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The Hollow Promise of Freedom of Conscience

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ABSTRACT

Two hundred years ago, Thomas Jefferson asserted that no law "ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority." Since then, freedom of conscience has continued to be heralded as a fundamental principle of American society. Indeed, many current policy debates—most notably in the medical and military contexts—are predicated on the theory that claims of conscience are worthy of legal respect. This Article, which offers a comprehensive account of the contemporary treatment of conscience, challenges established assumptions and seeks to reframe the debate about the normative value of conscience in American society.

This Article first clarifies contemporary understandings of conscience by systematically analyzing its treatment in positive law. It looks beyond the traditional medical, military, and religious contexts, giving a descriptive account of law's treatment of conscience across various substantive realms, including tax evasion, civil disobedience, discrimination, and even violent terrorism. It demonstrates that legal accommodations are typically granted on an ad hoc basis, without a guiding doctrinal principle. If there is a consistent and coherent justification for treating cases differently, our legal system has thus far failed to provide it.

This Article concludes that, in order for American law to reflect the kind of robust, autonomy-based respect for conscience to which every pluralistic society aspires, we must agree on a content-neutral guiding principle for negotiating future claims for legal accommodation. The alternative, the Article posits, is to concede that American society has aban-

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doned the fundamental purpose of conscientious accommodation—namely, protecting the individual from oppressive majoritarian understandings of morality.

TABLE OF CONTENTS

INTRODUCTION

Freedom of conscience has long been touted as a fundamental principle of a pluralistic society. Two hundred years ago, Thomas Jefferson asserted that no law "ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."[1] Since that time, courts and legislatures have continued to hold conscience in high regard, most notably in justifying military exemptions for conscientious objectors, granting legal accommodations for physicians who refuse to perform controversial medical procedures, and addressing the sub-category of conscience claims that is expressly based on religious belief and analyzed under the First Amendment. Indeed, contemporary philosopher John Rawls has described liberty of conscience as "one of the fixed points of our considered judgments of justice,"[2] and many current policy debates are predicated on the theory that claims of conscience are worthy of legal respect.

Although the principle of freedom of conscience seems to do significant theoretical work in these debates, we know very little about how American law treats claims of conscience as a whole.[3] Some of the most compelling contemporary work in this area has focused on discrete categories of conscientious objection, such as claims by medical providers,[4] military personnel,[5] and the like.[6] In bringing these threads together,[7]

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1 Thomas Jefferson, To the Society of the Methodist Episcopal Church at New London, Connecticut (Feb. 4, 1809), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 147 (H.A. Washington ed., 1854).

2 JOHN RAWLS, A THEORY OF JUSTICE 206 (1971).

3 One reason for this may be that contemporary legal discussions of conscience tend to be subsumed by religion and constitutionalism. See, for example, the recent San Diego Law Review Symposium titled *Freedom of Conscience: Stranger in a Secular Land*, which focused in large part on the connection between respect for religion and respect for conscience. *See* Larry Alexander & Steven D. Smith, *Introduction to the 2010 Editors' Symposium: Freedom of Conscience: Stranger in a Secular Land*, 47 SAN DIEGO L. REV. 899 (2010).

4 *See, e.g.*, Kathleen M. Boozang, *Developing Public Policy for Sectarian Providers: Accommodating Religious Beliefs and Obtaining Access to Care*, 24 J.L. MED. & ETHICS 90 (1996); Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, 17 STAN. L. & POL'Y REV. 83 (2006); Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41 (2008).

5 *See, e.g.*, Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31; Joseph B. Mackey, *Reclaiming the In-Service Conscientious Objection Program: Proposals for Creating a Meaningful Limitation to the Claim of Conscientious Objection*, 2008 ARMY LAW. 31.

6 Other discrete examples include conscience in personal associations, *see generally* ROBERT K. VISCHER, *Voluntary Associations*, *in* CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 125 (2009); conscience in legal practice, *see generally* David Luban, *The Conscience of a Prosecutor*, 45 VAL. U. L. REV. 1 (2010); ROBERT K. VISCHER, *The Legal Profession*, *in* CONSCIENCE AND THE COMMON GOOD *supra*, at 269; and conscience and religion, *see generally* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008); Kent Greenawalt, *Moral*

this Article seeks to clarify the contemporary legal understanding of conscience and reframe the debate about the normative value of conscience in American society. As the scope of possible claims expands beyond the traditional claims law has already grappled with, and as more groups seek to negotiate legal accommodation for the exercise of their conscientious beliefs, this Article will help to guide the conversation about these issues, encouraging lawmakers to take a more principled approach to conscience accommodations.

At its core, this project is primarily a descriptive one. It offers a comprehensive account of the contemporary treatment of conscience in American law, demonstrating that the principle of freedom of conscience finds little consistent support in positive law. That is, if there is a coherent and principled justification for treating some claims of conscience differently than others, our legal system has thus far failed to provide it. While recognizing that a universal approach to conscientious accommodation may be impossible, and respect for conscience need not be unqualified or unconstrained, the premise of this Article is that the nature of these qualifications and constraints gives us valuable information about society's attitudes towards conscience. This descriptive element is necessary because it is impossible to offer recommendations for negotiating future claims of conscience without first recognizing where we currently stand.

The secondary aim of this Article, then, is to begin a discussion about our normative aspirations for law's treatment of conscience. The Article offers a tentative conclusion in this regard—namely, that the true purpose of providing legal protection for claims of conscience is to respect personal beliefs regardless of their content, and protect them from oppressive majoritarian values. Accordingly, as a pluralistic society, we ought to adopt a principled and content-neutral approach for accommodating claims of conscience. That is, future requests for conscientious protection—such as those by public and private service providers who oppose gay marriage, or those by physicians and scientists with moral objections to new technology such as stem cell research and synthetic biology—ought to be evaluated on a content-neutral basis. Alternatively, we must abandon the promise of freedom of conscience as a hollow one, and recognize that our respect for conscientious belief is based on nothing more principled than political judgments about the merits of claimants' conscientious beliefs and actions.

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and Religious Convictions as Categories for Special Treatment: The Exemption Strategy, 48 WM. & MARY L. REV. 1605 (2007); Steven D. Smith, *What Does Religion Have t o Do with Freedom of Conscience?*, 76 U. COLO. L. REV. 911 (2005).

7 I am indebted to scholars such as Kent Greenawalt, Brian Leiter, Martha Nussbaum, Michael Perry, Steven Smith, Rob Vischer, Robin Fretwell Wilson, and others whose work has inspired me to approach the question of conscience from a similarly broad perspective.

The Article proceeds in four steps. Part I provides a preliminary definition of conscience. It briefly describes the ways in which law might provide accommodations for claims of conscience, and outlines three common arguments for doing so: the pragmatic argument, which views respect for conscience as a necessary feature of a functioning society; the intrinsic argument, which views respect for conscience as a means of furthering personal autonomy and self-determination; and, finally, the objective argument, which views conscience as a reflection of moral truth.

Part II of the Article contends that legal scholarship as a whole has taken too narrow a view of freedom of conscience, generally limiting itself to discussion of religious, military, and medical contexts. This Article argues that a complete positive theory of the law of conscience must extend beyond these contexts to include many cases of civil disobedience, violent protest, tax avoidance, overt discrimination, and medical neglect, where claimants frequently take action or seek legal accommodation on the basis of their conscientious beliefs. More importantly, it demonstrates that in these non-traditional cases, courts and legislatures generally decline to apply the principle of respect for conscience that purportedly motivates established legal protections in the military and medical realms. In other words, while we use the language of conscience to define a theory of legal accommodation, that theory is inconsistently applied.

Part III critiques potential justifications that might be offered for treating some claims of conscience more favorably than others—contrasting, for example, conscientious opposition to war by military personnel, which is legally protected, with opposition by taxpayers, which is not. It demonstrates that none of the most common arguments for differential treatment—distinguishing between action and inaction, considering the degree of harm, evaluating causal proximity, distinguishing between an actor's personal and relational motivations, favoring religious over secular claims, or relying on an explicit balancing test—provide a satisfactory account of how positive law actually treats claims of conscience.

In light of the above conclusion, Part IV defends the argument that true respect for conscience demands a more consistent mechanism for legal accommodation, at least as a prima facie matter. It emphasizes the importance of establishing a coherent and repeatable test for conscientious accommodation, even if that test (like the balancing approach often used in constitutional law) is open-ended and results in uncertainty at the margins.

The Article concludes by offering two possible interpretations of the law of conscience. First, perhaps the apparently incoherent treatment of conscientious accommodation is in fact consistent with a bal-

ancing of interests, despite the fact that few lawmakers support their decisions by explicit reference to a balancing test. Alternatively, perhaps our ad hoc treatment of conscience is dependent on how closely the content of the claim aligns with generally accepted and politically palatable moral principles. While either may offer a satisfactory descriptive account of law's treatment of conscience, the Article concludes that there is a clear normative preference. The kind of robust respect for conscience to which every liberal society aspires, the Article argues, demands the application of content-neutral principles that recognize the inherent value of conscience when resolving negotiations for conscientious accommodation. One promising mechanism for resolving such disputes, the Article suggests, may be the kind of balancing analysis often used in constitutional law. This approach, of course, may be subject to criticism, including concern that it risks being used as a proxy for judgments based on majoritarian values. However, the alternative to establishing a content-neutral guiding principle is to abandon the promise of freedom of conscience and concede that American society considers exercises of personal conscience to be valuable only to the extent they align with widely accepted moral principles. This alternative, the Article argues, would undermine the foundational purpose of legal accommodation of conscientious belief, which is to protect individuals from oppressive majoritarian understandings of morality.

I. WHAT IS CONSCIENCE AND WHY DO WE VALUE IT?

The first step in understanding law's approach to claims of conscience is a better appreciation of the nature of conscience itself. To that end, Part I sets forth a brief definition of conscience and explains three arguments that are commonly used to justify legal accommodation for claims of conscience.

A. *What Is Conscience?*

It may be impossible to establish a singular and comprehensive definition of conscience.[8] That said, the idea of conscience is not a diffi-

[8] *See, e.g.*, Richard W. Garnett, *Standing, Spending, and Separation: How the No-Establishment Rule Does (and Does Not) Protect Conscience*, 54 VILL. L. REV. 655, 656 (2009) ("We are not entirely sure what the liberty of conscience is, means, or requires, but, nevertheless, it is . . . 'central . . . to the modern self-understanding generally.'"); Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325, 326 (2005) ("When we reverently invoke 'conscience,' 'freedom of conscience,' or the 'sanctity of conscience,' . . . do we

cult one to grasp—even the youngest child has some understanding of right and wrong, and of the nagging feeling of shame when she has made the wrong decision.[9] Very simply stated, a person's conscience is that person's judgment of the moral quality of his or her own conduct.[10]

Immanuel Kant describes conscience as an "internal tribunal" in which the judge and the accused are one and the same person.[11] "[C]onscience," he writes, "is the inward judge of all free actions."[12] When a person is choosing between two courses of action, conscience is the insistent voice inside her that tells her, "[t]his is right, and that is wrong."[13] If she chooses a course of action that does not conform with her moral ideals, conscience is the source of the resulting feelings of regret, shame, and guilt.[14]

When we describe a person as having acted on the grounds of conscience, we typically mean that she "acted on the basis of a sincere conviction about what is morally required or forbidden."[15] Thus, claims of conscience can be understood as a subset of moral claims generally[16]—one that connotes a strong link with individual identity and a preference for suffering significant burdens rather than acting against conscientious belief.[17] In an effort to better identify the various types of legally-relevant conduct that might be grounded in conscientious belief, Part I.A highlights three characteristics of conscience that are particularly important.

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have any idea what we are talking about? Or are we just exploiting a venerable theme for rhetorical purposes without any clear sense of what 'conscience' is or why it matters?").

9 *See* Grazyna Kochanska et al., *Guilt in Young Children: Development, Determinants, and Relations with a Broader System of Standards*, 73 CHILD DEV. 461 (2002).

10 *See generally* 42 IMMANUEL KANT, *The Critique of Pure Reason; The Critique of Practical Reason and Other Ethical Treatises; The Critique of Judgment*, *in* GREAT BOOKS OF THE WESTERN WORLD (Robert Maynard Hutchins ed., Encyclopedia Britannica 1952) ("Every man has a conscience, and finds himself observed by an inward judge which threatens and keeps him in awe (reverence combined with fear); and this power which watches over the laws within him is not something which he himself (arbitrarily) *makes*, but it is incorporated in his being."); Thomas E. Hill, Jr., *Four Conceptions of Conscience*, *in* INTEGRITY AND CONSCIENCE 13, 14 (Ian Shapiro & Robert Adams eds., 1998) (describing conscience as the "capacity . . . to sense or immediately discern that what he or she has done, is doing, or is about to do (or not do) is wrong, bad, and worthy of disapproval").

11 *See* KANT, *supra* note 10, at 379 (emphasis omitted).

12 *Id.*

13 *See* Smith, *supra* note 6, at 922 (describing conscience as "a divine 'voice' speaking within the soul of the individual").

14 *See* KANT, *supra* note 10, at 379; Hill, *supra* note 10 (noting that, when conscience is disregarded, it results in "mental discomfort and lowered self-esteem").

15 Smith, *supra* note 8, at 328; *see also* KANT, *supra* note 10, at 379; HENRY DAVID THOREAU, ON THE DUTY OF CIVIL DISOBEDIENCE 9 (Wilder Publ'ns 2008) (1849) ("The only obligation which I have a right to assume is to do at any time what I think right.").

16 *See* Kent Greenawalt, *Refusals of Conscience: What Are They and When Should They Be Accommodated?*, 9 AVE MARIA L. REV. 47, 49 (2010).

17 *See id.* at 49–50; Adam J. Kolber, *Alternative Burdens on Freedom of Conscience*, 47 SAN DIEGO L. REV. 919 (2010).

1. Transcending Reason, Binding Action

One of the most mystifying characteristics of conscience is that it is not necessarily backed by reason or logic.[18] One cannot reason one's way to conscience, because conscience "confesses the inadequacy of intellect and transcends reason itself."[19] In many respects, conscience is almost involuntary; typically, it resists efforts to modify it or deny it. As one author has described it, conscience binds a person in the grip of "volitional necessity"—when conscience speaks, one has no choice but to obey its commands.[20] This serves as a basis for one of the justifications that is often offered in support of granting legal accommodation to claims of conscience, namely that punishing people who act on grounds of conscience is unlikely to have a deterrent effect, because the pull of conscience is stronger than the pull of law.[21]

2. Shifting Boundaries: Beyond Religion

A second relevant characteristic of conscience is that its boundaries are unclear and continually expanding. While originating in the context of religious belief and faith-based obligation, the principle of freedom of conscience developed to incorporate both religious and secular morality. Today, it is expanding to approach even some deeply held personal, political, social, and philosophical beliefs.

An early version of the First Amendment proposed in the U.S. House of Representatives in 1789 prohibited Congress from making laws "establishing religion, . . . prevent[ing] the free exercise thereof,

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18 In the similar context of religious belief, Brian Leiter identifies as one of religion's key characteristics its "insulat[ion] from ordinary standards of evidence and rational justification." Brian Leiter, *Foundations of Religious Liberty: Toleration or Respect?*, 47 SAN DIEGO L. REV. 935, 945 (2010).

19 United States *ex rel.* Reel v. Badt, 53 F. Supp. 906, 907 (W.D.N.Y. 1943); *see also* Hill, *supra* note 10, at 16 ("Conscience . . . is not the same as reason, judgment, or will." (emphasis omitted)). *But see* KANT, *supra* note 10, at 379 (referring to conscience as an "intellectual and . . . moral capacity," and suggesting that some nature of reasoning or judgment is involved).

20 Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 215, 215 (2009); *see also* Ehlert v. United States, 422 F.2d 332, 333 (9th Cir. 1970) (holding that, for purposes of military classification, changes in conscientious belief can constitute "a circumstance over which the registrant has no control"); KANT, *supra* note 10, at 379 ("[Conscience] follows [man] like his shadow, when he thinks to escape."). Martin Luther expressed a similar, oft-quoted, sentiment: "I cannot and will not recant anything, for to go against conscience is neither right nor safe. Here I stand, I can do no other, so help me God. Amen." THE COLUMBIA DICTIONARY OF QUOTATIONS 465 (Robert Andrews ed., 1993).

21 *See infra* Part I.B.

or . . . infring[ing] the rights of conscience."[22] Indeed, many scholars believe that "the framers viewed 'free exercise of religion' and 'freedom of conscience' as virtually interchangeable concepts."[23] Prior to the mid-twentieth century, the most commonly accepted understanding of conscience was religious in nature,[24] and the First Amendment, which expressly grants a right to freedom of religion, was a natural source of relief for plaintiffs with strong conscientious convictions seeking protection from government oppression.[25] The concepts of religion and conscience were so closely tied that, in judicial opinions, the two terms were commonly paired with no explanation of the difference, if any, between them.[26]

Since that time, the contemporary understanding of conscience has broadened to expand beyond the scope of religious convictions. Steven Smith has described the linking of freedom of conscience with religious exercise as "problematic, if not thoroughly objectionable."[27] Most legal scholars now agree that protections for freedom of conscience must necessarily apply to protections for "secularized conscience" as well.[28]

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22 *See* Wallace v. Jaffree, 472 U.S. 38, 97 (1985).

23 Smith, *supra* note 6, at 912. *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1482–94 (1990).

24 Garnett, *supra* note 8, at 656; Smith, *supra* note 6, at 912 ("[F]or the preceding two-plus centuries, pleas for 'freedom of conscience' had been a central theme in the campaign to promote greater freedom in matters of religion, and those pleas had routinely been made and understood in essentially religious terms.").

25 *See, e.g.*, Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 593 (1940) (holding that a Board of Education requirement that children and teachers salute the American flag offends the guarantees of religious freedom established by the First and Fourteenth Amendments).

26 *See* Prince v. Massachusetts, 321 U.S. 158, 165–67 (1944) (referring to a parent's "obviously earnest claim for freedom of conscience and religious practice"; a parent's claim to control his child's course of conduct as being grounded in "religion or conscience"; and parental authority as including "matters of conscience and religious conviction"); *Gobitis*, 310 U.S. at 593 (describing the First Amendment's guarantee of religious freedom as one that is "brought into question . . . only when the conscience of individuals collides with the felt necessities of society").

27 Smith, *supra* note 6, at 912.

28 *See, e.g.*, KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 27–28 (1987) (describing moral claims to disobey the law as incorporating religious, aesthetic, and personal reasons); Ronald Beiner, *Three Versions of the Politics of Conscience: Hobbes, Spinoza, Locke*, 47 SAN DIEGO L. REV. 1107, 1109 (2010) (describing the issue as one of "conscientious intellectual commitment," rather than religious commitment); Garnett, *supra* note 8, at 659; Greenawalt, *supra* note 6, at 1625, 1642 (arguing that while free exercise demands certain religious exemptions, "nonestablishment, equal protection, and free speech sometimes require extension to similarly situated nonreligious claimaints"); Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901, 902 (2010) (assuming for the sake of argument that "religious claims of conscience [are] moral claims that rest on a religious base"); Leiter, *supra* note 18, at 959 (arguing that "there is no reason to limit claims of conscience to claims of religious conscience"); Brian Leiter, *Why Tolerate Religion?*, 25 CONST. COMMENT. 1 (2008); Michael J. Perry, *From Religious Freedom to Moral Freedom*, 47 SAN DIEGO L. REV. 993 (2010) (discussing the treatment of secular conscience in the United Nations International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights); Smith, *supra* note 6, at 912.

This approach is reflected most notably in jurisprudence extending the right of conscientious objection in the military to those with deeply held beliefs outside the sphere of organized religion.[29] According to the Supreme Court in *United States v. Seeger*, belief is a "broad spectrum," an "ethical concept . . . founded on human experience,"[30] that may in fact fall outside the scope of any individual's definition of religious conviction. In *Welsh v. United States*, for example, the claimant objector was "insistent" in denying that his views against war were religious, going so far as to cross out "religious training" as a reason for opposing participation in war on his Selective Service statement.[31] The Court, however, concluded that the state ought not to defer to a registrant's interpretation of his beliefs, and may consider these beliefs to be "religious" in nature if it is clear that the claimant holds them "with the strength of more traditional religious convictions."[32] *Seeger* and *Welsh*, according to Kent Greenawalt, "essentially eroded any distinction between religious and nonreligious claims to conscientious objection."[33]

While freedom of conscience has been broadly interpreted to incorporate both religious and secular understandings, many scholars believe that many strongly held beliefs do, nevertheless, fall outside its scope.[34] Historically, the realms of political, social, and even philosophical belief were viewed as not rising to the level of conscientious conviction. By way of example, the 1948 amendment to the Selective Training and Service Act expressly excluded "essentially political, sociological, or philosophical views or a merely personal moral code" from its definition

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Martha Nussbaum describes the principle of religious freedom and equality as arising "from a special respect for the faculty in human beings with which they search for life's ultimate meaning." NUSSBAUM, *supra* note 6, at 19. While acknowledging the controversy surrounding the overlap between religion and conscience, Nussbaum seems to view religious conviction as a subset of conscientious conviction more broadly. *See id.* at 19–20. That being said, some have expressed concern that expansion of the doctrine of conscientious objection to political, social, and personal ethical realms will reduce a formerly divine doctrine to "personal existential decision-making" and "consumer preferences." Garnett, *supra* note 8, at 658–59 (citing Marie A. Failinger, *Wondering After Babel: Power, Freedom and Ideology in U.S. Supreme Court Interpretations of the Religion Clauses*, *in* LAW AND RELIGION 81, 93–94 (Rex J. Ahdar ed., 2000)); *see also* Robert John Araujo, *Conscience, Totalitarianism, and the Positivist Mind*, 77 MISS. L.J. 571 (2007) (arguing that the exercise of conscience ought to be "founded on objective truth" rather than "individual fancy").

29 *See generally infra* Part II.C.

30 380 U.S. 163, 183 (1965).

31 398 U.S. 333, 341 (1970).

32 *Id.* at 343; *see also* Greenawalt, *All or Nothing at All*, *supra* note 5, at 53 (discussing *Welsh*). Admittedly, in cases such as *Welsh*, the Supreme Court was simply trying to craft a workable solution to the administrative challenge of identifying "legitimate" conscientious objectors, rather than attempting to define the scope of conscientious belief as a philosophical matter. However, its holdings in these cases are relevant in that they provide guidance about societal understandings of conscience at the time.

33 Greenawalt, *supra* note 28, at 909; *see also* Greenawalt, *supra* note 16, at 50–51.

34 *See, e.g.*, Greenawalt, *supra* note 5, at 53 (noting that it is difficult to draw a clear line between political and religious/conscientious bases for objection).

of "religious training and belief."[35] Of this exclusion, the Supreme Court in *Seeger* noted, "[t]hese judgments have historically been reserved for the Government, and in matters which can be said to fall within these areas the conviction of the individual has never been permitted to override that of the state."[36] Notably, however, only five years later in *Welsh*, the Court held that this statutory exemption should not be read to exclude "those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy."[37] If we can conclude anything from this turnaround, it is that the definition of conscience is not fixed or determinate, and that even the most careful attempts at line-drawing in this arena may be subject to challenge.[38]

3. Personal and Relational Components

A final characteristic of conscience, and one that will come into play in Part III.D, is that conscience may have two dimensions: personal and relational. The personal dimension of conscience is the one described above—namely, an individual's judgment about the moral qualities of her own conduct. However, conscience may also have a relational dimension, described by Rob Vischer as "the notion that the dictates of conscience are defined, articulated, and lived out in relationship with others."[39] That is, while the core of conscience is inward looking, the relational aspect of conscience is necessarily broader. For example, when a person acts on the basis of her conscientious beliefs, she (whether knowingly or not) serves as a model for those who observe her behavior, and who may then modify their own beliefs in response to her actions. Other examples of the relational aspect of conscience may be

35 *Seeger*, 380 U.S. at 165.

36 *Id.* at 173; *see also* Berman v. United States, 156 F.2d 377, 380 (9th Cir. 1946) (holding that the phrase "by reason of religious training and belief" was included in the Act "for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one"); United States v. Kauten, 133 F.2d 703, 707–08 (2d Cir. 1943) (holding that the phrase "religious training and belief" was not intended to include "philosophical and political considerations," such as a sincere "conviction that war is a futile means of righting wrongs or of protecting the state, that it is not worth the sacrifice, that it is waged for base ends, or is otherwise indefensible").

37 *Welsh*, 398 U.S. at 342–44 (noting, however, that conscientious objectors whose beliefs are based in part on public policy must nevertheless be determined by the Selective Service System to be "religious" objectors whose deeply held beliefs are "moral, ethical, or religious" in nature).

38 *See generally* Greenawalt, *The Significance of Conscience*, *supra* note 28.

39 VISCHER, *supra* note 6, at 3; *see also* MICHAEL WALZER, *The Obligation to Disobey*, *in* OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 3, 22 (1970).

more direct, as where a conscientious actor deliberately communicates her beliefs to others in an effort to change their views, their conduct, or the shape of social discourse as a whole.

B. *Justifying Legal Accommodation of Conscience*

Judging by the definition above, conscience is truly a formidable force—as an individualized expression of personal moral identity, it is a fundamental and unshakeable driver of human behavior. But it is one thing to say that conscience is an essential element in personal decision-making, and quite another to argue that expressions of conscience ought to receive protection under the law. Part I.B explains the three most common justifications that have been offered in support of legal accommodations for exercises of personal conscience.

This debate arises because individuals with strong conscientious beliefs may find themselves torn between their beliefs and the requirements or expectations of the law. To take a relatively simple example, consider a pharmacist who believes that sex before marriage is a sin, and is unwilling to fill prescriptions for birth control if the patient is an unmarried woman. In the absence of legal protections for acts of conscience by medical professionals, the pharmacist who refrains from participating in what she believes to be an immoral act may be subject to disciplinary action or license revocation by the state pharmacy board, a civil suit for negligence by the patient whose prescription she denied, or adverse employment action by her employer.[40] If she wants to avoid undesirable legal consequences such as these, the pharmacist may be forced to comply with the standard of care expected of her profession and fill the prescription, no matter how troubling this might be for her conscience.[41] When faced with such a conflict, what alternative does the pharmacist have but to seek legal accommodation for her conscientious belief? Indeed, this story of negotiated accommodation is exactly what has played out in the legislative arena since the Supreme Court's 1973 decision in *Roe v. Wade*.[42]

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40 *See* Jill Morrison & Micole Allekotte, *Duty First: Towards Patient-Centered Care and Limitations on the Right to Refuse for Moral, Religious or Ethical Reasons*, 9 AVE MARIA L. REV. 141, 165–75 (2010); Wilson, *supra* note 4, at 50–51.

41 Research shows that people who act in ways that violate their most deeply-held conscientious beliefs tend to lose self-esteem and suffer emotional distress. *See* GREENAWALT, *supra* note 28, at 315–16; Hill, *supra* note 10, at 14. For a discussion of the challenges faced by government officials who object to performing same-sex marriages, see Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318 (2010).

42 410 U.S. 113 (1973); *see also infra* Part II.B.

According to Steven Smith, the person who invokes freedom of conscience

> is in effect saying to the rest of us: "Although you might think you are justified in commanding or forbidding some performance, you should nonetheless refrain from commanding or forbidding this of me because I am opposed on the basis of a sincere conviction about what is morally required or proscribed."[43]

Conceived in this way, a claim of conscience operates as an exception to the prima facie duty to obey the law.[44] Much like the necessity defense and other justifications in criminal and civil law, conscience claims serve as "good reasons" to allow actions that deviate from legal or social norms and, if successful, justify accommodation of those who hold them.

Many modern societies, including our own, have been receptive to such arguments,[45] despite the fact that regular legal recognition of

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43 Smith, *supra* note 8, at 328.

44 *See* NUSSBAUM, *supra* note 6, at 21 ("Accommodation means giving religious people a 'break' in some area, for reasons of conscience—a dispensation from laws of general applicability . . . ."); RAWLS, *supra* note 2, at 363; Richard J. Arneson, *Against Freedom of Conscience*, 47 SAN DIEGO L. REV. 1015, 1018–20 (2010) (describing citizens' underlying moral duty to obey the rule of law to support the argument against conscientious accommodation); Kent Greenawalt, *The Rule of Law and the Exemption Strategy*, 30 CARDOZO L. REV. 1513, 1518 (2008) (describing exemptions based on religious belief as "a privilege not to comply with ordinary legal requirements based on a criterion that refers to religious belief or practice"); Greenawalt, *supra* note 28, at 903 (describing legislative accommodations of claims of conscience) ("[T]hese may simply relieve rights bearers of what would otherwise be legal requirements, but they may go further and protect certain actions from being treated by private employers or other private entities as the basis for adverse consequences."); Smith, *supra* note 6, at 915 (noting that the protection of conscience "has typically been understood to consist of some sort of rebuttable presumption of non-interference with conscience, qualified by something like a 'compelling state interest' limitation").

45 *See* NUSSBAUM, *supra* note 6, at 2 ("This is a country that respects people's committed search for a way of life according to their consciences. This is also a country that has long understood that liberty of conscience is worth nothing if it is not equal liberty."); *id.* at 22 (identifying the principle of respect for conscience, including the provision of "a protected space within which citizens may act as their conscience dictates" as well recognized in the American constitutional and philosophical tradition); RAWLS, *supra* note 2, at 177 ("[F]reedom of thought and liberty of conscience . . . ought not to be sacrificed to political liberty . . . ."); *id.* at 173 (noting that the political system would be an unjust one if it did not incorporate liberty of conscience); WALZER, *supra* note 39, at 12–15 (describing the "historical basis of liberalism" as a series of recognitions by a larger society of the claims of a smaller group); *id.* at 14 (noting that the right of an individual citizen to disobey societal obligations because of his conscientious belief is "very common in history and has often been fairly stable over long periods of time"); Greenawalt, *supra* note 16, at 48 (describing "historical recognition of the importance of conscience" as recognized by early American citizens); Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1, 6 (2010) ("[I]n the political theory of the Founding Fathers and the political principles undergirding the Constitution, protection of rights of conscience was essential, for without it virtue in the people could not develop."). George Anastaplo, however, emphasizes that "there is today much more official deference to scruples grounded in 'conscience' than was anticipated in this country two centuries ago." Letter from George Anastaplo to Nadia Sawicki (Aug. 31,

claims of conscience may threaten social order.[46] Legal and political theorists have recognized as one of the tenets of a liberal society the fact that "any individual citizen, oppressed by the ruler of the state, has a right to disobey their commands, break their laws, even rebel and seek to replace the rulers and change the laws."[47] In a letter from George Washington to the Quakers, he assured them that "the conscientious scruples of all men should be treated with great delicacy and tenderness," and that he wished for American law to "always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit."[48] By 1971, John Rawls considered "the question of equal liberty of conscience" to be "settled."[49] "It is one of the fixed points of our considered judgments of justice."[50] Indeed, American courts have long cited this country's "happy tradition" of "avoiding unnecessary clashes with the dictates of conscience,"[51] whether by way of legislative exemption, selective non-prosecution or non-enforcement, or dismissal by sympathetic judges and juries.[52]

Some might challenge the description of claims of conscience as "exceptions" from a general duty to obey the law. Robin Fretwell Wilson, for example, emphasizes that conscientious objectors are not seeking exemptions from pre-existing legal duties, but rather are seeking to

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2010) (on file with author). Similarly, Barry Sullivan notes that there has been a significant shift in expectations since that time—today, individuals tend to "think that it [i]s the state's job to design their public responsibilities in a way that accommodate[s] or complement[s] their personal religious views." Barry Sullivan, *Naked Fitzies and Iron Cages: Individual Values, Professional Virtues, and the Struggle for Public Space*, 78 TUL. L. REV. 1687, 1710 (2004).

46 *See, e.g.*, RAWLS, *supra* note 2, at 187 (noting that the state's right to restrict liberty of conscience is derivative of its obligation to maintain public order); Emp't Div. v. Smith, 494 U.S. 872, 885 (1990) (noting that routinely allowing exemptions on the basis of religious belief would frustrate the "government's ability to enforce generally applicable prohibitions of socially harmful conduct").

47 WALZER, *supra* note 39, at 3 (citing Locke).

48 NUSSBAUM, *supra* note 6, at 14; *see also* John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 116 (2007) (citing American colonists' persecution for "refusing to obey certain laws by reason of conscience").

49 RAWLS, *supra* note 2, at 181, 197.

50 *Id.* at 206.

51 United States v. Macintosh, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting); *see also* Gillette v. United States, 401 U.S. 437, 445 (1971) ("[C]ongressional reluctance to impose such a choice stems from a recognition of the value of conscientious action to the democratic community at large, and from respect for the general proposition that fundamental principles of conscience and religious duty may sometimes override the demands of the secular state.").

52 *See* GREENAWALT, *supra* note 28, at 282; Greenawalt, *supra* note 6, at 1608. Notably (and consistent with recent Supreme Court jurisprudence in freedom of religion cases), these mechanisms for accommodation of personal conscience are permissive rather than mandatory in nature. There is no constitutional requirement that legislatures provide exceptions from generally applicable laws on the basis of conscientious or religious belief, though such exceptions are constitutionally permissible. *See* City of Boerne v. Flores, 521 U.S. 507, 513 (1997); *Smith*, 494 U.S. at 886. *But see* Greenawalt, *supra* note 6, at 1636 (noting that if exemptions are granted on the basis of religious belief, the Equal Protection clause may require that they be extended to non-religious believers as well).

participate in a conversation about what the law should be.[53] Wilson's point, I take it, is that to conceive of granting exceptions to legal duties, one must believe that there exists some baseline set of duties with normative priority.

I concede that once conscientious accommodations are successfully negotiated and endorsed by way of legislation, it may be wrong to describe them as "exceptions" from a general duty to obey the law. That is, the statutory permission granted to a pharmacist who refuses to distribute certain drugs is not an exception to the law—rather, it *is* the law. However, while recognizing the risk in suggesting that yesterday's laws (no matter how faulty or misguided) somehow take normative priority over the laws of today, I believe that the language of "exceptions" in the context of conscientious accommodation is supported by its use in other areas.

For example, consider the common law duty of physicians to obtain informed consent, often bolstered by state informed consent statutes. This duty includes a number of established exceptions—a physician need not obtain consent in emergency situations, when the patient is incapable of consenting, when the patient waives her right of informed consent, or, in some rare cases, on grounds of therapeutic privilege. These exceptions have been recognized in both common law, and, occasionally, in informed consent legislation. But the fact that they are legally recognized does not preclude us from referring to them as "exceptions." In this context and others, we begin with general rules about prima facie duties, and then work in modifications to protect those who we believe are acting justifiably. The language of "exceptions" is similarly used in a host of other statutory contexts, including the duty to screen and stabilize patients under the Emergency Medical Treatment and Active Labor Act (EMTALA), which does not apply, inter alia, if the patient requests a transfer;[54] and the duty under some state's laws to obtain informed consent twenty-four hours in advance of an abortion, which does not apply in emergency situations; and others.[55] From my perspective, the language we use when referring to conscientious accommodations is less important than the varied justifications we offer for granting them in the first place.

53 Conversation with Robin Fretwell Wilson (Sept. 22, 2010) (notes on file with author).

54 EMTALA also does not apply if a physician certifies that the benefits of transfer exceed the risks, or if it is an "appropriate transfer" as defined in the statute. 42 U.S.C. § 1395dd(c) (2006).

55 *See generally* Greenawalt, *supra* note 44, at 1521–22 ("The written law itself contains many, many exemptions and privileges.").

1. Pragmatic Value: Ordering Society

The power of conscience is such that it often drives human behavior even in the face of strong countervailing considerations. A person acting on the grounds of conscience is often bound by "volitional necessity," the feeling that she has no choice but to follow her conscience even if that course of action is objectively impractical, illogical, or illegal.[56] Indeed, one way of measuring the strength of a person's conscientious belief is to ask whether she would be "willing to undergo significant hardship" rather than engage in an act that she believes is unconscionable.[57] In his *Letter from Birmingham Jail*, for example, Martin Luther King, Jr. cited the early Christians as models of conscientious resistance, on the grounds that they "were willing to face hungry lions and the excruciating pain of chopping blocks, before submitting to certain unjust laws of the Roman Empire."[58] If we accept that an individual may be driven to act in accordance with her strong conscientious beliefs regardless of the consequences, we begin to understand the pragmatic argument for legal accommodation of conscience.

Punishment in a civil society can serve many purposes, among them retribution, deterrence, and reform. However, punishing a person for acting in accordance with her conscience rarely serves these purposes effectively. First, because it is impossible to coerce belief against someone's wishes, punishment of conduct motivated by conscientious belief is unlikely to result in reform or rehabilitation.[59] On a similar note, the threat of punishment is unlikely to deter those acting on the basis of conscientious conviction.[60] That being said, some conscientious

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56 *See generally* Koppelman, *supra* note 20.

57 Greenawalt, *supra* note 6, at 1625; *see also* United States v. Macintosh, 283 U.S. 605, 631–32 (1931) (Hughes, C.J., dissenting) (describing how, rather than promise to obey a law that conflicts with their religious beliefs, some citizens "have been willing to suffer imprisonment or even death rather than to make such a promise"); Kolber, *supra* note 17 (arguing for imposing "alternative burdens" on those who make claims of conscience as an effective means of establishing sincerity of conscientious belief).

58 Martin Luther King, Jr., *Letter from Birmingham Jail*, *in* CIVIL DISOBEDIENCE: AN ENCYCLOPEDIC HISTORY OF DISSIDENCE IN THE UNITED STATES 627 (Mary Ellen Snodgrass ed., 2009).

59 GREENAWALT, *supra* note 28, at 315–16 ("Further, if the acts they are forced to perform do, like military service and jury duty, require active cooperation over a period of time, they are not likely to be the best candidates for the jobs involved."); *id.* at 275 ("[The actor who behaves out of conviction] typically will not be a suitable candidate for reform."); Leiter, *supra* note 18, at 941 (reading Locke as arguing that "the coercive mechanisms of the state are ill-suited to effect a real change in belief about religious or other matters").

60 GREENAWALT, *supra* note 28, at 315–16; Beiner, *supra* note 28, at 1109 (describing Hobbes's, Spinoza's, and Locke's interpretations of conscience as belief that "cannot be touched by coercion"). *But see* Greenawalt, *supra* note 44, at 1529 (suggesting that parents ambivalent about, rather than committed to, faith healing may be deterred by the prospect of criminal

objectors (those who are more are susceptible to the threat of punishment, perhaps because their moral commitments are not as firm) may be swayed by the threat of legal penalty, and may choose to comply with the law despite their conscience's voice to the contrary. What is the likely result for these persons, we might ask? "Deterrence of those who lack the will to act on their convictions exacts a terrible price. Their feeling that they have yielded to compulsion and violated their most deeply held beliefs and principles may involve profound resentment and loss of self-respect."[61] Finally, when it comes to retribution, many believe that the retributive purposes of punishment are poorly served by punishing individuals who act on the basis of moral compulsion rather than self-interest or impulsiveness.[62]

The pragmatic argument for legal accommodation of conscience recognizes these concerns, and maintains that a civil society is unlikely to function effectively if it chooses to punish conscientious objectors.[63] That is, although granting conscience-based exemptions from legal obligations as a matter of course may wreak havoc on the state's ability to maintain order,[64] the same can be said of a state that rejects claims of conscience altogether. The state has only a limited amount of control over its citizens: While it can try to establish rules for an orderly society, these rules will be nearly impossible to implement if they contradict the conscientious beliefs of its citizens. And since it is impossible for a society to adopt a body of laws that aligns itself perfectly with the beliefs of all its citizens, the society must order itself in such a way as to mediate between the interests of social order and the interests of citizens who

penalties); Leiter, *supra* note 18, at 941 (offering historical evidence that states can, in fact, "successfully inculcate beliefs" through coercion).

61 *See* GREENAWALT, *supra* note 28, at 315–16. *See generally* NUSSBAUM, *supra* note 6, at 54 (citing Roger Williams's analogization of violations of conscience, rape, and imprisonment).

62 *See* GREENAWALT, *supra* note 28, at 275, 315 ("The strength of conviction and willingness to sacrifice that are required to act against self-interest in doing what one believes to be morally correct are rightly considered admirable traits, not usually to be visited with harsh penalties.").

63 *See, e.g.*, Leiter, *supra* note 18, at 940–42 (describing Hobbes's and Locke's writings as supporting the principle of instrumental toleration of religious liberty); Smith, *supra* note 6, at 911 (describing the "futility" rationale for respecting conscience).

64 *See* United States v. Kauten, 133 F.2d 703, 707–08 (2d Cir. 1943) (noting that if all those who distrusted American foreign policy classified as conscientious objectors "the military effort might well have been seriously hampered"); *supra* note 46 and accompanying text. Some scholars, however, have criticized this rationale. *See, e.g.*, Wilson, *supra* note 4, at 62 (arguing that shifting the burden of access to controversial drugs from individual pharmacists to institutions would not result in significant hardship); WALZER, *supra* note 39, at 11–12 ("[T]here is considerable evidence to suggest that the state can live with, even if it chooses not to accommodate, groups with partial claims against itself. The disobedience of the members of such groups will be intermittent and limited; it is unlikely to be conspiratorial in any sense; it does not involve any overt resistance to whatever acts of law enforcement the public authorities feel to be necessary (unless these are radically disproportionate to the 'offense'). Such disobedience does not, in fact, challenge the existence of the larger society, only its authority in this or that case or type of case or over persons of this or that sort.").

might feel disenfranchised by laws that violate their conscientious beliefs.[65]

2. Intrinsic Value: Autonomy and Human Flourishing

A second argument for legal accommodation views the exercise of conscience as essential for human flourishing. There is intrinsic moral value in autonomy and self-determination, proponents argue, and the best way for the state to promote this value is to accommodate those with sincere conscientious beliefs.[66]

Importantly, the argument for intrinsic value is content-neutral—it supports the protection of conscientious belief regardless of whether that belief is in fact reflective of some greater moral truth, and sometimes regardless of its consequences. Fostering the development of personal conscience and self-determination is not viewed as a tool for achieving good outcomes,[67] but rather as a good in and of itself, reflecting the idea that "what makes people human is the power to reason and to choose."[68] In the words of Steven Smith, it may sometimes be "more important that people do what they sincerely *think* is right than that they do what *actually* is right."[69]

Whether arising from a Kantian view of the unconditional worth of all persons and the resulting respect for their own moral destiny,[70] or from John Stuart Mill's perspective that "society should permit individ-

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65 Part II will describe the ways in which the American government mediates these interests—namely, by granting conscientious objectors immunity from liability only in certain spheres of activity.

66 Brian Leiter's description of "recognition respect" and the "moral" or "principled" view of toleration seems similar to the autonomy-based justification for accommodating conscience. He describes a genuine principle of toleration as grounded in a dominant group's acknowledgement that "there are moral or epistemic reasons," not just instrumental reasons, to permit the conscientious actors' behavior, even if the majority group disapproves of the minority belief or action. *See* Leiter, *supra* note 18, at 942–43. That being said, Leiter has also recognized that "[a]ccommodation arguments may find their grounding in very different considerations than those adduced here pertaining to religious *toleration*." Leiter, *supra* note 28, at 27 n.60 (emphasis added).

67 In fact, research in the context of medical decisionmaking lends little support to the proposition that autonomy and information actually result in objectively better outcomes. *See* Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899 (1993).

68 Marsha Garrison & Carl E. Schneider, *Why Do We Value Autonomy? Autonomy as a Moral Duty*, *in* THE LAW OF BIOETHICS: INDIVIDUAL AUTONOMY AND SOCIAL REGULATION 80, 81 (2003); *see also* Leiter, *supra* note 28, at 7 ("[B]eing able to choose what to believe and how to live . . . makes for a better life.").

69 Smith, *supra* note 6, at 929 (emphasis added).

70 *See generally* KANT, *supra* note 10, at 379; Hill, *supra* note 10, at 17 ("Kant's moral theory holds that each of us must, in the end, treat our own (final) moral judgments as authoritative, even though they are fallible.").

uals to develop according to their convictions,"[71] courts and commentators take it as a given that autonomous choice is valuable and should be promoted. From granting constitutional protections for personal liberties to imposing a requirement of informed consent in medical contexts, American society has long recognized the value of autonomy and liberty in personal decision-making.[72] Given that we accept autonomy and self-actualization as valuable, and given that conscience is described as fundamental, nonrational, and tied to one's own sense of self,[73] it is not a leap to suggest that allowing a person to develop and realize her conscientious beliefs without legal imposition will advance her sense of self, and in doing so maximize her well-being.[74] Something similar has been suggested by Steven Smith, who argues that when the state "coerces people to act contrary to their core beliefs, it inflicts a particularly grave and in a sense self-defeating kind of injury . . . because insofar as personhood is undermined, the good of personal or human believing is subverted."[75]

Notably, some have suggested that the intrinsic argument for accommodation of conscience offers benefits to the state, not just the individual. For example, state deference to citizens' conscientious beliefs may be "necessary for the rule of law in a republican form of government" because it reinforces the moral basis for compliance with legal rules generally.[76] Alternatively, toleration of such "experiments of liv-

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71 *See* TOM BEAUCHAMP & JAMES CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 64 (6th ed. 2008).

72 As Justice O'Connor wrote in *Planned Parenthood v. Casey*,

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992). In *Lawrence v. Texas*, Justice Scalia, in his dissent, referred to this passage from Casey as the "famed sweet-mystery-of-life passage." 539 U.S. 558, 588 (2003); *see also* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990). Some critics argue that such respect for autonomy is often excessive. *See, e.g.*, CARL E. SCHNEIDER, THE PRACTICE OF AUTONOMY (1998) (setting forth a detailed critique of the theory of autonomy as applied in medical practice); Willard Gaylin, *Worshiping Autonomy*, HASTINGS CENTER REP., Nov.–Dec.1996, at 43.

73 *See generally* Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61 (2006) (arguing for an identity-liberty–based understanding of certain claims of conscience).

74 Leiter, *supra* note 28, at 7–8 (identifying this as a plausible utilitarian argument in support of legal accommodation of conscience).

75 Smith, *supra* note 6, at 935–36; *see also* Greenawalt, *supra* note 5, at 47–48 (discussing "existentially significant" acts); Perry, *supra* note 28, at 9–10.

76 *See* Wardle, *supra* note 45, at 8 (citing James Madison) ("[I]f men are not loyal to their duty to their God and their conscience, it is folly to expect them to be loyal to mere legal rules . . . . If you demand that a man betray his conscience, you have eliminated the only moral

ing" may have epistemic value—much like the proverbial marketplace of ideas of the First Amendment context, it may lead to the development of moral knowledge even if individuals' conscientious beliefs do not in fact reflect higher moral truths.[77]

3. Objectivism: A Greater Truth

A final argument for legal recognition of conscience considers acts grounded in conscience worthy of respect because such acts are more likely to reflect objective moral truths.[78] Traditional religious understandings of conscience, for example, suggest that personal conscience is an earthly reflection of a higher moral power.[79] That is, the value of exercising one's conscience lies not in the fact that it is an intrinsically valuable exercise of autonomy and self-realization but because exercising one's conscience directs one to a higher moral truth.

The objectivist approach to conscience rests on three key assumption—first, that some objective moral truth exists; second, that conscience is an effective means for accessing this truth; and third, that law is appropriately exercised in pursuit of moral ends. Each of these assumptions, of course, is subject to serious challenges beyond the scope of this Article.

For the purposes of this discussion, the most relevant distinction between the objectivist justification and the intrinsic and pragmatic justifications for respecting conscience is that only the objectivist approach is tied to the substance of a person's conscientious beliefs.[80] As explained above, both the pragmatic and intrinsic arguments are content-neutral—that is, they justify legal accommodation of conscience as a general matter because doing so, by definition, furthers social order or human flourishing. Under a content-neutral approach, an autonomous person's conscientious belief that killing one person may be morally

basis for his fidelity to the rule of law, and have destroyed the moral foundation for democracy.").

77 Leiter, *supra* note 28, at 8–9 (citing John Stuart Mill). Note that this account differs from the content-neutral account described above, which finds value within moral beliefs generally, rather than using these beliefs (which may or may not be accurate) as a means for determining a higher moral truth.

78 *See generally* Araujo, *supra* note 28, at 578 (arguing that conscience, to be valuable, must be aligned with objective truth rather than "individual fancy"); Perry, *supra* note 28, at 11–13, 16–18; Smith, *supra* note 8, at 357–58 (arguing that the case for conscience depends, in part, on moral objectivism).

79 *See generally* Garnett, *supra* note 8, at 658 ("For [St. Thomas] More, 'conscience was inseparably connected to truth' and its value . . . ."); Hill, *supra* note 10, at 17–21 (describing the popular religious view of conscience as a reliable reflection of objective moral truth, derivable through instinct).

80 Brian Leiter's theory of "appraisal respect" seems to be based on a similar concept. *See* Leiter, *supra* note 18, at 939–40.

required if necessary to save many other lives is (consequences aside) no more or less worthy of respect than another person's belief that killing others is always wrong. The objectivist approach, on the other hand, values conscience because it apparently taps into a universal moral truth. In other words, if personal conscientious beliefs were always morally correct, the objectivist would likely be willing to defend legal accommodation for conscience without exception.

As we will see in Part II, however, conscientious beliefs come in all shapes and sizes.[81] For example, one person's conscience might direct her to disconnect a dying loved one's ventilator to relieve him from suffering and allow him to die; another person's conscience might demand that she request aggressive treatment to preserve her loved one's life at all costs. How can both be acting in accordance with a greater moral truth? Could an objectivist defend the acts of two actors with contradictory conscientious beliefs? I posit that he could not. Under an objectivist approach, I believe, one person must be right and the other must be wrong. The problem, of course, is that we lack the tools necessary to determine which is which. Were an objectivist to accommodate both acts, he would not be furthering moral truth—rather, he would be maintaining the status quo, with one person advancing moral ends and the other retreating from them. Instead, a true objectivist should allow the law to accommodate personal conscience only in cases where that conscience aligns with moral truths, a determination that is either difficult or impossible to make.[82] Moreover, any such determination would be difficult to reconcile with the tenets of a pluralistic liberal society that values, or at least respects, diversity of belief.[83]

II. THE TREATMENT OF CONSCIENCE IN AMERICAN LAW

When considering areas of intersection between conscience and the law, the contexts that most often come to mind are explicitly religious claims, conscience-based refusals by medical providers to provide controversial services such as abortion or contraception, and conscien-

81 *See* Hill, *supra* note 10, at 277 (observing that people who rely on conscience "often approve of radically different principles, including some that may seem outrageous"); Koppelman, *supra* note 20, at 221 (noting that conscience can "generate exorbitant demands," such as for racial purification, that society does not want to respect).

82 To the extent that society does make such judgments, it is by will of the majority. This is why, in the few situations in which conscience is routinely accommodated, these accommodations can usually be traced back to legislative enactments. Note, however, that even these legislative enactments may sometimes be overturned in the face of public opposition, as in Maine, where a "people's veto" repealed a recently adopted same-sex marriage law. *See* Susan M. Cover, *Mainers Vote Down Gay-Marriage Law*, PORTLAND PRESS HERALD, Nov. 4 2009, at A1.

83 This distinction between respecting and valuing may be similar to Brian Leiter's distinction between "respect" and "toleration." *See* Leiter, *supra* note 18, at 938.

tious objection in the military. Part II seeks to offer a more comprehensive description of the various situations in which people seek to justify acts of conscience that might, in the absence of legal protections, be subject to civil, criminal, or administrative penalties.

Part II demonstrates that conscience may play a role in many legal contexts not traditionally identified as conscience-based—including, among others, civil disobedience, tax evasion, discrimination, medical neglect, and even terrorism.[84] While some readers may dispute whether each of these examples rises to the level of expression of conscientious belief, surely we can agree that at least some of them do, which in itself makes the important point that our understanding of conscience and the law must be broadened beyond the military, medical, and religious contexts.

Only once we recognize the various situations where conscience and the law intersect is the inconsistent nature of American law's treatment of conscience made obvious. In some cases, such as opposition to war by prospective members of the military, claims of conscience are accommodated; in others, such as opposition to war by taxpayers, conscientious actors may be subject to legal penalties. Part II, which describes law's response to claims of conscience in various contexts, provides a descriptive foundation for the analysis in Parts III, IV, and V.

A. *Explicitly Religious Claims*

As recognized in Part I.A, conscience encompasses both religious and secular beliefs. That is, some who seek legal accommodation on the basis of conscientious belief—those whose beliefs are religious in nature—may be able to raise a constitutional claim for religious freedom under the First Amendment. However, while the Constitution provides explicit protection for the subcategory of religious claims of conscience, it does not do so for claims of conscience as a general matter (or, obvi-

84 This list of situations in which conscience and the law intersect is by no means exhaustive. For example, it does not include situations where government actors or those with some degree of legal authority, such as jurors or attorneys, seek to excuse themselves from their duties for reasons of conscience—including jurors with conscientious objections to capital punishment, jurors who exercise the power of nullification when they object to the law being enforced, attorneys who fail to adequately defend their clients when doing so would violate their conscientious beliefs, and justices of the peace who refuse to marry same-sex couples. Because these people have a special legal role not shared by everyday citizens, a discussion of their right to refuse on grounds of conscience is beyond the scope of this Article. This Article also does not address situations where considerations of conscience keep laws from being enacted—for example, children are not required to attend public schools against their parents' conscientious beliefs.

ously, for the subcategory of purely secular claims).[85] Since explicitly religious claims of conscience are likely to receive the greatest protection under the law by virtue of their constitutional basis, it makes sense to begin the discussion there.

Claims for religious exemption from laws of general applicability are brought as constitutional claims to religious freedom under the First Amendment. Historically, courts evaluating such claims applied a strict scrutiny test, overturning state laws that burdened religious exercise unless they were narrowly tailored to serve compelling state interests.[86] In 1990, however, the Supreme Court dramatically changed course, holding that plaintiffs have no constitutional right to purely religious exemptions from neutral laws of general applicability.[87] In other words, while religious beliefs do receive special protections under the First Amendment, these protections do not include a constitutional right to legal accommodation of the type described in Part I.B.

As a constitutional matter, then, religious claims of conscience and secular claims of conscience stand on equal footing. A claimant seeking an exemption from a generally applicable law for reasons of conscience usually has no constitutional right to such an exemption, regardless of whether her conscientious belief is religious or secular in nature. If the claimant hopes to succeed, she must make her arguments in the sub-constitutional realm—that is, she must appeal to legislative or common law rights, rather than constitutional ones.[88] Indeed, in *Employment Division v. Smith*, after rejecting the plaintiff's claim to a religious exemption from an Oregon law criminalizing the possession of peyote, the

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85 Conscience, as an independent concept, is not explicitly protected under the Constitution. Although there is some significant overlap—most notably in the Free Exercise and Establishment Clauses of the First Amendment—the fit between conscience and constitutional protection is necessarily imperfect. Drafters of the Constitution had initially considered granting explicit constitutional protection to freedom of conscience. Early versions of the First Amendment prohibited Congress from "mak[ing] . . . law establishing religion, or . . . prevent[ing] the free exercise thereof, or . . . infring[ing] the rights of conscience." *See* Wallace v. Jaffree, 472 U.S. 38, 94–98 (1985). As adopted, however, the relevant provision of the First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

86 *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

87 Emp't Div. v. Smith, 494 U.S. 872, 881 (1990) (holding that while the First Amendment does not bar application of neutral, generally applicable laws to the exercise of religiously motivated behavior, exceptions have been made where claimants rely on the Free Exercise Clause "in conjunction with other constitutional protections, such as freedom of speech and of the press").

88 *See generally* John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. 1663, 1668 (2009) (arguing that courts should sometimes rely on sub-constitutional laws to enforce constitutional norms, because "a large number of what we define as constitutional rights are not actually required by the Constitution, but rather judicially crafted rules designed to implement underlying constitutional norms").

Supreme Court suggested that the appropriate route for redress was in the legislature.[89]

Congress responded directly to this challenge. Just three years after the ruling in *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA), effectively reinstating a form of strict scrutiny review for laws substantially burdening religious expression.[90] While RFRA has since been ruled unconstitutional as applied locally and on the state level, it is still enforceable as applied to federal law.[91] It has been used by claimants in contexts as varied as health care,[92] education,[93] taxation,[94] employment,[95] prisoners' rights,[96] and environmental regulations.[97] In evaluating these claims, courts must ask whether the state has demonstrated that enforcement of the federal law against the claimant is necessary to further a compelling state interest and whether enforcement is the least restrictive means of furthering that interest.[98] Outcomes in such cases are highly fact-dependent.[99]

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89 494 U.S. at 890.

90 RFRA provides that the government "shall not substantially burden a person's exercise of religion" unless it demonstrates that doing so is necessary to further a compelling government interest, and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(a) (2006). Any person whose religious exercise is burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." *Id.* § 2000bb-1(c).

91 Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006); City of Boerne v. Flores, 521 U.S. 507 (1997). Many states, however, have since adopted state RFRAs with provisions similar to those of the federal RFRA. *See* Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 598 (1999).

92 *See* Planned Parenthood of Se. Pa. v. Walton, 949 F. Supp. 290 (E.D. Pa. 1996) (holding that the Freedom of Access to Clinics Act does not violate claimants' rights under RFRA or under the First Amendment).

93 *See* Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995) (upholding a district court's grant of a preliminary injunction ordering a school district to accommodate students' religious practice of carrying ceremonial knives); Bauchman v. W. High Sch., 900 F. Supp. 254 (D. Utah 1995) (holding that a school choir's choice of Christian religious music did not violate plaintiffs' rights under the First Amendment or RFRA).

94 *See* Jenkins v. Comm'r of Internal Revenue, 483 F.3d 90 (2d Cir. 2007) (holding that there is no right to avoid payment of taxes for religious reasons under RFRA).

95 *See* Potter v. District of Columbia, 382 F. Supp. 2d 35 (D.D.C. 2005) (holding that fire department's policy of prohibiting facial hair satisfied the compelling interest test under RFRA).

96 *See* Alameen v. Coughlin, 892 F. Supp. 440 (E.D.N.Y. 1995) (holding that prison policy prohibiting display of religious beads did not satisfy the least restrictive alternative requirement of RFRA); Diaz v. Collins, 872 F. Supp 353 (E.D. Tex. 1994) (dismissing inmate's RFRA claim with respect to prison regulations requiring short hair and prohibiting the wearing of a headband).

97 *See* United States v. Jim, 888 F. Supp. 1058 (D. Or. 1995) (rejecting plaintiff's RFRA claim with respect to the hunting of bald eagles under the Endangered Species Act).

98 42 U.S.C. § 2000bb-1(b) (2006); *see generally* Marci A. Hamilton, *The Constitution's Pragmatic Balance of Power Between Church and State*, 2 NEXUS 33, 40 (1997).

99 A full discussion of courts' approaches to claims for religious exemption from generally applicable laws under RFRA, Title VII, and the First Amendment is beyond the scope of this Article. This brief description is merely intended to demonstrate that explicitly religious claims

B. *Claims by Medical Providers*

Claims of conscience made by medical providers are often raised, and are certainly discussed more frequently than any others, whether in the news media, legal journals, or medical literature. Typically, these cases arise when a medical provider chooses not to participate in a procedure that offends her conscience, and claims the right to do so without legal repercussions (such as professional discipline, adverse employment action, or malpractice liability).[100] The procedures that pro-providers most often find objectionable are typically those relating to reproductive health, including abortion, contraception, and sterilization. However, the scope of objection is now expanding to include other controversial practices, such as stem cell research and end-of-life care.[101] Medical providers' claims of conscientious objection are typically protected by federal and state law.

The first medical conscience clauses (that is, laws protecting a medical provider's right not to participate in objectionable procedures) arose in the wake of *Roe v. Wade*, which extended the Constitution's privacy protections to include a woman's right to an abortion performed by a willing medical provider.[102] Immediately after the Supreme Court's decision in *Roe*, Congress passed the Church Amendment, which prohibits recipients of federal funding (including most hospitals) from requiring their personnel "to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions," and provides that recipients of federal funding may not discriminate against personnel on the basis of their performance of or refusal to perform such procedures.[103] More

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form a subcategory of claims of conscience that may be recognized as valid grounds for exemption from generally applicable laws.

100 *See, e.g.*, Wilson, *supra* note 4; Adelle M. Banks, *Conscience Clauses Not Just About Abortion Anymore*, USA TODAY ONLINE (Oct. 24, 2009), http://www.usatoday.com/news/religion/2009-10-24-conscience-doctors_N.htm (describing an Evangelical Christian physician who resigned after refusing to provide birth control to single women); John Miller, *Planned Parenthood: Pharmacy Broke Conscience Law*, LEWISTON MORNING TRIB., Jan. 13, 2011 (describing an Idaho pharmacist's refusal to dispense a prescription without confirmation that it was not needed for post-abortion care); Dean Olsen, *Plan B Users: Rejecting Prescriptions Should Not Be Allowed*, SPRINGFIELD NEWS-LEADER (Missouri), Jan. 2, 2009, at A1 (describing a pharmacy owner challenging the governor's proposal to require all pharmacies to fill emergency contraception).

101 *See generally* R. Alta Charo, *The Celestial Fire of Conscience—Refusing to Deliver Medical Care*, 352 NEW ENG. J. MEDICINE 2471 (2005).

102 Roe v. Wade, 410 U.S. 113 (1973).

103 42 U.S.C. § 300a-7. The Church Amendment also provides that a state may not require hospitals to make their facilities available for sterilization or abortion if "the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious

generally, the Church Amendment states that no individual shall be required to assist in "any part of a health service program or research activity funded [by HHS]" if it "would be contrary to his religious beliefs or moral convictions."[104] Today, the Church Amendment is bolstered by the 2004 Weldon Amendment, which restricts federal funding to entities that abide by conscience laws;[105] 2008 Health and Human Services regulations;[106] Title VII of the Civil Rights Act;[107] the Coats-Snowe Amendment to the Public Health Service Act;[108] and other laws and regulations.[109] Many states have also adopted legislation protecting physicians and pharmacists from employment discrimination, professional

beliefs or moral convictions," and may not require the entity to provide personnel for such procedures if it "would be contrary to the religious beliefs or moral convictions of such personnel." *Id.*

104 *Id.*

105 *See generally* Wilson, *supra* note 4, at 49–50.

106 President Bush adopted these regulations immediately before he left office, to take effect the day President Obama took office. Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices In Violation of Federal Law, 73 Fed. Reg. 50,274 (Aug. 26, 2008). The Obama Administration recently rescinded part of that regulation to much public outcry. Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9,968 (Feb. 23, 2011); *see also* Rescission of the Regulation Entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law"; Proposal, 74 Fed. Reg. 10207 (Mar. 10, 2009) (proposing rescission of the Bush regulation).

107 Title VII provides that an employer may not discriminate against employees based on religion, unless the employer demonstrates that he is "unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (holding that Title VII does not require an employer to offer alternatives that would constitute an "undue hardship" within the meaning of the statute); Bruff v. N. Miss. Health Servs., Inc., 244 F.3d 495 (5th Cir. 2001) (holding that hospital was not required to accommodate plaintiff employee by excusing her from counseling homosexual clients on subjects which conflicted with her religious beliefs, as such accommodation would have constituted an undue burden as a matter of law); Shelton v. Univ. of Med. & Dentistry of N.J., 223 F.3d 220 (3d Cir. 2000) (rejecting Title VII claim where employee refused employer's offers of reasonable accommodations). That being said, the Supreme Court's interpretation of the "undue hardship" requirement does little to protect employees—it has held that anything "more than a de minimis cost" to the employer can constitute undue hardship. *Hardison*, 432 U.S. at 84.

108 The Coats-Snowe Amendment to the Public Health Service Act provides that the state may not discriminate against a health care entity that "refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions, . . . refuses to make arrangements for [such] activities, . . . or . . . attends (or attended) a post-graduate physician training program, or any other program of training in the health professions, that does not (or did not) perform induced abortions or require, provide or refer for training in the performance of induced abortions, or make arrangements for the provision of such training." 42 U.S.C. § 238n(a).

109 The 2010 Patient Protection and Affordable Care Act, for example, prohibits health insurance exchange plans from discriminating against providers based on their refusal to participate in abortions. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1303, 124 Stat. 119, 168–71 (2010).

discipline, or malpractice liability as a result of their refusal to participate in abortion or other reproductive health procedures.[110]

As the capabilities of modern medicine expand, medical providers with strong moral beliefs have begun to raise objections beyond the reproductive context. Some physicians who treat patients at the end of life, for example, may refuse to comply with a family member's request for withdrawal of life-sustaining treatment, citing reasons of conscience.[111] Other physicians may refuse to comply with a family member's request to provide arguably futile care to a similarly situated patient.[112] Some state legislatures have responded to these concerns by broadening their conscience clause protections.[113] For example, Louisiana's medical conscience law provides that "[a]ny person has the right not to participate in . . . *any health care service* that violates his conscience to the extent that patient access to health care is not compromised."[114] It defines "health care service" to include not only abortion and dispensation of abortifacient drugs, but also "human embryonic stem cell research, human embryo cloning, euthanasia, [and] physician-assisted suicide."[115]

Although the Church Amendment also extends its protections to providers who do choose to offer abortion,[116] many statutes adopted since that time only protect providers who wish to be excluded. That is, they generally do not protect those who use conscience to justify their active involvement in controversial procedures,[117] such as physician-

110 *See generally* Thaddeus Mason Pope, *Legal Briefing: Conscience Clauses and Conscientious Refusal*, 21 J. CLINICAL ETHICS 163, nn.38–45 (2010); Wilson, *supra* note 4, at 50–52.

111 *See generally* Stephen Wear et al., *Toleration of Moral Diversity and the Conscientious Refusal by Physicians to Withdraw Life-Sustaining Treatment*, 19 J. MED. & PHIL. 147 (1994).

112 *See generally* Thaddeus Mason Pope, *Medical Futility Statutes: No Safe Harbor to Unilaterally Refuse Life-Sustaining Treatment*, 75 TENN. L. REV. 1, 8–10 (2007).

113 *See generally* Pope, *Legal Briefing*, *supra* note 110 (citing state laws to this effect).

114 LA. REV. STAT. ANN. § 40:1299.35.9 (2011) (emphasis added).

115 *Id.*; *see also* IDAHO CODE ANN. § 18-611 (2011) (defining health care services to include stem cell treatment, cloning, and end of life treatment); OKLA. STAT. tit. 63, § 1-728c (2011) (defining health care services to include certain procedures involving the destruction of in vitro human embryos, procedures on fetuses in artificial wombs, procedures involving fetal tissue or organs, as well as assisted suicide and euthanasia); L.B. 461, 102d Leg., 1st Sess. (Neb. 2011) (providing for employer accommodation of religious objections to abortion, as well as experiments or medical procedures involving human embryos, non-therapeutic medical procedures on developing fetuses, transplants using fetal tissue that comes from a source other than stillbirth or miscarriage, and acts causing or assisting a person's death). The Patient Protection and Affordable Care Act also prohibits discrimination on the basis of a health care entity's refusal to provide "assisted suicide, euthanasia, or mercy killing." Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1553, 124 Stat. 119 (2010).

116 42 U.S.C. § 300a-7(c) (2006).

117 *See* Mark R. Wicclair, *Negative and Positive Claims of Conscience*, 18 CAMBRIDGE Q. HEALTHCARE ETHICS 14 (2009); *see also* Elizabeth Sepper, *Whose Conscience Counts?* (Feb. 21, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888375.

assisted suicide, euthanasia, female genital mutilation, voluntary amputation, and legal executions.[118]

C. *Claims by Military Objectors*

A third commonly recognized intersection between conscience and the law occurs in the military context. Since the early days of the American republic, pacifists and others with conscientious objections to combat have sought, and often received, exemptions from service.[119]

The Draft Act of 1917 exempted conscientious objectors from combat training and service only if they "belonged to 'any well-recognized religious sect or organization . . . whose existing creed or principles forb[ade] its members [from] participat[ion] in war.'"[120] This sectarian restriction was abandoned in the 1940 Selective Training and Service Act, which provided a combat exemption for any person who conscientiously objects to participation in war "by reason of religious training and belief,"[121] later defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation."[122] The Supreme Court, called upon to interpret this provision in 1965, held in *United States v. Seeger* that the test of belief "in a relation to a Supreme Being" is whether a sincere and meaningful belief "occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[123] In adopting such a broad reading of the Act, the Court paved the way for exempting individuals who deny that their objections are religious in

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118 For example, some prison physicians who are asked to participate in legally authorized executions refuse to do so for reasons of conscience; others believe they are morally obligated to assist in the lethal injection process to ensure that prisoners feel no pain. Many states have adopted laws that protect physicians from professional discipline on the basis of their participation in, or refusal to participate in, legally authorized executions. Nadia N. Sawicki, *Doctors, Discipline, and the Death Penalty: Professional Implications of Safe Harbor Policies*, 27 YALE L. & POL'Y REV. 107 (2008).

119 *See generally* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1806–08 (2006) (discussing military exemptions dating back to 1673).

120 Gillette v. United States, 401 U.S. 437, 443 n.8 (1971).

121 *Id.*

122 United States v. Seeger, 380 U.S. 163, 165 (1965).

123 *Id.* at 176. In *Seeger*, three conscientious objectors raised a constitutional challenge to Section 6(j) of the Universal Military Training and Service Act, which exempted from combat training and service only those whose conscientious opposition arises by reason of their "religious training and belief." *Id.* at 164–65. The petitioners argued that the Act's definition of "religious training and belief" violated the Establishment and Free Exercise Clauses because it did not exempt nonreligious conscientious objectors and it discriminated between different forms of religious expression. *Id.* The Court did not resolve the constitutional issue, because it interpreted the Act broadly, finding that the petitioners' beliefs fell within the Act's exceptions. *Id.* at 185–88.

nature and instead cite ethical or even policy grounds for their opposition to war.[124]

Issues of conscientious objection to military combat have become less common since the United States discontinued the draft and shifted to an all-volunteer policy in 1973. Today, conscientious objector claims typically arise when voluntarily enlisted service members subsequently seek discharge from active service pursuant to Section 6(j) of the Military Selective Service Act,[125] citing a change in beliefs or values.[126] The burden is on the service member to demonstrate the sincerity of his objection by clear and convincing evidence.[127] The Department of the Army Conscientious Objector Review Board (DACORB) has sole discretion to resolve conscientious objector claims; its decision will be upheld on judicial review unless it has no basis in fact.[128] In recent years, a number of servicemen and women have successfully obtained exemptions from combat duty pursuant to this policy.[129]

Notably, while voluntarily enlisted service members may petition for separation from the armed forces or reassignment to non-combat

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124 *See supra* notes 31–33 and accompanying text.

125 The current Department of Defense policy on conscientious objection is codified in section 6(j) of the Military Selective Service Act. The term "conscientious objection" is defined as a "firm, fixed and sincere objection to participation in war in any form or the bearing of arms, because of religious training and belief." Conscientious Objection, Army Reg. 600-43, at 27 (Aug. 21, 2006), *available at* http://www.army.mil/usapa/epubs/pdf/r600_43.pdf. The term "religious training and belief" is further defined to include "deeply held moral or ethical belief[s]," even if the applicant himself characterizes them as non-religious. *Id.* at 27–28.

126 In *Watson v. Geren*, for example, the petitioner (while attending medical school) received an Army scholarship in exchange for his commitment to serve one year on active duty for each year of funding received, and to remain in the Army Reserve for five years thereafter. 569 F.3d 115, 118 (2d Cir. 2009). At that time, he was not opposed to participating in war or serving as an officer. *Id.* In 2006, as his residency training was nearing completion, petitioner filed an application for discharge as a conscientious objector, stating that his beliefs about participation in war had changed. *Id.* at 119. Although the investigating officer recommended that petitioner be classified as a conscientious objector and discharged, the Department of Army Conscientious Objector Review Board (DACORB) denied Watson's application. *Id.* at 125–27. On appeal, the Second Circuit found no valid basis in fact for DACORB's decision, and granted the petitioner's application. *Id.* at 134–35.

127 Army Reg. 600-43, *supra* note 125, at 2.

128 United States *ex rel.* Foster v. Schlesinger, 520 F.2d 751, 755 (2d Cir. 1975) (holding that, in determining whether there is a basis in fact to support a decision, the court may not substitute its own judgment for that of the military, and should not weigh the evidence to determine whether the decision was justified). Nonetheless, as the First Circuit recently explained, "[a]lthough this standard of review is a narrow one, it is not toothless. A basis in fact will not find support in mere disbelief or surmise as to the applicant's motivation. Rather, the government must show some hard, reliable, provable facts which would provide a basis for disbelieving the applicant's sincerity, or it must show something concrete in the record which substantially blurs the picture painted by the applicant. The DACORB's reasons for its decision must be grounded in logic and a mere suspicion is an inadequate basis in fact." Hanna v. Sec'y of the Army, 513 F.3d 4, 12 (1st Cir. 2008) (citations and internal quotation marks omitted).

129 *See* Tamar Lewin, *A Hotline Grapples with Evolving Appeals for Conscientious Objector Status*, N.Y. TIMES, July 18, 2010, at A13; *see also, e.g.*, *Geren*, 569 F.3d at 130–35; *Hanna*, 513 F.3d 4.

duty for reasons of conscience, military courts have held that conscientious objector status may not be used as a defense to disobeying a direct command.[130] In *United States v. Webster*, for example, the appellant, an Army combat engineer who had converted to Islam a few years after entering the military, failed to obey an order for deployment to Iraq. He had filed a conscientious objector petition the same day he was to have been deployed, and at his court martial hearing tried to use his objector status as a defense to the charge of disobeying a direct order. The court, citing well-established precedent, rejected his claim, holding that there is "no authority for a self-help remedy of disobedience."[131] "Unlike duress, conscientious objection is generally not a defense to the offenses of failure to obey lawful orders or missing movement."[132] Thus, while military policy allows service members to preemptively seek discharge or reassignment by citing conscientious objector status, they may not use their status post hoc to defend themselves against charges of misconduct.

D. *Other Claims*

While the most prominent examples of individuals seeking conscience-based exemptions from the law arise in the religious, medical, and military contexts, these are by no means the only examples. In the realms of property law, criminal law, tax law, discrimination law, and family law, actors also make claims of conscience—usually with limited degrees of success. Part II.D enumerates just a few of these situations.

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130 United States v. Webster, 65 M.J. 936, 942–43 (A. Ct. Crim. App. 2008); United States v. Johnson, 45 M.J. 88, 90–91 (C.A.A.F. 1996).

131 *Webster*, 65 M.J. at 943; *see also* Johnson, 45 M.J. at 90–91.

132 *Webster*, 65 M.J. at 92. The *Webster* court cited *United States v. Wilson*, 41 C.M.R. 100 (C.M.A. 1969), in which the court upheld a service member's conviction for absenting himself without leave, holding,

> [The position of] a person in the military service who develops convictions of conscience that conflict with his military duties[, whose] position is like that of a civilian whose religion or conscience is in conflict with lawful orders of the Government. Speaking of the latter, the Supreme Court of the United States has said that to allow scruples of personal conscience to override the lawful command of constituted authority would "in effect . . . permit every citizen to become a law unto himself." . . . [T]he freedom to think and believe does not excuse intentional conduct that violates a lawful command. . . . If the command was lawful, the dictates of the accused's conscience, religion, or personal philosophy could not justify or excuse disobedience.

Wilson, 41 C.M.R. at 101 (internal citations omitted); *see also* United States v. Stewart, 43 C.M.R. 112, 115–16 (C.M.A. 1971) (holding that conscientious objection "is a defense to a court-martial proceeding only if the Constitution, a statute, or a regulation so provides").

1. Nonviolent Civil Disobedience

Rosa Parks, Martin Luther King, Jr. and the Greensboro Four are paradigms of civil disobedience, engaging in conscience-driven protests against discriminatory laws. However, these individuals were not seeking legal accommodation for their actions in the same way as the military, medical, and religious objectors described above—rather, they were hoping to be prosecuted, with the goal of drawing public attention to legal injustices.[133] In this respect, they differ from traditional conscientious objectors, as granting a legal exemption for their actions would perhaps be "inconsistent with the motivation for their conduct."[134]

That being said, a true understanding of law's treatment of conscience necessitates study of those who engage in civil disobedience, because personal considerations of conscience lie at the heart of their public efforts to promote legal and social change.[135] Certainly, these activists want their actions to make a social statement—but the reason this statement is necessary is because of the persistent internal voice of conscience telling them that the status quo is unjust, and that their own moral integrity would be at risk if they do not address this injustice.[136] As history demonstrates, however, those who engage in civil disobedience to protest discriminatory laws suffer legal consequences, at least until a majority of voters come to understand the justice of their causes.

Beyond the civil rights movement, modern activists who engage in nonviolent civil disobedience often do so by trespassing on private property to protest policies or activities with which they disagree[137]—including military defense programs;[138] nuclear policy;[139] foreign poli-

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133 Thanks to Rob Vischer for his helpful critique of this Part.

134 E-mail from Rob Vischer to the author (Aug. 17, 2010) (on file with author).

135 See *supra* Part I.A.3 for a discussion of the personal and relational elements of conscience.

136 *See* THOREAU, *supra* note 15, at 17 ("It is not a man's duty, as a matter of course, to devote himself to the eradication of any, even the most enormous wrong; he may still properly have other concerns to engage him; but it is his duty, at least, to wash his hands of it, and, if he gives it no thought longer, not to give it practically his support."). *But see* Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897 (2005) (distinguishing between civil/political disobedience and conscientious objection).

137 *See generally* EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP (2010).

138 *See, e.g.*, United States v. Dorell, 758 F.2d 427 (9th Cir. 1985) (rejecting necessity defense where defendant trespassed on an air force base to protest the MX missile program).

139 *See, e.g.*, United States v. Maxwell, 254 F.3d 21 (1st Cir. 2001) (rejecting the necessity defense for a defendant charged with trespass at naval base in order to prevent deployment of nuclear submarines there, on the grounds that danger was not imminent); United States v. Montgomery, 772 F.2d 733 (11th Cir. 1985) (rejecting the necessity defense for a defendant who unlawfully entered a naval installation for the purpose of temporarily stopping the United States Navy's use of the facility to conduct military training exercises with nuclear submarines); United States v. Quilty, 741 F.2d 1031, 1033 (7th Cir. 1984) (rejecting the necessity defense

cy;[140] environmental policy;[141] and abortion policy.[142] When criminal charges are brought against them, they raise the necessity defense, arguing that their misconduct is necessary to prevent greater societal harm. While not typically framed in the language of conscience, the necessity defense as used in these cases essentially rests on the actor's conviction that the policy or activity being protested is morally odious, and her sincere conviction that morality demands active intervention on her part. Ultimately, activists in such situations typically face punishment for their actions, because courts almost uniformly reject the necessity doctrine.[143] In cases of civil disobedience, defendants are rarely able to satisfy the four prongs of the narrow necessity defense: that the defendant was faced with a choice of evils and chose the lesser evil; that she acted to prevent imminent harm; that she reasonably anticipated a direct causal relationship between her conduct and the conduct to be averted; and that she had no legal alternatives to violating the law.[144]

A final example of conscience-based nonviolent civil disobedience is the New Sanctuary Movement, which encourages sheltering or providing aid to undocumented immigrants in violation of state and federal law. According to the website for the New Sanctuary Movement, its purpose is, as "an act of public witness," to "enable congregations to

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because the defendant had other "opportunities for the propagation of the anti-nuclear message"); United States v. Seward, 687 F.2d 1270, 1273 (10th Cir. 1982) (rejecting the necessity defense where defendants blocked entry to a nuclear weapons facility); Commonwealth v. Capitolo, 498 A.2d 806 (Pa. 1985) (finding that the danger of a nuclear explosion was not sufficiently immediate to warrant the necessity defense).

140 *See, e.g.*, United States v Schoon, 971 F.2d 193 (9th Cir. 1991) (involving 30 people who entered an IRS field office in Arizona chanting, "Keep American tax dollars out of El Salvador," and splashing fake blood in the office); State v. Drummy, 557 A.2d 574 (Conn. App. Ct. 1989) (holding the necessity defense was unavailable where defendants broke into Army recruiting office to protest war in Nicaragua because there was no causal link between the break-in and the prevention of atrocities allegedly being committed by the United States in Nicaragua).

141 *See, e.g.*, United States v. DeChristopher, No. 2:09-CR-183, 2009 WL 3837208 (D. Utah Nov. 16, 2009) (rejecting the necessity defense of an environmental activist who interfered with government auction for oil drilling leases).

142 *See, e.g.*, People v. Smith, 514 N.E.2d 211 (Ill. App. Ct. 1987) (rejecting abortion protesters' argument that they were attempting to stop a woman who "looked" to be more than 20 weeks pregnant from entering a clinic on the ground that the activists were making only an educated guess); Buckley v. City of Falls Church, 371 S.E.2d 827 (Va. Ct. App. 1988) (rejecting the necessity defense of abortion protesters who trespassed at an abortion clinic to distribute literature); *see also* Commonwealth v. Wall, 539 A.2d 1325 (Pa. Super. Ct. 1988) (rejecting abortion protesters' argument asserting justification for trespass). *But see* Allison v. City of Birmingham, 580 So. 2d 1377 (Ala. Crim. App. 1991) (rejecting the necessity defense, noting that abortion is constitutionally protected); People v. Berquist, 608 N.E.2d 1212 (Ill. App. Ct. 1993) (same); City of Wichita v. Tilson, 855 P.2d 911 (Kan. 1993) (noting, and listing, cases where appellate courts have rejected the necessity defense in abortion clinic "rescue" prosecutions); People v. Archer, 537 N.Y.S.2d 726 (N.Y. City Ct., Rochester 1988) (allowing the necessity defense where protesters staged sit-in at hospital that performed late-term abortions).

143 *See supra* notes 138–142.

144 *See* WAYNE R. LAFAVE, CRIMINAL LAW 552 (5th ed. 2010); *see also* United States v. Aguilar 883 F.2d 662, 693 (9th Cir. 1989).

publicly provide hospitality and protection to a limited number of immigrant families whose legal cases clearly reveal the contradictions and moral injustice of our current immigration system."[145] Participants in the movement, who risk legal punishment to defend immigrants' rights, explicitly cite reasons of conscience and compassion for doing so.[146] While there have been only a few reported cases of sanctuary providers facing legal punishment,[147] spokespersons for the U.S. Customs and Immigration Department have been clear that those who violate immigration laws will "face the consequences of their actions."[148]

2. Violence and Terrorism

While the classic definition of civil disobedience is limited to nonviolent protest,[149] some protesters ultimately turn to violence to make

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145 *Prophetic Hospitality: Strategy for a New Movement*, NEW SANCTUARY MOVEMENT (Jan. 14, 2012, 10:45 PM), http://www.newsanctuarymovement.org/hospitality.htm.

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> The New Sanctuary Movement is a coalition of interfaith religious leaders and participating congregations, called by our faith to respond actively and publicly to the suffering of our immigrant brothers and sisters residing in the United States. We acknowledge that the large-scale immigration of workers and their families to the United States is a complex historical, global and economic phenomenon that has many causes and does not lend itself to simplistic or purely reactive public policy solutions. We stand together in our faith that everyone, regardless of national origin, has basic common rights, including but not limited to: 1) livelihood; 2) family unity; and 3) physical and emotional safety. We witness the violation of these rights under current immigration policy, particularly in the separation of children from their parents due to unjust deportations, and in the exploitation of immigrant workers. We are deeply grieved by the violence done to families through immigration raids. We cannot in good conscience ignore such suffering and injustice.

The New Sanctuary Movement: Building on a Powerful Tradition, NEW SANCTUARY MOVEMENT (Jan. 14, 2012, 10:45 PM), http://www.newsanctuarymovement.org/movement.html.

147 *See* Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 GEO. IMMIGR. L.J. 147 (2010); Emily Breslin, Note, *The Road to Liability Is Paved with Humanitarian Intentions: Criminal Liability for Housing Undocumented People Under 8 U.S.C. § 1324(A)(1)(A)(III)*, 11 RUTGERS J.L. & RELIGION 214 (2009).

148 Louis Sahagun, *Giving Shelter from the Storm of Deportation*, L.A. TIMES, May 9, 2007, at B2. 8 U.S.C. § 1324, for example, imposes criminal penalties on anyone who "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place." 8 U.S.C. § 1324(a)(1)(A)(iii) (2006). Although some localities have liberal sanctuary laws, *see* Julia Duin, *California's Safe-House Soldiers*, WASH. TIMES, May 30, 2008, at A1, local sanctuary providers are still subject to federal prosecution. Consider also the widely publicized 2010 Arizona law that subjects cities to potential liability for not enforcing its provisions regarding police enforcement of immigration laws. *See* Randal C. Archibold, *Arizona's Effort to Bolster Local Immigration Authority Divides Law Enforcement*, N.Y. TIMES, April 21, 2010, at A16.

149 *See* RAWLS, *supra* note 2, at 364 (defining civil disobedience as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government").

their voices heard. Some pro-life advocates, for example, rather than simply picketing abortion clinics, have chosen to threaten, assault, or even kill physicians who provide abortions.[150] Scott Roeder, who in 2009 shot and killed Dr. George Tiller while he was at church, justified his actions as necessary to save the lives of unborn children.[151] In Roeder's case and others, defendants who engage in violence on the basis of moral compulsion often claim the necessity defense. Courts, however, have uniformly rejected this defense on the same grounds as in traditional cases of civil disobedience.[152]

Outside the abortion context, nearly every example of nonviolent civil disobedience (by means of trespass, for example) has a more violent analogue. Opponents of U.S. government policies have bombed or attacked government buildings, killing or injuring hundreds.[153] Joseph Stack, the pilot who crashed his plane into a Texas IRS building in early 2010, cited opposition to tax law as a significant motivating factor in his decision.[154] An apparent suicide note Stack posted online describes the United States as a "totalitarian regime" that coerces compliance with tax laws "not even the experts understand."[155] Stack concluded the note by writing, "[i]t has always been a myth that people have stopped dying for

150 The National Abortion Federation, a pro-choice organization that compiles statistics on the frequency of violent acts against abortion providers, reports 7 murders, 14 attempted murders, and 13 bombings taking place between 1994 and 2009. *NAF Violence and Disruption Statistics*, NAT'L ABORTION FED'N, http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/violence_stats.pdf (last visited Jan. 15, 2012).

151 *Defendant Says He Killed Abortion Provider to Save the Unborn*, WASH. POST, Jan. 29, 2010, at A4; Roxana Hegeman, *Abortion Doctor's Killer Gets Life Prison Term*, CHARLESTON GAZETTE, Apr. 2, 2010, at A8 (reporting that Roeder shouted, as he was being led out of the courtroom: "Blood of babies on your hands."); Joe Stumpe & Monica Davey, *Abortion Doctor Slain by Gunman in Kansas Church*, N.Y. TIMES, May 31, 2009, at A1.

152 *See Setback for Killer of Abortion Provider*, WASH. POST, Dec. 23, 2009, at A4; *see also* Hill v. State, 688 So. 2d 901 (Fla. 1996) (rejecting the necessity defense where defendant argued that killing of doctor and doctor's companion was necessary to prevent abortions).

153 In 1970, four men bombed Sterling Hall at the University of Wisconsin, which housed a research facility funded by the Army, injuring three and killing one. The bombers described their act as "not an isolated attack by 'lunatics,'" but rather "a conscious action," necessary to destroy "a vital cog in the machinery of U.S. imperialism, the most vicious and brutal machinery in the history of mankind." *Text of the FBI Affidavit Charging Four in University of Wisconsin Bombing*, N.Y. TIMES, Sept. 3, 1970, at A25. In 1990, tax denier Peter Hendrickson mailed a firebomb to the IRS, injuring a postal worker. Jason Zengerle, *Hell Nay, We Won't Pay!*, N.Y. TIMES MAG., Mar. 29, 2009, at 40. In 1995, Timothy McVeigh detonated a homemade bomb in front of the Oklahoma City Federal building, killing approximately 167 people. John Kifner, *U.S. Indicts 2 in Bomb Blast in Oklahoma*, N.Y. TIMES, Aug. 11, 1995, at A1. In 2010, Andrew Joseph Stack III flew a plane into a Texas IRS building, killing one person and injuring two others. Michael Brick, *Man with Grudge Against Tax System Crashes Plane into Texas I.R.S. Office*, N.Y. TIMES, Feb. 19, 2010, at A14.

154 *See* David Cay Johnston, *Tax Law Was Cited in Software Engineer's Suicide Note*, N.Y. TIMES, Feb. 19, 2010, at A17.

155 *See Remains of 2 Found After Austin Plane Crash*, CNN.COM (Feb. 19, 2010), http://edition.cnn.com/2010/US/02/18/texas.plane.crash (providing text of the apparent suicide note).

their freedom in this country . . . . I know there have been countless before me and there are sure to be as many after. But I also know that by not adding my body to the count, I insure [sic] nothing will change."[156] Timothy McVeigh, who was responsible for the 1995 Oklahoma City bombing, reportedly took his extreme action because of his fierce opposition to the government's firearms policies, including the passage of the Brady Bill.[157] In the realm of environmental policy, some activist groups (such as the Animal Liberation Front) have shifted from simple protests to more serious actions, causing hundreds of millions of dollars in damages to private property and occasionally injuring individuals. As with other forms of violent civil disobedience, no legislation exists to protect the rights of "eco-terrorists," and their arguments for the necessity defense are soundly rejected.[158]

At the furthest end of the spectrum, even textbook examples of ultra-violent terrorism—including the tragic events of September 11, 2001, and suicide bombings in the Middle East—can often be understood as manifestations of conscientious belief. The language used by perpetrators and proponents of such attacks is often religious in nature, and grounded in the conviction that the status quo is morally untenable and that direct violence is necessary to right these wrongs and to maintain their own spiritual integrity.[159] Although the acts perpetrated by these individuals cause significantly more damage than those done by non-violent protesters,[160] the difference in their motivations appears to be one of degree, rather than kind.

3. Tax Denial and Evasion

Conscientious opposition to military action has also found expression in the realm of tax law, with objectors refusing to pay taxes that contribute to what they consider to be morally objectionable defense efforts. In *Waitzkin v. Commissioner*, for example, taxpayers claimed a "war crimes deduction," arguing that payment of income taxes to be used for war and defense related purposes "would violate their con-

156 *Id.*

157 *See* John Kifner, *McVeigh's Mind*, N.Y. TIMES, Dec. 31, 1995, at A1.

158 *See* Steve Vanderheiden, *Eco-Terrorism or Justified Resistance? Radical Environmentalism and the "War on Terror,"* 33 POL. & SOC'Y 425 (2005).

159 *See generally* Yuval Neria et al., *The Al Qaeda 9/11 Instructions: A Study in the Construction of Religious Martyrdom*, 35 RELIGION 1 (2005); Joshua J. Yates, *The Resurgence of Jihad and the Specter of Religious Populism*, 27 SAIS REV. 127 (2007).

160 *See infra* Part III.B (discussing the argument for distinguishing between claims of conscience on the basis of their harmful effects).

science and religious beliefs under the First Amendment."[161] Arguments such as these have been uniformly rejected by courts, which refuse to "equate a conscientious objection to taking lives with a conscientious objection to paying a tax,"[162] and find no basis for exemption from federal income taxes.[163] Notably, legislation to codify arguments such as those made by the petitioners in *Waitzkin* has been proposed in Congress for years, but has never passed.[164]

Potentially, taxpayers could make similar arguments to avoid paying taxes that support any governmental programs or policies that they conscientiously oppose, though such claims have not yet been tested in the courts.[165] For example, much of the opposition to the 2010 Patient Protection and Affordable Care Act focused on the possibility that federal funds might be used to pay for elective abortions.[166] While the law

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161 Waitzkin v. Comm'r of Internal Revenue, 42 T.C.M. (CCH) 29 (T.C. 1981), *aff'd*, 697 F.2d 301 (2d Cir. 1982) (unpublished table decision). A statement attached to the petitioners' tax return read:

> The reasons for this decision were as follows (as also stated in our tax returns for 1973 and 1974). We cannot conscientiously pay income taxes which the United States uses for war and related defense purposes. Howard Waitzkin is a conscientious objector and has been so recognized by the Selective Service System. We believe that payment of taxes for defense would violate our conscientious and religious beliefs under the First Amendment. Furthermore, we adhere to the Nuremberg Principles which establish that each citizen bears responsibility for illegal and/or immoral military intervention policies of his/her government; we believe that the United States' continuing military intervention in Indochina, Latin America, Africa, and other parts of the world is both immoral and illegal under international law. Therefore, we are reducing our income tax we pay by 50 percent approximately that portion of the country's taxes which are spent on defense or war-related activities.

Id.

162 Linger v. Comm'r of Internal Revenue, 42 T.C.M. (CCH) 1068 (T.C. 1981).

163 *See* United States v. Lee, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."); Jenkins v. Comm'r of Internal Revenue, 483 F.3d 90, 92 (2d Cir. 2007); United States v. Ramsey, 992 F.2d 831, 833 (8th Cir. 1993) (rejecting taxpayer's argument that paying federal income taxes violates his pacifist beliefs); Wall v. United States, 756 F.2d 52 (8th Cir. 1985); United States v. Peister, 631 F.2d 658, 663 (10th Cir. 1980) (rejecting taxpayer's argument for exemption from income tax based on the basis of a "vow of poverty"); *Waitzkin*, 42 T.C.M. (CCH) 29 (refusing to grant petitioner a conscientious exemption from payment of taxes).

164 The Religious Freedom Peace Tax Fund Bill, which would "enable conscientious objectors to war to have their federal income taxes directed to a special fund which would be used for non-military purposes alone," was first proposed in 1972, and continues to be sponsored on a regular basis. *Our Purpose*, NAT'L CAMPAIGN FOR A PEACE TAX FUND, http://www.peacetaxfund.org/aboutus/mission.htm (last visited Jan. 18, 2012); *see* Religious Freedom Peace Tax Fund Act, H.R. 1191, 112th Cong. (2011); *see also Waitzkin*, 42 T.C.M. (CCH) 29.

165 *See generally* Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317 (2011) (proposing a compelling interest test for accommodation of taxpayers' conscientious beliefs).

166 *See* David D. Kirkpatrick, *Abortion Fight Adds to Debate on Health Care*, N.Y. TIMES, Sept. 28, 2009, at A1; Editorial, *Abortion and Health Care Reform*, N.Y. TIMES, Oct. 1, 2009, at A32.

as passed expressly prohibits the use of federal premiums or cost-sharing subsidies as payment for abortions excluded under the Hyde Amendment,[167] it is conceivable that, had the law excluded these provisions, some taxpayers would have sought exemption from payment, citing conscientious opposition to the use of their tax money for morally prohibited purposes.

Finally, it is worth highlighting the substantial number of taxpayers who subscribe to the "tax-honesty movement," known to the IRS and Justice Department as "tax deniers" or "tax defiers."[168] These groups typically offer frivolous legal arguments for why they are not obligated to pay income tax (for example, because the IRS is not an agency of the United States, or because only federal employees are properly subject to federal income taxes).[169] However, some of their rhetoric is suggestive of conscience-based claims—that is, despite all reason, logic, and legal argument to the contrary, they persist in making claims based on apparently sincere beliefs about what they believe to be the true nature of American tax law.[170] Peter Hendrickson, a tax denier and author of *Cracking the Code: The Fascinating Truth About Taxation in America*, a handbook for the tax denier movement, has compared his feelings in fighting the tax system to those of "Copernicus . . . when he was doing his research."[171] Moreover, when it comes to raising a legal defense for their violation of tax laws, one lawyer who represents tax deniers "counsels his clients to base their defense not on the rightness of their beliefs but rather on the fact that they are sincere in them."[172]

4. Discriminatory Acts

Since the adoption of expansive anti-discrimination laws throughout the United States, many have sought exemption from these laws on the basis of conscientious belief.[173] Conflicts most commonly arise in

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167 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1303(b), 124 Stat. 119, 171 (2010).

168 Zengerle, *supra* note 153.

169 INTERNAL REVENUE SERV., THE TRUTH ABOUT FRIVOLOUS TAX ARGUMENTS 29–31, 40–41 (2011), *available at* http://www.irs.gov/pub/irs-utl/friv_tax.pdf.

170 *See* Zengerle, *supra* note 153.

171 *Id.* In 1992, Hendrickson pled guilty in connection with mailing a firebomb to the IRS in 1990. *Id.* Since then, Hendrickson has been sued by the Justice Department for filing false tax returns; he is currently being charged with ten counts of submitting false documents to the IRS. *Id.*

172 *Id.*

173 Such claims are dependent on the content of the anti-discrimination laws: "I can, for example, absolutely refuse to hire anyone whose eyebrows are not at least three inches long." Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 131 (2006).

states and municipalities with laws that prohibit discrimination on the basis of sexual orientation or gender identity—for example, California, which prohibits businesses from discriminating on the basis of, inter alia, medical condition, marital status, or sexual orientation pursuant to the Unruh Civil Rights Act.[174] Numerous business owners in California and elsewhere (including medical providers,[175] websites,[176] event venues,[177] photographers,[178] landlords,[179] and civil servants[180]) have refused to provide services to gay couples on the basis of moral objections to homosexuality.

Most of these conscience claims are brought as constitutional defenses to suits alleging discrimination, arguing that enforcement of the civil rights laws against the claimants violates their First Amendment right to freedom of religion or expression. For the most part, courts apply the test developed in *Smith v. Fair Employment and Housing Commission*[181] or some variation thereof, holding that the defendants have no constitutional right to exemption from valid and neutral laws of general applicability.[182]

In the face of such disappointments, some states have adopted legislation explicitly providing for religious exemptions from civil rights and discrimination laws.[183] New Hampshire, Vermont, and Connecticut, for example, protect clergy who do not want to participate in same-sex marriages, and provide immunity from civil or criminal liability to religious organizations that refuse to provide services related to marriages that violate their religious beliefs.[184] These laws do not, however, protect individuals or organizations with no religious affiliations who

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174 CAL. CIV. CODE § 51 (Deering 2011).

175 *See* Ward v. Bd. of Control of E. Mich. Univ., 700 F. Supp. 2d 803 (E.D. Mich. 2010) (denying defendant university's motion for summary judgment in suit by counseling student who was dismissed for refusing to counsel gays); N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Sup. Ct., 189 P.3d 959 (Cal. 2008) (rejecting medical group's claim to a First Amendment defense for refusing to provide artificial insemination services to a lesbian couple).

176 *See* Butler v. Adoption Media, LLC, 486 F. Supp. 2d 1022 (N.D. Cal. 2007) (denying defendants' motion for summary judgment as to their claims under the Unruh Act); Carlson v. eHarmony.com, No. BC371958, 2008 WL 7662906 (Cal. Super. Ct. 2008).

177 *See* Barbara Bradley Hagerty, *Gay Rights, Religious Liberties: A Three-Act Story*, NAT'L PUB. RADIO (June 16, 2008), http://www.npr.org/templates/story/story.php?storyId=91486340.

178 Willock v. Elane Photography, LLC, HRD No. 06-12-20-0685 (N.M. Human Rights Comm'n Apr. 9, 2008), *available at* http://www.boxturtlebulletin.com/btb/wp-content/uploads/2008/04/elane.pdf.

179 *See* Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909 (Cal. 1996).

180 *See generally* Wilson, *supra* note 41.

181 913 P.2d 909.

182 *See, e.g.*, Butler, 486 F. Supp. 2d 1022; N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Sup. Ct., 189 P.3d 959, 966-67 (Cal. 2008); *Willock*, HRD No. 06-12-20-0685. *But see* Ward v. Bd. of Control of E. Mich. Univ., 700 F. Supp. 2d 803 (E.D. Mich. 2010)

183 *See* Wilson, *supra* note 41.

184 *See* CONN. GEN. STAT. § 46b-22b (2011); N.H. REV. STAT. ANN, § 457:37 (2011); VT. STAT. ANN. tit. 8, § 4501 (2011).

may nevertheless object to facilitating a same-sex marriage—including florists, caterers, photographers, and wedding venues—and some scholars have argued that the protections should be thus extended.[185]

Some claimants have also relied on RFRA, albeit unsuccessfully, to justify conscientious refusals to comply with anti-discrimination laws. In *Smith*, for example, the claimant was a landlord who believed that "sex outside of marriage is sinful, and that it is a sin for her to rent her units to people who will engage in nonmarital sex on her property.... [I]f she does so, she will be prevented from meeting her deceased husband in the hereafter."[186] The California Supreme Court denied her claim, holding that she had no right under RFRA to discriminate among prospective tenants based on their marital status, because the anti-discrimination laws did not substantially burden her freedom of religion.[187]

In conclusion, although a few statutes exist to protect religious organizations and clergy from liability for violating anti-discrimination laws, these laws do not extend to secular service providers with no formal connection to a religious institution.[188] And in most cases where service providers have attempted to use RFRA as a defense to their discriminatory actions, their claims have been unsuccessful.

5. Parents and Children

Conscience may also play a part in many choices that parents make on behalf of their children.[189] Parents who oppose education about premarital sexual activity may seek to excuse their children from curricular requirements in public schools.[190] Parents may seek conscience-based exemptions from state vaccination laws, either because the relevant vaccines were developed in unethical ways,[191] or because of ethical objec-

185 *See, e.g.*, Wilson, *supra* note 41; Robin Wilson, *Protection for All in Same-Sex Marriage*, L.A. TIMES, May 3, 2009, at A39; Alan Brownstein, Op-Ed, *Religious Freedom and Gay Marriage Can Coexist*, L.A. TIMES ONLINE (May 11, 2009), http://www.latimes.com/news/opinion/opinionla/la-oew-brownstein11-2009may11,0,426780.story.

186 *Smith*, 913 P.2d at 912 (holding that a landlord has no constitutional or RFRA-based right to discriminate against potential tenants on the basis of their marital status).

187 *Id.*

188 *See* Wilson, *supra* note 41, at 319–21.

189 Often, this arises in the context of a constitutional claim for free exercise of religion, as in *Wisconsin v. Yoder*, 406 U.S. 205, 208–12 (1972). But a wide variety of cases, including those discussed herein, fall within the sub-constitutional realm.

190 *See, e.g.*, Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 529 (1st Cir. 1995).

191 *See* Edward J. Furton, *Vaccines and the Right of Conscience*, NAT'L CATHOLIC BIOETHICS Q., Spring 2004, at 53, 53 (noting that parents "believe that it would be immoral to inoculate their children with . . . a vaccine with even the most remote connection to abortion"). Vaccinations with controversial origins include those for rubella, Hepatitis A, and varicella. *Id.*

tions to the likely consequences of the vaccine.[192] Parents who refuse to consent to medically necessary treatment for their children may also seek to defend themselves from medical neglect charges by citing reasons of conscience.[193] Parents who oppose animal cruelty and feed their infants a vegan diet may pursue similar defenses when facing charges of child abuse and endangerment.[194] Parents with strong cultural beliefs may ask physicians to assist in illegal practices that cause physical harm to their children, such as female genital mutilation.[195]

If, as is frequently the case, the parents in such cases are unable to raise a successful free exercise claim (or a liberty claim under the Fourteenth Amendment for the right to direct the upbringing of their children),[196] they must instead rely on sub-constitutional methods of enforcing their rights of conscience,[197] with varying degrees of success. In the context of vaccination, for example, legislatures in twenty states permit parents to opt their children out of vaccination on the basis of nonreligious personal convictions.[198] Moreover, many states have adopted legislative exemptions to child endangerment and neglect statutes that (in theory, at least) protect parents who rely on faith-based

192 *See* Michael Lindenberger, *An STD Vaccine for All Girls?*, TIME.COM (Jan. 17, 2007), http://www.time.com/time/health/article/0,8599,1579707,00.html (discussing parental objections to proposed state legislation that would make the HPV vaccine mandatory for girls as young as ten).

193 *See* Seth M. Asser & Rita Swan, *Child Fatalities from Religion-Motivated Neglect*, 101 PEDIATRICS 625 (1998).

194 *See, e.g.*, Greg Bluestein, *Vegans Sentenced for Starving Their Baby*, ASSOCIATED PRESS, May 9, 2007; Greg Retsinas, *Couple Guilty of Assault in Vegan Case*, N.Y. TIMES, Apr. 5, 2003, at D1.

195 *See* Wim Dekkers, *Routine (Non-Religious) Neonatal Circumcision and Bodily Integrity: A Transatlantic Dialogue*, 19 KENNEDY INST. ETHICS J. 125 (2009).

196 "Parents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children." Prince v. Massachusetts, 321 U.S. 158, 164, 170 (1944) (describing the parent's claim of a due process right "to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith").

197 *See, e.g.*, Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106i(a) (2006) ("Nothing in this subchapter . . . shall be construed . . . as establishing a Federal requirement that a parent or legal guardian provide a child any medical service or treatment against the religious beliefs of the parent or legal guardian."). Most states have statutes granting religious exemptions from child abuse and neglect statutes. Robin Fretwell Wilson, *The Perils of Privatized Marriage*, *in* MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION 253, 258 (Joel A. Nichols ed., 2012); Richard A. Hughes, *The Death of Children by Faith-Based Medical Neglect*, 20 J.L. & RELIGION 247, 248 (2004).

198 Nancy Berlinger, *Conscience Clauses, Health Care Providers, and Parents*, *in* FROM BIRTH TO DEATH AND BENCH TO CLINIC: THE HASTINGS CENTER BIOETHICS BRIEFING BOOK FOR JOURNALISTS, POLICYMAKERS, AND CAMPAIGNS 35 (Mary Crowley ed., 2008), *available at* http://www.thehastingscenter.org/uploadedFiles/Publications/Briefing_Book/conscience%20clauses%20chapter.pdf. Of course, in the event of a true public health emergency, the parents' right to refuse vaccination on behalf of their children would likely be curtailed. *See* Jacobson v. Mass., 197 U.S. 11 (1905); Michael deCourcy Hinds, *Judge Orders Measles Shots in Philadelphia*, N.Y. TIMES, Mar. 6, 1991, at A23.

healing rather than traditional medical treatment for their children.[199] In practice, however, courts have tended to interpret these laws narrowly. When parents are unwilling to provide life-saving medical treatment to their children on religious or conscientious grounds, modern courts have no compunction about ordering treatment against the parents' wishes,[200] or upholding manslaughter or homicide convictions if the parents' beliefs cause a child's death.[201] Similarly, vegan and vegetarian parents whose diets lead to malnutrition in their children are routinely punished regardless of the strength of their conscientious beliefs.[202]

At least one prominent health law and bioethics scholar has described the law's treatment of such cases as "unprincipled" and "inconsisten[t]."[203] While there is little consistency in how the law treats these various cases, a number of commentators have noted that when the harm suffered by the child is likely to be severe, parental claims for accommodation the basis of conscience are typically denied. In contrast, where the child's condition is not life threatening, courts are often more willing to defer to parental judgments.[204]

199 *See* Adam Lamparello, *Taking God out of the Hospital: Requiring Parents to Seek Medical Care for Their Children Regardless of Religious Belief*, 6 TEX. F. ON C.L. & C.R. 47, 48 (2001).

200 *See* Douglas S. Diekema, *Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention*, 25 THEORETICAL MED. & BIOETHICS 243, 248–49 (2004); Kent Greenawalt, *Objections in Conscience to Medical Procedures: Does Religion Make a Difference?*, 2006 U. ILL. L. REV. 799, 808. *But see* Newmark v. Williams, 588 A.2d 1108, 1110 (Del. 1991) (refusing to order chemotherapy for a child against his parents' wishes where the treatment was invasive and had only a 40% success rate).

201 *See, e.g.*, Walker v. Super. Ct., 763 P.2d 852, 866 (Cal. 1988) (holding that California faith healing law does not provide a defense to prosecution for homicide or other felonies when "serious physical harm or illness is . . . at risk"); Commonwealth v. Barnhardt, 497 A.2d 616, 619–23 (Pa. Super. Ct. 1986) (upholding parents' conviction for involuntary manslaughter when their child died as a result of an untreated tumor); *see generally* Lamparello, *supra* note 199, at 56–57; Wilson, *The Perils of Privatized Marriage*, *supra* note 197, at 260–61 (discussing the 2008 *Neumann* case, in which a child's parents were convicted of second-degree homicide for her death from a lack of insulin despite a Wisconsin law exempting parents who rely on faith healing from child abuse charges).

202 *See supra* note 194.

203 Jennifer L. Rosato, *Using Bioethics Discourse to Determine when Parents Should Make Health Care Decisions for Their Children: Is Deference Justified?*, 73 TEMP. L. REV. 1, 5 (2000); *see also* Diekema, *supra* note 200, at 245–46.

204 *See* Greenawalt, *supra* note 200, at 808; Diekema, *supra* note 200, at 245–46. The reluctance of courts and legislatures to accommodate parents' conscientious claims on behalf of their children is particularly surprising given that parents have a limited constitutional liberty right to direct the upbringing of their children as they see fit. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944).

III. RAISING OUR CONSCIOUSNESS OF CONSCIENCE: JUSTIFICATIONS FOR DIFFERENTIAL TREATMENT

After examining the various ways in which law responds to claims for legal accommodation on the basis of conscientious belief, the reader cannot be faulted for turning with a critical eye back to Part I.B's assertion that liberty of conscience is a fundamental principle of American society. Despite grand pronouncements by political philosophers, founding fathers, and modern courts about the importance of respecting personal conscience, the surprising fact remains that many claims of conscience—whether framed as constitutional claims for religious liberty or necessity defenses in criminal prosecutions—are unsuccessful. In fact, claims by actors seeking legal relief on the basis of conscientious belief have only met with regular success in the few contexts where there are explicit statutory protections—when members of the military seek exemptions from combat duty (though, notably, not when they use conscience as a post hoc defense in criminal proceedings), and when medical providers seek relief from adverse employment actions on the basis of their refusal to perform abortions or other controversial medical procedures. In most other situations, including civil disobedience, discrimination, terrorism, tax evasion, and medical neglect, courts enforce judgments against conscientious actors without hesitation. Rather than reinforcing a view of conscience as fundamental to American law and society, this assessment leaves the impression that legal accommodations for conscience are inconsistent and weak.

If the varied situations described in Part II are all woven through with the common thread of conscience, then—at least as a prima facie matter—they ought to be treated similarly.[205] Of course, even the strongest theory of accommodation of conscience has its limits.[206] As a result, it is incumbent upon the state to provide some explanation for differential treatment—for example, by identifying relevant distinctions between those cases in which law protects conscience and those in which claims of conscience are rejected.

Judges adjudicating individual claims have, of course, offered reasoned justifications for drawing the lines where they do. In tax cases, for example, they explain that the link between payment of taxes that support defense efforts and personal involvement in military combat is too indirect to support an extension of legal accommodation. In cases of

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205 *See generally infra* Part IV.

206 *See* Leiter, *Why Tolerate Religion?*, *supra* note 28, at 9–10 (noting that all principled arguments for religious toleration necessarily recognize side constraints).

violence and terrorism, judges point to the significant harms that are caused by the defendants' actions, even when those actions are grounded in sincerely held conscientious beliefs. In a variety of cases, judges often point to the administrative burden of extending leniency to yet another category of conscientious objectors.

But unfortunately, neither courts, nor legislators, nor legal scholars have yet offered any consistent explanation as to why the lines of accommodation for conscience are drawn where they are. That is, while each of the various justifications described herein may help resolve individual cases, no single justification offers an accurate descriptive account of law's treatment of conscience as a whole. If, for example, we try to extend the directness justification highlighted in tax avoidance cases to other situations (for example, instances of parental medical neglect), the outcome of this analysis does not match up with the actual outcome under our legal regime. If there is a content-neutral justification for treating these cases differently, our legal system has thus far failed to provide it.

Part III systematically examines the various justifications that have been offered to explain the differential legal treatment of various claims of conscience. Although each seems initially promising, none of these justifications offers an accurate descriptive account of law's treatment of conscience across various substantive realms.

A. *Action v. Inaction*

One justification for accommodating only certain claims of conscience relates to the distinction between action and inaction. A person's liberty is burdened most drastically, some argue, when the state compels her to act against her will. In contrast, if the state merely prevents a person from taking action, the burden on her liberty is not nearly as significant.[207] Consequently, reasons of conscience may only be good excuses for certain kinds of behavior—namely, omissions or failures to take action that is legally required or expected. Military conscientious objectors, for example, can obtain exemptions from a policy that would require them to engage in combat, an action that they view as morally objectionable. Similarly, medical providers who oppose abortion on conscientious grounds are permitted to avoid participation in acts that might otherwise be expected of practitioners. In contrast, the law does not protect those who engage in sit-ins, destroy property, or commit violence. Under this reasoning, the distinction is justified because these

207 *See, e.g.*, J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 361-64 (1969) (arguing that conscientious objections to performing positive duties should be specially privileged).

activists are not seeking to avoid compulsion by the state, but instead are actively taking steps in direct violation of the law, and the state has a right to prevent people from taking action that may be harmful to others.

As a descriptive matter, however, the action/inaction distinction does not explain why we grant legal accommodation for claims of conscience in some cases but not others.[208] To cite just one example, citizens who refuse to pay taxes that support morally objectionable government policies receive no accommodation, despite the fact that they are seeking exemption from a positive action compelled by the state (payment of taxes) in much the same way as military conscientious objectors, who are exempted. Moreover, it is often difficult to draw a clear distinction between passively refusing to take action compelled by the state and actively taking steps to avoid complicity with objectionable government policies.[209] For example, those who provide sanctuary to undocumented immigrants may risk punishment under federal and state law—but is their behavior best characterized as action or inaction? On the one hand, sanctuary providers might be viewed as simply refusing to comply with reporting requirements (inaction). On the other hand, they might be viewed as actively sheltering undocumented immigrants on their private property (action). If we cannot determine whether a believer's behavior constitutes action or inaction, then it is especially difficult to defend this account as a universal justification.

B. *Harm to Others*

A second account that might be offered to distinguish between claims of conscience asks whether accommodating the claims is likely to

208 There are also a number of normative/philosophical objections to the action/inaction distinction, which are beyond the scope of this Article. For example, many philosophers and some legal scholars have suggested that the law's distinction between active and passive behavior is merely semantic and not grounded in any real-world difference in motive or effect. *See, e.g.*, Ronald Dworkin et al., *The Philosophers' Brief*, *in* ETHICAL ISSUES IN MODERN MEDICINE 488–96 (Bonnie Steinbock et al. eds., 7th ed. 2009) (arguing that there is no legal distinction between active physician-assisted suicide and passive withdrawal of treatment); *see also* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990) (Scalia, J., concurring) (noting that where legislative intent is to prevent suicide, "it would seem . . . unreasonable to draw the line precisely between action and inaction").

209 Similar arguments about the action/inaction distinction have been raised in the context of Commerce Clause challenges to the 2010 Patient Protection and Affordable Care Act (PPACA). Critics of PPACA argue that Congress lacks authority to mandate the purchase of health insurance on the grounds that this would constitute inaction, rather than action, and therefore that it does not fall within the Commerce Clause. Supporters of PPACA, in contrast, argue that the law does indeed regulate action, namely the act of seeking medical care while uninsured.

cause harm to third parties.[210] Martha Nussbaum, for example, describes conscience as taking precedence over laws of general applicability only "where public order and safety are not jeopardized."[211] The first question to be resolved in fleshing out this theory is what kind of harm is relevant to the analysis: Harm to individual rights? Physical harm? Emotional harm?

Considering those who hold conscientious objection to abortion may be instructive in this regard. Providing legal protection (by way of conscience clauses) to physicians who refuse to perform elective abortions typically does not result in physical harm.[212] Indeed, such laws may even lessen the possibility of physical harm to a pregnant woman and her fetus, if her physician's refusal to abort results in the continuation of an uncomplicated pregnancy. On the other hand, providing legal protection to Scott Roeder, who killed a physician who regularly provided abortion services, would likely promote physical harm in the form of violence against abortion providers.[213] It is for this reason, some might argue, that the pro-life physician's choices are respected and those such as Roeder's are not. Notably, this argument negates the significance of the non-physical harm that may result to the pregnant woman from respecting the physician's claim of conscience—emotional harm, monetary harm (in that she is required to seek out the services of another physician), and the burden upon her constitutionally protected liberty interest in terminating a pregnancy. If we use this example as a guide, we might conclude that law is willing to accommodate claims of conscience only if the conscientious objector's action does not cause physical harm to a third party (even if it does cause other, less tangible harms).

It is difficult to defend this theory as a descriptive account of law's treatment of conscience. Much like physicians who object to performing abortions, individuals who engage in non-violent civil disobedience, sanctuary providers, and tax evaders also make claims of conscience that, if accommodated, would not cause physical harm. Why, then, are

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210 *See generally* GREENAWALT, *supra* note 28, at 318–19; Leiter, *supra* note 28, at 10–11.

211 NUSSBAUM, *supra* note 6, at 21.

212 Compare, for example, the physical harm that can occur to a woman if a medically necessary abortion is not provided. *See* Letter from Laura W. Murphy, Dir., Wash. Legislative Office, Am. Civil Liberties Union, to Ctrs. for Medicare and Medicaid Servs. Regarding the Denial of Reproductive Health Care at Religious Hospitals (Dec. 22, 2010), *available at* http://www.aclu.org/files/assets/EMTALA-_ACLU_CMS_Follow_Up_Letter-St__Joseph-_12-22-2010_FINAL.pdf.

213 *See* Monica Davey, *Abortion Foe Is Found Guilty of First-Degree Murder in Doctor's Killing*, N.Y. TIMES, Jan. 30, 2010, at A12 (quoting an abortion opponent as saying, "People had said if [Roeder] were acquitted it would be open season on doctors"); Larry Rohter, *Protester Guilty of Killing Doctor*, N.Y. TIMES, Mar. 6, 1994, at A20 (quoting the president of the Fund for a Feminist Majority as saying that a guilty verdict "will send a strong message" deterring abortion opponents from further violence).

their claims not respected? Surely, allowing individuals with strong conscientious beliefs to trespass peacefully on private property, shelter undocumented immigrants, or refuse to pay taxes is not likely to cause direct (or even indirect) physical harm. And the monetary and intangible harms they do cause seem no more troubling than the dignitary harm suffered by a woman whose physician refuses to perform an elective abortion.

Moreover, as with the action/inaction justification, not all cases can be neatly divided using the benchmark of physical harm. Military conscientious objectors, for example, seek accommodation from the government precisely *because* they want to prevent harm to third parties—granting an exception means that neither the objector himself nor the combatants he would otherwise be fighting will be injured or killed. On the other hand, one might argue that even a single soldier's refusal to fight in a war of great import is likely to result in an increased risk of harm to his fellow soldiers, as well as an increased risk to the safety of his countrymen. If we accept this argument, then granting combat exemptions to military objectors would be problematic. Given these considerations, it may be difficult to use the risk of physical harm as a unifying standard for legal accommodation.

C. *Directness of Causal Connection*

A third account that might be offered to distinguish between claims of conscience relates to the directness of the causal connection between the claimant's belief system and her behavior—essentially, a proximate cause analysis. Justice Cardozo made just such a distinction in his concurring opinion in *Hamilton v. Regents of the University of California*, which upheld a California requirement that university students take an ROTC course in military training and tactics. Of this requirement, Justice Cardozo noted: "Never in our history has the notion been accepted . . . that acts thus indirectly related to service in the camp or field are so tied to the practice of religion" as to warrant exemption from state regulation.[214]

Courts routinely make similar arguments when defendants raise the necessity defense for illegal actions taken on the basis of conscientious belief. One of the elements of the necessity defense is a demonstration that the defendant could have reasonably foreseen a causal link

214 Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 267 (1934) (Cardozo, J., concurring). Were the doctrine of conscientious exemption so extended, Justice Cardozo wrote, its scope would be carried to "lengths that have never yet been dreamed of," including exemption of those who refuse to pay taxes that contribute to defense efforts. *Id.* at 268.

between her own conduct and the harm she was seeking to avoid.[215] In upholding the conviction of a Vietnam protester who committed arson at a local draft board building, for example, the Ninth Circuit held that a defendant relying on the necessity defense must demonstrate "that a direct causal relationship be reasonably anticipated to exist between the defender's action and the avoidance of harm."[216] The Court held that it was unreasonable for the defendant to believe that setting fire to a draft board file cabinet would prevent the harm with which he was concerned—namely, the continuance of the Vietnam War.[217]

Much like the doctrine of proximate cause in tort law, a directness analysis would tie liability (or, in these cases, the lack thereof) to the existence of a causal nexus between the actions taken by a claimant, her underlying conscientious beliefs, and the morally objectionable harms she thereby sought to avoid. For example, while we might be willing to accommodate a military objector whose moral qualms about killing others prevent him from engaging in active combat, we would not accommodate him if he objected to paying taxes supporting the war effort, on account of the more distant causal relationship. Indeed, this is exactly the sort of reasoning that many courts have used in denying claims for exemption by conscientious objectors to taxation.[218]

However, despite its apparent logic, the directness model is simply not consistent with the way American law actually draws distinctions between various claims of conscience.[219] Consider, for example, those who are conscientiously opposed to abortion based on their belief that killing innocent human beings, at any stage of life, is morally wrong. Surely, the obstetrician who chooses not to provide abortions in her practice can draw a direct link between her conduct and the result she is seeking to avoid—she does not want to cause the death of an innocent human being by performing a medical abortion. As described in Part

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215 *See generally* Cohan, *supra* note 48, at 124–25.

216 United States v. Simpson, 460 F.2d 515, 518 (9th Cir. 1972).

217 *Id.*; *see also* United States v. Seward, 687 F.2d 1270, 1273 (10th Cir. 1982) (rejecting necessity defense where defendants blocked entry to a nuclear weapons facility, on the grounds that a reasonable person could not think "that blocking entry to [a nuclear weapons facility] for one day would terminate the official policy of the United States government as to nuclear weapons or nuclear power"); State v. Drummy, 557 A.2d 574 (Conn. App. Ct. 1989) (finding necessity defense unavailable where defendants broke into Army recruiting office to protest war in Nicaragua because there was no causal link between the break-in and the prevention of atrocities allegedly being committed by the United States in Nicaragua).

218 *See supra* notes 162–163 and accompanying text.

219 Some critics may also object to the directness model on normative/theoretical grounds, using substantially the same arguments that have been used to challenge the validity of proximate cause as a tort law theory of causation. *See, e.g.*, William L. Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1, 22 (1953). Further exploration of this debate is beyond the scope of this Article. Given the general acceptance of proximate cause as a doctrine in tort law, however, it is safe to assume that challenges to the doctrine in the context of conscience claims would be largely unsuccessful.

II.B, this physician will be protected under state and federal medical conscience laws.

Now, consider what might happen if a patient, pregnant as a result of rape, came to this same obstetrician to ask about her options. The physician might counsel her patient against abortion or fail to discuss it altogether;[220] however, the patient might nevertheless choose to abort, seeking out a different medical provider to provide the service. Even if the physician were to explain to her patient that abortion, adoption, and raising the child as one's own are all potential options, the patient might still decide against abortion. These examples are intended to demonstrate that, while the physician's explanation of options is one link in the causal chain leading to the patient's decision, it is not the only link. And yet, a physician who chooses not to speak to her patients about the possibility of abortion may be protected under state and federal conscience laws.[221] The lack of causation does not, unlike in military contexts, result in a lack of legal protection.

Furthermore, consider a person who objects to abortion on the same grounds as our hypothetical obstetrician—she believes that killing innocent human beings, at any stage of development, is morally wrong. Imagine, now, that this person has no qualms about killing in self-defense or in defense of others (that is, killing a person who is a threat), and that her conscience directs her to take one simple act that would prevent hundreds of innocent deaths. Surely, killing a physician who provides abortions will, as a causal matter, make it impossible for this physician to perform abortions in the future. However, although the causal link appears to be quite direct, our legal system does not grant leniency in this case.[222]

If we consider other examples of conscientious behavior, we see similar inconsistencies. A sanctuary provider who shelters an undocumented immigrant to prevent him from being deported is acting in a way that, as a causal matter, will prevent the immigrant's deportation. While he is not filing a petition for naturalization on behalf of the immigrant (the most direct option), his conduct is certainly a more direct way of achieving his goals than, for example, bombing the immigration office. A physician who refuses to perform in vitro fertilization on a

220 Some physicians, including recipients of Title X funding, may be prohibited from speaking about abortion as a condition of federal funding. *See* Rust v. Sullivan, 500 U.S. 173 (1991).

221 A number of state legislatures have proposed amendments to their conscience laws that would explicitly protect medical providers who refuse to discuss abortion or refuse to refer patients to another provider who might be willing to perform an abortion. *See supra* note 110.

222 *See, e.g.*, Davey, *supra* note 213 (discussing Scott Roeder, who was convicted of the first-degree murder of Dr. George R. Tiller despite his honest belief that deadly force was necessary to prevent further murders); Rohter, *supra* note 213 (discussing Michael F. Griffin, who was convicted of the first-degree murder of Dr. David Gunn despite claiming that he "acted in God's name").

lesbian because she opposes homosexuality on moral grounds and believes children should not be exposed to morally objectionable lifestyles is acting in the most direct way she can to prevent this harm, and yet she is unlikely to succeed if the patient brings a discrimination claim.[223] In conclusion, the directness of the causal connection between a conscientious objector's action and the harm she is trying to prevent does not accurately describe how the law differentiates between claims of conscience.

D. *Personal Versus Relational Exercises of Conscience*

Another distinction we might call upon to justify differential treatment is the distinction between personal and relational exercises of conscience. Perhaps we are more willing to accommodate conscience when it is exercised in a primary personal sense ("I need to maintain my own moral integrity") rather than in a secondary relational sense ("I need to act as a model for others and persuade them of the need for social change"). As noted in Part I.A.3, the actor in both cases is acting to prevent what she considers to be a societal and moral harm. But in one case she is ensuring only her own moral integrity, whereas in the other she is ensuring her moral integrity by taking action that is aimed at impacting others. Civil disobedience, for example, which by definition is aimed at social change, may be viewed as a primarily relational exercise of conscience. In contrast, military or medical conscientious objectors, although they may agree that social change is necessary, are arguably refraining from action primarily to ensure that they do not directly participate in what they deem to be an unjust system.

This potential justification is subject to serious challenges because it is often difficult, if not impossible, to distinguish between primarily personal and primarily relational actions.[224] As Rob Vischer notes, conscience always has elements of both, and there is no clear line between

223 *See* N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Sup. Ct., 189 P.3d 959 (Cal. 2008) (rejecting medical group's claim to a First Amendment defense for refusing to provide artificial insemination services to a lesbian couple in violation of the Unruh Civil Rights Act).

224 Moreover, even if it were possible to distinguish between claims of conscience that have a primarily personal component as opposed to those with a primarily relational component, it is not clear which category should receive greater protection. Although traditional examples of legal accommodations in religious, medical, and military contexts suggest that personal exercises of conscience receive greater protection, critics may argue that it is a mistake to excuse people who violate the law for what are essentially selfish purposes. As a comparison, consider the common law defense of necessity, which requires a showing that the defendant acted to prevent an objectively greater harm. If a defendant violates the law in order to avoid an alternative harm that is worse only in her subjective opinion, she will not receive the benefit of the necessity defense.

personal and relational exercises of conscience.[225] Given that an individual's conscience may be formed relationally, even the most self-directed exercises of conscience may have an inherently relational component. For example, are those who bomb abortion clinics in order to injure abortion providers aiming primarily at maintaining their own moral integrity, or communicating a moral message to prevent others from causing harm? Are business owners who refuse to serve gays acting on their own religious motivations, or do they also hope that this expression of their beliefs will contribute to the social dialogue about the moral acceptability of homosexuality? Moreover, few courts or legislatures have explicitly relied on such an analysis to distinguish between cases. For these reasons, it is impossible to defend the relational account of conscience as an explanation for current legal doctrine.

E. *Religious Claims of Conscience*

Another possible account of why we only grant some conscience-based accommodations is based on the distinction between religious and secular claims of conscience. Given that the Constitution explicitly references a right to religious freedom (but not a right of freedom of conscience more generally), perhaps the law's sub-constitutional treatment of conscience also reflects this dichotomy. That is, perhaps courts and legislatures are only willing to accommodate claims of conscience if they are founded in religious belief.

As a descriptive matter, however, this model does not provide an accurate illustration of the American law of conscience. While many accommodations are expressly framed in terms of religious belief—for example, the Selective Service Act's exemption for conscientious objection to war "by reason of religious training and belief"[226]—many are not. Consider, for example, state vaccination laws, many of which permit parents to opt their children out on the basis of philosophical, conscientious, or otherwise secular personal convictions.[227] Even the Selective Service Act, while framed in explicitly religious terms, has been interpreted by courts to exempt those whose beliefs run the gamut between philosophical and historical.[228] In *Watson v. Geren*, for example, the Second Circuit found no basis in fact to support the denial of an application for military conscientious exemption that the Army described as

225 E-mail from Rob Vischer, *supra* note 134; E-mail from Rob Vischer to the author (Aug. 13, 2010) (on file with author).

226 *See supra* note 121.

227 *See supra* Part II.D.5.

228 *See supra* Part II.C.

a "kitchen sink approach."[229] According to DACORB, the application was "punctuated throughout by block quotes from various figures that seem to have little or no relevance to the subject of the application," including Dr. Martin Luther King, Jr., Mahatma Gandhi, Jesus Christ, Buddha, Krishna, the Dalai Lama and Lao-Tse, who the applicant collectively described as "'heroes' it had taken him his entire life to discover."[230] Moreover, many claims of conscience that are explicitly grounded in religious doctrine—for example, Catholic opposition to abortion, when manifested as violence against abortion providers, or Islamic terrorists' belief in jihad—are not granted legal accommodation.

More importantly, however, the religious account poses a significant constitutional challenge. Exemptions from generally applicable laws on the basis of religious belief alone might run afoul of constitutional protections. Kent Greenawalt, for example, has argued that the government ought to treat strong "non-religious moral claims" like religious claims, because treating them differently on the basis of a "theological premise or popular opinion that religious beliefs and actions are more deserving than nonreligious views" might violate the Equal Protection clause.[231] If we want to offer a principled legal distinction between those cases in which we accommodate conscience and those in which we do not, the religious account seems unsatisfactory.

F. *Balancing Tests*

While courts frequently turn to theories including directness and harm when resolving individual cases, perhaps it is a mistake to expect any one of these theories to single-handedly resolve the full doctrinal area of conscientious accommodation. Perhaps, rather than drawing a clear line for accommodation based on blanket rules like whether a conscientious act causes physical harm, the test for legal accommodation of conscience is more nuanced.

Consider, for example, the compelling interest test adopted for religious freedom cases under RFRA.[232] According to the Supreme Court in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, Congress

229 569 F.3d 115, 133 (2d Cir. 2009) (internal quotation marks omitted).

230 *Id.*

231 Greenawalt, *supra* note 6, at 1626, 1636. Greenawalt defends the position that "free exercise demands certain exemptions but that nonestablishment, equal protection, and free speech sometimes require extension to similarly situated nonreligious claimaints." *Id.* at 1642; *see also* Feldblum, *supra* note 73, at 64 (arguing for recognition of "belief liberty" to protect religious or secular beliefs that are central to a person's identity); Garnett, *supra* note 8, at 661 (arguing that the no-establishment rule "protects the liberty of conscience primarily by respecting and protecting the independence of non-state authority").

232 *See generally supra* Part II.A.

chose a compelling interest standard because it is "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[233] Among the government interests that might justify uniform application of the law to religious objectors, the Court noted, are the possibility of significant administrative harm (such as the demise of the Social Security tax system).[234] If granting an accommodation "would seriously compromise [the government's] ability to administer [a] program," the balance of interests will favor the state, rather than the claimant, and the request for accommodation will be denied.[235]

At least one legal scholar has suggested that the protection of conscience "has typically been understood to consist of some sort of rebuttable presumption of non-interference with conscience, qualified by something like a 'compelling state interest' limitation."[236] However, while balancing tests are commonly applied in RFRA cases, it is very rare for courts or legislators considering claims of conscience to use explicit balancing language when making decisions outside the context of religious belief.[237]

Moreover, regardless of the language lawmakers actually use to justify their decisions, this kind of balancing test does not accurately describe positive law's treatment of conscience. First, the numerosity considerations that are invariably weighed in cases of religious accommodation are nowhere to be found in many conscience cases. In *O Centro*, for example, the American branch of the church seeking an exemption from the Controlled Substances Act (CSA) had only 130 members. The Court, while contrasting this with the "hundreds of thousands of Native Americans" who use peyote for religious purposes, ultimately found for the church, concluding that granting an exemption in either case would be unlikely to "undercut" the state's ability to enforce the CSA more generally.[238] In contrast, contemporary claims of con-

233 546 U.S. 418, 436 (2006) (quoting 42 U.S.C. § 2000bb(a)(5) (2006)).

234 *Id.* at 435 (citing United States v. Lee, 455 U.S. 252 (1982)).

235 *Id.*

236 Smith, *supra* note 6, at 916 n.22; *see also* Perry, *From Religious Freedom to Moral Freedom*, *supra* note 28, at 22 (arguing that the government should not be trusted as an arbiter of moral disagreements that do not implicate a legitimate government interest); Schwartzman, *supra* note 165 (proposing a compelling interest test for accommodation of taxpayers' conscientious beliefs).

237 *Cf.* State v. Pedersen, 679 N.W.2d 368, 373 (Minn. Ct. App. 2004) (evaluating defendant's claim under the Freedom of Conscience Clause of the Minnesota Constitution pursuant to a compelling interest test).

238 Gonzales v. O Centro Espírota Beneficente União do Vegetal, 546 U.S. 418, 433–35 (2006) (affirming grant of preliminary injunction against enforcement of the Controlled Substances Act with respect to religious use of a sacramental tea). Similarly, when the Supreme Court in *Yoder* held that members of the Old Order Amish community could not be convicted for violating Wisconsin's compulsory schooling laws, it noted that "probably few other religious groups or sects" would be able to make as convincing a showing as the Amish of the need for an exception. Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972).

science rarely involve narrow exceptions for relatively small populations of people. For example, the population of persons that maintain a conscientious opposition to abortion could potentially include many within the Catholic and Orthodox Catholic faith, which encompass approximately 25% of the U.S. population.[239] If a court or legislature were to explicitly consider the effect of allowing up to 25% of all medical providers (including physicians, nurses, pharmacists, lab technicians, and others) to abstain from participating in abortions, it is far from clear that its conclusions would satisfy a balancing test akin to the one used in First Amendment cases.[240]

Second, even setting aside the size of the population seeking accommodation, it is difficult to see how positive law's treatment of conscience in its various iterations is consistent with a rigorous application of a compelling interest or other balancing test. Consider, for example, the law's imposition of civil or criminal liability when people trespass on private property for reasons of social change, as in the case of peaceful sit-ins. Would excusing such non-violent protesters from liability significantly hamper the state's interest in social order or enforcement of private property rights? Reasonable minds could differ on this issue, but considering the way the Supreme Court has evaluated recent RFRA cases, it is difficult to imagine that excusing from punishment those few non-violent trespassers with firmly held conscientious beliefs would cause serious administrative difficulties.[241] As another example, consider the difference between granting exemptions from combat for military objectors and granting exemptions for taxpayers who oppose war in general. Congress and courts have long held that granting combat exemptions for conscientious objectors is not likely to seriously hamper

239 PEW FORUM ON RELIGION AND PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf.

240 In eighteen states, fewer than ten doctors are available to provide abortions. Alexi A. Wright & Ingrid T. Katz, Roe *Versus Reality—Abortion and Women's Health*, 355 NEW ENG. J. MEDICINE 1, 2 (2006) (citing the Guttmacher Institute's 2002 Abortion Provider Survey). Some states have adopted legislation in response to concerns about patient access in the context of conscientious refusals. *See* Wilson, *supra* note 4, at 43 (noting a Massachussets law directing all hospitals to provide emergency contraception to rape victims). Some believe that these concerns about patient access are exaggerated. For instance, in *The Limits of Conscience,* Robin Wilson offers, by way of example, two small towns in rural Virginia where patients do not have problems accessing reproductive care. *Id.* at 52–53. She points out that many of the approximately 850 Planned Parenthood facilities throughout the country are in "rural and impoverished areas," and suggests that the evidence does not support claims of an "access crisis" in such areas, but merely a crisis of convenience. *Id.* While the availability of Planned Parenthood and similar clinics may significantly lessen the burden on patients seeking controversial reproductive care, it is certainly within the realm of reasonableness for a legislator or a court to determine that the government's interests in ensuring access to care outweigh the rights of medical providers where the number of objecting medical providers is significant.

241 *See* WALZER, *supra* note 39, at 17 ("Indeed, there is very little evidence which suggests that carefully limited, morally serious civil disobedience undermines the legal system or endangers physical security.").

the state's defense efforts—the number of objectors is limited, and the Department of Defense (DOD) has established workable administrative procedures for evaluating their claims. If this is the case, why should exemption from payment of taxes on the basis of conscientious opposition to war be any different? If the percentage of objectors is the same among the taxpaying population and the population of young men eligible for the draft, then surely the IRS can establish administrative procedures similar to those used by DOD and enforce them at a proportional cost, without wreaking havoc on our system of taxation as a whole.

Different decisionmakers certainly may (and do) disagree with the interpretations above.[242] That being said, if courts or legislatures are relying on balancing tests when making decisions about claims of conscience, they are doing so neither explicitly nor consistently. Accordingly, it is difficult to defend the balancing approach as a descriptive model of law's treatment of conscience.

IV. IN DEFENSE OF CONSISTENCY

Legal thinkers offer a variety of justifications to distinguish between claims of conscience that do receive protection in American law and those that do not. Indeed, each theory may be reasonable and defensible when applied to individual cases. However, none of these justifications are generalizable enough to offer a satisfactory descriptive account of law's treatment of conscience as a whole.

The astute reader may, at this point, offer a challenge to this line of inquiry.[243] Perhaps it is a mistake to expect that any one of the justificatory theories described in Part III will single-handedly explain the doctrinal morass of conscientious accommodation. In a similar context, Kent Greenawalt offers a story of a couple's employment decisions over the course of their lifetimes.[244] At various points in time, their decision to relocate is driven primarily by professional aspirations, child-rearing goals, salary and prestige, or familial unity. But rarely do we see the couple explicitly and calculatedly balancing each of these interests in the course of making a decision. "This is how most people with opportunities go through life," Greenawalt asserts. "Yet we do not suppose they

242 *See, e.g.*, Waitzkin v. Comm'r, 42 T.C.M. (CCH) 29 (T.C. 1981), *aff'd*, 697 F.2d 301 (2d Cir. 1982) (unpublished table decision) ("If every citizen could refuse to pay all or part of his taxes because he disapproved of the government's use of the money, on religious grounds, the ability of the government to function could be impaired or even destroyed.").

243 Thanks to Rob Vischer and Robin Fretwell Wilson for encouraging me to develop these counter-arguments.

244 Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 SAN DIEGO L. REV. 1131, 1136 (2010).

are somehow incoherent or arbitrary in the way they make decisions, though they have no system that either they or we as outsiders could identify."[245] Similarly, policy decisions are rarely made on the basis of a systematic formula.

Of course, as Greenawalt recognizes, personal choices are clearly distinguishable from judges' and legislators' decisions about public welfare.[246] In the policy realm, consistency and reliance on authoritative precedent are significantly more important, our expectation being "that these sources are capable of leading the broad range of decisionmakers to the same results in the vast majority of instances."[247] Accordingly, when legal issues are at stake, our inclination is to identify specific standards and tests that judges can apply across a wide variety of cases. Even when they are "general and open-ended" (like the balancing analyses used in First Amendment and other constitutional cases), the existence of identifiable tests reduces uncertainty and provides valuable guidance to legal decisionmakers.[248]

While it may indeed be impossible to describe law's treatment of conscience in terms of a single evaluative factor (like harm or proximate cause), this challenge cannot be resolved by permitting decisionmakers to pick and choose which factor deserves primary consideration in each case. Allowing individual judges and policymakers to resolve legal claims of conscience in the same way a couple makes employment decisions will not result in the kind of doctrinal coherence that is necessary to guide future decisions. At the very least, lawmakers ought to commit to some identifiable standard, even if that standard balances a variety of interests and may result in "uncertainty at the edges."[249] The integrity and continuity of our legal system deserves as much. Unfortunately, in the context of conscientious accommodation (unlike First Amendment protection), very few courts or legislators explicitly rely on a single standard—no matter how imprecise.

This leads to a second possible objection to this Article's line of inquiry. Some readers may challenge the proposition that true respect for conscience demands a more consistent mechanism for legal accommodation than currently exists. It may be unrealistic or naïve, they argue, to

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245 *Id.*

246 *Id.*

247 *Id.* at 1137.

248 *Id.* at 1137–38.

249 *Id.* at 1138, 1148 (arguing that "judges need simpler, more absolute principles and rules," even if those rules result in uncertainty). Such uncertainty and imprecision may, of course, lead to partisan political decisions being made under the guise of legal principle. But having some guiding principle, no matter how flexible, would be an improvement over the incoherent system we have now. The "only plausible alternative to a balancing approach is to deny exemptions across the board," and "those raising constitutional claims will certainly prefer occasional uncertainty to rules that render their claims totally ineffective." *Id.* at 1149 (writing about the free exercise clause).

expect a body of diverse lawmakers—including judges, juries, and legislators—to develop and consistently apply an overarching doctrinal theory for the treatment of conscience. Given that most conscience accommodations are granted by way of legislation and thus subject to significant political pressures, perhaps it is folly to expect or demand doctrinal coherence.[250]

I offer the following response to this critique. It may indeed be somewhat naïve to hope that legislators and judges resolving claims for conscientious accommodation are consciously doing so on the basis of a coherent legal theory that aligns with the common law. However, it is by no means unreasonable to demand that they aspire to this. By way of example, Congress's recent decision to require that each piece of legislation introduced in the House be accompanied by a statement explicitly citing the constitutional authority on which it is based[251] speaks to the fact that many lawmakers do hope to legislate in a way that is consistent with underlying legal doctrine, at least from a constitutional perspective.[252] For similar reasons, when legislators or judges consider future negotiations for conscientious accommodation, the justifications they offer in support of their decisions ought to hang together in some reasonably consistent way.

CONCLUSION

Despite the fact that none of the justifications proposed in Part III provide a satisfying account of positive law's treatment of claims of conscience, it is nevertheless possible to reach some conclusions about this area of law. First, as a descriptive matter, we can offer two alternatives to the single-factor tests described in Part III. An evaluation of these alternatives, in turn, suggests normative goals for the jurisprudence of con-

250 Indeed, some may argue that it is a mistake to even consider the notion of "law's treatment of conscience." Andrew Koppelman, for example, has written that "American law is not aiming, clumsily, to protect conscience. It is doing something else." Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 970 (2010).

251 David Weigel, *Republicans Start Teaching Members How to Obey the Constitution*, SLATE (Dec. 20, 2010, 1:49 PM), *available at* http://www.slate.com/blogs/blogs/weigel/archive/2010/12/20/republicans-start-teaching-members-how-to-obey-the-constitution.aspx (reproducing a memo to members of the 112th Congress regarding a "New Constitutional Authority Requirement for Legislation").

252 Of course, in many situations, legislation may be adopted specifically because of dissatisfaction with precedential common law or existing statutes, but these efforts do not derail the argument for internal consistency. Just as the judicial principle of stare decisis allows for deviation from existing precedent when the need for change is clear and consistent with current or developing social norms, *see, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954), so legislatures and courts should not defer to existing laws if they have truly compelling reasons not to. But when a legislature chooses to craft an exemption to generally applicable law on the basis of conscientious belief, its reasoning ought to be defensible in other contexts as well.

science. This Article concludes that only a content-neutral approach to accommodation of conscience, such as a balancing of interests approach, is consistent with the principles of a pluralistic society that respects the inherent value of conscience.

If none of the justifications set forth in Part III explain why law accommodates conscience in some cases but not others, on what basis are judges and legislators making their decisions? There are two likely explanations. One possible interpretation of law's treatment of conscience is as a balancing analysis writ large, as suggested in Part IV. In other words, we might describe the law of conscience, though seemingly inconsistent when viewed through the lens of individual cases, as consistent with a balancing approach when viewed at a systemic level. That is, while each individual decisionmaker may cite only one factor as driving her analysis—the distinction between action and inaction, personal and relational motivations, or religious and secular claims; the degree of harm; or causal proximity, for instance—the body of law taken as a whole involves consideration of multiple factors, albeit without the benefit of a single coherent or reproducible test. These factors include the burden to the individual, the burden to the state, and the burden to society that may result from the conscientious actor's conduct—all content-neutral considerations regularly weighed by judges and lawmakers in other contexts. A similar approach can be found in freedom of speech cases, in which the Supreme Court has held that states may impose reasonable time, place, and manner restrictions on public speech, but may not regulate speech on the basis of its content.[253] Perhaps in the context of conscience, as well, legal decisions are based on the consequences of an actor's conscientious belief, not its origins.

A second, somewhat less charitable interpretation might conclude that there simply is no content-neutral explanation for why American law treats claims of conscience as it does. One might reasonably conclude that when legal decisionmakers evaluate claims of conscience, they do so on the basis of nothing more principled than judgments about the merits of claimants' conscientious beliefs. On this account, whether law ultimately provides accommodations for conscientious believers in a particular context has little to do with principled considerations of harm, causality, or administrative difficulty, and more to do with popular judgments about the validity of the claimant's beliefs and the reasonableness of her conduct in light of those beliefs. Courts and legislatures

253 *See generally* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642, 680 (1994) (holding that strict scrutiny applies to "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"); Police Dep't of Chi. v. Mosley 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (emphasis omitted)).

may be willing to grant conscience-based exemptions from generally applicable laws only if societal consensus determines that the claimant's underlying conscientious beliefs are objectively defensible and reflect moral truths—or, at least, majoritarian values acting as a proxy for such moral truths.[254] That is, if a majority of Americans agree that a pharmacist ought not to be punished for refusing to fill an unmarried woman's prescription for birth control in violation of her conscience, then that agreement can be interpreted simply as a societal judgment that the pharmacist's conscientious belief is correct (or, at the very least, correct enough to be entitled to deference). Indeed, this interpretation is consistent with the fact that most accommodations for claims of conscience have been created legislatively, and that courts are generally reluctant to provide relief in the absence of a legislative directive.[255] Perhaps laws like the Church Amendment and the Selective Service Act simply reflect society's normative judgment about what constitute "good reasons" for violating generally applicable law. On this account, freedom of conscience cannot be considered a fundamental and universal theory driving decisionmaking in military, medical, religious, and other contexts—rather, it is merely an appealing explanation used to justify individual grants of conscientious accommodation in an ad hoc manner.

Readers may reasonably disagree as to which of these two descriptive accounts is a more accurate interpretation of the American jurisprudence of conscience. But as to which is the normatively preferable approach when we are faced with future requests for conscientious protection—such as those by public and private service providers who oppose gay marriage, and by physicians and scientists with moral objections to new technology such as stem cell research and synthetic biology—I believe the answer is clear. If the true purpose of providing legal protection for claims of conscience is to respect personal beliefs and protect them from oppressive majoritarian values, these claims ought to be evaluated on a content-neutral basis.

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254 *See* MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 119 (1973) ("Punishment is never imposed if the court accepts the citizen's judgment.").

255 *See generally supra* Part II. Moreover, the content-based account may also help to explain why actors with similar conscientious beliefs—for example, a physician and a layperson, each of whom believes that abortion is unjustified murder—may be treated differently depending on how they exercise those beliefs. That is, a physician who refuses to perform abortions is generally protected from legal repercussions, but the layperson who kills an abortion provider is typically prosecuted to the full extent of the law. Under the content-based account, the difference in treatment can be justified on the grounds that the physician holds only one relevant conscientious belief (that abortion is unjustified murder and thus morally wrong), while the layperson also holds a second—namely, that murdering an abortion provider is morally justified. If both are correct with respect to the first belief, but the layperson is wrong with respect to the second belief, then it would be appropriate to punish the layperson, but not the physician.

An ad hoc approach that accommodates exercises of conscientious beliefs only on the basis of popular judgments about the value of those beliefs is problematic in two respects. First, while the ad hoc approach may be a more accurate reflection of public consensus about morality, it does not reflect the intrinsic value of respecting personal conscience. Looking to the content of an actor's conscientious belief to determine whether it is worthy of legal respect is simply inconsistent with the theory that conscience should be valued because of its inherent link to autonomy, identity, and human flourishing. And it is this theory of intrinsic value that most legal scholars, philosophers, and judges typically rely on when explaining why respect for conscience is so important in a pluralistic society.[256] From Thomas Aquinas[257] to Roger Williams,[258] a variety of thinkers have emphasized the value of respecting conscientious beliefs, even when they are erroneous or deviate from objective truths.[259] Modern scholars describe the value of conscience as existential in nature,[260] grounding it in the "dignity of the human person,"[261] and citing the close ties between conscience, identity, and personal integrity.[262] Even the Supreme Court, which has recognized the exercise of conscientious belief as valuable to a democratic community,[263] describes such choices as "central to personal dignity and autonomy."[264] Of course, some scholars and proponents of natural law theory may resist the autonomy-based view of conscience, arguing that discussions of accommodation for conscientious belief ought not to be walled off from judgments about objective morality.[265] However, most contemporary legal theory favors positive or interpretive (rather than natural) views of law,[266] and most modern descriptions of conscience as a normative ideal for a liberal society describe it in content-neutral terms. In other words, while there may be good reasons for a legal system to respect claims of conscience, the validity of the moral principles underlying these claims

256 *See generally supra* Part I.B.

257 *See* VISCHER, *supra* note 6, at 58.

258 *See* NUSSBAUM, *supra* note 6, at 52.

259 *See* Hill, *supra* note 10, at 17 (describing Kant's theory as demanding respect for conscience "even though [our moral judgments] are fallible").

260 Peter Fuss, *Conscience*, 74 ETHICS 111, 116 (1964); *see also* Greenawalt, *supra* note 5, at 47–48.

261 Garnett, *supra* note 8, at 672–73.

262 *See generally* VISCHER, *supra* note 6, at 64; Feldblum, *supra* note 73; Smith, *supra* note 6, at 935–36.

263 Gillette v. United States, 401 U.S. 437, 445 (1971).

264 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

265 *See, e.g.*, VISCHER, *supra* note 6, at 23; Araujo, *supra* note 28, at 577 (describing legal positivism as "human-worship," where the "'dominant prejudices of the moment,' rather than some objective and moral compass . . . guide[] society").

266 *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986); H.L.A. HART, THE CONCEPT OF LAW 185–86 (2d ed. 1994) (describing legal positivism as rejecting the claim that "laws reproduce or satisfy certain demands of morality").

should be irrelevant. Accordingly, if making judgments about moral truths—even if based on political consensus—is not law's job, then the content-based justification for legal accommodation of conscience is inadequate.

Second, adopting a content-based approach towards accommodation of conscience runs the risk of ossifying majoritarian beliefs and oppressing minorities. This is precisely the risk that the principle of legal respect for conscience—like the constitutional principles of religious freedom and freedom of speech—is designed to prevent. Accepting an objectivist or content-based view of freedom of conscience would suggest that it is permissible for the government to favor certain viewpoints over others without offering consistent policy reasons for its choices. If we are comfortable favoring some claims of conscience over others for reasons that have more to do with the state's interpretation of moral truth than principles of public policy, there is little to prevent this attitude from creeping into the state's treatment of religious belief.[267] Such an outcome would surely be objectionable to commentators on both sides of the political spectrum.[268]

Adopting the content-neutral approach to conscientious protection offers us the opportunity to re-commit ourselves to the principle of freedom of conscience by thinking more carefully about what, exactly, this principle demands. Does liberty of conscience demand a presumption that facially neutral laws are inapplicable to those with strong conscientious beliefs, or should conscientious actors be burdened with demonstrating why they should be exempt? If we put the burden of proof on the conscientious actors, what should they have to demonstrate to make a successful case? Is a balancing analysis based on a compelling interest standard sufficiently protective of state and individual interests? Finally, of the various kinds of accommodations that law could provide—complete immunity from legal consequences versus immunity only from certain kinds of laws, for example[269]—which are most appropriate? These questions and others are ones that legal scholars have not yet had the opportunity to answer with respect to the broad spectrum of potential conscientious claims described herein.

The principles of pluralism, liberalism, and escape from oppression on which our country was founded should continue to be normative goals in our jurisprudence. That is, while we cannot submit to the folly of moral relativism, our society ought to continue to foster and respect diversity of belief and opinion. In the realm of conscientious accommo-

267 *See generally* NUSSBAUM, *supra* note 6 (discussing lessening of protections for religious equality in connection with the increased prominence of evangelical Christianity).

268 Perhaps it is time to return to the words of Mahatma Gandhi: "In matters of conscience, the law of the majority has no place."

269 *See* GREENAWALT, *supra* note 28, at 318–21.

dation, the best way to do this is by requiring lawmakers to provide robust and content-neutral reasons for accommodating some exercises of conscientious belief but not others. Alternatively, if we are comfortable granting ad hoc exceptions based on the content of an actor's conscientious belief, we ought to concede that the promise of freedom of conscience, so often heralded as a fundamental feature of American law and society, is a hollow one.