

CROSS-DRESSERS WITH BENEFITS: FEMALE COMBAT SOLDIERS IN THE UNITED STATES AND ISRAEL

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The entry of women into positions of power in the military in general, and into combat units more specifically, is the ultimate manifestation of women's forging into the traditional male realm. The military warrior is perhaps the ultimate personification of the male gender role.¹ Accordingly, there is significant resistance to women in combat roles.²

While some of this resistance has to do with actual physical differences between the sexes,³ such physical differences can be overcome by some women.⁴ Physical differences—upper body strength, stamina, physical might—that may be necessary for combat are not relevant to those women who can meet minimum requirements for duty. To the extent women can overcome minimum physical thresholds set forth for combat roles, excuses for excluding women based on physical differences are stereotypical and should be

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1. See, e.g., Judith Gardam, *Gender and Non-Combatant Immunity*, 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 345, 366–67 (1993).
2. See generally Michelle Beneke & Kirsten Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 *HARV. WOMEN'S L.J.* 215, 216, 232 (1990) (discussing informal barriers facing women in combat roles in the context of "institutionalized sexual harassment of military women through 'lesbian baiting'"); Paul E. Roush, *The Exclusionists and Their Message*, 39 *NAVAL L. REV.* 163, 163 (1990) (discussing those who oppose women being assigned to combat units).
3. See CATHARINE A. MACKINNON, *SEX EQUALITY* 273 (2d ed. 2007) (discussing arguments in favor of exempting women from registering for the draft).
4. See Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 *UCLA L. REV.* 499, 532 n.132 (1991). It should be noted that no reasons are documented to underlie the combat exclusion in U.S. law. See MACKINNON, *supra* note 3, at 275.

rejected. The Department of Defense has therefore abandoned the argument that physical might is what requires female exclusion from combat.⁵ Some even argue that physical might is actually not what is needed for combat roles, and thus, that exclusion is completely based on sex discrimination.⁶ A greater challenge is determining whether combat roles should adapt to meet the average woman's physical capacities. However, with the evolution of modern combat, the blurring of front lines with support services,⁷ and a greater emphasis on enabling technologies rather than brute strength, the problem is essentially solving itself.⁸

Most of the resistance to women engaging in combat roles is not based on beliefs about physical differences. Rather, it is based on normative gender-role beliefs that women, by their nature, are inappropriate for combat and will inhibit the effectiveness of the "male warrior," or concerns about sexuality and sexual mores affecting "cohesion."⁹ These concerns are hard to quantify, are highly speculative, and have been largely discredited.¹⁰ Moreover, these concerns are based on others' negative reactions to women in the military, and thus, it seems unfair to punish qualified women who want to serve on that account.¹¹ Mainly, these concerns stem from ideas about women's frailty, their perceived need for protection, and a perception of women as sexual objects, as opposed to equal members of society; as such, they should be rejected.¹² While some

5. See Karst, *supra* note 4, at 532.

6. See Blythe Leszkay, *Feminism on the Front Lines*, 14 HASTINGS WOMEN'S L.J. 133, 158-63 (2003).

7. See, e.g., Diane H. Mazur, *Military Values in Law*, 14 DUKE J. GENDER L. & POL'Y 977, 988 (2007) ("The core definition of direct ground combat was itself in question because the battlefield had ceased to be linear. There was no longer a place that was predictably 'well forward on the battlefield,' a central component of the *Direct Ground Combat Definition and Assignment Rule*." (footnote omitted)).

8. See Michael J. Frevola, *Damn the Torpedoes, Full Speed Ahead: The Argument for Total Sex Integration in the Armed Forces*, 28 CONN. L. REV. 621, 637 (1996); Karst, *supra* note 4, at 532.

9. See Leszkay, *supra* note 6, at 160.

10. See Alison Harding, *Report: Women Should be Allowed to Serve in Combat*, CNN.COM (January 15, 2011, 6:38 PM), <http://www.cnn.com/2011/POLITICS/01/15/military.women/index.html?hpt=T2>; Leszkay, *supra* note 6, at 160.

11. See Leszkay, *supra* note 6, at 160.

12. See Mary Becker, *The Politics of Women's Wrongs and the Bill of Rights: A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 496 (1992); Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 189-90 (1982) (excluding women from the draft paints women as

cite concerns regarding the rape and torture of women, excluding women from combat arguably makes them more vulnerable than women who receive military training and experience the equal and empowered status combat training provides.¹³ Moreover, modern warfare has “blurred the existence of a ‘front and a rear’,” enabling the capture of women even when not in direct combat roles.¹⁴ Of course, men are also vulnerable to rape and torture. The male need to conform to a code of chivalry, protect women, and sustain their own egos has no place in the process of trying to recruit the best and brightest to defend a country.

However, the current reality is that many military positions, and combat roles in particular, remain bastions of women’s exclusion in a world in which excluding women from male institutions and traditional professions has fallen away to constitutional objections and broad societal changes.¹⁵ Women are increasingly involved in the military but are still subject to explicit exclusions. In the United States in particular, women are not required to register for selective service under the draft law¹⁶ and are prohibited from engaging in direct combat roles.¹⁷ Most countries worldwide have similar restrictions and regulations.¹⁸

From an international perspective, Israel presents an iconic view of women soldiers and the progressive inclusion of women in the

victims who need protection and undermines notions of shared responsibility in society).

13. See Leszkay, *supra* note 6, at 164–65.

14. *Id.* at 166.

15. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (declaring unconstitutional Virginia Military Institute’s provision of a single sex, all male educational environment); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (prohibiting peremptory challenges to jurors solely on the basis of gender); *Cohen v. Brown Univ.*, 101 F.3d 155, 184–85 (1st Cir. 1996) (“[Brown must implement a] full and effective accommodation of the athletics interests and abilities of its women students.”).

16. 50 U.S.C. app. § 453(a) (2006).

17. See DEP’T OF DEF., REPORT TO THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS 4, 6 (2009), available at http://www.defense.gov/pubs/pdfs/DoD_WHC_on_Women_and_Girls_Report_personal_info_redacted_C82A.pdf.

18. Fitriani & Ron Matthews, *Women at War: Possible Lessons for Small States—Analysis*, EURASIA REV. (Oct. 7, 2007), <http://www.eurasiareview.com/07102011-women-at-war-possible-lessons-for-small-states-analysis>. See generally *Rostker v. United States*, 453 U.S. 57, 78–79 (1981); Case C-186/01, *Dory v. Federal Republic of Germany*, [2003] E.C.R. I-2508 (decided Mar. 11, 2003); Beate Rudolf, *European Union: Compulsory Military Service*, 3 INT’L J. CONST. L. 673 (2003) (discussing a decision by the European Court of Human Rights refusing to interfere in the decisions of member states to exclude women from the military).

military.¹⁹ Images abound of the young female soldier dressed in her olive green uniform and wielding an Uzi that is half her size.²⁰ She is a soldier just like her male peers—she is strong and powerful. This image has developed for two main reasons. First, Israel, unlike its peers in terms of economic development and democratic governance, has a mandatory draft.²¹ Second, that draft pertains to all men and women who are not otherwise exempted because of religious study, religious practice, or a serious conscientious objection that impairs their ability to serve.²²

In a recent *New York Times* article, a woman from the U.S. military spoke wistfully of the equality and opportunity enjoyed by her peers in Israel, where women are permitted to take on all the military roles available to men.²³ She commented, “They make up a third of the [military], and are treated as equals with males.”²⁴ Apparently, however, her source for this information was a video created by CNN featuring footage of Israeli female soldiers.²⁵

Indeed, the image of Israel as being at the forefront of empowering women through military service, as personified in its female soldiers, is misleading.²⁶ Although legally permitted to engage in even direct combat roles, Israeli women very rarely engage in combat support roles, are completely absent as infantry, and have advanced insignificantly in military leadership.²⁷ Particularly in the

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19. Daphne Barak-Erez, *The Feminist Battle for Citizenship: Between Combat Duties and Conscientious Objection*, 13 CARDOZO J.L. & GENDER 531, 533 (2007).
 20. Inputting the search string “female uzi soldier” into Google’s image search engine on October 7, 2011 yielded over 40,000 results, many of the images portraying Israeli soldiers.
 21. See Amir Paz Fuchs & Michael Sfard, *The Fallacies of Objections to Selective Conscientious Objections*, 36 ISR. L. REV. 111, 114 n.7 (2004).
 22. See Defense Service Law, 5746–1986, 40 LSI 112, §§ 30, 36 (amended in 2000) (Isr.); see also *infra* notes 160–82 and accompanying text (explaining the extent of exemptions for conscientious objections for men and women).
 23. Catherine Ross, *Home Fires: Women’s Work*, N.Y. TIMES, (Feb. 15, 2010, 9:00 PM), <http://opinionator.blogs.nytimes.com/2010/02/15/womens-work>.
 24. *Id.*
 25. *Id.*
 26. See Noya Rimalt, *Women in the Sphere of Masculinity: The Double-Edged Sword of Women’s Integration in the Military*, 4 DUKE J. GENDER L. & POL’Y 1097, 1113–15 (2007) (describing the cultural restraints that maintain segregation in the army despite women’s freedom to engage in all combat roles); Nitza Berkowitz, ‘Women of Valor’: *Women and Citizenship in Israel* [Hebrew] 2 ISRAELI SOC. 277, 309 (1999).
 27. See, e.g., Barak-Erez, *supra* note 19, at 531–33, 536–40; Dafna Izraeli, *Gendering Military Service in the Israel Defense Forces*, 12 ISR. SOC. SCI. RES. 129, 131 (1997) (“[T]he gender regime of the Israeli army, which is based on a gendered division of

military context, Israel's dedication to formal equality and its occasional indication of its commitment to substantive equality and affirmative action for women²⁸ is peppered with loopholes.²⁹ In fact, as I will argue in this paper, the more parochial United States—with its sexually discriminatory regulations that exclude women from the draft and from direct combat units³⁰—is actually more advanced in the quest for gender equality in the military.

The comparison I present between the roles of women in the Israeli military and the U.S. military will demonstrate how feminism has taken hold differently in different cultures, with contrasting results. In Israel, facial attempts to achieve gender-neutrality provide little relief in the face of a legal and cultural background in which gender inequalities are still deeply ingrained and gender differences, including the role of mothering, have not been sufficiently unpacked

labor and a gendered structure of power, both formal and informal, constitutes and sustains the proverbial, taken-for-granted role of women in society as help-meet to men.” (citation omitted); Joyce Robbins and Uri Ben-Eliezer, *New Roles or New Times? Gender Inequality and Militarism in Israel's Nation-in-Arms*, 7 (3) SOC. POL. 309, 333–37 (2000).

28. See, e.g., Women's Equal Rights Law, 5711-1951, 5 LSI 171 (amended in 2000) (Isr.); HCJ 453/94 Israel Women's Network v. Gov't of Israel, 48(5) PD 501 [1994] (Isr.) [hereinafter Israel Women's Network] (setting forth a policy of affirmative action in public office); HCJ 104/87 Nevo v. Nat'l Labour Court 44(4) PD 749 [1990] (Isr.) [hereinafter Nevo] (indicating a commitment to the principle of formal equality between the sexes). For an English translation of *Nevo*, see http://elyon1.court.gov.il/files_eng/87/040/001/Z01/87001040.z01.pdf. All other citations to this case refer to the English translation. For an English translation of *Israel Women's Network*, see http://elyon1.court.gov.il/files_eng/94/530/004/Z01/94004530.z01.pdf. All other citations to this case refer to the English translation. Family law is largely governed by the more gender focused Jewish Law. See RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN 227 (2004); Daphne Barak-Erez, Commentary, *Can Equality Survive Exceptions?*, 107 MICH. L. REV. FIRST IMPRESSIONS 134, 135 (2009), available at <http://www.michiganlawreview.org/firstimpressions/vol107/barak-erez.pdf>; Frances Raday, *Equality of Women Under Israeli Law*, JERUSALEM Q. 27, 81, 81–82 (1983); Frances Raday, *The Israeli Perspective on Gender, Labour and the Family*, in THE STATUS OF WOMEN AT THE DAWN OF THE TWENTY-FIRST CENTURY 113, 117–19, 126 (2001).
29. Even cases such as *Nevo v. Minister of Labor*, which raised the mandatory retirement age for women to equal that for men and is the standard bearer of formal equality in Israel, see Barak-Erez, *supra* note 19, at 137, permit women to retire at a younger age if they so choose but does not allow men the same advantage. *Nevo*, *supra* note 28, at 10.
30. See 50 U.S.C. app. § 453(a) (2006) (excluding women from the draft); DEP'T OF DEF., *supra* note 17, at 3 (noting the U.S. policy of excluding women from direct combat units).

and analyzed.³¹ Indeed, it is the significant sex-based benefits provided to mothers and women in the Israeli military (e.g., exemption from reserve duty and a shortened draft) that help to preserve women's inequality despite facially neutral laws.³² By contrast, in the United States, where the military has carved out a special island of differentiation, underlying advances in the treatment of women, the alleviation of workplace inequalities and changes in the very nature of warfare have made women more equal in the military than draft registration or combat laws make apparent.³³

Achieving equality is more complex than simply being granted permission to engage in traditionally male roles like combat warfare. Cultural and legal contexts are crucial to understanding the nature of inequality and the best road to reform. Demanding neutrality or special treatment without carefully analyzing the values and practical ramifications at stake may undermine the enterprise. The United States should take heed of how benefits given to Israeli women in combat roles have undermined their success in the military and recognize that gender neutrality in job assignment cannot by itself ensure women's empowerment and equality. The Israeli legal system should reflect on how underlying legal and cultural forces can make facially neutral laws ineffective.

This article will proceed in four parts. In the first part, I will unpack the seminal court cases from the United States and Israel regarding the role of women in the military in their respective countries—*Rostker v. United States* and *Miller v. Israel Defense Forces*.³⁴ I will point to the differences and similarities in the two cases and demonstrate how each case contends with legally created benefits to women, which, in turn, create real differences between the sexes. In the second part, I will identify problems with the Israeli system of giving legal benefits to women in the military and propose how to rid Israeli legislation of discrimination and stereotypes by adopting provisions that support reproduction in a manner that recognizes the role of both mothers and fathers in raising children. In

31. See *infra* text accompanying notes 143–56.

32. See *infra* text accompanying notes 55–61.

33. See *infra* text accompanying notes 137–42 (discussing how women in the U.S. military are actually held to a more equal standard than the draft and combat laws would suggest).

34. *Rostker v. Goldberg*, 453 U.S. 57 (1981); H CJ 4541/94 *Miller v. Minister of Defense*, 49(4) PD 94 [1995] (Isr.) [hereinafter *Miller*]. For an English translation of the latter, see http://elyon1.court.gov.il/files_eng/94/410/045/Z01/94045410.z01.pdf. All other citations to this case refer to the English translation.

the third part, I will describe further how deep cultural norms and religious influences create discrimination despite gender-neutrality. And in the fourth part, I will draw conclusions from the comparison of the roles of women in the Israeli and U.S. militaries and argue that there is more to gender equality than whether laws are gender-neutral or benefits for women exist. Indeed, gender-neutrality can provide a problematic mask under which deep discrimination lingers. As such, the underlying reasons for benefits and the context in which neutrality functions must be critically analyzed. In the United States, progress toward gender equality makes discrimination in military laws less harmful, while gender-neutral laws in Israel fail to dissolve deep discriminatory policies.

I. THE FLIPSIDE OF LEGAL BENEFITS

Any discussion of women in the military in Israel must consider the seminal case of *Miller v. Israel Defense Forces*.³⁵ *Miller* demonstrates that women are still second-class citizens in the Israeli army. Unlike in the United States, Israeli laws and regulations do not prohibit women from direct combat units or exclude them from the draft.³⁶ Yet the laws provide significant benefits to women—benefits that keep them subordinate and handicapped.³⁷

From a theoretical perspective, many liberal feminists are inclined to look at any benefits as problematic both as a matter of constitutional law and because they undermine the effort to obtain formal equality.³⁸ Here, however, I take a more nuanced view, arguing that some benefits that are sex-specific (recognizing biological differences regarding gestation, for instance) or gender sensitive are not only acceptable but are necessary for achieving equality because of the existence of legitimate and valuable gender differences.³⁹ Indeed, not recognizing such differences discriminates

35. *Miller*, *supra* note 34.

36. Defense Service Law, 5746–1986, 40 LSI 112, §§ 1, 16A, (amended in 2000) (Isr.).

37. *See generally* Barak-Erez, *supra* note 19, *passim* (discussing how ingrained exceptionalism has undermined notions of equality in Israel).

38. *See, e.g.*, Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action, and the Meaning of Woman's Equality*, 13 GOLDEN GATE U. L. REV. 513, 533–39 (1983); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 345–46 (1984). *See generally* Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970's*, 1989 U. CHI. LEGAL F. 9, 10–19 (discussing leading Supreme Court cases).

39. *See, e.g.*, CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 215–36 (1989); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault*

against women by not acknowledging the legitimacy of such differences.⁴⁰ Other benefits, like the ones given to women in the Israeli military, are deeply problematic. The effort must be made to distinguish between the “good” benefits and the “bad” ones in order to achieve real substantive equality for women. After explaining the facts and legal holding of *Miller*, I will explain how I believe such a distinction between good and bad benefits can and must be made in the context of women in the military.

In *Miller*, the facts were ideal to challenge the military status quo. At the time, no woman had ever been assigned to become a pilot in the Israeli Air Force.⁴¹ In *Miller*, a female candidate for the Israel Air Force pilot’s course was already a civilian pilot, and she was qualified in every way for service in the Israeli Air Force.⁴² Yet the army refused to assign Miller to an Israeli-Air-Force profession because she was a woman.⁴³ They informed her that it was the policy of the military not to assign women to combat roles, such as piloting aircrafts, regardless of their qualifications.⁴⁴ Her lawyers, aware of the great pull embodied in the justification of national security and the difficulty in legally challenging older laws in Israel, such as the Defense Service Law,⁴⁵ were particularly cautious. They did not attack any fundamental legislation or broad policies; they asked only that Alice Miller be permitted to serve in the Israeli Air Force as a pilot.⁴⁶

Moreover, the legal background could not have been riper for such an attack. The authority supporting military directives establishing a list of certain female jobs and requiring that women not be placed in combat professions without separate consent and approval had recently been repealed.⁴⁷ Accordingly, although sex-specific classifications were still on the books, the Defense Minister’s

Divorce and its Aftermath, 56 U. CIN. L. REV. 1, 77–89 (1987) (differences in relationships with offspring); Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 36–45 (2008); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1295–1300, 1304–08, 1323–33 (1987).

40. See sources cited *supra* note 39.

41. Miller, *supra* note 34, at 6 (opinion of Mazza, J.).

42. *Id.* at 5.

43. *Id.* at 6.

44. *Id.*

45. See *infra* notes 67–69 and accompanying text.

46. Miller, *supra* note 34, at 9 (opinion of Mazza, J.).

47. *Id.* at 7–8.

authority for promulgating the directives was no longer valid.⁴⁸ Thus, aviation, considered a combat role, was not foreclosed to Ms. Miller as a matter of military law, but only as a matter of military policy.⁴⁹

At first glance, the army's decision seems to be a clear-cut case of discrimination on the basis of sex.⁵⁰ Still, what is so challenging about this decision is how compelling the military's case was for denying Miller the chance to be a pilot. While military regulations were no longer authorized to dictate that certain military professions belonged to women only, there are three legal distinctions between men and women in the military that are codified and solidified in the Defense Service Law.⁵¹ First, women have a mandatory service of two years, while men serve for three years in compulsory service.⁵² Second, women serve in compulsory reserves only until the age of thirty-eight while men serve until the age of fifty-four.⁵³ Third, and most significantly, women are exempted from compulsory military service if they are married, and excluded from reserve duty altogether if they are pregnant or are mothers.⁵⁴

The military therefore argued that because of these significant exemptions or "benefits" given to women, it was financially and logistically unjustifiable to train a woman to be a pilot in the Israeli Air Force.⁵⁵ Such service required a voluntary extension of service

48. *See id.*

49. *See id.*

50. Women's Equal Rights Law, 5711-1951, 5 LSI 171 (amended in 2000) (Isr.). Although Israel has the Women's Equal Rights Law, which explicitly disallows any form of discrimination against women, the law has only limited force. The law is not one of the entrenched laws and can thus be overridden by religious law or prior legislation. *See id.* § 5; Basic Law: Human Dignity and Liberty, 5752-1992, 1391 LSI 150, § 10 (1992) (Isr.), available at http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm. Moreover, it permits different treatment between men and women when there are relevant and substantive distinctions between them. But in numerous cases, such as *Dr. Naomi Nevo v. National Labor Court*, Israeli courts have embraced formal equality. *See Nevo, supra* note 28, at 1-3. Israeli courts have also determined that affirmative action for women in public offices is required. Israel Women's Network, *supra* note 28, at 10, 12-13.

51. Defense Service Law, 5746-1986, 40 LSI 112, §§ 1, 15, 16, 29, 39 (amended in 2000) (Isr.).

52. *Id.* §§ 15, 16.

53. *Id.* §§ 1, 29.

54. *Id.* § 39.

55. Miller, *supra* note 34, at 12; *cf.* Barak-Erez, *supra* note 19, at 536 (2007) (describing the potentially pernicious nature of benefits to women: "In principle, the bill [Defense Services Law] supported women's enlistment, but it also made highly significant distinctions between the service envisioned for women and for men.").

for women of seven years at the time of the Miller case, currently nine years,⁵⁶ and particularly frequent and extensive reserve duty.⁵⁷ Training women, it is argued, even those who agree to volunteer for the extended time it takes to undergo Israeli-Air-Force training, does not make sense for the military.⁵⁸ Under the law, women pilots can exempt themselves from extended service and reserves by getting married or having children.⁵⁹ Any attempts to voluntarily exempt oneself from such benefits are considered unlikely to be enforceable.⁶⁰ Thus, it is no surprise that the military did not want to train women pilots and that women, despite gender-neutral regulations, were, and still are, largely absent from combat roles and the higher echelons of the Israeli military.⁶¹ Although these legal distinctions are intended to benefit Israeli women, these benefits make it harder for women to achieve stature and desirable placement in the highest ranks of the army.

Two justices agreed with the military's argument summarized above with an added dose of deference to military decision-making in light of national security concerns.⁶² The other three justices did not,⁶³ and the military was compelled to accept Alice Miller into a pilots training course, which, unfortunately, she did not complete.⁶⁴ Since then, however, women have succeeded in becoming Israeli combat pilots.⁶⁵

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56. Miller, *supra* note 34, at 39 (opinion of Tal J.) (noting that women pilots have two years compulsory service and an additional five years of voluntary service to which they must commit). The modern requirement for soldiers is a nine year commitment in total compulsory and voluntary service. See <http://iaf.org.il/2464-he/IAF.aspx> (pointing out that obligatory service is now nine years for pilots) (Hebrew translated by author).
 57. See Netanel Lorch, *The Israel Defense Forces*, ISR. MINISTRY FOREIGN AFFAIRS (May 31, 1997), <http://www.mfa.gov.il/MFA/Facts%20About%20Israel/State/The%20Israel%20Defense%20Forces>; Yehontan Maroz, *The Girls*, ISRAELI AIR FORCE (Feb. 1, 2011), <http://www.iaf.org.il/4365-36046-en/IAF.aspx>.
 58. Miller, *supra* note 34, at 12–13 (opinion of Mazza, J.).
 59. *Id.*
 60. *Id.*
 61. See Barak-Erez, *supra* note 19, at 536, 538, 544, 553, 555, 557.
 62. Miller, *supra* note 34, at 24–25 (opinion of Kedmi, J.); *id.* at 38–39 (opinion of Tal, J.).
 63. See *id.* at 23–24 (opinion of Mazza, J.); *id.* at 33–34 (opinion of Strasberg-Cohen, J.); *id.* at 60 (opinion of Dorner, J.).
 64. *Israel Air Force Not for Her*, N.Y. TIMES, Jan. 5, 1996, at A9 (explaining that Alice Miller failed qualification exams for flight training).
 65. RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN 157–58 (2004); Yossi Yehushua, *IDF Presents: 3 New Female Pilots*, YNETNEWS (Dec. 22, 2005, 9:02 AM), <http://www.ynetnews.com/articles/0,7340,L-3188543,00.html>; *Two*

The challenge for the other three justices was to justify a legal demand that the army work around and bear the costs of these potentially enormous benefits (or constraints) bestowed upon women.⁶⁶ The law itself was not challenged, and the justices did not argue that the Defense Service Law itself, which provides these significant benefits, be changed.⁶⁷ Rather, it was the military policy of excluding women from the Israeli Air Force that was under fire.⁶⁸ Military forces have traditionally enjoyed exceptional deference due to national security concerns.⁶⁹ How, then, can a court demand that the army deal with this potentially significant constraint in training its troops? Is this not a matter of national security—of life and death? Particularly in Israel, where there is so much financial, political, and societal support of the need for military might, how could the court demand such a sacrifice from the military?⁷⁰ In other words, in *Miller* there was a significant, legally created difference between men and women in military contexts—as undeniable, albeit less useful, as

Female Pilots and a Female Navigator Set to Graduate from Recent Pilot Course, ISR. DEF. FORCES (Dec. 29, 2010, 14:42), <http://dover.idf.il/IDF/English/News/today/10/12/2901>.

66. See *Miller*, *supra* note 34, at 23–24 (opinion of Mazza, J.).
67. Judicial review of infringing legislation was expressly restricted to legislation enacted after 1992. Basic Law: Human Dignity and Liberty, 5752-1992, 1391 LSI 150 (1992) (Isr.), available at http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.
68. *Miller*, *supra* note 34, at 8 (opinion of Mazza, J.).
69. See, e.g., *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (“We ‘give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.’” (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986))); *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (“[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”); *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981) (“[P]erhaps in no other area has the Court accorded Congress greater deference [than in national defense and military affairs].”); *Dennis v. U.S.*, 341 U.S. 494 (1951); *Korematsu v. U.S.*, 323 U.S. 214 (1944); *Miller*, *supra* note 34, at 23 (opinion of Mazza, J.); Devin Schindler, *Between Safety and Transparency: Prior Restraints, FOIA, and the Power of the Executive*, 38 HASTINGS CONST. L. Q. 1, 41 (2010).
70. Although there is still some deference to the military in court decisions, commentators have noted that the deference is decreasing. Guy Davidov & Amnon Reichman, *Prolonged Armed Conflict & Diminished Deference to the Military: Lessons from Israel*, 35 LAW & SOC. INQUIRY 919, 922 (2010) (“Much like courts in other countries, the Israeli Supreme Court generally exhibits some degree of deference to the forward-looking decisions of governmental agencies.”); Jason Litwack, Note, *A Disproportionate Ruling for all the Right Reasons: Beit Sourik Village v. The Gov’t of Israel*, 31 BROOK. J. INT’L L. 857, 895–96 (2006); Stephen J. Schulhofer, *Checks and Balances in Torture: American, British & Israel Experiences*, 102 MICH. L. REV. 1906, 1910, 1923 (2004).

biological differences such as gestational capacities and breastfeeding.⁷¹ Although the difference in this case was created by the law and not by nature, it existed nonetheless, and the question was how to deal with it.

In the United States, the same general issue arose in *Rostker v. United States*.⁷² At issue in *Rostker* was whether a law mandating draft registration for men and not women was permissible under the Equal Protection Clause.⁷³ The majority noted that such a sex-based classification was justified because of a prior legal differentiation between men and women—only men can serve in combat units.⁷⁴ This legally created distinction, which the Court felt reflected Congress's support of allegedly well-established and entrenched societal norms, provided a sufficient state interest to justify excluding women from registering for the draft.⁷⁵ The underlying law that excluded women from combat roles was not even challenged.⁷⁶ The dissent acutely pointed to the many non-combat jobs (70–80% of all jobs in the military)⁷⁷ that might be filled by drafted women, and called the majority decision discriminatory.⁷⁸ But the weight of the difference created by the laws determining who can perform combat roles overrode that reasoning for the majority when it came to registration for the draft.⁷⁹

In Israel, however, Justices Mazza, Strasberg-Cohen, and Dorner were intent on overcoming the weight of the law that created legal distinctions between men and women in the military.⁸⁰ Strasberg-

71. See Miller, *supra* note 34, at 26 (opinion of Strasberg-Cohen, J.) (“The law does not contain any provision directly violating the equality of men and women soldiers with respect to the nature of the jobs to which they can be assigned, but as a result of the distinction that the law created in the service conditions, there arose—as a matter of policy – an inequality which, for our purposes, is the refusal to accept women for an aviation course. In my opinion, the distinction created by the law should not be perpetuated by discrimination built on its foundations.”).

72. 453 U.S. 57.

73. *Id.* at 59.

74. *Id.* at 77–79.

75. *Id.* at 76–79.

76. *Id.* at 67.

77. See William A. Kamens, *Selective Disservice: The Indefensible Discrimination of Draft Registration*, 52 AM. U. L. REV. 703, 719 n.118, 720 n.129, 736 n.255, 759 n.433 (2003).

78. *Rostker*, 453 U.S. at 84–86 (White, J., dissenting); *id.* at 100 (Marshall, J., dissenting).

79. See *id.* at 83 (majority opinion).

80. Miller, *supra* note 34, at 14 (opinion of Mazza, J.); *id.* at 29 (opinion of Strasberg-Cohen, J.); *id.* at 59–61 (opinion of Dorner, J.).

Cohen explicitly recognized the legally created difference between men and women:

In my opinion, *the difference between the service conditions* of men and the service conditions of women, as stipulated in the law, creates a real and difficult problem for the training and service of women as pilots. The continuity of a woman pilot's military service may be affected and her military service is liable to end if she marries, becomes pregnant or becomes a mother, and she can be released from reserve duty at the age of 38 . . . by giving unilateral notice, even if she volunteers for such service above that age.⁸¹

Justice Strasberg-Cohen analogized the "benefit" of reduced military service for women to a physical disability and argued that it should be accommodated:

If, for example, a disabled person in a wheelchair wants to be accepted for work in a public institution, and his qualifications fulfil the requirements of the job, but the access to the office is by way of stairs; the restriction in the physical conditions allowing access to the place of work creates a relevant difference Therefore we would require an investment of resources in order to neutralize the difference and remedy it by means of an elevator or in some other way that will allow the disabled person to reach that office.⁸²

Like a physical disability, she argued, the legally created disability, mistakenly called a benefit, for women in the army should be accommodated to counter the burdens it puts on women in achieving equality and desirable placements in the army.⁸³

Such an analogy to a physical disability is reminiscent of attempts to contend with pregnancy discrimination in U.S. law.⁸⁴ Pregnancy is the quintessential sex difference.⁸⁵ Even otherwise liberal feminists, who focus on equal treatment and ignore differences whenever possible, accept the need to contend with the different biological state

81. *Id.* at 27 (opinion of Strasberg-Cohen, J.).

82. *Id.* at 29.

83. *See id.* at 31.

84. *See Williams, supra* note 38, at 325.

85. *See id.* at 325–26.

of pregnancy.⁸⁶ In *Geduldig v. Aiello*, the Supreme Court held that, under the Equal Protection Clause of the U.S. Constitution, discrimination on the basis of pregnancy is not sex-based discrimination, and thus, the state only had to provide a rational reason for its exclusion of pregnant women from an employee disability plan.⁸⁷ In reaction to this dubious holding, the Federal Government passed an amendment to Title VII, which prohibits discrimination on the basis of sex, to include discrimination on the basis of pregnancy as sex discrimination.⁸⁸ According to Title VII, as amended by the Pregnancy Discrimination Act (PDA), employers must treat pregnancy like any other disability—it must receive the same legal treatment as physical or mental disabilities.⁸⁹ Struggling with how to categorize a female sex difference in gender-neutral terms, the law treats it as equivalent to a disability that must be accommodated.

Equating pregnancy to a disability has received some support.⁹⁰ But others have argued that pregnancy is a natural condition, not a disability, and should not be analogized as such.⁹¹ This dispute came to a head in *California Federal Savings & Loan Association v. Guerra*, when California tried to treat maternity leave more favorably than other disability leave.⁹² The Supreme Court held that pregnancy

86. See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 17 (1987) (discussing her theory of episodic difference in which she accepts the need to accept sexual differences only during the stage of pregnancy).

87. See *Geduldig v. Aiello*, 417 U.S. 484, 494–95 (1974).

88. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006).

89. *Id.*

90. See, e.g., Brief of the ACLU et al. as Amici Curiae Supporting Respondent at 7, *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (No. 85-494), 1986 WL 728369; Williams, *supra* note 38, at 357.

91. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 41 (2d ed. 2003); Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 47–49 (2010); see William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y, 153–54 (2007) (classifying pregnancy discrimination as a form of sex discrimination, not discrimination based on a disability); Krieger & Cooney, *supra* note 38, at 539–45 (arguing that pregnancy is an inherent sex difference, not a normative one); Littleton, *supra* note 39, at 1299 (supporting the notion that pregnancy should be treated “as ‘different’ from other causes of disability”).

92. *Guerra*, 479 U.S. 272, 275–76 (noting that under California law, women who took maternity leave were guaranteed a similar position upon their return, while those on disability leave were not).

did not have to be treated like any other disability, as it would seem from the face of PDA, but that Title VII should be viewed as a floor and that extra benefits could be provided.⁹³

Treating gender differences as disabilities is troubling because they are not. As MacKinnon aptly notes, women are as different from men as men are from women.⁹⁴ From a male perspective, a woman's difference might look like a disability. But is that the way we want to frame legal rights and responsibilities; characterizing female differences as disabilities? Why should the male norm be the model against which disabilities are defined? Categorizing women's differences as disabilities fails to appreciate the reality of women's lives. Women are not disabled when they are pregnant; they are reproducing and thereby providing a valuable service to society.⁹⁵ When women's differences provide significant value to society, those differences should be supported, not just accommodated as a physical disability.⁹⁶ A legal system that treats women's differences as disabilities is clearly male-centered and will always undervalue those differences as aberrations. There is a need for substantive equality to affirmatively accommodate women's biological differences without attempting to treat such differences in gender-neutral but male-centered terms.⁹⁷

93. *Id.* at 285.

94. CATHARINE MACKINNON, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED: DISCOURSES IN LIFE AND LAW* 32, 37 (1987).

95. See e.g., Lucinda M. Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1175 (1986) ("Employers should bear the costs of [childbearing] responsibilities because childbearing and rearing are crucially important social functions that are connected to and have major impacts on the work world."); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving and the Limits of Economic and Liberal Theory*, 34 U. MICH. J.L. REFORM 371, 452–53, 467–68 (2001). But see Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181, 186–87, 208 (2001) (arguing that children are not, in fact, a public good, but rather a personal choice and that population can be replenished by immigration). For a poignant critique of Franke's argument, see Becker, *infra* notes 96–97.

96. See Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 61 (2002) ("We need to elevate care to this level of importance [a core value] for the basic reason that it is essential to human health and balanced development.") (quoting MONA HARRINGTON, *CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS* 48–49 (1999)); Ann Laquer Estin, *Maintenance, Alimony and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 787–802 (1993); Laufer-Ukeles, *supra* note 39, at 36–40.

97. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1993); Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 41–42; Laufer-Ukeles, *supra* note

In the cases of *Miller* and *Rostker*, women's situations should not be viewed as disabilities. Rather, the women received legislative exclusions or benefits that differentiated them from men and were then discriminated against because of those benefits. Describing women as having a disability pretends that their disadvantages are accidents of fate, like being born without a leg, not a state imposed problem that can be remedied.

In *Miller*, on the other hand, Justice Dorner swung more broadly, arguing that sex-based discrimination affronts human dignity, which, she argued, is protected by the Israeli Basic Law of Human Dignity.⁹⁸ Anchoring prohibitions against sex-discrimination in human dignity instead of equality has the possible consequence that laws could be unequal on their face yet not be discriminatory because they do not violate human dignity.⁹⁹ Or stated differently, it is substantive equality and not formal equality that is essential to human dignity.¹⁰⁰

39, at 36–42; Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 87 (1987); see *Andrews v. Law Soc'y of British Columbia*, [1989] 1 S.C.R. 143, 167–68 [1989] (Can.) (McIntyre, J., dissenting), available at <http://scc.lexum.org/en/1989/1989scr1-143/1989scr1-143.pdf>.

98. *Miller*, *supra* note 34, at 47–48 (opinion of Dorner, J.). Justice Dorner accepted that the principle of equality is not entrenched as part of the Basic Law and thus cannot serve as the basis for judicial review of discriminatory practices. *Id.* at 43–44. But the Basic Law does, according to Dorner, protect against affronts to human dignity, and sex discrimination is such an affront. *Id.* at 44–45. Others have rooted equal protection in the concept of human dignity. See Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 426 (1992); Alan Gewirth, *Human Dignity as the Basis of Rights*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 10, 12 (Michael J. Meyer & William A. Parent eds., 1992); Neomi Rao, *Gender, Race, and Individual Dignity: Evaluating Justice Ginsburg's Equality Jurisprudence*, 70 OHIO ST. L.J. 1053, 1059, 1080 (2009) (discussing Justice Ginsburg's focus on dignity in her equal protection jurisprudence); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1745–52 (2008) (arguing that the undue burden framework for evaluating abortion regulations seeks to vindicate both the equality and liberty dimensions of human dignity).

99. See Caroline Forell, *Gender Equality, Social Values and Provocations in the United States, Canada and Australia*, 14 AM. U. J. GENDER SOC. POL'Y & L. 27, 40–42 (2006) (discussing how Canada's treatment of gender discrimination as a matter of human dignity leads to a broader equality than does the equal protection analysis used in the United States and Australia).

100. See *Andrews v. Law Soc'y of British Columbia*, [1989] 1 S.C.R. 143, 164 (Can.) (McIntyre, J., dissenting) (“It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious

Thus, laws that give benefits to women would not necessarily discriminate against women if the purpose of the discrimination were to protect or promote human dignity, autonomy, or substantive equality.

Recognizing that such an affront on human dignity must be balanced against competing governmental interests, Justice Dorner equated the differences encountered in *Miller* to biological differences like pregnancy and differences in religious beliefs and demanded that the military step up to “adapt[] to the needs of women.”¹⁰¹ But are legally created differences the same as biological differences or differences in religious beliefs? Justice Dorner argued that any discrimination must be uprooted regardless of its cause.¹⁰² Still, does the army need to accommodate handicapped soldiers in combat units? Or more pertinently, would the army need to accommodate a woman if the underlying law said she could only serve for two years and could not commit to further service regardless of marital status (perhaps to encourage such a status)? Would the military have to accommodate such a legally created difference?

Justice Dorner responded to this concern at the end of her opinion by appealing to the concept of proportionality: “In these circumstances, where an extra financial burden is imposed on all private employers for the sake of achieving equality, considerations of budgeting and planning efficiency cannot justify a decision of the State that violates a basic right.”¹⁰³ But does “budgeting and planning efficiency” in the context of the military go to interests in national security? Having enough pilots to fight in wars seems more than mere administrative efficiency and planning. Can no amount of planning and efficiency overcome the need to accommodate women? To answer these questions, Dorner leaned once again on the concept of human dignity, but a clear reconciliation of these concerns was missing: “[T]he damage caused by closing the aviation course to women exceeds the benefit of the planning considerations. First, closing the aviation course to women violates their dignity and degrades them.”

Although they both recognized the tension, both Justices Dorner’s and Justice Strasberg-Cohen’s opinions leave us to contemplate the

inequality.”), available at <http://scc.lexum.org/en/1989/1989scr1-143/1989scr1-143.html>; Forell, *supra* note 99, at 40–42.

101. Miller, *supra* note 34, at 57 (opinion of Dorner, J.).

102. *See id.* at 57–58.

103. *Id.* at 60.

extent to which the military must accommodate legally created differences. As Justice Strasberg-Cohen remarked, a discriminatory law such as the Defense Service Law should be amended or neutralized in order to achieve equality, “although not at any price.”¹⁰⁴ Justice Strasberg-Cohen contended that although the Defense Service Law creates a difference, and a weighty one as she explicitly acknowledged, it can be neutralized at a “reasonable price” and therefore must be.¹⁰⁵ But what is a reasonable price to impose on the Israeli Air Force, and how can it be determined in the context of a country that is in a state of continuous military struggle internally and with its neighbors?

Justice Mazza was the only justice who realistically struggled with this tension, which I believe is the key to this seminal case. He took seriously the planning, efficiency, and budgetary concerns potentially imposed upon the military by the Israel Defense Service Law:

Even a temporary absence of a woman pilot during her compulsory service, as a result of pregnancy or childbirth, can disrupt the planned daily activity of the whole airborne unit. And perhaps the main difficulty lies in the inability to rely on her undertaking to continue reserve duty for which she is not liable, since, if she becomes pregnant or gives birth, and gives notice that she retracts her commitment to volunteer, there will be no legal possibility of compelling her to serve.¹⁰⁶

Recognizing the potential breadth and impact of these benefits is important because they are significant. Minimizing them and insisting that the army accommodate them at all costs fails to contend with their seriousness.

Justice Mazza took a practical stance toward these concerns. He noted that these potential problems were based on the assumption that women would back out of their commitments, but he thought such assumptions were unfair: “As a rule, it is correct to assume that someone who commits himself to such an undertaking will want and be able to perform it.”¹⁰⁷ He argued that, in other countries, disturbances from pregnancy and childbirth have been limited and

104. *Id.* at 27–28 (opinion of Strasberg-Cohen, J.).

105. *Id.* at 28–29 (“Our case falls into the second category, in which the relevant differences can be neutralized and it ought to be remedied.”).

106. *Id.* at 20 (opinion of Mazza, J.).

107. *Id.*

that men also occasionally back out of their commitments to continued service.¹⁰⁸ Other countries, however, do not exempt mothers from continued duty if they voluntarily commit to do so.¹⁰⁹ Acknowledging this, Mazza proposed an experimental integration of women into the Israeli Air Force in order to determine the real extent of the burden on the military, which Mazza pointed out was only speculative and unsubstantiated by the military.¹¹⁰ Mazza suspected that there would be little extra burden, if any, that the vast majority of women pilots would uphold their voluntary commitments, and that minimal maternity leaves would not greatly disrupt military function.¹¹¹

In the end, Justice Mazza was likely right, and statistics have borne him out in Israel and internationally.¹¹² And his decision and reasoning were sufficient to get past the weight of the legally created difference in this case. But the dilemma of legally created differences lives on and may not be so neatly parsed in the future. The problem is that although Israeli women are permitted into any military role, their benefits make them a liability and substantial integration has still not occurred.

II. FINDING A FORMULA THAT CAN WORK FOR INCLUDING WOMEN IN THE MILITARY

The way forward is not in contending with the weight of the difference created by the discriminatory Israeli Defense Service Law

108. *Id.* at 21; *see also* Leszkay, *supra* note 6, at 159, 162 (noting U.S. studies that maternity leaves for women and absences from reserves are comparable to leaves for men who go AWOL or are imprisoned for civilian violence—therefore, women and men have very similar attendance rates for military duty).

109. *See Women in the Military*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Women_in_the_military (last visited Dec. 31, 2011) (explaining that females in Finland voluntarily undertake military service and that during the first forty-five days of service they have the option to leave the military without consequences, but after that, they are obligated to complete the service which lasts six, nine, or twelve months).

110. Miller, *supra* note 34, at 21–23 (opinion of Mazza, J.).

111. *Id.* at 20–22.

112. *See, e.g.*, Leszkay, *supra* note 6, at 159, 162; Rimalt, *supra* note 26, at 1105–06 (describing logistical changes in a number of units and successes that women have achieved in combat units in the Israeli army); Mady W. Segal, *The Argument for Female Combatants*, in *FEMALE SOLDIERS—COMBATANTS OR NON-COMBATANTS?: HISTORICAL AND CONTEMPORARY PERSPECTIVES* 267, 272 (Nancy Loring Goldman ed., 1982).

but in reconsidering and unpacking the underlying law itself.¹¹³ By giving benefits and exemptions to mothers, wives, and women generally, the Israeli Defense Service Law imposes an injustice on women.

Sometimes a benefit can be a form of discrimination as well. Other times, benefits or accommodations are needed to support equality. When biological and value-producing gender differences are at stake, a concept of substantive equality that recognizes differences is needed to promote equality for women, support important societal values such as caregiving to children, and recognize differences in women's bodies and sexuality.¹¹⁴ Only when such secondary values are at stake should gender differences be recognized.¹¹⁵ Other times, recognizing differences can serve to subordinate women and lead to discrimination because such differences were created in a patriarchal society in which women

113. Because the Defense Service Law dates back to the creation of Israel, it is entrenched and not subject to judicial review, making the law extremely difficult to overturn. *See* Basic Law: Human Dignity and Liberty, 5752–1992, 1391 LSI 150, § 10 (1992) (Isr.), available at http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1992/3/Basic%20Law-%20Human%20Dignity%20and%20Liberty- (regarding the preservation of laws passed prior to adoption of the Basic Law: Human Dignity and Liberty).

114. *See* *Andrews v. Law Soc'y of British Columbia*, [1989], 1 S.C.R. 143, 167–68 (Can.), available at <http://scc.lexum.org/en/1989/1989scr1-143/1989scr1-143.html>; MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 235 (1995); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 212–24 (1990) (advocating a relational, contextual approach to considering difference); Finley, *supra* note 96, at 1150 (“Equality analysis simply cannot provide the answer. Only basic political and moral judgments about ultimate social aims can suggest a basis for choosing among possible similarities and dissimilarities. Even when the discourse moves to this value-laden level, it is not possible to guarantee completely satisfactory solutions free of perverse effects that can undermine whatever ultimate goal is at stake. These perverse effects are intrinsic to being both the same and different simultaneously, because as women choose to focus on certain similarities that we think will reduce gender hierarchy, the nagging differences will not disappear from view.”); Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 *YALE L.J.* 913, 960–61 (promoting a more explicitly normative and moral approach to determining sex equality in constitutional law); Laufer-Ukeles, *supra* note 39, at 31–52 (discussing different categories of gender differences and proposing an analysis for when gender differences should be recognized and supported and when ignored in order to support woman's equality in a substantive manner).

115. *See* Laufer-Ukeles, *supra* note 39, at 36–39 (“Similarly, other than recognizing purely biological differences, recognition of difference should be justified in pursuit of a secondary objective beyond just promoting women's interests, where the difference is inextricably tied up with woman-hood.”).

were subordinate.¹¹⁶ What women need, as MacKinnon has explained, is to “have it both ways”—sometimes to be treated the same, and sometimes to be treated differently, depending on the nature of the difference that is at stake.¹¹⁷ The goal is to be able to decipher between instances when benefits cause harm and reinforce inequality, and instances when benefits or accommodations promote justice and are necessary to achieve equality. In order to distinguish between these circumstances, the rationale behind the laws that create the benefits must be examined to determine what is at stake and whether it is a benefit that truly serves a valid and valuable purpose or whether it is merely discrimination.

It is not a coincidence that, in both the United States and Israel, there are legally created differences between the sexes in military contexts, as seen in the Israeli Defense Service Law and in U.S. draft laws. First, the courts give a tremendous amount of discretion to the military’s internal decisions in light of the purpose of protecting the nation.¹¹⁸ Second, there is heavy entrenchment of the military as a male-dominant institution.¹¹⁹

The justification for the Israeli Defense Service Law may be based on a policy that women, once they are wives or mothers, are not suited for military service. This is a blatantly discriminatory policy, particularly in a militarized society such as Israel, in which the vast majority of societal leaders have held high command.¹²⁰ The military

116. See MACKINNON, *supra* note 94, at 32–33, 39 (“[D]emands for equality will always appear to be asking to have it both ways: the same when we are the same, different when we are different. But this is the way men have it: equal and different too. They have it the same as women when they are the same and want it, and different from women when they are different and want to be, which usually they do. Equal and different too would only be parity.”); Laufer-Ukeles, *supra* note 39, at 36–39.

117. MACKINNON, *supra* note 94, at 39.

118. See *supra* notes 69–70 and accompanying text.

119. See *infra* notes 148–56 and accompanying text.

120. See HALPERIN-KADDARI, *supra* note 28, at 155; Izraeli, *supra* note 27, at 142; Rimalt, *supra* note 26, at 1104. Service in high-status positions in the army is credited for generating social and political status as well as material advantages.

is clearly central to Israeli society,¹²¹ so to deem women less capable and unnecessary for military purposes is deeply problematic.¹²²

In fact, however, the policy behind the sex-based classification in the law is more complex. The rationale behind the legal differentiation between men and women is not explicitly discriminatory but a matter of a national agenda—reproduction.¹²³ Prime Minister David Ben-Gurion explained that the benefits that were bestowed are in praise of “the woman’s special mission, the mission of motherhood.”¹²⁴ National and religiously driven attempts to repopulate a horribly diminished Jewish population post-Holocaust are still felt in Israel.¹²⁵ Moreover, tense demographic pressures against maintaining a Jewish majority in the state of Israel compound the push towards procreation.¹²⁶ Such an agenda has influenced a plethora of legislation and national policy that is pro-maternalist and pro-reproduction.¹²⁷ Indeed women’s roles in reproduction have been compared with and seen as complementary to the male role in the military.¹²⁸

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121. YAGIL LEVY, *ISRAEL'S MATERIALIST MILITARISM* 23–27 (2007) (referring to the Israeli military as the melting pot of society); Hadar Aviram, *Discourse of Disobedience: Law, Political Philosophy, and Trials of Conscientious Objectors*, 9 J.L. SOC'Y 1, 11–12 (2008); see Baruch Kimmerling, *Patterns of Militarism in Israel*, 34 EUR. J. SOC. 196, 207 (1993); Rimalt, *supra* note 26, at 1103 (“In Israel, military service is recognized as a hallmark of citizenship.”).
122. See Rimalt, *supra* note 26, at 1104 (describing how the subordinate role of women in the Israeli military leads to less than equal citizenship in society).
123. *But see* Barak-Erez, *supra* note 19, at 535 (discussing CA 5/51 Steinberg v. Attorney Gen., [1951] 5 PD 1061 (Isr.) where the court stated, “When imposing a duty of service on women, the Israeli legislature expanded the enlistment structure accepted worldwide. At the same time, however, since women cannot serve in all military duties, as well as willing to show respect for the opinions of part of the population, it did not impose on women military duties equal to those of men.”).
124. *Id.* at 536–37 (discussing Prime Minister David Ben-Gurion’s statements during the debates on the Defense Service Law of 1949, Session 68 of the First Knesset); see also Noya Rimalt, *Equality with a Vengeance: Female Conscientious Objectors in Pursuit of a Voice and Substantive Gender Equality*, 16 COLUM. J. GENDER & L. 97, 106–08 (2007).
125. See, e.g., Nitzza Berkovitch, *Motherhood as a National Mission: The Construction of Womanhood in the Legal Discourse in Israel*, 20 WOMEN’S STUD. INT’L F. 605, 610 (1997).
126. *Id.*
127. *Id.* at 605–16.
128. On the coupling of obligations for reserve duty and maternity leave, see H CJ 335/76 Lifschitz-Aviram v. Israel Lawyers Assoc. [1977] 31(1) PD 250 (Isr.); Omi Morgenstern-Leissner, *Hospital Birth, Military Service and the Ties that Bind Them: The Case of Israel*, 12 NASHIM: J. JEWISH WOMEN'S STUD. & GENDER ISSUES 203

The agenda is arguably understandable and certainly valid if a country so espouses it. Certainly, it is as valid as China's agenda of limiting family size for the sake of reducing its population.¹²⁹ Moreover, one might argue that given that the vast majority of countries in the world exempt women from the mandatory draft altogether, Israel is actually relatively progressive in its stance toward women as soldiers.¹³⁰

Yet there is no acceptable justification for demanding that the agenda of reproducing Jews be borne only by the country's women, despite their individual preferences, talents, careers, and agendas. While women alone can gestate, both men and women are capable of providing the time and energy needed to care for children, which is the basis for the benefits and exclusions in the law beyond basic maternity leave. Proponents of the law will counter that, in fact, women will bear much of this burden, and it is their right to choose to do so.¹³¹ It is indeed likely that given modern social norms, women will bear most of the burden of child-rearing, or experience most of the joys—depending on your perspective—and it is not only their right but perhaps to their benefit to do so. Still, it is deeply problematic for the law to codify this reality in a coercive manner by giving women the “benefit” of exemptions and shortened service requirements so that they can care for children without allowing men to choose to be the primary caregivers and women to choose to be the primary soldiers and serve regularly in reserve duty.¹³² By coercively providing the benefit only to women, the army can justify sex-based policies that ban women from many military roles that require a long training period and may have extended reserve duty.¹³³ These roles

(2006); Frances Raday, *Equality, Religion, and Gender in Israel*, JEWISH WOMEN'S ARCHIVE, <http://jwa.org/encyclopedia/article/equality-religion-and-gender-in-israel>, (last visited Dec. 31, 2011). For a U.S. example of such coupling, see Littleton, *supra* note 39, at 1330–31.

129. See Matthew D. Martin III, *The Dysfunctional Progeny of Eugenics: Autonomy Gone AWOL*, 15 CARDOZO J. INT'L & COMP. L. 371, 398–417 (2007); Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1035, 1054–58 (1996) (providing an overview and philosophical discussion of the one-child policy implemented in China to curb population growth); Nicole Skalla, *China's One-Child Policy: Illegal Children and the Family Planning Law*, 30 BROOK. J. INT'L L. 329 (2004).

130. See *supra* notes 19–22 and accompanying text.

131. See Leora F. Eisenstadt, *Privileged but Equal? A Comparison of the U.S. and Israeli Notions of Sex Equality in Employment Law*, 40 VAND. J. TRANSNAT'L L. 357, 377–79 (2007).

132. See Barak-Erez, *supra* note 19, at 537–38.

133. See *id.* at 538–40.

are typically quite prestigious and give soldiers professional training and connections that carry over into civilian life after service.¹³⁴

Instead, while maintaining the value and purpose of supporting reproduction, the Israeli legislature should allow either parent to choose to be exempted from reserve duty upon the birth of a child. Similarly, compulsory duty should be shortened for either a mother or a father upon pregnancy or either mother or father in single sex-couples. Maternity leave for women must be given, but there is no sex-based reason for women but not men to care for young children. Even if it is the case that usually it is women who choose to do so, not providing an option to deny such benefits is the cause of the *Miller* dilemma. The Israeli Defense Service Law stereotypes women and bases legislation on such stereotypes. It does not allow for some women to opt out and for men to step up to the caregiver role.¹³⁵ In so doing, the Israeli legal system stereotypically assumes that motherhood and primary child rearing is the province of women.

In that regard, the Israeli law is more problematic and harmful to women than the U.S. laws and regulations that exclude women entirely from compulsory draft registration and from direct combat units.¹³⁶ This is because nothing in the U.S. law benefits women so extensively that they cannot opt out of their special treatment. Women may not be drafted in the United States, but they can commit themselves to voluntary service.¹³⁷ Once they do so, they are permitted maternity leave, but they have the same requirements as men to serve in reserve duty.¹³⁸ Women cannot serve in direct-combat units, but they serve in many non-direct units¹³⁹ and, upon giving birth, they can take six weeks maternity leave and defer deployment for up to four months.¹⁴⁰ Moreover, the realities of modern warfare for U.S. soldiers in Iraq and Afghanistan are that women who are connected to combat units are essentially on the front lines because traditional wars with front lines have been replaced by broad attacks on military posts.¹⁴¹ “[Military experts indicate] that

134. See Guy I. Seidman & Eyal A. Nun, *Women, the Military and the Court: Israel at 2001*, 11 S. CAL. REV. L. & WOMEN'S STUD. 91, 99–100 (2001).

135. Defense Service Law, 5746-1986, 40 LSI 112, § 39 (amended in 2000) (Isr.).

136. See 50 U.S.C. app. § 453(a) (2006); DEP'T OF DEF., *supra* note 16, at 3.

137. See 50 U.S.C. app. § 453(a); DEP'T OF DEF., *supra* note 17, at 3, 12.

138. See DEP'T OF DEF., *supra* note 17, at 6. See generally 10 U.S.C. § 12103 (2006); 6 C.J.S. *Armed Services* § 50 (2011).

139. DEP'T OF DEF., *supra* note 17, at 3.

140. *Id.* at 6.

141. See Harding, *supra* note 10.

technology and circumstance have drastically altered modern warfare.” They say it is difficult to distinguish between combat and non-combat roles on the front lines of the wars in Iraq and Afghanistan.”¹⁴² Thus, despite legislative classifications excluding women from combat, U.S. women soldiers fare better because they are burdened by fewer benefits and stereotypical mandates. Women who want to be leaders in the U.S. military at least have the right to opt out of the roles to which they are pegged.

In sum, benefits, exemptions, and accommodations need to be examined in context. In Israel, women have the right to enter all areas of the military.¹⁴³ But based on the entrenched gender separation regarding the role of women in motherhood and reproduction, they do not have the ability to escape the negative consequences of the benefits that are granted to them.¹⁴⁴ The Israeli Defense Service Law is deeply gendered in its provisions, and simply opening access to women will not cure this gendered legislation.¹⁴⁵ Benefits and accommodations to women that rely on stereotypes and cultural differences, such as women’s propensity to care for children, must be gender-neutral in order to give both men and women freedom to choose these roles.¹⁴⁶ Cultural gender differences, such as women’s identification with the caregiver role, cannot be made sex-specific without being discriminatory.¹⁴⁷ The value of caregiving that justifies the benefits provided to women is valid, but placing such cultural gender roles upon women only entrenches and fixes gender roles in an unjustifiable manner.

142. *Id.*

143. Women’s Equal Rights Law, 5711-1951, 5 LSI 171, § 6D (amended in 2000) (Isr.).

144. *See supra* notes 123–34 and accompanying text.

145. *See* Barak-Erez, *supra* note 19, at 545; *supra* notes 51–54 and accompanying text.

146. CATHARINE A. MACKINNON, *On Exceptionality: Women as Women in Law*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 70, 73 (1987) (“A few husbands are like most wives—financially dependent on their spouse. It is also true that a few fathers, like most mothers are primary parents My point, though, is that occupying those particular positions is consistent with the norms for gender female. To be poor, financially dependent, and a primary parent constitutes part of what being a woman means. Most of those who are in those circumstances are women. A gender-neutral approach to those circumstances obscures, while the protectionist approach declines to change, the fact that women’s poverty, financial dependency, motherhood and sexual accessibility (our targeted-for-sexual-violation status) substantively make up women’s status *as women*. It describes what it is to be most women. That some men find themselves in a similar situation doesn’t mean that they occupy that status *as men*, as members of their gender. They do so as exceptions, both in norms and numbers.” (footnote omitted)).

147. *See* Laufer-Ukeles, *supra* note 39, at 36–47.

III. THE POWER OF CULTURAL AND RELIGIOUS NORMS DESPITE FORMAL EQUALITY

Despite the *Miller* case and the repeal of sex-based classifications regarding placement of women in military professions, the Israeli military is very much a male-dominated institution with significant separation of the sexes.¹⁴⁸ As a matter of Israel Defense Forces (IDF) policy, even though legally permitted,¹⁴⁹ women still do not serve as front-line infantry or artillery combat.¹⁵⁰ Only a marginal number of women have entered the ranks of certain specialty combat roles—pilots, navigators, anti-aircraft soldiers, field intelligence, unmanned aerial vehicle operators, and, very recently, naval officers.¹⁵¹ The army is still largely segregated by sex, with most women serving in dedicated roles as educators, instructors, engineers, logistics personnel, office personnel, and guides.¹⁵² They are largely facilitators, not combatants. This is so despite the fact that modern military roles require much less physical strength and much more intellectual and mechanical prowess.¹⁵³

The significant benefits given to Israeli women by the Defense Service Law only serve to frustrate the integration of women by making them risky and unpalatable soldiers on paper and by differentiating them even more from their male peers.¹⁵⁴ In the end, the Israeli military is segregated because it always has been, because that is the culture of the military, and because sex segregation and discrimination is still a reality in Israeli society.¹⁵⁵ Gender-neutral laws cannot change the reality of social norms, particularly when there is limited judicial review in Israel and significant benefits that

148. See Rimalt, *supra* note 26, at 1104, 1107–19; Robbins & Ben Eliezer, *supra* note 27, *passim*; Orna Sasson-Levy, *Feminism and Military Gender Practices: Israeli Women Soldiers in Masculine Roles*, 73 SOC. INQUIRY 440, 444–46 (2003).

149. Defense Service Law, 5746-1986, 40 LSI 112, § 16A (amended in 2000) (Isr.); Women's Equal Rights Law, 5711-1951, 5 LSI 171, § 6D (amended in 2000) (Isr.); Barak-Erez, *supra* note 19, at 544 (“[E]very woman who is eligible for service in the defense forces, or who serves in them, has a right equal to that of a man to serve in any duty, or to be assigned to any duty.” (quoting § 6D of the Women’s Equal Rights Law)).

150. See Rimalt, *supra* note 26, at 1113; Robbins & Ben-Eliezer, *supra* note 27, at 330–34.

151. See Rimalt, *supra* note 26, at 1113 (“[I]n 2005, only 2.5% of women soldiers served in combat roles.”).

152. See *id.* at 1113–14; Sasson-Levy, *supra* note 148, at 445.

153. See *supra* notes 6–8 and accompanying text.

154. See *supra* notes 51–61 and accompanying text.

155. See *infra* notes 157–88 and accompanying text; Rimalt, *supra* note 26, at 1100–04.

frustrate the goal of equality.¹⁵⁶ Gender-neutrality provides the opportunity for change, but it will not be realized without more fundamental changes in society and in the structure and orientation of the military and the legislation that forms the military.

Segregation and discrimination are also the influence of religious Jewish norms in Israel.¹⁵⁷ Such religious norms affect society, the law, and the military.¹⁵⁸ In fact, during discussions about the Defense Service Law, religious members of the Knesset were vocally opposed to women serving in any military capacity.¹⁵⁹ Although they failed to universally exclude women from military service, they were able to reach a compromise with secular members to allow women, but not men, to exempt themselves from mandatory conscription for reasons of “conscience,” including religious reasons.¹⁶⁰ As originally drafted,

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156. See Basic Law: Human Dignity and Liberty, 5752–1992, 1391 LSI 150, § 10 (1992) (Isr.) (indicating that there is no judicial review of older laws). See generally Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 326–31 (1995) (discussing the availability of judicial review under the Basic Laws). In order to give the legislature time to work out problems with enacted laws, newer laws can be exempted from being subject to judicial review for being discriminatory or otherwise violating the Basic Laws for a limited period of time. See HCJ 2458/01 New Family Org. v. Surrogacy Agreements Approvals Comm. 57(1) PD 419 [2003] (Isr.). For the interpretation of the basic laws as recognizing the possibility of judicial review, see CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill. 49(4) PD 221 [1995] (Isr.); for an English translation, see http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf. See also Daphne Barak-Erez, *Israel: The Security Barrier—Between International Law, Constitutional Law, and Domestic Judicial Review*, 4 INT’L J. CONST. L. 540, 542 (2006); Daphne Barak-Erez, *Law and Religion Under the Status Quo Model: Between Past Compromises and Constant Change*, 30 CARDOZO L. REV. 2495, 2503 & n.28 (2009) (“Indeed, Basic Law: Human Dignity and Liberty limits this possibility [of judicial review] only to new legislation, introduced after 1992. However, Basic Law: Freedom of Occupation is applicable to former laws.”).
157. See Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. INT’L L. & FOREIGN AFF. 339, 344–47 (2000) (acknowledging religion as a primary factor in disadvantaging women).
158. Compare *id.* at 352–59, 361–64 (discussing how religious norms have shaped laws, qualifications to be rabbinical advocates, and the membership of legislative bodies), and Ran Hirschl, *Constitutional Rights vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1842–44 (2004) (outlining several contexts in which religious norms would exclude women from leadership positions and conflict with Israeli secular norms of equality), with Rimalt, *supra* note 124, at 105–06 (discussing how religious norms have shaped the military).
159. Rimalt, *supra* note 124, at 108 (citing remarks from the 1949 debate in the Israeli Parliament regarding the Defense Service Law).
160. *Id.* at 108–09; see Defense Service Law, 5746–1986, 40 LSI 112, § 39 (amended in 2000) (Isr.) (“The following persons shall be exempt from the duty of the defense

the exemption was only available for religious reasons.¹⁶¹ But some religious and secular members of Parliament (the Israeli Knesset) did not want to limit the conscientious objection to religious reasons because they held broad beliefs about the differences between men and women in the military as well as concerns about discriminating against secular women.¹⁶² In the end, the decision as to who would get the benefit of women's exclusion from the draft for reasons of conscience was left to the individuals applying for such exemptions, and although the exclusion was usually used for religious reasons, the objection of conscience exclusion was applied more broadly.¹⁶³

In *Milo v. Ministry of Defense*, this uneasy status quo came to an end as the Israeli Supreme Court more squarely addressed the issue of the exclusions from service available to women but not men under the Objections of Conscience Clause.¹⁶⁴ The Israeli Supreme Court decided that a woman did not have a right to a waiver from army service because of her conscientious objection to Israeli policies in the occupied territories.¹⁶⁵ Milo argued that she was entitled to opt out of military service because section 39(c) of the Defense Service Law permits women (but not men) to opt out of military service because of their conscientious objections or religious reasons.¹⁶⁶ The Israeli Supreme Court ultimately determined that only conscientious objections for religious reasons were covered by section 39(c) and

service . . . (c) A female person of military age who has proved, in such manner and to such authority as shall be prescribed by regulations, that reasons of conscience or reasons connected with her family's religious way of life prevent her from serving in defense service shall be exempt from that duty of service.”).

161. Rimalt, *supra* note 124, at 108.

162. *See id.* at 110–11.

163. *See id.* at 108–15.

164. HCJ 2383/04 *Milo v. Minister of Def.* 59(1) PD 166 [2004] (Isr.) (translated by author).

165. *Id.*

166. Defense Service Law, 5746–1986, 40 LSI 112, § 39(c) (amended in 2000) (Isr.). The Defense Service Law also allows a man or women to be excused from service for various reasons only upon express permission by order of the Minister of Defense. *Id.* § 36 (“The Minister of Defense may, by order, if he sees fit to do so for reasons connected with the size of the regular forces or reserve forces of the Israel Defense Forces or for reasons connected with the requirements of education, security, settlement or the national economy or for family reasons or other reasons (1) exempt a person of military age from the duty of regular service or reduce the period of his service; (2) exempt a person of military age from the duty of reserve service for a specified period or absolutely . . .”).

that all other female objectors should be treated just like men under section 36.¹⁶⁷

The benefit Milo sought under the Defense Service Law was based on no reason other than cultural norms, stereotypes, and protectionist sentiments towards women.¹⁶⁸ Milo did not even attempt to bring a broader rationale; she simply argued that, based on what the law said, she was entitled to an exemption from service.¹⁶⁹ Some feminists have argued that the conscientious exemption for women advanced substantive equality by mainstreaming an alternative path of citizenship that was more feminine, less militaristic, and not dominated by the male establishment.¹⁷⁰ In particular, Noya Rimalt points to national service as a valid feminine alternative to military service that was paving a new and feminized path to citizenship.¹⁷¹ Rimalt complains that marginal desegregation does not begin to break down the male dominated nature of the military, and, thus, an alternative is needed.¹⁷² It is worth noting, however, that those women who were exempted from military service were not obligated to perform alternative national service—they chose to.¹⁷³ And it was mostly religiously observant women who chose this alternative path.¹⁷⁴

There is no doubt that allowing women exemptions from military service not available to men provides a benefit that violates formal

167. HCJ 2383/04 Milo v. Minister of Def. 59(1) PD 166 [2004] (Isr.) (translated by author). This provision should not be confused with exemptions received by Haredi men engaged in full-time study at religious institutions. Such exemptions are not available to women. See Yehuda Goodman, *Dynamics of Inclusion and Exclusion: Comparing Mental Illness Narratives of Haredi Male Patients and Their Rabbis*, 25 *CULTURE MED. & PSYCHIATRY* 169, 177 (2001).

168. See Rimalt, *supra* note 124, at 105–12.

169. *Id.* at 140.

170. See *id.* at 115–21; see also MACKINNON, *supra* note 3, at 273 (discussing the following arguments in favor of exempting women from registering for the draft: (1) women are less competent at military tasks, particularly combat tasks; (2) the draft would disrupt family plans; (3) stereotypical male protectionism of women may adversely affect military success; (4) captured and imprisoned women would suffer more brutality at the hands of the enemy; and (5) women, with their feminist nature, would have difficulty fitting into male militaristic culture) *cf.* Littleton, *supra* note 39, at 1329–32 (discussing how motherhood could be compared to military service in terms of providing valuable service to one's country).

171. See Rimalt, *supra* note 124, at 115–21.

172. *Id.* at 117–19.

173. *Id.* at 119.

174. *Id.* at 119–20.

equality.¹⁷⁵ If an exemption for conscientious objections were given to both men and women who were disinclined to serve, it might promote an alternative means of achieving valid citizenship. However, for Israel's national security, such an exemption is not possible at this time.¹⁷⁶ As a result, the exemption is available only for women.¹⁷⁷

Exempting women more broadly than men from military service because women are less powerful and suffer more discrimination in the military, as Rimalt suggests, will not promote substantive equality in the long run.¹⁷⁸ First, women will not integrate in the military and in society more broadly if they do not serve as often as possible.¹⁷⁹ As army service is so central to Israeli society, maximal integration is needed to support women's equal citizenship.¹⁸⁰ Second, reinforcing women's second-class status by legislation that permits them to be exempted—in a manner not dissimilar to U.S. draft exclusions—gives legal force to discriminatory practices against women.¹⁸¹ In addition, excluding women from mandatory service silences women's voices as conscientious objectors because their objection to military service would not matter.¹⁸² The ultimate goal must be to integrate women fully into military life or provide conscientious objector exclusions for both men and women who may have problems serving. This would require a national service alternative for both men and women when security considerations and military staffing needs allow such an alternative to be implemented. Equality will not result from permitting gender differentiation because of cultural stereotypes that pervade military service; such a practice will serve to legitimize such discrimination.

As a result of the ruling in *Milo*, military service is not mandatory for religious women, but it is for secular women.¹⁸³ Such religious benefits for women have a number of problematic effects. First,

175. HCJ 2383/04 *Milo v. Minister of Def.* 59(1) PD 166 [2004] (Isr.) (translated by author).

176. See Rimalt, *supra* note 124, at 111 (quoting DK (1978) 2380 (statement of Amnon Rubinstein)).

177. Defense Service Law, 5746–1986, 40 LSI 112, § 39(c) (amended in 2000) (Isr.).

178. Rimalt, *supra* note 124, at 142–44.

179. See Rimalt, *supra* note 26, at 1113–15.

180. *Id.* at 1104.

181. Rimalt, *supra* note 124, at 142.

182. See *id.* at 142–43 (acknowledging this problem with allowing female exemptions but discussing the benefits of such exemptions); see also Becker, *supra* note 12, at 496–500.

183. See *supra* note 167 and accompanying text.

segregation based on Jewish norms makes it harder for Israeli women to achieve equality within and outside of the military.¹⁸⁴ Because religious women frequently opt out of service, there are fewer women in the military, undermining integration.¹⁸⁵ Moreover, the state allowing such segregation affects the perception of women more generally.¹⁸⁶ The military normalizes sex discrimination by acceding to religious demands.¹⁸⁷ In addition to allowing only religious women to be exempted from army service, religious soldiers seek modesty and protection of “family purity” by demanding that co-ed units be segregated by sex, and the military often accedes to these demands.¹⁸⁸ Second, the goal of religious tolerance co-opts the state in sex segregation only for the religious, which can create bad feelings between the religious and secular communities and tarnish the state’s commitment to equality. Third, focusing on religious gender concerns allows the state to feel justified in its policies and ignore the deeper ways in which the state discriminates against women outside religious contexts—discrimination that could perhaps be equally as harmful.

IV. CONCLUSION: PUTTING THE ANALYSIS INTO CONTEXT

In contrast to the upbeat reports in the media and popular beliefs about their power and equal status, the reality for women in the

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184. See David ben Yacov, *Report: Religious Men in Army Bad for Women*, ISR. NAT’L NEWS (July 21, 2011, 3:24 PM), <http://www.israelnationalnews.com/News/News.aspx/145950> (reporting that a special IDF report claims that the integration of religious soldiers in the IDF leads to discrimination against women); Amos Harel, *IDF General Causes Storm After Calling to Curtail Religiosity in Army*, HAARETZ.COM (July 20, 2011, 3:11 AM), <http://www.haaretz.com/print-edition/news/idf-general-causes-storm-after-calling-to-curtail-religiosity-in-army-1.374118> (discussing how religious demands for modesty undermine integration of women in the military).
185. See Yaakov Katz, *IDF Wants More Female Enlistments*, JERUSALEM POST (Mar. 8, 2007, 1:08 AM), <http://www.jpost.com/Israel/Article.aspx?id=53898>.
186. Rimalt, *supra* note 26, at 1104.
187. See, e.g., Merav Michaeli, *Full Integration of Women into IDF Would Be Good for Israel’s Security*, HAARETZ.COM (July 21, 2011, 1:52 AM), <http://www.haaretz.com/print-edition/features/full-integration-of-women-into-idf-would-be-good-for-israel-s-security-1.374356> (noting that some religious leaders put “great pressure to reduce or stop the process of absorbing women” on the army).
188. See Yofi Tirosh, *Alice Through the Looking Glass: Reflections on Representations of the Female Body in the Discourse on Integrating Women in Combat Roles*, in DISCOURSE ON INTEGRATING WOMEN IN COMBAT ROLES, GENDER, LAW AND FEMINISM (2007) [Hebrew].

Israeli military is more complicated. Despite women's access to combat roles, exceptions, benefits, cultural norms, and religious influence all create a complex dynamic regarding women's equality in Israel in general and in the military more specifically. Israel's commitment to formal equality is peppered with loopholes described as benefits. Israel's commitment to substantive equality, which allows for such benefits to be given only to women, is neither sufficiently rationalized nor based on legitimate, valuable differences in women that need to be promoted by such legislation and policies. Rather, such benefits camouflage protectionism, stereotypes, and discrimination.

Indeed, it is ironic that in a rare instance in which the United States breaks with its strong judicial and legislative emphasis on formal equality to achieve effective equality for women, the United States proves to be progressive when compared to the more gender-neutral Israeli military.¹⁸⁹ While ironic, it is not surprising. Although classifications can be discriminatory and harmful toward women's interests, the lack of gender-based classifications does not ensure equal access, stature, or even opportunity for women.¹⁹⁰ Moreover, not providing benefits to women when real differences are involved—not providing maternity leave—can seriously hamper women's advancement. The nature of benefits and classifications of all kinds must be carefully examined to reveal their underlying justifications, which then must be judged in light of the validity of the goals involved. Moreover, underlying cultural norms must be examined to identify the most realistic means of achieving equality in the relevant social climate.

In the case of the Israeli Defense Service Law, there is no valid justification for differentiating between men and women when it comes to length of duty, participation in reserves, and the ability to opt out of military service for family reasons or conscientious objection. The Israeli legislative goal of supporting child rearing is valid, but there is no justification whatsoever to make this policy sex-specific. Doing so not only coercively pushes mothers into domestic roles that otherwise may have been shared or split differently, it penalizes, in an unforgiving manner, women who want to serve but are not and may never be mothers. Thus, the policy stereotypes women as mothers and disadvantages those women who do not fit the stereotypes and those men who are or would like to be primary

189. See *supra* notes 136–53 and accompanying text.

190. See *supra* note 148 and accompanying text.

caregivers to their children. It also hampers women's integration into the military and society more generally as fewer women serve and do so for shorter periods of time.¹⁹¹ Women don't need those kinds of benefits when they are taking on traditional male roles. Those kinds of benefits are dangerously double-edged and must be rooted out as voraciously as paternalistic legislation prohibiting women from combat roles, because the effect is precisely the same.

The Israeli Defense Service Law should and can be made gender-neutral while maintaining its carve outs for primary caregivers to further Israel's pronatalist agenda.¹⁹² In so doing, Israel will support the laudable goals of protecting and valuing child rearing and reproduction without bootstrapping women by fiat.

In the United States, classification on the basis of sex persists in the military, as women are excluded from combat roles.¹⁹³ Yet women are making waves nonetheless.¹⁹⁴ Social, cultural and legal advances in women's equality outside the military have filtered into the ranks of deployed forces.¹⁹⁵ Leaving women free to choose to volunteer as they see fit in the context of modern warfare, where the front lines blend with support roles, has enabled women's integration despite classificatory legislation.¹⁹⁶ The lack of particular benefits for women allows women to commit, in many situations, to act in operative combat roles in a manner indistinguishable from male service.¹⁹⁷

A Pentagon commission on diversity has recently recommended that the U.S. military end its ban on women serving in direct combat roles for two reasons: (1) such a restriction is discriminatory, and (2) it is out of touch with modern warfare.¹⁹⁸ Neutralizing the law for combat roles makes a lot of sense in modern times and would be a huge triumph for women in the United States. Excluding women from combat and from the draft hurts women in a variety of

191. See *supra* notes 52–54 and accompanying text.

192. See *supra* Part II.

193. See *supra* note 16 and accompanying text.

194. Darlene M. Iskra, *Who are the Women Who Have Broken Through the Military's "Brass" Ceiling?*, F. PUB. POL'Y (Summer 2008), <http://forumonpublicpolicy.com/summer08papers/archivesummer08/iskra.pdf>.

195. See *supra* notes 137–42 and accompanying text.

196. See Iskra, *supra* note 194, at 8.

197. See *supra* notes 136–42 and accompanying text.

198. Harding, *supra* note 10.

overlapping ways.¹⁹⁹ But it should be noted that simply allowing women into combat units will not create equality and that substantive oversight and careful consideration should be undertaken to be sure women and others are not discriminated against in practice—in the military and elsewhere.

199. *See, e.g.*, Becker, *supra* note 12, at 496–500 (“Exclusion of women from militia service in combat denies women the obligations of full citizenship.”); Leszkay, *supra* note 6, *passim*.

