EQUALITY WITH A VENGEANCE: FEMALE CONSCIENTIOUS OBJECTORS IN PURSUIT OF A VOICE AND SUBSTANTIVE GENDER EQUALITY

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In December 2002, Shani Werner, a member of a group of young Israeli women who refused to serve in the military because of their conscientious objection to the occupation of the West Bank and Gaza, wrote an open letter to the other members of her group:

> When we drafted our first protest letter as high school seniors (in the summer of 2001), we drafted it together—male and female conscientious objectors alike. We didn't ask ourselves whether both [of] these refusals to serve (the men's and the women's) belonged together. It was clear to us that a woman's refusal was identical in its importance to a man's, and therefore we were not aware of the significance of the letter that we wrote, which placed male and female conscientious objections on an equal footing. . . .
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> A great deal of time has past since then . . . . As time passed, frustration built up in me. I started feeling that within our [sheltered environment]—that of high school graduates in particular, and of the Israeli left in general—we created a mirror image of the very phenomena we are fighting against. We created a militarization of draft resistance.
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> The extremely upsetting image of the good woman who awaits the return of "her" soldier from the front and who irons his uniform—[the image] against which we are fighting—we have not changed it. We have created a mirror image of her—a woman

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> who is yearning for the quick release of the male conscientious objector from prison, and who in the meantime encourages him from a distance . . . .
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> . . . .
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> . . . We have stopped debating the significance of the phenomenon of women's conscientious objection, and we have almost completely ceased to promote it in the public sphere . . . . Nonetheless, we keep debating the issue of imprisoned male draft resisters over and over again.
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> My refusal to be drafted, which I viewed in the past as a public-political stance, has today turned into a private one. . . . Because the public discourse is not aware of it and the left-wing discourse ignores it, the conscientious objection of young women has stayed a private matter, not to mention a silenced one.[1]

When Shani wrote this letter, the phenomenon of women's conscientious objection had not received significant exposure or recognition in Israeli public or legal discourse. Conscientious objection was identified strictly with male draft resistors: conscripts and reservists who refused to serve on grounds of general pacifism or their specific opposition to Israeli policies in the Occupied Territories of the West Bank and Gaza.[2] Furthermore, not only did the Israeli public discussion of draft resistance focus on the refusal of these men and the jail terms they received, but it also created an overlap between conscientious objection as a social and legal phenomenon on the one hand, and the incarceration of the male conscientious objectors on the other. The fact that women also signed the 2001 High School Seniors' Letter[3] and refused to be drafted into the military on grounds of conscience

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[1] Open Letter from Shani Werner (Dec. 31, 2002), *available at* http://www.newprofile.org/showdata.asp?pid=143 (Hebrew).

[2] *See infra* Part II.

[3] This letter was sent to Israeli Prime Minister Ariel Sharon in August 2001. It was signed by sixty-two young men and women. Among other things, they wrote "When the elected government tramples on democratic values and the possibility of a just peace in the region, we have no choice but to obey our conscience and refuse to take part in the attack on the Palestinian people." Gadi Algazi, *Lehakshiv le Kol Haseruv* [*To Listen to the Voice of Objection*], *in* MISHPETEY HA-SARBANIM: HA-TOVE'A HA-TZVA'I NEGED HAGAY MATAR, MATAN KAMINER, SHIMRI ZAMERET, ADAM MAOR AND NAOAM BAHAT, HA-TOVE'A HA-TZVA'I NEGED YONATAN BEN ARTZI [THE REFUSNIKS TRIALS: THE MILITARY PROSECUTOR VERSUS HAGAY MATAR, MATAN KAMINER, SHIMRI ZAMERET, ADAM MAOR, NOAM BAHAT, AND THE MILITARY PROSECUTOR VERSUS YONATAN BEN-ARTZI] 7, 11 (Dov Khenin et al.

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did not penetrate public or media awareness. The public eye also ignored the fact that these women, although not incarcerated for their beliefs, were nonetheless active draft resistors and performed alternative forms of civilian national service. This situation resulted in part from the structure of the Defense Service Law that governs the issue of conscientious objection to military service in Israel.[4] The statute contains separate provisions for dealing with male and female conscientious objectors. Under its terms, women, unlike men, enjoy the explicit right to be exempted from military service on grounds of conscience. Consequently, throughout the past, female conscientious objectors have received exemptions from military service quite easily, whereas similar requests made by men have usually been denied. Moreover, those men who continued to resist the draft were tried before military tribunals and imprisoned.[5]

However, since Shani Werner wrote her letter, changes have taken place. These changes have reshaped the character of the public and legal discussion of the issue of conscientious objection. Specifically, women's conscientious objection has started to gain wider public recognition,[6] and no longer remains a private matter of concern only to female objectors. But it appears that women's draft resistance has won recognition only because it has adopted the characteristics of the parallel male phenomenon. In 2004, the military authorities decided to reinterpret the different legal provisions

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eds., 2004) (Hebrew) [hereinafter THE REFUSNIKS TRIALS]. A year later the letter was re-signed by approximately 300 students (male and female), and sent again to the Prime Minister. *Id.*

Algazi indicates that these letters followed a tradition of letters signed by high school seniors that started in the 1970s. All such letters were signed by both male and female students who declared their opposition to the military occupation of the West Bank and Gaza and the war in Lebanon. *Id.* at 23-35. For the most recent high school seniors' letter, which was drafted and signed in 2005, see Seniors' Letter to Israeli Prime Minister Ariel Sharon (2005), *available at* http://www.hagada.org.il/hagada/html/modules.php?name=News&file=print&sid=3241 (last visited Oct. 30, 2006) (Hebrew).

[4] Defense Service Law (Consolidated Version), 5746-1986, 40 LSI 112 (1985-86) (Isr.).

[5] *See infra* notes 58-59, 64 and accompanying text.

[6] Lili Galili, *Tzahal Lo Shole'akh Sarvaniot La-Keleh* [*The IDF Does not Send Female Objectors to Jail*], HA'ARETZ, Jan. 21, 2004, *available at* http://news.walla.co.il/?w=//494971 (Hebrew); Bili Moskuna Lerman, *Otsrot Beyarok* [*Stopping at the Green Line*], MA'ARIV, Mar. 2004, at 62 (Hebrew); Yuval Yoez, *Matzpun Ekhad Le-Gvarim ve Nashim* [*One Conscience for Men and Women*], HA'ARETZ, Aug. 22, 2004, *available at* http://www.haaretz.co.il/hasite/pages/ShArtPE.jhtml?itemNo=467558&contrassID=2&subContrassID=2&sbSubContrassID=0 (Hebrew).

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that address conscientious objection, and enforce a stricter policy towards female objectors.[7] As a result, some women have served sentences in military prisons for their refusal to serve.[8] Subsequently, Israel's Supreme Court endorsed this new policy. Following the petition of a female conscientious objector who was denied exemption and then imprisoned, the Court ruled that women's separate right to conscientious exemption should be abolished, since the principle of sex-based equality required formal equality between men and women.[9] In other words, in order to "equalize" conscientious objection, the Court decided that women should receive precisely the same strict legal treatment as men.[10]

This Article will investigate the process by which women's conscientious objection has been simultaneously "masculinized" and formally equalized. The story of female draft resistors in Israel serves as a case study, providing important insights into the inherent constraints of contemporary legal discourse in promoting substantive gender equality and into the relationship between specific legal arrangements and the invisibility of women in the public sphere. This case study also sheds a more nuanced light on the nature of separate legal arrangements for women, and raises important questions about the appropriate feminist agenda for social and legal change. As this Article will analyze and explain, the formal reference to equality that legitimized the denial of the separate right granted to women has far reaching consequences from a woman's perspective. When those consequences are compared with the old regime of gender separation, it is unclear whether women were better off before or after the change. In this sense, it seems that Shani Werner underestimated the significance of her conscientious objection with regard to its transformative potential. True, in the framework of the original legal structure, women's "voice" of resistance was weak and largely ignored; however, it was not meaningless in the public sphere. Rather, considering the central role of the military in

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[7] *See infra* notes 133-134 and accompanying text.

[8] Two cases have garnered publicity. Inbal Gelbart was imprisoned for four consecutive terms, but eventually exempt from military service for reasons of pacifism. *See* Lili Galili, *Be'karov Vaadat Matspoon achat Le'banim Ve'banot* [*Soon, One Conscious Committee for Boys and Girls*], HA'ARETZ, Mar. 5 2004, *available at* http://www.ynet.co.il/articles/0,7340,L-2880804,00.html (Hebrew). Laura Milo was imprisoned for one term of fourteen days before appealing to the High Court of Justice. *See infra* Part III.

[9] HCJ 2383/04 Milo v. Minister of Defense [2004] IsrSC 59(1) 166.

[10] *Id.*

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Israel in shaping the meaning of citizenship in a male-biased manner, the practice of women's conscientious objection to the draft appeared to hold the promise of reconstructing the commitments of citizenship in a non-militaristic vein that would have been a significant step toward substantive gender equality. Given the Supreme Court's recent decision,[11] however, the possibility that this form of conscientious objection would win recognition has been completely undermined, as has its growing influence in the public sphere.

Part I of this Article outlines the legal foundation of the Defense Service Law and explains the role of the military and military service in Israel. It also examines the legislative history that shaped the separate legal provisions applied to female and male conscientious objectors. Part I explores how this particular sex-specific legislation was born, rationalized, and consolidated, and what its implications for women were. This Part argues that, while this legislation was clearly shaped by problematic gendered perceptions, the separate legal arrangement for conscientious objection would eventually grant women an important right to resist the draft. This right would become especially significant in light of the problematic link between military service and citizenship in Israel and the adverse effect this link has on the status of women. More specifically, the argument is that not only did the separate right to conscientious objection protect women's freedom of conscience, but it also held transformative potential. This right opened the door for a feminist practice of civil community service, which would replace military service and potentially demilitarize the commitments of citizenship in Israel, thereby promoting substantive gender equality.

Part II explores the further consequences of the separate legal arrangements for male and female conscientious objectors. Specifically, it focuses on questions of law and voice, examining the influence of various legal arrangements on women's ability to be heard and have a significant influence and presence in the public sphere. This Part argues that the prevailing masculine legal order under which women exercised their separate right to conscientiously object interfered with their ability to articulate a meaningful public voice of protest in terms of both visibility and presence in the public sphere. Hence, while women exercised a more significant right to conscientiously object, the Israeli public discussion of draft resistance focused only on the phenomenon of male draft resistors.

Part III evaluates the significance of the recent legal changes to the interpretation and application of the separate provisions of the Defense

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[11] *Id.*

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Service Law. It highlights the potentially detrimental consequences of a legal reform that undermines existing separate legal arrangements for men and women in the name of sex-based equality. It also raises important questions regarding the relationship between feminist lawmaking and the courts.

This Article concludes with the claim that the story of female conscientious objectors in Israel provides an important case study regarding the limits of the law, its unexpected effects, and the often-overlooked potential for social change. This story also sheds light on the inseparable link between feminist agendas and legal outcomes.

I. THE GENDERED CONSTRUCTION OF CONSCIENCE

A. Exemptions from Military Service: The Israeli Legal Framework

Israel was the first—and is still the only—Western democracy to have mandatory conscription of women.[12] The 1986 Defense Service Law,[13] which replaced the 1959 version,[14] mandates military service for both men and women while differentiating between the sexes in the terms of conditions of service. Article 1 states that the law applies to men between the ages of eighteen and fifty-four and to women between the ages of eighteen and thirty-eight.[15] Gender-based differentiation is also made with regard to the length of mandatory service and the extent of reserve duty obligations.[16] In addition, as far back as 1949, the original version of the Defense Service Law created a gender-based distinction regarding the legal grounds on which a person could file for exemption from military service. The Law granted women exemption from military service on three basic

[12] Amir Paz-Fuchs & Michael Sfarad, *The Fallacies of Objections to Selective Conscientious Objection*, ISR. L. REV., Fall 2002, at 111, 114 n.7.

[13] Defense Service Law (Consolidated Version), 5746-1986, 40 LSI 112 (1985-86) (Isr.).

[14] Defense Service Law (Consolidated Version), 5719-1959, 13 LSI 328 (1958-59) (Isr.).

[15] Defense Service Law (1986).

[16] Men are required to perform three years of service and women two years. Defense Service Law §§ 15-16 (1986) (note that in the translation posted on the Ministry of Foreign Affairs website, males' service requirement is incorrectly listed as thirty months). On completion of their mandatory service, citizens "of military age" are subject to an annual reserve duty. In the case of men, "military age" is defined as "any age from eighteen to fifty-four years." In the case of women it is "any age from eighteen to thirty-eight years." *Id.* § 1.

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grounds: family status (marriage, pregnancy, or motherhood), religious belief, and conscientious objection.[17] These exemptions were subsequently integrated into the consolidated version of the Defense Service Law in 1959 and continue to apply to all women who might otherwise be called to serve in the military.[18]

Similar exemptions from regular and reserve military duty have never been formulated for men. Rather, the only legal basis for exemption of this kind is pursuant to a different section in the Defense Service Law of 1986, which grants the Minister of Defense a general discretion to exempt "a person of military age" from the duty to perform military service "for reasons connected with the requirements of education, security, settlement or the national economy or for family or *other reasons*."[19] Thus, the case of

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[17] Those exemptions were included in Section 11 of the 1949 Law. Defense Service Law § 11, 5709-1949, 3 LSI 112 (1949) (Isr.).

[18] The 1959 Consolidated Version incorporated the exemptions, Defense Service Law § 30 (1959), and in the 1986 Consolidated Version the relevant provisions read:

> (a) The following persons shall be exempt from the duty of defence service –
> (1) The mother of a child; (2) A pregnant woman.
> (b) A married woman shall be exempt from the duty of regular 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 defence service shall be exempt from the duty of that service.

Defense Service Law § 39 (1986). The religious exemption is further elaborated in Section 40 of the Law:

> A female person designated for defence service who declares in writing under section 15 of the Evidence Ordinance (New Version), 5731-1971, before a judge (*shofet*, *i.e.*, a judge of a civil court – Tr.) or a judge of a rabbinical court (*dayan*) (1) that reasons of religious conviction prevent her from serving in defence service and (2) that she observes the dietary laws at home and away from home and (3) she does not ride on the Sabbath shall be exempt from defence service after delivering the affidavit, in the manner and at the time prescribed by regulations, to a calling-up officer empowered in that behalf.

Id.

[19] *Id.* § 36 (emphasis added). The relevant provisions of Section 36 read:

> 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 Defence Forces or for reasons connected with the requirements of

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every man who wishes to be exempt from military service falls within this paragraph, and the grant of that exemption—on whatever grounds it might be based—is not defined as the individual's right, but rather as a discretionary matter solely dependent upon the consent of the Minister of Defense. By contrast, a woman's exemption from military service is not subject to discretionary approval and is based solely on the submission of proof that she meets the specific conditions established by law.[20]

B. Historical Background

Why did the law create this distinction between men and women with regard to their military service? A close analysis of the legislative history of the Defense Service Law reveals that the law reflects a great deal of ambivalence toward both women's military service and women's equality in general. Expressions of this same ambivalence can be found in other legal provisions enacted in the early years of the State as well.[21]

> education, security, settlement or the national economy or for family reasons or for 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 specific period or absolutely . . . .

Id. (note that the translation posted on the Ministry of Foreign Affairs website reads "security, settlement," but a more accurate translation would be "security settlement" or "security-settlement").

[20] Married women, pregnant women, and mothers have to provide the military with an official document to certify their family status, their motherhood, or their pregnancy. Defense Service Regulations, 1989, KT 5237, 188 (Exemption for a Mother of a Child and a Pregnant Woman). Female conscientious objectors and religious women have to file an affidavit with a special committee that handles their request for exemption. Those women are then required to appear before the committee with two witnesses that support their claim that reasons of conscience or reasons connected with their family's religious way of life prevent them from performing military service. If the committee is persuaded with the sincerity of the claim, it must grant the requested exemption. Defense Service Regulations, 1978, KT 3895, 2176 (1978) (Women's Exemption from Military Service on Grounds of Conscience or Religious Familial Way of Life). By contrast, men seeking exemption on conscientious grounds approach a different committee that has no direct statutory basis. This committee was established by the Minister of Defense under his discretionary power to grant exemptions. *See infra* note 57 and accompanying text.

[21] *See, e.g.*, Women's Equal Rights Law, 5711-1951, 5 LSI 171 (1950-51) (Isr.). For a detailed analysis of the complexity of attitudes toward women and womanhood as reflected by early Israeli legislation, see Noya Rimalt, Sameness, Difference, and Gender Equality in American and Israeli Law 209-35 (2001) (unpublished Ph.D. dissertation, Tel Aviv University) (on file with University of Haifa Library) (Hebrew).

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Formally speaking, the founding fathers of the State of Israel saw themselves as dedicated to the principle of gender equality. The Proclamation of Independence announced that the State of Israel "will ensure complete equality of social and political rights to all its citizens irrespective of religion, race or sex."[22] Further, the first elected government's official objectives established a more detailed endorsement of the equality of women.[23] Despite the declarative statements regarding equality, however, the political establishment and the legal system were guided by deeply-rooted stereotypical and patriarchal perceptions of gender and gender roles. Women were perceived first and foremost as mothers and wives whose primary role was the bearing and rearing of children. This perception was fed in part by the image of women in Jewish religious law.[24] It was also supported by the national ethos that accompanied the foundation of the State, according to which the State of Israel was predestined to bring about the rejuvenation of the Jewish people in their homeland. The perception of women as child-bearers and mothers was ascribed a central role in the fulfillment of that vision.[25]

It is against this backdrop of tension between deeply entrenched beliefs regarding the distinctive differences between men and women, on the one hand, and, on the other, the pronounced commitment to the principle of equality in general and to sex-based equality in particular, that one should understand the structure of the Defense Service Law.[26] This law, first enacted in 1949 (one year after the establishment of the State of Israel), was the first law to cope with this tension and accommodate it legally. Thus, the Defense Service Law imposed the draft on women and men both,

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[22] PROCLAMATION OF INDEPENDENCE para. 13 (Isr. 1948), *translation available at* http://www.knesset.gov.il/docs/eng/megilat_eng.htm.

[23] Specifically, it was declared that "full and complete social equality of women will exist, equality of rights and duties with regard to the State, the society and the economy and with regard to the legal system." Pnina Lahav, *Shivooy Zcchooyot Ha'isha kesheapaliative Rak Mekalkel: Hadyoon Ba'knesset Al Chok* [*When the Palliative Simply Impairs: Debate in the Knesset on the Law for Women's Rights*], 46-47 ZMANIM 149, 149 (1993) (Hebrew).

[24] RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN 166-72 (2004).

[25] Nitza Berkovitch, *Motherhood as a National Mission: The Construction of Womanhood in the Legal Discourse in Israel*, 20 WOMEN'S STUD. INT'L F. 605, 616 (1997); Lahav, *supra* note 23, at 149-50.

[26] Nitza Berkovitch demonstrates this tension in the context of the exemption for married women. Berkovitch, *supra* note 24, at 608-10.

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making some Jewish women's voluntary practice of participating in pre-state Israel's defense activities a mandatory state rule.[27] However, married women, pregnant women, and mothers were exempt from military service, and hardly any members of the Knesset (the Israeli legislature) protested against this all-inclusive exemption or critically debated the gendered assumptions underlying this exemption.[28] An explicit expression of this ambivalence with regard to the appropriate legal treatment of women can be found in the words of David Ben-Gurion, the first Prime Minister of Israel and the first Minister of Defense, who introduced the proposed draft of the law to the Knesset. Ben-Gurion praised the principle of gender equality as expressed and exercised by the new statute:

> Women have been equal partners with regard to all rights and duties in the Zionist movement and in the Yishuv [the pre-state Jewish community], in all of the Yishuv's projects, in construction and in defense, in the founding of the State and in the establishment of the Israel Defense Forces, and they have done their share in our War of Independence.[29]

Nevertheless, Ben-Gurion explained:

> When debating the status of women, two things must be remembered—and both at the same time. The first—the special mission of the woman—is the destiny of motherhood. There is no greater mission than this in life. . . . We should honor and value motherhood, and place the woman in the most comfortable and appropriate conditions when she is to be a mother . . . . *[W]omen should not be assigned roles that are incompatible with motherhood.*[30]

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[27] The central military organization in the Yishuv (the pre-state Jewish community) was the Haganah, which was established in 1920 and served as a "people's militia" for the protection of the community. Thousands of Jewish women were active members of the Haganah and of the other smaller defense frameworks. Some of these women participated as fighters in the war of independence. *See* Lilach Rosenberg-Friedman, *Religious Women Fighters in Israel's War of Independence: A New Gender Perception or a Passing Episode?*, 6 NASHIM 119 (2003).

[28] Berkovitch, *supra* note 25, at 610.

[29] DK (1949) 1569.

[30] *Id.* at 1568-69 (emphasis added).

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Ben-Gurion concluded by stating that "women are not disqualified from any kind of service, they are not deprived of any right, and they are not exempt from any duty unless it interferes with their motherhood."[31]

Furthermore, even when Ben-Gurion addressed the military service of single women—those who were supposed to serve in the military on equal terms with men—it is clear that he was not seeking full equality in the military, but rather a framework of military service founded on a separate basis for each gender:

> We do not intend to draft women [in]to combat units . . . . [T]he training that we see necessary for women is basic military training and agricultural instruction. . . . I fully agree with those who pointed out the importance of our birth rate, but for that reason there is a need to train women. . . . *[I]f we want our young women in their places of settlement to get married and have babies—we have to allow them to protect themselves and their babies*.[32]

It is important to note that these basic perceptions of the unique role of women as mothers united almost all Knesset members. The rhetoric of Ben-Gurion and other secular parliamentarians merged with the similar rhetoric voiced by representatives of the religious parties. Likewise, the arguments of both secular and religious Knesset members revealed underlying patriarchal views regarding the unique role of women; those views laid the ideological groundwork for the first type of exemption that was granted to women under the law, the exemption on the grounds of family status.[33] This exemption released married women, pregnant women, and mothers from military service. Yet, while Knesset members from secular parties still endorsed a mandatory draft for some women,[34] representatives of the

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[31] *Id.* at 1569.

[32] *Id.* at 1570 (emphasis added).

[33] MK Ya'akov Meridor from the National Herut Party suggested changing the conscription age for women from eighteen to nineteen and explained: "If we don't require women to be drafted until the age of 19, we leave them the option of getting married during the year between 18 and 19. I believe this can add thousands of weddings each year and this is something we should not underestimate with regard to the distant future." *Id.* at 1608. The religious Minister of Social Affairs Rabbi Levin added in this context: "God Almighty created men and women and destined each for a different role, and no human being should aspire to change this order that is predetermined." *Id.* at 1446.

[34] *Id.* at 1336-1627.

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Jewish religious parties objected to the conscription of women altogether.[35] The religious position was that drafting women might pose a real threat to the Jewish family and to Jewish tradition, not only because of women's distinctive role as mothers, but also for moral and religious reasons related to modesty.

Member of Knesset (MK) Shag from the United Religious Front best articulated this perception of difference when he stated:

> [W]hy haven't most of the civilized nations of the world imposed this obligation on women up until today? . . . [First,] because women, due to their nature, due to their physical temperament—after all, we ourselves call them the weaker sex physically speaking—cannot perform combat duty. The second reason is this: because this might create a breach with regard to morality and modesty. And the third reason is that the mandatory draft of women might lead to a lower birth rate.[36]

Moslem Knesset members also endorsed this formulation of gender difference and expressed similar objections to the conscription of women. MK Jarjura from the Democratic List of Nazareth explained:

> Imposing obligatory military service on women is an innovation that is contradictory to the laws of nature ever since the creation of the world, and it is against the laws and views of religion and the principles of society and its norms. . . . A young woman has special rights in society[.] . . . [S]he is the housewife who educates the future generation. She stands out in her compassion and in other emotional sensitivities. . . . Surely she can be of help in other areas that fit her condition and her special characteristics.[37]

The strong objection of all religious members of the legislature to any form of military service for women led to the creation of the second type of exemption for women: an exemption on the grounds of religious belief.[38]

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[35] *Id.*

[36] *Id.* at 1524.

[37] *Id.* at 1528-29.

[38] In the initial legislative proposal, it was suggested that the religious exemption would be phrased as follows: "A woman of military age who declared, in such manner as will be prescribed by the regulations, that she is observant and that her religious conviction prevents her from serving in the military shall be exempt from the duty of that service." Legislative Proposal for the Defense Service Law, § 11(c), 1949, HH, 185, 188.

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This exemption was included in the first draft of the bill, apparently by secular Knesset members in the hope that integrating it into the bill would resolve the religious and secular dispute over women's military service.[39] But these hopes evaporated during the legislative debates. Some religious Knesset members declared that the specific exemption provided for religious women was not satisfactory in their eyes for two major reasons. First, the Ultra Orthodox Knesset members argued that, in terms of women's inherent difference from men, it was more appropriate to provide a comprehensive exemption from military service for all women than a special exemption for religious women alone. In this context, the Minister of Religions, Yehuda Leib Maimon, stated: "Yes, I object to giving any special right to religious women. Out of respect for women, for the purity of women, all daughters of Israel are as one. And I do not want to differentiate between a religious woman and a non-religious woman."[40]

Second, the more Zionist among the religious members of Knesset worried that a specific exemption would stigmatize religious women as a group. Therefore, they suggested that the religious exemption should be included in a more general category of exemption, one that would refer to all forms of conscientious objection to the draft, irrespective of gender and not limited to religious grounds.[41]

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[39] DK (1949) 1447.

[40] *Id.* at 1556. The Minister of Social Affairs, Y. M. Levin, added: "[T]his amendment does not solve the problem, as a matter of principle, and our demand to abolish the obligatory military service for women in general still stands. Apart from that, we believe that every Israeli woman is internally religious, even if she does not state it explicitly, and we should state it for her." *Id.* at 1447.

[41] MK Unna, representative of the United Religious Front, explained:

> *We do not want public opinion to view the religious woman as one who does not fulfill her obligation to the state.* That would be the result of the law in its proposed form. . . . *[I]f the issue of religious women's exemption was included in a general section that deals with the issue of exemption on grounds of conscience, one could live with this arrangement.* For then it would be clear that the intention here is for an individual solution, and not for creating a class of those who are exempt, with all the negative implications. In my opinion, the issue of exemption on grounds of conscience is an issue that the law has to deal with[.] . . . [P]eople who object to military service out of genuine grounds of conscience should not be denied the right to be exempt.

Id. at 1522-23 (emphasis added).

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C. The Right to Conscientious Objection is Born as a Unique Feminine Right

Addressing these reservations, the parliamentary committee in charge of preparing the final draft of the bill amended the section providing for women's religious exemption. They added an exemption based on the grounds of conscience to the exemption based on religious belief, thus partially responding to religious members' concerns regarding the religious exemption.[42] On the one hand, the exemption was expanded, potentially applying to more than just religious women. On the other hand, the exemption remained gender-based—the additional exemption, based on grounds of conscience, was available only to women.

The fact that the legislature ultimately rejected the original religious demand to create a gender-neutral right of exemption, and instead grouped together all three exemptions for women in the same provision of the law, appears to have stemmed from the prevailing perceptions of women expressed in the legislative debate. As mentioned above, the legislative history of the Defense Service Law demonstrates that even those who supported the conscription of women did not regard women as potential combatants, but rather as an auxiliary force of relatively marginal importance.[43] Within this framework, men remained the essential manpower of the Israel Defense Forces (IDF); the legislature appears to have taken care not to create exemption opportunities that might deplete this human reserve. That being the case, it can be argued that exemptions on grounds of conscience were granted to women because their contribution to the military was viewed as expendable.[44]

Out of this exclusionary perception of women, a legal rule evolved, making it possible for women to exercise the right of freedom of conscience, despite the fact that the legislature did not set out to grant a basic right to women. Securing the exemption for reasons of conscience was primarily intended to placate the demands of religious Knesset members. Nonetheless, the outcome was that women won the right to

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[42] After being amended, the section exempting women read: "A woman of a military age who declared that reasons of conscience or reasons of religious conviction prevent her from military service, shall be exempt from the duty of that service in a manner prescribed by regulations." *Id.* at 1607.

[43] *See supra* notes 32-33 and accompanying text.

[44] This assumption finds support in later legislative deliberations that took place in the 1970s as part of a legislative initiative to amend this provision. *See infra* note 46 and accompanying text.

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request an exemption from military service, not only when they were carrying out traditional expectations and fulfilling women's stereotypical mission, but also when their objection to the draft derived from reasons of conscience. In subsequent years, the legislature explicitly endorsed this distinctive meaning of the conscientious exemption for women, and even recognized its rights-based characteristics. This happened in the late 1970s when the Defense Service Law underwent additional reform. A proposed amendment to the law suggested replacing the exemption for reasons of conscience with a broader religious exemption for women.[45] Several secular Knesset members opposed this proposed amendment and highlighted the specific significance of the conscientious exemption for women. Amnon Rubinstein from the Liberal Party was particularly adamant on this issue, explaining:

> The law that is presented today by the Government . . . obliterates, on grounds whose significance and nature are not known to me, a right . . . that a young woman can be exempt from military service on the grounds of conscience. . . . True, this exemption did not exist for men because we say: the State of Israel is a state in siege, fighting many enemies and cannot therefore allow itself the exemption of conscience for men. But *as for women we said: because we can allow ourselves such a broad exemption . . . let's put ourselves in the general framework of the laws of the enlightened countries and make the law of the religious objector equal to that of the conscientious objector.*[46]

The criticism voiced against the removal of the exemption for reasons of conscience was heard. When the final draft of the bill was brought before the Knesset for enactment, grounds of conscience were reincorporated in the exemption clause alongside the religious exemption that was further elaborated in a separate provision.[47]

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[45] DK (1978) 2136. The proposed amendment was initiated by members of the religious parties in an attempt to expand the group of women exempt on religious grounds. *Id.*

[46] *Id.* at 2380 (emphasis added). Other Knesset members voiced similar protest. Among them were those who even called for extension of the conscientious exemption to men in order to prevent a wrongful discrimination between men and women. *Id.* at 2372, 2382.

[47] These provisions were included in the consolidated version of the Defense Service Law. See *supra* note 18 for the full text of these provisions.

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This legal framework of a separate right granted to women to conscientiously object is the one that, over the years, shaped the phenomenon of female conscientious objection, its scope, and its substance.[48] The exact number of female conscientious objectors who exercised this right is unclear,[49] but it appears that the phenomenon grew in volume after the outbreak of the second Palestinian uprising in October 2000. The most recent statistic released by the military indicates that in the years 2001-2004, 587 women applied to conscience committees for exemption. Of these women, 475 were released from service.[50] The high school seniors' letter that Shani Werner and her friends signed in 2001, in which dozens of young men and women declared their opposition to implementing Israeli policies in the Occupied Territories, signaled this expansion. From 2001 on, the group-based aspects of the phenomenon became more apparent. It was no longer a matter of a few women resisting the draft individually, but rather a group of female conscientious objectors with a shared political agenda successfully exercising their right under the law.[51] After winning their exemption, many of these women volunteered for

[48] In the late 1970s, the legislature supplemented this right with a specific enforcement mechanism. A committee was established that was authorized under the law to deal specifically with women's conscience- and religious-based requests for exemption from military service. Defense Service Law Regulations, 1978, KT 3895, 2176 (Women's Exemption from Military Service on Grounds of Conscience or Religious Familial Way of Life).

[49] The Israeli military, as a matter of principle, does not release official statistics on this subject. In recent years, however, and in response to specific media inquiries, some numbers have been released by the IDF spokesperson. *See infra* note 50 and accompanying text.

[50] Daphne Barak-Erez, *Al Tayasot ve Sarbaniot Matzpun: Ma'avak Ekhad o Ma'avakim Shonim?* [*On Female Pilots and Conscientious Objectors: One Struggle or Two Different Ones?*], *in* STUDIES IN LAW, GENDER AND FEMINISM n.78 (forthcoming 2007) (on file with the author) (Hebrew). However, the IDF did not specify the specific grounds—specific or pacifist—on which they objected. Furthermore, it was recently published that the military is concerned with the growing numbers of women who are not conscripted: 32.1% for religious reasons, and an additional ten percent for other reasons that include reasons of conscience. Khanan Greenberg, *De'aga Be-Tzahal: Ha-Banot Mema'atot Lehitgayes* [*A Concern in the Military: Girls Hardly Enlist*], YNET, July 2005, *available at* http://www.ynet.co.il/articles/0,7340,L-3117323,00.html (Hebrew). The growing numbers of women who in recent years have signed high school seniors' letters also provide some basis for the assessment that the phenomenon of female conscientious objectors with a concrete political agenda is on the rise. *See supra* note 3.

[51] *See* Barak-Erez, *supra* note 49.

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national service in a civilian setting, such as a hospital or a school, thus replacing military service with social action of another kind.[52]

By contrast, the comparable phenomenon of male conscientious objection was defined very differently under the law. As mentioned above, in addition to the specific exemptions granted to women, the Defense Service Law states generally that the Minister of Defense is entitled, "if he sees fit to do so," to grant exemptions from standard military service or from reserve duty to any conscript for reasons of "education, security, settlement or the national economy or for family reasons or *for other reasons*."[53] An early Supreme Court decision determined that the phrase "other reasons" permits the Minister of Defense, at his discretion, to exempt men from regular or reserve service for reasons including conscientious objection.[54] Ministers of Defense have exercised that discretion in evaluating subsequent petitions.[55] The standard legal approach when handling such cases was that, while pacifists—"full objectors" who object to the framework of the military service as a matter of principle—could be individually exempt from service, the military had to remain apolitical and therefore could not allow "selective objection" for reasons specific to a particular war or military operation.[56] Thus, the IDF created a distinction between draft resistance originating in pacifism and draft resistance connected to a specific moral, political, or ideological stand. In 1995, a military "conscience committee" was established to interview potential male objectors and release the pacifists among them from the obligation of military service.[57] Yet even among those men who declared themselves as pacifists, the number of requests that the committee approved over the years was remarkably low. A recent case revealed that the committee has granted only three individual exemptions over a period of eight years.[58] Furthermore, non-pacifist objectors have been tried and imprisoned for

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[52] *See infra* notes 84-89 and accompanying text.

[53] Defense Service Law § 36 (1986) (emphasis added).

[54] HCJ 734/83 Shine v. Minister of Defense [1984] IsrSC 38(3) 393, 402.

[55] HCJ 1380/02 Ben-Artzi v. Minister of Defense [2003] IsrSC 56(4) 476.

[56] *Shine*, IsrSC 38(3) at 402-03.

[57] *See Ben-Artzi*, IsrSC 56(4) at 477.

[58] *Id.* at 479. Paz-Fuchs and Sfard indicate that this number represents three percent of the total number of applicants to the committee during that period. Paz-Fuchs & Sfarad, *supra* note 12, at 115 n.14.

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"refusal to obey orders,"[59] a practice endorsed by the High Court of Justice.[60] Even the legislation of the Basic Law: Human Dignity and Liberty,[61] which is now generally accepted as part of Israel's "semi-constitution,"[62] did not alter the Supreme Court's position on this issue.[63] Thus, the scope of the exemption for reasons of conscience that exists for men is substantially more restricted than that granted to women.

With regard to women, and due to the different phrasing of the relevant provisions of the law, the common practice for many years was to grant an exemption to both pacifists and "selective" conscientious objectors without distinguishing between the two. Until recently, most women who

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[59] It is estimated that following the decision to distinguish between universal or "full" conscientious objection and "selective" conscientious objection, military commanders have ordered the imprisonment of dozens of male soldiers who refused to serve in the Lebanon War during the 1980s and early 1990s. RUTH LINN, CONSCIENCE AT WAR: THE ISRAELI SOLDIER AS A MORAL CRITIC 9-11 (1996); LEON SHELEF, KOL HA'KAVOD: SARVANUT MATSPOONIT MITOCH NEAMENOOT EZRAHIT [THE VOICE OF DIGNITY: CONSCIENTIOUS OBJECTION DUE TO CIVIC LOYALTY] 123-41 (1989) (Hebrew). Hundreds more were incarcerated during the first and second Palestinian uprising (*intifada*) for their refusal to serve under what they saw as an immoral and illegal occupation. Paz-Fuchs & Sfarad, *supra* note 12, at 115.

[60] *See, e.g., Shine*, IsrSC 38(3) 393. In that case a soldier refused to serve in southern Lebanon, claiming that, according to his conscientious outlook, the IDF's presence in Lebanon was illegal and not in accord with any fundamental justification for military activity. The court held that this argument was invalid. Justice M. Elon wrote: "This is a case of a draft objection which is based on ideological political reasons not to fight *in a particular location*, and recognizing such an objection damages the operation of Israel's democratic system of decision-making and leads to discrimination in military drafting." *Id.* at 402-03. United States courts have made similar decisions. *See, e.g.*, Gillette v. United States, 401 U.S. 437 (1971). *See also* Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31.

[61] Basic Law: Human Dignity and Liberty, 1992, S.H. 150.

[62] Israel did not adopt a written constitution upon its establishment. Instead, Israel enacted in the early 1990s two new "Basic Laws" that address two human rights guarantees: Basic Law: Human Dignity and Liberty, *id.*, and Basic Law: Freedom of Occupation, 1994, S.H. 90. Many jurists in Israel, Chief Justice Aharon Barak central among them, refer to these as a "semi-constitution," and identify them as the beginning of the judicial review process in Israeli law. In other words, courts now have the power to strike down any legislation that violates the basic rights guaranteed by the Basic Laws. However, according to the Basic Laws themselves, legislation that was in effect prior to the enactment of the Basic Laws is immune from this kind of review, and is subject only to interpretation that accommodates the Basic Laws. HALPERIN-KADDARI, *supra* note 24, at 25.

[63] HCJ 7622/02 Zonshein v. Judge-Advocate General [2002] IsrSC 57(1) 726 (regarding a group of reserve soldiers who refused to serve in the Occupied Territories).

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requested exemption from military service on selective grounds of conscience or on general pacifist grounds were excused from military service.[64] Some of these women turned to an alternative civilian service instead.[65] Thus, selective objectors like Shani Werner were released from the military after expressing their conscientious objection to the military's role in the Occupied Territories. At the same time, the young men who resisted the draft for the exact same reasons were incarcerated.[66] Female conscientious objectors were therefore able to exercise their basic right to freedom of conscience in a much more comprehensive manner than men; to that extent, women have been privileged by the separate legal arrangement to which they have been subject. Furthermore, this Article argues that the actual exercise of this right, which in practice often meant replacing military service with civilian social action, not only diverted their conscientious objection to new avenues of social action, but also added value and significance to the act as a whole.

D. From a Feminine Right to a Feminist Practice

Contemporary theories of citizenship identify a close connection between military service and ideas of citizenship.[67] Scholars claim that, following the French and American Revolutions, military service has played a key role in the definition of citizenship and the development of the nation state.[68] Feminist theorists still perceive this fact as bearing significant consequences for women's status in society.[69] In the United States,

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[64] The most recent statistics released by the military reveal that more than eighty percent of the requests for conscientious exemption—including specific and pacifist objections—filed by women between the years 2001-2004 were approved. *See* Barak-Erez, *supra* note 50, at n.78.

[65] *See infra* note 89 and accompanying text.

[66] *See, e.g.*, MilC (GS) 151,174,205,222,243/03 Military Prosecutor v. Matar [2004] (unreported decision) (on file with the author).

[67] Morris Janowitz, *Military Institutions and Citizenship in Western Societies*, 2 ARMED FORCES & SOC'Y 185, 189 (1976); Max Weber, *Citizenship in Ancient and Medieval Cities*, *in* THE CITIZENSHIP DEBATES 43 (Gershon Shafir ed., 1998); Rogers Brubaker, *Immigration, Citizenship, and the Nation-State in France and Germany*, *in* THE CITIZENSHIP DEBATES, *supra*, at 131.

[68] Janowitz, *supra* note 67, at 190-93.

[69] CYNTHIA H. ENLOE, DOES KHAKI BECOME YOU? THE MILITARISM OF WOMEN'S LIVES 9-13 (1983).

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feminists argue that American citizenship has undergone a process of remasculinization over the last several decades, which has rehabilitated the image of the citizen soldier as the quintessential symbol of American values and as the protector of American freedoms.[70]

In Israel, soldiering has always been the highest form of citizenship. The central role of the Israeli military in a state that was formed and developed in the context of ongoing armed conflict and national crisis greatly contributed to the formation of an inseparable link between citizenship and military service.[71] Military service that delineates the boundaries of the political collective is perceived as the fundamental expression of the individual's commitment to the state. In addition, civic virtue is constructed in terms of military virtue.[72] This militarized construction of citizenship has an adverse effect on the status of women in society. Since its inception, the Israeli military has created and maintained very different roles for men and women. Among the positions that were traditionally closed for women were those that could entail wartime combat and other occupations classified as combat positions.[73] More than any other factor, this contributed to the exclusion of women from the higher echelons of military leadership.[74] Moreover, the Israeli military constitutes one of the most important public institutions, a major source for the formation and recruitment of the political and, to a certain extent, economic elite; as a result, the marginalization of women within the military has tremendous consequences for women's status in society generally.[75] As males were assigned the primary role in the nation's defense, militarized manhood became the primary aspect of a gendered understanding of citizenship. This

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[70] *See* SUSAN JEFFORDS, THE REMASCULINIZATION OF AMERICA: GENDER AND THE VIETNAM WAR (1989); GENDERING WAR TALK (Miriam Cooke & Angela Woolacott eds., 1993). A specific example of the manner in which the perception of a militarized citizenship guided a gendered distribution of privileges in society is *Massachusetts Personnel Administrator v. Feeney*, 442 U.S. 256 (1979). In that case, the Court upheld a statute giving absolute preference to veterans for jobs in the state civil service despite the fact that ninety-eight percent of the veterans were male. *Id.* at 270.

[71] Baruch Kimmerling, *Patterns of Militarism*, 34 EUR. J. SOC. 196 (1993); Berkovitch, *supra* note 25, at 610.

[72] Sara Helman, *Militarism and the Construction of the Community*, 25 J. POL. & MIL. SOC'Y 305, 324 (1997).

[73] HALPERIN-KADDARI, *supra* note 24, at 153.

[74] *Id.*

[75] *Id.* at 155.

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masculine perception of citizenship determined who ultimately exercised power and even sovereignty in Israeli society. In the words of Dafna Izraeli, "the military intensifies gender distinctions and then uses them as justifications for both their construction in the first place, and for sustaining gender inequality."[76]

Traditionally, feminist legal activists and other advocates of gender equality have tried to challenge this gender-biased perception of citizenship through an integrationist strategy. Their efforts were aimed at promoting women into combat positions and equalizing their military contribution with that of men so they could make a valid claim for full citizenship.[77] However, this strategy has not been very successful. The military has only been partially receptive to the idea of women in combat roles,[78] and it

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[76] Dafna N. Izraeli, *Gendering Military Service in the Israel Defense Forces*, 12 ISRAEL SOC. SCI. RES. 129, 129 (1997) (citation omitted). *See also* Dafna N. Izraeli, *Migdure Be'sherut Hatsvai Betzahal [Gendering in the IDF Military Service]*, 14 THEORY & CRITIQUE 85 (1999) (Hebrew); HALPERIN-KADDARI, *supra* note 24; YAEL YISHAI, BETWEEN THE FLAG AND THE BANNER: WOMEN IN ISRAELI POLITICS (1997). It is important to note that, in addition to its gendered implications, military service and the central role of the military in Israeli society sustain other grave inequalities in society, especially along ethnic lines. Due to the prolonged Arab-Israeli conflict, the Arab citizens of Israel are not required to perform military service. This in turn serves as an explicit or implicit justification for their construction in public and legal discourse as lesser citizens deserving of lesser rights and privileges. *See* Kimmerling, *supra* note 71; Gershon Shafir & Yoav Peled, *Citizenship and Stratification in an Ethnic Democracy*, 21 ETHNIC & RACIAL STUD. 408 (1998).

[77] The most significant feminist battle in that regard is the case of Alice Miller, brought by a feminist organization to the Supreme Court in the mid-1990s. HCJ 4541/94 Miller v. Minister of Defense [1995] IsrSC 49(4) 94. In that case a young woman challenged the Air Force's policy of excluding women from pilot training courses. The petitioner claimed that the exclusion of women from all flying positions in the military violated women's right to equality. The Supreme Court accepted the claim and ordered the military authorities to open pilot training courses to women on an equal basis with men. This decision facilitated women's integration into combat roles in other branches of the military, such as the Navy. It also contributed to a legislative reform that amended the Women's Equal Rights Law and the Defense Service Law to include a specific declaration with regard to women's right to fulfill any position in the military unless the nature or the substance of the position preclude women's participation. *See* Women's Equal Rights Law, amend. 2, 2000, S.H. 167. This amendment later became Section 16(a) of the Defense Service Law of 1986 (Consolidated Version). *See* Defence Service Law § 6(d), amend. 11, 2000, S.H. 64. *See also* Noya Rimalt, *When a Feminist Struggle Becomes a Symbol of the Agenda as a Whole: The Example of Women in the Military*, 6 NASHIM 148 (2003).

[78] The primary form of military occupation that remains closed to women's recruitment is infantry combat, as it involves specific physical qualifications that are, according to military officials, beyond women's capabilities. HALPERIN-KADDARI, *supra* note 24, at 153.

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appears that entrenched chauvinistic traditions, such as sexual harassment, hinder effective female assimilation.[79] Furthermore, recent feminist literature indicates that women's growing assimilation into the military does not, in fact, undermine the ideology of gender that pervades all facets of the institution.[80] Rather, it is perpetuated through various processes in which women combatants internalize this androcentric ideology, and later express it in their dress codes, behavior, and misogynist attitudes towards other women.[81] In other words, it turns out that women soldiers serving in traditionally masculine roles do not develop a collective consciousness that could challenge the gendered structure of the military.[82] Therefore, it seems that the problem of gender hierarchy may rest in the structures of militarism itself.[83] Under these circumstances, it is doubtful that women's access to these structures carries the potential to solve the problem and to change the gender-biased manner in which perceptions of militarized citizenship are defined and enforced.

In light of this feminist critique, it is necessary to assess the significance of the special right granted to Israeli women to resist the draft on grounds of conscience and to replace it with alternative civilian community service. Under Israeli law, national civilian service is not mandatory for those granted exemption from military service.[84] The issue

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[79] Orna Sasson-Levi, *Feminism and Military Gender Practices: Israeli Women in "Masculine" Roles*, 73 SOC. INQUIRY 440 (2003); Noya Rimalt, *Al Min, Miniyoot Ve'kavod: Hachok Lemeniat Hatrada Minit Be'ree Hateoria Hafeministit Ve'hamtsiut Hamishpatit* [*On Sex, Sexuality and Dignity: The Law for the Prevention of Sexual Harassment in Light of Feminist Theory and Legal Reality*], 35 MISHPATIM 601 (2005) (Hebrew).

[80] Sasson-Levi, *supra* note 79; Izraeli, *supra* note 76.

[81] Sasson-Levi, *supra* note 79; Izraeli, *supra* note 76.

[82] Sasson-Levi, *supra* note 79.

[83] *See* Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25, 39 (1989); Patricia Shields, *Sex Roles in the Military*, *in* THE MILITARY: MORE THAN JUST A JOB? 99 (Charles C. Moskos & Frank R. Wood eds., 1988); Lucinda J. Peach, *Women at War: The Ethics of Women in Combat*, 15 HAMLINE J. PUB. L. & POL'Y 199 (1994); ENLOE, *supra* note 69. For a more optimistic vision as to feminist potential to promote institutional change and transform the androcentric nature of the military, see Kathryn Abrams, *Gender in the Military: Androcentrism and Institutional Reform*, 56 LAW & CONTEMP. PROBS. 217 (1993).

[84] At the time a suggestion was made to create an official alternative path for national service for women who were not drafted for religious or conscientious reasons. In 1953, the Knesset proposed providing just such a mandatory national service, National Service Law, 5713-1953, 7 LSI 137 (1952-53) (Isr.), but due to various objections this law has never been implemented.

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has been debated several times, but the legislature has yet to resolve it completely.[85] National Service remains a voluntary practice. However, in response to the growing dimensions of this phenomenon, the legislature has awarded some recognition and status to the practice of voluntary civilian social service. For instance, legislation was introduced to award the same state economic benefits awarded to those who perform regular military service receive to those who, after being granted exemption from military service, volunteer for this civilian form of service.[86] As a result, choosing to volunteer for national civilian service now legally entitles one to certain privileges that were originally reserved for those who performed military service.[87]

Initially, the practice of replacing military service with civilian service emerged as the voluntary practice of religious women, and later included secular women usually exempt from service for health reasons.[88] In recent years, female conscientious objectors have joined them,[89] and it appears that this gradually changed the significance of the conscientious exemption. Religious women and women with health problems avoided the

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[85] Rachel Werzberger, *Sherut Leumi Lebnei Miutim* [*Civilian Service for Minorities*], THE KNESSET RES. & INFO. CENTER, Mar. 2003 (Hebrew).

[86] *See, e.g.*, Veteran's Integration Law, 1994, S.H. 132. For a more detailed analysis of the legislative framework that equalized the status of the two groups, see Werzberger, *supra* note 85.

[87] National service is defined very broadly under the law, and includes any service for the benefit of the public in areas such as education, health, protection of the environment, immigration, and social welfare. Social Security Regulations, 2002, KT 6177, 853 (Women in Voluntary National Service).

[88] Werzberger, *supra* note 85.

[89] The exact number of female conscientious objectors who volunteered for civilian service in recent years is unknown, since no official statistics are kept. But circumstantial evidence that this phenomenon has grown in recent years to a sizeable proportion can be found in an article published in *Ha'aretz* in 2004. In that article, it was reported that Shlomit, the major NGO assisting in the placing of secular women who were exempt from service into various volunteer positions as part of a national civilian service, was concerned with the growing numbers of women conscientious objectors who were approaching the organization and asking for a placement with an NGO that assists the Palestinian population. Shlomit therefore decided not to assist this category of women, a decision members of the *refuseniks* movement speculate was made in order to avoid providing indirect support to draft resistance. *See* Lili Galili, *Ha-Sarbaniot She-Rotzot Sherut Le'umi Nitkalot Be-Seruv* [*Female Conscientious Objectors Who Apply for Civilian Service are Rejected*], HA'ARETZ, July 6, 2004, *available at* http://www.haaretz.co.il/hasite/pages/ShArtPE.jhtml?itemNo=447885 (Hebrew).

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draft for reasons unrelated to the values, norms, policies, and operations of the military. Instead, they were either physically unable to serve or did not do so because they were motivated by religious perceptions of womanhood and morality that women are predestined for a different role in society. Female conscientious objectors, on the other hand, directly objected to the draft itself.[90] They either objected to the military as a whole and the values underlying it, or were specifically opposed to certain operations, such as the military occupation of the West Bank and Gaza. Under these circumstances, the fact that the law facilitated the female objectors' decisions and provided those who served in civilian service with the same economic benefits as those provided for active military service had potentially far-reaching consequences. It appeared to hold the promise of a feminist practice that might reconstruct the commitments of citizenship in a non-militaristic vein.

As explained above, current data on women in the military appears to indicate that the gradual integration of women in the military does not change the androcentric nature of this institution.[91] This supports the feminists' observation that "women may serve the military, but they can never be permitted to be the military."[92] Moreover, if the integrationist strategy does not work for women in the military, a better focus for feminists would be to undermine the centrality of militarism in determining status in society. That is, if working within the military only serves to reinforce masculine citizenship, new avenues for equal citizenship should be explored. From this point of view, draft resistors who replaced military service with civilian service—and enjoyed state economic support for doing so—furthered this agenda by strengthening an alternative path to equal citizenship. This path could have proven to be more beneficial for women than the traditional goal of integration in the military. If civilian national service had gained additional status and legitimacy under the law, it could potentially have been established as an alternative path to citizenship, one that challenged the ideal of the citizen-soldier and threatened men's control over citizenship. Hence, as exercised and enforced, the separate right of

[90] One expression of the motivation behind those women's draft resistance can be found in the High School Seniors' Letter that some of them signed. Additional documentation of the reasons that motivated those women to request exemption on conscientious grounds can be found on the website of New Profile, which publishes, among other things, personal statements written by some women conscientious objectors. New Profile–A Movement for the Civil-ization of Israeli Society, http://www.newprofile.org/ (last visited Oct. 31, 2006).

[91] *See supra* notes 78-82 and accompanying text.

[92] ENLOE, *supra* note 69, at 15.

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conscientious objection that was granted to women, as it had been exercised and enforced, held much more significance than originally intended. It not only protected women's freedom of conscience, but it also held the potential to promote an alternative feminist agenda regarding a path to equal citizenship for women.

However, this state of affairs has not been free of obstacles, as Shani Werner pointed out in her letter.[93] On the one hand, the distinct right granted to women did, in fact, protect their ability to make much more comprehensive decisions regarding military service than men. It also may have carried unexpected transformative potential for women's status in society. On the other hand, this broad, gender-biased right to conscientious objection undermined the feminine act of objection in other significant respects. As Shani Werner discussed, the female conscientious objectors were ignored in the public discourse, which focused exclusively on the parallel masculine phenomenon.[94] These women, therefore, felt that they had been silenced and that their distinct, gendered pattern of objection remained meaningless in the public sphere. In other words, these women interpreted the denial of public recognition as a denial of voice. One can contend, therefore, that while enabling women to channel their protest in a potentially radical direction, the prevailing legal order simultaneously interfered with these women's ability to articulate a meaningful public voice of protest as part of, and in addition to, their act of resistance. This intriguing outcome will be discussed in Part II of this Article, which focuses on questions of voice and law, and examines the additional implications of the separate legal arrangements that have been applied to female and male conscientious objectors.

II. ON LAW, GENDER, AND VOICE

Feminist literature of the past three decades has examined the issue of women's voices, generally focusing on the various ways in which women's voices are silenced, distorted, marginalized, and excluded from the public domain, and on how this process contributes to the construction of the public domain as a masculine domain with regard to the values it promotes and the needs it protects.[95] Although scholars describe the voice

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[93] Open Letter from Shani Werner, *supra* note 1.

[94] *Id.*

[95] Two of the most influential feminist writers, Carol Gilligan and Catharine MacKinnon, have devoted much of their scholarship to the issue of women's voices. *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S

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metaphor in different terms, a common underlying theme is the connection between voice and power. The very use of voice as a central theme reflects a shared understanding of the gendered social and legal reality in terms of a dichotomy between silence and voice. Silence is a sign of powerlessness; therefore, giving voice to women is seen as a political act of empowerment.[96] This connection between silence and disempowerment was implied in Shani Werner's letter.[97] However, careful examination of the case of Israeli female conscientious objectors reveals that a clear division between silence and voice does not always exist, suggesting that defining instances of gender disempowerment and empowerment is not so simple.

At first sight, conscientious objection appears to be a clear case of giving voice to women; women were formally granted a right to speak. They were granted the right to voice conscientious objection to military service and avoid the draft. Furthermore, as argued in Part I, the actual practice of objection that women developed under the protection of the law potentially enhanced their voice, facilitating the promotion of an alternative feminist agenda. However, a harder look at the legal dynamic of how the right was exercised and enforced reveals that the law's effect on women's and men's voices is more complicated than initially appears.

As discussed above, male and female conscientious objectors were subject to separate legal rules that differed substantially in their scope and content. While women's freedom of conscience was broadly protected, the same right was substantially restricted where men were concerned. This restriction diverted the legal treatment of those men to the judicial arena; male objectors who were adamant about their refusal to perform military service were subjected to formal disciplinary proceedings and eventually

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DEVELOPMENT (1982); CAROL GILLIGAN, THE BIRTH OF PLEASURE (2002); Carol Gilligan, *Getting Civilized*, 63 FORDHAM L. REV. 17 (1994); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); CATHARINE A. MACKINNON, ONLY WORDS (1993). Many other scholars have addressed the subject as well. *See* WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND (Mary Field Belenky et al. eds., 1986). Other feminist literature explores more broadly the idea of women's language. *See, e.g.*, Luce Irigaray, *When Our Lips Speak Together*, 6 SIGNS 69 (1980); Hélène Cixous, *La Rire de la Méduse* [*The Laugh of the Medusa*], *translated in* THE SIGNS READER: WOMEN, GENDER & SCHOLARSHIP (Elizabeth Abel & Emily K. Abel eds., 1983).

[96] *See* GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT, *supra* note 95; MACKINNON, ONLY WORDS, *supra* note 95.

[97] Open Letter from Shani Werner, *supra* note 1.

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tried in a military court for their refusal to obey orders.[98] Such legal proceedings, despite the fact that they impaired the possibility of exercising the right to freedom of conscience at the individual level, provided significant additional meaning to the masculine act of resistance; they gave male objectors a right to counsel and an opportunity to voice their arguments in a public forum.[99]

In other words, the official trial, where male objectors answered the accusation of refusal to enlist in the IDF and defended their resistance, supplied them with a legal platform from which to expound their moral position regarding the military occupation of the Territories, the basis of their objection. This public expression of the political and moral stance of

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[98] The refusal to comply with a military order is an offense under Military Justice Law § 122, 5715-1955, 9 LSI 184 (1954-55) (Isr.) ("A soldier who wilfully does not comply with an order given him by a commander in the execution of his duty, or refuses, by words or behaviour, to comply with such an order, is liable to imprisonment for a term of three years."). Most conscientious objectors (reserve soldiers and conscripts) who refuse to report for duty or refuse to serve are prosecuted by higher-ranking disciplinary officers within their units. Some cases are taken more seriously by the IDF, such as when a conscientious objector has repeatedly refused to perform military service, or a person declares his or her conscientious objection while already serving in the IDF and refuses to continue serving; in such cases, the accused may be tried in a military court, facing the possibility of a longer sentence of imprisonment. *See* AMNESTY INT'L, ISRAEL: THE PRICE OF PRINCIPLES: IMPRISONMENT OF CONSCIENTIOUS OBJECTORS (1999), *available at* http://web.amnesty.org/library/pdf/MDE150491999ENGLISH/$File/MDE1504999.pdf. *See also* Yoram Shachar, *The Elgazi Trials: Selective Conscientious Objection in Israel*, 12 ISR. Y.B. ON HUM. RTS. 214, 232 (1982).

[99] According to the Military Justice Law, a disciplinary hearing before a military judicial officer must be conducted in the presence of the accused. The disciplinary officer is required to read the text of the complaint to the accused and give the accused an opportunity to be heard before giving the judgment. In a military trial, the accused also has a right to counsel and an opportunity to make his or her arguments at length before a wider audience. For this reason, some conscientious objectors preferred to be tried before a military court. *See* Shachar, *supra* note 98, at 219. In 2002, Lieutenant David Zonshein, a reserve soldier who was brought before a disciplinary tribunal for his refusal to serve in the Occupied Territories, demanded a hearing before a military criminal court as opposed to undergoing disciplinary hearings. The army authorities, presumably wary of the publicity such a case might involve, refused. Zonshein subsequently petitioned the Supreme Court for the right to be tried before the military court. The Supreme Court, per Chief Justice Barak, offered a unique arrangement: instead of dealing with the narrow issue of the right to a military trial, the parties would skip all intermediary proceedings and raise all substantive matters directly before the Supreme Court. The parties agreed, and Zonshein and seven other selective conscientious objectors who joined the petition gained the right to be heard by the highest judicial authority of the state and to introduce at considerable length their conscientious objection to the military occupation of the Territories. *See* Paz-Fuchs & Sfarad, *supra* note 12; HCJ 7622/02 Zonshein v. Judge-Advocate General [2002] IsrSC 57(1) 726.

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each objector transformed the nature of his protest from a private issue to a public phenomenon. The most prominent examples are the recent trials of five male selective conscientious objectors, who refused to participate in the implementation of Israeli policies in the Occupied Territories,[100] and Yonatan Ben-Artzi, who refused to serve because of his pacifist ideology and was nonetheless denied exemption.[101] In both cases the objectors were tried before military courts,[102] and the trials, which lasted for several months, were the subject of intense media coverage. The objectors and their attorneys perceived the trials as important opportunities to raise the issue of the military occupation of the West Bank and Gaza, and insisted on the right of each objector to articulate his voice of objection.[103] In both trials the objectors were given the opportunity to testify at great length before the three-judge tribunal, allowing them to expound on biographical, philosophical, and political issues.[104] Furthermore, the relevance and importance of the personal, political, and moral stances of the male objectors were recognized by the courts; in each case, an entire section of

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[100] MilC (GS) 151,174,205,222,243/03 Military Prosecutor v. Matar [2004] (unreported decision) (on file with the author) (trial of five selective objectors).

[101] MilC (GS) 129/03 Military Prosecutor v. Ben-Artzi [2003] (unreported decision) (trial of Yonatan Ben-Artzi, a pacifist).

[102] In the *Matar* and *Ben-Artzi* cases, each defendant had previously been subjected to disciplinary proceedings and sentenced to several consecutive terms of imprisonment before being tried by a military court. *See* MilC (GS) 151,174,205,222,243/03 Military Prosecutor v. Matar [2004] (unreported decision); MilC (GS) 129/03 Military Prosecutor v. Ben-Artzi [2003] (unreported decision).

[103] One of the defense lawyers who represented the five selective objectors explained:

> A legal defense is conducted in a field of given facts . . . and the fundamental facts here were: the five are conscientious objectors . . . and therefore it was important for them to explain openly the rationale for their objection. It was important for them to introduce in court their conscientious position, a position for which they were willing to pay the heavy price. The defense had to enable them to speak—to legally oblige the court to hear the arguments, harsh and difficult as they are.

Dov Khenin, *Madrikh Mekutzar La-Mishtamesh* [*A Short User's Manual*], *in* THE REFUSNIKS TRIALS, *supra* note 3, at 162.

[104] For the testimonies of each objector, see THE REFUSNIKS TRIALS, *supra* note 3, at 39-128.

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the written opinion was devoted to a detailed account of these issues.[105] Thus, although their requests for exemption from the military were ultimately denied—all the defendants were convicted—their moral objection to the occupation was documented and publicized in a manner that made this voice of protest both significant and potentially influential.

Similarly, the very act of criminalizing the objectors contributed to the male act of objection gaining meaning in the public sphere. The court did not mince words in its description of the dangers inherent in male objection, including threatening the public order and the military's ability to carry out its job.[106] Thus, placing the issue in military court actually added value to the male act of resistance, increasing its visibility in the public arena and affirming its significance. Furthermore, it can be argued that the all-too-real punishment of incarceration[107] contributed to the glorification of the masculine act of dissent in an additional sense. Incarcerating male conscientious objectors framed the conflict between the men and the state in the confrontational, masculine terms of force against force.[108]

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[105] *See* MilC (GS) 151,174,205,222,243/03 Military Prosecutor v. Matar [2004] (unreported decision); MilC (GS) 129/03 Military Prosecutor v. Ben-Artzi [2003] (unreported decision).

[106] Specifically, the sentencing decision against the five selective objectors stated:

> Once the defendants before us made an effort to publicize their objection act, those acts caused additional damage to the military and to the state. Their acts call into question the justifiability of the military's actions and the morality of participation in the IDF. In so doing they undermine the legitimacy of state actions in the eyes of the world and assist hostile nations in their arguments against the state.

Gzar Din [*Sentencing*], *in* THE REFUSNIKS TRIALS, *supra* note 3, at 224, 227.

[107] Each of the five selective conscientious objectors was sentenced to a year's imprisonment. MilC (GS) 151,174,205,222,243/03 Military Prosecutor v. Matar [2004] (unreported decision). The Ben-Artzi case resulted in a two-to-four month sentence (the actual term depending on whether the defendant would pay the imposed fine). MilC (GS) 129/03 Military Prosecutor v. Ben-Artzi [2003] (unreported decision). All of the defendants were also sentenced to additional periods of incarceration as a result of disciplinary hearings held prior to the decision to try them before a military court. MilC (GS) 151,174,205,222,243/03 Military Prosecutor v. Matar [2004] (unreported decision); MilC (GS) 129/03 Military Prosecutor v. Ben-Artzi [2003] (unreported decision).

[108] Kathleen Kennedy, *Manhood and Subversion During World War I: The Cases of Eugene Debs and Alexander Berkman*, 82 N.C. L. REV. 1661, 1664 n.8 (2004) (citing Gerald Edwin Shenk, "Work or Fight": Selective Service and Manhood in the Progressive Era (1992) (unpublished Ph.D. dissertation, University of California, San Diego) (on file with the University of California, San Diego Library)) (describing Shenk's categories of

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The male objectors themselves were partners in this process of masculinization. It is no coincidence that one of the objector's movements opposing military service in the Occupied Territories calls itself "Courage to Refuse" and highlights the military rank and combat experience of its members.[109] "Courage," a masculine trait cultivated in the military, together with military symbols such as rank and combat experience that typically belong in the masculine domain,[110] are leveraged by these male objectors. They not only portray their willingness to pay the price of their resistance to the draft in terms common to the militaristic arena, but they also rely on masculine symbols as a source of legitimacy.[111] In this respect, both the legal discourse and the framework of male conscientious objection within it are nurtured by a common normative foundation that draws upon masculine terms such as "courage," "force," and "heroism" to reinforce their importance and significance in the public sphere.

"common perceptions attributed to masculine men and those considered more effeminate," including Powerful/Powerless; Structure/Chaos; and Physical perfection/Illness, crippled).

[109] In January 2002, fifty reservist conscientious objectors published a petition declaring their refusal to fight beyond the 1967 borders. The petition was published under the title "Courage to Refuse." The objectors, who served in the past as combat officers and soldiers, stressed this fact by referring to their ranks and military experience and highlighting the selective nature of their objection. They protested not against the existence of an army as such, but rather against the role that the Israeli army plays in the Occupied Territories. Within several months the group's number rose to over 500, and they formed a protest movement named "Courage to Refuse." Courage to Refuse – Combatants Letter, http://www.seruv.org.il/english/combatants_letter.asp (last visited Oct. 30, 2006). This initiative triggered the formation of other objection groups among reservist combat soldiers, such as military pilots who again formed into a group and expressed their conscientious objection to serve in the West Bank and the Gaza Strip as part of and within the framework of their military expertise. The Pilots Have Courage to Refuse, http://www.seruv.org.il/english/article.asp?msgid=55&type=news (last visited Oct. 30, 2006). In this context it is important to distinguish between two groups of male objectors. The first and the largest is the group of reservists who expressed their objection to serve only when they were called for reserve service. The second is the group of conscripts who, like Shani Werner and her friends, resisted the draft from the beginning. The five selective objectors belong to the latter group, while those like "Courage to Refuse" belong to the former.

[110] *See supra* note 78 and accompanying text. It is important to note that, despite the growing incorporation of women in the military in recent years, men still hold most of the high ranking positions, and no woman is of high enough rank to participate in General Staff meetings on a regular basis. *See* HALPERIN-KADDARI, *supra* note 24, at 159-60; Rimalt, *supra* note 79.

[111] *See supra* note 108 and accompanying text.

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Thus, despite the fact that conscientious objection to the draft is usually portrayed as a social phenomenon aspiring to demilitarize society,[112] the opposite occurred in the case of these Israeli male conscientious objectors. Militarism and manhood became an essential part of the public recognition of the act of objection, reaffirming the centrality and importance of militarism as a masculine ideology. In other words, although the male objectors and their supporters aspired to provide alternatives to patriotic manhood by resisting the draft, they did not challenge the basic attributes of manhood. Their vision of the ethical dissenter was distinctly masculine, privileging the male experience and values, and placing men and women in fundamentally different political and social roles. Moreover, in this normative framework, the legal decision to incarcerate the objectors strengthened both the objectors' self image and the public's perception of the movement, for it allowed them to publicly present highly acclaimed masculine attributes such as heroism and courage. These attributes are not only necessary to the construction of a male identity, but are also respected and valued in the public eye.

None of these symbols were available to female objectors. In being granted an exemption without a legal challenge, women were denied the recognition, attention, and glorification that the male objectors enjoyed, thus silencing their parallel struggle of conscience, and framing it in insignificant and marginal terms. It was against this backdrop that Shani Werner protested in her public letter.[113] As explained in Part I, many female conscientious objectors volunteered for alternative civilian national service throughout the years. They dedicated themselves to community activity, helping underprivileged groups and promoting the public interest in a number of ways.[114] Yet, in translating their protest into civilian social activity, they failed to win any public recognition under the existing legal structure. They were ignored by the press and excluded from the public discussion of conscientious objection. In this way, women's potentially subversive actions were de-radicalized. While women had the opportunity to carry out a significantly more substantive act of resistance than were men, the fact that their objection was not publicly visible prevented it from gaining any real influence.

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[112] LINN, *supra* note 59, at 10.

[113] Open Letter from Shani Werner, *supra* note 1.

[114] See *supra* note 87 and accompanying text for a description of the different social activities that can be recognized under the law as national service.

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This process of marginalization can be attributed to the masculine-militaristic structures within which the female objectors attempted to make their voice heard. As Ann Scales persuasively argued in a similar context, it is "extremely difficult, in the shadow of the military monolith, to make dissent *heard*. Th[is] is especially so for women, whose opinions are systematically rendered trivial or invisible."[115] Furthermore, one can claim that, as part of this process, the fact that women's acts of resistance turned into a more "feminine" social activity, which did not involve a confrontational struggle with the state requiring "courage," but rather required "compassion" and "caring," was a key factor in its devaluation in the public eye. These were not values cultivated and ascribed importance in the hegemonic militaristic discourse.

Moreover, against the background of the general militarization of Israeli society, the practice of serving in national civilian service has come to be perceived not only as a feminine (and therefore inherently inferior) practice, but also as marginal in comparison to the "real" national service, namely military service. An obvious official demonstration of this belief was expressed during the trial of the five selective male objectors.[116] They asked the court to be given the opportunity to replace their military service with national civilian service—just like female conscientious objectors.[117] The court denied this request, ruling that national civilian service was not a fitting alternative for military service because "military service has unique characteristics and inherent to it are its unique dangers."[118] The possibility that the social contribution to society, which is inherent in national civilian service, could equal the contribution inherent in military service—thus creating an accepted alternative for military service—was rejected by the military court. Under these circumstances, putting the male objectors behind bars was presented as the only appropriate response to their act of refusal to serve, even though the court concluded that the objectors were determined to persist with their objection.[119] Thus, incarceration was not intended to pressure the objectors to reconsider their refusal to serve; rather, their

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[115] Scales, *supra* note 83, at 63 (internal citation omitted).

[116] MilC (GS) 151,174,205,222,243/03 Military Prosecutor v. Matar [2004] (unreported decision) (on file with the author).

[117] *Id.*

[118] *Id.* § H.5.2; *Psak Ha-Din* [*Judgment*], *in* THE REFUSNIKS TRIALS, *supra* note 3, at 205, 219.

[119] *Gzar Din*, [*Sentencing*], *in* THE REFUSNIKS TRIALS, *supra* note 3, at 224, 235.

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rejection of military service was a complete and final act.[120] In this respect, their imprisonment implicitly affirmed an obvious hierarchy with regard to the centrality and uniqueness of military service compared to any other social-national service. This implied hierarchy not only sends a demeaning and dismissive message regarding the voluntary service of all female objectors, but it may also explain why female conscientious objection was not a source of public interest or recognition, particularly in comparison to the male objectors who were engaged in a confrontational power struggle with the military authorities, and sentenced to serve time in a military prison as a result.

In contrast to male conscientious objection, female conscientious objection existed in a manner visible only to the female objectors themselves. The political dimension of such resistance to the draft was almost invisible as a direct consequence of the legal structure; therefore, the distinctive feminine action of strengthening civil virtues as opposed to military virtues was silenced in the public sphere. Within public and legal discourse in Israel, conscientious objection was defined as a male phenomenon, both in terms of the gender of the people identified with it and the values they expressed and represented.[121] The voice the law originally

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[120] *Id.* at 235.

[121] A clear manifestation of this gender-biased reference to the phenomenon of conscientious objection in Israel can be found in the legal and sociological literature dedicated to the issue. A survey of this literature reveals that it deals exclusively with the masculine aspect of this phenomenon. *See, e.g.*, Shachar, *supra* note 98 (analyzing the military proceedings in the case of Gadi Algazi, the most famous case of concrete refusal to serve in the late 1970s); SHELEF, *supra* note 59 (discussing the legal and philosophical aspects of the phenomenon of selective conscientious objection in the context of the cases against male soldiers who refused to serve before, during, and after the 1982 Lebanon war); LINN, *supra* note 59 (focusing on data collected from male reservists who refused to serve and male reservists who did not refuse to serve despite their objections to the military actions during the First Intifada in the late 1980s and early 1990s); Ruth Linn, *When the Individual Soldier Says No to War: A Look at Selective Refusal During the Intifada*, 33 J. PEACE RES. 421 (1996) (analyzing the form and essence of men's selective conscientious objection during the First Intifada); PERETZ KIDRON, REFUSENIK! ISRAEL'S SOLDIERS OF CONSCIENCE (2004) (discussing the phenomenon of conscientious objection among male soldiers during the Second Intifada); RONIT CHACHAM, BREAKING RANKS: REFUSING TO SERVE IN THE WEST BANK AND GAZA STRIP (2004) (discussing the story of specific male objectors during the Second Intifada). Following the Supreme Court decision in the case of David Zonshein, HCJ 7622/02 Zonshein v. Judge-Advocate General [2002] IsrSC 57(1) 726, Israel Law Review dedicated an entire volume to the issue of the distinction between selective conscientious objection and full conscientious objection as it is enforced with regard to male soldiers. ISR. L. REV., Fall 2002. The trials of the five selective objectors and Yonatan Ben-Artzi were documented in THE REFUSNIKS TRIALS, *supra* note 3. *See also* David Enoch, *Al Psak Hadin*

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gave to women by enabling them to resist the draft and replace military service with community civil service has been taken away through the implementation and enforcement of the legal rules developed around conscientious objection to the draft.

This is the context in which Shani Werner made her plea for public recognition of the female act of objection. However, Shani Werner and her fellow female objectors were not alone in their call for change. A demand for change was also heard from the male side.[122] Yet while the essence of the women's demand was to gain a public "voice," the essence of the male claim was formal equality. The conflict between these two goals is the subject of Part III of this Article, which deals with the way the claim for gender equality is ultimately dealt with under the law.

III. THE EQUALITY CRISIS: FEMALE CONSCIENTIOUS OBJECTION BETWEEN FORMAL AND SUBSTANTIVE EQUALITY

A. The Sex-Specific Right is Taken to Court

More than twenty years ago, after a decade of feminist litigation of sex-equality cases, Wendy Williams, a feminist scholar and activist, evaluated whether the court system was an appropriate forum for promoting women's demand for equality.[123] The feminist idea at that early date was to achieve gender equality via the courts based on claims under the Fourteenth Amendment of the United States Constitution.[124] Williams, who was part of that feminist effort,[125] reflected on her experience and reached the following conclusions:

Shel Bet Hadin Hatsvai Be'inian Hameshet Hasarvanim [*On the Military Court's Decision in the Matter of the Five Objectors*], 8 MISHPAT UMIMSHAL 701 (2005) (Hebrew).

[122] *See infra* notes 131-132 and accompanying text.

[123] Wendy Williams, *The Equality Crisis: Some Reflections On Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 175 (1982).

[124] *Id.*

[125] Wendy Williams served as co-counsel in the case of *Geduldig v. Aiello*, 417 U.S. 484 (1974), one of the pioneering feminist efforts in the early 1970s to litigate women's issues under the Equal Protection Clause of the U.S. Constitution. The case involved a state disability plan covering all but pregnancy-related disabilities. The plaintiffs argued that it constituted discrimination on the basis of sex. The Court, however, rejected the claim of discrimination and upheld the disability plan. A few years later Congress overruled the

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> Courts will do no more than measure women's claim to equality against legal benefits and burdens that are an expression of white male middle-class interests and values. This means, to rephrase the point, that women's equality as delivered by the courts can only be an integration into a pre-existing, predominantly male world.[126]

Williams's insights regarding the distinctly limited capacity of the courts were shared by other feminist lawyers,[127] and guided the strategic choices made in litigating sex-equality cases starting in the 1970s. This framework suggested feminists should litigate only when they wanted the court to rule that privileges explicitly bestowed on men should also be made available to women.[128] The basic assumption was that, to the extent that women shared those predominantly male values or aspired to share that world on its own terms, the courts had proven to be the most efficient, accessible, and reliable mode of redress since the early 1970s. However, if the law needs to be reconstructed to reflect the distinct needs and values of women, change must be sought from legislatures rather than the courts, as the latter have never been the source of radical social change.[129] Even in hard cases involving unique feminine aspects, the argument was that feminist lawyers had to adhere to the principle of equal treatment based on the masculine

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Court's decision when it passed the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2000).

[126] Williams, *supra* note 123, at 175.

[127] Ruth Bader Ginsburg, who headed the Women's Rights Project of the American Civil Liberties Union in the 1970s, has expressed similar views. *See* Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9.

[128] The first case the Women's Rights Project brought to the Supreme Court, *Reed v. Reed*, 404 U.S. 71 (1971), provided a clear example of this approach. This case involved a sex-specific law creating preference for male estate executors. Ruth Bader Ginsburg and the other attorneys involved in this appeal represented Sally Reed, whose request to be appointed as administrator of her son's estate was denied on the basis of this statute, and the father was appointed instead. This appointment was successfully challenged under the Equal Protection Clause. *Id.* at 76-77. On remand, the parents were named joint administrators of the estate of their deceased son. *See* Reed v. Reed, 493 P.2d 701 (Idaho 1972).

[129] *See* Williams, *supra* note 123, at 175; Ginsburg & Flagg, *supra* note 127. For a similar proposition regarding the limited capacity of the courts and the need to refer to the legislative path instead, see Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975 (1993).

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standard of law if they wanted to present to the courts a coherent theory of equality.[130]

These feminist notions concerning the limits and possibilities of judicial discourse in dealing with gender-equality issues provide an interesting starting point for the analysis of the latest development with regard to female conscientious objectors, namely the conscientious objection's subjection to judicial review in light of considerations of gender equality.

The demand for uniform gender equality in the treatment of conscientious objection was first raised in the military trials of the male conscientious objectors.[131] They claimed that, just as the army exempts female objectors who base their request for exemption either on selective or universal grounds of conscience, a similar broad exemption should be available to men.[132] The IDF responded to this claim in an interesting manner. Instead of admitting that it applied different policies to men and women on the basis of the distinct legal provisions for men and women, the military claimed that a mistake must have been made by the military authorities to the extent that some selective refusals by women were recognized by the military as deserving exemption.[133] Therefore, the military declared that henceforth it would be strict in applying the same distinction between universal and selective conscientious objection claims

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[130] Williams, *supra* note 123, at 188.

[131] This claim was raised as a preliminary defense by the five selective objectors. They introduced as evidence an application for exemption filed with the military authorities by a woman named Hadas Goldman. She defined herself as a selective conscientious objector and was granted exemption without any difficulties. Based on this example, the male objectors raised a claim of gender-based discrimination and called for the nullification of the legal proceedings against them. Preliminary Arguments of the Defense at 7, MilC (GS) 151,174,205,222,243/03 Military Prosecutor v. Matar [2004] (on file with the author). *See also* Application of Hadas Goldman to the Women's Committee and Official Letter of Exemption (Mar. 11, 2002) (on file with the author). The lawyer defending pacifist Yonatan Ben-Artzi also raised this claim as part of Ben-Artzi's defense. *See Defense Summary Arguments in the Ben-Artzi Case, in* THE REFUSNIKS TRIALS, *supra* note 3, at 325.

[132] *See supra* note 128 and accompanying text.

[133] A direct reference to this claim of mistake can be found in the Military Court's interim decision rejecting all preliminary arguments raised by the defense in the trial of the five selective objectors, including the claim of gender discrimination. Specifically, the court held that "[a]s to the claim of discrimination, we accepted the explanation of the prosecutor that the positive discrimination [of women] resulted from mistake . . . and not from a purposeful policy." Intermediate Decision at 18, MilC (GS) 151,174,205,222,243/03 Military Prosecutor v. Matar [2004] (unpublished decision) (on file with the author).

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to women.[134] And indeed, the military started to apply to women the policy it had always applied to men.[135] That is, it distinguished between requests for exemptions based on selective grounds of conscience and requests that were based on claims of pacifism. This differentiation was done within the framework of Article 39 of the Defense Service Law, now reinterpreted to provide a more limited right of freedom of conscience to women than its original interpretation and implementation.[136] In 2004, as a direct result of this new policy, the military denied the request of Laura Milo, a conscientious objector, for an exemption from military service due to her specific objection to the military occupation of the Territories.[137] While Shani Werner and her friends had applied for, and had received, such exemptions just a few years earlier, Laura Milo's request was denied; following her adamant refusal to enlist, she was sent to prison.[138] Thus, formal equality was achieved—women are now being incarcerated for draft resistance.

Laura Milo's case brought the issue before the Supreme Court. Following the rejection of her request for exemption and her incarceration, she filed a petition with the Supreme Court with the aim of regaining the broader right for freedom of conscience now denied to women.[139] In her appeal to the Court, Milo challenged the new egalitarian policy of the military, arguing that, given the different legal provisions that applied to each group under the law, it was inappropriate to grant equal treatment to men and women with regard to selective conscientious objection.[140] Rather,

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[134] *Id.*

[135] HCJ 2383/04 Milo v. Minister of Defense [2004] IsrSC 59(1) 166.

[136] *Id.*

[137] Close to the designated date for her induction into the military, Laura Milo wrote a letter to the committee in charge of women's requests for exemption. In that letter she wrote: "I cannot cooperate with the Israeli occupying military force. . . . I object to the occupation . . . . I will not take part in an institution that performs a policy that is wrong from a conscientious perspective." *Id.* at 171.

[138] *Id.* at 170.

[139] Petition to the High Court of Justice, HCJ 2383/04 Milo v. Minister of Defense [2004] (on file with the author).

[140] *Id.* §§ 28-29. In her petition Milo stressed the fact that with regard to women, the law explicitly recognized their right to freedom of conscience and their entitlement to exemption from military service based on that right. By contrast, there was no explicit legal recognition of men's entitlement to an exemption based on the right to freedom of conscience, but only a general reference to "other reasons," which provided broad

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she argued that different treatment of each group was more compatible with the separate legal order.[141] Thus, even if the Minister distinguished between male selective conscientious objectors and pacifists, and granted exemptions only to the latter, a similar restrictive distinction should not apply to women due to the broader phrasing of the exemption clause,[142] which appeared to cover both types of women's conscientious objection. Therefore, Milo claimed, the Court should invalidate the military's new interpretation of Article 39 and reinstate its original interpretation.[143] In short, Laura Milo asked the Court to uphold the "separate and not equal" legal regime with regard to conscientious objection that had prevailed up to that point in time.

B. Female Conscientious Objectors are Equalized with a Vengeance

As a result of Milo's petition, the Supreme Court was called upon for the first time to address the appropriate interpretation of the different legal arrangements found in the Defense Service Law concerning the conscientious objection of women and men. The Supreme Court displayed no doubt as to the correct outcome. The Court not only rejected Laura Milo's appeal, but it also struck down the unique right of women to be exempt from military service on grounds of conscience, thus subjecting women to the stricter provisions that had previously been applied only to men.[144] This denial of a separate right for women was rationalized and justified, it is important to note, mainly on the basis of arguments of gender equality.[145] Delivering the opinion of the court, Justice Procaccia divided her analysis of this case in two parts. First, she examined the instructions of Article 36 of the Defense Service Law.[146] Article 36 was originally understood and interpreted by all parties, including the state and the

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discretionary authority to the Minister of Defense to approve or deny the request for exemption. *Id.*

[141] *Id.*

[142] *Id.* § 31.

[143] *Id.* § 22.

[144] HCJ 2383/04 Milo v. Minister of Defense [2004] IsrSC 59(1) 166.

[145] *Id.* at 182-85.

[146] *Id.*

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military, as dealing exclusively with male conscientious objectors.[147] Justice Procaccia, however, interpreted it differently. She held that the authority of the Minister of Defense under the article was not limited to men, because the specific language indicated that it applied to every "person of military age," a phrase she interpreted as referring to men and women alike.[148] Therefore, the Justice concluded, female conscientious objectors should be subject not only to the general provisions of the article, but also to the distinction it drew between pacifism and selective objection.[149] Due to considerations of gender equality, she appeared to regard this result as inevitable. Justice Procaccia explained that, with regard to matters of conscientious objection, men and women were similarly situated; therefore, arguments of gender equality required that women should be subject to the same legal treatment as men.[150] Furthermore, the Justice added that subjecting women to the stricter "masculine" exemption system actually contributed to a more egalitarian recognition of women's contribution to the armed forces in Israel.[151] Surely, whoever constitutes a vital element of the military is not likely to be easily excused from military service. In other words, the very act of restricting women's right to conscientiously object was perceived by the Justice as promoting principles of gender equality, treating women as an essential resource whose services the military could not lightly forgo.[152]

After referring to gender-equality arguments in reaching her conclusion that female conscientious objectors should be subject to the legal

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[147] *See* State's Summary Argument, HCJ 2383/04 Milo v. Minister of Defense [2004] (on file with the author).

[148] *Milo*, IsrSC 59(1) at 182.

[149] *Id.* at 185.

[150] *Id.* at 183.

[151] *Id.* at 183-84.

[152] Specifically, Justice Procaccia summarized her position as follows:

> Substantive principles of equality justify, then, equal treatment of men and women in the carrying out of the authority of the Minister of Defense according to Section 36 of the Law. . . . That is the case with regard to applying the exemption to universal conscientious objection, and this is the case regarding the inapplicability of the exemption to selective objection.

Id. at 185.

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framework of exemptions embedded in Article 36, Justice Procaccia moved on to the second part of her analysis and provided her interpretation of Article 39 of the Law.[153] In her explanation, she employed arguments of gender difference to delineate the boundaries of Article 39.[154] The Justice determined that the expression "reasons of conscience" in Article 39 did not refer to a general right to freedom of conscience in its common understanding, but rather to religious beliefs that prevent only women from serving in the military based on the perception that women are different from men.[155] Grounding this conclusion in the legislative history of this provision, Justice Procaccia explained that, since the special exemption clause for women was intended to satisfy the needs and desires of the religious segments of Israeli society, those considerations should govern the interpretation of legislative intent.[156] Therefore, even if the legislature included "reasons of conscience" in the article along with "religious way of life," the two phrases should be read as referring to the exact same religious basis for exemption.[157] This conclusion, equating the expressions "reasons of conscience" and "religious way of life," empties "reasons of conscience" of any independent meaning. In fact, it leads to the elimination of "reasons of conscience" as independent grounds for exemption under Article 39.

Therefore, the outcome resulted not only in the rejection of Laura Milo's petition, but the denial of the broad and independent right to exemption from military service on grounds of conscience that had been exercised openly by female conscientious objectors for years. Furthermore, this denial was based on gender equality. Going forward, female

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[153] *Id.* at 185-89.

[154] *Id.*

[155] *Id.* at 186.

[156] *Id.* at 186-87.

[157] Justice Procaccia wrote:

> The exemption from military service granted to a woman according to Section 39 for "reasons of conscience" or for "religious familial way of life" is basically meant to respect and to honor the inability of women to serve in the military due to religious perceptions and the customary and ethnic traditions to which they subscribe. Exemption based on "reasons of conscience" in the special context of this provision is strongly related to religious belief, or customary or ethnic-traditional grounds, which prevent a woman from serving in any kind of military service.

Id. at 189.

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conscientious draft resistors would be subject to the same restrictive legal arrangement that was applied to men under Article 36 of the Law, according to which exemption from military service on grounds of conscience was not the right of each conscript, but rather a discretionary matter which could potentially be changed at any time. Not only could it be withdrawn, but, to the extent that it remained in force, it only covered universal conscientious objection, and not selective conscientious objection.

C. Laura Milo: Between the Court and Feminist Lawmaking

This legal outcome, in which the other two male Justices concurred without reservation,[158] seems to confirm the arguments made by Williams and other feminist activists over two decades ago regarding the masculine limits of the courts. It also suggests that the same pragmatic perceptions of what can be achieved through the judicial path—perceptions that motivated feminist lawmaking in the seventies and eighties—remain highly relevant today. As Williams predicted, "courts will do no more than measure women's claim to equality against legal benefits and burdens that are an expression of white male middle-class interests and values."[159] Therefore, it seems reasonable to argue that the Milo decision should be viewed as yet another expression of the kind of judicial treatment that women can expect to receive as a result of the courts' severely limited capacity.

However, on further examination, this outcome can also be seen as a reflection of a much larger phenomenon regarding the nature and consequences of the relationship between feminist lawmaking and the judicial definition of sex-based equality. A second look at the case of Laura Milo leads one to wonder whether the feminists' predictions regarding the potential products of judicial discourse are not self-fulfilling. Certainly, when all parties to the judicial process adhere to the belief that the courts can never be a source of social change, visions of social change are not even introduced in court, and the existing legal order remains undisturbed. Therefore, it is important to remember that the critical feminist notions concerning the limits and possibilities of judicial discourse in dealing with gender equality issues, in addition to the strategic decision to use the courts as instruments of change, have contributed significantly to the nature and substance of sex-equality case law.

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[158] Justice Procaccia delivered the opinion of the court to which Justice Mazza and Justice Levi simply joined. *Id.* at 192.

[159] Williams, *supra* note 123, at 175.

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The ways in which the critical feminist approach to the courts has shaped sex-equality law becomes more apparent if one examines, for instance, American constitutional sex discrimination cases heard by the Supreme Court of the United States over the last three decades.[160] Many of these cases were the product of feminist initiatives, and they all involved plaintiffs trying to highlight the discriminatory nature of sex-specific classifications, demanding their replacement with the equal treatment of men and women.[161] The successful cases were those in which the court accepted the claim of discrimination and invalidated the sex-specific laws at issue.[162] In Israel, where feminist efforts to promote gender equality have been guided by the American example,[163] a similar process occurred. Most leading cases initiated as part of feminist efforts to establish the principle of sex-based equality involved women seeking the same treatment as men.[164]

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[160] For a detailed account of the Supreme Court cases interpreting sex discrimination under the Equal Protection Clause of the U.S. Constitution from 1971 through the end of the twentieth century, see FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY: CASES AND MATERIALS 75-81 (Mary E. Becker et al. eds., 2d ed. 2001).

[161] David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. 33 (1984). Cole highlights the fact that many of the discrimination cases brought by feminists at the time involved men seeking the same legal treatment as women, such as *Frontiero v. Richardson*, 411 U.S. 677 (1973). Cole, *supra*, at 58-62.

[162] Cole, *supra* note 161, at 58-62.

[163] For a general analysis of the impact of the American Women's Movement on the formation of the Israeli Women's Movement, see Hannah Safran, Ha'kesher Ha'americani: Hashpaato Shel Hafeminism Ha'americani Al Hatnooa Lezchoot Bchira Lenashim Bayeshoov Hayehudi (1919-1926) Ve'al Hatnooa Leshivion Ha'nashim Be'israel (1971-1982) [The American Connection: The Influence of American Feminism on the Struggle for Women's Suffrage (1919-1926) in the Jewish Community and Women's Equality (1971-1982) in Israel] (2001) (unpublished Ph.D dissertation, University of Haifa) (on file with Haifa University Library) (Hebrew). For a more concrete analysis of the manner in which American feminist lawmaking has influenced and shaped Israeli feminist legal battles, see Leora Bilsky, *Yivoo Tarbooti: Hamikre Shel Feminism Be'israel* [*Cultural Translation: The Case of Israeli Feminism*], 25 TEL AVIV U. L. REV. 523 (2001) (Hebrew).

[164] *See, e.g.*, HCJ 153/87 Shakdiel v. Minister of Religious Affairs [1988] IsrSC 42(2) 221 (contesting the exclusion of women from local religious councils); HCJ 953/87 Poraz v. Mayor of Tel Aviv [1988] IsrSC 42(2) 309 (demanding the inclusion of women in the municipal body that elects the Chief Rabbi of Tel Aviv); HCJ 104/87 Nevo v. National Labor Court [1990] IsrSC 44(4) 749 (fighting for the equalization of the retirement age for men and women); HCJ 4541/94 Miller v. Minister of Defense [1995] IsrSC 49(4) 94 (insisting on the right to enter a military pilot training program). For a more detailed analysis of the significance of those cases in the context of feminist battles of the 1980s and 1990s in Israel, see Rimalt, *supra* note 77.

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In all such cases the court was attentive to claims of discrimination and the principle of gender equality in terms of equal treatment was recognized and reaffirmed.

Further, in their effort to eradicate sex-specific laws that they perceived as perpetuating rigid sex roles and contributing to women's subordinate status in society, both American and Israeli feminists fought throughout the 1990s for the full integration of women in the military.[165] For example, one struggle in Israel focused on the admission of women to pilot training courses,[166] and another in the United States centered on the admission of women to the Virginia Military Institute,[167] but the two were essentially similar. Thus, *Reed v. Reed*, the first case to hold that the Equal Protection Clause prohibits discrimination on the basis of sex,[168] reflects the same feminist ideology as *United States v. Virginia*,[169] despite the twenty-five years that separate them. In both cases, women sought and won the implementation of the equal treatment model of subjecting women to the masculine standard of the law. Likewise, in Israel, Leah Shakdiel, one of the pioneering Orthodox feminist activists, fought for an equal right to be elected to an all-male religious council.[170] Alice Miller, who followed her almost a decade later, demanded to serve as a military pilot equally with male soldiers,[171] introducing the same concept of equality before the Court. This is not to say, of course, that feminist litigation in the last several decades in the United States or Israel has been limited to claims that adopted and implemented the formal and masculine definition of equality. Rather, the argument is that feminist forces in both places played a role in the formulation of sex-equality case law and the definition of gender equality that underlies this case law. Further, the feminist causes of action,

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[165] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996); HCJ 4541/94 Miller v. Minister of Defense [1995] IsrSC 49(4) 94.

[166] *Miller*, IsrSC 49(4) 94.

[167] *Virginia*, 518 U.S. 515. In an earlier case, a male plaintiff challenged the Military Selective Service Act under the Fifth Amendment because it authorized the registration of males but not females. The Supreme Court upheld the sex-based classification as closely related to Congress's purpose of authorizing the drafting of combat troops, for which only males were eligible. Rosteker v. Goldberg, 453 U.S. 57 (1981).

[168] Reed v. Reed, 404 U.S. 71 (1971).

[169] *Virginia*, 518 U.S. 515.

[170] HCJ 153/87 Shakdiel v. Minister of Religious Affairs [1988] IsrSC 42(2) 221.

[171] *Miller*, IsrSC 49(4) 94.

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as well the legal arguments that were raised to defend them, should be understood in light of pragmatic perceptions regarding the limits and the possibilities of the courts.

Within this framework, it is important to examine more critically not only the Supreme Court's decision in Laura Milo's case, but also the plaintiff's role in contributing to how the court eventually resolved the issue of gender equality. Laura Milo, it should be remembered, was trying to defend a sex-specific law that was plainly discriminatory;[172] women had a broad right to freedom of conscience that was denied to men. However, in her efforts to defend a right that was unique to women, Laura Milo adhered to technical formalities and neglected any substantive argument she might have raised.[173] She did not claim that the sex classification promoted the equal citizenship of women or compensated them for practices of exclusion and subordination in the military. Instead, she asked the court to allow her and other women to continue enjoying the broader conscientious exemption from military service that they traditionally enjoyed, simply because the plain language of the statute treated women differently, and, in this case advantageously, compared to men.[174] However, after years of feminist groups and organizations petitioning the courts to eliminate the legal distinctions between men and women, and to equalize the status of women, it is not surprising that this appeal was perceived by the Court not only as having no legal basis, but also as undermining the principle of gender equality. Moreover, the Court's decision to bring the status of women in line with that of men, and not the other way around, is not unexpected under these circumstances. Theoretically speaking, even after the Court interpreted the separate legal arrangement as violating the principle of gender equality, nullification was not the only remedy available. It could have applied the remedy of "extension," and extended the broad right for

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[172] *See supra* note 18 and accompanying text.

[173] Petition to the High Court of Justice, HCJ 2383/04 Milo v. Minister of Defense [2004] (on file with the author).

[174] *Id.* §§ 26-31. In this context it is important to highlight that Milo repeated this line of argument even after her petition was denied. She filed a request for rehearing in which she argued that "[t]he Court has applied a so-called egalitarian interpretation . . . that ignored the general nature of the Defense Service Law that all along draws a substantial distinction between men and women. . . . *Whatever our views on the appropriate situation with regard to sex-based equality in the military, it is not for us or for the court to make a determination in this matter.* The legislature is the one who determined those rules and the court must adhere to them as long as they are not amended by the legislature." Petition for Rehearing §§ 9, 92, HCJ 7802/04 Milo v. Minister of Defense [2004] (on file with the author) (emphasis added).

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conscientious objection to men. Alternatively, at a minimum, the Court could have pointed to the remedy of extension as desired under the circumstances, and referred the issue back to the legislature for reconsideration. Yet neither of these was considered by the Court, which clearly perceived the option of subjecting female conscientious objectors to the male standard of law as the only possible expression of gender equality.[175] It appears that the three Justices were never in doubt as to the correct definition of equality. Therefore, the possibility of aligning the masculine legal standard with the feminine one was not even mentioned as a possibility that existed within the scope of gender equality.

However, the Court was not alone in being limited by an unambiguous, male-biased perspective. In her petition, Laura Milo refrained from raising any substantive arguments in defense of the sex-specific right she was trying to hold on to. She also avoided any normative reference to the concept of equality that could have been applied without interfering with women's long-enjoyed right to conscientious objection. Hence, although Milo merely aspired to preserve the broad right to conscientiously object, she made no normative effort to defend this right or assert its validity within the framework of a substantive concept of gender equality. She simply argued that women should have this right because the legislature conferred it decades ago. She did not try to shed light on the potential radical implications of this right with regard to the promotion of women's status in society. She also refrained from referring to the way in which the female standard of law, and not just the male one, could be used as a basis for remedying this situation, thereby extending the broad "feminine" right to both men and women. Had she done so, there would have been another explicit option facing the Court, one that at least challenged the official perception of formal-masculine sex-based equality. But Milo did not, and consequently her petition did not offer any valid way of responding to this arrangement in an age when the law is dedicated to the promotion of principles of gender equality. In the absence of other critical perspectives regarding the desirable outcome of the case—a result that could respond to both Milo's claim and also implement principles of equality—the Court had little option but to apply the only perception of equality prevalent in legal and judicial discourse.

Why was Milo's petition constrained to such narrow and formal arguments? One must suspect that it was a by-product of the pragmatic

[175] HCJ 2383/04 Milo v. Minister of Defense [2004] IsrSC 59(1) 166, 185.

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approach to the courts. Laura Milo and her feminist lawyers[176] apparently believed they were using the legal arguments that could best serve the feminist cause of preserving the broad right to freedom of conscience women had enjoyed. But the final outcome reveals that they were wrong. This conclusion inevitably raises the question whether the Court would have responded differently to a less pragmatic and more radical vision of gender equality.

IV. CONCLUSION: THE LIMITS OF THE LAW AND ITS POSSIBILITIES

The story of female conscientious objectors in Israel, which started with the parliamentary deliberation over the Defense Service Law and ended, at least for the time being, with the Court decision in the case of Laura Milo, provides an interesting case study regarding not only the limits, but also the possibilities, of the law.

This Article has outlined three major aspects of this story that deserve particular analysis and discussion from a feminist perspective. The first aspect relates to the historical context in which the special conscientious exemption for women was created. As described and explained above, this sex-specific law was the obvious product of a "separate spheres" mentality; analysis of its legislative history demonstrates the patriarchal perceptions of women that originally shaped and rationalized this arrangement. Typically, this kind of normative and historical context would have made the special exemption granted to women inherently suspect, since the law's disparate treatment of men and women formed under such circumstances is usually perceived as perpetuating rigid sex roles and, therefore, contributing to women's subordination. However, there were unusual dynamics involved in this special right. While clearly shaped by problematic gendered perceptions, this separate legal arrangement for women evolved to award women a significant right—the right to exercise their freedom of conscience with regard to military service. Under the protection of the law, women won recognition of broad grounds for conscientious objection to the military as such or to specific aspects thereof.

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[176] Laura Milo was represented by two feminist lawyers, Neta Ziv and Smadar Ben Natan. Neta Ziv also served as co-counsel for Alice Miller, who fought for her right to be a military pilot. HCJ 4541/94 Miller v. Minister of Defense [1995] IsrSC 49(4) 94. Smadar Ben Natan's most notable women's rights case involved the representation of a coalition of feminist groups and organizations in their petition against the Playboy broadcasting television channel. HCJ 5432/03 "Shin" for the Equal Representation of Women v. Cable Broadcasting Commission [2004] IsrSC 58(3) 65.

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Furthermore, the law also legitimized their choice between military service and community service by granting them equal economic benefits, thereby symbolically equalizing the two types of national service. This recognition not only allowed female conscientious objectors to implement an agenda that undermined the central role of militarism and military service in Israeli society, but also facilitated the creation of an alternative path to equal citizenship of particular importance to women. Hence, as exercised and enforced, the separate right to conscientiously object became even more significant. It protected women's freedom of conscience, and it provided them the legal option to attack many masculine aspects of the contemporary legal and social order. This moment seemed to hold the promise of a distinctive feminist practice that could reconstruct the commitments of citizenship in a non-militaristic vein.

However, as this Article has shown, this state of affairs was not free of obstacles. The second aspect of the analysis reveals that the actual operation of this single-sex arrangement was quite complex. On the one hand, the separate right granted to women did, in fact, protect their ability to make conscientious choices in a much more comprehensive manner than was granted to men; it also carried other important and radical consequences from a feminist perspective. On the other hand, this broad gender-biased right to conscientious objection undermined the feminine act of objection in other significant respects. While enabling women to win an exemption from military service for reasons of conscience and to channel their protests to substantive avenues of action, the prevailing masculine legal order simultaneously interfered with those women's ability to articulate a meaningful voice of protest that was both visible and influential in the public sphere.

Under these circumstances, it is of particular interest to examine the latest legal development with regard to women's separate right to conscientious objection. As this Article analyzed and explained, when faced with an appeal filed by a female conscientious objector, the Court abolished women's long-standing separate right to conscientious objection, subjecting women to the stricter masculine standard of law. This ruling was presented as the obvious and inevitable product of the law's commitment to gender equality. The formal reference to equality has legitimized denying the unique right granted to women, and will have far-reaching consequences from a woman's perspective. Not only are women now denied the broad right others enjoyed for many years, the subversive feminist action that developed as a result of this right has been completely undermined as well. Thus, when the consequences of this new egalitarian legal order are compared with the old regime of gender separation, it is not clear whether

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women are in a better position than before. True, the unique right women enjoyed was exercised under a masculine social and legal order that privileged the masculine voice of dissent, and definitely undermined its feminine counterpart. Yet the feminine and feminist social action that gradually developed under the law was not without meaning, even if it appeared to lack public recognition. In this sense, it seems that Shani Werner underestimated the significance of women's ongoing conscientious action when she wrote her letter. Had the legal system allowed the conscientious objection to continue, it may have eventually challenged deeply-rooted perceptions regarding the link between militarism and citizenship, a connection which has detrimental consequences for women. In other words, in the framework of the original legal structure, the female voice was not entirely silenced. It still had presence and significance in the public sphere, even if it was weak and largely ignored. However, following the Supreme Court's decision in the case of Laura Milo, this particular form of female conscientious objection has been totally undermined; the possibility that this unique feminine voice would win recognition and influence in the public discourse came to an end. Thus, despite the fact that the new egalitarian legal order now imposed on women places them in a similar position to that of men, as far as the ability to voice dissent in an official judicial forum is concerned, one should recognize that this newly awarded voice may be less significant than the old voice that has now been silenced.

Furthermore, this latest legal development concerning female conscientious objectors in Israel also suggests that the critical evaluation of the judicial decision cannot focus exclusively on the Court. Feminists should also recognize and rethink the role of the plaintiff in shaping the legal field and its boundaries in sex-equality cases. In the case of Laura Milo, the need for this recognition becomes obvious if one examines the gap between the goal of her petition and the actual rhetoric that was employed to defend it. Although Laura Milo aspired to preserve a broad radical practice of female conscientious objection, there was no normative effort to defend this feminine practice and its significance either within the framework of a substantive concept of gender equality or as a sex-specific classification that deserves protection. In other words, in line with many other sex-equality cases, Milo adhered to narrow and formal arguments and avoided any radical challenge to the contemporary judicial perception of gender equality. Therefore, the outcome of the case—taking from women a separate and potentially radical right they enjoyed—was inevitable because the masculine limits of judicial discourse were, in fact, the limits of the feminist activism itself.

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Above all, the story of female conscientious objectors is not only a story of the limits of the law, but also a story of its unexpected results, the subversive potential for social change, and the inseparable link between feminist agendas and legal outcomes.

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