Cross-Dressers with Benefits: Female Combat Soldiers in the U.S. and Israel

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

While some of this resistance has to do with actual, physical gender differences,3 such physical differences can be overcome by some women.4 Thus, physical differences -- i.e., upper body strength, stamina, physical might – that might be necessary for combat are not relevant to women who can meet minimum requirements. Thus, to the extent women can overcome minimum thresholds set forth for combat roles, excuses for excluding women based on physical differences are stereotypical and should be 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

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1 See e.g., Judith Gardam, Gender and Non-Combatant Immunity, 3 Transnational Law and Contemporary Problems 345, 366-367 (1993).
4 It should be noted that no reasons are documented to underlie the combat exclusion in U.S. law. See Mackinnon, supra note XX, at 275.
on sex discrimination. A greater challenge is determining whether combat roles should adopt to meet average women’s physical capacities, but with the evolution of modern combat, the blurring of front-lines with support services, and a greater emphasis on enabling technologies rather than brute strength, the problem is essentially solving itself.

Most of the resistance is more symbolic, based on normative gender role beliefs in the “male warrior” or concerns about sexuality and sexual mores affecting “cohesion” which are hard to quantify, are highly speculative and have been discredited. These concerns are based on others reactions to women in the military and thus it seems unfair to punish women on that account. Mainly, these concerns stem from ideas about women’s frailty, their need for protection and a perception of women as sexual objects as opposed to equal members of society and as such should be rejected as well. While some cite concerns regarding the rape and torture of women, excluding women from combat arguably makes them more vulnerable and more in need of protection than the provision of military training and the equal and empowered status this provides. Modern warfare has “blurred the existence of a front and a rear” enabling the capture of

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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.”)
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 XX, at 532.
10 See Blythe, supra note XX, at 160.
12 See Blythe, supra note XX, at 164-165.
women who are just as vulnerable to rape and torture as men. The male need to conform to a code of chivalry, to protect women and to 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 most military positions and combat roles in particular, remain a bastion of women’s exclusion in a world in which excluding women from male institutions, traditional professions and gender roles more generally have fallen away to constitutional objections and broad societal changes. Women are increasingly involved in the military but are still subject to explicit exclusions. In the U.S. in particular, women are not required to register for selective service under the draft law and are prohibited from engaging in direct combat roles. Most countries worldwide have similar restrictions and regulations.

From an international perspective, Israel presents an iconic view of women soldiers and the progressive inclusion of women in the military. Images abound of the young female soldier dressed in her olive green uniform and wielding an Uzi that is half her size. 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. Second, that draft pertains to all men and women, who are not otherwise exempted because of

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13 *Id.* at 165-166.


15 *See Rostker v. Goldberg*, 453 U.S. 57 (1981); *See also infra* note 26, and accompanying text.


religious study, religious practice or serious conscientious object that impairs their ability to serve.\textsuperscript{18}

In a recent N.Y. Times article,\textsuperscript{19} 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 all military roles just as men are. She comments, “They make up a third of the military and are treated as equals to males.”\textsuperscript{20} Apparently, however, her source for this information was a video created by CNN featuring footage of Israeli female soldiers.\textsuperscript{21}

Indeed, the image of Israel at the forefront of empowering women through military service, dedicated to equal treatment of women as demonstrated by much of its non-family law legislation,\textsuperscript{22} and personified in its girl soldiers who are indeed legally permitted to serve in any capacity, is misleading.\textsuperscript{23} Israel’s dedication to formal equality, and its occasional indication of its commitment to substantive equality and affirmative action for women, is peppered with loopholes,\textsuperscript{24} particularly in the military context.

\textsuperscript{18}See Israel Defense Services Law §§ 30, 36 (1986).
\textsuperscript{20}Id.
\textsuperscript{21}Id.
\textsuperscript{24}Even cases such as Nevo v. Minister of Labor which raised the mandatory retirement age for women to equal that of men and is the standard bearer of formal equality in Israel, see Barak-Erez, supra note 19, at
Although permitted by the law, Israeli women very rarely engage even in combat support roles, are completely absent as infantry and have advanced very insignificantly in military leadership. In fact, as I will argue in this paper, the more parochial U.S., with its regulations that are clearly classificatory by sex – with a male only draft and women excluded from direct combat units -- is actually more advanced in the quest for gender equality in the military.

The comparison I present between the role of women in the Israeli military and the U.S. military will demonstrate how feminism has taken hold differently across cultures with contrasting results. In Israel, where gender differences and inequalities are still deeply ingrained in society, facial attempts at gender neutrality provide little relief in the face of a legal and cultural background in which the role of mothering and gender difference has not been sufficiently unpacked and analyzed. Indeed, it is the significant

135, actually still permits women to retire at a younger age if they so choose but does not allow men the same advantage.

25 See e.g., Daphne Barak-Erez, The Feminist Battle for Citizenship: Between Combat Duties and Conscientious Objection, 13 Cardozo J.L. & Gender 531 (2007); Dafna Izraeli, Genderizing in the Israeli Military,[Hebrew] 14 Theory & Criticism 85, 86 (1999) (“The gender regime of the Israeli army, which is based on division of labor and on a genderized power structure, establishes and affirms the role women have been assigned as a natural matter of course—to be ‘a help to match.’”).

26 Women are not allowed to serve in direct combat roles in the infantry or as special operation s commandos or to serve in combat vessels other than in the air force, where they do serve as combat pilots in limited numbers. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 541(a), 107 Stat. 1547, 1659 (repealing 10 U.S.C. § 6015, which provided that “women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions.”); National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 531(a)(1), 105 Stat. 1290, 1365 (repealing 10 U.S.C. § 8549, which provided that female members of the Air Force “may not be assigned to duty in aircraft engaged in combat missions.”); Section, Aug. 10, 1956, c. 1041, 70A Stat. 375, as amended Oct. 20, 1978, Pub.L. 95-485, Title VIII, § 808, 92 Stat. 1623; Dec. 12, 1980, Pub.L. 96-513, Title V, § 503(44), 94 Stat. 2914; Dec. 5, 1991, Pub.L. 102-190, Div. A, Title V, § 531(b), 105 Stat. 1365 (authorizing Secretary of the Navy to prescribe manner of training for women officers and enlisted women members, including kind of duty to which women could be assigned, but barred women (other than aviation officers) from assignment to duty on vessels engaged in, or likely to be engaged in, combat missions)). Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Army, Navy, and Air Force et al., Direct Ground Combat Definition and Assignment Rule (Jan. 13, 1994) (determining that women be excluded from “direct combat roles” defined as being well-forward on the battle field). The current provisions, as amended and supplemented over the years, are codified at 10 U.S.C. §§ 652 & 6035. See also Ann Scott Tyson, Female Pilots Get Their Shot in the Iraqi Skies, WASH. POST, Feb. 27, 2006, at A1 (discussing female aviators serving in direct combat roles).
sex-linked benefits provided to mothers and women in Israel in their military service (exemption from reserve duty, shortened draft) that prove to make women’s inequality resistant to facially neutral laws.

By contrast, in the U.S. where the military has carved out a special island of differentiation, but underlying advances in the treatment of women and alleviation of workplace inequalities, as well as changed in the very nature of warfare, have made women more equal in the military than draft or combat laws make apparent.

Achieving equality is more complex than 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 and/or special treatment without carefully analyzing the values and practical ramifications at stake may undermine the enterprise. The U.S. should take heed of how benefits to Israeli women underlying their combat roles have undermined their success in the military and the Israeli legal system should reflect on how underlying legal and cultural forces make facially neutral laws ineffective.

This article will proceed in four parts. In this first part, I will unpack the two seminal Supreme Court cases regarding women in the military in their respective countries – Rostker v. U.S. and Miller v. Israel Defense Forces. I will point to the differences and similarities of the two cases and how each case contends with legally created benefits to women, which in turn create real differences between the genders. In the second part, I will point to the problems with the Israeli system of legal benefits to women in the military and propose how to rid Israeli legislation of discrimination and stereotypes by making provisions that support childbirth gender neutral. In 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 between the role of women in the Israeli and U.S. militaries and argue that there is more to gender equality than whether or not laws or gender neutral or benefits for women exist. Indeed, gender neutrality can provide a problematic mask under which deep discrimination lingers. Rather, the underlying reasons for benefits and the context in which neutrality functions must be clearly analyzed critically. In the U.S. progress towards gender equality makes discrimination in military laws less harmful, while gender neutral-laws in Israel do not 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. Miller demonstrates clearly why women are still second-class citizens in the Israeli army. Unlike in the U.S., Israeli laws and regulations do not prohibit women from combat units or exclude them from the draft. Yet, the laws provide significant benefits to women, benefits that keep them subordinate and handicapped.

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 compete gender neutrality. Here, however, I take a more nuanced

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28 See Barak-Erez, supra note XX (discussing how ingrained exceptionalism has undermined notions of equality in Israel).
view, arguing that while some benefits that are sex-specific (recognizing biological differences regarding gestation, for instance) or gender sensitive, are not only acceptable but necessary for achieving equality because of the existence of legitimate and valuable gender differences.\textsuperscript{30} Indeed, not recognizing such differences discriminates against women by not acknowledging the legitimacy of such differences.\textsuperscript{31} 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 \textit{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 \textit{Miller}, the facts are ideal to challenge the military status quo. A female candidate for the Israel Air Force pilot’s course is already a civilian pilot and she is qualified in every way for service in the Air Force. Her lawyers, aware of the great pull embodied in the justification of national security and the difficulty in legally challenging older laws in Israel,\textsuperscript{32} are particularly cautious – they do not attack any fundamental legislation or broad policies, they ask only that Alice Miller be permitted to serve in the Air Force as a pilot.

Moreover, the legal background could not have been riper for such an attack. The authority for military directives establishing that women not be placed in combat professions without separate consent and approval and establishing a list of certain

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\textsuperscript{31} Id.
\textsuperscript{32} See \textit{infra} note XX to XX and accompanying text.
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female jobs had just recently been repealed.\textsuperscript{33} Accordingly, although sex-specific classifications were still on the books, the Defense Minister’s Authority for promulgating the directives was no longer valid. Thus, aviation, considered a combat role, was not foreclosed to Ms. Miller as a matter of military regulations only as a matter of military policy.

And yet, the army refused to assign Miller to an Air Force profession because she was a woman. They informed her that it was the policy of the military not to assign women to combat roles such as piloting aircraft regardless of their qualifications. At first glance, the army’s decision seems a clear-cut case of discrimination on the basis of sex.\textsuperscript{34}

Still, what is so ensnaring about this decision is how compelling the Military’s case is for denying Miller the chance to be a pilot. While military regulations are no longer authorized to dictate that certain military professions are female, there are three legal distinctions between men and women in the military codified and solidified in The Defense Services Law (1986).\textsuperscript{35} First, women have a mandatory service of two years, while men serve for three years in compulsory service. Second, women serve in compulsory reserves only until the age of 38 while men serve until the age of 54. Third, and most significantly, women are exempted from compulsory military service if they are married and from reserve duty altogether if they are pregnant or are mothers.\textsuperscript{36}

\textsuperscript{33} Miller ¶ 5 (J. Mazza).
\textsuperscript{34} Although Israel has the Equal Rights for Women Law (Isr. 1951), 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 thus can be overridden by legislation. 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, H.C. 104/87, Israeli courts have embraced formal equality. Israeli courts have also determined that affirmative action for women in public offices is required. Israel Women’s Network v. Minister of Labor HCJ 2671/98.
\textsuperscript{35} Miller ¶ 3 (J. Mazza).
\textsuperscript{36} Id.
The Military therefore argues in *Miller* that because of these huge exemptions or “benefits” given to women, it is financially and logistically unjustifiable to train a woman to be a pilot in the Air Force. ³⁷ Such service requires a voluntary extension of service for seven years and particularly frequent and extensive reserve duty. Training women, it is argued, even those who agree to volunteer for the extended time it takes to undergo Air Force training, does not make sense for the military. Under the law, women pilots can exempt themselves from extended service and reserves by getting married and/or having children. Any attempts to voluntarily exempt oneself from such benefits are considered unlikely to be enforceable.³⁸ Thus, it is no surprise that the military does not want to train women pilots and that women, despite gender-neutral regulations, were and still are largely absent from combat and higher echelons of the military service in Israel.

Two judges agreed with the reasoning of the military paraphrased in the preceding paragraph, adding in a dose of deference to military decision-making in light of national security concerns.³⁹ The other three justices did not,⁴⁰ and Alice Miller was forcibly accepted into a pilots training course, which unfortunately she did not complete.⁴¹ Since then, however, women have succeeding in becoming combat pilots in Israel.⁴²

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³⁷ *See Daphne Erez Barak, The Feminist Battle For Citizenship: Between Combat Duties and Conscientious Objection, 13 Cardozo J.L. & Gender 531, 536 (2007) (“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.”)

³⁸ Miller ¶ 11 (J. Mazza).

³⁹ *See decisions of J. Kedmi and J. Ts. E. Tal.*

⁴⁰ *See decisions of J. Mazza, J. Strassberg-Cohen, and J. Dorner.*

⁴¹ *See Israel Air force Not for Her, NEW YORK TIMES (January 5, 1996) (explaining that Alice Miller failed qualification exams for flight training).*

⁴² *See Yossi Yehushua, IDF Presents: 3 New Female Pilots, YNET NEWS.COM (December 22, 2005), available at [http://www.ynetnews.com/articles/0,7340,L-3188543,00.html](http://www.ynetnews.com/articles/0,7340,L-3188543,00.html) (last visited March 2, 2011); Two Female Pilots and a Female Navigator Set to Graduate from Recent Pilot Course, IDF Website, (December 29, 2010), available at [http://dover.idf.il/IDF/English/News/today/10/12/2901.htm](http://dover.idf.il/IDF/English/News/today/10/12/2901.htm) (last visited March 2, 2011); Ruth Halperin-Kadari, Women in Israel 158 (2004).*
The challenge for the other three justices was to justify legally demanding that the army swallow and work around these potentially enormous benefits (or constraints) bestowed upon women. The law itself was not challenged, and the Justices did not mention the possibility that the Defense Services Law itself, which provides these significant benefits, be changed. Rather, it was the military policy of excluding women from the Air Force that was under fire. The army has traditionally enjoyed exceptional deference due to national security concerns. How then can a court demand that the army deal with this potentially very real handicap 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 for and deference to the need for military might, how could the court demand such a sacrifice from the military?

In other words, in *Miller* there is a significant legally created difference between men and women in the context of women in the military – as undeniable, albeit less

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43 The possibility of conducting a judicial review of infringing legislation was expressly restricted in the Basic Law: Human Dignity and Liberty to new legislation enacted after 1992.


useful, as biological differences such as gestational capacities, and breastfeeding.\textsuperscript{46}

Although the difference in this case is created by the law and not nature, it exists nonetheless and the question is how to deal with it.

In the U.S. the same issue arises in \textit{Rostker v. U.S.}\textsuperscript{47} At issue in \textit{Rostker} is whether a law mandating draft registration for men and not women is permissible under the equal protection clause.\textsuperscript{48} The majority notes that such a sex-based classification is justified because of a prior legal differentiation between men and women – only men can serve in combat units. This legally created distinction, according to the majority, which it refers to as well-established and entrenched in societal norms, provides sufficient state interest in excluding women from registering for the draft.\textsuperscript{49} The underlying law itself that excludes women from combat is not even challenged.\textsuperscript{50} While the dissent acutely points to the many non-combat jobs (70-80\% of all jobs in the military) that might be filled by drafted women, and calls the majority decision discriminatory, the weight of the difference created by the law overrides this practicality when it comes to the draft.

In Israel, however, Justices Mazza, Strassberg-Cohen, and Dorner are intent on overcoming the weight of the law that creates this legal distinction between men and women. Although this legal distinction is 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.

\textsuperscript{46} Miller ¶ 2 (J. Strassberg-Cohen) (“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.”)
\textsuperscript{47} 453 U.S. 57 (1981).
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
Strassberg-Cohen recognizes this legally created difference explicitly: “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.”

Justice Strassberg-Cohen analogizes the “benefit” of reduced military service for women to a physical disability and argues 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 fulfill 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 … 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.”

Like a physical disability, she argues, the legally created disability (aka benefit) on women in the army should be accommodated to counter the burdens it puts on women in achieving equality and desirable placements in the army.

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

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51 Miller ¶ 3 (J. Strassberg-Cohen).
52 Miller ¶ 6 (J. Strassberg Cohen).
pregnancy. 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 discrimination because sex is not equivalent to pregnancy, which they deemed a gender-neutral category. 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. According to Title VII, as amended by the PDA, pregnancy must be treated by employees as any other disability – it must receive the same legal treatment as physical or mental disabilities.

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. But, others have argued that pregnancy is not a disability. This puzzle came to ahead in Cal. Fed. v. Guerra when California tried to give some benefit to maternity leave over other disability leave. The Supreme Court held that pregnancy 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.

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53 *See Herma Hill Kay, Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath, 56 U. CIN. L. REV. 1, 78 (1987) (discussing her theory of episodic difference in which she accepts the need to accept female difference only during the stage of pregnancy).*


56 *Id.*

57 *Wendy Williams, Equality’s Riddle, Richard Posner*


60 *Id.* (under California law, women who took maternity leave were guaranteed a similar position upon their return while those on disability leave were not).
Treating differences as disabilities is troubling, because they are not. Women are as different from men as men are from women. 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 into disabilities? Why should the male norm be the model against which disabilities are defined? Categorizing women’s difference as a disability 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. Women’s difference should not just be accommodated as a disability; women’s differences from men, at least when they provide significantly value to society, should be accepted and appreciated. 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, male-centered terms.

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61 CATHARINE MACKINNON, Difference and Dominance, in FEMINISM UNMODIFIED: DISCOURSES IN LIFE AND LAW 37 (1987);
In the cases of *Miller* and *Rostker*, women’s situation in the military is not that of a disability. Rather, women have received exclusions and/or benefits that differentiate them by legislation and are then discriminated against because of the benefits. Describing their situation as having a disability pretends that their disadvantage it is an accident of fate, like being born without a leg, not a state imposed problem that can be remedied.

Justice Dorner on the other hand swings more broadly, arguing that discrimination on the basis of sex affronts human dignity, which she argues is protected by the Israeli Basic Law of Human Dignity. Anchoring prohibitions against discrimination based on gender in human dignity instead of equality has the interesting possible consequence of laws being unequal on their face and yet, if they do not violate human dignity, they would not be discriminatory. Or, stated differently, it is substantive equality and not formal equality that is derived from human dignity. Thus, for instance laws that give benefits to women, would not necessary discriminate against women if the purpose of discrimination is to protect or promote human dignity, autonomy and/or substantive equality.

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66 *Id. Andrews v. Law Soc’y of British Columbia, 1 S.C.R. 143 [1989] (Can.) (“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 inequality…”)*
Recognizing that such an affront on human dignity must be balanced against competing governmental interests, Dorner equates the differences encountered in *Miller* to biological differences like pregnancy and differences in religious beliefs and demands that the military step up to “adapt[] to the needs of women.”\(^67\) But, are legally created differences the same as biological differences or differences in religious beliefs? Justice Dorner argues that any discrimination must be uprooted regardless of its cause.\(^68\) Still, does the army need to accommodate handicapped soldiers in combat units? Or, more pertinently, would the army need to accommodate women if the underlying law said she can only serve for two years and can not commit to further service regardless of marital status (perhaps to encourage such status)? Would such legally created difference also need to be accommodated by the military?

Justice Dorner responds to this concern at the end of her opinion through 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.”\(^69\) But does not “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 leans once again on the concept human dignity but a clear reconciliation of these concerns is missing: “…the damage caused by closing the aviation course to women

\(^{67}\) *Miller* ¶ 16 (J. Dorner).

\(^{68}\) *Miller* ¶ 16 (J. Dorner).

\(^{69}\) *Miller* ¶ 22 (J. Dorner).
exceeds the benefit of the planning considerations. First, closing the aviation course to women violates their dignity and degrades them.”

Although they both recognize the tension, both Justices Dorner and Strassberg Cohen’s opinions leave us to contemplate how much legally created difference should the military have to accommodate. As Justice Strasberg-Cohen remarks, a discriminatory law such as The Israel Defense Services Law should be amended or neutralized in order to achieve equality “although not at any price.”

Justice Strasberg-Cohen simply contends that although The Israel Defense Services Law creates a difference, and a weighty one as she explicitly acknowledges, it can be neutralized at a “reasonable price” and therefore must be. But, what is a reasonable price and who gets to determine what is reasonable?

Justice Mazza is the only Justice who realistically struggles with this tension, which I believe is the key to this seminal case. Mazza takes seriously the planning, efficiency and budgetary concerns potentially imposed upon the military by the Israeli Defense Services 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 give birth, and gives notice that she retracts her commitment to volunteer, there will be no legal possibility of compelling her to serve.”

Recognizing the potential breadth and impact of these benefits is important, because they are

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70 Miller ¶ 3 (J. Strasberg-Cohen).
71 Miller ¶ 4 (J. Strasberg-Cohen) (“Our case falls into the second category, in which the relevant differences can be neutralized and it ought to be remedied.”)
72 Miller ¶ 20 (J. Mazza).
potentially significant. Minimizing them and insisting that the army accommodate them at all costs fails to contend with their seriousness.

Justice Mazza takes a practical stance toward these concerns. He notes that these potential problems are based on women backing out of their commitments, but such assumptions are 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.” He argues that in other countries disturbances from pregnancy and childbirth have been limited and then men also sometimes back out of their commitments to continued service. Other countries, however, do not exempt mothers from continued duty despite a woman’s voluntary commitment to do so. Acknowledging this, Mazza proposes an experimental integration of women into the Air Force in order to determine the real extent of the burden on the military, which Mazza points out is only speculative and unsubstantiated by the military. Mazza suspects that there will be little extra burden, if any, and that the vast majority of women pilots will uphold their voluntary commitments and that minimal maternity leaves will not greatly disrupt military function.

In the end, Justice Mazza is likely right – as statistics have borne out in Israel and internationally. And, his decision and reasoning is sufficient to get past the weight of difference in this case. But, the dilemma of legally created difference lives on and may not be so neatly parsed in the future. The problem is that although women are permitted

73 Miller ¶ 21 (J. Mazza).
74 Id. See also Blythe Leszkay, Feminism and The Front Lines, 14 Hasting’s Women’s L. J. 133 (2003) (noting U.S. studies that maternity leaves for women, or absence from reserves, are comparable to leaves for men who go AWOL or imprisoned for civilian violence – therefore, women and men have very similar attendance rates for military duty).
75 Id.
76 See e.g., Leszkay, supra note XX, at 162; Mady W. Segal, The Argument for Female Combatants, in FEMALE SOLDIERS – COMBATANTS OR NON-COMBATANTS? HISTORICAL AND CONTEMPORARY PERSPECTIVES 267, 272 (1982); Rimault, supra note XX, at 1105-1106 (describing logistical chances in a number of units and successes that women have achieved in combat units in the Israeli army).
into any military role, their benefits make them a liability and integration has not occurred.

II. Finding a Formula for Including Women in the Military that Can Work

The necessary way forward is not in contending with the weight of the difference created by the discriminatory Israeli Military Defense Law, but in reconsidering and unpacking the underlying law itself.\(^77\) By giving benefits and exemptions to mothers, wives and women generally, the Israeli Defense Services Law serves 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 real biological and value-laden gender differences are at stake, substantive equality that recognizes difference is needed to promote equality for women, to support important societal values, such as caregiving to children, and to recognize differences in women’s bodies and sexuality.\(^78\) Only when such secondary values are at stake should gender differences be

\(^77\) Because the Israeli Defense Services Law is a law dating back to the creating of the State, it is entrenched and not subject to judicial review, making the law extremely difficult to overturn. See section 10 of the Basic Law regarding the preservation of laws.

\(^78\) See Laufer-Ukeles, supra note 59, 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). Lucinda Findley, Transcending Equality: A Way Out of the Maternity and the Workplace Debate, 86 COLUM. L. REV. 1118, 1150 (1986) (“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.”); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 212-224 (1990) (advocating a relational, contextual approach to considering difference); Ann E. Freedman, Sex Equality, Sex Differences and the Supreme Court, 92 YALE L.J. 913, 960 (promoting a more explicitly normative and moral approach to determining sex equality in constitutional law). Andrews v. Law Soc’y of British Columbia, 1 S.C.R. 143 [1989] (Can.). MARTHA FINEMAN, NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 235 (1995); See also cites supra note 59.
recognized.\textsuperscript{79} Other times, recognizing difference can serve to subordinate women and lead to discrimination because such differences were created in a patriarchal society where women were subordinated.\textsuperscript{80} What women need as Mackinnon has explained is to “have it both ways” sometimes to be treated the same and sometimes treated differently depending on the nature of the difference that is at stake.\textsuperscript{81} The goal is to be able to decipher between when benefits harm and reinforce inequality and 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 U.S. and Israel in the realm of the military there is a legally created difference between the sexes as seen in Israeli Defense Services Law and in U.S. draft laws, not obviously comparable to any other context. First, the military receives a tremendous amount of discretion in making internal decisions in light of purpose of protecting the nation.\textsuperscript{82} Second, there is heady entrenchment of the military as a male dominant institution.\textsuperscript{83}

The justification for the Israeli Defense Service Law may be based on a policy that women, once they are wives and mothers, are not suited for military services – a

\[\text{\textsuperscript{79} See Laufer-Ukeles, supra note 59 at 36-39 ("Similarly, other than recognizing purely biological differences, where the difference is inextricably tied up with womanhood, recognition of difference should be justified in pursuit of a secondary objective beyond just promoting women's interests.")}\]
\[\text{\textsuperscript{80} See Laufer-Ukeles, supra note 59, at 36-39; CATHARINE MACKINNON, DIFFERENCE AND DOMINANCE, IN FEMINISM UNMODIFIED: DISCOURSES IN LIFE AND LAW 32-33, 39 (1987) ("[D]emands for equality will always appear to be asking to have it both ways: the same when we are the same, different when we are different. But this is the way men have it: equal and different too. They have it the same as women when they are the same and want it, and different from women when they are different and want to be, which usually they do. Equal and different too would only be parity.")}\]
\[\text{\textsuperscript{81} Id.}\]
\[\text{\textsuperscript{82} See infra notes XX to XX and accompanying text.}\]
\[\text{\textsuperscript{83} See infra notes XX to XX and accompanying text.}\]
blatantly discriminatory policy, particularly in a militarized society such as Israel in which the vast majority of societal leaders have held high command.84 The military is clearly central to Israeli society,85 so to deem women less capable and necessary is deeply problematic.86

In fact, however, the policy behind the sex-based classification in the law is not explicitly discriminatory, but a matter of a national agenda – reproduction.87 Ben-Gurion explained the benefits are in praise to “the woman’s special mission, the mission of motherhood.”88 National and religiously-driven attempts to recreate a horribly diminished Jewish population post-Holocaust are still felt in Israel.89 Moreover, tense demographic pressures in maintaining a Jewish majority in the state of Israel compound the push towards procreation. Such an agenda has influenced a plethora of legislation


85 Hadar Aviram, Discourse of Disobedience: Law, Political Phil. & Trials of Conscientious Objectors, 9 J. L. & SOCIETY 1, 11-12 (2008); YAGIL LEVY, THE OTHER ARMY OF ISRAEL: MATERIALIST MILITARISM IN ISRAEL (2003) (referring to the Israeli military as the melting pot of society); See Rimalt, supra note XX, at 1103 (“In Israel, military service is recognized as a hallmark of citizenship.”); Baruch Kimmerling, Patterns of Militarism in Israel, 34 EUROPEAN J. SOC. 196, 207 (1993).

86 See Rimalt, supra note XX, at 1104 (describing how the subordinate role of women in the Israeli military leads to less than equal citizenship in society).

87 But see the more neutral reasoning provided in CA 5/51 Steinberg v. Attorney General [1951] IsrSC 5 1061 (“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.”)


89 See e.g., Berkovitch, supra note XX, at 610.
and national policy that is pro materialist and pro reproduction.\textsuperscript{90} Indeed women’s role in reproduction has been compared and coupled with the male role in military prowess.\textsuperscript{91}

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.\textsuperscript{92} Moreover, one might argue 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 towards women as mothers.\textsuperscript{93}

Yet, there is no acceptable justification for demanding that the agenda of reproducing Jews be borne only by the country’s women despite individual preferences, talents, careers and agendas. Proponents of the law will counter that in fact women will de facto bear much of this burden and it is their right to choose to do so. It is indeed likely that given modern social norms women will bear most of the burden, 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 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. By


\textsuperscript{93} See infra note XX to XX and accompanying text.
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 and expect extended reserve duty. These roles are typically quite prestigious and ones that equip soldiers with a profession, or with connections that carry over into civilian life after service.

Instead, maintaining the value and purpose of supporting childbirth, the Israeli legislature should allow either parent to choose to be exempted from reserve duty upon birth of a child. Similarly, compulsory duty can 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 after a three month leave, caring for children is something either sexes can do. There is no sex-based reason for women and 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 out of such benefits is the cause for the Miller dilemma. The Israeli Defense Services 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. In so doing, the Israeli legal system stereotypically assumes motherhood and primary caregiving for women without allowing them the opportunity to opt out.

In that regard, the Israeli law is more problematic and harmful to women than the U.S. law that excludes women entirely from compulsory draft and from direct combat units. This is because nothing in the U.S. law benefits women so extensively so as to not let her be free of her special treatment. Women may not be drafted in the U.S. but they can commit themselves to voluntary service. Once they do so, they are permitted a maternity leave, but they have the same requirements as men to serve in reserve duty. They can not serve in direct combat units, but they serve in many non-direct units, and,
upon giving birth, take three months maternity leave. Moreover, the realities of modern warfare for U.S. soldiers in Iraq and Afghanistan is that woman 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. Military experts indicate that “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.” Thus, despite legislative classifications excluding women from combat, U.S. women soldiers fare better because they are burdened by less 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. But, based on more entrenched gender separation regarding the role of women in motherhood and reproduction, they do not have the ability to escape the benefits that are granted to them. The Israel Military Services law is deeply gendered in its provisions and simply opening access to women will not cure this gendered legislation even if the provisions that remain gendered are intended to benefit women in the manner of substantive equality. Benefits and accommodations to women that rely on stereotypes and cultural differences such as women’s propensity to care for children must be made gender neutral in order to give both men and women freedom to choose these roles and protection when the roles are.

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95 Id.
chose by either sex. Cultural differences such as the caregiver role cannot be made sex-specific without being discriminatory. 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.

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. As a matter of Israel Defense Forces (“IDF”) policy, even though legally permitted, women still do not serve as front-line infantry or artillery combat soldiers nor in elite brigades such as in paratroopers, which are still foreclosed to women, and only a marginal number of women have entered the ranks of certain specialty combat roles, pilots, navigators, anti-

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96 CATHARINE MACKINNON, On Exceptionality: Women as Women in Law, in FEMINISM UNMODIFIED: DISCOURS ENS ON LIFE 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”) 97 See Laufer-Ukeles, supra note XX, at 36.
99 An amendment was introduced in 2000 in the Equal Rights for Women Law that included, inter alia, a reference to equal rights in the army. According to Section 6D(a), which was added to the main law, “every 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.” A similar provision was also added to the new Section 16A of the Defense Service Law. Women’s Equal Rights Law, 5711-1951, 5 LSI 33 (1951-52) (Amend. 2000 No. 2) (Isr.). See Daphne Barak-Erez, supra note XX, at 543-547.
aircraft soldiers, field intelligence, UAV operators, and very recently naval officers.\textsuperscript{101}

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.\textsuperscript{102}

They are largely facilitators not combatants. This is despite the fact that modern military operations require much less physical strength and much more intellectual and mechanical prowess.

There are no apparent reasons for the extent of the segregation other than cultural norms.\textsuperscript{103} 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.\textsuperscript{104} The significant benefits given to Israeli women by the Israel Defense Services Law only serve to frustrate their integration by making them risky and unpalatable soldiers on paper and by differentiating them even more from their male peers. Gender-neutral laws cannot change the reality of social norms, particularly when there is limited judicial review in Israel.\textsuperscript{105} Gender-neutrality provides the opportunity,

\textsuperscript{101} As of 2005 only 2.5\% of women soldiers served in combat roles. \textit{See} Rimault, \textit{supra} note XX, at 1113.
\textsuperscript{102} \textit{See} Rimalt, \textit{supra} note XX, at 1113-1114.
\textsuperscript{103} \textit{See infra} notes XX to XX and accompanying text.
\textsuperscript{104} \textit{See Rimalt, \textit{supra} note XX, at 1100-1104.}
but it will not be realized without more fundamental changes in society and in the structure and orientation of the military.

Segregation and discrimination are also the influence of religious Jewish norms in Israel. Such religious norms affect society, the law and the military. In fact, religious members of the Knesset were vocally opposed to women serving in the military at all during discussions of the Israel Defense Services Law. A compromise was reached allowing women, but not men, to be released from mandatory conscription for reasons of “conscience” that included religious reasons. Religious and some secular Knesset members did not want this conscientious objection to be limited to religious reasons owing to broader beliefs in differences between men and women and their roles in the military as well as concerns about discrimination against secular women. In the end, the decision was left to the results of individual applications for exemptions from service and although usually used for religious reasons, the objections of conscience exclusion was applied more broadly.

In Milo v. Ministry of Defense, this uneasy status quo came to an end as the Supreme Court more squarely addressed the issue of exclusions from service available to women and not men under the objections of conscience clause. The Supreme Court

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107 See Rimalt, supra note XX, at 108 (citing remarks from the debate in the Israeli Parliament regarding the Israel Defense Services Law in 1949).
108 See Israel Defense Services Law § 30 (1986) “The following persons shall be exempt from the duty of the defense 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.”
109 See Rimalt, supra note XX, at 111-112.
110 See Id.; infra note 104.
111 HCJ 2383/04 Milo v. Minister of Defense [2004] IsrSC59(1) 166.
decided that a woman did not have a right to a waiver from army service because of conscientious objection to Israeli policies in the occupied territories.\footnote{Id.} Milo argued that she was entitled to opt out of military service because section 39(c) of the Defense Services Law permits women (not men) to opt out of military service because of conscientious objection or religious reasons she can not service in the military.\footnote{Id.} The Supreme Court ultimately determined that only conscientious objection for religious reasons was intended by section 39 (c), and that all other women should be treated just like men under section 36.\footnote{HCJ 2383/04 Milo v. Minister of Defense [2004] IsrSC59(1) 166.}

The distinction Milo sought based on the gendered Israeli Defense Services Law is based on no reason other than cultural norms, stereotypes and protectionist sentiments towards women. Milo did not even attempt to bring one other than to argue that it was what the law said and thus she was entitled to an exemption from service.\footnote{Id.} Some feminists have argued that the exemption for women advanced substantive equality by mainstreaming an alternative path of citizenship that was more feminine and less militaristic and dominated by the male establishment.\footnote{See Rimalt, supra note XX, at 115-121; Littleton, supra note XX; See also Motion to Intervene of Stacy Acker et al., at 6-11, Rostker v. Goldberg, 453 U.S. 57 (1981) (advocating for female exemptions from the mandatory draft because (1) women are less competent at military tasks, particularly combat tasks; (2) of disruption of family plans; (3) of male protectionism and stereotypes that may affect military success; (4) if imprisoned they would suffer more brutality by the enemy and (5) due to the difficulties fitting into male militaristic culture that is against women’s feminist nature.} In particular, Rimalt points to national service as a valid feminine alternative to military service that was paving a new...
and feminized path to citizenship.\textsuperscript{117} As against the process of desegregated the military as a means of achieving equality, Rimalt complains that marginal desegregation does not begin to break down the male dominate nature of the military.\textsuperscript{118} It is worth noting however that those women who were exempted under the clause from military service were not obligated to perform this alternative national service – they chose to. And, it was mostly religiously observant women who chose this alternative path.\textsuperscript{119}

There is no doubt that allowing women exemptions from military service not available to men provides a benefit that violates formal equality.\textsuperscript{120} If an exemption for conscientious objection could be given to both men and women who were disinclined to serve, it might promote alternative means of achieving valid citizenship. However, for national security reasons in Israel such an exemption is not possible at this time. As a result, it is left to justify such an exemption only for women. Exempting women more broadly then men because women are less powerful and suffer more discrimination in the military will not promote substantive equality in the long-run as Rimalt argues. First, this is because women will not integrate in the military and in society more broadly if they do not serve as often as possible. As army service being as central as it is to Israeli society, maximal integration is needed to support women’s equal citizenship.\textsuperscript{121} 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. In addition, taking women out of the picture silences their

\textsuperscript{117} See Rimalt, \textit{supra} note XX, at 115-121.
\textsuperscript{118} Id. at 117-119.
\textsuperscript{119} Id. at 119-120
\textsuperscript{120} HCJ 2383/04 Milo v. Minister of Defense [2004] IsrSC59(1) 166.
\textsuperscript{121} See infra note XX to XX and accompanying text.
conscientious objector voices as their objection to military service does not matter.\textsuperscript{122} The ultimate goal must be to integrate women fully into military life and/or provide conscientious objector exclusions for both men and women who may have problems serving and thereby legitimize a national service alternative when security concerns allow such an alternative to be implemented. Equality will not result from permitting gender differentiation because of cultural stereotypes that pervade army service - -it will serve to legitimate such discrimination.

As a result of the ruling in \textit{Milo}, the army is not mandatory for religious women while it is for secular women. Such religious benefits for girls have a number of problematic affects. First, segregation with respect to Jewish norms makes it harder for Israeli women to achieve equality within the military and without. There are fewer women in the military and the state allowing such segregation affects the perception of women more generally.\textsuperscript{123} 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 tarnishes the state’s commitment to sex equality. Third, separating out religious gender concerns allows the state to feel justified in its own policies without looking deeper into the ways in which the state discriminates against women in a manner different than religion, but perhaps, equally as harmful. Religious law openly separates between men and women. Secular law is more gender neutral but gender neutrality can not change discrimination in society, which is affected by religious norms. Finally, the military normalizes sex discrimination by acceding to religious

\textsuperscript{122} See Rimalt, supra note XX, at 121-125 (acknowledging this problem with allowing female exemptions but still advocating for such exemptions); Mary Becker, \textit{The Politics of Women’s Wrongs and the Bill of Rights: A Bicentennial Perspective}, 59 U. Chi. L. Rev. 453, 496-500 (1992).

\textsuperscript{123} See Id.
demands. In addition to allowing only religious girls to be exempted from army service, religious soldiers seek modesty and protection of “family purity” by demanding that co-ed units are sex segregated, and the military often accedes to these demands.124

IV. Conclusion: Putting the Analysis into Context

In contrast to the upbeat reports in the media and popular belief about the power of women in the Israeli military, the reality for women in the Israeli military is more complicated. Despite women’s access to combat roles in the military, 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. Alternatively, Israel’s commitment to substantive equality, which allows for such benefits is not sufficiently rationalized nor based on legitimate valuable differences in women that need to be supported. Rather, such benefits belie protectionism, stereotypes and discriminatory policies.

Indeed, it is ironic that in a rare instance in which the U.S. breaks with its strong judicial and legislative leaning on formal equality to achieve equality for women, the U.S. proves to be progressive in comparison to the more gender-neutral Israeli military. While ironic, it is not surprising. While classifications can be discriminatory and harmful toward women’s interests, the lack of classifications does not ensure equal access, stature or even opportunity for women. Moreover, not providing benefits to women when real difference is involved – i.e., the lack of maternity leave can seriously hamper women’s

124 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].
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 reality in the relevant social climate.

In the case of the Israel Defense Services 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 for family reasons or conscientious objection. The Israeli legislative goal of supporting caregiving is valid, but there is no justification whatsoever to make this policy goal 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 and are not even parents and may never be. Thus, it stereotypes women as mothers, and disadvantages those women who do not fit the stereotypes. It also hampers integration in the military and society more generally as fewer women serve for shorter period of time. 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, quite frankly, the effect is precisely the same.

The Israeli law of military service should and can be made gender neutral while maintaining its carve outs for primary caregivers to further its pro-natalist agenda. In so doing, Israel will support the laudable goals of protecting and valuing caregiving and reproduction without bootstrapping women as a matter of fiat.
In the U.S. classification on the basis of sex persist in the military, as women are excluding from combat roles, although women are making waves nonetheless. Social, cultural and legal advances in women’s equality outside the military have filtered into the ranks of deployed forces. 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. The lack of particular benefits for women allows women to commit in many situations to act in operative combat roles in a manner not distinguishable from male service.

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. Neutralizing the law for combat roles makes a lot of sense in modern times and would be a huge triumph for women in the U.S. Excluding women from combat and from the draft hurts women in a variety of overlapping ways. 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 all others are not discriminated against, in practice, in the military and elsewhere.

125 See infra notes XX to XX and accompanying text.