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Protecting Freedom of Conscience in a Constitutional State

ABSTRACT

Constitutional states are committed to the protection of freedom of conscience and religious freedom. Such commitment, however, is problematical on two counts. To begin with, it requires the solving of delicate, conceptual, protecting-what, problems; these have to do with the very notions of freedom of conscience and religious freedom, the exact content of the two liberties, and their mutual relationships. Furthermore, it requires the resolution of strategic, protecting-how, problems, concerning the identification of the most appropriate means to the task. The paper contains, accordingly, two parts. In the first one, it argues for coping with conceptual issues on the basis of a liberal, individualistic, conception of freedom of conscience. In the second one, it provides an outline of a doctrine for the protection of freedom of conscience in a religious society, which advocates the granting of a general right to conscientious objection, both in a negative and in a positive variety.

KEYWORDS

Conscience, freedom of conscience, religious freedom, constitutional state, right to conscientious objection

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1. *Preface*

The main concern of this paper is a problem of constitutional engineering. The problem consists in devising how a constitutional state can provide adequate protection to freedom of conscience and religious freedom, with particular attention paid to the condition of individuals that happen to live in a religious society: that is to say, in a society where the cultural and political influence of religious groups, organizations and institution is a pervasive and conspicuous phenomenon.

It goes without saying that such protecting-how problem cannot be treated properly, unless the object of protection is precisely identified: unless, in other words, the protecting-what problem has been previously coped with and somehow settled. To be sure, this latter problem could be skipped if there were a widespread consent, among scholars, upon the notions of freedom of conscience and religious freedom. Unfortunately, however, that seems not to be the case. Accordingly, my paper contains two parts. The first part is dedicated to defining a notion of freedom of conscience and religious freedom in a way that is suitable to a constitutional state coherently inspired by the principles of liberalism[1]. The second part contains the outline of an integrated doctrine for the protection of

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[1] Very roughly speaking, two principles may be singled out as paramount to liberalism: the principle of equal superiority (or "equal sovereignty") and the harm principle. According to the first principle, each individual is morally

freedom of conscience and religious freedom, by a constitutional state, in a religious society. As we shall see, such an integrated doctrine purports to combine a doctrine of the sphere of individual privacy (reserved space, space of inviolability, *coto vedado*) with a general right to conscientious objection, considered both in a negative and in a positive variety.

I
Protecting-What

2. *"Conscience", "Freedom of Conscience"*

By the term "conscience", as it occurs in ordinary discourse, we may understand two different, though related, things. On the one hand, "conscience" stands for each individual's own moral code. This amounts to the set of (fundamental, ultimate) moral standards and convictions governing the practical life of the individual. On the other hand, "conscience" also names the intellectual faculty by means of which each individual identifies – establishes, precisifies, revises, updates, etc. – the moral code governing his practical life. At any time in the life of an individual, conscience as a moral code (*conscience-code*) is, accordingly, the output of conscience as a moral faculty (*conscience-faculty*)[2].

The two senses of "conscience" go somehow intertwined in everyday, ordinary speech[3]. Indeed, we are all familiar with expressions like "My conscience forbade me to do that", "I will act according to the dictates of my conscience", "The voice of my conscience tells me not to do that", "If you do that, your conscience will persecute you for the rest of your life", etc.

Terms like "dictates", "voice", and "persecution" denounce an archaic mode of thinking, still afoot, characterized by a primordial animism inclined to personification, which turns the faculty of conscience into an "agent", endowed with its own life, that lives inside of each individual as an exacting guest. This way of thinking goes along with a few, well-known, images about how the faculty of conscience works. First, conscience is, to any individual, the "never sleeping" interior *surveyor* that scrutinizes each and every thought and action of hers. Second, conscience is, to any individual, the interior inflexible *drill-sergeant* issuing commands for any situation of practical life. Third,

superior ("sovereign") in relation to the social bodies and institutions where she happens to be involved in the different stations of her life. The second principle sets the proper borders of each individual's superiority ("sovereignty") by establishing the requirement that individual actions ought never to do harm to others. See MILL 1859, ch. I.; FEINBERG 1984, *General Introduction*.

[2] A short but worthwhile history of "conscience" in Western culture is offered in VIANO 2011, 16 ff. For a longer history, from the sixteenth to the nineteenth century, see ANDREW 2012. As to the notions of "conscience", see, e.g.: DENT 1998, 579: conscience as the set of «fundamental moral convictions by keeping to which they [persons] retain a sense of their moral integrity and decency as people»; SAPIR, STATMAN 2005, 472: «The notion of conscience refers to a person's innermost normative beliefs; those that constitute his or her personal identity»; MACKLEM 2006, 68: «Anything that we believe we have reason to do may, under the correct conditions, become a matter of conscience for us»; 113: «The claims that conscience makes upon us do not simply add to the repertoire of reasons before us. Rather, they are mandatory reasons, that tell us to follow their direction, and correspondingly exclude considerations of the other reasons that are relevant to the decision before us and that would otherwise determine its outcome»; and 116, where conscience, as rational conscience, is presented as the seat of men's "critical spirit" in selecting the reasons for doing what is better («one of the central functions of conscience is to preserve us from the unfounded claims of motive and attachment»); GALEOTTI 2008, 2, where "conscience" is defined as «a set of private or non-public reasons»; NUSSBAUM 2008, 19: «the faculty in human beings with which they search for life's ultimate meaning».

[3] *The Concise Oxford Dictionary* defines "conscience" as the «moral sense of right and wrong», where "sense" suggests, at the same time, the faculty by which we get to know what is morally right or wrong as if by sensation, and the output of the exercise of such faculty.

conscience is, to any individual, the interior *wise shepherd*, who leads her to do the right and abstain from the wrong ("the goads of conscience"). Fourth, and last, conscience is, to any individual, the interior *authority* that, acting at the same time like an *incorruptible judge* and a *punctual executioner*, pronounces upon her infringements and inflicts the corresponding, inescapable, torments.

All these images from our everyday, archaic, mode of thinking go along with the idea according to which the faculty of conscience speaks the truth. Far from being casual, arbitrary, or even whimsical, the dictates of conscience do mirror moral precepts that are *objective* (not-subjective), *absolute* (not-relative to some moral point of view among others), and *binding* (not-optional for the addressee). From this standpoint, accordingly, conscience acts as an organ of *hetero-direction* of individual actions: it works, in other words, as a sort of ethical *microchip* that, at any time, conveys to individuals the heteronomous – external and automatically binding – directives of true morality[4].

One more piece is needed in order to complete this very swift account of conscience in our archaic, everyday, thinking. According to the ministers of institutional moralities – like, e.g., the ministers of certain institutionalized religions – the dictates making up each individual's conscience, in order to be truly objective, absolute, and binding, must pass the test of institutional moral experts who tell people, authoritatively, *how* the dictates of conscience are properly to be understood and acted upon. Individual conscience, if left to her loneliness, may err. This means that each individual's faculty of conscience, in order to work correctly, must defer to the pronouncements of such institutional moral experts: it must become, in other words, the organ of an *authoritarian hetero-direction* of individual conduct.

The authoritarian-heteronomous conception of conscience (-code and -faculty) characterizes mainstream medieval Christian thought. It represents accordingly, so far as Western culture is concerned, the orthodox conception of conscience. Modernity comes with the transition from such an orthodox, authoritarian-heteronomous conscience, to a heterodox, individualist, autonomous, conscience. It is worthwhile distinguishing two stages in this process.

The first stage is characterized by a conception of the faculty of conscience that combines the heteronomy of moral standards with an anti-authoritarian, individualist attitude. This is the stage of protestant conscience. Here, the faculty of conscience is still the vehicle of heteronomous, objective, automatically binding standards of behaviour: the faculty through which each agent comes to know what she really ought to do. However, each individual is now considered as entrusted with the delicate task of being the sole authorized interpreter of true moral requirements: each individual is the only agent competent to establish what those standards require, so far as her conduct is in order, without any interference from intrusive, unwanted, meddlesome moral experts provided by authoritarian institutions[5]. Each individual becomes, we may say, a genuine, though not yet a "full right", *moral*

[4] An example of such a view can be seen in some verses of John Milton, *Paradise Lost*: «And I [God] will place *within* them [men] *as a guide*/My Umpire Conscience» (quoted by WALZER 1970, 121, italics added). According to ANDREW 2012, 51: «Milton has God place a divine lighthouse within the human soul that can illuminate the way to safe harbour and emit sounds to warn us of the dangerous rocks».

[5] A heteronomous, but individualist and anti-authoritarian conception of conscience appears in the words pronounced by Martin Luther at the Diet of Worms, on April 18, 1521: «Nisi convictus fuero testimoniis Scripturarum aut ratione evidente (nam neque Papae neque Conciliis solis credo, cum constet eos errare saepius et sibi ipsis contradixisse), victus sum Scripturis a me adductis captaque est conscientia in verbis Dei: revocare neque possum neque volo quidquam, cum contra conscientiam agere neque tutum sit, neque integrum. Hier stehe ich. Ich kan nicht anders. Gott helff mir. Amen» (quoted by PASSERIN D'ENTRÈVES 1970-71, 46, n. 9; see also ANDREW 2012, 15 f.). In another basic passage, Luther claims that: «In the consciences [of humans] God wants to be alone, and wants that only his word should reign» (quoted by RUFFINI 1901, 37). SAPIR, STATMAN (2005, 473 f.), quote, following ANDREW (2001), the following passage by Luther: «I lift my voice simply on behalf of liberty and conscience, and I confidently cry: No law, whether of men or of angels, may rightfully be imposed upon Christians without their consent, for we are free of all laws». From it they assume to get evidence for a Protestant conception of conscience, that would be

subject: an agent personally responsible for the correct knowledge, interpretation and application of the fundamental moral standards that ought to regulate her life[6].

The second stage in the transition from medieval, authoritarian-heteronomous conscience, is characterized by conceiving the faculty of conscience as having to do, not only with the identification of the basic moral standards of an individual, but also, and primarily, with establishing their binding force upon him. This is the stage of autonomous conscience. The faculty of conscience becomes the tool by means of which each individual makes use of his *moral autonomy*: that is to say, she exercises the moral power of establishing which standards are to be binding in her practical life. Individuals do not necessarily create the basic standards governing their practical life, so far as their content goes. But, in any case, such standards are binding for them if, and only if, by exercising their moral autonomy, they have accepted them by means of a free, ultimate (but usually revisable) choice, as the fundamental precepts of their moral life – as the polar stars for their navigation through the high sea of practical issues[7].

The authoritarian-heteronomous conception and the individualist-autonomous conception of conscience cast quite different requests upon positive law.

The former requires endorsing an authoritarian conception of freedom of conscience. From this standpoint, freedom of conscience is to be conceived, for each individual, as the freedom to act according to the true dictates of the correct authoritarian heteronomous conscience (-code), as they are publicly expounded and taught by authorized interpreters.

Contrariwise, the individualist-autonomous conception requires the endorsement of a liberal version of freedom of conscience. Here, freedom of conscience is to be conceived as encompassing two dimensions. On the one hand, it is the inner liberty, for each and every individual, to exercise her moral autonomy in creating, selecting, adopting and revising the standards governing the practical dimensions of her life, without suffering any undue external influence. This is the *internal dimension* of freedom of conscience, or freedom of conscience *in foro interno*. On the other hand, it is the outer liberty, for each and every individual, of acting and living according to the moral standards that, in the exercise of her moral autonomy, she has created, selected, adopted and revised as the standards governing the practical dimensions of her life, without suffering any undue external restraint. This is the *external dimension* of freedom of conscience, or freedom of conscience *in foro externo* [8].

«essentially individual and subjective», representing «a profoundly subversive and antinomist understanding of the concept of conscience, one that presents a threat to the existing religious, social and political order», since it coincides with «the dictates» of people's «hearts». They also recognise, though, that according to «Luther and Protestant philosophers», «the Divine will is revealed to human beings through their conscience». Accordingly, I think the account I have provided in the text, of a heteronomous, anti-authoritarian and individualist conception of conscience, to be in line with Luther's thought. This notion is individualist but not «subjective»: the «dictates of the heart» do not create moral norms, nor establish their binding force upon an individual; rather, they simply reproduce norms issuing from the will of the deity, norms that men can get to know also by a direct reading of Scripture and by making use of their reason. Indeed, as ANDREW (2012, 8) makes clear, «Protestant conscience» is «yoked […] to Christian standards of good and evil».

[6] The knowledge of the right principles of human conduct automatically "brings with it" the duty to act accordingly. This does not mean, however, that, once the duty has been identified, men be motivated to act in that way.

[7] In C.S. Lewis's words: «*conscience*, so to speak, passed from the witness-box to the bench and even to the legislator's throne» (quoted by ANDREW 2012, 4, italics in the text).

[8] See RUFFINI 1901, 11. The double dimension of liberal freedom of conscience is often overlooked by definitions that only point to what I have called its "external dimension": «Freedom of conscience» – writes for instance Chaim Ganz, quoted by SAPIR, STATMAN 2005, 475 – «means the freedom to act on the dictates of conscience for the sole reason that they are given by the conscience»; likewise, SAPIR, STATMAN 2005, 476: «How can a person's conscience be offended or violated? The answer is simple: by coercing her to act contrary to her deeply held principles». A

The authoritarian conception of freedom of conscience is incompatible, by design, with deontological individualism and ethical pluralism. It favours moral imperialism, moral paternalism, and the establishment of authoritarian states, usually of religious-theocratic cast. It may accommodate for toleration towards different moral and religious outlooks, but only out of a strategic calculus. It may even promote and justify, in specific cultural and political situations, such evils like social unrest and political violence, subversion, civil war, internal and international terrorism.

By contrast, the liberal conception of freedom of conscience is compatible, by design, with deontological individualism and moral pluralism. It rejects (mere) toleration in favour of a universal individual right to freedom of conscience. It opposes moral imperialism and moral paternalism. It requires the establishment of a democratic constitutional state, so far as possible neutral in matters of conscience and religion[9]. Indeed, it is well known that liberal liberty of conscience also embraces, and protects, the

broader notion, encompassing an internal as well as an external dimension like the ones I have singled out in the text seems, however, fitter to providing effective protection to this fundamental right.

[9] The proper way of accounting for the neutrality of the liberal constitutional state is still a major issue in political philosophy. It may be useful to recall two positions that have been endorsed in recent literature. MACLURE, TAYLOR (2011, 16 f.) claim that the neutrality of a «secular state» must – by instrumental necessity – be «incomplete»: i.e., it must be characterized by a «minimum of perfectionism», consisting in promoting individuals' moral autonomy at the expense of the authoritarian heteronomous moralities present in the society, if such a political order wishes to be really coherent with the twin substantive principles of political secularism, namely, the principle of moral equality and the principle of moral autonomy. In the same vein MACKLEM (2006, 116-118). By contrast, LEITER (2013, 14 f.), uses the impossibility of liberal neutrality – unlike Maclure and Taylor, without paying attention to the different degrees in which it may be realized – as an argument to claim that the proper way of accounting for the position of the liberal state towards religion is not in terms of "neutrality", but, rather, in terms of "toleration". Leiter's view is probably inspired by the goal of providing a realistic picture of the matter. Indeed, he also thinks the very idea of moral autonomy to be, on the face of reality, false. We should not forget, however, that the idea of "toleration" is tied to pre-constitutional regimes, where religions different from the one professed by the state were "tolerated" by acts that, in principle, the sovereign could repeal in any moment. For this reason, depicting the liberal constitutional state of our days as a regime of "toleration" towards religions blurs the lines between structurally different regimes and is, for that very reason, misleading. As Thomas Paine underscores in a celebrated passage of his *Rights of Man* (PAINE 1791, 136 f.): «The French constitution hath abolished or renounced *Toleration*, and *Intolerance* also, and hath established *universal right of conscience*. Toleration is not the *opposite* of Intolerance, but is the counterfeit of it. Both are despotisms. The one assumes to itself the right to with-holding Liberty of Conscience, and the other of granting it. The one is the pope armed with fire and faggot, and the other is the pope selling or granting indulgencies. The former is church and state, the latter is church and traffic». It must be added that Leiter presents liberal toleration as "principled toleration", that is to say, as toleration justified by moral reasons (LEITER 2013, chs. I and IV). That move too is, to my mind, confusing. If liberals have reasons of principle for granting to every individual a right to freedom of religion – though, to be sure, not an absolute right (but, as we know, absolute rights are a very rare commodity, if not altogether impossible to conceive, as many people like to think) – why should their attitude be downsized to "toleration"? Leiter suggests that "toleration" is a proper way to depict reality, since the "respect" that liberals claim to pay to religions and religious believers cannot be but a "minimal respect" that consists in saying: "Let them do whatever they want, provided they do not do harm to anybody". I am not sure, however, that liberal respect for religion is so minimal as Leiter claims. Indeed, we may say, liberal respect for religion, though it does not necessarily amount to "appraisal respect" (i.e., respect coming from positive appraisal of religion as such), is more than "minimal" since it reflects, and depends on, an appraisal respect for the moral agents as autonomous agents that, during their life, by exercising their own moral autonomy, may adopt religious beliefs. Accordingly, saying that liberals "tolerate" religion would be a proper way of speaking if, but only if, it would also be a proper way of speaking to say that liberals "tolerate" individuals' moral autonomy. Which sounds utterly weird. Indeed, Leiter seems to provide for religious liberty a non-liberal, prudential, justification, similar to the justification Schauer provides for granting free speech. This is, of course, perfectly in tune with the rules of the intellectual game going under the name of "normative ethics". To my view, however, it has the disadvantage of grounding some of the constitutional state's most valuable assets on utilitarian reasons. In this way he seems to be taking side against liberalism as a deontological outlook, his avowal of

freedom of each individual to put herself under the direction of some external moral authority: either of a religious, or of a secular, sort. With this sole limit, however: the freedom of each individual to bind herself to the standards of some heteronomous moralities, even to the most authoritarian, strict, and mortifying ones, cannot in any case involve the right to coerce others into the same bonds.

The conclusion, which the preceding analysis suggests, can be recounted as follows: when constitutional states commit themselves to the protection of freedom of conscience, they commit themselves to protecting, for each and every subject, the liberal variety of freedom of conscience. This, in turn, represents the legal projection of an individualist, anti-authoritarian, autonomous, conception of conscience. That is indeed a very trivial conclusion. I think, nonetheless, the preceding analysis of mine to be not totally idle. People living in religious societies are constantly exposed to religious people's claims about the *proper* way of understanding conscience and freedom of conscience, to the point of losing sight of the very notions that should inspire the institutions of a genuine constitutional state. My analysis had the – hopefully clarifying – purpose of bringing to the fore the different conceptions of conscience that are at stake, their relationships with positive legal orders, and their institutional projections in terms of individual rights and social peace. In other words, what anybody must endorse, if she wishes to be a subject truly faithful to a constitutional regime.

3. *Freedom of Conscience and Religious Freedom*

In the history of Western political thought and legal institutions, the right to freedom of conscience is tightly connected to the right to religious freedom. Due to the uncertainties surrounding the notions of "conscience" and "religion", however, the relationships between the two rights (assuming, for the sake of the argument, that they are two separate rights) are far from being settled by a general intellectual consent on clear and univocal terms[10]. It goes without saying that any clarification and resolution of indeterminacy problems as to the present issue must depend – if only by way of an un-committed, detached, analytical experiment – on some, previously selected, ethical-normative standpoint. There is indeed no absolutely true notion of freedom of conscience, nor any absolutely true notion of freedom of religion, but only notions and conceptions relative to, and dependent on, specific political philosophies and ethical outlooks. As a consequence, when we come to law, the interpretation of such recurrent phrases like "freedom of conscience" and "freedom of religion" cannot depend but on commitments to some political and moral philosophical outlook.

Now, in very broad, pre-partisan, tautological, terms, religious freedom may be defined as freedom in relation to religious matters. In common sense and ordinary language, "religious matters" concern, at least, the following issues:

1. The existence and properties of supernatural beings (gods, demons, nymphs, the spirits of trees, sources and mountains, the souls of ancestors, etc.);

neutrality notwithstanding (see LEITER 2013, ix f.). In her analysis of the notion of toleration, Letizia GIANFORMAGGIO (1993) provides a further argument not to speak of "toleration" with regard to the position of the liberal state in matters of religion. Toleration – claims Gianformaggio – always satisfies some need – be it also a need arising out of a moral principle – of the tolerating side: it is, in this sense, in the (moral) interest of the tolerating side. Liberal religious freedom, however, belongs to contexts where there is no room for tolerating and tolerated sides, but only for individuals endowed with equal fundamental moral and legal rights. For a penetrating criticism of the standard definition of "toleration", see also BARONCELLI 1993.

[10] For instance, in *The Oxford Dictionary* "Freedom of conscience" is defined as «The right to follow one's own beliefs in matters of religion and morality».

2. The relationships, if any, between supernatural beings (their will, desire, design, reason, understanding, whim, humour, behaviour, etc.), on the one hand, and the human condition on earth and the afterlife, on the other;
3. The relationships, if any, between supernatural beings (their will, desire, design, reason, understanding, whim, humour, behaviour, etc.) and the conduct of individual human beings, be they believers or not-believers, towards themselves, other humans, non-human animals, the environment, and of course, not least, the supernatural beings;
4. The rules, rituals, ways of worship, teachings, forms of life, etc., issuing directly or indirectly from supernatural beings and their adoption, interpretation, development, and application by believers, as isolated agents or within associative or institutional structures;
5. The forms of life, as defined by rules, rituals, teachings, etc., established by spiritual masters like Buddha, Confucius, etc., and their adoption, interpretation, development, and application by followers, as isolated agents or within associative or institutional structures;
6. The invention, modification, and revision of a form of life, as defined by rules, rituals, teaching, etc., by somebody acting as a spiritual master[11].

[11] In my definition of "religious matters" I have followed the same approach of William Alston, who, in his *The Philosophy of Language* (ALSTON 1964), uses "religion" as an example of a term referring to a set of family-like-related instances, which is suitable to be defined by means of nine characters combining in clusters to make of some social phenomenon an instance of "religion". The nine characters are: 1) belief in supernatural beings; 2) a sacred v. profane distinction; 3) ritual acts focused around the sacred; 4) a morality grounded in the sacred; 5) characteristically religious feelings aroused by the sacred; 6) prayer and other forms of communication with sacred reality; 7) a worldview; 8) a relatively total organization of one's life based upon the worldview; and 9) a social group bound together by the above. In my survey of what I take to be the common sense view of "religious matters", I am making two claims. First, the term "religion", as a legal term, is not fit for definitions by means of some discrete set of necessary and sufficient properties. Second, from a liberal standpoint, the proper way to define "religion" is by means of an explanatory definition, or rational reconstruction, that takes into account common sense and linguistic usages, without necessarily deferring to them. This is not, however, a commonly shared view among scholars. For instance, in his book *Why Tolerate Religion?* (LEITER 2013, ch. 2), Brian Leiter purports to set forth a definition of "religion" by means of a set of three necessary and jointly sufficient properties: (1) experienced categoricity of commands; (2) purposive insulation of beliefs from the evidence and reasons governing common sense and scientific knowledge; (3) function of existential consolation. For a careful conceptual criticism, showing that such a definition of religion is unable to single out religion from morality (unless, perhaps, in quantitative terms of degree), see HIMMA 2014. After assuming that the definition of "religion", as it occurs in constitutional documents, is a «moral question», Timothy MACKLEM (2006, 141, italics in the text) comes to the following proposal: «As far as freedom of religion is concerned […] *religion refers to the participation in institutions and practices that manifest a freely given personal commitment to a particular set of beliefs, commitment to which is capable of enhancing human well-being; beliefs that are not based on reason alone but are held, at least in part, on the basis of faith*». Accordingly, the rationale of religious freedom would be the protection, for each and every individual, of the value of personal wellbeing connected to beliefs, practices and institutions the adoption of which depends on leaps of faith. If Himma is right, as I think he is, MacKlem's definition raises the same demarcation problem as Leiter's (who, by the way, took into account MacKlem's definition). In the posthumous book *Religion without God*, Ronald Dworkin advocates the replacement of the «troublesome special right» to religious freedom with «the general right to ethical independence»: he suggests that «we treat religious freedom as part of ethical independence», as a «central case of a more general right to ethical independence» (DWORKIN 2013, 144-146). Such a right would be subject to the limits deriving, to put it in my own terms, from a liberal reading of the harm principle. Indeed, considering the *Smith* case, where the U.S. Supreme Court decided that the use of peyote, a notoriously hallucinogenic drug, for religious rituals was not protected by the "Free exercise clause" of the First Amendment to the American Constitution, Dworkin applauds to the decision in the following terms: «The general right does not protect the religious use of a banned hallucinogenic drug when that use threatens general damage to the community» (DWORKIN 2013, 132 ff., 135). Apparently, Dworkin's general right to ethical independence is tantamount to the liberal right to freedom of conscience and bears to religious freedom the same genus-species relationship I consider in the text. Indeed, from his standpoint, the right to religious freedom can be defined as the specification of the right to ethical independence in relation to religious matters like, e.g., the presence of religious emblems in public buildings, the wearing of religious symbols in public schools, etc. For a juristic approach to religious freedom, from the standpoint of a

Clearly, religious matters embrace a vast array of ontological, epistemological, cosmological, eschatological, anthropological, and moral issues. If we consider such an array of issues from the standpoint of liberalism – the political morality that, as I said, should inspire contemporary constitutional states – the notion of religious freedom can be made more precise by regarding it as conceptually dependent on two more basic freedoms: freedom of thought and freedom of conscience. Religious freedom can be characterized, in this way, as the *specification of the liberal freedom of thought and the liberal freedom of conscience in relation to religious matters*[12]. According to this view, very roughly speaking, the ontology, epistemology, cosmology, and eschatology of theistic and non-theistic religions are protected by religious freedom as a specification of freedom of thought; the moral, dress, food, ritual and worship codes of theistic and non-theistic religions may be considered as being protected, instead, by religious freedom as a specification of freedom of conscience.

4. *Rejecting the Special Status Claim*

Believers in theistic religions commonly assume a special status for their claims of conscience, one that would justify the granting of privileged forms of legal protection over the claims of conscience of secular people and, usually, also of people of a different religious creed. In so doing, they raise what, in scholars' jargon, is known as the "special status problem"[13]. Theistic believers usually support their pretence to special status by a mixture of three arguments, namely: an argument from the true god, an argument from tradition and respect for majority's feelings, and, finally, an argument from the bestowal of external benefit[14].

First, theistic believers argue their claims of conscience should be recognized a special status and protection, because those claims give voice to, and reflect, the "true design" of the "true deity" for the whole mankind.

liberal, individualist, and anti-communitarian, uptake of religion, see TAYLOR 2005, providing a commentary upon UN law and the European Convention law, in the light of the practice of their interpretation and application.

[12] In the light of the connection between freedom of thought and freedom of expression, religious freedom may also be understood as freedom of religious expression, that is to say, as freedom of expression in relation to religious matters. On the relationships between freedom of expression and religion, see ATIENZA 2006, who advocates an attitude of radical liberalism, giving legally free wheel to the criticism of religious beliefs, within the limits of respect to persons. See also POST 2007. SAPIR, STATMAN (2005, 478-486) also consider the possibility of seeing the rationale of religious freedom not only in the right to conscience, but also in a "right to culture". The right to religious freedom, from this standpoint, would be the right to the protection of religious communities as *minoritarian* forms of culture important to "the realization of autonomy" and "personal identity" of their members. Obviously, such a right makes sense only for those religious communities that are in fact minority cultures in a society and, in any case, does not give them any «privileged protection compared with other minority cultures». Furthermore, the right, insofar as it requires imposing restrictions to «secular majority», «must be limited to instances where the damage to the religious culture is significant and direct, and where the price to be paid by the majority is not high».

[13] SAPIR, STATMAN 2005 dismiss the "special status" claim of theistic believers by the following reasoning: provided such a special status would involve giving «a religious conscientious claimant an advantage that does not sit well with the principle of equality», and provided, furthermore, that the rationale for granting such a right must be a non-religious, liberal-secular one, «concerned for the conscience of all people», it seems necessary to come to «the relinquishing of freedom of religion as an independent category» (486 f.). LEITER 2013 and HIMMA 2014 also come to the same conclusion. That is, indeed, a must for any coherent supporter of the constitutional state and liberal liberty of conscience.

[14] These remarks of mine are grounded on the argumentative strategy employed in Italy by top Catholic Church dignitaries during the 1990s and 2000s, up to election of Pope Francis. On later development in the Catholic Church's strategy, see VIANO 2016.

Second, theistic believers argue their claims of conscience should be recognized a special status and protection, because these claims belong to a religious creed and institution which – unlike different religious creeds or secularism – played, and does still play, a peculiar, relevant role in the history, culture, and tradition of the country. Accordingly, the feelings of the (moral, if not statistical) majority of the country would be offended, were such claims not granted the value they deserve.

Third, theistic believers argue their claims of conscience should be recognized a special status and protection, because these claims belong to a religious creed and institution which, by their very existence, would contribute to the well being both of society at large, and of its several members.

Unfortunately for theistic believers, however, from the standpoint of liberalism – the backbone axiology of the constitutional state – these arguments are by no means conclusive. In fact, they can be easily turned down.

The argument from the "true deity", and its "true callings", calls for an outright rejection. Indeed, were the government and positive laws of a constitutional state to accept it, they would give up political secularism and neutrality entirely, since they would violate what, in American constitutional law, amounts to the establishment clause. From the standpoint of a liberal constitutional state, concerned with the liberty of conscience and religious liberty of each and every one of its citizens, there are no true or false deities, no true or false divine callings. There are just deities, and divine callings, as believed in and invoked by believers, on the one hand, and doubted upon or denied altogether by non-believers (atheists or agnosticists), on the other. The whole religious matter is, and must be regarded as, nothing else than a usually complex, and often thorny, social phenomenon.

The argument from tradition and respect for majoritarian feelings is a subtle way of appealing to the negative side of the equality principle. This requires, as we all know, that different cases should be treated differently[15]. It is, presumably, for this reason that the religious majority of a country would feel offended, were the special legal status and protection denied to the claims of conscience it cherishes. From a liberal standpoint, however, matters of conscience and conscientious claims of any sort are to be treated as *timeless*. They are not suitable subjects for the principle of antiquity (*prior in tempore potior in iure*), since they belong to the timeless dimension of ethical principles, where argumentation must stick to substantive reasons. By the same token, theistic claims of conscience cannot claim any special status whatsoever on the basis of their correspondence to majoritarian feelings and attitudes. Indeed, the fact that a claim of conscience is majoritarian in a given society does not make for its special legal value at all. Matters of conscience are *not suitable subjects* for applying the *majority principle*. On the contrary, they (must) belong to the "reserved sphere" the constitutional state must guarantee to each and every individual *against* undue interferences by other people, even though (and precisely because) these people may be majority. Finally, the fact that some people's feelings may be offended by the denial of a special legal status to their own theistic claims of conscience, even if it is the majority's feelings, must be considered as devoid of any legal relevance whatsoever. This is so because, from a liberal standpoint, the presumed offence does not amount to any harm in the proper, Millian, sense[16].

[15] The argument from tradition may also be considered, of course, as an appeal to cultural identity: it is, however, an appeal to the "majoritarian" historical and cultural identity of a people. It claims a certain religion ought to be given a privileged legal status because of the prominent, unique, different, role it is assumed to have played in moulding the cultural identity of a people. The appeal to cultural identity, as an argument for special status, turns again on the negative side of the equality principle.

[16] The European Court of Human Rights takes a very prudent attitude on the matter of religious liberty feelings, one that is more in tune with a communitarian conception of religious liberty, than with a liberal one. See TAYLOR 2005, 70 ff.

The argument from the bestowal of benefit, finally, appeals to the pretended benefits that society at large, and each and every individual inside of it, would derive from the very existence of the religious creed and institution to which certain claims of conscience belong. To be sure, whether, and to what extent, particular religions are beneficial to a society is a matter of fact asking for careful empirical inquiry, after the relevant conceptual issues have been settled (Which benefits? To whom? How can we measure them? Etc.). Religions may be beneficial, but they may also not be so[17]. Be it as it may, however, from a liberal standpoint, the entire issue must be considered irrelevant as to the special status and protection problem. First of all, even supposing that a certain religion does in fact benefit a society, why should the claims of conscience of its believers be entitled to privileged legal protection? Special protection, notice, is being asked for as a matter of *right*. Now, that right cannot but be a sort of "quasi-contractual" or "trade-off" right: the special protection is, in fact, the *price* asked in exchange for the benefits a certain religion pretends to be bestowing upon a certain society. If that is the case, however, three remarks seem in order. First, religions do something supposedly beneficial to society *by their own initiative* and *in their own interest* (e.g., for proselytism's sake, for the sake of gaining "souls" to their cause). As a consequence, they cannot claim to have any *legal right* to society's – and legal order's – gratitude in the form of a special status for their claims of conscience. Second, religions in a constitutional state do already enjoy of the precious benefit of public protection of religious freedom: they are, in this sense, already compensated for whatever benefit they may bestow on society. Third, the beneficial effects of religion upon a society are uncertain and disputable; contrariwise, the beneficial effects any religion derives from the public protection of religious freedom are solid and certain.

5. *Religious Freedom: A Cluster of Rights*

I have suggested that, from a liberal standpoint, religious freedom may be characterized as the *specification of the liberal freedom of thought and the liberal freedom of conscience in relation to religious matters*. This is, clearly, a quite broad notion. To such notion corresponds, in turn, a *right to religious freedom in a broad sense*, which encompasses a plurality of more specific rights. I would say, more precisely, that the right to religious freedom, if broadly conceived, presents both a *double dimension* and a *four-legged structure*.

To begin with, it is worthwhile distinguishing between the *internal* and the *external* dimensions of religious freedom – as it is worthwhile distinguishing between the internal and the external dimensions of freedom of conscience (as we have seen) and freedom of thought[18]. In its *internal dimension*, religious freedom is the liberty, for each and every individual, to adopt, revise, change and reject

[17] According to SAPIR, STATMAN (2005, 470 ff.), this is a dubious factual claim, for people can also point to the *costs* – which may sometimes be very high in terms of social divisions, prejudice, fanaticism, individual suffering and misery – that the presence of religious creeds and institutions may impose upon people and societies, and the balance is by no means clear. Having defined the benefit from religion as amounting to «existential consolation», LEITER (2013, 62-64, 83-85) comes to the conclusion that: «It is not obvious […] why one should bite the speculative bullet [i.e., endorse the overall beneficial effect of religion to society], *absent an antecedent bias in favour of religion*» (italics added): that is to say, religion is evidently beneficial to religious people, and the claim to universal benefit is probably self-serving.

[18] The double dimension can be read in the basic human rights law instruments, like art. 18 of the UN Universal Declaration of Human Rights (1948), art. 18(1)-(3) of the International Covenant for the Protection of Civil and Political Rights (1967), art. 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). See TAYLOR 2005.

beliefs and attitudes concerning religious matters and, particularly, religious forms of life[19]. This liberty concerns believing in a theistic religion or in a non-theistic one, embracing agnosticism or atheism, believing or not-believing a certain religious form of life to be truly conducive to such goods as a meaningful existence, eternal life, universal salvation, perfection on earth and beyond, endorsing a religious moral code, etc. To be sure, protecting the internal dimension of religious freedom against undue forms of invasion of, and influence upon, the human mind by public or private powers is by all means necessary. It is not sufficient, however. An adequate protection of religious freedom requires, accordingly, the protection of its *external dimension*: the public expression, alone or together with other people, of one's beliefs and attitudes concerning religious matters, the public exercise of religious rituals, the public abiding by religious rules, practice, worship, and teaching (concerning, for instance, food, garments, holidays, education, sex, etc.).

The liberal right to religious freedom in a broad sense, however, exhibits not only an internal and an external dimension, along the same lines as freedom of conscience, as we have just seen. It may also be characterized, from the standpoint of its content, as presenting a *four-legged structure* that cuts through the two dimensions. In perhaps clearer terms, the right to religious freedom in a broad sense is a complex right, which, at a lower level of abstraction, amounts to the combination of two pairs of articles: on the one hand, the right to freedom *of religion*, together with the correlative right to freedom *from non-religion*; on the other hand, the right to freedom *of non-religion*, together with the correlative right to freedom *from religion*.

The right to freedom *of* religion is the right of leading a religion-informed life. It concerns, paradigmatically, the adoption of some theistic or non-theistic religion and the public expression and exercise of its rituals, practices, worship, teachings, observances, etc.[20]. Complementary to this right is the right to freedom *from non-religion*. This is the right of people adhering to some religious creed to be free from the undue interferences of either the secular, or the differently religious, beliefs of other people, upon their own form of life; it is, in other terms, the liberty from suffering undue forms of imposition coming either from people of non-religious allegiance, or from people entertaining different religious beliefs.

Contrariwise, the right to freedom *of non-religion* is the right of leading a religion-free life. It concerns, paradigmatically, the rejection of any theistic or non-theistic religion, the adoption of an atheist, agnostic, secular form of life, and the public expression and exercise of its principles, rules, and teachings. Complementary to this right is the right to freedom *from religion*. This is the right of secular people to be free from the interferences of other people's religious beliefs upon their own form of life; it is the liberty from suffering the imposition of other people's religious beliefs, rules, teachings, worships and rituals in their everyday life, which is usually sponsored by institutionalized churches and powerful religious groups and associations[21].

[19] In the terms of human rights instruments: «freedom to change [one's] religion or belief» (art. 18 of the UN Universal Declaration of Human Rights; art. 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms); «freedom to have or adopt a religion or belief of [one's own] choice» (art. 18(1) of the International Covenant for the Protection of Civil and Political Rights).

[20] According to art. 18 of the Universal Declaration of Human Rights, for instance, the «right to freedom of religion» includes the «freedom, either alone or in community with others and in public or private, to manifest his religion […] in teaching, practice, worship and observance». Similar clauses are contained in the International Covenant on Civil and Political Rights (art. 18(1)) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 9(1)).

[21] The rights of freedom from non-religion and freedom from religion may be read, for instance, in art. 18(2), of International Covenant on Civil and Political Rights: «No one shall be subject to coercion that would impair his freedom to have or to adopt a religion or belief of his choice». See also the U.N. Declaration on the Elimination of all

In an essay published some years ago, Sapir and Statman consider the right to freedom from religion, claiming that it should be understood narrowly. They see its proper scope as that of a right providing protection to «secular people», from being «forced to perform an act, or to participate in a ceremony, of a clearly religious nature», whenever such a coercion consists in forcing them to perform behaviours that make them «feel […] alienated from themselves», being «forced to behave in a manner that is inauthentic and against their integrity»[22]. For instance, they say, such right would protect secular people from being coerced into entering in a religious marriage[23].

Sapir's and Statman's characterization of the right to freedom from religion has the evident merit of aiming at determinacy and precision. I think, nonetheless, that their notion of freedom from religion is unfit to providing "secular people", as they call them, with a level of protection adequate to the requirements of a liberal constitutional state. In fact, their definition proves to be unduly narrow on two counts.

First, according to Sapir and Statman, as we have seen, the act or ceremony which secular people are forced to perform must be «of a clearly religious nature». Now, this condition can be read either in a narrow, or a broader, way. On the narrow reading, an act or ceremony is "of a clearly religious nature", if, and only if, it is prescribed by the ritual code of a given religion. Being forced into performing a Catholic marriage or attending a Catholic mass would be clear examples to the point. On the broader reading, contrariwise, an act or ceremony is "of a clearly religious nature" not only if it is required buy some religious code expressly supported by positive law, but also if it is required by religiously inspired positive laws: that it to say, by laws the content of which, under the pretence of neutrality, tacitly endorses the moral and/or ritual dictates of a given religion or set of religions. I suspect that Sapir and Statman do opt for the narrow reading of the "clearly religious nature" condition. In so doing, however, their notion of freedom from religion leaves secular people defenceless from the imposition of acts or ceremonies required by positive laws that tacitly endorse the moral and/or ritual dictates of a given religion or set of religions. From the standpoint of liberal religious freedom, the wider reading of the "clearly religious nature" condition is, accordingly, to be selected, so as to encompass all the forms of coercion to perform acts, or participating in ceremonies, required by religiously inspired laws. Provided one endorses this wider notion, it is still an open question whether negligible forms of coercion (like, e.g., not be served a certain food, or not be allowed to go through a certain road, at a certain time) should enjoy of constitutional protection.

Second, Sapir's and Statman's notion of freedom from religion takes into account only one kind of religiously dependent norms. As we have seen, these are the positive-duty prescriptions that require

Forms of Intolerance and Discrimination Based on Religion or Belief (November 25, 1981), the U.N. Resolution on Elimination of all Forms of Religious Intolerance (December 20, 1993), and, more recently, the U.N. Resolution on Elimination of all Forms of Religious Intolerance (March 16, 2009). In his account of "freedom from religion", Ermanno VITALE (2004, 99 ff.) emphasizes the state-duty side of it, seeing it as the duty of the state to make sure that each and every individual be able to exercise a genuine freedom of choice as to religious matters («remove the socio-cultural obstacles to each and every individual's free choice concerning his position in matter of religion»). Among the means to fulfil such duty, Vitale suggests the introduction in school curricula of the teaching of "history of religions and critique of religion". During the XIX century, the secular state characterized itself precisely by the adoption of a set of measures aimed at freeing individual from unwanted religious interferences with their lives. Such measures include, for instance, the establishment of public registers of births and deaths, public schools, civil marriage (as an alternative to religious marriage), public welfare (as an alternative to private charity), and public cemeteries.

[22] Contrariwise, «Coercion of other behaviours – such as refraining from serving non-kosher food at some party, or refraining from driving a car through a certain route – cannot be interpreted as a violation of freedom of conscience, and, in such circumstances, constitutional protection on the basis of freedom from religion cannot be claimed» (SAPIR, STATMAN 2005, 502).

[23] SAPIR, STATMAN 2005, 502, 506-508.

people «to perform an act, or to participate in a ceremony, of a clearly religious nature». However, religiously inspired laws may harm secular people also by means of *negative norms*. These can be of two different kinds: (a) negative imperative norms, which ascribe some negative duty of conduct, that is to say, the duty to abstain from performing certain acts; (b) inability-norms, which make people unable to validly performing certain acts. Positive legal orders are still filled, as we know, by religiously inspired laws that, for instance, make abortion and sodomy among consenting adults a crime, prevent any form of valid "same-sex marriage", prevent couples from proceeding to heterologous forms of insemination, prevent people from making valid "living wills", etc. If we adopt Sapir's and Statman's narrow conception of freedom from religion, we make secular people defenceless also in front of these, mostly harmful and grossly alienating, laws.

6. *Taking Stock*

Let me very briefly summarize.

1. In order to provide a solution to the protecting-what problem, I have identified in turn: an individualist-autonomous conception of conscience; a liberal conception of freedom of conscience; a broad notion of religious freedom and a corresponding right to religious freedom in a broad sense, which is characterized by a double dimension (internal and external) and includes the more specific rights to freedom of religion (the one usually conveyed by constitutional and international covenants clauses), freedom of non-religion, freedom from non-religion, and freedom from religion, the latter to be understood as establishing a broad protection against religiously inspired laws.

2. I have argued these notions and conceptions to be the most in tune with the spirit of a contemporary constitutional state, by means of a comparison (and contrast) with rival ones. These include, as we have seen, an individualist-heteronomous and an authoritarian-heteronomous conception of individual conscience, an authoritarian notion of freedom of conscience, and a narrow notion of freedom from religion, like the one set forth by Sapir and Statman.

It is now time to proceed to the second part of my paper, dealing with the protecting-how problem of constitutional engineering I mentioned at the outset.

II
Protecting-How

7. *The Problem of Effective Protection of Freedom of Conscience in a Religious Society: Strengthening the Democratic Process*

Political majorities in religious societies may affect the freedom of conscience – and religious freedom as freedom from religion – of individuals by means of the democratic process. This may happen through the enactment, by a democratic parliament, of religiously inspired laws of universal application.

One way of protecting freedom of conscience against this threat consists in strengthening the democratic procedures, so as to ensure that religiously inspired laws be enacted after a society-wide process, involving true and serious debates between the partisans of the different opinions at stake. For instance, a few years ago, a staunch defender of political secularism living in a clear instance of religious society, Carlo Augusto Viano, proposed a set of rules purporting to establish the conditions

for the legitimate access by religious groups, organizations, and institutions to the democratic process and its benefits. According to these rules:

1. Religious groups, organizations, and institutions enjoy of a full right to participate in the process of legislation by campaigns (including any act of propaganda and public advertisement) addressed to the public opinion.
2. The exercise of this right, however, ought to be subject to *limits* that concern the *places* and the *forms* of religious campaigns.
3. Religious campaigns in favour of some piece of legislation:

– are to be regarded as totally free, whenever they are performed inside of buildings devoted to worship, like churches and oratories;
– are to be regarded as totally prohibited whenever they claim to take place inside of public buildings, like public hospitals, public schools, barracks, police districts, etc.;
– are to be regarded as permitted, when they are performed inside of public spaces likely to be "visited" by all citizens (like, e.g., national television or radio programs), provided the religious points of view are exposed and argued for in the presence of people of different beliefs and allegiances, so as to insure an effective "cross examination" and "fair trial"[24].

To be sure, the strengthening of the democratic process may provide a limit to religiously inspired legislation; it is, accordingly, a valuable means to be adopted. By itself, however, it cannot provide an adequate protection to individuals' freedom of conscience. Indeed, it does not rule out the possibility that a religiously inspired statute be enacted, which may interfere with the freedom of conscience, and religious freedom, of some individuals. In a constitutional state informed to the principles of liberalism, however, individuals have rights, and there are things the state cannot do without violating their rights, even though violations may come from a democratically enacted law. These premises lead to a well-known conclusion: the democratic protection to individuals' freedom of conscience, though valuable, must be supplemented with further guarantees offered by the institutions of the constitutional state. It is to this issue that I now turn.

8. *The Problem of Effective Protection of Freedom of Conscience in a Religious Society: An Integrated Doctrine of Constitutional Protection*

In a constitutional state, the axiological basis for the guarantee of freedom of conscience and religious freedom, particularly as freedom from religion, is conveniently represented, in my opinion, by the following postulates.

I. The law encompasses a set of supreme constitutional principles, which may be either expressly stated by specific constitutional provisions, or implicit in constitutional discourse, forming the "implicit" or "unwritten constitution". Supreme constitutional principles, in force of being supreme, are immune from change: even in the form of due constitutional amendment. Supreme constitutional principles, insofar as they grant fundamental rights, delimit, for each rights-holder, an area of inviolability (*coto vedado*).

II. The liberal rights to freedom of conscience and religious freedom are granted and protected by supreme principles of a constitutional state.

[24] See VIANO 2007.

III. The liberal rights to freedom of conscience and religious freedom involve a general right to conscientious objection. The exercise of such right is subject only to whatever limits are derivable from a fair, liberal reading of the harm principle[25].

IV. The general right to conscientious objection comes in two varieties, represented by the negative and the positive right to conscientious objection[26].

V. Constitutional provisions establishing a general right to conscientious objection are to be considered, technically speaking, as normatively redundant. Nonetheless, whenever enacted, they perform a very important asseveration and symbolic function.

VI. Statutory provisions establishing a right to conscientious objection for specific generic cases (like, e.g., military service or medical care of abortion) ought not to be read as implying, in force of the *expressio unius* canon, the denial of a like right for different situations. Contrariwise, such provisions should be read as expressing not-exclusive specifications and implementations of the general constitutional right to conscientious objection.

VII. But for the limits imposed by a liberal reading of the harm principle (as established by the third postulate above), whenever a legal provision, be it of internal or international law, declares the right of conscientious objection to be subject to the "laws that regulate the exercise thereof" (or similar forms of words)[27], these limits should be read as authorizing the enactment of laws that introduce *facilitating restrictions*, i.e., any limit necessary to coordinate and make easier the exercise of the right to conscientious objection by people, while any law introducing *obliterating restrictions*, i.e., meant to unduly restrict or virtually suppress such a right, is to be deemed invalid.

Taking into account this set of postulates, an adequate constitutional protection of freedom of conscience and freedom from religion can be provided by conforming the practice of legislatures and tribunals to the twin doctrines of protected space ("private realm", "protected area"[28]; "*coto vedado*"[29]) and constitutional conscientious objection. The two doctrines – it must be emphasized – offer complementary forms of guarantee (on this point I will come back below, at 8.2.). In fact, they may be combined into an "integrated doctrine of protection" characterized by the following claims:

1. The legal space of constitutional states contains a set of matters upon which political majorities, even very broad and extended ones, can validly produce neither *imperative norms* (i.e., norms imposing positive or negative duties), nor *inability norms* (i.e., norms ascribing positions of incapacity, incompetence, no-power, validly to perform certain legal acts).

2. These matters, which concern individual morality and individual forms of life ("ethical matters", "ethically sensible issues"), compose the protected space, the sphere of protected privacy or individual inviolability, which is reserved to the moral autonomy (the moral power of self-determination in practical issues) of each and every individual.

3. These limits to the competence of the democratic legislature, if not expressly stated by any constitutional provision, must be considered to obtain by way of an implicit constitutional principle, being freedom of conscience a supreme constitutional principle.

4. Whenever, these principles notwithstanding, a democratic legislature decides to enact a law containing imperative and/or inability norms on matters belonging to the space of individual

[25] MILL 1859, 16 f., 83-103; FEINBERG 1984, 1-27; DWORKIN 2006, ch. 3.

[26] I have set forth this distinction in CHIASSONI 2009, CHIASSONI 2011; see also SAPORITI 2013; SAPORITI 2015. For a wholesale criticism of the notion of positive conscientious objection, see MASTROMARTINO 2015, 629-637. I will consider this criticism later (see below, nt. 38).

[27] See, e.g., art. 10 of the Charter of Fundamental Rights of the European Union, according to which: «The right of conscientious objection is recognized in accordance with the national laws governing the exercise of this right».

[28] GALEOTTI 2008.

[29] GARZÓN VALDÉS 2004.

inviolability, it must provide the law with a set of provisions regulating the right to conscientious objection.

5. Whenever a democratic legislature has enacted a law containing imperative or inability norms on matters belonging to the space of inviolability, without providing it with provisions concerning the exercise of the right to conscientious objection, the people who assume to have been harmed in their freedom of conscience or religious freedom are entitled to file a judicial complaint asking for the complete invalidation of the law, or, subordinately, for the recognition of their constitutional right to conscientious objection.

6. Where judicial review is committed to a constitutional court, the ordinary judge in front of whom the lawsuit has been brought ought to adopt temporary measures to protect people's freedom of conscience while the constitutional process is afoot.

7. In their decision-making, legislatures and judges, according of their respective functions and competences, ought to take into account the two varieties of the right to conscientious objection: the right to negative conscientious objection and the right to positive conscientious objection.

Two remarks are in order.

It may be worthwhile emphasizing that the granting of freedom of conscience and religious freedom does not "involve" a general right to conscientious objection as a matter of logical implication. Rather, freedom of conscience and religious freedom "involve" a general, judicially enforceable right to conscientious objection by way of practical requirement: as a means that is necessary, and likely to contribute, to their effective protection in front of abusive practices; as an instrumental right on which their being real, not purely paper, rights depends.

The distinction between a negative and a positive right to conscientious objection, which I have mentioned a few times so far, is by no means usual and is, in fact, controversial[30]. The remaining of my paper will be devoted to cast some light on it, and argue, turning down criticism, that it is a sensible and viable distinction in view of providing an adequate protection to freedom of conscience in a religious society.

Before doing so, however, two preliminary issues must be considered. The first issue, calling for a very short detour, is conceptual; it concerns the difference, which is often overlooked by scholars, between conscientious objection as a form of unlawful resistance to positive laws, on the one hand, and conscientious objection as a constitutional right, on the other. The second issue, which demands a more extensive treatment, is substantive. It concerns scepticism about the possibility for a constitutional state of granting a general right to conscientious objection. In the following two sections I will say a few words on both issues.

9. *"Conscientious Objection": Unlawful Resistance v. Constitutional Entitlement*

In this paper, I am interested in casting light on the *right* to conscientious objection as a fundamental, general, individual right, explicitly or implicitly granted by a constitutional state to each and every of its subjects. I am not concerned, by contrast, with conscientious objection as a pacific form of resistance to an established power, akin to civil disobedience. Indeed, the two notions must be carefully distinguished. According to the standard notion, conscientious objection as a form of resistance consists in violating an existing law for reasons of conscience. Isolated individuals, who wish to witness publicly their opposition in conscience to a certain piece of legislation, even though they may think the legal regime, as a whole, not to be immoral or unjust, violate that very piece of

[30] See, e.g., MASTROMARTINO 2015.

legislation, and are willing and ready to suffer the negative consequences of their conduct (like, e.g., being fined, or jailed, or fired). This is an evidently altogether different situation from the one I wish to focus on here, where individual exercise their right to conscientious objection to protect their freedom of conscience, and freedom from religion, against some constitutionally illegitimate law[31].

10. *A General Right to Conscientious Objection? Overcoming Sceptical Stings*

The idea of a general right to conscientious objection was, and apparently still is, anathema to Western contemporary constitutional culture. Indeed, the rights to conscientious objection so far granted to people – concerning military service, medical assistance to abortion, and, more recently, experimentation on animals – were in fact regarded as exceptions to a general regime where conscientious objection was considered as a form of unlawful, punishable, protest[32]. Furthermore, international law instruments seem to treat the right of conscientious objection, if any, as something specifically to be granted by established political authority[33].

I think, nonetheless, that the present age allows for – and indeed requires – a different view on the issue. As a matter of political and moral philosophy, a general right to conscientious objection must be recognized by any government seriously committed to the protection of individuals' freedom of conscience. The main arguments that can be branded against the idea of a general right to conscientious objection include the following five:

1. The international law argument;
2. The pointlessness argument from the invalidity of religiously inspired, non-neutral, laws;
3. The consequentialist argument from instability and anarchy;
4. The consequentialist argument from damage to general welfare and common good;
5. The procedural drawbacks argument[34].

No one of them however, as we shall see in a moment, seems to pose any serious challenge to the claim I am defending.

10.1. *The Argument from International Law*

The argument from international law turns upon international law instruments. These include, in particular, the International Covenant on Civil and Political Rights (art. 8, 3 *c*) *ii*)), the European Convention on Human Rights (art. 4, al. 3), and, more recently, art. 10 of the Charter of Fundamental Rights of the European Union, according to which: «The right of conscientious objection is recognized in accordance with the national laws governing the exercise of this right».

These instruments seem to establish, or strongly suggest, two mutually conspiring conclusions.

[31] On conscientious objection as an "act" or "practice" of disobedience, see, e.g., PASSERIN D'ENTRÈVES 1973; RAZ 1979, 263, 276 ff.; BOBBIO 1983, 317 f.; MACKLEM 2006, 69 ff.

[32] See, e.g., DWORKIN 1968; DWORKIN 1983.

[33] See, e.g., art. 8 al. 3 c) (ii) ICCPR, art. 4 ECHR, and, in a different tone, the already quoted art. 10 of the Charter of Fundamental Rights of the European Union, according to which: «The right of conscientious objection is recognized in accordance with the national laws governing the exercise of this right».

[34] One or more of these arguments have been used, e.g., in GALEOTTI 2008; LEITER 2013, 94 ff.; and RAZ 1979, 287 f.-288.

First, there is no way of entertaining the idea of a *general* right to conscientious objection. That is so, because only limited, *situation-specific*, rights to conscientious objection are available to individuals.

Second, there is no way of entertaining the idea of an *implicit* right to conscientious objection, waiting to be made explicit in relevant sets of cases. That is so, because only *explicit* rights to conscientious objection, depending for their existence upon *ad hoc* national laws that regulate their exercise, are available to individuals.

Now, if my account of the axiology of a constitutional state is correct, any reference to what international law instruments say simply is, in point of national law, totally irrelevant. International law instruments, the European Charter included, may in fact be used to *enhance* the set of fundamental rights people enjoy within national states. They cannot be used, however, either to *deprive* people of the fundamental rights they do already enjoy according to their own national legal system, or, anyhow, to *downsize* such rights. Constitutional states recognize a fundamental right to freedom of conscience and religious freedom. These rights, as we have seen, involve a general right to conscientious objection. Consequently, the citizens of constitutional states do have a general right to conscientious objection, whatever the station of international law is or may be.

10.2. *The Pointlessness Argument*

The pointlessness argument runs as follows. Once people's fundamental rights to freedom of conscience and religious freedom are being protected by a constitutional system making religiously inspired norms, which violate individuals' protected sphere, invalid, there is no point, no use, in granting people also a general right to conscientious objection.

The pointlessness argument makes appeal to constitutional parsimony. However, it is too easy to be (totally) good. Indeed, from a strategic and prudential point of view, above all when we have to do with religious societies, the invalidity guarantee, by itself, may not work. The symbolic force of a given religiously inspired law may be so strong to weaken, defer, or altogether deter judicial review. Accordingly, individuals must be granted a default protection-device for their freedom of conscience (and freedom from religion). Such a default device consists, precisely, in a general right to conscientious objection along the lines I am sketching here.

10.3. *The Consequentialist Arguments from Anarchy and Damage to General Welfare*

Perhaps, the strongest argument against the granting of a general right to conscientious objection is the consequentialist argument. According to it, the granting of such a right would have disastrous effects upon society: for, it is claimed, it will open the gates to political and legal instability, and would undermine the very existence of a peaceful government under the law, fatally leading to anarchy.

Now, upon reflexion, at least two different arguments are available to counter the consequentialist argument from anarchy.

First, in point of fact, the gloomy prediction the argument from anarchy turns upon is not reliable. That is so since, contrariwise, it is more likely that granting a general right to conscientious objection would bring about the strengthening of social bonds and social harmony, under a general law of individual freedom[35]. Indeed, each and every individual, under that regime, would appreciate an effort to treat everyone with equal concern and respect – always, of course, within the limits allowed by a liberal reading of the harm principle.

[35] For this reply, see e.g. WALZER 1970, 120 ff.

Second, in point of rational argumentation, the consequentialist argument from fear of anarchy – granting a general right to conscientious objection is tantamount to opening the gate to the dissolution of law and order – is, on the whole, ill conceived. In fact it assumes, without providing any reason for that, that *either* we grant an *absolute* right to conscientious objection, and so are doomed to anarchy and the dissolution of society, *or* we cannot grant any such right *at all*. In so claiming, however, the argument is too poor to be good. To begin with, no constitutional right – but, of course, for the rights concerning the protection of life and the ban on torture and inhuman or degrading treatments – is, as a matter of principle, absolute. Furthermore, a relative right to conscientious objection, subject to limitations inspired, as I said, by a liberal interpretation of the harm principle, is, all things considered viable. On this issue, I will come back in a moment, while dealing with a few cases for a viable exercise of the right to conscientious objection.

The same line of reasoning, from the *prima facie*, relative nature of the general right to conscientious objection also applies to counter the damage to general welfare or public good variety of the consequentialist argument. A general right to conscientious objection, it is submitted, would endanger general welfare, by allowing people to opt out of social solidarity and refusing to contribute to general well being. This would be the case however, if, and only if, the right to conscientious objection were, by its very nature, incapable of being applied by balancing conflicting rights and interests, or, alternatively, by specifying its scope of application in ways suitable to the maintenance of social welfare. Which is not.

10.4. *The Procedural Drawbacks Argument*

In one of the finest essays ever written on the subject, Joseph Raz identifies two procedural drawbacks (as they might be called), which would be concomitant to granting a general right to conscientious objection to be exercised by people by means of judicial action or exception. These are: (*a*) cheating, or the possibility of abuses by people not really motivated to object to a law by reasons of conscience, which is difficult, if not impossible, to discover; and (*b*) favouring «public intrusion into the private affairs of individuals», due to the need to investigate about the sincerity of people's claims of conscience. Dealing with the latter drawback, Raz makes clear that it does pop out «unless the right is applied on the basis of a simple declaration by the objector (a method making abuse all the more easy)» [36].

To be sure, these procedural costs are to be taken into account. Nonetheless, they do not seem capable of making up a conclusive argument against a general right to conscientious objection. In fact, four, not preposterous, replies are available. First, judicial decisions must establish the *potential* harmfulness of a law to individuals' freedom of conscience. This calls for hypothetical judgments: suppose somebody truly entertains such and such a secular or religious conviction of conscience and wishes to act accordingly. Would the law at stake violate her freedom of conscience? Such hypothetical judgments, however, make people's actual cheating legally irrelevant. Second, it seems necessary to distinguish between those cases where a simple declaration by the objector should be enough (this is so whenever paternalistic or perfectionist laws are at stake, like those preventing early abortion, same-sex intercourses, and same-sex marriages), on the one hand, and those cases where, on the contrary, a sincerity test must be applied, since allowing the conscientious objection would impose

[36] Raz (1979, 287) also considers a third drawback: encouragement of «self-doubt», «self-deception», and «in general undesirable forms of introspection». This is not, however, a procedural drawback, since it points, rather, to the psychological costs that a general right to conscientious objection may impose on individuals. Such costs, of course, would depend on each individual's sensibility and proneness to self-doubt etc. This procedural drawback is also considered by GALEOTTI 2008 and LEITER 2013.

costs on individual people and society at large (this is so whenever non-paternalistic, non-perfectionist general welfare laws are at stake), on the other hand. Third, the level of scrutiny about claimants' sincerity can in any case be arranged to be proportionate to the level of the likely costs of conscientious objection to society and individual people. Fourth, investigation, when necessary, may be arranged so as to be respectful for people's private life.

11. *Two Varieties of the Right to Conscientious Objection: Preliminary Remarks*

It is worthwhile distinguishing, as I said, two varieties of the right to conscientious objection. It is now time to provide some more detail about them, and show their viability in a constitutional state, against the opinion that considers only specific cases of a negative right to conscientious objection to be viable.

In general terms, the negative right to conscientious objection (or, what I take to be the same, the right to negative conscientious objection) may be characterized as follows: it is the *faculty* (permission, liberty), that is ascribed to an individual who is the addressee of a *positive legal duty* (the duty of doing something, providing some service, performing some act), *not to comply* with that duty, and *omit* the required conduct, for reasons of conscience.

By contrast, the right to positive conscientious objection may consist, according to the situation:

(a) in the *faculty* (permission, liberty), ascribed to an individual that is the addressee of a *negative legal duty* (the duty of not doing something, abstaining from performing certain conduct), *not to* comply with that duty, and *perform* the otherwise forbidden conduct, for reasons of conscience;

(b) in the *power* (capacity, authorization, ability), ascribed to an individual that is the addressee of an *inability norm* concerning a certain legal act (a norm making people incapable of validly performing that act), *validly to perform* that act, for reasons of conscience.

The right to negative conscientious objection has been recognized in many constitutional orders, not as a general right, to be sure, but only with regard to specific situations (military service, medical treatment of abortion, etc.) [37].

The right to positive conscientious objection, by contrast, has never been expressly considered. Perhaps, this is due to the idea, most of the time tacitly entertained, according to which there is a *radical asymmetry*, so to speak, between the negative and the positive right to conscientious objection, which would make whatever claim to read such a positive right into the very texture of the law of constitutional states appear utterly weird, unreasonable, and in any case unviable.

I think the idea of a radical asymmetry between the negative and the positive right to conscientious objection to be wrong[38]. Such a conclusion of mine, as we shall see in a moment, appears to be supported by an even superficial comparative analysis of a few exemplary cases.

[37] See e.g. WALZER 1970, 125 ff.; VIANO 2016.

[38] Dealing with the conscientious objection of the medical doctor who, wishing to abide by the instructions of the living will of a patient, does perform otherwise prohibited acts (like interrupting artificial hydration and alimentation), MASTROMARTINO (2015) argues that the «institute of [positive] conscientious objection» is not «convincing»: both for «theoretical reasons», and for «practical» consideration of «legal politics» (633-636). In such cases, positive conscientious objection would be «not admissible» from «a theoretical point of view» on two counts. (1) Unlike negative conscientious objection, which consists in omissions, and leaves space for other doctors to perform the action that some doctor does not want to perform (like, e.g., proceeding to an abortion), positive conscientious objection, which consists in positive actions, does not leave such a space and leads to an «irremediable violation of the statute», due to the death of the patient. (2) Positive conscientious objections reflects a difference between the axiology of the conscientious objector and the axiology of the legislature: the former considers certain goods as «more valuable or on a par with the good protected by the statute», while the latter regards the good protected by the statute as paramount

12. *The Right to Negative Conscientious Objection: Two Exemplary Cases*

According to the law of several countries, a gynaecologist working for a public hospital where gynaecologists are required to perform voluntary interruptions of pregnancy has the faculty not to perform such interventions for reasons of conscience – for instance, if her religious creed considers abortion a crime. Likewise, in many countries where military service is compulsory, a physically and mentally fit youngster may avoid conscription for reasons of conscience – for instance, if he is a sincere secular pacifist.

Why does most people (now) think these exemptions from duty to be justified? Apparently, the question commands an easy answer: because most people (now) think that, in both cases, if the laws

(634). However, according to Mastromartino, conscientious objection presupposes that the legislature recognizes «the legitimate existence and equal dignity of different axiological options» (634). Hence, positive conscientious objection is unreasonable, for it unreasonably presupposes that the legislature, while prohibiting a certain behaviour because it damages a certain legal good, ascribes equal value to the different goods that would be served by violating that prohibition. Furthermore, positive conscientious objection would be objectionable, from a practical point of view, on four counts. (1') It is liable to «political manoeuvres» («strumentalizzazione politica»), whereas the «proper aim» of conscientious objection is to «exhaust itself» in the «defence» of individuals' «moral integrity» (635). (2') By being regarded as actionable also in the absence of any authorizing statutory clause, it betrays the «spirit of conciliation» that «generally inspires its acknowledgement» (635). (3') It is a pointless tool of protection, provided people can resort to judicial review (636). And, finally, (4') it is out of joint with the standard cases of conscientious objection, for «the legislature contemplates conscientious objection when considers perfectly legitimate the duties it decides to impose, so that [the] introduction [of a conscientious objection clause] (the exception) always has the value of a confirmation, and not of a denegation, of the constitutional legitimacy of the rule» (636). Mastromartino's arguments against positive conscientious objection are not convincing. Let's begin with the theoretical arguments. As to (1), it must be noticed that it only considers the positive conscientious objection of the medical doctor in the living will case; it does not consider, however, the positive conscientious objection of the patient in the same cases. This is unfortunate. Indeed, the central issue, from the standpoint of the protection of people's fundamental rights, is whether the right to positive conscientious objection *of the patient* – allowing her to make a valid, binding, living will, notwithstanding the general incapacity established by statute – is justified. If, as I claim, it is justified, then the positive conscientious objection of the medical doctor, abiding by the living will of a certain patient, is also justified, in a derivative way. It is simply wrong to take the case of the medical doctor's positive conscientious objection *apart from* the case of the patient's positive conscientious objection, for it stands, or falls, with it. As to (2), it must be noticed that the whole argument is flawed by an unduly pro-legislature bias. It assumes that the right to conscientious objection depends on legislative evaluations. However, the purpose of establishing a general right to conscientious objections, in a negative and positive variety, is precisely to free conscientious objection from the legislature's grip. Accordingly, from the standpoint of the protection of people's fundamental rights, the central issue is not whether the axiology of the conscientious objectors does, or does not, suit to the legislature's own axiology. The central issue is, rather, whether the legislature's axiology is, or is not, compatible with the constitutional protection of freedom of conscience. Let's turn to the practical reasons Mastromartino provides against positive conscientious objection. As to (1'), it amounts to a purely petition of principle: positive conscientious objection is no good, because it is not like negative conscientious objection, which is the true and proper form of conscientious objection. Furthermore, it smells of old conceptualism and natural law thinking. As to (2'), it again assumes as paramount a legislative conception of conscientious objection (centred on a "Respect the legislature!" instruction), whereas what is at stake, when a general right to (positive or negative) conscientious objection is being waged, is precisely the overcoming of legislative state ways of thinking. As to (3'), I have replied while dealing with the pointlessness argument (see above, 10.2). Finally, as to (4'), it must be noticed that the argument, out of the usual pro-legislature attitude adopted by Mastromartino, totally overlooks that, from a constitutional standpoint, the presence of a statutory clause allowing conscientious objection is evidence that that very statute, *absent such a clause*, would be constitutionally illegitimate. For instance, the abortion statute, without the clause providing for the conscientious objection of anti-abortion medical doctors, would be constitutional illegitimate on that count. This remark also suggests that there is no radical asymmetry between negative and positive conscientious objection, as I am going to argue now in the text.

did not grant such an exemption, the laws would be constitutionally illegitimate, provided they would violate both the religious gynaecologist's, and the young secular pacifist's, freedom of conscience.

Let's assume, for the sake of argument, that both cases really are evident, paradigmatic instances of situations where the granting of a negative right to conscientious objection is justified, and indeed required, in order to protect the constitutional right to freedom of conscience of the people involved. Provided that is the case, it is worthwhile bringing to the fore the structural aspects they share, so as to have some ground for comparing those apparently clear cases of a justified negative right to conscientious objection with a few cases which, as it may be claimed, would be clear cases of a justified positive right to conscientious objection.

First, in both cases people have a *perfect legal duty* – a duty backed-up by coercive legal sanctions – to perform certain activities: one that descends, on the one hand, from an employment relationship, on the other hand, from citizenship.

Second, in both cases people find themselves in a predicament, represented by a *collision of duties*. By hypothesis, their *positive legal duty* to perform certain activities is at odds with their *negative moral duty* not to perform them.

Third, in both cases it is assumed that the prevalence of the legal duty over the corresponding, opposite, moral duty would amount to the *infringement of a fundamental constitutional right* of the people involved: namely, their right to freedom of conscience – and, in the gynaecologist's case, religious freedom (as freedom of religion and from non-religion).

Fourth, in both cases it is clear that the prevalence of the moral duty over the legal duty brings about *negative consequences*: both to society at large, and to other people individually considered. On the one hand, these exemptions have *costs*: costs to public hospitals (that have to pay someone else to do the job of the objectors), costs to the women who decide to have an abortion (in terms of delay, stress, being obliged to go searching for a different medical centre, etc.), costs to the military defence of the country (if pacifism becomes a widespread phenomenon, the state will have to invest more in professional soldiers or hire "contractors"), costs to "ordinary" conscripts (say, those who are neither pacifist, nor war-freaks), who may incur in a higher risk to be killed or maimed in war. On the other hand, these exemptions fly in the face of *legal principles*, even momentous ones: the principle of social solidarity, which grounds the duty of participating to the defence of the country; the principle of good administration; the right of women to health, that may be compromised by a widespread phenomenon of conscientious objection to abortion[39].

Fifth, and last, these exemptions mirror a *balancing* among the several legal rights and interests at stake, giving priority to freedom of conscience over different, competing, rights.

Keeping in mind these structural traits of the two clear cases of a justified negative right to conscientious objection, let's move to consider two cases where apparently, for coherence's sake, the granting of a positive right to conscientious objection, far from being weird or unviable, should be considered as being, likewise, justified.

13. *The Right to Positive Conscientious Objection: Two Exemplary Cases*

I will now consider two cases where a positive right to conscientious objection is at stake. The first case, which is modelled after a real one, involves a negative imperative legal norm: it is the celebrated

[39] This last point cast a dubious light on the legitimacy of granting an unconditioned right to conscientious objection to gynaecologists, from the standpoint of a liberal interpretation of the harm principle. Here, I will not pursue this point further.

"Kirpan case" decided by the Canadian Supreme Court (*Multani v. Commission Scolaire Marguerite-Bourgeois*) and commented, negatively, by Brian Leiter, as we shall see in a moment[40]. The second case is an imaginary one, involving an inability legal norm; it concerns the discipline of "living wills" (or biological wills) in the imaginary constitutional state of Freedonia – a merry, jolly, island in the middle of an ancient sea.

13.1. *Bringing a Kirpan to School*

A school commission in a Canadian city has enacted a regulation according to which students are not allowed to carry weapons into the school building. A boy of Sikh religious allegiance assumes to have the duty to carry with him a ritual sword (*kirpan*) at any time. Does he have a good case to be allowed to carry the *kirpan* into the school, for reasons of conscience (and religious freedom)?

The Canadian Supreme Court, in the *Multani* case, said yes. Brian Leiter, in a book of some years ago, says no. Both sides argue in term of granting "exemptions" or "exceptions".

I think the issue would be better disposed of by asking whether, in the case at hand and in like cases, the plaintiff is justified in claiming a right to positive conscientious objection. To argue for this suggestion of mine, I will consider briefly the arguments Leiter provides for maintaining that, in cases like the one decided by the Canadian Court, every claim to exemption should be rejected: be it grounded on religious rules, as it is the case with the Sikh boy, or on some social or family tradition, as it is the case with the "rural boy" Leiter imagines – a boy who, according to the rules of his ancestors, should always carry with him the knife of his great-grandfather, as all his forerunners have always done during their lives. Apparently, Leiter grounds his conclusion on two arguments.

First, in evaluating claims to conscientious objection (as I would say), courts ought not to defer to subjective interpretations of religious – or, in any case, traditional – rules of behaviour, but should rather consider objective interpretive practice and understandings[41]. Leiter makes this claim, presumably, in order to prevent courts from becoming the dupes of individuals' whim or, even worse, of individuals' cheating. In the *Multani* case, however, the Court relied on the claimant boy's own strict interpretation about *kirpan* wearing, overlooking that such an interpretation was by no means the only or dominant one in the relevant religious community.

Second, in evaluating claims to conscientious objection (as I would say), courts ought to avoid conceding privileges that fly in the face of the equality side of the right to freedom of conscience. For instance, they should not grant an exemption in favour of the Sikh boy if they are not also willing to grant a like exemption to the rural boy. But, accordingly to Leiter, that is precisely what was likely to happen, had the rural boy applied to the same (or any) court.

Leiter's arguments are thoughtful and provoking. Furthermore, they raise two capital problems: the problem of the proper way of coping with subjective claims of conscience and the problem of avoiding undue discriminations among similar claims of conscience.

I think, nonetheless, that the first of Leiter's arguments should be rejected, while the second should play a role only after a careful evaluation of specific conscientious objection claims, from the standpoint of the harm principle, has been performed.

As to the first of Leiter's argument, one may reply that, contrariwise to what Leiter claims, a moral case can be made in favour of a subjective conception of liberty of conscience, which is not, at least *prima facie*, preposterous. In their book *Secularism and Freedom of Conscience*, Maclure and Taylor

[40] By the way, laws making sex between consenting, same-sex, adults a crime provide an even clearer case where a positive right to conscientious objection appears to be fully justified.

[41] LEITER 2013, 66.

argue for such a view, in the very name of individual autonomy, under the requirement of sincerity[42]. We can reinforce that conclusion by the following remark. Freedom of conscience, we may say, is not tantamount to the freedom to follow the moral or religious rules approved by the relevant community. If that were the case, paradoxically, freedom of conscience would become freedom for authoritarian, orthodox consciences only. As a consequence, the only way to protect freedom of conscience, which is compatible with the genuine protection of each individual's moral autonomy (with his "ethical independence", in Dworkin's terms)[43], consists in adopting a liberal conception of conscience. This, in turn, requires adopting a subjective conception of the rights and duties one has "according to one's conscience". Obviously, all such subjective conceptions must pass some sincerity test: in principle, courts – and society – are not to be fooled by impostors[44].

As to the second of Leiter's arguments, one may reply that, from a liberal standpoint, the case of the Sikh boy and the case of the rural boy must be treated assuming, in both cases, the existence of a *prima facie* right to positive conscientious objection, as a *relative individual right* limited by a liberal reading of the harm principle. Accordingly, before considering the discrimination side of the issue, courts should evaluate the – actual or likely – harmfulness to third parties of the behaviour claimed as a matter of freedom of conscience. As a matter of course, precedents may reduce the scope for fresh judgments. On this token, courts, in the cases of the Sikh and the rural boy alike, ought to evaluate whether bringing a weapon to school does constitute, or not, in the situation of the case, a danger to third parties' life and limbs so relevant as to justify the harm principle limitation[45].

13.2. *Living Wills in Freedonia*

The political majority of Freedonia has approved a law that makes individuals incapable of making valid living wills: that is to say, wills containing binding instructions to doctors and medical personnel at large, about which end-of-life treatments they are allowed to apply to the testator's body, once he has lost conscience.

In the light of the cases of the religious gynaecologist and the young secular pacifist, where a negative right to conscientious objection has been granted as a matter of course, would individuals, aware about the integrated doctrine of reserved space and constitutional conscientious objection, also be justified in claiming a positive right to conscientious objection against the Freedonian law on living wills?

I think the answer must be a clear yes. To argue for this conclusion I will consider, in turn, the structural traits of the present situation from the standpoints, respectively, of a legislator who voted for the law (I'll call him: the ethical legislator), and of a jurist defending the prerogatives of a constitutional state.

[42] MACLURE, TAYLOR 2011, 100-104.

[43] DWORKIN 2013.

[44] The sincerity test gives rise to problems of procedural costs and uncertainties. I think the sincerity scrutiny should be strict the more the exemption that is being required imposes burdens upon third parties. Contrariwise, it should be relaxed the more it is self-regarding. On this point, see also above § 10.4.

[45] They may adopt, to do the proper balancing, an Alexy-like formula of the following sort:
$CIV^{P1/P2/C} = AIV^{P1} \times EIC^{P2>P1} / AIV^{P2} \times EIC^{P1>P2}$, where $CIV^{P1/P2/C}$ stands for the Comparative Institutional Value of Principle P1 in relation to principle P2 as to the individual case C; AIV^{P1} and AIV^{P2} stand for the Abstract Institutional Value of Principle P1 and Principle P2; $EIC^{P2>P1}$ and $EIC^{P1>P2}$ stand for the Expected Institutional Cost to Principle P1 of the prevalence of Principle P2 and the Expected Institutional Cost to Principle P2 of the prevalence of Principle P1, respectively.

The Case of the Ethical Legislator

From the vantage point of the ethical legislator, the main features of the case run as follows.

1. The enacted law on living will contains a disability provision, establishing people's incapacitation to make living wills binding on doctors and medical personnel at large.

2. To be sure, that law gives rise to a normative conflict between the legal norm of disability, on the one hand, and the opposite, ability moral norm, on the other, which happens to be part of many people's conscience (-code).

3. The legal norm of disability finds its ultimate justification in the constitutional right to life, which is a fundamental individual right. Indeed, it has been enacted, as the ethical legislator makes clear, "to defend life" and to "build up a barrier against euthanasia".

4. The moral norm of competence, contrariwise, finds its ultimate justification, if any, in the constitutional right to freedom of conscience and religious freedom (as freedom from religion), which is also a fundamental individual right.

5. As a consequence, the enacted law about living wills, so far as the conscience of some people is concerned, gives rise to a collision between two fundamental principles (the principle of sanctity of life and the principle of freedom of conscience) and their corresponding fundamental rights.

6. The prevalence of the right to freedom of conscience over the right to life would bring about unbearable costs: the right to life being much more valuable than the right to freedom of conscience. Accordingly, the prevalence of the right to life over liberty of conscience cannot have but less relevant, bearable, costs.

7. A proper balancing of the two rights at stake must, accordingly, give priority to the right to life over liberty of conscience, and, by the same token, to the disability norm over the ability norm.

The Case of the Constitutional Jurist

From the vantage point of a jurist keen on defending the prerogatives of Freedonia as a genuine constitutional state, the structural features of the case are to be recounted differently.

1. To be sure, the enacted law on living will, where it contains the disability provision establishing people's incapacitation to make living wills binding on doctors and medical personnel at large, gives rise to a normative conflict between a legal norm of disability, on the one hand, and the opposite, ability moral norm, on the other, which happens to be part of many people's conscience (-code).

2. Supporters of the disability norm claim it to be justified by the right to life: "to defend life" and "build up a barrier against euthanasia", as they like to say.

3. Unfortunately, they ground their argument upon an understanding of the right to life that is biased by deference to a peculiar religious vision of such a right: an authoritarian, paternalist, anti-individualist, orthodox vision according to which life is a fundamental good (being the gift of a supernatural being), and must be protected at all costs, even at the cost of overriding the will, and moral autonomy, of individuals.

4. The Freedonian law on living wills is, accordingly, a religiously inspired law that violates people's reserved space of privacy and freedom of conscience in the name of a peculiar religious conception of the right to life.

5. As a consequence, individual have a good case of conscience for asking to judges either to invalidate such a law altogether, due to its clear unconstitutionality, or for saving the law, but reading into it a right to positive conscientious objection clause, making them capable, for reasons of conscience, to shape binding living wills.

6. People who think that granting such a positive right to conscientious objection would be absurd, unreasonable or even unlawful, would do better considering the following points:

– first, in past years Freedonian law has granted a negative right to conscientious objection to religious gynaecologists and young secular pacifists;

– second, such negative rights have been granted although it was clear that they had negative consequences, both to society and to individuals, in terms of costs and the impairment of rights;

– third, granting a right to positive conscientious objection against the disability norm on living wills, by contrast, would not have any such negative consequences: neither in terms of social and individual costs, nor in terms of the impairment of rights; there is indeed no violation at all of the right to life in the only understanding compatible with a liberal, constitutional state, but only the violation of right to life as understood by the ministers and believers of a specific religious confession;

– fourth, provided Freedonian legislators have granted to people rights of negative conscientious objection in the cases of abortion and military service, even though those rights had negative consequences in terms of costs and the impairment of individual rights, they should *a fortiori* grant to people a right of positive conscientious objection in the living will case, since such granting does not have any negative consequences, but for the moral feelings of those religious people who uphold the law. The moral feelings of believers in a religion, however, are not entitled to protection under a liberal constitutional state.

14. *Final Remarks*

1. Freedom of conscience and religious freedom, in the liberal reading I have outlined here, represent basic goods – among others, to be sure – to any morally decent society.

2. Their protection requires a constant effort in devising adequate institutional machineries.

3. The right to conscientious objection has been, so far, a Cinderella of constitutional engineering, due, basically, to the sceptical stings I considered above.

4. It is time to get rid of such preposterous drawbacks, in the name of a comprehensive, unprejudiced evaluation, for relevant classes of cases, of the forms and limits of a general right to conscientious objection, in the negative and positive variety alike.

References

ALSTON W. 1964. *Philosophy of Language*, Englewood Cliffs (N.J.), Prentice Hall, 1964.

ATIENZA M. 2006. *Las caricaturas de Mahoma y la libertad de expression*, in GARCÍA JARAMILLO L. (ed.), *Nuevas perspectivas sobre la relación/tensión entre la democracia y el constitucionalismo*, Lima, Grijley, 2014, 133 ff.

BARONCELLI F. 1993. *Tolleranza. Il fascino perverso di una definizione*, in COMANDUCCI P., GUASTINI R. (eds.), *Analisi e diritto 1993. Ricerche di giurisprudenza analitica*, Torino, Giappichelli, 1993, 229 ff.

BOBBIO N. 1983. *Disobbedienza civile*, in BOBBIO N., MATTEUCCI N., PASQUINO G. (eds.), *Dizionario di politica*, Milano, TEA, 1990, 316 ff.

CECCANTI S. 2006. *Laicità e istituzioni democratiche*, in BONIOLO G. (ed.), *Laicità. Una geografia delle nostre radici*, Torino, Einaudi, 2006.

CHIASSONI P. 2009. *Libertà e obiezione di coscienza nello stato costituzionale*, in «Diritto & questioni pubbliche», 9, 2009, 65 ff.

CHIASSONI P. 2011. *Obiezione di coscienza: negativa e positiva*, in «Notizie di Politeia», 101, 2011, 36 ff.

COHEN C. 1968. *Conscientious Objection*, in «Ethics», 78, 1968, 269 ff.

DENT N. 1998. *Conscience*, in CRAIG E. (ed.), *Routledge Encyclopedia of Philosophy*, London-New York, Routledge, 1998, 579 ff.

DWORKIN R. 2006. *Is Democracy Possible Here? Principles for a New Political Debate*, Princeton-Oxford, Princeton University Press, 2006.

DWORKIN R. 2013. *Religion Without God*, Cambridge (Mass.)-London, Harvard University Press, 2013.

FEINBERG J. 1984. *The Moral Limits of the Criminal Law. I. Harm to Others*, New York-Oxford, Oxford University Press, 1984.

GALEOTTI E. 2008. *The Place of Conscientious Objection in a Liberal Democracy*, 2008. Avalaible from: http://www.sifp.it/articoli-libri-e-interviste-articles-books-and-interviews/the-place-of-conscientious-objection-in-liberal-1.

GARZÓN VALDÉS E. 2004. *Para ir terminando*, in ATIENZA M., *El derecho como argumentación*, Cátedra Ernesto Garzón Valdés 2003, Fontamara, Distribuciones Fontamara, 2004.

GIANFORMAGGIO L. 1993. *Il male da tollerare, il bene del tollerare, l'intollerabile*, in COMANDUCCI P., GUASTINI R. (eds.), *Analisi e diritto 1993. Ricerche di giurisprudenza analitica*, Torino, Giappichelli, 1993, 203 ff.

HIMMA K.E. 2014. *Compensating for a Legally Imposed Disability: Is There a Special Fundamental Right to Religious Freedom?*, Paper presented at the International Conference "Fundamental Rights – Justification and Interpretation", Faculty of Law, University of Belgrade, 24-25 October 2014.

LEITER B. 2013. *Why Tolerate Religion?*, Princeton-Oxford, Princeton University Press, 2013.

MACKLEM T. 2006. *Independence of Mind*, Oxford, Oxford University Press, 2006.

MACLURE J., TAYLOR C. 2011. *Secularism and Freedom of Conscience*, Cambridge (Mass.)-London, Harvard University Press, 2011.

MASTROMARTINO F. 2015. *Contro l'obiezione di coscienza positiva*, in «Ragion Pratica», 45, 2015, 629 ff.

MILL J.S. 1859. *On Liberty*, in MILL J.S., *On Liberty and Other Essays*, Oxford, Oxford University Press, 1991.

NUSSBAUM M. 2008. *Liberty of Conscience. In Defense of America's Tradition of Religious Equality*, New York, Basic Books, 2008.

PAINE T. 1791. *The Rights of Man: Being an Answer to Mr Burke's Attack on the French Revolution*, in ID., *Rights of Man, Common Sense and Other Political Writings*, Oxford-New York, Oxford University Press, 1995.

PASSERIN D'ENTRÈVES A. 1970-71. *Legittimità e resistenza*, in «Studi Sassaresi», III, *Autonomia e diritto di resistenza*, 1970-71 (but: 1973).

PASSERIN D'ENTRÈVES A. 1973. *Obbligo politico e libertà di coscienza*, in «Rivista internazionale di filosofia del diritto», IV serie, 50, 1973.

POST R. 2007. *Religion and Freedom of Speech: Portraits of Muhammad*, in «Constellations», 14, 2007, 72 ff.

RAZ J. 1979. *The Authority of Law. Essays on Law and Morality*, Oxford, Clarendon Press, 1979.

RUFFINI F. 1901. *La libertà religiosa. Storia dell'idea*, Introduzione di A.C. Jemolo, Milano, Feltrinelli, 1967.

RUSCONI G.E. 2004. *Come se Dio non ci fosse. I laici, i cattolici e la democrazia*, Torino, Einaudi, 2004.

SAPIR G., STATMAN D. 2005. *Why Freedom of Religion does not Include Freedom from Religion*, in «Law and Philosophy», 24, 2005, 467 ff.

SAPORITI M. 2013. *La coscienza disubbidiente. Ragioni, tutele e limiti dell'obiezione di coscienza*, Milano, Giuffrè, 2013.

SAPORITI M. 2015. *For a General Legal Theory of Conscientious Objection*, in «Ratio Juris», 3, 2015, 416 ff.

VIANO C.A. 2007. *La libertà dalla religione*. Available from: http://www.segnalo.it/SAGG-ART/CULT-RELIG/2006/viano%20libert%C3%A0%20dalla%20religione.doc.

VIANO C.A. 2011. *La coscienza: voci e mistificazioni*, in «Notizie di Politeia», XXVII, 101, 2011, 11 ff.

VIANO C.A. 2016. *Tra coscienza infelice e democrazia: il caso dell'obiezione di coscienza*. Available from: http://ilrasoiodioccam-micromega.blogautore.espresso.repubblica.it/category/articoli/.

VITALE E. 2004. *Libertà di religione. E dalla religione?*, in BOVERO M. (ed.), *Quale libertà. Dizionario minimo contro i falsi liberali*, Roma-Bari, Laterza, 2004, 91 ff.

WALZER M. 1970. *Coscientious Objection*, in ID. *Obligations. Essays on Disobedience, War, and Citizenship*, Cambridge (Mass.)-London, Harvard University Press, 1970.