

# Prostituting the Constitution

**By Kathleen Peratis**

Fri. Aug 26, 2005

Let's say you run an agency administering governmental disaster relief funds and, after a big hurricane, you are told you no longer will be permitted to administer funds unless you publicly announce that you are opposed to gay marriage — whether or not you actually oppose it, whether or not you even have an opinion. Far fetched? Absurd? An outrageous infringement of your right to free speech and its corollary, silence?

Unfortunately, no.

The conservative right has relentlessly advocated its extreme agenda, rendering plausible what was once absurd. And it has successfully lobbied to transform the newly plausible into law. Case in point: The Global AIDS Act and its requirement that all recipients of funding for programs to combat HIV/AIDS in the developing world must become promoters of the administration's anti-prostitution campaign, whether or not they actually endorse it.

When the Bush administration signed on to the global war on HIV/AIDS in 2003 and Congress provided funding for both domestic and foreign agencies involved in the "war," the "faith-based community" went to work on two fronts: One, to ensure that the abstinence-only programs of religious groups got a share of the funding, though there is plenty of proof that such programs do no good in HIV/AIDS prevention and often do serious harm. Two, in an effort to limit funding to the "godless" progressive community, to insert a requirement into the Global AIDS Act that all recipients of funding declare that they have a policy "opposing prostitution and sex trafficking."

Even if they have no such policy. Even if their work has nothing to do with sex workers. Even if, as many of them believe, such a declaration is counterproductive because it stigmatizes prostitutes and makes it more difficult to teach them how to protect themselves against infection.

Most of the NGOs that work with sex workers pursue what some call a "harm reduction" approach — condoms, health care, safe-sex negotiating skills — which they deem the best way to save lives. The Bush administration, on the other hand, agrees with those who argue that all prostitution is slavery and that the only thing to do is close down the brothels and rescue the victims.

Despite the administration's official anti-prostitution stance, the Justice Department advised the president in 2003 that while the "loyalty oath" called for in the Global AIDS Act could be applied to foreign NGOs, it could not constitutionally apply to Americans — what with the First Amendment and all. Foreign NGOs protested. Brazil, where prostitution is not illegal and whose AIDS program is regarded as one of the most

successful in the developing world, famously decided to forgo \$40 million in American aid rather than cease distributing condoms and other health information and support to sex workers, as the law was deemed to require.

This did not cause the administration to back down. In fact, the opposite occurred. Last fall, the Justice Department withdrew its earlier advice regarding the unconstitutionality of applying the law to Americans: The administration promptly announced that henceforth, the requirement applied to all NGOs, both foreign and American, without distinction.

American NGOs complained that the requirement was unwieldy and counterproductive. A Catholic Relief Services spokesperson said: “If we had to require the archbishop of Ouagadougou to sign a pledge against prostitution, that’s hard to do. And we have 20,000 partners.” According to Ruth Messenger of American Jewish World Service, the pledge resulted in a Cambodian partner of an American NGO discontinuing its plans to provide English-language training classes for sex workers, even with funds provided by other sources, thereby depriving these women of a skill that could move them toward a better life.

Last month, many of the affected NGOs joined in a lawsuit challenging the law as an unconstitutional infringement of their free-speech rights.

A precursor of the Global AIDS Act loyalty oath is the “global gag rule,” developed in 1984 under the Reagan administration, revoked by President Clinton and then reinstated by President Bush on his first day in office. It forbids foreign recipients of American-backed family planning grants not only from providing abortion services abroad, even with nongovernmental funds, but also from even mentioning the word “abortion” in their discourse with clients or others. This draconian rule never applied to Americans. Such interference with our free-speech rights was unthinkable — or at least it was five years ago.

According to Washington lawyer Martina Vandenberg, who represents the plaintiffs in the court case challenging the law, no governmental attempt of this kind has ever succeeded. She cites the stirring condemnation, issued in the dark days of World War II, by Supreme Court Justice Robert Jackson: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

If the loyalty oath called for in the Global AIDS Act is not declared unconstitutional as applied to Americans, what is the next “official orthodoxy” we may be required to endorse as a condition for receiving government funds? It would be wise to hedge your bets.

As this newspaper's editorialist pointed out a few weeks ago, the days when we could count on the courts to rescue our agenda — and, for that matter, the Constitution — are over. This is the way the lights go out.

*Kathleen Peratis, a partner in the New York law firm Outten & Golden, is a trustee of Human Rights Watch.*