Racial Discrimination Under 42 U.S.C. § 1982: Proof or Perceptions? *Shaare Tefila Congregation v. Cobb*

Christopher E. Celichowski*

Background

On November 1, 1982, employees and members of Shaare Tefila Congregation gathered to socialize and hold a board of directors meeting in their Silver Springs, Maryland synagogue. A group of young men mingled across the street drinking beer in the parking lot of the "Drug Fair," a pharmacy in a local shopping center.[1]

As the night wore on, the young men's conversation turned to the subject of Jews; in particular, Nazi Germany, Nazi race principles, and the Ku Klux Klan's doctrine of Jewish inferiority.[2] Their words erupted into violence and destruction when the men spray-painted "KKK," "White Power," "Arian [sic] Brotherhood," and a Star of David with an arrow through it on the Drug Fair walls.[3]

"Somebody should do that on a synagogue," suggested one of the men. The group walked through the parking lot to Shaare Tefila synagogue.[4] They desecrated the synagogue with the words "Dead Jew," "Death to the Jude,"[5] "In, Take a Shower Jew," "Toten Kamf Raband,"[6] and other anti-Semitic slogans and symbols. They also painted a swastika on a car belonging to Dr. Jacob

---

* Christopher E. Celichowski will receive his J.D. from the University of Minnesota Law School in 1988.

1. Brief for Appellant at 3, Shaare Tefila Congregation v. Cobb, 785 F.2d 523 (4th Cir. 1986) (No. 85-1544), *aff'g* 606 F. Supp. 1504 (D. Md. 1985), *rev'd*, 107 S. Ct. 2019 (1987).

2. Plaintiff's Memorandum in Opposition to Motion to Dismiss at 6-8, *Shaare Tefila Congregation*, 606 F. Supp. 1504 (D. Md. 1985) (No. R-84-880).

3. *Id.* Michael Remer, one of the defendants, later admitted painting a replica of the steel eagle—a Nazi symbol borrowed from one ancient Roman legion—on the pharmacy wall. Petition for Writ of Certiorari at 3, *Shaare Tefila Congregation*, 785 F.2d 523 (4th Cir. 1986) (No. 85-2156).

4. *Id.*

5. *Id.* "Jude" is German for Jew.

6. *Id.* This phrase is a phonetic reference to Totenkopverbande, the "death head units" of Nazi concentration camp guards from 1936 through World War II. According to Robert Wolfe, Chief of the Modern Military Headquarters branch of the National Archives, the Totenkopverbande used a skull and crossbones as its in-

Teller, a Shaare Tefila board member. Upon hearing that Teller's car was vandalized, Mr. Levin, the Congregation's executive director, went outside to check for further damage and discovered the desecrated temple walls.

Neither Levin nor the young vandals could have known that the events of that night were the first step down a long litigious road leading to the U.S. Supreme Court.

Introduction

Shaare Tefila Congregation (Shaare Tefila) brought suit in federal district court in Maryland, alleging that defendants[7] violated their federal rights under 42 U.S.C. § 1981,[8] 42 U.S.C. § 1982,[9] 42 U.S.C. § 1985(3),[10] and Maryland state law.[11] The district court

---

signia. Declaration of Robert Wolfe at 4, *Shaare Tefila Congregation*, 606 F. Supp. 1504 (D. Md. 1985) (No. R-84-880).

7. The defendants were John William Cobb, William Randall Harris, Thomas Lloyd Heine, William Hest, Thomas Joseph Hunt, Jr., Raymond Lee Jordan, Dominic Queen, and Michael David Remer. *Id.* at 523.

8. 42 U.S.C. § 1981 (1982). Entitled "Equal Rights Under the Law," the statute provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall extend to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

9. 42 U.S.C. § 1982 (1982). Entitled "Property Rights of Citizens," the statute provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." *Id.*

10. 42 U.S.C. § 1985(3) (1982). The statute addresses "Depriving Persons of Rights or Privileges." It reads as follows:

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any support or advocacy in a legal manner, toward or in favor of any lawfully qualified person as an elector for President or Vice-President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having or exercising any right or privilege of a citizen of the United States, the party so injured may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Id.

refused Shaare Tefila's proferred definition of subjectively determined racial discrimination under section 1982,[12] ruling that their proposed definition relied "entirely on the idiosyncracies of individual defendants" and thus exceeded the scope of the statute.[13] The court also dismissed the other federal claims and the pendent state claims.[14]

Shaare Tefila appealed the district court's ruling to the Fourth Circuit Court of Appeals. The Fourth Circuit concluded that adopting Shaare Tefila's interpretation of section 1982 "would permit charges of racial discrimination to arise out of nothing more than the subjective, irrational perceptions of the defendants,"[15] and upheld the district court.

Shaare Tefila petitioned the United States Supreme Court for writ of certiorari based solely on its section 1982 claim.[16] The Court granted certiorari on October 6, 1986.[17] The Supreme Court overruled both lower courts, holding that while the mere allegation that defendants were motivated by racial animus was insufficient to state a section 1982 action, Jews could claim section 1982 protection because the statute's drafters intended to include them as a protected group. The Court incorporated most of its analysis in *Shaare Tefila Congregation* from a companion case, *Al-Khazraji v. St. Francis College*.[18] Relying on nineteenth century reference works and the recorded 1866 congressional debates over the statute that became section 1982, the Court found: "[I]t is evident from the legislative history of the section . . . that Jews and Arabs

---

11. Plaintiffs alleged actions in trespass, nuisance, and intentional infliction of emotional distress. Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 525 (4th Cir. 1986), *rev'd*, 107 S. Ct. 2019 (1987).

12. The Fourth Circuit concluded that the plaintiffs could not base a section 1982 racial discrimination claim "solely on the basis of defendants' perceptions of Jews as being members of a racially distinct group." 785 F.2d at 527.

13. *Shaare Tefila Congregation*, 606 F. Supp. 1504, 1508 (D. Md. 1985).

14. *Id.* at 1510.

15. The Fourth Circuit's view of racial discrimination is at odds with the common meaning of the related word "prejudice." According to Webster's Dictionary, "prejudice" is "an irrational attitude of hostility directed against an individual, a group, a race, or their supposed characteristics." Webster's Seventh New Collegiate Dictionary 670 (1970). *See infra* text accompanying note 74. 728 F.2d at 527. The district and appellate court opinions dismissed the section 1981 claim and the section 1985(3) claim with little discussion. They ruled that the plaintiffs failed to meet the "state action" requirement of section 1981. *Id.* at 525-26; 606 F. Supp. at 1506. Both courts also concluded that the section 1985(3) claim was too attenuated since Shaare Tefila never alleged that the defendants actually interfered with their right to interstate travel. 785 F.2d at 527; 606 F. Supp. at 1509 (1985).

16. Petition for Writ of Certiorari at (i), *Shaare Tefila Congregation* (No. 85-1544).

17. 107 S. Ct. 62 (1987).

18. 107 S. Ct. 2022 (1987).

were among the peoples then considered to be distinct races and hence within the protection of the statute. Jews are not foreclosed from stating a cause of action against other members of what today is considered to be part of the Caucasian race."[19]

At issue before the Court was the extent of Shaare Tefila's burden of proof under 42 U.S.C. § 1982. Defendants argue that Shaare Tefila must prove they belonged to a nonwhite race in order to bring a section 1982 action, while plaintiffs contended they need only establish injury from conduct motivated by an anti-Semitic racial animus. Framing the issue in the former manner imposed an arguably insurmountable burden on the plaintiffs, because it required them to prove Jews were racially distinct "nonwhites." The latter formulation avoids exclusive reliance on the vague term "race."

This article explores several aspects of *Shaare Tefila Congregation v. Cobb*.[20] First, this article examines the legislative and case history of 42 U.S.C. § 1982 relied on by the United States Supreme Court in its brief opinion. The article, however, goes beyond the Court's very brief analysis and examines further compelling reasons to justify its ruling. It then compares *Shaare Tefila Congregation* with *Al-Khazraji v. Saint Francis College*,[21] a recent Third Circuit Court of Appeals decision also accepted for review by the United States Supreme Court. Third, the article suggests that historical and contemporary persecution of Jews has a unique racial character not present in religious discrimination against other groups, and therefore such discrimination constitutes "racial" discrimination falling under the protective mantle of 42 U.S.C. § 1982. Further, the restrictive interpretation of the statute used by the lower courts reviewing this case and followed by other federal courts relied on a questionable interpretation of the ambiguous legislative intent and history of section 1982. Also, this narrow definition defies current criticisms questioning the accuracy and relevancy of racial classifications and their relation to prejudice.

The article suggests that reliance on a subjective standard, focusing on the intent and motives of the discriminator, comports with the inherent nature of racial prejudice and proposes that England's Race Relations Act of 1976 and its interpretation by the House of Lords be used as a legitimate aid in interpreting the scope and application of 42 U.S.C. § 1982. Finally, section 1982 of-

19. 107 S. Ct. 2019, 2022 (1987).
20. 785 F.2d 523 (4th Cir. 1986), *rev'd*, 107 S. Ct. 2019 (1987).
21. 784 F.2d 505 (3d Cir. 1986), *rev'd*, 107 S. Ct. 2022 (1987).

fers appropriate relief when a defendant, motivated by an anti-Semitic racial animus, perpetrates discriminatory acts against a Jewish individual or group.

I. Legislative History of Section 1982

Both 42 U.S.C. § 1981 and 42 U.S.C. § 1982 originated in the Civil Rights Act of 1866.[22] Numerous commentators have noted that the ambiguous language of the Civil Rights Act of 1866 has proven a fertile ground for varied interpretations of its legislative history and scope.[23]

The thirteenth amendment,[24] forbidding slavery, provided the underlying impetus for the Civil Rights Act of 1866.[25] The Supreme Court initially read the amendment narrowly, holding that although it empowered Congress to destroy "badges and incidents of slavery;"[26] discrimination based on "race and color were not regarded as badges of slavery."[27] The Court also concluded that since Congress reenacted section one of the Act after the passage of the fourteenth amendment in 1870,[28] section one only cov-

---

22. Section One of the Civil Rights Act of 1866 provided:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

23. *See, e.g.*, Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 Calif. L. Rev. 662 (1975); Comment, *Developments in the Law—Section 1981*, 15 Harv. C.R.-C.L. L. Rev. 29 (1980); Julie Colin, *Racial Character of Section 1981 Should Be Subject to Dynamic Interpretation to Afford Protection Against Group Discrimination*—Ortiz v. Bank of America, *547 F. Supp. 550 (E.D. Cal. 1982)*, 13 Seton Hall L. Rev. 763 (1983).

24. The thirteenth amendment reads as follows: "Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof that party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have the power to enforce this article by appropriate legislation." U.S. Const. amend. XIII.

25. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 287 (1975). *See also* Greenfield & Kates, *supra* note 23, at 663.

26. *See* Civil Rights Cases, 109 U.S. 3, 20-21 (1883).

27. *Id.* at 25.

28. A majority of Congress believed that the thirteenth amendment authorized them to enact legislation beyond the direct prohibition of slavery itself. A minority, however, believed Congress could not base its creation of the Civil Rights Act of

ered discrimination under the guise of state action and not private discrimination.[29] Congress codified the Act in 1874 and later recodified the statutes into their present form as 42 U.S.C. §§ 1981 and 1982.[30]

In 1968, the Supreme Court broadened its interpretation of section 1982 to include private discrimination in *Jones v. Alfred H. Mayer Co.*[31] According to Justice Marshall's majority opinion, "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges of slavery, and the authority to translate that determination into effective legislation."[32] Marshall repudiated the "state action" requirement imposed on section 1982 by earlier courts and extended section 1982 to private discrimination.[33]

The Supreme Court's recent interpretations also consider section 1982 a constitutional exercise of congressional power applicable to both state and private acts of racial discrimination. The Court, however, has not delineated the scope of "race" under the statute.[34] In *McDonald v. Santa Fe Trail Transportation Co.*,[35] the Supreme Court held section 1981 applicable to white persons as well as nonwhites.[36] Using the *McDonald* reasoning, section 1982 also presumably applies to both whites and nonwhites since both statutes originated in the Civil Rights Act of 1866, which by its terms applied to "all persons." *McDonald*, however, involved an employment discrimination claim filed by two white employees

---

1866 on any grant of power flowing from the thirteenth amendment. Senator Bingham, a member of this minority and the drafter of the fourteenth amendment, hoped that the fourteenth amendment would provide the clear grant of congressional authority necessary to enact the Civil Rights Act of 1866. Greenfield & Kates, *supra* note 23, at 663-64 n.9.

29. Civil Rights Cases, 109 U.S. at 16.

30. Enforcement Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144 (codified at Rev. Stat. §§ 1977-1978 (1874); current version at 42 U.S.C. §§ 1981-1982 (1982)).

31. 392 U.S. 409 (1968).

32. *Id.* at 440.

33. *Id.* at 420-37.

34. The Supreme Court has never expressly ruled on whether section 1981's prohibition against racial discrimination included discrimination based on national origin. *See* Ortiz v. Bank of Am., 547 F. Supp. 550, 556 (E.D. Cal. 1982) (allowing a section 1981 claim by a woman of Puerto Rican descent who alleged she had been passed over for promotions and ultimately fired because of her accent). The Court has, however, interpreted section 1981 to prohibit discrimination due to alienage. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419-20 (1948). Yet according to Judge Wilkinson's dissenting opinion in *Shaare Tefila Congregation*, the extent of this protection is unclear. Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 530 (4th Cir. 1986) (Wilkinson, J., dissenting), *rev'd*, 107 S. Ct. 2019 (1987), (citing Lorilyn Chamberlin, *National Origin Discrimination Under Section 1981*, 51 Fordham L. Rev. 919, 922-23 (1983)).

35. 427 U.S. 273 (1976).

36. *Id.* at 287.

who were dismissed for stealing on the job and who alleged discrimination because a Black participant in the thefts was not fired.[37] Thus, *Shaare Tefila* offered the Supreme Court its first opportunity to interpret the proper scope of section 1982 without benefit of the clear-cut racial distinction between Blacks and whites.[38]

A. The Concept of "Race" and the Civil Rights Act of 1866

Proponents and opponents of the Civil Rights Act of 1866 recognized inherent ambiguities in the words "race" and "color," and both sides reacted predictably to the terms' inclusion in the Act. Critics wondered if and where racial lines could be drawn. Senator Cowan queried:

> [W]hat is meant by the word "race," . . . and where is it settled that there are two or more, how many[?] . . .
>
> "[C]olor" is another word upon which nobody is very well advised just at present. Men are of all shades of color, and the races of men differ from the deepest jet up to the fairest of lily white all over the world.[39]

Supporters of the Act found the bill equally applicable to Blacks and whites.[40] Commentators note that discussions during the legislative hearings, which focus on the statute's grant of citizenship, lend further credence to the conclusion that "the Act was not conceived of as limited in application to black people."[41]

B. Scientific Classifications of Race

Those looking to scientific racial classifications for a definition of "race" for section 1982 will find these classifications even less helpful than the murky legislative history. Anthropologist Ashley Montagu defined race as follows: "[R]ace designates a group or population characterized by some concentrations, relative as to frequency and distribution, of hereditary particles (genes) or physical characters, which appear, fluctuate, and often disappear in the course of time by reason of geographic and/or cultural isolation."[42]

---

37. *Id.* at 276.

38. *See supra* note 34. *Cf.* Al-Khazraji v. St. Francis College, 107 S. Ct. 2022, 2026 (1987).

39. Cong. Globe, 39th Cong., 1st Sess. 499 (1866) (gender-specific nouns in original).

40. *Id.* at 599 (Remarks of Senator Trumbull).

41. Greenfield & Kates, *supra* note 23, at 675 (contains a detailed legislative history of 42 U.S.C. § 1981).

42. Ashley Montagu, Statement on Race 8 (3d ed. 1972), *quoted in* Greenfield & Kates, *supra* note 23, at 676-77.

Montagu noted, however, that genetic definitions of "race" mean little to the average person. "To most people," he wrote, "a race is any group of people whom they choose to describe as a race. Thus, many national, religious, geographic, linguistic or cultural groups have . . . been called 'race.' "[43] According to Montagu, the popular inability to distinguish between a genetic definition of race and an explanation based on other characteristics historically manifested itself particularly well in the perceptions of Jews. "Jews are nearly always referred to in popular parlance as a 'race.' This is done not only by the so-called 'man in the street' but also by many scientists, medical men, philosophers, politicians, historians, and the members of many other professions."[44]

Scholars in other disciplines have attributed the categorization of groups by race as a "social and conventional, not a biological concept."[45] According to Gunnar Myrdal, social definitions, rather than biological facts, determine the status of an individual in the interracial milieu.[46] Legal commentators have taken this one step further in the context of sections 1981 and 1982, concluding that the statutes address a *social* phenomenon.[47] They conclude that "[s]ince the evil at which the statutes are aimed is discrimination, the scientific validity of the discriminator's racial definition is irrelevant."[48] As one author aptly states, "the fact that to the anthropologists the Jews are not a race has made little

---

43. *Id.*

44. Ashley Montagu, Man's Most Dangerous Myth: The Fallacy of Race 353 (5th ed. 1974), *quoted in* Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 533 (Wilkinson, J., dissenting), *cert. granted*, 107 S. Ct. 62 (1987). Chief Justice Rehnquist knew first-hand about popular misconceptions concerning the racial identity of Jews. During his Senate confirmation in July and August 1987, it was revealed that his Vermont cottage deed contained a clause which read: "No part of the herein conveyed property shall be leased or sold to members of the *Hebrew race*." N.Y. Times, Aug. 1, 1987, at 9, col. 1 (emphasis added). A developer of the property included the clause in the original deed to the property in the 1930s, and the Chief Justice did not recall reading the clause before buying the property. *Id.* The Supreme Court has declared such racially restrictive covenants unconstitutional, and those still in existence are unenforceable. Shelley v. Kraemer, 334 U.S. 1 (1948).

45. Gunnar Myrdal, An American Dilemma 115 (1962).

46. *Id.* Myrdal concludes that "the scientific concept of race is totally inapplicable at the very spots where we recognize 'race problems.' " *Id.* (emphasis omitted).

47. *See* Greenfield & Kates, *supra* note 23, at 678.

48. *Id.* Greenfield and Kates note that:

> Modern science may thus give an inaccurate picture of who is subject to racial discrimination today because individuals belonging to a group which is accurately defined only in terms of a common religion, country of origin, or other characteristic not passed on through heredity may nonetheless be subjected to discrimination because the discriminator perceives them as having distinct "racial" characteristics.

Id. at 677.

difference to racial bigots."[49]

Thus the Supreme Court properly avoided any reliance on so-called "scientific" definitions of race. Anthropologists and others have yet to arrive at a consensus. The Supreme Court, however, looked to nineteenth century reference materials and cryptic legislative history for its decision. The Court's decision should have included a close examination of the policy considerations underlying 42 U.S.C. § 1982.

II. Analysis

A. *Shaare Tefila Congregation v. Cobb*: The Fourth Circuit Opinions

1. Judge Hall's Majority Opinion

The Fourth Circuit Court of Appeals denied all of Shaare Tefila's federal claims in an opinion by Judge Hall. The state claims were also dismissed for lack of pendent jurisdiction.[50] The plaintiffs relied on *Manzanares v. Safeway Stores, Inc.*[51] to support their section 1982 claim. *Manzanares* held that a Mexican-American plaintiff could assert a section 1982 cause of action against his employer because alleged race and/or national origin discrimination resulted in his being treated differently from Anglo-Americans.[52] The *Manzanares* court concluded: "[S]ection 1981 is directed to racial discrimination primarily, but is not necessarily limited to the technical or restrictive meaning of 'race.' "[53] Shaare Tefila argued that the Tenth Circuit employed a racial perceptions test, but Judge Hall read *Manzanares* differently. He concluded that the *Manzanares* court focused on community attitudes and practices,[54] a test that is known in civil rights parlance as the "common understanding" test.[55] He stated that "the Tenth Circuit emphasized that Mexican-Americans, as a group, are *commonly treated differently* from Anglo-Americans, as a group. We do not find the position of Jews in this society to be analogous to that of Mexican-Americans or others *commonly considered* to be non-

49. Thomas F. Gosset, Race: The History of an Idea in America 449 (1963).

50. Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 510 (4th Cir. 1986), *rev'd*, 107 S. Ct. 2019 (1987).

51. 593 F.2d 968 (10th Cir. 1979).

52. *Id.*

53. *Id.* at 971.

54. *Shaare Tefila Congregation*, 785 F.2d at 526-27.

55. Greenfield & Kates, *supra* note 23, at 690. According to the authors, "since racial prejudice and discrimination are based on attitudes toward individuals because they are seen as members of a group, the test employed should be based upon membership in a group commonly perceived as nonwhite." *Id.* (emphasis added).

whites."[56]

The common understanding test originated in *United States v. Bhagat Singh Thind*,[57] a case involving federal immigration and naturalization laws,[58] but some commentators support its use in applying sections 1981 and 1982.[59] Under the common understanding test, only persons belonging to a group considered "white" by a majority of reasonable United States citizens fit the definition of "white person." Commentators supporting inclusion of Mexican-Americans under section 1982 urged adoption of this standard, but focused on skin color and other physical differences in doing so.[60] Since Jews arguably possess few physical characteristics different from others commonly called "white," adopting the current formulation of the common understanding test for section 1982 actions apparently precludes claims brought by Jews.

Nevertheless, valid reasons compel rejection of the common understanding test in the section 1982 context. First, reliance solely on physical characteristics will likely result in an underinclusive categorization for purposes of preventing racial discrimination. The characteristics included in most definitions of race depend on the purposes underlying such classifications and go beyond mere physical differences.[61] "Racial discrimination" implies two related, yet distinct, concepts. Race, the characteristic serving as the motivating factor behind discriminatory behavior, involves an inquiry into the discriminator's state of mind. Discrimination implies some type of concrete *action* by the discriminator. Thus, race provides the mental impetus, or motive, for the discriminator's intent and action. Racial discrimination statutes do not punish those who merely possess racially prejudicial viewpoints; rather, such laws are intended to punish those who hold those racist beliefs and act on them to the detriment of others' rights.[62]

---

56. *Shaare Tefila Congregation*, 785 F.2d at 527 (emphasis added).

57. 261 U.S. 204 (1923).

58. *Id.* at 206-07.

59. *See* Greenfield & Kates, *supra* note 23, at 690.

60. *Id.* at 679 nn.76-77.

61. *See supra* notes 42-49 and accompanying text.

62. Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 528 (4th Cir. 1986) (Wilkinson, J., dissenting), *rev'd*, 107 S. Ct. 2019 (1987). According to Judge Wilkinson:

> The Civil Rights Acts of 1866 and 1871 were enacted precisely to halt the spread of violence and hatred by those motivated by such perceptions, and plaintiffs in this case, no less than those in the usual racial discrimination case, have suffered the consequences of abhorrent notions concerning racial identity and its relevance.

Id.

The Court in Jones v. Alfred Mayer Co. alluded to the purpose underlying racial discrimination laws when it discussed the legislative history of section 1982. "Indeed, one of the most comprehensive studies then before Congress stressed the

Furthermore, the requirement that an individual perpetrator's (mis)perceptions have a "racial character" to state a section 1982 claim[63] makes any inquiry into "common understanding" irrelevant. It is the discriminator's motive and state of mind which should be considered, not whether one can rationalize an inherently irrational action under a manifestly objective standard.[64]

Second, the Fourth Circuit's application of the common understanding test ignores popular misconceptions, because "Jews are often perceived to be identifiable, both by surname and physiognomy, as a distinct group."[65] Judge Hall's analysis fails to distinguish between anti-Judaism and anti-Semitism. Anti-Judaism originated in ancient times as a national hatred against the Jews, later assuming distinctly religious overtones.[66] Anti-Semitism, in contrast, "is the modern form of the ancient prejudice against the Jew; it bases its opposition to the Jews on the *race* theory."[67] Notwithstanding Judge Hall's conclusions, the nature of the defendant's actions indicate a racial, not a religious motivation. Defendant's malevolent slogans did not denounce the Jewish religion. The use of Nazi terminology and symbols clearly focused on the plaintiff's alleged *racial* inferiority.[68] The proposition that the attacks were religiously motivated because the defendants vandalized synagogue walls weakens under the weight of common sense. A person seeking to discriminate against Blacks on account of their race would not desecrate a Klan hall nor would an anti-Semitic vandal choose the local Catholic church for his scrawling terrorism. The discriminator, like the jackal, takes his victim as he

---

prevalence of private hostility toward Negroes and the need to protect them from the resulting persecution and discrimination." 392 U.S. 409, 428 (1968) (citing Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 2, 17-25). This discussion clearly indicates the idea ("private hostility")/act ("persecution and discrimination") dichotomy inherent in section 1982 and racial discrimination laws in general. Even the dictionary definition of "discrimination" recognizes the dichotomy. According to the dictionary definition, discrimination is "an act based on prejudice." The American Heritage Dictionary of the English Language 376 (William Morris ed. 1973).

63. *See* Georgia v. Rachel, 384 U.S. 780, 804-05 (1966).

64. *See Shaare Tefila Congregation*, 785 F.2d at 530 (Wilkinson, J., dissenting).

65. *See* Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 Geo. L.J. 89, 122-23 (1984) (surnames and physiognomical characteristics not attributable to religious status, but fall closer to "racial" differences).

66. Lee Levinger, Anti-Semitism in the United States 10 (1972).

67. *Id.* at 9-10 (emphasis added).

68. *See supra* notes 3-4 and accompanying text. Nazi persecution of Jews was based neither on religion nor on national origin. Greenfield & Kates, *supra* note 23, at 677-78. "The Nazi discrimination against the Jews was racial in that the Nazis defined the Jews as separate from their 'Aryan' race and maintained that Jews were a physically distinct people." *Id.* at 678.

finds him. The Jewish victims in this case should not go without relief because of social ambivalence about the motives for hatred against Jews,[69] especially when clear evidence of racial motivation exists among the defendants.

Finally, the Fourth Circuit affirmed the district court's granting of defendants' 12(b)(1) and 12(b)(6) motions to dismiss the complaint for failure to state a claim.[70] Dismissal of plaintiff-appellants' claims, despite the requirement that such claims be construed liberally in favor of the claimant, deprived them of the opportunity to present their claims in court. Given the ambiguity surrounding the statutes at issue and the seriousness of the charges, the lower courts should have allowed Shaare Tefila the opportunity to make its case before a jury.[71]

2. Judge Wilkinson's Dissent

Although he concurred with the majority's dismissal of Shaare Tefila's section 1981 claim for lack of state action, Judge Wilkinson found "the erroneous but all too sincere view of defendants that Jews constitute a separate race worthy of humiliation and degradation sufficient to bring the claim within [section 1982]."[72] After reviewing the defendant's depositions, he concluded that they unquestionably considered Jews racially distinct.[73] He criticized the majority's refusal to adopt Shaare Tefila's subjective racial animus test by noting:

> All racial prejudice is the result of subjective, irrational perceptions, which drain individuals of their dignity because of their perceived equivalence as members of a racial group. The Civil Rights Acts of 1866 and 1871 were enacted precisely to halt the spread of violence and hatred by those motivated by such perceptions, and plaintiffs in this case, no less than those in the usual racial discrimination case, have suffered the consequences of abhorrent notions concerning racial identity and its relevance.[74]

Judge Wilkinson argued that discriminatory intent remains

69. *See supra* notes 64-66.

70. Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 525 (4th Cir. 1986), *rev'd*, 107 S. Ct. 2019 (1987).

71. Nevertheless, the Supreme Court could not base its holding on procedural grounds, and thus avoid the merits of plaintiff's section 1982 action. If the Supreme Court affirmed the Fourth Circuit decision on procedural grounds, it would have concurred with that court's judgment that Jews—*as a matter of law*—cannot bring a section 1982 claim. Given the particular facts of this case, such a judgment would have had the same functional effect as a judgment on the merits.

72. 785 F.2d at 528 (Wilkinson, J., dissenting).

73. *Id.* at 529.

74. *Id.* at 528.

the focus not only of section 1981 and section 1982, but that it is inherent in all laws designed to destroy racial prejudice.[75] Noting the historical persecution of Jews based on their alleged racial inferiority, Judge Wilkinson conceded that the civil rights laws will not right every wrong foisted on a Jewish citizen. It only touches those that have an "avowedly racial" aim.[76] He argued against the adoption of a scientific standard to determine "race," dismissing it as "too treacherous for a court seeking to determine the precise coverage of federal law" and "irrelevant to the determination of the protection of a statute addressed to a social phenomenon."[77]

Wilkinson's flexible approach to interpreting the scope of section 1982 is more persuasive than the majority's reading of the statute. He makes common sense observations regarding the nature and process of racial discrimination, then neatly fits plaintiffs' claim within that discussion. Wilkinson's opinion recognized what the majority's did not: that few racists consult sections 1981 and 1982 and the case law interpreting it before they decide to discriminate. They simply form an erroneous, irrational belief based on their own misperceptions of race and its relevance, then harm an innocent party.

B. Al-Khazraji v. Saint Francis College

A Third Circuit Court of Appeals decision upholding a section 1981 claim by a naturalized United States citizen of Arab extraction offers further insight into the conceptual quagmire encountered in attempting to objectively define race in the racial discrimination context.

Majid Ghaidan Al-Khazraji, a naturalized United States citizen born in Iraq, filed suit against Saint Francis College under various federal anti-discrimination statutes, including 42 U.S.C. § 1981, challenging the college's refusal to grant him tenure following his fifth year of teaching.[78] The District Court for the Western District of Pennsylvania dismissed some of his claims and granted defendant's summary judgment motion for the remaining claims.[79] Al-Khazraji sought review in the Third Circuit Court of Appeals, which held that ethnic Arabs can rely on section 1981 to remedy

75. *Id.* at 530 (citing case law under title VII, the fifth and fourteenth amendments, and 42 U.S.C. § 1985(3)).

76. *Id.* at 531.

77. *Id.* at 532.

78. Al-Khazraji v. Saint Francis College, 784 F.2d 505 (3d Cir. 1986), *rev'd*, 107 S. Ct. 2022 (1987).

79. *Id.* at 507.

racial discrimination against them.[80]

Although Al-Khazraji sought relief under section 1981 rather than section 1982, the same issue surfaced in that case and *Shaare Tefila*: what is the appropriate standard for determining who shall qualify as a "race" under the statutes rooted in the Civil Rights Act of 1866?[81]

Judge Stapleton's opinion in *Al-Khazraji* began with the recognition that *McDonald v. Santa Fe Transportation Co.*[82] broadened the scope of section 1981 to include racial discrimination against whites as well as Blacks.[83] Noting that the Supreme Court never precisely defined its notion of "race," Judge Stapleton analyzed the legislative history of section 1981 and rejected any scientific definition of race.[84] Judge Stapleton appeared to focus on an objective standard similar to that favored by the *Shaare Tefila* majority, yet he and the Fourth Circuit reached an opposite result.[85]

According to the *Al-Khazraji* court, "Discrimination based on race seems, at a minimum, to involve discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*."[86] Judge Stapleton, like Judge Hall in *Shaare Tefila Congregation*, noted that the *Manzanares* court held that prejudice depends upon the attitudes and practices of the community.[87] Both the *Al-Khazraji* and *Shaare Tefila Congregation* majorities supported using the objective common understanding test.[88]

The Third Circuit and the Fourth Circuit used the same objective test for non-Black minority groups, yet they arrived at different results. Two rationales explain the anomoly: either (1) the Arab plaintiff in *Al-Khazraji* simply demonstrated sufficient objective physical distinctions to qualify under the objective interpretation of section 1981, while the Jewish plaintiffs in *Shaare Tefila* did not, or (2) the inapposite results point to inherent weaknesses

80. 784 F.2d at 508-09.

81. *Id.* at 514.

82. 427 U.S. 273 (1976).

83. 784 F.2d at 515 (citing *McDonald*, 427 U.S. at 287-96).

84. *Al-Khazraji*, 784 F.2d at 515-17.

85. Both defendants in *Shaare Tefila Congregation* and *Al-Khazraji* filed motions for summary judgment. The Fourth Circuit affirmed the district court's dismissal of Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 528 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1987), while the Third Circuit reversed the district court's dismissal of *Al-Khazraji*, 784 F.2d at 519. *See supra* notes 70-71 and accompanying text.

86. *Id.* at 517 (emphasis in original). *See also supra* notes 60 & 65. Some argue Jews do, in fact, have physiognomically distinct characteristics. *See infra* note 124.

87. *Al-Khazraji*, 784 F.2d at 517; 785 F.2d at 526-27.

88. *See id. See also Shaare Tefila*, 785 F.2d at 526-27.

in using an objective test to determine the existence of racial discrimination. The latter explanation is more persuasive because the primary focus in determining whether an act of racial discrimination has taken place should be the defendant's motive and state of mind.[89] In addition, the common understanding test offers little help given the general dubiousness of racial classifications, and the specific social ambivalence about the racial identity of Jews.

III. The "Racial Character" of Historical Persecution Against Jews

> Six million Jews did not die in the holocaust as a result of difference in religious doctrine; they were the victims of an avowedly racist Nazi ideology that measured jewishness by blood rather than belief.[90]

The racial perceptions of the defendants in this case are indisputable. Their words and the adoption of slogans embraced by the Ku Klux Klan and the Nazis, two groups notorious for their avowedly racial hatred of Jews, manifests an open social wound festering for centuries.[91] Indeed, one author succinctly portrayed this phenomenon: "In medieval times hostility to the Jew, whatever its underlying social or psychological motivations, was defined primarily in religious terms. From the fifteenth century onward this was no longer true, and Jew hatred was redefined, becoming first partly, and then, at least in theory, wholly racial."[92] Nazi theory and practice is premised on the alleged racial superiority of the Aryan race (supremacy over Jews).[93] As this incident vividly illustrates, anti-Semitic attacks against Jews and their property by white supremacists continue.[94]

---

89. *See supra* notes 64-69 and accompanying text.

90. Amicus Curiae Brief of Anti-Defamation League of B'nai B'rith in Support of Granting Certiorari at 15, *Shaare Tefila Congregation* (No. 85-1544).

91. *Id.*

92. *Id.* (citing Bernard Lewis, Semites and Anti-Semites 81 (1986)).

93. *Shaare Tefila Congregation*, 785 F.2d at 531 (Wilkinson, J., dissenting). The reader should not be misled into thinking that the Nazis cornered the market on racist theories claiming Jewish inferiority. For example, the "restrictionist" immigration policy imposed by the U.S. following World War I utilized a quota system to keep so-called "inferior" groups, such as the Jews, from entering the country. Those who spearheaded the "restrictionist" drive subscribed to the theory that:

> American greatness lay in the intrinsic superiority of its "Nordic" population—the first Anglo-Saxon settlers and the old immigrants, who supposedly blended smoothly into American life because they were of the same "race." The new immigrants [especially the Jews] were another breed altogether, members of lower races whose "immemorial hereditary tendencies" rendered them incapable of contributing anything positive to the nation. Indeed, they were a menace.

Lance Liebman, Ethnic Relations in America 14 (1982).

94. *See Shaare Tefila Congregation*, 785 F.2d at 531. The Anti-Defamation League of B'nai B'rith estimated in its 1985 Annual Audit of Anti-Semitic Incidents

The peculiar "racial character" of anti-Semitism at issue here distinguishes it from the pure religious discrimination suffered by Catholics, Protestants, and other religious groups.[95] A Catholic's section 1982 claim alleging discrimination based solely on his or her Catholic faith would be denied. Likewise, if Shaare Tefila founded its claim solely on alleged religious discrimination, section 1982 would offer no remedy.[96] The unchallenged facts of this case, however, dispel any notion that religious motives rather than racial motives supported defendant's actions. When defendants repeatedly reveal and admit racial hatred and racial animus, the Court should have given greater consideration to their unequivocal admissions.[97]

Courts have referred to the "racial" character of prejudice

---

1 (1986) that there were 638 incidents of anti-Semitic vandalism against Jews in the United States. In addition to property damage, anti-Semitic physical assaults against Jews and anti-Semitic threats and harassment of Jewish institutions reportedly totaled 306.

95. *See Shaare Tefila Congregation*, 785 F.2d at 529-30 (Wilkinson, J., dissenting) (admitting that although Jews are not a distinct race, discriminators have historically based their hatred of Jews on supposed racial distinctions). *Compare with* 785 F.2d at 528 (Murnaghan, J., concurring). Judge Murnaghan reasoned against adopting the notion that a section 1982 discrimination claim against Jews may be founded on misperceptions. To do so would stretch section 1982 to give "ill-mannered and unreasoned fracases" such as the continuing conflict between Irish Catholics and Protestants unwarranted status as a civil rights controversy. *Id.* at 528. Instead, he advocated that the proper forum for such controversies should be state courts. *Id.* His argument, however, is unpersuasive because it ignores the uniquely racial character of the historical persecutions against the Jews. Neither Catholics nor Protestants can offer credible historical proof that they suffered from *racial* prejudice.

96. *See* 785 F.2d at 529-30 (Wilkinson, J., dissenting) (discussing emphasis on "racially discriminatory animus" or discriminatory intent as an element of a section 1982 claim).

97. Judge Wilkinson notes that the paintings on the synagogue aligned defendants with the Ku Klux Klan and Nazis, two well-known purveyors of *racial* anti-Semitism. Furthermore, Wilkinson states:

> Depositions of defendants reveal that they understood the message of these groups and ascribed to their racial theories. Defendant Heine, for example, understood the Nazis wanted to develop a superior race, one distinct from the Jewish race. Defendant Hunt believed that the phrase "Dead Jew" would make a Jew uncomfortable because "it's an insult to your race." Thus, there is no question that defendants considered Jews to be a racially distinct group.

Id. at 529 (Wilkinson, J., dissenting).

A federal district court in California noted: "The history of 'racial prejudice' against Jews throughout Europe and in this country appears to be so well known as almost not to require documentation." Ortiz v. Bank of Am., 547 F. Supp. 550, 567 (1982). The court added: "Thus, even if the Supreme Court's observation that religious discrimination is not covered by section 1981, it does not necessarily follow that discrimination against Jews would be excluded." *Id. But see Shaare Tefila Congregation*, 785 F.2d at 527, where the court simply concludes that "discrimination against Jews is not racial discrimination." *See also Shaare Tefila Congregation*, 606 F. Supp 1504, 1507-08 (D. Md. 1985), where the defendants argued that although

and discrimination against Jews in legal contexts other than the civil rights area. Judicial opinions from many state courts describe inflammatory, racist remarks directed at Jews.[98] Past judicial acknowledgments of the racial character of discrimination against Jews demonstrate that derogatory characterizations of Jews based on alleged racial distinctions are more widespread than the *Shaare Tefila Congregation* majority concluded under its highly questionable objective standard. The bigoted attorneys in these state court cases would not have offered such disparaging remarks without hoping they would have the desired prejudicial effect on the jury. *A fortiori*, appellate judges would not have reversed on the basis of these remarks unless they had the prejudicial effect on the jury intended by counsel. If the jurors, representative of the community, lacked these prejudices, the anti-Semitic remarks would constitute harmless error. The prejudicial nature and effect of these comments are similar to the acts at issue in *Shaare Tefila Congregation*. Unlike some earlier courts, the *Shaare Tefila Congregation* court failed to adequately consider the widespread occurrence of *racial* slurs against Jews.

IV. The Inherent Nature of Racial Discrimination Requires a "Subjective" Test in Determining Racial Animus

In molding a test for racial animus, one must consider the nature of alleged racial discrimination. "[R]acial discrimination is based on the misperception of the relevance of racial identity. Bigots are motivated by the belief that those of another race are inferior and hence worthy of physical, mental, and social repression."[99] Sections 1981 and 1982 prohibit "*all* racially motivated deprivations

---

plaintiffs used a "pleading artifice" to assert race discrimination, plaintiffs' claims amounted to religious discrimination not actionable under section 1982.

Defendants correctly argued that section 1982 offers no relief for victims of purely religious discrimination. This defense creates some interesting theoretical possibilities. If plaintiffs brought suit under a federal law prohibiting religious discrimination would defendants then have argued that Nazi slogans and symbols indicated a racial, rather than religious motivation? Would such a defense succeed?

98. Freeman v. Dempsey, 41 Ill. App. 554 (1891) is illustrative. An Illinois appellate court held an attack leveled against a Jewish defendant by opposing counsel was highly improper and reversible, prejudicial error. The opposing counsel denounced the defendant as "[a] Jew, a Christ-killer, a murderer of our Savior." *Id.* at 556. The court found, "[a]s to the other epithets applied to him, denunciatory as they are of the whole *Jewish race*, it is almost inconceivable that they should be uttered or tolerated in the trial of a cause of justice." *Id.* (emphasis added). *See also* Loeb v. Webster, 213 Ala. 99 (1925); People v. Simon, 80 Cal. App. 675, 252 P. 758 (1927); Colker v. Connecticut Fire Ins. Co., 224 Ky. 837, 7 S.W.2d 502 (1928).

99. *Shaare Tefila Congregation*, 785 F.2d at 530 (Wilkinson, J., dissenting).

of the rights enumerated in the statute."[100] By virtue of words such as "misperception," "belief," and "motivated," "racial discrimination" must be premised on a finding of discriminatory intent.[101]

In a section 1982 action, defendants are motivated by a false belief that their victims' "racial" status marks them as candidates for repression. Defendants engage in discriminatory behavior to injure victims, knowing their conduct is certain to do so. For example, defendant Thomas Hunt testified that he thought a Jew seeing the phrase "Dead Jew" painted on a synagogue would feel uncomfortable because "[i]t's an insult to your race."[102]

The propriety of a decision to classify a group of persons as a "race" depends on an individual's reason for doing so.[103] According to one social scientist, "[t]he causes of intolerance rest, not in what men say but in what they do. The reasons alleged for dislike and suspicion of the Jew are valuable merely for showing the state of mind in the anti-Semite himself, not for revealing the actual reasons for his attitude."[104] The use of a subjective test focusing on "racial animus" recognizes the merit of this proposition. It merely asks what drove the particular defendant to act in a discriminatory manner.

Conversely, an objective test, such as the common understanding test, requires the aggrieved plaintiff to go one step beyond this. The plaintiff must prove both the "racial animus" of the particular defendant and its existence in a reasonably sufficient number of persons.[105] Yet it was the individual, rather than society, that discriminated against the plaintiff. To argue that there be a common understanding and belief in an inherently irrational concept is anomalous. "Prejudice," wrote Samuel Johnson, "not being founded on reason cannot be removed by argument."[106]

A subjective test focusing on racial animus narrows the section 1982 inquiry to its proper focus: the individual. The objective common understanding test spreads the inquiry into irrelevant territory when it goes beyond the individual's beliefs and examines

100. *Id.* (quoting Jones v. Mayer Co., 392 U.S. 409, 426 (1968) (emphasis in original)).

101. *Id.*

102. *Id.* at 529.

103. *See supra* notes 42-51 and accompanying text.

104. Levinger, *supra* note 66, at 18.

105. *Shaare Tefila Congregation*, 785 F.2d at 526. After reviewing the *Manzanares* decision, the *Shaare Tefila Congregation* majority concluded: "[T]he Tenth Circuit emphasized that Mexican-Americans, as a group, are commonly treated differently from Anglos as a group. We do not find the position of Jews in this society to be analogous to that of Mexican-Americans or others commonly considered to be nonwhites." *Id.* at 526-27.

106. Laurence J. Peter, Peter's Quotations: Ideas For Our Time 460 (1977).

societal beliefs. It requires the plaintiff to prove not only that the "bad apple" which killed Snow White was poisoned, but that the taint existed in the entire tree.

V. The English Approach to Racial Discrimination: The Race Relations Act of 1976

Great Britain and the United States share a common law heritage which effects the way our respective judicial systems view the law and their role in interpreting it. Each system has continually examined relevant developments in the other, hoping to achieve the aims of justice, fairness, and consistency. An examination of England's Race Relations Act of 1976[107] sheds critical light on the same issues involved in defining the scope of section 1982 protection. Such an examination would have enabled the Supreme Court to meet these time-honored goals.

England's statutory approach to racial discrimination differs significantly from sections 1981 and 1982. In prohibiting both direct and indirect discrimination, the Race Relations Act of 1976 defines the term "racial group" broadly to include any group "defined by reference to colour, race, nationality or ethnic or national origins."[108]

The U.S. Congress imparted only an ambiguous indication of its intended interpretation of "race" under the Civil Rights Act of

---

107. Race Relations Act, 1976, ch. 74.

108. Race Relations Act, 1976, ch. 74, Part I, § 3(1).

Meaning of "racial grounds," "racial group" etc.

3.-(1) In this Act, unless the context otherwise requires—"racial grounds" means any of the following grounds, namely colour, race, nationality or ethnic or national origins;

"racial group" means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and reference to a person's racial group refer to any racial group into which he falls.

(2) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Act.

(3) In this Act—

(a) references to discrimination refer to any discrimination falling within section 1 or 2; and

(b) references to racial discrimination refer to any discrimination falling within section 1 and related expressions shall be construed accordingly.

(4) A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1) must be such that the relevant circumstances in the one case are the same, or not materially different in the other.

Id. § 3.

1871.[109] England's Parliament, however, clearly indicated its intent to construe "racial group" liberally. One commentator, reviewing a House of Lords decision under the Race Relations Act of 1976, concluded:

> It is clear that the House of Lords repudiated entirely any attempt to equate the term "ethnic" with the biological notion of race. Parliament, it considered, could not have intended that membership of a racial group should depend upon scientific proof that a person possessed distinctive biological characteristics, *assuming that they existed*. This suggests that both the terms "ethnic" and "race" used in the Act are considered by the House to be socially, not biologically, defined.[110]

The House of Lords reviewed *Mandla v. Lee*,[111] a case involving a discrimination claim by a Sikh minor seeking admission to a private school. The school headmaster, unwilling to bend school policies, refused to admit the boy unless he removed his turban and cut his hair. The minor's father alleged discrimination and sued under the Race Relations Act of 1976. Two lower courts refused his claim, concluding that Sikhs are not a racial group.[112] The House of Lords reversed, concluding that the term "ethnic" in section 3 of the Act embraced Sikhs because it should be interpreted in a broad cultural and historical sense.[113]

The *Mandla* opinion offers several points relevant to *Shaare Tefila* and *Al-Khazraji*. First, it recognizes the close similarity, if not synonymity, of the terms "race" and "ethnic." Lord Fraser cited the widespread confusion engendered by use of the term "race" by quoting from an earlier case: "Moreover, 'racial' is not term of art, either legal or, I surmise, scientific. I apprehend that anthropologists would dispute how far the word 'race' is biologically at all relevant to the species amusingly called homo sapiens."[114] Fraser concluded that "[t]he word 'ethnic' still retains a racial flavour but is used nowadays in an extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin."[115]

Second, Lord Fraser recognized the peculiarly subjective na-

---

109. Enforcement Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144 (codified at Rev. Stat. §§ 1977-1978 (1874); current version at 42 U.S.C. §§ 1981-1982 (1982)).

110. Ian McKenna, *Racial Discrimination*, 46 Mod. L. Rev. 759, 762 (1983) (emphasis in original) (*reviewing* Mandla v. Lee, [1983] 2 W.L.R. 620 (H.L.(E.))).

111. [1982] 3 W.L.R. 932 (C.A.), *rev'd*, [1983] 2 W.L.R. 620 (H.L.).

112. [1982] 3 W.L.R. at 934.

113. [1983] 2 W.L.R. at 625.

114. *Id.* at 624 (quoting Lord Simon's opinion in Ealing London Borough Council v. Race Relations Board, [1972] 2 W.L.R. 71, 83 (H.L.(E.))).

115. *Id.* at 625.

ture of racial prejudice.[116] In his opinion he noted that "[a] person may treat another relatively unfavourably 'on racial grounds' because he regards that other as being of a particular race, or belonging to a particular racial group, even if his belief is, from a scientific point of view, completely erroneous."[117] The common understanding test employed by the Fourth Circuit in *Shaare Tefila* ignores this observation.[118]

Finally, Lord Fraser set up seven criteria he considered important in determining whether a particular group qualifies as an ethnic group. Given the murkiness of the term "race," and its similarity to the word "ethnic," these criteria could help United States courts determine whether a group qualifies as a "race" under section 1982. Lord Fraser considered the first two characteristics essential and the remainder simply relevant.[119] The characteristics are as follows:

> (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive;
> (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religous observance;
> (3) either a common geographical origin, or descent from a small number of common ancestors;
> (4) a common language, not necessarily peculiar to the group;
> (5) a common literature peculiar to the group;
> (6) a common religion different from that of neighbouring groups or from the general community surrounding it;
> (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.[120]

Even a cursory glance reveals that Jews meet both the "essential" and "relevant" characteristics.[121] The adoption of similar

---

116. *Id.* Lord Fraser also argued in dicta that the English statute, by virtue of its enumerated characteristics, protected converts and those who marry into a particular group, as well as those born into the group. The statute does not distinguish between those born into a particular racial group and those who later adhere to it.

117. *Id.* (gender-specific pronouns in original).

118. *See supra* notes 64-69 and accompanying text.

119. *Mandla*, [1983] 2 W.L.R. at 625.

120. *Id.*

121. Jews fulfill the seven criteria outlined in *Mandla*:

(1) Despite their fragmentation, most European Jews emigrating to the United States

> [c]ould recall, or had directly come from, a traditional Jewish society. The communal thrust of Judaism—the sense of being a community of fate, the discipline imposed by the halacha, and the obligation to bretheren in distress—was still at the heart of their religio-ethnic out-

criteria by the Supreme Court would have had a two-fold effect. It

look. Whatever their land of origin, American Jews saw themselves as part of Kelal Israel, the totality of Israel.

Arthur A. Goren, Dimensions of Ethnicity: The American Jews 11 (1982). Thomas Sowell concurs in Goren's view, noting,

> Although divided by national cultures, and even internal differences of religious theory and practice, Jews shared not only their ancestral origins in ancient Israel and a core of common religious beliefs and traditions but also centuries of history as a minority subjected to varying degrees of hostility wherever they went.

Thomas Sowell, Ethnic America 70 (1981).

(2)

> When other groups emigrated, they were like leaves which social winds scattered to a foreign land; the tree from which they were blown remained rooted in the old territory. When Jews emigrated, it was not just leaves that were blown, nor even branches, but whole segments of the tree.

Charles Bezalel Sherman, The Jew Within American Society 122 (1965). Other groups had never experienced minority status until arriving in the United States, but Jews had lived as strangers in other countries for centuries. *Id.* According to Sherman,

> Others came to their new country with one culture; the Jews came with two, and frequently more than two, cultures. One culture—their own—they carried deep *within* themselves, within their spiritual and psychic being. The other they bore *upon* themselves, like an outer garment. Each time they trod new ground, they changed their outer garment, but always they succeeded in retaining at least in part their inner culture.

Id. at 123.

(3) "Jews perceived their ethnic existence as part of an historic and religious continuum that extended back to biblical times." Goren, *supra*, at 4. Indeed, Sowell notes that the diaspora—the dispersion of Jews throughout Europe and the world—began when Roman armies conquered Palestine in 70 A.D., forcing Jews from their "ancestral homeland." Sowell, *supra*, at 70. The diaspora explains why Jewish emigration to the United States occurred in three phases corresponding to the Jewish subgroups: Sephardic Jews, German Jews, and Eastern European Jews. *Id.* at 75-82. *See also* Sherman, *supra*, at 57-83.

(4) & (5) Yiddish language and literature, uniquely Jewish cultural products which flourished in the United States during the first half of the 20th century, have nearly died. Sherman, *supra*, at 174. Nevertheless, Hebrew language and literature retains vitality in the Jewish community after two millenia. *Id.* Jews "have also produced a considerable Jewish culture in English—practically the only substantial ethnic culture in English—thus mitigating the effects of linguistic disintegration and reducing the impact of assimilatory pressures." *Id.*

(6) While Jewish group existence transcends national boundaries, one cannot conclude that Jews are merely a religious group rather than a people. *Id.* at 126.

> The very fact that Judaism was the faith of only one group in the whole world placed religion itself at the very heart of Jewish ethnic identity . . . . What is significant is that no other ethnic group displayed any desire to break the Jewish monopoly on Judaism and that the Jews themselves do not extend themselves to seek proselytes.

Id.

(7) Jews have experienced severe oppression and are frequently classified as a minority. "While all other [white ethnic] minority groups [in the United States] are minorities only in certain of their relations and otherwise belong to the majority, the Jews are a minority in all significant social relations." *Id.* at 57. Sherman argues that all ethnic groups demonstrate a sense of "national resentment" against

would have given section 1982 a necessary broad scope and protected groups such as Jews. More importantly, these criteria would have given lower courts uniform guidelines for interpreting section 1982. The Supreme Court's citation of dictionary definitions and remarks made by legislators while considering the Civil Rights Act of 1866 worked well in this case because both sources mentioned Jews and Arabs. This simple analysis will not work, however, when ethnic or minority groups not known or discussed by legislators in 1866 are discriminated against on the basis of "race." The Court's convenient analysis would have worked a great injustice in this case had legislators not discussed Jews on the record or if dictionary editors had ignored them. Our statutory commitment to "racial" and ethnic equality should depend on more than the mere fortuity of being mentioned during 120-year-old congressional debates or in ancient dictionaries.

A proponent of a narrow interpretation of section 1982 might argue that the English approach has no relevance in *Shaare Tefila Congregation* because 42 U.S.C. § 1982 refers only to "race."[122] Thus, such proponents would argue that "ethnic" or other related terms need not be considered. Such an objection ignores a critical difference between the two statutes. The precursors to 42 U.S.C. § 1982, the Civil Rights Acts of 1866 and 1871,[123] originated over a century ago. Only eleven years have passed since the Race Relations Act of 1976. Our understanding of the complex anthropological, social, and psychological factors that influence a discriminator's conscious or unconscious decision to define a particular group as a "race" have changed and advanced since 1866.[124]

---

the people who kept them in bondage. "Among Jews, this resentment was directed against virtually the entire world, because they were everywhere, if not persecuted, at least discriminated against." *Id.* at 58.

A New Zealand court found that Jews are an ethnic group under that nation's Race Relations Act. King Ansell v. Police, [1979] 2 N.Z.L.R. 531. Although New Zealand's Act is structurally different than the British statute, it raised the identical issue reviewed in *Mandla*, according to Lord Fraser. [1983] 2 W.L.R. at 625.

122. See *supra* note 9, for text of 42 U.S.C. § 1982.

123. Enforcement Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144 (codified at Rev. Stat. §§ 1977-1978 (1874); current version at 42 U.S.C. §§ 1981-1982 (1982)).

124. *See generally* Thomas F. Gosset, Race: The History of an Idea in America (1975). Nineteenth century anthropologists based their racial classification on perceived physical differences between groups. *Id.* at 58-81. During the 1800s, various anthropologists used the following as indicia of racial distinctions: skin color, skull size and shape, facial features, brain size and convolutions (phrenology), hair structure, and even body lice. *Id.* According to Gosset, this confusion manifested itself in the number of races recognized by individual anthropologists. The number varied from three to 63, and some "scientists" included species within each race. *Id.* at 82. Gosset concludes:

> There was a fundamental fallacy behind this whole vast nineteenth-century search for methods to measure race differences. Many a racist

Congress's decision to recodify R.S. § 1978 as section 1982 should not be read as codifying the outmoded, simplistic notions of race and racial discrimination held by the framers of the Civil Rights Act of 1866. Instead, the recodification should be interpreted in light of advances in the natural and social sciences available to the twentieth century Congress which supported section 1982. England's Parliament clearly recognized this, and several United States courts have recognized this evolution of thought as well.[125]

> awaited breathlessly some scheme of race classification which would withstand the testing methods of science, and was prepared once such a method was found—to pile mountains of *ad hoc* theory concerning the character and temperament of races into any discoveries concerning their measurable differences. How little the search really mattered may be seen in the tendency of racists, when a physical basis of measurable race differences eluded them, to assume immense innate psychological differences in any case. They did not really need proof for what they *knew* was there.

Id. at 82-83 (emphasis in original).

When racial theorists found physical characteristics an infertile source to buttress their prejudice, they turned to other theories. During the nineteenth and into the early twentieth century, researchers used the Teutonic Origins theory and studies of language and literature to divide humankind into various races. *Id.* at 84-122.

Herbert Spencer's Social Darwinism, which theorized that the rigors of a free economy separated the strong (rich) from the weak (poor), was combined with existing racist theories and achieved popular support which remains even today. *Id.* at 144-73. "Its central idea," writes Gosset, "is that the nonwhite races are oppressed, poverty-stricken and inferior social status for no other reason than their innate lack of capacity." *Id.* at 173.

The popularity of racist theories seemed to grow in proportion to the rate of United States immigration and reached a peak in the 1920s. Although fanatics like the KKK represented the "emotional" aspect of United States racism, Gosset argues that the biggest threat came from social and natural scientists "who made racism respectable." The views of these scientists were popularized through magazines such as the *Saturday Evening Post*. One of the *Post*'s writers, commenting on European emigration, warned of the "mongrelization" of the United States. *Id.* at 402. The Nordic founders of our country, according to Kenneth L. Roberts, made the United States into a great nation. "But if a few more million members of the Alpine, Mediterranean, and *Semitic* races are poured among us, the result must inevitably be a hybrid race of people as worthless and futile as the good-for-nothing mongrels of Central America and South Eastern Europe." *Id.* at 402.

Since the 1920s, cultural anthropology has commanded the greatest support in explaining human differences. It rejects social interpretation by means of race theories in favor of an explanation founded upon cultural factors. *Id.* at 416.

Unfortunately, this academic trend has not filtered down to the proletariat, "since millions undoubtedly still believe that character and intelligence and human worth are largely matters of race." *Id.* at 424.

125. The following courts have allowed "nontraditional" section 1981 plaintiffs to bring actions: Al-Khazraji v. Saint Francis College, 784 F.2d 505 (3d Cir. 1986), *cert. granted*, 107 S. Ct. 62 (1986) (Arab-American); Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979) (Mexican-American); Banker v. Time Chem., Inc., 579 F. Supp. 1183 (N.D. Ill. 1983) (East Indian); Baruah v. Young, 536 F. Supp. 356 (D. Md. 1982) (nonwhite native of India); Ortiz v. Bank of Am., 547 F. Supp. 550 (E.D. Cal. 1982) (Puerto Rican-Americans); Pollard v. City of Hartford, 539 F. Supp. 1156 (D. Conn. 1982) (Hispanics); Aponte v. National Steel Serv. Center, 500 F. Supp. 198 (N.D. Ill. 1980) (Mexican-American); Khawaja v. Wyatt, 494 F. Supp. 302 (W.D.N.Y.

The Supreme Court should have recognized the trend as well, and given lower federal courts more sophisticated guidelines upon which to base their section 1982 rulings.[126]

Conclusion

The United States Supreme Court properly held that Jews may state a cause of action under 42 U.S.C. § 1982. Its reliance, however, on a handful of nineteenth century dictionaries and encyclopedias in addition to section 1982's murky legislative history did not go far enough. It failed to fully articulate and protect the basic premise behind section 1982: to punish discrimination based on race.

The ambiguous legislative history of the statute allows modern courts to interpret "race" broadly, consistent with current understanding of the social and psychological complexities underlying all prejudice. Scientific definitions of "race," moreover, are arbitrary. An objective standard based on physical characteristics, such as skin color, fails to punish those who subjectively believe in racial differences and act with a racially discriminatory intent. In addition, racial discrimination and prejudice are inherently subjective concepts lending themselves naturally to a subjective analysis, rather than an objective test. Furthermore, England's Race Relations Act of 1976, and Lord Fraser's interpretation of it in *Mandla v. Lee*, provide a framework for defining the scope and application of section 1982. Finally, the "racial character" of discrimination against Jews indicates that they should be a protected group for section 1982 purposes.

1980) (Pakistani-American); Lopez v. Sears, Roebuck & Co., 493 F. Supp. 801 (D. Md. 1980) (non-white Spanish surnamed Maylay (brown) permanent resident alien); Tayyari v. New Mexico State Univ., 495 F. Supp. 1365 (D.N.M. 1980) (Iranian noncitizens); Ridgeway v. International Bhd. of Elec. Workers Local 134, 466 F. Supp. 595 (N.D. Ill. 1979) (Hispanic); Cubas v. Rapid Am. Corp., 420 F. Supp. 663 (E.D. Pa. 1976) (Cuban American). *But see* Kurylas v. United States Dep't of Agric., 373 F. Supp. 1072 (D.D.C. 1974), *aff'd*, 514 F.2d 894 (D.C. Cir. 1975) (Polish-American); Budinsky v. Corning Glass Works, 425 F. Supp. 786 (W.D. Pa. 1977) (Slavic).

126. The author recognizes that the Court probably preferred to avoid "judicial legislating." Nevertheless, its refusal to offer more defined standards for section 1982 will leave that task to lower courts, resulting in a patchwork quilt of conflicting, inconsistent opinions as courts struggle to include or exclude ethnic or racial groups not mentioned in the sources cited by the Court.