

Calvin Lecture #3: Charitable Choiceⁱ

Belfast, Northern Ireland

It is a great honor to be invited to this series of seminars that considers the evolving relationship between government and religious institutions. Our particular interest today is the proper place of religious institutions in providing social services, and the proper role of government in funding and regulating services provided by religious organizations.

These issues have come to the fore on both sides of the Atlantic during the last decade. Prime Minister Blare has praised and encouraged the role of religious bodies in providing for the practical needs of citizens, and has encouraged greater cooperation between government and faith-based organizations. Similar themes have characterized the current and previous American administrations. At the same time, the European Union has proposed guidelines for hiring and employment directives that may have serious implications for such cooperation, and member states are to enact legislation implementing these directives by year's end. Thus there is focused interest on the importance of thinking through the appropriate relationship between the state, faith-based organizations, and the provision of social services.

I would like to open our conversation by talking about our recent experience with these issues in the United States. First I will consider *what faith-based organizations are able to do* as community service providers. Then we will consider how *public policy and law*

are affecting the relationship between these providers and the state, on both continents. And finally I will outline *some complications that have arisen* as public policy and law have evolved in the United States.

I realize that we Americans are noisy neighbors, and you hardly need much reminding about what the U.S. is like, but it may be helpful to briefly mention a few distinctives before we think about comparisons across the ocean. First, the United States is a pretty big place. I live in Michigan, which is not particularly large among the fifty states, but Michigan is still as large as England and Scotland combined, about three times the size of your beautiful island—which is to say, perhaps 12 times the size of Northern Ireland. The country's size and history have made the United States rather diverse—culturally, ethnically, and religiously. Our “federal” system of government divides responsibilities not only among different branches of government—legislative, executive and judicial—but also among levels of government, with national, state and local governments responsible for different but overlapping responsibilities for social services. And finally, some social services are not directly provided by government offices, but instead offered through “vouchers,” which are in effect gift certificates that can be spent by the recipient at a variety of private and public providers. This all makes for a rather complicated social-service and public-policy situation, some of which we will try to plumb today.

1. What Can Faith-Based Organizations Do?

Judging by what faith-based organizations (FBOs) *actually* do, the answer is: Quite a lot. At a conference I attended this month in Washington, Catherine Marshall of the World Bank reported that FBOs are the largest distribution system in the world, exceeding Coca-Cola or international beer sales. Marshall continues: Over twenty percent of the world's resources are controlled by religious organizations, and between thirty and fifty percent of health and education worldwide is provided by FBOs. They are especially important in low-income countries and neighborhoods, and often earn higher levels of local confidence and credibility than other non-governmental organizations or governmental structures.

As in the United Kingdom, FBOs and other non-profit community organizations are major providers of social services in the United States. For example: about 50% of Americans attend church on any given Sunday; 74% of their congregations contribute volunteers to FBOs that provide social services; 59% of church members volunteer to provide social services at least several times a year. Eventually this all begins to add up: One-third of American GDP is provided by non-profits, and perhaps half of this is provided by FBOs. Over two-thirds of federally-supported residences for the elderly are operated by FBOs, and one-sixth of child-care facilities are housed in religious facilities. Congregations and FBOs spend \$15-20 billion of private voluntary contributions each year on social services, and government funds at least an additional \$2 billion per year of social services provided by FBOs.

The privately, voluntarily-funded services often include *long-term services* (such as child care, long-term homeless shelters, educations, health clinics, substance-abuse programs, adoption services, English as a second language and high-school completion programs, refugee resettlements, counseling for abstinence/nutrition/budget/family issues, senior home care, disabilities care, transportation services, employment assistance and training, youth mentoring, and after-school programs. Though voluntarily-funded FBOs may include such services, they tend to emphasize more *short-term, emergency-aid services*, such as emergency food banks, emergency housing shelters, short-term financial or clothing assistance, and maternity homes. Most government funding for FBO social services has gone not to individual congregations, but rather to large, national organizations who receive up to two-thirds of their funds from government. These organizations often emphasize longer-term services. The biggest uses of public funds by FBOs are for housing programs, education vouchers, welfare-to-work programs, and food/shelter programs.

When public officials praise the work of FBOs, they often emphasize special qualities that FBOs are said to bring to their tasks. The most commonly-cited advantages of FBOs include the following:

- FBOs may offer special access to large pools of especially committed workers, who are able to reach people in ways different from other providers. One 1998 study finds lower pay among FBO providers, but more experienced and better educated employees than among private- or public-sector counterparts.

- Local, community-based solutions are often in practice preferable to cookie-cutter large-scale answers. Small FBOs often know local needs, and build networks of relationships that fight the isolation of the poor. FBOs are often willing to work in the worst neighborhoods; they are flexible, personal, usually deeply committed, and encourage a moral code that reinforces personal responsibility.
- The presence of FBOs strengthens civil society and the voices of advocacy and dissent. FBOs can serve to challenge policy-makers to improve public policies.
- In some cases, there are spiritual roots to social problems. There is no bright line dividing secular and spiritual causes of human difficulties. But public programs often institutionalize a false dualism. FBOs can serve to break this barrier down.

2. Public Policy and FBO-State Relations

In the United States, we are navigating among a number of legal provisions that are in creative tension with each other. Consider first several elements from the original amendments to the American Constitution (1787):

[insert bill of rights overhead]

The First Amendment requires that Congress make no law concerning endorsement of a particular religion, yet seems to limit itself to the national Congress (not other entities of government) and seems to only require even-handedness, not hostility to religion. It goes on to guarantee freedom of assembly, which it taken to mean not only the opportunity to literally meet in public but also to form and promote a thick web of civil-society

institutions, without having their functions overtaken by the state. The Fifth Amendment (along with other Constitutional amendments) guarantees due process and equal protection under the laws. Thus we would expect that there should be no discriminatory procedures that disadvantage faith-based organizations relative to their secular peers. And the tenth amendment refers to the American attempt at subsidiary federalism, in which there are multiple layers of government and preference is generally given to lower, more local institutions when possible.

Unfortunately, the apparent thrust of these amendments toward favoring community and faith-based organizations is not as simple as it might seem. Though the First Amendment speaks only of the national Congress (not government in general), and though the law was originally intended, at least in part, to prevent Congress from *disestablishing* individual state governments, in 1947 it was interpreted by the Supreme Court to bar action by the state-in-general that touches upon religion-in-general. In later Supreme Court decisions, this “wall of separation between church and state” (a phrase from a personal letter by Thomas Jefferson, not the Constitution) was given two different meanings—the “strict separation” meaning just referred to, and a “state neutrality” meaning, in which government involvement in religion may be acceptable under certain circumstances. For example, in 1971 the Supreme Court judged that such involvement was acceptable when it involves a secular purpose without advancing or inhibiting religion, when there is no “excessive entanglement” between government and religion. These two meanings—strict separation and neutrality--were applied differently in various contexts, in ways that are not always consistent. For example, the chaplain of the

national Congress may open sessions with prayer, but teachers at publicly-funded schools may not offer even a moment of silence if prayer is listed as an optional activity during that silence.

All of these difficult questions arise when the state becomes directly related to religious institutions. The situation is less confused when FBOs act without direct government funding or involvement. The 1964 Civil Rights Act requires that, in general, hiring must take place without regard to gender, race, national origin, and other attributes, including religion:

[insert Civil Rights Act language]

Yet Title VII of the Civil Rights Act grants an explicit exemption from the requirements touching upon religion: Religious organizations may consider the religious identity, belief and compliance with norms of job applicants when they make personnel decisions. Furthermore, the Equal Opportunity Act of 1972 specifically grants these Title VII exemptions to all FBO job categories—they apply not only for clergy but for all job categories within the organization, including positions that deliver social services. The Civil Rights Act further exempts all organizations with fewer than fifteen employees from the requirements of the Act, whether they are religious or not. The Supreme Court unanimously upheld the Title VII provisions for religious organizations in 1987. These provisions are taken to be important in maintaining the common values, sense of community, and unity of purpose that contribute to FBO effectiveness in serving citizens,

and it is also taken as a matter of principle that the state should not in general have the power to define religious belief or practice for citizens.

Thus the law is clear that voluntarily-funded FBO ministries may hire with respect to religious standards, for all job categories. Law and practice are less clear when government money is used to fund faith-based service ministries. This is especially difficult in cases where programs are jointly-funded by various levels of government, not all of which may grant the same hiring exceptions to FBOs.

In this uncertain legal situation, two practices gradually emerged during the last two generations, as a response to the uncertainty: 1) Government contracting guidelines sometimes exceeded the clear requirements of the law, making funds unavailable to some legitimate, effective programs—especially small, urban, church-based ministries which in America are disproportionately African-American or Hispanic. Some government programs explicitly forbade religious organizations from applying for funds—for example, in ownership of residence programs for the elderly and disabled, though there exists no basis in law for this practice. Community Development Grants similarly prohibited funding “as a general rule” to “primarily religious” organizations “for any activities, including secular activities.” 2) These tendencies were reinforced when some large, nation-wide FBOs seeking public funding effectively secularized their operations and hiring to avoid the threat of lawsuits. Over time, they sometimes influenced the contracting process to help assure that they would be favored and newcomers disfavored for future contracts.

As the courts gradually moved from emphasizing “strict separation” toward “neutrality” understandings of the law, the situation became ripe for a Congressional clarification of the law surrounding government funding of faith-based social services. The 1996 Charitable Choice law attempts to bring clarity to this situation. “Charitable Choice” refers to a small component of the 1996 Welfare Reform legislation. Charitable Choice was signed into law by President Clinton with bipartisan support, was expanded several times under him by bi-partisan majorities, and was endorsed by both 2000 presidential candidates. The law seeks to improve the quality of social services for the poor, but also to bring fundamental change in the place of faith in the American public square, by “leveling the playing field” for faith-based providers of social services in several Federal programs:

- In brief, when federal/state/local governments contract with non-governmental organizations to providers government-funded social services, FBOs must be allowed to compete for funds on the same basis as other providers. This non-discrimination applies to government contracts, grants, certificates and vouchers. FBOs are also subject to the same program evaluations as other providers. (Governments are not *required* by the law to contract with any outside organizations; as of the 2001-2002 legislative cycle, about twenty states had funded FBO contracts. No funds are “set aside” for FB providers, and the law only applied to welfare-to-work programs initially--a very small portion of Federal spending, including things like job training, work placements, and job-readiness mentoring. The law was expanded later in the ‘90s to two other

programs: drug-treatment initiatives and community-action grants (including things like child-support enforcement and homeless programs).) Other Federal programs have invited FBOs to participate, without the explicit Charitable Choice provisions of this law.

- To protect the faith-based character of FB providers, the law allows that they may maintain their religious atmosphere (for example, displaying religious symbols), choose their governing board according to their own standards, and retain their Civil Rights Act Title VII protections to hire, fire and discipline workers according to religious standards. (They still must observe all other Civil Rights Act hiring protections.) The organization retains control of the definition, development, practice and expression of its convictions.
- To protect the liberty of recipients: People receiving social services must be served without reference to their beliefs. Though the provider needn't separate its religious nature from its social service activities, and though the FBO may use principles rooted in its faith system and religious tradition, recipients may decline to participate in inherently religious activities (except when using vouchers, where the ability to decline is implicit in the freedom to use vouchers at multiple sites). Participants must be offered a secular alternative provider if they object to the faith-based program. (There is no corresponding right to request a faith-based provider as a result of objections to a secular provider.)
- To protect the institutional separation of church and state, public funds may only be used to fulfill the public social-service goals of the program being funded. No public money may be used for inherently religious activities; any worship or Bible

study or similar inherently religious activities are to be separated in time or place from the publicly-funded activities. Public funds are subject to audit, but the rest of the organization can be shielded from federal audits by keeping the public funds in a separate account.

These provisions are judged to be aid to the public, not to religion, even though the provider may be a faith-based organization. When a variety of organizations are eligible, including secular ones, and together they provide a legitimate public purpose, then the use of public funds by religious organizations is not judged a violation of the constitution (though some forms of religious school funding have been judged unconstitutional). The Supreme Court has never ruled against a social-welfare program on the basis that FBOs participated, and the court has held that there is no free-exercise-of-religion right for taxpayers to object.

This approach strikes a relatively open stance to religion in the public square. For a brief period just after the Second World War, several Supreme Court decisions tended to enshrine a different vision, one more consistent with the classic Enlightenment view of faith as an internal, subjective affair that had no place in the public world of facts and politics. But more recent jurisprudence and legislation has returned to the longer American tradition, consistent with several European Christian Democratic traditions. In fact, Charitable Choice legislation was directly influenced by the tradition of Christian Democrats in the Netherlands, as several drafters of the legislation were drawing directly

on the work of Abraham Kuyper, the Netherlands' Prime Minister at the turn of the last century.

In this context, there is a stark contrast between the direction of American policy and that of the European Union. In the European Union Employment Directive, which is to be implemented by December of this year in the EU member states, we have a position that is much more hostile toward faith in the public square, and as such more consistent with the principles of secular modernism than the American practice. In particular, we can contrast the Directive with the provisions of the Civil Rights Act. The Act grants explicit religion-related hiring exemptions to religious organizations for all of their job categories. But the Directive allows employment exemptions, now or in future, only when an activity's nature or context make "a characteristic... a genuine and determining occupational requirement," and then only if:

- the objective is legitimate,
- the requirement is proportionate,
- the Directive's provisions are otherwise complied with,
- the ethos of the organization is based on religion/belief ("Religion," "belief" and "ethos" are not defined.)
- the organizations acts in conformity with national constitutions/laws (i.e., the member state must specifically provide for the exemption; the default position is no provision of an exemption)
- hired individuals are required to "act in good faith and with loyalty to the organization's ethos." (Contrast the provisions in the American laws that allow

organizations to consider a person's "religious identity, belief and compliance with norms.")

The Directive makes some allowance for previous practice in member states: Member states may allow for more differences only if:

- The exemptions were law (or practice eventually codified into law) at the time of adoption of the Directive.
- ethos of the covered organization is based on religion or belief.
- The activities' nature or context makes the employee's religion or belief "a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos."
- The difference of treatment is implemented "taking account of Member States constitutional provisions and principles, (and) the general principles of Community law."
- The differences do not "justify discrimination on another ground."

In practice, in the UK, such standards have been interpreted relatively strictly, with relatively little allowance for invoking religion-related standards in hiring.

3. Complications Under Charitable Choice

Many who favor Charitable Choice practices in principle still fret that there are prudential reasons to be wary. The autonomy and mission of religious organizations might be

threatened by government restrictions; religious organizations might lose their prophetic voice once they become accustomed to state financing; Charitable Choice might be a ploy to eventually shrink government funding for social services in the future, with the resulting burden placed at the feet of FBOs; the quality of social services offered by FBOs might prove to be inferior, harming their reputation as well as those in need of service; and the rights of non-religious citizens might be infringed as a result of alliances between the state and FBOs. We now turn to these concerns, organized around two themes: the administration of project bidding, and the government's evaluation of social services.ⁱⁱ

The Administration of Project Bidding

Simply have a good-looking law on the books does not ensure that contracts will actually be let in a fair way. This is clear, for example, in the way that Clinton-administration executive orders effectively emptied Charitable Choice law of its potential impact in many states. So we must turn from the letter of the law to consider the means by which it is administered.

American federalism complicates our task. Charitable Choice is a *federal* law about the use of federal money. But many social service programs are *administered* by states or counties, often with a mix of federal and state money. Charitable choice law does not prescribe how it is to be implemented by the states. Even with clear law, it is potentially ineffective if the states do not implement it with fair bidding procedures and clear

employment procedures. Not all state and local government officials even *know about* Charitable Choice, or comply with it. For example, during the Clinton administration, it appears that only Oklahoma, Texas, Michigan and Wisconsin universally complied with the law, with other states at various levels of formal compliance, and the large majority without formal employment protection legislation. This may be because of the Clinton administration's notably lax enforcement of the law. The President not only made the law a low priority, but also issues executive orders after his re-election and at the occasion of each extension of the law, interpreting the law to not require fair contract bidding procedures in the case of "pervasively sectarian" providers—effectively negating the core idea in Charitable Choice law.

By contrast, President Bush's first executive order created the White House Office of Faith-Based and Community Initiatives, which aimed to lower the administrative hurdles faced by FBOs when they wish to provide government-funded social services. His second executive order created "satellite" offices with similar aims in the main Federal government ministries that fund social services. These offices, for example, provide technical assistance for FBO funding applications, and have established websites that promote funding opportunities for FBOs. Some states have complemented this effort by, for example, hosting educational meetings about grant writing doing demonstration projects with FBOs to learn about how to work together with them, and changing procurement practices to lower barriers for FBO participation.

Even in such “open” states, there remain administrative barriers and complications. The requirements for tracking of funds, and the licensing and credentialing requirements for staff (e.g., medical-staff requirements for drug-treatment programs) create significant obstacles for some small FBOs. In a 2002 study by Stephen Monsma, bureaucratization and paperwork requirements were the main complaints of FBOs receiving public funds. Often FBOs lack the start-up funds to create a full-documented program for which to apply for funding, and may lack cash reserves to carry the organization until government reimburses it for services rendered. Some FBOs have overcome these obstacles by banding together through intermediary administrative FBOs, to spread out their overhead.

Some FBOs and academic researchers also fear that the “professionalism” required to participate in the government bidding process will encourage a loss of spirituality in the program, or even secularization. One 1998 study indicates that government funds may tend to make the less-religious programs more secular, while encouraging the more-religious programs to expand their services. Dependence on government funds could also potentially move an FBO from its traditional constituency, which might gradually lead to secularism. Thus many scholars and religious leaders recommend that government must actively protect the religious nature of participating FBOs.

In the end, each FBO is left to judge the dangers of secularization, though the law was drafted by people who sought to minimize the pressures toward secularization by ensuring legal and practical protections for FBOs. Though these are all potential difficulties in principle, a 2001 General Accounting Office report finds no literature

reporting problems due to non-discriminatory employment exceptions in the law, no problems due to the requirement that funds may not be put to explicitly religious uses, and no problems related to the requirement that an alternative, non-religious provider must be provided when requested. The report also found no reported difficulties related to the ability states have to exempt particular FBOs from some certification and program-oversight requirements related to specific services (such as child-care facilities, substance-abuse programs, and youth homes).

The GAO report considered potential problems from the perspective of participants and government overseers; a different approach would ask FBOs if they have experienced the difficulties with Charitable Choice law that some had feared. A survey of 400 FBO service providers in fifteen states (Sherman, 2002) finds that 93% of the FBO contractors are satisfied with their relationship to government. Of these providers, one-fourth are individual congregations, three-fourths other organizations; 56% have fewer than 15 employees. 42% of the providers represent evangelical organizations; primarily-minority churches are more active in contracting with government than primarily-white churches. Over half of the providers were new to government contracting since 1996.

Only 9% reported that even a single client left for a secular alternative. Both the number of contracts written with individual congregations, and the range of services provided by FBOs, have expanded since 1996. Few problems with government intrusiveness or the application process were reported. 87% of providers expanded their number of recipients through the grants, and 68% started entirely new programs with the money. Fewer than

6% agreed with any of the common fears that, for example, public money might affect the organization's mission, displace private giving, or limit the organization's ability to criticize government.

Government Evaluation of Social Service Provision

If, in order to receive funds, a service provider must effectively meet secularizing standards, then the nominal protections of the law do not matter as much as the standards for evaluating the provider. Thus we turn to the evaluation process to complete our consideration of Charitable Choice initiatives.

Monitoring and evaluation of the public funds used by FBOs is by nature a difficult process. FBOs often operate more informally than other providers, with more volunteers and smaller administrative staffs. They often have less experience with government contracts and the detailed information collection these contracts require. American Federalism does not help. The devolution of programs to county offices makes it harder to track disbursements or evaluate program results. If vouchers are involved, there is even more difficulty tracking where the vouchers are redeemed.

FBOs also often have different program emphases than other providers. Whereas government has emphasized the provision of services, FBOs often emphasize transformation of a person's spirit of values. Such changes are often undocumentable, so FBOs end up needing to do more with fewer resources for documentation and evaluation.

There is some evidence that FBOs may be inspected more closely in welfare-to-work programs than their secular counterparts (Monsma, 2002), but also evidence that formal partnerships between FBOs and state/local government are emerging (e.g., Sherman, 2002, who documented 84 such programs among the 400 FBOs she studied).

On the other hand, there has existed very little evaluation of prior government funding of social services. The emphasis has been on simply documenting the provision of the services without financial improprieties, not on evaluating the actual effects of these services. So there is not a very high documented threshold of effectiveness that must be equaled by small FBOs. A 2002 GAO report finds there is simply no information on which to assess the relative effectiveness of FBOs in providing social services. But there is some direct and much indirect evidence that FBOs are more effective in enabling people to overcome social ills. Prisoners involved in Prison Fellowship Bible studies have much lower recidivism after release than those not involved; Teen Challenge's drug treatment program is much more effective than secular counterparts. One literature review finds no single case of a secular program outperforming a similar or parallel faith-based program. (Monsma, 2001) There is also much (overwhelming) indirect evidence of religious belief and practice being associated with higher marital satisfaction and lower divorce and illegitimacy rates, lower suicide rates, lower poverty rates, and higher levels of self-esteem.

Conclusion

In all honesty, we must say that the jury is still out on the ultimate effects of Charitable Choice law. The law is limited to a small slice of Federal spending. Implementation in the states has been spotty, and subject to the influence of executive orders that change when presidential administrations change. Yet the initial indications seem to present Charitable Choice as an alternative that serves to improve the social services available to the poor, while also enriching political culture by preserving a reasonable place for faith in the public square.

ⁱ For many of the general statistics about the role of FBOs and volunteers in the world economy, I am in debt to a conference presentation by Catherine Marshall of The World Bank. For directing me to information about the EU Employment Directive, I am in debt to Alwyn Thompson. The Center for Public Justice provided a helpful summary of the provisions of Charitable Choice law. I learned much about the legislative process and judicial history behind Charitable Choice from several conference papers and book chapters by Douglas Koopman and Amy Black.

ⁱⁱ We could easily add a third area in which complications have arisen in developing Charitable Choice legislation: the legislative process itself. It would be nice if we could draw a simple line from serious scholarship to the formation of public opinion to the enactment of legislation. "Seeing weaknesses in former approaches to welfare, and believing deeply in the dignity of the person, yet also believing in the responsibility to form the common good, legislators deliberated and crafted a third, better way." Unfortunately, the linkages among values, scholarship, belief and legislation are a bit looser than we might hope, and it is worth thinking about why and how we have acted as we have during the 90s. Some in the process were motivated by improving the lot of the poor, but others sought the poor's electoral votes, and other simply wanted to favor particular religious viewpoints rather than create genuine pluralism. Largely because of the conflict among motives, extensions of Charitable Choice law were bogged down during the first two years of the Bush administration, essentially getting nowhere. It appears that a version of Charitable Choice law will be passed in the administration's third year, but without extending Charitable Choice to any new areas of Federal funding, and without explicitly guaranteeing faith-based organizations' rights to hire employees based in part on their religious beliefs and practices.