Introduction

During the waning days of 2009, the Jewish world was torn over the case of a 12-year-old English boy whose application for admission to the prestigious North London Jewish School had been declined.[1] Identified in court documents only as "M," the boy was rejected because the school (confusingly known as "JFS") did not recognize the validity of his mother's non-Orthodox conversion. M's parents sued the school, taking his case all the way to the United Kingdom's highest court. Sitting on this case, Lord Kerr observed that the "basic question" on appeal could be stated simply: "Was M treated less favourably on racial grounds?"[2] Yet this simple question turns out to be exceedingly difficult. In the *New York Times*' assessment, "The questions before the judges in Courtroom No. 1 of Britain's Supreme Court were as ancient and as complex as Judaism itself. Who is a Jew? And who gets to decide?"[3] True enough.

But of all the ways in which this "ancient" and "complex" question could be raised, why did M's lawyers frame his complaint in terms of race? To the modern mind, the idea of a "Jewish race" recalls nothing so forcefully as the catastrophic experience of twentieth-century Nazi racial science and its antecedent forms of nineteenth-century pseudoscience. Under English law, however, even state-funded religious schools may give admissions preferences, when oversubscribed, to students who share their faith. What they may not do is discriminate on the basis of

1 *R (on the application of E) v. Governing Body of JFS and the Admissions Appeal Panel of JFS*, UKSC 15 (2009). The school is also known as "JFS," which stands for the "Jewish Free School."

2 *Id.* at 43.

3 Sarah Lyall, *Who Is a Jew? Court Ruling in Britain Raises Question*, NEW YORK TIMES, November 7, 2009; available at www.nytimes.com/2009/11/08/world/europe/08britain.html.

race. Hence M claimed racial discrimination based on his mother's gentile ancestry. But are Jews a "race?" And is discrimination against Jews (or gentiles) "racial?" "The difficulty of the present case," Lord Mance observed, "is that the word 'Jewish' may refer to a people, race, or ethnic group and/or to membership of a religion."[4]

This difficulty must have been felt in a peculiarly personal way by the president of the United Kingdom's Supreme Court, Baron Phillips of Worth Matravers. Lord Phillips had surprised the English legal community the year before when he announced that his own mother was of Sephardic descent. This had led the local Jewish press to inquire, "How Jewish is Lord Chief Justice Phillips?"[5] Before his dramatic announcement, Lord Phillips had no known ties to England's Jewish community. Moreover, as the *Jewish Chronicle* wryly observed, Nicholas Addison Phillips is "not a Yiddische moniker," and Lord Phillips' Royal Navy background does not fit with the ostensible Jewish preference for wandering on dry land.[6] Nevertheless, in light of Phillips' announcement, his bushy eyebrows, and his legal training, the *Chronicle* was moved to judge Phillips "guilty as charged": "88% Jewish!"[7]

As the *Chronicle*'s tongue-in-cheek treatment of this distinguished jurist suggests, the question of Jewish identity is a live one not only in the courts but also throughout the worldwide Jewish community. While this question occasionally has been a source of humor, it also has been quite serious. Some 30 years ago, one Mr. Seide, a toolmaker, complained to England's administrative tribunals that he had been ill treated by a co-worker.[8] When he tried to enlist another co-worker to support him, management transferred him to a less desirable shift. Seide sued his employer under the United Kingdom's Race Relations Act, which bans racial but not religious discrimination. Here again, the question arose as to whether anti-Jewish discrimination could properly be described as "racial."

4 *JFS*, UKSC 15 (2009), slip op., at 26.

5 *How Jewish Is Lord Chief Justice Phillips*? The Jewish Chronicle, July 10, 2008; available at www.thejc.com/lifestyle/how-jewish-is/how-jewish-lord-chief-justice-phillips.

6 *Id.*

7 Phillips might find consolation in the fact that even Rahm Emanuel was adjudged to be only 93% Jewish. *See How Jewish Is Rahm Emanuel? The Jewish Chronicle*, November 13, 2008; available at www.thejc.com/lifestyle/how-jewish-is/how-jewish-rahm-emanuel. Apparently, Emanuel's "Rahm-bo"-like behavior, his pungent linguistic tendencies, and his marriage to a convert precluded a perfect score.

8 *Seide v. Gillette Industries, Ltd.*, IRLR 427 (1980).

In the United States, courts wrestled with this same question in the wake of the 1991 Crown Heights riot. An angry mob, believing that a Hasidic community ambulance had wrongly failed to treat an African-American car accident victim, marched to the Jewish neighborhood to exact vengeance. Yelling "there's a Jew, get the Jew," the mob randomly seized a young Australian Hasid named Yankel Rosenbaum, beat him up, and stabbed him to death.[9] The perpetrators, African-Americans, were convicted under a statute enacted to enforce the Thirteenth Amendment by criminalizing certain injuries inflicted because of a victim's race or religion.[10] In their appeal, the perpetrators argued that Congress lacked power to protect Jewish victims under this antislavery amendment because Jews are not among the "races" that it was intended to protect.

A few years before the Crown Heights riot, neo-Nazis had spray-painted the Shaare Tefila Congregation of Silver Spring, Maryland, with a number of anti-Semitic messages: "Death to the Jude," "In, Take a Shower Jew," "Dead Jew," "Arian [*sic*] Brotherhood," "White Power," and so forth. Congregants sued the vandals under 42 U.S.C.S. §1982, the successor to an 1866 statute that bans certain forms of discrimination on the basis of race.[11] Again, the perpetrators argued that Jews cannot avail themselves of an antiracism provision because Jews are not a race. Here, though, the irony was even more palpable because the perpetrators themselves were the ones who viewed Jews as racially distinct. One defendant testified that the point of the desecration was to give Jews "an insult to your race."[12] But are Jews really a race, and should the courts treat them so, when theories of racial distinctness are so frequently interwoven with perceptions of racial inferiority?

In such cases, Anglo-American courts generally have acknowledged both the complexity of Jewish identity and the variousness of anti-Jewish discrimination. Lord Denning once observed that a "'Jew' may mean a dozen different things."[13] For example, Judaism is a religion. Thus a convert from Christianity is considered to be a Jew. Jewishness is also an ethnic category: A man of Jewish parentage is sometimes described as Jewish, even though he may be a convert to Christianity. To some people, it may even suffice if his grandfather was a Jew and his grandmother was not. Indeed, Denning added, with a somewhat

[9] *United States v. Nelson*, 68 F.3d 583, 585–586 (2d Cir. 1995).
[10] 18 U.S.C. §245(b)(2)(B).
[11] *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987).
[12] *Shaare Tefila v. Cobb*, 785 F. 2d 523, 529 (Wilkinson, J., dissenting).
[13] *Mandla v. Dowell Lee*, 3 ALL E.R., 1108, 1112 (CA) (1982) (Denning, J., opposing).

jarring flourish, Jewishness may be a racial category even in the biological sense: "The Jewish blood may have become very thin by intermarriage with Christians, but still many would call him a 'Jew.'"[14] In all four cases, the courts recognized a racial character inherent in either Jewish identity or anti-Jewish animus. Their reasoning, however, varied widely. No court was as bold, as blunt, or as controversial, for example, as Lord Denning in his anachronistic-sounding reference to "Jewish blood."

The U.K. Supreme Court, in a 5–4 decision against JFS, adopted what has been called a "categorical" approach. That is to say, the court held that Jews *as a category* constitute a distinct race within the meaning of the pertinent civil rights law.[15] "It is … a fundamental tenet of the Jewish religion derived from … Deuteronomy]," Lord Phillips intoned (as if in response to the *Jewish Chronicle*), "that the child of a Jewish mother is automatically and inalienably Jewish."[16] The court thus affirmed an appellate opinion that had announced: "It appears to us clear (a) that Jews constitute a racial group defined principally by ethnic origin and additionally by conversion, and (b) that to discriminate against a person on the ground that he or someone else either is or is not Jewish is therefore to discriminate against him on racial grounds."[17] In other words, anti-Semitic conduct may constitute racial discrimination because Jews are a distinct race. While the English law lords divided over whether JFS had discriminated racially in M's case, they were unanimous in their view that Jews are covered under the Race Relations Act as "a group with common ethnic origins."[18] Indeed, one dissenting law lord insisted that "*[t]here can be no doubt* that Jews, including those who have converted to Judaism, are an ethnic group" and that this proposition had long been "*indisputable*."[19]

The U.S. Supreme Court, in the *Shaare Tefila* case, adopted a variation on this categorical approach. Like the English appeals court, the U.S. Supreme Court held that Jews may be considered to form a distinct

[14] *Lord Denning*, *Mandla v. Dowell Lee*, 3 ALL E.R., 1108, 1112 (CA) (1982).
[15] The "categorical approach" is described in Lisa Tudisco Evren, Note, *When Is a Race Not a Race? Contemporary Issues under the Civil Rights Act of 1866*, 61 NY UNIVERSITY LAW REVIEW (November 1986) 976, 998.
[16] *JFS*, UKSC 15 (2009), slip op., at 2.
[17] *R (E) v Governing Body of JFS*, EWCA Civ. 626 (2009); WLR (D) 209 (2009).
[18] *JFS*, UKSC 15 (2009), slip op., at 67 (Lord Hope, J., dissenting). Lord Rodger went so far as to say that the decision "produces such manifest discrimination against Jewish schools in comparison with other faith schools that one can't help feeling that something has gone wrong."
[19] *Id.*, slip op., at 87 (Brown, J., dissenting) (emphasis added).

"race" within the meaning of at least one civil rights statute. In *Shaare Tefila*, it was the Civil Rights Act of 1866. The *Shaare Tefila* Court did not, however, find that Jews constitute a racial group under either prevailing scientific norms or current popular understandings. Rather, the Court determined only that the 1866 Congress intended to include Jews within its broad prohibition on racial discrimination because Jews were thought to be a race at that time. In other words, the Court held not that Jews *are* a distinct race but that rather that they should be *deemed to be* for the limited purpose of interpreting a particular statute.

The United Kingdom's Employment Appeal Tribunal based the *Seide* case on a different, noncategorical rationale. That is, it did not hold that Jews *are* a "race" (or *should be deemed such*) under scientific standards, popular usage, original intent, or any other analysis. Instead, it used what might be called a "subjective approach," focusing on the character of the discriminatory conduct rather than the category of the victimized group. Under this approach, the tribunal announced that the question of civil rights protection turned on "whether what happened here was on the ground of [Mr. Seide's] religion" rather than on whether Jews are categorically protected.[20] If the perpetrators were motivated by religious bias, their conduct would not be covered under the United Kingdom's Race Relations Act. "On the other hand," the tribunal continued, "if it was on the ground of his race or ethnic origin, then it would be within the ambit of the Act."[21] In this way, the court established that anti-Jewish discrimination can violate a prohibition on racial discrimination, but only if it is motivated by a racial animus.

While U.S. and U.K. courts both generally have found that Jews are protected from racial discrimination, the American bureaucracy has not. This issue is also now playing out, repeatedly and badly, in the U.S. system of administrative civil rights enforcement, particularly in the corner of the federal bureaucracy where discrimination in the American university system is addressed. The U.S. Department of Education's Office for Civil Rights (OCR), responsible for ensuring equal opportunity in colleges and universities, has been forced to confront this question of Jewish identity in order to address the resurgent problem of contemporary anti-Semitism in American higher education.

In 2006, the independent, bipartisan U.S. Commission on Civil Rights charged that anti-Semitism had become a "serious" problem on

[20] *Seide v. Gillette Industries, Ltd.*, IRLR 427 (1980).
[21] *Id.*, at §§[22]–[23].

many American college campuses and directed OCR to aggressively enforce federal civil rights laws to address the situation.[22] OCR, however, has not prosecuted a single allegation of anti-Semitism, either before or after receiving the Civil Rights Commission's pointed admonition. Indeed, OCR dropped even its most notorious anti-Semitism case – *In re University of California at Irvine* – in a manner that has drawn considerable congressional and public criticism.[23] Those criticisms undoubtedly would have been more intense if the public had been aware of the extraordinary dissension, accusations, and recriminations that took place *within* OCR as *Irvine* was investigated.

What does it mean to be a Jew? What does it mean to be an anti-Semite? What does it mean to be the subject of Jew hatred? Like the great Sphinx, the elephantine federal bureaucracy has posed these three riddles to the Jewish community. In Greek mythology, the Sphinx strangled or devoured those who were unable to solve its riddles. In the United States, the price of failure is the loss of fundamental rights. If these riddles are not answered correctly, Jewish students at publicly funded colleges, universities, and public schools will be denied the protections of the most significant civil rights statute governing educational institutions. The federal bureaucracy has struggled with these riddles for decades. Its inability to solve them has paralyzed civil rights enforcement in cases of campus anti-Semitism. So far no one has stepped forward to provide the solution. This book answers the Sphinx.

The *Irvine* case was perhaps the most extraordinary of the many cases that have drawn public attention to the problem of anti-Semitism on twenty-first-century American college campuses. Over the course of several years, Irvine students alleged a pattern of harassment, intimidation, stalking, rock throwing, vandalism, and other disturbing behavior directed against Jewish students and supporters of Israel. Significant

[22] U.S. Commission on Civil Rights, Findings and Recommendations of the United States Commission on Civil Rights Regarding Campus Anti-Semitism 1 (2006) (hereinafter U.S.C.C.R., Findings and Recommendations).

[23] See Letter from Charles R. Love, Program Manager, Office for Civil Rights, Region IX, U.S. Department of Education, to Dr. Michael V. Drake, Chancellor, University of California, Irvine, *In re UC-Irvine*, November 30, 2007; available at www.ocregister.com/newsimages/news/2007/12/OCR_Report_120507-Z05145157–0001.pdf (hereinafter *Irvine* or "Love Letter to Irvine"]; Letter of Senators Arlen Specter, Sam Brownback, and Jon Kyl to Secretary of Education Margaret Spellings, February 27, 2008; Letter of Representatives Brad Sherman, Steven Rothman, Linda Sanchez, Allyson Schwartz, and Robert Wexler, April 30, 2008; available at www.zoa.org/media/user/documents/publ/ushousetoedsecyretitlevi.pdf.

problems also had been identified at Berkeley, Columbia, San Francisco State, and elsewhere. These cases typically involved a mix of old-fashioned and more contemporary anti-Semitic discourse, often combined with intimidating or destructive behavior. Typically, the anti-Jewish rhetoric is complicated by at least some form of criticism of the State of Israel, raising claims of free speech or academic freedom. In its first major higher-education anti-Semitism case, OCR conducted a lengthy, extensive investigation to determine whether this activity violated Title VI of the Civil Rights Act of 1964, which prohibits discrimination "on the ground of race" in federally assisted programs and activities.[24]

Although OCR's career staff determined that a hostile environment had formed at Irvine, they were overruled by political appointees within the second George W. Bush administration.[25] This political reversal was ironic in that the first George W. Bush administration had adopted landmark legal guidance prohibiting precisely the activities that the second George W. Bush administration allowed. At a conceptual level, the reversal reflected a legal disagreement over whether anti-Semitism can be described, for purposes of affording civil rights protections, as discrimination "on the ground of race." On a broader societal level, it reflected disagreement about the extent to which anti-Jewish harassment should be addressed by the federal government.

The basic problem is that Congress has given OCR jurisdiction over race and national origin discrimination but not over discrimination on the basis of religion. Despite several more recent, helpful lower court rulings, the Supreme Court has narrowed the definition of "national origin" discrimination to describe only the "nation" from which one's family has emigrated.[26] Such narrow conceptions of nationhood clearly exclude Jews, who have lacked a common governing or political authority for most of their history. These two constraints force questions of educational anti-Semitism into the domain of "race." In order to receive full civil rights protections, victims of anti-Semitic harassment must argue that they have faced "discrimination on the basis of … race." With this jurisdictional limitation in mind, OCR routinely rejects anti-Semitism allegations on the grounds that Judaism is only a religion.

This has created various anomalies. African American, Arab, Hispanic, female, disabled, Boy Scout, or older students who charge

[24] 42 U.S.C. §2000(d) (2000).
[25] This important fact has not been reported previously.
[26] The controlling Supreme Court authority is *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973).

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, 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, but OCR would not 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 other ethnicity.

This is an extraordinary gap in American civil rights law.[27] Virtually all major civil rights laws enacted during the heyday of the civil rights movement covered religion as well as race, color, and national origin. This had been true of executive orders throughout the 1940s and 1950s, as well as statutes passed during the 1950s and 1960s. The landmark Civil Rights Act of 1964, which was the principal statutory tool used to end state-sanctioned racial segregation, covered race, color, and national origin in virtually all of its provisions – except for the critically important Title VI, which prohibited discrimination in federally assisted programs and activities, including most public and private colleges. The reason for this unusual omission was that Congress did not want to risk interfering in parochial schools and religiously oriented universities. As we now know, it would have been eminently feasible for Congress to prohibit religious discrimination in education while still carving out an exception for religious institutions. But it did not do so.

In the heat of the moment, however, when questions remained as to whether Congress would have the fortitude to enact the landmark legislation protecting African Americans, key congressmen decided that it would be more "expedient" simply to remove any reference to religion from the applicable statutory provision. The result, nearly a half-century after the fact, is that Congress still has never passed legislation to prohibit religious discrimination in American education. This is not to say, of course, that it is lawful for public elementary and secondary schools or public universities to discriminate against religious minorities. The First

[27] This lacuna is explored at greater length in two of my earlier articles, *Privileging and Protecting Schoolhouse Religion*, 37 J. Law & Educ. (October 2008) 505, and *The Most Important Right We Think We Have But Don't: Freedom from Religious Discrimination in Education*, 7 Nev. Law J. (Fall 2006) 171.

Amendment to the United States Constitution guarantees all Americans the right to freely exercise their religion. The Fourteenth Amendment, which renders the First Amendment applicable to the states, also guarantees the equal protection of the laws. The lesson of the civil rights movement, however, was that constitutional rights have little worth if they are not backed by effective enforcement schemes. This is why the basic civil rights laws passed during the 1960s so-called second reconstruction period were concerned primarily with developing systems to enforce rights that had already been established by the Constitution.

Since 1964, Congress has passed more legislation protecting the civil rights of American students. Successive statutes protected the rights of women and girls, students with disabilities, students of nontraditional age, and even students who are members of certain patriotic youth organizations such as the Boys Scouts of America. Congress has not, however, added "religion" to the list of protected classifications. At the margins, some legislation has been helpful. For example, the Equal Access Act ensures that religious groups will, under many circumstances, have equal rights to enjoy the use of school facilities during noninstructional time (mainly after school). This does not, however, provide much protection to religious minority students who face discrimination or harassment, such as the creation of hostile environments within public and private universities. Some support may be found in other places, such as state law provisions or accrediting agencies' standards. The problem is that none of these authorities provide the protective apparatus of federal civil rights enforcement.

Ultimately, the fault for this governmental failure lies as much with the federal bureaucracy as with Congress. For Jewish students, the long-standing statutory omission should have been easily solvable. After all, it is well established that anti-Semitism may take several forms, including not only religious but also ethnic and racial animus.[28] The U.S. State Department, for example, uses Merriam-Webster's long-standing, influential definition of anti-Semitism as "hostility toward or discrimination against Jews as a religious, ethnic or racial group."[29] Moreover, the U.S.

[28] This observation is commonplace within the historical literature, but it also has been recognized within the U.S. federal courts, for example, by Judge Richard Posner in *Bachman v. St. Monica's Congregation*, 902 F. 2d 1259, 1260–1261 (7th Cir. 1990).

[29] U.S. Department of State, Contemporary Global Anti-Semitism: A Report Provided to the United States Congress (2008), 6 (quoting Webster's Third New International Dictionary (Philip Babcock Grove, ed.) (Springfield, MA, 2002), 96.

Supreme Court had defined the concept of "race" fairly broadly, at least as that term is used in the 1866 statute, to refer to shared "ethnic and ancestral" characteristics.[30] The problem is that OCR uses rather formalistic approaches to determining, within the meaning of the statute that provides the source of its authority, whether anti-Semitism is "discrimination on the basis of … race." Since at least the Carter administration, OCR has concluded that it is not.

In 2004, OCR pledged for the first time to enforce federal civil rights law against those forms of anti-Semitism which are based on Jewish ethnic or ancestral heritage. Drawing on Supreme Court precedents, OCR issued policy statements announcing that anti-Semitic harassment is prohibited by Title VI's antiracism provisions. Naturally, OCR conceded that purely religious or theological discrimination is not prohibited. The agency announced, however, that discrimination on the basis of ethnic or ancestral characteristics is no less permissible against groups that also have religious attributes than against groups that do not. In an important guidance letter, OCR announced that it "recognizes that anti-Semitic harassment may include adverse action taken against individuals based on a victim's ethnic background or ancestry, notwithstanding the prospect that such harassment may constitute religious discrimination as well."[31]

Since 2004, unfortunately, OCR has not enforced this policy despite prodding from the Civil Rights Commission and from various members of Congress. Aside from the usual bureaucratic inertia – the tendency of government officials to be risk averse – OCR officials have had significant substantive misgivings. As a jurisdictional matter, OCR has been reticent to address discrimination against religious groups after Congress chose to exclude "religion" from within the scope of Title VI protection. More important, OCR has been reluctant to suggest that Jews are members of a biologically distinct racial group, given the genocidal ramifications that that theory had had during the last century. It was, after all, Adolf Hitler who had most eventfully insisted that "Jewry is without question a race and not a religious community."[32]

[30] See *Shaare Tefila Congregation v. Cobb*; *Saint Francis College v. Al-Khazraji*.

[31] OCR Guidance Letter from Kenneth L. Marcus Delegated the Authority of Assistant Secretary of Education for Civil Rights to Sid Groeneman, Senior Research Associate, Institute for Jewish & Community Research, October 22, 2004; available at www.eusccr.com/letterforcampus.pdf ("OCR Guidance Letter to IJCR")

[32] Alan E. Steinweis, STUDYING THE JEW: SCHOLARLY ANTISEMITISM IN NAZI GERMANY (2006), 7, quoting Letter of Adolf Hitler to Adolf Gemlich, September 16, 1919.