The Limits of Equality – Wishing for Discrimination?

Yifat Bitton

Abstract

This article focuses on the different manner in which antidiscrimination regimes treat groups that have been discriminated-against *de jure* and *de facto*. 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. The central argument is that the way in which *de jure*, overt and blatant discrimination necessarily must create a coherent group identity recognized by law allows groups that are discriminated against in this manner to obtain remedial relief, whereas 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.

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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, 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.

This 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, it 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. Additionally, the Article suggests that in addition to influencing the well-being of the *de jure* discriminated group, *de jure* discrimination also indirectly influences groups that

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

mainly suffer from another form of discrimination, namely *de facto* discrimination. The latter category of groups will often lack the ability to access the legal system that the former category of groups 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* ddiscriminatoin 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>your decision?> 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 primer legal text, received "visibility" (albeit notorious visibility), and were constituted as a legal entity (albeit as a discriminated-against group). 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 a discriminated-against entity that is entitled to legal remedy 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".[2] This understanding of the interaction between *de jure* discrimination and legal relief demonstrates that the past existence of *de jure* discrimination is a key factor in determining the quality and quantity of the legal relief

[2] 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.

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 the past discrimination.[4] In 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<needs a proposition?> two real world examples, first the contrasting American experiences of African- and Mexican Americans and second the Israeli experience with Mizrahi-Jews and Arab-Palestinians. 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* discrimation 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.[5] 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.[6] Mexican-Americans did not explicitly fall under any of America's *de*

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[4]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.

[5] 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).

jure discriminatory practices during the Jim Crow era, despite the fact that Mexican-Americans were a substantial minority group at the time.[7] However, although they did not suffer from *de jure* discrimination, Mexican-Americans did suffer from discriminatory practices such as chronic abuse and segregation.[8] This discrimination was quite similar to that suffered by groups suffering from *de jure* discrimination,[9] except that the discrimination against Mexican-Americans did not primarily occur through the use of the formal legal system. To date, despite being the largest minority group in American today,[10] Mexican-Americans remain largely invisible in the American antidiscrimination discourse.[11]

The dominant position of African-Americans over Mexican Americans in the antidiscrimination discourse has been widely discussed.[12] This Article sheds new light on this discussion and suggests that the difference between the two groups

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[6] 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 occured 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].

[7] 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).

[8] For a brief history of Mexican-American encounters with the law see *Mexican Americans & the Law*, *supra* note 6, at 4-10.

[9] Greenfield & Kates, *supra* note 7, at 687.

[10] 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).

[11] 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).

[12] *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 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 11, 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 10*, at 162. On the shared conceptual prejudice against both groups see Richard Delgado & Jean Stefancic, *Critical Race Theory* (2001) 76-74.

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 full recognition as a discriminated-against group while Mexican-Americans have not--nonetheless demands further inquiry.

Another example of this *de jure/de facto* distinction is found in Israel. On one hand, Israel has a well-developed antidiscrimination jurisprudence and the right for equality is guaranteed to all its citizens.[13] On the other hand, due to Israel's Jewish foundations, *de jure* discrimination against non-Jews still exists with the primary goal of maintaining Israel's Jewish majority.[14] Within this legal framework, the recognition of the *de jure* discriminated groups and the non-recognition of the*de facto* ones is extremely apparent. The Mizrahis, a group of Jews of Arab descent, are a legally unrecognized group that suffers from lingering *de facto* discrimination. Unlike Mexican-Americans, Mizrahis are largely absent from the Israeli discrimination discourse. This absence is better understood when compared to the social and legal position of the Arab-Israelis group, which is the prototypical discriminated-against "other" in the Israeli context. Unlike African-Americans, where America's legal colorblindness replaced past *de jure* discrimination, Israel's law with regard to Arab-Israelis simultaneously exists in both the remedying and discriminating stages. As a result, their Arab-Israelis' status as the main target of *de jure* discrimination has, in a paradoxical way, positioned them to be the main recipients of antidiscrimination relief in areas where discrimination against them cannot be justified as defending the Jewish character of Israel.[15] This state of affairs affects the Israeli courts' judgments about the position of Mizrahis and makes the de facto discrimination that the Mizrahis suffer more invisible and legally unrecognizable.

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[13] The right of equality for all has been adopted by the Supreme Court as the heart of both Israel's constitutional and administrative laws. For Israel's unique manner of protecting human rights through the judiciary see Aron Barak, *Constitutional Law without a Constitution: The Role of the Judiciary*, *in* The Role of Courts in Society 448 (S. Shetreet ed., 1988).

[14] For the delicate status of Arabs in Israel as citizens and simultaenously de jure and de facto discriminated-against minority see generally, David Kretzmer, The Legal Status of the Arabs in Israel (1990). For the various forms of discrimination against Arab-Israelis see *id*, at 89-134.

[15] See Chaim Gans, *The Palestinian Right of Return and the Justice of Zionism*, 5 Theoretical Inquiries in Law 269 (2004); Amnon Rubinstein & Barak Medina, The Constitutional Law of Israel: Fundamental Principles 463-466 (6th ed., 2005).

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 a fragile group recognition.

This Article proceeds in five 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. Parts III and IV describe 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 these parts is on the ways in which American and Israeli 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 V argues for the greater use of contextual tools in 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 I: Location, Location

This article's argument is located at the intersection of the anti-discrimination and epistemological discourses and challenges the traditional conception of the ways in which these discourses intersect. This part discusses the different ways in which the 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 to whether an action is *de jure* 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, manipulable line between *de facto* and *de jure* acts.[16] 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 primer 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 direct the argument made in this Article applies.

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.[17] These arbitrary lines had a devastating effect on the struggle of de facto discriminated against groups to overcome such discrimination.[18] In many cases, courts refused to provide relief for complaints made about segregating practices on

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[16] For a challenge of this distinction in order to demonstrate a *de jure* discrimination that allows for *de jure* relief see "De Jure Segregation of Chicanos in Texas Schools" 7 *Har. Civil Rt-Civil Lib. LR* 307 (1972) (challenging the denial of de jure discriminated-against status for Chicanos in Texas).

[17] *See*, for example, the opinions of Justices Douglas and Powell in *Keyes v. School District No. 1, Denver, CO*, 413 U.S. 189 (1973), in which they clarified that any discrimination administered by a state agency, regardless of its informal basis, as in the case of a discriminatory unwritten policy and discriminatory decisions by officals, 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. Ibid, at p.216.

[18] *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 6, at 27-28

the grounds that those practices were not *de jure* and thus did not provide grounds for judicial intervention.[19]

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.[20] 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. This Article proposes a phenomenological insight on the systematic effects that the divergent forms of discrimination have in creating "legally cognized discriminated groups".

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.[21] 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.[22] 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.[23] 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,

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[19] *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 on this basis).

[20] *See Cisneros*, supra note 12, at 617-18 (reconceptualizating the facts as de jure acts). For a comprehensive example of such a project, 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).

[21] *Developments in the Law – Equal Protection*, 82 Harv. L. Rev. 1065, 1125 (1968-1969).

[22] Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985).

[23] *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

enduring role for the judiciary with regard to protecting minorities.[24] 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. But the group recognition this Article is concerned with is not the commonly discussed nature of the group that is relevant to what level of judicial review applies to laws affecting that group.[25] 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 have enough distinctiveness so as to have standing to raise the discrimination claim.[26] 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".[27] The Equal Protection Clause, thus incorporates a group-based ideology even while maintaining the individualistic nature

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[24] *Id*, at 715.
[25] *See* John E. Nowak & Ronald D. Rotunda, Constitutional Law 685-692 (7th ed., 2004).
[26] 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).
[27] *Castaneda v. Partida*, 430 U.S. 482, 494 (1977); *see also Hernandez* v. *Texas,* 347 U.S. 475, 478-479.

of claims.[28] 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.

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

The *de jure/de facto* distinction offers a unique perspective on the way in which discriminated groups are constructed. 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*.[29] 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. It is the place where social consensus and dominant beliefs are being realized.[30] *De jure* discrimination creates "differences" between groups, recognizes those differences, and construes those differences as meaningful. Therefore, the absence of groups or their "differences" from society's legal texts might signify their non-existence.

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[28] 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.

[29] Some scholarship has 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").

[30] 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, at xxiv (Kimberle W. Crenshaw et al., 1995).

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 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 structure the ability of a group to participate in the remedial stage, thus structurally barring groups that are "legally absent" from the discrimination discourse from benefiting in the curing stage. For these "legally absent" groups, the antidiscrimination battlefield is especially difficult, since they have to fight for redress in an area where they were never formally injured.

1) The Distinctiveness through Alienation Effect

Discrimination is a form of alienation and it aims at excluding someone from certain things or privileges. But, in order for there to be alienation, there must first be identification and acknowledgment of the alienated group's existence in order to frame that group as a distinct "other" that is subject to different treatment. "Identifying" the characteristics of the subject upon which exclusion is based requires that the subject has a distinctiveness common with the excluded group. From this viewpoint, the discourse of discrimination can be understood as having been utilized both as a means of causing the "other" to suffer from deprivation and alienation and as a means of forming that same "other" group.[32] But perhaps paradoxically, this discriminating discourse retains some maneuvering potential since the legal language

[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).

[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).

that the de jure discrimination employs plays into the hands of 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]

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.[34] These definitions were designed to meet the need to statutorily identify a person for exclusionary purposes[35] and thereby created an indisputable "African-American legal entity". 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.[36] 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.[37] The Court settled for the adoption of the statute's language as the relevant legal definition for identifying

[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] 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 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).

[35] 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*.

[36] 163 U.S. 537 (1896).

[37] The petitioner, as the Court admitted, was "only 1/8 black" and had "Caucasian looks". Ibid, at p.542

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.[38]

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.[39] The first case to acknowledge Mexican-Americans as a legally identifiable non-white group was *Hernandez v. Texas*,[40] in 1954, where the Court concluded that the systematic exclusion of Mexican-Americans from jury duty on the basis of their "class" was unconstitutional.[41] 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 specific circumstances.

Although celebrated as a landmark step toward achieving legal visibility for Mexican-Americans,[42] *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*.[43] 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*

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[38] 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.

[39] For example, see the cases discussed in Delgado & Palacios, *supra* note 6, in which Mexican-Americans were not recognized as a group for class action and equal protection purposes.

[40] *Supra* note 27

[41] 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).

[42] Mexican Americans & the Law, *supra* note 6, at 16.

[43] 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 27.

Ind. School District,[44] the court's language was never the definitive language that would have recognized Mexican-Americans as a broad, rather than a local, group. 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.[45] Moreover, the distinctive 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 inability to conclusively identify the group before them:[46]

> "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

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[44] 324 F. Supp 599, at 606-607 (1970).
[45] In this case, the court declared that the group was an identifiable as an ethnic minority. However, in order to justify its conclusionwhich was not derived from a de jure definition of the group, the court, in 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).
[46] *Id*, at 606-08.

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.

Later cases in which court again held that Mexican-Americans are an identifiable class, like the infamous *Keyes* case,[47] have not yet had the all-encompassing effect of creating group recognition.[48] In sum, unlike African-Americans, Mexican-Americans have to each time first constitute themselves as a group and only then make their specific allegations of discrimination.

2) The Collaborating-Organizational Effect

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, called the countermajoritarian difficulty, due to their lack of power to negotiate with the powerful majority.[49] 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.[50] Here, again, the powerful effect of *de jure* discrimination is of enormous relevance. Legally institutionalized discrimination enhances intra-group collectivity.[51] Naturally, 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. On the other hand, groups that do not suffer from

[47] *Supra* note 17TheCourt declared that this class existed "for purposes of the fourteenth amendment".
[48] Delgado & Palacios, *supra* note 6, at 396.
[49] See Ackerman, *supra* note 22, at 719-722. Although critical of the pluralistic democracy ideology, Ackerman adheres to it as the leading concern of the judiciary. *Id*, at 722.
[50] *Id*, at 723-40.
[51] *Id*, at 729. Ackerman points to insularity of the group as enhancing this effect.

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 against position.

Using legislation to discriminate provokes a sharper sense of humiliation, of otherness, and of alienated outsiderness.[52] 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.[53] 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 the addressees of the discriminating laws, could not see themselves as its authors.[54] 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 Mexican-Americans suffered from *de facto* discrimination, they were treated by court as "the other white," a group that deserved not to be discriminated against. This "other white" strategy[55] 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. In *Mendez v. Westminster School Dist. Of Orange County,*[56] 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

[52] *See* Patricia J. Williams, The Alchemy of Race and Rights 88-89 (1991).
[53] 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.
[54] 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).
[55] On the employment of this strategy by activists see Rangel & Alcala, *supra* note 20, at 342-48.
[56] 161 F.2d 774 (Cal. 1947).

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.[57] 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 Mexican-Americans were not the other. This explains part of the difficulty Mexican Americans had in their quest for recognition as a "group".[58]

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.[59]

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

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[57] *Id*, at 780.
[58] *See* Delgado & Palacio, *supra* note 6.
[59] Luna, *supra* note 11, at 232, 247.

oppression, which consisted of less formal discriminating practices.[60] 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 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."[61] 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.[62] Dr. King, an integrationist himself, strictly called upon disobedience to *de jure* discrimination.[63] *De jure* discrimination was also the reason for the evolution of and the main target of the revolutionary Black Civil Rights Movement,[64] 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."[65] 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.[66]

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

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[60] For Crenshaw's distinction see Crenshaw, *supra* note 1, at 1377.
[61] *Id*, at 1382-1383.
[62] On Dr. King's conceptions of racism see Derrick Bell, Triumph in Challenge, 54 MD. L. Rev.1691 (1995).
[63] 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)
[64] Peller, *supra* note 31, at 809 (presenting Malcolm X's view on segregation).
[65] 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).
[66] 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.

system. The lack of *de jure* discrimination caused Crenshaw's "loss of collectivity" within the Mexican-American consciousness and produced an imagined sense among Mexican-Americans that they belonged to the hegemony. The absence of *de jure* discrimination sent a message of assimilation and made an elaborated legal fight appear irrelevant.[67] 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.[68] 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.[69] 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.[70] 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 Ackerman points to 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

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[67] 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.

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

[69] 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).

[70] Meier & Gutierrez, *supra* note 67, at 127-29.

anonymity in order to engage in a political 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.[71] 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.[72] 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,*[73]the Court did not find homosexuals to 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,*[74] the dicussion 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.[75]

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

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[71] Ackerman, *supra* note 22, at 729-31.
[72] 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).
[73] 517 U.S. 620 (1996).
[74] 478 U.S. 186 (1986).
[75] 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).

groups suffer from "legal anonymity". They are locked in a legal closet, which enhances their chances for assimilation and enables them to refrain from political confrontations.[76] 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.[77]

3) The visibility and witnessing effect or "unhappiness without a title is double unhappiness"[78]

The legal discourse produces through discrimination not only a classification of groups, but presence for those groups. Presence is therefore the *signifie* of discrimination, its *signifiant*.[79] *De jure* discrimination gives public presence to its subjects and narrated 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 outlined by *de jure* regulations and affected the transparency and visibility of both the group's existence and the group's oppression.

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[76] 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 22, at 730-31.

[77] 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).

[78] Hanna Arendt, Rahel Varnhagen – The Life of a Jewess 173 (The Johns Hopkins University Press, Baltimore, 1997).

[79] For an elaboration on semiotics and the law see Bernard S. Jackson, Semiotics and Legal Theory (1997).

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 need are as unimportant to the legal world as they are elsewhere in society.[80] 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.[81] 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.[82] These groups are therefore relatively visible on the spectrum of "visibility"; in contrast, Mexican-Americans fall into a category of extreme invisibility.

De facto discriminated against groups extends another extreme of the visibility spectrum. “Invisibility” is commonly used to describe also the omnipresence of a

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[80] *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).

[81] 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).

[82] 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 meanings that law had in the lives of black slaves).

group that need not be “named”, rather than describe the non-existence of the “un-named” group. In race and feminist critical theory, the invisible “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.[83] 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.[84] 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.

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.[85] 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

[83] Simon De-Beauvoir, The Other Sex (1949); Catherine A. MacKinnon, Toward a Feminist Theory of the State 96-105 (1989).
[84] On the “whiteness” of the law see Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 Law & Ineq. 323 (1997).
[85] 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).

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.[86] 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 canonical legal texts. Law canonizes discriminated groups, providing them the necessary "naming" for all prospective antidiscrimination purposes during a later remedial stage.[87] 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.

4) The Moral Blameworthy and Institutional Legitimacy Effect

[86] Those images are considered to be Greimasian semiotics of law. *See*, generally, Jackson, *supra* note 79, at p.31-43.
[87] The discriminated-against group has to prove each time a concrete discrimination that needs to be addressed; nevertheless, it does not need to prove that the group itself is identifiable.

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. [88] Therefore, institutional legitimacy and moral blameworthiness suggest that it is important for the same legal mechanisms that discriminated to be the mechanisms used to provide the remedies. In other words, *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 unforgettable to the legal system. *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*[89] 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.[90]

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 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

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[88] The goals of an antidiscrimination regime are varied and are not merely formal. *See* Brest, *supra* note 2, 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.

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

[90] 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).

reach of the state.[91] 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.[92] 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*,[93] 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.

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.[94] 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 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

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[91] 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).

[92] 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).

[93] 100 U.S. 303 (1880).

[94] Kennedy, *supra* note 81, at 347.

of a corrective justice desire to right past undeniable wrongs that were caused by the legal system itself.[95]

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.[96] 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.[97] 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."[98] 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.[99]

5) The Intentional Discrimination Presumption Effect

The *de jure/de facto* distinction has an active role in determining the intent or purpose in the challenged discriminatory act. The presence of *de jure* discrimination is an important factor in establishing an act as intentional. An example of this role is the Court's statement that the intent behind explicit *de jure* discrimination in the past may be used in the present to prove intent regardless of chronological remoteness.[100]

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

[96] 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".

[97] See Justice Powell's opinions in *Bakke*, and Fullilove, *supra* note 90. 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.

[98] 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).

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

[100] Keyes, *supra* note 17, at 210-11. The scope of this relevance is nevertheless limited.

Unsurprisingly, this logic was applied primarily in cases where *de jure* discrimination previously existed.[101] 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.[102] 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.[103]

6) The Non-legal Effect of *De Jure* Discrimination

This Article does not discuss the vast set of reciprocal relations between law, discrimination, and society, since those are beyond its scope. This Article instead will simply note the unique influence *de jure* discrimination has upon the formation of a legally cognized group.[104]

First, it is important to note that there is no strict, clear relations 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.[105] Nevertheless, in

[101] *See*, e.g., *Cisneros*, *supra* note 12, 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-Anericans, yet while discussing the injustice of the *de jure/de facto* distinction, Justices Douglas and Powell refered 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).

[102] *See*, for example, *Columbus Bd. Of Education v. Penick*, 443 U.S. 449 (1979).

[103] For examples of myriad cases thus decided see Martinez, *supra* note19, *id*.

[104] By this the Article adopts an anti-racial legal theory proposition that measures its effectiveness only as far as it examines the "non-legal" aspects of social change. See Hall, *Supra* note , at 4.

[105] 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

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. Once discrimination is institutionalized in law, that legal discrimination distinguishes the group from the rest of society and implies the "realness" of the differences recognized by the law. Recognition by the law also makes visible (and harder to deny) at least some of the suffering by the discriminated-against group. Thus, by removing a group from society's legal canon and by no longer discriminating against that group under the law, this removal creates some social commitment to equality vis-a-vis that group.[106] These impacts are relevant both to the discriminated-against group and the discriminating group. *De jure* discriminated-against group members are better positioned to develop the self-consciousness about their position that is needed for that group to initiate an effective legal and political struggle for rights.

A story of a Mexican-American battle against discrimination will help to 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 Mexican origin.[107] 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 fact that this case received substantial sympathetic public attention, the public reaction to the discrimination, which in general denied it, 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

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enforced, the statute has caused anguish to and has been widdely criticized as being derogating to Native Americans.

[106]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).

[107] 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).

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, it's 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 level and the mortician agreed, eventually, to bury Longoria.

Conclusion: A Structural Effect

The formal, overt, linguistic dimension of different forms of discrimination has powerful effects that both courts and scholars have up until now neglected. The language structure of *de jure* discrimination reflected and embodied the view of the world and the nature of reality.[108] 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. Since the discrimination discourse is framed in the context of *de jure* discrimination, it helps to prevent the formation of group identities with *de facto* discriminated-against groups, the nature of whose composition might be more complex, contextualized, and historicized than the composition of *de jure* discriminated against groups.[109] 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

[108] See generally Richard Bandler & John Grinder, The Structure of Magic: A Book About Language and Therapy 21-22 (1975) (stating that humans use language to represent and model experience); Wendell Johnson, People in Quandaries: The Semantics of Personal Adjustment 112-42 (1946) (noting that "the relationship between language and reality is a structural relationship").

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

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.

Part III:

The Effects on the Battle for Segregation in Education in the States

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 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-Americnas 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.[110]. But African-Americans won the war in the broader legal sense with *Brown v. Board of Education* in 1954.[111] Although vastly criticized,[112] 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,[113] 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".[114] Court thus brought the suffering of African-American children--and through them the African-

[110] 161 F.2d 774 (Cal. 1947). *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.

[111] 347 U.S. 483 (1954).

[112] 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).

[113] 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.*

[114] *Brown*, *supra* note , at 494.

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.[115] In *Brown*, Court has recognized the existence of a suffering, discriminated-against group. Introducing the petitioners as "minors of the Negro race," Court has affirmed, and acknowledged without reservations their status as a legally identifiable group.[116]

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….'"[117] More importantly, from *Brown* onward, the viability of every segregation claim brought into court by African-Americans was immediately and fully discussed. No special epistemological effort was 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. 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.[118]

The experience of Mexican-Americans seeking to gain legal recognition as a group differed tremendously from that of African-Americans.[119] 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.[120] 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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[115] 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.
[116] *Id*, at 487.
[117] Derrick Bell, *Race, Racism and American Law* 551 (3rd ed., 1992).
[118] 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).
[119] 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 11, at 238-39.
[120] *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.[121] 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.[122] 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,*[123] 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.[124] Court also referred to such blatant segregation as degrading and fostering antagonism against and inferiority in Mexican-American children.[125] 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

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[121] *Mendez*, *supra* note 56, at 780.
[122] For extensive research on race-based segregation against Mexican-Americans, see Delgado & Palacios, *supra* note 6, at 392-95
[123] 96 F. Supp 1004 (Ariz. 1951).
[124] *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) (indentifying 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.
[125] Gonzales, *supra* note123, at 1007.

court rather than recognize Mexican-Americans as a group more generally.[126] 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.[127] 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.[128]

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.[129] 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.[130] 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" identity.[131] The use of more flexible terms like "national origin" to describe groups against which discrimination is prohibited has an inclusive effect of helping establish

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[126] *U.S. v. State of Texas*, 342 F. Supp. 24 (E.D. Tex. 1971). The court referred to the students "in this case" as constituting a legally identifiable group.

[127] See Martinez, *supra* note,19 at 584-606.

[128] 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).

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

[130] This is apparent in the evolution of race law in the 20th-century. *See* Harris, supra note (88 Calif.). 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).

[131] *See* for example *Cisneros*, *supra* note 12 ("identifiable ethnic group"); *Keyes*, supra note 17, ("protected ethnic minority group"). On 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).

group identity for many *de facto* discriminated-against groups.[132] 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.[133] 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.[134] 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.[135] 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."[136] 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 fight.[137]

Part IV: The Missing Discrimination Paradigm of Streaming from *De Facto* to *De Jure*: The Case for Mizrahis' Discrimination in Israel

[132] This shift has, nonetheless, a regressive effect on the notion of "race" as a social construct and its vast implications within LatCrit theory. See Lopez, *supra* note 41.
[133] *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).
[134] *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) (nullifing 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 , at 854-864.
[135] 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).
[136] *See supra* note .
[137] For this effect see Crenshaw, *supra* note 1, at 1369-1386.

Against this background, this Article now focuses on the Mizrahi Jews, who suffer no *de jure* discrimination. As opposed to the case of Mexican-Americans, Mizrahis in Israel have not managed to break through the absence that non-*de jure* discrimination forces upon them and they have no recognition in the Israeli antidiscrimination discourse. Both Mexican-Americans and Mizrahis are positioned in limiting socio-political dialectics: the former in the American black/white dialectic and the latter in the Zionist Arab/Jew dialectic. The difference is that this dialectic marginalized discrimination against Mexican-Americans, yet in Israel, it barred any recognition of Mizrahis. The worse position of Mizrahis is a consequence of their unique condition, where the Israeli legal system maintains the dialectic by considering the Mizrahis as part of the un-discriminated-against group contrasted with Arab-Israelis, who are Israel's ultimate *de jure* discriminated-against group. The differences between Mizrahis and Mexican-Americans suggest that considering the unique circumstances of the Israeli case will help to demonstrate the extremity of this Article's argument.[138]

This section examines the Israeli discourse over segregation in education and how that discourse made the Mizrahis as legally "invisible" group.

1) The Double Oppression of Mizrahis

Israeli Jewish society's most fundamental division is an ethnic one between Mizrahis and Ashkenazis.[139] Ashkenazis have historically been the dominant and privileged group, while Mizrahis have been the low status group.[140] Mizrahis suffer from structural injustice and discrimination, have a high unemployment rate, comprise a disproportionate percentage of Israeli prison and social welfare population, and have substantial educational under-achievement. These deficiencies have been steady or, if anything, increasing over Israel's six decades of statehood.[141] This poor position of

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[138] Note, however, that this Article does not seek to conduct a thorough comparative analysis of the differences between the American and Israeli system. *See* The law of Israel: general surveys (Itzhak Zamir et al, 1995).

[139] Issachar Rosen-Zvi, Taking Space Seriously: Law, Space, and Society in Contemporary Israel 10 (2003). 46% of Jewish Israelis are Mizrahis and 41% are Ashkenazis (the left 13% are of newly arrived immigrants which are not categorized through this traditional division).

[140] For significant writers see Ella Shohat, *Sephardim in Israel: Zionism from the Standpoint of Its Jewish Victims*, 19 Social Text 1 (1988); Henriette Dahan-Kalev, *The 'Other' in Zionism: The Case of the Mizrahim*, 8 Palestine-Israel Jour. 90, 91-2 (2001); Meyrav Wurmser, *Post-Zionism and the Sephardi Question*, 8 Middle East Quar. (2005).

[141] Although Mizrahis today comprise a larger share of the formally educated society, recent research indicates that the gap itself between Mizrahis and Ashkenazis in education has grown in the last

Mizrahis is a result of lingering discrimination against them, which began with the Mizrahis' immigration to Israel the in the early 1950's when the Ashkenazis held political, social, and cultural power in the early days of the modern state of Israel. "Mizrahis" is a social and cultural category that was invented by the Ashkenazis in order to legitimize the Ashkenazis' own existence, identity, and hegemony, in much the same manner as Orientalism was invented by the colonial west.[142] Ashkenazis, including both the founders of Israel and later immigrants from Europe, considered themselves to be a representative of Europe that faced a primitive Asian East, specifically, Arabs and Arab-Jews.[143]

Discriminatory policies against Mizrahis are both observationally obvious and academically supported. While their fellow Ashkenazi immigrants were given preferences in public services, Mizrahi immigrants were subject to economic and cultural oppression.[144] They suffered from differential and discriminatory land distribution and housing policy, which force them to settle in Israel's wasteland and prevented them from owning private property; this oppression is still prevalent today.[145] Mizrahis were also deprived of fair and equal access to education and suffered tremendous cultural oppression.[146] Nevertheless, Israeli society denies (or at the least debates and doubts) that Mizrahi oppression and discrimination exists.[147] The

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decades. *See* Momi Dahan, *He is (Not) Entitled – Has the Gap in Education Narrowed? in* Education and Social Justice in Israel – On Equal Opportunities in Education 19 (Samuel Shay et al, 2003).

[142] Ella Shohat, *The Invention of the Mizrahim*, 1999 Journal of Palestine Studies 5. On colonial-oriental relations generally, see Eduard Said, Orientalism (1979).

[143] Ronen Shamir, The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine 169 (2000).

[144] In the words of the head of the Jewish Agency who allocated housing to the coming immigrants, "preference should be twofold: a. the polish Jews should be given a higher priority for housing. b. (…) better benefits in the camps…" *See* Tom Segev, 1949 – The First Israelis 173 (1984).

[145] *See* Oren Yiftachel, *Nation-Building or Ethnic Fragmentation? Ashkenazim, Mizrahim and Arabs in the Israeli Frontier*, 1 Space and Polity 2, 149-169 (1997); Hubert Lu-Yon and Rachel Kalush: Housing in Israel: Policy and Inequality (1994).

[146] On educational discrimination, see *infra* the text that shortly follows. On cultural repression, see Shohat, *supra* note 140.

[147] It wasn't until the late 90s that Ehud Barak, then the leader of the traditional Ashkenazi hegemony party Ma'arach, asked for the Mizrachim's forgiveness for all their suffering. But this act was considered to be a pre-elective strategy rather than a sincere quest for forgiveness; his apology was general and ambiguous and it wasn't admissive of guilt or suggestive of correction, but rather was an attempt to ask the Mizrahim to join the party. However, although partial and minimal, Barak's apology resulted in angry responses on behalf of Ashkenazim who considered it an admission of something that had never happened. Another interesting example of the political blurring of the discrimination is evident in the analysis of the political platform of the Knesset parties in 1996. None of them explicitly addressed the Mizrahi issue, except for vaguely mentioning the "ethnic" equality by one left party. The only party that overtly addressed the issue was "Shas", a Mizrahi-based party that called for the revival of Mizrahi pride. For the unique phenomenon that Shas constitutes in Israeli politics, see Gad Barzilai, Communities and Law – Politics and Cultures of Legal Identities, 260-278 (2003).

ill situation of the Mizrahis is often rationalized as resulting from differences in merit or on immigration difficulties.[148] The most institutionalized rationalization is the "crisis of modernization" from which the Mizrahis allegedly suffer when they moved from what is perceived as the barbarian-like Arab culture into the "modern" European culture represented by the Ashkenazi population. Thus, the Ashkenazi adopted measures to modernize the Mizrahis, such as special segregated education and low quality employment.[149] These measures ended up creating an informal but still present system of segregation and discrimination between the Mizrahis and Ashkenazis.

In one of the rare discussions of the Mizrahi group in the Israeli legal discourse, a Mizrahi scholar has observes:[150]

> What were the legal manifestations of the status of Mizrahi Jews? The issue is much more subtle than that of the status of Israeli Arabs or women. In the case of Arabs and women, explicit legal norms discriminated or at least recognized differences. With regard to the Mizrahim, Israeli law appears to have been blind. Formally they have been treated as equal…

A review of Israeli statutes and documented judicial decisions supports this argument, since no legal actor has ever explicitly or formally categorized the “Mizrahi” as a group with an independent identity and independent challenges.[151] Although this conclusion fits well with the absence of a Mizrahi group in Israeli culture,[152] the

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[148] Pnina Lahav, (Forum) *Assesing the Field. New Departures in Israel Legal History, Part Three: A "Jewish State . . . to Be Known as the State of Israel": Notes on Israeli Legal Historiography*, 19 Law & Hist. Rev. 387, 414 (2001). Although it is true that some of the newly arrived Russian immigrants suffered economic hardship, that hardship does not exist to the same extent as the hardship suffered by the poorest Mizrahim. Moreover, as opposed to the Mizrahim's static position, the transitional position of Russian immigrants suggests that they have a high prospect of acquiring a satisfactory status in Israeli society. *See* Michael Schulz, Israel Between Conflict and Accommodation: The Transformation of Collective Identities 107 (Diss. Thesis, Goteburg University, 1996). Russian immigrants enjoy the Ashkenazi networking. Their transitional position is part of a natural and well-known immigration absorption difficulties that all immigrants usually suffer. In contrast to the impression shared by many, this group became fairly well-integrated in Israeli society and is relatively better integrated in comparison to Mizrahim or Ethiopian Jews. *Id*, at 157.

[149] This myth had, of course, no support. Many of the Morrocan Jews, for example, who were considered as the most inferior of the Mizrahim, were shocked to find how underdeveloped Israel was when they immigrated. Another example is the Yemenis, almost all of whom came from a very strict educational culture and were "Thora" and "Thalmud" learned persons. Ella Shohat, *supra* note .

[150] Lahav, supra note 148, *id*.

[151] A rare use of the Mizrahi categorization was used during the holding down of Mizrahim's riots in the 60’s, where a judge addressed one of the rebel leaders saying that "Morroccans should be twice penalized” just for being a Morrocan. See Sami Shalom Chetrit, The Mizrahi Struggle in Israel: Between Oppression and Liberation Identification and Alternative 1948-2003 104-5 (2004).

[152] Dahan-Kalev describes the way the erasure of Mizrahi knowledge and cultural expression--silencing and removing it from the Israeli conscious and textbooks--created a second generation with dependant and frustrated identity characteristics. Dahan-Kalev, *supra* note 140, at 94.

difficulty is that the categorizations of Mizrahis have been entertained by officials.[153] But formally, the legal system has adopted a melting pot ideology that supports the Zionist ethos of one land for all Jews. The Israeli Law of Return of 1950[154] declares the right of every Jew to immigrate to Israel, supplemented by a provision in the Nationality Law of 1952 that grants automatic Israeli citizenship to every immigrant Jew.[155] This mechanism proposed a unifying, sameness-based, all-Jew encompassing *de jure* rhetoric; this rhetoric largely hid the Mizrahis' suffering from *de facto* discrimination and has made the legal sphere both structurally and symbolically irrelevant to the Mizrahi struggle for equality.[156]

A key factor to understanding the invisibility of the Mizrahis is their relative position in Israeli society, where race-like discrimination places them next to Arab-Israelis. The Arab-Israelis are the most prominent group to be legally recognized in the Israeli antidiscrimination discourse as being discriminated against; this discrimination is both *de jure* and *de facto*. The Israeli legal system discriminates against all of its non-Jewish citizens, but within the Israeli social context this discrimination primarily harms its Arab citizens.[157] The Israeli legal system is constitutional, even though it has no formal constitution. Some statutes, which are called “Basic-Laws”, have a constitutional normative status and they represent the Israeli system’s legal and institutional foundations.[158] Israel bans through a constitutional basic-law any non-Jewish ownership of lands,[159] and states explicitly that the spouses of Israel's Arab citizens do not acquire Israeli citizenship by the act of marriage.[160] Israeli-Arabs are in a unique position, where on the one hand they are *de*

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[153] The Ashkenazi-Mizrahi division can be detected in formal non-legal realities. The official Israeli Central Bureau of Statistics, for instance, applies a division along the lines of Jews originating from Afro-Asian countries and those originating from Europe and America. So does the official census. *See* Schulz, *supra* note 148, at 104-6.

[154] 4 L.S.I 114. This law is known as the law of "Shevut".

[155] 6 L.S.I.50. In addition, Israel’s Declaration of Independence declares Israel to be the home of all Jews: "In the state of Israel the Jewish people have raised".

[156] Studies in identity perception reveal an interesting dissonance through which Mizrahis identify more with being a part of the Jewish people than with being Israeli citizens, whereas Ashkenazis identify themselves primarily as Israeli citizens. Schulz, supra note 148, at 253-56. One shocking datum indicates that Israeli Arabs are more likely to identify as Israelis than Mizrahim.

[157] Quite different is the case of non-Israeli Palestinians. The expulsion of the majority of Palestinians in the occupied territories made it unnecessary for Israel to invest in the textual means of *de jure* discrimination against that group. Raef Zreik, *Palestine, Apartheid, and the Rights Discourse*, 34 Jour. Palestine Stud. 68, 72-73 (2004).

[158] *See,* Zamir, *supra* note138, at 6-13.

[159] For the legislative history of the Jewish land ownership principle, see Kretzmer, *supra* note 14, at 49-76.

[160] The Law of Citizenship and Entrance to Israel (commandment) (Amending), 2005 (Amen. 27.7.05).

jure discriminated against, while on the other hand they enjoy an number of antidiscrimination laws that work in their favor in "civil" contexts. After decades of suffering discrimination, in the past two decades the Israeli Supreme Court and legislature have demonstrated a gradual willingness to apply antidiscrimination rules and affirmative actions to benefit Arab-Israelis.[161] In this remedial stage, Arab-Israelis are nevertheless still largely *de jure* discriminated-against, as the abovementioned statutes shows.[162] As a result, unlike America's efforts to eliminate the alienation of non-white communities by adopting a colorblind consciousness during the remedial stage, in Israel the Arabs are treated as fundamentally different from Jews even at the remedial stage.

2) Segregation and Integration in Israel between *De Jure and De Facto*

In Israel, the Mizrahi minority has suffered from segregation, mainly in education and in residency. This segregation has played and continues to play a central role in shaping the Mizrahis' poor social condition. But this segregation was not administered through an explicit *de jure* system but rather through informal decisions and actions in a way that had a crucial impact on the structure of the Mizrahis' battle for equality.

In the early 1970's, the Israeli government, aware of the *de facto* segregation against Mizrahis in education, decided to adopt a correctional "integration in education" plan for Mizrahis and Ashkenazis.[163] It was only then, at what might be identified as the beginning of the remedial stage, that the first legal petitions about segregation in education begun. However, these petitions were advanced exclusively by Ashkenazis who opposed the plan. An Israeli scholar noted this exclusivity suggested that it resulted from the low accessibility the poor Mizrahi population had

[161] *See*, e.g., *The Association for Human Rights in Israel v. Israeli Government*, 55(v) P.D. 15 (demanding affirmative actions in favor of Arab-Israelies in all governmental and quasi-governmental entities); *Adalah Organization v. the minister of religious affairs*, 52(v) P.D. 167 (ordering the Ministry of Religions to reallocate its budget more equally between Jews and Arab-Israelis).

[162] Courts and the legislature limit, nonetheless, other rights of Israeli-Arabs in "civil" arenas, where a threat to the Jewish characteristics of Israel is posed. For example, in the years 2000 and 2001, the Israeli Parliament (the Knesset) rejected initiatives to statutorily declare the full equality of the Arab minority citizens in Israel. The Supreme Court has also declined to give the Arabic language a formal and institutional status alongside the Hebrew language. *See Reem Engineers Constructors LTD v. Nazareth Local Authority*, P.D. 47(v) 189, and *Adalla, v. Tel-Aviv-Jaffa City Council*, P.D. 56(v) 393. This experience resembles that of African-Americans in America. *See* Siegel, *supra* note!!.

[163] This plan was adopted in a non-legislative manner that enabled the lingering un-mentioning of Mizrahis. *See* Michael Chen & Audrey Addi, Community politics School Reform and Educational Achievement, *in* Educational Advancement and Distributive Justice: Between Equality and Equity 341 (Reuven Kahana ed, 1995).

to courts.[164] I find this reasoning unpersuasive because of the total exclusion of Mizrahi petitions; rather, I suggest that structural legal barriers, caused by the *de facto* nature of the discrimination from which the Mizrahis suffer, contributed to the sharp differences in the number of petitions and that these barriers made it almost impossible for Mizrahis as a *de facto* discriminated-again group to cross the judicial barriers that this discrimination shaped

The Israeli Supreme Court has consistently supported the integration plan. Nevertheless, the absence of *de jure* discrimination against Mizrahis forced the Israeli Supreme Court to use a rather manipulative discourse. The first case to deal with this integration was *Kremer v. Municipality of Jerusalem*,[165] in which the Ashkenazi petitioners refused to send their children to an integrated school as mandated by the integration plan. The case was heard in May 1971. Three weeks earlier a group of thousands young Mizrahis--who were second generation of Mizrahi immigrants born in the 1950's--lead a famous and extremely atypical Mizrahi protest march (which devolved into riots) against the discrimination and oppression of Mizrahis in Israel. Although the entire country was aware of this protest, the majority of the Israeli Supreme Court chose to ignore the social context in which its ruling was made.[166] Instead, the Israeli Supreme Court used neutral words and referred to the integration plan as an effort to overcome the gap between "different ethnicities" rather than explicitly naming Ashkenazis and Mizrahis. One Justice, however, noted in his concurrence the plan's focus on Mizrahis. This concurrence, though, was, the first and last time that a court made a direct judicial reference to the Mizrahis. From this case on, the Israeli desegregation discourse proceeded in a non-contextual, non-naming, "invisibilizing" manner. The equalizing purpose of the integration plan was apparent, but rather than name it as such, the end goal of the plan was described only by the broad and blurry phrase of an "equal Israeli society". At first, the plan's goal was to merge between different ethnic communities,[167] but over time this goal has lost its

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[164] Rosen-Zvi, supra note 139, at 17, note 18. Rosen-Zvi claims that one petition included Mizrahi students who tried to avoid segregation, yet a closer and a more careful examination of the petition reveals that the Mizrahi identity was not stressed by the students themselves. In fact, it seems that they were exempted from an integrative school, which was aimed at advancing Mizrahis.

[165] 25(i) P.D. 767 (1971).

[166] The author thanks Claris Harbon for this point. For information about the second-generation Mizrahi social movement, called "The Israeli Black Panthers", and the 1971 demonstration, see http://www.marxist.com/israel-black-panthers200802.htm

[167] For example, the plan was described as having the goal of creating a merger of "various ethnicities" in the school system *Kozlowski v. Regional Council Eshkol*, 30(ii) P.D. 449, 456 (1976); it was also

significance in the court's rhetoric and it was substituted by him. In later incarnations, the plan was described as trying to merge "the strong and the weak,"[168] but eventually, the court abandoned this mildly ethnic rhetoric and began to stress narrowing the economic gap as the plan's main goal.

This type of reasoning embodies some of the structural barriers that the Mizrahis faced as a *de facto* discriminated-against group; that is, the structural barriers are that the Israeli legal system has worked to limit the possibility of the Mizrahis being recognized as a discriminated-against group. The most interesting structural effect is that in contrast to the American system--where anti-discrimination is designed to advance an integrative ideology-- the Israeli discourse has never focused on discrimination.[169] The Israeli Supreme Court did not regard any of these cases as presenting questions of discrimination. The lack of a formal *de jure* substantiation of school segregation allowed the court to base its opinions on administrative and technical points while leaving the notion of discrimination and the racism of the Ashkenazi petitioners untouched. Indeed, somewhat perversely, the only discrimination discussed in these cases is the petitioners' claims that forcing them to attend integrated schools discriminate against them. Another prominent contrast to the American experience is that the Mizrahis are largely absent from the segregation cases. Except for a single mention in the *Kremer* case, the courts have used the neutral and blurred language of "various ethnic-groups" rather than naming the Mizrahis explicitly. This misleading usage has stripped the involved groups of their identity as well and ignored the realities of the power relations between groups by trying to make it seem as if all the groups were and shared the same "melting pot" aspiration for integration. Although desegregation was presented as a mutual need for diversity from which both the Mizrahis and Ashkenazis would benefit. Rather, the goal of the plan was to stop the lingering segregation in education from which Mizrahis suffered and to block the Ashkenazi flight from Mizrahi educational surroundings. The neutral language the court employed when describing the conflict concealed this phenomenon.

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described as creating a merger of "various ethnicities and social levels", *Kremer*, supra note 165, at 770; *Shaul v. Jerusalem City Council*, 29(ii) P.D. 804, 806 (1976).

[168] *Cheshin v. Dr. Hochberg*, 42(iv) P.D. 285, 287 (1988).

[169] Analyzing the Court's role in implementing the integration plan in Israel, an Israeli scholar noted its similarity to the African-American experience. Rosen-Zvi, supra note 139, at 28-29. Obviously, both the facts and the argument in this Article render such similarity impossible.

Both the discriminating and remedial practices toward the Mizrahis were non-*de jure* and informal. But interestingly, during both stages, the Israeli Ministry of Education has published internal documents using the pedagogical classification of "Teunei Tipuach" (students in need of special nurture). Until the mid- 1990's, this classification applied explicitly and exclusively to Mizrahis.[170] The implications of this classification were devastating, since it limited educational access to only the most basic curriculums, which meant that students so classified could at best attend vocational high schools and would have a future without much chance at higher education.[171] The effects of this classification are still event in Israeli society today.[172] During its rulings, the Israeli Supreme Court uncritically employed this pedagogical label when considering Ashkenazi resistance to integration.[173] The Israeli Supreme Court's used this definition that applied primarily to the Mizrahis in an un-contextualized manner, that is without mentioning this definition's original traits. This usage of an inexplicit recognition of the group combined with the Israeli Supreme Court's overlooking of the identity of the parties in these cases represents the way in which the court inexplicitly acknowledged some existence of the group while at the same time denying that group any legal relevance.

One might ask whether the Israeli Supreme Court's advancement of integration is all that matters. This Article argues that it is not all that matters and that by not mentioning Mizrahis and later blurring the role their poor social status played in motivating the integration plan, the court declared that these facts had no meaning in terms of creating legal recognition. As opposed to the American experience, where courts narrated the suffering of segregated students, the narrative of Mizrahis' segregation has been ignored, even though it was the motive behind the integration plan. The transformation that the integration plan's narrative has gone through in the court has made the Mizarhis as a group be non-existent, and made the group have no chance of becoming a legally recognized entity. But most importantly, the absence of

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[170] "The son or daughter of a father who is a Jew of African or Asian origin and who had a low level of schooling and a large family". *Id*, at 12.

[171] A 1970 survey revealed that only 2.7% of vocational high school graduates achieved a matriculation diploma, a prerequisite for university entrance. The effectiveness of this classification was illustrated in the late 1970s, when the majority of Mizrahi pupils were defined as "Teuney Tipuach". Shlomo Swirski, *Politics and Education in Israel* 180-183 (1999).

[172] For the Teunei Tipuach pedagogy and its structural implications see Chetrit, supra note 151, at 75-80.

[173] *See*, for example *Dikman v. Ashdod City Council*, 35(ii) P.D. 203 (1980); *Ramat Raziel Board v. Yehuda Mountain Public School*, 31 (iii) 794 (1977).

the Mizrahi and Ashkenazi groups from the discrimination discourse has contributed to the failure of the integration plan, which court appeared so eager to promote.[174]

One Israeli scholar argues that the court's failure to recognize the politics of Israel's geography--that is, the residential segregation between Mizrahis and Ashkenazis-- perpetuated segregated education "by requiring children to attend school within the segregated district in which they reside."[175] Under this argument, "more attentiveness by Israeli courts and legislators to the unequal social division of space, within which the reform was implemented" would have prevented this undesirable outcome.[176] But this analysis fails to recognize exactly the same things that the court has failed to recognize. Considering the invisibility of the politics of space in the court as the core of the problem ignores the politics of this invisibility itself. As this Article demonstrated earlier, the ignoring of this politics of invisibility did not result from the mere "inattentiveness" of the court, but rather represented fundamental conceptions regarding the issue at hand. The court clearly was not unaware of the social identity of the groups involved in the segregation dispute nor was unaware of the segregated spaces in which these groups resided. The non-*de jure* discrimination against the Mizrahis allowed the court to make these facts invisible, by ascribing to them no legal relevance. This irrelevance does not necessarily result from the court's misconceptions about space, but rather result from the lack of a Mizrahi group entity or the presence of a Mizrahi group narrative in the legal system. This means that any attempt to correct the court's misconceptions about space would first require a correction of its misconceptions about the groups. The thought that it is the nonexistence of the Mizrahis group in the legal narrative that causes the court's shortcomings rather than an ignorance of the politics of space is supported by the fact that the politics of space do play a large role in analysis of discrimination against the Arab-Bedouin population, demonstrating that in cases where the narrative recognizes a group that the court is well aware of the impact of space.[177] The court's consideration of the Mizrahis, then must result not from inattentiveness to space, but rather must be the result of choice by the court to legally ignore the Mizrahis group. Overt *de jure* segregation of Mizrahis would have forced the court to cross these conceptual barriers

[174] Moreover, after decades of what might be seen as the Court's support of the plan, in the last couple of decades almost all cases were decided against desegregation. See, e.g., *Sarig v. Minister of Education*, (not published, 1993); *Mazurski v. Ministry of Education* (not published, 2004).
[175] Rosen-Zvi, *supra* note 139, at 28.
[176] *Id*, at 28.
[177] *Id*, at 4.

about the Mizrahis group identity and would have made it impossible for the court to ignore the existence of this group.

Today, some signs of re-contextualization in the Israeli education system are becoming evident. Recent education legislation has focused on one's origin as a category that education system oppresses.[178] Moreover, a recent ministerial committee who reevaluated the Israeli education system explicitly used the ethnicity of the Mizrahis in its recommendation for reforms. These changes might represent the beginnings of the legal formulation of a Mizrahi group entity and lead to enhanced equality in education.

3) Segregation and De-segregation of Arab-Palestinians: Relative Presence

A comprehensive analysis of *de jure* segregation in education in Israel would require an analysis of the position of Arab-Israelis. But, due to irreconcilable cultural and intellectual differences in educational aspirations between Arabs and Jews, in most cases these two groups have been totally segregated and no case has been filed challenging that segregation. However, the Israeli Supreme Court recent heard a case on segregation between Arab-Israelis and Jewish-Israelis in the context of residential segregation. In *Ka'adan v. Israel Land Administration*, the court held that a segregating residential practice was illegally discriminatory. In this case, there was no doubt about the identity of the groups involved or their power relations. At the beginning of its opinion, the court explicitly frames the case as one in which an Arab is barred from building a home in a Jewish settlement. The petitioners, an Arab-Israeli couple, are presented as Arabs seeking to live among Jews.[179] This case demonstrates the easy recognition the court gives to the Arab group in the legal discourse on antidiscrimination.

As opposed to the Arab's experience, the Mizrahis' attempts to overcome discriminatory treatment were advanced through social struggles alone. However, as the case of Mexican-Americans shows, the absence of legal recognition for a discriminated group cannot be overcome by activist legal work. And as the integration

[178] Section 5 to Law of Pupils' Rights (2000) 42 I.B.L. forbids discrimination of a pupil based on her "edah", or socio-economic background. This provision is redundant to a poverty-based discrimination provision, revealing that poverty should not be a code word for oppression.

[179] Moreover, although it was not explicitly forbidden in the Israeli discriminatory laws, the petitioners' national origin was declared by court to be a forbidden classification, thereby emphasizing that classification's discriminatory ramifications.

in education litigation suggested, the antidiscrimination discourse was unavailable for Mizrahis.

A demonstration of this point is the only attempt to gain legal recognition for the Mizrahi group, which the Israeli courts bluntly rejected. In a case called Hakeshet,[180] the court dealt with a challenge that Mizrahis raised to the allocation of lands in Israel among its Jewish population. Israel's Lands Administration, the legal body responsible for formulating land policy in Israel, decided to allocate extremely valuable state lands to private citizens by changing its designation from agrarian to urban. The allocation would have provided enormous compensation to the agrarian sector, which was predominately of Ashkenazi population that used these lands.[181] However, these lands were mostly state lands leased to the agrarian sector without ownership rights, meaning that the agrarian sector was about to unjustly benefit from the reallocation of this public property. In this case, the court again used various de-contextualizing techniques. When introducing the case, the court described the petitioners, a Mizrahi association. The court narrowly circumscribe the group by defining it as an association striving to:[182] "fight for the implementation of political, cultural social and economic individual rights of all the citizens of Israeli society… insisting on just and encompassing wealth distribution to all social groups in Israel." The ellipses in the court's opinion elide the association's more contextualized and sharp self-description, which stated that "[t]he association was initiated by women and men, second and third generation offspring of Jews of Arab origin."[183] Moreover, throughout the brief the petitioners relied on an explicit narrative telling of the systematic oppression of the Mizrahis. The court, though, chose to narrate the petition being an administrative claim to avoid deciding the case based on the group's oppression. The discrimination argument was also problematically shaped by the Mizrahi petitioners themselves as one about the distinction between the "agrarian sector" and the "urban sector", a distinction that risked again making this case racially neutral by de-contextualizing the analysis. This shaping, though, resulted from the lawyers' decision to refrain from using a "new entity" strategy due to the hazard of

[180] *The New Discourse Association v. Minister of National Foundation*, 56(6) P.D. 25 (2002).
[181] The decision no.727 related to agrarian settlements, which are comprised largely of Mizrahi. Nevertheless, the lands that had the highest economic value were held, unsurprisingly, by the Ashkenazi.
[182] *The New Discourse Association*, supra note 180, at 47.
[183] Moreover, as an act of solidarity, a group of Mizrahi filed a co-petition. They are described by the court as "scholars… concerned with Israel's land allocation policy". *Id*, at 47.

over-politicizing the suit or being denied legal relief for lacking standing.[184] That is, the activists were more concerned with achieving a concrete result by abolishing the discrimination than concerned about striving for a general legal recognition of the group as a whole.[185] The court, upholding the petition, embraced the shape given by the Mizrahi activists, yet erased, as was mentioned above, the identity of the petitioners and again ignored the power relations between the groups involved in this nationwide controversy, in which the Ashkenazi "agrarian sector" who disproportionately benefited from this land allocation while the Mizrahi "urban sector" had fewer opportunities to purchase from the state the public housing in which they resided. The Israeli Supreme Court in this case clearly demonstrated its unwillingness to recognize the Mizrahis as a discriminated-against group, even while acknowledging the existence of the very discriminatory practices used against them.

4) Mexican-Americans and Mizrahis: The Shared Lines of Double Discrimination

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.

Whatever the motives behind the non-*de jure* discrimination of the Mexican-Americans[186] and the Mizrahis[187] groups are, the outcome of that discrimination was

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[184] This information was obtained from two of the initiators of the petition, Professor Gad Barzilay and Doctor Hani Zubeida.

[185] Some Mizrahi activists that this author has talked to say that this was the set of concerns they had in mind when considering whether to submit petitions. For the client's material interest and activist's symbolic interest conflict, see Derrick A. Bell, "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L. J. 470 (1976).

[186] 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. Gary A. Greenfield and Don B. Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 Cal. L. Rev. 662, 683-684 (1975). 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. *Id*, at 321.

[187] In the Israeli case, some speculated that "[t]he efficiency of manipulations and the weakness of the Mizrahis as an object, rendered official discrimination superfluous, as opposed to the case of

legally untraceable discrimination. The existence of this form of legally untraceable discrimination further disadvantaged these groups vis-à-vis de jure discriminated-against groups during the remedial stage. Both Mizrahis and Mexican-Americans were subjugated by a hegemony that was not too "different" from them, compared with the other de jure discriminated-against groups, thus making it complicated for the law to differentiate these groups from their hegemonic counterpart. The legal system is inherently limited by the need for simplicity, clarity, and other practical concerns when implementing *de jure* discrimination; therefore, groups that suffer *de jure* discrimination are likely to have simplistic differences, such as those based on race, gender, or religion, because the easier it is for the law to identify the group, the easier it is for the law to discriminate against that group.[188] 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".[189] This inherent difficulty of applying *de jure* discriminate against fairly similar groups led to a false belief by the legal system that no discrimination occurred against these groups. Instead, although there was a formal equality, these groups suffered from substanital *de facto* discrimination. This arrangement caused the "non-clusion" of the *de facto* discriminated-against groups when they were barred from participating in the eventual remedial stage.

Mexican-Americans and Mizrahis thus both cross into the rights discourse from a unique position. The critique in this Article about the limits of the discrimination discourse has focused primarily on its rhetorical adherence to the difference-sameness dichotomy, which guaranteed legal and social inclusion and

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Palestinians, homosexuals and women, against whom discrimination is founded in the legal system." Dahan-Kalev, supra note 140, at 94. Another proposition might be that this non-*de jure* discrimination has served to strengthen the Zionist project of an Israeli-Jewish unity compared with an Arab ultimate "otherness", which will never really jeopardize the Israeli power-relations. In this respect, Mizrahis are an actual and conceptual part of the Israeli-Jewish mass, and thus in a better position to change the existing power-relation through a legal struggle. Consequently, they are less likely to enjoy a legal recognition that entitles them to antidiscrimination relief.

[188] Moreover, the legal system 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).

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

entitlement for equal rights only to "similar" people.[190] 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.[191] Mexican-Americans and Mizrahis share an illusory "sameness" with the hegemony; specifically, they share the fact that they are both different from the defined "other" and they share the fact that neither is subject to *de jure* discrimination. The myth of these commonalities between these *de facto*-discriminated against groups and the hegemonies is so deeply rooted that it prevents them from being identified as a distinct discriminated-again group that would have some legal relevance within the rights discourse.[192]

Part V: 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 historsized 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

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[190] 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).

[191] 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. Zreik, *supra* note 157.

[192] At this crucial point, Mizrahis still differ from Mexican-Americans. Mizrahis have no point of departure from the Ashkenazis due to their legally unifying Jewish identity and their shared citizenship. Mexican-Americans, on the other hand, somewhat differentiate themselves from the white hegemony based on their distinctive national origin, which substantiates discrimination against them. Additionally, the practice of creating a symbolic "other", namely, the Arab natives, has more strongly affected Mizrahis' sense of sameness as sharing with Ashkenazis a united hegemony over Arabs. In the United States, nonetheless, the beneficiaries of the African-American "otherness" were not Mexican-Americans, but rather poor-class whites. See Crenshaw, *supra* note 1, at 1372, 1380-1381.

consider contextualized issues.[193] 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.[194] 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 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.[195] The absence of systematic institutional reflection about these patterns of second generation discrimination contributes to its cumulative discriminatory effect.[196] 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.

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[193] Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. Cal. L. Rev. 1597 (1990).
[194] For this distinction and its vast implications, see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (2001)
[195] *Id*, at 465-85.
[196] For these characteristics of second-generation discrimination, see *id*, at 471-72.

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.[197] 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 jure* discrimination.[198] 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. In the case of Mizrahis, the Israeli Supreme Court should "name" the

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[197] See, e.g., Andrew Luger, (Note) *Liberal Theory as Constitutional Doctrine: A Critical Approach to Equal Protection*, 73 Geo. L. J. 153 (1984).

[198] 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 5, at 524.

parties before it when hearing discrimination cases and acknowledge their contextual existence as discriminated-against groups

Conclusion

Nothing in this Article should be read as favoring discrimination; instead, the goal of this Article is to take a more holistic approach to discrimination and how different forms of discrimination affect the legal recognition of different groups. Being a legally cognizable group might indeed prove insufficient for preventing racial discrimination,[199] 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.

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 believing that what we see in the law is all that exists.

[199] See Volokh, *supra* note 96, at 314. Volokh warns against the looseness of the strict scrutiny standard, which might fail to protect against some discriminatory practices.