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Reasonable Accommodation and Non-Invidious Discrimination Under the Maine Human Rights Act

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REASONABLE ACCOMMODATION AND NON-INVIDIOUS DISCRIMINATION UNDER THE MAINE HUMAN RIGHTS ACT

I. INTRODUCTION

"Invidious," through its Latin root *invidia*, for envy, hints at the dangers of arbitrary discrimination.[1] Statutes, for instance, that distribute social or economic benefits and allocate burdens in a patently arbitrary manner alienate the burdened class. Such laws tear at the social fabric by instilling resentment and bitterness in the disfavored group. At an extreme they encourage rebellion.[2] The famous *Carolene Products* footnote, in which Justice Stone suggested that the Court would apply a heightened standard of judicial review to statutes affecting "discrete and insular minorities," draws an implicit connection between invidiousness and fundamental unfairness.[3] Invidiousness thus refers to the patent unfairness and immorality of the decisionmaker's choice and to the victimization that discrimination involves, including the socially destructive impulses

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1. According to *Webster's*, "invidious" denotes the quality of being "detrimental to reputation"; "likely to cause discontent or animosity or envy"; "full of envious resentment"; and "of an unpleasant or objectionable nature." Synonymous terms include "defamatory," "jealous," "hateful," and "injurious." The word derives from the Latin, *invidiosus* and *invidia*. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) (unabridged). The Latin word *invidiosus* denotes the quality of being envious, of causing envy; or of being hateful or causing hate. Invidia denotes envy and ill-will. CASSELL'S NEW LATIN DICTIONARY (1959). "Invidious" is a legal term of art, and, therefore, its usage outside the context of antidiscrimination law serves only as a starting point for understanding its legal sense. *See also* O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U. L. REV. 19, 19 (1979) ("The jurisprudence of the equal protection clause has for some time been dominated by exegesis of terms of art.") (footnotes omitted).

2. That the sense of powerlessness and estrangement from the system, which accompanies arbitrary governmental decision making, can boil over into violent protest is evinced in the undercurrents of the legislative debates on enactment of the Maine Human Rights Act. *See infra* text accompanying notes 95-105.

3. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Justice Stone wrote:

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. Carolene Products did not discuss invidious discrimination as such, but the Court suggested, in the above-quoted passage, that the presumption of constitutionality of legislative action would not apply to legislation directed at groups unable to defend their interests because of historical exclusion from the political process.

that subjection to arbitrary decisionmaking engenders.

As antidiscrimination law has evolved, however, courts construing antidiscrimination statutes, such as the Maine Human Rights Act (MHRA),[4] have held that invidious motivation is no longer necessary for a finding of unlawful discrimination.[5] These courts have taken cognizance of the fact that barriers that are not erected purposefully to exclude persons belonging to a protected classification, but which nevertheless operate to exclude them, can discriminate just as effectively as policies of intentional exclusion.[6] Defendants who come under antidiscrimination statutes may be held liable for the discriminatory *effects* of their conduct unless they can justify the practice that has produced the discriminatory effect either on the grounds of business necessity or job relatedness or on the basis that the alternatives would cause undue hardship to the defendant's enterprise.[7] Thus, whereas prior to the development of non-invidious discrimination doctrine a defendant needed only to satisfy a court that he harbored, or at least acted upon, no stereotyped ideas connoting the social inferiority of a particular group or protected classification in order to acquit himself of a charge of discrimination, the duty imposed by non-invidious discrimination doctrine includes an affirmative obligation to foresee, and to act to alleviate or avoid, the exclusionary consequences of one's activity.[8] Non-invidious discrimination doctrine thus embodies more stringent moral principles than those expressed in invidious discrimination doctrine. Rather than limiting itself to purging the process of the more egregious, stereotype-based discrimination, antidiscrimination law now focuses on the more subtle but equally pernicious factors of apathy and indifference to the "basic human right to a life with dignity."[9]

Maine Human Rights Commission v. Local 1361, United Paperworkers International Union,[10] *Percy v. Allen*,[11] and *Maine Human Rights Commission v. City of South Portland*[12] form a line of cases decided under the MHRA that arguably establishes a non-invidious discrimination doctrine in Maine. The first case in this line, *Local 1361*, decided in 1978, was also the first appeal that the Maine Supreme Judicial Court, sitting as the Law Court, heard under the Act. The notion that the MHRA proscribes certain non-invidious discrimination has thus been recognized since the Law Court's first interpretation of the Act. Not until the court's recent

4. ME. REV. STAT. ANN. tit. 5, §§ 4551-4632 (1979 & Supp. 1987-1988).
5. *See, e.g., infra* text accompanying notes 61-67.
6. *See, e.g., infra* text accompanying notes 61-67.
7. *See infra* text accompanying notes 61-74.
8. *See infra* text accompanying notes 61-74.
9. ME. REV. STAT. ANN. tit. 5, § 4552 (Supp. 1987-1988).
10. 383 A.2d 369 (Me. 1978).
11. 449 A.2d 337 (Me. 1982), *appeal after remand*, 472 A.2d 432 (Me. 1984).
12. 508 A.2d 948 (Me. 1986).

application of the MHRA in *South Portland*, decided in 1986, however, has the doctrine begun to assume definite shape. In that case, the Law Court, in a four to three decision, affirmed a Kennebec County Superior Court judgment holding the city of South Portland liable for public accommodations discrimination against the physically handicapped in the maintenance and operation of a public bus system that was inaccessible to wheelchair users. The court held the city liable under the public accommodations provision of the Act despite the absence of a finding of invidious motivation and notwithstanding the provision, by the city, of paratransit service for the handicapped.[13] Concerns about affirmative action, and the role of invidious stereotyping as a necessary condition for liability under the Act, have attended the development of Maine's antidiscrimination law throughout all three cases.[14]

As the doctrine of non-invidious discrimination has developed, there has been a corresponding development of the doctrine of reasonable accommodation. Reasonable accommodation allows the defendant to make out an affirmative defense of undue hardship based on a preponderance of the evidence.[15] That is, a defendant may rebut a prima facie showing of a discriminatory exclusion of a protected class of individuals by establishing that elimination of the barrier would result in undue economic or administrative hardship. Reasonable accommodation provides the requisite flexibility needed in circumstances that, because they lack the egregious wrongfulness of invidious motivation, call for a more restrained exercise of remedial power. Given the emergence of non-invidious discrimination as a basis for liability and the corresponding growth of the doctrine of reasonable accommodation, the question arises as to whether reasonable accommodation might in practice become the court's all-purpose method for adjudicating discrimination claims under the MHRA. The tendency might be to view all but the clearest cases of invidiously motivated discrimination as cases of non-invidious discrimination, thus implicating the flexible limiting principle. Should the law develop in this manner, then—despite the sensitive regard for dignitary interests displayed by the lower court and the Law Court in *South Portland*—the way would be open for a less sensitive bench to balance away individual rights in all but the clearest cases of invidious discrimination.

This Comment first sets out briefly the origins of invidious discrimination in constitutional doctrine under the equal protection clause of the United States Constitution. The Comment briefly

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13. *Id.* at 955-56.

14. *See, e.g.*, Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d at 957 (Glassman, J., dissenting). *See also infra* notes 114-226 and accompanying text.

15. *See, e.g.*, Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d at 955-56 n.6.

traces the origins of the doctrine of invidious discrimination in an attempt to show the extreme narrowness of the concept. The Comment then sketches the development of non-invidious discrimination doctrine, and the standard of reasonable accommodation, in the federal statutory contexts. The Comment next sets out and discusses the relevant provisions and legislative history of the MHRA. The Comment then analyzes in detail the line of discrimination cases that ends with *Maine Human Rights Commission v. City of South Portland*, the case that consummates the emergence of non-invidious discrimination doctrine under the MHRA. The Comment concludes with a short section arguing the relevance of non-invidious discrimination doctrine for all areas within the MHRA and observing dangers posed by too great a reliance on reasonable accommodation as an all-purpose standard for determining the legality or illegality of prima facie discrimination.

This Comment argues that to protect "the basic human right to a life with dignity"[16] courts must attribute great weight to the dignitary interest of the protected individual when balancing that interest against any asserted justification based on undue hardship. The precise character of the dignitary interest will vary according to the classification at issue and its relevance to the individual's qualifications. This case-by-case balancing of factual circumstances precludes formulation of an across-the-board test for reasonable accommodation. It is, however, appropriate to speak of weighing interests and to advocate according great weight to the dignitary interests asserted by a plaintiff who has made out a prima facie case of discriminatory effect, even though the language of "weighing interests" remains figurative and somewhat imprecise.

Notwithstanding the difficulty of formulating guidelines for a flexible balancing test, the reasons for giving great weight to the dignitary interest are strong. The Legislature has clearly expressed its intention that the MHRA be construed broadly in accordance with its remedial purposes.[17] Federal courts have construed analogous federal antidiscrimination statutes to prohibit forms of non-invidiously motivated discrimination.[18] Thus, the general principle of recognizing a prima facie case of unlawful discrimination based on non-invidiously motivated conduct has already been established.[19] The result of erring on the side of assigning too much weight to a plaintiff's interests rather than not enough will be, at worst, to enforce a greater regard for the discriminatory consequences of business and administrative practices. Moreover, according great weight to a plaintiff's interests will make it more difficult for courts to be

16. ME. REV. STAT. ANN. tit. 5, § 4552 (Supp. 1987-1988).
17. *See infra* text accompanying notes 111-113.
18. *See infra* text accompanying notes 61-74.
19. *See infra* text accompanying notes 61-74.

misled by defendants' arguments based on cost. Insofar as "cost" is just another way of talking about what people consider important,[20] arguments based on financial or administrative burden may mask normative value judgments that are contrary to those endorsed by the Legislature and might conceal truly subjective determinations under a veneer of objectivity composed of the economic facts and figures that attend a cost-benefit analysis.

II. INVIDIOUSNESS

A. *Constitutional Sources of Antidiscrimination Law.*

There are two sources of antidiscrimination law in Maine: constitutions and statutes. The United States Constitution prohibits discrimination primarily through the due process clause of the fifth amendment[21] and the equal protection clause of the fourteenth amendment,[22] although other provisions of the Constitution also prohibit discriminatory state action.[23] Article 1, section 6-A of the

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20. *See* Kaufman, *Federal and State Handicapped Discrimination Laws: Toward an Accommodating Legal Framework*, 18 LOY. U. CHI. L.J. 1119 (1987) (prescriptive nature of judgments underlying application of reasonable accommodation); Marshaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46-59 (1976-1977) (cost/benefit analysis overlooks social and moral values underlying what constitutes acceptable due process); Note, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863, 875 (1988) ("Prejudice shapes the perception that the needs of people with disabilities are 'extra' needs above and beyond the norm, and that meeting these needs is a form of preferential treatment.").

21. The fifth amendment expressly concerns due process: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The clause applies against federal, rather than state, government. Although the fifth amendment expressly refers only to due process, due process encompasses equal protection as well. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (citing Bolling v. Sharpe, 347 U.S. 497 (1954)).

22. The fourteenth amendment, applicable on its face only to the states, refers both to due process and equal protection: "No state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

23. Other provisions of the Constitution prohibit discrimination, but the Supreme Court has generally not used the term "invidious" to denote the quality of the discrimination that renders it unconstitutional. For instance, the commerce clause prohibits economic discrimination against interstate trade. *See, e.g.*, Bacchus Imports Ltd. v. Dias, 468 U.S. 263 (1984) (excise tax that has both the purpose and effect of discriminating in favor of locally produced goods violates the commerce clause); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (state may not ban importation of solid or liquid waste for dumping in in-state sites). The Supreme Court regularly refers to protectionist measures as discriminatory and frequently employs the term "discrimination" in its opinions on the commerce clause. *See, e.g.*, Bacchus Imports Ltd. v. Dias, 468 U.S. at 271 ("Likewise, the effect of the exemption is clearly discriminatory."); City of Philadelphia v. New Jersey, 437 U.S. at 624 ("But where other legislative objectives are credibly advanced and there is no patent discrimination

Maine Constitution similarly prohibits the state government from denying equal protection of the laws to any person within the state.[24] Unlike the fourteenth amendment, which refers broadly to

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against interstate trade . . . ."). Any connection between discrimination under the commerce and equal protection clauses is primarily semantic and reflects the fact that the term "discrimination" can be taken broadly to mean any choice or selection that favors one option over another. A clear indication of the substantive difference between discrimination under the two clauses is that the commerce clause prohibits state action that discriminates in effect, *see* City of Philadelphia v. New Jersey, 437 U.S. at 626, whereas the equal protection clause focuses only on discrimination by design, *see infra* text accompanying notes 39-44. This doctrinal difference reflects in part the concern of the commerce clause with the allocation of economic costs and benefits as opposed to the equal protection clause's concern for the moral quality of properly motivated, i.e., impartial, governmental action. Nevertheless, the contrast in types of "discrimination" prohibited by the Constitution illustrates the narrow type of discrimination at issue in the equal protection clause.

Interestingly, the two types of discrimination converge in the Civil Rights Act of 1964. Although the evil that Congress sought to remedy was more closely analogous to the type of discrimination prohibited under the equal protection clause, i.e., racial and ethnic prejudice, Congress based its assertion of federal jurisdiction over private discriminatory conduct on the commerce clause, and the Supreme Court upheld this exercise of Congressional power. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). That the Court upheld antidiscrimination legislation on the grounds that private discriminatory conduct has an adverse economic impact on society raises the question of the role of cost/benefit analysis in discrimination law, a question that this Comment addresses more directly in the context of the Maine Human Rights Act. Nevertheless, *Heart of Atlanta* and *Katzenbach* suggest that while discrimination may impede interstate commerce, the economic cost is a consequence of the true evil that Congress sought to eliminate, not the real evil itself. Thus, statutory antidiscrimination law evolved from an area of law that did focus on the consequences of a "discriminatory act" and not solely on the motivation.

The privileges and immunities clause of article IV also prohibits discrimination. The clause states, "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2. The Supreme Court has struck down state and local provisions limiting employment opportunities to state and municipal residents on the grounds that economic protectionism tends to defeat the policy behind the privileges and immunities clause of unifying the nation as a single entity. *See, e.g.*, Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 279 (1985) (state may not exclude lawyers who reside out of state from membership in the state bar association); Toomer v. Witsell, 334 U.S. 385 (1948) (state may not impose substantially disproportionate fishing boat licensing fees on nonresident, commercial fishermen as compared with resident commercial fishermen). The word "fundamental," in the context of the privileges and immunities clause, is a term of art. In this context fundamental refers to the role of the privilege or immunity in binding the nation into a cohesive unit in both a commercial and non-commercial sense. *See* Supreme Court of New Hampshire v. Piper, 470 U.S. at 224. The purpose of the privileges and immunities clause thus bears some resemblance to that of the commerce clause, but the Court has relied on the provision primarily to prohibit discrimination based on residency requirements.

24. Article 1, section 6-A provides: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof." ME. CONST. art. I, § 6-A.

"equal protection of the laws," article 1, section 6-A contains specific language guaranteeing freedom from discrimination in the exercise of civil rights.[25] Generally, however, the Law Court has construed article 1, section 6-A consistently with the analogous federal constitutional provision.[26] United States Supreme Court decisions thus provide reliable guidance as to the state of the law under the Maine Constitution.

The concept of invidious discrimination originated in United States Supreme Court decisions construing the equal protection clause.[27] Since the equal protection clause contains no explicit reference to either discrimination or invidiousness, the doctrine has evolved wholly as a matter of judicial interpretation.[28] The term of art embodies a complex set of values relating to fundamental notions of good government, including the Court's perception of its own role in our system of separated powers. Included within the normative concept of invidiousness are judgments about the nature of the political process, the inevitability of state-promulgated classifications that assist in the allocation of finite resources,[29] and the

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25. *Id.*

26. *See, e.g.*, Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14, 25 (Me. 1981). In *Penobscot Area*, the Law Court stated: "Central to *any* equal protection claim is the existence of some state activity which discriminates against a person or group for arbitrary or invidious reasons." *Id.* (emphasis added).

27. *See generally* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 UCLA L. REV. 716 (1969) (ascribing origination of the doctrine to Justice Douglas).

28. The historical purposes of the fourteenth amendment provide the strongest support for the proposition that the equal protection clause prohibits racial discrimination. For instance, the Court stated in the *Slaughter-House Cases*,

> We repeat, then, in the light of . . . events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of [the thirteenth, fourteenth, and fifteenth] amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made free man and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, *in terms*, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1872) (emphasis added). *See also, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY 16-19 (1977) (original purposes of fourteenth amendment narrowly limited to race in post-Civil War era); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COL. L. REV. 1023, 1028-32 (1979) (equal protection clause originally intended to protect against racial discrimination, which remains the paradigm of unconstitutional discrimination today).

29. Personnel Adm'r v. Feeney, 442 U.S. 256, 271-72 (1979) ("Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no

history of racial and ethnic relations in our nation of minorities.[30] Because "invidious discrimination" connotes a complex set of values, any attempt to understand the term completely would require a careful examination of the Court's use of the word in the context of every equal protection case it has decided. A brief, general discussion of the basic "two-tier" analysis that the Court has developed under the equal protection clause will suffice, however, for the purposes of this Comment.[31]

The two-tier method is a two-step approach to equal protection. If the claim involves a suspect classification, or a non-suspect classification that infringes upon a fundamental right, the Court will strictly scrutinize the challenged state action. To withstand strict scrutiny, the state must show that the classification serves a compelling governmental purpose and that it constitutes the necessary means to the attainment of that end.[32] On the other hand, if the challenged state action does not involve a suspect classification or fundamental right, it must merely satisfy the rational basis test. Under this low level, or minimal scrutiny test, the classification must merely bear a rational relationship to a legitimate state pur-

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differently from all other members of the class described by the law.").

30. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (consistent with proper institutional relationship between judiciary and legislature in government of separated powers, Court will presume legislation rational, and hence constitutional, unless sufficient facts shown to rebut this strong presumption). In Justice Stone's famous footnote 4, *id.* at 152-53 n.4, he suggested a basis for strict scrutiny of certain legislative actions. For the text of the note in pertinent part, see *supra* note 3. Under this theory, discrimination is invidious to the extent that it burdens a class or category of persons unable to endeavor to prosecute its own political interests in the democratic arena. The unfairness springs from the helplessness of the particular burdened class, not from the inequality per se. The footnote suggests the normative judgment that, consistent with separation of powers, the Court should intercede in the democratic process only to the extent necessary to ensure that the process is disenfranchising no one. Invidious discrimination thus contains less than a judgment against inequality. It proscribes only certain very limited types of inequality that are unfair in the context of representative democracy.

31. The Court requires that gender classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). A substantial-relation-to-an-important-governmental-objective test thus constitutes a third, intermediate level of scrutiny and thus belies the strict "two-tier" approach. *See also* Plyler v. Doe, 457 U.S. 202, 216-24 (1982) (public education is a benefit that is sufficiently important to require more than rational basis scrutiny, but less than strict scrutiny reserved for fundamental rights). A full treatment of the different levels of scrutiny would take intermediate scrutiny into account. For purposes of this Comment, however, the two-tier model, although no longer strictly adhered to by the Court, will suffice to illustrate the narrow concept of invidious discrimination.

32. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978) (racial classification requires strict scrutiny notwithstanding that classification favors minorities over majority) (quoting *In re* Griffiths, 413 U.S. 717, 721-22 (1973) and McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).

pose.[33] If the Court can conceive of some set of circumstances under which the challenged classification appears not arbitrary, then the Court will uphold it under the rational basis test. Courts routinely refer to state action that fails either the strict scrutiny or the rational basis test as invidious discrimination.[34] State action challenged under the former test is almost always struck down, and action challenged under the latter standard is almost always upheld. Supreme Court doctrine under the strict scrutiny test, therefore, provides the more reliable indication as to the meaning of invidious discrimination, since only under that test has the Court defined positive examples.

Cases in which the Court has applied strict scrutiny reveal the narrowness of the concept of invidious discrimination. First, insofar as strict scrutiny involves suspect classifications, it presupposes the complex process by which the Court defines classifications as suspect. Indeed, the Court has exhibited considerable reluctance to expand the set of suspect classifications beyond race, alienage, and national origin, despite compelling arguments for considering gender and physical and mental handicap classifications also as suspect.[35] The definition of a suspect classification reflects in part the historical concern embodied in the fourteenth amendment with guaranteeing freedom from racial discrimination.[36] Suspect classifications also

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33. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 491 (1955) (Oklahoma statute prohibiting opticians from fitting or replacing lenses except with written prescription from licensed optometrist or ophthalmologist rationally related to legitimate state goal of freeing profession of eye doctor from taint of commercialism).

34. *See* Caron v. Scott Paper Co., 448 A.2d 329, 331 (Me. 1982) ("section 112, being neither arbitrary nor invidiously discriminatory in effect"); Beaulieu v. City of Lewiston, 440 A.2d 334, 339 (Me. 1982) ("[L]aw survives constitutional scrutiny unless there exists no conceivable set of facts which prevents the characterization of the renter/owner distinction as arbitrary, invidious, or irrational."); Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14, 25 (Me. 1981) ("arbitrary or invidious"); Maine State Employees Ass'n v. University of Maine, 395 A.2d 829, 832 (Me. 1978) ("invidious, arbitrary, or unreasonable discrimination"); Department of Trans. v. National Adv. Co., 387 A.2d 745, 750 (Me. 1978) (equating arbitrariness, unreasonableness, and invidiousness) (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911)); Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Ass'n, 320 A.2d 247, 255 (Me. 1974) ("Only invidious-arbitrary or unreasonable-discrimination is prohibited by law."); B.P.O.E. Lodge No. 2043 v. Ingraham, 297 A.2d 609, 615 (Me. 1972) (equating "arbitrary," "capricious," and "invidiousness"); State v. Karmil Merchandising Corp., 186 A.2d 352, 365 (Me. 1962) ("plainly discriminatory or plainly arbitrary").

35. *See, e.g.*, Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855 (1975) (discusses merits of defining physically handicapped as suspect class).

36. *See, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1873) (discussing the "one pervading purpose" of the fourteenth amendment, as well as the thirteenth and fifteenth, of protecting the "newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him").

reflect judicial solicitude for "discrete and insular minorities" whose exclusion from the political process denies them the ability to combat disadvantageous legislation through normal political give-and-take.[37] Finally, insofar as the Court has shown no tendency towards declassifying racial classifications as suspect, notwithstanding racial minorities' greater access to the political process, suspect classifications also reflect the more patently normative judgment that certain kinds of distinctions are simply wrong for government to make. Whatever the precise alchemy of factors, the Court has refused to expand suspect classifications beyond a very limited set.[38] The Court has similarly restricted the concept of "fundamental rights."[39]

Second, the strict scrutiny test requires that the challenged state action be undertaken with a specific kind of intent. In order to fail strict scrutiny, the challenged action involving a suspect classification must be undertaken "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[40] This stan-

37. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

38. For example, the Court declined to define mental handicap as a protected classification in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). The Court did, however, arguably apply a heightened standard of rationality review in lieu of the strict scrutiny analysis that would have followed from a definition of mental handicap as a protected classification. *Id.* at 447-50.

39. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 30-31 (1973) (Court distinguished between interests that are "fundamental," in the colloquial sense of "very important," and interests that are "fundamental" for constitutional purposes. The latter refers only to rights guaranteed expressly, or by direct implication, in the text of the Constitution itself and thus excludes such important rights as public education and voting in state elections.).

40. Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979). The *Feeney* Court distinguished the intent required under the fourteenth amendment from that "common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions." *Id.* at 278. *Feeney* concerned a challenge to a Massachusetts veterans preference statute that mandated that veterans qualifying for civil service positions be considered for appointment ahead of qualifying nonveterans. The Court held that the statute did not violate the equal protection clause despite the fact that it operated to favor a class from which women had traditionally been excluded. The evidence did not show that the Massachusetts Legislature "originally devised or subsequently re-enacted [the statute] because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service." *Id.* at 279. The Court found that "[w]hen the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women." *Id.* at 280. That the Court refused to conclude from the clearly foreseeable disparate impact of the statute that it was intended to discriminate against women emphasizes the motive element in the Court's test. Under *Feeney*, impact is relevant, but only as circumstantial evidence of purpose. Impact does not of itself trigger heightened scrutiny. *See id.* at 279 nn.24 & 25.

Feeney represents the consummation of a line of cases concerning discriminatory intent. In Washington v. Davis, 426 U.S. 229 (1976), the Court faced a constitutional challenge to the validity of a standardized employment test administered to candi-

dard thus requires more than the minimal torts standard of merely intending the act; the state must intend the discriminatory result.[41] This requirement ensures that only conduct that clearly contravenes the ideal of impartial government will violate the equal protection clause. The requirement is reflected in the Court's refusal to find a constitutional violation where legislative or administrative action merely affects members of suspect classifications disadvantageously relative to others.[42] Although the Court has ruled that impact, or effect, is relevant to invidious discrimination, it is relevant only as circumstantial evidence of the crucial intent factor and not as direct evidence of unconstitutional action.[43]

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dates for the position of police officer in the District of Columbia Metropolitan Police Department. The challenge was based on the ground that a disproportionate number of black applicants failed the test relative to whites. The Court held that disparate impact alone "does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Id.* at 242. Applying rationality review, the Court upheld the test as consistent with the constitutionally legitimate goal of "seeking modestly to upgrade the communicative abilities of its employees." *Id.* at 246.

In Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the Court clarified the quantum of discriminatory intent needed to make out a violation of the equal protection clause. The Court rejected the notion that the holding in *Davis* required "a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes," or that the purpose was "the 'dominant' or 'primary' one." *Id.* at 265. Rather, where "discriminatory purpose has been a motivating factor in the decision," the challenged state action no longer warrants the usual presumption of constitutionality. *Id.* at 265-66. The *Arlington Heights* Court upheld the lower court's findings that the municipality's denial of a zoning variance for a low income housing project reflected non-invidious concerns for preserving the character of the town as one primarily of single-family homes. *Id.* at 268-71.

41. Intent in the torts sense is intent to do the act. *See* W. PROSSER & W. KEETON, THE LAW OF TORTS § 8 (5th ed. 1984) (student edition).

42. *See, e.g.*, Cleburne v. Cleburne Living Center, 473 U.S. 432, 451 (1985) (Stevens, J., concurring). In construing the Court's own use of the rational basis methodology, Justice Stevens posited governmental impartiality as the true interest sought to be protected by the equal protection clause: "Thus, the word 'rational'—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially." *Id.* at 452.

43. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976). The *Washington* Court explained:

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious discrimination forbidden by the Constitution.

Id.

The area of equal protection jurisprudence that most markedly relies on the distinction between intent and effect has been that of school desegregation. The Court has adhered to the distinction between de facto discrimination, which refers to the fact that schools are populated primarily by students of one racial group or another, and de jure discrimination. The latter refers to legally mandated segregated schooling. While the Court has sought to remedy the latter, it has declined to find a consti-

Once the plaintiff establishes the requisite level of intent, the inquiry then focuses upon the state's motive, i.e., the reasons behind its intentional conduct. The archetypal invidious motivation is that of the bigot who is consciously aware of, or even openly embraces, his hatred of a particular group. Invidious motivation includes more, however, than the desire to relegate a particular group to second-class citizenship out of pure discriminatory animus. Invidious motivation also includes the more subtle, but no less pernicious attitude that singles out an identifiable group for special protection in a belief that the group's inferiority requires solicitude. Well-intentioned discrimination is just as unlawful as animus-based discrimination; good faith is no defense.[44] Both reflect stereotypes that stigmatize or brand persons as social inferiors based on traits not possessed by the majority and not indicative of personal worth.

The lower level scrutiny embodied in rational basis review rarely results in a finding of unconstitutionality.[45] This judicial deference reflects the strong policy of *not* interfering with legislative judgments on matters of social and economic policies that the Court expressed in *United States v. Carolene Products Co.*, the case that marked the end of an era of judicial interference in social and economic policy matters on grounds of substantive due process.[46] The

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tutional violation in the former kind of situation. *Compare* Brown v. Board of Educ., 347 U.S. 483 (1954) (state law requiring racially segregated schooling held to violate the equal protection clause) *with, e.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (fact that pupil population in various city schools is not homogeneous does not violate the constitution absent showing of segregative intent).

44. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (Federal Old-Age, Survivors, and Disability Insurance Benefits Program conferred greater benefits on widows compared to widowers based on assumption "that wives are usually dependent"). Similarly, under antidiscrimination statutes, discussed *infra* text accompanying notes 51-74, good faith is not a defense to invidiously motivated discrimination. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (good faith efforts of employer to help employees meet hiring and promotion criteria no defense to discriminatory effect); Maine Human Rights Comm'n v. Canadian Pac., Ltd., 458 A.2d 1225, 1231 (Me. 1983) ("[G]ood faith is not at issue in determining the validity of discriminatory employment practices under the MHRA.").

45. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (transit authority rule prohibiting employment of methadone users constitutionally permissible because rationally related to legitimate state purpose of ensuring public safety); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (Oklahoma statute requiring prescription from eye doctor before optician may grind or fit new lenses rationally related to permissible state purpose of removing taint of commercialism from medical practice). *But see* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (denial of special use permit to group home for mentally retarded violates fourteenth amendment because not rationally related to permissible purpose of ensuring safety of the residents of the proposed home).

46. United States v. Carolene Prods. Co., 304 U.S. 144 (1938). As commentators have pointed out in arguing for an effects-based principle under the equal protection clause, the invidiousness of the consequences of such non-invidiously motivated behavior can be seen in the way the discriminatory effect perpetuates discriminatory

strength of this non-interference policy supplies a gauge as to the meaning of invidious discrimination, for invidiousness constitutes a sufficiently great wrong to allow the court to overcome its powerful, post-*Lochner*[47] era reluctance to enter this area of social and economic policy-making.

The Maine Supreme Judicial Court has likewise extended considerable deference to state classifications that do not involve a suspect classification.[48] The Law Court, following the Supreme Court, routinely describes the antithesis of a rational basis in phrases centered on the term "invidious."[49] It is clear that the term "invidious" in this context connotes a decision that is so patently arbitrary that it lacks even the semblance of fairness that would allow a deferential court to ascribe the inequalities produced by the classification to "politics as usual" and to leave its correction to the normal workings of the democratic process. Thus, outside the context of suspect classifications, invidious discrimination serves as a basis on which a Maine or federal court would, if it found a sufficiently egregious, non-suspect classification, strike down the legislation as a denial of equal protection. The standard is so deferential, however, that it amounts in practice to a requirement that discrimination that fails the rational basis test be purposeful and stereotype-based rather than merely illogical.[50]

Invidious discrimination thus represents a very narrow range of possible inequality-producing behavior. Invidious motivation, as an element of one type of invidious discrimination found under strict scrutiny, represents an even narrower range of conduct. It must be conduct that is intentional in a specific sense and that is predicated on a suspect classification. Moreover, invidious discrimination must proceed from a motive involving a stereotype that implies social inferiority. Invidious discrimination based on a motive to stigmatize, whether or not out of pure animus or antipathy, can also be found under the rational basis test. Yet the rarity with which the rational basis test results in a finding of unconstitutionality emphasizes

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attitudes. People tend to equate material well-being with personal worth. To the extent that non-invidiously motivated practices nevertheless affect minorities in a material way, the effect will reinforce the invidious belief that they are morally inferior. The effect will also reinforce the minority's belief that the law does not treat them fairly and equitably. *See* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1040-41 (1979) (also advances theory of equal protection based on moral equality; uses term "illicit motive").

47. Lochner v. New York, 198 U.S. 45 (1905). *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-2 through 8-7, at 567-86 (2d ed. 1988) (discussing *Lochner* era and its erosion).

48. *See supra* note 34.

49. *See supra* note 34.

50. *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-41 (1985).

again the narrowness of the prohibition against inequality-producing behavior as a matter of equal protection.

B. *Statutory Sources of Antidiscrimination Law.*

Antidiscrimination law in Maine is also governed by state and federal statutes. Federal statutes such as the Civil Rights Act of 1964[51] and section 504 of the Rehabilitation Act of 1973[52] prohibit discrimination by both state and non-state actors. The MHRA,[53] modeled in part on the federal Civil Rights Act of 1964,[54] also prohibits discrimination by state and non-state actors in Maine. Unlike the broad sweep of the constitutional provisions prohibiting denial of equal protection, antidiscrimination statutes generally define unlawful discrimination precisely in terms of prohibited bases of decision-making, e.g., gender, in specific contexts, e.g., employment.[55] This precision limits judicial development to the boundaries created by the legislature. Courts have generally construed human and civil rights statutes very broadly within the limits imposed by the language of the statutes, however, consistent with the remedial nature

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51. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1982 & Supp. IV 1986)).

52. Pub. L. No. 93-112, 87 Stat. 394 (codified at 29 U.S.C. § 794 (1982)). Section 504 prohibits discrimination on the basis of physical or mental handicap in any program receiving federal funding:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

Id. This statute did not apply in Maine Human Rights Commission v. City of South Portland, 508 A.2d 948 (Me. 1986), because the city received no federal financial assistance, but funded the start-up cost of its bus system with a referendum bond issue. *Id.* at 950-52. A detailed discussion of section 504 is beyond the scope of this Comment. See *infra* text accompanying notes 57-60 & 68-74 for a brief discussion of Supreme Court cases construing the section insofar as relevant to the development of non-invidious discrimination doctrine. *See generally* Wigner, *The Anti-discrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401 (1984).

53. P.L. 1971, ch. 501 (codified as amended at ME. REV. STAT. ANN. tit. 5, §§ 4551-4632 (1979 & Supp. 1987-1988)).

54. *See, e.g.*, Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369, 374-75 (Me. 1978) (adducing evidence from legislative history that Act was modeled on the 1964 federal statute). *But see* Percy v. Allen, 449 A.2d 337, 346-47 (Wathen, J., concurring) (criticizing *Local 1361* court's use of legislative history based on earlier unsuccessful attempt to enact the MHRA).

55. *See, e.g.*, 42 U.S.C. § 2000e (1982) (section of 1964 Act prohibiting discrimination on basis of race, national origin, religion, or gender in context of private employment); ME. REV. STAT. ANN. tit. 5, §§ 4571-4572 (1979 & Supp. 1987-1988) (subchapter of Maine Act prohibiting discrimination in private employment context on basis of race, religion, national origin, color, gender, age, or physical or mental handicap).

of the legislation.[56]

The United States Supreme Court has construed both the Civil Rights Act of 1964 and section 504 of the Rehabilitation Act to prohibit purposeful, invidiously motivated discrimination analogous to that which would have triggered the strict scrutiny test under the equal protection clause if caused by a state actor. For instance, *Heart of Atlanta Motel v. United States*,[57] the seminal civil rights case in which the Supreme Court upheld congressional power to regulate private discrimination in public accommodations as a valid exercise of commerce clause power, concerned overt private discrimination based on race.[58] In *Southeastern Community College v. Davis*,[59] the first case construing section 504, the Court stated that the provision prohibited purposeful, invidiously motivated discrimination on account of physical handicap but found that the challenged action in that case involved no invidious motivation.[60] The

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56. *See, e.g.*, Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d at 373 (stating that the MHRA was meant to have a "very broad coverage").

57. 379 U.S. 241 (1964).

58. An owner of a large motel in Atlanta, Georgia brought an action seeking declaratory relief and an injunction enjoining enforcement of the Civil Rights Act of 1964. The appellant contended, on appeal, that the Act exceeded Congress's power under the commerce clause. The appellant solicited business out of state and approximately 75% of its registered guests came from out of state. The public accommodations owner "had followed a practice of refusing to rent rooms to Negroes, and [the appellant owner] alleged that it intended to continue to do so." *Id.* at 243. The Court upheld the constitutionality of the Civil Rights Act as a regulation of interstate commerce. *Id.* at 261.

59. 442 U.S. 397 (1979).

60. *Davis* concerned an appeal brought by a severely hearing-impaired person who applied for admission to a nursing program. The successful completion of the program would have made the applicant eligible for state certification as a registered nurse. *Id.* at 400. A medical examination revealed that the applicant would have to lip-read in order to receive effective communication and, consequently, that she would be responsible only for speech " 'spoken to her, when the talker gets her attention and allows her to look directly at the talker.' " *Id.* at 401. The Executive Director of the State Board of Nursing recommended denying the applicant admission on the basis that her hearing impairment would jeopardize safety and also on the basis that the modifications necessary to allow her participation in the program would effectively deny her a full learning experience consistent with the nursing curriculum. *Id.* at 401-402. The college eventually denied the application after further deliberation. *Id.* at 402.

Suit was brought under section 504 of the Rehabilitation Act of 1973. The district court held that plaintiff was not "otherwise qualified" within the meaning of the Act. That is, she could not function satisfactorily within the program in spite of her handicap. The Fourth Circuit Court of Appeals reversed, holding that "otherwise qualified" meant qualified in every respect without regard to the applicant's handicap. The court of appeals also contrued section 504 as imposing a duty to accommodate the disabilities of applicants even when the modifications are expensive. *Id.* at 404. The Supreme Court reversed.

The Court ruled that an "otherwise qualified person is one who is able to meet all

two cases demonstrate that the proscription against private discrimination reflects the legislative policy judgment that the society should largely be free from invidious decisionmaking rather than the narrower, judicially interpreted constitutional principle that government must treat people impartially.

The Court early on, however, extended the statutory antidiscrimination principle to prohibit effects-based discrimination.[61] In

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of a program's requirements in spite of his handicap." *Id.* at 406. To hold as the court of appeals did would "prevent an institution from taking into account any limitation resulting from the handicap, however disabling." *Id.* In so ruling, the Court relied heavily on regulations promulgated by the Department of Health, Education and Welfare (HEW) that construed section 504. *Id.* at 407. Given that the petitioner could properly take applicants' physical handicaps into account, the question then became whether "the physical qualifications Southeastern demanded of respondent might not be necessary for participation in its nursing program." *Id.* To resolve this question required the Court, in effect, to sit in judgment over the manner in which the college had structured its nursing program. The Court was required to take into account both the skills which the college considered essential to a properly trained registered nurse as well as the educational means by which the college sought to inculcate those skills.

The Court stated that it was "not open to dispute that, as Southeastern's Associate Degree Nursing program currently is constituted, the ability to understand speech without reliance on lipreading is *necessary* for patient safety during the clinical phase of the program." *Id.* (emphasis added). The respondent contended that section 504 nevertheless obligated the college "to undertake affirmative action that would dispense with the need for effective oral communication," *id.* at 407, by restructuring the program. Rather than train the respondent to perform all the tasks a registered nurse is licensed to perform, Southeastern could train her to perform satisfactorily "some of the duties of a registered nurse" and that would be "sufficient." *Id.* at 408.

The Court answered the respondent's contention by noting that HEW regulations obligated post-secondary institutions receiving federal funds to make " '*modifications*' in their programs to accommodate handicapped persons, . . . such as sign-language interpreters." *Id.* at 408 (emphasis added; footnote omitted). The administratively recognized duty to make modifications did not, however, include a duty to make "fundamental alterations in the nature of a program," *id.* at 410, such as would be required in order to admit the respondent, for to admit her the college would be able to allow her "to take only academic classes." *Id.* That would give her not "even a rough equivalent of the training a nursing program normally gives." *Id.* The Court concluded by contrasting the statutorily imposed duties to make modifications and to avoid discriminatory animus with the duty to take affirmative action:

> The uncontroverted testimony of several members of Southeastern's staff and faculty established that the purpose of its program was to train persons who could serve the nursing profession in all customary ways. This type of purpose, far from reflecting any *animus against handicapped individuals*, is shared by many if not most of the institutions that train persons to render professional service. It is undisputed that respondent could not participate in Southeastern's nursing program unless the standards were substantially lowered. Section 504 imposes no requirement upon an educational institution to lower or to effect *substantial modifications* of standards to accommodate a handicapped person.

Id. at 413 (emphasis added; citations and footnote omitted).

61. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

the seminal case of *Griggs v. Duke Power Co.*,[62] the defendant potentially violated Title VII of the Civil Rights Act of 1964 by imposing a set of hiring and promotion criteria that operated to exclude disproportionate numbers of black employees and prospective employees relative to whites.[63] The Court expressly found that the selection criteria did *not* reflect covert discriminatory animus, thus

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62. *Id.*

63. Duke Power, a North Carolina utility, required a high school diploma for employment in any of its five departments except labor, which involved menial work. The highest paying position in the labor department paid less than the lowest paying position in any of the other departments. *Id.* at 427. Prior to passage of the Civil Rights Act of 1964, the company had confined its employment of blacks to the labor department pursuant to a policy of overt racial segregation. *Id.* at 427-28. After passage of the Act, the company abandoned its policy of discrimination. The company required, however, a high school diploma for transfer out of the labor department into any of the other departments. This requirement, the plaintiffs argued, disadvantaged black employees in the labor department who suffered from the effects of the historically segregated and inferior public education provided to blacks in that region. *Id.* at 430. The company also required all first-time prospective employees to perform satisfactorily on "two professionally prepared aptitude tests[:] . . . the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test." *Id.* at 427-28. The Court found that this requirement also victimized blacks, who have "long received inferior education in segregated schools." *Id.* at 430.

The district court found for the defendants, holding that the company did not presently engage in intentional racial discrimination and any prior policy of purposeful racial segregation lay outside the prospective application of title VII of the 1964 Act. *Id.* at 428. Implicit in the holding was the idea that the Act prohibits only purposeful, i.e., invidious discrimination. The court of appeals affirmed on the question of invidious discrimination.

The United States Supreme Court reversed on the issue of intentional discrimination:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

Id. at 431. The Court further stated, "Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant." *Id.* at 436. Although the fact situation in *Griggs* contained an element of purposeful, conventionally invidious discrimination insofar as concerns the historically inferior public education received by blacks, the Court made no attempt to predicate its holding on that factor, but announced the broad principle quoted above. Other courts, including the Law Court, have not read *Griggs* as confined to a situation where the discriminatory consequences can be traced to some prior condition involving conventionally invidious behavior. *See* Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369, 373-75 (Me. 1978) (citing, quoting and discussing *Griggs*).

holding that a showing of discriminatory effects without more is sufficient to constitute a prima facie case of unlawful discrimination. After *Griggs v. Duke Power Co.*, disparate impact was direct evidence of unlawful discrimination, not merely circumstantial evidence of discriminatory intent.[64] Moreover, the defendant's good faith was acknowledged in that the company offered to finance a substantial portion of the cost of tuition for any employee seeking a high school diploma, one of the challenged criteria.[65] Thus, the criteria did not reflect a desire to exclude a racial minority, but merely the non-invidious desire to establish minimal levels of employee competency. Notwithstanding that the defendant showed good faith and that the discriminatory consequences of the selection criteria did not constitute circumstantial evidence of invidious intent, liability could potentially follow under Title VII unless the defendant could show that the job requirements were job-related or mandated by business necessity.[66]

This principle clearly reflects a shift in focus away from the invidious quality of the alleged discriminator's motives as the basis for defining the wrong and providing a remedy. The *Griggs* principle focuses on the consequence to the victim of the alleged discrimination. *Griggs* represents the judgment that harm, both in material and dignitary terms, flows to a person who is denied an important private benefit of civil society because of his or her race, gender, handicap, or the like, regardless of whether the harm occurs as a result of the actor's specific intent or as a consequence of, in effect, the actor's careless indifference or negligence.[67] In either case, the

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64. Griggs v. Duke Power Co., 401 U.S. at 432.

65. *Id.*

66. *Id. Griggs* has caused a flood of scholarly commentary, some of it critical of the Court's analysis. For a recent article discussing the legislative history of Title VII from the standpoint of the disparate impact theory of unlawful discrimination and arguing that disparate impact works best as a procedural device for ferreting out covert invidious discrimination, see Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987).

67. The shift from invidious motivation as the ground of liability in the constitutional context to the consequences of an act as the basis of liability parallels, in an interesting way, the difference between intentional torts, with their emphasis on the nature of the conduct, and negligence, with its focus on the consequences of an act. Effects-based discrimination implies a duty similar to that underlying negligence law. The defendant, in effect, must foresee and obviate the harmful effects of his actions, and the concomitant denial of personal dignity and worthiness, where the harm entails the denial of housing, employment, access to public accommodations or any of the other important privately allocated benefits brought within the terms of the Act. Insofar as negligence law imposes a duty to act affirmatively to avoid, or eliminate, an unreasonable risk of harm, it imposes a duty of "affirmative action" not essentially different from that created by effects-based discrimination doctrine. The scope of the duty may differ, but its affirmative nature does not. In each case a person may have to act to discharge the duty owed, not merely refrain from acting. *See* Kaufman, *supra* note 20, at 1144 (equating obligation under the Illinois Human Rights Act with

victim has been denied a tangible benefit that he or she would have received, but for membership in a protected class.

Section 504 of the Rehabilitation Act also supports the finding of a prima facie case of discrimination on the basis of a policy or practice that denies meaningful access to the benefit conferred notwithstanding a lack of discriminatory animus. The Supreme Court has not yet, however, upheld a lower court ruling based on disparate impact under the Act. In *Alexander v. Choate*,[68] the Court rejected the argument that reduction from twenty to fourteen days of annual inpatient hospital care covered by state Medicaid constituted an unlawful discriminatory effect despite evidence of a severely disproportionate impact on handicapped persons.[69] Nevertheless, the Court found that one of the purposes of section 504 was to reach discrimination "often the product, not of invidious animus, but rather of thoughtlessness and indifference."[70] Implied by this purpose is the notion that the Act does prohibit discrimination in some cases notwithstanding that it lacks the element of purposefulness found in invidious discrimination as traditionally defined. Indeed, the *Alexander* Court rejected the State of Tennessee's argument that section 504 prohibited only invidiously motivated discrimination.[71] The Court thus left the door open for plaintiffs to plead and prove effects-based discrimination. The Court also wrote, "[T]o assure meaningful access, *reasonable accommodations* in the grantee's program or benefit may have to be made."[72] Reasonable accommodation would not require modifications that were fundamental or substantial, i.e., that involved changes in the essential nature of the program.[73] Although the Court recognized the vagueness of the limiting principle of reasonable accommodation when stated as a general rule, it declined to define the principle further.

In sum, invidious discrimination, as defined under the Supreme Court's equal protection jurisprudence, has long-since ceased to be

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negligence per se).

68. 469 U.S. 287 (1985).

69. Uncontroverted statistical evidence showed that while only 7.8% of non-handicapped persons receiving Medicaid required more than 14 days of inpatient care, 27.4% of handicapped Medicaid recipients needed longer care. *Id.* at 289-90.

70. *Id.* at 295, *quoted in* Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d 948, 954 n.5 (Me. 1986). Although the Supreme Court has not expressly equated disparate impact with reasonable accommodation, the two standards do seem substantially similar. *See* Kaufman, *supra* note 20, at 1132 ("prescriptive duty of reasonable accommodation can be seen as the application of the 'business necessity' defense to charges of handicapped discrimination").

71. *Id.* at 292-99.

72. *Id.* at 301 (emphasis added).

73. *Id.* at 300 (citing Southeastern Community College v. Davis, 442 U.S. 397 (1979)). *See also* Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401 (1984).

the sole paradigm for unlawful discrimination. Remedial antidiscrimination legislation has expanded the concept of unlawful discrimination to include the kind of effects-based discrimination that does not violate the equal protection clause. With the development of the doctrine of non-invidiously motivated discrimination as an independent source of unlawfulness, reasonable accommodation has emerged as a means of distinguishing between a lawful and an unlawful discriminatory effect. The problem with determining the proper scope of the duty to foresee and take steps to eliminate discriminatory consequences is reflected in the tension between reasonable accommodation and "affirmative action" under federal law.[74]

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74. Generally, courts have not imposed broad duties to foresee and avoid the creation of discriminatory barriers under the doctrine of reasonable accommodation primarily because of a perceived connection between reasonable accommodation and the remedial doctrine of affirmative action. *See, e.g.*, Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Trans. Auth., 718 F.2d 490, 496 (1st Cir. 1983) (order to expend $320,000 equipping 42 newly purchased buses with wheelchair lifts constitutes affirmative action). The courts that have expressly referred to reasonable accommodation as tantamount to affirmative action have been criticized both by other courts, *see, e.g.*, Dopico v. Goldschmidt, 637 F.2d 644, 652 (2d Cir. 1982), and commentators for this "unfortunate" choice of terms. *See* Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U.L. REV. 881, 885-86 (1980); Note, *Accommodating the Handicapped: Rehabilitating Section 504 After* Southeastern, 80 COLUM. L. REV. 171, 185-86 (1980). *See also* Alexander v. Choate, 469 U.S. 287, 300 n.20 (1984) (Justice Marshall, writing for a unanimous Court, noted criticism of the Court's previous use of the term "affirmative action" in connection with reasonable accommodation, but defended the aptness of the Court's usage).

Indeed, courts that have refused to apply reasonable accommodation without express provision from the legislature may have underestimated the extent to which the duty not to discriminate has become an affirmative duty under remedial antidiscrimination legislation notwithstanding the lack of a provision expressly authorizing affirmative action. *See* Eastern Paralyzed Veterans Ass'n v. Metropolitan Trans. Auth., 79 A.D.2d 516, 517, 433 N.Y.S.2d 46, 46 (1980). Where Congress, or a state legislature, has defined the evil to be remedied as the societal cost of denying capable individuals access to opportunities in which they can make the most of their capabilities for both their own and society's benefit, courts may fairly impose a duty to avoid creating unnecessary barriers to such opportunities. *See, e.g.*, Alexander v. Choate, 469 U.S. at 295 n.13, 296 (discussing legislative history of Rehabilitation Act); Eastern Paralyzed Veterans Ass'n v. Metropolitan Trans. Auth., 79 A.D.2d at 517, 433 N.Y.S.2d at 463-64 (Kupferman, J., dissenting) (noting legislative statement of purpose). As the cases involving physical handicap discrimination show perhaps most clearly of all, the kind of negative duty analogous to that imposed upon the states by the equal protection clause, i.e., the duty merely to refrain from acting upon a discriminatory purpose, leaves people free to remain indifferent to exclusionary barriers that both waste human potential and stir feelings of social estrangement and hostility. *See* Alexander v. Choate, 469 U.S. at 295 n.13, 296.

Courts that apply reasonable accommodation at the direction of a statute or regulation generally construe the doctrine narrowly to avoid the problem of affirmative action. *See, e.g.*, Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Trans. Auth., 718 F.2d 490, 496 (1st Cir. 1983). The same considerations that might cause a court to apply reasonable accommodation as a matter of judicial construction would

III. A General Interpretation of the Maine Human Rights Act

Like the federal Civil Rights Act of 1964 upon which it was modeled,[75] the MHRA declares that freedom from discrimination is a civil right and sets up an administrative procedure by which a person alleging discrimination may obtain a remedy without having to undergo formal judicial proceedings.[76] The Act effectively defines certain human characteristics as irrelevant for purposes of determining an individual's qualifications to receive specific societal benefits. This scheme reflects a legislative judgment as to what needs are essential to a life with dignity.[77] The MHRA prohibits discrimination in employment,[78] housing,[79] public accommodations,[80] credit exten-

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also, however, lead a court to construe a legislatively or administratively mandated use of the doctrine more broadly than narrowly. Federal district courts that have imposed a broad duty of reasonable accommodation generally have been reversed on appeal. *See id.* The Maine Law Court has imposed greater duties under the doctrine of reasonable accommodation than either the federal courts or other state high courts. Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d 948 (Me. 1986).

75. *See, e.g.*, Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369, 375 (Me. 1978) ("Our examination of the legislative history and statutory structure of the Maine Act inescapably compels but one conclusion: the employment discrimination provisions in our statute were intended to be the state counterparts of the Federal Act, complementing and in certain instances supplementing the federal."); 3 Legis. Rec. 4195 (1969) (statement of Rep. Marstaller) ("This legislation is patterned after legislation in some other states and has many of those provisions. It is also patterned after the federal law.").

76. *See* Me. Rev. Stat. Ann. tit. 5, § 4611 (1979) (creating right to file an administrative complaint with Maine Human Rights Commission alleging, under oath, unlawful discrimination with supporting facts). The Commission investigates the complaint and "endeavor[s] to resolve the matter by informal means prior to a determination of whether there are reasonable grounds to believe that unlawful discrimination has occurred." *Id.* § 4612(1). If the Commission finds that reasonable grounds exist to conclude that discrimination has occurred, then the Commission may either continue to seek to resolve the matter through informal conciliation, *id.* § 4612(3), or, if the Commission believes that irreparable injury may occur to the victims of such discrimination if relief is not immediately granted, the Commission may bring an action in superior court on behalf of the complainant. *Id.* § 4612(4)(A). In any event, should efforts at informal conciliation fail, the Commission may bring an action seeking injunctive and compensatory relief. *Id.*

The statutory scheme thus clearly gives the administrative agency the front-line position in determining what constitutes unlawful discrimination under the Act. *Cf. id.* § 4552 (Supp. 1987-1988) (statement of policy to keep all practices infringing on basic rights to human dignity under review, i.e., through the Commission); *id.* § 4566 (powers and duties of Commission). This front-line position rests on the idea that "anti-discrimination efforts should be unified under a group of specialists." Governor's Task Force on Human Rights 14 (1968).

77. *See* Me. Rev. Stat. Ann. tit. 5, §§ 4552, 4566 (provisions referring expressly to human dignity as the underlying value sought to be protected by the Act). See *infra* text accompanying notes 106-113 for a discussion of these provisions and their implications for non-invidious discrimination doctrine.

78. Me. Rev. Stat. Ann. tit. 5, §§ 4571-4575 (1979 & Supp. 1987-1988).

sion,[81] and education[82] on the basis of race, color, sex, physical or mental handicap, religion, ancestry or national origin, age, and marital status.[83]

The history of statutory antidiscrimination law in Maine shows a clear trend towards expanding the right not to be discriminated against by including an ever-widening range of conduct within the ambit of unlawful discrimination. The legislative history of the MHRA itself also supports finding an intention to construe the Act broadly enough to reach non-invidiously motivated discrimination. Moreover, the express terms of the statute suggest that the Legislature did not intend to limit its coverage to invidious discrimination as traditionally defined.

The development of statutory antidiscrimination law in Maine from the beginning of the twentieth century reveals an expansion of the right not to be discriminated against. The Legislature expanded the right by proscribing an increasing range of conduct by, in effect, redefining the wrong in terms of less egregious forms of conduct. In this way, the course of statutory antidiscrimination law in Maine has increasingly adopted a more morally insistent view of what constitutes discrimination.

Prior to passage of the MHRA, Maine prohibited private discrimination through a congeries of state statutes that had been enacted at various times since the early twentieth century and that were scattered throughout the *Maine Revised Statutes*. For example, a statute enacted in 1917 prohibited any person "being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation" from discriminating against persons on the basis of "religious sect, creed, class, denomination, or nationality."[84] This act was subsequently codified in chapter 134 of the *Maine Revised Statutes*, which concerned threats to public order.[85]

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79. *Id.* §§ 4581-4583.

80. *Id.* §§ 4591-4594-B.

81. *Id.* §§ 4595-4598.

82. *Id.* §§ 4601-4604.

83. Not all protected classifications are contained under each subchapter. For example, only the employment subchapter prohibits discrimination on the basis of age. *Id.* § 4572 (1979 & Supp. 1987-1988). Only the fair credit extension provision prohibits discrimination based on marital status. *Id.* § 4595. All subchapters, however, prohibit discrimination on the basis of race, color, sex, ancestry, religion or national origin.

84. P.L. 1917, ch. 225, § 1.

85. ME. REV. STAT. ch. 134, §§ 7-10 (1930) (current version as amended codified at ME. REV. STAT. ANN. tit. 5, § 4592 (Supp. 1987-1988)). Included in the same chapter were laws against strikes by public service employees, *id.* at §§ 11-15; against mobs and in favor of using police to disperse them, *id.* at §§ 16-18; and detailing the Governor's power in the event of insurrection and invasion, *id.* §§ 21-22. Although one may fairly infer only a limited amount from such relics of statutory history, the placement does suggest a somewhat different conception of discrimination, in particular of what

The placement suggests that the Legislature viewed public accommodations discrimination as primarily a threat to public order and objected mostly to the inflammatory nature of published intentions to discriminate. Significantly, the statute did not prohibit discriminatory conduct itself. The legislation made it unlawful to "publish, issue, circulate, distribute or display, in any way, any advertisement, circular, folder, book, pamphlet, written or painted or printed notice or sign, of any kind or description, intended to discriminate against or actually discriminating against persons" on the basis of religion,[86] but expressly affirmed, "Nothing in this act contained shall be construed to prohibit the mailing of a private communication in writing, sent in response to a specific written inquiry."[87] Thus, antidiscrimination law imposed no duty not to discriminate, merely to discriminate discreetly.

Another statute enacted in the early 1900's banned discrimination against soldiers.[88] A 1937 statute prohibited discrimination in state employment on the basis of "political or religious opinions or affiliations, sex or marital status."[89] These early statutes criminalized discriminatory conduct. Penalties generally ranged from a fine of not more than one hundred dollars to not more than thirty days in jail, or both.[90] There are no reported decisions by the Law Court under any of these statutes.

In 1959, responding to the momentum given the civil rights movement by the landmark decision of *Brown v. Board of Education*,[91] the Maine Legislature amended its public accommodations statute to impose a duty not to discriminate. The amended version made it unlawful for any owner or operator of a public accommodation to "refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof . . . ."[92] The Legislature also broadened the scope of the duty not to discriminate by including, for the first time, race as a protected classification.[93] Criminal sanctions were also toughened.[94] Maine's antidiscrimina-

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is *wrong* with it, from that expressed in the current MHRA. The earlier statute appears to take the rather crude position that discrimination is an evil because it is likely to foment public disorder when those victimized by it take offense and lash back. Discrimination law under the MHRA has evolved far beyond this point. The MHRA takes a more morally insistent position based on respect for human dignity, not the majority's self-interest in preserving public order.

86. P.L. 1917, ch. 225, § 1.

87. *Id.* § 3.

88. P.L. 1917, ch. 177 (later codified at ME. REV. STAT. ch. 129, § 21 (1930)).

89. P.L. 1937, ch. 221, § 13 (later codified at ME. REV. STAT. ch. 59, § 13 (1944)).

90. *See, e.g.*, P.L. 1917, ch. 225, § 4.

91. 349 U.S. 294 (1954).

92. P.L. 1959, ch. 282, § 50 (current version as amended codified at ME. REV. STAT. ANN. tit. 5, § 4592 (Supp. 1987-1988)).

93. *Id.*

94. *Id.*

tion legislation, however, remained scattered throughout the Maine statutes. The step taken in 1971, to expand the substantive basis of antidiscrimination law and to unify the statutes under a single statement of policy and administrative enforcement mechanism, was unprecedented. The action was different in kind, not degree, from prior antidiscrimination law in Maine and indicated a clear trend towards expanding the antidiscrimination right.

Impetus for the MHRA originated in a report by the Task Force on Human Rights convened by Governor Curtis in 1968.[95] Governor Curtis charged the committee of lawmakers and laypersons with the task of "search[ing] our statutes and our conscience to see that our society at least imposes no legal impediments to each citizen's full exercise of the rights of all citizens."[96] The report issued by the Task Force concentrated largely on acts of invidious discrimination committed by private citizens and police against ethnic and social minorities, primarily members of Maine's Indian population.[97] The charge to the Task Force, however, did contain the term "no legal impediments." This phrase suggests non-invidiously created barriers to equal opportunity as much as invidious, attitudinal barriers. The terms of the language suggest, in any event, a broad approach that would ensure the *full* realization of equal opportunity despite the fact that the report focused on instances of invidious discrimination.[98]

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95. GOVERNOR'S TASK FORCE ON HUMAN RIGHTS (1968), *discussed in* Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369, 373-74 (Me. 1978).

96. GOVERNOR'S TASK FORCE ON HUMAN RIGHTS app. A-1 (1968).

97. *E.g., id.* app. A-36, A-37, A-39.

98. *See* Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d at 373 ("The legislative history of the Maine Act indicates that it was meant to have very broad coverage.").

The Task Force recommended two major changes in Maine's discrimination laws. First, the Task Force suggested that the Legislature decriminalize wrongful discrimination. "Much as we condemn discrimination," wrote the Task Force, "we recognize that most persons who discriminate are not 'criminals.' " GOVERNOR'S TASK FORCE ON HUMAN RIGHTS 15 (1968). Second, the report proposed that the state establish a Maine Human Rights Commission. *Id.* This recommendation stemmed partly from the conclusion that "anti-discrimination efforts should be unified under a group of specialists," *id.* at 14, and partly from the notion that "it should be possible to avoid all legal actions, and solve problems of discrimination by conciliation." *Id.* The Task Force appended its own proposed version of the Maine Human Rights Act to the Report. *Id.* app. A-2.

Although the Governor charged the Task Force with "review[ing] the experience of other states, especially those who have set up special agencies for this purpose," *id.* app. A-1, and although the Task Force did propose creating a Human Rights Commission, the Task Force ultimately adopted a conservative position in the sense that it "deliberately refrained from proposing anti-discrimination legislation in new areas." *Id.* at 16. Rather the Task Force limited its proposal to three areas—employment, housing, and public accommodations—in which the State "has already expressed its public policy against discrimination." *Id.* Nevertheless, the Task

When illustrating the evil that the MHRA was intended to remedy, proponents of the proposed Act adverted to instances of invidious discrimination and the social ills that it produces, notwithstanding that legislators referred to invidious discrimination by name only once.[99] For example, Representative McTeague, one of the Act's proponents, stressed a person's right to be judged without having invidious factors taken into account:

> I ask you to keep in mind that we all look forward to the day when being an American in Maine it means very little where your grandfather came from or where you go to church or what . . . [color] you have on your skin. But each of us is judged as one man . . . as one individual.[100]

Another proponent sounded the corollary theme that invidious discrimination inevitably provokes a violent reaction from its victims: "Discrimination has permeated into the very heart of this country, and its destructive and divisive forces now threaten to destroy it."[101] The emphasis on the most egregious form of discrimination may reflect current events at the time of debate and enactment of the proposed legislation more than it reflects a clear legislative intention to restrict the MHRA's coverage to only the most egregiously discrimi-

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Force urged the acceptance with resoundingly broad language:

> We should stress the diversity of human life, not its homogeneity. We should be proud of those original Americans who still live among us, and should bend every effort to make their opportunities equal in every way to those of people in the surrounding white communities. We should take the lead not only in solving our own problems, whether of social conscience or of political history, but also we should take the lead in the nation by showing the way in these areas.

Id.

Whether the Legislature enacted the MHRA with similar intent is another question; but, in the absence of an express legislative repudiation of the spirit of the above-quoted language, and given the similarity between the Task Force's own proposed statute and the MHRA as enacted, one might fairly conclude that the Legislature did just that. *Compare id.* app. A-2 ("Proposed Human Rights Act for Maine") *with, e.g.*, L.D. 1384 (104th Legis. 1969) (one of three proposed human rights acts for Maine) *and* P.L. 1971, ch. 501 (MHRA as originally enacted).

Not every member of the Legislature greeted the report with enthusiasm, however:

> The bible on which this gospel was based was something called the Report of the Governor's Task Force on Human Rights. This report was a hodgepodge of lurid newspaper clippings, plus some photos of Indian Island and Passamaquoddy Indian Reservations. The whole package was liberally sprinkled with the usual pious cliches which have become the hallmark of the professional dogooders. The literary content was about on a par with a high school theme.

2 Legis. Rec. 2446 (1971) (remarks of Rep. Kelley).

99. 3 Legis. Rec. 4320 (1969) (remarks of Sen. Berry) ("Then [the Maine Human Rights Commission members] have the duty of investigating all forms of invidious discrimination.").

100. 3 Legis. Rec. 4580 (1971).

101. *Id.* at 4197 (remarks of Rep. Watson).

natory acts.[102]

Consistent with the emphasis on invidious discrimination, the administrative scheme proposed by the Act suggests an intent to reach, and reform, the person who "has a problem in his own mind with discrimination."[103] Previously, Maine law had treated discrimination as a criminal offense remedied through criminal sanctions imposed on the offender after formal trial. Proponents of the MHRA repeatedly urged de-criminalization as a more effective way to remedy the problem:

> We recognize first of all that discrimination is not basically a criminal problem but a social problem and it should be handled not primarily in the criminal courts but rather by conciliation and mediation between the parties. We provide for this voluntary mediation on these very sensitive questions. . . . Sending a man to jail doesn't help that man who has got a problem in his own mind with discrimination . . . .[104]

Informal conciliation outside the context of an adversarial trial would not only provide, in theory, a better opportunity to educate the discriminator as to a proper attitude, but would provide a more satisfactory remedy for the victim:

> We deal with the social problem and not one of violence or crime. Criminal punishment of the person who discriminates does not aid the person discriminated against. If a man loses his job because of discrimination, putting his employer in jail does nothing. It is not likely to happen in a practical way at any rate. However, an order of back pay and restoring the man to his job is a practical remedy.[105]

Far from restricting interpretations of the Act, the Legislature's emphasis on discrimination as a social problem supports reading the MHRA broadly to include non-invidious discrimination, for apathy and indifference constitute attitudinal problems comparable in their social destructiveness to outright animosity. The evil of indifference might not loom as large as the evil of pure discriminatory animus, and the impetus to reform indifference or apathy might spring from a more refined sense of morality. Nevertheless, the Act has prohibited "good faith" discrimination that singles out a protected class for special protection on the basis of an unfounded stereotype that it cannot protect itself. Indifference to discriminatory effects is similarly antithetical to a high regard for the basic right to human dignity.

The express terms of the Act provide the strongest support for a

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102. Riots engulfed sections of many major American cities in the summer of 1969.

103. *See infra* note 105.

104. 3 Legis. Rec. 4196-97 (1969) (remarks of Rep. McTeague).

105. *Id.* at 4550 (1969) (remarks of Rep. McTeague).

reading that proscribes a broader range of conduct than that analogous to invidious discrimination as defined under the federal Constitution. The centerpiece of each of the subchapters of the MHRA is the provision declaring the right to be free of discrimination in that context. For instance, section 4591 of the public accommodations subchapter provides: "The opportunity for every individual to have equal access to places of public accommodation without discrimination because of race, color, sex, physical or mental handicap, religion, ancestry or national origin is recognized as and declared to be a civil right."[106] The employment,[107] housing,[108] credit extension,[109] and education[110] subchapters contain comparable language. The problem is that although these chapters define unlawful discrimination, they do not indicate whether the concept of "discrimination" is limited to purposeful discrimination or includes the broader notion of effects-based discrimination. This ambiguity throws the focus of the inquiry onto the general provisions of subchapter I.

Three key general provisions of subchapter I support construing the right against discrimination to include freedom from non-invidiously created discriminatory barriers. First, the statement of policy conveys an intent that the courts read the Act broadly:

> To protect the public health, safety and welfare, it is declared to be the policy of this State to keep *continually* in review *all practices* infringing on the *basic human right to a life with dignity*, and the causes of such practices, so that corrective measures may, where possible, be promptly recommended and implemented, and to prevent discrimination in employment, housing or access to public accommodations on account of race, color, sex, physical or mental handicap, religion, ancestry or national origin and in employment, discrimination on account of age; and to prevent discrimination in the extension of credit on account of age, race, color, sex, marital status, religion, ancestry or national origin.[111]

The emphasis on continued review implies an intent that courts not freeze ideas of unlawful discrimination at any particular point in time or stage of development but keep antidiscrimination concepts flexible and open to change. The breadth of "all practices" likewise conveys an intent not to limit the scope of the Act. The emphasis on "all practices" specifically suggests a concern for activity and its effects rather than focusing more narrowly on the subjective element of belief or motivation. Finally, grounding the right in the normative concept of "the basic human right to a life with dignity" necessarily

106. ME. REV. STAT. ANN. tit. 5, § 4591 (1979).
107. *Id.* § 4571.
108. *Id.* § 4581.
109. *Id.* § 4595.
110. *Id.* § 4601 (Supp. 1987-1988).
111. *Id.* § 4552.

implies an intention to keep the antidiscrimination principle open-ended, for the values that make up the concept of human dignity will change over time. Moreover, this statement appears to authorize a court to construe the MHRA in terms of the normative concept of human dignity.

Second, the Act defines "discriminate" broadly to include "*without limitation*, segregate or separate."[112] The expansiveness of "without limitation" clearly supports giving the rights declared in the Act a broad reading. Moreover, whereas "segregate" might imply invidious motivation, "separate" clearly suggests a physical apartness in fact if not by design.

Third, the powers and the duties of the Maine Human Rights Commission distinguish between invidious and other, i.e., non-invidious, discrimination:

> The commission has the duty of investigating all conditions and practices within the State which allegedly detract from the enjoyment, by each inhabitant of the State, of full human rights and personal dignity. *Without limiting the generality of the foregoing*, it has the duty of investigating all forms of invidious discrimination, whether carried out legally or illegally, and whether by public agencies or private persons. Based on its investigations, it has the further duty to recommend measures calculated to promote the full enjoyment of human rights and personal dignity by all the inhabitants of this State.[113]

This provision necessarily implies that the "generality" of the notion of "full human rights and personal dignity" is not limited to the concept of invidious discrimination.

In sum, the trend in the development of statutory antidiscrimination law in Maine, the particular legislative history of the MHRA, and the express terms of the Act support finding the right to be free from discrimination as generally to include the right to be free from barriers that operate discriminatorily as well as from invidiously motivated discrimination. To construe the MHRA thus is merely to bring the statute into line with judicial interpretation of federal antidiscrimination statutes.

IV. Non-Invidious Discrimination Under the Maine Human Rights Act

The Law Court has construed the MHRA to prohibit invidiously motivated discrimination that is implied by stereotypes connoting social inferiority.[114] Consistent with federal case law interpreting

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112. *Id.* § 4553(2) (1979) (emphasis added).

113. *Id.* § 4566.

114. For example, in Higgins v. Maine Central Railroad, 471 A.2d 288 (Me. 1984), the Law Court vacated a superior court judgment in favor of the defendant railroad on a claim of unlawful employment discrimination lodged under subchapter III of the

federal antidiscrimination statutes such as the Civil Rights and Rehabilitation Acts, the Maine court has construed the MHRA also to prohibit non-invidiously motivated discrimination based solely on effects or consequences. With the introduction of effects-based discrimination, however, the court has faced the difficult task of deter-

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MHRA. The plaintiff, an enginehouse laborer and turntable operator, had worked for Maine Central for ten years before the defendant discovered that the plaintiff suffered from epilepsy. *Id.* at 289. The defendant consequently dismissed the employee upon the recommendation of its chief medical examiner that the employee be placed under work restrictions. *Id.*

At trial the defendant raised the safety defense created by ME. REV. STAT. ANN. tit. 5, § 4573(4) (1979), *construed in* Maine Human Rights Comm'n v. Canadian Pac., Ltd., 458 A.2d 1225 (Me. 1983). In vacating the judgment, the Law Court held that the railroad had failed to conduct a sufficiently individualized assessment to allow it to formulate a factual basis for finding with reasonable probability that the plaintiff could not perform his job without endangering his own or others' safety. Higgins v. Maine Cent. R.R., 471 A.2d at 291-92. In other words, the railroad had acted on the basis of a stereotype about epilepsy victims, namely that they could not perform jobs safely. The court stated: "In sum, the Defendants engaged in the sort of invidious stereotyping which the Act prohibits." *Id. See also* Maine Human Rights Comm'n v. Canadian Pac., Ltd., 458 A.2d 1225, 1231 (Me. 1983) ("The MHRA is intended to prevent discrimination against the physically handicapped based on unfounded stereotyping."), *quoted in* Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d 948, 959 (Me. 1986) (Glassman, J., dissenting).

Similarly, in the earlier case of Maine Human Rights Commission v. City of Auburn, 408 A.2d 1253 (Me. 1979), female applicants for the position of police officer on the Auburn police force brought an action under the MHRA alleging employment discrimination based on gender. Having scored above the average male score on the written part of the civil service examination, *id.* at 1258, the female applicants were rejected primarily on the basis of their poor scores on the interview portion of the selection process. At trial, the Civil Service Commission Chairman, who interviewed the women applicants, testified to asking the women "how they would respond [to a fight between two large men on a public sidewalk] given the fact that they were 'females, and perhaps not of the aggressive nature as some males can be.'" *Id.* at 1259. The chairman also testified that he told one applicant that "more than 'just a pretty face' was needed to break up a fight." *Id.* Finally, he told another plaintiff that "she should be content with the fact that she was the mother of three sons." *Id.* These statements are clear examples of invidious stereotyping based directly on gender.

Another type of stereotyping occurred in the Auburn Police Department's reliance on physical strength as a hiring criteria. *See id.* at 1266. Establishing strength as a job requirement does not necessarily implicate an invidious stereotype about women. Rather, it involves a stereotype of a police officer, i.e., of a certain social role, and also of males: "The conception of a police officer as necessarily aggressive, big, strong, and intimidating is a sex stereotype." *Id.* Such stereotypes can have a discriminating effect on female applicants seeking the position of police officer. In the *Auburn* case, the Law Court held that the MHRA prohibits sex stereotyping embedded in facially neutral practices as well as more direct and overt sex stereotyping. *Id.* at 1266. The Law Court vacated the superior court judgment in favor of the defendants. *Id.* at 1268. *See also* Maine Human Rights Comm'n v. City of Auburn, 425 A.2d 990 (Me. 1981) (same case on second appeal).

Notwithstanding the expressions of concern by some proponents of the MHRA regarding invidiously motivated discrimination against racial minorities, the Law Court has heard no appeals from cases involving racial or national origin discrimination.

mining which effects are legal and which are illegal without the clear reference points of intent and motive. As the Supreme Court has done under the Rehabilitation Act, the Law Court has turned to reasonable accommodation as the principle by which it distinguishes those effects for which the defendant is not liable from those that create liability.

A. Maine Human Rights Commission v. Local 1361, United Paperworkers International Union.

The Maine court first applied reasonable accommodation in *Maine Human Rights Commission v. Local 1361, United Paperworkers International Union*,[115] an employment discrimination case brought under section 4571 of the MHRA.[116] The Law Court held that liability for unlawful discrimination could attach despite the fact that the defendant union had acted pursuant to an agency shop provision in a collective bargaining agreement whose validity the Supreme Court had previously upheld against challenge as an unfair labor practice under the National Labor Relations Act (NLRA).[117] The question facing the Law Court was whether a union security clause unlawfully discriminated against a Seventh-day Adventist employee who refused to pay union dues on the grounds that such payments violated her religious beliefs.[118] To show her good

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115. 383 A.2d 369 (Me. 1978).

116. ME. REV. STAT. ANN. tit. 5, § 4571 (1979). Section 4571 provides in its entirety: "The opportunity for an individual to secure employment without discrimination because of race, color, sex, physical or mental handicap, religion, age, ancestry or national origin is recognized as and declared to be a civil right." *Id.*

117. *See* NLRB v. General Motors Corp., 373 U.S. 734 (1963).

118. Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d at 372. Under the agency shop provision at issue in this case, Michaud did not have to join the union that represented the unit of the paper mill where she worked as a laboratory technician. She did, however, have to contribute dues to the union so as to share in the cost of the union's representation in negotiations from which she benefited. *Id.* The security agreement provided, in pertinent part, as follows:

> "All employees of the Company presently covered by the Agreement shall on the thirtieth (30th) day hereafter become and remain *members* of the Union in good standing *as to the payment of initiation fees and periodic dues* . . . . The Company agrees *to discharge*, upon written request from the Union, any employee who does *not tender* to the Union the uniform initiation fees and/or periodic dues."

Id. n.2 (emphasis added). In NLRB v. General Motors Corp., 373 U.S. 734 (1963), the Supreme Court upheld the validity of agency shop provisions such as the one at issue in *Local 1361*. For a brief discussion of agency shop provisions, their validity and their relationship to unlawful religious discrimination, see generally Schwab, *Union Security Agreements and Title VII: The Scope and Effect of the New Section 19 of the National Labor Relations Act*, 17 GONZ. L. REV. 329, 332-33 (1982).

At the time of *Local 1361*, the National Labor Relations Act provided:

> Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion,

faith not to become a free rider, the employee offered to contribute a like amount to a non-religious charity of the union's choice, an option that Congress subsequently allowed in a 1980 amendment to the NLRA.[119] Evidence supported the conclusion that the employee's religious beliefs, not job performance, caused her dismissal. The court provided no indication that the union and company negotiated the provision because of, rather than in spite of, its effect on conscientious objectors. The effect was thus clearly non-intentional and the motive non-invidious.

The union raised before the Law Court the issue of whether the MHRA required discriminatory motive as a necessary condition of unlawfulness. Arguing that section 4572(1)(c) prohibited only religiously motivated discrimination, the union contended that the dues requirement did not discriminate invidiously because it applied, and was intended to apply, uniformly to all employees in the bargaining unit.[120] The court soundly rejected this argument as "simply without

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body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization . . . except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund . . . .

29 U.S.C. § 169 (1976) (amended 1980). Since Michaud was not an employee of a health care institution, she did not qualify under this exception.

119. Congress amended the provision in 1980 by deleting the requirement that the conscientious objector work in a health care institution. Act of Dec. 24, 1980, Pub. L. No. 96-593, 94 Stat. 3452 (codified at 29 U.S.C. § 169 (1982)). Thus, the precise issue posed by *Local 1361* may not arise under the National Labor Relations Act and the case is, in a sense, moot as precedent. *Local 1361* nevertheless demonstrates how the court approaches discrimination claims brought under the Act which do not involve traditional notions of unlawful, i.e., invidious, conduct.

120. The case thus involved the two issues posed by Maine Human Rights Commission v. City of South Portland, 508 A.2d 948 (Me. 1986), i.e., whether unlawful discrimination requires invidious motivation and, if not, how to limit the greatly expanded field of potential liability that recognition of non-invidious discrimination would create. The *South Portland* court held that unlawful discrimination does not require a finding of invidious motivation, *id.* at 954-56, and utilized the principle of reasonable accommodation to limit the expanded field of potential liability. *Id. See infra* text accompanying notes 170-224. The *Local 1361* court resolved both issues at this early date in a manner indicating that, especially as concerned the asserted requirement of invidious discrimination, the court found no substantial question as to what the Act required.

Congress amended the NLRA to permit the optional payment to nonreligious charity in 1980. Act of Dec. 24, 1980, Pub. L. No. 96-593, 94 Stat. 3452 (codified at 29 U.S.C. § 169 (1982)). The amended statute provides, in pertinent part:

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' [sic] employer and a labor organization in lieu of periodic dues and initiation fees,

merit."[121] The Law Court expressly relied on (1) the "striking structural and linguistic similarities in the treatment of employment discrimination"[122] between subchapter III of the MHRA[123] and Title VII of the Civil Rights Act of 1964,[124] and (2) the Supreme Court's interpretation of Title VII in *Griggs v. Duke Power Co.*,[125] as prohibiting effects-based discrimination. The court quoted *Griggs* approvingly: " 'Congress directed the thrust of the [Federal] Act to the *consequences* of employment practices, not simply the motivation,' "[126] and " '[t]he [Federal] Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.' "[127] The court acknowledged that the effects-oriented concept did challenge basic notions of unlawful discrimination, but quoted Governor Curtis's charge to the 1968 Task Force on Human Rights " 'to see that our society places no *legal* impediments to [equal opportunity]' "[128] as support for the proposition that the Act "was meant to have very broad coverage."[129] The court held:

> In short, we find nothing in the Maine Act which suggests that the Legislature intended it to apply to the limited situation, typically devoid of proof, that an employer or labor organization intends to discriminate. As in *Griggs v. Duke Power Co.*, the touchstone of our statutory prohibition is whether in fact the disputed practice *results* in unlawful employment discrimination.[130]

The court relied on *Griggs* in interpreting the MHRA partly because of the origins of the MHRA in the Civil Rights Act of 1964.[131] The court applied *Griggs*, however, in a way that went beyond the holding of that case. Whereas in *Griggs* the underlying conduct of the employer—imposing job selection criteria without testing

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> to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund . . . .

Id. Notwithstanding that this amendment in all likelihood precludes the precise issue in *Local 1361* from arising again under the MHRA, the case shows how the Law Court analyzes and resolves claims of discrimination based on non-invidiously motivated conduct and stands as authority for the analytical method that the Law Court will apply in these cases.

121. Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369, 373, 375 (Me. 1978).

122. *Id.* at 374.

123. ME. REV. STAT. ANN. tit. 5, §§ 4571-4574 (1979 & Supp. 1987-1988).

124. 42 U.S.C. §§ 2000e-2000e-17 (1982).

125. 401 U.S. 424 (1971), *quoted and discussed in* Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d at 373.

126. Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d at 373 (quoting Griggs v. Duke Power Co., 401 U.S. at 432).

127. *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. at 431).

128. *Id.* (quoting GOVERNOR'S TASK FORCE ON HUMAN RIGHTS app. A-1 (1968)).

129. *Id.*

130. *Id.* at 375 (citation deleted; emphasis added).

131. *Id.* at 373.

whether they reflected the actual requirements of the job—was in itself arbitrary, the use of a union security clause was a more reasonable course of action. Congress expressly authorized security clauses through a Supreme Court-construed provision in the NLRA.[132] Moreover, several circuit courts of appeals had previously upheld the provision against constitutional attack.[133] The difference between *Griggs* and *Local 1361* thus is substantial; the employer's action in *Griggs* was a private decision based on testing criteria leading to an economically inefficient use of resources, whereas the union's action in *Local 1361* constituted reliance on a legally tested means of implementing national labor policy. To hold the union potentially liable for discrimination under these circumstances announces a clearly different idea of unlawful discrimination from that implied by traditional notions of invidiousness, with its emphasis on

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132. 29 U.S.C. § 158(a)(3) (1982). This provision permits employers to agree with labor organizations to condition employment on membership in the union that represents the employee's unit in collective bargaining talks:

> It shall be an unfair labor practice for an employer—
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made . . . .

Id. In NLRB v. General Motors Corp., 373 U.S. 734 (1963), the Supreme Court held that an agency shop provision, requiring that employees contribute the equivalent of initiation fees and monthly dues or face discharge from employment, did not constitute an unfair labor practice under section 8(a)(3) of the National Labor Relations Act.

133. Although the Supreme Court had not addressed the issue prior to the Law Court's decision in *Local 1361*, several courts of appeal had upheld the constitutionality of union security agreements under the free exercise clause and one circuit had upheld the agreement's constitutionality under the first amendment. *See* Schwab, *Union Security Agreements and Title VII*, 17 GONZ. L. REV. 329, 331 n.11 (1981-1982) (cases cited therein). For instance, the First Circuit upheld the constitutionality of a collective bargaining provision requiring a religious objector to pay union dues and fees. Linscott v. Miller Falls Co., 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971), *cited in* Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d at 377 n.19. The court applied a compelling state interest test and ruled that " '[i]ndustrial peace along the arteries of commerce' " constituted sufficiently compelling governmental interest to override the plaintiff's interest in securing employment that did infringe upon her religious beliefs and practices. *Id.* at 17 (quoting Railway Employees' Dept. v. Hanson, 351 U.S. 225, 233 (1956)).

illicit motive and discriminatory intent.[134]

Because *Local 1361* involves a religious issue, a question arises as to whether the result in *Local 1361* reflects special considerations that attach to religion because of its constitutionally protected status. Both the union and the Commission, however, stipulated establishment and free exercise clause arguments out of the case.[135] This stipulation cleared the way for a ruling on the discriminatory effects of non-invidious conduct that potentially would apply across the full range of MHRA-protected interests. The *Local 1361* holding thus represents a more morally insistent position than that of *Griggs* and certainly than that of invidious discrimination. Not only should civil society deter if not stamp out invidious motives; civil society should also ensure that no person is unfairly prevented in any way from acquiring or retaining the benefits essential to a life with dignity because of religion, gender, age, or other traits that the society, through legislative enactment, deems irrelevant to personal qualifications. Moreover, the prima facie reasonableness of the effects-producing conduct is not necessarily a defense. The sticking point is how to determine which non-invidiously motivated practices having discriminatory effects are unlawful.

The Maine Human Rights Commission promulgated an employment guideline addressing this problem based on federal precedent.[136] The guideline created an affirmative defense of reasonable

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134. Again, the precise question raised by the case may never arise again because of the 1980 amendments to the NLRA. *See supra* note 118. The case still stands for the proposition, however, that non-invidiously motivated "barriers" to equal access and equal opportunity can lead to liability for unlawful discrimination.

135. Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369, 377 n.19 (Me. 1978).

136. Me. Human Rights Comm'n Reg. 3.05 (current version at Me. Human Rights Comm'n Reg. 3.10(c) (Oct. 14, 1980)). In 1967, the Equal Employment Opportunity Commission promulgated a regulation stating that the duty not to discriminate under title VII of the Civil Rights Act of 1964 includes

> an obligation on the part of an employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. . . . Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

29 C.F.R. § 1605.1 (1968), *quoted in* Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369, 376 n.18 (Me. 1978). The Law Court found that the "Maine Commission virtually incorporated the entire federal regulation into section 3.05." *Id.* at 376.

The federal regulation was challenged in Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), on the grounds that it imposed an affirmative duty to accede to the religious beliefs of another and thus surpassed the duty purportedly created by the Civil Rights Act of simply refraining from invidious discrimination. The Sixth Circuit upheld the challenge and an equally divided Supreme Court affirmed the de-

accommodation:

> *"The duty not to discriminate on religious grounds includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship to the conduct of the employer's business.* Because of the particularly sensitive nature of refusing to hire or discharging an individual on account of his religious beliefs, the burden of proof that the accommodations required by the individual's religious needs impose an undue hardship to the conduct of the employer's business, is on the employer."[137]

The court held that this interpretation was "a reasonable construction of the Maine Act."[138] The court affirmed the administrative interpretation primarily because the categorical language of section 4571 would otherwise prohibit any and all discriminations based upon religious beliefs. The court thus favored reasonable accommodation because it could "breathe flexibility into an otherwise airtight prohibition against religious discrimination."[139] It is not clear from the opinion whether reasonable accommodation is accepted as a gloss on the business necessity defense created by judicial interpretation in *Griggs v. Duke Power Co.* or as a separate defense to effects-based discrimination.[140] Clearly, however, the flexibility of rea-

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cision of the circuit court in a per curiam opinion without explanation. Dewey v. Reynolds Metals Co., 402 U.S. 689, 689 (1971). Congress subsequently amended title VII to include the duty to accommodate in the statute itself, thus revealing that "the guideline well captured the original intention of the Federal Act." Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d at 377. *See* 42 U.S.C. § 2000e(j) (1982). Given that the regulation expresses congressional intent as to the Civil Rights Act of 1964, and given the Law Court's professed preference for construing the MHRA consistently with federal construction of the federal Act, it follows that Employment Guideline section 3.05 captures legislative intent as to the MHRA.

The Law Court went beyond complete reliance on the parallel to federal law, however, by stating that section 3.05 "is a reasonable construction of the Maine Act." Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d at 378. The court thereby implied that the regulation stands on its own ground by virtue of its reasonableness. For a brief discussion of the undercurrent of debate, which runs throughout Law Court interpretations of the MHRA, over whether to adhere to analogous federal precedent or to chart an independent course, see *infra* note 157.

137. Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d at 376 (quoting Me. Human Rights Comm'n Reg. 3.05) (italics in court opinion).

138. The court stated that the superior court "appeared to rule as a matter of law that an exemption from Union dues would be an undue hardship upon the Union." *Id.* at 378. *See also id.* at 378-79 n.26.

139. Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d at 378.

140. For an argument that business necessity and reasonable accommodation involve essentially the same requirements, see Kaufman, *supra* note 20, at 1132. In

sonable accommodation is what recommended the standard. Equally clear is that the court considered flexibility crucial to the fair adjudication of effects-based discrimination claims. Given that less egregious motivation is involved in effects-based discrimination than in intentional discrimination, the need for the remedial power of the court is less pressing. The less wrongful conduct naturally opens the way for defendants to provide a broader range of justifications for their conduct.

The lower court in *Local 1361* had reached essentially the same conclusion. It had ruled, however, that exempting an employee from the agency shop provision of the contract, which was permitted by the express terms of the NLRA and upheld by Supreme Court decisions, would constitute undue hardship as a matter of law.[141] The Law Court reversed on the basis of the inappropriateness of ruling on the reasonable accommodation question as a matter of law.[142] The Law Court held that the lawfulness of the union's refusal to accommodate the employee depended entirely on a factual inquiry into what was feasible under the circumstances. The court referred to "a basic tenant [sic] of our guidelines which provides: 'Resolution of such cases depends on *specific factual circumstances* and involves a *delicate balancing* of an applicant or employee's religious needs with the degree of disruption imposed on the employer's business operation.' "[143] Thus, having diminished the standard of justification essentially to one of reasonableness under the circumstances, the court described a method that would balance the non-invidious interests asserted by the defendant against the dignitary interests asserted by the plaintiff. The danger of "delicate balancing" keyed to the circumstances of each case lies in the fact that a court can fail to accord sufficient weight to the plaintiff's interests in personal dignity.

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response to the union's argument that the statute evinces no legislative intent that a union or an employer must accommodate an employee's religious beliefs "to the point of hardship," *id.*, the court referred to the bona fide occupational qualification (BFOQ) defense: "On the contrary, in the absence of a bona fide occupational qualification, any discharge based upon religion would be a violation of the Act." *Id.* The court thus apparently meant to include reasonable accommodation within the BFOQ defense. Under this reading, the employment guideline defines the BFOQ defense specifically for religion and does not set up a separate, administratively created defense outside the statutory defense. This interpretation gibes with a statement of the Law Court in a later case that the court "ha[d] not heretofore engaged in an *extended* analysis of the substantive context of the bona fide occupational qualification defense." Percy v. Allen, 449 A.2d 337, 342 (Me. 1982) (citing Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d at 378) (emphasis added).

141. Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d at 378.

142. *Id.* at 379.

143. *Id.* (quoting Me. Human Rights Comm'n Reg. 3.05).

Local 1361 illustrates this danger in that the Law Court instructed the lower court, on remand, to consider the financial burden of exempting the employee from dues paying, but held, "To require the Union to bear more than a de minimis extra cost would be an undue hardship on the Union."[144] The problem with the "de minimis extra cost" formulation is that it necessarily involves the lower court in making subsurface value judgments about the importance of the rights at stake while seeming to evaluate neutral economic criteria, for how much is de minimis and how is a court to know? The Law Court, in setting forth the de minimis standard, adhered strictly to analogous federal precedent.[145] The court also in-

144. *Id.* at 381.

145. In Hardison v. Trans World Airways, 432 U.S. 63 (1977), the Supreme Court addressed the "reach of [the] obligation" of an employer to accommodate his employee's religious needs. *Id.* at 75. Hardison, an employee at TWA's maintenance and overhaul base in Kansas City, Mo., converted to a religion that prohibited adherents from performing any work "from sunset on Friday until sunset on Saturday." *Id.* at 67. A seniority system, established by collective bargaining contract, determined which employees would have Saturday off. When Hardison transferred from one building in TWA's Kansas City complex to another building so as to be able to work the day shift, he relinquished the seniority he had achieved at his former post and, under the terms of the collective bargaining agreement, was required to begin at the bottom of the seniority list in the new building. The practical effect of Hardison's loss of seniority was that he could no longer have his Sabbath day off. Hardison refused to report for work on Saturdays and the company eventually discharged him on the ground of insubordination for refusing to work. The company did not discharge Hardison, however, without first attempting to arrange a schedule swap within the limits imposed by the seniority system.

The Supreme Court held that the duty to accommodate the religious needs of employees under 42 U.S.C. § 2000e(j) did not require the company to violate the seniority system established by collective bargaining. "Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts." *Id.* at 79. Given that the maintenance facility must remain open on Saturdays, seniority constituted a neutral basis on which to allocate unpopular work schedules. The alternative, assigning work schedules based on religious preference, would "deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath" and "Title VII [did] not contemplate such unequal treatment." *Id.* at 81.

The Court also rejected arguments that TWA should accomodate Hardison by replacing him with qualified weekend personnel from other departments (TWA had cut back to a skeleton crew on weekends to accommodate employee preference) or by paying another employee overtime and requiring Hardison to work only four days per week. The Court noted that both solutions would "involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages" and that to "require TWA to bear more than a de minimis cost . . . is an undue hardship." *Id.* at 84. Although the Court used the language of economic cost, the true basis for its holding appears to be, as it was regarding the seniority system, that "to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve *unequal treatment* of employees on the *basis* of their *religion*." *Id.*

Arguably, the Law Court misapplied the de minimis cost standard of *Hardison* in

structed the lower court to consider, however, the more difficult issue of "the impact on the morale of the Union members from any such exemption" and stated that "mere grumbling will not suffice."[146] Thus, the court did not confine itself to assessing the financial cost of the exemption, but also required the lower court to evaluate the more difficult issue of morale. Nevertheless, the instruction to require no more than de minimis cost would lead the lower court on remand to accord comparatively far greater weight to the evidence of hardship adduced by the union than to the dignitary concerns asserted by the employee.

B. *Percy v. Allen.*

In *Percy v. Allen*,[147] the Law Court also ruled that liability could be based upon non-invidiously motivated discrimination. This case concerned a claim of unlawful gender-based discrimination resulting from a hiring policy established by the Maine Bureau of Mental Health and Corrections. The policy directed that no females be hired for the position of prison guards at the Maine State Prison.[148] The policy stemmed from a concern for the privacy rights asserted by members of the male inmate population.[149]

A 100% turnover rate among guards at the state prison during 1977 created the conflict between privacy rights and employment rights.[150] The Bureau reasoned that the high turnover rate necessitated that every guard be able to carry out every guard function. This versatility would ensure the safety of the guards and the inmates and would allow for the training of new guards by guards currently on the force. But because crucial duties of prison guards included keeping prisoners under surveillance in lavatory and shower facilities and conducting strip searches of the inmates, male inmates contended, and the Bureau agreed, that the hiring of females would infringe on inmate privacy.[151] Although the prison officials excluded

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Local 1361 because permitting the employee to contribute an equivalent sum to a secular charity would involve no unequal treatment on the basis of religion. Neither the union nor the company in *Local 1361* would incur any additional expense. Moreover, the religious objector would suffer the same out of pocket loss as all other employees in the same bargaining unit. The real concern thus apparently centers on the morale issue, an issue that *Hardison* did not address and to which the Court did not apply the de minimis cost standard.

146. *Id.*

147. 449 A.2d 337 (Me. 1982), *appeal after remand*, 472 A.2d 432 (Me. 1984).

148. *Id.* at 339.

149. *Id.*

150. *Id.* at 340.

151. *Id.* at 339-340. The inmates did not object to the surveillance per se, merely to the gender of the guards doing the surveillance. The court did not consider whether the inmates' claim of an infringement of their privacy rights involved invidious gender-based stereotyping nor does the opinion provide any indication that the plaintiff alleged this type of discrimination. Both the court and the plaintiff evidently

prospective prison guards because of, not merely in spite of, the applicant's gender—and so made out the requisite level of intent to satisfy even the demanding constitutional standard—their motive was non-invidious. It derived from no stereotypes about women or their place in society that would connote inferior status. At no point did the Law Court refer to any claim put forward by the plaintiff that the prison authorities used privacy rights as a pretext to conceal invidious motivation. Rather the motivation proceeded solely from a concern for the privacy rights asserted by prisoners. Thus, the discrimination was intentional but non-invidious.

A female applicant, Lynn Percy, applied for the position of prison guard during the height of this turnover crunch. Evidence adduced at trial showed that Ms. Percy satisfied all job prerequisites except gender.[152] On this basis alone the Bureau rejected her application.[153] Ms. Percy brought suit in superior court after proceedings before the Maine Human Rights Commission failed to conciliate the parties.[154] The superior court ruled that the conflict with prisoner privacy rights transformed the attribute of female gender into a bona fide occupational qualification. In upholding the defendant's conduct as not unlawfully discriminatory as a matter of law, the superior court ruled that the MHRA did not impose a duty that would " ' "force employers to tear up their normal mode of operations by such devices" as splitting and severing and reassigning duties and work areas between employees . . . .' "[155]

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accepted the legitimacy of the privacy claim.

152. *Id.* at 339.

153. *Id.*

154. *Id.* at 341. Ms. Percy initially filed an administrative complaint with the Maine Human Rights Commission alleging gender-based discrimination in violation of section 4571 of the MHRA. The Commission found reasonable grounds to believe discrimination had occurred and brought suit in Knox County Superior Court. The suit ended favorably for Ms. Percy when the Bureau signed a consent decree obligating it to implement an affirmative action program seeking a prison work force reflective of that found in the state as a whole. The consent decree expressly left open the question of back wages and lost benefits owed to Ms. Percy. The prison subsequently hired Ms. Percy in July 1979. Ms. Percy continued her suit to recover lost wages and benefits on the theory that the Bureau had unlawfully discriminated against her when it initially rejected her application for solely gender-based reasons. *Id.*

The superior court refrained from applying the doctrine of reasonable accommodation for the reason that the plaintiff did not pray for injunctive relief: "Because the plaintiff here seeks only back pay and lost benefits, the court found an analysis of reasonable accommodation to be unnecessary." *Id.* at 346. The Law Court, however, corrected the lower court by stating that reasonable accommodation does not go solely to the question of whether injunctive relief is available. Rather, reasonable accommodation goes to the threshold question of whether the defendant is liable for unlawful discrimination and thus whether any relief is available. *Id.*

155. *Id.* at 341 (quoting Percy v. Zitnay, No. CV-79-92, slip op. at 8 (Me. Super. Ct., Kno. Cty., Oct. 8, 1981) (quoting L. LARSON, EMPLOYMENT DISCRIMINATION § 15.50, at 4-47 (1977))).

Percy v. Allen was the Law Court's first opportunity to construe the BFOQ defense created by section 4572 of the Act.[156] Consistent with its method in *Local 1361* and the legislative history of the MHRA, the court looked to federal case law construing the analogous provision of Title VII.[157] Like the federal BFOQ,[158] the Maine defense was characterized as " 'extremely narrow.' "[159] The court then referred to the two-part test for making out a valid BFOQ defense under federal law as established by the United States Supreme Court in *Dothard v. Rawlinson*: (1) " 'the *essence* of the business operation would be undermined by not hiring members of one sex exclusively,' " and (2) "the employer must have 'reasonable cause to believe, that is, factual basis for believing, that all or substantially

156. *Id.* at 342. *See* ME. REV. STAT. ANN. tit. 5, § 4572 (1979 & Supp. 1987-1988).

157. Percy v. Allen, 449 A.2d at 342-45. *But see id.* at 346-47 (Wathen, J., concurring). Justice Wathen wrote: "Elemental justice requires that before one person's right to employment must yield to another's right of privacy, it must be determined that it is not possible for both to exist in relative harmony." *Id.* at 346. Justice Wathen questioned the reliance placed on federal precedent in construing the MHRA: "Specifically, I reject the notion that 'the Maine legislature—by adopting provisions that generally track the federal antidiscrimination statutes—intended the courts to look to the federal case law to "provide significant guidance in the construction of our statute." ' " *Id.* (quoting Maine Human Rights Comm'n v. City of Auburn, 408 A.2d 1253, 1261 (Me. 1979) (quoting Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369, 375 (Me. 1978))). The justice further criticized the majority for "inflexible adherence to federal case law" amounting to a "short circuit [of] the traditional process of statutory construction," *id.* at 347, and casting the Maine court in the "subservient role of locating and following binding precedent in other jurisdictions." *Id.* at 346. Justice Wathen concluded: "If every decision in a claim of discrimination is to start with the answer provided by the federal courts, the Maine Human Rights Act will not long remain responsive to the particular needs and circumstances of the people of the State of Maine." *Id.* at 347.

The tension between adherence to federal precedent and independent construction of the Maine Act furnishes an interesting subplot that winds throughout the *Local 1361*, *Percy v. Allen*, and *Maine Human Rights Commission v. City of South Portland* line of cases. The last case in this line, with its majority opinion authored by Justice Wathen, provides at least a temporary resolution of the conflict in favor of an independent Maine judiciary, insofar as the majority in *South Portland* eschewed federal and New York state precedent in construing the Act to require affirmative efforts to provide the handicapped with access to public transportation. Arguably, concern for elemental justice, not technical statutory construction, swayed the majority. *See* Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d 948 (Me. 1986) (Wathen, J.).

158. 42 U.S.C. § 2000e-2(e) (1982). Unlike the Maine statute, the federal Act defines the BFOQ defense. The statute states in pertinent part:

> [I]t shall not be an unlawful employment practice for an employer to hire . . . employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification *reasonably* necessary to the normal operation of that particular business or enterprise . . . .

Id. (emphasis added).

159. Percy v. Allen, 449 A.2d at 343 (quoting Dothard v. Rawlinson, 433 U.S. 321, 334 (1977)).

all women would be unable to perform safely and efficiently the duties of the job involved.' "[160]

Having stated this two-part test, however, the court essentially repudiated the *Dothard* elements and focused solely on reasonable accommodation, which it grafted onto the Maine BFOQ defense independently of any administrative regulation or federal case law precedent. The court justified this innovation by reference to the privacy rights of inmates, stating, "Where the asserted justification for the discriminatory conduct is rooted in the privacy interests of those with whom the complainant has contact, a third component is brought to bear on the successful assertion of the defense. This element is accommodation . . . ."[161] In a footnote, the court distinguished *Dothard* on the grounds that the defendants in that case predicated their assertion of the BFOQ defense on "a concern for the safety of a female guard there and for the maintenance of security at the institution," and that the defendant raised no defense based on the privacy rights of the inmates.[162] By contrast, the Maine Bureau of Mental Health and Corrections "*exclusively* predicate[d] [its] analysis on the privacy interests of the inmates and not on any concern for the safety of female guards."[163] The court did not explain, however, why safety concerns invoke the "essence of the business" test alone whereas privacy rights necessitate the extra component of reasonable accommodation. Nor did the court explain why, if safety and privacy are fundamentally different interests calling for different "tests," reasonable accommodation constitutes a third prong of the essence of the business test and not a separate defense entirely. The very idea of accommodation suggests a more flexible standard than that implied by an approach denying relief only if the relief would undermine the *essence* of the business. The two tests, in other words, seem at least facially and semantically incompatible. The prima facie non-invidiousness of the motivation would supply a basis for applying the more flexible test. The court did not, however, explain its choice in those terms.

What the court's adoption of reasonable accommodation may indicate more than any meaningful distinction between privacy rights and safety concerns is a tendency on the part of the court to prefer the more flexible language of "reasonable accommodation" in situations involving all but the most clearly invidious, i.e., egregiously wrongful, motivations. Since the court adopted reasonable accommodation where no Maine Human Rights Commission regulation prompted the adoption of the standard in this precise circumstance,

160. *Id.* (quoting Dothard v. Rawlinson, 433 U.S. at 333) (citations deleted by *Percy* court; emphasis supplied by *Dothard* Court).

161. *Id.*

162. *Id.* n.10.

163. *Id.* (emphasis in original).

Percy can be distinguished from *Local 1361. Percy* illustrates more clearly the judicial preference for reasonable accommodation and shows the court reinterpreting an established tenet of federal statutory antidiscrimination law in terms of reasonable accommodation, a legal standard that the court has preferred expressly for its flexibility.[164] The court's interpretation of the BFOQ defense may signal a tendency to interpret other aspects of antidiscrimination law in terms of the more flexible standard.

Although preferring reasonable accommodation for its flexibility, the court clearly adopted a heightened standard of reasonableness. A heightened standard of what constitutes a reasonable alternative is necessary so as to prevent the very flexibility of the accommodation doctrine from undermining the strong policy goals of the MHRA towards equal opportunity and equal access. The court provided guidance for the lower court hearing the case on remand by including strong language in its opinion indicating that the Act required more than fainthearted attempts to accommodate persons excluded from employment opportunities because of their possession of a protected trait. Nor would the court subscribe to merely plausible explanations as to why the defendant need not have pursued conciliatory alternatives.

The court based its endorsement of a heightened standard of reasonableness on the great importance of the dignitary interests protected by the Act:

> The need to accommodate the interests of the employee and the institution is grounded in the *weighty* anti-discrimination considerations at issue, embodied in the equal employment laws of the Maine Human Rights Act. *So considerable is the importance of equal employment opportunity* under the Maine statute that the arrangement of job assignments and even the structure of the facility itself are not immune from reasonable alterations that are necessary to effect a harmonization of employment practices with that opportunity. The *importance* of the anti-discrimination principle is further revealed by the procedural framework which casts upon the employer the burden of demonstrating that such accommodation would have been unfeasible.[165]

By emphasizing the importance of the interests asserted by a plaintiff under the MHRA, the court provided the type of clear guidance necessary for lower courts to ascribe proper weight to the dignitary interests protected by the Act and not to balance them away.

Moreover, the court arguably accorded great weight to the dignitary interests asserted by Ms. Percy. The Law Court did so, first, by reversing the superior court's judgment for the defendant as a mat-

164. *See* Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369, 378 (Me. 1978).

165. Percy v. Allen, 449 A.2d at 345 (emphasis added).

ter of law. The lower court's holding that the MHRA does not require " 'employers to tear up their normal mode of operations' " precluded the delicate balancing of circumstances required by reasonable accommodation and "prematurely cut[] off the full inquiry under the proper standard that requires such reassignment and reorganization [as] can be implemented without undue burden to the employer . . . ."[166] The court thus remanded for further inquiry into the feasibility of accommodating female guards. The order to balance factual circumstances before reaching a legal conclusion reflects a judgment that the interests of a plaintiff in not being discriminated against are so important that only rarely, if at all, will evidence of cost outweigh the dignitary interests as a matter of law.

The court again arguably accorded great weight to the antidiscrimination interest when it ruled, on second appeal, that the defendants had failed to carry their burden of proof on the issue of the unfeasibility of accommodation.[167] On remand, the superior court had simply entered judgment for the defendants on the basis of the BFOQ defense without conducting any further evidentiary hearings on the issue of reasonable accommodation, as instructed by the Law Court.[168] In effect, the lower court had reiterated its original judgment for defendants as a matter of law. The plaintiff contended on appeal that defendants had failed to carry their burden of proof under the affirmative defense, and the Law Court agreed despite the fact that the evidence that the plaintiffs adduced suggested a need for potentially costly modifications to the physical plant of the prison.[169] That the court reversed the lower court a second time and, in effect, found for the plaintiff as a matter of law suggests that the court not only endorsed but applied a heightened standard of reasonableness urged by this Comment.

Percy v. Allen is thus an important case in the development of non-invidious discrimination and reasonable accommodation under the MHRA for three reasons. First, the case results in a finding of unlawful discrimination despite the absence of any evidence of invidious motivation. The defendants failed to make out an affirmative BFOQ defense based on the theory that employment rights of women seeking jobs as prison guards and the privacy rights of inmates could not reasonably co-exist. Second, the case shows the Law Court adverting to, but essentially abandoning reliance on, federal precedent in construing the state human rights act and in interpreting its BFOQ defense in terms of reasonable accommodation rather

166. *Id.*

167. Percy v. Allen, 472 A.2d 432 (Me. 1984).

168. *Id.* at 433.

169. Percy v. Allen, 449 A.2d at 339 (privacy infringement would occur in residential area, thus leaving modifications to physical plant the only way to solve the problem).

than the essence of the business test. Third, the Law Court applied, in effect, a heightened standard of reasonableness to the balancing process under reasonable accommodation analysis commensurate with the great weight of the dignitary interests guaranteed by the MHRA.

C. *Maine Human Rights Commission v. City of South Portland.*

In *Maine Human Rights Commission v. City of South Portland*,[170] the Law Court continued the development of the non-invidious discrimination doctrine begun in *Maine Human Rights Commission v. Local 1361, United Paperworkers International Union.* The *South Portland* court affirmed a superior court judgment[171] that held the City of South Portland liable for unlawful discrimination in the operation of its city bus system. In affirming the judgment, the Law Court upheld liability for unlawful discrimination notwithstanding the absence of invidious motivation. The court also once again seized upon reasonable accommodation as the preferred limiting principle in cases not involving invidious motivation. In essence, the court imposed the heightened standard of reasonableness that it applied in *Percy v. Allen* and that the legislative judgment as to the paramount importance of the dignitary interests protected by the Act demands.

Maine Human Rights Commission v. City of South Portland concerned a claim initiated by the Maine Association of Handicapped Persons, and others, alleging public accommodations discrimination under sections 4591 and 4592 of the MHRA.[172] The suit alleged that

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170. 508 A.2d 948 (Me. 1986).

171. Maine Human Rights Comm'n v. City of S. Portland, No. CV-84-106 (Me. Super. Ct., Ken. Cty., Aug. 13, 1984).

172. *Id.* at 950. Section 4591 declares the civil right of equal access to public accommodations without discrimination as to physical handicap: "The opportunity for every individual to have equal access to places of public accommodation without discrimination because of race, color, sex, physical or mental handicap, religion, ancestry or national origin is recognized as and declared to be a civil right." ME. REV. STAT. ANN. tit. 5, § 4591 (1979).

Section 4592, set forth in pertinent part below, defines unlawful public accommodations discrimination more particularly:

> It shall be unlawful public accommodations discrimination, in violation of this Act:
>
> For any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, to directly or indirectly refuse, withhold from or deny to any person, on account of race or color, sex, physical or mental handicap, religion, ancestry or national origin, any of the accommodations, advantages, facilities or privileges of such place of public accommodation, or for such reason in any manner discriminate against any person in the price, terms or conditions upon which access to such accommodation, advantages, facilities and privileges may depend . . . .

Id. § 4592 (1979 & Supp. 1987-1988). For a discussion of the statutory history of the

by operating a public fixed-route bus system comprised entirely of wheelchair-inaccessible, high-floor buses, the City of South Portland discriminated against wheelchair users and other ambulatory-impaired persons by denying them access to public transportation.[173] South Portland countered that the alternate, paratransit service that it provided especially for handicapped persons constituted equivalent service.[174] The city argued that, insofar as the paratransit

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provision as a reflection of the evolution of Maine's statutory antidiscrimination law as a whole, see *supra* text accompanying notes 75-98.

173. The city of South Portland initially purchased five high-floor buses for delivery by January 1983. Maine Human Rights Comm'n v. City of S. Portland, No. CV-84-106, slip op. at 7 (Me. Super. Ct., Ken. Cty., Aug. 13, 1984). High-floor buses derive their name from the fact that passengers gain access to the interior of the bus by ascending three high steps. These are the buses traditionally used for urban mass transit in this country despite some efforts to encourage production of alternate, more readily accessible models. *Id.* slip op. at 11. South Portland ordered five high-floor, "City Bird" buses from the Blue Bird Bus Company. *Id.* slip op. at 7. The lower court's findings of fact as to the cost of the buses contain some ambiguity. As the court itself noted, the buses cost either $95,000 or $97,500 apiece, depending on whether one referred to the South Portland City Manager's trial testimony or to the bid documents submitted into evidence. *Id.* slip op. at 7 n.3. High-floor buses could be made accessible to wheelchairs only by installation of hydraulic lifts in one of the stairwells, usually the rear one. The court found that lifts cost from $10,000 to $16,000 apiece. *Id.* slip op. at 13. The court found the difference insignificant insofar as the Skillcraft bus company, which marketed a low-floor bus nationally, offered the low-floor model for sale for the price of $96,500. *See id.* slip op. at 11-12.

A low-floor bus takes its name from the fact that the floor is situated close to ground level. Passengers gain access with less risk of falling when ascending or descending the stairs. Moreover, "low floor buses [are] readily accessible to wheelchair users, by a ramp pulled out or powered out from the bus stairs on which wheelchair users [can] roll themselves onto the bus." *Id.* slip op. at 11. Whether the high-floor bus cost $1,500 less than the low-floor model, or $1,000 more, seemed to make no difference to the lower court. In either case, the low-floor bus was reasonably available. *Id.* slip op. at 12. In September 1983, South Portland purchased a sixth high-floor bus. *Id.* slip op. at 10.

174. Paratransit service, offered by the Regional Transportation Program (RTP), provides door-to-door service for handicapped persons and others who qualify. The lower court found that the paratransit service provided by RTP in South Portland was not equivalent to the service wheelchair users would receive aboard the fixed-route buses despite the advantage of door-to-door service:

> 1. Generally, arrangements must be made at least 24 hours in advance of the desired trip for service on paratransit.
>
> 2. The purposes for which paratransit services are desired must be disclosed.
>
> 3. Presently, paratransit service is only provided to take persons to medical or educational appointments or to deal with government benefit or legal matters. . . . Paratransit is not available for shopping trips, recreation, visiting friends or simply taking a trip to view the scenery.
>
> 4. Paratransit service is only available on weekdays from about 7:00 a.m. in the morning to approximately 5:00 or 6:00 p.m. in the evening. It is not available on weekends or holidays.
>
> 5. Persons are generally required to be ready at least 45 minutes before the scheduled time they desire to be picked up, and long waits for paratran-

system offered door-to-door service, it provided better service than the public fixed-route lines, which would require handicapped persons to make their own way to and from the bus stops, and thus subject wheelchair users to the exclusionary effect of impediments such as hills, snowbanks, and curb-stones. The city also argued that wheelchair-accessible, low-floor buses were not reasonably available when, in 1983, it seceded from the Greater Portland Transit District (METRO) and founded its own municipal transit authority.[175]

The lower court rejected both arguments.[176] Focusing on the cost of the wheelchair-accessible buses relative to the inaccessible models, the court found that the former carried a purchase price of merely $1500 more than the high-floor models purchased by the city.[177] The court also found that hydraulic lifts installed in the stairwells of high-floor buses were available for $12,000 to $16,000 per lift, could be maintained for several hundred dollars or less per year, and were "relatively easy to use."[178] Based on these findings the court concluded that South Portland could have "easily" accommodated wheelchair users on its public bus system.[179] The court further concluded, based on the ways in which the rules governing paratransit service restricted its use by the handicapped, that paratransit service was "not equal in the level or quality of service to the services provided by the South Portland Fixed Route Public Transit System."[180] On appeal, the Law Court upheld the findings of fact as not clearly erroneous and rejected the city's claim that section 4591 prohibited only invidiously motivated discrimination.[181]

The court justified holding South Portland liable despite the absence of traditional invidious factors because of "certain unique cir-

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sit service at either end of a trip are not unusual. Further, there are times when paratransit service simply fails to meet a scheduled appointment.

6. Able-bodied relatives and friends cannot accompany wheelchair users on paratransit trips.

Maine Human Rights Comm'n v. City of S. Portland, No. CV-84-106, slip op. at 14-15. The court reasoned that even assuming that "under Maine Law separate but equal systems are a valid approach to providing public transportation service for handicapped citizens," relevant federal criteria suggested that the RTP service provided at relevant times failed to compare favorably with the public fixed route system. *See id.* slip op. at 16 (quoting proposed guidelines published by the Urban Mass Transportation System, 48 Fed. Reg. 40,684, 40,693 (1983)).

175. *See* Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d 948, 951 (Me. 1986).

176. Maine Human Rights Comm'n v. City of S. Portland, No. CV-84-106, slip op. at 14, 16, 21-23.

177. *Id.* slip op. at 7, 12.

178. *Id.* slip op. at 13-14.

179. *Id.* slip op. at 23 ("The South Portland Transit System could have easily been created to be accessible to wheelchair users.").

180. *Id.* slip op. at 22.

181. Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d 948, 956 (Me. 1986).

cumstances"[182] and "unique societal problems"[183] faced by the physically handicapped:

> Rarely, in such a case, is there invidious bias on the part of the proprietor of a place of public accommodation. Rather, such discrimination ordinarily results from the erection or maintenance of physical barriers that prevent the handicapped person from gaining entrance. Although the proprietor may not consciously intend to discriminate, the barrier excludes as effectively as would an intentional policy.[184]

Thus, the court based its decision on factors that it saw as unique to the physical handicapped. Unless the ground of liability opened up to include some exclusions not based upon invidious bias, the Act would fail to effectuate the policies declared by the Legislature of ensuring equal access to public accommodations.

The court relied on the statement of legislative policy contained in section 4552, focusing primarily on "the policy of this State to keep continually in review all practices infringing on the basic human right to a life with dignity, and the causes of such practices, so that corrective measures may, where possible, be promptly recommended and implemented . . . ."[185] The court also focused on the statement of fact accompanying the 1974 amendment to the MHRA adding physically handicapped persons as a protected class.[186] The amendment provided "that the MHRA was intended 'to guarantee physically handicapped persons the fullest possible participation in the social and economic life of the State.' "[187] Finally, the court referred to section 4591, which declares the right to equal access without discrimination on account of physical handicap "in absolute terms."[188] Relying on *Local 1361*, the Law Court adopted reasonable

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182. *Id.* at 954. The Law Court stated, "The brief filed on behalf of [Maine Association of Handicapped Persons] correctly identifies *certain unique circumstances* involved in discrimination against handicapped persons." *Id.* (emphasis added).

183. *Id.* The court wrote, "The substantive statutory provisions involved in this case must be read in light of the *unique societal problems* of the handicapped and the legislative goal of matching progress with opportunity." *Id.* (emphasis added).

184. *Id.*

185. *Id.* (quoting ME. REV. STAT. ANN. tit. 5, § 4552 (1979 & Supp. 1987-1988)). The court read the policy statement as addressing the "plight of the handicapped," *id.*, but insofar as the policy statement does not in any way limit itself to the physically handicapped and refers to all classifications protected by the Act, the statement can play a comparable, central role in the determination of any non-invidious discrimination claim brought under the MHRA.

186. *Id.* ("More explicit confirmation of the legislative purpose is provided by the statement of fact accompanying the 1974 amendment adding physically handicapped persons as a protected class under the MHRA.").

187. *Id.* (quoting L.D. 2058, Statement of Fact (106th Legis. 1974)).

188. *Id.* ("The rights of handicapped persons are given meaning and form in absolute terms under 5 M.R.S.A. §§ 4591 and 4592."). Section 4591 declares the civil right to be free from discrimination in access to public accommodations: "The opportunity

accommodation as a means of breathing flexibility into an otherwise "airtight prohibition."[189] Wrote the court: "The tension between the legislative statement of policy and the substantive prohibition mandates an application of the doctrine of reasonable accommodation to claims of discrimination in public transportation based on physical handicap."[190]

Given the flexibility called for by the legislative policy statement in conjunction with the categorical terms of the antidiscrimination right, the court held: "The creation of a physical barrier in circumstances where that result could reasonably have been avoided without financial or administrative burden, constitutes an illegal act of discrimination."[191] The Law Court upheld, as not clearly erroneous, the lower court's finding that the low-floor bus was reasonably available.[192] The evidence most relevant to the low-floor bus's reasonable availability was that of purchase price.[193] The provision of paratransit service did not change the result because, although "commendable," the supplemental service did "not relieve the City from its obligation to avoid discriminatory practices *where possible.*"[194]

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for every individual to have equal access to places of public accommodation *without discrimination* because of race, color, sex, physical or mental handicap, religion, ancestry or national origin is recognized as and declared to be a civil right." ME. REV. STAT. ANN. tit. 5, § 4591 (1979) (emphasis added). Section 4591 declares the right in absolute terms presumably because the Act defines "discrimination" broadly to include, in effect, any separation. *See id.* § 4553(2). Thus, read literally, section 4591 would prohibit any separation caused by the excluded person's physical handicap without reference to any culpability factors on the part of those responsible for the creation of the exclusionary barrier. Reasonable accommodation, in effect, interjects an element of culpability into an otherwise strict liability discrimination statute.

The Maine court faced an identical problem, and reached an identical solution, in Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369 (Me. 1978). The *Local 1361* court explained, "[I]n absence of a bona fide occupational qualification, *any discharge* [from employment] based upon religion would be a violation of the Act." *Id.* at 378 (emphasis added). For the text of section 4592, which defines unlawful public accommodations discrimination with somewhat more particularity, but still subject to interpretation in what is meant by "discrimination," see *supra* note 172.

189. *See* Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d at 954 (quoting Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d at 378) (" 'One of the purposes of [reasonable accommodation] is to breathe flexibility into an otherwise airtight prohibition against religious discrimination, by providing that a reasonable accommodation need not be made if it would amount to undue hardship.' "). *See also id.* at 955 (quoting Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d at 378).

190. *Id.* at 955.

191. *Id.* at 955-56.

192. *Id.* at 956.

193. *See supra* note 173.

194. Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d at 956 (emphasis added) (alluding to ME. REV. STAT. ANN. tit. 5, § 4552 (1979), which states that the policy of the MHRA is to review practices that infringe "on the basic right to a life with dignity . . . so that corrective measures may, where possible, be promptly

A dissenting opinion authored by Justice Glassman, in which Justice Nichols and Chief Justice McKusick joined, criticized the majority for involving the courts in ad hoc cost-benefit analysis more appropriately left to the Legislature.[195] The dissent argued that "reasonable accommodation is properly invoked to determine the scope of remedial relief" and cited *Percy v. Allen* and *Local 1361*,[196] the same cases relied on by the majority. These cases, argued the dissent, showed that the affirmative defense of reasonable accommo-

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recommended and implemented . . . .").

195. *Id.* at 957 (Glassman, J., dissenting).

196. *Id.* at 958 (Glassman, J., dissenting) (citing Percy v. Allen, 449 A.2d 337, 341-46 (Me. 1984), *appeal after remand*, 472 A.2d 432 (Me. 1982); Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369, 375-78 (Me. 1978)). It is not clear exactly what is meant by the proposition that reasonable accommodation goes only to the feasibility of a remedy and not into the finding of wrongfulness in the first place. Inasmuch as the *Local 1361* court clearly adopted reasonable accommodation as an affirmative defense, *see* Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d at 375-76, 378, the court clearly considered reasonable accommodation as part of the determination of whether a wrong had occurred and so, by implication, whether any remedy at all could be granted. Similarly, the court in *Percy v. Allen* expressly adopted reasonable accommodation as part of the BFOQ affirmative defense, and, furthermore, expressly overruled the lower court on just this point: i.e., whether reasonable accommodation went to the question of the availability of a remedy, or to the question of the existence of a wrong. The *Percy* court explained, "[A]t the initial, liability phase in which the legality of the defendants' conduct is assessed, plenary consideration must be given to the issue of accommodation, regardless of the nature of the requested relief." Percy v. Allen, 449 A.2d at 346, *quoted in* Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d at 956 n.6.

The dissenting opinion seems to suggest that the court could find that wrongful discrimination has occurred and yet grant no remedy. If this proposition means that the Act recognizes wrongs for which there are no remedies, then the proposition appears to collide with article 1, section 19 of the Maine Constitution, which provides that every wrong shall have a remedy. *See* ME. CONST. art. 1, § 19, *construed in* Black v. Solmitz, 409 A.2d 634, 635 (Me. 1978). If the dissent had in mind the statutory fines available under the MHRA, *see* ME. REV. STAT. ANN. tit. 5, § 4613(2)(B) (1979 & Supp. 1987-1988), so that reasonable accommodation goes to determining the availability of injunctive, as opposed to monetary, relief, then the dissent still has to reckon with the court's clear adoption of reasonable accommodation as an affirmative defense. What can reasonable accommodation as an affirmative defense mean except that it goes to the question of wrongfulness?

The dissent's real objection appears to be that applying reasonable accommodation requires the court to engage in ad hoc balancing and to base liability on potentially subtle factual distinctions where there is no bright line drawn by the invidious motivation of the actor. Perhaps to counter this objection, the majority concentrated on the issue of purchase price, and focused on the negligible difference between the price of the high- and low-floor buses, as if to say that this decision involved no subtle factual distinctions at all but actually involved a bright line. Indeed, if price is the only issue, then the case is an easy one, for South Portland's decision to favor the inaccessible over the accessible bus, all other things being equal, is simply arbitrary. The choice was not so stark as purchase price would make it seem, however. *See supra* note 173; *infra* text accompanying notes 212-223.

dation addressed the feasibility of a remedy to prima facie discrimination. The dissent argued that by "importing the principle [of reasonable accommodation] into the initial finding of unlawful discrimination, the court has made the initial finding as discretionary as the fashioning of remedial relief . . . [and] has usurped the legislative function."[197]

The dissent also traced the history of the public accommodations provisions to support the proposition that the Legislature intended subchapter V to operate

> as it operates in other cases of discrimination. Discrimination because of race, national origin, religion, age or sex results primarily from *stereotyping attitudes* that are embodied in practice. Discrimination against a physically handicapped person results in part from this invidious *stereotyping.* Insofar as such discriminatory *stereotyping* is embodied in practice, the law prohibits it.[198]

The dissent consequently characterized the court's decision predicating liability on non-invidious factors as representing "a major departure from this court's prior decisions construing the MHRA and from the corpus of antidiscrimination law."[199]

On one level, notwithstanding the dissent's views, *Maine Human Rights Commission v. City of South Portland* merely continues the development of non-invidious discrimination as a basis for liability under the MHRA. The case extends the doctrine somewhat by applying it for the first time outside the employment context and subchapter III. This wrinkle aside, the court's predication of liability on the discriminatory effects of the high-floor bus design does not differ materially from its basing liability on the discriminatory consequences of the security agreement in *Local 1361* nor on the purposeful, gender-based hiring policy at issue in *Percy v. Allen.*[200] In two of the three cases the effect of the "barrier" in question established potential liability by making out a prima facie case of discrimination. In none of these cases did the Law Court require a showing of invidious motivation. The only question was whether the defendant might have reasonably avoided the discriminatory effect, and the indignity it caused, by pursuing a reasonably available alternative policy. *South Portland* is thus consistent with prior cases under the MHRA, coheres with general principles developed under federal antidiscrimination statutes, and does not, therefore, depart from the corpus of antidiscrimination law, as charged by the dissent in that case.[201] Rather the case continues a trend that emerged with

197. Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d at 958 (Glassman, J., dissenting).

198. *Id.* at 959 (Glassman, J., dissenting) (emphasis added).

199. *Id.* (Glassman, J., dissenting).

200. *See supra* text accompanying notes 115-171.

201. Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d at 959 (Glass-

the first Law Court decision under the Act.

What distinguishes *South Portland* as a non-invidious discrimination case is the weight accorded to the Legislature's antidiscrimination policy. One indication of the great weight that the court gave to this policy is the central role that the section 4552 policy statement played in the court's reasoning.[202] Unlike its decisions in *Local 1361* and *Percy v. Allen*, the court made section 4552 the cornerstone of its opinion, deriving from the provision the premise that the Legislature understood that not all discriminatory barriers could be removed at once but that it intended a gradual rolling back of such barriers as removal became feasible.[203] Another indication of the great weight accorded to the dignitary interests is that the court used the general policy expressed in section 4552 to condition and qualify the meaning of the legislative history of the public accommodation provisions and the enactment of specific access requirements for buildings in sections 4582, 4593, 4594, and 4594-A. As the dissent forcefully argued, both elements of statutory history cut against the claim that the Legislature intended a broad remedial approach in the narrow context of handicap access to public transit.[204] Yet the court held that the general policy overrode contrary implications of the specific provisions. The court tacitly found the general MHRA policy more persuasive than any contrary influence exerted by the more restrictive approach to the question of handicap access to public transportation taken by federal courts under section 504 of the Rehabilitation Act.[205] The court also implicitly rejected available au-

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man, J., dissenting).

202. *See id.* at 954 (quoting in its entirety ME. REV. STAT. ANN. tit. 5, § 4552 (1979)).

203. *Id.*

204. *Id.* at 960-61 (Glassman, J., dissenting).

205. A pair of First Circuit cases illustrates the way in which federal courts have favored a narrow construction of section 504. In Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 549 F. Supp. 592 (D.R.I. 1982), the court held that the Rhode Island Public Transit Authority (RIPTA) unlawfully discriminated against the physically handicapped, in violation of section 504, by, in part, failing to include wheelchair lifts on the 42 new buses it had added to its fleet.

The court based its holding on a sensitive evaluation of the facts. Finding that the installation of a lift on each of the 42 buses would cost $8,114 apiece, for an aggregate additional outlay of $340,000, *id.* at 613, the court noted that this price amounted to the cost of just two additional non-accessible buses. *Id.* at 614. The court could not find "that two additional buses for the able-bodied are more important than 42 buses that wheelchair users, as well as the general public, can use." *Id.* The court presumably meant that RIPTA could have elected to purchase 40 non-accessible buses and still satisfy the demand of able-bodied riders. Otherwise, the objection raised against the purchase of the lifts, that they cost too much, could also be raised against the purchase of the two additional non-accessible buses.

The court ruled that "defendants have a duty under § 504 to *avoid* discriminating against the handicapped." *Id.* at 613 (emphasis supplied). The ruling was based in part on Southeastern Community College v. Davis, 442 U.S. 397 (1979). In the court's

thority from another state jurisdiction influenced heavily by the re-

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reading, *Davis* required modifications that (a) did not amount to a " 'fundamental alteration' in the nature" of the program, Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. at 606 (quoting Southeastern Community College v. Davis, 442 U.S. at 410), and that (b) would not impose undue hardship on the defendant. *Id.* at 607. The ruling was also based in part on the then recent Second Circuit decision in Dopico v. Goldschmit, 687 F.2d 644 (2d Cir. 1982), which reasoned that "because the barriers to equal participation are physical rather than abstract, some sort of action must be taken to remove them, if only in the area of new construction or purchasing." *Id.* at 652, *quoted in* Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. at 606-607. The court equated affirmative action with substantial modifications, Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. at 607, and denied that the $340,000 purchase constituted affirmative action. Rather the purchase "would only require RIPTA to refrain from discriminating against the handicapped in its upcoming purchase of buses and the management of its fixed route transport system." *Id.*

The court of appeals reversed and remanded. Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 718 F.2d 490 (1st Cir. 1983), *discussed in* Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d 948, 960 n.5 (Glassman, J., dissenting). The court focused narrowly on the $340,000 required to furnish the new buses with lifts and stressed that *Davis* "did not impose the duty nor confer the authority on a district court to engage in affirmative action," Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 718 F.2d at 495, and that *Davis*'s "central message remained that section 504 does not impose the duty to engage in affirmative action." *Id.* at 496. The court dismissed the district court's reading of affirmative action as "[s]emantics." *Id.* at 496. The court concluded, "We are unable to square [*Davis*] with an order imposing a duty on RIPTA to spend over $320,000 on controversial lifts for its new buses." *Id.* at 496. Although the court sympathized with the humane considerations prompting the lower court's decision, the court apparently could not shake the conclusion that $320,000 was simply a lot of money.

The strength of the district court's analysis is that it seeks to arrive at an understanding of what $320,000 means in terms of the dignitary interests at stake for the handicapped. The court achieved this understanding by equating the cost of 42 accessible buses, and the benefit that they would confer on the handicapped, with the cost of only 2 non-accessible buses, and the negligible benefit that 2 more non-accessible buses would confer upon an already amply served able-bodied ridership. Viewed in this light, the court approved the imposition of the $320,000 cost because it could not subscribe to the basic underlying value judgment implied by its comparison of the costs of accessible and non-accessible buses. Other federal courts ruling on handicapped discrimination claims in public transportation have, like the First Circuit, focused narrowly on cost and the spectre of "affirmative action." *See, e.g.*, American Public Transit Ass'n v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981) (regulations requiring all public transportation vehicles and terminals be made accessible to wheelchair users exceeds scope of section 504). *But see* Americans Disabled for Accessible Pub. Transp. v. Dole, 676 F. Supp. 635 (E.D. Pa. 1988) (invalidating Department of Transportation regulation requiring that recipient of federal funds expend no more than three percent of federal funds received on making public transportation accessible to the handicapped). For a history of federal transportation regulations bearing on handicapped accessibility, see Note, *Section 504 Transportation Regulations: Molding Civil Rights Legislation to Meet the Realities of Economic Constraints*, 26 WASHBURN L.J. 558 (1987).

strictive federal approach.[206] Finally, the strength of the policy to eliminate discriminatory barriers can be seen in the court's rejection of the "separate but equal" argument implicit in South Portland's provision of paratransit service.[207] Overriding all these concerns was

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206. A divided (3-2) New York appellate court rejected a handicapped plaintiff's claim, under the New York Human Rights Act, that the Metropolitan Transportation Authority had committed unlawful public accommodations discrimination by failing to purchase buses and construct terminals that provide access to wheelchair-bound and semiambulatory persons. Eastern Paralyzed Veterans Ass'n v. Metropolitan Trans. Auth., 79 A.D.2d 516, 433 N.Y.S.2d 461 (1980) (mem.), *cited in* Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d at 959, 960 n.3. The court assumed that plaintiffs had charged defendants with a duty to employ special efforts to give "the disabled more than equal treatment," Eastern Paralyzed Veterans Ass'n v. Metropolitan Trans. Auth., 79 A.D.2d at 517, 433 N.Y.S.2d at 462-63, and held, "[W]e find no indication in the language of [the New York Human Rights Act] that the defendants must make 'special efforts' or take 'affirmative action' to accommodate the disabled." *Id.* The court dismissed the complaint insofar as it alleged violations of the state antidiscrimination statute, a statute that bears close resemblance to the MHRA in the language of its public accommodations provisions. The court presupposed that any affirmative duty to act entailed unequal treatment and affirmative action.

The dissent noted that "the term 'special efforts' may have been unfortunate in that it could connote some more required effort than plaintiffs seek." *Id.* at 518, 433 N.Y.S.2d at 463 (Kupferman, J., dissenting). As the transportation authority had built new terminals, purchased new buses, and renovated stations and terminals since the Act's effective date, the defendant had in essence created *new* obstacles to access. Insofar as the complaint alleged that these new barriers contravened the New York Human Rights Act, plaintiffs had stated a claim for relief. *Id.* The Act imposed an affirmative duty at least to the extent of requiring that defendants "no longer be oblivious to the special needs of [the disabled]." *Id.* The dissent draws a fairly express connection between the remedial purposes of the Act, necessitating liberal construction, and an affirmative duty to act so as not to create needless barriers to access for the handicapped.

207. *See* Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d at 956. The Law Court stated: "That result [i.e., liability for unlawful public accommodations discrimination] is not altered by the fact that a separate transit system is also provided. It is commendable that South Portland provides service to all residents, but that does not relieve the City from its obligation to avoid discriminatory practices where possible." *Id.* The Law Court muted somewhat the lower court's more resounding rejection of the separate but equal argument. The lower court wrote: " 'Separate but equal' has been rejected as a means of achieving rights denominated as civil rights since *Brown v. Board of Education* overruled *Plessy v. Ferguson* thirty years ago." Maine Human Rights Comm'n v. City of S. Portland, No. CV-84-106, slip op. at 22 (Me. Super. Ct., Ken. Cty., Aug. 13, 1984) (footnotes omitted) (citing Brown v. Board of Educ., 347 U.S. 483 (1954), and Plessy v. Ferguson, 163 U.S. 537 (1896)).

The superior court's use of *Brown* is interesting because, insofar as *Brown* represents the paradigm case of invidiously motivated discrimination, *see* Brown v. Board of Educ., 347 U.S. at 494 ("To separate [black school aged children] from others of similar age and qualifications solely because of their race *generates a feeling of inferiority* as to their status in the community . . . ." (emphasis added)), it suggests that the lower court may have come close to finding invidious motivation on the part of the City of South Portland, notwithstanding that its conclusions contained no express reference to invidious factors. In other words, the case contained factors that might

the Legislature's declared purpose to review " '*all* practices infringing on the basic human right to a life with dignity.' "[208]

South Portland also identified indifference as an offending attitude comparable to the stereotyping present in invidious motivation. For instance, the court quoted a Supreme Court opinion approvingly: " 'Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference--of benign neglect.' "[209] Thoughtlessness and indifference relegate the handicapped to second-class citizenship as effectively as exclusions motivated by a consciously held belief implying inferiority. The failure to foresee the harmful consequences of one's actions may signal a lesser degree of moral fault than the intent to bring about those harmful consequences. Nevertheless, the failure does signal a sort of fault that the law has found unlawful in other contexts and that the Legislature might fairly have intended the MHRA to reach.[210] Having isolated indifference to discriminatory effects in the context of physical handicap discrimination, the court has no good reason not to extend the theory of non-invidious discrimination into all other areas of the Act. Indeed, "non-invidious" may be a misnomer in that the sort of indifference to which the court adverted can have the same socially destructive consequences as actively invidious discrimination.

The *South Portland* court seized on reasonable accommodation as the proper limiting principle governing allegations of non-invidious discrimination under the public accommodations provisions, just as the *Local 1361* and *Percy v. Allen* courts had done under the employment subchapter.[211] Unlike subchapter III, the public accommodations provisions included no affirmative defense. Rather section 4591 proscribed public accommodations discrimination in sweeping,

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have led the court to find invidious motivation had the doctrine of non-invidious discrimination not been available as an alternate basis for its decision.

At any rate, the Law Court did *not* cite *Brown*, nor did it expressly tie its rejection of paratransit service, as a legally sufficient means of discharging the city's duty not to discriminate under the MHRA, to the unconstitutional doctrine of separate but equal, with its traditional connection to invidious discrimination. The absence of any comparable reference to the separate but equal doctrine suggests further that the Law Court disposed of the appeal without perceiving any reason to rest the disposition of the case on a finding of invidious discrimination. This point further supports the contention that *South Portland* is a non-invidious discrimination case.

208. Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d at 954 (quoting ME. REV. STAT. ANN. tit. 5, § 4552 (1979)).

209. *Id.* at 954 n.5 (quoting Alexander v. Choate, 469 U.S. 287, 295 (1984)).

210. The failure to foresee and avert the reasonably foreseeable and avoidable harmful consequence of one's actions resembles negligence. *See* Kaufman, *supra* note 20, at 1144 (analyzing duty to provide access to public accommodations under Illinois Human Rights Act in terms of common law negligence theory).

211. *See supra* text accompanying notes 115-146 (discussing *Local 1361*) & 146-171 (discussing *Percy v. Allen*).

categorical terms. An absolutist approach to public accommodations discrimination is clearly inappropriate and unjust in cases of non-invidious, effects-based exclusion. With the lesser quantum of moral fault comes a diminished need to define all instances of prima facie discrimination as wrongful and a greater need to promote flexibility in determining the legality or illegality of the challenged conduct. Like the *Local 1361* court, the *South Portland* court adopted reasonable accommodation expressly for its flexibility. Like the *Percy v. Allen* court, the *South Portland* court adopted the standard in reinterpreting the statute for purposes of non-invidious discrimination. Unlike either of the previous cases, however, *South Portland* adopted reasonable accommodation, with its implied affirmative defense of undue hardship, purely as a matter of judicial construction with no textual support in the public accommodations subchapter itself. Unlike the employment subchapter, subchapter V contains no affirmative defense as part of the statutory scheme. *South Portland* thus represents more clearly than either of the previous cases the court's reinterpretation of statutory antidiscrimination law in terms of reasonable accommodation to account for liability based on non-invidious factors.

South Portland applies a heightened standard of reasonableness consistent with the great weight that should be accorded the dignity interests sought to be protected by the Act. Although there were other administrative concerns, the imposition of the heightened standard began with the lower court's finding that the city could have "easily" accommodated physically handicapped passengers.[212] The finding that the city bus system could have easily accommodated wheelchair users suggests the absence of any real question on the matter.

Evidence adduced by defendants as to the potential cost and administrative burden of purchasing a fleet of accessible low-floor buses in mid-1982, however, arguably raises legitimate concerns for a municipality just beginning the business of operating its own transit authority.[213] For instance, the court found that only one company in the United States manufactured low-floor buses during 1981-1982.[214] Municipal authorities might reasonably be concerned that the manufacture of low-floor buses by a single domestic manufacturer indicated a lack of confidence in the product by industry experts. City officials also might reasonably be wary of investing heavily in an as yet unaccepted design that could jeopardize operations and lead to future outlays should an unprofitable market lead the manufacturer to discontinue the model or even to go out of busi-

212. Maine Human Rights Comm'n v. City of S. Portland, No. CV-84-106, slip op. at 23 (Me. Super. Ct., Ken. Cty., Aug. 13, 1984).

213. *See id.* slip op. at 11-14.

214. *Id.* slip op. at 12.

ness altogether. Perhaps more important, the low-floor bus was essentially an experimental model. As if to minimize the legitimacy of the city's concerns, the lower court stated, "In late 1981 Skillcraft low floor buses were actually operating on fixed routes in Sarasota, Florida and as part of a paratransit system in Cleveland, Ohio."[215] The court's use of the word "actually" strongly implies that the court would have found it reasonable for South Portland to purchase the model even if no other city had yet acquired or tested the low-floor buses.

To find that a municipality, which is undertaking to provide an expensive new service, may not proceed cautiously and refrain from committing all its resources to an essentially untried product unreasonably de-emphasizes legitimate economic and administrative concerns of the city. The "track record" of a vehicle is a legitimate concern when purchasing the vehicle, and the total lack of a track record, under road and climate conditions likely to be encountered in Maine, constitutes a reasonable concern of city authorities. The lower court did find that "[b]y late 1983 Skillcraft low floor buses were operating in other northern cities including four Skillcraft buses which had been purchased and were in operation by the [transit] system in the Portland area."[216] This evidence, however, bears only obliquely, if at all, on the issue of the reasonableness of South Portland's failure to invest heavily in low-floor buses a year and a half before a trend towards industry acceptance had developed.[217] That the lower court found that these legitimate govern-

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215. *Id.*

216. *Id.*

217. The relevance of this finding is questionable, because the lower court expressly held that the accommodation question went to the reasonableness of accommodating physically handicapped persons at the time of the *creation* of the South Portland Transit System. *See id.* slip op. at 23 ("The South Portland Transit System could have easily been created to be accessible to wheelchair users."). To the extent that the lower court referred to the reasonableness of any modifications, it did so in the context of fitting already operating high-floor buses with hydraulic lifts. *See id.* slip op. at 24 (city will submit plan "for making all of the buses on its fixed route system accessible to wheelchair users"). The Law Court also framed its holding in terms of the reasonableness of accommodating the handicapped at the time that South Portland first implemented its fixed route bus system: "The *creation* of a physical barrier in circumstances where that result could reasonably have been avoided without financial or administrative burden, constitutes an illegal act of discrimination." Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d at 955-56 (emphasis added).

Moreover, the Law Court distinguished the reasonableness of ordering accessible low-floor buses in the first place—given the negligible price difference between the low- and the high-floor models—from the reasonableness of ordering the installation of mechanical lifts as a remedial measure predicated on a finding of unlawful discrimination. The court held that although the costly installation of mechanical lifts might not have constituted a failure to accommodate, had that been the only available means of avoiding the creation of the step barrier, that issue was a separate issue

mental concerns failed to outweigh—or even to come close to outweighing—the dignitary interests protected by the Act shows the very substantial weight accorded to these interests.

The Law Court did not dwell on the complicated nature of the factual background of the case. To the extent that it referred to the factual basis of the lower court's holding, the Law Court referred to the negligible difference between the purchase price of each bus model.[218] Insofar as the Law Court's decision stressed purchase price alone, the case appeared easier than it actually was. For on that basis, the decision to purchase the comparably priced inacessible model was plainly arbitrary and, in that sense, even invidious.

Finally, the strong normative content contained in the judgment of reasonable accommodation can be seen in the court's treatment of the paratransit service provided by South Portland. The lower court initially found that the service contracted for by the city with the Regional Transportation Program (RTP) did not constitute equivalent service.[219] The city countered that it would expend the sums necessary to upgrade the service to " 'demand response' service that would be available on 3 to 4 hours notice."[220] Upgrading the paratransit system would have cost five times as much as making the fixed route system accessible to wheelchair users. Noting that money did not seem to be an issue, the court framed the "real issue . . . [as] whether separate but equal systems may be maintained . . . ."[221] The court then rejected the separate but equal approach on essentially normative grounds.[222] It stated, " 'Separate but equal' has been rejected as a means of achieving rights denominated as civil rights since *Brown v. Board of Education* overruled *Plessy v. Ferguson* thirty years ago."[223]

The grounds are essentially normative in that the finding implicitly rejects a utilitarian definition of the benefit conferred by public transportation. The benefit is not that of being transported from

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from the reasonableness of installing hydraulic lifts as a remedial measure: "The fact that the Superior Court ordered the installation of wheelchair lifts as relief for an established act of discrimination, does not suggest that the same measure was required initially as a reasonable accommodation." *Id.* at 956.

218. Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d at 952 n.3. For a discussion of purchase price, see *supra* note 173.

219. *See* Maine Human Rights Comm'n v. City of S. Portland, No. CV-84-106, slip op. at 16, 22 (Me. Super. Ct., Ken. Cty., Aug. 13, 1984). For a discussion of the deficiencies of paratransit service as provided by South Portland via RTP, see *supra* note 174.

220. *Id.* slip op. at 17.

221. *Id.* slip op. at 18.

222. That is, the court assumed equality between the two modes of transportation and ruled that, even in that event, provision of paratransit service would fail to discharge South Portland's duty under the statute. *Id.* slip op. at 22.

223. *Id.* slip op. at 22 (footnotes omitted). For a discussion of the court's use of *Brown v. Board of Education*, see *supra* note 207.

point A to point B with equal facility aboard paratransit as compared with public vehicles—as one "reasonable" view might suppose.[224] Rather the benefit is that of riding aboard the "public" vehicles, and thus of participating in the mainstream of community life—a value worth upholding for its own sake regardless of any practical benefits that may flow from separate transportation. That the Law Court upheld the rejection of separate but equal as not a reasonable accommodation highlights its commitment to according substantial weight to the dignitary interests sought to be protected by the Act and illustrates how essentially normative judgments that can underlie evaluations of what is reasonable under the circumstances.

In sum, *South Portland* represents the clearest indication of a trend begun under the MHRA in *Local 1361*, but having roots

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224. On appeal, the dissent laid special stress on examining the nature of transportation as a guide to determining legislative intent:

> The conclusion that section 4592 does not define South Portland's transit system as unlawful is reenforced by consideration of the nature of transportation. As . . . an economist and expert witness for South Portland[] testified, consumer demand for transportation is a "derived demand." That is to say, unlike employment, education, or housing that are ends in themselves though also means to a productive and satisfying life, public conveyance or transportation is not desired for its own sake, but purely as one method of movement to assist in obtaining other ends. The important goal of transportation is to be able to reach a destination.

Maine Human Rights Comm'n v. City of S. Portland, 508 A.2d at 960 (Glassman, J., dissenting) (footnote omitted) (citing Lagasse v. Hannaford Bros. Co., 497 A.2d 1112, 1117 (Me. 1985) (reasonable construction of legislative intent requires court to look at real-life situation that Legislature addressed, not simply to read language of statute in the abstract, in isolation from concrete experience)).

On the other hand, the MHRA defines unlawful public accommodations discrimination in terms of access to specific public conveyances. Although subchapter V speaks only of denials of access to public accommodations, section 4553(8) defines "public accommodation" to include "*all* public conveyances operated on land, water or in the air." ME. REV. STAT. ANN. tit. 5, § 4553(8) (1979) (emphasis added). The plain language of the statute thus suggests that the Legislature considered the benefits of transportation and nevertheless considered the duty imposed by the Act to extend to providing access to particular vehicles, not simply to the ability, through one type of vehicle or another, to reach destinations with equal facility. Although the categorial language of "all public conveyances" might suggest a duty not to discriminate invidiously, since an absolute ban on that type of discrimination intuitively makes more sense than a categorical proscription against non-invidious denials of access, reasonable accommodation will, in the latter case, qualify "all public conveyances" to mean only those for which a reasonable accommodation can be made. Moreover, the value sought to be protected by focusing on access to particular vehicles rather than on the general benefit of expeditious transportation goes to the heart of the dignitary concerns sought to be upheld by the Act. Access to "public" vehicles identifies wheelchair users as belonging to the same class of persons as everyone else, i.e., to the general public. To relegate the handicapped to their own transportation system, distinct from that provided for the "public," in effect defines them not as members of the public, but as belonging to a discrete minority.

outside Maine law, of recognizing a prima facie case of discrimination based on the consequences of an act rather than the motivation. The case thus illustrates the shift in the focus of antidiscrimination law away from purging society of illicit motives and towards guaranteeing persons full participation in society without impediment because of irrelevant factors. *South Portland* also clearly establishes that reasonable accommodation, with its inherent flexibility and potentially broad parameters of justification, will serve as the limiting principle in prima facie non-invidious discrimination cases. *South Portland* provides the clearest example yet of the MHRA being construed to create an affirmative defense based on reasonable accommodation and undue hardship. Most important, *South Portland* imposes what might be termed a heightened standard of reasonableness to ensure that the goals of equal opportunity and realization of full personal dignity declared by the Legislature will be carried out and to avert the danger that precious civil rights will be balanced away.

V. CONCLUSION

After *South Portland*, it is now clear that employers, owners and operators of public accommodations, and others whose activity brings them under the terms of the MHRA owe a statutory duty to foresee, and take reasonable steps to avoid, the discriminatory effects of their practices and policies. This duty imposes an obligation to act affirmatively to alleviate or avoid discriminatory consequences. Whether the duty has been met in any particular case will be judged according to the standard of reasonable accommodation.[225]

The balancing of circumstances that will go into determining whether an accommodation is reasonable will vary sufficiently from case to case to make formulation of a precise legal test difficult, if not impossible; nevertheless, potential defendants should expect that evidence adduced to show the undue hardship of any proposed accommodation will be assessed according to a heightened standard of reasonableness. To state the point metaphorically, the dignitary interest protected by the Act will be weighed heavily against the evidence of hardship.

Moreover, the dignitary interest *should* be weighed heavily against asserted claims of cost and administrative burden for at least three reasons. First, the Legislature has declared its clear in-

225. Where the statute defines the benefit all-inclusively, e.g., as the MHRA defines public accommodations to include "all public conveyances operated on land," ME. REV. STAT. ANN. tit. 5, § 4553(8) (Supp. 1987-1988), then one may not discharge this duty by providing a substitute, even if reasonably comparable, if equal opportunity to obtain the same benefit might reasonably be provided.

tention to uphold "the basic human right to a life with dignity."[226] Second, arguments made in terms of cost and burden can easily beguile one into thinking they involve value-neutral matters. Yet cost and burden are merely different ways of talking about what one considers important. The judgment that accommodation costs too much or will impose too great a burden may merely restate the underlying normative value judgment that the dignitary interests asserted by the plaintiff are not sufficiently worthy to warrant redress. To guard against legitimizing unacceptable value judgments cloaked in economic data and cost estimates, courts should weigh financial data lightly and, if anything, err on the side of according them less credence rather than more in a close case.

Third, the availability of non-invidious discrimination doctrine will encourage courts to dispose of cases on this ground except on the clearest proof of invidious motivation. The danger that finding a prima facie case based on effects rather than motivation poses for civil rights is that with non-invidious discrimination comes the more flexible limiting principle of reasonable accommodation. Reasonable accommodation gives the defendant more room to justify his conduct and increases the chance that value judgments will be disguised as findings of economic cost or administrative burden. In this way, reasonable accommodation doctrine could conceivably begin to subsume a substantial portion of statutory antidiscrimination law previously analyzed under the rubric of invidious discrimination with its "extremely narrow" standards of justification. *South Portland* provides a case in point. With the clearly discriminatory effect of the step barrier, there was no need to inquire into the city's motivation even though, notwithstanding what was stated above, the slight difference in cost might arguably have supported liability based on invidious discrimination.

Nor, with the sensitivity displayed by the *South Portland* court to the dignitary interests infringed by effects-based discrimination, will there necessarily be a reason for plaintiffs to avoid attempting to make out a prima facie case based on discriminatory effects for fear that reasonable accommodation would permit a court to balance away their rights. This assurance will last, however, only as long as the court views the evidence through the medium of a heightened standard of reasonableness. Should the reverse happen, then reasonable accommodation will allow a future court perhaps less sensitive to dignitary interests than was the *South Portland* court to balance away and ultimately trivialize the antidiscrimination right.

Stuart W. Tisdale, Jr.

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226. ME. REV. STAT. ANN. tit. 5, § 4552 (Supp. 1987-1988).