

**PEPFAR: PREACHING ABSTINENCE AT THE COST OF  
GLOBAL HEALTH AND OTHER MISGUIDED RELIEF  
POLICIES**

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## I. INTRODUCTION

*“We are still hopeful that America, being a strong and well-meaning country, will not go down in history as a country which exported ideas at the expense of people’s free will to choose.”*

*—An HIV-positive Ugandan man<sup>1</sup>*

As of 2007, there was an estimated thirty-three million people living with HIV/AIDS in the world, more than ninety percent of whom lived in developing countries, including twenty-two million in Sub-Saharan Africa.<sup>2</sup> The rate of new adult infections in Sub-Saharan Africa is a startling 5.9%.<sup>3</sup> No other area of the world has a new infection rate in adults of more than 1.2%, with most falling

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1. AVERT, *HIV and AIDS in Uganda*, <http://www.avert.org/aidsuganda.htm> (last visited Feb. 4, 2010). “AVERT is an international HIV and AIDS charity, based in the [United Kingdom] working to avert HIV and AIDS worldwide, through education, treatment and care.” *AIDS charity AVERT in action*, <http://www.avert.org/aids-hiv-charity-avert.htm> (last visited Mar. 16, 2010).

2. AVERT, *Worldwide HIV & AIDS Statistics, Global HIV/AIDS estimates, end of 2008*, <http://www.avert.org/worldstats.htm> [hereinafter AVERT *Worldwide*] (last visited Feb. 4, 2010).

3. Mark Cichocki, *HIV Statistics – Regional Breakdown of the Epidemic, HIV/AIDS Data That Puts the Epidemic in Perspective* (2007), <http://aids.about.com/od/dataandstatistics/qt/regional.htm> (last visited Mar. 6, 2009).

below one percent.<sup>4</sup> Despite sufficient attention, abundant funding, and scientifically proven methods of prevention, this health crisis persists unabated.

The longer the spread of HIV infections remains uncontained, the more irreparable the resultant damage will be. Countries are losing a generation of young adults and creating a generation of orphans.<sup>5</sup> As new infections continue, and the number of people living with HIV/AIDS grows, the need for treatment increases and outpaces the ability to provide it.<sup>6</sup>

This pandemic calls for interventions that emphasize effective, evidence-based prevention methods embracing the broadest spectrum of knowledge.<sup>7</sup> Any program addressing this must reach all people, without regard to their health, status, or any ideology that detracts from the ability to provide unbiased service.<sup>8</sup> It must have sufficient flexibility to cater to local needs and community structures.<sup>9</sup> The Joint United Nations program on AIDS/HIV (“UNAIDS”) advocates that any policy for HIV prevention must “ensure that human rights are promoted, protected and respected and that measures are taken to eliminate discrimination and combat stigma. Any policy must promote widespread knowledge of how HIV is transmitted, how it may be averted and the links between HIV prevention and sexual and reproductive health.”<sup>10</sup> It also must promote programs targeted at high risk groups, reform any legal framework that would create a barrier to effective, evidence based HIV prevention, and scale up both prevention and treatment in a balanced way designed to fully capitalize on the synergies between the two.<sup>11</sup>

Backed by an unprecedented monetary commitment, former President Bush enacted the President’s Emergency Plan for AIDS Relief (“PEPFAR”) in 2003.<sup>12</sup> The legislation embodied America’s desire to be viewed as the leader in the treatment and prevention of AIDS on the global platform.<sup>13</sup> While no one can

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4. *Id.*

5. AVERT *Worldwide*, *supra* note 2 (explaining that Africa alone had 14 million AIDS orphans as of 2007, and there have been more than 25 million AIDS deaths since 1981, with 33.4 million still living with the disease).

6. PEPFAR IMPLEMENTATION: PROGRESS AND PROMISE 7 (Institute of Medicine of the National Academies et al. eds., 2007) [hereinafter PEPFAR IMPLEMENTATION] (PEPFAR refers to the President’s Emergency Plan for AIDS Relief).

7. *See* UNAIDS, *HIV Prevention*, <http://www.unaids.org/en/PolicyAndPractice/Prevention/default.asp> (last visited Feb. 4, 2010).

8. *See id.*

9. *See id.*

10. *Id.* (among the twelve standards listed as “Essential Policy Actions for HIV Prevention”).

11. *See id.*

12. The United States President’s Emergency Plan for AIDS Relief, *About PEPFAR*, <http://www.pepfar.gov/about/index.htm> (last visited Feb. 4, 2010); *see also* AVERT, *President’s Emergency Plan For AIDS Relief (PEPFAR)*, <http://www.avert.org/pepfar.htm> (last visited Feb. 4, 2010).

13. *PEPFAR: An Assessment of Progress and Challenges: Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. 2 (2007) (statement of Hon. Tom Lantos, Chairman, H. Comm. on Foreign Affairs) [hereinafter *PEPFAR Hearing*]. Chairman Lantos states:

discount the key role PEPFAR plays, and the multitudinous organizations it funds, the Bush Administration's insistence on abstinence, fidelity, and prioritizing faith-based partnerships undermines its effectiveness.<sup>14</sup> None of the elements deemed essential by UNAIDS are represented in the program, which takes a marked departure from scientifically proven methods of prevention.<sup>15</sup> The methodology adopted by PEPFAR has been harshly criticized by international organizations, medical and public-health scholars, and human rights activists.<sup>16</sup> The infection rates in the host countries are still skyrocketing, while those countries that refused to adopt the PEPFAR restrictions and thus forwent American aid, instead choosing to continue condom provision and frank, non-judgmental discussions, have slowed their own infection rates.<sup>17</sup>

The question must be asked: why would the Bush Administration chose to devote such a large sum of money to a program without any guaranty of success? One answer is that the administration wanted to be viewed as the leader in this arena, wanted to be seen as a notably humanitarian government, and wanted to do it while spreading its own values and moral code.<sup>18</sup> The idea of successful prevention seems to come a distant second to the ideology the administration

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[PEPFAR] authorized \$15 billion for 15 of the hardest hit nations in Africa and elsewhere, establishing the United States as the world leader in the global battle against AIDS. And those who occasionally complain that we have lost our moral authority better take notice of this figure. There is no nation on the planet which would have made a remotely comparable effort.

*See generally*, Senator William H. Frist, M.D., *Medicine as a Currency for Peace Through Global Health Diplomacy*, 26 YALE L. & POL'Y REV. 209 (advocating for support of funding global health diplomacy so that America can be renowned as a great humanitarian State).

14. Lawrence O. Gostin, *A Proposal for a Framework Convention on Global Health*, 10 J. INT'L ECON. L. 989, 991 (2007) [hereinafter Gostin, *Framework*] (discussing a proposal for reframing America's approach to development assistance).

15. *See supra* notes 10-12 and accompanying text.

16. *See* Gostin, *Framework*, *supra* note 14, at 991; AVERT: *President's Emergency Plan For AIDS Relief (PEPFAR)*, *supra* note 12 (discussing the negative effects of PEPFAR's prevention policies.)

17. For example, Brazil, whose President chose to forgo American funding in 2003 and continue their successful prevention programs, has not seen a raise in the adult HIV prevalence percentage since 1994, remaining at 0.6 percent; whereas South Africa, a PEPFAR host country, has seen the prevalence steadily increasing, reaching 18.1 percent in 2007. *See* UNAIDS, *2008 Report on the Global AIDS Epidemic* (Aug. 2008), available at [http://www.unaids.org/en/KnowledgeCentre/HIVData/GlobalReport/2008/2008\\_Global\\_report.asp](http://www.unaids.org/en/KnowledgeCentre/HIVData/GlobalReport/2008/2008_Global_report.asp).

18. *See, e.g.*, DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF GLOBAL HEALTH AFFAIRS, GUIDANCE REGARDING SECTION 301(f) OF THE UNITED STATES LEADERSHIP AGAINST HIV/AIDS, TUBERCULOSIS AND MALARIA ACT OF 2003 (2007) [hereinafter GUIDANCE](guiding grant officers and implementing partners regarding the provision of the Act requiring governments to have a policy explicitly opposing prostitution and sex trafficking ("the Prostitution Pledge"), the Department of Health and Human Services states, "[a]s part of that Act, to ensure that the Government's organizational partners will not undermine [its] goal through the promotion of counterproductive activities . . . and that the U.S. Government's message opposing prostitution and sex trafficking is not confused by conflicting positions[.]" they must enforce the pledge).

wanted to promote. The harm in the Bush Administration's chosen approach goes well beyond the immediate infections not prevented, and will last for many years to come, despite the end of the administration. In 2009, the Obama administration recommitted to the PEPFAR program, with a new five year strategy, extending from 2010 to 2014.<sup>19</sup> The very same prevention methods underrepresented in the original PEPFAR plan are noticeably absent from the newest adaptation.<sup>20</sup>

This comment will review various aspects of PEPFAR and the restrictions adversely affecting its implementation and potential for success, and will provide recommendations to avoid the same problems in future legislation. Part II will summarize the PEPFAR legislation and related aid policies in place under the former Bush administration that rendered the grandiose authorization ineffectual, if not counterproductive. It will also comment on the early evidence of the Obama administration's adaptation of the plan. Part III will examine the limitations and contingencies found in PEPFAR and some of the specific implications they have on any potential solution to the HIV/AIDS crisis, as well as on the rights of the organizations and communities involved. Part IV employs the framework of a "Symbolic Crusade" to interpret the motive behind implementing such a technically flawed, but ideologically cemented program.<sup>21</sup> Finally, Part V will examine alternative frameworks for the provision of foreign health aid for emergencies such as the AIDS crisis, and propose a framework that would ensure sustainable, long-term programs. Part VI concludes.

## II. THE PEPFAR LEGISLATION AND RELATED POLICY

### A. *The President's Emergency Plan for AIDS Relief*

On July 30, 2008, the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008<sup>22</sup> ("2008 Reauthorization Act") was signed into law by former President George W. Bush.<sup>23</sup> This act reauthorizes PEPFAR, which was first signed into law in 2003.<sup>24</sup> The 2008 Reauthorization Act expands the U.S. Government's

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19. The United States President's Emergency Plan for AIDS Relief, Executive Summary of *PEPFAR's Strategy*, <http://www.pepfar.gov/strategy/document/133244.htm> (last visited Feb. 4, 2010).

20. *Id.*

21. JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (Univ. of Illinois Press 1966) (analyzing the important role of the Temperance movement as a symbolic movement of status politics, the result of the rural abstaining Protestant losing status to the urban non-abstaining classes).

22. Tom Lantos and Henry J. Hyde, United States Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization Act of 2008, Pub. L. 110-293, 122 Stat. 2918 (2008) ("2008 Reauthorization Act").

23. The United States President's Emergency Plan for AIDS Relief, *About PEPFAR*, *supra* note 12.

24. United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. §§ 7601-7682 (2003) (the legislative authorization for PEPFAR); *see also* The United

commitment until 2013, making it the largest commitment by any single nation to combat global HIV/AIDS, or any disease, in history.<sup>25</sup>

PEPFAR began as a five-year global program with a fifteen billion dollar authorization, an amount that was more than tripled by the 2008 Reauthorization Act, which authorized forty-eight billion.<sup>26</sup> Thirty-nine billion dollars will be dedicated to HIV/AIDS programs and contributions to the Global Fund to Fight HIV/AIDS, Tuberculosis, and Malaria, while the remaining nine billion is allocated to U.S. initiatives to combat malaria and tuberculosis.<sup>27</sup> PEPFAR has three goals for AIDS relief: treatment, prevention, and care. In the next ten years, it aims to treat at least three million people, prevent twelve million new infections, and care for twelve million people, including five million orphans and vulnerable children.<sup>28</sup> “To meet these goals, PEPFAR will support training of at least 140,000 new health care workers in HIV/AIDS prevention, treatment and care.”<sup>29</sup> PEPFAR has a unique structure, working in partnership with fifteen focus countries, or host nations, in Africa, Asia, and the Caribbean.<sup>30</sup> This article will discuss PEPFAR’s funding structure for HIV/AIDS prevention programs, and in particular, its many contingencies and heavy focus on abstinence programs.

PEPFAR adopted a bilateral structure for funding international AIDS projects, which had been utilized by the U.S. Agency for International Development (“USAID”) since the 1980s.<sup>31</sup> PEPFAR’s implementation in 2003 brought USAID and the coordination of PEPFAR projects together as a single program headed by the Office of the Global AIDS Coordinator (“OGAC”).<sup>32</sup> The chairman of OGAC carries the title of Ambassador and is seated within the executive branch’s Department of State.<sup>33</sup> The first Coordinator was Randall Tobias, who was neither a veteran in government offices, nor a doctor or public health practitioner, but

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States President’s Emergency Plan For AIDS Relief, *About PEPFAR*, *supra* note 12.

25. The United States President’s Emergency Plan For AIDS Relief, *About PEPFAR*, *supra* note 12.

26. AVERT: *President’s Emergency Plan for AIDS RELIEF (PEPFAR)*, *supra* note 12.

27. *Id.*; see also UNAIDS, *An Analysis of the Gender Policies of the Three Major AIDS Financing Institutions: The Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Bank and the President’s Emergency Plan for AIDS Relief* 20 [hereinafter *UNAIDS, Analysis*], available at [http://data.unaids.org/pub/Report/2008/20080715\\_sitan\\_aidsfinancingmechanisms\\_en.pdf](http://data.unaids.org/pub/Report/2008/20080715_sitan_aidsfinancingmechanisms_en.pdf) (last visited Feb. 4, 2010).

28. U.S. President’s Emergency Plan for AIDS Relief, *PEPFAR: A Commitment Renewed*, <http://www.pepfar.gov/documents/organization/114676.pdf> (last visited Feb. 4, 2010).

29. *Id.*

30. The fifteen focus countries are in Africa: Botswana, Cote d’Ivoire, Ethiopia, Kenya, Mozambique, Namibia, Nigeria, Rwanda, South Africa, Tanzania, Uganda, Zambia; in the Caribbean: Guyana and Haiti; and in Asia: Vietnam. *UNAIDS Analysis, supra* note 27, at 16 n. 36.

31. RAYMOND W. COPSON, CONGRESSIONAL RESEARCH SERVICES, *THE GLOBAL FUND AND PEPFAR IN U.S. INTERNATIONAL AIDS POLICY* 3, (2005), available at <http://www.usembassy.it/pdf/other/RL33135.pdf>.

32. *Id.*

33. *Id.*

rather a former pharmaceutical executive.<sup>34</sup> Upon Tobias' resignation in 2007,<sup>35</sup> Ambassador Mark Dybul was appointed to the position,<sup>36</sup> and, in June of 2009, Dr. Eric Goosby assumed the role.<sup>37</sup> The OGAC oversees and coordinates all U.S. resources and the international activities of the U.S. Government to combat the HIV/AIDS epidemic, including apportioning funds and guiding implementation.<sup>38</sup>

In PEPFAR's original implementing act, the Effective Distribution of HIV/AIDS Funds was apportioned in specific percentages: fifty-five percent for treatment of infected individuals, fifteen percent for palliative care, twenty percent for "prevention consistent with [section 104(A)(d) of the Foreign Assistance Act of 1961,]<sup>39</sup> of which at least [thirty-three] percent should be expended for abstinence-until-marriage programs," and ten percent to orphans and vulnerable children.<sup>40</sup>

According to the OGAC, roughly 140 million people have been reached by PEPFAR. "Of this total, roughly two-thirds of people received abstinence-until-marriage/be faithful messages and roughly one-third received condoms and other prevention messages.<sup>41</sup> PEPFAR has supported the training or retraining of more than 864,000 people for prevention programs . . . Roughly two thirds of [which] were trained for abstinence-until-marriage/be faithful programs."<sup>42</sup>

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34. President George W. Bush, *President Bush Names Randall Tobias to be Global AIDS Coordinator* (July 2003), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/07/20030702-3.html>.

35. Tobias immediately resigned from his post as Global AIDS Coordinator when it was revealed that his name was on the list of clients of the notorious "DC Madam" escort service. *State Department official resigns over 'D.C. madam,'* CNN (Apr. 27, 2007), <http://www.cnn.com/2007/POLITICS/04/27/dc.madam/index.html> (last visited Feb. 4, 2010).

36. Prior to this appointment, Dybul served as Acting U.S. Global AIDS Coordinator, served on the Planning Task Force for the Emergency Plan, and was the lead for the HHS department concerning the International Prevention of Mother and Child HIV vaccine. Dybul is a medical doctor and was a fellow in infectious diseases at the National Institute of Allergy and Infectious Diseases. U.S. DEP'T OF STATE, BIOGRAPHY, AMBASSADOR, MARK DYBUL, <http://www.state.gov/outofdate/bios/64719.htm> (last visited Mar. 15, 2010).

37. See The United States President's Emergency Plan for AIDS Relief, *Dr. Eric Goosby Assumes the Role of U.S. Global AIDS Coordinator*, June, 23, 2009, <http://www.pepfar.gov/press/releases/2009/125246.htm> (last visited Feb. 4, 2010). Goosby is a medical doctor who previously held the post of CEO and Chief Medical Officer of Pangaia Global AIDS Foundation from 2001 to June 2009. *Id.*

38. Center for Global Health and Gender Equity, *U.S. Global AIDS Policy and HIV Prevention Fact Sheet*, Sep. 2008, <http://www.pepfarwatch.org/images/PEPFAR/globalaidsandhipolicy.pdf>

39. 22 U.S.C. § 7631 (2003) (adding section 104(A)(d)(4) of the Foreign Assistance Act of 1961 to the 2003 Authorization Act).

40. *Id.* § 7672(b) (Sense of Congress Section).

41. PEPFAR IMPLEMENTATION, *supra* note 6, at 123.

42. *Id.*

**B. PEPFAR in Conjunction with Other Ideologically-Based Health Aid Policies in Place Under the Bush Administration**

PEPFAR adopted the nomenclature of a successful Ugandan treatment and prevention program known as the “ABC model”: “Abstain, Be faithful, use Condoms.”<sup>43</sup> While the Ugandan program saw the categories of ABC as equally vital to efforts to diminish new infections, the American version sees them as listed in order of priority.<sup>44</sup> Unlike Uganda’s model, PEPFAR promotes condom use only “where appropriate” and only at the end of the list.<sup>45</sup>

The 2008 Reauthorization Act nearly doubled the percentage of funds going to abstinence programs. It replaced the thirty-three percent earmark with a “requirement that the Global AIDS Coordinator report to Congress if less than [fifty percent] of funding to prevent sexual transmission of HIV is spent on abstinence and fidelity programs[.]”<sup>46</sup> The prevention activities enumerated in Section 104(A)(d), known as The Leadership Act, are consistent with President Bush’s abstinence-based policies.<sup>47</sup>

While it explicitly states that funds can be provided “notwithstanding any other provision of law that restricts assistance to foreign countries,” such as the Mexico City Policy (also known as the “Global Gag Rule”),<sup>48</sup> PEPFAR contains its own harsh limitations on funding.<sup>49</sup> “No funds made available to carry out this Act,

43. 22 U.S.C. § 7601(2)(C)(2003).

44. *Id.*; see also PEPFAR IMPLEMENTATION, *supra* note 6, at 115 (summarizing the language of both the 2003 and 2008 Acts); see also Tina Rosenberg, Editorial, *On Capital Hill, Ideology is Distorting an African AIDS Success*, N.Y. TIMES, Apr. 28, 2003, at A30 (In ten years Uganda had seen a drop in new infections unmatched anywhere in the world, and “the religious right is convinced it knows Uganda’s secret: abstinence.” But the former director of TASO, Uganda’s premier group helping the infected said: “It is so unfair to pull out one element of a bigger picture-- a very small percentage of the whole picture—and say, ‘This is what works.’”).

45. 22 U.S.C. § 2151b–2(d) (2003):

Activities Supported[.]

(1) Prevention [–] Prevention of HIV/AIDS through activities including – (A) programs and efforts that are designed or intended to impart knowledge with the exclusive purpose of helping individuals avoid behaviors that place them in risk of HIV infection, including integration of such programs into health programs and the inclusion in counseling programs of information on methods of avoiding infection of HIV, including delaying sexual debut, abstinence, fidelity and monogamy, reduction of casual sexual partnering, reducing sexual violence and coercion, including child marriage, widow inheritance, and polygamy, and where appropriate, use of condoms[.]

46. Center for Health and Gender Equality, *U.S. Global AIDS Policy and HIV Prevention Fact Sheet*, *supra* note 38.

47. 22 U.S.C. § 2151b-2 (2003) (reauthorizing the addition of section 104(A)(d) of the Foreign Assistance Act of 1961 to the 2003 Authorization Act).

48. For a detailed discussion see *infra* Part III.

49. 22 USC § 2151b(4) (2003): Relationship to Other Laws; see UNAIDS *Analysis*, *supra* note 27:

The Mexico City Policy mandates that no [U.S.] funding can be provided to any foreign nongovernmental organization that performs abortions [even if they are using their own funding as opposed to the United States]. In 1993, President Clinton ended the policy by executive order. In 2001, President George W. Bush reinstated the ban by executive order.



or any amendment made by this Act, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking.”<sup>50</sup>

Furthermore, despite the carve-out allowing funds to go to HIV/AIDS relief organizations that counsel women about or provide legal abortions,<sup>51</sup> this carve-out applies only to organizations that are *exclusively* receiving PEPFAR funding. The Global Gag Rule prohibited any organization that received funding from the United States from performing abortions, advocating for liberalized abortion policies, or even providing information or counseling on abortion procedures.<sup>52</sup> It further prohibited the provision of U.S. contraceptive supplies to organizations that provide such services.<sup>53</sup> Many hospitals and health clinics have already suffered, and in many cases been forced to close, due to loss of funding on account of the Global Gag Rule.<sup>54</sup> The HIV/AIDS carve out has not solved this problem, but rather replaced institutions like International Planned Parenthood with faith-based organizations that provide no form of contraceptive or counseling on such choices.<sup>55</sup> Despite the recent revocation of the Global Gag Rule, much damage was left in its wake.

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In August 2003, Bush issued a carve-out in the form of a presidential memorandum clarifying that HIV/AIDS assistance was exempt from these restrictions. This means that if a foreign nongovernmental organization receives [U.S.] family planning assistance, it has to comply with the Mexico City Policy; if the organization is receiving *only* HIV/AIDS funding, it is not subject to these restrictions.

(emphasis added). President Obama has since issued a Presidential Memorandum revoking the most recent reinstatement of the Gag Rule and directed the Secretary of State to immediately waive any such conditions in any current grants. See Memorandum from President Barack Obama on the Mexico City Policy---Voluntary Population Planning to the Secretary of State and the Administrator of USAID (Jan. 23, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/MexicoCityPolicy-VoluntaryPopulationPlanning](http://www.whitehouse.gov/the_press_office/MexicoCityPolicy-VoluntaryPopulationPlanning).

50. 22 USC § 7631(2)(2003) (amending 108 Pub. Law. 25 § 104A (f)).

51. See 22 USC § 2151b(4) (2003): Relationship to Other Laws, *supra* note 49.

52. Serra Sippel, *Achieving Global Sexual and Reproductive Health and Rights*, 35 HUMAN RIGHTS 13, 15 (2008).

53. *Id.*

54. See, e.g., Susan A. Cohen, *Global Gag Rule Exporting Antiabortion Ideology at the Expense of American Values*, The Guttmacher Report on Public Policy (June 2001) 1-2, *available at* <http://www.guttmacher.org/pubs/tgr/04/3/gr040301.pdf> (explaining that organizations in South Africa that provide abortion counseling to HIV positive women face losing one-quarter of their funding if they continue to provide such services).

55. See Heather Boonstra and Susan A. Cohen, *Of Gag Rules and Loyalty Oaths: Exporting Ideology at the Expense of Public Health and American Values*, 13 U.C. DAVIS J. INT’L L. & POL’Y 1, 3 (2006).

### III. PEPFAR'S REQUIREMENTS AND THE MEXICO CITY POLICY HAS LED TO AN INFLUX OF FAITH-BASED PARTNER ORGANIZATIONS AND THE DEGRADATION OF HEALTH CARE SYSTEMS IN PARTNER COUNTRIES

#### A. *Limitations Found in PEPFAR*

There are three main contingencies that impinge on the effectiveness of PEPFAR: (1) the categorical funding earmarks included in the Leadership Act section of the legislation, (2) the Smith Conscience Amendment, and (3) the "Prostitution Pledge" set out in the limitations section. Each constraint has a severe and discrete impact on the effectiveness of the Act.

##### 1. The Leadership Act

The section of PEPFAR known as the "Leadership Act" mandates a prioritization of "delaying sexual debut, abstinence, fidelity and monogamy, reduction of casual sexual partnering . . . and where appropriate, use of condoms."<sup>56</sup> The original act had a thirty-three percent earmark for abstinence-until-marriage programs, which was changed to a guideline that rings warning bells if funding of abstinence and faithfulness programs falls below fifty percent.<sup>57</sup> While at first glance it may appear that the new provision promotes abstinence/faithfulness teachings and distribution of condoms equally, in a fifty/fifty ratio, in reality this is far from the truth.

In a hearing before the Committee on Foreign Affairs regarding PEPFAR, Committee Chairman Tom Lantos paid a great deal of attention to the criticism and challenges of the thirty-three percent abstinence-only funding requirement.<sup>58</sup> He stated that, "[w]hen the committee wrote this law, some of our Republican members insisted that at least one-third of total funding for prevention initiatives be used for abstinence-until-marriage education. Despite our strong reservations, this thirty-three percent requirement was included in the final draft."<sup>59</sup> Chairman Lantos then quoted a report from the Institute of Medicine which said that the provision "impeded the prevention arm from achieving its goals . . . 'hamper[ing] these efforts and thus the program's ability to meet the targets.'"<sup>60</sup> He further cited

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56. 22 USC § 2151b-2(d)(1)(A); *see also* PEPFAR IMPLEMENTATION, *supra* note 6, at 120 ("These activities focus on 'delay of sexual debut, abstinence, fidelity and monogamy, reduction of casual sexual partnering, reducing sexual violence and coercion, including child marriage, widow inheritance, and polygamy, and where appropriate, use of condoms.'").

57. PEPFAR IMPLEMENTATION, *supra* note 6, at 123:

Comprehensive and integrated approaches drawing on all components of ABC and targeting specific populations have been shown to be effective in increasing healthy behaviors and decreasing transmission of HIV. . . . There is, however, little evidence to show that ABC when separated out into its components is as effective as the comprehensive approach.

58. *PEPFAR Hearing*, *supra* note 13.

59. *Id.* at 2.

60. *Id.*; *see* PEPFAR IMPLEMENTATION, *supra* note 6, at 113 ("the abstinence-until-marriage budget allocation in the Leadership Act hampers these efforts and thus PEPFAR's ability to meet the target. . . . it has greatly limited the ability of Country Teams to develop and

the Government Accountability Office's report that the allocation clause challenged the country teams "ability to integrate the components of the ABC model and respond to local needs, local epidemiology and distinctive social and cultural patterns."<sup>61</sup> Despite noting that "we need to and we shall revisit this thirty-three percent provision as the law comes up for reauthorization . . . [w]e should take a hard look at the consequences of this funding scheme and consider its wisdom False"<sup>62</sup> and uninfluenced by the great debate regarding the pitfalls of the funding scheme, the reauthorization includes the requirement that the Global AIDS Coordinator report to Congress if less than fifty percent is spent on abstinence and fidelity programs.<sup>63</sup> While the framework no longer appears as stringent, the funds are diverted in the same manner.<sup>64</sup>

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implement comprehensive prevention programs that are well integrated . . . and that target those populations at greatest risk.").

61. *Id.* at 3.

62. *Id.*

63. As an example of the debate that ensued in the Committee Hearing, *see PEPFAR Hearing, supra* note 13, at 7 (testimony of Mr. Smith, ranking member of the Africa and Global Health Subcommittee and author of the Smith Amendment: "Some have called for the removal of this requirement in favor of what they call an evidence-based approach. . . . What these people fail to take into account is that the ABC model is evidence-based, and those countries with generalized epidemics have experienced declines in prevalence."); *id.* at 17 (testimony of Ambassador Dybul: "Long before PEPFAR was initiated, many nations with generalized epidemics had already developed their own national HIV prevention strategies that included the 'ABC' approach to behavior change (Abstain, Be faithful, *correct and consistent* use of Condoms where appropriate). The new data . . . links adoption of all three of the ABC behaviors to reductions in prevalence.") (emphasis added); *id.* at 22 (testimony of Chairman Lantos: questioning the effectiveness of "the distribution of funds [sic] approved last time. My understanding is that you personally favor the one-third/one-third/one-third approach . . . [but please summarize] the views of the critics who would like to either change that ratio or to eliminate it altogether, so if you would begin with that issue I would appreciate it."); *id.* at 22-24 (further testimony of Ambassador Dybul).

The most at-risk people are young adults and so we need to get to the young adults. . . . The data in each country are almost identical that where we see reductions in prevalence we see an increase in age of first onset of sexual activity. Children are delaying their sexual debut, abstaining for a longer period of time. Very importantly, we are seeing a massive reduction in young men in their number of partners. . . . We do know that increase in condom use, if they are used consistently and correctly, among people who engage in sexual activity are essential to prevent the spread of infection, so you need to utilize all three approaches. . . . If you look at condom use in Botswana from the mid 1990s through 2000, it went up precipitously. In fact, Botswana has one of the highest condom use reports in the world, about 80 percent among sexually active people. At the same time, the prevalence rate went way up to 30 percent. So you have to have a comprehensive approach to get young people to change behaviors in order to change the epidemic. The purpose of a directive to me at this point is to ensure that we move toward the evidence, that we do have an evidence-based approach.

*Id.* at 24 (further testimony of Chairman Lantos: "I think every member of this committee is fully aware of the fact that the thirty three percent formula was not scientifically based, but it was a political compromise among members of the committee and Members of the Congress.").

64. Some advocates immediately expressed their concern over this restriction, although data has yet to be recorded regarding the true effect. *See* Pathfinder International, Pathfinder

Ambassador Dybul defended the allocation strategy by calling on the success of the original Ugandan ABC programs, but he neglected to point out a significant difference between the two. While the original Ugandan program defines ABC as “Abstinence, Be Faithful, and use Condoms,” PEPFAR refers to the “C” as “*where appropriate, use of condoms.*” This restricts condom funding for the general population, providing it only for “select, so-called high-risk populations.”<sup>65</sup> “Where appropriate” has been interpreted to limit the promotion of condom use to specific groups, including “sero-discordant couples,<sup>66</sup> people living with HIV, the military, police, commercial sex workers and their clients, truck drivers, and refugees.”<sup>67</sup> This excludes any general population education on the use of condoms, such as the education of school aged children, who are a main target of abstinence-until-marriage education.<sup>68</sup>

Dybul also pointed to the importance of reaching children for the prevention and control of the disease. With this in mind, many abstinence/be faithful programs are “focused on developing students’ life skills,”<sup>69</sup> including “school-based, community, and media interventions aimed at delaying sexual activity among youths.” Yet programs under the condoms and other prevention categories are focused only on the “priority groups” and include “mass media campaigns, peer-to-peer counseling, condom promotion, and communication interventions targeting behavior change in high-risk venues and along transportation corridors.”<sup>70</sup> Notably absent from this second category is any program directed specifically at youth; therefore, children are not given the full benefit of the ABC programs and do not have the option of contraception should they not choose to, or are unable to, abstain from sex. Ambassador Dybul stated, “[o]ur approach has always been to provide information to people we respect and let them make a decision.”<sup>71</sup> However, if discussion of and provision of condoms is not included in the outreach, the youth cannot make a fully informed decision.

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International's Response to Recent PEPFAR Reauthorization (“certain provisions could undermine the program, such as new reporting requirements around spending on abstinence programs. According to the bill, PEPFAR recipients will now need to justify their programmatic decisions if abstinence and be faithful expenditures account for less than 50 percent of their total funding for HIV prevention activities.”); *see also* Amplify Your Voice, PEPFAR Reauthorization: Are Abstinence Requirements Really Gone?, <http://www.amplifyyourvoice.org/u/yellowsun/2009/11/3/PEPFAR-Reauthorization-Are-Abstinence-Requirements-Really-Gone>.

65. Leonard S. Rubenstein and Eric A. Friedman, *Human Rights and The President's AIDS Initiative*, 31 HUM. RTS. 4, 5, (2004); *see* PEPFAR IMPLEMENTATION, *supra* note 6, at 122-24.

66. Sero-discordant couples are comprised as one HIV positive partner and one HIV negative partner. For information on sero-discordant couples see The Body, the Complete HIV/AIDS Resource, <http://www.thebody.com/Forums/AIDS/COUPLES/index.html>.

67. PEPFAR IMPLEMENTATION, *supra* note 6, at 122.

68. Rubenstein, *supra* note 65, at 5 (“[C]ondom distribution to the general population in addition to specific groups is widely recognized as one of the basic elements of an effective HIV prevention strategy.”).

69. PEPFAR IMPLEMENTATION, *supra* note 6, at 120.

70. *Id.* at 122.

71. *PEPFAR Hearing*, *supra* note 13, at 22.

In addition to restricting programs to certain groups, the Leadership Act also adds the expression, “condoms *and other prevention*.” Therefore, the funds remaining after the lion’s share has been allocated to abstinence and be faithful programs are further diverted to such programs as “supporting studies of risk reduction associated with male circumcision and of alcohol consumption as a risk factor for HIV transmission False”<sup>72</sup> In South Africa, a program funded via the “condoms and other prevention” category supports post-rape services, including post-exposure prophylaxis and policy development. In Botswana, PEPFAR is supporting two programs focused on alcohol use as a contributing factor to the transmission of the HIV virus.<sup>73</sup> While these are vital programs, they are not engaged in condom distribution.<sup>74</sup> These research projects receive their funding through the “condoms and other prevention” funds, despite neither providing condoms nor educating about condom use, thus siphoning off funding from the most proven prevention method.<sup>75</sup>

Finally, in addition to relegating condom provision only to “high risk” groups, PEPFAR includes further constraints on condom distribution. Focus countries are reportedly not eligible to receive condoms from the greater pool of contraceptives provided through the USAID, because of the “interpretation of legislative intent.”<sup>76</sup> It has been interpreted that, in writing PEPFAR, Congress intended the focus countries to receive all provisions directly through the Act. This effectively shut the focus countries out of the international commodities fund that generally purchases condoms for the recipients of aid. Programs in PEPFAR supported host countries that wish to provide condoms must use their PEPFAR funds to purchase them independently.<sup>77</sup> Funds are therefore being diverted to purchase actual goods rather than implementing a program of service provision, and tracking data regarding the provision of condoms in these countries is sorely lacking.<sup>78</sup>

Rigid, prescribed budget allocations are themselves problematic. The allocation guidelines have been established so that they become increasingly more restrictive over time.<sup>79</sup> “Contrary to basic principles of good management and accountability, the budget allocations have made spending money in a particular

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72. PEPFAR IMPLEMENTATION, *supra* note 6, at 123.

73. *Id.*

74. *Id.* at 124.

75. According to the Centers for Disease Control and Prevention (“CDC”):

[C]onsiderably more scientific evidence exists regarding condom effectiveness for prevention of HIV infection than for other STDs. The body of research on the effectiveness of latex condoms in preventing sexual transmission of HIV is both comprehensive and conclusive. The ability of latex condoms to prevent transmission of HIV has been scientifically established in “real-life” studies of sexually active couples as well as in laboratory studies.

CDC, Condoms and STDs: Fact Sheet for Public Health Personnel, *available at* <http://www.cdc.gov/condomeffectiveness/latex.htm#HIV>.

76. PEPFAR IMPLEMENTATION, *supra* note 6, at 122.

77. *Id.*

78. *Id.*

79. *Id.* at 11.

way an end in itself rather than a means to an end—in this instance, the vitally important objective of saving lives today and in the future.”<sup>80</sup> PEPFAR staffs, both at home and abroad, have voiced their frustration with the budget allocations and have shown that the strict performance targets detract from planning and implementing care.<sup>81</sup> Such restrictions are counterproductive, especially in a program intended to fund grassroots organizations to provide community-based care which often requires a great deal of flexibility. PEPFAR’s programs are not tailored to meet the needs found in each of the fifteen countries, instead they are tailored to be able to meet and report on the budget allocations.<sup>82</sup>

## 2. The Smith Amendment

Representative Chris Smith (R-NJ), whose vocal support of the budget allocation was noted above, introduced an additional element affecting the implementation of PEPFAR. The “Smith Conscience Amendment,” a bill passed by a voice vote despite strong Democratic opposition,<sup>83</sup> was designed to protect faith-based care providers from providing services against their religious beliefs. This amendment, also known as the “conscience clause,” allows organizations to opt out of providing services, such as providing full and comprehensive information needed to prevent sexual transmission of HIV.<sup>84</sup>

In its first manifestation, the clause allowed faith-based organizations to exclude HIV prevention programs, such as condom distribution, so they could provide solely abstinence and be faithful services without fear of losing funds. The clause was expanded in the 2008 Reauthorization, allowing the faith-based organizations to also refuse the provision of any care if the refusal is based on a religious or moral objection.<sup>85</sup> This includes the refusal of providing medical care, regardless of the need or emergency, if there is such an objection. A church-run hospital, for instance, can refuse to treat or counsel a woman who comes to them in need, if the sexual act causing her disease occurred in the course of prostitution, or even from a premarital affair. This amendment opens the door for discrimination and the continued stigmatization of people at high risk of or living with HIV/AIDS.<sup>86</sup>

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80. *Id.*

81. *Id.* (citing U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-06-395, GLOBAL HEALTH: SPENDING REQUIREMENT PRESENTS CHALLENGES FOR ALLOCATING PREVENTION FUNDING UNDER THE PRESIDENT’S EMERGENCY PLAN FOR AIDS RELIEF (2006)).

82. *Id.* at 11.

83. See Eagle Forum Capital Alert, Tell Congress to Pass Science-Based, Pro-Family Amendments to AIDS Bill <http://www.eagleforum.org/alert/2003/AIDS-4-29-03.shtml> (last visited Feb. 4, 2010).

84. Elisa Dunn-Georgiou, PEPFAR Reauthorization and the Conscience Clause (Aug. 6, 2008), <http://www.rhrealitycheck.org/blog/2008/08/06/pepfar-reauthorization-and-conscience-clause>; see also Nina Crimm, *Toward Facilitating A Voice for Politically Marginalized Minorities and Enhancing Presidential Public Accountability and Transparency in Foreign Health Policymaking*, 39 VAND. J. TRANSNAT’L L. 1053, 1077 (2006).

85. Dunn-Georgiou, *supra* note 84.

86. *Id.*

### 3. The Prostitution Pledge

PEPFAR, and the 2008 Reauthorization of the Act, directed that no funds will be provided to any organization unless that organization has a policy “*explicitly* opposing prostitution and sex trafficking.”<sup>87</sup> The Office of Global Health Affairs instructs that, to ensure the Government’s efforts to combat the global spread of AIDS are not undermined through the promotion of counterproductive activities, all organizations receiving PEPFAR funds, with limited exceptions, must explicitly take the anti-prostitution and sex trafficking pledge. The goal behind this pledge is that “the U.S. Government’s message opposing prostitution and sex trafficking is not confused by conflicting positions of these organizations.”<sup>88</sup>

The pledge was first introduced as an amendment by the same Mr. Smith, who in the Congressional Hearing of 2007 stated, “The intent behind that amendment . . . is to try to ensure that we do not become enablers of prostitution and sex trafficking.”<sup>89</sup> Mr. Smith responded to questions of the pledge’s constitutionality by urging, “[w]e ought to be looking to enable those women to escape and find a life free of that kind of degrading treatment, but regrettably some of the partners that we had financed in the past went to court because they did not want to adhere to that policy.”<sup>90</sup> While Ambassador Dybul was more sensitive to the cultural and socioeconomic issues surrounding a woman’s involvement with prostitution, and the need to show compassion for such issues, he nonetheless concluded, “at the same time, you don’t want to do things that encourage that activity because it will lead to spread of the infection both directly, but also by encouraging gender inequality.”<sup>91</sup> It is likely that the accumulation of the beliefs mentioned above enabled the “Prostitution Pledge” to be included in the 2008 reauthorization.

The impact of the “Anti-Prostitution Pledge” is far reaching. The problem of forced prostitution and human trafficking into the commercial sex trade is a global

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87. 22 U.S.C. § 7631 (2006) (“No funds made by this Act, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking.”); *see also* H.R. 5501.

88. GUIDANCE, *supra* note 18.

89. *PEPFAR Hearing, supra* note 13, at 30. The prostitution pledge first took shape in 2004 as a policy directive only reaching foreign NGOs, and was expanded in 2005 by AAPD 05-04, the USAID policy directive requiring *all organizations* receiving funds under the PEPFAR program to sign a certification opposing prostitution and sex trafficking. U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT (USAID), AAPD 05-04 AMENDMENT 2, IMPLEMENTATION OF THE UNITED STATES LEADERSHIP AGAINST HIV/AIDS, TUBERCULOSIS AND MALARIA ACT OF 2003 – ELIGIBILITY LIMITATION ON THE USE OF FUNDS AND OPPOSITION TO PROSTITUTION AND SEX TRAFFICKING (2007), *available at* ([http://www.usaid.gov/business/business\\_opportunities/cib/pdf/aapd05\\_04\\_amendment2.pdf](http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04_amendment2.pdf) [hereinafter AAPD]; *see* Tamara Fillinger, *Enhancing Human Security: U.S. Policies and their Health Impact on Women in Sub-Saharan Africa*, 6 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 337 (2006).

90. *PEPFAR Hearing, supra* note 13, at 30.

91. *Id.* at 31.

travesty, as described by the International Labor Organization report that “perhaps as many as 2.4 million [people] are victims of human trafficking.”<sup>92</sup> While desire to speak out against sexual exploitation is indeed noble, the practical consequences have been grave. The pledge has been called “undemocratic,” said to “undermine human rights,” and, when applied domestically, judged unconstitutional,<sup>93</sup> yet it remains in place even today.

There are three discrete consequences to an organization refusing to make the declaratory statement: (a) that organization will lose any funds coming from PEPFAR; (b) the community in which it is based will lose what may have been an established and successful provider; and (c) the proven benefit of incorporating outreach and care to sex workers for the successful curtailment of the spread of HIV is lost.

#### *a. Defunding Organizations*

The most barefaced effect the “Prostitution Pledge” has is directly on the providers that would be receiving PEPFAR funds. If, prior to the inclusion of this funding contingency, the Non-Governmental Organization (“NGO”) provided services or resources to people or groups which the government considers to be engaging in speech or activity “that could be perceived as insufficiently opposed to prostitution,”<sup>94</sup> they must now either refuse to provide such care or lose what might be a large percentage if not all of their funds. Using this clause, President Bush defunded such organizations as the International Planned Parenthood Federation (“IPPF”) for their promotion of family planning and contraception.<sup>95</sup> The IPPF is an internationally respected service provider that operates in over 180 countries with nearly 60,000 offices worldwide and provides access to contraception, testing, health care, and counseling.<sup>96</sup>

The loss of funding had a deep impact on the IPPF, but it hits other organizations even harder. The Global Health Council, for instance, refused to honor the request of U.S. government officials to uninvite the IPPF and the United Nations Population Fund from its annual international conference in 2004.<sup>97</sup> Weeks

92. Edi C.M. Kinney, *Appropriations for Abolitionists: Undermining Effects of the U.S. Mandatory Anti-Prostitution Pledge in the Fight Against Human Trafficking and HIV/AIDS*, 21 BERKELEY J. GENDER L. & JUST. 158, 159 (2006).

93. Rubenstein, *supra* note 65, at 5.

94. AAPD, *supra* note 89.

95. Wilson Adam Schooley, *Human Rights Heroes*, 35 HUM. RTS. 25, 26 (2008) (IPPF promotes family planning, specifically by using contraception, and focuses on a rights-based approach to reproductive health, including provision of abortions. Bush also defunded the United Nations Population Fund, yet reinstated their appropriation via the amendment to the AAPD, AAPD, *supra* note 89).

96. See International Planned Parenthood Federation, About IPPF, <https://www.ippf.org/en/about> (last visited Feb. 5, 2010).

97. The Global Health Council is the world’s largest membership alliance of health-care professionals, NGOs, foundations, corporations, government agencies, and academic institutions working together to improve health throughout the world. Global Health Council, Who We Are, [http://www.globalhealth.org/view\\_top.php3?id=25](http://www.globalhealth.org/view_top.php3?id=25) (last visited Feb. 5, 2010).



before the conference, USAID, the Center for Disease Control, and the Health and Human Services departments all rescinded their federal funding from the organization, for failure to comply with the requirements of the “Anti-Prostitution Pledge.”<sup>98</sup> The council chose to continue its work and its “commitment to free speech, open exchange, and a dialogue based on facts rather than ideology. . . [stating] ‘[w]e will not be deterred, and we will not be gagged.’”<sup>99</sup> However, the loss of federal funds has necessitated the dismissal of twenty percent of their staff, which has limited their activities, and caused them to devote more time to fundraising than to substantive work.<sup>100</sup> These are just two examples of organizations, dedicated to providing care to those suffering from or at risk of contracting HIV/AIDS, which have seen their missions thwarted by this pledge, though the list of such agencies is exponentially longer.

***b. The Disruption of Health and Social Welfare Services and NGO Practices***

Looking beyond the financial loss the individual service provider must face if it does not sign the certification, the existence of the requirement itself takes a considerable toll on the efforts being made to combat HIV/AIDS on the ground.<sup>101</sup> The funding restrictions based on conservative ideology change the “class of organizations that qualify to receive funding from U.S. agencies, thereby reshaping the political composition and trajectory of many AIDS-prevention initiatives at home and abroad.”<sup>102</sup> Requiring service providers to take the “Prostitution Pledge” has a three-pronged effect, rupturing an NGO’s ability to provide service, limiting the services being provided to the community, and even disturbing the network of NGOs. Successful organizations working in the field will often develop multi-sectional strategies to combat AIDS and related issues, by reaching out to those who are involved in or at high risk of human trafficking or sex work in struggling economies.

In such a network, the organizations will partner with one another to reach the most people and have the flexibility necessary to adapt to the changing picture of the disease and conditions.<sup>103</sup> Some “governmental officials and NGO advocates

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98. Schooley, *supra* note 95, at 26.

99. *Id.*

100. *Id.*

101. Lawrence O. Gostin, *Meeting Basic Survival Needs of the World’s Least Healthy People: Toward a Framework Convention on Global Health*, 96 GEO. L.J. 331, 363 (2008) (“Sometimes donors exert control over the use of funds that discourages local leaders from taking ownership over programs. Strings attached to funding can even be detrimental to the public’s health. No one undervalues the key role played, for example, by PEPFAR, but the Bush Administration’s insistence on abstinence, fidelity, and faith-based programs undermines effective prevention and harm-reduction strategies.”).

102. Kinney, *supra* note 92, at 164; *see also* Fillinger, *supra* note 89, at 349 (noting that “the policy rescinds previous funding requirements to utilize a multi-sectoral approach to HIV/AIDS prevention [that] had been put in place by advocates of a science-based approach.”).

103. Kinney, *supra* note 92, at 184.

receiving funds subject to USAID restrictions suggested. . . they resented increased control over their programming and the [restriction on their] ability to partner with other organizations.”<sup>104</sup> One activist said:

We’re not supposed to work together anymore, but we do. We need their help for translation, to help find their families and villages, and for their contacts in indigenous communities. We’re working to improve [our recognition in the community], but sex worker advocates are still better at it, because they’re trusted.<sup>105</sup>

The importance of cultivating trust within the host community and providing services that those most in need of feel comfortable seeking out cannot be overemphasized. A restrictive and potentially demeaning policy such as the “prostitution pledge” can detract from any such trust.

***c. The Prostitution Pledge Inhibits Impact Work That Has Met With Marked Success in Many Countries***

Finally, this pledge is juxtaposed with the most successful documented cases combating the spread of HIV. China, Thailand, and Brazil have all received accolades for fighting against the disease when, in its dawn on the global front, it appeared to hit them most fatally.<sup>106</sup> All three have, in their own manner, incorporated the educating, servicing, treatment, and testing of sex workers in their countries. When HIV began permeating Thailand, the Thai government unabashedly focused its effort to tackle the problem of commercial sex trade. In a major advertising campaign, the Thai government encouraged condom use in all commercial sexual encounters.<sup>107</sup> Although prostitution is illegal in Thailand, the “widespread and entrenched character of the Thai sex industry” rendered such an uncompromising policy necessary.<sup>108</sup> Thailand’s efforts have been rewarded with the first population-level declines for the rate of infection in Asia.<sup>109</sup>

Epidemiological data indisputably shows that non-discriminatory programs such as Thailand’s, which provide aid and education to at-risk communities, are successful. By comparison, the decision to restrict funding to the organizations that provide such aid cannot be said to be for the benefit of the cause or on the basis of science. “Some peer-outreach, rights-based sex worker organizations lauded for their development of ‘best practices’ by international organizations such as UNAIDS have already been stripped of their USAID funds for refusing to sign the pledge. . . NGOs and advocacy groups asserted that the broad language of the prostitution-pledge funding restriction has a ‘chilling effect’ on programs in the

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104. *Id.* at 185.

105. *Id.*

106. *Id.* at 94; *see also* Sean C. Clark, Note, *Never in a Vacuum: Learning From the Thai Fight Against HIV*, 13 WM. & MARY J. WOMEN & L. 593, 601-05 (2007) (discussing the successful programs Thailand implemented to slow the spread of HIV/AIDS, particularly by reaching out to female sex workers).

107. *Clark, supra* note 106, at 602-03

108. *Id.* at 601-02.

109. *Id.* at 603.

field, as NGOs anxious to secure grants curtail effective prevention programs[.]”<sup>110</sup> When the organizations that are working to provide care at the grassroots level are reporting negative effects of the United States’ anti-prostitution policies, those policies ought to be reconsidered, if provision of care is the actual goal.<sup>111</sup>

**B. *Effects of the Leadership Act and the Prostitution Pledge on the Potential Impact of PEPFAR and the Solution to the HIV/AIDS Crisis***

**1. Disproportionate Funding of Faith-Based Care Givers**

Despite being heralded as “A Quiet Revolution,” former President Bush’s support of Faith-Based and Community Initiative programs was anything but quiet.<sup>112</sup> It was widely promoted by the White House and affected much of his office’s policy making, including PEPFAR and its implementation. In an address on the Faith Based and Community Initiative (FBCI) to the Jericho Program of Maryland,<sup>113</sup> Bush said:

When we begin [sic] the work we didn’t settle for just opening an office in the White House; we opened 11 offices for faith-based and community initiatives throughout the federal government. It’s one thing for the White House to have an office. But most of the money — or all the money, for that matter — is appropriated to different Cabinet officers and their secretariats, and then those distribute the money. And so we wanted to make sure that this faith-based initiative was rooted throughout the government.<sup>114</sup>

In a fact sheet published by the White House in 2008, PEPFAR was described as representing a “massive-scale implementation of the [Faith-Based] Initiative’s vision.”<sup>115</sup> Highlighting that more than twenty percent of PEPFAR partners were faith-based, the White House touted the focus on their principles as evidence of the program’s success.<sup>116</sup>

The Office of the U.S. Global AIDS Coordinator reported that PEPFAR has reached more than 140 million people with messages intended to prevent sexual transmission of HIV. Of this total, “roughly two-thirds of people received

110. Kinney, *supra* note 92, at 177.

111. *Id.*

112. President Bush Discusses the Faith-Based and Community Initiative, Jan. 29, 2008 <http://georgewbush-whitehouse.archives.gov/news/releases/2008/01/20080129-1.html> [hereinafter Bush Discusses] (last visited Feb. 5, 2010).

113. The Jericho Program of Maryland is run by the Episcopal Community Services of Maryland, and funded by the Department of Labor’s Prisoner Re-Entry Initiative to help men rebuild their lives after prison. Jericho Reentry Program, <http://www.ecsm.org/programs/jericho.php> (last visited Feb. 5, 2010).

114. Bush Discusses, *supra* note 112.

115. Fact Sheet: The Faith-Based and Community Initiative: A Quiet Revolution in the Way Government Addresses Human Need, Jan. 28, 2008, <http://georgewbush-whitehouse.archives.gov/news/releases/2008/01/20080129-8.html> (last visited Feb. 5, 2010).

116. *Id.*

abstinence-until-marriage/be faithful messages and roughly one-third received condoms and other prevention messages.”<sup>117</sup> The same distribution is found in the training or retraining of people for the prevention programs, two-thirds of whom were trained for abstinence-until-marriage/be faithful programs.<sup>118</sup>

The Ugandan program from which PEPFAR’s ABC formula is derived was rooted in a balance of teaching, communication, and care. The messages of abstinence, be-faithful, and condom use were disseminated equally and openly.<sup>119</sup> The Ugandan leadership attacked the epidemic with the “full spectrum of . . . efforts.”<sup>120</sup> This included strong political leadership; open discussion of sex and AIDS, including by prominent figures speaking publicly about being infected; state leadership actively working with native witch doctors and traditional healers to disseminate the message and refer those infected to Western doctors; working closely with religious organizations while also promoting and providing condom usage; and providing nonjudgmental AIDS education to prostitutes and men who have sex with men.<sup>121</sup>

In contrast, PEPFAR’s budget allocations make such a balanced integration of programs and methods impossible, and instead fractions care into discrete program groups.<sup>122</sup> The focus on funding of abstinence-only teaching, which is almost

117. PEPFAR IMPLEMENTATION, *supra* note 6, at 123.

118. *Id.*; DATA: debt AIDS trade Africa, HIV/AIDS, TB and Malaria, What is the President’s Emergency Plan for AIDS Relief?, <http://data.d202.org/node/275> (last visited Feb. 5, 2010) (noting that Bush’s 2005 announcement of the “New Partners Initiative,” providing \$200 million in PEPFAR grants to organizations with little experience working with the U.S. government, in conjunction with the administration’s prioritization of faith-based care providers, is troublesome in that “ideologically aligned organizations without the experience or capacity to implement HIV/AIDS programs will be relied upon to deliver these complicated interventions.”); *but see* Allison Herling and Ray Martin, *Faith-Based Organizations are Getting All the Money: Reality or Rumor*, Global Health Council (Dec. 2005), <http://www.globalhealth.org/publications/article.php3?id=1404> (arguing that the concern of over-funding of faith-based organizations is largely unfounded, finding the faith based allotment of PEPFAR funds has remained at a quarter or just below. This article also notes that, “abstinence until marriage is still the primary message for young people and information about condoms must be coupled with information about abstinence as the preferred – and only 100 percent effective – method of HIV prevention[,]” and was written by the Executive Director of Christian Connections for Health).

119. Tina Rosenberg, *On Capitol Hill, Ideology Is Distorting an African AIDS Success*, N.Y. Times, Apr. 28, 2003, at A30.

120. *Id.*

121. *Id.*

122. PEPFAR IMPLEMENTATION, *supra* note 6, at 99-100:

The lack of an evidence base for the budget allocations and a rationale linking the allocations to performance targets and goals has adversely affected implementation . . . PEPFAR’s categories of prevention, treatment, and care and the subcategories within them fragment the natural continuum of needs and services, often in ways that do not correspond to global standards, do not align with an individual focus country’s perspective, and do not permit optimal management of patients and their families. . . The suballocations and corresponding subcategories . . . [are] problematic. . . . According to many of the Country Teams, the abstinence-until-marriage allocation within the prevention category has been the most difficult to manage. . . By requiring the Country Teams to isolate funding for these activities,

always linked to faith, makes working with community leaders such as witch-doctors unlikely. The Smith Amendment allows organizations to offer services related only to abstinence and faithfulness, ignoring the third element of condoms, and refusing care to whomever they find objectionable.<sup>123</sup> This creates an environment in which the unjustifiable constraints on the program threaten to suffocate its very purpose.<sup>124</sup>

Further, when the Gag Rule was in place, it could be evaded only if an organization received exclusively PEPFAR funds, and no other funding grants. Therefore, only an organization that would not provide, refer, or even counsel on the option of abortion, and that signed the anti-prostitution pledge, could receive funding through PEPFAR. Since two-thirds of PEPFAR funds were already allocated to faith-based organizations that could refuse to provide any service related to abortion via the Smith Conscience Amendment, this left few organizations not affiliated with a church standing to fulfill this narrow segment.<sup>125</sup> Those that were left intact were nevertheless deterred from treating the most at-risk communities or integrating their work with organizations that do.<sup>126</sup> The Gag Rule may have since been rescinded, but the service providers have been unable to reorganize and return quickly, and are still noticeably absent.

## 2. Detrimental Effect to Organizations Working Toward Eliminating Forced Prostitution and Human Trafficking

The pledge not only impeded work to prevent further HIV infection, but also handicapped the fight against prostitution and trafficking itself.<sup>127</sup> By restricting the organizations eligible for funding, “the development and implementation of effective interventions in targeted communities, such as those of [migrants] or commercial sex workers” is crippled.<sup>128</sup> Many if not all of the countries targeted by PEPFAR have a population of marginalized women who sporadically rely on the

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this budget allocation has undermined the teams’ ability to integrate prevention programming.

123. See Dunn-Georgio, *supra* note 84 and accompanying text.

124. See generally AVERT: *HIV and AIDS in Uganda*, <http://www.avert.org/aidsuganda.htm> (reporting the waning praise and success of Uganda’s prevention efforts since PEPFAR began channeling large sums of money into pro-abstinence and anti-condom faith-based organizations, shifting the emphasis to A and B just because of this disproportionate funding) (last visited Feb. 5, 2010).

125. See Schooley, *supra* note 95, at 26 and accompanying text.

126. See Fillingier, *supra* note 89, at 349-50 (arguing that the requirement of certifying opposition to prostitution and sex trafficking “rescinds previous funding requirements to utilize a multi-sectoral approach to HIV/AIDS prevention. . . . contrary to past USAID practice and scientific evidence regarding [its] effectiveness. . . [and] the lack of guidance on what constitutes promoting prostitution has created a chilling effect on HIV/AIDS programming that relates [sic] to sex workers.”).

127. *Id.* (“the policy acts to further stigmatize sex workers. It exacerbates the difficulty of helping them protect their health and the health of others, undermines efforts to encourage healthier means of employment and ignores the social and economic vulnerability that drives people into sex work.”).

128. Kinney, *supra* note 92, at 160-61.

sex trade to maintain sustenance for themselves and their families.<sup>129</sup> The pledge is vague as to whether such sporadic commoditization is considered “prostitution” for the purposes of the Act; therefore organizations will close their doors to such women in their attempt to keep their much needed funding in place.<sup>130</sup>

Tamera Fillinger, a former Foreign Service legal advisor to USAID, fears that while it “does not sound overly restrictive on its face. . . . [T]he prohibition on promoting the practice of prostitution leaves room for an overly-broad interpretation that could compromise any project that includes sex workers.”<sup>131</sup> Noting that sex workers are a primary “vector” of transmission, they should therefore play a vital role in any prevention program.<sup>132</sup> However, by requiring organizations to certify their condemnation of sex work, the policy stigmatizes rather than involves sex workers.<sup>133</sup> The lack of guidance regarding what constitutes the promotion of prostitution has the result of chilling any program that relates in any way to sex workers.<sup>134</sup> Furthermore, fund recipients are being threatened by an aggressive USAID Inspector General that may impose civil and criminal liability for taking actions against the pledge.<sup>135</sup>

It is clear that “this prostitution pledge even applie[s] to those programs working with commercial sex workers to prevent HIV infection.”<sup>136</sup> As a result, the pledge requirement effectively closes out the organizations with the greatest experience in the field and the most established connections to targeted communities,<sup>137</sup> while also alienating and stigmatizing many high risk groups.<sup>138</sup> Since groups at high risk of trafficking, sexual exploitation, and contracting or spreading HIV most often will not take advantage of health services unless they are “provided in a non-judgmental, non-discriminatory context,” they may not seek out the care offered by the approved organizations that take the place of those they frequented in the past.<sup>139</sup>

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129. Fred Katerere, *Mozambique: Respecting Sex Work*, AFROL NEWS, Nov. 26, 2008 (In Mozambique, a PEPFAR host country, the deputy Minister of Women’s Affairs and Social Welfare has recognized the intersection between poverty, sex-work, violence and disease. In a courageous move, he has called for the urgent establishment of legislation legalizing prostitution and protecting the fundamental rights of sex workers. “Legalization would not only help the women to survive by the money they make from their work, but it could also help in cutting down the high figures of HIV/AIDS rates . . . forced sex increases the risk of HIV . . . Legalizing sex work could help to protect these women from violence, protecting both their rights, and their health.”)

130. Fillinger, *supra* note 89, at 349-50.

131. *Id.* at 349.

132. *Id.*

133. *Id.*

134. *Id.* at 346-50.

135. *Id.* at 350.

136. William A. Smith, *The Politicization of HIV Prevention and the Cynicism of U.S. Assistance to Africa*, 35 HUM. RTS. 18, 18 (2008).

137. Kinney, *supra* note 92, at 163.

138. *Id.* at 162.

139. *Id.* at 163.

Many NGOs have reported that this policy has taken a “considerable toll” on their work and the kinds of organizations able to function in the field, and forecloses the most at-risk communities from enjoying any of the services provided.<sup>140</sup> It should also be remembered that the provision of condoms under PEPFAR is restricted to at-risk communities. When those communities most at risk are being closed out and stigmatized through the Prostitution Pledge, even their access to condoms will likely be threatened.

### 3. PEPFAR Receives Criticism from the Feminist Community

There is a critical need to develop strategies to address the gender dimension of the HIV/AIDS epidemic to ensure success and quality of the services provided, despite gender concerns being explicitly written into the PEPFAR authorization legislation.<sup>141</sup> Listed under the “Activities Supported” section is “assistance for the purpose of increasing women’s access to employment opportunities, income, productive resources, and microfinance programs.”<sup>142</sup> The broad ideological stance of the Act has subsumed this goal.<sup>143</sup>

PEPFAR has taken many steps to advance its work on gender and AIDS. It established a Gender Initiative on Girls’ Vulnerability to HIV,<sup>144</sup> included an initiative to collect sex disaggregated data,<sup>145</sup> established the Interagency Gender Technical Working Group,<sup>146</sup> and encouraged the creation of gender focal points to build capacity in the country teams.<sup>147</sup> However, it is difficult to distinguish which programs are concentrated on gender issues, which gender issues they are focused

140. *Id.* at 164.

141. Janet Fleischman, *An Analysis of the Gender Policies of the Three Major AIDS Financing Institutions: The Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Bank and the President’s Emergency Plan for AIDS Relief*, UNAIDS (July 2008) [hereinafter *Gender Policies*] available at

[http://data.unaids.org/pub/Report/2008/20080715\\_sitan\\_aidsfinancingmechanisms\\_en.pdf](http://data.unaids.org/pub/Report/2008/20080715_sitan_aidsfinancingmechanisms_en.pdf).

142. 22 U.S.C. § 2151b-2(d)(1)(J) (2008).

143. See discussion *infra* text accompanying notes 138-152.

144. USAID, *Statement of Work, PEPFAR Gender Initiative on Girls’ Vulnerability to HIV*, [http://ghiqc.usaid.gov/projsearch/docs/pepfar/pepfar\\_sow-bid.pdf](http://ghiqc.usaid.gov/projsearch/docs/pepfar/pepfar_sow-bid.pdf) (“The PEPFAR Gender Initiative on Girls’ Vulnerability to HIV has been developed as part of a set of PEPFAR special gender initiatives. The program aims to prevent HIV infection among 13- to 19-year-old girls, by developing innovative program interventions to successfully modify contextual factors associated with increased sexual risk behavior and rates of HIV infection among these adolescents and assessing the feasibility and effectiveness of these interventions and their potential for sustainability, scale-up, and transferability to other settings. Botswana, Malawi and Mozambique are the three countries selected for this Initiative.”).

145. *Gender Policies*, *supra* note 141, at 17.

146. The Interagency Gender Working Group is a network of nongovernmental organizations, USAID, cooperating agencies, and the Bureau for Global Health of USAID. Its goal is to foster sustainable development and improve reproductive health and HIV/AIDS outcomes through promoting gender equity. INTERAGENCY GENDER WORKING GROUP, <http://www.igwg.org> (last visited Feb. 8, 2010).

147. *Gender Policies*, *supra* note 141, at 17.

on, and the level of funding specifically allocated to them. Furthermore, there are some notable gaps in PEPFAR's work on gender, including little focus on preventing unintended pregnancies apart from teaching abstinence and delay of sexual debut, and weak integration with reproductive health and family planning programs.<sup>148</sup> Notwithstanding the gaps, PEPFAR's mission, at the very least, includes the desire to impact the gender dimensions of the epidemic.

One major critique focuses on the aforementioned lack of integration of reproductive health and sexual rights with HIV/AIDS prevention. The failure to engage with the current international movement to promote these rights is seen to have a "devastating impact on women."<sup>149</sup> Even today an estimated 68,000 women die globally each year from unsafe abortions due to unmet needs for contraceptive services and laws that restrict and criminalize abortions, forcing them out of the hands of health providers and into the shadows.<sup>150</sup> The recent emergence of anti-abortion and anti-family planning policies has sharply detracted from what was once a record level of United States support for voluntary family planning programs and multilateral agreements recognizing sexual and reproductive freedoms.<sup>151</sup>

PEPFAR's "Prostitution Pledge" cuts deeply into both the notion of sexual freedom and the freedom of speech. Shepherding condoms into the role of technology to be provided only for those most at-risk, has robbed the general community of an essential tool of reproductive freedom. An estimated two-hundred million women each year have unmet contraceptive needs.<sup>152</sup> After meeting with great success through condom distribution in conjunction with other programs, Uganda endured a condom crisis in 2004.<sup>153</sup> Fearing that the quality of condoms being distributed was poor, the Ugandan government incinerated millions of condoms, leaving a severe scarcity in 2005.<sup>154</sup> Uganda also implemented new taxes, making it impossible for many people to afford what condoms were available.<sup>155</sup> Some experts believe that America was largely to blame for the shortages.<sup>156</sup>

Finally, "[a]bstinence-until-marriage programs ignore basic civil rights to obtain information, make informed choices about sex and reproduction, and to live

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148. *Id.* at 18.

149. Sippel, *supra* note 52, at 13.

150. *Id.*

151. *Id.* at 14.

152. *Id.* at 13.

153. AVERT, Uganda page, *supra* note 1, at 5.

154. *Id.*

155. *Id.*

156. *Id.*; see also PEPFAR IMPLEMENTATION, *supra* note 6, at 38 (the momentum of condom distribution was lost in 2004 when the Ugandan government issued a nationwide recall of condoms distributed free in health clinics, though some experts, such as Stephen Lewis of the Stephen Lewis Foundation and formerly the Special Envoy to UN Secretary-General Kofi Annan, believe that the extreme American policies represented in PEPFAR were largely to blame. One such policy is that PEPFAR-supported programs cannot obtain their condoms through the global commodities fund that developing countries use).



free from discrimination.”<sup>157</sup> Feminist scholars see these policies as not only impinging heavily on what is declared to be the ultimate goal of the program, the care of patients and prevention of the further spread of HIV/AIDS, but also annulling the mission of gender equalization.

Yet another striking example of PEPFAR’s ideological policies cutting into grassroots efforts preexisting the Act can be seen in South East Asia. One of the casualties of the anti-prostitution policies has been a Cambodian NGO working on educating and empowering commercial sex workers to alleviate the conditions that have quickened the sexual infection rate and led to a dramatic number of women caught in sex trafficking. Such non-traditional programs work by teaching English to sex workers, and those in high risk of being brought into the sex trade, enabling them to assert their rights, demand condom use with clients, or even learn skills that provide an exit from sex work to traditional employment.<sup>158</sup>

#### 4. Constitutional Concerns

In addition to the direct impact that the “Prostitution Pledge” has on the ability of organizations to provide the services discussed above, broader consequences must also be noted. NGOs and their advocates have averred that terminating or refusing funding to organizations that have not taken the pledge “essentially mandate[s] civil organizations to endorse government ideologies to the detriment of the very communities they intend to assist.”<sup>159</sup> “Not only have funding restrictions and terminations disrupted crucial health and social welfare services for impoverished peoples throughout the world, such policies undermine the utilization and development of best practices in the field and arguably constitute violation of international laws.”<sup>160</sup> Best practices in this iteration envision programs that successfully work within at-risk communities in a non-discriminatory and non-judgmental fashion, such as the programs in Thailand discussed above.<sup>161</sup>

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157. Sippel, *supra* note 52, at 15; see Suzanne Petroni and Patty Skuster, *The Exportation of Ideology: Reproductive Health and Rights in U.S. Foreign Policy*, 35 HUM. RTS. 9, 10(2008) (noting that the “Religious Right’s” unprecedented access to the Bush administration, and influence in issues related to sexuality, has impacted both domestic and international family planning with an aim to disengage from long-standing agreements regarding reproductive health).

158. Kinney, *supra* note 92, at 177. While Cambodia is not itself a PEPFAR focus country, this is but one example of the types of non-governmental organizations providing services to those most at need, unable to continue to do so as a result of the stringent requirements of gaining American aid.

159. Kinney, *supra* note 92, at 163.

160. *Id.* at 164; see, e.g., The Universal Declaration of Human Rights, G.A. Res. 217, art. 19, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”; International Covenant of Political and Civil Rights art 19 (1), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (“Everyone shall have the right to hold opinions without interference.”).

161. Kinney, *supra* note 92, at 162-63; see also Clark, *supra* note 106 and accompanying text.

Domestically, this “Anti-Prostitution Pledge” has been found unconstitutional by the District Court for the Southern District of New York, when applied to funding for domestic NGOs.<sup>162</sup> The court likened the pledge to “speech, or an agreement not to speak, [that has been] compelled or coerced as a condition of participation in a government program.”<sup>163</sup> The government’s response has not been to withdraw or amend the policy, but rather to put out a directive exempting only four specific organizations from the pledge.<sup>164</sup>

The government’s response did not improve the courts view of the pledge’s constitutionality, but rather detracted from it. In its decision to award a preliminary injunction enjoining the withholding of funds otherwise authorized by the act due to failure to meet the Prostitution Pledge requirements,<sup>165</sup> the court found that “the Government’s arguments are deeply undercut by the Act’s provisions excepting certain organizations from the Policy Requirement.”<sup>166</sup> In this decision the pledge was found to apply unconstitutional viewpoint discrimination and to unconstitutionally compel speech.<sup>167</sup>

The court found that the clear purpose of PEPFAR is to combat the spread of HIV/AIDS and other diseases and to make the United States a leader in that effort.<sup>168</sup> The focus is meant to be on eradicating the disease and not on eradicating prostitution.<sup>169</sup> One of the choices Congress made in the strategy to meet this goal is to eradicate prostitution as it is one cause linked to the spread of HIV/AIDS.<sup>170</sup> Whether or not Congress’ approach is better than those advocated by the plaintiff organizations (including empowering women and changing the economic and societal status of their communities), does not *per se* determine its constitutionality.<sup>171</sup> “Congress is free to choose which strategies best serve the goal

162. *Alliance for Open Soc. Int’l v. U.S. Agency Int’l Dev.*, 430 F. Supp. 2d 222 (S.D.N.Y. 2006), *remanded*, 254 F.App’x. at 843, 2007 WL 3334335 (2d Cir. Nov. 8, 2007) (remanding the government’s appeal of a preliminary injunction for further findings of fact on a new policy implemented by the U.S. Agency for International Development and the Department of Health and Human Services); the Department of Justice dropped its appeal in July of 2009, Jodi Jacobson, *DOJ Drops Appeal of “Prostitution Pledge” Injunction* RHRealityCheck.org, July 22, 2009, <http://www.rhrealitycheck.org/blog/2009/07/21/departement-justice-withdraws-appeal-injunction-against-prostitution-pledge> (last visited Feb. 4, 2010).

163. *Alliance for Open Soc. Int’l*, 430 F. Supp. 2d at 275.

164. USAID, Acquisition & Assistance Policy Directive, AAPD 05-04, Amendment 2 (October 16, 2007) (AAPD) (exempting the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency from the prostitution pledge.) [http://www.usaid.gov/business/business\\_opportunities/cib/pdf/aapd05\\_04\\_amendment2.pdf](http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04_amendment2.pdf).

165. *Alliance for Open Soc. Int’l*, 430 F. Supp. 2d at 229, 278.

166. *Alliance for Open Soc. Int’l v. U.S. Agency Int’l Dev.*, 430 F. Supp. 2d 222, 274 (S.D.N.Y. 2006), *remanded*, 254 F.App’x. at 843, 2007 WL 3334335 (2d Cir. Nov. 8, 2007)

167. *Id.*

168. *Id.* at 242.

169. *Id.*

170. *Id.* at 242-43

171. *Alliance for Open Soc. Int’l v. U.S. Agency Int’l Dev.*, 430 F. Supp. 2d 222, 243 (S.D.N.Y. 2006), *remanded*, 254 F.App’x. at 843, 2007 WL 3334335 (2d Cir. Nov. 8, 2007)

to fight HIV/AIDS.”<sup>172</sup> However, the pledge has the negative effects of squashing the voice of NGOs, whose “far-reaching role . . . [is] presenting issues of concern to governmental officials, as well as contributing to public debate on contested social issues;”<sup>173</sup> and of placing a “blanket ban on certain constitutionally protected speech.”<sup>174</sup> While enforcing this constitutionally burdensome provision, Congress also does not explain how the carve-out of four organizations and any UN agency from compliance with the pledge, furthers their stated goals.<sup>175</sup> For these reasons, the court found the pledge was not narrowly tailored to the stated goals. The court also found the pledge to unconstitutionally compel speech, since the requirement “essentially enlists the government’s private partners to convey the government’s message and renders these organizations, on this particular issue, de facto mouthpieces for its view.”<sup>176</sup>

Furthermore, a preliminary injunction was found necessary because if allowed to continue withholding funds, plaintiffs would suffer irreparable harm.<sup>177</sup> Holding that the pledge has effects so debilitating as to require a preliminary injunction when applied to American-based organizations is a most telling statement as to the lasting and destructive effects it has on the general community of providers of HIV/AIDS services. Nevertheless, the injunction does not reach internationally headquartered providers.

#### IV. PEPFAR AS A “SYMBOLIC CRUSADE”

In his book *Symbolic Crusade: Status Politics and the American Temperance Movement*, Joseph R. Gusfield proclaimed that “[a]s status groups vie with each other to change or defend their prestige allocation, they do so through symbolic rather than instrumental goals.”<sup>178</sup> Gusfield was referring to the rural, Protestant middle class’ loss of influence as immigrants grew in number and urban centers grew in dominance.<sup>179</sup> The push for intoxicant abstinence laws that resulted is a perfect frame through which to look at the conservative, religious right’s push for sexual abstinence laws today.

Lawrence O. Gostin, in his *Proposal for a Framework Convention on Global Health*, wrote that “although well intentioned, [in PEPFAR] the Bush Administration’s insistence on abstinence, fidelity, and faith-based programmes

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172. *Id.* at 243.

173. *Id.* at 262.

174. *Id.* at 270.

175. *Id.* at 269.

176. *Alliance for Open Soc. Int’l*, 430 F. Supp. 2d at 276.

177. *Id.* at 278 (finding effects such as being chilled from planning and participating in a conference regarding sex work, prohibiting the continuance with private funds of work to legalize prostitution in Brazil, and the debilitating effect on organizations fundraising as their donors expect them to adhere to the principles of an open society, to be irreparably harmful).

178. GUSFIELD, *supra* note 21, at 21.

179. *Id.* at 4.

undermines effective prevention and harm reduction strategies.”<sup>180</sup> Despite extensive literature regarding the counterproductive qualities of the PEPFAR legislation, the reauthorization reinstated every controversial element.<sup>181</sup> This sent the message that the symbolic, moral elements were the essence and purpose of the legislation. Gusfield wrote, “[e]ven if the law is not enforced or is unenforceable, the symbolic import of its passage is important to the reformer . . . [t]he public support of one conception of morality at the expense of another enhances the prestige and self-esteem of the victors and degrades the culture of the losers.”<sup>182</sup>

#### A. *The Symbolic Crusade of the American Temperance Movement*

Gusfield’s book describes the relationship between abstinence attitudes, the organized Temperance movement, and conflicts arising between divergent subcultures in America.<sup>183</sup> Temperance began as a social movement in the nineteenth century, when the ‘native’ American Protestants “adhered to a culture in which self-control, industriousness, and impulse renunciation were both praised and made necessary”.<sup>184</sup> As the twentieth century took shape, these traits gave way to a more urban, less religious segment of society that grew rapidly.<sup>185</sup> The temperance adherent first tried to impress his religious dedication and the respectability of a sober middle-class life as the goal of America.<sup>186</sup> His attempts at *assimilative reform* lost their effectiveness when the non-abstainers acquired power and were no longer a group he could pity or help.<sup>187</sup> The urban lifestyle became dominant, rejecting and supplanting the former status group.<sup>188</sup> The abstainer then began to use *coercive reform*, feeling the need to “shore up his waning self-esteem by inflicting his morality on everybody.”<sup>189</sup> He did this by pushing for legislation which codified his moral values and made them law to be followed, transgression of which would be punished.<sup>190</sup>

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180. Gostin, *Framework*, *supra* note 14, at 990-91.

181. Center for Health and Gender Equity, *U.S. Global AIDS Policy and HIV Prevention, Law to Reauthorize the President’s Emergency Plan For AIDS Relief* (September, 2008), <http://www.pepfarwatch.org/images/PEPFAR/globalaidsandhivpolicy.pdf> (“[T]he [reauthorization] Act . . . retains key elements that have seriously undermined prevention efforts, particularly among women and youth.”).

182. GUSFIELD, *supra* note 21, at 4-5.

183. *Id.* at 3.

184. *Id.* at 4.

185. *Id.*

186. *Id.*

187. *Id.* at 6 (In *assimilative reform* “the reformer was sympathetic to the plight of the urban poor and critical of the conditions produced by industry and the factory system.” It was believed that “[i]n the doctrines of abstinence they could still offer the poor and the immigrants a way of living which had the sanction of respect and success attached to it.”).

188. GUSFIELD, *supra* note 21, at 7.

189. *Id.* at 7, 87-88 (“The *coercive reformer* does not perceive the subjects of his reform with sympathy or warmth. . . The violators of norms are now enemies . . . [and he] has begun to feel that his norms may not be as respected as he has thought . . . [so he pushes] for political enforcement [as] an attempt to defend the position of social superiority . . .”) (emphasis added).

190. *Id.* at 7-8.

When seeking to reclaim social respect and honor, the abstainer sought public acts through which he could reassert his dominance.<sup>191</sup> When his attempts at winning the non-abstainers to his system of belief failed, he moved to legislate those beliefs into a system of law. “Converting the sinner to virtue is one way; law is another.”<sup>192</sup> As status groups compete with each other to gain dominance, they do so through symbolic rather than instrumental goals.<sup>193</sup>

Conceiving political acts as symbolic acts is enlightening when studying PEPFAR. “Expressive movements in their ‘pure’ form are divorced from any goal in terms of changes demanded in the social system.”<sup>194</sup> This can be seen in expressions such as the Prostitution Pledge, which takes no steps to change the environment that breeds prostitution, while demanding a symbolic declaration opposing it.<sup>195</sup>

When symbolic acts were taken to criminalize alcohol, the only risk was losing the enjoyment of that vice, whereas when symbolic acts are taken in the prevention of disease, they risk life. The use of symbolic acts in the context of disease prevention has resulted in replacing proven, scientific means of prevention with ideological programs, regardless of functionality or success.

***B. Analysis of the “New Right’s” Fulfillment of the “Know-Nothing’s” Role in Status Politics and Coercive Reform***

The Know-Nothing party was formed when the Whigs and Democrats split over anti-slaveryism.<sup>196</sup> The abolitionists (those opposed to slavery) joined with the prohibitionists (those seeking to abolish liquor), sharing the same Protestant ideology. The Temperance Movement also allied with the anti-alien movement, completing the formation of the Know-Nothings.<sup>197</sup> In the ensuing polarization process, the Know-Nothings needed to defeat the Irish and Germans, who opposed Temperance programs, and halt the influx of additional immigrants who would ally with them.<sup>198</sup> The Know-Nothing platform was centered on restricting immigration by effectively shutting the borders, and legislating for abstinence.<sup>199</sup>

One example of the party’s rhetoric, blaming immigrants, poverty, and alcohol for all of society’s ills, was a tract written in the late 1840s titled, “Temperance Lecturer: Being Facts Gathered from a Personal Examination of All the Jails and Poor-Houses in the State of New York, Showing the Effects of

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191. *Id.* at 4.

192. *Id.*

193. *Id.* at 11.

194. GUSFIELD, *supra* note 21, at 23.

195. *See id.* at 21 (“As status groups vie with each other to change or defend their prestige allocation, they do so through symbolic rather than instrumental goals.”).

196. *Id.* at 54.

197. *Id.* at 56.

198. *Id.* at 57.

199. GUSFIELD, *supra* note 21, at 52.

Intoxicating Drinks in Producing Taxes, Pauperism, and Crime.”<sup>200</sup> This treatise linked the consumption of alcoholic beverages to economic misfortune, crime, and even higher taxes for the rest of the community, including abstainers.<sup>201</sup> Upon the failure of the Temperance Movement, the passing of Amendment XXI,<sup>202</sup> which recalled the prohibition amendment, the Know-Nothings retreated.<sup>203</sup> Their ideology and method of symbolic politics did not die, and began to reappear a few decades later as the New Right.

In the 1970's, after the *Roe v. Wade* decision and in the context of increasing women entering the labor force, the New Right began to fear that the structure of the traditional family was in crisis.<sup>204</sup> They were adamantly opposed to the Equal Rights Amendments.<sup>205</sup> While favoring equal opportunity and individual freedom, their conception of opportunity and freedom belonged only to their status group, the “native” white male. To the New Right, freedom and opportunity exists only when in a structure of economic, sexual and racial inequality.<sup>206</sup> They feared women leaving the home, gaining equal footing with men, and breaking down the sexual societal structure that represented their dominance.<sup>207</sup> The New Right in American politics attempted to remedy their losses in the abortion and equal rights court decisions by enforcing the epistemology of male dominance through law.<sup>208</sup>

From the sixties to the mid seventies, the White House and Congress strongly and consistently supported family planning programs.<sup>209</sup> Opposition to abortion by the Catholic Church began to politicize family planning assistance programs, but Supreme Court decisions made its abolition impossible in the United States.<sup>210</sup> In part a reaction to the New Right's loss at home, this brought to the Global South the first of what would become numerous funding restrictions hindering women's ability to access reproductive care.<sup>211</sup> Only months following *Roe*, Senator Helms

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200. *Id.* at 56 (written by Samuel Chipman).

201. *Id.*

202. U.S. CONST. amend. XXI, §§ 1, 2 (Section 1 reads, “the eighteenth article of amendment to the Constitution of the United States is hereby repealed,” while Section 2 allows states to keep prohibition laws intact and demands neighboring states to respect this, declaring, “the transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”).

203. GUSFIELD, *supra* note 21, at 126.

204. James Gathii, *Exporting Culture Wars*, 13 U.C. DAVIS J. INT'L L. & POL'Y 67, 75 (2006).

205. *Id.* at 76.

206. *Id.*

207. *Id.* at 77.

208. *Id.*

209. Suzanne Petroni & Patty Skuster, *The Exportation of Ideology: Reproductive Health and Rights in U.S. Foreign Policy*, 35 HUM. RTS. 9, 9 (2008).

210. *Id.*

211. *Id.*; American University: Center for the Global South, <http://www1.american.edu/academic.depts/acainst/cgs/about.html> (defining “Global South” as the nations of Africa, Central and Latin America, and most of Asia) (last visited April 18, 2010).

led a successful effort to prohibit U.S. foreign aid for the provision of abortion.<sup>212</sup> This was the start of what became the Global Gag Rule, put into effect upon Reagan's election.<sup>213</sup> The New Right's insistence upon legislating sexual abstinence is strikingly similar to the Know-Nothing Party's insistence on temperance legislation, yet far more onerous for the lives at stake, and the lasting effects these policies will have on the network of aid workers and care providers for years to come.

While they had influence over Reagan and George H.W. Bush, the Religious Right<sup>214</sup> obtained unprecedented access to the George W. Bush administration. Issues of sexuality and family planning were at the very core of their crusade, which led to the annihilation of health rights for women in the Global South who resided in countries that accept American aid.<sup>215</sup> The New Right's policy and programs for non-governmental recipients mirror their asserted moral values, rather than promoting effective reproductive health.<sup>216</sup> The United States' exportation of this moral code and imposition of its own culture wars on developing countries is a form of cultural imperialism.<sup>217</sup> In exporting restrictions on the provision of funding for HIV/AIDS treatment and prevention, this cultural imperialism jeopardizes thousands, if not millions, of lives.

The director of International Health Policy for the Health Global Access Project ("HealthGAP") described the George W. Bush Administration as having a pattern of contradiction between word and deed, stemming from political calculation.<sup>218</sup> Specifically noting the Bush Administration's resistance to the Global Fund, the director sees it as motivated not by logic or fact, but by political considerations.<sup>219</sup> The Global Fund is subjected to regular audits by the General Accounting Office, and the administration could not control the choice of bilateral partners to receive funds.<sup>220</sup> To maintain his political viability, Bush ceded large swaths of his policy to the Christian Right, traditionalists shaping American public policy and international funding so as to mirror their own values regardless of the impact on the health and human rights of those affected.<sup>221</sup> As a result, the health and rights of women in the Global South have become victims of the "ideological hijacking of U.S. policies."<sup>222</sup>

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212. *Id.*

213. *Id.* at 9-10.

214. In modern discussion of the "New Right" in American politics, the term is often used interchangeably with the terms "Religious Right" and "Christian Right," as I will do herein.

215. Petroni & Skuster, *supra* note 209, at 10.

216. *Id.* at 10-11.

217. Gathii, *supra* note 204, at 77.

218. Asia Russell, *The Bush Administration's Global AIDS Promises—And Praxis*, 4 YALE J. HEALTH POL'Y, L. & ETHICS 133, 135 (2004).

219. *Id.* at 140.

220. *Id.* at 141.

221. *Id.* at 140.

222. Petroni & Skuster, *supra* note 209, at 12.

In a letter written to President Bush in 2003, the Eagle Forum<sup>223</sup> urged the President to sign a bill authorizing PEPFAR only if it “contains legislative language codifying your priorities.”<sup>224</sup> The first priority was to limit involvement with the Global Fund, because U.S. influence over this organization was minimal.<sup>225</sup> The next priority was to design the program around the successful Ugandan model.<sup>226</sup> Yet with a crafty turn of the pen, the letter was written to name the Ugandan program the “ABC” approach, erroneously stating that the “model prioritizes abstinence, being faithful to a monogamous partner, and only as a last result, condoms.”<sup>227</sup>

The letter continued by advocating for the protection of faith-based organizations that did not want to distribute condoms as a form of AIDS prevention, and the insistence that the bill contain “fully binding percentages expressing how funding should be used,” the removal of a requirement that the AIDS coordinator position require Senate confirmation, and the inclusion of the Prostitution Pledge, so that “[n]ot one tax-dollar should go to any organization that works to undermine [the policy opposing prostitution and sex trafficking].”<sup>228</sup> The letter goes on to employ heated language encouraging an extension of the Mexico City Policy, declaring “AIDS initiative is about stopping a crisis; it should not be morphed into another funding stream for the abortion industry.” With the exception of extending the Mexico City Policy, each demand by the Eagle Forum found its place in the final PEPFAR bill.<sup>229</sup>

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223. Join Eagle Forum so You Will Have a Voice at the U.S. Capitol and State Capitols, <http://www.eagleforum.org/misc/descript.html> (last visited Mar. 14th, 2010). The Eagle Forum is a DC based lobbying organization, self-defined as leading the pro-family movement since 1972. In addition to anti-abortion, abstinence-until-marriage views, listed on their agenda is support of American sovereignty through closing of the borders; supporting the American identity through increased border security and making English the official language; exposing radical feminists and legislating to protect the institution of marriage; and supporting traditional education through means such as “oppose liberal propaganda in the curriculum through global education and Political Correctness” and opposing federally funded daycare.

224. Letter to President Bush, Apr. 16, 2003, *available at* <http://www.eagleforum.org/alert/2003/Global-AIDS-bill-Letter.PDF>.

225. *Id.*

226. *Id.*

227. *Id.*; see Rosenberg, *supra* note 44 and accompanying text (“Uganda’s AIDS prevention program resists an ideological label. It does emphasize abstinence and monogamy, and does work closely with religious organizations. But Uganda also promotes condom usage and has been able to make condoms available to those who need them. Uganda also does AIDS education among prostitutes and gay men. Its work with these high-risk groups is nonjudgmental, to avoid driving the epidemic underground. . . Any embrace of the Uganda strategy must include the full spectrum of its anti-AIDS efforts.”).

228. Letter to President Bush, *supra* note 224.

229. It has been argued that many of the amendments to the bill, such as the Smith Conscience Amendment and the Prostitution Pledge got passed through committee hearings and eventually written into the bill as a compromise to maintain the carve out of the Mexico City Policy. See Rachel Anglin, Student Articles, *The Path of “Easy Legislation:” A Case Study of the U.S. Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003*, 34 OHIO N.U.L. REV. 567, 584-591 (2008). The effectiveness of this compromise has been heatedly debated, as seen in statements made by Rep. Pelosi who saw the prioritization of abstinence and fidelity over



Noticeably absent, the Eagle Forum's letter failed to cite any scientific proof justifying the reversal on policy. The letter explicitly evinces a desire to make the bill conform to the values of the Religious Right rather than to the needs of the host countries and proven methods of combating HIV/AIDS, such as condom provision.

In a published article, former Senate Majority Leader William H. Frist stated the reasons he believed Congress should apportion a great deal of money to "global health diplomacy."<sup>230</sup> The three major reasons he averred were self-protection,<sup>231</sup> the diplomatic opportunity it affords to combat the global image of an imperial America,<sup>232</sup> and health as a powerful and universal message of peace and goodwill.<sup>233</sup> Even when discussing the importance of ending the diseases that are hollowing out countries and killing children, Frist brings the argument back to the American image, stating, "[y]ou do not go to war with someone who has saved the life of your child. What a difference it would make if more people in the world found themselves saying, 'The Americans helped heal our children.'"<sup>234</sup> Like the Eagle Forum's letter, Frist's article did not acknowledge the preservation of lives and reversal of a deadly epidemic as reason enough to act. Evidently, Frist's only accepted justification for health aid was the improvement it would bring to our image and acceptance abroad.

***C. Unlike the Temperance Movement, the Symbolic Crusade Represented in PEPFAR is Dangerous Because It Affects the Health of Large Populations and Has Lasting Impact Not Easily Reversed***

The efficacy of the symbolic laws that criminalized alcohol is certainly worth examining, especially as a framework through which to view the American practice of legislating ideological symbols. However, the comparative juxtaposition of the Temperance Movement with PEPFAR has limited utility beyond this framework. The effects of the conditions and restrictions employed by the Act implicate the survival of millions of people in the Global South. As discussed above, these policies restrict access of many high risk people to health care and prevention programs; they cause the default of many providers by restricting funding and creating environments that hamstringing the providers' work; they restrict full dissemination of information and provisions of information to all

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the use of condoms as "attempts to unravel the delicate compromise established by our negotiations on this bill." 149 CONG. REC. H36505, 3615 (daily ed. May 1, 2003) (statement of Rep. Lee); and Rep. Lee who saw the Smith Amendment as a way for "social conservatives . . . to carve out a specific exemption. . . [which] would give an organization the ability to affirmatively tell those suffering and dying of AIDS not to use one method over another. This could be deadly." 149 CONG. REC. H3605, 3611 (daily ed. May 1, 2003) (statement of Rep. Lee).

230. See Frist, *supra* note 13, at 209.

231. *Id.* at 213.

232. *Id.* at 215.

233. *Id.* at 218.

234. *Id.* at 219.

people, whether defined as “high risk” or not; and they further stigmatize and marginalize at-risk groups, women, any person unwilling or unable to abstain from sexual relations, and all those who are infected and can be judged as having failed to faithfully adhere to the AB credence.<sup>235</sup> These actions are taken with the sole purpose of spreading ideological principles, with little regard to actually stalling the spread of HIV. In stark contrast, those countries that have successfully brought down the infection rate have done so by employing exactly the programs and policies that PEPFAR prohibits.<sup>236</sup>

The 2008 Act has a five year authorization, terminating in 2013.<sup>237</sup> Even if the legislation is amended before that date, the damage already inflicted will have created changes in the state of health care and prevention in host countries, which will require many years of rebuilding to reverse. In *Alliance for Open Soc. Int'l v. U.S. Agency Int'l Dev.*, the court found that allowing funding to be withheld for failure to comply with the Prostitution Pledge even just for the time of litigation would cause irreparable harm.<sup>238</sup> There is also evidence that the constant shifting of policies in health care provision and NGO governance creates insecurity, threatening the very benefits those policies were intended to produce.<sup>239</sup> When there is a change in political party, or a change in the perceived emergency of the disease or cause, funding is pulled out.<sup>240</sup> In the time of funding, the local providers became dependant on it, and thus do not make efforts to build up their own, self-sufficient infrastructure.<sup>241</sup> Further, due to restrictions, many pre-existing

235. See generally Fillinger, *supra* note 89, and accompanying text (describing the chilling of programs and the stigmatization of sex workers caused by the Prostitution Pledge); see PEPFAR IMPLEMENTATION, *supra* note 6, at 261 (“a faith-based organization with an objection to condoms could be operating a counseling and testing program, ART program, or prevention program and not be providing information about condoms or condoms themselves[.]” and can refuse care if based on a religious or moral objection).

236. See Clark, *supra* note 106 and accompanying text; see also AVERT: HIV & AIDS in Brazil, <http://www.avert.org/aids-brazil.htm>; see also *Online NewsHour, Brazil: A Model Response To AIDS?* (PBS 2003) available at <http://www.pbs.org/newshour/health/aids/brazil/> (last visited Feb. 4, 2010).

237. In 2009 President Obama recommitted to the Act, but in doing so he avoided the sticky issues of abortion, abstinence, condom provision, and the prostitution pledge. The 2009 Reauthorization Act can be found at <http://www.pepfar.gov/documents/organization/108294.pdf>. See also, Medical News Today: Obama Administration Releases Five-Year PEPFAR Strategy, Avoids Abortion, Abstinence Issues <http://www.medicalnewstoday.com/articles/173546.php>.

238. See generally *Alliance for Open Soc. Int'l v. U.S. Agency Int'l Dev.*, 430 F. Supp. 2d 222, 243 (S.D.N.Y. 2006).

239. See, e.g., Schooley, *supra* note 95 (discussing the American defunding of many prominent organizations, and the stress of fundraising placed on them, detracting from their ability to provide the services they were created for).

240. *Id.*

241. See B.S. Chimni, *The Changing World Order, the Structural Role of Humanitarian NGOs, and the Protection of Displaced Persons and Migrant* (Paper for the ICVA Conference on NGOs in a Changing World Order: Dilemmas and Challenges Geneva, 14-15 February 2003), available at <http://www.icva.ch/doc00000936.html>:

[H]umanitarian NGOs are driven by donor priorities rather than local needs. A striking feature of any analysis of official humanitarian aid is how a small number of donor countries

providers have either become unrecognizable or have been shut down all together.<sup>242</sup> Substantial official aid, and aid raised independently by NGOs, has been based, either intentionally or unknowingly, on foreign policy objectives or the interests of individual donors, rather than the interests of the recipients.<sup>243</sup> Aid often led to excessive dependency and impeded the growth of nations into self-sufficient states.<sup>244</sup> In one oft-heard criticism of NGO aid and developmental assistance, the age-old adage, “Give a man a fish; you have fed him for today. Teach a man to fish; and you have fed him for a lifetime” is repeated.<sup>245</sup> “It is not that the poor are unable to do things themselves, but with the aftermaths of colonialism, corruption, conflicts and so on, rebuilding and developing often requires outside assistance. The form of assistance that would be preferred is one that allows the recipient to help them help themselves.”<sup>246</sup>

## V. SOME PROPOSED FRAMEWORKS FOR HIV/AIDS FUNDING

The public health scholar, Lawrence O. Gostin, would have aid go to the basic survival needs of the world’s neediest countries, rather than hot button diseases and unpredictable emergencies, in an effort to depoliticize and stabilize the provision of public health aid.<sup>247</sup> While this is one answer, the question of which countries are indeed the most in need of money can itself become one fueled by political fire. He also advocates for a Framework Convention on Global Health, which would be an international body working to commit States to a set of targets, both economic and logistic, in an effort to dismantle barriers to constructive aid work.<sup>248</sup> Such a body would be ideal, but it does not address America’s recent unwillingness to be bound by international organizations, and so may be too utopian.

Nina Crimm, law professor and expert in nonprofit organizations and healthcare policies and practices impacting vulnerable population

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are able to exert a significant influence over the shape of the humanitarian system. . . the absence of resources with local NGOs makes them turn to INGOs for funds engendering a baneful dependence. . . It is difficult for local NGOs . . . to get such resources from any source and therefore end up being sub-sub-contractors to EC NGOs . . . This makes them overlook the privatization of public functions that their activities entail. . . It may therefore be validly argued that 'NGOs undermine democracy by taking social programs and public debate out of the hands of the local people and their elected natural leaders and creating dependence on non-elected overseas officials and their anointed local officials.

242. *See, e.g.,* Schooley, *supra* note 95.

243. *ee* Chimni, *supra* note 240.

244. *Id.*

245. Anup Shah, *Inadvertently Doing More Harm Than Good?* GLOBAL ISSUES, June 1, 2005, <http://www.globalissues.org/article/25/non-governmental-organizations-on-development-issues#InadvertentlyDoingMoreHarmThanGood> (last visited Feb. 4, 2010).

246. *Id.*

247. *See generally* Gostin, *Framework*, *supra* note 14.

248. *Id.* at 989.

segments,<sup>249</sup> advocates for a Presidential Advisory Board made up of nonprofit organizations in advisory positions similar to their function vis-à-vis the ECOSOC, the OECD, and the WHO.<sup>250</sup> “This arrangement is proposed as a meaningful approach to officially integrating into the president’s foreign policymaking process U.S. nonprofits that can assist in identifying incipient and intensifying global health problems and needs, in recommending responsive formulations and policy options, and in protecting vital U.S. interests.”<sup>251</sup> This would give the changing interests of non-profit organizations even greater pull on American policymaking, and would presumably allow the administration to select the NGOs they chose to listen to as they do their cabinet. Hence, the voices would change as the politics of those in office do, and the organizations would be able to sway the President’s policymaking without even going through the democratic process of Congress. While it cannot be overstated that the NGO’s are the most knowledgeable bodies to determine the conditions and needs of the countries within which they work, and their voices and knowledge should surely be incorporated in any policymaking, Prof. Crimm’s proposal seems unable to solve the politicization and instability of foreign aid provision.

For this reason, I advocate a dual approach. The United States should rededicate the majority of its global health aid commitments to the international bodies already in place, such as the Global Health Fund and the World Health Organization. President Bush stopped funding these organizations precisely because he lacked control over them. President Obama and Congress should realize the error in this judgment and the dangers in it reoccurring, and they should create legislation that sets a percentage of funds permanently dedicated to the international organizations. The second prong of my approach would be to require that all programs controlling the allocation of remaining monies directly contributed to international aid pass constitutional muster.

## VI. CONCLUSION

With the new administration in office, new policies will set in and some old ones will be redacted, as has already occurred with regard to the Mexico City Policy. A position statement released during President Obama’s campaign, prior to the passage of the 2008 Reauthorization Act, pronounced: “Obama believes that our first priority should be to reauthorize PEPFAR when it expires in 2008 and rewrite much of the bill to allow best practices – not ideology – to drive funding for HIV/AIDS programs.”<sup>252</sup> However, the five-year reauthorization timidly avoided the major issues of abortion, and while prevention was emphasized, the role of condoms in prevention again takes a second seat to the promotion of

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249. Nina Crimm, biography, *available at* <http://new.stjohns.edu/academics/graduate/law/faculty/Profiles/Crimm>.

250. Crimm, *supra* note 84, at 1114.

251. *Id.* at 1116.

252. Obama ’08, *Barack Obama: Fighting HIV/AIDS Worldwide*, <http://www.barackobama.com/pdf/AIDSFactSheet.pdf> (last visited Mar. 6, 2009).

abstinence and delay of sexual debut.<sup>253</sup> Furthermore, provision of condoms is never specifically mentioned in the supporting literature, such as the office's executive summary.<sup>254</sup> Considering the political position the administration currently finds itself in, the polarization of the current health care debate, the continuing economic hardships, and the growing military engagement, it is unsurprising if disappointing that a greater and more vocal turn towards effective and unbiased prevention has not yet been made.

For all the reasons expounded above, the ideological policies contained in PEPFAR must be amended. First, while the bill is in effect, it should be changed to reflect programs that have been proven effective in combating the spread of HIV/AIDS. It should include liberal distribution of condoms, and expansive education policies on their use and effectiveness. It should further encourage its mandate-holders to engage in an unbiased dialogue with at-risk communities, including those engaged in the sex-trade. Finally, it should incorporate provisions to allow for greater transparency.<sup>255</sup>

A prime example of a successful HIV/AIDS program can be seen in Brazil, a country that refused American aid when the conditions were placed upon it.<sup>256</sup> "In the mid-nineties, the World Bank estimated 1.2 million Brazilians would be infected with HIV by the year 2000. Today, the number of those estimated to be infected with the virus is half that amount."<sup>257</sup> Brazil, similar to Cambodia, did this through a mass marketing campaign advocating safe sex, free and easily accessible condom provision, communication with at-risk communities, and resistance to pressures from the Roman Catholic church, which is very strong in that country.<sup>258</sup> Rather than seeking to lead the world in monetary and symbolic contribution to the war against HIV/AIDS, in rewriting PEPFAR, Congress and the Executive should follow the examples of those counties that have been successful and seek to replicate their success. As it stands, the only success PEPFAR has had is in terms of dollars spent, not lives saved or infections averted.

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253. *Id.*

254. Executive Summary, *supra* note 19.

255. See generally Crimm, *supra* note 84.

256. Jorge Werthein, Brazil's representative for UNAIDS, "[i]t's a well-organized, well-formulated program that works because the government has managed to integrate the whole society--especially the NGOs," Stephen Buckley, *Brazil Becomes Model in Fight against AIDS; Government, Activists, Team to Defy Epidemic Through Distribution of Drugs*, WASH. POST, Sept. 17, 2000 at A22, available at <http://www.thebody.com/content/art32060.html>.

257. *Online NewsHour*, Straight Talk -- July 16, 2003, [http://pbs.org/newshour/bb/healthy/july-dec03/brazil\\_7-16.html](http://pbs.org/newshour/bb/healthy/july-dec03/brazil_7-16.html) (last visited Mar. 14, 2010).

258. *Id.* (Dr. Artur Kalichman, coordinator of the program for sexually transmitted diseases and AIDS in Sao Paolo, discussed how Brazil arrived at its focus on condoms. "Abstinence could be an individual choice, and it's very respectable. I cannot disagree with somebody who decides to be abstinent; it's okay, for sure and it works. But as a public health message, I don't believe that it's feasible and I don't believe it works – not ideologically, based on evidence made available all over the world. . . we are going this way: Telling to the people to use condoms, telling to the people to practice safe sex, and I think this is the best way."); see also Clark *supra* note 106.

Amending the PEPFAR legislation will not protect the developing countries most harmed by these measures from the same being passed at the next changing of the guard. A greater change in the foundation of the way the United States provides aid is needed. With most development and health assistance being driven by high profile events or frightening diseases, such as HIV/AIDS, the fundamental problems of global health remain.<sup>259</sup> As aid is given, taken away, and shifted, the countries in need are left scrambling to meet basic survival needs such as sanitation and sewage, clean air and water, diet and nutrition, essential medicine and vaccine, functioning health care systems, and a societal structure that empowers citizens to care for their own health and protect their own bodies.<sup>260</sup>

The global HIV/AIDS crisis must be handled with a continuing sense of emergency and all efforts should be thrown into a policy that guarantees success, rather than one that aims at promoting faith-based ideology. This policy must be one that emphasizes effective, evidence-based prevention; it must reach all people, without regard to their health, status, or any ideology that detracts from the ability to provide unbiased service; and it must have the flexibility necessary to cater to local needs and community structures. In conjunction with a renewed and amended effort, a structure should be built that changes the method of providing assistance to developing countries for their health and survival needs.

As stated earlier, a bilateral approach is needed. First, the U.S. should reinvigorate its faith in the international organizations, such as the World Health Organization, that have the training, expertise, and consistency of programs to properly work towards global health. Second, as an effort to restrict such damaging symbolic policies from intruding on future aid provision, domestic measures should be put in place that would disallow legislating demands and restrictions on foreign assistance that would be unconstitutional at home.

It has been argued by some that international aid is allocated through Congress' spending power, and since recipients are free to decline funding, there should be no constitutional objection. However, the impact of these requirements goes beyond an organization choosing or rejecting funding. Looking towards constitutional guidelines is one easy way to forbid aid programs that, in effect, violate the basic rights of the recipient communities. This would be an easily acceptable tool domestically, rather than forcing Congress to look at international law or to defer to international organizations, which may lead to a panicked claim to sovereignty and superiority. By demanding that all international aid be given in constitutionally acceptable terms, meeting not only requirements of free speech, but also due process and equal protection, the most necessary changes to international aid bills can be made.

Finally, in addition to ensuring that any future legislation for international aid respects all constitutional mandates, additional safeguards should be in place to ensure that policies cannot change with the tide of political favor. One way to do

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259. Lawrence O. Gostin, *Global Health Law Governance*, 22 EMORY INT'L L. REV. 35, 36 (2008).

260. *Id.*

this would be to frame legislation that embraces consistency and divorces itself from ideological and political purposes, and to make mandates permanent and built into the fabric of government, as was done domestically with such programs as Medicare and Medicaid. However, before making any program so durable, it *must* be made to ensure that human rights are promoted, protected and respected and that measures are taken to eliminate discrimination, combat stigma, and provide aid and preventative measures based on scientifically proven methods, not ideologically held beliefs.

*“With funding coming in now, for any youth activities, if you talk about abstinence in your proposal, you will get the money. Everybody knows that.”*

*—A teenager working with youth in Kampala, Uganda<sup>261</sup>*

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261. Human Rights Watch, *The Less They Know, the Better* (March 29, 2005), <http://www.hrw.org/en/reports/2005/03/29/less-they-know-better> (last visited Feb. 4, 2010).