



**JOURNAL** for the  
**STUDY** of  
**ANTISEMITISM**

Volume 2 Issue #2 2010

## The New OCR Antisemitism Policy<sup>1</sup>

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Since 2004, many of us have pushed the U.S. Department of Education's Office for Civil Rights (OCR) to issue a new policy statement interpreting Title VI of the Civil Rights Act of 1964 (Title VI) to cover discrimination against Jewish students.<sup>3</sup> Now that OCR has done so—in a remarkable victory in the battle to combat antisemitism in American higher education—the question remains whether the new policy will be properly enforced.<sup>4</sup> This paper will argue that OCR's new policy is potentially even more significant than is commonly observed, but that its effectiveness will turn on three unresolved questions: Does the federal government grasp the civil rights ramifications of the New Antisemitism? Can OCR fully enforce its new policy consistent with the limitations imposed by the First Amendment? Will Congress act to provide stability to this policy and to close the remaining loophole? Only time will tell whether these three questions can be answered in the affirmative, but the rights of Jewish college students depend on it.

### I. BACKGROUND

Title VI is the important U.S. federal civil rights statute that prohibits

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1. This paper has been revised to reflect developments since an earlier version was delivered at the 2010 conference of the *Journal for the Study of Antisemitism*. In the interim, some of this material was published in an opinion piece distributed by the Jewish Telegraphic Agency (JTA): Kenneth L. Marcus, "U.S. Must Enforce Policy on Campus Harassment." *New Jersey Jewish News* (December 13, 2010), [http://www.jewishresearch.org/v2/campus\\_harassment.htm](http://www.jewishresearch.org/v2/campus_harassment.htm). Avital Eliason provided valuable research assistance, and Aryeh Weinberg provided useful comments.

2. Director, The Antisemitism Initiative at the Institute for Jewish and Community Research and Lillie and Nathan Ackerman Visiting Professor of Equality and Justice in America at the School of Public Affairs, Bernard M. Baruch College, City University of New York.

3. See Letter of Thirteen Jewish Organizations to Arne Duncan, U.S. Secretary of Education, dated March 16, 2010, [http://www.adl.org/Civil\\_Rights/letter\\_associationjlj\\_2010.asp](http://www.adl.org/Civil_Rights/letter_associationjlj_2010.asp); and Peter Schmidt, "Education Department Takes Stand on Antisemitism That Could Draw It into Free-Speech Fights," *The Chronicle of Higher Education*, October 28, 2010.

4. JTA, "New Guidelines Add Protections for Jewish Students," October 28, 2010, <http://jta.org/news/article/2010/10/26/2741452/new-guidelines-will-protect-jewish-students>.

discrimination in federally assisted programs and activities, including nearly all public and private colleges and universities, on the basis of race, color, or national origin.<sup>5</sup> Since Title VI does not mention religion, it has long been debated whether Jews are encompassed within its protections.<sup>6</sup> This debate matters, in part, because OCR—the primary enforcement agency in cases involving education and civil rights—does not have jurisdiction to investigate campus antisemitism cases unless the answer to this question is yes. Given the resurgence of campus antisemitism over the last decade, OCR’s jurisdiction in such cases is an important matter of civil rights law and policy.<sup>7</sup>

Until 2004, OCR typically refused to investigate antisemitism complaints on the grounds that Jews are a religion, not a race or national origin. In 2004, late in my tenure as head of OCR, I issued a series of policy statements announcing that OCR would henceforth investigate antisemitism complaints to the extent that they implicate ethnic or ancestral bias (the “2004 Policy,” or the “Marcus Policy”).<sup>8</sup> Over the following six years, my successors generally did not adhere to these policy statements, despite admonitions from the U.S. Commission on Civil Rights that they do so.<sup>9</sup> During this period, the Antisemitism Initiative at the Institute for Jewish and Community Research (IJCR) joined with a dozen other organizations, as well as dozens of members of Congress, in pushing OCR to return to the 2004 Policy.

On October 26, 2010, the Obama Justice Department released an opinion letter confirming the legal correctness of the 2004 Policy. This letter, written by Assistant Attorney General Thomas Perez to Assistant Secretary of Education for Civil Rights Russlynn Ali, quotes the key section of the 2004 Policy and concludes simply, “We agree with that analysis.”<sup>10</sup> The

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5. 42 U.S.C. § 2000(d) (2000).

6. This is the central question explored in Kenneth L. Marcus, *Jewish Identity and Civil Rights in America* (Cambridge University Press, 2010).

7. This resurgence is documented in U.S. Commission on Civil Rights, *Campus Antisemitism* (2006); and Gary A. Tobin, Aryeh Weinberg, and Jenna Ferer, *The Uncivil University* (New York: Institute for Jewish and Community Research, 2005).

8. See, e.g., Kenneth L. Marcus, deputy assistant secretary of education for enforcement, delegated the authority of assistant secretary of education for civil rights, U.S. Department of Education, Dear Colleague letter, “Title VI and Title IX Religious Discrimination in Schools and Colleges” (September 13, 2004); and Kenneth L. Marcus, delegated the authority of assistant secretary of education for civil rights, U.S. Department of Education, to Sidney Groeneman, PhD, senior research associate, Institute for Jewish and Community Research.

9. Marcus, *Jewish Identity and Civil Rights in America*, 44-48.

10. Thomas E. Perez, assistant attorney general for civil rights, letter to Russ-

relevant portion of the 2004 Policy, which now carries the imprimatur of the Obama Justice Department, reads as follows:

Groups that face discrimination on the basis of shared ethnic characteristics may not be denied the protection of our civil rights laws on the ground that they also share a common faith. Similarly, the existence of facts indicative of religious discrimination does not divest OCR of jurisdiction to investigate and remedy allegations of race or ethnic discrimination. OCR will exercise its jurisdiction to enforce the Title VI prohibition against national origin discrimination, regardless of whether the groups targeted for discrimination also exhibit religious characteristics. Thus, for example, OCR aggressively investigates alleged race or ethnic harassment against Arab Muslim, Sikh, and Jewish students.<sup>11</sup>

Simultaneously, Assistant Secretary Ali accepted IJCR's recommendation and affirmed the Marcus Policy in a guidance letter directed to recipients of federal education funding (the "Ali Policy").<sup>12</sup> Because this policy statement was buried deeply within a longer policy on bullying in public schools, and because it was phrased as a policy "clarification," some readers did not immediately grasp that OCR had effected a sea change in the government's policy approach to campus antisemitism.

Like the Perez letter, the Ali Policy adopts the Marcus Policy, but Assistant Secretary Ali also provides some important embellishments:

While Title VI does not cover discrimination based solely on religion, groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (e.g., Muslims or Sikhs).<sup>13</sup>

While the main import of the Ali Policy is to affirm the Marcus Policy's statement against antisemitism, it is also an important tool for addressing campus antisemitism for four additional reasons.

First, the Ali Policy establishes that unlawful antisemitic harassment on federally funded campuses "does not have to include intent to harm."<sup>14</sup>

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lynn H. Ali, assistant secretary of education for civil rights, dated September 8, 2010, [http://www.justice.gov/crt/cor/title\\_vi\\_letter\\_to\\_ed\\_2010-09-08.pdf](http://www.justice.gov/crt/cor/title_vi_letter_to_ed_2010-09-08.pdf).

11. Marcus, "Title VI and Title IX Religious Discrimination."

12. Russlynn Ali, Dear Colleague letter dated October 26, 2010, [http://www.jewishresearch.org/v2/Letter\\_OCR.htm](http://www.jewishresearch.org/v2/Letter_OCR.htm).

13. Ibid.

14. Ibid.

This is significant because perpetrators often deny that they are antisemitic and insist that they did not mean to harm any individual Jews. These denials have been given more credence than they deserve, because so many contemporary incidents of the New Antisemitism may appear at first blush to target Israel or Zionists rather than Jewish students per se. The denials are typically implausible, though, in several respects: because the New Antisemitism shares extensive common tropes with its precursors, because research demonstrates a close relationship between anti-Israel and antisemitic views, and because antisemitism and racism are commonly repressed or denied in the postwar West as an unconscious response to guilt associated with these phenomena.<sup>15</sup> Under the Ali Policy, such defenses will be given no credence.

Second, actionable conduct need not be “directed at a specific target”;<sup>16</sup> in other words, the offensive conduct need not be limited to attacks on a particular student. Often, antisemitism is expressed in public lectures and in literature distributed on campus. The question then arises of whether such incidents can violate federal anti-discrimination law if no particular Jewish student is singled out for abuse. This is important, because hostile environments are often formed through conduct that pervades an entire institution, but it may be difficult to prove the actions were taken against particular students, or individual students may be reluctant to come forward in an environment in which they may fear reprisal. Under OCR’s approach, the fact that individual students are not specifically targeted is insufficient to rebut a claim of antisemitic hostile environment discrimination.

Third, there need not be “repeated incidents” to form a hostile environment; in other words, if the misconduct is bad enough, one incident can be actionable.<sup>17</sup> Clearly, OCR will be more likely to find a violation if multiple incidents are documented, but one severe incident is sufficient according to OCR’s latest pronouncement. In this respect, OCR is staking out an aggressive position, one that will be particularly significant in cases of extreme but episodic hate.

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15. Marcus, *Jewish Identity and Civil Rights in America*, 167 and sources cited therein.

16. Ali, Dear Colleague letter.

17. This doctrine, which OCR has repeatedly announced, appears to conflict with the opposite principle, which the U.S. Supreme Court announced in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 652-53 (1999): “Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behaviors sufficient to rise to this level . . .” For one possible resolution of the conflict between the Supreme Court’s interpretation and OCR’s, see Marcus, “Anti-Zionism as Racism,” 886 n. 292.

Finally, it is not enough to punish the perpetrator. When a hostile environment is formed at a federally funded institution, the Ali Policy establishes that it is insufficient for the institution to punish the student or organization that is responsible; the institution itself must “take prompt and effective steps reasonably calculated to end the harassment and prevent its recurrence.”<sup>18</sup> Beyond punishing the perpetrators, this can include “publicly labeling the incidents as antisemitic” and strengthening anti-harassment policies, procedures, education, training, and outreach for the entire institutional community.

In sum, the Ali Policy not only returns OCR to its 2004 stance against antisemitism but also clarifies several points that will be important for those who advocate against campus antisemitism. It is a strong, aggressive policy, one that should be a boon for efforts to confront anti-Jewish animus on federally funded campuses in a manner that is equivalent to the way in which other forms of bias are addressed.

## II. THE NEW ANTISEMITISM

Good policies are one thing, but effective enforcement is another. Whether this policy succeeds in practice will depend on three factors. First, OCR must address antisemitic incidents that masquerade as anti-Israelism. On college campuses—and especially in protests brought by the anti-Israel boycotts, divestment, and sanctions movement—it is now widely understood that attacking “Jews” by name is impolitic, but that one can smear Zionists with impunity.<sup>19</sup> In its preliminary resolution of the landmark University of California at Irvine case, OCR appeared unable to recognize the extent to which “[a]nti-Semitic bigotry”—in the words of the U.S. Commission on Civil Rights—could be “camouflaged as anti-Israelism or anti-Zionism.”<sup>20</sup>

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18. Ali, Dear Colleague letter.

19. The Obama administration has properly characterized efforts to boycott Israeli academics as being antisemitic in character. See Hannah Rosenthal, U.S. special envoy for monitoring and combatting global antisemitism, “Remarks Before 2010 Conference on Combatting Antisemitism” (November 8, 2010), <http://www.state.gov/g/drl/rls/rm/2010/150920.htm> (“[W]hen academics from Israel are boycotted—this is not objecting to a policy—this is antisemitism.”).

20. U.S. Commission on Civil Rights, “FINDINGS AND RECOMMENDATIONS OF THE U.S. COMMISSION ON CIVIL RIGHTS ON CAMPUS ANTISEMITISM,” 1 (April 3, 2006), <http://www.usccr.gov/pubs/050306FRUSCCRRCAS.pdf>. For OCR’s Regional IX letter opinion, now pending on appeal at OCR headquarters, see Charles R. Love, program manager, Office for Civil Rights, Region IX, U.S. Department of Education, to Dr. Michael V. Drake, chancellor, University of Cali-

Natan Sharansky famously supplied a “3-D” test to address dissolve this ruse<sup>21</sup>: If anti-Israel protesters Demonize Israel, use Double standards, or try to Delegitimize the Jewish state, something other than mere political argumentation is generally involved. While Sharansky’s 3D test is helpful in part for its mnemonic cleverness, I have argued in *Jewish Identity and Civil Rights in America* that it lacks sufficient rigor to be used without modification for scholarly or governmental purposes. Fortunately, other models also exist.<sup>22</sup>

Numerous other scholars, officials, agencies, and commentators have, however, with varying degrees of rigor, supplied criteria for distinguishing between antisemitism and non-antisemitic forms of anti-Israelism.<sup>23</sup> While these criteria can be formulated in various ways, they typically emphasize that anti-Israeli actions may be presumptively characterized as antisemitic if they entail the use of classic antisemitic stereotypes for describing Israel, the application of double standards for evaluating Israeli actions, or the imposition of collective responsibility for non-Israeli Jews.<sup>24</sup>

The U.S. State Department and the European Union’s Agency for Fundamental Rights (formerly the European Monitoring Centre on Racism and Xenophobia) have developed the most important criteria for distinguishing between the permissible and the impermissible. The State Department-endorsed EUMC Working Definition provides the following authoritative presentation of “[e]xamples of the ways in which antisemitism manifests itself with regard to the State of Israel taking into account the overall context:”

- Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.
- Applying double standards by requiring of Israel a behavior not expected or demanded of any other democratic nation.
- Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.

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fornia-Irvine, 7 n. 10 (November 30, 2007). OCR’s resolution of this case is analyzed in Marcus, *Jewish Identity and Civil Rights in America*, 81-97.

21. Natan Sharansky, “Antisemitism in 3D.” *Jerusalem Post*, February 23, 2004, [www.ncsj.org/AugPages/022304JPost\\_Shar.stml](http://www.ncsj.org/AugPages/022304JPost_Shar.stml).

22. See Marcus, *Jewish Identity and Civil Rights in America*, 61.

23. These efforts are analyzed in Kenneth L. Marcus, “Anti-Zionism as Racism: Campus Antisemitism and the Civil Rights Act of 1964,” *William and Mary Bill of Rights Journal*, 15 (February 2007): 837, 846-848.

24. Marcus, *Jewish Identity and Civil Rights in America*, 62.

- Drawing comparisons of contemporary Israeli policy to that of the Nazis.
- Holding Jews collectively responsible for actions of the state of Israel.

Consistent with standard conventions, the EUMC also stated the obvious point that “criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic.”<sup>25</sup>

So far, OCR has ignored the issue altogether, and its past history provides little comfort that it will get it right. On November 9, 2010, representatives of parliaments from over fifty countries gathered in Canada under the aegis of the Interparliamentary Coalition to Combat Antisemitism and issued an important statement that addresses this very point. The Ottawa Protocol on Combatting Antisemitism declares forthrightly that “Universities should use the EUMC Working Definition of Antisemitism as a basis for education, training and orientation.”<sup>26</sup> OCR should follow the U.S. State Department’s lead and incorporate the *EUMC Working Definition* into its policies as recommended by the Ottawa Protocol.

### III. FREEDOM OF SPEECH

Second, OCR needs to demonstrate that it can protect Jewish students from hate and bias while guarding the First Amendment and academic freedom. On many campuses, anti-Israel activists suppress pro-Israel advocacy by heckling Jewish-sponsored speakers, vandalizing Jewish posters and fliers, and intimidating students who wear clothing or jewelry that connects them with the Jewish state.<sup>27</sup> University leaders must condemn these attacks on free speech and academic freedom.<sup>28</sup>

At the same time, OCR must explain that nothing in its new policy

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25. European Monitoring Centre on Racism and Xenophobia, Working Definition of Antisemitism (March 16, 2006), <http://www.fra.europa.eu/fraWebsite/material/pub/AS/AS-WorkingDefinition-draft.pdf>.

26. Interparliamentary Coalition to Combat Antisemitism, Ottawa Protocol on Combatting Antisemitism, November 9, 2010, <http://www.antisem.org/archive/ottawa-protocol-on-combating-antisemitism/>.

27. Jewish students’ perspectives on such activities are presented in Kenneth L. Marcus, “Whitewashing Antisemitism at the University of California-Irvine.” *Journal for the Study of Antisemitism*, 2:13-48 (2010), [http://www.jsantisemitism.org/pdf/jsa\\_2-1.pdf](http://www.jsantisemitism.org/pdf/jsa_2-1.pdf).

28. The U.S. Commission on Civil Rights has instructed that “university leadership should set a moral example by denouncing antisemitic and other hate speech, while safeguarding all rights protected under the First Amendment and under basic principles of academic freedom.” U.S. Commission on Civil Rights, *Findings and*

requires any encroachment on constitutionally protected expression by either advocates or critics of Israel.<sup>29</sup> In many cases, campus antisemitism includes non-speech elements such as assault and vandalism.<sup>30</sup> In other cases, antisemitic incidents include forms of speech that are excepted from protection under the First Amendment, such as threats of imminent illegal actions or perhaps incidents of “fighting words.”<sup>31</sup> In these circumstances, universities may regulate antisemitic incidents without First Amendment issues arising.<sup>32</sup> Similarly, universities may reasonably regulate the time, place, or manner of on-campus expression, and they may reasonably relate speech in non-forum locations. When expressive conduct is used to create a hostile environment for Jewish students in traditional or designated campus forums, the extent to which university officials may (or must) regulate the expression itself is a difficult but important question beyond the scope of this short paper.<sup>33</sup> What *is* clear, however, is that universities must take some action in these circumstances. Even where public university administrators are constitutionally precluded from punishing offensive antisemitic speech, the correct response is never to do nothing. The best university

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*Recommendations of the U.S. Commission on Civil Rights on Campus Antisemitism*, 2.

29. OCR has issued general guidance indicating that its policies should be understood as conforming to the restrictions of the First Amendment’s Speech Clause. See Gerald A. Reynolds, assistant secretary of education for civil rights, Dear Colleague letter dated July 28, 2003, <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

30. The field of campus antisemitism generates a remarkable number of easy cases for the First Amendment, because speech issues are so frequently claimed frivolously. Stanley Fish explores this phenomenon in “The Free-Speech Follies.” *Chronicle of Higher Education*, June 13, 2003, available at <http://chronicle.com/jobs/news/2003/06/2003061301c/>.

31. *Brandenberg v. Ohio*, 395 U.S. 444, 448-49 (1969) (imminent incitement); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words).

32. For an excellent discussion of options available to administrators in higher education who want to address potentially hostile campus environments in a manner that does [not] violate constitutional provisions, see William A. Kaplin and Barbara A. Lee, *The Law of Higher Education* § 9.6.3. (4th ed., 2007).

33. Several scholars, including Kenneth Lasson and Alexander Tsesis, have recently explored this issue in conference papers domestically, and it is addressed in greater detail in Marcus, *Jewish Identity and Civil Rights in America*, 76-80. Internationally, comparable issues have been addressed, e.g., by Lesley Klaff, “Anti-Zionist Expression on the UK Campus: Free Speech or Hate Speech?” *Jewish Political Studies Review*, 22, [http://www.jsantisemitism.org/pdf/JPSR\(22\)3-4-Klaff.pdf](http://www.jsantisemitism.org/pdf/JPSR(22)3-4-Klaff.pdf) (Fall 2010); and Stefan Braun, “Second-Class Citizens: Jews, Freedom of Speech, and Intolerance on Canadian University Campuses.” *Washington and Lee Journal of Civil Rights and Social Justice*, 12:1 (SPRING 2006).

response is often to condemn the hate or bigotry, rather than to censor or punish the speaker. Universities that fail to do so deserve to get a call from the federal agency that funds them.

#### IV. LEGISLATION

Third, the current OCR policy is still informal policy guidance, and it may not endure. Worse, since it does not cover religious discrimination, it contains a loophole wide enough that some perpetrators may evade enforcement. Ultimately, Congress must act to protect all religious minorities—not just Jews, but also Sikhs, Muslims, and others—from discrimination at federally funded secular institutions of higher learning. Then-Senator Arlen Specter and Rep. Brad Sherman introduced legislation in the last Congress to prohibit religious discrimination in federally assisted educational programs and activities, subject to an exception for faith-based institutions.<sup>34</sup> This proposed legislation is based on a series of academic articles that have advocated precisely this approach.<sup>35</sup> There are numerous reasons why Congress should pass a religious freedom in education act. The following are a few of the most salient.

Religious nondiscrimination provisions are necessary to protect students from the peculiar harms visited by religious bigotry. As with the other forms of discrimination, religious discrimination demeans historically disadvantaged minority groups. Beyond the immediate sting of discriminatory actions, hate and bias incidents may have long-term psychological impacts on both victim and perpetrator. For example, the American Psychological Association's Resolution on Antisemitic and Anti-Jewish Prejudice has every recognized that antisemitic bigotry "creates a climate of fear, anxiety and insecurity, both for the individual and the community" and exposes victims "to suffering the feelings of vulnerability, anger, depression and other *sequelae* of victimization."<sup>36</sup> Some research indicates that these

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34. See Morton A. Klein and Susan Tuchman, "Legislation to Protect Students from Antisemitic Harassment." *Jewish Exponent* (October 7, 2010).

35. See Kenneth L. Marcus, "Privileging and Protecting Schoolhouse Religion," *Journal of Law and Education*, 37:505 (October 2008); and Kenneth L. Marcus, "The Most Important Right We Think We Have but Don't: Freedom from Religious Discrimination in Education." *Nevada Law Journal*, 7:171 (Fall 2006). This section draws in part on these two articles.

36. APA Council of Representatives (APA), "Resolution on Antisemitic and Anti-Jewish Prejudice" (August 2005, amended August 2007), citing C. S. Crandall and A. Eshleman, "A Justification-Suppression Model of the Expression and Experience of Prejudice." *Psychological Bulletin*, 414-446 (2003); and Paul Valent,

problems are particularly acute in the case of school-age victims.<sup>37</sup> Adolescence in particular is a period of heightened conflict and change, when perceptions of inequitable treatment can exact a particularly severe psychological impact.<sup>38</sup> It is interesting that these harms are not limited to the victim. The APA also acknowledges that religious hate and bias “also harm the perpetrators by desensitizing them to violence, and raise concerns about their generalizing such acts to other groups.”<sup>39</sup> To this extent, religious discrimination should be combatted as vigorously as other forms of bigotry.

More broadly, legislation is needed to effectuate the principal intent underlying Title VI, *i.e.*, to ensure that federal moneys are not being used to fund activities prohibited under the Constitution. In other words, Congress must prohibit religious discrimination in the public schools if religious students are to enjoy the equal educational opportunity guaranteed by the Equal Protection Clause of the Fourteenth Amendment and the full range of religious freedoms protected under the Free Exercise Clause of the First Amendment.<sup>40</sup> The significance of constitutional protection is easy enough to grasp. To paraphrase Martin Luther King, Jr., constitutional rights constitute a promissory note that can only be redeemed only by legislative codification, regulatory implementation, and administrative enforcement.<sup>41</sup> Providing equal educational opportunities to vulnerable minorities has historically required the federally legislated tripartite structure of private-party litigation, judicial enforcement, and agency administrative enforcement.<sup>42</sup>

The first two arguments establish the need to protect religious minorities, which is manifestly the purpose of religious freedom legislation. The absence of religious-freedom legislation has adverse effects that extend beyond religious minorities. To begin with, religious discrimination should

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*Child Survivors of the Holocaust* (Routledge, 2002), <http://www.apa.org/about/governance/council/policy/antisemitic.pdf>.

37. Judge Richard Posner has provided a widely read discussion of the vulnerability of school-age student to harassment in *Nuxoll v. Indian Prairie School District #204*, 2008 U.S. App. LEXIS 8737, \*7-8 (7th Circuit, 2008) in which he finds research to be suggestive but not conclusive, and sources cited therein.

38. *Ibid.*, 258.

39. APA, “Resolution on Antisemitic and Anti-Jewish Prejudice.” See <http://www.jsantisemitism.org/contact.html>.

40. For a discussion of the relationship between civil rights statutes and their constitutional antecedents, see Marcus, “Anti-Zionism as Racism,” 866-867.

41. *Martin Luther King, Jr., A Testament of Hope: The Essential Writings of Martin Luther King, Jr.*, ed. James M. Washington (New York: HarperOne, 1996), 219.

42. For a discussion of this tripartite structure, emphasizing the importance of the administrative process, see Marcus, “Anti-Zionism as Racism,” 856-58.

be policed because it is so closely interrelated with racial and ethnic discrimination. A religious exception to our anti-discrimination rules allows religious discriminators to escape sanction when acting under the guise of racial bigotry. This point has been demonstrated convincingly in the context of jury selection.<sup>43</sup> The problem is that many people face both racial and religious prejudice. To the extent that racial bias is policed but religious bias is not, discriminators can evade enforcement by feigning that their actions are motivated only by religious animus. Thus, for example, in hybrid or intersectional cases, those who choose to use racially motivated jury strikes have been able to camouflage their bias as a religious discrimination, thus avoiding censure. In the same way, where racial discrimination is banned but religious discrimination is not, intersectional discrimination can evade enforcement. Creating incentives for government actors to engage in or to feign religious bias is a significant negative externality of the legislative decision to exclude religion from the reach of civil rights law.

Race and religion are so closely associated that neither can be entirely eliminated without banning the other as well. The continuities between race and religion have led many social scientists to refer to ethno-religious groups.<sup>44</sup> Discriminatory animus is commonly directed at an undifferentiated amalgam of minority group characteristics, such as ethnicity, religion, and race. Some examples of this phenomenon are the mid-century mistreatment of Japanese Americans; the more recent forms of discrimination against Arab and Muslim Americans and Sikhs<sup>45</sup>; and the racially charged historical American mistreatment of Indians.<sup>46</sup> In other words, religion is frequently a material constituent in the construction of racial otherness.<sup>47</sup>

In some cases, antisemitism and ethnic, racial, and religious discrimination are so closely intertwined as to be indistinguishable.<sup>48</sup> Consider, for example, Supreme Court precedent holding Jews to be a *race* within the meaning of the Civil Rights Act of 1866, and U.S. Department of Education regulatory guidance holding antisemitism to be a form of prohibited racial discrimination under Title VI of the Civil Rights Act of 1964.<sup>49</sup> In both

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43. Daniel M. Hinkle, "Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?" *Buffalo Criminal Law Review*, 9 (139):169-173 (2005).

44. *Ibid.*

45. Margaret Chon and Donna E. Arzt, "Walking While Muslim." *Law and Contemporary Problems*, 68:215, 221-222 (Spring 2005).

46. Kenneth Karst, "Religious Freedom and Equal Citizenship: Reflections on Lukumi," *Tulane Law Review*, 69:335, 340, 343 (December 1994).

47. Margaret Chon and Donna E. Arzt, "Walking While Muslim," 215, 225.

48. Hinkle, 169, 172; Marcus, "Anti-Zionism as Racism," 862, 872-877.

49. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987); See let-

cases, the determinations were necessary in order to conclude that certain forms of antisemitic discrimination are actionable under these respective statutes.<sup>50</sup>

By banning ethnic discrimination without also banning religious discrimination, Title VI anomalously extends greater protections to members of religious groups that share ethnic or ancestral characteristics than to groups that do not. After all, the Ali Policy (like the Marcus Policy before it) announced that OCR would enforce Title VI's race and national origin provisions to protect students who are members of groups exhibiting both religious and racial or ethnic characteristics, such as Jewish and Sikh students.<sup>51</sup> OCR's reason is that, to the extent that these groups are "races" under the "ethnic or ancestral heritage" standard in *St. Francis College v. Al-Khazraji*<sup>52</sup> and *Shaare Tefila Congregation v. Cobb*,<sup>53</sup> they are also covered under Title VI. It would therefore be inequitable and arguably a denial of Equal Protection to deny such groups administrative enforcement on the grounds that they also share religious characteristics.<sup>54</sup> At the same time, the question arises of whether extending protections to those religious groups that are also ethnic or ancestral groups but not extending protections to those that are only religious groups may in turn create the appearance of inequity.

This problem is complicated by the fact that religious discrimination has an undeniable disparate impact on certain ethnic groups. For example, religious discrimination motivated by anti-Jewish animus has a disparate impact on persons of Jewish ethnic or ancestral heritage. OCR has jurisdiction over antisemitic discrimination because such discrimination is based on ethnicity or race, not because it is based partly upon the tenets of the Jewish

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ter from Kenneth L. Marcus, deputy assistant secretary for enforcement, delegated the authority of assistant secretary of education for civil rights, U.S. Department of Education, to colleague, "Title VI and Title IX Religious Discrimination in Schools and Colleges" (September 13, 2004), available at <http://www.ed.gov/print/about/offices/list/ocr/religious-rights2004.html> [hereinafter 2004 OCR Dear Colleague Letter]).

50. Marcus, "Anti-Zionism as Racism," 840, 887-888.

51. See Marcus, "Title VI and Title IX Religious Discrimination in Schools and Colleges"; letter from Kenneth L. Marcus, to Sidney Groeneman, PhD, This position was also subsequently adopted by the U.S. Commission on Civil Rights. See *Campus Anti-Semitism* (2006), available at <http://www.usccr.gov/pubs/081506campusantibrief07.pdf>; and Jennifer Jacobson, "Civil-Rights Panel Urges Federal Monitoring of Campus Antisemitism." *Chronicle of Higher Education*, April 14, 2006, A27.

52. 481 U.S. 604 (1987).

53. *Ibid.*

54. Marcus, Dear Colleague letter; Marcus, *Campus Anti-Semitism*, 862.

faith.<sup>55</sup> That exception may be difficult to square with OCR's disparate-impact regulations. On the other hand, if OCR did not recognize such an exception, apparently it is concerned that it would be charged with *ultra vires* action to the extent that religious discrimination per se is not within its jurisdiction.

Finally, OCR's adherence to its own guidance has been questionable at best over the last few years.<sup>56</sup> Indeed, its failure to enforce the 2004 Policy between 2005 and 2010 suggests that more formal action is required to save the Ali Policy from the same non-enforcement that its predecessor had faced. That would send a strong signal that the U.S. Department of Education must ensure equal opportunity for all students at federally funded institutions.

## V. CONCLUSION

The Ali Policy is an enormous step forward in the battle against campus antisemitism. This is true not only because it explicitly embraces OCR's prior 2004 Policy but also because it clarifies the prior policy in several significant ways that push the enforcement forward. Ultimately, though, this policy will succeed only if it is effectively enforced. This in turn will depend on whether OCR has the courage and vision to fully apply the policy in the range of cases in which it will arise. If OCR can respond correctly to questions about the new antisemitism and the First Amendment, then the Ali Policy has a decent chance of success. In the end, though, OCR can only go so far without further Congressional action. A new Religious Freedom in Education Act will be necessary to close a significant loophole remaining in OCR's antisemitism policy and to ensure that future administrations enforce the policy to the extent required.

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55. Marcus, "Title VI and Title IX Religious Discrimination."

56. See, e.g., Meghan Clyne, "Education Department Backs Away from Antisemitism Safeguards," *N.Y. Sun* (March 29, 2006).