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The Challenge of Selective Conscientious Objection in Israel

Randy Friedman

The tradition of moral inquiry into war is as old as war itself. Judgments about the rightness and wrongness of any given conflict extend from the motivations and intentions of the leaders who command to the soldiers on the ground, and involve political and military leaders, soldiers and civilians, within and outside the direct conflict. Just war theory draws on religious and secular sources to put forward sets of criteria which help us to explore the morality of immorality. Undergirding this tradition of moral inquiry are sets of assumptions about human rights, states' rights, responsibility, and, of course, justice. There is also an assumption that these notions cross national and cultural borders, and that they have value in as much as they do. There may be an additional assumption that they should, or that we should be able to agree on a set of principles which reflect these values and govern our behavior, the behavior of states, and the behavior of soldiers. This is not to say that all arguments in just war theory are universalistic. Many draw on particular beliefs and belief-structures which are tradition-specific and require as a *source or qualification of authority* the acceptance of a myriad of metaphysical and religious beliefs.

The moral calculus of this type of moral thinking can be relativistic or perspectival in nature: our just war is another's occupation; their freedom fighter is our terrorist. Turning to multiple and often conflicting sources of authority obfuscates what foundationalist moral thought seeks to ground in or recognize as certain universal principles. Occupation may be seen to demand the violation of certain principles; withdrawal may be seen as a form of blasphemous action. Appeals made to often competing if not exclusive sources of authority which are meant to supersede, transcend, or replace the authority of the state (to compel its citizens to follow orders which carry the force of law), shape the projection of just war theory. If the first step before normative ethics is 'descriptive' ethics, then the hope of this paper is to present and untangle a complicated set of questions and positions by looking at lived experience.

Theoria, April 2006

One particularly interesting and possibly innovative example of the invocation of competing sources of authority as part of argumentation in the just war theory tradition comes from a group of Israeli reservists who recently (and unsuccessfully) argued in the Israeli High Court for the recognition of a right of selective conscientious objection to military service in the occupied territories.¹ There are a great number of rival religious, political, and secular allegiances which influence the arguments made to justify selective conscientious objection in the Israeli Defense Forces (IDF). In Israel today, the only arguments which tend to succeed, and the only type of refusal recognized by the IDF, is conscientious objection based on religious grounds, or claims based on a thoroughgoing pacifism—the secular alternative to religious conscientious objection. No claims of selective conscientious objection have been recognized (allowed) by the IDF. Judgments about the relative justice of a given conflict have failed to convince authorities to recognize such a right. A new line of argumentation in just war theory has emerged which uses appeals to transnational authority. Though the terms of just war theory are well known, it may help to restate briefly the basic guidelines before jumping into the specific example of their application in Israel.

Judging War

Just War Theory offers a particular vocabulary for the question of how we *judge* a war. There are two aspects of war which are judged.² Michael Walzer tells us:

War is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt. The first kind of judgment is adjectival in character: we say that a particular war is just or unjust. The second is adverbial: we say that war is being fought justly or unjustly. *Jus ad bellum*, the justice of war, and *jus in bello*, justice in war, point to deep issues. The first requires us to make judgments about aggression and self-defense; the second about the observance or violation of the customary and positive rules of engagement (Walzer 1977: 21).

This first judgment is reached after analyzing the reasons for and intentions behind starting a war and the authority of the state to make such a decision. The second judgment, about the rules of war, focuses on questions of noncombatant immunity and proportionality.

Examples of just wars include, most classically, wars of self-defense. But this group of wars has been expanded to include pre-emptive strikes against states posing imminent threats. But using war fighting as a response to a threat is not automatically blessed: Stanley Hoffman has noted that 'if the threats can be handled effectively, without resort to force, war is not morally acceptable' (Hoffman 1981: 152).

'Nondefensive wars' are an even trickier moral category in just war theory. The 'right' or 'rightness' of intervention on behalf of a state suffering from armed external aggression is often broadened to include situations in which a state is attacking a part or population of its own citizens (witness intervention on behalf of the Kurds in northern Iraq). Humanitarian intervention often justifies the use of outside force in cases of genocide or famine (Hoffman 1981: 156). This rationale has been used in Somalia and Bosnia.

War fighting, *jus in bello*, involves judgments concerning proportionality and 'double effect' which is, according to Walzer, 'a way of reconciling the absolute prohibition against attacking non-combatants with the legitimate conduct of military activities.' Walzer reviews some of the qualifications: the bad or evil consequences of a military action may be acceptable if this action is a legitimate act of war, if the evil effect is not one of the ends or means to an end and finally, if the good effect is sufficiently good to compensate for the evil effect (Walzer 1977: 153). There is a kind of moral arithmetic for calculating collateral damage.

The distance between a reasoned discourse about the proper way to fight and to kill, the reasons upon which we can agree to determine a just war, and the behavior of a soldier in combat could not be greater. Somehow, by placing rules on the soldier's fighting behavior—and justifying his or her mere presence in combat—we seem to bless the situation with reason—or inject reason into the insanity. Soldiers are themselves means to an end. They are generally not considered to be effective if each considers his or her orders against the largest moral questions of war: why are we here, what are we fighting for, and so on. An order carries with it its own justification. The soldier does, however, carry a code of conduct, one which recognizes the difference between a combatant and a non-combatant; one which sets out—often in very broad terms—the rules of engagement (when a soldier can employ deadly force against an enemy or a perceived threat). There are times when a soldier asks whether his or her actions are in line with the original or initial judgments of the justice of the war or mission in which s/he finds her/himself. Asking these

questions may reduce her/his efficacy as a soldier, and, in the end, force her/him to refuse to carry out certain orders. Refusing to follow orders based on an individual's judgment of the justice of a given military action is not generally recognized—though the IDF does emphasize a certain need for this type of thinking, and has distributed guidelines (including 'moral' instruction) to its soldiers. This move from theory to action focuses our attention on questions and varieties of conscientious objection.

Conscientious Objection and Selective Refusal

Conscientious objection in its most basic form is the 'refusal to participate in the military based upon an opposition to war' (Marcus 1998: 509). There are two bases for this blanket objection: religious and ethical or secular. Religious objection stems from certain religious groups or traditions 'which eschew military service, violence, and war categorically' (Marcus 1998: 540). Secular conscientious objectors have generally been pacifists (Marcus 1998: 541), those who claim, based on their conscience and education, to be opposed to violence in all forms.

Selective refusal is the refusal to participate in a specific military action. Selective objection can apply to or be used by both soldiers and civilians: someone who is to be drafted can claim that, while he does not object to military service, he objects to serving in the particular conflict at hand. Likewise, someone who is already in uniform can become a selective conscientious objector by refusing to participate in a particular campaign or action. Selective objection is usually based on 'violations of standards of national or international law and bolstered by the inherent definition of a conscientious objection, the appeal to individual conscience' (Marcus 1998: 542). As with conscientious objection, selective objection can also break down along secular and religious lines.

The most famous case of selective refusal based on religious grounds in the United States is the *Gillette* decision, argued before the Supreme Court on December 9, 1970, and decided on March 8, 1971. *Gillette* refused to be drafted into the armed forces, claiming an exemption as a conscientious objector. The notes of the case explain that 'in support of his unsuccessful request for classification as a conscientious objector, [*Gillette*] had stated his willingness to participate in a war of national defense or a war sponsored by the United Nations as a peace-keeping measure, but declared his opposition to American

military operations in Vietnam, which he characterized as “unjust”. [Gilette’s] view of his duty to abstain from any involvement in a war seen as unjust is, in his words, “based on a humanist approach to religion,” and his personal decision concerning military service was guided by fundamental principles of conscience and deeply held views about the purpose and obligation of human existence.’³

The case boils down to two questions: does conscientious objection to a particular war relieve the objector from military service; and, does the limitation of conscientious objector status to only those who object to all war violate the religious clauses of the First Amendment. Commenting on this aspect of the appeal, David Malament notes that ‘numerous religions forbid participation in particular wars without teaching pacifism.’ Recognizing one tradition’s absolute pacifism, but not another’s attitude toward just and unjust war ‘creates invidious distinctions, rendering grace to some while denying it to others.’⁴ Needless to say, Gilette lost both arguments. Objection must be based on ‘religious training and belief’ (ignoring the jurisdiction or authority of a given religious tradition to judge a particular war to be unjust); and it must apply to participation in any war in any form (Malament 1972: 372-3).

The standard for judging conscientious objection uses a broad understanding of ‘religious.’ Writing for the Court in a separate decision (Seeger) relating to secular conscientious objection, Justice Clark explained:

We have concluded that Congress, in using the expression “Supreme Being” rather than the designation “God,” was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief “in a relation to a Supreme Being” is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is “in a relation to a Supreme Being” and the other is not (380 U.S. 163, 166).

Since the U.S. Supreme Court decided the Seeger case (in 1965, 380 US 163), secular or ethical objection has also been recognized, with the qualification that the objection was total and not selective.⁵

Conscientious objection of any variety serves a deliberate legal function in democratic society. Writing at the height of the Vietnam

War, Carl Cohen argued that ‘conscientious objection may be viewed as a legal pressure valve, deliberately devised to relieve the tension between deeply held moral convictions and the demands of the law, when that tension becomes extreme. The community should avoid creating situations in which any of its respected members are necessarily faced with an intolerable moral dilemma’ (Cohen 1968: 269). While we can appreciate Cohen’s wishful thinking, the demands of the political and military establishments on individual citizens continue to present intolerable moral dilemmas, especially in those societies where there is military conscription. How is someone to balance the demands made by various and competing sources of authority?

Yesh Gvul

This is the situation or question of ‘Yesh Gvul,’ *there is a limit or border*. The name comes from an organization in Israel which assists draft soldiers who are conscientious objectors to military service, both draft soldiers and reservists who refuse to cross the border into the occupied territories, and those soldiers who object to interacting with the civilian population. The double-meaning of the name is meant to point both to political and moral borders. Yesh Gvul supported a petition signed by many junior officers and NCOs in the reserves who broadcast their refusal to ‘continue to fight beyond the 1967 borders in order to dominate, expel, starve and humiliate an entire people.’⁶ This group, known as *Ometz Lsarev* (Courage to Refuse) presents challenges to the state and the military based on appeals to military rules of conduct, Basic Laws of the State, international law, and certain traditions of moral thought. The problem, according to their petition (‘Petition for an *Order Nisi* and a Temporary Injunction’, 2002), is moral and political:

[These orders] destroy all the values we had absorbed while growing up in this country.

The price of Occupation is the loss of the IDF’s human character and the corruption of the entire Israeli society.

[We] were issued commands and directives that had nothing to do with the security of our country, and that had the sole purpose of perpetuating our control over the Palestinian people.

The petition concludes with the argument that this ‘War of the Settlements’ is futile anyway, since ‘the territories are not Israel, and the

settlements are bound to be evacuated in the end.⁷⁷ These arguments are not new and they are not revolutionary.

One of the first questions here is whether or not to violate the law. Israel's Basic Law dealing with the Army provides that 'The duty of serving in the Army ... shall be prescribed by or by virtue of Law' and 'The power to issue instructions and orders binding in the Army shall be prescribed by or by virtue of Law.'⁷⁸ In other words, the order to report and all subsequent orders issued to the (citizen and) soldier in uniform carry the force of law.

The IDF provides its own guidelines for the protection of its values which it inculcates in its soldiers through education in basic training and operational instruction. These include, among others, 'Responsibility: seeing yourself as an active participant in the defense of the state, its citizens and residents'; and 'Purity of Arms, the use of weapons and force only for the purpose of their mission and only to the necessary extent. IDF soldiers will not use their weapons and force to harm human beings who are not combatants or prisoners of war, and will do all in their power to avoid causing harm to their lives, bodies, dignity, and property.'⁷⁹ The reservists who signed the petition argue that the acts of war in which they are ordered to participate do not serve the intention or purpose of protecting the state and intentionally involve actions which target an entire population, combatant and non-combatant.

How does this situation translate in the language of just war theory? The 'Justice of the War' may be unclear. The question could be put: is crossing the green line *ipso facto* an act of unjust or immoral aggression? Or, is it military occupation plagued by continuous violations of the Law of Occupation? Is there a difference between these two descriptions? Or is service in the Occupied Territories participation in a war of self-defense? Would this judgment about the justice of the war, coupled with the specifics of the threat Israel seeks to counter, justify the military actions in the Occupied Territories so many find troubling? We can return to Walzer's definition of a just war as one which is limited, and ask: is the IDF 'governed by a set of rules designed to bar, so far as possible, the use of violence and coercion against noncombatant populations?' The policy of extra-judicial assassinations is especially troubling. How does one calculate the threat posed by someone against the damage in death and suffering that will be caused by the attack on civilians around the target? For instance, what if this person is asleep in an apartment building? Or riding in a car with his family?

What if someone shoots at soldiers from the cover of a civilian residence? Does the soldier return fire toward the area if he cannot be certain that civilians are not in the target area? What if the rules of engagement are set so that the soldier may shoot to kill even if he is not certain that his life is in danger? How can he be sure that the person (man, woman, or child) crossing in front of his position is not concealing a belt of explosives meant for him or anyone, civilian or soldier, behind him? Has every precaution been taken to prevent civilian casualties? Has the soldier been issued clear open-fire regulations? These difficult questions, and the seeming impossibility, while serving in the Occupied Territories, of avoiding some of them, is a central component of the case for selective refusal in Israel.

Objection in Israel

In Israel today there are four groups of objectors: religious and secular conscientious objectors, and religious and secular selective objectors, though religious selective conscientious objection has not been particularly well organized as a *movement*. Of these groups, only those who claim conscientious objector status based on religious belief or pacifism are not currently faced with time in military prison. The history of the exemption granted on religious grounds would take us too far afield; religious conscientious objection is as much a political determination as an attempt by the Israeli government to protect the expression of religious freedom.¹⁰ For our purposes, I will simply note that in Israel, only conscientious objection based on religious grounds has received a blanket stamp of approval. The group of secular conscientious objectors face a difficult challenge to prove that they object to all forms of military service (in other words, that they are pacifists). Often, those whose pacifism is suspect are drafted, and when they refuse, are sentenced to repeated terms of imprisonment in military prisons in an attempt to break their will to object. In the end, many of these secular objectors are found unfit to serve—in other words, their conscientious objection is not recognized, but translated into a more functional recognition by the Army that pursuing these teenagers is fruitless. There is an institutional method in place for the testing of claims of pacifism, en route to the possibility of recognizing conscientious objection based on non-religious ground. Those who argue that they are opposed to the military actions in the Occupied Territories—in other words, selective objectors—have been sent

to military prison. They are often treated most harshly by the military authorities before some resolution of their status is reached.

The case that we are exploring involves reservists in the Israeli Army who claim selective conscientious objection. These are not draft soldiers doing compulsory service. Some Israeli men who have completed their compulsory service are called-up annually for one month a year to serve in the Reserves. Often, decisions about selective refusal are decided by individual commanders. The options include persuading the reservist to change his mind, assigning the reservist to a task or location which would not be objectionable to the reservist, or convening a disciplinary hearing. Yoram Peri notes that:

The case-by-case effort to resolve the issue of refusal through various ways without raising public awareness [has] continued for years; it corresponded to the generally informal character of the IDF as well as the *modus operandi* of the Israeli civil service. This was the antithesis of de Gaulle's famous statement (made during deliberations over the possible legalization of conscientious objection in France), "I will accept conscientious objection, but not conscientious objectors." In Israel, objectors were tolerable; objection was the problem (Peri 1993: 151).

The decision to bring an individual soldier or group of soldiers to court martial rests with the Military Advocate General. Since the beginning of the 'second Intifada,' some reservists have been brought up on charges for refusing to serve in the Occupied Territories.

The Duty to Disobey

A group of '*Seruvnikim*' (refusers) put their case before the Israeli Supreme Court in an unsuccessful attempt to force the Military Advocate General to revoke the punishments imposed on them for their selective refusal. By doing so, they were arguing for the recognition of secular selective refusal. To make their case, they referred to a great many arguments about the justice of the occupation, generally, and of the various specific actions which are a daily part of the routine of occupation. A review of their brief to the Court shows that, first and foremost, they refer to the international conventions which govern war fighting and occupation, citing in the second paragraph of their argument the goal of various international conventions to 'reduc[e] the distress and damages caused to civilians during wartime and foreign occupation' ('Petition': 5). At the same time, the Peti-

tioners cite the evolution of human rights in the Israeli judicial system specifically protecting acts of conscience. This leads them to assert that 'they can no longer take part in tasks they were assigned to in the Occupied Territories, since such a task is evidently illegal, unlawful, and against their moral code' ('Petition': 5-6). The tripartite argument, then, cites international conventions, Israeli law, and the laws of personal conscience (freedom of conscience).

The basic facts of the Occupation that the Petitioners present to the court make the case that the IDF routinely imposes 'collective punishment [on the] civilian population' and, 'even when meant for crucial aims such as combating terror, does severe damage to dozens and hundreds of thousands of civilians innocent of all crimes' ('Petition': 6). I am aware that this aspect of the case is often the most contentious for certain audiences to hear. The case made by the Petitioners cites curfews, blockades, closures, demolitions, prevention of access to health care, and the killing and injuring of civilians in an occupied territory. Each argument is predicated on violations evidenced by the Petitioners from personal experience and from the work of various human rights organizations.

All three sources of objection, international law, Israeli law, and freedom of conscience draw on notions of a 'duty to disobey' which runs headlong into the authority of the military to command its soldiers to do its will. Writing in 1967, Michael Walzer explained that 'the duty to disobey arises when obligations incurred in some small group come into conflict with obligations incurred in a larger, more inclusive group, generally the state. The larger society can always recognize the claims of smaller groups and so relieve their members from the burdens and risks of disobedience. Indeed, the historical basis of liberalism is in large part simply a series of such recognitions' (Walzer 1967: 167-168). In our case, the structure of the duty to disobey is different from that which Walzer describes. A part of the Petitioners' claim is that obligations to the rules of conduct of an international convention prevent them from fulfilling their obligations to the state.¹¹ In other words, the obligations to a larger group bring members of the smaller group into conflict with the state.

The violation of Israeli law cited by the Petitioners refers to protections for disobedience of illegal orders under both military and civil law. In the Military Code of Conduct, soldiers are not to be held criminally liable for disobeying illegal orders. The Code and the argument made by the Petitioners are tricky or complicated. The Code reads, according to the 'Petition,' that 'a serviceman is obliged to

refrain from obeying an evidently illegal order.' This article, they argue, 'does not establish the kind of disobedience to be deemed legal, but the kind of obedience deemed to be illegal' ('Petition': 40). This allows the Petitioners to make their case that the orders issued in relation to the occupation are illegal.

Here, the Petitioners maintain that 'in recent years the Israeli occupation of the territories has turned into a system of collective penalization of [the] civilian population, a system that hardly distinguishes innocents from suspects since the entire population is deemed enemy' ('Petition': 18). Inherent in the situation of serving in the Occupied Territories, they argue, is the 'lack of clear-cut boundaries between operations serving those same evidently illegal ends of prohibited collective punishment, and innocent operations that do not serve that end. Attempt[ing] to distinguish illegitimate missions from the legitimate ones would be in vain' ('Petition': 18). The Petitioners also cite Article 11 of Israel's Basic Law, 'Human Dignity and Liberty,' which was signed into law in 1994. This article is meant to protect and preserve life, body, dignity, property, privacy, and freedom. Though I am not an expert on legal affairs, and certainly not on the evolution of the legal system in Israel, I find an interesting exemption written into this Basic Law. It reads:

There shall be no restriction of rights under this Basic Law held by persons serving in the Israel Defense Forces, the Israel Police, the Prisons Service and other security organizations of the State, nor shall such rights be subject to conditions, except by virtue of a law, or by regulation enacted by virtue of a law, and to an extent no greater than is required by the nature and character of the service.

The Petitioners maintain that they are 'constitutionally protected by the right of freedom of conscience' from being forced to 'perpetrate such acts that are exceedingly opposed to their conscience and moral code' ('Petition': 19). The reservists also cite five international conventions which seek to protect freedom of conscience as might pertain to their freedom to refuse service in the Occupied Territories.¹²

In a plea to the highest expression of their duty to disobey, the Petitioners invoke the well-known words of Gandhi:

I am here, therefore, to invite and submit cheerfully to the highest penalty that can be inflicted upon me for what in law is deliberate crime, and what appears to me to be the highest duty of a citizen. The only course open to you, the Judge and the assessors, is either to resign from your posts and

thus dissociate yourselves from evil, if you feel that the law you are called upon to administer is an evil, and that in reality I am innocent, or to inflict on me the severest penalty, if you believe that the system and the law you are assisting to administer are good for the people of this country, and that my activity is, therefore, injurious to the common wealth ('Petition': 21).

Gandhi shares with Martin Luther King an understanding that accepting the penalty imposed for disobeying a law one finds unjust, reflects the highest respect for the rule of law. The force of their argument comes down, in large part, through the nine Annexes of their petition, which include some 32 reports on the actions in the Occupied Territories they find so abhorrent. Their basic argument, whether calling on international convention, Israeli law, or personal conscience as the source of authority, centered on the immorality of the occupation. The Petitioners, by citing many violations of international law, seemingly tempted the High Court to distance itself from its traditional deference to the IDF.

In ruling on the 'Petition,' the High Court ignored the question of the legality of the occupation, because the Petitioners had dropped this question in arguments before the Court (see HC 7622/02, 6).¹³ The Court decided that the Reservists did not have a right to selectively refuse service in the Occupied Territories. Though he does cite legal precedent from Israel and abroad, Chief Justice Barak relies not on a judicial source of authority, but on a utilitarian (and realistic) consideration of the common good. He concludes 'that the conscience of the conscientious objector (whether selective or "full") may be injured only where substantial harm would almost certainly be caused to the public interest' (HC 7622/02, 16). That possible greater harm weighs heavily in his decision:

The phenomenon of selective conscientious objection would be broader than "full" objection, and would evoke an intense feeling of discrimination "between blood and blood." Moreover, it affects security considerations themselves, since a group of selective objectors would tend to increase in size. Additionally, in a pluralistic society such as ours, recognizing selective conscientious objection may loosen the ties which hold us together as a nation. Yesterday, the objection was against serving in South Lebanon. Today, the objection is against serving in Judea and Samaria. Tomorrow, the objection will be against vacating this or that settlement. The army of the nation may turn into an army of different groups comprised of various units, to each of which it would be conscientiously acceptable to act in certain areas, whereas it would be conscientiously unacceptable to act in others. In a polarized society such as ours, this con-

sideration weighs heavily. Furthermore, it becomes difficult to distinguish between one who claims conscientious objection in good faith and one who, in actuality, objects to the policy of the government or the Knesset, as it is a fine distinction—occasionally an exceedingly fine distinction—between objecting to a state policy and between conscientious objection to carry out that policy. The ability to manage an administrative system which will act indiscriminately and impartially is especially complicated in selective conscientious objection (HC 7622/02, 15-16).¹⁴

While the Reservists' legal options expired with the Court's ruling, their influence and their struggle have not waned. Perhaps emboldened by the Reservists, new groups of secular conscientious objectors have moved to the fore. Some have argued that service in the IDF would force a violation of freedom of conscience. Others have argued that they will not agree to be conscripted because of Israel's actions in the Occupied Territories. Conscientious objection, as the Petitioners (and Chief Justice Barak) note, has been recognized by resolution of the U.N. Human Rights Commission (see 'Petition,' 69; UNHRC Resolution 77/1998) as a correct application of the 1948 U.N. Human Rights Declaration (and Article 18 to the UN Covenant on Civil and Political Rights). And, in Israel, where the objector makes the claim that s/he is an absolute pacifist, the end result is usually some exemption from military service. The argument for selective conscientious objection, based on freedom of conscience and the application of international convention pertaining to specific conflicts and military actions, has not found similar success.

Already, though, the impact in Israel of the *Servnik* movement has allowed for a greater public discussion of the authority of the IDF to field soldiers to fight in the way it has deemed necessary. Sara Helman finds this to be a significant step in the redefinition of citizenship in Israel, one which started in 1982 with demonstrations against the war in Lebanon.¹⁵ The war in Lebanon was described by then Prime Minister Begin as a 'war of choice'—this, according to Yoram Peri, 'negated the tradition of fighting only just wars, that is, "wars of no choice"' (Peri 1993: 152).¹⁶ It was seen as 'a "political war," waged as a political instrument, rather than a defensive war aimed at countering a threat to the nation's existence' (Helman 1999: 51, 56). This judgment about *Jus ad bellum*, the justice of war, applies to the current situation as well, and how Israelis define an existential threat to the State.

Conclusions

For Helman, the consequences of these various movements cannot be understated. They serve to create ‘a new civic space around the sphere of national security, wherein individuals can challenge the practices of the state, empowers them, paving the way for a call to reduce that state’s demands of the individual and to institute a new right—selective conscientious objection. This can be summarily stated in the following terms: “because I have the right to establish what security is, the state cannot recruit me unconditionally for every military activity”’ (Helman 1999: 62). This challenges the State’s unconditional authority over security issues, and allows citizen-soldiers to demand greater ‘responsibility’ from the State in how they may be put to use.¹⁷ More important, perhaps, is the growing movement to apply the rule of law of other states and international conventions as a tool against the IDF. Recently, the Israeli government has been forced to respond to one part of the challenge of the *Seruvnikim*, defending IDF officers from possible arrest in Europe on charges of human rights violations.¹⁸

For the selective conscientious objector, this may be of little comfort. But there has been movement in the international human rights community in the direction of the recognition and support of selective conscientious objection.¹⁹ Working from some of the same assumptions as the *Seruvnikim*, many now support those who ‘object to a particular conflict based on their opposition to the state’s violations of international law’ (Marcus 1998: 542). Arguing for a broader right of refusal, Marcus writes that ‘respect for the individual mandates a right of conscientious objection inclusive of selective objectors who base their opposition upon ethics, religion, or violations of international law. This definition is more inclusive and based on the personal beliefs of the objector’ (Marcus 1998: 542). It seems unlikely that it or any other state’s military force will allow this rhetoric of individuality and the appeal to international standards and conventions to translate into a broad recognition of a right to selective conscientious objection. The most likely consequence of the *Refusenik* movement, however, may be, as Helman argues, an expansion of the ability of citizens to challenge certain decisions by the state, and the state’s unquestioned ability to justify its military decisions.

Yaron Ezrahi (2005), following Helman, argues that this may shift the proper debate from the realm of just war theory (a judgment of the just use of force in the continuing conflict). He asks:

Has the state fulfilled, and is it continuing to fulfill, the elementary conditions of its unwritten agreement with the citizens, on which the latter's legal and moral duty to obey is based? And what if the moral precondition for the citizen's duty to obey is that the state, in all its branches, avoid using the force entrusted to it arbitrarily and without proper parliamentary procedure? Does the State of Israel live up to this requirement? If not, how does this affect the dilemma of conscientious objection?

The second problem arises, as the basic argument of the *Refusenikim* makes clear, from the very nature of the actions the IDF has been requiring—not actions of war, though the rhetoric of continual war and security would obscure this distinction, but of occupation, which bring with it actual and unique obligations. Ezrahi (2005) argues: 'war creates a particular set of problems for conscientious objection; these are very different from the problems that arise from a state of occupation, in which the military is used to oppress an occupied civilian population and to back up massive settlement intended to change the demographic makeup of the occupied lands.'

Ezrahi's comments come in a review of a set of articles on refusal published in the Israeli journal *Alpayim*.²⁰ The argument comes down to a disagreement over whether the *Refusenikim* were committing acts of civil disobedience 'in order to thwart government policy' and so deserve (and should expect) to be punished, or, were 'following the dictates of individual conscience.' (William James' pragmatic qualification about a difference that makes a difference seems particularly relevant here.) Ezrahi is himself offended at the prospect of a government involving itself in the 'galling invasion of the individual conscience, as well as the presumption of legal experts to determine what motivation within the individual's private world might serve as a "sufficient condition" for objection.' Chaim Gans, in his piece in *Alpayim*, rejects the position, advocated by Shlomo Avineri and others, 'according to which moral disobedience is not legitimate because it is impossible to base it on neutral ideological grounds' (Gans 2004: 12, from the Hebrew). The objection to service in the territories, according to Gans, can be founded on a universal or universalistic claim that the continuing occupation of another people is wrong *for everyone*, not just wrong for those who refuse to serve. While their claim may not be ideologically or politically neutral, Gans argues, it is based on the recognition of a universal moral norm: occupation and oppression is wrong. Some versions of objection to the recent withdrawal from Gaza might hold another universal claim altogether, one which recognizes the transcendence of religious beliefs over political decisions.²¹

Whether refusal is an act of civil disobedience meant to challenge the state politically as a form of protest, or an action which reflects a deep moral objection to the policies of the state, selective conscientious objection presents the state and its citizens with a number of difficult legal and moral challenges. Appeals to authority outside of the state, whether religious or secular, influence both citizenship and the behavior of the government itself. As Israel raises funds to defend IDF officers from charges of human rights violations in the United Kingdom, it may find itself in need of a better defense against those citizens hesitant to be placed in harm's way, militarily and legally. At some point in the future it may find itself unable to field soldiers for whom service in the Occupied Territories is prohibited by inviolable secular or religious law. And for those who will continue to argue that they cannot abide service in an army of occupation, an expression sounded in 1968 by Yeshayahu Leibowitz, the moral crisis of an individual conscience rent between obligations to the state and obligations to self, will linger along with the pain of a conscience nurtured and then rejected by this democratic society.

NOTES

1. Of the many forms of objection, I have chosen to examine only one: selective conscientious objection by reservists, specifically a group which brought an argument before the court. Categories or groups of refusal include conscientious objection to all service in the IDF based on religious belief (recognized by the state), conscientious objection to all service in the IDF based on an individual's pacifism (sometimes recognized by the state), conscientious objection to all service based on an appeal to freedom of conscience (not recognized by the state), and various forms of selective conscientious objection based on religious belief, appeals to freedom of conscience, and/or doctrines of universal human rights. Thanks to John P. Reeder, Reuven Kaminer and Charles Goodman for commenting on earlier drafts of this paper.
2. I am well aware of the limitations of this direction of inquiry into selective conscientious objection. Reviewing *Alpayim* 27 in *Ha'aretz*, Yaron Ezrahi (2005) challenges the efficacy of exploring refusal and the duty to dis/obey instead of focusing on the state's 'own duty to uphold the law and enforce it without bias.' Sarah Helman (1999) recognizes a shift toward this very kind of questioning in Israeli society, a topic I will explore in the conclusion.

3. *Gillette v. United States*. No. 85. 401 U.S. 437; 91 S. Ct. 828; 28 L. Ed. 2d 168; 1971 U.S. Lexis 69.
4. Malament argues at length that governments should recognize that certain religious traditions have developed just war teachings which *require* that complex assessments be made to determine if a particular war is just—and participation in it not unjust (Malament 1972: 369). Room needs to be made, he argues (under the First Amendment to the U.S. constitution), for these ‘other sorts of religious objection[s] to participation in war’ (Malament 1972: 370). This type of argument may be particularly relevant to those in Israel who would argue against withdrawal, though this line of thought is beyond the limited scope of this paper.
5. Seeger is cited in the later decision *Welsh v. United States*, where conscientious objection based on ethical/moral beliefs was upheld. See *Welsh v. United States*. 398 U.S. 333:

MR. JUSTICE BLACK, joined by MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL, concluded that:

This case is controlled by *United States v. Seeger*, *supra*, to which it is factually similar. Under *Seeger*, 6 (j) is not limited to those whose opposition to war is prompted by orthodox or parochial religious beliefs. A registrant’s conscientious objection to all war is ‘religious’ within the meaning of 6 (j) if this [398 U.S. 333, 334] opposition stems from the registrant’s moral, ethical, or religious beliefs about what is right and wrong and these beliefs are held with the strength of traditional religious convictions. In view of the broad scope of the word ‘religious,’ a registrant’s characterization of his beliefs as ‘nonreligious’ is not a reliable guide to those administering the exemption.

6. The letter began with a similar strategy used in the ‘Officers’ Letter’ of 1978. As Michael Feige notes, this letter, written to then Prime Minister Begin, used the status of its signatories as a symbolic tool, in this case, to demand that the government seek out and utilize all means available to negotiate peace with Israel’s neighbors.
7. <http://www.seruv.org.il/defaulteng.asp>
8. See: ‘Basic Law: The Military’ (http://www.knesset.gov.il/laws/special/eng/basic11_eng.htm), and ‘Basic Law: Human Dignity and Liberty’ (http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm).
9. <http://www1.idf.il/DOVER/site/mainpage.asp?sl=EN&id=32>
10. ‘The basis for this exemption is very different from that common to Christian societies. In negotiations over the status of the army in the new state held with David Ben-Gurion, the leader of the Mapai or Labor party, representatives of the religious parties requested that yeshiva (religious seminary) students be excused from conscription. This request was not justified in terms of pacifism, nor was it born of antimilitary sentiments or of a refusal to learn a military profession. Rather, it was a matter of “preventing neglect of the Torah.” According to a Jewish tradition of several hundred years, if a young man desires to dedicate his life to religious study, the community must allow him to do so’ (Peri 1993: 149).
11. Interestingly, Walzer also makes a point to mention that the objector ‘is obligated to other men as well as to ideals. Indeed, to think of the effect of his actions upon the ideal he once espoused, which is surely a necessary part of any due process of renunciation or withdrawal, is also to think of its effect upon those who still hold fast to that ideal’ (Walzer 1967: 165). In the Israeli case, the most immediate pressure a selective objector faces is from the other members of the objector’s unit.

12. These conventions include: Article 18 to the 1948 U.N.H.D.R, Article 18 to the 1966 U.N. Covenant on Civil and Political Rights; Article 9 to the 1950 European Convention on Human Rights and Fundamental Liberties; Article 12 to the American Convention on Human Rights; and Article 8 to the African Commission on Human and Peoples' Rights ('Petition': 69).
13. The Court noted that in an appeal to the Judge-Advocate General (which was then appealed to the High Court), the Petitioners were turned down because they were not refusing specific actions, but were trying to construct a defense based on historical injustices: 'The decision also stated that the procedure employed by the petitioners was unlawful. The applicants should have refused the call to duty itself (a "direct attack"), and not acted as they did by reporting to duty, then refusing to comply with an order and only then raising an argument of defense (an "indirect attack")' (HC 7622/02, 3-4).
14. Chief Justice Barak's prescience may have been easy to come by—many in Israel could see that religious selective conscientious objection was looming over the horizon. In fact, in the run-up to the withdrawal from Gaza, it was reported that some members of religious organizations were issuing *halakhic* rulings forbidding soldiers from following certain orders.
15. She argues that 'conscientious objection in Israel represents a radical attempt to redefine the obligations of citizenship and to institute a new right, hitherto non-existent in that society. The practice of conscientious objection embodies an alternative discourse on citizenship and on the subject of rights and obligations. This redefinition entails a reformulation of modes of participation in the political community and of the political culture that frames it' (Helman 1999: 46).
16. Helman explains: 'The 1982 demonstrations' motto was that the war in Lebanon was a "war of choice" (*milchemet breirah* or the Israeli equivalent to the "unjust war"). Such a motto contained an open questioning of the legitimacy of the war and the authority of the state's elites to declare and wage war. Moreover, the protest against the war also challenged the right of the state to command its male citizens to kill and be killed under any circumstances. As the war was perceived as a "war of choice," the link between the sacrifices of [the] citizen-soldier and the needs of national security was called into question' (Helman 1999: 46).
17. See note 2.
18. See Yuval Yoaz, 'Israel Allocates \$1 million for Officers Facing War-crime Charges,' *Ha'aretz*, September 19, 2005. Some human rights groups in Israel, including Yesh Gvul and the Israeli Committee against House Demolitions, have supported prosecuting military and police officers abroad for various crimes, including 'harming [an occupied] civilian population' (see Jonathan Lis, 'U.K. War Crime Complaints to be Filed Against Jerusalem Municipal Inspectors,' *Ha'aretz*, September 15, 2005).
19. See Marcus 1998, pp.541-545.
20. An excellent selection of articles on 'Refusals to Serve—Political Dissent in the Israel Defense Forces,' by Chaim Gans, Barak Medina, Leonard Hammer and others, as well as the English translation of the Israeli High Court's ruling, and Sagi and Shapira's piece, appear in a special issue of the *Israeli Law Review* 36: 3, Fall 2002.
21. In fact, there was no simple division between supporters and opponents of the withdrawal. Some religious authorities criticized the government's decision and argued against selective conscientious objection. Others held that religious

commitments obligated (religious) soldiers to refuse to participate in the withdrawal (see Nadav Shragai, 'Dozens of Rabbis Sign Open Letter Opposing Refusal', *Ha'aretz*, October 21, 2004).

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