

**Redemption or Rehabilitation?  
Charitable Choice and Criminal Justice**

Sheila Sues Kennedy  
Assistant Professor  
Law and Public Policy  
School of Public and Environmental Affairs  
Indiana University–Purdue University Indianapolis  
801 W. Michigan Street  
Indianapolis, IN 46202-5152  
shekenne@iupui.edu

Prepared for delivery at the Conference on Religion, Crime & Punishment, Orlando, FL  
September 24-25, 2001

This manuscript is work in progress. Please do not cite or circulate it  
without the author's permission. Comments and criticisms are welcome  
and may be directed to the above address.

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, reforming welfare “as we know it.”<sup>1</sup> Among the provisions of that bill was a requirement that states contract with faith-based social service providers on the same basis as they contract with other nonprofits. The bill specified that “pervasively sectarian” organizations were not to be discriminated against; that such providers should be allowed to maintain hiring policies based upon their religious dictates; and that they could not be required to divest the premises where services were delivered of religious iconography. Subsequently, Charitable Choice provisions have been attached to Welfare-to-Work (1997), Community Services Block Grant (1998), and Substance Abuse and Mental Health Services Administration drug treatment (2000). The Community Solutions Act of 2001 (H.R. 7), which further extends the approach, recently passed the House of Representatives.

Although government partnerships with religious organizations and their affiliates has been a feature of the social service landscape for decades, Charitable Choice legislation has been attacked from Left and Right alike. Civil libertarians object to provisions that, for the first time, would allow employment discrimination with public funds, and worry that the legislation is part of a new assault on separation of Church and State. Religious Right activists demand assurances that funds will not flow to disfavored groups like the Nation of Islam or the Scientologists. African-American pastors in urban areas—arguably the main targets of the initiative—are concerned that “government shekels” will be accompanied by “government shackles,” that the costs and regulatory burdens involved

---

<sup>1</sup> The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, H.R. 3734, 104th Congress, 2d Session, P.L. 104-193.

in collaborations with government will divert resources from client services and will mute their prophetic voice.

Caught in the middle are public managers, who must make the legislation work in the face of significant administrative challenges. Those challenges can be grouped into three major areas: outreach and contracting procedures; contract administration; and evaluation. In each of these categories, political realities and especially constitutional constraints will significantly complicate the manager's job. While the administrative challenges are significant for all government programs, however, the evangelical nature of many faith-based criminal justice programs implicates the constitutional issues in ways that other programs may not.

### **Background**

Federal and state government units have provided services through nonprofit and religious organizations since the inception of government social welfare programs, although the media characterization of Charitable Choice and President Bush's faith-based initiative as "new" or even "revolutionary" has tended to obscure that history (U.S. Senate Judiciary Committee 2001). In a 1969 study of findings from a 1965 survey of 406 sectarian agencies in 21 states, Bernard J. Coughlin reported that 70 percent of them were involved in some type of purchase of service contract with the government. A 1982 study by F. Ellen Netting, focusing on government funding of Protestant social service agencies in one Midwestern city, found that some agencies received between 60 and 80 percent of their support from the government, and that approximately half of their

combined budgets were government-financed. In 1994, government funding accounted for 65 percent of the nearly two *billion* dollar annual budget of Catholic Charities USA, and 75 percent of the revenues of the Jewish Board of Family and Children’s Services (Monsma 1996, Brown and McKeown 1997, Minow 2000). As the American Jewish Committee (AJC) noted in a 1990 Report of its Task Force on Sectarian Social Services and Public Funding,

...there has been a long-standing history of governmental aid to certain sectarian social programs, demonstrating that, in the non-educational context, there may be substantial involvement between the state and sectarian institutions. The government has provided aid to sectarian homes for the elderly, foster child care homes, and hospitals...The legitimacy of such aid, as a matter of broad public principle, was confirmed in the Supreme Court case *Bowen v. Kendrick* (1988). In so ruling the Court relied upon a nearly century-old decision in which it had upheld unanimously the provision of public funds to a sectarian-affiliated hospital, *Bradford v. Roberts* (1899)—the only other time the Court had directly addressed the issue (AJC 1990, 5).

Confounding both historical and constitutional analyses of Charitable Choice and President Bush’s subsequent faith-based initiative is the fact that our public debate, and much existing First Amendment case law, assumes the interchangeability of “religious,” “sectarian,” and “faith-based” as descriptive terms. While the rhetoric used by Congressional supporters of Charitable Choice suggested a specialized meaning, neither

the legislation nor representatives of the White House Office of Faith-Based and Community Initiatives has defined what “faith based” means for purposes of Charitable Choice initiatives, or explained how these “faith based” organizations differ from the religious entities that have been partnering with government for decades. Many religious providers with histories of social welfare provision are “faith-based” in the most literal sense—that is, the provision of essentially secular social services is motivated by their religious beliefs. Feeding and clothing the poor, tending to the sick, and housing the aged are approached as religious duties, rather than as opportunities for proselytizing or transforming the individuals served. However, this is by no means universally true of religious organizations that have historically received government funding, especially old-age and child-care facilities (AJC 1990). Individual congregations are clearly “faith based” by anyone’s definition of that term; yet studies show that twenty percent of congregations providing social services engage in collaboration with government agencies. Most of those partnerships preceded passage of Charitable Choice (U.S. Senate Judiciary Committee 2001; Chaves 2001).

Given this history and background, it would have been helpful had Congress addressed several important questions: what does “faith-based” mean for purposes of these Charitable Choice initiatives? How do the FBOs targeted by Charitable Choice legislation differ from those with a long history of governmental contractual relationships? What are the barriers to their participation in social service delivery, and to what extent are those barriers constitutionally mandatory? What is the availability and interest, and what are the capacities, of these organizations? Few of these questions,

however, found their way into the Congressional debates about Charitable Choice (Kennedy 2001), and none were addressed by the legislation. The resulting ambiguities have created substantial public management issues, particularly where the services involve drug treatment and prisoner rehabilitation.

Charitable Choice legislation was explicitly predicated on the assumption that Faith-Based Organizations (FBOs) are more effective and efficient at providing assistance than the secular and religiously-affiliated nonprofits that have been delivering the bulk of tax-supported social welfare programs on government's behalf.<sup>2</sup> These claims have been made most frequently in the area of drug treatment, where Teen Challenge, for example, claims a success rate of 85%. (Goodstein 2001) Such a success rate would indeed be impressive—even remarkable; however, independent researchers point out that the success rate calculation is based upon the number of clients completing the program. If the calculation is adjusted to include those who start the program but do not finish, the rate drops to 25%. (Goodstein 2001) Furthermore, different drug programs define “success” differently, making meaningful comparisons very difficult. In fact, there is no empirical data available either to support or rebut a presumption that religious drug treatment providers, or FBOs in general, are more effective than secular providers.

In September, 2000, with support from the Ford Foundation, our research team commenced work on a three-year evaluation of Charitable Choice implementation by

---

<sup>2</sup> Prior to the mid-1960's a “public system provided basic human services to the needy, and a small private system supported by philanthropic donations delivered services to more specialized populations.” The majority of human services are now provided by nonprofits for whom government funds have become the principal source of revenue. (Salomon 1995; Stone, Hager & Griffin 2001).

three states—Indiana, Massachusetts, and North Carolina—chosen because they represent different political cultures and religious landscapes. We will investigate and analyze state governments’ methods of identifying and working with FBOs; assess the comparative efficacy of faith-based and secular providers; review the capacity of FBOs to bid for, and state governments to manage, purchase-of-service contracts; and address issues of public and constitutional accountability. During the first year of the project, as we have pursued our primary research objectives, we have also encountered and identified many of the practical issues confronting public managers who find themselves charged with translating the original Charitable Choice legislation into action.

### **Outreach and Contracting Procedures**

If Charitable Choice is intended to make government contracts more “user friendly” to FBOs who have not previously partnered with the public sector, so as to encourage their entry into social service partnerships (DiIulio, 2001), the first task for public managers will be to inventory their current procurement processes in order to identify and remove existing barriers to their entry. Public managers must then develop criteria for identifying, and mechanisms for reaching out to, new faith-based partners (FBOs).

Not surprisingly, the identification of barriers disadvantaging FBOs has elicited different responses in different states. Massachusetts significantly revamped its procurement processes in 1995, with the express purpose of making the government contracting process more accessible and transparent to all potential bidders. Massachusetts officials believe the revamped process does not contain barriers to FBO participation; furthermore,

the state points to its long history of contracting with Catholic, Lutheran and Jewish agencies. (Jensen 2001) While the Center for Public Justice gave Massachusetts an “F” on its recent “report card” rating the states on implementation of Charitable Choice (Center for Public Justice 2000), state officials took the position that the legislation was intended to “level the playing field” and Massachusetts’ field was already level.

North Carolina has approached implementation primarily through an existing effort: the Communities of Faith Initiative of the North Carolina Rural Economic Development Center. Launched in the early 1990’s, the program worked across denominational and racial lines to address the needs of rural inhabitants of North Carolina, particularly those living in or near poverty. The most numerous and powerful institutions in rural North Carolina were the churches; accordingly, it was through an alliance of those churches that the Rural Center proposed to deliver services. Subsequent to enactment of Charitable Choice, the Center has held two conferences, and has entered into a contract with the North Carolina Division of Social Services to initiate a church-based pilot program to support rural families as they move from welfare to work. “Faith Demonstration Awards” were made to five faith-based projects, most of which serve more than one county but none of which are statewide in scope. Communities of Faith also does training for FBOs; in 2000, organizations from 42 North Carolina counties attended its Faith With Works seminars.

Indiana has been the most ambitious of the three states we are studying. The state established an initiative called FaithWorks, designed to reach out to faith-based

organizations that had not previously contracted with the state, and to assist them with capacity-building and technical assistance. FaithWorks' short-term goal is to give such organizations the tools, access and information needed to become competitive with traditional providers. Its long-term goal is the creation of networks and links that will allow the faith community to sustain an effective presence in the area of social service delivery. As part of an overall outreach effort to the faith community, six informal meetings were held around the state in February of 2000. Invitations were sent to houses of worship and nonprofit service providers affiliated with religious organizations, although any interested organization was welcome to send representatives.

Approximately one thousand people attended. During the year, four hundred organizations received technical assistance, either through state-paid consultants or by attending state-sponsored workshops. Workshops included descriptions of the Charitable Choice legislation, state procurement procedures, the contracting process, effective proposal development, TANF program requirements and fiscal management and accountability.

“Affirmative action” outreach programs like Indiana’s FaithWorks or North Carolina’s Community of Faith Initiative are one method of achieving participation by FBOs, and publicizing the existence of a level playing field. Complete revamping of the procurement process, similar to the Massachusetts effort, is another. Both sets of states must confront a threshold issue, however: establishing appropriate criteria for bidders. Supporters of Charitable Choice have criticized insistence upon professional credentials and norms. In a recent article in *Commentary*, Les Lenkowsky argues for “elimination of

arbitrary rules that allow, for example, the use of professional therapy but not pastoral counseling.” (Lenkowsky 2001, 23) If an agency is putting together an RFP for counseling services, and requires that successful bidders employ licensed social workers, or certified drug counselors, has the state discriminated against FBOs offering unlicensed “pastoral counseling”? Lenkowsky clearly believes it has, although other religious spokespersons disagree. Addressing the House Committee on Government Reform’s Subcommittee on Criminal Justice, Drug Policy and Human Resources, Rev. Horace R. Smith, President & CEO of Group Ministries Baltimore, testified:

“In its present state, the proposed initiative seems to allow funds to be distributed to community and faith-based organizations basically because they meet the criteria that they are either community or faith based. The criteria for distribution of funds needs to go beyond that narrow stipulation. There should be some form of standardization these organizations are held to. There’s a danger that those we seek to service won’t receive the level of help they actually need because there presently is not any standard of care within the faith based community.”<sup>3</sup>

Reverend Smith strongly endorsed certification requirements, saying “I am a strong advocate for accreditation.”

States are accountable for the quality of the services they provide, and have a legal obligation to evaluate the ability of bidders to provide services at an appropriate level. If the bidder offers “pastoral counseling,” in lieu of professional certification, how is the

---

<sup>3</sup> Hearing on “Effective Faith-Based Treatment Programs” 23 May 2001.

probable efficacy of that counseling—and thus the responsiveness of the bidder—to be assessed? If the state appears to relax or discard professional standards when the bidder is an FBO, secular nonprofits and current state contractors may justifiably object that an unconstitutional preference is being shown to religious organizations in violation of the Establishment Clause. In his recent testimony on Faith Based Solutions before the Senate Committee on the Judiciary, John L. Avery of the Association for Addiction Professionals focused upon precisely that issue.

“NAADAC’s concern is not with who provides care, but rather by what clinical standards that care is provided. We are committed to the application of science-based best practices, perhaps as most succinctly stated in the National Institute of Drug Abuse (NIDA) publication, ‘Principles of Drug Addiction Treatment, a Research-based Guide.’” (U.S. Senate Judiciary Committee 2001)

Avery emphasized that, for his organization, the “salient issue is the clinical competency of the treatment provider” and concern for consumer protection and public safety.

If FBOs believe insistence on evidence of “clinical competency” is discriminatory, and the NAADC believes that failure to require such evidence is malpractice, it is no wonder that many public administrators feel caught in an untenable situation.

The states we are studying have also taken different approaches to the issue of who qualifies as an FBO. Massachusetts, as indicated, considers religious providers essentially

fungible, both with other sectarian organizations and with secular providers. All are officially considered equal, and evaluated solely with respect to the responsiveness of their bid. If lack of prior experience or absence of credentialed personnel operates to disadvantage some bidders, that is considered to be unfortunate but irrelevant. In Indiana, the state “counts” as FBOs only those participating in its Indiana Manpower Placement and Comprehensive Training (IMPACT) program. IMPACT is Indiana’s welfare reform demonstration project; it includes cash assistance and employment services programs for needy and eligible families with dependent children, and is funded with TANF dollars<sup>4</sup>. This approach has allowed the state to sidestep the more difficult constitutional issues involved in drug treatment and prison contracts, by concentrating its outreach in less problematic areas.

In his recent testimony before the Judiciary Committee, constitutional law professor Douglas Laycock raised a different outreach issue. Laycock noted that “choosing someone to deliver social services is more complex than picking the low bidder on a pencil contract. How do you keep thousands of government employees, federal state and local, from discriminating on religious grounds when they award grants and contracts?” (U.S. Senate Judiciary Committee 2001). The validity of this concern is underscored by statements issued by Pat Robertson and others, warning the administration against contracts with the Nation of Islam or the Scientologists. Laycock endorsed a “reporting requirement” that would require “explanation” of any “obvious over-or-under

---

<sup>4</sup> This approach to categorization has generated anomalies: Horizon House, for example, is a homeless shelter created and supported by a group of churches and other nonprofits. Its Executive Director is an ordained minister. Indiana does not consider Horizon House to be “faith based” for programmatic purposes; however, the Career Resource Center, a for-profit corporation which participates in IMPACT, is classified as an FBO, and self-identifies as faith-based.

representation” of religious providers. Whatever the merits of such a requirement, it would be yet another bureaucratic task requiring at least some level of resource allocation. Whether such a mechanism would minimize claims of bias is an open question; as Richard Foltin of the American Jewish Committee has noted,

“It seems almost inevitable that, whatever claims may be made that contracts will be allocated on the basis of merit, in any given community the religious groups most likely to receive funds will be those associated with ‘mainstream’ faiths. And, even if the contracts are allocated on a totally objective basis, there is likely to be sharp distrust and suspicion that this is not the case.”

### **Contract Monitoring**

Early experience in Indiana suggests that monitoring first-time FBOs requires considerably more resources, more “hands-on” help, than is needed with more experienced providers. This can be expected to diminish as such providers become more sophisticated about government’s expectations.

More troubling is the significant constitutional issue involved in monitoring. The Free Exercise Clause protects religious organizations against unwarranted intrusion, and what is “unwarranted” is subject to interpretation. Even if audit and accountability measures are perfectly appropriate constitutionally, elected officials have expressed concerns that, should state agencies find FBO compliance inadequate, charges of bias will be leveled and may well resonate politically. To the extent Charitable Choice focuses upon inner

city churches, race will inevitably become a part of the political equation in such situations, a prospect that concerns even strong supporters of Charitable Choice and vigorous outreach efforts.<sup>5</sup> If government oversight is not to be viewed as racially or religiously discriminatory, great care will need to be exercised to eliminate unintended disparities in the monitoring process. Oversight methodology and criteria will need to be well-conceived and communicated to faith-based contractors before the fact and with clarity.

State agencies are constitutionally required to insure that government funds go only to support secular activities. Consistent with that requirement, the original Charitable Choice legislation prohibits use of tax dollars for proselytizing, and prohibits conditioning service delivery upon participation in religious activities. Public managers are responsible for compliance with those restrictions; however, states have limited managerial resources with which to monitor programmatic content for constitutional compliance. Middle managers hired to administer service contracts cannot be expected to recognize any but the most egregious First Amendment violations, and have limited time to devote to such issues. If a violation is alleged and proven, however, the state can be held liable. As the Welfare Information Network frames the issue on a section of its Website devoted to discussion of frequently asked questions,

“State or local jurisdictions should consider these terms [“faith based organization” and “proslytization”] when working on contracting arrangements that are covered by Section 104 of the federal welfare

---

<sup>5</sup> It is instructive that this issue has been raised with the authors on several occasions, but always “off the record.” It is a persistent background concern that no one wants to acknowledge publicly.

reform law, P.L. 104-193, also known as the "Charitable Choice" provisions. Contracting with funds under the Temporary Assistance to Needy Families Program is covered by Section 104. The law does not offer definitions of "religious organization" and "proselytization," and although some states may have defined these terms in case law related to schooling or other issues, they are not familiar to many contract officers.

Given the lack of precedents, states and local jurisdictions generally have avoided legally binding definitions in their contracts, especially as to what constitutes proselytization. Instead, dialogue and "gut instinct" are guiding the implementation of the ban on proselytization when contracting with federal funds. This approach could include: ensuring that organizations bidding on a contract know in advance about the prohibition on using the contract funds for proselytization; talking with the contracting organization about the state or local agency's expectations, and the consequences of any problems reported with proselytization; and ensuring that participants are aware of the ban and what steps they can take if they feel uncomfortable receiving services from a religious provider. For example, Section 104 provides welfare recipients the right to seek alternative providers. Religious organizations have certain rights under Section 104 as well.

As Rev. Castanon of the United Methodist church warned in his testimony to the Senate Judiciary Committee on Faith Based Solutions,

“As long as government attempts to separate what is religious from secular in entities like churches, synagogues, mosques, etc. it risks becoming excessively entangled with religion, thus advancing it or hindering religion, both clear violations of the establishment clause.” (2001)

Finally, there is the requirement that secular alternatives be provided for welfare recipients who do not want a faith-based provider. Public managers will need to identify such alternatives and fund them. This should not present a problem in urban areas, but it can be a challenge in more rural states, or rural areas of states, where alternative providers may not be convenient, or even available, or in very homogeneous communities.<sup>6</sup> A related problem arises when a client who has been assigned to an FBO becomes uncomfortable with the religious context of the programming and requests a change of provider. The state must have procedures to allocate or recapture payment and find a replacement provider in such circumstances.

### **Evaluation**

State agencies should evaluate the efficacy of all service providers, secular or religious.

Such evaluation was problematic well before the passage of Charitable Choice; in all three of the states we are studying, the social welfare system is so radically decentralized and uncoordinated as to make sound evaluation of programs virtually impossible. In

---

<sup>6</sup> As Douglas Laycock noted in his testimony, “We have not succeeded in guaranteeing even one provider for all people who need these services. How can we plausibly guarantee a choice of providers?” (U.S. Senate Judiciary Committee 2001)

addition, welfare populations are notoriously difficult to track: poor people move frequently, often do not have telephones, and are frequently unresponsive to or intimidated by survey forms and other formal inquiries. The lack of credible data is one reason that welfare policies generally elicit such strong disagreements among scholars and policymakers.

Public managers must measure programmatic success—once defined—without intruding upon the constitutional prerogatives of the religious organization. This can be especially difficult when the FBO has chosen not to form a 501c3 affiliate, because monitoring and evaluation of fiscal performance will require review of books and records, and program costs may not have been segregated from other financial information. Even if there is a separate 501c3, some inquiry into the finances of the religious organization may be necessary if, for example, a church or synagogue is providing substantial in-kind support. Any analysis of the cost of providing services will include the value of volunteer time, use of church equipment and facilities, and similar accommodations. Valuing those accommodations may require more review than the FBO feels is constitutionally appropriate.

These are thorny issues, but their resolution is important, because good information is necessary if programs are to work.

## **Rehabilitation vs. Redemption: The Constitutional Dimension**

The foregoing discussion is applicable to social service providers generally; however, when the programs being provided are faith-based drug treatment and prison counseling, there is an almost insurmountable constitutional barrier to direct government funding. The nature of the dilemma is illustrated by the testimony of numerous advocates of religious interventions: they are very clear that they believe the only way to help teenagers on drugs, or prisoners, is through religious conversion. A recent quotation from Jack Cowley, national director of operations for The InnerChange Prison Fellowship Ministry is illustrative. According to Cowley, “We see crime as a result of sin and therefore we know that a relationship with Christ can heal people.” Unlike social services like job training and placement, day care or medical assistance, drug and prison programs are *faith-infused*. It is not accidental that so many prison programs are called “Ministries.”

Programs like InnerChange, Teen Challenge or House of Hope are centered on religious belief; acceptance of Jesus, the importance of biblical precepts and morality, *are* the program.

Prison Fellowship Ministries, one of the most prominent of the prison programs, describes itself as “Christ-based” and its vision as “That God’s kingdom will be manifested as the redemptive grace and peace of Jesus Christ are experienced by those impacted by crime.” The organization’s web page argues that crime is fundamentally a moral and spiritual problem that requires a moral and spiritual solution, and goes on to

state that “Offenders do not simply need rehabilitation; they require regeneration of a sinful heart.”

These drug and prison programs provided by faith groups have religious conversion as their primary purpose. Other programs encompassed by the Charitable Choice initiatives may create environments within which constitutional violations are more likely to occur, but the programs can be conducted in a constitutionally appropriate fashion; funding for programs like Teen Challenge and Prison Fellowship Ministries, however, is clearly funding *for* religion and—under decades of First Amendment jurisprudence—constitutionally prohibited.

In 1946, Justice Hugo Black summarized the meaning of the First Amendment’s religion clauses in an eloquent paragraph that has been cited in numerous religious liberty cases:

“The Establishment Clause means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No 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.” (*Everson v. Board of Education*, 330 U.S. 1)

The mere fact that tax dollars are paid to a religious organization, of course, is not equivalent to funding religion. Government may constitutionally purchase services, including social services, from sectarian sources, or enter into other partnerships that involve the transfer of tax dollars to such entities so long as the funds do not support inherently religious activities. The relative lack of concern over government’s historic support for religious social services is at least partly because the secular nature of those services is readily apparent. Hospitals and nursing homes are providing medical care; day care facilities are supervising children; job placement counselors have secular counterparts engaged in providing similar, if not identical, programs. While economists remind us that dollars are fungible, it is relatively simple to calculate the costs of nursing services or child care, and to subsidize only that (secular program) cost.

In the parochial school context, where there has been much more debate and litigation, programs that have passed constitutional muster have been those involving an identifiably secular benefit available to all citizens—immunization, speech and hearing testing, transportation—where exclusion of children attending religious schools was deemed to burden the free exercise rights of parents opting for religious education. When public aid has been disallowed, the Court has pointed to the “pervasively sectarian” nature of the religious school, and the impossibility of ensuring that only secular program elements benefit from the expenditure of public funds. “Pervasively sectarian” organizations are defined by the courts as those in which the religious elements are so fundamentally interwoven into every aspect of programming that it would be impossible to separate them for purposes of ensuring that support goes only to the secular portions.

In *Agostini v. Felton*,<sup>7</sup> the Court (quoting from *Witters v. Washington Department of Services for the Blind*<sup>8</sup>) explained that in order to be constitutionally permissible, any public money earmarked for secular purposes that ultimately goes to pervasively

---

<sup>7</sup> 521 US 203 (1997)

<sup>8</sup> 474 US 481 (1986)

religious institutions must do so “only as a result of the genuinely independent and private choices of individuals.” Many constitutional commentators believe a voucher program for social services that allowed recipients to choose between religious and secular providers would be constitutional. If public dollars have been allocated for a secular purpose (drug treatment or offender rehabilitation, for example) and if there is a “genuinely independent and private” choice of service provider, then there is no constitutionally persuasive reason to prevent an elderly person seeking nursing home care from spending her benefits in a nursing home run by her religious denomination, or to prevent a drug-dependent teen from choosing to enroll at Teen Challenge. As the Court struggles for neutrality in its application of the religion clauses, as it searches for a formulation that neither burdens nor benefits religious practice and belief, the exercise of intervening independent choice sufficient to insulate government from a charge of endorsement would seem to be the fairest way to achieve evenhandedness. Many constitutional scholars thus believe that a voucher program would be legally and practically preferable to direct contractual relationships between FBOs and government agencies. Such an approach could allow religiously infused drug treatment programs to participate; however, it would not solve the practical and constitutional dilemmas posed by prison ministries, nor would it moot the very real debate over accreditation requirements for government contractors.

### **Conclusion**

Religious organizations are doing wonderful things. If I have learned anything in the course of my research, it is that it is impossible to overstate the extent of the contribution being made to this nation by people and organizations of faith. A recognition of that fact does not, however, impel an uncritical embrace of Charitable Choice, as many of those same religious organizations have cautioned.

The question is not: are these organizations doing good work? They are. Nor is it: should government partner with them? It does and it always has. The real questions are: When? How? With which ones? Under what circumstances? Answering those questions adequately will require us to revisit some foundational issues that have gotten lost along the increasingly politicized way.

## References

- Brown, Dorothy. M., and McKeown, Elizabeth. 1997. *The Poor Belong to Us: Catholic Charities and American Welfare*. Cambridge, MA: Harvard University Press.
- Chaves, Mark. Interview by author. Chicago, IL, April 2001.
- Charitable Choice Compliance: A National Report Card. 2000. Annapolis, MD: The Center for Public Justice. Available from:  
[http://www.cpjustice.org/stories/storyReader\\$](http://www.cpjustice.org/stories/storyReader$). Accessed August 1, 2001.
- Coughlin, Bernard J. 1969. *Church and State in Social Welfare*. New York: Columbia University Press.
- DiIulio Jr., John J. Know Us by Our Works. *Wall Street Journal*, 14 February 2001, 237 (32):A22.
- Goodstein, Laurie. Church-Based Projects Lack Data on Results. *The New York Times*, 24 April 2001. [Online]. Available from:  
<http://www.nytimes.com/2001/04/24/politics/24FAIT.html?searchpv=nytToday>. Accessed August 21, 2001.
- Jensen, Laura. Interview by author. Indianapolis, IN, May 2001.
- Kennedy, Sheila S. 2001. Privatization and Prayer: The Case of Charitable Choice. (Currently under review.)
- Lenkowsky, Leslie. 2001. Funding the Faithful: Why Bush is Right. *Commentary* 111 (6). Available from: <http://www.commentarymagazine.com/0106/lenkowsky.htm>. Accessed August 1, 2001.
- Minow, Martha. 1999. Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew it. *Duke Law Journal* 49: 493.
- Monsma, Stephen V. 1996. *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money*. Lanham, MD: Rowman and Littlefield Publishers.
- Netting, F. Ellen. 1982. Secular and Religious Funding of Church-Related Agencies. *Social Service Review* 56,4: 586-604.
- Raibley, Matt. Interview by author. Indianapolis, IN, July 2001.
- Salamon, Lester M. 1995. *Partners in Public Service: Government-Nonprofit Relations in the Modern Welfare State*. Baltimore: Johns Hopkins University Press.

Stone, Melissa, Mark A. Hager and Jennifer Griffin. 2001. Organizational characteristics and funding environments: A study of a population of United Way-affiliated nonprofits. *Public Administration Review* 61,3:274-287.

Task Force on Sectarian Social Services and Public Funding. 1990. New York: The American Jewish Committee.

U.S. Senate Judiciary Committee. *Faith Based Solutions: What are the Legal Issues? Hearing before the Judiciary Committee.* 107th Cong., 1st sess., 6 June 2001.