

ON THE MORAL WRONGNESS OF A MALE-ONLY BAN ON LEAVING ONE'S HOMELAND**

Introduction

The aim of this paper is to examine whether it is morally wrong to ban only male citizens from leaving a country in wartime, and if it is, why it is the case.

On February 24th, 2022, Russia, led by President Vladimir Putin, launched an invasion of Ukraine. On the same day, Ukraine's President Volodymyr Zelensky declared martial law and ordered a general mobilization, prohibiting male citizens aged 18 to 60 (who could be conscripted into military service) from crossing Ukraine's international border. Since then, while women, children under 18, and elderly people over 60 are allowed to cross the border to leave the country, male Ukrainian citizens of conscription age are, with a few exceptions,¹ no longer able to do so.

While many Ukrainian men and women are bravely fighting for their homeland against Russian troops, the justifiability of the ban on men of conscription age leaving Ukraine is in dispute, even among Ukrainians.² After Alexander Gumirov, a lawyer in Odesa, started

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¹ Among those falling into these exceptions are men who independently raise a child under the age of 18, men on whom are dependent three or more minor children, men who care for a child with a disability or severe or rare diseases, men with disabilities, men with special work duties (e.g., drivers, railway workers, sailors, athletes, and volunteers), and so on. For all possible legal options for men aged 18 to 60 to go abroad, see "How to Go Abroad for a Man During Martial Law: All Possible Legal Options," *VisitUkraine.today*, accessed June 16, 2023, <https://visitukraine.today/blog/1065/how-to-go-abroad-for-a-man-during-martial-law-all-possible-legal-options>. See also "Departure of Men Abroad in 2023: What Has Changed for Military Servicemen," *VisitUkraine.today*, accessed June 16, 2023, <https://visitukraine.today/blog/1385/departure-of-men-abroad-in-2023-what-has-changed-for-military-servicemen>.

² According to a survey conducted by Human Security Lab, fewer than half (44.7%) of Ukrainians believe that men should be forced to stay in the country, whereas the rest outright oppose the travel ban (28.3%) or have an opinion "different than both options" (27%). Of those who believe that men should be forced to stay, many qualify that support by suggesting changes to the law, such as training be made mandatory and the ban be also extended to women. See "New Survey from Human Security Lab Shows Majority of Ukrainians Want

a petition to lift the ban, which gathered over 25,000 signatures,³ President Zelensky negatively responded to it, saying: “[Should it be addressed to] those parents who [have] lost their sons < ... > who sacrificed their lives to defend an oblast or a city in our country?”⁴ Another lawyer, Dmytro Busanov in Kyiv, criticized the ban for violating Article 33 of the Constitution, saying that it restricts the right to freely leave Ukrainian territory without parliamentary legislation.⁵ He has already taken on two cases to fight the ban and said he is even considering filing an application with the European Court of Human Rights.

These opponents of the ban have each made a case based on legal and moral dimensions. Regarding the *legal* dimension, some scholars (and Busanov) have argued that the ban violates important human rights guaranteed by international law (e.g., the right to life, the right to leave, and the right to conscientious objection).⁶

In terms of the *moral* dimension, there are several categories of argument to challenge the ban. First, from a consequentialist standpoint, it can be argued that to forcibly conscript reluctant fighters would corrupt the morale of combat units, or that it would be economically more beneficial to allow men to work abroad and send money home. The second, based on individual freedom, invokes the importance of individuals’ moral right to move freely (especially when leaving one’s country in wartime, where one’s life and bodily integrity are under threat) and opposes the ban because it infringes on this fundamental right without compelling reasons. The third is an argument based on fairness or non-discrimination. Since the ban is addressed only to male citizens aged 18 to 60 and exempts females, it can be argued that it unfairly or wrongfully discriminates against men.

In this paper, I focus on the third argument and argue that the ban unfairly and morally wrongfully discriminates against male Ukrainian citizens on the basis of their gender. First, I define discrimination and apply it to our case. Second, moving from the descriptive definition of discrimination to its moral wrongness, I argue that the male-only ban is unfair and morally unjustified. Third, I argue that the ban can also be deemed morally wrong from one of the prominent views in the field of the ethics of discrimination; that is, the deliberative freedom view.

to End Travel Ban,” *Human Security Lab*, accessed October 25, 2022, <https://www.humansecuritylab.net/news/new-survey-from-human-security-lab-shows-majority-of-ukrainians-want-to-end-travel-ban>.

³ Олександр Гуміров, “Скасувати заборону виїзду з України чоловіків віком від 18 до 60 років та запровадити пріоритет призову під час мобілізації добровольців,” ЕЛЕКТРОННІ ПЕТИЦІЇ: Офіційне інтернет-представництво Президента України, May 18, 2022, <https://petition.president.gov.ua/petition/139292>.

⁴ Roman Romaniuk, “Zelensky: Up to 100 Ukrainian Soldiers Killed Each Day in Eastern Ukraine,” *Ukrainska Pravda*, May 22, 2022, <https://www.pravda.com.ua/eng/news/2022/05/22/7347852/>.

⁵ Paul Waldie, “Ukraine’s Ban on Adult Men Leaving the Country Faces Growing Legal Challenges,” *The Globe and Mail*, August 29, 2022, <https://www.theglobeandmail.com/world/article-ukraines-ban-on-adult-men-leaving-the-country-faces-growing-legal/>.

⁶ e.g., Amy Maguire, “Why Banning Men from Leaving Ukraine Violates their Human Rights,” *The Conversation*, March 8, 2022, <https://theconversation.com/why-banning-men-from-leaving-ukraine-violates-their-human-rights-178411>; Pia Lotta Storf, “Ukraine’s Travel Ban, Gender and Human Rights,” *Völkerrechtsblog*, March 18, 2022, <https://voelkerrechtsblog.org/ukraines-travel-ban-gender-and-human-rights/>.

I. The Concept of Discrimination

Since the ban prohibits only male citizens from leaving the country, the most natural way to challenge it would be to argue that it unfairly or morally wrongfully discriminates against them.

Although there are variations, the concept of discrimination can generally be defined as follows:

X discriminates against Y in relation to Z if and only if:

X treats Y less favorably than X treats Z; and

It is because (X believes that) Y has a property (P) and (X believes that) Z does not have P that X treats Y less favorably than Z.⁷

When we apply this definition to our case, we can argue that since the Ukrainian border guards who implement the ban (X) prevent male citizens aged 18 to 60 (Y) from crossing the border while permitting female citizens who are otherwise similarly situated (Z) to do so, and they do this because (they believe that)⁸ the former have the property of being male and (they believe that) the latter do not have this property (that is, having the property of being female instead), they discriminate against these male citizens (i.e., the ban discriminates against men).

Alternatively, the concept of discrimination can be defined more narrowly by adding to the above formulation another condition that P is membership of a socially salient group; that is, a group whose membership is considered important to the structure of social interactions across a wide range of social contexts.⁹ Although my sympathies lie with the broader definition, we can remain neutral in this choice, since the relevant ban can be classified as discrimination under either definition, given that one's gender is socially salient in this sense in almost all of the world's societies (including Ukraine).

II. The Unfairness and Moral Wrongness of Discrimination

Even if a particular act or rule constitutes discrimination in the sense explicated in the previous section, it does not follow that it is *morally wrongful* discrimination. The (partial)

⁷ I have constructed this definition from Kasper Lippert-Rasmussen's "generic discrimination" (Kasper Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (Oxford: Oxford University Press, 2014), 15) and Benjamin Eidelson's "working definition of discrimination" (Benjamin Eidelson, *Discrimination and Disrespect* (Oxford: Oxford University Press, 2015), 17).

⁸ Sometimes, the border guards do not allow female citizens to cross the border because they (mistakenly) believe that they are male. This happens especially when transgender female citizens try to cross the border and their passports or ID cards identify them as male (Enrique Anarte, "Trans and Non-Binary People Trapped in War-Torn Ukraine," *Openly*, March 4, 2022, https://www.openlynews.com/i/?id=f5cb8051-fd75-4420-a3c6-5e4e1f4ce2f7&utm_source=news-trust&utm_medium=redirect&utm_campaign=context&utm_content=article).

⁹ cf. Andrew Altman, "Discrimination," in *The Stanford Encyclopedia of Philosophy*, ed. E. Zalta, April 20, 2020, <https://plato.stanford.edu/entries/discrimination/>; Lippert-Rasmussen, *Born Free and Equal?* 30, 45–46.

mobilization (under martial law) of only those who have *consented* to be servicemen (/ -women) or reserves (in peacetime) does constitute discrimination against them (at least under the broader definition) in relation to those who have not consented to do so, but it is far from clear that this way of mobilizing them is morally wrong (at least as long as the country is fighting in self-defense).

One way of arguing that an instance of discrimination is morally wrong is that it is *unfair*. Although there is more than one way of defining this concept, we can safely argue that fairness has its root on Aristotle's articulation of justice, namely "To treat like cases alike and different cases differently."¹⁰ John Broome developed this articulation further and conceptualized fairness as the requirement that "claims should be satisfied in proportion to their strength."¹¹ According to this notion of fairness, "equal claims require equal satisfaction <...> stronger claims require more satisfaction than weaker one, and <...> [even] weaker claims require some satisfaction <...> [so] must not simply be overridden by stronger ones."

To illustrate why fairness should be so defined, Broome gave an example of a dangerous mission, on which "[s]omeone has to be sent" but in which the person sent "will probably be killed."¹² In this scenario, "[t]he people available are similar in all respects, except that one has special talents that make her more likely than others to carry out the mission well (but no more likely to survive)." Broome contended that "[w]hile it could plausibly be thought that the right thing is simply to send this person <...> it is also very plausible that doing so would be unfair to her." This is because, he argued, "[this] talented candidate has a claim to the good of being left behind, and her claim is as strong as anyone else's."¹³

The requirement of fairness that Broome has explicated is not absolute and can be outweighed by other reasons, all things being considered. In the case of the dangerous mission above, he contended that "fairness is outweighed by expediency, so that on balance it is right to send the talented candidate <...> depend[ing] on the circumstances."¹⁴

Now we can go back to our case of the ban on leaving one's country in wartime. To determine whether or not the ban is fair (or nonetheless morally justified despite its unfairness), we need to examine whether those female citizens who are situated similarly to their male counterparts (yet are allowed to leave their homeland on the basis of their gender) have a stronger claim to the good of being able to evacuate such a life-and-body-threatening place and whether there are some reasons (other than those of fairness) strong enough to settle our case in favor of the ban, all things being considered.

¹⁰ Aristotle, *Nicomachean Ethics*, trans. W. D. Ross (Raleigh, N. C.: Generic NL Freebook Publisher, 2000), book 5, chap. 3.

¹¹ John Broome, "Fairness," *Proceedings of the Aristotelian Society* 91, no. 1 (June 1991): 95.

¹² *Ibid.*, 90. I focus on this example of Broome partly because this relevantly resembles our case of the ban, in that the fairness of the distribution of the good of being in safety is at issue.

¹³ *Ibid.*, 94.

¹⁴ *Ibid.*, 90.

1. On the moral justifiability of (male-only) conscription

Before examining the fairness and moral justifiability of the ban, we need first to consider the elements of the (male-only) conscription system of Ukraine. Since the aim of the ban can naturally be understood as to mobilize citizens who can be conscripted into military service,¹⁵ and under Ukraine law, only male citizens are being (and have been) conscripted against their will,¹⁶ the moral justifiability of the ban will be seriously challenged if it can be argued that male-only conscription is unfair and morally wrongful discrimination. The same will hold true if the system of conscription itself is unjustifiable in the first place, whether it is male-only or gender-neutral.

It is undeniable that the volunteer military system has important advantages over the conscription system. Given the fact that we all have different conceptions of the good, regardless of gender (for instance, some are aggressive and willing to risk their lives, while others are modest and do not like fighting), the volunteer system is respectful of individuals' autonomy, which is considered a supreme value in contemporary liberal societies.¹⁷ In addition, given that armed forces made up of professional soldiers are better able to carry out missions than those including conscripts who have trained for less time and against their will, and that to force young citizens, who would otherwise serve in the labor force, to engage in military service for one or two years may impose a severe burden on the domestic economy, the volunteer system is efficient in terms of military effectiveness and economic development. Hence, for the conscription system to be justified, we need to provide compelling reasons strong enough to outweigh the merits of the volunteer system.

Some theorists, *inter alia*, communitarians or civic republicans, argue that the conscription system is necessary to cultivate civic virtue and encourage citizens' participation in democratic

¹⁵ “[Ukraine’s state border guard service (DPSA)] adds the measure [of banning all Ukrainian men aged between 18 to 60 from leaving the country] is aimed at ‘guaranteeing Ukraine’s defence and the organisation of timely mobilization.’” (“Ukrainian Men Banned from Leaving Country,” *BBC News*, accessed October 26, 2022, <https://www.bbc.com/news/live/world-europe-60454795>).

¹⁶ In peacetime, female citizens can be accepted for military service and service in the military reserve only voluntarily, and even in wartime, only females who have (voluntarily) registered themselves and have certain specialties and/or professions related to a corresponding military specialty (and thus subject to military registration) can be legally conscripted (Law of Ukraine, March 25, 1992, No. 2232-XII, “About Military Duty and Military Service” [UA], art 1, pt 11, 12).

¹⁷ If the respect for autonomy is all that we are concerned about, it might be argued that we need only to exempt from military duty those exercising conscientious objection, rather than abolishing conscription altogether. In principle, it may be the case. However, I suspect this will not work in our real case. First, individuals' autonomy cannot be sufficiently respected if the menu of alternative (non-military) service available to them is quite limited. Second, in Ukraine, alternative (non-military) service for those exercising conscientious objection is available only for those belonging to one of the religious groups listed by the government, and even for them, “there is ... no clear provision in the legal framework concerning conscientious objection and alternative service” in times of mobilization (Caroline Morin-Terrini and Thomas Schrott ed., *Fact Finding Mission Report: Ukraine* (Fontenay-sous-Bois: French Office for the Protection of Refugees and Stateless Persons, 2017), 32–34).

society.¹⁸ Even if this is the case, it is unclear why they think these aims cannot be attained by making them engage in *non-military* community service. Another argument is that the volunteer system is unfair because only those from disadvantaged backgrounds are forced to join the armed forces out of economic need, whereas others are not.¹⁹ However, there are other dangerous occupations in which the disadvantaged tend to be overpopulated (e.g., firefighters and coal miners), so it is hard to understand why only military service should be compulsory for every citizen. Moreover, if the problem of “economic conscription” is about economic injustice, a more constructive way to tackle it would be to redress this injustice through social policies rather than by introducing universal conscription while leaving the underlying injustice intact.

A more promising argument for conscription is that it is needed to suppress the irresponsible belligerent impulse of citizens in democratic society. Under the volunteer military system, the argument goes, the majority of citizens can easily support wars (whose *jus at bellum* is highly suspect) while being in safety, imposing all the combat danger exclusively on professional soldiers, who are in a minority. We can disincentivize the majority from supporting unnecessary wars only under the conscription system, which will directly expose them to life-threatening danger if they decide to do so.²⁰

While it seems true that the conscription system can exert such a disincentivizing effect on the majority citizens, there are surely other factors (e.g., geopolitical position of the country, character of majority citizens, severity of economic disparity, and the degree to which the government respects the freedom of expression) that can make a difference as to the belligerence of a nation, so it is still an open question of *to what degree* the conscription system can contribute to this overall effect compared to these other factors. Considering the fact that countries have started aggressive wars even under the conscription system (e.g., the U. S. vs. Vietnam, Israel vs. Lebanon, and Russia vs. Ukraine), this openness makes the argument highly vulnerable to manipulation.

To take the ongoing war as an example, if Russia had decided to withdraw from Ukraine only a few months after the rise of its citizens’ anti-war movements following Putin’s declaration of partial mobilization, the proponents of this argument would explain that it is Russia’s conscription system, under which Putin could mobilize citizens, that significantly contributed to the decision. If Russia were to continue its military operations in Ukraine

¹⁸ “Neither a professional nor a ‘volunteer’ army is compatible with democratic citizenship ... Both armies are mercenary in character and contribute to the privatization of social life that has been corrosive to citizenship in other realms” (Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley, Los Angeles and London: University of California Press, 1984), 299).

¹⁹ “[A volunteer army] makes [military] service a function of economic need – in reality the poor, the undereducated, and the ill-trained volunteer, certainly not freely but because they have no alternatives” (Barber, *Strong Democracy*, 299).

²⁰ “A professional or volunteer force can be used abroad for purposes that a conscript army might not brook (the American experience in Vietnam and the Israeli experience in Lebanon in 1982 are illustrations of conscript armies resisting unpopular wars)” (Barber, *Strong Democracy*, 299).

for one or two more years after the mobilization, I assume the proponents would argue that it is because the mobilization was only “partial” and attribute the continuation of Russian’s invasion to such other factors as Putin’s “dictatorship” and oppression of free speech instead of conceding that the conscription system does not significantly make a difference to countries’ decisions regarding war. This kind of cherry-picking evaluation of the facts renders their thesis (i.e., the conscription system is necessary to suppress the irresponsible belligerent impulse of citizens) substantially unfalsifiable.²¹ Moreover, we also need to consider that under the conscription system, the government can suppress anti-war movements by selectively calling to arms those individuals that have joined in the protests, as Russia did.

So far, I have examined the arguments for conscription, none of which I find sufficiently compelling. But even if they can show the justifiability of the conscription system *per se*, the important thing to note is that their rationales cannot be employed to justify *male-only* conscription. First, since both women and men are citizens, the cultivation of civic virtue and democratic participation cannot be invoked to justify discriminatory treatment between two genders regarding conscription. Second, if the unfairness of “economic conscription” under the volunteer system lies in the fact that only some citizen groups (e.g., the poor and the undereducated) are forced to join the armed forces, this unfairness will remain the same (or even be intensified) in the case of male-only conscription because, unlike the poor and the undereducated, who have a few occupational choices other than military service under the volunteer military system, men have to choose between military service and legal punishment under the conscription system, given that they cannot change their gender on their individual efforts.²² Third, since women constitute (more than) half of citizens, and hawks are present in both gender groups, it is far from clear that male-only (rather than universal) conscription is sufficient to suppress the belligerent impulse of the majority, if the conscription system has such a function in the first place. Alternatively, if it suffices to suppress this impulse so that only a substantial number of citizens are being conscripted, it does not follow that male-only conscription should be adopted, because *ex hypothesi* the same aim can also be attained by, say, *female-only* conscription. Hence, for the exemption of female citizens from conscription to be justified, we need to provide independent arguments as to why this is fair or morally justifiable despite its unfairness.

2. On the moral arguments for female-only exemption from conscription

It is widely believed that since women are generally physically weaker than men, and thus unfit for combat, an unconditional exemption of female (but not male) citizens from conscription is morally justified. This argument is analogous to the one employed in Broome’s

²¹ See Karl Popper, *The Logic of Scientific Discovery* (London: Hutchinson, 1959), which advocated for falsifiability as a condition of a scientific theory.

²² I already discussed the problems with the availability of alternative (non-military) service for those exercising consciousness objection in note 17, above.

dangerous mission earlier. The situation of male citizens in our conscription case corresponds to that of “the talented candidate” in Broome’s dangerous mission. Since the strength of claims to the good of “being left behind” seems the same for all in both cases (because all human beings have the equal right to life and bodily integrity regardless of gender, and the unfitness for combat on the part of female citizens no more gives them a stronger claim to “the commodity of staying behind” than the lack of talent on the part of the untalented candidates does in the dangerous mission case),²³ the question before us is whether female citizens’ *alleged* physical weakness (hence, unfitness for combat) can nevertheless justify their exemption from conscription, despite its unfairness.

Even setting aside that military service involves functions other than combat, this argument is flawed for the simple reason that there do exist some females who are physically strong enough to carry out combat if they are properly trained. Therefore, if the underlying concern is about drafting those fit for combat to improve military effectiveness, the appropriate response will be a gender-neutral (rather than male-only) physical examination for all. Admittedly, running such a universal examination might place a substantial burden on the national budget, but given that some European countries (e.g., Sweden and Norway) have introduced conscription for both genders, it is unclear why Ukraine cannot follow that path. After all, if we are sincerely concerned about efficiency and the economic effect of universal conscription, then what is recommended is not male-only conscription but a volunteer military system made up exclusively of professional soldiers (as I argued in the previous subsection).

Another argument for the general exemption of females from conscription focuses on their *physiological* differences from males, *inter alia*, their distinctive function to bear children. This argument may be construed as providing a reason to outweigh the requirement of fairness. Since women’s menstruation and potential to take maternity leave hinder military forces’ operations to a significant degree if they are conscripted, the argument goes, female-only exemption from conscription can be justified for the reason of overall military effectiveness, even though this unfitness as such does not give them a stronger claim to the good of being left behind. Alternatively, the argument may be interpreted in terms of fairness itself. Since only women bear children, and reproduction involves both physical burden and contribution to the survival of the nation (comparable to military service), it is unfair to conscript female citizens, the argument goes, because it would mean imposing on them more than their fair share of the burden of the nation’s survival; that is, all citizens have the same claim to the *overall* good of being relieved from the self-sacrifice in the interest for all, and female citizens’ self-sacrifice in the context of delivering the next generation gives them a stronger claim to the good of being relieved from the self-sacrifice in another context of national defense.

²³ “In the case of dangerous mission, there are reasons for giving the commodity of staying behind to the untalented candidates ... [b]ut their lack of talent does not give the untalented candidates a stronger claim to this commodity” (John Broome, *Weighing Goods: Equality, Uncertainty and Time* (Oxford: Basil Blackwell, 1991), 195).

Construed either way, this argument is not convincing enough. As to the first interpretation, even setting aside that not all women menstruate and have the capacity to reproduce, we can still point out that some male citizens do rely on special commodities in their daily lives (e.g., those with myopia on glasses and those with asthma on inhaled steroids) just as able-bodied females on menstrual hygiene products, but (unlike the latter) are not necessarily exempt from conscription. Considering this fact, it is unclear why the military forces can accommodate only the former but not the latter without undermining overall military effectiveness. As to the second interpretation, we can argue that the alleged parallel between males' fulfillment of national defense and females' fulfillment of reproduction cannot be sustained, since female citizens are legally allowed not to bear any child (even if they are capable of doing so), whereas male citizens have a legal obligation to serve in the military under conscription. It is one thing to exempt only females who have actually given birth from (or shorten the term of) conscription; it is quite another to exempt *all* females from conscription, regardless of their *actual* contribution to reproduction.

We can come up with still more arguments for female-only exemption, such as the argument based on male dominance in military organizations. Since the armed forces are and have been designed to accommodate the interests of male citizens, and most members of the armed forces are male, female citizens will have to face inferior treatment (e.g., being targets of sexual harassment) in such a hostile environment and have little prospect of thriving if conscripted. Hence, the argument goes, the introduction of gender-neutral conscription should be postponed until the military forces are fully redesigned to be women-friendly.²⁴

Even setting aside the problem that this argument totally ignores the fact that some men (e.g., sexual minorities and *unmanly* men) are also vulnerable to inferior treatment (including sexual harassment) in the masculinist environment of the military (yet not exempt from conscription because of their vulnerability), this argument is flawed for the simple reason that the problem of male dominance is present in *any* organization that has traditionally been dominated by men (e.g. parliaments, cabinets, and the executive committees of large firms), and in the case of these other organizations, we would normally argue first for the positive step of increasing the representation of women there to rectify the masculinist environment and the underlying male-centered norms. To be consistent, we should take the same attitude with regard to military organizations, and since it is possible that under our entrenched gender norms, merely encouraging women to join the armed forces might not change the situation whereby they are underrepresented, the conscription of both female and male citizens might be needed for proportional (or beyond-the-critical-mass)

²⁴ Here, too, we can construct two variations of the argument: one based on fairness and the other based on reasons outweighing unfairness. We might argue, for instance, that females have a stronger claim to the good of being left behind because they have a stronger need for this good; that is, they are more likely to be sexually harassed in such an environment. Alternatively, we might also argue that since females under such a hostile environment will not thrive, and hence meaningfully contribute to the overall military effectiveness, their exemption from military service is justified, despite them not having a stronger claim to the good of being left behind.

representation of women in military organizations.²⁵ In any case, male-only conscription cannot change the *status-quo*; worse still, it might even entrench it.

3. *Fight for homeland broader than military combat* (?)

So far, I have examined the moral justifiability of the (male-only) conscription system in Ukraine, upon which the male-only ban on leaving the country seems to rely. Although the arguments I have examined are not exhaustive, we can temporarily conclude that (male-only) conscription is morally unjustified until somebody provides any other argument unexamined in the previous subsections.

However, is there any other way in which the Ukraine government can justify its (male-only) ban on leaving the country? When considering this matter, it is important to keep in mind that for citizens to defend their country against invaders, it is not enough that only those engaging in combat remain in the country. Even apart from the importance of combat service support in military organizations, the success of the self-defending nation depends greatly on large-scale non-military cooperation on the part of its own citizens (e.g., removing debris, running transportation, and healing the injured), and for there to be such cooperation, at least a substantial number of citizens have to remain. Seen from this perspective, we might make better sense of why the government also applies the ban to male citizens who are unable to be mobilized (e.g., students). For all that the government has officially announced, it might be better to understand the rationale behind the ban as making citizens who are able to “fight” in this broader sense (including non-military cooperation) stay, rather than mobilizing them for purely military use.

At the same time, this way of justifying the ban makes it difficult to explain why only male citizens have to remain in their country, since the need for female-only exemption seems far less compelling in the case of non-military cooperation than military mobilization.

The mere need to suppress the number of refugees from the country does not suffice to justify this gender-based discriminatory treatment. Tatsuo Inoue, a Japanese legal philosopher, claimed:

It is because the Ukraine government is fighting against Russian troops by introducing general mobilization, which prohibits males aged 18 to 60 from leaving the country while permitting women, children, and the elderly to flee aboard, that European countries, which had been closing their doors to refugees, have accepted so many Ukraine refugees, undertaking the risk of a new refugee crisis <...> If the Ukraine government had adopted the policy of allowing anybody who wanted to flee abroad to do so, European countries would not have opened their doors to Ukraine refugees so widely as they actually do now <...> It is not only because they would have had to avoid the excessive burden of accepting refugees but also because they are

²⁵ By saying this, I do not mean to argue that we should introduce universal conscription instead of the volunteer military system. What I am saying is only that if we are so concerned about the problem of male dominance in military forces, as are the proponents of the female-only exemption based on this consideration, the norm of consistency might lead us to support universal, rather than male-only, conscription.

not so generous as to support a country that unconditionally allows its own people to flee without fighting on their own against the invaders in the first place.²⁶

However, if the problem concerns the overflow of refugees and the people's lack of eagerness to defend their own country, the fairest thing to do would seem to be to draw lots to decide who should stay and who can leave, since (as I have repeatedly argued) the strength of the claims to the good of being in safety seems to be the same for all, regardless of gender.²⁷ Hence, for the male-only ban to be justified, we still need further arguments as to why it is fair or morally justified (despite its unfairness).

4. On the moral arguments for female-only exemption from the ban on leaving the country

The most natural response to the question I have posed seems to be that women, whether civilians or combatants, are much more vulnerable to sexual assault (e.g., rape) than men if captured by enemy troops, so that their claim to the good of being in safety is by far stronger than that of men. Indeed, this argument seems to be in line with the requirement of special protection for women prescribed in the Geneva Conventions and Protocol I.²⁸

For all its initial appeal, this argument is not without problems. Even setting aside that men too can be victims of sexual assault in war (as we saw in Abu Ghraib prison in Iraq, where US soldiers, including female ones, inflicted electric shocks on male prisoners' genitals),²⁹ this argument pays little attention to the possibility that male rather than female civilians are more likely to be killed by enemies if captivated. Adam Jones, citing the examples of Kosovo, East Timor, and so on, pointed out that male civilians (especially of "battle age") are and have been most targeted for mass-killing in war.³⁰ Indeed, as we have recently witnessed, "[o]f the 458 people killed during Russia's occupation of the Kyiv suburb of Bucha last March, 366 were men."³¹ As killing is generally considered worse than sexual assault

²⁶ Tatsuo Inoue, *Ukuraina-senso to Mukiau: Putin toiu "Akumu" no Jisso to Kyokun* (Tokyo: Shinzansha Publisher, 2022), 240–41.

²⁷ Broome argued that if the strength of the claims to the relevant good is equal, yet the good to be distributed is indivisible (e.g., the claims cannot be equally satisfied), fairness would require holding a lottery because by doing this, "[e]ach person can be given a sort of surrogate satisfaction [that is, an equal *chance* of getting the good]" (Broome, "Fairness," 97–98). Indeed, Inoue himself conceded that "it is a separate question to be considered whether or not the criteria employed by the Ukraine government in deciding whom to give permission to flee abroad is fair enough" (Inoue, *Ukuraina-senso to Mukiau*, 254, n. 31).

²⁸ The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 11 August 1949, entered into force 21 October 1950) 75 UNTS 5 (Fourth Geneva Convention) art 27; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I) art 76.

²⁹ This example is cited from David Benatar, *The Second Sexism: Discrimination against Men and Boys* (Malden, MA and Oxford: Wiley-Blackwell, 2012), 118.

³⁰ Adam Jones, "Gendercide and Genocide," *Journal of Genocide Research* 2, no. 2 (June 2000): 185ff.

³¹ Waldie, "Ukraine's Ban on Adult Men Leaving the Country Faces Growing Legal Challenges."

(including rape), since almost all liberal democracies maintain more severe statutory punishment against the former than the latter, it is far from evident that females have a stronger claim to the good of being in safety than males do in war.

Alternatively, we might conceive of an argument based on women's role as caregivers. Since women are primary forces of caring for the dependent (e.g., children, the elderly, and the disabled), and these vulnerable people have special needs to be in safety in wartime, the argument goes, the female-only exemption from the ban is justified by their special role of accompanying and looking after dependents in safety.³²

While the rationale behind this argument may intelligibly explain why male citizens who are the primary caregivers (e.g., single fathers or fathers of three or more children or a disabled child) are also exempt from the ban, the ban is obviously both over-and-under inclusive if it is wholeheartedly to commit itself to this justificatory claim; that is, it is overinclusive in that female citizens who have no dependent are allowed to leave the country, and it is underinclusive in that male citizens who are primarily (or exclusively) caring for their two children, and whose wives are full-time breadwinners and too busy to share caregiving, are made to stay under the ban. Since it seems not impossible for border guards to confirm the family status of every individual citizen who tries to cross the border from the relevant documents (as they do now in the case of only male citizens), if the Ukraine government nonetheless sticks to the current ban based on gender, overlooking its evident over-and-under-inclusiveness, I suspect the true motivation behind the female-only exemption is not the safety of the dependent but the uncritical endorsement of the traditional norms of the gender division of labor.

Earlier, I pointed out that males are more likely to be killed in war even if they are unarmed civilians, casting doubt on the argument that females have a stronger claim to the good of being in safety. However, conceding this point, one might argue that the prioritization of women for evacuation abroad is still justified for the reason of the survival of the whole nation, which is quite analogous to that of the conservation of species. Since "an individual man can father thousands of children if there were fertile women to gestate them, whereas an individual woman can produce only one child per year or so," one might argue, "too many fatalities of women [but not men] of reproductive years would inhibit a society's ability to produce a new generation and thus threaten its own survival."³³

³² Here, too, this argument can be based either on fairness or reasons outweighing unfairness. One might argue, for instance, that since women are burdened with the care for the dependent, and caregiving needs to be done in safety, they have a stronger claim to the good of being in safety. Alternatively, one might argue that, since the safety of the dependent (especially of children) is vital for the survival of the whole nation, and women who primarily care for the dependent can contribute to this aim by being allowed to flee aboard with the dependent, their special exemption from the ban can be justified even if they, *qua* being female, do not have a stronger claim to this good than their male counterparts.

³³ Benatar, *The Second Sexism*, 79. Benatar said that this can be attributed to Tom Digby's following argument: "If we send the women off to war and some get killed, it has a far greater impact on our ability to produce more babies than if the same number of men had been killed. Thus, societies that

Even apart from the fear that this argument might be a dangerous slippery slope toward eugenics, I find it problematic because it seems to earn its intuitive appeal by obscuring what is meant by “the survival of the whole ‘nation’ or ‘a new generation.’” If proponents of this argument assume the “nation” to be a pure-blooded community, and members of “a new generation” are born exclusively from Ukrainian parents, the argument might be employed to prioritize women in evacuation. However, if we include those born from “international” sexual intercourse in the members of “a new generation,” then the prioritization of *male* rather than female citizens in evacuation might be derived from the very same rationale of this argument, since Ukrainian males, if fleeing abroad, will be able to make more Ukrainian children (through intercourse with foreign women) than their female counterparts will (through intercourse with foreign men) in a same period, since the citizenship law of Ukraine basically maintains the principle of *jus sanguinis*, in which children automatically acquire citizenship at birth if at least one parent, whether mother or father, is a Ukrainian.³⁴ Either way, the argument will fail because the former will lose its intuitive attractiveness once its chauvinistic implications are brought into light and the latter can lead to self-refutation.

III. An Additional Argument on the Moral Wrongness of Discrimination: Deliberative Freedom

Sophia Moreau recently constructed a novel view on the moral wrongness of discrimination. In the field of the ethics of discrimination, theories of discrimination that locate the unfairness or moral wrongness in demeaning or lowering of the social status of the discriminated have been in the dominant position.³⁵ Against these theories, Moreau argued that the unfairness and moral wrongness of all instances of discrimination cannot be fully explained.³⁶ To show this, she gave an example of a grocery store that channels female job applicants into positions as cashiers and male counterparts into positions in the stockroom. Since neither position is regarded as inherently superior to the other, she claimed our objection to this arrangement cannot be that “the women are being demeaned relative to men or [*vice versa*], or that the policy perpetuates a lower status for either men or women.” Rather, what is wrong with this arrangement seems to be stereotyping “that unfairly

have faced circumstances requiring them to insure efficient reproduction, and that would include war, have deemed men the disposable sex, comparatively, so they get assigned to combat” (Tom Digby, “Male Trouble: Are Men Victims of Sexism?” *Social Theory and Practice* 29, no. 2 [April 2003]: 256). To be fair to him, I should add that Digby only meant to provide a *descriptive* explanation about why men are and have been assigned to combat as a *matter of fact*, rather than a *normative* argument as to why they *should* be.

³⁴ Law of Ukraine, January 18, 2001, No. 2235-III, “About Citizenship of Ukraine” (UA), art 7.

³⁵ The most representative among these theories are those of Owen Fiss, “Groups and the Equal Protection Clause,” *Philosophy and Public Affairs* 5, no. 2 (Winter 1976): 107–77 and Deborah Hellman, *When Is Discrimination Wrong?* (Cambridge, MA: Harvard University Press, 2008).

³⁶ Sophia Moreau, “Discrimination and Freedom,” in *The Routledge Handbook of the Ethics of Discrimination*, ed. Kasper Lippert-Rasmussen (London and New York: Routledge, 2018), 166.

restrict[s] their freedom: women have no choice of becoming or envisioning themselves as strong enough to work in a stocking room, and men have no choice of being seen as anything other than their muscles.”

As an alternative to these theories, she proposed a theory of morally wrongful discrimination based on the infringement of the right to “deliberative freedom.” Deliberative freedom is “the freedom to deliberate about one’s life, and to decide what to do in light of those deliberations, without having to treat certain personal traits (or other people’s assumptions about them) as costs, and without having to live one’s life with these traits always before one’s eyes.”³⁷ Indeed, the wrongness of the policy in the example of the grocery store can be easily explained from the perspective of deliberative freedom. In this case, both female and male applicants have their deliberative freedom infringed by this arrangement; that is, the former has to treat the employers’ assumptions about femaleness (that is, being weak and unfit for muscular labor) as costs, and the latter has to treat their assumptions about maleness (that is, “men need to be strong”) as costs, when looking for jobs.

At the same time, Moreau denies that any infringement of one’s deliberative freedom constitutes unfair and morally wrongful discrimination. For it to be wrongful discrimination, one needs one’s *right* to deliberative freedom to be infringed by the relevant act.³⁸ Whether a person has a right to a certain deliberative freedom in a particular circumstance is determined by more than one consideration. However, the most fundamental among them is, Moreau claimed, whether the infringement of this particular freedom amounts to failing to respect the person as a being who is equally capable of autonomy. When assessing if someone has the right to a certain deliberative freedom, she continued, the idea of respecting someone as a person capable of autonomy points us in the direction of a number of relevant considerations:

One of the most important of these considerations are whether the costs that a discriminatee is being asked to bear reflect her own personal choices, or whether they reflect other people’s assumptions about who she is and what roles she ought to occupy <...> But <...> it also depends on how extensive and pervasive those costs are; whether they affect goals or choices that are particularly important to the discriminatee’s own conception of herself and of her life; and whether most people in the discriminatee’s society, too, face the kind of deliberative burden that she is facing.³⁹

The interests of other people who are affected by a particular practice are also relevant considerations.⁴⁰

When applied to our case, it is obviously true that the ban does infringe on the deliberative freedom of male citizens because, by its presence, they have to bear the costs of their society’s

³⁷ Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford: Oxford University Press, 2020), 84. This idea of deliberative freedom was originally developed in Sophia Moreau, “What Is Discrimination?” *Philosophy and Public Affairs* 38, no. 2 (Spring 2010): 148–49.

³⁸ Moreau, *Faces of Inequality*, 88–89.

³⁹ *Ibid.*, 90.

⁴⁰ *Ibid.*, 91–92.

assumptions about maleness (that is, “men should fight”) when deliberating on whether to stay or leave the country in wartime. The question is whether they have a *right* to this particular deliberative freedom – that is, a right to be free from treating their society’s assumptions about maleness as costs when deliberating whether to stay or leave. Does the ban fail to treat them as beings equally capable of autonomy, given the interests of others affected by the government’s decision concerning it?

My answer to this question is “probably yes.” First, since the costs on the part of male citizens reflect not their own personal choices (after all, we have not chosen our gender) but the assumptions of other people in the same society (including female citizens) about how men should behave in wartime, it does not seem fair to ask them to bear these costs. Second, these costs of having to take into consideration other people’s assumptions about maleness when determining whether to stay or leave the country significantly impede the goals and choices of males whose conceptions of themselves and of their lives are not adaptable to the traditional gender norms (e.g., sexual minorities and *unmanly* men). Third, it is only male citizens aged 18 to 60 who are facing the relevant kind of burden imposed by the ban. Although the ban may also negatively affect the deliberative freedom of female citizens, since assumptions about how men should behave based on gender norms indirectly construct those about how women should, it is not the case at least that everyone in Ukraine must bear the burden to *equal* degrees.

As to the interests of other people, it might be argued that female citizens’ more important deliberative freedom will be infringed if the ban is extended equally to them, since they will have to take their gender (being more likely to be sexually assaulted) as a cost when staying in the country. However, if I am right in arguing that women do not necessarily have a stronger claim to the good of being in safety *qua* being women (since in the case of mass killing, it might be men who are more likely to be targeted), it is unclear if the importance of this kind of deliberative freedom on the part of female citizens can outweigh that on the part of male counterparts infringed by the male-only ban. It might also be argued that the interests of female caregivers and their dependents will be infringed by the gender-neutral ban, but if this is all we are concerned about, the appropriate response would be to introduce a *gender-neutral* exemption for any citizen who has dependents to care for.

Alternatively, if we opt for lifting the male-only ban, it might be argued that the interests of Ukrainians as a whole would be infringed because no one would stay to fight for the country against Russia’s invasion. I find this argument unconvincing, however, considering that a substantive number of Ukrainian citizens have already volunteered for military service and tens of thousands of Ukrainian military-age males who had lived abroad have returned to the country “to defend sovereignty and territorial integrity.”⁴¹ Overall, since the impact

⁴¹ Irina Chevtayeva, “How Men Try to Get Around the Ban to Leave Ukraine,” *DW*, July 19, 2022, <https://www.dw.com/en/how-ukrainian-men-try-to-get-around-the-ban-to-leave-the-country/a-62529639>. [Update: Since the acceptance decision of this paper on May 30, 2023, the situation of war has changed drastically, and Ukraine is now facing a shortage of soldiers who are willing to fight against Russian

of the ban on the deliberative freedom of male citizens is quite substantial in a way that reflects little choice on the part of them and burdens them unequally compared to others, while the interests of others are not compelling enough, I conclude that the ban infringes male citizens' *right* to be free from treating their society's assumptions about maleness as costs when deliberating on whether to stay or leave, thereby constituting morally wrongful discrimination against them.

Conclusion

In this paper, I have examined the moral wrongness of Ukraine's male-only ban on leaving the country and concluded that it unfairly and morally wrongfully discriminates against male citizens on the basis of their gender.

Before closing, I wish to make three remarks on the scope and implications of the arguments in this paper. First, since the focus has been on differential treatment based on gender, rather than on the ban on leaving *per se*, the arguments made in this paper are basically neutral regarding how the Ukraine government should rectify this morally wrongful discrimination. It might be that it should immediately lift the ban on male citizens altogether. It might be that it should extend the same ban on female citizens similarly situated.⁴² Alternatively, there might be a third or intermediate way.⁴³ This is a question worthy of further examination.

troops. That having been said, I still find it unnecessary to change my position on this point. First, it seems to me that the Ukraine government still has the options for increasing volunteers such as raising salaries of the soldiers, promising them the discharge from military service after the definitive period (e.g., one or two years), and so on. Second and more importantly, if there is not a sufficient number of citizens who will voluntarily stay and fight for their homeland when allowed to leave, I think this very fact can be construed as the manifestation of their collective unwillingness to continue fighting against the invasion by risking their lives and limbs (the unwillingness which reflects the uncoerced and autonomous decisions of individuals), thereby seriously undermining the claim that they have collective interests in protecting the country in the first place.]

⁴² At the time of writing, there is no similar ban on female citizens as far as I know. Women who have (voluntarily) registered themselves can legally be conscripted into military service, thus being liable to be subjected to the same ban. However, Hanna Malyar, the Deputy Minister of Defense of Ukraine, announced, on July 4th, that there is no need to mobilize them (“*немає потреби в примусовій мобілізації жінок – Міноборони*,” *Слово і Діло*, accessed October 26, 2022, <https://www.slovoidilo.ua/2022/07/04/povyna/bezpeka/zsu-nemaye-potreby-prymusovij-mobilizacziyi-zhinok-minoborony>). Only women with certain specialties and/or professions related to a corresponding military specialty can legally be subject to registration (Law of Ukraine, March 25, 1992, No. 2232-XII, “About Military Duty and Military Service” [UA], art 1, pt 11), but since this mandatory military registration has been postponed until October 1st, 2023, for the time being, the registration of female citizens is “exclusively voluntary” (“Departure of Women Abroad from October 1: The Final Decision of the Ministry of Defense of Ukraine,” *VisitUkraine.today*, accessed June 16, 2023, <https://visitukraine.today/blog/808/departure-of-women-abroad-from-october-1-the-final-decision-of-the-ministry-of-defense-of-ukraine>).

⁴³ Viktor Andrusiv, the adviser to the head of the Ministry of Internal Affairs of Ukraine, once proposed that male citizens be able to travel abroad freely provided that they have paid “an insurance premium” of between 3000 and 5000 dollars (“The Ministry of Internal Affairs of Ukraine Proposes to Allow Men

Second, my arguments in this paper have focused exclusively on the *moral* wrongness of the relevant ban, and therefore said nothing about the duty to obey even immoral laws, which has been one of the major questions in the field of legal philosophy. This is highly relevant in our context, as the martial law and general mobilization were declared and ordered by President Zelensky and approved by a majority of parliamentarians, all democratically elected by the people. Do male Ukrainians have a moral duty to obey the ban even if it morally wrongfully discriminates against them? If some of them try to leave the country illegally under the conviction that it is morally wrongful gender discrimination, can this act be justified as civil disobedience? These are questions we need to reflect upon.

Third, all my arguments in this paper can be applied to *any* country introducing gender-based bans on leaving in wartime. As we already know, Putin ordered partial mobilization on September 21, 2022 and began to conscript (male) reservists against their will. On April 14 of this year, he even signed “a law that makes electronic military summonses equivalent to those delivered on paper. <...> After a summons is considered delivered, the eligible party will be barred from leaving the country until they appear at a military enlistment office.”⁴⁴ If Russia is to implement this ban on leaving, all that I have argued against the ban in Ukraine could be equally applied to it. In any case, nothing in my criticism concerning the Ukraine government in this paper diminishes the far greater evil on the part of Russia, which has initiated an unjustified war of aggression and targeted unarmed civilians, whether females or males.

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to Travel Abroad in Exchange for an ‘Insurance Fee,’” *Top War*, accessed October 23, 2022, <https://en.topwar.ru/197024-na-ukraine-predlagajut-razreshit-muzhchinam-vyezd-za-rubezh-v-obmen-na-strahovoj-vznos.html>). Although this proposal is not perfect from the standpoint of nondiscrimination, since female citizens are free from such requirement for permission to leave, it might be a lesser evil than the current total ban on males if it is now politically infeasible to lift the ban altogether.

⁴⁴ “Putin Signs Law on Electronic Summonses and Restrictions on ‘Dodgers,’” *Meduza*, accessed on June 16, 2023, <https://meduza.io/en/news/2023/04/14/putin-signs-law-on-electronic-summonses-and-restrictions-on-dodgers>.

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Yuichiro Mori. On the Moral Wrongness of a Male-only Ban on Leaving One's Homeland

Abstract. The aim of this paper is to examine whether it is morally wrong to ban only male citizens from leaving a country in wartime, and if it is, why it is the case. Following Russia's invasion of Ukraine, President Volodymyr Zelensky declared martial law and ordered general mobilization, at the same time prohibiting male citizens aged 18 to 60 from crossing the border. The justifiability of the ban is in dispute, and opponents have made a case in both legal and moral dimensions. In the moral dimension, there are arguments based on consequentialism, individual freedom, and fairness or non-discrimination. In this paper, I focus on the third argument and argue that the ban unfairly and morally wrongfully discriminates against male Ukraine citizens on the basis of their gender. First, I define discrimination and apply it to our case. Second, moving from the descriptive definition of discrimination to its moral wrongness, I argue that the male-only ban is unfair and morally unjustified. Third, I argue that the ban can also be deemed morally wrong from one of the prominent views in the field of the ethics of discrimination, namely the deliberative freedom view.

Keywords: war; ban on leaving the country; gender; discrimination; fairness; conscription; deliberative freedom.

Юічіро Морі. Про моральну неправильність заборони залишати батьківщину лише для чоловіків

Анотація. Метою цієї роботи є вивчення того, чи є морально неправильним забороняти лише громадянам чоловічої статі залишати країну у воєнний час, і якщо це так, то чому це так. Після вторгнення Росії в Україну президент Володимир Зеленський оголосив воєнний стан

і наказав провести загальну мобілізацію, одночасно заборонивши перетинати кордон громадянам чоловічої статі віком від 18 до 60 років. Обґрунтованість заборони оскаржується, і опоненти висунули аргументи як у юридичному, так і в моральному вимірах. У моральному вимірі існують аргументи, засновані на консеквенціалізмі, індивідуальній свободі та справедливості або недискримінації. У цій статті я зосереджуюся на третьому аргументі і стверджую, що заборона несправедливо та морально неправильно дискримінує громадян України чоловічої статі за ознакою їхньої статі. По-перше, я визначаю дискримінацію і застосовую її до нашого випадку. По-друге, переходячи від описового визначення дискримінації до її моральної неправильності, я стверджую, що заборона лише для чоловіків є несправедливою та морально не виправданою. По-третє, я стверджую, що заборона також може бути визнана морально неправильно з точки зору однієї з визначних ідей у сфері етики дискримінації, а саме дорадчого погляду на свободу.

Ключові слова: війна; заборона на виїзд з країни; стать; дискримінація; справедливість; призов на військову службу; дорадча свобода.

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