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ARTICLE

THE COMMON GOOD REQUIRES ROBUST INSTITUTIONAL RELIGIOUS FREEDOM

STANLEY CARLSON-THIES*

The topic of this Symposium seems inherently contradictory—religious freedom appears to be directly at odds with the common good. Many in our society regard religious views and practices as harmful; to the extent that they are right, religious freedom, by protecting those views and practices, allows action against the good of some, and thus against the good of all—the common good. Even if religion is not generally bad, it comprises a number of distinct belief systems and ways of life; religious freedom, by protecting such sectarianism, contributes to, and deepens, divisions in society. That outcome seems to be at right angles to whatever the common good might be.

In opposition to views such as these, I will argue that a broad freedom for religious exercise, including an extensive freedom for religious institutions to be distinctive—to depart from generally accepted practices and standards—is necessary to achieving the common good. Religious freedom does not subvert the common good; rather, it is essential to it.

In my comments, I will generally ignore the limitations on religious freedom that are also necessary, along with limits on other freedoms, if the common good is to be secured. I do this to underscore the vital importance of religious freedom itself to the common good. We are so accustomed to arguments, laws, and legal decisions that warn against, and cabin, unbounded religious freedom, that its positive contribution to the common good—moreover its indispensability—receives insufficient attention. I will stress those positive contributions, while acknowledging that no freedom, in practice, can be unbounded.

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By religious freedom, I mean protection in law for persons and organizations to act or not act in accordance with their religious convictions—within limits, of course—even when such action or refusal to act conflicts with generally applicable laws or society’s general sense of what is right. This legally protected religious freedom to be countercultural is a freedom not only to hold different views or convictions, but a freedom to act or not act based on those different views or convictions.¹ It is a freedom not only to act or not act in worship and in private spaces, such as churches and at home, but also out in society. It is a freedom not only to do, or not do, “religious” things, e.g., engage in worship or wear religious clothing, but to act, or not act, as required by religious conviction in “secular” matters, such as providing medical care. It is not only a personal freedom, but a protection for persons to join with others in creating and operating organizations that act or do not act in accordance with religious conviction.

As to the concept of the “common good,” it is an important and complex topic that receives special attention in the sophisticated body of Catholic Social Teaching.² In the following discussion, I will argue that the common good should be a norm or goal for political communities.³ According to this political norm, every person in a political community ought to be protected in order to exist and flourish, with no one treated worse than others. The good of each and all ought to be promoted as much as possible, including by means of communal actions undertaken by the government to achieve outcomes and to provide goods that cannot be produced by any individual, particular segment of society, or private institution or endeavor. According to the political norm of the common good, laws, government actions, and government programs must, as far as possible, aim for the good of all, not the good of some over the good of others in the political community.

How, then, might religious freedom, including legal protections that enable religious organizations to operate and serve differently than do their secular counterparts, contribute to the achievement of this political or governmental common good for the promotion of the interests and flourishing of all? Does religious freedom elevate the limited interests and convictions of some over the interests and convictions of others? Indeed, it is a common view that religious freedom, unless narrowly confined, constitutes a “right to discriminate,” or a right to harm others.⁴ Therefore, I begin by briefly discussing an event and policy study which pleaded for restrictions on relig-

1. For a much narrower definition of what religious freedom is or should be, see MARCI A. HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* (2d ed. 2014).

2. For one helpful wide-ranging discussion of the concept, see generally *IN SEARCH OF THE COMMON GOOD* (Patrick D. Miller & Dennis P. McCann eds., 2005).

3. Cf. James Skillen, *The Common Good as Political Norm*, in *IN SEARCH OF THE COMMON GOOD*, *supra* note 2, at 256–78.

4. For two of the many expressions of this view, see generally U.S. COMM’N ON CIVIL RIGHTS, *PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIB-*

ious freedom for the sake of the good of LGBTQ older adults. Their good, of course, is part of the common good.

The event, held in New York City in December 2017, and the policy study, released at that event, were both entitled “*Dignity Denied: Religious Exemptions and LGBT Elder Services.*”⁵ Put simply, the authors presented an argument that religious freedom enables discrimination against these members of the political community like this: many religious traditions are not LGBTQ-affirming; many elder services—in-home care, hospitals and hospices, assisted living and retirement facilities—are operated by religious communities. Thus, religious exemptions in laws and regulations that prohibit discrimination against LGBTQ persons necessarily open the door to harmful treatment of LGBTQ seniors. Such exemptions must not be allowed. More freedom for religious people and institutions entails more suffering for LGBTQ people; protecting religious freedom elevates the good of religious people over LGBTQ people. If so, such a policy certainly would violate the requirement that the government must promote the good of all—the common good.

Early in the event, Carmelyn Malalis, Chair and Commissioner of the New York City Commission on Human Rights, assured the audience, in effect, that such an unjust elevation of religious freedom over LGBTQ rights is not permitted in New York. The City proclaims that it is

home to one of the strongest anti-discrimination laws in the country, the NYC Human Rights Law, which protects individuals living, working, and visiting New York City from discrimination and bias in 22 protected categories, including sexual orientation, race, religion, gender and immigration status.⁶

Chair Malalis spoke at some length about the investigations conducted by the Commission, the penalties that are assessed, and the changes in practice required of offending institutions. All of this was to reassure the audience that the injustices LGBTQ senior citizens encounter in other places will not occur in New York City, or, if they do take place, will be countered vigorously by the municipal government.

ERTIES (2016), <https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.pdf> HAMILTON, *supra* note 1, at 219–38.

5. MOVEMENT ADVANCEMENT PROJECT, PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT & SAGE, *DIGNITY DENIED: RELIGIOUS EXEMPTIONS AND LGBT ELDER SERVICES* (2017), <http://www.lgbtmap.org/dignity-denied-lgbt-older-adults>. The event was held at Union Theological Seminary, Dec. 15, 2017. *Upcoming Events*, UNION, <https://utsnyc.edu/event/dignity-denied-religious-exemptions-lgbt-elder-services-report-release-panel-discussion/> (last visited Feb. 19, 2019).

6. *New York City Files Amicus Brief on Behalf of 65 Jurisdictions in Support of Enforcing Colorado Anti-Discrimination Law*, N.Y.C.: OFFICE OF THE MAYOR (Oct. 30, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/698-17/new-york-city-files-amicus-brief-behalf-65-jurisdictions-support-enforcing-colorado> (the Chairperson’s statement at the event was identical or similar).

This reassurance might be put in other terms: The New York City government is determined to use its authority and power on behalf of the common good—to protect every member of the political community. No one, including LGBTQ older adults, will be turned away from, nor treated abusively in, services for seniors (or by other services or facilities) due to their identity, practices, or beliefs.

While this is a laudable commitment by the New York City government, we might ask whether society loses something of significant value when a government promotes the common good in this way. Specifically, does the City's extensive and intensive application of nondiscrimination laws strongly undermine private organizations' ability to be distinctive in their services and cultures? As a result, does it diminish those private organizations' ability to positively attract particular clients and patients, serving those clients and patients the way the clients, patients, and organizations believe is best?

To be sure, it is an essential good—part of the common good—when LGBTQ older adults are able to find expert and loving care. However, as the “Dignity Denied” project itself acknowledges, not everyone affirms or regards as praiseworthy LGBTQ relationships and conduct. Some religious communities live by a different understanding of acceptable and positive sexual or intimate relationships.⁷ Their desire to live in accordance with an alternative understanding need not signify that they intend any disrespect or harm toward LGBTQ people, nor that they wish to prevent LGBTQ people from living as they desire. But it does raise this question: is it not also a positive good—part of the common good—that these other older adults, persons who, because of their religious or moral views, prefer to be in an environment that affirms traditional marriage and conservative sexual standards of conduct, also are able to find services and facilities that respect and reflect their convictions, identities, and relationships?

I propose that promoting the good of all—securing the common good—requires public policies that do not flatten out such differences among private institutions in civil society, but instead, protect them.⁸ Every person should be able to find, as much as is practicable, suitable facilities and services. No one should suffer discrimination. And yet, if all persons

7. See, e.g., *Religious Groups' Official Positions on Same-Sex Marriage*, PEW RESEARCH CTR. (Dec. 7, 2012), <http://www.pewforum.org/2012/12/07/religious-groups-official-positions-on-same-sex-marriage/> (summarizing the views on same-sex marriage of a wide range of religious traditions in the United States and providing links to statements from those various traditions).

8. I will say little about commercial private organizations, as opposed to religious and other nonprofit organizations and houses of worship. There is strong public opinion that businesses should not discriminate in employment and in providing goods and services. And, yet, is it not part of the concept of a free market to be comprised of diverse establishments that appeal to varied sets of employees and customers? For a penetrating discussion of religious freedom and commercial entities, see RONALD J. COLOMBO, *THE FIRST AMENDMENT AND THE BUSINESS CORPORATION* (2014).

are to find suitable facilities and services, a diversity of facilities and services must be available. Some of these will be welcoming and affirming for people of certain convictions and identities, but not for others, who will instead find them to be unsuitable or even hostile. Other facilities and services will be welcoming and affirming for persons with other convictions and identities; yet, not all will be affirmed. Not feeling welcome everywhere may not be due to discrimination; rather, it may be the inevitable consequence of the moral and religious heterogeneity of the public.⁹

The diversity of individuals—their varied self-understandings, contrasting or conflicting moral values and religious convictions, and diverse ideals about conduct—can best be served by public policies that make a diversity of service providers possible, rather than policies that minimize or eliminate such moral or religious diversity in pursuit of the important goal of eliminating wrongful discrimination.¹⁰ Thus, the common good requires robust institutional religious freedom.

I. PROMOTING THE COMMON GOOD BY ENABLING PERSONS AND ORGANIZATIONS TO BE TRUE TO THEIR CONVICTIONS

How might strong protections for religious freedom, including institutional religious freedom, contribute to, and even be essential for, achieving the common good in a political community? This symposium explores whether, and how, religious freedom might be defended, since it “preserves space for religious groups to benefit individuals and society.”¹¹ Indeed, I will take up this question, arguing that religious freedom contributes to the common good by enabling faith-based organizations to offer both an extensive volume and distinctive version of services.

I will begin, however, with two other positive connections between religious freedom and the common good. These first two connections represent different aspects of this proposition: an essential part of promoting the common good is having the government safeguard the people’s freedom to be true to their various convictions and beliefs. If this is true, then promoting the common good requires protecting the religious freedom of all persons, in the first place, and all private institutions, in the second place.

9. STEPHEN V. MONSMA & STANLEY CARLSON-THIES, *FREE TO SERVE: PROTECTING THE RELIGIOUS FREEDOM OF FAITH-BASED ORGANIZATIONS* 101–04 (2015).

10. Not all differential treatment or discrimination is wrongful, and not all wrongful discrimination should be made illegal. See the careful discussions in Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, in *LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS* 194, 194–227 (Austin Sarat ed., 2012); see also Nathan A. Berkeley, *Religious Freedom and LGBT Rights: Trading Zero Sum Approaches for Careful Distinctions and Genuine Pluralism*, 50 *GONZ. L. REV.* 1, 1–28 (2015); JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* (2017).

11. Symposium Brochure, *Religious Freedom and the Common Good* (on file with the *University of St. Thomas Law Journal*).

Protecting what many are sure is, in fact, wrong, contributes to the common good.¹²

A. *Protect Individual Religious Freedom*

Seeking to live consistently with deep convictions, religious or philosophical, about what is right and wrong, worthy and trivial, is an aspect of human nature. People desire “the right to be wrong,” to use Kevin Hasson’s formulation.¹³ Generally, people desire for their actions and verbiage to express what they really believe; they intend their outward identity to be an expression of their inward certainties.¹⁴

Thus, to promote and protect the common good—the good of every member of the political community—the government must, as much as it can, protect people’s freedom to live consistently with their convictions, even though others do not share those convictions. If a law mandates acting against some deep conviction, a religious accommodation that enables citizens holding a contrary conviction nevertheless to live in accordance with their beliefs is necessary. The accommodation—religious freedom—is a freedom for persons not only to believe and worship contrary to society’s consensus, but, consistent with the rights of others, to engage according to those distinctive beliefs in public life, careers, and service to neighbors. It is a freedom that enables people to receive what they themselves regard as appropriate help, e.g., not being pressured to choose euthanasia or to abort an unborn child diagnosed with Down syndrome if seeking medical care.

Government officials must not, on their own, decide what everyone ought to believe or how they ought to act, and then require such beliefs and action by everyone. They must not, despite the great value of democratic decision-making, determine the majority’s preferred beliefs and then impose those views on everyone as obligatory standards without religious freedom or conscience protections. The First Amendment guarantees vari-

12. My thanks to Dr. Bernard Fryshman of the Association of Advanced Rabbinical and Talmudic Schools for the reminder that religious freedom must protect religious exercise and religious organizations even when the public does not value positively the things that religious people and organizations do with their freedom.

13. See KEVIN SEAMUS HASSON, *THE RIGHT TO BE WRONG: ENDING THE CULTURE WAR OVER RELIGION IN AMERICA* (2005).

14. Illustrative:

Both same-sex couples and committed religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For religious believers, the conduct at issue is to live and act consistently with the demands of the Being that they believe made us all and holds the whole world together. For same-sex couples, the conduct at issue is to join personal commitment and sexual expression in a multi-faceted intimate relationship with the person they love. And often, they are following their own religious values in making the commitment to marry.

Brief for Douglas Laycock, Thomas C. Berg, David Blankenhorn, Marie A. Failinger & Edward McGlynn Gaffney as Amici Curiae Supporting Petitioners at 13–14, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574).

ous freedoms of belief and action, because coerced uniformity is not legitimate.¹⁵ Similarly, other provisions in the Bill of Rights, the Constitution in general, and our foundational political principles more broadly, all limit what the federal, state, and local governments may rightly do in order to protect such freedom—the ability to go in a different direction—of persons, civil society institutions, and the market. To secure the good of each member of the political community, and thus the common good, the government must protect the freedom of each member to live in accordance with his or her convictions.

The same opposition to coerced conformity is expressed in the protection of freedom of religion and conscience in the Universal Declaration of Human Rights of 1948.¹⁶ The Declaration seeks to promote “*equal* and inalienable rights of *all* members of the human family” (emphasis added)—common good language.¹⁷ Article 18 states that

[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.¹⁸

In sum, to promote the common good, the government must provide space for, rather than suppress, varied fundamental beliefs and the resulting diverse patterns of action; it must protect the religious freedom of every citizen as much as possible.

B. *Protect Institutional Religious Freedom*

My second connection between religious freedom and the common good is an extension of the first: promoting the common good requires not only protecting the ability of *individuals* to live in accordance with their varied convictions, but also requires protecting the freedom of private *organizations* to manifest, in their operations and services, these varied convictions and ways of life.

15. Here are four illuminating arguments from different traditions and settings for why religious conviction and conscience should be protected, not coerced. See HASSON, *supra* note 13; see also ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE* (2010) (especially Part I); see also CATHOLICISM AND RELIGIOUS FREEDOM: CONTEMPORARY REFLECTIONS ON VATICAN II'S DECLARATION ON RELIGIOUS LIBERTY (Kenneth L. Grasso & Robert P. Hunt eds., 2006); JOHN WITTE, JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* (2007).

16. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

17. *Id.* at pmb1.

18. *Id.* at pmb1., art. 18.

One key way people put their convictions into practice is by creating and operating private organizations—both nonprofit and for-profit.¹⁹ Organizations pursue objectives on a significant scale, and distinctive organizations pursue distinctive objectives on a significant scale. Because people have different convictions about what should get done, and about how those objectives should be achieved, protection of the people’s freedom to create and operate distinctive organizations is an essential part of governmental respect for the people.²⁰ And, since protecting the ability of the members of a political community to live in accordance with their convictions is a vital part of promoting the common good, protecting institutional religious freedom is also a vital part of promoting the common good.²¹

Protecting institutional religious freedom is distinct from protecting conscience rights.²² Our nation rightly safeguards conscience through legal provisions that, for example, protect people from having to violate their convictions regarding important matters, such as facilitating elective abortions, assisting with capital punishment, and serving in combat. Such provisions provide protections for people serving *in* institutions, whether governmental or private.²³ It protects employees who, for reasons of religious or moral conviction, seek the freedom to avoid something normally required. Laws and regulations that protect conscience enable these employees to refuse to act in some way that is otherwise required by the organization’s policies.

Yet, the freedom to live consistently with one’s countercultural convictions needs to extend beyond just the right to avoid something that others *in* an organization are required to do; rather, it must include the freedom to join with others to accomplish something distinctive by means of *creating*

19. I am specifically referencing organizations—not informal or non-organized groups or “communities” of individuals (such as some “community of religious people” in contrast to non-believers).

20. Compare to Justice Alito’s remarks in his majority opinion in *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2768 (2014): “A corporation is simply a form of organization used by human beings to achieve desired ends. . . . [Thus,] protecting the free-exercise rights of corporations like Hobby Lobby . . . protects the religious liberty of the humans who own and control those companies.”

21. On institutional religious freedom, or the religious freedom of religious organizations, see, for example, MONSMA & CARLSON-THIES, *supra* note 9, *passim*; see also VISCHER, *supra* note 15; COLOMBO, *supra* note 8; Stanley Carlson-Thies, *Keynote Address: Beyond Right of Conscience to Freedom to Live Faithfully*, 24 REGENT U.L. REV. 351, 351–68 (2012); Stanley Carlson-Thies, *Why We Need Institutions in Order to be Faithful, and What Institutions Need So That They Can be Faithful*, 44 PRO REGE 1, 1–10 (2015).

22. Stanley Carlson-Thies, *Keynote Address: Beyond the Right of Conscience to Freedom to Live Faithfully*, 24 REGENT U.L. REV. 351 (2012).

23. However, note that conscience protections in health care also generally protect institutions themselves, such as hospitals, from having to participate in procedures that violate the institutions’ ethical guidelines. See SECRETARIAT OF PRO-LIFE ACTIVITIES, U.S. CONFERENCE OF CATHOLIC BISHOPS, *CURRENT FEDERAL LAWS PROTECTING CONSCIENCE RIGHTS* (2016), <http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Federal-Conscience-Laws.pdf> (last visited Feb. 19, 2019).

and operating distinctive organizations. This is a right to put a conviction into practice along with others, which is more than a right to refrain from doing what others are required to do.

Consider Catholic doctors and nurses with their pro-life commitments. Conscience protections in the law shield them from being required to facilitate or perform elective abortions in federally-supported hospitals and other medical facilities. Yet, there is more to pro-life medical care than avoiding participation in elective abortions. The doctors and nurses may seek an institutional environment with a whole-person view of patients and colleagues, inclusive of spirituality and spiritual care. While deeply opposed to policies they believe wrongfully hasten death, they may also be skeptical of high-tech procedures and equipment that seem to falsely promise to avoid the travails of sinful human life, favoring palliative care instead. On one hand, avoiding the killing of unborn children is fundamental; however, on the other hand, they may also regard it to be vital that the institution where they work contributes extensively to the care of the poor in the surrounding community via free clinical care and wellness programs.²⁴

To find such a consistently pro-life workplace, the doctors and nurses may choose a Catholic hospital or a Christian faith-based health clinic. That is, they may choose such a hospital or clinic if the laws governing the creation and functioning of medical facilities do not require policies and practices that conflict with pro-life tenets, nor forbid protocols and programs that affirm pro-life, pro-religion convictions. In a society in which some people and organizations are pro-choice, and laws protect access to elective abortions and reproductive health care, being able to live and serve according to pro-life convictions requires legal protection for pro-life institutions, not only individual conscience rights.

Some citizens, because of their religious convictions, desire to serve and live in a way that the laws generally forbid. Respect for those citizens and their convictions requires the government, absent a compelling contrary interest, to provide a religious freedom accommodation that enables those citizens to create and operate organizations in accordance with their convictions. For a government to promote the common good by accommodating its citizens' convictions, a robust institutional religious freedom, putting distinct views into practice, as well as individual religious freedom, is required.²⁵

24. This paragraph loosely follows a passage in Stanley Carlson-Thies, *supra* note 22, at 357–58; see also LEONARD J. NELSON, III, *DIAGNOSIS CRITICAL: THE URGENT THREATS CONFRONTING CATHOLIC HEALTH CARE* (2009).

25. There is an alternative strategy that purports to secure respect of everyone's convictions: requiring government policies and practices resolutely to avoid religious and other differences of conviction. Rather than accommodate those diverse convictions, the government should ignore them. Yet, the result of such a policy is not equal respect for all, but, rather, equal disrespect for all, or, more likely, favoritism to some views over others. For example, when public schools are required resolutely to exclude religion, they convey not neutrality but rather, an official view that

II. PROMOTING THE COMMON GOOD BY PROTECTING THE SERVICES OF FAITH-BASED ORGANIZATIONS

The second set of connections between religious freedom and the common good involves Catholic health care institutions, as well as other faith-based organizations.

I have argued that the common good requires the government maximally to accommodate the desire of all persons, to put their religious convictions into practice, individually and via organizations. That entails allowing persons and organizations to act, or not to act, differently than generally required by law. Religious freedom also contributes to the common good in another vital way: through government protection and promotion of the provision of services to our neighbors via faith-based organizations.

You can call this the social utility, communal, or social welfare aspect of the common good. In the United States, and even in countries that are considered social welfare states, non-governmental organizations provide much of this needed social welfare aid.²⁶ Private donations fund many such services, while the government funds much of the rest.²⁷ Many of the non-governmental organizations that provide such help are religious.²⁸ Their services may be supported by private funding, by government funding, or by both.²⁹ Institutional religious freedom enables them to serve extensively and distinctively—two aspects of their contribution to the common good.

religion is irrelevant to life. This makes schools supposedly intended to be for all into institutions hospitable only to some.

26. See, e.g., *Final Report Summary - FACIT (Faith-Based Organisations and Exclusion in European Cities)*, EUROPEAN COMM'N: CORDIS, https://cordis.europa.eu/result/rcn/55806_en.html (last visited Feb. 19, 2019) (note that the project is funded by the European Union).

27. Nonprofit organizations may fund their operations and services not only from donations and government awards but also by fees-for-service, honoraria, sales of publications, and entrepreneurial activity (e.g., operating a money-making catering service that provides employment for the clients of the organization's job-training services). For a classic discussion of various funding sources, see generally KIRSTEN A. GRØNBJERG, *UNDERSTANDING NONPROFIT FUNDING: MANAGING REVENUES IN SOCIAL SERVICES AND COMMUNITY DEVELOPMENT ORGANIZATIONS* (1993).

28. Stephen V. Monsma notes the difficulty of documenting the proportion of services provided by religious in comparison to non-religious organizations and then offers illustrative analyses of several service domains. STEPHEN V. MONSMA, *PLURALISM AND FREEDOM: FAITH-BASED ORGANIZATIONS IN A DEMOCRATIC SOCIETY* 15–41 (2012); see also BYRON JOHNSON ET AL., *BAYLOR INST. FOR STUDIES OF RELIGION, ASSESSING THE FAITH-BASED RESPONSE TO HOMELESSNESS IN AMERICA: FINDINGS FROM ELEVEN CITIES* (2017) (a recent study of the faith-based role in services to the homeless).

29. See, e.g., STEPHEN V. MONSMA, *PUTTING FAITH IN PARTNERSHIPS: WELFARE-TO-WORK IN FOUR CITIES* 125–71 (2004) (specifically, the data on funding sources for faith-based welfare-to-work programs in four cities).

A. *The Quantitative Dimension of the Contribution from Faith-Based Organizations*

No complete accounting exists to show how extensive the services are of faith-based organizations for the needy, or, more generally, how extensive the contributions are to society provided by religious organizations, whether houses of worship or religious nonprofits.³⁰ We do not, however, need extensive statistics to know how important these services are—there are three quick indicators to prove their importance.

One indicator involves the startling announcement made by candidate Barack Obama in his 2008 campaign for president, as well as his subsequent action as president. In that announcement, Obama declared, to the great surprise of many, that he would continue, and even expand, the federal faith-based initiative launched by President George W. Bush, notwithstanding the strong Democratic criticism of the Bush initiative. Why would he press for even greater involvement by churches and other faith-based organizations in federally-funded social service programs? Obama gave this reason: “The challenges we face today—from saving our planet to ending poverty—are simply too big for government to solve alone. We need an all-hands-on-deck approach.”³¹ The “all-hands approach” he believed necessary to respond to pressing social needs includes many religious organizations. Obama then pledged, and as president carried out, a continuation of the faith-based initiative that many regarded as his predecessor’s pet project.³²

30. There are multiple reasons for this: the variety of religions, the many types of religious organizations (informal and formal, small and large, related to a house of worship or denomination, or not, etc.), and the many ways religious persons and religious organizations contribute to society. Another reason: although the federal government has taken many steps over the past two decades, and more, to ensure that faith-based organizations are not excluded from the opportunity to compete for, and win, federal funding to provide services, there is no requirement—for constitutional reasons—that those organizations identify themselves as religious when seeking or receiving funding. For a recent discussion on the contributions of religion to the good of cities, and the complexities of measuring those contributions, see the three *Religion and the Good of the Cities* reports issued by the Social Cities initiative of Cardus. CARDUS, RELIGION AND THE GOOD OF THE CITY: REPORT 1: THE CONTEMPORARY CULTURAL CONTEXT OF THE CITY (2017), <https://www.cardus.ca/research/social-cities/reports/religion-and-the-good-of-the-city-report-1/>; CARDUS, RELIGION AND THE GOOD OF THE CITY: REPORT 2: THE STATE OF RESEARCH AND INFLUENCE (2017), <https://www.cardus.ca/research/social-cities/reports/religion-and-the-good-of-the-city-report-1/>; CARDUS, RELIGION AND THE GOOD OF THE CITY: REPORT 3: THE FUTURE CONDITIONS OF THE CITY (2017), <https://www.cardus.ca/research/social-cities/reports/religion-and-the-good-of-the-city-report-1/>.

31. Jeff Zeleny & Michael Luo, *Obama Seeks Bigger Roles for Religious Groups*, N.Y. TIMES (July 2, 2008), <http://www.nytimes.com/2008/07/02/us/politics/02obama.html>.

32. On the principles, and continuity over federal administrations, of the faith-based initiative, see Carl H. Esbeck & Stanley Carlson-Thies, *Happy Birthday Charitable Choice, 20 Years of Success: Two Decades of Bipartisan Cooperation on Government Funding and Religion*, INSTITUTIONAL RELIGIOUS FREEDOM ALL. (Aug. 22, 2016), <http://www.irfalliance.org/happy-birthday-charitable-choice-20-years-of-success/>.

Here are two other indicators, both drawn from the path-breaking analysis of Brian J. Grim and Melissa E. Grim. Using a variety of data sources, they estimated that American congregations, taken together, make an annual contribution to society (expenditures on goods and salaries, the value of social programs, and more) of \$418 billion, and that religious charities, such as hospitals, educational institutions, and social service agencies, add another \$302.9 billion in social and economic value.³³ Almost all congregations offer some, or many, service programs to their surrounding communities—not only to their own members, the Grim and Grim report notes. It also points out that 40 percent of the largest charities are faith-based.

As candidate and president, Obama understood that many of the “hands” that serve neighbors in elder care, health care, education, substance abuse services, day care, services in prisons and for ex-prisoners, job training, as well as many others, are religious. These are all contributions to the common good. When religious freedom makes it possible for organizations that operate and serve differently from their secular counterparts nevertheless to offer their programs to the community, the common good is enhanced by the good they carry out.

But perhaps religious freedom is dispensable. If laws or court decisions prohibited religiously-shaped means of operating and serving, resulting in faith-based service agencies closing their doors, and churches restricting their services to members, would the contributions of these organizations to the poor and society simply be provided by the government and secular organizations? There are good reasons to be skeptical.

No laws inhibit a great upswell of contributions to secular service agencies, suggesting there is no army of donors-in-waiting willing to fund private secular service providers in place of faith-based service providers. While religious Americans, who donate more than secular Americans, give more to secular causes as well as religious causes and organizations,³⁴ it seems unlikely that religious giving to social services, education, and health care would continue at current levels if the religious service providers disappeared. Note, too, that faith-based organizations that currently receive government funding commonly add additional funds from their own donors to support those services.³⁵ And they may as well offer additional ser-

33. These numbers are from the summary sheet, Brian J. Grim & Melissa E. Grim, *The Socio-Economic Contributions of Religion to American Society: An Empirical Analysis*, FAITH COUNTS, <http://faithcounts.com/wp-content/uploads/Summary-Sheet.pdf> (last visited Feb. 19, 2019); Brian J. Grim & Melissa E. Grim, *The Socio-Economic Contributions of Religion to American Society: An Empirical Analysis*, 12 INTERDISC. J. RES. ON RELIGION, 1, 1–31 (2016).

34. See, e.g., ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 444–54 (2010).

35. Note the comment of Rev. Larry Snyder, then President of Catholic Charities USA and former head of Catholic Charities in Minneapolis:

I can say from my time in Minneapolis, the programs that we had that were contracted with the government, the government would pay somewhere between two-thirds and three-fourths of what we needed and we had to make up the rest. So we were subsi-

vices—not government-compensated—such as providing ex-offenders connections to new social networks to establish new patterns of life.³⁶

It is even more difficult to imagine replacing the various kinds of positive contributions made by congregations, typically with little or no government funding,³⁷ if those congregations felt compelled to curtail services due to expanding non-discrimination laws. Would the government dramatically increase tax-funded services to replace the many services offered to their surrounding neighbors by religious congregations? If so, what new non-religious organizations would spring forth to provide those government-funded services?³⁸

Institutional religious freedom protects the congregations' extensive community-serving operations and the work of self-standing religious service providers. This is the quantitative connection between protecting religious freedom and promoting fulfillment of the common good. Yet, religious organizations contribute vitally to the common good, not only in the volume of services they provide, but also in how they serve and in the choices they provide to clients, students, and patients.

B. The Qualitative Dimension of the Contribution from Faith-Based Organizations

For this dimension, too, President Obama's actions were illuminating. The last report issued by his President's Advisory Council for Faith-Based and Neighborhood Partnerships, *Strengthening Efforts to Increase Opportunity and End Poverty*,³⁹ stresses how complex the problems of entrenched poverty and extreme inequality are. These, the Council noted, "are social ills with deep spiritual and communal implications. They not only perpetuate lack of opportunity, but they also demean human dignity, crush the

dizing the government, if you will, by hundreds of thousands of dollars every year. We were happy to do that because it furthered our mission and the mission of the common good.

Reverend Larry Snyder, Panelist at The Brookings Inst. Symposium: *Faith-Based and Neighborhood Partnerships in the Obama Era: Assessing the First Year and Looking Ahead* (Feb. 18 2010), https://www.brookings.edu/wp-content/uploads/2012/04/20100218_faith_based.pdf (uncorrected event transcript).

36. See, e.g., MONSMA, PLURALISM AND FREEDOM, *supra* note 28, at 34–38.

37. For an overview of these contributions, see generally RAM CNAAN ET AL., *THE INVISIBLE CARING HAND: AMERICAN CONGREGATIONS AND THE PROVISION OF WELFARE* (2002).

38. On the difficulties of replacing one set of service providers by another, even when the two sets of organizations offer related or overlapping services, see, for example, Kinsey Hasstedt, *Federally Qualified Health Centers: Vital Sources of Care, No Substitute for the Family Planning Safety Net*, 20 GUTTMACHER POL'Y REV. 67 (2017).

39. PRESIDENT'S ADVISORY COUNCIL ON FAITH-BASED AND NEIGHBORHOOD PARTNERSHIPS, *STRENGTHENING EFFORTS TO INCREASE OPPORTUNITY AND END POVERTY: RECOMMENDATIONS OF THE PRESIDENT'S ADVISORY COUNCIL FOR FAITH-BASED AND NEIGHBORHOOD PARTNERSHIPS TO ADDRESS POVERTY AND INEQUALITY* (2016), https://obamawhitehouse.archives.gov/sites/default/files/docs/2017_advisory_council_report.pdf.

human spirit, and sever family and communal bonds”⁴⁰ Effective solutions require government resources, the Council concluded, but “it is critical for these resources to be channeled in a manner that encourages partnerships within local ecosystems of place-based actors, including individuals, faith-based and neighborhood groups, service providers, and public institutions.”⁴¹ The report is an eloquent reminder that human problems are complex, and that effective responses to these problems, and the development of resilient and thriving local communities that forestall them, may often require more than the delivery of standardized services, uniform professionalized training, or narrowly physical or psychological interventions. A faith dimension, spiritual resources, may be needed.

Indeed, because problems are complex and variegated, effective assistance must also be variegated. What works for one person or community may be less effective, or ineffective, for another. Variety is more likely to promote the good of all than a single approach. Thus, institutional religious freedom, enabling religious options to be among those available, serves the common good. As the US Conference of Catholic Bishops has observed, the exclusion from the medical profession of doctors and nurses who reject participating in abortions reduces the ability of the profession to serve well the whole population of patients, as “[m]any patients want access to physicians and other health care providers who do not see the taking of human life as part of a profession devoted to healing.”⁴² Similarly, given the existing diversity of values and religions, it is no contradiction for the Human Rights Campaign to urge government and private child welfare agencies to adopt a wide range of “LGBTQ inclusive policies and affirming practices” in the quest to encourage more LGBTQ persons and couples to become foster or adoptive parents,⁴³ while the Heritage Foundation urges legal protections for faith-based agencies committed to traditional marriage and sexuality in its quest to encourage more conservative and religious persons and couples to step forward for the sake of children in need.⁴⁴

I began by noting that some of our fellow citizens are sure that religion is harmful to people, and thus religious freedom subtracts from the common good. But, of course, many others are sure of the opposite: religion in general, or particular religions, are good for people, allowing them to flourish

40. *Id.* at 11.

41. *Id.* at 12.

42. Letter from the Office of Gen. Counsel, U.S. Conference of Catholic Bishops, to Dep’t of Health and Human Services, Office of Public Health and Sci. (Mar. 23, 2009), <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hss-on-conscience-2009-03.pdf> (concerning the Department’s proposed rescission of a 2008 conscience protection regulation).

43. *All Children-All Families: About the Project*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/all-children-all-families-about-the-initiative> (last visited Feb. 19, 2019).

44. Natalie Goodnow, *The Role of Faith-Based Agencies in Child Welfare*, HERITAGE FOUND. (May 22, 2018), <https://www.heritage.org/civil-society/report/the-role-faith-based-agencies-child-welfare>.

in life, and helping them when in need. Some are sure that spiritual forces are fake or harmful; others are sure that in instances such as substance abuse treatment, a spiritual dimension is vital to lasting recovery. Many health care personnel are committed to the pro-life approach, and many others think such an approach is detrimental to the well-being of women.

In short, Americans are diverse in convictions, practices, and ethical frameworks. We do not agree on what flourishing entails, how to help marriages and families thrive, what set of treatments, policies, or societal and individual changes will reverse the opioid epidemic, whether and what kind of character formation should occur in schooling, and much more.

For our diverse population to be served well, service providers need also be diverse; they must offer different treatments, educational programs, and environments. Private funders do well to permit such diversity, and the federal government, to its credit, has chosen to respect the diversity of services in its initiative to protect and promote partnerships with religious, as well as private secular, service providers. An “all-hands approach” is best for our diverse society.

For a qualitative reason—diverse services best serve a diverse set of patients, clients, students, and customers—government can best promote the common good by protecting diverse institutions.

III. DISCRIMINATION IN SERVICES OR DIVERSITY OF SERVICES?

Those are my four connections between religious freedom, and in particular, institutional religious freedom and the common good.

Now, consider, again, the New York City conference and its deep concern that LGBTQ elders might be mistreated by non-affirming faith-based service providers and facilities, resulting in its strong policy recommendation to disallow religious exemptions to nondiscrimination law. That view was strongly enforced by the comments of the Chair of the NYC Human Rights Commission, who stressed the long list of protected categories across so many facets of life.

LGBTQ elders, indeed, ought not to suffer exclusion and discriminatory treatment. Yet other elders—those with conservative religious or moral values—also deserve respectful treatment and hospitable facilities. Is not the common good enhanced, rather than narrowed, when both sets of elders are able to find institutions and services that welcome them? If so, then nondiscrimination laws may not be the best approach to promoting the common good in circumstances like these.

A few months before the LGBTQ elder care conference, which stressed maintaining strong nondiscrimination protections by minimizing religious accommodations, the *New York Times* published an article that

implicitly suggested an alternative approach.⁴⁵ The article featured Mary Ellen Green, a homeless lesbian who avoids harassment by patronizing a Manhattan senior center serving the LGBTQ community.⁴⁶ The center, however, is only open on weekdays during business hours.⁴⁷ But soon, the article said, she might have a more permanent place to go, as the operator of the senior center, as well as private developers, were building the city's "first subsidized housing for older people like Ms. Green who need a place to live, may face discrimination from their neighbors, or simply want to spend their later years among those they feel most comfortable with."⁴⁸ The new housing, the article notes, is required by law not to exclude anyone who meets the financial and age qualifications; however, the buildings "are being heavily marketed to the lesbian, gay, bisexual and transgender communities."⁴⁹ Specifically, one of the developers is quoted as stating, "It's our hope that we end up here with a building that is largely L.G.B.T. seniors or seniors who understand the L.G.B.T. community and are accepting of it."⁵⁰

In my view, notwithstanding the strong legal and popular consensus favoring a strict application of nondiscrimination law, the new Manhattan senior buildings should be allowed by law to admit only LGBTQ persons and couples. There should be no need to resort to the uncertain and suspect subterfuge of targeted advertising. And yet, other seniors, too, should be able to find appropriate senior facilities. Orthodox Jewish or Muslim seniors, as well as others who desire to live out their lives among older people who share their beliefs about religion and family and marriage, should also be able to find safe and inviting places, places where they, too, will be surrounded by people "they feel most comfortable with," as the *New York Times* article put it.

Nondiscrimination law is essential, but it is not a magical tool that automatically advances the common good. We should use it as sparingly as possible, rather than seeking to expand it as far as we can possibly imagine.

In our ever more heterogeneous society, explicitly pluralist government policies—policies that incorporate, rather than ignore or seek to undermine different moral and religious patterns of values and conduct—should be the policy prescription. That is the only way the government can facilitate everyone's desire to live consistently with their divergent deep convictions. Less government regimentation and more civil society freedom results in more of the common good.

45. Winnie Hu, *Creating a Home for L.G.B.T. Seniors in New York City*, N.Y. TIMES (July 3, 2017), <https://www.nytimes.com/2017/07/03/nyregion/housing-lgbt-seniors-new-york-city.html>.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

Pluralist policy—ensuring that multiple options are available—does not eliminate grief. When there are LGBTQ-affirming senior facilities and traditional-values elder facilities; Catholic, Montessori, Jewish, public (secular), and Protestant schools; LGBTQ-affirming as well as historic-marriage adoption agencies; and Muslim law-student clubs alongside evangelical student groups, *everyone* will be turned away somewhere. Each of us will have to know to avoid particular businesses and nonprofits or else we will enter some organization or program only to encounter distressing discussion and treatment. That’s the reality of a heterogeneous society. The alternative, in which the government endorses and enforces the views and preferences of just some segment of the populace, is not genuinely neutral and it does not actually advance the (multifarious) common good.

Yet, pluralist policy is different than libertarian neglect. There is a vital governmental purpose to ensure that people have access to acceptable choices when they have a right to a service. An appropriate child welfare policy, for example, will not allow a monopoly to either traditional values, nor LGBTQ-affirming adoption agencies, just as school choice policies must make it possible for families to choose a secular option, rather than only religious private schools.

I will give the final word to the distinguished political theorist, William Galston, from his book, *Liberal Pluralism*. Given the legitimate diversity that characterizes a society like ours, Galston says, good public policy will be “parsimonious in specifying binding public principles and cautious about employing such principles to intervene in the internal affairs of civil associations. It will, rather, pursue a policy of maximum feasible accommodation, limited only by the core requirements of individual security and civic unity.”⁵¹

51. WILLIAM A. GALSTON, *LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE* 20 (2002).