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

> When we drafted our first protest letter as high school seniors (in the summer of 2001), we drafted it together—male and female conscientious objectors alike. We didn't ask ourselves whether both these refusals to serve (the male and the female) belonged together. It was clear to us that a woman's refusal was identical in its importance to a man's, and therefore we were not aware of the significance of the letter that we wrote, which placed male and female conscientious objections on an equal footing….
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> A great deal of time has past since then…. And as time passed, frustration has built up in me. I started feeling that within our sheltered environment—that of high school graduates in particular, and of the Israeli left in general—we created a mirror image of the very phenomenon we are fighting against. We created a militarization of draft resistance.
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> The extremely upsetting image of the good woman who awaits the return of her soldier from the front and who irons his uniform—[the image] against which we are fighting—has not changed. We have created a mirror-image for her—a woman who is yearning for the quick release of the male conscientious objector from prison, and who in the meantime encourages him from a distance….
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> We have stopped debating the significance of the phenomenon of women's conscientious objection, and we have almost completely ceased to promote it in the public sphere… despite the fact that we keep debating the issue of imprisoned male draft resisters over and over again.
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> My refusal to be drafted, which I viewed in the past as a public-political stance, has today turned into a private one.… Because public discourse is not aware of it

> and left-wing discourse ignores it, the conscientious objection of young women has stayed a private matter, not to mention a silenced one.[1]

When Shani wrote this letter and distributed it to members of her group, the phenomenon of women's conscientious objection had not yet received any exposure or recognition in public or legal discourse in Israel. Conscientious objection was identified strictly with male draft resistors: conscripts and reservists who refused to serve on general grounds of pacifism or because of their specific opposition to Israeli policies in the Occupied Territories of the West Bank and Gaza. Furthermore, not only did the Israeli public discussion of draft resistance focus on the refusal of these men and the jail terms they received, but also created an overlap between conscientious objection as a social and legal phenomenon on the one hand, and the incarceration of these male conscientious objectors on the other. The fact that there were women among the students who signed the 2001 High School Seniors' Letter,[2] and that they too refused to be drafted into the military on grounds of conscience, did not penetrate public or media awareness, which also ignored the fact that all these women, although not incarcerated for their beliefs, were active draft resistors nonetheless, and performed

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1 Unpublished letter (in Hebrew; on file with the author).

2 This letter was sent to Israeli Prime Minister Ariel Sharon in August 2001. It was signed by 62 young men and women. Among other things they wrote in this letter: "When the elected government undermines democratic values and the possibility of a just peace in the region, we have no choice but to obey our conscience and refuse to take part in the attack on the Palestinian people." A year later the letter was re-signed by 250 students (male and female) and sent again to the Prime Minister. *See*: Gadi Elgazi, *To Listen to the Voice of Objection*, *in* THE REFUSENIKS TRIALS, THE MILITARY PROSECUTOR VERSUS: HAGAI MATAR, MATAN KAMINER, SHIMRI ZAMERET, ADAM MAOR, NOAM KMINER AND THE MILITARY PROSECUTOR VERSUS YONI BEN ARTZI 11, 25 (Dov Khanin, Michael Sfard et. al. eds., 2004).

Elgazi indicates that these letters followed a tradition of letters signed by high school seniors that started in the 1970s. All such letters were signed by both male and female students who declared their opposition to the military occupation of the West Bank and Gaza. *Id*. For the most recent high school seniors' letter, which was drafted and signed in 2005, *see* <http://www.shministim.org>.

alternative forms of civilian national service. This situation resulted partly from the structure of the Defense Service Law that governs the issue of conscientious objection to military service in Israel.[3] The statute contains separate provisions for dealing with male and female conscientious objectors. Under its terms, women, unlike men, enjoy an explicitly recognized right to be exempt from military service on grounds of conscience. Consequently, female conscientious objectors have throughout the years received exemptions from military service quite easily, while similar requests made by men were usually denied, and those who continued to resist were tried before military tribunals and imprisoned.

Nevertheless, in the period of time since Shani Werner's letter was written, a few changes have taken place. These changes have reshaped the character of the public and legal discussion of the issue of conscientious objection. Women's conscientious objection has started gaining wider public recognition,[4] and it is no longer a private matter that is of concern only to female objectors. It appears, however, that women's draft resistance has won recognition only because it has adopted the characteristics of the parallel male phenomenon. During the year 2004, the military authorities decided to reinterpret the different legal provisions that deal with conscientious objection and to implement a stricter policy towards female objectors. Consequently, a few women have already served sentences in military prisons for their refusal to serve.[5] Furthermore, this new policy has recently won the

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[3] Defense Service Law (Consolidated version) 5746-1986, 1170 Laws of the State of Israel (hereinafter L.S.I) 107 (1985-86) (hereinafter Defense Service Law).

[4] Lili Galili, *Women Conscientious Objectors Are not Sent to Jail—Is it a Right or Discrimination?*, Ha'aretz (Jan. 21, 2004); Bili Moskuna Lerman, *Stopping at the Green Line*, Ma'ariv (Mar. 2004); Yuval Yoez, *One Conscience for Men and Women*, Ha'aretz (Aug. 22, 2004).

[5] Two cases have won publicity: Inbal Gelbart, who was imprisoned for four consecutive terms and was eventually exempt from military service for reasons of pacifism, and Laura Milo, who was imprisoned for

significant backing of Israel's Supreme Court. Following the petition of a female conscientious objector who was denied exemption and was subsequently imprisoned, the Court ruled that women's special right to conscientious exemption should be abolished, since the principle of sex-based equality required that in all issues relating to conscientious objection women should receive precisely the same strict legal treatment that men did.[6]

In this article I wish to investigate this process by which women's conscientious objection has been simultaneously both "masculinized" and formally equalized. The story of female draft resistors in Israel serves as a case study that can provide important insights into the inherent constraints of contemporary legal discourse in promoting substantive gender equality and into the relationship between specific legal arrangements and the invisibility of women in the public sphere. This case study also sheds a more complex light on the nature of separate legal arrangements for women, and raises important questions about the appropriate feminist agenda for social and legal change.

Part I of this article outlines the legal foundation of the Defense Service Law and examines the legislative history that shaped the separate legal provisions which were applied to female and male conscientious objectors. In this context, I explore how this particular sex-specific legislation was born, rationalized and consolidated, and what its implications for women were. I argue that, while it was clearly shaped by problematic gendered perceptions, this separate legal arrangement came eventually to grant women an important right. Not only did it protect women's freedom of conscience, but it actually facilitated the promotion of an

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one term of 14 days before appealing to the High Court of Justice. For a detailed analysis of the latter case *see infra* part III.

6 H.C. 2383/04, *Laura Milo v. Minister of Defense*, 59(1) P.D. 166.

alternative feminist agenda regarding women's path to equal citizenship. However, this state of affairs was not free of obstacles.

Part II explores the further consequences of the separate legal arrangements for male and female conscientious objectors. Specifically, it focuses on questions of law and "voice," and examines the influence of one or another legal arrangement on the ability of women to be heard and have a significant influence and presence in the public sphere. I argue that the prevailing masculine legal order under which women exercised their separate right to conscientious objection interfered with their ability to articulate a meaningful public "voice" of protest in terms of visibility and presence in the public domain.

Part III evaluates the significance of the recent legal changes to the interpretation and application of the separate provisions of the Defense Service Law. It highlights the possible detrimental consequences of a legal reform that undermines existing separate legal arrangements for men and women in the name of the principle of sex-based equality. It also raises important questions regarding the relationship between feminist lawmaking and the courts.

I conclude with the claim that the story of women conscientious objectors in Israel provides an important case study regarding not only the limits of law but also its unexpected effects, its often overlooked potential for social change and the inseparable link between feminist agendas and legal outcomes.

I. The Gendered Construction of Conscience

A. Exemptions from Military Service: The Israeli legal Framework

Israel was the first—and is still the only—Western democracy to have mandatory conscription of women.[7] The 1986 Defense Service Law (Consolidated Version),[8] which replaced the 1949 version of the law,[9] mandates military service for both men and women while differentiating between the sexes in terms of conditions of service. Article I states that the law applies to men between the ages of eighteen and fifty-four and to women between the ages of eighteen and thirty-eight. Gender-based differentiation is also made with regard to the length of mandatory service and the extent of reserve duty obligations.[10] Furthermore, as far back as 1949 the Defense Service Law created a gender-based distinction regarding the legal grounds on which a person could be exempt from military service. The Law granted women exemption from military service on three main grounds: family status (marriage, pregnancy or motherhood), religious belief and conscientious objection.[11] These exemptions were subsequently integrated into the consolidated version of the Defense Service Law of 1986, and continue to apply to this day to all women who might otherwise be called to serve in the military.[12]

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7 Amir Paz-Fuchs & Michael Sfarad, *The Fallacies of Objections to Selective Conscientious Objection*, 36 ISR. L. REV. 111 (2002) at footnote 7.

8 Defense Service Law *supra* note 3. An English version of this statue is available at: <http://www.mfa.gov.il/MFA/MFAArchive/1980_1989/Defence+Service+Law+-Consolidated+Version--+5746-1.htm>.

9 The Defense Service Law 5709-1949, 25 L.S.I. 271 (1949).

10 Men are required to perform three years of service and women two years. Defense Service Law § 15 - 16. On completion of their mandatory service, citizens "of military age" are subject to an annual reserve duty. In the case of men, "military age" is defined as "any age from eighteen to fifty-four years. In the case of women it is "any age from eighteen to thirty-eight years".

11 Those exemptions were included in Section 11 of the original Law of 1949. *Supra* note 9.

12 The relevant provisions of Article 39 of the Law read as follows:

(a) The following persons shall be exempt from the duty of defense service – (1)The mother of a child (2) A pregnant woman.

(b) A married woman shall be exempt from the duty of a regular service.

Similar exemptions from regular and reserve military duty have not been formulated for men. Rather, the only legal basis for exemption of this kind is pursuant to a different section in the Defense Service Law of 1986 which grants the Minister of Defense a general discretion to exempt "a person of military age" from the duty to perform military service "for reasons connected with the requirements of education, security, settlement or the national economy or for family or *other reasons*" (emphasis added).[13] Thus, the case of every man who wishes to be exempt from military service falls within this paragraph, and approval of the exemption—on whatever grounds it might be—is not defined as the individual's right but rather as a discretionary matter that is solely dependent upon the consent of the Minister of Defense. By contrast, a woman's exemption from military service is not subject to discretionary approval, but is determined based solely on the woman's providing proof that she meets the specific conditions established by law.

B. Historical Background and Normative Context

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

The religious exemption is further elaborated in Article 40 of the Law, which reads:

A female person who is called upon to perform military service who declares in writing under section 15 of the Evidence Ordinance (New Version), 5731-1971, before a judge or a judge of a rabbinical court (1) that reasons of religious conviction prevent her from serving and that (2) she observes the dietary laws at home and that (3) she does not ride on the Sabbath, shall be exempt from military service after providing the affidavit, in the manner and at the time prescribed by regulations, to a calling-up officer empowered in that behalf.

[13] The relevant provisions of Article 36 read: "The Minister of Defense may, by order, if he sees fit to do so for reasons connected with the size of the regular forces or reserve forces of the Israeli Defense Forces or for reasons connected with the requirements of education, security, settlement or the national economy or for family or other reasons (1) exempt a person of military age from the duty of regular service or reduce the period of his service; (2) exempt a person of military age from the duty of reserve service for a specific period or absolutely…"

Why did the law create this distinction between men and women with regard to their military service? A close analysis of the legislative history of the Defense Service Law reveals that the structure of the law reflects a great deal of ambivalence towards women's military service and women's equality in general. Other expressions of this same ambivalence can be found in a variety of legal provisions which were enacted in the early years of the State.

Formally speaking, the founding fathers of the State of Israel saw themselves as obligated to the principle of gender equality. The Proclamation of Independence stated that the State of Israel "will ensure complete equality of social and political rights to all its citizens irrespective of religion, race or sex,"[14] and a more detailed reference to the equality of women was established in the official objectives of the first elected Government of Israel.[15] However, as even a cursory examination reveals, despite the declarative statements regarding equality, the political establishment and the legal system were guided by deeply-rooted stereotypical and patriarchal perceptions of gender and gender roles. Women were perceived first and for most as mothers and wives and as persons whose primary role was the bearing and rearing of children. This perception was fed in part by the image of women in Jewish religious law.[16] However, it was also supported in the existing national ethos which accompanied the foundation of the State, according to which the State of Israel was predestined to bring about the rejuvenation of the Jewish people in their homeland. The

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[14] The Proclamation of Independence of the State of Israel. For an English version *see*: http://www.knesset.gov.il/docs/eng/megilat_eng.htm

[15] Specifically, it was declared there that "full and complete social equality of women will exist, equality of rights and duties with regard to the State, the society and the economy and with regard to the legal system". See: Pnina Lahav, *When the Palliative Simply Impairs: Debate in the Knesset on the Law for Women's Rights*, 46-47 ZMANIM 149, 149 (1993) (Hebrew).

[16] Ruth Halperin-Kaddari, WOMEN IN ISRAEL: A STATE OF THEIR OWN 166-72 (2004).

perception of women as child bearers and mothers was ascribed a central role in the fulfillment of that vision.[17]

It is against this backdrop of tension between, on the one hand, deeply entrenched beliefs regarding the distinctive differences between men and women and, on the other, the pronounced commitment to the principle of equality in general and to sex-based equality in particular, that one should understand the structure of the Defense Service Law. This Law, first enacted in 1949 (i.e., one year after the establishment of the State of Israel), was in fact the first law which had to cope with this tension and to accommodate it legally. Thus, we find that the Defense Service Law imposed the draft on women and men alike. On the other hand, married women, pregnant women and mothers were exempt from military service, with hardly any members of the Knesset (the Israeli legislature) protesting against this all-inclusive exemption or initiating a critical debate on the gendered assumptions underlying this exemption.[18] An explicit expression of this ambivalence with regards to the appropriate legal treatment of women can be found in the words of David Ben-Gurion, the first Prime Minister of Israel who also acted as Minister of Defense, who introduced the proposed draft of the law to the Knesset for legislative deliberation before its enactment. On the one hand, Ben-Gurion praised the principle of gender equality as expressed and exercised by the new statute:

> Women have been equal partners with regard to all rights and duties in the Zionist movement and in the State of Israel, in all of the State's projects, whether in construction or in defense, whether in the founding of the State or in the

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[17] Nitza Berkovitch, *Motherhood as a National Mission: The Construction of Womanhood in the Legal Discourse in Israel*, 20 WOMEN'S STUDIES INTERNATIONAL FORUM 605 (1997); Pnina Lahav, *supra* note 15.

[18] Nitza Berkovitch, *id*.

> establishment of the Israel Defense Forces, and they have done their share in our War of Independence.[19]

Nevertheless, Ben-Gurion explained,

> When debating the status of women, two things must be remembered—and both at the same time. The first—the special mission of the woman—the destiny of motherhood. There is no greater task than this in life…. We should honor and value mothers, and place women in the most comfortable and appropriate conditions when they are to be mothers… *no duties should be placed on the woman that interfere with the practice of motherhood***.**[20] (Emphasis added)

The conclusion that Ben-Gurion drew from this discussion was that "women are not disqualified from any kind of service, they are not barred from any right and they are not exempt from any duty unless it interferes with their motherhood".[21]

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

> We are told that women are not being drafted into military service in any other nation in the world in days of peace. We also do not intend to draft women to combat units… and the training that we see necessary for women is basic military training and agricultural instruction.… I fully agree with those who pointed out the importance of our birth rate, but for that reason there is a need to train women—

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[19] 2 Knesset Records, 1569 (1949).

[20] *Id*, at 1568-69.

[21] *Id*, at 1569.

> for there will be no birth rate [at all] if the resettlement [of the country] is based entirely on men. *And if we want our daughters in their places of settlement to get married and have babies—we have to allow them to protect themselves and their babies*.[22] (Emphasis added)

It is important to note that these basic perceptions of the unique role of women as mothers united almost all Knesset members, and the rhetoric of Ben-Gurion and other secular parliamentarians merged with the similar rhetoric voiced by representatives of the religious parties. The arguments of both secular and religious Knesset members revealed and expressed underlying patriarchal views regarding the unique role of women, and those views laid the ideological groundwork for the first type of exemption that was granted to women under the law: the exemption on the grounds of family status. [23] This exemption released married women, pregnant women and mothers from military service. Yet while Knesset members from secular parties still endorsed a mandatory draft for some women, representatives of the Jewish religious parties objected to the conscription of women altogether. The religious position was that a women's draft might pose a real threat to the Jewish family and to Jewish tradition, not only because of women's distinctive role as mothers but also due to other moral and religious considerations related to modesty that prevented them from serving in the army.[24]

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[22] *Id*, at 1570.

[23] MK Ya'akov Meridor from the National "Herut" Party suggested changing the conscription age for women from 18 to 19 and explained: "If we don't oblige women to be drafted until the age of 19, we leave them the option of getting married during the year between 18 and 19. I believe this can add thousands of weddings each year and this is something we should not underestimate with regard to the distant future." 2 Knesset Records, 1608 (1949). The religious Minister of Social Affairs Rabbi Levin added in this context: "God Almighty created men and women and destined each for a different role, and no human being should aspire to change this order that is predetermined." 2 Knesset, 1446 (1949).

[24] MK Shag from the United Religious Front best articulated this perception of difference when he stated:

This argumentation of gender difference was endorsed by Moslem Knesset members as well, who expressed similar objections to the conscription of women. MK Jarjura from the Democratic List of Nazareth explained:

> Imposing obligatory military service on women is an innovation that has been contradictory to the laws of nature ever since the creation of the world, and it is against the laws of religion and the views and principles of society and its norms. …. A young woman has special rights in society… she is the foundation of the family, she is the housewife who educates the future generation. She stands out in her compassion and in other emotional sensitivities…. Surely she can be of help in other areas that fit her condition and her special characteristics.[25]

The strong objection of all religious members of the legislature to any form of military service for women led to the creation of the second type of exemption for women, an exemption on the grounds of religious belief.[26] This exemption was apparently included in the first draft of the bill by Knesset members from secular parties who were hoping that by integrating it into the bill they would resolve the dispute between the religious and secular

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"I wish first of all to ask the ones who are so enthusiastic about this obligatory law: why haven't most of the civilized nations of the world imposed this obligation on women up until today? ... I think that the reasons for that are simple and known: because women, due to their nature, due to their physical temperament—after all, we ourselves call them the weaker sex physically speaking—cannot perform combat duty. The second reason is this: because this might create a breach with regard to morality and modesty. And the third reason is that the mandatory draft of women might lead to a lower birth rate..." 2 Knesset Records, 1528-1529 (1949).

[25] 2 Knesset Records, 1524 (1949).

[26] In the initial legislative proposal it was suggested that the religious exemption would be phrased as following: "A woman of military age who declares in such manner as is prescribed by the regulations that she is observant and that her religious belief prevents her from serving in the military shall be exempt from the duty of that service." Section 11(c) of the Legislative Proposal for the Defense Service Law—1949. 21 Legislative Proposals 185 (1949).

camps over military service for women.[27] But during the legislative deliberations, these hopes evaporated. Some religious Knesset members declared that the specific exemption provided for religious women was not satisfactory in their eyes for two main reasons. First, the Ultra Orthodox Knesset members argued that in terms of women's inherent difference from men, it was more appropriate to provide a comprehensive exemption from military service for all women than a special exemption for religious women alone.[28] Second, the more Zionist oriented among the Religious members of Knesset were worried that a specific exemption would stigmatize religious women as a group. They therefore suggested that the religious exemption should be included in a more general category of exemption, that would refer to all forms of conscientious objection to the draft, irrespective of gender and not limited to religious grounds.[29]

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[27] 2 Knesset Records, 1447 (1949).

[28] The Minister of Religions, Yehuda Leib Maimon, stated in this context: "Yes, I object to giving any special right to religious women. Out of respect for women, for the purity of women, all daughters of Israel are as one. And I do not want to differentiate between a religious woman and a non-religious woman." 2 Knesset Records, 1556 (1949). The Minister of Social Affairs, Y. M. Levin, added the following: "… this amendment does not solve the problem, as a matter of principle, and our demand to dismiss the obligatory military service for women in general still stands. Apart from that, we believe that every Israeli woman is, in her heart, religious, and if she does not state it explicitly then we should state it for her." 2 Knesset Records, 1447 (1949).

[29] MK Unna representative of the Religious Kibbutz Movement explained: "*We do not want public opinion to view the religious woman as one who does not fulfill her obligation to the country*. That would be the result of the law in its current form…. *if the issue of religious women's exemption was included in a general section that deals with the issue of exemption on grounds of conscience, one could live with this arrangement*. For then it would be clear that the intention here is for an individual solution, and not for creating a class of those who are exempt, with all the negative implications. In my opinion, the issue of exemption on grounds of conscience is an issue that the law has to deal with… people who object to military service out of genuine grounds of conscience should not be denied the right to be exempt." (Emphasis added) 2 Knesset Records, 1528 (1949).

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

Following those reservations, the parliamentary committee in charge of preparing a final draft of the bill amended the section providing for religious exemption from service for women. To the exemption based on religious belief they added an exemption based on the grounds of conscience, thus partially responding to the religious demand concerning the religious exemption. On the one hand, the exemption was extended and was made potentially applicable to a group consisting of more than just religious women. On the other hand, the exemption remained gender-based—so much so that the new additional exemption based on grounds of conscience was available only to women, just like the two other types of exemptions. Nevertheless, although they were grouped together in the same provision of the law, the exemption for reasons of conscience differed substantially from the other two gender-based exemptions. It was added to the law almost at the last minute in a totally different context and for different reasons. Whereas the purpose behind the exemption on familial and religious grounds was to respond to common stereotypical perceptions of gender difference, the exemption for reasons of conscience was aimed at locating the specific exemption for religious women in a more general context, so that religious women would not be singled out as a group of draft avoiders. The fact that the legislature ultimately dropped the original religious demand to create a gender-neutral right in that context, and specified that this exemption was available for women alone, stemmed, one should admit, from the prevailing perceptions of women expressed in the legislative debate. As already mentioned, the legislative history of the Defense Service Law demonstrates that even those who supported the conscription of women did not regard women as potential combat material but rather as an auxiliary force of relatively marginal importance. Within this perceptional

framework, men remained the essential reserve of manpower of the Israel Defense Forces (IDF), and with regard to them, the legislature appears to have taken care not to create exemption opportunities that might deplete this human reserve. That being the case, exemptions on grounds of conscience were granted only to women, as their contribution to the military was expendable.[30] Out of this exclusionary perception of women there evolved a legal rule which in fact made it possible for women to exercise the basic right to freedom of conscience, despite the fact that, as emerged from the Knesset debate, the legislature did not set out to grant a basic right to women. Securing the exemption for reasons of conscience under the law was mainly intended to placate the demands of religious Knesset members. Nonetheless, it is the outcome that counts, and so women won the right to request an exemption from military service, not only when they were carrying out traditional expectations and fulfilling their stereotypical mission as women, but also when their objection to the draft derived from reasons of conscience. In subsequent years, it is important to note, the legislature explicitly endorsed this distinctive meaning of the conscientious exemption for women and in fact recognized its right-based aspects.[31]

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[30] This assumption finds support in later legislative deliberations which took place in the 1970s as part of a legislative initiative to amend this provision. *See infra* note 31.

[31] This happened in the late 1970s when the Defense Service Law underwent an additional reform. A proposed amendment to the law suggested replacing the exemption for reasons of conscience with a broader religious exemption for women. *See*: Defense Service Law (Amendment no 13), 82 Knesset Records, 2136 (1978). Several secular Knesset members opposed that proposed amendment and highlighted the specific significance of the conscientious exemption. Amnon Rubinstein from the Liberal Party was particularly clear about this issue and explained:

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

This legal framework of a separate right of a woman to conscientious exemption is the one that, over the years, shaped the phenomenon of female conscientious objection, its scope and its substance.[32] The exact number of women conscientious objectors who exercised this right is unclear,[33] yet it appears that in the aftermath of the outbreak of the second Palestinian uprising in October 2000 the phenomenon of female drafts resistors grew in volume.[34] In fact, the high school seniors' letter that Shani Werner and her friends signed in 2001, in which dozens of young men and women declared their opposition to implementing Israeli policies in the Occupied Territories, signaled a change in that context. From that time on, the

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general framework of the laws of the enlightened countries and make the law of the religious objector equal to that of the conscientious objector." (Emphasis added.) 82 Knesset Records, 2380 (1978).

Other Knesset members voiced similar protest, and among them were those who even called for extension of the conscientious exemption to men in order to prevent a wrongful discrimination between men and women. 82 Knesset Records, 2372, 2382 (1978). One way or another, the criticism voiced against the removal of that exemption from the list of exemptions granted to women under the law made an impact, and when the final draft of the bill was brought before the Knesset for enactment, grounds of conscience were re-included in the exemption clause alongside the religious exemption that was further elaborated in a separate provision. Those provisions were included in the consolidated version of the Defense Service Law of 1986. For the full text of those provisions *see supra* note 12.

[32] In the late 1970s the legislature supplemented this right with a specific enforcement mechanism. A committee was established which was authorized under the law to deal specifically with women's conscience- and religious-based requests for exemption from military service. *See*, The Defense Service Law Regulations (Women's Exemption from Military service on grounds of Conscience or Religious Familial Way of Life), 5738-1978, 3895 Regulations of Israel 2176 (1978).

[33] The Israeli military as a matter of principle does not release official statistics on this subject. In recent years, however, and in response to specific media inquiries, some number have been released by the IDF spokesperson. *See infra* note 34.

[34] Military statistics released to the public indicate that in the years 2000 to 2003 367 women applied for exemption on grounds of conscientious objection. Of these women 278 were released from service. Ha'aretz (Mar. 5, 2004). Furthermore, it was recently published that the military is concerned with the growing numbers of women who are not conscripted: 32.1% for religious reasons and an additional 10% for other reasons that include reasons of conscience. Chanan Greenberg, *A Concern in the Military: Girls Hardly Enlist*, Ynet (Jul. 2005). The growing numbers of women who in recent years have signed high school seniors' letters also provides some basis for the assessment that the phenomenon of female conscientious objectors is on the rise. *See supra* note 2.

group-based aspects of the phenomenon became more apparent. It was no longer a matter of a few women resisting draft individually, but rather a group of female conscientious objectors with a shared political agenda exercising their right under the law and winning an exemption from military service. After winning their exemption, many of these women volunteered for national service in a civilian setting such as a hospital or a school, thus replacing military service with social action of another kind.[35]

By contrast, the comparable phenomenon of male conscientious objection was defined differently under the law. As mentioned earlier, in addition to the specific exemptions granted to women, the Defense Service Law states generally that the Minister of Defense is entitled "if he sees fit to do so" to grant exemptions from standard military service or from reserve duty to any conscript for reasons of "education, security, settlement or the national economy or for family or *other reasons*" (emphasis added).[36] Successive Ministers of Defense have taken the position that the phrase "other reasons" permits them, among other things, to exempt men from regular or reserve service for conscientious reasons.[37] Furthermore, the standard legal approach when handling such cases was that while pacifists ("full objectors"), who object to the framework of the military service as a matter of principle, could be individually exempt from service, the military had to remain apolitical

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[35] At the time it was suggested to create an official alternative path for national service for women who were not drafted for religious or conscientious reasons. In 1953 the Knesset legislated the National Service Law, which provides for just such a mandatory national service. 5713-1953, 134 L.S.I. 163 (1952-53). But due to various objections this law has never been implemented. Under these circumstances, the practice of substituting national civilian service for military service has evolved as a voluntary practice adopted first by religious women and later on by female conscientious objectors and other secular women who were exempt from service. See also *infra* text accompanying notes 55-57.

[36] Section 36 to the law, *supra* note 13.

[37] H.C. 734/83, Ya'akov Shine v. The Minister of Defense, 38(3) P.D. 393; H.C. 1380/02, Ben Artzi v. Minister of Defense, 56(4) P.D. 476.

and therefore could not allow "selective objection" based on objections to a specific war or to a military operation.[38] The IDF thus created a distinction between draft resistance whose origin is pacifism and draft resistance that is connected to a more specific moral, political, or ideological stand. In 1995 a military "conscience committee" was established to interview potential male objectors and release the pacifists among them from the obligation of military service.[39] Yet even among those men who declared themselves as pacifists, the number of requests that the committee approved over the years was remarkably low.[40] Furthermore, non-pacifists objectors have been tried and imprisoned for "refusal to obey orders,"[41] and this practice has on several occasions been approved of by the High Court of Justice.[42] Even the legislation of the Basic Law: Human Dignity and Liberty,[43] which is now generally accepted

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[38] Shine, *id.*

[39] Ben-Artzi, *supra* note 37.

[40] A recent case revealed that the committee has exempt only three individuals from military service over a period of eight years, Ben-Artzi, *id*, or 3% of the total number of applicants to the committee during that period. Amir Paz-Fuchs & Michael Sfarad *supra* note 7.

[41] It is estimated that following the decision to distinguish between universal or "full" conscientious objection and "selective" conscientious objection, military commanders have ordered the imprisonment of dozens of male soldiers who refused to serve in the Lebanon War during the 1980s and early 1990s. Ruth Linn, CONSCIENCE AT WAR: THE ISRAELI SOLDIER AS A MORAL CRITIC (1996); Leon Shelef, THE VOICE OF DIGNITY: CONSCIENTIOUS OBJECTION DUE TO CIVIC LOYALITY (1989). Hundreds more were incarcerated during the first and second Palestinian uprising (*intifada)* for their refusal to serve under what they saw as an immoral and illegal occupation. Paz-Fuchs & Sfarad, *id*.

[42] *See* Shine *supra* note 37. In that case a soldier refused to serve in southern Lebanon, claiming that according to his conscientious outlook, the IDF's presence in Lebanon was illegal and was not in accord with any fundamental justification for military activity. The court held that this argument was invalid. Justice M. Elon wrote: "This is a case of a draft objection which is based on ideological political reasons not to fight in a particular location. Recognizing such an objection damages the operation of Israel's democratic system of decision-making and leads to discrimination in military drafting." *Id* at 402. *See* also H.C. 630/89, Machnes v. The Chief of Staff (unreported case). For a similar American ruling *see Gillette v. United States*, 401 U.S. 437 (1971). *See also* Kent Greenwalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31.

[43] Basic Law: Human Dignity and Liberty, 5752-1992, 1391 L.S.I. 150 (1992).

as part of Israel's "semi-constitution,"[44] did not alter the Supreme Court's position on this issue.[45] The scope of the exemption for reasons of conscience that exists for men under the Defense Service Law was therefore a substantially far more restricted one than that granted to women.

With regard to women, and due to the different phrasing of the relevant provisions of the law, the common practice for many years was to grant an exemption to both pacifists and "selective" conscientious objectors without distinguishing between the two groups. Until recently, most women who requested exemption from military service on selective grounds of conscience or on general pacifist grounds were excused from military service, and many of them turned to an alternative civilian service instead. Thus, selective objectors like Shani Werner were released from the military after expressing their conscientious objection to serving in the military because of the role it plays in the Occupied Territories, while the young men who resisted the draft for the exact same reasons were incarcerated. Female conscientious objectors were therefore able to exercise their basic right to freedom of conscience in a much more comprehensive manner than men, and to that extent women have been privileged by the separate legal arrangement to which they have been subject.

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[44] Israel did not adopt a written constitution upon its establishment. Instead, Israel enacted in the early nineties two new "Basic Laws" that address two human rights guarantees: Basic Law: Human Dignity and Liberty *id* and Basic Law: Freedom of Occupation 1994, 5754-1994, 1454 L.S.I. 90. Many jurists in Israel, Chief Justice Aharon Barak central among them, refer to these as a "semi-constitution", and identify them as the beginning of the judicial review process in Israeli law. In other words, courts now have the power to strike down any legislation that violates the basic rights guaranteed by the two Basic Laws. However, according to the basic Laws themselves, legislation that was in effect before enactment of the Basic Laws is immune from any kind of review and subject only to interpretation that accommodates the Basic Laws. Ruth Halperin-Kaddari, *supra* note 16, at 25.

[45] H.C. 7622/02, David Zonshein et al v. Judge Advocate General, 57(1) P.D. 726. That case involved a group of reserve soldiers who refused to serve in the Occupied Territories. For an English translation of the Zonshein case, see: the Supreme Court website <http://62.90.71.124/eng/verdict/framesetSrch.html>.

Furthermore, it appears that the actual exercise of this right, which in practice often meant replacing military service with civilian social action, not only diverted their conscientious objection to new avenues of social action, but also added value and significance to this act as a whole.

D. From a Feminine Right to a Feminist Practice

Feminist theorists argue that in the last several decades American citizenship has undergone a process of remasculinization that has rehabilitated the image of the citizen soldier as the quintessential symbol of American values and as the protector of American freedoms.[46] In Israel, soldiering has always been the highest form of citizenship. The central role of the Israeli military in a state that was formed and developed in the context of an on-going armed conflict and of a national crisis greatly contributed to the formation of an inseparable link between citizenship and military service.[47] Furthermore, as males were assigned the primary role in the nation's defense,[48] militarized manhood became the primary aspect of this gendered understanding of citizenship, which also determined who ultimately exercised

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[46] Susan Jeffords, THE REMASCULANIZATION OF AMERICA: GENDER AND THE VIETNAM WAR (1990); GENDERING WAR TALK (Miriam Cooke & Angela Woolacott eds., 1993). For a specific example of the manner in which the perception of a militarized citizenship guided a gendered distribution of privileges in society *see*: *Massachusetts Personnel Administrator v. Feeny*, 442 U.S. 256 (1979). In that case, the court upheld a statute which gave absolute preference to veterans for jobs in the state civil service despite the fact that ninety-eight percent of the veterans were male. *Id*, at 270.

[47] Baruch Kimmerling, *Patterns of Militarism*, 34 EUROPEAN JOURNAL OF SOCIOLOGY 196 (1993); Nitza Berkovitch, *Motherhood as a National Mission*, *supra* note 17, at 610.

[48] Since its inception, the Israeli military has created and maintained very different roles for men and women. Among the positions that were traditionally closed for women were those that could entail war time combat and other occupations classified as combat positions. This more than any other factor contributed to the exclusion of women from the higher echelons of military leadership. Ruth Halperin-Kaddari, *Id*, At 153.

power and even sovereignty in Israeli society.[49] Traditionally, feminist legal activists and other advocates of gender equality have tried to challenge this gender-biased perception of citizenship by referring to an integrationist strategy. The effort was to promote women into combat positions and to equalize their military contribution to that of men, so they could make a valid claim for full citizenship.[50] However, until now this move has not been very successful. The military was only partly receptive to the idea of women in combat roles,[51] and it appears that entrenched chauvinistic masculine traditions such as sexual harassment

[49] The Israeli military is one of the most important public institutions, a major source for the formation and recruitment of the political, and to a certain extent economic elite. It is an important channel for political recruitment and a recruitment pool for civilian managers in business and industry. Therefore, the marginalization of women within the military has tremendous consequences for their status in society in general. *See*, Dafna N. Izraeli, *Gendering in the IDF Military Service*, 14 THEORY AND CRITIQUE 85 (1999) (Hebrew); Ruth Halperin-Kaddari, WOMEN IN ISRAEL, *supra* note 16, at 155; Yael Yishai, BETWEEN THE FLAG AND THE BANNER: WOMEN IN ISRAELI POLITICS (1997).

[50] The most significant feminist battle in that regard is the case of Alice Miller, brought by a feminist organization to the Supreme Court in the mid-nineties. H.C. 4541/94, *Alice Miller v. Minister of Defense*, 49(4) P.D. 94. In that case a young woman challenged the Air Force's policy of excluding women from pilot training courses. The petitioner claimed that the exclusion of women from all flying positions in the military violated women's right to equality. The Supreme Court accepted the claim, and ordered the military authorities to open its pilot training courses to women on an equal basis with men. This decision facilitated women's integration in combat roles in other branches of the military, such as the Navy. It also contributed to a legislative reform that amended the Women's Equal Rights Law and the Defense Service Law to include a specific declaration with regard to women's right to fulfill any position in the military unless the nature or the substance of the position prevents women's participation. *See*, Women's Equal Right's Law (Amendment No. 2), 5760-2000, L.S.I. 167 This amendment later became Article 16(a) of the Defense Service Law of 1986 (Consolidated Version); *See* Defense Service Law (Amendment No. 11), 5760-2000, 1723 L.S.I. 64 (2000). (2000), section 6(d). *See* also: Noya Rimalt, *When a Feminist Battle Becomes a Symbol of the Agenda as a Whole*, 6 NASHIM: A JOURNAL OF JEWISH WOMEN'S STUDIES & GENDER ISSUES 148 (Fall 2003).

[51] The main type of military occupation that remains closed for women's recruitment is infantry combat, as it involves specific physical qualifications which according to military officials are beyond women's capabilities. Ruth Halperin-Kaddari, WOMEN IN ISRAEL *supra* note 16 at 153.

hinder effective female assimilation.[52] Furthermore, recent feminist literature indicates that women's growing assimilation in the military in fact does not undermine the ideology of gender that pervades all facets of the institution, but rather perpetuates it through various processes in which women combatants internalize this androcentric ideology and later express it in their dress codes, their forms of behavior and their attitudes towards other women.[53] Therefore it seems that, as various feminists have noted, the problem of gender hierarchy might rest in the structures of militarism itself, and it is therefore doubtful whether women's access to these structures in itself has the potential to solve the problem and to change the gender-biased manner in which perceptions of militarized citizenship are defined and enforced.[54]

Against the backdrop of this feminist critique, one should assess the significance of the special right granted to Israeli women to resist the draft on grounds of conscience and to replace it with an alternative civilian community service. As mentioned earlier, under Israeli law national civilian service is not mandatory for those who are exempt from military

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[52] Orna Sasson-Levi, *Subversion Within Oppression: The Construction of Gendered Identities of Female Soldiers in Masculine Roles*, *in* WILL YOU LISTEN TO MY VOICE: REPRESENTATIONS OF WOMEN IN ISRAELI CULTURE 277 (Yael Azmon ed., 2001) ; Noya Rimalt, *On Sex Sexuality and Dignity: The Law for the Prevention of Sexual Harassment in Light of Feminist Theory and Legal Reality*, 35 MISHPATIM 601 (2005).

[53] Orna Sasson-Levi, *id*. Dafna N. Izraeli, *supra* note 49.

[54] Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 Harv. Women's L. J. 39 (1989); Patricia Shields, *Sex Roles in the Military*, *in* THE MILITARY – MORE THAN JUST A JOB 99 (Charles Moskos & Frank Wood eds., 1988); Lucinda J. Peach, *Women at War: The Ethics of Women in Combat*, 15 HAMELINE J. PUB. L. & POL'Y 199 (1994); Cynthia H. Enloe, DOES KHAKI BECOME YOU? THE MILITARISM OF WOMEN'S LIVES (1983). For a more optimistic vision as to feminist potential to promote institutional change and transform the androcentric nature of the military *see* Katharine Abrams, *Gender in the Military: Androcentrism and Institutional Reform*, 56 LAW & CONTEMP. PROBS. 217 (1993)

service.[55] The issue has been debated several times over the years, but to this day the legislature has not resolved it completely.[56] National Service remained a voluntary practice. Yet, in response to the growing dimensions of the phenomenon, the legislature gradually awarded some recognition and status to the practice of voluntary civilian social service. Legislation was introduced to grant those who volunteer for this civilian form of service after having been exempt from military service the same state economic benefits as those who perform regular military service.[57] Hence, today whoever chooses to volunteer to national civilian service is legally entitled to various privileges that were originally reserved for those who performed military service

Initially, the practice of replacing military service with civilian service initially emerged as a voluntary practice adopted by religious women, but in recent years female conscientious objectors have joined them,[58] gradually changing the significance of this phenomenon. Whereas religious women were motivated by cultural and religious perceptions which

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[55] *See supra* note 35.

[56] Rachel Werzberger, *Civilian Service for Minorities,* The Knesset Research and Information Center (Mar. 2003).

[57] See for instance: The Veteran's Integration Law- 1994 , 5754-1994, 1461 L.S.I. 132 (1994).For a more detailed analysis of the legislative framework that equalize the status of the two groups *See*: Rachel Verzberger, *supra* note 56.

[58] The exact number of women conscientious objectors who volunteered for civilian service in recent years is unknown, since no official statistics are kept. But an implicit confirmation of the claim that this phenomenon has grown in recent years to sizeable proportions can be found in an article published in Ha'aretz a year ago. In that article it was reported that "Shlomit," the major NGO assisting in the placing of secular women who were exempt from service in various volunteer positions as part of a national civilian service, was concerned with the growing numbers of women conscientious objectors who were approaching the organization. The NGO therefore decided not to assist this category of women in order not to provide indirect support to draft resistance. *See* Lili Galili, *Female Conscientious Objectors who Apply for Civilian Service are Rejected*, Ha'aretz (July 6, 2004) As a result of this policy, women conscientious objectors now apply for civilian service through another NGO which does not hold a similar policy against conscientious objection.

objected to women's military service based on patriarchal notions of womanhood and morality, conscientious objectors introduced a much more radical objection to the draft—a direct objection to various aspects of militarism itself. Under those circumstances one can argue that the fact that the law facilitated these women's choice to turn to a civilian form of action by providing them with the same economic benefits as those granted for active military service, had far reaching consequences from a feminist perspective. If feminists are correct in their observation that "women may serve the military, but they can never be permitted to be the military,"[59] then undermining the centrality of militarism in determining status in society should be the primary focus of feminist work. That is, if working from within the military domain only serves to regenerate masculine citizenship, then new avenues for equal citizenship should be explored. In this respect, it seems that the practice of replacing military service with civilian service worked to achieve this goal in creating an alternative path that might prove to be more beneficial for women than the traditional path of integration. It contributed to a process by which civilian national service gained status and legitimacy under the law and was gradually established as an alternative path to citizenship, one that challenged the ideal of the citizen-soldier and threatened men's control over citizenship. Hence, as exercised and enforced, the separate right for conscientious objection that was granted to women under the law has become much more significant than one could expect. It not only protected women's freedom of conscience but in fact facilitated the promotion of an alternative feminist agenda regarding women's path to equal citizenship.

However, this state of affairs has not been free of obstacles, as Shani Werner pointed out in her letter. On the one hand, the distinct right granted to women did in fact protect their ability

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[59] Cynthia Enloe, *supra* note 54, at 15.

to make conscientious choices in a much more comprehensive manner than men. And it also carried other important consequences from a feminist perspective. But on the other hand, this broad gender-biased right to conscientious objection undermined the feminine act of objection in other significant respects. While enabling women to win an exemption from military service for reasons of conscience and channeling their protest in alternative directions, the prevailing legal order simultaneously interfered with these women's ability to articulate a meaningful public "voice" of protest as part of, and in addition to, their act of resistance. This intriguing outcome will be discussed in the second part of this article, which focuses on questions of "voice" and law, and examines the additional implications of the separate legal arrangements that were applied over the years to female and male conscientious objectors.

II. On Law, Gender and "Voice"

Feminist literature of the past three decades has turned to examine the issue of women's voices in general. [60] The literature usually focuses on the various ways in which women's voices are silenced, distorted, marginalized and excluded from the public domain, and on how this process contributes to the construction of the public domain as a masculine domain. Although various writers understand the "voice" metaphor differently,[61] it seems that the

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[60] Two of the most influential feminist writers, Carol Gilligan and Catharine MacKinnon, devote large parts of their works to the issue of women's voices. *See*: Carol Gilligan, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Catharine A. MacKinnon, ONLY WORDS (1993). Other Feminist literature explores more broadly the idea of women's language. *See* for example: Luce Irigaray, *When Our Lips Speak Together*, 6 SIGNS 69 (1980).

[61] Carol Gilligan, for instance, tries to expose pre-existing "feminine" voices that have so far been ignored. She uses "voice" as a metaphor to describe different types of thinking and different types of moral perception. Hence this work focuses on the positive content of women's voices and on its added value to contemporary

very reference to "voice" as a central theme of the analysis reflects a shared dichotomized understanding of the social and legal reality in terms of silence or voice. Furthermore, silence is understood in these writings as a sign of powerlessness, and therefore giving voice to women is seen as a political act of empowerment.

The specific case of Israeli female conscientious objectors can serve as a very interesting example in this regard. It may suggest that a clear division between silence and voice does not always exist, in which case it would be much harder to define instances of disempowerment and empowerment. At first sight, this example appears to be a clear case of giving voice to women; women were formally granted a right to speak. They were granted the right to voice conscientious objection to military service and to avoid the draft. Furthermore, as the discussion in the first part of the article has revealed, the actual practice of objection that women were able to develop under the protection of the law seemed to enhance the significance of their voices in the public domain, since this practice facilitated the promotion of a feminist agenda regarding women's path to equal citizenship. Yet a second look at the relevant legal dynamics under which the right was exercised and enforced reveals that the role of law with regard to women's voices is in fact more complicated than it initially appears.

As discussed earlier, male and female conscientious objectors were subject to separate legal rules that differed substantially in their scope and content. While women's freedom of

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moral and ethical discourse. *Id*. MacKinnon's work on the other hand focuses on the reality of conflict and domination between men and women which explains the silencing of women's voices. She argues that to allow new voices into the public domain, existing voices that monopolize it should be silenced. Instead of dealing with the content of the "feminine" voice, this feminist project focuses rather on the social and legal power structures that determine whose voice is ultimately heard.

conscience was broadly protected, the same right was substantially restricted where men were concerned. This restriction diverted the legal treatment of those men to the judicial arena, due to the fact that male objectors who were adamant about their refusal to perform military service were initially subjected to disciplinary proceedings and eventually tried in a military court for their refusal to obey orders.[62] Such legal proceedings, despite the fact that they impaired the possibility of exercising the right to freedom of conscience at the individual level, provided significant additional meaning to the masculine act of resistance, since it resulted in the male objectors having a right to counsel and an opportunity to make their arguments at length in a public forum.[63] In other words, the official trial during which

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[62] The refusal to comply with a military order is an offence under section 122 of the Military Justice Law, 5715-1955, 189 L.S.I 171 (1955) (hereinafter Military Justice Law). This section reads: "A Soldier who willfully does not comply with an order given to him by a commander in the execution of his duty, or refuses, by words or behavior to comply with such an order, is liable to imprisonment for a term of three years." Most conscientious objectors (reserve soldiers and conscripts) who refuse to report for duty or refuse to serve are prosecuted by higher-ranking disciplinary officers within their units. In those cases that are taken more seriously by the IDF, for example where a conscientious objector has repeatedly refused to perform military service or where a person declares his conscientious objection when he or she is already serving in IDF and refuses to continue serving, the accused may be tried in a military court, facing the possibility of a longer sentence of imprisonment. *See*: Amnesty International, I*srael, The Price of Principles: Imprisonment of Conscientious Objectors* (1999), *at* <http://web.amnesty.org/library/index/ENGMDE150491999>. *See* also: Yoram Shachar, *The Elgazi trials – Selective Conscientious Objection in Israel*, 12 ISRAEL YEARBOOK ON HUMAN RIGHTS 214 (1982).

[63] According to the Military Justice Law, a disciplinary hearing before a military judicial officer must be conducted in the presence of the accused. The disciplinary officer is required to read the text of the complaint to the accused and give the accused an opportunity to be heard before giving the judgment. In a military trial the accused has also a right to counsel and an opportunity to make his or her arguments at length before a wider audience. For this reason some conscientious objectors preferred to be tried before a military court. *See* for example the Elgazi case: Yoram Shachar, i*d*. In 2002 Lieutenant David Zonshein, a reserve soldier who was brought before a disciplinary tribunal for his refusal to serve in the Occupied Territories, demanded a hearing before a military criminal court as opposed to disciplinary hearings. The army authorities, presumably wary of the publicity such a case might involve, refused and Zonshein petitioned the Supreme Court for a right to be tried before the military court. The Supreme Court per Chief Justice Barak offered a unique arrangement: instead of dealing with the narrow issue of the right to a military trial, the parties would skip all intermediary proceedings and raise all substantive matters directly

the male objectors were requested to answer and defend the accusation of refusal to enlist in the IDF supplied them with a legal platform from which to expound their moral position regarding the military occupation of the Territories, which was at the base of their objection to serve. This public expression of the individual political and moral stance of each objector transformed the nature of his protest from a private issue to a public phenomenon. The most prominent example is the recent trial of five male selective conscientious objectors who refused to participate in the implementation of Israeli policies in the Occupied Territories,[64] along with the trial of another objector whose refusal to serve was based on his pacifist ideology.[65] In both cases the individuals were tried before military courts,[66] and the trials, which lasted for several months, were the object of intense media coverage. The objectors and their counsels perceived the trials as important opportunities to raise the issue of the military occupation of the West Bank and Gaza as a subject for political and public debate and therefore insisted on the right of each objector to articulate his "voice" of objection and his personal motivation to resist the draft.[67] In both trials the objectors were given the

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before the Supreme Court. The parties agreed and Zonshein and seven other selective conscientious objectors who joined the petition gained the right to be heard by the highest judicial authority of the state and to introduce at considerable length their conscientious objection to the military occupation of the Territories. *See*: Paz-Fuchs & Sfarad, *supra* note 7. For the Court ruling in this case *see supra* note 45.

[64] Headquarters 151, 174, 205, 222, 243/03, *Military Prosecutor v. Haggai Matar*, (unreported decision) (hereinafter the five selective objectors' case).

[65] Headquarters 129/03, *Military Prosecutor v. Yonatan Ben-Artzi*, (unreported decision) (hereinafter the Ben-Artzi case).

[66] In the case of the five selective objectors and Ben-Artzi, who was a pacifist, each defendant had previously been subjected to disciplinary proceedings and sentenced to several consecutive terms of imprisonment before being tried by a military court.

[67] In a book that documented those two trials the defense lawyer who represented the five selective objectors explained: "A legal defense is conducted in a field of given facts…and the fundamental facts here were: the five are conscientious objectors… and therefore it was important for them to explain clearly the rationale for their objection. It was important for them to introduce in court their conscientious position, a position for

opportunity to testify at great length before the three-judge tribunal, and their lengthy testimonies made reference to biographical, philosophical and political issues.[68] Furthermore, the relevance and importance of the personal, political and moral stance of the male objectors was recognized by the courts, and in each case an entire section of the written opinion was devoted to a detailed account of the various testimonies of the defendants.[69] Thus, although their requests for exemption from the military were ultimately denied—all the defendants were convicted—their moral objection to the occupation was documented and publicized in a manner that made this "voice" of protest not only significant but also potentially influential. In a similar way, the very act of criminalization of the objectors also contributed to the process in which the male act of objection became meaningful in the public sphere. In both the decision to convict and the verdict itself, the court did not mince words when describing the danger inherent in the acts of the male objectors in terms of the threat to the public order and to the military's ability to carry out its job.[70] Thus, removing the issue to military court, as well as the judicial rhetoric that was used in those proceedings, actually added more value to this male act of resistance in the sense that it not only made it more visible in the public arena, but it also reaffirmed its significance. Furthermore, it can be claimed that the fact that

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which they are willing to pay the heavy price. The essence of the defense was to enable them to speak – to oblige the court to hear the arguments, harsh and difficult as they are." Dov Khanin, *A Short User's Manual*, *in* THE REFUSENIKS TRIALS *supra* note 2 at 162

68 For the testimonies of each objector *see*: THE REFUSENIKS TRIALS, *id*, at 39-128.

69 The case of the five selective objectors, *supra* note 64 and the Ben-Artzi case, *supra* note 65.

70 Specifically, the decision against the five selective objectors stated in part: "Once the defendants before us made an effort to publicize their objection act, those acts caused additional damage to the military and to the state. The acts of the defendants call into question the justifiability of the military's actions and the morality of participation in the IDF. In so doing they undermine the legitimacy of state actions in the eyes of the world and assist hostile nations in their arguments against the state." THE REFUSENIKS TRIALS, *supra* note 2, at 227.

these proceedings ended with the all-too-real punishment of incarceration[71] contributed to the glorification of the masculine act of dissent in an additional sense. Incarcerating male conscientious objectors contributed to building the conflict between the men and the state in confrontational masculine terms of force against force.[72] The male objectors themselves were also partners in this process of constructing the objection discourse in those masculine terms. It is not without reason that one of the objectors' movements that opposes military service in the Occupied Territories calls itself "Courage to Refuse" and makes mention of the military rank and combat experience of its members as an important factor that legitimizes their voice of dissent.[73] "Courage" as a masculine trait that the military cultivates and builds upon, together with central military symbols such as rank and combat experience that typically

[71] Each of the five selective conscientious objectors was sentenced to a year's imprisonment. The Ben-Artzi case resulted in a two- to four-month sentence (the actual term depending on whether the defendant would pay the imposed fine). All the defendants were also sentenced to additional periods of incarceration as a result of disciplinary hearings held prior to the decision to try them before a military court.

[72] Gerald Edwin Shenk, WORK OR FIGHT: SELECTIVE SERVICE AND MANHOOD IN THE PROGRESSIVE ERA (1992) (unpublished Ph.D. dissertation, University of California, San Diego Library). Professor Shenk categorizes in his work the common perceptions attributed to masculine men and those considered more effeminate in the following dichotomized terms: Agency – Latency; Powerful –Powerless; Volition – Instinct, Impulse; Structure – Chaos; Organization – Disorganization; Self-discipline – Controlled by others; Physical perfection – Illness, Crippled; Balance – Distortion; Fairness – Inequity. Cited in Kathleen Kennedy, *Manhood and Subversion During World War I: The Cases of Eugene Debs and Alexander Berkman*, 82 N.C.L. REV. 1661, 1664 (2004).

[73] In January 2002, 50 reservist conscientious objectors published a petition declaring their refusal to fight beyond the 1967 borders. The petition was published under the title "Courage to Refuse." The objectors, who served in the past as combat officers and soldiers stressed this fact by referring to their ranks and military experience and highlighted the selective nature of their objection. They protested not against the existence of an army as such but rather against the role the Israeli army plays in the Occupied Territories. Within several months the group's number rose to over 500, all of whom joined together to form a protest movement named "Courage to Refuse" (Courage to Refuse – Combatant's letter, <http://www.seruv.org.il/english/default.asp>). This initiative triggered the formation of other objection groups among reservist combat soldiers such as military pilots who again formed into a group and expressed their conscientious objection to serve in the West Bank and the Gaza Strip as part of and within the framework of their military expertise: <http://tayasim.org.il>.

belong in the masculine domain,[74] were now recruited by the male objectors. They tried not only to portray their willingness to pay the price of their resistance to the draft in terms common in the militaristic arena, but also relied on the most obvious masculine symbols as a source for legitimization. In this respect, it seems that both legal discourse and the male conscientious objection discourse that grew within it are nurtured by a similar normative foundation that draws upon "masculine" terms such as "courage," "force" and "heroism," and that reinforces their importance and significance in the public sphere. It also becomes clear, then, that although conscientious objection to the draft is usually perceived and portrayed as a social phenomenon that aspires to demilitarize society,[75] in the particular case of Israeli male conscientious objectors the opposite process occurred: militarism and manhood became essential for the public recognition of the act of objection, and with this the centrality and importance of militarism as a masculine ideology was reaffirmed. In other words, although the male objectors and their supporters aspired to provide alternatives to patriotic manhood by resisting the draft, they did not challenge the basic attributes of manhood. Their vision of the ethical dissenter was a distinctly masculine one that privileged men's experience and values and therefore placed men and women in fundamentally different political and social roles. Moreover, in this normative framework the legal decision to incarcerate the objectors strengthened both the objectors' self-perception and the public perception of them, for it allowed them to publicly present their heroism and courage—a highly acclaimed form of

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[74] *Supra* note 48. In this respect it is also important to note that despite the growing incorporation of women in the military in recent years, men still hold most of the high ranking positions and no woman is of high enough rank to participate in General Staff meetings on a regular basis. See: Ruth Halperin-Kaddari, *supra* note 16, at 159-160; Noya Rimalt, *On Sex, Sexuality and Dignity*, *supra* note 52.

[75] Ruth Linn, CONSCIENCE AT WAR *supra* note 41.

masculine behavior—whose performance is not only a necessary element of the construction of an appropriate male identity, but is also respected and valued in the public eye.

All these effects—glorification of the conscientious act of objection, an official legal forum to express their "voice" of resistance and the opportunity to demonstrate publicly a highly acclaimed personal trait such as heroism—were not available to female objectors. They were excluded from these legal practices completely, and this exclusion silenced their parallel struggle of conscience and constructed it in insignificant and marginal terms. It was against this that Shani Werner protested in her public letter discussed earlier. As explained in the first part of this article, every year many female conscientious objectors volunteered for alternative civilian national service. They dedicated themselves to community activity, to helping underprivileged groups and to promoting the public interest in various contexts. Yet translating their protest into civilian social activity of this kind did not win any recognition under the existing legal structure. It was ignored by the press and was excluded from any public discussion of the phenomenon of conscientious objection. In this sense, women's potentially subversive actions were deradicalized. While women were given the opportunity to carry out a much more significant act of resistance than were men, the fact that this act was not visible publicly made it almost nonexistent and therefore hardly influential. This process of marginalization can be attributed to the masculine-militaristic structures within which the feminine "voice" of objection was striving to be heard. That is, the extremely difficult task of making dissent heard in the shadow of the military monolith became especially difficult for women whose opinions were systematically rendered trivial or

invisible.[76] Furthermore, one can claim that, as part of this process, the fact that women's act of resistance turned into a more "feminine" social activity that did not involve a confrontational struggle with the state and did not require "courage" but rather "compassion" and "caring" at most, was a key factor in its devaluation in the public eye, since these certainly were not values that the hegemonic militaristic discourse cultivates or ascribes importance to. On top of that, against the background of the general militarization of Israeli society, the practice of serving in a form of national civilian service has come to be perceived not only as a feminine (and therefore inherently inferior) practice, but also as marginal in comparison to the "real" national service, namely military service. An obvious official demonstration of this belief was expressed during the trial of the five selective male objectors. They asked the court to be given the opportunity to replace their military service with national civilian service just like women conscientious objectors. The court denied this request, ruling that national civilian service was not a fitting alternative for military service because "military service has unique characteristics and inherent to it are its unique dangers."[77] The possibility that the social contribution to society that is inherent in national civilian service could equal the contribution inherent in military service, thus creating an accepted alternative for military service, was denied from the outset. Putting the male objectors behind bars was presented under these circumstances as the only appropriate legal and public response to their act of refusal to serve, even though the court concluded that it was convinced that the objectors were determined to persist with their objection. The incarceration of the objectors was not intended to make them reconsider their refusal to

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[76] Ann Scales, *supra* note 54, at 63.

[77] The five selective objectors' case, *supra* note 64, at section H.5.2 to the decision. THE REFUSENIKS TRIALS, *supra* note 2, at 219.

serve, their rejection of military service now being a completed and final act. The imprisonment was meant to express and confirm an obvious hierarchy with regard to the centrality and uniqueness of military service in comparison to any other social-national activity. In retrospect, this perception not only sent a demeaning and dismissive message regarding the voluntary service of all women objectors, but it may also explain why female conscientious objection was not a source of public interest or recognition in comparison to the men who engaged in a confrontational power struggle with the military authorities and who were sentenced to serve time in a military prison.

In contrast to male conscientious objection, female conscientious objection existed, therefore, in a visible manner only on the individual level, when specific women won exemption from military service after they succeeded in persuading the military authorities that reasons of conscience prevented them from serving. The political dimension of such women's resistance to the draft were almost invisible as a direct consequence of the legal structure, and their distinctive feminine "voice" of conscience was silenced in the public sphere. Within public and legal discourse in Israel, conscientious objection was defined as a male phenomenon, both in terms of the gender of the people identifying with it and in terms of the values that it expressed and represented.[78] What the law originally gave to women it

[78] A clear manifestation of this gender-biased reference to the phenomenon of conscientious objection in Israel can be found in the legal and sociological literature dedicated to the issue. A survey of this literature reveals that it deals exclusively with the masculine aspect of this phenomenon. *See* for example: Yoram Shachar, *supra* note 62. Leon Shelef, supra note 41; Ruth Linn, *supra* note 41; Ruth Linn, *When the Individual Soldier Says No to War: A Look at Selective Refusal during the Intifada*, 33(4) JOURNAL OF PEACE RESEARCH 421 (1996) ; Peretz Kidron, REFUSENIK! ISRAEL'S SOLDIERS OF CONSCIENCE (2004); Ronit Chacham, BREAKING RANKS: REFUSING TO SERVE IN THE WEST BANK AND GAZA STRIP (2004). Following the Supreme Court decision in the case of David Zonshein (*supra* note 45) Israel Law Review dedicated an entire volume to the issue of the distinction between

appeared to be taking away in the process of legal implementation and enforcement of the legal rules concerning conscientious objection to the draft.

This is the context, then, of Shani Werner's outcry for public recognition of the female act of objection. However, Shani Werner was not alone in her call for change. A demand for change was also heard from the male side. Yet while the essence of the women's demand was to gain a public "voice" and recognition, the essence of the male claim was formal equality. This fact brings me to the third part of my analysis, which deals with the way the claim for gender equality is ultimately dealt with under the law.

III. The Equality Crisis: Female Conscientious Objection between Formal and Substantive Equality

A. The Sex-Specific Right is Taken to Court

More than twenty years ago, Wendy Williams, a feminist scholar and activist, tried to evaluate to what extent the court system was an appropriate forum for promoting women's demand for equality. This was done after a decade of litigating sex equality cases in the courts. The feminist idea at that early date was to try to achieve gender equality via the courts, based on claims under the Fourteenth Amendment to the Constitution. Williams, who

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selective conscientious objection and full conscientious objection as it is enforced with regard to male soldiers. See volume 36 to the Law Review (2002). The trials of the five selective objectors and Yonatan Ben-Artzi were documented in THE REFUSENIKS TRIALS *supra* note 2. *See* also David Enoch, *On the Military Court's Decision in the Matter of the Five Objectors*, 8(2) MISHPAT UMIMSHAL 701 (2005).

was part of that feminist effort,[79] later reflected on her experience and reached the following conclusions:

> Courts will do no more than measure women's claim to equality against legal benefits and burdens that are an expression of white male middle-class interests and values. This means rephrasing the point that women's equality as delivered by the courts can only be an integration into a pre-existing, predominantly male world.[80]

Williams' insights regarding the distinctly limited capacity of the courts were shared by other feminist lawyers,[81] and they guided their strategic choices in litigating sex equality cases starting in the 1970s. Within this framework, they encouraged women to litigate only those issues with respect to which they wanted the court to rule that privileges explicitly bestowed on men should also be made available to women. [82] The basic assumption was that to the extent that women shared those predominantly male values or aspired to share that world on

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

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

[81] Ruth Bader Ginsburg, who in the 1970s headed the Women's Rights Project organized by the New York office of the American Civil Liberties Union, expressed similar views. *See*: Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 9 UNIVERSITY OF CHICAGO LEGAL FORUM 10 (1989).

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

its own terms, resorting to the courts had, since the early 1970s, proven to be the most efficient, accessible and reliable mode of redress. But to the extent that the law must be reconstructed to reflect the needs and values of women as well, change must be sought from legislatures rather than from the court system, which has never been the source of radical social change.[83] Hence, even in hard cases that involved unique feminine aspects, the argument was that feminist lawyers had to adhere to the principle of equal treatment based on the masculine standard of law if they wanted to present to the courts a coherent theory of equality.[84]

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

The first instance in which the demand for gender equality in all matters relating to conscientious objection was raised was during the military trials of the male conscientious objectors.[85] Their claim was that, just as the army exempts from military service women

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[83] Williams, *supra* note 80; Ginsburg & Flagg, *supra* note 81. For a similar position regarding the limited capacity of the courts and the need to refer to the legislative path instead. *See also* Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 COLO. L. REV. 975 (1993).

[84] Williams, *id*, at 188.

[85] This claim was raised as a preliminary defense by the five selective objectors. They introduced as evidence an application for exemption filed with the military authorities by a woman named Hadas Goldman. She defined herself as a selective conscientious objector and was granted exemption without any difficulties. Based on this example, the male objectors raised a claim of gender-based discrimination and called for the nullification of the legal proceedings against them. *See* The defense preliminary arguments in the matter of *Military Prosecutor v. Haggai Matar* (151, 174, 205, 222, 243/03) at p. 7 (on file with the author), and also Hadas Goldman's application to the women's committee and the official letter of exemption she received (on

objectors who base their request for exemption on both selective and universal grounds of conscience, a similar broad exemption opportunity should be given to men.[86] The IDF responded to this claim in an interesting manner. Instead of admitting that it applied different policies to men and women on the basis of the different legal provisions they are subject to, the military claimed that to the extent that some selective refusals by women were recognized by the military as deserving exemption, then a mistake must have been made by the military authorities. Therefore the Military declared that henceforth it would be strict in its application of a similar distinction between universal and selective conscientious objection claims made by women.[87] And indeed the military started to apply to women the policy that it had always applied to men. That is, it distinguished between requests for exemptions based on selective grounds of conscience and requests that were based on claims of pacifism. This was done within the framework of Article 39 of the Law, now reinterpreted to provide a lesser right of freedom of conscience to women compared to its original interpretation and implementation. As a direct result of this new policy, in 2004 the military denied the request of Laura Milo, a conscientious objector, to receive an exemption from military service due to her specific objection to the military occupation of the Territories.[88]

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file with the author). The lawyer defending pacifist Yonatan Ben-Artzi also raised this claim as part of Ben-Artzi's defense. *See* the Defense Summary Arguments in the Ben-Artzi case in THE REFUSNIKS TRIALS, *supra* note 2, at 325.

[86] *Id*.

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

[88] Close to the designated date for her induction into the military, Laura Milo wrote a letter to the committee in charge of women's requests for exemption. In that letter she wrote: "I cannot cooperate with the Israeli

While Shani Werner and her friends had applied for, and had received, similar exemptions a few years earlier; Laura Milo's request was denied, and following her adamant refusal to enlist, she was sent to prison.[89] Thus, one aspect of formal equality was achieved—women too were now being incarcerated for draft resistance.

This case resulted in the issue reaching the Supreme Court. Following the rejection of her request for exemption and her incarceration, Laura Milo filed a petition with the Supreme Court aimed at regaining the broader right for freedom of conscience that was now denied to women. In her appeal to the Court, Milo challenged the new egalitarian policy of the military, arguing that, given the different legal provisions that applied to each group under the law, it was inappropriate to grant equal treatment to men and women with regard to selective conscientious objection.[90] Milo stressed the fact that with regard to women, the law explicitly recognized their right to freedom of conscience and their entitlement to exemption from military service based on that right. By contrast, as far as men were concerned, there was no explicit legal recognition of their entitlement to an exemption based on the right to freedom of conscience, but only a general reference to "other reasons" for exemption which provided broad discretionary authority to the Minister of Defense to approve or deny the request for exemption.[91] Under this legal framework, Milo argued, even if the Minister decided to distinguish between male selective conscientious objectors and pacifists and to

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occupying military forces….I object to the occupation …I will not take part in an institution that performs a policy that is wrong from a conscientious perspective…." cited in H.C. 2383/04 *Laura Milo v. Minister of Defense*, *supra* note 6, at 171.

[89] *Supra* note 5.

[90] *See* Petition to the High Court of Justice in the Matter of *Laura Milo v. Minister of Defense* (H.C. 2383/04), sections 28-29 (on file with the author).

[91] *Id.*

grant exemptions only to the latter, a similar restrictive distinction should not apply to women due to the different and broader phrasing of the exemption clause that applied to them.[92] That clause appeared to cover both types of women's conscientious objection. Therefore, Milo claimed, the Court should invalidate the military's new interpretation of Article 39 and reinstate its original interpretation. In short, Laura Milo asked the Court to uphold the "separate but not equal" legal regime with regard to conscientious objection that had prevailed until then.

B. Women Conscientious Objectors are Equalized with a Vengeance

As a result of Milo's line of argument, the Supreme Court was for the first time called upon to deal with the appropriate interpretation of the different legal arrangements found in the Defense Service Law concerning the conscientious objection of women and men. The Supreme Court, it appears, was not in doubt as to the correct outcome. The Court not only rejected Laura Milo's appeal, but also struck the unique right of women to be exempt from military service on grounds of conscience, subjecting women to the stricter provisions which until then had applied only to men.[93] This denial of a separate right for women was rationalized and justified, it is important to note, mainly on the basis of arguments of gender equality. Justice Procaccia, delivering the opinion of the Court, divided her analysis of this case in two. First, she examined the instructions of Article 36 of the Defense Service Law. This section was originally understood and interpreted by all parties, including the state and the military, as one dealing exclusively with male conscientious objectors. Justice Procaccia, however, gave it a different interpretation. She held that the authority of the Minister of

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[92] *Id*, at section 31.

[93] H.C. 2383/04, *supra* note 6.

Defense under that section was not limited to men, for it applied, as the specific language of the law indicated, to every "person of military age," a phrase that could be interpreted as referring to men and women alike.[94] Therefore, the Justice concluded, female conscientious objectors should be subject not only to the general provisions of the Article, but also to the distinction it drew between pacifism and selective objection. This result the Justice regarded as inevitable, due to considerations of gender equality. Justice Procaccia explained that with regard to matters of conscientious objection, men and women were similarly situated and therefore arguments of gender equality required that women should be subject to the same legal treatment as men.[95] Furthermore, the Justice added, the subjection of women to the "masculine" exemption system, which was stricter, actually contributed to a more egalitarian recognition of women's contribution to the armed forces in Israel.[96] Surely, whoever constitutes a vital element of the military is not likely to be easily excused from military service. In other words, the very act of restricting women's right to exemption from military service based on reasons of conscience in a manner identical to that of men was perceived by the Justice as an act that promoted principles of gender equality, since it presented women as an essential resource, one whose services the military could not lightly forgo. [97]

After referring to gender-equality arguments in reaching her conclusion that women conscientious objectors should be subject to the legal framework of exemptions embedded in

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[94] *Id*, at 182.
[95] *Id*, at 183

[96] *Id*, at 183-184.

[97] Specifically, the Justice summarized her position in the following manner: "Substantive principles of equality justify, then, equal treatment of men and women in the carrying out of the authority of the Minister of Defense according to Section 36 of the Law…. That is the case with regard to applying the exemption to universal conscientious objection, and this is the case regarding the inapplicability of the exemption to selective objection." *Id*, at 185.

Article 36 rather than Article 39 of the Law as had been the practice until then, Justice Procaccia moved on to the second part of her analysis, in which she explained what was, in her opinion, the correct interpretation of Article 39 of the Law. In her explanation she employed arguments of gender difference to delineate the boundaries of Article 39 as opposed to Article 36. The Justice determined that the expression "grounds of conscience" in Article 39 did not refer to the general right to freedom of conscience in its common understanding, but rather to religious beliefs that prevent only women from serving in the military based on their perception as different from men.[98] Grounding this conclusion in the legislative history of this provision, Justice Procaccia explained that the fact that the creation of a special exemption clause for women was intended to satisfy the needs and desires of the religious segments of Israeli society should govern the interpretation of legislative intent.[99] Therefore, even if the legislature included in that Article the term "reasons of conscience" along with the term "reasons of religious familial way of life," these two terms should be read as referring to the exact same religious basis for exemption. [100] This conclusion emptied the expression "reasons of conscience," which appears in Article 39 and which relates only to women, of any independent meaning. In other words, the judicial interpretation equated the expressions "reasons of conscience" and "grounds of familial, religious way of life," and the

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[98] *Id*, at 186.

[99] *Id*, at 186-187.

[100] As Justice Procaccia wrote: "The exemption from military service granted to a woman according to Section 39 for "reasons of conscience" or for "religious familial way of life" is basically meant to respect and to honor the inability of women to serve in the military due to religious perceptions and the customary and ethnic traditions to which they subscribe**.** Exemption based on "reasons of conscience" in the special context of this provision is strongly related to religious belief, or customary or ethnic-traditional grounds, which prevent a woman from serving in any kind of military service…." *Id*, at 189.

identity between the two terms made redundant the existence of "reasons of conscience" as an independent ground for exemption in that provision.

The outcome therefore was that not only was Laura Milo's petition rejected, but the broad and independent right for exemption from military service based on grounds of conscience exercised openly by female conscientious objectors throughout the years was now denied to all women. Furthermore, it was on the grounds of gender equality that women's separate right to freedom of conscience was denied. From this point on, women conscientious draft resistors would be subject to the same restrictive legal arrangement that was applied to men under Article 36 of the Law, according to which exemption from military service on grounds of conscience was not the inherent right of each conscript, but rather a discretionary matter which could potentially be changed at any time. Not only could it be withdrawn, but to the extent that it remained in force it covered only universal conscientious objection and not selective conscientious objection.

C. Laura Milo between the Court and Feminist Lawmaking

This legal outcome, with which the other two male Justices concurred without reservation, seems to confirm the assumptions made by Williams and other feminist activists over two decades ago regarding the masculine limits of the courts. It might also suggest that the same pragmatic perceptions as to what could be achieved through the judicial path—perceptions that motivated feminist lawmaking in the seventies and eighties—might be highly relevant today. As Williams predicted, "courts will do no more than measure women's claim to equality against legal benefits and burdens that are an expression of white male middle-class

interests and values,"[101] and therefore it seems reasonable to argue that the Milo decision should be analyzed as yet another expression of the kind of judicial treatment women can expect to receive as a result of the distinctly limited capacity of the courts.

However, on reexamination this outcome might also be seen as reflecting a much larger phenomenon with regard to the nature and consequences of the relationship between feminist lawmaking and the judicial definition of sex-based equality. A second look at the case of Laura Milo leads one to wonder whether the feminist pragmatic predictions regarding the potential products of judicial discourse are not self-fulfilling. Certainly, when all parties to the judicial process adhere to the belief that the courts can never be a source of social change, visions of social change are not even introduced in court, and the existing legal order remains undisturbed. In this context it is therefore important to remember that the critical feminist notions concerning the limits and possibilities of judicial discourse in dealing with gender equality issues, in addition to the strategic decision to refer to the courts as instruments of change, have in fact contributed significantly to the nature and substance of constitutional sex-equality case law. This becomes more apparent if one examines, for instance, all American constitutional sex discrimination cases heard by the Supreme Court in the last three decades.[102] Many of these cases were the product of feminist initiatives and they all involved plaintiffs who tried to highlight the discriminatory nature of sex-specific

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[101] *Supra* note 80.

[102] For a detailed account of all Supreme Court cases interpreting sex discrimination under the Equal Protection Clause of the Fourteenth Amendment from the first case holding that the Equal Protection Clause prohibits discrimination on the basis of sex in 1971 through the end of the twentieth century *see*: FEMINIST JURISPRUDENCE, TAKING WOMEN SERIOUSLY CASES AND MATERIALS (2nd ed., Mary Becker, Cynthia Grant Bowman et al eds., 2001), at 75-81.

classifications, demanding their replacement with the equal treatment of men and women.[103] The successful cases among them were the ones in which the court accepted the claim of prohibited discrimination and invalidated the single-sex laws involved.[104] In Israel, where feminist efforts to promote gender equality have been guided by the American example,[105] a similar process occurred. All leading cases initiated as part of feminist efforts to establish the principle of sex-based equality involved women seeking the same treatment as men.[106] In all such cases the court was attentive to claims of discrimination, and the principle of gender equality in terms of equal treatment was recognized and reaffirmed. Furthermore, in their efforts to eradicate sex-specific laws that were perceived as perpetuating rigid sex roles and contributing to women's subordinated status in society, both American and Israeli feminists fought throughout the nineties for the full integration of women in the military. In Israel this struggle focused on the admission of women to pilot training courses,[107] and in the U.S. it

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[103] David Cole, *Strategies of Difference: Litigating Women Rights in A Man's World*, 2 LAW & IN EQUALITY 33 (1984).

[104] *Id*.

[105] For a general analysis of the impact of the American Women's Movement on the formation of the Israeli Women's Movement *see*: Hanna Safran, THE INFLUENCE OF AMERICAN FEMINISM ON THE SUFFRAGIST MOVEMENT IN THE JEWISH SETTLEMENT (1919 – 1926) AND THE WOMEN'S MOVEMENT IN ISRAEL 1971 -1982 (2001) (unpublished Ph.D dissertation, University of Haifa) (on file with Haifa University Library). For a more concrete analysis of the manner in which American feminist lawmaking has influenced and shaped Israeli feminist legal battles, *see*: Leora Bilsky, *Cultural Translation: The Case of Israeli Feminism*, 25 TEL AVIV UNIVERSITY LAW REVIEW 523 (2001) (in Hebrew).

[106] *See* for example: H.C. 153/87 *Shakdiel v. Minister of Religious Affairs*, 42(2) P.D. 221 (contesting the exclusion of women from local religious councils); H.C. 953/87 *Poraz v. Mayor of Tel Aviv*, 42(2) P.D. 309 (demanding the inclusion of women in the municipal body that elects the Chief Rabbi of Tel Aviv); H.C. 104/87 *Nevo v. National Labor Court*, 44(4) P.D. 752 (fighting for the equalization of the retirement age for men and women); H.C. 45-41/94 *Alice Miller v. Minister of Defense*, *supra* note 50 (insisting on the right to enter a military pilot training program). For a more detailed analysis of the significance of those cases in the context of feminist battles of the eighties and nineties in Israel *see* Noya Rimalt, *When A Feminist Struggle Becomes a Symbol of the Agenda as a Whole: The Example of Women in the Military*, *supra* note 50.

[107] *Alice Miller v. Minister of Defense*, *id*.

centered on the admission of women to the Virginia Military Institute,[108] but these two struggles were essentially similar. In that sense, *Reed v. Reed*, the first case holding that the Equal Protection Clause prohibits discrimination on the basis of sex,[109] reflects the same feminist ideology as *U.S. v. Virginia*,[110] despite the twenty-five years that separate them. In both cases, women sought and won the implementation of the equal treatment model of subjecting women to the masculine standard of the law. In Israel too, Leah Shakdiel,[111] one of the pioneering Orthodox feminist activists, who fought for her right to be elected to a religious council, and Alice Miller, who followed her almost a decade later with her demand to serve as a military pilot,[112] introduced the same concept of equality before the Court. This is not to say of course that feminist litigation in the last several decades in the U.S. or in Israel has been limited to struggles that adopted and implemented the formal and masculine definition of equality. Rather, the argument is that feminist forces in both places played a role in the formulation of sex-equality case law and the definition of gender equality that underlies this case law. Moreover, the feminist causes of action, as well the legal arguments that were raised to defend them, should be understood in light of pragmatic perceptions regarding the limits and the possibilities of the courts.

Within this framework of analysis, it is therefore important to examine more critically not only the Supreme Court's decision in Laura Milo but also the role of the plaintiff in

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[108] *U.S. v. Virginia*, 518 U.S. 515 (1996). In an earlier case in which a male plaintiff challenged the selective service registration limited to males, the Court upheld the sex-based classification and determined that since women as a group were not eligible for combat, they need not be registered. *See Rosteker v. Goldberg*, 453 U.S. 57 (1981)

[109] *Supra* note 82.

[110] *Supra* note 108.

[111] *Supra* note 106.

[112] *Alice Miller v. Minister of Defense*, *supra* note 50.

contributing to the manner in which the court eventually resolved the issue of gender equality. Laura Milo, it should be remembered, was trying to defend a sex-specific law that was certainly discriminatory. Women were given a broad right to freedom of conscience that was denied to men. In addition, in her efforts to defend a right that was unique to women, Laura Milo adhered to technical formalities and neglected any substantive argument she might have raised. She did not claim that the sex classification promoted the equal citizenship of women or compensated them for practices of exclusion and subordination in the military. Instead, she asked the court to allow her and other women to continue enjoying the broader conscientious exemption from military service they traditionally enjoyed, simply because the existing legal arrangement granted women a different, and in this case advantageous, treatment than men.[113] However, after years of feminist groups and organization petitioning the courts to eliminate all legal distinctions between men and women and to equalize the status of women to that of men, it is not surprising to learn that this appeal was perceived by the Court not only as having no legal basis but also as undermining the principle of gender equality. Moreover, the fact that the Court decided to bring the status of women in line with that of men and not the other way around does not seem unexpected under these circumstances. Theoretically speaking, once the separate legal arrangement was perceived by the Court as violating the principle of gender equality, the

[113] Petition to the High Court of Justice in the Matter of Laura Milo, *supra* note 90, at sections 26-31. In this context it is important to mention the fact that Milo repeated this line of argument even after her petition was denied. She filed a request for rehearing in which she argued the following: "The Court has applied a so-called egalitarian interpretation… that ignored the general nature of the Defense Service Law that all along draws a substantial distinction between men and women…. **Whatever our views on the appropriate situation with regard to sex-based equality in the military, it is not for us or for the court to make a determination in this matter**. The legislature is the one who determined those rules and the court must adhere to them as long as they are not amended by the legislature." *See* section 9 and 92 to petition for rehearing 7802/04 *Laura Milo v. Minister of Defense* (on file with the author) (emphasis added).

remedy of nullification was not the only remedy available. It was also possible to apply the remedy of "extension" and extend the broad right for conscientious objection to men as well. Furthermore, the Court could have at least pointed to the remedy of extension as the desired one under the circumstances, and then referred the issue back to the legislator for reconsideration. Yet none of these alternative remedies were even considered by the Court, which clearly perceived the option of subjecting female conscientious objectors to the male standard of law as the only possible expression of gender equality. The three Justices were not in doubt, it appears, as to the correct definition of equality, and therefore the possibility of aligning the masculine legal standard in accordance with the feminine one was not even mentioned as a possibility that existed within the scope of gender equality.

The Court, however, was not the only one captured by an unambiguous male-biased perspective. In her petition, Laura Milo not only refrained from raising any substantive arguments in defense of the sex-specific classification she tried to hold on to; she also avoided any normative reference to the concept of equality that could be applied here without interfering with the right women enjoyed. In other words, had Milo recognized in her appeal the problematic normative aspects of the existing discriminatory arrangement, and shed light on the way in which the female standard of law, and not just the male one, could be used as a basis for remedying this situation and establishing gender-equality principles on it, then there would have been another explicit option facing the Court, one which would at least have challenged the official perception of sex-based equality. In reality, this did not happen, and consequently Milo's petition did not offer any valid way of responding to this arrangement in an age when the law is formally dedicated to the promotion of principles of gender equality. In the absence of other critical perspectives regarding the desirable outcome

of the case, a result that could not only respond to Milo's claim but also properly implement principles of equality, the Court was left to apply the only perception of equality prevalent in legal and judicial discourse.

Why was Milo's petition constrained to such narrow and formal argumentations? One can only suspect that it was a by-product of the pragmatic approach to the courts. Clearly Laura Milo and her feminist lawyers[114] believed they were referring to the kind of legal arguments that could best serve the feminist cause of preserving the broad right to freedom of conscience women had enjoyed until then. The final outcome in this case indicates that they were wrong, and this conclusion inevitably raises the question whether the Court would have responded differently to a less pragmatic and a more radical vision of gender equality.

IV. Conclusion: The Limits of the Law and its Possibilities

The story of women conscientious objectors in Israel, which started with the parliamentary deliberation over the Defense Service Law and ended, at least for the present, with the Court decision in the case of Laura Milo, provides an interesting case study regarding the limits, but also the possibilities, of the law.

In this article I have tried to outline three major aspects of this story that deserve particular analysis and discussion from a feminist perspective. The first aspect relates to the historical

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[114] Laura Milo was represented by two feminist lawyers: Neta Ziv and Smadar Ben Natan. Neta Ziv also served as co-counsel for Alice Miller who fought for her right to be a military pilot (*supra* note 50), and Smadar Ben Natan's most notable feminist case involved the representation of a coalition of feminist groups and organization in their petition against the Playboy broadcasting television channel *see*: H.C. 5432/03 *"Shin" for the Equal Representation of Women v. Cables Broadcasting Commission*, 58(3) P.D. 65.

context in which the special conscientious exemption for women was created. As demonstrated and explained above, this sex-specific law was the obvious product of the "separate spheres" mentality, and the analysis of its legislative history uncovered the patriarchal perceptions of women that originally shaped and rationalized this arrangement. Typically, this kind of normative and historical context would have made the special exemption granted to women inherently suspect, since the law's differential treatment of men and women under such circumstances is usually perceived as perpetuating rigid sex roles and therefore contributing to women's subordination. However with regard to the special right for conscientious objection granted to Israeli women, there were unexpected dynamics involved. While clearly shaped by problematic gendered perceptions, this separate legal arrangement for women evolved to award women a significant right—the right to exercise their freedom of conscience with regard to military service. Under the protection of the law they won recognition of broad grounds for conscientious objection to the draft. This recognition allowed them to undermine the central role of militarism and military service in Israeli society. It also facilitated the creation of alternative paths to equal citizenship that are particularly important for women. Hence, as exercised and enforced, the separate right for conscientious objection granted to women became even more significant. It not only protected women's freedom of conscience, but it also provided them the legal option to launch an attack on many masculine aspects of the contemporary legal and social order, and therefore to promote a more radical and subversive feminist agenda, as opposed to the typical agenda that is usually promoted through the official legal routes.

However, as I have further shown, this state of affairs was not free of obstacles. The second aspect of the analysis reveals that the actual operation of this single-sex arrangement was in

fact more complex. On the one hand, the separate right granted to women did in fact protect their ability to make conscientious choices in a much more comprehensive manner than was granted to men, and it also carried other important and radical consequences from a feminist perspective. On the other hand, this broad gender-biased right to conscientious objection undermined the feminine act of objection in other significant respects. While enabling women to win an exemption from military service for reasons of conscience and to channel their protest to substantive avenues of action, the prevailing masculine legal order simultaneously interfered with those women's ability to articulate a meaningful public "voice" of protest in terms of visibility and presence in the public domain.

Under these circumstances it was of particular interest to examine the latest legal development with regard to women's separate right to conscientious objection. As I have analyzed and explained, in response to an appeal filed by a woman conscientious objector, the Court recently abolished women's long-standing separate right to conscientious objection, subjecting women to the stricter masculine standard of law. This ruling was presented as the direct and inevitable product of the law's current commitment to gender equality. The formal reference to equality has legitimated the denial of the unique right granted to women, and this outcome had far-reaching consequences from women's perspective. Not only were they now denied the broad fundamental right they enjoyed for many years, but in addition the subversive feminist action that developed as a result of this woman's right was completely undermined. Hence, when the consequences of this new egalitarian legal order are compared with the old regime of gender separation, it is not clear that women were not better off before. True, the unique right women enjoyed was exercised under a masculine social and legal order that privileged the masculine "voice" of dissent and definitely undermined its

feminine aspects. Yet the feminine and feminist social action that gradually developed under the law, was not without meaning in the long run, even if it appeared to lack public recognition. In this sense, it seems that Shani Werner underestimated in her letter the significance of women's ongoing conscientious action. Had the legal system allowed it to exist, it might eventually have challenged deeply-rooted perceptions regarding the inevitable link between militarism and citizenship, which have detrimental consequences for women. In other words, in the framework of the original legal structure, the "female voice" was not entirely silenced. It still had presence and significance in the public domain, even if it was weak and ignored. Following the Supreme Court's decision in the case of Laura Milo, this particular form of female conscientious objection has however been totally undermined, and with it the possibility that this unique feminine "voice" would win recognition and an ever-growing influence in the public domain came to an end. Thus, despite the fact that the new egalitarian legal order that is now imposed on women placed them in a similar position to that of men as far as the ability to voice dissent in an official judicial forum is concerned, one should recognize that this newly awarded "voice" seems to be less significant than the old "voice" that has now been silenced.

Furthermore, this latest legal development concerning female conscientious objectors in Israel also suggests that the critical evaluation of the judicial decision cannot focus exclusively on the Court as a separate entity. Feminists should also recognize and rethink the role of the plaintiff in shaping the legal field and its boundaries in sex equality cases. In the case of Laura Milo, this becomes obvious if one identifies the gap between the goal of her petition and the actual rhetoric that was employed to defend it. Laura Milo aspired to preserve a broad radical practice of female conscientious objection. Yet there was no

normative effort to defend this "feminine" practice and its significance, either within the framework of a substantive concept of gender equality or as a sex-specific classification that deserves protection. In other words, in line with many other sex-equality cases, Milo adhered to narrow and formal arguments and avoided any radical challenge to the contemporary judicial perception of gender equality. The outcome of the case—taking away from women the separate and potentially radical right they enjoyed—was therefore inevitable because the masculine limits of judicial discourse became in fact the limits of feminist activism itself.

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