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MORALITY V. REALITY: THE STRUGGLE TO EFFECTIVELY FIGHT HIV/AIDS AND RESPECT HUMAN RIGHTS

INTRODUCTION

The United States considers itself a leader in the worldwide fight against the Human Immunodeficiency Virus (HIV) and the Acquired Immune Deficiency Syndrome (AIDS).¹ This concept of global leadership is evident throughout the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“U.S. Leadership Act”).² This bill represents the United States’ recognition of the severity of the HIV/AIDS pandemic and its dedication to helping reverse the grave trends of this crisis.³

However, should a country be considered a true leader of a field in which it is creating policy that departs from internationally recognized best practices? The relevance of this question is significant in light of two recent federal district court cases in which judges held a part of the U.S. Leadership Act to be unconstitutional.⁴ It also is important as the approach of the United States to HIV/AIDS prevention and treatment is different than the approaches that many public health experts recommend as well as the approaches other nations have taken who have had measurable success in the field of HIV/AIDS policy development and implementation.

The United States codified its contribution to the struggle against HIV/AIDS with the U.S. Leadership Act based on information and encouragement from the United Nations.⁵ The United Nations declared a strategic plan in 2001 to encourage its members to create policies and pledge aid to fight HIV/AIDS worldwide.⁶ This declaration called for comprehensive and timely efforts geared towards the prevention, treat-

1. According to the United States Agency for International Development (USAID), “the U.S. government is the world leader in responding to the global pandemic of AIDS.” USAID Health: HIV/AIDS, Overview, http://www.usaid.gov/our_work/global_health/aids/ (last visited Apr. 15, 2007). *See also* George W. Bush, President of the United States, Statement Upon Signing H.R. 1298, 2003 U.S.C.C.A.N. 726 (May 27, 2003).

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

3. *Id.* at 712–18.

4. *Alliance for Open Society Int’l v. U.S. Agency for Int’l Dev.*, 430 F.Supp. 2d 222 (S.D.N.Y. 2006); *DKT Int’l v. U.S. Agency for Int’l Dev.*, 435 F.Supp. 2d 5 (D.D.C. 2006), *rev’d*, 477 F.3d 758 (D.C. Cir. 2007).

5. 117 Stat. 711.

6. G.A. Res. S-26/2, U.N. Doc. A/RES/S-26/2 (June 27, 2001).

ment, and collaboration needed to not only immobilize, but also begin to reverse, the worldwide HIV/AIDS pandemic.⁷ On May 27, 2003, the United States Congress passed the U.S. Leadership Act and officially became a part of the strategy of the United Nations to fight HIV/AIDS worldwide.⁸ However, examination of the declaration of the United Nations and the subsequent strategies of other States reveal significant differences between the priorities of the United States and the priorities of other parties involved in the global struggle against HIV/AIDS.

These priorities must be examined in light of the fact that state actors have an internationally recognized obligation to “ensure the free and full exercise” of human rights by protecting its citizens from known or foreseeable harms.⁹ These human rights include the right to the “enjoyment of the highest attainable standard of physical and mental health...[including] [t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases[.]” as well as the right “[t]o enjoy the benefits of scientific progress and its applications[.]”¹⁰ Moreover, protecting the human rights of all individuals is an obligation *erga omnes* because all States have a legal interest in this protection.¹¹ Therefore, “national governments bear the responsibility for protecting their citizens from the spread of the HIV epidemic and of mitigating its impact.”¹²

Policies implemented to fulfill these international obligations must be effective and feasible. Especially in the field of public health, policy goals must be realistic and the strategies used to pursue them must be

7. *Id.*

8. 117 Stat. 711.

9. Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, at 166–67 (July 29, 1988). The Inter-American Court of Human Rights stated, in dicta, that States must not only have legal structures in place that make the fulfillment of human rights possible, they must conduct themselves “so as to effectively ensure the free and full exercise of human rights.” *Id.* Specifically, in the Velásquez Rodríguez Case, this obligation led to the conclusion that the State of Honduras was responsible for the kidnapping and murder of Manfredo Rodríguez, even though it claimed to have played no part. *Id.* at 182. The Court held Honduras liable because the government knew about these violations of human rights and did not stop them from occurring. *Id.*

10. International Covenant on Economic, Social, and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316, Art. 12, 15 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976.

11. Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb 5).

12. Joint United Nations Programme on HIV/AIDS (UNAIDS), Programme Coordinating Board, *Young people and HIV/AIDS: Background discussion paper on the elements of a global strategy*, ¶ 55, U.N. Doc. UNAIDS/PCB(7)/98.3 (Oct. 21, 1998) (hereinafter *Young people and HIV/AIDS*).

proven effective. The differences between the approaches to HIV/AIDS of the United Nations, the United States, and many other countries, such as Brazil, Thailand, and the Netherlands, highlight policy areas that require harmonization in order to make the worldwide effort against HIV/AIDS as effective as possible. The strategies that have proven most realistic and, more importantly, most effective are those that make human rights a priority and utilize the recommendations of international human rights agreements.¹³ These strategies, which emphasize personal choice and respect for all individuals, hold the most promise in the fight against HIV/AIDS and should be utilized more in the future.

This Note will review various aspects of the global effort to fight HIV/AIDS in order to provide recommendations for the future. Part I will summarize the current state of the HIV/AIDS crisis and its staggering effects on communities throughout the world. Part II will examine the strategy of the United Nations to create a global framework in the fight against HIV/AIDS, and Part III will discuss the way in which the United States responded to this strategy. Part IV will then consider Brazil's strategy for HIV/AIDS prevention and treatment, and explore the significant differences it presents. Finally, Part V will propose alternative legal strategies for the future of United States policy based on internationally recognized values and human rights.

I. STATEMENT OF NEED

Over the past twenty-five years, the HIV/AIDS crisis has developed into "an unprecedented human catastrophe."¹⁴ Only twenty-five years after identifying HIV/AIDS and enabling diagnosis and treatment, the number of people who have been, or are, directly affected¹⁵ by this pandemic is approaching one hundred million.¹⁶ More specifically, more than sixty-five million¹⁷ people have contracted HIV at some point over

13. G.A. Res. S-26/2, *supra* note 6, at ¶ 16.

14. G.A. Res. 60/262, ¶ 2, U.N. Doc A/RES/60/262 (June 2, 2006).

15. This estimate of those "directly affected" only includes people who either have been diagnosed with, or have died from, HIV or AIDS, and their children. Estimates of people who have been affected by the pandemic in other ways would be infinitely higher.

16. G.A. Res. 60/262, *supra* note 14, at ¶ 2.

17. This number is likely an estimate of infections that have been diagnosed and for which we officially account. A recent study conducted in the United Kingdom showed that 31% of all HIV infections are undiagnosed and therefore not accounted for in certain statistics. Explanations for these undiagnosed cases include the perception many individuals have of immunity from risk, which leads to low rates of voluntary testing. See World Health Org. (WHO) Reg'l Office for Europe, Health Evidence Network, *What is the impact of HIV on families?*, 9 (December 2005) (prepared by P. van Empelen), available at <http://www.euro.who.int/Document/E87762.pdf>. In addition, many people

the last twenty-five years.¹⁸ More than twenty-five million people have died as a result of AIDS-related illness during this time and approximately forty million are currently living with HIV/AIDS globally.¹⁹ HIV/AIDS has become the leading cause of death worldwide for adults aged fifteen to forty-nine, with three million deaths in 2003 alone.²⁰ The HIV/AIDS pandemic has also ravaged the lives of many children— “[fifteen] million children have been orphaned by AIDS and millions more made vulnerable” by the death or illness of a parent, guardian, or caretaker.²¹

Moreover, the communities most seriously affected by HIV/AIDS have changed over the last twenty-five years in many notable ways, including shifts in the gender, age, and location of many new cases and high concentrations of infections.²² The world has seen a feminization²³ of the pandemic as “women now represent 50 per cent of people living with HIV worldwide and nearly 60 per cent of people living with HIV in Africa.”²⁴ In addition, new infections are occurring in much younger age

throughout the world do not have access to the necessary health care or resources that they need to appropriately diagnose HIV or AIDS. According to the World Health Organization, approximately one billion people are living in extreme poverty worldwide and these people lack access to basic health services. This leads to a situation such as the one found in many nations in Asia and the Pacific, where there are low “prevalence rates,” or diagnosed cases, of HIV/AIDS, but large numbers of infected people. The World Health Organization has found that “India has a prevalence one twentieth that of South Africa yet the same number of people infected.” WHO Regional Office for the Western Pacific, *Fact sheets: Health, poverty, and MDG* (2005), available at http://www.wpro.who.int/media_centre/fact_sheets/fs_20050621.htm.

18. G.A. Res. 60/262, *supra* note 14, at ¶ 2.

19. *Id.*

20. WHO Regional Office for the Western Pacific, *supra* note 17.

21. G.A. Res. 60/262, *supra* note 14, at ¶ 2.

22. See Frontline: the age of AIDS: timeline—25 years of AIDS | PBS, <http://www.pbs.org/wgbh/pages/frontline/aids/cron/crontext.html> (last visited Apr. 15, 2007).

23. The original belief about HIV/AIDS was that it predominantly affected men who had sex with men and people who used intravenous drugs. At first, the disease was unofficially known as the Gay-Related Immunodeficiency Syndrome (GRID) and one of the first organizations formed to help address the problems associated with HIV/AIDS was the Gay Men’s Health Crisis (GMHC). However, this perception has changed as it has become very clear that HIV/AIDS does not discriminate: women face similar risks as men, and all people who have unprotected sex face similar risks, regardless of the sex of their partner. *Id.* See also David Jefferson, *How AIDS Changed America*, Newsweek, May 15, 2006, available at <http://www.msnbc.msn.com/id/12663345/site/newsweek/>.

24. G.A. Res. 60/262, *supra* note 14, at ¶ 7. Even though the populations of women and men living with HIV/AIDS worldwide are approximately equal, women are more vulnerable to HIV/AIDS infection and its impact due to gender inequalities and various

groups than ever before, as “half of all new HIV infections occur among children and young people under the age of 25.”²⁵ Developing nations have become the epicenters of the evolving pandemic and recent statistics estimate that more than ninety-five percent of all people living with HIV/AIDS live in developing nations.²⁶ Sub-Saharan Africa has also become the part of the world with the largest number, and highest concentration, of people living with, and dying from, HIV/AIDS.²⁷ According to the United Nations, the HIV/AIDS pandemic “constitutes a global emergency and poses one of the most formidable challenges to the development, progress and stability of our respective societies and the world at large, and requires an exceptional and comprehensive global response”²⁸

II. STRATEGY OF THE UNITED NATIONS

In 2001, the United Nations made an initial commitment to the fight against HIV/AIDS.²⁹ The General Assembly passed a resolution, known as the Declaration of Commitment on HIV/AIDS (“Declaration”) and entitled “Global Crisis—Global Action.”³⁰ The Declaration listed many ways in which Member States could fulfill their own commitments to join this worldwide fight.³¹ It stated that prevention is of the utmost im-

biological factors. WHO, *Women and HIV/AIDS*, http://www.who.int/gender/hiv_aids/en/ (last visited Apr. 15, 2007).

25. G.A. Res. 60/262, *supra* note 14, at ¶ 8; *Young people and HIV/AIDS*, *supra* note 12, at ¶ 2.

26. G.A. Res. 60/262, *supra* note 14, at ¶ 2. At first, concerns about HIV and AIDS were focused on the United States because that is where many of the first cases occurred and the media was covering this fact. Many European countries even banned the import of blood from the United States in the early 1980’s. See *Frontline: the age of AIDS: timeline—25 years of AIDS* | PBS, *supra* note 22.

27. See Joint United Nations Programme on HIV/AIDS (UNAIDS): Regions, http://www.unaids.org/en/Regions_Countries/ (last visited Apr. 15, 2007). The United Nations has estimated that while Sub-Saharan Africa contains slightly more than ten percent of the global population, more than sixty percent of all people living with HIV live in Sub-Saharan Africa, with over twenty-five million infections. In 2005 alone, “an estimated 3.2 million people in the region became newly infected, while 2.4 million adults and children died of AIDS.” *Id.*

28. G.A. Res. 60/262, *supra* note 14, at ¶ 3.

29. See G.A. Res. S-26/2, *supra* note 6.

30. *Id.*

31. *Id.* at ¶¶ 37–103. According to the Declaration, these efforts should include eliciting the active participation of civil society, the business community, and the private sector to develop and implement both action and financing plans, constructively confront stigmas and eliminate discrimination, address the effects of gender and age, and

portance, while care, support, and treatment are also crucial aspects of an effective response to the HIV/AIDS crisis.³² The Declaration called for prevention efforts to “ensure that at least 90 per cent [by 2005], and by 2010 at least 95 per cent of young men and women aged 15 to 24 have access to the information, education, including peer education and youth-specific HIV education, and services necessary to develop the life skills required to reduce their vulnerability to HIV infection. . . .”³³ It also specified the priority that must be given to the most vulnerable populations, including women and children, especially children who have been orphaned by HIV/AIDS.³⁴

The United Nations renewed this commitment to the worldwide struggle against HIV/AIDS with a second General Assembly resolution, known as the Political Declaration on HIV/AIDS (“Political Declaration”), which was passed at the High-Level Meeting on AIDS in New York on June 2, 2006.³⁵ The Political Declaration updated statistics, recognized the efforts that many Member States have already made, encouraged States to renew their own commitments, and reiterated the goals of the United Nations’ global strategy.³⁶

Specifically, the United Nations emphasized its commitment to implementing policies that will help prevent the spread of HIV/AIDS in youth populations to try “to ensure an HIV-free future generation.”³⁷ The Po-

strengthen health, education and legal system capacity to safeguard “the right to the highest attainable standard of physical and mental health.” *Id.* at ¶ 37.

32. *Id.* at ¶ 17. Prevention efforts should include programs that account for local circumstances as well as cultural values geared towards decreasing high-risk behavior by educating about and encouraging safer-sex practices and increasing the availability of male and female condoms and sterile needles. Efforts should also be made towards early diagnosis and effective treatment to help prevent an infected individual from further spreading the disease. *Id.* at ¶ 52.

33. *Id.* at ¶ 53.

34. *See Id.* at ¶¶ 62–67.

35. *See* G.A. Res. 60/262, *supra* note 14. The High-Level Meeting on AIDS took place on June 2, 2006 after a two-day technical review at the United Nations in New York. 2006 High-Level Meeting on AIDS: Questions and answers, *available at* http://data.unaids.org/pub/InformationNote/2006/200605_HLM_QA_en.pdf. The goals at this meeting were to review the progress that had been made in implementing the Declaration of 2001, consider recommendations on how to reach the stated targets, and renew the commitment of the United Nations and the importance of the Declaration. *Id.* Attendees at the meeting included national delegations led by Heads of States and Governments, organizations and individuals involved in HIV/AIDS programming efforts, world business leaders, HIV/AIDS researchers, people living with HIV/AIDS, and HIV/AIDS advocates from the entertainment industry. *Id.*

36. *See* G.A. Res. 60/262, *supra* note 14.

37. *Id.* at ¶ 26. The United Nations included in its plan “the implementation of comprehensive, evidence-based prevention strategies, responsible sexual behaviour, including

litical Declaration also stated the importance of harm-reduction strategies, especially in the realm of drug use.³⁸ In addition, the Political Declaration elaborated on the feminization of HIV/AIDS and the need for efforts to eliminate gender inequalities and discrimination based on gender in order to empower women to protect themselves from HIV infection in an environment free from coercion, abuse, and violence.³⁹ Finally, the Political Declaration made a number of commitments to efforts that the United Nations believes will play a unique role in the fight against HIV/AIDS, including the commitment “to overcoming legal, regulatory or other barriers that block access to effective HIV prevention, treatment, care and support, medicines, commodities and services.”⁴⁰

III. RESPONSE OF THE UNITED STATES

A. U.S. Leadership Act

On May 27, 2003, the United States Congress passed the U.S. Leadership Act and pledged a significant amount of funding, resources, and support to assist foreign countries in their struggles against HIV/AIDS, tuberculosis, and malaria, and “to strengthen United States leadership and the effectiveness of the United States response”⁴¹ to these infectious diseases. The U.S. Leadership Act lays out a five-prong strategy for meeting its goals:

- (1) establishing a . . . five-year, global strategy . . . that encompasses a plan for phased expansion . . . and improved coordination . . . between the United States and foreign governments and international organizations;
- (2) providing increased resources for multilateral efforts to fight HIV/AIDS;
- (3) providing increased resources for United States bilateral efforts . . . to combat HIV/AIDS, tuberculosis, and malaria;
- (4) encouraging the expansion of private sector efforts and expanding public-private sector partnerships to combat HIV/AIDS; and
- (5) intensifying efforts to support the development of vaccines and treatment for HIV/AIDS, tuberculosis, and malaria.⁴²

The U.S. Leadership Act has tremendous potential to effect positive change in the lives of many individuals, as well as entire communities,

the use of condoms, evidence-and skills-based, youth-specific HIV education, mass media interventions and the provision of youth-friendly health services.” *Id.*

38. *Id.* at ¶ 22.

39. *Id.* at ¶ 30.

40. *Id.* at ¶ 24.

41. 117 Stat. 711, 717.

42. *Id.* at 717–18.

struggling with the problems associated with HIV/AIDS.⁴³ In many countries struggling with HIV/AIDS throughout the world, the major obstacles to treatment and prevention include poverty and underdevelopment, which compound the problem and impede support and prevention strategies.⁴⁴ The U.S. Leadership Act pledges over sixteen billion dollars in aid to HIV/AIDS programs all over the world.⁴⁵ Given this enormous financial commitment, the U.S. Leadership Act could be the legal framework of an excellent opportunity for the United States to use its resources in an effective way in order to help reverse the trends of the HIV/AIDS pandemic.

However, the U.S. Leadership Act differs from the declarations of the United Nations and the strategies of other States in significant ways. These variations reflect different views about how to properly address the HIV/AIDS problem worldwide. The United Nations encourages the use of proven effective methods of prevention, while the United States places great emphasis on methods that are morally driven, rather than objectively-based. The Political Declaration speaks at length about different forms of comprehensive sexual health education, which have shown to be very effective in various contexts.⁴⁶ Nevertheless, the U.S. Leadership Act emphasizes the teaching of abstinence as a primary focus of education efforts.⁴⁷ There is minimal, if any, evidence that abstinence-only education helps to prevent the spread of sexually transmitted diseases (STDs), such as HIV/AIDS.⁴⁸ This is just one example of the problems within the U.S. Leadership Act's current framework.

B. Encroachments of Free Speech and Impediments to Prevention Efforts

Another problem with the U.S. Leadership Act developed into a recent pair of cases in federal district courts in the Southern District of New

43. *Id.* at 715–16.

44. G.A. Res. S-26/2, *supra* note 6, at ¶ 11.

45. The Act authorizes the appropriation of three billion dollars per year for five years, beginning in fiscal year 2004 and continuing through fiscal year 2008. 117 Stat. 711, 745. The Act also authorizes a one billion dollar contribution to the Global Fund in 2004 and commits to contribute “such sums as may be necessary for the fiscal years 2005–2008.” *Id.* at 724–25. The Global Fund was established in January 2002 as an international AIDS trust fund and the International Bank for Reconstruction and Development serves as its initial collection trustee. *Id.* at 724.

46. See Naomi Starkman & Nicole Rajani, *The Case for Comprehensive Sex Education*, 16 AIDS Patient Care and STDs 313 (2002).

47. 117 Stat. 711, 718, 729.

48. Deborah M. Roffman, *Abstain, Yes. But With Your Eyes Wide Open*, in TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL ISSUES IN HUMAN SEXUALITY 4, 6 (8th Ed. McGraw-Hill/Dushkin 2002).

York and the District of Columbia.⁴⁹ The plaintiffs in these cases, Alliance for Open Society International, Inc. (“AOSI”), Pathfinder International (“Pathfinder”), and DKT International, Inc. (“DKT”) are “United States-based non-profit organizations actively participating in the worldwide effort to limit the spread of HIV/AIDS.”⁵⁰ These plaintiffs alleged that part of the U.S. Leadership Act’s funding eligibility requirement,⁵¹ which stated that organizations may only receive funding through the Act if they “have a policy explicitly opposing prostitution,”⁵² was an unconstitutional violation of the First Amendment and their right

49. Alliance for Open Society Int’l, 430 F.Supp. 2d 222; DKT Int’l, 435 F.Supp. 2d 5.

50. Alliance for Open Society Int’l, 430 F.Supp. 2d at 230; DKT Int’l, 435 F.Supp. 2d 5. AOSI is an integral part of a worldwide effort to implement a number of “initiatives to promote open society by shaping government policy and supporting education, media, public health, and human and women’s rights, as well as social, legal, and economic reform.” Alliance for Open Society—Main Page, http://www.aosi.kz/index_eng.htm (last visited Apr. 15, 2007). Specifically, AOSI has been involved in utilizing a grant from the United States Agency for International Development (USAID) to implement a drug and HIV/AIDS reduction program, known as the Drug Demand Reduction Program, in Central Asia. *Id.* Pathfinder International partners with local government and grassroots organizations in over twenty developing countries throughout the world to support family planning, reproductive health services, prevention and treatment of HIV/AIDS and care for women suffering from complications of unsafe abortions. Pathfinder International: About Us, <http://www.pathfind.org/site/PageServer?pagename=AboutUs> (last visited Apr. 15, 2007). DKT International is a charitable organization that implements international social marketing programs, which focus on family planning and HIV/AIDS prevention. DKT International, <http://www.dktinternational.org/default.htm> (last visited Apr. 15, 2007). One example of DKT’s work is its condom use program, which is modeled on other successful condom use campaigns, and promotes one-hundred percent condom use in non-traditional outlets, such as “red light areas, [k]araoke bars, motels, and other establishments located near high-risk sexual activity.” *Id.*

51. It is important to note that the statute’s funding eligibility requirement regarding sex work has two parts. 117 Stat. 711, 734. The first part dictates that funding from the Act may not be used to promote sex work or advocate for its legalization. *Id.* The second part states that funding may not be provided to any organization that has not explicitly stated an opposition to sex work. *Id.* The plaintiffs in these cases only challenged the second of these two parts of the funding eligibility requirement. *See* Alliance for Open Society Int’l, 430 F.Supp. 2d at 229; DKT Int’l, 435 F.Supp. 2d at 14. They did not challenge any restriction on the use of government funds. *Id.*

52. 117 Stat. 711, 734; 22 U.S.C. §7631(f). This requirement is regulated by USAID, which is responsible for awarding grants pursuant to the U.S. Leadership Act, by compelling all applicants to submit specific provision with their grant application entitled the “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking.” DKT Int’l, 435 F.Supp. 2d at 7. USAID was created by executive order in 1961 and it is an “independent agency that provides economic, development, and humanitarian assistance around the world in support of the foreign policy goals of the United States.” Alliance for Open Society Int’l, 430 F.Supp. 2d at 231.

to freedom of speech.⁵³ Specifically, they challenged the notion that the government may dictate their speech as well as control what they do with alternative private funding, by requiring them to adopt organization-wide policies and practices that align with what the government believes about sex work⁵⁴ and about what is appropriate for these organizations and the work they do.⁵⁵

The plaintiffs are all engaged in important work to counter the effects of HIV/AIDS and to help enhance prevention efforts worldwide.⁵⁶ As such, they work with many individuals in different high-risk populations, including sex workers.⁵⁷ Pathfinder has stated that it wants to continue using its private funding to work with sex workers in India and community organizations in Brazil that address the legal issues surrounding sex work.⁵⁸ Pathfinder has also stated its desire to engage policymakers in a

53. See *Alliance for Open Society Int'l*, 430 F.Supp. 2d at 229; DKT Int'l, 435 F.Supp. 2d at 14.

54. There is a difference in terminology used throughout these cases that reflects a larger point of contention. As the court points out in *Alliance for Open Society*, the plaintiffs used the term "sex work," while the defendants used the term "prostitution." *Alliance for Open Society Int'l*, 430 F.Supp. 2d at 230. The court ultimately decides to use "prostitution" because that is the term used throughout the U.S. Leadership Act. *Id.* However, the court notes that there is a difference of opinion regarding these terms as plaintiffs explain that "sex work" tends to be prevalent in the public health and international relief fields but many amici took offense to the notion of "sex" as work. *Id.* The term "sex work" is sometimes used to reflect the notion that people should have the right "to control their own bodies, including the right to exchange sexual favors for money." WILLIAM J. TAVERNER, *TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL ISSUES IN HUMAN SEXUALITY* 244-45 (8th Ed. McGraw-Hill/Dushkin 2002). This Note will use the term "sex work," except when providing a direct quote in which "prostitution" was previously used.

55. *Alliance for Open Society Int'l*, 430 F.Supp. 2d at 234. Maurice Middleberg, the Vice President of EngenderHealth, which is another organization involved in successful HIV/AIDS programs in Africa and Asia, recently summarized this argument well by stating that these organizations "shouldn't have to agree with the Administration policy in order to do the work of saving lives." Esther Kaplan, *Just Say Não*, THE NATION, May 30, 2005, available at <http://www.thenation.com/doc/20050530/kaplan>. A logical response to such a statement is that the organizations do not need to agree with the Administration in order to do their work. Rather, according to the statute, they must agree with the Administration in order to receive funding from the United States to do their work. 117 Stat. 711, 734. Therefore, this has been a crucial issue for organizations that rely on the United States to fund their HIV/AIDS programs.

56. See *supra* note 50.

57. AOSI's Drug Demand Reduction Program in Uzbekistan, Tajikistan, and Kyrgyzstan involves working with sex workers and Pathfinder's work in India includes organizing sex workers to agree to engage in HIV/AIDS prevention methods. *Alliance for Open Society Int'l*, 430 F.Supp. 2d at 230.

58. *Id.* at 238-39.

“thoughtful policy debate on the appropriate legal regime for prostitution.”⁵⁹ DKT has stated that it does not have a policy “either opposing or supporting prostitution” and it will not adopt a policy that states an opposition to prostitution.⁶⁰ DKT believes that such a policy would hinder the progress of their condom distribution work by “stigmatizing and alienating many of the people vulnerable to HIV/AIDS—the sex workers.”⁶¹

In *Alliance for Open Society*, the District Court for the Southern District of New York held that “the Government’s viewpoint based restriction is . . . offensive to the First Amendment as it improperly compels speech by affirmatively requiring Plaintiffs to adopt a policy espousing the government’s preferred message.”⁶² Similarly, in *DKT International*, the District Court for the District of Columbia concluded that the second part of the Act’s funding eligibility requirement is an unconstitutional violation of the First Amendment because it constitutes a viewpoint based restriction on freedom of speech and is not narrowly tailored to further a compelling government interest.⁶³ The Second Circuit Court of Appeals is currently reviewing the *Alliance for Open Society* case, while a three-judge panel of the District of Columbia Circuit Court of Appeals recently reversed the District Court’s *DKT International* decision.⁶⁴

However, reports have already shown that this restriction in the U.S. Leadership Act and other similar “legislative actions have resulted in reduced distributions of condoms and other contraceptive supplies, lessened spending on programs to prevent HIV/AIDS transmission, heightened allocations of AIDS relief funding to faith based organizations that traditionally support abstinence-only means of HIV/AIDS prevention and protection, and eliminated funding to international family planning programs that provide legal abortions or abortion counseling in addition

59. *Id.* at 239.

60. DKT Int’l, 435 F.Supp. 2d at 12.

61. *Id.*

62. *Alliance for Open Society Int’l*, 430 F.Supp. 2d at 274.

63. DKT Int’l, 435 F.Supp. 2d at 35.

64. *Alliance for Open Society Int’l v. U.S. Agency for Int’l Dev.*, No. 06-4035-cv (2d Cir. filed Aug. 2006); *DKT Int’l v. U.S. Agency for Int’l Dev.*, 477 F.3d 758 (D.C. Cir. 2007). In reversing the district court’s decision, the District of Columbia Court of Appeals panel held that “[t]he Act does not compel DKT to advocate the government’s position on prostitution and sex trafficking; it requires only that if DKT wishes to receive funds it must communicate the message the government chooses to fund.” *DKT Int’l*, 477 F.3d at 764. The three-judge panel of the appellate court found that this does not violate the First Amendment and therefore reversed the district court, however DKT may *Seek en banc* review. *Id.*; OMB Watch, <http://www.ombwatch.org/articleview/3758/> (last visited Apr. 15, 2007).

to HIV/AIDS prevention programs.”⁶⁵ This kind of exclusive legislation limits the participation of certain communities in the United States’ fight against HIV/AIDS and “can also have the domino effect of provoking otherwise unaffected actors to ‘opt out’ of engagement.”⁶⁶ The extremely strong stance of the United States against sex work, and its effort “to export its perspective abroad,” forces other actors to essentially “pick sides,” and privileges those who agree while completely excluding those who do not.⁶⁷ This divisive policy-making is counterproductive and serves as an injustice to potentially life-saving work by “severely undermin[ing] the transnational interactive process.”⁶⁸

C. Exclusive Abstinence and Morally-Based Distinctions

An additional problem with the U.S. Leadership Act is encompassed within its policy goals regarding educational programs.⁶⁹ The Act states that the priority of any program’s prevention efforts must be the reduction of high-risk behaviors, which should be accomplished by “promoting abstinence from sexual activity and substance abuse, encouraging monogamy and faithfulness, promoting the effective use of condoms, and eradicating prostitution, the sex trade, rape, sexual assault and sexual exploitation of women and children.”⁷⁰ While some of these policy goals may be valid, they also present a problem with their narrow focus on the encouragement of abstinence from certain activities rather than a more broad and inclusive expansion of knowledge and increase in overall awareness.⁷¹

65. Nina J. Crimm, *Toward Facilitating a Voice for Politically Marginalized Minorities and Enhancing Presidential Public Accountability and Transparency in Foreign Health Policymaking*, 39 VAND. J. TRANSNAT'L L. 1053, 1077 (2006).

66. Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 491-92 (2006) (evaluating these legislative restrictions within the context of anti-trafficking efforts).

67. *Id.* at 492.

68. *Id.*

69. 117 Stat. 711, 718.

70. *Id.*

71. This is one of the problems that the Human Rights Caucus raised at the United Nations High-Level Meeting on AIDS. Statement by the Human Rights Caucus at the High Level Meeting on HIV and AIDS, New York (2 June 2006), available at http://www.reproductiverights.org/pdf/ww_HUMAN.RIGHTS.CAUCUS.HIVAIDS.pdf. Simply telling people to abstain from high-risk activity without teaching them about what the risks are and how to best avoid them if they do choose to participate in such activities is neither effective nor appropriate. A human rights-based approach involves the affected communities in their own prevention and treatment. *Id.* Individuals have the right to make their own choices about their behavior and empowering them with the information necessary to ensure that those choices are informed decisions is more respectful and effi-

This trend exists throughout the U.S. Leadership Act and it appears again in the Bilateral Efforts section, where the Act states that efforts to prevent the transmission of HIV/AIDS shall not focus on providing comprehensive information about reducing one's risk or raising awareness generally about safer methods of sexual activity or drug use.⁷² Instead, the Act dictates that prevention efforts shall have the "exclusive purpose" of encouraging individuals to avoid behavior that places them at risk of HIV infection by using methods such as "delaying sexual debut, abstinence, fidelity and monogamy, reduction of casual sexual partnering, reducing sexual violence and coercion, including child marriage, widow inheritance, and polygamy, and where appropriate, use of condoms."⁷³

This section begins to reflect the tone of moral judgment that permeates through the entire Act.⁷⁴ There is a heavy emphasis on avoiding activities deemed to be "wrong" without much discussion of comprehensive education about safer ways to take part in these activities or lower risk alternatives.⁷⁵ There is a clear distinction between victims of HIV/AIDS that the U.S. government perceives to be innocent and those who essentially are perceived to have brought it on themselves.⁷⁶ The U.S. Leadership Act gives great prominence to the more universally-acceptable types of victims, such as women who contract HIV unknowingly from unfaithful spouses and children who contract it from their mothers, while implying that other individuals with HIV or AIDS, such as sex workers, drug users, individuals with early sexual debut, or indi-

cient than trying to dictate what appropriate behavior is or should be. The Human Rights Caucus "consists of individuals from the following organizations and institutions: Action Aid International, Amnesty International, Human Rights Watch, Center for Women's Global Leadership, Center for Reproductive Rights, Human Rights Program/Harvard Law School, Program on International Health and Human Rights/Harvard School of Public Health, Arc International, International Women's Health Coalition." *Id.*

72. *See* 117 Stat. 711, 729.

73. *Id.*

74. *See Id.*

75. *See Id.* For example, this section encourages programs to promote the delay of sexual debut, thereby implying that having sex at a young age is inappropriate behavior. *See Id.* The Act never discusses the promotion of comprehensive education for young people to allow them to make their own decisions about sex. *See* 117 Stat. 711. This section also encourages the reduction of casual sexual partnering, which implies that sex outside of a serious relationship, such as marriage, is also inappropriate. *See Id.* at 729. The Act never mentions the promotion of, or education about, various safer sex methods or practices in the general population to help ensure that people who have sex outside of serious relationships will do so safely. *See Id.* Rather, it continually emphasizes abstinence and monogamy as the tools that people should use to prevent HIV/AIDS. *See* 117 Stat. 711.

76. *See Id.* at 729.

viduals who have sex outside of serious relationships, are irresponsible risk-takers who deserve less support.⁷⁷ This approach runs contrary to what many public health organizations recommend as best practices⁷⁸ and it raises the question of whether this is a valid distinction for the United States to make in allocating resources.⁷⁹

IV. SUCCESS IN BRAZIL

The narrow focus of the U.S. Leadership Act becomes more apparent after comparing it to the strategy of Brazil, which takes a very different approach to HIV/AIDS prevention and treatment. First, Brazil views sex work and those who take part in it very differently than the United States, as evidenced by the fact that sex work is legal in Brazil while it is not legal in the United States.⁸⁰ Brazil is not only unwilling to oppose sex work generally, but its programs also incorporate sex workers into their own policy development and implementation.⁸¹ Brazil's AIDS Commissioner, Pedro Chequer, even stated that sex workers "are our partners" and his commission could not ask them to "take a position against themselves."⁸²

77. *See Id.* The Act includes a substantial discussion regarding "Assistance to Children and Families." *Id.* at 740–43. At the same time, the Congressional findings include the assertion that "prostitution and sex trafficking are 'causes and factors in the spread of the HIV/AIDS epidemic.'" Alliance for Open Society Int'l, 430 F.Supp. 2d at 232, citing 711 Stat. 716.

78. A recent report of the World Health Organization recommended that "policymaking should be directed at laws that protect the human rights of HIV-infected people, regardless of their behavior (such as drug use) or place of origin, so that acceptance, care and support increase for people and families affected by HIV." WHO Reg'l Office for Europe, *supra* note 17, at 20.

79. This distinction becomes increasingly important to analyze as more members of Congress present plans to further restrict how United States funding may be used. It has been reported that "Representative Henry Hyde is seeking to withdraw funds from groups that object to pushing abstinence, while Representative Mark Souder is leading a campaign to match the anti-prostitution pledge with one condemning needle exchange." Kaplan, *supra* note 55.

80. *See* David Salyer, *President Bush's War on...Prostitution?*, SURVIVAL NEWS, July/August 2005, available at <http://www.thebody.com/content/art32399.html>.

81. Kaplan, *supra* note 55.

82. *Id.*; Alliance for Open Society Int'l, 430 F.Supp. 2d at 232. Statements such as these show a much more respectful approach to HIV/AIDS prevention and support. The Brazilian AIDS Commission has recognized that sex workers do not deserve to be marginalized or stigmatized by inherently discriminatory policies. *Id.* The Brazilian AIDS Commission has also implemented many human rights-based practices and forged a productive working relationship with sex workers in order to work towards what is clearly a mutual goal—the reduction of HIV/AIDS infection in the population as a whole. *Id.*

Brazil also places a greater value than the United States on comprehensive forms of sex education.⁸³ After Brazil insisted that USAID negotiate directly with the Brazilian AIDS Commission, rather than the individual Brazilian non-governmental organizations (NGOs), the AIDS Commission, under Chequer's leadership, persuaded USAID to remove much of its emphasis on abstinence from the proposed grant agreement.⁸⁴

As a result, in May of 2005, Chequer made a strong statement against the restrictive ways in which the United States distributes funding to aid programs engaged in the fight against HIV/AIDS.⁸⁵ When faced with a choice between signing a statement opposing sex work and turning down forty million dollars of funding for AIDS work from the United States, Chequer chose what he felt was the only ethically responsible and non-discriminatory option.⁸⁶ He decided not to accept any funding from the United States and explained that the goal of his commission is to "reach every segment of society, with no discrimination."⁸⁷ The Brazilian strategy in the fight against HIV/AIDS places great value on the importance of human rights and Chequer was unwilling to sacrifice these rights in order to comply with the irresponsible policies of the United States.⁸⁸

The Brazilian AIDS commission, which is comprised of seven seats filled by different government ministries, supported Chequer's decision and voted unanimously to find alternative sources of funding for the country's vital AIDS programs, which have proven quite successful in the past decade.⁸⁹ Experts had predicted in the early nineties that Brazil would see 1.2 million HIV infections by the year 2000.⁹⁰ However, the country's effective programs, which include HIV/AIDS treatment, large-scale condom distribution, and detailed HIV/AIDS education, have halted the progress of HIV/AIDS and resulted in half as many infections as were expected.⁹¹ The HIV/AIDS prevention and treatment pro-

83. Kaplan, *supra* note 55.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. See Michael M. Phillips & Matt Moffett, *Brazil refuses U.S. AIDS funds, rejects conditions*, WALL STREET JOURNAL, May 2, 2005, at A3.

89. Kaplan, *supra* note 55.

90. *Id.*

91. *Id.* See Monte Reel, *Where Prostitutes Also Fight AIDS: Brazil's Sex Workers Hand Out Condoms, Crossing U.S. Ideological Line*, WASHINGTON POST, Mar. 2, 2006, at A14, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/03/01/AR2006030102316_pf.html. Brazil's progress in HIV/AIDS work over the past two decades has been one of the few success stories in the developing world. Kaplan, *supra* note 55. During a time period when many other nations

grams in Brazil “are considered by the United Nations to be the most successful in the developing world.”⁹²

V. ALTERNATIVE STRATEGIES FOR THE FUTURE

These successful prevention efforts prove that leaders can make a difference and effect positive change even in the context of a grave crisis such as HIV/AIDS. Leaders in this fight must be realistic in their analysis of various prevention approaches because the global struggle with HIV/AIDS is a very personal issue. The commitments that nations make must realize the realities of people’s lives and how these plans will affect the individuals who are an integral part of any successful strategy. Incorporating human rights-based approaches will help develop realistic policies and progressive strategies, supported by social science research. These types of HIV/AIDS prevention strategies include two vital components, the use of comprehensive sex education and the legalization, and therefore involvement and regulation, of the sex work industry, which incorporate proven effectiveness and the importance of human rights.

A. Comprehensive Sex Education

Comprehensive forms of sex education have been continuously proven to serve as effective and realistic means of helping to prevent the transmission of sexually transmitted diseases, such as HIV/AIDS.⁹³ The World Health Organization conducted a study in 1993 and, by reviewing the evaluations of thirty-five sex education programs, it found that the most effective programs in reducing sexual risk-taking were comprehensive programs that include information about abstinence, contraception, and the prevention of sexually transmitted disease.⁹⁴ Implementing comprehensive forms of education about sexuality, which include teaching methods of safer sex practices, is a realistic aspect of HIV/AIDS prevention policy because it provides individuals with the information necessary to make informed decisions about their sexual lives.⁹⁵

were allowing, unintentionally or not, HIV and AIDS to spiral out of control, Brazil was actually bringing it under control. *Id.*

92. Reel, *supra* note 91.

93. Starkman & Rajani, *supra* note 46.

94. *Id.* at 314–15.

95. *Young people and HIV/AIDS*, *supra* note 12, at ¶¶ 19–20. The paper also states that “young people who know about the risks of HIV, who have been able to develop the skills to act upon that knowledge and who have access to the services that meet their needs can become an important resource in slowing the continuing spread of HIV.” *Id.* at ¶ 6.

The U.S. Leadership Act's emphasis on abstinence education represents the misguided notion of the United States, and especially the current administration, about how best to prevent the spread of sexually transmitted disease.⁹⁶ Relying on abstinence education is essentially ignoring the realities of the world in which we live, where people experiment with sexual activities, even if they are encouraged to do otherwise.⁹⁷ Without the appropriate knowledge to make informed decisions about sexual issues, those who are sexually active become extremely vulnerable to a variety of negative consequences, including HIV infection.⁹⁸ Teaching people simply to abstain from sex outside of marriage or other serious and/or monogamous relationships is not an adequate way to help them avoid high-risk behavior and has not been proven effective.⁹⁹

In countries where programs have been implemented that work with young people to help them reduce the risks involved in their sexual behavior, positive trends have been reported.¹⁰⁰ In Thailand, young men who visited sex workers reported much higher levels of condom use in 1995 than in 1991: ninety-three percent and sixty-one percent, respectively.¹⁰¹ These men had "half as many STD infections and a third fewer HIV infections than had been recorded among [a similar age group] four years earlier."¹⁰² In Senegal, approximately forty percent of women and sixty-six percent of men under twenty-five reported using condoms with non-regular partners in 1997, while less than five percent had reportedly done so earlier in the decade.¹⁰³

Policymakers are often hesitant to raise issues such as comprehensive sex education for many reasons, including the general lack of public discussion about safer sex and the common misunderstandings about what

96. See Debra Hauser, *Five Years of Abstinence-Only-Until-Marriage Education: Assessing the Impact*, available at <http://www.advocatesforyouth.org/publications/stateevaluations.pdf>.

97. Starkman & Rajani, *supra* note 46, at 313.

98. *Young people and HIV/AIDS*, *supra* note 12, at ¶ 9.

99. *Id.* at ¶ 20.

100. *Id.* at ¶ 4.

101. *Id.* Private companies became involved in increasing condom accessibility and social marketing in the mid-1990's in Thailand, and, as a result, use of condoms doubled among young people. *Id.* at ¶ 13. In 1997, a national survey recorded that eighty-seven percent of men in their early twenties in Thailand reported using a condom every time they visited a brothel sex worker. *Id.*

102. *Id.* at ¶ 5.

103. *Id.* at ¶ 4.

effective sex education entails.¹⁰⁴ Certain people feel that raising the topic of sex in any way, even in the context of safer sex and pregnancy or disease prevention, will lead to an increase in sex among young people or a decrease in the age of sexual debut, which will automatically lead to an increase in negative sexual consequences.¹⁰⁵ However, many studies have shown that comprehensive sexual health programs do not encourage additional sexual experimentation.¹⁰⁶ On the contrary, these programs help people to make their own informed decisions and can help to delay sexual debut as well as decrease the rates of STD infections among those young people who are already sexually active.¹⁰⁷

Comprehensive forms of sexual health education are not only proven to be an effective and realistic way to help prevent the spread of HIV/AIDS, but they align with many international human rights standards. The Universal Declaration of Human Rights, which the General Assembly of the United Nations adopted in 1948, states that all people have the right to education, which “shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.”¹⁰⁸ The Covenant on Economic, Social, and Cultural Rights, adopted by the United Nations General Assembly in 1966, elaborates on this right by including that a person’s education must enable them to “participate effectively in a free society [and] promote understanding. . . .”¹⁰⁹ Individuals also have the right to “life, liberty and the security of person.”¹¹⁰ In addition, all people are entitled to realize the social and cultural rights “indispensable for his dignity and the free development of his personality.”¹¹¹ These rights all contribute to the duty to provide adequate education about sexual health

104. *Id.* at ¶¶ 14, 19. In addition to a general lack of public discourse about sex, “policy makers, leaders, and parents are often reluctant to admit that large numbers of young people have sex” at all. *Id.* at ¶ 21.

105. *Id.* at ¶ 19.

106. *Id.*

107. *Id.* “Youth programmes in many countries have begun to focus on personal capacity building to assess personal risk, decision making and negotiations skills. When the full range of safer options is provided, young people tend to choose the one most suitable to them according to the stage in their lives. An interesting formula has been devised in Tanzania and other parts of Africa, where ‘Fidelity’, ‘Abstinence’ and ‘Condoms’ are pictured as three life boats – the message being that people may switch from one to another according to their life circumstances, as long as they are safely in one boat.” *Id.* at ¶ 20.

108. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. Doc A/810, Art. 26, (Dec. 10, 1948).

109. Covenant on Economic, Social, and Cultural Rights, *supra* note 10, at Art. 13.

110. Universal Declaration of Human Rights, *supra* note 108, at Art. 3.

111. *Id.* at Art. 22.

and safer sex practices.¹¹² Individuals have the right to a full education that enables them to freely and safely make decisions about their own lives in order to fulfill their desired development, and Members of the United Nations have a duty to work towards this goal together.¹¹³

B. Legalization of Sex Work

Sex work is currently completely legal in a number of nations and other jurisdictions.¹¹⁴ There are also nations where sex work itself is legal, however certain activities that relate or contribute to sex work are illegal and advocates are working towards complete legalization.¹¹⁵ Studies in certain legalized nations and jurisdictions have shown that HIV/AIDS rates within populations of sex workers and their clients are low in comparison to nations and jurisdictions where sex work is prohibited.¹¹⁶ In the Netherlands, for example, where sex work is legal and regulated, “non-IV-drug-using female sex workers and their male clients were found to have an extremely low incidence of HIV.”¹¹⁷ Other nations where sex work is legal have been able to keep the spread of HIV/AIDS to a much lower threshold than would be expected. Brazil, for example, has had half as many HIV/AIDS infections over the last fifteen years as

112. States may subject these rights to limitation, but only if the limitation will further the “general welfare [of the population] in a democratic society.” Covenant on Economic, Social, and Cultural Rights, *supra* note 10, at Art. 4.

113. Universal Declaration of Human Rights, *supra* note 108.

114. For example, sex work is legal in Germany and the Netherlands and it was legalized in New Zealand in June 2003 with the passage of the New Zealand Prostitution Reform Act 2003. See TAVERNER *supra* note 54, at 245; Working Group on the legal regulation of the purchase of sexual services, *Purchasing Sexual Services in Sweden and the Netherlands: Legal Regulation and Experiences*, 25-6 (Oct. 8, 2004). See also Prostitution Reform Act 2003, 2003 S.N.Z. No. 28, available at <http://rangi.knowledgebasket.co.nz/gpacts/public/text/2003/an/028.html>.

115. Canadian HIV/AIDS Legal Network, *supra* note 114, at 3, 19. Also, advocates in Canada are lobbying for the repeal of the different sections of the Canadian Criminal Code that criminalize activities related to sex work. Canadian HIV/AIDS Legal Network, *Sex, work, rights: Changing Canada's criminal laws to protect sex workers' health and human rights*, 18 (2005). According to the Canadian Criminal Code, the act of “exchanging sex for money and other things of value” is legal, however almost everything related to this act is illegal, which makes it very difficult to be a sex worker and not break the law. *Id.* at 3. Illegal acts include running a brothel, taking or directing a person to a brothel, procuring a sex worker, and communicating for the purposes of sex work. *Id.*

116. Luis Scaccabarozzi, *Sex Workers and HIV*, 15 ACRIA Update 1 (Winter 2005/06), available at http://www.acria.org/treatment/treatment_edu_winterupdate2005_2006_workers.html.

117. *Id.*

experts originally expected.¹¹⁸ Additionally, a study that compared brothel workers in the areas of Nevada where brothels are legal to sex workers who had been arrested in those areas in the state where sex work is completely prohibited found that none of the legal workers had HIV/AIDS, while six percent of the illegal workers did.¹¹⁹

Additionally, there are many jurisdictions where sex work is technically illegal, however regulations or programs have been implemented, recognizing that sex work occurs, that have helped to prevent the spread of HIV/AIDS among sex workers and clients. In Vienna, for example, sex workers are registered and consistently tested for various sexually transmitted diseases, including HIV/AIDS.¹²⁰ Studies have shown that HIV/AIDS prevalence rates in communities of sex workers in Vienna are comparable to the population as a whole, which, in Europe, is generally low.¹²¹ Another good example of effective government regulation of sex work is Thailand.¹²² The Thai government began working with the owners of brothels in the early nineties to enforce a policy of 100% condom use.¹²³ The government provided free condoms to the owners of these brothels who, in turn, instructed the sex workers to insist that they be used with clients.¹²⁴ The government enforced this policy by closing any brothels that allowed unprotected sex.¹²⁵ The results were very impressive with the use of condoms in brothels increasing from fourteen percent in 1989 to over ninety percent by 1994.¹²⁶ This time period also saw a large decrease in the number of new cases of sexually transmitted infections treated at government clinics as well as decreases in HIV/AIDS infection rates in certain populations.¹²⁷

This raises questions about the effectiveness of the U.S. Leadership Act's funding eligibility requirements.¹²⁸ The district courts in *Alliance for Open Society* and *DKT* both held that the U.S. Leadership Act's provision that limits funding to groups or organizations that "have a policy

118. Kaplan, *supra* note 55.

119. James Bovard, *Safeguard Public Health: Legalize Contractual Sex*, in *TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL ISSUES IN HUMAN SEXUALITY* 246, 249 (8th Ed. McGraw-Hill/Dushkin 2002).

120. *See* Scaccabarozzi, *supra* note 116.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Alliance for Open Society Int'l*, 430 F.Supp. 2d 222; *DKT Int'l*, 435 F.Supp. 2d 5.

explicitly opposing prostitution”¹²⁹ is unconstitutional,¹³⁰ and it also may be extremely impractical.¹³¹ The success in the fight against HIV/AIDS in nations where sex work is legal suggests that a more realistic form of social policy advancement is advocating for the legalization of all sex work worldwide, rather than against it.¹³²

The U.S. Leadership Act specifically prohibits using funds made available through the Act “to promote or advocate the legalization or practice of prostitution.”¹³³ However, ignoring the fact that people will engage in sex work, both as sex workers and clients, even if they are encouraged not to, is very similar to ignoring the realities of sexual activity in general.¹³⁴ Various people are going to engage in various sexual practices, whether they are legal or not.¹³⁵ Even if an individual or organization does not feel it is appropriate to *encourage* a certain type of behavior, an appropriate public health goal would be to maximize the possibility that this sexual behavior is undertaken in as safe a manner as possible. In order to realistically work to help prevent the spread of sexually transmitted diseases, policymakers must face the reality of the world in which they live, and draft appropriate social policy for that world, rather than trying to change the behavior of others.¹³⁶

Legalizing sex work would allow public health agencies to better regulate conditions in the sex industry and could lead to increased levels of

129. 117 Stat. 711, 734; 22 U.S.C. §7631(f).

130. Alliance for Open Society Int’l, 430 F.Supp. 2d at 274; DKT Int’l, 435 F.Supp. 2d at 35.

131. See Chuang, *supra* note 66, at 491-92.

132. The term “sex work” has a fairly broad meaning, including commercial sex, stripping, phone sex lines, and pornography. These activities carry various legal statuses in different countries throughout the world. In this note, a reference to the “legalization of sex work” means legalizing all consensual forms of sex work that are currently illegal in a country.

133. 117 Stat. 711, 733-34.

134. Bovard, *supra* note 119, at 249.

135. See Scaccabarozzi, *supra* note 116. This researcher found that “[t]here is little evidence that prohibitive legislation affects the amount of commercial sex available.” *Id.* Moreover, others have found that “[c]ommercial sex never can and never should be abolished.” W. Kopp & S. Mayerhofer, *Commercial sex – past and present*, 12 Acta Dermatoven APA 47, 50 (2003).

136. According to a recent report on the legal regulation of sex work in Sweden and the Netherlands, the Dutch government believes that legislation against any aspect of sex work will not eradicate the practice because sex work “is part of life and will always be so.” Working Group on the legal regulation of the purchase of sexual services, *supra* note 114, at 27. It also believes that political leaders are responsible for protecting sex workers from exploitation and abuse in order to ensure that individuals may become employed as sex workers if that is what they want to do. *Id.*

protection and decreased levels of transmission of sexually transmitted diseases.¹³⁷ This goal can be accomplished by removing criminal sanctions on the sex work itself and placing specific sanctions on individuals who do not promote safety in the sex work industry. New Zealand, for example, passed the Prostitution Reform Act in 2003 for the purpose of decriminalizing sex work, promoting the human rights and social and economic welfare of sex workers, and enhancing public health.¹³⁸ This law placed certain restrictions on the operators of “businesses of prostitution,” sex workers, and clients.¹³⁹ These parties are required to “take all reasonable steps to ensure that no commercial sexual services” are undertaken without utilizing appropriate safer sex methods.¹⁴⁰ Operators are also required to “take all reasonable steps to give health information (whether oral or written) to sex workers and clients.”¹⁴¹ The sanctions for violating these parts of the law are fines up to ten thousand dollars for operators and fines up to two thousand dollars for sex workers and clients.¹⁴² As a result, the HIV/AIDS prevalence rates in New Zealand are extremely low, even when compared to other industrialized nations.¹⁴³

Improving regulation of the sex work industry, although potentially very effective and important, is not the only factor with which governments should be concerned. Legalizing sex work could also help to remove much of the stigma that currently surrounds the industry.¹⁴⁴ This could lead to improvements in HIV/AIDS prevention and treatment because it would help bring sex work out from the underground industry that it generally is today.¹⁴⁵

It is important to note that sex work is very different than human sex trafficking. The U.S. Leadership Act combines these two issues in both

137. Bovard, *supra* note 119, at 248.

138. Prostitution Reform Act 2003, 2003 S.N.Z. No. 28, § 3 (a-c).

139. *Id.* at § 8–9.

140. *Id.* at § 8(1)(a).

141. *Id.* at § 8(1)(b). Health information includes “information on safer sex practices and on services for the prevention and treatment of sexually transmitted infections.” *Id.*

142. *Id.* at § 8(2), § 9(4).

143. According to UNAIDS statistics, the HIV/AIDS prevalence rate for adults aged fifteen to forty-nine in New Zealand is 0.1%, while these rates in the United States and Spain are 0.6%, and the rates in France and Italy are 0.4% and 0.5%, respectively. See UNAIDS Country Data, http://www.unaids.org/en/Regions_Countries/Countries/default.asp (last visited Apr. 15, 2007).

144. Canadian HIV/AIDS Legal Network, *supra* note 114, at 14, 18.

145. *Id.* at 18. Alliance for Open Society Int'l, 430 F.Supp. 2d at 232. (“Stigma and discrimination push people in high risk groups...underground, making them difficult to reach through prevention and thus creating more opportunities for HIV/AIDS to spread to the general population.”)

parts of its funding eligibility requirement,¹⁴⁶ however sex work and sex trafficking are not the same activity. Sex work is a mutually consensual activity while trafficking is an exploitative and non-consensual activity. Trafficking is essentially involuntary sex work. Some people may believe that both sex work and sex trafficking are wrong, however legalizing sex work is not the same as allowing, or even just condoning, sex trafficking.

Legalizing sex work and involving sex workers in the regulation of their industry is a human rights issue. According to the International Covenant on Economic, Social and Cultural Rights, individuals have the right to self-determination, which includes the right to “freely pursue their economic, social and cultural development.”¹⁴⁷ The Universal Declaration of Human Rights states that all people have the “right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”¹⁴⁸ All people have a right to choose how they earn a living, and, as long as this choice is made free from coercion, governments should protect each person’s individual decision as long as it does no harm to other people.

The Human Rights Caucus at the High Level Meeting on AIDS of the United Nations released a statement outlining the aspects of a human rights-based approach to HIV/AIDS prevention, treatment, and care for the future.¹⁴⁹ This statement notes that human rights abuses occur in nations all over the world in the context of the HIV/AIDS pandemic and policymakers need to recognize this fact in order to effectively work towards a solution.¹⁵⁰ According to the Human Rights Caucus, human rights-based approaches “require ensuring the participation of affected communities, non-discrimination in program delivery, attention to the

146. The first limitation states that no funding from the Act may be used “to promote or advocate the legalization or practice of prostitution or sex trafficking.” 117 Stat. 711, 733–34. The second limitation adds that the funding also may not be used “to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking.” *Id.*

147. Covenant on Economic, Social and Cultural Rights, *supra* note 10, at Art. 1.

148. Universal Declaration of Human Rights, *supra* note 108, at Art. 23. The Covenant on Economic, Social and Cultural Rights also states that everyone has a right “to gain his living by work which he freely chooses or accepts[.]” Covenant on Economic, Social and Cultural Rights, *supra* note 10, at Art. 6.

149. Human Rights Caucus, *supra* note 71.

150. Human rights abuses that are mentioned in this statement include “acts perpetrated and/or tolerated by governments such as restrictions of movement, gender-based violence, discrimination, police harassment, threats to privacy and freedom of assembly.” They also include denial of care, treatment, education, and access to basic health and social services. Human Rights Caucus, *supra* note 71.

legal and policy environment in which interventions take place, and accountability for what is done, and how it is done.”¹⁵¹ The statement recommends comprehensive strategies that heavily emphasize human rights principles.¹⁵²

First, members of the affected communities must be involved in the creation of policy and the implementation of programs.¹⁵³ This means, among many things, that people living with HIV/AIDS should be involved in decisions about treatment and care, and people in high risk populations, including sex workers, should be involved in decisions about prevention.¹⁵⁴ Second, prevention and treatment efforts should be implemented with equal access for all.¹⁵⁵ This requires the elimination of stigmas attached to certain communities, such as sex workers, in order to allow efficient and effective resource distribution. Lastly, policymakers must pay attention to the legal and political environment in which programs are being implemented.¹⁵⁶ This includes considering the human rights implications of policies, including the legal status of sex work.

If necessary, governments may restrict internationally recognized human rights, but “solely for the purpose of promoting the general welfare in a democratic society.”¹⁵⁷ Sex work does little to no harm to the welfare of the general public or society as a whole. In any event, sex work is a part of society and legislating against it does nothing but make the industry more dangerous for those involved.¹⁵⁸ Even though the criminalization of sex work may be furthering legitimate policy goals, the policies are overbroad and may be accomplished in ways that cause less damage.¹⁵⁹ Legalizing sex work promotes the human rights of sex workers and their clients by enabling better regulation of the industry, which results in more effective disease prevention.

151. *Id.*

152. These human rights principles include “specific, measurable and time-bound targets,” as well as an emphasis on “universal access to treatment, prevention, care and support” and “protection and empowerment of vulnerable groups[,] harm reduction and substitution therapy[,] sexual and reproductive health and rights[,] and] comprehensive, evidence-based sexuality education.” *Id.*

153. *Id.*; Alliance for Open Society Int’l, 430 F.Supp. 2d at 232.

154. Alliance for Open Society Int’l, 430 F.Supp. 2d at 232. (“Involving individuals from the particular target community – sex workers, for example – in delivering the message gives credibility, reduces fear and stigma, and makes it more likely that people hearing the message will follow through with specific behaviors.”)

155. Human Rights Caucus, *supra* note 71.

156. *Id.*

157. Covenant on Economic, Social and Cultural Rights, *supra* note 10, at Art. 4.

158. Canadian HIV/AIDS Legal Network, *supra* note 114, at 16.

159. *Id.*

The legalization of sex work has been recognized as good policy and “[s]everal international guidelines about HIV/AIDS and human rights recommend that criminal laws that increase the health and safety risks (including the risk of HIV infection) of sex workers should be repealed.”¹⁶⁰ Therefore, Congress should remove both funding eligibility requirements regarding sex work from the U.S. Leadership Act, and consider encouraging the legalization of sex work in order to involve sex workers in the fight against HIV/AIDS and to better regulate the industry.

VI. CONCLUSION

Ensuring that all people may completely exercise their internationally recognized human rights without restriction is an obligation that national governments must take very seriously. These rights, which include the right to physical and mental health, prevention of disease, adequate education, and personal liberty, are essential to “promote social progress and better standards of life.”¹⁶¹ Therefore, national governments and other state actors must take responsibility for protecting its citizens from HIV/AIDS by implementing effective and realistic prevention programs and ensuring equality in access to treatment, care, and support.¹⁶²

The United States is one of the most powerful nations in the world. It is in a prime position to effect extremely positive change in the lives of individuals struggling with HIV/AIDS and to make great strides in helping countries all over the world to fight this global pandemic. However, the current U.S. Leadership Act will not bring the United States to the position of leadership for which it was created. Policymakers, in the United States and worldwide, must focus on progressive and effective approaches to prevention, treatment, and support in order to create the changes we need to reverse the grave trend of HIV/AIDS. The United States can be an effective leader in this sense by creating policy that reflects the reality of the HIV/AIDS pandemic and the communities who most need aid.

To this end, policymakers worldwide must ensure that HIV/AIDS prevention programs are based on comprehensive sexual health education strategies. They must also work toward the legalization of sex work to allow members of the sex work industry to fully participate in the fight

160. *Id.* at 17.

161. Universal Declaration of Human Rights, *supra* note 108, at Preamble, Art. 26; International Covenant on Economic, Social, and Cultural Rights, *supra* note 10, at Art. 12, 13.

162. *Young People and HIV/AIDS*, *supra* note 12, at 55.

against HIV/AIDS. These strategies are sound policy decisions, not only because of their proven effectiveness, but also because they maximize the realization of the human rights of those who are involved and affected.

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