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TREATING BLACKS AS IF THEY WERE WHITE: PROBLEMS OF DEFINITION AND PROOF IN SECTION 1982 CASES

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Immediately after the Civil War, the United States Congress enacted, over presidential veto, a statute popularly known as the 1866 Civil Rights Act.[1] In 1870 that statute was reenacted,[2] and a major part is presently codified as sections 1981 and 1982 of title

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The authors teach Civil Advocacy, a course that simulates a complex litigation from initial client interview through trial. The litigation involves, among other things, difficult questions about the scope and meaning of 42 U.S.C. § 1982 (1970). *See* Brown, Givelber & Subrin, *There Are No Good Advocates in Cubbyholes*, LEARNING & L., Winter 1975, at 55. This experience convinced our students and ourselves that neither courts nor commentators had articulated a precise and comprehensive definition of the elements of a prima facie case under § 1982. We are grateful to the Civil Advocacy students of the past two years, whose work in the field of housing discrimination law was invaluable in helping us to identify the problems with which this Article is concerned. In addition, we wish to thank our students, Ms. Mary Lyndon, Mr. Ronald Witmer, Ms. Kate Kaplan, and Ms. Nancy Lorenz, for assisting us in the preparation of this Article.

[1] Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

[2] Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 144. The commentators disagree about the purpose of the 1870 legislation. The debate centers around the scope of congressional authority to pass the initial legislation pursuant to § 2 of the thirteenth

42 of the United States Code. Those sections lay virtually moribund for a hundred years,[3] until they were revived in 1968 as a judicial contribution to the mid-twentieth century civil rights movement.[4] Passed in the wake of Union victory, the 1866 Civil Rights Act represented an attempt by the victors to crystallize the metaphysics of emancipation into the perquisites of citizenship and to give "real content to the freedom guaranteed by the Thirteenth Amendment."[5] The language of section 1982 is deceptively simple: "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."[6]

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amendment. It has been suggested that Congress felt that the later legislation was necessary to protect the 1866 statute under congressional authority pursuant to § 5 of the fourteenth amendment, thus placing its constitutionality beyond doubt. *See* Pennsylvania v. Local 542, Operating Eng'rs, 347 F. Supp. 268, 288-89 (E.D. Pa. 1972); *cf.* J. TENBROEK, EQUAL UNDER LAW 201 (rev. ed. 1965) (originally published as THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951)) [hereinafter cited as TENBROEK]; Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89, 122. Other commentators feel that the 1870 statute merely made selective additions (such as enforcement provisions) to the 1866 statute. *See* Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last*: Jones v. Alfred H. Mayer Co., 55 VA. L. REV. 272, 293-99 (1969).

The reason for this debate seems to be an attempt to discover through legislative history whether the 1866 Civil Rights Act contains a requirement of "state action." The United States Supreme Court responded negatively in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). *But see* Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 486-88 (1974).

The 1870 legislation has also given rise to a secondary debate involving the effect, if any, of the changes caused by that reenactment. The Supreme Court noted in Jones v. Alfred H. Mayer, *supra* at 436-37, that the scope of the 1866 statute was not altered when it was reenacted in 1870. Similarly, it has been held that the change from the word "citizens" in § 1 of the 1866 Act to the words "all persons" in §§ 16 and 18 of the 1870 Act did not change the meaning of the original statute. Pennsylvania v. Local 542, Operating Eng'rs, *supra* at 288-90.

[3] *See, e.g.*, Hurd v. Hodge, 334 U.S. 24 (1948); Corrigan v. Buckley, 271 U.S. 323 (1926); Buchanan v. Warley, 245 U.S. 60 (1917); The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1882). The Supreme Court in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437, expressly stated that § 1982's partial and temporary dormancy did not diminish its force.

[4] The revival was accomplished in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[5] *Id.* at 433. Many commentators have noted this congressional intent to confer first-class citizenship upon the newly emancipated slaves. *See* Note, *supra* note 2, at 502-03; Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019 (1969); Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294 (1969). The most thorough discussion of this aspect of the legislative history appears in TENBROEK, *supra* note 2, *passim*.

[6] 42 U.S.C. § 1982 (1970).

Since 1968 there has been considerable litigation under this statute, but little appreciation of the ambiguity of the words "same right . . . as is enjoyed by white citizens." Decisions tend to discuss the evidence presented in great detail without relating that evidence to a carefully drawn definition of the statutory language and the elements of the prima facie case which that definition should supply. Until we know what the plaintiff must prove, however, evidentiary analysis lacks direction, and until we know what the statutory language means, there will be no consistent approach to what the plaintiff must prove.[7]

In this Article we shall attempt to define the words "same right . . . as is enjoyed by white citizens," to set forth the elements of the prima facie case derived therefrom, and to consider what evidence, inferences, and presumptions would permit a plaintiff to establish those elements. Our inquiry is pertinent not only to section 1982 cases: Section 1981[8] contains parallel language with respect to contract actions, and Title VIII of the Civil Rights Act of 1968[9] (as well as several state and local statutes) is directed to

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[7] This method of addressing the problem is sound because it forces close attention to what the statute actually says and to the relationship between meaning and proof. This is important both for litigating § 1982 cases and for guiding private conduct. Most people tend to translate legal rules into a series of "dos" and "don'ts" for guidance in their everyday affairs. These "dos" and "don'ts" depend primarily on the perception of what behavior predictably produces liability, as opposed to a more abstract perception of legal principles.

> The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas . . . is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But, as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right.

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

[8] 42 U.S.C. § 1981 (1970) 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 be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[9] 42 U.S.C. §§ 3601-19 (1970). The Supreme Court has made it clear that the passage of Title VIII did not diminish the effectiveness of § 1982. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 416-17 (1968).

The coverage of § 1982 is significantly broader than the coverage of Title VIII. Section 1982 covers the small landlord while § 803(b) of Title VIII, 42 U.S.C. § 3603(b) (1970), exempts most direct sales or rentals of single family houses by owners and rentals of units in owner occupied dwellings containing less than four units. This exemption

similar ends. Therefore, while our definition of the "same right" language is most relevant to sections 1982 and 1981, our discussion of evidentiary considerations is also applicable to civil rights litigation in general.

I. "SAME RIGHT" AS IS ENJOYED BY WHITE CITIZENS: ITS MEANING AND ROLE IN A PRIMA FACIE CASE

Section 1982 broadly declares that all citizens shall enjoy the "same rights" in property transactions[10] as are enjoyed by white citizens. Yet the statute neither defines the precise content of those "rights" nor identifies whose obligation it is to ensure their availability to "all citizens." The latter problem was addressed by the Supreme Court in *Jones v. Alfred H. Mayer Co.*[11] The Court rejected the interpretation that section 1982 requires state action—that it guarantees only legal rights, created by govern-

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does not apply to § 1982. Morris v. Cizek, 503 F.2d 1303 (7th Cir. 1974); *see* Note, *supra* note 2, at 475-76. Moreover, Title VIII applies only to dwellings, while § 1982 applies not only to real *and* personal property, but also to *all* realty—large and small, residential and commercial.

In addition, certain procedural requirements which are absent from § 1982 encumber Title VIII. Although Title VIII litigants must first exhaust their administrative remedies, 42 U.S.C. § 3610(a)-(d) (1970), the exhaustion doctrine is not applicable to § 1982 cases. Also, the Title VIII statute of limitations, 42 U.S.C. § 3610(b) (1970) (180 days), is appreciably shorter than the time period for bringing suit under § 1982. *See* Hickman v. Fincher, 483 F.2d 855 (4th Cir. 1973) (South Carolina's one-year statute of limitations applicable to § 1982 cause of action).

For an analysis of the other differences between Title VIII and § 1982, see Smedley, *A Comparative Analysis of Title VIII and Section 1982*, 22 VAND. L. REV. 459 (1969); Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019 (1969).

[10] We shall not discuss the precise nature of the type of property rights covered by § 1982. The statute enumerates the rights to "inherit, purchase, lease, sell, hold, and convey real and personal property." The courts have given a broad interpretation to the items on this list. *See, e.g.*, Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Sims v. Order of United Commercial Travelers of America, 343 F. Supp. 112 (D. Mass. 1972).

A similarly broad interpretation has been given to the contract rights language of § 1981. *See, e.g.*, Scott v. Young, 421 F.2d 143 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970); Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973), *aff'd in relevant part sub nom.* McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975) (en banc), *petition for cert. filed*, 44 U.S.L.W. 3054 (U.S. July 10, 1975) (No. 75-62); *cf.* Riley v. Adirondack Southern School for Girls, 368 F. Supp. 392 (M.D. Fla. 1973), *appeal docketed*, No. 74-1976, 5th Cir., Apr. 15, 1974; Grier v. Specialized Skills, Inc., 326 F. Supp. 856 (W.D.N.C. 1971). *But cf.* Cook v. Advertiser Co., 458 F.2d 1119 (5th Cir. 1972); Housing Authority v. Henry, 334 F. Supp. 490 (D.N.J. 1971).

For a case involving both § 1982 property rights and § 1981 contract rights, see Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974).

[11] 392 U.S. 409 (1968).

ment and capable of being denied only by government.[12] Holding that a private real estate developer's racially motivated refusal to sell a house to a black violates section 1982, the Court appeared to suggest an expansive reading of the "same right" language:

> Negro citizens . . . would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[13]

In neither of its subsequent section 1982 decisions,[14] however, has the Court clarified what it means to be free "to buy whatever a white man can buy" or "to live wherever a white man can live."

A. *Two Categories of Definition*

When a plaintiff brings suit under section 1982, the harm he or she alleges is the denial by the defendant of the "same right . . . as is enjoyed by white citizens." A definition of that phrase thus supplies at least two elements of plaintiff's prima facie case: the actionable conduct or omission (the failure to accord the plaintiff the same right as white citizens), and plaintiff's harm (being denied that right).

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[12] Although § 1982 is not limited to the behavior of the government, its mandate obviously applies to governmental action. Even though the technical bonds of slavery had been dissolved by the adoption of the thirteenth amendment, the prevalence of the infamous Black Codes continued to limit black people to second-class citizenship. TENBROEK, *supra* note 2, at 174-97.

The United States Supreme Court held in Jones v. Alfred H. Mayer Co. that Congress was fully empowered by the thirteenth amendment to enact § 1982 and that the thirteenth amendment authorized Congress not only to dissolve the bonds of master and slave, but also to determine the badges and incidents of slavery, whether or not the product of governmental action, and to remove those badges and incidents by legislation. 392 U.S. at 437-44.

[13] 392 U.S. at 443 (footnote omitted).

[14] Since *Jones*, only two § 1982 cases have reached the Supreme Court: Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973), and Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).

Our analysis suggests that case law has developed two basic theories of "same right . . . as is enjoyed by white citizens." One view is that a non-white is entitled to be treated as a white would have been treated by the particular defendant. Under this definition, the defendant creates by his or her own treatment of whites the rights to be accorded to a non-white. This we characterize as the "defendant-oriented view." The other view is that a plaintiff is entitled to the type of treatment society normally accords whites.[15] This we call the "community-oriented view."[16]

1. The Defendant-Oriented View

The defendant-oriented view of "same right" defines the right in terms of how the particular defendant would have treated a white person. The only way to answer the "would have" question is by inquiring into defendant's motivation. This is most clearly the case when the defendant has not dealt with whites under similar circumstances; there are then no facts about how the defendant actually treats similarly situated whites. The only objective facts relate to treatment of a black. But even if the defendant has previously dealt with whites, or if there were a tester,[17] the defendant-oriented view still calls for a motivational inquiry. In every case there are a vast number of reasons why people may or may not have been willing to engage in a property transaction. No plaintiff will be able to demonstrate a completely identical situation in which the defendant dealt with a white. Nor will a plaintiff be able to prove that he or she meets all of the criteria that a defendant may potentially use in choosing with whom to deal. It will always be the case that the defendant might have treated a white in the same way as he or she treated the

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[15] Although the cases do not use the terminology we have employed, for examples of the "defendant-oriented view," see Hamilton v. Miller, 477 F.2d 908 (10th Cir. 1973); Bush v. Kaim, 297 F. Supp. 151, 161-63 (N.D. Ohio 1969). For examples of the "community-oriented view," see Clark v. Universal Builders, Inc., 501 F.2d 324, 330-34 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974); Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333, 1340-42 (2d Cir. 1974). *See also* Williams v. Matthews Co., 499 F.2d 819, 826-28 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974).

[16] The difference between these theories is actually more complex than this simple dichotomy suggests. Regardless of how one reads the statute, the defendant's state of mind is relevant. *See* text accompanying notes 25-29, 73-74, 80-87 *infra*.

[17] The function of a tester in real estate transactions is to determine how a given lessor or seller responds to a white person who is apparently seeking to deal with the lessor or seller. The person who acts as a tester "tests" whether property is available, and, if so, on what terms. The purpose of a tester is to help discourage discriminatory practices and to facilitate proof in discrimination cases.

non-white plaintiff. Consequently, the reasons for the treatment—the defendant's motivation—are critical in determining how the defendant would have treated a white person.

There is thus a violation of section 1982 under the defendant-oriented view when the defendant's sentiments about race cause his or her disadvantageous treatment of blacks. This, we assume, is what courts mean when they refer to racial motivation.[18] When the plaintiff proves racial motivation, he or she establishes two elements of the prima facie case: the act and the harm prohibited by section 1982.

The defendant-oriented view solves the simple cases of discrimination—"I won't rent to you because you're black"—and some harder ones as well. Under this view, plaintiff also prevails in a case in which a defendant treats blacks and whites alike in a given transaction in a sophisticated effort to avoid dealing with blacks at all. For instance, a landlord might apply a policy of renting only to people recommended by existing tenants, and, pursuant to this policy, reject applications from both blacks and whites.[19] Also, a defendant who deals only with blacks can violate section 1982 if the race of his or her tenants or buyers influences his or her treatment of them.[20] If the defendant's act disadvantageous to the plaintiff is racially motivated, the defendant violates section 1982.

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[18] It is possible to construct a defendant-oriented test that does not look exclusively to racial motivation. For instance, one could interpret § 1982 to mean that a defendant currently or previously dealing with whites must accord blacks identical treatment *regardless* of whether any difference in treatment is racially motivated, whereas defendants who do not currently and have not previously dealt with whites violate the statute only if their treatment of blacks *is* racially motivated. This construct, however—that the legal definition of the statute differs if one has never dealt with whites—is an utterly irrational reading of § 1982. While prior experience with whites is undoubtedly relevant to proof (and to available inferences), it cannot control the meaning of the statutory language.

[19] *Cf.* Williams v. Matthews Co., 499 F.2d 819 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974); Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974); Local 53, Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

[20] Whether § 1982 prohibits better treatment of non-whites because of race is beyond the scope of this Article. The issue is whether the statute should be read as a non-discrimination statute or as a statute prohibiting only disadvantageous treatment of non-whites. If the latter reading is correct, then § 1982 would not prohibit more advantageous treatment of non-whites than of whites. *Cf.* DeFunis v. Odegaard, 416 U.S. 312 (1974), *vacating as moot*, 82 Wash. 2d 11, 507 P.2d 1169 (1973). This will be an issue only with respect to those transactions not covered by Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-19 (1970), because § 804(a) of that statute, *id.* § 3604(a), seems to prohibit any failure to deal because of race. For a further discussion of Title VIII, see note 9 *supra*.

As we shall try to demonstrate, however, racial motivation should not be the exclusive test of liability. Suppose that the particular defendant does not treat blacks and whites differently and there is no direct evidence of racial motivation, yet whites in the community consistently receive better treatment with respect to the same type of transaction. Under the definition of "same right" that we advocate, plaintiff may still be able to establish a violation of section 1982.

2. The Community-Oriented View

There is another approach to the "same right" language of section 1982 which avoids the necessity of proving the defendant's racial motivation, and which is more in keeping with the statute's purposes. Under this view a plaintiff is entitled to the same rights that society affords similarly situated whites in similar property transactions. The plaintiff, therefore, is not faced with the task of proving how this particular defendant would have treated the plaintiff had the plaintiff been white, a task compelling inquiry into racial motivation. As we shall show,[21] however, the community-oriented test still requires an inquiry into motivation, but the inquiry is significantly different from that required under the defendant-oriented view.

In the recent cases of *Clark v. Universal Builders, Inc.*[22] and *Love v. DeCarlo Homes, Inc.*,[23] the Seventh and Fifth Circuits, respectively, addressed the issue whether the "same right" language of section 1982 encompasses more than the right to be free of racially motivated disadvantageous treatment. The gravamen of the complaints in both cases was similar: that the defendants had sold homes to the black plaintiffs on terms less advantageous than a white could typically secure when purchasing a home, and that a segregated housing market left the plaintiffs little choice other than to deal with the defendants. In neither case was there evidence that the actual homes in question were offered to whites on terms different from those offered to blacks.

In *Love*, the Fifth Circuit held that plaintiffs had failed to

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[21] *See* text accompanying notes 25-29, 73-74, 80-87 *infra*.

[22] 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974).

[23] 482 F.2d 613 (5th Cir.), *cert. denied*, 414 U.S. 1115 (1973).

establish a prima facie case.[24] Plaintiffs were more successful in the Seventh Circuit. In addition to holding that there was sufficient evidence to get to the jury on the theory of racial motivation,[25] the court in *Clark* also held that plaintiffs had established a prima facie case under section 1982 by introducing evidence tending to show (a) the existence of a racially segregated dual housing market in Chicago, and (b) that the defendants took advantage of or exploited[26] the dual housing market by selling homes to blacks on terms substantially less favorable than the terms upon which similarly situated whites were able to purchase similar housing in the Chicago area. According to the court, this evidence shifted the burden to the defendants to come forward with a "legitimate non-discriminatory" explanation for their behavior in order to escape liability. The court rejected the defendant's argument that "to charge whatever the market will bear" is a "legitimate non-discriminatory" explanation.[27]

Jones v. Alfred H. Mayer Co.[28] arose on a demurrer to plaintiff's complaint alleging racial motivation. The case thus was consistent with the defendant-oriented view, although it did not exclude the possibility of a community-oriented test. *Clark* represents a significant advance in the law under section 1982 because the court recognized that the words "same right . . . as is enjoyed by white citizens" could mean rights created by the treatment accorded to whites by persons other than the defendant. Under the Seventh Circuit's community-oriented view, therefore, it is not necessary in every case that the defendant, by his treatment of whites, create the right that the defendant

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[24] Plaintiff failed to do so because the evidence did not demonstrate that similarly situated whites could purchase similar homes on more advantageous terms elsewhere. 482 F.2d at 615-16. The court thus was not compelled to decide whether a violation of § 1982 could be established without direct proof of conscious racial motivation on the part of the defendants.

[25] 501 F.2d at 330. The *Clark* court did not label the theory "racial motivation," yet its reference to "the traditional theory of discrimination" must be taken to refer to this theory. The Seventh Circuit noted that a prima facie case existed if the defendant treated similarly situated whites better than the black plaintiff. This characterization tends to confuse evidence of the test with the test itself.

[26] For an early analysis of "exploitation" as "racial unconscionability," see Note, *Discriminatory Housing Markets, Racial Unconscionability, and Section 1988:* The Contract Buyers League *Case*, 80 YALE L.J. 516 (1971).

[27] 501 F.2d at 331-34.

[28] 392 U.S. 409 (1968).

denies non-whites.[29] We shall now examine each view in greater detail.

B. *Difficulties with the Defendant-Oriented View*

The Seventh Circuit is correct in perceiving that the "same right" language of section 1982 can refer to rights created by the action of persons other than the defendant. There is nothing in the language of the statute that suggests that the reference to "same right" is limited to rights created only by the defendant. Indeed, there is no mention of defendants at all. Nor is there anything in *Jones v. Alfred H. Mayer Co.* to indicate that the statute is so narrow; on the contrary, the Supreme Court's reading of the scope of congressional power to enact the statute suggests that a broad reading of section 1982 is proper. Nor does the legislative history indicate that a defendant-oriented view of the language is appropriate.[30] The central, albeit unresolved, question emerging from the congressional debate was whether the purpose of the legislation was to achieve equality of treatment for blacks and whites, or to provide for equality of achievement between blacks and whites, or to endow everybody—both blacks and whites—with a bundle of natural law rights.[31] The defendant-oriented view seeks equality of treatment only to the extent that the defendant is consciously denying it, inherently eliminates the possibility of a policy of equality of achievement (for example, affirmative action to redress the effects of past discrimination), and looks to defendant-created rights as opposed to rights in the community at large.

The Supreme Court has viewed other congressional bans on racial discrimination as reaching conduct other than that which

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[29] In *Jones*, the Supreme Court spoke in terms of "racially motivated" conduct, thus defining the right in terms of the defendant's mental state. The procedural posture of that case did not necessitate consideration of any broader definition of the right. In *Clark*, the Seventh Circuit expanded the definition of right, but did not indicate a particular culpable state of mind with which a defendant must have acted in denying that right to the plaintiff. We shall address these issues in more detail at text accompanying notes 73-74, 80-87 *infra*.

[30] Indeed, the congressional debates appear to reflect little more than the predominant philosophies of the day: social contract, natural law, and abolitionism. TENBROEK, *supra* note 2, at 174-97.

[31] *Id.* For a thorough explanation of the difference between equality of treatment and equality of achievement, see Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237-49 (1971).

is racially motivated. In *Griggs v. Duke Power Co.*,[32] the Court found that the evidence did not support a conclusion that Duke Power was responsible for the conditions that caused blacks to do more poorly than whites on an employment test. Yet the Court interpreted section 703(h) of Title VII of the Civil Rights Act of 1964[33] to prohibit tests that excluded blacks, but not whites, from favored positions, unless it was shown that the tests were related to job performance.[34] The language in Title VII[35] goes no further than to prohibit racial discrimination, which *Jones v. Alfred H. Mayer Co.* indicated is the function of section 1982 in property transactions. The Title VII cases support the view that a congressional ban on racial discrimination is entitled to a broad reading, one that goes beyond a prohibition of consciously inconsistent treatment of the races.[36] Recent cases involving both Title VIII of the Civil Rights Act of 1968[37] and section 1982 are in accord.[38]

A glance at the history of the housing industry in this country makes it clear that there are significant public policy reasons why section 1982 should receive a broad reading. It is beyond question that the housing market has been, and continues to be, segregated by race.[39] It is equally beyond question that, at least

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[32] 401 U.S. 424 (1971).

[33] 42 U.S.C. § 2000e-2(h) (1970).

[34] The *Griggs* decision is particularly interesting when read in light of the prohibition against preferential treatment in section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j) (1970).

[35] 42 U.S.C. §§ 2000e *et seq.* (1970).

[36] *See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

[37] 42 U.S.C. §§ 3601-19 (1970).

[38] For cases involving section 1982, see, *e.g.*, Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974); Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974); *cf.* Williams v. Matthews Co., 499 F.2d 819 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974). *But see* Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972). For Title VIII, see, *e.g.*, United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 95 S. Ct. 2656 (1975); Joseph Skillken Co. v. City of Toledo, 380 F. Supp. 228 (N.D. Ohio 1974). *Contra*, Boyd v. Lefrak Org., 509 F.2d 1110 (2d Cir. 1975).

[39] *See, e.g.*, R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970'S (1973); NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. NO. 91-34, 91st Cong., 1st Sess. (1968); NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING & URBAN LAND INSTITUTE, FAIR HOUSING AND EXCLUSIONARY LAND USE (ULI Research Report No. 23, 1974); UNITED STATES COMMISSION ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA (1974); UNITED STATES COMMISSION ON CIVIL RIGHTS, 1961 REPORT: HOUSING (1961). For a representative sampling of the cases, see Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 95 S. Ct. 1950 (1975); Clark v. Universal Builders, Inc., 501 F.2d

until the late nineteen-sixties, the market was deliberately segregated by race.[40] Indeed, until *Jones v. Alfred H. Mayer Co.*, it was considered lawful, in the absence of a state law to the contrary, for private parties to discriminate against non-whites. This segregation was not inadvertent or incidental to the operation of the private real estate market; it was perceived as a means of maintaining property values, and deliberately employed with that end in mind. Many of the typical practices of the housing industry were originally developed as a means of maintaining racial exclusivity.[41] Where people now live, therefore, is in part a product of overt racial discrimination. Moreover, as the real estate market presently operates, where people live today is a highly reliable indicator of where they will seek new housing.[42] The terms and conditions under which people live substantially affect the capital they can accumulate.[43] In short, the long history of violation of the anti-discrimination mandate of section 1982 has produced a real estate market that may be little affected by a ban limited solely to racially motivated discrimination. It is clearly racial discrimination for an industry that has contributed mightily to a segregated society to continue "business as usual" when that business is conducted in a manner that treats non-whites worse than it does whites for reasons attributable to race, even if no longer consciously racially motivated.

Finally, the defendant-oriented view is unsatisfactory because of the type of proof of racial motivation it requires. This requirement imposes an onerous and unwarranted burden on the plaintiff. Because there is rarely direct evidence of a defendant's thought processes, plaintiff's success in proving racial motivation depends in large measure upon the willingness of factfinders to draw favorable inferences. There is reason to doubt the neutrality of factfinders on this issue, the ability of even neutral factfinders to make an accurate determination with

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324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974); Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam*, 457 F.2d 788 (5th Cir. 1972).

[40] *See* authorities cited note 39 *supra*.

[41] *Id.*

[42] *Id. See also* Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483 (1973).

[43] Clark v. Universal Builders, Inc., 501 F.2d 324, 331 n.5 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974).

respect to racial motivation, and the relevance of the issue at all.

Consider again, for example, the facts of *Clark v. Universal Builders, Inc.*[44] Plaintiffs introduced evidence tending to show that the terms defendants charged them were worse than the terms upon which similarly situated whites could purchase comparable housing in the Chicago area. Plaintiffs also introduced credible evidence that the housing market in Chicago was segregated, substantially limiting the areas where plaintiffs could realistically hope to purchase homes.

Under the defendant-oriented view, these facts would not require an explanation from defendants unless (a) they were legally sufficient to justify the inference that race was a conscious factor in Universal Builders' pricing policy and consequently that defendants would have behaved differently had race not been a consideration; and (b) the factfinder was willing to draw that inference. Assuming that the facts are legally sufficient to support the inference,[45] the factfinder's willingness to draw the inference may turn on the factfinder's own feelings about race.

Although all determinations of fact depend to some extent on the factfinder's own perceptions of the world, asking factfinders to draw inferences with respect to something that is probably unknowable—racial motivation—may be tantamount to asking no more than what result they would like to see in a particular case. This may be either desirable or unavoidable in other areas of the law, but it is not suitable to race discrimination cases. It is undesirable because of the danger that racial prejudice may influence the factfinder's decision, a decision which, under traditional doctrines, would be very difficult for a reviewing court to reverse.[46] And it is readily avoidable by a broader definition of "same right."[47]

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[44] 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974).

[45] *See* text accompanying notes 91-107 *infra*.

[46] For cases in which the appellate court has done the unusual and reversed the factfinder's decision, see Stevens v. Dobs, Inc., 483 F.2d 82 (4th Cir. 1973); Smith v. Sol D. Adler Co., 436 F.2d 344 (7th Cir. 1971). *Cf.*, *e.g.*, Jennings v. Patterson, 488 F.2d 436 (5th Cir. 1974); Johnson v. Jerry Pals Real Estate, 485 F.2d 528 (7th Cir. 1973).

It was no accident that in the recent case of Curtis v. Loether, 415 U.S. 189 (1974), the prospective tenant was arguing against jury trials while the landlord was arguing in favor of them.

[47] For cases in which it is at least arguable that the court has articulated a new substantive rule of law in order to deal with the breakdown of reliable factfinding in cases involving allegations of racial discrimination, see, *e.g.*, United States v. City of Black Jack,

Even assuming that factfinders are genuinely neutral with respect to race, their determinations of racial motivation may be inaccurate for reasons beyond their control. The best source of evidence on this point is the defendant, and he or she may not be reliable on the subject either because the defendant chooses not to describe his or her racial motivation accurately, or because the defendant is unaware of his or her racial motivation. In the absence of direct evidence of racial motivation, the factfinder must make the difficult choice between the inferences from defendant's conduct and defendant's non-racial explanation for his or her behavior.

Ultimately, one must ask why liability under section 1982 ought to turn on racial motivation. There is nothing in the language of the statute suggesting that motivation is important. The statute is directed toward achieving a social result, not toward punishing people with bad motives.[48] We therefore conclude that a proper interpretation of section 1982 cannot include racial motivation as the exclusive test of liability.

C. *Difficulties with the Community-Oriented View*

We have seen that there is a fundamental problem with defining "same right . . . as enjoyed by white citizens" in terms of the specific defendant's treatment of white citizens. Under that view, which we have called "defendant-oriented," a prima facie case must include proof as to conscious racial motivation. In our discussion of *Clark v. Universal Builders, Inc.*,[49] we saw that the "same right" language can be defined in terms of a group other than the defendant, namely, that class of people of whom the

508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 95 S. Ct. 2656 (1975); Hawkins v. Town of Shaw, 461 F.2d 1171 (5th Cir. 1972) (en banc).

[48] There is an argument that people may be on notice that they should not consciously hold people's race against them in real estate transactions, but not on notice as to a broader duty. The argument is not persuasive. First, this is not a criminal statute; people may not have the same due process rights to "fair notice" under a civil statute as attend criminal statutes. Clark v. Universal Builders, Inc., 501 F.2d 324, 332-33 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974). Second, at a minimum every potential defendant knows that he or she is dealing with a non-white, and is thus on notice that special legal obligations may apply to the transaction. Finally, the problem of fair notice disappears once a definitive standard for § 1982 is formulated. This is not to suggest that there are no limits to how broadly § 1982 can be read; it is rather to suggest that there is no reason to assume that the statute must be read to apply only to consciously racially motivated disadvantageous treatment.

[49] 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974); *see* text accompanying notes 25-29 *supra*.

defendant is a member. For instance, in *Clark* the court looked to how others dealing in single family homes treated whites situated similarly to the black plaintiffs. This "other persons" definition, which we characterize as "community-oriented," freed the plaintiff from the need to prove conscious racial motivation on the part of the defendants. For reasons already stated, this is desirable.[50]

Yet there are problems with an "other persons" definition. What does it mean? A lawyer faced with this question would instinctively suggest one of two approaches: (1) How do other people in fact treat white citizens under similar circumstances? (custom) or (2) How would reasonable other people treat white citizens under similar circumstances? (a reasonable person test).[51] As we shall try to demonstrate, however, neither of these approaches is satisfactory, and we shall suggest a third approach: How would people behave toward the plaintiff in a race-blind society?[52]

Defining "same right . . . as is enjoyed by white citizens" in terms of the customary treatment of white persons in comparable transactions may require individual defendants to treat blacks "better" than they do whites competing in the same market, or, to bastardize the statutory language, to give blacks special

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[50] *See* text accompanying notes 30-48 *supra*.

In the first published commentary on *Clark* the author rejects out of hand the court's conclusion, 501 F.2d at 336-38, that evidence of gross disparity between profit margins realized from defendants' operations in black and in white housing markets is sufficient to make out a prima facie case under the "traditional" (defendant-oriented) view of § 1982. 88 HARV. L. REV. 1610, 1612 (1975). The commentator contends that the *Clark* court was mistaken because such evidence suggests only "the developers' greater awareness of price differentials between the two markets" and "this awareness is not equivalent to discrimination." *Id.* However, to make out a prima facie case of racially motivated discrimination it is not necessary that the evidence adduced by the plaintiff be "equivalent to" such discrimination. It is only necessary that the evidence be such that it is permissible for the factfinder to infer that the difference in pricing policies is racially motivated. For a discussion of the appropriateness of such an inference, see text accompanying notes 91-107 *infra*.

[51] It is necessary to offer an approach defined in terms of custom tempered by reasonableness as an alternative to an approach where custom controls the definition because the custom (or the group norm) may well be bigoted or irrational. For example, if a white landlord's custom were to rent only to friends or relatives of existing tenants, all of whom were white, then the custom itself would be the source of the discriminatory conduct.

[52] A "blindness to race" test has the limitation of requiring the black to start at a point of equality with whites in terms of available dollars. *Cf.* Wallace v. Debron Corp., 363 F. Supp. 837 (E.D. Mo. 1973), *rev'd*, 494 F.2d 674 (8th Cir. 1974); Johnson v. Pike Corp., 332 F. Supp. 490 (C.D. Cal. 1971).

rights in addition to the statutorily mandated rights of white people.[53] Thus, it is theoretically possible that a given landlord would be free to reject a long-bearded white prospective tenant, but not a similarly hirsute black on the ground that he or she dislikes long beards. This would be true if it could be shown that landlords customarily do not reject typical tenants because of the existence or length of beards even though this defendant customarily does so. Moreover, the instances of preferential treatment of blacks would increase if one were to opt for an interpretation of "same right" as involving reasonable behavior. To return to the example, the black would win even if he could not prove that landlords generally ignore beards as long as he could establish that the custom of considering beards is an unreasonable one.[54]

The references to custom or to reasonable people therefore raise the possibility that blacks would have a generalized right to non-arbitrary treatment (as judged by custom or reasonableness) in real estate transactions whereas whites would not.[55] The new

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[53] There may be questions with respect to congressional authority to enact legislation under § 2 of the thirteenth amendment which would prefer blacks to whites; however, as the Supreme Court said in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968), "Does the authority of Congress to enforce the Thirteenth Amendment 'by appropriate legislation' include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes."

The Court cited with approval the statement in The Civil Rights Cases, 109 U.S. 3, 20 (1883), that § 2 of the thirteenth amendment empowers Congress "to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*." 392 U.S. at 439 (emphasis supplied by the Court). For a recent discussion, see Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974).

[54] We choose beards as an example because we feel that given contemporary male fashions a beard is a racially neutral characteristic. In Keys v. Continental Ill. Nat'l Bank & Trust Co., 357 F. Supp. 376 (N.D. Ill. 1973), a black plaintiff alleged a violation of § 1981 after he was fired for refusal to shave his sideburns. Plaintiff argued that he, "like the majority of American males of Negroid-African ancestry, regard[ed] the display of facial hair growth in the form of . . . long sideburns as traditional symbols of black-American masculinity." *Id.* at 377. The court granted summary judgment for the employer, noting that the plaintiff had been dismissed not because of his race, but rather because of his personal choice of dress. *Id.* at 380.

[55] Although the courts agree that arbitrary treatment based on race is impermissible, no court has yet recognized a right of non-whites to be free from non-racial arbitrariness. Two recent § 1981 private school cases are illustrative. In Riley v. Adirondack Southern School for Girls, 368 F. Supp. 392 (M.D. Fla. 1973), *appeal docketed*, No. 74-1976, 5th Cir., April 15, 1974, the court held that § 1981 does not prohibit racial discrimination by a truly private school as long as "other considerations"—albeit arbitrary ones—in addition to racial discrimination caused plaintiffs' rejection. *Id.* at 397-98. The court pointed out that if one can treat whites arbitrarily, then a black has no right to non-arbitrary treatment, for such a result would give blacks greater rights than whites. In Gonzales v.

"right" would extend far beyond the "right" to be free of arbitrariness based on race. This interpretation of section 1982 would require that the landlord treat the bearded black as he or she would a clean-shaven white.

Reading section 1982 to give non-whites a right to customary or reasonable treatment limits the ability of people dealing with non-whites to dispose of their property idiosyncratically. There is a strong argument against this limitation—namely, that it is important that people be able to decide with whom they live, particularly in their own homes.[56] A commune may want a potter or a carpenter. The Smiths may want a tutor or a baby sitter. The custom or reasonableness interpretation of "same right" might prohibit a landlord from making these choices when dealing with non-whites. In addition, it could conceivably limit a commercial developer's freedom to attempt the unusual, at least when dealing with non-white prospective tenants or purchasers. An interpretation of section 1982 that sets standards of reasonableness for the disposition or rental of real property (albeit only for non-whites) conflicts with the historically recognized policy of allowing those possessed of property the freedom to deal with whomever they please.[57] This freedom to dispose of property idiosyncratically may represent a very important value in this society. Although any economically sophisticated judgments on issues of this dimension or complexity are beyond the purview of this Article, it is conceivable that this freedom is a key factor in helping the housing market to operate at whatever level of efficiency it now attains.

Furthermore, a landlord who lives on the premises may

Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973), *aff'd in relevant part sub nom.* McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975) (en banc), *petition for cert. filed*, 44 U.S.L.W. 3054 (U.S. July 10, 1975) (No. 75-62), there was no need to reach this issue, because the court found that defendants had denied plaintiffs' right to contract because the plaintiffs were not white, *id.* at 1203, and that defendants had no criteria other than race for selecting students, *id.* at 1204. The court postulated a school that might be all black or all Chinese or all Jewish and noted that such schools were free to discriminate against whites, or, indeed, against non-whites if whites were similarly discriminated against. *Id.* at n.3. *See* Norwood v. Harrison, 413 U.S. 455, 470 (1973).

[56] Indeed, this interest is codified in Title VIII's "Ms. Murphy's boarding house" exemption, which specifically exempts dwellings providing living quarters for no more than four families. 42 U.S.C. § 3602(b)(2) (1970). The exemption is limited to Title VIII and does not apply to § 1982. Morris v. Cizek, 503 F.2d 1301 (7th Cir. 1974).

[57] 1 W. BLACKSTONE, COMMENTARIES *138. For an interesting application of this principle to race discrimination law, see Buchanan v. Warley, 245 U.S. 60 (1917).

have a constitutionally protected right of privacy or of associational freedom which permits wide choice in determining who will live in his or her dwelling.[58] Although every interpretation of section 1982 limits the landlord's right to refuse to rent, there is a difference between governmental interference with that associational right in order to insure equality of treatment of the races and interference with that right in order to eliminate all idiosyncratic behavior in dealing with blacks.

Of course, the strong social policy in favor of achieving racial justice may require measures that go beyond equality of treatment and begin to move toward assuring equality of achievement.[59] Toleration of idiosyncratic rental or sales practices may permit some landlords to avoid the prohibition against racial discrimination by selecting another characteristic on which to base what is, in reality, an illegal refusal.[60] But given the strong competing value in our jurisprudence of freely alienating property, it seems inappropriate to read section 1982 as prohibiting all non-customary or idiosyncratic behavior in property transactions with blacks.

D. *A Suggested Definition*

Interpreting section 1982 to refer to customary or reasonable treatment creates the danger that the statute may apply too broadly; reading it as turning on conscious racial motivation creates the opposite problem. For this reason, we turn to a third approach, which consists of a two-part test: A non-white is denied the "same right . . . as is enjoyed by white citizens" whenever (a) a non-white receives disadvantageous treatment as compared with the treatment of similarly situated whites by the

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[58] The possible existence and scope of this constitutionally protected right are analyzed in three recent notes: Note, *supra* note 2, at 520-24; Note, *Desegregation of Private Schools: Section 1981 as an Alternative to State Action*, 62 GEO. L.J. 1363, 1388-1400 (1974); Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 YALE L.J. 1441 (1975). *See also* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

[59] *See* note 31 *supra*.

[60] We would have to know a great deal more about how much truly arbitrary behavior exists in the real estate field before comfortably coming to the conclusion that a dislike for beards or obesity or extreme height or certain clothing is frequently not a disguise for a dislike for blacks. *See, e.g.*, Stevens v. Dobs, Inc., 483 F.2d 82 (4th Cir. 1973); Pughsley v. 3750 Lake Shore Drive Cooperative Bldg., 463 F.2d 1055 (7th Cir. 1972); Hughes v. Dyer, 378 F. Supp. 1305 (W.D. Mo. 1974). *See also* Morales v. Haines, 486 F.2d 880 (7th Cir. 1973).

defendant or by others engaging in transactions similar to the defendant's, (b) for a reason attributable to race. Sole reliance on the first part of the test—disadvantageous treatment in fact —suffers from the same difficulties as the custom test, which we have shown to be too broad.[61] Applied alone, it would prohibit all idiosyncratic behavior in property transactions with blacks. Sole reliance on the mental element—a reason attributable to race—would free the statute from any requirement of injury in fact.

Our proposed test asks, "How would people be treated in the real estate market if this were a race-blind and not a race-conscious society?"[62] A non-white plaintiff is injured not only when a defendant consciously takes race into consideration in determining how to deal with plaintiff; the injury is just as real and its effects are just as devastating, if the defendant acts for reasons that are attributable to race, even if the defendant does not consciously consider them so.

In *Clark v. Universal Builders, Inc.*,[63] the financing and sales

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[61] *See* text accompanying notes 51-60 *supra*.

[62] There is arguably a fourth possibility: the "racially discriminatory effects" test of such cases as Griggs v. Duke Power Co., 410 U.S. 424 (1971); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 95 S. Ct. 2656 (1975); Hawkins v. Town of Shaw, 461 F.2d 1171 (5th Cir. 1972) (en banc). In our view, the so-called "effects" test is not a persuasive interpretation of § 1982. Section 1982 applies to purely private transactions, and the "effects" test has been developed, applied, and apparently limited to cases dealing with governmental entities and cases involving comprehensive legislation regulating discrimination in employment (Title VII) and real estate (Title VIII). The distinctions between these cases and the typical § 1982 case are important. First, governmental entities have no privacy or associational interest of the type discussed above. Moreover, there is no apparent social value in permitting the government to treat its citizens idiosyncratically—indeed, the judicial development of the equal protection clause is eloquent testimony to the contrary. Further, with respect to Titles VII and VIII, Congress has weighed and resolved the competing interests of privacy, freedom to deal idiosyncratically, and non-discrimination. Whether or not the Court correctly divined the "true" congressional intent in Griggs v. Duke Power Co., *supra*, there is no question that Congress intended to legislate exhaustively in the area of employment discrimination. The same cannot confidently be said of §§ 1981 and 1982.

Finally, our proposed test does not differ dramatically from the "effects test." As we shall demonstrate, text accompanying notes 91-132, our test achieves the significant practical result of the effects test—a shift of the burden of going forward and/or risk of non-persuasion once plaintiff has proved racially discriminatory impact. The "effects test" also resembles our test in that the defendant is permitted to justify his or her conduct. The difference between our test and the "effects test" lies in the kinds of justifications that are satisfactory. As we have argued above, we believe our test to be more responsive to the interests affected by § 1982.

[63] 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974). *See* text accompanying notes 25-29 *supra*.

practices attributed to the defendants amounted to a "bad deal" when compared with the arrangements that whites could make in purchasing similar housing. Universal's houses were more expensive than comparable white housing. Universal's terms were worse than those that whites could secure—normally a long-term conditional sales contract as opposed to a transfer of title subject to a mortgage. The blacks dealing with Universal got less for more; they had to spend more capital and income than whites spent for comparable housing. Universal offered the kind of deal that no one with free choice would make, and the segregated housing market in Chicago severely restricted plaintiffs' freedom of choice. Thus, Universal's opportunity to deal with the plaintiffs on disadvantageous terms was directly attributable to the plaintiffs' non-white race.

In *Clark* the Seventh Circuit held that these facts established a prima facie case under what it termed the "exploitation theory of liability" of section 1982. Although that phrase nicely describes the conduct of Universal Builders, it is not sufficiently general to do justice to the purposes of section 1982. Suppose that a black tries to rent an apartment in an all-white building and is refused on the ground that apartments are rented only to people who know the present tenants. Suppose further that the policy is applied to both blacks and whites alike, and that present tenants either do not know or do not recommend blacks, so that some whites but no blacks can get apartments. This is not exploitation as defined in *Clark* because there is no proof of a segregated market which the defendant exploited. Yet the policy clearly has a greater impact on blacks than on whites.[64] Moreover, a policy of dealing only with relatives or friends is a traditional means of perpetuating racial exclusivity.[65] In most cases, it has little purpose beyond maintaining exclusivity. In our view, this is a "reason attributable to race" and within the prohibition of section 1982.

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[64] *Cf.* Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974); Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971); Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *modified*, 472 F.2d 631 (9th Cir. 1972). *See also* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[65] For contemporary examples, see the practices employed by the defendants in Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974); Local 53, Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

We define a reason attributable to race as one based on a policy that, when applied to the given transaction, (a) is likely to have a greater adverse effect on blacks than on whites; and (b) is likely to have such an effect because: (1) the policy is a product of, or reflects,[66] the long history of discrimination against non-whites; or (2) the history of discrimination has left blacks more vulnerable than whites;[67] or (3) the policy evinces an individual's personal reaction to blacks;[68] unless[69] (c) the reason serves an important business[70] purpose (other than whatever advantages flow from disadvantageous treatment of non-whites).[71] This definition fits the language and purpose of section 1982, and provides a workable standard for litigating private housing discrimination cases.[72] Although this approach to "same right" clearly covers the policies in *Clark* and the "rent on recommendation" policy described above, it would not cover our previous case of the bearded black who is refused housing on the ground that the landlord dislikes beards, if the factfinder believes that reason. This is because it would probably be impossible to convince a judge *both* (a) that the policy is likely to affect blacks more adversely than whites and (b) that if there is a differential effect,

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[66] *E.g.*, a policy of renting only to friends and relatives of existing tenants.

[67] *E.g.*, Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974).

[68] Thus phrased, our definition subsumes consciously racially motivated treatment, which, of course, is the most obvious reason attributable to race.

[69] We suggest that part (c) of our definition be treated as an affirmative defense for the following reasons: (1) before reaching part (c), the plaintiff has already had to convince the judge, *see* note 74 *infra*, of disadvantageous treatment and of a nexus between that treatment and plaintiff's blackness, thereby placing himself or herself within the class of citizens that the statute was passed to protect; (2) it is difficult to prove a negative; (3) it is the defendant who knows which, if any, business purpose is relied upon, and why it is "important"; and (4) the defendant's answer will instruct the plaintiff whether to conduct discovery of purported business reasons.

[70] The term "business" covers both obvious business reasons, such as a security deposit or a down payment, and more subtle reasons, such as a private landlord's desiring a babysitter or tutor. Babysitters and tutors cost money.

[71] Our definition is intended to exclude the justification that unfavorable treatment of blacks is "good business," either because it keeps whites happy, *cf.* Williams v. Matthews Co., 499 F.2d 819 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974); Roberts v. St. Louis Southwestern Ry., 329 F. Supp. 973 (E.D. Ark. 1971), or because it is profit maximizing, Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974). For a similar result under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1970), see Griggs v. Duke Power Co., 401 U.S. 424 (1971). The cases under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-19 (1970), are in accord. *See, e.g.*, United States v. Reddoch, 467 F.2d 897 (5th Cir. 1972).

[72] *See* text accompanying notes 91-132 *infra*.

the difference is a product of, or reflects, the long history of race discrimination, or manifests the defendant's personal reaction to blacks.

As the "reason attributable to race" part of our approach turns on the reasons for the defendant's conduct, it resembles the defendant-oriented test in that the defendant's motivation is relevant.[73] We still must give the defendant a chance to explain why he or she treated the non-white as he or she did, because the reason may not be attributable to race—for example, the black plaintiff may have been unemployed and unable to pay the rent. It differs from the defendant-oriented test, however, in an extremely important respect. Under the defendant-oriented test, defendant's liability turns on his or her subjective feelings about race. Under our proposed test, although the defendant's reasons for acting are still essential, the legality of those reasons is measured by an objective test—namely, whether those reasons are attributable to race.[74]

The other part of our approach—disadvantageous treatment—is both broader and narrower than the test of customary or reasonable treatment. It is broader because it measures a defendant's treatment of blacks both against how the defen-

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[73] This does not mean, however, that the plaintiffs must adduce direct evidence of defendant's mental processes to prevail on this issue. Inferences and presumptions are available to bridge the gap between proof of the defendant's behavior and the factfinder's conclusion about the reason for that behavior.

[74] By "objective test," we mean that the defendant's reason for acting in a particular manner can be attributable to race even though the defendant does not subjectively have racial motivation. This objective test, however, obviously also covers cases of subjective racial motivation, for if defendant's treatment of a black plaintiff is actually racially motivated, the treatment is inherently attributable to race. Whether a reason is one attributable to race is a question of law for the judge to determine. This approach is consistent with McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In that case plaintiff had established a prima facie case of racial discrimination in employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1970). The Court held that, if believed, the defendant's explanation for refusing to rehire plaintiff—that he had engaged in unlawful activity designed to disrupt defendant's business—was sufficient to defeat plaintiff's prima facie case. Thus, while the question whether defendant's explanation is believable is a question of fact, the legal sufficiency of the explanation is a question of law. This approach permits consistent decisionmaking and provides clear guidance with respect to a private party's obligations under the civil rights laws. Moreover, plaintiffs would face an onerous problem of proof if required to introduce evidence as to each element of a reason attributable to race, particularly because in most cases plaintiff's proof on this point might have to await defendant's testimony as to his reasons for treating plaintiff disadvantageously. Consequently, in a jury case, the court should instruct the jury which reasons are attributable to race, leaving to the jury the task of determining whether defendant in fact acted for a forbidden reason.

dant does or would treat whites, and against how others engaging in similar transactions treat whites. It is narrower in that it avoids most of the preferential treatment problems of the custom or reasonable treatment test.[75]

The most substantial problem with the "attributable to race" approach is defining the limits of the doctrine. Given the distribution of wealth and income in our society, a rent of $400 a month affects blacks more harshly than whites. It is arguable that racial discrimination has been a substantial factor in producing this state of affairs; yet it is impossible to read section 1982 as requiring those dealing in the real estate market to ignore either available capital or income stream in deciding whether and on what terms to deal with someone.[76] Even if the thirteenth

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[75] It avoids only "most" of the problems because it is possible that a landlord or seller will insist on maintaining an exclusionary policy even when that policy cannot be applied to non-whites; thus, it is theoretically possible that in order to comply with § 1982, a landlord might continue to exclude whites who are not recommended by present tenants but not blacks who are similarly unrecommended. Whatever constitutional difficulties there may be in preferential treatment that results from enjoining idiosyncratic real estate practices, there is no doubt about a court's power under the civil rights laws to enjoin a practice that it finds to be attributable to race. *See, e.g.*, Associated Gen. Contractors, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

Moreover, it is arguable that, whatever the definition of "same right" in § 1982, the statute "prefers" non-whites in the sense that a non-white has a more straightforward right to recover for violation of the statute. For example, if whites bought homes in the black ghetto from Universal Builders they would allegedly have purchased on the same terms as the black buyers, Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974). *See* text accompanying notes 22-29, 44-45, 63-64 *supra*. If the right of those whites to bring an action under § 1982 exists at all, however, it may only be a derivative right. *See, e.g.*, Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). *But cf.* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

[76] In Boyd v. Lefrak Org., 509 F.2d 1110 (2d Cir. 1975), the Second Circuit found that neither § 1982 nor Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-19 (1970), prohibited the defendant from requiring that a prospective tenant have a weekly income equal to a fixed percentage of the monthly rental of the desired apartment despite a showing that this requirement excluded welfare recipients, a group which was over three-quarters black or Spanish-surnamed. The majority reasoned that § 1982 and Title VIII prohibited *only* racially motivated disadvantageous treatment of non-whites, and that defendant's practice did not spring from such motivation.

As we have argued, text accompanying notes 30-48 *supra*, the Second Circuit's interpretation of § 1982 does not do justice to the language or purpose of the statute. Assuming that landlords do not typically impose percentage requirements on white persons with an income comparable to the plaintiff's in *Lefrak* (thus satisfying the injury requirement of § 1982), liability should turn on the reasons for this policy. Although Lefrak's policy cannot be held to violate § 1982 simply because it has a disadvantageous impact on minorities—a rent of $250 a month also has such an impact—neither is it valid simply because the district court (Justice Clark, sitting by designation) was unwilling to

amendment permitted Congress to do so, the language of section 1982 is not susceptible of such a reading.[77] Nor is it conceivable that Congress intended the statute so to be read. The only satisfactory resolution is that suggested by the Supreme Court in *Jones v. Alfred H. Mayer Co.*,[78] that the statute means that a dollar in the hands of a black can purchase the same thing as a dollar in the hands of a white, but was not intended to force private persons to compensate for differences in ability to acquire capital or generate income. It is for this reason that we limit the "attributable to race" test to those situations in which the policy does not serve an important business purpose (other than the business advantages flowing from disadvantageous treatment of non-whites).[79]

E. *Mental Elements of a Prima Facie Case*

Defining "same right . . . as is enjoyed by white citizens" to prohibit disadvantageous treatment for reasons attributable to race supplies three elements of plaintiff's prima facie case: (a) the prohibited act or omission (defendant's treatment of plaintiff); (b) the injury or harm (disadvantageous treatment);

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make what it considered to be an unnecessary finding of racial motivation. Boyd v. Lefrak, P-H EQUAL OPPORTUNITY IN HOUSING ¶ 13650 (E.D.N.Y. 1974). Rather, if the policy affects a predominantly black class unfavorably as compared with similarly situated whites, the validity of the defendant's action should turn on the reasons for the defendant's requirement. If Lefrak had been able to convince the factfinder that dealing with welfare recipients created substantial cash flow problems or produced a markedly higher rate of defaults *and* that this was the reason for its policy, then Lefrak should have prevailed.

[77] Whites have no "right"—whether based on custom or reasonableness or any other source—to a particular type of housing regardless of ability to pay a lawfully set price for it. By definition, therefore, § 1982 does not grant such a "right" to non-whites.

[78] 392 U.S. 409 (1968).

[79] A somewhat analogous problem arises in construing the "bona fide occupational qualification" exception in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e) (1970). *See* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); Wilson v. Sibley Memorial Hosp., 340 F. Supp. 686 (D.D.C. 1972), *rev'd on other grounds*, 488 F.2d 1338 (D.C. Cir. 1973). Courts have not completely resolved the question whether a loss of profit can be a defense to an alleged violation of Title VII. *Cf.* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). Our definition is designed to make clear that loss of business advantage attributable to race is no defense to a § 1982 action. For instance, under our definition if a landlord charges a higher rent in a black neighborhood than is normally charged for comparable housing in a white neighborhood, he or she does not violate § 1982 if his legitimate expenses (e.g., heat) are commensurately higher. If the landlord makes higher profits in the black neighborhood as a result of a captive black population, however, this is a business advantage flowing from disadvantageous treatment of non-whites.

and (c) the mental state (that defendant was motivated by a reason attributable to race). There is, however, an additional state of mind issue that must be resolved in order to define precisely the mental element of a prima facie case under section 1982. This is the question whether the failure to deal which caused[80] plaintiff's injury must be shown to have been intentional. Consider two examples. In the first, the plaintiff seeks to rent an apartment and the landlord refuses. Suit is filed and the landlord testifies that he or she meant to say no to the plaintiff, and explains why he or she refused the rental. In the second, plaintiff seeks to rent an apartment and is told by the landlord, "I will let you know tomorrow." The plaintiff does not hear the next day, and when plaintiff calls to find out what happened, the landlord says that the apartment has been rented. Suit is filed, and the landlord testifies (and the factfinder believes) that although the landlord had intended to rent to plaintiff, he or she forgot to call plaintiff the next day and, in the interim, the landlord's agent rented the apartment to another.

In the first example, the landlord intended not to rent the apartment. In the second example, the landlord intended to rent the apartment but negligently failed to carry out that intention.

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[80] Although a full discussion of the issue is beyond the scope of this Article, liability under the statute necessarily also depends on finding that the defendant was the "legal cause" of the plaintiff's injury. Typically, this is not a difficult issue. The plaintiff has sought to engage in a property transaction with the defendant, and the defendant has rebuffed plaintiff. Plaintiff identifies the rebuff as the injury (the denial of the "same right . . . as is enjoyed by white citizens"), and the case typically turns on the reasons for the defendant's action.

Suppose, however, that the defendant does not rebuff the plaintiff, but deals with him or her on the same basis as the defendant does or would deal with whites. Suppose further that it can be demonstrated that the terms on which the landlord does deal are substantially worse than the terms on which whites can typically either rent or purchase comparable real estate. Although this would be an injury under the broad definition of § 1982, can it fairly be said that the defendant "caused" the injury rather than that the plaintiff "caused" his or her own injury by failing to look harder for a better deal? The answer to this question may turn on the opportunities enjoyed by plaintiffs to secure housing on other terms from other sellers or lessors. Thus, in Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974), the Seventh Circuit held that plaintiffs had established a prima facie violation of § 1982 when, in addition to demonstrating injury in the broad sense, they established the existence of a dual housing market which sharply reduced their options as to where and from whom they could buy.

Here, as elsewhere in the law, the determination whether the defendant's action was the "legal cause" of the plaintiff's injury will depend on the policies underlying the substantive law, the nature and character of the defendant's act, and our commonly shared notions of what is "just."

If section 1982 is interpreted to apply only to those whose acts reflect their intention, then the landlord may be liable in the first example but cannot be liable in the second. If, however, section 1982 requires no particular state of mind accompanying the act of refusal, or only a negligent failure to rent, then it is possible that the landlord would be liable in either example.

Section 1982 should not impose liability on those who inadvertently or negligently do the act or omit to do the act that allegedly injures plaintiff. Liability under section 1982 should ultimately depend on the reasons why the defendant acted or omitted to act. The kinds of reasons that section 1982 invalidates are those that are attributable to the plaintiff's non-white race. A truly inadvertent or negligent[81] action or inaction is not so attributable.[82] If the factfinder can determine the *reason* for defendant's conduct—for example, a refusal to rent because plaintiff had an Afro hairstyle—then the factfinder has necessarily found that the injurious act was intentional in the threshold

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[81] If the factfinder determines that an individual was negligent or acted inadvertently, that is legally the end of the matter. Although it may make psychological sense to go further—to inquire *why* the defendant was negligent—the law does not carry the inquiry this far. The legal factfinding process is an awkward mechanism for answering such questions, and we have no adequate jurisprudence other than the insanity defense for dealing with non-conscious motivation. *But see* Hawkins v. Town of Shaw, 461 F.2d 1171, 1173 (5th Cir. 1972) (en banc), in which the court said, "[T]he facts before us squarely and certainly support the reasonable and logical inference that there was here neglect involving clear overtones of racial discrimination . . . ." Judge Wisdom, concurring, characterized this statement as "ambiguous." *Id.* at 1174. In our view it is illogical, and most likely reflects the uneasy tension between the Fifth Circuit's own reading of the record and its willingness to reverse a district court's finding as to motivation.

[82] It is arguable that there is yet another state of mind issue. This would be whether, assuming that the disadvantageous treatment need not be consciously *motivated* by racial considerations, the defendant nonetheless must have been *aware* that the challenged policy results in disadvantageous treatment of blacks for a reason attributable to race. Returning to the landlord who only rents to people recommended by present tenants, suppose the factfinder believes that the landlord neither employed the policy to exclude blacks *nor was aware that this would be the result of the policy*. Should this exculpate the landlord?

The issue is whether a "pure heart but an empty head" should be a defense to a § 1982 action. We believe that it should not. First, there is nothing either in the language or purpose of the statute or in the case law that suggests that "awareness" is a requirement under § 1982. Second, it is a false issue at least with respect to prospective relief. Once plaintiff has been rebuffed, complains, and sues, the defendant will be made aware of the effects of his or her policy and will have opportunity to alter them without awaiting trial. Finally, the difference between motivation and awareness is quite subtle, and may well be beyond the grasp of factfinders. Requiring proof of "awareness" would be reintroducing the problems associated with demanding proof of conscious racial motivation.

sense we are discussing. Consequently, the question whether defendant intended the act is not a separate element of the prima facie case.

There is a final issue concerning the meaning of "reasons attributable to race." Suppose that the defendant testifies and the factfinder believes that a reason attributable to race was a factor in the defendant's decision to act or not to act, but that it was not the only factor in that decision.[83] What test should a court apply in determining whether there has been a violation of the statute?

In one sense this is a causation issue, but it is not the typical causation issue whether the defendant's act or omission was the legal cause of the plaintiff's injury.[84] The question here is different: whether the reason attributable to race should be considered a reason for the defendant's act or omission. Of the traditional tests of causation, the one that meets both the language and policy of section 1982 is the contributing factor test.[85] The meaning of the statute is that private parties must treat non-whites as whites are treated in property transactions. By definition, a private party does not do so when he or she takes a reason attributable to race into account, even if that reason is not the sole factor behind the refusal to deal. As one court which reversed the lower court's application of a "but for" test has noted, there is "no acceptable place in the law for partial racial discrimination."[86]

Under this approach, the case of a defendant who acted for both permissible and impermissible reasons is not difficult to resolve. For example, if the defendant refused even to consider the plaintiff's offer to deal for a prohibited reason, there is a violation of section 1982. Proof that the defendant ultimately would have refused to conclude a transaction with the plaintiff because of some disqualifying reason not attributable to race may be relevant to the type and amount of harm suffered by

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[83] *See, e.g.*, Williams v. Matthews Co., 499 F.2d 819, *cert. denied*, 419 U.S. 1021 (1974); Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1970); Hughes v. Dyer, 378 F. Supp. 1305 (W.D. Mo. 1974).

[84] *See* note 80 *supra*.

[85] Our suggestion is consistent with the approach of the Seventh Circuit in Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 349-50 (7th Cir. 1970).

[86] *Id.* at 350.

plaintiff, and to the type of relief that a court will grant,[87] but is not controlling on the issue whether the statute has been violated.

F. *Summary: Elements of the Prima Facie Case*

To summarize the discussion to this point, the words "same right . . . as is enjoyed by white citizens" contained in section 1982 grant to non-white citizens[88] freedom from any disadvantageous treatment for a reason attributable to race. Disadvantageous treatment means either treatment less favorable than the defendant does or would grant to similarly situated whites, or treatment less favorable than others engaged in transactions similar to the defendant's typically accord such whites. "Reason attributable to race" means that the reason for the disadvantageous treatment is one based on a policy that, when applied to the given transaction, (a) is likely to have a greater adverse effect on blacks than on whites; and (b) is likely to have such an effect because: (1) the policy is a product of, or reflects, the long history of discrimination against non-whites; or (2) the history of discrimination has left blacks more vulnerable than whites; or (3) the policy evinces an individual's personal reaction to blacks; unless (c) the reason serves an important business purpose (other than whatever advantages flow from disadvantageous treatment of non-whites).

This definition supplies both the prohibited act and the injury under section 1982. It also indicates the requisite mental element: that a reason attributable to race was a contributing factor in the defendant's refusal to deal with the plaintiff. In addition to these elements—supplied by the definition of "same right"—plaintiff must also establish that defendant's act or omission was the legal cause of plaintiff's injury.[89]

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[87] In this regard consider the (admittedly unlikely) case of a black pyromaniac who is refused rental housing by a self-proclaimed racist landlord. Under our approach to the problem, proof that race was *a* factor in the landlord's refusal to deal would arguably support a money judgment for the plaintiff. It would not, however, require the court to order the defendant to rent to the plaintiff. The only "right" denied the plaintiff was the "right" to have the rental decision made without consideration of the plaintiff's race; a violation of this "right" may result in punitive damages, but it does not, by itself, require the landlord to rent to the plaintiff.

[88] Because the statute grants a right to "citizens," the plaintiff is also required to establish his or her citizenship.

[89] For a brief discussion of the causation element of a prima facie case, see note 80 *supra*.

II. Proof of Section 1982 Violations

In this section we shall first discuss proof of the injury and state of mind elements of the prima facie case. In particular, we shall analyze the inferences that the factfinder appropriately may draw in order to establish that case. We shall then discuss the treatment of defendant's response to the prima facie case, concentrating on the role of presumptions in shifting the burden of going forward, the burden of persuasion, or both. We have two goals: to demonstrate that our definition of "same right" provides a workable framework within which to litigate and resolve section 1982 disputes, and to indicate the inferences and presumptions that should be employed in determining the significance of evidence in cases involving allegations of racial discrimination.

The concept of a prima facie case is fundamental to our jurisprudence. Plaintiff has introduced evidence of a prima facie case when there is sufficient evidence to permit a factfinder reasonably to conclude, by a preponderance of the evidence, that plaintiff has established the existence of each element of his or her claim for relief.[90] Under section 1982, a prima facie case means that there is sufficient evidence to permit a factfinder reasonably to conclude that (a) defendant's conduct (b) caused (c) plaintiff to be treated less advantageously than similarly situated whites are or would be treated by defendant or by people engaged in transactions similar to defendant's, and (d) that defendant acted for a reason attributable to race. The remainder of this discussion will concentrate on elements (c) and (d) above, the elements most directly derived from our definition of "same right."

A. *Permissible Inferences*

Evidence constituting a prima facie case with respect to element (c) above, injury, also constitutes a prima facie case with respect to element (d), state of mind. Proof that a defendant has treated a non-white worse than he or she (or others engaging in similar transactions) treats or would treat similarly situated whites *permits* the factfinder to draw the inference that the difference in treatment is attributable to race. The converse is also true: Evidence constituting a prima facie case with respect to

[90] Black's Law Dictionary 1353 (4th ed. 1968).

state of mind also constitutes a prima facie case with respect to injury. Proof that a defendant acted pursuant to a reason attributable to race permits the factfinder to draw the inference that the conduct predicated upon that state of mind would manifest itself in terms of racially disparate treatment.

The relationship between proof of state of mind and injury is most obvious in simple cases. In *Harris v. Jones*,[91] Harris, a black, went to an advertised apartment on the second floor of Jones' home. She indicated her desire to rent the apartment for her husband and herself (they had no children), but was refused on the ground that the lessors were looking for an older couple who could make a longer time commitment than the one year to which plaintiff would commit herself. The next day, a tester[92]—a twenty-seven-year-old white graduate student with long hair and a droopy mustache—went to the Jones' home, was shown the apartment, and tendered a ten dollar deposit. The tester indicated that he was married but childless and was in a three- or four-year program. He was not asked to make a commitment for longer than one year. Although Jones was present in court, she did not testify and offered no reasons for refusing Harris and accepting the tester.

From these facts, the court in *Harris v. Jones* found a violation of section 1982; there was sufficient evidence with respect to each element of the claim for relief to constitute a prima facie case, and the evidence was believed. What supported that finding? Why is it not as likely that the Joneses simply changed their minds about the qualities they were looking for in a tenant, or that they took a strong liking to the tester and decided that they wanted to rent to him and his wife even though they were no older than the Harrises, or that they thought that a person of his education would enrich their lives? Perhaps the landlords disliked Harris but did not want to hurt her feelings, and so told gentle lies to explain their refusal. If Harris had been white instead of black, any of these suggested explanations would have been believable. In deciding *Harris v. Jones*, the court necessarily made certain assumptions about human behavior. The court must have assumed that the defendants were conscious of and reacted unfavorably to the plaintiff's *race* instead of any other

[91] 296 F. Supp. 1082 (D. Mass. 1969).

[92] *See* note 17 *supra*.

feature about her. Because there was no evidence about the defendants' personalities and views, the court must have based this assumption on its view of how people generally, or landlords specifically, react to blacks. The court's willingness to draw the inference that defendants reacted unfavorably to Harris' race also permitted it to conclude that the defendants would have treated Harris differently had she been white, thereby establishing the injury element of the prima facie case.

Although the conclusion that racial prejudice is pervasive in our society, particularly in the real estate market, is hardly novel,[93] a court's willingness to employ that perception in drawing inferences to explain behavior is noteworthy. After all, inferences are predicated upon the way people normally behave. Here a court is suggesting that, given the facts of *Harris*, the normal motivation for a refusal to rent would be racial prejudice. This is hardly a "color-blind" inference. It presents a generally unkind assumption about how people behave. Indeed, it suggests that it would be error to instruct the factfinder otherwise, namely, that in resolving the case, it is to assume that people behave in a non-discriminatory manner in real estate dealings, absent proof to the contrary.[94]

The reasoning process employed by the court in *Harris v. Jones* is not unusual. Facts similar to those of *Harris* have been held to constitute a prima facie case even under the defendant-oriented view of section 1982.[95] Moreover, the Supreme Court's definition of a prima facie case under Title VII of the Civil Rights Act of 1964[96] parallels the simple "tester"[97] case under

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[93] *See* note 39 *supra*.

[94] *Cf.* United States v. Pelzer Realty Co., 484 F.2d 438, 443-44 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Fessler & Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 441, 448 (1971).

[95] *See, e.g.*, Clark v. Universal Builders, Inc., 501 F.2d 324, 336 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974); Williams v. Matthews Co., 499 F.2d 819 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974); Seaton v. Sky Realty Co., 491 F.2d 634 (7th Cir. 1974); Jennings v. Patterson, 488 F.2d 436 (5th Cir. 1974); Stevens v. Dobs, Inc., 483 F.2d 82 (4th Cir. 1973); Hamilton v. Miller, 477 F.2d 908 (10th Cir. 1973); Hall v. Freitas, 343 F. Supp. 1099 (N.D. Cal. 1972); Williamson v. Hampton Management Co., 339 F. Supp. 1146 (N.D. Ill. 1972); Martin v. John C. Bowers & Co., 334 F. Supp. 5 (N.D. Ill. 1971); Brown v. Ballas, 331 F. Supp. 1033 (N.D. Tex. 1971); Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969); Newbern v. Lake Lorelei, Inc., 308 F. Supp. 497 (S.D. Ohio 1968). *Cf.* Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974).

[96] 42 U.S.C. §§ 2000e *et seq.* (1970).

[97] Note 17 *supra*.

section 1982. In *McDonnell Douglas Corp. v. Green*,[98] the Supreme Court described a prima facie violation of Title VII as including the following evidence about the plaintiff:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[99]

Although *Green* did not involve a tester, the plaintiff proved the functional equivalent of what a tester would have proved —that the employer continued to look for someone with plaintiff's qualifications after having rejected the plaintiff. Similarly, in a section 1982 case, defendant's advertising for a tenant or purchaser of plaintiff's qualifications after refusing plaintiff permits the inference that plaintiff was refused for reasons attributable to race. There is no magic in a tester. The function of a tester is to facilitate proof that defendant refused plaintiff for reasons attributable to race and that defendant would have treated a white differently from the way in which he or she treated plaintiff.[100]

Suppose, however, there is a case in which a tester (or the equivalent) is irrelevant because defendant does not refuse to deal with plaintiff, as in *Clark v. Universal Builders, Inc.*[101] In that case, plaintiffs introduced evidence establishing that the defendants sold houses to them on terms less favorable than the terms on which a white person with the same resources could purchase comparable housing elsewhere in the Chicago area.[102] As we

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[98] 411 U.S. 792 (1973).

[99] *Id.* at 802. As the Court observed in a footnote, "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at n.13.

[100] Indeed, there is no magic in any particular type of proof despite the tendency of some courts to confuse evidence relevant to a legal test with the test itself. *See* note 25 *supra*. *Cf.* Williams v. Matthews Co., 499 F.2d 819, 827-28 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974). Courts do so, we suggest, because insufficient attention has been paid to precise definitions of the applicable legal rule.

[101] 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974).

[102] Plaintiffs also introduced evidence of a segregated housing market, thus demonstrating that their actual options in purchasing housing were limited. Indeed, the

have previously demonstrated,[103] this proves injury under section 1982. The same evidence also supports the inference that the injury is attributable to race. Because courts proceed on the assumption that people react unfavorably to race,[104] facts that support no inference as to motivation if plaintiff is white ("I didn't get the apartment for which I was fully qualified") *do* support an inference of a reason attributable to race if plaintiff is black. In *Clark*, even assuming that the defendants did not treat blacks and whites differently, the defendants did behave in an unusual manner toward blacks to their disadvantage. Whatever the explanation for defendants' behavior had their customers been white, the combination of unusual and disadvantageous treatment of an almost exclusively black population permits the inference that the unusual and disadvantageous treatment of blacks was attributable to their race.

Moreover, although we reject conscious racial motivation as the exclusive mental element that will result in liability under section 1982, it should be noted that evidence sufficient to support the inference of a reason attributable to race arguably supports the inference of *racial motivation*. The difference between the two mental states (racial motivation versus a reason attributable to race) turns on such matters as whether the defendant appreciated the effects of his or her conduct and whether the defendant desired those effects. This is not to suggest that the line between our approach and the traditional one with respect to mental state is irrelevant to the actual resolution of section 1982 cases; the distinction is very important with respect to a court's treatment of defendant's explanation once plaintiff has established a prima facie case.

Even under our analysis, plaintiff will not have an easy task establishing a prima facie case in those situations in which a tester or its equivalent is either unavailable or irrelevant. Plaintiffs must adduce evidence of comparable transactions and of the

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Seventh Circuit found reversible error in the district court's refusal to admit evidence tending to show that plaintiffs were unable to purchase homes in the surrounding (primarily all-white) suburbs of Chicago.

[103] *See* text accompanying notes 25-27, 38-42 *supra*.

[104] Harris v. Jones, 296 F. Supp. 1082 (D. Mass. 1969); *see* text accompanying notes 91-94 *supra*.

There may, of course, be other reasonable explanations for defendant's treatment of plaintiff, The factfinder does not have to conclude that the treatment was attributable to race, but, rather, is only permitted to do so. This is the function of an inference.

personal characteristics that are considered by people who engage in such transactions. Plaintiff must then offer evidence of what happens to whites who possess similar characteristics in such transactions. The relevant characteristics will vary with the transaction. A person selling a residence will typically consider the sales price and the ability of the buyer to make the down payment and to secure mortgage financing. While a lessor will consider the rental figure, he or she will also be concerned about the tenant's reliability and timeliness in making payments, as well as about how the tenant will treat the leased premises, and whether the tenant's behavior will interfere with other tenants or occupants of the dwelling. A builder-financer-seller such as Universal Builders will be interested in the normal concerns of both sellers and lenders. Capital, income stream, and ability and willingness to maintain the property are all relevant concerns of such enterprises. Identifying all those matters as to which evidence is needed may be less than half the battle; securing that evidence will often be difficult. These problems in the proof process should calm any fear that our suggested approach will unjustifiably "open the floodgates" of litigation.[105]

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[105] Consider what should be a simple case. A black is refused rental in a two-hundred-unit apartment house and the landlord offers no reasons therefor. The prospective black tenant wishes to prove that landlords customarily rent to white people who are "like" him or her—that such whites have an option here that has been denied to the plaintiff. But what does it mean for one tenant to be "like" other acceptable tenants? Must the refused tenant prove similar age, income, prior rental record, marital status, credit history and financial position? Must he or she prove compliance with such formal lease convenants (which, more often than not, are honored only in the breach) as number of children, existence of pets, or willingness to turn off the television at 11:00 p.m.?

What about the more informal aspects of the landlord-tenant relationship, such as willingness to sign a three-year lease, to cheat on rent control, to avoid loud parties, and to wait another year before demanding fresh paint? Obviously, the list can exhaust the litigant's time and financial resources.

Suppose, however, that it is possible to agree on the terms that comprise the list. The rejected tenant must then ascertain the typical behavior of a landlord with respect to each item. Behavioral disparities abound. Relevancy problems become critical. If landlords in Austin, Texas, require a one-year lease and no security deposit, is that relevant to determining whether a landlord in San Francisco, California, behaved in a customary fashion in requiring a three-year lease? Indeed, is it relevant that inner city landlords may not require wall-to-wall carpeting when evaluating a suburban landlord's requirement that such carpeting be installed? Rental units may differ widely according to locality, type of construction, requirements of state and local building codes, climate, type of management, size, age and design of buildings, use of property (residential, commercial, or industrial), and the interest of the landlord (personal residence, investment, tax shelter).

These problems may inevitably force litigants pursuing this road to use expert testimony, thus increasing both the cost and the complexity of litigation. Plaintiffs may find

To summarize, a plaintiff has established a prima facie case under section 1982 when he or she introduces credible evidence of the following: (a) that the plaintiff is a non-white citizen; (b) that plaintiff has attempted to engage in a property transaction with the defendant at a time when the defendant is willing to engage in such a transaction; and (c) either (i) that the defendant has treated the plaintiff less well than similarly situated white persons are normally treated in comparable property transactions, or (ii) that the defendant has treated the plaintiff less well than the defendant would treat, currently treats, or has previously treated similarly situated whites. Plaintiff need not introduce direct evidence of mental state because of the logical inference that flows from proof of injury ((c) (i) or (ii) above).

While those cases that describe the elements of a prima facie case under section 1982 do so in terms different from those we have set out above,[106] the actual resolution of the cases is consistent with our formulation.[107]

B. *Treatment of Defendant's Explanation*

The preceding discussion related to the evidence that permits a factfinder to draw inferences in order to conclude that plaintiff has made out a prima facie case of discrimination. This

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it far easier to produce out-of-town experts on real estate practices than to rely on local real estate people, who have to deal continually with the landlords. Yet an out-of-town expert's lack of familiarity with the conditions about which he or she is being called to testify might be a bar to his or her being qualified. Even if the expert has been qualified, his or her lack of knowledge of local conditions might well make the expert's testimony less probative in the eyes of the factfinder.

[106] Cases cited note 95 *supra*.

[107] In Love v. DeCarlo Homes, Inc., 482 F.2d 613 (5th Cir.), *cert. denied*, 414 U.S. 1115 (1973), the Fifth Circuit held that the plaintiffs had failed to establish a prima facie case because they had failed to show that similarly situated whites could purchase comparable housing on more favorable terms elsewhere. This decision is not inconsistent with our analysis although the court's emphasis on the necessity of showing "comparable" housing is probably misplaced. Suppose that the policies employed by the defendants in Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974), had been carried to such extremes that, as a result, the houses in the black market were so poorly constructed as to have no equal in the non-segregated market. Would the impossibility of finding "comparable" housing mean that buyers in the black market could have no remedy under § 1982? Suppose that plaintiffs adduced evidence that the profit margin in the industry did not vary significantly with the sales price and that the profit margin for the sale of houses in the black market greatly exceeded that for other sales. Would such evidence not render the "comparability" issue irrelevant? Indeed, although the court's opinion is not as clear as one might wish on this point, it appears that the plaintiffs in *Clark* attempted to do precisely this. 501 F.2d at 337-39.

evidence, even if unanswered, would not necessarily compel that conclusion; moreover, the defendant still has available the defense of a non-racial reason for his or her conduct. The next question is whether the evidence sufficient for a prima facie case also supports some kind of presumption regarding the defendant's reasons for acting in the manner complained of.[108]

At a minimum, the effect of a presumption is to say, "Fact-finder, if you believe the evidence the plaintiff has introduced of the triggering facts ((a), (b), and (c)(i) or (ii) above), then you *must* find the presumed fact (a reason attributable to race) unless the defendant comes forward with evidence of an acceptable reason for his or her conduct.[109]

Considerations that have traditionally led courts to employ presumptions all favor the use of a presumption in section 1982 cases: The presumed fact (a reason attributable to race) is usually or normally present where the triggering facts are found; the most relevant evidence is typically within the defendant's knowledge or control;[110] the presumed fact (a reason attributable to race) is difficult to prove because of the multiplicity of potential explanations and the possibility of "after the fact" creation; and important social policies favor the presumption.[111] The Supreme Court has recognized that the strong social policy against racial discrimination justifies the use of a presumption in a suit brought under Title VII of the Civil Rights Act of 1964,[112] and

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[108] As we have noted earlier, note 74 *supra*, the question whether a particular reason is "attributable to race" is one of law for the court.

[109] *See* McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 342 (2d ed. E. Cleary 1972).

[110] It has been suggested that in view of the development of more flexible rules of discovery this consideration is not especially significant. 88 HARV. L. REV. 1610, 1618 (1975). But this ignores the fact that the issue to be determined is the defendant's state of mind, and that state of mind is difficult to determine accurately, whether by discovery or by cross-examination at trial. It is for this reason that presumptions and inferences are employed. In any event, it seems clear that the dominant consideration is the judicial assessment of the probability that the fact to be inferred actually occurred. *Cf.* McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 337, at 787 (2d ed. E. Cleary 1972).

[111] *See, e.g.*, F. JAMES, CIVIL PROCEDURE 259-66 (1965); Subrin, *Presumptions and Their Treatment Under the Law of Ohio*, 26 OHIO ST. L.J. 175, 181-92 (1965).

[112] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Supreme Court in *Green* enumerated the elements of a prima facie case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1970), and then stated that upon proof of a prima facie case, "[t]he burden must then shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S. at 802. Thus, *Green* stands for the proposition that proof of a prima facie case raises a presumption that race was a factor in the defendant's conduct.

decisions under section 1982 are in accord.[113]

The harder question is what happens to the presumption when the defendant adduces evidence that he or she acted for a reason that is not "attributable to race." There are three general kinds of possibilities.[114]

The first is that the presumption disappears, *and* there is no inference. This means that once evidence of a non-racial reason is introduced, the presumption disappears, and because there is no inference, the plaintiff is left without a prima facie case. Given our argument that there is an inference, and given the important reasons for both the inference and the presumption, this approach makes little sense.

The next possibility is that the defendant's evidence makes the presumption disappear, but the inference remains. The factfinder is left to choose between the inference and the defendant's statement of a non-racial reason. Thus, the presumption operates to shift the burden of going forward, but not the burden of persuasion, which remains with the plaintiff.[115] Because the inference is so strong, and because the courts in effect have adopted it in section 1982 and similar cases,[116] the inference should take the case to the jury regardless of the defendant's explanation.

The third possibility is that the presumption receives its greatest possible weight short of an irrebuttable presumption (which is not a presumption at all, but rather a rule of substantive law). Under this view, if the factfinder believes plaintiff's evidence as to the existence of the triggering fact (injury), then the factfinder must find the presumed fact (that the defendant acted for a reason attributable to race) unless the defendant not only comes forward with credible evidence to the contrary, but

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[113] *See, e.g.*, Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974); Williams v. Matthews Co., 499 F.2d 819 (8th Cir. 1973), *cert. denied*, 419 U.S. 1021 (1974); *cf.* Hamilton v. Miller, 477 F.2d 908 (10th Cir. 1973).

[114] *See* Subrin, *supra* note 111, at 184-92.

[115] The same result could be achieved by treating the presumption as sufficient evidence of the presumed fact, to be weighed by the factfinder, even after the defendant introduces some evidence counter to the presumed fact. The House version of Federal Rule of Evidence 301 handled presumptions in this manner, H.R. REP. No. 650, 93d Cong., 1st Sess. 7 (1973), but the Senate Committee on the Judiciary criticized this approach on the ground that presumptions are not evidence. S. REP. No. 1277, 93d Cong., 2d Sess. 9 (1974). The conference committee also rejected this draft. H.R. REP. No. 1597, 93d Cong., 2d Sess. 5-6 (1974).

[116] *E.g.*, Harris v. Jones, 296 F. Supp. 1082 (D. Mass. 1969).

also persuades the factfinder of the truth of that contrary evidence. This test therefore shifts both the burden of going forward and the burden of persuasion. The second and third tests differ in that if the factfinder is in equipoise between believing and disbelieving the defendant's testimony, the plaintiff wins under the third test and the defendant wins under the second.

Consider once more the example of the plaintiff who seeks to rent an apartment from a landlord who insists that the apartment is available only to those recommended by present tenants. As previously indicated,[117] proof of these facts plus proof that similarly situated whites could rent comparable apartments elsewhere without such a restriction establishes the prima facie case. Suppose that defendant testifies and denies the plaintiff's version of the facts, stating that he or she told plaintiff that it would be "helpful" if plaintiff knew someone in the apartment building, but that the reason for the refusal was that defendant's agent had previously committed the apartment and defendant felt bound by that commitment.

Assuming that a presumption which shifts the burden of persuasion applies, and that our suggested definition of section 1982 is adopted, the factfinder must find for plaintiff if: (a) it finds that defendant refused the apartment because plaintiff was black; or (b) it finds that the defendant in fact employed a policy of renting only to friends of the present tenants, and the judge has determined that such policy meets the legal definition of "attributable to race"; or (c) the judge rules that the alleged policy meets the legal definition of "attributable to race," and the factfinder is in equipoise as to the reason for the non-rental. On the other hand, if the presumption shifts the burden of going forward but not the burden of persuasion, and if the inference remains, then plaintiff will prevail under conditions (a) and (b), but not under condition (c). If the factfinder believes defendant's explanation, then defendant wins regardless of which interpretation of section 1982 applies and regardless of which presumption is adopted.

We have argued that a definition of "same right . . . as is enjoyed by white citizens" which takes community practices into consideration is appropriate. We now suggest that proof of a prima facie case should shift both the burden of proof and the

[117] *See* text accompanying notes 64-72 *supra*.

burden of persuasion. Although the problems of definition and of procedure are not solved by reference to identical considerations, our solutions reflect at least one common concern: that the factfinding process do justice to the purpose of section 1982.

In addition, similar considerations are relevant both in allocating the burden of persuasion and in determining whether to employ a presumption.[118] As we have previously tried to demonstrate, those considerations favor the employment of a presumption; they also favor shifting the burden of persuasion to the defendant once the presumption is raised.[119]

Finally, factfinders—particularly jurors—are more likely to be overly hostile to the purposes of section 1982 than they are likely to be overly enthusiastic about the statutory purposes. If bias enters the factfinding process, it is more likely to be a pro-defendant (white) bias than it is a pro-plaintiff (black) bias. If the judgment of Congress, appellate courts, and presidential commissions is accurate,[120] then to the extent that white people have feelings about non-whites, those feelings probably are negative rather than positive. Thus, in a very real sense, it is inaccurate to say that it is as hard to disprove racial prejudice as it is to prove racial prejudice.[121] Proof does not exist for its own sake; a matter is not proved until a factfinder performs its function and determines "what happened." Once the plaintiff establishes a prima facie case, the effect of the presumption should be to shift both the burden of going forward and the burden of persuasion to the defendant for the simplest of reasons: As a practical matter,

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[118] *Compare* authorities cited note 111 *supra with* McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 337 (2d ed. E. Cleary 1972).

[119] *Contra*, 88 HARV. L. REV. 1610, 1618 (1975). This commentator argues that as an empirical matter, it is incorrect to assume that on the facts in Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974), it was more likely than not that race was a factor in defendants' pricing policies. In support of this contention the commentator cites the statement in *Clark*, 501 F.2d at 333, that "a myriad of permissible factors" may explain a price differential. Reliance on this phrase is misplaced. In its original context the phrase was applicable only to "reasonable" price differentials. *Id.* But when expert testimony establishes that the differing profit margin is completely out of line with that which prevails in the industry—that the price differential is "unreasonable"—it is hardly startling, as either a legal or an empirical matter, that reasons attributable to race should be deemed the likely explanation for defendant's conduct. *See* text accompanying notes 39-41, 63-64 *supra*. *See generally* D. McENTIRE, RESIDENCE AND RACE 148-56 (1960); authorities cited note 39 *supra*.

[120] *See generally* S. REP. No. 872, 88th Cong., 2d Sess., (1964); H.R. REP. No. 914, 88th Cong., 1st Sess. (1963); authorities cited note 39 *supra*.

[121] *Cf.* Hamilton v. Miller, 477 F.2d 908, 910 n.2 (10th Cir. 1973).

it is easier for the defendant than for the plaintiff to meet the burden.

This proposal is hardly revolutionary. The "burden of persuasion shift" matters only in those cases in which the factfinder is near equipoise between believing and disbelieving the defendant's explanation. In such cases, accurate factfinding is best served by giving the defendant the burden of persuasion.[122] Indeed, Rule 301 of the Rules of Evidence for United States Courts and Magistrates, promulgated by the Supreme Court in 1972, adopted the view that a presumption shifts both the burden of going forward and the burden of persuasion: "In all cases not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."[123]

Congress, however, chose not to follow this approach, and instead opted for a restrictive doctrine that prohibits the use of a presumption to shift the burden of persuasion, even though the logic of the situation would suggest such a result. Rule 301 of the Federal Rules of Evidence as enacted provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to

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[122] *See* Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931).

The case law on this point is murky. As the court said in United States v. United States Steel Corp., 371 F. Supp. 1045, 1058 n.34 (N.D. Ala. 1973), "The distinction between the burden of going forward with the evidence and the burden of persuasion . . . is frequently blurred, even in cases which specifically deal with the issue. See, *e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 . . . ." In addition to confusing the two parts of the burden of proof, courts tend to confuse presumptions with inferences. Consider the following statement from Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974):

> Thus, where a Negro buyer meets the objective requirements of a real estate developer so that a sale would in all likelihood have been consummated were he white and where statistics show that all of a substantial number of lots in the development have been sold only to whites, a prima facie inference of discrimination arises as a matter of law if his offer to purchase is refused. If the inference is not satisfactorily explained away, the fact of discrimination becomes established.

A "prima facie inference . . . as a matter of law" is a presumption. *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803-06 (1973).

[123] Proposed Fed. R. Evid. 301, 56 F.R.D. 208 (1972).

> such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.[124]

On its face, at least, rule 301 as enacted would seem to require that any presumption employed in a section 1982 action brought in a federal court shift only the burden of going forward. Yet as Judge Weinstein has astutely pointed out,[125] the Supreme Court's decision in *Keyes v. School District No. 1*[126] strongly indicates that when a plaintiff proves that one segment of a school district is intentionally segregated, both the burden of going forward and the burden of persuasion are shifted to the school district to show that other schools within the system are not deliberately segregated.[127] Did Congress intend to overrule this aspect of *Keyes* when it enacted rule 301? Although it is difficult to imagine Congress' taking so drastic a step without any discussion of the important social policies that the Court thought justified shifting the burden of persuasion in *Keyes*, it

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[124] The troubled and inconclusive history of rule 301 is set forth in detail in 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 301-1 to -18 (1975). In a memorandum to the conference committee, Professor Cleary, who served as Reporter to the Advisory Committee on Rules of Evidence and the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, roundly criticized the ultimate selection of the "bursting bubble" theory—the theory that a presumption disappears upon the introducion of evidence that would support a finding of the nonexistence of the presumed fact. *Id.* 301-10 to -12.

The confusion is compounded by the conference committee's statement that under rule 301 as adopted, "If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it *may* presume the existence of the presumed fact." H.R. REP. No. 1597, 93d Cong., 2d Sess. 5 (1974) (emphasis supplied). Thus construed, rule 301 does not deal with presumptions at all, but rather with inferences. Even under the "bursting bubble" theory, the function of a presumption is to shift the risk of not going forward. If the defendant offers no evidence to contradict a presumed fact, and the factfinder believes the triggering facts, then the factfinder *must* find the presumed fact. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 345 (2d ed. E. Cleary 1972); Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324, 327 (1952).

[125] J. WEINSTEIN & M. BERGER, *supra* note 124, at 300-15 to -16.

[126] 413 U.S. 189 (1973).

[127] This burden-shifting principle is not new or novel. There are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, "is merely a question of policy and fairness based on experience in the different situations." 9 J. Wigmore, Evidence § 2486, at 275 (3d ed. 1940). In the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which "fairness" and "policy" require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated.

Id. at 209.

is equally difficult to point to anything in the language of rule 301 that dictates to the contrary.[128] One is sorely tempted to argue that section 1982 (or the fourteenth amendment, in the case of *Keyes*) is an example of a situation where Congress has "otherwise provided" for presumptions to shift both the burden of coming forward and the burden of persuasion. The effect of such a reading may be salutary, but this interpretation of the rule simply is unreasonable. If courts are allowed to "divine the intent" of Congress regarding the effect of presumptions on a statute-by-statute basis when the statute itself is silent on the subject, rule 301 will be rendered meaningless.

Alternatively, a court could remove the mental element (a reason attributable to race) from the plaintiff's prima facie case and hold that proof of a reason not attributable to race is an affirmative defense, thus assuring that the burden of persuasion on this issue is "originally cast" on the defendant. Although as a theoretical matter we believe that the mental state of the defendant should constitute an element of the prima facie case,[129] as a practical matter the only difference between this and our proposal would be that the factfinder could find for the plaintiff without having to draw an inference that the defendant acted for a reason attributable to race.

In federal courts, then, until Congress makes clear what results it intended by the enactment of rule 301, or amends the rule to permit more flexibility in the effect of presumptions as they relate to particular fact patterns,[130] there still should exist a presumption that shifts the burden of going forward to the defendant, with an inference of "reason attributable to race" remaining even if defendant comes forward with a reason for his behavior that is not attributable to race. In state courts, however, there is room for the more logical development of a presumption that shifts the entire burden of proof to the defendant—a presumption that requires the defendant to prove a non-racial reason for his or her treatment of the plaintiff.[131]

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[128] One interesting result of the enactment of rule 301 may be an increase in § 1982 litigation in state courts, where the rule does not apply. FED. R. EVID. 101. It is settled law that state courts do have jurisdiction under § 1982. Sullivan v. Little Hunting Park, Inc., 396 U.S. 299 (1969).

[129] *See* text accompanying notes 80-87 *supra*.

[130] California, for example has provided by statute that some presumptions shift the burden of production, while others shift the entire burden of proof. CAL. EVID. CODE § 601 (West 1966).

[131] *See* note 129 *supra*.

III. CONCLUSION

The purpose of this Article has been to clarify discrimination cases under section 1982 by answering the litigator's basic questions: What conduct does the statute prohibit? What are the elements of a prima facie case? What evidence will supply inferences sufficient to make out a prima facie case? What happens when the defendant responds to the prima facie case? We have answered these questions in the context of a single statute in order to promote a precise understanding of what conduct is prohibited.

By anatomizing section 1982, we have also sought to demystify civil rights litigation generally. Thus, we have emphasized that analysis of the evidence lacks focus, and even meaning, unless there is a clear definition of the legal rule. The question—"Do facts *a*, *b*, and *c* permit the factfinder to find fact *d*?"—can never be answered satisfactorily until we know what fact *d* is supposed to be. Yet courts struggle mightily to discern whether evidence supports an inference of "racial discrimination" without first giving a precise definition to that term.[132]

Similarly, we have pointed out that issues of what inferences are permissible and what presumptions are appropriate should be resolved in discrimination cases by reference to the same kinds of considerations as apply in other areas of the law. If there appears to be a unique feature of civil rights litigation, it is only that courts have recognized that people normally react to race. The recognition of this fact, we argue, supports the legal conclusion that poor treatment of non-whites as compared with

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[132] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), exemplifies the process. The Court spent considerable time defining what constitutes a prima facie case and what constitutes an adequate rebuttal to it, but never defined precisely those ultimate facts that plaintiff's case permitted the factfinder to find, and what defendant's case, if believed, compelled the factfinder not to find. If the ultimate fact was whether defendant refused to hire plaintiff because plaintiff was black, then what of Griggs v. Duke Power Co., 401 U.S. 424 (1971), in which the Court indicated that defendant would be liable even in the absence of racial motivation? Perhaps the "ultimate fact" was whether defendant's action was not for a good business reason, but the Court did not say.

This problem is not confined to cases involving private discrimination. The jury discrimination cases also suffer from the tendency of courts to indicate the evidence that establishes a prima facie case, and to indicate whether defendant's response is adequate, without indicating that rule of law which, when applied to plaintiff's evidence, permits a factfinder to find for plaintiff. *See, e.g.*, Turner v. Fouche, 396 U.S. 346, 360-61 (1970). For a scholarly example of the process, see Fessler & Haar, *supra* note 94, at 446-56 (discussing the prima facie case of a municipal equalization case without defining racial discrimination).

whites at a minimum permits the inference that the defendant acted for reasons attributable to race.

Finally, we have suggested a definition for the state-of-mind element of section 1982—a reason attributable to race—which should be relevant both to the interpretation of section 1982 and to defining racial discrimination generally.