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Absence of Balance: Sweeping Refusal Policies in PEPFAR And the Proposed Trafficking Victims' Protection Act

By Heather D. Boonstra

In August 2011, the Obama administration formally accepted the recommendation of an Institute of Medicine expert panel that contraceptive counseling and methods be included in a select set of women's preventive health services that, under the Affordable Care Act, automatically would be covered in most private insurance plans without additional cost-sharing beginning in August 2012. Only plans provided by bona fide religious employers—defined narrowly as those that exist for the purpose of inculcating religious values and that primarily serve and employ people who share the employer's religion—would be eligible for an exemption from the coverage requirement. In February 2012, the administration relented somewhat, proposing an "accommodation" aimed at a broader set of religiously affiliated employers, such as hospitals, universities and charities. Employees of these organizations would be provided the coverage guaranteed under the law, but not by the objecting employer. Instead, it would be provided and paid for by the employers' insurance companies, which also would solely communicate with the employees about their coverage.

The administration's accommodation is a tacit effort to adapt to the insurance coverage context a central element of ethical principles long endorsed by a broad range of professional medical associations, which require a balance between health care providers' religious or moral objections to providing certain medical services and patients' rights to be informed about and receive those services. This attempt at balance has not satisfied the U.S. Conference of Catholic Bishops or their allies in evangelical Protestant and other social conservative organizations. These interest groups continue to insist that an employer's religious objection to contraception (including that of an individual business owner) should receive absolute deference, notwithstanding the conscience rights, health care needs or even legal entitlements of their employees. Anything less, they say, constitutes an attack on the right of employers to practice their religion and a "war on religion" in general.

Whether the bishops and their allies in other social conservative organizations will prevail with regard to contraceptive insurance coverage for women in the United States remains to be seen. But the fact remains that they have already succeeded in enshrining the principle of absolute deference to the objector in another area of the law that affects some of the most vulnerable people in the world: men and women at risk of HIV infection in developing countries. Under the President's Emergency Plan for AIDS Relief (PEPFAR), organizations receiving U.S. government funds for the prevention of the sexual transmission of HIV may not only refuse on religious or moral grounds to directly provide condoms (or any other service to which they object), but they may also withhold information about condoms and refuse to refer clients to other programs through which condoms may be obtained. Moreover, they are now seeking to extend this wholly unbalanced approach to another program affecting an equally vulnerable group of people: women who have been victims of sex trafficking.

Professional Standards

Over time, physicians and others involved in the provision of health care have generated professional codes of ethics that define what it means

to be a health care professional. These codes embody certain principles and specify rules and obligations that are especially helpful when conflicts of values arise, such as conflicts between the provider's beliefs and patients' autonomy and access to care.

Professional codes have been remarkably consistent when it comes to the concept of refusal. Although not always spelled out in one place or in every association's guidelines, these codes support a right to refuse, but also assert that this right must be balanced with other values and duties that health care providers accept by virtue of their profession. In essence, professional medical standards typically endorse a provider's right to step away, or "withdraw" from providing a health care service that violates his or her moral or religious beliefs, but not in a way that blocks or denies patients' own right to care. Indeed, a conscientious belief cannot take precedence if, for example, it imposes serious risks on patients, invades patients' autonomy or treats patients unjustly.[1]

These are the standards of practice of the major health care provider associations in the United States, including the American Medical Association, the American Academy of Pediatrics, the American Pharmacists Association and the American Academy of Physician Assistants (see "Rights vs. Responsibilities: Professional Standards and Provider Refusals," August 2005). The American Nurses Association's code of ethics, for example, says, "Where a particular treatment, intervention, activity, or practice is morally objectionable to the nurse…the nurse is justified in refusing to participate on moral grounds…. The nurse is obliged to provide for the patient's safety, to avoid patient abandonment, and to withdraw only when assured that alternative sources of nursing care are available to the patient."[2] The American Congress of Obstetricians and Gynecologists' committee on ethics asserts that, regardless of their religious or moral objections, health care professionals must provide all patients with accurate and unbiased information, prior notice of professionals' objections and timely referral in cases of refusal.[3] The committee calls for maximizing respect for health care professionals' consciences without compromising the health and well-being of those they serve. In the end, "the patient's well-being must be paramount." Similarly, the World Medical Association, which provides guidance to physicians, national medical associations and governments throughout the world, insists that providers who are not able to provide the care and services required—for whatever reason, be it that they do not have the capacity or refuse care—must not abandon their patients, but instead should refer them to those equipped to provide such services. In fact, this imperative to assist patients in making alternative arrangements is so essential that, "unless or until the referral can be accomplished, the physician must care for the patient to the best of his or her ability."[4]

PEPFAR I

PEPFAR—launched by President George W. Bush in 2003 with strong bipartisan support from Congress—funds programs that provide a continuum of HIV prevention, care and treatment services to people in developing countries; $6.4 billion was appropriated for such programs in FY 2012. PEPFAR is a discretionary grant program, meaning that it generally provides assistance to programs through grants and agreements awarded on a competitive basis. No group, religious or secular, has a "right" to these funds. Rather, the relevant PEPFAR agency designs solicitations with the goal of improving health outcomes and then selects projects for funding based on the quality of the applications it receives. PEPFAR solicitations often take a "multisectoral approach," stressing linkages and referrals across different HIV program areas or between HIV and related funding streams, such as family planning.

Under the initial statute, PEPFAR I, which guided the program between FY 2004 and FY 2008, the strategy for preventing the sexual transmission of HIV largely embraced the ideology of social conservatives. Although supposedly shaped by the so-called ABC model (Abstain, Be faithful, use Condoms), it included a requirement that one-third of all HIV prevention funds be spent on abstinence-until-marriage programs. In implementing this requirement, the Office of the U.S. Global AIDS Coordinator developed official program guidance that required country teams to spend

INCREASING IMBALANCE

PEPFAR I

An organization that is otherwise eligible to receive assistance…

- shall not be required, as a condition of receiving the assistance, to endorse or utilize a multisectoral approach to combating HIV/AIDS, or to endorse, utilize, or participate in a prevention method or treatment program to which the organization has a religious or moral objection.

PEPFAR II

An organization, including a faith-based organization, that is otherwise eligible to receive assistance…

- shall not be required, as a condition of receiving such assistance, to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and
- shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements under such provisions of law for refusing to meet any [of these] requirements.

Trafficking Victims Protection Reauthorization Act of 2011

An organization, including a faith-based organization, that is otherwise eligible to receive assistance…

- shall not be required, as a condition of receiving such assistance, to endorse, utilize, provide, make a referral to, become integrated with, or otherwise participate in any program, project, or activity to which the organization has a religious or moral objection; or
- [shall not be] discriminated against in the solicitation or issuance of grants, contracts, cooperative agreements, or other Federal funding [under this Act] for refusing to meet any [of these] requirements.
- The courts of the United States shall have jurisdiction to prevent and redress actual or threatened violations of this section by issuing any form of legal or equitable relief, including injunctions prohibiting conduct that violates this section; and orders preventing the disbursement of all or a portion of Federal financial assistance to a specific offending department, agency, or program, project, or activity until such time as the conduct prohibited by this section has ceased.
- An action under this section may be instituted by any organization that has standing to complain of an actual or threatened violation of this section; or the Attorney General of the United States.

two-thirds of all the funds spent on sexual transmission prevention on "AB activities"—those focused on abstinence outside of marriage and monogamy in marriage (or at least reducing the number of sexual partners). The earmark meant big money for programs with an exclusive AB focus and led to much less funding for programs promoting comprehensive ABC messaging.[5]

The original PEPFAR law also included a refusal policy stipulating that no organization was required "to endorse, utilize, or participate in" a program to which it has a religious or moral objection (see box). Although the law was silent on the subject, referrals were required by the U.S. Agency for International Development (USAID), which administered the prevention program. This policy was essentially in-line with medical ethical standards—and it tracked with U.S. government family planning policy, international and domestic. Under the international family planning program, no organization can be "discriminated against" because of its "religious or conscientious commitment" to offer, in this case, exclusively natural family planning methods accepted by the Catholic hierarchy. Nevertheless, federal law requires that funds be available only to organizations that agree to "offer, either directly or through referral to, or information about access to, a broad range of family planning methods and services." Similarly, under the domestic Title X family planning program, federal regulations stipulate that organizations that offer only a single method of family planning, such as natural family planning, may receive Title X funding as part of a project "as long as the entire project offers a broad range of family planning services," to which women can be referred.

Effectively, what this meant in implementing PEPFAR I was that an organization with a religious or moral objection to condoms could apply for an award for a comprehensive ABC program, as a member or even a leader of a consortium of groups, so long as it was willing to refer individuals seeking condoms or information about condoms to a partner organization in the consortium that provided those services. Alternatively, such an organization could opt to apply only for awards for A or AB programs to which it had no

objection. In fact, under the Bush administration, Catholic Relief Services (CRS) became a major partner in PEPFAR prevention programs and received significant funding for programs that promoted AB messaging. According to CRS, however, several of its funding applications were rejected because the organization would not offer condoms, either directly or through referrals.[6]

PEPFAR II

In 2008, when it came time to renew PEPFAR for another five years, Congress debated whether to loosen the abstinence-until-marriage spending requirement in light of evidence that the requirement limited countries' abilities to effectively apply resources where they are needed most.[7] The U.S. bishops, meanwhile, urged policymakers to maintain the status quo. The earmark, they said, is critical for protecting both AB programs and funding to CRS.[6] They also lobbied to strengthen the refusal clause.

In the end, the U.S. bishops lost the fight on the spending requirement, but got their way on the refusal clause. For PEPFAR II (for FY 2009–2013), Congress repealed the "hard earmark" for abstinence-until-marriage programs. Instead, it stipulated that for those countries with generalized epidemics, the global AIDS coordinator must develop an HIV sexual prevention strategy for which at least half of funding supports "activities promoting abstinence, delay of sexual debut, monogamy, fidelity and partner reduction." Without any public discussion or debate, however, it also amended the refusal clause, relieving organizations of any obligation to refer individuals for services to which they have a religious or moral objection.

Almost four years later, the Obama administration—saddled with this refusal policy—issued a directive laying out the steps an organization needs to take if it has conscience concerns with respect to a particular solicitation.[8] Essentially, an organization with a religious or moral objection is welcome to apply and may choose to submit an application that does not respond to all of the solicitation's specified activities. If the organization has properly notified U.S. officials before the application deadline of its objection, the proposal will be evaluated based only on the activities for which a proposal is submitted, and will not be evaluated "favorably or unfavorably" due to the absence of critical interventions.

The Trafficking Victims' Program

The evolution of the federal program to assist victims of human trafficking is somewhat different. Established by the Trafficking Victims Protection Act of 2000, the purpose of the program is to make "housing, educational, health care, job training and other Federally-funded social service programs available to assist victims in rebuilding their lives."[9] Many of the victims of human trafficking are women and girls who have been forced into prostitution and have suffered horrible physical and sexual abuse at the hands of traffickers.

Initially, the Department of Health and Human Services (DHHS) implemented the trafficking victims' program by making grants to a number of organizations that provided a broad range of critical services. In 2005, DHHS decided to select a general contractor to administer the funds and, a year later, awarded the master contract to the U.S. Conference of Catholic Bishops, which in turn subcontracted with over 100 other organizations (many of which were not Catholic institutions) to work with trafficking victims. The Trafficking Victims Protection Act does not include a conscientious refusal policy. During the bidding process, however, the U.S. bishops made clear their intention to distribute federal funds in a manner consistent with Catholic belief, and the Bush administration's DHHS went so far as to allow the U.S. bishops to prohibit subcontractors from either providing or referring for contraception and abortion—services to which beneficiaries of the trafficking victims' program would otherwise have access.

In 2011, when the contract with the U.S. bishops was set to expire, the Obama administration's DHHS took steps to ensure that, going forward, victims of trafficking would have access to a broad range of reproductive health services through government-funded programs. DHHS issued a funding announcement for a comprehensive program that would provide an array of services for victims of trafficking, specifically

including referrals to medical providers who can provide "family planning services and the full range of legally permissible gynecological and obstetric care."[10] DHHS stipulated that, although any organization may apply, it would give "strong preference" to applicants that are willing to offer all of the services and referrals required by the program. As Sharon Parrott—a top aide to DHHS Secretary Sebelius who was closely involved in the process—told the *Washington Post,* "The priority in this case was how to best meet the needs of victims of trafficking so they can take control of their own lives."[11] DHHS's contract with the U.S. bishops expired in October 2011, and the award went instead to three other groups willing to provide a comprehensive package of services.

In March 2012, a federal court in Massachusetts dealt the bishops another blow. In a case that the American Civil Liberties Union (ACLU) and the ACLU of Massachusetts had brought against DHHS in 2009, the court ruled that DHHS cannot impose religiously based restrictions on reproductive health services for victims of human trafficking. The court found that, by authorizing the U.S. bishops to prohibit the use of anti-trafficking funds for contraceptive and abortion referrals, DHHS had "impliedly endorsed" the religious beliefs of the U.S. bishops and the Catholic Church—a violation of the Establishment Clause of the First Amendment. "The court is right to insist that organizations receiving government funding cannot use their religion as an excuse to discriminate and withhold crucial services from victims of human trafficking," said Brigitte Amiri, senior staff attorney with the ACLU Reproductive Freedom Project. "The court's decision ensures that people who have been forced into horrific circumstances will have access to all necessary services—including reproductive health care—to rebuild their lives."[12]

Stung by the outcomes in the trafficking arena, but armed with the precedent from PEPFAR II, the bishops and their allies are seeking similarly sweeping conscience protections under the Trafficking Victims Protection Act, which is currently in the process of being reauthorized. Rep. Chris Smith (R-NJ) introduced a new authorization bill in December 2011 that would add a refusal provision and take the trafficking victims' program out of DHHS's hands entirely, shifting it to the Justice Department. Similar to the provision in PEPFAR II, the refusal clause in Smith's bill would relieve any organization of their obligation to provide referrals for any health service. The Smith proposal would go further by explicitly empowering an organization to seek remedy through the courts when it believes it did not—or will not—win a federal grant or contract because it refuses to meet the requirements of the program. Courts would have jurisdiction to "prevent and redress actual or threatened violations" of the refusal clause, including cutting off funds to the offending department, agency or program until the conduct in violation of the refusal clause has ceased.

A Search for Balance

In his ruling in the ACLU's lawsuit against DHHS officials, *ACLU of Massachusetts v. Sebelius,* Judge Richard G. Stearns noted that the case is not about government forcing a religious organization to act contrary to its most fundamental beliefs. "No one is arguing that the [U.S. Conference of Catholic Bishops] can be mandated by government to provide abortion or contraceptive services or be discriminated against for its refusal to do so. Rather, this case is about the limits of the government's ability to delegate to a religious institution the right to use taxpayer money to impose its beliefs on others (who may or may not share them)."

Indeed, some of the strongest critics of the U.S. bishops' position maintain that the Catholic hierarchy, by its actions with regard to both the global AIDS and trafficking programs, is curtailing the freedom and autonomy of others to make informed decisions about their own health, all while using government money to do so. By denying people access to information and refusing to refer them to the health care services to which they are entitled under government programs, the bishops have found a back-door way of using taxpayer money to impose their beliefs on others.

Practically speaking, the refusal clause is also something of a logistical nightmare. USAID has

said it will work with U.S. missions in-country, on a case-by-case basis, when an organization has raised an objection to identify an appropriate approach to mitigate the harm to individuals. How successful that will be, however, is questionable. Ensuring that no one falls through the cracks is a challenge, particularly in developing countries, where health systems are weak, there is a shortage of available health care personnel and supplies, and individuals often travel long distances to obtain the services they need. The likelihood of individuals in Sub-Saharan Africa, for example, receiving HIV services from faith-based organizations is high. A 2007 report conducted for the World Health Organization estimates that 30–70% of the health infrastructure in Africa is currently owned by faith-based organizations.[13] And the Vatican has estimated that Catholic religious orders and institutions provide 25% of the total care given to people living with HIV around the world.[14]

Beyond the logistical and even legal issues, however, the sweeping refusal policies embodied in PEPFAR and sought for the trafficking program constitute gross violations of accepted ethical standards and hurt the very people those programs are designed to serve. Imagine a woman who is HIV-negative and married to a man who is HIV-positive, being deprived of access to condoms because the clinic available to her is affiliated with the Catholic Church. Or a woman forced into prostitution denied contraception or, if she had been raped, even information about abortion services. Codes of ethics exist to remind us all that conscience is a two-way street. When religious or moral objections are accommodated, it is equally important that individuals' access to care not be impeded. One-sided refusal polices fail the ethical test precisely because they are one-sided, because they are lacking in any semblance of balance. **www.guttmacher.org**

REFERENCES

1. Beauchamp TL and Childress JF, *Principles of Biomedical Ethics,* fourth ed., New York: Oxford University Press, 1994.

2. American Nurses Association, *The Code of Ethics for Nurses with Interpretive Statements,* Silver Spring, MD: American Nurses Association, 2001, <http://nursingworld.org/MainMenuCategories/EthicsStandards/CodeofEthicsforNurses/Code-of-Ethics.pdf>, accessed June 7, 2012.

3. American College of Obstetricians and Gynecologists (ACOG), The limits of conscientious refusal in reproductive medicine, *ACOG Committee Opinion,* 2007, No. 385, <http://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Ethics/The_Limits_of_Conscientious_Refusal_in_Reproductive_Medicine>, accessed June 7, 2012.

4. World Medical Association, Statement on HIV/AIDS and the medical profession, 2006, <http://www.wma.net/en/30publications/10policies/a25/index.html>, accessed June 7, 2012.

5. United States Government Accountability Office (GAO), *Spending Requirement Presents Challenges for Allocating Prevention Funding Under the President's Emergency Plan for AIDS Relief,* Washington, DC: GAO, 2006, <http://www.gao.gov/assets/250/249585.pdf>, accessed June 14, 2012.

6. Wenski TG and Hackett K, *Letter to House Committee on PEPFAR Reauthorization,* Feb. 6, 2008, Washington, DC: United States Conference of Catholic Bishops; and Baltimore, MD: Catholic Relief Services, <http://old.usccb.org/sdwp/international/2008-02pepfar_cong_ltr.pdf>, accessed July 16, 2012.

7. Institute of Medicine, *PEPFAR Implementation: Progress and Promise,* 2007, <http://www.iom.edu/Reports/2007/PEPFAR-Implementation-Progress-and-Promise.aspx>, accessed June 14, 2012.

8. United States Agency for International Development (USAID), *Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, as Amended – Conscience Clause Implementation, Medically Accurate Condom Information and Opposition to Prostitution and Sex Trafficking, AAPD 12-04,* Washington, DC: USAID, Feb. 15, 2012, <http://transition.usaid.gov/business/business_opportunities/cib/pdf/aapd12_04.pdf>, accessed June 14, 2012.

9. Department of Health and Human Services, Trafficking Victims Protection Act of 2000, *Fact Sheet,* 2012, <http://www.acf.hhs.gov/trafficking/about/TVPA_2000.htm>, accessed July 6, 2012.

10. National Human Trafficking Victim Assistance Program, Funding opportunity announcement, 2011, <http://www.acf.hhs.gov/grants/open/foa/view/HHS-2011-ACF-ORR-ZV-0148>, accessed July 16, 2012.

11. Markon J, Health, abortion issues split Obama administration and Catholic groups, *Washington Post,* Oct. 31, 2011, <http://www.washingtonpost.com/politics/health-abortion-issues-split-obama-administration-catholic-groups/2011/10/27/gIQAXV5xZM_story_1.html>, accessed June 7, 2012.

12. American Civil Liberties Union (ACLU), Court prohibits religious restrictions on government-funded trafficking victims' program, press release, New York: ACLU, Mar. 24, 2012, <http://www.aclu.org/reproductive-freedom/court-prohibits-religious-restrictions-government-funded-trafficking-victims>, accessed June 7, 2012.

13. African Religious Health Assets Programme (ARHAP), *Appreciating Assets: The Contribution of Religion to Universal Access in Africa,* Cape Town: ARHAP, 2006, <http://www.arhap.uct.ac.za/pub_WHO2006.php>, accessed June 7, 2012.

14. Hummes C, Intervention by the Holy See at the Plenary Session of the United Nations on: "Implementation of the Declaration of Commitment on HIV/AIDS," Sept. 22, 2003, <http://www.vatican.va/roman_curia/secretariat_state/2003/documents/rc_seg-st_20030922_commitment-hiv-aids_en.html>, accessed June 7, 2012.