

# Recent Developments

## The High Cost of Merging With A Religiously-Controlled Hospital

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### I. INTRODUCTION

Increasingly, public<sup>1</sup> and privately-owned hospitals are merging with religious health care systems, which are often Catholic.<sup>2</sup> Many hospitals experiencing financial troubles assert that merging with a religious health care system is the only way to stay in business.<sup>3</sup> However, the nonfinancial cost for saving a hospital in this manner may be severe.<sup>4</sup> Such mergers may reduce or eliminate women's health services in the affected

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1. Throughout this article, "public hospitals" refers to government-owned or -managed hospitals supported by taxpayers.
2. Heather L. Carlson, Note and Comment: *Freedom at Risk: The Implications of City of Boerne v. Flores on the Merger of Catholic and Non-Catholic Hospitals*, 17 ST. LOUIS U. PUB. L. REV. 157, 157 (1997); Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1070 (2000).
3. Carlson, *supra* note 2, at 158; see also Matt Sabo, *Providence Faces Fight for Control of Clinics*, THE OREGONIAN, Aug. 14, 2000, 2000 WL 5423901 (stating that ten of the publicly run hospitals in Oregon suffered operating losses in 1999, and that Providence Health System, a Catholic organization, expects the Pacific Communities Health District to save approximately \$300,000 if it merges with Providence).
4. See Minow, *supra* note 2, at 1070 (stating that although merging with a religious hospital provides a solution for hospitals facing financial problems, such mergers can affect the availability of reproductive services, services for persons who are HIV-positive, and end-of-life choices for patients with terminal illnesses). But see Lawrence E. Singer, *Realigning Catholic Healthcare: Bridging Legal and Church Control in a Consolidating Market*, 72 TUL. L. REV. 159, 167-68 (1997) (describing the benefits that Catholic health care institutions provide to a community, including services to the elderly and indigent, and claiming that Catholic health care institutions treat a higher percentage of Medicare and Medicaid patients than community hospitals).

communities,<sup>5</sup> especially abortion, contraception, sterilization, infertility services, and emergency contraception for rape survivors.<sup>6</sup> The women most affected by these cutbacks are low-income and minority women, particularly those living in rural areas, because these women have fewer health care options.<sup>7</sup> This essay will provide a brief overview of the growing trend of these hospital mergers,<sup>8</sup> the resulting loss of women's health services,<sup>9</sup> and the various legal and grass-roots methods that activists have employed to preserve full access to women's health services.<sup>10</sup>

## II. CATHOLIC INFLUENCE ON HEALTH CARE: FINANCIAL AND PROGRAMMATIC

### A. Financial Influence: Driving Forces Behind Catholic Hospital Mergers

In the last ten years, the Catholic Church has become more influential in the health care industry, partly due to mergers with non-Catholic

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5. See Carlson, *supra* note 2, at 158; MergerWatch, *How Religious Health Systems are Reducing Access to Reproductive Services*, at <http://www.mergerwatch.org/people/PoorWomen.html> (last visited Nov. 13, 2000).
  6. Lois Uttley, *How Merging Religious and Secular Hospitals Can Threaten Health Care Services*, SOCIAL POLICY, Spring 2000, at 5.
  7. See Lisa C. Ikemoto, *When A Hospital Becomes Catholic*, 47 MERCER L. REV. 1087, 1112-14 (1996) (stating that in rural areas the poverty rate is higher for African-Americans and migrant farm workers and that poverty makes access to alternative health care facilities more difficult); see also American Civil Liberties Union Freedom Network, *Hospital Mergers: The Threat to Reproductive Health Services* (1995) (fact sheet), available at <http://www.aclu.org/library/hospital.html> (last visited Feb. 22, 2001) (stating that 1,004 rape survivors in the Chicago area were denied emergency contraception by Catholic institutions, and that forty-five percent of those were low-income women seeking services in largely minority communities).
  8. Ikemoto, *supra* note 7, at 1089; Minow, *supra* note 2, at 1070.
  9. See Minow, *supra* note 2, at 1070; Barbara Weiss, *Did Women's Health Issues Kill This Hospital Merger?*, MEDICAL ECONOMICS, May 1999; Patricia Miller, *Religion, Reproductive Health and Access to Services*, CONSCIENCE, Summer 2000; see also Jane Hochberg, Comment, *The Sacred Heart Story: Hospital Mergers and Their Effects on Reproductive Rights*, 75 OR. L. REV. 945, 952-54 (1996); Ikemoto, *supra* note 7, at 1087-88.
  10. See Uttley, *supra* note 6, at 10-12 (describing consumers' efforts to protect their health care choices and access through "petitions, rallies, newspaper ads and through attempts to utilize whatever federal and state regulatory processes may apply"); Hochberg, *supra* note 9, at 957-58 (describing letter-writing campaigns and lobbying efforts that successfully blocked hospital mergers, and the inclusion of community groups in merger negotiations); Liz Bucar, *When Catholic and Non-Catholic Hospitals Merge*, CONSCIENCE, Summer 1998, at 13 (discussing efforts to invoke antitrust law to monitor proposed mergers) [hereinafter Bucar, *When Catholic and Non-Catholic Hospitals Merge*]; Vince Galloro, *Fit to be Tried: ACLU, Others Claim Violation of Church-State Separation in Suit Against Catholic-Affiliated Hospital*, MOD. HEALTHCARE, Aug. 21, 2000 (describing a lawsuit in which patients claim that a merger between a city-owned hospital and a Catholic hospital violates the constitutionally mandated separation between church and state); National Women's Law Center, *Hospital Mergers and the Threat to Reproductive Health Services: Applying Charitable Trust Laws* (Nov. 1999), available at <http://www.nwlc.org/details.cfm?id=235&section=health> (describing how charitable trust law may apply to hospital mergers).

hospitals.<sup>11</sup> Approximately 127 mergers between Catholic and non-Catholic medical institutions took place between 1990 and 1998.<sup>12</sup> Ten of the twenty largest health care systems in 1999 were Catholic.<sup>13</sup> The combined net patient revenues for these ten hospitals amounted to more than twenty-eight billion dollars in 1999.<sup>14</sup>

Many non-religious hospitals have merged with Catholic institutions in recent years, seeking much-needed financial support.<sup>15</sup> Financial pressures in the health care industry can be so extreme that hospitals may feel forced to merge with more financially stable Catholic hospitals, sacrificing reproductive services in order to keep their doors open.<sup>16</sup> Payments from managed-care providers and Medicare have fallen and many surgeries are now taking place on an outpatient basis, leaving hospital beds empty.<sup>17</sup>

## B. The Impact of the *Directives* on Hospitals and Physicians

Upon affiliation with a Catholic institution, the non-religious hospital is often required to agree to abide by Catholic guidelines regarding the

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11. See Miller, *supra* note 9, at 2 (stating that through mergers with non-Catholic hospitals, the formation of Catholic HMOs and the growth of multi-hospital health systems, the Catholic influence in health care has expanded); see also Singer, *supra* note 4, at 169-70 (stating that several factors affecting Catholic health care institutions, including an increasingly competitive health care environment and the growth of managed care, have forced Catholic institutions to increasingly consider consolidations with non-Catholic hospitals).
  12. Weiss, *supra* note 9, at 58. *But see generally* Lawrence E. Singer & Elizabeth Johnson Lantz, *The Coming Millennium: Enduring Issues Confronting Catholic Health Care*, 8 ANN. HEALTH L. 299, 313-15 (1999) (claiming that the trend of mergers involving non-Catholic hospitals is on the decline).
  13. Miller, *supra* note 9, at 3; Deanna Bellandi et al., *Profitability a Matter of Ownership Status*, MODERN HEALTHCARE, June 12, 2000, at 24, 26 (stating that the combined number of acute-care hospitals for these ten Catholic hospitals is 240).
  14. See Bellandi et al., *supra* note 13, at 32.
  15. See Minow, *supra* note 2, at 1070 (pointing to cost squeezes and downsizing as motivating mergers).
  16. See Ikemoto, *supra* note 7, at 1088 (stating that non-Catholic hospitals view the decision to merge with a Catholic hospital as a trade: exchanging women's health services for financial security and the ability to guarantee reliable health services for the entire community); see also Minow, *supra* note 2, at 1070-71 (stating that mergers between non-religious hospitals and Catholic institutions have allowed some communities to retain basic health services that were in jeopardy, but have resulted in a reduction of reproductive health services previously provided by the non-religious hospitals); AMERICAN PUBLIC HEALTH ASSOCIATION, APHA MEMBERS PRESENT POLICY PROPOSALS TO THE ASSOCIATION 1 (2000) (on file with author) (stating that many non-religious health care institutions seek a solution to financial problems by merging with Catholic hospitals but that these mergers often result in a loss of all or most of the reproductive health services, including abortions, contraceptive services, prenatal testing, genetic counseling, sterilizations and emergency contraception for rape survivors).
  17. Carlson, *supra* note 2, at 158 (explaining the financial and competitive pressures behind hospital mergers); Christine A. Varney, *New Directions at the FTC: Efficiency Justifications in Hospital Mergers and Vertical Integration Concerns*, Remarks Before the Health Care Antitrust Forum (May 2, 1995) (stating that providers claim that mergers are necessary because of rising costs of health care).

provision of health care services.<sup>18</sup> These guidelines are derived from the *Ethical and Religious Directives for Catholic Health Care Services* that were approved by the National Conference of Catholic Bishops in November 1994.<sup>19</sup> The *Directives* specifically ban contraception, sterilization, most forms of assisted fertilization and any abortion that is not performed to save the mother's life.<sup>20</sup> Some Catholic hospitals, as well as the non-religious hospitals that have affiliated with them, adhere to the *Directives* very strictly.<sup>21</sup> They may refuse basic services such as offering condoms to patients infected with AIDS,<sup>22</sup> giving emergency contraceptives to rape victims,<sup>23</sup> and giving referrals for services the hospital does not provide.<sup>24</sup>

The *Directives* also impose moral and ethical restrictions upon physicians seeking employment or privileges at Catholic medical facilities.<sup>25</sup> A religiously-controlled medical institution that refuses to provide services on moral grounds may require physicians to sign a statement indicating that they agree to follow the moral teachings of the church as a condition for medical privileges and employment.<sup>26</sup>

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18. Carlson, *supra* note 2, at 160-61; see also Rob Boston, *Emergency! How a City-Owned Hospital in Florida Wound Up Operating Under the Catholic Bishops' Control—And What Americans United And Its Allies Are Doing About It*, CHURCH & STATE, October 2000, at 4 (stating that, in the process of merging with a Catholic institution, non-religious hospitals "have often agreed to abide by Catholic teachings on reproduction and other issues").
  19. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES (1994), available at [http://207.238.20.223/ethical\\_and\\_religious\\_directives.html](http://207.238.20.223/ethical_and_religious_directives.html); see also Rev. Kevin D. O'Rourke, *Applying the Directives: The Ethical and Religious Directives Concerning Three Medical Situations Require Some Elucidation*, HEALTH PROGRESS, July-August 1998, at 64 (providing an overview of five directives related to pregnancy, rape survivors, and artificial nutrition for persons in a persistent vegetative state).
  20. See NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *supra* note 19. Directives 39-44 place restrictions on contraception and many methods of fertilization. Directive 54 states that direct sterilization is not permitted. Directive 46 states that "abortion," the direct intention to terminate a pregnancy before viability or direct intention to destroy a viable fetus, is never permitted. Directive 48 states, however, that "[o]perations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman are permitted when they cannot be safely postponed until the unborn child is viable, even if they will result in the death of the unborn child." *Id.*
  21. Boston, *supra* note 18, at 6.
  22. *Id.*
  23. LIZ BUCAR, CATHOLICS FOR A FREE CHOICE, CAUTION: CATHOLIC HEALTH RESTRICTIONS MAY BE HAZARDOUS TO YOUR HEALTH 9 (1999) [hereinafter BUCAR, CATHOLICS FOR A FREE CHOICE] (citing a 1998-99 study by Catholics for a Free Choice of 589 Catholic hospital emergency rooms, 82% of which did not provide emergency contraception to women who had been raped); Steven S. Smugar, M.D., et al., *Informed Consent for Emergency Contraception: Variability in Hospital Care of Rape Victims*, 90 AM. J. OF PUB. HEALTH 1372 (Sept. 2000) (providing a survey of Catholic hospitals that prohibit physicians from advising rape survivors about emergency contraception).
  24. BUCAR, CATHOLICS FOR A FREE CHOICE, *supra* note 23, at 9 (citing results from the 1999 study indicating that of 481 Catholic hospitals that deny women emergency contraceptives, 31% refused to provide referral on request for women who had been raped); Boston, *supra* note 18, at 6 (stating that doctors at some non-Catholic hospitals that merge with Catholic health care organizations have been instructed not to give referrals for services not provided at their own hospitals post-merger).
  25. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *supra* note 19, at 8.
  26. Uttley, *supra* note 6, at 6.

### C. Conscience Clauses

Conscience clauses offer statutory support for allowing Catholic hospitals to refuse to provide services on religious or ethical grounds. Introduced into law following the U.S. Supreme Court's legalization of abortion in *Roe v. Wade*<sup>27</sup> after religious medical care providers expressed fears that they would be required to participate in abortions,<sup>28</sup> conscience clauses allow a health care provider to refuse to perform a service if it would conflict with the provider's personal, religious or moral beliefs.<sup>29</sup> Since the enactment of the first conscience clause statute by Congress in 1973, several states have enacted similar statutes, and some have been broadened.<sup>30</sup> For example, some states now allow medical institutions to go beyond denial of services such as abortion and sterilization, permitting providers to refuse on religious or ethical grounds to provide counseling about such services.<sup>31</sup> While these statutes seek to protect the religious liberty of medical providers, they assume that all patients have a wide variety of health care choices and impose religious and moral restrictions upon patients.<sup>32</sup>

### D. Hospitals' Responses to the Directives

Some non-religious institutions have managed to retain some reproductive health services through the principle of cooperation.<sup>33</sup> Using this strategy, a Catholic institution may allow an act that is considered immoral to be performed to avoid a greater harm (such as the closing of a much-needed hospital) as long as the Catholic institution is not directly involved.<sup>34</sup> For example, a non-Catholic hospital that has merged with a

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27. 410 U.S. 113 (1973) (holding that the state may not interfere in a woman's right to terminate her pregnancy during the first trimester).
  28. See Angela Bonavoglia, *Co-opting Conscience: The Dangerous Evolution of Conscience Clauses in American Health Policy*, PROCHOICE PREMIERE ISSUE, Jan. 1999, at 1.
  29. 42 U.S.C. § 300a-7 (1991). See also Kathleen M. Boozang, *Deciding the Fate of Religious Hospitals in the Emerging Health Care Market*, 31 HOUS. L. REV. 1429, 1481-83 (1995) (providing a brief description and history of conscience clauses).
  30. E.g., MD. CODE ANN., HEALTH-GEN. I § 20-214(a) (2000); MO. ANN. STAT. § 197.032(2) (West 1999); MONT. CODE ANN. § 50-20-111 (1999); OR. REV. STAT. § 435.485 (1999); PA. CONS. STAT. § 3213(d) (2000).
  31. Smugar et al., *supra* note 23, at 1372; see also, e.g., MD. CODE ANN., HEALTH-GEN. I § 20-214(a) (2000); MONT. CODE ANN. § 50-20-111 (1999); OR. REV. STAT. § 435.485 (1999); PA. CONS. STAT. § 3213(d) (2000).
  32. Ikemoto, *supra* note 7, at 1113-14 (stating that patients who already have marginal access to health services, such as low-income women in rural areas, are affected disproportionately when services are reduced); see also Uttley, *supra* note 6, at 10 (stating that conscience clauses are "based on the increasingly erroneous assumption that patients have a wide variety of health care choices and can simply go to a different hospital if denied a service at a religiously affiliated facility").
  33. Press Release, Catholics for a Free Choice, Bishops to Revise Directives; Sterilization Loophole to be Closed (Oct. 23, 2000), at [http://www.catholicsforchoice.org/new/pressrelease/1023CHA\\_Advisory.htm](http://www.catholicsforchoice.org/new/pressrelease/1023CHA_Advisory.htm). (last visited Nov. 13, 2000).
  34. *Id.*

Catholic institution may preserve the ability to provide sterilizations by contracting the service out to a doctors' group.<sup>35</sup> Pressure from the Vatican threatens even this limited retention of services, however.<sup>36</sup> Proposed revisions to the *Directives* include a new statement that "Catholic health care institutions are not to provide direct sterilization, even based upon the principle of material cooperation."<sup>37</sup>

Compliance with the *Directives* varies among newly-merged hospitals.<sup>38</sup> Financial and social pressures, however, can force non-religious hospitals that have merged to comply.<sup>39</sup> The Catholic bishops' conference warns that scandal may ensue if a merged non-religious hospital does not respect church teaching and discipline.<sup>40</sup> Such a scandal broke out at Brackenburg Hospital in Austin, Texas.<sup>41</sup> The public facility merged with a Catholic institution, but was allowed to provide sterilization procedures and on-site pregnancy counseling including information about abortion and birth control.<sup>42</sup> After being bombarded with complaints from traditionalist Catholics, the Vatican ordered the local archbishop to change the hospital's policies.<sup>43</sup>

Non-religious hospitals that have merged with a Catholic institution may also be threatened financially if they fail to comply with the *Directives*.<sup>44</sup> When Elliot Hospital in Manchester, New Hampshire, entered into a merger agreement with Catholic Medical Center, they formed Optima Health Care.<sup>45</sup> According to one hospital doctor, Optima gave assurances that it would continue to allow the performance of tubal ligations

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35. *Id.*

36. *Id.*

37. *Id.* (quoting the proposed amendment to Directive 53, and another proposed directive which states that: "[t]he principles governing cooperation cannot justify Catholic health care institutions' engaging in immediate material cooperation in intrinsically evil actions such as abortion, direct sterilization and euthanasia").

38. Ikemoto, *supra* note 7, at 1100 (stating that local bishops have a "great deal of influence over how a hospital will follow the Directives"); see also Boston, *supra* note 18, at 6 (stating that some non-religious hospitals that have merged with a Catholic institution bend the rules regarding contraceptives); Smugar, et al., *supra* note 23, at 1373 (explaining that a 1999 study indicated that staff at twelve of twenty-seven Catholic hospitals reported that hospital policies banned discussion of emergency contraception with rape survivors, but that respondents at eight of the twelve hospitals with restrictive policies indicated that information on emergency contraception likely would be provided to rape survivors).

39. See *infra* notes 40, 44-48 and accompanying text.

40. Uttley, *supra* note 6, at 7.

41. Boston, *supra* note 18, at 6.

42. *Id.*

43. *Id.* at 6. John McCarthy, the local archbishop, has refused to change the hospital's policies thus far. McCarthy, however, is about to retire and the Vatican will replace him with Bishop Gregory Aymond, who is considered more conservative and more willing to follow Vatican orders. *Id.*

44. Jayne O'Donnell, *Antitrust Health Fight: Catholic Hospital Deals Limit Access, Activists Say*, USA TODAY, Apr. 8, 1999, at 1B, 2B (stating that Pope John Paul II has warned hospitals that if they do not adhere to the Church's rules, they could lose Catholic sponsorship).

45. Weiss, *supra* note 9, at 79.

and medically necessary abortions.<sup>46</sup> However, after an anti-choice group found out about abortions at Elliot Hospital, the Catholic Church required it to discontinue this service or face possible dissolution of the merger.<sup>47</sup> In sum, due to the financial and social pressures associated with a hospital's non-compliance with the *Directives*, many women may simply find that health services once offered at their community hospitals are no longer available.<sup>48</sup>

### III. DISPROPORTIONATE EFFECT ON LOW-INCOME WOMEN LIVING IN RURAL AREAS

When a non-religious hospital in a rural community merges with a religiously controlled institution, many low-income women in these areas lose their only local source of reproductive health services.<sup>49</sup> In many rural areas, a Catholic hospital is the only hospital available to women living in the area.<sup>50</sup> In 1999, there were ninety-one counties in the United States where a Catholic institution was the sole hospital provider.<sup>51</sup> That is a twenty percent increase since 1997.<sup>52</sup> While women with more financial resources or more health care options may be able to secure reproductive services elsewhere, low-income women are not afforded these options.<sup>53</sup>

46. *Id.* (quoting Dr. Wayne Goldner, saying that he was told it would be "no problem" to continue to perform tubal ligations and vasectomies, honor living wills, and terminate pregnancies for medical reasons). *But see* New Hampshire Attorney General, New Hampshire Attorney General's Report on Optima Health (March 10, 1998), available at <http://www.state.nh.us/nhdoj/CHARITABLE/optimal.html> (last visited Feb. 22, 2001) (stating that the Catholic Medical Center was not aware of Elliot Hospital's policies regarding pregnancy and abortion); *see also* Bucar, *When Catholic And Non-Catholic Hospitals Merge*, *supra* note 10, at 15 (stating that Catholic Church officials deny any agreement to allow abortions and maintain that if they knew that abortions were being performed at Elliot Hospital, they would have objected to the practice at the time of the merger).

47. *See* Bucar, *When Catholic and Non-Catholic Hospitals Merge*, *supra* note 10, at 15; *see also* National Women's Law Center, Hospital Mergers and the Threat to Reproductive Health Services (November 1999), at <http://www.nwlc.org/details.cfm?id=235&section=health> (last visited Feb. 22, 2001) (noting that Elliot Hospital and Catholic Medical Center have since been re-established as two separate hospitals after community outcry encouraged the New Hampshire Attorney General to review the merger for possible violations of charitable trust laws).

48. *See* Uttley, *supra* note 6, at 7; *see also. e.g.* MergerWatch, *Current Threats*, Waukeegan, Illinois, available at <http://www.mergerwatch.org/hospitals/Waukeegan.html> [hereinafter MergerWatch, *Current Threats*] (last visited Feb. 22, 2001) (providing a list of several hospitals that are currently at risk of merging with a religiously-controlled institution: Victory Memorial Hospital, a community hospital in Waukegan, Illinois is planning to merge with St. Therese Medical Center; non-religious General Hospital in Eureka, California is planning to merge with St. Joseph Health System; non-religious Nathan Littauer Hospital in Gloversville, New York is working on a merger with St. Mary's Hospital and its Catholic sponsored parent company, Carondelet Health System; non-religious Paterson General Hospital in Wayne, New Jersey may also be taken over by a Catholic system).

49. Ikemoto, *supra* note 7, at 1113-14.

50. Weiss, *supra* note 9, at 72.

51. *Id.*

52. *Id.*

53. Ikemoto, *supra* note 7, at 1113-14.

A woman may not even be aware that the hospital is affiliated with a Catholic institution until she arrives in need of services that the hospital refuses to give.<sup>54</sup> This was the case for Kathleen Hutchins, a Medicaid patient of Manchester, New Hampshire, who was denied an emergency termination of her fourteen-week pregnancy at Elliot Hospital when her amniotic sac broke prematurely.<sup>55</sup> Elliot Hospital had previously merged with the only other hospital in Manchester, Catholic Medical Center.<sup>56</sup> As a condition of the merger agreement, Elliot Hospital had agreed to ban abortions except to save a woman's life. Despite the warnings of Hutchins' physician, Dr. Wayne Goldner, that if the procedure was not performed she could face a lethal infection,<sup>57</sup> administrators at Elliot Hospital told Dr. Goldner that he could not terminate Hutchins' pregnancy at Elliot Hospital unless her life was at immediate risk.<sup>58</sup>

In Gilroy, the poorest community in Santa Clara County, California, a Latina woman faced a similar denial of services.<sup>59</sup> After becoming pregnant with her ninth child, she decided to have a tubal ligation performed following the birth.<sup>60</sup> To avoid having to undergo two separate surgical procedures, Campos planned to deliver her baby and have the sterilization procedure performed immediately afterwards at Gilroy's only hospital, South Valley Community Hospital.<sup>61</sup> South Valley, however, had recently been purchased by Catholic Health Care West and was re-named St. Louise Regional Medical Center, and the facility would not perform sterilizations.<sup>62</sup> Despite Campos' belief that nine children were "way more than enough," she was denied the sterilization procedure she desired.<sup>63</sup> Advocates fear such stories may become more prevalent as Catholic and other religious institutions merge with non-religious hospitals that formerly provided the full array of women's health services.<sup>64</sup>

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54. See Hochberg, *supra* note 9, at 957.

55. Uttley, *supra* note 6, at 4; AMERICAN PUBLIC HEALTH ASSOCIATION, PRESERVING CONSUMER CHOICE IN AN ERA OF RELIGIOUS SECULAR HEALTH INDUSTRY MERGERS (Nov. 15, 2000), at 9 (Official Policy Statement Adopted by the Governing Council of the APHA), available at <http://www.mergerwatch.org/publications/APHA%20paper%20revisions2.pdf> (last visited Feb. 22, 2001) [hereinafter AMERICAN PUBLIC HEALTH ASSOCIATION, PRESERVING CONSUMER CHOICE].

56. Uttley, *supra* note 6, at 4; AMERICAN PUBLIC HEALTH ASSOCIATION, PROPOSED POLICY STATEMENTS TO BE CONSIDERED AT ANNUAL MEETING (2000), at 3 [hereinafter AMERICAN PUBLIC HEALTH ASSOCIATION, PROPOSED POLICY STATEMENTS] (on file with author).

57. Uttley, *supra* note 6, at 4; Nadya Labi, *Holy Owned: Is it Fair for a Catholic Hospital to Impose Its Morals on Patients?*, TIME, Nov. 15, 1999, at 86.

58. See Uttley, *supra* note 6, at 4.; see also Weiss, *supra* note 9, at 79 (stating that some doctors have expressed similar concern regarding the way Catholic hospitals treat women who have had a premature rupture of membranes).

59. Uttley, *supra* note 6, at 7.

60. AMERICAN PUBLIC HEALTH ASSOCIATION, PRESERVING CONSUMER CHOICE, *supra* note 55, at 9.

61. Leslie Laurence, *The Hidden Health Threat That Puts Every Woman At Risk*, REDBOOK, July 2000, at 114.

62. Uttley, *supra* note 6, at 7.

63. *Id.*

64. Bucar, *When Catholic And Non-Catholic Hospitals Merge*, *supra* note 10, at 16.

#### IV. LEGAL APPROACHES TO RETAIN OR RESTORE WOMEN'S HEALTH SERVICES

A pending merger can be challenged on several grounds.<sup>65</sup> There are also several methods that can be employed to attempt to restore women's health services once a merger has already taken place.<sup>66</sup> Communities facing the threat of lost women's health services due to a merger with a religiously-controlled institution have obtained help from several different organizations to prevent mergers or to arrange compromises allowing some reproductive health services to be retained.<sup>67</sup>

##### A. Legal Challenges Being Raised to Intervene When a Merger is Pending

###### 1. Claims of Antitrust Violations

One way to challenge a pending merger is on antitrust grounds.<sup>68</sup> If the merger will result in the restraint of trade due to a monopoly of a significant geographical area, antitrust laws can be invoked to challenge the merger.<sup>69</sup> With the help of former Justice Department Antitrust Chief Anne Bingaman and ex-Federal Trade Commission Antitrust Director Mary Lou Steptoe, The National Women's Law Center has drafted an antitrust manual to help advocates prevent hospitals from merging with religiously-controlled institutions by arguing that less competition could lead to higher health care prices.<sup>70</sup> Antitrust enforcers focus on deals that may limit competition in the markets in which the parties operate.<sup>71</sup> Although "reproductive services" have not been identified as a "relevant

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65. See *infra* Part IV.A.

66. See *infra* Part IV.B.

67. Such organizations include: MergerWatch, c/o Family Planning Advocates of New York State, 17 Elk St., 3<sup>rd</sup> Floor, Albany, NY 12207, <http://www.mergerwatch.org>; Catholics For a Free Choice, 1436 U St. NW, Suite 301 Washington, DC 20009-3997, <http://www.cath4choice.org>; National Women's Law Center, 11 Dupont Circle NW, Suite 800, Washington, DC 20036, <http://www.nwlc.org>; American Civil Liberties Union, 125 Broad St., 18th Floor, New York, NY 10004, <http://www.aclu.org>; Planned Parenthood Federation of America, Public Policy Litigation and Law Department, 810 7th Ave., New York, NY 10019; <http://www.plannedparenthood.org>.

68. For a more detailed description as to how antitrust laws can be invoked in opposition to a hospital merger, see JUDITH C. APPELBAUM, NATIONAL WOMEN'S LAW CENTER, HOSPITAL MERGERS AND THE THREAT TO REPRODUCTIVE HEALTH SERVICES: USING ANTITRUST LAWS TO FIGHT BACK (1998) (available for purchase from the National Women's Law Center, 11 Dupont Circle NW, Suite 800, Washington, DC 20036) (on file with author).

69. See Hochberg, *supra* note 9, at 960; see also 15 U.S.C. §1 (2000) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.")

70. Hochberg, *supra* note 9, at 961; O'Donnell, *supra* note 44, at 1B.

71. See Hochberg, *supra* note 9, at 960-61; see also Mary Lou Steptoe, Current Issues in Health Care Antitrust: Boycotts, Mergers and Provider Networks, Spring Meeting of the Federal Trade Commission (April 5, 1995), WL 150724 at 6 (stating that the Federal Trade Commission's "objective in challenging a merger or acquisition is to preserve the benefits of competition").

product market” that should be reviewed under antitrust laws, merger opponents such as Judith Appelbaum, senior counsel of the National Women’s Law Center, try to show how less competition threatens consumer access to reproductive health services.<sup>72</sup> For example, advocates have clocked how much farther consumers would have to travel if forced to go to a competing hospital to obtain services that are no longer available at their local hospital.<sup>73</sup>

Catholic health care representatives express doubt as to whether the elimination of women’s health services can be characterized as an antitrust violation.<sup>74</sup> They argue that there is no antitrust violation because “[a]ny reduction in the availability of such services would not be the result of an intent to monopolize or obtain anti-competitive profits.”<sup>75</sup> Such doubts about the applicability of antitrust claims in this context may have some validity because antitrust laws focus on preservation of competition rather than on preservation of the full array of health care services within a community.<sup>76</sup> Antitrust claims may, however, be particularly viable in rural areas with small health care markets.<sup>77</sup> In such communities, competition and economic inefficiencies are more likely to result from a merger that leaves a religious institution as the sole health care provider within a region, causing patients to travel long distances to obtain the basic health services they require.<sup>78</sup>

## 2. Application of Charitable Trust Laws

Another method for intervention is the application of charitable trust laws. Charitable trusts are “designed for the benefit of a class or the public generally . . . for charitable, educational, religious or scientific purposes.”<sup>79</sup> In some states, charitable institutions such as non-profit hospitals are subject to charitable trust laws.<sup>80</sup> Mergers between hospitals may violate such laws if the merger significantly alters the mission of one or both of the merging entities.<sup>81</sup> Advocates invoke charitable trust law by

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72. See O’Donnell, *supra* note 44, at 1B.

73. *Id.* at 2B.

74. *Id.* (expressing the views of Paul Yde, an antitrust lawyer with Vinson & Elkins who represents Christus Health, a Catholic health care organization).

75. *Id.* (quoting Paul Yde).

76. See Hochberg, *supra* note 9, at 961.

77. See Ikemoto, *supra* note 7, at 1132 (explaining that while few federal anti-trust investigations find mergers to be in violation of the law, state regulations could be used to challenge hospital mergers).

78. See *id.*

79. BLACK’S LAW DICTIONARY 1049 (6th ed. 1991) (defining charitable trusts as a type of trust).

80. See, e.g., N.H. REV. STAT. ANN. § 547:3-g (2000) (defining the trustee of a charitable trust who is subject to New Hampshire charitable trust laws as “[a]ny individual, group of individuals, corporation or other legal entity holding property in trust pursuant to any charitable trust or charitable purpose”).

81. See *Queen of Angels Hosp. v. Younger*, 136 Cal. Rptr. 36, 39 (Ct. App. 1977) (noting the rule that “all the assets of a corporation organized solely for charitable purposes must be deemed to

arguing that since the public is the beneficiary of the charity, it has a right to have its institutions maintain their stated mission.<sup>82</sup>

The Attorney General of New Hampshire found a violation of charitable trust law after analyzing the five-year old merger between Elliot Hospital and Catholic Medical Center, which resulted in the formation of Optima Health.<sup>83</sup> The Attorney General reviewed the merger and reported, among other things, that Optima violated its duty of candor in dealing with the community because it failed to announce or address its intention to deviate from Elliot Hospital's mission and failed to consider how the two hospitals' missions could be preserved before deciding to consolidate.<sup>84</sup> The Attorney General's review and report in this case eventually led to the re-establishment of the two separate hospitals, and the merger is currently being dissolved.<sup>85</sup> Thus, the application of charitable trust laws in this manner could provide an additional means of intervening when a potential merger is threatening access to health services.<sup>86</sup>

### 3. Violation of the First Amendment—Separation of Church and State

To prevent such mergers, opponents also argue that public hospital mergers with religiously controlled hospitals violate the First Amendment's mandated separation of church and state.<sup>87</sup> In Newport, Oregon, an agreement between Catholic-affiliated Providence Hospital and taxpayer-supported Pacific Communities Health District has been postponed after a group of Newport-area residents filed a lawsuit alleging a violation of the First Amendment.<sup>88</sup> Art LaFrance, an attorney working on behalf

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be impressed with a charitable trust by virtue of the express declaration of the corporation's purpose" (citing *Pac. Home v. County of Los Angeles*, 264 P.2d 539, 543 (Cal. 1953)), and finding that a lease agreement between a charitable hospital and a hospital corporation was invalid because the charitable organization illegally abandoned its primary purpose of operating a hospital by leasing out the hospital and using the rent money to establish free medical clinics); see also, e.g., New Hampshire Attorney General, *supra* note 46, at 1 (stating that Catholic Medical Center and Elliot Hospital, the two hospitals that merged to create Optima Health, were nonprofit charitable institutions bound by a social contract to the local community, and as such, they had a "fiduciary duty to preserve and protect their charitable assets and to ensure that those assets were used for purposes consistent with the fundamental charitable missions of the respective institutions").

82. See National Women's Law Center, *supra* note 10.

83. See New Hampshire Attorney General, *supra* note 46.

84. *Id.*

85. National Women's Law Center, *supra* note 10.

86. *Id.*

87. See U.S. CONST., amend. 1; see also, e.g., Sabo, *supra* note 3 (stating that a group of Newport, Oregon residents are challenging a merger between a public hospital and private Catholic hospital on First Amendment grounds).

88. Petition of Gary Hoagland, et al., No. 00-1227 (Lincoln County Cir. Ct. filed March 15, 2000); see also Sabo, *supra* note 3; Galloro, *supra* note 10, at 16 (describing a lawsuit that was filed in August 2000 by Planned Parenthood, the American Civil Liberties Union of Florida, Americans United for the Separation of Church and State, and the National Organization for Women against

of the residents, has stated that the residents oppose the proposal “to merge a public hospital into a private religious system, but keep the district alive and keep its bonding authority going to support the operation of a Catholic system.”<sup>89</sup> Since Pacific Communities Health District would not be going out of business, LaFrance states that all the government powers will be available to Providence, essentially “government by a private religious group,” which LaFrance argues is in violation of the First Amendment.<sup>90</sup>

## **B. Methods to Restore Women’s Health Services After a Merger Has Taken Place**

### **1. Medical Malpractice on the Grounds of Lack of Informed Consent or Substandard Care**

Once a merger has already occurred, one potential method to restore lost services involves a medical malpractice claim for failure to obtain informed consent. This argument is based on the claim that the discontinuation of reproductive health services, combined with the imposition of “gag orders” on physicians, prevent physicians from informing their patients of all of their health care options.<sup>91</sup> This argument was made in Troy, New York in 1994 when the merger of Leonard Hospital and St. Mary’s Hospital led to discontinued reproductive health services.<sup>92</sup> The merger agreement required that family planning service referrals would be provided, but only at the patient’s request.<sup>93</sup> After a suit was filed for medical malpractice, a legal settlement was reached in 1996 and providers are now required to give patients a detailed referral list.<sup>94</sup> Furthermore, doctors are allowed to advise patients of their options, even if their patients do not make a request for such information.<sup>95</sup>

With regard to emergency contraception for rape survivors, some religious hospitals prohibit even discussing the possibility.<sup>96</sup> A 1999 Catholics for Free Choice report indicates that eighty-two percent of Catholic hospitals do not provide emergency contraception to survivors of rape.<sup>97</sup> Thirty-one percent of those would not provide a referral to

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a city-owned Florida hospital on similar grounds): *MergerWatch, Current Threats, supra* note 48 (including information about the Florida lawsuit).

89. Sabo, *supra* note 3.

90. *Id.*

91. Bucar, *When Catholic And Non-Catholic Hospitals Merge, supra* note 10, at 13.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Smugar, et al., *supra* note 23, at 1373.

97. BUCAR, CATHOLICS FOR FREE CHOICE, *supra* note 23, at 9.

another facility that would offer this service.<sup>98</sup> Emergency contraceptives are approved by the Food and Drug Administration as postcoital pregnancy prophylaxis.<sup>99</sup> Emergency contraceptives are the treatment recommended by the American College of Obstetricians and Gynecologists, and at least one study indicates that the nationwide standard of care for treatment of rape survivors is the administration of emergency contraception.<sup>100</sup> Thus, some physicians argue that failure to inform a rape survivor of her options "is tantamount to abandonment"<sup>101</sup> because if a physician "discontinues his services before the need for them is at an end, he is bound first to give due notice to the patient and afford the latter ample opportunity to secure other medical attendance of [her] own choice."<sup>102</sup> If a rape survivor is not given information about the availability of emergency contraception, she may believe that she has received all possible and appropriate medical care.<sup>103</sup> In such a case, the rape survivor has not only endured the harm caused by the rape, but also the harm caused by the substandard care following the rape (possibly resulting in an unwanted pregnancy) and may have a viable medical malpractice case.

A California appellate court has suggested that a rape victim who has suffered harm due to a hospital's refusal to treat or offer a referral may have a legal claim for medical malpractice.<sup>104</sup> In *Brownfield v. Daniel Freeman Marina Hospital* the court stated:

[W]hen a rape victim can allege: that a skilled practitioner of good standing would have provided her with information concerning and access to estrogen pregnancy prophylaxis under similar circumstances; that if such information had been provided to her she would have elected such treatment; and that damages have proximately resulted from the failure to provide her with information concerning this treatment option, said rape victim can state a cause of action for damages for medical malpractice.<sup>105</sup>

Similarly, religious hospitals may also be providing substandard care in some cases where a woman experiences a rupture of membranes early in her pregnancy, which often leads to a miscarriage.<sup>106</sup> Obstetrician-gynecologist Ira Jaffe, M.D., who trained at a Catholic hospital, expressed concern regarding Catholic hospitals' treatment of patients experiencing

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98. *Id.*

99. Smugar, et al., *supra* note 23, at 1372.

100. *Id.* at 1374.

101. *Id.*

102. *Id.* (citing *Capps v. Valk*, 369 P.2d 238, 240 (Kan. 1962), which held that a surgeon was negligent because he failed to provide his patient with follow-up care during her hospital recovery from that surgery).

103. Smugar, et al., *supra* note 23, at 1374.

104. *Brownfield v. Daniel Freeman Marina Hosp.*, 256 Cal. Rptr. 240, 245 (Cal. Ct. App. 1989).

105. *Id.*

106. See Weiss, *supra* note 9, at 79 (describing a hospital's procedure for a ruptured membrane and the risks associated with not terminating a pregnancy in these circumstances).

this problem.<sup>107</sup> Dr. Jaffe indicated that when a woman experiences a premature rupture of membranes, “not only is the fetus no longer viable, but unless the pregnancy is terminated, the patient will almost surely develop an intrauterine infection, putting her at risk for septic shock, damaged fallopian tubes, infertility, or even death.”<sup>108</sup> Despite these risks, in some Catholic institutions, a termination cannot be performed if there is “even an infinitesimal chance that the pregnancy can continue” and must be delayed until the patient shows signs of becoming ill.<sup>109</sup> Arguably, such care is also substandard.

#### IV. GRASS-ROOTS AND COMMUNITY EFFORTS TO PROTECT WOMEN’S HEALTH SERVICES

A number of organizations such as MergerWatch,<sup>110</sup> Catholics for a Free Choice,<sup>111</sup> the National Women’s Law Center,<sup>112</sup> the American Civil Liberties Union,<sup>113</sup> and Planned Parenthood<sup>114</sup> are responding actively to the loss or threatened loss of reproductive health services from mergers with religious hospitals.<sup>115</sup> MergerWatch, for example, tracks mergers between religious and non-religious hospitals nationwide.<sup>116</sup> MergerWatch seeks to maintain or restore lost health services, publishes educational materials to help communities build local coalitions, and guides activists through regulatory processes.<sup>117</sup>

With commitment, persistence and creativity, several communities have been able to draw on the resources and models provided by these organizations to successfully retain health services that were at risk.<sup>118</sup> In New York’s Mid-Hudson Valley, for example, a merger between a secular hospital and a religious institution fell apart when residents obtained 10,000 signatures on petitions, used roadside billboards to show opposition to the merger, and raised antitrust issues with the Federal Trade Commission.<sup>119</sup> A merger between a Catholic hospital and a community

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107. *See id.* (describing Dr. Jaffe’s preference to treat patients before they exhibit sure signs of illness).

108. *Id.*

109. *Id.* (stating Dr. Jaffe’s opinion).

110. MergerWatch, c/o Family Planning Advocates of New York State, <http://www.mergerwatch.org>.

111. Catholics For a Free Choice, <http://www.cath4choice.org>.

112. National Women’s Law Center, <http://www.nwlc.org>.

113. American Civil Liberties Union, <http://www.aclu.org>.

114. Planned Parenthood Federation of America, <http://www.plannedparenthood.org>.

115. *See infra* notes 116-29 and accompanying text.

116. MergerWatch was formed in 1996 after a merger between a religious hospital and a non-religious hospital in Troy, New York resulted in the elimination of contraceptive services for poor women in the community. Uttley, *supra* note 6, at 12.

117. *Id.*

118. *Id.* at 10-12.

119. *Id.* at 10-11.

hospital in Enid, Oklahoma was prevented when over 200 citizens attended a public hearing and 79 physicians signed a letter condemning the proposed merger.<sup>120</sup>

Other communities have used creative solutions to retain at least some of their reproductive health services by intervening during negotiations. If a community expresses a strong conviction to retain all or most health care services, sometimes it can convince the merging hospitals to use a "loose joint-operating agreement" that allows the hospital to retain some services without requiring the religious entity to participate in funding of any services deemed immoral.<sup>121</sup> In this situation, the hospitals achieve a "virtual" merger: the hospitals share some aspects of their business operations while maintaining separate legal identities and management.<sup>122</sup> Another option is to relocate reproductive health services from the hospital to a freestanding clinic.<sup>123</sup> While this compromise allows a community to retain some services, advocates argue that establishing a separate clinic does not sufficiently address the community's health care needs because clinics are not able to adequately respond to emergencies that may arise during a procedure and are not able to perform surgical procedures for women with elevated health risks.<sup>124</sup>

Many organizations provide suggestions to facilitate early intervention by advocates.<sup>125</sup> Sandy Oestreich, president of the Pinellas National Organization for Women, recommends reviewing community hospital newsletters and local newspaper business sections to keep informed about

120. *Id.* at 11.

121. *Id.*

122. See Bucar, *When Catholic and Non-Catholic Hospitals Merge*, *supra* note 10, at 14 (explaining that a virtual merger does not merge assets or establish one governing body).

A joint operating agreement is essentially "a contractual arrangement which may, but need not, involve the creation of a separate corporation, partnership, or limited liability company (JOC) to oversee the operations of the participating health care systems" where "[e]ach participant retains ownership of its assets and continues to be liable for its own liabilities." When merger participants make such an agreement, some procedures, such as sterilizations, "may in some cases be performed at the facilities of the non-Catholic participants, provided that the Catholic participants are segregated from the governance and finances related to the performance of those procedures." Stuart M. Lockman & Tracy E. Silverman, *Formation of Hybrid-Type Organizations: Virtual Mergers of Health Care Systems*, 72 FLA. B.J. 14, 14, 16 (April 1998).

123. *But see* Bucar, *When Catholic and Non-Catholic Hospitals Merge*, *supra* note 10, at 15 (commenting that Catholic hospitals often promise to preserve access to reproductive health care through the use of clinics yet frequently do not follow through).

124. See Ikemoto, *supra* note 7, at 1125 (providing examples in Ohio where separate outpatient surgical clinics were established for women's health services to supplement services lost in a merger with religious hospitals): The California Hospital Abortion Access Project, *Holes in the Safety Net: The Lack of Access in California Hospitals*, <http://www.choice.org/access/data.summary.2.html> (last visited Sept. 24, 2000) (stating that hospitals are better able to accommodate patients with medical conditions such as "asthma, previous cesarean sections, diabetes, severe anemia, heart disease, obesity and seizure disorders").

125. *E.g.*, Rebecca Farmer, *Reproductive Rights at Risk in States and Communities*, <http://www.now.org/nnt/spring-2000/repro.html> (last visited Feb. 22, 2001); Judith Mandelbaum-Schmid, *Their Religion, Your Rights*, SELF, May 1999, at 214; American Civil Liberties Union Freedom Network, *supra* note 7.

the possibility of mergers and affiliations.<sup>126</sup> Lois Uttley, director of MergerWatch, says that it is critical for consumers to know the identity of their health care providers, and to remain alert to potential changes.<sup>127</sup> Steps that can be taken to preserve reproductive health services in the face of a threatened merger include: contacting expert organizations for guidance; identifying the reproductive health services the religiously-controlled hospital may target for elimination; “request[ing] a meeting with the CEO of the hospital where services are threatened”; contacting local pro-choice organizations and others (including physicians) who may support grassroots activism; making the public aware of the potential merger and its consequences; contacting the media and/or “plac[ing] advertisements in local newspapers to present your views”; organizing letter-writing campaigns to inform the hospitals of concerns about the threat of lost services; contacting the state department of health and attorney general to ascertain state laws and administrative processes related to hospital mergers; and organizing demonstrations to increase community awareness.<sup>128</sup> If a community can pool its resources to make it clear that a loss of reproductive health services is unacceptable, the pressure imposed on the hospitals considering the merger can be enough to force the hospital to seriously reconsider the elimination or reduction of services and to present acceptable solutions or compromises.<sup>129</sup>

## V. CONCLUSION

The trend of hospital mergers between religious and non-religious hospitals may continue to threaten access to reproductive health services, especially for patients who already have limited access because they live in rural areas or have low incomes.<sup>130</sup> However, as this essay suggests, there are several avenues that concerned citizens and activists can take to try to prevent the loss of these vital services.<sup>131</sup> The creativity and determination of those who commit themselves to ensuring that reproductive health services will continue to be available to all who desire them has resulted in several viable legal and practical methods of intervention.<sup>132</sup>

Although I believe it is important to respect the religious rights and beliefs of others, when the expression of these beliefs encroaches on pa-

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126. Farmer, *supra* note 125.

127. Mandelbaum-Schmid, *supra* note 125, at 151.

128. American Civil Liberties Union Freedom Network, *supra* note 7.

129. See *supra* notes 118-121 and accompanying text.

130. See MergerWatch, *Current Threats*, *supra* note 48 (listing several hospitals that are currently at risk of merging with a religiously controlled institution).

131. See American Civil Liberties Union Freedom Network, *supra* note 7 (providing several suggestions for community action to preserve women's health services).

132. See discussion *supra* parts III.A-B and IV.

tients' rights to access basic health services, intervention is appropriate and necessary. I hope that public outcry, in the forms of legal and grassroots action, will persuade state actors, legislatures, hospital administrators, and clergy to properly acknowledge patients' rights and participate in the creation of acceptable solutions to the financial problems that hospitals increasingly face. We need solutions that do not deny essential health services to any group of people.