Journal of Law and Religion 30, no. 2 (2015): 176–193 © Center for the Study of Law and Religion at Emory University
doi:10.1017/jlr.2015.5

ARTICLES

RESTORING FREEDOM OF CONSCIENCE

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ABSTRACT

This paper argues that secular legal systems need a better defined space for freedom of conscience because this important right has been crowded out by both freedom of religion and freedom of thought. Based on the principles of the Protestant Reformation, American constitutionalism expanded the idea of freedom of conscience to the point of making it almost interchangeable with freedom of religion. On the other hand, international law, followed by European constitutional law, reduced the political force of the concept of freedom of conscience by assimilating it to freedom of thought. And yet freedom of conscience cannot be treated just the same as either religious freedom or freedom of thought. By nature, the secular legal systems of political communities are moral, but nonreligious. So morality and religion affect legal systems in different ways. For this reason, freedom of conscience and freedom of religion should be protected using different legal devices. The so-called privilege of abstaining (*beneficium abstinendi*) best protects freedom of conscience; freedom of religion, by contrast, is appropriately protected by what I call the religious exception (*exceptio religiosa*). The consequences of applying these legal tools in particular cases, and their proper scopes, depend on the constitutional model of the political community in question. But in general, an increasingly globalized, diverse, and multicultural society demands a wider application of both these legal tools.

KEYWORDS: freedom of conscience, freedom of religion, freedom of thought, accommodation, exemptions, public morality

INTRODUCTION

This essay makes the case for a well-defined legal space for freedom of conscience, as distinct from freedom of thought and freedom of religion. Freedom of thought is required for the human person as a rational being (*homo rationalis*); freedom of conscience is required for the human person as a moral being (*homo moralis*); and freedom of religion is required for the human person as a religious being (*homo religiosus*). These three liberties are closely related but ontologically distinct. Thus, although they are protected under the same universal human right in many international instruments, because of their intrinsic affinities,[1] they affect the secular legal system in different ways; and in some cases, the legal means used to preserve and protect them should be specific to each freedom.

1 See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), art. 18; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102–23, 999 U.N.T.S. 171, art. 18; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221, art. 9; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based

https://doi.org/10.1017/jlr.2015.5 Published online by Cambridge University Press

In American constitutional law, freedom of conscience has been subsumed into religious freedom. Hence the inconsistency and volatility of US Supreme Court doctrines on religious and moral issues in the last few decades.[2] Belief in the existence of God and in his inestimable gift of freedom were the original pillars of both freedom of conscience and freedom of religion. That these two freedoms were (if not quite synonymous) largely interchangeable in colonial and revolutionary America, as they were in the Protestant Reformation, sheds light on two questions: First, why was freedom of conscience considered not just an inner moral freedom, as it is in international and European law, but a genuine political freedom, a real limit on government that protects personal choices as well as moral judgments?[3] Second, why have both the culture of religious accommodation and the religious exemption strategy[4] been developed largely in American constitutional law?

However, in international and recent European law, freedom of conscience has been subsumed into freedom of thought and, in some contexts, freedom of religion.[5] This subsuming of freedom of conscience into freedoms of thought and religion may be justified by strong similarities among all three freedoms, as well as certain historical and cultural developments. The three freedoms are similar in two respects. First, they are all related to the *forum internum*—that is, the internal and private realm in which no state interference is ever justified. Second, they are all liberties in the negative sense, to invoke Isaiah Berlin's famous distinction: they help define "the area within which the subject—a person or groups of persons—is or should be left to do or be what he is able to do or be, without interference by other persons."[6] As for historical and cultural developments, all three liberties were philosophically developed as parts of a single, natural continuum, whose culmination was the public practice and expression of one's religious or similar convictions.

In this essay, I first analyze how the original right to freedom of conscience has been secularized by a shift from a religious framework, very much present in the American constitutional tradition, to a framework disconnected from religion, which has been prevalent in international and European law. Second, I argue that this secularization of the rights of conscience necessitates a clearer distinction between freedom of conscience and freedom of religion. Finally, I show that legal systems should protect and promote freedom of conscience in its secularized form using legal instruments peculiar to it, and different from those used to protect freedom of religion. The privilege of abstaining (*beneficium abstinendi*) is the appropriate legal device for protecting freedom of conscience, while the religious exception (*exceptio religiosa*) is the proper legal tool for protecting freedom of religion.

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on Religion or Belief, G.A. Res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (Nov. 25, 1981), art. 1.

2 For an overview of the American experience and its inconsistencies, see John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment*, 3rd ed. (Philadelphia: Westview Press, 2011), 287–94. See also Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008); Kent Greenawalt, *Religion and the Constitution*, 2 vols. (Princeton, NJ: Princeton University Press, 2006–2009); Andrew Koppelman, *Defending American Religious Neutrality* (Cambridge, MA: Harvard University Press, 2013).

3 For the difference between action and judgment in relation to freedom, see Hannah Arendt, *Between Past and Future* (New York: Penguin Books, 2006), 145–46.

4 On the development of the exemption strategy in American constitutional law, see Kent Greenawalt, *Religion and the Constitution*, vol. 2, *Establishment and Fairness* (Princeton, NJ: Princeton University Press, 2008), 298–51.

5 On the interrelation between the UN and European systems, see Paul M. Taylor, *Freedom of Religion, UN and European Human Rights Law and Practice* (New York: Cambridge University Press, 2005), 7–9. See also Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (New York: Oxford University Press, 2011), 237–58; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, 2nd ed. (New York: Oxford University Press, 2013), 1–19.

6 See Isaiah Berlin, *Four Essays on Liberty* (New York: Oxford University Press, 1969), 121–22.

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FREEDOM OF CONSCIENCE: A SHIFTING PARADIGM

With the rise of modernity, and specifically in the American colonial and later constitutional experience, freedom of conscience was understood as a broad and flexible right that embraced many rights and liberties related to religion.[7] Expressions such as religious freedom, religious liberty, rights of conscience, religious equality, free exercise of religion, and religious rights were used interchangeably in the writings and speeches of the framers—especially the American framers—of the right to religious freedom.[8]

Indeed, under American law, religion and conscience remained inseparable. Conscience was the door to religion; separating the two seemed unthinkable. To protect conscience was to protect religion, and vice versa. In fact, the three most important practical components of freedom of conscience were the right of private judgment in religious matters, the prohibition of any kind of religiously based discrimination, and the guarantee of freedom and an exemption from legal imposition and legal restraints in religious matters, which was understood as a legitimate response to the tensions between religion and the legal system.[9] Religious rights aimed to protect the existence of a plurality of religions, the prerogatives of individual conscience, the separation of religious and political structures, and the free exercise of religion as a genuine path to finding and praising God. So freedom of conscience protected acts based on religion, but not those based on purely secular moral conviction.[10]

Still, religion and conscience were not considered identical. Of course, the First Amendment to the U.S. Constitution mentions religion, not conscience. Famously, James Madison's initial proposal would have protected the "rights of conscience" rather than the "free exercise of religion,"[11] but it was revised. Perhaps the change was just a matter of taste, but it has legal implications: it is constitutionally permissible, at least theoretically, to separate conscience and religion, such that the First Amendment fails to protect those matters of conscience unrelated to the free exercise of religion or its nonestablishment.

Both in Reformation-era Europe and in post-Revolutionary America, where the existence of God was a matter of broad social consensus, the perceived intrinsic relation between religion and conscience had its ultimate foundation in people's understanding of God. Religion, as most then saw it, could not be understood without reference to God—since it was seen as a way of seeking and praising God—but neither could conscience, for it was understood to "remind us of what we owe to God," as John Calvin wrote in his *Institutes*.[12] It was the internal witness to the existence of God as lawmaker. Indeed, in Lutheran theology, conscience was derived directly from faith.[13] Thus, God provided meaning and unity to all the rights related to religion that came under the right of freedom of conscience. Indeed, the need to protect this freedom was a natural implication of the Calvinist doctrine of God's absolute sovereignty over men's consciences. This absolute power

7 For a general overview of religious rights in the Western legal tradition, see Brian Tierney, "Religious Rights: A Historical Perspective," in *Religious Liberty in Western Thought* (Atlanta, GA: Scholars Press, 1996), 29–57.

8 See John Witte, Jr., *The Reformations of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (New York: Cambridge University Press, 2007), 170–76; see also Michael W. McConnell, "The Origin and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103, no. 7 (1990): 1488.

9 For a development of these three aspects, see Witte and Nichols, *American Constitutional Experiment*, 42–45.

10 See McConnell, "Origins and Historical Understanding," 1421–25.

11 Ibid., 1482, 1488.

12 John Calvin, *The Institutes of the Christian Religion*, trans. Henry Beveridge (Grand Rapids, MI: William B. Eerdmans, 1989), 317.

13 Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, MA: Belknap Press of Harvard University Press, 2003), 75.

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required that every human being believe according to his or her will. It ruled out any kind of external imposition, political coercion, or psychological duress, so that God could do his work through each person's conscience.[14]

The emancipation of individual conscience even from institutionalized religion was the starting point of a process, strongly influenced by the Enlightenment, that led to the secularization of conscience.[15] That is, conscience was separated from religion, as religion was separated from God. Today, there are many religions without any idea of God or conscience, just as there are interesting approaches to conscience that make no reference to God or religion. On the other hand, it is possible to believe in God without having any religion and to regard conscience as just a "society-forming instinct." Once conscience has been separated from religion, secular legal systems are interested in it just insofar as it is connected with morality, in which legal systems necessarily take an interest.

The new legal justification of this secularized form of freedom of conscience is no longer God's existence or sovereignty, but human dignity, considered as a pillar of all human rights and legal systems.[16] Dignity is more than the set of all human rights. It is also more than a basic good, a value, or a principle. It is the unique, absolute, and permanent ontological status of the person; it is what makes the person an ultimate reality—that is, the ultimate concern of all our institutions.[17] Thanks to dignity, the human person can preserve his or her identity while living in various forms of harmony with others. In this way, dignity unites the legal, the moral, the ethical, and the religious—indeed all the dimensions of the human person. Or to put it another way, human dignity lies at the intersection of two core axes: the horizontal axis linking persons among themselves (political community); and the vertical axis linking the person (and communities) to transcendence. Dignity opens the door to God,[18] but the idea of dignity does not presuppose any concrete idea of God. So dignity is a pillar that can be shared by believers and nonbelievers, and is thus a good starting point for grounding freedom of conscience.

The secularization of conscience does not imply reducing freedom of conscience to a mere expression of freedom of thought, as if moral judgments had no special legal relevance (thereby giving in to what we can call the "European temptation").[19] Nor does it mean regarding freedom of conscience as a right simply to practice one's morality in all its dimensions (the American temptation).[20] Finally, it does not mean the secularization of religion. It means, rather, that there are

14 For a good approach to this doctrine of the sovereignty of God, whose best exponent was Johannes Althusius, see Witte, *The Reformation of Rights*, 143–207.

15 For a deep overview of the history of the idea of conscience, see Charles Taylor, *Sources of the Self* (Cambridge: Cambridge University Press, 1989); Paul Ricoeur, *Oneself as Another*, trans. Kathleen Blamey (Chicago: Chicago University Press, 1992); Paul Strohm, *Conscience: A Very Short Introduction* (New York: Oxford University Press, 2001). More recently, see Robert K. Vischer, *Conscience and the Common Good* (Cambridge: Cambridge University Press, 2010), 48–72.

16 Cf. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), preamble ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.").

17 For more about dignity as *status*, see Jeremy Waldron, *Dignity, Rank, and Rights* (New York: Oxford University Press, 2012); Waldron. "How Law Protects Dignity," *Cambridge Law Journal* 71, no. 1 (2012): 200–22. For a history of the concept, see Michael Rosen, *Dignity: Its History and Meaning* (Cambridge, MA: Harvard University Press, 2012); Martin Schlag, *La dignità dell'uomo come principio sociale* (Rome: EDUSC, 2013).

18 See Rafael Domingo, "The Metalegal God," *Ecclesiastical Law Journal* 16, no. 1 (2014): 147–67.

19 This position is defended by any positivistic approach to the law, which tries (ultimately without success) to separate from the legal system any kind of moral element.

20 See Michael J. Perry, "The Right to Religious and Moral Freedom," in *Religion and Human Rights: An Introduction* (New York: Oxford University Press, 2012), 269–80; see also Perry, *Human Rights in the*

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certain protections that secular legal systems must preserve, based on human dignity and no longer simply on religion.

Historically, religion and morality have been very closely related. But they are different ideas, different realities, different metalegal concepts. So they affect secular legal systems in different ways. Morality does not evidentially depend on religion and religion, or at least a great part of it, does not depend on morality.[21] Although religion and morality are intrinsically connected and mutually supporting, especially according to the Abrahamic religions, they do not have definitional connections.[22] So it is possible to talk, logically and legally, about religion without morality and morality without religion. We can recognize as exercises of religion, beliefs and practices that do not stem from a sense of moral obligation, and we can cite and develop moral rationales for acts of conscience that are independent of religion. So in the age of secularization, a legal system can—and, I argue, should—distinguish religious freedom from freedom of conscience in order to provide more adequate, specific protections for these important liberties.

This is no place to provide an account of the nature of religion and its relation to morality or metaethics.[23] For our legal purposes, it is enough to note that secular legal systems are able to differentiate moral reasoning—secular rationality—from the reasoning characteristic of theological traditions: what we might call religious *supra*-rationality (to indicate a type of reasoning that might avowedly go beyond natural reason, without necessarily going against it—without *ir*rationality). For legal systems characteristically operate in the realm of rationality;[24] they are by nature moral,[25] but not religious. If they were otherwise, they would fail to be both either legal or secular: They wouldn't be legal, inasmuch as law is characteristically an expression and a branch of political morality.[26] And they would not be secular, since secularity implies a structural and substantive separation of legal sources from religious ones.[27]

A word about this latter point: Legal systems can rest their features on nonreligious justifications because there is, in addition to any revealed truths, a common human reason capable of providing

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Constitutional Law of the United States (New York: Cambridge University Press, 2013), chap. 7. For a revisited version of this chapter, see Michel J. Perry, "Freedom of Conscience as Religious and Moral Freedom," *Journal of Law and Religion* 29, no. 1 (2014): 24–41.

21 In the same vein, see Robert Audi, *Democratic Authority and the Separation of Church and State* (New York: Oxford University Press, 2011), 9. For a theistic approach to morality, see Mark C. Murphy, *God and Moral Law: On the Theistic Explanation of Morality* (New York: Oxford University Press, 2011); C. Stephen Evans, *God and Moral Obligation* (New York: Oxford University Press, 2013).

22 Ronald Dworkin's book *Justice for Hedgehogs* is the most recent important attempt to support morality without religion. Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Belknap Press of Harvard University Press, 2011); see also Ronald Dworkin, *Religion without God* (Cambridge, MA: Harvard University Press, 2013), 10–21.

23 For a good approach, which I basically share, see Robert Audi, *Democratic Authority and the Separation of Church and State* (New York: Oxford University Press, 2011), 9–36. See also, Audi, *Rationality and Religious Commitment* (New York: Oxford University Press, 2011), 137–87.

24 Referring to the American experience, Horwitz does well to point out, "In practice courts have little difficulty recognizing genuine religious claims, and the cases raising potentially borderline questions appear to be few and far between." Paul Horwitz, *The Agnostic Age: Law, Religion, and the Constitution* (New York: Oxford University Press, 2011), 193.

25 In this vein, see Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1969), 33–94.

26 See Dworkin, *Justice for Hedgehogs*, 5.

27 On the phenomenon of secularization, see Charles Taylor, *A Secular Age* (Cambridge, MA: Belknap Press of Harvard University Press, 2007), and Craig Calhoun, Mark Juergensmeyer, and Jonathan Van Antwerpen, *Rethinking Secularism* (New York: Oxford University Press, 2011).

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moral justifications.[28] But to say that secular legal systems properly draw exclusively on legal sources and authorities is not to require strict political neutrality on religious issues, let alone to ostracize religion in the public sphere.[29] Insofar as the populace controls politics and the populace practices religion, the political community will necessarily be influenced by religion.[30]

FREEDOM OF CONSCIENCE: BETWEEN FREEDOM OF THOUGHT AND FREEDOM OF RELIGION

Though internationally protected under the same umbrella, freedom of conscience is ontologically different and legally separable from freedom of thought and freedom of religion. This fact should be reflected in all secular legal systems; the proper legal mechanisms for protecting these three freedoms are different.

The three freedoms are intrinsically united by their status as "inner freedoms." In this sense, they are absolute freedoms and together make up an indefeasible right. They protect the inward space in which human beings can escape from any kind of external coercion. They watch over the space in which the self has the final say.[31] Together, the three freedoms constitute a sort of hendiatris, like the Roman hendiatris of *fortunae*, composed of *concordia* (harmony), *salus* (health), and *pax* (peace). The General Comment of the Human Rights Committee captures the inward character of this right, which "does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice."[32] So it is only as beliefs are externalized or made manifest that political communities can interfere legally. But it is also here, in the external realm, that the three freedoms are separable, for thought, morality, and religion are different realities, from the perspective of the law. Freedom of thought does not operate externally. It remains in the *forum internum*. The external operation of freedom of conscience, as I argue below, is best protected by a legal "privilege of abstaining," a permission not to do something. And the external exercise of freedom of religion is best protected, as I show here, by an affirmative "right to something."[33]

The right to freedom of thought, conscience, and religion is thus a complex right that includes three interdependent but distinguishable components. They are interdependent, because without freedom of thought, there is no freedom of conscience, and without freedom of conscience, there is no religious freedom. And yet these freedoms are not identical: Freedom of conscience demands freedom of thought because free reasoning is a necessary condition for making moral judgments. Freedom of religion demands freedom of conscience because the decision to be religious or not

28 In this vein, see Jürgen Habermas, *Between Naturalism and Religion: Philosophical Essays* (Cambridge: Polity Press, 2010), 120.

29 I develop this argument in Rafael Domingo, "A New Paradigm for Religious Freedom," *Journal of Church and State* 56, no. 3 (2014): 427–53.

30 Religion as a social phenomenon is paradigmatic in America. For an excellent descriptive account, see John Micklethwait and Adrian Wooldridge, *God is Back* (New York: Penguin Books, 2009).

31 For an approach to conscience as a matter of space, see Robert K. Vischer, *Conscience and the Common Good* (New York: Cambridge University Press, 2010).

32 Cf. Human Rights Committee, General Comment 22, Article 18 (48th Session, 1993), U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993).

33 I use in part the terminology adopted by Robert Alexy, *A Theory of Constitutional Rights*, trans. Julian Rivers (New York: Oxford University Press, 2012), 120. But that does not mean that I necessarily agree with his constitutional theory. For a deep critique, see Matthias Klatt, ed., *Institutionalized Reason: The Jurisprudence of Robert Alexy* (New York: Oxford University Press, 2012). See also the comments and responses of Robert Alexey, *A Theory of Constitutional Rights*, 319–56.

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is a personal moral decision, one of conscience, and not strictly a religious decision—just as, say, the decision to be married or not (or to work or not) is a moral decision and not precisely a marital (or labor) decision. (It would make no sense to say that Peter makes the "marital" decision not to marry, or that Mary makes the "labor" decision never to work.) In this sense, freedom of conscience is at the heart of the basic structure of "rights to something" (religion, marriage, labor) since the object of this kind of right is always either an act or an omission.

Freedom of thought, for its part, is the most basic form of freedom.[34] No one can live as he or she wishes without thinking as he or she sees fit.[35] It is the pillar, the indispensable condition of all other freedoms. Freedom of thought is a moral, that is, an inner and nonpolitical freedom. It protects the person as a rational being (*homo rationalis*). Freedom of thought refers to the freedom to think of ideas or arrangements of ideas, but it also embraces opinions, *Weltanschauungen*, viewpoints, and ideas formed as a result of feelings, sentiments, emotions, or interpretations, all without regard to the quality of the supporting reasons or arguments. Using Robert Alexy's terminology, we can say that freedom of thought is also a right to an omission on the part of the political community—a right against its meddling in the most basic exercises of one's rationality.[36] Since the various ways of externalizing thoughts are protected by the rights to freedom of speech, religion, and association, freedom of thought itself remains a completely unlimited right.[37] Indeed, though not entirely inconceivable, its violation is highly improbable.[38] So freedom of thought only needs legal recognition as an inalienable inner moral freedom. But for its potential flourishing, it depends on other rights, especially freedom of speech or expression.

Insofar as they are not yet expressed or acted upon, moral and religious thoughts, viewpoints, and opinions are also protected under freedom of thought. From a legal system's perspective, the kind of thought is irrelevant: all are free by definition and without exception. Moreover, while no one is morally or legally obliged to express his or her own thoughts in general, we are all obligated to act on our moral convictions. This obligation is precisely what separates freedom of thought from freedom of conscience (and, as discussed below, requires special legal treatment).

Freedom of conscience is the freedom required for human beings insofar as we are moral beings (*homo moralis*). Because it presupposes freedom of thought, freedom of conscience comes second in the logical progression of freedoms discussed here. Just as freedom of thought protects not only reason but the product of reason (thoughts and opinions), so freedom of conscience protects not just conscience—that is, the capacity to make moral judgments—but its end product: moral judgments, decisions, or conclusions. Using Alexy's terminology, we can say that freedom of conscience is a right to an omission on the part of the political community—a right against its meddling in the exercises of one's "being moral."[39]

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34 However, freedom of thought is not the first expression of freedom that human beings recognize. In the same vein, "We first become aware of freedom or its opposite in our intercourse with others, not in the intercourse with ourselves." Arendt, *Between Past and Future*, 147.

35 See Epictetus, *Discourses*, trans. P. E. Matheson (Oxford: Clarendon Press, 1916), IV.I ("That man is free, who lives as he wishes, who is proof against compulsion and hindrance and violence, whose impulses are untrammeled, who gets what he wills to get and avoids what he wills to avoid.").

36 See Alexy, *A Theory of Constitutional Rights*, 124.

37 These rights are potentially important ways to protect freedom of thought. For an overview of the current debate about freedom of speech in relation with freedom of thought, see Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012).

38 In the same vein, see Jim Murdoch, *Protecting the Right to Freedom of Thought, Conscience and Religion* (Strasburg: Council of Europe, 2012), 18.

39 Alexy, *A Theory of Constitutional Rights*, 124.

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Freedom of conscience protects individual moral judgments since they are conclusive and so should be followed by the person making them. It provides legal recognition of, and protection for, the idea of moral obligation. What differentiates freedom of thought and freedom of conscience is that freedom of conscience protects the binding decision of an acting person to do something here and now.[40] It protects the fact that this decision is a binding decision, that is, one that generates a moral obligation. What freedom of thought protects (a set of ideas) is not, as such, binding. But like freedom of thought, freedom of conscience is an absolute inner freedom: it does not permit any political interference in the process of making a final moral judgment.

By distinguishing freedom of conscience from freedom of thought, legal systems bestow specifically legal significance on moral obligation. They recognize that human persons can be morally bound by nonlegal sources of moral obligation. Moreover, legal systems recognize that human dignity binds of its own power and that a political sovereign binds only as an extension of individual dignity. By recognizing that the human person can bind himself or herself—by virtue of his or her own dignity, rather than the command of a sovereign—legal systems implicitly recognize the principle of personal responsibility, which is key for the development of any legal system. They also implicitly recognize the priority of dignity over sovereignty, and, therefore, the centrality of the person in the political community.[41]

The secular legal system does not take into account the truth or moral quality of a person's judgment of conscience, the potential contribution of any kind of transcendent law to that judgment,[42] or the person's degree of praiseworthiness or culpability for (not) obeying conscience. This is not its business. Freedom of conscience in secular legal systems protects conscientious judgments as such, on the ground that they have been reached by persons with dignity and are, for them, binding. Under this standard, the legal system demands a justification for accommodating someone's acts of conscience, since every legal act restricting the application of a law requires public justification to avoid being discriminatory.

The secularization of freedom of conscience should lead us to expand it to embrace the fulfillment of purely moral (as opposed to religious) obligations. Indeed, if in the contemporary understanding freedom of conscience is to be based on dignity rather than religion, religious freedom cannot remain the only way to protect the expression of judgments of conscience. In other words, if religious freedom and freedom of conscience are no longer necessarily linked, freedom of conscience must extend to acts based on conscience but not religion. After all, the point of a moral decision is not the decision as such but the fulfillment of the corresponding obligation. Obligations are to be performed, not just generated.

Freedom of conscience protects this minimum area of freedom that must not, under any circumstances, be violated. But precisely where the border between private life and political authority should be drawn is "a matter of argument, indeed of haggling," as Berlin said.[43] The scope of freedom of conscience should be narrower than that of religious freedom, since the secular legal systems of democratic political communities are by definition moral and nonreligious. (That is, they cannot

40 Robert Spaemann, *Persons: The Difference between Someone and Something*, trans. Oliver O'Donovan (New York: Oxford University Press, 2006), 174.

41 On the supremacy of the person, see John Finnis, "The Priority of Persons," in *Collected Essays*, vol. 2, *Intention and Identity* (New York: Oxford University Press, 2011), 19–35; see also Finnis, "The Priority of the Person Revisited," *American Journal of Jurisprudence* 58, no. 1 (2013): 45–62.

42 For more on the idea of transcendent law, see Rémi Brague, *The Law of God: The Philosophical History of an Idea*, trans. Lydia G. Cochrane (Chicago: University of Chicago Press, 2007).

43 Berlin, *Four Essays on Liberty*, 125.

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avoid staking positions on certain moral questions pertaining to the common good, but they *must* avoid staking positions on specifically religious matters.) They can limit individual morality in order to develop a public morality, but they cannot limit religion and belief in order to develop a "public religion." More precisely, secular legal systems cannot limit religion if there is no ground of public order or public morality for doing so. Because of our interdependence, the exercise of freedom by some citizens always comes at the expense of restricting the freedom of others. In a country where nude beaches are allowed, the exercise of freedom by those who want to frequent such beaches requires restricting the freedom of those who believe they must avoid them on moral grounds. On the other hand, the prohibition of nude beaches based on reasons of public morality implies a restriction of the freedom of those who want to frequent them.

The free practice of individual morality is not a proper constitutional limit on the public morality of the legal system. To be a member of a political community means renouncing one's own practice of morality when it is not in accordance with a justification recognized by the legal system. Public morality prevails over individual morality just as public decisions prevail over private decisions: *ius publicum privatorum pactis mutari non potest*.[44] Public law cannot be altered by the agreements of private persons, let alone by individual decisions.

Even so, the precise boundaries between individual morality and public morality will depend on the constitutional model of the political community in question. A liberal constitutional model will emphasize individual moral freedom as against public morality, strictly scrutinizing policies that might limit individual morality. On the other hand, a communitarian model will emphasize the priority of public morality over individual morality in order to promote the common good of society, as well as the strong link between public and private morality. But in any system, the practice of one's individual morality cannot be considered a human right as such. What freedom of conscience protects is the value of individual moral *obligations*, as an expression of dignity, not the right to practice one's own morality, including one's own moral preferences—which would imply a denial of the fundamentally moral nature of the political community's legal norms.

Where there is moral obligation, there is moral responsibility, which in turn requires moral freedom. This is what freedom of conscience protects. Where there is a mere moral preference, there is neither moral obligation nor moral responsibility. So, there is no freedom of conscience, strictly speaking. And in an inherently moral community like the political community, there is no legal argument for protecting such preference.[45]

On the other hand, to be a member of a political community does not imply renouncing one's practice of religion, because secular legal systems are by definition *non*religious. So it is the legal system, not the citizen, that must renounce the 'practice of religion'—in this case, the legal imposition of religious obligations. In other words, the most important legal difference between freedom of conscience and freedom of religion is that, in the case of freedom of conscience, it is the citizen who renounces the practice of his or her morality when it conflicts with that of the legal system. But in the case of religious freedom, it is the political community that must renounce any 'practice' of religion on its part, to make room for citizens' various religions. Secular legal systems may limit religious freedom with the aim of protecting "public safety, order, health, or morals or the

44 Papinian, in Justinian, *Digest*, ed. Theodor Mommsen and Paul Krueger (Berlin: Weidmann, 1895), 2.14.38.

45 For more on this argument, see Rafael Domingo, "A Right to Religious and Moral Freedom?" *International Journal of Constitutional Law* 12, no. 1 (2014): 226–247; see also Michael J. Perry, "A Right to Religious and Moral Freedom? A Reply to Rafael Domingo," *International Journal of Constitutional Law* 12, no. 1 (2014): 248–55.

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fundamental rights and freedoms of other."[46] But they may limit the practice of citizens' individual morality more broadly, so long as they stay within the democratic standards of equality and protection of minorities.

This explains how a moral reason could constitute enough of a justification even to regulate religion. (The legal prohibition of religious polygamy based on moral reasoning is a good example.) On the other hand, a purely religious reason or argument could never justify a political community's imposition of moral norms or standards. If a political community bans abortion, say, it must be on rational moral grounds, not just religious ones, since (again) a secular legal system may not rely on religious arguments as such. Freedom of conscience is the starting-point—but by no means the endpoint or culmination—of religious freedom. As John Stuart Mill rightly affirms, "The great writers to whom the world owes what religious liberty it possesses, have mostly asserted freedom of conscience as an indefeasible right, and denied absolutely that a human being is accountable to others for his religious belief."[47]

Religious freedom protects the religious dimension of the human being (*homo religiosus*). It is the result of linking freedom and religion. Just as freedom of thought protects not just a certain freedom but the value of thoughts themselves, and freedom of conscience protects not just freedom but the value of conscience as a way of reaching binding moral judgments, so religious freedom protects not just freedom but religion as such, as a source of intrinsic value, a defensible idea,[48] and a good in itself.[49]

The legal treatment of religion demands a "multifactor approach," since what counts as religion may vary according to the legal issues at stake.[50] But the ultimate justification for legally protecting religion lies in the need to protect what I have called suprarationality (a mode of thinking that goes beyond, without necessarily contradicting, the conclusions of natural reason) as a dimension of human dignity as well as a secular value. Again, this does not mean that evidence of "suprarational" modes of thought and reasoning should be the single factor in determining whether a belief system should be protected as a religion. It just means that suprarationality is the starting point and the ultimate justification of this determination, since it is a value in itself in a way that should have legal implications.

The reason that suprarationality justifies the protection of religion is that respect for it imposes an extrinsic constitutional limit on secular legal systems. And this is so because our ability to access suprarationality and to conduct our lives according to its conclusions requires complete individual and collective freedom (religious freedom). This freedom cannot be provided by the secular legal system of a political community. It can only be protected by law. This freedom can be found privately (private suprarationality) or within a community of voluntary membership, like a religious community (public suprarationality). Where it cannot be found is in a community of compulsory membership, like the political community. So the most genuine acts of suprarationality should be developed beyond the reach of the legal and the political.

Suprarationality as a constitutional limit has at least three important legal implications: (1) religious acts in the strictest sense are not and should not be turned into legal acts—that is, they

46 See International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171, art. 18, ¶ 3.

47 John Stuart Mill, *On Liberty*, ed. John Gray (New York: Oxford University Press, 2008), 12.

48 For the beneficial influences of religion, see Habermas, *Between Naturalism and Religion*, 124–25, 209–47.

49 See especially John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 2011), 89–90.

50 In the same vein, see Kent Greenawalt, *Religion and the Constitution*, vol. 1, *Free Exercise and Fairness* (Princeton, NJ: Princeton University Press, 2006), 137.

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should not be made, let alone imposed, by political authorities as such or by secular legal systems; (2) suprarational (religious) arguments should not be used by democratic communities in legal discourse; and (3) political and religious authority should be separate, since religious communities and political communities are complementary. These three implications are expressions of the natural incompatibility of legal coercion and religious freedom.

Secular legal systems should guarantee the free exercise or practice of religion in the political sphere provided that this practice does not contravene public order and the public morality of the political community. This freedom should extend to choosing one's religion and freely changing it in the *forum internum*, and also to worship and other forms of religious manifestation, as well as religious education. It should cover, that is, all expressions of religion in the private and public spheres, which go beyond but not against the nature and goals of the political community. So the right to religious freedom should be configured not just as a freedom but as a "right to something," as a "right to religion."

In sum, the right to freedom of thought, conscience, and religion has just two forms of externalization: through morality (freedom of conscience) and through religion (freedom of religion). These two forms have different levels of importance and should be protected in different ways by the legal system. "No one pretends that actions should be as free as opinions," Mill says categorically.[51] Paraphrasing him, we can say that in keeping with the necessarily moral but nonreligious nature of secular legal systems, no one pretends that moral actions should be as free as religious ones.

BENEFICIUM ABSTINENDI V. *EXCEPTIO RELIGIOSA*

If freedom of thought, freedom of conscience, and freedom of religion are ontologically different and affect legal systems in different ways, we should use different tools to protect them. Specific legal tools of protection are expressions of the very nature of the rights they protect. For example, the so-called *exceptio veritatis* can be understood only in the context of crimes against honor, which specifically require a *false* imputation, and a writ of habeas corpus makes sense only in the context of detention, as a safeguard for individual freedom against arbitrary state action.

Likewise, the two freedoms of conscience and of religion call for protection by two different legal tools, each tailored to the underlying rights themselves: the privilege of abstaining (*beneficium abstinendi*) for freedom of conscience, and the religious exception (*exceptio religiosa*) for religious freedom. Both these legal means of protection should be recognized by all legal systems as hallmarks of the right to freedom of thought, conscience, and religion even if the scope of their application in different legal systems will depend on the particular community's constitutional model. In any case, in an increasingly globalized world of diversity and multiculturalism, accommodations—and thus, the applications of these legal tools—should be expanded as a matter of social justice.[52]

I refer to these legal devices in Latin for three reasons: first, because I found inspiration for them in Roman law; second, because I think it important to give them "universal" names, to encourage their use across legal systems; and third because, unfortunately, available terms in this area of law are deficient. Vague terms for the relevant concepts abound in all languages but especially in English (privilege, grace, benefit, exemption, exception, accommodation), and this variety can cause misunderstanding and confusion. I also wish to avoid expressions like "religious exemptions"

51 Mill, *On Liberty*, 62.

52 See Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge, MA: Harvard University Press, 2011), 68.

https://doi.org/10.1017/jlr.2015.5 Published online by Cambridge University Press

and "conscientious exemptions," which encourage treating all legal means of protection uniformly under the confusingly general title of "exemptions." Moreover, the concept of legal exemption covers forms of accommodation across several different fields (taxation, employment, and so on), and not just in the religious realm. (A new German law on the circumcision of male children is a prime example of an attempt to solve conflicts by a general legal exemption introduced by the Legislative Power.[53])

I also avoid the expression "conscientious objection" because it is applied in some countries just in the context of military service, while in other countries it has been generalized to all cases of conflict between individual conscience and the legal system. From a legal standpoint, moreover, "conscientious objection" is inadequate. "Objection" comes from procedural law, where it denotes a formal protest raised during a trial to disallow a witness's testimony or other evidence allegedly barred by the rules of evidence. As I discuss below, it is the executive and not the judiciary that should concern itself with "conscientious objections."

Although the word "privilege" (*beneficium*) has many meanings in different legal traditions,[54] "privilege" should be here understood in the general sense of an advantage or favor granted by the executive or administrative power—and not by the judiciary or by agreement of the parties. The legislature can create, recognize, or regulate a privilege (*beneficium*) and even turn it into a general right (*ius abstinendi*). But the legislature cannot grant it precisely as a privilege, for it is the sort of thing that should be granted on a case-by-case basis. The *beneficium* is not a particular law in favor of some citizens (privilege in the strictest sense, *privilegium*), in violation of equal protection and public reason. It is instead a legal advantage based on dignity and solidarity and meant to relieve the excessive burden that some citizens would otherwise face in complying with a law. It is, therefore, a matter of accommodation just in the application of laws (executive power), not in their creation (legislative power), or in the resolution of legal conflicts by adjudication (judiciary).

Ancient Roman law provides many privileges (*beneficia*) to alleviate such special burdens.[55] One of them, the privilege of abstaining (*beneficium abstinendi*), could serve as a good framework to apply in the field of freedom of conscience. Under Roman law, the privilege of abstaining[56] was a special privilege provided by the Roman magistrate to some universal heirs (so-called *heredes sui et necessarii*) to enable them to avoid the stigma of the decedent's insolvency. *Heredes sui et*

53 Cf. the new wording of § 1631d(2) of the German Civil Code (BGB) on circumcision of the male child ("Beschneidung des männlichen Kindes"): "In the first six months after the birth of the child persons delegated for that purpose by a religious body too may perform circumcisions according to paragraph 1, if they are especially trained for that purpose and, without being physicians, are comparatively qualified for performing circumcisions." Bürgerliches Gesetzbuch [BGB] [Civil Code], Aug. 18, 1896, Reichsgesetzblatt [RBGl.] 195, as amended, § 1631d, para. 2. (Ger.) (translation available at gesetze-im-internet.de/englisch_bgb/englisch_bgb.html).

54 The word "privilege" has very different meaning in common law, canon law, and civil law. For a general view see the definition of "privilege" in Bryan A. Garner, ed., *Black's Law Dictionary*, 9th ed. (St. Paul, MN: West, 2009), 179.

55 E.g., *beneficium divisionis*, *beneficium cedendarum actionum*, *beneficium excussionis personalis*, *beneficium inventarii*, or *beneficium competentiae*. For a general explanation of privileges in Roman Law, see W. W. Buckland and Peter Stein, *A Text-Book of Roman Law from Augustus to Justinian* (New York: Cambridge University Press, 2007), 449–50, 693. See also Max Kaser, *Das römische Privatrecht*, vol. 1, *Das altrömische, das vorklassische und klassische Recht* (Munich: Beck Verlag, 1971), 211, 664–66, 733–74.

56 For an explanation of this specific privilege, see Barry Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1975), 238, 240–41. See also Kaser, *Das römische Privatrecht*, 1:714–15, and George Mousourakis, *Fundamentals of Private Roman Law* (New York: Springer, 2012), 296, 298, 303. Roman legal sources refer to the privilege as a *beneficium*, Ulpian, in Justinian, *Digest*, 29.2.71.4, but also as a *ius*, Gaius, *Institutes*, 2.159, *facultas*, Gaius, *Institutes*, 2.160, or *potestas*, Gaius, in Justinian, *Digest*, 29.2.57.pr.

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necessarii were heirs not by the decedent's personal decision but directly by law. They were "compulsory heirs." As a general matter, compulsory heirs did not have the power to refuse their inheritance. So, for example, the son of a decedent was a compulsory heir because he would receive the inheritance just in virtue of being a son. Under this system, there was no gap in the ownership of the family property, and the continuity of the family was guaranteed. According to Roman law standards, the value of family continuity prevailed over the interest of individual members.

The same principle is expressed in the medieval saying "The King is dead, long live the King!" Just as the transfer of sovereignty occurred instantaneously at the moment of one monarch's death, so under Roman law the transfer of inheritance occurred instantaneously upon the decedent's death. The privilege of abstaining resolved the problem of the distribution of family burdens. Because it was a heavy burden to be the compulsory heir of an inheritance full of debts, such heirs could apply for a privilege of abstaining to refuse the inheritance without losing their status inside the family.

The praetor was the one to provide the *beneficium* since the grant of the privilege was announced in the annual praetorian edict, published in the forum.[57] The praetor had no lawmaking power; rather, he could implement the privilege by exercising a procedural power. Where the privilege was invoked, the decedent's assets would be sold in his name, and the magistrate would refuse to grant any legal action against the heir. The exercise of this privilege did not negate legacies if the estate was solvent. Following the heir's decision to exercise this privilege, creditors could take the estate to satisfy their own claims. In short, the privilege operated in practice as a legal right on the heir's part to decline an inheritance.

Moreover, though we do not have reliable information on this, it is highly probable that, if an heir eligible for the privilege was sued, the praetor, after verifying that the recipient's eligibility would protect him from creditors by providing him a legal remedy. The *formula* for this remedy incorporated the legal fiction that "the heir was not heir" (*perinde ac si heres non esset*),[58] which judges were then required to follow, thus effectively absolving the defendant of liability.[59]

The main features of this privilege of abstaining were thus the following: (a) it applied within a community, the family; (b) it did not change the position of the petitioner within the community: the heir remained a legal member of his family; (c) it did not invalidate the legal principles of the community; (d) it did not authorize positive action in violation of the law: it only provided permission not to do something, thus blocking legal actions against the petitioner through a legal fiction; (e) its purpose was to avoid a burden: compulsory liability for the decedent's debts; (f) it was provided by the political power (the praetor), not the judiciary, upon application by the petitioner; (g) the avoided burden was distributed among other citizens (the decedent's creditors) according to equity and solidarity.

We can apply this same framework to freedom of conscience (as distinct from religious freedom), to resolve cases where there is a conflict between public morality and individual moral obligation: In the case of freedom of conscience, the privilege would also take place within a community—the political community. It would not change the position of the beneficiary within the community—the petitioner would remain a member of the political community, that is, a citizen. It would not invalidate the basic legal principles of the community—that all members of

57 For a partial attempted reconstruction of the edict *Si suus heres erit* (§ 209–10) with the announcement of the privilege, see Otto Lenel, *Das Edictum Perpetuum*, 3rd ed. (1927; repr. Aalen: Scientia, 1956), 418–21.

58 See ibid., 418n8.

59 For a brief, general but sound overview of the civil procedure in the Roman classical period, see David Johnston, *Roman Law in Context* (New York: Cambridge University Press, 2007), 112–32.

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the political community are under the legal system without exception, and that the legal system must be obeyed. The privilege would not authorize doing something, but rather abstaining from something. Its purpose would be to avoid a substantial burden on the citizen who would have to violate conscience in obeying a legal command. It would be provided by the executive or administrative power, not the legislature or judiciary, upon application by the petitioner. Moreover, the burdens of abstention would be distributed among other citizens (as many as possible) according to equity and solidarity.

The oldest application of the privilege of abstaining is in the context of conscientious objections to the performance of military service.[60] The privilege of abstaining can be (and has been) applied in many other cases, as well: to refusals to dispense abortion pills, collaborate in or perform abortions, carry out death sentences, receive certain forms of medical treatment, practice euthanasia, circumcise babies, work on the Sabbath, serve on juries, swear oaths, cover contraception in employee health insurance, marry gay couples, salute the flag, and so on.[61]

The justification of a sort of *beneficium abstinendi* for acts of conscience lies in the fact that, although public morality prevails over individual moral obligations, it is nothing more than an extension of private morality. Moral principles, inasmuch as they can be shared, engage both private and public spheres of morality.[62] Without conscience—and thus without individual moral obligation—there is no public morality. The collective sovereignty that supports public morality is just an extension of individual dignity, which is the ultimate foundation of any democratic political community based on human rights. So legal systems should protect as much as possible the fulfillment of individual moral obligations; for in doing so, they are protecting dignity, which in turn strengthens public morality and sovereignty. By "individual moral obligations" I do not mean mere moral *preferences*, but categorical moral obligations, which affect human dignity at its core.

The privilege of abstaining is the legal system's last resort for protecting individual dignity against collective sovereignty without contravening its own binding force overall. Even when rights are protected, dignity can suffer. Thus, this abstention will be available when a citizen believes that his or her dignity is harmed by a legal command that goes against a perceived moral obligation, even if it does not go against a basic right. The legal system can grant the privilege provided that another person can fulfill the legal obligation in question if it is one that must be fulfilled for the sake of the common good. The petitioner would then be allowed to remain in silence, in loyal silence,[63] as the best way to resolve the conflict between public and private moral obligation. But the political community would also fall into silence, in the sense of avoiding any legal action against the petitioner for not complying with the legal command. The laws would be silent in order to protect individual dignity as the core source of political sovereignty.

The privilege of abstaining could therefore be considered a permission not to do something, by remaining in silence. The permission would allow omissions of what is normally required, but not *commissions*, affirmative acts, which are independent.[64] That is, positive (perceived) moral

60 For an overview, see Greenawalt, *Free Exercise and Fairness*, 49–67.

61 For a comparative approach to different applications of this privilege, see Rafael Navarro-Valls and Javier Martinez-Torrón, *Conflictos entre conciencia y Ley: Las objeciones de conciencia* (Madrid: Iustel, 2012). For an American overview, see Robert K. Vischer, *Conscience and the Common Good* (New York: Cambridge University Press, 2010), 125–302.

62 In the same vein, see Martin Rhonheimer, *The Common Good of Constitutional Democracy*, ed. William F. Murphy, Jr. (Washington, DC: Catholic University of America Press, 2013), 118.

63 See Horace, *Carmina*, 3.2.25 ("Est et fideli tuta silentio merces." (There is likewise a reward for loyal silence.)).

64 See Alexy, *A Theory of Constitutional Rights*, 151.

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obligations that consist in doing something in violation of law would not be covered by this privilege. Membership in a political community grounds an obligation to obey its legal system. If a legal system banned the bearing of arms and a citizen made the moral decision to carry a pistol because his or her family felt unprotected by law enforcement, this privilege would not apply to him or her. By bearing a pistol, he or she would just be violating the law. Such a private decision might be right morally but not right according to the legal system. The legal system could not support such a decision. What the citizen could do legally is to bring action against the government for negligence in its duty to ensure the safety of citizens. Disobeying the law in accordance with the legal system is a contradiction in terms. But this is not what happens with the privilege of abstaining based on a conscientious refusal, which is not an act in the public forum.[65]

The privilege should be granted by the executive power, not by the legislature or judiciary. The reason is that privileges affect the law's enforcement, which is the specific domain of the executive. The executive officer is not supposed to make laws (the role of the legislature) or interpret them (the role of the judiciary). The role of the executive is to enforce the law as written by the legislature and interpreted by the judicial system. Executive bureaucracies are commonly the source of regulations. And to provide this privilege is just a matter of administration or regulation, not of adjudication. The legal administrative procedure to obtain a privilege is not a legal process of resolving a dispute. A dispute requires two parties, and in this procedure, there are no adverse parties: just a petitioner. The legislature could pass a law regarding the procedure of granting privileges, or recognizing privileges granted, but the grant of the privilege as such, like any other permission, is within the purview of the branch tasked with enforcing the law: the executive. The judiciary could intervene where the privilege was denied by the executive power without sufficient justification, but it is not the normal business of the judiciary to provide such advantages to citizens.

The privilege of abstaining would affect all kinds of moral obligation, both religious and nonreligious, but it would call for public justification since it would require distributing the burden of certain citizens' abstention among other citizens according to the principle of solidarity.[66] Moral objections grounded in religion should not be excluded from the privilege of abstaining provided that they have a moral rationale. There would be no legal reason to exclude religious morality from this privilege when the underlying moral norm could be justified by the same rational standards as other moral obligations. As long as religious morality is still *morality*, in other words, it would come under this *beneficium*: in such cases, a reasonable moral argument could be made as a public legal justification. However, the mere fact that a citizen feels bound by a contrary religious obligation is not enough to justify the privilege.

Thus, for example, the fact that the Catholic Church forbids Catholic physicians to practice abortion does not mean that a Catholic physician could not apply for the privilege of abstaining using a rational moral argument. The argument could be based on the defense of the right to life of all human beings, even unborn persons. Likewise, an observant Jew could use this privilege of abstaining to avoid working on the Sabbath. The legal justification could be that human beings need to rest in order to be able to work and that the decision to make Sunday the general official day of rest might be discriminatory against the non-Christian. Even so, many religious issues fit much better under the distinct category of religious exception, as discussed below. For two reasons,

65 In the same vein, John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1999), 324.

66 See Maclure and Taylor, *Secularism and Freedom of Conscience*, 99 ("Since granting an accommodation modifies the terms of social cooperation and the distribution of resources, the petitioner must justify his request; in other words, he is faced with the obligation of public justification.").

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in a country where the Islamic full veil (niqāb and burqa) is banned for safety reasons, for example, a Muslim girl could not apply for the privilege of abstaining to wear the veil: first, wearing the veil is not an abstention but disobedience, a positive act against the law; second, it is difficult to find a rational moral (as opposed to religious) argument for the privilege in this case.

This brings us, then, to religious exceptions. The starting point of the argument for making religious exceptions is the opposite of the starting point of the argument for abstentions. The privilege of abstaining is based on the idea that the secular legal system, though nonreligious, is by definition moral. However, the religious exception is based on the essentially nonreligious character of the legal system and on the subjectivity of the multifactor legal approach to religion discussed above. Because secular legal systems are nonreligious (they may not invoke what I have called suprarational arguments), secular legal systems should not limit the practice of religion beyond the limits of public order and public morality. It is not their business. This is the basis of religious freedom.

In other words, because of its nonreligious character, the political authority bears the burden of justifying legal action touching on religious matters, since the religious domain is an extrinsic limit on the domain of the law. But since the legal approach to religion is both objective and subjective, it is not enough for the state to guarantee the neutrality of a law (indeed, in my opinion, no law is neutral). Rather, for full protection, citizens must be able to claim religious exceptions.

In sum, morality is not a proper constitutional limit on the secular legal system, since legal systems are inevitably moral (i.e., they must stake positions on moral questions). But religion does operate as such a limit, because legal systems are by definition nonreligious. In this sense, we can say that a political community supported by a secular legal system is a nonreligious community. That does not mean that religion and politics are incompatible, that religion has no place in the public square, or that political communities should not cooperate with religion. What it means is that secular legal systems should not incorporate religious arguments into legal reasoning.

The religious exception is an affirmative legal defense that protects citizens against unjustified interference by political authorities in religious issues even when the law in question is religiously neutral. Since the concept of religion has been expanded to the point of embracing both an objective and a subjective dimension, the existence of the religious exception in all legal systems has become a necessary condition to guarantee fully the right of religious freedom.[67]

The religious exception should be addressed by the judiciary because it is a matter of adjudication: through a legal process, the judge examines evidence and legal argumentation set forth by litigants to come to a judicial decision that determines the rights and obligations of the parties involved. It is the judiciary that has to decide whether or not the legislative or the executive powers exceeded the limits of the political by invading the individual or communitarian religious domain. The judicial recognition of an *exceptio religiosa* in a particular case could be generalized by the legislature through a statutory exemption (e.g., by amending a ban on alcohol to exclude liturgical uses), but this generalization could never be an imposition of the judiciary on the legislature if the original law was truly neutral. The legislative power and not the judiciary should be the ultimate arbiter of disagreements about the requirements of justice in general as opposed to particular cases.[68]

67 The religious exception is very far from becoming a matter of selective application of the principle of toleration to the conscience of only religious believers, which Brian Leiter is right to say would be "not morally defensible." Brian Leiter, *Why Tolerate Religion?* (Princeton, NJ: Princeton University Press, 2013), 133. In my opinion, toleration is not the best justification for the ideal of religious freedom, as Leiter suggests. Religious exceptionalism cannot be understood just as a matter of toleration but as a matter of individual freedom within a political community, which is by definition nonreligious.

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By recognizing the religious exception, the judiciary identifies a specific violation of the right to religious freedom, thus opening the door to action in the public sphere at odds with what a statute requires. It does *not* thereby authorize action against the legal system as such, for it is precisely the legal system that supports the right to religious freedom as fundamental in the first place. The judiciary is just resolving a conflict between a basic human right, recognized by law, and a specific legal provision. So, in the above mentioned case where a political authority bans (for safety reasons) the use of a full veil covering the face, a Muslim girl could ask the judiciary for an *exceptio religiosa* in order to protect her right to religious freedom. If a state bans alcohol for health reasons, a Catholic priest could apply for the *exceptio religiosa* on religious grounds, since the law, though neutral or nonreligious, violates the religious freedom of those who use wine in celebrating their liturgy. Moreover, religious exceptions bolster not just freedom of religion but political values of autonomy and tolerance.[69]

The error of the U.S. Supreme Court in the famous peyote case of *Employment Division v. Smith*,[70] which changed for the worse the American regime of religious accommodation, was precisely to confuse the *beneficium abstinendi* with the *exceptio religiosa*. The Supreme Court ruled that neutral laws of general applicability did not violate the Free Exercise Clause of the First Amendment. Therefore, though states have the power to accommodate otherwise illegal acts done in pursuit of religious beliefs, they are not required to do so. But in this case, what the defendant asked of the court was not a *beneficium abstinendi* but judicial recognition of a religious exception. There is no doubt that a state can ban the use of peyote for reasons of public order and morality. There is no doubt that this ban could be justified by political authorities with reasonable arguments. But there is also no doubt that this Oregon law interfered as a matter of fact with certain Native Americans' liturgy. So, for adherents of certain Native American traditions, this Oregon law was a violation of the right to religious freedom. Using the terminology of this paper, we can say that the mistake of the Supreme Court was to apply the principles of freedom of conscience to a case of freedom of religion. Fortunately, in the recent Hobby Lobby decision,[71] the Supreme Court came out the way it should have in this respect.

CONCLUSION

In the American constitutional experience, freedom of conscience has been supplanted by religious freedom. In international and European law, on the other hand, freedom of conscience has been crowded out by freedom of thought. So, freedom of conscience needs to recover its own space in secular legal systems; it adds to freedom of thought the protection of moral obligation as a political value. Binding moral decisions require specific legal protections provided that they not interfere with the public morality of legal systems. Since the secular legal system of a political community is by nature moral, the right of freedom of conscience does not imply a right to practice one's

68 In this vein, see Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999).

69 In this vein, but applied to the conscientious exemptions, see Yossi Nehushtan, "What Are Conscientious Exemptions Really About?," *Oxford Journal of Law and Religion* 2, no. 2 (2013): 393–416.

70 *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

71 In *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014), the U.S. Supreme Court allowed *closely held* for-profit corporations to be exempt from federal government regulations requiring employers to cover certain contraceptives for their female employees. This case represents the first time that the Supreme Court recognized a for-profit corporation's claim of religious belief, but it is limited to *closely held* corporations under the 1993 Religious Freedom Restoration Act.

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morality. On the contrary, to be part of a political community means giving up the freedom to live by one's morality when doing so is required by the rules of the community. When there is a conflict between a command of public morality and a categorical individual moral obligation, collective sovereignty prevails over individual dignity. However, as an expression of the primacy of the human person, legal systems should provide a privilege of abstaining (*beneficium abstentionis*) to protect dignity. The privilege of abstaining does not imply a violation of the legal system as such: the legal system simply remains silent to protect dignity as a reasonable reaction to the citizen's abstention. *Silent leges dignitatis causa*: the laws fall silent because of dignity, we can say, paraphrasing Cicero's famous dictum.[72]

Unlike freedom of conscience, religious freedom is based on the idea that secular legal systems are nonreligious by definition. This nonreligious character justifies the existence of a political right to religious freedom that protects citizens against political intrusion in religious matters, even based on apparently religiously neutral legislation. The proper specific legal tool for protecting religious freedom as an affirmative defense is the *exceptio religiosa*, which should be recognized by the judiciary. The *exceptio religiosa* opens the door to acts in accord with the legal system but at odds with a general statute. The legal justification of the *exceptio religiosa* is that secular legal systems should prefer to abstain from the application of a law, even a neutral law, in cases of conflict with religion. In doing so, secular legal systems protect their own legal nature, which again is inherently nonreligious. Trying to distinguish the legal tools for protecting freedom of conscience and freedom of religion is the best way to legally differentiate two basic freedoms, which are indeed ontologically different: freedom of conscience and freedom of religion.

72 The Ciceronian phrase is "silent enim leges inter arma" (in times of war, the laws fall silent). Cicero, *Pro Milone*, IV.11.

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