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OF GAG RULES AND LOYALTY OATHS: EXPORTING IDEOLOGY AT
THE EXPENSE OF PUBLIC HEALTH AND AMERICAN VALUES

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I. INTRODUCTION

In the wake of the 2000 national elections, in which social conservatives played a critical role in electing the president, “payback time” arrived on the very first business day of the new Bush Administration. On January 22, 2001, President George W. Bush reinstated the “global gag rule.” The rule disqualifies overseas groups from receiving family planning assistance from the U.S. Agency for International Development (USAID) if they use their own funds to advocate for the liberalization of their own countries’ abortion laws or provide abortion services.¹ The following year, on separate grounds, President Bush cut off U.S. contribution to the United Nations Population Fund. The Bush Administration has refused to reinstitute the program.² By 2003, congressional conservatives and the White House

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¹ See Restoration of the Mexico City Policy, 66 Fed. Reg. 17,303 (Mar. 28, 2001), available at http://www.usaid.gov/business/business_opportunities/cib/pdf/cib0108r.pdf.

² See Letter from Nicholas R. Burns, Under Secretary of State for Political Affairs, U.S.

adopted another kind of ideological litmus test for the anti-trafficking and global HIV/AIDS programs. The standard, still in place today, disqualifies nongovernmental organizations from receiving any funding under these programs unless they explicitly adopt the Bush Administration's position against prostitution.³ Whether by suppressing speech it does not like, as in the case of the global gag rule, or by forcing speech it does, as in the case of the anti-prostitution loyalty oath, the Bush Administration and its allies are dramatically changing the nature of U.S. foreign assistance. The programs, especially those aimed primarily at women, alter the face the United States presents to the world.

II. EFFECTS OF THE GLOBAL GAG RULE

Under the global gag rule, family planning funds administered by USAID may be transferred only to foreign nongovernmental organizations that pledge not to "perform or actively promote abortion as a method of family planning."⁴ U.S.-based groups are themselves not subject to the restrictions but are responsible for their overseas partners' compliance with them.⁵ Specifically, foreign nongovernmental organizations may not use their own funds to:

- provide information on request to pregnant women about the option of legal abortion or where to obtain abortion services;
- provide legal abortion services; or,
- advocate in support of legal abortion in their own country or participate in a public information campaign on the availability of legal abortion.

Advocacy against abortion, however, is permissible.⁶

Department of State, to David Obey, Congressman, U.S. House of Representatives (Sept. 13, 2006), *available at* <http://maloney.house.gov/documents/women/unfpa/20060913UNFPAdetermination.pdf>.

³ United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25, § 301, 117 Stat. 711, 733-734 (codified in scattered sections of 22 U.S.C. (2003)); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 7(7), 117 Stat. 2875, 2885-2886 (codified in scattered sections of 22 U.S.C., 18 U.S.C., and 8 U.S.C. (2003)).

⁴ George W. Bush, *Memorandum for the Administrator of the United States Agency for Internal Development*, WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS (Jan. 29, 2001), *available at* <http://www.whitehouse.gov/news/releases/20010123-5.html>.

⁵ See Restoration of the Mexico City Policy, *supra* note 1, at 17,303.

⁶ *Id.* at 17,306.

The Bush Administration justified the global gag rule by expressing the belief that “it will make abortion more rare.”⁷ In fact, there is no evidence of any such impact.⁸ If President Bush’s goal is to reduce the incidence of abortion worldwide, the most effective way to do this is by addressing the root cause of abortion — unplanned pregnancy — by increasing access to contraceptives.⁹ The policy, however, does not facilitate access to contraception.¹⁰ On the contrary, it significantly impedes access by disqualifying hospitals and health clinics in developing countries from receiving U.S. support for family planning programs if they also provide legal abortion services, including counseling or referral for abortion services.¹¹

According to two reviews on the impact of the global gag rule, at its core the rule interferes with access to family-planning programs and undermines U.S. foreign policy to protect women’s health and to promote democratic principles abroad.¹² For those organizations that agree to sign the gag rule, U.S. funding comes at a price. For example, nongovernmental organizations in Ethiopia have succumbed to the policy, but at the cost of their ability to engage in a discussion — initiated by the Ethiopian government, no less — about liberalizing Ethiopia’s abortion law.¹³ In Ethiopia, where maternal mortality is among Africa’s highest and where unsafe abortion is a major contributing factor to mortality,¹⁴ the National

⁷ Interview with Ari Fleischer, Press Secretary, White House, in Wash. D.C. (Jan. 22, 2001) (on file with author).

⁸ Mexico City Policy: Effects of Restrictions on International Family Planning Funding: Hearing Before the Comm. On Foreign Relations, 107th Cong. 35-36, (2001), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:75604.pdf.

⁹ THE ALAN GUTTMACHER INST., SHARING RESPONSIBILITY: WOMEN, SOCIETY AND ABORTION WORLDWIDE 42 (1999), *available at* <http://www.guttmacher.org/pubs/sharing.pdf>.

¹⁰ *See generally* Restoration of the Mexico City Policy, *supra* note 1.

¹¹ *See generally Id.*

¹² THE CENTER FOR REPRODUCTIVE RIGHTS, BREAKING THE SILENCE: THE GLOBAL GAG RULE’S IMPACT ON UNSAFE ABORTION 23-24 (2003) [hereinafter BREAKING THE SILENCE], *available at* http://www.reproductiverights.org/pdf/bo_ggr.pdf; The Global Gag Rule Impact Project, *The Global Gag Rule and Contraceptive Supplies*, http://www.globalgagrul.org/pdfs/issue_factsheets/GGR_fact_contraceptive.pdf.

¹³ *See* BREAKING THE SILENCE, *supra* note 12; Global Gag Rule Impact Project, *supra* note 12.

¹⁴ *See* MATERNAL MORTALITY IN 2000: ESTIMATES DEVELOPED BY WHO, UNICEF AND UNFPA (2004), *available at* http://www.who.int/reproductive-health/publications/maternal_mortality_2000/index.html. *See also* Ethiopian Society of Obstetricians & Gynecologists’ Secretariat, *A Data Base on Abortion Literature Review*, *available at* <http://www.esog.org.et/Publications.htm> (follow “a data base on abortion literature review”

Office of Population recommended last year that “abortion law reform... be discussed by the reproductive health task force.”¹⁵ Nevertheless, the task force, composed of representatives from local NGOs, government ministries, international organizations and donors, including USAID, demurred, fearful of jeopardizing its relationship with USAID.¹⁶

Refusal to sign the gag rule has cut off U.S. family planning assistance from some of the largest family planning providers, such as International Planned Parenthood member associations.¹⁷ As a result of the gag rule, contraceptives, already in short supply before the rule’s application, are no longer shipped by USAID to 16 developing countries in Africa, Asia and the Middle East.¹⁸ USAID has also sharply curtailed shipments to 13 other countries.¹⁹ The Lesotho Planned Parenthood Association, for example, received 426,000 condoms from USAID between 1998 and 2000.²⁰ Now, USAID ships no condoms to Lesotho, a country in which one in four women is infected with HIV.²¹

Fundamentally, the gag rule is also antidemocratic. Even as the Bush Administration is promoting the role of civil society organizations overseas and the importance of free speech and democratic participation,²² it is conditioning U.S. family planning assistance on the sacrifice of these very values and activities — at least where improving access to safe abortion is the issue. The policy implicates not only the sanctity of the doctor-patient relationship but also freedom of speech, respect for national sovereignty and democratic participation. “Across Africa, Asia, and Latin America, women’s health and rights organizations have blossomed, gaining a powerful voice both at home and in the United Nations,” noted Adrienne Germain, president of the International Women’s Health Coalition, in recent correspondence.²³

hyperlink) (summarizing key evidence on unsafe abortion in Ethiopia).

¹⁵ BREAKING THE SILENCE, *supra* note 12, at 24 (referencing an interview with an anonymous official within Ethiopia’s National Office of Population); see Susan Cohen, *Global Gag Rule Revisited: HIV/AIDS Initiative Out, Family Planning Still In*, 6 GUTTMACHER REPORT ON PUB. POL. 1 (2003), <http://www.guttmacher.org/pubs/tgr/06/4/gr060401.pdf>.

¹⁶ BREAKING THE SILENCE, *supra* note 12, at 24.

¹⁷ International Planned Parenthood Federation, What is IPPF/WHO’s stance on the Global Gag Rule?, http://www.ippfwhr.org/about/about_faqs_e.html#gagrul (last visited Oct. 30, 2006).

¹⁸ Global Gag Rule Impact Project, *supra* note 12.

¹⁹ *Id.*

²⁰ Kate Francis & Amy Leipziger, Population Connection, *The Global Gag Rule: Bleak Choices and Cruel Effects* 4, <http://www.populationconnection.org/Communications/FactSheets/GGR%202004.pdf>.

²¹ *Id.*

²² Paula Dobriansky, International Philanthropy, Remarks to the Fund for American Studies (Jan. 18, 2003) available at <http://www.state.gov/g/rls/rm/2003/17895.htm>.

²³ Susan Cohen, *Global Gag Rule: Exporting Antiabortion Ideology at the Expense of*

She added, “[t]hey are outraged about the Bush Administration’s impingement on the basic right to free speech in their countries, as a matter of principle and also because they see the horrifying consequences of restricting access to safe abortion.”²⁴

III. IMPACT OF ANTIPROSTITUTION PLEDGE

In February 2003, the Bush Administration deemed organizations “advocating prostitution as an employment choice” or those that “advocate or support the legalization of prostitution” to be “not appropriate partners” for U.S. anti-trafficking grants.²⁵ Later that year, conservatives in Congress and the Bush Administration took this policy a step further in the course of reauthorizing the Trafficking Victims Protection Reauthorization Act of 2003.²⁶ Under that law, NGOs seeking funds must affirmatively state that they do not support “the legalization or practice of prostitution.”²⁷ Silence on the issue is not an option. Also in 2003, Congress added a similar requirement to the U.S. Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, which governs the U.S. global AIDS program.²⁸

Unquestionably, sex trafficking — which is most widespread in South Asia, where large commercial sex industries thrive — is an extreme threat to women and an internationally recognized violation of human rights. In addition, with foreign sex tourists particularly interested in finding younger and younger sex partners (partly in hopes of minimizing their risk of exposure to HIV), child sexual exploitation is a major component of the problem.²⁹ Even so, a large gray area surrounds the question of whether all prostitution is inherently coercive. Indeed, many women in sex work do not perceive themselves as having been trafficked or forced into sex work.³⁰ Many consider themselves to have become commercial sex workers by

American Values, 4 GUTTMACHER REPORT ON PUB. POL. 1, 2 (2001).

²⁴ *Id.* at 1-3.

²⁵ OFFICE OF WOMEN IN DEVELOPMENT, U.S. AGENCY FOR INT’L DEV., *TRAFFICKING IN PERSONS: THE USAID STRATEGY FOR RESPONSE 9* (2003).

²⁶ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003).

²⁷ *Id.* at 2886.

²⁸ United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25, 117 Stat. 711.

²⁹ INTERNATIONAL LABOR ORGANIZATION, *UNBEARABLE TO THE HUMAN HEART: CHILD TRAFICKING AND ACTION TO ELIMINATE IT 24* (2002), *available at* <http://www.ilo.org/public/english/standards/ipecc/publ/childtraf/unbearable.pdf>.

³⁰ See Jennifer Block, *Sex Trafficking: Why the Faith Trade Is Interested in the Sex Trade*, 25 CONSCIENCE 32 (Summer 2004).

choice.³¹ These women participate actively in the movement for sex workers' rights, they advocate for protections against abuse and exploitation, and lobby for health care and other economic benefits.³² Indeed, the Center for Health and Gender Equity observes that sex workers who resist rescues may not do so because they would prefer commercial sex as a lifestyle, but because there are no viable economic alternatives to feed and clothe themselves and their families.³³

Thus, while it is critical to address the dangers associated with prostitution and especially with sex trafficking and other kinds of human exploitation, forcing NGOs to denounce and oppose prostitution will do nothing to ameliorate the situation. Indeed, it could end up crippling or even closing down some of the most successful HIV-prevention services and empowerment strategies for women in the sex industry. In a column for *The Washington Post*, Holly Burkhalter (then the U.S. policy director for Physicians for Human Rights) explained the exasperation of one representative of a particularly effective advocacy group in Bangladesh.

.... describing her effort to help Bangladeshi brothel workers acquire the right to wear shoes or sandals outside of brothels — a simple dignity denied them by local custom — she stated: 'How can we help these beaten down, marginalized women organize themselves to achieve such victories if we are publicly opposing what they do to earn money?'³⁴

IV. INTERFERING WITH INTEGRATION

While proponents of the global gag rule and antiprostitution litmus test assert that funding restrictions are necessary to discourage abortion and reduce exposure to HIV/AIDS, there simply is no supporting evidence.³⁵ Furthermore, no public health rationale supports these ideologically

³¹ Thomas Steinfatt, Simon Baker & Allan Beesey, Measuring the Number of Trafficked Women in Cambodia: 2002, Presentation at The Human Rights Challenge Of Globalization in Asia-Pacific-US: The Trafficking in Persons, Especially Women and Children (Nov. 13-15, 2002), available at www.slate.msn.com/Features/pdf/Trfcamf3.pdf.

³² Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003).

³³ Center for Health and Gender Equity, *Working with Women in Prostitution: A Critical Dimension of HIV Prevention* 3-4 (2003), <http://www.genderhealth.org/pubs/SexWorkersHIVPreventionApr2003.pdf>.

³⁴ Holly Burkhalter, *Better Health, Better Lives for Sex Workers*, WASHINGTON POST, Dec. 8, 2003, at A25.

³⁵ See Cohen, *supra* note 23; see also Susan Cohen, *Ominous Convergence: Sex Trafficking, Prostitution and International Family Planning*, 8 GUTTMACHER REPORT ON PUB. POL. 12, 12-14 (2005).

motivated restrictions.³⁶ In fact, the restrictions impede those larger goals by making contraceptive services less available in some geographic areas. As a legal matter, the U.S. district courts for the Southern District of New York and for Washington, D.C. both ruled recently that the antiprostitution pledge unconstitutionally restricts the free speech rights of U.S.-based NGOs.³⁷ “The Supreme Court has repeatedly found that speech, or an agreement not to speak, cannot be compelled or coerced as a condition of participation in a government program,” wrote one judge.³⁸ The government has appealed both cases.

Meanwhile, both policies remain in force and inevitably complicate linkages between family planning and HIV/AIDS programs in developing countries. Relationships between family planning and HIV programs take advantage of critically important, long-term investments in family planning organizations and health care infrastructure, particularly in areas of prevention of mother-to-child transmission, HIV testing and diagnosis and treatment of sexually transmitted infections.³⁹ The global gag rule, however, often precludes organizations with years of experience in reproductive health from bringing their expertise to an integrated program.⁴⁰ Similarly, the antiprostitution pledge constrains integration, because organizations that provide health care to sex workers may be reluctant to sign a statement opposing prostitution out of concern for increasing the stigma and isolation of women in commercial sex work.⁴¹

V. FUTURE DIRECTIONS

In recent years, social conservatives have successfully used the power of the purse to export their ideology and worldview. As long as they possess the political support — in the Bush Administration and in Congress — it seems they will be able to get away with these sorts of excesses despite the

³⁶ See Cohen, *supra* note 23.

³⁷ See *Alliance for Open Soc. Inc. v. U.S. Agency for Int’l Dev.*, 430 F.Supp.2d 222 (S.D.N.Y. 2006); *DKT Int’l Inc. v. U.S. Agency for Int’l Dev.*, 435 F.Supp.2d 5 (D.D.C. 2006).

³⁸ *Alliance for Open Soc. Int’l*, 430 F.Supp.2d at 275. (Note that foreign, indigenous NGOs do not have the standing to challenge the law since they enjoy no protection under the U.S. Constitution.)

³⁹ See United Nations Population Fund, *The Glion Call to Action on Family Planning and HIV / AIDS in Women and Children* (2004), http://www.unfpa.org/upload/lib_pub_file/333_filename_glion_cal_to_action.pdf; Heather Boonstra, *The Role of Reproductive Health Providers in Preventing HIV*, 7 GUTTMACHER REPORT ON PUB. POL. 7, 7-10 (Oct. 2004).

⁴⁰ See discussion “Effects of Global Gag Rule,” *infra*.

⁴¹ See *Restoration of the Mexico City Policy*, *supra* note 1; *Global Gag Rule Impact Project*, *supra* note 12; *Center for Health and Gender Equity*, *supra* note 33; *Burkhalter*, *supra* note 34.

fact that, as in these two cases, they are doing demonstrable harm as a matter of public health. The fact that two federal courts have ruled that the antiprostitution pledge is unconstitutional as applied to U.S.-based groups is some consolation, but the U.S. courts will not be able to offer any relief to indigenous NGOs, whether it involves the antiprostitution pledge or the global gag rule.

Only a shift in the political winds will open the possibility of restoring a rational approach to U.S. reproductive health and HIV/AIDS assistance overseas. Until then, the U.S. government appears satisfied with an approach that bases indigenous groups' eligibility for U.S. family planning aid on whether they are willing to be gagged when it comes to debates in their own countries about liberalizing their abortion law or policies.⁴² In the area of U.S. global HIV/AIDS assistance, the first criterion for deciding whether to award funding turns on whether the recipient organization agrees to adopt the U.S. government's position against prostitution. Eventually, the pendulum will swing back to a place where respect for U.S. principles and values, including U.S. constitutional principles, does not stop at U.S. borders. When this happens, efforts to advance and preserve "best practices" in public health may resume their rightful priority over the promotion of ideology. The only question is how much harm will be done in the meantime.

⁴² See discussion, "Effect of Global Gag Rule," *infra*.