**Civic Conscience, Selective Conscientious Objection and Lack of Choice**

ABSTRACT

Most democratic states tolerate, to various extents, conscientious objection. The same states do not tolerate, almost completely, acts of civil disobedience and what they perceive as selective conscientious objection.

In this paper it is claimed that the dichotomy between civil disobedience and conscientious objection is quite often misguided; that the existence of a ‘civic conscience’ makes it impossible to differentiate between conscientious objection and civil disobedience; and that there is no such thing as ‘selective’ conscientious objection – or that classifying an objection as ‘selective’ has no significant moral or practical implications.

These claims are supported by a preliminary, more general argument according to which conscientious objection is and should be tolerated because the objector lacks the ability to choose his conscience and to decide whether to act upon it. The ‘lack of choice argument’, it is argued, applies equally to all types of conscientious objection, including those which are mistakenly called ‘selective’ objection. It also applies to one type of civil disobedience.

Therefore, if a state is willing to tolerate non-selective conscientious objection, it may and at times must also tolerate selective conscientious objection and (one type of) civil disobedience and to a similar degree (all other things being equal).

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# 1. Introduction

Most states do not tolerate civil disobedience and what they perceive as selective conscientious objection. Yet many states that do not tolerate civil disobedience and selective conscientious objection do tolerate (to various degrees) what they perceive as non-selective conscientious objection. In this paper it is argued that all too often there are no prevailing justifications for only tolerating non-selective conscientious objections. That is, if a state is willing to tolerate non-selective conscientious objections, it may and at times must also tolerate civil disobedience (which relies on what I shall call ‘civic conscience’) and selective conscientious objections – to a similar degree (all other things being equal). This is so because there is one common justification for tolerating conscientious objection, civil disobedience (which relies on a ‘civic conscience’) and selective conscientious objection. This justification is grounded in the lack of ability of the dissident to choose the content of their conscience and to choose whether or not to act with accordance of their conscience.

Specifically, the lack of ability to choose one’s conscience as well as the lack of ability to choose whether to act upon it means that the dichotomy between civil disobedience and conscientious objection is quite often misguided. It also means that there is no such thing as ‘selective’ conscientious objection, or rather that conceptually, all conscientious objection – even the type mistakenly labelled ‘absolute’ conscientious objection – in fact is selective conscientious objection.

Moreover, even if the conceptual distinction between selective conscientious objection and non-selective (or absolute) conscientious objection is sustainable, I argue that this distinction has no significant moral or practical implications and that ultimately, all kinds of conscientious objection should be treated equally (all other things being equal).

In the second section I lay out a few definitions of the central concepts (conscientious objection, selective conscientious objection and civil disobedience) in order to avoid misconceptions. In the third section I argue, in short, that a common justification for tolerating all types of conscientious objection involves acknowledgement that conscientious objectors do not have real choice when they acquire their conscience and acts upon it. In the fourth section I rely on the lack of choice argument and offer a new understanding of the differences between conscientious objection and civil disobedience. In the fifth, sixth and seventh sections I rely on the lack of choice argument in order to explain why selective conscientious objection is merely a form of conscientious objection and therefore should be treated the same.

# 2. Conscientious objection, civil disobedience and selective conscientious objection

For the purpose of this paper, and without trying to defend this assertion, I will perceive ‘conscience’ as a source of ‘higher moral demands’ to which a person sees himself as subordinate. I will assume that a person’s conscience consists of his deepest moral beliefs which provide uniquely strong or weighty reasons for doing X or refraining from doing X. These ‘conscientious reasons’ are normally conclusive and are very rarely overridden by conflicting reasons or excluded from the balance of reasons by exclusionary reasons. Conscientious reasons can in fact be perceived as exclusionary reasons themselves. Exclusionary reasons exclude first-order reasons from the balance of reasons, which now rests upon the non-excluded reasons and sometimes also on the exclusionary reason itself.[[1]](#footnote-1) It may be the case that when one has conscientious reasons for doing X or refraining from doing X, at least some conflicting first-order reasons are excluded from the balance of reasons by the conscientious reasons and thus do not have any effect on the decision-making balancing process. It can also be the case that conscientious reasons simply override most other reasons without excluding any of them from the balance of reasons. For the purpose of this paper there is no need to decide whether conscientious reasons are uniquely strong and weighty first-order reasons or exclusionary reasons, as according to both perceptions – and as I apply them here – conscientious reasons are ‘trump cards’ in the sense that they almost always determine the final decision. Only in the face of severe consequences following an ‘act of conscience’, may a person act contrary to his conscientious reasons. Since conscientious reasons result from one’s deepest moral beliefs, acting against them results in great harm to one’s personhood and moral integrity.

There is no agreed definitions to ‘conscientious objection’, ‘selective conscientious objection’ and ‘civil disobedience’. Here I will assume the validity of the following definitions, without aiming to justify them or to refute possible criticism of them.

Conscientious objection is often defined as a private act which its only purpose is to distance the objector from acting according to a legal demand. With regard to military service, for example, a conscientious objector refuses to join the army for ‘conscientious reasons’ – that is, because he thinks that he is, regardless of the circumstances, morally prohibited from enlisting into the army. This objection is often perceived as ‘absolute’ because it is based on an absolute objection to the use of lethal measures or violence. It is not conditional and is not subject to changeable circumstances.

Selective conscientious objection, like ‘absolute’ conscientious objection, is also a private act, whose only purpose is to distance the objector from acting according to a legal demand. With regard to military service, the selective conscientious objector does not necessarily oppose to enlisting in the army altogether and under all circumstances. The ‘selective’ objector opposes a particular war, military operation or policy with which he is being asked to engage. As long as the war, operation or policy is sustained, the selective conscientious objector refuses either to take part in the fighting or operation, or to join the army altogether. Such a refusal may be based on either the aim of the war or the policy – or the manner in which the war or policy are carried out. This objection is perceived as selective because it results from the objector’s assessment of the morality of certain wars, operations or policies, as opposed to his assessment of the overall morality of military service as such.

Civil disobedience is often defined as a public, political act, whose purpose is to bring about a change in the law or in existing policies. Whereas conscientious objection is a breach of a law that the agent is morally prohibited from obeying, civil disobedience is politically motivated. The distinction is thus put in terms of the motivations of those engaging in conscientious objection and civil disobedience. This distinction also demarcates the distinction between the private nature of conscientious objection and the public nature of civil disobedience.

According to common views, civil disobedience is essentially a public action whereas conscientious objection is essentially a private action. Conscientious objection is a private act in the sense that it is not political. It does not aim to change the legal rule itself or to challenge the rule-making system. Its sole purpose is to allow the conscientious objector to follow his conscience by disobeying legal rules which contradict his conscience. Conscientious objection is also a private act in the sense that the objector normally does not aim to make his objection public. Moreover, in certain cases making the objection public will run against the objector’s interest that may be either committing a discrete act of objection to obey the legal rule or seeking an exemption from the legal rule. This is not to say that conscientious objection is a private act by its nature. Public objection does not necessarily deny its ‘conscientious nature’ but here it is assumed, without trying to defend this argument, that even when a conscientious objection is ‘public’ in the sense that it is publicized, its purpose is still ‘private’ rather than political in the sense that its purpose is ‘selfish’ – to distance the objector from the demand of the law without aiming to change the law itself.

Most scholars argue that the case for a right to conscientious objection seems much stronger – or that there are stronger reasons for tolerating conscientious objection rather than civil disobedience.[[2]](#footnote-2) This approach is similar to that of many governments, who are willing to tolerate conscientious objection to some extent, but not civil disobedience – for reasons that will be explained briefly in section 5 below. However, these categories are partially overlapping.[[3]](#footnote-3) Conscientious objection and civil disobedience can interact in two ways. First, a specific act can be both conscientious objection and civil disobedience, for example, when a conscientious objector who refuses to enlist in the army for private conscientious reasons also wishes that his refusal to serve in the army would promote a change in the law or would encourage others to refuse to enlist in the army. Second, there can be two or more different acts involved: a private refusal to enlist in the army, complemented by additional public acts of a political nature that the objector himself takes on, e.g. signing petitions, participating in demonstrations and so on. These additional public acts might be unlawful but do not necessarily have to be.

In order to better understand the relation between conscientious objection, selective conscientious objection and civil disobedience, a better understanding of the nature of conscientious objection is required.

# 3. Conscientious objection and lack of choice[[4]](#footnote-4)

According to the common view, conscientious objection is grounded in autonomy. Put differently, conscientious objection is tolerated out of respect for the objector's autonomy.[[5]](#footnote-5) Another common view is that conscientious objection is grounded in ‘moral integrity’ or ‘personal integrity’ – thus should be tolerated out of respect for the objector’s moral integrity. While this latter view is sound, most of those who subscribe to this view wrongly emphasise the importance of respecting or tolerating people’s autonomy and choices with regard to having a certain conscience and acting upon it.[[6]](#footnote-6)

The concept of autonomy is much disputed in the literature. Here I adopt, without trying to defend, a Razian conception of autonomy.[[7]](#footnote-7) According to such a conception, autonomy implies that (i) people have minimal rationality (i.e. they are able to set goals and comprehend the means of achieving those goals); (ii) that people have an adequate range of valuable options from which they are able to choose; and (iii) that people be appropriately *independent* while exercising those choices (i.e. that they are free from outside manipulation and coercion). Thus, I take it that in emphasising autonomy as a central concept within the issue of conscientious objection, defenders of the common view are implying that conscientious objectors should have an independent choice, or that they do in fact have an independent choice from a range of valuable options – just as freedom of conscience implies that one should be free to choose one’s conscience and act upon it.

But there are two problems with this view. First, one does not always have a meaningful, independent choice as to whether to act upon one’s beliefs. This is particularly true of the conscientious objector and their deep-seated commitments to certain principles. Second, one does not really choose one’s deepest beliefs (i.e. the sources of those conscientious commitments).

As to acting upon our conscience, in the case of conscientious reasons we have uniquely strong, powerful ‘fixed points’ that rule out virtually all possibilities – and they do so with regard to uniquely important decisions which relate to our deepest held moral values, thus to our moral integrity and personhood. We are in fact compelled to obey our conscience’s dictates and we express our attitude by using words such as ‘dictates of conscience’ rather than ‘choices of conscience’ or ‘advices of conscience’. Conscientious reasons operate in a particular manner. They are conclusive and possibly exclusionary. They will usually determine the decision in a particular context and exclude consideration of some alternative reasons for action. Thus, the conscientious objector is not demonstrating responsiveness to reasons, nor an ability to reflectively apply moral reasons to their decisions. On the contrary, they are demonstrating a lack of responsiveness to reason.

This conceptual argument is buttressed by empirical evidence suggesting that typical conscientious objectors are indeed remarkably insensitive to alterations in the balance of reasons for and against actions.[[8]](#footnote-8) They will follow their conscience ‘no matter what’.

Alternatively, if a conscientious objector decides to act against her conscience in order to avoid exceptionally severe sanctions, she will do so because she lacks an adequate range of valuable options and has simply been coerced into acting against her conscience. In this case, a great harm will be caused to her moral integrity or personhood. This is similar to the classic example of the highwayman giving you a choice between your money or your life. You opt for your life, of course, but in no sense was this decision the result of an autonomous choice.

It should be noted that the fact that conscientious reasons are conclusive and possibly exclusionary, and that they usually determine the decision, does not rule out the possibility of an ambivalent, torn, agonizing, and deliberating conscientious agent. First, the lack of choice argument suggests that one does not *always* have a meaningful, independent choice as to whether to act upon one’s beliefs – and that conscientious reasons *usually* determine the decision in a particular context. We may have rare exceptions to the lack of choice argument. Second, Haidt and other moral psychologists have highlighted how most moral decision-making is not based on sorting through or manipulating consciously represented moral reasons. In reality, people do not always have a clear, consciously articulable sense of their moral values. They simply react to scenarios (usually in predictable and reliable ways) and then confabulate moral reasons for action after the fact.[[9]](#footnote-9) Third, potential conscientious objectors may not have a clear sense of what their higher order preferences might be. They may need time to ‘reveal’ them. This does not contradict the argument that whatever their decision may eventually be, it will result from pre-fixed moral (and other) preferences which are non-chosen. And lastly, some conscientious objectors are what psychologists would call a *chronic cogniser*, i.e. someone who takes pleasure in thinking and extended deliberation. Others are *chronic misers*, i.e. they dislike extended deliberation and therefore act impulsively. But the distribution of those psychological traits is something under the control of neither agent,[[10]](#footnote-10) thus the lack of choice argument remains relevant after all.

A possible reply to the ‘lack of choice’ argument within the context of *acting* upon one’s conscience could be that the decision to act in accordance with one’s conscience is a perfect exemplar of autonomous choice as the requisite autonomy can be traced back to the period of time over which the contents of one’s conscience was developed. This necessitates an argument in relation to the lack of choice with regard to *having* a certain conscience.

One does not really choose one’s deepest beliefs (i.e. the sources of his conscientious commitments). It is highly implausible to suppose that the development of conscience is something that flows from or can be traced to autonomous choices. Our conscience is something we stumble upon; that is thrust upon us by forces beyond our control. The emerging consensus view in moral psychology suggests that moral conscience is the causal product of a basic, genetically endowed cognitive architecture that is then moulded by the cultural and social environment of the individual agent.[[11]](#footnote-11)

Consequently, respect for the conscientious objector cannot be said to flow from respect for individual autonomy. Therefore, with regard to tolerating conscientious objection, we should apply the concept of autonomy with caution, as tolerating conscientious objection does not reflect respect for the conscientious objector’s right to choose but rather acknowledges his lack of real ability to choose his conscience and to refrain from acting upon his conscience, i.e. his lack of real choice.

In the following paragraphs I describe, in short, the ‘lack of choice’ argument’s general analytical and normative implications – yet still within the context of conscientious objection.[[12]](#footnote-12) In the following sections I will elaborate on more specific implications of this argument and with regard to the relation between conscientious objection, civil disobedience and selective conscientious objection.

The general implications of the lack of choice argument, within the context of conscientious objection, are twofold: first, if conscientious objections are tolerated – they are tolerated *inter alia* because of the lack of choice. Second, the lack of choice always provides a reason for tolerating conscientious objections – but not necessarily a strong or conclusive reason.

The first implication of the lack of choice argument is analytical by its nature. If the lack of choice argument is sound, then tolerating conscientious objection does not reflect respect for the conscientious objector’s right to choose but rather acknowledges his lack of real ability to choose his conscience and to refrain from acting upon his conscience. The lack of choice argument provides an accurate explanation for the nature and importance of freedom of conscience. It provides an accurate description of what we do when we tolerate conscientious objection. It is the most compelling way to understand the fascinating duality of the nature of conscience: it is both inner-part of our deepest and personal moral values (thus part of our moral personality or integrity) and an external source of moral commands – in the sense that its content and scope are decided by forces beyond our control. This duality is nicely expressed in Constance Braithwaite’s description of her own experience as conscientious objector: ‘I felt both that I was acting completely freely and that I could not possibly act otherwise; that I was expressing my essential self and that I was bearing an impersonal witness’.[[13]](#footnote-13)

Thus, from an analytical-descriptive point of view, freedom of conscience does not protect the right to *choose* to do X (or not to do X), as much as it protects the right to do X (or not to do X). It is therefore misguided to talk about ‘protecting liberty of conscience’ since we have no liberty with regard to choosing our conscience. The liberty that we do claim is the liberty to have a conscience and to act upon it without being subjected to sanctions. Not respecting this kind of liberty will make our lives worse but not because we were denied the ability to choose (ability that we do not have any way) but because forcing us to act against our non-chosen conscience will result in great harm to our moral integrity.

As to the normative implications of the lack of choice argument: the common way to justify tolerating conscientious objection is to turn to the principle of autonomy that states that people should be able to make their own choices and have an adequate range of good options from which to choose. I suggest that a better way to justify tolerating conscientious objection is to acknowledge that in matters of conscience, people do not have real choice. Here I do not only claim that acknowledging the lack of choice explains what we do when we tolerate conscientious objection. I now claim that the lack of choice provides a reason for tolerating conscientious objection.

The main reason for tolerating conscientious objection is that not tolerating it results in severe harm to the objector’s moral personhood. Yet, the fact that severe harm to one’s moral personhood is inflicted when one acts against one’s conscience is only important if we assume that one does not choose one’s conscience and cannot simply will to change it. If our conscience can be chosen then potential dissenters have the ability to adapt their beliefs and life plan to the conditions with which they must come to terms. They can simply choose to modify their conscience – and if they choose otherwise they should be responsible for their choice. Convictions of conscience are unique and different from preferences and non-conscientious beliefs – but not just because of the ‘harm to the moral personhood’ reason. Conscientious convictions are special because of the special harm that is caused to a person who is forced to act against his *non-chosen* moral-conscientious convictions, which also cannot be changed at will.

The lack of choice argument always provides a reason for legally tolerating conscientious objections because people cannot be held morally responsible for decisions they made but did not choose to make. In cases of conscientious objection, our conscience, which we did not choose but simply have, compels us to disobey the law. In contrast to physical compulsion in which we do not will the compulsory act, under conscience-based compulsion we do will the compulsory act even though we cannot choose to do otherwise. The lack of choice to do otherwise or the compulsion to disobey the law denies our moral responsibility despite willing to disobey the law and perhaps not even trying to resist the compulsion to disobey the law.

Legal responsibility – while different from moral responsibility – cannot ignore the lack of moral responsibility. There are, of course, cases in which the ‘lack of choice argument’ applies in full yet the conscientious objector should not be tolerated at all or to a certain extent either because policy considerations, the content of his conscience or because of neutral justifications (which will not be specified here). The argument made here is that the lack of choice argument always provides a reason for tolerating conscientious objection. The weight that should be accorded to this reason may vary and it may be overridden by other reasons – but it should always be taken into consideration.

The lack of choice argument has vast moral and legal implications. Within the narrow scope of this paper it is argued that this argument eliminates, at least in part, the distinction between conscientious objection and civil disobedience. It also helps in clarifying that there is no such thing as ‘selective’ conscientious objection – and that even if there is – the distinction between selective and non-selective conscientious objection bears no moral implications. In the next section the relation between the lack of choice argument and the distinction between conscientious objection and civil disobedience will be explained. In the following sections, it will be explained how the lack of choice argument helps in eliminating the difference between selective and non-selective conscientious objection.

# 4. Lack of choice, six types of disobedience, and the importance of a civic conscience

As was noted above, conscientious objection and civil disobedience are partially overlapping. This overlapping means that the distinction between the two is not always clear. It also means that there are more than two types of disobedience. There are in fact (no less than) six types of disobedience. I will start by briefly describing these types and will then discuss them in more detail.

The first type is ‘pure and private conscientious objection’ which is unwillingness to perform an act that contradicts one’s conscience, without having any intention to bring about a change in the law or in existing policies. This type may include deliberately secretive or non-communicative disobedience (normally in order to avoid punishment or penalty) or non-public disobedience that lacks an intention to change the law or policy but is not deliberately secretive or non-communicative.[[14]](#footnote-14)

The second is ‘hybrid private objection’ (or - conscientious objection and civil disobedience motives in the same act) which is unwillingness to perform an act that contradicts one’s conscience, alongside having mere wishes that the refusal would promote a political or legal change.

The third is ‘hybrid private objection alongside lawful public acts’ which is private unwillingness to perform an act that contradicts one’s conscience, alongside taking part in a lawful political campaign to change the law or particular policy.

The fourth is ‘hybrid private objection alongside acts of civil disobedience’ which is unwillingness to perform an act that contradicts one’s conscience, alongside taking additional illegal measures in order to change the law or particular policy.

The fifth is ‘civil disobedience’ which is taking illegal measures in order to change the law or particular policy – and doing so for political or ideological reasons and in any event not for conscientious reasons.

The sixth is ‘civic-conscientious disobedience’, which results from having a ‘civic-conscience’ i.e. a conscience that imposes someone to publicly disobey the law in order to bring about a change in the same law or in other laws or policies.

This classification is not exhaustive. The third type of disobedience (‘hybrid private objection alongside lawful public acts’) can result from two different motives: the first is where the objector is under a moral-conscientious duty (or believes she is under such duty) not just to disobey the law as a conscientious objector but also to bring about a legal change by committing lawful public acts. The second is where the objector believes she is only under a moral-conscientious duty to disobey the law as a conscientious objector, but not necessarily to bring about a legal or political change. Same sub-classification can be applied regarding disobedience of type four (‘hybrid private objection alongside acts of civil disobedience’). This sub-classification also marks the difference between type five (‘civil disobedience’) and type six (‘civic-conscientious disobedience’).

This offered classification has several moral and political implications. It affects the moral evaluation of refusals to obey the law. It also affects the range of justified political response to refusals to obey the law. Lastly, it challenges the common distinction between conscientious objection and civil disobedience. These points are explained below.

In the first type of disobedience, the ‘pure private conscientious objection’, one refuses to perform an act that contradicts one’s conscience, e.g. enlisting in the army. This is the typical case of conscientious objection which normally provides the strongest reasons for tolerance precisely because it only relies on ‘conscientious reasons’ and because of its private and ‘selfish’ nature.

In the second case, which I referred to as ‘hybrid private objection’, the objector refuses to perform an act both because performing the act contradicts his conscience and because she wishes that her refusal – usually together with those of others – would promote a change in the law or in existing policies. This is the case when, for example, a conscientious objector who refuses to enlist in the army for private conscientious reasons also wishes that her refusal to serve in the army would promote a change in the law or would encourage others to refuse to enlist in the army. I shall assume that these are mere wishes and that the conscientious objector does not take further measures to achieve these wishes. I shall also assume that the objector openly declares these two reasons for action when she is asked about her reasons by the authorities. Here the objection is still essentially a private action as the objector, for any reason whatsoever, does not take further steps to use her objection for promoting the desirable legal change. This case is not different from the first one in any meaningful way as long as the pure conscientious reason is a sufficient reason for the objector’s to justify her objection and as long as the objector does not take any meaningful public acts in order to bring about a political change.

The third case, which was called ‘hybrid private objection alongside lawful public acts’, is slightly more problematic. In this case, the conscientious objector not only wishes that others will use his refusal in their struggle to change the law and not only wishes that his refusal together with others’ will create a critical mass that result in rethinking the morality of the law, but he also takes an active part in a *legal* political campaign to change the law. This is the case, for example, when a conscientious objector who refuses to enlist in the army for private conscientious reasons takes additional public acts of a political nature, e.g. interviewing in the media, signing petitions, participating in demonstrations and so on. This case is different from the former because here the political reason is not just a reason for the private refusal but also for acting in the public sphere, yet without breaking any further laws. What should be the state’s response to the third case? The answer may depend on another classification that was noted above. We now divide the third type of objection into two sub types.

In the first, the objector acts in the public sphere in order to change the law not only because of the wrongfulness or the immorality of the law but because he believes that his conscience imposes on him a duty to do so. In this case we are assuming that for the objector, not taking an *active* part in a struggle to change the law means not complying with his conscience in a similar way and to a similar extent as in the case of actually acting according to the immoral law. This is the case when the conscientious objector who refuses to enlist in the army for private conscientious reasons (e.g. a conscientious objection to serve in the Israeli Defense Forces as long as the Israeli army maintains the occupation of Palestinian territory) believes he is also under a moral-conscientious duty to take additional *legal* public acts of a political nature in order to end Israeli occupation of Palestinian territory.

In this special case the conscientious objector has a ‘civic conscience’. Having a ‘civic conscience’ means having a conscience that imposes someone to act in the public sphere in order to change the law rather than just objecting obeying the law. An objector with a civic conscience believes that he is under a conscientious-moral duty to change the immoral law (both by private refusal and by public acts) in the same way he believes that he is under a conscientious-moral duty not to obey the immoral law. If we acknowledge the lack of choice argument regarding having a conscience and acting upon it, then this case presents a reason for the authorities to treat the objector as if he was a pure conscientious objector.

The second sub-type presents a harder case. Here, the conscientious objector takes further lawful public steps in order to change the law not because his conscience compels him to do so or because he thinks he is under a significant or perhaps a unique moral duty to do so but simply because he thinks this is the right thing to do. The sense of self-obligation is much weaker in this case. There are a lot of things we feel we should do because they are the right things to do, but not too often do we feel that we are under a moral-conscientious duty to act in a specific way. There is a significant difference between having a reason to do something and feeling compelled by one’s conscience to do it. There are cases in which we are under a moral duty to refuse to obey the law yet without being under a moral duty to take an active part in the struggle to change the law. Furthermore, even if the immorality of the law is a reason which underlies both the personal refusal to obey it, and the participation in the public struggle against it, it does not necessarily mean that the objector feels compelled in the same way or to the same extent, to take these two different measures. Therefore, one may believe (either rightly or wrongly) he is under a moral duty to disobey an immoral law while not feeling the same way about changing the law. He indeed may try to change the law, using his refusal as a means to that end, simply because he thinks he has good reasons to do so, but then the authorities have a weaker reason to treat him in the same way they treat pure conscientious objectors.

If we take the state’s point of view, it may not be utterly unreasonable for it to tolerate what it perceives as an erroneous conscience, under the provision that the objector will not use his objection for political goals, assuming of course this usage is not for itself what may be called act of conscience. After all, the starting point is that the objector violates the law by his objection. The state might be willing to tolerate this illegal behaviour acknowledging the importance of freedom of conscience or acknowledging that the objector does not have a real choice in that matter. Accordingly, the state might be less willing to tolerate it if the objector uses the state’s tolerance to prevent what the state sees as a legitimate goal in the name of what the state sees as misguided values. It should be noted though that the public nature of the refusal in this special case is not a conclusive or even a strong reason for state’s intolerance. It is only *a* reason for it. A powerful counter-argument could be that if the state is willing to tolerate acts of pure conscientious objection, it would be wrong to do so under the condition that the objector does not take *legal* measures to change the law. Put differently, it would be wrong to limit the conscientious objector’s freedom of expression (or other relevant political rights) in a discriminatory way – and only because he is a conscientious objector.

The discussion above divided the third type of objection (‘hybrid private objection alongside lawful public acts’) into two sub types. This distinction also applies to the fourth and fifth types of objection (‘hybrid private objection alongside unlawful public acts’ and ‘civil disobedience’). Thus, the concept of ‘civic conscience’ is important in these cases as well. Moreover, as these cases involve acts of civil disobedience (disobeying the law in order to achieve political goals – rather than aiming to achieve political goals by taking legal measures) – the incorporation of a ‘civic conscience’ into these cases raises further difficulties. Acts of civil disobedience are almost never tolerated by the state. Can the concept of ‘civic conscience’ challenge this practice?

According to the common view, civil disobedience differs from conscientious objection because the former is a public, political act, whose purpose is to bring about a change in the law or in existing policies whereas the latter is a private breach of a law that the agent is morally prohibited from obeying. Its only purpose is to distant the objector from the demands of the law that contradict the objector’s conscience. However, the concept of civic conscience and the existence of acts that may be called civic-conscientious disobedience may challenge the distinction between conscientious objection and civil disobedience.

The distinction between civil disobedience and conscientious objection does exist and may be helpful – but only to a certain extent. The distinction collapses when we face acts of public or private disobedience which their purpose is to bring about a change in the law or in existing policies because the dissenter believes he is under a moral, conscientious duty to bring about a change in the law or in existing policies. This is in fact disobedience of type six – ‘civic-conscientious disobedience’.

If a civic-conscientious disobedient does something or refrain from an act in order to achieve political goals (changing the law or certain policies) because he thinks he is under a moral-conscientious duty to do so, i.e. because his conscience compels him to do so, then the harm caused to such an objector’s moral personhood by enforcing him to obey the law is by no means different than the harm caused to an ‘absolute’, ‘pure’ conscientious objector. All the common rationales for tolerating conscientious objection (e.g. autonomy and freedom of conscience) and especially the novel rational I suggested above (acknowledging the objector's lack of choice) apply here in the same manner.

Thus, there is a good reason to tolerate the civic conscience – and civic-conscientious disobedience. This reason is grounded in the special harm that is caused to a person who is coerced to act against his *non-chosen* moral-conscientious convictions, which also cannot be changed at will. This may not be an overriding reason – and presumably there will always be reasons not to tolerate civic-conscientious disobedience – but this reason should be taken into account. Does this mean that we also have a similar reason to tolerate selective conscientious objection? This question will be discussed below.

# 5. Selective conscientious objection and civil disobedience

Selective conscientious objection (much like non-selective conscientious objection) can fall within any of the first four types of disobedience – as well as the sixth mentioned above. That is, selective conscientious objection can be ‘pure and private conscientious objection’, ‘hybrid private objection’, ‘hybrid private objection alongside lawful public acts’, ‘hybrid private objection alongside acts of civil disobedience’ and ‘civic-conscientious objection’.

This is important because one common argument against tolerating selective conscientious objection is that it is in fact civil disobedience or ‘political objection’, or at least is closer to civil disobedience than to a ‘pure’ conscientious objection. Judges tend to equate selective conscientious objection with civil disobedience, or to claim that the selective conscientious objection is in fact ‘political’ or ‘ideological’ rather than conscientious, and by that to justify not tolerating it.[[15]](#footnote-15) The common assumption here is twofold. First, a democratic state should not tolerate those who wish to win a political or ideological dispute by applying violent measures or by disobeying the law. The core of democracy is deciding political or ideological disputes by means of persuasion and ultimately by the rule of the majority. While democracies should tolerate different perceptions of the good they normally should not tolerate violent or illegal violations of the ‘rules of the game’ or disobeying the will of the majority as expressed in the law of the land when this disobedience aims to achieve political or ideological goals. Second, a democratic state should tolerate to a certain extent those who merely wish to distance themselves from legal demands for conscientious reasons. The assumption here is that pure conscientious objections do not aim to achieve political or ideological goals by violent means or by disobeying the law. Therefore, the rules of the game remain intact. Freedom of conscience, it is argued, should be protected more than the freedom to achieve political goals – when both freedoms are manifested by disobeying the law – and so far as protecting freedom of conscience does not severely jeopardize the purpose of the legal rule itself.

This line of argument may be defended as long as we differentiate between paradigmatic cases of civil disobedience and conscientious objection. However, and as noted above, cases of civic-conscientious disobedience eliminate the distinction between civil disobedience and conscientious objection. Since civic-conscientious disobedience can find its expression in all types of disobedience (except the first and the fifth) and since selective conscientious objection can fall within any of the first four types of disobedience as well as the sixth mentioned above, it is misguided to classify selective conscientious objection as civil disobedience – and not to tolerate it as a result. If there are reasons for not tolerating selective conscientious objection they should be found elsewhere.

There are scholars who agree that the distinction between selective and non-selective conscientious objection is misguided yet still uphold the distinction between civil disobedience and conscientious objection (both ‘selective’ and ‘absolute’) and accord it moral and pragmatic importance – *inter alia* for the reasons mentioned above.[[16]](#footnote-16) However, acknowledging that the distinction between civil disobedience and conscientious objection may not have moral and pragmatic importance – or in fact does not exist in cases of civic-conscientious objection – complements and reinforces the argument that the distinction between selective and non-selective conscientious objection is either misguided or bears no moral implications. Put differently, the distinction between selective and non-selective conscientious objection is either misguided or bears no moral implications because of two related reasons: first, and that was the reason mentioned above – equating (only) selective conscientious objection with civil disobedience is misguided because all too often the line between civil disobedience and any type of conscientious objection is either blurred or does not exist; and second, and this is the argument elaborated below – there is in fact no such thing as ‘selective’ conscientious objection.

# 6. Lack of choice and the non-existence of ‘selective’ conscientious objection

Through this point, I assumed that selective conscientious objection exists. I have suggested definitions for conscientious objection, selective conscientious objection and civil disobedience thus implying that differences do exist between the three. At this point, however, I wish to maintain that the mere concept of selective conscientious objection – or the assumption that there are meaningful conceptual differences between selective conscientious objection and non-selective conscientious objection – is unsustainable.

Back in 1979, Joseph Raz implied, without elaborating on the point, that a ‘selective’ conscientious objection is merely a kind of conscientious objection, emphasizing that it is first and foremost conscientious objection and therefore (other things being equal) it should be treated like any other conscientious objection.[[17]](#footnote-17) Since then, other scholars expressed similar views, especially but not exclusively within the narrower context of unjust wars.[[18]](#footnote-18) Yet, the conceptual claim that there is no such thing as ‘selective’ conscientious objection was not highlighted in the literature. Moreover, most courts and administrative authorities in most states still do not tolerate what they perceive as selective conscientious objection, while they are willing to tolerate what they perceive as non-selective conscientious objection. This is troubling because from a conceptual perspective, there is no selective, non-selective (or absolute) conscientious objection, but just conscientious objection. This is the case for two main reasons.

First, the distinction between selective and absolute objection can only be made by someone other than the conscientious objector himself. This differentiation is normally undertaken by state agents. With regard to conscientious objection to enlist in the army, for example, the objector himself cannot really choose between opposing army enlistment in general, opposing all wars and opposing a specific war. One’s conscience has its own will and its own boundaries, and they may be broad or narrow, conditional or unconditional. This is hardly a matter of choice. Classifying an objection as ‘selective’ implies that the objector ‘selects’ what he objects to; yet the true conscientious objector does not and in fact cannot choose or control his conscience – and in turn cannot select the scope and the nature of his conscientious objection. Put differently, the lack of choice argument is applicable to selective conscientious objection and to non-selective conscientious objection alike thus making the term ‘selective’ meaningless.

Second, almost all conscientious objections can be perceived as ‘selective’. If by ‘selective’ we refer – wrongly – to the scope of the objection, then selective objection is in fact a ‘narrow’ objection in comparison to broader objection. Objection to a specific war is more selective or narrower than objection to all wars (which is mistakenly known as ‘absolute’ objection). However, objection to all wars is more selective or narrower than a conscientious-pacifist objection to join an army. The objection to join an army is more selective or narrower than an objection to participate in any activity that benefits the army (such as, for example, working in a factory that provides food, clothes or military equipment to the army). Objection to participate in any activity that benefits the army is also selective in respect to an anarchist political objection to treat any law as authoritative – or to an objection to obey any secular law as opposed to religious law; and so forth. The only true ‘absolute’ or non-selective objection is an objection to obey all laws. All other objections are in fact selective to various degrees. The fact the some objections are ‘more selective’ or narrower than other objections bears no moral implications. It is none other than a rather uninteresting fact.

If by ‘selective’ we do not refer to the scope of the objection but rather to the reason for the objection, and by that we are in fact equating ‘selective’ with ‘conditional’, then yet again, almost all objections can be perceived as ‘selective’. A conscientious objector can refuse to enlist in the army altogether. He can do so for various conscientious reasons that may be conditional, selective or specific to varying degrees. He can refuse to join the army because the army was responsible for his parents’ death; because the army is currently involved in an unjust war; because the army constantly assists the government in persecuting political minorities; because he is a pacifist or because he is an anarchist. All these conscientious reasons, apart from the latter, are selective, specific or conditional. They may all lead to a sincere conscientious objection to join the army. This example shows that from the conceptual point of view, there is little point in distinguishing between kinds of objection and classifying them as selective and non-selective. Once the conceptual distinction fails, it becomes hard to comprehend how the selective, specific or conditional nature of a conscientious objection can bear any moral importance or moral implications.

Before concluding this point, it is interesting to note that for unknown reasons, only (or mostly) secular conscientious objections to enlist in the army are classified as ‘selective’ objections and as such are not tolerated. It is not at all clear why other types of objection, especially religious ones, are not classified as selective even though they clearly are (if we accept that selective objections do exist). Consider the religious physician who refuses to perform abortions or to write contraception prescriptions – but provides all other medical treatments and services; the religious employer who seeks exemptions from equality laws in the workplace but respects his employees’ other rights; and the religious public officer who refuses to perform same-sex marriage ceremonies – but will marry heterosexuals. They are all selective conscientious objectors but are never classified as such. We may suspect that the concept ‘selective conscientious objection’ was created in order to single out secular conscientious objection to enlisting in the army and to morally justify not tolerating it – even though it is not conceptually different than most types of conscientious objection, some of which are tolerated to various extent. I will not pursue this assumption here but it does raise doubts as to the sincerity and integrity of those who created this false conceptual distinction or insist on maintaining it.

# 7. Do ‘selective’ conscientious objections pose unique prudential difficulties?

Courts and policy makers may agree that from a conceptual point of view, all conscientious objections are selective. They may also agree that selective conscientious objection is just a kind of conscientious objection. However, within the context of refusal to enlist to the army, they would and indeed do argue that there are still meaningful non-conceptual differences between total, pacifist refusal to enlist to the army and conditional refusal to do so. These mostly alleged differences normally rely on prudential reasons which aim to morally justify not tolerating selective conscientious objection.

Presumably, the most common prudential argument against tolerating selective objection is that selective objection is more common than non-selective objection and has the tendency to spread, and thus it threatens society as a whole or the state itself.[[19]](#footnote-19)

The number of those who seek conscientious exemption is indeed a relevant factor. Conscientious exemptions may be granted up to a certain quota since exceeding that quota will diminish the purpose of the general rule itself. Assume that the law exempts ‘selective’ conscientious objectors from compulsory enlistment in the army. It may be the case that national security, which is the rationale of the general rule, would allow no more than X exemptions from the rule at any given time or for any given set of circumstances. It may also be the case that the number of sincere, selective conscientious objectors exceeds X. The ruler now faces three options: to grant exemptions to all the sincere objectors, thus jeopardizing national security; to grant exemptions to none and thus harm conscientious objectors more than the public interest demands; and to grant exemptions only to certain sincere objectors, i.e. to X of them. Only the last option is defensible. The government should generally exempt ‘selective’ objectors as long as their number does not jeopardize the public interest. The mere fact (if this is indeed a fact) that there are more selective conscientious objectors than non-selective ones, does not in and of itself justifies a general rule against granting conscientious exemptions to all selective conscientious objectors as such.[[20]](#footnote-20)

The alleged fact that selective objection has a tendency to grow is indeed fictional. If the ‘lack of choice’ argument is sound i.e. if we cannot choose our conscientious convictions, there is no reason to assume that granting conscientious exemption (or tolerating ‘selective’ conscientious objectors in other ways) will suddenly or gradually transform law-obeying citizens to dissidents or that it would create an incentive to become conscientious objectors. This is not how our conscience works. It does not disappear in the face of grave intolerance and is not created merely because it is likely to be tolerated.

If the state does recognize, and at times it must recognize selective objectors as selective *conscientious* objectors, the state should exempt ‘selective’ objectors as long as their number does not jeopardize the public interest. If eventually the numbers would grow, the state would have to grant exemptions only to some of the objectors. The state must find the solution that would maximize the protection given to the freedom of conscience (which is not in fact ‘free’) without giving up the rationales of the justified general legal rule, namely granting exemptions only to some objectors. The choosing process can be the result of a ballot that, however arbitrary, reflects equality of opportunities. The governing principle should be that of tolerating the maximum freedom of conscience that it is justifiable to tolerate. Alternatively, if we cannot choose our conscience, if we cannot choose whether to act upon it, and if being coerced to act in contrast to its demands causes severe harm to our moral personhood and integrity, then in the face of vast conscientious objection to a legal rule, the state may wish to reconsider the morality or feasibility of the general rule itself, or in appropriate cases, to try to achieve its purpose by other means.

# 8. Conclusion

Most democratic states tolerate, to various extents, conscientious objections. The same states do not tolerate, almost completely, acts of civil disobedience and what they perceive as selective conscientious objection. This is disturbing for two main reasons. First, conscientious objection and civil disobedience are partially overlapping. Similarly, it is not at all clear whether there is meaningful conceptual difference between ‘selective’ conscientious objection and ‘absolute’ conscientious objection. Second, even if such a difference exists it bears no significant moral or practical implications. There are no moral or prudential prevailing reasons that justify treating both types of objection differently. Most notably, the 'lack of choice' argument which justifies tolerating conscientious objection in the right cases, equally applies to selective conscientious objection and to non-selective conscientious objection.

We should therefore abandon old and misguided conceptions and calcifications regarding the issue of selective conscientious objection and civil disobedience. A fresh philosophical and practical approach to conscientious objection is needed. This paper offers initial thoughts in this direction.

1. For the difference between first order and second order reasons see J Raz, *Practical Reasons and Norms* (2nd edition, 1999) 35 – 36, 39 – 40. [↑](#footnote-ref-1)
2. J Raz, *The Authority of Law* (Clarendon Press, Oxford, 1979) 276; J Raz, *the Morality of Freedom* (1986) chapter 4*;* J Raz, *Ethics in the Public Domain* (1994) chapter 14; R Dworkin, *Taking Rights Seriously* (1977) chapters 7 and 8; R Dworkin, *A Matter of Principle* (1984) 104-116; R Dworkin, *Law’s Empire* (1986) 190-224; J Rawls, *A Theory of Justice* (1971) 350-391. These views are reflected in more recent writing about this subject, but compare to K Brownlee, *Conscience and Conviction: The Case for Civil Disobedience,* (Oxford University Press, 2012) 5-7. Brownlee suggests that the state should normally tolerate civil disobedience rather than private conscientious objection – yet Brownlee’s perception of ‘civil disobedience’ is quite different than the one adopted here. For Brownlee, civil disobedience is in fact a ‘communicative act of conscientious objection’, i.e. a ‘public’ act of conscientious objection which still has ‘selfish’ motives rather than strategic-political ones. For the view that there is a moral right to public-civil disobedience see D Lefkowitz ‘On a Moral Right to Civil Disobedience’ 117 *Ethics* 202-233 (2007). Both Brownlee and Lefkowitz do not base their views on the ‘lack of choice argument’. [↑](#footnote-ref-2)
3. Raz 1979 (n 2) 264, 276; D Enoch ‘Some Arguments Against Conscientious Objection and Civil Disobedience Refuted’ 36 *Israel Law Review* (2002) 227; C Gans, *Philosophical Anarchism and Political Disobedience* (CUP 1992) 139-141. Note, however, that common arguments about the overlap between conscientious objection and civil disobedience do not rely on the ‘lack of choice’ argument which is discussed in section 3 below. [↑](#footnote-ref-3)
4. The argument that conscientious objection results from lack of choice (with regard to having a certain conscience and acting upon it) rather than from exercising one’s autonomy is developed in detail elsewhere: Y Nehushtan & J Danaher ‘The Foundation of Conscientious Objection: Against Freedom and Autonomy’ (forthcoming 2017). Section 3 merely summarises this argument and in some points assumes its validity. For the full argument see the article above. [↑](#footnote-ref-4)
5. Brownlee (n 2) 128-139, 167-168, 171-172. [↑](#footnote-ref-5)
6. B Leiter, ‘Why Tolerate Religion?’ 25 *Constitutional Commentary* (2008) 1, 25; D Sulmasy, ‘What is Conscience and Why is Respect for it So Important?’ 29(3) *Theoretical Medicine and Bioethics* (2008) 135, 138; S Murphy and S Genuis, ‘Freedom of Conscience in Health Care: Distinctions and Limits’10 *Journal of Bioethical Inquiry* (2013) 347; M Wicclair, *Conscientious Objection in Health Care* (2011) 4-5. [↑](#footnote-ref-6)
7. Raz 1986 (n 3) chapters 14 and 15; J Raz, 'Autonomy, Toleration and the Harm Principle' in R Gavison (ed) *Issues in Contemporary Legal Philosophy* (1987) 313. [↑](#footnote-ref-7)
8. S Atran and R Axelrod, ‘Reframing Sacred Values’ (2008) 24(3) *Negotiation Journal* 221-246; J Ginges, S Atran, D Medin, and K Shikaki ‘Sacred bounds on rational resolution of violent political conflict’ (2007) 104 *Proceedings of the National Academy of Sciences* 7357–7360; S Atran, J Ginges, ‘Religious and Sacred Imperatives in Human Conflict’ (2012) 336 *Science* 855-857. The term ‘sacred values’ is understood to cover moral principles to which individuals are deeply committed, and which can be both secular and religious in nature. [↑](#footnote-ref-8)
9. Haidt cites several lines of evidence for this view. See J Haidt, *The Righteous Mind* (London: Penguin 2012) chapter 2. [↑](#footnote-ref-9)
10. B Waller, *Against Moral Responsibility* (Cambridge MA: MIT Press, 2011) 30-35. [↑](#footnote-ref-10)
11. For a general overview, see J Haidt (n 9) chapter 2. For more scientific discussions, see J Haidt, ‘The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment’ (2001) 108 *Psychological Review* 814-834; J Haidt, ‘The New Synthesis in Moral Psychology’ (2007) 316 *Science* 998-1002; and J Haidt and C Joseph, ‘Intuitive Ethics: How Innately Prepared Intuitions Generate Culturally Variable Virtues’ (2004) *Daedalus* 55-66. [↑](#footnote-ref-11)
12. These general implications were described in-length in Nehushtan & Danaher (n 4). [↑](#footnote-ref-12)
13. C Braithwaite, *Conscientious Objection to Compulsions under the Law* (1995) 383. [↑](#footnote-ref-13)
14. This type may also include conscientious objection which is in fact communicative. It would still be a type of (private) conscientious objection as long as the motive of the objection is selfish (acting accordance to one’s conscience) rather than ‘political’ (changing the law or the administrative policy). This interesting type of conscientious objection is classified by Brownlee as ‘conscience-driven civil disobedience’ (n 2) 5-10. [↑](#footnote-ref-14)
15. See, for example, in relatively recent Israeli case law: H.C 7622/02 *Zonshein v. Judge Advocate General* 57(1) P.D. 726 (2002). For the English translation see: 'Zonshein v. Judge Advocate General' 36 *Israel L.Rev.* (2002) 1. See also H.C 2383/04 *Milo v. Ministry of Defense* 59(1) P.D 116 (2004). The Milo decision has not been published in English. And see also H.C 5587/09 Shvili v. Ministry of Defense (28.7.2010). Petition for further hearing was denied in H.C 5977/10 Shvili v. Ministry of Defense (31.8.2010). These decisions have not been published in English. For articles discussing these decisions, see: B Medina, 'Political Disobedience in the IDF: The Scope of the Legal Rights of Soldiers to be Excused From Taking Part in Military Activities in the Occupied Territories' 36 *Israel L.Rev* (2002) 73, 75-76; A Paz-Fuchs and M Sfard 'The Fallacies of Objections to Selective Conscientious Objections' 36 *Israel L.Rev*. (2002) 111, 113-115; Y Nehushtan, ‘Selective Conscientious Objection: Philosophical and Conceptual Doubts in Light of Israeli Case Law' in *When Soldiers Say No: Selective Conscientious Objection in the Modern Military*; A Ellner, P Robinson, and D Whetham eds; Ashgate; 2014) 137-154. Similar approach was also applied in the well-known case of *Gillette v. United States* [401 U.S. 437](http://en.wikipedia.org/wiki/Case_citation) (1971). [↑](#footnote-ref-15)
16. Paz-Fuchs and Sfard (n 12) 131. [↑](#footnote-ref-16)
17. Raz 1979 (n 2) 263. [↑](#footnote-ref-17)
18. P Robinson, 'Integrity and Selective Conscientious Objection' 8(1) *Journal of Military Ethics* (2009) 34; J. Wolfendale, 'Professional Integrity and Disobedience in the Military' 8(2) *Journal of Military Ethics* (2009) 127; G Clifford 'Legalizing Selective Conscientious Objection' 3(1) *Public Reason* (2011) 22. [↑](#footnote-ref-18)
19. See in the case law in footnote 12. [↑](#footnote-ref-19)
20. For this argument see Nehushtan (n 15) 146-147. [↑](#footnote-ref-20)