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FEMINISM, POWER, AND SEX WORK IN THE CONTEXT OF HIV/AIDS: CONSEQUENCES FOR WOMEN'S HEALTH

AZIZA AHMED*

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I. Introduction and Background

Globally, women constitute approximately fifty percent of all HIV infections.[1] Women may eventually comprise the majority of people living with HIV/AIDS in the world;[2] this is already true in Sub-Saharan Africa where women constitute sixty percent of the individuals living with HIV.[3] The recognition that women's inequality may be a driver of women's vulnerability to contracting HIV has led to a series of feminist legal responses in an effort to address HIV.[4]

One of the deepest fault lines between feminist legal reform projects to reduce the HIV vulnerability of women is on the issue of sex work.[5] Sex workers' vulnerability to contracting HIV is great, and in turn the prevalence of HIV among sex workers is very high, in some countries reaching sixty percent.[6] Some feminists (called domination or abolitionist feminists) rely

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[1] Joint United Nations Programme on HIV/AIDS [hereinafter UNAIDS], 2008 Report on the Global AIDS Epidemic: Executive Summary 30 (2008), *available at* http://data.unaids.org/pub/GlobalReport/2008/JC1511_GR08_ExecutiveSummary_en.pdf.

[2] *HIV/AIDS and Women*, Ctrs. For Disease Control & Prevention, http://www.cdc.gov/hiv/topics/women (last visited Feb. 11, 2010).

[3] *Gender Inequalities and HIV*, World Health Org., http://www.who.int/gender/hiv_aids/en (last visited Aug. 24, 2010).

[4] *See, e.g.*, Fed'n of Women Lawyers—Kenya & Int'l Women's Human Rights Clinic, Georgetown Univ. Law Ctr., Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights 6–8 (Oct. 3, 2008), *available at* http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/FIDAKenya41.pdf; Physicians for Human Rights, Epidemic of Inequality: Women's Rights and HIV/AIDS in Botswana & Swaziland 63–64 (2007), *available at* http://physiciansforhumanrights.org/library/documents/reports/botswana-swaziland-report.pdf; Women ARISE, Key Messaging Document 1–3 (2010), *available at* http://www.aids2010community.org/wp-content/uploads/2009/12/WomenARISE_ENG.pdf; *Women and Risk of HIV/AIDS Infection*, Int'l Women's Health Coal., http://www.iwhc.org/index.php?option=com_content&task=view&id=2472&Itemid=824 (last updated June 10, 2008).

[5] *See* Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 Colum. L. Rev. 304, 328–29 (1995) (describing dominance feminism and a rise of a critique of dominance feminism, including a critique of dominance feminist anti-pornography work). For examples of dominance feminist writing on pornography and sex work, see Kathleen Barry, Female Sexual Slavery 9–13 (1979); Andrea Dworkin & Catharine MacKinnon, Pornography & Civil Rights: A New Day for Women's Equality 24–25 (1988). For a representation of the critique of dominance feminist thinking about sex, see Carole S. Vance, *More Danger, More Pleasure: A Decade after the Barnard Sexuality Conference*, *in* Pleasure and Danger, at xvii (Carole S. Vance, ed., Pandora Press 1992) [hereinafter Vance, *More Danger, More Pleasure*].

[6] In Benin, Burundi, Cameroon, Ghana, Guinea-Bissau, Mali, and Nigeria more than thirty percent of all sex workers are living with HIV. UNAIDS, AIDS Epidemic Update

heavily on criminal prohibitions to address sex workers' vulnerability to HIV.[7] Other feminists (namely sex-positive or sex-radical[8] feminists) and sex worker activists call for a legal response that relies on decriminalization of sex work in order to reduce the incidence of HIV in the sex work community.[9]

This Article assesses feminists' conflicting legal, policy, and regulatory proposals to address sex workers' vulnerability to contracting HIV. This Article employs a Governance Feminism ("GF") analysis that allows us to assess feminists as powerful actors in the institutions that govern HIV.[10] This Article focuses on two cases in which particular legal and policy proposals can be traced directly to feminist engagement and disagreement: the drafting of the United Nations Joint Programme on HIV/AIDS Guidance Note on Sex Work and the creation and implementation of the Anti-Prostitution Loyalty Oath.

Part I of this Article introduces the role of feminism in the broader HIV epidemic. Part II provides a brief history of feminist debates on the issue of sex work and trafficking and the rise of sex-positive feminists and sex worker activists. Part III provides a theoretical framing for this analysis of

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33 (2009), *available at* http://data.unaids.org/pub/Report/2009/JC1700_Epi_Update_2009_en.pdf. In Myanmar, more than eighteen percent of sex workers are living with HIV. *Id.* at 40. In some parts of India, sex workers have HIV prevalence of more than forty percent. VK Desai et al., *Prevalence of sexually transmitted infections and performance of STI syndromes against aetiological diagnosis, in female sex workers of red light area in Surat, India,* 79 SEXUALLY TRANSMITTED INFECTIONS 111, 111 (2003). Where sex workers are able to access services, the prevalence of HIV decreases. ANNA-LOUISE CRAGO, OPEN SOC'Y INST., OUR LIVES MATTER: SEX WORKERS UNITE FOR HEALTH AND RIGHTS 39, 49 (2008), *available at* http://www.bayswan.org/SFInitiative08/resources/Soros_OurLives_08.pdf.

[7] Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1664–69 (2010).

[8] The terms sex-radical, sex-positive, and pro-sex feminist are often used interchangeably. Some have voiced support for the term sex-radical while others prefer pro-sex or sex-positive. In this paper, I use sex-positive feminist because of the active use of the term in the context of HIV and reproductive health organizations and activism. *See* Vance, *More Danger, More Pleasure*, *supra* note 5, at xxiii (explaining the history of the evolution of pro-sex and sex-radical feminist as a term to characterize a particular feminist perspective).

[9] Decriminalization translates into the repeal of criminal laws that address sex work. *See* Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 339–40 (2006); Janice Raymond & Melissa Ditmore, *Debating Legalized Prostitution*, WASH. POST POSTGLOBAL BLOG (Feb. 28, 2007, 2:13 PM), http://newsweek.washingtonpost.com/postglobal/needtoknow/2007/02/debating_legalized_prostitutio.html.

[10] *See* Halley et al., *supra* note 9, at 340 ("I mean the term to refer to the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power. It takes many forms, and some parts of feminism participate more effectively than others; some are not players at all. Feminists by no means have won everything they want—far from it—but neither are they helpless outsiders. Rather, as feminist legal activism comes of age, it accedes to a newly mature engagement with power.").

feminist activism in the context of HIV. Part IV discusses two cases of feminist engagement in international HIV/AIDS governance structures: the 2007 UNAIDS Guidance Note on HIV and Sex Work and the Anti-Prostitution Pledge. Finally, Part V examines the unintended consequences of proposed feminist legal reforms pertaining to sex workers by feminists on the health of women.

While there is noted gender diversity among sex workers,[11] the feminist rhetoric around sex work remains highly focused on female sex workers.[12] This is a limitation in how feminists—particularly abolitionist feminists—have chosen to view sex workers. By contrast, sex-positive feminists have noted the limitations of feminist analysis and have identified and responded to the needs of a more diverse group of sex workers. However, this Article focuses on the female sex worker as the site of intervention, given that she is intended to be the primary beneficiary of all feminist legal reform projects.

II. An Old Feminist Battle

The feminist disagreement regarding sex work and trafficking predates the HIV epidemic.[13] The abolitionist feminist response to sex work is best represented by Kathleen Barry, Catharine MacKinnon, and Andrea Dworkin. These feminists argued that prostitution is always exploitative.[14] In their book, *Pornography and Civil Rights*, Andrea Dworkin and Catharine MacKinnon argued the importance of eliminating pornography and prostitution:

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[11] Crago, *supra* note 6, at 14 (2008).

[12] In actual projects and programs, however, many sex-positive feminist activists working at the intersection of HIV and sex work often run programs inclusive of transsexual and MSM (men who have sex with men) sex workers. The same cannot be said for raid-and-rescue schemes run partly by dominance feminist organizations. For an example of a sex-positive feminist organization also serving MSM and transsexual individuals, see Sangram, http://www.sangram.org (last visited Aug. 31, 2010). For an example of a subordination feminist organization, see Coalition Against Trafficking in Women ("CATW"), http://www.catwinternational.org/about/index.php (last visited Aug. 31, 2010).

[13] For a history of agency and coercion in feminist legal theory, see Abrams, *supra* note 5, at 326–30; *see also* Carole S. Vance, *Pleasure and Danger: Toward a Politics of Sexuality*, *in* Pleasure and Danger, *supra* note 5, at 1 [hereinafter Vance, *Toward a Politics of Sexuality*] (presenting the disagreement between feminists with particular regard to sexuality).

[14] Kathleen Barry understands this form of sex to be sexual slavery: "These women and girls are victims of female sexual slavery. Some have escaped; others have not. When it is organized, female sexual slavery is a highly profitable business that merchandises women's bodies to brothels and harems around the world." Barry, *supra* note 5, at 39. Organizations including CATW, founded in part by Kathleen Barry, define prostitution as exploitation in the same terms as rape, genital mutilation, incest, and battering. Equality Now, another abolitionist feminist organization, also relies on an understanding of prostitution in which women are constantly exploited and victimized, and it has advocated for criminal prohibitions around sex work and trafficking. For a full review of this position, see Barry, *supra* note 5, at 163; Dworkin & MacKinnon, *supra* note 5; Halley et al., *supra* note 9.

> Obscured beneath the legal fog of obscenity law and the shield of the law of privacy and the perversely cruel joke of the law against prostitution has been the real buying and selling of real individuals through coercion or entrapment, or through exploiting their powerlessness, social worthlessness and lack of choices and credibility, their despair and sometimes their hope.[15]

The movement to end pornography, and later prostitution, begun by Barry, MacKinnon, and Dworkin launched abolitionist feminist efforts to end sex work. For abolitionist feminists, the "prostituted" woman always acts under coercion and is subject to sexual violence. For abolitionist feminists, the tool for "rescuing" sex workers and ending sex work became criminal sanctions and penalties.[16]

Over time, abolitionist feminists, evangelical Christians, and neo-conservatives came together with the goal of abolishing prostitution. Characterized as "neo-abolitionists,"[17] this alliance successfully captures notions of victimhood, equates sex work with trafficking, and relies on criminal prohibitions as a key way to stop or end trafficking and sex work.[18] Among other victories, the success of the neo-abolitionist movement is reflected in the passage of the Trafficking Victim Protections Act of 2000 ("TVPA") and its reauthorizations.[19] The TVPA accomplishes abolitionist goals through the spread of criminal prohibitions as a way to end trafficking, defining sex work as trafficking,[20] and the co-optation of a victimhood discourse.[21] The TVPA set the stage for a range of victories for abolitionist feminists both domestically and internationally.

A. *Rise of the Sex-Positive Feminists and Sex Worker Rights Groups*

The 1980s saw the rise of two new movements that challenged abolitionist feminism. First, a nascent sex workers' rights movement began to

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[15] Dworkin & MacKinnon, *supra* note 5, at 24–25.

[16] Catharine MacKinnon, Women's Lives, Men's Laws 157 (2005).

[17] Chuang, *supra* note 7, at 1664.

[18] *See* Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism,"* 18 Differences: J. Feminist Cultural Stud. 128, 132 (2007); Chuang, *supra* note 7, at 1664; Halley et al., *supra* note 9, at 337.

[19] The Trafficking Victims Protection Act was a victory for abolitionist feminists: "The TVPA contains a provision that ultimately became a powerful vehicle for the neo-abolitionists to promote their anti-prostitution agenda worldwide." Chuang, *supra* note 7 at 1679. The TVPA contains language that later appears in the Anti-Prostitution Pledge.

[20] *See* Chuang, *supra* note 7, at 1656; Edi C. M. Kinney, *Appropriations for the 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, 191 (2006).

[21] Chuang, *supra* note 7, at 1658.

organize on a national and global scale.[22] Second, a shift in feminist thinking resisted the dominance feminist view of sexuality.[23]

In 1985, the World Charter for Prostitutes' Rights—one of the first charters of its kind—called for a decriminalization of "all aspects of adult prostitution resulting from individual decision."[24] The Charter was the product of the two World Whores Congresses, held in 1985 and 1986.[25] These Congresses were supported by the formation of organizations such as Call Off Your Old Tired Ethics ("COYOTE") in San Francisco in 1973 by Margo St. James,[26] the Italian Committee for the Civil Rights of Prostitutes in 1982, and the English Collective of Prostitutes in England in 1975.[27] Sex worker movements in developing countries were also organizing but were largely unrepresented in the global mobilization efforts of the 1990s. It was with the formation of the Network for Sex Work Projects in 1991 that the global sex workers movement began to include sex workers from developing countries, including the Maxi Linder Association in Suriname and the Colombian Association of Women.[28] These groups were founded to advocate specifically for sex workers' health, working conditions, and the provision of support services.[29]

A new group of feminist practitioners and scholars grew tired of the dominance feminist framing of sex and sexuality.[30] Called "sex-positive" or "sex-radical" feminists,[31] this new sub-movement regarded sex as a place of potential agency for women, rather than inevitable subordination. In keeping with this logic,[32] sex workers were no longer exploited slaves; instead there was the potential for power and agency.[33] This new feminist framing of sex work allowed sex-positive feminists to become allies of sex workers.[34] Prominent sex worker rights activist Cheryl Overs described this movement in an interview:

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[22] Gail Pheterson, *Not Repeating History*, *in* A VINDICATION OF THE RIGHTS OF WHORES 3, 4–5 (Gail Pheterson ed., 1989).

[23] Vance, *Toward a Politics of Sexuality*, *supra* note 13, at 3.

[24] Jo Doezema, *Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy*, *in* GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION 34, 37 (Kamala Kempadoo & Jo Doezema eds., 1998).

[25] *Id.*; Pheterson, *supra* note 22, at 3.

[26] Kamala Kempadoo, *Introduction*, *in* GLOBAL SEX WORKERS, *supra* note 24, at 19; Pheterson, *supra* note 22, at 4.

[27] Kempadoo, *supra* note 26, at 19.

[28] *Id.* at 19–21.

[29] *See id.*

[30] Vance, *More Pleasure, More Danger*, *supra* note 5, at xvii.

[31] *Id.* at xxiii; Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 282 (2008).

[32] Vance, *Towards a Politics of Sexuality*, *supra* note 13, at 1.

[33] *Id.* at 6–7.

[34] *See* Melissa Ditmore, *Sex Work, trafficking and HIV: how development is compromising sex workers' human rights*, *in* DEVELOPMENT WITH A BODY: SEXUALITY, HUMAN RIGHTS & DEVELOPMENT 54, 54–64 (Andrea Cornwall, Sonia Corrêa & Susan Jolly eds., 2008).

> Once a pro-sex feminist theory was articulated we even had new supporters from the women's movement who were listening to sex workers for the first time. Young feminists matured with the notion of sex workers rights as a fixed entry on the women's rights agenda. I enjoyed that because I felt exonerated. It had been hurtful, as well as frustrating, that for many years feminist puritans have said that our demands for recognition of sex work as valid work were a product of false consciousness which blurred our perceptions of our damaging experiences as victims of the sex industry![35]

The ability of sex-positive feminists to engage with sex workers—and of sex workers to be feminists—created new alliances and a new dynamic.[36] It provided feminists and sex workers with both an intellectual and an actual base for legal reform efforts pushing for a decriminalization of sex work.[37]

III. A Theoretical Model: Governance Feminism

This Article assesses the impact of feminist theorizing, organizing, and discourse on global regulatory and policy structures specific to sex work and HIV. The Governance Feminism ("GF") approach assesses feminist achievements through an examination of the institutionalization of feminist projects in national and international governance structures. The framework has been employed to analyze subordination feminists' use of criminal prohibitions aimed at abolishing sex work when engaging with top-down institutions.[38] This Article builds on previous GF analyses by highlighting the role of sex-positive feminists who utilize the same governance structures as their abolitionist counterparts to advocate but rely on the *decriminalization* of sex work as a means of reducing sex workers' vulnerability to HIV. Sex-positive feminists, with their sex worker allies, argue that decriminalization makes sex work safer.[39]

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[35] Jo Doezema, *International Activism*, *in* Global Sex Workers, *supra* note 24, at 204–05.

[36] Jill Nagle, *Introduction*, *in* Whores and Other Feminists 1, 1 (Jill Nagle ed., 1997).

[37] For a women's rights perspective that advocates for the decriminalization of sex work, see Kathambi Kinoti, *Sex Work in Southern Africa: Criminalization Provides Screen for Other Rights Violations*, Ass'n for Women's Rights in Dev. (Feb. 20, 2009), http://www.awid.org/eng/Issues-and-Analysis/Library/Sex-work-in-Southern-Africa-Criminalization-provides-screen-for-other-rights-violations.

[38] For a description of Governance Feminism, see Halley et al., *supra* note 9, at 340.

[39] Audacia Ray, *Neither Victims Nor Voiceless: Sex Workers Speaking for Themselves*, RH Reality Check Blog (Jan. 11, 2010, 8:34 PM), http://www.rhrealitycheck.org/blog/2010/01/11/neither-victims-nor-voiceless-sex-workers-speaking-themselves; *Anti-Prostitution Pledge*, Change Ctr. for Health & Gender Equity, http://www.genderhealth.org/the_issues/us_foreign_policy/antiprostitution_pledge (last visited Oct. 6, 2010); *Position Statement*, FIRST, http://www.firstadvocates.org (last visited Oct. 6, 2010).

The emphasis on decriminalization signals a reliance on informal and local governance to improve health conditions for sex workers. Sex-positive feminists do not expect that decriminalization will eliminate issues that exist for sex workers, such as harassment from state agents. Rather, sex-positive feminists are attempting to use top-down global governance structures to constrain the power of national authorities at the state and local level. This form of activism allows sex workers to mobilize both for work and for health purposes.[40]

A. Proposed Legal Regimes by Abolitionist and Sex-Positive Feminists, Sex Workers, and Public Health Authorities

Feminist legal reform proposals can be divided into four main categories:[41]

Decriminalization—Decriminalization translates into the repeal of criminal laws that address sex work.[42] Supporters of decriminalization include sex worker rights groups, sex-positive feminists, and public health scholars who largely draw from the health and human rights movement. These groups argue that decriminalization allows sex workers to collectivize, mobilize, and change an often unsafe work environment under the leadership and direction of sex workers.[43] Sex-positive feminists note that sex workers are the best allies in the battle against trafficking because sex workers have immediate access to trafficked women.[44]

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[40] *See* Monica Rao Biradavolu et al., *Can sex workers regulate police? Learning from an HIV prevention project for sex workers in southern India*, 68 Soc. Sci. and Med. 1541 (2009) (describing how sex workers can change the behavior of state agents); Prabha Kotiswaran, *Born unto Brothels—Toward a Legal Ethnography of Sex Work in an Indian Red-Light Area*, 33 Law & Soc. Inquiry 579–629 (2008) (describing how power operates in the context of red-light districts outside of the criminal law regime).

[41] There have been many "frameworks" outlined to help define and structure the debate on laws around sex work. For a summary, see Cheryl Overs, Paolo Longo Research Initiative, 17 Different Frameworks of Sex Work Law and Still Counting (July 2010), *available at* http://www.plri.org/resource/17-different-frameworks-sex-work-law-and-still-counting; *see also* Halley, et al., *supra* note 9, at 338–40 ("We also note a wide range of regulatory modes specific to sex trafficking regimes, differently affecting the players we see as the key 'stakeholders' in the regime: the sex worker, the pimp, the john, the brothelkeeper, and the landlord."); Chuang, *supra* note 7, at 1668.

[42] Chuang, *supra* note 7, at 1668; Halley et al., *supra* note 9, at 339.

[43] Canadian HIV/AIDS Legal Network, A Human Rights Approach to HIV/AIDS 2, *available at* www.aidslex.org/site_documents/G026E.pdf.

[44] I have categorized groups and individuals as "sex-positive feminists" if they have identified themselves as feminist and argued for the decriminalization of sex work. Sex-positive feminist health organizations, including the International Women's Health Coalition and the Center for Health and Gender Equity, have expressed support for decriminalization of sex work. *See* Change Ctr. for Health and Gender Equity, *supra* note 39; Ray, *supra* note 39.

Regulation—Regulation is characterized by a "patchwork" of local legal regulations.[45] These regulations often have the goal of monitoring sex worker behavior and improving the health of sex workers in order to stop the spread of HIV/AIDS.[46] Local public health authorities often support regulatory schemes, but both abolitionist feminists and sex-positive feminists have largely been opposed to regulation.[47] For abolitionist feminists, regulation represents ongoing regulation of women's bodies.[48] For sex-positive feminists, regulation empowers state agencies to utilize coercive measures in an attempt to improve health outcomes.[49]

Partial criminalization—Best characterized by the "Swedish model," partial criminalization may target clients, people who live off the earnings of a sex worker, and those people who profit from sex work.[50] Supporters of partial criminalization are typically religious and/or right-wing groups in the United States,[51] along with abolition feminists.[52] Sex-positive feminists and sex workers have largely opposed partial criminalization schemes because of the negative impact on sex workers when clients are criminalized.[53] These negative consequences include being pushed underground and into unsafe locations to continue to engage in sex work.[54]

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[45] Barbara G. Brents & Kathryn Hausbeck, *State-Sanctioned Sex: Negotiating Formal and Informal Regulatory Practices in Nevada Brothels*, 44 Soc. Persp. 307, 311 (2001).

[46] *Id.*

[47] Barry, *supra* note 5, at 130; *id.* at 310.

[48] Barry, *supra* note 5, at 130–34.

[49] *See, e.g.*, Canadian HIV/AIDS Legal Network, Sex, Work, Rights: Reforming Canadian Criminal Laws on Prostitution 27–30 (2005), *available at* http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=199 (examining recent reforms to prostitution laws in New Zealand and Sweden and the effect of those reforms on the health and human rights of sex workers).

[50] *See* Don Kulick, *Talk Delivered at Beijing Plus Ten Meetings on the "Swedish Model,"* Global Rights, http://www.globalrights.org/site/DocServer/Don_Kulik_on_the_Swedish_Model,pdf?docID=5803.

[51] *See* Bernstein, *supra* note 18, at 130 (describing the coalitions of groups that form the abolitionist movement). See also a description of the International Justice Mission's work:

> IJM investigators spend thousands of hours infiltrating brothels and uncovering the world of sexual exploitation. IJM staff then work with local authorities to conduct raids and rescue victims from this horrific nightmare, placing them in safe homes where they receive aftercare and begin new lives of freedom. IJM lawyers work to secure the conviction and sentencing of brothel keepers and other perpetrators involved in sex trafficking. These convictions help to deter future perpetrators and change the system that traffics women and girls for sexual exploitation.

Prayer Guide for the Abolition of Slavery, Int'l Justice Mission (2007), *available at* www.ijm.org/downloaddocument?gid=77.

[52] *See* Janice G. Raymond, *10 Reasons for Not Legalizing Prostitution*, Vancouver Rape Relief & Women's Shelter (Mar. 25, 2003), http://www.rapereliefshelter.bc.ca/issues/prostitution_legalizing.html.

[53] *See Legalization v. Decriminalization*, Stella, http://www.chezstella.org/stella/?q=en/debate (last visited Aug. 30, 2010).

[54] Crago, *supra* note 6, at 32.

Full criminalization—A full criminalization legal regime would include criminal sanctions for sex workers, clients, living off of the earnings of a sex worker, and others involved in the act of soliciting or selling sex.[55] Supporters may include conservative or right-leaning individuals and organizations, though some abolitionist feminists have also supported full criminalization.[56] Like partial criminalization, any purported health benefits of full criminalization come from ending sex work.

IV. Two Cases of Feminist Engagement in International Health Governance Structures

A. *Sex Work in Global Public Health Governance: The Case of the UNAIDS Guidance Note*

In this section of the Article, I frame how feminist and sex worker rights perspectives have shaped public health institutions with regard to sex work and HIV. Shifts in the treatment of sex workers by public health institutions illustrate both the power of feminists and sex workers to influence public health discourse and practice toward sex workers.

The public health framework brings a host of new institutions through which various feminists and feminist organizations attempt to achieve feminist reforms. In the global AIDS governance structure, relevant entities include (but are not limited to): the United Nations Joint Programme on HIV/AIDS ("UNAIDS"); the World Health Organization ("WHO"); and the Global Fund for HIV/AIDS, TB, and Malaria ("the Global Fund").[57] Bilateral aid agencies also play a large part in HIV/AIDS governance, including the United States Agency for International Development through the President's Emergency Plan for AIDS Relief ("PEPFAR").[58]

The HIV epidemic brought new attention to sex work, new struggles for sex worker movements, and new venues within which the feminist battle would unfold. Sex workers have been the focus of interventions designed to curb the spread of HIV since the early days of the epidemic.[59] The public

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[55] Barry, *supra* note 5, at 126.

[56] *See* Raymond, *supra* note 52; *see also* Chuang, *supra* note 7, at 1669 (citing Bernstein's documentation of neo-abolitionist feminists).

[57] Each entity has a different mandate. UNAIDS operates as an interagency office of the United Nations to address HIV/AIDS. *See About UNAIDS*, UNAIDS, http://www.unaids.org/en/AboutUNAIDS/default.asp (last visited Aug. 30, 2010). The World Health Organization provides technical support to WHO member states to assist with treatment scale-up, care, and prevention services, as well as drugs and diagnostics. WHO co-sponsors the work of UNAIDS. *See WHO and HIV/AIDS*, WHO, http://www.who.int/hiv/en (last visited Aug. 30, 2010).

[58] *See generally* Lawrence O. Gostin, *President's Emergency Plan for AIDS Relief: Health and Development at the Crossroads*, 17 J. Am. Med. Ass'n 2046 (2008).

[59] *See* J.M. Guerin et al., *Acquired Immune Deficiency Syndrome: Specific Aspects of the Disease in Haiti*, 435 Annals N.Y. Acad. Sci. 254, 254 (1984); Joan K. Kreiss et al.,

health response to HIV historically treated sex workers as "vectors" for transmission.[60] Public health officials were concerned less with the health of the sex worker and instead prioritized the health of the sex worker's client or the larger community.[61] The "sex-workers-as-vectors" rhetoric continues to serve as a backdrop in the HIV response.[62] Accordingly, coercive public measures continue to be proposed and implemented by public health agencies at the global, regional, and local levels, including forced testing for HIV, surveillance, and violence.[63] These punitive measures have pushed sex workers underground.[64]

The growing health and human rights movement has challenged the dominant, and often coercive,[65] public health response towards sex workers.[66] The community of health and human rights experts contains a range of feminist organizations with an explicit sex-positive feminist agenda.[67] The concepts promoted by the health and human rights movement include accessibility, acceptability, affordability, and quality.[68] Where a health and

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AIDS Virus Infection in Nairobi Prostitutes: Spread of the Epidemic to East Africa, 314 New Eng. J. Med. 414, 414–18 (1986).

[60] *See generally* Edward Morse et al., *The Male Street Prostitute: A Vector for Transmission of HIV Infection Into the Heterosexual World*, 32 Soc. Sci. Med. 535 (1991); Catherine Pirkle, Riswana Soundardjee & Artuso Stella, *Female Sex Workers in China: Vectors of Disease?*, 34 Sexually Transmitted Diseases 695 (2007).

[61] Pirkle, Soundardjee, & Stella, *supra* note 60, at 695.

[62] *Id.* at 702 (arguing that the language of "vectors" is still commonly used and acts to "stigmatize[ ] and marginalize[ ]" sex workers in the HIV response).

[63] For descriptions of state violence against sex workers in the context of public health, see generally Kate Shannon & Joanne Csete, *Violence, Condom Negotiation, and HIV/STI Risk Among Sex Workers*, 304 J. Am. Med. Ass'n 573 (2010); Sex Workers' Rights Advocacy Network ("SWAN"), Arrest the Violence: Human Rights Abuses Against Sex Workers in Central and Eastern Europe and Central Asia (2009), *available at* http://swannet.org/files/swannet/File/Documents/Arrest_the_Violence_SWAN_Report_Nov2009_eng.pdf.

[64] Crago, *supra* note 6, at 32.

[65] *See* Shannon & Csete, *supra* note 63, at 573–74; SWAN, *supra* note 63 (describing state violence against sex workers in the context of public health).

[66] For an overview of the importance of human rights in the response to health, see Jonathan Mann, *Health and Human Rights: If Not Now, When?*, 2 Health & Hum. Rts. 113–20 (1997). Human rights approaches (and rights based approaches generally), however, are not without critique. *See* David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 Harv. Hum. Rts. J. 101 (2002) (presenting a critique of the human rights movement and suggesting the need to assess the costs and benefits of engaging in human rights activism); *see also* Libby Adler, *The Gay Agenda*, 16 Mich. J. Gender & L. 147 (2009) (arguing that there are costs associated with the reliance on "rights arguments" that have not been given due consideration).

[67] This includes organizations like the Center for Health and Gender Equity ("CHANGE"), the International Women's Health Coalition, and the Women Won't Wait Campaign.

[68] U.N. CESCR, 22d session, gen. Comment. 14, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000). The Committee interprets the right to health, as defined in Article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participa-

human rights approach was adopted, the role of sex workers began to shift from that of recipient of a health program to that of participant in the design and implementation of health programs.[69] In turn, the health and human rights community contributed to the engagement of affected communities, namely sex workers, in the development and implementation of programs and policies.

In light of this new framework for imagining the role of sex workers in health, in 2002, UNAIDS offered a technical advisory document on HIV and sex work. UNAIDS stressed the need to involve sex workers in condom promotion and in safer sex outreach, and to decriminalize sex work.[70] In 2004, the World Health Organization followed suit by highlighting the role of sex workers in the implementation of HIV projects and collaborating with sex worker networks to publish a tool kit laying out the following key principles:[71]

> Notwithstanding the diversity of sex work settings, a review of current best practice in sex work interventions suggests that observation of the following key principles contribute to effectiveness and sustainability:
> - adopting a non-judgmental attitude;
> - ensuring that interventions do no harm;
> - ensuring that sex workers' rights to privacy, confidentiality and anonymity are respected;
> - respecting sex workers' human rights and according them basic dignity;
> - respecting sex workers' views, knowledge and life experiences;
> - involving sex workers, and, where appropriate, other community members in all stages of the development and implementation of interventions;
> - recognizing that sex workers are usually highly motivated to improve their health and well-being, and that sex workers are part of the solution;
> - building capacities and leadership among sex workers in order to facilitate effective participation and community ownership;

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tion of the population in all health-related decision-making at the community, national, and international levels.

[69] UNAIDS, Female sex worker HIV prevention projects: Lessons learnt from Papua New Guinea, India, and Bangladesh 53, 108 (2000), *available at* data.unaids.org/publications/IRC-pub05/jc438-femsexwork_en.pdf.

[70] UNAIDS, Sex work and HIV/AIDS: UNAIDS Technical Update 10, 15 (2002), *available at* http://data.unaids.org/publications/IRC-pub02/jc705-sexwork-tu_en.pdf.

[71] *HIV/AIDS sex work tool kit*, World Health Org., http://who.arvkit.net/sw/en/contentdetail.jsp?ID=204&d=sw.11 (last visited Nov. 7, 2010); *Key Principles*, World Health Org., http://www.who.int/hiv/topics/vct/sw_toolkit/context/en/index4.html (last visited Nov. 7, 2010); *New online tool kit on HIV/AIDS prevention for sex workers*, World Health Org. (Nov. 11, 2004), http://www.who.int/mediacentre/news/releases/2004/pr80/en/print.html.

- recognizing the role played in HIV transmission by clients and third parties, i.e. targeting the whole sex work setting, including clients and third parties, rather than only sex workers;
- recognizing and adapting to the diversity of sex work settings and of the people involved.[72]

WHO and the Global Coalition on Women and AIDS, a project of UNAIDS, also published a shorter document entitled "Violence Against Sex Workers and HIV Prevention," which states that the criminalization of sex work leads to violence against sex workers. Sex worker rights activists provided input for the document.[73] In 2006, UNAIDS and the Office of High Commissioner for Human Rights published the *International Guidelines on HIV/AIDS and Human Rights* ("International Guidelines"), which stated that among other structural factors, the decriminalization of sex work was necessary to reach sex workers in the response to HIV:

> With regard to adult sex work that involves no victimization, criminal law should be reviewed with the aim of decriminalizing, then legally regulating occupational health and safety conditions to protect sex workers and their clients, including support for safe sex during sex work. Criminal law should not impede provision of HIV prevention and care services to sex workers and their clients. Criminal law should ensure that children and adult sex workers who have been trafficked or otherwise coerced into sex work are protected from participation in the sex industry and are not prosecuted for such participation but rather are removed from sex work and provided with medical and psycho-social support services, including those related to HIV.[74]

Despite a growing trend towards sex worker inclusion and a changing tide in the use of criminal law as an adequate way to address HIV among sex workers, these reforms were tenuous victories for sex workers in the context of AIDS governance, and they were soon challenged.

In 2007, only a year after the issuance of the International Guidelines and five years after UNAIDS issued a technical advisory suggesting that sex work be decriminalized, UNAIDS issued a new Guidance Note, prepared by the United Nations Population Fund ("UNFPA"). The 2007 *Guidance Note*

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[72] *Key Principles*, *supra* note 71.

[73] *See* Avni Amin with Cheryl Overs & Penelope Saunders, World Health Organization, Violence Against Women and HIV/AIDS: Critical Intersections—Violence Against Sex Workers and HIV Prevention 1 (2005), *available at* http://www.who.int/gender/documents/sexworkers.pdf ("Criminalization of sex work contributes to an environment in which, violence against sex workers is tolerated, leaving them less likely to be protected from it.").

[74] Office of U.N. High Comm'r for Hum. Rts. & UNAIDS, International Guidelines on HIV/AIDS and Human Rights 30 (2006), *available at* http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf.

on Sex Work and HIV retreated from a sex worker rights perspective advocating decriminalization focusing instead on providing alternatives to sex work and ending demand for sex work.[75] As signalled by the shift in perspective, the new Guidance Note on sex work was the product of interventions from abolitionists and marked the product of a struggle between abolitionist and sex-positive feminists with and within UNAIDS.[76]

The shift towards a more abolitionist inspired Guidance Note was the result of numerous efforts by abolitionists to influence the HIV governance structures including UNAIDS. This was exemplified in July of 2006 at a UNAIDS Global Consultation on Sex Work and HIV/AIDS in Rio de Janeiro.[77] Attendees included members of UN agencies, NGOs, and sex worker organizations, including the Asia-Pacific Network of Sex Workers, the Latin American and Caribbean Network of Sex Workers, and the Network for Sex Work Projects ("NSWP"). Abolitionist feminists, who until 2006, were not involved in the discourse on HIV in sex work at UNAIDS, were also invited to the meeting. Both sex worker organizations and abolitionist feminists gave presentations.[78] Melissa Farley, an abolitionist, spoke about "'healing' from prostitution" and a "harm elimination" rather than a harm reduction approach.[79] Farley also spoke of the need to reduce demand for sex work through the use of felony level charges against clients of sex workers.[80] As documented by Anna-Louise Crago in her article, "The Curious Sex Worker's Guide to the UNAIDS Guidance Note," the participation of abolitionist feminists and their allies shifted the thinking of UNAIDS on the decriminalization of sex work:

> The United States sent 4 people to the meeting. Three worked with the government and one was an anti-prostitution activist. The Americans were very against sex work or harm reduction projects. They supported criminalizing clients and "rescuing" women from sex work. They also had a very intimidating presence. One UN person told me that after they said in the meeting that there was a difference between sex work and trafficking, their boss at the head office in another country received an angry call from the US government almost immediately. When the UN people had a meeting

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[75] *See* UNAIDS, UNAIDS Guidance Note: HIV and Sex Work (Apr. 2007), [hereinafter UNAIDS Guidance Note 2007] (on file with author).

[76] *See Timeline of events prior to and in response to the United Nations Guidance Note on Sex Work and HIV*, AIDS2008.com (July 2006), *available at* www.aids2008.com/files/user_29/20080615-TimelineOfEvents.pdf [hereinafter *Timeline of events*].

[77] *Id.*

[78] *See* UNAIDS, U.N. Population Fund ("UNFPA") & Nat'l STD/AIDS Programme of the Ministry of Health of Brazil, Report of the Global Technical Consultation on HIV and Sex Work (2006) (on file with author).

[79] *Id.* at 17–18.

[80] *Id.*

> after the consultation, the Americans sat nearby and appeared to be listening in and taking notes.[81]

Sustained pressure exerted by the U.S. government and abolitionist feminists on UNAIDS resulted in a guidance note with a strong abolitionist bent.[82] This was despite the presence of more than a dozen sex worker organizations and individuals advocating within the meeting for the rights of sex workers.[83] In this new 2007 draft Guidance Note, decriminalization was not mentioned once, in contrast to the numerous United Nations documents produced before the Guidance Note. Further, unlike previous documents, the 2007 Guidance Note explicitly suggested that many sex workers are trafficked into sex work:

> A significant number of women and girls are trafficked into sex work, knowingly or unknowingly, with the promise of a better life for themselves and their families. The increasing feminization of migration and the involvement of families, kin networks and local communities in the movement of women and girls, blurs the difference between trafficking and sex work. The figures on the proportion of women trafficked into sex work and those people entering sex work of their own volition, regardless of the reason for doing so, are often disputed and result in significantly different political, legal and policy approaches and outcomes.[84]

This reversal of earlier "rights-based" approaches to sex work led to a multi-pronged advocacy effort from sex-positive feminists and sex workers. Sex-positive feminists and sex workers worked with and within several key organizations, including the Canadian HIV/AIDS Legal Network, Open Society Institute, and Global Working Group on Sex Work Policy ("GWG") working under the guidance of the Network of Sex Worker Projects ("NSWP"). NSWP also engaged in direct advocacy with UNAIDS for the document to be revised.[85]

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[81] Anna-Louise Crago, *The Curious Sex Worker's Guide to the UNAIDS Guidance Note on HIV and Sex Work*, Sex Workers' Rights Advocacy Network, http://swannet.org/node/578 (last visited Aug. 30, 2010).

[82] Anna-Louise Crago, "Bitches Killing the Nation": The State-Sponsored Scapegoating of Sex Workers for HIV in Zambia 2004–2008 (June 2010) (unpublished Master's thesis, University of Concordia) (on file with author) [hereinafter Crago, "Bitches Killing the Nation"]; Telephone interview with Anna-Louise Crago, Consultant (Oct. 5, 2010).

[83] Canadian HIV/AIDS Legal Network, A Human Rights-Based Commentary on UNAIDS Guidance Note: HIV and Sex Work (April 2007) (2007), *available at* http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1196 (arguing that the Guidance Note issued by UNAIDS was inconsistent with human rights principles); Crago, "Bitches Killing the Nation," *supra* note 82.

[84] UNAIDS Guidance Note 2007, *supra* note 75, at 1.

[85] *Timeline of events*, *supra* note 76.

The proposed changes in the approach which have raised the most concern among sex worker organizations are:

- An emphasis on reducing commercial sex rather than reducing HIV;
- The conflation of human trafficking with sex work; entrenchment of police and law enforcement in HIV prevention programming;
- A lack of focus on measures to protect HIV positive sex workers from stigma and discrimination and ensure their access to treatment and care;
- The invisibility of male and transgender sex workers and a lack of guidance in the programming for them.[86]

The GWG revised Guidance Note highlighted, amongst other points, that:

> The procedural aspects of a rights-based approach which includes participation, accountability and transparency are central to working with sex workers. As currently understood, international human rights law provides limited protection for sex workers. Where sex workers are criminalized or stigmatized the starting point is one of deprivation of fundamental rights.[87]

Further, UN bodies were also sites of activism, with key sex worker activists serving as members of the UNAIDS Human Rights Reference Group and utilizing UNAIDS mechanisms.[88] At the April 2008 Programme Coordinating Board ("PCB") meeting of UNAIDS, several NGO representatives were able to effectively lobby UNAIDS to move closer to its 2002 stance on sex work.[89] The official NGO report of the PCB meeting documents the call by NGOs to UNAIDS:

> Following the UNAIDS Guidance Note on HIV and Sex Work was released in April 2007, there has been extensive criticism from networks of sex workers and sex work projects from across the world due to the undermining of a human rights based approach and the promotion of repressive approaches to sex work and HIV, which are known to have an adverse impact on working conditions, and increasing stigma surrounding sex work . . . .
>
> While this guidance is still being developed, it is urged that the consultation with networks of sex workers and sex projects and the effectiveness of the approaches outlined in the guidance note be

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[86] Letter from the Global Working Group on HIV and Sex Work Policy to Peter Piot (Sept. 20, 2007) (on file with author).

[87] GLOBAL WORKING GROUP ON HIV AND SEX WORK POLICY, INPUTS TO THE UNAIDS GUIDANCE NOTE ON HIV AND SEX WORK 4 (Apr. 2007) (on file with author).

[88] *Timeline of events*, *supra* note 76.

[89] Telephone interview with Anna-Louis Crago, *supra* note 82.

> documented. It is recommended that UNAIDS will . . . monitor and evaluate the implementation of the Guidance Note in consultation with sex workers to ensure the development and maintenance of an enabling environment that respects the rights of sex workers, and which promotes and supports their empowerment are given equal attention and resources among other priorities.[90]

A revised final Guidance Note was released in 2009. Despite the engagement of sex workers throughout the process, the final Guidance Note retained many elements of the abolitionist position, in particular the conflation of sex work with trafficking:

> A number of complex factors may also contribute to entry into sex work. For sex workers, these factors range along a continuum that extends from free choice to forced sex work and trafficking. Trafficking, which represents the denial of virtually all human rights, involves the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, abduction, or fraud, of deception, of abuse of power or the giving or receiving of payment or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation. Women and girls are the primary victims of trafficking for sex work, although a smaller number of men and boys are also trafficked into sex work. This Guidance Note affirms the right of any sex worker to leave sex work if she/he so wishes and to have meaningful access to options for employment other than sex work.[91]

The 2009 Guidance Note also does not mention decriminalization. Perhaps to counter the document's strong abolitionist focus, at the release of the Guidance Note, Michel Sidibé, the Executive Director of UNAIDS, established an advisory group co-chaired by NWSP and UNAIDS "to support and advise UNAIDS (Secretariat and Cosponsors), from a perspective that is informed by human rights principles, the best available evidence and the lived experience of sex workers."[92] The advisory group will work on four key areas, including the removal of punitive laws, policies, and practices; reduction of demand; the conflation of human trafficking and sex work; and eco-

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[90] Report by the NGO Rep., Apr. 23–25, 2008, UNAIDS/PCB(22)/08.2; UNAIDS, 22d Meeting of the UNAIDS Programme Coordinating Bd., 14 (Mar. 11, 2008).

[91] UNAIDS, UNAIDS Guidance Note on HIV and Sex Work 5 (2009), *available at* http://data.unaids.org/pub/BaseDocument/2009/jc1696_guidance_note_hiv_and_sexwork_en.pdf [hereinafter UNAIDS Guidance Note 2009].

[92] *UNAIDS Advisory Group on HIV and Sex Work & Global Working Group on HIV and Sex Work Policy*, NSWP: Global Network of Sex Work Projects, http://iac.nswp.org/unaids-advisory-group (last visited Aug. 30, 2010).

nomic empowerment.[93] It remains unclear what power the working group will have to effect programming. The existence of both the abolitionist feminist-influenced Guidance Note and the sex worker-run working group is evidence of conflicting interventions into global HIV governance.

B. U.S. Bilateral Aid for HIV and Sex Work: The Case of the Anti-Prostitution Pledge

There are substantive parallels between the global and national debates on sex work and HIV, and the same individuals and organizations serve as key actors influencing national policies on global HIV aid. This section of the Article assesses the role of dominance feminists, sex-positive feminists, and sex worker rights groups in the ongoing battles around the Anti-Prostitution Pledge.

1. *History of the Anti-Prostitution Pledge: Early Engagement from Feminists and Sex Worker Rights Groups*

On January 28, 2003, President George W. Bush announced a $15 billion commitment to address the global HIV/AIDS epidemic. This announcement led to the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act ("Leadership Act"), which became law in May of 2003.[94] This law makes the United States the largest government donor to HIV and AIDS prevention globally.[95] The Act was a product of nearly twenty years of activism from the U.S. based AIDS community.[96] The Leadership Act immediately began to implicate women's rights issues on a broader scale, however. Proposed amendments pushed by the Congressional Pro-Life Caucus alerted left-leaning activist groups of the need to engage with the Leadership Act.[97] These amendments included application of the "Global Gag Rule,"[98] prioritization of abstinence-only sex education,[99] and funding provi-

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[93] *UNAIDS Advisory Group on HIV and Sex Work*, Paolo Longo Research Initiative, http://www.plri.org/story/unaids-advisory-group-hiv-and-sex-work (last visited Aug. 30, 2010).

[94] United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25, 117 Stat. 711 (2003) (current version at 22 U.S.C.A. §§7601 *et seq* (West 2010)).

[95] Gostin, *supra* note 58, at 2046.

[96] *Id.*; Penelope Saunders, *Prohibiting Sex Work Projects, Restricting Women's Rights: The International Impact of the 2003 U.S. Global AIDS Act*, 7 Health & Hum. Rts. 179, 182 (2004).

[97] Gostin, *supra* note 58; Saunders, *supra* note 96, at 182.

[98] Saunders, *supra* note 96, at 182. The Global Gag rule is a regulation that prevents organizations from supporting abortion services even if they are funded through non-U.S. based foreign assistance (or other sources). *Id.*

[99] Jonathan Cohen & Tony Tate, *The Less They Know the Better: Abstinence-Only HIV/AIDS Programs in Uganda*, 14 Reprod. Health Matters 174, 174–78 (2006); Gostin, *supra* note 58, at 2046.

sions for faith-based organizations.[100] Feminist, women's rights, reproductive health, and HIV activists and organizations engaged in attempts to reverse these amendments to the Leadership Act.[101]

During this time, Republican Congressman Christopher Smith (NJ), proposed another amendment to the Leadership Act that has come to be known as the "Anti-Prostitution Pledge."[102] The amendment mandated that organizations receiving funding through the Leadership Act must have a policy explicitly opposing prostitution and sex trafficking. It banned these organizations from promoting or advocating for the legalization or practice of prostitution or sex trafficking.[103] The Anti-Prostitution Pledge exempted the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization, International AIDS Vaccine Initiative; and any "United Nations agency" from its requirements.[104]

Abolitionist feminists supported Smith's introduction of the Anti-Prostitution Pledge. This support was the product of a longstanding relationship between abolitionist feminists and the right-wing in the United States, which had begun with the Trafficking Victims Protection Act of 2000 ("TVPA"), passed only a few years before the 2003 Leadership Act.[105] The TVPA has a strong abolitionist focus, conflates sex work and trafficking, and limits funding such that an organization receiving funds cannot "promote, support, or advocate the legalization or practice of prostitution."[106] The Leadership Act fully incorporated the abolitionist feminist position toward sex work and prostitution:

> Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic. One in nine South Africans is living with AIDS, and sexual assault is rampant, at a victimization rate of one in three women. Meanwhile in Cambodia, as many as 40 percent of prostitutes are infected with HIV and the country has the highest rate of increase of HIV infection in all of Southeast Asia. Victims of coercive sexual

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[100] John W. Dietrich, *The Politics of PEPFAR: The President's Emergency Plan for AIDS Relief*, 21 Ethics & Int'l Aff. 277, 289 (2007).

[101] Saunders, *supra* note 96, at 182.

[102] *See* Crago, supra note 6, at 20.

[103] *See* United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C.A. § 7631 (West 2010).

[104] Ctr. for Health & Gender Equity, Policy Brief: Implications of U.S. Policy Restrictions for Programs Aimed at Commercial Sex Workers 1 (2005), *available at* http://www.genderhealth.org/files/uploads/change/publications/aplobrief.pdf.

[105] Chuang, *supra* note 7, at 1664.

[106] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (current version at 22 U.S.C.A. § 7101 *et seq* (West 2010)).

> encounters do not get to make choices about their sexual activities.[107]

This language set the stage for the actual pledge, which is nearly identical to language found in the TVPA:

> (e) LIMITATION—No funds made available to carry out this Act, or any amendment made by this Act, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.
> (f) LIMITATION—No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.[108]

Sex-positive feminist advocates actively campaigned against the Anti-Prostitution Pledge.[109] Despite being joined by a host of public health agencies (funding and programmatic), including the Open Society Institute and Global AIDS Alliance, sex-positive feminists and sex worker rights advocates were unsuccessful in removing the amendment from the Leadership Act.[110]

Abolitionist feminist success was partly due to the momentum of past victories, including the TVPA.[111] At the time of the passage of the TVPA, abolitionist feminists developed a broad base of right-wing support in the United States. These alliances were revived to ensure that the passage and implementation of the Anti-Prostitution Pledge in the Leadership Act continued through the next round of authorizations and implementation. For example, in 2005, two years after the passage of the Leadership Act,

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[107] United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25, §2, 117 Stat. 711, 716 (2003) (current version at 22 U.S.C.A. §§7601(23) (West 2010)).

[108] §§ 104A(e), (f), 117 Stat. at 733–34.

[109] Activists included: Jodi Jacobsen, then-Executive Director of CHANGE; Melissa Ditmore; and the International Women's Health Coalition under the leadership of Adrienne Germain. Telephone interview with Jodi Jacobsen, former Executive Director of CHANGE (Aug. 3, 2010); Telephone interview with Melissa Ditmore, Independent Consultant (Aug. 11, 2010). Email from Penelope Saunders, to author (Nov. 11, 2010) (highlighting the role of the Center for Health and Gender Equity, International Women's Health Coalition, and a range of other individual feminist and/or sex worker activists and academics who were active in challenging the insertion of the anti-prostitution language into the Leadership Act).

[110] *Id.*

[111] Scott Swenson, *Lantos Never Compromised Principle; Why is Bono?*, RH Reality Check Blog, (Feb. 13, 2008, 9:48 AM), http://www.rhrealitycheck.org/blog/2008/02/12/lantos-never-compromised-principle-why-is-bono.

abolitionist feminists Donna Hughes and Phyllis Chesler co-signed a letter with the Christian Medical Association, Alabama Physicians for Life, World Relief, and the Traditional Values Coalition.[112] The letter, which was delivered to President Bush, urged him to enforce the Anti-Prostitution Pledge of the Leadership Act and stop policies that legalized, regulated, or tolerated prostitution:

> Nevertheless, under the guise of anti-trafficking or anti-HIV/AIDS activities, some NGO's incredibly continue to prop up the practice of prostitution instead of rescuing the victims. Despite the fact that Congress has required any organization receiving certain federal grants to produce assurances that the organization opposes prostitution and sex trafficking, many of these NGO's are now imploring you to ignore this mandate.
>
> . . . .
>
> Not surprisingly, the NGO protesters provided no evidence, no peer-reviewed data sources to buttress their argument that opposing the so-called "choice" of prostitution would somehow undermine "best practices" in the field.
>
> The evidence shows that medical pathologies resulting from trafficking and prostitution include bodily injuries such as broken bones, concussions, burns, as well as vaginal and anal tearing from violent assaults, stabbings, rapes, and torture; traumatic brain injury (resulting in memory loss, dizziness, headaches, numbness, etc.); sexually transmitted diseases such as HIV/AIDS, gonorrhea, syphilis, UTI's, and pubic lice; sterility, miscarriages, and menstrual problems; infectious diseases including TB, hepatitis, malaria, and pneumonia; drug and alcohol addition; forced abortions; and post-traumatic stress disorder, including nightmares, flashbacks, depression, depersonalization, disorientation, suicidal tendencies and suicide.[113]

This sustained advocacy resulted in maintenance of the Anti-Prostitution Pledge language in the Leadership Act reauthorization. Documentation of the amendment negotiation process suggests that, despite advocacy for the removal of the Anti-Prostitution Pledge by sex-positive feminists that led to versions of the Leadership Act being drafted without the Anti-Prostitution Pledge, behind closed doors the Pledge was ultimately included in the final reauthorization bill and in the 2008 Leadership Act.[114]

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[112] Letter from the Christian Dental and Med. Ass'n to Former President George W. Bush (Aug. 4, 2005) (on file with author).

[113] *Id.*

[114] Assistance to Combat HIV/AIDS, Pub. L. No. 108–25, §§ 301(e), (f), 117 Stat. 711, 733–34 (codified at 22 U.S.C. §§ 7631(e), (f)); Tom Lantos & Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization

2. *History of the Cases*

In addition to ongoing advocacy efforts by both abolitionist and sex-positive feminist organizations regarding the Leadership Act, litigation focused on the Anti-Prostitution Pledge was also underway. The U.S. Department of Justice ("DOJ") had initially concluded that the application of the Anti-Prostitution Pledge in the United States to U.S.-based organizations would be unconstitutional under the First Amendment.[115] However, the DOJ later amended this guidance to state that the Anti-Prostitution Pledge would apply to U.S.-based organizations.[116] In response, the first case filed in August of 2005 was on behalf of DKT International, a provider of HIV/AIDS services. The case was filed in the U.S. District Court for the District of Columbia against the United States Agency for International Development ("USAID").[117] DKT sued USAID on First Amendment grounds, arguing that DKT was compelled to adopt the government's viewpoint and that the Anti-Prostitution Pledge restricted privately funded speech.[118] An additional case was filed on September 23, 2005, in the Southern District of New York by the Alliance for Open Society International ("AOSI"), the Open Society Institute, Pathfinder International, the Global Health Council, and Interaction, also based on First Amendment grounds.[119]

3. *Feminist Response and Involvement in Anti-Prostitution Pledge Litigation*

Abolitionist feminists, sex-positive feminists, and sex worker rights groups have been integrally involved in the litigation. This section of the Article does not provide a play-by-play of all of the litigation, but rather highlights the specific moments in which feminist organizations participated.

4. *Engagement in the Processes of the Court*

On November 15, 2006, in *DKT v. USAID*, international sex-positive feminist organizations, including the Women's Rights Project of the Ameri-

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Act of 2008, Pub. L. No. 110-293, 117 Stat. 711 (codified at 22 U.S.C. § 7601 (West 2010)); CTR. FOR HEALTH & GENDER EQUITY, *supra* note 104, at 1.

[115] CTR. FOR HEALTH & GENDER EQUITY, *supra* note 104.

[116] *Id.*; Letter from Daniel Levin, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to Alex M. Azar II, Gen. Counsel, U.S. Dep't of Health & Human Servs. (Sept. 20, 2004) (on file with author), *available at* http://www.globalrights.org/site/DocServer/Update_letter_on_funding_restrictions.2005.doc?docID=4224.

[117] DKT v. USAID: *Challenging Global AIDS Funding Restrictions*, BRENNAN CENTER FOR JUSTICE (Feb. 27, 2007), http://www.brennancenter.org/content/resource/dkt_v_usaid.

[118] Mem. of Law in Support of DKT International's Mot. For a Prelim. Inj., DKT Int'l Inc. v. USAID, 477 F.3d 758 (D.C. 2007) (No. 05-01604).

[119] Compl., Alliance for Open Society Int'l, Inc. v. USAID, 430 F. Supp. 2d 222 (S.D.N.Y. 2006) (No. 05-8209).

can Civil Liberties Union ("ACLU"), the Centre for Health and Gender Equity, the Center for Reproductive Rights, and the International Women's Health Coalition filed an amicus brief in support of DKT's motion of preliminary injunction.[120] The brief argued that, in addition to the First Amendment violations, the existence of the Anti-Prostitution Pledge meant that sex workers were being further stigmatized, driven away from health programs, and were not being reached in key HIV interventions.[121]

Despite not having filed a brief in the DKT case, abolitionist feminists were present in the litigation through their advocacy surrounding the TVPA in the years prior.[122] On April 9, 2003, years before the litigation surrounding the Anti-Prostitution Pledge began, Donna Hughes testified on the "Trafficking of Women and Children in East Asia and Beyond" to the Subcommittee of East Asian and Pacific Affairs for the Senate Foreign Relations Committee.[123] Her testimony explicitly highlighted the restrictions that should be placed on HIV/AIDS monies and highlighted the role of Congressman Christopher Smith in drafting the language of the anti-prostitution pledge:

> We can better reduce the spread of HIV by rescuing trafficking victims and ending the sexual slave trade that creates a demand for more victims. In every case, U.S. policies should encourage the arrest and prosecution of traffickers and pimps and the permanent closure of the brothels . . . .
>
> There are billions of dollars being spent on HIV/AIDS prevention and treatment, and a significant portion of it is directed for prevention in "high risk" groups, such as women and children in prostitution. There should be appropriate restrictions or requirements for how aid organizations and their personnel respond when they suspect that anyone they come in contact with is abused, exploited, or enslaved.
>
> In the House, Representative Chris Smith has been successful in adding an amendment to the Global HIV/AIDS bill (H.S. 1298) that will prevent funds from this Act being used to provide assistance to any group that does not have a policy explicitly opposing prostitution and sex trafficking.[124]

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[120] Brief for AIDS Action et al. as Amici Curiae Supporting Plaintiff, DKT v. USAID, 477 F.3d 758 (D.C. 2007) (No. 05-01604).

[121] *Id.* at 2, 4–5.

[122] *See* Chuang, *supra* note 7, at 1677–80, 1683–1704 (discussing the passage of the TVPA and the rise and influence of the neo-abolitionist movement after 2000).

[123] *Trafficking of Women and Children in E. Asia and Beyond: A Review of U.S. Pol'y: Hearing before the S. Subcomm. on East Asian and Pacific Affairs of the S. Comm. on Foreign Relations*, 108th Cong. 1 (2003) (statement of Donna Hughes, Professor and Carlson Endowed Chair in Women's Studies, Univ. of Rhode Island).

[124] *Id.* at 2–3.

In its 2005 motion arguing to dismiss the DKT case, USAID relied on Donna Hughes' testimony that women who are trafficked are at higher risk for HIV, which is a "death sentence for victims."[125] The brief also focused in on Hughes' statement that "[b]rothels and other sites where women and children are used in prostitution are markets for the distribution of the AIDS virus."[126]

In 2005, abolitionist feminists came together to submit an amicus brief on behalf of the United States Agency for International Development in *AOSI v. USAID*. The brief was filed by the Coalition Against Trafficking in Women ("CATW") and Equality Now on behalf of eighteen organizations, including Apne Aap in India, Coalition Against Trafficking in Women, Asia Pacific, and Standing Against Global Exploitation ("the SAGE Project").[127] In the brief, the amici argued that organizations opposed to the legalization of prostitution are more effective in the long run because the eradication of the sex industry will lead to a reduction of HIV/AIDS.[128] The amicus brief highlights the exploitative nature of prostitution using dominance feminism language:

> The harms of prostitution are so profoundly linked to gender, class, and racial inequality as to make the prostitution industry one of the world's most extreme systems of discrimination. Its victims are overwhelmingly female and overwhelmingly poor. They are made vulnerable by the disadvantaged status of women in many regions, by the childhood sexual abuse for which girls are disproportionately targeted, and by the desperation induced by poverty.[129]

The abolitionist feminist position of prostitution as a complete form of male-over-female subordination exists throughout the document and grounds the approach taken by dominance feminists to the litigation at hand.[130]

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[125] Government's Reply Brief in Supp. of Mot. to Dismiss at 9, DKT v. USAID, 477 F.3d 758 (D.C. 2005) (No. 05-01604), *available at* http://www.brennancenter.org/content/resource/dkt_v_usaid/.

[126] Government's Mem. of Points and Authorities in Supp. of Mot. to Dismiss at 9, DKT v. USAID, 477 F.3d 758 (D.C. 2005) (No. 05-01604), *available at* http://www.brennancenter.org/content/resource/dkt_v_usaid/.

[127] Brief for Coal. Against Trafficking in Women et al. as Amici Curiae Supporting Respondents, AOSI v. USAID, 430 F. Supp. 2d 222 (S.D.N.Y. 2006) (No. 05-8209).

[128] *Id.* at 2 ("The United States has compelling reasons to decide that its funds are better spent on organizations whose approach will in the long run be far more effective.").

[129] *Id.* at 5.

[130] *Id.* at 3. The brief includes other examples of abolitionist feminist reasoning: "The prostitution and sex trafficking industry, whether legal or illegal, brings physical and mental devastation upon the persons—mostly female, and mostly young—whose bodies are bought and sold for sexual use. Individuals living in prostitution or emerging from prostitution exhibit symptoms of mental and emotional trauma at levels that are comparable to the mental health injuries sustained by survivors of combat or rape. This harm to mental health, typically accompanied by serious harm to physical health, is read-

In 2006, sex-positive feminists and sex worker rights groups filed their own amicus brief in support of AOSI and other plaintiffs. The brief was submitted by the Women's Rights Project of the ACLU on behalf of amici, including the Center for Health and Gender Equity, International Women's Health Coalition, the Center for Reproductive Rights, and a variety of public health organizations including AIDS Action, Planned Parenthood Federation of America, and the Foundation for AIDS Research ("amFAR").[131] The brief argued that sex workers are integral to successful HIV programs and that the abolitionist position alienates the most marginalized women, in turn preventing HIV programs from effectively reaching sex workers.[132]

In 2008, as a result of ongoing litigation, a preliminary injunction was ordered to halt the application of the Anti-Prostitution Pledge to most U.S.-based organizations.[133] The challenges posed by the Anti-Prostitution Pledge continue, however, for foreign-based NGOs to whom the pledge continues to apply.[134] The litigation is ongoing—USAID submitted a brief in the United States Court of Appeals to continue the appeal of the injunction in May of 2011. The government continues to argue that the Leadership Act is constitutional on First Amendment grounds and that the plaintiffs do not have standing.[135]

5. *Feminist Activism on the Anti-Prostitution Pledge Outside of Litigation*

While abolitionist feminists continued to engage in activism to stop trafficking both within and outside of the context of HIV, sex-positive feminists also continued to advocate for the removal of the Anti-Prostitution Pledge or, at a minimum, a change in the Health and Human Services ("HHS") regulations that would narrow the interpretation of the law and clarify the regulations.[136]

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ily explained upon examination of conditions in the sex industry. Prostitution within that industry is an experience that is saturated in violence and coercion, both physical and sexual." *Id.*

[131] Brief for AIDS Action et al. as Amici Curiae Supporting Plaintiff-Appellees, AOSI v. USAID, 430 F. Supp. 2d 222 (S.D.N.Y. 2006) (No. 05-8209).

[132] *Id.* at 6–7.

[133] *DKT v. USAID: Challenging Global AIDS Funding Restrictions, supra* note 116.

[134] Ctr. for Health & Gender Equity, *supra* note 104.

[135] Revised Brief for Defendants-Appellants at 3, 28, AOSI v. USAID, No. 08-0417-cv (2d Cir. 2010), *available at* http://www.brennancenter.org/page/-/Justice/AJLawsuits/051110GovernmentAOSIbrief.pdf.

[136] *See* Ctr. for Health & Gender Equity, *supra* note 104, at 6. For example, the 2010 FIFA World Cup caught the attention of numerous feminists as an opportunity to engage on issues of sex work and trafficking. *See Urgent Call: World Cup Soccer and Sex Trafficking—A Volatile Combination*, Equality Now (May 2010), http://equality-now.org/english/takeaction/newsalert/urgentalert_southafrica_201005_en.html.

During the course of the litigation, HHS revised these guidelines several times between 2007 and 2009.[137] In December 2009, several letters were submitted to Health and Human Services that included feminist organizations. Twenty-one organizations, including several sex-positive feminist groups and other public health organizations, expressed concern in a letter to Kathleen Sebelius about the Anti-Prostitution Pledge.[138] Feminist signatories to the letter included the International Women's Health Coalition, Ipas USA, and the International Planned Parenthood Federation.[139] The letter sought clarification as to what the pledge meant by "opposing prostitution" and noted that organizations were unsure whether they could engage in activities including:

> Researching the pros and cons of various legal regimes and their impact on HIV transmission among sex workers; [a]dvocating for reducing or eliminating criminal penalties against sex workers in order to encourage them to help identify traffickers or to address extortion of police; and [h]elping sex workers form collectives and unions in order to better protect themselves from police and community violence and abuse and enable them to access health services.[140]

The Center for Health and Gender Equity and Human Rights Watch submitted a second letter,[141] and a third letter was presented by 170 individuals and organizations, including the Sex Worker Outreach Project, Global Network of Sex Worker Projects, Scarlet Alliance in Australia, Sex Workers Interest Organization in Denmark, and Syndicat du TRAvail Sexuel (STRASS) of France.[142]

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[137] *AOSI v. USAID*, BRENNAN CENTER FOR JUSTICE, http://www.brennancenter.org/content/resource/aosi_v_usaid/%20for%20a%20brief (last visited November 19, 2010).

[138] Letter from 21 Humanitarian, Public Health, and Human Rights Organizations to Kathleen Sebelius, Secretary, U.S. Dep't of Health & Human Servs, *Comments on Office of Global Health Affairs (on file with author); Reg. on the Organizational Integrity of Entities Implementing Leadership Act Programs and Activities, Notice of Proposed Rulemaking* (Dec. 23, 2009), *available at* http://www.brennancenter.org/page/-/Justice/AJLawsuits/20091223.Groups_Comments.pdf.

[139] *Id.*

[140] *Id.*

[141] Letter from the Ctr. for Health and Gender Equity and Human Rights Watch to Kathleen Sebelius, Secretary, U.S. Dep't of Health & Human Servs., *Comments on Office of Global Health Affairs' Regulation on the Organizational Integrity of Entities Implementing Leadership Act Programs and Activities, Notice of Proposed Rulemaking* (Dec. 23, 2009), *available at* http://www.brennancenter.org/page/-/Justice/AJLawsuits/20091223.CHANGE_HRW_Comments.pdf.

[142] Letter from 170+ Individuals and Grassroots Orgs. to Kathleen Sebelius, Secretary, U.S. Dep't of Health & Human Servs., *Comments on Office of Global Health Affairs' Reg. on the Organizational Integrity of Entities Implementing Leadership Act Programs and Activities, Notice of Proposed Rulemaking* (Dec. 23, 2009), *available at* http://www.brennancenter.org/page/-/Justice/CourtCases/20091223.Grassroots_comments.pdf.

On April 13, 2010, HHS issued final regulations.[143] In its regulations, the agency acknowledged the remarks by sex-positive feminist organizations and their allies in seeking clarification.[144] However, the regulations remained vague and highlighted the harms of prostitution:

> The goal in implementing the revised rule on the prostitution policy provision is to ensure that the Government's position opposing prostitution and sex trafficking is not undermined while allowing Leadership Act funding recipients greater flexibility in finding alternative channels for protected expression in diverse areas for diverse populations. Given the numerous factual situations that may arise, the Department has deliberately adopted a case-by-case approach in this area, recognizing that circumstances in some countries may make it difficult for organizations to satisfy some of the factors demonstrating objective integrity and independence. The Department also plans to work with recipients to address individual questions regarding the separation criteria, and to help remedy violations before taking enforcement action. We believe these steps will ensure recipients have adequate channels for engaging in protected speech while still adhering to the requirement of the Leadership Act that recipient organizations be opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men and children.[145]

The definition of commercial sex work remained equally vague, to the detriment of organizations working with sex workers: "*Commercial sex act* means any sex act on account of which anything of value is given to or received by any person."[146] This lack of clarity potentially implicates a broad range of behaviors and sexual interactions.

Generally, the new rule clarifies little about how the Anti-Prostitution Pledge should work in practice, and confusion amongst recipients of global AIDS funding remains.[147] However, there are a few specific changes. The new rule of April 13, 2010 states that:

> [F]unding announcements and agreements with funding recipients include a clause that states that the recipient is opposed to prostitution and sex trafficking because of the psychological and physical

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[143] Organizational Integrity of Entities That Are Implementing Programs and Activities Under the Leadership Act, 75 Fed. Reg. 18760 (Apr. 13, 2010) (codified at 45 C.F.R. pt. 89).

[144] *Id.* at 18762.

[145] *Id.*

[146] Organizational Integrity of Entities Implementing Programs and Activities Under the Leadership Act, 45 C.F.R. § 89.2 (2010).

[147] Melissa Ditmore and Dan Allman, *A Case Story Analysis of the Implementation of PEPFAR's Anti-Prostitution Pledge and its Implications for Successful HIV Prevention Among Organizations Working with Sex Workers*, XVIII International AIDS Conference (July 22, 2010), http://pag.aids2010.org/Abstracts.aspx?SID=620&AID=6226.

> risks they pose for women, men, and children . . . the rule also . . . eliminates the requirement for an additional certification by funding recipients.[148]

Abolitionist language continues to be present and features more explicitly in the most recent regulations. The language that the opposition to prostitution and sex trafficking is due to the "psychological and physical risks they pose for women, men, children" was added in the April 2010 rule.[149] These final regulations went into effect on May 13, 2010.[150]

V. Feminist Legal Reforms: The Unintended Consequences on Women's Health

This section lays out the real-world impact of feminist and sex worker advocacy reform agendas on women's health. Understanding unintended consequences allows us to weigh the prohibitionist or abolitionist approach against a more liberalized criminal law regime around sex work.[151] This section highlights three ways in which some feminist legal reforms can have unintended consequences that harm women's health: through violence experienced in the context of rehabilitation, by harm to women's health through criminalization of the client, and de-funding HIV best practices pertaining to sex work.

A. *Women's Greater Exposure to Sexual and Other Violence by the State*

Sex workers are very vulnerable to violence. Studies in Central and South Asia, Europe, and North America have estimated that forty to seventy percent of sex workers experience violence each year.[152] Much of this violence is inflicted by police officers. Evidence suggests that police officers often harass, beat, rape, and ultimately arrest sex workers despite taking sexual favors in lieu of bribes.[153] When sex workers experience violence from non-state agents, sex workers are often denied access to police protection and their complaints to the police are ignored. This violence places sex workers at a greater risk of contracting HIV, prevents public health workers

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[148] Organizational Integrity of Entities That Are Implementing Programs and Activities Under the Leadership Act, 75 Fed. Reg. at 18760.

[149] *Id.*

[150] *Id.*

[151] Joanna Busza, *Having the rug pulled from under your feet: one project's experience of the US policy reversal on sex work*, 21 Health Pol'y Plan 329, 330–31 (2006); Scott H. Evertz, *How Ideology Trumped Science: Why PEPFAR Has Failed to Meet Its Potential* 13–15 (2010), Ctr. for Am. Progress & Council for Global Equality, *available at* http://www.americanprogress.org/issues/2010/01/pdf/pepfar.pdf.

[152] Shannon & Csete, *supra* note 63, at 573–74.

[153] *See* Cheryl Overs, APNSW, Caught Between the Tiger and the Crocodile: The Campaign to Suppress Human Trafficking and Sexual Exploitation in Cambodia (Draft) 7, *available at* www.aidslex.org/site_documents/SX-0046E.pdf.

from reaching sex workers, and further disenfranchises sex workers who must deal with the additional trauma of a violent removal from a brothel through raids and rescues of sex workers.[154]

Abolitionist feminist organizations support anti-trafficking organizations in Cambodia that utilize this "raid, rescue, and rehabilitate" approach to trafficking and sex work.[155] This method entails the use of state agents to raid brothels. Ongoing activism from abolitionist feminist organizations for anti-trafficking activities results in U.S. government aid for raids and rescue programs. The USAID Office of Women and Development has provided a total of $528 million to anti-trafficking projects since 2001, including $994,761 granted to the International Justice Mission, the organization that carries out many of these "rescue" programs.[156]

Sex-positive feminists and sex workers argue that allowing the state to regulate sex work places greater authority in the hands of those individuals who have historically been violent toward sex workers.[157] In Cambodia, state raids on brothels—often conducted under the guise of rehabilitating sex workers, encouraged by new domestic anti-trafficking legislation, and with U.S. government support—have resulted in extreme violence against the same sex workers that the government seeks to rehabilitate.[158] Sex worker rights groups have documented that in rehabilitation centers (where sex workers often end up after they have been "rescued"), sex workers experience rape by guards and prisoners, beatings, and a lack of medical attention

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[154] Tara SH Beattie et al., *Violence against female sex workers in Karnataka State, south India: impact on health, and reductions in violence following an intervention program*, 10 BMC Public Health 1, 2, 10 (2010), *available at* http://www.biomedcentral.com/1471-2458/10/476.

[155] For a document on raids and rescues from an abolitionist perspective, see *Cambodia*, CATW, http://www.catwinternational.org/factbook/Cambodia.php (last visited Aug. 30, 2010) ("In a two-month period in 1997, there were more than 500 prostituted women and girls rescued and 20 traffickers arrested."); *see also* Bernstein, *supra* note 18, at 139 ("Although the organization's operations have attracted some controversy (as in Phnom Penh, Cambodia, where the rescued women escaped through the windows with bedsheets in order to run back to the brothels from which they had been 'liberated' [Soderlund]), the undercover and mass-mediated model of activism that IJM propounds has become the emulated standard for evangelical Christian and secular feminist organizations alike.").

[156] *Trafficking in Persons*, USAID, http://www.usaid.gov/our_work/cross-cutting_programs/wid/trafficking/index.html (last visited Aug. 30, 2010); USAID, International Justice Mission Anti-Trafficking Program in Cambodia: Assessment iv (2006), *available at* http://pdf.usaid.gov/pdf_docs/PNADG806.pdf [hereinafter IJM Assessment].

[157] Crago, *supra* note 6, at 32.

[158] See the support of the U.S. government to anti-trafficking initiatives in Cambodia: "USAID has provided funding for a number of organizations to implement anti-trafficking activities in Cambodia. In September 2003, USAID's Office of Women in Development (WID Office), provided $994,761 to support the International Justice Mission's (IJM) two-year anti-trafficking program in Cambodia. This cooperative agreement marked the first funding that IJM had received from USAID." IJM Assessment, *supra* note 156, at iv; *see also* Overs, *supra* note 153; *Trafficking in Persons*, *supra* note 156 ("The U.S. Government has been at the forefront of efforts to stop trafficking in persons throughout the world. Since 2001, the United States has provided about $528 million in anti-trafficking assistance overseas. USAID has been a major part of this effort, providing $123.1 million in assistance to more than 70 countries since 2001.").

and care.[159] Sex workers have often attempted to escape from rehabilitation centers, and when successful, they often return to brothels.[160]

Despite this knowledge, abolitionist feminists and their allies directly rely on state service providers to "rescue" sex workers often holding sex workers in police custody as part of the rescue and rehabilitate process.[161] The rehabilitation centers are often managed by the Ministry of Social Affairs, Veterans, and Youth Rehabilitation ("MoSAVY") in Cambodia: "Following rescues, MoSAVY temporarily holds victims from four to twenty-four hours before placing them in shelters."[162]

Decriminalization of sex work as advocated by sex-positive and sex worker rights groups does not immediately solve the problem of abuse by the state or the police although it might cease raids on brothels.[163] However, decriminalization does allow for organizations that work with sex worker communities to shift the balance of power between the sex worker and state agents that are engaged in harmful behavior toward the sex worker. In their article *Can Sex Workers Regulate the Police? Learning from an HIV Prevention Project for Sex Workers in Southern India*, Biradovolu, Burris, and their co-authors document the role of an external NGO in bringing together sex workers to better regulate the police.[164] This evidence suggests that decriminalization moves power away from the hands of the state and allows for a more diffuse engagement of sex workers and state agents. This improves sex workers' capacity to engage in HIV projects and programs.[165]

State-run rehabilitation centers may in fact be a site of HIV transmission and a cause of women's poor health, given the exposure to sexual and other violence perpetrated against sex workers in the course of this "rescue" process. Understanding the consequences of empowering state agents to

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[159] Overs, *supra* note 153, at 8; *Off the Streets: Arbitrary Detention and Other Abuses Against Sex Workers in Cambodia*, Human Rights Watch (July 19, 2010), http://www.hrw.org/en/reports/2010/07/20/streets.

[160] Bernstein, *supra* note 18, at 139.

[161] IJM Assessment, *supra* note 156, at 11 ("IJM's presence in Cambodia has aided law enforcement's capacity to fight trafficking. IJM has closely supported the AHTJPU and the Municipal Police Chief, both of which expressed appreciation for IJM's assistance and dedication to fighting human trafficking. General B.G Un Sokhunthea, the Director of AHTJPU, specifically acknowledged the value of police training and equipment provided by IJM including a camera, video equipment, a television, microphones and CD player. This equipment has also been used by the police force to train other officers and staff.").

[162] *Id.*

[163] Crago, *supra* note 63.

[164] Biradavolu et. al., *supra* note 40, at 1544 ("The NGO's presence introduced new sources of power for sex workers to draw upon in their interactions with police. Sex workers were emboldened when NGO staff did not stigmatize their profession and declared the women to be indispensable for HIV prevention. They developed organizational power by forming CBOs. As newly-trained bearers of knowledge on HIV, sex workers deployed a new discursive power in interacting with police. Affiliation with a transnational NGO and a global donor signaled to sex workers, police and local officials the presence of networked power that might be called upon in a conflict.").

[165] *Id.*

raid, rehabilitate, and rescue sex workers suggests that decriminalization is a more appropriate response to facilitating reduction in violence for female sex workers.

B. Women's Greater Exposure to Violence via Criminalizing the Client

Abolitionist feminists often rely on the "Swedish" model as a means of abolishing sex work while not harming the sex worker herself. The Swedish model criminalizes the client without criminalizing the activities of the sex worker.[166]

Sex workers and sex-positive feminists note that the Swedish model actually creates a more harmful situation. Instead of ending sex work, sex workers and sex-positive feminists assert that the Swedish model simply makes practicing sex work less safe, as sex workers are driven out of sight to suit the need of their clients to remain hidden.[167] Sex workers become more vulnerable to violence and may be less likely to negotiate condom use.[168] This places women at higher risk of contracting HIV/AIDS.[169] There are other unexpected consequences as well. Documentation suggests that when landlords understand themselves as prosecutable as pimps under the Swedish law, sex workers are left without a place to live. The connection between access to housing and HIV risk has been noted by many scholars who argue that homelessness pushes women into economic dependency, transactional sex, violent relationships, and, often, a greater inability to negotiate safe sex.[170] Decriminalization of sex work does not immediately eliminate vio-

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[166] CANADIAN HIV/AIDS LEGAL NETWORK, *supra* note 49. *See also video interview with Swedish sex worker and activist Pye Jacobssen*, SEX WORKERS' ADVOCACY NETWORK (June 22, 2009), *available at* http://swannet.org/node/1512 ("Everything comes back to radical feminism, you know? In every country you have radical feminists, in Sweden radical feminism is the norm, and if you really go way back in radical feminism, they say that any penetration is like rape. Now it actually says, in the context of the law, it says that no prostitution is prostitution out of free will. It means that everybody is a victim. If you scream and shout that you're not a victim you are suffering from a false consciousness. And if you try to convince them that you're not even suffering from a false consciousness, they will say: 'Well you're not representative.' And the fact is that I'm very representative. I'm middle aged, Swedish, working indoors, which is a very typical Swedish sex worker. And the fact of the matter is that most people in the sex industry chose it for whatever reason. It maybe suits their purposes, their way of living, or the money, or for whatever reason. And then you will also get, especially here in Sweden, people will challenge you and say: 'so what's a free choice?' Yeah, but ask someone working as an assistant in a hospital, working with old people, cleaning the faeces the whole day, if that was a free choice. She probably wanted to pay her rent. There are a lot of occupations that we take because we need to survive."); Kulick, *supra* note 50.

[167] *Sex Workers Meet Feminism*, ASSOCIATION OF WOMEN IN DEVELOPMENT (Apr. 12, 2008), http://awid.org/eng/Forum-08-in-Review/Most-Popular-Break-out-Sessions/Forum-08-s-Most-Popular-Breakout-Sessions/Sex-Workers-meet-Feminism; ASTRA NETWORK, ADVOCATE'S TOOL NO. 5: TRAFFICKING IN PERSONS 2, *available at* www.astra.org.pl/tool5.pdf.

[168] Kulick, *supra* note 50; Shannon & Csete, *supra* note 63, at 573–74.

[169] Shannon & Csete, *supra* note 63, at 573–74.

[170] SEX WORKERS' ADVOCACY NETWORK, *supra* note 166.

lence against sex workers; however, it does allow for sex workers to remain visible. In turn, sex workers are better able to negotiate sex in safer venues, can be less afraid to seek services related to health, safety, and security, and are visible and accessible to health care workers with information and education.[171]

C. Women's Greater Vulnerability Through De-Funding "Best Practices" on Sex Work

The abolitionist feminist support for the Anti-Prostitution Pledge resulted in the de-funding of known best practices on HIV. These practices include the use of peer education for sex workers, collectivization of sex workers, and sex worker empowerment to reduce violence from clients and state agents.[172] The World Health Organization and UNAIDS have identified sex workers as leaders in the HIV response and the use of peer education models as a key element of outreach to sex workers.[173]

As a statement to the centrality of sex workers in the Brazilian HIV response, the Brazilian government refused $40 million dollars of U.S. money for HIV due to its unwillingness to sign the Anti-Prostitution Pledge.[174] Brazil noted that sex workers were integral in the continued success of the Brazilian HIV response:[175]

> In Brazil, where prostitution is legal, the government was unwilling to turn its back on a population that's not only among the most vulnerable to HIV but also among the most active in combating it. "Sex workers are part of implementing our AIDS policy and deciding how to promote it . . . . They are our partners. How could we ask prostitutes to take a position against themselves?"[176]

The abolitionist feminist supported Anti-Prostitution Pledge has also impacted non-governmental organizations. *The Lancet*, a leading public health journal, highlighted the work of feminist sex worker activist Meena

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[171] Shannon & Csete, *supra* note 63, at 573–74.

[172] *See* FHI/UNAIDS, Best Practices in HIV/AIDS Prevention Collection 82 (Bunmi Makinwa & Mary O'Grady eds., 2001), *available at* http://www.fhi.org/en/HIVAIDS/pub/guide/bestpractices.htm ("Important principles include participation of the target group in decisions about services, peer empowerment and a comprehensive approach to prevention and treatment.").

[173] UNAIDS, Female sex worker HIV prevention projects, *supra* note 69, at 29.

[174] Esther Kaplan, *Just Say Não*, The Nation (May 12, 2005), http://www.thenation.com/article/just-say-n%C3%A3o; Nicole Franck Masenior & Chris Beyrer, *The US Anti-Prostitution Pledge: First Amendment Challenges and Public Health Priorities*, 4 PLoS Med. 1158, 1158 (2007), *available at* http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0040207.

[175] Kaplan, *supra* note 174; Masenior & Beyrer, *supra* note 174.

[176] Kaplan, *supra* note 174.

Seshu,[177] and her organization's interaction with the Bush administration's anti-prostitution policy:

> In 2005, SANGRAM seemingly fell foul of the US Bush administration that would not support HIV programmes unless they opposed prostitution. Seshu says that "SANGRAM refused to sign the anti-prostitution pledge, and decided to return some grant money they had already been given by USAID. Somehow, this fact got twisted into a media storm that claimed that SANGRAM had been cut off from funding because of the issue of trafficked children." Damaging allegations were made that SANGRAM was obstructing efforts to release trafficked children. The reality, says Seshu, is that sex workers were terrorised by police while they were on a mission initiated by local NGOs to raid brothels to liberate children. As Seshu makes clear: "We have been working on HIV/AIDS prevention and for the rights of people in prostitution for more than a decade; we oppose trafficking for any purpose and believe it is a criminal offence. We believe that the use of minors in prostitution is child sexual abuse.[178]

In Bangladesh, Durjoy Narj Shangho, a UNAIDS best-practice program was forced to reduce sex worker drop-in centers from twenty to four.[179] In Cambodia, the Medisans Sans Fronteirs Lotus Project was eventually forced to close after abolitionist feminists discovered that the project was providing services to sex workers:

> Then, in 2002, the Lotus Club project caught the eye of activists working to catalyse the U.S. policy shift. It was one of 8 or so programmes brought before the House Committee on International Relations on 19 June 2002 as an example of alleged 'Foreign Government Complicity in Human Trafficking.' The testimonial misrepresented much of the project, and naively condemned staff for having 'never called the police,' perhaps not appreciating how integrally involved local police forces already were—through routine extortion of bribes, as regular clients and as the rumoured owners of some brothels.[180]

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[177] *The Power of Movements: Reflections from AWID's 11th International Forum*, Global Fund for Women (Apr. 27, 2010), http://www.awid.org/eng/content/download/71251/786909/file/SexWorkersMeetFeminism.pdf.

[178] Priya Shetty, *Profile: Meena Saraswhati Seshu: Tackling HIV for India's Sex Workers*, 376 The Lancet 17, 17 (2010).

[179] Taimur Khan, Devika Iyer & Sapna Patel, Critique of the Anti-Prostitution Pledge and its Global Impact: A Position Paper of the Sex Workers Project at the Urban Justice Center 24 (2007), *available at* http://sexworkersproject.org/publications/archives/factsheets/2007/; *see also* Crago, *supra* note 6, at 20 (stating that the number of drop-in centers actually reduced to only three).

[180] Joanna Busza, *Having the rug pulled from under your feet: one project's experience of the US policy reversal on sex work*, 21 Health Pol'y Plan 329, 330 (2006).

Evidence from the Bill Gates-funded AVAHAN project demonstrates that the collectivization of sex workers translates into more effective HIV interventions.[181] The Anti-Prostitution Pledge's implementation by the U.S. government serves to deny funds for HIV organizations engaged in collective sex worker action and undermines the ability of sex worker organizations to utilize this mechanism for HIV prevention. By underfunding or cutting funding for successful HIV interventions around sex work, the abolitionist position reduces the potential for information, education, care, treatment, and support around HIV for sex workers.

VI. Conclusion

Feminists seek to respond to women's vulnerability to HIV through many channels, including direct engagement with the state through bilateral and multilateral aid, and via the governance structures that shape the international HIV response. The feminist response, as demonstrated in this paper, wields power in shaping national and international law and policy, and the critical impact feminists have on these debates.

Because of this impact, feminists must examine the consequences of feminist legal reform projects. If they do not do so, feminists risk implementing reform projects that harm women, regardless of their intent. This analysis demonstrates that an effective response to HIV among sex workers is one that decriminalizes sex work rather than relying on criminal prohibitions. Further evidence suggests that effective support for sex worker programs can change police behavior, impacting HIV/AIDS outcomes, and that there are demonstrated health benefits to sex workers when they organize and collectivize. Decriminalization, proposed by sex-positive feminists and sex worker activists, facilitates the ability of sex workers and HIV programs to capitalize on a diffuse existence of power to garner better health outcomes. For many feminists, especially those who rely on criminal prohibitions as a means to positively impact women's health, this outcome may be difficult to accept. However, it is when feminists are willing to assess the consequences of proposed feminist legal reforms that we might find that what benefits women is dramatically different from what was first imagined.

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[181] Kim M. Blankenship, Rebekah Burroway & Elizabeth Reed, *Factors associated with awareness and utilisation of a community mobilisation intervention for female sex workers in Andhra Pradesh, India*, 86 Sexually Transmitted Infections i69, i70 (2010); S. Rajaram, *Programme Exposure And Sexual Behaviour In Female Sex Workers, Bellary District, Karnataka State* 30 (CHARME-India, Working Paper No. 12, 2010).