How Jewish Americans Became Legally "Racialized"

Max Planck Institute for the Study of Religious and Ethnic Diversity
Annalise E. Glauz-Todrank

Preamble: I had originally titled this paper, "How Jewish Americans Became Legally 'Racialized' in the Past," but not only did that seemed too awkward, it also didn't resolve what I actually wanted to convey: **that "racialization" for Jewish Americans can be historically fluid**. It's convenient for the Supreme Court not to make too many shifts in the term "race" as it decides cases related to it—better to think about how it was defined in the past in a particular legislative ruling. What I want to do today is to demonstrate that the Supreme Court in 1987 deemed that Jews had been racialized in *1866* as "Hebrews"—with the Civil Rights Act of that year—as they determined that the defacement of a synagogue in 1982 with Ku Klux Klan and Nazi graffiti constituted a racist activity. Therefore, although the Court has never deemed "race" a *socially constructed category*, we can think of Jewish Americans *today* as having *been* racialized, due to their racial marginalization in the *past*; and they are continually *allowed* to do so as well, based on the precedent of *Shaare Tefila Congregation v. Cobb* (1987).

Let's begin the story: Late in the evening of November 1, 1982, the members of Shaare Tefila's Board of Trustees, a synagogue affiliated with the Conservative movement, started leaving their synagogue meeting. It was the Monday before voting day in Silver Spring, Maryland. Jack and Bess Teller had parked across the street and were the first to leave. When they arrived at their car, they noticed spray paint on the front of their sandalwood-colored Oldsmobile. Looking more carefully, they recognized two swastikas. One was a confused mess, the other one was clearly identifiable as the Nazi symbol. Enraged, they took the car and drove home. From there, Jack called President Maurice Potosky and Executive Director Marshall S. Levin who were still talking at the synagogue and informed them about the swastikas on his car. Disturbed, they

headed outside the white building and found one shocking image and caption after another, spray-painted either in red or black: “Death to the Jude,” “Death to the Jews, “Toten Kampf Raband,”[i] a large image of a flaming cross, a Nazi eagle, and the letters “SS” on a cement pipe used as playground equipment. Perhaps the worst graffiti was spray-painted over a door: “In, Take a Shower, Jew.” Horrified, Potosky and Levin called Rabbi Martin S. Halpern, who had been at home that evening. He came immediately, and they discussed what to do.

Eliminating antisemitic graffiti and keeping it from the non-Jewish community was a common practice in the 1980s. The prevailing sentiment within the Jewish community was that instances of antisemitic[ii] vandalism should be immediately cleaned up and quietly removed. Better if the surrounding community and the press did not find out. Better to keep it quiet so that “copycat” crimes did not occur. Many Jewish Americans viewed these instances of defacement an embarrassment to the Jewish community.[iii] As the *Washington Post* three days after the incident reported: “Jewish leaders say that statistics do not accurately reflect the true extent of such incidents, since there is a great reluctance on the part of many victims to report such acts for fear of encouraging their repetition.”[iv]

That November night, the three men at the synagogue puzzled over the practicality of removing the paint.[v] Shaare Tefila served as the local polling station. When the voters arrived the next day, they would not fail to see the six-foot Nazi eagle and the words painted on the walls if they remained there. The men would need to hire someone with a sand-blaster, someone who could literally blast the paint off the walls. Where would they find such a person late at night?

Of the three men, Marshall Levin was a young executive director. For his doctoral work, he had studied Jewish identity and the Shoah, and focused particularly on its effects on female survivors. When the vandalism incident occurred at Shaare Tefila, Levin contextualized it in

terms of other violence committed against Jews, and he thought about these acts as *crimes*, emphasizing the role of law. Levin considered the negative impact of the vandalism at Shaare Tefila on the entire population of Silver Spring, rather than only on the Shaare Tefila members who had directly experienced the attack. Levin tried to convince Potosky and Rabbi Halpern that if the congregation left the graffiti on the building, the larger community would respond by uniting with them against the act.[vi] In the end, Levin persuaded them. The decision marked a turning point for antisemitic vandalism in the local area.[vii]

When the press came to film the desecration, Levin told them that they must return on the following Sunday for the cleanup day that the members of the Shaare Tefila youth group were organizing. That day, between six hundred and one thousand people showed up to support the congregation. True to Levin's belief, the community embraced rather than abandoned the members of Shaare Tefila. Their story made national and international news.[viii] Shaare Tefila's reaction to the vandalism began to shift ideas about the sociological implications of permitting non-Jews to witness antisemitic graffiti.

Some time after the defacement, someone overheard a person bragging about the vandalism in a store and, thanks to this lead, the police eventually identified eight White young men who together had participated in various crimes that night. Two of them were found guilty of defacing the synagogue and one for spray-painting the Teller's car. With respect to the vandalism, however, the state of Maryland had no law pertaining to the antisemitic *message* that the vandals spray-painted on either of these buildings. According to the law, if they had painted only their initials, they would have been guilty of the same crime.

The Jewish Advocacy Center (JAC), a legal organization based in Washington DC, wished to pursue the act further, and sought to file a civil suit that would make antisemitic

behavior a federal crime. The JAC, founded by Irvin Shapell and Kevin Lipson, was designed based on the Southern Poverty Law Center (SPLC), which had recently won a key case against the Ku Klux Klan that resulted in a major financial loss for the them.[ix] Like the SPLC, the JAC aimed to use the law as a tool in the larger social battle to protect civil rights on an everyday basis.

The JAC hired several lawyers at Hogan and Hartson to defend the plaintiffs, Shaare Tefila, in the case of *Shaare Tefila Congregation v. Cobb*.[x] They utilized their best option, the Civil Rights Act of 1866, passed to further protect the rights of the 13th Amendment. This Amendment prohibits slavery, but with an exception for any person who commits a crime. The Civil Rights Act guarantees the same rights to *all* citizens that it does to *white* citizens. In this suit, the plaintiff's lawyers asserted that congregation members were white citizens, but that the vandals *viewed* Jews as an inferior race. The lawyer for the defendants, Deborah T. Garren, dismissed this assertion because Jews—she argued—are members of a *religion*, and thus cannot cite the Civil Rights Act of 1866.

Garren's argument reflected the dominant view in the 1980s that understood Jewish Americans as having been members of a "religion." This view neglected the racialization that Jews had long suffered in Europe, and, to a much lesser degree, in the US. Both Jewish and non-Jewish Americans were impacted by this dominant view. And, even with the many instances of anti-Jewish *racism*, many Jewish Americans and almost all non-Jewish Americans *assume* that Jewish Americans have always been White and members of a religious group.[xi]

After *Shaare Tefila* lost in the Federal District Court and the Fourth Circuit Court of Appeals—because the majority of both courts viewed Jews as "white" and didn't account for the perceptions of the perpetrators—the synagogue and their legal team thought the matter was over.

The case reached the Supreme Court *only* because the Court needed to decide which reasoning was correct regarding the sections of law that originated in the Civil Rights Act of 1866, the Fourth Circuit in which *Shaare Tefila* lost, or the Third Circuit Court—*St Francis College v. Al-Khazraji*—in which Al-Khazraji won.[xii]

The *St. Francis College v. Al-Khazraji* case focused on enforcing contracts: Majid Ghaidan Al-Khazraji was an assistant professor who would have received tenure at St. Francis College had it not been for his Muslim, Iraqi origin. He claimed that the college racially discriminated against him under Section 1981 of the Civil Rights Act of 1866. His lawyer, Caroline Mitchell, had researched the way that race was defined leading up to the time of 1866 in dictionaries and encyclopedias, and determined that, as an Iraqi-American, his ancestry was considered "Arab," which was, under the 1987 definition, a "different branch" of the "Caucasian" race. With that argument, Mitchell won his case.

The Supreme Court agreed with Mitchell about (Muslim) Iraqis and applied that same reasoning to the (Jewish) Shaare Tefila members, who would have been considered "Hebrews" in 1866. Justice Byron White delivered the opinion of the Court in *Shaare Tefila*. He stated, in part:

> As *Saint Francis* makes clear, the question before us is not whether Jews are considered a separate case by today's standards, but whether, at the time [Section] 1982 was adopted, Jews constituted a people that Congress intended to protect. It is evident from the legislative history of the section reviewed in *Saint Francis College*, a review that we need not repeat here, that Jews and Arabs were among the peoples then considered [481 U.S. 615, 618] to be distinct and hence within the statute.

The Supreme Court could racialize these technically "Caucasian" groups: Muslim Iraqi Americans and Jewish Americans only in the *past*…but not in the *present*, because they were considered "White."

On American Census forms in 1980, we do not see options for "Jewish" and "Iraqi," only options for "Black" and "White and other races." In 2020, American dominant discourse presumes both would choose "White," although each of them might write in their "racial" identity under "some other race." Jews today who identify as Black or African American, or with origin in various Asian, American Indian, Alaska Native, Hispanic, Latino, or Spanish countries, *might* check those boxes on the 2020 Census forms, because they might identify with that group. Although judges, in many cases, may attempt to follow these definitions, they have never, according to John Tehranian's article "Performing Whiteness," published in 2000, and *as far as I know* (please correct me, if I'm wrong), up until now, understood race as "socially constructed."[xiii] This means that even though the prevailing narratives have changed over time to conceive of people as "racially" distinct at different points, judges don't necessarily follow the census or government categories, which reflect only the changing narratives anyway.

Even given the *status* of precedent and the nature of American legal definitions that accord with *categories*—such as race or religion—I argue that Americans *still* need a legal system that accords more closely with the **historical fluidity of race** and other such categories. (But because the dominant discourse *also* informs judges—among other people—who decides? Scholars, who focus specifically on these topics?)

---

[i] A misspelling and a reference to the Nazi "death head units."

[ii] Note: I use the spelling "antisemitism," rather than the more common "anti-Semitism," for the same reasons as David Hirsh, who writes antisemitism without a hyphen because "there is no 'Semitism' which antisemitism is against." Antisemitism refers to hatred of Jews not of "Semites" or of people who speak Semitic languages. See David Hirsh, "Anti-Zionism and Antisemitism: Cosmopolitan Reflections," in *The Yale Initiative for the Interdisciplinary Study of Antisemitism Working Paper Series*, Charles Small, Series Editor, 2007.

[iii] Levin, interview by author, New York, July 10, 2008.

[iv] Marjorie Hyer, "Jewish Leader Seeks Action on Vandalism," *Washington Post*, 4 November 1982, Metro Section, Final edition.

[v] Levin, interview.

[vi] For instance, in an interview with the Washington Post, Rabbi Halpern noted: "In the past, the response was often to conceal these things, sweep them under the rug," he says. "But overall, I think publicity is favorable. If you

acquiesce, even with silence, you are bound to encourage more." See Michael Kernan, "The Specter of Anti-Semitism, The Unending Web of Fear," *Washington Post*, 1 December 1982, Style section, Final edition.

[vii] Naomi W. Cohen, "*Shaare Tefila Congregation v. Cobb*: A New Departure in American Jewish Defense?" in *Jewish History* 3, No.1 (1988).

[viii] SEE WASHINGTON POST, JERUSALEM POST, ETC (will cite these articles)

[ix] Kevin Lipson, phone interview by author, May 20, 2009.

[x] *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987).

[xi] Bruce Lincoln, *Discourse and the Construction of Society: Comparative Studies of Myth, Ritual, and Classification* (New York: Oxford University Press, 1989), 3–32, especially.

[xii] *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).

[xiii] John Tehranian, "Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America" in *The Yale Law Journal* 109, no. 4 (Jan. 2000), 842.