Vanderbilt Journal of Transnational Law

Volume 40
Issue 2 *March 2007*

Article 2

2007

Privileged but Equal? A Comparison of U.S. and Israeli Notions of Sex Equality in Employment Law

Leora F. Eisenstadt

Privileged but Equal? A Comparison of U.S. and Israeli Notions of Sex Equality in Employment Law

*Leora F. Eisenstadt**

ABSTRACT

Ever-expanding media coverage, scholarship, and popular publications discussing the difficulty of combining work and family suggest that this issue is now the essential locus for gender debate in the United States. The essence of the debate is the meaning of equality: whether it carries the same meaning for women and men, whether biological and sociological differences should impact the understanding of equality, and whether law and social policy should reflect or encourage these differences. Privileged but Equal details the theory of sex equality that is embodied in Israeli employment law and contrasts it with the U.S. approach. The Article suggests that the Israeli system employs an "equality through difference" model, which approves of special treatment for women in the form of privileges, options, and exemptions so that women who maintain primary responsibility for family and home have greater opportunities to enter and succeed in the workplace. The Article explores the historical circumstances, societal needs, and cultural pre-dispositions that have shared in creating the Israeli conception of sex equality in an effort to determine whether Israel's approach or any of its parts would be palatable, appropriate, or vastly unworkable in the United States.

---

* Judicial Law Clerk to the Honorable R. Barclay Surrick, Eastern District of Pennsylvania. J.D., New York University School of Law. This Article was initially researched while on a Fulbright Fellowship at Tel Aviv University in Israel. Many thanks to the Fulbright Program in Israel for its support and generous provision of resources. This Article greatly benefited from comments and discussions with Professor Frances Raday and Michael Shalev at Hebrew University, Professor Liora Bilsky at Tel Aviv University, Rabbi Dr. Haviva Ner-David at the Conservative Yeshiva in Jerusalem, and Professors William Nelson, Sylvia Law, Deborah Malamud, Samuel Estreicher, Laura Sager, and Barry Friedman at NYU School of Law. Special thanks to my husband, Mike Uram, for his never-ending support. The opinions expressed in this Article, unless otherwise attributed, belong to the Author alone.

TABLE OF CONTENTS

I. INTRODUCTION

In 2002, Sylvia Ann Hewlett's book, CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN,[1] caused an

1. SYLVIA ANN HEWLETT, CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN (2002).

uproar in the U.S. media. It described a widespread phenomenon of professional women who are increasingly waiting to have children into their late thirties and forties, when it is often biologically too late. The book stirred much discussion about the professional and familial choices that women in the United States are making and how these choices impact society and the personal happiness of individual women. Many of these women waited to consider having children because of the toll it would take on their careers or because they had spent their youths focused on education and career.[2] The overwhelming response to the book suggested that many women experienced this problem of mixing career and family. It became clear that more often than not in the United States, women who wanted to pursue the feminist ideal of professional parity with their male counterparts had to forego motherhood at least until they had established themselves as workers.[3]

The discourse that followed this book in classrooms and living rooms across the country suggests that the combination of women, work, and family is now the essential locus for gender debate. The emerging responses will guide the feminist and counter-feminist movements in the United States. The essence of the debate is on the meaning of equality—whether the achievement of equality in U.S. society carries the same meaning for women as it does for men, whether biological and sociological differences should impact the understanding of equality, and whether law and social policy should reflect and even encourage these differences. The answers to these questions undoubtedly depend on the advocate's notion of U.S. society and its goals. Should individual happiness (or the pursuit thereof) be the ultimate determinant of social and legal policy? Or are there

---

2. Nancy Gibbs, *Making Time for a Baby*, TIME MAGAZINE, Apr. 15, 2002, at 48.

3. Recently, the situation of professional women in the United States was raised again in the context of changing the "dilemma" of the women investigated by Hewlett. David Brooks, the conservative New York Times commentator, wrote an op-ed column suggesting that U.S. society and perhaps even U.S. law and social policy should encourage women to focus on getting married and raising children for the first ten years after they graduate from college. David Brooks, *Empty Nests, and Hearts*, N.Y. TIMES, Jan. 15, 2005, at A15. Once their children were school-aged, he argued, women, now near age forty, could re-direct their attention to graduate level education and professional development and could then work uninterrupted for the next thirty years. *Id.* The letters to the editor in response to this column ranged from outright applause to intense resentment. Some women agreed with Brooks but demanded that his suggestions be applied equally to men who may want to be primary caretakers of children as well. *See* Lotte Bailyn, Letter to the Editor, *The Kids-and-Careers Tightrope*, N.Y. TIMES, Jan. 19, 2005, at A18. Others simply rejected the notion that women should focus on a life partner and children when they were young and immature, while others rejected the notion that a man could tell them anything about how to live their professional and reproductive lives. *See* Constance Leisure, Letter to the Editor, *The Kids-and-Careers Tightrope,* N.Y. TIMES, Jan. 19, 2005, at A18.

larger societal aims that should take precedence over individual needs and desires? In answering these questions, it is useful to remove our U.S. blinders and recognize that numerous countries are dealing and have dealt with similar questions.

> Societies differ in the ways they institutionalise the relationship between family and work for both women and men. They differ in the opportunities they provide for both to combine professional and family careers. They differ in the supports they provide women in their roles as mothers and homemakers. . . . These differences among societies are reflected in public policies regarding both the public and private spheres. Such policies, in turn, reflect economic and political interests as well as normative ideals regarding gender roles and family life.[4]

In essence, societies differ in the ways in which they define and conceive of equality, particularly as it pertains to the sexes.

To shed light on the emerging debate of the proper balance of work and family, this Article will explore Israeli society's approach to sex equality, comparing Israeli equal employment law to its U.S. counterpart. The United States has adopted a formal equality approach, believing that, for the most part, equality is achieved through equal treatment. Israel, on the other hand, provides special treatment for women in the form of mandatory paid maternity leave, shorter work hours for mothers, optional early retirement for female workers, and maternal exemptions from the military. This special treatment is part of an equality-seeking regime; it is an attempt to equalize a societally unequal situation so that women who maintain primary responsibility for family and home have greater opportunities to enter and succeed in the workplace. While this approach may at first seem repugnant to those schooled in U.S. and Aristotelian notions of equality, Israel's system allows for women in large numbers to join the labor force while not delaying marriage and childbirth. Israeli laws, in effect, provide a statutory encouragement for combining work and family. But is this equality? This Article explores the benefits and flaws of the Israeli approach. It seeks to locate the historical circumstances, societal needs, and cultural predispositions that have shared in creating the Israeli conception of sex equality. In the United States, where there is clearly a struggle to effectively combine work and family roles, the Israeli approach must be considered to determine whether it or any of its parts would be palatable, appropriate, or vastly unworkable.

Part II of this Article will provide a brief overview of the varying theoretical approaches to sex equality, locating Israel's approach within them. Part III will address the Israeli legislative commitment

---

4. Dafna N. Izraeli, *Balanced Lives – Pursuing Professional Careers and Meeting Family Obligations: Israeli Perspectives, in* WOMEN IN LAW 141, 141 (Shimon Shetreet ed., 1998).

to sex equality in employment and will explore the specifics of the special treatment approach embodied in that legislation. Part IV will examine the relevant Israeli case law that deals with sex equality in employment, identifying the ways in which it mirrors or deviates from the legislative approach. Part V will briefly review U.S. equal employment opportunity law, seeking to highlight the differences in Israel's approach. Finally, Part VI will explore the ways in which Israeli equal employment law reflects multiple societal priorities and values. This Part will address the following: Israel's dominant collectivist ideology that focuses not on the individual's needs but on those of the community, the Arab-Israeli conflict and the resulting demographic threat facing the Israeli population, the Jewish legal system's endorsement of sex difference, and the influence of European approaches to sex equality.

Nitza Berkovitch, an Israeli sociologist, has noted that "[l]aw can be conceived as a cultural product . . .. [It] embodies and expresses specific social ideologies through its assumptions about society and its various members. At the same time, law also plays an active role. . . . [It] reflects as well as reproduces social structures."[5] This Article will examine Israeli equal employment law as a means of understanding different theoretical approaches to equality. It will explore how social structures and ideologies inform the chosen approach to equality and the ways in which employment law, in particular, both reflects and reproduces these social structures.

II. CONCEPTIONS OF EQUALITY

When discussing sex equality, the conversation typically begins with reference to the Aristotelian notion that equality entails the treatment of likes alike and un-likes differently in accordance with their unlikeness.[6] This definition, as Catherine MacKinnon has pointed out, served to create the sameness/difference dichotomy that has become the dominant approach to sex equality and that has occupied most legal debate and scholarship on the subject.[7]

---

5. Nitza Berkovitch, *Motherhood as a National Mission: The Construction of Womanhood in the Legal Discourse in Israel*, 20 WOMEN'S STUD. INT'L F. 605, 607 (1997) (internal citations omitted).

6. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 225 (1989); *see also* Frances Raday, *On Equality – Judicial Profiles*, 35 ISR. L. REV. 380, 382 (2001).

7. *See* MACKINNON, *supra* note 6, at 220. MacKinnon notes that "[m]ost scholarship on sex discrimination law concerns which of these paths to sex equality is preferable in the long run or more appropriate to any particular issue . . . ." *Id.* at 220. She suggests an alternate approach, claiming that neither sameness nor difference

The U.S. conception of sex equality and laws that seek to eradicate sex discrimination are premised on a theory of "sameness," in which a woman's relevant similarity to men is the basis on which she can demand equal treatment.[8] The U.S. approach embodies theories of formal equality and substantive equality, both of which are based on the principle of sameness. Formal equality is depicted in John Stuart Mill's notion that sex equality may be achieved through commitment to "a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other."[9] Such an approach insists on the removal of barriers to equal achievement and the eradication of discrimination. Substantive equality added to this notion the recognition that equal treatment was not sufficient to achieve equality and that equal opportunity could only be ensured through prohibition of intentional and unintentional discrimination, sexual harassment, and hostile work environments.[10] Substantive equality demanded the creation of a system in which the rights provided by formal equality could be enforced.[11] Under both formal and substantive equality schemes, U.S. legislation and jurisprudence have sought to achieve sex equality by identifying ways in which men and women are the same and thus deserving of the same treatment.[12] The sameness approach suggests that the only relevant differences are biological, that sex stereotypes should not be given credence as actual differences, and that the use of even biological differences to justify differential treatment must be intensely scrutinized to ensure a relevant connection between the biological characteristic and the difference in treatment.

While to the law student in the United States it seems obvious that the principle of sex equality should embody this notion of sameness, it is by no means the only approach to sex equality. The other side of the debate focuses, of course, on difference and argues that providing absolute equal treatment disregards the real differences in needs, values, and positions of women.[13] It is possible to situate affirmative action within the difference theory because it recognizes historical discrimination against women, which then

---

addresses the real issues of power and hierarchy embodied in the problem of sex inequality. *Id.*

8. *See id.* at 217.

9. Sarah E. Burns, *Slouching Toward Gender Equality, in* WOMEN IN LAW 275, 275 (1998) (quoting JOHN STUART MILL, THE SUBJECTION OF WOMEN 1 (Susan M. Okin ed., Hackett Publ'g 1988) (1869)).

10. *See* Raday, *supra* note 6, at 385–86.

11. *See id.*

12. *See* Burns, *supra* note 9, at 278.

13. *See* WOMEN, EQUALITY, AND EUROPE 3–4 (Mary Buckley & Malcolm Anderson, eds., 1988). The editors provide a discussion of various approaches to equality, including the notion that attention must be paid to situational differences.

requires differences in present treatment to remedy the inequality that was historically created. Thus, different treatment under affirmative action is based not on relevant biological differences, but on a history of unjustifiable differential treatment.[14] However, while affirmative action seems to emerge out of a difference theory, it has, for the most part, been accepted under the sameness approach as a necessary supplement to formal and substantive equality.[15]

What has not been accepted under the U.S. conception of sameness equality is an approach to equality that expands recognition of difference beyond both biology and historic discrimination. In Israel, the legal system acknowledges both biological and societal differences.[16] This Article will refer to this system as "equality through difference." In contrast to the sameness theory, the equality through difference theory both appreciates and accommodates differences.[17] Frances Raday, who advocates accommodation as "the most far-reaching measure of socio-dynamic equality," insists that the concept of equality should not end with the bestowal of formal equality or even with the creation of substantive equal opportunity and affirmative action to remedy past

---

14. *See* Raday, *supra* note 6, at 387.

15. *See id.*

16. Catherine MacKinnon calls this "situated difference." *See* MACKINNON, *supra* note 6, at 217–23.

17. *See* Raday, *supra* note 6, at 388. The focus of this Article is the Israeli approach to sex equality in employment law, and it does not deal with any other aspects of Israeli law. That is a purposeful choice, as Israeli law is not consistent in its approach to sex equality in all aspects of life. While Israel uses a civil law system for issues of employment law, criminal law, property, and other matters, all issues of personal status are dealt with through the religious courts. Berkovitch, *supra* note 5, at 607. Israel, upon achieving statehood in 1948, adopted the Ottoman system of law, which had been practiced by the British in the decades before Israeli statehood. *Id.* That system left all matters of personal status law to each religious community. *Id.* For Israeli Jews this means that all matters relating to marriage and divorce must be dealt with in the Rabbinic courts, which apply ancient Jewish law. The result is a situation of great inequality for women, who are not viewed as independent legal entities under this system. The situation has led to much criticism, in particular regarding its approach to divorce. Women are not permitted to initiate a divorce and must wait until the husband formally consents. Raday, *supra* note 6, at 391. The courts cannot force a man to consent, leaving many women permanently chained to their husbands, a circumstance called *Agunah* in Hebrew. *Id.* This situation of immense inequality, however, pertains only to matters of personal status dealt with in the Rabbinic courts and is not meant to permeate the civil law courts at all. As a result, the employment laws are highly focused on achieving equality for women in this sphere without regard to their positions within the Rabbinic law. The impact on Israeli society of the Jewish law's approach to women will be discussed in Part VI.D. However, this Article focuses on equal employment legislation in order to explore Israel's strong commitment to sex equality in this sphere and to question the ways in which that commitment differs from the U.S. approach.

discrimination.[18] Instead, she argues that "[w]here the differences between groups are not the result of stereotypes but are genuine ongoing differences relevant to the function to be performed, then a society which regards participation in such functions as a social goal, needs to provide measures of accommodation for those differences."[19] Thus, the accommodation theory, as advocated by Raday, adopts Aristotle's notion of treating likes alike and un-likes differently but differs from a sameness approach in its willingness to consider biological differences in determining the appropriate treatment of the sexes. Accommodation must be made to ensure participation in the system despite biological difference. As this Article will argue, Israeli legislation has, at times, gone beyond even this definition of accommodation to embody what the Author terms the "equality through difference" theory. Under this theory, even societal differences between men and women are not ignored but are instead accommodated by the legal system. For example, the fact that women are primary caretakers, while not a biologically relevant difference, is a societal reality in many countries and, under this equality through difference theory, would be reflected in the laws applicable to working women.

Societies attempting to achieve sex equality in the workplace and educational settings must choose between the equality through sameness and the equality through difference approaches. As may be expected, both systems have benefits and flaws. With respect to the sameness approach, Sarah Burns has commented that:

> The equality model has much to recommend it . . . . By proposing a simple comparative test, the equality model provides guidelines to achieve results that many would otherwise avoid by the rationalizations used to perpetuate inequality in the first place. At the same time . . . whether through the constraints of the model or abuses of it, the equality model has been limited in its ability to address underlying patterns of inequality.[20]

Catherine MacKinnon has also noted that the sameness approach makes the male paradigm the ideal, forcing women to become like men in order to claim unequal treatment.[21] "The sameness route ignores the fact that the indices or injuries of sex or sexism often ensure that simply being a woman may mean seldom being in a

---

18. *See* Raday, *supra* note 6, at 390. There are numerous explanations for affirmative action including and going beyond that of remedying past discrimination. Affirmative action is, however, a "limited measure intended to close gaps," while "accommodation is a long term measure intended to facilitate participation in spite of difference." Correspondence with Frances Raday, Professor, Hebrew Univ., Faculty of Law, in Jerusalem, Isr. (Aug. 31, 2005).

19. *See* Raday, *supra* note 6, at 388.

20. Burns, *supra* note 9, at 278–79.

21. *See* MACKINNON, *supra* note 6, at 225.

position sufficiently similar to a man's to have unequal treatment attributed to sex bias."[22]

The difference approach too lends itself to both praise and criticism. It is commended in that it accounts for the reality of difference between men and women in their societal roles. However, this approach is often criticized as protectionist and regressive in that, as MacKinnon notes, it "incorporates and reflects rather than alters the substance of women's inferior status . . . ."[23] In this way, the difference approach accounts for the realities of women's experiences but does nothing to change the unfairness and inequality that exists deep within the system.

Evaluation of the appropriateness of an equality-seeking regime is dependent, for the most part, on the goals and mores of the society in which it is used. Thus, as Izraeli points out, societies concieve of women's roles and status, as they do with equality overal, according to societal needs or values. In these differences lies the explanation for the varying approaches used by the Israeli and U.S. legal systems to achieving what each considers "sex equality."

III. ISRAELI EQUAL EMPLOYMENT LEGISLATION

A. *Israel's Continuing Statutory Commitment to Sex Equality*

Israel has been committed explicitly to the principle of sex equality from its earliest years. Because Israel's legal system was initially based in large part on English law, the state came into being with recognition of women as legal persons who deserve equal treatment.[24] In fact, the 1948 Declaration of Independence incorporated this notion of sex equality, asserting that the State of Israel would "ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race, or sex."[25] The fact

---

22. *Id.* at 233.

23. *Id.*

24. Frances Raday, *Equality of Women under Israeli Law*, 27 JERUSALEM Q. 81, 81 (1983).

25. Declaration of Independence cl. 2 (Isr. 1948), *cited in* Raday, *supra* note 24, at 82. Note that while the "equal protection" clause of the U.S. Constitution predates Israel's Declaration of Independence, it was not thought to include sex until much later. Israel's assertion of sex equality in 1948 came sixteen years before the United States passed the Civil Rights Act of 1964, which prohibited discrimination in employment based on sex, among other categories. Even then, sex was added to the Civil Rights Act by Senators wishing to derail the Act's passage with what they considered to be an outlandish amendment. *See* KATHARINE BARTLETT, ANGELA HARRIS, AND DEBORAH RHODE, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 167 (3d ed. 2002). The Act passed with the addition of sex and became one of the most important tools used in combating sex discrimination in the United States. *Id.*

that this assertion of sex equality appeared in Israel's founding document suggests Israel's long-standing commitment to the concept. However, unlike the later laws passed by the Knesset, Israel's Parliament, the Declaration of Independence has no constitutional authority, making it impossible to use this assertion of sex equality to invalidate contemporaneous or future laws and practices that violate it.

As a result, between the state's founding in 1948 and the present, the Knesset has passed numerous laws guaranteeing equal rights to women.[26] The decade between 1950 and 1960 in Israel brought two important pieces of equality legislation: the Women's Rights Law of 1951[27] and the Women's Employment Law of 1954,[28] both of which focused on protecting working mothers. In 1964, the Knesset expanded its commitment to sex equality in employment, passing the Equal Pay Law, which mandated equal wages between the sexes for equal work.[29] In the 1980s, this body of legislation was expanded through amendments and supplemented through new statutes, often in response to challenges raised in the courts.

In 1981, the National Labor Court heard a case in which an El-Al Airline stewardess challenged the company's policy that prohibited the promotion of women to the rank of chief steward.[30] The National Labor Court, in *Chazin v. El-Al,* held in favor of the woman based on its power to invalidate provisions in collective bargaining agreements as contrary to public policy.[31] However, the ruling only affected those who were already employed because the laws that existed at the time of the case pertained only to discrimination in working conditions and not to applicants seeking to be hired.[32] As a result, the Knesset passed the Equal Employment Opportunity Law of 1981,[33] prohibiting sex discrimination in employment settings and in the acceptance of job applications.[34]

In 1987, the Knesset passed the Equal Retirement Age for Male and Female Employees Law, in response to *Nevo,* a case decided one

---

26. Raday, *supra* note 6, at 82. Israel has never asserted the notion of sex equality in one of its Basic Laws, which act as a developing constitution. *Id.* However, in 1992, it passed the Basic Law of Human Dignity and Liberty, which some have argued may serve as the basis for equality demands as well. *Id.*

27. Chok Shivui Zchuyot HaIshah [Women's Rights Law], 1951, S.H. 248.

28. Chok Avodat Nashim [Employment of Women Law], 1954.

29. Chok Schar Shaveh LaOvedet V'LaOved [Equal Pay Law] 5714-1963/64, 18 LSI 165 (1964) (Isr.).

30. Chazin v. El-Al, 4 P.D.A. 365 [1972/3].

31. *Id.* at 377.

32. Frances Raday, *Women, Work and the Law, in* CALLING THE EQUALITY BLUFF: WOMEN IN ISRAEL 178, 180 (1993).

33. Chok Shivyon Hahizdamnuyot Ba'Avodah [Equal Employment Opportunities Law], 1981.

34. Raday, *supra* note 32, at 180.

year earlier by the supreme court.[35] The Retirement Age Act required that male and female workers be permitted to retire at the same age but granted women the option to retire five years earlier than men.[36] Prior to the law's enactment, women had been forced to retire five years earlier than their male co-workers.[37]

One year later, the Knesset also passed the 1988 Equal Employment Opportunity Law,[38] which made it clear that the prohibition on sex discrimination applied in offers of employment, conditions of employment, training and professional study, dismissal, and severance pay.[39] It also added a prohibition on sexual harassment and, by noting that the "posing of irrelevant conditions may constitute discrimination," allowed, to some extent, for claims of disparate impact discrimination.[40]

In more recent years, these laws, passed between 1951 and 1988, have been continually amended and revised so as to keep them up to date with changing societal norms. Thus, while the principle of sex equality has never been formally asserted in one of Israel's Basic Laws, which form its developing constitution,[41] the various legislative acts dealing with equality, particularly in employment, have created a rich statutory scheme prohibiting sex discrimination and attempting to ensure equal opportunities.

B. *Israeli Legislation's Difference Approach to Sex Equality*

The equality through difference approach appears in various forms in Israel's sex equality legislation. Israel, like the United States, initially provided women with special protections in the law, justifying these protections on the basis of women's vulnerability and special needs resulting from their reproductive capacity and perceived physical weakness.[42] However, unlike the United States,

---

35. *Id.* at 181; HCJ 104/87 Nevo v. National Labour Court [1990] IsrSC 44(4) 749.

36. Raday, *supra* note 32, at 181.

37. *Id.*

38. *Id.* This law revised the 1981 law of the same name.

39. *Id.* at 182.

40. *Id.* While this law explicitly included a prohibition on sexual harassment, it applied only to harassment that was related to economic threats or quid pro quo harassment and did not discuss the hostile work environment component of sexual harassment. *Id.*

41. While Israel's Declaration of Independence stipulates that a written constitution would be drawn up and passed, this never came to fruition. GERSHON SHAFIR & YOAV PELED, BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP 260 (2002). In 1950, the Knesset voted to postpone the adoption of a formal constitution and instead allowed for the passage of Basic or Fundamental Laws which would be viewed as a gradually developing constitution. *Id.*

42. *See* Raday, *supra* note 32, at 184–85.

which has eliminated these protections as discriminatory, Israel maintained protective provisions for women and transformed them into privileges and exemptions. Israel justified this special treatment based on women's biological characteristics and social roles.[43] Privileges, such as legally mandated maternity leave, and exemptions, such as the exemption from army service, while different in mode, have essentially the same goal and outcome. They seek to grant special treatment to women in order to equalize a socially unequal situation and to fulfill a societal need that is served by gendered social roles. As the following discussion will demonstrate, Israeli sex equality legislation employs privileges, exemptions, and options to achieve these goals.

1. Night Work

The earliest of these privileges can be found in the 1954 Women's Employment Law, which dealt with multiple aspects of women's participation in the labor force.[44] When the law was initially enacted, it contained a provision prohibiting women from being employed at night.[45] This provision was included because the drafters considered night work to be particularly harmful to women. The provision was enacted to protect what was believed to be the weak female constitution.[46] The law was amended in 1963, 1973, and 1986. The current version, however, provides not that women may not work at night, but instead that "[a]n employer may not refuse to hire a woman only because she, when accepted for work, announces that she will not agree to work at night due to family reasons."[47]

As it stands now, the provision essentially provides women the option to reject night work based on the vague phrase "family reasons" and maintain their jobs despite the employer's need for someone to work at night.[48] As a result, the employer may be forced

---

43. *Id.*

44. Chok Avodat Nashim [Women's Employment Law], 1954.

45. *See* Employment of Women Law, 1954, H.H., 288.

46. *See id.*

47. Women's Employment Law, 1986, § 2 (C) (Author's translation).

48. Women's Employment Law, 1986, § 2 (C) 1–9. There is an exception to this rule for women working in industries that require night work as a component of the job itself. *Id.* These industries include: travel or tourism agencies that are in airports, seaports, or international conferences; state services that are essential to the state; institutions that care for the sick, elderly, or children; and newspapers, among others. *Id.* Additionally, a 1955 amendment to the law indicated that the prohibition (since extinguished) on night work would not apply to jobs that were in service of the nation, including those dealing with taxes, meteorology, telephone centers, police force, prison services, airline services, and travel bureaus. *See* Amendment to Women's Employment Law Regarding Night Work in Service of the Nation, 1955. The amendment included conditions on night work, in service of the nation, including requirements that women

to hire additional employees to work those night shifts that the woman rejects. The female worker may invoke this privilege as needed according to the burdens of her familial role. As is clear from the legislation, this privilege is provided to women alone. Male workers may refuse to work at night due to family issues but will not be ensured their job security should they make this claim. An employer appears to have every right to reject a male job applicant who announces his refusal to work at night even if he bases this refusal on "family reasons."

While the law itself offers little insight into the reasoning behind this female-only privilege, the legislative history provides an explanation that is based on the family centric position of women in Israeli society. Knesset member Ora Namir, in presenting the 1986 Amendment to the law that changed the prohibition on night work into an option to refuse it, explained the committee's fear that because of a worsening economic situation in the country, if the law eliminated the prohibition altogether, employers would automatically demand night work.[49] "And if a woman did not want to, she would not get work. This phenomenon is severe and is likely to harm a woman's equal opportunity to work."[50]

The committee was concerned about the implications of permitting women to work at night despite the fact that the reality of their familial obligations had not changed. They believed that if employers could demand that women work at night, women would be forced, because of their obligations to children and home, to affirmatively and without protection of the law, refuse to work at night. Women would thereby be placed at a grave disadvantage when competing in the job market with men. Thus, Namir suggested the privilege to refuse night work that was granted to women in this provision was an attempt to create equal opportunity for women who were otherwise in an unequal position because of their social roles as primary caretakers of the home and family.[51] It was not biological differences in the form of weaker constitutions or childbirth that prompted this provision, but rather the societal reality of gender roles in relation to the home and family.[52] This provision perfectly

---

be provided appropriate places to rest, hot drinks, means of transportation to and from work and specific rest periods between days of work. *See id.* As will be discussed *infra* in Part VI, the notion of communal needs has always maintained a strong presence and influence on Israeli law, in this case working as an exception to protective legislation for women.

49. D.K. (1986) 2463 (discussing an amendment to the 1954 Women's Employment Law).

50. *Id.*

51. *Id.*

52. *Id.* In explaining the reason for vesting power in the Minister of Labor to establish conditions for employing a woman at night, Namir indicated that "the

embodies the "equality through difference" approach. The Israeli law, by privileging female workers, attempts to equalize an unequal playing field in which women's family and home obligations would otherwise disadvantage them in a competitive labor market.

2. Maternity Leave

The 1954 Women's Employment Law also contained provisions for maternity leave, which is arguably one of the most important aspects of the accommodation approach. The original law mandated twelve weeks of maternity leave for women workers, prohibited employers from employing new mothers during this period, and mandated monetary fines and potential imprisonment as penalties for violating this prohibition.[53] This provision of the 1954 law was amended in 1973, 1986, five times in the 1990s, 2002, and most recently in 2003.[54] However, the basic notion of a mandatory twelve-week maternity leave has been maintained throughout the law's history.

The most recent version of the law requires the employer to grant and the new mother to take a total of twelve weeks of leave, of which six weeks or less may be used, according to the needs of the worker, prior to delivery while the remainder must be taken after delivery.[55] Additionally, a female worker who has fallen ill or been hospitalized during the period of her maternity leave is entitled to an extension of the maternity leave for a period that is not longer than the hospitalization and not more than four weeks total.[56] The maternity leave may further be increased if the worker has had more than one baby, increasing the period of maternity leave by two weeks for each additional baby delivered; however, it may not be extended, in total, beyond sixteen weeks.[57]

This maternity leave provision, while obligating both employer and female worker, also mandates payment to the female worker from the National Insurance Fund.[58] According to the National Insurance Law of 1968, a woman on mandatory maternity leave is compensated not by the employer but by the government so that the employer's obligation is merely to refuse to employ the worker during this period and to continue to pay into her pension and other

---

committee admits that employment of women at night engenders concern over their health and safety." *Id.* However, this was by no means the driving force behind the creation of the option to refuse night work. *Id.*

53. Women's Employment Law § 6.
54. *Id.*
55. *Id.* § 6(A)–(B).
56. *Id.* § 6B(1).
57. *Id.* § 6C.
58. *Id.*

professional funds as if she were continuing to work.[59] Moreover, the law specifies that absence from work for maternity leave shall not harm the worker's seniority rights, further enhancing the privilege.[60]

In addition to mandating maternity leave, the law also ensures the female worker's position while she is on leave and includes provisions prohibiting termination before, during, or as a result of her pregnancy.[61] According to the law, an employer may not fire a female worker while she is pregnant and before she has taken leave without express permission of the Minister of Labor, who will not permit such a termination if it is, in his opinion, connected to her pregnancy.[62] Additionally, a woman may not be fired during her maternity leave or during the forty-five days after the maternity leave is complete.[63] The law also indicates that female workers, upon reaching their fifth month of pregnancy, must inform their employers of their condition.[64] At that point, the employer may not employ her during overtime and weekends.[65] Finally, the penalties against an employer for employing a woman during this mandatory maternity leave period have been maintained in the current version of the law and include both monetary fines and potential imprisonment.[66]

In addition to maternity leave, a woman who has worked for the same employer for at least a year prior to childbirth may take unpaid leave after her twelve weeks of mandatory paid leave. The number of months of unpaid leave must equal one fourth of the number of months that she had previously worked for the same employer, with a maximum of twelve months.[67] While this leave is unpaid, it is similar to the mandatory paid leave period in that the woman worker is guaranteed a return to her prior position at the end of her leave and is guaranteed that her seniority rights will not be affected.[68] The law also mandates that a nursing woman be permitted to be absent from work for an hour each day, and this time may not be deducted from her pay.[69]

---

59. *Id.* § 6G(1).
60. *Id.* § 6I.
61. *Id.* § 9(1).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* However, despite this prohibition, a woman who agrees in writing to be employed on weekends and for overtime may only be employed if she also has a gynecologist's permission that details the conditions under which she can continue to work. *Id.* § 10(1).
66. *Id.* § 14.
67. *Id.* § 7(d)(1).
68. *Id.* § 7(d)(2).
69. *Id.* § 7(c)(3).

A recent amendment to this law made the leave policy somewhat applicable to new fathers as well. While the leave is not mandatory for male workers, a man whose wife had a baby may take paternity leave from the six week portion of leave occurring after the delivery if his wife agrees in writing to forego a portion of it and she is working during the period that the man is on leave.[70] Thus, the legislation created an optional paternity leave to be taken only if the mother has agreed to share part of the leave that is, by law, her right.[71]

In the same vein, both male and female workers are given the right to be absent from work when undergoing fertility treatments. According to a 1990 Amendment to the Women's Employment Law, female workers may be absent for a total of four fertility treatments in a year.[72] For each treatment, she may be absent from work for sixteen days if the workplace operates on a five day per week schedule, or twenty days if the workplace operates on a six day per week schedule.[73] Thus, at maximum, a woman may be absent for eighty days in a year to undergo fertility treatments. While male workers also have this privilege, it is greatly reduced with a maximum of twelve days of leave in a year.[74]

As is surely clear by now, the "equality through difference" approach is most stark in the Israeli legislation's treatment of pregnancy. For female workers, maternity leave is mandatory and paid by the government, and employment during this period subjects the employer to potential fines and imprisonment. Additionally, the law ensures that women workers can maintain their jobs while taking this leave from work. While the law provides male workers with some rights to paternity leave, it is certainly not mandatory and, for the most part, is dependent on the mother's willingness to forego part of her leave so that he may take a leave period as well. This legislation seeks to both encourage reproduction[75] and ensure women's ability to maintain their jobs and return to the workplace upon completion of maternity leave. By making the leave mandatory, the government has sought to prevent employers from pressuring female workers not to take leave and prevent discrimination against those workers who do. The law essentially seeks to equalize the unequal playing field created by reproductive biology that affects the ways in which male and female workers structure their working lives.

---

70. *Id.* § 6(h)(1).
71. *Id.* § 6H(1).
72. Amendment to Women's Employment Law – Absence due to Fertility Treatments, 1990, § 2.
73. *Id.*
74. *Id.*
75. *Id.*

3. Prohibited, Limited, and Dangerous Work

The Women's Employment Law also contains prohibitions on types of employment for women "of fertile age." In 2001, the Knesset amended the Women's Employment Law to create conditions on the employment of women under the age of forty-five, which the law defines as "fertile age."[76] The amendment initially specifies that employers at educational and medical institutions must inform fertile-age female employees about the risks of contracting rubella, the dangers it poses to the development of the fetus, and the locations for provision of vaccination for this disease.[77]

The amendment then addresses work that is prohibited to women of fertile age, including work in places that produce specific chemicals or where such chemicals exist in the air in sufficient quantity as to be detrimental to fertility.[78] A female worker who discovers that she is pregnant and who works in such an environment must inform her employer that she is pregnant within ten days of finding out the information herself.[79] Such a worker will then be prohibited from working with specific chemicals or in an environment in which she will be exposed to them.[80] If the employer cannot find alternative appropriate work for the female employee during the period of her pregnancy, she will go on leave and receive payments from the National Insurance Fund during this time.[81]

The prohibition on employing fertile age or pregnant women in such environments is particularly illustrative of the difference approach to equality embodied in the Israeli law. In this instance, the exemption of fertile women from employment is directly tied to their reproductive capacity and is intended to protect both an actual fetus and the potential to become pregnant that a woman under forty-five may endanger in such a workplace. However, despite similar dangers to male fertility, there is no comparable provision to protect fertile age men who may work in such environments. The exemption of women, while potentially placing them at a disadvantage in acquiring certain types of employment, is not seen as violative of the basic principle of sex equality.[82] As will be discussed in Part VI of

---

76. Amendment to Women's Employment Law - Prohibited, Limited, and Dangerous Work, 2001, § 1.

77. *Id.* § 2.

78. *Id.* § 3.

79. *Id.* § 4. The same is true for a female worker who is nursing and works in such an environment. *Id.*

80. *Id.* 5.

81. *Id.* 6.

82. In terms of comparison, it is important to note that the U.S. Supreme Court has explicitly rejected such a fetal protection policy instituted by a private employer. *See* U.A.W. v. Johnson Controls, 499 U.S. 187, 221 (1991). The Court held that such

this Article, the societal value placed on demographic growth has likely contributed to a view of sex equality that allows for different treatment of fertile age women in potentially dangerous workplaces.

4. Retirement Age

The Israeli workforce is dominated by labor unions, and working relationships are often defined through collective bargaining agreements, which establish benefits, promotions, and mandatory retirement ages.[83] The mandatory retirement age provision, it is argued, ensures constant introduction of new and motivated workers, while likewise ensuring monetary support for the older worker who has already contributed his most productive years of work.[84] However, prior to the 1980s numerous collective bargaining agreements dealt differently with male and female workers, imposing a retirement age on men that was five years later than that imposed on women.[85] Generally, the agreements mandated that men would retire at sixty-five while women were forced to retire by age sixty.[86] While some women saw this as a benefit in that they could retire earlier, pursue other interests, and receive economic support from the government, others resented the fact that these agreements cut short their professional or working lives simply because they were women.[87] Additionally, in forcing an earlier retirement age on women, these agreements effectively reduced the amount of money a working woman was able to earn in her lifetime, perhaps under the assumption that she was being cared for by a man who could continue to work and support his family for an additional five years.[88]

In 1987, Dr. Naomi Nevo, an Israeli sociologist, filed suit challenging these early retirement provisions in her collective

---

policies were prohibited as discriminatory under Title VII of the 1964 Civil Rights Act, noting "decisions about the welfare of future children must be left to parents who conceive, bear, support, and raise them rather than to employers who hire those parents." *Id.* at 189.

83. *See* MICHAEL SHALEV, LABOUR AND THE POLITICAL ECONOMY IN ISRAEL 24–26 (1992). The Histadrut, the General Organization of Workers in the Land of Israel, is Israel's largest union and is thus one of the most important organizations in the country. *Id.* at 23. "As a trade union, the Histadrut claims some three-quarters of all wage-earners as members and represents even more (about 85 per cent) in negotiating collective agreements, which are often legally binding on the entire relevant labour force." *Id.* at 23–24.

84. *See Nevo*, IsrSC 44(4) at 756 (discussing possible benefits of mandatory retirement age).

85. *See* Interview with Frances Raday, Professor, Hebrew Univ., Faculty of Law, in Jerusalem, Isr. (May 9, 2004).

86. *See id.*

87. *See id.*

88. *See id.*

bargaining agreement and claiming that the provision constituted sex discrimination.[89] While her case was dismissed at the regional level and by the National Labor Court, Dr. Nevo ultimately brought her case to the Israeli Supreme Court in 1990, which found in her favor.[90] However, prior to the decision of the Israeli Supreme Court, the Knesset, in response to this developing case, passed the Equal Retirement Age for Male and Female Workers Law in 1987.[91] The law mandated that

> where, in a collective agreement, a retirement age for women is set lower than for men, the woman will have a right, despite what is said in the collective agreement, to retire from her work at any age between her set out retirement age and that set out for the male worker.[92]

Thus, women workers were permitted to retire any time between age sixty and sixty-five, while their male counterparts could retire only at age sixty-five. The law equalized the situation to some extent in granting women the right to work as many years as their male counterparts but maintained a clear privilege for women. Unlike their male colleagues, women who worked under certain collective agreements could now choose either to retire earlier and receive benefits or to continue working an additional five years and then retire.

Knesset Member, Ora Namir, the head of the Committee on Labor and Welfare, explained the reasoning behind the statute during legislative debate. She noted the particular harm to women under the old system in that a woman, who must leave the work cycle to have and raise children numerous times throughout her career, was already prevented from working for the maximum amount of time she was able and from earning the salary increases and promotions that come with devotion to work and increasing experience.[93] "And here, just as they reach the age when their

---

89. Nevo v. The Jewish Agency, 18 P.D.A. 197 (1986); *see* Raday, *supra* note 32, at 181–82. Claims that early retirement constituted sex discrimination began before Dr. Nevo's case, when two professors at Hadassah Hospital brought suit in 1983. *See* Raday, *supra* note 32, at 181. When their case stalled in the courts, they, with their counsel, Frances Raday, turned for assistance to the Hadassah Women's Organization in the United States, which put pressure on the Israeli hospital to draft a new collective agreement with equal retirement ages for men and women. *Id.* Because this case was not won in the courts and therefore did not set any precedent, the issue was ripe for re-litigation in 1987 with Dr. Nevo's claim. *See also* FRANCES RADAY, *The Israeli Perspective on Gender, Labor, and the Family*, *in* THE STATUS OF WOMEN AT THE BEGINNING OF THE 21ST CENTURY – PROCEEDINGS 113 (2001) (discussing comparable early retirement claims).

90. *Nevo*, IsrSC 44(4) at 786.

91. Equal Retirement Age for Male and Female Workers Law, 1987.

92. *Id.* § 2.

93. DK (1987) 2167.

children are grown and the woman is available more to devote herself to her work, she is prevented from doing so by the early retirement age."[94] The law intended to correct this inequity by permitting the woman to work as long as the man. Namir, however, also sought to justify the female only option to retire earlier, which, she acknowledged, provided special treatment for women rather than absolute equality:

> I admit that this stands in contradiction to absolute equality between a woman and a man, but still the women are those who get pregnant, those who give birth; they are those who raise the children from a young age on their own. We must grant them much more than equality—so that they can get to real equality.[95]

The optional retirement age for women was instituted to both ensure equal opportunity for women who wanted to work as long as their male colleagues and to provide women with the privilege of opting out of later retirement in order to compensate them for the unequal contribution they had made to the creation of children and family.

In this way, the Equal Retirement Age for Male and Female Workers Law is the consummate example of Israel's equality through difference approach. In maintaining this privilege for women, the Israeli legislation acknowledges both biological differences in reproduction and societal differences in family care-taking, allowing both types of gender difference to inform the law. Special or asymmetrical treatment of women is justified as necessary in order to achieve real equality in a society where equality through sameness would ignore actual differences in gender roles.[96]

5. Exemption from Military

Like numerous countries, military service in Israel is obligatory for a number of years.[97] At the age of eighteen, a large percentage of Israelis are drafted into the military for a period of time before

---

94. *Id.* (discussing the Equal Retirement Age for Men and Women Law).

95. *Id.*

96. What is not discussed in the legislative debates surrounding this law is the potential that the law will create incentives to hire male workers over female workers. If a woman age fifty-nine is competing with a man of the same age for a position, the employer might well be advised to hire the man, who will not be able to retire for another six years. The female worker, on the other hand, may retire any time between sixty and sixty-five, making her a far greater economic risk. This, of course, is the traditional argument against special treatment of women—it both creates incentives to discriminate against women and further entrenches stereotypes of women as less productive and less valuable workers.

97. Defense Service Law, 5746-1986, 40 LSI 144 (1986) (Isr.).

entering the workforce or pursuing higher education.[98] Many establish contacts or networks in the army that lead to jobs and careers. Some remain in the army after their mandatory service is completed so that the military will pay for their university studies in exchange for their return to service after acquiring advanced skills.[99] As a result, military service has taken on enormous importance in the professional lives of Israeli citizens who essentially begin their careers in the military institution.[100]

A unique aspect of military service in Israel is that it is mandated for both men and women, albeit in different ways.[101] This sex neutral military obligation has led numerous outside observers to imagine that sex parity and formal equality are the norm in all of Israeli society. These observers assume that if there is equality in military participation, a traditionally patriarchal sphere, it must be the case in society at large as well. However, upon closer look it is clear that formal equality is not the goal or the norm in the Israeli military.[102] There has been much focus in recent years on the position of women in the Israeli military. This has led to considerable progress in the job opportunities available to women and in their treatment by higher-level officers.[103] Despite these changes, however, there remain essential differences in the demands made upon male and female citizens in the statute that creates mandatory military service.

The Defense Service Law was passed in 1949.[104] In its original form, the law defined men of military age to include those males between the ages of eighteen and forty-nine, while defining military-age women as females between eighteen and thirty-four yeas old.[105] The law mandated conscription of men for a period of twenty-four months and women for a term of only twelve months, and it exempted

---

98. *See* Guy I. Seidman & Eyal A. Nun, *Women, the Military, and the Court: Israel at 2001*, 11 S. CAL. REV. L. & WOMEN'S STUD. 91, 95–97 (2001) (discussing Israeli Defense Force recruitment practices).

99. *Id.* at 99 (discussing post-conscription activities of Israeli soldiers).

100. *See* Orna Sasson Levy, *Constructing Identities at the Margins: Masculinities and Citizenship in the Israeli Army*, 43 SOC. Q. 357, 376–77 (2002).

101. Defense Service Law, 40 LSI 144.

102. Much has been written about the lack of actual equality among male and female soldiers in the Israeli military, the positions they receive in the army, their treatment by higher-level officers, and the prevalence of sexual harassment. *See, e.g.*, Tzili Mor, *Law as a Tool for a Sexual Revolution: Israel's Prevention of Sexual Harassment Law –1998*, 7 MICH. J. GENDER & L. 291, 294 (2001); Seidman & Nun, *supra* note 98, at 95–97. Because the focus of this Article is on the legislative approach to sex equality, it focuses not on the position of women in the military, but instead on the legislation that makes different demands on male and female citizens entering the Israeli Defense Forces.

103. *See* Seidman & Nun, *supra* note 98, at 94 (discussing recently improved conditions for women in the Israeli Defense Forces).

104. Defense Service Law, 5709-1949, 3 LSI 112, 112 (1949) (Isr.).

105. *Id.*

from regular conscription women who were married, mothers, pregnant, or who declared that reasons of conscience or religious conviction precluded their service.[106] Since its inception, the statute has undergone numerous amendments affecting the term of service, the ages of conscription, reserve duty requirements, and exemptions.[107] However, despite the many changes, the statute has maintained its different demands on male and female citizens. In terms of the time period of conscription, the current law requires male Israelis to serve a period of three years, while female Israelis must serve only two years in an entry-level position.[108] More importantly for this Article, however, is the enduring provision exempting married women, mothers, and pregnant women, an exemption that has no parallel for male citizens.[109]

The legislative debates surrounding the initial passage of the Defense Service Law in 1949 shed some light on the exemption of married women and those who are or would soon be mothers. It is important to note that "the exemption of married women and mothers was practically a non-issue throughout the long debates."[110] The issue was raised in only five out of the forty-five speeches given on the Defense Service Law, suggesting that all were clearly in agreement that married women and mothers should be granted this privilege.[111]

David Ben-Gurion, who at the time served as both the Prime Minister and Minister of Defense, commented that a married woman should be granted the opportunity to stay at home and "be happy with her husband" and that "there is no destiny that is more important than motherhood."[112] A more telling comment came from a member of the secular Labor party who declared that "[h]e who worries about Jewish demography should worry about the family. We cannot afford to draft married women because it will decrease the birth rate."[113] Thus, at the same time that the fledgling Israeli government made clear its commitment to sex equality by taking the bold and unique step of conscripting both men and women, it also

---

106. *Id.*

107. *See* Defense Service Law, 5712-1952, 6 LSI 44 (1952) (Isr.); Defense Service Law, 5738-1978, 32 LSI 221 (1978) (Isr.); Defense Service Law, 5749-1989, LSI 25 (1989) (Isr.).

108. Seidman & Nun, *supra* note 98, at 95.

109. Defense Service Law, 5709-1949, 3 LSI 112 (1949) (Isr.); Seidman & Nun, *supra* note 98, at 99.

110. Berkovitch, *supra* note 5, at 610.

111. *Id.* Berkovitch also points out that in the years since 1949, this issue has never been raised in parliament or by the Israeli public. *Id.* at 611. "It is considered natural and obvious," she suggests, "and has never attracted the public attention." *Id.*

112. *Id.* at 610 (quoting DK (1949) 1568, 1569).

113. *Id.* at 611 (quoting DK (1949) 1627).

made clear its view that motherhood and the birthing of new citizens should be the priority for all Israeli women. This exemption from military service, which has endured since its institution in 1949, is justified much like the different treatment afforded to women in the employment laws—allowing them to refuse night work, forcing them to take a mandatory maternity leave, exempting them from work dangerous to fertility, and allowing them to retire early. All are justified by the acknowledgment that women have a role in Israeli society that is, at times, considered more important than that of a worker—women are wives and mothers, and their treatment in Israeli employment law acknowledges both the reality of this situation and society's reliance on women continuing to fulfill this role.

6. Preservation of Privilege

In addition to the specific grants of privilege to Israeli women in the Women's Employment Law, the Equal Retirement Age Law, and the Defense Service Law, several statutes contain a statement confirming the general commitment to special treatment or granting of privileges to Israeli women. These provisions indicate that such privilege does not, in the eyes of the law, constitute unlawful discrimination, a position that enables the accommodation approach.

The Israeli Equal Employment Opportunity law, passed in 1988, includes such a provision. Among the statements prohibiting discrimination and sexual harassment and clarifying the rights of male and female workers, the law also contains a provision called "Preservation of Privileges."[114] The Section states that the law "does not come to detract from privileges granted to female workers by legislation, collective bargaining agreements, or employment contracts and does not view such privileges as discrimination."[115] The legislative history surrounding this law makes clear that the preservation of privilege was essential to the creation of the Israeli sex equality regime. Ora Namir, Head of the Committee on Labor and Welfare, presented the bill to the parliament and suggested that "the basic principle of the law is the creation of equal opportunities in employment and not equality in conditions alone."[116] Moshe Katzav, Minister of Labor at the time of the law's passage, further highlighted this provision's importance in Israel's system of asymmetrical equality:

---

114. Equal Employment Opportunity Law, 1988, § 3 – Preservation of Privileges (author's translation).

115. *Id.*

116. DK (1988) 1984.

> The law allows for the preferential treatment of women workers in specific instances. [It] recognizes the societal reality of division of roles between partners in a couple and the placing on the woman, even if she works outside the home, of the concern for the household and care of the children.[117]

The Preservation of Privilege Section of this law was clearly intended to ensure the legislation's accommodationist approach to sex equality in employment. As Katzav indicated, the law recognizes the social reality that Israeli women carry additional burdens at home and thus allows for special treatment of women at work to compensate for their unequal social reality.

The Preservation of Privilege provision in the Equal Employment Opportunity Law of 1988 can be viewed as a broad statement of Israel's legislative approach to sex equality in employment: equality for women in employment is the end goal, but that end should be reached through acknowledgement and accommodation of women's biological and social differences. In granting women the option to refuse night work, instituting mandatory paid maternity leave, forbidding dangerous work to pregnant or fertile-age women, granting women the option of early retirement, and exempting wives and mothers from military service, the Israeli employment legislation clearly advocates the difference approach to equality in employment. In contrast to a formal or Aristotelian notion of equality, Israeli legislation does not aim to achieve absolute equality but rather grants women special privileges and exemptions as a means of accommodating their biological and social differences. The following Parts will address the ways in which the Israeli courts have dealt with the accommodationist approach of the legislation and will suggest reasons and circumstances of Israeli history and society that have created the context for Israel's equality through difference regime.

IV. ISRAELI CASE LAW ON SEX EQUALITY IN EMPLOYMENT

While the primary focus of this Article is the Israeli legislative approach to sex equality in employment, the case law on the subject, while not extensive, has certainly served to further women's rights and positions in the workplace. However, it is difficult to see an overwhelming trend in the Israeli Supreme Court's approach to sex equality in employment, both because of the sources upon which it relies and because of the structure of the judiciary. The Israeli judicial system is only fifty-seven years old, and thus, it relies on

---

117. DK (1988) 1984, 1989.

precedents and legal theories from numerous countries and systems.[118] In addition, the court, which is a fourteen member body, typically sits in three or, in important cases, five judge panels, allowing for only a few opinions on an issue.[119] The individual judges each have different approaches to the concept of equality, in particular sex equality, resulting in what Frances Raday refers to as "a mosaic of different opinions."[120]

Raday, who has researched extensively the philosophies of numerous individual justices of the supreme court, suggests that their approaches to the issue of sex equality range from "a traditional Aristotelian approach" to a "fully socio-dynamic approach" but that each judge seems to maintain internal consistency in his or her views.[121] Regarding the court as a whole, however, she argues that there has been a clear shift to socio-dynamic—or what this Article has referred to as difference or accomodationist—equality.[122] While Raday's study dealt with the broad concept of equality in Israeli law, her argument holds true with regard to the treatment of sex equality in employment laws in particular.[123]

---

118. Gary J. Jacobsen, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763, 1774 (2004).

119. *See* Daniel J. Rothstein, *Adjudication of Freedom of Expression Cases Under Israel's Unwritten Constitution*, 18 CORNELL INT'L L.J. 247, 279 (1985) (noting that while the Court typically sits in three judge panels, it can also "sit in panels of odd numbers over three by order of the President of the Court, the Deputy President, or the three-judge panel originally assigned to the case"). The court's inconsistency results both from structural issues and from the court's lack of clarity over whether it is a constitutional or law-making court or a simple court of appeal.

> Any description of the Court's positions must be qualified in light of the Court's practice of hearing cases in less than full panels. . . . The difficulty of analyzing the Court as a body is exacerbated by the judges' tradition, apparently inherited from England, of publishing separate opinions based on very similar grounds of decision.

Id. at 261, n.83. *See also* Courts Law [Consolidated Version], 5744-1984, § 26, 1123 S.H. 198, 202.

120. Raday, *supra* note 6, at 448.

121. *Id.*

122. *Id.* at 448.

123. It is important to note that there has been much discussion regarding the impact of the 1992 Basic Law, Human Dignity and Liberty, on the equality jurisprudence of the court. While the law does not explicitly mention the term "equality," a number of justices believe that its principles mandate equality and that the law can be used as a basis for future holdings invalidating discrimination. Raday, *supra* note 6, at 382, 418. Israeli law professor Shimon Shetreet describes this law, along with the Basic Law, Freedom of Occupation, as giving "fundamental rights a preferred normative status." SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 431 (1994). He believes that these two laws "will allow in the future the invalidation of laws which conflict or contradict them." *Id.*

In the 1970s, the equality cases in the Israeli Supreme Court were clearly decided through a formal equality prism. Justice Agranat set the tone for these cases in 1971 in *Boronovski*, where he laid out the basic Aristotelian formula for equality that has since been cited in virtually every Israeli case dealing with the subject.[124] In 1976, the court decided its first sex equality in employment case, *Lifshitz-Aviram v. Law Society*.[125] The case emerged out of the Israeli Law Society's rule requiring all new attorneys to perform a two-year internship (or *staj*) before they are considered full members of the profession.[126] The rule contained an exception for those serving reserve duty in the military.[127] Despite the month-long absence for reserve duty, this time would nevertheless be counted towards the fulfillment of the internship requirement.[128] However, the same exemption was not applied to women lawyers who became pregnant during their two-year internships.[129] Under the Women's Employment Law of 1954,[130] such a woman was forced to take a three-month maternity leave, during which time it was a criminal offense to employ her. Despite the mandatory nature of this leave, it was not given the same status as reserve duty leave and was not counted towards the completion of the internship requirement.[131] As a result, female attorneys who gave birth during their internship years were forced to work additional time to make up for the mandatory leave.[132] The plaintiff, Pnina Lifshitz-Aviram, claimed that this difference constituted sex discrimination when compared with the treatment of the male intern serving reserve duty.[133]

The court's response to this argument was short and wholeheartedly negative. The court considered the case through the prism of formal equality and compared the two parties at issue: the military reserve soldier and the pregnant woman.

---

124. Raday, *supra* note 6, at 390 (citing Boronovski v. Chief Rabbinate [1971] IsrSC 28(1) 7). *Boronovski* dealt with a claim by a married woman that the Rabbinic license granting her husband permission to re-marry without her consent to a divorce was sex discrimination because under the applicable Rabbinic law, his consent would be required should she seek a divorce. *Id.* She also claimed that it constituted religious discrimination as such a rule only applied to Jewish citizens. *Id.* at 391. The court, while recognizing the injustice to the woman, refused to overrule the Rabbinic court, perhaps recognizing the political ramifications such a decision would have. *Id.* at 390. Despite the court's failure to find discriminatory treatment, the dictum regarding formal equality has been cited in many subsequent cases. *Id.* at 392.

125. HCJ 335/76 Lifshitz-Aviram v. Law Society [1976] IsrSC 31(1) 250.

126. Raday, *supra* note 6, at 393.

127. *Id.*

128. *Lifshitz-Aviram*, IsrSC 31(1) 250.

129. *Id.*

130. *See supra* Part III.B.2 for a full explanation of the maternity leave laws.

131. *Lifshitz-Aviram*, IsrSC 31(1) 250.

132. *See id.*

133. *Id.*

> There is no negative discrimination against [the pregnant woman] as opposed to the Reserve duty person because, as is known, there is no negative discrimination except in a case in which the qualities are the same. This is not the case here, because even if you admit that there is equality from the perspective that the pregnant woman fulfills a position that should be encouraged from a national standpoint, their other features are different, and hence, it is not unlawful for the Bureau to privilege the soldier (male or female) over the pregnant woman.[134]

Thus, despite the fact that the court recognized that both the birthing mother and the reservist fulfilled functions of national importance, and despite the fact that the leave taken by each was mandated by law, the court, with little explanation, found them sufficiently different to justify differential treatment. Subsequent to this case, the Law Society voluntarily changed its policy to exempt maternity leave from the *staj* requirement just as it did reserve duty.[135] Thus, while the court in 1976 was operating under a formal equality scheme, the parliament and administrative agencies had adopted a more accommodationist approach to women's roles as mothers and caretakers, an approach that was not only evident in the employment laws at the time but also in the response of the Law Society to this supreme court case.

Over a decade later, the court again applied the formal equality approach to a question of women's rights but emerged with a more favorable result for the female complainant. In *Shakdiel v. Minister of Religious Affairs,* a local government council proposed that a religiously observant woman be appointed to the religious council for the area.[136] The local rabbi opposed her appointment.[137] The woman was ultimately excluded from the religious council because she was a woman, because women had never before served on these religious councils, and because it was argued that her presence would impair the proper functioning of the council.[138] The woman filed suit claiming that her gender was an irrelevant ground for disqualification and that this exclusion constituted unlawful sex discrimination.[139] While this was not an explicitly employment law-related case, the ramifications for sex equality in employment were clear. The case addressed a government agency's right to exclude a woman from a specific position solely because of her sex.

---

134. *Id.* at 252.
135. Raday, *supra* note 6, at 394.
136. HCJ 153/87 Shakdiel v. Minister of Religious Affairs [1988] IsrSC 42(2) 221, 223.
137. *Id.* at 225.
138. *Id.* at 232.
139. *Id.* at 232–33.

In a lengthy opinion that discussed the nature of the religious councils as governmental, administrative bodies and the stance of the Jewish law (*Halachah*) regarding a woman's participation in such a body, Justice Elon held that the woman should be included in the composition of the religious council and required one of the already installed male members of the council to vacate his seat in her favor.[140] Justice Elon based this decision on a formal equality approach to the law. He compared the two groups at issue, men and women, and finding no relevant difference that would justify different treatment, mandated equal treatment such that the woman be appointed to the religious council.[141] Unlike *Lifshitz-Aviram*, then, this case demonstrated the court's efforts to grant women equal rights using the Aristotelian or formal equality approach.

Only two years later, in 1990, in a case dealing directly with employment law issues, the court began to embrace the accommodationist or difference approach that had shaped the legislature's actions for decades. In *Nevo v. National Labor Court*,[142] the plaintiff, Dr. Naomi Nevo challenged the Jewish Agency's Pension Rules that mandated women's retirement at age sixty while requiring men to retire at age sixty-five.[143] Nevo, a sociologist who worked for the Jewish Agency, originally brought suit in the Regional Labor Court.[144] She claimed that the early retirement aspect of her collective agreement constituted unlawful sex discrimination and sought, as a result, to have that provision declared void.[145] Both her actions at the regional level and at the National Labor Court were dismissed,[146] and Dr. Nevo then filed an appeal with the supreme court sitting as the High Court of Justice.[147]

---

140. *Id.* at 293.

141. *Id.*

142. Nevo, IsrSC 44(4) at 749.

143. The Pension Rules constituted a section of the Terms of Employment that was derived from an agreement between the Jewish Agency and the Central Committee of the Union of Office Workers in Israel. *Id.* at 756.

144. *Id.* at 751.

145. *See supra* note 89.

146. The National Labor Court, relying on the fact that the Knesset had only passed laws prohibiting sex discrimination in hiring and in wages, found that it could not invalidate the different retirement age in the Pension Rules because it was outside of the intentions of the legislation. *Id.*

147. *Nevo*, IsrSC 44(4) at 751. The Israeli Supreme Court sits both as the highest court of appeal with discretion to hear appeals from judgments of the district courts and as the High Court of Justice, which has exclusive jurisdiction to deal with "matters in which it deems it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal." Rothstein, *supra* note 119 at 279 n.191 (citing Basic Law of Adjudication,1984, S.H. 78, 80). The supreme court, when sitting as the High Court of Justice (*Bagatz* in Hebrew, which is an acronym meaning High Court of Justice), may review cases on appeal from the

However, between the dismissal of her case by the National Labor Court and its review at the supreme court, the Knesset passed legislation to remedy what was viewed as an unjust verdict at the National Labor Court.[148] In 1987, the Knesset passed the Equal Retirement Age for Male and Female Employees Law, requiring parity of retirement age in collective agreements.[149] Where the agreement had provided for an earlier retirement age for women, however, the law allowed female workers to retain the right to retire at that earlier age.[150] This law was passed after Nevo had filed her petition and applied only prospectively, giving it little if any legal impact on the case before the supreme court.[151] Thus, the court was faced with deciding whether the old Pension Rules constituted sex discrimination and what, if any, weight to give the newly enacted Knesset law on retirement age.

The court began, as it has begun most cases on equality, by citing to *Boronovski* and Justice Agranat's formulation of the Aristotelian conception of equality: "[I]t is necessary to treat equally people between whom there are no substantial differences which are relevant to their object."[152] The court then questioned whether gender differences justified different retirement ages in light of the dual purposes behind the mandatory retirement age: (1) enabling the employee to rest after years of service and (2) allowing the employer to revitalize his staff with new, young workers.[153] The attorney for the Jewish Agency argued that the earlier retirement age constituted a privilege given to women in recognition of their dual roles of worker and wife/mother and added that many women supported it.[154] The court, in rejecting this argument, noted that when women reach the age of sixty, they have completed their obligations as mothers, so the distinctions between men and women are wholly irrelevant at that point.[155]

In addition, the court recognized that there are numerous "negative personal, mental, and social consequences" to retirement in that retirees often feel that they are no longer contributing to

---

National Labor Court on the basis of *ultra vires*—a substantial legal error or neglect of the rules of natural justice. *See* SHETREET, *supra* note 123, at 99.

148. *See* Raday, *supra* note 32, at 181.

149. *See* Equal Retirement Age for Male and Female Employees Law; *see also* Raday, supra note 32, at 181.

150. *See* Equal Retirement Age for Male and Female Employees Law, *supra* note 149.

151. *Nevo*, IsrSC 44(4) at 771.

152. *Id.* at 752.

153. *Id.* at 753.

154. *Id.*

155. *Id.* at 754.

society.[156] The court also noted that there are negative economic consequences to early retirement: (1) women who have not amassed full pension benefits by age sixty lose the ability to accrue more time and to earn more upon retirement; (2) they lose five years of full salary, which is worth more than pension payments; and (3) they lose the ability to advance in careers that required many years of advanced training and education before joining the workforce.[157] The court then explicitly stated that early retirement is particularly harmful to women workers:

> Many women cannot devote the bulk of their energies to work during the period when they are bearing and raising their children. As a result, they lose many years necessary for career advancement. . . . However, when a woman reaches the age of sixty, and her children in most cases have already left their parents' home . . . it is precisely at this moment that the woman, if she is interested, is able to . . . devote more time to work. To *force* her, because she is a woman, to retire from her work at *this* stage of her life and abandon the realization of her hopes in this area is indeed discrimination.[158]

The court concluded that early retirement should not be viewed as a privilege for women, but that it instead constituted unlawful discrimination in violation of the principles of the Women's Equal Rights Law.[159]

The court then added a highly significant, although little emphasized, remark. Justice Bach, who wrote the majority opinion, stated: "I do not find fault with giving women the *option* to retire; this is likely to be to the advantage of all concerned."[160] Finally, the court made mention of the newly enacted Male and Female Workers (Equal Retirement Age) Law and held that despite its non-retroactivity, the law did not preclude a finding that the Pension Rules constituted unlawful discrimination.[161] Despite a thorough treatment of all the issues involved in this case, Justice Bach never returned to his comment approving of an option for women to retire any time between ages sixty and sixty-five. In this one exceptionally important comment, however, the court changed direction from focusing purely on formal equality to an accommodation approach that mandated parity but still allowed for some privilege to remain in the hands of female workers.[162] In so doing, the court essentially

---

156. *Id.*
157. *Id.* at 754–55.
158. *Id.* at 756 (emphasis in original).
159. *Id.* at 765–69.
160. *Id.* at 756 (emphasis in original).
161. *Id.*
162. Interview with Frances Raday, Professor, Hebrew Univ., Faculty of Law, in Jerusalem, Isr. (May 9, 2004). Professor Raday, who argued this case on behalf of the

approved of the legislature's initiative in this area which, like many of its laws, took an "equality through difference" approach to women's treatment in the workplace.

Roughly five years later, the supreme court was again asked to evaluate an allegedly discriminatory policy, this time dealing with the military, and had an opportunity to further develop its accommodation approach. The case, *Miller v. Minister of Defense*, involved the military's ban on female fighter-pilots in the Israeli Air Force.[163] While this case did not explicitly deal with an employment law or a provision of a collective agreement, the military is widely recognized as the initial gateway into the labor market. In addition, Alice Miller, the plaintiff, made clear in her arguments to the court that it was nearly impossible to become a civilian pilot for an Israeli airline without first serving as a pilot in the military, making this case particularly relevant to employment law issues.[164]

Alice Miller held a pilot's license in South Africa, from where she had immigrated to Israel.[165] When she reached the point of mandatory military service, Miller requested to take the tests to enter fighter-pilot training but was rejected because, the Israeli Defense Force (IDF) responded, women could not serve in combat units.[166] When Miller appealed to the supreme court for an injunction to force the military to allow her to take the tests, the IDF argued that women were precluded from serving as fighter-pilots because of statutory provisions that created relevant distinctions between the genders.[167] Specifically, the military pointed to provisions mandating shorter periods of service for women, an age cap for women in the reserves that was lower than that for men, and the prohibition on mothers serving in the reserves.[168] The IDF argued that based on these exemptions and prohibitions, women could not be counted on in the "'critical mass' of pilots needed for the routine operational plan of the Israeli Air Force" nor would it be fiscally responsible to invest large sums of money in training women to be pilots when they could not be relied on to serve for long periods after the training was complete.[169]

---

plaintiff, has commented that she believed the court wanted her to argue for absolute formal equality so that it might base its decision on that basis but that it was always willing to allow for optional earlier retirement as part of its decision.

163. HCJ 4541/94 Miller v. Minister of Defense, [1995] IsrSC 49(4) 94 (Isr.).

164. *See* Seidman & Nun, *supra* note 98, at 116; *see also Miller*, IsrSC 49(4) at 164.

165. *Miller*, IsrSC 49(4) at 103; *see also* Seidman & Nun, *supra* note 98, at 115.

166. *Miller*, IsrSC 49(4) at 103–04.

167. *Miller*, IsrSC 49(4) at 109; *see also* Seidman & Nun, *supra* note 98, at 116.

168. *Miller*, IsrSC 49(4) at 108–09; *see also* Seidman & Nun, *supra* note 98, at 116; *see supra text* accompanying notes 78–86.

169. Seidman & Nun, *supra* note 98, at 116–17.

The case was referred to a five-justice panel because of its importance and was ultimately decided by a 3-2 majority.[170] Justices Mazza, Dorner, and Strasberg-Cohen, the majority justices, all concluded that accommodation was a necessary component of sex equality law.[171] The court began by citing to Justice Agranat's Aristotelian formula for equality first expounded in the *Boronovski* case.[172] It then held that under a formal equality scheme, there were no relevant differences between men and women to justify this unequal treatment, and therefore, the exclusion of women from the pilot's course constituted unlawful sex discrimination.[173] The justices recognized that the differences that did exist between the sexes emerged out of statutory provisions that made unequal demands on men and women.[174] However, the court did not advocate the equalization of these underlying laws. Justice Mazza found that the differential treatment in the statutes was "intended to ease women's lot, obviously so in view of the biological differences between the sexes" but that there was an obligation to accommodate these differences and, particularly, an obligation on the state to pay the cost of this accommodation.[175] Justice Dorner similarly argued:

> The interest in guaranteeing the dignity and status of women, on one hand, and the continuation of society's existence and the rearing of children, on the other, demands—as far as possible—that women should not be . . . discriminated against *vis-à-vis* men. The social regulations—including the legal regulations—must be adapted to their needs.[176]

Thus, Justices Dorner and Mazza supported the statutory differences in the Defense Service Law's treatment of men and women, despite the cost to the Air Force that resulted. In this way, both justices advocated an explicitly accommodationist approach based primarily on society's need for women to continue in their roles as mothers.

The third member of the majority, Justice Strasberg-Cohen, similarly found that there was a relevant difference between the sexes and that it was created by the various statutory exemptions of women from military service. She argued that where those differences could be "neutralized at a reasonable cost," they should be accommodated in order to achieve equality.[177] Each of the majority

---

170. *Miller*, IsrSC 49(4) at 103.
171. *Id.* at 114.
172. *Id.* at 109.
173. *Id.* at 109–11.
174. *Id.* at 113.
175. Raday, *supra* note 6, at 420 (quoting *Miller*, IsrSC 49(4) at 114).
176. Raday, *supra* note 6, at 422–23 (quoting *Miller*, IsrSC 49(4) at 142).
177. Raday, *supra* note 6, at 430 (quoting *Miller*, IsrSC 49(4) at 121). Raday argues that Justice Dorner, while adopting the accomodationist approach, maintained an element of traditionalism as she argued for the accommodation of women both as

justices used a formal equality model to invalidate the actual discriminatory practice but advocated an approach to sex equality that accommodated differences between the sexes, whether they were biological or socially created. In this case, the court truly embodied the legislation's approach to sex equality, which does not permit the existence of detrimental discrimination against women but allows for some differential treatment when it is viewed as positively benefiting women and accommodating their needs as both workers and family care-takers.[178]

V. CONTRASTING ISRAELI AND U.S. APPROACHES TO SEX EQUALITY IN EMPLOYMENT

The U.S. approach to sex equality has emerged through legislation, case law, and the Supreme Court's interpretation of the Constitution and federal statutes. It is a substantial and complex body of law that cannot be fully addressed in this Article. Rather, the purpose of this Part is merely to describe briefly the overall U.S. approach to equality between the sexes, to highlight the differences between the U.S. and the Israeli systems, and to point out the small areas of overlap.

The dominant paradigm through which sex discrimination is analyzed in the United States is the "equality model" in which "women cannot be treated differently than men, at least not where women and men are similarly situated."[179] This is essentially a formal equality approach that compares the two parties at issue, in this case the two sexes, assessing the ways in which they are similar or different and the relevance of those differences in the case at hand. This model has both benefits and flaws. The model provides a clear test for judges who might otherwise be swayed by preconceived notions and gender biases. On the other hand, "the equality model

---

child bearers, the biological characteristic, and as childrearers, the socially created role. *Id.* at 424. Justice Strasberg-Cohen, she argues, is the only justice who argued for accommodation solely on the basis of biological difference. *Id.* However, while Raday may argue that Strasberg-Cohen's approach is the most progressive, Dorner's approach most accurately reflects the Israeli legislative approach which, while accommodating for reproductive differences, also accommodates for women's social role as wives and mothers. *Id.*

178. The concept of affirmative action for women in employment laws or in any sector of society is beyond the scope of this Article, as it involves differential treatment as a means of remedying historical discrimination rather than as an attempt to accommodate present day biological and social differences. Israeli legislation and case law, however, do discuss the concept of affirmative action as is evident in the Israeli Supreme Court case, HCJ 453/94 Isr. Women's Network v. Minister of Transp. [1994] IsrSC 48(5) 501.

179. Burns, *supra* note 9, at 278.

has been limited in its ability to address underlying patterns of inequality."[180] This approach to sex equality emerged out of the model used to address racism and race discrimination in the United States, where it was clear that any biological difference should play no role in assessing the treatment of a racial group. As a result, the use of this model in combating sex discrimination has, at times, ignored real differences between men and women "given that women bear children and men do not."[181] Both legislation and Supreme Court jurisprudence have, in recent years, acknowledged the problem of reproductive difference to some extent, but the dominant approach to sex equality has remained the formal equality approach with a recognition that some alteration must be made to deal with the impact of historic discrimination and with biological differences.[182]

This formal equality model was not always the dominant approach to the position of women in the United States. The laws and cases of the late nineteenth century and the early part of the twentieth century consistently maintained that women deserved both protection and special treatment.[183] In one of the most famous cases of the early twentieth century, *Lochner v. New York*, the Supreme Court rejected the notion that labor could be regulated based on the need to protect an individual's right to contract.[184] At the same time, numerous states passed laws regulating the number of hours women could work, prohibiting women from working at night, and setting a minimum wage for female workers.[185] When this issue reached the Supreme Court in *Muller v. Oregon* in 1908, the Court upheld

---

180. *Id.* at 279.

181. *Id.* at 278.

182. One of the dominant influences on the development of the U.S. approach to sex equality is the economic and political model in which the United States operates. "[T]he United States economy is a private market economy in which issues of public health and welfare, such as healthcare and childcare, have been part of that private, not public attention." *Id.* at 276. In contrast to the political systems of Israel and much of Western Europe which emerged out of socialist influences, the United States' capitalist approach means that areas in which men and women operate differently, particularly child birth and childcare, have been viewed as outside the purview of government intervention so that "the family has been treated from the public-sector perspective as a private personal concern, not a matter for the national public agenda." *Id.* As a result, U.S. law prohibits sex discrimination but does not affirmatively step in to alleviate burdens that widen the gap between men's and women's ability to participate in public life.

183. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908).

184. Lochner v. New York, 198 U.S. 45, 61 (1905) (invalidating a New York state law that limited the hours that bakers could work to ten per day on the grounds that it constituted "an illegal interference with the rights of individuals to make contracts").

185. See Alice Kessler-Harris, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES, 183–87 (1982) for further discussion of the development of such protective legislation and the motivations and justifications behind it.

Oregon's protective legislation for the female worker on the grounds that "her physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man."[186]

The U.S. approach has undergone a drastic transformation in the last fifty years so that unlike the Israeli system, which maintains some special treatment legislation, protective legislation for women is no longer legal in the United States. Rather, under the formal equality model created by the legislation and case law of the 1960s and 1970s, policies that favor or provide special treatment to women constitute sex discrimination just like policies that favor men.[187] With the emergence of the civil rights movement and the advent of anti-discrimination law, special treatment was dismissed as a form of discrimination that both perpetuated stereotypes of the sexes and hindered women's ability to participate in all aspects of public and private life.[188]

The history of legal remedies for sex discrimination in the United States began in the 1960s. The Equal Pay Act, which prohibited sex discrimination in employee wages, was passed in 1963.[189] Emerging out of the formal equality model, the statute essentially required courts to inquire whether the disparity in pay between a man and a woman resulted from sheer discrimination or whether there was a legitimate explanation for the difference.[190] This statute was later eclipsed by the Civil Rights Act of 1964, which combats discrimination in public accommodation facilities, education, federal programs, employment, and voting.[191] Title VII of the Civil Rights Act specifically addresses employment, prohibiting discrimination on the basis of race, color, religion, sex, or national origin.[192] The Act includes an exception to the above prohibition for religion, sex, and national origin for what has come to be referred to as a "BFOQ" or

---

186. *Muller*, 208 U.S. at 422.

187. *See* Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201 (discussing the basic statutory structure of "formal equality models").

188. Burns, *supra* note 9, at 275–78.

189. 29 U.S.C. § 206(d) (1963).

190. For a more elaborate discussion of this statute, see B.A. BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES (1975).

191. *See* HOPE LANDRINE AND ELIZABETH A. KLONOFF, DISCRIMINATION AGAINST WOMEN: PREVALENCE, CONSEQUENCES, AND REMEDIES 177 (1997).

192. 42 U.S.C. § 2000e–2(a) (1964). It is a widely told story that "sex" was added to Title VII by Southern Democrats who sought to destroy the legislation and believed that the addition of "sex" would be so outrageous as to ensure that the bill would not pass. Instead, Title VII passed with the prohibition on sex discrimination and became, arguably, the most important tool in the fight for sex equality in the United States. *See* LANDRINE & KLONOFF, *supra* note 191, at 177.

"bona-fide occupational qualification" that is "reasonably necessary to the normal operation of that particular business or enterprise."[193]

The courts have interpreted Title VII to cover both disparate treatment discrimination, where an employer's policy facially discriminates against women, and disparate impact discrimination, where a "policy that appears to be sex-neutral" in practice has discriminatory results.[194] Despite this flexibility in interpretation of what constitutes discrimination, Title VII maintains a formal equality model, allowing for differential treatment only where there is a difference between the sexes that is relevant to the particular employment situation. Thus, the primary means of achieving sex equality in the United States is through the removal of obstacles to opportunity, in particular through the prohibition of discrimination.

This attempt to eliminate discrimination as a means of achieving sex equality is common to both Israel and the United States. However, it is in the treatment of biological and socially created differences between the sexes that the laws of each country diverge. This is particularly evident in the interface between pregnancy, childrearing, and work. The U.S. Supreme Court initially dealt with reproductive differences in *Geduldig v. Aiello*, in which the plaintiffs challenged a state disability insurance plan that, despite covering a comprehensive list of disabilities, excluded pregnancy.[195] *Geduldig* was followed two years later by *General Electric Co. v. Gilbert*, in which female employees sued under Title VII because they had been denied disability benefits while absent from work as a result of pregnancy.[196] In both cases, the court employed a formal equality analysis and compared two categories of workers: pregnant women and non-pregnant persons of both sexes. Despite the fact that only women become pregnant, the Supreme Court held that discrimination on the basis of pregnancy did not constitute unlawful sex discrimination because there were female workers in both categories.[197] The Court's formal equality analysis resulted in this strange conclusion. As a result, Congress responded in 1978 with the passage of the Pregnancy Discrimination Act (PDA) as an amendment to Title VII, explicitly overruling the *Gilbert* decision.[198] The PDA specifically provides:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related

---

193. 42 U.S.C. § 2000e–2(e).
194. LANDRINE & KLONOFF, *supra* note 191, at 178.
195. Geduldig v. Aiello, 417 U.S. 484 (1974).
196. Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976); *see also* Burns, *supra* note 9, at 293.
197. *Gen. Elec. Co.*, 429 U.S. at 134.
198. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978).

> medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . ..[199]

The PDA requires the courts to view differential treatment on the basis of pregnancy as a form of sex discrimination.

More recent case law interpreting Title VII and the PDA has created a mixed set of precedents that, for the most part, maintain formal equality with a glimpse of accommodationist leanings. In the first case, *California Federal Savings and Loan v. Guerra*, the Supreme Court upheld a state law that required four months of unpaid maternity leave against a challenge that the law violated the PDA, which required absolute equality between pregnancy and other disabilities. [200] The Court in *Guerra* took its most accommodationist approach yet, choosing to view the PDA as a floor and not a ceiling, and allowed for preferential treatment of pregnancy as a means of achieving equal opportunities for women.[201]

Only four years later, however, the Court seemed to take an entirely contradictory approach in *U.S. Automobile Workers v. Johnson Controls*, in which it struck down, under Title VII, an employer fetal protection policy that prohibited women of fertile age from working in a workplace that had large amounts of lead exposure.[202] The Court famously stated: "Decisions about the welfare of future children [must] be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents or the courts."[203] The Court in *Johnson Controls* prohibited differential treatment of pregnancy when the result was to exclude women from employment based on their ability to have children.[204] Thus, the Supreme Court's jurisprudence on pregnancy and work depicts a somewhat inconsistent path that seeks primarily to maintain formal equality between the sexes while permitting some differential treatment when it benefits women.

The most recent addition to legislation regarding work and pregnancy came with the passage of the Family Medical Leave Act (FMLA).[205] The statute requires employers with more than fifty employees to allow workers to take up to twelve weeks of unpaid leave to care for a new infant or an ill family member, while

---

199. *Id.*

200. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

201. *Id.* at 285.

202. *Johnson Controls*, 499 U.S. at 187. See *supra* note 82 for an explicit comparison of this case to the Israeli legislation instituting similar fetal protection policies.

203. *Johnson Controls*, 499 U.S. at 188–89.

204. *Id.* at 206.

205. Family Medical Leave Act, 29 U.S.C. §§ 2601–2654 (1999).

maintaining the right to be restored to the same or an equivalent position when they return to work.[206] The statute's language is intentionally gender neutral, allowing both male and female workers to take advantage of this leave. However, its unpaid nature makes it difficult for those with little savings or lower incomes to make use of the time off. There has been much debate surrounding the effectiveness of the FMLA, and numerous studies have assessed its use by each gender.[207] Despite the controversy and criticism, the FMLA is still valid and has not been modified or supplanted since its original passage in 1993.

In comparing the Israeli and U.S. approaches to sex equality in employment, a number of differences are immediately clear. While the Israeli approach allows affirmative government involvement in the regulation and protection of women workers, the U.S. approach focuses almost exclusively on prohibiting discrimination as a means of achieving equality. Additionally, while Israeli legislation maintains some special treatment of women to alleviate the burden of being both workers and family care-takers, U.S. legislation mandates gender neutral approaches to the family-work dilemma in an effort to maintain the formal equality model. What is not immediately clear, however, is which system is more successful in achieving sex equality in employment and to what extent success is based on the unique needs of each individual society. To better understand both the impact and the emergence of an equality scheme, Part VI will examine the factors in Israeli history, society, and law that created the equality through difference approach.

VI. SOCIAL, HISTORICAL, AND STRUCTURAL UNDERPINNINGS OF ISRAEL'S EQUALITY THROUGH DIFFERENCE MODEL

The use of a particular model or theory of equality is dependent in large part on the dominant values and priorities of the society in which it is used. The notion of equality is itself a social product, constructed out of already existing ideologies, practices, and structures. The laws and legal theories that enforce a notion of equality tend to both reflect these already existing social norms and reproduce them. The notion of formal equality, which treats like individuals alike, is attractive to U.S. society, a capitalist economy in which the focal point is the individual person and his or her ability to

206. *Id.* § 2612.

207. For additional discussion and assessment of the FMLA, see Samuel Issacharoff and Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994); see also Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707 (2000).

succeed. Thus, in arguing for equal treatment of a specific group in the United States, it is beneficial to focus on the ways in which individual members of that discriminated against group are identical to members of a group who are treated with dignity and respect.

In contrast, capitalism and individual rights have not been of primary importance in Israeli society. Instead, in Israel the equality through difference model arose out of and tends to reproduce numerous social realities, including: Israel's strong familial tradition, the republican or collectivist ideology that dominates Israeli society and politics, a demographic crisis and the resulting emphasis on motherhood, the impact of Jewish law and its maintenance of sex segregated spheres, and the influence of western European policy approaches to family and work. These factors are societal goals, social norms, and political realities, and they create the context in Israel in which the accommodationist approach to sex equality thrives.

A. *Israel's Collectivist Ideology*

In their recent book, BEING ISRAELI, two prominent Israeli sociologists, Gershon Shafir and Yoav Peled, argue that there are three primary political discourses that frame Israeli society and law: the republican discourse, the liberal discourse, and the ethno-nationalist discourse.[208] They define the liberal discourse as one in which the role of politics is to "protect individuals from interference by governments, and by one another, in the exercise of the rights they inalienably possess."[209] The republican discourse, on the other extreme, is one in which members of the community "experience their citizenship . . . as active participation in the pursuit of a common good" and in which greater obligations to society "are accompanied by exceptional privileges."[210] Finally, the ethno-nationalist discourse suggests that common descent is a pre-requisite for full citizenship with no obligation to contribute to the state beyond embodying this identity.[211]

Shafir and Peled argue that the ethno-nationalist and liberal discourses are currently engaged in competition for supremacy in

---

208. SHAFIR & PELED, *supra* note 41, at 3. Shafir and Peled have alternately referred to these discourses as "citizenship discourses," which they define as "political and linguistic strategies of membership fashioned out of alternative combinations of identities and claims." Gershon Shafir and Yoav Peled, *Citizenship and Stratification in an Ethnic Democracy*, 21 ETHNIC AND RACIAL STUD. 408, 409 (1998). These discourses serve to stratify society and determine validity of claims to rights and privileges of membership in the community. *Id.*

209. SHAFIR & PELED, *supra* note 41, at 4.

210. *Id.* at 5.

211. *Id.* at 6.

Israeli society.[212] However, they maintain that the country was born out of the republican or collectivist ideology, in which, unlike the liberal discourse, the focus is not on the individual and his rights but rather on the community's needs and goals and the ways in which individuals can contribute to this community.[213] This ideology was a product of the Labor Settlement Movement of the early 1900s, which created Jewish settlements in British-controlled Palestine.[214] The ethos of the early Jewish settlers was *chalutziyut*, or pioneering. They were committed to the Jewish people and to redeeming their land, a philosophy which Peled has argued was distinctly republican in its approach: "Like most nationalist ideologies, it embodied a collective sense of mission for an ethnically defined community. . . . While individual rights and the procedural rules of democracy were widely respected, they were clearly seen, in line with republican thinking, as secondary in value to the collective Zionist mission."[215]

The republican ideology remained dominant in Israel even as the country transitioned from early settlements to a nation-state. In fact, Shafir and Peled argue that a new republican virtue "was invoked to

---

212. *Id.* at 21. Shafir and Peled argue that liberalism and ethno-nationalism are on the rise in Israel and that as a result, the republican discourse will decline in importance. *Id.* However, this argument in BEING ISRAELI was published before the current *intifada* (the second) and recent war in Lebanon emerged as dominant and defining factors in Israeli society. It could be argued that the state of conflict and renewed terrorism have caused a resurgence of the republican discourse, to which people tend to cling when under threat. A renewed devotion to the state and the community over the needs of the individual is a natural response to threats from the outside. Thus, the theory proposed by Shafir and Peled is useful for purposes of this Article in understanding the origins of the ideologies operative in Israel but may not provide an accurate picture of current and future developments. Additionally, Yoav Peled, in a 1992 article that appears to be a precursor to his recent book, argued that "the dominant strain in Israel's political culture may be termed *ethno-republicanism*. Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 AM. POL. SCI. REV. 432, 432 (1992). "Jewish ethnicity is a necessary condition for membership in the political community, while the contribution to the process of Jewish national redemption is a measure of one's civic virtue." *Id.* at 435. This argument is still convincing, especially in light of the recent *intifada* and its impact on society. Similarly, Dafna Izraeli argued that women's demand for equality was undergoing a strengthening as a result of a decline in the collectivist approach. In an article published in 1993, she wrote: "Looking to the 1990's, it appears that when the *Intifada* ends and the economy begins to revitalize, the issue of women's entitlement to more equal rewards for their investments in human capital and for their potential contributions to economic life will have greater probability of moving closer to center stage." Dafna Izraeli, *Women and Work: From Collective to Career*, *in* CALLING THE EQUALITY BLUFF: WOMEN IN ISRAEL, *supra* note 32, at 165, 176. While Izraeli may be correct that women's demands and rhetoric will change with the liberalization of Israeli society, the projected end to the *intifada* has yet to materialize.

213. SHAFIR & PELED, *supra* note 41, at 17.

214. *Id.*

215. Peled, *supra* note 212, at 434.

legitimate the transition to statehood."[216] As an example of this rhetoric, they cite to the words of David Ben-Gurion, Israel's first prime minister: "Even if in their private lives they act as *chalutzim*, both the individual, and the organizations of individuals, will fail if they do not put their *chalutzic* activity in the service of the state . . . ."[217] Thus, "individuals and social groups continued to be treated by the state in accordance with their presumed contributions to the common good as defined by the Zionist project."[218]

Ben Gurion even invoked this value of contribution when considering the creation of a constitution for the new state. In opposing a U.S. style bill of rights as unnecessary, Ben Gurion argued that citizens' rights would not be endangered by their democratically elected government.[219] Instead, he advocated for the creation of a "bill of duties" because the new country could not, he believed, be built or defended "without intensified *chalutziyut,* and *chalutziyut* means accepting the burden of duties."[220]

This discourse of duty and contribution was so dominant that it became, in addition to the rhetoric used to encourage communal participation in statehood, the language used by women to legitimate their fight for the right to participate in the labor market. These women framed their argument "in terms of their right to contribute to the creation of the new society. The rhetoric of motives was couched in collective not individualistic terms: It was an ideology not of personal entitlements but of social obligations. . . . After statehood, this collectivistic ideology translated into public policy."[221] Thus, the republican discourse served both to transition the community from settlement to statehood and provided a rhetoric through which groups advocated their own advancement.

This notion of attaining status, rights, and privileges in society on the basis of one's contribution to the collective is alive and well in present day Israel. It is embodied in the policy of mandatory military service, as a result of which former soldiers receive benefits that are widely presumed to be a right of those who have served the larger community.[222] Additionally, it is evident in the language of

---

216. Shafir & Peled, *supra* note 208, at 416.
217. Peled, *supra* note 212, at 434–35.
218. Shafir & Peled, *supra* note 208, at 417.
219. SHAFIR & PELED, *supra* note 41, at 261.
220. *Id.* at 261 (citing DK (1950) 819).
221. *See* Izraeli, *supra* note 212, at 165.
222. An example of this was evident on an Israeli news broadcast examining the government's policy of funding in-vitro fertilization. When the government began to consider cutting back to funding only two fertilizations per family, some Israelis were outraged and expressed the belief that because they had served the nation in the military and continued to serve through the yearly reserve duty, they were owed this benefit from the government. *See, e.g.*, Moshe Sherer, *National Service in Israel:*

politicians, supreme court justices, and average Israelis who often speak of the needs of the collective as the driving force for individual and communal action. The dominance of the republican discourse emerges clearly in the description of Israeli society given by Shulamit Aloni, a member of the Israeli Knesset. In an interview in 1979, Aloni tellingly remarked:

> [T]here was always talk of the society, to sacrifice for the State, to sacrifice for the society, which means that the person, the individual, is less important, and the mission of the people is more important. And that's why basic rights, which you take for granted in America, we didn't know.[223]

Similarly, Judith Buber-Agassi, an Israeli sociologist and political scientist, expressed this sentiment, even while arguing for greater individual rights and liberties. She commented that in her view, freedom of expression, movement, and thought for individuals is of the utmost importance in a "decent society."[224] She hastened to add, "[b]ecause only the individual who has those rights will be one who will be ready to *contribute to society*."[225] Finally, Justice Dorner of the Israeli Supreme Court seemed to be echoing this view in her 1995 opinion in *Miller*. In the midst of arguing for greater opportunities for women, she remarked that this need for sex equality was, in fact, a societal need lest "the potential of half the population not be realized, thus *harming society* as a whole."[226] The discourse of collectivism is therefore both a foundation of Israel's society and a dominant contemporary commitment.

The collectivism discourse also has a tremendous impact on the opportunities available to Israeli women and on the way in which society conceives of women's proper role. The emphasis on collectivism translates, with respect to women, into an emphasis on family and traditional female roles within the family, because that conception is ultimately good for the society and the state. This conception of Israeli women began pre-statehood when the republican discourse dominated the early settlement movement. As Shafir and Peled argue, "the Zionist version of republican discourse—physical labor, agricultural settlement, and military service—were all conceived of as essentially masculine," leading to an emphasis on

---

Motivations, Volunteer Characteristics, and Levels of Content, 33 NONPROFIT & VOLUNTARY SECTOR Q. 94 (2004) (discussing motivations behind military service in Israel).

223. GERALDINE STERN, ISRAELI WOMEN SPEAK OUT 20 (1979).

224. *Id.* at 93.

225. *Id.* (emphasis added).

226. *Miller*, IsrSC 49(4) at 142, *cited in* Raday, *supra* note 6, at 423 (emphasis added).

women's private familial roles as their form of republican contribution.[227]

Despite this emphasis on traditional familial roles, however, the early state laws, such as the Women's Rights Law of 1951 and the Women's Employment Law of 1954, did recognize that women could also contribute to society as workers. These laws, however, maintained a dual focus. They were "founded on a combination of the socialist philosophy that everyone should be engaged in productive labor and the social commitment to development of family, in which women were perceived as playing the role of homemaker."[228] The conception of women's roles and choices was therefore dictated in large part by the emphasis on their contribution to society. Women would be encouraged not as individuals with the right to labor participation, but as elements in a collective whose role was created by the needs of the community.

In sum, the dominance of the republican discourse in Israel has meant a focus not on individual rights but instead on how each individual can best contribute to society. Within this paradigm, women are often viewed in their traditional familial roles because as wives and mothers, they can offer an essential contribution to the needs of the collective—the next generation.[229] Through law and rhetoric, Israeli society has, of course, also acknowledged women's contribution as workers. However, because the focus is not on what women as human beings deserve in terms of the right to work and instead emerges out of a collectivist discourse focusing on communal contribution, the conception of equality must fit that collectivist ideology. Rather than seeking to achieve absolute or formal equality of rights, the collectivist approach seeks equality of contribution to society at large. Accommodation or equality through difference is acceptable in Israeli society in large part because collectivism allows room for difference as long as the contribution and resulting social status is equal. Thus, while the commitment to achieving equality is paramount, the conception of what equality means is a product of the dominant republican discourse.

B. *The Demographic Threat and Resulting Importance of Motherhood*

Within the collectivist focus of Israeli society, the contribution of women as mothers has often been elevated in value above all else. This has resulted, in large part, from the demographic crisis in which

---

227. SHAFIR & PELED, *supra* note 41, at 96.

228. Raday, *supra* note 32, at 178.

229. See *infra* Part VI.B for a more in-depth discussion of Israeli society's need for mothers and increased numbers of children.

Israel sees itself, a crisis which has emphasized women's reproductive capacity as a national asset. This discussion of the demographic threat and the importance of motherhood must begin by noting the overall emphasis in Israeli society on "familism" and the importance of the family.

The strong familial tradition in Israel, it has been argued, is tied in large part to the influence of the Jewish religion and the large religious population on the politics, laws, and overall culture of the society. Israel, when it was first established in 1948, was born of a coalition between secular Zionists who sought to create an ethnically Jewish nation-state and religious Zionists who believed that Israel was their religious homeland.[230] Calling this an "unholy coalition," Judith Buber-Agassi explained that the two sides, in order to work together, sought common ground and found it in their parallel emphasis on traditional family values:

> [I]n order to somehow gloss over this unholy coalition . . . the elements in the secular Zionist ideology were emphasized, which we, more or less, have in common with Orthodoxy. And that is an emphasis on the family. "Familism," I would call it, is the all importance of the family and the emphasis on having larger families. . . . And this familism has encouraged the view that the proper place of women is first and foremost in the home as wives and mothers.[231]

Thus, the initial focus on the family and women's traditional family roles emerged with the birth of the state and was a function of the necessary political coalition between the religious and secular parties.

Evidence of the importance of women's familial roles can also be found by examining the development of the women's movement in Israel. Israeli women themselves, in seeking equality, greater political representation, and legal rights, have often defined themselves first as mothers and focused almost exclusively on their rights and needs in that familial role.[232] In the pre-state settlement movement, women pioneers had already begun to organize themselves around women's issues. In 1911, these settlers formed the Women Worker's Movement, dedicated to the "struggle for equal participation of women in pioneering activities."[233] Only twenty years later, however, the organization changed its name to "Organization of Working Mothers" to better capture its focus and membership.[234] Thus, despite the fact that this organization was

---

230. Justice Aharon Barak of the Israeli Supreme Court has stated: "In my opinion, Zionism on the one hand and Jewish *halachah* on the other hand left their imprint on Israel's Jewish character." GERSHON SHAFIR & YOAV PELED, BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP 1 n.1 (2002).

231. STERN, *supra* note 223, at 95.

232. *Id.*

233. SHAFIR & PELED, *supra* note 41, at 106.

234. *Id.*

essentially a labor union, its focus, since 1930, has been to advocate for greater assistance for working mothers.[235]

Similarly, the 1970s women's movement that emerged in Israel had a uniquely familist focus (as opposed to its U.S. counterpart that focused on equal rights in education, work, and government). The women's party platform in Israel during this time called for pension rights for housewives, for housework to be counted as work experience, and for the creation of community centers in which the work of running a home, including laundry, cooking, and child care, could be communalized.[236] In addition, the women's litigation of the time reflects a similar familist focus. *Lifshitz-Aviram*, a 1976 case, was the first case in which the supreme court was asked to address the problems of sex equality in employment, and it arose in the context of the needs of working mothers. [237] As discussed above, the plaintiff in *Lifshitz-Aviram,* a female attorney, sought to force the Bar Association to reduce her required two-year internship period by three-months, the period of her mandatory maternity leave.[238] While the plaintiff lost her case, the mere fact that the first equal employment case raised at the supreme court involved the treatment of mothers suggests that the emphasis on familial roles even served to define the movement for women's equality.

This focus on familism and motherhood, while present on its own in Israeli society, has been reinforced by the ever-present demographic threat. This threat emerged at the time of the first settlements in the pre-state period and continues today. [239] It is the notion that Israel is engaged in a demographic battle with its Arab neighbors and the non-Jewish residents of its own territory such that increasing the population through reproduction and immigration is of utmost importance. The fear is that, should Israel lose this battle, it would mean the end of the Jewish state altogether. As a result of this fear, "giving birth in Israel may take on the proportions of a political act."[240]

The notion of a demographic crisis in Israel emerged in the pre-state settlement period. Jewish settlers were overwhelmingly in the minority in their new homeland, and they recognized that increasing

---

235. *Id.* at 107. "Because of their familist orientation, these organizations failed to play a leading role in the legislative battles for gender equality at the workplace and have contributed to the persistence of the definition of women's citizenship as motherhood." *Id.*

236. STERN, *supra* note 223, at 55 (described by Marcia Freedman, one of the founders of the 1970s Israeli women's movement).

237. Lifshitz-Aviram, IsrSC 31(1) at 250.

238. See *supra* Part IV. for the earlier discussion of this case.

239. LESLEY HAZLETON, ISRAELI WOMEN: THE REALITY BEHIND THE MYTHS 90 (1977).

240. *Id.*

the Jewish population was essential to the goal of making Palestine a permanent home.[241] To this end, they continually encouraged immigration from European and North African Jewish communities.[242] However, the British government, then in control of Palestine, in an effort to staunch the growing power of Jewish settlers, instituted restrictions on Jewish immigration.[243] As a result, the settlers began to refer to reproduction as "internal immigration."[244] Reproduction, outside of the control of the British, was viewed as a means of increasing the population and thereby serving the community's most essential need.[245]

The reliance on reproduction to combat the demographic crisis continued as the population transitioned from pioneering settlers to citizens of the newly formed state. Israel's first prime minister, David Ben-Gurion, stressed this point in numerous speeches and comments, always emphasizing the importance of women's reproductive contributions.[246] Shortly after statehood, the Israeli Knesset debated and enacted the Defense Service Law of 1949 which, among other things, mandated military service for men and women but exempted married women and mothers from that obligation. Ben-Gurion, in defending that position, remarked in the course of the legislative debate that "[m]otherhood is the unique destiny of women and there is no destiny that is more important than motherhood."[247] Similarly, a Knesset member from the ruling Labor party seconded this notion in an even more explicit endorsement of the prioritization of motherhood: "He who worries about Jewish demography should worry about the family. We cannot afford to draft married women because it will decrease the birthrate."[248] In 1967, Ben-Gurion, then an elder statesman, spoke out again in an article in the *Ha-aretz* newspaper: "Increasing the Jewish birthrate is a vital need for the existence of Israel, and a Jewish woman who does not bring at least four children into the world . . . is defrauding the Jewish mission."[249] Thus, the early Israeli leaders endorsed and reinforced the importance of women's contributions as mothers, framing this as both their paramount role in society and as the fulfillment of a vital social and political need.

---

241. *See* STERN, *supra* note 223, at 63.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. Berkovitch, *supra* note 5, at 610.
247. *Id.* (citing DK (1949) 1568).
248. *Id.*
249. *How Can the Birthrate be Increased?*, HA'ARETZ MAG., Dec. 8, 1967, *quoted in* HAZLETON, *supra* note 239, at 63.

As a result, the government instituted policies and programs to encourage women to take on this role. The government created cash prizes for women with ten or more children, creating financial incentives to make motherhood one's primary or exclusive focus.[250] Additionally, the government instituted, and still continues to issue through the National Insurance Fund, birth allowances and payments for each additional child, subsidizing child rearing and thus making the creation of large families a more viable option financially.[251] Finally, the government made Mother's Day a legal work holiday for women with children, further emphasizing the importance of that role.[252]

While the demographic threat initially emerged as a result of the Jewish settlers' position as a minority within the territory of Israel itself, the continual wars between Israel and its neighbors further reinforced the feeling of crisis. One Israeli sociologist noted with respect to the 1973 war, in which all of Israel's Arab neighbors attacked jointly: "The Egyptians alone outnumber Israeli Jews by ten to one, and anyone who witnessed the human wall assaults of Egyptian troops across the Suez Canal . . . knows the importance of population for Israel's survival."[253] With the rise of terrorism directed at military and civilian targets, the crisis has only intensified. Lest one think that because Israel is nearing its sixtieth birthday this demographic threat has declined, *Ha'aretz* newspaper in 2004 published an article entitled "The Demographics Point to a Binational State," in which the author argued that given current population trends, Israel could not maintain its Jewish character much longer:

> At the end of the War of Independence, after the expulsion and flight of some 700,000 Arabs, the population of Israel consisted of eighty-two percent Jews and eighteen percent Arabs. In 2003, fifty-four years and almost three million immigrants later, the Central Bureau of Statistics' official figures indicated a similar Jewish-Arab ratio (eighty-one percent Jews, nineteen percent Arabs). . . . If we assume that . . . massive immigration is no longer very likely, it becomes clear why more and more demographic experts and Jewish politicians see the question of a "Jewish majority" in Israel as a central issue.[254]

---

250. *See* Marilyn Safir, *Religion, Tradition, and Public Policy Give Family First Priority*, *in* CALLING THE EQUALITY BLUFF, *supra* note 32, at 57, 59; *see also* HAZLETON, *supra* note 239, at 71. While this government initiative emerged in the 1950s, it was quietly abolished in 1959 when the government realized that Arab families were benefiting far more under the program than Jewish Israelis. *Id.*

251. *See* Safir, *supra* note 250, at 59.

252. *Id.*

253. HAZLETON, *supra* note 239, at 69.

254. Yair Sheleg, *The Demographics Point to a Binational State*, HA'ARETZ MAG., May 25, 2004, at 6.

In discussing potential means of combating this crisis, the author pointed to immigration, mortality, and the birth rate.[255] However, immigration, he noted, is unlikely to be large enough to truly make a difference, shifting the focus entirely to the birth rate.[256] In comparing Israel's birth rate to other countries with similar gross domestic product (GDP) figures, Israeli professor Sergio Della Pergola found that "the fertility level of Israel's Jews, a population with an average per capita GDP of $17,000, exists elsewhere in the world only in countries with an annual average per capita GDP of $3200 (like Albania and Uzbekistan)."[257] Similarly, the birthrate of Israel's Muslim population mirrors that of countries like Kenya and Sudan, which have far lower GDPs.[258] Thus, Della Pergola has concluded that the cause of the unusually high fertility levels in both populations must be attributed to "the national conflict, which pushes both groups to increase birth rates."[259] The demographic threat has continually been and still is a dominant concern of the Israeli Jewish population and its representatives. The result has often been to focus on women's capacity for reproduction, or "internal immigration," and the need to incentivize reproduction and value motherhood as "a national mission."[260]

In a society dominated by a republican ideology that values contribution over individual rights, and in a context of continual war with far more populous enemies, women gained status in large part through their ability to reproduce. This approach "presents reproduction as women's incomparable and unique contribution as citizens of their state, and as their prime channel for fulfillment as human beings."[261] This view, which prioritizes motherhood above other roles for women, gains some expression in the contemporary women's employment laws as well. If the collectivist ideology deems equal ability to contribute to be more important than individual rights, and the demographic threat makes reproduction of paramount importance to society, it seems only natural that employment laws would reflect the society's desire to allow women equal opportunities to succeed in the workplace while also encouraging service to the state through motherhood. The mandatory maternity leave policy, the option to refuse night work for family reasons, the exemption of mothers from military service, and the exclusion of fertile women from certain industries are all policies that seek to accommodate

---

255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. Berkovitch, *supra* note 5, at 606.
261. HAZLETON, *supra* note 239, at 27.

women's familial role while insuring them a place in the workforce. A formal equality regime, which would reject such special treatment, would also likely fail to encourage motherhood. Thus, in large part it is the combination of the republican ideology and the demographic threat that make accommodation rather than formal equality an appropriate paradigm for Israeli sex equality law.

C. *Impact of Jewish Law and Its Exemption of Women from Ritual Obligation*

While the republican ideology and demographic threat may explain Israel's adoption of an accommodationist approach to sex equality in employment, further explanation may be found in the principles of Jewish law, which, as the cultural and religious inheritance of the state of Israel, have arguably influenced its civil legal system as well. Under Jewish law, women are exempted from many ritual obligations, a principle that is often explained by reference to women's more important roles as wives and mothers.[262] This exemption and its explanations encourage sex-segregated roles to benefit the community, an approach that to some extent mirrors the Israeli legislative approach to equal employment law. Jewish law is one of the most fundamental cultural influences on Israeli society and its legal system. "It constitutes a moral system whose values and attitudes penetrate the consciousness of every Israeli, man and woman, religious and non-religious."[263] As a result, the tradition embodied in Jewish law may further explain the evolution and acceptance of accommodation and equality through difference in Israel's equal employment laws.

Traditional Jewish law, or *halachah*, presents a complicated and sometimes inconsistent approach to women and ritual obligations.[264] The overwhelming principle, despite some exceptions, is that women

---

262. *Id.*

263. *Id.* at 52–53.

264. *Halachah* is an elaborate system that includes the Torah (the Jewish Bible), oral law, and various interpretations of and commentaries on these two elements. The traditional view is that Moses received the written law, the Torah, from God on Mt. Sinai approximately 3,200 years ago. Stephen J. Werber, *Cloning: A Jewish Law Perspective With a Comparative Study of Other Abrahamic Traditions*, 30 SETON HALL L. REV. 1114, 1122 (2000). This was then complemented with an oral law, the *Mishnah*, that was redacted by R. Judah Ha-Nasi, in 200 C.E. *Id.* Rabbinic commentators further explained both the written and oral law in a book called *Gemara*. *Id.* While these three sources are seen as foundational and unchanging, they are subject to ongoing interpretation in the form of "(1) judicial decision making; (2) rabbinic response to specific questions—'Responsa'; (3) commentary by . . . scholars . . . and (4) Midrash." *Id.* at 1122–23.

are exempt from "positive time-bound commandments."[265] This means that a ritual obligation that is to be performed at a specific time is mandated for men only. Such obligations include: the recitation of the *Shema* prayer,[266] the wearing of phylacteries or *tefillin,* and the dwelling in the *sukkah,*[267] among others.[268] While there are numerous time-bound commandments that women are obligated to do, these instances are primarily viewed as exceptions that do not defeat the principle itself.[269] The time-bound ritual obligations constitute many of the central ritual acts of daily Jewish life, a reality that has led to frustration among many women who seek to be full participants in their religion.

Nonetheless, explanations and justifications for this exemption abound, both from ancient and modern Rabbinic commentators. While the explanations express different understandings of the role and character of women, virtually all of them note that this exemption is not meant to create inequality between the sexes nor to imply women are of a lesser status—"both [men and women] are equally sacred."[270] In fact, some commentators explain the exemption by citing to women's superiority, as did the *Maharal* of

---

265. *See* MOSHE MEISELMAN, JEWISH WOMAN IN JEWISH LAW 43–50 (1978); *see also Mishnah Kiddushin,* 1:7 ("And all positive time-bound commandments men are obligated in and women are exempt from, and all positive non-time bound commandments both men and women are obligated in."). There are two types of commandments in Jewish law: positive ("thou shall") and negative ("thou shall not"). While it is understood that women are obligated in all negative commandments, this source in the *Mishnah* indicates that women are exempt from some positive commandments. *See* RACHEL BIALE, WOMEN AND JEWISH LAW 10–15 (1984).

266. The *Shema* is the prayer recited four times daily: morning, midday, evening, and at night.

267. The *sukkah* is the hut in which Jews dwell during the holiday of *Sukkot.*

268. MEISELMAN, *supra* note 265, at 44–45.

269. For example, women are obligated in the prayer after meals, *birkat hamazon,* despite the fact that it is a positive time-bound commandment (in that it must be done after eating). *See Mishnah Brachot,* 3:3. There is a great deal of debate around the question of whether a woman is permitted to perform the ritual acts from which she is exempted. Under Jewish law, performing an act out of obligation is rewarded more than performing an act voluntarily. *See* MEISELMAN, *supra* note 265, at 48. As such, some commentators allow women to perform these acts while others preclude them. *See id.* Additionally, Rabbis differ over whether a woman may say the appropriate blessing when performing this ritual act. *See id.* The formulation of Jewish blessings is: "Blessed are You, O Lord, our God, King of the universe, who has sanctified us through his mitzvoth, and *commanded us to . . . .* " *See id.* As a result, some argue that women, who are not technically commanded to perform the ritual, may not say these words while others maintain that the phrase refers to the collective obligation of the Jewish people, thereby permitting women to say the blessing as well. *See id.*; *see also* Maimonides, Laws of Tzitzit 3:9; Tosafot, Commentary on Kiddushin 31a; Shulchan Aruch, Orach Chayyim 589:6.

270. MEISELMAN, *supra* note 265, at 43. While those who oppose the exemption of women view this type of statement as merely apologist, such explanations appear time and again in the opinions that discuss the subject.

Prague, a sixteenth century Jewish jurist who explained that women have greater potential for spiritual growth and thus do not need the ritual obligations men do.[271] Numerous others, however, suggest that this exemption was based on women's obligations to the home and family. Abudarham, a fourteenth century commentator, suggested that because women's familial obligations are so important, they should not be forced to choose between the performance of these and the performance of ritual obligations.[272] Similarly, Saul Berman, a modern commentator, suggests that women are exempted from obligations that would mandate "a communal appearance" because "it was the mandatory departure from the home which would constitute the greatest threat to the proper performance of household responsibilities."[273] Finally, Menachem Brayer, a commentator in the 1980s, argues that it is the specific emphasis on the Jewish woman's maternal role that provides the reason for the exemption:

> This assertion that the Torah views the role of wife-mother as the proper role for a Jewish woman cannot be denied. There are countless rabbinic passages to substantiate such an assertion. The Torah went out of its way to protect this role by exempting the woman from any religious demands which might possibly conflict with the proper fulfillment of this wife-mother role. The reason . . . is obvious. The very survival of the Jewish people, the preservation and the transmittance of our heritage, depend on the selection of just such a role by Jewish women.[274]

Thus, one of the primary explanations for a woman's exemption under Jewish law from many ritual obligations is the focus on and importance of her role as mother and homemaker, a role which, as noted above, is vital to the survival of the Jewish people.

The similarities between this traditional Jewish legal approach and that of the Israeli legislation are self-evident. In each, women

---

271. MENACHEM BRAYER, THE JEWISH WOMAN IN RABBINIC LITERATURE – A PSYCHOHISTORICAL PERSPECTIVE 150 (1986). Other similar explanations include Rabbi Samson Raphael Hirsch's position that women "have greater fervor and more faithful enthusiasm for their God-serving calling." MEISELMAN, *supra* note 265, at 44. These explanations are immediately suspicious, of course, as numerous legal scholars have noted that whenever women are lauded as special, it is often an excuse to exclude them from something. As Justice Brennan noted in *Frontiero v. Richardson,* sex discrimination has often been "rationalized by an attitude of 'romantic paternalism,' which, in practical effect, put women, not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

272. *See* MEISELMAN, *supra* note 265, at 43; *see also* Sefer Abudarham, Part IV, Birchat Hamitzvot, *translated in* BIALE, *supra* note 265, at 13.

273. Saul Berman, *The Status of Women in Hallakhic Judaism,* TRADITION MAG., 1973, at 16.

274. BRAYER, *supra* note 271, at 205. This passage in particular is remarkably similar to remarks by David Ben-Gurion and other government officials explaining women's exemption from the military and the importance of motherhood to the Israeli national endeavor. *See also supra* notes 247–49 and accompanying text.

are exempted from certain activities—under Jewish law, ritual acts, and under Israeli law, military service, employment after childbirth, night work, and work in industries dangerous to fertility. In each case, these exemptions are justified by the overwhelming importance of women's familial roles and obligations and the community's need for continual reproduction.

Because this approach to women's participation in ritual practice is a fundamental component of Jewish law, it is not a radical jump to assume that the presence of this concept somehow influenced Israeli law as well. While Jewish law is certainly not cited as a source of the accommodationist provisions of the employment laws,[275] numerous legal scholars have argued that the principles of Jewish law act as a moral and cultural basis for much of the Israeli legal system. The Foundations of Law Act of 1980 explicitly made this reliance a lawful endeavor, stating: "If the court, in considering a legal question requiring determination, finds no answer to it in any enactment, in decided law or by way of analogy, it shall determine the question in the light of the principles of liberty, justice, equity and peace in the Jewish heritage."[276] With this act, the parliament formally endorsed the use of Jewish law to aid in making secular legal decisions.

In addition to this codification of the role of Jewish law, *halachah* has an informal impact on Israeli legislation and court decisions as well. As Justice Menachem Elon, former President of the Israeli Supreme Court, wrote: "In some measure, the law in the State of Israel follows the principles of Jewish law even in areas where the latter system has not officially been rendered applicable."[277] Similarly, Israeli legal scholars note that while Jewish law has not been affected by Israeli law, "[t]here is, however, little doubt that to a certain extent, Israeli law is influenced by Jewish law."[278] Finally, Jewish law has clearly had an impact on the decisions of the supreme court, particularly when the court must decide what justice or public

---

275. Jewish law is a cited source of law for numerous pieces of Israeli legislation, including: the Cooperative Houses Law, the Wage Protection Law, the Severance Pay Law, the Maintenance Law, and the Laws of Succession. *See* Menachem Elon, *The Sources and Nature of Jewish Law and its Application in the State of Israel - Part IV*, 4 ISR. L. REV. 80, 84–85 (1969); *see also* THE PRINCIPLES OF JEWISH LAW 42 (1975).

276. Foundations of Law Act, 1980, *translated in* JEWISH LAW AND CURRENT LEGAL PROBLEMS 9 (1984).

277. THE PRINCIPLES OF JEWISH LAW, *supra* note 276, at 42. Similarly, Israeli legal scholar Shmuel Shilo echoed these comments, noting "Jewish law has had its impact—if not too strong a one—on the Israeli legal system both in the field of legislation and in the decisions of the courts—especially Israel's Supreme Court." Shmuel Shilo, *Jewish Law in the Israeli Legal System*, *in* TOWARDS A NEW EUROPEAN IUS COMMUNE 81, 84 (1999).

278. Brayahu Lifshitz, *Israeli Law and Jewish Law - Interaction and Independence*, 24 ISR. L. REV. 507, 507 (1990).

policy entail. Justice Silberg spoke of the influence of Jewish law in *Zim v. Maziar*,[279] commenting: "[F]or determining what would our public policy be and require . . . we look to our own moral and cultural values, as indeed we have no other source of good order and public policy."[280] It is evident that Israeli society and, by extension, Israeli law draw on the cultural and religious heritage provided by Jewish law.

The notion of exempting women from various aspects of public life has existed in Jewish law since its creation, and both ancient and modern commentators have explained this exemption as a means of alleviating the burden on a woman whose primary obligation is to her home and family. While there is certainly no direct connection between this concept in Jewish law and the various exemptions provided to women under Israeli civil law, the similarity is remarkable. Given that judges, politicians, and scholars agree that Jewish law influences Israeli society in countless subconscious ways, it is reasonable to conclude that the existence of these exemptions in Jewish law served to prime the Israeli public for the use of similar exemptions and protections in equal employment law. The notion of an exemption for women because of a higher or more fundamental obligation thus pervades both religious law and secular employment law in Israel, making the equality through difference approach palatable and welcomed by both lawmakers and workers.

D. *European Countries' Approach to Family and Work*

While it is the Author's position that the equality through difference approach is acceptable in Israel because of related social factors including the collectivist ideology, the emphasis on motherhood, the demographic threat, and the influence of Jewish law, it is important to note that Israel is not alone in its adoption of the accommodationist approach to sex equality in employment. Israel's conception of sex equality differs greatly from that of the United States, but its model is remarkably similar to that of numerous European countries. This model may be acceptable to the Israeli public because of the social factors described above, but its creation was probably influenced to some extent by these European welfare states.

European countries are, in general, committed to the principal of equal opportunity and equal treatment for both sexes. However,

---

279. C.A. 461/62, Zim v. Maziar (1963) IsrSC 17.

280. Haim H. Cohn, *Jewish Law in Israel, in* JEWISH LAW IN LEGAL HISTORY AND THE MODERN WORLD 124, 139 (Bernard S. Jackson ed., 1980) (quoting *Zim*, IsrSC 17. at 1330 ff.).

unlike the United States, which has rejected protective legislation because of this commitment to equal treatment, the European Union has indicated an acceptance of some protectivist or special treatment policies for women.[281] Like Israel, the European Union mandates sex equality but considers exemptions and special treatment relating to motherhood to be outside of the equal treatment mandate.[282] While this principle manifests differently in the various E.U. Member States, some examples include the exclusion of pregnant women from work that would endanger the fetus or the mother and bans on night work for pregnant and nursing women.[283] Israel similarly has fetal protection legislation banning fertile age women from work in dangerous industries and a legal provision guaranteeing women the right to refuse night work because of family reasons.[284] These policies exhibit an approach to equal employment law that accommodates difference when motherhood is a factor.

Nowhere is this special treatment for motherhood model more evident than in maternity leave policies in both Israel and the European Union. In 1996, the European Union passed a directive that applies to all of the Member Countries. The Directive indicated that workers were to have "individual entitlement to parental leave on the grounds of the birth or adoption of a child, enabling them to take care of the child for at least three months."[285] The individual Member States must implement this directive and can introduce even more favorable policies than that guaranteed by the E.U. directive.[286] European countries offer extremely generous paid leave programs explicitly for mothers to cover the weeks and months after childbirth. Most of these countries also supplement maternity leave programs with parental leave that provides both mothers and fathers with paid leave during their children's pre-school years.[287] Specifically, the Nordic countries, including Denmark, Finland, Sweden, and Norway,[288] offer between thirty and forty-two weeks of paid

---

281. Helen Fenwick, *Special Protections for Women in European Union Law*, *in* SEX EQUALITY LAW IN THE EUROPEAN UNION 63, 73 (1996). The E.U. Commission has indicated "a rejection of the notion of protection for women in general but an acceptance of a protective stance towards maternity: the construct—protection for womankind—becomes protection for motherhood." *Id.*

282. *Id.*

283. *Id.*

284. *See supra* Part III.B.1.

285. Directive on Parental Leave and Leave for Family Reasons: Council Directive 96/34/EC of 3 June 1996 (*quoted in* JANET C. GORNICK & MARCIA K. MEYERS, FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT 310 (2003)).

286. *Id.*

287. GORNICK & MEYERS, *supra* note 284, at 121.

288. While Norway is not a member of the European Union, it is, as a result of international agreements, bound by the gender equality provisions of E.U. law. *See*

maternity leave.[289] Other European countries, including Belgium, France, Germany, Luxembourg, and the Netherlands, offer twelve to sixteen weeks of paid maternity leave.[290] In contrast, the only similar national program in the United States is the Family Medical Leave Act, which guarantees male and female workers up to twelve weeks of unpaid leave to deal with a variety of family concerns.[291] Thus, the Israeli approach of mandatory paid maternity leave more closely resembles that of the various European countries, which provide paid leave specifically for mothers post-childbirth.

In addition, Israeli law bears some resemblance to the European laws' endorsement of special treatment for women workers. For example, Norway, which has a basic act mandating sex equality in work, private life, and public administration, also includes a provision in this legislation for special or differential treatment. The Act states that, "differential treatment of men and women may be in accordance with the law if the treatment can promote gender equality in accordance with the objective of the Act."[292] This provision allows for the creation of certain advantages for one sex over the other with the understanding that such special treatment may, in actuality, promote overall equality. This approach, like what is here called equality through difference or accommodation, in Israeli law suggests that equality is not necessarily achieved through absolute sameness in treatment and allows for exemptions and special privileges to further the goal of equality. Thus, while it emerged out of numerous social factors, ideologies, and political realities, Israeli law may have been influenced by the family-work policies and sex equality regimes of European countries, which share Israel's socialist history and modern welfare state model.

VII. CONCLUSION

Israeli equal employment law seeks to create equal opportunity for male and female workers within the realities of Israeli society. To that end, the law takes an accommodation approach, eschewing formal equality for a system that allows differential treatment of

---

Anne Lise Ryel, *The Nordic Model of Gender Equality Law*, *in* SEX EQUALITY LAW IN THE EUROPEAN UNION, *supra* note 281, at 357. The other Nordic countries mentioned are all E.U. members.

289. GORNICK & MEYERS, *supra* note 285, at 122.

290. *Id.* at 123. For a chart of the specifics of each country's leave policy, see *id.* at 124–27.

291. 29 U.S.C. § 2612(a)(1).

292. Ryel, *supra* note 288, at 362.

female workers. Despite pronouncements of equality and equal treatment, the law allows only women to refuse to work at night due to family reasons and prevents discrimination against those workers who exercise this right. The law prohibits female workers of fertile age from working in industries that may be dangerous to their fertility. It exempts women who are married or are mothers from military service, the gateway to the Israeli workplace, and allows women workers to retire earlier than their male counterparts. Finally, it mandates a maternity leave of three months with parental leave for fathers provided only as a supplement to this maternal preference. These privileges, exemptions, and options are provided solely to women and yet are provided as part of an equality-seeking regime and explained in each case as a means of achieving greater equality for women workers who bear the burdens of both work and family obligations.

It is clear that the Israeli system does not condone differential treatment of women workers as a means of rejecting the principle and value of sex equality. Rather, the Israeli system views this approach as essential to achieving equality. And yet the U.S. system, similarly committed to achieving sex equality in the workplace, operates in an entirely different framework, that of formal equality. U.S. legislation and case law maintain that equality demands absolutely equal treatment, that sameness of treatment will lead to actual equality in practice, and that differential treatment can only lead to damaging stereotypes in which women will be viewed as less valuable workers.

Why the difference between the two nations? The Author has argued that the Israeli system, while no less committed to equality, operates under the equality through difference approach because of ideological underpinnings, political and demographic needs, and cultural influences. The draftsmen of Israel's Succession Law, which deals with issues of inheritance, similarly indicated that in creating that law in 1952, they relied on:

> (1) the legal and factual situation that exists at present in this country
>
> (2) Jewish law which is one of our national cultural possessions and which we must revive and continue; [and]
>
> (3) the laws of other countries in the West and East from which our people have been gathered in order to mingle here as a unified community.[293]

The same considerations, the Author has argued, are true for the series of laws dealing with equal employment for Israeli women. The laws emerged out of the legal and factual situation of the country in

---

293. Menachem Elon, *The Sources and Nature of Jewish Law and its Application in the State of Israel – Part IV*, 4 ISR. L. REV. 80, 81 (1969).

that the collectivist history and ideology, as well the demographic needs and resulting emphasis on women's reproductive contribution, have greatly impacted the conception of equality that is operative in these laws. The Jewish law as a national cultural possession and its notion of exempting women from ritual obligations has subconsciously influenced Israeli employment law. Finally, the laws of European countries, which have similar welfare state mentalities, have clearly influenced the Israeli system of employment laws as well.

The remaining question, however, is how to evaluate the Israeli approach to sex equality. U.S. observers may consider the Israeli approach simply that of a society not yet ready for true equality. Such is the instinct of one Israeli woman, who, commenting on what has come to be known as the "myth of equality," took this exact position in an article in a daily newspaper in 1986:

> What gets me is the deception: Israeli society is still not ready for equality and women's liberation, because all of us are still chained to our traditional roles. . . . So let them stop trying to sell young girls the beautiful myth of the liberated Israeli woman; it's worth no more than the photograph of the woman soldier on the magazine cover.[294]

On the other hand, both Frances Raday and the late Dafna Izraeli, scholars of Israeli sex equality law, have both justified and praised the Israeli approach. Izraeli justified the maintenance of privileges for women by suggesting that it indicated "an ambivalence about foregoing privileges when the opportunities are not in fact yet equal."[295] Differential treatment is necessary, she argued, until the society has truly equalized in practice.[296] Frances Raday, in an essay she wrote in 1995, similarly argued that the options, privileges, and exemptions for women in Israeli employment law were part of a process of transition to true equality.

> [T]he change from restrictive protections to options has societal justice to it. The transition from inequality to equality does not happen overnight. For women who have worked and maintained their family roles within traditional stereotypes, the change to equality can be a harsh blow. Many women carry a double burden of household and workplace work and cannot change this aspect of their lives so late in the game. The options that are now built into the employment law

---

294. Aviram Golan (Barbara Swirski, trans.), *Musings of an Israeli Superwoman in* CALLING THE EQUALITY BLUFF, *supra* note 32, at 101 (adapted from an article that appeared in *Davar* (Hebrew Daily) on Nov. 28, 1986).

295. Dafna Izraeli, *Women and Work: From Collective to Career, in* CALLING THE EQUALITY BLUFF: WOMEN IN ISRAEL, *supra* note 32, at 175.

296. *Id.*

> should be seen as "means of transition" that will disappear naturally if equality in the workplace is created in practice.[297]

Raday has more recently justified the equality through difference approach in a new way. She now views it as a more effective and realistic approach to achieving equality.[298] Raday has argued that a new, more complex notion of equality must incorporate more than the removal of discriminatory barriers and must do more than grant formal equality.[299] It must also incorporate "an appreciation of group differences . . . which may impede access to social institutions . . . and [must] require measures of accommodation. To meet this new awareness, the concept of equality has developed into a socio-dynamic concept that includes equality of opportunity, affirmative action, and accommodation requirements."[300]

U.S. scholars have also recognized the difficulty with a formal equality regime that ignores the reality of difference. They also note the problems of an accommodation regime that reproduces negative stereotypes and may impair the achievement of meaningful equality. Former Supreme Court Justice Sandra Day O'Connor commented on this dilemma as faced by the Court:

> It is in recognizing and responding to this fundamental difference that our Court has had its most difficult challenges. The dilemma is this: if society does not recognize the fact that only women can bear children, then "equal treatment" ends up being unequal. On the other hand, if society recognizes pregnancy as requiring special solicitude, it is a slippery slope back to the "protectionist" legislation that barred women from the workplace.[301]

Thus, despite the different approaches actually adopted by the U.S. and Israeli systems, the problem remains the same. The United States chose to adopt formal equality and avoid the "slippery slope," while Israel chose to accommodate the reality of difference and risk reinforcement of damaging stereotypes. Neither system, obviously, is without flaw.

The recognition and examination of these variant approaches to sex equality in employment leaves numerous questions unanswered. Can one evaluate a system of equality outside of the context of the society in which it operates? Are there natural rights that must be protected, or is the success of a conception of equality dependant on the specific goals of the society? Who should the equality regime

---

297. Frances Raday, *Women in the Workplace*, *in* THE POSITION OF WOMEN IN SOCIETY AND LAW 64, 89 (1995).

298. *See* Raday, *supra* note 6, at 380.

299. *Id.*

300. *Id.* at 390.

301. Sandra Day O'Connor, *The Challenge of a Woman in Law*, *in* WOMEN IN LAW 5, 11 (1998).

protect—the majority who may prefer privileges and accommodation of difference or the minority who do not experience the difference but only the discrimination?[302] Finally, can systems of equality be transported across countries and cultures—are there aspects of the Israeli system that would benefit the United States or vice versa?

These questions are left to further research. What is abundantly clear, however, is that these dilemmas can no longer be ignored in a society in which many women feel they are failing at combining work and family. In the United States in the last several years alone, at least six books have been published from scholarly and popular authors attempting to explain and provide solutions to the problems inherent in combining work and family within a culture that requires a near impossible commitment to both.[303] Judith Warner, author of the most recent of these books, PERFECT MADNESS: MOTHERHOOD IN THE AGE OF ANXIETY, has noted that as mothers, many women must choose between their professional careers at the cost of abandoning their children and a total devotion to home and family at the cost of living in a state of "crazy-making isolation."[304] But, she adds, "[t]hese are choices that don't feel like choices at all. These are the harsh realities of family life in a culture that has no structures in place to allow women—and men—to balance work and child rearing."[305] To combat this harsh reality, Warner suggests that women stop blaming themselves and look to their government and society for answers. "We need solutions—politically palatable, economically feasible, home-grown American solutions—that can, collectively give mothers and families a break."[306] This Article should serve somewhat as a response to Warner in that it suggests that those in the United States must, in fact, look beyond U.S. solutions and recognize that the

---

302. For example, while most women in Israel bear children and thus benefit from the privileges given to Israeli mothers, the minority of women who choose not to become mothers often bear the brunt of this maternal privileging by performing the work from which their child-bearing colleagues are exempted. One example of this occurs in the education profession that is dominated by women. Because mothers are often allowed shorter workdays, their childless female colleagues must work longer hours to make up for this absence. The question is: with which category of women should the law concern itself?

303. *See* JUDITH WARNER, PERFECT MADNESS: MOTHERHOOD IN THE AGE OF ANXIETY (2005); CYNTHIA FUCHS EPSTEIN & ARNE KALLEBERG, FIGHTING FOR TIME: SHIFTING BOUNDARIES OF WORK AND SOCIAL LIFE (2004); KATHLEEN GERSON & JERRY A. JACOBS, THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY (2004); SYLVIA ANN HEWLETT, CREATING A LIFE: WHAT EVERY WOMAN NEEDS TO KNOW ABOUT HAVING A BABY AND A CAREER (2004); JANET C. GORNICK & MARCIA K. MEYERS, FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT (2003); HARRIET B. PRESSER, WORKING IN A 24/7 ECONOMY: CHALLENGES FOR AMERICAN FAMILIES (2003).

304. Judith Warner, *Mommy Madness*, NEWSWEEK, Feb. 21, 2005, at 45.

305. *Id.* at 45–46.

306. *Id.* at 48.

United States is not the only society dealing with these problems. This Article examined Israeli employment law, its conception of sex equality, the means to achieve it, and the underlying social realities that make the definition and approach workable in that nation. The next step is to identify the social and political realities at work in U.S. society and to borrow, change, and create solutions that will ultimately work in this country.