FAITH-BASED CHARITIES AND THE QUEST TO SOLVE AMERICA'S SOCIAL ILLS: A LEGAL AND POLICY ANALYSIS

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INTRODUCTION

In his inaugural address, President George W. Bush proclaimed, "Church and charity, synagogue and mosque, lend our communities their humanity and they will have an honored place in our plans and in our laws."[1] Nine days later, the President signed Executive Order 13,199 establishing a White House "Office of Faith-Based and Community Initiatives" to "help the Federal Government coordinate a national effort to expand opportunities for faith-based and other community organizations."[2] Executive Order 13,198, signed at the same ceremony, established a "Center for Faith-Based and Community Initiatives" in the Departments of Justice, Education, Labor, Health and Human Services, and Housing and Urban Development.[3] The stated goal is to "eliminate regulatory, contracting, and other programmatic obstacles to the participation of faith-based and other community organizations in the provision of social services."[4]

Based on these executive orders, it appears President Bush intends to follow through on his campaign pledge to make faith-based organizations (FBOs) an integral provider of government-funded social services. Confronted with this new reality, what kinds of obstacles are likely to be encountered?

To begin with, how will the public respond to an overtly religious social service provider? In a recent work titled *The Diminishing Divide: Religion's Changing Role in American Politics*, Andrew Kohut and his co-authors show that Americans, since the 1960s, have become more tol-

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1 *President: 'I Ask You to Be Citizens,'* N.Y. TIMES, Jan. 21, 2001, at A14.

2 Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001).

3 Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 29, 2001).

4 *Id.*

erant of "closer links between religion and politics." [5] After examining polling data from that decade, and comparing it with data collected throughout the 1990s, the authors conclude that "the days when religion and politics were never to be discussed in public are long over."[6] And yet they caution "the secularizing pressures of modern society will present a powerful challenge to the expansion of religious affiliations, practices, and beliefs."[7]

The apparent contradiction neatly states the fundamental obstacle to FBOs: while most Americans accept that religion can have a positive role in public life, in an increasingly secular society, the prospect of government embracing religion as policy is unnerving. But why? What prevents religion from being an important part of public life in a secular society? The answer is not as daunting as some have portrayed.

A. DEEP DIVISIONS, INFLEXIBLE POSITIONS

The distinction made throughout this article is that while it is logical to assume that secularization affects a religious institution's ability to gain converts, the institution itself may very well carry on and thrive by affiliating with secular people and organizations. This distinction often goes unnoticed because, in recent history, scholars, politicians, and the public too often focus on the symbolic relationship between church and state.[8] Rather than view church/state relations as "zero-sum," meaning that religious involvement in public affairs comes at the expense of civil society and vice versa, it is better to evaluate the benefits of specific partnerships.[9]

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5 ANDREW KOHUT ET AL., THE DIMINISHING DIVIDE: RELIGION'S CHANGING ROLE IN AMERICAN POLITICS 123 (2000).

6 *Id.* at 122.

7 *Id.* at 128.

8 *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 4–5 (1993). Professor Carter provides an apt illustration when he describes a religiously oriented drug treatment program that asks its members to pray. *Id.* "The program, then, could fairly be described as proselytizing — but, unlike some forms of proselytization, its work is in a secular cause." *Id.*

9 A contrary view, expressed by Professor Esbeck, is that:

> [I]t should be stated candidly and up front that there is no truly neutral position . . . for all models of church/state relations embody substantive choices . . . . Separationism is a value-laden judgment that certain areas of the human condition best lie within the province of religion, while other areas of life are properly under the authority of civil government . . . . The same must be said for its primary competitor, the neutrality theory. Indeed, to demand that any theory of church/state relations transcend its pedigree or its presuppositions and be substantively neutral is to ask the impossible.

Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 5 (1997).

Arguing religion as an important element of public life does not simultaneously mean an end to the Establishment Clause.[10] Strict separationists reject this notion because the symbolic meaning of *any* partnership between church and state runs contrary to the idea, articulated by Justice Hugo Black, that, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[11]

In a similar vein, some advocates of faith-based social assistance excoriate past federal programs for embracing secularism. They assert that while government welfare programs in the past "declared a war on poverty that was actually a war on God, since the Bible was excluded . . . from governmental antipoverty work," government must learn from its failures and embrace a "New Pragmatism . . . [where] religious programs receive no special preference but no special antagonism either."[12]

In the end, however, framing the issue of "closer links between religion and politics" in symbolic terms alone creates an unworkable paradox. Without reasoned arguments and empirical data, one cannot answer the question: Can religion's public role expand in a secular society? This question needs to be answered because voters and their elected representatives often turn to "religion," albeit a fuzzy concept at times, when addressing an array of social problems. It can hardly be said that a latter day "Great Awakening" is responsible.

Indeed, it is doubtful that the trend toward "faith-based" solutions is a product of greater religiosity in recent years.[13] The explanation is more mundane: despite government efforts, poverty, substance abuse, and crime remain serious problems and the public blames government for not "fixing" these problems.

In the wake of dismantling much of the traditional welfare apparatus in 1996, not surprisingly, the public and politicians of both parties are, in 2001, receptive to new ideas.[14] Concrete expectations and not religious fervor, therefore, have made FBOs viable public policy.

Evaluating FBOs though the prism of secular versus sacred misses the point. Public interest in FBOs is not a product of heightened religios-

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10 *See* Carter, *supra* note 8, at 105–121.

11 Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 18 (1947). It is interesting to note that this often cited case, symbol of the strict separation doctrine, actually condoned the use of state funds for parochial schools. *Id.*

12 MARVIN OLASKY, RENEWING AMERICAN COMPASSION 138 (1996).

13 *See* KOHUT ET AL., *supra* note 5, at 16–33.

14 *See* CBS News Poll, July 14, 1999, *available at* WESTLAW, POLL Database, USCBS.99007A Q52 010 (showing that sixty-five percent of those surveyed favored federal grants to FBOs); Family Research Council, *America Assesses Drug Policy Survey*, July 13, 1998, *available at* WESTLAW, POLL Database, USPC.98DRUG R13 018 (showing that sixty-four percent of those surveyed felt that the government should make it easier for FBOs to expand their drug treatment programs).

ity, rather it is derivative of the public discrediting of government social service provision. Indeed, despite the trend toward secularization, the public is willing to accept some level of religious involvement in heretofore-secular government programs because there is a general belief that they work. Our task is to confirm or deny this perception while also examining the potential constitutional and practical impediments to President Bush's proposals. Our analysis offers three conclusions.

First, FBOs are effective at dealing with chronic social problems by combining material assistance with spiritual uplift, thus sparking personal transformation. The bonds formed by FBOs within communities facilitate behavior modification "one person at a time." Sectarian differences among FBOs are not major factors in this calculus. FBOs sponsored by various religious denominations achieve similar positive results in dealing with social problems not otherwise adequately handled by existing public sector programs.

FBOs' success stems from addressing the spiritual needs of individuals by instilling values that change behavior.[15] This is possible because their volunteer staffs interact closely with the people they serve.[16] Thus, such organizations hold promise[17] as a way to help the hard-core underclass of the inner cities.[18]

Second, financing FBOs through the Tax Code is preferable to direct federal funding. The fear that public funding means government take-over of religion serves as perhaps the greatest impediment to a more expansive role for FBOs. For that reason, direct funding of FBOs is problematic. Better to encourage taxpayers to contribute more by allowing deductions for non-itemizers and to choose which FBOs to fund through tax credits. Direct funding also suffers from another weakness: governmental bureaucracy and political patronage.

Third, although predicting the U.S. Supreme Court's resolution of church-state issues is fraught with difficulties, the emerging "equal treatment" of religion by the High Court supports the constitutionality of publicly funding FBOs. As long as no one denomination is favored and beneficiaries are given a secular alternative, no constitutional bar exists.

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15 144 CONG. REC. S12686 (daily ed. Oct. 20, 1998) (statement of Sen. Ashcroft).

16 Amy L. Sherman, *Cross Purposes: Will Conservative Welfare Reform Corrupt Religious Charities?*, POL'Y REV., Fall 1995, at 58, 60.

17 One major caveat to involving FBOs is the FBO itself. The religious character of a FBO is what makes it uniquely suited to cope with difficult social problems. If government funding comes at the cost of stifling this message or if the expansion robs FBOs of their strengths (i.e., personal attention), then FBOs become victims of their own success. Thus FBOs must be assured an independent role in the eyes of the law and that the cost of participation is not unduly burdensome. In reality, it is too early to tell if FBOs are convinced.

18 David Kuo, *Re-Funding Social Services: Why Government Shouldn't Fear Working With Churches*, BLUEPRINT, Spring 1999, at 34, *available at* http://www.ndol.org/blueprint.

While the tax alternative seems certain to pass constitutional muster, direct funding is more vulnerable to accusations of government favoritism.

The article is divided into five sections. The first looks at the "welfare state" in the twentieth century, reasons for reform in 1996 (and what it entailed), and religion's importance to welfare reform. The second section attempts to define FBOs and the "Charitable Choice" provisions of the 1996 Welfare Reform Act, and evaluates their success and future. The third, fourth, and fifth sections assess the hurdles to implementing church/state collaboration: the third section examines whether greater collaboration is constitutional; the fourth section asks whether religion and by extension FBOs are effective at dealing with social problems; and the fifth section evaluates President Bush's plan and its alternatives.

I. THE FOUNDATION FOR WELFARE REFORM

A. WELFARE IN THE TWENTIETH CENTURY

Throughout American history, towns, counties, and states made efforts to address poverty. But only the twentieth century witnessed the creation of expansive federal welfare programs.[19] Make no mistake, welfare existed in America before the 1936 Social Security Act and was a subject of great debate.[20] However, the New Deal and Great Society marked the zenith of the American welfare state.[21] During this time, Americans accepted government's moral obligation to provide temporary assistance to its less fortunate citizens.[22] This burden on government — the price of "social justice"— became a routine budget item under presidents of both parties.[23] But with time, moral obligation evolved into something new. Housing, child support, and unemployment assistance, no longer temporary assistance, became the frontline for an expansive interpretation of government's moral *cum* legal obligation: one that stressed entitlement.[24]

Aid to Families with Dependent Children (AFDC) and Emergency Assistance (EA), both open-ended entitlements, were the two pillars of

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19 William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 116–19 (1997).

20 *See generally* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA (1996); WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA (6th ed. 1999); Joan Underhill Hannon, *The Generosity of Antebellum Poor Relief*, 44 J. ECON. HIST. 810 (1984); William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. Rev. 35 (1996).

21 *See generally supra* note 20.

22 *Id.*

23 *Id.*

24 *Id.*

"traditional" welfare.[25] AFDC "enabl[ed] each State to furnish financial assistance and rehabilitation and other services, as practicable under the conditions in such State, to needy dependent children,"[26] with the federal government reimbursing states, after 1965, at a minimum of 50 percent and a maximum of 83 percent, depending on the given state's per capita income.[27] Moreover, the entitlement remained intact notwithstanding budget deficits and recessions.[28]

AFDC supported needy children who were deprived of parental support or care because their father or mother was incapacitated, deceased, or unemployed, or continuously absent from home.[29] It also permitted payments for the child's needy caretaker relative (usually the mother), for another person in the home deemed essential to the child's well-being, and for pregnant women in their third trimester of pregnancy.[30] EA provided short-term emergency services and benefits to needy families.[31] The Job Opportunities and Basic Skills Training Program (JOBS) program, however, unlike the other two, was a capped entitlement (at $1 billion in 1996)[32] designed to "assure that needy families with children obtain[ed] the education, training, and employment that w[ould] help them avoid long-term welfare dependence."[33] Essentially, welfare policy before the 1996 reforms focused on supplying the material needs of its recipients. Although the JOBS program's stated goal was to prevent long-term dependency,[34] its exemptions permitted dependency.[35]

Obligation and entitlement are often considered parallels, however, sense of entitlement arose decades *after* the New Deal proclaimed the government's moral obligation.[36] The move to "empower" poor Ameri-

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25 STAFF OF HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., 1998 GREEN BOOK 398 (Comm. Print 1998).

26 42 U.S.C. § 601 (1994) (repealed 1996).

27 STAFF OF HOUSE COMM. ON WAYS AND MEANS, *supra* note 25, at 405 (noting the matching formula came into existence with the creation of Medicaid). *See* 42 U.S.C. § 1396d(b) (1998).

28 R. KENT WEAVER, ENDING WELFARE AS WE KNOW IT 16–17 (2000).

29 42 U.S.C. § 606(a) (1994) (repealed 1996).

30 42 U.S.C. § 606(b) (1994) (repealed 1996).

31 42 U.S.C. § 606(e)(1) (1994) (repealed 1996).

32 STAFF OF HOUSE COMM. ON WAYS AND MEANS, *supra* note 25, at 475–76.

33 42 U.S.C. § 681 (1994) (repealed 1996).

34 *See* STAFF OF HOUSE COMM. ON WAYS AND MEANS, *supra* note 25, at 489–90 (noting AFDC and EA contained no time limits, and no performance bonuses existed for states that encouraged recipients to seek jobs); *see also* 42 U.S.C. § 682(d) (1994) (repealed 1996) (requiring that recipients of ancillary programs, such as JOBS, pursue educational opportunities or jobs skills training).

35 *See* 42 U.S.C. § 602(a)(19)(C) (1994) (repealed 1996) (exempting people who were "ill, incapacitated or of advanced age[,] . . . needed in the home because of the illness or incapacity of another member of the household[, or] . . . the parent or other relative of a child under 3 years of age").

36 *See generally supra* note 20.

cans in the 1960s ensured that the cost of entitlements would never extinguish government's obligation.[37] Cost was irrelevant in the moral calculus of social justice. For many politicians "social justice" meant an entitlement program. Politicians accepted the cost of entitlement programs without necessarily identifying with the priorities of social justice, making the institutional momentum behind the "welfare state" politically difficult to reform if it meant a reduction in benefits.[38]

That is, until 1996. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996[39] (hereinafter referred to as the "Welfare Reform Act," or the "Act") was an unprecedented departure from political orthodoxy. It emerged after Republicans took control of the House of Representatives and during the administration of the first "New Democrat" president. Upon signing the Welfare Reform Act into law, the President called for "all of us — States and cities, the Federal Government, businesses and ordinary citizens — to work together to make the promise of this new day real."[40] This message contrasted sharply with President Franklin D. Roosevelt's observation that, "[w]here heretofore men had turned to neighbors for help and advice, they now turned to Government."[41]

The Welfare Reform Act reorganized federal contributions, creating one capped entitlement to the states known as Temporary Assistance to Needy Families (TANF). The TANF block grants provided states with a fixed annual amount based on past expenditures for AFDC benefits and administration, EA, and JOBS.[42] The grants would equal the greater of: (1) the average federal payments for these programs from 1993 to 1994; (2) federal payments in 1994, plus additional EA funding for some states;

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37 *Id.*

38 *Id.*

39 Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

40 Statement on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 32 WEEKLY. COMP. PRES. DOC. 1487, 1489 (Aug. 22, 1996). President Clinton prefaced this by saying:

> [T]his bill is a real step forward for our country, for our values, and for people on welfare. It should represent not simply the ending of a system that too often hurts those it is supposed to help, but the beginning of a new era in which welfare will become what it was meant to be: a second chance, not a way of life.

Id.

41 Franklin D. Roosevelt, *"A Social Security Program Must Include All Those Who Need Its Protection." Radio Address on the Third Anniversary of the Social Security Act. White House, Washington, D.C., Aug. 15, 1938, in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE CONTINUING STRUGGLE FOR LIBERALISM 478 (Samuel I. Rosenman ed., 1941).

42 STAFF OF HOUSE COMM. ON WAYS AND MEANS, *supra* note 25, at 503.

or (3) estimated federal payments in 1995.[43] The Act also gave states access to a $2 billion contingency fund.[44]

Beyond changing the federal-state spending mechanism, the Act conditioned assistance on a set of state-devised objective criteria.[45] There were no longer guaranteed benefits,[46] meaning no entitlement. If eligible for assistance, a recipient lost eligibility after two cumulative years.[47] The state criteria also required recipients to work after two years of assistance.[48] Single-parent recipients are required to work 20 hours per week, increasing to 30 by 2000, and two-parent families are required to work 35 hours per week.[49] There are exemptions to the work rule for single parents with children under age six who cannot find child-care.[50]

Under the Act, states must have work participation rates of 25% in 1997 increasing to 50% in 2002.[51] The two-parent family rate increases from 75% to 95% by 1999.[52] Substantive penalties and rewards encourage states to meet the work participation guidelines, an aspect absent in the superannuated AFDC and EA programs.[53] With TANF, a wide array of penalties are available including a 5% loss in a state's block grant if it fails to meet the work participation rate.[54] The penalty increases by 2% for each consecutive failure with a maximum reduction of 21%.[55] A state performing well based on a formula developed by the Department of Health and Human Services (HHS) may receive a bonus not to exceed 5% of the state's block grant.[56] The five states that demonstrate the greatest reduction in out-of-wedlock births and abortions qualify for additional bonuses of up to $20 million.[57]

The policies behind TANF, to reduce dependency by limiting benefits, providing states with incentives to reduce welfare loads, and making job programs mandatory, contrast sharply with the pre-1996 focus on material support. At their core, the "tough" measures included in TANF

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43 *Id.*

44 42 U.S.C. § 603(b) (1998).

45 42 U.S.C. § 602(a) (1998).

46 42 U.S.C. § 601(b) (1998).

47 42 U.S.C. § 602(a)(1)(A)(ii) (1998).

48 *Id.*

49 42 U.S.C. § 607(d) (1998) (defining work as including unsubsidized and subsidized employment, on-the-job-training, work experience, community service, up to 12 months of vocational training, or provision of childcare services to individuals who are participating in community service).

50 42 U.S.C. § 607(e)(2) (1998).

51 42 U.S.C. § 607(a)(1) (1998).

52 42 U.S.C. § 607(a)(2) (1998).

53 42 U.S.C. § 609 (1998).

54 42 U.S.C. § 609(a)(1)(B) (1998).

55 42 U.S.C. § 609(a)(3)(B) (1998).

56 42 U.S.C. § 603(a)(4)(B)(ii) (1998).

57 42 U.S.C. § 603(a)(2)(B)(i)(I) (1998).

were intended to alter behavior. The confluence of events — both a Congress and President willing to radically change the welfare — was not, however, coincidental. Rather, it was a reflection of the public's disappointment with the status quo.

B. REASONS FOR REFORM

If welfare reform were simply about cost and reducing the federal budget deficit, there would have been little to debate. If the government no longer possesses the resources, the question of whether welfare *should* continue is academic. Welfare, however, was a budget priority, and specific entitlement programs like AFDC guaranteed benefits even in recessions and fiscal downturns.[58] Moreover, federal spending on AFDC never surpassed one-half of one percent of GDP and, indeed, fell to only one-fourth of one percent by 1996.[59] Therefore, the impetus behind welfare reform was not the need to cut costs but the palpable sense that the system was not working. The promise of the twentieth century, the confidence in social science and its ability to end poverty, much like the promise of transforming institutions in the nineteenth century, had not been realized. This sense precipitated the Welfare Reform Act.

Programs such as AFDC and EA successfully raised living standards in terms of providing for the material needs of those in poverty: cash, food, housing, and education aid. Welfare programs, in large part, remained true to President Roosevelt's vision of providing Americans with "that minimum necessary to keep a foothold."[60] Nevertheless, by 1968, the celebrations surrounding the 33rd anniversary of the Social Security Act lauding the social insurance provisions did not praise its welfare components.[61] President Johnson put it succinctly when he stated that: "The welfare system today pleases no one. It is criticized by liberals and conservatives, by the poor and the wealthy, by social workers and politicians, by whites and by Negroes in every area of the Nation."[62]

Ultimately, a chasm emerged between the provision of material assistance to the poor, something the government did relatively well, and the perception of welfare itself. This did not surprise those who viewed

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58 *See generally* STAFF OF HOUSE COMM. ON WAYS AND MEANS, *supra* note 25, at 399–472.

59 C. Eugene Steuerle & Gordon Mermin, *Devolution as Seen from the Budget*, *in* ASSESSING NEW FEDERALISM: ISSUES AND OPTIONS FOR STATES, (Urban Inst. ed., 1997), *available at* http://newfederalism.urban.org/html/anf_a2.htm#authors.

60 Roosevelt, *supra* note 41, at 480.

61 U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, SOCIAL SECURITY ANNIVERSARY – 1968: A THIRD OF A CENTURY (1968), *available at* http://www.ssa.gov/history/68booklet.html.

62 Statement by the President Upon Signing the Social Security Amendments and Upon Appointing a Commission to Study the Nation's Welfare Programs January 2, 1968, I PUB. PAPERS 14 (1970).

public assistance as "material, [and] that it s[ought] material ends by material means and therefore must fail . . . For man is a spiritual being, and if he is to be helped, it must be by spiritual means."[63] Welfare critics and non-critics alike were confronted with a basic question: Is welfare a means to an end — "a second chance" — or an end in itself?

C. IS RELIGION THE MISSING COMPONENT?

For Harvard sociologist Robert Putnam, the decline of civic organizations and social interaction is not empirically linked to the welfare state.[64] But interestingly he notes a loss of what he calls "social capital" in spite of consistent economic growth throughout the latter half of the twentieth century.[65] Could this mean that material assistance, alone, is insufficient for those on welfare? If not, what more is required?

Putnam demonstrates empirically that: (1) social capital is vital to the overall health of communities; (2) social capital, as expressed by levels of participation in civic groups, has declined since the 1960s; and (3) no one factor is to blame.[66] He divides responsibility among "generational changes," meaning an inexorable trend toward less civically minded generations, pressures of "time and money," electronic and isolating forms of entertainment, above all television, and suburbanization.[67] Putnam concedes, however, that "certain social expenditures and tax policies may have created disincentives for civic-minded philanthropy."[68]

Although approaching the issue from two different angles, Putnam and University of Texas journalism professor Marvin Olasky believe government was not the cause of social disintegration. The principal concern is that civic involvement generally, for Putnam, and religious participation in welfare relief efforts, for Olasky, declined throughout the twentieth century. Putnam ascribes this to socio-economic factors whereas Olasky criticizes the strict separation that evolved out of twentieth century welfare policy.

Olasky's analysis of twentieth century welfare focuses on two fundamental errors: (1) the government's focus on material aid to the exclusion of moral instruction and (2) the government's unwillingness to use religion.[69] The first criticism is reminiscent of nineteenth century theo-

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63 TRATTNER, *supra* note 20, at 96.

64 ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 281–82 (2000).

65 *Id.* at 25.

66 *See generally id.*

67 *Id.* at 277–84.

68 *Id.* at 281.

69 *See generally* MARVIN OLASKY, COMPASSIONATE CONSERVATISM: WHAT IT IS, WHAT IT DOES, AND HOW IT CAN TRANSFORM AMERICA (2000).

ries of charity predicated on moral teaching, while the second attacks strict separation of church and state. Religion played a major role in nineteenth century welfare whereas the federal government never utilized religion similarly. Olasky, who is largely responsible for President Bush's "compassionate conservatism" mantra, argues that "[i]nstead of either shunning all government contact or engaging in a tight embrace, they now can try an arms-length handshake," thus at least recognizing the potential synergies between religion and government.[70]

Prior to 1996, there were three possible solutions to the welfare impasse: (1) do nothing, or take only incremental steps at reform; (2) eliminate all government sponsorship of welfare or (3) introduce comprehensive reforms. The first two options were never really options because a discredited system needed a new focus, recognizing the indispensable role of government. Nevertheless, in taking the third option, welfare reform in 1996 need not have incorporated religion. And yet, the attempted incorporation of FBOs has arguably developed into its most controversial and promising facet.

II. FBOS AND CHARITABLE CHOICE: A COMPLEX MARRIAGE?

A. WHAT ARE FBOS AND WHAT DO THEY DO?

A FBO can be many things; it can be linked with Catholic, Protestant, or Jewish congregations; it may be found in the inner city or the suburbs; it often has a distinct ethnic identity; and it provides a wide array of social services that include, but are not limited to, housing, economic development assistance, teen recreational programs, neighborhood alliances, and soup kitchens.[71] Although the nature of FBOs — typically small, fragmented, and local — makes a full listing of their activities impossible, we provide a general impression of their main characteristics.

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[70] *Id.* at 186.

[71] *See generally* RAM A. CNAAN, THE NEWER DEAL: SOCIAL WORK AND RELIGION IN PARTNERSHIP (1999) [hereinafter CNAAN, THE NEWER DEAL]; VIRGINIA A. HODGKINSON & MURRAY S. WEITZMAN, INDEPENDENT SECTOR, FROM BELIEF TO COMMITMENT: THE COMMUNITY SERVICE ACTIVITIES AND FINANCES OF RELIGIOUS CONGREGATIONS IN THE UNITED STATES (1993); Mark Chaves, *Religious Congregations and Welfare Reform: Who Will Take Advantage of "Charitable Choice"?*, 64 AM. SOC. REV. 836 (1999); Ram A. Cnaan, *Keeping Faith in the City: How 401 Urban Religious Congregations Serve Their Neediest Neighbors*, 2000–1 U. PA. CENTER FOR RES. ON RELIGION AND URB. CIV. SOC'Y 1 [hereinafter Cnaan, *Keeping Faith in the City*]; Ram A. Cnaan, *Our Hidden Safety Net: Social and Community Work by Urban American Religious Congregations*, BROOKINGS REV., Spring 1999, at 50 [hereinafter Cnaan, *Our Hidden Safety Net*]; Ram A. Cnaan, *Social and Community Involvement of Religious Congregations Housed in Historic Religious Properties: Findings from a Six-City Study* (May 1998) (unpublished report to Partners for Sacred Places, on file with authors) [hereinafter Cnaan, *Six-City Study*].

One cannot appreciate the diverse make-up of FBOs without examining empirical studies. Multi-city surveys of FBO activities generate a number of interesting findings: (1) the majority of congregations provide at least a single type of social service; (2) the types of social services FBOs offer are extremely varied, though most congregations provide some core programs; and (3) FBO program offerings are not necessarily a function of a congregation's racial composition or denomination.

Research indicates that a majority of religious congregations in this country qualify as FBOs; that is, they provide at least one type of social service. Naturally, the percentage of congregations that provide at least one type of social service cannot be determined with precision, but consensus is well over 50 percent.[72] Current research suggests that the correct figure is somewhere around 90 percent. In a 1998 study of 111 congregations in six metropolitan areas ("Six-City" study), 92.8 percent of those surveyed provided at least one service.[73] In another national survey, first conducted in 1987 and then updated in 1993, 92 percent of 727 congregations reported offering at least one social service.[74]

Regional studies produce similar results. A 2000 study of 401 Philadelphia congregations found 91 percent sponsored at least one program,[75] while a 1996 study of 196 congregations in Philadelphia placed the figure at 87 percent.[76] A study conducted in 1997 of 266 religious congregations in Washington, D.C., and its surrounding suburbs, reported almost 95 percent providing at least one social service;[77] a 1991 study of 152 congregations in Chicago found 77 percent offering at least one program.[78]

The absolute number and types of social services provided by congregations is far greater than what the one-to-one ratio (congregations to social programs), assumed above, suggests. On average, research indicates congregations are more likely involved in more than one social service program. The Six-City study placed the figure at over four pro-

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72 *See* Chaves, *supra* note 71. The figure may be considerably higher if one excludes the much-criticized 57 percent found by Chaves. *Id.* at 838. *See, e.g.*, CNAAN, THE NEWER DEAL; HODGKINSON & WEITZMAN, *supra* note 71; Cnaan, *Keeping Faith in the City*, *supra* note 71; Cnaan, *Our Hidden Safety Net*, *supra* note 71; Cnaan, *Six-City Study*, *supra* note 71.

73 Cnaan, *Six-City Study*, *supra* note 71, at 10.

74 HODGKINSON & WEITZMAN, *supra* note 71, at 1, 19. As a national sample, this study was weighted to reflect the current trends of the nations 258,000 religious congregations. *Id.* at 6.

75 Cnaan, *Keeping Faith in the City*, *supra* note 71, at 4.

76 Cnaan, *Six-City Study*, *supra* note 71, at 3.

77 Tobi Jennifer Printz, *Faith-Based Service Providers in the Nation's Capital: Can They Do More?*, *in* CHARTING CIVIL SOCIETY (Urban Inst. ed., 1998), *available at* http://www.urban.org/periodcl/cnp/cnp_2.htm.

78 Cnaan, *Six-City Study*, *supra* note 71, at 3.

grams per congregation,[79] and the survey of 401 Philadelphia congregations reported 2.5 programs per congregation.[80]

In terms of breadth, the Six-City study determined that 49 social programs were offered by more than 25 percent of the congregations surveyed.[81] These programs varied greatly in terms of targeted beneficiaries. The most frequently offered programs included: food pantries (60.36%), music performances (56.76%), clothing (53.15%), holiday celebrations (53.15%), community fairs (51.35%), choral groups (51.35%), international relief (51.35%), recreational programs for teens (45.95%), alliance with neighborhood associations (45.04%), hospital visitation (44.01%), visitation of sick (43.24%), recreational programs for children (42.44%), soup kitchen (41.44%), and tutoring (40.54%).[82] In addition, congregations offered unique programs not widely reproduced. Congregations in particular cities were more likely to offer certain programs than those in other cities.[83] Thus, regional differences have an impact on at least some of the programs offered by congregations.

Race and denomination does not impact on program offerings when regional differences are accounted for. Race is of particular interest because religious congregations are highly segregated.[84] However, FBOs derived from mostly African-American or Caucasian congregations provide essentially the same kinds of social services.

Although FBOs are not easily defined, both in terms of the services offered and their internal organization, no one model has shown itself to be superior or inferior to another. One may therefore argue that FBOs are still in an early stage of development and presently resistant to assessment. Nevertheless, in our minds, the correct conclusion, is that FBOs will never be defined in terms of budgets and bureaucracy. Each FBO is a black box even though, broadly stated, each FBO's mission is to help people.

B. CHARITABLE CHOICE TO THE RESCUE?

The Welfare Reform Act includes a provision that has come to be known as "Charitable Choice." Charitable Choice has three goals. First,

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[79] *Id.* at 31.

[80] Cnaan, *Keeping Faith in the City, supra* note 71, at 4. Both the Six-City study and the 401 Philadelphia study may under-represent the true total because both limited each congregation's response to only five programs, *see* Cnaan, *Six-City Study, supra* note 71, at 12.

[81] Cnaan, *Six-City Study, supra* note 71, at 13. The 49 programs were chosen from a prepared list of 200 as part of the survey, *id.* at 11, so as a percentage it is 49/200 and not 49 divided by 449 (the total number of programs).

[82] *Id.* at 13.

[83] *Id.* at 13–15.

[84] Cnaan, *Keeping Faith in the City, supra* note 71, at 14.

it encourages states to expand the involvement of community and faith-based organizations in public anti-poverty efforts. Second, the provision protects the religious integrity and character of faith-based organizations that choose to accept government funds for social services. And third, it protects the religious freedom of beneficiaries. The Welfare Reform Act enforces Charitable Choice's goals in four ways.

First, the federal government and states receiving federal funds cannot discriminate against a private-sector social service provider "on the basis that the organization has a religious character."[85] Second, "control over the definition, development, practice of its [the FBO's] religious beliefs"[86] cannot be impaired. Third, FBOs cannot discriminate against a beneficiary "on the basis of religion, a religious belief, or refusal to actively participate in a religious practice."[87] And fourth, a beneficiary who objects to dealing with FBOs is entitled to "an alternative provider that is accessible to the individual."[88]

The Charitable Choice provision applies to the TANF program.[89] Included activities are providing work for recipients, food assistance, maternity homes for unmarried minors and expectant mothers who cannot remain at home, and substance abuse treatment programs. The government funds these services either by paying providers to deliver specific services or by providing beneficiaries with certificates or vouchers that are redeemable at the FBO or the secular provider of their choice. These provisions also apply to state funds that commingle with federal block grant money and, preempt any conflicting state laws.

Aside from guidelines established by legislation, FBOs have developed their own guidelines to reinforce federal regulations that are broken.[90] The Code also allays concerns of a state take-over of religion by the federal funding of FBOs. These guidelines require that participating FBOs comply with federal regulations; remain truthful and transparent to the public; protect their autonomy and religious character; do not discriminate or coerce recipients; participate in federal programs only so far as it is part of the FBO's mission; and remain fiscally prudent and accountable.[91]

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85 Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, § 104, 110 Stat. 2105, 2162 (1996).

86 *Id.*

87 *Id.* at 2163.

88 *Id.*

89 *Id.* at 2113.

90 *See generally A Code of Conduct*, 117 THE CHRISTIAN CENTURY, July 5, 2000, *available at* 2000 WL 9857739.

91 *Id.* at 718 ("Signatories to the Code agree to faithfully abide by the regulations of Charitable Choice[,] . . . openly agree that government legitimately asserts certain requirements, and that having agreed to accept funds, the organizations accept the duties attached (unless a gross injustice or issue of conscience would compel dissent).").

The question remains whether FBOs are taking advantage of the federal government's new stance, embodied in the Charitable Choice provisions, toward non-secular social service providers. Objections to Charitable Choice are not limited to advocates of strict separation of church and state. Criticism comes from those who argue Charitable Choice is "creat[ing] a spiritual poverty trap for religious charities by attracting them with government dollars and then forcing them, through a web of regulations and ambiguities, to forfeit time, resources, and ultimately mission."[92]

Many FBOs may be reluctant to accept federal funding if conditioned on government certification. Although Charitable Choice integrates FBOs into the general pool of independent social service providers and expressly protects the integrity of religious organizations, past experience shows that the promise of federal funding can have a "corrupting" influence.[93] Anecdotal evidence shows that over time, long periods in many cases, the religious zeal of a small, independent ministry is lost once federal dollars begin to pour in. Catholic Charities (begun in 1910) and Volunteers of America (begun in 1896) once focused on providing social services and, in the latter's case, openly proselytized its beneficiaries.[94] Both organizations now receive considerable federal support, 64% of total revenues for Catholic Charities and 69% of total revenues for Volunteers of America.[95] Both organizations are now headquartered in Washington D.C. and have embraced policy advocacy.[96]

The story of REACH, Inc., the community development arm of the 12th Street Missionary Baptist Church in Detroit, sums up the suspicions harbored by FBOs. The organization started senior outreach programs, ran day-care centers, and rehabilitated old properties.[97] REACH operations depended on charitable donations from parishioners and private companies, but in the early 1990s it received a grant from the Department of Housing and Urban Development (HUD).[98] Bureaucratic tangles arrived with expanding operations through federal money, ultimately slowing work, and a sense of creeping "impersonalization."[99] REACH became less informal, less reliant on volunteers, and relied more

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92 Lisa E. Oliphant, *Charitable Choice: The End of Churches As We Know Them?*, 58 POL'Y & PRAC. OF PUB. HUM. SERVICES, June 1, 2000, at 1, *available at* 2000 WL 18991172.

93 Terrence Scanlon, Letter to the Editor, *Beware the Effects of Government Funds on Charities*, THE CHRON. OF PHILANTHROPY, September 9, 1999, at 42, *available at* LEXIS, News Library, U.S. News, Combined File.

94 *Id.*

95 *Id.*

96 *Id.*

97 Sherman, *Cross Purposes, supra* note 16, at 59–60.

98 *Id.*

99 *Id.*

on professionals to staff their programs.[100] As budgets rose from $1 million annually before the HUD grant to $1.7 million to fund a single housing project, ministry programs focused less on "moral and spiritual matters" and more on a "commodified" version of their earlier activities.[101] Thus objective criteria and statistics replaced the informality of human development.[102]

Although Charitable Choice has not existed for very long, preliminary research suggests that FBOs have not rushed to take advantage.[103] An analysis of data collected in the 1998 National Congregations Study (NCS) indicates only three percent of congregations with social service projects receive government funds. In the Washington, D.C. area, in 1997, 11 out of 266 congregations received government funds and what was received amounted to less than five percent of their total budget.[104]

It is possible the statistical findings to date are a product of the number and size of most FBOs. FBOs are typically small, church affiliated organizations, found in virtually every American city, staffed almost entirely by volunteers. Thus, they are not ideally organized (*viz.*, centrally run by lawyers) to take immediate advantage of an obscure provision of the Welfare Reform Act.

There are, however, three reasons why FBOs have not taken advantage of government assistance: (1) states have been slow to comply with the federal mandate allowing "pervasively" sectarian groups to bid on social service contracts; (2) FBOs are simply not aware of the changes in federal law and presumably would participate if informed; and (3) FBOs are aware of Charitable Choice but are reluctant to participate.

First, removing state barriers against FBOs is a prerequisite to the full implementation of Charitable Choice because, as was the case before passage of the Welfare Reform Act, states ultimately implement federal welfare mandates. Clearly, ensuring states are in compliance with Charitable Choice is not trivial nor is there a simple way of gauging compliance. The Center for Public Justice examined nine states and rated Charitable Choice compliance by assigning grades of satisfactory, insufficient, or unsatisfactory.[105] Only two states, Texas and Wisconsin, re-

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100 *Id.*

101 *Id.*

102 *Id.*

103 Printz, *supra* note 77, at 2.

104 *Id.*

105 THE CENTER FOR PUBLIC JUSTICE, CHARITABLE CHOICE COMPLIANCE: A NATIONAL REPORT CARD, (Oct. 5, 2000), *available at* http://downloads.weblogger.com/gems/cpj/50StateRpt.pdf. States receiving Fs fall short on compliance with Charitable Choice . . . . To be compliant, states have to go beyond their past practice of contracting with religiously affiliated providers to obtain secular services . . . . To be compliant, states must follow the new rules when they use federal money to buy services . . . [and] must evaluate their procurement policies and practices and change those that conflict with Charitable Choice. *Id.*

ceived satisfactory marks.[106] Four states (California, Illinois, Michigan, and Virginia) received insufficient marks.[107] And three states (Massachusetts, Mississippi, and New York) each received marks indicating that their compliance efforts were unsatisfactory.[108] In a subsequent study of all 50 states, only 12 states were given a passing grade with just four states receiving an "A."[109]

Compliance with Charitable Choice parallels the number of new collaborations between FBOs and states. This preliminary conclusion draws support from a companion study to the nine state survey. This research indicated the two satisfactory states had a total of 61 new collaborations since 1996; the four insufficient states had 53 new collaborations; and the three unsatisfactory states had 13 new collaborations.[110]

Second, the 1998 NCS study found only 24% of the nearly 1200 congregations studied were aware of the Charitable Choice provisions of the Welfare Reform Act.[111] Even so, the long-term significance of this poor name recognition is questionable; with time, most FBOs can be expected to develop a basic understanding of what Charitable Choice has to offer. There is little reason to believe that the current ignorance of Charitable Choice constitutes a structural impediment to its future expansion.

The final explanation for the restrained response of FBOs to Charitable Choice presents the gravest problem for the new emphasis on sectarian social service providers. Ultimately, FBOs need to feel comfortable when accepting government funds or else the suspicions of government may compel FBOs to remain autonomous. The 1998 NCS study found 15% of the congregations studied had standing policies against accepting government funds and 36% would apply for government funds if possible.

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106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *See* AMY L. SHERMAN, 2000 CHARITABLE CHOICE TRACKING PROJECT, THE GROWING IMPACT OF CHARITABLE CHOICE: A CATALOGUE OF NEW COLLABORATIONS BETWEEN GOVERNMENT AND FAITH-BASED ORGANIZATIONS IN NINE STATES (2000).

111 Chaves, *Religious Congregations and Welfare Reform*, *supra* note 71, at 839. Similar research conducted in Philadelphia found that only 8.2 percent of the congregations surveyed, as of February 2000, are familiar with Charitable Choice. Cnaan, *Keeping Faith in the City*, *supra* note 71, at 19. Two and a half percent reported holding discussions about taking advantage of federal funds, but only one congregation had received a government contract under Charitable Choice. *Id.* at 19–20. However, 62.1 percent answered yes when asked: "If not actively involved with Charitable Choice, would your congregation consider applying for government funds under the provisions of Charitable Choice?" *Id.* at 20.

C. EXPANSION OF CHARITABLE CHOICE

Despite the tepid response to the 1996 Welfare Reform Act's Charitable Choice provisions, Congress has embraced the concept in recently proposed and enacted legislation. In four separate legislative initiatives, the formula employed in 1996 was used again to make FBOs eligible partners in a vast array of federal programs.

The Coats Human Services Reauthorization Act of 1998 incorporated Charitable Choice in the Community Services Block Grant Program, which "provide[s] assistance to States and local communities, working through a network of community action agencies and other neighborhood-based organizations, for the reduction of poverty."[112] As a result of the Children's Health Act of 2000,[113] Charitable Choice now also covers federal money used to operate drug and alcohol treatment programs.[114] More ambitiously, the proposed Charitable Choice Expansion Act of 1999 sought to make Charitable Choice a part of all federal spending programs "in which the Federal, State, or local government is authorized to use nongovernmental organizations, through contracts, grants, certificates, vouchers, or other forms of disbursement."[115]

III. CONSTITUTIONALITY OF FUNDING FBOS

Courts interpret the First Amendment's Establishment Clause to prohibit governmental action that "promotes" religion.[116] Two competing approaches exist for resolving controversies dealing with whether or not governmental action promotes religion. The traditional separation theory disfavors any government involvement in religion, raising Constitutional issues with respect to any governmental funding scheme, including Charitable Choice. Under the equal treatment, or "nonpreferential" view, a neutral government aid program in which religious groups participate would unlikely offend the Establishment Clause. Furthermore, enhanced tax incentives to charitable giving do not run counter to either theory.

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112 Coats Human Services Reauthorization Act, Pub. L. No. 105-285, § 672, 112 Stat. 2702, 2728 (1998).

113 Children's Health Act of 2000, Pub. L. No. 106-310, 114 Stat. 1101 (2000).

114 *Id.*

115 S. 1113, 106th Cong. § 1994A(c) (1999).

116 Rosenberger v. University of Virginia, 515 U.S. 819, 846–47 (1995) (O'Connor, J., concurring) ("Public funds may not be used to endorse the religious message." (quoting Bowen v. Kendrick, 487 U.S. 589, 642 (1988) (Blackmun, J., dissenting))).

A. SEPARATION THEORY AND ITS EXCEPTIONS

Everson v. Board of Education established the basic principles underlying separation.[117] The U.S. Supreme Court interpreted the establishment of religion to include laws that "aid one religion, aid all religions, or prefer one religion over another."[118] Justice Hugo Black's majority opinion stated "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[119] Under this view, commentators characterize the Establishment Clause as erecting a "wall of separation" between Church and State.[120] The public sector could not fund any organization religious in character. However, if it could separate its secular and sacred elements, the government could fund the secular part. The broad separation theory of *Everson* remained the dominant view of the High Court until the late 1980s. Although confusing to apply, the Court has never officially abandoned separation and therefore it remains relevant for FBOs receiving direct government assistance.[121]

It is worth noting, although *Everson* is often cited for its exposition of the separationism theory, the Court's opinion upheld the challenged state law authorizing local school boards to reimburse parents for the costs of transporting their children enrolled in parochial schools.[122] The Court found no Establishment Clause violation because government funds were provided under a general nondiscriminatory program, available to parents of children in both public and parochial schools.[123] The Court distinguished between financial assistance benefiting a religious institution, thereby aiding religion, and financial assistance for programs such as transportation that are "marked off from the religious function."[124] The Court regarded the latter type of assistance as more like general public services such as police and fire protection, that do not constitute support of the institution's religious mission.[125]

Subsequently, in *Lemon v. Kurtzman*,[126] the Court, in striking down state laws providing salary supplements to teachers of secular subjects in faith-based schools, introduced a three-part test to determine whether a challenged government action is sufficiently separate from the organiza-

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117 Everson v. Bd. of Educ., 330 U.S. 1, 15–16, 18 (1947).
118 *Id.* at 15.
119 *Id.* at 16.
120 *Reynolds v. United States*, 98 U.S. 145, 165 (1878).
121 LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 150 (1994).
122 330 U.S. at 4.
123 *Id.* at 25.
124 *Id.* at 18.
125 *Id.* at 17.
126 403 U.S. 602 (1971).

tion's religious function.[127] To satisfy this test, the statute in question (1) must have a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not foster "an excessive government entanglement with religion."[128] The *Lemon* test, by barring programs that advance religion or even significantly involve the government with religious institutions, made separation the guiding force in church-state cases.[129]

Aguilar v. Felton[130] illustrates the evolving approach to the Establishment Clause in the context of elementary schools, in which the Court tends to apply separationism most strictly. The case involved a federal program under which public teachers taught reading and math classes in parochial schools.[131] Under the program, teachers were directed to avoid involvement with religious activities and prohibited from using religious materials.[132] Rooms were cleared of religious symbols and teachers were supervised by a system of unannounced visits.[133] In an opinion by Justice Brennan, the Court held the program unconstitutional for two reasons. First, because aid was provided in a "pervasively sectarian environment,"[134] the monitoring system necessary to avoid the program being used to inculcate religious beliefs excessively entangled the state with religion.[135] Second, the program subsidized religion directly by relieving the schools of paying for remedial classes.[136] The Court issued a similar opinion in the companion case of *Grand Rapids School District v. Ball*.[137]

In *Agostini v. Felton*,[138] the Court reversed itself and upheld the federally funded remedial education program struck down in *Aguilar*.[139] The Court reaffirmed its test whether aiding government programs had a secular purpose and a primary effect that neither advances nor inhibits religion.[140] However, intervening cases undermined the basis for the conclusion in *Aguilar* for two reasons. First, the Court has abandoned

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127 *Id.* at 612–13.

128 *Id.*

129 Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 236 (1994).

130 473 U.S. 402 (1985).

131 *Id.* at 406.

132 *Id.* at 407.

133 *Id.* at 406–07.

134 *Id.* at 412.

135 *Id.* at 412–13.

136 *Id.* at 417 (Powell, J., concurring).

137 473 U.S. 373 (1985) (holding publicly funded remedial non-religious courses taught by state employees at parochial schools have primary effect of advancing religion due to the risk of state sponsored religious indoctrination).

138 521 U.S. 203 (1997).

139 *Id.* at 234–35.

140 *Id.*

the presumption that public employees placed on parochial school grounds will inevitably inculcate religion or represent a symbolic union between government and religion.[141] And second, the Court no longer presumes that all government funds directly aiding the educational function of religious schools are invalid.[142] A crucial element in analyzing programs aiding students in religious schools is whether candidates are selected on a religiously neutral basis.[143] *Agostini* signals a less restrictive application of separationism and a greater recognition that a secular purpose can exist in a religious environment.

In *Romer v. Maryland Public Works Board*,[144] the Court upheld discretionary grants to qualifying private colleges, including religious colleges, provided the funds not be used for "sectarian purposes."[145] The decision is relevant to faith-based social service organizations receiving government assistance for two reasons. First, the decision indicates the Court may be more tolerant of government aid outside the elementary school context. Second, the decision clarifies the "pervasively sectarian" concept. According to the Court, factors indicating aid recipients are not "pervasively sectarian" include autonomy from church control,[146] absence of religious indoctrination,[147] academic freedom,[148] absence of religious preference in hiring faculty,[149] and absence of religious preference in admitting students.[150]

The Court addressed the issue of government assistance to FBOs under the separation theory in *Bowen v. Kendrick*.[151] The Court upheld the constitutionality of the Federal Adolescent Family Life Act.[152] The Act provides grants to FBOs for services and research relating to premarital adolescent sexuality and pregnancy.[153] Applying the *Lemon* test, the Court concluded the nonreligious purpose of addressing premarital teenage sexuality and pregnancy primarily motivated the Act[154] and its effect was not advancing or inhibiting religion.[155] The Act did not violate the primary effect test by recognizing the role religious organizations had in

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141 *Id.* at 223.
142 *Id.* at 225.
143 *Id.* at 232.
144 426 U.S. 736 (1976).
145 *Id.* at 739.
146 *Id.* at 755.
147 *Id.*
148 *Id.* at 757.
149 *Id.*
150 *Id.* at 757–58.
151 487 U.S. 589 (1988).
152 *Id.* at 593.
153 *Id.* at 593–95.
154 *Id.* at 602.
155 *Id.* at 611–12.

addressing teenage sexuality and pregnancy,[156] provided the program successfully maintained a neutral course.[157] The services provided did not include religious indoctrination or teaching.[158] Furthermore, allowing religious organizations to participate as eligible grantees does not impermissibly promote religion unless a significant proportion of funds flow to "pervasively sectarian" institutions.[159] The program's neutral grant requirements and wide spectrum of organizations eligible to participate undercut any risk of promoting religion.[160]

The present (or any expansion) of the carefully crafted Charitable Choice governmental funding mechanism would likely survive challenge under the separation theory. Consonant with separationist theory, although a FBO is permitted to show religious symbols, such as art, icons, or scripture, direct funds cannot pay for inherently religious activities, such as sectarian worship, instruction, or proselytization. Justice O'Connor, in her concurring opinion in *Bowen*, noted, "*any* use of public funds to promote religious doctrines violates the Establishment Clause."[161] Thus, FBO staff can talk about spiritual matters when recipients desire it, provided the discussion is not held during the time set for a publicly funded social service program.

In addition, the recipients of the funding provided by Charitable Choice are not defined by religion. Sacred and secular social service providers are eligible to receive funding. More importantly, a faith-based provider cannot discriminate against any beneficiary on the basis of religion, religious belief, or a refusal to actively participate in a religious practice.[162] As a FBO's services cannot be provided using a religious litmus test, ultimate funding recipients are not defined by religion. Aid is offered to clients without regard to religion. Furthermore, because beneficiaries cannot be forced to participate in religious activities, Charitable Choice funding will not lead to the coercion of anyone to support or participate in religion or its exercise. Also, the direct funding does not indicate government support and approval for religion in general, or a particular religion. There is no appearance of endorsement of religion. Nevertheless, loosening restrictions embedded in Charitable Choice, for instance by removing the secular provider alternative, would magnify the vulnerability of government funding of FBOs under separation jurisprudence.

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156 *Id.* at 605, 606–07.

157 *Id.* at 606, 609–12.

158 *Id.* at 612.

159 *Id.* at 610.

160 *Id.*

161 *Id.* at 623.

162 Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, § 104, 110 Stat. 2105, 2163 (1996).

B. EMERGING EQUAL TREATMENT VIEW

The competing equal treatment view has emerged in several U.S. Supreme Court cases.[163] Under this view, the Establishment Clause has the narrower purpose of forbidding the government from establishing a national church or preferring one religion to another. This view rejects the separation theory's assertion of the Establishment Clause preventing the government from assisting religion generally. The equal treatment view allows public sector aid to flow as part of a neutral scheme directly to institutions, even those providing religious indoctrination and teaching. The equal treatment view therefore avoids the restrictions imposed by the separationist doctrine on the use of public funds by FBOs.

The equal treatment theory is based, in part, on a revised historical understanding of the Establishment Clause. In his dissenting opinion to *Wallace v. Jaffree*,[164] Chief Justice William Rehnquist explained the Establishment Clause's original intention was forbidding Congress from designating any church as "a national church" and from enacting laws preferring one religion to another.[165] "As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means."[166]

The first case applying equal treatment was *Widmar v. Vincent*.[167] The Court held a state university could not exclude a Bible study group from university facilities otherwise made available to registered student groups.[168] When a public institution creates a forum open to private speakers, it cannot exclude religious groups without violating their First Amendment rights of free speech and association.[169] Since the property is provided under a religion-neutral equal access policy, the Court reasoned the benefit to the religious group is incidental and there is no appearance of the university endorsing the group's religious views.[170]

Similarly, in *Lamb's Chapel v. Center Moriches Union Free School District*,[171] the Court struck down a policy denying access to religious groups using public school premises outside school hours to show a film

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163 *See generally* Rosenberger v. Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981).

164 Wallace v. Jaffree, 472 U.S. 38 (1985).

165 *Id.* at 99 (Rehnquist, J., dissenting).

166 *Id.* at 113 (Rehnquist, J., dissenting).

167 Widmar v. Vincent, 454 U.S. 263 (1981).

168 *Id.* at 277.

169 *Id.*

170 *Id.* at 274–75.

171 508 U.S. 384 (1993).

on parenting.[172] The facility was otherwise made available for social, civic, and recreational purposes.[173] But the school policy explicitly excluded religious use.[174] The Court held the exclusion violated the church group's First Amendment rights of speech and assembly and rejected the school's Establishment Clause defense compelling it to deny access.[175] No Establishment Clause violation occurred because, as in *Widmar*, the school created a limited forum and granted neutral access.[176] Hence, there was no danger of the community perceiving the school as endorsing the religious group's views.[177] The significance of *Lamb's Chapel* is the Court's explicit reliance on equal access in its analysis as opposed to relying on separationism or the rationale that the benefit to religion was incidental.[178]

In *Rosenberger v. University of Virginia*,[179] the Court held the Establishment Clause does not compel a state university to bar funding for a religiously oriented student publication when such aid was available to all bona fide student groups.[180] No violation of the Establishment Clause occurs when a university grants access on a religion-neutral basis to a wide spectrum of student groups, including groups using funds for sectarian activities.[181] The majority focused on the fact that the financial support was distributed on a religion-neutral basis.[182]

Apart from direct government assistance programs such as Charitable Choice, use of the income tax system further minimizes the potential for a successful constitutional challenge. The Supreme Court has held government program providing assistance to religious institutions more likely satisfy the Establishment Clause where aid is provided indirectly through third parties. For example, in *Mueller v. Allen*,[183] the Court upheld a state income tax statute allowing a deduction on a neutral basis for educational costs incurred by parents, even though virtually all of the benefit went to parents with children in parochial schools.[184] Thus en-

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172 *Id.*

173 *Id.* at 386–87.

174 *Id.*

175 *Id.* at 394–95.

176 *Id.*

177 *Id.* at 395.

178 STEPHEN V. MONSMA, WHEN SACRED & SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY 43 (1996).

179 515 U.S. 819 (1995).

180 *Id.* at 839.

181 *Id.*

182 *Id.* ("We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.").

183 463 U.S. 388 (1983).

184 *Id.* at 400–01.

hanced tax incentives for charitable donations would withstand Constitutional scrutiny under either the separation or equal treatment theories.

IV. ARE FAITH-BASED ORGANIZATIONS EFFECTIVE?

"[W]hen church congregations assist needy individuals, they do more than merely pass out checks to case numbers — they help their neighbors, thereby *strengthening the bonds of community.*"[185] This sentiment epitomizes why FBOs are effective in addressing crime and other social ills as well as improving living standards in troubled communities. What's more, the public generally agrees. A *New York Times* poll found 68% of Americans believe that "voluntary groups like charities and churches" are better able to fight poverty in the cities than government.[186] Although public interest in FBOs draws inspiration from extensive media coverage of groups such as the "Front Porch Alliance" and "Prison Fellowship Ministries," this sentiment is more than superficial.

Empirical research hints at an inverse relationship between "religion" and pervasive social ills such as rampant crime, substance abuse, and youth delinquency. Even so, the "faith-factor" thesis remains a subject of debate — a debate hamstrung by poor understanding of *how* religion influences behavior. This "how" gap makes confirmation of the faith-factor thesis impossible. To bridge the gap, and thus lend credence to the faith-factor thesis, this section assesses how religion affects behavior.

With the exception of the empirical analyses of the Prison Fellowship Ministries ("Prison Fellowship"), this section employs studies measuring religion's impact on behavior generally rather than examining FBOs directly. This measure of the faith-factor serves as a proxy for assessing the potential effectiveness of religion utilized by FBOs, remembering that Charitable Choice bars public funding of sectarian worship, instruction, or proselytization.[187] Thus, a FBO may, but need not separate its spiritual and secular aspects. It seemingly can seek conversions using private funds.

In itself, a statistical relationship linking religion and socially undesirable behavior is not dispositive. The observed correlation must be the product of religion (the independent variable) acting upon behavior (the dependent variable), and not the product of other independent or mediating factors. Thus, knowing the direction of "causation" is critical to either illuminating or debunking the faith-factor thesis.

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185 Stephen Goldsmith, *The City and Civil Society*, THE CIV. SOC'Y PROJECT, June, 1997, at 1, 8 (emphasis added).

186 N.Y. TIMES Poll, *available at* WESTLAW, POLL database, USNYT.DEC14 R16 (Dec. 14, 1990).

187 42 U.S.C. § 604a(j).

The causation question asks whether religion is a predictor of socially beneficial behavior or only tangentially linked to it. Aside from discerning the direction of causation, two reasons exist for knowing the faith-factor's relative significance. First, without a mechanism explaining *how much* religion stops substance abuse or crime, the faith-factor thesis remains vulnerable to competing theories that account for a substantial part of the relationship with other proximate mediating factors, such as parental or nonreligious institutional factors. Second, policymakers need to know how to use religion in order to foster effective programs nationwide. At present, legislators, like the public, have only a vague notion that faith-based programs succeed where government has failed.

The theory developed in this section attempts to define a faith-factor mechanism reconciling inconsistent empirical findings and answering three questions: (1) is religion a deterrent against pervasive social problems; (2) are FBOs particularly effective in the most troubled communities; and (3) why is religion apparently more effective at rehabilitation than preventing deviant behavior.

A. TOWARD A "FAITH-FACTOR" THEORY

Developing a theory reconciling data from many sources is difficult because of methodological differences found in empirical studies.[188] Two examples are differences in research quality (e.g., controls for race and gender) and the number of factors used to measure religiosity. However, mathematical precision is not at issue. The faith factor theory posits that structural identity, provided by a FBO, serves as a vital mechanism for social control. Rather than attempting to prove anything beyond a reasonable doubt, the proposed theory offers a degree of clarity by showing that religion has a predictable effect on some, but not all, forms of deviant behavior.

In this framework, FBOs serve two principal functions: "deterrence" and "rehabilitation." Deterrence is religion's positive role in shaping and enforcing normative behavior to prevent deviancy. Four mechanisms, or "protective factors," explain how: (1) religion helps strengthen family solidarity; (2) religious organizations provide viable parental support systems (*e.g.*, parenting classes and pastoral family counseling); (3) religious doctrines set boundaries; and (4) religious organizations provide young people with a coping resource outside the family.[189]

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188 Byron R. Johnson et al., *A Systematic Review of the Religiosity and Delinquency Literature: A Research Note*, 16 J. CONTEMP. CRIM. JUST. 32, 46 (2000).

189 Kenneth I. Maton & Elizabeth A. Wells, *Religion as a Community Resource for Well-Being: Prevention, Healing, and Empowerment Pathways*, 51 J. SOC. ISSUES 177, 179 (1995).

Rehabilitation strives to "reform" convicts by preventing recidivism. Prison ministries use activities such as Bible study and seminars to achieve this goal. These activities moderate behavior while incarcerated and after release by helping inmates cope with the psychological trauma of prison life.[190]

Faith-factor thesis critics argue that religion serves as a significant predictor for only a few types of deviancy and other factors are far better predictors for most others.[191] According to this view, religion is an insignificant predictor for most forms of deviancy when nonreligious factors are accounted for.[192] In other words, family and friends are better placed than religion to create an environment non-conducive to deviant behavior.

Faith-factor thesis proponents reject the assertion that religion is a limited predictor of delinquency.[193] They criticize studies supporting such a conclusion since they contain "soft variables" (e.g. self-reported data rather than data derived from observable behavior), are of poor quality (e.g. lack of clarity, weak controls), or fail to address the "cumulative" effect of religion on the probability that a religious person will engage in any deviant behavior.[194] However, these analyses recognize, at least empirically, certain types of deviant behavior not being consistently affected by religion.[195]

Interestingly, both views focus on methodology to substantiate claims that the faith-factor is either mostly significant or mostly spurious. Nevertheless, assuming their respective arguments are correct, and the effects of religion have been grossly overstated or understated, why not claim that religion is a predictor of *every* form of deviancy or *none at all* instead of *most* or only *few*? It is because the data do not support an all-or-nothing conclusion. Indeed, since the data do not lend themselves to an all-or-nothing conclusion, perhaps these conflicting results are not the product of inexact measurement, but are in fact a reflection of reality. This suggests religion and deviancy are not monolithic concepts and the actual causal mechanism governing the faith-factor is flexible.

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190 Byron R. Johnson et al., *Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 JUST. Q. 145, 155 (1997); Michael Wrigley & Mark LaGory, *The Role of Religion and Spirituality in Rehabilitation: A Sociological Perspective*, 1 J. RELIGION IN DISABILITY & REHABILITATION 27, 37–38 (1994).

191 John K. Cochran et al., *Is the Religiosity-Delinquency Relationship Spurious?: A Test of Arousal and Social Control Theories*, 31 J. RES. IN CRIME & DELINQ. 92, 103–10 (1994).

192 *Id.*

193 *See* John Gartner et al., *Religious Commitment and Mental Health: A Review of the Empirical Literature*, 19 J. PSYCH. & THEOLOGY 6, 15 (1991); Johnson et al., *supra* note 188, at 45–46; Douglas M. Sloane & Raymond H. Potvin, *Religion and Delinquency: Cutting Through the Maze*, 65 SOC. FORCES 87, 103–04 (1986).

194 *See generally* Gartner et al., *Religious Commitment and Mental Health*, at 6–15.

195 *See generally id.*

Flexibility is incorporated into the proposed faith-factor theory by segregating religion into two separate, though not mutually exclusive, "identities." The first identity is termed "structural" in that it relates to the organizational aspects of religion rather than theology. The second identity is termed "evangelical" and focuses on the spiritual and emotional impacts of religion (e.g., salvation and forgiveness). These identities are linked to the two functional categories — deterrence and rehabilitation — in different proportions. Whereas the evangelical identity is a more important part of rehabilitation, both identities are a necessary part of deterrence when the secular community offers little positive reinforcement.

Recognizing that FBOs require both identities, to varying degrees, to accomplish deterrence and rehabilitation offers greater accuracy than what is found in conventional analyses. Indeed, the proposed faith-factor theory predicts the inconsistencies found in the empirical record. It predicts convict rehabilitation is easier than deterring deviant behavior in a community devoid of secular controls because convicts live in a structured environment. This occurs because prison ministries can focus attention on their evangelical identity whereas faith-based programs aimed at deterrence must provide both structural and evangelical identities in the most troubled communities. The success of Prison Fellowship at reducing recidivism, in contrast to the highly fragmented and inconsistent results associated with deterrence, supports this conclusion.

In short, the significance of faith-based solutions depends on the environment they operate in and the number of functions undertaken. Because the most troubled communities lack the capacity to promote normative behavior, religion's evangelical identity will likewise not be significant unless FBOs go to extraordinary lengths to compensate for the lack of secular structure. By contrast, in a structured environment like a prison, the faith-factor will have greater significance because it need only focus on its evangelical identity to function properly.

B. DETERRENCE THROUGH FAITH?

FBOs are varied in their use of religion, when religion is defined as "encompassing the spectrum of groups and activities whose focus extends beyond the material reality of everyday life (i.e., to a spiritual reality)."[196] They do not provide services according to one model. Instead, FBOs field programs that have a religious orientation but that also meet the temporal needs of the community: conflict mediation, drug treatment, and after-school activities.

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196 Maton & Wells, *Religion as a Community Resource for Well-Being, supra* note 189, at 178; *see also* Mark E. Barrett et al., *Behavioral Changes of Adolescents in Drug Abuse Intervention Programs*, 44 J. CLINICAL PSYCH. 462 (1988).

Faith-factor studies reflect this diversity. No single research model dominates studies of religion's effect on behavior. In empirical studies, deviancy includes anything from teen pregnancy, truancy, suicide, crimes against people, theft, and substance abuse. The following analysis focuses on three forms of deviancy that are often found in the empirical literature: substance abuse, juvenile delinquency, and crime.

Data from the National Longitudinal Study of Adolescent Health (NLSAH) (N = 12,118) showed that children with "religious identities"[197] were less likely to abuse cigarettes, alcohol or marijuana.[198] However, no similar link existed between religious identity and violent behavior.[199] Furthermore, in relation to substance abuse, two competing variables — "parent-adolescent connectedness" and "school connectedness" — more effectively inhibited cigarette, alcohol, and marijuana use than religious identity.[200] Other large data sets echo the conflicting results found in the NLSAH study.

A Search Institute study (N = 34,129) measured religiosity using three criteria: (1) time spent attending "services, groups or programs at a church or synagogue" per week,[201] (2) frequency in attending "religious services at a church or synagogue,"[202] and (3) the self-reported importance of religion.[203] Once again, religion inhibited cigarette, alcohol and marijuana use among children.[204] Moreover, based on the study's definition of juvenile delinquency, religiosity also had an inhibitory effect on that form of deviancy.[205] Yet religion's statistical significance as an explanatory factor for substance abuse and juvenile delinquency was no stronger than three background variables: educational ability, educational aspiration, and gender. However, the authors conclude that religion "is as strong (or as weak) as any of the background variables that are more frequently cited as determinants of attitudes and behavior . . . . [Religion] deserves attention as an important explanatory variable in these areas."[206]

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197 Michael D. Resnick et al., *Protecting Adolescents From Harm: Findings From the National Longitudinal Study on Adolescent Health*, 278 JAMA 823, 831 (1997) (defining "religious identities" as one who "pray[s] frequently, view[s] self as religious, affiliate[s] with a religion").

198 *Id.*

199 *Id.*

200 *Id.*

201 Michael J. Donahue & Peter L. Benson, *Religion and the Well-Being of Adolescents*, 51 J. SOC. ISSUES, 145, 154 (1995).

202 *See generally id.*

203 *See generally id.*

204 *See generally id.*

205 *Id.* (defining violence using 6 criteria: (1) being in trouble with the police, (2) fighting, (3) vandalism, (4) gang fighting, (5) physically hurting someone, and (6) using a weapon to extort something from a person).

206 *Id.* at 155.

Criminal behavior (acts against people and property) is also a subject of controversy. For example, research drawn from the 1980 Religious Ecology Dataset (N = 15,217) compared church membership rates with six classes of crime: murder, rape, assault, burglary, larceny, and robbery.[207] Church membership had a significant inhibitory effect on four classes, yet there was no correlation with murder and only an insignificant correlation with robbery.[208] This discrepancy may be explained by the emerging consensus that religion is a more effective inhibitor of substance abuse and delinquency (the so-called "anti-ascetic" behaviors), though some current research, while not disproving this conclusion, does not confirm it.[209]

The structural identity of religion is less important to a strong secular structured community. One might imagine a morally ambiguous community having secular structure. The evangelical identity easily takes root and mediates in this type of community through peer and family relationships. Yet more often, troubled communities lack secular structure, thus the effectiveness of the evangelical message lessens unless the community becomes extraordinarily religious in both its structural and evangelical identities. African-American churches in the inner city are an example of this. An analysis of the 1977 National Youth Survey (N = 1,725) indicated that average involvement in serious crime among "religious" youths, i.e., those who frequently attend church services,[210] living in "high disorder" communities, i.e., lacking social order (peace, safety, observance of the law) and control (acts that maintain order),[211] is in fact lower than the average in "low disorder" communities.[212] The study suggests churches can compensate for the lack of secular structure in the community through its own structural and evangelical identities.[213]

In short, if few secular structures, such as strong families and schools, exist in a community for transmitting normative beliefs, religion's evangelical message will less likely have a significant impact on deviancy unless FBOs build those institutions from scratch.

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207 William Sims Bainbridge, *The Religious Ecology of Deviance*, 54 AM. SOC. REV. 288, 290 (1989).

208 *Id.* at 292.

209 Brent B. Benda, *The Effect of Religion on Adolescent Delinquency Revisited*, 32 J. RES. IN CRIME & DELINQ. 446 (1995); *see also* Bruce A. Chadwick & Brent L. Top, *Religiosity and Delinquency Among LDS Adolescents*, 32 J. FOR THE SCI. STUDY OF RELIGION 51 (1993).

210 Byron R. Johnson et al., The 'Invisible Institution' and Black Youth Crime: The Church as an Agency of Local Social Control, 29 J. YOUTH & ADOLESCENCE 482, 485 (2000).

211 *Id.* at 481.

212 *Id.* at 486–87.

213 *Id.* at 492–93.

C. REHABILITATION AND RENEWAL

The empirical record for recidivism and survival, survival being the period of time until recidivism occurs, for those in Prison Fellowship, is less ambiguous. Moreover, prison studies directly assess, thus, measure the value of religion as utilized by FBOs. There are, however, far fewer studies focusing on the effects of religion in a prison environment. Conclusive confirmation of its success awaits further research.

The Prison Fellowship strives to help inmates cope with the stress of incarceration and prepare for release through religious instruction. It organizes seminars, Bible studies, distributes newspapers, and facilitates correspondence between prisoners and volunteers. Moreover, its "Innerchange Freedom Initiative," a prerelease program, helps inmates transition to the outside world by ministering to them before and after release.

A study of New York State inmates (N = 402) found recidivism and survival rates were far better among highly active members, although participation in fellowship programs had no appreciable affect on behavior while in prison.[214] Without controlling for level of participation, however, there was no difference between participants and nonparticipants.[215]

The perceived failure to affect behavior while incarcerated may be due to uncertainties over causation. The data used in the New York study did not specify whether problem behavior occurred before or after participation in Prison Fellowship. Thus, problem behavior brought on by mental and psychological distress may have led inmates to seek religious counseling. The study suggests religion is not a quick cure but a more long-term, therapeutic remedy since limited involvement in Prison Fellowship was not related to low recidivism whereas active involvement was.[216]

Although the New York and another inmate study (N = 365)[217] concluded recidivism and survival rates were better among active participants to Prison Fellowship,[218] other variables must be controlled for. Inmates considered high risk, based on the number of infractions while in prison and other salient factors, had an impact on recidivism. Among those participating in Prison Fellowship versus the control group, high-risk inmates had higher recidivism rates and shorter survival times.[219]

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214 Johnson et al., *supra* note 190, at 154–63.

215 *Id.* at 161.

216 Mark C. Young et al., *Long-Term Recidivism Among Federal Inmates Trained As Volunteer Prison Ministers*, 22 J. OFFENDER REHABILITATION 97, 111–13 (1995).

217 *Id.* at 106–15.

218 *Id.* at 108, 111.

219 *Id.*

Although there is less empirical data, the Prison Fellowship seems to helps lower recidivism among active participants deemed "low risk" (e.g., not prone to repeat offenses). Religious instruction may not be an effective course of therapy with hardened criminals. Nevertheless, the finding of religion helping those on the fringe is consistent with some theories behind rehabilitation. Those theories believe the act of incarceration is psychologically traumatizing. Hence, lessening the trauma suffered in prison reduces the risk of it spilling over into life after prison.

Another notion is religion being more effective when administered in prisons than used as a deterrent in troubled communities. Removed from the dysfunctional environment, which led to incarceration, and given adequate structure, an inmate is free to focus on spiritual growth, which not only mitigates the incarceration process, but also uses the time to develop a moral foundation.

Prison Ministries' long-term effect on inmates, as shown by the lower recidivism rates, demonstrates a slow process of moral growth translating into an ability to live without crime. In essence, this view rediscovers the value of the old penitentiary: a place giving wayward people the chance at renewal.

Thus the structure imposed in prisons allows inmates to focus on religion's spiritual identity. As opposed to the problems experienced by communities without secular structure, prisons have an abundance of structure. Religious instruction need not dwell on providing what the secular authorities have failed to. In the worst communities religious groups must do both. Unfortunately, they are successful only if they go to tremendous lengths to make up for the lack of secular structure.

D. WHAT CAN FBOs HOPE TO ACCOMPLISH?

Based on the empirical evidence and analyses presented, the three questions posed in this section's introduction can be answered.

First, does religion deter problems like crime, substance abuse, and juvenile delinquency and if so, can FBOs inoculate communities by providing social services with a religious component? Despite the contradictory evidence, the proposed faith-factor theory spells out the conditions under which religion can lessen deviant behavior and explains their necessity. For religion to be a successful promoter of normative behavior or deterrent of deviant behavior, there must be structure. This structure can be secular or religious — the so-called structural identity — but in either case it is a vital mechanism for social control. If such a structure exists, then it is possible for religion to have a positive role in preventing deviant behavior.

Second, if FBOs are capable of renewing communities, are they always effective? Effectiveness depends on two factors according to the

faith-factor theory: a structured environment and competent organizations. The latter condition, a basic assumption in this analysis, is crucial. It is too easy to overlook the fact that a FBO must balance the temporal needs of its beneficiaries with remaining faithful to its spiritual and moral mission. Although in theory, the faith-factor is perfectly suited for morally ambiguous communities that have secular structure, FBOs are most needed in inner city communities lacking any structure. To be effective, FBOs first need to set up their own structures and use them to promote their spiritual and moral message. In both cases, the organization must be competently run to be effective.

And third, why is religion seemingly more effective at rehabilitation than at preventing deviancy? The proper prison environment is a far better vehicle for instilling normative values in low risk prisoners. Indeed, a prison is preferable to the highly dysfunctional inner city because incarceration provides structure. With the secular component providing structure, FBOs concentrate on the evangelical mission of building moral character, and thus under the right conditions prisons are effective vehicles for promoting normative behavior.

FBOs are faced with an intractable problem in inner city communities: the lack of secular structure. Without it, FBOs must create their own structure at enormous cost. In short, most FBOs currently lack the financial and human resources to build structures for transmitting normative values. Thus, FBOs are not as effective as theoretically possible. Hopefully, new federal initiatives will help FBOs gain the necessary financial resources, thereby enabling religious groups to develop stronger structures. Communities may also, on their own initiative, develop secular structures after FBOs are more involved in meeting social ills.

V. PRESIDENT BUSH'S PLAN AND ALTERNATIVES

During the 2000 presidential campaign, former Vice President Gore and President Bush both endorsed a greater role for FBOs in the delivery of social services. However, the candidates took different approaches on the critical issue of providing additional financing, with Mr. Gore relying on direct government aid and President Bush favoring increased tax incentives for private giving.

A. BROADER ACCESS TO FEDERAL FUNDING

The Gore campaign advocated more public funding for FBOs through an expanded Charitable Choice program.[220] Gore proposed ex-

220 Al Gore, Remarks as Prepared for Delivery by Vice-President Al Gore on the Role of Faith-Based Organizations (May 24, 1999), *available at* www.algore2000.com/speeches/speeches_faith_052499.html; Kevin Sack, *Gore Backs Federal Money for Church Social Service Programs,* N.Y. TIMES, May 25, 1999, at A23.

panding Charitable Choice to encompass federally funded social services for homelessness, youth violence, and substance abuse treatment.[221] Gore's approach carried forward current limitations in the law, including mandating a secular alternative, barring any use of government funds for proselytizing, and requiring FBOs to account for the use of federal funds.[222] In addition to expanding Charitable Choice, Gore also proposed a program to increase charitable contributions by encouraging private employers to match employee contributions to FBOs.[223]

One advantage of using direct government assistance centers is the ability to ensure recipient organizations meeting basic administrative, financial, and managerial standards. Although Charitable Choice prohibits the public sector from discriminating against a FBO due to its religious character, the government may utilize its usual criteria to decide whether a particular organization will receive contracts. Moreover, unlike a program of voluntary contributions, the government can target financial assistance to FBOs serving the most troubled communities. However, smaller, low budget charities may have difficulty satisfying federal contracting requirements.

Once grants are awarded, compliance with ongoing monitoring and accounting requirements may have unintended consequences. For example, FBOs accepting federal funding may need to comply with government regulations requiring them to deliver services in an unaccustomed manner, maintain different staffing levels, or employ only staff with specified credentials.[224] This degree of government control can result in the unwanted consequence of diverting resources to regulatory compliance and eroding a charity's spiritual, moral, and care-giving mission. The financial audit, although limited in scope, may also be quite intrusive.

Watering down the religious contents of FBOs will likely diminish their effectiveness.[225] FBOs succeed in turning lives around because they instill religious conviction by helping individuals find meaning and hope in their lives. By accepting government funding, the entity inevitably becomes more "secularized," and may, like Charitable Choice, be barred from using funds for sectarian worship, instruction, or proselytization.

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221 Gore, *supra* note 220.

222 *Id.*

223 *Id.*

224 Joe Loconte, *The 7 Deadly Sins of Government Funding for Private Charities*, POL'Y REV., Mar.–Apr. 1997, at 28.

225 Isaac Kramnick & R. Laurence Moore, *Can the Churches Save the Cities?: Faith-Based Services and the Constitution*, THE AM. PROSPECT, Nov.–Dec. 1997, at 50; Sherman, *supra* note 16, at 60, 62.

Another potential drawback centers on the risk of increased financial dependency on government funding. FBOs may lose focus on their spiritual and moral mission because of the necessity of lobbying and currying favor with federal agencies.[226] As with other government contractors, the corrupting influence of public sector funding makes FBOs vulnerable to being "captured" by the grant-making process.

B. TAX INCENTIVES TO SPUR PRIVATE GIVING TO FBOS

President Bush favors using tax incentives to encourage increased charitable contributions.[227] During his campaign, President Bush proposed creating a special charitable contribution deduction, in addition to the standard deduction, for the 80 million taxpayers (70% of all filers) who do not elect to claim itemized deductions under the Tax Code.[228] He also proposed increasing the cap on corporate charitable contributions from 10% to 15% of taxable income and allowing retirement-age individuals to make tax-free withdrawals from individual retirement accounts for charitable contributions.[229] Bush would also create a charitable state-tax credit allowing individuals and corporations to claim a credit against state income or other taxes for contributions to charities.[230] States, in turn, could recoup the revenue cost by receiving additional federal welfare transfer payments.[231]

Proponents argue that use of deductions and credits allows individuals and corporations, rather than federal and state bureaucrats, to select and evaluate FBOs. This approach makes charitable organizations directly accountable to their contributors instead of government officials and agencies. In other words, funding is free from much of the burdensome regulation otherwise accompanying direct government assistance. The federal government need only certify the charitable status of FBOs to enable contributions to qualify for a charitable deduction under the Tax Code. The lessened role of the government and attendant administrative costs result in a greater percentage of each dollar contributed being put to work by charities.

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226 Michael Horowitz, *Subsidies May Cost Churches Their Souls*, WALL ST. J., Dec. 16, 1999, at A22.

227 George W. Bush, The Duty of Hope, Address at the Metro Church, Indianapolis (July 22, 1999), *available at* http://www.georgewbush.com/speeches/faith/dutyofhope.html [hereinafter Bush, Duty of Hope]; Adam Clymer, *Filter Aid to Poor Through Churches, Bush Urges*, N.Y. TIMES, July 23, 1999, at A1; George W. Bush, *Faith-Based Initiatives: Encouraging and Outpouring of Giving*, Aug. 2, 1999, *at* http://www.georgewbush.com/issues/domestic/faith/giving.asp [hereinafter Bush, Encouraging and Outpouring of Giving].

228 Bush, Duty of Hope, *supra* note 227.

229 Bush, Encouraging and Outpouring of Giving, *supra* note 227.

230 *Id.*

231 *Id.*

Although we favor the use of the less bureaucratic Tax Code approach as a means of funding FBOS without fostering a loss of mission, several drawbacks exist. First, restoring the charitable deduction for non-itemizers, which existed prior to the Tax Reform Act of 1986, while encouraging lower and middle-income taxpayers to begin charitable giving, adds complexity to individual returns. Taxpayers who do not otherwise itemize their deductions would need to maintain records of their charitable contributions. The proposed charitable contribution deduction for non-itemizers would be subject to the present percentage of income limitations[232] and could not exceed the standard deduction dollar cap.[233] Record keeping and limits on the availability of tax benefits serve, however, as key sources of complexity for individuals in the tax system.[234]

Second, restoring the charitable contribution for non-itemizers creates a double deduction problem. This standard deduction already compensates for the inability of non-itemizers to deduct charitable contributions. Congress could avoid this problem by allowing a deduction only in excess of a specified floor amount. However, this type of provision could further compound the complexity problem.

Third, using tax deductions rather than credits is subject to criticism on equity grounds. A tax deduction reduces tax liability indirectly by reducing the amount of the income subject to taxation. A tax credit results in a dollar-for-dollar reduction in tax liability equal to the amount of the credit. Compared to tax deductions, the credit approach provides taxpayers a more economically valuable incentive because it reduces taxes directly and accords a greater tax benefit for lower income taxpayers. To deal with this objection, President Bush coupled the tax deduction initiative with his charitable state-tax credit proposal.

Fourth, expanded use of the income tax system may not channel financial assistance to inner city charities where it is most needed. Under President Bush's proposal, individuals and corporations, not the government, would decide who receives contributions. The increased tax subsidies may benefit other non-profit institutions, such as suburban hospitals and educational institutions.[235] To deal with this problem, the charitable state-tax credit proposal would allow states to pick the charities they want to target with the credit.

Finally, will the tax breaks encourage an increase in charitable giving by individuals and corporations? Proponents assume so. A recent

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232 I.R.C. § 170(b) (1995).

233 I.R.C. § 63(b)(2) (1995).

234 *Overview of Present Law and Issues Relating to Individual Income Taxes: Scheduled for a Public Hearing Before the S. Comm. on Finance on Apr. 15, 1999, JCX-18-99*, 106th Cong. (1999) (prepared by the Staff of the Joint Comm. on Taxation).

235 Kuo, *supra* note 18, at 34.

study conducted by PricewaterhouseCoopers concluded that President Bush's proposal would stimulate an additional $14.6 billion in charitable giving in 2000 — an increase of 11.9% — and would generate a 16.6% rise in the number of givers.[236] In 1986, when non-itemizers could deduct 100% of their contributions, donations by non-itemizers rose 40% from 1985, when they could only deduct 50%.[237] However, even if tax incentives do not lead to an outpouring of new funds for FBOs, policymakers may reexamine direct funding alternatives.

VI. CONCLUSION

The Welfare Reform Act of 1996 represents only the first stage in a complete overhaul of the nation's federal public assistance programs. Indeed, to justify the economic realities imposed by welfare reform and refute the criticism that reform is only concerned with saving money, the federal government should embrace a new social policy fully utilizing FBOs.

Serious, but manageable, financial and constitutional limitations exist on any relationship between the government and FBOs. A tax-oriented funding policy, while not perfect, is preferable to direct government funding because it does not generate a new bureaucracy. This will comfort FBOs because being "captured" by the government is their principal reservation to accepting public money. Tax-oriented funding is also more consistent with the Supreme Court's rulings on church/state interactions and thus more likely to withstand constitutional scrutiny.

Absent the funding and constitutional limitations, two further questions remain. First, are FBOs willing to increase their responsibilities and do more to meet America's social ills? Many smaller FBOs believe a shoestring budget is part of their key to success, and so they may not want more money. Other FBOs rely so heavily on a few people that they do not see how they can grow bigger or deal with more personnel. While striving to preserve the distinct character of smaller organizations, namely their accessibility and ability to deal with people on an individual basis, FBOs are now presented with an unparalleled opportunity to do even more. Assuming FBOs take on greater responsibilities, a second question assumes paramount importance: How will FBOs staff their expanded programs? Using qualified seniors as volunteers may help allevi-

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236 NAT'L ECONOMIC CONSULTING, PRICEWATERHOUSECOOPERS LLP, INCENTIVES FOR NONITEMIZERS TO GIVE MORE: AN ANALYSIS PREPARED FOR INDEPENDENT SECTOR (2001), *available at* http://www.independentsector.org.

237 Fred Stokeld, *Bush Plan Would Give Charitable Deduction to Non-Itemizers*, TAX NOTES TODAY, Dec. 1, 1999.

ate the short staffing dilemma while encouraging a positive contribution by older persons.

There is no way to be empirically certain that religious social service providers are more effective at dealing with chronic social problems than traditional government programs. The inconsistencies in the empirical record confirm this observation. However, the analytical framework developed offers some clarity. Religion can be an effective tool of social policy when coupled with traditional, secular social programs. As such, it is foolish not to use FBOs to meet America's social ills. Instilling a stronger sense of personal responsibility and of empowering more Americans to take control of their lives is worthy of different approaches. A competitive, parallel structure where consumers choose their own service providers will challenge traditional public sector schemes, forcing a rethinking of their mission and values.