

FAITH-BASED INITIATIVE 2.0: THE BUSH FAITH-BASED AND COMMUNITY INITIATIVE

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Critics of President George W. Bush's faith-based initiative¹ often claimed that it was not a serious public policy effort, but rather a political ploy aimed at pleasing the Republican white evangelical "base" and poaching African-American and Hispanic pastors and voters from the Democratic Party. However, even casual observers should have known better. If the initiative was just about politics, why did some thirty-six states, led by both Democrats and Republicans, create their own initiatives, maintaining them even when state leadership changed from one party to the other?² Why did the Pew Charitable Trusts invest in an eight-year project, the Roundtable on Religion and Social Welfare Policy, to track the initiative's goals, outcomes, and legal reforms? If the initiative was mere low politics, why did it spark so many books, journal and law review articles, and dissertations?³

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1. This Essay will follow convention and use this short form, rather than the more precise name, the Bush Faith-Based and Community Initiative.

2. See IRA C. LUPU & ROBERT W. TUTTLE, *THE ROUNDTABLE ON RELIGION & SOCIAL WELFARE POLICY, THE STATE OF THE LAW—2008: A CUMULATIVE REPORT ON LEGAL DEVELOPMENTS AFFECTING GOVERNMENT PARTNERSHIPS WITH FAITH-BASED ORGANIZATIONS* (2008), available at http://www.religionandsocialpolicy.org/docs/legal/state_ofthe_law_2008.pdf [hereinafter STATE OF THE LAW].

3. See, e.g., AMY E. BLACK ET AL., *OF LITTLE FAITH: THE POLITICS OF GEORGE W. BUSH'S FAITH-BASED INITIATIVES* (2004); LEWIS D. SOLOMON, *IN GOD WE TRUST?: FAITH-BASED ORGANIZATIONS AND THE QUEST TO SOLVE AMERICA'S SOCIAL ILLS* (2003); Vernadette Ramirez Broyles, *The Faith-Based Initiative, Charitable Choice, and Protecting the Free Speech Rights of Faith-Based Organizations*, 26 HARV. J.L. & PUB. POL'Y 315 (2003); Linda C. McClain, *Unleashing or Harnessing "Armies of Compassion"?: Reflections on the Faith-Based Initiative*, 39 LOY. U. CHI. L.J. 361 (2008).

Any doubts that the Bush initiative was a serious policy should have been finally dispelled on July 1, 2008, when Democratic presidential candidate Barack Obama proclaimed that he would expand and improve the initiative;⁴ or when, during the transition period, he mandated a serious review of the initiative and its administrative apparatus; or when, soon after becoming President, he announced the formation of the White House Office of Faith-Based and Neighborhood Partnerships, his version of the Bush faith-based office, and appointed Joshua DuBois to head the new office.⁵ Expanding and improving, re-viewing and evaluating, new leadership and a renamed effort: There must have been a great deal of substance to the Bush faith-based initiative for Obama to take these actions.

But what was that substance? What did the Bush initiative aim to achieve and what is its legacy?

I. REENGINEERING GOVERNMENT

When evaluating the initiative, the focus should not be on whether, or how much, federal money flowed to faith-based organizations during the Bush Administration. The key question should concern what resulted from the spending. Unfortunately, outcome evidence is scarce, as it is uniformly in social services. It is even difficult to measure the effect of the initiative on the proportion of providers that are faith-based.⁶ Extensive government collaboration with religiously affiliated social-service organizations was already decades old at the start of the initiative, and statistics on the subject, both older and more

4. Jeff Zeleny & Michael Luo, *Obama Seeks Bigger Role for Religious Groups*, N.Y. TIMES, July 2, 2008, at A1; see also OBAMA FOR AMERICA, PARTNERING WITH COMMUNITIES OF FAITH 2 (2008), available at http://obama.3cdn.net/c2c74198bb57fc007c_e906mvlj.pdf.

5. Press Release, The White House, Office of the Press Sec'y, Obama Announces White House Office of Faith-based and Neighborhood Partnerships (Feb. 5, 2009), available at http://www.whitehouse.gov/the_press_office/ObamaAnnouncesWhiteHouseOfficeofFaith-basedandNeighborhoodPartnerships/.

6. For efforts to measure changes in participation by faith-based organizations, see JONATHAN JACOBSON ET AL., MATHEMATICA POLICY RESEARCH, INC., STATE AND LOCAL CONTRACTING FOR SOCIAL SERVICES UNDER CHARITABLE CHOICE: FINAL REPORT (2005), available at <http://www.mathematica-mpr.com/publications/pdfs/charitablechoice.pdf>; and FREDRICA D. KRAMER ET AL., URBAN INST., FEDERAL POLICY ON THE GROUND: FAITH-BASED ORGANIZATIONS DELIVERING LOCAL SERVICES (2005), available at http://www.urban.org/UploadedPDF/311197_DP05-01.pdf.

recent, are unreliable. Faith-based applicants and grantees are not required to identify themselves as such and, in any case, most federal social service funds go to state and local agencies before being awarded to private groups. Those agencies need not report back to the federal government in detail. In addition, while much of the Bush initiative focused on the rules of government collaboration with faith-based organizations—rules which can serve either to encourage or discourage faith-based participation⁷—an evaluation centered on changes to these rules is too narrow.

After all the key legislative step in creating a level playing field for faith-based providers came—as part of what this Essay will call the first version of the faith-based initiative—during the Clinton Administration: the addition of Charitable Choice provisions to four federal programs.⁸ Even before that, at various times the federal government had carefully crafted its funding rules so that faith-based organizations could be full participants. A notable example is a 1990 child care law that uses vouchers or certificates to enable families to choose faith-based child care programs.⁹ Also notable are longstanding policies of U.S. overseas development, which are designed to accommodate the many religious organizations that have been key government partners in that work.¹⁰

It is more illuminating to regard the Bush faith-based initiative as a determined and sweeping reframing of the relationship between government and civil society. As President Bush put it at the start of his Administration, there was to be a “new attitude” on the part of the federal government “to honor and not restrict faith-based and community initiatives, to accept rather than dismiss such programs, and to empower rather

7. See *infra* Part I.B.

8. See Stanley W. Carlson-Thies, *Charitable Choice: Bringing Religion Back into American Welfare*, in *RELIGION RETURNS TO THE PUBLIC SQUARE: FAITH AND POLICY IN AMERICA* 269, 280–82 (Hugh Hecló & Wilfred M. McClay eds., 2003).

9. For a discussion of the Ford-Durenburger Amendment, see Allen D. Hertzke, *An Assessment of the Mainline Churches Since 1945*, in *THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY* 43, 68 (James E. Wood, Jr. & Derek Davis eds., 1991).

10. See J. BRUCE NICHOLS, *THE UNEASY ALLIANCE: RELIGION, REFUGEE WORK, AND U.S. FOREIGN POLICY* (1988).

than ignore them.”¹¹ This amounted, he said, to “a new role” for the government: It would be the “supporter, enabler, catalyst and collaborator” of these organizations.¹²

This campaign to reframe the relationship between government and civil society in the area of human services came in three forms: stressing the importance of civil society institutions in responding to social needs, modifying, as noted above, the rules governing government collaboration with the religious organizations that are such an important part of civil society, and giving greater prominence to the role of religious organizations in serving the common good.

A. *Highlighting the Vital Social-Service Role of Civil Society Institutions*

Recall Tocqueville¹³ or the encouragement given to nonprofits by U.S. regulations and tax law,¹⁴ and it is obvious that charities, broadly understood, have always had a central place in the American response to social need and community development. Yet, through the twentieth century, with one big boost from the Great Depression and the New Deal response and another from President Lyndon Johnson’s Great Society and War on Poverty, the emphasis shifted more and more to government, and especially the federal government, at the expense of civil society.¹⁵ And although the expanding social services after the mid-1960s were typically delivered by private charities, including religiously affiliated groups, government had the upper hand: These private organizations were carrying out government plans.¹⁶

The Bush Administration took steps to change this relationship. President Bush pressed for changes in government prac-

11. GEORGE W. BUSH, RALLYING THE ARMIES OF COMPASSION: A REPORT TO SUPPORT THE HEROIC WORKS OF FAITH-BASED GROUPS ACROSS AMERICA, H.R. DOC. NO. 107-36, at 6 (2001).

12. *Id.*

13. See, e.g., 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 513–17 (J.P. Mayer ed., George Lawrence trans., HarperPerennial 1969) (1835).

14. See MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 56–67 (2004).

15. See Carlson-Thies, *supra* note 8, at 271–73.

16. See Stanley Carlson-Thies, *Faith-Based Institutions Cooperating with Public Welfare: The Promise of the Charitable Choice Provision*, in WELFARE REFORM & FAITH-BASED ORGANIZATIONS 29, 35–37 (Derek Davis & Barry Hankins eds., 1999).

tice, notably at the Department of Homeland Security, to coordinate more closely federal efforts with private action, for example, in disaster preparedness and response.¹⁷ He spoke often about how extensively troubled families, poor communities, and places devastated by disaster depend on the freely given help of secular and faith-based organizations. President Bush signed into law measures to encourage greater private giving to these “neighborhood healers,” as he called them.¹⁸ He worked with Congress to create a Compassion Capital Fund that has provided federal support in the form of technical assistance and small grants to help private charities improve their management and programs with no requirement that they partner with the government to deliver services.¹⁹ President Bush also modified the rules governing federal funding for social services so that the collaborations have more of a partnership character.²⁰

B. *Updating the Federal Grant Rules Concerning
Religion and Religious Organizations*

This partnership style shows up in various ways, including the systematic use of intermediaries. Intermediaries are larger, experienced organizations that, by taking on a large part of the management and reporting burden of government grants, enable a network of grassroots groups to offer government-funded services without first needing to become more like government—namely, larger and more bureaucratic.²¹ But the new style is particularly evident in the Bush Administration’s revised church-state rules for federal grants.²²

17. See THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 49 (2006), available at <http://www.lib.umich.edu/govdocs/pdf/katrina-lessons-learned.pdf>; WHITE HOUSE FAITH-BASED AND COMMUNITY INITIATIVES, GUIDANCE TO FAITH-BASED AND COMMUNITY ORGANIZATIONS ON PARTNERING WITH THE FEDERAL GOVERNMENT 1–2 (2003), available at <http://www.ethicsinstitute.com/pdf/Faith%20Based%20Federal%20Grants.pdf>.

18. See THE WHITE HOUSE, INNOVATIONS IN COMPASSION: THE FAITH-BASED INITIATIVE: A FINAL REPORT TO THE ARMIES OF COMPASSION 39 (2008) [hereinafter INNOVATIONS IN COMPASSION]; cf. ANNE FARRIS ET AL., THE ROUNDTABLE ON RELIGION AND SOCIAL WELFARE POLICY, THE EXPANDING ADMINISTRATIVE PRESIDENCY: GEORGE W. BUSH AND THE FAITH-BASED INITIATIVE (2004).

19. See KRAMER ET AL., *supra* note 6, at 2–3.

20. See STATE OF THE LAW, *supra* note 2, at i–ii.

21. *Id.* at 4.

22. See INNOVATIONS IN COMPASSION, *supra* note 18, at 30–31.

As noted, the major legislative rule changes came before Bush, when President Clinton signed the Charitable Choice rules into law four times, beginning with the 1996 federal welfare reform law.²³ Charitable Choice specifically provides that faith-based organizations are eligible for federal funds without first having to suppress or conceal their religious identity and practices. They are able to participate as robustly religious organizations without being excluded for not appearing secular.²⁴ The rules protect religious boards of directors and mission statements; voluntary, privately paid religious activities, separate from the federally funded services; and the practice of taking account of religion in selecting staff, unless forbidden by the federal law specific to the social service or by a state or local procurement rule.²⁵ However, the faith-based organizations and their secular counterparts must serve all eligible beneficiaries without discriminating on the basis of religion, and officials are obligated to offer an alternative when a beneficiary does not want to be served by a faith-based provider.²⁶

The Bush Administration transformed these innovative principles into changed government practice through a wide range of actions.²⁷ Foundational steps were the promulgation of Charitable Choice regulations and then, following an “Equal Protection” Executive Order issued in December 2002, the adoption of “equal treatment” regulations, similar to the Charitable Choice principles, to govern the expenditure of federal funds in other social service programs.²⁸

These rules require grant officials not to be biased either for or against faith-based applicants, prohibit religious selectivity in providing assistance, and demand that “inherently religious activities” be kept separate from the federally funded services.²⁹

23. See Carlson-Thies, *supra* note 8, at 282.

24. See *id.* at 282–83.

25. For the details of religious hiring, see CARL H. ESBECK ET AL., CTR. FOR PUB. JUSTICE, THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS (2004), <http://www.cpjustice.org/files/religiousstaffing.pdf>.

26. See STANLEY W. CARLSON-THIES, CHARITABLE CHOICE FOR WELFARE & COMMUNITY SERVICES: AN IMPLEMENTATION GUIDE FOR STATE, LOCAL, AND FEDERAL OFFICIALS 2 (2000).

27. See FARRIS ET AL., *supra* note 18; INNOVATIONS IN COMPASSION, *supra* note 18, at i, 30–31.

28. On the legal developments, see STATE OF THE LAW, *supra* note 2, at 3–4.

29. See *id.* at 4, 11–12.

Some critics have nonetheless charged the Bush Administration with violating fundamental church-state separation principles.³⁰ The constitutional law experts for the Pew Roundtable were more accurate: The Bush Administration's level playing field for faith-based organizations "reflects a decisive shift in the law of the Constitution's Establishment Clause, away from a regime that excluded 'pervasively sectarian' entities, and toward one that permits a far greater range of partnerships between government and [faith-based organizations]."³¹ The main impact of the initiative was to require the federal government to *catch up* to the changed constitutional standards.³²

C. *Rehabilitating the Public Role of Religious Organizations.*

The two trends just discussed combined in the Bush faith-based initiative to give new attention and emphasis to the important public-service role faith-based organizations play. That role, never absent, had been obscured by a common view that religion is a matter of private beliefs and action, whereas government and the public sphere are naturally or normatively religion-free. That view surely has become highly implausible after more than a dozen years of emphatic federal action designed to enable faith-based organizations to fully participate in government social-service programs. The Bush bully pulpit and the flood of research stimulated by the Bush initiative's spotlight on faith-based social services have foregrounded just how important religious organizations are in responding to needs beyond office hours and in widely distributed locations, as trusted providers of both services and guidance, in building up communities and strengthening families, and in responding quickly and remaining long when natural disasters occur.

30. See, e.g., Philip C. Aka, *Assessing the Constitutionality of President George W. Bush's Faith-Based Initiatives*, 9 J.L. SOC'Y 53, 62 (2008) ("Bush's . . . religion-based initiatives are constitutionally suspect."); Sean T. McLaughlin, *More Than Meets the Eye: President Bush's Faith-Based Initiative*, 33 U. MEM. L. REV. 41, 42 (2002) ("President Bush's plan challenges conventional understandings of religion's role in public life . . ."); Martha A. Boden, Comment, *Compassion Inaction: Why President Bush's Faith-Based Initiatives Violate the Establishment Clause*, 29 SEATTLE U. L. REV. 991 (2006).

31. STATE OF THE LAW, *supra* note 2, at ii (emphasis added).

32. See Ira Lupu, Remarks at the Opening Plenary Session of The Roundtable on Religion & Social Policy 2004 State of the Law Conference (Dec. 9, 2004), available at http://www.religionandsocialpolicy.org/docs/transcripts/12-09-04_Plenary_State_ofthe_Law_2004.pdf.

Though these faith-based groups are without doubt religious organizations, they provide humanitarian assistance. Research demonstrates that America's congregations, not even counting the thousands of separate faith-based nonprofits, constitute a major part of "our social safety net": "[H]elping others has become the norm for most local congregations, regardless of denomination."³³ Similarly, research shows that religious people—more so than nonreligious—give generously of time and talent and money, not only to religious causes, but also to secular causes.³⁴ People and organizations of faith contribute to the common good, not despite their faith, but because of it; they make distinctive *faith-shaped* contributions that are as important to the common good as are secular works.

II. THREE SNAPSHOTS

I have proposed that the major significance of the Bush faith-based initiative was to recast the federal government's social service work as a government partnership with civil society's efforts instead of a substitution for or domination over those efforts. The Administration (optimistically) summarized the impact of the initiative in these words: "[A] bureaucratic culture accustomed to large programs has been opened to localized, community-driven solutions."³⁵ That change of focus or emphasis is reflected in three innovative Bush programs.

A. PEPFAR

The President's Emergency Plan for AIDS Relief, started in 2003 and reauthorized with some changes in 2008, is noteworthy as an "unparalleled commitment" to AIDS prevention and treatment³⁶ and is generally regarded as highly successful, despite controversy about some elements, particularly the stress on abstinence and faithfulness as prevention strategies.³⁷ A no-

33. RAM A. CNAAN ET AL., *THE INVISIBLE CARING HAND: AMERICAN CONGREGATIONS AND THE PROVISION OF WELFARE* 280 (2002).

34. ARTHUR C. BROOKS, *WHO REALLY CARES: AMERICA'S CHARITY DIVIDE: WHO GIVES, WHO DOESN'T, AND WHY IT MATTERS* 38 (2006).

35. *INNOVATIONS IN COMPASSION*, *supra* note 18, at 1.

36. John W. Dietrich, *The Politics of PEPFAR: The President's Emergency Plan for AIDS Relief*, 21 *ETHICS & INT'L AFF.* 277, 277 (2007).

37. See Lisa Smith, *PEPFAR 2: Fighting HIV/AIDS (and Human Nature)*, *HUMANIST*, May–June 2008, at 6.

table feature of the program is its extensive and deliberate use of grassroots groups, with a stress on faith-based organizations, to deliver services. In 2007, nearly a quarter of the program's local partners were faith-based.³⁸

Why look specifically to religious organizations when their involvement in public programs is contentious, especially when the issue is as sensitive as the prevention and treatment of HIV/AIDS? According to the State Department, the importance of religious organizations in society is one reason: "In many focus countries, more than eighty percent of citizens participate in religious institutions. In certain nations, upwards of fifty percent of health services are provided through faith-based institutions, making them crucial delivery points for HIV/AIDS information and services."³⁹ A further reason is precisely the moral sensitivity of the matters at hand: Once given training in how to manage programs and information about successful prevention and treatment practices, faith-based grassroots groups "often design the most culturally appropriate and responsive interventions and have the legitimacy and authority to implement successful programs that deal with normally sensitive subjects."⁴⁰ PEPFAR offers the needed training through its New Partners Initiative.⁴¹

B. Ready4Work

The importance of trust, moral authority, and prime location is a reason the Ready4Work pilot prisoner re-entry program was designed to draw into participation faith-based and secular grassroots groups.⁴² To prepare ex-prisoners to become productive citizens in the community, the program built service networks of government agencies, experienced nonprofit organizations, businesses, churches, and neighborhood groups. Employment oppor-

38. INNOVATIONS IN COMPASSION, *supra* note 18, at 6.

39. OFFICE OF THE U.S. GLOBAL AIDS COORDINATOR, THE PRESIDENT'S EMERGENCY PLAN FOR AIDS RELIEF: COMMUNITY AND FAITH-BASED ORGANIZATIONS 2 (2005).

40. *Id.* at 1. For a similar rationale, see THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, REPORT ON THE INVOLVEMENT OF FAITH-BASED ORGANIZATIONS IN THE GLOBAL FUND 6-9 (2008), http://www.theglobalfund.org/documents/publications/other/FBOReport/GlobalFund_FBO_Report_en.pdf.

41. Office of the U.S. Global AIDS Coordinator, New Partners Initiative Homepage, <http://www.pepfar.gov/c19532.htm> (last visited Feb. 19, 2009).

42. For an overview of the Ready4Work program, see JOSHUA GOOD & PAMELA SHERRID, WHEN THE GATES OPEN: READY4WORK, A NATIONAL RESPONSE TO THE PRISONER REENTRY CRISIS 2 (2005).

tunities were offered by the businesses. The nonprofits managed the networks and arranged for government services such as housing. The grassroots groups provided mentors, the ingredient missing from previous efforts to help ex-prisoners transition successfully to a life back in society. Ready4Work enlisted “the commitment and credibility of volunteers” from the grassroots organizations.⁴³ Serving as mentors, the volunteers “help returnees change their personal mindsets, deal with workplace challenges and build social relationships.”⁴⁴

C. Access to Recovery

Access to Recover (ATR) funds a different kind of response to addiction from the main federal drug treatment program.⁴⁵ The states and Indian tribes that win ATR awards construct voucher systems through which addicts obtain recovery-support services as well as treatment services. Recovery-support services range from transportation and child-care help to spiritual counseling and mentoring, and the drug-treatment services can include spiritual approaches. Why so much religion, and how can it be included in a federally funded social service?

As to the “why,” perhaps it is enough to remember that Alcoholics Anonymous and similar programs insist that a “higher power” is essential if addicts are to avoid relapses.⁴⁶ The “how” is explained by the Supreme Court’s doctrine on “indirect” funding of services.⁴⁷ In ATR’s vouchers program, if some “faith-integrated” service receives federal dollars, it is because of the choice of an addict, not a government official; it is the consequence of an addict’s constitutionally protected religious exercise, not of an official’s unconstitutional effort to establish a

43. *Id.*

44. *Id.*

45. For an explanation of the main features of the Access to Recovery program, see Press Release, Substance Abuse & Mental Health Serv. Admin., U.S. Dep’t of Health & Human Servs., Access to Recovery: How It Will Work (June 20, 2003), http://www.samhsa.gov/news/newsreleases/030620bg_atr_how.htm.

46. For the important role of religion in drug treatment, see THE NAT’L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUM. UNIV., SO HELP ME GOD: SUBSTANCE ABUSE, RELIGION AND SPIRITUALITY (2001).

47. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 654–55 (2002); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

religion.⁴⁸ ATR's voucher-based system invests addicts in their own recovery, expands the range and style of services they can use, and improves outcomes by extending assistance beyond the treatment phase. It is striking that, although Connecticut is firmly in the "blue state" category, the commissioner of its mental health department is determined his state should mimic the Bush ATR program.⁴⁹

III. ROOM FOR IMPROVEMENT

The Bush initiative was determined and persistent.⁵⁰ But the federal government is like a supertanker: It changes direction very slowly. The performance of the Bush faith-based initiative lagged its promise.

Consider vouchers, a paradigmatic innovation of the Bush initiative. Vouchers enable faith-integrated services to be funded by the government because the funding is "indirect."⁵¹ They ease the involvement of faith-based groups by eliminating the requirement that inherently religious activities be kept entirely separate from the government-funded services. Vouchers facilitate participation by grassroots organizations because, as part of an array of providers, any individual organization need not offer a large volume of services. And they promote bottom-up innovation by putting a premium on diverse, rather than standardized, services. Yet, despite great interest by the Administration,⁵² and the notable example of the ATR program,

48. Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 927-28 (2003).

49. Thomas A. Kirk, Jr., Comm'r, Conn. Dep't of Mental Health and Addiction Servs., State of Conn., Opportunity for True System Change, Presentation at the White House National Faith-Based and Community Initiatives Conference: Innovations in Effective Compassion (June 26, 2008), available at <http://www.ct.gov/dmhas/lib/dmhas/presentations/062608.pdf>.

50. I think that is the necessary conclusion, notwithstanding imperfect commitment to the initiative by significant forces in the Administration. On the imperfect commitment, see JOHN J. DI IULIO, JR., *GODLY REPUBLIC: A CENTRIST BLUEPRINT FOR AMERICA'S FAITH-BASED FUTURE* (2007). For a less reliable account, see DAVID KUO, *TEMPTING FAITH: AN INSIDE STORY OF POLITICAL SEDUCTION* (2006).

51. Lupu & Tuttle, *supra* note 48, at 927.

52. See, e.g., GRETCHEN KIRBY & ANDREW BURWICK, MATHEMATICA POLICY RESEARCH, *USING VOUCHERS TO DELIVER SOCIAL SERVICES: CONSIDERATIONS BASED ON THE CHILD CARE AND DEVELOPMENT FUND (CCDF) AND TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) PROGRAM EXPERIENCES* (2007), available at <http://aspe.hhs.gov/hsp/07/vouchers/experiences/report.pdf>.

after eight years of innovation most federal funding remains “direct”—officials select one or a small number of providers and any religious activities have to be kept separate from the services paid for by government dollars.

The lack of greater “voucherization,” to use the policy wonks’ term, is especially puzzling given the Administration’s conviction that mentoring can be vital to producing successful outcomes. The Ready4Work program, Mentoring Children of Prisoners, and other programs count on volunteers to pass on life wisdom and encouraging words to children and adults facing challenging circumstances and choices. But these programs are funded by grants (the mentors are volunteers, but federal dollars support recruitment, training, making matches, and so on), and thus the mentoring must be religion-free. This is so even though the mentors are typically drawn from churches (termed “volunteer-rich environments” by experts),⁵³ and both mentors and mentees, like much of the American public, often have a religious background and regard faith to be an important part of life. Mentors are instructed to defer all talk about religion until the official hour of mentoring is over, no matter how relevant to the interaction both mentor and mentee might regard religion to be, and notwithstanding that the discussion and the relationship itself are consensual.⁵⁴ By the end of the Administration only a little progress had been made to overcome this dysfunctional way of supporting expanded mentoring. A Department of Labor program experimented with “beneficiary-choice contracting,” a way of contracting for services that conforms to the Supreme Court’s “indirect” funding guidelines,⁵⁵ and a portion of the Mentoring Children of Prisoners program was converted to voucher funding.⁵⁶ But these innovations, like ATR, are but exceptions in a sea of continued

53. HOWARD HUSOCK, KENNEDY SCHOOL OF GOVERNMENT CASE PROGRAM, STARTING AMACHI: THE ELEMENTS AND OPERATION OF A VOLUNTEER-BASED SOCIAL PROGRAM 13 (2003), available at <http://www.fastennetwork.org/Uploads/A8BBB2D9-31FD-43F7-9B23-D3D2A9AA16D4.pdf>.

54. See CTR. FOR FAITH-BASED CMTY. INITIATIVES, U.S. DEP’T OF LABOR, READY4REENTRY: PRISONER REENTRY TOOLKIT FOR FAITH-BASED AND COMMUNITY ORGANIZATIONS (n.d.), available at <http://www.doleta.gov/PRI/PDF/Pritoolkit.pdf>.

55. See STANLEY CARLSON-THIES ET AL., BENEFICIARY-CHOICE CONTRACTING IMPLEMENTATION GUIDE (2009), <http://www.coffeyconsultingllc.com/pdfs/BCGuide01152009.pdf>.

56. Child and Family Services Improvement Act of 2006 § 8(b)(1)(B), Pub. L. No. 109-288, 120 Stat. 1233, 1250 (codified in scattered sections of 42 U.S.C.).

“direct” funding programs that welcome the involvement of faith-based *organizations* but forbid federal support for faith-based *services*.

No progress at all was made in another area where religion and services coincide. Many professions, from doctors, nurses, and hospice care providers to counselors and social workers, now regard religion or spirituality to be a relevant and sometimes even vital aspect of the professional helping relationship. Their practice guidelines now mandate attention to this dimension, recommending the taking of a spiritual inventory and, where appropriate, using spiritual resources to supplement secular care.⁵⁷ Yet government often funds the services these professionals provide, and the funding is usually “direct”: The professionals’ services are contracted. Thus, notwithstanding the practice guidelines, religion is supposed to be excluded from the relationship with the patient or client.

Returning to the patient after-hours to complete a spiritual inventory or to discuss how the patient’s religious faith might enable her to undergo an essential but frightening treatment does not seem to be an adequate answer to the dilemma. Nor is it always obvious how a voucher alternative could be implemented. Should patients be required to interview a series of palliative care nurses about whether religion is incorporated into their treatment routines, with each nurse’s monthly income dependent on those patients’ choices?

These are unnecessary complications. The helping professions have already solved the problem of protecting patients’ religious freedom without a blanket exclusion of religion: The doctor or counselor must seek the patient’s or client’s consent before discussing religion, and is furthermore bound by professional norms not to abuse her position of power and authority in the relationship.⁵⁸ These procedures and norms fully protect patients’ religious freedom. Yet this way of dealing with religion in government-supported services fits neither the “direct” nor the “indirect” funding model. Conceptualizing this

57. Katherine Gergen Barnett & Auguste H. Fortin, *Spirituality and Medicine: A Workshop for Medical Students and Residents*, 21 J. GEN. INTERNAL MED. 481, 481 (2006) (“[G]overning bodies for medical education . . . have recommended that spirituality and religion be incorporated into medical training.”).

58. See Stephen G. Post et al., *Physicians and Patient Spirituality: Professional Boundaries, Competency, and Ethics*, 132 ANNALS INTERNAL MED. 578, 581–82 (2000).

alternative and winning legal acceptance for it was not even on the Bush agenda.⁵⁹

Consider, finally, an entirely different failure. The No Child Left Behind law provides that children assigned to a persistently underperforming public school should be able to transfer to a better public school or should receive extra help from a tutoring service.⁶⁰ Faith-based and secular grassroots groups are among the entities that can apply to become Supplementary Educational Services grantees that offer the tutoring.⁶¹ The SES program, however, is operated through public school districts, which often are leery of faith-based groups, because of a string of Supreme Court cases mandating strict separation of religion and public schools. Worse, the law provides that school districts need not allocate funds to SES grants and that funds not used in that way will be retained by the district for its own uses.⁶² It will come as no surprise, then, that local school districts often have not operated SES grant programs, grassroots groups have often had no chance to apply, and most students have had no access to the tutoring.⁶³ The law authorizes participation by faith-based groups, but, in the same law, this provision, which has nothing specifically to do with religion, largely nullifies the effects of the permissive language. Indeed, the inefficiencies and incoherence of government operations are a major reason why the policy innovations of the Bush faith-based initiative have not changed more significantly how the government provides services.

IV. RELIGION IN AMERICAN PUBLIC LIFE

Sociologist of religion Peter Berger famously said that America is a nation of (religiously committed) Indians governed by an elite of (resolutely secular) Swedes. There are many reasons for the

59. For a fuller discussion of this issue, see Stanley Carlson-Thies, *The Faith-Based Initiative: Both Cause of Contention and the Solution to an Impasse?*, 44 J. ECUMENICAL STUD. 70 (2009).

60. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

61. U.S. DEP'T OF EDUC., SUPPLEMENTAL EDUCATIONAL SERVICES: NON-REGULATORY GUIDANCE 10 (2009), available at <http://www.ed.gov/policy/elsec/guid/suppsvcsguid.doc>.

62. Michael J. Petrilli, *Testing the Limits of NCLB: Implementation is not the problem*, EDUC. NEXT, Fall 2007, at 53.

63. *Id.* at 52, 53.

propensity of our governing class to insist on a “naked public square,”⁶⁴ despite the First Amendment requirement that government not hinder the free exercise of religion⁶⁵ and notwithstanding the American liberal tradition’s high valuation of freedom of conviction. An important reason is a casual presumption that the choice is binary between church and state, or religion and the public square: either theocracy or secularism, either a mandated religion or else the enforced retreat of religion from public influence and public affairs. Theocracy being clearly unconstitutional⁶⁶ (not that it has ever been a realistic prospect in the United States), the alternative of secularism must be the normative requirement.

And yet enforced secularism also violates the First Amendment and our liberal tradition. It sits uneasily with the manifest religiosity of American citizens and American civil society, including the many instances of faith in social-service institutions and in the professions. What we need is an alternative framework, something other than either government-mandated religion or government-mandated secularism.

The faith-based initiative—pursued by the Bush Administration and during the Clinton years—provides a model of the alternative we need. This is a model of equal opportunity or accommodation: The government ought to be neither for nor against religion, but rather ought to treat religious and secular options and choices equally.⁶⁷ The faith-based initiative has not been perfect in practice, but its principles are the right ones: honor religious along with secular convictions, accommodate faith-based as well as secular social-service providers, and protect the identity of religious providers while at the same time safeguarding the rights of clients.

V. THE FAITH-BASED INITIATIVE, VERSION 3.0

How will President Obama’s faith-based initiative develop? Will it be an expansion of the Bush initiative or will it develop in

64. RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (2d ed. 1986).

65. U.S. CONST. amend. I.

66. *Id.*

67. For this alternative model, see, for example, STEPHEN V. MONSMA, *POSITIVE NEUTRALITY: LETTING RELIGIOUS FREEDOM RING* (1993); Richard W. Garnett, *Positive Secularism and the American Model of Religious Liberty*, *PUB. DISCOURSE*, Jan. 30, 2009, <http://www.thepublicdiscourse.com/viewarticle.php?selectedarticle=2009.01.30.001.pdart>.

a significantly new direction? Early indications are intriguing. President Obama has criticized the Bush initiative for being politicized, for not expanding spending, and for not sufficiently stressing measurable outcomes.⁶⁸ Yet he often has emphasized his own strong commitment to fully engaging faith-based organizations, along with secular groups, in an “all hands on deck” approach to addressing social needs.⁶⁹ As a candidate he committed to maintaining the federal faith-based offices and the federal partnership with state faith-based offices, while advocating expanded use of intermediaries and even greater efforts to build the management and service capacity of private organizations.⁷⁰

But he has also voiced worries that the Bush initiative was too cavalier about constitutional limitations on religion.⁷¹ If Bush typically praised the “wonder-working power” of faith,⁷² Obama is more likely to emphasize the secular restraints within which faith-based organizations must work. He stresses the secular good that faith-based organizations must accomplish and emphasizes that federal funds must not be used for proselytizing or religious instruction,⁷³ and he has advocated banning religious hiring in programs that faith-based groups operate with federal funds.⁷⁴ Except for the religious hiring restrictions, these are restatements of themes of the Bush initiative, but the tone is one that may encourage a smaller public role for faith-based social services.

If that happens, it will be an unfortunate development for this third version of the faith-based initiative. The Charitable Choice rules (faith-based initiative 1.0) and the Bush equal treatment rules (faith-based initiative 2.0) require government to be biased neither for nor against faith-based providers and to seek to protect equally faith-based organizations and the clients who turn to government-funded services for help. The rules may need to be fine-tuned to better protect the religious freedom of those clients,

68. Amy Sullivan, *Why Obama seized the faith-based mantle*, USA TODAY, July 28, 2008, at A11.

69. OBAMA FOR AMERICA, *supra* note 4, at 2.

70. *Id.*

71. *Id.*

72. President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 28, 2003).

73. OBAMA FOR AMERICA, *supra* note 4, at 2.

74. *Id.* For the opposite stance of the Bush Administration, see CARL H. ESBECK, ET AL., *supra* note 25.

but better protection for them should not be purchased at the expense of greater restrictions on faith-based organizations.

President Obama should insist not only on protecting clients from unwanted religion but also on meeting the needs of the many clients who value services that include religion. Many Americans are religious believers who do not think that religion is irrelevant to social problems and solutions. I recall a time when I told an audience that Charitable Choice explicitly guarantees clients an alternative if they object to receiving services from a faith-based provider. Two people immediately leapt to their feet and said that they had been through a series of secular drug treatment programs to no avail but had finally gotten effective help when they went to a faith-based program. They both insisted, with great urgency, that if the government really cared for the well-being of citizens, it would add to the Charitable Choice guarantee the promise of faith-infused services for all clients who desire this kind of help.

I hope President Obama will show as much concern for citizens who are convinced of the power of faith as he does for those who are committed to secular methods. Wherever possible, he should work to ensure that there are not only secular alternatives to faith-based providers but also faith-based alternatives to secular services. It will be a very important improvement to the faith-based initiative if the Obama Administration greatly expands the use of “indirect” funding so that faith-integrated services can routinely be offered next to secular services.⁷⁵ The federal collaboration with faith-based organizations will best fulfill the twin requirements of the First Amendment—respect for religious exercise without the establishment of religion—when people seeking help can routinely choose between secular and faith-integrated services.

75. These comments draw from Brookings Inst., Panel, White House Partnerships with Faith-Based Organizations: What Should the New Administration Do? (Dec. 5, 2008), available at http://www.brookings.edu/~media/Files/events/2008/1205_faith_based/20081205_faith_based.pdf (containing the response of Stanley Carlson-Thies to MELISSA ROGERS & E.J. DIONNE JR., BROOKINGS INST., SERVING PEOPLE IN NEED, SAFEGUARDING RELIGIOUS FREEDOM: RECOMMENDATIONS FOR THE NEW ADMINISTRATION ON PARTNERSHIPS WITH FAITH-BASED ORGANIZATIONS (2008), http://www.brookings.edu/~media/Files/rc/papers/2008/12_religion_dionne/12_religion_dionne).