



WISHING FOR DISCRIMINATION? A comparative gaze on categorization, racism and the Law

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I.- INTRODUCTION

“State power has made a significant difference - sometimes between life and death - in the efforts of Black people to transform their world.” (Crenshaw 1988: 1382)

Imagine discrimination as an advantageous stratagem - unimaginable? Not necessarily. I suggest that formal, overt, and blatant discrimination in an early discriminating stage could be helpful by enabling a group suffering discrimination to establish itself, creating group recognition, and positioning itself for antidiscrimination relief at a later, remedial stage.

Antidiscrimination laws are some of the most significant laws that recognize and seek to redress suffering and injustice. They allow formerly discriminated-against groups to utilize the legal system to redistribute social power through variety of remedies. I approach the prerequisite of antidiscrimination laws that there be some past or ongoing

¹ Ph.D., The Hebrew University. I wish to acknowledge my special debt of gratitude to Duncan Kennedy and Janet Halley who have helped me out, supported, encouraged, and criticized me. This article was written during the time I spent as a Fulbright Fellow and a visiting researcher at Harvard Law School, and I wish to thank the Graduates Program's Colloquium members for their comments during the presentation of this paper. I also thank Pnina Lahav, Yishai Blank, Daphne Barak-Erez, Roy Kreitner, Yael Aridor-Bar-Ilan, Eyal Diskin, and all others with whom I have discussed this Article, specifically Gerald Torres, Alvaro Santos, Hila Keren, Amalia Sa'ar and Claris Harbon.

For a previous, American law focused version of this article see: Yifat Bitton, *The Limits of Equality and the Virtues Of Discrimination* 2006 Mich. St. LR 595.

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discrimination in a manner that diverges from the dominant view that discrimination is a purely destructive force. In contrast, I argue 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 that discriminatory legal rules have potentially important constructive, constitutive value for groups. This notion does not mean that discrimination is good. Rather a specific form of discrimination, namely *de jure* discrimination, not only negatively influences the well-being of the discriminated group, but also has indirect positive effects on the well-being of the group by improving its ability to access the legal system to fight against this discrimination. In addition to influencing the well-being of the *de jure* discriminated group, *de jure* discrimination also indirectly influences groups that mainly suffer from *de facto* discrimination. Groups in the latter category often lack the ability to access the legal system that groups in the former category generally have. Thus, once one considers both the discriminatory and the remedial phases groups confronted with *de jure* discrimination might be better off than groups only facing *de facto*. The reason for this paradox is simple: it is easier to fight legal battles for a group remedy when a group has already been identified as the “outlawed” and is asking to be “inlawed.” In doctrinal terms, my 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.

My hypothesis is that *de jure* discrimination has important effects. *De jure* discrimination perpetuates the identity of the discriminated group, it increases the sense of “realness” of the discrimination-based suffering, and it vindicates the group’s need for and entitlement to legal redress. To put in other terms, although groups suffering from *de jure* discrimination were brutally excluded from society by the law, they were, at the same time, included in society’s primary legal text, received “visibility” (albeit notorious visibility), and were constituted as a legal entity (albeit as a discriminated-against entity).² These effects become evident through what I call the “streaming from *de jure* discrimination paradigm,” a phenomenon in which a group’s struggle to become recognized by law as being discriminated-against is reinforced when that discrimination is *de jure*. In

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

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other words, a group suffering *de jure* discrimination at an early stage, which I designate as the “discriminating stage,” dramatically increases that group’s prospects of recognition as a “legally discriminated group” that enjoys the right to obtain antidiscrimination relief during the later “curing stage.”³ This understanding of the interaction between *de jure* discrimination and legal relief demonstrates that the past existence of *de jure* discrimination is a key factor in determining the quality and quantity of the legal relief later available to the group and 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 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*.

My analysis is relevant to any regime where dichotomous *de jure* and *de facto* discriminatory practices exist simultaneously during the first stage and where antidiscrimination laws are used to remedy past discrimination during the second stage.⁴ During the discrimination stage, all groups are subject to *de facto* discrimination, while only some of them are also explicitly subject to *de jure* discrimination. Although the theoretical application of the Article is more general, to demonstrate its implications, the Article concentrates on 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 from *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 how “the streaming from *de jure* discrimination paradigm” creates a legally cognizable discriminated group. This group was the main target of America’s *de jure* discrimination. Both slavery and the Jim Crow laws, were aimed at African-Americans, creating a state-sponsored, constitutionally-protected system of racial discrimination that took place after the abolition of slavery from 1890 through the mid-twentieth century (Davis 1991: 51-70). 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

3. The stage of commitment to the “antidiscrimination principle” began gradually after the Civil War and during the Reconstruction, but is much more evident, coherent, and holistic since the mid-20th century (Brest 1976). Kimberle Crenshaw marks the abolishment of the Jim Crow legal system as the crucial point of transition into the “formal equality” era (Crenshaw 1988: 1377).

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.

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America's "forgotten minority;" indeed, their status as a legally cognizable minority group is fragile even in the present day (Delgado and Palacios 1975). Mexican-Americans did not explicitly fall under any of America's *de jure* discriminatory regulations during the Jim Crow era, despite the fact that Mexican-Americans were a substantial minority group at the time (Greenfield and Kates 1975).⁵ However, although they almost did not suffer from prominent or legally visible *de jure* discrimination (Menchaca 1993),⁶ Mexican-Americans did suffer from discriminatory practices such as chronic abuse and segregation (Valencia et al. 2004: 4-10).

This discrimination was quite similar in its outcome to that suffered by groups suffering from *de jure* discrimination (Greenfield and Kates 1975: 687), 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 America today, according to the U.S. Census (Montoya 2000: 162), Mexican-Americans remain largely invisible in the American antidiscrimination discourse (Luna 2003).

The dominant position of African-Americans over Mexican-Americans in the antidiscrimination discourse has been widely discussed (Espinoza and Harris 1997; Hacker 1992; Perea 1997; Luna 2003: 229; Montoya 2000: 162; Delgado and Stefancic 2001: 76-74). This article sheds new light on the discussion and suggests that the difference between the two groups represents the different forms of discrimination suffered by them. Although one may consider it fairly obvious that different types of discrimination lead to different treatment in the discrimination discourse, this specific difference between the groups—where African-Americans have enjoyed genuine legal recognition as a discriminated-against group, while Mexican-Americans have not—nonetheless demands further inquiry.

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, as the right of equality for all has been adopted by the Su-

5. The survey was conducted in the southern states where most Mexican-Americans resided Arizona, California, Colorado, New Mexico, and Texas.

6. To be sure, I do not intend to state that there was no formal regulatory *de jure* discrimination against Mexican-Americans whatsoever. However, this form of discrimination was sporadic and rare. See for example a Californian regulation known as the "Greaser Act" from 1855, in which vagrancy was banned on "all persons who are commonly known as 'Greasers' or the issue of Spanish...blood..." 113 Cal. Stat. 175 (1855) excerpted in Haney Lopez (1994: 29).

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preme Court being at the heart of both Israel's constitutional and administrative laws (Barak 1988: 448). 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 (Kretzmer 1990: 89-134). 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 and Muslim 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 (Gans 2004; Rubinstein and Medina 2005: 463-466). 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.

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 legal recognition of groups that have suffered *de jure* segregation and has failed to shape the legal recognition of groups that have suffered primarily from *de facto* segregation. The former have come to be recognized as strong cohesive groups, whereas the latter have acquired at best fragile group recognition.

This article proceeds in four parts. Part I discusses the intersection of discrimination theories and equal protection theories as they relate to my main argument. Part II explores the advantages of *de jure* discrimination in enhancing the ability of the discriminated-against group to obtain *de jure* relief. This set of advantages will be demonstrated using the American experience alone. 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

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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.

I. THE ANTI/DISCRIMINATION DISCOURSE-LOCATION, LOCATION

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

1.1 The *De jure* - *De facto* Distinction Discourse

What makes an act “*de jure*” and thus eligible for judicial review? Is a single, concrete decision by a low-level official as *de jure* as an broadly-applicable rule found in a federal statute? Over time, the distinction between *de jure* and *de facto* action has been progressively blurred, and sometimes this distinction signifies little more than a legal conclusion (Canady 1990: 589).

This ephemeral distinction has been criticized as having an elusive, false jurisprudential effect, enabling court to draw a thin, changeable line between *de facto* and *de jure* acts (Rangel and Alcalá 1972). Though fully aware of this criticism and supportive of it, I still maintain that at some level the distinction matters; specifically, the distinction matters to the way in how discriminated groups perceive themselves politically and how others perceive the discriminated-against groups. I employ the distinction consciously in its extreme technical sense to make this theoretical point. When 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* discrimination, on the other hand, result from actions that are covert and that are less or not formalized in primary legal texts. These two poles of discrimination, nonetheless, are located along a continuum. The more a particular type of discrimination bears to one of the poles, the more squarely my argument applies.

The discussion of the role of the *de jure/de facto* distinction in the current discrimination analysis has been somewhat meager and one-dimensional. The Equal Protection Clause of the Fourteenth Amendment restrains only state action and thus only counters *de jure* discrimination. This truth has profoundly limited courts’ power to confront non-*de jure* discriminatory actions. Since *de facto* discriminatory practices occur with little if any legal record, they are more difficult to track than *de jure* discriminatory practices. Particularly in the struggle for desegregation in education, artificial and

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blurred lines were drawn between largely similar discriminating acts by public authorities (*Keyes v. School District No.1 Denver, Colorado*).⁷ These arbitrary lines had a devastating effect on the struggle of *de facto* discriminated groups to overcome such discrimination (Valencia et al. 2004: 27-28). In many cases, courts refuse to provide relief for complaints made about segregating practices on the grounds that those practices were not *de jure* and thus did not provide grounds for judicial intervention (Martinez 1994: 586-603).

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 end goal of dismantling the distinction.⁸ Rather, I stress that the distinction, though largely unjustified, has some meaningful effects that are ignored in the attempts to normatively abolish the distinction. I propose a phenomenological insight into the systematic effects of divergent discrimination forms in creating "legally cognized discriminated groups."

1.2 The Judicial Protection of Minorities Discourse

The *de jure/de facto* distinction critique is significant to scholarship on the justification for having judicial review that favors discriminated-against groups (Developments in the Law 1969: 1125). 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 (Ackerman 1985). Ackerman pointed out the misconceptions embedded in the Supreme Court's "discrete and insular" definition for determining which groups are entitled to judicial protection through the Equal Protection Clause.⁹ 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 (Ackerman 1985: 724). The argument here follows Ackerman's and, to some extent, criticizes it as ignoring worsened groups

7. 413 U.S. 189 (1973). The judges criticized this conception and clarified that any discrimination administered by a state agency, regardless of its informal basis, as in the case of a discriminatory unwritten policy and decisions by officials, is a state action under the Fourteenth Amendment. Referring to the Board of Education's acts presented as "*de facto* discrimination," Justice Douglas declared that "each is but another form of *de jure* discrimination" and suggests there should be no constitutional implications to the distinction once the force of law is placed behind the defendants. *Id.*, at 216.

8. See Cisneros, *supra* note at 617-18 (reconceptualizing the facts as *de jure* acts). For a comprehensive example of such a project, see Rangel & Alcalá, *supra* note.

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

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in need for judiciary protection, namely, minorities which are “anonymous, defused, and legally absent.”

Although Ackerman’s argument focuses on the separation of powers and the judiciary’s power to nullify discriminatory statutes, it also suggests a broader, enduring role for the judiciary with regard to protecting minorities (Ackerman 1985: 715). Ackerman’s analysis presupposes a viable legal recognition of the minority group since he targets the anti-democratic nature of the *de jure* discrimination of such groups (Ackerman 1985: 719). His basic idea is that the less politically effective a discriminated group is the more courts are democratically empowered to operate to protect that group (Ackerman 1985: 713-718). 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. These features are heavily influenced by whether a group is discriminated against *de jure* or *de facto*, which underscores the need for a reconsideration of how we define what a minority group is for remedial purposes.

1.3 The Equal Protection Discourse

Recognition of a group is a prerequisite to that group asserting an Equal Protection Claim for one of its members. But the group recognition I am concerned with is not the commonly discussed group classification that is relevant to what level of judicial review applies to laws affecting that group (Nowak and Rotunda 2004: 685-692). 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; thus, this concept of group recognition is unconcerned with what level of judicial review will apply. 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.

In contrast, this article concerns the group recognition requirement of the Equal Protection Clause that any group challenging a discriminatory act would have enough distinctiveness so as to have standing to raise the discrimination claim (Choper et al. 2001: 1507-1518). This requirement, 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.”¹⁰ The Equal Protection Clause thus incorporates a group-based ideology even while maintaining the individualistic nature of claims (Brown 1994: 71-87; Fiss 1976:

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

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123-127). 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 group recognition that is evident in *de facto* discriminated 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 identity 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.

II. -FORMAL *DE JURE* DISCRIMINATION AND ITS EFFECTS - A PHENOMENOLOGY

The *de jure/de facto* distinction is important to understanding the way in which discriminated-against groups are constructed through the legal text. The distinction affects a group's recognition in various ways through the different stages of discrimination and through the development of antidiscrimination law. The difficulty, however, is that antidiscrimination law was initially designed to redress *de jure* discrimination (Selmi 1997: 285). 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 see it, of reflecting reality (Crenshaw et al. 1995: xxiv). It is the place where social consensus and dominant beliefs of people in democratic societies are being realized (Ackerman 1985: 719-722). *De jure* discrimination creates "differences" between groups, recognizes those differences, and construes those differences as meaningful in reality. Therefore, the absence of groups - or their "differences" - from society's legal texts might signify their non-existence.¹¹

By asserting that legal texts matter, I embrace the basic idea of social construction of reality theories in general and social construction of reality through law, in particular (Kollock and O'brien 1994; Teubner 1989).

I treat primary legal texts as a major symbolic instrument in the production of power structures and thereby call for a problematization of any alleged naturalness of the anti-discrimination discourse. Discriminated groups, as political categories, are created within particular regimes of hegemony-power, and the language of law plays an important role in this ongoing process (Cover 1983 and 1986). The effects presented below ma-

11. By non-existence I wish to avoid the phrase "exclusion", since this phrase presumes existence without recognition. By not mentioning a group, nor by discriminating against it neither by benefiting it, the legal text signifies the group's total non-existence.

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nifest the influence that *de jure* discrimination has on the construction of a recognized discriminated group within the antidiscrimination discourse. This phenomenon is distilled through the utilization of different methods from various disciplines, such as the semiotics of law, the rhetoric of law and the sociology of law. Additionally, the effects apply simultaneously to different players and agents in the construction process of recognizing a group as discriminated-against. Some of them affect members of the discriminated-against group, while others affect the members of the hegemonic group, who in turn shape others inside the legal system (such as regulators, lawyers and judges) and outside of it. Through comprising many of these methodological constituents at different levels, the effects themselves organize around their outcomes, meaning that they are presented in correlation to the way they contribute to the process of defining the discriminated-against group as a subject for relief implementation.¹²

What follows is a discussion of the effects that the different types of discrimination have on creating a group as a legal entity in the remedial stage (Peller 1990). The effects are all relevant to the way in which a discriminated-against group's status as a legal entity, with legal relevance to anti-discrimination relief, is generated. However, the effects themselves are somewhat independent from one another and 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 groups as legal entities and the way the lack of these factors disadvantages *de facto* discriminated groups.

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

12. I am less interested in the methodological motivations of the process of recognizing a group as discriminated-against. Rather, I focus on the legal aspects and manifestations of this process, understood through the abovementioned methodological constituents.

2.1 The Semiotic Impact of Discrimination

a) The Distinctiveness Effect

Discrimination is a form of exclusion that demands the identification and acknowledgment of the party to be excluded. Identifying the characteristics of the subject upon which exclusion is based requires that the subject share distinctiveness in common with the excluded group. From this “Foucaultian” viewpoint, the discourse of discrimination both causes the “other” to suffer from deprivation and, at the same time, forms that same “other” group (Horrocks 1999: 64). Paradoxically, the discriminating discourse retains some maneuvering potential since the legal language that the *de jure* discrimination employs against the groups plays into the hands of these very same discriminated groups when the remedial stage begins. Discriminated-against groups can use the same classifying rhetoric that was used to define and exclude their group for their own benefit. In a sense, then, discriminated-against groups are able to trap the legal system by its own definitional creations. A group’s distinct existence at the remedial stage is a consequence of their earlier identification as a legally-cognizable entity for the purpose of discrimination. This existence of a “legal entity” means that the discriminated 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 – as opposed to, say, the prominent distinctiveness of gender-based groups – this effect of the law creating their legal identity is highly valuable in the remedial stage. It should be stressed, however, that this process does not imply that prior to it there were no meanings of “race” attached to groups such as African-Americans or Mexican-Americans outside the legal apparatus. Rather, I suggest that racial groups as we know them today within the antidiscrimination discourse were shaped, in part, by the discrimination discourse. This idea resembles the way in which races as they form part of our discourse today should not be understood as constructed by the shared history of their members, but rather that it was their members’ shared history of oppression that shaped these races in their current appearance (Haney Lopez 1994: 38).

The experience of the African-American group prominently illustrates 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. Various terms used for “naming” African-Americans (Kennedy 2002). The Texas statute, for example, identified “Negros” as “all persons of mixed blood descended from Negro ances-

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try” or “a Negro or person of African descent.” (Murray 1997: 443-44). These definitions were designed to meet the need to statutorily identify a person for exclusionary purposes. They thereby created an indisputable “African-American legal entity,” sustained by a rhetoric that enabled the courts to identify the group and exempted them from justifying their choices of identification. Moreover, the legal system was indifferent to the divergent definitions used to “identify” the group, as the notorious case of *Plessy v. Ferguson*¹³ demonstrates. In *Plessy*, the Court considered Louisiana’s legal definition of African-Americans to be a matter of state legislative autonomy (*Plessy*: 540). 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 – of being only 1/8 black and having “Caucasian looks” – was legally irrelevant (*Plessy*: 542). The Court settled for the adoption of the statute’s language as the relevant legal definition for identifying the plaintiff’s group: “colored races” (*Plessy*: 542). Adopting this definition also allowed the Court to ignore strong sociological objections to the notion that there is any “real” biological meaning to race (Pomeroy 2000; Haney Lopez 1994).

On the other hand, 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 (Delgado and Palacios 1975). The first case to acknowledge Mexican-Americans as a legally identifiable non-white group was *Hernandez v. Texas*,¹⁴ in 1954, where the Court concluded that the systematic exclusion of Mexican-Americans from jury duty on the basis of their “class” was unconstitutional. The Court refused, though, to identify the group on the basis of race or color, a refusal which proved devastating in subsequent cases (Haney Lopez 1997). Furthermore, in *Hernandez* the Court refused to adopt a broad conception of the affected group and instead pointed to evidences about the local discriminatory practices against Mexican-Americans (*Hernandez*: 479-480); thus, the Court established the existence of Mexicans-Americans as an identifiable class only within specific circumstances and locations (*Hernandez*: 479-480).

The contrasting experience of African-Americans is commonly shown, but is harder to trace, since for the Court, it was unquestioned that the group is identifiable. For example, in *Brown v. Board of Education*,¹⁵ the Court by introducing the various petitioners from different states, as “minors of the Negro race” affirmed and acknowledged peti-

13. 163 U.S. 537 (1896)

14. *Supra* note 10.

15. 347 U.S. 483 (1954)

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tioners' status as a generally identifiable group (*Brown*: 487). This group recognition not only overarches different geographic areas, but also various realms of discrimination, other than segregation in education, to which the group's recognition diffused. For example, *Moose Lodge No. 107 v. Irvis*,¹⁶ presented an equal protection claim of a "negro" after the club denied him service. *Palmer v. Thompson*,¹⁷ presented an equal protection claim of "Negro citizens" \ "black citizens" against the local authority which decided that closing a public pool was preferred over desegregating it.

Although celebrated as a landmark step toward achieving legal visibility for Mexican-Americans (Flores et al. 2004: 16), *Hernandez* also left a harsh 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. 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 Texas County than the one at issue in *Hernandez* (*United States v. Hunt*, 265 F. Supp. 178, 188 (W.D. Tex. 1967). It took the Court almost a decade to acknowledge an all-Texas Mexican-American group (*Castaneda*). This legacy induced courts to refuse recognizing the group's standing for purposes of equal protection claims. Even in cases when it was decided that Mexican-Americans were a discriminated group, as in the important case of *Cisneros v. Corpus Christi Ind. School District*,¹⁸ the court's rhetoric was never definitive in recognizing Mexican-Americans as a broad, rather than a local, group. The semiotic impact was apparent (Barthes 1957): 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 (*Cisneros*: footnotes 29-30). 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 (*Hernandez*: 479-480; *Cisneros*: footnotes 29-30). This confusion is captured in the sincere struggle of courts and their inability to conclusively identify the group before them, 16 years after the celebrated *Hernandez* was decided:

"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 parentheti-

16. 407 U.S. 163 (1972)

17. 403 U.S. 217

18. 324 F. Supp 599, at 606-607 (1970)

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cally 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.” (Cisneros: 606-608)

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 up 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 rather than their similarities. As opposed to court’s analogy, the “naming” experiences of the two groups in fact diverged both in reason and in outcome. The “list of names” for African-Americans that court lists represents the abundance of identifications that were attached by *de jure* discrimination; thus, there was no confusion or indeterminacy in the remedial stage, only different names attached to a well-defined group. 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 the Court again held that Mexican-Americans are an identifiable class, like the infamous *Keyes v. School District No. 1, Denver, CO.* case,¹⁹ have not yet had the all-encompassing effect of creating group recognition (Delgado and Palacios: 396). 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. The *United States v. Texas Education Agency*²⁰ desegregation case is a sharp example of that effect. The victims of segregation in this case were both African-Americans and Mexican-Americans. Nevertheless, the Court voiced its concern only with whether the latter constituted an identifiable group while having no similar concerns regarding the former. In other cases, where members of both groups applied jointly, there was no such inquiry as to the status of Mexican-Americans. My guess is

19. 413 U.S. 189 (1973). The Court declared that this class existed “for purposes of the fourteenth amendment”.

20. 467 F.2d 848, 852(1972)

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that the presence of African-Americans as joint petitioners redeemed the group recognition issue of Mexican-Americans since the former substantiated the required eligibility for a Fourteenth Amendment relief against the white hegemony anyway (see, for example, *Soria v. Oxnard School Dist. Board of Trustees*.²¹).

b) The Visibility-Witnessing Effect (or “Unhappiness without a Title is Double Unhappiness”) (Arendt 1997: 173)

The legal discourse of discrimination not only classifies groups and shapes their distinctiveness, but also manifests their presence. Presence is therefore the *signifier* of discrimination, its *significant* (Jackson 1997). *De jure* discrimination gives public presence to its subjects and narrates their discriminated experience. In the remedial stage, the same narrative that was used by the legal system for discrimination against the group is used to justify giving anti-discrimination relief to the members of that group. Moreover, the number of different situations in which *de jure* discrimination existed created multiple narratives of oppression and exclusion 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.

This effect is part of a larger theoretical scheme of “visibility,” emphasizing the powerfulness of the legal discourse, which excludes minorities by their absence from legal texts and reasoning. This absence from the law’s formal and substantive foundations designates the excluded party as the “other” and demonstrates that its needs are as unimportant to the legal world as they are elsewhere in society (Frug 1985). The *de jure/de facto* distinction I seek to make 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 groups marks them as the “other,” whereas the absence of *de facto* discriminated groups signifies their complete non-existence (Kennedy 1991: 333). 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

21. 488 F. 2d. 579, 581 (1973)

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not to exclude. Silence is the decision to “non-clude.” By “non-cluding,” this I mean 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 suffer from injustice and inequality that might be termed “lawlessness,” they are at the same time subject to the control of the legal system and thus are subject to lawfulness (Maguire Schultz 1991: 58; Bailey and Green 1999). These groups are therefore relatively visible; in contrast, *de facto* discriminated groups, such as Mexican-Americans, fall into a category of extreme invisibility.

“Invisibility” is commonly used to describe also the omnipresence of a group that need not be “named,” rather than describe the non-existence of the “un-named” group (De-Beauvoir 1949: Introduction). Drawing on the work of Pierre Bourdieu and treating the law as a quintessential arena of symbolic power, one can regard the normative classification of “whiteness” as unmarked and “blackness” as marked as an objectified form of white hegemony (Bourdieu 1989). The invisible unmarked or “un-named” is the group whose dominance and hegemony shapes the relevant social system and thus does not need to be explicitly named and presented (MacKinnon 1989: 96-105). 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 (Nunn 1997). Therefore, this archetype’s absence from the legal texts is misleading since it reflects the group’s constituting presence. However, I use the terminology of “un-naming” 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. I contrast 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 groups visible challenges the traditional conceptualization of “naming” as exclusionary and “un-naming” as inclusive. Instead, I suggest a broader conception that will treat the “un-named” discriminated groups as being the most invisible group. Moreover, the invisible normality of whiteness manifested in the law as well as achieved through it, engages the law as a “white public space” - fashioned as the material or symbolic dimensions of the places where racism is reproduced by the professional class - where the unmarked is simply white (Page and Thomas 1994: 111). In this symbolic space, the un-named group is eliminated and marginalized as a discriminated-against group,

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through its being merged into the white public space as an inseparable part of it.²² However, this process does not signify inclusion of the group, since in reality the group is discriminated-against, *de facto*.

The theoretical scheme of “invisibility” I address 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-against 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, such as, for example, Chinese people (see *Gong Lum v. Rice*²³). Next to these explicit laws on the continuum are implied laws, such as laws with a “whites only” requirement. This sort of implicit laws does not “name” the other, rather it “names” its opposite, privileged entity. Here, the group’s absence could nevertheless signify its existence because of the statute’s “wholeness” impact. According to this impact, discriminatory statutes are always positioned within a semantic field of “social power relations” where the oppressor and oppressed groups are “different” from one another and can signify one another (Jackson 1997: 31-43). 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 a canonical status through legal texts. Law canonizes discriminated-against groups, providing them the necessary “naming” for all prospective antidiscrimination purposes during the later

22. The main tool through which the merging was implemented was the “other white” strategy. See *infra*, note 17 and subsequent text.

²³ 275 U.S. 78 (1927)

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remedial stage. 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 group lacks any “legal” support since they are not discriminated-against by the law; this lack of “legal” support deprives the group of legal viability in asserting their claims during the remedial stage.

2. 2 The Collaborating-Organizational Effect

a) Through Intra-group Reactions

The ability of minorities to politically organize has a key role in determining 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 (Ackerman 1985: 719-722). Within this framework, minority groups suffer from a systematic disadvantage due to their lack of power to negotiate with the powerful majority (Ackerman 1985: 722). A famous dictum by Justice Stone in the *Carolene Products*²⁴ suggests that “discrete and insular minorities” were the ones who suffer most from democratic ineffectiveness and are the ones who are eligible for and entitled to protection from the judiciary when the legislature fails to provide such protection (Ackerman 1985: 722-731). 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 group more able to operate collectively (Ackerman 1985: 723-740). Here, again, the powerful effect of *de jure* discrimination is of enormous relevance. Using legislation to discriminate provokes a sharper sense of humiliation and alienation (Williams 1991: 88-89). The law functions as a primary social instrument in racializing the group, mainly for subordinating purposes (Haney Lopez 1994: 3). Consequently, a group member’s consciousness of being discriminated against revolves around the notion of the group’s oppression as a whole, and formal, *de jure* discrimination makes that group oppression much more powerful, painful, and outrageous, thus enhancing an intra-group interaction and collectivity. On the other hand, groups that do not suffer from blatant, evidential, formal discrimination, but rather from more covert discrimination, are expected to have a lesser sense of group identity and a higher level of self-denial of their discrimi-

24. United States v. Carolene Prods. Co., 304 U.S. 144 (1938)

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nated position, and of intra-group collectivity, Since these group members would prefer avoiding unnecessary confrontations, as long as they don't suffer from overt discrimination (Ackerman 1985: 730-731).

In the terms of Ackerman's critique, the geographical insularity of the group is less effective and the discreteness of the group is blurred for *de facto* discriminated 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 as insular groups, the former was more able to successfully organize as a community, to develop a racially proud consciousness, and to eventually to better their social status, relatively speaking (Luna 2003: 232, 247).

Others have previously observed this effect of *de jure* discrimination. 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 1988: 1382). Crenshaw criticizes the fact that what was primarily abolished through that transition was the symbolic oppression of African-Americans represented by legal ordinances, rather than actual, material oppression, which consisted of informal discriminating practices (Crenshaw 1988: 1377). 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 all the community members—even its most advantaged and pro-assimilationist members—were unable to avoid or deny their belonging to the group (Crenshaw 1988: 1383-1384). 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” (Crenshaw 1988: 1382-1383). 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 (Bell 1995). Dr. King, the integrationist movement leader, strictly called upon disobedience to *de jure* discrimination, out of respect to the law, as he explained it (King 1964: 167). As its main target *de jure* discrimination also prompted the revolutionary Black Civil Rights Movement (Peller 1990: 809), whose consciousness was built upon fighting the evil of institutionalized discrimination. A black scholar commented on this battle: “Law does not exist in a

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vacuum and racism is not solely a by-product of law” (Hall 1988: 13). 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, and 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 it was a mistaken struggle by itself.

Kimberle Crenshaw located her critique within the relations of African-Americans and White-Americans, but it can be easily applied to my analysis of *de facto* discriminated-against groups. Unlike their African-American peers, Mexican-Americans did not suffer from blatant, formal legal alienation and thus were not as easily considered—either by themselves or by others—as “out-laws” from the social system. Drawing on Crenshaw’s work, one can infer that the lack of *de jure* discrimination caused “loss of collectivity” within the Mexican-American consciousness and weakened ties between their community identities and a racial identity, as opposed to such strong ties within African-Americans (Haney Lopez 1994: 10). The absence of *de jure* discrimination sent a message of assimilation and of false belonging to the hegemony whereby there is none acceptance of the identity of the other (Haney Lopez 1998: 57-58), and this has made an elaborated legal fight appear irrelevant or even unwanted.

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. 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 only in the late 1960’s, took the lead in litigating against the *de facto* discrimination Mexican-Americans suffered (Meier and Gutierrez 2000: 130). They relied overwhelmingly on an integrationist and assimilative ideology rather than on a separatist or a group-collectivist ideology, specifying that they were “white” (Meier and Gutierrez 2000: 130). Perhaps partly for this reason, these groups failed to receive nationwide attention despite their considerable achievements (Oni and Winant 1986: 103-04). 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 (Meier and Gutierrez 2000: 127-129). 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 Mexican-Americans 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 group. This may also explain why LULAC had initiated only two lawsuits at the times of segregated reality in the late 1940s, although these lawsuits were fairly substantial (Meier and Gutierrez 2000: 130).

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Another aspect of intra-group interaction to which Ackerman points is that the more discrete the members of a group are the easier it is to track them and commit them to the group's political struggle (Ackerman 1985: 729-730). African-Americans are a discrete group, who because of their skin color are easy to track. Ackerman contrasts homosexuals: since their membership is more anonymous and not superficially prominent, they are harder to track and politically mobilize (Ackerman 1985: 729-730). Ackerman further argues that even when tracked, a group member would have to let go of his or her anonymity in order to engage in a political struggle and that this is something members of anonymous groups would hesitate to do (Ackerman 1985: 730-731). 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 (Ackerman 1985: 729-731).

By supplementing Ackerman's argument this article manifests its incompleteness. Ackerman's discussion of "discreteness" focuses solely on the physical "visibility" of the group, such as the color or gender of its members (Ackerman 1985: 729), but there is also a 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," homosexuals are substantively "legally present" and enjoy a substantial amount of political visibility, albeit notorious. The discourse of sexual-orientation based discrimination initially dealt with prohibitions on sodomy (Halley 1995). Later, the struggle for homosexual rights targeted other *de jure* provisions, such as prohibitions on same-sex marriages, again triggering a legal discussion that increased the legal visibility of the group. Until *Romer v. Evans*,²⁵ the Court did not find homosexuals to constitute a legal group that was entitled to special constitutional protections. In the first case to discuss homosexuals' right to equal protection, *Bowers v. Hardwick*,²⁶ the discussion revolved around homosexual activity rather than homosexuals as an entity or a 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 suffered *de jure* discrimination resulting from a state constitution prohibiting the recognition of homosexuals "as a class of persons", paving the way for the Court's group-based discussion (*Romer*: 627). Thus, the distinctiveness given to the group by the discriminating legislature made the group legally viable, even

25. 517 U.S. 620 (1996)

26. 478 U.S. 186 (1986)

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when using prohibitions on actions of homosexuality rather than using group-based rhetoric (*Lawrence v. Texas*²⁷; Yoshino 2002: 872-873).

Considering *de facto* discriminated groups extends Ackerman's conception of discreteness to a symbolic level where the law constitutes presence. In contrast to homosexuals, members of *de facto* discriminated 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 (Ackerman 730-731). 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 groups also creates a supportive social-political environment both among the group members and also among people outside the group who support the abolition of the recognized *de jure* discrimination, as in the case of the NAACP, which was largely supported by white Americans' donations (Green 2000: 179-181). Having said all that, it is important to note that *de jure* discrimination is not the exclusive way through which political collectivity and consciousness can be achieved. These can be attained through different and complex routes, of which *de jure* discrimination is only one primary example.

b) Through Inter-group Reactions

Legally institutionalized discrimination also enhances the consciousness of people outside of the discriminated-against group, whose members are now "legally marked out" in a way that makes it relatively easy for others to identify them (Ackerman 1985: 729-730). 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 legislature and "they" refers to the *de jure* discriminated group (Ely 1980). In this framework, discrimination constitutes the other as a "minority." The majority manifests political superiority over the minority and hence forces the minority to admit its relative political powerlessness and recognize its proper place within social power relationships (Ely 1980: 157-160). For example, African-Americans, as the addressees of the discriminating laws, could not see themselves as its authors (Jurgen Habermas 1994: 121-122). Understood this way, a lack of *de jure* discrimination against a *de facto* discriminated group creates a "we-all" as opposed to a "we-they" po-

27. 539 U.S. 558 (2003)

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litical structure, which eases any traces of distinctiveness and discourages the development of a group consciousness among the *de facto* discriminated group.

This notion is clear when applied to the Mexican-American group. Since they suffered from *de facto* discrimination, Mexican-Americans were treated by court as “the other white,” a group that deserved not to be discriminated against. This “other white” strategy was first triggered by the determination of citizenship eligibility of Mexican-Americans after the Mexican-American war, and was later employed by activists (Menchaca 1993: 584; Rangel and Alcala 1972: 342-328), 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 is a statement about the inclusiveness of Mexican-Americans and their lack of distinctiveness from whites, as was specifically stated by the 1940 national census, which stipulated that “Mexicans were to be listed as white...” (Haney Lopez 1994: 51). In *Mendez v. Westminster School Dist. Of Orange County*,²⁸ 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 groups, such as “Chinese, Japanese or Mongolian” (*Mendez*: 780). Relying on California’s rules forbidding discrimination unless it was against colored and black people, the court concluded that the discrimination against the plaintiffs was unconstitutional (*Mendez*: 780-781). This decision furthered the symbolic effect of the “we”-“they” dichotomy whereby Mexican-Americans are placed within the “we” group and not in the “they” group. Mexican-Americans are thus considered “one of the great races” and contrasted with other races that were denied equal participation in education (*Mendez*: 780). 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 groups, were marked as “the real” others, whereas Mexican-Americans are not. This explains part of the difficulty Mexican-Americans have in their quest for recognition as a “discriminated-against group” rather than as part of the privileged whites (Delgado and Palacio 1975).

2.3 The Institutional Memory and Blameworthy Effects

Antidiscrimination rules are meant, among other things, to rectify the countermajoritarian difficulties that minorities face and to redress injuries that the law or society has

28. 161 F.2d 774 (Cal. 1947)

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inflicted upon them (Brest 1976: 6-9). Therefore, institutional memory and blameworthiness suggest that it is important for the same legal mechanisms that discriminate to be the mechanisms used to provide the remedies. *De jure* discrimination provides direct formal access to the legal system's remedial functions for *de jure* discriminated groups. The formalism of the legal system and the documentary nature of *de jure* discrimination make it impossible for the legal system to ignore it. *De jure* discrimination is less likely to be denied than *de facto* discrimination. Although nations tend to forget their historical evils, institutionalized documents make such forgetfulness harder. A legislative and adjudicative change of heart does not erase the legal history of a nation, but rather places another narrative next to that history. Discriminatory legal rules can be expunged from a nation's book of statutes, but their past existence is always evident and traceable. The vast documentation of the Jim Crow regulations and the judicial revisiting of *Dred Scott*²⁹ and the *Plessy* cases demonstrate the strong presence of the past institutional suffering of African-Americans. During the remedial stage of African-Americans' legal history, this documentation of institutionalized injury provided a firm justification for remediation (See, e.g. *Fullilove v. Klutznick*³⁰; *Regents of the University of California v. Bakke*³¹).

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, focusing on legislative discriminatory initiatives. 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 (Ackerman 1985: 715). 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 opposed to the "legal") as a sphere beyond equality law and thus allows for the continuation of racial inequality outside the official reach of the state (Harris 2000: 1935).

As I have previously argued, Mexican-Americans are only partially recognized by the legal system. Since they do not suffer from *de jure* discrimination, it is 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 is *de jure* means

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

30. 448 U.S. 448 (1980)

31. 438 U.S. 265 (1978)

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that Mexican-Americans have no legal relevance as a group. In *Hernandez*, the Court focused on social motivations for discrimination rather than “legal” ones, thus deriving the emergence of the Mexican-American group from a change in “community prejudices” against them (*Hernandez* 478). 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 is by far long lasting in America (De Leon 1983). In the case of *de jure* discriminated groups, the law’s involvement transforms 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*³² the Court focused on the devastating impact of *de jure* discrimination in excluding African-Americans from “civil society.” This observation conceives the social harm inflicted on them as also being a legal harm. Many conservative legal theorists and positive legalists claim that law merely reflects society’s desires (Dworkin 1986; Hart 1961). 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 (Habermas 1973: 253). This debate, though, is less important once legal involvement is present in the wronging. Through *de jure* discrimination the legal system creates as well as reflects reality, unraveling the line between the legal and the social realms (Kennedy 1991: 347). 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 groups receive from the legal system during the remedial stage can be understood as a result of a corrective justice aspiration of the legal system to right undeniable past wrongs that were caused by this very same system (Fiss 1999: 14).

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 (see *Grutter v. Bollinger*³³; *Richmond v. J.A. Croson Co.*³⁴). 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 (*Barhold v. Rodriguez*³⁵). 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.” (Post 2001: 22). The

32. 100 U.S. 303 (1880)

33. 539 U.S. 306 (2003)

34. 488 U.S. 469, 507 (1989)

35. 863 F.2d 233, 237 (1988)

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involvement of the judiciary during the remedial stage can thus be understood as being motivated by institutional remorsefulness (Crenshaw 1988: 1382).

A story of one Mexican-American battle against discrimination can also help illustrate this effect. “The Felix Longoria Incident,” occurred in Texas in 1949 (Garcia 2002: 104-139). 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 (Garcia 2002: 107-108). Hector Garcia, an activist working for a Mexican-American Forum challenged this discrimination (Garcia 2002: 110-139). As with most of the discriminatory acts against Mexican-Americans in Texas, the burial refusal was not *de jure* but rather was said directly to the widow by the mortician. As demonstrated by the substantial sympathetic public attention that this case received, the public reaction to the discrimination claim—one of denial—was of a different nature than if the discrimination had been based in law and hence “legal.” The incident is portrayed as atypical, even though separate burial services and cemeteries were common (Garcia 2002: 114). It was resolved as a misunderstanding and misinterpretation of the funeral house owner’s words. Since the mortician’s behavior lacked legal approval, the public blamed Garcia for stirring up trouble in an area where problems did not truly exist (Garcia 2002: 121-128).

This type of public denial of the reality of discrimination is typical *de facto* 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 authorizing the discrimination. Since *de jure* discrimination is institutionalized, its effect cannot be dismissed as a private, whereas *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.

2.4 The Presumption of Intentional Discrimination Effect

The presence of *de jure* discrimination is an important factor in establishing that a discriminatory act was intentional. This role is exemplified by the Court’s statement that the intent behind explicit *de jure* discrimination in the past may be used in the present to prove intent regardless of chronological remoteness (*Keyes*: 210-211). Unsurprisingly, this logic applies primarily in cases where *de jure* discrimination previously

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existed (See, e.g., *Cisneros*: 148; *United states v. Jefferson County Board of Education*³⁶; *Swann v. Charlotte-Mecklenberg Board of Education*³⁷). Particularly interesting is *Keyes* where the petitioners were both Mexican-Americans and African-Americans, yet while discussing the injustice of the *de jure/de facto* distinction, Justices Douglas and Powell referred only to the African-American petitioners.

The practical implication of this logic is great because equal protection claims are limited to claims that can prove intentional discrimination, and this logic allows the court to assume intentional discrimination where *de jure* discrimination existed in the past. This logic thus has a “narrating” effect, where it allows the group’s narrative of oppression to be told (See, e.g. *Columbus Bd. Of Education v. Penick*³⁸). The narrated information can be used by the discriminated group to achieve redress for past discrimination. In other words, 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 (Martinez 1994).

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

It is important to note though that there is no strict relation between the legal status of a group and the social status of a group as one that is discriminated against. Some groups may not be discriminated-against by the law and yet suffer discrimination from society. *De facto* discriminated-against groups demonstrate this idea well. At the same time, some groups face *de jure* discrimination without being discriminated against by society in fact, such as in the case of an anti-Indian 17th Century statute in Massachusetts which survived at the state’s law books, although in reality, the state itself has no such anti-Indian inclination. Nevertheless, in between these poles, there is certainly a correlation between the use of the law to order society and between enhancing the social and self-awareness around a group subjugated to *de jure* discrimination in a way needed for that group to initiate an effective legal and political struggle for rights. Moreover, removing

36. 380 F.2d 385, 397 (5th Cir. La. 1967)

37. 402 U.S. 1 (1971)

38. 443 U.S. 449 (1979)

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a group from society's legal canon and by no longer discriminating against it under the law, in the antidiscrimination stage also creates some sense of social commitment to equality vis-à-vis that group (Siegel 1996-1997).

III. -THE BATTLE FOR SEGREGATION IN EDUCATION AS A TEST CASE: THE AMERICAN STORY

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-Americans 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 these groups demonstrate this difference in impact. Both groups suffered from segregation in education, but while African-Americans suffered mainly from *de jure* discrimination, Mexican-Americans suffered almost exclusively from *de facto* discrimination. In terms of judicial success, Mexican-Americans were the first to win a segregation battle in the *Mendez* case in 1946. But African-Americans won the war on segregation in the broader legal sense with *Brown v. Board of Education* in 1954. Although vastly criticized, mainly due to its subsequent ruling in *Brown v. Board of Education* (No. II)³⁹ (Whitman 2004: 310-334), the *Brown* decision is a cornerstone for abolishing segregation and the “separate but equal” doctrine. A compelling explanation for *Brown*'s central status in the discrimination discourse is that it emphasizes the suffering and social exclusion of African-Americans through *de jure* discrimination. The NAACP, which argued the case, narrated African-American suffering through briefs and professional opinions and the Court embraced that narrative, 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” (*Brown*: 494). The Court thus brought the suffering of African-American children—and through them the African-American people—into the legal system and made that suffering intrinsic to the group's legal entity. The institutionalized discrimination at issue in the case also represented the broader story of discrimination of educational bodies against African-Americans nation-wide, as the plaintiffs were gathered from different schools in different locations (*Brown*: 486). In *Brown*, the Court recognized African-Americans as the group generally, while introducing the petitioners as “minors

39. 349 U.S. 294 (1955)

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of the Negro race.” Thus, the Court affirmed and acknowledged without reservation their status as a legally identifiable group (*Brown*: 487).

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....’” (Bell 2004: 551). More importantly, from *Brown* onward, the viability of every segregation claim brought into court by African-Americans was immediately and fully discussed. No special rhetoric and epistemological efforts were required by courts to define the petitioners or their discriminated-against position. This ease of asserting claims was the unfelt yet crucial impact of *de jure* discrimination which established African-Americans’ group recognition. Their visibility as a recognized group was simply unquestioned, as the cases teach us (*Griffin v. County School Board*⁴⁰ (The petitioners are laconically described as “a group of Negro school children”); *Wright v. Council of Emporia*⁴¹ (The appellants are simply described as “Negro children”); *Norwood v. Harrison*⁴², (The court relates to the issue of school segregation as relevant to “white” and “Negro” students); *Cooper et al. Members of the Board of Directors of the Little Rock, Arkansas, Independent School District, et al v. Aaron et al.*⁴³ (again, the Court only incidentally declare that the battle around the implementation of *Brown* was revolving nine “Negro students”. *Id.* at 9). The conceptualization of the litigation as one seeking equality between different identifiable groups prompted African-Americans seeking 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 legally reshape the educational system.

The experience of Mexican-Americans seeking to gain legal recognition as a group differed tremendously from that of African-Americans, and was perceived as secondary and minimal in terms of scholarly and social reputation (Luna 2003: 238-239). As I argued earlier, the discrimination against Mexican-Americans was primarily *de facto* and thus, their status as a legally cognizable minority group was therefore fragile. 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 comprehensive identity of the group from forming. *Mendez*, one of the few cases 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* deci-

40. 377 U.S. 218 (1964)

41. 407 U.S. 451 (1972)

42. 413 U.S. 455 (1973)

43. 358 U.S. 1 (1958)

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sion blurred the legal status of Mexican-Americans as an identifiable group and blurred their suffering. Considering them to be “whites,” the court said that “Mexican-Americans were not appropriate subjects for discriminatory treatment since state law did not allow for discrimination against whites (*Mendez* 780). This strategy of labeling Mexican-Americans as white was eventually 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 (Delgado and Palacios 1975: 397-395). 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 would have exposed the suffering of the Mexican-American group.

Mendez was followed by *Gonzales v. Sheely*⁴⁴, in which a federal court in Arizona ruled on a segregation claim. Like *Mendez*, this case was atypical and based on *de jure* discrimination against Mexican-Americans. In *Gonzales*, the court identified the petitioners on the basis of class, due to 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 (*Gonzales*: 1006). The Court also referred to such blatant segregation as degrading and fostering antagonism against and inferiority in Mexican-American children (*Gonzales*: 1007). 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 instead of generally recognizing Mexican-Americans as a group. For example, in *U.S. v. State of Texas*⁴⁵, the court referred to the petitioning Mexican-American students as constituting a legally identifiable group, by themselves. Furthermore, without a general group recognition, Mexican-Americans have to reassert and reconstruct each time their group identity each time a member wants to assert a discrimination claim. The prerequisite that challenged discrimination be *de jure* rather than *de facto* blocked many other petitions challenging discrimination against Mexican-Americans (*Martinez*: 584-606). Along with other factors, *de facto* discrimination against Mexican-Americans helps explain why Mexican-Americans continue to attend the most segregated schools and are “more concentrated in high-poverty schools than any other group of students” in the United States (Bowman 2001: 1783).

44. 96 F. Supp 1004 (Ariz. 1951)

45. 342 F. Supp. 24 (E.D. Tex. 1971)

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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 utilizes a colorblind notion, whereby reason and neutrality replaces prejudice and stereotyping, which governed *de jure* discrimination rhetoric (Peller 1990: 759-761). The shift between the stages symbolizes a shift from negotiating equality through difference to negotiating through sameness, and the gap between discriminated-against groups has narrowed. Mexican-Americans (as well as other *de facto* discriminated-against groups, for example, Arabs) became actors that are allowed to use antidiscrimination relief in their favor and are allowed to form a "discriminated-against group" identity (*St. Francis College v. Al-Khazraji*⁴⁶). The use of more flexible terms like "national origin" to describe groups protected from discrimination has an inclusive effect of helping establish group identity for many *de facto* discriminated groups, even though blurring the concept of "race" (Haney Lopez 1997). Likewise, the "unreasonable classification" discourse that evolved during this colorblind era displaced the racial oppression discourse which was a key factor in legally recognizing a discriminated-against group (Colker 1986). Within this new system, the status of *de facto* discriminated groups has improved because these changes have given hope for recognition of the group and for full participation in antidiscrimination relief. For Title VII purposes, which became gradually at the center of antidiscrimination battles, African and Mexican Americans were considered as equally eligible for protection (*Davis v. County of Los Angeles*⁴⁷; *Ortiz v. Bank of America*⁴⁸). Moreover, the Civil Rights Acts banned a larger range of discriminatory practices than just simple *de jure* ones. They banned both intentional and unintentional discrimination and have largely departed from the old view of the Equal Protection Clause primarily redressing *de jure* discrimination (Comb and Comb 2004: 650-656). These notions have influenced the recognition of groups in equal protection claims. In this era the Mexican-Americans began to be recognized as either a "race" or as a "national origin" (*United States v. Midland Independent School Dist.*⁴⁹; *Ramirez v. Department of Corrections*⁵⁰). 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-

46. 481 U.S. 604 (1987)

47. 566 F.2d 1334 (9th Cir. 1977)

48. 547 F. Supp. 550, 558 (Cal. 1982)

49. 519 F.2d 60, 63 (1975)

50. 222 F.3d 1238, 1240, 1243 (2000)

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Americans has become more *de facto*-based than *de jure*-based, and has thus become harder to claim and to fight (Crenshaw 1988: 1369-1386).

IV. -THE MISSING DISCRIMINATION PARADIGM OF STREAMING FROM DE FACTO TO DE JURE: THE CASE FOR MIZRAHIS' DISCRIMINATION IN ISRAEL

Against this background, this Article will now focus on Israel, where a seemingly resembling situation applies to the Mizrahi Jews - Jews of Arab and Muslim descent - who suffer from non-*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. However, while this dialectic marginalized discrimination against Mexican-Americans, in the Israel case, it has completely barred any recognition of Mizrahis as a group. The inferior 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-Plestinians, 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. However, this Article does not seek to conduct a thorough comparative analysis of the differences between the American and the Israeli legal systems (Itzhak Zamir et al, 1995).

This section, therefore, after introducing the Israeli social stratification, will examine the Israeli discourse over segregation in education and demonstrate how that discourse constructed the Mizrahis as a legally "invisible" group.

4.1 The Double Oppression of Mizrahis: Material Discrimination and No Legal recognition

Israeli Jewish society's most fundamental division is an ethnic one between Mizrahis and Ashkenazis, who comprise 87% of Israel's Jewish population (Rosen-Zvi 2003: 10). Ashkenazis have historically been the dominant and privileged group, while Mizrahis have been the low status group (Shohat 1988; Dahan-Kalev 2001: 91-92; Wurmser 2005). 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

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cies have been steady or, if anything, increasing over Israel's six decades of statehood, especially in the realm of education (Dahan 2003).

The poor position of Mizrahis is a result of lingering discrimination against them, which began with the Mizrahis' immigration to Israel 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 (Shohat 1999; Said 1979). Ashkenazis, including both the founders of Israel and later immigrants from Europe, considered themselves to be the representatives of Europe that faced a primitive Asian East, specifically, Arabs and Mizrahis, who were in fact, Arab-Jews (Shamir 2000: 169). While their fellow Ashkenazi immigrants were given preferences in public services, Mizrahi immigrants were subject to economic and cultural oppression (Segev 1984: 173). They suffered from differential and discriminatory land distribution and housing policy, which forced them to settle in Israel's wasteland and prevented them from owning private property; this oppression is still prevalent today (Yiftachel 1997: 149-169; Lu-Yon and Kalush 1994). Mizrahis were also deprived of fair and equal access to education and suffered tremendous cultural oppression (Shohat 1988). Nevertheless, Israeli society denies (or at the least debates and doubts) that Mizrahi oppression and discrimination exists. The ill situation of the Mizrahis is often rationalized as resulting from differences in merit or on immigration difficulties (Lahav 2001: 414). 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. This myth had, of course, no support. Many of the Moroccan 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 (Shohat 1988). Thus, the Ashkenazi adopted measures to modernize the Mizrahis, such as special segregated education and low quality employment. These measures ended up creating an informal but still present system of segregation and discrimination between the Mizrahis and Ashkenazis.

Discriminatory policies against Mizrahis are both observationally obvious and academically supported in disciplines such as sociology and anthropology, exclusively. In one of the rare discussions of the Mizrahi group in the Israeli legal discourse, a Mizrahi scholar has observed (Lahav 2001: 414):

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“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, as no legal actor has ever explicitly or formally categorized the “Mizrahi” as a group with an independent identity having independent challenges (Shalom Chetrit 2004: 104-105). Although this conclusion fits well with the denial of a Mizrahi group in Israeli consciousness (Dahan-Kalev 2001: 94) the difficulty is that categorization of Mizrahis has been entertained by Israeli officials, such as The official Israeli Central Bureau of Statistics, which applied a division along the lines of Jews originating from Afro-Asian countries and those originating from Europe and America (Schulz 1996: 104-106). However, 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 (4 L.S.I 114) declares the right of every Jew to immigrate to Israel, supplemented by a provision in the Nationality Law of 1952 (6 L.S.I.50) that grants automatic Israeli citizenship to every immigrant Jew, and Israel’s Declaration of Independence declares Israel to be the home of all Jews: "In the state of Israel the Jewish people have raised". 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.

A key factor to understanding the invisibility of the Mizrahis is their relative disposition in Israeli social stratification, 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 socio-political context this discrimination primarily relates to and is most harmful to its Arab citizens. Quite different is the case of non-Israeli Palestinians, whose expulsion in the occupied territories made it unnecessary for Israel to invest in the textual means of *de jure* discrimination against that group (Zreik 2004: 72-73).

The Israeli legal system is constitutional, 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 (Zamir 1995: 6-13).

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Israel bans through a constitutional basic-law any non-Jewish ownership of lands (section 1 of The Law of Israeli Lands (1960) I.B.L. 56), and states explicitly that the non-Israeli-Palestinian spouse of Israel's Arab citizens do not acquire Israeli citizenship by the act of marriage (The Law of Citizenship and Entrance to Israel (commandment) (Amending), 2005 (Amen. 27.7.05)). At the same time, Israel's constitutional legacy ensures equality to all its citizens, be they Arab or Jews, by declaring to be a democratic constitution-based state (sections 1-1a of Basic-Law: The Human Dignity and Liberty (1992) I.B.L. 150). Israeli Supreme Court ruling as well as specific legislation provides unique protection from discrimination to the Arab-Palestinian citizens of Israel and even apply affirmative action rules in their favor (*See, e.g., The Association for Human Rights in Israel v. Israeli Government*⁵¹ (imposing affirmative actions in favor of Arab-Israelies on all governmental and quasi-governmental entities); *Adalah Organization v. the minister of religious affairs*⁵² (ordering the Ministry of Religions to reallocate its budget more equally between Jews and Arab-Israelis). Arab-Palestinian citizens of Israel are, therefore, trapped in a unique-paradoxical position, where on the one hand they suffer from being the *de jure* discriminated-against group, while on the other hand, they enjoy the benefits of being subjected to antidiscrimination and affirmative action laws. This situation is a result of a transitional stage the Israeli legal system underwent; after decades of disregard of Arab-Palestinians' discrimination-related suffering, in the past two decades, the Israeli Supreme Court and legislature have demonstrated a relatively gradual willingness to apply antidiscrimination rules and affirmative actions to benefit this group. In this seemingly "remedial stage", Arab-Israelis are nevertheless still largely *de jure* discriminated-against, as the abovementioned statutes show.

Here the most important difference between the American and the Israeli experience is established: unlike America's efforts to eliminate the alienation of African-Americans and other non-white communities by adopting a colorblind consciousness during the remedial stage, in Israel, the Arab-Palestinians are still being treated as fundamentally different from Jews, even at the remedial stage, where equality is the system's declared main concern. Therefore, there is no Arab entity in Israeli legislation but for in affirmative action statutes.

51. 55(v) P.D. 15 (2001)

52. 52(v) P.D. 167 (1998)

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4.2 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 residence. 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. The plan was adopted in a non-legislative manner that enabled the lingering un-mentioning of the Mizrahi-Ashkenazi dialectic (Chen and Addi 1995). It was only then, at what might be identified as the beginning of the remedial stage, that the first legal petitions regarding segregation in education were filed. However, these petitions were advanced exclusively by Ashkenazis who opposed the plan. An Israeli scholar who noted this exclusivity suggested that it resulted from the low accessibility the poor Mizrahi population had to courts (Rosen-Zvi 2003: 17). I find this reasoning unpersuasive considering the total absence of Mizrahi-induced petitions; rather, I suggest that structural legal barriers, caused by the *de facto* nature of the discrimination from which the Mizrahis suffer, contributed to this exclusiveness of Ashkenazi petitioners 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.

Back at the court, 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 in its supportive reasoning, as an analysis of the petitions will hereafter reveal. The first case to deal with the Israeli integration was *Kremer v. Municipality of Jerusalem*⁵³, in which the Ashkenazi petitioners refused to send their children to an integrated school as mandated by the integration plan. The case was heard on May 1971. Three weeks earlier, a group of thousands of young Mizrahis—who were second generation of Mizrahi immigrants born in the 1950's—lead a famous and extremely atypical Mizrahi protest march (which developed into riots) against the discrimination and oppression of Mizrahis in Israel. Although the Israeli society was profoundly shaken by this protest, the majority of the Supreme Court judges chose to ignore the social context in which their ruling was made (Shalom Chetrit 2004). Making their decision, the judges used a neutral language referring to the integration plan as an effort to overcome the gap between "different ethnici-

53. 25(i) P.D. 767 (1971)

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ties" rather than explicitly naming Ashkenazis and Mizrahis, and only one Justice noted in his concurrence the integration plan's focus on Mizrahis. This concurrence, however, was the *first* and *last* time that a court made a direct judicial reference to Mizrahis. From this case onwards, the Israeli desegregation in education 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 described as aiming to merge between different ethnic communities (*Kozlowski v. Regional Council Eshkol*⁵⁴; *Kremer*: 770; *Shaul v. Jerusalem City Council*⁵⁵). However, over time this goal has lost its significance in the court's rhetoric. In later incarnations, the plan was described as trying to merge "the strong and the weak" (*Cheshin v. Dr. Hochberg*⁵⁶), and eventually, the court abandoned even this mildly ethnic rhetoric and began to stress narrowing the economic gap as the plan's main goal. This type of court reasoning and rhetoric 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 Mizrahis to be 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 on segregation has never focused on discrimination. The Israeli Supreme Court did not regard any of these cases as presenting discrimination related issues. The lack of a formal *de jure* substantiation of school segregation allowed the court to base its opinions on administrative and technical grounds while leaving the notions of discrimination and the racism of the Ashkenazi petitioners untouched. Indeed, somewhat perversely, the only discrimination discussed in these cases was the petitioners' claims that forcing them to attend integrated schools discriminated 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 groups involved in the petitions of their identity thus ignoring the realities of the power relations between those groups. This has enabled the court to portray all the groups of Israeli society as equally sharing the "melting pot" aspirations of integration, as if desegregation was a mutual need for diversity from which both the Mizrahis and Ashkenazis would benefit. In reality, however, the goal of the plan was to stop the lingering segregation in education from which Mizrahis suffered, and to block the

54. 30(ii) P.D. 449, 456 (1976)

55. 29(ii) P.D. 804, 806 (1976)

56. 42(iv) P.D. 285, 287 (1988)

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Ashkenazi flight from Mizrahi educational surroundings. The neutral language the court employed when describing the conflict concealed this phenomenon.

As previously showed, both the discriminating and the remedial practices toward Mizrahis were non-*de jure* and informal. But interestingly, during both stages, the Israeli Ministry of Education has operated some internal regulations 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, defining this student as "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" (Rosen-Zvi 2003: 12). 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 (Swirski 1999: 180-183). The effects of this classification are still event in Israeli society today (Shalom-Chetrit 2004: 75-80). During its rulings, the Israeli Supreme Court uncritically employed this pedagogical label when considering Ashkenazi resistance to integration (*Dikman v. Ashdod City Council*⁵⁷; *Ramat Razi'el Board v. Yehuda Mountain Public School*⁵⁸). The Israeli Supreme Court used this definition that applied primarily to the Mizrahis in an un-contextualized manner, that is without mentioning this definition's original ethnic-based traits. This usage of an inexplicit recognition of the Mizrahi 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 of any legal relevance.

One might ask whether the Israeli Supreme Court's eventual advancement of integration is all that matters. This Article argues that it is not 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 relevance in 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 Mizrahis 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 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. Moreover, after decades of what might be seen as

57. 35(ii) P.D. 203 (1980)

58. 31 (iii) P.D. 794 (1977)

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the Court's support of the plan, in the last couple of decades almost all cases were decided against desegregation (*Sarig v. Minister of Education*, (not published, 1993); *Mazurski v. Ministry of Education* (not published, 2004)).

Trying to rationalize this outcome, one Israeli scholar argued 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" (Rosen-Zvi 2003: 28). 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 (Rosen-Zvi 2003: 28). 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. It is the stance of this article that ignoring 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 "invisibilized" these facts to the court, 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, for example, demonstrating that in cases where the narrative recognizes a group, the court is well aware of the impact of space (Rosen-Zvi 2003: 4). The court's consideration of Mizrahis, then, must result not from attentiveness to space, but rather from court's recognition of the legal identity of the Mizrahi group. Overt *de jure* segregation of Mizrahis would have forced the court to cross these conceptual barriers regarding 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 of the Israeli educational system are becoming evident. Recent education legislation has focused on one's origin as a category banned of use for educational purposes (Section 5 to Law of Pupils' Rights (2000) I.B.L. 42). Moreover, a recent ministerial committee who reevaluated the Israeli education system explicitly used the ethnicity of the Mizrahis in its recommendation for re-

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forms. These changes - which still demand contextual analysis - might represent the beginnings of the legal formulation of a Mizrahi group entity and lead to enhanced equality in education. However, the delayed reaction of the law might prove ineffective. For example, the national origin of a second-generation-Mizrahi, might pose a substantial challenge to court. The person discriminated at discrimination cases of that kind can barely be identified as having a national origin other than Israeli, since born in Israel.

4.3 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-Palestinians. However, due to various reasons - combining irreconcilable cultural and intellectual differences in educational aspirations between Arabs and Jews and Israeli-Jewish discriminative agendas - in most cases these two groups have been totally segregated and no case has been filed challenging that segregation. The more common, though still relatively rare, integration aspiration of Arab-Palestinians regards residence within Jewish-Israeli communities. A monumental case of that sort has been recently brought to the Israeli Supreme Court in *Ka'adan v. Israel Land Administration*⁵⁹, where the court held that a segregating residential practice was illegally discriminatory. Contrasting the Mizrahi segregation cases experience, 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 acquiring a home at a Jewish small town. The petitioners, an Arab-Israeli couple, are presented as Arabs seeking to live among Jews (Ka'adan: 265). Such presentation of the parties in this case best demonstrates the easy recognition the court gives to the Arab group in the legal discourse on antidiscrimination.

4.4 The Mizrahi non-use of the legal battlefield

As a direct result of its absence from the legal discourse, the antidiscrimination discourse was unavailable for the Mizrahi group, whose attempts to overcome discriminatory treatment were advanced through social struggles alone, as opposed to the women's and Arab-Palestinians' experiences, for example. This is not surprising; as the case of Mexican-Americans showed, the absence of legal recognition of a discriminated group has put substantial difficulties on activist legal work.

⁵⁹ 54 (i) P.D. 258 (2000)

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Demonstrative of this is the failure of the only Mizrahi attempt to gain legal recognition, which was bluntly rejected by the Israeli courts. In the case of *The New Discourse Association v. Minister of National Foundation*⁶⁰, 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 in its decision no.727 to allocate extremely valuable state lands to private citizens by changing its designation from agrarian to urban. This allocation would have provided enormous compensation to the agrarian sector, which was predominately Ashkenazi. However, the allocated 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 of the issue as Mizrahi-Ashkenazi related. When introducing the case, the court described the petitioners, a Mizrahi association and Mizrahi personas. The court narrowly circumscribed the group by defining it as an association striving to: "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 New Discourse Association: 47). 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". 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" (The New Discourse Association: 47). 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. Additional to the Court's de-contextualization of the case, the discrimination argument was problematically shaped by the Mizrahi petitioners themselves as regarding 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 over-politicizing the suit or being denied legal relief for lacking standing.⁶¹ That is, the activists were more concerned with achieving a concrete result by abolishing the discrimination than concerned about striving for a general legal

⁶⁰ 56(6) P.D. 25 (2002)

⁶¹ This information was obtained from two of the initiators of the petition, Professor Gad Barzilai and Doctor Hani Zubeida. This form of activism reflects the conflicting client's material interest and activist's symbolic interest (Bell 1976)

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recognition of the group as a whole.⁶² The court, upholding the petition, embraced the legal structure 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” 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 case demonstrates the extremity of the situation, where the Israeli Supreme Court is unwilling to recognize the Mizrahis as a discriminated-against group, even while acknowledging the existence of the very discriminatory practices used against them.

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

Whatever the motives behind the *de facto* discrimination against the Mexican-Americans and the Mizrahis groups were, the outcome of that discrimination was legally-untraceable discrimination.

With regard to Mexican-Americans, speculations were made 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 was that diplomatic issues with Mexico, which strongly opposed a race-based differentiation of Mexican-Americans, contributed to the U.S. refraining from using the *de jure* discrimination apparatus (Greenfield and Kates 1975: 683-684). 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.⁶³ 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 Palestinians, homosexuals and women, against whom discrimination is founded in the legal system” (Dahan-Kalev, 2001: 94). Another proposition is 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 strug-

⁶² I identify this type of dilemma as the dilemma between “Naming or Claiming”. This dilemma draws on the idea of “naming, blaming, claiming” in socio-legal studies (Felstiner et al., 1980-81). I refer to the Naming process as potentially risking the sustainability of the legal claim, in the case where the Naming process involves highly controversial political aspects.

⁶³ I wish to thank Gerald Torres for this point.

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gle. Consequently, they are less likely to enjoy a legal recognition that entitles them to antidiscrimination relief.

Regardless of its motivation, this form of untraceable discrimination further disadvantaged these groups during the remedial stage, especially in comparison to groups who suffered from *de jure* discrimination. Mexican-Americans, as well as Mizrahis, were subjugated by a hegemony - of White-Americans and Ashkenazis, respectively - that was not too “different” from them, compared with the other prominent *de jure* discriminated groups - of African-Americans and Palestinians, respectively - thus making it complicated for the law to differentiate them from their white hegemonic counterparts. As expected, the easier it was for the law to identify the group, the easier it was for the law to discriminate against that group. 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 the “other.” *De jure* discrimination against Mexican-Americans, for example, would have risked blurring the white/black distinction, which was invaluable to whites (Martinez 1997). This inherent difficulty of applying *de jure* discriminate against fairly similar groups led to a false belief—produced by the legal system—that no discrimination occurred against these groups, Mainly through rejecting *de facto* based discrimination claims of Mexican-Americans, as the courts did. Instead, although they enjoyed formal equality, these groups suffered from substantial *de facto* discrimination. This arrangement caused their “non-clusion” when they were barred from participating in the eventual remedial stage.

Mexican-Americans and Mizrahis thus both cross into the rights discourse from a special position. The discrimination discourse’s rhetorical adherence to the difference-sameness dichotomy guaranteed legal and social inclusion and entitlement for equal rights only to “similar” people (Minow 1990). 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 (Zreik 2004: 133). Mexican-Americans and Mizrahis share an illusory “sameness” with the hegemony; specifically, they share the fact that they are different from their ultimate defined “other” and they are not subject to *de jure* discrimination. The myth of these commonalities between these *de facto* discriminated groups and the American and Israeli white hegemonies is so deeply rooted that it prevents them from being identified as distinct discriminated-against groups that could have legal relevance within the antidiscrimination discourse.

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V.- PLEADING AND PROVING DISCRIMINATION WITHIN THE STREAMING FROM *DE FACTO* TO *DE JURE* PARADIGM - A CALL FOR SUBSTANCE, CONTEXT, AND CONSCIOUSNESS

I stress a phenomenological analysis; thus it is beyond the scope of this article to suggest a full elaboration of the different ways through which the legal system should treat differently discriminated-against groups. Instead, this Part briefly points to the general possibility of expanding the limits of the rights discourse through contextualization, so that the rights discourse can include *de facto* discriminated-against groups in its remedial stage. In order to accomplish this inclusion, the legal system needs to develop a mechanism for pleading and proving discrimination within the streaming from *de facto/de jure* paradigm that uses a contextualized and historicized approach to inquire into the social-political background of the formation of a discriminated group. Law and its rights discourse are highly de-contextualized and de-historicized by their alleged objective and universal nature, and thus they lack the conceptual room to consider contextualized issues (Minow and Spelman 1990). But it is only by being read against a contextual background that the absence of *de facto* discriminated racial groups from the legal narrative can be understood as signifying double discrimination rather than as signifying no discrimination. 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 of discrimination as a social construct, by moving from first-generation discrimination to second-generation discrimination in the last decades (Sturm 2001). 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 (Sturm 2001: 465-468). 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 (Sturm 2001: 468-475). The absence of systematic institutional reflection about these patterns of second generation discrimination contributes to its cumulative discriminatory effect (Sturm 2001: 471-472). This generational distinction is helpful in analyzing the *de jure/de facto* distinction's role in

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forming legally cognizable discriminated groups. The first generation's institutionalized, horizontal, and formal discrimination scheme is the *de jure* style of discrimination, whereas the second generation's more complicated and contextualized scheme is the *de facto* style of discrimination. But although *de facto* discriminated-against groups suffered from second generation discrimination style, they nevertheless suffered from it within a system that was also engaged in first generation discrimination. The experience of these *de facto* discriminated-against groups challenges the one-dimensional perception of discrimination. These groups are legal non-entities that signify the existence of sophisticated discrimination forms within that first-generation discrimination. Indeed, one role *de jure* discrimination plays is to hide the presence of co-existing *de facto* discrimination, and antidiscrimination laws should keep this role in mind.

In this respect, my position joins other calls to employ a critical approach to Equal Protection Clause jurisprudence (Luger 1984). With *de facto* discriminated groups, courts must adopt alternative, less formal ways of proving discrimination. An example of this approach is Supreme Court's decision in *Castaneda*, 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, the Court relied on statistical evidence that showed a low percentage of Mexican-American jurors to conclude that such a low percentage could only be explained by intent to discriminate (*Castaneda*: 495-498). 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 (Haney Lopez (2000); Nowak and Rotunda 2004: 524). 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 (*Castaneda*: 495). 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 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 Court should "name" the parties before it when hearing discrimination cases and acknowledge their contextual existence as a discriminated group.

The case for Mexican-Americans and Mizrahis should be thus contextualized. By reflecting on the relationship between legal recognition and *de jure* discrimination it is

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possible to explain the higher levels of recognition given to *de jure* discriminated groups through 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 legally recognized as a discriminated group and is entitled to *de jure* antidiscrimination remedies in its favor, but rather the nature of the suffering should bear on the breadth of these remedies.

VI. CONCLUSION

Nothing in this article should be read as favoring discrimination; instead, my goal is to take a more nuanced approach to the effects of different forms of discrimination on the legal recognition of different groups. Being a legally cognizable group might indeed prove insufficient for preventing racial discrimination, however, 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 groups have suffered; nevertheless, a group's status as being discriminated against *de facto* 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. I have tried to illuminate the phenomenology through which these groups have generated their identities and have followed different paths in the remedial legal system based on the different forms of discrimination they suffered.

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

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