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## The Constitutional Right Not to Kill

Mark L. Rienzi

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# THE CONSTITUTIONAL RIGHT NOT TO KILL

Mark L. Rienzi\*

## ABSTRACT

*Federal and state governments either participate in or permit a variety of different types of killings. These include military operations, capital punishment, assisted suicide, abortion, and self-defense or defense of others. In a pluralistic society, it is no surprise that there will be some members of the population who refuse to participate in some or all of these types of killings.*

*The question of how governments should treat such refusals is older than the Republic itself. Since colonial times, the answer to this question has been driven largely by statutory protections, with the Constitution playing a smaller role, particularly since the Supreme Court's 1990 decision in *Employment Division v. Smith*.*

*This Article offers a new answer to this very old question: a federal constitutional right not to kill protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.*

*The Court's substantive due process cases suggest that certain unenumerated rights can qualify for constitutional protection when they are "deeply rooted in the Nation's history and tradition." This Article reviews the government's historical ability to force unwilling citizens to participate in government-sanctioned killings across a variety of contexts and concludes that the right not to kill passes the Court's stated tests, and does so even better than previously recognized rights. The right not to kill also fits squarely within the zone of individual decision making protected by the Court's decisions in *Planned Parenthood v. Casey* and *Lawrence v. Texas*.*

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*Recognition of a constitutional right, of course, does not mean that the right can never be infringed. Rather, as with most rights, the constitutional right not to kill can presumably be trumped by a sufficiently compelling government interest and a narrowly tailored law. In the vast majority of cases, however, the government will not be able to meet this test, leaving individuals free to decide for themselves whether they are willing to participate in government-sanctioned killings.*

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## INTRODUCTION

Michael Morales was hours away from execution. Two federal courts had approved the lethal injection protocol with which California planned to end the convicted murderer's life.<sup>1</sup> Because of the type of injection the State planned to administer, the protocol required the presence of physicians to monitor Morales and ensure that he was not subjected to unnecessary pain.<sup>2</sup>

The execution never happened. Although two anesthesiologists had originally agreed to attend, both withdrew when they learned the district court's order required them to determine whether Morales was properly anesthetized and unconscious when the lethal injection occurred.<sup>3</sup> The doctors explained that such active participation in the execution "is ethically unacceptable."<sup>4</sup> Today, Morales continues to live on death row as the State searches for a constitutional lethal injection protocol.<sup>5</sup>

The *Morales* case highlights a tension that is not unique to capital punishment. There are a variety of different circumstances in which governments either conduct or permit killings. These include capital punishment, military service, assisted suicide, abortion, and killings in self-defense or defense of others. In each of these varied contexts, there will be individuals who, like the anesthesiologists, will be conscientiously opposed to participating in the killings.

Suppose the government had tried to force the anesthesiologists to participate in the execution. Could they do it? Or do the doctors have a right to refuse to participate in killing?

Historically, parties seeking conscience-based exemptions from laws had two principal recourses. First, if the objection was based on religion an

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<sup>1</sup> *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047–48 (N.D. Cal.), *aff'd per curiam*, 438 F.3d 926 (9th Cir. 2006).

<sup>2</sup> *Id.* at 1047–48.

<sup>3</sup> See Kevin B. O'Reilly, *Controversial California Ruling Focuses on Physician Role in Execution*, AMEDNEWS.COM (Mar. 13, 2006), <http://www.ama-assn.org/amednews/2006/03/13/prl20313.htm>.

<sup>4</sup> See *id.*; see also CODE OF MED. ETHICS 2.06 (Am. Med. Ass'n 2000), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page?> ("A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 52–53; Atul Gawande, *When Law and Ethics Collide—Why Physicians Participate in Executions*, 354 NEW ENG. J. MED. 1221, 1221 (2006).

<sup>5</sup> See Charles Johnson, Op-Ed., *California's Death Penalty: Unusual but Not Cruel*, L.A. TIMES, Jan. 3, 2012, at A15.

exemption might have been available under the First Amendment's Free Exercise Clause.<sup>6</sup> Yet under the Supreme Court's 1990 decision in *Employment Division v. Smith*,<sup>7</sup> such claims are considerably harder to bring, at least as to laws that are deemed neutral and generally applicable.<sup>8</sup>

Second, even without a constitutional free exercise claim, a religion- or conscience-based exemption might be available as a matter of legislative grace through the democratic process. Indeed, the availability of such legislative exemptions was highlighted by the *Smith* opinion as a promising and appropriate source of protection for religious objectors.<sup>9</sup> Although the *Smith* decision is the subject of intense debate,<sup>10</sup> scholars on both sides have noted

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<sup>6</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (providing religious exemption for Amish who objected to sending their children to public school after eighth grade); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (“[T]o condition the availability of benefits upon this appellant’s willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.”).

<sup>7</sup> 494 U.S. 872, 878 (1990) (holding that a neutral and generally applicable law does not offend the First Amendment as long as its object is not to burden free exercise, even if the law *incidentally* has such an effect), *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488, 1488–89 (codified as amended at 42 U.S.C. §§ 2000bb, -1 (2006)), *as recognized in* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). *Smith* was originally superseded by the Religious Freedom Restitution Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, 1488–90. However, the Supreme Court held the Act unconstitutional as applied to state and local governments through the Enforcement Clause of the Fourteenth Amendment. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Congress responded by amending the Act to apply only to the federal government. See Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 6, 114 Stat. 806, 806 (codified as amended at 42 U.S.C. §§ 2000bb-1 to -2 (2006)). The Court’s holding in *Smith* nevertheless governs the application of the Free Exercise Clause against the states. See, e.g., *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012) (applying *Smith*).

<sup>8</sup> See *Smith*, 494 U.S. at 894 (O’Connor, J., concurring in the judgment) (suggesting that under the rule prescribed by the majority, the Free Exercise Clause would only provide relief in “the extreme and hypothetical situation in which a State directly targets a religious practice”); see also Amy Adamczyk, John Wybraniec & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA*, 46 J. CHURCH & ST. 237, 240–42 (2004) (explaining that the *Smith* holding had a detrimental effect on plaintiffs using the Free Exercise Clause to vindicate their religious liberty claims).

<sup>9</sup> *Smith*, 494 U.S. at 890 (“Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.”).

<sup>10</sup> Some have argued that *Smith* mischaracterized free exercise law by contorting both free exercise precedent and the Clause’s original meaning. See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990). But see Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Overview*, 60 GEO. WASH. L. REV. 915, 916–32 (1992). Others defend the utility of *Smith* by asserting that it ensures religious groups are not allowed to undermine otherwise valid laws that protect the community. See, e.g., William P. Marshall, Correspondence, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 312 (1991). Still others have argued that, even read through *Smith*’s lens, the Free Exercise Clause still permits religion-based exemptions to generally applicable

the prevalence of these types of legislative exemptions for religion- or conscience-based objections.<sup>11</sup>

Beyond the Free Exercise Clause and legislative protections, there is actually a third and better source of protection for objectors to laws that would require them to kill: the Due Process Clauses of the Fifth and Fourteenth Amendments. If a constitutional right not to kill exists under these Amendments, it would provide greater protection than statutory exemptions, which of course can be changed at any time, and often protect only some objectors.<sup>12</sup> Likewise, a due process right would offer much greater protection than the Free Exercise Clause, both because it would not be subject to the limitations of *Smith*, and because it would extend to objectors whose claims are not based on religion.

The project of identifying unenumerated rights to be protected through substantive due process is, of course, highly controversial.<sup>13</sup> This Article is not intended to resolve, or even address, that debate. Rather, this Article simply accepts the current state of substantive due process law as the Court has articulated it, and considers whether that law requires recognition of a constitutional right not to kill.

The Supreme Court has provided substantive due process protection for “fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty,

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laws in specified contexts. *See, e.g.*, William J. Haun, Comment, *A Standard for Salvation: Evaluating “Hybrid-Rights” Free-Exercise Claims*, 61 CATH. U. L. REV. 265, 282–83 (2011).

<sup>11</sup> *See* Hamburger, *supra* note 10, at 929; McConnell, *supra* note 10, at 1116–19. *Smith* also acknowledged this reality. *See Smith*, 494 U.S. at 890 (“It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.”).

<sup>12</sup> *See, e.g., infra* Part I.A (describing how military conscientious objector protections do not extend to all objectors); *cf.* Mark L. Rienzi, *The Constitutional Right Not to Participate in Abortions: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 NOTRE DAME L. REV. 1, 5–10 (2011) (arguing that, in the context of protecting the consciences of health care providers, the Fourteenth Amendment’s Due Process Clause provides stronger constitutional protection to refuse participation in abortion procedures than the Free Exercise Clause).

<sup>13</sup> *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935–36 (1973) (“What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure.” (citation omitted)). The Supreme Court, too, acknowledges the dangers inherent to embarking on such a search. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)) (noting that “guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended”).



such that neither liberty nor justice would exist if they were sacrificed.”<sup>14</sup> Relatedly, the Court explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that the Due Process Clause protects certain particularly important decisions implicating “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>15</sup>

This Article examines whether the right not to be forced by the government to kill is, in fact, “deeply rooted in the nation’s history and tradition,” and whether it is personal enough to merit protection under *Casey*’s “mystery of life” passage. Looking at the right not to kill in five different contexts—the military draft, capital punishment, assisted suicide, abortion, and self-defense or defense of others<sup>16</sup>—this analysis shows that the right not to kill has been widely protected across a variety of different times and contexts.<sup>17</sup> In comparison with other rights the Court has recognized for substantive due process protection, this history alone is more than adequate to qualify the right not to kill for constitutional protection.<sup>18</sup>

The decision whether or not to kill another human being—even where the killing is conducted or sanctioned by the government—is also precisely the sort of highly personal decision that implicates “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,” discussed in *Casey*<sup>19</sup> and *Lawrence v. Texas*.<sup>20</sup> Moreover, psychological research indicates that participating in killings can have serious negative psychological and health effects for those persons involved,<sup>21</sup> which was an important factor for the Court in recognizing the right to abortion in *Roe v. Wade*.<sup>22</sup> Accordingly, the right not to kill also falls within the *Casey/Lawrence* “meaning of the universe” conception of fundamental rights.

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<sup>14</sup> *Glucksberg*, 521 U.S. at 720–21 (citations omitted) (internal quotation marks omitted); *see also* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 (2010).

<sup>15</sup> 505 U.S. 833, 851 (1992).

<sup>16</sup> *See infra* Part I.

<sup>17</sup> *See infra* Part II.

<sup>18</sup> *See infra* Part II.

<sup>19</sup> *See Casey*, 505 U.S. at 851.

<sup>20</sup> *See Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*, 505 U.S. at 851).

<sup>21</sup> *See infra* note 275.

<sup>22</sup> *See Roe v. Wade*, 410 U.S. 113, 153 (1973) (explaining that the absence of an abortion right could subject women to psychological harm, including “a distressful life and future” and the “continuing stigma of unwed motherhood”); *see also Casey*, 505 U.S. at 882 (emphasizing that the abortion decision is fraught with psychological consequences for the pregnant woman and noting that a woman who regretted her abortion decision may face “devastating psychological consequences”).

For these reasons, the right not to kill another person meets the Court's tests for protection under substantive due process. This is a broad and far-reaching claim, as the right would apply in a host of varied situations in which the government requires a person to kill. The claim is also in tension with some existing Supreme Court precedent in *Smith* and elsewhere suggesting that exemptions for conscientious objectors are generally matters of legislative grace rather than constitutional right.<sup>23</sup> Yet a fair reading of the Court's substantive due process cases, the historical record of protections for those who do not wish to kill, and the obvious personal and self-defining nature of the decision not to kill require recognition of the right as fundamental.

Part I of this Article provides a historical overview of five different situations in which the government might require an individual to participate in killings that are either conducted or permitted by the government: military service, capital punishment, assisted suicide, abortion, and self-defense or defense of others. In each context, many governments have either expressly or implicitly recognized the right of unwilling individuals not to participate, usually through legislation. The broad arc of this history is that, across a variety of different contexts, our laws have frequently recognized the right of individuals to choose not to participate in a wide variety of government-conducted or government-permitted killings.

Part II addresses whether this history is sufficient to satisfy the Court's stated tests for recognition of a Fourteenth Amendment right. Part II demonstrates that the historical support for a constitutional right not to kill is strong, and in fact is considerably stronger than other histories on which the Court has relied to recognize other constitutional rights for substantive due process protection. Part II also addresses whether the right not to kill satisfies

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<sup>23</sup> See *United States v. Macintosh*, 283 U.S. 605, 624 (1931) (rejecting claim of constitutional right to refrain from military service based on the "well-nigh limitless extent of the war powers"), *abrogated in part by* *Girouard v. United States*, 328 U.S. 61 (1946); see also *United States v. Burns*, 450 F.2d 44, 46 (10th Cir. 1971) ("An exemption, limited or otherwise, from actual military service, for any reason, is not a constitutional right of a registrant . . . but one of legislative grace."); *United States v. Boardman*, 419 F.2d 110, 112 (1st Cir. 1969) ("It has been repeatedly recognized that exemption for military service is a matter of Congressional grace rather than constitutional compulsion."); *United States v. Crouch*, 415 F.2d 425, 430 (5th Cir. 1969) ("There is no constitutional right to exemption from military service because of religious belief. This right comes from Congress."); *Korte v. United States*, 260 F.2d 633, 635 (9th Cir. 1958) ("It is well settled that exemption from military service is a matter of legislative grace and not a matter of right." (internal quotation marks omitted)); *United States v. Bendik*, 220 F.2d 249, 252 (2d Cir. 1955) ("Grant of the deferment is an act of legislative grace, for no one has a constitutional right to exemption from military service."); *Pomorski v. United States*, 222 F.2d 106, 107 (6th Cir. 1955) (per curiam) ("It is not the Constitution but Congressional policy which relieves the conscientious objector from the duty of bearing arms.").

other modes of inquiry the Court has used for finding substantive due process rights, including the *Casey* mystery of life approach and looking to recent trends. Part II concludes that under any approach the Court has taken, the right not to kill qualifies for substantive due process protection.

Finally the Conclusion briefly addresses the likely standards that would apply to the constitutional right not to kill. As with most constitutional rights, the right not to kill could presumably be infringed in limited circumstances when the government is acting in furtherance of a sufficiently compelling government interest, and if forcing the objector to kill is narrowly tailored to achieve that compelling government interest. It is conceivable that in certain situations of national peril, for example an armed conflict requiring a military draft, the test might be satisfied. In the vast majority of circumstances, however, the government will not be able to satisfy this test, forcing the government to conduct its killings with only willing participants.

## I. HISTORICAL ANALYSIS—HOW AND WHEN HAS THE GOVERNMENT FORCED PEOPLE TO KILL?

### A. *Military Conscription*

#### 1. *The Founding Era*

In 1789, George Washington wrote to a Quaker correspondent:

I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy . . . it is my wish and desire, that the laws may always be extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.<sup>24</sup>

Consistent with Washington's sentiment, the nation's history of military draft laws shows an ongoing effort to find ways to accommodate at least some individuals who object to being forced to kill. That protection has never been complete or absolute. But the overall arc of this history shows a longstanding effort to protect conscientious objectors to military service, with steadily broader protections being introduced over time.

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<sup>24</sup> Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), in GEORGE WASHINGTON ON RELIGIOUS LIBERTY AND MUTUAL UNDERSTANDING 11, 11 (Edward Frank Humphrey ed., 1932).

Many early American state constitutions and conscription statutes contained conscience-protection clauses for at least some religious objectors.<sup>25</sup> These protections varied: many were limited to members of particular religious denominations, and many required objectors to pay a fee considered “equivalent” to personal service in the military.

New York, for example, exempted Quakers from having to bear arms based on “[s]cruples of con[s]cience” so long as they gave “the State [s]uch [s]um[s] of money, in lieu of their per[s]onal [s]ervice, as the [s]ame may, in the judgment of the legi[s]lature, be worth.”<sup>26</sup> Pennsylvania likewise required conscientious objectors to pay a tax or fine to support the military effort, which was often called an “equivalent” to military service.<sup>27</sup>

Pennsylvania’s protection for objectors was very broad in some respects. For example, Pennsylvania went so far as to even exempt government employees from compiling lists of persons eligible for military service if the employee’s refusal to do so “proceed[ed] from conscientious motives.”<sup>28</sup>

Rhode Island provided perhaps the broadest protection for any conscientious objector:

Noe person nor persons [within this colony], that is or hereafter shall be persuaded in his, their conscience, or consciences [and by him or them declared], that he nor they cannot nor ought not to trayne, to learned to fight, nor to war, nor kill any person or persons . . . nor

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<sup>25</sup> See Claire Marblestone, Note, *A Matter of Conscience: United States v. Seeger and the Supreme Court’s Historical Failure to Define Conscientious Objector Status Under the First Amendment*, 38 HASTINGS CONST. L.Q. 201, 204 n.18 (2010).

<sup>26</sup> See N.Y. CONST. of 1777 § 40; see also DELAWARE DECLARATION OF RIGHTS § 10 (1776) (similar); N.H. CONST. of 1784, art. I, § 13, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1280, 1281 (Ben: Perley Poore ed., Lawbook Exchange, Ltd. 2001) (2d ed. 1878) (similar also to the New York provision); PETER BROCK, VARIETIES OF PACIFISM: A SURVEY FROM ANTIQUITY TO THE OUTSET OF THE TWENTIETH CENTURY 31, 34 (1998) (noting the favorable conditions for conscientious objectors in Rhode Island and Pennsylvania); STEPHEN M. KOHN, JAILED FOR PEACE: THE HISTORY OF AMERICAN DRAFT LAW VIOLATORS, 1658–1985, at 9–12 (1986); Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367, 375 (1994) (noting Pennsylvania, Delaware, New Hampshire, Vermont, and New York had constitutional provisions granting exemptions from conscription laws for conscientious objectors).

<sup>27</sup> See Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1822 (2006) (discussing Pennsylvania’s requirement that military objectors pay an equivalent).

<sup>28</sup> See Resolutions Directing the Mode of Levying Taxes on Non-Associators § 2 (Apr. 5, 1776), *reprinted in* 8 PA. STAT.; see also Laycock, *supra* note 27, at 1822 (discussing same).

shall suffer any punishment, fine, distraint, penalty nor imprisonment.<sup>29</sup>

With this language, Rhode Island extended the exemption beyond members of particular religious groups and eliminated even the common requirement of having to pay for an equivalent.

While many colonial and state governments protected a right of conscientious objection to military service, efforts to expressly include such a provision in the Federal Constitution failed. Early drafts of the Second Amendment stated that “no person religiously scrupulous shall be compelled to bear arms.”<sup>30</sup> While this proposed amendment was approved by the required two-thirds supermajority in the House, the Senate rejected this language, and our current Second Amendment is silent on the issue.<sup>31</sup>

## 2. *The Civil War*

The development of federal conscientious objector laws began with the Civil War. As the Supreme Court explained in *United States v. Seeger*, the Federal Militia Act of 1862 left control of conscription primarily to the states.<sup>32</sup> However, pursuant to General Order No. 99, later enacted as the Federal Conscription Act of 1863, the federal government struck “from the conscription list those who were exempted by the States.”<sup>33</sup> The federal system also “established a commutation or substitution system fashioned from earlier state enactments.”<sup>34</sup>

This reliance on state conscientious objector laws ended with the Federal Conscription Act of 1863. At that point “the Federal Government occupied the field entirely.”<sup>35</sup> In the 1864 Draft Act, the federal government directly “extended exemptions to those conscientious objectors who were members of religious denominations opposed to the bearing of arms and who were

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<sup>29</sup> KOHN, *supra* note 26, at 8 (alteration in original) (citing RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND, Statute of August 13, 1673 (John R. Bartlett ed., 1861)).

<sup>30</sup> 1 ANNALS OF CONG. 749 (1789) (Joseph Gales ed., 1834).

<sup>31</sup> See Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL’Y 1083, 1109–1119 (2008) (providing a detailed overview of the treatment of conscience language during Congress’s consideration of the Second Amendment).

<sup>32</sup> *United States v. Seeger*, 380 U.S. 163, 170 (1965).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 171.

prohibited from doing so by the articles of faith of their denominations.”<sup>36</sup> Additionally, an exemption from combat may not have been an exemption from aiding the war effort entirely. The Draft Act instead provided that bona fide conscientious objectors would “be assigned by the Secretary of War to duty in the hospitals, or to the care of freedman.”<sup>37</sup> An objector could obtain relief from military service altogether only if he agreed to pay the government a fee that would assist wounded soldiers.<sup>38</sup>

### 3. *World War I*

When the federal government instituted a draft again in World War I, the provisions governing conscientious objectors largely tracked the 1864 Draft Act.<sup>39</sup> Yet the law encountered criticism for not accommodating “individual objectors,” that is, those without ties to an organized religion.<sup>40</sup> President Woodrow Wilson accordingly issued an Executive Order that guided the Act’s implementation to apply equally to “other conscientious scruples” along with religious objectors.<sup>41</sup>

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<sup>36</sup> *Id.* In the same year, the Confederate government extended similar protections for conscientious objectors. *Id.*

<sup>37</sup> Draft Act of 1864, ch. 13, § 17, 13 Stat. 6, 9.

<sup>38</sup> *Id.*

<sup>39</sup> *See Seeger*, 380 U.S. at 171 (“The Draft Act of 1917 afforded exemptions to conscientious objectors who were affiliated with a ‘well-recognized religious sect or organization [then] organized and existing and whose existing creed or principles [forbade] its members to participate in war in any form.’” (alteration in original) (citation omitted)).

<sup>40</sup> *See* WALTER GUEST KELLOGG, *THE CONSCIENTIOUS OBJECTOR* 17 (1919).

<sup>41</sup> *Id.* at 18–21 (reprinting President Wilson’s Executive Order). Interestingly, President Wilson’s Executive Order came just before the U.S. Supreme Court affirmed the 1917 Act when attacked on the theory that the First Amendment’s Religion Clauses prohibit the Act from limiting objector status to ministers, theological students, and pacifistic religious sects. *See Arver v. United States* (Selective Draft Law Cases), 245 U.S. 366, 389–90 (1918). With the class of objectors expanded to the “individual objector,” the military established a board of inquiry that set out to determine the sincerity of the objector’s beliefs. *See* KELLOGG, *supra* note 40, at 29 (noting the various factors considered to determine if an individual objector was entitled to an exemption). The newfound standing for individual conscience objections not based on formal religious teaching presented a “troublesome problem” to board members. *Id.* Such objectors relied on their own interpretation of the Bible, or certain biblical passages—placing the reasonableness and consistency of their objection at issue. *Id.* Major Walter G. Kellogg, a judge advocate general and chairman of the board of inquiry, reports of the following directive from the War Department:

An order issued March 6, 1918, directed that a psychological examination should be made of all conscientious objectors. This examination, as usually conducted, covered a wide range, and was intended to reach into the utmost recesses of the objector’s mind. The objector was given a rating psychologically, and any inconsistencies in his testimony were noted, and submitted to the Board upon its visitation.

*Id.* at 30.

#### 4. *Modern Era: World War II to the Present*

The Selective Service Act allowed an individual to base a conscientious objection on “religious training and belief,” which the Act defined as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.”<sup>42</sup> The Act required that the objector be “conscientiously opposed to participation in war in any form.”<sup>43</sup>

Over time, the Court interpreted the Selective Service Act of 1940 to broaden the definition of “religious training and belief.”<sup>44</sup> For example, in *United States v. Seeger*, the Court considered Congress’s choice to “deliberately broaden[]” the scope of objections by allowing individuals to reference a “Supreme Being” rather than “God” as their source of objection in the Selective Service Act.<sup>45</sup> After reviewing the statutory developments under the Act, the Court stated a broad test for conscientious objection, which includes not only religious objections but also moral and ethical objections:

A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.<sup>46</sup>

The *Seeger* Court recognized that the exemption provision needed to “deal[] with the beliefs of different individuals who will articulate them in a multitude of ways,”<sup>47</sup> and focused its test simply on the sincerity of the individual’s conscientious objection.<sup>48</sup>

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<sup>42</sup> Selective Service Act of 1948, ch. 625, 62 Stat. 604, 612–13 (amending the Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885 (expired Mar. 31, 1947)).

<sup>43</sup> *Id.*

<sup>44</sup> See Alfred J. Sciarrino & Kenneth L. Deutsch, *Conscientious Objection to War: Heroes to Human Shields*, 18 *BYU J. PUB. L.* 59, 86–87 (2003).

<sup>45</sup> 380 U.S. 163, 175 (1965).

<sup>46</sup> *Id.* at 176.

<sup>47</sup> *Id.* at 184.

<sup>48</sup> See *id.* at 185.

Even this broadened approach to conscientious objection remains focused on individuals who are opposed to participating in *any war*, as opposed to those who are opposed to participating in a particular war.<sup>49</sup> This leaves certain people who have moral objections to participation in particular wars—for example, someone who subscribes to “just war theory,” which condemns some, but not other, wars—without protection.<sup>50</sup>

This approach to conscientious objection remains the rule today, even within our all-volunteer military in which soldiers arrive without being drafted.<sup>51</sup> Under current Department of Defense guidelines, a conscientious objector is someone who has “[a] firm, fixed, and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and/or belief.”<sup>52</sup> The guidelines define “religious training and/or belief” as including not only traditional religious views, but also “solely moral or ethical beliefs even though the applicant may not characterize these beliefs as ‘religious’ in the traditional sense.”<sup>53</sup>

The guidelines also allow for two different types of objectors: those for whom non-combatant participation in the military effort is morally permissible and those who have conscience-based objections to *any* type of support for the military.<sup>54</sup> Objectors “whose convictions are such as to permit military service in a non-combatant status”<sup>55</sup> may be assigned to such service;<sup>56</sup> those who

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<sup>49</sup> See *Gillette v. United States*, 401 U.S. 437, 443 (1971) (holding that the Selective Service Act would be “strain[ed]” to be applied to objectors who are only opposed to a specific war, such as the Vietnam Conflict and that the objection status applies to those opposed to “participation in all war” generally).

<sup>50</sup> See, e.g., *id.* at 439–41.

<sup>51</sup> See U.S. DEP’T OF DEF., INSTRUCTION NO. 1300.06 (May 5, 2007), available at <http://www.dtic.mil/whs/directives/corres/pdf/130006p.pdf>.

<sup>52</sup> *Id.* at 2.

<sup>53</sup> *Id.* (“Religious Training and/or belief: Belief in an external power or ‘being’ or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being. The external power or ‘being’ need not be one that has found expression in either religious or societal traditions. However, it should sincerely occupy a place of equal or greater value in the life of its possessor. Deeply held moral or ethical beliefs should be valued with the strength and devotion of traditional religious conviction. The term ‘religious training and/or belief’ may include solely moral or ethical beliefs even though the applicant may not characterize these beliefs as ‘religious’ in the traditional sense, or may expressly characterize them as not religious. The term ‘religious training and/or belief’ does not include a belief that rests solely upon considerations of policy, pragmatism, expediency, or political views.”).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See *id.* at 11.



“sincerely object[] to participation in military service of any kind”<sup>57</sup> are eligible for discharge.<sup>58</sup>

Despite the breadth of the modern conscientious objector regulations, they continue to limit the availability of the exemption to those who selectively object to participation in particular wars.<sup>59</sup> According to the Department of Defense, “An individual who desires to choose the war in which he or she will participate is not a Conscientious Objector under the law. The individual’s objection must be to all wars rather than a specific war.”<sup>60</sup>

To date, the Supreme Court has always treated conscientious objector provisions in the military context as matters of legislative grace rather than constitutional entitlement.<sup>61</sup> Yet the history of legislative exemptions from military service shows a longstanding effort to avoid forcing individuals to kill when it is contrary to their deeply held beliefs to do so. While this effort has never yielded complete protection for every objector, it has been ongoing for several hundreds of years; has been conducted at the colonial, state, and federal levels across a variety of conflicts; has been expanded at times by the Supreme Court; and continues to this day.

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<sup>57</sup> *Id.* at 2.

<sup>58</sup> *Id.* at 11.

<sup>59</sup> *Id.* at 3.

<sup>60</sup> *Id.*

<sup>61</sup> *See, e.g.,* *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 264 (1934) (“The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him.”); *United States v. Macintosh*, 283 U.S. 605, 624 (1931) (rejecting claim of constitutional right to refrain from military service based on the “well-nigh limitless extent of the war powers”), *abrogated in part by* *Girouard v. United States*, 328 U.S. 61 (1946). Lower courts have largely, though not completely, followed this trend. *See* *United States v. Burns*, 450 F.2d 44, 46 (10th Cir. 1971); *United States v. Boardman*, 419 F.2d 110, 112 (1st Cir. 1969); *United States v. Crouch*, 415 F.2d 425, 430 (5th Cir. 1969); *Korte v. United States*, 260 F.2d 633, 635 (9th Cir. 1958) (“It is well settled that exemption from military service is a matter of legislative grace and not a matter of right.” (internal quotation marks omitted)); *United States v. Bendik*, 220 F.2d 249, 252 (2d Cir. 1955); *Pomorski v. United States*, 222 F.2d 106, 107 (6th Cir. 1955) (per curiam). *But see* *United States v. McFadden*, 309 F. Supp. 502, 505–08 (N.D. Cal. 1970) (holding the Selective Service Act unconstitutional under the Free Exercise, Establishment, and Equal Protection Clauses), *vacated*, 401 U.S. 1006 (1971); *United States v. Sisson*, 297 F. Supp. 902, 911 (D. Mass. 1969) (holding that in not granting conscientious objector status to a particular registrant, the Military Selective Service Act of 1967 violates the Free Exercise and Establishment Clauses of the First Amendment).

## B. Capital Punishment

### 1. Historical Background—Finding an Executioner

While the existence of conscientious objector provisions in the military context enjoys a long historical tradition,<sup>62</sup> the notion of such express protections for those who do not wish to participate in capital punishment is a relatively new innovation. Express conscience protections in this area date from 1988 to the present day.<sup>63</sup>

It has not always been easy to find willing individuals to conduct government executions. Unlike military service—which sometimes (though not always) brings with it societal respect and appreciation—the job of executing criminals historically carried considerably less prestige. In fact, “the stigma associated with the job of the executioner has [historically] made the position undesirable.”<sup>64</sup>

In seventeenth and eighteenth century Europe, for example, an executioner was often something of an outcast.<sup>65</sup> Nevertheless, rather than coerce people to take the job, authorities offered deals to condemned inmates to convince them to perform the task in exchange for a lighter sentence:

English crowds may have attended executions in large numbers, but the professional hangman there, like executioners elsewhere in Europe, was often a pariah. Frequently hangmen had to be recruited from among the ranks of condemned inmates who were specially relieved if they agreed to serve in that capacity.<sup>66</sup>

Stigmas persist to this day.<sup>67</sup>

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<sup>62</sup> See *supra* Part I.A.

<sup>63</sup> See *infra* notes 73–78 and accompanying text.

<sup>64</sup> Ellyde Roko, Note, *Executioner Identities: Toward Recognizing a Right to Know Who Is Hiding Beneath the Hood*, 75 *FORDHAM L. REV.* 2791, 2796 (2007).

<sup>65</sup> Robert J. Cottrol, *Finality with Ambivalence: The American Death Penalty's Uneasy History*, 56 *STAN. L. REV.* 1641, 1649 (2004) (reviewing STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2002)); see also STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 39 (2002) (“There was a tension between . . . the approval of death as a punishment and a strong reluctance to carry out the distasteful steps necessary to put that punishment into practice.”); V. A. C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770–1868*, at 99–105, 307, 609 (1994).

<sup>66</sup> Cottrol, *supra* note 65, at 1649 (footnote omitted); see also BANNER, *supra* note 65, at 36–39.

<sup>67</sup> See Roko, *supra* note 64, at 2800 (“Regardless of whether the personnel injecting the execution drugs are medical professionals, prison officials have voiced concerns that identifying the execution team members would make it difficult to find anyone willing to take on the job.”).

Procedures for capital punishment have long reflected the difficult moral burdens imposed on the executioner. For this reason, elaborate execution protocols are often established to permit the executioner to avoid personal moral responsibility for the killing.<sup>68</sup> Statutes in many states forbid disclosure of the identity of persons involved in executions.<sup>69</sup>

Over the centuries, technological advances have also changed capital punishment in ways that impact who might serve as the executioner. The shift from hangings to electrocutions to lethal injections has come to require participation in the execution process by experienced professionals.<sup>70</sup> Many professional organizations, however, discourage their members from participating in capital punishment. For example, the American Medical Association's Code of Ethics states that "[a] physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."<sup>71</sup>

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<sup>68</sup> See JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 149–51 (1997) ("Executioners themselves are oftentimes absolved from personal responsibility for executions. A blank is put in one of the firing squad guns, an unknown executioner stands behind a one-way mirror, or only one of two buttons—pushed by different individuals—activates the lethal injection machine."); see also BANNER, *supra* note 65, at 299 (describing how states created elaborate protocols for lethal injection so "[e]ach prison employee could think of himself as a mere link in a long chain that led to the condemned person's death").

<sup>69</sup> BESSLER, *supra* note 68, at 151 (stating that statutes protect the identities of executioners in many states, including Florida, Illinois, Montana, New Jersey, and New York). The Illinois statute, for example, states, "[T]he identity of executioners . . . and information contained in records that would identify those persons shall remain confidential, shall not be subject to disclosure, and shall not be admissible as evidence or be discoverable in any action of any kind in any court or before any tribunal, board, agency, or person." 725 ILL. COMP. STAT. 5/119–5(e) (2003).

<sup>70</sup> See Cottrol, *supra* note 65, at 1656–58.

<sup>71</sup> CODE OF MED. ETHICS 2.06 (Am. Med. Ass'n 2000), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page?>; see also AM. NURSES ASS'N CTR. FOR ETHICS AND HUMAN RIGHTS, *AM. NURSES ASS'N, NURSES' ROLE IN CAPITAL PUNISHMENT I* (2010), available at <http://gm6.nursingworld.org/gm-node/33733.aspx> ("The American Nurses Association (ANA) is strongly opposed to nurse participation in capital punishment. Participation in executions, either directly or indirectly, is viewed as contrary to the fundamental goals and ethical traditions of the nursing profession."); Orin F. Guidry, President, Am. Soc'y of Anesthesiologists, Message from the President: Observations Regarding Lethal Injection (June 30, 2006), available at <http://asatest.asahq.org/news/asanews063006.htm> (stating that the American Society of Anesthesiologists had adopted the American Medical Association's "position regarding physician nonparticipation in executions" in 2001).

## 2. *Conscience Protections*

### a. *Express Protections*

Seventeen states and the District of Columbia have prohibited capital punishment entirely.<sup>72</sup> In these states, of course, there is no danger that an unwilling person could be forced to participate in an execution.

For the remaining thirty-three states and the federal government that still practice capital punishment, the last twenty-five years have witnessed a trend towards express conscience protections for those who do not wish to participate. In particular, beginning with the federal government in 1988, eleven states and the federal government have adopted some type of statute or regulation to ensure that individuals are not forced to participate in executions against their will.<sup>73</sup>

For example, the federal conscience protection statute for capital punishment provides protection to a broad range of individuals, including federal employees, state employees, and contractors.<sup>74</sup> The law protects these people against compulsion to engage in a broad range of activities in relation to capital punishment “if such participation is contrary to the moral or religious convictions of the employee.”<sup>75</sup> These provisions protect the individual not only from direct involvement—such as personally administering a lethal injection or turning on the electric chair—but also less direct involvement such as preparing the individual and apparatus used, supervising other people who will do these things, or even attending the execution.<sup>76</sup> In fact, the federal protection even extends to those who object on conscience grounds to

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<sup>72</sup> *States with and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited July 22, 2012).

<sup>73</sup> See George Kannar, *Federalizing Death*, 44 BUFF. L. REV. 325, 332–34 (1996) (citing 21 U.S.C. § 848(r) (repealed 2006)); see also 18 U.S.C. § 3597(b) (2006). Louisiana appears to have enacted the first state law on this subject in 1990. See LA. REV. STAT. ANN. § 15:569(c) (2012) (“No licensed health professional shall be compelled to administer a lethal injection.”).

<sup>74</sup> 18 U.S.C. § 3597(b) (2006) (extending protection to any “employee of any State department of corrections, the United States Department of Justice, the Federal Bureau of Prisons, or the United States Marshals Service, and [any] employee providing services to that department, bureau, or service under contract”).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (“No employee . . . shall be required . . . to be in attendance at or to participate in any prosecution or execution under this section if such participation is contrary to the moral or religious convictions of the employee. In this subsection, ‘participation in executions’ includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.”).

participating in any *prosecution* that may lead to the death penalty.<sup>77</sup> If any such action is contrary to the “moral or religious convictions of the employee,” the employee is exempted by law.<sup>78</sup>

The state exemptions are not as detailed as the federal conscience protection. Some protect objectors by simply requiring that all participants in executions be volunteers. For example, Arizona law provides that “[a]ll team members serve on a strictly voluntary basis.”<sup>79</sup> California law likewise provides that “[n]o physician or any other person invited pursuant to this section, whether or not employed by the Department of Corrections, shall be compelled to attend the execution, and any physician’s attendance shall be voluntary.”<sup>80</sup> Both states expressly provide that there shall be no repercussions for an employee’s refusal to participate.<sup>81</sup>

Other state laws phrase the protection as a ban on compulsion, as opposed to a requirement to use volunteers. Georgia law, for example, provides that “[n]o state agency, department, or official may, through regulation or otherwise, require or compel a physician to participate in the execution of a death sentence.”<sup>82</sup> Connecticut law likewise provides that “[e]xcept as provided by statute, no employee of the Department of Correction shall be required to participate in the execution of an inmate.”<sup>83</sup>

Notably, these jurisdictions that focus on voluntarism or non-compulsion do not limit the objectors to simply religious objectors. Nor do they even follow the federal military draft model of limiting objections to religious objectors or persons acting on deep moral convictions.<sup>84</sup> Instead, these jurisdictions appear to allow the protected individuals to choose not to participate for any reason whatsoever.

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> ARIZ. DEP’T OF CORR., DEPARTMENT ORDER 710: EXECUTION PROCEDURES 2 (2012).

<sup>80</sup> CAL. PENAL CODE § 3605(c) (West 2011).

<sup>81</sup> *Id.* (“A physician’s or any other person’s refusal to attend the execution shall not be used in any disciplinary action or negative job performance citation.”); ARIZ. DEP’T OF CORR., DEPARTMENT ORDER 710: EXECUTION PROCEDURES 2 (2012) (“At any point before, during or after an execution any team member may decline to participate or participate further without additional notice and explanation or repercussion. The Division Director for Offender Operations shall ensure all team members understand and comply with the provisions contained herein.”).

<sup>82</sup> GA. CODE ANN. § 17-10-38(d) (West 2003).

<sup>83</sup> CONN. DEP’T OF CORR., DIRECTIVE NUMBER 6.15: ADMINISTRATION OF CAPITAL PUNISHMENT 1 (2004).

<sup>84</sup> *See supra* Part I.A.

Other states take a slightly more limited approach and protect objectors who rely on “moral or ethical” grounds for refusing to participate in an execution.<sup>85</sup> This mirrors the federal protection for employees asked to participate in an execution or prosecution “contrary to the moral or religious convictions of the employee.”<sup>86</sup>

In terms of what a conscientious objector may refuse to do, the narrowest of these exemptions appears to be Louisiana’s, which protects objectors from being “compelled to administer a lethal injection.”<sup>87</sup> Most, however, protect objectors from a broader range of activities. For example, the protections in Arizona, Connecticut, and Oregon allow objectors to refuse to “participate” in the execution, which seems likely to be broader than simply administering the injection.<sup>88</sup> Washington expressly allows objectors to refuse to “participate *in any part* of the execution procedure.”<sup>89</sup> Georgia, in fact, has taken the additional step of defining “participate” to include “selecting injection sites; starting an intravenous line or lines as a port for a lethal injection device; prescribing, preparing, administering, or supervising injection drugs or their doses or types; inspecting, testing, or maintaining lethal injection devices; or consulting with or supervising lethal injection personnel.”<sup>90</sup>

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<sup>85</sup> See, e.g., ALA. CODE § 15-18-82.1(i) (2011) (“Nothing contained in this section is intended to require any physician, nurse, pharmacist, or employee of the Department of Corrections or any other person to assist in any aspect of an execution *which is contrary to the person’s moral or ethical beliefs.*” (emphasis added)); FLA. STAT. § 922.105(9) (2012) (same).

<sup>86</sup> See 18 U.S.C. § 3597(b) (2006).

<sup>87</sup> LA. REV. STAT. ANN. § 15:569(c) (2012).

<sup>88</sup> ARIZ. DEP’T OF CORR., DEPARTMENT ORDER 710: EXECUTION PROCEDURES 2 (2012); CONN. DEP’T OF CORR., DIRECTIVE NUMBER 6.15: ADMINISTRATION OF CAPITAL PUNISHMENT 1 (2004); OR. ADMIN. R. 291-024-0005(3)(b) (2012).

<sup>89</sup> WASH. DEP’T OF CORR., POLICY NUMBER DOC 490.200: CAPITAL PUNISHMENT 7 (2011) (emphasis added).

<sup>90</sup> GA. CODE ANN. § 17-10-38(d) (West 2003). The American Medical Association’s Code of Ethics defines participation to include not only actions “which would directly cause the death of the condemned” but also any action “which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned.” CODE OF MED. ETHICS 2.06 (Am. Med. Ass’n 2000), *available at* <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page?>. The AMA states that participation includes, among other things, the following:

[P]rescribing or administering tranquilizers and other psychotropic agents and medications that are part of the execution procedure; monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending or observing an execution as a physician; . . . rendering of technical advice regarding execution . . . selecting injection sites; starting intravenous lines as a port for a lethal injection device; prescribing, preparing, administering, or supervising injection drugs or their doses or types; inspecting, testing, or maintaining lethal injection devices; and consulting with or supervising lethal injection personnel.

Other states even more broadly allow objectors to refuse to “assist in any aspect” of the execution (Alabama,<sup>91</sup> Florida<sup>92</sup>), refuse to even “attend” (California),<sup>93</sup> or be exempted from being on the execution team at all (Kentucky).<sup>94</sup>

Thus, while the express conscience protections in this context vary, three themes emerge. First, unlike the military draft context,<sup>95</sup> the conscience protections available in the capital punishment context are not generally limited to religious or even deeply held moral viewpoints. Nor does there seem to be any analogue to the “all wars” requirement<sup>96</sup> from the draft context. Instead, where the right is provided, it usually appears to protect objectors, regardless of their reasons and regardless of whether those reasons are in any way selective.

Second, with the exception of Louisiana, the protections seem to protect conscientious objectors not only from being required to actually execute the person, but also from participating in other ways—including mere attendance at the execution, assistance with the prosecution, or supervision of other employees who will conduct the execution.

Third, like the current protections for conscientious objectors within our all-volunteer military, the express protections in the capital punishment context often protect people who have already willingly made a free choice to become corrections department employees but have objections to participating in executions.

#### *b. General Protections*

In addition to the express protections for conscientious objectors provided by the federal government and eleven death-penalty states, another nine death-penalty states have general protections that would provide protection to at least religious objectors.

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*Id.*

<sup>91</sup> ALA. CODE § 15-18-82.1(i) (2011).

<sup>92</sup> FLA. STAT. § 922.105(9) (2012).

<sup>93</sup> CAL. PENAL CODE § 3605(c) (West 2011).

<sup>94</sup> 501 KY. ADMIN. REGS. 16:320 (2010).

<sup>95</sup> *See supra* Part I.A.

<sup>96</sup> *See supra* notes 59–60 and accompanying text.

Three of these states—North Carolina, Indiana, and Ohio—have interpreted their state constitutional religious freedom protections to require strict scrutiny for any substantial burden on religion.<sup>97</sup> Another five of these states—Missouri, South Carolina, Oklahoma, Pennsylvania, and Texas—have passed state Religious Freedom Restoration Act statutes to require strict scrutiny for such burdens as a matter of statutory law.<sup>98</sup>

In these states, a religious objector would likely have substantial protection from being compelled by the government to participate in executions. The religious objector would need to establish that forced participation would impose a substantial burden on his or her religious beliefs.<sup>99</sup> Once such a burden is established, the objector could only be forced if such compulsion were the least restrictive means of satisfying a compelling government interest.<sup>100</sup>

In sum, in the context of capital punishment there are seventeen states, and the District of Columbia, in which it is absolutely certain no one can be forced to participate (because the death penalty is not practiced),<sup>101</sup> another eleven states and the federal government that have express protections for objectors to capital punishment,<sup>102</sup> and another eight states in which at least religious objectors have strong protection against government compulsion to participate in executions.<sup>103</sup> Thus in thirty-six out of fifty states, in the District of Columbia, and at the federal level, some or all death-penalty objectors are protected from forced participation in executions.

As with military conscription, this evidence shows a commitment, albeit an imperfect one, to exempt objectors from forced participation in capital punishment. The recent origins of the express conscience protections show an

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<sup>97</sup> See Eugene Volokh, *Religious Exemption Law Map of the United States*, VOLOKH CONSPIRACY (July 9, 2010, 5:36 PM), <http://volokh.com/2010/07/09/religious-exemption-law-map-of-the-united-states/>; see also *Highler v. State*, 834 N.E.2d 182, 196–97 & n.10 (Ind. Ct. App. 2005) (“The judiciary has uniformly employed strict scrutiny in evaluating the constitutionality of state interference with or involvement in religion.”), *aff’d in part and vacated in part*, 854 N.E.2d 823 (Ind. 2006); *State v. Blackmon*, 719 N.E.2d 970, 974 & n.3 (Ohio Ct. App. 1998).

<sup>98</sup> See MO. REV. STAT. § 1.302 (2011); OKLA. STAT. tit. 51, §§ 251–54 (2008); 71 PA. CONS. STAT. ANN. §§ 2401–07 (2012); S.C. CODE ANN. § 1-32-40 (2005); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–012 (West 2011).

<sup>99</sup> See, e.g., 71 PA. CONS. STAT. ANN. § 2404 (2012).

<sup>100</sup> *Id.*

<sup>101</sup> See *supra* note 72.

<sup>102</sup> See *supra* Part I.B.2.a.

<sup>103</sup> See *supra* Part I.B.2.b.



increased commitment on this front in the past twenty-five years, but it is still the case that corrections employees and others have no express protection in at least thirteen states, and in another nine protection only extends to religious objectors.

### C. *Assisted Suicide*

As in the military service and capital punishment contexts, the relatively new area of legalized assisted suicide has also brought with it conscience protections for those who do not wish to participate in killings.

In most jurisdictions, of course, it remains illegal to assist someone in committing suicide. As the Supreme Court explained in *Washington v. Glucksberg*:

In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States’ assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States’ commitment to the protection and preservation of all human life.<sup>104</sup>

In fact, this tradition predates the Union itself.<sup>105</sup> “[F]or over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.”<sup>106</sup> The law’s general antipathy toward assisted suicide is not simply traditional; it is reflected even today in the Model Penal Code.<sup>107</sup> In most states, then, it seems clear that the general consensus against assisted suicide precludes the state from forcing an unwilling person to assist a suicide.<sup>108</sup>

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<sup>104</sup> 521 U.S. 702, 710 (1997) (footnote omitted) (citing *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 280 (1990)); see also *id.* at 710–19 & n.8.

<sup>105</sup> The first explicit statute criminalizing assisted suicide came in 1829 in New York. 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 7, at 661 (1829).

<sup>106</sup> *Glucksberg*, 521 U.S. at 711; see also 4 WILLIAM BLACKSTONE, COMMENTARIES \*189 (characterizing suicide as “the pretended hero[is]m, but real cowardice, of the Stoic philo[s]ophers, who de[s]troyed them[s]elves to avoid tho[s]e ills which they had not the fortitude to endure”).

<sup>107</sup> See MODEL PENAL CODE § 210.5 cmt. 5 (Official Draft and Revised Comments 1980) (“[T]he interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim.”).

<sup>108</sup> Some states even go further than not decriminalizing assisted suicide, but explicitly provide protection for those who might refuse participation in assisting suicide—even from professional actions taken against that individual. South Dakota, for example, took the affirmative step of explicitly stating, “No such refusal to dispense medication pursuant to this section may be the basis for any claim for damages against the pharmacist

As of this writing, there are only three states that do not conform to the general prohibition against assisted suicide: Oregon, Washington, and Montana. Oregon and Washington have legalized physician-assisted suicide via statute;<sup>109</sup> Montana has done so via court decision.<sup>110</sup>

To date, none of these states has attempted to impose any affirmative requirement that healthcare providers participate in an assisted suicide. Two of the states have express conscience protections.

Oregon's Death with Dignity Act both authorizes assisted suicide and provides affirmative conscience protection to those who might object to participating in the killing.<sup>111</sup> First, the Act provides that "[n]o professional organization or association, or health care provider, may subject a person to censure, discipline, suspension, loss of license, loss of privileges, loss of membership or other penalty" for refusing to participate in assisted suicide.<sup>112</sup> Second, the Act outlaws even *contractual* duties to provide drugs to end a patient's life.<sup>113</sup> Third, Oregon's conscience protection extends even to those who are not directly involved in providing the drugs to end a patient's life by creating an express right for a hospital to sanction doctors who provide life-ending drugs "on the premises of the prohibiting provider."<sup>114</sup> Washington provides virtually identical conscience protections to Oregon.<sup>115</sup>

Notably, neither Washington nor Oregon requires that the refusal to participate in assisted suicide be the result of religious views, or even the result

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or the pharmacy of the pharmacist or the basis for any disciplinary, recriminatory, or discriminatory action against the pharmacist." S.D. CODIFIED LAWS § 36-11-70 (2012).

<sup>109</sup> See OR. REV. STAT. § 127.800 (2011); WASH. REV. CODE ANN. § 70.245.190 (West 2011).

<sup>110</sup> See *Baxter v. State*, 224 P.3d 1211, 1222 (Mont. 2009) ("Under [Montana criminal law], a terminally ill patient's consent to physician aid in dying constitutes a statutory defense to a charge of homicide against the aiding physician when no other consent exceptions apply.").

<sup>111</sup> See OR. REV. STAT. § 127.800 (2011).

<sup>112</sup> *Id.* § 127.885(2).

<sup>113</sup> *Id.* § 127.885(4).

<sup>114</sup> *Id.* § 127.885(5)(a).

<sup>115</sup> WASH. REV. CODE ANN. § 70.245.190(1)(d)-(2)(b) (West 2011) ("Only willing health care providers shall participate in the provision to a qualified patient of medication to end his or her life in a humane and dignified manner. If a health care provider is unable or unwilling to carry out a patient's request under this chapter, and the patient transfers his or her care to a new health care provider, the prior health care provider shall transfer, upon request, a copy of the patient's relevant medical records to the new health care provider."); see also *Stormans, Inc. v. Selecky*, No. C07-5374 RBL, 2012 U.S. Dist. LEXIS 22370, at \*28-29 (W.D. Wash. Feb. 22, 2012) ("If the Death with Dignity Act had required medical providers to participate in assisted suicide, there is little doubt that the medical providers would have the right to refuse to do so. . . . There is no doubt about the consequences of assisted suicide.").

of deeply held moral or ethical views as required in the military context. Instead, as in the capital punishment context, these conscience rights appear to extend to any objector, regardless of the nature of the objection.<sup>116</sup>

Conscience protections are less clear in Montana, where the right to assisted suicide emerged from a judicial opinion. In *Baxter v. State*, the court stated that a terminally ill patient could provide adequate consent to a physician to provide lethal doses of drugs.<sup>117</sup> In rejecting the argument that such consent violates public policy, the Montana Supreme Court relied on Montana's Rights of the Terminally Ill Act (Terminally Ill Act) to find that there was no policy against physicians helping terminally ill patients to die.<sup>118</sup>

Although conscience protections are not express and were not discussed in the *Baxter* opinion, the Terminally Ill Act, upon which the court relied, provides that “[a] health care provider . . . if unwilling to comply with the declaration [requesting withdrawal of treatment], shall advise the declarant and any individual designated to act for the declarant promptly.”<sup>119</sup> In such a case, the Act simply requires the unwilling physician to transfer the patient to a different provider.<sup>120</sup>

It is unclear, of course, whether the allowance in the Terminally Ill Act for Montana healthcare providers to transfer patients rather than withdraw treatment would translate into a similar right for providers to opt out of assisting with suicides. As a policy matter, it seems likely that any jurisdiction that would recognize and protect a right to withdraw treatment—a more passive participation in death—would also protect a right to refuse to assist suicide—a more active participation in killing.

Thus, in the assisted suicide context it can be said that: (1) in forty-seven states there is no chance of anyone being forced by the government to participate because the practice is illegal; (2) in two of the three states to legalize the practice, there are strong, express conscience protections not only for healthcare providers that do not want to personally participate, but also for entities that do not want their premises used for assisted suicides;<sup>121</sup> and (3) there is one state that has legalized assisted suicide with no express protection,

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<sup>116</sup> OR. REV. STAT. § 127.885 (2011); WASH. REV. CODE ANN. § 70.245.190 (West 2011).

<sup>117</sup> 224 P.3d 1211, 1222 (Mont. 2009).

<sup>118</sup> *Id.* at 1217.

<sup>119</sup> MONT. CODE. ANN. § 50-9-103(5) (2011).

<sup>120</sup> *Id.* § 50-9-203.

<sup>121</sup> See *supra* notes 111–16 and accompanying text.

although the conscience protection applicable to withdrawing treatment suggests a willingness to protect objectors in a related context.<sup>122</sup>

#### *D. Abortion*

In each of the contexts discussed so far—the military, capital punishment, and assisted suicide—there are of course different views as to whether the killings in question are morally permissible. Yet there is essentially no room for debate that each of these contexts involves the killing of other human beings. In short, the debate is over the morality or permissibility of the killing, not whether a killing takes place at all.

The context of abortion, of course, is different. In *Roe v. Wade*, the Supreme Court famously declared itself unable to determine when human life begins: “[T]he judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”<sup>123</sup> Thus, in some ways the abortion debate is about whether abortion is killing at all, with some abortion supporters arguing that abortion does not involve killing, and abortion opponents arguing that it does.<sup>124</sup> This dispute over whether abortion is a killing in the first place adds a difficulty that is not present in the other contexts where the fact of killing is agreed upon, and the only questions concern the permissibility of that killing.

Nevertheless, despite this additional level of dispute, the abortion context offers the most systematic and all-encompassing example of government efforts to ensure that unwilling individuals are not forced to engage in what they believe to be killings.<sup>125</sup>

Historically, healthcare providers have generally been free to refuse to perform abortions.<sup>126</sup> At common law, physicians actually had no duty to treat

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<sup>122</sup> See *supra* notes 117–20 and accompanying text.

<sup>123</sup> 410 U.S. 113, 159 (1973).

<sup>124</sup> See, e.g., *id.* at 159–62 (noting the “wide divergence of thinking” on when life begins).

<sup>125</sup> The historical treatment of those who are unwilling to participate in abortions is discussed at length in my recent article. Rienzi, *supra* note 12. In the article, I set forth at length the historical arguments concerning the right not to perform abortions, and explain how the historical basis for this right is sufficient to ground a Fourteenth Amendment right not to be forced to participate in abortions. *Id.* at 18–25. Thus, what is here is a short summary of the detailed historical analysis in that paper.

<sup>126</sup> *Id.* at 17–35.

any patient at all, even in an emergency.<sup>127</sup> While the exact legal status of abortion at common law is the subject of intense debate, there has been no suggestion from historians on either side that providers were forced by the government to participate in abortions.<sup>128</sup> In fact, even historians supporting the *Roe* decision acknowledge that abortion was at best tolerated—rather than expressly legalized—and that the law dealt quite harshly with abortion providers, including imposing the death penalty on the provider if a woman died during an abortion.<sup>129</sup> Moreover, medical ethics codes for centuries prohibited participation in abortions—a prohibition that would be difficult to follow if the state could force medical providers to perform abortions.<sup>130</sup>

Even before *Roe* was decided, states that permitted abortion were taking action to protect those physicians or hospitals that objected to participation in abortions. In 1971, New York enacted a criminal law prohibiting discrimination against any person for his or her refusal to participate in abortions.<sup>131</sup> Many other states—including Arkansas, Alaska, Colorado, Delaware, Florida, Georgia, Hawaii, and Maryland—included explicit conscience protections for individuals and institutions in the same statutes that liberalized their abortion laws.<sup>132</sup>

That trend of protecting conscientious objectors to abortions continued and dramatically expanded in the aftermath of *Roe*. Today, virtually every state in the country has some sort of statute protecting individuals and, in many cases,

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<sup>127</sup> See, e.g., *id.* at 23–24; see also SAMUEL WILLISTON, WILLISTON ON CONTRACTS §62:12 (4th ed. 2002) (“In the absence of a statute, a physician is under no obligation to engage in practice or to accept professional employment.”) (citing cases).

<sup>128</sup> Rienzi, *supra* note 12, at 18–25.

<sup>129</sup> *Id.* at 18–22; see also Cyril C. Means, Jr., *The Law of New York Concerning Abortion and the Status of the Fetus, 1664–1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 437–38 (1968) (noting that abortion was “tolerated” rather than legalized at common law, and that severe disincentives were imposed, including that if a woman did not survive an abortion, “he who had performed [the abortion] was hanged”).

<sup>130</sup> Rienzi, *supra* note 12, at 24–25.

<sup>131</sup> See N.Y. CIV. RIGHTS LAW § 79-i (McKinney 2009) (“When the performing of an abortion on a human being or assisting thereat is contrary to the conscience or religious beliefs of any person, he may refuse to perform or assist in such abortion by filing a prior written refusal setting forth the reasons therefor with the appropriate and responsible hospital, person, firm, corporation or association, and no such hospital, person, firm, corporation or association shall discriminate against the person so refusing to act.”).

<sup>132</sup> See, e.g., 1970 Alaska Sess. Laws 103-1 (“Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.”); 1968-69 Ark. Acts 179; 1967 Colo. Sess. Laws 285; 57 Del. Laws 411 (1970); 1972 Fla. Laws 610; 1968 Ga. Laws 1436; 1970 Haw. Sess. Laws 1; 1968 Md. Laws 875.

entities who refuse to provide abortions.<sup>133</sup> Most of these statutes arose in the decade following *Roe*.<sup>134</sup> Some states expressly limit this protection to the practice of abortion, which is treated specially.<sup>135</sup> Other states protect conscience for other procedures as well.<sup>136</sup>

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<sup>133</sup> See, e.g., NARAL PRO-CHOICE AM. FOUND., WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES 16 (2012), available at <http://www.prochoiceamerica.org/assets/download-files/2011-who-decides.pdf> (noting that forty-seven states and the District of Columbia "allow certain individuals or entities to refuse to provide women specific reproductive-health services, information, or referrals").

While an exhaustive list of the varying formulations and purposes of state-law conscience protections is beyond the scope of this Article, some representative examples include the following: ALASKA STAT. § 18.16.010(b) (2011) ("Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section."); ARIZ. REV. STAT. ANN. § 36-2154(B) (2009) ("A pharmacy, hospital or health professional, or any employee of a pharmacy, hospital or health professional, who states in writing an objection to abortion, abortion medication, emergency contraception or any medication or device intended to inhibit or prevent implantation of a fertilized ovum on moral or religious grounds is not required to facilitate or participate in the provision of an abortion, abortion medication, emergency contraception or any medication or device intended to inhibit or prevent implantation of a fertilized ovum."); CONN. AGENCIES REGS. § 19-13-D54(f) (2012) ("No person shall be required to participate in any phase of an abortion that violates his or her judgment, philosophical, moral or religious beliefs."); HAW. REV. STAT. § 453-16(e) (West 2008) ("Nothing in this section shall require any hospital or any person to participate in an abortion . . ."); IDAHO CODE ANN. § 18-611(2) (West 2006 & Supp. 2011) ("No health care professional shall be required to provide any health care service that violates his or her conscience."); IOWA CODE ANN. § 146.1 (West 2005) ("An individual who may lawfully perform, assist, or participate in medical procedures which will result in an abortion shall not be required against that individual's religious beliefs or moral convictions to perform, assist, or participate in such procedures."); ME. REV. STAT. ANN. tit. 22, § 1903(4) (2004) ("No private institution or physician or no agent or employee of such institution or physician shall be prohibited from refusing to provide family planning services when such refusal is based upon religious or conscientious objection."); MD. CODE ANN., HEALTH-GEN. § 20-214 (LexisNexis 2009) ("(a)(1) A person may not be required to perform or participate in, or refer to any source for, any medical procedure that results in artificial insemination, sterilization, or termination of pregnancy. . . . (b)(1) A licensed hospital, hospital director, or hospital governing board may not be required: (i) To permit, within the hospital, the performance of any medical procedure that results in artificial insemination, sterilization, or termination of pregnancy; or (ii) To refer to any source for these medical procedures."); MINN. STAT. § 145.414(a) (2011) ("No person and no hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion for any reason."), *invalidated in part by* *Hodgson v. Lawson*, 542 F.2d 1350 (8th Cir. 1976); N.J. STAT. ANN. § 2A:65A-1 (West 2000) ("No person shall be required to perform or assist in the performance of an abortion or sterilization."); *id.* § 2A:65A-2 ("No hospital or other health care facility shall be required to provide abortion or sterilization services or procedures.").

<sup>134</sup> See Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 180-81 (1993) ("Most conscience clause provisions were adopted between 1973 and 1982, when the federal courts were broadly defining a new and very controversial constitutional privacy right to abortion. Concern about discrimination against individuals who, for religious or other moral reasons, objected to participating in providing abortion services led to the widespread adoption of conscience clause statutes." (footnote omitted)).

<sup>135</sup> See, e.g., HAW. REV. STAT. § 453-16 (West 2008).

<sup>136</sup> For example, Illinois has a Health Care Right of Conscience Statute. See 745 ILL. COMP. STAT. ANN. 70/2 (West 2010). The statute begins as follows:

At the federal level, Congress likewise took almost immediate action after *Roe* to protect physicians and hospitals from being forced to perform abortions. In particular, as part of legislation known as the “Church Amendment,” Congress clarified that recipients of certain federal funds were not required to provide abortions, and that those facilities were prohibited from discriminating against employees who refused to participate in abortions.<sup>137</sup>

When inserting the particular language in the Church Amendment that protects individual conscience, Representative Heinz said the following:

Mr. Chairman, freedom of conscience is one of the most sacred, inviolable rights that all men hold dear. With the Supreme Court decision legalizing abortion under certain circumstances, the House must now assure people who work in hospitals, clinics, and other such health institutions that they will never be forced to engage in any procedure that they regard as morally abhorrent.

. . . [In addition to protecting institutions from being forced to perform abortions,] we must also guarantee that no hospital will discharge, or suspend the staff privileges of, any person because he

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The General Assembly finds and declares that people and organizations hold different beliefs about whether certain health care services are morally acceptable. It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care.

*Id.*  
<sup>137</sup> 42 U.S.C. § 300a-7(c)(1) (2006). This section provides:

No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act [42 U.S.C. 201 et seq.], the Community Mental Health Centers Act [42 U.S.C. 2689 et seq.], or the Developmental Disabilities Services and Facilities Construction Act [42 U.S.C. 6000 et seq.] after June 18, 1973, may—

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel, because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

*Id.*

or she either cooperates or refuses to cooperate in the performance of a lawful abortion or sterilization because of moral convictions.

. . . .

Congress must clearly state that it will not tolerate discrimination of any kind against health personnel because of their beliefs or actions with regard to abortions or sterilizations. I ask, therefore, that the House approve my amendment . . . .<sup>138</sup>

Without further discussion, the House promptly passed the Amendment and the bill by an overwhelming margin: 372–1.<sup>139</sup> The Church Amendment was ultimately enacted and signed into law in 1973.<sup>140</sup>

In the years since *Roe*, Congress has enacted additional laws designed to protect healthcare workers who refuse to perform abortions. For example, in 1996, Congress enacted the “Danforth Amendment” to prohibit “[a]bortion-related discrimination in governmental activities regarding training and licensing of physicians.”<sup>141</sup> In particular, the law prevents governments from discriminating against healthcare providers who refuse to provide a range of abortion-related services, and protects doctors, medical students, and health training programs.<sup>142</sup> The Danforth Amendment protects refusals to participate in abortion or abortion-related services for any reason, and is not limited to religious objections.<sup>143</sup> Likewise, in 2005, Congress enacted the “Hyde-Weldon Amendment,” which strips federal funding from any institution that discriminates against a healthcare provider for refusing to participate in an abortion.<sup>144</sup>

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<sup>138</sup> 119 CONG. REC. 17,462–63 (1973).

<sup>139</sup> *Id.* at 17,463.

<sup>140</sup> 42 U.S.C. § 300a-7(c)(1) (2006). When the Senate considered the Church Amendment, Senator Ted Kennedy said the following:

Congress has the authority under the Constitution to exempt individuals from any requirement that they perform medical procedures that are objectionable to their religious convictions. Indeed, in many cases, the Constitution itself is sufficient to grant an exemption to protect persons from official acts that infringe on their free exercise of religion.

119 CONG. REC. 9602 (1973). He therefore supported “full protection [of] the religious freedom of physicians and others” represented by the Amendment. *Id.*

<sup>141</sup> 42 U.S.C. § 238n (2006).

<sup>142</sup> *See id.* (“The Federal Government, and any State or local government that receives Federal financial assistance, may not subject any health care entity [defined to include individuals] to discrimination on the basis that . . . the entity 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.”).

<sup>143</sup> *See id.*

<sup>144</sup> Consolidated Appropriations Act of 2005, Pub. L. No. 108–447, § 508, 118 Stat. 2809, 3163 (2004); *see also* Consolidated Appropriations Act of 2008, Pub. L. No. 110–161, § 508(d)(1), 121 Stat. 1844, 2209



Thus, in a variety of ways—and at both the state and federal levels—legislators acted quickly, decisively, and at times nearly unanimously to protect conscience rights in the wake of *Roe*. These protections extended not only to direct personal performance of an abortion but more broadly to providers who have an objection to being forced to “participate,” “refer,” “assist,” “arrange for,” “admit any patient for,” “allow the use of hospital facilities for,” “accommodate,” or “advise” concerning abortion.<sup>145</sup> The speedy passage and near ubiquity of these laws demonstrate that a great majority of Americans at the time—regardless of their famously intense disputes as to the merits of the underlying abortion question—agreed that the government should not have the power to compel participation in abortions by unwilling individuals and institutions.

### *E. Self-Defense or Defense of Others*

Historically, the law has also permitted people to kill in defense of themselves or defense of others.<sup>146</sup> In *McDonald v. City of Chicago*, the Supreme Court explained that the privilege of self-defense “is a basic right, recognized by many legal systems from ancient times to the present day.”<sup>147</sup> Today, the privilege to use force in defense of oneself or in defense of others is recognized in both tort law and criminal law.<sup>148</sup>

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(2007) (“None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.”).

<sup>145</sup> See, e.g., 42 U.S.C. § 300a-7(c)(1) (2006); NARAL PRO-CHOICE AM. FOUND., *supra* note 133, at 16.

<sup>146</sup> See, e.g., *Commonwealth v. Martin*, 341 N.E.2d 885, 889–90 (Mass. 1976) (reiterating the longstanding rule, known as the “defense of others” defense in criminal law, that a person is justified in using force to protect a third party from an aggressor’s use of force); see also *State v. Cook*, 515 S.E.2d 127, 133 (W. Va. 1999) (holding that the intervenor’s right to defend a third party parallels the third party’s right of self-defense, allowing the intervenor to use as much force as the third party would be justified in using to protect himself).

<sup>147</sup> 130 S. Ct. 3020, 3036 & n.15 (2010) (“Citing Jewish, Greek, and Roman law, Blackstone wrote that if a person killed an attacker, ‘the [s]layer is in no kind of fault what[s]soever, not even in the minute[s]t degree; and is therefore to be totally acquitted and di[s]charged, with commendation rather than blame.’” (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*182); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 19, at 124 (5th ed. 1984) (“[S]ince about 1400 the privilege [of self-defense] has been recognized, and it is now undisputed, in the law of torts as well as in the criminal law.” (footnote omitted)).

<sup>148</sup> See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 260 (5th ed. 2009) (noting majority rule in criminal law that “an intervenor *may* use deadly or nondeadly force to the extent that such force *reasonably appears* to the intervenor to be justified in defense of the third party”); KEETON ET AL., *supra* note 147, §§ 19–20, at 124–31 (noting existence of “privilege” to engage in such defensive uses of force in tort law).

The private use of lethal force in an emergency situation is of course very different from either the government killings described above (military draft and capital punishment) or the planned, medical killings described above (assisted suicide and abortion). And the private use of lethal force does not appear to have generated anything like the express conscience protections we have seen in the four other contexts discussed above.

Nevertheless, the rules governing killings in self-defense and defense of others offer a useful point of comparison. While both tort law and criminal law *permit* people to kill in defense of themselves or others, the general rule is that people are not *required* to engage in these types of killings.<sup>149</sup> That is, under both tort law and criminal law, the use of force in these situations is a privilege, but not a duty.<sup>150</sup>

For this reason, it seems clear that a person who is unwilling to kill in self-defense or defense of others is rarely, if ever, required by law to do so.<sup>151</sup> This is entirely consistent with the general notion in both tort and criminal law that intervention—even intervention that comes at absolutely no cost to the intervenor—is not required to help another person.<sup>152</sup> And most importantly for our purposes here, it is also entirely consistent with the approach we see in the

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<sup>149</sup> See Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About “Bad Samaritan” Laws*, 40 SANTA CLARA L. REV. 971, 975 (2000) (“Current law is fairly clear, so it should not detain us long. The general rule is that a person is not criminally responsible for what he fails to do.” (footnote omitted)).

<sup>150</sup> DRESSLER, *supra* note 148, at 260; KEETON ET AL., *supra* note 147, §§ 19–20, at 124–31.

<sup>151</sup> It is, of course, theoretically possible that someone may undertake a duty to kill in defense of someone else by virtue of some relationship to the person, by having created the dangerous situation, or by contract. For example, perhaps a bodyguard who has committed to use deadly force to protect someone from attack could be held liable for breaching this duty. See, e.g., Dressler, *supra* note 149, at 975–76 (discussing some situations and relationships that create affirmative duties to act). So far as I can determine, these situations are extremely rare if not entirely hypothetical in the area of a duty to kill. I could not locate a single case in any jurisdiction in which any court ever indicated that a person had an *obligation* to kill in defense of self or others. To the extent any such cases exist, they are surely the exceptions to the general rule that the law does not require intervention, much less intervention with lethal force.

<sup>152</sup> See *supra* notes 148–50. A tragic example of this principle is the death of Kitty Genovese, who was attacked and cried for help for more than half an hour while thirty-eight people heard her pleas from the safety of their homes but did nothing to help her. Dressler, *supra* note 149, at 972–73. None were charged with a crime. See *id.* at 985.

A similar rule exists in tort law. See, e.g., *Hurley v. Eddingfield*, 59 N.E. 1058, 1058 (Ind. 1901) (holding that physician was under no obligation to help a dying man when the physician had refused aid to the man “[w]ithout any reason whatever” so that “[d]eath ensued, without decedent’s fault, and wholly from appellee’s wrongful act”); see also *Findlay v. Bd. of Supervisors*, 230 P.2d 526, 531 (Ariz. 1951) (“Physicians are not public servants who are bound to serve all who seek them, as are innkeepers, common carriers, and the like.” (quoting 41 AM. JUR. *Physicians and Surgeons* § 4 (1942))).

other four areas of government-conducted or government-permitted killings, in that unwilling individuals are generally not required to participate.

## II. APPLYING THE TESTS: THE FUNDAMENTAL RIGHT NOT TO KILL

The Supreme Court's Due Process Clause jurisprudence is hardly a model of clarity. The major precedents are among the Supreme Court's most controversial decisions in the last half-century, including *Roe*, *Casey*, and *Lawrence*. With the politically fraught nature of the cases and the divided Courts that have decided them, it is unsurprising that the Court has been unable to maintain a completely consistent approach to determining what liberties are protected by the Due Process Clause. One constant is that the Court usually conducts an analysis of history and tradition. But that analysis is sometimes supplemented by other approaches, such as counting states to discern a present trend or consensus, or delving philosophically into the nature of liberty and the meaning of human life. Different combinations of these approaches appear in different cases, generally with no clear indication why a particular set of approaches was chosen or which approach was ultimately dispositive.<sup>153</sup>

Fortunately, the right not to kill presents an easy case. Choosing among the Supreme Court's approaches is unnecessary, as the right not to kill satisfies every criterion the Court has put forward at least as well as the other rights the Court has already recognized.

Part II.A will measure the right not to kill by the standards of history and tradition; Part II.B will look to current state and federal laws for evidence of trends and current consensus; and Part II.C will use an independent philosophical and policy analysis based on the Court's opinions in *Casey* and *Lawrence*. The right not to kill survives all three tests the Supreme Court has used to evaluate substantive due process claims, giving it an unusually strong case for constitutional protection.

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<sup>153</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 n.17 (1997) (discussing that, despite references to a different approach toward substantive due process in *Casey*, “[the Court] did not in so doing jettison [its] established approach”); Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. Rev. 63, 64 (2006) (“[T]he Court has yet to agree upon a theory of decisionmaking that can explain and justify its [substantive due process] rulings.”); see also *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (focusing on “an emerging awareness that liberty gives substantial protection” to adults in consensual sexual choices). The contrast between these approaches led some to speculate that *Lawrence* abandoned the history and tradition approach demonstrated in *Glucksberg*. See Laurence H. Tribe, Essay, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1936 (2004).

## A. *History and Tradition*

### 1. *The Court's Test*

The Supreme Court's "history and tradition" line of substantive due process reasoning begins in Justice Harlan's famous dissent in *Poe v. Ullman*.<sup>154</sup> After acknowledging that "[d]ue process has not been reduced to any formula," he insists that judges applying substantive due process have not "felt free to roam where unguided speculation might take them."<sup>155</sup> Their guide, according to Harlan, is "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke."<sup>156</sup> Harlan thus introduces the three major themes of the history and tradition approach: (1) the lack of a single clear rule defining the boundaries of substantive due process; (2) the resulting danger of government by judicial "speculation;" and (3) the power of history and tradition to guide judges' due process decision making.

Harlan's dissent was quoted at length by the plurality in *Moore v. City of East Cleveland*, which strengthened the emphasis on these three ideas.<sup>157</sup> The plurality expressed concern that "the only limits to such judicial intervention" would be "the predilections of those who happen at the time to be Members of this Court," but nevertheless rejected the possibility of restraining judges by "drawing arbitrary lines."<sup>158</sup> Quoting Harlan's concurring opinion in *Griswold v. Connecticut*, the plurality concluded that due process could be appropriately limited by "respect for the teachings of history [and], solid recognition of the basic values that underlie our society."<sup>159</sup> Though such respect would prevent judges from inventing novel due process rights, the *Moore* plurality found that it supported the right of extended family members to live together.<sup>160</sup> "[T]he institution of the family," it wrote, "is deeply rooted in this Nation's history

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<sup>154</sup> 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

<sup>155</sup> *Id.* at 542.

<sup>156</sup> *Id.*

<sup>157</sup> See 431 U.S. 494, 501–02 (1977) (plurality opinion).

<sup>158</sup> *Id.* at 502–03.

<sup>159</sup> *Id.* at 503 (alteration in original) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgment)).

<sup>160</sup> *Id.* at 505–06.

and tradition”<sup>161</sup>—a phrase that would become a common touchstone in later substantive due process decisions.

Since *Moore*, the history and tradition approach has been expressly invoked to decide a number of substantive due process cases, usually against the due process claimant. *Bowers v. Hardwick* quoted *Moore* to justify its refusal to strike down anti-sodomy laws,<sup>162</sup> and *Michael H. v. Gerald D.* appealed to history and tradition in recognizing the parental rights of a mother’s husband over those of the probable biological father.<sup>163</sup> There were occasional exceptions in which the Court’s use of history and tradition resulted in a favorable judgment for the due process claimant. Using a history and tradition approach, the majority in *Cruzan v. Director, Missouri Department of Health* recognized a due process right to refuse medical treatment.<sup>164</sup>

More recently, *Washington v. Glucksberg* further developed *Moore*’s reasoning to reject a right to physician-assisted suicide. The *Glucksberg* majority tried to consolidate all the Court’s substantive due process precedents into a single, history-driven test. According to *Glucksberg*, new substantive due process rights must satisfy two requirements:

1. They must be “objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”<sup>165</sup>
2. They must be carefully described.<sup>166</sup>

*Glucksberg* thus aims to use history to restrain judges still further. Rights must be “objectively” historical, not merely grounded in judges’ subjective interpretation of history. Moreover, the *Glucksberg* Court attempted to subsume other strains of substantive due process reasoning into the historical framework by including the more philosophical “ordered liberty” test from *Palko v. Connecticut* in the same prong as the historical test, then analyzing only the historical part of the test and refraining from a free-wheeling analysis

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<sup>161</sup> *Id.* at 503.

<sup>162</sup> 478 U.S. 186, 191–92 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

<sup>163</sup> 491 U.S. 110, 122–24 (1989) (plurality opinion).

<sup>164</sup> 497 U.S. 261, 270–79 (1990).

<sup>165</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations omitted) (quoting *Moore*, 431 U.S. at 503 (plurality opinion)); *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969)) (internal quotation marks omitted).

<sup>166</sup> *Id.* at 721.

of what might be “implicit in the concept of ordered liberty.”<sup>167</sup> Through this tactic and others, *Glucksberg* tried to reinterpret decisions not driven by a historical approach in a historical light.<sup>168</sup>

Despite history-friendly Justices’ best efforts, many substantive due process decisions have not adhered strictly to the history and tradition approach. For example, the majority in *Lawrence v. Texas* overruled history-driven *Bowers v. Hardwick* without once mentioning *Glucksberg*’s attempt at an authoritative, history-based framework.<sup>169</sup> Yet even those substantive due process opinions in which history was not explicitly controlling tend to make at least some effort to portray the rights they protect as “deeply rooted in this Nation’s history and tradition.” *Roe v. Wade* argued at length that abortion was traditionally much less strictly regulated than in the mid-twentieth century,<sup>170</sup> and *Lawrence v. Texas* sought to undermine *Bowers*’s historical evidence supporting anti-sodomy laws, rather than merely dismissing the historical approach as irrelevant.<sup>171</sup>

Together, *Roe* and *Lawrence* confirm that a right can qualify for substantive due process protection even if the conduct was not previously protected as constitutional and was not even legal. Rather, the Court simply appears to be looking at whether, as a practical matter, individuals could or could not engage in the activity at issue.<sup>172</sup> Put differently, the historical analysis appears to be satisfied by a showing of only de facto freedom, even if that freedom historically had not been de jure, or officially recognized by the law.

Two important questions remain before this Article can evaluate the right not to kill using the Court’s history and tradition approach. First, how closely must a proposed right correspond with rights that can be observed in history and tradition? In other words, how specifically must a right be defined before the Court begins looking for it in history? Second, what sorts of evidence has

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<sup>167</sup> *Id.* at 720–22.

<sup>168</sup> *Id.* at 710 (“We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices.” (citations omitted)).

<sup>169</sup> *Lawrence v. Texas*, 539 U.S. 558, 567–71 (2003).

<sup>170</sup> 410 U.S. 113, 129–41 (1973) (discussing, at great length, the history of abortion regulations from ancient times to the 1970s).

<sup>171</sup> *Lawrence*, 539 U.S. at 567–71.

<sup>172</sup> As Professor Michael McConnell explains, it was not necessary for the right to be protected when the Fourteenth Amendment was enacted, “but only that it has enjoyed protection over the course of years.” Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 671.

the Court used to determine whether a right is deeply rooted in American history and tradition?

The issue of specificity presents a significant challenge for the history and tradition approach and has often been a battleground for debates among the Justices. *Bowers* and *Lawrence*, for example, differed significantly in the way they defined the right in question: *Bowers* asked whether there was a historically recognized right of “homosexuals to engage in acts of consensual sodomy,”<sup>173</sup> while *Lawrence* characterized the right as relating to “intimate conduct with another person.”<sup>174</sup> It is generally easier to find historical support for broad rights than for narrow ones, so Justices opposing new rights tend to define them narrowly, while Justices supporting them argue for broader understandings.<sup>175</sup> Justice Scalia attempted to settle the question in *Michael H.* by arguing in a footnote that rights should be analyzed at “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”<sup>176</sup> This footnote drew the support of only Chief Justice Rehnquist, however, as the other two members of the plurality refused to join that part of the opinion.<sup>177</sup> Rehnquist’s own majority opinion in *Glucksberg* may have tried again to settle the question by requiring a “careful description” of the proposed right,<sup>178</sup> but neither it nor subsequent Supreme Court opinions citing it have done much to elaborate on what makes a description “careful.”<sup>179</sup>

The issue of evidence—of *how* the Court determines whether a tradition exists to support a proposed right after it has been defined—raises similar difficulties. Justices taking a restrictive view toward new rights often limit

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<sup>173</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986), *overruled by Lawrence*, 539 U.S. 558.

<sup>174</sup> *Lawrence*, 539 U.S. at 567.

<sup>175</sup> *Cf. id.* at 586 (Scalia, J., dissenting) (“Though there is discussion of ‘fundamental proposition[s],’ and ‘fundamental decisions,’ nowhere does the Court’s opinion declare that homosexual sodomy is a ‘fundamental right’ under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a ‘fundamental right.’ Thus, while overruling the *outcome* of *Bowers*, the Court . . . simply describes petitioners’ conduct as ‘an exercise of their liberty’ . . .” (alteration in original) (citations omitted)); *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (“This case is [not] about a fundamental right to engage in homosexual sodomy . . . Rather, this case is about the most comprehensive of rights and the right most valued by civilized men, namely, the right to be let alone.” (citations omitted) (internal quotation marks omitted)).

<sup>176</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion).

<sup>177</sup> *Id.* at 113.

<sup>178</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

<sup>179</sup> The careful description requirement has only been mentioned by one subsequent Supreme Court opinion, *Chavez v. Martinez*, 538 U.S. 760 (2003) (plurality opinion), which contrasts it with “vague generalities, such as ‘the right not to be talked to.’” *Id.* at 775–76. No further detail is given. *Id.* at 776.

their search to legal sources, asking whether American law and the common law tradition have generally respected the proposed right.<sup>180</sup> Justices favoring new rights have often consulted a broader range of sources—including ancient law,<sup>181</sup> community and professional norms,<sup>182</sup> and public debates about constitutional ideals—especially from the Founding Era.<sup>183</sup> Moreover, they have sometimes looked not to whether Americans traditionally had a constitutional right to engage in particular conduct—or even whether the conduct was traditionally legal—but whether as a matter of actual practice Americans could freely engage in it.<sup>184</sup> Thus, in *Roe* and *Lawrence*, the Court found historical support for rights to abortion and freedom in intimate contact, despite widespread laws against abortion and sodomy, on the grounds that the laws had previously been less restrictive<sup>185</sup> and had not been enforced.<sup>186</sup>

To summarize, though the Supreme Court’s substantive due process jurisprudence has not always relied on history and tradition, it is clear that history and tradition remain important factors in deciding whether to recognize a new substantive due process right. Further, as history and tradition are generally used to restrict, rather than expand, the scope of possible due process rights, satisfying the “deeply rooted” standard of *Glucksberg* is likely the greatest obstacle facing proposed rights. The rest of this section will argue that regardless of whether a narrow or broad conception of the right is used, and regardless of the sorts of evidence allowed, the right not to kill clears this most difficult hurdle.

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<sup>180</sup> See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 (2010) (“[T]he governing standard is not whether *any* civilized system [can] be imagined that would not accord the particular protection. Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice.” (second alteration in original) (citation omitted) (internal quotation marks omitted))).

<sup>181</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 130 (1973) (surveying ancient Persian, Greek, and Roman law on abortion).

<sup>182</sup> See, e.g., *id.* at 131–32, 141–46 (noting the popularity and meaning of the Hippocratic Oath, the position of the American Medical Association, and the position of the American Public Health Association).

<sup>183</sup> See, e.g., *McDonald*, 130 S. Ct. at 3037 (noting that “[t]he right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights”).

<sup>184</sup> See McConnell, *supra* note 172, at 670–71 (explaining that the Court in *Glucksberg* evaluated the possibility of a fundamental right to assisted suicide up to the present time, thus indicating that conduct “enjoy[ing] protection over the course of years,” even if not constitutionally protected at the time of the Fourteenth Amendment, can be protected as a fundamental right); Rienzi, *supra* note 12, at 13–14 (2011) (discussing the same approach to due process in the context of healthcare providers refusing to perform abortions).

<sup>185</sup> *Roe*, 410 U.S. at 139–41.

<sup>186</sup> *Lawrence v. Texas*, 539 U.S. 558, 569 (2003).



## 2. *The Historical Argument for a Constitutional Right Not to Kill*

In light of the history set forth in Part I, it is clear that a right not to kill passes the history and tradition test. More specifically, the right not to kill has a better claim to being deeply rooted in history and tradition than (1) the rights the Court has rejected under the history and tradition analysis, and (2) many of the rights the Court has recognized for protection under substantive due process.

### a. *The Constitutional Right Not to Kill Has a Stronger Historical Basis than Previously Rejected Rights*

The bare minimum threshold for a newly claimed substantive due process right should be that its claim under the historical analysis test must at least be better than claims the Court has already rejected for other rights. The constitutional right not to kill easily passes this test.

In *Michael H.*, for example, the plurality rejected the idea that the biological father of a child had a due process right to establish paternity and obtain parental rights against the mother and her husband.<sup>187</sup> Justice Scalia, writing for a plurality, emphasized that nowhere in American legal traditions or the common law were biological fathers given parental rights “over a child born into a woman’s existing marriage with another man,”<sup>188</sup> and several states had considered related issues and come to conclusions inconsistent with such rights for a biological father.<sup>189</sup> In short, there was no historical record of legal protection for the right claimed to be fundamental.

Similarly, in *Glucksberg*, the Court supported its rejection of a right to assisted suicide by recounting the long history, both at common law and in the United States, of banning both suicide and assistance of suicide:

[W]e are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.<sup>190</sup>

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<sup>187</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (plurality opinion).

<sup>188</sup> *Id.* at 125.

<sup>189</sup> *Id.* at 125–26.

<sup>190</sup> *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997).

Thus, the Court concluded that, in virtually all times and circumstances, there simply was not and had not been a right to assisted suicide.<sup>191</sup>

From the history presented in Part I, it is clear that the right not to kill is of an entirely different order than those rejected in *Michael H.* and *Glucksberg*. As that history demonstrates, conscientious objection to state-authorized killing is an issue that prior generations of Americans have addressed with a steady stream of positive laws designed to protect the conscientious objector. These laws have been enacted by both state and federal governments, over a period of several centuries, and covering a wide and disparate array of different kinds of killings, including military service,<sup>192</sup> capital punishment,<sup>193</sup> assisted suicide,<sup>194</sup> and abortion.<sup>195</sup> These different contexts present different government interests, different individual interests, and different moral questions. Yet each shows a strong and growing effort to protect unwilling individuals from compelled participation in government-permitted or government-conducted killings.

Two possible issues with this history arise, but neither changes the analysis. First, an argument can be made that talking about a right not to kill across a variety of different contexts does not pass *Glucksberg*'s careful description test. Under this argument, it would be better to focus more specifically on separate conscience rights for different contexts—one for the draft, another for executions, a third for abortion, etc.

This is a fair criticism of the approach, and I think it entirely plausible to recognize constitutional rights not to kill one at a time. Indeed, I think plausible cases can be made for each of these rights in isolation, as I have argued elsewhere for the abortion context.<sup>196</sup> Ultimately, however, this level-of-specificity concern points to a strength of the argument for a broader

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<sup>191</sup> *Id.* at 728.

<sup>192</sup> *See supra* Part I.A.

<sup>193</sup> *See supra* Part I.B.

<sup>194</sup> *See supra* Part I.C.

<sup>195</sup> *See supra* Part I.D.

<sup>196</sup> *See generally* Rienzi, *supra* note 12 (arguing that substantive due process protects the right of healthcare providers not to participate in abortions). In early 2012, a federal judge in Washington indicated that, if the decision were his, he would accept this substantive due process argument in the context of pharmacists who object to dispensing emergency contraception. *Stormans, Inc. v. Selecky*, No. C07-5374 RBL, 2012 U.S. Dist. LEXIS 22370, at \*10 (W.D. Wash. Feb. 22, 2012) (noting that, in the court's view "the answer is clear" that the substantive due process right passes the test, but that the Supreme Court has not previously recognized the right and "[t]he Supreme Court will have to answer that question in the affirmative" before the district court could recognize the right as fundamental).

constitutional right not to kill. It is precisely because a right not to kill has been recognized so widely—in so many different contexts, by so many different governments, in so many different times—that the right should be categorized as fundamental.<sup>197</sup>

Second, one can argue that the historical protections for the right not to kill are not absolute. As set forth in Part I, there remain some conscientious objectors who can still be forced to fight in the military. And there remain some death-penalty states without express protections for objectors in that context. These gaps in protection are real, and they are quite serious of course for the people who are not yet protected. Indeed, they present a strong reason for why recognition of a constitutional right not to kill is important, as it would extend protection to those pockets of objectors who have not yet received express protection.

Yet these gaps in protection do not make the right not to kill look anything like the rights rejected in *Michael H.* and *Glucksberg*, neither of which could point to any significant historical protection for the claimed right. In those cases, the overall picture was a total or nearly total absence of legal protection, supplemented in *Glucksberg* by one state that had protected the right being claimed.<sup>198</sup> Here, in contrast, the overall picture is a steady and increasing effort—across contexts, locations, and time—to protect people from compelled participation in killing, which has not yet resulted in complete protection of the right.

In short, the constitutional right not to kill has a far better historical claim than the rights the Court has rejected under the historical test.

*b. The Constitutional Right Not to Kill Has As Much or More Support than Other Rights Recognized Under the History and Tradition Test*

As set forth above, the right not to kill finds itself on much firmer footing than the rights the Court has rejected using the history and tradition approach.

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<sup>197</sup> Viewing these rights in isolation would be somewhat like breaking the right recognized in *Cruzan* into rights such as: a right to refuse heart surgeries, a right to refuse botox injections, and a right to refuse blood transfusions. There may well be sufficient evidence to identify each of these, independently, as its own constitutional right. But the history and tradition argument derives much of its force from the fact that we have generally respected the right in *Cruzan* across a variety of circumstances. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 270–76 (1990) (deriving a general right to refuse medical treatment from a survey of cases in which patients were held to have the right to refuse diverse types of medical treatment).

<sup>198</sup> *Washington v. Glucksberg*, 521 U.S. 702, 717 (1997).

But how does it compare with the rights the Court has acknowledged? Using the Supreme Court's decisions in *Moore*, *Cruzan*, *Roe*, and *Lawrence* as the bases for comparison, it is fair to say that the right not to kill has as much or better historical support than rights the Court has recognized for substantive due process protection.<sup>199</sup>

*i. Moore and Cruzan*

*Moore*, the opinion that coined the “deeply rooted” phrase that *Glucksberg* would turn into a test, used history and tradition to support a right for extended families to live together.<sup>200</sup> *Moore*'s reasoning can be broken into two steps. First, the plurality used precedent to argue that substantive due process protected an important set of family rights, including the right to live together.<sup>201</sup> Second, the plurality extended this right to extended family members because “[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”<sup>202</sup>

Notably, the *Moore* plurality provided no legal reasoning to support this claim, instead merely citing to a book by a sociologist, a newspaper article by a psychologist, and a handful of census figures.<sup>203</sup> In other words, the plurality did not ask whether extended families had historically been seen to have the same rights as nuclear families, or whether they had even had any common law, statutory, or constitutional rights at all. Rather, the Court merely asked whether extended families were part of the deeply rooted institution of the family.

In *Cruzan*, the Court did focus on legal rights, deriving a substantive due process right to refuse medical treatment in large part from the common law tort of battery, which made it an intentional tort to treat a patient without

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<sup>199</sup> The Court has also used a similar formulation of the history and tradition approach when considering the question of incorporation, only slightly modifying it when referencing unenumerated fundamental rights. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 n.11 (2010) (noting that “in recent cases addressing unenumerated rights, we have required that a right also be ‘implicit in the concept of ordered liberty.’” (quoting *Glucksberg*, 521 U.S. at 721)). Addressing the use of this analysis for incorporation purposes is beyond the scope of this article.

<sup>200</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–06 (1977) (plurality opinion).

<sup>201</sup> *Id.* at 504–05.

<sup>202</sup> *Id.* at 504.

<sup>203</sup> *Id.* at 504 n.14.

informed consent.<sup>204</sup> The Court did not dwell on the historical limits of this right—compulsory vaccination, for example,<sup>205</sup> or the sterilizations infamously upheld in *Buck v. Bell*.<sup>206</sup> These gaps in protection received no attention from the Court. Rather, it was apparently sufficient to show that the right had existed over time as a general matter and was supported by the Court's more recent constitutional precedents.<sup>207</sup>

How does the right not to kill compare with the rights recognized in *Moore* and *Cruzan*? It is true that the right not to kill may not be able to claim the same antiquity as the institution of the family protected by *Moore*.<sup>208</sup> Yet the right not to kill has roots in our history and tradition dating at least to colonial times.<sup>209</sup> Moreover, the extensive positive legal protection accorded to the right not to kill over time and across a variety of contexts presents a stronger case than *Moore* that the right was recognized and legally protected.<sup>210</sup>

Like the right to refuse medical care recognized in *Cruzan*, the right not to kill has enjoyed some type of legal protection for hundreds of years. While neither protection has been absolute—both the right not to kill and the right to refuse medical care have certainly been subject to exceptions—both have been broadly protected. It is probably true that *Cruzan* presents a case with closer-to-absolute protection than exists today for the right not to kill. But the right

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<sup>204</sup> *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990); see also *Glucksberg*, 521 U.S. at 724–25 (“In *Cruzan*, . . . [w]e began with the observation that “[a]t common law, even the touching of one person by another without consent and without legal justification was a battery.” (second alteration in original) (quoting *Cruzan*, 497 U.S. at 269)).

<sup>205</sup> See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (holding the state has the power to require compulsory vaccination).

<sup>206</sup> 274 U.S. 200, 207 (1927) (holding, infamously, that “[t]hree generations of imbeciles are enough”); *id.* (“We have seen more than once that the public welfare may call upon the best citizens for their lives. . . . The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.” (citing *Jacobson*, 197 U.S. 11)). Forced sterilization continued in the United States at least into the 1970s, both for individuals the state viewed as physically or mentally disabled and also for those the government viewed as unduly promiscuous. See, e.g., *All Things Considered* (National Public Radio broadcast June 22, 2011), available at <http://www.npr.org/2011/06/22/137347548/n-c-considers-paying-forced-sterilization-victims> (describing story of Elaine Riddick, who was forcibly sterilized by the state in 1968, at the age of fourteen, after she became pregnant as the result of a rape). “The state of North Carolina said Riddick was promiscuous and didn’t get along well with others.” *Id.*

<sup>207</sup> See *Cruzan*, 497 U.S. at 270–77 (holding there is a general right to refuse medical treatment after surveying precedent from the prior fifteen years in which patients were held to have the right to refuse diverse types of medical treatment).

<sup>208</sup> To be clear, I have not explored the historical roots of the right not to kill back to antiquity. I have limited the focus of this paper to rights not to kill in the United States from the colonial period to the present.

<sup>209</sup> See *supra* Part I.

<sup>210</sup> See *supra* Part I.

not to kill boasts a power advantage in terms of the number and scope of positive laws enacted to protect the interest.<sup>211</sup> Put another way, the right at issue in *Cruzan* was simply handed to us from British common law and retained by American common law. The right not to kill discussed herein is the product of conscious, democratic lawmaking by a wide variety of citizens across a wide variety of times and contexts.

*ii. Roe and Lawrence*

The Court's historical analysis in *Roe* and *Lawrence* confirms that a practice need not have longstanding legal protection in order to qualify for substantive due process protection. Thus, despite the absence of any laws affirmatively protecting elective abortion, despite undisputed prohibitions on abortion for most of the century prior to *Roe*,<sup>212</sup> and despite common law indications that at least some abortions were illegal,<sup>213</sup> the Court in *Roe* found the historical analysis satisfied because it determined women enjoyed "substantially broader" freedom to abort at earlier times:

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.<sup>214</sup>

Likewise, in *Lawrence*, the Court again found an activity that had been widely criminalized to be a fundamental and deeply rooted right. The Court acknowledged that sodomy had long been illegal, but found sodomy laws had not generally targeted homosexual sodomy.<sup>215</sup> Furthermore, the Court found that the prosecutions in the historical record for consensual homosexual sodomy were sparse, making it "difficult to say that society approved of a

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<sup>211</sup> See *supra* Part I.

<sup>212</sup> *Roe v. Wade*, 410 U.S. 113, 138–40 (1973).

<sup>213</sup> *Id.* at 132–36.

<sup>214</sup> *Id.* at 140–41.

<sup>215</sup> See *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

rigorous and systematic punishment of the consensual acts committed in private and by adults.”<sup>216</sup>

Thus, the Court’s analysis shows that activities that were never expressly protected, and at times were expressly outlawed, can be recognized as fundamental rights, deeply rooted in the nation’s history and tradition. The test is satisfied if the historical analysis shows that, as a practical matter, individuals remained free to engage in the activity for which constitutional protection is sought.

The right not to kill easily surpasses the historical foundations offered by the Court in *Roe* and *Lawrence*. *Roe* and *Lawrence* concerned practices that were illegal for most of the nation’s history, and were not expressly protected in law until the recent past. Yet both were deemed sufficient for substantive due process protection. In contrast, the right not to kill has enjoyed broad legal protection, across a variety of different contexts and times. Simply put, if *Roe* and *Lawrence* pass the historical foundations test, the right not to kill does so with flying colors.

#### *B. Recent Trends and Consensus*

Some of the Court’s substantive due process decisions consider whether recent trends or a current consensus weigh in favor of or against the existence of a right. No due process holding has explicitly rested on trends and consensus alone, nor has any opinion articulated a structured trends and consensus test. Still, at least three major due process decisions have used evidence of recent trends to support their conclusions: *Roe*, *Glucksberg*, and *Lawrence*.

This section will first examine *Glucksberg* as an example of trends that supported denial of a right, before moving on to *Roe* and *Lawrence*, where the Court found that present trends favored the proposed right. It will then conclude by arguing that the present trends and consensus surrounding the right not to kill are far more akin to those in *Roe* and *Lawrence* than the ones in *Glucksberg*.

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<sup>216</sup> *Id.* at 569–70.

1. *Recent Trends and Consensus as Used in Glucksberg, Roe, and Lawrence*

After concluding that bans on assisting suicide were “deeply rooted” in history, the *Glucksberg* majority spent five paragraphs discussing more recent legal developments. According to the Court, the only state to have permitted assisted suicide was Oregon, which did so in 1994 through a ballot initiative similar to ones rejected in Washington and California in 1991 and 1993.<sup>217</sup> The Court mentioned or cited nearly twenty other states where proposals to permit assisted suicide were rejected, as well as a federal statute signed by President Clinton prohibiting the use of federal funds for assisted suicide.<sup>218</sup> Finally, in a footnote, the Court turned its research to foreign law and concluded that Canada, the United Kingdom, New Zealand, and Australia had all rejected legalizing assisted suicide, mentioning only Colombia as recognizing a constitutional right in this regard.<sup>219</sup>

On the basis of this evidence, the Court concluded that “the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues,” but that “our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decision making, we have not retreated from this prohibition.”<sup>220</sup>

In *Roe* and *Lawrence*, the Court found facts more favorable to the proposed due process rights. In *Roe*, the Court found some support for an abortion right in the limited evidence of a trend toward legalization—a stronger trend toward legalization than anything the *Glucksberg* Court could find, but hardly an overwhelming one. The Court noted that “about one-third” of the states had recently changed their abortion laws to make them “less stringent.”<sup>221</sup> The *Roe* Court also emphasized the official positions of American professional associations. For over 100 years, the American Medical Association maintained the position that abortion should generally be illegal and doctors

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<sup>217</sup> *Washington v. Glucksberg*, 521 U.S. 702, 717 (1997). Since *Glucksberg* was decided in 1997, two more states have begun to permit assisted suicide: Washington, through a ballot initiative that passed in 2008, WASH. REV. CODE ANN. § 70.245.190 (West 2011), and Montana, through a 2009 supreme court decision, *Baxter v. State*, 224 P.3d 1211, 1222 (Mont. 2009).

<sup>218</sup> *Glucksberg*, 521 U.S. at 717 & n.15.

<sup>219</sup> *Id.* at 718 n.16.

<sup>220</sup> *Id.* at 719.

<sup>221</sup> *Roe v. Wade*, 410 U.S. 113, 140 (1973).



should not participate in the procedure before finally changing its position in 1970 to support abortion.<sup>222</sup> Similarly, in 1970 the American Public Health Association adopted new “Standards for Abortion Services” calling for abortion referral to be easily available,<sup>223</sup> and the American Bar Association called for abortion to be largely unrestricted in the first twenty weeks of pregnancy.<sup>224</sup> Though the Court did not explicitly rest its holding on these professional associations’ positions, they did support its reasoning, and the Court spent six pages of the majority opinion discussing them.<sup>225</sup>

*Lawrence* placed even more emphasis on the trends supporting its decision, and it certainly had stronger trends to emphasize. All fifty states prohibited sodomy in 1961, but by the time *Bowers* was decided in 1986 fully half of them had repealed their sodomy laws.<sup>226</sup> By the time *Lawrence* was decided, half of the remaining states had repealed their sodomy laws as well.<sup>227</sup> Perhaps even more compellingly, even those states that retained their sodomy laws had generally not enforced them against consensual private conduct.<sup>228</sup> Already in 1955 the American Law Institute’s Model Penal Code had recommended decriminalizing private consensual sexual behavior<sup>229</sup> and had the Court wished to cite other private organizations’ opposition to sodomy laws, it could easily have done so.<sup>230</sup> Like *Glucksberg*, *Lawrence* also cites foreign law, mentioning the European Court of Human Rights in particular as recognizing a right to freedom in intimate conduct.<sup>231</sup>

*Lawrence* also emphasized that recent history—for instance modern trends—has particular weight. The Court explained that “[i]n all events we think that our laws and traditions in the past half century are of most relevance” to the historical inquiry.<sup>232</sup> The Court found that these more recent legal developments “show[ed] an emerging awareness that liberty gives

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<sup>222</sup> *Id.* at 141–44.

<sup>223</sup> *Id.* at 144–46.

<sup>224</sup> *Id.* at 146 n.40.

<sup>225</sup> *Id.* at 141–47.

<sup>226</sup> *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

<sup>227</sup> *Id.* at 573.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 572.

<sup>230</sup> *See, e.g.*, Brief for Am. Psychological Ass’n et al. as Amici Curiae in Support of Petitioners at 3, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (arguing that antisodomy laws “reinforce[] prejudice, discrimination, and violence against gay men and lesbians”).

<sup>231</sup> *Lawrence*, 539 U.S. at 574.

<sup>232</sup> *Id.* at 571–72.

substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>233</sup>

In summary, *Glucksberg* rejected a right to assisted suicide in part by showing that although there was a modern trend for states to reconsider their assisted suicide bans, the consensus was still very strongly against repealing the bans: at the time, only one state had done so, and most of the foreign jurisdictions examined also continued to prohibit assisting suicide. *Roe* found some support in changes to state law in a third of the states, coupled with the views of professional organizations. *Lawrence* offered solid evidence of a trend: the Model Penal Code recommended an end to sodomy laws, thirty-seven states—nearly enough to pass a constitutional amendment—legalized sodomy over the course of forty years, and the European Court of Human Rights committed forty-five countries to deregulate private sexual behavior.

2. *The Constitutional Right Not to Kill is Supported by Recent Trends and Consensus As Well As or Better than Previously Recognized Substantive Due Process Rights*

How does the right not to kill compare with these rights by the measure of present trends and consensus? Here the answer is resoundingly affirmative: there can be no question that if present trends and consensus supported *Roe* and *Lawrence*, they must be understood to support a right not to kill. Likewise, the recent—and for that matter ancient—trends and consensus in support of a right not to kill are the diametric opposite of the trend in *Glucksberg* against recognition of a right to assisted suicide.

As discussed in Part I.A, historical support for conscientious objection has only increased with time. In the context of military conscription, though the tradition of exempting conscientious objectors is as old as the Republic, since World War I it has grown broader and more deeply entrenched. This has occurred through expansion of the exemption made available to individuals who were not members of traditional pacifist religions.<sup>234</sup> And the Supreme Court extended the exemption right in *Seeger* to include all people with deep convictions against serving in the military, not merely those with religious objections.<sup>235</sup> In our modern, all-volunteer military, these protections are applied to soldiers who voluntarily enter the military and then later realize their

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<sup>233</sup> *Id.* at 572.

<sup>234</sup> *See supra* Part I.A.

<sup>235</sup> *See United States v. Seeger*, 380 U.S. 163, 175–76 (1965).

objections.<sup>236</sup> Although the system does not provide perfect protection—it still excludes selective war objectors,<sup>237</sup> for example—there is clear evidence of a trend over time toward more generous conscientious objector provisions.

The same is true in the capital punishment area. Over the past twenty-five years, we have seen eleven states and the federal government enact express conscience protections to ensure that no unwilling individual will be forced to participate in an execution.<sup>238</sup> This is in addition to the sixteen states that have outlawed capital punishment entirely, and the nine states that would protect at least religious objectors under more general laws.<sup>239</sup> As discussed in Part I.B, the express conscience provisions in this context are generally quite generous, and they extend not only to direct involvement in the execution itself, but to a wide range of related activities as well.<sup>240</sup>

Likewise, as assisted suicide opened up a new avenue for government-permitted killings, we see that legislatures immediately reacted to create express conscience protections in both Oregon and Washington.<sup>241</sup> Notably, these protections are written into the very same statutes that allow for assisted suicide in the first place, thus demonstrating a practice of protecting conscience when new avenues of killing become permissible.

But the best example of contemporary trends and consensus in favor of a right not to kill comes in the abortion context, where protection of conscience has been almost universal and has all occurred within the last fifty years.<sup>242</sup>

In the years prior to *Roe*, at least fourteen states had already liberalized their abortion laws.<sup>243</sup> These pre-*Roe* liberalization laws frequently came with the creation of express statutory protection for physicians and other healthcare personnel and institutions that refused to participate in abortions.<sup>244</sup> Likewise, when it decided in 1970 to support greater access to abortion, the American Medical Association also resolved that “[n]either physician, hospital, nor

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<sup>236</sup> See *supra* note 51 and accompanying text.

<sup>237</sup> See *supra* notes 49–50 and accompanying text.

<sup>238</sup> See *supra* Part I.B.2.a.

<sup>239</sup> See *supra* note 72 and Part I.B.2.b.

<sup>240</sup> See *supra* Part I.B.

<sup>241</sup> See *supra* notes 111–16 and accompanying text.

<sup>242</sup> See *supra* Part I.D.

<sup>243</sup> See *Roe v. Wade*, 410 U.S. 113, 139–40 & n.37 (1973) (“In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code . . .”).

<sup>244</sup> Rienzi, *supra* note 12, at 30–31.

hospital personnel shall be required to perform any act violative of personally-held moral principles.”<sup>245</sup>

Once the Court’s decision in *Roe* established a constitutional right to abortion, state and federal legislatures acted quickly and decisively to confirm that no physician could be forced to provide an abortion.<sup>246</sup> At both the state and federal levels, legislators quickly enacted conscience statutes to protect individuals and institutional healthcare providers from being forced to participate in abortions.<sup>247</sup> These laws were not limited solely to the direct performance of abortion. Instead, they protected against compulsion to participate even indirectly, including by referral or providing space.<sup>248</sup>

The speed and near unanimity of these legislative actions confirm that the right not to be forced by the government to perform abortions is implicit in the concept of ordered liberty. For decades, abortion has been the most divisive political, social, and ethical issue in the country. Yet amidst this widespread, heated, and seemingly endless disagreement, we see something remarkable: essentially unanimous agreement from state and federal governments that providers should not be forced to participate in abortions. Moreover, this widespread agreement has occurred in the past fifty years—the time period the *Lawrence* Court deemed most important.

In sum, it is overwhelmingly clear that, to the extent current trends and consensus play a part in substantive due process analysis, the right not to kill has strong support.

### C. *Liberty and Self-Definition*

The Supreme Court has also sometimes engaged in a more philosophical inquiry as part of its substantive due process analysis. This approach is often described with two phrases from the 1937 case *Palko v. Connecticut*: due process protects those rights that are “implicit in the concept of ordered

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<sup>245</sup> *Roe*, 410 U.S. at 144 n.38.

<sup>246</sup> See *supra* note 134 and accompanying text; see also Rienzi, *supra* note 12, at 30–35, 40–41.

<sup>247</sup> Rienzi, *supra* note 12, at 41.

<sup>248</sup> *Id.* The breadth of protection is consistent with the AMA’s resolution that neither individuals nor institutions “shall be required to perform any act violative of personally-held moral principles.” See *Roe*, 410 U.S. at 144 n.38 (quoting Proceedings of the AMA House of Delegates 220 (June 1970)).

liberty,”<sup>249</sup> which are so important that “neither liberty nor justice would exist if they were sacrificed.”<sup>250</sup>

### 1. *Liberty and Self-Definition in Roe, Casey, and Lawrence*

The key cases that use this philosophical approach are *Roe*, *Casey*, and *Lawrence*. These cases have in common a certain core conception of personal liberty and autonomy. *Roe* described the right in terms of “personal privacy, or a guarantee of certain areas or zones of privacy.”<sup>251</sup> Importantly, it also rejected the idea that the state could “adopt[] one theory of life” in order to “override the rights of the pregnant woman that are at stake.”<sup>252</sup>

The Court’s decision in *Casey* waxed more poetic, further developing the theme that individuals have the right to develop and act on their own beliefs about the meaning and nature of life. The Court explained:

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.<sup>253</sup>

Thus the protections of substantive due process extend not only to certain actions, but also to the right to make one’s own decisions on certain issues without “compulsion of the State.”<sup>254</sup> *Casey* determined that the freedom to make such decisions about one’s own “concept of existence, of meaning, of the universe, and of the mystery of human life” is a freedom that “define[s] the attributes of personhood.”<sup>255</sup> *Casey* also explained that, at least as to a pregnant woman seeking an abortion, her destiny “must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”<sup>256</sup>

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<sup>249</sup> 302 U.S. 319, 325 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

<sup>250</sup> *Id.* at 326.

<sup>251</sup> *Roe*, 410 U.S. at 152.

<sup>252</sup> *Id.* at 162.

<sup>253</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 852.

More history-minded decisions have tried to rein in this sort of reasoning. In *Duncan v. Louisiana*, the Court reinterpreted *Palko*'s "implicit in the concept of ordered liberty" standard to mean, essentially, implicit in the "Anglo-American regime of ordered liberty."<sup>257</sup> *Glucksberg* likewise tried to turn *Palko* into a historical test by including it in the first prong of its test, and then spent the opinion discussing the legal history of suicide rather than the nature of "ordered liberty."<sup>258</sup> *Glucksberg* also tried to tame *Casey*'s broad language about "defin[ing] one's own concept of . . . the mystery of human life"<sup>259</sup> by bluntly asserting the following: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise."<sup>260</sup>

Nevertheless, the Court has not abandoned the "liberty and self-definition" approach. Justice Kennedy—who joined the *Glucksberg* majority, co-authored the "mystery of life" opinion in *Casey*, and returned to independent philosophical inquiry in the opinion for the Court in *Lawrence*—picked up where *Casey* left off: "The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."<sup>261</sup> The Court then quoted the passage from *Casey* above, endorsing again the idea that beliefs about "one's own concept of existence, of meaning, of the universe, and of the mystery of human life" must not be "formed under compulsion of the State."<sup>262</sup>

## 2. *The Constitutional Right Not to Kill Fits Within the Court's "Liberty and Self-Definition" Approach*

Does the *Casey/Lawrence* self-definition conception of substantive due process rights apply to the right not to kill? There are strong arguments that it does.

First, this view of substantive due process was developed in the context of what many people understand to be legally permissible killing, namely

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<sup>257</sup> 391 U.S. 145, 149 n.14 (1968).

<sup>258</sup> See *supra* notes 167–68 and accompanying text.

<sup>259</sup> *Casey*, 505 U.S. at 851.

<sup>260</sup> *Washington v. Glucksberg*, 521 U.S. 702, 727–28 (1997) (citation omitted).

<sup>261</sup> *Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003).

<sup>262</sup> *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

abortion.<sup>263</sup> Thus, the Court has already indicated that the decision whether or not to kill is the type of decision that involves “one’s own concept of existence . . . and of the mystery of human life.”<sup>264</sup> Of course the abortion context is different and arguably more personal for the person seeking the abortion—the life or potential life that is being aborted is the offspring of, and within the body of, the pregnant woman.

But for those who are asked to participate in the abortion, the decision to use their own skills, hands, and minds to conduct an abortion surely involves their own views about “the mystery of human life.”<sup>265</sup> Nor is it self-evident that the sexual autonomy protected in *Lawrence* is necessarily more personal than deciding whether or not to kill—at the very least, reasonable people can differ as to whether decisions about sex or decisions about participating in killings are more personal and self-defining.

Indeed, *Casey* itself explained that the decision to have an abortion was “fraught with consequences” for the medical personnel asked to participate.<sup>266</sup> Forcing an unwilling doctor to conduct an abortion would certainly deprive her of the right to have her own “destiny . . . shaped to a large extent on her own conception of her spiritual imperatives and her place in society,” as *Casey* promises to women considering abortion.<sup>267</sup> Thus, it is perhaps no surprise that legislatures across the country have repeatedly acted to ensure that unwilling healthcare providers are not forced to participate in abortions.<sup>268</sup>

Our treatment of rights not to kill across varying contexts confirms that, both historically and today, our laws generally recognize that the decision whether to participate in killing is a particularly important decision worthy of protection. This is evidenced, first and foremost, by the wide range of contexts for which we have developed express conscience protections as discussed in Part I.

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<sup>263</sup> See, e.g., *Casey*, 505 U.S. at 852 (noting that abortion is a “procedure[] some deem nothing short of an act of violence against innocent human life; and, depending on one’s beliefs, for the life or potential life that is aborted”).

<sup>264</sup> *Id.* at 851.

<sup>265</sup> See Rienzi, *supra* note 12 (explaining the historical basis for substantive due process protection for healthcare workers who do not want to participate in abortion).

<sup>266</sup> *Casey*, 505 U.S. at 852.

<sup>267</sup> *Id.*

<sup>268</sup> See *supra* Part I.D.

But focusing simply on the *existence* of these protections only tells a fraction of the story. It is the sheer *breadth* of the protections that confirms a widely shared public understanding that participating in what is even arguably a killing is a deeply personal decision that is generally beyond the government's reach.

In the context of military service, this is demonstrated both by the breadth of the protection—expanded by Congress and the Court over time to include moral and ethical objectors as well as religious ones—and by the fact that our military recognizes that some individuals will have objections not merely to engaging in combat, but also to performing any other military task.<sup>269</sup> While this type of protection was originally designed as an exemption from *compulsory* military service, it has evolved into a right for members of our all-volunteer military who willingly joined the service.<sup>270</sup> In the capital punishment context, we see a similar breadth, as the laws generally protect people not only from directly causing a death, but also from other types of “participation” or even mere attendance.<sup>271</sup> The same occurs in the assisted suicide context and in the abortion context, both of which allow for objections not only from actual direct performance, but also from other types of involvement including referral, training, or use of one's property.<sup>272</sup>

The variety of ways in which we protect these rights suggests an implicit understanding that decisions about whether or not to participate in a killing are, in fact, highly personal and highly variable. Moreover, although we have obvious national disagreements over whether abortion is a killing and over whether assisted suicide is morally permissible, our laws recognize that unwilling individuals cannot and should not be coerced into participating in these practices, even in tangential ways.<sup>273</sup> We provide these broad protections even for people who are not “drafted” in any sense but instead deliberately signed up to join the military, work in a corrections department, or work in a

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<sup>269</sup> See *supra* Part I.A.3–4; see also U.S. DEP'T OF DEF., INSTRUCTION NO. 1300.06 (May 5, 2007), available at <http://www.dtic.mil/whs/directives/corres/pdf/130006p.pdf>.

<sup>270</sup> See U.S. DEP'T OF DEF., INSTRUCTION NO. 1300.06 (May 5, 2007), available at <http://www.dtic.mil/whs/directives/corres/pdf/130006p.pdf>.

<sup>271</sup> See *supra* Part I.B.

<sup>272</sup> See *supra* notes 111–15, 145 and accompanying text; see also Rienzi, *supra* note 12, at 38–45.

<sup>273</sup> This is confirmed by the fact that the Court did not even require taxpayer funds to be used for elective abortions. See, e.g., *Harris v. McRae*, 448 U.S. 297, 326 (1980); *Maher v. Roe*, 432 U.S. 464, 474 (1977).



medical profession. And we do so promptly upon legalizing practices that are even arguably killing.<sup>274</sup>

The deeply personal nature of the decision whether to participate in killings is also confirmed by psychological research concerning the negative health effects many people experience after participating in killings of different kinds.<sup>275</sup> As this research suggests, killing has different effects on different people, and the decision to participate in killing involves a willingness to endure, or at least risk, such psychological consequences. The Supreme Court viewed the avoidance of negative psychological health effects as one of the reasons to find a right to abortion in *Roe*,<sup>276</sup> and the same argument appears available here to support a right not to kill.

In sum, there are strong reasons to believe that deciding whether to participate in a killing is the type of deeply personal decision that implicates one's concept of the universe and the mystery of human life, and which should be protected even under the "liberty and self-definition" rationale for substantive due process rights.

## CONCLUSION

Under any approach to substantive due process—history and tradition, recent trends and emerging consensus, liberty and self-definition—the constitutional right not to kill qualifies for protection. In fact, under each test,

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<sup>274</sup> See *supra* Part I.D (discussing the speed and near unanimity with which federal and state laws were enacted to protect conscientious objectors after *Roe*); see also Rienzi, *supra* note 12, at 38–45.

<sup>275</sup> See, e.g., Lisa H. Harris, *Second Trimester Abortion Provision: Breaking the Silence and Changing the Discourse*, REPROD. HEALTH MATTERS, Supplement May 2008, at 74, 75–76, 78 (discussing mental harm to abortion providers and noting existence of annual psychological workshops for abortion and family planning providers); Christopher Hill, *These Are Their Stories: How the Portrayal of Capital Punishment on Law & Order Can Help Abolitionists Argue Against the Death Penalty*, 9 J. INST. JUST. & INT'L STUD. 113, 117–18 (2009) (recounting stories of post-traumatic stress and psychological harm to corrections department workers who participated in executions); F. Don Nidiffer & Spencer Leach, *To Hell and Back: Evolution of Combat-Related Post Traumatic Stress Disorder*, 29 DEV. MENTAL HEALTH L. 1 (2010); see generally RACHEL M. MACNAIR, PERPETRATION-INDUCED TRAUMATIC STRESS (2002) (discussing psychological harm from killing in a wide variety of contexts).

<sup>276</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973) (noting the mental and psychological burdens that would be imposed without an abortion right, including "a distressful life and future" in which "[m]ental and physical health may be taxed by child care," "the distress . . . associated with the unwanted child," and the "continuing stigma of unwed motherhood"). The Court in *Casey* noted that the abortion decision is "fraught with consequences" for all involved, 505 U.S. 833, 852 (1992), and the plurality noted that a woman who makes that decision with incomplete information may later suffer "devastating psychological consequences." *Id.* at 882 (plurality opinion).

the right not to kill qualifies as well or better than other rights the Court has recognized over time.

Recognition of a constitutional right not to kill would have great value to those individuals who currently fall between the cracks of our general legal protections for conscience rights related to killing. For example, corrections employees in states that currently lack express protections for conscientious objection to capital punishment<sup>277</sup> would receive protection. So too would doctors and pharmacists in Montana who conscientiously refuse to participate in assisted suicide,<sup>278</sup> and healthcare personnel in the occasional jurisdiction that does not provide express protections against compelled participation in abortions.<sup>279</sup>

Recognizing the constitutional right not to kill in jurisdictions that have failed to provide statutory protections is entirely consistent with the Court's prior substantive due process cases. For example, in *Lawrence* and *Roe*, the Court relied on the existence of a statutory right in some locations as a justification to extend that right to other locations as a constitutional matter.<sup>280</sup>

A more difficult question will likely arise as to whether the constitutional right not to kill should carry with it the limits traditionally imposed by legislatures. For example, as discussed above, the right of conscientious objection to military service has traditionally applied only to individuals who objected to participation in all wars; selective draft objectors have not been excused.<sup>281</sup> One might argue that the constitutional right not to kill in the military context should carry the same limitation, which is, after all, part of the right's "history" and "tradition."<sup>282</sup> Indeed, this exclusion was deemed by the Court in *Gillette v. United States* to be a crucial piece of the national draft laws and a valid exercise of Congress's power.<sup>283</sup> Nevertheless, once a right is constitutionalized, there is a strong argument that it must be recognized equally for all who would assert it.<sup>284</sup>

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<sup>277</sup> See *supra* Part I.B.2.b.

<sup>278</sup> See *supra* notes 117–20 and accompanying text.

<sup>279</sup> See *supra* Part I.D.

<sup>280</sup> See *supra* text accompanying notes 221–33.

<sup>281</sup> See *supra* notes 49–50 and accompanying text.

<sup>282</sup> See *supra* Part I.A.

<sup>283</sup> See 401 U.S. 437, 460 (1971).

<sup>284</sup> For example, after the Court had recognized the right of married persons to use contraceptives in *Griswold v. Connecticut*, 381 U.S. 479 (1965), it later found that states could not exclude single individuals from this protection in *Eisenstadt v. Baird*. 405 U.S. 438, 448–54 (1972) (rejecting limitation to married couples under the Equal Protection Clause). Similarly, in the First Amendment context, the Court has

While the precise contours of the constitutional right not to kill will need to be worked out in future cases and scholarship, it is important to note that recognition of a constitutional right not to kill would not mean that the government can *never* require its citizens to kill. Rather, as with virtually all rights, a constitutional right not to kill could presumably be trumped if the government law satisfies strict scrutiny.<sup>285</sup> Thus, if the government is using the least restrictive means to achieve a compelling government interest, it would remain free to compel citizens to participate in government-conducted or government-approved killings.

It is theoretically possible that there could be situations in which the government has such a truly compelling interest that can only be achieved by forcing particular unwilling citizens to participate in killings that violate their consciences—for example, in the context of a large-scale attack on the nation in which the government must draft citizens and ignore historical conscience protections.

In most cases, however, it seems likely that the government will not be able to satisfy this test. For virtually all situations, the government will presumably have a difficult time explaining why it has a compelling need to force unwilling individuals to participate in killings. Thus the constitutional right not to kill will largely ensure that conscientious objectors will not be compelled to participate in government-conducted or government-permitted killings.

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explained that the government must accord the same free speech rights to all speakers. *See Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (“Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.”).

<sup>285</sup> *See, e.g., Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (noting that substantive due process forbids the government from interfering with fundamental liberties “unless the infringement is narrowly tailored to serve a compelling state interest”).