

SYNAGOGUE AND STATE IN THE ISRAELI MILITARY: A STORY OF "INAPPROPRIATE
INTEGRATION"

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The encounter between synagogue and State in Israel's military context raises a variety of complex questions that defy conventional paradigms. While religious liberty continues to occupy a special place in most liberal democratic thought, the legal and philosophical literature pondering its various dimensions has largely lost analytic sight of the fascinating intersection of military and religion. This article embarks on analyzing the appropriate integration between loyalty to God and to country, and between religious male and secular female soldiers.

Evaluating examples of synagogue-state tensions and accommodationist policies, this Article explores the manner and extent to which the Israeli military (IDF) responds to the observant soldier's multiple identities as a religious minority member and a faithful citizen of the larger secular polity. Against this backdrop, the Article analyzes the vexed challenges posed to multicultural theory by the equivocal status of the Orthodox community as a numerical minority but "power majority" within the military, and by the IDF's unique exercise of multiculturalist protection, termed herein "external restrictions," imposed on majority group members. It concludes that the ongoing "religionization" of the IDF through the 2002 "Appropriate Integration" regulation has served as a powerful counterforce to gender equality, fostering a growing practice of female exclusion through which women are disenfranchised from core, non-negotiable protections of citizenship. The Article identifies as the prime casualty of this aggressive multicultural accommodation not only secular women's hard-won equality of opportunity, but also the very rights and status of minority women within their own religious community.

I. INTRODUCTION

The relationship between religion and state is one of the most debated issues in legal and philosophical thought. The well-known though hotly contested legal phrases "free exercise of religion," "freedom from religion," protection of "religious sensibilities," and "the Establishment Clause" have been thoroughly analyzed. The importance of evaluating the proper place of religious values and considerations in the legal system has only grown in recent years for both practical and theoretical reasons.

Practically, the Western world has seen a resurgence of religion, a radical change most apparent in countries with a wide variety of religious traditions and levels of economic development and best evidenced not only by the growth of fundamentalism, but also by a variety of renewed practices in both public and private domains.¹ The

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¹ Scott M. Thomas, *A Globalized God: Religion's Growing Influence in International Politics*, FOREIGNAFFAIRS.COM (November/December 2010), <https://www.foreignaffairs.com/articles/global-commons/2010-11-01/globalized-god>.

absolute separation of religion and state, promoted in the name of liberal neutralism, seems to be losing theoretical favor in many liberal democracies—especially in its strictest form as a prohibition on state-supported religion.² The American model espousing a "wall of separation" between religion and state is now a glaring exception in the Western world.³ Indeed, a recent comparative study examining the relationship between church and state in forty democracies debunked the myth of an inherent liberal commitment to religious separation.⁴

Yet despite the growing visibility of religion in the public sphere and the law, and the wealth of literature on the topic notwithstanding, the intricate dilemma of religion in the unique context of the military has largely escaped scholarly attention. While some legal scholars have examined religion-based exemption *from* military service,⁵ little work has been done regarding religion *within* the operating military.⁶ This question has added complexity in Israel given the compulsory nature of conscription to the Israel Defense Forces (hereinafter "IDF") and religion's growing presence therein—a process called "the religionization" of the IDF.

Examining synagogue and State tensions in the IDF, this Article challenges multicultural theory as it presently understood to accommodate these complex cultural interactions. It asks whether every minority community is worthy of multicultural protection simply by virtue of being a numerical minority, demonstrating that Israel's Orthodox or national-religious community wields considerable socioeconomic and political power in the "Jewish and Democratic" State notwithstanding its minority status. The Article then postulates the relevant "admission criteria" for groups seeking multicultural status, and, for groups so deserving, further factors necessary to determine if a particular cultural practice should be granted State-sanctioned accommodation. This rigorous analysis is especially acute where cultural groups seek, as does Israel's Orthodox community, not only protection within their minority communities, but also to extend their cultural norms beyond community borders to influence the majority at large—a unique exercise of multiculturalism I term "external restrictions."

This article attempts to fill in the scholarly gaps both as to the conflict between religion and military and, more broadly, as to the nuanced understanding of multiculturalism required when cultural groups small in number wield significant power nonetheless. To do so, it begins by presenting a theoretical framework for analyzing the relationship between synagogue and State in the Israeli military. Applying the concepts of freedom of and from religion in the army base, it then analyzes the challenges this

² DANIEL STATMAN & GIDEON SAPIR, STATE AND RELIGION IN ISRAEL: A PHILOSOPHICAL-LEGAL INQUIRY 15 (2014) [in Hebrew].

³ *Id.* at 18 (listing France and Portugal as exceptional in requiring separation between church and state).

⁴ Jonathan Fox, *Separation of Religion and State in Stable Christian Democracies: Fact or Myth?*, 1 J. L. & RELIGION 60 (2012).

⁵ The classic example in the Israeli context is the contentious "equal security-burden" theme raised by the longstanding religious military exemption of the ultra-Orthodox Jewish community.

⁶ While this proposition is generally true when it comes to legal writing, in sociological writing the scholarship of Professor Stuart A. Cohen stands out as an important exception. *See, e.g.*, Stuart A. Cohen, *From Integration to Segregation: The Role of Religion in the IDF*, 25 ARMED FORCES AND SOC'Y, 387, 387 (1999) ("The role of religion in Israeli military service is so inherently complex that it resists classification in accordance with conventional paradigms"). *See also* the recent groundbreaking book of Yagil Levy, published when the article was in press, YAGIL LEVY, THE DIVINE COMMANDER: THE THEOCRATIZATION OF THE ISRAELI MILITARY (2015).

complex relationship poses to multicultural theory and exposes Israel's perverse multiculturalism.

The article proceeds in four parts. The first lays the theoretical groundwork for analyzing synagogue-State conflicts in the unique confines of the military. It builds on the well-established thesis that the violation of religious beliefs may jeopardize the right to culture, offend freedom of conscience, or otherwise attack religious identity. Using the conceptual toolbox explicated therein, the second part examines the so-called "religionization" that the IDF has ostensibly undergone in recent years and questions the status of Orthodox soldiers as a minority group entitled to multicultural accommodation. Against this backdrop, the third part examines the relationship between religious soldiers and women—two minorities whose integration into the military challenges respectively the traditional secular and male hegemony. The last part critically analyzes the novel experiment that is the IDF's "Appropriate Integration" Regulation. It finds that nowhere else is the conflict between the twin commitments to religious diversity and gender equality so acute and debilitating, and concludes that the military has illegitimately accommodated religion by sacrificing women's fundamental rights and equal status in the armed forces.

II. THEORIZING RELIGIOUS LIBERTY

In order to critically analyze the interaction between religion and state in the Israeli military, it is necessary first to demarcate the relevant theoretical framework and core concepts governing the synagogue-state relationship. In what follows I discuss the key theoretical players in the religion-state conflict, including freedom of religion, freedom from religion, and multicultural theory. With these tools in place, I then embark in the next Parts on examining their implications for regulating religion in the military context.

Freedom of religion is a right so central to liberal tradition and constitutional thinking that each and every democratic system in existence today, and even many countries who eschew democracy, have uncompromisingly safeguarded the free exercise of religion.⁷ Despite its centrality, the theoretical underpinnings justifying this right remain controversial in both the philosophical and legal literature.⁸ One of the most persuasive theoretical accounts justifying freedom of religion dismantles the right into two alternative concepts: as a form of the freedom of conscience, and as a special case of the right to culture.⁹ The analysis that follows introduces these two lines of inquiry and illustrate their application with examples from the military world.

⁷ STATMAN & SAPIR, *supra* note 2, at 107.

⁸ See e.g., Kenneth Lasson, *Religious Liberty in the Military: The First Amendment Under "Friendly Fire"*, 9 J. L. & RELIGION 471, 471 (1992). For an astute account of religious liberty on which the following analysis heavily relies see STATMAN & SAPIR, *supra* note 2.

⁹ Gideon Sapir, *Religion and State: A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 622 (1999) [hereinafter Sapir, *Religion & State*]. There are other rationales for freedom of religion, of course, such as Enlightenment philosophy's belief that the state is not equipped to evaluate religious belief and that religion is anyways irrelevant to state affairs, both of which have been persuasively refuted elsewhere. See, e.g., Sapir, *supra* at 623-25; see also Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PENN. L. REV. 149 (1991).

A. Religious Liberty as Freedom of Conscience

Since freedom of religion involves conscientious acts—indeed, it is "the paradigm freedom of conscience"¹⁰—it is properly understood as an inseparable part of the broader right to freedom of conscience. Conscience implicates our most deeply held normative convictions, those constitutive of self-identity. The violation of such a conviction amounts to an intolerable attack on personhood and self-integrity; it is a "soul rape."¹¹ Since religious beliefs are often profound normative principles lying at the core of personal identity, forcing a person to disobey her religious mandates violates the freedom of conscience.¹² Whatever the content of those religious convictions may be, and however misguided or false, liberal theory safeguards freedom of conscience in order to protect "people of principle" from the feeling of self-alienation experienced by those who betray their conscience.¹³

That religious liberty is part of a broader freedom and not a stand-alone right stresses the conceptual point that no discernible rationale can distinguish between religious and secular conscience.¹⁴ Doing so would give an undeserved advantage to religious persons and thereby offend fundamental notions of equal protection. As a matter of principle, a secular person required to violate what she perceives to be a moral obligation is no less violated than a religious person so required. That her moral code is secular does not reduce it to the realm of personal preferences merely peripheral to self-definition.¹⁵ It follows from the indistinguishable nature of religious and secular

¹⁰ *Church of New Faith v Commissioner for Pay-Roll Tax* (Vic.) (1983) 49 A.L.R. 65, 68-69 (Austl.). See also Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: a Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 961 (1995).

¹¹ MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 37 (2008); Gideon Sapir & Daniel Statman, *Religious Marriage in a Liberal State*, 30 CARDOZO L. REV. 2855, 2862 (2009).

¹² Indeed, as Statman and Sapir note, freedom of conscience and religion are often definitionally inseparable. STATMAN & SAPIR, *supra* note 2, at 110. For a different understanding of freedom of conscience, see NUSSBAUM, *id.*

¹³ STATMAN & SAPIR, *supra* note 2, at 110; Gideon Sapir & Daniel Statman, *Why Freedom of Religion Does Not Include Freedom From Religion*, 24 L. & PHIL. 467 (2005) [hereinafter Sapir & Statman, *Why Freedom*]. The authors also suggest that we protect conscience in order to reward those who lead a selfless life and overcome their myopic self-interest in their everyday behavior. Yet since we protect people regardless of the (im)moral content of their principles, I find this rationale unconvincing.

¹⁴ For an elaboration of this argument, see generally Brian Leiter, WHY TOLERATE RELIGION (2013). But see Michael M. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1497 (1990) (viewing the source of the conscientious actions as controlling). For McConnell, the religious imperative emanates from a higher transcendent power beyond individual control, and hence the religious conscientious objector is doomed to suffer infinitely more than his secular counterpart, whose convictions result from human autonomous judgment.

¹⁵ Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 336 (1996), quoted in Sapir, *Religion & State*, *supra* note 9, at 642-43 ("The nontheist's belief in transcendent moral obligations—in obligations that transcend his self-interest and his personal preferences and which he experiences as so strong that he has no choice but to comply—is analogous to the transcendent moral obligations that are part of the cluster of theistic beliefs that we recognize as religious."). In my view, the only possible distinction between the religious and secular consciences is not substantive but procedural, and more specifically relates to ease of proof. It is much easier for the religious individual to convince a decision-maker that she is a member of a religious sect than for her secular sister to make a parallel case concerning her non-religious, moral reasoning.

conscience that in the military setting, inasmuch as the State exempts religious objectors from military service, as is the case in Israel with Jewish Orthodox women and ultra-Orthodox men, it must also excuse the pacifist conscientious objector, or at least assign her to non-conflicting forms of military or national service.¹⁶

Once religious liberty has been characterized as a specific archetype of freedom of conscience, an analysis of its proper scope is in order. Freedom of conscience is offended when a person is caught in a direct and irreconcilable conflict between her spiritual and legal commitments. Daniel Statman and Gideon Sapir, drawing on the work of Noam Zohar, suggest that a person's conscience is violated when she is required to perform an act which defies an established religious prohibition (e.g., break Sabbath laws) and to which she is strongly opposed, or when she is prevented from fulfilling a religious commandment (e.g., the mandate to pray or make Kiddush). A thorough definition of these categories requires an understanding of what we mean when we say "required." The compulsion referenced in this discussion refers not only to physical coercion, but also to heavy prices inflicted on the individual for refusing to comply with the mandate in question.¹⁷ For example, that a person may refuse a military order that she deems violative of her conscience cannot be legitimately regarded as a reasonable solution to a religious conflict if that refusal incurs a significant penalty.

These conditions serve to carefully confine the scope of protection accorded under freedom of conscience; they stand in contradistinction to situations in which the violating act is done by others.¹⁸ The reason is clear and simple: "What others do might annoy, injure, or harm me in various ways, but they cannot *through* their agency touch my conscience."¹⁹ This narrow definition renders freedom of conscience a workable and fair concept in practice, allowing us to reasonably limit its protection to those special cases in which it is truly justified. Such limitation is important, because the protection of too many customs may raise inequality concerns, insofar as some groups will have the privilege of special accommodation and others will not, and may threaten the maintenance of a lawful society, insofar as accommodation often means exempting a group from a particular law.

The potential abuse of freedom of conscience raises questions as to how to and who should decide the qualifications required of a certain practice for recognition as a religious norm. The inquiry could be subjective in nature (asking whether the specific individual perceives the custom in question as obligatory) or objective (asking what the

¹⁶See generally Daniel Statman, *Critical Reflections on the Exemption from Military Service on Conscientious Objection Grounds*, 31 IYUNY MISHPAT 669 (2009) [in Hebrew]. For the adjudication of conscientious objections to military service, see e.g., HCJ 7622/02 Zonshein v. Chief Military Advocate General, PD 57(1) 726 (2002) (Isr.). But see STATMAN & SAPIR, *supra* note 2, at 120-21, who reject the current conscientious exemption for the reason that most objectors do not perceive IDF actions as amounting to a murder or a similarly disastrous crime.

¹⁷ Gideon Sapir, *The Boundaries of the Establishment of Religion*, 8 MISHPAT UMIMSHAL 155, 176-77 (2005) [in Hebrew].

¹⁸ STATMAN & SAPIR, *supra* note 2, at 120; Sapir & Statman, *Why Freedom*, *supra* note 13, at 499 ("Consciences should be protected only when *directly* threatened, which usually happens when action of some kind is required ('individually', not 'collectively') an action [sic] which goes against the deepest convictions of an individual.").

¹⁹ Sapir & Statman, *Why Freedom*, *supra* note 13, at 482 (citing Alan Donagan, *Conscience*, I ENCYCLOPEDIA OF ETHICS 298 (1992) ("[T]he conscience of the agent is limited to the actions of the agent himself.")).

authoritative religious texts actually say about the custom in question). Different legal systems employ different approaches. Canada, for example, uses the subjective test,²⁰ while American courts often find favor with the objective test.²¹

The immediate advantage of the subjective test is that it saves the State from becoming a "national theology board"²² taking sides in internal religious disputes. In this way a series of complex questions are avoided, such as which rabbinical figures and religious texts to consult and the problem of offending religious liberty by the very judicial act of deciding for the group the proper interpretation of its religious mandates.²³ Moreover, if the reason for honoring freedom of conscience is the desire to shield a person from the self-alienation that accompanies a betrayal of fundamental principles, it seems that her sincere subjective perception as to what her faith obligates her to do should be controlling.

The objective test, on the other hand, better controls against a potential flood of religious exceptionalism claims born from the imaginations of adherents and rendering "each conscience . . . a law unto itself."²⁴ Moreover, the very insistence on a clear and formal religious rule deters imposters seeking to take advantage of the system. This initial screening of false claims also makes it feasible to waive the intrusive inquiry into the sincerity of the individual's alleged commitment to a specific religion that the subjective test may require.

Regarding religion-related disputes in the military context, the objective test is more appealing. The narrow protection it affords is well suited to the strict military framework that by its very nature demands the surrender of a wide array of freedoms regularly exercised in civilian life. Recognizing the uniqueness of the military context, Israel's human rights Basic Law designated a separate and more lenient Security Limitations Clause exclusively for the purposes of evaluating alleged infringement of *soldiers'* rights.²⁵

Fairness considerations also play a role; the objective test contributes to cohesion among soldiers since protecting religious freedom means that some soldiers are exempt from regulations that everybody else must obey (e.g., secular soldiers are required to tend to tedious tasks while their religious counterparts pray).²⁶ Moreover, the objective test is

²⁰ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 (Can.).

²¹ *Warner v. City of Boca Raton*, 887 So. 2d 1023 (Fla. 2004). *But see* *Burwell v. Hobby Lobby*, 13-354 (U.S. Jun. 30, 2014).

²² *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, A. concurring in the judgment in part and dissenting in part).

²³ Ruth Gavison, *Yes to Jewish Public Sphere*, 24 MEIMAD 7 (2002) [in Hebrew]; Laura S. Underkuffler, *Religious Exceptionalism and Human Rights*, in RELIGION AND THE DISCOURSE OF HUMAN RIGHTS 439, 443 (Hanoach Dagan et al. eds., 2014) ("The inherently subjective nature of religion has led American courts to refuse to examine the existence, legitimacy, or sincerity of declared religious belief"). *See also* *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 10-553 (U.S. Jan. 11, 2012) (voicing concerns regarding interference with religious autonomy).

²⁴ *Employment Division v. Smith*, 494 U.S. 872, 890 (1990).

²⁵ *See* Basic Law: Human Liberty and Dignity, SH No. 1391 p. 150 § 9 (Isr.).

²⁶ To be sure, the time allocated to Orthodox soldiers for prayer every morning in lieu of performing mundane military chores shouldered by secular soldiers is an unnecessary religious accommodation. While banning soldiers from the act of praying—a *halakhically*-mandated duty—is a clear violation of their freedom of conscience, this is not to say that the IDF is obliged to exempt religious soldiers from other mandatory tasks to allow time for prayer. The IDF would thus be justified in expecting religious soldiers to wake up earlier in order to meet both their religious and military obligations. Acknowledging this subtle

more easily implemented in the military context, as will be explained in greater detail below in a discussion of the IDF's Military Rabbinate. While in other civil contexts we may want to allow the court to scrutinize and second-guess rabbinical opinions,²⁷ in the military context, the same deference the courts usually accord military authorities should extend also to military religious authorities.²⁸ That is, the IDF Chief Rabbi, as the "local *halakhic* decisor" (*mara de'atra*), should be the ultimate arbiter of Jewish law for military purposes.²⁹ This will effectively spare the court from the unseemly task of examining the legitimacy of professed religious beliefs.

Designating the IDF Rabbinate as the *halakhic* arbiter is also appealing normatively. As I shall argue, unlike civil rabbis for whom the conventional take on Jewish law is often conservative and rigid, the IDF Rabbinate as a military institution tends to issue context-sensitive *halakhic* rulings which take into account the special circumstances of applying Jewish law in military life as well as extra-*halakhic* considerations such as the overriding desire for national unity.³⁰ This allows for more flexibility and generally reduces the loyalty conflict between synagogue and state.

Some may still argue that conferring so extensive an authority on the Military Rabbinate without critically examining its reasoning (except in extreme cases) is ill-advised, since this generous deference may be abused in order to promote sectarian agendas in a way that would render freedom of religion an all-encompassing privilege.³¹ While appealing at first, this argument ultimately fails for three reasons. To begin with, as a military organ first and foremost, the Military Rabbi is inherently motivated to creatively fit Jewish law within military constraints.³² As a matter of policy, judicial deference may actually work to further incentivize the IDF Rabbinate to adopt moderate and liberal interpretations of *halakha* when possible, lest its interpretative privileges be revoked. This promising result serves well the interests of the liberal state in establishing equal respect and concern for all—by encouraging the Orthodox community to adapt their religious norms to a form more respectful of human rights and gender equality.³³

distinction is key in adapting military routine to incorporate religious duties in a way that would minimize the tensions between religious and secular soldiers so inimical to unit cohesion.

²⁷ In the civil context, a less-deferential policy is more advisable. In my view, courts should examine more critically the expert opinions of religious authorities and in case they find a genuine cultural conflict over a liberally-problematic practice, they should give voice to the more liberal dissenting opinions competing to (re)define the components of their religious identity. Compare Yaacov Ben Shemesh, *Law and Internal Cultural Conflict*, 1 L. & ETHICS HUM. RTS. 1 (2007).

²⁸ For the view that the rabbis are the sole interpreters of *halakha*, see HCJ 1514/01 Gur Arye v. The Second Authority for Television and Radio 55(4) PD 267, 280 (2001) (Dorner, D. dissenting) (the content of the religious directive is determined by the ordained rabbinical authorities); HJC 6024/97 Shavit V. Rishon Lezion Jewish Burial Society, 53(3) PD 600, 642 (1999) (Englard, Y. dissenting). But see STATMAN & SAPIR, *supra* note 2, at 139-49 (calling for the courts to critically examine rabbinical opinions).

²⁹ To be sure, even if the Military Rabbinate deems a certain scenario violative of *halakha*, religious liberty is implicated only if the soldier is actively involved himself in the religious violation.

³⁰ See the discussion *infra* IV.D.1.

³¹ See STATMAN & SAPIR, *supra* note 2.

³² For this creative interpretive approach see *infra* IV.D.1.

³³ By this suggestion, I am paying heed to Menachem Mautner's call for Israeli liberals to "facilitate the development of trends in contemporary Jewish *halakha* that may lead to narrowing the gap and reducing the tensions between the secular and religious Jewish groups residing in the country." MEHACHEM MAUTNER, LAW AND CULTURE IN ISRAEL AT THE THRESHOLD OF THE TWENTY-FIRST CENTURY 319 (2008) [in Hebrew].

Second, even if judicial confidence in the Military Rabbinate does grant relatively expansive freedom to religion, this is not necessarily a negative result. In almost all other contexts of civil life, a person who feels that some element of his life (job, surroundings, school, etc.) compromises his religious observance is at least theoretically free to leave or quit. Yet since military conscription is mandatory, a religious male person does not enjoy a similar right of exit. The unavailability of a right to exit is a further justification for giving wider latitude to the Military Rabbinate to determine when a right has been violated.

Finally, if deference to the Military Rabbinate risks unreasonably broadening the scope of religious rights, those rights can be circumscribed in other ways to guard against potential abuse. In the military context in particular, it is likely that compelling interests of security and order often justifiably require the subordination of many rights—including religious freedom. This is where the final step of analysis is required: a balance-of-interests test weighing the costs of granting a religious freedom against its benefits. The Court, then, instead of placing the center of its analytic gravity on *identifying* the right violated, should let a balance-of-interests test do the normative work of limiting religious exceptionalism.³⁴ Take, for example, the conscription of ultra-Orthodox (*charedi*) yeshiva students. The crux of the matter is not whether yeshiva students are *halakhically* prohibited from serving in the IDF (because doing so means neglecting Torah studies); rather, the question is whether, if they are so prohibited, the State is justified in exempting them from service and thereby unevenly distributing the nation's security burden.

Other factors to consider in a balance-of-interests test include whether less costly alternatives exist by which to protect the religious freedom at question, and whether the resulting costs and benefits are equitably distributed. For example, if the costs of protecting a religious freedom can be imposed on the party benefitting from its protection, dissenters have little ground on which to stand.

The theoretical framework presenting religious liberty as a freedom of conscience, and the balance-of-interests test best suited to evaluate alleged violations thereof, are only one lens through which to view and justify the right to religious liberty. The next section will consider an alternative: religious liberty as a right to culture.

³⁴ This is the approach of American courts. See Underkuffler, *supra* note 23, at 445-46.

B. Religious Liberty as the Right to Culture

The right to religious liberty may also be conceptualized as part and parcel of the right to culture.³⁵ According to this view, the religion-state dialogue sits within the larger state-vs-culture debate, with religion as a prototypical example of an all-encompassing culture dictating comprehensive rules that shape critical aspects of human existence. Religion, in the words of Lawrence Friedman, represents the defining essence of a cultural system, that is, "crucial, essential aspects of group life, marrow-deep beliefs and institutions, such that any alteration in this 'culture' can seriously injure or damage the group in its very groupness."³⁶

This conceptualization means that the right to culture imposes on states the responsibility to support and protect the cultural lifespan of religious minorities whose systems of belief would be otherwise lost in the majoritarian cultural battlefield.³⁷ It follows that not every cultural structure or religious framework is duly entitled to protection. Rather, only those minority groups struggling for cultural survival should be accommodated, and the more vulnerable a religion, the stronger the state protection it requires.³⁸

Theories differ in justifying the right to culture. To begin, classical liberalism is concerned with individuals, promoting freedom of choice and the autonomy of private will regardless of social contexts and group affiliations.³⁹ The normative ideal underlying this approach is the guarantee of equal citizenship. Critical schools of classical liberal thought, however, have sought to undermine this atomist ideology, instead championing *tolerance* as the basic liberal value. This focus prompts the liberal state to protect the cultural rights of its minority groups in order to promote equality of a different nature.⁴⁰

The realization that individual autonomy and well-being is crucially dependent on group affiliation and cultural identity led to what is called the "multicultural turn in liberal theory."⁴¹ Multiculturalism has gained a place of honor in liberal theory in the past few decades,⁴² with the liberal state now essentially committed to protecting the uniqueness

³⁵ This argument was thoroughly developed by Sapir, *Religion & State*, *supra* note 9.

³⁶ Lawrence M. Friedman, *The War of the Worlds: a Few Comments on Law, Culture, and Rights*, 47 CASE W. RES. L. REV. 379, 381 (1997).

³⁷ Sapir, *Religion & State*, *supra* note 9, at 634.

³⁸ STATMAN & SAPIR, *supra* note 2, at 114; Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, in MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE: THE ARIEL ROSEN-ZVI OBM MEMORIAL VOLUME 93, 103 (Menachem Mautner, Ronen Shamir & Avi Sagi eds., 1998) [in Hebrew] [hereinafter MULTICULTURALISM].

³⁹ Michael Karayanni, *Living In a Group of One's Own: Normative Implications Related to the Private Nature of the Religious Accommodations for the Palestinian – Arab Minority in Israel*, 6 UCLA. J. ISLAMIC & NEAR E. L 1, 26 (2007).

⁴⁰ See John Rawls, JUSTICE AS FAIRNESS: A RESTATEMENT, 5-8 (2001). For an interesting discussion of the rise of multiculturalism from the liberal tradition, see LOTEM PERRY--HAZAN, THE ULTRA-ORTHODOX EDUCATION IN ISRAEL: LAW, CULTURE, AND POLITICS 321-324 (Daphna Bar-On ed., 2013) [in Hebrew]; see also Gila Stopler, *The Boundaries of Equality – Marginal Musings on Ruth Halperin-Kaddari's Women in Israel: A State of their Own*, 8 MISHPAT UMIMSHAL 391, 414 (2005) [in Hebrew].

⁴¹ See Jacob T. Levy, *liberal Jacobinism*, 114 ETHICS 318, 322 (2004).

⁴² See Stopler, *supra* note 40, at 414. In Israel, a special edited volume was devoted to a discussion of multiculturalism in Israeli society and in Israeli law. See MULTICULTURALISM, *supra* note 38.

of its internal minority groups.⁴³ Multiculturalism demands that the liberal state not only tolerate cultural and religious diversity, but also recognize and provide positive accommodation of group differences for cultural minorities through “group-differentiated rights.” Will Kymlicka, the father of multiculturalism, argues that any minority defeated in the cultural marketplace of ideas is entitled to the protection of special group-differentiated rights in light of the strategic importance of cultural communities in shaping freedom of choice and in helping individuals realize a meaningful life.⁴⁴ Other multiculturalist liberals justify the protection of minority cultures with the roles these cultures play in the constitution of individual identity.⁴⁵ This is especially true for religious minorities due to the jeopardized position of religion in the liberal state,⁴⁶ and the particular esteem in which religious freedom is held by both believers and the founding principles of liberal governance.⁴⁷

These different justifications for multiculturalist protection yield varying conclusions about what multiculturalism should protect. Theorists differ in endorsing “thin” multiculturalism, protective only of liberal minority cultures, or “thick” multiculturalism, protective of both liberal and illiberal minority cultures.⁴⁸ The core inquiry occupying theoretical multicultural scholarship grapples with the agonizing problem that accommodating *group*-differentiated rights often means compromising the well-being of *individual* group members.⁴⁹ That is to say, specially-granted cultural rights may allow a protected group to restrict its individual members in ways prohibited in majoritarian culture. The intersection between feminism and multiculturalism has contributed significantly to exposing this tension. Since many minority groups pledge allegiance to patriarchal fundamentals, multiculturalist policies often act as a front for gender inequality, rendering women—the minority within the minority—the victims of liberal tolerance.⁵⁰ Feminist criticism has thus highlighted what the multiculturalist approach tends to gloss over: the heterogeneity of a minority culture's internal make-up,

⁴³ See Rawls, *supra* note 40, at 5-8. For an interesting discussion of the rise of multiculturalism from the liberal tradition, see PERRY-HAZAN, *supra* note 40, at 321-324; see also Stopler, *supra* note 40, at 414.

⁴⁴ WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 76, 126 (1996).

⁴⁵ See, e.g., Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 25-26 (Amy Gutmann ed., 1994); Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 SOC. RES. 491 (1994).

⁴⁶ See Sapir, *Religion & State*, *supra* note 9, at 634.

⁴⁷ For a detailed critical discussion laying out four justifications for the special protection of religious freedom, see Daniel Statman & Gideon Sapir, *Freedom of Religion, Freedom from Religion and Protection of Religious Feelings*, 21 BAR-ILAN L. STUD. 5, 8-19 (2004) [in Hebrew]. Statman and Sapir note that early scholarship on the right to culture did not treat religion as a culture, but later writing transformed freedom of religion into a “shining beacon” of the right to culture. *Id.* at 16, n.46.

⁴⁸ Yael Tamir, *Two Types of Multiculturalism*, in MULTICULTURALISM, *supra* note 38, at 79.

⁴⁹ Kymlicka himself believes that minority cultures should be protected as long as they do not discriminate on ‘suspect’ grounds such as race, sex, or sexual orientation, and do not harm the community's fundamental liberties. See WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE, 168-72, 195-98 (1989). See below for the main arguments of his position.

⁵⁰ Susan Moller Okin is the standard-bearer for liberal feminist critiques on multiculturalist liberalism. See, e.g., Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in IS MULTICULTURALISM BAD FOR WOMEN? 12-13 (Martha C. Nussbaum, Joshua Cohen & Matthew Howard eds., 1999) [hereinafter IS MULTICULTURALISM BAD FOR WOMEN?]; Susan Moller Okin, *Feminism and Multiculturalism: Some Tensions*, 108 ETHICS 661 (1998); Susan Moller Okin, *Mistresses of Their Own Destiny: Group Rights, Gender and Realistic Rights of Exit*, 112 ETHICS 205 (2002).

which often features a gender power gap. According to this critical reading of multiculturalism, the right to cultural autonomy is too often also the right of the strong to rule the weak under the protection of the liberal state.⁵¹

The liberal price a multiculturalist approach pays in the currency of harming individual rights bothered Kymlicka himself. To resolve this conflict, Kymlicka distinguishes between two kinds of group rights: *external protections* and *internal restrictions*.⁵² *External protections*, which Kymlicka believes a liberal society owes minority groups for purposes of cultural preservation, safeguard the cultural minority from the incursion of external influences threatening to its survival.⁵³ The religious exemption from military service given until recently to ultra-Orthodox yeshiva students is one example of an external multicultural accommodation, for obvious reasons: compulsory conscription risks young *charedi* soldiers withdrawing from the *charedi* culture and abandoning their ultra-Orthodox religious lifestyle.

Special rights granted to a minority culture may also take the form of *internal restrictions*, that is, the violation of the fundamental rights of minority community members for the sake of preserving the group's (illiberal) culture.⁵⁴ While Kymlicka himself rejects internal restrictions as an illegitimate form of multiculturalist accommodation, others support it—provided that minority members are free to exercise a right of exit from their communities.⁵⁵ The demand of religious parties to exempt

⁵¹ Feminist theory differs across various schools of feminist thought, and feminist critiques of multiculturalist liberalism accordingly do not present a united front. For example, liberal feminists believe that feminism and multiculturalism are bitter rivals and that accommodation should be granted to liberal cultures alone. See the works of Susan Okin, *supra* note 50; See also Frances Raday, *Women in Law in Israel: A Study of the Relationship between Professional Integration and Feminism*, 12 GEORGIA STATE UNIVERSITY L. REV. 525 (1996). Multicultural feminists, on the other hand, support a milder position, one which values minority women's own voices and the importance to those women of communal membership and religious identity. For these scholars, feminism should celebrate the potential inherent in a multiculturalist approach for the protection of the constitutive parts of minority women's personality and self-definition. See, e.g., Sander L. Gilman, *Barbaric Rituals?*, in IS MULTICULTURALISM BAD FOR WOMEN, *supra* note 50, at 53; Bonnie Honig, *My Culture Made Me Do It*, in IS MULTICULTURALISM BAD FOR WOMEN, *supra* note 50, at 35; Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001-2002). For an illuminating overview of the three primary feminist critiques of multiculturalism, see Ayelet Shachar, *What We Owe Women: The View from Multicultural Feminism*, in TOWARD A HUMANIST JUSTICE: THE POLITICAL PHILOSOPHY OF SUSAN MOLLER 143 (Debra Satz & Rob Reich eds., 2009).

⁵² This is not to say that Kymlicka's distinction between the two categories of external protections and internal restrictions has not attracted scathing criticism. For a critical assessments of Kymlicka's distinction as blurry, ambiguous, and illusory, see e.g., AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 30-31 (2001); PATRICK MACKLEM, INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA 231 (2001).

⁵³ KYMLICKA, *supra* note 44, at 35-38.

⁵⁴ *Id.* at 152.

⁵⁵ Unlike Kymlicka, other multicultural scholars believe that a liberal theory of minority rights should also protect non-liberal cultures. See, e.g., Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105 (1992) (arguing that a state should not intervene in minority cultures' freedom of association or in their intra-community cultural practices, even if the latter are clearly anti-liberal, as long as individuals maintain the right to leave the community). For a similar view, see Jeff Spinner-Halev, *Autonomy, Association and Pluralism*, in MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY 157 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005) [hereinafter MINORITIES]. For the various functions of the right to exit in multicultural theory, see Oanagh Reitman, *On Exit*, in MINORITIES *supra*, at 189. For a critique of the view which grants the minority culture a 'carte blanche' to harm the rights of its members, see Kymlicka, *supra* note, at 234, note 18; see also Margalit & Halbertal, *supra* note 38, at 114. See also Alon Harel & Aharon Schnarch, *Gender Segregation in Public Transportation*, 3 ALEI MISHPAT 71, 92 (2003) [in Hebrew] (offering a 3-criteria liberal sieve test which justifies the legitimation of anti-liberal practices). For a critique of their

observant women from the military may be conceptualized as a demand for an internal restriction—one that harms the equal participation of women in citizenship-constituting service for the sake of protecting them from the immodesty of army life and the perceived sexual promiscuity of a secular masculine environment.⁵⁶

Israeli multiculturalism has taken a unique turn in that it has gone beyond external protections and internal restrictions and adopted a whole new measure of accommodation: what I term "external restrictions." Unlike external protections, which protect the minority from corroding outside culture, or internal restrictions, which limit the rights of members within the community in the name of cultural preservation, external restrictions limit the rights of members *outside* the group. External restrictions are a unique—and far more troubling—form of accommodation in that they force individuals outside the group to pay for the principles of those inside it. Israel's perverse multiculturalism goes even further in that it violates the very fundamental premise of multicultural theory: the protection of vulnerable minorities threatened by majority culture but themselves unthreatening to the neutral liberal state.⁵⁷ In the skewed form of "Israeli-style" multiculturalism, I will show, already strong minorities are given further power to control the majority in a way that threatens the very liberal-democratic structure of the State.

The peculiar application of multiculturalism in a state that is both Jewish and democratic, especially in the context of religion and military relations, challenges us to rethink two elements of multicultural theory: the set of admission criteria for awarding multicultural status to minority groups, and, once admitted for protection, the qualifying conditions for a particular practice of that group to be considered multicultural in nature. Curiously, despite the significance of these threshold inquiries, they have thus far aroused little interest in most multicultural scholars.⁵⁸

Regarding the first question—admission criteria for multicultural accommodation—mainstream multicultural analysis has focused only on *cultural characteristics* differentiating minority groups from the majority, to the neglect of other criteria. Obscuring other controlling factors from the multicultural calculus—such as the minority's socioeconomic position and political power, the constitutional relationship between religion and state, and the nature of the democratic order (e.g., that Israel is an ethnic, Jewish state)—flattens multicultural recognition into a "one-size-fits all" form in which all minorities deserve the same level of accommodation. Through these limited theoretical binoculars, for example, Israel's ultra-Orthodox Jews and its Palestinian-Arab

approach, see Noya Rimalt, *Gender Segregation as Sexual Discrimination*, 3 ALEI MISHPAT, 99, 120 (2003) [in Hebrew].

⁵⁶ Compare Orna Sasson-Levy, *Between Gender Segregation and Women's Exclusion: Gender in the Military Space*, in WHERE AM I? GENDERED PERSPECTIVES ON SPACE 111, 119 (Roni Halpern ed., 2013) [in Hebrew] ("the masculine bias in the discourse of modesty constitutes clear power relations, since the meaning of gender segregation in *halakhic* society is pushing women away from public sources of power").

⁵⁷ Multiculturalism Canadian style is a textbook example of the proper application of multicultural theory. On the Canadian model, see generally Ayelet Shahar, *When Religion and Equality Collide: Lessons from Multicultural Canada*, 10 L. & ETHICS HUM. RTS. (2016).

⁵⁸ For a notable exception regarding the first theoretical element, see Gila Stopler, *Contextualizing Multiculturalism: A Three Dimensional Examination of Multicultural Claims*, 1 L. & ETHICS HUM. RTS. 309 (2007). For the second, see Michael Karayanni, *Multiculture Me No More! On Multicultural Qualifications and the Palestinian-Arab Minority of Israel*, 54 DIOGENES 39 (2007).

minority are treated alike in the Jewish and democratic State, despite their widely different statuses.⁵⁹

Examining the accommodation of the national-religious community (alternatively "religious-Zionist" or "Orthodox" community) in the military provides an intriguing case study illustrating the theoretical urgency of developing clear admission criteria for multicultural status. To ask whether Israel's Orthodox minority properly deserves multicultural accommodation in the "Jewish and Democratic State," we must inquire whether this subculture is a loser in the cultural battlefield and thus deserving of state protection. In particular we should ask whether Orthodox Judaism is better regarded as a "majority" culture, in the substantive sense, in the Jewish State, both in comparison to other Jewish denominations (the Reform and Conservative movements, for example) and to rivaling non-Jewish religions (Muslim, Christian, and Druze), or as a functional "minority" culture in a predominantly liberal-secular environment. This involves a consideration of Orthodox Judaism as the State religion as well as the considerable and disproportionate political power wielded by this group. All of these factors challenge the justification of multicultural accommodation as a form of "protection" granted to communities at risk of cultural corrosion. Lastly, any multiculturalist analysis must consider whether the right to culture is context-dependent, such that a group may qualify for multicultural recognition within some settings but not others. I take up these questions in part III.

Even once a group is deemed worthy of multicultural status, a second set of questions concerns the preconditions or "multicultural qualifications"⁶⁰ of the particular cultural norm or practice for which protection is sought. For an accommodation to be regarded normatively as a derivative of multiculturalism, at least two minimal thresholds must be satisfied.

First, we must consider whether support for a given cultural norm can claim an adequate level of consensus within the minority group seeking its protection.⁶¹ Governmental accommodation of the cultural norm must comport with the will and consent of the community itself.⁶² Take, for example, the religious jurisdiction granted to Israel's Greek Orthodox community in family law matters, which in its current form garners only minority support even within the minority community effected.⁶³ This accommodation—purportedly protective of minority group autonomy, but in fact disfavored by many of those it restricts—is befittingly termed by Michael Karayanni a "multiculture me no more" regulation.⁶⁴

⁵⁹ This lack of what Gila Stopler aptly calls "contextualized" analysis is made clear in her thought-provoking work comparing the status of the Palestinian-Arab and the ultra-Orthodox or *charedi* minorities. See Gila Stopler, *The Arab Minority, the Ultra Orthodox Minority and Multicultural Theory in a Jewish and Democratic State*, in *SUTURES IN A NATIONAL CUT – LAW, MINORITY, AND CONFLICT* (Raef Zreik & Ilan Saban eds., forthcoming 2016)[in Hebrew].

⁶⁰ See generally Karayanni, *supra* note 58.

⁶¹ Michael Karayanni, *Adjudicating Culture*, 47 *OSGOODE HALL L. J.* 371, 382, 384 (2009).

⁶² Michael Karayanni, *The "Other" Religion and State Conflict in Israel: On the Nature of Religious Accommodations for the Palestinian-Arab Minority*, in *RELIGION IN THE PUBLIC SPHERE: A COMPARATIVE ANALYSIS OF GERMAN, ISRAELI, AMERICAN AND INTERNATIONAL LAW* 333, 370-71 (Winfried Brugger & Michael Karayanni eds., 2007).

⁶³ Karayanni, *supra* note 58, at 53.

⁶⁴ *Id.*

Second, we must evaluate the motivation behind the accommodation. A more nuanced analysis, for example, might ultimately deny multicultural status and strip of liberal legitimacy an accommodation ultimately designed to serve the interests of the broader majority in controlling the minority community. Similarly, a properly complex analysis might identify a malicious motivation on the part of group leaders in instituting a cultural practice, and find that such motivation is of import to the liberal-multicultural State from which protection is sought. Consider, for example, the notion that the exemption from military service granted to the Palestinian-Arab community was motivated, in large part, by the desire to relegate group members to second-class citizenship rather than to spare them the possibly agonizing conflict of defending their country against their national Palestinian brothers in the occupied territories. If a group-based right, though desired by the minority community, is ill-motivated and adversely impacts the status of that community as a whole, I argue that the resulting accommodation may for that reason be disqualified as a type of multiculturalism. When the State protects a community's practice as "multicultural," it dignifies that practice as a thing potentially worthy of protection in the name of human rights. If that practice is driven by ulterior motives and ultimately harmful to the group it purports to protect, the act is unworthy of the normative dignity conferred by the title of "multiculturalism," and the State undeserving of recognition as a tolerant liberal-multicultural regime.

Applying multicultural theory to the synagogue-state conflict in the context of the IDF, part IV will appositely contextualize these inquiries and reveal examples of external restrictions unique to Israeli multiculturalism. It will also expose Israeli-style multiculturalism as one in which the State ironically facilitates the *radicalization* of minority cultures, rather than their *liberalization*, as multicultural theory ultimately aspires to do. This results in a state-supported religious extremism that actually runs against the wishes of most minority community members, thereby subverting the rationales at the root of multicultural accommodation—the promotion of diverse lifestyles and cultures with the ultimate aim of overall equality.

C. *The Conceptual Coin's Other Side: Freedom from Religion*

The right to freedom from religion, to complete the conceptual picture, has begun to gain momentum in liberal philosophy, most eminently as an extension of the right to freedom of religion or as a symmetrical right of the same importance.⁶⁵ Yet more recent scholarship has argued that we cannot simply grant freedom from religion its own protection without requiring of it the same justificatory groundwork that supports freedom of religion.⁶⁶ When this justification is tested, it is not clear that freedom from religion is properly justified by both the right to culture and the freedom of conscience.

⁶⁵ For a famous exposition of this proposition, see Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 197 (1992). See also HJC 5016/96 Horev v. Minister of Transport, 51(4) PD 1, 93 (1997) (Or, T. dissenting) (Isr.). But see Michael McConnell, *Religious Freedom at a Crossroads*, 5 UNIV. CHI. L. REV. 174 (1992).

⁶⁶ This argument is well-developed by Sapir and Statman, building on the work of Daphne Barak-Erez and Ron Shapira, *The Delusion of Symmetric Rights*, 19 OXFORD J. OF L. STUD. 297 (1999), which denies the fallacy of symmetrical rights. See Sapir & Statman, *Why Freedom*, *supra* note 13, at 490.

Let us start with religious freedom as a right to culture. This normative basis provides no justification for freedom from religion. Recall that religion is extended protection in the first place only insofar as it is the loser in the competitive cultural marketplace. It is religion's marginal status and struggle for survival as a minority culture that triggers multicultural entitlements as an anti-assimilationist measure. It follows that secularism, which as the majority culture in the liberal state is not endangered, does not normatively require special rights of accommodation.⁶⁷

Freedom from religion, as Sapir and Statman cogently argue, may fit more comfortably under the umbrella of the right to conscience. In this sense its protection should extend to shelter both the individual nonbeliever and minority religious groups from unwilling participation in religious acts or rituals (e.g., reciting a prayer or performing the Kiddush on the Sabbath) that violate their fundamental convictions. Only in such cases can it be said that the offense resembles that faced by a devout person forced to betray her religious precepts in that it generates feelings of self-alienation, ridicule, or lack of authenticity.⁶⁸

It has been suggested that freedom from religion is at stake not only when either the right to culture or the freedom of conscience is violated; but it may also be threatened on a third and different basis: when state action is premised on a religious rationale.⁶⁹ A mounting philosophical scholarship questions whether religious arguments are admissible as a valid basis for state action,⁷⁰ to which I cannot do justice here in brief. Suffice it to say for our purposes that I agree with those who hold that this third basis for freedom from religion is untenable, not the least because it discriminates against religion in comparison to any other worldview or ideology and compromises equal participation of the religious person in the political process.⁷¹

Let us take an example from the military world. Israeli soldiers are all compelled to eat kosher food in army kitchens. While such a limitation may restrict liberty, it is clear that the IDF is permitted to decide the dietary menu of the soldiers for budgetary, practical and other considerations. It is not clear why religious considerations should be singled out for adverse treatment or require special protections for the individuals thereby restrained. Consider restrictions on meat or at least certain types of meat (of animals in danger of extinction) for reasons rooted in vegetarian ideology, for example.

⁶⁷ Sapir & Statman, *Why Freedom*, *supra* note 13, at 493; STATMAN & SAPIR, *supra* note 2, at 185; Margalit & Moshe, *supra* note 45, at 509. This is not to say, of course, that the secular culture has no viable content as a competing value system which requires promotion and public expression. It only means that because secularism is the majority culture, it does not necessitate special rights or "protection" from surrounding minority cultures.

⁶⁸ Sapir & Statman, *Why Freedom*, *supra* note 13, at 494-95. As an example for a classic violation of the conscience of the secular person, Sapir and Statman refer to forced participation in a religious marriage ceremony. See Gideon Sapir & Daniel Statman, *Religious Marriage in a Liberal State*, 30 CARDOZO L. REV. 2855, 2865 (2009).

⁶⁹ This argument has been voiced by the Israeli Supreme Court. For analysis of the Court's "innovation," see Gideon Sapir & Daniel Statman, *Religious Arguments in the Public Sphere: A View from Israel*, 1 L., RELIGION & STATE 242 (2012).

⁷⁰ For these academics, religious arguments are unintelligible and therefore exclude secular people as unequal members of the polity. See, e.g., Kent Greenawalt, PRIVATE CONSCIENCES AND PUBLIC REASONS 132 (1995); John Rawls, POLITICAL LIBERALISM 212-54 (1993). For a thorough analysis criticizing the liberal hostility toward religion-based legislation, see STATMAN & SAPIR, *supra* note 2, at ch. 4; Paul J. Weithman, RELIGION AND THE OBLIGATIONS OF CITIZENSHIP ch. 2 (2002).

⁷¹ STATMAN & SAPIR, *supra* note 2, ch. 8.

The secular soldier may complain about the encroachment of her autonomy, but she does not have a separate legitimate claim of protection from vegetarian ideology.

Yet more importantly, forcing a soldier to eat kosher food in military kitchens is not a freedom-from-religion violation in the freedom of conscience sense, as eating food that has been rabbinically supervised raises no moral problem for the non-religious individual. While the restriction may be a nuisance or inconvenient for some, it cannot be said to stand in profound opposition to the secular person's value system or to offend her innermost fundamental convictions. Indeed, secular people are often unaware and at best indifferent to whether a certain food is kosher, in actuality or in principle.⁷²

In short, of the three potential bases for the right to religious liberty, only freedom of conscience remains standing. As our analysis established, freedom of conscience is violated only when the state demands *active participation* in religious activities unacceptably disrespectful to the secular normative outlook and thus triggers the right to protection of freedom from religion. Other examples are no different than the myriad instances in which citizens find laws to be objectionable, silly, or unjust, and nonetheless must obey them in a democratic order governed by the rule of law.

With this normative tool-box at the ready, the next part critically examines the intricate interaction between synagogue and State in the military, with a special focus on the growing conflict between the religious rights of Orthodox soldiers and the gender equality rights of secular women.

III. WAR OR PEACE: SYNAGOGUE AND STATE UNDER ONE MILITARY ROOF

The relationship between religion and the military in Israel differs from that in other liberal states because of Israel's compulsory service law model. Given the military's compulsive element and its claim to be 'a people's army'—a melting pot of social solidarity—the IDF must consider the unique needs of all its soldiers and allow devout observants to maintain their religious lifestyle in the military environment.⁷³ After all, even professional militaries employing a voluntary service model still institutionalize religious practices at various levels for the sake of free exercise rights.⁷⁴ Western armed forces as varied as Australia, Canada, France, New Zealand, the United Kingdom and the United States all generally allow soldiers to fulfill their patriotic calling without seriously

⁷² Note that the maintenance of *kasbrut* in the military is not only a minimal and proportional limitation, but that the maintenance of parallel kitchens (kosher alongside non-kosher) is problematic, both logistically speaking and on account of jeopardizing military cohesiveness. See Asa Kasher, *Religion and Stateliness in the Military of a Jewish and Democratic State*, in BETWEEN THE KIPA AND THE BERET – RELIGION, POLITICS AND THE MILITARY IN ISRAEL, 401, 410 (Reuven Gal, ed., Tamir Libel, dep. Ed., 2012) [in Hebrew] [hereinafter BETWEEN THE KIPA AND THE BERET].

⁷³ Elisheva Rosman-Stollman, *The Military Establishment's Treatment of Religiously Observant Soldiers: A Comparative View*, in BETWEEN THE KIPA AND THE BERET, *id.*, at 43, 48, 65. See also Cohen, *supra* note 6, at 288.

⁷⁴ For a comprehensive comparative review of various militaries' accommodations for religious soldiers, see Rosman-Stollman, *id.*, at 46-64. See also Yagil Levy, *The Theocratization of the Israeli Military*, 40 ARMED FORCES & SOC'Y 269, 274 (2014); Shmil Peleg, *Religious Rights in the Framework of an Ultra-Orthodox Soldier's Service in the IDF*, 409-10 MA'ARACHOT 94, 98 (2006) [in Hebrew]; Hanan Melzer, *The IDF, an Army of a Jewish and Democratic State*, 14 I.D.C. L. REV. 347, 386 (2012) [in Hebrew].

compromising the dictates of their faith, notwithstanding that professional soldiers are presumed to have accepted restrictions on religious liberty by freely enlisting.⁷⁵

Consequently, what level of accommodation should the *compulsory* army of a Jewish and democratic State provide for religious conscripts? Are they entitled, beyond the protection of religious freedom on an individual basis, also to a multicultural recognition on a collective basis as a vulnerable minority group? This section aims to answer this pivotal question.

A. Admission Criteria for Multicultural Status: Is the Orthodox Community a Vulnerable Minority?

In order to assess the justification for and proper scope of group rights accorded to the Orthodox community in the military, one preliminary question is whether this group deserves multicultural protection as a minority in the first place. Recall that for a religion, as for any other group, to be shielded under the right-to-culture umbrella, it must be a minority culture endangered by the cultural majority. This marginal status is often correlated with the relative size of the particular religious group in the population as a whole. Indeed, it seems that most multicultural scholars uncritically accept that all minority cultures merit undifferentiated protection simply by virtue of being a minority.⁷⁶ Yet the Orthodox national-religious community in Israel challenges us to refine this otherwise un-nuanced criterium.

To begin, the national-religious community defies categorization into one of multiculturalism's three types of vulnerable communities: 1) liberal communities that seek to integrate into the liberal state while maintaining their distinct cultural identity;⁷⁷ 2) illiberal communities that seek to remain isolated from the liberal state but still demand governmental assistance in preserving their cultural heritage (as do the Satmar Hassidic community in New York⁷⁸ and the ultra-Orthodox community in Israel);⁷⁹ and 3) illiberal secluded communities whose members are "partial citizens" seeking neither to integrate

⁷⁵ The U.S., armed forces, for example, address the needs of religious soldiers through the appointment of military chaplains whose duty is to protect the right to religious freedom of all soldiers, despite the First Amendment's formidable Establishment Clause problems. The paramount guideline in the Department of Defense Directive is to accommodate religion-based requests whenever feasible. Soldiers are served kosher food, allocated time to pray, spared physical training during fast days, and allowed to wear a yarmulke. Interestingly enough, the dominant religion-related concern in the U.S. military is not so much *free* exercise of religion but rather religious coercion. In recent years the U.S. military has witnessed a notable number of instances in which the right of nonevangelistic Christians to freedom from religion was utterly disregarded by pressures to attend religious services, participate in prayers before meals etc. For a concise comparative analysis, see generally Lasson, *supra* note 8; Elisheva Rosman-Stollman, *Mediating Structures and the Military: The Case of Religious Soldiers*, 34 ARMED FORCES & SOCIETY 615 (2008); David Fitzkee and Linell Letendre, *Religion in the Military: Navigating the Channel Between the Religion Clauses*, 59 A. F. L. REV 1 (2007); Ira Lupu and Robert Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89 (2007-2008); Robert Sugg, *Religion in Military Society: Reconciling Establishment and Free Exercise*, 28(3) AIR & SPACE POWER J. 157 (2014).

⁷⁶ For a refreshing exception, see STATMAN & SAPIR, *supra* note 2, at 114-15.

⁷⁷ For the differentiation between communities that affects the level of multicultural accommodation see generally the writings of Jeff Spinner-Halev, *infra* notes 78 & 83.

⁷⁸ Jeff Spinner-Halev, *Extending Diversity: Religion in Public and Private Education*, in CITIZENSHIP IN DIVERSE SOCIETIES 68 (Will Kymlicka and Wayne Norman eds., 2000).

⁷⁹ *But see* Stopler, *supra* note 59, at 9, viewing the *charedi* community in terms that I reserve for the national-religious group and that I regard as one of the main constitutive differences between the Orthodox and ultra-Orthodox community.

into the liberal state nor any kind of government-granted cultural protection (as do the U.S. Amish).⁸⁰

Israel's national-religious community does not sit comfortably in any of these categories. First, it is difficult to suggest a straightforward answer even to the pivotal question of the liberal status of the national-religious public, given its variegated complex internal structure of liberal and illiberal strands (a point to which I shall return later). It is safe to say that this minority is located somewhere near the middle of the liberal spectrum—certainly not as illiberal as the ultra-Orthodox sector in Israel, but not as liberal as the French-speaking Quebec in Canada. Second, while seeking to preserve its distinct culture, the *national-religious* community is greatly immersed in the secular state for the sake of influencing larger society with its own sectarian vision of the Jewish people and their Holy Land.⁸¹ In other words, the community seeks state resources not only in order to promote its internal affairs and intra-group interests, but also to impart changes on the majoritarian culture.⁸² This is a unique feature of Israeli multiculturalism.

To accommodate this category-defining exception, I suggest various "admission criteria" that are obscured in mainstream multicultural analysis but that must be considered in order to properly determine the status and scope of accommodation owed to a given minority group. This contextualized analysis will reveal Israel's national-religious public as a powerful minority politically, economically, and socially in the Jewish State generally and in the IDF in particular. I argue that admission criteria for multicultural protection should be less a matter of quantity and more one of quality, focusing not on numerical inferiority but the degree of cultural differences and, more holistically, the minority group's position within the governing political and socioeconomic regime.⁸³ Such qualitative factors include, among others, the political power exercised by group members, the system of government, and the status of that religion in public life and in the state's constitutional structure. Obviously, the place of religion under a "wall of separation" between church and state is markedly different than its place in a state supporting religion. Equally important, considering the nature of a state as an "ethnic democracy" like Israel—a term coined by Sammi Smootha to express Israel's dual adherence to equality of political and civil rights to all members of society and to preferential treatment to the Jewish majority⁸⁴—it would be a miscalculation to accord the same undifferentiated multicultural accommodation to Jewish sub-groups as

⁸⁰ Jeff Spinner-Halev, *Cultural Pluralism and Partial Citizenship*, in *MULTICULTURAL QUESTIONS* 65 (Christian Joppke and Steven Lukes eds., 1999).

⁸¹ Yedidia Stern, *Female Exclusion and Sovereignty*, IDI.org (Jan. 10, 2012), <http://www.idi.org.il/-ספרים-הדרת-נשים-והריבונות/מאמרים/ומאמרים> [in Hebrew].

⁸² It is difficult to make generalizations about the national-religious community since it is an umbrella term for many sub-groups differing in important respects. The position presented in the text is usually typical of the religious establishment and the CHARDAL sub-group within religious Zionism. See *infra* section IV.C.(2).

⁸³ Drawing on the work of Nancy Fraser's model of justice, Gila Stopler insightfully evaluates the propriety of different minorities' claims of discrimination and misrecognition along the three dimensions of justice—recognition, redistribution, and political participation. For analysis of Fraser's work and its application in the context of the ultra-Orthodox and Palestinian-Arab communities, see *generally* Stopler, *supra* note 58.

⁸⁴ Sammi Smootha, *The Model of Ethnic Democracy*, in *THE FATE OF ETHNIC DEMOCRACY IN POST COMMUNIST EUROPE*, 5, 23 (Sammi Smootha & Priit Jarve eds., 2005).

to non-Jewish groups.⁸⁵ Finally, the redistribution or economic class of a cultural minority is also instrumental in measuring its position within the state, and accordingly in determining its threshold entitlement to multicultural status and group accommodation.

The national-religious community is an interesting case-study by all measures. On the one hand, at only eleven percent of the Israeli population, Orthodox Jews are a clear cultural minority in number. At the same time, only forty-three percent of the Jewish population defines itself as secular, and that number is expected to shrink further over the next two decades as demographers predict a mass immigration of secular Jews to Western liberal states.⁸⁶

Yet the Orthodox community possesses political power far in excess of its numbers,⁸⁷ especially in comparison to other religious groups in the Western world.⁸⁸ There has been no single government in Israel lacking the support of at least one Jewish religious party. This is so especially if one considers the rising influence of the "Jewish Home" party, which brought significant leverage to the national-religious public. Concededly, unlike the ultra-Orthodox parties, which essentially decide the fate of governments, the Orthodox party has never gained the crucial function of a swing vote in the coalition-building process. But one could reasonably aggregate the Modern- and ultra-Orthodox parties—two religious groups that have been "extremely successful"⁸⁹ in leveraging political power to support religious interests—into a single entity for the purposes of weighing the relative power of the Jewish orthodoxy as a cultural framework. For this and other reasons, I term the Orthodox community in Israel a cultural minority in number, a "power majority" in substance nonetheless.

Israel is thus a challenging case for multicultural theory because it features a peculiar democratic regime properly termed a "*minocracy*," that is, rule by a minority. The minority rules in the sense that the religious minority exerts such influence within Israel's highly fragmented political spectrum that it is able to impose its will on the majority, thereby dictating its ideological agendas to society at large.⁹⁰

Moreover, Israel's identity as an "ethnic democracy" renders the national-religious camp not an "alien" minority like the Palestinian-Arab community, but a joint owner of the Jewish State together with secular majority Jews.⁹¹ For this reason, in terms of recognition, the national-religious camp has suffered little in comparison to the second-class treatment of Israel's chronic Palestinian-Arab minority.⁹² Unlike their ultra-Orthodox counterparts, Orthodox Jews are an integral component of the population every bit as much as their secular Jewish peers; they are neither misrecognized nor

⁸⁵ For an important discussion of the different status that should be accorded to the ultra-Orthodox v. the Palestinian-Arab minorities see Stopler, *supra* note 58.

⁸⁶ BYSTROV EVGENIA & ARNON SOFER, ISRAEL DEMOGRAPHY 2012 – 2030: ON THE WAY TO BECOME A RELIGIOUS STATE (2012) [in Hebrew].

⁸⁷ GERSHON SHAFIR & YOAV PELED, BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP 137 (2002).

⁸⁸ STATMAN & SAPIR, *supra* note 2, at 201.

⁸⁹ Karayanni, *supra* note 39, at 13.

⁹⁰ Interestingly, it is precisely the fact that Israel's classic and most chronic minority—the Palestinian community—does not participate in government and therefore cannot be in the coalition that has cultivated the disproportionately powerful position of the religious (mostly ultra-Orthodox) parties. Stopler, *supra* note 58, at 333-34.

⁹¹ Stopler, *id.*, at 329.

⁹² *Id.* at 349-52.

disrespected in publicly-held stereotypes and in daily interaction.⁹³ It is thus difficult to term the national-religious camp the "Other among us," as cultural groups afforded multicultural protection typically are described.⁹⁴ Perhaps for this reason, the national-religious group can claim no discernible economic vulnerability or socioeconomic injustices of redistribution stemming from their minority status. They are neither marginalized in the private marketplace nor discriminated against in the allocation of state budgets (as are their Palestinian-Arab counterparts), nor are they disadvantaged by a restrictive or unsustainable cultural lifestyle (e.g., full-time religious studies at the expense of workforce participation), as are their ultra-Orthodox brothers, the poorest sector in Israel.⁹⁵

With respect to protecting a minority group from cultural extinction, it is also essential to consider the *constitutional* relationship of religion and the state.⁹⁶ It is difficult to make the case for the vulnerability of the national religious minority given that its defining culture—Jewish Orthodoxy—occupies the formal status of the State religion and given the Gordian knot between Judaism as a religion and as a nationality. The interconnection between State and synagogue in Israel is so inextricably tied—much like the association of nation and religion within Judaism—that it is likely unprecedented in the Western world with respect to resource allocation, regulation, and institutionalization.⁹⁷ As Frances Raday correctly notes, the Jewish population forged its cultural identity in response to hostile external forces; the result was a protective self-conceptualization in which "Jewish identity became indistinguishable from religious identity."⁹⁸

Jewish Orthodoxy is correspondingly an acknowledged component of political life and afforded preferred and official treatment in the public sphere and the legal system. It plays a unique role in molding the character of Israel.⁹⁹ No other religion, including the Jewish Non-Orthodox sects, has seriously contended with Orthodox hegemony.¹⁰⁰ The application of religious personal status law, burial services, designation of the Sabbath as the official day of rest for Jews, observation of the dietary laws of kosher food in state-run establishments, restricting pork production and prohibiting the sale of *chametz* (a type of non-kosher food) during Passover in public areas are only a few notable examples of the extent to which Orthodox Judaism regulates the public sphere.¹⁰¹

⁹³ *Id.*

⁹⁴ As the apt term by which Gad Barzilai refers to the *charedi* community. See Gad Barzilai, *Others Among Us: Law and Political Boundaries for the Ultra Orthodox Community*, 27(2) IUNEI MISHPAT 587 (2003) [in Hebrew].

⁹⁵ Stopler, *supra* note 58, at 26.

⁹⁶ Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. INT'L. & FOREIGN AFF. 339, 365 (2000).

⁹⁷ Sapir, *supra* note 17, at 156-57.

⁹⁸ Frances Raday, *Religion, Multiculturalism and Equality: The Israeli Case*, 25 ISR. Y. B. HUM. RTS. 193, 195 (1995).

⁹⁹ Ruth Gavison, *Religion and State: Separation and Privatization*, 2 MISHPAT UMIMSHAL 55 (1994) [in Hebrew].

¹⁰⁰ Raday, *supra* note 98, at 214-18.

¹⁰¹ For an overview of the implementation of religious ideology in the public sphere, see, e.g., Raday, *supra* note 98, at 218-26; Gideon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT'L & COMP. L. REV. 617, 619-24 (1998) (discussing status quo arrangements); Karayanni, *supra* note 39.

Moreover, several religious institutions, including the Chief Rabbinate and Chief Rabbinical Council, local Chief Rabbis and councils, and the Rabbinical Court are all official state bodies fully funded by the government.¹⁰² It is telling that in other Western democracies, where religion is marginalized and its manifestations relegated to the periphery of social life, church-state conflicts largely pivot on the need to guard religion against majoritarian insensitivities, while in Israel the secular hegemony is most often on guard to "protect" the public domain from religious overreaching.¹⁰³ The prominence of Jewish Orthodoxy, then, is of exceeding importance in our admission-criteria analysis, because the more a religious minority group enjoys privileges in various domains, the narrower the protection to which it is entitled under the right to religious culture.

On the other hand, while Jewish Orthodoxy is indeed the majority religion relative to sects of Judaism and other faiths, it is a minority culture in the public space relative to liberal secularism.¹⁰⁴ In our "secular age,"¹⁰⁵ Israel's cultural marketplace values is dominated by Western secularism; in this sense, it is hard to deny that a religion-based lifestyle constitutes a vulnerable minority culture worthy of multicultural accommodation to secure its societal longevity.¹⁰⁶ In fact, the religious-secular divide has been found "the most critical of all societal divisions in contemporary Israel,"¹⁰⁷ not least because of the increasing polarization of the respective lifestyles of the Orthodox and secular communities.¹⁰⁸

That being said, one must remain cognizant of the relative vulnerability of the secular culture in Israel, at least in comparison to other secularist Western regimes. As Menachem Mautner has demonstrated, the metamorphosis that Israeli secularism has undergone in its identity and cultural values (*inter alia*, the shift from Hebrews alien to the Jewish tradition of the Diaspora to Jews who seek intimate acquaintance with their heritage, and from socialism to capitalism) has weakened secular self-definition and cultural identification. Since the dominant secular group adopted various identity elements from competing religious culture, and given that secularism by its very nature is less institutionalized, lacking in canonical texts, shared rituals and accepted "spiritual" leaders, Jewish Orthodoxy holds a clear advantage in the struggle to determine the cultural character of the State.¹⁰⁹

In short, by every measure, the status of the national-religious group is multifaceted, equivocal and versatile, and uniquely problematizes our understanding of

¹⁰² Shimon Shetreet, *State and Religion: Funding of Religious Institutions—The Case of Israel in Comparative Perspective*, 13 NOTRE DAME J. L. ETHICS & PUBL. POL'Y 421 (1999); Sapir, *Religion & State*, *supra* note 9, at 604-05; Raday, *supra* note 98, at 213.

¹⁰³ STATMAN & SAPIR, *supra* note 2, at 200-01.

¹⁰⁴ This is not to deny, of course, that minority religions in the Jewish State (e.g., Muslim, Christian, Druze) face much more formidable risks to their cultural survival and are accordingly entitled to a more robust multicultural protection than Jewish orthodox groups.

¹⁰⁵ CHARLES TAYLOR, *A SECULAR AGE* (2007).

¹⁰⁶ See STATMAN & SAPIR, *supra* note 2, at 293. See also *id.* at 153 ("This period is characterized by the secularization of Western society, in which religious culture is constantly threatened by secular society. This threat enters the hearts of religiously-observant people unwillingly, and undermines their belief in the truths of their faith and its ability to withstand the sweeping onslaught of secularism.").

¹⁰⁷ Cohen, *supra* note 6, at 393.

¹⁰⁸ *Id.* at 394.

¹⁰⁹ Mautner, *supra* note 33, at 293.

the classic vulnerable minority worthy of state protection through multicultural accommodation. Multicultural scholarship has thus far invested too little thought in devising a theoretical barometer by which to gauge the level of multicultural accommodation to influential minorities seeking to rewrite the cultural ethos of the liberal state. This may be in part because multicultural theory overestimates the strength and stability of the liberal-democratic government under attack.¹¹⁰ Kymlicka, for one, seems to downplay the possible dangers that multiculturalist policies may pose to the liberal state and consequently remains overly optimistic in his "liberal expectation" that such measures will correct the illiberal characteristics of the minority.¹¹¹ This sanguine "expectation" becomes a hazardous illusion, especially in states featuring a weak liberal-democratic government, as does Israel. As Gila Stopler sensibly critiques, mainstream multicultural analysis falsely assumes that the accommodating state enjoys a stable liberal-democratic form of governance, when in fact such stability varies widely and is a major factor in determining the ability of the state to sustain illiberal cultures without risking its own liberal framework.¹¹²

The above analysis has shown that Israel's Orthodox community challenges the prevailing understanding of multicultural theory, and forces us to refine the criteria for which groups and practices deserve accommodation. Acknowledging the context-sensitive nature of multiculturalist accommodation,¹¹³ the following section will examine in particular one setting in which the Orthodox community seeks multiculturalist protection it may or may not merit: the IDF.

B. *The Orthodox Community in the Military: A Numerical Minority and Power Majority*

Examining the general position of the national-religious community on the state-level provides only one side of the multicultural story. This section looks closely at the position of the Orthodox community in the *specific* context of the military setting, thus

¹¹⁰ For a relatively rare exception, in the context of offensive expression, see the analysis of the Rushdie affair and the Danish cartoons through a multicultural prism in Meital Pinto, *What Are Offences to Feelings Really About? A New Regulatory Principle for the Multicultural Era*, 30 OXFORD J. LEGAL STUD. 695 (2010).

¹¹¹ WILL KYMLICKA, MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY 94-95 (2007). See also Will Kymlicka, *An Update from the Multiculturalism Wars: Comments on Shachar and Spinner-Halev*, in MULTICULTURAL QUESTIONS 112, 118-20, 126-27 (Christian Joppke & Steven Lukes eds., 1990).

¹¹² Stopler, *supra* note 59. Drawing on Kymlicka, Stopler asserts that liberal multiculturalist policy is workable only under the conditions of a strong liberal-democratic structure committed to the full protection of human rights and the desecuritization of majority-minority relations. Since Israel does not abide by these conditions, multiculturalism in a Jewish and democratic state weakens the Palestinian-Arab minority as it disproportionately reinforces the *charedi* community.

¹¹³ A properly nuanced multicultural analysis must be context-sensitive and define concretely a basic cultural unit of measurement, that is, local, state-wide, or world-wide. At the far end, some scholars call to consider the status of a specific religion worldwide. For them, the prominent status of Islam and Christianity, for example, disqualifies their followers as a minority group meriting special multicultural protection. See Sapir and Statman, this volume. At the opposite end, take the example of the city of Bnei Brak—a center of ultra-Orthodox Judaism. In this communitarian territory, the *charedi* population should enjoy broad autonomy rights to shape their privatized public domain in accordance with the dictates of their unique culture. Within its geographical boundaries, however, it is the non-religious residents and their secular western culture who in fact constitute an inverse minority, and thus are in possible need of multicultural protection from the dominant ultra-Orthodox culture.

revealing a fascinating phenomenon: a numerical minority that forms a power majority nonetheless.

Before Orthodox culture had its way with the Israeli military, the devout soldier was an "Other" in the IDF, with the "greedy" military's secular atmosphere creating an irreconcilable conflict between his identity as a religious group member and as a citizen.¹¹⁴ Faithful to its proud image as the people's army and conscious of its compulsory conscription, the IDF had to restructure its entire framework so as not to alienate religious soldiers or require them to contravene Jewish law.¹¹⁵ The IDF soon adopted a whole array of military regulations that tend to the religious interests of Orthodox soldiers and aim to accommodate their distinct cultural lifestyle and religious practice.¹¹⁶ A representative example of the IDF's staunch support for religious accommodation is the establishment of the Military Rabbinate corps, a religious services provider that among its many functions attends to the religious needs of adherent soldiers, provides religious services and spiritual guidance, and consults military authorities and adherent soldiers on the conformity of everyday military life with Jewish law.¹¹⁷

The highlight of these accommodations was a series of religious study programs: *hesder* yeshivas (arrangement academies), pre-military preparatory academies (*mekhinot*), and *shiluv* (combination) yeshivas. These "mediating structures" between the military and the religious establishment enable adherent soldiers to belong simultaneously to both competing institutions by facilitating accommodation between the scroll and the sword and by alleviating military-religious tensions within the IDF.¹¹⁸ They function as an

¹¹⁴ To illustrate this, suffice it to mention the incident that rocked the government in the early days of the State of Israel: the incarceration and subsequent humiliation of a group of soldiers for refusing to cook on the Sabbath. See Aharon Kampinsky, *The Military Rabbinate and the Question of its Double Loyalties*, in *THE KIPA AND THE BERET*, 161, 164-165 (Moshe Rachimi ed. 2009) [in Hebrew]. See also ZEHAVA OSTFELD, *AN ARMY IS BORN: THE MAIN STAGES OF ESTABLISHING THE ARMY UNDER DAVID BEN-GURION* 748 (1994); Yagil Levy, *The Military as a Split Labor Market: The Case of Women and Religious Soldiers in the Israel Defense Forces*, 26 *INT'L J. OF POLITICS, CULTURE, AND SOC.* 393 (2013) (Religiously-observant soldiers were excluded from combat formations in fact but not in law due to the fear of their secularizing influence).

¹¹⁵ For an instructive overview see Cohen, *supra* note 6.

¹¹⁶ Take, for example, the maintenance of synagogues in every military installation and the provision of religious articles on request, including kosher food and uniforms without *shatnez* (impermissible fabrics containing both wool and linen). The IDF also allocates prayer times and adopts the Jewish calendar, including the maintenance of the Sabbath and Jewish festivals on which casual military activities are limited. Religiously-observant soldiers are exempted from training activities on fast days and are allowed to maintain the Orthodox male dress code (such as yarmulke and fringed garments (*tzitzit*) despite the military requirement for camouflage), a beard, and abstinence from shaving during the counting of the Omer. See Rosman-Stollman, *supra* note 73, at 48-49; Peleg, *supra* note 74, at 98 (reviewing the High Command Directives on religious affairs); Cohen, *supra* note 6, at 389; Yaron Zilberstein, *The Character of the Chief Rabbi of the IDF: Past, Present and Future*, in *THE KIPA AND THE BERET* 75 (Moshe Rachimi ed. 2009) [in Hebrew]. It is noteworthy that comparable benefits are also granted to members of other religions. See Tamir Libel & Reuven Gal, *Between Army-Society Relations and Religion-Army Relations: The Various Faces of the Theocratization Process*, in *BETWEEN THE KIPA AND THE BERET*, *supra* note 72, at 83, 102 [in Hebrew].

¹¹⁷ For a detailed discussion of the IDF Rabbinate, see AARON KAMPINSKY, *RELIGION, MILITARY AND SOCIETY IN ISRAEL: CHANGES IN THE DEVELOPMENT OF THE IDF RABBINATE* (2007). See also Cohen, *supra* note 6, at 389-90.

¹¹⁸ The study programs allow religious soldiers to defer military service for the sake of spiritual "fortification" and to alternate spells of military service with yeshiva studies, or to serve together in separate formations (in the *hesder* track). See Stuart A. Cohen, *The Hesder Yeshivot in Israel: A Church-State Military Arrangement*, 35 *J. CHURCH & STATE* 113 (1993); Stuart A. Cohen, *Dilemmas of Military Service in Israel: The Religious Dimension*, 2 *THE TORAH U-MADDA J.* 1, 10 (2004) [in Hebrew] [hereinafter *Dilemmas*];

anti-assimilationist measure taken against uncontrolled exposure to the secularizing influences of military culture—a cultural self-defense designed to guarantee the continued survival of the religious Zionist community.¹¹⁹ Most significantly, the heads of the study frameworks, civilian rabbis, serve as gatekeepers of religious standards in the military, voicing the concerns and needs of religious soldiers to the IDF authorities and opposing what they consider inhospitable policies that jeopardize *halakhic* observance. For example, civilian rabbis at Naval headquarters successfully protested on behalf of their students against the Navy's gender-integrated evaluation process, demanding that the institution preserve modesty standards if it was to continue recruiting religious soldiers.¹²⁰

All these accommodationist policies in turn have spurred a so-called "religionization" process manifested in the exchange of elites—religious Zionists substituted for secular soldiers as the primary candidates for commanding officer positions¹²¹—a reorganizational move aptly termed by Yagil Levi as a shift "from the 'People's Army' to the 'Army of the Peripheries.'"¹²² National religious soldiers, despite remaining a substantial minority in most combat units and officer courses, now occupy senior positions within those ranks (if not yet the very highest echelons of the military profession). They also enjoy considerable bargaining power by virtue of the powerful mediating structures that render the religious establishment vitally influential in decision-making within the IDF.¹²³ Today, no single cultural or interest group is more powerful than the Orthodox community, nor enjoys such substantial and institutionalized cultural protection.

Libel & Gal, *supra* note 116, at 93, 96-100. See also Yagil Levy, *The IDF Between Solidarity and Conflict – The People's Army vs. the Draft*, 28 WORKING PAPER SERIES 5 (2014) [in Hebrew].

¹¹⁹ While mediating structures are a legitimate and even commendable multicultural accommodation of religion, it is unclear why the abbreviated military service to which *bedser* yeshiva students are entitled is justified. Indeed, this shortened service pattern has provoked internal critique within parts of the Orthodox public itself for the failure of its youth to carry out equally the right and duty to serve the nation and defend its security. Cohen, *Dilemmas id*, at 10. For religious soldiers interested in intensive spiritual fortification, the military should maintain the *shiluv* (integration) framework, allowing them to combine Torah study for two years (prior, during, and in the conclusion of army service a-la the *bedser* Yeshiva arrangement) with a *full*, three-year regular service.

¹²⁰ Rosman-Stollman, *supra* note 75, at 622.

¹²¹ See, e.g., Stuart A. Cohen, *Changing Societal-Military Relations in Israel: The Operational Implications*, 21 CONTEMP. SECURITY POL. 116, 132 (2000).

¹²² Stuart A. Cohen, *Tensions Between Military Service and Jewish Orthodoxy in Israel: Implications Imagined and Real*, 12 ISR. STUD. 103, 103 (2007).

¹²³ For example, the command ranks in the Golani and Givati brigades, as well as in many elite reconnaissance units (*sayarot*), are mostly made up of Orthodox personnel. The number of Infantry Officer Training graduates among the religiously-observant is higher every year (a more than ten-fold increase, for example, was recorded between 1990 and 2007), and Orthodox soldiers make up almost 40% of the junior command ranks, more than three times their proportion in the general population. See Yoaz Hendel, *Religious Zionism – Trends in Attitudes Towards IDF Service*, in BETWEEN THE KIPA AND THE BERET, *supra* note 72, at 293, 294-96 [in Hebrew]; Ze'ev Drori, *The Gap Between The Kipa and the Beret: How the IDF Faces the Process of Theocratization*, in BETWEEN THE KIPA AND THE BERET, *supra* note 72, at 135 [in Hebrew]; Libel and Gal, *supra* note 116, at 105; Amos Harel, *The Quiet Mechina Revolution*, HA'ARETZ, Dec. 11, 2003. See also Asher Cohen, *The Kipa and the Beret—Image and Reality: The Public Discourse on Religious Zionism and Military Service*, in THE KIPA AND THE BERET 95, 96 (Moshe Rachimi ed. 2009) [in Hebrew] [hereinafter *image and reality*] (the Religious Zionists' relative weight along the chains of command and among combatants in combat formations is significantly greater than their part in the general population); Cohen, *supra* note 6, at 397; Cohen, *Dilemmas*, *supra* note 118, at 3.

Adding yet another layer to the numerical-minority, power-majority phenomenon, changes in the IDF's fundamental sociocultural profile were followed by a broader, ideological shift in religion-military relations. Sociologists conceptualize the upgraded status of the military's national-religious sector as the promotion of a new agenda which challenges secular hegemony by fortifying religious themes in multiple areas of military life.¹²⁴ For example, the IDF's ethical code was altered to emphasize the 'Jewish' element of the constitutional phrase "a Jewish and democratic State,"¹²⁵ now stating that "the IDF is the *Jewish State's* military force."¹²⁶ It also leverages Jewish values as a unifying force in the socialization of all serving personnel in a push to revive military sacrificial motivation.¹²⁷

Following what has been deemed an organizational and conceptual revolution, the Military Rabbinate, once concerned primarily with the technical provision of religious services for devout soldiers, now pursues the far more ambitious goal of shaping the spiritual and moral world of *secular* soldiers.¹²⁸ The "theologization"¹²⁹ of military culture was deepened in 2007 when then-Chief Military Rabbi Brigadier-General Avichai Rontzki established a new "Jewish Awareness" branch of the Military Rabbinate, charged with, among other things, "the inculcation of Jewish spiritual values and awareness according to the sources of Jewish tradition."¹³⁰ Finally, the IDF Rabbinate operates a thriving intra-military conversion apparatus for judaizing Israeli soldiers, while counting conversion to Judaism as among its top priorities.¹³¹

Further complicating matters, the still predominant secular military framework seems to be a paradigmatic locus for multicultural recognition and religious accommodation. In civil life, many religious minorities concerned with the temptations of secular culture—mostly the ultra-Orthodox and, increasingly, modern Orthodox Jews

¹²⁴ See generally Yagil Levy & Zeev Lehrer, *Competitiveness and Exclusion: Why does a Religious Rhetoric Opposing Women in the Military Develop?*, in BETWEEN THE KIPA AND THE BERET, *supra* note 72, at 339 [in Hebrew]; Levy, *supra* note 74, at 277, 284-87.

¹²⁵ Tamir Libel defines this move as a form of religionization which changed the "people's army" ethos to the "Jewish people's army" ethos. As emphasized by Libel, those responsible for spearheading religionization's emergence surprisingly do not belong to the military clergy or to Orthodox officers, but to the IDF senior command ranks in general. Tamir Libel, *From 'People's Army' to 'Jewish People's Army': The IDF's Force Structure between Professionalization and Militarization*, in BETWEEN THE KIPA AND THE BERET, *supra* note 72, at 205, 208 [in Hebrew].

¹²⁶ See Levy, *supra* note 118, at 13, quoting the Mission and Distinction document (Chief Education and Youth Officer Headquarters, n.d.).

¹²⁷ *Id.* at 13; see also *id.* at 14 ("[O]nce the character of the standard soldier (in the image of a religiously-observant soldier) had been shaped, so was the standard against which the military's soldiers should be re-educated – a religious socialization assisted by the Military Rabbinate.").

¹²⁸ For developments in the vision and influence of the Military Rabbinate throughout its history, see Stuart A. Cohen, Aaron Kampinsky & Elisheva Rosman-Stollman, Presentation to the Panel on Military Chaplaincy and Religious Diversity, IUS Biennial Conference, Chicago Ill: Swimming Against the Tide: The Changing Functions and Status of Chaplains in the IDF (Oct. 24, 2013). See also Kampinsky, *supra* note 114, at 161-62, 177, 181-83; Levy, *supra* note 118, at 12.

¹²⁹ This expression was coined by Yagil Levy. See Yagil Levy, *A Multi-Dimensional Analysis of the Clash between Feminism and Religion in the IDF*, 2 THE PUBLIC SPHERE 1, 8 (2008) [in Hebrew].

¹³⁰ Libel, *supra* note 125, at 232, quoting Rabbi Rontzki. See also *id.* at 229-32. See also Drori, *supra* note 123, at 139-40; Kasher, *supra* note 72, at 413-16 (criticizing the Military Rabbinate's fortification of Jewish identity via 'Jewish awareness' activities based solely on Orthodox Judaism).

¹³¹ Melcer, *supra* note 74, at 362-63. See also Guy Yisrael Zeidman, *The Military and Privatization*, 17 I.D.C. L. REV. 15, 177, n.590 (2014) [in Hebrew] (taking a positive view of "this important apparatus," considering it as "serving a significant public end"); Cohen, Kampinsky & Rosman-Stollman, *supra* note 128, at 10.

as well—end up seceding from the public sphere. In what may be regarded as an act of cultural self-defense, these groups tend to cluster in separate cities, municipalities and neighborhoods, with their own sectarian educational institutions and youth movements. In the compulsory setting of military service, however, secession as a protective measure is not possible; there is no right of exit from the IDF.¹³² Military service is a closed organization in which individuals are uprooted from their normal lives, separated from their natural environments and subjected to great influence that may undermine the very *nomos* of religious-national culture.¹³³ Indeed, religious soldiers report deep feelings of distress and acute cultural shock when they are exposed to the lifestyle and attitudes of their secular counterparts, particularly with respect to the treatment of women.¹³⁴

In the final analysis, this multitude of competing considerations precludes any neat conclusion regarding the status of the religious-national community in the IDF. As this group *partially* fulfills the various admission criteria for multicultural status, it warrants neither full multicultural recognition nor complete rejection as a vulnerable community worthy of protection. The Orthodox community's status as a power majority must affect the level of accommodation it deserves. As a consequence, I find theoretical justification for some (but not all) accommodationist policies, namely, those that protect the Orthodox soldier's freedom of religion while only minimally encroaching on the secular soldier's freedom from religion.¹³⁵

The following analysis will show that the ill-calibrated accommodation of the Orthodox community in the IDF is oblivious to the perilous consequences of protecting a strong illiberal minority seeking to dominate Israel's marketplace of cultural ideas. The devastating results disprove Kymlicka's "liberal expectation," revealing an ill-placed overconfidence in the stability of liberal majority culture that undermines a basic premise of multicultural theory.

IV. APPROPRIATE INTEGRATION AS A MECHANISM FOR FEMALE EXCLUSION

The considerable power held by the religious mediating structures combined with the IDF's fear of losing highly motivated and high-quality religious manpower has recently led to the military's most dramatic religious accommodation to date—the so-called Appropriate Integration Regulation (hereinafter, the "Regulation"). As the pages that follow show, the Regulation ultimately permits religious interests to violate women's

¹³² It is true that the Orthodox sector is far more assimilated and actively involved in the general secular society than the ultra-Orthodox community. Yet this does not mean that the national-religious group should not be protected from cultural assimilation, but only that the level of protection required is not as high or intensive as in the case of the *charedy* community.

¹³³ Daniel Statman, *Reciprocity of Rights and Duties, Benefits and Burdens: National Service for Israeli Arabs*, 6 L. & ETHICS HUM. RTS. 247, 255 (2012).

¹³⁴ See, e.g., Cohen, *supra* note 122, at 117 ("Quite apart from experiencing the alarm to which every conscript is submitted on entering the military framework, the religious soldier is estranged and struck dumb by the comportment of his secular comrades. Even their everyday speech contains phrases and terms which his own mouth, accustomed to prayer, is unable to utter and which his ears, attuned to words of wisdom, refuse to absorb.").

¹³⁵ A classic example of a legitimate accommodationist policy is the religious study programs, with the exception of the unjustified truncated spell of military service for its members. Multicultural protection does not mean that religious soldiers should not shoulder the same burden as other conscripts.

rights. The incorporation of religious doctrines into Israel's legal system is a key factor in constructing women's inferior citizenship in Israeli society, and now forms the latest barrier undermining their position in the military.¹³⁶ In other words, the IDF's "religious revolution" has concomitantly brought a counter-revolution regarding women's status as soldiers. While women as a group have never enjoyed perfect gender equality—not even in the egalitarian aftermath of such landmark decisions as *Alice Miller*, which opened the Air Force pilot training course to women¹³⁷—the trend towards religionization cuts against women's hard-won *individual* equality of opportunity in the military.

A. *Head-on Collision: Religious Revolution v. Gender Revolution under the Appropriate Integration Regulation*

As observed, the increased presence and power of Orthodox soldiers in the military has given this group greater leverage to shape a service environment befitting their religious identity and cultural way of life.¹³⁸ It is what some may term a "coup in reverse"—military subjection to intense civilian intrusion by religious rabbis in areas of decision-making traditionally reserved to strictly military authority.¹³⁹ As the highlight of this religionization, the Zionist movement sought to impose on the IDF its doctrines and values in the spirit of the biblical commandment, "Thy camp shall be holy."¹⁴⁰ But compliance with this commandment faced a serious barrier: the mixed membership of men and women in combat formations.¹⁴¹

The IDF's growing egalitarianism toward women naturally brought about closer interactions between religious and female personnel which inevitably offended religious soldiers.¹⁴² The "gender revolution"¹⁴³ signified by such momentous events as the 1995 celebrated case of *Alice Miller*, the 2000 amendment to the Defense Service Law heralding the equitable integration of women in military, and the establishment of the mixed-gender Caracal combat battalion, intensified the contentious issue.¹⁴⁴ Religious-national soldiers not previously exposed to such intense interactions with a gender

¹³⁶ For the formal, semi-formal and informal effects of religion on women's status in Israel, *see generally* Halperin-Kaddari, *supra* note 96.

¹³⁷ HCJ 4541/94 Miller v. Minister of Defense, 49 (4) PD 94 (1995) (Isr.).

¹³⁸ *See, e.g.*, Hendl, *supra* note 123, at 301-02 ("the fact that *yarmulke*-wearing soldiers serve exemplarily commits the military to expanding the array of services these soldiers require").

¹³⁹ On this concept and its applicability to the IDF and its relationship with civilian rabbis, among other civilian interest groups, *see* Stuart A. Cohen, *Changing Civil-Military Relations in Israel: Towards an Over Subordinate IDF*, 12 ISRAEL AFF. 769 (2006).

¹⁴⁰ Deuteronomy 23:14 (King James). *See also* Levy, *supra* note 74, at 279, which explains that "holy" in this context refers to the maintenance of sexual modesty and gender separation.

¹⁴¹ *See, e.g.*, what Rabbi Avraham Baron, the Director-General of the Union of *Hesder* Yeshivas had to say, as reported by Amos Harel, *Without God's Help, We Will Not Win Wars*, HA'ARETZ, June 5, 2006: "The fact that there is now in the army a battalion in which males and females serve together is giving me sleepless nights That is a stain on the army Without God's help we will not win wars, and the Holy One set one condition: for the camp to be holy"

¹⁴² Levy & Lehrer, *supra* note 124, at 339 (the presence of religious soldiers leads to "an increasingly more intense process seeking the delegitimization of female service"); Cohen, *supra* note 122, at 118.

¹⁴³ *See* Karin Carmit Yefet & Shulamit Almog, *Religionization, Exclusion and the Military: "Zero Motivation" for Gender Equality?*, 39 IYUNEY MISHPAT (forthcoming, 2016) [in Hebrew].

¹⁴⁴ Neri Horowitz & Keren Sagi, *Appropriate Integration, Deviations and Screeches in the Common Arrangement*, 25 (Agora Policy, 2010) (on file with the authors) [in Hebrew].

effectively unknown to them prior to the military melting pot¹⁴⁵ turned to civilian (as opposed to military) rabbis for advice and guidance.¹⁴⁶ The resulting discourse depicted women as an 'obstacle' to be neutralized; that Orthodox soldiers might serve in close physical proximity with women soon became the religious movement's "most pressing problem,"¹⁴⁷ with Orthodox soldiers considered their military service "conditional on its convergence with Jewish law"¹⁴⁸ in the context of gender issues. As a result, civilian rabbis sought to intervene in military life most extensively at the gender-religion interface,¹⁴⁹ in contrast with the inclusion and acceptance that generally characterized religious positions on other feminist issues.¹⁵⁰

Hard lobbying by the civilian rabbis soon brought the increasing "modesty" problems of mixed-gender service to the attention of the IDF Chief of Staff in 2001 and, eventually, the Knesset (Israeli Parliament)¹⁵¹ In the parliamentary debates that followed, the Chief Military Rabbi coined the term "Appropriate Integration"—now a ubiquitous IDF buzzword—to describe the compromise sought by the Orthodox group.¹⁵² The debates revealed a varying and surprising spectrum of views; the Women's Affairs Advisor to the Chief of Staff, for example, essentially suggested that religiously-observant soldiers be fully accommodated with the long-term goal of a gender-separated military.¹⁵³

The debates spurred the formation of a special committee, led by the Commanding Officer of Central Command and Commander of Ground Forces, Major-General Adv. Yiftach Ron-Tal, to examine proposed regulations concerning the appropriate integration of men and women under one military roof.¹⁵⁴ The Ron-Tal Commission—which would in time become a determinant force regarding the position of women in the IDF—deliberated for more than two years before formulating guidelines to ensure that religious soldiers were protected from the *halakhic* "dangers" raised by mixed-gender service.¹⁵⁵ These guidelines provided for, among others, rules regarding a modest dress code, gender-segregated living arrangements, and a range of dispensations granted to religious soldiers, including exemption from gender-mixed activities, instruction from same-sex instructors only, and assignment to a homogeneously male framework in any course or training where they might be exposed to *yichud* [the prohibited unchaperoned seclusion of a man and a woman in a private

¹⁴⁵ The integration of secular women is particularly stressful to religiously-observant soldiers due to both the former's gender and their secular upbringing. See Cohen, *Dilemmas*, *supra* note 118, at 7. See also *id.* at 8 (the religiously-observant soldiers' encounter with their secular peers is described as a traumatic culture shock); Hendel, *supra* note 123, at 302.

¹⁴⁶ Horowitz & Sagi, *supra* note 144, at 22 (detailing the evolution of the Appropriate Integration Rules).

¹⁴⁷ Rosman-Stollman, *supra* note 75, at 623.

¹⁴⁸ Cohen, *supra* note 122, at 119. Shabbat observance also raises the same intensity of feelings.

¹⁴⁹ Drori, *supra* note 123, at 138; Levy, *supra* note 74, at, at 278.

¹⁵⁰ Levy & Lehrer, *supra* note 124, at 340.

¹⁵¹ Zeev Lehrer, *Women's Equality in the IDF? A Decade to the Military Service Law 12* (Working Paper, Van Leer Institute, 2010) [in Hebrew]; Levy & Lehrer, *supra* note 124, at 346; Libel & Gal, *supra* note 116, at 96, 100; Levy, *supra* note 118, at 12; Cohen, *supra* note 122, at 118.

¹⁵² Horowitz & Sagi, *supra* note 148, at 26. The parliamentary debate was initially meant to discuss the issue of drafting ultra-Orthodox *Yeshiva* students against the background of the Tal Commission's recommendations. However, this topic was soon abandoned in light of the concerns over mixed-gender combat raised by the religious Zionist movement. *Id.* at 26.

¹⁵³ Horowitz & Sagi, *supra* note 144, at 27.

¹⁵⁴ *Id.*, at 27-29.

¹⁵⁵ Rosman-Stollman, *supra* note 73, at 48; NETA MOSHE, FEMALE SERVICE IN THE IDF 9 (2012).

area], physical contact with women, or women in revealing clothing.¹⁵⁶ The Appropriate Integration Rules were eventually incorporated into the military statute book as General Staff Directive No. 33.0207, "Joint Male and Female Service with a View to Appropriate Integration."¹⁵⁷

Surprisingly, leaders championing the interests of women endorsed the Directive wholeheartedly. A festive meeting of the Knesset's Committee on the Status of Women and Gender Equality celebrating the decade anniversary of *Alice Miller* heralded the Directive as a feminist achievement. According to then-Deputy to the Women's Affairs Advisor to the Chief of Staff, the Directive sought to create a convenient and equitable service environment more tolerant and respectful of women.¹⁵⁸ The then-Commander of the Manpower Directorate, Major-General Avi Zamir, even characterized the Regulation as encouraging religious *women* to enlist in the IDF.¹⁵⁹ Scholars of the IDF further endorsed the notion that the Directive would serve women by "prevent[ing] discrimination, abuse, and sexual harassment in mixed-gender and gender-separated formations,"¹⁶⁰ and by fostering service environment free from crass, vulgar language, and otherwise demeaning conduct.¹⁶¹ This discourse perceived Orthodox men and secular women as a coalition sharing the common interest of dismantling the military culture of hegemonic masculinity—a necessary step in optimizing the IDF for female prosperity.¹⁶²

At first, the Directive stagnated as a dead letter largely unenforced in IDF units.¹⁶³ But underenforcement combined with escalated tensions between religious soldiers and secular women to provoke severe censure from religious leaders unsatisfied with the lack of implementation.¹⁶⁴ The desire to appease the religious establishment

¹⁵⁶ See §§7-9, 11, 14 and 15 of General Staff Directive No. 33.0207, known as "The Appropriate Integration Rules."

¹⁵⁷ General Staff Directive GS 33.0207, i.e. the Appropriate Integration Directive, was instituted under the protection of the Military Justice Law, 5715 – 1955, which acts as the source of the High Command Directives' authority. See Military Justice Law, 5715 – 1955, §§1, 2a, 2b, 3, SH No. 189 p. 171 (Isr.).

¹⁵⁸ See Lt. Cnl. Shirli Karni in Protocol no. 167 of the Knesset's Committee on the Status of Women and Gender Equality, the 16th Knesset, 8.3.05 ("a festive meeting marking International Women's day and a decade since the Alice Miller ruling by the High Court of Justice").

¹⁵⁹ See the explanation by Brig. Gen. Avi Zamir in Protocol No. 178, Knesset Committee on the Status of Women and Gender Equality, 18.5.2005. See also Reuven Gal, *The IDF Religionalized- So What? Explanations, Meanings, Implications*, in BETWEEN THE KIPA AND THE BERET, *supra* note 72, at 603.

¹⁶⁰ Hendel, *supra* note 123, at 306, n.20.

¹⁶¹ Levy, *supra* note 130, at 8 (quoting the Be'Sheva newspaper) (the influence of Orthodox officers "is apparent in the demand for value-laden conduct and in the temperance of military vulgarity and coarseness."). Indeed, a study has found that most religious men report experiencing discomfort in a working environment characterized by sexually suggestive behaviors or expressions. Gila Califi-Amir, *Assimilation of Gendered Point of View – New Strategy in the IDF to promote Equal Opportunity*, 436 MAARACHOT 28, 34 (2011). See also Yagil Levy, *The Clash between Feminism and Religion in the Israeli Military: A Multilayered Analysis*, 17 SOC. POL.: INT'L STUD. GENDER, ST. & SOC'Y 17 185, 194 (2010).

¹⁶² The ideology of hegemonic masculinity "permits and even encourages men to use profanities and act rudely towards women in a manner that would be considered illegitimate in civilian society." See ORNA SASSON-LEVY, IDENTITIES IN UNIFORM: MASCULINITIES AND FEMININITIES IN THE ISRAELI MILITARY 165, 183 (2006) [in Hebrew].

¹⁶³ Levy & Lehrer, *supra* note 124, at 347; Protocol No. 178, Knesset Committee on the Status of Women and Gender Equality, 18.5.2005.

¹⁶⁴ According to Neri Horowitz and Keren Sagi, the religious establishment began viewing female service in combat units as a "culture war" exacerbated by the politically-volatile disengagement from the Gaza strip. Horowitz & Sagi, *supra* note 144, at 23.

while continuing to recruit soldiers from its ranks led to the institution of a dedicated implementation body known as the Appropriate Integration Directorate (the "Directorate").¹⁶⁵ The Directorate supervised female soldiers' code of dress and monitored their interactions with male soldiers with such intense scrutiny that the Directorate soon earned the title of "modesty patrol,"¹⁶⁶ said to "manag[e] the IDF like a synagogue."¹⁶⁷ Throughout its existence, the Directorate acted to aggressively and continuously implement the Directive throughout the IDF and—as we shall see below—imposed an interpretational regime on the Appropriate Integration Regulation far stricter than that required by the text itself.

B. From Integration to Segregation: From Alice Miller to Hadas Miller

Inspired by the Appropriate Integration Directorate, the Directive's trend of underenforcement was exchanged for the other extreme—that of overenforcement.¹⁶⁸ The conservative content merged into the Directive was shaped by civilian rabbis, who quickly became the *de facto* heads of these soldiers' chain of command, rather than by the Military Rabbinate, the local doctrinal authority (*Mara D'atra* in Jewish law).¹⁶⁹ Inspired by civilian responsa, *halakha* has been adapted to military practice with none of the control or transparency that would have existed if the Military Rabbinate—possessing the necessary expertise for such an adaptation—had been charged with the same task.¹⁷⁰

The responsa on religion and gender in the military are unique when compared to that on other *halakhic* issues. First, while issues concerning mixed-gender service and problems of modesty were not even listed as on-going challenges of military service in rabbinical works prior to the new millennium, they rapidly became one of the most common issues troubling the religiously-observant soldier.¹⁷¹ Second, they are unlike other issues characterized by a wide range of opinions—even on such explosive topics as the disengagement from Gaza. Insofar as relations between male and female soldiers are concerned, however, the Rabbinical tone is forceful and decisive, and may even call for

¹⁶⁵ Libel, *supra* note 125, at 229; Lehrer, *supra* note 151, at 13.

¹⁶⁶ Levy, *supra* note 74, at 280; Yagil Levy, *Why did Female Exclusion Develop in the Military*, IDI.org (Jan. 2, 2012), www.idi.org.il/ספרים-ומאמרים/מאמרים/מדוע-התפתחה-הדרת-נשים-בצבא.

¹⁶⁷ As remarked by Etti Livni MK, chairwoman of the Committee on the Status of Women and Gender Equality during a debate concerning the establishment of a "Directorate for the Investigation of Modesty in the IDF," i.e., the Appropriate Integration Directorate. See the debate's protocol, no. 178, Knesset Committee on the Status of Women and Gender Equality 18.5.2005.

¹⁶⁸ Levy & Lehrer, *supra* note 124, at 347; see the protocol of the debate that took place at the Committee on the Status of Women and Gender Equality (no. 178) 18.5.2005.

¹⁶⁹ See Zilberstein, *supra* note 116, at 90; Cohen, *Dilemmas*, *supra* note 118, at 13 (noting that while military ethics require that the ultimate source of authority in any ruling concerning the interface between *halakha* and the military should lie with the Military Rabbinate, what happens in practice is entirely different, with the majority of the relevant discourse taking place in civilian rabbinical circles). This shift matters because, as Zilberstein notes, "a military Rabbi's ruling on military issues is very much unlike that of a civilian Rabbi. The military Rabbi is accountable to his own unit and this means that his *halakhic* ruling will include his knowledge of the unit and its members, as well as an understanding of the integration of *halakhic* and military systems." See also Kasher, *supra* note 72, at 426; Cohen, Kampinsky, and Rosman-Stollman, *supra* note 128, at 10-11.

¹⁷⁰ Cohen, *Dilemmas*, *supra* note 118, at 13.

¹⁷¹ Horowitz & Sagi, *supra* note 144, at 10; Cohen, *supra* note 122, at 17 (issues related to inter-gender relations in the military constitute a "new topic of *halakhic* inquiry" which only began to gather steam in the late 1990s).

insubordination.¹⁷² The following electronic correspondence between a soldier and his Rabbi, one of many such examples, is clearly instructive of the difficulties created by the Rabbis' interpretive authority insofar as the IDF's functioning and female integration are concerned:

Question: Does taking part in fitness training led by a female instructor who is not as modest as she could be constitute a [*halakhic*] problem? Is it possible for me as a soldier to request an exemption from such training if it is delivered by a woman on the grounds of modesty? Will the military take me into consideration?

Response: Under no reality whatsoever are you to take part in fitness training delivered by a woman. This activity is immodest, as expressed by her clothing and her movements, and is forbidden by the laws of the Torah. The military usually takes this into consideration, but there are exceptions. In such cases you must exempt yourself from taking part in the training.¹⁷³

In the same strict spirit, Rabbi Ratzon Arusi reacted unequivocally to a military course for medics "replete with forbidden sights," in which the female instructors uncover their bodies as part of the exercises demonstration: "It is forbidden for you to be in that course. . . . Should all authorities refuse to deal with the matter then you will have to disobey orders and go to prison."¹⁷⁴

Even more telling of the uncompromising position of many civilian Rabbis—a position that leaves no room to harmonize military life with the observance of modesty laws—is the response of *besder* Rabbi Eliezer Melamed to soldiers' fears that his *halakhic* rulings indicate a "radicalization" and asking for an explanation of why male soldiers were not forbidden to receive instruction from women when such practice was allowed in the past. The Rabbi responded as follows:

The military began to allow women to deliver some of the training sessions With time, the number of sessions increased, to the point that there are currently entire courses that are delivered by female instructors. In addition, and as a result of improperly permissive education, many restrictions that female soldiers were subjected to have been violated, making their current behavior much worse than their earlier conduct. Furthermore, our current generation has witnessed the formulation of a large observant public which demands higher *halakhic* standards from both itself and its surrounding society If this public is not taken into consideration, a significant part of it might make the far-reaching decision of acting like the Ultra-Orthodox public and foregoing enlistment altogether. . . . It is therefore our duty to demand that the

¹⁷² Cohen, *supra* note 122, at 118-19.

¹⁷³ "Ask the Rabbi," *Kipa* website, <http://www.kipa.co.il/ask/show>.

¹⁷⁴ See Ratzon Arusi, *Girls in the Army*, MORESHET.co.il (March 2005), <http://shut.moreshet.co.il/shut2.asp?id=49689> [in Hebrew].

military brass never force a man to take part in a mixed-gender activity or in a training session delivered by a female soldier against his will.¹⁷⁵

In time, then, religionization translated into exclusion. Military authorities faced repeated requests for gender segregation in response to strict *halakhic* rulings emphasizing female exclusion.¹⁷⁶ Many witness reports now suggest that IDF commanders prefer working with male soldiers and limit the employment of female soldiers as instructors to prevent inter-gender conflict.¹⁷⁷ The *Hadas Miller* case is a paradigmatic example of this growing trend. Miller, an outstanding female member of an artillery brigade, found herself reassigned after successfully completing a full course of training because the *besder* yeshiva soldiers who joined her battery asked not to serve alongside a woman.¹⁷⁸ This segregation, tantamount to functional exclusion, severely impaired Miller's career; due to gender tensions she was eventually assigned to a far less prestigious position.¹⁷⁹

The media is replete with similar cases in which female soldiers were reassigned or otherwise limited for the sake of religious interests. Orthodox male soldiers have refused to train on vehicles driven by female soldiers during an Armored Corps Reserve battalion training maneuver; a Battalion Commander refused to admit a female adjutant due to his opposition to their joint transit on an APC; Orthodox Intelligence officer cadets have demanded that female instructors be ordered to remain behind a desk while teaching; and soldiers in some combat platoons have refused to accept female sniping and marksmanship instructors.¹⁸⁰ These religious preferences and behavioral patterns have resulted in a well-documented process in which women are blocked from roles that appear formally open to them.¹⁸¹ This command-level reluctance to assign women to

¹⁷⁵ Rabbi Eliezer Melamed, *Female Instructors, Female Commanders and Camp Holiness*, 280 BESHEVA (Feb. 14, 2008) <http://www.inn.co.il/Besheva/Article.aspx/7213> [in Hebrew]. See also Cohen, *supra* note 122, at 120 ("These are issues on which no compromise is at all possible").

¹⁷⁶ See Yefet & Almog, *supra* note 143. See also Levy, *supra* note 161, at 186 ("[M]any rabbis have demanded that the rules be reshaped or at least interpreted in a manner that heightens the separation.").

¹⁷⁷ See Horowitz & Sagi, *supra* note 144, at 3 (concluding that "the Directive disrupts the ability to maintain reasonable working arrangements on gender issues, demands a considerable degree of managerial and command efforts and represents a problematization of female service."). See also *id.* at 43. For a High Court of Justice petition submitted by an Air Defense Command female officer who was not promoted due to religiously observant soldiers' opposition to serving with women, see HCJ 6757/03 Ya'ara Stolberg v. The Minister of Defense (Feb. 28, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.) This petition was not deliberated on formal grounds and was dismissed at the Court's suggestion.

¹⁷⁸ *Female Combatant: 'I was Transferred from my Post Because of Yeshiva Soldiers'*, WALLA NEWS (Apr. 25, 2005), <http://news.walla.co.il/item/705876> [in Hebrew].

¹⁷⁹ Miller was demoted from Battery Commander to Recruit Instructor. Sasson-Levy, *supra* note 56, at 138.

¹⁸⁰ For a description of these cases and others, see Yefet & Almog, *supra* note 143; Drori, *supra* note 123, at 138; KARMIT HABER & PNINA SHARVIT-BARUCH, FEMALE SERVICE IN THE IDF: CONTINUED PROGRESS OR REREAT? 18-19 (2013) [in Hebrew] (presenting a range of cases from the unpublished document prepared by the outgoing Commander of the IDF's Manpower Directorate, Major-General Avi Zamir, which indicate a trend of religionization-inspired cases of female exclusion); Amos Harel, *The IDF is Fighting over who Controls the Kipa*, HA'ARETZ June 22, 2011 [in Hebrew] [hereinafter *Who Controls?*]; Amos Harel, *Is the IDF Becoming an Orthodox Army*, HA'ARETZ, July 22, 2011 [in Hebrew]; Riki Shapira-Rosenberg, *A Woman-Free Zone*, HA'ARETZ, July 1, 2013 [in Hebrew] [hereinafter *Women Free*] (noting that "soldiers' requests not to serve alongside women or receive instruction from them were granted by field commanders and led in many cases to female soldiers being pushed away from command and instruction roles."); Tsafi Sa'ar, *The Sarit Hadad Affair: Why Women Should be Allowed to Sing to IDF Soldiers*, HA'ARETZ, Aug. 12, 2014 [in Hebrew].

¹⁸¹ Califi-Amir, *supra* note 161, at 32 ("the increasing integration of religiously-observant soldiers in combat formations often causes women to be pushed away from them"); Levy & Lehrer, *supra* note 124, at 347

staff, command and instructional roles has risen to the level of "a strict code aligning itself to the needs of the religious soldier" and now questions to what extent female instructors should continue to be employed in the Armored and Artillery corps.¹⁸²

The hyperactive enforcement of the Directive has also led to absurdities entirely contrary to its spirit. In one instance, a female soldier was confined to her base for braiding a friend's hair, while another guilty of the same offense was ordered to compose a written apology to the Orthodox soldiers in her unit for having offended their religious sensibilities.¹⁸³ One female soldier refused to hug her father (Reserve Colonel Jacob Castel) during a formal parent-soldier event out of concern that doing so would compromise the Appropriate Integration rules.¹⁸⁴ Indeed, her concerns were not unfounded, as two female soldiers who hugged each other in support during their recruit training in the Intelligence Corps were threatened with court-martial for violating the Appropriate Integration Regulation.¹⁸⁵

The extent to which the Directive was used to establish a new military gender code is chronicled in a 2011 in-depth study commissioned by the Women's Affairs Advisor to the Chief of Staff, Brigadier-General Gila Califi-Amir, to explore the practical realization of Appropriate Integration. As the study indicated, Appropriate Integration had become an "aggressive means" of strengthening the ethos of modesty in the military in the spirit of "thy camp shall be holy,"¹⁸⁶ shaping in considerable part the IDF's agenda on gender.¹⁸⁷ In the words of Califi-Amir, the Integration Rules had become "the primary—if not sole—perspective used in practice to implement the joint service of men and women in the IDF," leading to "a double loss: the women are limited both spatially and in the ability to function effectively," while the "increasingly strict" enforcement of the Rules had escalated to the point of "religious extremism."¹⁸⁸

Understood thus, Appropriate Integration constitutes a latent yet powerfully subversive barrier to gender equality in the military, covertly acting to replace the formal barriers broken down by feminism and the law in hard-won victories. For example, before the Regulation, women commanding men or women serving in combat roles used to externalize an overt masculinity in order to "conceal" their sexual identity, employing gender emulation as a strategic tool to enjoy the opportunities open to their male comrades in arms.¹⁸⁹ While gender emulation is obviously a small and hollow victory, it at

("the very enforcement presented women as a modesty-related nuisance that must be dealt with by limiting the women rather than the men"), 348 ("The long-range result of this regime's enforcement was the exclusion of women from various roles . . . and the imposition of a significant limitation on women's ability to integrate as equals – mostly in field units.").

¹⁸² *Id.* at 35.

¹⁸³ See, e.g., Noam Barkan, *Braided and Punished*, YEDIOT ACHARONOT, Nov. 12, 2012; Harel, *Who Controls?*, *supra* note 184 [in Hebrew].

¹⁸⁴ For more on this, see Shraga Bar-On, *Statehood in Command: In Favor of Forced Pluralism*, 57 DE'OT 57, 24, 29 (2012) [in Hebrew].

¹⁸⁵ Shulamit Almog & Karin Carmit Yefet, *Inappropriate Integration*, HA'ARETZ, Aug. 14, 2014 [in Hebrew].

¹⁸⁶ Horowitz & Sagi, *supra* note 144, at 3-4.

¹⁸⁷ *Id.* at 41.

¹⁸⁸ Califi-Amir, *supra* note 161, at 32.

¹⁸⁹ Sasson-Levy, *supra* note 162, at 157 (explaining that the gender emulation that is manifested in the constitution of a new identity incorporating both feminine and masculine patterns undermined female soldiers' labelling as 'girls' and blurred the boundaries between the notions of "femininity" and "masculinity."). See also Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC'Y 125 (1987).

least secured equality of opportunity at the individual, if not group, level. Appropriate Integration, however, exposes the assimilation dynamic and relegates women back to their "appropriate" place. It is a constant reminder to soldiers that a woman is the "other", an outsider to the male military world, regardless of her devoted capitulation to its ideology.

By blocking women's access to traditionally masculine positions in the IDF, the Regulation structurally serves to preserve the male hegemony's control of the most highly desired and prestigious roles.¹⁹⁰ Under its rule, women become sexual objects and thereby an inherent problem within the military system. What began as a multicultural accommodation for Orthodox soldiers in the IDF thereby ironically became a means of reverting women to military 'Otherness.' In other words, Appropriate Integration ensures greater religious inclusion in the military institution only at the expense of gender inclusion.

The passage of the Equal Burden Law in 2014, which is expected to spur the enlistment of thousands of ultra-Orthodox men to the IDF, creates the imminent risk of strengthening the exclusion and segregation practices currently trending in the IDF. The intensive and wide-ranging public debate on the 'equal burden' issue paid little attention to the possible effects that ultra-Orthodox enlistment might have on the position of women in the IDF.¹⁹¹ Prior to the Equal Burden Law, enlistment of ultra-Orthodox men through the SHACHAR (ultra-Orthodox Integration) program already required the establishment of homogeneous and exclusively male units which enforced meticulous gender segregation in working environments.¹⁹² Ultra-Orthodox enlistees currently serve in two infantry battalions and two technical air force units and enjoy purely male processing and training programs in which they neither work alongside women nor are directly subordinated to them.¹⁹³ Since SHACHAR soldiers' command and officer training takes place in all military branches and divisions, the integration of ultra-Orthodox soldiers has required the separate allocation of "sterile" enclaves in IDF bases that expressly prohibit the presence of women.¹⁹⁴ The State Comptroller of Israel has cautioned that the ultra-Orthodox drafting policy might impede the integration of women into technical units that train SHACHAR soldiers as well as engender the social exclusion of female soldiers generally.¹⁹⁵ The enlistment of thousands of additional ultra-Orthodox men can only further escalate the exclusion suffered by women throughout the IDF.¹⁹⁶

¹⁹⁰ Sasson-Levy, *supra* note 56, at 138; Haber & Sharvit-Baruch, *supra* note 184, at 12 ("gender segregation leads to women's reassignment to less valuable roles and to their physical removal from the public sphere.").

¹⁹¹ See, e.g., Haber & Sharvit-Baruch, *supra* note 184, at 10 (noting that "a lack of debate on the question of how the ultra-Orthodox military integration model would affect another aspect of the equal burden issue – female service in the IDF – was prominently apparent on the sidelines.").

¹⁹² IDF, ultra-Orthodox integration website, general information. See also GILAD MAL'ACH, EQUAL BURDEN OR BURDEN OF EQUALITY: TOWARDS THE REVOCATION OF THE TAL LAW AND THE IMPLICATIONS OF DRAFTING YESHIVA STUDENTS INTO THE IDF (2012).

¹⁹³ Shapira Rosenberg, *Women Free*, *supra* note 184.

¹⁹⁴ Peleg, *supra* note 76, at 102. See also Haber & Sharvit-Baruch, *supra* note 184, at 21.

¹⁹⁵ Moshe, *supra* note 155.

¹⁹⁶ Amos Harel, *Panic Attack*, HA'ARETZ WEEKLY, July 6, 2012 [in Hebrew] at 4-5 (noting that the planned establishment of additional ultra-Orthodox NACHAL brigade led senior IDF officers to fear that "such a move would involve closing units to women."). Also see what the former Chief Military Rabbi,

V. TESTING THEORETICAL JUSTIFICATIONS FOR THE APPROPRIATE INTEGRATION REGULATION

This Part analyzes whether appropriate integration may be justified through the lens of religious liberty as either the right to culture or the right to freedom of conscience. It concludes that neither justification adequately warrants sacrificing gender equality on the alter of religious accommodation.

A. Appropriate Integration as a Right to Culture

This section will examine whether it is possible to justify the Appropriate Integration Regulation in the name of religious freedom as the right to culture. This analysis takes as a normative starting point the IDF's special nature as a people's army sensitive to cultural differences and committed to managing diversity.¹⁹⁷ Section D will then attempt to justify the Regulation in the alternative as a right to freedom of conscience.

As we saw, it is not clear that the national-religious community is an entirely vulnerable minority entitled to multicultural accommodation. In both number (especially in combat units) and political weight (especially considering the organized religious mediating structures), there is likely no other group more influential to the military than the religious establishment. I earlier concluded that this complexity should not disqualify the Orthodox minority from protection in the overwhelmingly secular military atmosphere to which religious soldiers are forcibly exposed, yet maintained that the Orthodox culture's status as a power majority must be considered in limiting the level of multicultural accommodation afforded.

Assume, then, that the religiously-observant do deserve at least some level of collective protection within the "greedy" framework of a secular and compulsory military. In multicultural typology, theirs is a claim for public accommodation or "fair inclusion."¹⁹⁸ As such, the Appropriate Integration Regulation may appear as a unique cultural arrangement respectful of the Orthodox minority's freedom of religion as the right to culture, insofar as it provides suitable conditions for integration without

Brigadier-General Avichai Rontzki, had to say in a National Security Studies Center Memorandum which illustrates the problem of integrating both women and ultra-Orthodox men into military frameworks:

If we would like Ultra-Orthodox men to serve in the military, we must be aware of the price this entails and the implications this would have on the military... a proliferation of Ultra-Orthodox and religiously-observant soldiers might affect the IDF's instructional apparatus, which is mostly staffed by female soldiers, since we are already witnessing requests to adapt many locations to the needs of Ultra-Orthodox and national-religious soldiers. Similar problems will present themselves in Intelligence Operations Rooms... Female soldiers man many of these such that women would be able to serve at one outpost but not at another.

The Memorandum is quoted by Haber and Sharvit-Baruch, *supra* note 184, at 22.

¹⁹⁷ With regard to the diversity management policy, see Edna Lomsky-Feder & Eyal Ben-Ari, *From 'The People in Uniform' to 'Different Uniforms for the People': Professionalism, Diversity and the Israeli Defense Forces, in MANAGING DIVERSITY IN THE ARMED FORCES: EXPERIENCES FROM NINE COUNTRIES* 157-86 (Joseph Soeters & Jan van der Meulen eds., 1999).

¹⁹⁸ Shahar, *supra* note 57.

assimilation.¹⁹⁹ A more careful reading, however, reveals that the accommodation of religious practices in the military turns the tables on multicultural liberalism. The Regulation is not about the liberal dilemma of extending protection to illiberal practices enforced by minority communities on their members. Neither is it about granting further credence to minority women's agency, nor is it concerned with the feminist interest in gauging whether the culture's contribution to its female members' feelings of value and self-respect justifies multicultural endorsement of patriarchal customs. Rather, the Appropriate Integration Regulation is concerned with relaxing the liberal commitment to human dignity and gender equality not among minority community women, but among *majority* group women, with the latter group being asked to pay the price for liberal tolerance. Such external restrictions, imposing cultural values that harm not only insider community members but also outsiders, cannot be justified even under the most generous of liberal attitudes towards anti-liberal minority groups.

Theoretically speaking, it is thus misguided to conceptualize the issue in terms of a confrontation between feminism and multiculturalism. The reason is as simple as it is powerful: the Appropriate Integration Regulation concerns a minority culture forcing itself upon unwilling women within the cultural majority. Feminists disagree even as to the modest proposition that the concept of consent could validate deference to religious over egalitarian values at the expense of its own minority female members,²⁰⁰ yet surely no multicultural argument supports the proposition that consent by the minority community (and its own female members) may dictate the fate of unconsenting majority-group women. Considering that Orthodox doctrine has already profoundly impacted the status of all women in Israeli civilian life,²⁰¹ enforcing additional religious norms on the female majority in military life adds insult to injury and as such is particularly repugnant. In the apt terms of Ruth Halperin-Kaddari (albeit it in a different context), "the formal imposition of the minority culture over the majority makes any claim for respect and preservation ironic."²⁰²

The view of freedom of religion as the right to culture reveals a deeply rooted problem of Appropriate Integration. Arguments for religious autonomy usually arise when a minority culture is threatened in its designated 'home,' that is, in the territorial boundaries within which the minority community resides. It can hardly be said, however, that Orthodox soldiers are in their 'home' in the public space of the military. By granting them such extensive religious protections, Appropriate Integration works to "privatize" the IDF, that is, to turn the public sphere of the military camp into a privatized community zone largely governed by the minority's religious codes.²⁰³ It is this

¹⁹⁹ For a discussion of the argument which suggests that the Jewish religion does not constitute a minority culture worthy of protection, see Daniel Statman & Gideon Sapir, *Israel's Non-Jewish Religions*, 28 BAR-ILAN L. STUD. REV. 185, 198 (2012).

²⁰⁰ For a detailed discussion of the contours of this debate, see Raday, *supra* note 98, at 208-10.

²⁰¹ See generally Karin Carmit Yefet, *Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom*, 20 YALE J.L. & FEMINISM 441, 456 (2009); Stopler, *supra* note 58, at 333 ("Every Jewish woman in Israel who is involved in a divorce is subject to the discriminatory religious Jewish law as it is interpreted by the highly conservative Ultra Orthodox judges.").

²⁰² Halperin-Kaddari, *supra* note 96, at 365.

²⁰³ Indeed, the natural expression of the right to culture is the provision of autonomy to the minority group within the geographical domain where it constitutes a majority, while its expansion beyond this boundary is by and large unjustified. Given the disturbing potential of religious freedom to unreasonably restrict

“privatization” of the IDF, which expropriates the army base from the application of fundamental constitutional mandates of gender equality, that creates a space for the patriarchal domination of women within the public sphere.

The following analysis will proceed by asking if Appropriate Integration meets the "qualifying conditions" set forth above for deeming an accommodation "multicultural" in nature. It will show that the gender segregation practices encoded in the Regulation fail those standards first on the grounds of ulterior motive, and second on the grounds that they lack support from a majority of the Orthodox community itself.

1. *Appropriate Integration, Inappropriate Motivation: The Perils of Israeli-Style Multiculturalism*

Feminist critiques of multicultural theory are often suspicious of multicultural protection, asking what prices *minority* women pay in the name of communal accommodation. But the vicious patterns of Israeli-style multiculturalism expose an even greater danger, where respect for cultural difference is translated into a license of both inter-and-intra group gender subordination. By restricting women both inside and outside protected cultures, Israeli multiculturalism worsens the position of a group already vulnerable to what remains of traditional patriarchy.

While liberal multiculturalism recognizes the dual measures of external protections and internal restrictions, recall that Israeli-style multiculturalism introduces the novel form of "external restrictions." In this type of multiculturalism, religious accommodation functions not as a shield but as a sword, with the rhetoric of liberal rights strategically abused to promote the majority's own partisan interests in a gendered hierarchical order.²⁰⁴ Take the classic example of sacrificing gender equality on the altar of religious dictates in the family law arena. As part of the "cult of masculinity" underlying secularist Zionist ideology,²⁰⁵ the Israeli legislature adopted patriarchal religious law in the spheres of marriage and divorce—not to maintain the *status quo* or preserve the Jewish character of the State, but to entrench unequal gender relations. As Zvi Triger cogently shows, legislative debates leveraged religious sentiment to ensure State-supported male supremacy in family life while maintaining the illusion of gender equality as a key component of the State's founding ethos.²⁰⁶

majoritarian secular culture on the grounds of securing minority religious culture, some scholars suggest that cultural protection should be geographically limited to the particular regions where minority members reside. STATMAN & SAPIR, *supra* note 2, at 58, 85. See also HCJ 3872/93 Mitterel Ltd v. Prime Minister, 47(5) PD 485, 509 (Isr.) (Or, T. concurring) ("The State and its agencies . . . will guard and protect the freedom of religion of a person in his home, but where he leaves his home and comes into the public arena or into the private realm of another person, he will no longer be able to impose his will or his opinion on any other person.").

²⁰⁴ Multiculturalism may indeed serve as a liberal pretext for denying rights. See, e.g., Shulamit Almog & Lotem Perry-Hazan, *Conceptualizing the Right of Children to Adaptable Education*, 20 INT'L J. CHILD. RTS. 486 (2012) (fearing that the state may deny children full educational rights by using the pretext of multiculturalism).

²⁰⁵ On the tight relationship between Zionism and Masculinity and its legal manifestations, see Karin Carmit Yefet, *Feminism and Hyper-Masculinity in Israel: A Case Study in Deconstructing Legal Fatherhood*, 27 YALE J.L. & FEMINISM 47 (2015).

²⁰⁶ Zvi Haim Triger, *Between Zionism and Judaism: Family Law and the Intersection of Anti-semitism, Misogyny, and Homophobia* (2004) (unpublished J.S.D. dissertation, NYU) (on file with author), at 183.

I argue that the same patriarchally-motivated forces that historically subjected majority secular women to religious norms are resurfacing in the military context in the guise of multiculturalism. The line of inquiry that follows explores closely the driving forces behind the Regulation and the motivation for its aggressive implementation. It exposes the symbiosis between cultural majority and minority males seeking to preserve male hegemony. It also provides a fuller explanation for what is essentially a *carte blanche* license to exclude women under the auspices of the IDF's accommodationist policy.

The interest behind the military's decision to implement Appropriate Integration is two-fold: sufficiently appeasing the religious establishment so as to ensure continued access to its ranks, and serving deeply-entrenched patriarchal forces within the military itself—old elites who espouse a conservative ideological perception of gender as "naturally" hierarchical. The first relates to intra-group gender relations; the second to inter-group gender relations. I will consider each in turn.

In order to understand the military's first interest, appeasing the religious establishment, we need to delve into the woman-friendly developments in Orthodox Zionist society which threaten to subvert the communal gender hierarchy and undermine the male monopoly in the public, military, and religious spheres.²⁰⁷ As part of modern changes in the gendered distribution of power, Orthodox women are being intensively integrated into institutions of higher education, the job market and even Torah scholarship.²⁰⁸ The apex of this process lies in women's increasing deviation from national service tracks to military service.²⁰⁹

A central cause for the "dreaded" change in the service patterns of religious women is the upgraded status of all women in the military during the post-*Alice Miller* "gender revolution."²¹⁰ The desire to preserve power relations between the sexes *within* the Orthodox community therefore plays an important role in the military trend of excluding women generally. Put differently, this motivating factor driving Appropriate Integration derives at least in part from the desire to neutralize the overall attractiveness of military service for Orthodox women.²¹¹ Under this narrative, pushing secular women away from combat formations might eventually yield the "ultimate solution" of abolishing mandatory military service for all women, thereby making the IDF camp "holy," or women-free. This motivation runs deeper than the mere desire to maintain

²⁰⁷ For a fuller account of the intra-communal feminization process, see Yefet & Almog, *supra* note 143.

²⁰⁸ Levy & Lehrer, *supra* note 124, at 344-45.

²⁰⁹ See Ranit Budai-Hyman, *Skirts in Khaki: The Feminine Religious Choice in the IDF*, in BETWEEN THE KIPA AND THE BERET, *supra* note 72, 549, at 554-55 [in Hebrew], who discusses the "far-reaching changes" in the status of religiously-observant women in recent years, as well as the many references cited therein. In Yagil Levy's terms, "the controversy surrounding the enlistment of women gains a unique dimension in the religious environment as part of a wider debate concerning the position of women . . . who challenge a man's ability to control his family." Levy, *supra* note 130, at 11. See also Levy, *supra* note 114 (the integration of secular women into the military inspires religiously-observant women to also enlist, a service which is conceptualized as something which may undermine the gender hierarchy).

²¹⁰ This interesting thesis is developed in Levy & Lehrer, *supra* note 124. According to the authors, other interests are involved in the escalation of exclusionary practices beyond the consideration of maintaining the existing gender order, such as religious Zionism's interest in maintaining the balance of power in relation to the ultra-Orthodox public and preventing the option of enlisting through the ultra-Orthodox NACHAL, which might lead to ultra-Orthodoxization, as well as the aspiration to ensure religious dominance in military units in order to deter the IDF from the future eviction of West Bank settlements.

²¹¹ Levy & Lehrer, *supra* note 124, at 345.

gender hierarchy in Orthodox society and the military. It also forms a part of the desire of the National-ultra-Orthodox *charedi-le'umi* (also known by the acronym CHARDAL)—the most extremist segment of the national-religious camp—to alter gender relations in Israeli society generally. This overarching agenda marks the fundamental difference between the National ultra-Orthodox stream and the separatist ultra-Orthodox stream—only the former wishes to impose gender separation norms on the public sphere as a whole.²¹²

The influence of the Orthodox community on the military has rendered the IDF a primary tool of influence on society at large.²¹³ Given its prominent role in Israeli society, the IDF is the ultimate laboratory in which to test mechanisms for social engineering, including gender segregation.²¹⁴ As Yedidia Stern explains, "the increasingly severe exclusion of women within the national-religious camp" is not just an issue of *halakhic* interpretation, but is

[t]he expression of a deep desire for reshaping the character of the State of Israel The public-sovereign part of the struggle over female exclusion makes it clear that we are concerned with a controversy that touches more than just equality, human dignity and women's rights. The exclusion of women reflects a struggle over space, both sectorial and pan-Israeli.²¹⁵

The "deep desire" to effect a nationwide shift in gender-relations is yet another testament to the uniqueness of Israeli-style multiculturalism, in which a powerful minority group struggles not for its own cultural survival, but to and transform its minority culture into a national majority.²¹⁶

The second interest driving Appropriate Integration relates to non-religious patriarchal interests within the military itself. Age-old conservatism within the IDF has long opposed the integration of women into the military on the grounds of physiological differences between the sexes and the alleged harm to the IDF's *esprit de corps*, organizational efficiency, and operational effectiveness.²¹⁷ The IDF's decision to take

²¹² However, the separatist stream demands more severe gender exclusion in its own communities than does the national stream. See Stern, *supra* note 84; MAUTNER, *supra* note 33, at 315.

²¹³ Levy, *supra* note 114 ("The religious elites see the military as a major tool for exerting general influence both in the military and throughout society.").

²¹⁴ Cohen, *supra* note 139, at 777; Orna Sasson-Levy, *Gender Separation or Women's Exclusion: The Military as a Case Study*, in CIVIL–MILITARY RELATIONS IN ISRAEL: ESSAYS IN HONOR OF STUART A. COHEN 147, 164 (Elisheva Rosman-Stollman & Aharon Kampinsky eds., 2014).

²¹⁵ Stern, *supra* note 84.

²¹⁶ For a helpful account of this exceptional multicultural regime see Mautner, *supra* note 33, ch. 9.

²¹⁷ Udi Lebel & Shoshana Lubish-Omer, *Returning to What We Were: The Wearers of Crocheted Yarmulka's in the IDF as a Conservative Opposition to a Post-Modern Army*, in BETWEEN THE KIPA AND THE BERET, *supra* note 72, at 181 [in Hebrew] (noting that religious Zionism created a coalition with the conservative militarist camp which was formed against the background of the latter's opposition to post-modern militarism, and which mostly consists of Reserve Major-Generals with otherwise secular and left-wing views.) See, e.g., Raz Sagi, *The IDF's War-Readiness from the Perspective of Integrating Women in Combat Roles*, 26 COLLOQUIA ON STRATEGY & DIPLOMACY 19, 26 (2011) [in Hebrew] (the integration of women into combat units "shall have an immense destructive effect on combat readiness, unit cohesiveness and military effectiveness."). See also Orna Sasson-Levy, *Feminism and Military Gender Practices: Israeli Women*

religious sensibilities into consideration, then, involves far more than an altruistic desire to include and accommodate all segments of society. Rather, putting women back in their "appropriate" place substantially drives military support for the Regulation and its hyperactive enforcement. After budgetary and planning considerations were removed from the bounds of legitimate legal discourse in the post-*Alice Miller* era, they were replaced by new, multiculturalist justifications citing religious freedom—justifications more agreeable to the liberal palate. Religious interests thus aligned with conservative-traditionalist interests in a powerful coalition, to the severe detriment of gender equality in the military.²¹⁸

Through this coalition, religionization has breathed new life into the IDF's conservative-secular school of thought. Elsewhere Shulamit Almog and I show the various ways in which the religious-secular male coalition has worked to reconstitute the IDF from a 'people's army' to a decidedly male army. This includes, most famously, its rejection of the egalitarian recommendations of the Segev Committee charged in 2007 with shaping women's service in the IDF.²¹⁹ We also point to the evolution of IDF rhetoric from a particularistic exclusionary tone focusing on the needs of the religious soldier to, finally, one of universal exclusionism centered on national security as compromised by female soldiers.²²⁰ This reanimated conservative discourse surfaced in meetings of the Ground Forces Command and General Staff and was soon harnessed to promote the 'targeted elimination' of the gender revolution and egalitarian achievements inspired by *Alice Miller*. These initiatives included, among others, removing women from field units, cancelling combat roles for female soldiers, and reinstating segregated training.²²¹

Revealing of its internal dynamics, the IDF has taken a pro-woman stance, despite religious opposition, only in trivial issues of gender equality that are of meager substantive value to female soldiers. Take, for example, the IDF's steadfast support for gender equality in the context of women's singing as opposed to women's service.²²² This easy concession—allowing female singers to lead formal military ceremonies—hides the complexity inherent in the integration of religious soldiers and women in combat units and reveals the workings of the religious-conservative coalition to preserve military patriarchy. The IDF permitted the female voice (literally) to be heard precisely in an

Soldiers in "Masculine" Roles, 73 SOC. INQUIRY 440, 443-444 (2003) (explaining the militarist camp's position).

²¹⁸ Sasson-Levy, *supra* note 214, at 160 ("Although the rabbis were the ones who initiated the process of re-separation, some secular commanders also object to the integration of women and prefer to preserve exclusively masculine units, arguing that women will compromise combat readiness.").

²¹⁹ Yefet & Almog *supra* note 143.

²²⁰ *Id.*

²²¹ Lehrer, *supra* note 151, at 14.

²²² Horowitz & Sagi, *supra* note 144, at 17 (Insofar as women's singing was concerned "the Chief of Staff acted uncompromisingly and prohibited religiously-observant soldiers from leaving military ceremonies."). Even the Military Rabbinate ruled that religious soldiers are not required to leave ceremonies which include women's singing as long as they avoid looking at or listening to the female singer. See Orna Sasson-Levy, *Women in a Professional Army: Gender Implications of The Transfer to a Professional Army in Israel*, 5 THE PUBLIC SPHERE 75, 79 (2011). See also, e.g., HCJ 6556/11 Glickman v. Commander of the Ground Forces (2011) Nevo Legal Database (by subscription, in Hebrew) (Isr.), in which an Orthodox cadet petitioned against his removal from the corps-specific component of his officer training on account of his insubordination in refusing to participate in evening event commemorating the IDF's combat heritage which included women's singing on religious grounds.

arena with no normative platform for challenging patriarchy in the military. To the contrary, permitting women's singing entrenches a traditionally female military function—that of adding decorativeness and refinement to male service. In a somewhat similar fashion, the IDF also rejected a Military Rabbinate initiative that would have limited the role of women in laying wreaths during military funerals.²²³ Indeed, marginal, symbolic responsibilities such as floral decorations and singing well fit for the gendered social roles patriarchy assigns to women and conveniently nourish notions of masculine superiority.

Where patriarchal and religious interests do clash, then, patriarchy wins out, appearing to defend women's rights at the expense of Orthodox traditions. Insofar as women's exclusion from traditionally male roles is concerned, however, patriarchal and religious interests remain aligned. It is this alliance of interests that is manifested in the Appropriate Integration Regulation.²²⁴ In this rendering, Appropriate Integration is self-serving; the military authorities' generous "concessions" to religious forces in reality take the welcome form of gender segregation and female subordination.

In short, Appropriate Integration has been transformed from a local and limited tool for protecting the Orthodox soldier's way of life to a force systematically imposing a gendered code of exclusion as a value in and of itself. Under the guise of liberal tolerance toward religious freedom as the right to culture, multiculturalist aims have been translated into a broader agenda to de-legitimize female combat service, restore the traditional gender order, and encourage the eventual exclusion of women from the military altogether.²²⁵ As such, the Regulation is a prime candidate for considering the ill-effects of the secondary motivation driving supposedly multiculturalist protections. In my view, a group-based "right" of such suspect motivations—of *both* minority group leaders *and* the state agencies codifying it—for that reason alone fails the threshold qualification for multicultural status. Titling a practice as "multicultural" dignifies it with normative legitimacy and exalts the state supporting it as an emblem of liberal tolerance. A group accommodation so marred with ulterior motives—subordinating both minority and majority women—cannot properly be regarded as "multicultural" in nature.²²⁶

2. Multicultural Theory as a Catalyst in the Radicalization of Religious Minority-Group Identity

This section questions characterization of the regulation as a multicultural accommodation for yet another reason—its failure to meet the fundamental qualifying

²²³ Harel, *supra* note 184; Horowitz & Sagi, *supra* note 144, at 36.

²²⁴ But see some examples to the contrary, in which commanders refused to allow the exclusion of women by virtue of the Appropriate Integration Rules, such as the case in which three soldiers from the Har Bracha Hesder Yeshiva refused to take part in an Intelligence training course delivered by female instructors and commanders, and were court-martialed to 21 days of imprisonment. See Melamed, *supra* note 175; Sasson-Levy, *supra* note 222, at 79. Similarly, a paratrooper's request to be exempted from a training drop due to the fact that the person pushing the trainees out of the aircraft was a female parachuting instructor was denied. Gili Cohen, *Soldier In Paratrooper Course Refuses to Carry Out a Training Drop because a Female Parachuting Instructor was Present On Board the Plane*, HA'ARETZ, Dec. 30, 2011 [in Hebrew].

²²⁵ Levy, *supra* note 166. See also Sasson-Levy, *supra* note 222, at 80.

²²⁶ Note that a malicious motivation should be taken into account only when it is accompanied by a real-world adverse impact. A person may not be able to make even a prima facie claim of ill-motivation if the practice does not carry significant harmful side-effects.

threshold that a recognized cultural practice is at stake and that a majority of the minority group supports the accommodation. I argue that Appropriate Integration troublingly exposes an inherent peril in multicultural theory—the State’s increasingly active role in shaping minority culture and *malestreaming* its radical elements.

Appropriate Integration has ignored heterogeneity within the national-religious group, blindly assuming that the norms it codifies are common religio-cultural practices agreed upon by the entire protected community. This myopic vision is particularly troubling in light of the fact that Jewish law is said to be more pluralistic than that of any other religion,²²⁷ and that religious Zionism is an umbrella term encompassing a wide range of variegated *halakhic* lines of thought, lifestyle, and religious and political behavior.²²⁸

As part of the rich variety of worldviews characteristic of the Orthodox stream, the gender segregation envisioned by the Regulation represents the stringent norms of the National-ultra-Orthodox (or CHARDAL), a minor sub-group positioned at the extreme end of the Orthodox public.²²⁹ The majority of religious Zionists tends towards the liberal end of the liberal-conservative continuum and is currently undergoing a process of internalizing western-liberal values to become "religiously orthodox at home, and Israelis outside" (*dati be'veitcha–yisraeli be'tsetcha*).²³⁰ During the past few years, however, the radical 'minority within the minority' has sought to implement in *halakhic* interpretation an endorsement of ultra-Orthodox views regarding sexual modesty and gender relations.²³¹ Indeed, it is under the influence of this ultra-Orthodoxization push that religious Zionism has for the first time in its history witnessed practices of modesty and gender segregation growing more strict. These segregational practices have reached youth movements, institutions of higher education, and, with the cooperation of the Ministry of Education, even highschool and elementary schools,²³² where admission for

²²⁷ RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN 11 (2004).

²²⁸ For a review of the structure of religious-Zionist society, see YAIR SHELEG, THE NEW RELIGIOUS JEWS: RECENT DEVELOPMENTS AMONG OBSERVANT JEWS IN ISRAEL (2000); Asher Cohen, *The Crocheted Yarmulke and What Lies Behind It: Multiple Identities in Religious Zionism*, 15 AKDAMOT 9 (2005) [in Hbrew]. See also Cohen, *supra* note 122, at 110.

²²⁹ In a 2012 survey only 2.2 percent of the population identified themselves as National ultra-Orthodox while 11.8 percent defined themselves as "religious." See Asher Cohen and Bernard Susser, *Women Singing, Cadets Leaving: The Extreme Case Syndrome in Religion—Army Relationships*, in CIVIL–MILITARY RELATIONS IN ISRAEL: ESSAYS IN HONOR OF STUART A. COHEN 127, 135 (Elisheva Rosman-Stollman & Aharon Kampinsky eds., 2014) (citing TAMAR HERMANN, THE ISRAELI DEMOCRACY INDEX (2012)).

²³⁰ Sheleg, *supra* note 228, at 75; Mautner, *supra* note 33, at 314 (stating that most of the religious persons in Israel are committed to both their religious precepts and the values of liberal democracy).

²³¹ See Chanan Mozes, *From Religious Zionism to Postmodern Religiosity: Trends and Processes in Religious Zionism since the Rabin Assassination* (2009) (unpublished PhD dissertation, Bar-Ilan University), cited in Asher Cohen, *Image and Reality*, *supra* note 123, at 109-10; Cohen & Susser, *supra* note 229, at 134; Sasson-Levy, *supra* note 56, at 137.

²³² Halperin-Kaddari, *supra* note 227, at 91 (documenting the expanding trend of segregation in state-religious education); Sasson-Levy, *supra* note 56, at 136; Yifat Sela, *Serving in Faith: Female Soldiers and the IDF*, in BETWEEN THE KIPA AND THE BERET, *supra* note 72, at 544; Talila Neshet, *Radicalization in State-Religious Education: Segregated School Buses and the Prohibition of Female Singing*, HA'ARETZ, Nov. 18, 2011 [in Hebrew]; Cohen & Susser, *supra* note 229, at 138 (describing an internal controversy over the character of Bnei Akiva and the strong resistance to its emerging practices of gender separation and conservative attitude towards female singing). But see Talila Neshet, *Hundreds of Parents Air Grievances on Radical ultra-Orthodoxization in State-Religious Education*, HA'ARETZ, Nov. 18, 2011.

girls are increasingly dependent on compliance with certain modesty standards.²³³ Recently, these restrictive forces have begun manifesting even in the de-legitimization of national *civil* service for women (religious women may currently volunteer for two years of civilian national service in lieu of enlistment).²³⁴

Against this backdrop, Appropriate Integration may be properly conceptualized as the import of ultra-Orthodox norms to the Orthodox system of values, rendering the views of the most radical minority the mouthpiece of religious Zionism as a whole.²³⁵ It is an extreme example of the majority power position attained by this numerical minority. More than protecting the entire culture, the military codex entrusts the marginal CHARDALic minority with the authority to legislate exclusionary practices on behalf of the majority, to the detriment of observant and secular women alike. It is now "religious moderation which requires explanation"²³⁶ in the military. In short, in the internal struggle for cultural hegemony over religious Zionism, the State has sided with the marginal minority, confusing the extreme with the universal norm.

The move is even more intriguing for its inversion of normative legal attitudes. In her renowned studies analyzing the mutual relationship between the law and the right to culture, Madhavi Sunder shows that multicultural accommodation typically takes the form of protecting traditional minority group practices endangered by encroaching liberal forces espousing change.²³⁷ The adoption of the Appropriate Integration Directive, however, symbolizes an inverse move: eschewing traditional preservation, the law instead turns to *transformation*, supporting new norms based on a conservative reactionary agenda. As discussed earlier, gender separation had never been formerly practiced by religious Zionists, nor was mixed-gender military service considered problematic until recently. At a deeper level, therefore, the Directive imbues the definition of 'national-religious' with a conservative, regressive character that works against gender equality.²³⁸

Because the law has provided the CHARDALic minority the exclusive right to regulate on behalf of the entire Orthodox community, moderately religious soldiers may now be pressured to adopt gender separation as a normative part of their cultural identity. The IDF's accommodationist policy thus silences disagreement with the conservative *retro*-interpretation of the modesty discourse, disincentivizes internal reform, and frustrates the Orthodox feminist initiative to liberalize and empower women within the confines of *halakha*.²³⁹ Indeed, this is not surprising considering that in many other

²³³ Sasson-Levy, *supra* note 218, at 155.

²³⁴ Liraz Chachmon, *Shattering the Bubble: On the Enlistment of Religious Women in the IDF*, 450 MA'ARACHOT 34, 35-36 (2014) [in Hebrew] (observing that in recent years some have claimed that national service too is *halakbically* verboten, and that some Rabbis have even considered it "in violation of religious precepts.").

²³⁵ See, e.g., Haber and Sharvit-Baruch, *supra* note 184, at 16 (noting many Orthodox soldiers' resistance to the move towards gender segregation).

²³⁶ Cohen & Susser, *supra* note 229, at 132 (quoting Charles Liebman, *Extremism as a Religious Norm*, 22 J. SCI. STUD. RELIGION 75 (1983)).

²³⁷ See Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003).

²³⁸ Compare to the statement by the representative of *Kolech*, *infra* note 241. For a similar argument relating to the ultra-Orthodox public and the bus segregation affair, see Noya Rimalt, *The Law as an Agent of Multiculturalism: Utopia and Reality in the Bus Segregation Affair*, 42 MISHPATIM 773, 829-31 (2013) [in Hebrew].

²³⁹ Rimalt, *supra* note 55, at 115; Rimalt, *id.* at 832, noting that gender segregation has also been seeping into the national-religious space, where it has been accompanied by increasingly louder voices of dissent from within the community. Also compare Madhavi Sunder, *id.* noting that the currently prevalent trend among minority cultures is characterized by internal controversies and by attempts made by male and female

instances the State has not shied from taking sides in *halakhic* debates to the detriment of all women.²⁴⁰

The aggressive implementation of the Regulation is a powerful testament to the fact that the Appropriate Integration has indeed stunted creative and gender-friendly intra-*halakhic* methodologies for integrating Jewish Law into military life.²⁴¹ The radicalization trend supported by the Directive conceptualizes the mere presence of women as negating any form of appropriate integration. As one *hesder* Yeshiva Rabbi warned in 2008:

That which is called "Appropriate Integration" is improper and does not satisfy *halakhic* criteria. It was formulated according to conciliatory criteria . . . such that whosoever enlists is in fact a compromiser . . . there should not be any female soldiers around at all, not even clerks. All kinds of situations prohibited by the [religious] laws of *yichud* might arise. While it is difficult to say there will be no female soldiers whatsoever, it is necessary to understand that the military's moral norms are very loose. Over there, not even married women maintain their sanctity. There is an atmosphere of profanity, innuendo, and poor form, which is why we require a safety factor.²⁴²

The IDF's role in encouraging radicalization becomes all the more apparent when comparing the issue of female service with that of female singing. The IDF's uncompromising position towards allowing women's singing pressured religious authorities to accommodate the practice. The Military Rabbinate accepted male soldiers' exposure to female soldier-singers and civilian rabbis fell in line, suggesting that soldiers adopt "adaptation strategies" (such as keeping one's eyes down and singing verbatim) to "tolerate" the activity.²⁴³ The opposite process occurred, however, insofar as women's service is concerned: the IDF's endorsement of the de-legitimatization of women's service radicalized *halakhic* rulings on gender-integration in the military, even in cases where the religious law had once been tolerant—especially in the Orthodox world where gender separation was never a part of the religious lifestyle.²⁴⁴

individual members of the community to promote processes of liberalization from within, processes which are often thwarted by the law.

²⁴⁰ The most prominent example is probably the immunity accorded by the civil legislature to the gender discrimination of exclusively male appointments to religious judge positions, thereby thwarting an otherwise burgeoning liberalization of this topic. Halperin-Kaddari, *supra* note 96, at 353-54.

²⁴¹ Compare the statement by the representative of the Orthodox feminist organization *Kolech*, Rachel Gordin, Protocol no. 121 of the meeting of the parliamentary Committee on the Status of Women and Gender Equality (Dec. 27, 2011).

²⁴² Hagit Rotenberg, *The Battle for Camp Holiness*, 280 BESHEVA (Feb. 14, 2008), <http://www.inn.co.il/Besheva/Article.aspx/7216> [in Hebrew].

²⁴³ See the Statement by Rabbi Rimon as quoted by Kasher, *supra* note 72, at 434, note 33.

²⁴⁴ As aforementioned, the Military Rabbinate is far more liberal in its approach to women's service, and even the Union of *Hesder* Yeshivas formerly expressed milder and more inclusive positions—not just towards the place of women in the IDF, but also towards women's assignment to instruction and combat support roles. See the statements presented by Horowitz & Sagi, *supra* note 144, at 27. See also *id.* at 41 ("Just as the increasing integration of female soldiers has altered the IDF's status quo on gender, so have religiously-observant soldiers' service needs become characterized by a dynamic of increasing strictness . . . [in a manner] exceeding the narrow perspective of religious soldiers' needs.").

All in all, Appropriate Integration constitutes a kosher stamp of approval on a kind of minority tyranny under the aegis of the law, one resulting in the oppression of majority-group secular women. The legal imprimatur contributes in turn to the fortification of ultra-Orthodoxization patterns within Jewish Orthodoxy, thus inhibiting the equality of minority community women and their freedom to color Jewish law in feminist and progressive shades.²⁴⁵ In other words, Kymlicka's "liberal expectation" that multiculturalism will liberalize a "thick" multiculturalist society (one mixed with liberal and illiberal cultures) into a "thin" multicultural regime (encompassing only liberal cultures) is not merely unrealistic, but inherently flawed. Israeli multiculturalism as manifested in the IDF shows that actions initiated by state agencies in the name of multiculturalism ironically do the opposite, drawing us farthest from the liberal illusion of a thick-to-thin multicultural transformation. In the final analysis, the State has endorsed radical elements in the definitional identity of the minority group, rendering that group more illiberal in the name of liberal accommodation.

B. Appropriate Integration as a right to Freedom of Conscience

Having examined Appropriate Integration as a *group*-right in light of the freedom of culture, it is left to examine its mandates as a form of freedom of conscience of the individual. This section will address whether the individual Orthodox soldier may be entitled to a freedom of conscience protection justifying the military's restrictions on women.

1. The Military Rabbinate as the Ultimate Arbiter of Halakha in the IDF

The first question that needs to be addressed is whether the integration rules anchored in the Regulation indeed constitute religious norms. Recall that while an argument for religious freedom as the right to culture requires that a certain practice is necessary for the continued survival of the minority religion, to warrant shelter as a freedom of conscience the practice in question must implicate a direct violation of religious prohibition or the prevention of a religious commandment. Recall also that such a determination is best done with objective, rather than subjective criteria, and requires the selection of a decision-maker who will determine which practices truly are required (or prohibited) by the religion in question.

In the IDF, this threshold question is most efficiently established through the authorized local *halakhic* desider: the Military Rabbinate. By virtue of its position, this hybrid body is generally characterized by moderate and realistic *halakhic* positions that are context-sensitive and considerate of the unique framework of the military institution. This is because the Military Rabbinate has an interest in adapting *halakha* to army life so as to preserve both; as the IDF Chief Rabbi Rafi Peretz put it, Jewish law must be

²⁴⁵ The dilemma may be even more complex, since while the multiculturalist vision perpetuated in the Directive is harmful to secular female soldiers on the one hand, it also facilitates Orthodox female soldiers' empowerment on the other hand, eases their integration into the military framework and renders accessible opportunities previously closed to them. By so doing, it also alters the male-female power relations within the Orthodox community.

interpreted differently in the military context so as not to destroy the delicate fabric of army life.²⁴⁶ Civilian rabbis, on the other hand, are generally unwilling to accommodate the peculiarities of the military,²⁴⁷ adhering instead to what Charles Libman famously calls "extremism as a religious norm," which in Jewish Orthodoxy is translated into "the tendency to adopt whatever ruling has more restrictions . . . even when [a more lenient] interpretation can be found easily."²⁴⁸

The issue of gender relations attests well to the advantages of the Military Rabbinate as the guiding *halakhic* ruler for resolving freedom of conscience claims, as it shows how profoundly Military and Civilian Rabbinate differ in their rulings. While Religious Zionist rabbis have launched an "all-out war" on integrating female soldiers into combat formations, the Military Rabbinate takes a more liberal, inclusive position, refusing to treat joint service as a religious problem at all.²⁴⁹ A second example is the high-profile issue of women's singing in the military. Many civil rabbis, including Israel's Chief Rabbi, have taken a strict position, prohibiting the attendance of military ceremonies featuring female vocalists with the highest level of religious severity. As the head of one *hesder* yeshiva put it, it is incumbent upon a male soldier to "sacrifice his life" to exit a female singing event, even if "a firing squad is awaiting outside."²⁵⁰ The Military Rabbinate, on the other hand, cognizant of the complexity of integrating Jewish law to the military context, factored in meta-*halakhic* considerations and reached a more lenient conclusion. In an elaborate opinion, one IDF Rabbi noted that a *halakhic* decider must factor in the reaction of the secular audience and the effects of its ruling on unit cohesion. Because secular soldiers (mis)perceive the prohibition on women's singing as degrading, this must influence religious decision-making into liberalizing *halakha* to the greatest extent possible.²⁵¹ He also found relevant the social change in women's status as bearing directly on the religious permissibility of inter-gender interaction. Thus, for example, "[i]t cannot be denied that now it is almost impossible to say for a normal man that hearing a woman singer might make him sinful, even in the extreme, and therefore there is no denying that there is room for leniency."²⁵² In the tradeoff between *halakhic* concerns over female singing and the meta-principles of human dignity and unit cohesion, the rabbi concluded, the former must give and the latter are controlling.²⁵³

²⁴⁶ Aviad Yehiel Hollander, *Halakhic Multiculturalism in the IDF: Rulings of Official Religious Authorities in Israel Concerning "Women's Singing"*, 34(3) MOD. JUDAISM 271, 279-80 (2014).

²⁴⁷ Hollander, *id.* at 281-82. See also Stuart Cohen, *The Re-Discovery of Orthodox Jewish Laws Relating to the Military and War (Hilkhot Tzava u – Milhamah) in Contemporary Israel: Trends and Implications*, 12 ISRAEL STUD. 1, 14-15 (2007).

²⁴⁸ Cohen & Susser, *supra* note 229, at 132, and the quote of Libman's famous text cited therein.

²⁴⁹ According to the Military Rabbinate's position, "the issue should be dealt with outside the Military Rabbinate and even by the non-religious, in order to clarify that the issue of women's integration in field units is related to 'human dignity' rather than religion." See Kampinsky, *supra* note 114, at 167-68.

²⁵⁰ Yehoshua Brainer, *Rabbi Levanon: Women Singing in the IDF? Only with Ear Plugs*, WALLA NEWS (Nov. 27, 2011), <http://news.walla.co.il/item/1880384>.

²⁵¹ Hollander, *supra* note 246, at 277.

²⁵² *Id.* at 278 (quoting Rabbi Krim).

²⁵³ Analyzing IDF Rabbi Krim's decision, Hollander explains: "His desire to maintain unity within the army motivated his search for legitimate *halakhic* positions, allowing all soldiers to attend the ceremonies [with female vocalists]. To further this goal, he uncovers obscure sources and provides new interpretations to some of the well known positions of other Deciders." *Id.* at 281. See also *id.* at 282-83 ("In order to prevent a possible rift within the army ranks, Rabbi Krim was ready to advance renewed interpretations of the traditional *halakha* and offered *halakhic* rulings which matched the demands of the Chief of Staff."). For the

A major reason behind the marked differences in *halakbic* opinions between civil and military rabbis relates to motive. It seems that, for civil rabbis, a wider strategic agenda may be at work, one that goes beyond the multicultural demand for shaping a religious-friendly military service environment. Infusing *halakha* with increasingly strict content may be part of a wider array of interests intended to fight the internal feminization processes which have spread throughout the Orthodox community. Recall the earlier discussion of the convenient if implicit alliance between religious and patriarchal interests; a strict interpretation of *halakha* at the expense of women serves this alliance, and further contributes to the overall goal of inflicting the CHARDALic vision on the culture not only of the IDF, but also of the public sphere generally. If true, this would not be the first time that civil rabbis have made decisions influenced by ulterior motives. Scholars have identified similarly hidden forces at work in the legal debates over the proper exercise of the *kashrut* (conformity with dietary law) authority, to take a famous example.²⁵⁴ Interestingly enough, the *kashrut* debate, though related to food issues, also involved rabbinical enforcement of female modesty.²⁵⁵

The differences in interpretation between military and civil rabbis alongside the possibility of ulterior motives explain well the advantage of deferring to the Military Rabbinate in resolving synagogue-military disputes. Having established a decision-maker to whom to defer in the interpretation of religious mandates, let us next determine whether the religious right to freedom of conscience may justify either of the two most problematic rules of the Appropriate Integration regime.

2. *The 'Modest Clothing' Requirement*

This section will analyze whether the Appropriate Integration's gender-neutral requirement that soldiers dress modestly at all times, in no shorter than knee-height and elbow-length cloths²⁵⁶ implicates freedom of religion or freedom from religion rights as a form of freedom of conscience.

Though ladies first, let us start with a possible claim of the Orthodox male soldier to a constitutional stake in the modesty of the women surrounding him. Recall that freedom of conscience is only violated when the person himself is *actively* required to commit (or avoid committing) an act that directly clashes with his theological mandates. This is not the case here. The religious soldier is passively exposed to female immodesty, which is no different than similar exposure in public streets, the workplace, and wedding halls. A person may not legitimately invoke his freedom of conscience rights when *others*

consideration of meta-principles such as preserving Jewish unity as overriding other specific *halakbic* doctrines in the context of obeying orders to participate in disengagement operations, see Cohen, *supra* note 122, at 112-13.

²⁵⁴ SAPIR & STATMAN, *supra* note, at 67, 143, 251-52.

²⁵⁵ In one example, religious authorities deprived a business of a kosher certificate because it hosted belly-dancers. HCJ 465/89 Raskin v. The Jerusalem Religious Council, 44(2) PD 673.

²⁵⁶ Section 14 of Appropriate Integration Directive. See Orna Sasson-Levy & Sarit Amram-Katz, *Gender Integration in Israeli Officer Training: Degendering and Regendering the Military*, 33 SIGNS 105, 120 (2007); Libel & Gal, *supra* note 116, at 102. Of course, my analysis is based on the premise that the modesty requirement is not selectively enforced against women, what would no doubt amount to gender discrimination and raise a different set of concerns.

fail to act or dress the way he would want them to; otherwise almost every conceivable secular behavior could qualify as a violation.

Nor, however, is the right of female soldiers to freedom *from* religion implicated by the dress code for two reasons. First, it is undeniable that a person holds dear her right to personal appearance and that the modesty requirement conveys a reductionist message that perceives a woman as a mere tempting body whose dangerous sexuality must be concealed.²⁵⁷ Yet the dress regulation is not tantamount to a freedom of conscience violation for the simple reason that it does not in itself force a woman to perform a religious activity, participate in a ritual practice, or wear a religious garment. While her right to freedom of dress is restricted, and while this may be inconvenient, the secular woman's conscience, properly understood, cannot reasonably be said to be attacked by the mere act of wearing long pants or sleeved shirts, since there is nothing in the secular value system that is fundamentally opposed to such a dress. Hence, the claim that the secular female soldier forced to wear more modest apparel is somehow inauthentic to her self-identity is unreasonable. True, a woman may harbor strong opposition to the restricted dress code because of the message it projects about the female body, but if this is the case, then the source of her opposition is not the religious basis for the regulation, but rather the moral problem inherent in the content of the regulation—that is, her objection is not a freedom from religion claim.

What is more, the clothing restrictions in the military do not raise the freedom-from-religion problems inherent in religious legislation. While there is a longstanding philosophical debate as to the liberal permissibility of supporting religiously-motivated legislation, most scholars seem to be at peace with a law premised on religion but supported by a concurring independent secular rationale.²⁵⁸ This is the case here. Clothing restrictions in the military are not an Appropriate Integration innovation, but rather a reincarnation of old regulations requiring "appropriate and not revealing" clothing.²⁵⁹ This requirement, enacted long before religionization was underway, is supported by secular values of unity and discipline.²⁶⁰

Finding that the modest clothing requirement is neither a protected freedom of religion nor a violation of freedom from religion, I conclude that the requirement may stand, at least to the extent of the religious rights inquiry. While female soldiers could

²⁵⁷ Yofi Tirosh, *Alice through the Looking Glass: Reflections on Representations of the Female Body in the Discourse on Integrating Women in Combat Roles*, in *STUDIES IN L., GENDER & FEMINISM* 885, 925 (Dafna Barak-Erez ed., 2007) [in Hebrew] (concluding that "what is clear is that even ten years after the *Miller* decision, women are still required to conceal their sexual, dangerous, profane and sinful bodies.").

²⁵⁸ This is the case especially when this rationale is not merely presumed but actually offered. See Robert Audi, *The Place of Religious Arguments in a Free and Democratic Society*, 30 *SAN DIEGO. L. REV.* 687 (1993). For a thorough analysis of the legitimacy of relying on religious arguments, see Sapir & Statman, *Religious Arguments*, *supra* note 69.

²⁵⁹ See General Staff Directive 33.0501: Uniforms—Types, Parts and Manner of Wearing and General Staff Directive 33.0507: Clothing—Civilian Clothing. According to the Standing Order, appropriate clothing is no shorter than knee-length trousers and a shirt with sleeves.

²⁶⁰ Indeed, I would take the argument further and conclude that the Appropriate Integration should not even be regarded as *religious* legislation. As Sapir and Statman persuasively contend, legislation that is based on the desire to protect religious freedom or avoid hurting religious feelings is not religious legislation, since it is not rooted in inaccessible or intelligible religious premises or theological suppositions, but rather on the *moral* duty to respect the sensibilities of certain groups, including the Orthodox people. Any other result would discriminate against observant individuals by unfairly prioritizing the secular worldview in the public sphere. See Sapir & Statman, *Religious Arguments*, *supra* note 69, at 244-47.

lodge other rights-based claims against the regulation, freedom of conscience is simply not implicated either for the religious or for the female soldiers. The only matter remaining for decision-makers, then, is a balance-of-interests analysis of the costs and benefits of the rule. The fact that clothing restrictions have been permitted to stand even in the civil context—the Israeli Supreme Court has upheld regulations requiring head-coverings for those appearing before the Rabbinical Court²⁶¹ and mandating a uniform for bus drivers²⁶²—is especially supportive of such limitations in the far more restricted military context. As the Supreme Court reasoned: "[n]ot every limitation applied to a person belonging to an organized and regular framework constitutes a violation of his fundamental rights . . . it is not possible to maintain an orderly and efficient workplace which projects an aura of seriousness and respect without regulations . . ." ²⁶³ This is true especially in a military environment so dependent for its function on the enforcement of discipline and unity.

3. *The Gender Segregation Requirement*

Just as with the modest clothing requirement, gender segregation rules in the Regulation—which provide for religious male soldiers to operate in a female-free zone and to avoid being commanded or instructed by women—cannot be justified as a freedom-of-conscience right of religious soldiers for a number of independent reasons.

First, the gender norms embedded in the Appropriate Integration regulation are not *halakhically* required. As mentioned, this is precisely where military and civilian religious authorities differ and where we have seen an exponential increase in "religious radicalization" wrought by the strict interpretation of religious law.²⁶⁴ The increasing strictness and exclusion, as cultivated by civil rabbis, is well illustrated in Minister of Defense Moshe Ya'alon's admonition that:

It is inappropriate for rabbis to subject their students to strict limitations, and to demand that the military take them into consideration . . . there exists an urgent need to cause the Rabbis to desist from directing soldiers, and to forbid interventions that violate the necessary balance required for allowing the service of religious soldiers alongside the service of girls in diverse roles throughout the IDF.²⁶⁵

Even if we may ignore the problematic terminology employed by the former Chief of Staff—which calls men "soldiers" but women "girls"—we must not ignore the

²⁶¹ See Rabbinical Court Procedure Regulations 5753, § 53, YP No. 4102 (1993) p. 2299 (Isr.). See also HCJ 1912/97 Rish v. The Chief Rabbinate of Israel, 52 (5) PD 650 (1998).

²⁶² CA 396/00 Ben-Da v. Cooperative Transportation Society Ltd., 56 (1) PD 56 (1) 851.

²⁶³ *Id.*

²⁶⁴ Gal, *supra* note 159, at 20-21. See also Amos Harel, *Outgoing Commander of the Manpower Directorate to Chief of Staff Gantz: Stop Religious Radicalization in the IDF*, HA'ARETZ, July 20, 2011 [in Hebrew]. A similar letter signed by a considerable number of Reserve Major-Generals followed suit, and warned the Chief of Staff about religious radicalization in the IDF and about their fear that this would harm women's motivation to enlist and serve. Gal, *supra*, at 21.

²⁶⁵ Haver and Sharvit-Baruch, *supra* note 184, at 20 (quoting Moshe Ya'alon).

fact that religionization leads to the adoption of *halakhic* strictures in the military space that have no counterparts in equivalent civilian frameworks.²⁶⁶ While female nurses, for example, may treat male patients in the civilian sphere, many rabbis forbid treatment by female combat medics in the military sphere. While women have been permitted to act as teachers at *yeshiva* high schools, similar female roles have been censured in the military.²⁶⁷ Indeed, religious soldiers do not hesitate to demand that female instructors be replaced by men, reflecting the attempt of religious extremists to "establish norms that would make contact between male soldiers and female instructors impossible—a practice that has scarce *halakhic* sources and that would undo long-standing and prevalent training patterns in the IDF."²⁶⁸

Ultimately, there is no direct religious prohibition against being in the presence of or instructed by women—inter-gender interactions are an everyday occurrence in civil life. In fact, the *halakhic* validity of gender segregation was recently rejected even with respect to the *ultra-Orthodox* community. In the *Sror* case, for example, the Labor Court denied unemployment benefits to an ultra-Orthodox woman who refused to apply to non-gender-segregated jobs. The court concluded that "there is no *yichud* (prohibition of seclusion of a man and a woman in a private area) insofar as the men and women are placed together for employment purposes," adding that "a woman may [*halakhically*] remain alone with another male employee at a place of employment provided this is done for employment purposes and certain conditions are met."²⁶⁹

Even if the segregation *were halakhically* required, it could not be justified by freedom of conscience arguments because, just as with the modesty requirement, gender integration neither requires the religious soldier to perform a religious violation nor prevents him from fulfilling a religious obligation. Even taking as true the position that serving next to or under women dressed immodestly borders on religious catastrophe, recall that actions performed by *other people* cannot be construed as harmful to one's

²⁶⁶ Horowitz & Sagi, *supra* note 144, at 45 ("Most religious soldiers, who do not demand strict segregation in their civilian lives, in their social frameworks, in their youth movements, in their institutions of higher education, in their households and in their towns and cities cannot demand that the IDF impose norms and strictures that affect a large public who has no interest in their imposition and which adversely affect female soldiers.").

²⁶⁷ Reserve Colonel Ya'akov Castel, former head of the General Staff's Education Department, and currently personal adviser to the Chief Education Officer, for example, asks:

Why is it . . . that I may take instruction from a woman sitting behind a desk and teaching English at a *Yeshiva* high school but suddenly wish to create a different and more radical reality for myself in the military? And why should the military accept this and adapt itself accordingly? Why would no civilian Rabbi dare to rule that female nurses should not treat male patients, while permitting no female combat medics in the military?

Quoted in Bar-On, *supra* note 184, at 29.

²⁶⁸ Cohen & Susser, *supra* note 229, at 142.

²⁶⁹ SA (Statutory Appeal) (Regional, Tel-Aviv) 3741-04-11, *Sror v. Israeli Employment Service* (Dec. 19, 2011) Nevo Legal Database (by subscription, in Hebrew) (Isr.). *But see* *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987) (invalidating statutory unemployment regulation conditioning unemployment compensation benefits upon a person's willingness to work under conditions that violate one's religion).

conscience. This is the case even if those external actions require the indirect cooperation of the religious individual, and even if they occur in a domain under his control.²⁷⁰

Thus, gender separation is at best a mere preference like any other (such as wearing jewelry or growing long hair) that the military is under no duty to accommodate. The IDF is not required to respect this preference—however strong—any more than it is the whims of the "religiously" misogynist individual.²⁷¹ While believers are free to impose upon themselves stricter religious practices in their private lives, they cannot legitimately expect the IDF to alter its operations to the detriment of others in order to accommodate their preferences.²⁷² If it did, it would be required to extend the same protection to the inclinations of the secular conscience—for example, a misogynist who considers female soldierhood a violation of his deeply held normative beliefs. Indeed, as we shall see next, some evidence already suggests that *secular* male soldiers abuse the Regulation by asking to transfer to a gender-sterilized setting, fearing that women's very presence threatens their masculinity and impairs unit function.

4. *Religious Liberty v. Gender Equality: A Balance-of-Interests Analysis*

After the initial inquiry of whether the regulation in practice implicates religious rights is the second and more central inquiry of the balance-of-interests test—the examination of what we as a society are willing to pay in normative, declaratory, and practical prices for the sake of some people's conscience. A balance-of-interests test is useful in that it forces the analysis to account for the costs imposed on women for the sake of religious freedom.

Analytically, the Appropriate Integration regulation claims the right to engage in gender discrimination to the tune of worsening structural inequality between men and women and reproducing hierarchical gender power relations. Religionization in the military has relegated women to inferior military roles, preserving for men the most prestigious positions of greatest decision-making power; this, in turn, entrenches masculine gender policies. The Appropriate Integration regime thus imposes an additional cost in the legitimacy it confers on gender segregation and in its entrenchment of a culture hostile to women. A study by the Women's Affairs Advisor to the Chief of Staff discovered that mixed-gender combat formations are considered less prestigious and are disparagingly referred to as "pussy platoons."²⁷³ As a result, some records indicate that soldiers report feeling ashamed at serving alongside women, complaining that they have been denied an "authentic" (or "masculine") military experience, in some cases

²⁷⁰ STATMAN & SAPIR, *supra* note 2, at 120.

²⁷¹ When the United States Junior Chamber (*Jaycees*), for example, tried to exclude women from membership, the U.S. Supreme Court held that in the competition between the Jaycee's right of association to exclude women as members and the state anti-discrimination law, the latter triumphs. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

²⁷² For a proposition in this spirit see the apt remark of Rabbi Yuval Cherlow as quoted in Cohen & Susser, *supra* note 229, at 139.

²⁷³ This, for example, was the name given to the mixed-gender platoon of the first integrated IDF Flight School Class. The Israel Air Force base was even referred to as "Mount Pussy." See Tirosh, *supra* note 257, at. 929, n.122.

requesting reassignment to a segregated unit.²⁷⁴ It is not unreasonable to fear that *secular* men who adopt such chauvinist stereotypes may abuse the regulation's veto power over gender equality in order to preserve the gender 'purity' of combat formations as incubators of masculinity. Orna Sasson-Levy and Sarit Amram-Katz's study corroborates this apprehension. They found that many soldiers' requests to be assigned to all-male units had nothing to do with religious considerations, since those soldiers were avowedly secular, but instead reflected concern about the harm of female presence to the quality and masculinity of the unit.²⁷⁵

The gravity of the consequences resulting from the Regulation is especially illustrated by a thought experiment comparing women to other national minorities. Suppose a religiously racist soldier (à la the followers of Church of Jesus Christ Christian, a white supremacist religious organization) opposed for reasons of conscience an army inclusive of non-Jews or operating under a Druze commander.²⁷⁶ Or consider the segment of ultra-Orthodox students who insist that their homogenous *chardi* unit be split up on the basis of Ashkenazi and Sephardic origins, as is now notoriously common in their yeshivas, schools, and marriage market.²⁷⁷ Such "appropriate exclusion" or "separate but equal" regulations would be dismissed outrightly on the grounds that there is a limit beyond which religion cannot reach. Some principles are so sacred that they sit at the very core of the inviolable governmental compact that defines us as a society. We might wonder, then, why equality of race and origin deserves such a sacred spot, yet gender does not.

One deep-seated reason for the different treatment of race and sex in the IDF is that the military authorities value male *manpower*, while women are regarded as dispensable. Yet if a balance-of-interests test analysis finds that religious liberty cannot excuse racism, neither can it excuse chauvinism. American law, for example, has treated national origin, race, and sex as the inviolable trinity of anti-discrimination law. It has steadfastly repudiated the proposition that a claimed religious imperative may trump gender equality, treating the eradication of sex discrimination as "a national priority of the highest order."²⁷⁸

²⁷⁴ Sarit Amram-Katz, *Combat is the Best Sister: Gender Integration in the Preparation of Combat Units in the IDF*, in 2 MILITARY PSYCHOL. 171 (2003) [in Hebrew]. Indeed, as has been recently reported in Deborah Chasid and Ze'ev Lehrer, *Who is Afraid of Women in the IDF?* 402 MA'ARACHOT 112, 117 (2005) [in Hebrew]: Female soldiers in combat formations are also required to overcome a great degree of skepticism, disbelief, and occasional hostility on the part of some of their fellow soldiers, commanders and at times even the military establishment. These parties still find it difficult to internalize the notion that a woman can fight as well as a man and feel that their masculinity is thus harmed. This resistance is sometimes translated into obstructive and discriminatory behaviors that adversely affect the female soldiers' odds for success and limit them from attaining their full potential.

²⁷⁵ Sasson-Levy & Amram-Katz, *supra* note 256, at 121. See also Harel, *supra* note 184 (quoting Yagil Levy).

²⁷⁶ Note that the IDF maintains separate origin-based units for Druze and Bedouin soldiers (the Khrev platoon and Bedouin 'Trackers' Platoon respectively), but it does so as a multicultural accommodation to the benefit of these distinct communities, the members of which are free to join non-segregated units instead.

²⁷⁷ See, e.g., the famous *Immanuel Case* and its illuminating analysis in Shulamit Almog & Lotem Perry-Hazan, *Contesting Religious Authority: The Immanuel 'Beis-Yaakov' School Segregation Case*, 26(1) INT'L J. SEMIOTICS L. 211 (2013).

²⁷⁸ Underkuffler, *supra* note 23, at 451. In American law the new claimant for antidiscrimination protection is sexual orientation. See *id.*

In past religion-vs-gender conflicts, Israel has generally decided the balance-of-interests test in favor of religion.²⁷⁹ Interestingly, however, it recently proved willing to break old habits. In the *Sror* case discussed above, recall that the Labor Court denied unemployment benefits to an ultra-Orthodox woman refusing to apply to non-gender-segregated jobs, reasoning that there was no *halakbic* prohibition on gender integration in the workplace. The Court was correct in its decision, but not entirely in its reasoning. While this decision invested a great deal of judicial energy in demonstrating that its ruling comported with *halakha*, the framework set forth in this paper is less interested in the internal intricacies of Jewish law and more in the tradeoff illuminated by a balance-of-interests test.²⁸⁰ The case does not involve a freedom of conscience violation simply because the woman is not actively obliged to work in a mixed-gender workplace. She may prefer to remain unemployed—as indeed she chose—a decision for which she is asked to pay a price (loss of employment compensation). While it is true that a severe penalty may amount to practical coercion, it is equally true that a person of principles must be ready to pay for her beliefs. It cannot be the case that every penalty constitutes a violation of conscience; and in this case, it did not.²⁸¹

This brings me to the final reason for which, in a balance-of-interests inquiry between the competing religious rights of men and the equality rights of women, the value of gender equality must win. Even if the Military Rabbinate can show that without Appropriate Integration rules, military service conditions would be emphatically noncompliant with religious law, the religious claim still must yield because Orthodox soldiers have an alternative to mixed-gender service. Available to them are a variety of both military and civilian service frameworks that minimize exposure to secular culture and mixed-gender environments, allowing them to pass through their term of service without compromising their religious beliefs. As mentioned, in recent years the IDF has made great progress in establishing special units to accommodate the religious needs of ultra-Orthodox soldiers and preserve their unique identity. Orthodox soldiers are thus not forced to serve with women, but may and should have the option to serve in the segregated units of the *Nachal Charedi*, a female-free zone likely to expand exponentially with the upcoming compulsory conscription of *charedi* men. The segregation of religious troops is already facilitated by the *besder* formations, and there is some evidence to suggest that national-religious soldiers now increasingly volunteer to serve in this more sequestered structure in order to better neutralize the impact of secular military norms.²⁸² This solution thus responds well to the Orthodox soldier's multiple identities as a religious minority member and a faithful citizen of the larger polity, committed to serve both God and country.²⁸³

²⁷⁹ For various examples of this legal pattern, see generally Halperin-Kaddari, *supra* note 96, and Raday, *supra* note 98.

²⁸⁰ See the analysis *supra* at Section IIA.

²⁸¹ This is somewhat reminiscent of the position taken in the American case of Bob Jones University, which involved the deprivation of a tax-exemption benefit from the University for forbidding interracial relationships on religious grounds. If a person seeks to act in a way that violates core liberal values of the state, the state is justified in depriving her of state benefits, be they tax benefits or unemployment compensation benefits. See *Bob Jones University v. United States*, 461 U.S. 574 (1983).

²⁸² Cohen, *supra* note 122, at 120.

²⁸³ One qualification remains, and that is that the IDF should remain considerate of the needs of religious soldiers in "regular" units whenever possible and without unduly burdening military functioning or the

Admittedly, this alternative may prove costly to individual religious soldiers constrained in the range of positions to which they can be assigned. Moreover, on a collective level, this segregational alternative is said to undermine the overarching plan of the religious establishment to exert a spiritual influence on the entire IDF.²⁸⁴ Even if devout soldiers find little solace in this "exit" option, it does represent the reasonable price that a man of principles should be expected to pay for what he believes in—a price tag which, much like the denial of unemployment benefits to the religious woman in the *Sror* case, cannot seriously be regarded as constitutive of a conscience violation. This solution has an added equitable benefit: it is only fair that religious soldiers themselves, and not the women around them, pay the price for their principles.

For this reason, I reject the radical feminist approach of ending the gender equality problem by eliminating compulsory female service. The particular importance attached to the issue of women's equality in the IDF derives from the fact that their position in the most highly valued of all national institutions has profound implications for the gender regime of Israeli society as a whole.²⁸⁵ Given the centrality of military service as a key citizenship-certification process, Israeli women cannot afford to exercise a right of exit from the IDF; doing so would merely confirm their second-class status. In the choice between "purifying" the military from female presence (or segregating women, as the Women's Affairs Advisor to the Chief of Staff would have it), I therefore side with limited religious segregation in designated military formations. Any other solution forces women to bear the price of religious extremism.

V. CONCLUSION

Most analyses of the relationship between military and religion have been preoccupied with the role religion plays outside the IDF—namely, religious exemption from military service. Less has been done regarding the role religion plays inside the boundaries of the military camp, the most prominent space of our shared citizenship. This Article sought to fill in the academic lacuna.

I argued that the experimentation in religious accommodation in the IDF provides an underexplored yet pivotal case study in exposing the deficiencies of

rights of others. For example, it would be well advised not to assign a religious man to perform guard duty, or any other activity involving intense physical contact, with a woman. The latter case actually implicates a clear offense to the religious conscience—inter-gender touching between unmarried persons is prohibited in almost all circumstances—and should be avoided provided that the women's core right to gender equality remains firmly in place. A reasonable religious accommodation seems particularly fitting on the part of the army as an arm of the Jewish State, a definitional identity that should translate into limited measures taken to facilitate the full participation of religious Jews in the public sphere. Indeed, the national consideration of preserving the Jewish character of the State has been often invoked as a basis for so-called religious legislation in the public sphere. STATMAN & SAPIR, *supra* note 2, at 59.

²⁸⁴ Gal, *supra* note 159.

²⁸⁵ An extensive body of feminist literature has repeatedly warned that harming women's equality of opportunity in the IDF involves the loss of valuable economic, social and symbolic resources, which not only manifest in the ability to develop a military career, but also in the reproduction of this inequality in civilian life and the exclusion of women from positions of influence and power in the public sphere. See Frances Raday, *The Military – Feminism and Citizenship*, 9 PLILIM 185, 186, 189 (2000). See also Orna Sasson-Levy, *Feminism and Military Gender Practices: Israeli Women Soldiers in 'Masculine' Roles*, 73 SOC. INQUIRY 440, 445 (2003) ("Within Israeli society, there is a growing awareness that Israeli women are not perceived as equal citizens, due in part to their unequal military service.").

multicultural theory. This vast body of scholarship has thus far focused mainly on identifying theoretical or institutional touchstones for determining which cultural practices are worthy of state accommodation, rather than which groups are worthy of multicultural status to begin with. As we saw, the case of the national-religious community in the IDF challenges us to rethink the admission criteria and qualifying conditions for a cultural minority to merit multicultural accommodation. It also underscores the lack of an appropriate analytical framework with which to test potential abuse of multicultural accommodation as a weapon against the liberal state and especially its female citizens.

The Article found that a religious soldier is more justified when making demands for religious accommodation in a mandatory, conscription-based army like the IDF and that the religious study programs represent a successful experiment in harmonization between synagogue and state. These mediating structures enable Orthodox soldiers to straddle the two worlds of military and religion while preserving their distinctive cultural identity and ensuring the continued existence of their religious-national community.

While many measures have been taken to accommodate military practice to Orthodox religious requirements, the Appropriate Integration Regulation is one accommodation too many, and one that does violence to the concept of liberal multiculturalism. It is in the meeting point between religion and gender equality in the military that the finely tuned and sensitive equilibrium between synagogue and state is lost. While liberal multiculturalism is comprised of the two dimensions of external protections and internal restrictions, Israeli-style multiculturalism introduces the new mechanism of "external restrictions." This perilous form of accommodation is made possible by coalition-building between men from both the majority and minority groups; together, these interests have combined patriarchal forces to sustain a hierarchal gender order in the IDF.

Appropriate Integration is not religious accommodation; it is identity discrimination which forces secular women into the status of the Other in the IDF. The very inclusion of this regulation in the military legal code sends a deeply offensive message to women, one that forces the principle of gender equality to "quietly retire from active duty."²⁸⁶ Israeli women's hard-won rights in the military are thus the prime casualty of religionization in the IDF.

Appropriate Integration implicates more than the status of secular women in the military. It also takes a side in a divisive internal argument over the character of the national-religious community in Israel and exposes the inherent peril of multicultural theory as a liberal guise under which the state partakes in (mis)shaping the cultural identity of a group. Rather than preserve religious culture, the IDF empowers new radical voices within the Orthodox community who wish to contest the status quo and alter the public space of the military. The regulation thus ironically silences not the dissenting new conservative voices, but the majority's more liberal and moderate position, codifying an extremist interpretation as representative of mainstream culture. Such "accommodation" cannot thus be properly regarded as multicultural in nature, and indeed only stifles the potential for developing a more moderate, gender-egalitarian and context-sensitive

²⁸⁶ This expression, coined in a different context, is taken from Smith, *supra* note 9, at 225.

reinterpretation of Jewish law—a result particularly tragic for religious women themselves.

The Article concluded that in the normative competition between the right to religious multiculturalist liberty and the right to equality, the latter must triumph. The price for the integration of religious male troops cannot be women's segregation. A soldier whose religious conscience is threatened by female presence should find refuge in serving in the special units designated for ultra-Orthodox *charedi* members.

In the final analysis, in managing cultural diversity the IDF must safeguard the right to gender equality of secular female soldiers no less than the right to religious freedom of observant male soldiers.