

The Foundations of Conscientious Objection: Against Freedom and Autonomy

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(forthcoming in *Jurisprudence*)

Abstract

According to the common view, conscientious objection is grounded in autonomy or in ‘freedom of conscience’ and is tolerated out of respect for the objector's autonomy. Emphasising freedom of conscience or autonomy as a central concept within the issue of conscientious objection implies that the conscientious objector should have an independent choice among alternative beliefs, positions or values. In this paper it is argued that: (a) it is not true that the typical conscientious objector has such a choice when they decide to act upon their conscience and (b) it is not true that the typical conscientious objector exercises autonomy when developing or acquiring their conscience. 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 their lack of real ability to choose their conscience and to refrain from acting upon their conscience. This has both normative and analytical implications for the treatment of conscientious objectors.

1. Introduction

According to the common view, conscientious objection is grounded in autonomy or in ‘freedom of conscience’. Consequently, conscientious objection is tolerated out of respect for the objector's autonomy, which is in turn linked to their ability to independently choose their beliefs and commitments.

This paper advances two arguments. First, it is argued that one cannot really choose whether or not to act upon one's deepest beliefs, and second one cannot really choose what one's deepest beliefs will be. Consequently, the actions of the typical conscientious objector are reflective of an inability to choose. This argument results in two conclusions. The first conclusion is that, from an analytical point of view, tolerating conscientious objection does not in the typical case reflect respect for the conscientious objector's autonomy but rather acknowledges his lack of real ability to choose his conscience and to refrain from acting upon his conscience. The second conclusion is that, from a normative point of view, the lack of real choice always provides a reason for tolerating conscientious objection albeit not necessarily a conclusive or prevailing reason or even a strong one.

Even though the concept of ‘conscience’ lies at the core of this paper we will not answer the question ‘What is conscience?’. We will not discuss the origins of the

concept,¹ or its contemporary meaning and disagreements about it.² We will also refrain from discussing the (alleged?) change from regarding conscientious objections mainly as religiously motivated to seeing them mainly as secularly or non-religiously motivated.³ For the purpose of this paper, and without trying to defend this assertion, we will perceive ‘conscience’ as a source of ‘higher demands’ to which a person sees himself as subordinate. We will assume that a person’s conscience consists of their deepest moral beliefs which provide for them uniquely strong or weighty reasons for doing X or refraining from doing X.⁴ These ‘conscientious reasons’ are often 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 then rests upon the non-excluded

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¹ These origins are rooted in the Latin word *Conscientia* and in the Greek concepts (that changed their meanings over the years) of *syneidesis* and *synderesis*; see, for example: E D’arcy, *Conscience and Its Right to Freedom* (1961); H Costigance, ‘A History of the Western Idea of Conscience’ in J Hoose (ed) *Conscience in World Religions* (1999) 3, 12, 18-19, where the views of Aquinas, Martin Luther, Lewis Rambo and others are discussed; David Richards, *Toleration and the Constitution* (OUP, 1986) 85-95, where the views of John Locke and Pierre Bayle are discussed. For Germain Grisez’s distinction between ‘personal conscience’, ‘cultural conscience’ and ‘absolute conscience’, see: G Grisez, *The Way of the Lord Jesus: I: Christian Moral Principles* (1983) 73-96, and D Leal, ‘Against Conscience: A Protestant View’ in J Hoose (ed) *Conscience in World Religions* (1999) 27-28.

² LM Hammer, *The International Human Right to Freedom of Conscience* (2001) 107-114; on page 107 however Hammer states that ‘... from a phenomenological standpoint, it is virtually impossible to adequately define the meaning or implications of conscience’.

³ See, for example: CC Moskos and JW Chambers (eds), *The New Conscientious Objection - From Sacred to Secular Resistance* (1993) chap. 1, 16.

⁴ Mark Wicclair, *Conscientious Objection in Health Care* (2011) 4-5.

reasons and sometimes also on the exclusionary reason itself.⁵ It may be the case that when one has conscientious reasons for doing X or refraining from doing X, at least some conflicting reasons are excluded from the balance of reasons by the conscientious reasons and thus do not have any effect on the decision-making 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 we 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’, will a person act contrary to his conscientious reasons. This is what differentiates conscientious reasons from other moral reasons – and makes the former unique and in fact quite rare. Many people have moral beliefs. Many people mistakenly think that their moral beliefs are conscientious ones. Those who have moral reasons but will not act upon them even when the consequences of acting upon them are not severe, may think that their moral reasons are conscientious reasons but they will be wrong. People who claim they have conscientious reasons not to eat meat, for example, but do so anyway with the absence of threat or severe sanctions, may have moral reasons not to eat meat, but not conscientious ones. Ignoring the distinction between conscientious reasons and other moral reasons will result in a very broad and therefore unusable definition of conscience and freedom of conscience. To take one example, if all moral reasons are

⁵ For the difference between first order and second order reasons see J. Raz *Practical Reasons and Norms* (2nd edition, 1999) 35 – 36, 39 - 40.

conscientious reasons, then conscientious objection becomes merely moral objection. Since it is plainly impossible to exempt all ‘moral objectors’ from the application of the law, the inevitable result will be that conscientious exemptions will never be granted. Ignoring the distinction between conscientious reasons and moral reasons will therefore undermine the moral and legal importance of freedom of conscience. The only possible way for a person to know whether her reasons are conscientious or merely moral is to ask herself if she will be willing to act upon these reasons even in the face of severe sanctions or while taking the risk of suffering severe consequences. Since conscientious reasons result from one’s deepest moral beliefs, acting against them results in great harm to one’s moral personhood and moral integrity.⁶ Note that in assuming conscientious reasons to be uniquely strong or weighty for the individual we do not assume that the individual is right to afford them that weight or strength. In other words, we hold that there is a distinction between what the individual believes to be the case with respect to her conscientious reasons and what is normatively appropriate. This distinction becomes important both when we defend our argument that the typical conscientious objector lacks choice and when we address the normative implications of that argument.

Acting upon one’s conscience may find expression in illegal acts or omissions. This is the case of conscientious objection. For the purpose of this paper we will refer to conscientious objection as a private act (or omission) which is based on conscientious reasons and whose only purpose is to distance the objector from acting

⁶ For a good discussion of various perceptions of ‘moral personhood’ see J.A. Frimer and L.J. Walker ‘Towards a New Paradigm of Moral Personhood’ 37(3) *Journal of Moral Education* (2008) 333; G.E. Scott, *Moral Personhood: An Essay in the Philosophy of Moral Psychology* (Sunny Series in Ethical Theory, 1990). For the purpose of this paper we assume that moral personhood entails some causal connection between holding moral views and acting upon these views.

according to a legal demand. 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 may also be a private act in the sense that the objector may prefer not to make his objection public. In certain cases making the objection public will run against the objector's interest. The objector may wish to commit a discrete act of objection to obey the legal rule without being caught or to seek an exemption from the legal rule by quietly and discretely negotiating with the authorities. 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 we assume, 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. This is the difference between conscientious objection and civil disobedience. The latter is a public, political act, whose purpose is to bring about a change in the law or in existing policies. Thus, conscientious objection is a breach of a law that the agent is conscientiously prohibited from obeying, whereas civil disobedience is politically motivated.⁷

⁷ For a similar distinction see Joseph Raz, *The Authority of Law* (1979) chapters 14 and 15. Even though conscientious objection and civil disobedience are partly overlapping, we will ignore this point here and will only refer our arguments to paradigmatic cases of conscientious objection.

2. Conscientious objection, autonomy and the lack of choice argument

According to the common view, conscientious objection is grounded in autonomy and is tolerated out of respect for the objector's autonomy.⁸ This is allied to another common view which 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 it wrongly emphasise the importance of respecting or tolerating people's autonomous choices, that is choices with regard to having a certain conscience and acting upon it.⁹ We argue that this view is flawed. Autonomy or independent choice is not the appropriate ground for tolerating conscientious objection: most instances of conscientious objection are reflective of lack of autonomy and independent choice and so their toleration should not be grounded in respect for autonomy and independent choice.

The concept of autonomy is much disputed in the literature. Here we adopt a broadly Razian conception of autonomy.¹⁰ 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) people have an adequate range

⁸ Kimberley Brownlee, *Conscience and Conviction – The case for Civil Disobedience* (2012) 128-139, 167-168, 171-172.

⁹ B Leiter, 'Why Tolerate Religion?' 25 *Constitutional Commentary* (2008) 1, 25; Daniel Sulmasy, 'What is Conscience and Why is Respect for it So Important?' 29(3) *Theoretical Medicine and Bioethics* (2008) 135, 138; Sean Murphy and Stephen Genuis, 'Freedom of Conscience in Health Care: Distinctions and Limits' 10 *Journal of Bioethical Inquiry* (2013) 347; Wicclair (n4).

¹⁰ J Raz *The Morality of Freedom* (1986) chapters 14 and 15; J Raz, 'Autonomy, Toleration and the Harm Principle' in R Gavison (ed) *Issues in Contemporary Legal Philosophy* (1987) 313. Weaker versions of autonomy are discussed later in relation to specific objections to our position.

of valuable options from which they are able to choose; and (iii) people are appropriately independent while exercising those choices (i.e. that they are free from outside determination, manipulation and coercion). Thus, we take it that in emphasising autonomy as a central concept within the issue of conscientious objection, defenders of the common view are implying that the conscientious objector exercises a rational 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.¹¹

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. One also does not always have a meaningful, independent choice as to which action is best in light of one's belief. This is particularly true of the typical conscientious objector. Second, one does not really independently choose one's deepest beliefs (i.e. the sources of one's conscientious commitments). It should be noted that Raz's perception of autonomy focuses on being free from external coercion. Here, and as will be explained in detail below, we argue that a person that feels compelled to act in a certain way because of conscientious reasons that result from a conscience that was never chosen, is subject to internal coercion that denies or diminishes his autonomy. Consequently, respect for the typical conscientious objector is not best thought of as arising from respect for autonomy. Therefore, with regard to tolerating conscientious

¹¹ It worth noting here that a distinction can be drawn between freedom, as a local concept applying to particular moments of decision, and autonomy as a global concept, applying across an extended temporal swathe of an individual's life. See G Dworkin, 'The Concept of Autonomy' (1981) 12/13 *Grazer Philosophische Studien* 203-213. Not everyone embraces this distinction but, in any event, our argument claims that both freedom and autonomy are lacking in the decision of the typical conscientious objector.

objection, we should apply the concept of autonomy with caution, as tolerating conscientious objection does not typically reflect respect for the conscientious objector's freedom to choose but rather acknowledges the lack of real ability to choose one's conscience and to refrain from acting upon one's conscience, and the lack of adequate range of valuable options to choose from.

To defend this argument, it is useful to break the typical case of conscientious objection up into two distinct timeframes. The first, which we shall call T1, is the time at which the conscientious objector makes a decision as to whether to act in accordance with their conscience. So understood, T1 encompasses a localised moment or series of moments in time. The second, which we shall call T0, is the time over which the conscientious objector develops their conscientious commitments. So understood, T0 can encompass a much more extended series of moments in time. It is our contention that the typical conscientious objector lacks independent choice over both timeframes.

It is important to note at the outset that this argument concerns the typical conscientious objector and not every possible instance of conscientious objection. We concede at points in the following discussion that certain conceptions of autonomy might allow for rare cases in which conscientious objection does emanate from autonomy. We respond, however, by arguing that in order to embrace these cases one must engage in considerable conceptual manoeuvrings that are a long way from the most common-sense understandings of autonomy and that even then doing so would limit conscientious objection to rare instances that would be counterintuitive because they would exclude the majority of cases that we typically group under that

description. Consequently, we submit that it is more plausible to simply reconceive the conceptual basis on which conscientious objections are tolerated.

2.1 – The Lack of Real Choice in Acting in Accordance with One's Conscience

We start by setting out the argument in relation to the lack of real choice at T1. The decisional dynamic in such a situation is demonstrated by two typical cases. The first is the case of having to decide between (a) not acting upon one's conscience and (b) suffering an exceptionally severe sanction should one act upon it (e.g., a Muslim woman who feels compelled by her religious conscience to wear a veil and faces a criminal law that utterly prohibits the wearing of a veil and imposes long imprisonment periods as sanctions). The second is the case when one has to decide whether to (a) not act upon one's conscience and consequently enjoy various types of benefits or (b) act upon it and thereby lose these benefits (e.g., a Muslim woman whose religious conscience compels her to wear a veil, facing a law that utterly prohibits wearing a veil in free-tuition public universities but not in numerous expensive private ones). The sanctions in both cases are severe because either the woman acts from conscientious commitments and is punished or excluded from some benefit; or she reneges on the commitments that are core to her sense of identity and moral purpose, forcing some serious rethinking of who or what she is.

In both cases, and if the objection to removing the veil is a conscientious one, we argue that the Muslim woman does not have an independent choice from a valuable range of options. If, as is most likely, she decides to wear the veil it will be

because the exceptional weight afforded to her conscientious reasons determines this decision.¹² In other words, because at T1 her faculty of choice was fixed in such a way as to render openness to and choice among the available options effectively impossible, she has no choice but to wear the veil. She is, in fact, compelled by her conscience to wear the veil.

It may be argued that in both veil cases (conscience vs. threat; conscience vs. forgone benefit), if the Muslim woman decides to wear the veil after all, she would base her decision on her assessment of the reasons that apply to her and on the weight she would accord to these reasons. It may also be argued that even if she feels compelled to choose that way, it is her take on reason that is compelling her – and that to say otherwise is to infantilise her or to undermine her agency.

We, however, argue that the reasons that conscientious objectors have for acting in a certain way – and the weight that is accorded to these reasons – are not really chosen but rather result from ‘fixed points’ which are beyond their control and which allow them or prevent them from weighing and evaluating the alternatives. This point will be elaborated in section 2.2 below, where we discuss the lack of real choice over the content of one’s conscience. Here, suffice it to say that the fact a person has reasons for acting in a certain way, and can reason their decision and justify it, does not entail or reflect choice, freedom or autonomy. Moreover, the lack of real choice both at T0 and T1 does not infantilise the conscientious objector or

¹² Lest there be any confusion: to call it a decision should not be taken to imply that there is involved an intelligible, independent autonomous choice. We assume that everyone faces decision problems in life – i.e. contexts in which multiple outcomes are, at least, epistemically conceivable. To say that someone ‘decides’ in our view simply means that when confronted by these decision problems the agent realises one of these epistemically conceivable outcomes. It could be that only one outcome was ever realisable, but even if that weren’t the case, and more than one was realisable, it would not follow that the agent has exercised an autonomous choice. If someone points a gun to your head you may ‘decide’ to follow their instructions, but the decision is not an exercise of autonomous choice.

undermine their agency – as long as they can reason their decision. Lack of real choice in terms of having ‘fixed points’ which are beyond our control and which allow us or prevent us from weighing and evaluating the alternatives – does not prevent us from reasoning our decisions. It merely dictates the way in which we reason our decisions – and the decisions themselves.

Alternatively, if the Muslim woman decides to act against her conscience in order to avoid the exceptionally severe sanction, she will do so because she lacks an adequate range of valuable options and has simply been coerced into acting against her conscience. Formally, it would seem like the woman’s ‘choice’ meets the conditions for coercion: the legal system threatens to make her extremely or considerably worse off than she would otherwise be unless she drops her conscientious commitments. And if we are coerced into doing X, we would not be inclined to say that we chose to act or that our choice was an autonomous one (free from external manipulation or interference).

In this case, a great harm will be caused to the woman’s moral integrity or personhood. Some might dispute this. They may ask: if she was not acting autonomously to begin with, how does it do any harm to her moral integrity or personhood to act contrary to her commitments? Doesn’t the claim that damage is being done to her integrity or personhood assume that she was acting autonomously?¹³ As we argue in section 3 below, forcing people to act against their non-chosen conscience does result in great harm to their moral integrity or personhood. The liberty that conscientious objectors claim is the liberty to have a conscience and to act upon it without being subjected to sanctions or to denial of

¹³ This question is taken directly from an anonymous reviewer.

meaningful benefits. A non-chosen conscience is not a non-genuine conscience. A non-chosen decision to act upon one's conscience is not less important to the decision-maker merely because the decision-maker feels that they have no choice but to make that decision. Thus, a claim that harm is being caused to a person's moral integrity or personhood, by coercing them to act against their conscience, does not assume that they were autonomous when they acquired their conscience.

Some may respond that in arguing that the typical conscientious objector lacks real choice at T1, we are assuming far too high a standard of autonomy, and, more particularly, far too high a standard of what it means to exercise autonomous control over particular decisions in one's life. This is a topic that is much debated in the literature on responsibility, control and freedom of choice. It is not possible to do full justice to the various positions on choice and control that have been carved out in that literature. Nevertheless, we hope to cover as much of the conceptual territory as is possible to give a sense of the difficulty of arguing that the conscientious objector has an independent choice. We can start by considering two obvious objections to the argument just made arising from compatibilist theories of control and autonomy.

The first objection stems from the *reasons-responsive* and *reason-guiding* views of compatibilist control.¹⁴ Both theories adopt a slightly deflationist view of what it is to meaningfully control one's actions. It is not necessary, according to these views, to be able to genuinely choose among reasons for actions or among valuable options. All that is required is that one's decision emanate from a decision-making mechanism that is sensitive to changes in the balance of sufficient reasons for and

¹⁴ Fischer, JM and Ravizza, M *Responsibility and Control* (Cambridge: CUP, 1998); and R. Jay Wallace *Responsibility and the Moral Sentiments* (Harvard: HUP, 1994).

against particular actions, or more specifically that it is capable of grasping and acting upon sufficient moral reasons for action.¹⁵ It could be argued that the decisions of the typical conscientious objector satisfy both of these requirements, insofar as they do act upon certain types of moral reason (those linked to their conscientious commitments) and they can be responsive to changes relating to those reasons.

But this strikes us as being incorrect. We argue that, even if we do accept this deflationist conception of what it takes to be in control of one's actions, it does not follow that the typical conscientious objector exhibits the right kind of reasons-responsivity. And, furthermore, even if they do display the right kind of responsivity it is only because what it means to be reasons responsive is so thin as to result in the same normative conclusions toward which we direct our argument in section 3.¹⁶ To unpack this argument we need to get a clearer sense of what reasons-responsive control entails.

Fischer and Ravizza state that there are three ways in which to understand reasons-responsivity:

Strong reasons-responsivity: an agent is strongly reasons-responsive if their actions emanate from a deliberative mechanism M and, if there were sufficient reason to do otherwise, M would recognize the sufficient reason to do otherwise

¹⁵ The former is Fischer and Ravizza's view; the latter is Wallace's. Fischer and Ravizza define their view in counterfactual terms. In other words, a decision-making mechanism M is moderately reasons responsive if in at least some closely related possible worlds involving different mixes of reasons for action, it would result in an alternative decision. Quite how strong the counterfactual responsiveness to reasons needs to be is unclear in the current debate, though most reject that notion of strong reasons responsiveness (which arises when any change in reasons results in an alternative decision).

¹⁶ We are indebted to two anonymous reviewers who highlighted some weaknesses in our original formulation of this argument and encouraged us to revise it.

and thus choose to do otherwise.

Weak reasons-responsivity: an agent is weakly reasons-responsive just in case their actions emanate from a deliberative mechanism M and there is at least one possible scenario or possible world in which there is a sufficient reason to decide and do otherwise, and M recognizes that reason and issues a different action.

Moderate reasons-responsivity: an agent is moderately reasons-responsive if their actions emanate from a deliberative mechanism M and M responds to a ‘rich pattern of reasons, reasons that hang together rationally as a class and fit a coherent or sane pattern’¹⁷ even if it doesn’t always respond to sufficient reasons or even if it doesn’t just do so in an extremely rare class of cases.

There are also three possible failures in responsivity: (i) failure to be receptive to reasons (i.e. to hear or understand them); (ii) failure to be reactive to reasons (i.e. to afford them their appropriate weight); and (iii) impotence (i.e. an inability to translate reasons into actions).

Although Fischer and Ravizza hold that strong reasons-responsivity is sufficient for having control over one’s choices, they do not think it is necessary. Indeed, believing that it is necessary has counterintuitive results because it would

¹⁷ This description is taken from Stanford Encyclopedia of Philosophy discussion of Compatibilism: The State of the Art –available at <https://plato.stanford.edu/entries/compatibilism/supplement.html> (accessed 6/1/2018)

require a high degree of sensitivity to changes in sufficient reasons for action. This is some solace to the conscientious objector since they definitely could not display this degree of sensitivity. The nature of their conscientious reasons is such as to outweigh or exclude many other sufficient reasons for action. So the question then becomes whether weak or moderate reasons responsiveness is required for having autonomous control and which type of responsiveness is displayed by the typical conscientious objector.

It is generally accepted that weak responsiveness is too lax a standard. If all that is required for control is sensitivity to at least one change in the balance of sufficient reasons, it would follow that those in the grip of strong delusions or paranoid ideas are reasons responsive. Conscientious objectors probably do display weak reasons-responsiveness since they do indeed act on the basis of (what seem to them to be) sufficient reasons for action and probably would be sensitive to at least one change in the balance of sufficient reasons for action (for example, if someone convinced them that their interpretation of a sacred doctrine or moral principle was flawed). But this is little solace if weak responsiveness is too lax a standard.

Moderate reasons-responsiveness is the middle course that Fischer and Ravizza try to steer. The problem, as with all middle courses, is figuring out what is truly moderate. Three conditions have been identified. The first is that it involves responsiveness to a *coherent, rational and sane pattern* of reasons. The second is that it involves affording reasons an *appropriate normative weight* in decision-making (this means that moderate reasons-responsiveness is necessarily evaluative in nature: it involves taking a point of view on whether the reasons to which the agent is

responsive deserve the kind of weight they are being granted). The third is that the decision-making mechanism must satisfy a *historical independence condition* in order to count as being in control. These three conditions all pose problems for someone trying to argue that the typical conscientious objector is displaying autonomous control over their actions because it is unlikely that the typical conscientious objector satisfies all three conditions.

The first problem is that a deliberative mechanism that is dominated by a conscientious reason for action probably does not display rational, coherent and sane sensitivity to reasons, at least not in the typical case. Of course, rationality, coherence and sanity are highly contested concepts. But even if you embrace those contests, you end up with the conclusion that the typical conscientious objector fails to satisfy the condition. Limiting ourselves just to rationality, on an economic/decision theoretic view all this condition would require would be an ability to identify and respond to decision-relevant information, and to act on intelligible, transitive preferences in consistent manner across decision problems. On a more normative view it would require sensitivity to the right kinds of reasons. Either way we think there is empirical evidence suggesting that those with deep conscientious commitments do not act in a manner that is rationally sensitive to reasons. Empirical work done on the concept of sacred values (a term which is understood to cover moral principles to which individuals are deeply committed, and which can be both secular and religious in nature) illustrates this point.¹⁸ It is found that those with sacred values are not simply

¹⁸ Atran, S and Axelrod, R. 'Reframing Sacred Values' (2008) 24(3) *Negotiation Journal* 221-246; Ginges, J., 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; Atran, S and Ginges, J 'Religious and Sacred Imperatives in Human Conflict' (2012) 336 *Science* 855-857

inclined to ignore changes in the incentives favouring actions that are contrary to their values, but that they are likely to become even more entrenched in their commitment to those values if those incentives change in favour of alternative actions. In other words, they become like gamblers, doubling down on their commitments, even when presented with what most others would deem good alternative reasons for action. This evidence has been cited as an explanation for the escalation and intractability of certain social, ethnic and religious conflicts. While you might, as a reviewer to this article did, claim that this doubling-down is exactly what we should expect from sacred values, and so is rational, sane and coherent, we think this is counterintuitive. To double down in this manner means to become more close-minded and to afford less weight to alternative reasons for action than would ordinarily be the case. It is hard to see how that could amount to a rational sensitivity (let alone sanity), even on a highly instrumentalised view of rationality. In any event, there are other reasons to doubt the rational, coherent and sane nature of conscientious commitments. There is considerable evidence (discussed in more detail below) to suggest that people's moral commitments are not subject to rational scrutability or defensibility.¹⁹ Those with the deepest moral commitments are the most selective, most biased, and most tribal when it comes to engaging with alternative reasons for actions. They will often ignore or manipulate evidence that is contrary to their commitments. It would be difficult to say that these patterns of behaviour involve the sane, rational, coherence that is demanded by moderate reasons-responsivity.

One might be able to reject this by leaning on Fischer and Ravizza's second

¹⁹ See the discussions of Haidt and moral psychology in section 2.2

condition and claiming that the patterns of behaviour are reasons-responsive because the conscientious reasons for action are rationally compelling: it is right and proper for the conscientious objector to treat their reasons for action as exclusionary or conclusive and to seek to undermine or ignore countervailing evidence. This would be, *prima facie*, consistent with moderate reasons responsivity since it is about given reasons their due. But this is where the evaluative nature of the second condition of moderate responsivity begins to bite. Replying in this way means that one necessarily has to evaluate the normative appropriateness of the reasons in question. One is no longer detached or impartial. One has to be willing to say that the conscientious objector did the right thing by refusing to perform the abortion or blood transfusion (or whatever) when faced with alternative reasons for action. This is very different from tolerating an objection out of respect for the individual's choice or autonomy; it is tolerating an objection because you respect the way in which they weigh the underlying reason for action. This is not far from the view we end up advocating in section 3, so our claim is that if you endorse this deflationist account of autonomy, and this valenced understanding of what a conscientious reason is, you end up with something quite different from the common view.

In any event, there is another reason for thinking that the typical conscientious objector will fail to meet the requirements of moderate reasons-responsivity: their deliberative mechanism is unlikely to meet the historical independence requirement, for reasons we explain in section 2.2.

Another possible objection to the claim that there is a lack of choice at T1 stems from a *hierarchical* view of autonomy, such as those made popular by the likes

of Frankfurt and (Gerald) Dworkin.²⁰ According to these views, an autonomous decision is one that is consistent with the higher order preferences of an agent. Those who lack real autonomous choice are those who decide on the basis of compulsive first-order desires; those who have real choice are those who act on the basis of reflective second (or higher) order desires. It seems obvious that the decisions of the conscientious objector would match this definition of autonomous choice since, as defined previously, the conscience is the source of higher reasons that dictates the choice in a particular context.

There are two problems with this response. The first is that this higher-order view is itself deeply unsatisfactory. As others have pointed out,²¹ if this theory is correct, then someone who is brainwashed into accepting a certain set of values (e.g. by a religious cult leader) can be said to be acting autonomously because they will be fully committed to those values (they will ‘want to want’ them – to adopt the language of Frankfurtian autonomy). But this seems to be wrong. A person who is manipulated into accepting a certain set of values is perhaps the epitome of the lack of autonomy because their acceptance of those values is not properly independent.²²

The other reason for rejecting this response is that it may simply not be true that the typical conscientious objector acts on the basis of *reflective* higher-order

²⁰ Frankfurt, H ‘Freedom of the will and the concept of a person’ (1971) 68 *Journal of Philosophy* 5-20; Dworkin, G. *The Theory and Practice of Autonomy* (Cambridge: CUP 1988)

²¹ Richard Double *The Non-Reality of Free Will*; Derk Pereboom *Free Will, Agency and Meaning in Life* (Oxford: OUP, 2014)

²² Frankfurt appears willing to bite the bullet on this score. Dworkin tries to address it by appealing to hierarchically endorsed values with the right kind of causal history (i.e. that are not manipulated or coerced). But it is very difficult to determine what the right causal history is. Dworkin proposes a test whereby the individual is asked (after the fact) whether they would endorse the means whereby they acquired the values. But this too is unsatisfactory as those who are brainwashed into a set of beliefs will often be inclined to endorse the means of acquisition after the fact. In any event, we say more about the typical pathways through which a conscience is developed below.

preferences. This argument is developed more fully in relation to the lack of choice at T0, below. To briefly anticipate some of its elements, the empirical evidence on moral conscience and moral decision-making suggests that many people have no reflective basis for their deepest moral commitments. On the contrary, they are often ‘dumbfounded’ when challenged to come up with principles that explain their commitments. Thus, they act in a manner that often lacks some conscious process of identifying and committing to a reflective higher-order preference.

This defence of the lack of choice at T1 might seem inconsequential. While we believe that it has some analytical and normative significance, we concede that others may tend to view the decision to act in accordance with one’s conscience at T1 as a perfect exemplar of autonomous choice on the grounds that 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 at T0.

2.2 – The Lack of Real Choice over the Content of One’s Conscience

It will be useful to start with a clearer sense of the problem. Dennett has used the example of Martin Luther to illustrate that meaningful choice at a particular moment in time is not needed in order to exercise meaningful control over one’s decisions.²³ When he was brought before the Diet of Worms to explain his inauguration of the Protestant Reformation, Luther explicitly invoked the demands of

²³ Dennett, D. *Elbow Room: The Varieties of Free Will worth Wanting* (Cambridge, MA: MIT Press 1984)

conscience, allegedly commenting ‘Here I stand, I can do no other’. That is to say, he explicitly acknowledged the lack of choice with respect to his actions, and explained them by reference to what was necessitated by his conscience. It is a classic exemplar of what we have argued in relation to T1 – and presumably a representative description of the ‘internal point of view’ of most conscientious objectors.

But this does not and should not lead us to conclude that Luther acted without genuine control over his actions. Luther’s conscience may have made it impossible for him to do otherwise, but this just implies that the ability to choose among options is irrelevant to the question of autonomous control over an action. Others such as Kane²⁴ agree that Luther may have acted with autonomous control, but they argue that this is because the exercise of autonomy can be traced back²⁵ to an earlier moment in time, namely: the moment (or moments) at which he developed his conscience. As Kane puts it:

‘If [Luther’s] act did issue from his existing character, then his moral accountability for it would depend on whether he was responsible by virtue of earlier choices and actions for being the sort of person he had become at that time...Often we act from a will that is already formed, but it is “our own free will” by virtue of the fact that we formed it by other choices and actions in our past...’²⁶

²⁴ Kane, R. *The Significance of Free Will* (Oxford: OUP, 1996)

²⁵ Tracing conditions of this sort are actively defended by participants in the free will/moral responsibility debate e.g. Fischer and Tonganazzini ‘The Truth about Tracing’ (2009) 43 *Nous* 531-556

²⁶ Quote from Kane, R. *Free Will* (Oxford: OUP, 2005), p 82

All of this suggests a general escape route for the defender of the autonomy-based view of conscientious objection. If they can prove that the typical conscientious objector had some meaningful choice with respect to the formation of their conscience (i.e. if they had choice at T0), then this will transfer over to the decision made at T1 and imply that they acted autonomously at T1, even if they lacked choice or control at that particular moment. Thus, it may still be the case that we tolerate their conscientious objection out of respect for their autonomy.

But we argue that this escape route is unlikely to be available. 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. There are two ways in which we can defend this: by appealing to evidence suggesting that our general character and commitments are shaped by forces beyond our control; and by appealing to evidence that applies specifically in relation to the formation of moral commitments and beliefs. The former effectively amounts to an embrace of hard determinism (i.e. the view that there is no such thing as autonomous choice); the latter is more moderate and is consistent with both compatibilist and indeterminist views of free will (i.e. it holds that autonomous choice is possible, maybe even for conscientious objectors but very rare or unlikely, no matter what understanding of autonomous choice you apply).

Although our argument does not ultimately depend upon it, we think there is much to be said for the hard determinist stance on autonomous choice. In recent years there has been a growing understanding that people do not really have freedom to

choose – at least not in the broad, thick meaning of the term – at any moment in their lives. It has been indicated by psychologists,²⁷ experimental philosophers²⁸, neuroscientists²⁹ and sociobiologists³⁰ that our preferences, tastes, character,³¹ moral values³² and ultimately acts are dictated by our genes, brain activity, childhood experiences or traumas, socialisation, environment, and unconscious cognitive and emotional factors – all of which are beyond our control. For example, with respect to character and action, we have no control or very little or limited control over our willingness to take risks;³³ over whether we are sensitive to other people's emotions or able to understand them; or over being constantly fearless or cowardly; or over being lazy or hardworking, shy or assertive, thoughtful or rude, or even liberal in political outlook.³⁴ Of course, we often have a strong feeling of being in control, but

²⁷ *Are We Free? Psychology and Free Will* (John Baer, James Kaufman and Roy Baumeister eds; OUP; 2008) especially chapters 8, 10, 11, 12; Daniel Wegner *The Illusion of Conscious Will* (2002).

²⁸ Joshua Knobe and Shaun Nichols 'Free Will and the Bounds of the Self' in *The Oxford Handbook of Free Will* (Robert Kane ed; 2nd ed; OUP; 2011) 530-554.

²⁹ Benjamin Libet 'Do we have Free will?' 6 *Journal of Consciousness Studies* 47-47 (1999); Benjamin Libet 'Consciousness, Free Action and the Brain' 8 *Journal of Consciousness Studies* 59-65 (2001); Henrik Walter 'Contribution of Neuroscience to the Free Will Debate: From Random Movement to Intelligible Action' in *The Oxford Handbook of Free Will* (Robert Kane ed; 2nd ed; OUP; 2011) 515-529.

³⁰ Edward Wilson *Sociobiology: The New Synthesis* (Harvard University Press, 1975).

³¹ See in particular, Doris, J. *Lack of Character: Personality and Moral Behavior* (Cambridge: CUP, 2003), which uses psychological evidence to argue against the concept of a robust moral character.

³² J Greene, *Moral Tribes*; J Haidt, *The Righteous Mind* (London: Penguin 2012)

³³ Muchael Zyphuri, Jayanth Narayanan, Richard Arvey, and Gordon Alexander 'The Genetics of Economic Risk Preferences' 22 *Journal of Behavioral Decision Making* 367-377 (2009); Anna Dreber 'Biological Basis of Risk Preferences' Gruter Institute Squaw Valley Conference – Innovation and Economic Growth (18 May 2010), available at SSRN: <http://ssrn.com/abstract=1611259>.

³⁴ For recent research that shows that liberals may owe their political outlook partly to their genetic make-up, see Jaime Settle, Christopher Dawes, Nicholas Christakis, and James Fowler 'Friendships Moderate an Association between a Dopamine Gene Variant and Political Ideology' 72(4) *The Journal of Politics* 1189-1198 (2010).

more and more evidence suggests that this is illusory.³⁵ Experimental research shows that ‘even behaviour that subjects believe to be completely under conscious control is influenced by external factors’.³⁶ This view is, of course, not just limited to the sciences. The number of philosophers taking on board this growing body of evidence, and defending an anti-free will and anti-autonomous choice position is increasing, with several authors in recent years making a strong case for this hard determinist view.³⁷ There are still plenty of people willing to defend the alternative view (some of whom will be discussed below). Still, in light of this growing body of evidence, and the absence of persuasive account of how free will in fact works, we would suggest a reversal of the burden of proof might be appropriate on this issue: it is up to those who believe that one’s conscience is developed through the exercise of autonomous choice to prove that this is, in fact, true and to show how it takes place.

It may be argued that appealing to this general free will scepticism is odd in the present context. After all, we started with a specific (Razian) conception of autonomy and its value and used that to scrutinise the nature of conscientious objection and the toleration thereof. This intimated that we had a narrow focus in this article on the topic of conscientious objection. But the general argument just outlined

³⁵ The work of Patrick Haggard is particularly strong on this point: Filevich E, Kühn S, Haggard P. ‘There is no free won’t: antecedent brain activity predicts decisions to inhibit’ (2013) 8 *PLoS One* e53053; Haggard, P ‘Decision time for free will’ (2011) 69(3) *Neuron* 404-406; Haggard P, Clark S & Kalogeras J. ‘Voluntary action and Conscious Awareness (2002) 5 *Nature Neuroscience* 80-84.

³⁶ Henry Roediger, Michael Goode and Franklin Zaromb ‘Free Will and the Control of Action’ in *Are We Free? Psychology and Free Will* (John Baer, James Kaufman and Roy Baumeister eds; OUP; 2008) 205-225.

³⁷ Levy, N. *Hard Luck: How Luck Undermines Free Will and Responsibility* (Oxford: OUP, 2011); Waller, B. *Against Moral Responsibility* (MIT Press, 2011); Caruso, G. *Free Will and Consciousness: A Determinist Account of the Illusion of Free Will* (Lexington Books, 2013); Caruso, G. (ed) *Exploring the Illusion of Free Will and Moral Responsibility* (Lexington Books, 2013); Pereboom, D. *Free Will, Agency and Meaning in Life* (Oxford: OUP, 2014)

has much broader significance. It implies that most people, most of the time, lack anything approaching autonomy, be it Razian or otherwise. Thus, it suggests that autonomy cannot really be a central concept in political theory. Surely we do not wish to push the argument that far?

The answer is that we are not worried about these broader implications. We remain focused on the question of the analytical and normative basis on which conscientious objectors are tolerated. If what we have just argued has broader implications, so be it: we believe that exploring the implications of the anti-free will view in particular narrow domains is, in itself, of value. Many who defend the anti-free will view talk about the societal implications in a general fashion, or focus largely on crime and punishment. By honing in on an alternative area of legal and political philosophy we can assist in adding more flesh to this general view. Furthermore, we submit that there is nothing paradoxical or self-defeating about trying to reconceptualise the normative basis on which conscientious objectors are tolerated if one embraces such free will scepticism. Some people might argue that it is strange to offer moral or normative arguments against or in favour of a particular practice if we have no real choice over what to do anyway. But this is to assume that free will scepticism is tantamount to nihilistic fatalism. It is not. Moral reasons and moral arguments can still be relevant (and causally efficacious) in a world without free will as traditionally conceived.

Fortunately, one does not need to embrace this strong form of free will scepticism to embrace our argument. There is a narrower argument to be made about the development of moral conscience itself (excluding other aspects of one's character

and action) and the unlikelihood of developing one's conscience in an autonomous fashion. This narrower argument holds out the possibility that some few individuals might develop conscience through an autonomous process but suggests that such instances will be extremely rare and, hence, provide at best a counterintuitive basis on which to tolerate conscientious objections.

This narrower argument starts by appealing to the emerging consensus in moral psychology, which 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, not through rational reflection by the agent themselves. The work of Jonathan Haidt is particularly instructive on this point.³⁸ He argues that human beings share a set of six moral foundations, which get tuned up and down through the course of one's cognitive development. These foundations consist in the sensitivity to distinct categories of moral good/bad, e.g. care/harm, fairness/cheating, sanctity/degradation. The degree of sensitivity and significance attached to these different categories varies depending on the cultural and social background of the individual. Indeed, Haidt finds that the variation in moral response profiles is quite tightly correlated to the cultural and social background of the individual. Thus, for example, those from upper-class backgrounds tend to view violations of religious dress codes as pure matters of social convention, whereas those

³⁸ For a general overview, see Flanagan, O. *The Geography of Morals* (Oxford: OUP, 2017); Haidt, J. *The Righteous Mind* (London: Penguin 2012). For more scientific discussions, see Haidt, J. 'The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment' (2001) 108 *Psychological Review* 814-834; Haidt, J. 'The New Synthesis in Moral Psychology' (2007) 316 *Science* 998-1002; and Haidt, J. and Joseph, C. 'Intuitive Ethics: How Innately Prepared Intuitions Generate Culturally Variable Virtues' (2004) *Daedalus* fall, 55-66.

from lower class backgrounds view them as significant moral violations.³⁹ Many more examples along these lines provide evidence for the claim that moral conscience is something that is thrust upon the individual, by the society and culture in which they live, not something they dictate through autonomous choice.

This is supported by Haidt and other moral psychologists' findings that most moral decision-making is not based on any rational reflective consideration of moral reasons for action. 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.⁴⁰ This is deeply troubling for any account of autonomous choice that supposes that we can grasp and act upon moral reasons for action, or that we act in a manner that expresses our higher order preferences. Indeed, the evidence seems to suggest that moral actors frequently have no clear sense of what their higher order preferences might be. They react intuitively and without conscious reason. This reinforces the notion that autonomous choice does not dictate the development of moral conscience at T0. To be clear, in defending this narrower claim about moral conscience we are not claiming conscience is fixed and unalterable. On the contrary, we accept that it can and often is changed over the course of an individual's life. We are simply denying that these changes are governed by anything that can be called autonomous choice.

We believe that these two arguments provide ample support for the lack of

³⁹ Haidt, J.; Koller, S. and Dias, M. 'Affect, Culture, and Morality, or Is it Wrong to Eat Your Dog?' (1993) 65 *Journal of Applied Social Psychology* 33:1-36

⁴⁰ Haidt cites several lines of evidence for this view. See *The Righteous Mind*, chapter 2.

real choice at T0. Nevertheless, there is an obvious counterargument. As noted above, some might accept that the picture we have painted is true for the majority of people, but insist that in at least some cases the development of conscience is governed by autonomous choice and these are the cases that matter from the perspective of toleration. Thus, there remains the possibility of the *autonomous convert*, who adopts a stance of conscientious objection through careful deliberation, reflection and choice and whose choices ought to be tolerated on that basis.

There are two things to be said in response to this suggestion. First, we can quite happily concede the possibility (conceptual or empirical) of the autonomous convert. This does not greatly affect our position. Our argument relates to the typical conscientious objector and the general societal basis on which their objection is to be tolerated. The fact that there may be occasional objectors who arrive at their position through a genuine exercise of autonomy does not greatly disturb this picture. But in saying this we would caution people against readily assuming that particular instances of conversion to a cause involve autonomous choice. Once again, we would submit that the empirical evidence suggests that most converts are influenced by factors beyond their control and merely adopt readily available sets of moral principles to rationalise their conversion. The autonomous selection of these moral principles is not the best predictor of what they do.⁴¹ Again, in light of this general picture, we suggest that the burden of proof is on those claiming that there are genuine cases of autonomous conversion, not on the defenders of the lack of choice position.

⁴¹ A good illustration of this is Atran's work on conversions to a terrorist cause, which are often not best explained by commitment to an ideology but rather by the presence of a certain kind of social network or fictive kinship: Atran, S. *Talking to the Enemy* (New York: Ecco Books, 2010)

The second response to the possibility of autonomous conversion is to take issue with the primary philosophical accounts of this process. We think in particular here of the accounts of *self-forming actions* proffered by Robert Kane and Mark Balaguer (both of whom are libertarians and indeterminists when it comes to the possibility of free will and choice); and the *intentional self-modification* account proffered by Alfred Mele (which is essentially compatibilist in nature). These accounts put forward potential mechanisms for autonomous conversion, but we believe that neither is likely to succeed in showing that such conversion is plausible or sufficient to defeat our argument.

The Kane/Balaguer account focuses on particular moments in time when agents face tough decisions, with equally weighty reasons for two or more options, and are consequently forced to choose between the options through the pure exercise of undetermined will. Balaguer⁴² (whose version of this is the most up to date) calls such decisions *torn decisions* and believes that they play an important part in how we exercise autonomous control over our lives. To apply the concept to the present discussion, we could imagine someone trying to decide whether to commit to the principle of radical nonviolence and become a conscientious objector to the military draft, or whether to accept some need for violent self-defence and do their duty. They will have identified the arguments favouring pacifism and the arguments against; they will perceive the sets of arguments on both sides as being of equal weight; and they will ‘just choose’ to come down in favour of radical nonviolence. Balaguer’s view is that because the causal environment was in a state of equilibrium at the moment prior

⁴² Balaguer, M *Free Will as an Open Scientific Problem* (Cambridge, MA: MIT Press, 2010)

to the choice (the sets of reasons were perfectly balanced), the decision was undetermined and hence a genuinely free choice. The individual is, consequently, an autonomous convert to the pacifist cause.

There are at least two problems with this potential mechanism of conversion. In the first instance, it is not at all clear that it is empirically plausible or tractable. Studies already suggest that we are not the best interpreters of the causes underlying our behaviour: we may believe that the reasons are equally weighted and that nothing external to ourselves is forcing our decision, but we may be wrong. Second, it is not clear that it is even conceptually compelling. As others have pointed out,⁴³ it relies on an exceptionally thin account of what it means for an *individual* to exercise choice at a particular moment, and then compounds the importance of this thin account by tracing the responsibility for future actions back to the moment of these torn decisions. On the Kane/Balaguer account, there is nothing about the agent prior to the moment of the torn decision – i.e. nothing about their beliefs, character, education and so forth – that settles the decision that is ultimately made. Consequently, it seems like *they* are not really in control; their decision is indistinguishable from an event involving pure chance or luck. It is difficult to see any solace here for the defender of the autonomous convert.

This brings us to Alfred Mele's account of intentional self-modification.⁴⁴ It is illustrated by a thought experiment. Mele asks us to imagine Betty, a six-year-old girl

⁴³ Pereboom, D. *Free Will, Agency and Meaning in Life* (Oxford: OUP, 2014), pp 33-39; Dennett, D (London: Penguin, 2003), chapter 4; Blumenfeld, D. 'Lucky agents, big and little: should size really matter?' (2011) 156(3) *Philosophical Studies* 311-319

⁴⁴ Mele, A. *Autonomous Agents* (Oxford: OUP 1995); also *Effective Intentions: The Power of Conscious Will* (Oxford: OUP, 2009)

who is afraid of the basement in her house. Betty knows that no harm has come to anyone, including herself, who has entered the basement. But she is still afraid. Nevertheless, she recognizes that her fear is ‘babyish’ and takes steps to overcome it. She starts to make periodic visits to the basement, staying slightly longer each time until she no longer feels afraid. After following this method for a few months, she loses her irrational fear. She has intentionally modified her character, over an extended period of time, and so when she later makes decisions on the basis of that modified character they can be rightly viewed as autonomous because of the method of conversion. This model of intentional self-modification could arise in the case of a convert to a particular set of moral values and principles. Again, imagine the putative-pacifist, who has some resistance to the principle of radical nonviolence at first, but forces themselves to analyse more of the arguments and debates, to attend meetings and public talks, and then gradually, over a period of months and years, grows to embrace the cause. Are they not then an autonomous convert?

There are several potential responses to this claim. First, it is doubtful whether Mele’s model of self-modification is a good fit for the kinds of conversion that are relevant to conscientious objection cases. Betty, as imagined by Mele, is using an evaluative principle (‘I should not be so babyish’ or ‘babyishness is a negative quality’) to determine a course of action that allows her to modify her personal characteristics. The evaluative principle is the fixed point that drives the intentional self-modification. But in the case of the autonomous convert, it is usually the evaluative principles that are themselves being modified. Now, of course, there could be hierarchies of values, and values that are higher up the hierarchy might be used to

drive some intentional modification, but it is certainly more difficult to imagine cases in which this will take place given the eventual ‘trump card’ status of conscientious commitments.

Second, Mele’s model presupposes that the agent has the cognitive capacities that will facilitate the self-modification. As Waller points out,⁴⁵ someone like Betty is what psychologists would call a *chronic cogniser*, i.e. someone who takes pleasure in thinking and extended deliberation. She is not a *chronic miser*, i.e. someone who dislikes extended deliberation and prefers to act impulsively. Such an individual would not be able to intentionally self-modify (or, at the very least, would find it exceptionally difficult to do so). If one can only be an autonomous convert if one is a chronic cogniser and uses this capacity to engage in a process of intentional self-modification, then three problems would seem to emerge. First, there is the difficulty of knowing whether this is in fact how someone arrived at their beliefs after the fact, particularly given that individuals are not the best or most accurate self-historians. Second, there is the apparent fact – from the findings in moral psychology given above – that most people do not arrive at their moral beliefs through this process of intentional self-modification. And third, there is the fact that if one embraces the notion that one can only tolerate a conscientious objection that has been arrived at following a process of intentional self-modification, one is doing something that seems normatively undesirable. You are unfairly favouring one type of conscientious objection due to the results of a natural/social lottery (i.e. the distribution of cognitive capacities and talents). If the results of this lottery are not under our control why

⁴⁵ Waller *Against Moral Responsibility* (Cambridge MA: MIT Press, 2011), 30-35.

should we be more tolerant of the chronic cogniser than the chronic miser?

To sum up, we think it highly unlikely that a conscientious objector exercises autonomous control over the development of their conscience at T0. We concede the possibility of a truly autonomous convert, but we think this is unlikely to be the norm and that focusing our understanding of conscientious objection on them leads to a counterintuitively narrow conception of what a conscientious objection is. We suggest that the burden of proof is on those who claim otherwise.

When this argument is coupled with the argument for the lack of choice at T1, we believe there is strong case for believing that the typical conscientious objector is not acting out of some exercise of autonomous choice or freedom of conscience. Rather, they are acting as they must, as the conscience that they did not shape demands. We turn next to the analytical and normative implications of this view.

3. The analytical and normative implications of the lack of choice argument

The implications of the lack of choice argument 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.

From the conscientious objectors' point of view, when they follow their conscience's dictates they do not feel that they are exercising ongoing free and autonomous choice in that matter. They are in fact compelled to obey their conscience's dictates and express their attitude by using words such as 'dictates of conscience' or 'commands of conscience' rather than 'choices of conscience' or 'advices of conscience'.

This is the most compelling way to understand the fascinating duality of the nature of conscience: it is both an inner-part of our deepest and personal moral values (thus part of our moral personality) and an external source of moral commands – in the sense that its content and scope were 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'.⁴⁶

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) without being exposed to sanctions. This perception of what freedom of conscience means demonstrates why the 'will theory' or the 'choice theory' of rights cannot properly describe the nature of all rights (or their main

⁴⁶ Constance Braithwaite, *Conscientious Objection to Compulsions under the Law* (1995) 383.

function). The 'will theory' may have its appeal, in the sense that, when one has a right (or liberty), one normally has a choice whether or not to exercise it. Put differently, the function of some rights is to give their holder control over another's duty. When the right-holder chooses to exercise his right he imposes duties on others. The assumption here is that the right-holder can always choose not to exercise his right and by that to waive the other's correlative duties. However, when one is compelled by one's conscience to do X or to avoid doing X, one is simply seeking a legal right to act upon one's conscience, which may mean having a legal right to do what one would do anyway, because one does not have a real choice in this matter. Having a legal (or moral) right in these cases does not have to entail a choice whether to exercise it. Thus, the will theory of rights may describe accurately the function of some rights. It fails however to describe the meaning and function of freedom of conscience.

Brian Leiter asks why protecting liberty of conscience promotes human well-being. His answer is that 'many of the arguments trade, at bottom, on a simple idea: namely, that *being able to choose what to believe and how to live...* makes for a better life. Being told *what you must believe* and *how you must live*, conversely, make lives worse'.⁴⁷ We suggest, however, that being able to choose what to believe and how to live is not the only alternative to being told what to believe and how to behave. A third option exists, according to which protecting a person's right to have and act upon a certain conscience promotes the person's well-being precisely because one cannot really choose one's conscience, i.e. select what to believe in and, at times, how

⁴⁷ Brian Leiter, *Why Tolerate Religion* (New Jersey, Princeton University Press, 2013) 101.

to live. Leiter himself acknowledges the lack of choice argument when he writes that ‘a claim of conscience is, after all, a claim about what one *must* do, no matter what’.⁴⁸ 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 indeed make our lives worse but not because we were denied the ability to choose but because forcing us to act against our non-chosen conscience will result in great harm to our moral integrity.

Things are more complex with regard 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. We 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 we do not only claim that acknowledging the lack of choice explains what we do when we tolerate conscientious objection. We now claim that the lack of choice provides *a reason* for tolerating conscientious objection. This argument requires a few clarifications.

3.1 Lack of choice – and insanity

We should be careful not to push the lack of choice argument too far. Garvey, for example, offers a provocative view according to which what separates religion from

⁴⁸ *ibid* 95.

non-religion is that the former ‘is a lot like insanity’.⁴⁹ Therefore, the religious believer is truly compelled by his belief to do something or to avoid doing something because he lacks the will – in the same way as an insane person lacks the will – to choose to do otherwise, at least not without completely diminishing his personhood. In Garvey’s words, we should protect religious believers’ freedom precisely because they are not free.⁵⁰ Garvey’s observation pushes the lack of choice argument a bit too far by equating lack of choice with insanity. Both sane and insane people can lack real choice when they act in a certain way – but for different reasons and in different ways. Insane people cannot reason their decisions and may even lack the ability to fully understand the nature of their decisions and their implications. Sane conscientious objectors are compelled by their conscience, but they may be able to reason their decisions (even if wrongly), *i.e.* to understand them and to comprehend their implications. Lack of choice may exist in various cases but its nature and extent may vary. Conscientious objectors, insane persons, those who are threatened by a robber, those who have only one valuable option and many horrible ones – all lack real choice but it would be a mistake to treat all these cases or persons equally.

Garvey’s lack of choice argument is also too narrow as he only applies it to religious conventions. As we shall see below, this is a common mistake. Most of the (few) scholars who do claim that conscientious objectors lack real choice (normally without justifying this assertion) limit their argument to religious conscientious objection or to religious convictions. It is true that the religious believer does not

⁴⁹ JH Garvey, ‘Free Exercise and the Values of Religious Liberty’ (1986) 18 *Connecticut Law Review* 779, 793, 798.

⁵⁰ *ibid* 801.

choose his belief and does not have the free will to act against it (and this does not make him ‘insane’), but the same thing can be said about most non-religious conscientious objectors as well.

3.2 Conscientious convictions – and preferences

Understanding the justification for tolerating conscientious objection as one that refers to lack of choice is important when we are trying to answer the question of why conscientious convictions are different from mere preferences. Three criteria can be taken into account in order to differentiate between claims of conscience and claims of preference: vulnerability (in the sense of being adversely affected by neutral laws); ability to choose; and moral personhood. Views according to which no conscientious exemptions should ever be granted from legal rules eliminate the distinction between conscientious convictions and mere preferences as all are equally not being tolerated.⁵¹ The distinction does exist, however. The only question is which of the three reasons grounds this distinction: vulnerability, ability to choose or the importance of moral personhood.

The distinction between preferences and conscience does not result from differences in terms of vulnerability, as ‘general’ or ‘neutral’ laws may adversely affect preferences and conscientious convictions alike. More accurately, vulnerability cannot be the sole justification for tolerating conscientious objection rather than preference-based objection. Vulnerability matters most when the vulnerable person cannot simply choose to change his behaviour in order to comply with the neutral

⁵¹ B Barry, *Culture and Equality* (Cambridge, Polity Press, 2001) 46, 50.

legal demand. Eisgruber and Sager implicitly apply this argument while comparing holding a religious belief to having a physical disability.⁵² Both may prevent or make it harder for a person to obey neutral laws, i.e. laws that do not intend to harm or impose an exceptional burden on either religious adherents or disabled people (and here, also, the argument should apply to non-religious conscientious objectors). Eisgruber and Sager argue that an exemption from the law may be required in both cases and for the same reason – the vulnerability of religious believers and disabled people with regard to neutral laws. It is implied here that religious believers cannot simply will to change their belief or to choose to act against it almost to the extent of disabled people being limited by their physical disability. Equating conscientious convictions with disability or placing requests based on conscientious convictions on equal footing with requests on grounds of health may seem farfetched. The common counter-argument (which is normally made within the context of the religious conscience) is that people living with a disability or an illness did not choose their condition, whereas religious believers have made the choice to embrace a given religion and to interpret it strictly. It is argued that religious believers can always choose to interpret and practice their religion differently or even to give it up.⁵³ Benjamin Beit-Hallahmi answers this argument well by submitting that ‘religious identity has nothing to do with choice or deliberation and everything to do with the

⁵² CL Eisgruber and LG Sager, 'Mediating Institutions: Beyond the Public/Private Distinction: The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct' (1994) 61 University of Chicago Law Review 1245, 1267.

⁵³ J Maclure and C Taylor, *Secularism and Freedom of Conscience* (Cambridge, MA, Harvard University Press, 2011) 69-70.

accidents of birth and history’.⁵⁴ This observation is true with regard to non-religious beliefs, as well as to the religious and non-religious conscience.

Thus, the distinction between conscience and preferences cannot be justified only on the ground of vulnerability. It also does not result solely from a difference in the ability to choose as we do not choose either our conscience or our preferences. We simply have them. The distinction between conscience and preferences results from the fact that severe harm to one’s moral personhood is only inflicted when one decides or is being compelled to act contrary to one’s conscience (rather than to one’s preferences) in order to avoid a meaningful sanction.

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. Maclure and Taylor, for example, argue that imposing a ‘restriction of conscience’ rather than a ‘restriction of preference’ inflicts ‘moral harm’ and violates one’s moral integrity and self-respect.⁵⁵ This is no doubt true. But, if conscience and religious faith can be chosen, as Maclure and Taylor argue,⁵⁶ then believers 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. Thus, convictions of conscience may be a ‘particular type of subjective

⁵⁴ Benjamin Beit-Hallahmi, *Psychological Perspectives on Religion and Religiosity* (New York, Routledge, 2015) 234.

⁵⁵ Maclure and Taylor (n 51) 76-77. That alone leads them to argue that conscience-based claims should be placed on equal footing with requests on grounds on health after all.

⁵⁶ Maclure and Taylor (n 51) 82: ‘freedom of religion allows people to adopt the religious beliefs of their choice.’ See also on page 100 when they talk about ‘choices of conscience’.

preference' as noted by Maclure and Taylor,⁵⁷ but not just because of the 'harm to the moral personhood' criterion. Conscientious convictions are special because of the special harm that is caused to a person who acts against his *non-chosen* moral convictions, which cannot be changed at will.

While Maclure and Taylor wrongly argue that conscientious convictions are chosen, Bedi wrongly argues that only conscientious convictions are not chosen whereas mere preferences are in fact chosen – and that that fact differentiates between the two. Bedi argues that in order to prefer religious beliefs to mere preferences, 'we must see the religious practice as effectively unchosen, rigid and inhospitable to contestation ... the more the religious group is seen as just like any other voluntary association or preference, the more difficult it becomes to justify an exemption'.⁵⁸ This view has more general implications. Bedi explains that 'on the one hand, contemporary theory has come to see religious affiliations and practices as contingent, open-ended and freely constructed. On the other hand, in order to justify different or special treatment for such groups we must view these affiliations as unchosen, static and not freely constructed'.⁵⁹ Bedi demonstrates that 'free choice' could not be the right justification for granting religious exemptions and not merely preference-based exemptions. Bedi's argument is mostly descriptive. He does say that he strongly

⁵⁷ Maclure and Taylor (n 51) 73.

⁵⁸ S Bedi, 'Debate: What is so Special About Religion? The Dilemma of the Religious Exemption' (2007) 15 *The Journal of Political Philosophy* 235. See also p 237: 'as we move in the direction of anti-primordialism—as the literature seems to be doing—we undercut the ability to grant an exemption, to treat religion as special or different from a mere preference or voluntary association'. Bedi also discusses other arguments that, in his view, cannot adequately answer why religion is special when compared to mere preferences: the value of diversity, equal respect, tradition, non-instrumentality, cost and normativity (see pp 241–247). For a more simplistic view, according to which religious belief is no different from any other preference, see Barry (n 47) 35.

⁵⁹ S Bedi, 'Debate: What is so Special About Religion? The Dilemma of the Religious Exemption' (2007) 15 *The Journal of Political Philosophy* 235.

doubts that religion occupies one extreme or the other (i.e., religion as complete choice and religion as complete lack of choice), but his main argument is simply that, in order to create a distinction between religion and mere preferences with respect to the issue of legal exemptions, religion should be perceived as largely non-chosen, static and not freely constructed.

Bedi's general argument is appealing but suffers from three drawbacks. First, Bedi is right to suggest that the religious conscience is not chosen and that that provides a reason to tolerate it. Bedi's lack of choice argument, however, is in fact an assertion as it is not based on in-depth philosophical arguments about the meaning and nature of having lack of choice, or on related empirical, sociological and behavioural findings. In this paper we tried to offer sound basis for Bedi's and others' intuitive (yet still helpful) assertion. Second, Bedi (much like Garvey,⁶⁰ Beit-Hallahmi,⁶¹ Eisgruber and Sager,⁶² and Roberts and Lester⁶³) addresses the lack of choice argument within the context of religion – and religious conscientious exemptions. He ignores the non-religious conscience and does not apply his arguments to cases of non-religious conscientious exemptions. This omission may lead to a misguided conclusion according to which the lack of choice argument justifies granting favourable treatment to religious-conscientious objectors rather than perceiving the lack of choice argument as a reason to tolerate all types of conscientious objections. Third, Bedi is wrong to suggest that the lack of choice

⁶⁰ Garvey (n 47).

⁶¹ Beit-Hallahmi (n 52).

⁶² Eisgruber and Sager (n 50).

⁶³ P Roberts and E Lester, 'The Distinctive Paradox of Religious Tolerance: Active Tolerance as a Mean Between Passive Tolerance and Recognition' 20 *Public Affairs Quarterly* (2006) 347.

argument only applies to (religious) moral convictions – and not to mere preferences. The fact is that our preferences are also unchosen. They are dictated by our genes, brain activity, childhood experiences or traumas, socialization, environment, and unconscious cognitive and emotional factors – all of which are beyond our control. We do not choose our preferences. We simply have them and cannot change them at will. Therefore, the ‘lack of choice’ argument, when it stands alone, cannot explain the difference between conscientious convictions and mere preferences. It does, however, provide a reason to tolerate conscientious objection – when put together with the ‘moral personality’ reason.

3.3 Lack of choice, moral responsibility and legal responsibility

Within the specific context of conscientious objection, whether religious or not, the importance of the ‘lack of choice’ argument should not be overstated. Roberts and Lester, for example, claim that ‘one reason to choose greater tolerance instead of lesser sensitivity in the case of religion is that many religious believers feel their beliefs are immutable or non-negotiable... people should not be blamed for matters outside of their control’.⁶⁴ The first part of the argument is true though its scope should be expanded so it will apply to all types of conscience whether religious or not. The fact that conscientious convictions are not chosen provides one reason for tolerating conscientious objection. The second part of the argument (‘people should not be blamed for matters outside of their control’) should be treated with caution. Even if the argument that conscience is indeed not chosen is established it does not

⁶⁴ Roberts and Lester (n 61) 351.

follow that conscientious objection should be legally tolerated in all cases or indeed any. More reasons are required here. Accordingly, there may be good reasons for not tolerating conscientious objectors – even if conscientious convictions are not chosen. People may not be morally responsible for ‘matters outside of their control’ – but they may be legally responsible for them. 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 might deny our moral responsibility even if we actively will to disobey the law and do not try to resist the compulsion to disobey the law. Legal responsibility – while different from moral responsibility – cannot ignore the lack of moral responsibility. But there are 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 of policy considerations, the content of his conscience or because of neutral justifications.

Two examples can clarify this point. The law can impose a duty to vaccinate one’s child in order to protect that child’s health as well as the health of others. The law may also exempt from the rule any sincere conscientious objector. It will probably be justified to grant exemptions to the law only as long as the anticipated number of objectors does not jeopardize the rationale of the rule itself (protecting the

public health). When the legitimate purpose of the rule is jeopardized, some (or all) conscientious objectors to vaccination would not be granted exemptions regardless of the lack of choice argument – and in order to protect rights and interests of others (or public interests). Conscientious exemptions should also not be granted to those who object the law because they hold morally repugnant consciences, e.g. those who disobey equality laws because their conscience compels them to discriminate on grounds of race. The racist conscientious objector may not be able to act otherwise – and this may be a reason for tolerating his objection – yet this reason will almost always be outweighed by stronger reasons not to tolerate it.

3.4 Lack of choice – as a reason for tolerance

The argument made above was 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, which leads to lack of moral responsibility – and in turn provides a reason to legally tolerate conscientious objection, may be troubling to some. Kimberley Brownlee, for example, rejects the normative implications of the lack of choice argument – and for two reasons. First, she argues that denial of responsibility for what we call a ‘conscience-based act’ ‘is in tension with the Aristotelian conception of us as persons who wish to show that we have reasons for acting as we do’.⁶⁵ However, our lack of choice regarding having a conscience and

⁶⁵ Brownlee (n 8) 170.

acting upon it does not rule out our ability to reason our decision. The reasons will follow the act of conscience that we are compelled to do – rather than precede it – but we can still provide such reasons and they may or may not be persuading. Moreover, it may be true that persons normally wish to show that they have reasons for acting as they do, but as we noted above it does not follow that they actually have such reasons, that these reasons are genuine or that they preceded the act.

Brownlee adds that using the compulsion or lack of choice argument for tolerating conscientious objection ‘would most likely protect the capricious passions and proclivities of the least reasonable rather than the sincere, serious reflective moral commitments of the more reasonable’.⁶⁶ We do not think that this is the case. The lack of choice argument applies equally to all acts of conscientious objection and to all kinds of conscience. It does not result in favouritism towards either capricious passions or proclivities of the least reasonable – or the sincere, serious (ex post) reflective moral commitments of the more reasonable. Furthermore, we do not suggest that the fact that people are compelled by their conscience to act denies their legal responsibility. We do not suggest using the lack of choice argument as a legal trump card (e.g. as a sufficient reason for establishing a defence within the context of criminal law or for granting conscientious exemption). All we argue is that the lack of choice argument should always be added to the balance of reasons when we need to decide whether to tolerate conscientious objection.

At this point one may argue that our view about ‘lack of choice as a reason for

⁶⁶ Brownlee (n 8) 170. Brownlee makes her arguments within the context of what she refers to as civil disobedience. However, Brownlee’s perception of what civil disobedience is differs from the common definition of the term and is in fact closer to what we call here ‘conscientious objection’.

tolerance' is in tension with the general view that we have about the possibility of many of us, and especially conscientious objectors, not being reasons-responsive agents. What would be the point, one may ask, of making normative arguments in a determinist world? However, the fact that our previous arguments may depend (in part and to a limited extent) on incompatible determinism, does not, of course, prevent us from suggesting that the lack of choice argument should always be added to the balance of reasons when we need to decide whether to tolerate conscientious objection. More generally, it does not prevent us from providing reasons to be tolerant or from providing reasons for acting in any other way. All it means is that when we think that the lack of choice is always a reason for tolerance – we think that because of reasons beyond our control. We succeeded or failed in establishing this argument because of the skills that we have but never chose to have or acquire. Others may or may not be persuaded by our argument because of reasons beyond their control. More generally, subscribing to incompatible determinism does mean that making normative arguments is pointless or at odds with incompatible determinism itself. All it means is that the likelihood that these arguments will be persuasive depends on factors beyond our control.

4. Conclusion

To briefly recap, in this article we have argued, and contrary to the common view, that the concept of autonomy or autonomous choice does not provide a sound basis for tolerating conscientious objections. This is because the decisions made on foot of conscientious commitments are not made on the basis of meaningful choice. Rather,

our conscience dictates and determines particular choices, whilst closing off almost all other possible choices. Likewise, the development of conscience is not something over which people exercise autonomous control. This argument then has two major implications. Analytically, it implies that the best explanation for what it is we are doing when we tolerate conscientious objectors is that we are acknowledging their lack of autonomous choice. Normatively, it suggests that the lack of autonomous choice provides a reason for tolerating conscientious objections, and that this reason stems from the special harm to moral integrity and personhood that is done by failing to act in accordance with one's non-chosen conscience. However, the normative implications of this argument should not be overstated: it provides *a* reason for toleration, not necessarily a decisive or overwhelming reason for toleration.