

# A JILV Backgrounder

## A New Threat to American Civil Rights:



### Will American Jewish Organizations Take Seriously Civil Rights Legislation That They Helped Write?

by Jeffrey H. Bergman

For much of the middle and late 20th century, the organized Jewish community played a key role in promoting and developing the civil rights agenda, including the landmark 1964 Civil Rights Act. The Union for Reform Judaism, and its Religious Action Center, hosted the Leadership Conference on Civil Rights as it drafted what became the 1964 Act (a fact which the URJ's website



From left: Martin Luther King Jr., Ralph Abernathy, Maurice Eisendrath, and Abraham Joshua Heschel during the march from Selma to Montgomery in 1965. From the film "Shared Legacies." Menemsha Films

still proudly emphasizes). The Anti-Defamation League, the American Jewish Committee, and other vaunted organizations included active civil rights programs, sponsoring legislation, and litigation to support the vision of a more perfect union. American Jewish leaders' civil rights advocacy was understood to protect specifically Jewish interests and broader American ideals. Rabbi Joachim Prinz, the head of the American Jewish Congress who spoke along with Martin Luther King at the 1963 March on Washington, noted that "when God created man, he created him as everybody's neighbor. Neighbor is not a geographic term. It is a moral concept. It means our collective responsibility for the preservation of man's dignity and integrity." Prinz closed his address by appealing to the language of the Pledge of Allegiance and the commitment to "liberty and justice for all."

#### What Our Civil Rights Laws Hold

The primary civil rights laws aimed at their objectives in a manner both powerful and subtle. Although we tend to think that the 1964 Civil Rights Act (as well as the preceding Civil Rights Acts from the 1870s through the 1950s) loosely barred "discrimination," "discriminatory acts," or "practices with discriminatory effects," particularly against blacks, women, and other protected classes, the Acts can better be understood as prohibiting particular reasons for discrimination or particular grounds

for making decisions. Under the 1964 Act, making commercial, employment, educational, housing, and many other decisions based on a person's race, color, religion, sex, or nationality, became punishable by law. But, crucially, the Acts protected the broader right to make decisions in daily life as long as they were not based on a prohibited ground. Employers, for example, were expressly permitted to set job terms for their employees based on a "bona fide seniority or merit system," to set compensation based on measured quantity or quality of work, or to use

any "professionally developed ability test," provided such methods were not "designed, intended, or used to discriminate because of race, color, religion, sex or national origin." So employers could still choose employees based on a range of qualifying factors, an act in and of itself of discrimination against those deemed less qualified. Professionals could similarly select clients. Private schools could choose students. Landlords could choose tenants. Each of these, and other, areas of life involve intricate decisions and an interplay of priorities, which the law recognizes broad freedom to pursue as long as prohibited categories are not implicated.

Behind this legal structure of Civil Rights law lies the idea captured by Rabbi Prinz that each person is entitled to be treated as an individual, with his or her own strengths, weaknesses, personality, and character. Race and other prohibited categories are not, or should not be, permitted to become central to how we are treated under the law. In other words, the Civil Rights Acts deemed race itself as an invidious category in American life.

#### Why Jews Celebrated Color-Blind Laws

It is no accident that this powerful yet constrained understanding underlying the 1964 Civil Rights Act was welcomed by the Jewish community for so long. At a basic level, this approach facilitated an amazing era

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of Jewish accomplishment within American society. The insistence that nationality, ethnicity, and religion could not be impediments to individual efforts provided a legal shield against antisemitic prejudice and allowed talented Jews to rise in all walks of life. Jews had previously been subjected to admissions quotas at the most prominent American colleges and universities and were informally blocked from many business, legal, medical, and academic jobs at established organizations. But even more than this, many Jews recognized that using race as a defining human characteristic is inconsistent with core Jewish beliefs, including the understanding of human beings as each *b'tselem Elohim*, or created in the image of God.



Stanley Levison and Harry Wachtel were marchers, fundraisers, and close advisors to Martin Luther King Jr. leading up to the 1964 Civil Rights Act. From the film "Shared Legacies." Menemsha Films

Indeed, the term "race" appears to have antisemitic origins. Following the Reconquista and the forced conversions of Jews on the Iberian Peninsula in the 15th and 16th centuries, the Spanish term "raza" emerged to describe one's bloodline. Even those whose families had converted from Judaism to Roman Catholic Christianity in an earlier generation could be treated differently under Spanish law based on their ancestors' prior status. When the word "raza" became "race" in English, it brought with it the idea that a person's ancestry held more importance than his or her own beliefs, personal merit, or individual actions. Although of course, in Judaism, notions of peoplehood – *Am Yisrael* – are central to Jewish identity, the concept of a people is malleable and porous (through conversion and the traditional rules of Jewish descent) in a way that race is not. Treating Jews as if we were a separate race was a pseudo-scientific and reductive practice of 19th century "race science," later picked up by Nazi Germany. It is no surprise at all that 20th-century American Jews rejected the treatment of people based on racial criteria, not just due to the memory of the Shoah, but because it is deeply out of step with traditional Jewish sources and culture.

### The New Challenge To Civil Rights Laws

Today, we are witnessing a rapid and distressing abandonment of these convictions, including by those very Jewish organizations that helped establish them and the laws that codified them 60 years ago. A new focus on race and other forms of group identity as constitutive of individuals, rather than the other way around, has created conflicts that in some cases might be considered funny if they were not patently unjust. At a psychological counseling practice affiliated with Stanford University, two Jewish mental health professionals have filed an EEOC complaint alleging that they were subjected to harassment and professional retaliation for asking whether their organization's focus on patients' race was helpful to treatment and then for requesting that Jewish concerns about antisemitism also receive consideration in organizational diversity efforts. At Smith College, a residence life and library employee had filed a lawsuit alleging that she was denied promotions and professional development opportunities for openly race-based reasons and was harassed when she questioned residence life and housing decisions that were specifically based on the affected students' racial backgrounds. At Princeton University, a Jewish classics professor had his tenure revoked and was fired, allegedly for sexual misconduct which he had already been punished for; the professor claims this was a pretext and that he was actually terminated for criticizing Princeton's culture on racial politics. And – although details in many cases are disputed and under examination – school districts in places like Wellesley, Massachusetts, have come under fire for curricular programming that involves separating students by race or ethnicity and then providing different instruction to different student racial groups.

### Why Jewish Organizations Must Stand Up for Their Core Principles

Whether these and other lawsuits and complaints ultimately have merit remains to be seen. The organizations and individuals involved will have their own competing explanations, which deserve a full, honest, and unbiased hearing. But the allegations, on their face, raise serious concerns about what can happen when race becomes crucial to an organization's day-to-day operations: segregated "white affinity spaces," explicit double standards, reductive categorization of employees, students, and others based on race or skin color, and deeply poisonous, divisive relationships.

Some might counter, however: haven't employers and other institutions always been given leeway in considering race, at least when certain goals are at issue? Aren't colleges allowed to consider a student

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applicant's race, sex, and background when making admissions decisions in order to foster a diverse student body? Although these practices have been contentious, they have been permitted since the U.S. Supreme Court's decision in *Regents of the University of California v. Bakke* decision, which allowed race to be used as a "plus factor" in decision-making, all other things being equal. But even the most assertive affirmative action programs fall short of what we are now seeing in many places of employment in the name of diversity, equity, and inclusion. The new cases, like those involving Stanford, Princeton, and Smith, involve allegedly open and specific negative treatment of individuals – peer harassment, supervisor retaliation or firings, and mandatory participation in programs that promote racial stereotyping – that would easily be recognized as illegal if the racial identities of the complainants were reversed. If the *Bakke* and later affirmative action cases were in tension with the neutral individualism underlying the 1964 Civil Rights Act, the new cases openly flout it.

The American Jewish community had, and maintains, deep wells of fellow-feeling towards Blacks and others who have been denied equal citizenship. And so many Jewish organizations have been slow to react to these new views, or have embraced them. The Religious Action Center of Reform Judaism, for example, notwithstanding its involvement in the 1964 Act, now argues that any disparity between groups is per se evidence of racial injustice, and calls for corrective measures in employment, education, and other areas on expressly racial grounds. Rabbinic organizations for the Reform, Conservative and Reconstructionist movements have begun inviting rabbis to join sub-groups based on their members' racial backgrounds. For some other Jewish organizations, the response has been more conflicted. The Anti-Defamation League, after advancing a new definition of "racism" as "the oppression of people of color based on a socially constructed racial hierarchy," was met with public ridicule after Whoopi Goldberg appeared to suggest that Jews could never have been victims of racism because they were not "people of color." The ADL then changed course and returned to its traditional understanding that racism appears whenever any person is disfavored by others because of his or her race or ethnicity, an understanding much more in line with the 1964 Civil Rights Act and its attempt to make race less, not more, important to social life.

For all Jews who remain committed to existing civil rights laws, these cases and developments ought to be deeply troubling. It should not be – and yet it may well be – difficult for Jewish organizations to speak honestly and to recognize that there is a purpose to prohibiting actions based on racial discrimination. For such actions and decisions to now be permitted, even encouraged, without strong opposition from the Jewish world seems a sad irony and a dangerous one. Like so many other institutions, too many Jewish groups seem to have abandoned their core principles in the face of relentless ideological challenge. It's time for Jewish organizations to exercise the deliberative processes and due diligence they are known for, and rediscover the importance of individual equality in law, liberty, justice, and moral dignity that Rabbi Prinz and so many others valued.

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