . events at issue were not based on the national origin of the Jewish students, but rather based on opposition to the policies of Israel." For this reason, Love concluded, "these incidents, therefore, were not within OCR's subject matter jurisdiction."

Beyond ignoring its own publicly stated policies and Supreme Court precedent—and aside from the questionable practices surrounding the entire investigation—OCR's Irvine approach misunderstands Jewish identity. OCR's current assumption that Jews are only adherents of a faith tradition fails to appreciate that Jews share not only religion but also bonds of ancestry and ethnicity.

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." Most commentators have long agreed 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. However, the decision to use provisions of the law that were designed to combat racism to also defend citizens against anti-Semitism is both legal and necessary because both varieties of hate are founded on irrational or inaccurate group identifications. The modern understanding of anti-discrimination

provisions, following the Supreme Court's 1987 *Shaare Tefila* decision, asks only whether Jews share ethnic or ancestral ties, not whether they are biologically or nationally distinct.

The Irvine case continues to shape discussions and perceptions of campus anti-Semitism. The events there have had an enormous impact on many of the students. Surprisingly, the person who has most vehemently decried anti-Semitism in that case is the man who was charged with investigating it: Arthur Zeidman. Zeidman believes, moreover, that a defining feature of that case was deeply entrenched anti-Semitism, not only at Irvine, but also at OCR. In a formal complaint, Zeidman has charged—and both Love and Grossman have agreed—that the agency responsible for protecting students from bigotry is guilty of the very evil it was established to combat.

An administrative-law judge recently dismissed Zeidman's complaint against OCR. Nonetheless, it is remarkable that the senior OCR officials who worked most closely on the Irvine case could devise no better explanation for OCR's handling of this case than anti-Semitism within the highest levels of the civil-rights agency (an accusation that Black and others understandably deny). Paul Grossman, for example, testified in the subsequent employment litigation that "the most likely reason" for Zeidman's troubles with his Washington superiors "is that Mr. Zeidman is Jewish." Charlie Love testified that anyone who denies that Zeidman's Jewish identity was a factor in the manner in which headquarters treated him "was lying." Whether they are right or not, the suspicions of OCR's western regional leadership speak volumes about the mishandling of the Irvine case.

The Obama administration's OCR chief, Assistant Secretary Russlynn Ali, has described her position on Title VI and anti-Semitism in terms that echo the unsatisfying view expressed in the letter sent by Stephanie Monroe to ZOA. "It has long been OCR's policy," she wrote in a letter to a member of Congress last year, "that Title VI does not cover discrimination based solely on religion, including anti-Semitic harassment, intimidation, and discrimination." In this way, Ali lumps "anti-Semitic harassment" in with other forms of nonactionable religious discrimination. Her only public concession thus far has been that "when cases include allegations of race, color, or national origin discrimination in addition to religious discrimination, OCR would have jurisdiction over the portion of the complaint alleging discrimination on the basis of race, color, or national origin." In other words, anti-Semitism is not enough. OCR will support Jewish students, under Ali's apparent interpretation, only if they are also victimized by other forms of discrimination, as might happen for instance to Israeli Jews, black Jews, or Hispanic Jews.

The government's failure to address the outrages at Irvine has created a significant anomaly in the law, one in which Jews are treated differently from virtually any other group. African-Americans, Arabs, Hispanics, women, older students, and even Boy Scouts who charge their schools with discrimination can have their cases investigated by the federal government.

Coincidentally, Obama's secretary of education, Arne Duncan, recently announced in a major address that his department would significantly step up enforcement of civil-rights laws. Meanwhile, the Irvine case remains under appeal at the Office for Civil Rights, which is directly in his purview. The outcome of this case will determine the credibility of Duncan's pledge.