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WE NEED INQUIRE FURTHER: NORMATIVE STEREOTYPES, HASIDIC JEWS, AND THE CIVIL RIGHTS ACT OF 1866

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I. INTRODUCTION—WE NEED INQUIRE FURTHER: NORMATIVE STEREOTYPES, HASIDIC JEWS, AND THE CIVIL RIGHTS ACT OF 1866

In the late 1980s, a Hasidic Rabbi named Yitzchok LeBlanc-Sternberg applied for a permit to establish a home-synagogue in a housing development in Ramapo, New York.[1] His neighbors attempted to deny the permit, allegedly because they were prejudiced against Hasidic Jews and did not wish to see an increase in the Hasidic population of the area.[2] In 1994, a Hasidic Denver public school teacher named Yishai Singer, a Hispanic convert to Judaism, alleged that he was discriminated against because of his Hasidic religious practice, beliefs, and garb.[3] LeBlanc-Sternberg and Singer each filed causes of action under 42 U.S.C. §§ 1981–1982, the sections of the United States code that incorporate the Civil Rights Act of 1866.[4] Congress passed this act immediately after the

1. LeBlanc-Sternberg v. Fletcher, 781 F. Supp. 261, 264 (S.D.N.Y. 1991).

2. *Id.* at 264; William Glaberson, *Orthodox Jews Battle Neighbors in a Zoning War*, N.Y. TIMES, June 3, 1991, at A1 ("The motivation of some people is that they do not want the Ultra-Orthodox or the Hasidim to move in.").

3. Singer v. Denver Sch. Dist. No. 1, 959 F. Supp. 1325, 1327–28 (D. Colo. 1997).

4. Runyon v. McCrary 427 U.S. 160, 169 n. 8, (1976) (stating that a "portion" of the Civil Rights Act of 1866 is presently codified in 42 U.S.C. § 1981); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422 (1968) ("In its original form, 42 U.S.C. § 1982 was part of § 1 of the Civil Rights Act of 1866."); Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 612 (1987) (stating that § 1981 has its roots in both the Civil Rights Act of 1866 and the Voting Rights Act of 1870); *see also* PETER W. LOW AND JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS, 5TH ED. (Foundation Press 2004), 1082 (stating that

Civil War to protect recently freed Blacks from private discrimination.[5] The Supreme Court has consistently interpreted these statutes to apply only to racial discrimination.[6]

According to modern Supreme Court opinions, The Civil Rights Act of 1866 prohibits only "discrimination [against members of protected groups] solely because of their ancestry or ethnic characteristics."[7] The Court refers to this type of discrimination as 'racial animus.'[8] In the 1987 case *Shaare Tefila Congregation v. Cobb*, Jews were recognized as a protected ethnic group under these statutes,[9] but the Supreme Court also reaffirmed that The Civil Rights Act only prohibits 'ethnic' or 'ancestral' discrimination.[10] The Act does *not* encompass religious discrimination.[11] Yet, despite the Supreme Court's rulings, the district courts held that both Rabbi LeBlanc-Sternberg's and Mr. Singers' allegations of discrimination based on specific Jewish religious practice *were* actionable under The Act.[12] This Note will document and explain this paradox.

Part II of this Note will review the development of the Court's jurisprudence surrounding The Civil Rights Act, and will discuss the two important restrictions on the scope of the Act: (1) it applies only to cases of racial discrimination, and (2) it applies only when the plaintiff and defendant are persons of different races.[13] This section will also explain how Jews became a protected group under The Civil Rights Act, which, after all, was passed to protect Southern freed Blacks from the predations of

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"[p]ortions of [Section 1 of The Civil Rights Act of 1866] survive as 42 U.S.C. §§ 1981 and 1982,"). This Note will refer to Sections 1981 and 1982 together as The Civil Rights Act of 1866 (The Civil Rights Act or The Act).

5. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 289 (1976).

6. *Id.* at 285; *see also* Georgia v. Rachel, 384 U.S. 780, 791, 1789 (1966) ("Congress intended to protect a limited category of rights, specifically defined in terms of racial equality."); Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987) (noting that discrimination based on religion does not lead to a § 1981 claim); Shaare Tefila Congregation v. Cobb 481 U.S. 615–17 (1987) (ignoring the obvious potential religious discrimination claims of plaintiff synagogue).

7. *Saint. Francis Coll.*, 481 U.S. at 613; Shaare Tefila Congregation, 481 U.S. at 617.

8. *Shaare Tefila Congregation*, 481 U.S. at 617. As the Court has defined race under The Civil Rights Act as equivalent to ethnicity and ancestry, this Note will use the terms interchangeably.

9. *Id.*

10. *See also Shaare Tefila Congregation*, 481 U.S. at 617; *Saint Francis Coll.*, 481 U.S. at 613.

11. *Saint Francis Coll.*, 481 U.S. at 613 (noting that discrimination based on religion does not lead to a § 1981 claim); *see also* Shaare Tefila Congregation, 481 U.S. 615 (ignoring the obvious potential religious discrimination claims of plaintiffs).

12. *LeBlanc-Sternberg*, 781 F. Supp. at 267–68; *Singer*, 959 F. Supp. at 1327. The district court judge allowed LeBlanc-Sternberg's § 1982 claim, but a jury then found no liability on the part of the defendants. United States. v. Vill. of Airmont, 839 F. Supp. 1054, 1063 (1993).

13. *See Saint Francis Coll.*, 481 U.S. at 609–10.

White Redeemers.[14] Lastly, this section will consider the unique complexities that emerge when applying these statutes, with their restrictions, to allegations of anti-Semitism. These complexities emerge because 'Jew' is both an ethnic and a religious identity,[15] and Jews have historically been plagued by two distinct brands of anti-Semitism: religious anti-Semitism and ethnic or racial anti-Semitism.[16]

Part II will conclude by demonstrating that, according to the Supreme Court, The Civil Rights Act of 1866 should apply equally to Jews as to other ethnic groups. That is, even though Jews might experience both racial and religious discrimination, each directed towards the same Jewish identity, The Act can only protect Jews from racial (or ethnic) discrimination—*not* religious discrimination.

Part III will take a closer look at the facts and legal analysis in the *LeBlanc-Sternberg* and *Singer* cases. In each case, the defendants argued that the discrimination in question was of a religious nature and thus not actionable under The Act. In each case the court rejected the defendants' claims. In *LeBlanc-Sternberg v. Fletcher*, the court acknowledged that racial and religious discrimination are different concepts.[17] The court then claimed that religious and racial discrimination against Jews are difficult to distinguish, and declined to make any effort to determine the true nature of the discrimination alleged.[18] Instead, the court asserted that since "Jews are entitled to the protections of §§ 1981 and 1982 . . . [w]e need not inquire any further."[19] The *Singer v. Denver School District No. 1* court did attempt to discern religious from racial discrimination, but held that this distinction was irrelevant to Jewish claims of discrimination under The Act. Specifically, the court reasoned that "[s]ince Singer is claiming he was discriminated against as a Jew, a distinct racial group for the purposes of § 1981, Defendants are not entitled to judgment on the basis that he is claiming religious discrimination."[20] Together, these cases might suggest that any member of a protected ethnic group can sue under The Civil Rights Act for discrimination based on that identity, whether or not there

14. *McDonald*, 427 U.S. at 289.

15. *See* United Jewish Communities, *National Jewish Population Survey*, 2, *available at* http://www.ujc.org/local_includes/downloads/temp/njps2000-01_revised_1.06.04.pdf (last visited March 18, 2007). The question of Jewish self-definition is rich and complex. *See* Zvi Gitelman, What Is a Jew? Conceptions and Their Consequences in Russia and Ukraine,(2006) (unpublished essay, on file with author) (reviewing definitions from the United States and Europe, including a "nation," a "people," a "race," an "ethnic group," a "religion," a "religious race," and "a cultural group with peculiar racial traits.").

16. Nico Stehr & Jay Weinstein, *The Power of Knowledge: Race Science, Race Policy, and the Holocaust*, 13 SOC. EPISTEMOLOGY 1, 4–5 (1999).

17. 781 F. Supp. at 267.

18. *Id.* at 267–68.

19. *Id.* at 268 (internal citations omitted).

20. *Singer*, 959 F. Supp. at 1331.

is a clear *racial* animus.[21] Alternatively, Jews might uniquely be able to bring religious discrimination claims under The Act, because of the practical difficulty of distinguishing between racial and religious anti-Semitism.[22]

Part IV will consider, but ultimately reject, the possibility that either of these explanations are correct. This section will carefully review the Court's holding in *Shaare Tefila Congregation* and conclude that it runs counter to both district courts' rulings. Next, this part will engage in a close reading of two subsequent cases.[23] This will show first that *LeBlanc-Sternberg* and *Singer's* expansion of The Civil Rights Act of 1866 to include even non-racial discrimination, such as religious discrimination, against a protected ethnic group is not representative of a broad reinterpretation of The Act; rather, it is unique to Jews.[24] Perhaps more surprisingly, this review will show that only *Hasidic* Jews have been able to successfully bring claims for religious discrimination under The Act; non-Orthodox Jews have not been able to do so.[25] This will suggest that it is not just the double identity 'Jew,' but rather some unique feature of Orthodox, specifically Hasidic,[26] Jews that is determinative in *LeBlanc-Sternberg* and *Singer.*

Part V will introduce the concept of normative stereotypes. These stereotypes are not based on factual (either accurate or inaccurate) beliefs about a group, but rather on normative beliefs about how that group

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21. For example, an Iraqi immigrant who was discriminated against because of his national origin, and not because of his Arab ethnicity, might nonetheless have a cause of action under §§ 1981–1982. *Cf. Saint Francis Coll.*, 481 U.S. at 613 (stating that such discrimination would not be actionable); *but see* Gold v. Gallaudet Coll., No. 86-7079, 1987 U.S. App. LEXIS 17616, at *12 (unpublished) (D.C. Cir. Nov. 20, 1987) (suggesting that such discrimination *would* be actionable.)

22. *Cf. LeBlanc-Sternberg*, 781 F. Supp. at 267 ("Because Jewish culture, ancestry, and ethnic identity are intricately bound up with Judaic religious beliefs, racial and religious discrimination against Jews cannot be as easily distinguished as defendants would have it.").

23. Elkhatib v. Dunkin' Donuts, Inc., No. 02 C 8131, 2004 WL 2600119 (N.D. Ill. Nov. 15, 2004); Kratz v. Coll. of Staten Island, No. 96-CV-0680, 2000 U.S. Dist. LEXIS 5199 (E.D.N.Y. Mar. 15, 2000).

24. *See Elkhatib*, 2004 WL 2600119, at *3.

25. *See Kratz*, 2000 U.S. Dist. LEXIS 5199, at *7.

26. Courts have been imprecise in their usage of 'Hasidic' and 'Orthodox.' They are not equivalent: Hasidim are a subset of Orthodox Jews. *See* LeBlanc-Sternberg v. Fletcher, 67 F.3d. 412, 417 (2nd. Cir. 1995). Hasidim are distinguished by, among other things, an emphasis on cultural separatism. *See* SAMUEL G. FREEDMAN, JEW VS. JEW: THE STRUGGLE FOR THE SOUL OF AMERICAN JEWRY 217–26 (Simon & Schuster 2000). This Note will use the term 'Orthodox' when generality is appropriate, but will largely use 'Hasidic,' as the issues discussed are most relevant to Hasidim.

should behave.[27] Normative stereotypes are distinct from general social norms, in that these expectations apply *specifically* to members a certain group, and not to every member of a society; they thus burden members of that group solely on the basis of group membership.[28] This section suggests that although the results in *LeBlanc-Sternberg* and *Singer* are incorrect as a matter of doctrine, they are consistent with the theory that anti-discrimination laws prohibit discrimination based on normative stereotypes as well as discrimination based on animus.[29]

LeBlanc-Sternberg and Singer were discriminated against because of their Hasidic practice. Undoubtedly this was religious discrimination, which is still beyond the scope of The Civil Rights Act. However, it may also have been racial discrimination, although it did not reflect racial animus. Instead, the discrimination was based upon the Hasidic plaintiffs' failure to conform to a normative Jewish stereotype, specifically, the belief that Jews should assimilate into broader American culture. This assimilation norm may be more strongly applied to Jews than to non-Jews such as the Amish. This suggests that assimilation is not just a general social norm, but is instead associated with Jewish ethnic status, and so functions as a normative ethnic stereotype.[30] The hostility faced by plaintiffs because of their failure to assimilate was therefore not race-neutral, but was in fact triggered by their status as ethnic Jews. It should therefore be recognized as racial discrimination. At least in the special case of Hasidic Jews, The Civil Rights Act of 1866 may encompass discrimination based on normative stereotypes as well as racial animus. While the expansion of civil rights is generally laudable, such expansion should occur through forthright and careful law-making—not the shoddy and injudicious disregard of law and fact evinced by the courts in *Leblanc-Sternberg* and *Singer*.

II. JEWS ARE PROTECTED FROM RACIAL DISCRIMINATION UNDER THE CIVIL RIGHTS ACT OF 1866, BUT APPARENTLY NOT FROM RELIGIOUS ANTI-SEMITISM

Congress passed the Civil Rights Act of 1866 because of "the necessity for further relief of the constitutionally emancipated former Negro

27. K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, *in* PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW, 55, 63–65 (Robert C. Post ed., Duke Univ. Press 2001).

28. *See* Appiah *id.* at 65.

29. *Id.* at 63; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."); *but see* Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004) (holding that not all invocations of normative stereotypes will be deemed unlawfully discriminatory).

30. *See* Appiah, *supra* note 27, at 64.

slaves."[31] Sections 1981 and 1982 protect the right to contract and to hold property, respectively, and provide that 'all persons' or 'all citizens' in the United States shall have the same rights as 'White citizens' with regard to these rights.[32] Section 1981 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. . . .[33]

Section 1982 has similar language and provides that "[a]ll 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."[34] Importantly, The Act even applies to private action.[35]

A. *The Civil Rights Act Protects People of All Ethnicities, but only from Racial Discrimination*

The statutory text of The Civil Rights Act does not state what type of discrimination the Act prohibits, declaring only that "all persons [or citizens] ... shall have the same right ... as is enjoyed by white citizens."[36] However, the Supreme Court has consistently held that The Act prohibits only racial discrimination and does not reach claims of discrimination based on religion or national origin.[37] This understanding of The Act is based upon its use of the term "white citizens" to describe the baseline group of rights which all individuals shall now enjoy.[38] According to the Court, these phrases "emphasiz[e] 'the racial character of the rights being protected.' "[39]

White and non-White victims alike have recourse under The Civil Rights Act when complaining of racial discrimination.[40] This interpretation was not self-evident: the same language drawn upon to establish the racial character of the rights being protected—"the same right ... as is

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31. *McDonald*, 427 U.S. at 289.
32. 42 U.S.C. §§ 1981–1982 (2006).
33. 42 U.S.C. § 1981 (2006).
34. 42 U.S.C. § 1982 (2006).
35. *Jones*, 392 U.S. at 413.
36. 42 U.S.C. §§ 1981–1982 (2006).
37. *Jones*, 392 U.S. at 413; *see also Saint Francis Coll.*, 481 U.S. at 613 (noting that discrimination based on religion does not lead to a Section 1981 claim).
38. *See* Georgia v. Rachel, 384 U.S. 780, 791 (1966).
39. *McDonald*, 427 U.S. at 287 (quoting *Rachel*, 384 U.S. at 791).
40. *See id.*

enjoyed by white citizens"[41]—might also suggest that The Act protects only non-White victims of discrimination by White perpetrators. However, other language in The Act states that "*all* persons [citizens] shall have the same right."[42] This compels the opposite conclusion: The Civil Rights Act of 1866 prohibits racial discrimination against a victim of any race.[43] The legislative history of The Act likewise supports this understanding. As one Congressional sponsor stated, The Civil Rights Act was meant to apply to "every race and color."[44]

Nonetheless, The Civil Rights Act of 1866 does not reach *all* acts of racial discrimination: it does not cover racial discrimination inflicted upon a victim by a member of his or her own racial group.[45] Therefore, under The Act, a person classified as White cannot sue claiming discrimination by another person also classified as White.[46] This created an open and crucial question as to whether certain ethnic or racial groups were, for purposes of The Civil Rights Act, categorized as White or non-White.

B. Shaare Tefila Congregation *and* Saint Francis College *Extended Protection under the Civil Rights Act of 1866 to Jews and Arabs*

In 1987 companion cases, *Shaare Tefila Congregation v. Cobb*[47] and *Saint Francis College v. Al-Khazraji*,[48] the Supreme Court answered this knotty question of classification and statutory scope with regard to Jews and Arabs. The Court held that The Civil Rights Act of 1866 protected both Jews[49] and Arabs[50]—although classified by modern convention as 'Caucasoid'[51]—from racial discrimination targeted at them by Whites. The Court reached this result *without* rejecting the premise that The Act does not apply to discrimination by one member of a racial group against an-

41. 42 U.S.C. §§ 1981–1982 (2006).
42. *Id.* (emphasis added).
43. *See McDonald*, 427 U.S. at 287–96.
44. *Id.* at 287.
45. *See Saint Francis Coll.*, 481 U.S. at 609–10.
46. *See id.*
47. 481 U.S. 615.
48. 481 U.S. 604.
49. *Shaare Tefila Congregation*, 481 U.S. at 617–18.
50. *Saint Francis Coll.*, 481 U.S. at 604.
51. *Id.* at 610 n.4.

other member of that group.[52] Indeed, this presumption runs throughout the 1987 opinions.[53]

The Court explained that the proper question was not whether Jews or Arabs would *currently* be considered Caucasian, and therefore unable to sue other Caucasians for discriminating against them for being Jews or Arabs.[54] Nor was it sufficient to show that the defendants were motivated by racial animus,[55] as the plaintiffs and their amici urged.[56] Rather, the Court held that it was necessary to determine whether Jews and Arabs "constitute[d] . . . group[s] of people that Congress intended to protect,"[57] at the time that it passed the Civil Rights Act of 1866. This required the

52. *Id.* at 609–10 (rejecting only one premise of petitioner's argument that an Arab could not sue a Caucasian under the Civil Rights Act. The petitioners contended that because Arabs are considered Caucasian, and because The Civil Rights Act does not allow suits against a person of the same race as the plaintiff, the plaintiff's claim was not cognizable. The court rejected only the first premise, on the grounds that Arabs were not considered Caucasian in the 19th Century.).

53. *See id.*; *Shaare Tefila Congregation*, 481 U.S. at 617–18 ("[T]he Court of appeals erred in holding that Jews cannot state a § 1982 claim against other White defendants. That view rested on the notion that because Jews today are not thought to be members of a separate race, they cannot make out a claim of racial discrimination within the meaning of § 1982. . . . Jews and Arabs were among the peoples then considered to be distinct races and hence within the protection of the statute. Jews are not foreclosed from stating a cause of action against other members of what today is considered to be part of the Caucasian race.").

54. *Saint Francis Coll.*, 481 U.S. at 613; *Shaare Tefila Congregation*, 481 U.S. at 617.

55. *Shaare Tefila Congregation*, 481 U.S. at 617.

56. Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 526 (4th Cir. 1986) ("The Congregation maintains that Jews are not members of a racially distinct group and do not wish to be so considered.") It is striking how desperately the Jewish plaintiffs and amici such as the Anti-Defamation League of B'nai B'rith sought to avoid a Supreme Court ruling that Jews were a separate race. Instead, they argued that even though Jews were *not* a separate race, the defendants' irrational racist beliefs classified them as such, and this racial animus should be sufficient under The Civil Rights Act. *Shaare Tefila Congregation*, 481 U.S. at 616; *see also Shaare Tefila Congregation*, 785 F.2d 523 (accepting the argument that Jews are not a separate race, but dismissing the argument that subjective racial animus is within the scope of The Civil Rights Act). The Holocaust looms large in this reflexive shying from views that would classify Jews as a separate race. *Shaare Tefila Congregation*, 785 F.2d 523 at 530 (Wilkinson, J. Concurring) ("It is undeniable that the misguided view of the racial distinctiveness of Jews has led to atrocities of no less consequence than those generated by other fallacious beliefs about race. . . . It is, of course, clear to this court, the district court, and counsel that Jews are not, under any legitimate view, a distinct race"). Economic factors may also serve as motivation. *See* KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS: AND WHAT THAT SAYS ABOUT RACE IN AMERICA, 25–50 (Rutgers University Press 1998) (arguing that current widespread Jewish prosperity results from the classification of Jews as White after WWII; this enabled Jews to take advantage of federal programs, such as FHA mortgages and GI Bill disbursements, that were often denied to people of color).

57. *Shaare Tefila Congregation*, 481 U.S. at 617.

Court to determine whether Jews and Arabs were considered distinct races in 1866.[58]

The Court began this inquiry by noting that "all those who might be deemed Caucasian today were not thought to be of the same race at the time [The Civil Rights Act of 1866] became law."[59] To determine the scope of the term 'race' at this time, the Court looked to period dictionaries and encyclopedias. Each source used 'race' to refer to what today might be called ethnicity. For example, dictionaries "commonly referred to race as a 'continued series of descendants from a parent who is called the stock.'"[60] Encyclopedias "described race in terms of ethnic groups" and categorized Finns, Swedes, Norwegians, Germans, Greeks, Italians, Gypsies, Basques, Arabs and Hebrews, among others, as different races.[61] As the Court noted, these separate 'races' are in fact what would now be called 'ethnic groups.'[62] Furthermore, the legislative history of the Civil Rights Act of 1866 supported the belief that 'race,' as used in The Act, is not restricted to supposed biological classifications, but also encompasses ethnicity.[63]

Thus, the term 'race,' as used in The Civil Rights Act of 1866, really means 'ethnicity,' and an expansive notion of ethnicity at that. In fact, in *Saint Francis College* the Supreme Court stated that even Englishmen and Germans are not considered members of the same race for purposes of The Act.[64] Under this standard, Jews and Arabs are considered racially distinct from other Caucasians and their allegations of discrimination by White defendants are actionable under the Act.[65]

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58. *Id.* at 617–18.

59. *Saint Francis Coll.*, 481 U.S. at 610.

60. *Id.* (quoting N. Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 666 (NO1830).

61. *Id.* at 611.

62. *Id.* The Court's use of dictionary definitions in this context has been criticized as "contrived because those definitions undoubtedly were rooted in nineteenth century bigotry." Jennifer Grace Redmond, Note, *Redefining Race in* Saint Francis College v. Al-Khazraji *and* Shaare Tefila Congregation v. Cobb*: Using Dictionaries Instead of the Thirteenth Amendment*, 42 VAND. L. REV. 209, 214–15 (1989).

63. *Id.* at 612 (noting that "the debates are replete with references" to races such as Scandinavian, German, Anglo-Saxon, Mexican, Black, Latin, and Jewish).

64. *Id.*

65. The eligibility of Jews for protection under laws prohibiting racial discrimination is apparently still a matter of some controversy and confusion. In 2006, the U.S. Commission on Civil Rights voted to recommend that Education Department officials act to protect students from anti-Semitism under Title VI of the Civil Rights Act of 1964. Title VI prohibits discrimination on the basis of race, color, or national origin by any institution that receives federal funds. The chairman of the Commission voted against the recommendation as beyond the powers of the Education Department's Office for Civil Rights. The chairman argued that the Office for Civil Rights investigates cases of discrimination based on race and national origin, and that since Judaism is a religion, anti-Semitism does not fall within the office's jurisdiction. Jennifer Jacobson, Civil-Rights

C. *The Civil Rights Act of 1866 Prohibits Only Discrimination Based on* Genetic *Membership in an Ethnic Group*

In order for a Jew or Arab to bring a claim under The Civil Rights Act, it is not sufficient to show merely that Jews and Arabs were considered distinct races from other Whites in 1866. As the Supreme Court has repeatedly stated, The Civil Rights Act prohibits only racial discrimination.[66]

The Supreme Court defined racial discrimination under The Act in the 1987 companion cases.[67] For purposes of The Act, a plaintiff shows that she was a victim of racial discrimination if she can demonstrate that she was "subjected to intentional discrimination solely because of [her] ancestry or ethnic characteristics."[68] Arguably, this disjunctive language suggests that racial discrimination under The Act encompasses two distinct categories: (1) 'ancestry' discrimination, which refers to genetic features usually associated with race, and (2) 'ethnic characteristics' discrimination, which is based on cultural features such as language or traditional practices.[69] For example, the actions of a defendant who becomes irate at the sound of spoken Hebrew, regardless of whether the speaker is Jewish (or is perhaps instead a non-Jewish ancient languages scholar), could be thought of as ethnic characteristics discrimination, because the Hebrew language is a prominent 'characteristic' of Jewish ethnicity.[70] This would not be considered 'ancestry' discrimination, because our defendant is disinterested in the actual ancestry of the plaintiff. Nonetheless, this discrimination might qualify as racial discrimination under the disjunctive reading of The Act. According to this view, the plaintiff only has to prove 'ancestry' discrimination *or* 'ethnic characteristics' discrimination—not both.

Panel Urges Federal Monitoring of Campus Anti-Semitism, THE CHRONICLE OF HIGHER EDUCATION, Apr. 14, 2006 at A27. *Cf. Shaare Tefila Congregation*, 785 F. at 530 (Wilkinson, J. Concurring) ("It is, of course, clear . . . that Jews are not, under any legitimate view, a distinct race, but are in fact members of a religious community with a rich cultural heritage.")

66. *Saint Francis Coll.*, 481 U.S. at 613 (1987) (noting that discrimination based on religion does not lead to a Civil Rights Act claim); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285 (1976); *Rachel*, 384 U.S. at 791 (1966) ("Congress intended to protect a limited category of rights, specifically defined in terms of racial equality.").

67. *Saint Francis Coll.*, 481 U.S. at 604; *Shaare Tefila Congregation*, 481 U.S. at 615.

68. *Saint Francis Coll.*, 481 U.S. at 613.

69. *Cf.* Elkhatib v. Dunkin' Donuts Inc., No. 02 C 8131, 2004 WL 2600119 at *3 N.D. Ill. (Nov. 15, 2004) (arguing that § 1981 encompasses discrimination against an Arab based on Arab "racial traditions" prohibiting the sale of pork.).

70. *Cf.* 29 C.F.R. § 1606.1 (2005) cited in Oranika v. City of Chicago, 2005 U.S. Dist. LEXIS 24024 at *8 (N.D. Ill. Oct. 17, 2005) (explaining that national origin discrimination under Title VII includes discrimination based on place of birth, "*or because an individual has the physical, cultural, or linguistic characteristics of a national origin group.*" (emphasis added)).

However, this reading is contradicted by other language in *Saint Francis College*, in which the Court clearly stated that The Act applies only to discrimination that occurs *because* of the victim's genetic status as a member of an ethnic group. As the Court said, The Act prohibits only "discrimination against an individual '*because* he or she is *genetically* part of an ethnically ... distinctive sub-grouping of homo sapiens.'"[71] When this statement is compared to the earlier language that states that racial discrimination occurs when someone is "subjected to intentional discrimination solely because of [her] ancestry or ethnic characteristics,"[72] it becomes clear that 'ancestry' and 'ethnic characteristics' are not separate categories, but are, rather, synonyms. This means that the disjunctive reading—according to which discrimination based solely on so-called "ethnic characteristics," but divorced from actual ancestry, is actionable under the Civil Rights Act—must be incorrect.

Therefore The Civil Rights Act of 1866 prohibits only discrimination that is, first, directed towards a member of a protected ethnic class, and second, based on his or her genetic membership in that class. For example, the Arab plaintiff in *Saint Francis College* could only prevail on his § 1982 claim if he could prove that at least some of the discrimination he faced was simply because he was, genetically speaking, an Arab.[73] Discrimination based on any other characteristics perhaps associated with such Arab genetic status, such as Muslim religion or country of origin, would not be actionable.[74]

D. *Jews Are Complicated: Jews Are Both an Ethnicity and a Religion and Have Faced Religious and Racial Anti-Semitism*

While the Supreme Court has held that Jews are a distinct race for purposes of The Civil Rights Act of 1866, Jews are more than a distinct race; Jews are also members of a shared religion.[75] A person not born to Jewish parents may convert to Judaism and is then considered a Jew.[76] For example, the 2001 National Jewish Population Survey in the United States counted as a Jew any person who had at least one Jewish parent (and who had not converted to another monotheistic religion) *or* whose

71. *Saint Francis Coll.*, 481 U.S. at 613.

72. *Id.*

73. *Id.*

74. *Id.*; *see also Elkhatib*, 2004 WL 2600119 (rejecting a Section 1981 claim based on such alleged discrimination).

75. Stehr & Weinstein, *supra* note 16, at 25.

76. *See, e.g.*, United Jewish Communities, *National Jewish Population Survey*, 2, http://www.ujc.org/local_includes/downloads/temp/njps2000-01_revised_1.06.04.pdf (last visited March 18, 2007).

religion is Jewish.[77] In most cases, Jewish religion and Jewish ancestry overlap.[78]

Given this two-dimensional religious and racial identity, Jews have also historically been subjected to two distinctive types of anti-Semitism: racial anti-Semitism based on Jewish ancestry, and religious anti-Semitism, based on Jewish beliefs and behaviors.[79]

Racial anti-Semitism has been a more recent phenomenon, typified by the Nazis and the 1935 passage of their Nuremberg Laws, which classified Germans into Jewish and non-Jewish persons based on principles of heredity.[80] The history of, and main distinctions between, these two types of hatred are lucidly explained by Jay Weinstein and Nico Stehr:

> It has been widely observed that [the ancestral anti-Semitism enshrined in the Nuremberg laws] represents a significant departure from traditional forms of anti-Semitism. For nearly two millennia the Jews of Europe had been viewed as 'different' (marginals, outsiders, and in many instances pariahs) because they refused to accept Christ as their Messiah and, according to Church doctrine, belatedly revoked in 1968, because they were responsible for the Saviour's death. Although these beliefs and the exclusionary practices based on them made life difficult for Jews, they also allowed for the possibility of exculpation through conversion. Moreover, since even a Jewish mother and father could produce a Christian child, the religion of one's parents was not necessarily grounds for exclusion, persecution or execution. 'The world without Jews' envisioned by European Christians prior to World War I was one in which all former

77. *Id.*

78. *See, e.g., id.*, at 29–30 (classifying over 90% of those of Jewish background as Jews). This does not, however, mean that "Jewish faith" and "Jewish ethnicity" are equivalent statuses. Courts surprisingly frequently do not understand this, and use the terms as though they were synonyms. *See, e.g.*, Sinai v. New England Tel. & Tel. Co., 3 F.3d. 471, 472–73 (discussing the plaintiff's racial discrimination suit under § 1981, and finding "pertinent" that his employer had hired "several adherents of the Jewish faith." The court also repeatedly refers to the plaintiff's ethnicity as "Jewish/Hebrew."); *See also* Rosenbaum v. Bd. of Tr. of Montgomery Cmty Coll., 1999 WL 182358 at *3 (4th Cir. March 19, 1999) (dismissing the plaintiff's claim of ethnic discrimination, in part because "the Defendants have not engaged in discriminatory practices against those of the Jewish *faith*.") (emphasis added). This represents a troubling analytic sloppiness; evidence of a defendant's hiring practices with regard to religion seems hardly relevant to a claim of ethnic or racial discrimination.

79. Stehr & Weinstein, *supra* note 16, at 4–5; *see also* Bachman v. St. Monica's Congregation, 902 F.2d 1259, 1260–61 (1990).

80. *Id.*

> Jews will have joined the faith—or, as in Karl Marx's secularized formulation, will have stopped behaving 'like Jews.'[81]

As Weinstein and Stehr emphasize, racial anti-Semitism, as per the Nazis, targets Jews because of their ancestry. As a result, there is no action that a Jew can take to protect herself. On the other hand, religious anti-Semitism, as per the Catholic Church or even Marx, targets Jews because of their religious affiliation with Judaism, following of Jewish doctrine, and Jewish practices.[82] This hatred, however, can be appeased if a Jew chooses to believe and behave differently. More generally and drastically, racial anti-Semitism can only be satisfied when there are no more people with Jewish blood in their veins. Religious anti-Semitism can be satisfied when there are no more adherents to Judaism.

E. *The Civil Rights Act Purports to Reach Only Racial Anti-Semitism*

The complication is that the Supreme Court has repeatedly declared that The Civil Rights Act of 1866 does not reach religious discrimination, but only racial discrimination.[83] Therefore, it would seem that when a Jew brings a claim under The Act alleging that she was discriminated against for being Jewish, the courts must engage in the same inquiry as they would for any other such plaintiff: they must determine whether the plaintiff's claim is really one of racial discrimination. If it is instead a claim of religious discrimination, it should not be cognizable under The Act. As the Court in *Saint Francis College* stated, The Civil Rights Act reaches "discrimination against an individual *because* he or she is genetically part of an ethnically . . . distinctive sub-grouping of homo sapiens."[84] Put differently, The Act reaches only racial animus.[85]

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81. *Id.* (internal citations omitted). There is some disagreement among courts and commentators as to when racial anti-Semitism emerged. According to Stehr and Weinstein, this was a tragic development of the Twentieth Century, a view which Judge Posner, in a historical review lacking any references or citations, seems to endorse. *Bachman*, 902 F.2d at 1260–61. The brief of the Anti-Defamation League differs, and suggests that racial anti-Semitism emerged in the 15th Century. Brief of the Anti-Defamation League of B'nai B'rith, page 11 (quoting B. LEWIS, SEMITES AND ANTI-SEMITES, 81 (1986)).

82. *Cf. Bachman*, 902 F.2d at 1260–61 ("There is religious anti-Semitism, . . . and racial anti-Semitism . . . . The one objects to Jews because of their religion, the other objects to Jews because they are descended from Jews, even if they are converts to other faiths.").

83. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987) (noting that discrimination based on religion does not lead to a § 1981 claim); *see also* Shaare Tefila Congregation v. Cobb 481 U.S. 615(1987) (ignoring the obvious potential religious discrimination claims of plaintiffs).

84. *Saint Francis Coll.*, 481 U.S. at 613 (emphasis added).

85. *See Shaare Tefila Congregation*, 481 U.S. at 617.

Shaare Tefila Congregation did not require the Supreme Court to grapple with this issue, as it was easy to determine that the defendants acted out of racial, and not religious, animus.[86] The defendants in that case defaced the outside walls of the Shaare Tefila Congregation with spray-painted swastikas, Ku Klux Klan symbols, and threatening anti-Semitic slogans including "Death to the Jude," "In, Take a Shower Jew," "Toten Kamf Raband," and "Dead Jew."[87] Their use of Holocaust imagery and Nazi and Klan symbols clearly indicated that the defendants were adherents to a doctrine of racial anti-Semitism.[88]

III. *LEBLANC-STERNBERG* AND *SINGER* HELD THAT ORTHODOX JEWS WERE PROTECTED BY THE CIVIL RIGHTS ACT OF 1866 AGAINST DISCRIMINATION BASED ON JEWISH RELIGIOUS PRACTICE

Nonetheless, despite the Supreme Court's repeated statements that The Civil Rights Act only reaches discrimination based on ancestry, two Federal District Courts have applied The Act to cases of discrimination based upon Jewish religious practice.

A. *In* LeBlanc-Sternberg *the Court Held that Racial and Religious Discrimination Are Hard to Distinguish, and There Is no Need to Try*

In the 1970s and 1980s, the number of Orthodox (predominantly Hasidic) Jews residing in Ramapo, New York—an unincorporated township—rose substantially. In fact, by 1986, Orthodox Jews constituted approximately 23,000 out of the 94,000 residents of Ramapo.[89] The total Jewish population of the township was much higher.[90]

Many non-Jewish and non-Orthodox residents of Ramapo reacted to this growth with hostility. These residents formed the Airmont Civic

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86. Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 524–25 (4th Cir. 1986). The racial character of the defendants' actions was never challenged in the Court of Appeals or in the Supreme Court.

87. *Id.*

88. While the defendants targeted a synagogue—a Jewish religious site—it is hard to imagine that they chose this site out of some doctrinal disagreement with Judaism; almost certainly they attacked a synagogue because synagogues, like Jewish Community Centers, are visible symbols of Jewish presence.

89. Glaberson, *supra* note 2; LeBlanc-Sternberg v. Fletcher, 781 F. Supp. 261, 263 (S.D.N.Y. 1991); *see also* Brian S. Sokoloff, *Airmont Case Presents Zoning Issues in Freedom of Religion Context*, NEW YORK LAW JOURNAL, January 6, 1994, at 1 (describing the growth in Orthodox and Hasidic population in Ramapo as "[a]kin to a rolling snowball, as more came, the kosher food vendors, yeshivas and places of worship that opened attracted still more people").

90. *LeBlanc-Sternberg*, 781 F. Supp at 263.

Association in order to incorporate their area of Ramapo as the village of Airmont and, consequently, gain control of the local zoning process. Because Orthodox Jews do not drive on the Sabbath, home synagogues were essential to the expansion of Hasidic neighborhoods away from established synagogues.[91] The Village of Airmont could therefore contain the expansion of Hasidic neighborhoods by enacting zoning laws that prevented the establishment of home synagogues in new housing developments.[92] This anti-Hasidic animus was the express impetus for the incorporation movement.[93] As one village trustee allegedly stated at a public meeting, "We all know that the purpose is to keep those Orthodox from Brooklyn out of here."[94] Other speakers declared that they would not stand for a Hasidic community in their backyard, and some "forecast a grim picture of a Hasidic belt" stretching across part of upstate New York.[95]

There is nothing to suggest that the Village of Airmont was established out of opposition to a general increase in the Jewish population, especially as many non-observant Jews already resided in the area. Instead, the incorporation movement was driven purely by opposition to the influx of Hasidic or Orthodox Jews, specifically. Hasidic and Orthodox Jews were described as " 'foreigners and interlopers', 'ignorant and uneducated,' and 'an insult to' the community."[96] They were also allegedly referred to as "a bunch of people who insist on living in the past,"[97] and "a tent-dwelling society."[98] Jews and non-Jews alike participated in this anti-Hasidic hostility,[99] and this was not the first time that other Jews had tried to prevent Hasidic Jews from entering their community. In a nearly identical zoning dispute litigated in 1979, there were thirty-seven named defendants: thirty-three of them, or *89 percent*, were Jewish.[100]

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91. *Id.* at 264; Jacques Steinberg, *Claim of Rights Violation of Hasidic Jews Is Rejected*, N.Y. TIMES, December 15, 1993, at B5.

92. LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 418 (2d Cir. 1995) [hereinafter *LeBlanc-Sternberg II*] (appealing *LeBlanc-Sternberg*, 781 F. Supp 261 on grounds unrelated to the Civil Rights Act).

93. *LeBlanc-Sternberg II*, 67 F.3d at 418–19 (noting that a later suggestion that the Airmont Civic Association start an initiative to plant trees was met with groans of derision, because, as one Association member stated, the "only reason" that the village was incorporated was to keep the Hasidim out).

94. Glaberson, *supra* note 2, at B2.

95. *LeBlanc-Sternberg II*, 67 F.3d at 418.

96. *Id.* at 430.

97. *LeBlanc-Sternberg II*, 67 F.3d at 418; *see also* Weiss v. Willow Tree Civic Ass'n, 467 F. Supp. 803, 807 (S.D.N.Y. 1979) (reporting, in a case with nearly identical facts, that a prime motivation for opposition to Hasidic neighbors was "the peculiar way of life of 'these people.' ").

98. Glaberson, *supra* note 2, at B2.

99. *Id.*

100. *Weiss*, 467 F. Supp. at 816 n.48.

After his petition to establish a home synagogue was denied, Rabbi LeBlanc-Sternberg sued the trustees of the Village of Airmont and the Town of Ramapo under § 1982, alleging that the defendants violated the Hasidim's right to use and enjoy property. In reply, the defendants asserted that "their alleged discriminatory acts were addressed solely to the plaintiffs' affiliation as Orthodox Jews. They suggest that the complaint is framed in terms which claim religious-based discrimination in that any discrimination was directed toward the plaintiffs' lifestyle as dictated by the tenets of plaintiffs' religion."[101] This characterization of the complaints is clearly accurate, based on the newspaper and trial record.[102] The defendants further argued that since § 1982 does not cover religious discrimination, the plaintiffs' claims should be dismissed.[103]

The court agreed with the defendants that the plaintiffs' complaint alleged religious discrimination. Nonetheless, the court ruled that the plaintiffs' claims were cognizable under the Act. The court reasoned as follows:

> The complaint does assert that the plaintiffs suffered discrimination because they were Orthodox Jews. However, that makes no difference. Sections 1981 and 1982 were "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." Because Jewish culture, ancestry, and ethnic identity are intricately bound up with Judaic religious beliefs, racial and religious discrimination against Jews cannot be as easily distinguished as defendants would have it. Moreover, the Supreme Court has explicitly stated that Jews are entitled to the protections of §§ 1981 and 1982 because Jews were considered to be a separate race in 1870 when those statutes became law. We need not inquire any further.[104]

When confronted with Hasidic Jews who, the court acknowledged, claimed that they were discriminated against for their religious practice, the court said that it could not distinguish between religious and ancestral anti-Semitism, and there was no need to try.

This is nonsense. While there may be some cases in which religious and racial anti-Semitism are hard to distinguish, this was not one of them. In the 1979 zoning dispute, which has nearly identical facts, the same district court had no trouble discerning that "the true nature and essence of [the] complaint" was that the Hasidim were discriminated against because

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101. *LeBlanc-Sternberg*, 781 F. Supp. at 267.

102. *See LeBlanc-Sternberg II*, 67 F. 3d at 418; *id.* at 430; *LeBlanc-Sternberg* 781 F. Supp. at 264 ; Glaberson, *supra* note 2.

103. *LeBlanc-Sternberg*, 781 F. Supp at 267.

104. *Id.* at 267–68 (internal citations omitted).

of "their religion, manner of dress and life style," and was therefore not cognizable under § 1982.[105] Granted, the 1979 case occurred before Jews were officially classified as a protected race under The Act by *Shaare Tefila Congregation*. However, it is unclear what part of *Shaare Tefila Congregation* removed the well-entrenched restriction that The Civil Rights Act applies only to racial discrimination. Also, to the extent that any of the defendants in *LeBlanc-Sternberg* were themselves Jewish—as seems highly likely given the similarity to the 1979 case—the requirement that the plaintiff and defendant be of different races would have immediately blocked the plaintiff's claims as to those defendants. Thus, the district court appears to have utterly misapplied the doctrine that emerges from *Shaare Tefila Congregation* and *Saint Francis College*, which is the following: it is not enough for the plaintiffs to be members of a protected group; they must also complain of racial discrimination *and* be of a different racial group than the defendants.

B. *In* Singer *the Court Held That the Nature of the Alleged Discrimination Is Irrelevant*

Perhaps even more curious than *LeBlanc-Sternberg* is the strange case of Yishai Singer. Jesse Hernandez was a Hispanic teacher for the Denver Public Schools from 1986 to 1994.[106] In 1989–1990, he converted to Judaism, became a Hasid, and changed his name to Yishai Singer. In 1994, Singer submitted a letter of resignation to the district in which he stated, "I have been subjected to a hostile work environment for members of the *Jewish religion* and for Hispanics. I cannot tolerate any more anti-semitic [sic] or racist conduct."[107]

Singer's specific allegations of hostility were almost all related to his religion. As the court noted, Singer believed his principal was hostile to him "because Singer is a Chassidic Jew."[108] Singer alleged many incidents of hostility towards his Orthodox beliefs and Hasidic dress, but none of these reflected racial animus towards Jewish ancestry (Which, as a convert, Singer lacked in the first place). For example, Singer alleged that the principal "continually made anti-Semitic remarks about his Chassidic clothing and appearance, criticizing his kippah/yarmulke, long black coat, side locks of hair and long beard."[109] This anti-Hasidic animus was directed not only at Singer's dress and appearance but also at his Orthodox religious convictions:

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105. *Weiss*, 467 F. Supp. at 816.
106. *Singer*, 959 F. Supp. at 1326–27.
107. *Id.* at 1327 (emphasis added).
108. *Id.*
109. *Id.*

> [The principal] made anti-Semitic remarks to him regarding the eating of pork, and intentionally interfered with his Sabbath observance.... [The principal] used profane language when disciplining him, which ... [the principal] knew to offend his religious sensibilities.... [D]espite his request, he was not provided with a kosher meal at a luncheon he was required to attend.... [The principal] pressured him to violate his religious beliefs by ordering him to attend graduation ceremonies where women would be singing.[110]

Singer himself seems to have conceptualized this all as religious discrimination: He stated that "he frequently accused [his superior] of religious harassment,"[111] and claimed that he was discriminated against for being of the Jewish religion.[112] At a basic logical level it could not be any other way—as a convert, Singer is Jewish, but he is *not* of Jewish ancestry. Therefore any discrimination that he experienced for being Jewish could not be racial anti-Semitism, based on Jewish parentage, but would instead be discrimination based on his Jewish beliefs and practices—religious anti-Semitism.

The school district and Singer's principal brought motions for summary judgment.[113] The school district's motion asserted that, for technical reasons based on the interaction of 42 U.S.C. § 1983 and § 1981, the district could not be liable to Singer under The Act. The court agreed.[114] Singer's principal argued that The Act "does not apply to religious discrimination and the claim should be dismissed insofar as it is based on such discrimination."[115]

Singer argued that *Shaare Tefila Congregation* was a sufficient basis for his claim, stating that since "Jews are a distinct race for civil rights purposes ..., discrimination against him on the basis of his being Jewish is actionable under § 1981."[116] The court accepted Singer's logic and ruled against the principal. The court reasoned that "[s]ince Singer is claiming he was discriminated against as a Jew, a distinct racial group for the purposes of § 1981, Defendants are not entitled to judgment on the basis that he is claiming religious discrimination."[117]

There are two things that are deeply surprising about the holding in *Singer*. First, because Singer had no Jewish ancestry, he could not claim that he faced discrimination based on his Jewish ancestry. Because racial

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110. *Id.* at 1328.
111. *Id.*
112. *Id.* at 1327.
113. *Id.* at 1329.
114. *Id.*
115. *Id.* at 1330.
116. *Id.* at 1331.
117. *Id.*

discrimination under The Civil Rights Act is equivalent to ancestral discrimination, Singer's lack of Jewish ancestry should have been fatal to his claim.[118] Moreover, even if Singer's tormentors mistakenly thought that Singer had Jewish ancestry, and discriminated against him for that reason, this would still have been insufficient. Mistaken racial animus towards someone who is *not* actually a member of a group protected by Congress is irrelevant for purposes of The Act.[119] Second, the discriminatory incidents upon which Singer based his claim were not racial in nature. Indeed, Singer and the court both described them as expressions of religious animus, which has long been beyond the scope of The Act.[120] Nevertheless, the district court ruled that this was all irrelevant. The reason: Jews are "a distinct racial group for the purposes of § 1981."[121]

IV. THESE CASES DO NOT MAKE SENSE UNDER TRADITIONAL CIVIL RIGHTS ACT OF 1866 DOCTRINE, NOR DO THEY FIT WITH OTHER RECENT CASES

The application of The Civil Rights Act of 1866 to religious discrimination in *Singer* and *LeBlanc-Sternberg* is clearly out of line with the Court's earlier jurisprudence regarding The Act. However, it is possible that the 1987 cases—which held that a 'White' plaintiff could sue a 'White' defendant for racial discrimination, so long as they were of different ethnic groups—marked a sea-change in the doctrine. Perhaps, by expanding race to ethnicity, and specifically by including Jews as a recognized race, these cases implicitly changed the doctrine from a narrow prohibition against racial animus to something broader—maybe even including religious discrimination.[122] This section will re-examine *Shaare Tefila Congregation, Saint Francis College,* and other later cases that did not involve Orthodox Jews and conclude that this is not a correct explanation of *LeBlanc-Sternberg* and *Singer.*

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118. *Saint Francis Coll.*, 481 U.S. at 613. Singer, as a convert, certainly possessed many of the "ethnic characteristics" of Jews, but, as shown in Part II, discrimination based upon such characteristics, absent genetic membership in a protected (and targeted) group is insufficient to underwrite a claim under The Act.

119. *See Shaare Tefila Congregation*, 481 U.S. at 616–17 (rejecting the plaintiff's argument that subjective racial animus is sufficient to underwrite a Civil Rights Act claim).

120. *Saint Francis Coll.*, 481 U.S. at 613 (noting that discrimination based on religion does not lead to a Civil Rights Act claim); *see also* Shaare Tefila Congregation, 481 U.S. 615 (ignoring the obvious potential religious discrimination claims of plaintiffs).

121. *Singer,* 959 F. Supp. at 1331.

122. *Cf.* Gold v. Gallaudet Coll., No. 86-7079 1987 U.S. App. LEXIS 17616 at *12 (D.C. Cir., Nov. 20, 1987) ("[T]he district court held that § 1981 creates a cause of action for racial discrimination not discrimination on the basis of sea [sic] and religion as alleged by Cold [sic]. The Supreme Court's rulings in *Saint Francis Coll. v. Al-Khazraji*, and its companion case, *Shaare Tefila Congregation v. Cobb*, however, strongly suggest that § 1981 creates a cause of action for persons suffering discrimination on the basis of their religious or ethnic identity.") (internal citations omitted).

A. *A Plain Reading of the 1987 Cases Does not Suggest the Results in the Hasidic Cases*

There is some very opaque language in *Saint Francis College* and *Shaare Tefila Congregation* that might support the rulings in *LeBlanc-Sternberg* and *Singer*. Quoting its ruling in *Saint Francis College*, the *Shaare Tefila Congregation* court stated that the Civil Rights Act of 1866 was "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."[123] This might mean that so long as a particular ethnic group has historically been subjected to *racial* animus, The Civil Rights Act prohibits *any type* of discrimination based on or associated with membership in that group.

However, this reading is inconsistent with the whole of the 1987 companion cases.[124] Elsewhere in the same opinions, the Court stated that The Act prohibits "discrimination against an individual *because* he or she is *genetically* part of an ethnically ... distinctive sub-grouping of homo sapiens."[125] Whereas the previous passage did not discuss the type of discrimination actually complained of by the plaintiff (but, rather, that to which her group is subjected), this passage addresses the nature of the plaintiff's complaint. Its plain meaning is that only discrimination that is actually based on the plaintiff's ancestry—racial or ancestral animus—is prohibited.

Thus, under the 1987 cases, both elements are necessary: the plaintiff must be a genetic member of a group that Congress intended to protect, and the plaintiff must complain of discrimination that occurred because of that genetic membership. There is nothing in *Shaare Tefila Congregation* to suggest that, as a matter of doctrine, Jews are exempted from this requirement. *Shaare Tefila Congregation* only resolved the question as to whether Jews were considered a separate race and so eligible to bring suit against Caucasian defendants under The Act. The case did not address any issues of Jewish exceptionality as to racial and religious identity and discrimination.[126] Jews, like all other groups, may have recourse to The Act only for claims of racial or ancestral discrimination.

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123. *Shaare Tefila Congregation*, 481 U.S. at 617, quoting *Saint Francis Coll.*, 481 U.S. at 613.

124. *Shaare Tefila Congregation*, 481 U.S. at 615; *Saint Francis Coll.*, 481 U.S. at 604.

125. *Saint Francis Coll.*, 481 U.S. at 613 (emphasis added).

126. *Shaare Tefila Congregation*, 481 U.S. at 617–18.

B. *Other Recent Cases Continue to Rule Religious Discrimination Beyond The Scope of the Civil Rights Act*

Nonetheless, it is possible that district courts, picking up on subtle hints in the 1987 cases, have begun applying The Civil Rights Act broadly to cases that do not allege racial animus. This would mean that *LeBlanc-Sternberg* and *Singer* are in fact in line with modern interpretations of *Shaare Tefila Congregation*. This is not the case. Instead, *LeBlanc-Sternberg* and *Singer*, in which The Act was applied broadly to Hasidic Jews, stand in contradistinction to two other recent cases in which The Act was applied traditionally and narrowly to an Arab and a non-Orthodox Jew.

First, The Act has not been applied broadly to plaintiffs of other ethnicities, only to Jews. In 2004, the Northern District of Illinois decided a case in which an Arab-American franchisee of Dunkin' Donuts, Walid Elkhatib, brought suit under The Act alleging that he was discriminated against because he would not sell pork products in his restaurant.[127] Elkhatib claimed that this discrimination was based on race because "his race's traditions and religious practices" prohibited him from selling pork.[128] The court rejected this, stating that since the dietary restrictions Elkhatib pointed to were associated with religion, and not race, his claim was one of religious discrimination and could not proceed under The Act.[129]

This suggests that *Singer* and *LeBlanc-Sternberg* do not represent a general trend away from the animus-based-on-genetic-membership requirement but perhaps that Jews occupy a unique place. For example, American Arabs are mostly not Muslims,[130] and not all Muslims are Arabs. Therefore, Islamic practice is not a proxy for Arab ancestry, and Islamic practice does not constitute an Arab "racial tradition." On the other hand, those who identify religiously as Jews are overwhelmingly of Jewish ancestry and vice-versa.[131] Perhaps, for this reason, Jewish religion could be seen as a proxy for Jewish ancestry, such that when a Jew complains of religious discrimination under The Act, a court need not inquire further.[132]

However, a second court did not have any trouble distinguishing between religious and racial discrimination when the plaintiff was a non-Orthodox Jew. This suggests that it is not just that Jews are unique, but that Orthodox or Hasidic Jews, in particular, are unique. In 2000 the East-

127. Elkhatib v. Dunkin' Donuts Inc., No. 02 C 8131, 2004 WL 2600119 (N.D. Ill. Nov. 15, 2004).

128. *Id.* at *3.

129. *Id.*

130. *Id.* at *3 n.3 (noting that "Seventy-five to eighty percent of the approximately 3.5 million Arab-Americans are Christians.").

131. National Jewish Population Survey *supra* note 15 (90% figure).

132. *Cf. LeBlanc-Sternberg*, 781 F. Supp. at 268.

ern District of New York decided a § 1981 case in which a non-observant Jew alleged that he was discriminated against by his employer for *not* being Orthodox and for being married to a Catholic.[133] The court easily determined that this was a claim of religious discrimination and was not actionable under the Act:

> Although the definition of race discrimination under Section 1981 is broad enough to include persons of Jewish descent, the underlying claim must be that the plaintiff was discriminated against *based upon that ancestry*. Kratz does not claim that he was discriminated against because he is of Jewish descent. Quite on the contrary, Kratz asserts that people of Jewish ancestry are favored in the hiring process provided that they are religiously observant. Indeed, the core allegation of his complaint is religious discrimination for being a non-observant Jew.[134]

The ease with which the court dispatched with the issue shows that it is not inherently difficult to classify discrimination against a Jew as racial or religious (the rationale offered in *LeBlanc-Sternberg*[135]), nor are all Jews allowed to bring religious discrimination claims under The Act (as *Singer* might suggest[136]). It is only for Hasidic Jewish plaintiffs that courts allow claims of religious discrimination to proceed under The Civil Rights Act of 1866.[137]

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133. Kratz v. College of Staten Island, No. 96-CV-0680, 2000 U.S. Dist. LEXIS 5199 (E.D.N.Y., Mar. 15, 2000), at *3.

134. *Id.* at *7–*8 (internal citations omitted) (emphasis added).

135. *LeBlanc-Sternberg*, 781 F. Supp. at 267–68 ("Because Jewish culture, ancestry, and ethnic identity are intricately bound up with Judaic religious beliefs, racial and religious discrimination against Jews cannot be as easily distinguished as defendants would have it.")

136. Singer v. Denver Sch. Dist. No. 1, 959 F. Supp. 1325 (1997) ("[s]ince Singer is claiming he was discriminated against as a Jew, a distinct racial group for the purposes of § 1981, Defendants are not entitled to judgment on the basis that he is claiming religious discrimination.").

137. *But see* Sides v. NYS Div. of State Police, No. 03-CV-153, 2005 U.S. Dist. Lexis 12635 (N.D.N.Y., June 28, 2005) (summarily dismissing an Orthodox Jew's § 1981 claim that he was discriminatorily denied employment because he would not work on the Sabbath. The court easily discerned that this was a religious discrimination claim, and hence outside the scope of The Act. However, this case is distinguishable from *Leblanc-Sternberg* and *Singer*. In those cases, the plaintiffs complained that they suffered discrimination based solely on their status as Hasidic Jews. Here, the plaintiff alleged that he suffered discrimination because his Orthodox observance led to functional constraints that were unacceptable to the employer. This distinction tracks the logic of *Shaare Tefila Congregation*, which limits The Act to cases of discrimination based solely on membership in a group).

V. PERHAPS RELIGIOUS DISCRIMINATION AGAINST HASIDIC JEWS *IS* DISCRIMINATION 'ON THE BASIS OF RACE,' ALTHOUGH MOTIVATED NOT BY RACIAL ANIMUS, BUT BY NORMATIVE RACIAL STEREOTYPES.

The Civil Rights Act of 1866 still seems to require an inquiry as to whether the plaintiff actually faced racial discrimination, thus far defined as racial animus. Yet *LeBlanc-Sternberg* and *Singer* held that the Hasidic plaintiffs alleging discrimination against them because of their Hasidic practice did not need any further showing of racial discrimination. This section will introduce the theory that racial discrimination may include discrimination based on failure to conform to normative racial stereotypes. It will suggest that the discrimination at issue in *LeBlanc-Sternberg* and *Singer* invoked normative stereotypes for those of Jewish ancestry and thus, constituted discrimination based on normative racial stereotypes. Although the Court has characterized racial discrimination under The Act as racial animus, perhaps The Act prohibits discrimination on the basis of normative racial stereotypes as well.

A. *'Racial Discrimination' Might Include Normative Stereotypes*

K. Anthony Appiah, a Harvard philosopher who often writes about race and identity, has suggested that American antidiscrimination law covers at least three different sorts of stereotypes, or bases for discrimination. He calls the first 'statistical stereotypes.' Statistical stereotypes ascribe a property to an individual that is correctly believed to be characteristic of some social group to which she belongs, but not necessarily characteristic of her. For example, a strong woman would face discrimination based on statistical stereotyping if she were denied a job as a firefighter on the grounds that women are not strong enough to be firefighters. Appiah calls the second type 'false stereotypes.' These ascribe to an individual some false and maliciously derived characteristic of the group to which he belongs. As Appiah notes, the classic examples of false stereotypes are ethnic stereotypes that prompt individuals to treat members of a certain group poorly because of some imagined negative characteristics of the group.[138] In other words, racial or ethnic animus—which the Court has suggested is the extent of The Act's prohibition[139]—could be categorized as discrimination based on false stereotypes.

Appiah calls his third category 'normative stereotypes.' As he explains, such "a stereotype is not a view about how members of the group behave *simpliciter*. It is grounded in a social consensus about how they *ought* to behave to conform appropriately to the norms *associated with*

138. Appiah, *supra* note 27, at 63–64.

139. Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987).

membership in that group." For example, "[w]hen employers require female employees to wear dresses and male employees not to do so, they are invoking normative gender stereotypes."[140] Importantly, normative stereotypes, as Appiah defines them, are distinct from general social norms. Whereas general social norms apply equally to people of different groups, and dictate behavior only in keeping with expectations of all members of society, normative stereotypes dictate how members of a group should behave "to conform appropriately to the norms *associated with membership in that group*."[141] Thus, whereas a requirement for female employees to wear skirts and male employees not to do so would invoke normative gender stereotypes, an employer's general requirement that employees maintain a "professional appearance" would not.

An invocation of normative sex stereotypes can be considered "discrimination on the basis of sex," even though an employer has not acted on a prohibited statistical judgment nor exhibited animus towards women or men.[142] As the Supreme Court stated in 1989, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[143] In this case, "assuming" that an employee matches a stereotype corresponds to Appiah's conception of statistical stereotypes, and "insisting" that the employee matches a stereotype corresponds to normative stereotypes. Each of these (as well as outright animus) represent a forbidden consideration of sex, and are considered "discrimination on the basis of sex stereotypes," which is prohibited by Title VII.[144]

The Supreme Court has held that gender discrimination law prohibits normative stereotyping,[145] and Appiah uses gender norms in his illustrations of normative stereotypes.[146] *LeBlanc-Sternberg* and *Singer* suggest that race discrimination law, specifically The Civil Rights Act of 1866, also prohibits normative stereotyping, at least when it comes to Hasidic Jews.

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140. Appiah, *supra* note 27, at 64–65 (emphasis—underline—added). However, Appiah is not sure whether this specific invocation of normative stereotypes is so offensive as to be unlawful. *See also* Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2003) (refusing to find gender-stereotyped grooming standards per se discriminatory).

141. Appiah, *supra* note 27, at 64 (emphasis added).

142. *Price Waterhouse*, 490 U.S. at 250 ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted *on the basis of gender*.") (emphasis added).

143. *Id.* at 251.

144. *See generally id.*

145. *Id.* at 251.

146. Appiah, *supra* note 27, at 64–67.

B. *These Cases May Involve Normative Racial Stereotypes and Therefore Racial Discrimination*

As we have seen, *LeBlanc-Sternberg* and *Singer* found violations of The Act in cases where there were no allegations of racial animus. To put this in Appiah's terms, there were no allegations of 'false stereotypes,' or general animus toward Jews, and these were certainly not cases of 'statistical stereotyping.' However, they might be explained as cases of normative stereotyping. These Hasidim faced discrimination based on their lifestyle and religious practice, which clearly offended, in some way, the defendants' normative beliefs as to appropriate behavior. It is likely that this discrimination was not based merely on general social norms, but instead specifically invoked normative ethnic stereotypes of Jews. This suggests that the Hasidic plaintiffs would not have faced such hostility based on their lifestyle, but for the fact that they were (*Singer* aside) ethnically Jewish. In this regard, it is fair to say that they were discriminated against because of their ethnicity.

Perhaps, then, these cases recognize "discrimination based on normative racial stereotypes"—in which behaviors permitted to one racial (or ethnic) group are denied to another—as within the scope of The Civil Rights Act of 1866.[147] This approach would explain both doctrinal problems in *LeBlanc-Sternberg*: that religious discrimination—and not racial animus—was alleged, and that some defendants were themselves Jewish. *Singer* would also make more sense under this theory, although it remains problematic that the plaintiff was not genetically Jewish.

1. Assimilation Is not Just a General Social Norm, But Has Exerted Particularly Powerful Pressure on Jews

American Jewry has grappled with, and often conceded to, powerful impulses towards assimilation throughout the twentieth century. Perhaps as a result, the National Jewish Population Survey found that Orthodox Jews have declined, and continue to decline, as a percentage of American Jewry. Only 41% of those raised Orthodox currently consider themselves

147. *See* Smith v. City of Salem, 378 F.3d, 566, 574 (6th Cir. 2004) (stating that "an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex." Such discrimination is actionable under Title VII); *see also* Anna R. Kirkland, *What's at Stake in Transgender Discrimination as Sex Discrimination*, 32 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 84, 97–98 (2006).

Orthodox.[148] For some Jews, as for my grandparents, being modern and American was itself an ideal to which to aspire. Pressures to assimilate have functioned both as broad societal expectations of Jews, as in religious anti-Semitism, and have also became internalized as Jewish norms.[149] In other words, assimilation reflects "a social consensus about how [Jews] ought to behave to conform appropriately to the norms associated with [being Jewish]."[150]

Orthodox, and particularly Hasidic, Jews have often struggled against these norms of the Un-kosher Land, which they view as detrimental to authentic Jewish values.[151] As evidenced by the vitriol exhibited in the New York zoning cases, this resistance to assimilation has come with a price: animus and discrimination.

Arguably such anti-Hasidic discrimination invokes a general, ethnicity-neutral, norm of assimilation that applies equally to all, Jews and non-Jews. If so, the hostility in these cases could *not* be considered discrimination on the basis of racial stereotypes, as there would be no racial content to the norm. Such hostility would therefore not qualify as discrimination on the basis of race (or Jewish ethnicity), because it may be directed at any ethnic group that fails to assimilate, rather then specifically at Jews.

However, I suggest that the discrimination against these Hasidim based on their failure to assimilate occurred precisely because they are Jewish, and so did invoke normative racial stereotypes. It should therefore be considered discrimination on the basis of race. There is reason to believe that the opponents of Hasidic expansion in New York (and perhaps Singer's principal as well) were not exhibiting a general dislike of traditional, non-Americanized religious practice. Instead, they were incensed specifically because the *Jewish* plaintiffs engaged in such un-American, such 'un-White', conduct.[152]

A joke I received via e-mail some years ago illustrates this phenomenon: A woman runs into a man on a street corner. He has a long beard, and is wearing a dark suit and a black hat. She immediately accosts him: "Why do you Hasidim dress as though you are still living in the 18th century? Why do you follow outmoded ways of thinking and customs that spurn the marvels of modernity? Why do you separate yourselves from the rest of American society—Do you think you're better than us?" The man listens with a quizzical look on his face, turns to her, and says, "Madame, I'm not Jewish; I'm Amish." She responds: "Oh! I think it's so

148. United Jewish Communities, *National Jewish Population Survey: Orthodox Jews*, 10, (Feb. 2004) *available at* http://www.ujc.org/getfile.asp?id=4983 (last visited March 18, 2007).

149. FREEDMAN, *supra* note 26, at 13–41.

150. Appiah, *supra* note 27, at 63–64.

151. FREEDMAN, *supra* note 26, at 219–29.

152. *See* BRODKIN, *supra* note 55, at 26 n. 3 (suggesting that Hasidim "lack the privileges of whiteness.")

nice that you people have kept your traditions!"[153] The Amish lifestyle may be fine, but the Hasidic is not.[154] This suggests that hostility towards Hasidic Jews does not merely reflect general norms of assimilation, but instead specifically invokes normative stereotypes for Jewish ethnicity.[155] It should therefore be conceived of as discrimination on the basis of ethnicity.

2. Normative Discrimination, Unlike Racial Animus, Is Particularly Likely to Occur Among Members of the Same Group

This hostility towards Orthodox and Hasidic Jews is, unfortunately, common among Jews as well as non-Jews. For example, thirty-three out of thirty-seven defendants in the 1979 Hasidic zoning case were themselves Jewish.[156] This hostility may arise because non-Orthodox Jews feel that the non-assimilating behavior of their Orthodox brethren threatens the economic and social gains that they have made via assimilation.[157] Non-orthodox Jews also may feel defensive about their level of Jewish commitment or perhaps simply have a visceral antipathy towards a culture that they view as close-minded.[158] The preceding statements are doubly

153. The similarities between Amish and Hasidic dress have also provided fodder for at least one other humorous incident. *See* THE FRISCO KID (Warner Bros. 1979) (depicting scene in which Polish Hasid Gene Wilder, newly arrived in the United States, mistakes an Amish community for "lantsmen," or fellow Polish Jews. He is overcome by shock when he finds out that in America even the "lantsmen" are gentiles.).

154. *Cf.* Jane Ammeson, *Indiana's Amish Country Takes You Back In Time*, ANN ARBOR NEWS, May 14, 2006 at H3 (extolling the virtues of visits to Amish country, in which "young boys dressed in black hats ride their bikes to school, . . ., and there are times when the streets resemble more a scene of the 19th century than one of the 21st," and encouraging readers to "Slow down and experience the simple life") with *LeBlanc-Sternberg II*, 67 F.3d at 430 (reporting derogatory references to Hasidim as "a bunch of people who insist on living in the past"); *LeBlanc-Sternberg II*, 67 F.3d at 430 (reporting derogatory references to Hasidim as "foreigners and interlopers," and "ignorant and uneducated,") with Glaberson, *supra* note 2 at B2 (reporting derogatory references to Hasidim as "a tent-dwelling society"); *but see* King v. Township of E. Lampeter, 17 F. Supp. 2d 394, 417–18 (1998) (addressing, and dismissing, plaintiff's claim that he suffered discrimination on the basis of Amish identity. However, it is important, and curious, to note that the plaintiff was not himself practicing the Amish lifestyle. *Id.* at 404.).

155. For purposes of this comparison, it is irrelevant that the Amish are not considered a separate *ethnic* group under The Act. *King*, 17. F. Supp. 2d at 417–18. Hasidic Jews are also not considered a separate ethnic group, but are a religious grouping within those who are Jewish. *See, e.g.*, *LeBlanc-Sternberg*, 781 F. Supp. 264.

156. *Weiss*, 467 F. Supp. at 816.

157. *See generally* BRODKIN, *supra* note 55 (documenting the gains that Jews made through assimilation, and classification as 'White'); FREEDMAN, *supra* note 26.

158. *See generally* FREEDMAN, *supra* note 26; *see also LeBlanc-Sternberg II*, 67 F.3d at 430 (reporting characterization of Hasidim as "ignorant and uneducated."); ALAN M. DERSHOWITZ, THE VANISHING AMERICAN JEW 55 (Little Brown & Co. 1997) ("The great paradox of Jewish life is that virtually all of the positive values we identify with Jews—

true with regard to relations between non-Orthodox and Hasidic Jews. Moreover, American Jews generally don't have a problem with people of *other* ethnicities rigorously following their own cultures. As the joke (Which is sometimes told with a non-Orthodox Jew as the antagonist) indicates, this is usually celebrated as multi-culturalism. In contrast, adherence to Orthodoxy, and particularly the separatism of Hasidism, is seen as a threatening affront, and often inspires hostility.

The theory that The Civil Rights Act of 1866 prohibits discrimination on the basis of normative racial stereotypes might explain why *LeBlanc-Sternberg* did not instantly dismiss the claims against Jewish defendants. Whereas the Court could not imagine that a person would hate another solely for a shared genetic membership, we might expect to see normative discrimination occur precisely between members of the same group, as they are likely the most invested in determining and enforcing the proper norms for that group.[159] In *LeBlanc-Sternberg*, the non-Orthodox Jewish neighbors were hostile to the Hasidic Jews because they differed greatly over the appropriate norms associated with Jewishness. Assuming that the Civil Rights Act really includes discrimination on the basis of normative racial stereotypes, it would be paradoxical to refuse to recognize such discrimination precisely in those situations in which it might be most likely to occur.

VI. CONCLUSION

In two cases, federal district courts extended The Civil Rights Act of 1866 to discrimination directed towards religious practice. These cases are not consistent with Supreme Court doctrine nor with more recent lower court cases, which require racial discrimination. However, these two cases might be conceptualized as redefining racial discrimination to include "discrimination based on normative stereotypes for race" as well as discrimination based on pure racial animus. The prohibition against gender discrimination under Title VII already encompasses discrimination on the basis of sex stereotypes, including normative sex stereotypes.[160] Perhaps this logic is making its way into Civil Rights Act jurisprudence. In these

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compassion, creativity, contributing to the world at large, charity, a quest for education—seem more characteristic of Jews who are closer to the secular end of the Jewish continuum than to the Ultra-Orthodox end. Put another way, the closer one lives to the religious core of Judaism, the further one is likely to be from the Jewish values so many of us cherish most."); *id.* at 57 ("We do not want our children to be like [the Hasidim and Ultra-Orthodox]. They do not produce—at least not directly—the great scientists, artists, philanthropists of whom we are so proud.").

159. *See generally* FREEDMAN, *supra* note 26, whose very title *Jew vs. Jew: The Struggle for the Soul of American Jewry*, suggests the sort of pitched battle that can occur between those with different views of appropriate group norms.

160. *Price Waterhouse*, 490 U.S. at 250–51.

cases, it is likely that the Hasidic plaintiffs faced discrimination based on their failure to assimilate into American culture not because they violated a *general* norm of assimilation, but rather because they did not conform to normative stereotypes for those of Jewish ethnicity. The resulting discrimination based on normative stereotypes might therefore be considered discrimination that occurred because of their race. At least in the special case of Hasidic Jews, the cases suggest that The Civil Rights Act of 1866 prohibits both racial animus and use of normative racial stereotypes.

This result is within the logic, if not the established doctrine of The Act.[161] This expansion contradicts the doctrine in the following three ways. First, the Supreme Court has specifically used the words "racial animus" to describe the type of racial discrimination that The Civil Rights Act prohibits.[162] According to Appiah's classifications, racial animus derives from *false* stereotypes, and so is quite distinct from discrimination based on *normative* stereotypes. The Court's characterization of prohibited discrimination as "racial animus" suggests that, doctrinally speaking, racial discrimination under The Act cannot include discrimination based on normative racial stereotypes.

Second, the Supreme Court has stated that The Civil Rights Act of 1866 prohibits only discrimination on the basis of genetic status in an ethnic group. As the Court said, The Act prohibits only "discrimination against an individual *because* he or she is *genetically* part of an ethnically ... distinctive sub-grouping of homo sapiens."[163] Moreover, that discrimination must occur "*solely* because of" the plaintiff's status.[164] This is very different from the Court's more expansive language in the sex-discrimination context, in which the Court noted that "Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of,'"[165] into Title VII. Perhaps this broader standard allowed for the inclusion of normative sex stereotypes. Yet, in the context of The Civil Rights Act of 1866, the Court has stated that discrimination must occur "solely because of" the plaintiff's status. Discrimination based on normative stereotypes does not occur *solely* because of ethnic status, but, instead, because of something more: failure to conform to normative stereotypes associated with genetic ethnic status.

Lastly, the Supreme Court has repeatedly reinforced the doctrine that The Civil Rights Act of 1866 only reaches racial discrimination per-

161. *Cf.* ROBERT C. POST ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW, 1 (Robert C. Post, ed., Duke University Press 2001) (2000) (suggesting that much of American antidiscrimination law is doctrinally muddled but nonetheless posses a logic).

162. Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987).

163. *Saint Francis Coll.*, 481 U.S. at 613 (emphasis added).

164. *Id.* (emphasis added).

165. *Price Waterhouse*, 490 U.S. at 241, n.7.

petrated against a member of a different ethnic group.[166] As we have seen, the expansion of The Act to normative racial stereotypes brings with it a corresponding leniency in this regard. In the New York Hasidic zoning cases, many of the defendants were themselves Jewish, and it is reasonable to expect that normative stereotypes will often be invoked between members of the same group. Thus, this trend contradicts established Civil Rights Act jurisprudence.

This trend may be within the logic of The Act, nonetheless. First, such discrimination on the basis of normative stereotypes really is discrimination on the basis of race. Another concept from gender discrimination law, that of "sex plus" discrimination, is useful in illustrating this logic. Unlawful "sex plus discrimination" occurs when animus is directed not towards sex per se, but to some other feature that is deemed unacceptable solely because of sex.[167] For example, where an employer will hire men with young children but not women with young children, the employer has engaged in unlawful sex discrimination.[168] As the Court said, this amounts to having "one hiring policy for women and another for men—each having pre-school-age children."[169] In the case of LeBlanc-Sternberg, the anti-Hasidic discrimination might be thought of as 'ethnic status "plus"' discrimination, in which the animus was targeted at the non-assimilated lifestyle of the Hasidim, the "plus." This plus was perhaps deemed unacceptable solely because of the ethnic status of the Hasidic plaintiffs, as an unassimilated lifestyle appears to be acceptable in non-Jews such as the Amish. This amounts to having one set of expectations for Jews and another for non-Jews. Thus, when the Hasidim faced animus based on their status as Hasidim, this might be thought of as animus that occurred because of race. Where an otherwise neutral category becomes the basis of discrimination because of the underlying racial category, that discrimination could plausibly be said to occur *because* of genetic membership in that ethnic group,[170] and The Civil Rights Act prohibits such discrimination.

Second, failure to conform to the requirement that plaintiff and defendant are of different races poses no logical problem. This restriction may not be a hard and fast doctrinal requirement, but may instead simply reflect the Supreme Court's functional presumptions as to when racial discrimination is likely to occur. If racial discrimination should occur within an ethnic group, as discrimination on the basis of normative stereotypes often will, there is no reason that The Civil Rights Act should not reach that discrimination.

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166. *See Saint Francis Coll.*, 481 U.S. at 609–10.

167. Kirkland, *supra* note 147, at 83, 102.

168. Phillips v. Martin Marietta, 400 U.S. 542, 544 (1971).

169. *Id.*

170. *See id.* at 547 (Marshall, J., concurring) ("employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.").

Even if such a trend is emerging, and even if it conforms to the logic of The Act, it is deeply troubling that the courts in question claimed to be merely operating within the bounds of Civil Rights Act jurisprudence. They certainly were not. Instead, they reached these noteworthy and perhaps revolutionary results by ignoring and mangling established doctrine. The expansion of the statutes beyond all previous interpretations to recognize a new type of racial discrimination has significant implications for the meaning of race and racial stereotypes. Unfortunately, these courts never acknowledged that they were undertaking such an endeavor, and were likely not prepared to deal with the consequences. Sloppy and injudicious decision-making is not the way to deal with questions that have such an important impact on our society. Instead, expansion of civil rights laws should occur through open and forthright debate about the social meaning of race and racial stereotypes.[171]

Towards that end, there are two significant challenges that courts will have to grapple with as they seek to apply The Civil Rights Act of 1866 to cases of discrimination based on normative racial stereotypes. First, what will qualify as a prohibited normative racial stereotype? Will any person's subjective beliefs about ethnic norms count, or will the courts require objective, widely-held, beliefs? Appiah's definition of normative stereotypes, that they are "grounded in social consensus,"[172] suggests an objective standard of widely-held beliefs, as do examples of normative sex stereotyping in violation of Title VII.[173] There is also reason to believe that The Civil Rights Act, specifically, would only recognize objective normative beliefs: *Shaare Tefila Congregation* and *St. Francis College* very much promote objective definitions, such as the requirement that a plaintiff must be a member of one of the objectively determined ethnic groups.[174]

Furthermore, the *Kratz* case could be read as a rejection of the proposition that subjective normative stereotypes constitute prohibited discrimination. Kratz alleged that he was not promoted because he was not Jewishly observant, while observant Jews were favored. In other words, Kratz alleged that he was discriminated against based on his failure to conform to the college's beliefs about how Jews should behave, namely, that they should be observant of Jewish religion. Yet the court did not find

171. *Cf.* POST, *supra* note 161, at 1 (calling for such a frank and open discussion about the social meaning of race and gender, instead of the usual muddled court opinion that invents loopholes and twists doctrine so as to avoid the big issue: what features of society and individuality should anti-discrimination law protect?).

172. Appiah, *supra* note 27, at 64.

173. *See Price Waterhouse*, 490 U.S. 235–56 (holding employer's statements encouraging the plaintiff to wear make-up, swear less, and "walk more femininely," constituted prohibited sex stereotyping).

174. *Shaare Tefila Congregation*, 481 U.S. at 617–18; *Saint Francis Coll.*, 481 U.S. at 613.

that this claim was actionable under The Civil Rights Act.[175] This might be explained by noting that, unlike assimilation, demands for greater Jewish religious observance have not been widespread in American society. This rejection of Kratz's claim suggests that The Civil Rights Act will not be extended to subjective normative discrimination, but only to a certain objective set of normative racial stereotypes. But is this right? Is a subjective normative stereotype, such as the one that burdened Kratz, any less objectionable? In the future, courts must weigh these doctrinal hints against a normative view of anti-discrimination law.

Second, as demonstrated above, a norm that is not specifically associated with membership in a racial or ethnic group is different from a normative racial stereotype. Enforcement of generally applicable normative beliefs simply cannot be considered racial discrimination. This Note suggests that the Hasidim faced discrimination on the basis of normative racial stereotypes, because they were subjected to pressures to assimilate that perhaps would not have been brought to bear on the Amish. This difference implies that assimilation could be viewed as a norm specifically associated with Jewish ethnic status, and not as a general social norm. But it is not clear how many points of comparison should be required to establish that a norm is associated with an ethnic group. If there is empirical evidence that a norm applies to a certain racial group, is it sufficient to show merely that there exists some other racial group to whom this norm does *not* apply? Such a difference would show that the norm is not universal, and would suggest that its application to a plaintiff was based, to some extent, on the plaintiff's ethnic status. Or would it be necessary to show that *no* other ethnic group has this norm? This would allow a determination that the invocation of a given norm was *uniquely* associated with the plaintiff's membership in a racial group.[176] This would certainly constitute action "on the basis of race," as there is no chance that the plaintiff would have been expected to conform to this norm, but for his or her race.

In the gender context, these judgments are less difficult. The law analyzes gender discrimination claims in a binary sense,[177] and so there is only one control group to examine in discerning gender-specific norms. Furthermore, gender stereotypes are often better defined than those for different ethnicities, as the Supreme Court has noted:

> It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring "a

175. Kratz v. Coll. Of Staten Island, No. 96-CV-0680, 2000 U.S. Dist. LEXIS 5199 at *7–*8 (E.D.N.Y. Mar. 15, 2000).

176. *Cf. Price Waterhouse*, 490 U.S. at 240–41 (discussing the difference between "because of" and "solely because of" causation).

177. *See* Smith v. City of Salem, 378 F.3d 566, 573–75 (6th Cir. 2004); *see also generally* Kirkland, *supra* note 147.

> course at charm school," nor does it require expertise in psychology to know that, if an employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.[178]

If women are burdened, one only must look to see the impact on men. With ethnicity, on the other hand, one could imagine looking to many different ethnic groups to determine whether a norm is specifically attached to a single group. For example, to ascertain the racial norms implicit in pressures on Jews to assimilate, one might look not only at the Amish, but also to other groups such as Indians, Africans, Latin Americans, and Arabs. For a Jewish plaintiff to make out a claim of discrimination on the basis of normative stereotypes would the plaintiff really be required to show that each of these other ethnic groups was not similarly subjected to pressures to assimilate? This would be a very difficult proposition, as assimilation *has* been a fact of life for many immigrant groups in America. Or could the plaintiff merely look to a single control group, such as the Amish, and—on the basis of the difference between the pressures on Jews and on this apparently similar group of non-Jews—assert that there is at least *some* racial component to the assimilation norm?

A new doctrine that prohibits discrimination on the basis of normative racial stereotypes under The Civil Rights Act of 1866 may be emerging. It has thus far been seen in judicial opinions that departed drastically from doctrinal restraints and yet did not acknowledge their own innovations, nor offer cogent and compelling explanations for them. As this trend is applied and tested, courts must openly address its implications. What sorts of beliefs will count, how will racial content be discerned, and how does this change the way we think about racial discrimination? We need inquire further.[179]

178. *Price Waterhouse*, 490 U.S. at 256.

179. *See Leblanc-Sternberg*, 781 F. Supp. at 268.