

# **SYMPOSIUM: THE FUTURE OF RIGHTS OF CONSCIENCE IN HEALTH CARE: LEGAL AND ETHICAL PERSPECTIVES: ARTICLE: EMPOWERING PRIVATE PROTECTION OF CONSCIENCE**

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## **Reporter**

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**Author:** Robin Fretwell Wilson+

+ Class of 1958 Law Alumni Professor of Law, Washington and Lee University School of Law. I am grateful to Al Carr, Mark Grunewald, and Joan Shaughnessy for their thoughtful comments and critiques.

## **Text**

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### **[\*101]**

Questions of conscience have bubbled to the surface over the last year, exposing what may be a gaping hole in the shield that federal law is supposed to have erected around individual prerogatives to refrain from providing deeply divisive health-care procedures. <sup>1</sup> Dating **[\*102]** back to 1973, the year of *Roe v. Wade*, <sup>2</sup> these federal

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<sup>1</sup> This Essay draws on Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* 77-102 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008) [hereinafter *Matters of Conscience*], and Robin Fretwell Wilson, *Essay: The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, [34 Am. J.L. & Med. 41, 53-56 \(2008\)](#) [hereinafter *Limits of Conscience*].

This Essay addresses conscience protections that allow a person to take an action, or refuse to act, without threat of repercussions. See *Matters of Conscience*, *supra*. Such protections are distinct from laws that restrict the funding of abortion. A controversial element of the new federal health-care reform law is whether it bars the use of federal funds to pay for abortion, as the Hyde Amendment has done annually since Sept. 30, 1976. Compare Tim Jost, *The House and Senate Bills on Abortion*, O'Neill Inst. Legal Solutions in Health Reform (Mar. 4, 2010, 5:17 PM), <http://oneillhealthreform.wordpress.com/2010/03/04/the-house-and-senate-bills-on-abortion/> ("The Senate bill, like the House bill, leaves federal funding for other programs, such as the Medicaid, Medicare, and Federally Qualified Community Health Centers subject to the Hyde amendment, as they have been for decades. It provides no funding for new programs that cover abortions ... .") with *What's Wrong with the Senate Health Care Bill on Abortion? A Response to Professor Jost*, U.S. Conf. of Catholic Bishops (Mar. 12, 2010), <http://www.usccb.org/healthcare/jost-response.pdf> ("The Senate bill authorizes and appropriates billions of dollars in new funding - outside the scope of the appropriations bills covered by the Hyde amendment and similar provisions - to fund services at (for example) Community Health Centers (Sec. 10503)."). To quell such concerns, President Obama signed an executive order directing federal regulators "to develop ... a model set of segregation guidelines for State health insurance commissioners to use when determining whether exchange plans are complying with" requirements not to fund abortion. Exec. Order No. 13,535,75 Fed. Reg. 15,599 (Mar. 24, 2010).

The new health-care legislation retains all conscience protections for direct actions or refusals to act in current law. See *The Patient Protection and Affordable Care Act*, **Pub. L. No. 111-148**, § 1303(b)(2), **124 Stat. 119**, 171 (2010) ("No Effect on Federal Laws Regarding Abortion"). It also adds new protections. See *id.* § 1303(a)(3), **124 Stat. at 171** (2010) ("Provider Conscience

conscience protections allow health-care personnel to refuse to provide or assist with abortion, sterilization, and other procedures if doing so would violate their "religious beliefs or moral convictions."<sup>3</sup>

On March 10, 2009, the Obama Administration asked for advice on whether to retain the so-called Bush Conscience Regulation ("Bush Regulation"),<sup>4</sup> finalized in the closing hours of the Bush Administration.<sup>5</sup> The Obama Administration "proposed to rescind in its entirety the final rule."<sup>6</sup> Among other things, the Bush Regulation directed health-care entities to certify that they are complying with federal conscience protections, and created a procedure for individuals to file complaints with U.S. Department of Health and **[\*103]** Human Services if their conscientious objections are not honored.<sup>7</sup> Until the Bush Regulation, the government provided no way for persons to file a complaint about possible violations.<sup>8</sup>

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Protections. - No individual health care provider or health care facility may be discriminated against because of a willingness or an unwillingness, if doing so is contrary to the religious or moral beliefs of the provider or facility, to provide, pay for, provide coverage of, or refer for abortions.").

<sup>2</sup> [410 U.S. 113 \(1973\)](#).

<sup>3</sup> See Health Programs Extension (The Church Amendment) Act of 1973, [42 U.S.C. § 300a-7](#) (2006), *infra* Part I.

<sup>4</sup> Rescission of the Regulation Entitled "Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law," [74 Fed. Reg. 10,207, 10,209](#) (proposed Mar. 10, 2009) [hereinafter Rescission Proposal].

<sup>5</sup> Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices, 45 C.F.R. § 88 (2009) (effective Jan. 20, 2009). The Bush Administration proposed the Bush Regulation on August 26, 2008, 35 years after the Church Amendment's passage. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, [73 Fed. Reg. 50,274](#) (proposed Aug. 26, 2008) (to be codified at 45 C.F.R. pt. 88). As the proposed regulation explained, the apparent lack of knowledge on the part of both health-care providers and the public about federal conscience protections in place for decades provided the impetus to finally adopt an implementing regulation. *Id.* at 50,276-77.

The Department has concluded that regulations and related efforts are necessary, in order to (1) educate the public and health care providers on the obligations imposed, and protections afforded, by federal law; (2) work with State and local governments and other recipients of funds from the Department to ensure compliance with the nondiscrimination requirements embodied in the Church Amendments, PHS Act § 245, and the Weldon Amendment; (3) when such compliance efforts prove unsuccessful, enforce these nondiscrimination laws through the various Department mechanisms, to ensure that Department funds do not support morally coercive or discriminatory practices or policies in violation of federal law; and (4) otherwise take an active role in promoting open communication within the healthcare industry, and between providers and patients, fostering a more inclusive, tolerant environment in the health care industry than may currently exist.

*Id.*

<sup>6</sup> Rescission Proposal, *supra* note 4, at 10,209.

<sup>7</sup> [73 Fed. Reg. 78,101](#) (Dec. 19, 2009).

§ 88.6 Complaint handling and Investigating.

The Office for Civil Rights (OCR) of the Department of Health and Human Services has been designated to receive complaints of discrimination and coercion based on the health care conscience protection statutes and this regulation. OCR will coordinate handling of complaints with the staff of the Departmental programs from which the entity, with respect to which a complaint has been filed, receives funding (i.e., Department funding component).

*Id.*; see also *id.* at 78,083 (explaining that the complaint "procedure will be put in place to receive and compile complaints, extend protection to those who make them, and the complaints will be reviewed for validity").

<sup>8</sup> Although the Bush Regulation has yet to be rescinded, a review of the Health and Human Services website for complaint procedures and statutes that it enforces today does not include the Church Amendment. Laws and Regulations Enforced by

A hue and cry went up from various quarters that, in soliciting advice, President Obama had in fact "rolled back" conscience protections.<sup>9</sup> The President's own remarks about the Bush Regulation fueled such concerns. On the eve of a visit with the Pope, President Obama said he supports sensible and "robust" conscience protections and that his policy "certainly will not be weaker" than what existed prior to the Bush Regulation.<sup>10</sup> President Obama's statements seem to suggest that federal conscience protections are not largely fixed in statute but instead are subject to significant change through regulatory action.<sup>11</sup>

**[\*104]** Against this backdrop of fears over waning protections, events on May 24, 2009 led Cathy Cenzone-DeCarlo, an operating room nurse, to sue Mt. Sinai Hospital in New York.<sup>12</sup> She claimed she was threatened and coerced into assisting with an abortion in violation of the Church Amendment,<sup>13</sup> which prohibits certain federally-funded organizations from discriminating against health-care professionals who refuse for religious or moral reasons to participate in abortions.<sup>14</sup>

Cathy's case, if it happened the way she alleges, is quite disturbing.<sup>15</sup> She says she alerted Mt. Sinai to her religious objection when she was hired, and that Mt. Sinai staffed around the objection for years.<sup>16</sup> That changed on Sunday, May 24, 2009.<sup>17</sup> Cathy's superior, she says, threatened her not only with the possibility of losing her job if she did not help with the abortion, but also with reporting her to the nursing board for "patient abandonment."<sup>18</sup> Cathy's family relied financially on her eight to nine on-call shifts a month, a number that shrank to once a month after this collision over facilitating abortion.<sup>19</sup>

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OCR, U.S. Dep't of Health & Human Servs., <http://www.hhs.gov/ocr/civilrights/resources/laws/index.html> (last visited Feb. 7, 2011).

<sup>9</sup> Jacqueline L. Salmon, Obama Reaches out Before Vatican Trip, Wash. Post, July 3, 2009 at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/02/AR2009070202451.html>. See also Rob Stein, Health Workers' "Conscience" Rule Set to Be Voided, Wash. Post, Feb. 28, 2009 at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/27/AR2009022701104.html>. Sister Carol Keehan, president of the Catholic Health Association, characterized the request for advice about rescinding the Bush Regulation as part of a "variety of efforts [in recent years] to force Catholic and other health care providers to perform or refer for abortions and sterilizations." David Stout, Move Toward Undoing Rule on Abortion, N.Y. Times, Feb. 28, 2009, at A16.

<sup>10</sup> Salmon, supra note 9.

<sup>11</sup> Of course, no regulation can rescind the protections enacted by Congress because statutes trump regulations. See *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

<sup>12</sup> Memorandum in Support of Motion for Preliminary Injunction at 1, *Cenzone-DeCarlo v. Mount Sinai Hosp.* 2010 WL 169485 (E.D.N.Y. 2010) (No. 09-3120) [hereinafter Memorandum for Preliminary Injunction], available at <http://www.telladf.org/UserDocs/Cenzone-DeCarloPI/brief.pdf>. Because the trial court decided the matter on motion for summary judgment by Mt. Sinai, it took the plaintiff's allegations in the light most favorable to her. While her charges remain only as allegations at this time, for purposes of this Essay, I will assume they are true.

<sup>13</sup> *Id.* at 1-2.

<sup>14</sup> [42 U.S.C. § 300a-7\(c\)](#) (2006).

<sup>15</sup> Memorandum for Preliminary Injunction, supra note 12, at 1-6.

<sup>16</sup> First Amended Verified Complaint PP 64-67, *Cenzone-DeCarlo v. Mount Sinai Hosp.*, 2010 WL 169485 (E.D.N.Y. 2010) (No. 09-3120). Cathy was willing to assist in miscarriage cases, which often require dilation and curettage in the first trimester of pregnancy. *Id.* P 63.

<sup>17</sup> *Id.* P 69.

<sup>18</sup> *Id.* PP 101-02.

Now, if all this unfolded for the reasons alleged, Cathy's case could not be a more clear-cut instance of discrimination against an abortion objector - something federal law has purported to prohibit since the enactment of the Church Amendment in 1973. <sup>20</sup> Mt. Sinai's response on August 10, 2009, asked simply that Cathy's case be dismissed. Mt. Sinai asserted that the Church Amendment did not confer a private right of action. <sup>21</sup> In its order dismissing the suit, the U.S. District Court for the Eastern District of New York agreed. <sup>22</sup>

**[\*105]** Having no private recourse, attorneys for Cathy asked Health and Human Services to investigate her experience at Mt. Sinai. Health and Human Services initially indicated that it would need "to decide whether [the office charged with enforcing medical nondiscrimination laws, the Office of Civil Rights within Health and Human Services] has authority and is able to take action with respect to the matters ... raised." <sup>23</sup> Then in June of 2010, Health and Human Services concluded that "OCR also has been designated to receive complaints of discrimination and coercion that violate the Church Amendment, ... and its implementing regulation," the Bush Regulation. <sup>24</sup> As a result, Health and Human Services opened an investigation into DeCarlo's complaint. <sup>25</sup>

The unclear future of the Bush Regulation, together with DeCarlo's experience, frame nicely the questions this Essay explores: Exactly what conscience protections do individual health-care providers receive under federal law and what recourse, if any, will they have if employers or others do not respect those protections? If private remedies are unavailable, what recourse will individuals have if the Obama Administration rescinds the Bush Regulation in its entirety, including the complaint procedure? If federal enforcement officials lack a mechanism to police conscience violations, <sup>26</sup> or worse, believe **[\*106]** the law is wrong-headed and simply choose not to enforce it, <sup>27</sup> will individual objectors have any recourse?

<sup>19</sup> Memorandum for Preliminary Injunction, *supra* note 12, at 4, 9.

<sup>20</sup> A number of federal statutes enacted by Congress allow conscientious objectors to step away from services that would violate their "religious beliefs or moral convictions." See *infra* Part I.

<sup>21</sup> [Cenzon-DeCarlo, 2010 WL 169485, at 3-4, 7](#). Although federal law contemplates an unqualified right to object to participating in an abortion without a showing that the objection causes no hardship to the patient, Cathy also alleged that "the procedure is sufficiently basic that an operating room nurse from any team would have the competency to handle the case" and that her supervisor was "qualified to perform this case herself and could have done so without any significant delay in the case." Memorandum for Preliminary Injunction, *supra* note 12, at 6. Elsewhere I have argued for exemptions qualified by hardship. See *Matters of Conscience*, *supra* note 1, at 81-85; *Limits of Conscience*, *supra* note 1, at 61-63; see also Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 *Nw. J.L. & Soc. Pol'y* 331-39 (2010).

<sup>22</sup> [Cenzon-DeCarlo, 2010 WL 169485, at 1](#). See *infra* Part II.

<sup>23</sup> Letter from Michael R. Carter, Reg'l Manager, Dep't of Health & Human Servs. Office for Civil Rights, Region II, to Matthew S. Bowman, Legal Counsel, Alliance Def. Fund (Mar. 15, 2010) (on file with author).

<sup>24</sup> Letter from Michael R. Carter, Reg'l Manager, Dep't of Health & Human Servs. Office for Civil Rights, Region II, to Matthew S. Bowman, Legal Counsel, Alliance Def. Fund (June 7, 2010) (on file with author).

<sup>25</sup> *Id.* See also Kaithianne Boniello, *Federal Probe of Nurse's Abort Suit*, N.Y. Post, June 20, 2010, at 4, available at [http://www.nypost.com/p/news/local/federal\\_probe\\_of\\_nurse\\_abort\\_suit\\_6fjeTK9PMueTeNtE0afJAK](http://www.nypost.com/p/news/local/federal_probe_of_nurse_abort_suit_6fjeTK9PMueTeNtE0afJAK).

<sup>26</sup> In other contexts, the Obama Administration has indicated it will not aggressively enforce certain laws, like the criminal prohibitions on marijuana. David Stout & Solomon Moore, *U.S. Won't Prosecute in States that Allow Medical Marijuana*, N.Y. Times, Oct. 20, 2009, at A1. Some see the Obama Administration's request for advice about rescinding the Bush Regulation, including its complaint procedure, as signaling a shift away from meaningful enforcement. See *supra* note 4.

<sup>27</sup> While forty-seven states have conscience protections that parallel those in federal law, see *Matters of Conscience*, *supra* note 1, app., recent remarks by state enforcement officials have raised the possibility that state officials charged with enforcing those laws may not be willing to do so.

This Essay first traces the history and development of federal conscience protections for health-care providers. It then examines whether the Church Amendment in particular creates a private right of action, and concludes that it does not. This Essay then explores the difficulty objectors would face if the Executive Branch chooses not to enforce federal conscience protections. Finding little recourse for conscientious objectors given the broad discretion accorded to agencies charged with enforcing the law, this Essay concludes that a private right of action may be necessary to provide meaningful conscience protections to individual providers.

## I. The Federal Conscience Protections

Conscience clauses in health care date back to just after the United States Supreme Court's 1973 decision in *Roe v. Wade*.<sup>28</sup> On their face, these statutes carve out a space for medical providers to [\*107] continue in their professional roles without participating in certain acts they find immoral.

Before the advent of the first federal conscience clause, however, the result was strikingly different. Although the Supreme Court's decisions in *Roe*<sup>29</sup> and *Griswold v. Connecticut*<sup>30</sup> established only the right to noninterference by the state in a woman's contraception and abortion decisions,<sup>31</sup> *Roe* precipitated a significant demand for abortion. Almost immediately the question arose: Do health-care providers have a duty to provide a patient with the abortion she now seeks and to which she has a constitutional right, or can providers simply say, "No thank you, not me"? In other words, do health-care providers have the right to refrain from this particular service?

In 1973, when *Roe* was decided, the question of a duty to provide an abortion was a significant one because the overwhelming majority of health-care institutions were nonprofit, tax-exempt facilities often affiliated with a church.<sup>32</sup> One of the reasons the question arose was because a woman's right to abortion was established through civil rights litigation, and not legislation. Civil rights litigation is designed to sort out what the rights are between the

In 2010, Massachusetts Attorney General Martha Coakley lost unexpectedly in a race for the late Senator Ted Kennedy's vacant Senate seat to Senator Scott Brown, a loss many believe was precipitated in part by her remarks about conscience rights with radio talk show host Ken Pittman. See Adam Nagourney et al., *G.O.P. Used Energy and Stealth to Win Seat*, *N.Y. Times*, Jan. 21, 2010, at A1; David Wedge, *Coakley's Abortion Remarks Spur Flap*, *Boston Herald*, Jan. 16, 2010, at 4. Like federal law, Massachusetts law allows any employee of a health-care facility who objects in writing to abortion or sterilization to refuse to perform those services. *Mass. Gen. Laws Ann. ch. 112, § 12I* (West 2010). Objectors cannot be sued or disciplined or otherwise punished. *Id.* In a discussion with Coakley about what should happen when a health-care provider, who is "Catholic, and believes what the Pope teaches that any form of birth control is a sin," refuses to dispense emergency contraceptives in the emergency room, Coakley responded to Pittman:

Martha Coakley: No, but we have a separation of church and state here Ken, let's be clear.

Ken Pittman: In the emergency room you still have your religious freedom.

Martha Coakley: (uh, weh, um) The law says that people are allowed to have that. And so then, if you - you can have religious freedom, but you probably shouldn't work in the emergency room.

Ken Pittman Interviews Martha Coakley Part II, *The Ken Pittman Show* (Jan. 14, 2010), <http://www.kenpittman.com/articles/186/1/Martha-Coakley-on-the-Ken-Pittman-Show/Page1.html>.

<sup>28</sup> [410 U.S. 113 \(1973\)](#).

<sup>29</sup> [Id. at 162-64](#).

<sup>30</sup> [381 U.S. 479, 485-86 \(1965\)](#). See also [Eisenstadt v. Baird, 405 U.S. 438, 453 \(1972\)](#).

<sup>31</sup> Douglas Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, supra note 1, at 103-21.

<sup>32</sup> See Katherine A. White, Note, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, [51 Stan. L. Rev. 1703, 1703 \(1999\)](#) (citing Liz Bucar, *Catholics for a Free Choice, When Catholic and Non-Catholic Hospitals Merge: Reproductive Health Care Compromised* 9 (1998)).

plaintiff - who is suing for access to something, like abortion - and the state that wants to regulate or deny it. But civil rights litigation is terrible at sorting out how everyone else other than the plaintiff and the state are going to have to respond to the new right the plaintiff is receiving. Thus, Roe opened a real can of worms both for institutional providers like the Catholic hospitals that did not want to offer abortions, and for individual providers who objected to performing them as well.

Family planning advocates worked diligently to extend the non-interference rights recognized in Roe into affirmative entitlements to another's assistance. This involved attempts to force individual institutions to provide controversial services and to force individual health-care providers to participate in them.<sup>33</sup> The private lawsuits brought against facilities urged that because of the facility's receipt of **[\*108]** certain federal monies and because of their tax-exempt status, a hospital that refused to perform an abortion deprived patients of their constitutional rights under "color of state law."<sup>34</sup> In other words, the plaintiffs urged that the hospital represented a state actor simply because they received federal funds or a free pass on their taxes.

The first of the suits to use this argument pressed for access to sterilization services shortly before Roe v. Wade. In Taylor v. St. Vincent's Hospital,<sup>35</sup> the United States District Court for the District of Montana enjoined a private, nonprofit, charitable hospital in Billings, Montana, from refusing to perform a tubal ligation.<sup>36</sup> The hospital had prohibited Mrs. Taylor's physician from surgically sterilizing her during the delivery of her baby by Caesarian section.<sup>37</sup> Mrs. Taylor brought suit under [42 U.S.C. § 1983](#), which prohibits entities acting under color of state law from subjecting "any citizen ... to the deprivation of any rights, ... secured by the Constitution and laws."<sup>38</sup> In denying the hospital's motion to dismiss for lack of jurisdiction, "the court [found that receipt of certain federal construction funds known as] Hill-Burton ... funds is alone sufficient to support an assumption of jurisdiction."<sup>39</sup> The hospital's tax immunity and licensing by the state also established, in the court's view, a connection between the hospital and the state sufficient to support jurisdiction.<sup>40</sup>

Almost before the ink could dry on the injunction, Congress stepped in with the first of the federal health-care conscience clauses, the Church Amendment.<sup>41</sup> That legislation prohibits a court or federal **[\*109]** agency from using receipt of certain federal monies as a basis for making an individual or institution perform an abortion or

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<sup>33</sup> See Matters of Conscience, *supra* note 1, at 82.

<sup>34</sup> [42 U.S.C. § 1983](#) (2006) (granting a private right of action against "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws ...").

<sup>35</sup> [369 F. Supp. 948 \(D. Mont. 1973\)](#).

<sup>36</sup> See [id. at 949-51](#) (noting the court's injunction, which was ordered Oct. 27, 1972).

<sup>37</sup> [Id. at 949](#).

<sup>38</sup> [42 U.S.C. § 1983](#) (2006).

<sup>39</sup> [Taylor, 369 F. Supp. at 950 n.1](#) (quoting 1973 U.S.C.C.A.N. (87 Stat.) 1473). See also Health Programs Extension Act of 1973, H.R. Rep. No. 93-227, at 7-8 (1973), reprinted in 1973 U.S.C.C.A.N. 1464, 1473 (discussing the preliminary injunction granted in Taylor). Hill-Burton funds provided support to construct health-care facilities in exchange for promises to provide community benefits. Hospital and Medical Facilities Amendment of 1964, [Pub. L. No. 99-443, 78 Stat. 447](#) (codified as amended at [42 U.S.C. § 291](#)(2006)).

<sup>40</sup> See H.R. Rep. No. 93-227, 1973 U.S.C.C.A.N. at 1473 (describing the district court's finding of "two other factors ... that established a connection between the hospital and the State sufficient to support jurisdiction").

<sup>41</sup> Health Programs Extension (The Church Amendment) Act of 1973, [42 U.S.C. § 300a-7](#) (2006).

sterilization contrary to their "religious beliefs or moral convictions" and forbids federally-funded health-care facilities from discriminating against objectors.<sup>42</sup> In effect, the Church Amendment says that litigants cannot bootstrap the receipt of federal benefits as a way to force a private, nonprofit facility into providing abortions.

The scope of protection under the Church Amendment is broad. It protects not only facilities, but also individual objectors through its nondiscrimination clause. For example, a facility that wants to do abortions cannot punish a doctor who does not want to do them. Likewise, a facility that does not want to do abortions cannot punish a doctor who performs them elsewhere - say, for example, by taking away the doctor's staff privileges or otherwise subjecting the doctor to censure. Congress expanded the conscience protections provided in the Church Amendment in subsequent pieces of legislation.<sup>43</sup>

## [\*110]

### II. Protections Without Teeth

At first blush, the Church Amendment would seem to give Cathy Cenzone-DeCarlo an unqualified right to refrain from assisting with abortions. Mt. Sinai nonetheless pressured her, leaving Cathy two possible responses: She could attempt to enforce whatever rights are granted to her under federal law in a private suit or she could ask federal authorities to enforce the Church Amendment against Mt. Sinai.

Cathy pursued the first avenue, and lost. Unfortunately for Cathy, after the Church Amendment's enactment, the U.S. Supreme Court put the brakes on courts recognizing private remedies under federal statutes where Congress did not explicitly create them. In *Cort v. Ash*, the Supreme Court set forth a four-part test for whether a private remedy is implicit in a statute:

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<sup>42</sup> Id. § 300a-7(c)(1). Specifically, the Church Amendment forbids any federally-funded health-care facility from:

Discriminat[ing] in the employment, promotion, or termination of employment of 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. § 300a-7(c)(1).

<sup>43</sup> On the heels of publicity about the Tuskegee syphilis study, Congress enacted the National Research Service Award Act of 1974 to beef up human subjects protections. Gordon C. Nagayama Hall et al., *Ethical Principles of the Psychology Profession and Ethnic Minority Issues*, in *Handbook of Professional Ethics for Psychologists* 301, 302 (William O'Donohue & Kyle Ferguson eds., 2003). Congress provided that individuals working in a health service program or research activity funded by Health and Human Services cannot be "required to perform or assist in the performance of any part of ... [a program or activity] ... if his performance or assistance ... would be contrary to his religious beliefs or moral convictions." [42 U.S.C. § 300a-7\(d\)](#) (2006).

Later rounds of conscience protections forbid federal agencies and state and local governments from punishing objectors. In 1988, Congress passed the Danforth Amendment, which provides that none of the provisions of Title IX "shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion." [20 U.S.C. § 1688](#) (2006). In 1996, Congress enacted the Coates-Snowe Amendment, which prohibits federal agencies, and state or local governments receiving federal funds, from discriminating against health-care providers and health training programs because they do not provide abortions or abortion training. See [42 U.S.C. § 238n](#) (2006). In 2004, and annually thereafter, Congress inserted into appropriation bills the Hyde-Weldon Amendment, which forbids federal funding of government bodies which discriminate against health-care providers and insurers not involved in abortion. Consolidated Appropriations Act, 2005, **Pub. L. No. 108-447**, § 508(d)(1)-(2), **118 Stat. 2809**, 3163 (2005). See *Matters of Conscience*, supra note 1, at 85-86. Unlike the Hyde-Weldon Amendment, included in the Consolidated Appropriations Act, the Church Amendment is tied to a statute that identifies and directs funds to support the "construction and modernization of ... nonprofit community hospitals and other medical facilities." Public Health Service Act, [42 U.S.C. § 291\(a\)](#) et seq. (2006).

First, ... does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law ... so that it would be inappropriate to infer a cause of action based solely on federal law? <sup>44</sup>

Later cases refined this test so that "congressional intent" controls. <sup>45</sup>

Applying this test, the U.S. District Court for the Eastern District of New York found that "the Church Amendment lacks the classic individual rights-creating language of Title VI and Title IX ("No person ... shall ... be subjected to discrimination') under which implied private rights of action have been found." <sup>46</sup> The Church [\*111] Amendment also "speaks to the funded entity rather than to any benefitted class and, therefore, lacks the focus on individuals that would indicate the necessary congressional intent that a private right of action be implied." <sup>47</sup> Moreover, "nothing in the legislative history demonstrates congressional intent that a private right of action exists under the statute." <sup>48</sup>

Of course, the Church Amendment was enacted before *Cort v. Ash* when Congress may have assumed a private right of action would be available. In cases considering pre-*Cort* statutes, courts sometimes recognize an implied right if Congress likely relied upon the then-prevailing practice of implying private rights of action under other statutes, like Title VI. <sup>49</sup>

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<sup>44</sup> [Cort v. Ash, 422 U.S. 66, 78 \(1975\)](#) (citations omitted).

<sup>45</sup> [Touche Ross & Co. v. Redington, 442 U.S. 560, 575, 578 \(1979\)](#) ("The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action."). See also [Cannon v. Univ. of Chi., 441 U.S. 677, 688 \(1979\)](#) (indicating that the *Cort* factors should be used as a means of discovering legislative intent); Susan J. Stabile, The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action, [71 Notre Dame L. Rev. 861, 870 \(1996\)](#).

<sup>46</sup> [Cenzon-DeCarlo v. Mount Sinai Hosp., No. 09-3120, 2010 WL 169485, at 6-7](#) (ellipses in original).

<sup>47</sup> As the District Court explained,

when finding a private right of action under Title IX, the Supreme Court recognized that: there would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefitted class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.

*Id.* at 7 (citing [Cannon, 441 U.S. at 690-93](#) (emphasis added)).

<sup>48</sup> *Id.* Federal law may form the grounds for a state law claim. For example, a violation of the federal statute may be actionable as a state law tort. See [Merrell Dow Pharm., Inc. v. Thompson, 487 U.S. 804, 805-06 \(1986\)](#) (involving a state law negligence claim based on a violation of the Federal Food, Drug, and Cosmetics Act); [Morgan v. Dep't of Pub. Works, 862 P.2d 1080, 1085 \(Idaho 1993\)](#) (using American with Disabilities Act guidelines for architectural accessibility to establish the duty of care in a state court common law negligence suit).

<sup>49</sup> See [Cannon, 441 U.S. at 696-98](#) (holding that Title IX implies a private right of action because Congress's consideration of Title VI's enforcement mechanisms demonstrates their assumption "that [Title IX] would be interpreted and applied as Title VI had been during the preceding eight years" and observing that "we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX."). Compare Title VI of the 1964 Civil Rights Act, [42 U.S.C. § 2000d](#) (2006) (generally providing that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."), with Title IX of the Education Amendments of 1972, [20 U.S.C. § 1681](#) (2006) (providing that "no person in the United States shall, on the basis of



Here the Church Amendment's legislative history is instructive. It says nothing about individual lawsuits under it or other statutes and makes no reference to statutes that do, like Title VI. First proposed by the sponsoring senator, Senator Church, the Church Amendment went to the House, where it was refined, and finally back to the Senate. On the Senate floor, Senator Church explained the text he originally [\*112] proposed, which ultimately became § 300a-7(b),<sup>50</sup> as follows: "The amendment ... merely says that the Government does not impose a new requirement conditioning the acceptance of Federal money upon the performing of certain operations that are contrary to religious beliefs, or deeply held moral conviction."<sup>51</sup> As another senator summed up the provision's effect, after the Church Amendment, "the Federal Government would be without power to override [a hospital] policy" not to provide abortion or sterilization.<sup>52</sup>

Senator Church's explanation of his "no-bootstrapping" provision prompted New York Senator Javits to propose a forerunner of the nondiscrimination provision contained in Section 300a-7(c), which directs fund recipients to not penalize or "discriminate against" doctors who refuse to do, or who actually do, abortions.<sup>53</sup> Javits [\*113] wanted

sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...").

<sup>50</sup> The Health Programs Extension (The Church Amendment) Act of 1973, [42 U.S.C. § 300a-7\(b\)](#) (2006):

(b) Prohibition of public officials and public authorities from imposition of certain requirements contrary to religious beliefs or moral convictions

The receipt of any 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.](#)] by any individual or entity does not authorize any court or any public official or other public authority to require -

(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or

(2) such entity to -

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

<sup>51</sup> 119 Cong. Rec. 9601 (1973) (statement of Sen. Church).

<sup>52</sup> 119 Cong. Rec. 9604 (1973) (statement of Sen. Buckley).

<sup>53</sup> [42 U.S.C. § 300a-7](#) (2006):

(c) Discrimination prohibition

(1) 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.

(2) No entity which receives after July 12, 1974, a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services may -

to "simply ... protect anybody who works for [a hospital that declines to provide abortions] against being fired or losing his hospital privileges if he does not agree with the policy of the hospital [not to perform abortions] and goes elsewhere and does what he wishes to do." <sup>54</sup> Clarifying, Senator Church asked:

In other words, if a physician who was part of a staff of a Catholic hospital, let us say, who was not himself a Catholic and had no compunction about performing sterilization or abortion operations, were to perform them in some other hospital, a public hospital, where there is no feeling against it, then he would not be discriminated against by the Catholic hospital for having performed those operations elsewhere. <sup>55</sup>

Senator Javits replied, "Exactly." <sup>56</sup>

**[\*114]** Initially, the senators in attendance were unsure what, if any, sanctioning power this provision would give the federal government if a fund recipient did discriminate. Senator Pastore asked pointedly where Congress got the authority to tell hospitals "what to do," namely, telling the hospital that it could not bar a doctor from "practicing in [that] hospital" because he or she performed an abortion elsewhere. <sup>57</sup> Pastore explicitly questioned whether a hospital could "be denied Hill-Burton funds." <sup>58</sup>

Senator Jackson responded, "There is no penalty." <sup>59</sup> Senator Pastore retorted, "Then, what are we doing? We have wasted a whole morning doing nothing." <sup>60</sup> Eventually, Senator Javits clarified what he meant: "If [fund recipients] do discriminate against the doctor who is in their hospital because he has done something they do not approve of in the other hospital, we have the authority to deprive them of that benefit." <sup>61</sup> Senator Pastore asked further, "What is the benefit?" to which Senator Javits responded, "The Federal money given for example under Hill-Burton." <sup>62</sup> Pushed by Pastore that this "sounds dictatorial," Senator Javits again reiterated "they may lose the benefits of Federal funds because they are discriminating against a doctor." <sup>63</sup> Senator Pastore clarified, asking if a "hospital does not receive one red cent from the Federal Government, then what is the penalty?" In that case, Senator Javits openly acknowledged, there would be "none whatever, and the law does not apply." <sup>64</sup>

(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 any lawful health service or research activity, because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance or assistance in the performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.

<sup>54</sup> 119 Cong. Rec. 9603 (1973) (statement of Senator Javits) (proposing the following text: "Such hospital or other health care institution shall not discriminate in the employment, promotion, extension of staff or other privileges or termination of employment of any physician or other health care personnel on the basis of their personal religious or moral convictions regarding abortion or sterilization or their participation in such procedures.").

<sup>55</sup> Id. (statement of Senator Church).

<sup>56</sup> Id. (statement of Senator Javits).

<sup>57</sup> Id. at 9604 (statement of Senator Pastore).

<sup>58</sup> Id.

<sup>59</sup> Id. (statement of Senator Jackson).

<sup>60</sup> Id. (statement of Senator Pastore).

<sup>61</sup> Id. (statement of Senator Javits).

<sup>62</sup> Id.

<sup>63</sup> Id.

<sup>64</sup> Id.

The House then took up Senator Church's text, as amended by Senator Javits. Representative Heinz proposed a broadened non-discrimination provision that resulted in the text we have today. It prohibits sanctions against both health-care providers who want to perform abortions elsewhere and those who do not want to perform them in the funded hospital. The House did not discuss Heinz's broadened nondiscrimination provision, other than his own statements in the record. Heinz described the broadened nondiscrimination provision as "assuring" and "guaranteeing" individuals the right to "never be [\*115] forced" to perform abortions.<sup>65</sup> He believed the broadened provision "clearly states" that Congress "will not tolerate" such discrimination. The House approved the amended text of the Church Amendment by a vote of 372 to 1.<sup>66</sup> When the Senate voted to approve the amended legislation, it did so without further discussion.<sup>67</sup>

Clearly, Congress thought through the question of penalties and decided that the specified federal funds could be removed by the federal government if a recipient discriminated against an abortion provider or objector. There is little to suggest that Congress intended to authorize private enforcement actions by conscientious objectors who are discriminated against as a result of their moral or religious convictions.<sup>68</sup> In Cathy's case, the District Court

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<sup>65</sup> Id. at 17,462-63. On the House floor, Rep. Heinz explained:

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 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 ... .

Id.

<sup>66</sup> Id.

<sup>67</sup> The Senate approved the amended text of the Church Amendment by a vote of 94-0 on June 5, 1973. 119 Cong. Rec. 18,072 (1973).

<sup>68</sup> But see Brief of Appellant at 7, *Cenzon-DeCarlo v. Mount Sinai Hosp.*, No. 10-556 (2d Cir. May 5, 2010) (arguing that the conscience protections enacted in 1974 as part of the National Health Services Research Act parroted the broadened nondiscrimination provision included in the Church Amendment and bore the label "individual rights," although the label was subsequently dropped in the U.S. Code). These provisions, enacted the year after the Church Amendment and contained at [42 U.S.C. § 300a-7\(d\)](#) and (e) (2006) (emphasis added), provide as follows:

(d) Individual rights respecting certain requirements contrary to religious beliefs or moral convictions

No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

(e) Prohibition on entities receiving Federal grant, etc., from discriminating against applicants for training or study because of refusal of applicant to participate on religious or moral grounds

No entity which receives, after September 29, 1979, any grant, contract, loan, loan guarantee, or interest subsidy 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 Assistance and Bill of Rights Act of 2000 [[42 U.S.C. 15001 et seq.](#)] may deny admission or otherwise discriminate against any applicant (including applicants for internships and residencies) for training or study because of the applicant's reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions.

ultimately concluded [\*116] that Congress meant to leave Cathy Cenzone-DeCarlo locked outside the courthouse door.

Congress did tie the Church Amendment to pots of federal money, like Public Health Service Act funds,<sup>69</sup> providing federal regulators a stick with which to bludgeon a discriminating hospital. And that tees up the question addressed in Part III: Must federal regulators provide Cathy the protection that the Church Amendment contemplates?

### III. Getting Administrators to Act

Rather than filing suit, an individual in Cathy's position can capitalize on the new complaint procedure in the Bush Regulation - assuming it is not rescinded - and ask officials in Health and Human Services to intercede on her behalf. As the Church Amendment's legislative history indicates, Health and Human Services could lean on Mt. Sinai or even take certain federal funds. But what if Health and Human Services refused to act,<sup>70</sup> or lacked implementing regulations that authorize it to act?<sup>71</sup> Could the objector force Health and Human Services's hand? Sadly, she could not, at least not very easily or effectively.

It is true that if an agency is not carrying out its duties, in what amounts to a blatant pattern of nonenforcement, an affected party can ask for a writ of mandamus.<sup>72</sup> In this case, an objector would ask the [\*117] court to compel Health and Human Services to remove an employer's federal funds.<sup>73</sup> However, courts have tended to find a very high threshold for issuance of the writ.<sup>74</sup> As the United States Court of Appeals for the District of Columbia explained in *Ganem v. Heckler*:

As an extraordinary remedy, mandamus generally will not issue unless there is a clear right in the plaintiff to the relief sought, a plainly defined and nondiscretionary duty on the part of the defendant to honor that right, and no other adequate remedy, either judicial or administrative, [is] available.<sup>75</sup>

As the legislative history of the Church Amendment indicates, Congress considered Health and Human Services' power to remove funds to be an adequate remedy.<sup>76</sup> Congress made clear that Health and Human Services has "the authority to deprive"<sup>77</sup> fund recipients of federal funds but may exercise its discretion in so doing.<sup>78</sup>

<sup>69</sup> [42 U.S.C. § 300a-7](#) (2006).

<sup>70</sup> See *supra* note 27 (discussing statements raising the possibility of nonenforcement of state law conscience protections by state officials).

<sup>71</sup> See Letter from Michael R. Carter, Reg'l Manager, Dep't of Health & Human Servs. Office for Civil Rights, Region II, to Matthew S. Bowman, Legal Counsel, Alliance Def. Fund, *supra* note 23.

<sup>72</sup> The writ of mandamus forces an official to carry out certain mandatory functions as required by law. Kenneth F. Warren, *Administrative Law in the Political System* 441 (4th ed. 2004).

<sup>73</sup> Health and Human Services might choose not to remove federal funds from Mount Sinai, but instead to send a warning letter.

<sup>74</sup> See *Ganem v. Heckler*, 746 F.2d 844, 852 (D.C. Cir. 1984). See also 2 Charles H. Koch, Jr., *Administrative Law and Practice* § 8.20 (2d ed. 1997).

<sup>75</sup> *Ganem*, 746 F.2d at 852.

<sup>76</sup> See 119 Cong. Rec., *supra* notes 51-66 (reviewing the legislative history of the Church Amendment); 119 Cong. Rec. 9604 (1973) (the exchange between Senators Pastore and Javits that if a "hospital does not receive one red cent from the Federal Government," then there would be no penalty "whatever, and the law does not apply.").

<sup>77</sup> 119 Cong. Rec. 9604 (1973).

<sup>78</sup> This discretion means that Health and Human Services may impose sanctions under the Church Amendment, but is not required to do so. Compare [42 U.S.C. § 300a-7](#) (2006), with [10 C.F.R. § 50.110](#) (2009). This regulation guides the Nuclear

An objector could also try to force action by Health and Human Services through a request for judicial review under [5 U.S.C. § 706\(1\)](#) of the Administrative Procedure Act, which asks the reviewing court to compel agency action that is unlawfully withheld or unreasonably delayed.<sup>79</sup> It is unclear whether an objector like Cathy could show unreasonable delay at this point since successful suits routinely rest **[\*118]** on inaction over a period of years.<sup>80</sup> More importantly, it is very difficult to compel action after inaction. While the APA generally allows for review of agency actions, it provides an exception when the action is "committed to agency discretion."<sup>81</sup> Although a narrow exception, actions committed to agency discretion encompass "agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise."<sup>82</sup> This hands-off approach "essentially leaves to Congress, and not to the courts, the decision as to whether an agency's refusal to institute proceedings should be judicially reviewable."<sup>83</sup> It also gives "an agency ... broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. That discretion is at its height when the agency decides not to bring an enforcement action."<sup>84</sup> Thus, if Health and Human Services informed an objector like Cathy that her complaint did not, in its view, warrant the use of agency resources to investigate or sanction the coercing party, there is little the objector can do to compel Health and Human Services to act otherwise.

Problems with inaction are hardly new or unique to the Church Amendment. Nonetheless, Cathy's tale is a cautionary one. It may warrant an inquiry from Congress to Health and Human Services about what enforcement action has been taken against Mt. Sinai, if any. Congress may also want to request information about historical patterns of enforcement under the Church Amendment and other **[\*119]** federal conscience protections or hold hearings to discern whether other health-care providers have had experiences like Cathy's. Congress may also want to consider stand-alone legislation mandating a complaint procedure or hotline,<sup>85</sup> especially if the Obama

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Regulatory Commission's discretion in imposing a penalty in cases of employee discrimination resulting from having reported safety concerns. If the Commission finds a violation, it must impose the specified penalty, which ranges from a reprimand to the imposition of civil penalties. While the Commission has discretion to determine the level of violation, once the violation is categorized, the agency has no discretion over penalty.

<sup>79</sup> Administrative Procedure Act, [5 U.S.C. § 706](#) (2006) [hereinafter APA] ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. The reviewing court shall - (1) compel agency action unlawfully withheld or unreasonably delayed ...").

<sup>80</sup> Richard J. Pierce, Jr., *Administrative Law Treatise* § 12.3 (5th ed. 2010) (noting that APA, [5 U.S.C. § 706\(1\)](#) is "always available as a potential basis for a court order directing an agency to act in a long-delayed matter."). The D.C. Circuit uses a multi-factor test to evaluate the reasonableness of an agency's delay, including whether Congress has provided a timetable or other indication of the speed with which it expects the agency to act; whether there are conflicting or competing agency priorities; and the interests prejudiced by the delay. See [Telecomm. Research & Action Ctr. v. FCC, 750 F.2d 70, 80 \(D.C. Cir. 1984\)](#).

<sup>81</sup> [5 U.S.C. § 701\(a\)\(2\)](#) (2006). [Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 419-20 \(1971\)](#) (holding that when reviewing agency action, a court should only consider the administrative record that was before the agency at the time the action was taken).

<sup>82</sup> [Heckler v. Chaney, 470 U.S. 821, 838 \(1985\)](#). But see [Overton Park, 401 U.S. at 410](#).

<sup>83</sup> [Heckler, 470 U.S. at 838](#) (concluding that the presumption that agency decisions not to institute proceedings are unreviewable under [5 U.S.C. § 701\(a\)\(2\)](#) is not overcome by the enforcement provisions of the Food, Drug and Cosmetic Act). The Court noted that the presumption that "an agency's decision not to take enforcement action [is] ... immune from judicial review ... [It] may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832-33. The Church Amendment provides no guidelines to Health and Human Services in exercising its enforcement authority.

<sup>84</sup> [Massachusetts v. EPA, 549 U.S. 497, 527 \(2007\)](#) (citation omitted). The Court did note that "some debate remains, however, as to the rigor with which we review an agency's denial of a petition for rulemaking." *Id.*

Administration rescinds the Bush Regulation in its entirety. Armed with additional information through hearings or a mandated complaint procedure, Congress can then decide whether a private right of action or other administrative process is necessary to supplement the enforcement efforts of federal regulators.<sup>86</sup>

Such a private right of action could provide for monetary damages, including punitive damages, as well as equitable relief.<sup>87</sup> The availability of monetary damages can sometimes be crucial because injunctive relief may not always be available after an objector has been forced to provide or assist with a service in violation of her conscience. Once that service has been provided, the plaintiff may lack standing to sue unless the coerced procedure is capable of repetition or the plaintiff suffered a demotion or other sanction that can then be remedied by injunctive relief.<sup>88</sup> Thus, injunctive relief may be illusory, placing a premium on monetary damages as a vehicle for encouraging compliance with federal conscience protections.

Of course, the debate over any private right of action immediately raises the specter of a flood of litigation.<sup>89</sup> Congress balanced the need **[\*120]** for a private right of action against such concerns in the Americans with Disabilities Act (ADA). There, where a "discriminating party is in violation of Title III of the ADA [which prohibits discrimination on the basis of disability by privately run places of public accommodation and public transportation], Congress contemplated dual enforcement by private parties and governmental agencies."<sup>90</sup> Private parties can ask for equitable relief in a direct civil action.<sup>91</sup> The Attorney General of the United States may also intervene at the court's discretion,<sup>92</sup> which then opens up the possibility of monetary damages if the Attorney General requests them.<sup>93</sup> Damages could include compensatory damages, such as out-of-pocket expenses, and damages for pain and suffering,<sup>94</sup> but not punitive damages.<sup>95</sup> Civil penalties may also be available when the Attorney General has

<sup>85</sup> See, e.g., Report a Safety or Security Concern, U.S. Nuclear Regulatory Comm'n, <http://www.nrc.gov/about-nrc/regulatory/allegations/safety-concern.html> (last visited Feb. 7, 2011); Enforcement Hotline, Fed. Energy Regulatory Comm'n, <http://www.ferc.gov/enforcement/staff-guid/enforce-hot.asp> (last visited Feb. 7, 2011); OIG Hotline Complaint Center, DOT Office of Inspector Gen., <http://www.oig.dot.gov/Hotline> (last visited Feb. 7, 2011).

<sup>86</sup> Congress can also encourage reporting through civil enforcement mechanisms. The Federal Energy Regulatory Commission, which is charged with the task of policing the electric, natural gas, hydroelectric, and oil pipeline industries, has authority to share civil penalties imposed on regulated parties with the complaining party. See Fed. Energy Regulatory Comm'n, Policy Statement on Penalty Guidelines (Mar. 18, 2010) <http://www.ferc.gov/whats-new/comm-meet/2010/031810/M-1.pdf>.

<sup>87</sup> Numerous federal statutes that create a private right of action include punitive damages as an available remedy. See, e.g., [15 U.S.C. § 1681n](#) (2006) (allowing for punitive damages for violations of the Fair Credit Reporting Act); [18 U.S.C. § 2710](#) (2006) (allowing for award of punitive damages for violations of the Video Privacy Protection Act); [35 U.S.C. § 284](#) (2006) (allowing for treble damages in cases of patent infringement).

<sup>88</sup> [City of Los Angeles v. Lyons, 461 U.S. 95, 109-111 \(1983\)](#).

<sup>89</sup> Of course, some conduct warrants increasing the burdens on administrative or legislative bodies. Congress believed the risk that health-care providers could be coerced into performing abortions in the wake of *Roe v. Wade* warranted investigation and imposition of sanctions. As this Essay demonstrates, without a private right of action or an administrative action providing the kind of remedies sought in a private civil suit, such enforcement mechanisms may be more illusory than real.

<sup>90</sup> Laura Rothstein & Ann C. McGinley, *Disability Law: Cases, Materials, Problems* 350 (5th ed. 2010).

<sup>91</sup> *Id.* (citing [42 U.S.C. § 12188](#) (2006)).

<sup>92</sup> *Id.* (citing [42 U.S.C. § 12188\(b\)](#) (2006)).

<sup>93</sup> *Id.* (citing [42 U.S.C. § 12188\(b\)\(2\)\(B\)](#) (2006)).

<sup>94</sup> *Id.* (citing [56 Fed. Reg. 35590](#) (July 26, 1991)).

<sup>95</sup> *Id.* (citing [42 U.S.C. § 12188\(b\)\(4\)](#) (2006)).

intervened. <sup>96</sup> In determining whether to assess civil penalties, the court considers good faith efforts to comply. <sup>97</sup> Attorneys' fees, litigation expenses, and costs in judicial or administrative proceedings may be awarded at the court's discretion to the prevailing party, except where that party is the United States. <sup>98</sup>

Because "individual complainants are not entitled to monetary damages under Title III... . Ordinarily an individual would be limited to injunctive relief and attorneys' fees and costs." <sup>99</sup> This scheme of allowing monetary damages only if federal enforcement officials agree provides some measured incentive for individual complainants to challenge the failure to comply with the ADA, without opening up the courts to a flood of new litigants. <sup>100</sup> Such an approach may provide a middle ground here as well.

**[\*121]** In addition to private litigation, administrative procedures can also encourage employees to report prohibited conduct. <sup>101</sup> Consider the administrative procedures available to employees who voice safety concerns in the nuclear power industry. When an employee alleges that she has been discriminated against in retaliation for having raised safety concerns, a two-pronged investigation process arises. The Nuclear Regulatory Commission (NRC) opens an investigation of the alleged unsafe practice, and the Department of Labor (DOL) investigates the alleged retaliation. The NRC has no discretion as to whether to investigate the alleged safety concern, but may exercise discretion as to whether a regulatory violation occurred and whether to impose a penalty. <sup>102</sup> Under § 22 of the Energy Reorganization Act, the DOL also must investigate the allegation of discrimination. If the DOL's investigation finds that the employee suffered adverse action as a result of having raised concerns, it can order remediation to make the employee whole, such as reinstatement or the payment of backpay. Relying on the DOL's findings, the NRC then may also penalize the employer for its discriminatory behavior, imposing civil penalties under its regulations. <sup>103</sup> Like a private right of action, this administrative mechanism both attempts to compensate the wronged employee and to discourage the improper behavior of the employer. If it passes on a private right of action, Congress could exploit this model to give real teeth to the Church Amendment's promise that individual providers may follow their conscience.

#### IV. Conclusion

The religious objections of real people to assisting with abortion have collided with the demands of modern medicine and have lost. Forced to participate in a late-term abortion of a 22-week-old fetus **[\*122]** over her

<sup>96</sup> Id. (citing [42 U.S.C. § 12188\(b\)\(2\)](#) (2006)).

<sup>97</sup> Id. (citing [42 U.S.C. § 12188\(b\)\(5\)](#) (2006)).

<sup>98</sup> Id. (citing [42 U.S.C. § 12205](#) (2006)).

<sup>99</sup> Id.

<sup>100</sup> Id. By limiting the remedies available to private plaintiffs, this damages scheme also reduces the potential for baseless claims. See U.S. Nuclear Regulatory Comm'n, Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues 2-3 (2002), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2002/secy2002-0166/attachment1.pdf> [hereinafter NRC Report]. While the Nuclear Regulatory Commission had authority to investigate safety concerns and to order that they be remedied, it had no authority to order remediation to a private employee. Id. When Congress learned of this, they enacted § 210 of the Energy Reorganization Act (now § 211). See Samuel R. Bagenstos, The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation, [54 UCLA L. Rev. 1, 6, 29-30 \(2006\)](#) (noting that fewer claims are brought as a result of Title III's limitations, but characterizing Title III's nondiscrimination provisions as "massively underenforced").

<sup>101</sup> In the 1980s, an employee with the Union Electric Callaway plant suffered adverse employment consequences as a result of having raised safety concerns. NRC Report, supra note 100, at 2-4.

<sup>102</sup> [10 C.F.R. § 50.110 \(2009\)](#). See, e.g., NRC Report, supra note 100, at 5, 30-31.

<sup>103</sup> [10 C.F.R. § 50.110 \(2009\)](#). See, e.g., NRC Report, supra note 100, at 5, 30-51.

religious objections, Cathy Cenzone-DeCarlo felt "violated and betrayed."<sup>104</sup> Plagued by gruesome nightmares, Cathy says participating "felt like a horror film unfolding."<sup>105</sup> Yet, Cathy has no recourse in the courts to enforce privately the conscience guarantees Congress purported to extend to her and other health-care providers in 1973. Moreover, if the federal agency charged with overseeing those conscience guarantees, the U.S. Department of Health and Human Services, refuses to sanction Cathy's employer, there is little Cathy can do. In order for Cathy and other conscientious objectors to have meaningful protection, Congress may have to empower them to stand up for their own religious and moral beliefs.

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<sup>104</sup> Thaddeus M. Baklinski, N.Y. Catholic Nurse Forced to Participate in Abortion Describes Ordeal, LifeSiteNews.com (July 28, 2009), <http://www.lifesitenews.com/ldn/2009/jul/09072806.html>.

<sup>105</sup> Id.