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The Limits of Equality and the Virtues of Discrimination

Yifat Bitton

Abstract

This article focuses on the application of antidiscrimination regimes to groups which have been discriminated-against *de jure* and *de facto*. This Article approaches diverges from the dominant view that discrimination is a purely destructive force. The central argument of the Article is that *de jure*, overt and blatant discrimination necessarily contributes to the creation of a coherent group identity recognized by law, which enables groups that are discriminated against to obtain remedial relief. In contrast, the law fails to recognize a coherent group identity for *de facto* discriminated-against groups and thus these groups have to overcome a structural challenge to obtain remedial relief to counter the discrimination. Thus, strangely, groups that are discriminated against *de jure* might be better off than groups that are discriminated against only *de facto* once one considers both the discriminatory and the remedial phases. After establishing the *de jure/de facto* distinction, the article explores the effects of this distinction on the equal protection claims of discriminated-against groups by contrasting the experiences of African-Americans and Mexican-Americans.

The Limits of Equality and the Virtues of Discrimination

Yifat Bitton[*]

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"State power has made a significant difference
– sometimes between life and death –
in the efforts of Black people to transform their world" [1]

Introduction

Imagine discrimination as an advantageous stratagem – unimaginable? Not necessarily. This Article suggests that formal, overt and blatant discrimination in an early, discriminating stage could be helpful by enabling a discriminated group to establish itself, creating group recognition, and positioning the group as eligible for antidiscrimination relief at a later, remedial stage.

Antidiscrimination laws are one of the most significant areas where the law recognizes and seeks to redress suffering and injustice. They allow formerly discriminated-against groups to utilize the legal system to redistribute social power through variety of remedies. This Article approaches the prerequisite of antidiscrimination laws that there be some past or on-going discrimination in a manner that diverges from the dominant view that discrimination is a purely destructive force. In contrast, this Article argues that discrimination can be a positive force inasmuch as it provides legal recognition for a discriminated against group. In other words, sometimes legal discrimination can make a group better off than it otherwise would be by creating a group cohesiveness that the group can later use to access powerful legal remedies against past wrongs.

The Article advances a novel argument re-evaluating discriminatory legal rules as also having potentially important constructive, constitutive value for groups. This notion does not mean that discrimination is good. Rather, the argument is that a specific form of discrimination, namely *de jure* discrimination, not only negatively influences the well-being of the group that is discriminated against, but also has indirect positive effects on the well-being of the group later on by improving that group's ability to access the legal system to fight against this discrimination. The Article also suggests that in addition to influencing the well-being of the *de jure* discriminated group, *de jure* discrimination also indirectly influences groups that mainly suffer from another form of discrimination, namely *de facto* discrimination.

[1] Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331,1382 (1988).

Groups in the latter category will often lack the ability to access the legal system that groups in the former category generally has. Thus, strangely, groups that are discriminated against *de jure* might be better off than groups that are discriminated against only *de facto* once one considers both the discriminatory and the remedial phases. The reason for this paradox is simple: it is easier to fight legal battles for group remedy when a group has already been identified as the "outlawed" and is asking to be "inlawed". In doctrinal terms, this Article's argument is apparent in the prerequisite of Equal Protection Clause jurisprudence that one should be discriminated against due to one's membership in a recognizable, distinct group. Groups that suffer from *de facto* discrimination, as opposed to *de jure* discrimination, face structural barriers in fulfilling this requirement.

The hypothesis in this Article is that *de jure* discrimination has important effects. *De jure* discrimination perpetuates the identity of the discriminated group, it increases the sense of "realness" of the discrimination-based suffering, and it vindicates the group's need for and entitlement to legal redress. To put in other terms, although groups suffering from *de jure* discrimination were brutally excluded from society by the law, they were, at the same time, included in society's primary legal text, received "visibility" (albeit notorious visibility), and were constituted as a legal entity (albeit as a discriminated-against entity).[2] These effects become evident through what this Article calls the "streaming from *de jure* discrimination paradigm," a phenomenon in which a group's struggle to become recognized by law as discriminated-against is reinforced when that discrimination is *de jure*. In other words, a group being *de jure* discriminated against at an early stage, which this Article designates the "discriminating stage," dramatically increases that group's prospects of recognition as a "legally discriminated group" that enjoys the right to obtain antidiscrimination relief during the later, "curing stage".[3] This understanding of the interaction between *de jure* discrimination and legal relief demonstrates that the

[2]In typifying "primary legal text" I exclude any non-regulatory official action and I include federal and state constitutional provisions, state primary [primary] legislation, local-specific regulations etc. My usage of this distinction as a version of the de jure / de facto distinction will be further elaborated below.

[3] The stage of commitment to the "antidiscrimination principle" begun gradually after the Civil War and during the Reconstruction, but is much more evident, coherent, and holistic since the mid-20th century. Paul Brest, *The Supreme Court, 1975 Term - Forward: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1 (1976). Kimberle Crenshaw marks the abolishment of the Jim Crow legal system as the crucial point of transition into the "formal equality" era. Crenshaw, *supra* note 1, at 1377.

past existence of *de jure* discrimination is a key factor in determining the quality and quantity of the legal relief later available to the group and is a key factor in determining how difficult it is for the group to obtain such relief. This Article challenges the justness of the current "streaming from *de jure* discrimination paradigm" and instead proposes an alternative approach that is more sensitive to different modes of discrimination and thus more effective at fighting both substantive and formal discrimination, whether that discrimination is *de facto* or *de jure*.

This Article's analysis is relevant to any regime in which at the first stage dichotomous *de jure* and *de facto* discriminatory practices exist simultaneously and in which at the second stage antidiscrimination laws are used to remedy past discrimination.[5] During the discrimination stage, all groups are subject to *de facto* discrimination, while only some of them are also explicitly subject to *de jure* discrimination. Although the theoretical application of the Article is more general, to demonstrate its implications, the Article concentrates on a real world example, contrasting American experiences of African- and Mexican Americans. The divergent experiences of these groups represent the different remedial treatment available to groups along the scale form *de jure* to *de facto* discrimination and help illustrate the implications of this Article's approach.

African-Americans are the most prominent group to suffer from *de jure* discrimination and represent the way in which "the streaming from *de jure* discrimination paradigm" creates a legally cognizable discriminated-against group. This group was the main target of America's *de jure* discrimination, both slavery and the Jim Crow, state-sponsored, constitutionally protected system of racial discrimination that took place after the abolition of slavery from 1890 through the mid-twentieth century.[6] Mexican-Americans, on the other hand, do not fit into the *de jure* paradigm and demonstrate why the typical "streaming from *de jure* discrimination paradigm" needs to be revised. Mexican-Americans are considered America's "forgotten minority"; indeed, their status as a legally cognizable minority group is fragile even in the present day.[7] Mexican-Americans did not explicitly fall

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[5]My argument is limited to racial discrimination since it is the hardest category to identify and determine, as opposed to gender-based groups or the group of the disabled, for example.

[6] On the Jim Crow legal system of segregation see F. James Davis, Who is Black? 51-70 (1991). On the constitutionality of slavery see Constitutional Law 422-431 (Geoffrey R. Stone et al., 4th ed., 2001).

under any of America's *de jure* discriminatory regulations during the Jim Crow era, despite the fact that Mexican-Americans were a substantial minority group at the time.[8] However, although they almost did not suffer from prominent or legally visible *de jure* discrimination,[9] Mexican-Americans did suffer from discriminatory practices such as chronic abuse and segregation.[10] This discrimination was quite similar in its outcome to that suffered by groups suffering from *de jure* discrimination,[11] except that the discrimination against Mexican-Americans did not primarily occur through the use of the formal, primary legal system. To date, despite being the largest minority group in America today,[12] Mexican-Americans remain largely invisible in the American antidiscrimination discourse.[13]

The dominant position of African-Americans over Mexican Americans in the antidiscrimination discourse has been widely discussed.[14] This Article sheds new light

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[7] Richard Delgado & Vicky Palacios, *Mexican Americans as a Legally Cognizable Class under Rule 23 and the Equal Protection Clause*, 50 Notre Dame Lawyer 393 (1975) (arguing though that a huge change has occurred with Mexican-American identity); Reynaldo Anaya Valencia, Sonia R. Garcia, Henry Flores & Jose Roberto Juarez Jr, Mexican Americans & the Law 16 (2004) [hereinafter: Mexican Americans & the Law].

[8] The survey was conducted in Arizona, California, Colorado, New Mexico, and Texas, the southern states in which most Mexican-Americans resided. See Gary A. Greenfield & Don B. Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 Cal. L. Rev. 662, 680 (1975).

[9] To be sure, I do not intend to state that there was no formal regulatory de jure discrimination against Mexican-Americans whatsoever. However, this form of discrimination was sporadic and rare. See for example a Californian regulation known as the "Greaser Act" from 1855, in which vagrancy was banned on "all persons who are commonly known as 'Greasers' or the issue of Spanish…blood…" 113 Cal. Stat. 175 (1855) excerpted in Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1, 29 (1994) (Undermines the "realness" of acknowledged races and arguing that races exist only as powerful social phenomena) .For an exploration of the experience of Mexican-Americans under the legal system of the United States from 1848 to 1946 see Martha Menchaca, *Chicano Indianism: A Historical Account of Racial Repression in the United States*, 20 Am. Ethnologist 583 (1993). Menchaca's historical review reveals some differentiation between the American discriminatory treatment of Mexicans of Indian descent and Mexicans of European-Spanish descent, in favor of the latter. Mexicans of Indian descent were simply perceived as "Indians" rather than as "Mexicans". *Id*, at 585-591.

[10] For a brief history of Mexican-American encounters with the law see *Mexican Americans & the Law*, *supra* note 7, at 4-10.

[11] Greenfield & Kates, *supra* note 8, at 687.

[12] U.S. Census figures identify Latinos as "the largest minority group in the U.S." See Margaret E. Montoya, *A Brief History of Chicana/o School Segregation: One Rationale for Affirmative Action*, 12 Berkeley La Raza L.J. 159, 162 (2000-01).

[13] Eduardo Luna, *How the Black/White Paradigm Renders Mexicans/Mexican Americans and Discrimination Against Them Invisible*, 14 La Raza L. Jour 225 (2003) (suggesting that Mexican-Americans have not suffered from discrimination or that they never resisted it).

[14] *See generally*, Leslie Espinoza & Angela P. Harris, Afterword: Embracing the Tar-Baby - LatCrit Theory and the Sticky Mess of Race, 85 Cal. L. Rev. 1585, 1596 (1997) (determining a black exceptionalism to other discriminated groups in America); Andrew Hacker, Two Nations: Black and

on this discussion and suggests that the difference between the two groups represents also the different forms of discrimination suffered by them. Although one may consider it fairly obvious that different types of discrimination lead to different treatment in the discrimination discourse, this specific difference between the groups- - where African-Americans have enjoyed genuine legal recognition as a discriminated-against group, while Mexican-Americans have not--nonetheless demands further inquiry.

Methodologically, this Article focuses on litigation over segregation, primarily in education, as the way in which these different groups engage in the discrimination discourse. It traces the various ways in which segregation litigation has contributed to producing the legal recognition of groups that suffered *de jure* segregation as opposed to the way it has shaped (or failed to shape) the legal recognition of groups that suffered primarily from *de facto* segregation. The former have come to be recognized as strong, cohesive groups, whereas the latter have acquired at best fragile group recognition.

This Article proceeds in four parts. Part I situates the Article's analysis at the juncture of the forms of discrimination and equal protection analyses as they relates to other proximate analyses. Part II explores the advantages of *de jure* discrimination, namely that it creates legally cognizable groups and thereby enhances the ability of that group to obtain *de jure* relief. Part III describes the ways in which the current rights discourse misses the process by which groups that suffer from *de facto* discrimination seek to achieve *de jure* relief. The focus in this part is on the ways in which American courts, dealing with segregation litigation in education, have failed to apply antidiscrimination law paradigms to groups that have typically suffered from *de facto* discrimination. Part IV argues for the greater use of contextual tools in

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White, Separate, Hostile, Unequal (1992) 16 (considers the Fourteenth Amendment and its antidiscrimination jurisprudence as tailored to African-Americans' experience). For a contrary position, see Juan F. Perea, The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought, 85 Calif. L. Rev. 1219 (1997). Courts do not necessarily uphold the paradigm. See *Cisneros v. Corpus Christi Independent School District*, 324 F. Supp. 599, 606 (S.D. Tex. 1970) (suggesting that "…the Mexican-Americans residing in this district have experienced deprivations and discriminations similar to those suffered by the district's Negroes, and they share with the Negro the special problems involved in overcoming existing divisive conditions and the stigma and disadvantage that have accompanied their segregation"). Other scholarship contends that the current socioeconomic status of Mexican Americans is even worse than that of African-Americans. See Luna, *supra* note 13, at 229. The 2000 United States Census reveals that Latinos currently comprise the largest minority group and suffer from greater segregation than African-Americans. See Montoya, *supra note 12*, at 162. On the shared conceptual prejudice against both groups see Richard Delgado & Jean Stefancic, *Critical Race Theory* (2001) 76-74.

applying antidiscrimination rules to *de facto* discrimination. Courts should be more attentive to the full legal history of a group pleading discrimination and the lack *de jure* discrimination against a group should not necessarily limit the legal recognition that group should receive during the remedial stage. Part V concludes.

Part I: The Anti/Discrimination Discourse - Location, Location

This article's argument is located at the intersection of discrimination and anti-discrimination theories and discourses and it challenges the traditional conception of the ways in which they intersect. This part discusses the different ways in which the theories and discourses intersect and how this Article's argument affects them.

1) The *De jure – De facto* Distinction discourse

What makes an act "*de jure*" and thus makes it eligible for judicial review? Is a single, concrete decision by a low hierarchy official as *de jure* as an action is under a federal statute? Over time, the distinction between *de jure* and *de facto* has been progressively blurred, and sometimes this distinction signifies little more than a legal conclusion. This ephemeral distinction has been criticized as having an elusive, false jurisprudential effect, enabling court to draw a thin, changeable line between *de facto* and *de jure* acts.[15] Though fully aware of this criticism and supportive of it, this Article still argues that at some level the distinction matters; specifically, the distinction matters to the way in which groups discriminated against in different ways perceive themselves politically and to the way in which those groups are perceived by others. This Article employs the distinction consciously in its extreme technical sense in order to make this theoretical point. Using the phrase *de jure* discrimination, I have in mind a most materialistic, formal meaning, namely discrimination that is effected by overt, explicit, and systematic laws and regulations. *De facto* actions of discrimination, on the other hand, result from actions that are covert and that are less or not formalized in primary legal texts. These two poles of discrimination, nonetheless, are located along a continuum, in which the more resemblance the type of discrimination being complained of bears to one of the poles, the more squarely the argument made in this Article applies.

[15] For a challenge of this distinction in order to demonstrate a *de jure* discrimination that allows for *de jure* relief see Jorge C. Rangel & Carlos M. Alcala (Project Report), *De Jure Segregation of Chicanos in Texas Schools*, 7 Harv. Civil Rt-Civil Lib. L. Rev. 307 (1972) (challenging the denial of *de jure* discriminated-against status for Chicanos in Texas).

The discussion of the role of the *de jure/de facto* distinction in the current discrimination analysis has been somewhat meager and one-dimensional. The Equal Protection Clause of the Fourteenth Amendment restrains only state action, and thus only counters *de jure* discrimination. This truth has profoundly limited courts' power to confront non-*de jure* discriminatory actions. Since they occurred with little if any legal record, *de facto* discriminatory practices were more difficult to track than *de jure* discriminatory practices. Particularly in the struggle for desegregation in education, artificial and blurred lines were drawn between largely similar discriminating acts by public authorities.[16] These arbitrary lines had a devastating effect on the struggle of *de facto* discriminated against groups to overcome such discrimination.[17] In many cases, courts refused to provide relief for complaints made about segregating practices on the grounds that those practices were not *de jure* and thus did not provide grounds for judicial intervention.[18]

The traditional critique of the distinction between *de jure* and *de facto* discrimination is different than the one this Article stresses. The traditional critique's main goal is to facilitate a re-conceptualization of *de jure* acts to include acts that are currently perceived as *de facto* ones with the eventual end goal of dismantling the distinction.[19] This Article, rather, stresses that the distinction, though largely unjustified, has yet some meaningful effects that have been so far ignored in the attempts to normatively abolish the distinction. The Article proposes a phenomenological insight on the systematic effects that the divergent forms of discrimination have in creating "legally cognized discriminated groups".

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[16] For this conception see the opinions of Justices Douglas and Powell in *Keyes v. School District No.1 Denver, Colorado* case, 413 U.S. 189 (1973). The judges criticized this conception and clarified that any discrimination administered by a state agency, regardless of its informal basis, as in the case of a discriminatory unwritten policy and decisions by officials, is a state action under the Fourteenth Amendment. Referring to the Board of Education's acts presented as "*de facto* discrimination," Justice Douglas declared that "each is but another form of *de jure* discrimination" and suggests there should be no constitutional implications to the distinction once the force of law is placed behind the defendants. *Id*, at 216.

[17] *Id*, at 218-19. Justice Powell suggested abandoning it in favor of adopting a broader conception of constitutional justice. *See* Mexican Americans & the Law, *supra* note 7, at 27-28.

[18] *See* George A. Martinez, *Legal Indeterminacy Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. Davis L. Rev. 555, 586-603 (1994) (presenting the various petitions declined based on the *de jure/de facto* distinction).

[19] *See Cisneros*, *supra* note 14, at 617-18 (reconceptualizating the facts as de jure acts). For a comprehensive example of such a project, see Rangel & Alcala, *supra* note 15.

2) The Judicial Protection of Minorities Discourse

The *de jure/de facto* distinction's critique is significant to scholarship on the justification for having judicial review that favors discriminated-against groups.[20] In his article on the judiciary's legitimate role in protecting minority rights, Bruce Ackerman used an interest-group analysis to reorient the doctrine of judicial intervention in minority rights.[21] Ackerman pointed out the misconceptions embedded in the Supreme Court's standard "discrete and insular" definition for determining which groups are entitled to judicial protection through the Equal Protection Clause.[22] He specifically argues that the Court has failed to evaluate the real need for judicial intervention on behalf of "anonymous and defused" minorities; Ackerman argues that these groups need protection since they are typically less politically empowered than the "discrete and insular" minorities. The argument here follows Ackerman's and, to some extent, criticizes it as ignoring worsened groups in need for judiciary protection, namely, minorities which are "anonymous, defused and legally absent".

Although Ackerman's argument focuses on the separation of powers and the judiciary's power to nullify discriminatory statutes, it also suggests a broader, enduring role for the judiciary with regard to protecting minorities.[23] Ackerman's analysis presupposes a viable legal recognition of the minority group, since he targets the anti-democratic nature of the *de jure* discrimination from which that group suffers. His basic idea is that the less politically effective a discriminated against group is, the more courts are democratically empowered to operate to protect that group. In the case of legally absent minorities, this political weakness is especially pronounced. For example, these minorities lack the "visibility" necessary for the political system to recognize their suffering or to enable them to accumulate political power. This Article argues that these features are heavily influenced by whether a group is discriminated against *de jure* or *de facto*, stressing the need for a reconsideration of how we define what a minority group is for remedial purposes.

3) The Equal Protection Discourse

Recognition of a group is a prerequisite to that group asserting an Equal Protection Claim by one of its members. But the group recognition this Article is concerned with is not the commonly discussed nature of the group that is relevant to

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[20] *Developments in the Law – Equal Protection*, 82 Harv. L. Rev. 1065, 1125 (1968-1969).
[21] Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985).
[22] *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).
[23] Ackerman, *supra* note 21, at 715.

what level of judicial review applies to laws affecting that group.[24] Rather, the concept of group recognition in this Article is unconcerned with what level of judicial review will apply, since a group's desire to be classified as a "suspect category" to receive the highest level of judicial protection is not a struggle to be recognized as a group. For example, laws discriminating against women are subject to a lower level of judicial scrutiny than African-Americans, yet women are the clearest legally cognizable group.

The type of group recognition this Article is concerned with is the requirement under the Equal Protection Clause that any group challenging a discriminatory act would have enough distinctiveness so as to have standing to raise the discrimination claim.[25] This requirement under the Equal Protection Clause, although rarely discussed, is crucial in pleading a constitutional violation: "the first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied".[26] The Equal Protection Clause thus incorporates a group-based ideology even while maintaining the individualistic nature of claims.[27] That is, one being part of a group--and the sameness one shares with that group--is necessary as a foundation for any individual allegation of discrimination. In this context, the lack of legal recognition as a group that is evident in *de facto* discriminated against groups like Mexican-Americans means that these groups have only a fragile, partial, and hesitant recognition. This limited recognition means that in order to win an equal protection claim, the group identify must be constantly and repetitively reassured before court. Thus, the effects of *de jure* discrimination structurally limit the scope of equal protection that *de facto* discriminated groups enjoy.

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[24] *See* John E. Nowak & Ronald D. Rotunda, Constitutional Law 685-692 (7th ed., 2004).

[25] This prerequisite is different from the "standing doctrine" requisite embedded in Article III of the Constitution. *See* Constitutional Law: Cases, Comments, Questions 1507-1518 (Jesse H. Choper et al., 9th ed., 2001).

[26] *Castaneda v. Partida*, 430 U.S. 482, 494 (1977); *see also Hernandez* v. *Texas,* 347 U.S. 475, 478-479.

[27] On the individualistic framework of the equal protection clause, see Kevin D. Brown, The Dilemma of Legal Discourse for Public Educational Responses to the "Crisis" Facing African- American Males, 23 Cap. U. L. Rev. 63, 71-87 (1994). On the role of the clause as protecting groups, see Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 123-127 (1976). However, this Article's argument does not rely on a communal perception of the Equal Protection Clause, since even an individual claimant needs to prove membership in a group.

Part II: Formal *De Jure* Discrimination and its Effects – A Phenomenology

Discriminated groups, as political categories, are created and recreated within particular regimes of hegemony-power, and the language of law plays an important role in this ongoing process. The *de jure/de facto* distinction is important to understanding the way in which discriminated groups are constructed through the legal text. The distinction affects a group's recognition in various ways through the different stages of discrimination and the development of antidiscrimination law. The difficulty, however, is that antidiscrimination law was initially based on the type of redressed discrimination being *de jure*.[28] Law is one important source from which people draw their sense of reality and "realness." It is one of society's most reliable mechanisms of producing reality or, as others sees it, of reflecting reality.[29] It is the place where social consensus and dominant beliefs are being realized. *De jure* discrimination creates "differences" between groups, recognizes those differences, and construes those differences as meaningful in reality. Therefore, the absence of groups - or their "differences" - from society's legal texts might signify their non-existence.

By asserting that legal texts matter, this Article embraces the basic idea of social construction of reality theories in general and social construction of reality through law, in particular. It treats primary legal texts as a major symbolic instrument in the production and reproduction of power structures, and thereby calls for a problematization of any alleged naturalness of the antidiscrimination discourse. The effects presented below manifest the influence that *de jure* discrimination has on the construction of a recognized discriminated-against group within the antidiscrimination discourse. This phenomenon is distilled through the utilization of different methods from various disciplines, such as the semiotics of law, the rhetorics of law and the sociology of law. Additionally, the effects apply simultaneously to different players and agents in the construction process of recognizing a group as discriminated-against: some of them affect the discriminated-against group members themselves, while others affect the members of the hegemonic group, who also constitute the

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[28] It has been argued that the Court is approaching discrimination issues based on the assumption of formal, blatant discrimination even though de jure discrimination almost is now rare. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 Geo. L. J. 279, 285 (1997) ("As long as… blatant barriers do not exist, the Court has difficulty seeing discrimination").

[29] This Article's interest is not in the ideological controversy over the force of law as a sociological move or the law's role in creating social norms. *See* Introduction to Critical Race Theory: The Key Writings That Formed the Movement, xxiv (Kimberle W. Crenshaw et al., 1995).

shaping of the different groups, from inside the legal system (such as regulators, lawyers and judges) and from outside of it.

Though comprising many of these methodological constituents at different levels, the effects themselves are organized around their outcomes, meaning that they are presented in correlation to the way they contribute to the process of founding the discriminated-against group as a subject for relief implementation.[30]

The Article will now trace the effects that the different types of discrimination have on creating a group as a legal entity in the remedial stage.[31] The effects are all relevant to the way in which a discriminated-against group's status as a legal entity, with legal relevance to anti-discrimination relief, is generated. However, the effects themselves are somewhat independent from one another and have a cumulative influence on the formation of the group as legal entity, rather than having a gradual, dependent influence where one effect flows from the other. Nevertheless, the common thread between these effects is the way in which they allow the formation of *de jure* discriminated-against groups as legal entities and the way the lack of these factors burdens *de facto* discriminated-against groups.

The effects of *de jure* discrimination that will be addressed in this Part confine the ability of a group to participate in the remedial stage, thus structurally barring groups that are not victims of *de jure* but of *de facto* discrimination from benefiting in the curing stage. For these groups that are "legally absent" groups, the antidiscrimination battlefield is especially difficult, since they have to fight for redress in an area where they were never formally acknowledged as injured.

1) The Semiotic Impact of Discrimination

a) The Distinctiveness Effect

Discrimination is a form of exclusion, which demands the identification and acknowledgment of the excluded entity subject to different treatment. "Identifying" the characteristics of the subject upon which exclusion is based requires that the

[30] This article is less interested in the methodological motivations of the process of recognizing a group as discriminated-against. Rather, it focuses on the legal aspects and manifestations of this process, understood through the abovementioned methodological constituents.

[31] In tracing these different stages, the Article does not intend to expose a coherent, consistent, and gradual progress of the legal discourse on discrimination. Moreover, the different stages must have been infused with and influenced one another and they may not even constitute some developmental phases. Garry Peller, *Frontier of Legal Thought III: Race Consciousness*, 1990 Duke L. J. 758 (1990) (considering some of the stages as a mere reflection of the opposing political ideologies of the integrationist and the nationalist movements in the late 1960s and early 1970s).

subject has a distinctiveness common with the excluded group. From this viewpoint, the discourse of discrimination both causes the "other" to suffer from deprivation and, at the same time, forms that same "other" group.[32] Paradoxically, the discriminating discourse retains some maneuvering potential since the legal language that the *de jure* discrimination employs against the groups plays into the hands of these very same discriminated groups when the remedial stage begins. Discriminated-against groups can now use the same classifying rhetoric that was used to define and exclude their group for their own benefit. In a sense, then, discriminated groups are able to trap the legal system by its own definitional creations. In other words, a group's distinct existence at the remedial stage is a consequence of the group identity and knowledge that was produced by the prior stage's discriminatory discourse that recognized the group's "legal entity" by discriminating against that group. This existence of a "legal entity" means that the discriminated against group need not prove that the group has any "real" or essential existence; rather, the fact that the legal system treated the group as real is sufficient. The legal system, which creates this group identity and knowledge during the *de jure* discrimination phase, cannot ignore or re-contextualize the group identity at the remedial stage. Especially for racially categorized groups, whose composition is socially ambiguous and often based on vague characterizations, this effect of the law creating their legal identity is highly valuable in the remedial stage.[33] It should be stressed, however, that this process does not imply that prior to it there were no meanings of "race" attached to groups such as African-Americans or Mexican-Americans outside the legal apparatus. Rather, it is suggested that racial groups as we know them today within the antidiscrimination discourse were shaped, in part, by the discrimination discourse.[34]

The African-American group is a prominent illustration of this effect. The distinctiveness of the group was created through various discriminatory provisions of the law that needed to and shamelessly did define what a "Negro" was.[35] These

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[32] This notion is compatible with Foucault's perception of discrimination as an instrument for establishing identities and differences. *See* Chris Horrocks, Introducing Foucault 64 (1999).

[33] Racial groups are here being contrasted with the cases of other groups; with women, for example, biology provides rather prominent distinctiveness to the group's members.

[34] This idea is compatible with Ian Haney Lopez's idea that races as they form part of our discourse today should not be understood as constructed by the shared history of their members and nothing else, but rather that it was their members' shared history of oppression that shaped these races in their current appearance. *See* Haney Lopez, *supra* note 9, at 38.

[35] The Texas statute, for example, identified "Negros" as "all persons of mixed blood descended from Negro ancestry" or "a Negro or person of African descent". Pauli Murray, States' Laws on Race and

definitions were designed to meet the need to statutorily identify a person for exclusionary purposes[36] and thereby created an indisputable "African-American legal entity", sustained by a rhetoric that enabled the courts to identify the group and exempted them from justifying their choices of identification. Moreover, the legal system was indifferent to the divergent definitions used to "identify" the group, as the notorious case of *Plessy v. Ferguson* demonstrates. In *Plessy*, the Court considered Louisiana's legal definition of African-Americans to be a matter of state legislative autonomy.[37] The Court specifically refrained from defining the plaintiff's race, indicating that so long as the segregation laws identified him as "colored," his unique racial condition was legally irrelevant.[38] The Court settled for the adoption of the statute's language as the relevant legal definition for identifying the plaintiff's group. Adopting this definition also allowed the Court to ignore strong objections to the notion that there is any "real" biological meaning to race.[39]

On the other hand, the courts' desire to look to statutory definitions rather than consider racial categorizations on their own initiative stood in the way of Mexican-Americans being recognized as a discriminated against group for remedial purposes.[40] The first case to acknowledge Mexican-Americans as a legally identifiable non-white group was *Hernandez v. Texas*,[41] in 1954, where the Court concluded that the systematic exclusion of Mexican-Americans from jury duty on the basis of their "class" was unconstitutional.[42] Nevertheless, in this decision the Court refused to adopt a broad conception of the affected group and instead pointed to evidence about the local discriminatory practices against Mexican-Americans; thus, the Court established the existence of Mexicans-Americans as an identifiable class only within

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Color 443-44 (1997). For the various terms used for "naming" African-Americans in general see Randall Kennedy, Nigger – The Strange Career of a Troublesome Word (2002).

[36] For the myriad "naming" of other groups in America who were not whites, see the comprehensive research considering discriminatory legislation all over the U.S. in Murray, *id*.

[37] 163 U.S. 537 (1896).

[38] The petitioner, as the Court admitted, was "only 1/8 black" and had "Caucasian looks". *Id*, at 542

[39] Lisa K. Pomeroy, *Restructuring Statistical Policy Directive No. 15: Controversy over Race Categorization and the 2000 Census*, 32 U. Tol. L. Rev. 67 (2000) (shows that racial categories are not generic or natural but rather are a social construct). There is a clear discrepancy between the social science acceptance of the social nature of race and the legal system's refusal to accept this notion. *Id*, at 69-70. Also see Haney Lopez, *supra* note 9.

[40] For example, see the cases discussed in Delgado & Palacios, *supra* note 7, in which Mexican-Americans were not recognized as a group for class action and equal protection purposes.

[41] *Supra* note 26.

[42] The Court refused, though, to identify the group on the basis of race or color. For the devastating consequences of this reluctance, see Ian Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 Calif. L. Rev. 1158 (1997).

specific circumstances. The contrasting experience of African-Americans is commonly shown, but is harder to trace, since for the Court, it is unquestioned that the group is identifiable.[43] For Example, in *Brown v. Board of Education*[44], the Court, introducing the various petitioners from different states, as "minors of the Negro race," affirmed and acknowledged, without reservation, their status as a generally identifiable group.[45] This group recognition has generalized not only different geographic areas, but also various realms of discrimination, other than segregation in education, to which the group recognition diffused.[46]

Although celebrated as a landmark step toward achieving legal visibility for Mexican-Americans,[47] *Hernandez* also posed a difficult legacy for the group, since it relied on a localized rather than nationalized conception of the "group." This localized conception forced later Mexican-American petitioners to bear the heavy cost of repeatedly establishing local discrimination in each case. Strangely enough, for example, a plaintiff with a similar claim of discrimination in jury selection in Texas was forced to again prove that he belonged to an identifiable group because his petition related to different county than the one at issue in *Hernandez*.[48] This legacy caused courts to refuse to recognize the group's standing for purposes of equal protection claims. Even in cases when it was decided that Mexican-Americans were a discriminated against group, like in the important case of *Cisneros v. Corpus Christi Ind. School District*,[49] the court's rhetoric was never the definitive rhetoric that would have recognized Mexican-Americans as a broad, rather than a local, group. The semiotic impact was apparent: lacking any *de jure* discrimination to define the group before it, the Court has looked for "cultural", "biological", and "social" evidence to support the existence of Mexican-Americans as a group.[50] Moreover, the distinctive

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[43] *See infra* note 53-54, and accompanied text.
[44] 347 U.S. 483 (1954).
[45] *Id*, at 487.
[46] See for example, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (An equal protection claim of a "negro" after the club denied him service); *Palmer v. Thompson*, 403 U.S. 217 (An equal protection claim of "Negro citizens"\"black citizens" against the local authority which decided that closing a public pool was preferred over desegregating it).
[47] Mexican Americans & the Law, *supra* note 7, at 16.
[48] For example, see the court's words in a case concluding "It appears and the court so finds that there is in Bexar County an identifiable ethnic group referred to as Mexican Americans…" *United States v. Hunt*, 265 F. Supp. 178, 188 (W.D. Tex. 1967). Ten years later, an all-Texas Mexican-American group was considered identifiable in that same matter. See *Castaneda*, *supra* note 26.
[49] 324 F. Supp 599, at 606-607 (1970).
[50] In this case, the court declared that the group was an identifiable as an ethnic minority. However, in order to justify its conclusion which was not derived from a de jure definition of the group, the court, in

characteristics of Mexican-American's – such as their surnames, cultural heritage, and appearance - have constantly been questioned on the grounds that they lack social "realness" or relevance to creating a group identity for Mexican-Americans. This confusion is captured in the sincere struggle of courts and their rhetoric inability to conclusively identify the group before them:[51]

> "It is clear to this court that Mexican-Americans, or Americans with Spanish surnames, or whatever they are called, or whatever they would like to be called, Latin-Americans, or several other new names of identification -- and parenthetically the court will take notice that this naming for identification phenomena is similar to that experienced in the Negro groups: black, Negro, colored, and now black again, with an occasional insulting epithet that is used less and less by white people… fortunately…it is clear to this court that these people for whom we have used the word Mexican-Americans to describe their class, group, or segment of our population, are an identifiable ethnic minority… This is not surprising; we can notice and identify their physical characteristics, their language, their predominant religion, their distinct culture, and, of course, their Spanish surnames.

In searching for "a name," and lacking any prior *de jure* definition of the group, the court is forced to create the group on its own. Trying to come with an acceptable definition, the court compares the naming difficulty with Mexican-Americans to the name changes that have accompanied the African-American group; this comparison, though, exemplifies the differences between the groups caused by their distinct discrimination forms. As opposed to court's analogy, the "naming" experiences of the two groups in fact diverged both in reason and in outcome. The "list of names" for African-Americans that court lists represents the abundance of identifications that were attached by *de jure* discrimination; thus, there was no confusion or indeterminacy in the remedial stage, only different names attached to a well-defined group. Thus, these names have not compromised the ability of courts to consistently identify the group before them as the same group of African-Americans. The Mexican-American "list" of names, however, demonstrates the lack of any prior legal definition of the group for court to rely upon at the curing stage.

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a footnote, considered an expert's testimony on the matter and discussed at length the characteristics of an identifiable group. *Id*, *id* (footnotes 29 and 30).

[51] *Id*, at 606-608.

Later cases in which court again held that Mexican-Americans are an identifiable class, like the infamous *Keyes* case,[52] have not yet had the all-encompassing effect of creating group recognition.[53] In sum, unlike African-Americans, Mexican-Americans had to each time first constitute themselves as a group and only then make their specific allegations of discrimination. The *United States v. Texas Education Agency*[54] desegregation case is a sharp exemplary of that effect. The petitioners in this case were both African-Americans and Mexican-Americans. Nevertheless, the Court voiced his concern only with whether the latter constituted an identifiable group while having no similar concerns regarding the former.[55]

b) The Visibility-Witnessing Effect (or "Unhappiness without a Title is Double Unhappiness"[56])

The legal discourse of discrimination not only classifies groups and shapes their distinctiveness, but also manifests their presence. Presence is therefore the *signifie* of discrimination, its *signifiant*.[57] *De jure* discrimination gives public presence to its subjects and narrates their discriminated experience. In the remedial stage, the same narrative that was used by the legal system for discrimination against the group is used to justify giving anti-discrimination relief to the members of that group. Moreover, number of different situations in which *de jure* discrimination existed created multiple narratives of oppression and exclusion that had to be revealed in the remedial stage: where *de jure* discrimination ordered segregated schools, the narrative of exclusion from the education system had been told; where it ordered employment segregation, the narrative of exclusion from the employment market had been told; and so forth. These narratives of discrimination, suffering, and deprivation were

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[52] *Supra* note 16. The Court declared that this class existed "for purposes of the fourteenth amendment".
[53] Delgado & Palacios, *supra* note 7, at 396.
[54] 467 F.2d 848, 852(1972)
[55] *Id*, at 852: "Mexican-Americans in many cities in Texas are an identifiable ethnic minority…" Nevertheless, in many other cases where members of both groups applied jointly, there was no such inquiry as to the status of Mexican-Americans. My guess would be that the presence of African-Americans as petitioners redeemed the group recognition problem of Mexican-Americans since the former constituted the required eligibility for relief against the white hegemony anyway.
[56] Hanna Arendt, Rahel Varnhagen – The Life of a Jewess 173 (1997).
[57] For an elaboration on the semiotics of the law see Bernard S. Jackson, Semiotics and Legal Theory (1997).

outlined by *de jure* regulations and affected the transparency and visibility of both the group’s existence and the group's oppression.

This effect is part of a larger theoretical scheme of "visibility," emphasizing the powerfulness of the legal discourse, which excludes minorities by their absence them from legal texts and reasoning. This absence from the law's formal and substantive foundations designate the excluded party as the "other" and demonstrate that its needs are as unimportant to the legal world as they are elsewhere in society.[58] The argument of this Article exceeds the limits of this "invisibility" critique. It argues that “absence” refers not only to absence from receiving the benefits of the law, but also an absence from suffering from the drawbacks of the law, specifically being absent from the legal discrimination mechanism. The alleged invisibility of *de jure* discriminated-against groups marks them as the "other," whereas the absence of *de facto* discriminated-against groups signifies their complete non-existence.[59] For example, using legal language to determine the "nature" of a person in order to classify him or her under a Jim Crow statute's requirements shapes the notion of a legal category. Silence, on the other hand, is a choice not only not to include but also a choice at the same time not to exclude. Silence is the decision to "non-clude." By "non-cluding," this Article means a situation where a group is being discriminated against yet is not being subjugated by explicit formal expressions of the law. The group is fully "named" by society's coercion since it suffers from discrimination, but is nameless under the law. Moreover, it does not exist as a group or entity. Although it is true that discriminated-against groups such as women and African-Americans also suffered from injustice and inequality that might be termed "lawlessness," they were at the same time subject to the control of the legal system and thus were subject to lawfulness.[60] These groups are therefore relatively visible on the spectrum of "visibility"; in contrast, Mexican-Americans fall into a category of extreme invisibility.

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[58] *See*, e.g., Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 Am. U.L. Rev. 1065 (1985) (Discusses the invisibility of women in contract law).

[59] For a close analysis of invisibility and non-existence see Duncan Kennedy, *The Stakes of Law, or Hale and Foucault*, *Legal Studies Forum* 327, 333 (1991).

[60] For lawlessness in women's life see Marjorie Maguire Schultz, *The Voices of Women: A Symposium in Legal Education: The Gendered Curriculum of Contracts and Carreers*, 77 Iowa L. Rev. 55, 58 (1991) (arguing that contract laws deserted paradigmatic contractual issues regarding familial relations). On lawlessness in African-American's life see Frankie Y. Bailey & Alice P. Green, Law Never Here (Westport, Connecticut, 1999) (describing in a short story the devastating meanings that law had in the lives of black slaves).

De facto discriminated against groups extends another extreme of the visibility spectrum. "Invisibility" is commonly used to describe also the omnipresence of a group that need not be "named", rather than describe the non-existence of the "un-named" group. Drawing on the work of Pierre Bourdieu and treating the law as a quintessential arena of symbolic power, one can regard the normative classification of "whiteness" as unmarked and "blackness" as marked as an objectified form of white hegemony.[61] The invisible unmarked or "un-named" is the group whose dominance and hegemony shapes the relevant social system and thus does not need to be explicitly named and presented.[62] In legal terms, critical theory argues that the law represents the white-male-heterosexual epistemology and life-experience and thus this group does not need to be named in the law.[63] Therefore, this archetype's absence from the legal texts is misleading since it reflects the group's constituting presence. In this Article, however, the terminology of "un-naming" is being used in a different manner. By "un-named" groups, this Article means those that suffer from an impotent absence, and not from an all-encompassing omnipresence. This Article contrasts the "naming" of minorities, such as African-Americans and women, not only with the "un-naming" of the dominant group of white men but also with the "un-naming" of other discriminated-against groups. Considering these other discriminated-against groups visible challenges the traditional conceptualization of "naming" as exclusionary and "un-naming" as inclusive. Instead, this Article suggests a broader conception that will treat the "un-named" discriminated groups as being as invisible as a group can be. Moreover, the invisible normality of whiteness manifested in the law as well as achieved through it, engages the law as a "white public space" in which the unmarked is simply white.[64] In this symbolic space, the un-named group is eliminated and marginalized as a discriminated-against group, through its being merged into the white public space as an inseparable part of it. However, this process

[61] Pierre Bourdieu, *Social Space and Symbolic Power*, 7 Sociological Theory 14 (1989)
[62] Simon De-Beauvoir, The Second Sex (1949); Catherine A. MacKinnon, Toward a Feminist Theory of the State 96-105 (1989).
[63] On the "whiteness" of the law see Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 Law & Ineq. 323 (1997).
[64] White public space is fashioned as: "Either in its material or symbolic dimensions, white public space is comprised of all the *places* where racism is reproduced by the professional class. That space may entail particular or generalized locations, sites, patterns, configurations, tactics, or devices that routinely, discursively, and sometimes coercively privilege Euro-Americans over nonwhites". Helan Page & Brook Thomas, *White Public Space and the Construction of White Privilege in U.S. Health Care: Fresh Concepts and a New Model of Analysis*, 8 Medical Anthropology Quarterly 109, 111 (1994).

does not signify inclusion of the group, since in reality it is discriminated-against, *de facto*.

The theoretical scheme of "invisibility" this Article addresses is affected by the legal visibility of the group as follows. Different, relative degrees of legal visibility and invisibility are located on a continuum. At one end there are laws that make the "otherness" of the laws' subject explicit. For example, laws denying access to public facilities that specifically named "Blacks" made the "otherness" of African-Americans apparent. In this case the discriminated group is more overtly distinguished than with laws where the ban is, for example, on "Colored" people, which is a general term encompassing various non-white groups.[65] Next to these explicit laws on the continuum are implied laws, such as laws with a "whites only" requirement. This sort of implicit law does not "name" the other, rather "names" the opposite, privileged entity. Here, the group's absence could nevertheless signify its existence because of the statute's “wholeness” impact. According to this impact, discriminatory statutes are always positioned within a semantic field of "social power relations" where the oppressor and oppressed groups are "different" from one another and can signify one another.[66] In the relatively narrow area of legal discrimination, naming the privileged group in a statute signifies the discriminated group as missing from the holistic frame of the oppressor and the oppressed, namely, from the statute's wholeness. For example, due to the black-white paradigm, "African-Americans" are members of a set of mutually exclusive forms of discrimination with "whites" as their opposite. This dichotomy is why statutorily privileging a "white" group would signify the presence of its "other," specifically African-Americans, but not, for example, the presence of Mexican-Americans, since Mexican-Americans are not the dichotomous opposite of "whites" and thus are not signified by the inclusion of "whites". Alongside this spectrum of visibility, both explicit and implicit *de jure* discrimination enhances the formation of the discriminated group as an entity.

In sum, *de jure* discrimination affects the magnitude of the visibility both of the existence of the group itself and of its discrimination-based suffering. Working from within the legal system, *de jure* discrimination brought the groups it defined into

[65] In the case of *Gong Lum v. Rice*, 275 U.S. 78 (1927), the Supreme Court affirmed a decision that allowed the exclusion of a Chinese child from a white school on the ground that the law required separate schools for "whites" and "colored" races. Chinese were also considered “Indians” by law. See *People v. Hall*, 4 Cal. 399 (1854) (prohibiting the testimony of an Indian witness).

[66] Those images are considered to be Greimasian semiotics of law. *See*, generally, Jackson, *supra* note 57, at 31-43.

a canonical status through legal texts. Law canonizes discriminated groups, providing them the necessary "naming" for all prospective antidiscrimination purposes during a later remedial stage.[67] Being named by the law has implications just as being named by the social sphere or by politicians would. Formal *de jure* discrimination is more systematic and more exposed to the public than *de facto* discrimination is, thereby conveying greater visibility to the subjects of that discrimination. This effect helps explain the weak position of Mexican-Americans in the American antidiscrimination discourse. Although Mexican-Americans are relatively physically distinct, their recognition as a discriminated-against group has lacked any “legal” support since they were not discriminated-against by the law; this lack of "legal" support deprives the group of legal viability in asserting their claims during the remedial stage.

2) The Collaborating-Organizational Effect

a) Through intra-group reactions

The ability and potential of minorities to politically organize has a key role in affecting their political power. Ackerman, who discusses minorities' entitlement to judiciary protection, refers to the idea of a “pluralist democracy,” which assumes that various interest groups negotiate with one another about the rules that they eventually democratically legislate. Within this framework, minority groups suffer from a systematic disadvantage, due to their lack of power to negotiate with the powerful majority.[68] A famous dictum by Justice Stone in the *Carolene Products* case suggested that “discrete and insular minorities” were the ones who suffered most from democratic ineffectiveness and were the ones who were eligible for and entitled to protection from the judiciary when the legislature failed to provide such protection. Ackerman criticizes the Court’s definition. Both insularity and discreteness, he argues, have an empowering rather than a disempowering effect on the political bargaining power of a group, since these characteristics make the groups more able to operate collectively.[69] Here, again, the powerful effect of *de jure* discrimination is of enormous relevance. Using legislation to discriminate provokes a sharper sense of

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[67] Though true that it has to prove each time a concrete discrimination that needs to be addressed, discriminated-against group nevertheless is not required to prove that the group itself is identifiable.
[68] See Ackerman, *supra* note 21, at 719-722. Although critical of the pluralistic democracy ideology, Ackerman adheres to it as the leading concern of the judiciary. *Id*, at 722.
[69] *Id*, at 723-740.

humiliation, of otherness, and of alienated outsiderness.[70] The law functions as a primary (among other) social instrument in racializing the group, mainly for subordinating purposes.[71] Consequentially, a group member's consciousness of being discriminated against revolves around the notion of the group's oppression as a whole, and formal, *de jure* discrimination makes that group oppression much more powerful, painful, and outrageous, thus enhancing an intra-group interaction and collectivity. On the other hand, groups that do not suffer from blatant, evidential, formal discrimination, but rather suffer from more covert discrimination, are expected to have a lesser sense of group identity and a higher level of self-denial of their discriminated position, and of intra-group collectivity.

In the terms of Ackerman's critique, the geographical insularity of the group is less effective and the discreteness of the group is blurred with non-*de jure* discriminated against groups. The consciousness of any group of its own identity is a crucial prerequisite for any organized political action. Hence, the geographical advantage is particularly effective where the group has a discrimination-oriented consciousness and is less effective in cases where the group lacks such a consciousness or where that consciousness is less pronounced. As history demonstrates, although both African-Americans and Mexican-Americans lived in insularity as groups, the former was more able successfully to organize as a community, to develop a racially proud consciousness, and eventually to better, relatively speaking, their social status.[72]

This effect of *de jure* discrimination has been previously observed. In criticizing the transition from the formal discrimination era of Jim Crow to the formal equality era, Kimberle Crenshaw points to the problematic effects that this transition has had on the African-American community. Crenshaw criticizes the fact that what was primarily abolished through that transition was the symbolic oppression of African-Americans represented by legal ordinances, rather than actual, material oppression, which consisted of less formal discriminating practices.[73] African-Americans derived much of the collective political power within their community from the formal nature of their discrimination, not only vis-à-vis Whites, but also vis-à-vis themselves. The one-rule-to-all discrimination imposed upon African-Americans

[70] *See* Patricia J. Williams, The Alchemy of Race and Rights 88-89 (1991).
[71] *See* Haney Lopez, *supra* note 9, at 3.
[72] Luna, *supra* note 13, at 232, 247.
[73] For Crenshaw's distinction see Crenshaw, *supra* note 1, at 1377.

by *de jure* discrimination had an inclusive effect and almost of all the community members--even its most advantaged and pro-assimilationist members--were unable to avoid or deny their belonging to the group. This discrimination imprisoned all of them under its strict rules, without exception, rendering inefficient most assimilationist strategies. Once the shift was made to the formal equality era, important portions of the group, particularly those well-off or assimilationist African-Americans, parted from it in what Crenshaw calls "the loss of collectivity."[74] Prior to that stage, even the Integrationist Movement, a pro-assimilation movement, emphasized difference in its agenda and had no illusions of African-Americans belonging to the white hegemony.[75] Dr. King, an integrationist himself, strictly called upon disobedience to *de jure* discrimination.[76] *De jure* discrimination was also the reason for the evolution of and the main target of the revolutionary Black Civil Rights Movement,[77] whose consciousness was built upon fighting the evil of institutionalized discrimination. A black scholar once wrote: "Law does not exist in a vacuum and racism is not solely a by-product of law."[78] This statement is an apt description of the mindset of the Civil Rights Movement of the 1960's. *De jure* discrimination has been a very powerful motivation for the Movement's admirable struggle.[79]

Crenshaw located her critique within the African-Americans and White-Americans relations, but it can be easily applied to this Article's analysis within discriminated-against groups. Unlike their African-American peers, Mexican-Americans did not suffer from blatant, formally legal alienation and thus were not as easily considered-- either by themselves or by others--as "out-laws" from the social system. Drawing on Crenshaw's work, one can infer that the lack of *de jure* discrimination caused "loss of collectivity" within the Mexican-American consciousness and encouraged the weak ties between their community identities and a racial identity, as opposed to such strong ties within African-Americans.[80] The

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[74] *Id*, at 1382-1383.
[75] On Dr. King's conceptions of racism see Derrick Bell, *Triumph in Challenge*, 54 MD. L. Rev.1691 (1995).
[76] In the famous "Letter from Birmingham City Jail" Dr. King presented his objection to *de jure* discrimination as derived from respect for law. Martin L. King Jr., Why We Can't Wait 167 (1963)
[77] Peller, *supra* note 31, at 809 (presenting Malcolm X's view on segregation).
[78] David Hall, Racism and the Limitation of Law: An Afro-centric Perspective of Law, Society and Collective Rights 13 (Ph.D. diss., Harvard University, 1988).
[79] Regardless of the criticism of the movement's concentration on *de jure* discrimination, the fact that the legal struggle should have been accompanied by a social one does not mean that this struggle was mistaken.
[80] *See* Haney Lopez, *supra* note 9, at 10.

absences of de jure discrimination sent a message of assimilation and of false belonging to the hegemony,[81] which made an elaborated legal fight appear irrelevant or even unwanted.[82] The history of the Mexican-American civil rights movements thus is more complex and assimilative than the history of the African-American civil rights movement does. Organizations like the League of United Latin American Citizens (LULAC), established in the late 1920's, and the Mexican American's Legal Defense and Educational Fund (MALDEF), established in the late 1960's, took the lead in litigating against the *de facto* discrimination Mexican-Americans suffered.[83] They relied overwhelmingly on an integrationist and assimilative ideology rather than on a separatist or a group-collectivist ideology; perhaps partly for this reason, these groups have failed to receive nationwide attention, despite their considerable achievements.[84] Scholars speculate as to the conditions that have shaped this strategy, and the suggestions have ranged from the community's weak social and political condition to an incompatibility among the personalities of the leadership.[85] I suggest another factor, namely the ambiguity on the part of the American legal system about the group's legal status. The fact that the law did not discriminatorily define the group has had an anti-radical impact on the self-consciousness and self-perception of its members and leaders with regard to their belonging to a discriminated against group.

Another aspect of intra-group interaction to which Ackerman points is that the more discrete the members of a group are, the easier it is to track them and commit them to the group's political struggle. African-Americans are an example of a discrete group, who because of their skin color are easy to track; Ackerman presents homosexuals as a counterexample, since their membership is more anonymous and not superficially prominent, thereby making homosexuals harder to track and politically mobilize. Ackerman furthers argues that even when tracked, a group member would have to let go of his or her anonymity in order to engage in a political

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[81]I hereby associate assimilation with the negative quality of false belonging since it is in fact a practice of noneacceptance of the identity of the other, as shaped through her racial community. See Haney Lopez, *supra* note 9, at 57-58.

[82] Matt S. Meier & Margo Gutierrez, Encyclopedia of the Mexican American Civil Rights Movements 130 (2000). LULAC had initiated only two lawsuits in the late 1940s, although these lawsuits were fairly substantial.

[83] For a discussion of the myriad of Mexican-American civil rights movements, see *id*.

[84] LULAC's official constitution mentioned Mexican pride, but emphasized that Mexican-Americans were white. *Id*, at 130. Although the nationalist ideology of the Mexican-American civil rights movement was apparent, that nationalism mainly focused on Mexican "border issues". See Michael Omi & Howard Winant, Racial Formation in the United States from the 1960s to the 1980s 103-04 (1986).

[85] Meier & Gutierrez, *supra* note 82, at 127-29.

struggle and that this revealing is something members of anonymous groups would hesitate to do. By so doing, a member of the anonymous group would risk "revealing" his or her identity and would position himself or herself on a social battlefield.[86] Ackerman's discussion of "discreteness" focuses on the physical "visibility" of the group, but this Article focuses on the legal dimension of discreteness. Once the group is visible to the law, meaning that it has been defined and recognized by the legal system through *de jure* discrimination, that group also becomes more politically visible. Thus, although homosexuals are relatively "socially invisible," this Article argues that homosexuals are substantively "legally present" and enjoy a substantial amount of political visibility.

The discourse of sexual orientation-based discrimination dealt initially with prohibitions on sodomy.[87] Later, the struggle for homosexual rights targeted other *de jure* provisions, again triggering a legal discussion that increased the legal visibility of the group. Until *Romer v. Evans,*[88]the Court did not find homosexuals to legally constitute a group that was entitled to special constitutional protections. Moreover, in the first case to discuss homosexual's right to equal protection, *Bowers v. Hardwick,*[89] the discussion revolved around homosexual activity rather than homosexuals as an entity or group. But *Romer* led to the law considering homosexuals as a group, even though *Romer* did not grant homosexuals all of the constitutional protection they sought. In *Romer*, homosexuals were discriminated against *de jure* by a state constitution, so the Court's discussion also has a group-based orientation. Thus, the distinctiveness given to the group by the legislature made the group legally viable.[90]

Considering groups that are discriminated against *de facto* extends Ackerman's conception of discreteness to a symbolic level where the law constitutes presence. In contrast to homosexuals, members of *de facto* discriminated against groups suffer from "legal anonymity". They are locked in a "legal closet", which

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[86] Ackerman, *supra* note 21, at 729-31.
[87] Janet Halley, *The Politics of the Closet: Legal Articulation of Sexual Orientation and Identity*, *in* After Identity: A Reader in Law and Culture (Dan Danielsen & Karen Engle, 1995).
[88] 517 U.S. 620 (1996).
[89] 478 U.S. 186 (1986).
[90] The representation of homosexual people as "a group" is yet to be defined by *de jure* provisions, since those provisions tend to address homosexual activities rather than a homosexual entity. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (prohibiting sodomy with *de jure* provisions). In *Lawrence*, the Justices were divided as to whether the issue at hand should be considered as an equal protection challenge--conceptualizing the case as group based (the minority)--or as a due process one--conceptualizing the case as activity based (the majority). On the gay status/conduct distinction, see Kenji Yoshino, *Covering*, 111 Yale L. Jour. 769, 872-73 (2002) (introducing the different assimilationist strategies of minorities).

enhances their chances for assimilation and enables them to refrain from political confrontations.[91] In contrast, legally discrete groups who earn their discreteness from *de jure* discrimination cannot as easily ignore or deny their oppression and are more limited in their assimilation ability. Thus, members of these groups are far more likely to be ready to organize politically to fight for better treatment. The legal discreteness of *de jure* discriminated against groups also creates a supportive social-political environment both among the group members and also in the form of goodwill from people outside the group who support the abolition of the recognized *de jure* discrimination.[92] Having said all that, it is importantly noted that *de jure* discrimination is not the exclusive way through which political collectivity and consciousness can be achieved. These can be attained through different and complex routes, of which *de jure* discrimination is only one primary example.[93]

b) Through inter-group reactions

Legally institutionalized discrimination enhances also the consciousness of members outside the discriminated-against group whose members are "legally marked out" in a way that makes it relatively easy for others to identify them.[94] Reflecting this notion is Dean Ely’s psychological approach to the legislative process, which represents *de jure* discrimination as a positioning of the relations between the relevant groups in a “we”-“they” dichotomy. "We" refers to the hegemonic oppressor, represented by the legislative and "they" refers to the *de jure* discriminated against group.[95] In this framework, discrimination constitutes the other as a "minority", in the sense of a majority manifesting political superiority over the minority and hence forcing the minority to admit its relative political powerlessness and recognize its proper place within social power relationships. For example, African-Americans, as

[91] Such an analysis adopts the presumption that people would prefer exiting to engaging in a confrontation. Ackerman stresses this assumption, relying on Albert Hirschman's work on confronting unsatisfactory situations. Ackerman, *supra* note 21, at 730-31.
[92] The NAACP's struggle, for example, was founded both by both whites and African Americans. See Equal Protection and the African-American Constitutional Experience – A Documentary History 179-181 (Robert P. Greed ed., 2000).
[93] One such course, for example, is demonstrated by the psychological progression that the Mexican-American activist Guillermo Fuenfrios described in his story: The Emergence of the New Chicano, as extracted at Haney Lopez, *supra* note 9, at 50-53.
[94] Ackerman. *supra* note 21, at 729-730.
[95] John Hart Ely, Democracy and Distrust (1980). I refrain from using this analysis to justify court intervention, as Ely does, and rather borrow the idea of the alienating power of discriminating laws.

the addressees of the discriminating laws, could not see themselves as its authors.[96] Understood this way, a lack of *de jure* discrimination against a *de facto* discriminated group creates an "we-all" as opposed to a "we-they" political structure, which eases any traces of distinctiveness and discourages the development of a group consciousness among the *de facto* discriminated against group.

This notion is clear in the Mexican-American case, where since they suffered from *de facto* discrimination, Mexican-Americans were treated by court as "the other white," a group that deserved not to be discriminated against. This “other white” strategy[97] demonstrates the coalescing effect, where neither side in the discriminatory regime develops a consciousness of real power relations between the parties. Moreover, symbolically this strategy was a statement about the inclusiveness of Mexican-Americans and their lack of distinctiveness from whites.[98] In *Mendez v. Westminster School Dist. Of Orange County,*[99] where Mexican-Americans won the right to have schools integrated because the court considered them to be "white"," the court distinguished them from *de jure* discriminated against groups. Relying on California’s rules forbidding discrimination unless it was against colored and black people, the court concluded that the discrimination against the plaintiffs was unconstitutional. This decisions furthered the symbolic effect of the “we”-“they” dichotomy, whereby Mexican Americans were placed within the “we” group and not in the “they” group. Mexican-Americans were thus considered “one of the great races” and contrasted with other races that were denied equal participation in education.[100] But this placement of Mexican-Americans in the "we" group fails to acknowledge the power relations between Whites and Mexican-Americans. In this power relationship, Mexican-Americans are a discriminated against minority, but the court's decisions instead position Mexican-Americans side by side with whites. Thus, *de jure* discriminated against groups, were marked as “the real” others, whereas

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[96] Here this Article adopts Habermasian terms. Jurgen Habermas, Struggles for Recognition in the Democratic Constitutional State, *in* Multiculturalism: Examining the Politics of Recognition 107, 121-122 (Charles Taylor et al., 1994).
[97] On the employment of this strategy by activists see Rangel & Alcala, *supra* note 15, at 342-48.
[98] This strategy was first triggered by the determination of citizenship eligibility to Mexican-Americans after the Mexican-American war. See Menchaca, *supra* note 9, at 584. The strategy was well established at the middle of the 20th century, and can be demonstrated at the 1940 national census which stipulated that “Mexicans were to be listed as white…”. *See* Haney Lopez, *supra* note 9, at 51.
[99] 161 F.2d 774 (Cal. 1947).
[100] *Id*, at 780.

Mexican-Americans were not the other. This explains part of the difficulty Mexican Americans had in their quest for recognition as a "group".[101]

3) **The Institutional Memory and Blameworthy Effects**

Antidiscrimination rules are meant to rectify the countermajoritanian difficulties minorities face and to redress harmful injuries that the law or society has inflicted upon them. [102] Therefore, institutional memory and blameworthiness suggest that it is important for the same legal mechanisms that discriminated to be the mechanisms used to provide the remedies. *De jure* discrimination provides direct, formal access to the legal system's remedial functions for *de jure* discriminated-against groups. The formalism of the legal system and the documentary nature of *de jure* discrimination make such discrimination impossible for the legal system to ignore. *De jure* discrimination is less likely or plausibly to be denied than *de facto* discrimination is. Although nations tend to forget their historical evils, institutionalized documents make such forgetfulness harder. A legislative and adjudicative change of hearts does not erase the legal history of a nation, but rather place another narrative next to that history. Discriminatory legal rules can be expunged from a nation's book of statutes, but their past existence viability is always evident and traceable. The vast documentation of the Jim Crow regulations and the judicial revisiting of *Dred Scott*[103] and *Plessy* demonstrate the strong presence of the past institutional suffering of African-Americans. This documented past was during the remedial stage a source for vast *legal* condemnation of the past institutional suffering and thus a firm justification for remediation.[104]

De jure discrimination powerfully situates its subjects within the legal system as the subjects of legal practice. Reflecting again on Ackerman's work, one might observe that the judiciary restricts its activism with regard to "non-legal" issues. The judiciary's commitment to protecting discrete and insular minorities assumes some prior legal recognition of such minority groups. Therefore, it is crucial to understand the discrete and insular minorities test as being inherently legal. This test aims at

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[101] *See* Delgado & Palacio, *supra* note 7.

[102] The goals of an antidiscrimination regime are varied and are not merely formal. *See* Brest, *supra* note 3, at 6-9. Brest, though, speaks in terms of preventing harms to minorities, whereas this Article also focuses on correcting harms already done to minorities.

[103] *Dred Scott v. Stanford*, 60 U.S. (19 How) 393 (1857)

[104] See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980); Regents of the University of *California v. Bakke*, 438 U.S. 265 (1978) (allowing affirmative action).

protecting groups from *de jure* discrimination alone. Other forms of discrimination are not thought of as proper areas for judicial intervention due to the traditional legal/social dichotomy that seeks to preserve the "social" as a sphere beyond equality law and thus that allows for the continuation of racial inequality outside the official reach of the state.[105] As this Article has previously argued, Mexican-Americans were only partially recognized by the legal system. Since they did not suffer from *de jure* discrimination, it was easier to consider Mexican-Americans to be a “social” rather than a “legal” entity. The Court’s reluctance to declare that the discrimination against Mexican-Americans was *de jure* meant that Mexican-Americans had no legal relevance as a group. In the *Hernandez* case, the Court focused to “social” motivations for discrimination rather than “legal” ones, thus deriving the “emergence” of the Mexican-American group within this specific from a change in "community prejudices" against them. Moreover, the wisdom of the Court's reliance on "social changes" triggering recognition of Mexican-Americans is challenged by the fact that discrimination against Mexican-American was by far long lasting.[106] In the case of *de jure* discriminated-against groups, the law’s involvement transformed what might have otherwise been considered a "wholly social" matter in to a “wholly legal” one, by establishing the group as having legal viability. For example, in the famous case of *Strauder v. West Virginia*,[107] the Court focused on the devastating impact of *de jure* discrimination in excluding African-Americans from “civil society.” This observation conceives the social harm inflicted on them as also being a legal harm.

Many conservative legal theories and positive legalism claim that law merely reflects society's desires. The critique from the left, on the other hand, argues that the law is actively involved in the production and maintenance of society's power relations. This debate, though, is less important once legal involvement is present in the wronging. Through *de jure* discrimination the legal system created as well as reflected reality, unraveling the line between the legal and the social realms.[108] Under these circumstances, adherence to the legal righting process is to be expected, because once the law had been formally involved in "wronging," there is a need for it to

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[105] This tactic is well-established in American equality laws. See Angela P. Harris, *Symposium on Law in the Twentieth Century: Equality Trouble: Sameness and Difference in Twentieth Century Race Law*, 88 Calif. L. Rev. 1923, 1935 (2000).
[106] For the history of the subordination and oppression of Mexican-Americans, see Arnold De Leon, They Called Them Greasers: Anglo Attitudes Toward Mexicans in Texas 1821-1900 (1983).
[107] 100 U.S. 303 (1880).
[108] Kennedy, *supra* note 59, at 347.

reverse its involvement. The high attention that *de jure* discriminated-against groups receive from the legal system during the remedial stage can be understood as a result of a corrective justice aspiration of the legal system to right undeniable past wrongs that were caused by this very same system.[109]

Affirmative action is the most prominent manifestation of this effect. Although the American legal system had not yet developed a well-established position as to affirmative action's constitutionality or normative desirability, affirmative action programs have nonetheless been judicially approved.[110] The inclination of courts in these cases to generally hold against general affirmative action programs while approving programs that aim to remedy concrete legal discrimination highlights the importance of *de jure* discrimination. The more concrete and unjust the past discrimination was--particularly if such discrimination resulted from the legal system itself rather than simply from society--the more justified present affirmative action is.[111] This is the essence of antidiscrimination law, as Robert Post describes it: "…antidiscrimination law always begins and ends in history, which means that it must participate in the very practices that it seeks to alter and regulate."[112] The involvement of the judiciary benefiting *de jure* discriminated-against groups in the remedial stage can thus be understood as being motivated by institutional remorsefulness.[113]

A story of one Mexican-American battle against discrimination can also help illustrate this effect. The story, called "The Felix Longoria Incident", occurred in Texas in 1949. Longoria was an American soldier who died during World War II. The local mortician refused to allow him to be buried at the chapel because of Longoria's

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[109] Owen M. Fiss, A Community of Equals: The Constitutional Protection of New Americans 14 (Beacon Press Boston, 1999).

[110] A study of related petitions shows lack of coherence in the Court's attitude in this matter. *See* Eugene Volokh, *Racial and Ethnic Classifications in American Law in* Beyond the color line– New Perspectives on Race and Ethnicity in America 309, 310-14 (Eds: Abigail Thernstrom & Stephan Thernstrom, 2002). This Article's interest is not in the normative justifications for affirmative action, but rather in its effect on constituting the "legally cognized discriminated group".

[111] See Justice Powell's opinions in *Bakke*, and *Fullilove*, *supra* note 104. The Court, nonetheless, has recently turned to diversity as primary justification for affirmative action. See Colin S. Diver, *From Equality to Diversity: The Detour from Brown to Grutter*, 2004 U. Ill. L. Rev. 691.

[112] Robert C. Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, in Prejudicial Appearances: The Logic of American Antidiscrimination Law 1, 22 (Robert C. Post et al, 2001).

[113] Crenshaw, *supra* note 1, at 1382 (stressing that *de jure* discrimination has encouraged federal involvement in aiding the African-American struggle for equality).

Mexican origin.[114] Hector Garcia, an activist working for a Mexican-American Forum challenged this discrimination. As with most of the discriminatory acts against Mexican-Americans in Texas, the burial refusal was not *de jure* based. As demonstrated by the substantial sympathetic public attention that this case received, the public reaction to the discrimination claim – one of denial — was of a different nature than if the discrimination had been based in law and hence "legal". The incident was portrayed as an atypical incident, even though in fact separate burial services and cemeteries were common. It was resolved as a misunderstanding and misinterpretation of the funeral house owner's words. Since the mortician's behavior lacking any official approval in law, the public blamed Garcia for stirring up trouble in an area where problems did not truly existed

These types of public denials of the reality of discrimination are typical with non-*de jure* discrimination. Similar *de jure* discrimination could not have been denied. The truth of *de jure* discrimination neither relies on matters of interpretation over "what exactly has been said" nor does it rely on the credibility of the party alleging discrimination, since in both cases the law is clearly authorizing discrimination. Since *de jure* discrimination is institutionalized, its effect cannot be dismissed as a private, unrepresentative dispute as *de facto* discrimination often can be. Declaring war on *de jure* discrimination is more likely to generate public support than war on *de facto* discrimination, to which the public might respond as it did to Garcia's work that the activists are just stirring up trouble. *De jure* discrimination is more difficult to rationalize or deny. As a result, this *de facto* discrimination case with the Texas burial was resolved on a very local, specific, "non-legal" level and the mortician agreed, eventually, to bury Longoria.

4) The Presumption of Intentional Discrimination Effect

The legacy of *de jure* discrimination has an active role in proving the discriminatory intent of a challenged discriminatory act. The presence of *de jure* discrimination is an important factor in establishing that a discriminatory act was intentional. This role is exemplified by the Court's statement that the intent behind explicit *de jure* discrimination in the past may be used in the present to prove intent

[114] This incident is detailed in the biography of Hector P. Garcia, a Mexican-American activist. Ignacio M. Garcia, Hector P. Garcia: In Relentless Pursuit of Justice 104-39 (2002).

regardless of chronological remoteness.[115] Unsurprisingly, this logic was applied primarily in cases where *de jure* discrimination previously existed.[116] The practical implication of this logic is large because equal protection claims are limited to claims that can prove intentional discrimination, and this logic allows the court to assume intentional discrimination. This logic thus has a "narrating" effect, where it allows the group's narrative of oppression to be told.[117] Moreover, the "narrating" effect also has an epistemological effect by causing the narrated information to be absorbed into the formal legal system and used by the narrating group to achieve redress for past discrimination. In other words, the logic is that the institutionalization of *de jure* discrimination signified a pattern of oppressive behavior that could be used to prove intentionality, whereas *de facto* discrimination was perceived as non-institutional, incidental, and random and thus could not be used to prove the intentionality necessary to assert an equal protection claim.[118]

Conclusion: Externalities for Cases of *De Facto* Discrimination

The formal, overt, linguistic dimension of different forms of discrimination has powerful effects that both courts and scholars have so far neglected. As with any discourse, the discrimination discourse dictates the way in which discriminated groups are construed and imposes frameworks that structure what can be experienced or what meaning an experience can encompass. Thus, discourse influences what can be said, thought, and done.

The unhappy result of the fact that discrimination discourse is framed in the context of *de jure* discrimination, is that it prevents the formation of group identities of *de facto* discriminated-against groups, whose composition might be more complex, contextualized, and historicized than the composition of *de jure* discriminated against

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[115] Keyes, *supra* note 16, at 210-11. The scope of this relevance is nevertheless limited.
[116] *See*, e.g., *Cisneros*, *supra* note 14, at 148 (finding, nevertheless, *de jure* discrimination despite no prior history of state law segregation); *United states v. Jefferson County Board of Education*, 380 F.2d 385, 397 (5th Cir. La. 1967); *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971). Particularly interesting is *Keyes* where the petitioners were both Mexican-Americans and African-Americans, yet while discussing the injustice of the *de jure/de facto* distinction, Justices Douglas and Powell referred only to the African-American petitioners. *Beckett v. The School Board of the City of Norfolk*, 308 F. Supp 1274, 1304 (holding that intentional state action can easily be identified whenever there is prior *de jure* discrimination against the group).
[117] *See*, for example, *Columbus Bd. Of Education v. Penick*, 443 U.S. 449 (1979).
[118] For examples of myriad cases thus decided see Martinez, *supra* note 18, *id*.

groups.[119] Thus, the primacy of *de jure* discrimination in the discrimination discourse shaped the way in which the formation of "legally cognized groups" became possible and thereby limited the antidiscrimination discourse to encompassing primarily *de jure* discriminated against groups. *De jure* discrimination structured what could or could not be included in the discrimination discourse; most importantly, the dominance of *de jure* discrimination largely prevented *de facto* discriminated groups from participating in the antidiscrimination discourse.

It is important to note though that there is no strict, clear relation between the legal status of a group and the social status of a group as one that is discriminated against. Some groups may not be discriminated-against by the law and yet suffer discrimination from society. *De facto* discriminated-against groups demonstrate this idea well. At the same time, some groups may be *de jure* discriminated against by the law without being discriminated against by society in fact.[120] Nevertheless, in between these poles, there is certainly a correlation between the use of the law to order society and between enhancing the social and self-awareness around a group subjugated to *de jure* discrimination in a way needed for that group to initiate an effective legal and political struggle for rights. Moreover, removing a group from society's legal canon and by no longer discriminating against it under the law, in the antidiscrimination stage also creates some sense of social commitment to equality vis-à-vis that group.[121]

Part III:
The Battle for Segregation in Education as a Test Case

The impact of the abovementioned effects on equal protection doctrine is somewhat elusive and will be introduced in this Part by examining the segregation in education litigation of both African and Mexican Americans. The impact is more

[119] Alan Hunt & Gary Wickham, Foucault and Law: Towards a Sociology of Law and Governance 8 (1994).

[120] A statute in Massachusetts that ordered the arrest of any Native Americans entering the state is a good example. This 17th century statute has managed to survive on the state's law books, although the state itself obviously abandoned its discriminatory practices against Indians. Nevertheless, although not enforced, the statute has caused anguish to and has been widely criticized as being derogating to Native Americans.

[121] Even though it might be that a change of the law does not fulfill the wish of the discriminated group for equality, it undeniably betters its over-all position. *See* Reva Siegel, *The Critical Use of History: Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111 (claiming that antidiscrimination laws were aimed at bettering the civil and political rights of African-Americans but not their social ones).

apparent in the Mexican-American litigation, where the court refused to identify the group, and less apparent in African-American litigation, where the court refrained from any similar discussion of group identity. Rulings on education segregation regarding theses groups demonstrate this difference in impact. Both groups suffered from segregation in education, but while African-Americans suffered mainly from *de jure* discrimination, Mexican-Americans suffered almost exclusively from *de facto* discrimination. In terms of judicial success, Mexican-Americans were the firsts to win a segregation battle, in the *Mendez* case in 1946.[122]. But African-Americans won the war in the broader legal sense with *Brown v. Board of Education* in 1954.[123] Although vastly criticized,[124] this decision is a cornerstone of abolishing segregation and the "separate but equal" doctrine. A compelling explanation for *Brown*'s central status in the discrimination discourse might be its emphasis on African-Americans' suffering and social exclusion through *de jure* discrimination. The NAACP, which argued the case, narrated African-American suffering through briefs and professional opinions and court embraced that narrative,[125] stressing the story of the group's oppression: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone".[126] Court thus brought the suffering of African-American children--and through them the African-American people--into the legal system and made that suffering intrinsic to the group's legal entity. The institutionalized discrimination at issue in the case also represented the broader story of discrimination of educational bodies against African-Americans.[127] In *Brown*, Court has recognized the existence of a suffering, discriminated-against general group of African-Americans. Introducing the petitioners

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[122] *Supra* note 99. *Independent School District v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App., 4th Dt., 1930), was the first case to challenge segregation against Mexican-Americans. After the lower court gave a desegregation injunction, the appellate court, reversing, held that the segregation was unintentional and reasonably demanded and thus valid.
[123] *Supra* note 44.
[124] This criticism was mainly due to its following ruling in *Brown v. Board of Education* (No. II) 349 U.S. 294 (1955), but also due to its limited rhetoric. *See* Mark Whitman, *Brown v. Board of Education* 310-334 (Fiftieth Anniversary Edition, 2004).
[125] The richness of this narrative was not present in the official decision, but it was exposed to Court. For a discussion of broad portions of the brief's material see Whitman, *id*.
[126] *Brown*, *supra* note 44, at 494.
[127] The Court employs generalizing language that gathers the different petitioners, stating that "a common legal question justifies their consideration together in this consolidated opinion". *Id*, at 486.

as "minors of the Negro race," Court has affirmed, and acknowledged without reservations their status as a legally identifiable group.[128]

The impact of *Brown* was "legal recognition," as Derrick Bell states: "The significance of this decision is that it altered the status of African-Americans who were no longer supplicants … 'seeking, pleading, begging to be treated as full-fledged members of the human race….'"[129] More importantly, from *Brown* onward, the viability of every segregation claim brought into court by African-Americans was immediately and fully discussed. No special rhetoric and epistemological efforts were required by courts to define the petitioners or their discriminated-against position. This ease of asserting claims was the unfelt yet crucial impact of *de jure* discrimination, which established African-Americans' group recognition.[130] The conceptualization of the litigation as one seeking equality between different identifiable groups prompted African-Americans seeking for equality to bring their segregation claims to court. *De jure* discrimination thus had a structural effect that enabled the group to gain control over attempts to reshape the educational system.[131]

The experience of Mexican-Americans seeking to gain legal recognition as a group differed tremendously from that of African-Americans.[132] As this Article has argued earlier, the discrimination against Mexican-Americans was primarily non-*de jure* and their status as a legally cognizable minority group is fragile.[133] The scarcity of legislation related to Mexican-Americans led to an insufficient amount of litigation by or against Mexican-Americans, which prevented a coherent and a comprehensive identity of the group and its real suffering from forming. *Mendez*, one of the few cases

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[128] *Id*, at 487.
[129] Derrick Bell, *Race, Racism and American Law* 551 (3rd ed., 1992).
[130] It is obviously very hard to trace this unfelt impact, since the courts discussing segregation cases simply overlooked the identity of the African-American appellants. Their viability as a recognized group was unquestioned and was a nonissue. *See* e.i., *Griffin v. County School Board*, 377 U.S. 218 (The petitioners are laconically described as "a group of Negro school children"); *Wright v. Council of Emporia*, 407 U.S. 451 (The appellants are simply described as "Negro children"); *Norwood v. Harrison*, 413 U.S. 455 (1973) (The appellants described as "school children's parents". Later in the case, the Court incidentally discusses the issue of school segregation as relevant to "white" and "Negro" students. *Id*, at 456.); *Cooper et al. Members of the Board of Directors of the Little Rock, Arkansas, Independent School District, et al v. Aaaron et al*., 358 U.S 1 (again, the Court only incidentally declare that the battle around the implementation of Brown was revolving nine "Negro students". *Id*, at 9).
[131] It is true that the aspirations and the hopes that were merged in *Brown* were not fulfilled; yet *Brown* taught that employing social tactics on top of the legal battle is essential to initiating deeper changes to the racial power relations. See Derrick Bell, Silent Covenants (2004).
[132] Their experience was perceived as secondary and minimal in terms of scholarly and social reputation, as compared the experience of African-Americans. *Luna*, *supra* note 13, at 238-39.
[133] *See supra* notes 6-7.

to have dealt with *de jure* discrimination against Mexican-Americans, is thus unsurprisingly considered a milestone in the group's struggle for equality. Nevertheless, the *Mendez* decision blurred the legal status of Mexican-Americans as an identifiable group and blurred their suffering. Considering them to be "whites," the court said that since they were "whites" they were not appropriate subjects for discriminatory treatment since state law did not allow for discrimination against whites.[134] This strategy of labeling Mexican-Americans as white was destructive to Mexican-Americans, since it did not mesh with social behavior toward Mexican-Americans or with the power relation from which Mexican-Americans suffered.[135] And with this rare *de jure* discrimination case, it is clear that a statute explicitly allowing *de jure* segregation of Mexican-Americans would have destroyed the court's reasoning; if *de jure* segregation had been applied against Mexican-Americans, it could have surfaced the suffering of the Mexicans-American group.

Mendez was followed by *Gonzales v. Sheely,*[136] in which a federal court in Arizona ruled on a segregation claim. Like *Mendez*, this case was also highly atypically and based on *de jure* discrimination against Mexican-Americans. In *Gonzales*, the court identified the petitioners before him as a class based on the fact that the regulations allowed the segregation of “all children of persons of Mexican or Latin descent or extraction”; thus, the court used this *de jure* “naming” of the group in its ruling.[137] Court also referred to such blatant segregation as degrading and fostering antagonism against and inferiority in Mexican-American children.[138] In later cases, however, where the discrimination was not *de jure* as in *Mendez* and *Gonzales*, legal recognition of Mexican-Americans as a group has not been forthcoming. Courts, frightened by their inability to determine precisely the contours of the group, continued to only apply ad-hoc group recognition to the specific petitioners before the

[134] *Mendez*, *supra* note 99, at 780.
[135] For extensive research on race-based segregation against Mexican-Americans, see Delgado & Palacios, *supra* note 7, at 392-95
[136] 96 F. Supp 1004 (Ariz. 1951).
[137] *Id*, at p. 1006. The court declared that the group constituted a class in terms of the right to bring a class action under Rule 23 of the Federal Rules of Civil Procedure, 28 U.S.C.A. Another source of "naming" is the petitioner's brief, which had a limited effect on the court. See, e.g., *Morales v. Shannon*, 366 F. Supp. 813 (Tex. 1973) (identifying the plaintiff as Mexican-American and explaining that the court inclines to name plaintiffs the way plaintiffs name themselves). On the other hand, the court used the word "Negro" for African-Americans without any explanation.
[138] Gonzales, *supra* note 136, at 1007.

court rather than recognize Mexican-Americans as a group more generally.[139] Without a general recognition for the group, the group members had to reassert and reconstruct each time the group identity in order to assert discrimination claims. Later on, the prerequisite that challenged discrimination be *de jure* rather than *de facto* blocked many other petitions challenging discrimination against Mexican-Americans.[140] Along with other factors, the effects of the discrimination against Mexican-Americans being *de facto* rather than *de jure* can help understand how in contrast to African-Americans, Mexican-Americans today continue to attend the most segregated schools and today they are "more segregated" and "more concentrated in high-poverty schools than any other group of students" in the United States.[141] [142]

The end of Jim Crow in the late-1950's and the passage of the Civil Rights Acts in the mid-1960's signified the end of *de jure* discrimination and, with it, the end of the immediate effects of the *de jure*/*de facto* distinction. America has gradually moved from the discriminating stage and entered into the remedial stage, which utilized a colorblind notion, whereby reason and neutrality replaced prejudice and stereotyping, which governed *de jure* discrimination rhetoric.[143] The shift between the stages symbolized a shift from negotiating equality through difference to negotiating it through sameness, and the gap between discriminated-against groups has narrowed.[144] Mexican-Americans (as well as other non-*de jure* discriminated-against groups, for example Arabs) became actors that were allowed to use antidiscrimination relief in their favor and allowed to gradually forming a "discriminated group"

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[139] See, for example, *U.S. v. State of Texas*, 342 F. Supp. 24 (E.D. Tex. 1971), where the court referred to the students "in this case" as constituting a legally identifiable group. Also see *Texas Education Agency*, where the Court is more generous, yet holds some confines on the recognition of Mexican-Americans, saying: "Mexican-Americans in many cities in Texas are an identifiable ethnic minority…". The recognition of the group is being thus geographically limited to "many cities in Texas" only.

[140] See Martinez, *supra* note 18 at 584-606.

[141] This was the conclusion of The President's Advisory Commission on Educational Excellence for Hispanic Americans. Kristi L. Bowman, (Note) *The New Face of School Desegregation*, 50 Duke L.J. 1751, 1783 (2001) (citations omitted).

[142] Id, at 852: "Nevertheless, in many other cases where members of both groups applied jointly, there was no such inquiry as to the status of Mexican-Americans. My guess would be that the presence of African-Americans as petitioners redeemed the group recognition problem of Mexican-Americans since the former constituted the required eligibility for relief against the white hegemony anyway. *See*, for example, *Soria v. Oxnard School Dist. Board of Trustees*, 328 F. Supp. 155.

[143] Race-consciousness was considered the main component of white supremacy ideology. Peller, *supra* note 31, at 759-61.

[144] This is apparent in the evolution of race law in the 20th-century. *See* Harris, *supra* note 105. For Title VII purposes, African and Mexican Americans were considered as equally eligible for protection. See *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977); *Ortiz v. Bank of America*, 547 F. Supp. 550, 558 (Cal. 1982).

identity.[145] The use of more flexible terms like "national origin" to describe groups against which discrimination is prohibited has an inclusive effect of helping establish group identity for many *de facto* discriminated-against groups.[146] Likewise, the "unreasonable classification" discourse that evolved during this colorblind era displaced the racial oppression discourse, which was a key factor in making recognized group as a discriminated-against one.[147] Within this new system, the status of *de facto* discriminated-against groups has improved because these changes have given hope for recognition of the group and for full participation in antidiscrimination relief.[148] Moreover, the Civil Rights Acts banned a larger range of discriminatory practices than just simple *de jure* ones, including relatively "private" forms that were closer to d*e facto* discrimination. The Civil Rights Acts banned both intentional and unintentional discrimination and has largely departed from the old view of the Equal Protection Clause primarily redressing *de jure* discrimination.[149] These notions have influenced the recognition of groups in equal protection claims. With Mexican-Americans, in this era the group began to be recognized as either a "race" or as a "national origin."[150] In contrast, in the new legal order where *de jure* discrimination has ceased, the powerful effects of legal symbolization of African-American racial existence and suffering led to the false belief that racism ended, even though the material subordination of African-Americans has not stopped. Rather, discrimination against African-Americans has become more *de facto*-based than *de jure*-based, and has thus become harder to claim and to fight.[151]

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[145] *See* for example *Cisneros*, *supra* note 14 ("identifiable ethnic group"); *Keyes*, *supra* note 16, ("protected ethnic minority group"). For the refusal of lower courts to consider race and nationality classifications as equally violative of the Fourteenth Amendment, see *Sanchez v. State*, 181 S.W.2d 87, 90 (Tex. Crim. 1944).

[146] This shift has, nonetheless, a regressive effect on the notion of "race" as a social construct and its vast implications within LatCrit theory. See Haney Lopez, *supra* note 42.

[147] *See* Colker, *Anti-Subordination above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003 (1986) (stressing the anti-subordination perspective as better representing the equal protection notion).

[148] *See*, e.g., *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (declaring unconstitutional a school board's bargaining agreement that aimed at maintaining the percentage of minority personnel during a layoff); *City of Richmond v. Croson*, 480 U.S. 469 (1989) (nullifying as unconstitutional a municipal provision to set aside a certain amount of contracts to minority business enterprises). For a critique of these cases, see Bell, *supra* note 129, at 854-864.

[149] This development started with *Shelly v. Kramer*, 334 U.S. 1 (1948) and became more systematic and widely approved of with the enactment of the Civil Right Acts. For the conceptual shift embedded in this development, see Michael W. Comb & Gwendolyn M. Comb, *Revisiting Brown v. Board of Education: A Cultural, Historical-Legal, and Political Perspective*, 47 How. L. Jour. 627, 650-656 (2004).

[150] *See supra* note ??.

[151] For this effect see Crenshaw, *supra* note 1, at 1369-1386.

Part IV: Pleading and Proving Discrimination within the Streaming from *De facto* to *De jure* Paradigm – A Call for Substance, Context, and Consciousness

This Article stresses a phenomenological analysis, thus it is beyond the confines of the article to suggest a full elaboration of the different ways through which the legal system should treat differently discriminated-against groups. Instead, in this Part the Article briefly points to the general possibility of expanding the limits of the rights discourse through contextualization so that the rights discourse can include *de facto* discriminated-against groups in its remedial stage. In order to accomplish this inclusion, the legal system needs to develop a mechanism for pleading and proving discrimination within the streaming from *de facto/de jure* paradigm that uses a contextualized and historicized approach to inquire into the social-political background of the formation of a group as discriminated-against. Law and its rights discourse are highly de-contextualized and de-historicized by their alleged objective and universal nature, and thus they lack the conceptual room to consider contextualized issues.[152] But it is only by being read against a contextual background that the absence of *de facto* discriminated-against racial groups from the legal narrative be understood as signifying double discrimination rather than as signifying no discrimination. The argument here suggests that the law should move toward a contextual and flexible test when implementing the Equal Protection Clause. Of course, however, there are many factors that go into framing the proper rule, and this Article's focus is too narrow to discuss all of them, but nonetheless the arguments laid out here do suggest at least some movement toward greater contextualization and flexibility in applying antidiscrimination laws.

Contextualizing the discrimination discourse is compatible with the transformation through which discrimination as a social construct has been going as it moved in the last decades from first-generation discrimination to second-generation discrimination.[153] One prominent characteristic of this transformation is that discrimination is typically no longer formal and blatant but rather is contextual and relational. The disappearance of blatant and intentional, discrimination practices and the emergence of more subtle ones represent this conceptual and structural shift in the discrimination discourse. First-generation discrimination violated clear and

[152] Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. Cal. L. Rev. 1597 (1990).
[153] For this distinction and its vast implications, see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (2001)

uncontroversial norms of fairness and formal equality. In contrast, second generation discrimination frequently involves patterns of interaction among groups that over time lead to the exclusion of non-dominant groups in a way that makes the discrimination difficult to trace back to the intentional, discrete actions of particular actors.[154] The absence of systematic institutional reflection about these patterns of second generation discrimination contributes to its cumulative discriminatory effect.[155] This generational distinction is helpful in analyzing the *de jure/de facto* distinction's role in forming legally cognizable discriminated-against groups. The first generation's institutionalized, horizontal, and formal discrimination scheme is the *de jure* style of discrimination, whereas the second generation is a more complex and contextual style of discrimination, the *de facto* style of discrimination. But although *de facto* discriminated groups suffer from second generation discrimination style, they may suffer from it within a system that is also engaged in first generation discrimination. The experience of these *de facto* discriminated-against groups challenges the one-dimensional perception of discrimination. These groups are legal non-entities that signify the existence of sophisticated discrimination forms within what first-generation discrimination. Indeed, one role *de jure* discrimination plays is to hide the existence of co-existing *de facto* discrimination, and antidiscrimination laws should keep this role in mind.

In this respect, this Article joins other calls to employ a critical approach to Equal Protection Clause jurisprudence.[156] With *de facto* discriminated-against groups, courts must adopt alternative, less formal ways of proving discrimination. An example of this approach is Supreme Court's decision in *Castaneda v. Partida*, where the Court applied a substantive test to gauge discrimination. The Mexican-American petitioner alleged a violation of the equal protection clause in a Texas jury selection. Ruling in the Mexican-American's favor, Court relied on statistical evidences on the low percentage of Mexican-American jurors, concluding that this low percentage could only be explained by intent to discriminate. Although it has not waived the intentional discrimination prerequisite for asserting equal protection claims, the Court has relaxed the traditional practice that proving intent requires a demonstration of *de*

[154] *Id*, at 465-485.
[155] For these characteristics of second-generation discrimination, see *id*, at 471-472.
[156] See, e.g., Andrew Luger, (Note) *Liberal Theory as Constitutional Doctrine: A Critical Approach to Equal Protection*, 73 Geo. L. J. 153 (1984).

jure discrimination.[157] Later in this case, the Court also affirmed the status of Mexican-Americans as an identifiable group and on that basis upheld the petitioner's constitutional claim.

A critical test seeking to provide substantial protection against discrimination would need to be aware of and concerned with the formal-substantive discrimination distinction. The unique situation of *de facto* discriminated-against groups compels the application of a more flexible, contextualized and historicized tests to deal with their discrimination claims. Courts should be more suspicious of the harm that *de facto* discriminated-against groups have suffered. In the case of Mexican Americans, courts should not require petitioners to prove each time that they are a discriminated-against group, and courts should also not limit their rulings to the specific circumstances of each case.

The case for Mexican-American should be thus contextualized. Reflecting on the relationship between legal recognition and *de jure* discrimination, a simple proposition might be that an explanation for the higher levels of recognition given to *de jure* discriminated-against groups is the supposition that these groups suffered more. This might be true, but as a theoretical matter the nature of the suffering--be it *de jure* or *de facto*--should have no bearing on whether a group is recognized as a group and is entitled to *de jure* antidiscrimination remedies in its favor, but rather on the breadth of these remedies.

Whatever the motives behind the non-*de jure* discrimination of the Mexican-Americans were,[158] the outcome of that discrimination was legally-untraceable discrimination. This form of untraceable discrimination further disadvantaged this group vis-à-vis *de jure* discriminated-against groups during the remedial stage. Mexican-Americans were subjugated by a hegemony that was not too “different” from them, compared with the other *de jure* discriminated-against group of African-

[157] For a flexible test that finds intentional discrimination with Mexican-Americans, see Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L. J. 1711 (2000). The use of statistics to find intentional discrimination is rare. Constitutional Law, *supra* note 6, at 524.

[158] With regard to Mexican-Americans, for example, one can speculate that the strong oppressive effect of *de facto* discrimination made it unnecessary for the hegemony to use the explicit form of *de jure* discrimination. Another speculation might be that diplomatic issues with Mexico, which strongly opposed a race-based differentiation of Mexican-Americans, contributed to the U.S. refraining from using the *de jure* discrimination apparatus. Greenfield & Kates, *supra* note 8, at 683-684. This was especially relevant in light of the U.S.-Mexico treaties that promised citizenship to former Mexicans as “whites”. *Inland Steel Co. v. Barcelona*, 39 N.E. 2nd 800 (Ind. 1942). It is also plausible to assume that the Mexican-American elite itself opposed such *de jure* practices, mainly out of a belief that this would grant them access to the mainstream (I wish to thank Gerald torres for this point).

Americans, thus making it complicated for the law to differentiate them from their white hegemonic counterpart: the easier it is for the law to identify the group, the easier it is for the law to discriminate against that group.[159] Moreover, adopting highly contextual group definitions might go against the hegemony's interest in making clear legal distinctions between itself and its "other" as a means of justifying the discrimination against this "other".[160] This inherent difficulty of applying *de jure* discriminate against fairly similar groups led to a false belief -- produced by the legal system -- that no discrimination occurred against these groups. Instead, although they enjoyed formal equality, Mexican-Americans suffered from substantial *de facto* discrimination. This arrangement caused their "non-clusion" when they were barred from participating in the eventual remedial stage.

Mexican-Americans thus cross into the rights discourse from a unique position. The discrimination discourse's rhetorical adherence to the difference-sameness dichotomy guaranteed legal and social inclusion and entitlement for equal rights only to "similar" people.[161] This dichotomy relies on the concept of unity, which prevents a discussion from developing about discrimination that imposes different outcomes among sub-groups of supposedly "similar" people.[162] Mexican-Americans share an illusory "sameness" with the hegemony; specifically, they share the fact that they are different from the ultimate defined African-American "other" and they are not subject to *de jure* discrimination. The myth of these commonalities between Mexican-Americans and the American white hegemony was so deeply rooted that it prevented Mexican-Americans from being identified as a distinct

[159] Moreover, the Court denied attempts to complicate those categorizations, even when the "new category" contained an intersection of two former familiar bases, such as race and gender. *See* Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in The Politics of Law – A Progressive Critique 195 (Ed: David Kairys, 1990) (criticizing the court's dismissal of a black woman's petition for damages based on being sexually harassed, both on the basis of race and gender).

[160] *De jure* discrimination against Mexican-Americans, for example, would have risked blurring the white/black distinction, which was invaluable to whites. *See* George A. Martinez, *Mexican Americans and Whiteness*, 2 Harv.-Latino L. Rev. 321 (1997).

[161] Martha Minow describes this as the failure of rights analysis to escape the dilemma of difference. Martha Minow, Making All the Difference: Inclusion, Exclusion and American Law 147 (1990).

[162] This Article has borrowed this idea from the analysis of the non-Israeli-Palestinians as located outside a frame of belonging to the Zionist vision. Outside the frame is how they were situated, not as a "missing part" needed to be reconstructed into the frame of Israeli society, but rather as the "differend", where the parties involved are presumed to have no common share of norms or ground on which their conflict can be adjudicated. Raef Zreik, Palestine, *Apartheid, and the Rights Discourse*, Jour. of Palestine Stud. 133 (2004).

discriminated-against group that could have some legal relevance within the antidiscrimination discourse.

Part V: Conclusion

Nothing in this Article should be read as favoring discrimination; instead, the goal of this Article is to take a more nuanced approach to the effects of different forms of discrimination on the legal recognition of different groups. Being a legally cognizable group might indeed prove insufficient for preventing racial discrimination,[163] but nevertheless this Article argues that the law is capable of improving the overall well being of a group. *De facto* discriminated-against groups have not suffered the same wrongs that *de jure* discriminated-against groups have suffered; nevertheless, a group's status as being *de facto* discriminated-against is very important for determining a group's position. This importance is particularly salient in the remedial stage; since the entitlement to legal relief is affected by the existence of *de jure* discrimination and groups that suffer primarily from *de facto* discrimination are unable to take advantage of these remedial mechanisms. This Article has tried to illuminate the phenomenology through which these groups have generated their identities and have followed different paths in the remedial legal system based on the different forms of discrimination they suffered.

While the legal system's abstention from the use of overt discrimination against a group may be interpreted as an actual lack of discrimination, it can be also seen as a form of appropriating the realm of discrimination, hence facilitating exclusion rather than producing inclusion of the group. In determining the scope of the eligibility of a *de facto* discriminated group for antidiscrimination relief, courts should keep in mind the fact that the position of *de facto* discriminated-against groups is a case study on the foolishness of the belief that what we see in the law is all that exists.

[163] See Volokh, *supra* note110, at 314. Volokh warns against the looseness of the strict scrutiny standard, which might fail to protect against some discriminatory practices.