

Discrimination Based on “Sameness,” Not “Difference”: Re-Defining the Limits of Equality through an Israeli Case for Discrimination

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ABSTRACT

This article points to a general weakness in liberal rights discourse, and specifically in the antidiscrimination stratagem. It argues that this stratagem is of limited effectiveness due to its perception of “difference” as constituting the heart of the notion of discrimination. Reliance on “difference” in formatting discrimination fails to acknowledge discrimination held against a group within settings characterized by “sameness,” thereby rendering the antidiscrimination principle too narrow to protect some discriminated-against groups. This point is exemplified by analyzing the case of the *de facto* discrimination against Mizrahi Jews in Israel, or Jews of Arab/Muslim descent, who are conceptualized under a notion of “sameness” rather than “difference” within Israeli hegemony vis-à-vis the Palestinians, who figure as the ultimate “others.” Employing an interdisciplinary methodology, the argument relies on the theory of Orientalism, developed in the fields of postmodern cultural studies, and on its implementation to address Israel’s social stratifications. Fortified with this richer, contextual concept of Orientalism, the article turns to the legal sphere to attain better understanding of the constituents of discrimination as a whole and of that practiced against Mizrahim, in particular. Specifically, the analysis targets the antidiscrimination stratagem and stresses its limited effectiveness when applied from within its traditionally ahistorical, de-politicized framework. In a radical move, the article argues that to cross into the antidiscrimination discourse in an effective way, Mizrahi Jews should also embrace the “Arab” component of their own identity. This move entails two reconstructive undertakings: one in which Mizrahis’ legal identity may be re-identified as “Arab,” and a second in which discrimination against Palestinians may be reconsidered as rooted in anti-ethnic rather than in anti-national sentiments. Consequently, a new discursive “third space” will be opened for both Palestinians and Mizrahis, in which they may collaborate in articulating and contesting both shared and uniquely encountered forms of discrimination. This two-pronged critical approach to challenging discrimination in Israeli sys-

tems can benefit both groups and enrich the antidiscrimination discourse in a manner crucial to achieving a better, more just society inside Israel.

INTRODUCTION

This article targets the over-simplicity of the antidiscrimination stratagem vis-à-vis the complexity of discriminatory practices and identity constructions. Specifically, it objects to the rudimentary account of “difference” that sits at the heart of antidiscrimination, which ignores the harmful impact that discrimination based on “sameness” bears for disadvantaged communities. This discrepancy characterizes the antidiscrimination stratagem that is rooted in both liberal and conservative conceptions of equal treatment. Challenging the de-contextualized nature of currently dominant antidiscrimination discourse, this article demonstrates this contention by considering the test case of the Mizrahi minority in Israel and its quest for equality. In doing so, the article provides an analysis of Israel’s intra-Jewish, yet-to-be-legally-revealed discriminatory practices and power relations. Intra-Jewish power relations are presented here as affecting Israeli-Palestinian relations and as reflecting the role the legal system plays in shaping Israel’s broader sociopolitical structure. The claim this article wishes to advance is that the notion of discrimination as “difference”-based is too limited and misses other forms of discrimination that are shaped and practiced within a “sameness”-based socio-legal environment. More generally, this article advances the view that, by its posing as the “antidote” to discrimination, antidiscrimination discourse is trapped by “poisons” that are carried by the same drug.

Discrimination is traditionally perceived as a practice of domination by the hegemonic group against differentiated minority groups. This practice comprises three stages: 1) identifying alleged differences between the two groups; 2) using these differences to establish distinctiveness; and 3) using the distinctive features to draw the lines of negatively-differential treatment toward minority groups. This discrimination format, however, does not apply to all disadvantaged groups. The intra-Jewish Israeli discrimination setting, for example, is rooted in the opposite notion of “sameness” rather than “difference.” The discrimination from which Mizrahi Jews—or Jews of Muslim/Arab descent—suffer is defined by a twofold similarity that the group members carry: to Israeli Jews on the one hand and to Arab Palestinians on the other. Their unique twofold basis for discrimination, therefore, calls for a special, contextually tailored analysis that rejects current antidiscrimination law analysis, which is based on “difference,” to find the appropriate remedial tools. Using an additional, sociological lens, I address the discrimination patterns to which Mizrahim are subject in the Israeli

legal context, as well as their absence from the Israeli antidiscrimination discourse due to the contextual standpoint of "sameness."

Drawing on the work of cultural studies in this field, most notably Edward Said's *Orientalism*² and its intellectual progeny, I argue that Mizrahim are in fact an invented group that, to a significant extent, serves as the "Orient" of a Eurocentric Israel. With this notion at hand, I suggest that the most effective way for Mizrahim to combat discrimination would be to stress their "difference" from conventional notions of Israeli identity while aligning themselves more closely with elements of Arab identity. In effect, this move means creating a new discursive "third space," in which both Mizrahis and Palestinians might work to advance their shared and unique discrimination claims in the Israeli legal context.

My hypothesis is that this seemingly counter-intuitive suggestion will prove much more effective for both groups' struggle. Mizrahis are currently compelled to bring their discrimination claims under the "sameness-difference" dichotomy dominating the Israeli antidiscrimination legal regime and its formal acknowledgement of Palestinians' right to remedial relief. The relatively well-developed Israeli antidiscrimination legal regime has long since identified "Arabness" as a suspect classification, under which many governmental as well as private practices in Israel have been adjudged illegal and unconstitutional.³ Yet, under the current antidiscrimination legal stratagem, Mizrahi claims for antidiscrimination redress and other forms of relief have gained no recognition. Thus, Mizrahis invoking the identity component of "Arabness" with respect to discriminatory practices against Mizrahis will benefit Mizrahim, despite their official "sameness" as Israeli Jews. Palestinians will also be able to use the "third space" to reconstruct their discrimination as rooted in anti-ethnic (namely anti-Arab) rather than anti-national sentiments, which allows for some of their claims to receive more favorable Jewish review insofar as it clarifies that these claims are civilian-based rather than "political" in nature.

I use critical notions of Orientalism, as the fear of "Arabness," to reconceptualize the discrimination held against Mizrahis in Israel as based in fear that tightly relates to their perceived "Arabness." Doing so, I argue that discrimination against Mizrahis deserves to be addressed by the legal system. Relocating Said's Orientalism analysis into the Israeli legal context serves the Mizrahi struggle in two ways. Firstly, it expands conventional notions of Israel's social and political stratifications beyond the lines dictated by the Arab-Jew dichotomy, in a manner that illuminates and problematizes the limits of the antidiscrimination discourse. This move provides the basis for the possible recognition of Mizrahis as a "suspect group" (or at least as a group at all) for remedial purposes. Secondly, this analysis challenges the traditional view that there are no systematic or insti-

tutional elements to Mizrahis' discriminated status—which is a view that ordinarily negates Mizrahi entitlement to remedial antidiscrimination relief.

In sum, this critical sociological framework facilitates the reorientation of the Israeli antidiscrimination discourse so that it can encompass the case of a “same” social group alongside other “different” groups, thereby perhaps enabling the former to attain the same tangible remedies as the latter. However, my project also has a broader implication: it suggests that Mizrahis and Palestinians who are Israeli citizens⁴ can—and should—collaborate in their respective struggles for equality. Pinpointing the “Arabness” that underlies the discrimination against Mizrahis exposes this discrimination as primarily ethnicity-based and calls for Mizrahis to collaborate with the other so-defined group of Palestinians. Combining allegations of anti-Mizrahi discrimination with those of anti-Palestinian discrimination will mutually benefit these groups. Mizrahis will be able to better articulate the discrimination against them as stemming from their “Arabness,” whereas Palestinians will be able to stress their fight for equality within the framework of ethnicity rather than nationality, rendering it more “social” than “political.”⁵ The article calls for Mizrahis and Palestinians alike to disrupt the identities set for them by the Arab-Jew binary, and to reconstruct them more fluidly and realistically. Once the identities are reconceptualized in what is known in cultural studies as a “third space,” some barriers between the two groups, and between them and the attainment of justice, will be demolished.

This article proceeds in five parts: I begin by sketching out the notion of “sameness”-based discrimination, including its discrepancy and absence from traditional antidiscrimination discourse. In the second part, I familiarize the reader with the general details of Israel's most significant intra-Jewish rift,⁶ between Mizrahim and Ashkenazim,⁷ and its discriminatory effects, which are invisible to the Israeli legal system. In the third part, I point to commonalities between this rift and the better-known Israeli national rift between the Jews and the Palestinians. Drawing on Said's Orientalism and subsequent work that Said's critical theory influence, I offer a unique and neglected Mizrahi perspective on the Jewish-Palestinian rift, one that bears major implications for both groups, Mizrahis and Palestinians, in their quests for equality in Israel under a new conceptual “third space.” In the fourth part, I demonstrate how the combined forces of Mizrahis and Palestinians can reshape these groups' legal battles for equality, including potentially large doctrinal implications and ramifications within the field of antidiscrimination law, in Israel and perhaps beyond. In the last part, I briefly address some of the foreseeable objections my project is likely to encounter, especially when considering the prevailing Israeli political structure.

Before I proceed further, however, I wish to voice my concern, as a legal scholar who is a Mizrahi woman, that non-Israeli readers might perceive my writing to be "Israeli." Indeed, in the minds of many non-Israelis, there is not any definition of *who* is an "Israeli"; there is only the presence of an Ashkenazi figure, which encompasses the "white public space"⁸ of consciousness of who "Israelis" are. This is especially so when it comes to Israeli academics, who also are predominantly Ashkenazis.⁹ My writing, on the other hand, is an articulation from a member of the minority intelligentsia, and thus it is a product of self-knowledge born of felt oppression.¹⁰ My hope is that readers of this article will acknowledge that the Mizrahi discourse that I engage and present offers a valuable, competing narrative from which a different, distinctive vision of "Israeli" can be defined.

I: INTRODUCING THE CONCEPT OF "SAMENESS" WITHIN
ANTIDISCRIMINATION DISCOURSE AND ITS
ISRAELI-PALESTINIAN CHALLENGE

A. *"Difference" as Constitutive of Discrimination*

Understanding the concept of discrimination as working within a "sameness-difference" dichotomy scheme is intuitive, because differences are sought to generate and justify discriminatory differential treatment.¹¹ Yet I find it important to revisit these roots, even if only briefly, so to better understand these organizing principles and assumptions of "sameness" and "difference" and, consequently, their paradoxical implications, as they delimit the antidiscrimination principle.

Consider two conventional definitions of "discrimination" which typically diverge into formal and substantive inquiries. First, discrimination is the making of distinctions.¹² Accordingly, on the methodological level, distinction requires noticing "difference," be it real or imagined.¹³ On the substantive level, definitions of discrimination require that these differences either be the motivation behind differential treatment or be demonstrably correlated to differential treatment in terms of material results (e.g., disproportionate adverse impact on members of a minority group). This definition of discrimination is embodied, for example, in the formal paradigm traditionally identified with the U.S. Supreme Court's antidiscrimination discourse, which focuses on "anti-classification" or "anti-differentiation." The second conventional definition of discrimination is the "disadvantaging of a group."¹⁴ This more squarely substantive definition, while offering a broader conception of discrimination, still stresses the pivotal role that "difference" plays; that is, it still requires that an identifiable, "different" group be subject to subordination.¹⁵

These fundamental perceptions of discrimination also construct the limits of what counts as “discrimination,” who counts as having experienced it, and what counts as its basis or form. The limits of the discrimination discourse involve primarily its rhetorical adherence to the “sameness-difference” dichotomy, which guarantees legal and social inclusion, as well as entitlement to equal rights, only to those people who are “similarly situated” and so are to be treated alike under law.¹⁶ The “sameness-difference” dichotomy relies on the concept of unity, which necessarily inhibits discussion about the kind of discrimination that imposes different materially significant yet legally invisible outcomes among sub-groups of supposedly “similar” people.¹⁷ By proposing to be the “antidote” to discrimination, the definition of “difference” within antidiscrimination discourse is itself dictated by its functional value as a tool of discrimination. Put differently, an identified group trait becomes a “difference” when, through a process of “meaningfulness,” it is subjected to prohibited discrimination. Moreover, a group may be characterized by multiple traits that make it vulnerable to different kinds of discriminatory practices. For example, the group of “black women” is exposed to gender-based discrimination as well as to race-based discrimination, with both traits creating a whole of discrimination that is simultaneously bigger than yet different from the sum of its parts.¹⁸ Attention to only one aspect of basis for discrimination is therefore insufficient.

This structuring of the concepts of discrimination and antidiscrimination has drawn substantial critique.¹⁹ Owen Fiss’s objection to “difference” constitutes one of the most prominent and influential juristic criticisms of the antidiscrimination principle.²⁰ By approaching discrimination as a means for subordination rather than mere forbidden, irrational classification, Fiss has offered a fuller, more meaningful account of social reality to this institutional hallmark.²¹ Though focusing primarily on the antidiscrimination principle as a mediating principle for applying the Equal Protection Clause, Fiss’s writing shows obvious concern with the discrimination-antidiscrimination nexus. Fiss criticizes the objective of countering “discrimination,” which is central to the “antidiscrimination principle,” as too narrowly and too technically defined under the traditional “ill fit” scrutiny.²² Fiss’s seminal work looks at “difference” as a constitutive notion that characterizes discrimination as a disgraceful social institution. While “difference” has since become a criterion for subordination, Fiss resists a reductionist limiting of “difference” to a criterion for “wrong” classifications.²³ By introducing the “group disadvantaging principle” as a preferred account of the discrimination principle,²⁴ Fiss approaches “difference” as a concept that pertains to enforcement and maintenance of power relations rather than one of irrational arbitrariness.

My critique of the legal discursive and conceptual notion of "sameness" takes inspiration from Fiss's line of theorization. For Fiss's critique of "difference" also bears on conceptualizing "sameness" as its dyad. Paraphrasing Fiss's work, one might say that "sameness," which renders irrelevant the application of the antidiscrimination principle, should be evaluated in light of its contribution to the reinforcement of power relations rather than its contribution to modes of classification of groups as "same."

Similar theoretical inspiration can be found in Catherine MacKinnon's work, which has been even more critical of the "sameness-difference" dichotomy, claiming that "sameness" is a structural barrier for gender equality. Through her "dominance approach," MacKinnon has associated "difference" with the state of power relations between genders, thereby introducing its immutability into what she calls the "oxymoronic Aristotelian equation of justice."²⁵ The need to reduce "difference" translates into a battle against women's subordination to men. Therefore, MacKinnon objects to "sameness" as being unattainable within settings of subordination. MacKinnon's objection can also be read as treating "sameness" as a conceptual and discursive impediment to equality, rather than as the criterion or principle by which to promote it; my critique of "sameness" draws insights from this perspective.

To sum up, one can distinguish between two contradictory moves within the notion of "difference": the increasingly varied and sophisticated accounts of what "difference" means to group-based discrimination, and the almost paradoxical judicial response to it by increasing resistance to and evasion of "difference."²⁶ Indeed, "difference" is a paradoxical concept: it requires legal recognition of the traits that it seeks to dismantle as unreal (arbitrary). That these traits are not merely negative is indicated in the fact that the judiciary, for diverse reasons, is unable to overcome their influence through the application of "rational" legal rethinking.²⁷ Yet since these legal concepts "have not been suppressed dialectically, and there are no other, entirely different concepts with which to replace them, there is nothing to do but to continue to think with them—albeit now in their detotalized or deconstructed forms."²⁸ This article proceeds in in this light and manner.

B. *"Sameness" as the New "Difference"*

Unlike the "difference" concept, "sameness" has drawn much less critical attention within discrimination scholarship. Within the traditional liberal jurisprudence, which reflects the Aristotelian equality principle of "treating like cases alike," sameness is deemed a positive force. Those who are the "same" or "similarly situated" as the dominant group are entitled to the same benefits as enjoyed by the dominant group. Feminist and Critical

Race analyses, in particular, have condemned the implied ideology of admired assimilation to the heterosexual-white-male norm that this formulation of the Aristotelian sameness maxim required and conferred.²⁹ Nevertheless, the elusiveness of “difference” is intertwined with that of “sameness.” Paradoxically, “sameness” has taken a tautological turn by being both the target of equality measures and the reason for them. It has become the signifier and the signified as to who is eligible to bring a legal claim for equal treatment (those who are “different”) and who is not (those who are already the “same”). “Sameness,” in this respect, is as problematic as “difference” by way of its dominating, oppressive nature and because labeling groups as similar bars them from crossing into the antidiscrimination discourse and its benefiting antidiscrimination protection.

A prominent example of the destructive power that “sameness” entails is the refusal to recognize economically-based classification, namely “poverty,” as grounds for entitlement to non-discriminatory practices based on economic status.³⁰ In other cases, it seems as if the wish to label a group “same” reflects a belief that it is indeed the “same.” Yet extending or imposing this belief renders the discriminated-against group altogether ineligible to make discrimination claims or be considered for antidiscrimination relief. The early refusal by U.S. courts to recognize Mexican-Americans as discriminated-against “non-whites”³¹ exemplifies these dynamics. Here again, “sameness” is ensnared by the same deficiency that characterizes “difference”: bound by the ideology of “sameness,” both concepts refrain from acknowledging relevant differences and thereby fail to function remedially.

This structural difficulty is closely related to what Martha Minow refers to as “the dilemma of difference,” where the legal system’s reluctance to recognize differences is rooted in its rejection of the destructive force of stigmatization attached to “difference.”³² This dilemma leads to the malfunction of the equality principle, since “refusing to acknowledge these differences may make them continue to matter in a world constructed with some groups, but not others, in mind.”³³ Minow, who is mainly concerned with the way that “difference” is made, claims:

The attribution of difference hides the power of those who classify and of the institutional arrangements that enshrine one type of person as the norm, and then treat classifications of difference as inherent and natural while debasing those defined as different.³⁴

In this respect, my interest lays in the similar considerations as Minow’s regarding “difference,” as applies to the process of constructing “sameness.”

Likewise, Iris Marion Young's perception of "difference" as a leading force for just democracy seconds Minow's perceptions of the need to acknowledge "difference" where it is ignored.³⁵ Young rejects objections raised against perceiving "difference" as "identity politics" which frustrates common-good discourse.³⁶ Young posits that group differences that amount to structural differentiations—namely, relations of power, resource allocation, and wrongful deprivation—must be included in the democratic process. Such inclusions should not be limited to formal application but rather should also encourage taking into account these group's interests, as well as their social knowledge and unique experiences.³⁷

By considering "difference" to be an obstacle to equality, liberal and conservative thought alike have, in their respective ways, advocated embracing "colorblindness" as a means to overcome it.³⁸ This tactic seems to conceal rather than to resolve the dilemmas embedded in the reality of difference, as experienced in the lives of those who bear the burdens of that reality and who, on the basis of "difference," are turned into a subordinate "other." Nancy Fraser's leftist deconstructionist critique has proposed to transcend "difference" by reducing the complex phenomena of subordination.³⁹ Fraser characterizes the dichotomous framework of political economy and culture as mutually exclusive, thereby endorsing a focus on the former at the expense of the latter. Although I disagree with Fraser's analysis of the structure of justice as dichotomous and non-contextual,⁴⁰ I nevertheless appreciate her initiative to break free of fixed identity conceptions. Accordingly, my work aims to facilitate a means of breaking free from the identity fixation of both "difference" and "sameness" toward a reconstruction of both in a new, constantly changing "third space."

Drawing critically upon on these notions of "difference" and "sameness," my claim is that the legal conceptual and discursive statement of "sameness," like "difference," distributes power and fixes identities. However, unlike "difference," it does so in ways that prevent pursuit of remediation and equality. Though generally speaking, being identified as "same" protects a group against discrimination, the attribution of "sameness" in circumstances where "difference" is denied or ignored renders the group and its members ineligible for the protection of antidiscrimination law. Within this conceptual framework, "sameness" emerges where "difference" sinks. The two concepts are positioned as a zero-sum game, in a multifaceted reality that allows the subordination of the "sames," simply because they are not "different." This failure to recognize, capture, and dismantle diverse and manifold modes of discrimination, which would require deeper and broader understandings of their functionality, further manifests the poisonous limits embedded in antidiscrimination when it is used as an antidote to

discrimination.⁴¹ The “dynamic of denial” practiced by the Israeli legal system against Mizrahim constitutes a perfect test case of this phenomenon.

C. *“Difference” and “Sameness” in Israeli Antidiscrimination Discourse*

Descended from common law tradition and inspired by American antidiscrimination law, the Israeli legal system is grounded in the conceptions of discrimination and antidiscrimination discussed in the previous section. Adopting the Aristotelian equality equation, the Israeli Supreme Court embraced the idea of “discrimination as classification” in its founding case law that conceptualizes what constitutes “discrimination.”⁴² Consequently, it has also adopted, with mild adaptations, the “antidiscrimination principle” as its mediating device to counter discrimination within a legal system that is constitutionally committed to equality.

The right to equality has always been a pillar of the Israeli legal system and a main characteristic of the system’s democratic nature, despite the fact that this right has only recently gained recognition as constitutional and therefore as enjoying superior legal status.⁴³ Moreover, even at its non-constitutional stages, this notion of the right to equality enjoyed a great deal of acknowledgement and advancement. Its elaborate and progressive development, coming mainly through the hands of former Chief Justice Aharon Barak, armed Israel with a relatively impressive antidiscrimination law apparatus. Israeli law protects against any kind of discrimination regardless of its basis⁴⁴ and acknowledges the right for affirmative action.⁴⁵ As regards what constitutes prohibited discrimination, Israeli antidiscrimination law is also open to according disparate impact the same legal significance as it accords to disparate treatment.⁴⁶ Thus, the Israeli antidiscrimination apparatus is robust for those groups whom it recognizes. However, its limitations lay in its scope of recognition of groups subject to suspect classification, specifically as based on the notion of “sameness” as embedded in the “sameness-difference” dichotomy. The plight of Mizrahim starkly illustrates these limits of the Israeli antidiscrimination discourse.

By self-identifying as a Jewish state, Israel constituted itself through a notion of “difference” in a manner unprecedented in democratic states, thereby enhancing “difference” as a main identity theme both legally and politically.⁴⁷ Mizrahim, who are in a way both Jewish and Arabic, enter this conceptually limited construct from a unique position of “sameness,” which, as I will detail later, is twofold. Firstly, they share an illusory “sameness” with the Jewish Ashkenazi hegemony; specifically, Ashkenazim and Mizrahim share the fact that they are both “fundamentally differ-

ent” from the ultimately defined “others”—the Palestinians—by virtue of nationality and religion. Secondly, and concurrent with being perceived as part of Israel’s Jewish hegemony, Mizrahis share with Palestinians (by virtue of their mutual Arab descent) similarities that are at best not acknowledged and at worst are tabooed and denied. When analyzed from the vantage point of Orientalism, these relatively immutable similarities can be re-identified as significant generators of Mizrahis’ discrimination. Indeed, the myth of all-encompassing commonalities, accompanied by disregard of Mizrahi similarities with Palestinians, is so deeply rooted that it prevents Mizrahim, who experience high levels of *de facto* discrimination, from being identified as a distinct discriminated-against group who are endowed with relevant legal standing within the equal rights discourse.⁴⁸

Clearly, discrimination against groups that resemble the dominant group must be administered as based on hidden or denied “differences” from the dominant group but in a manner that does not render the discrimination noticeable or relevant to the naked eye of antidiscrimination law. Mizrahis suffer from discrimination which has been, and remains, defined by their “sameness” as simultaneously the ultimate dominant group and the ultimate “others” in Israeli society. Therefore, the basis of Mizrahi discrimination is “sameness” rather than “difference.” This “sameness” deprives Mizrahim of their right to enter the garden of antidiscrimination discourse and consequentially enjoy its fruits, albeit unripe.⁴⁹ The situation described is not an accidental outcome. Instead, in a most profound manner, the hegemonic power in Israel developed by relying on the Mizrahis’ consent, affirmation, and consensus, rather than on overt submission and emphasis on “differences.”⁵⁰ Mizrahim were treated as “brothers” who came from the Arab Diaspora to the land promised to all Jews, yet designated as the family’s “black sheep” rather than as beloved siblings.

II. THE INVENTED AND DENIED CATEGORY OF MIZRAHIM

A. *Mizrahim as a Distinctive Discriminated Group*

In some ways, Israel can be described as an ethnocratic settler society. Mizrahim and Ashkenazim comprise roughly equal shares of Israel’s veteran Jewish population, while Palestinians comprise 20 percent of its overall citizenry.⁵¹ From its establishment forward, the Israeli regime has been based on space segregation and differential ethnic mechanisms towards Palestinians and Mizrahis.⁵² Although rarely documented or institutionally revealed, the existence of discriminatory policies against Mizrahim are both observationally evident and corroborated by academic research.⁵³ While their fellow Ashkenazi immigrants were given preferences in public ser-

vices, for example, Mizrahi immigrants were subject to economic and cultural oppression.⁵⁴ Mizrahis also suffered from differential and discriminatory land distribution mechanisms, especially with regard to public housing policies. They were sent to distant parts of Israel, mostly to desolate “development towns”⁵⁵ in order “to save the land” from the Palestinians by Judaizing it.⁵⁶ Moreover, treated as the main device by which Israel could defy the demographic leverage of its Arabic population, the Mizrahim in a sense stood as substitute for the Arabs and gradually became subject to the same discriminatory mechanisms from which the Palestinians had suffered.

Many oppressive mechanisms against Mizrahis persist today, although in a subtler manner.⁵⁷ Mizrahim, as a general matter, are a disempowered group who suffer from the kinds of social inferiority traits typical of marginalized groups.⁵⁸ For example, statistical data indicate that Mizrahis’ access to the education system, and their representation in it, is poor. Although students are not formally segregated from one another based on ethnic origin, a study held in “integrative” schools revealed a clear ethnic division by which Ashkenazi students are overrepresented in prestigious science programs while Mizrahis are overrepresented in the lower and middle tracks of education that offer limited potential for social mobility.⁵⁹ This may explain how, upon finishing high school, Ashkenazis are almost 100 percent more likely to be found eligible for matriculation certificates.⁶⁰

These discriminatory patterns permeate into higher education, where 31 percent of eligible Ashkenazi students gain admission to universities while only 22 percent of equally-qualified Mizrahis are admitted. This stratification spreads to the highest levels of academia, including the academic university faculty, and thus creates particularly substantial gaps. There, the representation of Mizrahis is as low as nine percent, and the Mizrahi women (like the author) amount to only 0.5 percent of all faculty members⁶¹ and only three percent of the female professors in Israeli universities.⁶² This evidently low representation decreases further in more-prestigious science faculty positions.⁶³ The Israeli legal faculty, for example, consists of only six percent Mizrahi.⁶⁴

Meanwhile, Mizrahis’ inferior status in the job market directly reflects enduring patterns of job-market disadvantage.⁶⁵ In addition to the general correlation between Mizrahi origin and low economic status,⁶⁶ Mizrahis are characterized by patterns of underrepresentation in the management job market (29 percent Mizrahi compared to 59 percent Ashkenazi) and overrepresentation in the blue-collar job market (40 percent Mizrahi versus 22 percent Ashkenazi).⁶⁷ Accordingly, the poverty rate among Mizrahis is nearly three times greater than it is among Ashkenazim.⁶⁸ Adding to these discrepancies is the fact that Mizrahis are unemployed at a rate five times

higher than that of Ashkenazis.⁶⁹ Even the military service, traditionally considered a main channel for "social fusion," was recently accused of having contributed to the creation and perpetuation of patterns of inequality between Mizrahim and Ashkenazim.⁷⁰

Moving on to the cultural arena, Mizrahi cultural institutions likewise suffer from manifestly unequal allocation in governmental budgeting.⁷¹ This is not surprising given that Mizrahis are believed to foster inferior cultural values, as depicted in popular culture imagery whereby Mizrahis are reduced to negative and ridiculed stereotypes.⁷² Mizrahis' cultural marginalism stems also from the geographic periphery and spatial segregation that characterizes their lives in Israel.⁷³ Mizrahis' minimal share in private capital ownership, generated by institutionalized discrimination in housing policies, further demonstrates the conditions of their systematic inferiority.⁷⁴ The strong nexus between ethnicity and capital was recently more clearly recognized when a governmental appraiser discovered that living in proximity of Mizrahis is a contributing factor to lowered property value, while living in proximity of Ashkenazim contributes to raising its value.⁷⁵

This is just a snapshot of Israel's wider social disparities as of the early 21st century.⁷⁶ However improved from the past, these conditions are still worrying. Mizrahis' slow progress up the social ladder has primarily reflected the development of Israeli society as a whole rather than some process that signifies the neutralization of the power struggle between Mizrahim and Ashkenazim.⁷⁷ More importantly, the socioeconomic gap between the groups is significant, with some studies indicating its growth over the last decades.⁷⁸ As of today, Ashkenazis sit atop the power structures in Israeli society and constitute "the Archimedean point, from which all the cultures, groups and forces in Israel develop."⁷⁹ Notwithstanding the clear ethnic stratification it contains, Israeli society denies that Mizrahi oppression and discrimination exists.⁸⁰ The ill situation of Mizrahim is often rationalized as resulting from differences in merit or on immigration difficulties.⁸¹ The most institutionalized rationalization is the "crisis of modernization," from which the Mizrahim allegedly suffered ever since they moved from what was perceived as a barbarian-like Arab culture into the "modern" European culture and State of Israel. Thus, the Ashkenazim supposedly needed to adopt transitional measures to "modernize" the Mizrahim, such as special segregated education and low quality employment.⁸² These measures ended up creating an informal but still present *de facto* system of segregation and discrimination between Israel's Mizrahim and Ashkenazim. Despite many strong indicators of a discriminatory social structure, however, no substantial measures have been adopted toward dis-

mantling it. As I shall work to show in the rest of this article, the denial of this structural reality contributes to its very existence.

B. *Dynamics of Denial*

Despite these indicators of structural social inequalities, Israeli society continues to debate, downplay, doubt, and even deny the existence of Mizrahi discrimination and oppression.⁸³ A body of sociological scholarship points to Israel's institutional denials of Mizrahim as a distinct demographic and legal group and of the existence of anti-Mizrahi discrimination.⁸⁴ Drawing on the discussion in the first section of this article, I refer to this situation as an example of the "dynamic of denial." Israel refuses to admit unjust practices against the Mizrahim, which ultimately leads to stability in the group's sociopolitical and economic inferiority and leaves the Mizrahim with no venue wherein they can address the enduring injustices to which they are being subject. Moreover, this "dynamic of denial" dictates the three manners by which the Mizrahi category in Israel is generally perceived: 1) nonexistent,⁸⁵ 2) an essentialist category that signifies a "cultural" group of people who share some background similarities, and 3) the Israeli home-grown new lower-class who suffers from structural divisions in education, geographic residence, employment, and related areas and factors.⁸⁶ All of these perceptions are of course reductionist, in the sense that they exclude considerations of historical, political, and other salient contexts. The group of "Mizrahim" to which this article alludes, however, exists at least in the sense that it bears and endures distributional effects, and thus the categorization invites—and requires—being utilized for *strategic* reasons, which involves acknowledging the necessary evil of positivist essentialisms, at least to some extent, in order to fight discrimination.⁸⁷

Yehouda Shenhav, an influential Mizrahi sociologist, further establishes the notion of institutional "denial" through his critique of Zionism. Rejecting the idea that Zionism was constituted on Jewish nationalism alone, Shenhav identifies multiple ideologies as lying at the heart of the Zionist project. He points to the inseparability of Zionism from the triad of nationalism, religion, and ethnicity. The components of this triad worked not only as a conceptual framework, but also as what he calls "categories of practice." Put simply, Shenhav's argument is that Zionism excluded Palestinians, as a national practice; excluded Mizrahis (and Arabs) as an ethnic practice; and excluded non-Jews as a religious practice.⁸⁸ Interestingly, in all three exclusionary respects, Zionism also used inclusion practices vis-à-vis Mizrahis as part of its genuine attempt to realize the dream of the Jewish state. Shenhav's articulation of the conceptual-practical triangle, which he

argues underlies Zionism, not only challenges the traditional perception of Zionism as a purely national project but also provides the analytic framework for establishing a "dynamic of denial." The hidden premise of ethnicity, specifically, nourishes this dynamic with regard to the ethnic division within Israel.

I see my contribution to the development of the "dynamic of denial" concept as adding to it the analysis of the Israeli legal context, illustrated through the experiences and concerns of Mizrahim. It is my assertion that while the sociopolitical and economic spheres have refused to recognize how Mizrahis' inferior position emanates from institutionalized discriminatory practices, the legal system has also reinforced this interplay of discriminatory practices and group inferiority both generally by not recognizing "Mizrahim" as a group, and specifically for antidiscrimination purposes. In other words, while Israeli sociologists have focused their concern on the fact that Mizrahim were denied recognition as a discriminated group within Israeli public opinion and consciousness, I now focus attention on their neglect within the legal sphere. My account of this "dynamic of denial" raises an even more disturbing concern: Mizrahim lack any legal venue or status by which they can seek not only recognition but also distributive redress to repair their inferior position.⁸⁹ At a later stage, this article will focus on breaking these walls of silence and reconstructing the legal system as an arena of recognition for Mizrahim and, more importantly, an arena for redressing the wrongs from which they suffer. Before I turn there, I will first introduce the structure of the law's "dynamics of denial" with regard to Mizrahim.

C. *Denial in the Legal Sphere: Mizrahim as Non-Category*

The legal system is one of Israel's main "public spaces" through which actors deny and de-legitimize the discrimination against Mizrahim. Almost no legal literature that hinges on Mizrahis' status, claims, problems, or interests exists.⁹⁰ Furthermore, the Israeli legal system reveals no traces of acknowledging anti-Mizrahi discrimination, either in its discrimination or antidiscrimination discourses. Although subject to *de facto* discrimination, since Mizrahim were never legally categorized and thus never subject to *de jure* discrimination, Mizrahim have no recognition under Israeli antidiscrimination discourse. This legal invisibility thereby renders the existing antidiscrimination literature, case law, and statutes relatively irrelevant to the Mizrahi situation.⁹¹

The Israeli legal system has formally adopted the sociopolitical "melting pot" ideology, under which the Zionist ethos proposed a unifying, "sameness"-based, "all-Jew encompassing" *de jure* rhetoric. Exemplary of

this ethos is the Israeli Law of Return (1950),⁹² which declared the right of every Jew to immigrate to Israel, as supplemented by a provision in the Nationality Law (1952) that grants automatic Israeli citizenship to every immigrant Jew.⁹³ Motivated by a wish to ensure the demographic superiority of Jews in Israel, the Law of Return functioned as a political signifier of Israel as an arena for combating “outside” social threats, thereby excluding from serious consideration such “internal” social problems as hierarchies and power relations.⁹⁴ Differential treatment statutes are also often administered upon Jewish exclusiveness, as demonstrated, for instance, by Israel’s ban through a constitutional basic-law of any non-Jewish ownership of lands.⁹⁵ This mechanism proposed a unifying, “sameness”-based, “all-Jew-encompassing” *de jure* rhetoric. Its rhetoric has largely hidden Mizrahi suffering from the lens of a *de facto* discrimination analysis and has made the legal sphere both structurally and symbolically irrelevant to the Mizrahi struggle for equality. Intra-Jewish distinctions became irrelevant under such dichotomous “privileged-Jews versus underprivileged-Palestinians” legal proposition.⁹⁶ The Mizrahi experience is distinct from cases of “recognized groups” such as Palestinians and women, for example, where explicit legal norms discriminated against them or at least recognized their legal differences and revealed the ill behavior against them. As one commentator has put the point, “With regard to the Mizrahim, Israeli law appears to have been blind. Formally they have been treated as equal. . .”⁹⁷

My analysis goes against these existing legal categories as dictating the scope of criticism. Notwithstanding the absence of Mizrahis from the surface of the legal system, I identify five focal points along Israeli legal history, whereby the legal system made implicit reference to Mizrahim. These points, which chart the emergence as well as the burial of the Mizrahi legal category, problematize as unnatural, political, and changeable the absence of the Mizrahim from the Israeli legal discourse.

The first focal point is also the first time the Israeli Supreme Court encountered the intra-Jewish ethnic rift as carrying “legal” meaning. *Kremer v. Municipality of Jerusalem*,⁹⁸ was the first education integration case to be decided by the Israeli Supreme Court, in circumstances where Ashkenazi petitioners refused to send their children to an integrated school as mandated by the national Integration in Education Plan.⁹⁹ The case was heard on May 1971. Three weeks earlier, a group of thousands of young Mizrahis, who were second-generation Mizrahi immigrants born in the 1950s, lead a famous yet highly uncommon protest march (which devolved into riots) against the discrimination and oppression Mizrahim experienced in Israel.¹⁰⁰ Although Israeli society was profoundly shaken by this protest, the majority of the Supreme Court justices ignored the social context in which their ruling was made.¹⁰¹ In their decision, the justices used neutral-

izing discourse in referring to the Integration Plan as an effort to overcome "gaps" between "different ethnicities and classes"¹⁰² rather than explicitly naming Ashkenazim and Mizrahim. Only one Justice noted in his concurrence the integration plan's focus on Mizrahim. This concurrence was the *first* and *last* time the Court made a direct judicial reference to Mizrahis regarding education in Israel. From this case onward, the Israeli educational desegregation discourse has proceeded in a non-contextual, non-naming, "invisibilizing" manner, not even once mentioning Mizrahim.¹⁰³

The second focal point is one of the rare cases to manifest some form of legal recognition of Mizrahi existence, albeit in a very limited and limiting manner. In *Shiran v. Israel's Broadcast Authority*,¹⁰⁴ the Supreme Court confronted a straightforward Mizrahi discourse as employed by the activist Mizrahi plaintiff. Alleging that Mizrahis' contribution to the establishment of Israel and to the Zionist movement has been erased from the set of representations offered by a state-produced-and-financed iconic television series, the plaintiff asked that the Court declare this national project illegitimate unless modified.¹⁰⁵ Rejecting this demand, the Court found it impossible to avoid using Mizrahi wording but still set a pattern of reasoning which adhered to a language of diversity rather than of subordination. Its overall rhetoric for analyzing the claim before it was mostly "technical" in the rare places it engaged in substantive discussion, the Court was not sympathetic to the plaintiffs' supposedly separatist allegations, and invoked the discourse of unification by referring to all "Jewish people" as an entirety.¹⁰⁶ Rather than addressing the substantive discrimination claim raised by the plaintiff, the Court used the legal platform to promote "Jewish unification." Ironically, a few years ago, in a journalist report celebrating the 30th anniversary of the iconic series that motivated this legal case, the series director admitted that the exclusion of Mizrahis from it stemmed from what he perceived as their marginal contribution to the nation's establishment.¹⁰⁷

The third focal point comes 21 years later and demonstrates how the absence of legal recognition for Mizrahim as a discriminated-against group has made much more difficult any activist legal work on the group's behalf. In *New Discourse Movement v. Minister of National Infrastructure*,¹⁰⁸ the Court dealt with a challenge that Mizrahis raised to the allocation of lands in Israel among its Jewish population. Israel's Lands Administration decided 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 predominantly-Ashkenazi agrarian sector. 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 public

property. In this case, the Court again used various de-contextualizing techniques that rendered the case irrelevant to the Mizrahi-Ashkenazi division. The Court's description of the petitioners, a Mizrahi association and Mizrahi individual activists, narrowly circumscribed the group. When introducing the case, the Court defined the petitioners as 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 inclusive wealth distribution to all social groups in Israel."¹⁰⁹ Rereading the original petition, Claris Harbon, a Mizrahi legal scholar, proved that the ellipses in the Court's opinion omitted 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 distinguished Mizrahi activists filed a co-petition. However, the Court described these co-petitioners somewhat laconically as "scholars. . . concerned with Israel's land allocation policy."¹¹⁰ As this case proves, the Israel Supreme Court, for whatever reason, has treated Mizrahi identity as not worthy of mention or inclusion in its jurisprudence.

The fourth focal moment in the "dynamic of denial" of Mizrahim in the Israeli legal system relates to the enactment of the Israeli Civil Rights Act in the marketplace in 2000.¹¹¹ Following its predecessors worldwide, the Act forbids discrimination in public and quasi-public social arenas based on multiple factors, such as race, religion, and gender. It does not, however, relate to ethnicity in a respect relevant and effective to Mizrahim.¹¹² The law's prohibition of discrimination based on "country of origin," which might seem at first glance to be useful for anti-Mizrahi discrimination cases, is actually unsuitable to contemporary Mizrahi victims of discrimination, for most are Israel-born and thus are not discriminated-against on the basis of their identification as related to some "country." Simply put, the Act neither relates nor applies to Mizrahis. This absence is particularly interesting, given the fact that this statute was enacted as a response to the ongoing discrimination against Mizrahis in these social arenas, as its legislative history reveals.¹¹³ This is how far the "dynamic of denial" of Mizrahis goes: the very same act that was intended to target the discrimination practices to which Mizrahim are subject still is unable to "name the un-nameable." In the rare cases that law has yielded the imposition of liability in favor of discriminated-against Mizrahis, the courts have either stated that the circumstances amounted to forbidden discrimination (but provided no further reasoning) or opined that the plaintiff's "dark skin color" was the reason for their discrimination. Notice, however, that the latter reasoning, while more convincing in the case of many Mizrahis, is even more problematic than the former: the dark skin categorization is

neither relevant to all Mizrahim¹¹⁴ nor is it stipulated by the Act itself as a forbidden basis for discrimination. This seems, therefore, like the courts' way of trying to work around the very apparent limitations of the law in order to address a painful reality.

Notwithstanding these legal denials, Mizrahi identity bears substantial relevance to the legal discourse. Though irrelevant to the legal system's explicit order, Mizrahis are very much present in its implicit, sub-textual order.¹¹⁵ Clearly enough, Mizrahis comprise most of the criminal defendants, most of the prison population, and almost none of the judiciary. To emphasize this point, I share what is both a hilarious and sad story out of my own experience. Being a first-year student at a most distinguished law school in Israel, I remember feeling "at home" when entering Criminal Law classes, because my professor's syllabus was filled with references to criminal cases titled with names, like mine, of Mizrahi descent. Contract law class, on the other hand, offered a syllabus filled with cases involving litigants with names of Ashkenazi descent. Under this division, it was clear who were the criminals and who were the good people trying to peacefully execute their rights to contract with one another. However, upon walking into my Contracts class late one day, I heard to my endless surprise the professor analyzing a Mizrahi-parties case. A moment later, I realized that it was the class session discussing "illegal contracts."

III. ESTABLISHING THE ISRAELI-PALESTINIAN "THIRD SPACE" OF ARAB ETHNICITY

"For Middle Easterners, the operating distinction had always been 'Muslim,' 'Jew,' and 'Christian,' not 'Arab' versus 'Jew.' The assumption was that 'Arabness' referred to a common shared culture and language, albeit with religious differences."¹¹⁶

The deeply rooted "dynamic of denial" of Mizrahi discrimination calls for a Mizrahi-Palestinian collaboration for the establishment of a new conceptual and discursive "third space," whereby both parties will be provided with richer and more effective means to litigate their rightful claims of discrimination. Establishing such a new space requires re-conceptualizing the common threads between Mizrahis and Palestinians. The new space can afford us a window into understanding not only the plight of Mizrahim, but also the complexity of the relations between Israelis and Palestinians more generally. These relations are normally perceived as quintessential manifestation of the Arab-Jew national dialectic of "difference," which is the traditional rhetoric for addressing it. Instead, this "third space" theorization

addresses these relations as having a significant ethnocultural dimension that is rooted in a particularly Eurocentric Zionism, which distinguishes Palestinians from Jews. Working to establish this new “third space” also rebuilds the categories of “Jew” and “Arab” as relational and interconnected, as opposed to dichotomous and mutually exclusive.¹¹⁷

In this article, this repositioning will be done using the notion of Orientalism as fashioned in Edward Said’s intellectual work and as developed within the Israeli context by his successor, Ella Shohat. Shenhav’s analysis of Zionism, as having an ethnic dimension (as discussed in the previous section), will also serve to help open this “third space.”¹¹⁸ Using these groundbreaking works and applying them to the legal field brings critical cultural analysis into the heart of legal reasoning in antidiscrimination law, a field where culture plays a pivotal role. More to the point, cultural studies, as a non-legal discipline, bears much creativity and flexibility that opposes the legal system’s rigid traits and underlying conceptions. Interdisciplinary analysis of what seems to be unquestionably “legal” can and should be challenged through the mirroring that this non-legal discipline has to offer. More specifically, Said’s work points to the structural problem of “thin” categorizations—such as “Jews” and “Arabs”—offered by the antidiscrimination legal system to dissolve problems emerging from what in reality are “thick” narratives of “Arabness” as having unique bearing on both Jews and Arabs.

A. *Said’s Orientalism*

A core assumption of any study that aspires to meliorate ethnic conflict is that understanding the sources and patterns of the conflict must precede the study.¹¹⁹ In the Israeli case, the sources and patterns of conflict can be tracked, at least in part, to the sociocultural phenomenon of “Orientalism.” My interest in Orientalism, as a body of knowledge, is rooted in my resistance toward perceiving “difference” as intrinsic and natural and my desire toward reshaping it as a socially constructed concept. Let us thus gain some familiarity with the theoretical framework of Orientalism toward understanding Mizrahis’ “difference” vis-à-vis Ashkenazi hegemony in Israel.¹²⁰

Edward Said, a Palestinian-Egyptian-American literary philosopher, developed the concept of Orientalism in his most established intellectual project.¹²¹ Said identified Orientalism as praxis of representation used by the colonial West to achieve domination over the East and over the “Orient,” by what he perceived as a constellation of false assumptions underlying Western attitudes toward the East. Namely, that a long tradition of romanticized, false images of Asia and the Middle East in Western culture

has served, implicitly, as a justification for Western (and specifically American) colonialism. Criticizing the literature relating to Asia and the Middle East by using poststructuralist epistemology,¹²² Said concluded that Western writings about the Orient depicted it as an irrational, weak, feminized "other," contrasted with the rational, strong, masculine West.¹²³ These contrasting categories, he suggested, derived from the need of the Orientalists, who authored these texts,¹²⁴ to create "difference" between West and East attributable to immutable "essences" in the Oriental structure. Said contended that these descriptions are a mere reflection of an entire canonical arsenal of representations of "the Oriental mind" created by the colonizers. These representations were shaped by the myths or stereotypes attributed to the Orient by the Western observer, who was himself confined in his identifications by Westernized epistemology. By coining the term Orientalism, Said's most significant contribution was not in dismantling the myths that had masqueraded as facts, but rather in re-conceptualizing them as a powerful domination discourse.¹²⁵

On an even more radical note, Said argued that the body of research within colonial Orientalism was not only intentional but indeed structurally targeted: the magistrates' reports were used to capitalize on colonial administration. Essentially, these seemingly ethnographic accounts and illustrative narratives constituted a set of manual aids, which assisted in expanding the colonial interests. Ultimately, Said identified the Orientalist discourse as still occupying sociocultural discourses. Its contemporary manifestations, however, are distinct from that of its traditional Orientalist predecessor. He asserted that a similar repertoire of the Orient is being created consistently within a discourse of cultural subordination, which itself is built upon the convenient stereotyping of Middle Easterners.¹²⁶ Though heavily criticized for some of its constituting elements,¹²⁷ Said's post-colonialist conceptualization of Orientalism had been immensely influential, specifically, on cultural studies.

B. *"Translating" Said's Orientalism into the Israeli Context: An Intra-Jewish Version of Orientalism*¹²⁸

Ella Shohat, Said's student and successor, was the first and most significant scholar to "translate" or "transform" Said's work into the Israeli context.¹²⁹ In her landmark book, *FORBIDDEN REMINISCENCES*, Shohat explores the images of Mizrahis in the Israeli cinema and film industry as canonical texts and narratives that reflect the ways in which Zionism has addressed Mizrahis, eventually, as Orientals.¹³⁰ Shohat introduced the framework of Orientalism in the Mizrahi case, thereby conceptualizing their status within the broader Palestinian context and indicating the intercon-

nectedness of these groups through the notion of “Arabness,” which has been portrayed hegemonically through an Orientalist process of myths and false representations. The “Arab” narrative borne by Mizrahis “endangered” the “Western” and “civilized” foundations of Zionist ethos, and was therefore excluded from Zionist collective memory and narrative. The solution to this “threat” was the imaginary, though official, “melting pot” ideology, whereby the Mizrahis had to deconstruct their “barbaric” identities, deny their “folkloric” past, repress any “Arab” cultural aspects of their heritage from “the old world” and “melt” into the new Israeli society alongside other “Jews.” That society was in fact a meltdown into Eurocentrism.¹³¹

One real consequence of this melting-down is the erosion of Mizrahi culture and dignity.¹³² According to Shohat’s analysis, although Zionism is primarily perceived as a nationalist project, it was, in fact, founded upon deep Eurocentric ethnic sentiments. Within this additional aspect of Zionism, this project has shaped Mizrahi identity, as is too often the case, through stereotyping the “other:”¹³³ the Mizrahis who by being mostly of traditional and religious background and of Arab/Muslim descent, represented ultimate otherness. Mizrahis, who were seen as primitive and decadent Jews “one grade above the Arabs,”¹³⁴ as some Zionist founders described them, were thus forced to deny, forget, or repress their own Arab culture and language in order to assimilate.¹³⁵ Shohat therefore claimed that Zionism was, roughly applied, a particular case study of Orientalism, saturated in fears of Islam and “Arabness.” With time, Shohat’s reading of Zionism through the prism of colonialism has made substantial contribution to understanding it in non-traditional ways.¹³⁶

C. *Zionism’s Multidimensional Characteristic and Its Ambivalence Toward Mizrahis’ Otherness*

In his seminal work *THE ARAB JEWS*, Yehouda Shenhav also offers great usefulness to my own socio-legal analysis. As elaborated earlier, Shenhav claims that ethnicity has played and still plays a central, though hidden, role in shaping the Israeli state and its stratifications. Shenhav stresses that by emphasizing nationalism as its formative notion, Zionism has marked the Mizrahi identity as separate from that of the Palestinians, while in reality seeing those two groups as closely related. Within this scheme, the “Arabness” of *both* Mizrahis and the Palestinians worked as a negative trait even if for different reasons; one that the Mizrahim should have suppressed, and more so, one by which the Palestinians were doomed to be primordially subordinated. The sophistication of the “othering” of Palestinians is manifested by channeling it through the category of “Arabness.” A closer look, however, reveals that this “othering” goes hand in

hand with the de-politicization of the Mizrahi category, which was achieved through the artificial detachment of their case from the Palestinian case. This "othering" enabled separating the two into "different" discourses: the intra-Jewish ethnic one and the inter-Jewish national one.¹³⁷

Shenhav encourages Mizrahis to reshape their own identity through the process of colonial analysis. Though maintaining their Jewish identity, Mizrahis should, Shenhav suggests, add to it the seemingly contradictory trait of "Arabness," from which to reconstruct their identity as "Arab-Jews." This category has already been in use in the past for different purposes, ranging from Orientalism to critical analysis. It has, therefore, a hybrid nature that renders it less consistent or coherent¹³⁸ than expected as an antidiscrimination categorization. I find this category, which is oxymoronic by design, to be extremely useful and intriguing as a way to problematize the traditional distribution of Israeli identities and powers.

IV. THE LEGAL ASPECTS OF ISRAELI ORIENTALISM

A. *Turning Sociocultural "Third Space" into Legal "Difference"*

The sociopolitical structure of Zionism, to which Shenhav alluded, is reinforced through the legal system. To reiterate, although the Israeli legal system bares no formally explicit discriminatory rules against Mizrahim, it ignores the discrimination practiced against them, even while entertaining claims of institutional discrimination against the Palestinians. Thus, this legal system forms, facilitates, and maintains the "Arab-Jew" dialectic as founded on a "national-Zionist" basis rather than on an ethnic-anti-Arab one. Once defined as "nation-based," the dialectic positions "Jews" on one side of the scale and "Arabs" on the other one, (who are not confined to Palestinians, but who constitute the immediate and only relevant group of reference in this respect). This positioning also makes it impossible for Mizrahis to somehow cross this "national line" and situate themselves at its Arab bank.

Within the socio-legal Jewish-Arab dialectic, Palestinians also find themselves in a bewildering position, for while suffering *de jure* discrimination, they also enjoy at least some benefit through numerous antidiscrimination laws that work in their favor. After decades of subjugating Palestinians through special discriminatory treatment, in the past twenty-five years the Israeli executive branch, the legislature, and predominantly the Supreme Court have demonstrated a gradual willingness to apply antidiscrimination rules and affirmative action plans to benefit Palestinians.¹³⁹ Notwithstanding this remedial atmosphere, Palestinians still face significant *de jure* and *de facto* discrimination, mainly through implied laws whereby the Israeli

legal system discriminates against all of its non-Jewish citizens; within the Israeli social context, this discrimination primarily harms its Arab citizens.¹⁴⁰ In addition, Palestinians remain by far the most underprivileged community of citizens in Israel today: they are almost completely segregated from Jews; they endure the highest rates of unemployment and earn the least; they are deprived of meaningful political participation in national decision-making; they receive minimal governmental support for socioeconomic sustainability; and they suffer from the lowest community infrastructures in Israel, whereby their health, physical wellbeing, and lives are seriously endangered.¹⁴¹

Caught within this nationalist rift even while being Israeli citizens, the Palestinians' allegations of discrimination are generally mitigated within what can be aptly described as "social" as well as "civil" contexts, rather than "political" ones.¹⁴² Namely, they bring their discrimination claims as predominantly based on civil rights violations and state interference with their civil life experiences. However, these socio-civil pleas are often evaluated in light of "political" considerations, thereby burdening their civil claims with political concerns.¹⁴³ A close analysis reveals that courts and the legislature limit the rights of Israeli-Arabs in collective, "social" arenas, where a "political" threat to the Jewish characteristics of Israel is allegedly posed. For example, in the years 2000 and 2001, the Knesset rejected initiatives to statutorily declare the full equality of the Arab minority citizens in Israel. On another occasion, the Supreme Court declined to give Arabic a formal and institutional linguistic status alongside Hebrew.¹⁴⁴ And, just recently, the Israel Supreme Court declared constitutional a statute that bans non-citizen Palestinians who married Israeli-Palestinians from joining their spouses inside Israel, stating rather explicitly that this "right to family life" threatens Israel's demographic Jewish leverage.¹⁴⁵ Using a "third space," whereby Mizrahi Jews and Arabs join in shared concerns, would possibly frustrate such contamination of civil claims as political/national.

Adapting this new category of Palestinians and Mizrahis shared "Arabness" to the legal sphere has never before been proposed. In a sense, one might say that Mizrahi intellectuals failed exactly where criticism should shine: in the legal system. Instead, they misinterpreted the legal system's silence regarding Mizrahis as irrelevant to their case. No Mizrahi scholars have heretofore specifically addressed the role of the legal sphere in constituting Mizrahim as a category. It is therefore crucial to push this analysis further and explore the feasibility of "Arab-Jewish" unity/communion with a strong sense of "Arabness" as a legal category. I adhere to this new category intuitively since it offers, as a first step, a replacement of the old "Mizrahi" category, which is trapped in the "dynamic of denial," where it has proved incapable of producing any legal merits. Secondly, and no less

importantly, doctrinally, this category encompasses the Arab trait, which prominently serves as a "suspect classification" within Israeli discrimination discourse.

My analysis, though, does not settle for the new categorization of Mizrahim as an end in itself. Rather, it strives to achieve an integrative and contra-dialectical objective, as it relates to shaping Mizrahi identity while having a close dialogue with the Palestinian one. Both Palestinians and Mizrahis seek a conceptual space where they can mediate their allegations and disputes vis-à-vis Ashkenazi dominance, and perhaps work together to alleviate the power imbalance of the latter over the former. The analysis of Orientalism enables them this "third space," whereby they meet on an old-new platform of "Arabness."¹⁴⁶ This platform, however, does not have an essentialist ancestry or a mere sociopolitical lineage. Mizrahis are not "Arab" in the sense that Palestinians are, for Palestinians are not integrated into Israeli society the way Mizrahis are. This new platform is thus a match point of the unmatched: it is composed of both Arab-Palestinian and Arab-Jews identities, yet it re-forms as another, hybrid identity, which is tailored more closely to their antidiscrimination needs as shaped through these groups' shared traits and, sometimes, experiences of discrimination.

In Shenhav's work, the hidden dimension of ethnicity brings Mizrahis and Palestinians back together, on the conceptual level. My work complements this idea by arguing that ethnicity brings them together as a legal and practical matter, as well. Understanding the connectedness of these two groups entails enormous influence for shaping their possible effective actions to fight against the subordination from which both groups suffer, sometimes separately and sometimes jointly; this newly conceptualized cooperation shall be presented hereby.

B. *Hybrid "Arab" Group Identity and the Israeli Antidiscrimination Legal System*

An introduction to the Israeli antidiscrimination legal system should be made in order to evaluate the sustainability of my suggestion. Going back to my earlier remarks, note that Israel's antidiscrimination rules resemble in many aspects those of the American legal system, by which it has been most influenced.¹⁴⁷ The Israeli antidiscrimination redress mechanism offers two main venues of advocacy: the constitutional-administrative one and the tort-like one. This bifurcation also resembles the division in the American system, between Fourteenth Amendment constitutional claims and Title IV tort-like claims. As opposed to the American system, however, both claims' formats perceive notions of affirmative action as integral to them and both apply to facially neutral, disparate impact policies, as well

as to disparate treatment policies. These mechanisms also allow burden-shifting once group-based differential treatment is proved before the court.¹⁴⁸ Another important departure of the Israeli system from its American counterpart relates to the former's adherence to a group-based perception of antidiscrimination tools.¹⁴⁹ As opposed to the Equal Protection Clause's individualistic form and choice of words as focused on "any person," the Israeli antidiscrimination principle is shaped to prohibit discrimination based on group traits such as race, religion, nationality, sex and so on.¹⁵⁰ Consequentially, the Israel Supreme Court would normally apply its ruling to sectors rather than to specific plaintiffs.¹⁵¹

According to Fiss's analysis of antidiscrimination principles, reference to these "natural classes" is the best indicator of the Court's adherence to addressing group discrimination and its concern with group stratifications.¹⁵² Additional indication lies in the sort of relief that petitioners in Israel seek. Though most antidiscrimination claims seek individual justice, such as the right of a Palestinian family to live in a Jewish town¹⁵³ or the rights of a woman to be summoned to the army's pilot training course,¹⁵⁴ many other claims have more communal aspirations.¹⁵⁵ Recently, a growing number of claims for antidiscrimination relief relate to group rights, most prominently, the right of equal share in budget allocations.¹⁵⁶ All these characteristics of Israeli antidiscrimination law demonstrate its openness to group-based equality advocacy.

Underlined by the "sameness/difference" dichotomy as previously described, Israeli antidiscrimination law holds a three-stage test to detect and identify forbidden discrimination. It first seeks to identify differential treatment, whether intended or consequential. Second, the Court determines the basis upon which the relevant state action has been administered. At this stage, the Court would usually seek the category by which the disadvantaged group has been classified. In the third stage, the Court would scrutinize the state action to determine its constitutionality, mainly in terms of its legitimate end and its proportionality.¹⁵⁷ Within this framework, the second stage would usually set the major barrier to Mizrahis, as currently they are not legally considered to be an "identifiable" group subject to discrimination. A similar framework is set for affirmative action claims. Here, a group that seeks recognition and redress under affirmative action plans needs to first substantiate itself as suffering from discrimination that justifies an active endorsement of its interests. Here again, Mizrahis are not expected to encounter such difficulties as rising to the point of discrimination. Despite having statistical evidence of their subordinate status, Mizrahis' greatest barrier from being considered eligible for affirmative action is, again, their lack of recognition as a group.

Read against this background, it can be concluded that the legal use of

the new hybrid category "Arab-Jew" has great potential for bettering the position of the Mizrahi and Palestinian groups, to the extent that they use antidiscrimination mechanisms. In light of the Israeli Court's adherence to group-based equality and its solid tradition of assigning to the "Arabness" categorization the greatest suspecting attention, this move makes tremendous strategic sense.¹⁵⁸

C. *"Third Space" Battlefields*

"The same historical process that dispossessed Palestinians of their property, lands and national-political rights, was linked to the dispossession of Middle Eastern and North African Jews of their property, lands, and rootedness in Muslim countries."¹⁵⁹

Once the common threads between the oppression of the two groups are recognized, it becomes easier to detect the similarities in the discrimination methods imposed upon both Mizrahis and Palestinians, which can then lead to joint resistance against those methods. Accordingly, the far-reaching objective of my article is to encourage Mizrahis and Palestinians to initiate shared battles, based on the shared components of their identity and their discrimination alike.

This is not some "theoretical experiment" for Mizrahis and Palestinians. Rather, what is envisioned is a real and meaningful path already being pursued by these two groups, at times separately and at times jointly, yet done so more systematically and more frequently. As my analysis thus far has demonstrated, the bright-line distinctions held in the formal legal-political arena between Mizrahis (as part of the Jewish population) and Palestinians (as part of the Arabic population) is far less relevant for Israeli real-life experience.

Indeed, in many respects Palestinians and Mizrahis have more in common than appears to the naked eye. It is crucial to both groups' interests that this commonality be better understood and maximized strategically. In terms of spatial and cultural geography, the two groups are known to comprise Israel's wilderness and periphery. They also comprise the typical population of "mixed cities" such as Akko, Jaffa, Lod, and Ramle, all of which are notorious for their ultra-underprivileged status. Related to their geographic marginality, the two groups share the unhappy burden of being Israel's least empowered communities. In terms of social wealth, they are at the bottom of statistical indicators, structurally barred from social mobility, and lacking useful political power.¹⁶⁰

That both groups suffer from related discriminatory mechanisms is apparent also in the fact that it would be more likely to find Mizrahi-Pales-

tinian shared battles for correlative interests, rather than Ashkenazi-Palestinian ones. With both great care and confidence, I assert that there has not yet been a common battle waged by Ashkenazis and Palestinians that was not built upon philanthropic foundations on the Ashkenazi side rather than on some sense of shared destiny and real common cause.¹⁶¹ Yet, these similarities in their point of departure may allow Mizrahis and Palestinians opportunity to engage in common battles and avail themselves of common strategies toward common interests. I shall now turn to pointing out some specific doctrinal implications and ramifications that my analysis bears.

1) *Discrimination Based on Identity*: Arab and Arab-related identity signify inferiority in various Israeli contexts. The most prominent example is discrimination that prevents the entrance of Mizrahis and Palestinians into clubs and amusement facilities and from enjoying fair access to services. It is very common to confuse Palestinians with Mizrahis, in terms of physical appearance, names, and sometimes even accents. Interestingly, Palestinian plaintiffs have at times claimed that it was their Mizrahi look-alike physical characteristics that ignited racist behavior against them.¹⁶² This identity “confusion” goes both ways: for example, my Iraq-born friend, Dr. Hani Zubida, who possesses an Arab name, is in fact a Mizrahi Jew who is engaged in human rights political activity. Each time his published column appears on national websites, his writing is met with racist backlash that assumes and then focuses on his seeming “Arabness,” such as this poster’s comment: “This Palestinian person will not teach us the rules of democracy.” The deep irony is that the only way to prosecute such commentators is to claim that they have discriminated against Hani because of (his supposed) “Arabness,” and not because of anything else.¹⁶³

2) *The “Danger Zone” of “Arabness”*: Mizrahis and Palestinians can engage one another’s identity as a means for better revealing the hidden ethnic dimensions of the discrimination each faces, and for articulating how this discrimination is disguised in the veneer of security concerns. For Mizrahim, such articulation would make it easier to stress the reality of their discrimination as ethnicity-based and as specifically associated with anti-“Arabness.” For Palestinians, this conceptual change would be helpful in removing the political dimension (e.g., as embodied in the concern regarding the safety of Israelis that is frequently raised against Palestinians as posing an alleged security threat) from their quest for social equality. Unveiling anti-Palestinian discriminatory practices as stemming from their Arab ethnicity, rather than their nationality, would nullify the relevance of security issues and concerns normally used to justify such practices. A sharp example of this reconstructionist potential is shown through litigation pertaining to the Israeli Civil Rights Act.¹⁶⁴ Although the Act forbids discriminatory practices against people based on their nationality,¹⁶⁵ it allows

the alleged discriminator to assert a defense claim premised on the security risk the plaintiff posed either to the public or to the specific public accommodation place that the defendant was not permitted to enter. This excuse can easily be associated with the "security" excuse traditionally invoked against the inclusion of Palestinians in Israeli public life. Prominent examples of which are special security checks (these are particularly harmful and degrading measures taken against Palestinians in Ben-Gurion, Israel's only international airport) or the refusal to allow entry to entertainment facilities.¹⁶⁶ Security considerations also affect Palestinians' most private aspects of living. As previously discussed, the Family Unification Act forbids, as a general matter, *all* family unification of spouses from outside of Israel with their Israeli citizen Palestinian spouses, who are, in turn, invited to unify with their loved ones in the occupied territories or any other country outside of Israel.¹⁶⁷ The Israeli Supreme Court has twice upheld this law based on the issue of security reasons.¹⁶⁸

The "security" excuse meandered into the Mizrahi discrimination sphere, albeit in a more subtle, non-nationalized manner: it began being raised against Mizrahim, who are regularly subject to bans from nightclubs in Israel. Here, the club owners usually raise their concern for personal security of the clubbers as a defense, claiming that the Mizrahi plaintiff, who normally possesses an "Arab" appearance, looked like "Arss," which is the derogatory Hebrew word for a dangerous, degenerate person (though, in fact, it comes from an Arabic word, meaning "pimp").¹⁶⁹ Tracing the common thread of these claims can help to weaken their validity and authenticity as excuses. Their sheer usage is by itself discriminatory in nature, since they perpetuate the Orientalist disgust and fear of "Arabness" as "invading" upon the imagined Eurocentric Israeli Jewish space.

3) *Discrimination in Budget Allocations*: The Israeli Supreme Court has long ago ruled in favor of the right of Palestinians to have an equal share in Israel's annual budget allocation plan and funded programs.¹⁷⁰ The Court's calculus of Palestinians' entitled share was derived from their relative percentage in Israel's overall population. A shared Mizrahi-Palestinian "Arabness-oriented" argument regarding budget allocation could thus transform how the Court estimates this share if it were quantified based on the aggregate of both the Palestinian and Mizrahi populations to whom the allocation may apply: together, the groups encompass a majority of more than 65 percent of Israel's population. For example, a demand based on the National Broadcasting Law of 1976 to allocate some share of its budget to developing the Arabic tradition, language, cultural assets, and so forth through national television broadcastings could be supported by a similar Mizrahi-based plea. Such supportive pleas would dramatically increase (from 20 percent up to 65 percent) the population entitled to cultural recog-

dition, strengthen the demand, and compel the national broadcasting office to invest proper means for introducing Arab culture to the Israeli Jewish public and familiarizing the latter with the former's virtues.

4) *Economic and Geographic Periphery Based Discrimination*: In many respects, Mizrahis and Palestinians share the faith of the bordered subalterns. This faith is stated not only in a symbolic fashion, but also as a realistic matter. Israel's peripheral population is comprised mainly of both groups. Mizrahis, therefore, border the Israeli geographic center and the Palestinian urban and (mainly) rural areas. Sociological literature has explored the role of the margins as gatekeeper subjects, as well as dynamic objects of agency that are undergoing a process of hybridization.¹⁷¹ Though controlled by the state's geopolitical demarcations, the subalterns are communicating through daily practices, where identity traits (e.g., language, culture, and aspirations) and obstacles are being shared. Through this process, the subaltern border positions function more "as a hyphenated rather than as a fixed entity, thereby refusing to settle down in one (tubicolous) world or another."¹⁷²

Israeli Mizrahi sociologist Galit Saada-Ophir has explored Mizrahis and Palestinians subaltern border positions from a cultural perspective. Reflecting on their dynamics at a mutual "borderland," Saada-Ophir explored the role of Mizrahi popular music as a site for recreating their hybrid identity.¹⁷³ Like Saada-Ophir, in my project I seek to explore the possibilities of new dynamics at the borders of the law. However, I differ from Saada-Ophir in my view of the hybridization process's functional merits. Specifically, Saada-Ophir concludes her research by stressing that Mizrahis' movement across musical borders has not yet "actualized its potential to become a creative presence in the Middle East that could challenge state policies by presenting a space in which Arabs and Jews do not exist in endless conflict."¹⁷⁴ Yet the practices of crossing the borders of legal categories and discourses that I advocate aspires to such an Arab-Jew actualization.

4.1) *Land Allocation and Housing Rights*: In the domain of land ownership and allocations, Palestinians undoubtedly suffer most from deep and grave deprivations.¹⁷⁵ Yet some of the practices held against them in this regard are very close to those held against Mizrahis, too. Harbon shows, for example, how the Israeli land regime and housing policies deprive both communities of their land rights, as well as benefit those who, as a group, comprise the main of property ownership in Israel today. It is therefore the mission of both communities to challenge this unfair distribution.¹⁷⁶ In a recent semi-legal "Popular Court" event, (primarily) Mizrahi and Palestinian petitioners presented their stories of the oppression and other suffering

each incurs, indeed in very similar ways, due to the harmful and abusive policies held against them as public housing tenants.¹⁷⁷

4.2) *Local-Central Governance Relations*: Israel’s poor is comprised mainly of Palestinians and Mizrahis who suffer from very low economic status.¹⁷⁸ Combining the struggles of both groups can illuminate the systematic yet traditionally concealed contribution of the State to their socio-economic status. For example, a group of Mizrahis, including myself, initiated a petition to the Israeli Supreme Court, which sought to sue the government for non-payment of local authorities’ employee salaries in both Mizrahi and Palestinian municipalities. Although there was at that time a nationwide financial crisis, it should be noted that not even one Ashkenazi municipality faced a similar fate as the Mizrahi- and Palestinian-dominant municipalities. Israel’s customary way of rationalizing this crisis in the Palestinian municipalities was by attributing its occurrence to “Arab-style” corruption and irresponsible policies, coupled with their population’s “Arab” nature of tax avoidance, which led to the demolition of their municipal budget.¹⁷⁹ These allegations became easier to overcome and dismiss once it was possible to point to the fact that Mizrahi communities, as Jewish communities, suffered from the same crisis, which resulted from the two groups’ shared oppression in being positioned on Israel’s cultural, political, and financial periphery. The petitioners then argued that government had a duty to cease its lingering, disempowering ill-behavior and to order the payment of these employees’ salaries. The Court, now faced with the petitioners’ joint power, handled the two groups as one, and deliberated on mutual rights (to governmental support) rather than their separate obligations (to pay local taxes).¹⁸⁰

4.3) *The Right to Equality in Public Services*: Living mostly in the geographic periphery of Israel, Mizrahis and Palestinians suffer from similar deprivations of public services that both groups could, and should, challenge. For example, the founding of governmental hospitals requires a governmental/executive decision. Most of Israel’s hospitals are “naturally” located in the center of Israel, whereas its geographic peripheries—and the populations who live there—suffer from life-threatening lack of satisfactory medical services. Mizrahis and Palestinians should file mutual petitions that seek to compel government to activate its authority and vote in favor of placing government hospitals where they are needed.¹⁸¹

D. *Implications and Ramifications*

1) *Immigration and Naturalization Laws*: Naturalization rules, which are tightly related to the Law of Return, present another arena where the new, jointly-advanced struggle can take shape. The Law of Return statute

is particularly harmful for Palestinians because it is designated for Jews alone, thereby not allowing Palestinians to return to their homeland (note: I do not refer here to the Palestinians' right of return to their pre-war villages, but rather of letting them enter Israel and unite with their families).¹⁸² This statute was designed to promote the "Jewishness" of the Israeli state and maintain a Zionist aspiration of having a Jewish demographic majority.¹⁸³ In reality, however, the statute has been used in ways that may have actually, and ironically, contributed to a growing, disturbing phenomenon of immigrant youth who engage in anti-Jewish "neo-Nazi" activities inside of Israel itself.¹⁸⁴ Indeed, application of the Law of Return seems to have contributed to the unintended consequence of "old European style" anti-Semitism against Jews within a Jewish state.

2) *Regarding Non-Israeli Palestinians*: The Mizrahi-Palestinian "third space" analysis and its promise as a politico-legal strategy bares relevance mostly with regard to the fight against discrimination of Palestinians who hold Israeli citizenship.¹⁸⁵ The potential legal effect of such a "third space" should be further explored in an effort to expand its scope of influence. Here, I point briefly to a recent statutory demand that women be a part of the negotiation teams toward a permanent settlement with the Palestinians.¹⁸⁶ One can envision a parallel demand regarding Mizrahis as guaranteeing that a mutual Arab-sensitive characteristic will be inserted to any future peace settlement.¹⁸⁷

3) *The Basic-Laws' Paradox—The "Jewish and Democratic State" Dyad*: The main obstacle that every Palestinian legal battle encounters and must overcome is the one relating to the nature of the Israeli state as democratic as well as Jewish, the latter being a means of justifying many courts' refusals of, or hesitations to find for, Palestinian petitioners' claims.¹⁸⁸ Reconstructing Palestinian-Israeli relations from a Mizrahi point of view can alter the disposition of the petitioners on this dichotomy and thus force the courts to consider a more creative, innovative reasoning style. Considered under the "third space" conceptual framework, a Palestinian quest would not be read anymore as challenging the "Jewish" trait of Israel's constitutional paradigm, but rather its "Democratic" one. Similarly, an ethnic-based challenge, rather than a nationality-based one, will compel reconsideration of the deepest causes that generate discrimination against Palestinians and Mizrahis in disallowing their equality rights.

The debate over Israeli constitutionalism's two counterintuitive institutional commitments, to maintaining a "Jewish and Democratic" state, has been profuse and unending, yet also quite limited. Taking the distinctiveness of these two characteristics as given, scholars have contemplated their relations vis-à-vis one another as opposites, complements, parts of a hierarchical order, and so on.¹⁸⁹ By contrast, my reflection on this dyadic nexus

considers these two concepts to be much less separate and different from one another than might be seen at first glance. Re-reading these characteristics as open and interactive ideas, I contend that the "Jewish and Democratic" components in this dyad share an ethnic dimension that therefore brings them into close relation to each other. This dyad is self-evidently rooted in the Zionist idea of the state as Jewish yet European insofar as it is democratically secular and not religious. Still following Shenhav's line of thought, the dyad is expected to employ ethnic consciousness, yet again albeit in hidden fashion.

Articulating the "Jewish and Democratic" dyad anew has obvious ramifications. As introduced earlier, Israeli courts and the legislature limit rights of Palestinians in "social" arenas, where there is a supposed threat to the Jewish characteristic of Israel. Under this epistemology, the Supreme Court has, for example, declined to give Arabic a formal and institutional linguistic status alongside Hebrew. It did, however, allow the use of Arabic alongside Hebrew, thereby keeping its secondary status and preventing it from having any significant effect on the Jewish characteristic of Israel. A more interesting claim could be that the Jewish characteristic of Israel comprises the Arabic language as it serves as an integral part of Jewish tradition for Israelis of Arab descent, as opposed to the threatening manner in which it is traditionally perceived.¹⁹⁰ This claim is consistent with the possible call for revised broadcasting budget processes and allocations in order to promote understanding and appreciation of Palestinian and Mizrahi culture, social contributions, perspectives, and the like. Mizrahis, in particular, can offer this option of being "Jews" and also adhering to Arabic. On the same note, maintaining the democratic characteristic of Israel requires that Palestinians be immune from the confusion of their political struggle with the much simpler demand for recognition of their cultural rights as civil rights.

My analysis of this dyad's categories, therefore, invites complexity into the interpretation, which also broadens the scope of interpretation beyond what current reading of the issues and dynamics permits. To summarize, introducing a conceptual and discursive "third space" as a legal notion will create bridges towards social fraternity in Israeli society, as well as practical usages that will facilitate both Mizrahi and Palestinian quests for equality. Important questions remain as to whether and, if so, how this conceptual notion can turn into a practical reality.

V. POSSIBLE RESERVATIONS

Notwithstanding its enormous potential for destabilizing and dismantling existing power relations in Israeli society, I anticipate that the proposed analysis will encounter skepticism, mainly as a practical matter,

though perhaps also conceptually and theoretically. Here I consider a few probable objections to my project and offer some initial lines of counterargument.

A. *Jewish-Arab “Shared” Interests—Oxymoronic?*

My analysis may raise concerns that in the current Israeli sociopolitical structure, Palestinians and Mizrahis are positioned in a zero-sum; their demands are hence expected to be read as mutually exclusive, as often happens with minorities who must compete with one another during their quests for equal living and budget allocations.¹⁹¹ The case of the *Arab High Observance Committee*¹⁹² illustrates this point squarely. There the Court upheld a Palestinian plea to declare void a governmental rehabilitative plan that set out to improve education services in Israel’s periphery but excluded most Palestinian peripheral settlements from its scope of application. As a result, the whole plan was declared voidable and its positive mission was substantially threatened.¹⁹³ Nevertheless, in most cases, the interests of both groups when brought together will overcome a “divide and conquer” strategy and zero-sum anxieties. For example, a quest for any other similar periphery-based governmental plan that may be brought jointly or in unity before the Court will be discussed as “compelling” by virtue of its being brought forth indiscriminately by all peripheral communities in Israel—namely, mainly Mizrahis and Palestinians.

B. *Mizrahis and Israeli Political Divisions*

This author contends that Zionism has managed to conceal the dialectic through which discrimination against Mizrahis and Palestinians is at least partially administered,¹⁹⁴ and also, importantly, to turn the two minorities against one another. In today’s Israel, right-sided political parties (like the Likud) who stress Jewish-nationalist agendas enjoy wide support from Mizrahim, while the left side (Labor, Meretz), which stress a pluralistic democratic account of the state of Israel, enjoys support mostly from Ashkenazim.¹⁹⁵ The fact that the Mizrahim were forced to live in Israel’s frontiers in times of armed conflict also sharpens the feeling of animosity.¹⁹⁶ Under such a political structure, it seems unlikely to expect any significant Mizrahi-Palestinian cooperation.

Yet several lines of responses can be offered to this particular objection. One is that, prior to Ashkenazi occupation of the peace camp, Mizrahis were actually the first people to resist going to the army back in 1949. A second is that, nowadays, Mizrahi personalities such as Mordechai Vanunu and Tali Fahima stand at the forefront of the battle for peace,

despite being marginalized as "whores" (where female) and traitors (where male) while their Ashkenazi equivalents are often perceived as hero leftists.¹⁹⁷ A third response is that understanding the Mizrahi/Palestinian rift as belonging to the colonialization context, whereby Mizrahis were expected and taught to treat their "Arabness" as an extinguishable trait of their identity (rather than as integral to their being), brings new possibility of meliorating this hatred. Fourth, in the search for social passing toward establishing social mobility for the group, "Arabness" has become to Mizrahis a source of shame, blame, and humiliation.¹⁹⁸ Through this "third space" reconceptualization, however, "Arabness" can now serve as a source for positive social mobilization.

It is also important to ponder and then respond to a consideration which faces Palestinians alone: are they willing to associate themselves with Mizrahis in such a project of intergroup solidarity? Some Palestinian scholarly work, such as that of Azmi Bishara, indicates a likely refusal to see solidarity.¹⁹⁹ Ironically, such works ultimately derive influence from Said's and they usually want to preserve some kind of distance from Jewish-Arab initiatives, albeit done within post-Zionist discourse. While such reluctance, on both sides, is to be expected, I contend that it can be countered through the constantly growing alliances that have recently sprung up in Israel. Intellectual discourse on this topic, conducted mainly by Mizrahis, has generated, and in some cases regenerated, Mizrahi-Palestinian alliances of grassroots groups who work together on shared interests and common battles. Activist groups are already working together to fight the discrimination that Palestinians and Mizrahis face—mainly in the fields of housing, workers' rights, and land allocation. These efforts prove that joint Mizrahi-Palestinian potential exists and indeed has already taken effect. Moreover, in contrast to political actions, which by their nature must involve large numbers, the personalized nature of legal fights enables a handful of individuals to initiate large-scale change for the betterment of whole communities. Mizrahim, as other scholars have envisioned them, have a strategic role to play in building bridges between Palestinians and Israeli Jews.²⁰⁰

VII. CONCLUSION

Until now, sociocultural Mizrahi critiques of Mizrahis' status and conditions in Israel, and in relation to those of Ashkenazis and Palestinians, has focused on discursive analyses rather than practical solutions to the unjust social stratification in Israel.²⁰¹ My own account of this criticism is that Mizrahi critiques have been locked in a zero-sum position between theoretically conceptualizing the problematic and working for remediation. This,

of course, is a false dichotomy, because discourse—including scholarly, cultural, and legal discourse—plays important roles in the construction of reality.²⁰² There is, nonetheless, much worth in having practical implications to any critique, and this article aims at enabling it here, as well.

On a methodological note, I would conclude by pointing out that Orientalism discourse has not yet been effectively and widely implemented in legal scholarship in general.²⁰³ Likewise, in Israel, though it has been embraced by a handful of disciplines, it has not yet managed to break through the legal system's positivist walls of de-politicization. My article, therefore, tries to make at least one break in these walls of disciplinary separation by exemplifying the potential embedded in colonial/post-colonial theories for enriching the meager style by which the discrimination/antidiscrimination legal discourse is fashioned. This article also shows that the 18th through 20th century power of colonial dominance over the "Orient" has not shifted into a solely-symbolic power (maintained by popular media misrepresentations, as Said argued), but rather that it also pervades the legal sphere, where it has substantial distributive effects. However, I argue that, along the lines of the general move into a more liberal, equality-striving society, this power has changed the configuration of Orientalism from being a manifestation of domination/subordination to being one that offers only limited remediation to its Orient victims.

My argument therefore takes Orientalism to be the starting point but not an ending one. Rather, Orientalism provides a fundamental context from which we should begin our reconstruction of "narratives of discrimination," which can result in a change in the "structures of antidiscrimination laws" and destabilization of the "dynamic of denial." Understanding how these structures are limited to the very-constrained and minimally-liberating power that the "sameness-difference" dichotomy, Orientalism offers the flexibility required to turn the dichotomy into a continuum for recognizing and addressing complex forms of discrimination. However, the reconstruction process of the Aristotelian equality principle should also be further attuned to the changing forms of Orientalist dominance, as well as the effects that other narratives of Orientalism lay down atop or next to post-colonialist critiques, projects, and struggles. I believe that Orientalist critique, coupled with its succeeding contemporary thoughts, still offers a productive tool for the sharpening of legal understandings and approaches to complex social situations and relations. My belief is embodied by choosing to concentrate on the most significant, and most denied, configurative narrative of Orientalism in the Mizrahi identity.

Finally, my work should not be read as to imply that Mizrahim are now the same Arab-Jews as they (perhaps) used to be. As Albert Memmi warned, "It is far too late to become Jewish Arabs again." In a way, this

stipulation admits the relative weakness of my own argument. However, as equality-targeted means, I consider the approach that I have worked to outline and advocate here as the best means by which Mizrahi can regain "difference" and realize their right to equality, in essence by trapping the legal system in its own definitional creations in order to encompass Mizrahi's and Palestinians' contextualized complexities. Doing so will broaden the concept of "difference" to new legal and other discursive spaces, where it can be read more substantively rather than formally, and as working within and against denied "difference," including through the imposition of "sameness."

NOTES

1. Associate Professor, College of Management School of Law (COMAS) Israel. Ph.D., The Hebrew University of Jerusalem and L.L.M., Yale University Law School. Co-founder and chair of Tmura, The Israeli Anti-Discrimination Legal Centre, which serves as the only civil society legal organization in Israel focusing on the rights of Mizrahi as a discriminated community. I wish to thank Peter Schuck for his useful and thoughtful comments on early versions of this article and to the participants of the Forum on Multidisciplinary Research at Yale University Law School (2008). Also, I thank Duncan Kennedy for his initial thoughts on this project. This article was made possible due to the generous support of the Émile Zola Chair for Interdisciplinary Human Rights Dialogue at the College of Management Academic Studies (COMAS). The general ideas presented in this article, and some specific discussions herein, also appear in my presentation to the UN International Meeting in Support of Israeli-Palestinian Peace, held June 18-19, 2013 in Beijing. *United Nations International Meeting in Support of Israeli-Palestinian Peace*, UNITED NATIONS INFORMATION SYSTEM ON THE QUESTION OF PALESTINE (UNISPAL) (June 19, 2013), <http://unispal.un.org/unispal.nsf/1ce874ab1832a53e852570bb006dfaf6/e47aa890f806ee1885257bd3004e0c32?OpenDocument>. See Yifat Bitton, *Discrimination Due to Arabness and the New Bridge for Peace for Israel and Palestine*, UNITED NATIONS INFORMATION SYSTEM ON THE QUESTION OF PALESTINE (UNISPAL) <http://www.un.org/depts/dpa/qpall/docs/2013Beijing/P3%20Yifat%20Bitton%20E%20LONG%20-%20FOR%20WEBSITE.pdf> (last visited April 12, 2014).

2. EDWARD W. SAID, *ORIENTALISM* (1979) [hereinafter Said, *Orientalism*].

3. See Robert Nicholson, *Legal Intifada: Palestinian NGOs and*

Resistance Litigation in Israeli Courts, 39 SYRACUSE J. INT'L L. & COM. 381, 403 (2012).

4. Using the term “Israeli citizen Palestinians,” I wish to distinguish those Palestinians who reside in Israel from those Palestinians who reside in the Occupied Territories, Gaza Strip, and in the Diaspora. I separate the groups for the limited strategic purpose of this article only, since the civil—as opposed to militarist—Israeli legal system applies to the formers alone.

5. Alliance between these two groups will require overcoming substantial difficulties, which I believe can be solved. *See infra* Parts V-VI.

6. ISSACHAR ROSEN-ZVI, *TAKING SPACE SERIOUSLY: LAW, SPACE, AND SOCIETY IN CONTEMPORARY ISRAEL* 10 (2003). Forty-six percent of Jewish Israelis are Mizrahis and 41 percent are Ashkenazis. The remaining 13 percent are newly arrived immigrants, which are not categorized through this traditional division. Although it is true that some of the newly arrived Jewish immigrants, many of whom come from Russia, suffer economic hardship, their hardship does not reach the same extent as that suffered by the poorest Mizrahim. Moreover, as opposed to the Mizrahim’s static position, the transitional position of Russian immigrants in Israel suggests that they have a high prospect of acquiring a satisfactory status in Israeli society. *See* Michael Schulz, *Israel between Conflict and Accommodation: the Transformation of Collective Identities* (1996) (Diss. Thesis, Gothenburg University). Russian immigrants enjoy Ashkenazi networking, and their transitional position in Israel is part of the usual, well-known immigration absorption difficulties that all immigrants usually suffer. In contrast to the impression shared by many, this group became fairly well-integrated in Israeli society and is relatively better integrated than are the Mizrahim or Ethiopian Jews. *Id.* at 157.

7. The term “Ashkenazim” relates mostly to Jews of European descent. This term is used in Israeli sociology to include American and Russian Jews, as well. It is easier, in this respect, to relate to a more broadly defined categorization than the definition offered by geographically based characteristics. For example, Ethiopian Jews are not considered Mizrahim, let alone Ashkenazim, but are by far one of the most discriminated-against groups among Jewish society in Israel.

8. Helán Page & R. Brooke Thomas, *White Public Space and the Construction of White Privilege in U.S. Health Care: Fresh Concepts and a New Model of Analysis*, 8 MED. ANTHROPOLOGY Q. 109, 111 (1994) (“ . . . [W]hite public space is comprised of all the places where racism is reproduced by the professional class. That space may entail particular or generalized locations, sites, patterns, configurations, tactics, or devices that routinely, discursively, and sometimes coercively privilege Euro-Americans over nonwhites.”).

9. Recent research reveals that Mizrahis amount to only nine percent of all Israeli academics. Israel Blechman, *The Ethnic Composition of Research Universities in Israel*, 33 THEORY & CRITICISM 191 (2008) (in Hebrew). In the legal field, this number drops to as little as six percent. Yifat Bitton, *Mizrahis and the Law: Absence as Existence*, 41 MISHPATIM 455, 474–85 (2011) [hereinafter Bitton, *Absence as Existence*].

10. Duncan Kennedy, *Frontier of Legal Thought III: A Cultural Pluralist Case for Affirmative Action in Legal Academia*, DUKE L. J. 705, 713 (1990).

11. Jane Flax, *Beyond Equality: Gender, Justice, and Difference*, in BEYOND EQUALITY AND DIFFERENCE, 193-210, 193 (Gisela Bock & Susan James, eds., 1992).

12. Compare AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 517 (4th ed. 2006) ("the ability or power to see or make fine distinctions") [hereinafter AMERICAN HERITAGE], and MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 358 (11th ed. 2005) ("the quality or power of finely distinguishing"), and RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 564 (2d ed. 2001) ("the power of making fine distinctions") [hereinafter WEBSTER'S UNABRIDGED]. See Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) (using the term "antidiscrimination principle" to refer to a principle against distinction-making). The flipside of this notion of discrimination lays in Western law's view of equality as stemming from Aristotle's notions of sameness and difference, according to which equality is guaranteed only to those who are "similarly situated," meaning "alike."

13. This notion is compatible with Foucault's perception of discrimination as an instrument for proactively establishing identities and differences. See CHRIS HORROCKS & ZORAN JEVTIC, INTRODUCING FOUCAULT, 64 (1999).

14. Accord AMERICAN HERITAGE, *supra* note 12, at 3184; WEBSTER'S UNABRIDGED, *supra* note 12, at 1525.

15. See *supra* note 1220. However, even broadest notions of "antidiscrimination as antisubordination" still acknowledge that subordination pertains to "different" and "identifiable" groups. Both of these notions are briefly and effectively reviewed in Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?* 58 U. MIAMI L. REV. 9 (2003).

16. Martha Minow describes this as the failure of rights analysis to escape the dilemma of difference. See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW, 147 (1990).

17. I borrow this idea from Raef Zreik's analysis of the non-Israeli-Palestinians as being located outside a frame of belonging to the Zionist

vision. Non-Israeli-Palestinians were described externally (e.g. “outside the frame”) rather than internally (or as a “missing part” that has to be built into the framework of Israeli society). Being situated in externally results in legal analysis devoid of a common normative ground on which their conflict can be adjudicated. Raef Zreik, *Palestine, Apartheid, and the Rights Discourse*, 34 J. PALESTINE STUD. 68, 72-73 (2004).

18. For the difficulties embedded in intersectionality, see, e.g., Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in U. CHI. LEGAL F. (1989) 139 (1989).

19. Most notably, feminists have objected to the notion of “difference” when exposing patterns of prejudice against women that the legal system has masked by ideas about difference and justified differential treatment. See Luce Irigaray, *‘Frenchwomen,’ Stop Trying, in THIS SEX WHICH IS NOT ONE* 189 (1985).

20. See Fiss, *supra* note 12.

21. *Id.* at 108.

22. The “ill fit” account of the antidiscrimination principle refers to scrutinizing discriminatory acts for whether they are arbitrary or justified, based on fitting the purpose of the discrimination with the act or aim in question. In the case that the discriminatory criterion applied results in an over-inclusive or under-inclusive result, the discrimination will be considered wrong and prohibited. *Id.* at 110-111.

23. “Difference” has been associated with prejudice rather than “distinction” in other fields as well. See Martha T. McCluskey, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L. J. 863 (1988).

24. Fiss, *supra* note 12, at 147-157.

25. CATHERINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSE ON LIFE AND LAW*, 32-45 (1987). See also Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L. J. 1373, 1378 (1986) (claiming that in sex discrimination doctrine, “the ‘relevant’ differences have been and always will be those which keep women in their place”).

26. Kathryn Abrams, *Symposium: Discrimination and Inequality Emerging Issues Afterword: Critical Strategy and the Judicial Evasion of Difference*, 85 CORNELL L. REV. 1426 (2000). RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS*, 142 (1993).

27. Abrams, *supra* note 26, at 1439-1442 (pointing to a set of reasons for judicial difference evasion, including psychological, philosophical and jurisprudential, and the ways to ameliorate their effect).

28. Stuart Hall, *Who Needs Identity?*, in *IDENTITY: A READER* 15-30, 15 (Paul De Gay et al., eds., 2000).

29. MINOW, *supra* note 16, at 51.

30. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973).

31. See Yifat Bitton, *The Limits of Equality and the Virtues of Discrimination*, 2006 MICH. ST. L. REV. 59 (2006) [hereinafter Bitton, *Limits of Equality*].

32. MINOW, *supra* note 16, at 20.

33. *Id.* at 47. Minow raises the further questions "How can historical discrimination on the basis of race and gender be overcome if the remedies themselves use the forbidden categories of race and gender? Yet without such remedies, how can historical discrimination and its legacies of segregation and exclusion be transcended?"

34. *Id.* at 111.

35. IRIS M. YOUNG, *INCLUSION AND DEMOCRACY* (2002); *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

36. MINOW, *supra* note 16, 83-120.

37. YOUNG, *INCLUSION AND DEMOCRACY* *supra* note 35, at 82-83.

38. See FISS, *supra* note 12, at 129-130.

39. NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE 'POSTSOCIALIST' CONDITION* (1997).

40. See the elaborate criticism in Iris M. Young, *Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory*, 222 *NEW LEFT REV.* 147 (1997).

41. I draw this conclusion in a previous paper, in which I show that antidiscrimination discourse proves much more effective for groups who suffer from *de jure* discrimination and far less so for groups who suffer from *de facto* discrimination, as the *de jure* discrimination is a more recognized and structured form of "discrimination" than is *de facto* discrimination. See Bitton, *Limits of Equality*, *supra* note 31.

42. HCJ 528/88 Avitan v. Israeli Land Authority 43(4) PD 297 [1989] (Isr.); HCJ 153/87 Shakdiel v. Minister of Religious Affairs 42(2) PD 221 [1988] (Isr.); HCJ 4541/94 Miller v. Minister of Defense, 49(4) PD 94 [1995] (Isr.); HCJ 678/88 Kfar Vradim v. Minister of Treasury, 43(2) PD 501, 507 [1989] (Isr.); HCJ 1703/92 C.A.L. Airlines v. Israel Prime-minister 52(4) PD 193, 235 [1998] (Isr.) ("discrimination is different treatment of equals and equal treatment of different").

43. See Carmit Yefet, *Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom*, 20 *YALE J.L. & FEMINISM* 441 (2009) (providing extensive exploration of the shift in the status of the right for equality in Israel).

44. Until recently, all discrimination pleas were judged by a unified test,

regardless of the basis for discrimination. This practice seems to have changed a bit, now that the Supreme Court has stated that some categorizations are more particularly troubling than are others.

45. HCJ 453/94 Women's Lobby v. Israeli Government, 48(5) PD 501[1994] (Isr.) [hereinafter Women's Lobby]; HCJ 1113/99 *Adala v. Minister of Religions*, 54(2) PD 164, 182 [2000] (Isr.); 10026/01 *Adala v. Israel Prime-minister*, 57(3) PD 31[2003] (Isr.).

46. Women's Lobby, at 565; HCJ 104/87 Nevo v. High Labor Court, 44(4) PD 749, 759 [1990] (Israel). In America, courts developed the disparate impact doctrine to interpret title VII of the Civil Rights Act of 1964. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The U.S. Supreme Court has rejected the disparate impact approach for equal protection claims. See *Washington v. Davis*, 426 U.S. 229 (1976).

47. See Edward Said, *An Ideology of Difference*, 12 CRITICAL INQUIRY 38 (1985) [hereinafter Said, *Ideology of Difference*].

48. Mexican-Americans, as a group, provide a good reference point for American readers of this article, as that group has suffered from *de facto* rather than proven *de jure* discrimination. See Bitton, *Limits of Equality*, *supra* note 31, at 594. At this crucial point however, Mizrahim still differ from Mexican-Americans, insofar as the Mizrahim have no point of departure from the Ashkenazim due to the two groups being linked legally by Jewish identity and Israeli citizenship. Additionally, the practice of creating a symbolic "other," namely, the Arab natives, has more strongly affected Mizrahis' sense of sameness as sharing with Ashkenazis, a united hegemony over Arabs. By comparison, in the United States, the beneficiaries of the African-American "otherness" were not Mexican-Americans or other racial, ethnic, linguistic, or nationally-identified groups, but rather poor whites and eventually white women. See Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1381-1382 (1988); Sally Kohn, *Affirmative Action Has Helped White Women More than Anyone*, TIME (Jun. 17, 2013) <http://ideas.time.com/2013/06/17/affirmative-action-has-helped-white-women-more-than-anyone/> (last visited April 4, 2014).

49. I adhere to antidiscrimination laws as the best available legal tool to combat discrimination given the inherent limitations of the law as a means to achieve social, and more particularly, racial justice. See generally Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); *Violence and the Word*, 95 YALE L.J. 1601 (1986).

50. YEHOUDA SHENHAV, THE ARAB JEWS: POSTCOLONIAL READING OF

NATIONALISM, RELIGION, AND ETHNICITY 17 (2006) [hereinafter SHENHAV, THE ARAB JEWS].

51. Yifat Bitton, *Finally, Our Own Brown! (?)*, 45(2) ISRAEL L. REV. 267, 269 (2012) [hereinafter Bitton, *Our Own Brown!*].

52. Ethnocracy is a political regime that, in contrast to democracy, is instituted on the basis of *qualified* rights to citizenship, and with ethnic affiliation (defined in terms of race, descent, religion, or language) as the distinguishing principle for citizenship/noncitizenship. The *raison d'être* of the ethnocracy is to secure that the most important instruments of state power are controlled by a specific ethnic collectivity. All other considerations concerning the distribution of power are ultimately subordinate to this basic intention. Ethnocracies are characterised by their control system – the legal, institutional, and physical instruments of power deemed necessary to secure ethnic dominance. See Oren Yiftachel, *Nation-Building and National Land: Social and Legal Dimensions*, 21 IYUNEI MISHPAT 637 (1998); *Nation-Building or Ethnic Fragmentation? Ashkenazim, Mizrahis and Arabs in the Israeli Frontier*, 1 SPACE & POLITY 149 (1997); *Israeli Society and Jewish-Palestinian Reconciliation: Ethnocracy and Its Territorial Contradictions*, 51 MIDDLE EAST J. 505 (1997); Alexander (Sandy) Kedar, *The Jewish State and the Arab Possessor, 1948-1967*, in THE HISTORY OF LAW IN A MULTICULTURAL SOCIETY - ISRAEL 1917-1967 311 (Ron Harris, Alexander Kedar, Pnina Lahav & Asaf Likhovski, eds., 2002).

53. Adva Center, a non-partisan, action-oriented Israeli policy analysis center, is one of the rare reliable sources for collecting and analyzing data regarding Mizrahis in society. Most of the data presented here is taken from the Adva Center website. See Shlomo Swirsky, Eti Conon-Atias, Hala Abu-Chala, *Annual Information on Equality & Social Justice in Israel 2008/2009*, ADVA CENTER, <http://www.adva.org/uploaded/tmunat%20mazav%202009%20final.pdf> (last visited April 4, 2014). The data relate to indisputable differences in education and employment between Ashkenazis ("A"), Mizrahis ("M"), and Palestinians ("P"), as revealed in percentages. In terms of eligibility for high school diploma, out of every group's potential students: 67 A/46 M/32 P. For entry to universities: 31 A/ 22 M/ not reported P. See also Iris Zarini, *Academic Periphery, Social Periphery: Mizrahi Professors in Israel*, in TO MY SISTER, FEMINIST, MIZRAHI POLITICS 143, 144 (Shlomit Lir, ed., 2007). In employment contexts, Ashkenazis earn 39 percent more than Mizrahis and 69 percent more than do Palestinians. Ashkenazis hold 54 percent of academic, managerial, and professional positions, compared with 29 percent by Mizrahis. Mizrahis statistically dominate Ashkenazis in the areas of clerical, sales, and service employment (30 M/ 23 A) and blue-collar labor (40 M/22 A). As to

unemployment rates, of out each group's total population: 1.5 A/7.5 M/10 P.

54. In the words of the head of the Jewish Agency who allocated housing to the coming immigrants, "preference should be twofold: a. the Polish Jews should be given a higher priority for housing. b. (. . .) better benefits in the camps. . ." See TOM SEGEV, 1949—THE FIRST ISRAELIS 173 (1984).

55. Hubert Lu-Yon & Rachel Kalush, *Housing in Israel: Policy and Inequality*, ADVA CENTER (September 1994) [hereinafter Lu-Yon & Kalush, *Housing in Israel*].

56. Erez Tzfadia & Oren Yiftachel, *Between urban and national: Political mobilization among Mizrahim in Israel's 'development towns,'* 21(1) CITIES 41, 44-45 (2004).

57. See Oren Yiftachel, *Nation-Building or Ethnic Fragmentation? Ashkenazim, Mizrahim and Arabs in the Israeli Frontier*, 1 SPACE & POLITY 2, 149-169 (1997) [hereinafter Yiftachel, *Nation-Building or Ethnic Fragmentation?*]; Lu-Yon & Kalush, *Housing in Israel* *supra* note 55.

58. In light of the numerical proportions of Israeli society as discussed in note 53 *supra*, the word choice of "minority" to describe Mizrahis signifies political powerlessness rather than numerical disadvantage. The dominance of a hegemonic group in society derives from its possession of power to dictate to other groups the basic rules and structures upon which that society is founded and through which it operates. Being a "minority," therefore, signifies a process of disempowerment. I use the terminology of "minority" to describe other disempowered groups throughout this article, as customary in Critical Race Theory.

59. A study led by Dr. Nissim Mizrachi of Tel Aviv University examined three randomly-chosen "integrative schools" in Netanya, a city known for its cultural diversity. The study's conclusion can serve to demonstrate the probable situation on segregated schools. See Nissim Mizrachi, et al., "*I don't want to see it*": *Decoupling Ethnicity and Class from Social Structure in Jewish Israeli High Schools*, 32 ETHNIC & RACIAL STUD. 1203 (2009).

60. Such as desolate development towns, which are under-developed cities built in the wilderness of Israeli periphery. Oren Yiftachel & Erez Tzfadi, *State, Space, and Capital: Immigrants in Israel and Sociospatial Stratification*, in THE POWER OF PROPERTY: ISRAELI SOCIETY IN THE GLOBAL AGE 197 (Dani Filk & Uri Ram, eds., 2004).

61. Israel Blechman, *The Ethnic Composition of Research Universities in Israel*, 33 THEORY & CRITICISM 191 (2008).

62. See Zarini, *supra* note 53. I extracted statistics regarding the following universities: Hebrew University, Tel Aviv, Haifa, Bar Ilan, Ben-Gurion and the Technion.

63. Interestingly, the law faculty is considered the most prestigious of academic schools. This fact is reflected in the ethnic breakdown of the law faculty, where there the percentage of Mizrahi academics is the lowest. By contrast, the faculty of social sciences, which is considered by most as the least prestigious, has the highest percentage of Mizrahis in its academic staff. See Gad Yair & Didi Shamas, *Ethnic Bias or Academic Neutrality at the University: Consequences for Affirmative Action*, in AFFIRMATIVE ACTION AND EQUAL REPRESENTATION IN ISRAEL 495 (2004).

64. The data drawn comes from my own research. See Bitton, *Absence as Existence*, *supra* note 9, at 460. I examined the staffing of 12 of Israel's law faculties. I excluded Sapir College, whose staff seemed to be in its formative stages, and therefore no accurate portrayal can be given. I also excluded from the review six staff members whose ethnic origins were unclear. However, even assuming that all six are of Mizrahi origin would only raise the percentage of Mizrahis to 7.5 percent. The percentage of Arab staff is even more disturbing – a mere 2.5 percent, with only one woman. Due to a lack of cooperation on the part of the staff, I could not examine the ethnic composition of all the different faculties. This lack of cooperation is indicative of an overall social phenomenon characterizing studies in this field. Similar difficulties occurred in studies conducted by Yair & Shamas *supra* note 63, and Mizrahi, *supra* note 59, as those researchers report.

65. Yinon Cohen, *Socioeconomic Gaps Between Mizrahim and Ashkenazim, 1975-1995*, A(1) ISRAELI SOC. 115 (1998). For a structural analysis of the Israeli job market as based on ethnicity-status, see Shlomo Swirski & Deborah Bernstein, *Who Worked Where, for Whom and for What: Economic Development in Israel and the Emergence of an Ethnic Division of Labor*, in NOTEBOOKS FOR RESEARCH AND CRITIQUE (1980).

66. For a Marxist analysis of the status of Mizrahis, see SHLOMO SWIRSKI, *ORIENTALS AND ASHKENAZIM IN ISRAEL: ETHNIC DIVISION OF LABOR* (1981).

67. See *supra* note 53. For a more concise portrayal of social realities in Israel, see Iris Garby & Gal Levy, *The Socio-Economic Gap in Israel*, in THE ISRAELI DEMOCRACY INSTITUTE POSITION PAPER SERIES (2000).

68. See Garby & Levy, *supra* note 67, and SWIRSKI, *supra* note 66.

69. See also *supra* note 53.

70. Yagil Levy, *Militarizing Inequality: A Conceptual Framework*, 27 THEORY & SOCIETY 873, 890 (1998) [hereinafter Levy, *Militarizing Inequality*] (indicating that the army is a mechanism of the establishment, which "reproduces" the inequality in Israeli society). For a more extensive description of the relationship between the army and Mizrahis, see YAGIL

LEVY, FROM THE "PEOPLE'S ARMY" TO THE "ARMY OF THE PERIPHERIES" (2007).

71. Mizrahi cultural institutions receive minimal shares of the total official budget allocated to cultural expenditures and support. For example, of the total Israeli orchestra budget, Mizrahi orchestras were granted seven percent in 2008 and four percent in 2009. *See* DATA REPORT: CULTURE BUDGET ALLOCATION IN ISRAEL, 2009 (a report submitted by the "My Heart is in the East" coalition of human rights NGOs to Israel's Minister of Culture; the coalition did not publish this report, or anything else, in English).

72. For Mizrahi representation in satire and pop-culture, *see* Galit Saada-Ophir, *Borderland Pop: Arab Jewish Musicians and the Politics of Performance*, 21 CULTURAL ANTHROPOLOGY 205 (2006). For the stereotypical representation of Mizrahis in Israeli cinema, *see* ELLA SHOHAT, ISRAELI CINEMA: HISTORY AND IDEOLOGY (1991) [hereinafter SHOHAT, ISRAELI CINEMA] and Dorit Dayan, The Representation of Mizrahis in Short Commercial Films in Israel Between 1950-2000 (2003) (unpublished M.A. thesis, Bar Ilan University), available at http://sifria2012.lnx.biu.ac.il/F/TYMB5JQ3I5G3SUKF6BH2NE22HTUEGVNAKMMJ8B45YXVKURKQQ9-55568?func=find-acc&acc_sequence=003137933. For the distortion of the Mizrahi figures in pop-culture, *see* Yifat Ben-Hay-Segev, Mizrahim in Israel Talk About Prime-Time Television Shows (2007) (Ph.D. dissertation, Bar Ilan University), available at http://sifria2012.lnx.biu.ac.il/F/LQYVC6KVJYQYQ2D4SABE41DPKMLRFVVGQJ5HRDK4JM8569FMAJL-57679?func=find-acc&acc_sequence=000744888. For the distortion of the Mizrahi figure in literature, *see* DROR MISHANI, THE ETHNIC UNCONSCIOUS: THE EMERGENCE OF 'MIZRAHIYUT' IN HEBREW LITERATURE (2006) (analyzing the Mizrahi stereotypes presented in the Israeli literary masterpieces *Black Box* by Amos Oz, *Individual Infiltration* by Yehoshua Kenaz, and *Five Seasons* by A. B. Yehoshua). *See also* Hanan Hever, *Color and Race in Israeli Fiction*, in RACISM IN ISRAEL 119 (2008).

73. Erez Tzfadia, Immigrants in Peripheral Settlements in Jewish Settler Society (2003) (Ph.D. dissertation, Ben-Gurion University), available at https://lib20.bgu.ac.il/F/HHDSK8B37DPUGEYC2YXRKK5GTCDRF2SYA7L97GMCBHLG2JJ2A1-46927?func=full-set-set&set_number=000617&set_entry=000006&format=999 (examining Israel's immigration and settlement policies for Mizrahi immigrants to Israel as a basis for their inferior status and as distancing them from cultural, political, and economic power sources); Adriana Kemp, *Borders, Space and National Identity in Israel*, 16 THEORY & CRITICISM 13 (2000); Benny Nuriely, *Strangers in a*

National Space: Arab-Jews in the Palestinian Ghetto in Lod, 26 THEORY & CRITICISM 332 (2005).

74. For systematic and historical analysis of the discrimination of Mizrahis in housing and property policies, see Claris Harbon, *Law, Society and Politics* (2008) (M.A. thesis, Tel Aviv University), available at (http://alephprd.tau.ac.il/F/S9S9CHNIX5JR49APUQDMAJ79K6X847CM5I18CDFGYB4RD6TUI6-04408?func=find-acc&acc_sequence=011585696). For a more concise analysis, See Garby & Levy, *supra* note 67, at 29-52.

75. See the study results, as published in the Ministry of Justice's website: ISRAEL MINISTRY OF JUSTICE, (July 2010), <http://www.justice.gov.il/NR/rdonlyres/309D5062-8CAF-4540-8C30-78030C50DB4F/21292/se.pdf>.

76. Although the situation reported on seems more "consequential" than "normative," despite the widespread belief that the racism and discrimination of the 1950's are no longer as prominent, it is not uncommon that key Israeli public figures speak in a racist manner toward Mizrahis. For example, Haim Hefer, a well-known poet, noted the "lack of culture" in the Moroccan ethnic group. Natan Zach, yet another respected poet, has also spoken similarly (in a TV interview, recently describing Mizrahis as "cavemen" who appreciate violence).

77. See Levy, *Militarizing Inequality*, *supra* note 70, at 898 (describing the Mizrahis progress in Israel: "As privileged and subordinated groups alike attain upward mobility, their positions might be changed, but not the power relations between them as long as that mobility occurs within the previously constructed confines and point of departure of each group. Here is the genesis of the syndrome in which subordinated groups find themselves 'going up a downward escalator'.")

78. Momi Dahan, Eyal Dvir, Natalie Mironichev & Samuel Shye, *Have the Gaps in Education Narrowed*, 1(2) ISRAEL ECON. REV. 37 (2003) (documenting increase in the education gap in Israel).

79. BARUCH KIMMERLING, *THE END OF ASHKENAZI HEGEMONY* (2001).

80. It was not until the late 1990s that Ehud Barak, then leader of the traditional Ashkenazi hegemony party Ma'arach, asked for the Mizrahim's forgiveness for all their suffering. Mizrahim generally considered this action to be a pre-election strategy rather than a sincere request, since his apology was general and ambiguous and did not admit guilt or suggest correction. Rather, Barak's apology was an attempt to ask the Mizrahim to join Ma'arach. Meanwhile, this apology, although partial and minimal, resulted in angry responses from Ashkenazim who considered it an admission of something that they believed had never happened. Another interesting example of the political blurring of the discrimination is evident in the analysis of the political platform of the Knesset parties in 1996.

None of the Knesset explicitly addressed the Mizrahi issue, except for vaguely mentioning the “ethnic” equality by one party on the political left. The only party that overtly addressed the issue was “Shas,” a Mizrahi-based party that called for the revival of Mizrahi pride. For a discussion of the unique phenomenon that Shas constitutes in Israeli politics, see GAD BARZILAI, *COMMUNITIES AND LAW – POLITICS AND CULTURES OF LEGAL IDENTITIES* 260-278 (2003).

81. Pnina Lahav, *Assessing the Field. New Departures in Israel Legal History, Part Three: A “Jewish State . . . to Be Known as the State of Israel:” Notes on Israeli Legal Historiography*, 19 *LAW & HIST. REV.* 387, 414 (2001). See also Uri Ben Eliezer, “*Negro, Pegro, Bili-Bili Pegro: How a Jew becomes Black in the Promised Land*, in *RACISM IN ISRAEL* 130 (2008) (on the Eurocentric foundations formatting immigration to Israel); Schulz, *supra* note 6, at 157.

82. This myth had, of course, no support. For example, many of the Moroccan Jews, who were considered the most inferior of the Mizrahim, were shocked to find how underdeveloped Israel was when they immigrated. Another example are the Yemenis, almost all of whom came from a very strict educational culture and were “Torah”- and “Talmud”-learned persons. See Ella Shohat, *Reflections by an Arab Jew*, Bint Jbeil, http://www.bintjbeil.com/E/occupation/arab_jew.html (last visited April 4, 2014) [hereinafter Shohat, *Reflections by an Arab Jew*].

83. BARZILAI, *supra* note 80.

84. Dahan-Kalev, *Ethnicity in Israel*, *infra* note 132, at 94, describes how the erasure of Mizrahi knowledge and cultural expression, through silencing and removing it from the Israeli textbooks and consciousness, created a second generation with dependent and frustrated identity characteristics. See also SHENHAV, *THE ARAB JEWS*, *supra* note 50.

85. This perception is usually accompanied with some sense of nostalgia, acknowledging the existence of Mizrahis as a category relevant to Israel’s past, even at times shameful history, namely the years of the significant immigration to Israel, mainly through the 1950s.

86. See SHENHAV, *THE ARAB JEWS*, *supra* note 50, 11-12. However, Shenhav does not present the first perception of nonexistence that I introduce. This is, in my opinion, missing the most simple and casual mode of denial practiced by everyday interactions I have with Israeli people, Ashkenazis and Mizrahis alike.

87. Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography*, in *IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS* 197, 205 (1987) (“I would read [the Subaltern Studies Group’s text] then, as a *strategic* use of positivist essentialism in a scrupulously visible political interest [. . .] This would allow them to use the critical force of anti-

humanism [. . .] even as they share its constitutive paradox: that the essentializing moment, the object of their criticism, is irreducible.”).

88. SHENHAV, *THE ARAB JEWS*, *supra* note 50, 12-16.

89. The notion of recognition and distribution demands as distinct from each other is embedded in theoretical analysis of justice structures. *See* FRASER, *supra* note 39, 13-15.

90. Unfortunately, I am one of only two legal scholars involved with this exploration as a main research concern. Claris Harbon, who is currently a Ph.D. candidate at McGill University Law School is, to my knowledge, the only other Mizrahi legal scholar who critically analyzes the legal status of Mizrahim. Harbon focuses mostly on property rights, land distribution, and public housing issues.

91. Elsewhere, I have set a discrimination typology that sheds light on the processes that shape this phenomenon, namely the use of *de facto* discrimination alone to discriminate against a group in a legal system whereby antidiscrimination adjudication and remedy is synchronically administered by *de jure* venues. *See* Yifat Bitton, *Wishing for Discrimination? A Comparative Gaze on Categorization, Racism and the Law*, 2 SORTUZ: ONATI J. OF EMERGENT SOCIO-LEGAL STUD. 39 (2008) [hereinafter Bitton, *Wishing for Discrimination?*].

92. Law of Return, 5710-1950 SH No.51 at 159 (1950) (Isr.) (also known as the law of “Shevut”).

93. Nationality Law, 5712-1952 SH No.95 at 146 (1952) (Isr.). *See also* THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL, May 14, 1948 (“In the state of Israel the Jewish people have raised.”).

94. Yossi Yonah, *Israel’s Immigration Policies: The Twofold Face of the “Demographic Threat,”* 10 SOCIAL IDENTITIES 195 (2004).

95. For the legislative history of the Jewish land ownership principle, *see* DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL*, 49-76 (1990).

96. Studies on identity perception reveal an interesting dissonance through which Mizrahis identify more with being a part of the Jewish people than with being Israeli citizens, whereas Ashkenazis identify themselves primarily as Israeli citizens. Schulz, *supra* note 6, 253-56. One shocking datum indicates that Israeli Arabs are more likely than are Mizrahim to identify as Israelis.

97. Lahav, *supra* note 81.

98. HCJ 152/71 Kremer v. Municipality of Jerusalem 25(1) PD 767 [1971] [Isr.].

99. The plan’s adoption, which occurred in a non-legislative manner, allowed for the continuing dynamic of Mizrahis remaining unmentioned. *See* Michael Chen & Audrey Addi, *Community Politics: School Reform and*

Educational Achievement, in EDUCATIONAL ADVANCEMENT AND DISTRIBUTIVE JUSTICE: BETWEEN EQUALITY AND EQUITY 341 (Reuven Kahana ed., 1995).

100. SAMI SHALOM CHETRIT, THE MIZRAHI STRUGGLE IN ISRAEL: BETWEEN OPPRESSION AND LIBERATION IDENTIFICATION AND ALTERNATIVE 1948-2003 (2004) [hereinafter CHETRIT, THE MIZRAHI STRUGGLE]. For more information about this second-generation Mizrahi social movement and the 1971 demonstration, see A. Kramer, *On the 30th Anniversary of the Black Panthers Movement in Israel* (Aug. 20, 2002), <http://www.marxist.com/israel-black-panthers200802.htm> (last visited April 16, 2014).

101. I thank Claris Harbon for acknowledging this point.

102. See *Kremer v. Municipality of Jerusalem*, *supra* note 98, at 771.

103. For detailed analysis of the cases following *Kremer* up to the present, see Bitton, *Wishing for Discrimination?*, *supra* note 91, 36-40.

104. HJC 1/81 Shiran v. Israel's Broadcast Authority 35(3) PD 365 [1981] [Israel].

105. *Id.* at 20. For historical context, at the time Israel had only one national regulated television network, which enjoyed a complete monopoly over this Israeli entertainment space. Israeli citizens were also compelled to pay for the services this network supplied, regardless of its content. The network's voice, therefore, was in fact "the voice of the nation." This fact has been fully acknowledged by the Court.

106. *Id.* at 21.

107. The interview was held in Hebrew and can be found at, Interview with Sarah Leibowitz, "*Eastern Jewry*" had no role in the establishment of the state, (October 10, 2010), <http://www.nrg.co.il/online/47/ART2/294/414.html> (last visited Apr. 16, 2014).

108. HCJ 244/00 The New Discourse Movement v. Minister of National Infrastructure PD 56(6) PD 25 [2002] [Isr.].

109. *Id.* at 47.

110. *Id.*

111. Prohibition of Discrimination in Products, Services and Entry to Amusement Facilities and Public Places Law, 5761-2000, SH No.1765 p.58 (Isr.), as amended by SH No. 1995 p. 332, and SH No. 2293 p. 784 [hereinafter Israeli Civil Rights Act].

112. In specific, the statute relates, as *numerus clausus*, to: ". . .race, religion or religious group, nationality, country of origin, sex, sexual orientation, view, political association, personal status or parenthood." Art. 3(a). The basis of "country of origin" can be used to fight against discrimination of Mizrahis born abroad. However, most of the Mizrahi population would find this basis useless, given that they are of the second

and third generation of Mizrahi people born in Israel. Three years ago, "disability" was added to the statute's list. Disabled People's Rights Act, 5765-2005, SH No.5, p.332, adding art. 3(e) (Isr.).

113. The statute, its history of origin, and its usage can be found in Bitton, *Absence as Existence*, *supra* note 8, at 486-507.

114. Many Mizrahim, mainly those of Moroccan origin, who comprise the majority of Mizrahim, have light skin tones but will still be identified as Mizrahis. In this respect, therefore, using the skin-tone criterion as discriminatory is problematic since it shapes the discrimination from which Mizrahis suffer as anchored in individualistic, rather than collective perceptions of "otherness."

115. See CHETRIT, THE MIZRAHI STRUGGLE, *supra* note 100, at 105. Chetrit documents a rare yet brutal case in which a judge mentions, pejoratively, a Mizrahi defendant's identity, albeit in a court protocol (which is not considered an important legal source and which no person is normally allowed access): "A Moroccan person will get twice the punishment in my court. . . you divide our unified nation."

116. Shohat, *Reflections by an Arab Jew*, *supra* note 82 (explaining why it was so hard for her Baghdadi grandmother to understand the distinction held in Israel between "we" (the Jews) and "them" (The Arabs)).

117. This reconstruction of difference is attributed to the social relations approach that followed the rights approach; it treats difference as resulting of comparison rather than from intrinsic identity traits.

118. Though Shenhav is considered to be opposing Said's work as rigid and binary (See SHOCHAT, FORBIDDEN REMINISCENCES, *infra* note 130, 14-16), he states openly in his book that Said and his account of colonialism have been influential source of his work (SHENHAV, THE ARAB JEWS, *supra* note 50, at 11).

119. DONALD HOROWITZ, ETHNIC GROUPS IN CONFLICT, 564 (2000).

120. Due to space limitations, here I can only sketch a brief, unavoidably oversimplified description of Said's Orientalism.

121. SAID, ORIENTALISM, *supra* note 2.

122. For an exploration and explication of the primary notions behind Said's scholarship, see Adel Iskandar, *On Orientalism: Edward Said, Representation, and the Post-Structural Epistemology of Power* (2008), http://www.allacademic.com/meta/p14802_index.html (presented at the International Communication Association annual meeting) (last visited April 16, 2014).

123. SAID, ORIENTALISM, *supra* note 2, at 47.

124. Although Said did not coin the term "Orientalist," he redefined it so that it no longer referred to erudite master of difficult languages, but rather to an ideologue of the colonialist empire. Mark F. Proudman, *Disraeli as*

an Orientalist: The Polemical Errors of Edward Said, 5(4) J. OF THE HIST. SOC'Y 547, 547-548 (2005).

125. Iskandar, *supra* note 122, at 3.

126. SAID, ORIENTALISM, *supra* note 2. For example, looking at the more current media genre, Said stated that over 100 movies filmed in the last three decades of the past century revolved around a storyline in which Middle Easterners were depicted as terrorists.

127. See, e.g., Ernest Gellner, *The Mightier Pen? Edward Said and the Double Standards of Inside-out Colonialism*, rev. of *Culture and Imperialism*, by Edward Said, TLS 19 February 1993; CHRISTOPHER A. BAYLY, EMPIRE AND INFORMATION: INTELLIGENCE GATHERING AND SOCIAL COMMUNICATION IN INDIA, 1780-1870 25, 143, 282 (1997); ROBERT IRWIN, FOR LUST OF KNOWING: THE ORIENTALISTS AND THEIR ENEMIES 159-60, 281-2 (2006).

128. I have borrowed the inspiration for the title from the work Ella Shohat, *The "Postcolonial" in Translation: Reading Said in Hebrew*, 34 JOURNAL OF PALESTINIAN STUDIES 55 (2004). For an account of Orientalism as irrelevant to Mizrahis in the way Shohat conceptualizes it, see Ehud Ein-Gil & Moshe Machover, *Zionism and Oriental Jews: A Dialectic of Exploitation and Co-optation*, 50 RACE & CLASS 62 (2009).

129. See SHOHAT, ISRAELI CINEMA, *supra* note 72; *Reflections by an Arab Jew*, *supra* note 82; FORBIDDEN REMINISCENCES, *infra* note 130.

130. SHOHAT, FORBIDDEN REMINISCENCES (2001). See also SHOHAT, ISRAELI CINEMA, *supra* note 72.

131. Orna Sasson-Levi & Avi Shoshana, "Passing" as (non)Ethnic: *The Israeli Version of Acting White*, 83 SOCIOLOGICAL INQUIRY, 448, 449-50 (2013).

132. Henriette Dahan-Kalev, *Ethnicity in Israel: A Post-Modernism Approach*, in EDUCATION AND SOCIETY: MODERNITY, POST-MODERNITY AND EDUCATION 197, 212 (Ilan Gur-Ze'ev, ed., 1999) [hereinafter Dahan-Kalev, *Ethnicity in Israel*].

133. Irene Browne & Ivy Kennelly, *Stereotypes and Realities: Images of Black Women in the Labor Market*, in LATIN AND AFRICAN AMERICAN WOMEN AT WORK: RACE, GENDER, AND ECONOMIC INEQUALITY 302, 306 (Irene Brown, ed., 1999).

134. See CHETRIT, THE MIZRAHI STRUGGLE, *supra* note 100, at 53-54.

135. For further discussion on the subject, see *Id.*; SHENHAV, THE ARAB – JEWS, *supra* note 50.

136. It is worth noting here the important contribution of two more Mizrahi women scholars who are engaged with Said's work. The first is Aziza Khazzoom, who questions the Mizrahi identity as invented as well as real. See AZIZA KHAZZOOM, THE ORIGINS OF ETHNIC INEQUALITY AMONG

JEWIS IN ISRAEL (1998). The second is Henriette Dahan-Kalev, who in *Ethnicity in Israel*, *supra* note 132, identified the 'othering' of Mizrahis along the lines of Orientalism. Said's intellectual influences are vastly spread in Israel today. To name just a few, *see* Smadar Lavie's ironic look at Israeli anthropology of the Bedouins in SMADAR LAVIE, *THE POETICS OF MILITARY OCCUPATION: MZEINA ALLEGORIES OF BEDOUIN IDENTITY UNDER ISRAELI AND EGYPTIAN RULE* (1991); Ammiel Alcalay's historical reflection on Mizrahi writers as intimately embedded in Arab culture in KEYS TO THE GARDEN: NEW ISRAELI WRITING (Ammiel Alcalay, ed., 1996); Yerach Gover's critique of Zionist literary assumptions and the images of Arabs in Hebrew literature in YERACH GOVER, *ZIONISM; THE LIMITS OF MORAL DISCOURSE IN HEBREW FICTION* (1994); Azmi Bishara's invocation of Orientalism to address racist discourses about "educated Arabs" within Israel in a context where Bishara's very writing in Hebrew challenges the limits of Israeli citizenship in Azmi Bishara, *On the Question of the Palestinian Minority in Israel*, 3 THEORY AND CRITICISM 7 (1993); Sami Shalom Chetrit's historical account of Mizrahi struggle within anti-Zionist paradigms (CHETRIT, *THE MIZRAHI STRUGGLE*, *supra* note 100; Sarah Chinski's look at Orientalist underpinnings of Israeli art history; Gabriel Piterberg's examination of Orientalist foundations in Israeli history books; Shoshana Madmoni's account of racist media representation of the kidnapping of Yemeni/Mizrahi babies in Israel in SHOSHANA MADMONI-GERBER, *ISRAELI MEDIA AND THE FRAMING OF INTERNAL CONFLICT: THE YEMENITE BABIES AFFAIR* (2014); and Oren Yiftachel's discussion of ethnocracy in land development and Palestinian dislocation within Israel in Oren Yiftachel, *Israeli Society and Jewish-Palestinian Reconciliation: Ethnocracy and Its Territorial Contradictions*, 51 MIDDLE EAST J. 505 (1997). Amnon Raz-Krakotzkin also makes significant use of Said's critique of Orientalism to address the Zionist negation of Jewish exile in Amnon Raz-Krakotzkin, *Exile Within Sovereignty: Toward a Critique of the 'Nation of Exile' in Israeli Culture*, (part 1) 4 THEORY & CRITICISM 23 (1993); (part two) 5 THEORY & CRITICISM 113 (1994).

137. SHENHAV, *THE ARAB JEWS*, *supra* note 50, at 11.

138. *Id.* at 9.

139. *See, e.g.*, HCJ 6924/93 *The Association for Human Rights in Israel v. Israeli Government*, 55(5) PD 15 [2001](demanding affirmative action in favor of Arab-Israelis in all governmental and quasi-governmental entities); HCJ 240/98 *Adalah Organization v. the Minister of Religious Affairs*, 52(5) PD 167 [1998] [Isr.] (ordering the Ministry of Religions to reallocate its budget more equally between Jews and Arab-Israelis).

140. Yousef Jabareen, *Constitution Building and Equality in Deeply-Divided Societies: The Case of the Arab Minority in Israel*, 26 WIS. INT'L

L.J. 345 (2008). The case of non-Israeli Palestinians is quite different. The expulsion of the majority of Palestinians in the occupied territories made it unnecessary for Israel to invest in the textual means of *de jure* discrimination against that group. Zreik, *supra* note 17, at 72-73.

141. Yousef Jabareen, *Law and Education: Critical Perspectives on Arab Palestinian Education in Israel*, 49 AM. BEHAV. SCI. 1052 (2006) (providing general review of the discriminated-against position of Palestinians, with specific focus on education).

142. See Reva Siegel, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995) (describing the civil sphere as pertaining to the matters of making business contracts, suing in the courts, giving evidence, acquiring property and in the protection of person and property).

143. Bishara, *supra* note 136, at 16, long ago identified the manner in which “civilian” claims of Palestinians are being read as inseparably “political” (“In the case of Arabs in Israel, the civilian issue challenged never stands alone, but is being perceived as part of the broader national debate.”).

144. See HCJ 105/92 Reem Engineers Constructors LTD v. Nazareth Local Authority, 47(5) PD 189 [1993] [Isr.], and HCJ 4112/99 Adalla, v. Tel-Aviv-Jaffa City Council, 56(5) PD 393 [2002] [Israel]. This experience resembles that of African-Americans in America. See Reva Siegel, *The Critical Use of History: Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (claiming that antidiscrimination laws were aimed at bettering the civil and political rights of African-Americans but not their social ones).

145. HCJ 466/07 Galeon v. Legal Consultant to the Government (Nov. 11, 2012) Nevo Legal Database (by subscription) (Isr.).

146. This conceptual “space” is most associated with Homi Bhabha’s work in the field of colonialism/postcolonialism. HOMI K. BHABHA, *THE LOCATION OF CULTURE* 37 (1994). I refrain, however, from adopting his specific notion of a “third space” position as pertaining more to the dyad of colonized-colonizer. My notion is more of a “third space” without the third parties. It has less to do with being a space of constant dynamics and creativity of identity and more with being a political, action-intended place. I do adhere, though, to Bhabha’s emphasis on the agency of the colonized in this respect. See Ilan Kapoor, *Acting in a Tight Spot: Homi Bhabha’s Postcolonial Politics*, 25 NEW POL. SCI. 561 (2003) (interpreting Bhabha’s perceptions of agency).

147. See *supra* note 42 and its accompanying text.

148. See *supra* note 111, Art.6. See also *The Law for Equal Opportunity at the Workplace*, 5748-1988 SH No.1240 p.38 (Isr.), Art. 9.

149. On the individualistic framework of the Equal Protection Clause, see

Kevin D. Brown, *The Dilemma of Legal Discourse for Public Educational Responses to the “Crisis” Facing African-American Males*, 23 CAP. U. L. REV. 63, 71-87 (1994). However, this individualistic framework does not preclude the role of the Clause as protecting groups. *See* Fiss, *supra* note 12, 123-27. Similarly, Title IV rights are by definition designed to target particular discrimination patterns, normally practiced against individuals.

150. HCJ 6698/95 Ka’adan v. Israeli Land Administration, 54(1) PD 258, 258, 280-281 [2000] [Israel]; HCJ 11956/05 Bishara et. al., v. The Ministry of Construction and Housing (Dec. 13, 2006) Nevo Legal Database (by subscription) (Israel) sec. 7; HCJ 5304/02 Accident Victims Organization v. Israel, 59(2) PD 135, 141 [2004] [Israel]; HCJ 721/94 Danilowitz v. El-Al Airlines, 48(5) PD 749, 761 [1994] [Isr.] (“distinction between groups based on a relevant difference is not discriminatory *per se*”); HCJ 6924/93 Association for Citizen Rights in Israel v. Israeli Government, 55(5) PD 15, 27-28 [2001] [Isr.] (“society’s best interest. . . requires fostering the equality principle between Jews and Arabs”).

151. The Court would refer in its judgment to a “Migzar” (sector): HCJ 727/00 *infra* note 157, at 94-95 (referring to Arab sector); HJC 4805/07 Center for Jewish Pluralism v. Ministry of Education, 62(4) PD 571 [2008] [Isr.] (referring to intra-Jewish religious sectors).

152. This is a major test that Fiss sets for identifying the relevance of groups to the antidiscrimination principle. *See* Fiss, *supra* note 202, 123-126.

153. *See* 6698/95 Ka’adan v. Israeli Land Administration, *supra* note 150.

154. 4541/94 Miller v. Minister of Defense, *supra* note 42.

155. The nature of right-seeking is also indicative of the scope of individualization in regard to the antidiscrimination principle at hand. *See* Fiss, *supra* note 202, at 127.

156. *See, e.g.*, HCJ 727/00 Arab Israeli Municipalities Association v. Minister of Housing, 56(2) PD 79 [2001] [Isr.] (budget allocations for rebuilding impoverished neighborhoods project); HCJ 1113/99 Adala v. Minister of Religions, (budget allocations for religious burial services); HCJ 2814/97 Arab Educational Affairs Supervision Committee v. Ministry of Education, 54(3) PD 233 [2000] [Isr.] (budget allocations for special nurturing programs for disadvantaged communities).

157. *See, e.g.*, 528/88 Avitan v. Israeli Land Administration, the opinion of Justice Or, ¶ 4; 153/87 Shakdiel v. Minister of Religious Affairs and Others; 4541/94 Miller v. Minister of Defense, *supra* note 42; 678/88 Kfar Vradim v. Minister of Treasury, opinion of Justice Or, ¶ 8; 1703/92 C.A.L. Airlines v. Israel Prime-minister, opinion of Chief Justice Barak, ¶ 15 (discrimination is different treatment of equals and equal treatment of those who are different).

158. However, I qualify my optimistic stance in light of the fact that judges enter their own preferences into the antidiscrimination discourse; therefore, they are able to frustrate or facilitate any group's effort to access the antidiscrimination principle. *See* FISS, *supra* note 12, at 121.

159. SHOHAT, FORBIDDEN REMINISCENCES, *supra* note 130.

160. By "useful political power," I refer to the exercise of political power for the benefit of the elected representative's group, as opposed to the use of such power in a manner that suits well, or at least does not challenge, the hegemony's power. Most Mizrahis who have been politically significant are considered to have served the ideologies of the parties who "accepted" them, both right and left; none of them have dared to raise the issues of "Mizrahis in Israel." In sociological terms, this is considered a classic adaptive manner of behavior of the underprivileged class representative. *See* CHETRIT, THE MIZRAHI STRUGGLE, *supra* note 100, 111-127. The only political party that has raised the "Mizrahis in Israel" issue loudly and clearly has been Shas, which advocated ultra-religious politics, and therefore was more confined in its political maneuvering. At least at its starting days, Shas enjoyed support of mainly Mizrahi voters and some Palestinian supporters and voters, who shared the party's social welfare concerns; in this context, these dynamics are unsurprising.

161. I mitigate this assertion by pointing to the general aspiration for peace, which all communities share.

162. *See, e.g.*, CC (Haifa) 23991/06 Algani v. Goovi Dance Bar (published in Nevo, 2010).

163. *See, e.g.*, the comments made in talkbacks (or reader responses) to his publication in the following: Hani Zubida, *Democratic security*, Israel News, (Jan. 11, 2007) <http://www.nrg.co.il/online/1/ART1/653/503.html> (last visited April 16, 2014). In this specific column, Zubida indicated that he served in the Israeli Defense Forces, where most Arabs are not allowed to serve, yet he was still perceived as an Arab, due to the "Arab" sound of his name.

164. *See* Israeli Civil Rights Act, *supra* note 111.

165. *Id.* at section 3(a).

166. *See* CC (Tel-Aviv-Jaffa) 11258/93 Na'amna v. Kalia (Sept. 1, 1996), Nevo Legal Database (by subscription) (Isr.).

167. Naturalization and Entrance to Israel Act (Emergency Ordinance) 5763-2000, SH No.1901 p.544 (Isr.), sec. 2. For a discussion of how this law targets the demographic superiority of Palestinians in Israel, *see* Yoav Peled, *Citizenship Betrayed: Israel's Emerging Immigration and Citizenship Regime*, 8 THEO. INQ. L. 603, 617 (2007).

168. First in HCJ 7052/03 Adallah v. Minister of Interior Affairs, 61(2) 202 PD [2006] [Isr.] and second in HCJ 466/07 Galeon v. Legal Consultant

to the Government (Nov. 11, 2012) Nevo Legal Database (by subscription) (Isr.).

169. I use the male form here specifically to indicate that men comprise the majority of people who are not allowed to enter amusement clubs in Israel. However, it seems that this gendered phenomenon can be attributed to the eroticization of colored women, whereby these women are portrayed as sexually available to white men. See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER AND THE LAW* 567 (2nd ed. 2004).

170. See generally H CJ 727/00, *supra* note 156.

171. See Saada-Ophir, *Borderland Pop*, *supra* note 72, at 206-207.

172. TRINH T. MINH-HA, *WHEN THE MOON WAXES RED: REPRESENTATION, GENDER AND CULTURAL POLITICS* 159 (1991).

173. See Saada-Ophir, *Borderland Pop*, *supra* note 72.

174. *Id.* at 225.

175. See Yiftachel, *Nation-Building or Ethnic Fragmentation?* *supra* note 57.

176. It should be noted that there are groups of Palestinian and Mizrahi activists who already collaborate on these matters. See ARAB JEWISH MOVEMENT FOR SOCIAL & POLITICAL CHANGE, <http://www.tarabut.info/he/home> (last visited March 27, 2014).

177. The event was held on October 2012, in Bat-Yam, Israel, and the author served as one of the judges on this popular tribunal.

178. See *supra* notes 53, 58, and accompanying text. The ultra-religious community also comprises a great share of Israel's poor, but they are not included in this counting because most members of this community are separatists and therefore are not willing to work collaboratively for social change.

179. See generally MUNICIPAL GOVERNANCE LOCAL GOVERNMENT IN PALESTINIAN SOCIETY IN ISRAEL: POLITICAL MANAGEMENT AND LEGAL ASPECTS (Yousef T. Jabareen & Mohanad Mustafa, eds., 2013).

180. Notwithstanding this alteration in the Court's manner of addressing the petition, the plaintiffs lost the case. See H CJ 962/04 Abutbul v. Ministry of Welfare (Aug. 12, 2004), Nevo Legal Database (by subscription) (Isr.).

181. The shared interest of Israeli periphery community is discussed in the mission statement of the Public Network for Health Equity in Israel. See *10 Principles in Equality in Health*, THE PUBLIC NETWORK FOR HEALTH EQUITY IN ISRAEL, (July 2011) <http://www.equalhealth.org.il/10-principles-of-equality-in-health> (last visited April 16, 2014).

182. See ISAAC ROSEN-ZVI *TAKING SPACE SERIOUSLY: LAW, SPACE, AND SOCIETY IN CONTEMPORARY ISRAEL* 3 (2003).

183. In reality, however, many members of this immigrant group had very

little to do with traditional religious Judaism. See YAIR SHELEG, *JEWISH, BUT NOT BY RELIGION* 5-13 (2004).

184. The Knesset held emergency discussion on this matter on May 5, 2008. For a journalistic report on this discussion, see http://pogrom.org.il/heb_articles.php?art_id=61 (covering the Israeli Parliament's Immigration Committee's emergency discussion pursuant to the police's declaration that "an Israeli home-grown Neo-Nazi organization established by immigrant youth has been revealed by the police. Police further submitted that the youth perpetrated hate crimes in Israel during 2006-2007.").

185. This is also one of the caveats of Mizrahi criticism in general, as not bearing any potential of a political action to end the occupation. See Henriette Dahan-Kalev, *Zionism, post Zionism and fear of Arabness* (2005) (unpublished manuscript, prepared for the Conference on Fear of the Other and the Israeli Palestinian Conflict, London) [hereinafter Dahan-Kalev, *Zionism*].

186. Woman's Rights Equating Act, § 6C(1), 5711-1951 SH No. 82 p.248 (Isr.).

187. Ironically, only recently has the Israeli parliament enacted a law relating to non-Israeli Palestinians and Mizrahis. This law demands that any future peace settlement will include a section on settling property disputes that some Mizrahi Jews have with their Arab states of origin, regarding property left behind and that subsequently expropriated by their states of origin. The Law Securing the Right for Compensation of Jewish Refugees of Arab and Iranian Descent, 5770-2010 SH No.2232 p.406 (Isr.).

188. See, e.g., 105/92 Reem Engineers Constructors LTD v. Nazareth Local Authority, 4112/99 Adalla, v. Tel-Aviv-Jaffa City Council; and 466/07 Galeon v. Legal Consultant to the Government.

189. See generally THE STATE OF ISRAEL: BETWEEN JUDAISM AND DEMOCRACY (Joseph E. David, ed., 2003); Menachem Elon, *The Values of a Jewish and Democratic State: The Task of Reaching a Synthesis*, 3 HUM. RTS. REV. 36 (2002).

190. See Bishara, *supra* note 136.

191. See, e.g., HCJ 727/00, *supra* note 156 (Palestinians contended that the National Neighborhood Reconstruction plan was to be reallocated between the Mizrahi community, who received it in Jewish underdeveloped towns, and themselves; the Court agreed that for the most part, the plan was indeed discriminatorily fashioned).

192. HCJ 11163/03 Arab High Observance Committee v. Israeli Prime minister (Feb. 27, 2006), Nevo Legal Database (by subscription) (Isr.).

193. *Id.* at 21 (¶ 29 to Chief Justice Barak's decision). Eventually, the Court ordered that the plan be annulled, with a 12-month suspension period for the government to restructure it more equally.

194. Part of the Israeli-Palestinian hostility can be attributed to the national conflict related to several incidents of warfare and bloodshed that both parties have sustained.

195. Hani Zubida, *The Change in the Israeli Governmental System: What (If at All) Can Be Learned from the Past Experience* in *DIVIDING THE LAND* 233 (Erez Casif, ed., 2008).

196. The case of the Gaza Strip and the Development Towns in southern Israel exemplifies this relation, and Cloud Pole Operation exemplifies this conflict, wherein Mizrahis suffered most from Palestinian bombing and, therefore, grew more alienated from Palestinians' interests.

197. An excellent example is the comparison of the experiences of Tali Fahima, a Mizrahi woman who decided to be the human shield of a wanted Palestinian, and the experience of Neta Golan, an Ashkenazi woman who lived in Ramallah and stood against the IDF's breaking-in to the city. The former was convicted of treason, while the latter wasn't even tried for her actions. Vered Lovitch, *The Court Decided: Tali Fahima will remain under arrest* (July 28, 2005), available at <http://www.ynet.co.il/Ext/App/TalkBack/CdaViewOpenTalkBack/0,11382,L-3119244-2,00.html> (last visited April 4, 2014).

198. See Shoshana & Sasson-Levi, *supra* note 131.

199. Bishara, *supra* note 136, 16-20. Bishara warns against depoliticization of Palestinians' struggle against Israel, by over-cooperation with Israelis.

200. Franklin H. Adler, *Israel's Mizrahim: "Other" Victims of Zionism or a Bridge to Regional Reconciliation?*, 23 *MACALESTER INT'L* 161, 170 (2011).

201. See Uri Yizhar, *Mizrahis in Israel: A Problem, a Victim or an Independent Voice?* 39 *MIPHNE* (2002).

202. See generally RICHARD BANDLER & JOHN GRINDER, *THE STRUCTURE OF MAGIC: A BOOK ABOUT LANGUAGE AND THERAPY* 21-22 (1975) (stating that humans use language to represent and model experience); WENDELL JOHNSON, *PEOPLE IN QUANDARIES: THE SEMANTICS OF PERSONAL ADJUSTMENT* 112-42 (1946) (noting "the relationship between language and reality is a structural relationship").

203. A search for this term in article titles across worldwide library electronic databases yielded three articles published in the U.S. Normally, any other one-term search would yield hundreds or even thousands of relevant articles. For the most general use of Orientalism in legal context, see Teemu Ruskola, *Legal Orientalism*, 101 *MICH. L. REV.* 179 (2002).

