

DISCRIMINATION AGAINST ARABS IN ISRAEL IN PUBLIC ACCOMMODATIONS

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I. INTRODUCTION

Discrimination against members of the Arab minority in public accommodations (e.g., recreation areas, disco-clubs, swimming pools, and transportation) is not uncommon in Israel. This phenomenon has been documented for years in the annual reports of human rights organizations in Israel.¹ In recent years, Arabs have begun challenging the legality of such discrimination in court in the following cases: denial of access to a water-park,² denial of membership to a country club,³ denial of access to a recreation area near the Sea of Galilee,⁴ and excessive security checks at the airports.⁵ In all of these cases, the defendants denied the claim of discrimination. They claimed that the nationality of the plaintiffs was not taken into account and that in fact they were evaluating the plaintiffs on individual grounds, which was necessary to ensure the security of the other customers. The plaintiffs rejected this claim, insisting that the defendants did take their nationality into ac-

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1. See HA-AGUDA L'Z'KHUYOT HA-EZRACH B'YISRA-EL, DUAKH SHENATI 1992-1993 [ASS'N FOR CIVIL RIGHTS IN ISR., ANNUAL REPORT 1992-1993] 15 (1993); ASS'N FOR CIVIL RIGHTS IN ISR., ANNUAL REPORT 1993-1994, at 15, 18 (1994); ASS'N FOR CIVIL RIGHTS IN ISR., ANNUAL REPORT 1994-1995, at 12 (1995); ASS'N FOR CIVIL RIGHTS IN ISR., ANNUAL REPORT 1995-1996, at 12-13 (1996); ASS'N FOR CIVIL RIGHTS IN ISR., ANNUAL REPORT 1997-1998, at 14-17 (1998); ASS'N FOR CIVIL RIGHTS IN ISR., ANNUAL REPORT 1998-1999, at 18, 20 (1999); ASS'N FOR CIVIL RIGHTS IN ISR., ANNUAL REPORT 2001-2002, at 7-8 (2002).

2. C.C. (Jm.) 11258/93, Na'amne v. Kibbutz Kalia (unpublished) (on file with author).

3. C.C. (Natanya) 2090/99, Abu-Ma'amer v. Merkaz Nofesh U-Sport Kefar Bilu [Country Club Kfar Bilu] (unpublished) (on file with author).

4. Ketav Ha-Teviah [Plaintiffs' Complaint], C.C. (Tverya) 1347/02, Balal v. Khof Levanon [Lebanon Beach] (2002) (unpublished) (on file with author).

5. C.C. (Jm.) 007832/97, El-Razek v. El-Al (unpublished) (on file with author); 18147/98, Talawi v. Arkia Kavey Te-ufa Yisra-elim Ba-am [Arkia Israeli Airlines] (pending) (on file with author).

count. They emphasized that the security claim was nothing more than mere pretext, designed to hide the defendants' biases and prejudice against Arabs.⁶

The possibility of filing civil suits in cases of discrimination in public accommodations is a relatively recent development in Israeli law. It has developed in both case law and statutes. In the last decade, Israeli courts have applied the constitutional right to equality to relationships between private parties through the use of private law doctrines. In addition, the Knesset, the Israeli Parliament, is adopting new statutes preventing private parties from discriminating in some important spheres of life, such as employment, health, and education. In 2000, the Knesset adopted The Anti-Discrimination Act in Products, Services and in the Entrance to Places of Entertainment and Public Places (hereinafter the Act).⁷ The Act imposes criminal and civil responsibility in cases of discrimination on the grounds of nationality (and other grounds as well). The strengthening of the legal protection of the Arab minority reflects the growing recognition of many in Israel of the importance of the right to equality and the acknowledgment of the harm caused by actions based on prejudice. This article will address two major issues related to the issue of discrimination against Arabs in public accommodations in Israel: the process that led to the formation of the anti-discrimination norm in this context; and the types of motivations, which, if acted upon, constitute wrongful discrimination.

In Part II, I will provide an explanation of the process of extending legal protection to members of the Arab minority in Israel. I will argue that such a process has become possible because the legal system (both courts and the Knesset) is bound institutionally by principles of public reason and integrity of the law. These principles acted to compensate slightly for the Arab minority's lack of effective political power in Israel.

In Part III, I will analyze four types of motivation that, if acted upon in the context of public accommodations, might

6. See *supra* notes 2-5.

7. Khok Isur Haflaya B'Mutzarim, B'Sherutim U-Viknisa Limkomot Bidur U-Limkomot Tziburiyim [Anti-Discrimination Act in Products, Services, and Access to Places of Entertainment and Public Places], 2000, S.H. 57.

lead to outcomes that could be classified as wrongful discrimination: (1) subtle prejudice, defined as biases, aversion, or feelings of discomfort associated with Arabs (whether conscious or not); (2) blatant prejudice defined as a belief in the inferiority of Arabs; (3) accounting for customers' preferences based on the first two motivations; and (4) an attempt to reduce costs by relying on membership in the Arab minority as a proxy (estimation) for such costs. I will argue that behaviors that are based on the first three types of motivations are absolutely prohibited by the Act. Motivations of the fourth type can only be justified in rare cases. I will analyze the legality of this motivation in the context of security checks in airports that are based on passengers' nationalities.

II. ARABS IN ISRAEL AND THE LEGAL PROCESS

A. *Arabs As a Discrete and Insular Minority*

The Arab minority in Israel is often portrayed as discrete and insular. It is so described primarily because this minority has very limited effect on the outcomes of the democratic processes in Israel. The Arab minority in Israel constitutes nearly one-fifth of the Israeli population but, because of the ongoing conflict between Israel and the Arab world, voting in Israel tends to reflect national group affiliation.⁸ The effect of such a conflict is to substantially limit the possibility that the Arab minority in Israel could ensure its interests through the democratic process.⁹

One possible response to this problem is to use the anti-majoritarian power of the courts to protect the interests of the Arab minority.¹⁰ This response follows the spirit of the famous remarks made by the post-*Lochner* U.S. Supreme Court in footnote four of the *Carolene Products* case.¹¹ In that case, the

8. See Eyal Benvenisti, *Facially Neutral Discrimination and the Israeli Supreme Court*, 36 N.Y.U. J. INT'L L. & POL. 677.

9. AS'AAD GHANEM, *THE PALESTINIAN-ARAB MINORITY IN ISRAEL, 1948-2000: A POLITICAL STUDY* 157-62 (2001); see also NADIM N. ROUHANA, *PALESTINIAN CITIZENS IN AN ETHNIC JEWISH STATE: IDENTITIES IN CONFLICT* 94-107 (1997) (describing the dilemmas faced by the Arab minority in Israel in trying to secure effectively its interests in the Israeli political arena).

10. See Benvenisti, *supra* note 8.

11. *United States v. Carolene Prod.*, 304 U.S. 144, 152 n.4 (1938). For a critical analysis of footnote four, see Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

Court indicated its willingness to strictly review statutes directed at a particular religious, national, or racial minority in order to inquire whether such laws were the result of "prejudice against discrete and insular minorities."¹² This footnote was the basis of the suspect classifications doctrine, developed by the U.S. Supreme Court in the second half of the twentieth century. According to this doctrine, racial, religious, and national classifications are suspect and, therefore, in order for the State to justify them, it has to prove that it is pursuing a "compelling state interest" and that the means chosen were "narrowly tailored" to achieve this interest.¹³ There are some recent indications that the Israeli Supreme Court may be willing to adopt the American suspect classifications doctrine. For example, when the Israeli Supreme Court struck down the Jewish Agency's policy not to lease lands it administers to non-Jews, it ruled that "disparate treatment because of religion or nationality is suspect treatment and it is prima-facie discriminatory."¹⁴ This decision indicates that the Israeli Supreme Court may be willing to use its anti-majoritarian powers to strike down legal arrangements when there are reasons to suspect that these arrangements were in fact the result of bias and prejudice against members of the Arab minority in Israel.

The use of the Court's power to veto democratic decisions that relate to the Arab minority may, indeed, be an appropriate response to the problem of the limited influence of Arabs on the democratic process. However, there are several difficulties in this response. First, it is very hard for the courts to identify the motives of the legislators. Because the Knesset is composed of 120 representatives, it is quite common for differ-

12. 304 U.S. at 152 n.4.

13. See Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1088 (1982). Cases that employ this doctrine include *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (noting that racial classifications are "immediately suspect" and are subject to "the most rigid scrutiny" by the courts), *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Loving v. Virginia*, 388 U.S. 1 (1967).

14. H.C. 6698/95, *Ka'adan v. Minhal Mekarka'ey Yisra-el* [Israel Lands Admin.], 54(1) P.D. 258, 276 (Arabs); see also H.C. 1113/99, *Adala v. Ha-Sar L'Inyaney Datot* [Minister of Religious Affairs], 54(2) P.D. 164, 172 (holding that discrimination on the basis of religion or nationality is prohibited whether done directly or indirectly); H.C. 6924/98, *Ha-Aguda Lizkhuyot Ha-Ezrakh B'Yisra-el v. Memshelet Yisra-el* [Ass'n for Civil Rights in Israel v. Government of Israel], 55(5) P.D. 15, 26-27.

ent rationales to be brought to justify one law. Some of these rationales may be grounded in prejudicial motives and some may not. How would one know in such a case whether the law was the result of “prejudice against a discrete and insular minority?”¹⁵ Second, the judicial response in this context is problematic because of the sense of illegitimacy of judicial intervention in the decisions of democratically elected representatives.¹⁶ This is because judges in Israel are not democratically elected and they are not accountable to the public. Third, courts are usually reluctant to determine that the legislature was motivated by prejudice, for fear that this might trigger a reaction from legislators restricting the courts’ powers. This might suggest that because of institutional limitations courts will not sufficiently protect the interests of minorities.¹⁷ Fourth, judges themselves are not immune from prejudicial attitudes towards minorities; therefore they may not provide minorities with optimal protection. In sum, these difficulties demonstrate that the reliance on the anti-majoritarian powers of the courts may not always be sufficient to protect the Arab minority from the majority, which holds the monopoly on political power. I do not want to suggest here that these difficulties cannot be mitigated or overcome,¹⁸ nor that the courts should not apply strict scrutiny when analyzing legal arrangements that adversely affect Arabs. I do, however, want to show that there are limitations on such judicial responses and that they may not be trivial.

15. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 822-23, 1465 (2d ed., 1988); Ugo Colella, *Trust the Tale, Not the Author: Judicial Review of Legislative Motivation and the Problem of Proving a Racially Discriminatory Purpose Under the California Constitution*, 69 *TEMP. L.REV.* 1081, 1124 (1996).

16. Cf. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 *N.Y.U. L. REV.* 1383 (2001) (discussing the development of the countermajoritarian problem in pre-*Lochner* American jurisprudence).

17. Cf. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT BAR OF POLITICS* 19, 208-12 (1986).

18. There may be several possible responses to the difficulties described above. First, courts can infer illicit motives from the disparate impact of the law. Second, judicial review may be legitimate and democratic precisely because of the failure of the democratic process to ensure the interests of discrete and insular minorities. Third, judicial review is legitimate because the judiciary is “the least dangerous branch” and thus the most appropriate branch to ensure constitutional rights. See *id.* at 1, 23-28.

In this part, I would like to propose an additional solution to mitigate the problem of the discreteness and insularity of the Arab minority in Israel. I think it may be possible to convince the legal institutions (the legislature and the courts) to consider the interests of discrete minorities when they form and interpret legal norms, despite the fact that these groups have no effective political power. It will be possible to do so because of two basic principles of the legal process: public reason and the integrity of the law.

The requirement that political institutions act according to the principle of public reason is an essential feature of contemporary liberal theory. As explained by John Rawls, political institutions should refrain from imposing arrangements, requirements, or laws on individuals on grounds that these individuals could reasonably reject.¹⁹ A person may reasonably reject an arrangement if its justifications are not grounded in public reason. This may be the case when the justifications are not accessible from that person's perspective or when the State does not show equal respect to him or her. Thus, there is no reason to assume that a member of one religious group would accept an arrangement that is based on justifications that are only accessible to the members of another religion.²⁰ It would also be implausible to assume that people belonging to discrete and insular minorities would accept policies that are based on prejudicial attitudes and biases against them. A policy grounded in such justifications is unfair; therefore it does not fulfill the requirement of public reason. A related principle is that of the integrity of the law. This principle, as described by Ronald Dworkin, requires the legal system to act similarly in similar cases. The legal system should act consistently and in a manner coherent with the principles supporting

19. This point is developed in JOHN RAWLS, *A THEORY OF JUSTICE* 11, 17-21 (1971) and JOHN RAWLS, *POLITICAL LIBERALISM* 212-19 (1993). See T. M. SCANLON, *WHAT WE OWE EACH OTHER* 191-97 (1998) for a foundational argument regarding ethical contractualism and the argument for reasonable rejection. See also AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 52 (1996) ("Deliberative democracy asks citizens and officials to justify public policy by giving reasons that can be accepted by those who are bound by it.").

20. See Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 *PHIL. & PUB. AFF.* 215, 216-17 (1987).

the existing body of law.²¹ Because these institutions seek legitimacy, they would try to present their legal arrangements as emanating from these principles.

In what follows, I will show how these principles may mitigate the problem of the lack of political power of the Arab minority in Israel. I will do so by first describing how the anti-discrimination norm in public accommodation evolved in Israel.

B. *The Evolution of the Anti-Discrimination Norm in Public Accommodation*

In the absence of a written constitution, the Israeli Supreme Court has set forth an unwritten bill of rights.²² The Court has long recognized the right to equality²³ though its interpretation in the first decades of Israel's existence was limited in two major senses. First, the Court did not provide strong legal protection to weak groups, such as Arabs and women.²⁴ Second, the unwritten, constitutional right to equality

21. RONALD DWORKIN, *LAW'S EMPIRE* 243 (1986) ("Law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks [judges] to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards.").

22. Amos Shapira, *Why Israel Has No Constitution, But Should, and Likely Will, Have One*, 37 ST. LOUIS U. L.J. 283, 287 (1993) ("The [Supreme] Court has had to pave a path to justify the normative existence in the Israeli system of universal fundamental freedoms (such as freedom of expression, association, demonstrations, and occupation) despite the conspicuous absence of a formal, written bill of rights."); see also Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 312-17 (1995) (discussing the historical development of Israeli constitutional principles).

23. See, e.g., H.C. 10/69, Boronovski v. Ha-Rav Ha-Rashi L'Yisra-el Ha-Rav Nasim, Ha-Rav Ha-Rashi L'Yisra-el Ha-Rav Onterman [The Chief Rabbis of Israel] 25(1) P.D. 7; H.C. 98/69, Bergman v. Sar Ha-Otzer [Minister of Finance], 23(1) P.D. 693; H.C. 246/81, Agudat Derekh Eretz v. Reshut Ha-Shidur [Ass'n of Respect v. Israel Broad. Auth.], 35(1) P.D. 1.

24. Regarding women, see C.A. 5/51, Sheinberg v. Ha-Yo-etz Ha-Mishpati [Attorney General], 5 P.D. 1061 (stating that a law that exempts religious women from military service and does not exempt religious men to the same extent is not discriminatory in light of the different roles women have in the familial sphere). Regarding Arabs, see H.C. 30/55, Vaada Le-Hagana Al Admot Nazeret Ha-Mufka-ot v. Sar Ha-Otzar [The Council for the Preservation of the Lands of Nazareth v. Minister of Finance], 9 P.D. 1261, and H.C. 200/83, Wattad v. Sar Ha-Otzar [Minister of Finance], 38(3) P.D. 113 (1983).

applied only to State actions. This was true because it was believed that applying it to private parties would constitute an unjustified intervention on their personal freedom.²⁵ In recent decades, however, there have been important developments with regard to these limitations. The Supreme Court today views “generic discrimination”²⁶ (discrimination on the basis of race, religion, nationality, sex, sexual orientation, etc.) as the most damaging type.²⁷ The Court is willing to apply more rigorous judicial review when there is a reasonable claim that minority groups and women have been discriminated against.²⁸ And, as will be described below, courts no longer restrict the right to equality to State actions. In several cases, the courts have indicated that private discrimination against women and minorities would be considered a breach of private law duties.

There are two major reasons why the courts resorted to private law duties when applying the right to equality in the private sector. First, modern states are now undergoing a process of privatization. The administration of more and more

25. See H.C. 262/62, *Peretz v. Kfar Shmaryahu*, 16 P.D. 2101, 2114. The justification of liberty was the central justification for the stance taken by the American courts against the application of constitutional norms to the private sphere. See Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329 (1993).

26. The term “generic discrimination” was first elaborated by Justice Heshin in H.C. 2671/98, *Shdulat Ha-Nashim B'Yisra-el v. Sar Ha-Avoda V'Ha-R'vakha* [Women's Network v. Minister of Labor and Social Affairs], 52(3) P.D. 630, 658-59. According to Heshin, generic discrimination is discrimination that is based on immutable characteristics, such as race or sex. *Id.*

27. In H.C. 953/87, *Poraz v. Lahat* [Mayor of Tel-Aviv], 42(2) P.D. 309, 332, the Court described the gravity of the harm in discrimination: “[T]he sense of being discriminated against has devastating effects on society. The feeling of lack of equal respect is one of the worst feelings. It harms the forces that unite the community. It infringes one's self-identity.” See also *Women's Network*, 52(3) P.D. at 658-659 (discrimination on the basis of race or sex is a critical assault on one's dignity).

28. See, e.g., H.C. 4541/94, *Miller v. Sar Ha-Bitakhon* [Minister of Defense], 49(4) P.D. 94 (1995) (women); *Ka'adan*, 54(1) P.D. 258 (Arabs); H.C. 721/94, *El-Al Netivey Avir L'Yisra-el* [El-Al Isr. Airlines] v. *Denilovitz*, 48(5) P.D. 749 (homosexuals); H.C. 4191/97, *Rekanat v. Beyt Ha-Din Ha-Artzi L'Avoda* [National Labor Court], 44(5) P.D. 330 (the elderly); H.C. 7081/93, *Botzer v. Macabbim-Reut*, 50(1) P.D. 19 (1996) (people with disabilities).

spheres of life (not only those of economic character) is now in the hands of private parties.²⁹ The increase in the power of private entities and the fear of abuse of such powers require setting some limits (and the right to equality constitutes an important limit of this sort).³⁰ Second, because the legislature refrained (at least at the beginning) from explicitly banning private discrimination, courts had to look for a judicial solution when dealing with blatantly unacceptable cases of discrimination.³¹ A similar phenomenon occurred in the United States in the period that preceded the enactment of the Civil Rights Act. In *Shelley v. Kraemer*,³² the U.S. Supreme Court ruled that although constitutional provisions do not bind private parties, they do bind the courts when asked to enforce the norms of private law. Thus, it refrained in this case from providing the plaintiff (a white man) with a legal remedy whose effect would have been to enforce a racist restrictive covenant.³³ The National Labor Court in Israel, in *Hezin v. El-Al*,³⁴ was required to consider a similar set of issues while dealing with a provision in a collective bargaining agreement that was based on prejudice and stereotypes against women. In that case, the Court deviated from the traditional approach that

29. For a discussion of the theoretical and legal problems that may arise from such a phenomenon, see Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1212 (2003).

30. Francis Raday, "Hafratat Zkhuyot Ha-Adam" V'Ha-Shimush L'Ra-a B'Koach [*The "Privatization of Human Rights" and the Abuse of Power*], 23 MISHPATIM 21 (1994).

31. See Stephen Goldstein, *Protection of Human Rights by Judges: The Israeli Experience*, 38 ST. LOUIS U. L.J. 605, 606 (1994) (noting that, from 1948 until 1992, "Israeli judges fashioned the law of human rights in a constitutional and, indeed, legislative vacuum in terms of the protection of human rights").

32. 334 U.S. 1 (1948) (holding that judicial enforcement of racially restrictive covenants constituted state action and the covenants therefore violated the equal protection clause of the 14th Amendment). The court's use of the state action doctrine in *Shelley* has been highly criticized as being irrational and difficult to apply. See Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 393, 393 (1988) (noting that commentators agree that the state action doctrine cannot be separated from substantive constitutional law); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 ("For twenty years, scholars persuasively argued that the concept of state action never could be rationally or consistently applied").

33. *Shelley*, 334 U.S. at 20.

34. L.A. 3-25, *Hezin v. El-Al*, L.P.D. 4, 365.

the right to equality does not bind private parties. It ruled that the discriminatory provision in a collective bargaining agreement was contrary to the requirement that contracts should not violate public policy and was therefore void.³⁵

The Chief Justice of the Israeli Supreme Court, Aharon Barak, is the strongest supporter of the application of constitutional norms to private law. His approach has been exemplified in both his academic publications³⁶ and his judicial decisions.³⁷ Barak's approach is similar to that of the German Constitutional Court in suggesting that the constitution has a "radiating effect" on private parties (*Drittwirkung*) and thus courts should interpret the provisions of private law in accordance with constitutional values.³⁸ According to Barak, the right to equality (as well as other constitutional norms) applies in the private sphere through the interpretation of the general doctrines of private law (e.g., negotiation in good faith and in accord with public policy in contracts; negligence and breach of a statutory duty in torts).³⁹ Barak's position has had an impact on lower courts when dealing with cases of discrimination in the private sphere. Indeed, there have been several cases in which these courts have been willing to apply anti-discrimination principles to the areas of housing⁴⁰ and public accommodations.⁴¹

35. *Id.* at 378-80.

36. Aharon Barak, *Constitutional Human Rights and Private Law*, in HUMAN RIGHTS IN PRIVATE LAW 13 (Daniel Friedman & Daphne Barak-Erez eds., 2001).

37. C.A. 294/91, Khevrat Kadisha K'hilat Yerushalayim [Kadisha Burial Society for the Jerusalem Congregation] v. Kestenbaum, 46(2) P.D. 494; A.H. 22/82 Beit Yules v. Raviv, 43(1) P.D. 441.

38. DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 49 (1997) (discussing German constitutional principles); DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 182-87 (1994).

39. Barak, *supra* note 36, at 33 (stating that, in determining the proper purpose of new legislation, it is proper to consider, *inter alia*, the human rights of others, which may be "formulated in value terms, such as 'good faith', 'negligence', 'reasonableness' and 'public policy'").

40. (Hi.) C.C. 5233/96, The Association for the Protection of Individual Rights v. Matzkin (unpublished) (on file with author).

41. C.C. (T.A.) 23319/90, Projekt Gan Ha-Ir [City Garden Project] v. Horovitz (unpublished); C.C. (T.A.) 15/97, Shamsiyan v. Mis'edet Ganey Rozmari [Rosemary Garden Rest.] (unpublished) (on file with author).

The decision of the Magistrate's Court in Jerusalem in *Na'amne*⁴² is illustrative of the legal ways the right to equality has been applied in private law. In this case, the Court found that the denial of access to a water-park in Kibbutz Kalia to an Arab family was based on discrimination.⁴³ The Court found that the defendant had violated its legal duties in two ways. First, the defendant did not notify all potential customers in advance that it did not allow the entrance of Arabs; therefore it failed to fulfill the statutory requirement to negotiate contracts in good faith.⁴⁴ Second, because nationality discrimination violates the right to human dignity, protected in Basic Law: Human Dignity and Freedom, the defendant breached a statutory duty.⁴⁵

The increased social recognition of the importance of equality and the legitimization provided by courts for the implementation of this right in the private sector have encouraged human rights organizations in Israel to call for legislative regulation of anti-discrimination in those spheres of life in which private action has a substantial effect on the social and economic interests of minorities or women. The Association for Civil Rights in Israel (ACRI) has been the strongest advocate of such a legislative move. It has successfully lobbied for such statutes, and, as a result, the Knesset has adopted anti-discrimination laws in the private sphere in areas such as employment,⁴⁶ health,⁴⁷ public accommodations, and education.⁴⁸ The issue of housing was left outside the legislative reg-

42. C.C. (Jm.) 11258/93, *Na'amne v. Kibbutz Kalia* (unpublished) (on file with author).

43. *Id.* at 13.

44. *Id.* at 6.

45. *Id.* at 7.

46. *Khok Shiyon Hizdamnuoyot Ba-Avoda* [Equal Opportunities in Employment Act], 1988, S.H. 38; *Khok Sakhar Shaveh La-Oved V'La-Ovedet* [Equal Pay for Men and Women Employees Act], 1996, S.H. 230.

47. *Khok Bitu-akh Bri-ut Mamlakhti* [National Health Insurance Act], 1994, S.H. 156; *Khok Z'khuyot Ha-Kholeh* [Patient's Rights Act], 1996, S.H. 327.

48. Anti-Discrimination Act in Products, Services, and Access to Places of Entertainment and Public Places, 2000, S.H. 57 (also applying to those providing educational services).

ulation due to the potential political problem that could arise from an attempt to regulate it.⁴⁹

In order to explain how the principles of public reason and the integrity of the law may have led the legal system to protect the Arab minority from discrimination, I will first describe how The Equal Opportunities in Employment Act, 1988,⁵⁰ was extended to protect Arabs as well. Due to the political difficulty in banning discrimination in the private sphere against Arabs, ACRI thought it would be wiser to first concentrate on banning discrimination of a less controversial type. The Equal Opportunities in Employment Act, as originally adopted in 1988, only banned discrimination on grounds that are usually associated with women.⁵¹ ACRI's hope was that it would later be possible to convince the legislature to extend the protection provided by the anti-discrimination norm in employment to Arabs as well.⁵² This hope was based on the belief that the legislature is bound by principles of public reason and the integrity of the law.⁵³ As long as no anti-discrimination norms were set in the private sector, the legislature could have argued that it refrained from providing for such norms due to public reasons. It would have been possible to base this avoidance on the principle of liberty, on its desire to allow the individual to exercise maximum liberty while acting in the private sphere. But, once the legislature recognized the need to limit the prerogative of private employ-

49. The issue of housing is more problematic to regulate because it may involve intervention within a more intimate sphere: the domicile. In addition, this issue raises sensitive dilemmas regarding the Jewish character of the State of Israel and the control over land. Cf. *Ka'adan*, 54(1) P.D. 258; see STATEMENT OF DEPUTY ATTORNEY GENERAL, JOSHUA SCHOFFMAN, KNESSET'S CONSTITUTIONAL COMMITTEE PROTOCOLS NO. 172 (Aug. 27, 2000), available at <http://www.knesset.gov.il/protocols/data/html/huka/2000-08-27.html> [hereinafter COMMITTEE PROTOCOL 172]. It should also be mentioned that the American Fair Housing Act, 42 U.S.C. §§ 3601-31 (2000), was unsuccessful in its attempt to eliminate racial segregation in housing in the United States. See Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051, 1051-53 (1988).

50. Equal Opportunities in Employment Act, 1988, S.H. 38.

51. The original version of the Act, from 1988, prohibited employment discrimination on the basis of gender, parenting, and marital status. See Equality of Opportunities in Labour Law, 1988, 42 L.S.I. 31.

52. Evelyn Gordon, *ACRI: Crackdown Has Begun Against Illegal Residents in the Territories*, JERUSALEM POST, June 28, 1995, at 12.

53. *Id.*

ers (in order to protect women), it would have been difficult to point to a public reason to explain why similar protection should not be afforded to Arabs as well. And, indeed, the integrity of the law (i.e., the requirement to act similarly in similar cases) led the Knesset to amend this law in 1995 to provide protection for the Arab minority as well.⁵⁴ A failure to do so could only have been based on bias and prejudice against Arabs.

Studies in social cognition may provide a psychological explanation for such behavior. One study showed that when a white bystander was the only witness to an accident, she helped black victims and white victims to the same extent. However, when a white bystander was not the only witness to an accident, she was less inclined to help the black victims (thirty-eight percent) than the white victims (seventy-five percent). The explanation is that when white people (even those holding unequivocal liberal beliefs) can rationalize their behavior on the basis of legitimate reasons (e.g., a belief that someone else would help the black victim) they do so. But, when legitimate reasons are not available, when there were no other witnesses, they have no alternative other than to help the black victim. Failing to act in such a circumstance could easily be interpreted, by oneself or others, as racial bias.⁵⁵

These same principles have had a similar effect on the way the Supreme Court in Israel has extended legal protection to the Arab minority in its decisions.⁵⁶ One example relates to the development of the legal doctrine that requires appropriate representation of women and Arabs. In *Women's Network*,⁵⁷ the Supreme Court ruled that, in light of the large number of laws requiring appropriate representation for women in the public sector, there is in fact a general duty to provide for such representation for women. Thus, the existence of this duty

54. *Id.*

55. Samuel L. Gaertner & John F. Dovidio, *The Subtlety of White Racism, Arousal, and Helping Behaviors*, 35 J. PERSONALITY & SOC. PSYCHOL. 691 (1977).

56. Cf. Ilan Saban, *Hashpa-at Beyt Ha-Mishpat Ha-Elyon Al Ma-amad Ha-Aravim B'Yisra-el* [*The Impact of the Supreme Court on the Status of Arabs in Israel*], 3 MISHPAT VE-MIMSHAL [LAW & GOV'T IN ISR.] 541, 551-52 (1996) (arguing that the increase in the general protection of civil and political rights has had a positive effect on the rights of the Arab minority in Israel).

57. *Women's Network*, 52(3) P.D. 630.

does not depend on the exact wording of the statutes.⁵⁸ Soon after this decision, the Supreme Court had to consider a similar case, this time dealing with appropriate representation of Arabs. In *ACRI*, the Court ruled that there is a similar requirement for appropriate representation of Arabs on the Board of Directors of the Israeli Lands Administration (though no specific statutory duty existed in that case).⁵⁹ In fact, maintaining the integrity of the law required the Court to provide similar protection to women and Arabs in similar situations.

The incremental process of applying anti-discrimination norms in the private sector was not only manifested by the expansion of this norm from one basis of discrimination (gender) to another (nationality), but also from one sphere of life (employment) to another (public accommodation). The issue of when to regulate raises a delicate question regarding the appropriate balance between equality rights and liberty.⁶⁰ It is illegitimate to impose a duty under the law requiring a person to invite an Arab to her home, even when that person is motivated by prejudicial attitudes against Arabs. It is, however, legitimate to obligate an employer not to discriminate against Arabs in the hiring process when the employer is motivated by that very same prejudice. The reason for the difference is two-fold. The harm caused by employment discrimination is greater than the harm caused by discrimination within the home. This is true due to the substantial economic loss that exists alongside the harm to a person's dignity. Second, the legal intervention in the context of employment is usually an infringement on economic liberties, while the same intervention within the home might constitute a substantial violation of the right to privacy (the latter is considered to be more im-

58. *Id.*

59. H.C. 6924/98, Ha-Aguda L'Z'khuyot Ha-Ezrakh B'Yisra-el v. Memshélet Yisra-el [Ass'n for Civil Rights in Isr. v. Isr.], 55(5) P.D. 15, 41. It should be noted, however, that the Court was reluctant to further expand its ruling to require proportional representation that fits the demographic proportions of Arabs in specific regions in Israel. See H.C. 9472/00, Ha-Va-ad Ha-Artzi L'Roshéy Ha-Reshuyot Ha-Aravíyot B'Yisra-el v. Sar Ha-Pnim [Nat'l Comm. of Arab Localities in Isr. v. Minister of Interior] (unpublished) (on file with author).

60. I developed such ideas in Moshe Cohen-Eliya, *Ha-Kheyruť V'Ha-Shivyon B'Re-i Ha-Khok L'Isur Haflaya B'Mutzarim U-V'Sheirutim* [*Liberty and Equality in the Mirror of the Anti-Discrimination Law in Public Accommodation*], 3 ALEI MISHPAT [LAW & GOV'T IN ISR.] 15 (2003).

portant). The integrity of the law requires the expansion of the anti-discrimination norm to similar cases, i.e., other contexts in which the rationale of the employment scenario can be applied. Public accommodations present a similar case because (1) in addition to the harm to a person's dignity, there is also a substantial harm in the denial of access to products, services, and public places, and (2) intervention in this context usually restricts economic liberties, not one's strong convictions.

In sum, the incremental process of applying the anti-discrimination norm in the private sector has served to overcome some of the disadvantages suffered by Arabs in the political process. In the first stage, it led to legitimizing the intervention in the private sphere for the purpose of protecting equality. In the second stage, it forced the legal institutions—on the basis of the principles of the integrity of the law and public reasonableness—to extend the anti-discrimination norm beyond gender to nationality and beyond the context of employment to the context of public accommodations.

III. WRONGFUL DISCRIMINATION

Article 3 of the Act prohibits discrimination in public accommodation that is based on nationality.⁶¹ When does discrimination in this context take place? What constitutes a wrongful act of discrimination? There are four types of motives that, if acted upon in the context of public accommodations, might produce outcomes that could be classified as wrongful discrimination: (1) biases and prejudice; (2) sincere racist belief; (3) catering to prejudicial preferences of customers; (4) group affiliation as a proxy for risks.⁶² I will now analyze these motives within the normative framework of the Act.

61. ASS'N FOR CIVIL RIGHTS IN ISR., A STATUS REPORT: EQUALITY FOR ARAB CITIZENS IN ISRAEL, at <http://www.acri.org.il/english/acri/engine/story.asp?id=100> (last visited Nov. 18, 2004) (noting that the "repeated instances of discrimination [against Arabs in Israel] cover all aspects of life").

62. I draw here from Larry Alexander's typological analysis of discriminatory preferences in *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149 (1992). For a moral analysis of biased preferences, see Alan Wertheimer, *Jobs, Qualifications, and Preferences*, 94 ETHICS 99 (1983).

A. *Subtle Prejudice: Biases and Aversions*

The first type of motive exists when the proprietor of a public accommodation acts out of a feeling of aversion to and discomfort with any contact with Arabs. An example for such a motive is a proprietor's feeling a sense of discomfort (a feeling he or she finds hard to explain) from allowing Arabs to enter swimming pools⁶³ or from associating with Arabs in a country club.⁶⁴ Behaviors grounded in biases of this sort are degrading and humiliating to Arabs, because they convey the message that Arabs in Israel are second-class citizens.⁶⁵

This type of bias against Arabs is prevalent in Israeli society. A recent study measuring the level of prejudicial attitudes of this sort towards Arabs in Israel revealed that Arabs in Israel suffer from greater resentment than Ethiopian Jews or foreign workers.⁶⁶ The level of resentment toward Arabs was especially intense in the context of personal relations (e.g., romantic relations), while it was somewhat lower with regards to providing Arabs with equal rights (e.g., social rights).⁶⁷ It should

63. See, e.g., ASS'N FOR CIVIL RIGHTS IN ISR., ANNUAL REPORT 1996-1997, at 12 (1997) (denying Arab children the access to a swimming pool).

64. Cf. C.C. (Natanya) 2090/99, Abu-Ma'amer v. Merkaz Nofesh U-Sport Kefar Bilu [Country Club Kfar Bilu] (unpublished) (on file with author).

65. Such a message directly violates the anti-discrimination principle. Cf. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5-10 (1976) (discussing the anti-discrimination principle, which "disfavors race-dependent decisions and conduct—at least when they selectively disadvantage the members of a minority group, and is based in part on principle that discrimination stigmatizes its victims"). The consequences of such a message are well elaborated in Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

66. Ami Pedahzure & Yael Yishai, *Hatred by Hated People: Xenophobia in Israel*, 22 STUD. IN CONFLICT & TERRORISM 101, 110-11 tbl. 2 (1999). In this study, resentment was measured on the basis of the answers to the following questions, among others:

- (1) Are you willing to invite (an Arab, an Ethiopian, a foreign worker) to a social event at your home?
- (2) Are you willing to accept (an Arab, an Ethiopian, a foreign worker) as your boss?
- (3) Would you approve a member of your family becoming romantically involved with (an Arab, an Ethiopian, a foreign worker)?
- (4) Would you agree to live in the same building as (an Arab, an Ethiopian, a foreign worker)?
- (5a) Are you willing to equalize the social rights of Arabs . . . to those of Jews?

Id. at 107.

67. *Id.* at 109 tbl. 1.

be noted, however, that these negative attitudes are context-dependent and are influenced by major events, such as terrorist attacks.⁶⁸

Prejudicial attitudes appear today in a more subtle, implicit form than in the past.⁶⁹ In many cases, people may not even be aware of the existence of such attitudes. Studies in cognitive psychology demonstrate this point.⁷⁰ In these studies, when asked for a quick response, subjects—even those with consciously unequivocally liberal-egalitarian views—expressed prejudices and stereotypical assumptions. In contrast, when these same subjects were given a reasonable amount of time to respond, their reactions did not reflect such stereotyping or prejudices. These findings are commonly explained by the fact that when an immediate response is required, people with egalitarian beliefs do not have sufficient time to neutralize the influence of their early exposure to stereotypical norms.⁷¹ People may even *act* upon biases of this sort without paying much attention to them, sometimes without even being

68. See Daniel Bar-Tal & Daniela Labin, *The Effect of a Major Event on Stereotyping: Terrorist Attacks in Israel and Israeli Adolescents' Perceptions of Palestinians, Jordanians, and Arabs*, 31 EUR. J. SOC. PSYCHOL. 265, 267 (2001).

69. Most contemporary cases of discrimination are the result of subtle prejudice. For the distinction between subtle and blatant prejudice, as well as an elaboration on the operation of subtle prejudice in modern society, see T.F. Pettigrew & R.W. Meertens, *Subtle and Blatant Prejudice in Western Europe*, 25 EUR. J. SOC. PSYCHOL. 57, 58-59 (1995); Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 357, 359-60 (Daniel T. Gilbert et al. eds., 1998); John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 3, 25 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998).

70. See, e.g., Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142, 1142 (1996) (noting that numerous studies have demonstrated “how stereotypes may influence responses without perceivers’ awareness of that influence”); Mahzarin R. Banaji & Curtis D. Hardin, *Automatic Stereotyping*, PSYCHOL. SCI., May 1996, at 136 (“Several recent experiments have demonstrated that stereotyping can occur implicitly, without subjects’ conscious awareness of the source or use of stereotypic information in judgment.”); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website*, 6 GROUP DYNAMICS 101 (2002) (discussing a study that demonstrates the operation of unconscious and implicit prejudicial attitudes with respect to race, age, and gender).

71. Cf. Daniel Bar-Tal, *Development of Social Categories and Stereotypes in Early Childhood: The Case of “The Arab” Concept Formation, Stereotypes and Atti-*

aware of them.⁷² For example, a bouncer in the entrance to a disco-club, who has to decide very quickly who will be allowed to enter the club and who will not, may be influenced unconsciously by biases he has against Arabs. He may therefore discriminate against Arabs because of such biases.

The Act prohibits behavior in public accommodations that is grounded in motives of this sort.⁷³ It is directly aimed at banning discrimination based on such biases and prejudice.⁷⁴ History shows that minority groups, and Arabs among them, have been systematically exposed to such prejudice and biases. The legal intervention with regard to behaviors grounded in such motives does not constitute a serious restriction on the autonomy of private parties. This is true because in most cases those who possess these biases do not possess strong racist convictions. For example, it is reasonable to assume that the proprietors of the water park in Kibbutz Kalia do not really believe that Arabs should be classified as second-class citizens. Once confronted with the motives for their behavior, they may modify it. In *Na'amne*, the court ruled that the proprietors of the water park did not comply with the duty to negotiate in good faith, not because they were biased, but because they did not

tudes by Jewish Children in Israel, 20 INT. J. INTERCULTURAL REL. 341 (1996) (studying the origins of Arab stereotypes for Israeli children).

72. One study showed, for example, that after subjects were exposed to a few words that are usually associated with "elderly" stereotypes (including "grey," "wrinkle," "wise," and "Florida"), they actually walked much slower than subjects who were not exposed to similar words. John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 236-37 (1996).

73. Anti-Discrimination Act in Products, Services, and Access to Places of Entertainment and Public Places, 2000, S.H. 57.

74. See *Hatza-at Khok Isur Haflaya B'Mutzarim, B'Sherutim U-Viknisa Limkomot Bidur U-Limkomot Tziburiyim* [Draft Bill of the Anti-Discrimination Act in Products, Services and Public Places], 1999, H.H 2830, available at <http://www.knesset.gov.il/laws/heb/FileD.asp?Type=2&SubNum=2&LawNum=2871> (explanatory introduction); Law Proposal to Ban Discrimination in Products, Services and Public Places, Law Proposals 2830, Nov. 23, 1999; see also TESTIMONY OF DEPUTY ATTORNEY GENERAL, JOSHUA SCHOFFMAN, KNESSET CONSTITUTIONAL COMMITTEE PROTOCOLS No. 188, (Oct. 30, 2000), available at <http://www.knesset.gov.il/protocols/data/html/huka/2000-10-30-01.html> ("[T]he purpose of this law was to ban classic discrimination, denial of entrance because of hostility and prejudicial attitudes.").

reveal their intentions to the plaintiff in advance.⁷⁵ We could hardly expect, however, the defendants to have published an advertisement stating that they would not allow entrance to Arabs in order to avoid legal responsibility in the future. They would not do so, either because they would not want to be portrayed publicly as racists or because they do not consider themselves to be racists.

B. *Blatant Prejudice: Sincere Racist Belief*

The second type of motive lies in a sincere racist belief. While motives of the first type usually manifest people's feelings, this second type relates to people's belief systems. An example of such a motive is a person denying Arabs entrance to a recreation area because he or she sincerely believes Arabs are inferior.

Discrimination against Arabs in public accommodations grounded in such motives are relatively rare in Israel. It is more likely to find discrimination that is grounded in one's beliefs system when women and homosexuals are concerned. For example, a religious proprietor of a private transportation company operating in ultra-religious neighborhoods may require women to sit in the back of buses. He will perceive such a practice as the implementation of his religious convictions.⁷⁶ Similarly, a person may not be inclined to rent an office to an

75. C.C. (Jm.) 11258/93, Na'amne v. Kibbutz Kalia (unpublished) (on file with author); accord C.C. (Jm.) 007832/97, *El-Razek* ¶ 12 (unpublished). In the latter case, El-Al Airlines delayed an Arab (a permanent resident of the State of Israel) from boarding a departing flight from Nice, France, to Israel. The reason for the delay was that in Nice's airport there were no arrangements that would make it possible for El-Al to conduct "special security checks." The Court ruled that the El-Al violated a duty under contract law (the duty to negotiate in good faith) to inform its Arab passengers of such possible problems in advance. *Id.*

76. Article 3(d)(3) of the Act exempts (under certain conditions) practices of separation between men and women that are often grounded in religious convictions. For a multiculturalist defense of this exemption, see Alon Harel & Aharon Schnerch, *Ha-Hafrada Beyn Ha-Minim Ba'Takhbura Ha-Tziburit* [*Sex Separation in Public Transportation*], 3 ALEY MISHPAT [LEAVES OF JUSTICE] 71 (2003); for a feminist critique thereof, see Noya Rimalt, *Hafradah Beyn Guarim Le-Nashim K'Haflayah Beyn Ha-Minim* [*Sexual Segregation as Sex Based Discrimination*], 3 ALEY MISHPAT [LEAVES OF JUSTICE] 99 (2003). It is not uncommon to come across arguments justifying discrimination against women in the name of religious convictions. See, e.g., L.A. 3-129 Plotkin v. Akhim Aizenberg [Eisenberg Bros. Inc.], 33 P.D.L. 481.

association whose primary goal is to protect the rights of homosexuals. The property owner might claim that her inclination not to do so is rooted in her sincere beliefs that homosexuals engage in immoral sexual activities.⁷⁷

Though acting upon such motives may be more degrading than acting upon the former type of motive, regulating discriminatory behavior stemming from a belief system may nonetheless be illegitimate. Such regulation would constitute a severe violation of the discriminators' autonomy because an essential element of a moral conviction would be infringed. The Knesset was sensitive to this problem. It refrained from applying the anti-discrimination norm, when the discriminatory behavior "was performed by a non-profit association or a club, and when it was performed to advance the particular needs of the group to which the members of the club or the association belong, as long as such needs do not contradict the purpose of the law."⁷⁸ Although it seems that this provision was designed to allow minority groups to empower themselves within an association that is open only to those belonging to this group, this provision also may be interpreted to allow members belonging to majority groups to enjoy their right to an expressive association as long as the association is a non-profit organization.⁷⁹ It thus seems that the Act focuses more on discriminatory behaviors of private entities acting to reap a *profit*.⁸⁰ This focus is based on the assumption that a behavior within a non-profit association usually reflects the genuine beliefs of its members. On the other hand, it is reasonable to assume that, when people are acting for profit, they may not

77. (Hi.) C.C. 5233/96, *Matzkin* (unpublished).

78. Anti-Discrimination Act in Products, Services, and Access to Places of Entertainment and Public Places, art. 3(d)(2), 2000, S.H. 57.

79. This may be a controversial interpretation of the Act. This is because the exemption would not apply when the association acts contrary to the purpose of the Act: "to enhance equality and to deny discrimination in the entrance to public places and in the providing of products and services." *Id.* art. 1. However, the reference to article 1 is somewhat circular because, in order to determine whether the purpose of the Act has been contravened, one has to figure out whether an act of discrimination had taken place. This brings us back to article 3, its exemption, and so on. Thus, it seems that the legislature sought to allow the courts to exercise some discretion in extreme cases of discrimination that are not undertaken for the sake of profit.

80. This is despite the fact that the Act explicitly applies to cases in which the activity is not undertaken for profit. *Id.* art. 3(b).

be exercising their sincere beliefs. In addition, activities within the economic sphere might cause more harm to the economic and social rights of minority groups than activities in the intimate sphere, and therefore it is more legitimate to regulate such conduct.

C. *Catering to Prejudicial Preferences of Customers*

The third type of motive, which is based on the first two types of motives, is the potential effect on profit that certain policies might have due to biases of potential customers. Since the proprietor is interested in an optimal profit, she would generally act rationally and refrain from allowing her own prejudices and biases to influence her economic decisions.⁸¹ But because the profit of a business is dependent on the willingness of the potential customers to frequent the public accommodation, she would have to take into account the preferences of these customers, including those that may be biased and prejudicial.⁸² In fact, this is the most common motive leading to discrimination in public accommodations. It is quite common for a proprietor of a place of entertainment to deny entrance to Arabs, simply because he is afraid that other customers would not otherwise patronize his establishment. As so blatantly stated by the proprietor of a club in Jaffa who denied entry to a woman with a disability: "Allowing disabled people to frequent the club will give people a bad impression. If they bring disabled people here, that means that this place is no longer 'in.'"⁸³

81. See GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 19 (1971) (explaining that an action based on bias or prejudice is economically inefficient).

82. In discussions before the Knesset's Constitutional Committee regarding the Act, the chairperson of the Merchants Association in Israel, emphasized the fact that merchants are against racial or sex-discrimination. He mentioned, however, that "the reason for discrimination is not the businessperson. Businesspersons only want maximum turnover, they want as many customers as possible. If they hadn't thought that their younger customers, because of the education they received, . . . would not attend these places because of race, skin color, and so forth, [the businesspersons] would surely not have discriminated." COMMITTEE PROTOCOL 172, *supra* note 49.

83. C.C. (T.A.) 15/97, *Rosemary Garden Rest.* (unpublished).

Business actions based on such motives constitute wrongful discrimination under the Act.⁸⁴ When a proprietor caters to the discriminatory preferences of his customers, he maintains and even increases the widespread prejudicial and hostile attitudes towards Arabs and other minority groups.⁸⁵ Had the Knesset refrained from banning these practices, the very purpose of the Act (namely, ensuring equal access to public accommodation to all, including Arabs) would have been seriously undermined. It may be that such legislative intervention will indeed result in economic loss to businesses.⁸⁶ However, this usually does not amount to a severe restriction of the proprietor's exercise of autonomy because there is no substantial limitation placed on her deep and sincere beliefs. To the contrary, it is more reasonable to assume that she does not personally hold such beliefs.⁸⁷ Thus, legislative intervention in such a case is indeed legitimate.

D. *Group Affiliation as a Proxy for Risks*

The fourth type of motive includes those cases in which a proprietor of a public accommodation assumes that a person will behave in a certain way by virtue of his or her belonging to a certain group. In the context of the relationships between

84. Cf. *Rekanat*, 44(5) P.D. 330 (Barak, C.J.) (prejudicial preferences of customers are the result of past discrimination and these preferences cannot justify disparate treatment on the basis of age). For criticism, see Patricia A. Casey, *Does Refusing to Hire Men as Food Servers Violate the Civil Rights Act? No: A Business Has a Right to Choose its Own Character, in Sex Discrimination*, 82 A.B.A.J. 40, 41 (1996) (defending the Hooters restaurant chain against accusations of sex discrimination in its hiring practices).

85. Cf. Cass A. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 761 (1991) (noting that third parties' attempts to promote discrimination reinforces the prejudices of others).

86. It is not certain that such a law would necessarily harm the profit of places of this sort. It may precisely be that a law that prohibits *all* owners of public accommodations to account for the discriminatory preferences of their customers would not allow these customers to exercise their biased preferences anywhere. Thus, an effective enforcement of the law would not harm the economic interests of the owners.

87. For views in support of the Act, see the position taken by the Chairman of the Merchants Association in Israel, COMMITTEE PROTOCOL 172, *supra* note 49, and the position taken by an owner of a place of entertainment, KNESSET CONSTITUTIONAL COMMITTEE PROTOCOLS NO. 174 (Aug. 30, 2000), available at <http://www.knesset.gov.il/protocols/data/html/huka/2000-08-30-01.html>.

Jews and Arabs in Israel, a proprietor may rely on the membership of a person in the Arab minority as a proxy for behavior that might harm the personal security of the other customers. For example, it is quite commonplace for Arabs to have to undergo stricter security checks in airports than Jews before boarding a plane.⁸⁸ Though it may be considered an act of discrimination in the providing of a service (air transportation), one might justify these stricter checks on the grounds that there is a statistical correlation between being an Arab and the extent of risk to the security of the passengers. There are other examples of behaviors that may stem from such a motive. When a proprietor of a recreation area denies access to Arabs, it may be because he thinks that there is a greater risk that Arab customers will harass other customers or engage in terrorist attacks.⁸⁹ Does the Act set an absolute ban on such motives? And if it does not, when are such motives justifiable and when are they not?

In order to answer these questions, we must first clarify the nature of this motive. An action that relies on having a particular nationality as a proxy for negative behaviors is an action that is based on stereotypes. In social cognition, stereotypes are defined as ascribing characteristics to social groups or segments of society.⁹⁰ These characteristics may include traits, physical attributes, societal roles, or even specific behaviors. Thus, a proxy of the sort described above is a version of a stereotype, because it ascribes a specific behavior (violence, terrorism) to a social group (Arabs). But classifying these motives as stereotypical does not necessarily lead to disqualifying them. A stereotypical way of thinking might be both efficient and economical, and it may be necessary to allow people to function in real life.⁹¹ In addition, the common assumption

88. See Jonathan Karp, *El Al's Airtight Security is Now in Demand*, WALL ST. J., Sept. 26, 2001, at A14 ("El Al's profiling might smack of discrimination in the U.S. Palestinians and other Arabs are almost always asked to step aside for more-thorough questioning and searches.").

89. See *supra* note 4.

90. See generally Yueh-Ting Lee & Victor Ottati, *Perceived Ingroup Homogeneity as a Function of Group Membership Salience and Stereotype Threat*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 610 (1995) (discussing cognitive and motivational models to social identity theory).

91. Wendy M. Rahn, *The Role of Partisan Stereotypes in Information Processing about Political Candidates*, 37 AM. J. POL. SCI. 472, 472-76 (1993).

that stereotypes are usually inaccurate and, thus, irrational is now heavily doubted by many social psychologists.⁹²

Despite the fact that such proxy uses may indeed be efficient, they cause some serious social harms. This is because they may portray members of the Arab minority in a very unfavorable way, labeling every member of the Arab minority as a terrorist. Indeed, from the perspective of those belonging to this group, it does not really matter whether the motive underlining this proxy is grounded in a bias or prejudice against them or not. The harm to their dignity is caused in any case.⁹³ Furthermore, the extensive use of proxies of the above-mentioned type could potentially reinforce prejudices and biases against Arabs and might increase the scope of discrimination against them.

Acting upon a motive of this sort constitutes disparate treatment of Arabs because their nationality is taken into account when a service is provided to the public. Thus, the only available way to justify such a policy would be to rely on the general defense set out in Article 3(d)(1) of the Act. This Article allows discrimination only “when it is required by the nature or the essence of the product, the service or the public place.”⁹⁴ Protecting the safety of the customers is of course an essential consideration in the managing of a public place. But is the reliance on such a proxy required to achieve this goal? The term “required” essentially stands for a requirement of proportionality—i.e., proportional relations between means and ends. Under Israeli constitutional law, this requirement is threefold: First, there should be rational connections between means and ends; second, the least drastic measure must be applied; and third, there should be a balance between the utility

92. See, e.g., Lee J. Jussim et. al., *Why Study Stereotype Accuracy and Inaccuracy?*, in *STEREOTYPE ACCURACY: TOWARD APPRECIATING GROUP DIFFERENCES* 3, 3 (Yueh-Ting Lee et al. eds., 1995).

93. For a good theoretical account of the harm to one’s dignity, see ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 7-19, 116 (1963). But see Daniel Statman, *Pgiya B’Regashot Datiyim [Offending Religious Feelings]*, in *RAV-TARBUTIYUT B-MEDINA DEMOKRATIT V’YEHUDIT [MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE]* 133, 149-157 (M. Mautner et al. eds., 1998) (arguing that a person whose feelings were offended can also reduce the offense, especially when the motive is a legitimate one and the offender did not intend to cause this incidental offense).

94. Anti-Discrimination Act in Products, Services, and Access to Places of Entertainment and Public Places, art. 3(d)(1), 2000, S.H. 57.

of the restriction and the harm to the protected right.⁹⁵ I will now analyze the legality of ethnic profiling in security checks in light of these principles.

1. *Rational Connections*

First, there must be a reliable statistical correlation between belonging to a certain social group and the risky behavior. Proxy uses are of an empirical nature. Therefore, in order to justify their use, one must show that they are reliable. Although there are greater chances that those involved in terrorism will be members of the Arab minority than of the Jewish majority, the number of Arabs involved in terrorism is relatively low.⁹⁶ In light of the importance of the anti-discrimination principle, it may be that the correlation between being an Arab and being a potential terrorist is not strong enough to justify such profiling.⁹⁷ (A different conclusion may be reached, however, with regard to Palestinians from the occu-

95. The principle of proportionality is one of the most important principles in Israeli constitutional law. It lies at the center of the limitation clauses in the Israeli Basic Laws. See, e.g., Khok Yesod: Kvod Ha-Adam V'Kheyruto [Basic Law: Human Dignity and Liberty], 1992, S.H. 150, art. 8 (amended 1994); Khok Yesod: Khofesh Ha-Isuk [Basic Law: Freedom of Occupation], 1994, S.H. 90, art. 4. The legal requirements of this principle were established in The legal requirements of this principle were established in H.C. 6821/93, Bank Ha-Mizrakhi v. Midgal, 49(4) P.D. 221. Many other constitutional courts employ this principle. See DAVID BEATTY, CONSTITUTIONAL LAW IN THEORY AND PRACTICE 106-06 (1995); DAVID M. BEATTY, HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 19 (1994).

96. There has been an increase in the numbers of Arab Israeli citizens involved in terrorism since the second *Intifadah* of the Palestinians in the occupied territories. However, those involved in terrorism (around two-hundred Arabs that are Israeli citizens) constitute less than 0.02% of the Arab minority in Israel. See Ori Nir, *Arab Israeli Involvement in Terrorism has Tripled*, Says PMO, HA'ARETZ, Oct. 29, 2004, available at <http://www.haaretzdaily.com/hasen/pages/ShArt.jhtml?itemNo=172526>.

97. In several cases, the Israeli Supreme Court has indicated that the satisfaction of proportionality requirements is dependent on the importance of the infringed right. See, e.g., H.C. 450/97, Tnufa v. Sar Ha-Avoda V'Ha-R'vakha [Minister of Labor and Social Affairs], 52(2) P.D. 433, 452 (1998); H.C. 1715/97, Lishkat Menahaley Ha-Hashka-ot B'Yisra-el v. Sar Ha-Otzar [The Chamber of Investment Managers in Israel v. Minister of Finance], 41(4) P.D. 367, 422-423; H.C. 1514/01, Gur Arye v. Ha-Reshut Ha-Shniya L'Televizya U-L'Radio [Second Broad. Auth.], 55(4) P.D. 267, 285 (2001) (Dorner, J., writing separately). Thus, a more important infringed right requires a stricter standard of proportionality.

pied territories). Second, any profiling system will always lag one step behind terrorists, because a terrorist who fits the profile can easily plant a bomb on someone who does not fit the profile. In this sense, profiles are under-inclusive from a security perspective.⁹⁸ In the past, potential suicide bombers in Israel were profiled as single young Palestinian males. However, in order to circumvent this profile, Palestinian terrorists began using women as suicide bombers,⁹⁹ and they began dressing in army uniform and ultra-orthodox outfits. This experience raises some serious doubts regarding the efficiency of ethnic profiling in security checks in airports.

2. *Least Drastic Means*

Although security checks based on ethnic profiling in airports usually do not deny Arabs access to air transportation, they do inflict serious emotional distress and shame upon Arabs. This is because Arabs are singled out on the basis of characteristics that they cannot change. Therefore, one must look into alternative ways to reduce the harm to Arabs without imposing a real threat to the security of passengers. It should be noted that the requirement of the least drastic measures does not mean that the alternative means must be as efficient as ethnic profiling may be. The least drastic measure should achieve the same result or *almost* the same result as the scrutinized mean (in this case, ethnic profiling).¹⁰⁰ There may be several less restrictive means in this regard. First, the installment of high-technology security equipment for luggage scan-

98. See STATEMENT OF KATIE CORRIGAN, LEGISLATIVE COUNSEL, AM. CIVIL LIBERTIES UNION, WASH. NAT'L OFFICE, ON AIR PASSENGER PROFILING BEFORE THE AVIATION SUBCOMM. OF THE H.R. COMM. ON TRANSPORTATION AND INFRASTRUCTURE (Feb. 27, 2002), available at <http://www.house.gov/transportation/aviation/02-27-02/corrigan.html>.

99. See the position of the Arab-American Anti-Discrimination Committee (ADC) before the Harvard Model Congress Senate Judiciary Committee in Rahul Rohatgi, Airport Profiling, Senate Comm. on the Judiciary: Senate Briefing Issues, Harvard Model Congress 6 (2003), available at http://216.239.41.104/search?q=cache:Gk3Nk8hSuulJ:hcs.harvard.edu/~hpep/boston/briefings/s_judb.pdf+the+issue+briefings++judiciary++airport+profiling+same+sex+marriage+&hl=en [hereinafter Harvard Model Congress].

100. Cf. Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 471-72 (1969) (discussing the concept of "less drastic means" as employed in U.S. first amendment jurisprudence); see Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 38 (1980).

ners would reduce the need to rely on ethnic profiling.¹⁰¹ Second, instead of ethnic profiling, it may be possible to apply profiling that is based on data on passengers' travel habits and histories.¹⁰² Third, the harm to the dignity of members of the Arab minority could be reduced if they were not the only ones singled out for strict security checks. This could be achieved if (1) other passengers would be randomly subject to stricter security checks, or (2) all passengers would have to undergo these checks. It is clear, however, that these alternative means are not without costs.

3. *Utility v. Harm*

What arises from the above is that it may be more appropriate to characterize the conflicting interests in this case not as equality and security, but as equality and economic interests. The basic question is how much society is willing to pay (in financial terms or in terms of convenience) in order to avoid the stigma and the humiliation associated with singling out individuals on the basis of characteristics they cannot change. A recent survey of Harvard Law School students, con-

101. See STATEMENT OF KATIE CORRIGAN, *supra* note 98.

102. Such a system was first implemented in the United States pursuant to the recommendations of the Gore Commission in 1997. WHITE HOUSE COMM'N ON AVIATION SAFETY & SEC., FINAL REPORT TO PRESIDENT CLINTON, available at <http://www.fas.org/irp/threat/212fin~1.html> (last visited Nov. 19, 2004). Following the September 11 terrorist attacks in the United States, the national database—the Computer Assisted Passenger Prescreening System (CAPPS)—has been under improvement (CAPPS II), although implementation has been delayed because of civil liberties concerns. U.S. GEN. ACCOUNTING OFFICE, AVIATION SEC.: COMPUTER-ASSISTED PASSENGER PRESCREENING SYS. FACES SIGNIFICANT IMPLEMENTATION CHALLENGES, available at <http://www.gao.gov/new.items/d04385.pdf> (last visited Nov. 19, 2004). A different type of screening and profiling system is the trusted travelers system, according to which passengers who voluntarily submit to a rigorous background check could be classified as “trusted travelers” and thereby deemed low-risk. See Jon E. Dougherty, *TSA's “Trusted Traveler Program” Herald's Big Brother*, NewsMax.com, Mar. 22, 2004, at <http://www.newsmax.com/archives/articles/2004/3/21/111950.shtml>. Passengers voluntarily participating in this program would be issued cards that would include biometric data, such as an iris scan or fingerprints, so they could bypass high-level security checkpoints. *Id.* This would eliminate wasting time on low-risk passengers and, thus, leave available more resources for focusing on potential terrorists. However, this program could be criticized on the grounds that it is both ineffective and over-reaching. See *id.*; Harvard Model Congress, *supra* note 99, at 7.

ducted after the events of September 11, examined the trade-off between civil liberties and terrorism risks. In this survey, the respondents were asked how much they were willing to pay (in terms of time-delay ranging from ten to sixty minutes) in order to avoid ethnic profiling in security checks. The results indicated that around half of the participants were willing to be delayed up to thirty minutes in order to avoid ethnic profiling.¹⁰³ Other, less drastic, measures (such as installment of high technology screening machines) would also incur greater financial costs. The requirement that society should pay in order to ensure equal respect for all its citizens is consistent with the general legal stance taken by the Israeli Supreme Court. The Court has already ruled that El-Al Airlines should bear some costs in order to ensure the right to equality. In the words of Chief Justice Barak:

I am willing to assume—however dubious this assumption may be—that in the short run [the anti-discrimination norm] may have a [negative] effect on the margins of the occupation. This is a “price” that El-Al—as well as other employers in Israel—should pay. Human rights cost money. The guarantee of equality costs money. Usually, the requirement to pay the “price” is directed at the government. But when human rights, and equality among them, apply in the relationship between individuals, these individuals should pay this price. This is a price that is worth paying in order to guarantee a society that protects human rights and respects equality.¹⁰⁴

Thus, as long as the alternative measures result in the government or the airlines incurring reasonable financial costs, such costs will be considered a reasonable price to pay in order to reduce the serious harms to the dignity of the members of the Arab minority that result from such checks.¹⁰⁵

103. W. KIP VISCUSI & RICHARD J. ZECKHAUSER, SACRIFICING CIVIL LIBERTIES TO REDUCE TERRORISM RISKS (Harvard Law & Econ. Discussion Paper No. 401, 2003), available at <http://ssrn.com/abstract=380620>.

104. *Rekanat*, 44(5) P.D. ¶ 25; see also *Miller*, 49(4) P.D. at 142; *Botzer*, 50(1) P.D. at 27.

105. This can also be viewed as an accommodation designed to protect the interests of a discrete and insular minority. The anti-discrimination norm in employment in the United States has also evolved to require employers to bear some costs in order to ensure equal opportunities. See Chris-

How do courts in Israel treat the issue of security checks in airports? Despite the fact that airline companies deny their reliance on the plaintiffs' nationality as a proxy for security risks, courts tend to assume that such practices *do* exist. In the *El Razeq* case the Court stated as follows:

El-Al constantly refrains from mentioning the reason why the plaintiff had to undergo a special security check, and it does not confirm that the reason was his Arab nationality. But the Court is not detached from reality, and when the defendant did not give any other reason, and since there is no evidence that can rebut the written testimony of the plaintiff that he was explicitly told that the reason for the unusual requirement was his Arab origin, I have no reason to doubt that this was in fact the reason, and none other.¹⁰⁶

But, despite the fact that the Court assumed that security checks do take the passengers' nationality into account, so far it has not scrutinized this policy. In the few cases brought before the courts, plaintiffs have been compensated for unjustified and unusual harm, such as when plaintiffs missed their flight because of excessive checks,¹⁰⁷ when a plaintiff was taken out of the plane for an additional check and as a result missed his flight,¹⁰⁸ and when plaintiffs were substantially delayed in the airport and were forced to fly without their luggage.¹⁰⁹ In these cases, there was no need to deal with the question of whether the mere taking into account of the plaintiffs' nationality was *in itself* illegal. Instead, the courts focused more on

tine Jolls, *Anti-discrimination and Accommodation*, 115 HARV. L. REV. 642 (2001).

106. C.C. (Jm.) 007832/97, *El-Razeq* ¶ 5 (unpublished); see also Harvard Model Congress, *supra* note 99, at 6 (describing the Israeli/European screening as including such factors as race and ethnicity but barring airlines from using those factors exclusively to flag passengers for intensive security).

107. C.C. (Jm.) 007832/97, *El-Razeq* ¶ 5 (unpublished).

108. C.C. (Jm.) 5203/97, *Mirwan v. Arkia Kavey Te-ufa Yisra-elim Ba-am [Arkia Israeli Airlines]* (unpublished) (on file with author).

109. C.C. (Hi.) 016232/98, *Ploni v. Arkia Kavey Te-ufa Yisra-elim Ba-am [Arkia Israeli Airlines]* (unpublished) (on file with author).

the excessiveness, the humiliation, and the economic loss that were caused in these exceptional cases.¹¹⁰

Talawi constituted the first attempt to directly attack the criteria of the security checks themselves.¹¹¹ The plaintiff in this case was an intern in an Israeli law firm, who claimed to have been required by the employees of Arkia Airlines to undergo special security checks in the local airports of Herzelia and Kiryat Shmona on the sole ground that he was an Arab. Contrary to other cases mentioned-above, that involved extremely excessive security checks, the *Talawi* case represented the more typical case in which Arabs are singled out for special security checks. In this sense, this lawsuit constituted an attack on the criteria for special security checks that apparently take the nationality of the passengers into account.

In order to prove his claim that he was discriminated against, the plaintiff asked the court (as part of the discovery process) to compel the airline to reveal the criteria for security checks. The request was denied by the Court, on the ground that these criteria were irrelevant for the purpose of proving the cause of action. The Court concluded that “in light of the facts described in the lawsuit claiming that the defendant’s employees acted in a certain way, these criteria were not relevant. This is because their behavior and its legality will be examined independently with no regard to these criteria.”¹¹² After denying this request, the Court proceeded to dismiss the lawsuit on the grounds that the plaintiff did not prove his claim that the security checks were excessive and humiliating.

As far as the interim decision is concerned, it seems to me that the Court erred in its refusal to order Arkia to reveal the criteria for special security checks for two reasons. First, the main cause of action in this case is discrimination on the basis of nationality. Thus, discovering whether the defendant took the plaintiff’s nationality into account is certainly a relevant

110. C.C. (Jm.) 5203/97, *Mirwan* (unpublished) (on file with author); C.C. (Hi.) 016232/98, *Ploni* (unpublished) (on file with author).

111. C.C. (Hi.) 18147/98, *Talawi v. Arkia* (unpublished) (on file with author).

112. C.C. (Hi.) 18147/98, *Talawi v. Arkia* (unpublished) (interim discovery decision, Feb. 5, 2002). There was a request for an appeal on an interim decision of the Magistrate’s Court not to order the airline to reveal the criteria for security checks. See C.A. (Hi.) 1186/02, *Talawi v. Arkia* (unpublished) (decision of Apr. 7, 2002).

fact for this lawsuit. Second, the taking into account of the plaintiff's nationality has an impact on the shifting of the burden of persuasion to the defendant. Because there are serious reasons to suspect that racial, ethnic, or religious classifications may be grounded in prejudice,¹¹³ the burden of persuasion shifts to the defendant to prove that his motives were legitimate and that such a classification was proportional.¹¹⁴ Since the shifting of the burden of persuasion to the defendant would have increased the chances of the plaintiff's winning the lawsuit, the discovery of these criteria are relevant to this lawsuit.

The discovery of the criteria for selecting who is subject to "special security checks" is important for two other reasons. First, judicial review may force defendants to seriously think of less drastic means of ensuring the safety of passengers. Second, judicial review of these criteria will serve the purpose of uncovering illicit motives. It would be possible to infer from the lack of proportionality of the security checks that these checks were in fact grounded in prejudice and bias and not in a real attempt to protect the personal security of customers.¹¹⁵ The less proportional the reliance on the proxy is, the more probable it is that such reliance was grounded in bias and prejudice. Thus, insisting on the proportionality of the stricter security checks of Arabs in airports would serve to reduce the suspicion that these checks are in fact grounded in prejudice and bias against Arabs in Israel.¹¹⁶

113. *Compare Ka'adan*, 54(1) P.D. at 276, with H.C. 104/87, *Nevo v. Beyt Ha-Din Ha-Artzi L'Avoda* [National Labor Court], 44(4) P.D. 749, ¶ 9 ("When the Court comes across a distinction between groups, it must thoroughly examine whether the distinction is grounded in an over-generalized stereotypical conception, whose origin is none other than prejudice.").

114. The general judicial approach is that once the plaintiff proves his nationality, there is a shift of burden to the defendant to justify his decision in terms of the defenses set out in article 3 of the Act. See, e.g., *Rekanat*, 44(5) P.D. 330 (in the context of employment discrimination).

115. John H. Ely, in *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 146 (1980), argues that the absence of rational connection between means and end serves as an indication of the existence of illicit motives.

116. It should be noted, however, that American courts have refrained from carefully scrutinizing the profiling in security checks, and they are less inclined to do so in the aftermath of the September 11 terrorist attacks. See Ellen Baker, *Flying While Arab: Racial Profiling and Air Travel Security*, 67 J. AIR L. & COM. 1375 (2002).

IV. CONCLUSION

This Article analyzed the phenomenon of discrimination against Arabs in Israel in public accommodations from legislative and interpretative perspectives.

First, I pointed to a possible legislative lobbying strategy that might help the Arab minority in Israel to overcome (in some respects) the prejudicial attitudes of some of the legislators toward this minority group. I illustrated how the antidiscrimination laws in Israel were extended to protect members of the Arab minority despite these prejudicial attitudes. This happened partly because the institutions that form and interpret norms are bound by principles of public reason and the integrity of the law. Thus, relying on these principles might serve the purpose of overcoming the discreteness and insularity of the Arab minority in Israel within the framework of the legislative process.

Second, I looked into four possible motives that might lead to decisions or behaviors that are harmful for Arabs in the sphere of public accommodations. I argued that judges should interpret the Antidiscrimination Act in Public Accommodations as strictly banning behaviors and decisions stemming from motives grounded in irrational biases against Arabs. As far as statistical discrimination is concerned, however, I argued that courts should generally strike down decisions based on the statistical correlation between national origin and a relevant characteristic (i.e., proxies). Reliance on such proxies, such as ethnic profiling in airports, can only be justified under a strict application of the proportionality requirements: In other words, when there is a convincing empirical and rational basis between the means (e.g., profiling) and the goal (e.g., security); when no less restrictive means are available; and when small-large trade offs (e.g., some administrative costs v. preventing stigma to vulnerable groups members) are not at issue.