

Race Before the Law

Is Judaism a race? A religion? Who gets to decide?

This lesson builds off of scholar Jennifer Glaser's work on how Jewish identity is constructed and understood in the context of US Supreme Court cases. This lesson focuses on one case in particular, Shaare Tefila Congregation vs. Cobb, to unpack how, even in the 1980s, the highest court in the land struggled with how to understand Jews as a group and how to define race. These materials lead us to confront the ongoing challenge of defining and describing Jewish identity. Though today we have more clarity about the histories and ideologies that gave rise to concepts of race and religion, the relationships among Jews, race, and religion remain intertwined and complicated.

In her work, Glaser applies concepts from Critical Race Theory (CRT) to understand what is happening in the context of Supreme Court cases. CRT has been misunderstood and strongly politicized in public conversations about how Americans talk about race, especially when it comes to the education of children. Some facilitators may find that teaching specifically about what CRT is will be helpful to their groups, while others might find that the controversy surrounding it distracts from the content of the lesson. To that end, the section of the lesson introducing CRT is separate from the sections on the Shaare Tefila case. Facilitators might choose to include it or not, and might choose to center it at the beginning of the lesson, allowing participants to incorporate its ideas through their study of the court case. Alternatively, others might choose to include it at the end.

GOALS

- Participants will explore the question of how to categorize Jewishness for themselves.
- Participants will unpack the questions facing Supreme Court justices in the 1980s as they sought to determine whether Jews should fall into the protected category of a law against racial discrimination.
- (optional) Participants will consider key tenets of Critical Race Theory as they apply to this case.

MATERIALS

- Appendix A : Facts and Analysis of Shaare Tefila v. Cobb
- Appendix B: Excerpts from the oral argument of Shaare Tefila v. Cobb
- Optional Audio of the Supreme Court’s oral argument can be found on this website: <https://www.oyez.org/cases/1986/85-2156>
- Optional Video: Jennifer Glaser’s analysis of the case: Race Before the Law.mp4 starting at minute 29
<https://vimeo.com/784632899/e6d7648c8f>
- Optional Video: Jennifer Glaser’s introduction to CRT (1:14-3:46)
<https://vimeo.com/784636716/acc84dbe86>

LESSON

Introductions: To the facilitator, the topic, and the group. What brought you to this session?: 10 minutes

Facilitator introduces the context for the case study: 2 minutes

- Figuring out how to label, or understand the category of “Jewishness” has been something that both Jews and others have struggled with for centuries. For example another scholar in this unit, Shana Sippy, has laid out some of the background of this challenge, and how it has manifested in different times and places. In the wake of the Holocaust in the twentieth century, race “science” was largely debunked as a dangerous and destructive way of thinking about groups of people. Recognizing that the Nazis sought to exterminate the Jewish “race,” Jews (and others) avoid using language of “race” to describe themselves. And yet, the category of “religion” doesn’t totally fit either, for many reasons including that many self-identifying Jews do not engage in religious practice.
- The question of how to understand the category of “Jew” continues to perplex and confound. The court case Shaare Tefila Congregation v. Cobb exemplifies these open questions, specifically within the strictures of legal language designed to protect minorities. We can study the oral argument of this case to understand the limitations of the concepts of “race” and “religion,” in general, and specifically as they apply to determining Jewish identity.

Encounter the case Shaare Tefila Congregation v. Cobb: 30-45 minutes

- Read Appendix A: overview of the facts of the case and analysis of the court's problem.
 - Invite participants to summarize the question facing the court, and how it was resolved.
- Appendix B: Read and/or listen to excerpts of the oral arguments of the case. (Full text and recording of the argument can be found here: <https://www.oyez.org/cases/1986/85-2156>) The first two selections lend themselves well to read-aloud conversations. You can assign participants to read the words of the various attorneys and justices who are represented in the transcript. Use the questions on the handout to check for understanding and stimulate conversation.

For further consideration: 30 minutes

- Watch Jennifer Glaser's analysis of the situation. (See her long video, starting at minute 29)
 - Summarize her perspective on the reasons Jews avoided casting themselves as a racial group. How does her analysis compare with or shape your understanding of the arguments about Jewish racial identity?
- Applying Critical Race Theory to understand the case:
 - Use excerpt of her short video (1:14-3:46) to introduce major concepts of CRT:
 - Race is socially constructed but racialization is real: What does it mean that race is socially constructed? What does it mean that racialization is a real force in our lives?
 - Changing racialization (ie, social understanding of race changes over time)
 - Voices of color matter
 - Applying CRT to understanding this case:
 - How does this case demonstrate that racialization has real social implications, even though race itself is socially constructed, ie, not a real biological fact?
 - How does it reflect changing racialization of a group?

Race, Religion & American Judaism

- How are voices of Jews as a minority group empowered and disempowered through this case?

Conclusions/Wrap up: 10 minutes

- If you are Jewish: How does witnessing the Supreme Court wrestling with how to categorize Jewish racial identity affect your own sense of your Jewish and racial identity?
- If you are not Jewish: How does witnessing the Supreme Court wrestling with how to categorize Jewish racial identity affect your own sense of how to categorize yourself or others in terms of race and religion?

Facts and Analysis of Shaare Tefila Congregation v. Cobb

Facts of the Case

After its Maryland synagogue was painted with anti-Semitic slogans and symbols, the Shaare Tefila Congregation brought a suit charging the white defendants with racially discriminatory interference with property rights under 42 U.S.C. Section 1982. The Maryland District Court dismissed the claims, maintaining that white-on-white violence was not racially discriminatory. The court addressed the question: Did the white defendants exhibit racially motivated discrimination in violation of the federal statute?

The Court unanimously ruled that Jews can state a claim of racial discrimination since they were among the peoples considered to be distinct races and hence within the protection of U.S.C. Section 1982. The statute "was intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." The Jewish people most certainly suffered such discrimination and so were not barred from their claim simply because both they, like the defendants, were Caucasian.

-from "Shaare Tefila Congregation v. Cobb." Oyez,
www.oyez.org/cases/1986/85-2156. Accessed 6 Nov. 2022.

Appendix A

Facts and Analysis of Shaare Tefila Congregation v. Cobb Facts of the Case

Central to the Supreme Court decision was the question of whether Jews can claim race-based protection or whether “Jewish” is a religious designation only. This question was so difficult for the court to answer, in part, because none of the categories involved—“religion,” “race,” or “Jewish”—are clearly legally defined. The U.S. legal system has a long history of grappling with both race and religion. Historically, it has defined race in a variety of ways, using scientific narratives and the “common knowledge” test, among others. These definitions were employed to legitimate and to clarify the operation of political institutions, like slavery and immigration.

No legal definition for religion exists, however. Unlike race in the United States, religion is not a category that has been used to explicitly justify a structural hierarchy. In other words, typically, the category of religion has not been imposed on a group of people and then cited as a reason to justify their subjugation. Rather, due to the American myth of religious pluralism, the category “religion” has been claimed by immigrant and indigenous American communities to legitimate practices and beliefs meaningful to them. Additionally, neither the United States judicial system nor the legislature has ever defined what it means to be Jewish. Jewish Americans had never successfully claimed civil rights protection on the basis of race before, so no immediately obvious precedent existed. Therefore, the Supreme Court justices faced a conundrum regarding how to decide the case. To do so, it was necessary to situate Jewish identity in relation to the legal categories “religion” and “race.”

From Annalise E. Glauz-Todrank, “Judging and Protecting Jewish Identity in Shaare Tefila Congregation v. Cobb,” in *Who Is A Jew?: Reflections on History, Religion, and Culture*, edited by Leonard J. Greenspoon (West Lafayette, IN: Purdue University Press, 2014), 45-46.

Excerpts from the Oral Argument, Feb. 25th, 1987

How did the justices approach the question of how to identify Jewishness? These excerpts depict the justices and attorneys in conversation about how to address the question of the legal category of Jewish identity. Through their conversations, we can see them exploring the categories of race and religion.

Deborah T. Garren was the attorney representing the men who vandalized the synagogue.

Patricia A. Brannan was the attorney for Shaare Tefila Congregation. Justice John Paul Stevens, Justice Antonin Scalia, Justice Sandra Day O'Connor, Justice Thurgood Marshall

Selection 1: Is antisemitism a form of racism?

In the following excerpt, the justices question defense attorney Deborah Garren on her proposal that antisemitism is not racial, since Jews are a religion, not a race.

Justice John Paul Stevens: May I ask, Ms. Garren, over the... years ago, and of course it's still prevalent in some areas, there was prejudice against Jews. That was known in our society. There was a lot of anti-Semitism. How would you characterize that prejudice?

Deborah T. Garren: Your Honor, I would--

John Paul Stevens: You wouldn't call it racial prejudice?

Deborah T. Garren: Prejudice that is based on their religion.

John Paul Stevens: Do you think it was based entirely on their religion?

Deborah T. Garren: That is the characteristic that defines them. There is no racial characteristic that in fact defines people of the Jewish faith. It is a religion.

John Paul Stevens: Do you think that would be the proper characterization in Germany when it was so virulent?

Deborah T. Garren: No, sir, but again that was the deviant perception of a couple of organizations in the society that had run rampant. It wasn't a common perception in the society. They weren't commonly identified.

John Paul Stevens: Do you think the origin of the prejudice in this country was entirely religious?

Deborah T. Garren: Of the prejudice against Jewish people?

John Paul Stevens: Yes.

Deborah T. Garren: I think I am not qualified to comment on that, but I have every reason to believe that religion in part motivated that prejudice because that is what in fact defines the group.

Antonin Scalia: It didn't extend to Jews who were atheists, nonbelievers? Do you really think that was the case?

Deborah T. Garren: I'm not sure I understand your question, Justice Scalia.

Antonin Scalia: I mean, do you think that the prejudice that existed against Jews in this country was only against believing Jews, and so long as the Jew said, I really no longer believe in the religious tenets of Judaism, the prejudice no longer existed and that person would have been able to get into all sort of country clubs and what not?

Deborah T. Garren: No, sir, but I do think that the discriminators identify the group by their religious beliefs. They may not know in each individual instance whether that Jewish person follows his faith or not.

Race, Religion & American Judaism

Discussion Questions:

In the exchange above, Deborah Garren argues that Jews should not be protected by racial discrimination laws because they are a religious group, not a racial group.

- How do Justices Stevens and Scalia challenge the notion that antisemitism is discrimination on the basis of religion?
- How does Garren answer their challenge?
- How does this exchange relate to your understanding of antisemitism?

Selection 2: How should we define race?

In the extended exchange below, the justices explore and challenge competing notions of race: Is it based on science? Common perceptions? Cultural differences? Skin color? None of the suggestions seems satisfactory.

John Paul Stevens: May I ask, is it critical to your case that there be some well-defined categories of races? I imagine at one time, perhaps scientists might have thought there were five or six races, or ten or twenty. Now, they seem to say there are three, is it, three races. What if 20 years from now they really study this thing and determine there is only one race, that really, the differences among the races are not scientifically significant?

Deborah T. Garren: Yes, sir.

John Paul Stevens: Then, I suppose the statute would just have... no longer have any significance.

Deborah T. Garren: That is why I would take the position that it isn't appropriate to define races by reference to any kind of scientific terminology. In fact, an appropriate approach is--

John Paul Stevens: Well, how do you define race, then? If you don't do it by reference to scientific standards, what are the standards for defining whether two people are in different races or not?

Deborah T. Garren: The approach that, in fact, anthropologists take in many instances is by reference to culture and by reference to common perceptions in society.

John Paul Stevens: Well, if you look at culture, I suppose a pretty strong argument could be made that the Jewish have a very special culture of their own.

Deborah T. Garren: I do not believe a strong argument could be made that the Jewish people are commonly identified as racially different. That's what I am referring to when I say that cultural--

John Paul Stevens: What I am trying to get at is, how does one decide whether two people are in the same or different races?

Deborah T. Garren: --One evaluates whether those individuals... you look at the individual, first of all, and you evaluate whether that individual is identified as white or is identified as non-white in our society, in some sense.

John Paul Stevens: So, now we've got two races, white and non-white? We're down to two, is that it?

Deborah T. Garren: There are various groups that would fall in the non-white category.
This isn't an effort to get at defining what race means.

Justice Sandra Day O'Connor: In your view, would Hispanics... how about Hispanics and Arabs. Would they fit in your category?

Deborah T. Garren: I think it's quite conceivable that Hispanics would be a group that is commonly identified as non-white in our society. Several of the lower circuit courts have held that and have approached the statute in precisely the way that I am suggesting that you approach it.

Sandra Day O'Connor: And how about Moslems or Arabs?

Deborah T. Garren: "Moslems" is a religious term, I believe. Again, it would require the courts to evaluate whether there is a common identification of that group as racially distinct, or non-white in our society. For my individual reaction--

Sandra Day O'Connor: Yes.

Deborah T. Garren: --I think that those groups would be included within the categories that are protected because in many instances individuals that are in those groups have dark skin, for example. And there can be no doubt that if an individual is discriminated against because he is black and has dark skin, or a large number of members of that group are black and have dark skin, they would have a cause of action under this statute.

Discussion Questions:

- In the exchange above, the justices press Garren to define race. What are the various suggestions that are made about how race can be defined?
- What does the exchange suggest about the meaning of race?
- What does this case suggest about the relationship between racism and antisemitism?
- What do you think the lawyers and justices got right about Jewish identity? What do you think they got wrong?

Selection 3: Recognizing the multi-racial reality of Jewish world

In this excerpt, Justice Marshall recalls that there is a synagogue in Harlem, which he asserts has no White people. With this comment, he introduces the reality that, despite what has been previously stated as a truth about Jews, not all Jews are White.

Justice Marshall: What would you say if they painted swastikas on the synagogue on Lenox Avenue in the middle of Harlem? There is a synagogue there.

Patricia A. Brannan: Yes, Justice Marshall.

Justice Marshall: And there is not a white person within ten blocks.

Patricia A. Brannan: And we believe that the result would be the same, that those congregants should be covered, as we believe Shaare Tefila would be covered.

Marshall: Well, you couldn't do it as a race, could you?

Patricia A. Brannan: Well, again swastikas on a synagogue again invoke that ideology of racial distinctness of Jews, and we think if that is part of—

Marshall: But there are no Jews in that synagogue. There are no white Jews, I would say.

Patricia A. Brannan: --Well, we think it makes no difference whether the Jews are black or white if the racial animus is there to support the cause of action. As in McDonald versus Jones, the Court hasn't weighed the color of the skin or the race of the victim but has looked to the intent of the discriminator and that the result there should be the same even if the victims are black.

Discussion Questions:

- What does the possibility of Black Jews imply about categorizing Jews as a race?
- What does this exchange reveal about how the justices are thinking about categories of race and religion?

Selection 4: How is racial discrimination different than religious discrimination?

Shaare Tefila's lawyer, Brannan, proposes that the deciding factor in this case should be whether or not the perpetrator had racist intent, not on whether the victims are considered a racial group or not. Here she hints at the difference between racial and religious identities.

Patricia A. Brannan: --The charge should be **whether it is conduct that we understand as racial, as based on that person and their heritage and background and what they are in unchangeable ways, unlike, for instance religion**, and that that should be backed up in the evidence and the plaintiff has the burden to show that it ties in historically or culturally with an understanding that is racial.

Discussion Questions:

- Based on this description, how does Brannan understand race? What makes it different than religion?
- What do you think of Brannan's account?